

CANADA / JUDGMENT

Longmuir v. Holland

2000 BCCA 538

COURT

British Columbia Court of Appeal

DECIDED

6 October 2000

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2000 BCCA 538

Citation:

Longmuir v. Holland

Date: 20001006

2000 BCCA 538

Docket: CA024885

Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

CECILIA DOROTHY LONGMUIR

PLAINTIFF

(RESPONDENT)

AND:

MARGARET ALICE HOLLAND

DEFENDANT

(APPELLANT)

AND:

KENNETH DESMOND HOLLAND,

ELLA PETERSON and ROBERT BONAR

DEFENDANTS

(RESPONDENTS)

Before:

The Honourable Madam Justice Southin

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Hall

Andrew Davis

Counsel for the Appellant

Frits E. Verhoeven

Counsel for the Respondent, Cecilia Dorothy Longmuir

Brian F. Schreiber

Counsel for the Respondent, Ella Peterson

Brian C. Markus

Counsel for the Respondent, Robert Bonar

Place and Date of Hearing:

Vancouver, British Columbia

3rd April, 2000

Place and Date of Judgment:

Vancouver, British Columbia

6th October, 2000

Written Reasons by The Honourable Madam Justice Southin dissenting on the issue of the 1991 Will

Written Reasons by The Honourable Madam Justice Newbury

dissenting on the issue of the 1984 Transfer (P. 69, ¶129)

Written Reasons by The Honourable Mr. Justice Hall (P. 86, ¶150)

Reasons for Judgment of the Honourable Madam Justice Southin:

[1] There is no more elusive doctrine of equity than that of "undue influence". This appeal is about that doctrine.

[2] At issue is this judgment pronounced the 2nd July, 1998:

THIS ACTION coming on for trial on March 10 and 11, 1997 and October 20-24, 27 and 28, 1997, and on hearing Frits Verhoeven, counsel for the Plaintiff; and Andrew Davis, counsel for the Defendant, Margaret Alice Holland; and Brian C. Markus, counsel for the Defendant, Robert Bonar; and Brian Schreiber, counsel for the Defendant, Ella Peterson; and Kenneth Desmond Holland, appearing on his own behalf: AND JUDGMENT being reserved to this date: THIS COURT ORDERS THAT the transfer dated April 11, 1984, from Helen Price Magee, also known as Helen Smith or Nellie Magee (the "Deceased"), to the Defendants, Kenneth Desmond Holland and Margaret Alice Holland, of an undivided two-thirds interest in the property situated at 4688 West 4th Avenue, Vancouver, in the Province of British Columbia, the legal description of which is: P.I.D. 004-684-630 Lot 2 of Lot 1, Block 143 District Lot 540, Plan 6671 City of Vancouver be and is hereby set aside. THIS COURT FURTHER DECLARES THAT the Last Will and Testament made by the Deceased dated August 9, 1991, is invalid. THIS COURT FURTHER DECLARES THAT the Last Will and Testament made by the Deceased dated in or about 1990, a copy of which is attached hereto as Schedule "A", is in all respects a good and valid Will. THIS COURT FURTHER DECLARES THAT the Defendant, Robert Bonar, is the Executor of the Estate of the Deceased. AND THIS COURT FURTHER ORDERS that the parties be at liberty to speak to the matters of:

- (a) An account of the rents, profits, dividends, interests, monies and income received by the Defendants Margaret Alice Holland and Kenneth Desmond Holland on account of the Deceased's Estate in respect of the property subject to the trust; (b) Occupational rent at market rates in relation to the continuing residency of the Defendant, Margaret Alice Holland, in the Deceased's home; (c) An accounting with respect to the handling of the financial affairs of the Deceased prior to the appointment of the Public Trustee as Committee on August 4th, 1992; (d) Costs.
- [3] As drawn, this judgment is not an exemplar of the draftsman's art.
- [4] Helen Price Magee, who was born on the 11th May, 1903, died the 23rd of October, 1994, a widow without issue. At the trial, the principal contestants were two nieces, each of whom over the years had hoped to get her hands on the old lady's house (the property mentioned in the judgment), which one of them (Mrs. Longmuir) described as "the Crown jewel in the family scheme of things".
- [5] It is also about the law's approach to the things people do with their assets when they are growing old or in failing health and need assistance to avoid what many of us dread - going into an old folks home. To put this issue in the language to be found in some of the cases, it is how in some circumstances the law is to approach the question of "manifest disadvantage" which, according to *National Westminster Bank v. Morgan*, [1985] 1 All E.R. 821, is the essential ingredient of setting aside a transaction for undue influence whether the transaction is, as in that case, a commercial transaction or, as in this case, an inter vivos gift.
- [6] Mrs. Magee had a number of collateral descendants, three of whom figure in this litigation. Mrs. Longmuir, a daughter of Mrs. Magee's sister, Mary, who had died in 1955, was born in 1932. She describes her relationship with her aunt, up to about 1983, thus:

Q All right. And with respect to your Aunt Nellie, can you tell me about your relationship with her, in summary. Just give me a brief overview, please, as you were growing up? A Well, my aunt and I were together through the years, from infancy because I lived in Point Grey my whole entire life, because my aunt also resided there. So in actual fact we had this relationship as I grew up, as I married, and as my life progressed. It was a close relationship. There were periods of time when I wasn't closely associated with my aunt in that when she married Roland Magee I didn't see her at that time too much. I did not see a lot of her during the years. Other people lived in her home. It's an odd fact that usually the changes she made in her home were unknown to me until after the fact, and so at times I did not see her. The period where my brother lived there, for instance. I didn't see a lot of her when Ron lived there. Not in her home. I continued to see her in other aspects, but not during that time when Ron Bonar lived in her home. Then as things went on during the course of events, when brother Ray moved out, I continued to see Nellie again after that. That brings us to about 1983. Q Let me slow you down for a minute. You've mentioned Rob Bonar, and we've heard evidence from him already. He lived in the basement in the '70's, he said? A Yes. Q And you mentioned Ray? A Brother Ray. Q Your brother Ray, Ray Vozza? A Yes. Q And he was there at what time? A As I recall, he moved in in February of '83, and he moved out in July of '83. My relationship with my aunt then resumed on a regular basis right through to 1991, at which time I didn't see her after that until I went to the hospital at the university, where she had been taken, at which time she no longer knew me. So the last recognition between my aunt and I ended in 1991. Q All right. And during the '80's with what kind of frequency did you see your Aunt Nellie? I'm talking about from 1983, as you mentioned after your brother Raymond left the house, to 1991? A On a regular basis. I would do things for my aunt. I would have her over for social visits. We'd go shopping, we'd go to church. We would visit other members of the family. I entertained her at Christmas and other family occasions, special occasions, Easter, the holiday season, with my daughters and other members of the family throughout that period of time.

[7] What Mrs. Longmuir described is, to me, a relationship between aunt and niece with nothing out of the ordinary in it, although, as I will describe hereafter, Mrs. Longmuir, in 1991 did something which many would think belies the impression this passage gives.

[8] Ray Vozza (Bonar) was Mrs. Longmuir's brother. The respondent, Robert Bonar, is his son and, thus, Mrs. Magee's great-nephew. [I assume Mrs. Longmuir's reference to "Ron" is a slip of the tongue, or a slip by the transcriber, for "Rob".]

[9] Ella Peterson, a long standing and devoted friend of Mrs. Magee, is a beneficiary in the Will of 1990, although she was not a beneficiary in any other Will made by Mrs. Magee.

[10] When, for whatever reason, the Bonars left Mrs. Magee's house, [I note that, according to Mrs. Peterson, "Ray stole her [Mrs. Magee's] savings bonds"] Mrs. Magee, then 80, was confronted with the question of how she could manage to stay in her house. Houses require maintenance. She could no longer do, if she had ever done it, the necessary gardening, painting, gutter cleaning, or so on, or deal with tradesmen - an important and sometimes trying aspect of being a householder. She did have, thanks to the government program for assisting older people to remain in their homes, several hours of household help a week.

Her house, in the 4600 block of West 4th Avenue was half a mile from the nearest shops and a much greater distance from her parish church.

[11] There is no evidence that Mrs. Longmuir, who was by then a widow but was working full-time, either offered or was asked by Mrs. Magee to come and live in the house. Such an invitation was extended to Margaret Holland, daughter of her brother, James, and then a woman in her late thirties, and Mrs. Holland's husband. An agreement dated 2nd December, 1983, of some four and one-half closely typed pages, was drawn up. It provides, in elaborate and precise detail, for, in one of its phrases, "the independent housing of two families".

[12] To show its nature, I quote it in part:

This is an agreement between: HELEN PRICE MAGEE SMITH KENNETH DESMOND HOLLAND AND MARGARET ALICE HOLLAND for the purpose of sharing Helen's residence at 4688 West Fourth Ave. Vancouver, BC as of February 1st, 1984. KENNETH AND MARGARET'S RESPONSIBILITIES:

A- Kenneth and Margaret will pay Helen for half the property taxes as they come due, however if Helen is unable to pay her half of the taxes then Kenneth and Margaret will pay the entire amount. B- Kenneth and Margaret will pay the entire B.C. Hydro bill. C- Kenneth and Margaret will pay the property fire insurance bill in full. D- Kenneth and Margaret will maintain yard and house at present standards. E- Kenneth and Margaret will have their own phones. F- Kenneth and Margaret will get approval from Helen before any changes are made to the house. G- Kenneth and Margaret will get approval from Helen before anything is thrown out other than normal garbage. [There then followed detailed requirements for alterations to the house to essentially be done by the Hollands.]

and from page 3 of the agreement:

KENNETH AND MARGARET'S RESPONSIBILITIES TOWARD HELEN: A- Margaret to do Helen's washing. B- Margaret to vacuum every week or two. C- Margaret to dust area Helen is unable to reach.

D- Margaret to wash bathroom and kitchen cupboards as needed. E- Margaret to look after Helen's physical needs, only the things she is unable to do. F- Kenneth and Margaret are not able to drive Helen whenever and wherever she wishes, except for medical emergencies. G- Kenneth or Margaret will take Helen grocery shopping once a week. H- Kenneth and or Margaret are not able to drive Helen Sunday morning to mass at the Holy Rosary, but will drive Helen to the local catholic church for 8 AM. mass and pick her up, if she so desires.

and from page 4:

By moving in with Helen Kenneth and Margaret are giving up all their friends and associations to meet Dr. Chong's thoughts that "someone should be in Helen's house in case of need", should Helen fall again or whatever. At the moment Helen is quite capable of pursuing her own lifestyle, going to church in the bus, visiting her friends, shopping, etc. This must continue for as long as

Helen's health and desires permit, she must be free to come and go as she pleases, as must Kenneth and Margaret, each independent of the other. By getting out and moving your feet about, walking around the stores, etc., Helen is helping herself to better health and friendship. Helen must keep moving about on her own feet for as long as possible. Time has a way of taking care of our needs, and when Helen can no longer use the bus, there are taxis or other means such as the Handy Dart bus to get Helen to her meetings. This way Helen retains her freedom and independence. Kenneth and Margaret are not baby sitters and Helen must insist upon being free to move about as she wishes, and Helen must allow Kenneth and Margaret the same freedom. It will be harder on them because of the distance from their friends but I am sure it will work if both parties try to follow the rules of owner and tenants. The final passages on page 5 were these:

It is very important that this agreement be strictly complied with in order to insure harmony. If Kenneth and Margaret do not live up to their agreement, Helen has the right to ask them to leave, giving them one calendar month as notice, and if Helen doesn't live up to her agreement this will free Kenneth and Margaret of their commitment to her and they have the right to move out giving Helen one calendar month as notice. We hereby understand and agree to all the conditions that have been outlined in this document and commit ourselves to make every effort to make this a happy and harmonious association. [13] Some months before the making of this agreement, in July 1983, Mrs. Magee had consulted Mr. David Comparelli, a Vancouver solicitor whom she had known previously, and made a Will leaving her house to Mrs. Holland and the residue to Ray Vozza. Mrs. Holland testified she had no knowledge of that Will at the time. The judge made no specific finding as to whether that evidence was true. In December 1983, Mrs. Magee again attended upon Mr. Comparelli and made a Will in which essentially she left all her estate to the Hollands. From a letter or statement written by Mrs. Peterson in 1990, it appears that Mrs. Magee had told her that her money had run out and all she had was her pension, from which one might infer that in 1983 there was money in addition to the house. Whether Ray Vozza did steal from Mrs. Magee is not in issue in these proceedings but if so it explains why he was cut out in the December 1983 Will and if he did not steal, it raises questions about the reliability of Mrs. Magee or Mrs. Peterson or both. Mrs. Magee, in December 1983, also gave the Hollands a power of attorney and exercised in their favour her statutory power to appoint her own committee.

[14] Some four months after the agreement, in April 1984, Mrs. Magee again attended upon Mr. Comparelli and instructed him to prepare a transfer of the house to herself and the Hollands as joint tenants. He did so and the transfer was duly registered. His evidence as to that transaction I shall recount hereafter.

[15] The Hollands knew of the transfer within a day or two of its execution. Whether they influenced the transfer in a manner that was "undue" within the meaning of the authorities is at the heart of this dispute.

[16] On the 9th July, 1986, that is to say some two years later, Mrs. Magee again attended upon Mr. Comparelli. She granted Mrs. Longmuir a power of attorney and severed the joint tenancy. She revoked her earlier Wills and made a Will appointing Mrs. Longmuir as executrix and leaving to her all her estate which, if the transfer was not avoided, was one-

third of the house plus such money, if any, as she then had. The Hollands, who had continued to reside in the house, separated in February 1989. He moved out. Mrs. Holland, to whom he assigned his undivided one-third interest, remained in the house for the rest of Mrs. Magee's life. As to the 1986 Will, Mrs. Longmuir testified that she did not, in any way, threaten or coerce Mrs. Magee into making that Will. There is no finding as to when Mrs. Holland first knew of the 1986 Will.

- [17] The only rational inference to draw from the events of the summer of 1986 is that Mrs. Magee was no longer satisfied with her relationship with the Hollands. According to Mrs. Hepenstall, a friend of Mrs. Magee's who took her out often between May 1984 and 1990, the Hollands were not doing things as Mrs. Magee wished. They kept dogs, cut down some trees, and so on. Whether the Hollands were really behaving badly or Mrs. Magee had become very crotchety, is not an issue which requires to be decided.
- [18] In the latter part of 1990, unbeknownst to the original parties to this litigation until part way through the trial (I shall expand on this hereafter), Mrs. Magee, having consulted a law students' legal aid clinic, made the Will, exhibit A to this judgment:
1. I HEREBY REVOKE all Wills and Testamentary dispositions of every nature whatsoever by me heretofore made AND DECLARE this only to be and contain my last Will and Testament.
 2. I NOMINATE, CONSTITUTE, AND APPOINT my nephew, BOBBY BONAR, of 6100 Canterbury Drive, California, U.S.A., to be the Executor of this my Will, and Trustee of my Estate; but if that person predeceases me or fails or refuses to act or continue to act as such, then I NOMINATE, CONSTITUTE, AND APPOINT my niece, DOROTHY LONGMUIR, secretary, of 4138 West 8th Avenue, Vancouver, British Columbia, in that person's place and stead; and I hereafter refer to either of them as "my Trustee".
 3. I GIVE, DEVISE, AND BEQUEATH unto my said Trustee all my estate, both real and personal, of whatsoever nature or kind and wheresoever situate, and also estate over which I may have a general power of appointment or disposal at the time of my death upon the following trusts, namely: [Here followed a) and b), the common clauses to convert, to pay debts, and so forth.]
- c) to transfer and deliver and divide equally the residue of my estate to Dorothy Longmuir, Ella Peterson, of 4453 West 8th Avenue, Vancouver, British Columbia, Bobby Bonar and Peggy Holland, of 4688 West 4th Avenue, Vancouver, British Columbia, for their own use and benefit absolutely.
- [19] This Will was executed some time after 12th September, 1990.
- [20] The following summer, Mrs. Magee ceased to be happy with Mrs. Longmuir because of an incident described thus by the learned trial judge in his reasons for judgment:
- [77] After she was given Power of Attorney over Mrs. Magee's affairs, Mrs. Longmuir assisted Mrs. Magee with her banking business. In this regard, she had authority, not only to make deposits, but also to withdraw funds from an account maintained in the name of Mrs. Magee at a branch of the Bank of British Columbia. It was in exercise of that authority that, on or

about April 2, 1991, Mrs. Longmuir transferred \$6,000 from Mrs. Magee's account to her own account at the same branch of the Bank of British Columbia. [78] When giving evidence, Mrs. Longmuir testified that she only "borrowed" the money, however, she acknowledged that she did not tell her aunt about the transfer. She said that she was on sick leave from her employment at the time and was under stress. She said that she needed the money to help her out. [79] I must say that I have difficulty accepting that explanation in light of the fact that, a few months later, Mrs. Longmuir was able to travel by air from Seattle, Washington to Anchorage, Alaska, to stay there for two nights, and then return to Vancouver by way of a 7-day cruise on one of the Princess Line cruise ships. No evidence was led, nor do I have any idea, about the cost of such a trip, but I think it reasonable to assume that it would have amounted to several thousand dollars. [80] On August 2, 1991, while Mrs. Longmuir was away on the Alaska trip, Mrs. Holland attended with Mrs. Magee at the bank where Mrs. Magee's account was kept. There, Mrs. Magee learned, not only of the \$6,000 transfer from her account to Mrs. Longmuir's, but also that Mrs. Longmuir had put a restriction upon the amount of money that she might withdraw from her account at any one time. [81] These discoveries so upset Mrs. Magee that she signed a handwritten note that day instructing the Bank to immediately cancel Mrs. Longmuir's authority to deal with her account. [82] Mrs. Holland then arranged to have the Bank of British Columbia account closed and the balance in Mrs. Magee's account transferred to a new account at The Royal Bank of Canada. [21] There was no evidence that the \$6,000.00 was repaid in Mrs. Magee's lifetime.

[22] What then followed was this:

[83] On August 7, 1991, Mrs. Magee and Mrs. Holland attended at Dr. Chong's office. In his clinical records, Dr. Chong noted that Mrs. Magee "[d]oes not want Dorothy Longmuir to have authority over her" and that he suggested to her that she seek legal advice. Dr. Chong did not consider this to be a "medical" visit. Although Mrs. Holland came to Dr. Chong's office with Mrs. Magee, it is his recollection that he talked to Mrs. Magee alone, and it is his opinion that Mrs. Magee came in just to tell him about her dissatisfaction with Dorothy Longmuir. [84] Dr. Chong made a note of the visit in his clinical records because he was becoming concerned about the situation. [85] On August 7, 1991, Mrs. Magee also spoke by telephone with Mr. Comparelli. She instructed him to prepare a new Will appointing Mrs. Holland as the sole executrix and beneficiary. The notes made by Mr. Comparelli that day show that Mrs. Magee instructed him to state in the new will that she had "given enough assistance and money to my niece and nephew Dorothy Longmuir and Raymond Vozza". [86] Mr. Comparelli testified that he can recall asking Mrs. Magee that day why she was changing her Will again. He said that, in reply, she told him that she was not happy with the way Mrs. Longmuir was handling her bank account and that Mrs. Longmuir would not let her manage her own money. [Emphasis mine.] [23] The Will made then is dated the 9th August, 1991:

I HEREBY REVOKE all former Wills and Codicils by me at anytime heretofore made. I NOMINATE, CONSTITUTE AND APPOINT my niece, MARGARET ALICE HOLLAND, of 4688 West 4th Avenue, in the City of Vancouver, in the Province of British Columbia to be the Executrix of

this my Will and I DIRECT my Executrix to pay all my just debts, funeral and testamentary expenses and all estate taxes that may be payable in connection with my estate. I DIRECT my Executrix to arrange for my funeral services through Kearney Funeral Home with funeral mass at Holy Rosary Cathedral. IN AS MUCH AS I HAVE provided abundant assistance and monies to my niece, DOROTHY LONGMUIR and to my nephew, RAYMOND VOZZA, I NOW GIVE, DEVISE AND BEQUEATH all the rest and residue of my estate both real and personal whatsoever and wheresoever situate unto my said niece, MARGARET ALICE HOLLAND, for her own use absolutely and forever. [24] Whether or not Mrs. Magee had testamentary capacity, her response to what was, in fact, theft by Mrs. Longmuir, and, on Mrs. Peterson's statement, theft by Mr. Vozza, was rational. One's kin are not entitled to anticipate their inheritance in this manner.

[25] As I understand it, it is common ground in this litigation that when Mrs. Magee died on the 23rd October, 1994, almost three years after she executed the last of her many Wills and ten years after executing the transfer, she was incapable of managing her own affairs. From 1991 onward, Mrs. Holland appears to have kept Mrs. Longmuir from the house.

[26] It is convenient at this point to comment that the learned trial judge in his reasons took a very unfavourable view of Mrs. Holland's veracity. If Mrs. Longmuir had dollar signs in her eyes, so did Mrs. Holland, but it must be kept firmly in mind that Mrs. Holland was the only one of the family, apparently, who was willing to make it possible for Mrs. Magee to remain for the last ten years of her life in her own house.

[27] With that overview of the facts of this case, and I shall return to the evidence in more detail hereafter, I turn now to an aspect of these proceedings which I mention in the hope that members of the legal profession engaged in law suits of this kind may learn something about their proper conduct.

[28] On the 26th April, 1995, Mrs. Longmuir commenced this action in which Mr. and Mrs. Holland were the only defendants. Although the statement of claim does not comply in all respects with the rules of pleading, I must nonetheless quote from it:

5. During the same year the Defendants Margaret Alice Holland, a niece of the Deceased, and her then husband, the Defendant Kenneth Desmond Holland, moved into the Deceased's home at 4688 West 4th Avenue, Vancouver, (the "Deceased's home"), where the Deceased had been living alone. The Deceased's home had been purchased by the Deceased and her husband Matthew Smith in 1938, and the Deceased had resided in the home since that time, and continued to reside there until her death in 1994. * * * 7. On April 11th, 1984, the Deceased signed a transfer of her home in favour of herself and the Defendants Margaret Alice Holland and Kenneth Desmond Holland, as joint tenants. There was no consideration or alternatively inadequate consideration given for the transfer. The Deceased severed the joint tenancy July 9th, 1986. * * * 10. The Plaintiff says that the 1991 Will is invalid for the following reasons:

(a) the Deceased was not mentally capable at the time the will was executed, due to mental illness, infirmity or senile dementia; (b) and, or in the alternative, the execution of the will was procured by the undue influence of the Defendant Margaret Alice Holland. Particulars are as follows:

(i) The Defendant Margaret Alice Holland was living with the Deceased in her home and had complete control over the Deceased's person including her physical care and basic needs prior to and at the time of the execution of the 1991 Will; (ii) The weak physical and mental condition of the Deceased, her vulnerability and dependency upon Margaret Alice Holland prior to and at the time of the execution of the will rendered her susceptible to undue influence, which was in fact exercised;

[29] This was part of the prayer for relief:

(a) A declaration that the Defendants Margaret Alice Holland and Kenneth Desmond Holland hold the two-thirds interest in 4688 West 4th Avenue in trust for the Deceased's Estate absolutely; (b) An Order transferring and conveying to the Deceased's Estate the two-thirds interest in 4688 West 4th Avenue held in trust for the Deceased's Estate; * * * (g) A declaration that the 1986 Will is valid and subsisting, and a grant of Letters Probate with respect to that will to the Plaintiff; (h) A declaration that the 1991 Will is invalid;

[30] The order of these claims is illogical, for unless and until Mrs. Longmuir proved in solemn form, that is to say obtained a grant of letters probate to the Will which she was propounding, she would have no status to seek the declaration claimed in subparagraph (a).

[31] In commencing this action, Mrs. Longmuir's solicitors might with profit have consulted Williams, Mortimer and Sunnucks, Executors, Administrators and Probate (London: Stevens & Sons, 1993), Tristram & Coote's Probate Practice (any of the modern editions - the latest available to me is the 27th edition, published in 1989 by Butterworths, although I believe there is also a 28th edition published in 1995), and Atkin's Court Forms, 2d ed., vol. 32.

[32] The Hollands delivered this statement of defence:

1. The Defendants deny the allegations of fact set out in the Statement of Claim. 2. In answer to the whole Statement of Claim the Defendants say and the facts are as follows: 3. The Defendant Margaret Alice Holland is the executrix and sole beneficiary under a will made by the deceased dated August 9, 1991, which will is in all respects a good and valid will. 4. In answer to paragraph 7 of the Statement of Claim the Defendants say that the transfer made by the deceased was a gift. 5. In the alternative the Defendants say that the deceased's will dated September 4, 1985 is in all respects a good and valid will and that the Defendants are executors and sole beneficiaries under that will. WHEREFORE the Defendants pray that the Plaintiff's claim be dismissed with costs throughout and a declaration that the will made by the deceased dated August 9, 1991 is in all respects a good and valid will and that the Defendant Margaret Alice Holland is the executrix and sole beneficiary, or that the deceased's will dated September 4, 1985 is in all respects a good and valid will and that the

Defendants are executors and sole beneficiaries under that will. [33] They counterclaimed as well and the prayer for relief in their counterclaim was the same as their prayer for relief in the statement of defence.

- [34] The proper form of a prayer (and the proper form of a judgment) is "that the court shall pronounce against the force and validity of the alleged Will of July 1986 and for the force and validity of the last Will and testament of the said deceased dated the 9th August, 1991, in solemn form of law".
- [35] Although the Will of 1985 was pleaded in the statement of defence, it has disappeared from these proceedings. I do not understand that at the end of the trial Mrs. Holland stood upon that Will. She stood only upon the Will of 1991.
- [36] To the statement of defence and counterclaim, there was no reply. As the pleadings stood, the issue on the transfer was gift or no gift. There was no plea on the record that the transfer ought to be avoided on the ground that it was brought about by undue influence. Those words do not appear in the original statement of claim in relation to the transfer.
- [37] However, it appears that the trial was conducted on the footing that there was such a plea and, thus, during the first two days of the trial, the issues were the validity of the 1991 Will, that is to say, was Mrs. Magee of sound and disposing mind and memory when she made that Will or was it procured by undue influence, and whether, if not, and if Mrs. Longmuir was entitled to a grant of letters probate for the 1986 Will, she, standing in the shoes of the testatrix, was entitled to assert that the 1984 transfer ought to be set aside on the grounds that it was induced by undue influence.
- [38] As I have already indicated, on the second day of the trial, the parties became aware that Mrs. Magee, having visited a law students' legal aid clinic, had made another Will in 1990, a Will which she did not mention to Mr. Comparelli in August 1991.
- [39] With this unexpected event, the trial had to be adjourned.
- [40] Mrs. Longmuir obtained leave to add Mrs. Peterson and Mr. Bonar as defendants and to amend her statement of claim to assert that the 1990 Will was invalid on the footing that Mrs. Magee had then no testamentary capacity. In other words, she was attempting to obtain the whole of the estate to the exclusion of her cousin, her nephew, and Mrs. Peterson.
- [41] Mr. Bonar then filed his own statement of defence and counterclaim, thus:
1. The Defendant, Robert Bonar, denies each and every allegation of fact contained in the Further Amended Statement of Claim except where expressly admitted in this Statement of Defence, and puts the Plaintiff to the strict proof thereof. 2. The Defendant, Bonar, admits paragraphs 1, 2, 3, 4, 5, and 9 of the Further Amended Statement of Claim. 3. In answer to the whole of the Further Amended Statement of Claim, the Defendant, Bonar, says and the fact is that he is the executor and a beneficiary under a Will made by the deceased dated in or about 1990, which will is in all respects a good and valid will. 4. In further answer to the

whole of the Further Amended Statement of Claim herein, the Defendant, Bonar, requires that the Will be proved in solemn form and he only intends to cross examine the witnesses produced in support of the Will. WHEREFORE the Defendant, Bonar, prays that the Plaintiff's claim be dismissed with costs. * * * COUNTER-CLAIM 1. The Defendant, Bonar, repeats allegations of fact contained in the Statement of Defence. 2. The Defendant, Bonar, prays that the Plaintiff's claim be dismissed and seeks a declaration that the Will made by the Deceased dated in or about 1990 is in all respects a good and valid Will and that the Defendant, Robert Bonar, is the executor and a beneficiary thereunder. [42] The fourth paragraph of Mr. Bonar's statement of defence is puzzling unless it is meant to refer to the Will of 1991. So far as the Will of 1990 was concerned, it was for Mr. Bonar, as the proponent of that Will, to call the evidence to prove it.

[43] Now, as I read this statement of defence and counterclaim, Mr. Bonar, whether wittingly or unwittingly, was not making any attack on the validity of the 1984 transfer but, if the Will of 1990 was the valid Will, he was the only person with status to attack that transfer. So far as I am able to ascertain from the record of the trial below, no one drew this obvious point to the attention of the learned trial judge, nor indeed did counsel draw this point to the Court's attention during the hearing of the appeal.

[44] When this lacuna in the pleadings became known to this Court after it had reserved judgment, this memorandum was sent to counsel:

It is trite law that only the personal representative has status to set aside an act done by his testator or intestate. Upon reviewing the pleadings below, the court notes that:

1. The plaintiff below sought to prove in solemn form the Will of 1986 and to set aside the transfer of the land. Her status to claim the latter relief was dependent upon her succeeding in obtaining the former. She does not seek in this Court to sustain the Will of 1986. 2. In his counterclaim dated 12th June, 1997, the respondent, Mr. Bonar, prayed "that the Plaintiff's claim be dismissed" and "a declaration that the Will made by the Deceased dated in or about 1990 is in all respects a good and valid Will and that the Defendant, Robert Bonar, is the executor and a beneficiary thereunder". He made no claim to set aside the transfer. Thus, once it became clear that the Court could not grant probate of the 1986 Will, there was, on the pleadings as they stand, no claim properly before the learned trial judge, nor is there any claim properly before us as to the validity of the transfer. It is up to the respondent, Mr. Bonar, having taking such advice as he deems appropriate on the implications of such a course of action, to decide whether he wishes to apply to this Court for an amendment of his counterclaim to raise as against the transfer the same allegations as were made by the plaintiff below, Mrs. Longmuir. The Court wishes counsel for him to inform us by the 9th June if he intends to so apply. If he decides he does so intend, the Court will fix a time for the hearing of the application. If he declines to do so, the Court may invite further submissions from counsel.

- [45] In the upshot, Mr. Bonar has obtained an amendment to his statement of defence and counterclaim which, inter alia, contains these paragraphs in the amended statement of defence and which are repeated essentially in the amended counterclaim:
4. In further answer to paragraph 10 of the Further Further Amended Statement of Claim, and in addition thereto, and in answer to paragraph 7 of the Statement of Defence of the Defendants, Margaret Alice Holland, and Kenneth Desmond Holland, the Defendant, Robert Bonar says that the Defendants, Margaret Alice Holland and Kenneth Desmond Holland, acquired dominion over the mind of the deceased. 5. In further answer to paragraph 7 of the Statement of Defence of the Defendants, Margaret Alice Holland and Kenneth Desmond Holland, the Defendant, Robert Bonar says that if the transfer made by the deceased was a gift, it was procured by the undue influence of the Defendants, Margaret Alice Holland and Kenneth Desmond Holland, over the deceased. 6. In the alternative, the relationship between the Defendants, Margaret Alice Holland and Kenneth Desmond Holland, on the one hand, and the deceased, on the other hand, at the time of the transfer, gives rise to the presumption of undue influence. [46] He prays in the amended counterclaim:
- a) A declaration that the Defendants Margaret Alice Holland and Kenneth Desmond Holland hold the two-thirds interest in 4688 West 4th Avenue in trust for the Deceased's Estate absolutely; * * * h) A declaration that the 1990 Will is valid;
- [47] As I have indicated earlier, logic dictates that these prayers ought to be reversed; "h" should be "a" and "a" should be subsequent to it, but nothing turns on this illogicality.
- [48] To this counterclaim, Mrs. Holland responded thus:
1. This Defendant denies that the Hollands acquired dominion over the mind of the deceased. 2. The transfer of the lands and premises at 4688 West 4th Avenue, in Vancouver, was made by the deceased as a gift to the Hollands, and that transfer was devoid of any undue influence whatsoever, and the deceased, at all material times, received independent legal advice from her own solicitor. 3. The deceased made a will dated August 9, 1991 which, in all respects, is a good and valid will and the Defendant Margaret Alice Holland is the Executrix and sole beneficiary thereunder. [49] On the 22nd July, 1998, Mrs. Holland gave notice of appeal.
- [50] In her factum, she seeks "an order allowing the appeal and declaring the April 11, 1984 transfer and the 1991 Will to be good and valid".
- [51] For her part, in this Court, Mrs. Longmuir did not seek to propound the 1986 Will. The contest now, so far as probate is concerned, is between Mrs. Holland, as the executrix named in the 1991 Will, and Mr. Bonar, as the executor named in the 1990 Will.
- [52] Thus, what Mrs. Longmuir was doing in this Court, save as one of the residuary beneficiaries in the 1990 Will, is not clear to me. She has no status on the question of the validity of the transfer.

[53] The first question is whether the instrument of 1991 is the proper last Will of the testatrix.

[54] The learned judge's conclusions as to the Will are encompassed in this passage:

[198] So far as the 1991 Will is concerned, in arriving at the statement of law set out above, the Supreme Court of Canada, in *Vout v. Hay* (supra), adopted the view expressed by Crocket J. in *Riach v. Ferris*, [1935] 1 D.L.R. 118 (S.C.C.), that in cases such as this, where the evidence raises a well-grounded suspicion in the mind of the court that the testator did not appreciate the effect of what he was doing when he executed the will, it is for the person seeking to establish the validity of a will to "remove that suspicion by affirmatively proving that the testator did in truth appreciate the effect of what he was doing". [Emphasis of Drost J.] [199] That, Mrs. Holland has failed to do. Her evidence, when weighed against the medical evidence, the notes of the care-workers, and the testimony of other witnesses, falls short of satisfying me that Mrs. Magee had testamentary capacity when she executed the 1991 Will. [200] Further, Mrs. Holland's evidence fails to dispel the suspicions raised by the evidence concerning Mrs. Magee's physical and mental condition before, during and after that Will was executed, that Mrs. Magee's mind was at the time of its execution unduly influenced by Mrs. Holland's domineering attitude. [55] I shall return to this passage. It will suffice at present to say I do not consider that paragraph 198 fully expresses the subtleties of the law.

[56] As the learned judge put little, if any, credence in Mrs. Holland's evidence, I shall pay no attention to it. As to "the medical evidence", there was no direct medical evidence that Mrs. Magee either had or had not testamentary capacity on the 9th August, 1991, although there was compelling medical evidence from Dr. Donnelly that by July 1992 she lacked such competence:

When I saw her on June 29th, 1992 she did not know what her assets were and therefore would not have been able to meet a very simple basic requirement for testamentary capacity. However, I cannot state whether or not she knew what her assets were on August 9th, 1991 because I did not see her then. On the date that I saw her on June 29th, it was clear Mrs. Holland was over-protective and over-bearing. Therefore on that date, clearly Mrs. Magee would have been susceptible to undue influence by Mrs. Holland. However, again I did not see her on the date she re-wrote her will August 9th, 1991 and cannot say if Mrs. Holland was acting in the same fashion on that particular day.... I have no history to suggest that Mrs. Magee had a traumatic event which would have suddenly caused her to have cognitive impairment. The natural history of cognitive impairment in a diagnosis of dementia in either Alzheimer's Disease or Multi-Infarcted origin, would suggest a slow or gradual onset. Unfortunately I do not have a history on my chart to verify the actual progression. Her family physician knew her over a long period of time and I believe he would be more likely to be capable of giving factual evidence regarding her mental status in the year 1991. I can only conclude that it is likely she had cognitive difficulties at that time, but I cannot on that basis draw any conclusions about testamentary capacity. [Emphasis of Drost J.]

[57] The evidence of Dr. Chong, the family physician, really did not assist one way or the other.

- [58] The "notes of the care workers" refers to those members of the staff of the Vancouver Health Department who dealt with Mrs. Magee and whose notes are contained in pages 232-277 of the appeal book.
- [59] In the words of a letter from the Vancouver Health Department of 13th July, 1995: "The Vancouver Health Department had provided Long Term Care Case Management service and Home Care Occupational Therapy service to Helen Smith." One of the case workers, Susan Coady, gave evidence. From her evidence and from the records, it becomes apparent that no one from Vancouver Health Department saw Mrs. Magee between April 1990 and February 1992.
- [60] Without going into detail, I think it fair to say that the records from February 1992 onwards show that by then she did lack testamentary capacity. But no one suggested the Will she made sometime after 12th September, 1990 was made when she lacked testamentary capacity. As to the "testimony of other witnesses", the learned judge does not enumerate the witnesses to whom he is there referring. What we have, therefore, is a testatrix with capacity in September 1990 and no capacity in February 1992. August 1991 is eleven months after the former and six months before the latter date.
- [61] The direct evidence as to what took place at the execution of the Will was that of Mr. Comparelli:

Q Did you next deal with Mrs. Magee in relation to the will in 1991? A Yes, she must have phoned me on the 7th of August, because I see on my note I have her telephone number along with the notes. Q You're referring to a note that's got number 28 on the upper right-hand corner? A Yes. Q And it says 7 August, 1991? A It says 7 August, '91. Q '91, sorry. And it's again, "Magee, Helen Price, also known as Helen Price Bonar Smith" with the address and phone number, "New executrix Margaret Alice Holland, funeral services." A "Holy Rosary Cathedral," yeah. Q And then given in brackets "I have given enough assistance and money to my niece and nephew, Dorothy Longmuir and Raymond Vozza." A Yes. Q "Residue to my niece, Margaret Alice Holland." A Yes. Q Do you recall this phone conversation, or the conversation that's reflected in these notes? A I remember a little in that I was asking her why she was changing the will again, because she had named Holland -- I recalled, I remember the name "Holland", and she said she wasn't happy with Mrs. Longmuir's handling of her bank account. Q Now, the reference to Mrs. Longmuir and the bank account, is it possible that she said something not about bank accounts but about payment of the utility bills? A It could be that. My recollection now that she says that "She won't let me manage my own money. I've got money in the bank and I can't get at it." Q That's your best recollection today of what she said? A Yes. * * * Q Mr. Comparelli, with respect to the conversation about financial matters that you've been telling us about, do you recall anything further beyond what you've already said? A Only that she couldn't -- she said she couldn't control her bank account. Q Do you recall her saying anything about a withdrawal limit on her bank account? A No. Q The statement in the notes about having given enough assistance to her niece and nephew, did she provide you with any details about that? A No, she did not. Q At that time or at the time of the execution of the will? A No, this was when she phoned me. Q Yes, but I'm going forward and

saying she didn't say anything to you about that during the phone call, did she give you any detail about that when you met with her? A No, she did not. Q You then prepared the will. A I did. Q And that's at photocopy number 29 in your file, and you recall her being at your office to sign the will on 9th of August, 1991. Do you recall the actual meeting? A I do not. No. Q Do you recall whether Mrs. Holland was present at the time the will was executed? A No, I don't. Q Is it possible that she was? A It's possible, yes. Q Mr. Comparelli, I'll direct your attention to exhibit 1, tab 17, that's a letter from the Law Students Legal Advice Program to Peggy Holland of August 24th, 1990? A I see that letter, yes. Q And it says "Re: Vacating the premises at 4688 West 4th Avenue." A I see that heading, yes. Q And the bottom paragraph it says "Please be advised that this document provides you with 10 days notification to leave the premises." I take it -- were you told in 1991, by Mrs. Magee, about any concerns or dissatisfactions she had with Mrs. Holland being in the home? A No. It's the first time I've seen this letter. Q In 1991, when the will was prepared and executed, did you know about the marital circumstances of Mr. and Mrs. Holland? A No. Q Did you know whether Mr. Holland was still in the home, as a resident of the home? A I do not know that. Q At that time did you ask Mrs. Magee any questions about what her assets were? A No, I did not. I don't usually concern myself, at the time of getting instructions, with the people's assets, if, in fact, they are giving everything to an individual or to a set of individuals. Q Did you ask her about possible beneficiaries other than Mrs. Holland? A No. Q Did you ask her about the title to the property and whether she was aware of the state of the title? A No, I did not. Q Did you ask any questions about her health? A No, I did not. In cross-examination: Q And can you give the court an indication, in your view, how well you got to know her as a person, during the course of dealing with her? A I didn't know her that well. She appeared to me always like a chirpy little bird. She was cheerful in disposition but generally she was annoyed at something or other when she came to see me and namely that she wanted to change her will or disposition, but she struck me as being a cheerful person, yes. Q All right. You've, I'm sure, drawn and looked after the execution of a large number of wills during your practice as a solicitor? A Yes. Q What was your practice in terms of concerning yourself about a testator's competency at the time of making a will? A Well, generally, if they came in without a telephone appointment, of course I would speak to them, and if I talked to them on the telephone, I would find out from their tenor, if they were serious, if they knew what they were doing, but at the same time when they did come in and I asked them to read the will, if it made sense to them, that's what they wanted, I could gauge from their reading of the will, and their discussion with me, and generally it wasn't a matter of just business. I would go out, as I say, to meet them in the reception room. My office was at the end of the hall, I would walk out through the hall to the reception room, meet the people, bring them in my office, you know, "How are you. How's the weather. How's your aches and pains," and so on. I would get a general feeling of the people's demeanour, whether there is anything wrong with them, physically or mentally. Q Now, during the course of looking after all these wills for Mrs. Magee, did you, at any time, become concerned about her competency? A No. From the first time I met her, which would be in the late '70's, until the last time I met her, she appeared to me to be the same chirpy little person. * * * Q Mr. Comparelli, first of all, let me ask you, in the overall course of dealing with her did you have an opinion as to her mental competence? A Yes. Q And on what did you base that opinion? A On seeing her, talking with her, and realizing she was an

intelligent woman. She spoke very intelligently. Q All right. And what opinion overall did you reach as to her competence? A That she was normal. She was no different from any other person that I had seen in the office. Q And in meeting with her in 1991, do you remember if your opinion changed as to her competence? A I know my opinion had not changed during all the years that I had dealt with her. Q Did you have any concerns about her competence in 1991? A No, I did not.

[62] There has been some suggestion in this case that Mr. Comparelli ought to have asked Mrs. Magee about the possible objects of her bounty and the nature and extent of her property. A solicitor can be faulted for not doing so when dealing with a stranger or even a long standing client who wants to do something irrational. But Mrs. Magee was no stranger and there was nothing irrational in her making a Will the substance of which accorded with Wills she had made in 1983 and 1985. Her addition of the instructions concerning her funeral was rational. I take judicial notice that Kearney Funeral Home has been the preferred funeral home of the Roman Catholic community in Vancouver for many years. Her instruction concerning the last paragraph of the Will was rational in light of the facts. Of course, if it had been shown that neither Mrs. Longmuir nor Mr. Vozza had ever had any of Mrs. Magee's money, then the clause itself would be evidence not only of a lack of testamentary capacity but also, because of Mrs. Holland's opportunity to influence Mrs. Magee, of undue influence.

[63] I have already quoted paragraph 198 of the learned judge's reasons in which he states his understanding of the law. While that paragraph is not an inaccurate statement of the law, it is also not, in the circumstances of this case, an adequate analysis of the law.

[64] Sopinka J., in his judgment in *Vout v. Hay*, [1995] 2 S.C.R. 876, 125 D.L.R. (4th) 431, points out many of the difficulties on what constitutes "suspicious circumstances", referring, at 885, to this passage from a case comment, (1938) 16 Can. Bar Rev. 405 at 406, by Dr. Cecil A. Wright:

Although superficially simple, problems involved in litigation concerning the establishment of a deceased person's will against attacks of lack of testamentary capacity, fraud and undue influence, are, in the writer's opinion, second to none in difficulty. While the Chief Justice of Canada has recently said in an appeal involving these questions that "the law is well established and well known" [*Riach v. Ferris*, [1934] S.C.R. 725, at 726], the fact remains that judgments dealing with litigation of this kind abound in language that is hazy, obscure, and extremely difficult to reconcile. While paragraphs can be taken from judgments setting out in convenient form an exposition of the existing law, it is an altogether different matter to apply that law to a given set of facts. [65] Dr. Wright's comment is as apt today as it was when it was written.

[66] The question is, what can raise a so-called "well-grounded suspicion"? As to that, Sopinka J. said, at para. 25, p. 888:

With respect to the second problem, although *Barry v. Butlin* and numerous other cases dealt with circumstances in which the procurer of the will obtained a benefit, it has been determined that the dictum in *Barry v. Butlin* extends to any "well-grounded suspicion" (per Davey L.J. in *Tyrrell v. Painton*, [1894] P. 151, at pp. 159-60). This was reaffirmed in this Court by Ritchie J. in *Re Martin*, *supra*. The suspicious circumstances may be raised by (1) circumstances surrounding the

preparation of the will, (2) circumstances tending to call into question the capacity of the testator, or (3) circumstances tending to show that the free will of the testator was overborne by acts of coercion or fraud. Since the suspicious circumstances may relate to various issues, in order to properly assess what effect the obligation to dispel the suspicion has on the burden of proof, it is appropriate to ask the question "suspicion of what?" See Wright, *supra*, and Macdonell, Sheard and Hull on Probate Practice (3rd ed. 1981), at p. 33. [Emphasis mine.] [67] After expanding on the question of burden of proof, Sopinka J. remarks, at paras. 28-29, p. 890, concerning undue influence being an affirmative defence:

No doubt this reflects the policy in favour of honouring the wishes of the testator where it is established that the formalities have been complied with, and knowledge and approval as well as testamentary capacity have been established. To disallow probate by reason of circumstances merely raising a suspicion of fraud or undue influence would tend to defeat the wishes of the testator in many cases where in fact no fraud or undue influence existed, but the propounder simply failed to discharge the legal burden. Accordingly, it has been authoritatively established that suspicious circumstances, even though they may raise a suspicion concerning the presence of fraud or undue influence, do no more than rebut the presumption to which I have referred. This requires the propounder of the will to prove knowledge and approval and testamentary capacity. The burden of proof with respect to fraud and undue influence remains with those attacking the will. See *Craig v. Lamoureux*, [1920] A.C. 349; *Riach v. Ferris*, [1934] S.C.R. 725; *Re Martin*, *supra*. It may be thought that proof of knowledge and approval will go a long way in disproving undue influence. Unquestionably there is an overlap. If it is established that the testator knew and appreciated what he was doing, in many cases there is little room for a finding that the testator was coerced.... [68] In the *Vout* case, the trial judge listed the matters which were alleged to constitute suspicious circumstances. (See para. 30, pp. 891-92.)

[69] Unlike the learned trial judge in *Vout v. Hay*, the learned trial judge in this case did not set out expressly the grounds of his suspicion, unless it can be said that his account of the evidence of the various witnesses, and especially his rejection of much of the evidence of Mrs. Holland, in and of itself raises "well-grounded suspicion". This was not a case, unlike many of the cases of which *Vout* was one, in which the testator has made in his old age a will in favour of someone who has not previously been an object of his bounty and does not fall within the class of persons testators usually remember in their wills, that is to say their next of kin. In this case, the sole beneficiary was one of the next of kin and had, from time to time, been the chief beneficiary of the testatrix's estate. The learned judge never does grapple with the fact that in August 1991, after what Mrs. Longmuir had done, the testatrix had a very good reason for making a new will. If she had had no such reason, then I would agree with the learned judge, for a testator, whose physical and mental powers are rapidly declining, to change a will, reasonable on its face, without a good reason, can in and of itself be the cause of judicial suspicion.

[70] In my opinion, there was no proper foundation in law for the learned judge's conclusion on the issue of testamentary capacity.

- [71] On the question of the Will there remains the issue of "undue influence". Mrs. Holland undoubtedly had the capacity to influence her aunt and may well have done so, but what is "undue" influence? It is influence which overbears the will of the person influenced so that in truth what she does is not his or her own act. If Mrs. Holland had said to Mrs. Magee, "you shouldn't leave anything to Cecilia as she has been stealing from you and I've been here all these years", she was only telling the truth, even if she was being ungenerous to her cousin. That would not, I think, be "undue". If she had said, "if you do not make a will in my favour I will leave this house", even that would not be "undue", albeit unkind. But, on the other hand, if she had said, "I will kill you if you do not make a will in my favour", that would be either undue influence or coercion, which are much the same thing.
- [72] I can see nothing in the evidence to warrant an inference that Mrs. Holland, despite her failings, would go to such lengths.
- [73] I conclude that probate ought to be granted of the Will of 1991 in solemn form of law.
- [74] Although this conclusion makes addressing the issue of the transfer strictly unnecessary, I propose to do so because it gives rise to important questions of law. The animadversions of Dr. Wright can *mutatis mutandis* be applied to proceedings to set aside *inter vivos* transactions.
- [75] A claim to set aside a transaction on the ground of undue influence is a claim in equity. A transaction so brought about is voidable not void. See Lindley L.J. in *Allcard v. Skinner* (1887), 36 Ch. D. 145 at 186-87. In broad terms, equity considers the obtaining of a benefit by such a means, a species of constructive fraud (Lindley L.J. at 183).
- [76] Mr. Bonar's right as executor is no greater than Mrs. Magee's right had she chosen to sue in her lifetime. As the claim is a claim in equity, a defendant may raise equitable defences. As it was put by Nourse L.J. in *Goldsworthy v. Brickell*, [1987] 1 All E.R. 853 at 872:

The characteristics of the right which are material for present purposes were these. Firstly, it was an equitable right and as such liable to be defeated by equitable defences. Secondly, although it was a right to set aside a contractual transaction, it arose outside of and not under the contract. Thirdly, it was in substance no different from other equitable rights to set aside completed transactions, for example a beneficiary's right to set aside a purchase by his trustee of the trust property. The equitable defences which would usually be regarded as being available to defeat such a right are laches, acquiescence and confirmation: see for example the judgment of Lindley LJ in *Allcard v Skinner* (1887) 36 Ch D 145 at 186-189, [1886-90] All ER Rep 90 at 101-103. By any of these means the transaction could have been affirmed, in the first two cases impliedly and in the third expressly. These expressions are not uniformly used. Sometimes laches is taken to mean undue delay on the part of the plaintiff in prosecuting his claim and no more. Sometimes acquiescence is used to mean laches in that sense. And sometimes laches is used to mean acquiescence in its proper sense, which involves a standing by so as to induce the other party to believe that the wrong is assented to. [77] Although Wilson J., in *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353, 81 D.L.R. (4th) 211, commented adversely on another passage in the *Goldsworthy*

reasons, she did not comment adversely on this passage, and see also *Allcard v. Skinner*, supra, in which the plaintiff failed because of the lapse of time from the cessation of the undue influence until the suit was brought, and *Mitchell v. Homfray* (1881-82), 8 Q.B.D. 587 (C.A.), in which it was held that an executor could not impeach a gift made by his testatrix, she having, when the influence had ceased, chosen to abide by it.

[78] I do not take the judgment of Nourse L.J. to be exhaustive or, indeed, as intended to be exhaustive on the question of equitable defences to claims such as this.

[79] In the case at bar, Mrs. Holland has raised no equitable defences. I make mention of this because, in a similar case, a person who, like Mrs. Holland, looked after the deceased for many years after the transaction being impugned by an executor might assert, for instance, that, relying on the gift, the deceased herself not having sought for many years and while of sound mind to call it into question, she suffered detriment by continuing to look after the deceased. In this case, as Mrs. Holland has pleaded no equitable defences, although she has had three opportunities to do so - when at the beginning of this action she pleaded to the original statement of claim, when the pleadings were amended during the trial, and in this Court when Mr. Bonar pleaded undue influence - I need say no more about them.

[80] The only question therefore is whether, in the period leading up to Mrs. Magee attending upon Mr. Comparelli on the 11th April, 1984, and on the day when she executed the transfer, she was under the undue influence of the Hollands.

[81] Much has been made in this case of a presumption set out thus in a passage in Halsbury's Laws of England (4th ed. 1977), vol. 18, para. 330, at p. 149, quoted implicitly with approval by Wilson J. in her judgment in *Geffen v. Goodman Estate*, supra, at 379 (S.C.R.):

330 ... Secondly, there are those cases in which the relationship between the donor and the donee at the time of or shortly before the making of the gift has been such as to raise a presumption that the donee had influence over the donor. In this second class of case the onus is on the donee to rebut the presumption by showing that the donor made the gift only after full, free and informed thought about it.

[Emphasis of Wilson J.]

[82] In *Geffen*, there are three judgments: that of Wilson J. concurred in by Cory J.; that of La Forest J. concurred in by McLachlin J. as she then was; and that of Sopinka J. Almost everything in all those judgments is obiter dicta, as Sopinka J. notes at the outset of his own judgment, for the ratio of the case is very simple. The trial judge found that the defendants had not exercised undue influence over their sister, who had had independent legal advice (as had Mrs. Magee) and who had survived for four years after the transaction without impugning it. The Court of Appeal reversed that finding. The Supreme Court of Canada restored it on the usual grounds of non-interference with findings of fact by a trial judge where those findings of fact are founded on a proper appreciation of the legal issues.

- [83] What in this century on this branch of the law has not been asked is how did this presumption, which Sopinka J. said is a presumption of law and therefore rebuttable, arise and is it any longer of practical implication?
- [84] I will assume that the reader is familiar with that passage in Holdsworth History of English Law, vol. IX, pp. 336-358, describing the tortuous course of adducing evidence in chancery before the Chancery Procedure Act, 1852, 15 & 16 Vict., c. 86, and with the provisions of that Act, especially as to the manner of giving evidence in chancery and with Lord Brougham's Act, 1851, which made parties to proceedings competent to give evidence.
- [85] There is also lurking under the surface in some cases, a concern on the part of chancery judges which, up until comparatively modern times, may have been sound, that women needed protection from avaricious husbands, fiancés, and so forth. In a world where a woman could not easily lead a truly independent life, there was much merit in their position. By way of illustration I note that in *Re Lloyd's Bank, Limited, Bomze and Lederman v. Bomze*, [1931] 1 Ch. 289, Maugham J., commenting in a case in which an alleged gift was made by a woman to a man to whom she was engaged, at p. 302, said:

In most cases she does not interest herself in her future pecuniary position as between herself and her husband. In general, she reposes the greatest confidence in her future husband; otherwise she would not marry him. In many, if not most, cases she would sign almost anything he put before her. In my judgment, the doctrine of *Huguenin v. Baseley* applies to such a relationship; ... [86] The judgment of Lord Eldon, in *Huguenin v. Baseley* (1807), 14 Ves. Jun. 273, 33 E.R. 526, [1803-13] All E.R. Rep. 1, (the principal foundation of *Allcard v. Skinner*, supra) was also, I think, affected by the course of proceedings and this underlying concern, the plaintiff in that case being a lady of substantial means, recently widowed. I so infer from this passage at 536 (E.R.):

The question is, not, whether she knew what she was doing, had done, or proposed to do, but how the intention was produced: whether all that care and providence was placed round her, as against those, who advised her, which, from their situation and relation with respect to her, they were bound to exert on her behalf. Her situation, with reference to pecuniary circumstances during the whole period, must also be attended to: her husband a few weeks before having been relieved from distress by a sum of money advanced by Baseley. In that view of the case no evidence out of these instruments could satisfy me, that Mrs. Huguenin understood them. I believe, farther, that the parties to the transaction did not understand it. Repeating therefore distinctly, that this Court is not to undo voluntary deeds, I represent the question thus: whether she executed these instruments not only voluntarily, but with that knowledge of all their effect, nature and consequences, which the Defendants Baseley and the attorney were bound by their duty to communicate to her, before she was suffered to execute them; and, though perhaps they were not aware of the duties, which this Court required from them in the situation, in which they stood, where the decision rests upon the ground of public utility, for the purpose of maintaining the principle it is necessary to impute knowledge, which the party may not actually have had. [87] I shall have something more to say about public utility later.

- [88] Whether, if the plaintiff in *Huguenin v. Baseley* had been examined and cross-examined, she would still have been thought to have been imposed on, that is to say not to understand fully what she was doing, no one can now say.
- [89] In some of the authorities decided after 1852, the person alleged to be the victim of undue influence was alive and able to speak to what induced the impugned transaction. In others, the "victim" is dead and there is therefore a lack of first-hand evidence on the point.
- [90] When the alleged victim is alive and in full possession of his or her faculties, what need is there for a presumption? Thus, in *McKay v. Clow*, [1941] S.C.R. 643, the complainant did testify. On his evidence, as described by Crocket J., I do not understand why Crocket J., speaking for the majority, found it necessary to invoke the presumption.
- [91] When the alleged victim is dead, a presumption which, in Sopinka J.'s words in *Geffen*, may only be an evidential burden or both an evidential burden and a legal burden (he did not answer which it is), may have been necessary to do justice, at least until the easing of the strict rule against hearsay evidence. But in this case we have evidence, albeit second-hand, from Mrs. Magee, who after April 1984 discussed the property with others on more than one occasion.
- [92] Although Sopinka J. did not answer the question as to the nature of the burden, he did say, at 397:

This Court, in *Circle Film Enterprises Inc. v. Canadian Broadcasting Corp.*, [1959] S.C.R. 602, adopted the former or evidentiary burden view, citing *Wigmore on Evidence*, 3rd ed., §. 2491(2). Judson J., speaking for the court, stated, at p. 606:

It must be kept in mind that the peculiar effect of a presumption "of law" (that is, the real presumption) is merely to invoke a rule of law compelling the jury to reach the conclusion in the absence of evidence to the contrary from the opponent. If the opponent does offer evidence to the contrary (sufficient to satisfy the judge's requirement of some evidence), the presumption disappears as a rule of law, and the case is in the jury's hands free from any rule. [Emphasis in original.]

- [93] In *Geffen*, Wilson J., at 381, quoted Lord Scarman's words on the importance of a "meticulous examination of the facts". I shall now turn to that meticulous examination, with particular reference to what Mrs. Magee said.

- [94] What then did Mrs. Magee say?

- [95] Mr. Comparelli testified thus as to the events of April 1984:

Q All right. And those notes, April 4, '84, were written on that date? A Yes. Q Now, it says "Mrs. Magee called. Wants to put house into joint tenancy with niece and husband." A Yes. Q And then there's something below that, I can't quite read, next to the Helen Magee. A There are the three notes in red ink. Is that the one you can't read -- oh, "i.e.," that is, id est. Q "Id est Helen Magee, Margaret Alice Holland, Kenneth Desmond Holland, occupation salesman, all of" and then the

address, postal code, and land values. A Yes. Q You need that for the transfer? A You need that for the land document transfer, yes. Q You haven't actually recalled this phone conversation that's referred to in the note of April 4th, 1984? A I do not recall the conversation, no. Q And you subsequently prepared a transfer, I suggest, it's at tab 10 of exhibit 1. THE COURT: Again, Mr. Comparelli, if you will, sir, the binder of documents, Exhibit 1. MR. VERHOEVEN: Sorry, the binder, exhibit 1 if you turn to tab 10. That's it, tab 10. You prepared the transfer that's shown there on tab 10? A Yes. Q And it's dated April the 11th, 1984? A Yes. Q And you witnessed the signature? A I did. Q Do you recall the meeting of April the 11th, 1984? A No, I don't. Q Do you have any recollection of being told by Mrs. Magee what the motivation for the transfer was? A Yes, she felt that since the Hollands took on some responsibility about looking after her and the house, and I believe she said they had a discussion that they felt, the Hollands, that they should have an interest in the house if they were going to spend money and time on it, and she agreed and gave me these instructions to transfer the house to the Hollands and herself as joint tenants. Q At the time, in April of '84 -- no, I'm going to come back to that. When you witnessed the transfer, did you provide her with advice as to whether the transaction was prudent or not, or just do what she said? A No, I think I would have spoken to her on the phone when she called me earlier and explained to her that it's a serious step to transfer property, and that's when she said that she should do it to give the Hollands some protection. Q Now, that's the phone call that you said you don't recall? A I don't recall the phone call, but I know that's what the gist of the conversation was, but I don't know when that conversation took place. Q I guess what I'm asking is are you telling me what you think you would have said, or are you telling me what you recall? A I'm telling you that's what I recall having said but I don't know when I said it. Q Is that the full extent of the recall you have about that conversation, about the wisdom of a transaction? A Yes, but I asked her why she was transferring the property which I felt was a serious step, and that's when she said she thought that the Hollands needed the protection. She wanted to give them that protection because they were spending money and time on the house. Q Did you discuss with her what interests they ought to have? A No, I did not. Q So the joint tenancy of the three of them, was that a -- as opposed to, for example, a tenancy in common with half and half or something other than some other distribution. Did you discuss those possibilities and things with her? A No, I believe that at this time the will was made where they were beneficiaries and joint tenancy would cover Mrs. Magee's control of the home, that they could not evict her and, also, I believe there was at that time a benefit to have her on the title, as far as a home owner grant was concerned. I believe the seniors had a larger home owner grant than non-seniors, and she would be entitled to claim the home owner grant for the house taxes if she was on the title. Q But my question was, was there a discussion with her concerning joint tenancy versus tenancy in common? A I don't recollect explaining that to her, no. Q Or whether it might be a different breakdown of ownership, for example, Mrs. Magee half, and the Hollands the other half, or something like that? A I don't recollect that, no. Q Or any other discussion of any other legal means to satisfy the concern about responsibility for the home? A I don't remember coming up with any other alternative methods. No, I do not. Q Or discussing any with her? A No. Q When she came in in April of 1984 was Mrs. Holland present? A This, I do not remember. Q You're not sure one way or another? A No, I don't.

[96] That matters had changed as far as Mrs. Holland was concerned by June of 1986, appears from this evidence:

Q And what do you recall of that conversation? A I don't recall when the conversation was, but the gist of the conversation, I recollect, was that she wanted to get her property back or give part of it to Dorothy Longmuir. I think her original intention, that I recollect, that she wanted the property back, and I told that she would have to have the Hollands sign the paper to get the property back, and I said if you want to give anything to Mrs. Longmuir, the only thing you can give would be your one-third interest after you sever the joint tenancy and I explained to her that to sever the joint tenancy meant that she would break the joint tenancy between herself and Holland, and that she would end up with one-third, and once she had that one-third, she could do what she wished with it. Q You said that you recall that she wanted to get her property back. A Yes. Q Did she give a reason for that? A I don't remember the reason, if any. No, I don't remember. Q Your recollection is that she wanted to leave the property to Mrs. Longmuir? A No. Q Do I have that right? A No. No, my recollection was that she wasn't going to give any property to Mrs. Longmuir other than by a process of will. Q That's what I meant, leave the property to Mrs. Longmuir. A By testamentary disposition. Q Yes. And was it at that point that you explained to her about the title and joint tenancy and so on? A Yes.

[97] In cross-examination, these questions were put and answered:

Q Okay. You said earlier, during your examination in chief when Mr. Verhoeven was asking you questions, you said something that you believe that Mrs. Magee's name was going to stay on the title because of the particular benefit, the home owner's grant or something to that effect? A Yes. At that time, and I think right up to the present time, the provincial government gives a greater home owner grant to seniors than to non-seniors. Q So is the corollary to that, that at some [time] you were instructed to remove Mrs. Magee's name entirely from the title? A I never heard those instructions. No. Q All right, so I guess what I'm getting, is why were you saying that Mrs. Magee's name had to stay on title. Isn't that a given? A Not if she wanted to give the property to somebody else, she wouldn't have to stay on the title? Q All right, so my question is, did she want to give the property entirely to the Hollands? A She may have. I don't know. I don't think that was ever discussed, but I know that it was discussed that if she stayed on the title, she would not only be protecting herself, but also saving some money for herself and the Hollands. Q And it was your view that she understood exactly what you were talking about at this time, was it? A Yes. I considered her an intelligent person.

[98] Referring to the events of 1986, he said:

Q And you see where it says -- I believe she called or came in -- and she was going to leave everything to Mrs. Longmuir and you were to sever the joint tenancy? A That is correct. Q Again, can you recall if those instructions were given to you by Mrs. Magee or did you, as the lawyer who originally did the transfer, know that you'd have to sever the joint tenancy for this? A Well, the latter part is correct. She knew that she wanted to give something to Mrs. Longmuir, she knew that she wanted the Hollands off the title, and I had to explain to her that it could only be done by

having their signatures. The only way she could get the title back is if they signed and the only way she could give anything to Mrs. Longmuir was to sever the joint tenancy so she herself would be a third owner. I don't believe -- no, in fact I know she did not give me those instructions. I explained that to her. Q Are you absolutely certain that she knew, in fact, that at [that] time that the Hollands were actually on the title, or did she know that only after you had explained it to her? A That's a good question. I don't know if she really knew. I assume she did because I had never done anything contrary to taking them off. She might have done something to take them off, have them signed over in the meantime, but I can't say that I knew that she knew. I cannot say that.

[99] Mr. Alfred Clarke, also a Vancouver solicitor, who was the first witness at trial, had known Mrs. Magee casually because they attended the same church. He had first heard of difficulties between Mrs. Magee and the Hollands in 1987 when Mrs. Longmuir gave him a note which read, in part:

Aunt Nellie is 84 and her health is quite good but my first cousin, Margaret Holland, and her husband, Ken, are a real trial to her. It's really a bad situation health, so I'm hoping there's something that can be done to remove them from Nellie's home and give her some peace of mind. There are many circumstances to discuss about all this and perhaps we could have a chat about it once you've gone over the documents. Thank you for considering this matter for me. Sincerely. Dorothy. [100] He met Mrs. Magee for the first time in a professional capacity on the evening of 4th February, 1988, at Mrs. Longmuir's house, which was not far from Mrs. Magee's house. Mrs. Longmuir was present throughout. Mr. Clarke gave evidence concerning a handwritten statement which Mrs. Magee had given to him, setting out what she perceived to be her problems with the Hollands and which reads, in part:

I did have a slight stroke. I could not phone my niece Dorothy, she was working, so I phoned another, my brother's daughter Mrs. M. Holland. She happens to be my Godchild. I used to look after them when they were children. Dr. Chong was here and they had a chat, then she came in and told me she would like to take over and I would not have to go to a hospital. Any how she did want me to put her name in case I would have to [have] medicine, then any how I did everything I could, she had a hard time to fit all her household into the basement and she asked me for the large bedroom. I loaned it to her and she got two big dogs and keeps them in the bedroom at night now she takes over and never asks me if I approve and she talks to me as if I am the roomer. Her Husband made all the rules and wanted to cut down a tree. The neighbours did not like that but his Wife Margaret told me there was a bad weed so all the trees had to go, he got the men from the Born Again to come and help him. She thought I should go to their Church and I told her no; I was shocked but I am having a big shock, I don't even answer her any more. She told me she was not happy. I told her that was good news, to go. Her husband came up. He said I insulted his wife. I told him I would be glad if they made up their minds to go, and its just because they both hate Dorothy. [101] Having referred to this note, Mr. Clarke said:

A ... We talked about that agreement for one thing, as I've mentioned, between Mr. and Mrs. Holland and Nellie, and we went over that in some detail. She -- we talked about the circumstances of that being entered into. It was apparently instigated to some degree I guess by Dr. Chong who was worried about her living alone after her stroke, and we talked about the conveyance that took place, the transfer from Nellie to herself and Mr. and Mrs. Holland in joint tenancy. Q Yes. A And, this is I believe what she is referring to here and it's consistent with what I recall her telling me where it says:

Then she came in and told me she would like to take over. I would not have to go to a hospital. Anyhow, she did want me to put her name in case I would have to medicine. Now -- Q Yes. A -- that relates to -- Q Yes. A -- her, what she told me on that occasion that she'd been persuaded to transfer two-thirds of her property into the name of Mr. and Mrs. Holland. And, it's my understanding that nothing was ever paid for that transfer. I think I discussed -- I'm trying to reconstruct as best I can. Well -- Q Yes. A -- let me just get my focus here for a minute. Yes, we -- I brought up a question to her whether -- I'm sure I did, whether the transfer of the land into the three names was because of the services they were giving under the agreement. I came away from that meeting with the understanding from her that that was not the case, although I knew in my heart that if there was ever a dispute about this, possibly that would be an allegation of Mr. and Mrs. Holland. The -- when I left the meeting I had understood from her that it was something she was persuaded to do. And, as I said, nothing was paid to her for that in consideration of that transfer.

[102] Thereafter, Mr. Clarke wrote to Mrs. Longmuir thus:

Q And you advised:

We confirm our advice, we doubt there is sufficient grounds under all the circumstances and the fact that too much time has gone by to set aside the earlier transactions regarding the house. And so you gave that advice? A When -- if I might just explain this, before I left the meeting I expressed concern about the delay and that there could have been an outright gift, voluntary gift from her to Mr. and Mrs. Holland in executing those transfers. Q Yes. A And I said I'm a little doubtful that any application to set it aside at this time for practical reasons would be successful, but I wanted to think about it some more and I remember leaving the meeting and going away, thinking about it further and I clearly remember the next morning at the office before I wrote this letter just looking at the -- refreshing my memory on some of the law of undue influence, and then I sat down and wrote this letter February 5th, 1988. Q You were cognizant of Mrs. Magee's age at that time? A Very much. Q And, was that a factor in your advice? A A practical factor. I -- for her to have to go -- to leave the house and then go through a horrible trial like this would be very difficult for a person like that. Q Yes. A But it was, but it was a practical factor but my opinion at that stage that under all the circumstances it would be her word against Mr. and Mrs. Holland presumably and so I, I was doubtful that she would have success in that. Q You went on to say: We also confirmed that in our opinion Mrs. Magee -- should Mrs. Magee move out of the house proceedings could be taken to force the sale of the house. A Yes. Q Could you explain that sentence? A Okay. Q What I meant to do there was to refer to the alternative, that if no

proceedings were taken to set it aside and she was totally unhappy there she could move elsewhere for the sake of her peace of mind, and then from a legal point of view that she could bring proceedings as a joint tenant for partition and sale.

[103] Whether Mrs. Magee saw this letter, Mr. Clarke could not say.

[104] In cross-examination, these questions were asked and answered:

Q But, one of the central items of discussion at that time was the transfer of the house to the Hollands, and supposedly Mrs. Magee being upset about that transfer; correct? A Correct. Yes. Q All right. Now, do you have an independent recollection of Mrs. Magee telling you that she'd been in any way forced to make that transfer? A I'd like to think about that for a minute. I don't think I have a memory of her saying she was forced to, but my recollection is that she was talked into it. Q All right. But, you've told us that you've had to reconstruct -- A Yes. Q -- this meeting to some extent? A Yes. Q All right. And since that day, and in fact, until fairly recently your role on behalf of Mrs. Longmuir -- and again I'm not suggesting there's anything improper here -- but your role has been to assist her in contesting the transfer to the Hollands and contesting the 1991 Will to the Hollands; is that correct? A I have never recommended to Dorothy that she contest the, the transfer. Q All right. A Yeah. Q But, you'll grant me that you wrote a letter to the Public Trustee calling the transfer into question? A Yes.

[105] That letter, dated 5th September, 1991, was, in part:

I have known Dorothy Longmuir and her brothers and sister for many many years and reside fairly close to her in Point Grey. I can assure you that she is a person of sincerity, honesty and integrity. She contacted me recently to advise that having been out of town for a short time she found on her return that her Aunt refused to communicate with her or see her. Her Aunt now is I believe approximately 87 years in age and I know her personally. Dorothy had for considerable time been managing the affairs of her Aunt under Power of Attorney and had signing power on her bank account. I am personally aware of the attention Dorothy has given to the care and help of her Aunt. Her Aunt resides at the same home with a person who is, I believe, a niece by the name of Margaret Alice Holland. Mrs. Longmuir, and I myself, are concerned that Mrs. Magee has come under the influence of Mrs. Holland and that in the present condition and age of Mrs. Magee she is unable to protect her own interests. Mrs. Longmuir found when she returned that the bank account which Mrs. Magee had on which Mrs. Longmuir had Power of Attorney had been closed out by Mrs. Magee under the influence of Mrs. Holland and the account moved elsewhere. [106] It is obvious from this letter that Mr. Clarke, who like Mr. Comparelli is a member of the legal profession respected by his contemporaries, could not have been informed about Mrs. Longmuir's "removal" of \$6,000.00 from her aunt's bank account.

[107] Mr. Bonar gave evidence and described conversations with his great aunt in 1986 and following. He spoke of her as being "very free spirited, when she wanted to do something she did it". He also testified that the circumstances of the Hollands moving in was not a subject of discussion although he did refer to an agreement which Mrs. Magee had made with them that they would help her if emergencies came up. There is nothing in his evidence of Mrs. Magee saying why it was that she had signed the transfer.

[108] In October 1990, a meeting took place between Mrs. Magee and Mr. Todd Kerr, also a solicitor, who testified:

Q Mr. Kerr, you said that you do recall vaguely meeting with the client. A Yes, I do. Q Can you tell me any of the details that you recall of that? A I recall meeting with two elderly women in my boardroom at my old firm. Back in 19 -- I believe it was October, 1990 -- I met with two elderly women and the firm at that time was Kerr Mouzourakis. I do recall meeting two women and it was in my boardroom. Q You don't recall any -- what was discussed at that meeting? A Well, again, my lord, just caution, I had to review the file to trigger my memory. What I can specifically recall is meeting [with] the women. I do recall that I was advised that there was a problem in the household of Mrs. Smith. I do recall she lived on West 4th Avenue. In fact, I even drove to the home, because it's in my neighbourhood, just to look at it, just because I knew there was a problem. I knew there was a problem with -- I knew that Mrs. Smith had let two relatives move into the house, I believe a niece or nephew and her husband, the Hollands. I knew there were problems that had arisen. She wasn't getting along with them. I recall problems regarding a dog moving in that she didn't expect. I was advised at the time -- I do recall being advised that they had gone to see somebody at UBC, a student at UBC, who had written a letter and I believe my instructions or my proposed role was to look at -- also I recall being told the property had been transferred back in 1984. I didn't recall the year '84 until I looked at my files. I do recall it being transferred to these people and they wanted to look at voiding this transfer or getting these people out of the house, getting into that problem.

[109] In cross-examination, he said:

Q With respect to matters of mental competency, do you have any recollection of asking -- let me back up. As between the two ladies that you saw you don't recall which one would be Mrs. Smith and which one was the other lady? A No, I don't. Q And you recall none of the discussion whatsoever, other than the generalities that you've mentioned? A No, I just recall the problem. I recall the problem with the people in the house and the transfer of the property before, but, no, I could not be specific, I'm sorry.

[110] It was Mr. Kerr who had in his possession, apparently given to him by Mrs. Magee in October 1990, the Will which is propounded by Mr. Bonar.

[111] Earlier in the summer of 1990, Mrs. Magee had consulted Ms. Maryanne Prohl, who at that time was participating in a students' legal aid clinic. She did not use the name Magee when she saw Ms. Prohl. She used the name which had been her original married name, of Smith. According to Ms. Prohl:

Q Now, you said that Mrs. Smith had concerns about a niece who was living [in] the house. What did she say, if you can -- to the best of your recollection on that? A I cannot recall the exact words that she said but in her words to me is that she was frightened of the niece and felt that her niece was being abusive towards her. I was quite concerned with respect to what she was relaying to me, and that's why I felt that it was necessary to write a letter, and it's concern for her safety and her welfare at the time after that meeting. I cannot recall specifically what she said. Q Was there a course of action that was discussed or a possible course of action that was discussed with her on the first meeting, something that could be done? A At that time we discussed a course of action, and one of them was preparing a letter but, at that point is we didn't do anything after that first meeting because she was quite frightened, and I explained to her that she basically think about things and that we would meet again. Q In relation to the abuse that she mentioned, did she give you any detail on that? Did she provide you with any information? A She would have provided me with details at the time but I cannot specifically recall.

[112] Subsequently, a further meeting was held and Ms. Prohl wrote a letter to the Hollands accusing them of abusing Mrs. Smith, to which a reply came from Mr. Davis pointing out that the property was held in joint tenancy. [Mr. Davis appears to have been unaware that the joint tenancy had been severed in 1986.]

[113] Having received Mr. Davis's letter as to the state of title to the property, Ms. Prohl suggested to Mrs. Magee that she consult a solicitor.

[114] Ms. Prohl was asked to explain some notes which she had written on the copy of the certificate of title sent to her by Mr. Davis, and this was her evidence:

Q What does this note indicate to you that she advised? A This note indicates to me exactly what's written is because [she] was ill and then I put a hyphen that it was a stroke. My summary note here is I was concerned with respect to this state of the property, and that during that period when the transfer occurred that she was providing me with the information that she was ill and had had a stroke. I don't specifically recall what she advised me at that time, but the notation here is in reference to when I had received this letter with the title that I was surprised and she was surprised, as well, and I had obviously, when I had met with her, had questioned her about the facts surrounding the transfer of the title because I had acted on the basis that it was -- Q All right, I've heard what you said. I just want to get this straight, though. The best that you can do with this note of yours is that she would have advised you that this transfer took place because she was under duress and she was ill in relation to a stroke at the time. That's the best you can make out of this? A What I can make out of that is, I guess is what I advised, is that she was surprised of her lack of knowledge by the state of her title. Q Well, I'm not talking about whether she was surprised or not, I'm talking about your note which says, "Void, order, duress, because

she was ill, stroke." A That's correct. That's my knowledge. THE COURT: Mr. Verhoeven? MR. VERHOEVEN: Well, I think it says under duress but I'm not certain -- I think she said clearly already that she doesn't recall what she was told and she had read us the notes, and I'm not -- THE COURT: I think Mr. Davis was suggesting to her what her note might indicate. MR. VERHOEVEN: All right. THE COURT: Perhaps you had better repeat it, Mr. Davis? MR. DAVIS: Yes. Q I'm asking you does your note not indicate to you that she told you that at the time this property was transferred it was done under duress because she was ill with a stroke? A Perhaps what my note indicates is that -- to me -- is that in one of the points that I was saying, is that it was void, and that it was made under duress, and because she was ill -- she was ill because she had a stroke at the time, and that's what the arrow is correlating to, her illness. Q Yes, that's what I thought. A That's what it meant.

[115] Ms. Prohl also testified that Mrs. Magee appeared to be surprised at the state of the title. If Ms. Prohl has correctly interpreted her notes, one is left with a question of Mrs. Magee's mental health in 1990. The evidence does not show that she had any continuing physical or mental deficiencies in April 1984.

[116] I have conducted this meticulous examination in order to answer this question: If in May 1984 Mrs. Magee, regretting what she had done, had sued to recover the lands, could she have succeeded, telling, of course, the exact truth of what had motivated her, in a trial taking place immediately thereafter? This is the true question, although the practicality is that a sensible solicitor consulted by the Hollands at that time would have advised them that a judge would be so sympathetic to Mrs. Magee they might as well give the property back, pack up and leave Mrs. Magee to her own devices.

[117] Having considered the whole of the learned judge's reasons, I am not satisfied he focused on this critical issue. Mrs. Holland's behaviour and Mrs. Magee's deteriorating mental and physical condition in the years that followed, especially in the last two years of her life, loom, on the issue of the transfer, far too large in the judgment.

[118] In *Allcard v. Skinner*, *supra*, Lindley L.J. said, at pp. 182-83:

The principle must be examined. What then is the principle? Is it that it is right and expedient to save persons from the consequences of their own folly? or is it that it is right and expedient to save them from being victimised by other people? In my opinion the doctrine of undue influence is founded upon the second of these two principles. Courts of Equity have never set aside gifts on the ground of the folly, imprudence, or want of foresight on the part of donors. The Courts have always repudiated any such jurisdiction. *Huguenin v. Baseley* is itself a clear authority to this effect. It would obviously be to encourage folly, recklessness, extravagance and vice if persons could get back property which they foolishly made away with, whether by giving it to charitable institutions or by bestowing it on less worthy objects. On the other hand, to protect people from being forced, tricked or misled in any way by others into parting with their property is one of the most legitimate objects of all laws; and the equitable doctrine of undue influence has grown out of and been developed by the necessity of grappling with insidious forms of spiritual tyranny and

with the infinite varieties of fraud. [119] In the succeeding paragraph Lord Lindley speaks of "[protecting] persons from the exercise of such influence under circumstances which render proof of it impossible. The Courts have required proof of its non-exercise, and, failing that proof, have set aside gifts otherwise unimpeachable."

[120] This paragraph is addressing cases like that of Miss Allcard who was a postulant in a religious order and had no independent advice.

[121] In my opinion, if one starts with the principle, as he expresses it, then matters such as the presence or absence of independent advice, in which I include the opportunity to obtain it, the advantages and disadvantages to the donor, the opportunity of the donee to influence the donor, and the relationship of the donor to the donee, and the unusual nature of the transaction, are all simply matters to be considered in answering the ultimate question, which is whether, on the balance of probabilities, the transaction was the result of equitable fraud practised by the donee on the donor.

[122] By "unusual nature of the transaction", I mean one which one would not ordinarily expect to occur. Such a case was *Re Brocklehurst*, [1978] 1 All E.R. 767 (C.A.), in which the aged, eccentric and wealthy Sir Philip Brocklehurst gave a 99 year lease of the extremely valuable shooting rights over his estate to the local mechanic, thereby defeating the expectations of his relatives. The concluding words, at 776-777, of Lord Denning's dissenting judgment (the majority upheld the gift) must be the high water mark of this emphasis on the out of the ordinary nature of the transaction:

[The judge] said that the 99-year lease was not to be accounted for by the ordinary motives of ordinary men. If I may suggest a motive, it appears to me that he was deliberately setting out to sever the estate and make it unsaleable in the hands of his successor: and he used the gift to Mr. Roberts as the tool for this purpose. He laughed and laughed about it, saying that when the gift was discovered, 'I shall be like a fox. I shall have gone to ground.' Forgive him, if you please, because he was so old and so eccentric and without any independent adviser. But do not let the transaction stand so as to work the destruction of an estate of which he was morally, though not in law, only a life tenant. It was his duty to preserve the estate in the interests of his family, the neighbourhood and the country at large. To my mind he had no right in equity whatever to do what he did. [123] In the case at bar, Mrs. Magee had the opportunity for independent advice and Mr. Comparelli raised with her the gravity of the step she was taking. That step was to her both an advantage and a disadvantage. It was an advantage to her to have the Hollands bear part of the cost of maintaining the house, including the taxes, and to have a reason to remain, for if they were not there, who could she get to come in, and a disadvantage to her to lose the right to exclude them from the property. That they had an opportunity to influence her is, in this case, a given, for they were living in the house. Mrs. Holland was not a stranger. That an aunt might prefer one niece over another is not unusual and in and of itself, in my opinion, does not give rise to an inference of undue influence. When I add to these various criteria the fact that in 1985 Mrs. Magee made a Will in favour of Mrs. Holland and that she did not at any time say to anyone that the Hollands had persuaded her to the transfer against her will, I conclude that had Mrs. Magee

brought an action shortly after the transaction in question, she could not have succeeded if the trial judge had not allowed himself to be swayed by sympathy.

[124] Earlier in these reasons, having quoted from Lord Eldon's judgment in *Huguenin v. Baseley*, I remarked that I would return to the question of "public utility". Nearly 200 years have elapsed since that judgment and accepting that Lord Eldon considered himself to be settling the law of equity for all time, I doubt that even he would have considered the public utility of one century to be the public utility of future centuries. It is not, I think, a matter of "public utility" for the courts of today to espouse the proposition that 80 year olds who are of sound mind will not convey property, save as the result of undue influence. To put it another way, there should not be an unspoken presumption that the aged are doddering of mind.

[125] I would allow the appeal, set aside the judgment below, dismiss Mr. Bonar's claims, and pronounce for the validity of the Will of 1991.

[126] The question of costs was not fully addressed by counsel. In this case, I do not consider that counsel would say anything useful on the subject. The difficulties of the trial were in large measure caused by the discovery of the new Will and, therefore, I would not award costs of the trial to any party.

[127] As to the costs of the appeal, if my colleagues were in agreement with me on the issue of which is the last Will of the testatrix, I would award the costs of the appeal on Scale 1 to Mrs. Holland against Mr. Bonar on the footing that Mr. Bonar had unsuccessfully both propounded the Will of 1990 and attacked the transfer.

[128] As, however, they are not of that mind, I concur in the disposition of costs proposed by Mr. Justice Hall.

"THE HONOURABLE MADAM JUSTICE SOUTHIN"

Reasons for Judgment of the Honourable Madam Justice Newbury:

[129] At the end of a nine-day trial in Supreme Court, Mr. Justice Drost found that a Will made in 1991 by Mrs. Helen Magee, also known as Mrs. Helen Smith, was invalid because the Court could not be satisfied that Mrs. Magee had had testamentary capacity when she executed it. Drost J. also ruled that a deed of land executed by Mrs. Magee in 1984 transferring her home on West 4th Avenue in Vancouver into her name and that of the appellant Mrs. Holland and her husband as joint tenants, was invalid because the Court could not be satisfied Mrs. Magee's mind was not unduly influenced by Mrs. Holland's "domineering attitude". Mrs. Holland, who was the sole beneficiary under the 1991 Will, appeals both findings on the basis that they are not supported by the evidence or are contrary to the evidence.

[130] Since the facts of the relationship between Mr. and Mrs. Holland and Mrs. Magee, and between the respondent Mrs. Longmuir and Mrs. Magee were explored at great length by the trial judge in his Reasons (see B.C.S.C., Vancouver Registry No. A951370, dated July 2, 1998), I do not intend to revisit them at length. However, some background is in order. In 1983, Mrs. Magee was 80 years old and living alone in her Vancouver home. She suffered from mild congestive heart failure and experienced a mild stroke. Her doctor spoke to Mrs. Holland, a niece of Mrs. Magee's, expressing concern about the aunt, and on December 2, 1983 Mrs. Magee entered into a written agreement with Mr. and Mrs. Holland.

[131] The agreement, obviously prepared by the Hollands, contemplated that they would share Mrs. Magee's residence with her. They intended to use their part of the house not only for themselves, but to shelter girls from "off the street". The agreement provided in considerable detail for the parties' respective responsibilities. The Hollands, for example, were to pay half the property taxes unless Mrs. Magee was unable to pay her half, in which case they were to pay the entire amount. They were also to pay certain other expenses, "get approval from Helen [Magee] before any changes are made to the house", "maintain yard and house at present standards", and undertake some renovations to the basement where they would be living. The Hollands agreed to assist Mrs. Magee in various household chores, but it was agreed Mrs. Magee was to have "her life to live", as were the Hollands. The document stated that they would be:

... considered as strangers renting Helen's basement for living conditions. As such there must be certain conditions that apply and these conditions must be agreed to by both parties. As the owner of the house Helen must have her privacy and independence of the main floor, except for [the Hollands'] use of the upstairs bedroom and bathroom as previously established. These same conditions must apply to [the Hollands] over their tenancy of the basement rooms, it is to be their home, and as their home, they must be free to invite you [sic] or their friends only if they wish to share their friendship. . . .

and further:

Helen must keep moving about on her own feet for as long as possible. Time has a way of taking care of our needs, and when Helen can no longer use the bus, there are taxis or other means such as the HandiDart bus to get Helen to her meetings. This way Helen retains her freedom and independence. [The Hollands] are not babysitters and Helen must insist upon being free to move about as she wishes, and Helen must allow [the Hollands] the same freedom.

Finally, the agreement stated that if the Hollands did not live up to their obligations, Mrs. Magee would be entitled to ask them to leave upon one month's notice "and if Helen doesn't live up to her agreement this will free [the Hollands] of their commitment to her and they have the right to move out giving Helen one calendar month as notice." The Hollands moved in with Mrs. Magee in January 1984.

- [132] It is noteworthy that the agreement made no mention of any transfer of the home or an interest therein to the Hollands, whether during Mrs. Magee's life or on her death. However, within a few weeks of the Hollands' move, Mrs. Magee attended at the office of a solicitor, Mr. Comparelli, and instructed him to transfer title to the home into her name and those of the Hollands as joint tenants. Mr. Comparelli was not able to recall much about his meeting with Mrs. Magee but remembered her saying that the Hollands felt that if they were going to spend money on the house, they should have an interest in it, and that she had agreed. He testified that he "would have" explained to Mrs. Magee that she was taking a serious step "and that's when she said she thought that the Hollands needed the protection." Mr. Comparelli did not recall explaining to Mrs. Magee the difference between joint tenancy and tenancy in common, but did suggest in his testimony that joint tenancy would ensure that Mrs. Magee remained in control of the house so that the Hollands could never "evict her".
- [133] In due course, the transfer documents were signed and registered in the Land Titles Office. It is fair to say that the relationship between the Hollands and Mrs. Magee began to deteriorate quickly thereafter. Mr. Holland (who was later divorced from his wife) testified, for example, that Mrs. Holland often shouted at Mrs. Magee and behaved angrily towards her. In March 1986, Mr. Holland wrote a letter to Mrs. Magee accusing her of "half truths and lies" during a recent Easter visit by "Bobby" and stating that in order to protect Mrs. Holland from Mrs. Magee's "vicious mouth and warped mind", Mrs. Magee would have to look after herself "until such time as you prove to us that you have genuinely changed your ways."
- [134] The "Bobby" referred to in the letter was Mr. Bonar, a grandnephew of Mrs. Magee's with whom she had previously had a close relationship. He had moved away but was visiting his great aunt in 1986 and was shown the letter. The Hollands testified that during his visit, Mr. Bonar agreed their position was reasonable; however, Mr. Bonar in his testimony denied any such discussion in 1986. What he did recall was being "screamed at" by Mrs. Holland after he took his aunt out for an afternoon. In later conversations with his aunt, she complained of feeling like a "prisoner in her own house" and about various things the Hollands were doing to her home, allegedly against her will. In particular, Mrs. Magee (who was small and frail) was terrified of two large dogs they kept on the property, and objected to the fact the Hollands had cut down many large old trees in the yard. When Mr. Bonar visited at Christmas in 1992, the door was answered by a stranger and the nephew had to push his way in. He found his aunt very "groggy" in bed. He objected to the pills Mrs. Holland was administering to Mrs. Magee. Mrs. Holland phoned him the next day and told him that she had obtained a restraining order against him and that he should never come near the house again. (There was no evidence of such an order.)
- [135] The trial judge found that most of the evidence given by the Hollands was not believable. On the other hand, he accepted Mr. Bonar's evidence, which was also consistent with that of Mrs. Peterson, a long-time friend of Mrs. Magee; Mrs. Hepenstall, an acquaintance who

renewed her friendship with Mrs. Magee in 1984; Mrs. Magee's parish priest, and others. It was also confirmed by Mrs. Longmuir, another niece of Mrs. Magee, who was with her aunt when she saw another lawyer, Mr. Clarke, in 1988. At that time, Mrs. Magee expressed her unhappiness with the Hollands and discussed both the December 1983 agreement and the property transfer. She revoked an earlier power of attorney she had granted in favour of the Hollands. The trial judge summarized Mr. Clarke's evidence:

Mr. Clarke testified that Mrs. Magee told him that evening that she wanted the Hollands out of her home, and that she wanted to recover sole title to the Property. He also has a clear recollection of Mrs. Magee telling him that the Hollands were very antagonistic toward Mrs. Longmuir, and that Mrs. Holland had told her that she had the power not to let Mrs. Longmuir into Mrs. Magee's home. Mr. Clarke said that he came away from that meeting believing that Mrs. Magee had been "persuaded" to transfer an interest in the Property to Mr. and Mrs. Holland. However, under cross-examination, he acknowledged that he has no recollection of Mrs. Magee telling him that she had been "forced" to make the transfer, and he said that it was only his impression that she had been "talked into it". In a letter to Mrs. Longmuir, written the next day, Mr. Clarke said:

We confirm our advice that we doubt that there is sufficient grounds, under all the circumstances and the fact that too much time has gone by, to set aside the earlier transactions regarding the house. We also confirm that, in our opinion, should Mrs. McGee [sic] move out of the house, proceedings could be taken to force the sale of the house. Mr. Clarke testified that Mrs. Magee's age was a "practical factor" he had in mind when reaching that conclusion. He said that he felt that any attempt by Mrs. Magee to revoke the transfer would perhaps result in unpleasant litigation, something he felt she would sooner avoid. [paras. 52-5]

[136] In 1990, Mrs. Magee, accompanied by her friend Mrs. Peterson, consulted a student at the Law Students' Legal Advice Program and told her Mrs. Holland was abusive towards her and that she was frightened of Mrs. Holland. After further meetings, the law student wrote a letter to Mrs. Holland on Mrs. Magee's behalf, instructing the former to vacate the house. However, she received a letter from Mrs. Holland's solicitor advising her that the Hollands owned the property in joint tenancy with Mrs. Magee - a fact that seemed to surprise Mrs. Magee when the law student informed her of the letter. Mrs. Magee instructed the student to prepare a new Will, which she signed in or around September 1990, appointing Mr. Bonar as her sole executor and leaving the residue of her estate equally between him, Mrs. Longmuir, Mrs. Holland and Mrs. Peterson. This Will was not found until after the trial began, in the offices of a Mr. Kerr, a Vancouver solicitor. Mr. Kerr testified that he had met with Mrs. Magee in October 1990, at which time she said she wanted to "avoid" the transfer of the interest in her property to Mr. and Mrs. Holland. He did not recall anything further but as the trial judge noted, it is clear that no further steps were taken.

[137] In 1991, Mrs. Magee had a falling-out with Mrs. Longmuir when the latter used her power of attorney to transfer some \$6,000 from Mrs. Magee's bank account without her permission. Mrs. Magee immediately cancelled Mrs. Longmuir's authority to deal with her property and closed the account. In August 1991, she instructed Mr. Comparelli to prepare a

new Will appointing Mrs. Holland as sole executrix and beneficiary. Mrs. Longmuir, having returned from a trip, soon learned of these facts and contacted Mr. Clarke again to express concern that Mrs. Magee had come "under the influence of Mrs. Holland" and that Mrs. Magee was "unable to protect her own interests". Mr. Clarke wrote to the Public Trustee in this regard.

- [138] For some reason, it was not until a year later that the Public Trustee took action. Mrs. Magee was assessed, over Mrs. Holland's strenuous objections, by medical personnel in June 1992. They found "significant cognitive impairment" attributable either to Alzheimer's Disease or dementia with multi-infarct origins; but although each has a gradual onset, the doctor could not say whether Mrs. Magee would have been significantly impaired a year earlier, when the last Will was made. On August 4, 1992 a Certificate of Incapability was issued and the Public Trustee was ultimately appointed to manage Mrs. Magee's affairs.
- [139] Mrs. Magee died in October 1994 at the age of 91. The questions thus arose: was her last Will (executed in 1991) a valid one? If not, was the 1990 Will valid? And did Mrs. Magee's Vancouver home form part of her estate, or did one-third pass to Mrs. Holland (who had already received her husband's one-third) as the surviving joint tenant?

The Trial Judgment

- [140] The trial judge began his analysis by referring to the presumption that arises when a person who is in a position to exercise a dominating influence over another, receives a substantial benefit from that other. In these circumstances, the benefit is presumed to have been obtained by the exercise of undue influence unless there is some evidence to the contrary. In *Geffen v. Goodman Estate* [1991] 2 S.C.R. 353, the Court was split on the application of this principle to commercial transactions, but Wilson J. (with Cory J. concurring) and La Forest J. (with McLachlin J., as she then was, concurring) agreed that the presumption of undue influence "will arise . . . when the parties are in a relationship of influence, where one person is in a position to dominate the will of another." (at 392)
- [141] As Drost J. noted, counsel for Mrs. Holland agreed that the presumption arose in this case in light of the relationship between Mrs. Magee and Mrs. Holland. This would place the case in the "second group" of cases referred to by Lindley L.J. in the locus classicus on the subject of undue influence, *Allcard v. Skinner* (1887) 36 Ch. D. 145 (C.A.). Wilson J. quoted from *Allcard* in *Geffen*:

The second group consists of cases in which the position of the donor to the donee has been such that it has been the duty of the donee to advise the donor, or even to manage his property for him. In such cases the Court throws upon the donee the burden of proving that he has not abused his position, and of proving that the gift made to him has not been brought about by any undue influence on his part. In this class of cases it has been considered necessary to shew that the donor had independent advice, and was removed from the influence of the donee when the gift to him was made. [*Geffen* at 369-70; emphasis added.]

Wilson J. also approved the statement in *National Westminster Bank Plc. v. Morgan*, [1985] 1 A.C. 686 (H.L.), to the effect that in order to determine whether the presumption has been rebutted in any particular case, a "meticulous examination of the facts" is called for. (at 381)

[142] In my opinion, this is exactly what the trial judge carried out in the case at bar. He correctly stated the law as established by Geffen and other authorities, reviewed the evidence of all major witnesses at length, made various findings of fact and credibility, and concluded that Mr. and Mrs. Holland had failed to satisfy the "heavy onus cast upon them with respect to the April 1984 transfer of title." (para. 195) In the analysis of Drost J.:

The entire circumstances, when coupled with Mr. and Mrs. Holland's untruthful testimony about the meeting with Dr. Chong at Mrs. Magee's home in November 1983, leave me with a serious doubt as to whether the transfer reflected a free and unfettered expression of Mrs. Magee's mind. In short, I am not satisfied that the Hollands, in particular Mrs. Holland, did not unduly influence Mrs. Magee with respect to that transaction. Moreover, as Bouck J. pointed out in *Bhandar v. Bhandar* (unreported, November 28, 1996, Victoria Registry, Docket No. 94 4572), paragraph 42:

In this . . . class of cases, the court interferes not on the ground that any wrongful act has in fact been committed by the donee but on the grounds of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused. [paras. 196-7]

The latter statement of Bouck J. may be traced back to the reasons of Cotton L.J. in *Allcard*, *supra*, at 171.

[143] In *Geffen*, the Supreme Court of Canada also emphasized the limited scope for appellate intervention in cases of this kind. Wilson J. quoted from *Harper v. The Queen* [1982] 1 S.C.R. 2, and *Schreiber Bros. Ltd. v. Currie Products Ltd.* [1980] 2 S.C.R. 78, to illustrate the Court's "non-interventionist approach to the review of trial court findings." In this case, despite the argument of counsel for Mrs. Holland that the presumption of undue influence was rebutted by Mrs. Magee's attendance before Mr. Comparelli to execute the 1984 transfer document, the trial judge remained unpersuaded. As Mr. Verhoeven argued, this conclusion was not without a basis in the evidence. The nature of the "advice" Mrs. Magee received in 1984 was not clearly recalled by the solicitor, and in any event Mrs. Magee was at all times in the position of being dominated by the Hollands. She was never "removed from the influence of the donee" at any time after late 1983. The Hollands continued to live in her basement (Mrs. Holland still occupies the house as far as I am aware) and to exercise influence, if not control, over her; and Mrs. Magee was sufficiently frail that if she did not have them to look after her, she likely faced institutionalization. Her position was extremely difficult, and was likely similar to that facing many elderly persons who wish to remain independent and for that purpose, bind themselves to make "gifts" or bequests to relations. I do not suggest that such transfers will never be valid or even that the presumption of undue influence will always arise; but in the circumstances of this case, it clearly did arise. From Mrs. Magee's many complaints to others and from the direct

evidence of Mrs. Hollands' domination of her, the trial judge was entitled to come to the conclusion that the presumption remained unrebutted on the evidence before him. I see no basis on which this court could interfere with that conclusion.

The 1991 Will

[144] With respect to the Will executed by Mrs. Magee in 1991, Drost J. noted that generally, the validity of a Will is presumed when it is shown to have been duly executed and read over by or for the testatrix and when she appeared to understand it. However, the trial judge continued:

. . . when suspicious circumstances are present, the presumption of validity is spent and the propounder of the will reassumes the legal burden of proving, on a balance of probabilities, that the testatrix had knowledge of and approved the contents of the will. In addition, where the suspicious circumstances relate to the mental capacity of the testatrix, the propounder reassumes the legal burden of establishing testamentary capacity. In such a case, the evidence must be carefully scrutinized in accordance with the gravity of the suspicion. [paras. 102-3]

In this regard, the trial judge noted the decision of the Supreme Court of Canada in *Vout v. Hay* [1995] 2 S.C.R. 876, a case in which both the testator's capacity and his freedom from undue influence were in question. Sopinka J. for the Court summarized the applicable law as follows:

. . . suspicious circumstances may be raised by (1) circumstances surrounding the preparation of the will, (2) circumstances tending to call into question the capacity of the testator, or (3) circumstances tending to show that the free will of the testator was overborne by acts of coercion or fraud. Since the suspicious circumstances may relate to various issues, in order to properly assess what effect the obligation to dispel the suspicion has on the burden of proof, it is appropriate to ask the question "suspicion of what?" . . . Suspicious circumstances in any of the three categories to which I refer above will affect the burden of proof with respect to knowledge and approval. The burden with respect to testamentary capacity will be affected as well if the circumstances reflect on the mental capacity of the testator to make a will. Although the propounder of the will has the legal burden with respect to due execution, knowledge and approval, and testamentary capacity, the propounder is aided by a rebuttable presumption. Upon proof that the will was duly executed with the requisite formalities, after having been read over to or by a testator who appeared to understand it, it will generally be presumed that the testator knew and approved of the contents and had the necessary testamentary capacity. Where suspicious circumstances are present, then the presumption is spent and the propounder of the will reassumes the legal burden of proving knowledge and approval. In addition, if the suspicious circumstances relate to mental capacity, the propounder of the will reassumes the legal burden of establishing testamentary capacity. Both of these issues must be proved in accordance with the civil standard. [paras. 25-7]

[145] In the case at bar, the "suspicious circumstances" related both to Mrs. Magee's testamentary capacity and to her freedom from undue influence. On the issue of capacity, Mrs. Magee was found to be incapable in 1992 and as I have noted, there was expert evidence from which it could be inferred that her mental decline was likely a slow one, rather than one that had started only in August 1992 after she suffered a fall, as Mrs. Holland alleged. The questions asked of Mrs. Magee by the solicitor who prepared the 1991 Will were perfunctory and not aimed at testing her mental capacity. As Rand J. noted in *Leger et al. v. Poirier* [1944] S.C.R. 142:

. . . there is no doubt whatever that we may have testamentary incapacity accompanied by deceptive ability to answer questions of ordinary and usual matters: that is, the mind may be incapable of carrying apprehension beyond a limited range of familiar and suggested topics. A "disposing mind and memory" is one able to comprehend, of its own initiative and volition, the essential elements of will-making, property, objects, just claims to consideration, revocation of existing dispositions, and the like . . . [at 161]

[146] With respect to the presumption of undue influence, the trial judge also found that the suspicious circumstances raised by the dominating influence of Mrs. Holland over Mrs. Magee were not dispelled, and indeed the evidence is even stronger as to that influence in the latter years of Mrs. Magee's life than it was in the early years of the 1983 agreement. As the trial judge noted, for example, Mrs. Holland made it "difficult, if not virtually impossible" for any of Mrs. Magee's other relatives or friends to see her after she had signed the 1991 Will, and even retained control of her mail so that friends' letters went unanswered.

[147] In all the circumstances, I am not persuaded that any reversible error of law or fact was made by Mr. Justice Drost, whether in setting aside the 1984 transfer, in declaring the 1991 Will invalid or in upholding the 1990 Will, which was, Drost J. noted, the "only one as to the terms of which neither of [Mrs. Magee's] nieces, nor her great-nephew, could have had any direct influence."

[148] I would therefore dismiss the appeal.

[149] In light of the fact that a majority of this court has agreed that the appeal should be dismissed as regards the 1991 Will, and that it should be allowed as regards the 1984 transfer, I agree with the disposition of costs proposed by Hall J.A.

"THE HONOURABLE MADAM JUSTICE NEWBURY"

Reasons for Judgment of the Honourable Mr. Justice Hall:

[150] I have had an opportunity to read, in draft, the Reasons for Judgment of Madam Justice Southin and Madam Justice Newbury. I concur, in the conclusion of Madam Justice Southin, that the 1984 transfer ought not to be set aside. It is significant to me that, in 1988, at the time of her discussions with a solicitor, Mr. Clarke, Mrs. Magee took no action to set aside the 1984 transfer. I also specifically endorse what Madam Justice Southin says in para. 123

of her Reasons. It seems to me, particularly on the basis of Madam Justice Southin's reasoning in that paragraph, that the 1984 transfer ought to be upheld. I believe that the courts must afford a measure of deference to persons to enable them to make arrangements which they perceive as beneficial. It follows that I would allow the appeal on this issue.

- [151] Concerning the issue of which will, executed by the testatrix, ought to be found to be valid, I am not disposed to differ from the conclusion reached by the trial judge. On this aspect, I am generally in agreement with the Reasons expressed by Madam Justice Newbury. It appears clear to me that the 1990 will was prepared and executed during the approximate time period September 15, 1990 to October 15, 1990. Ms. Prohl, a lawyer, who was called to the Bar in the year 1992 but was a student at the University of British Columbia in 1990, testified that she had a limited recollection of drawing the will but was of the view that she had done so. Mr. Kerr, a lawyer, in whose office the will ultimately was reposed around October 18, 1990 and ultimately discovered during the course of the trial in 1997, also had a very sketchy recollection of his dealings with Mrs. Magee concerning a will. Ms. Prohl came to know Mrs. Magee in July 1990 when she and her friend, Mrs. Peterson, came into a Law Student Legal Advice Program Clinic to consult with someone concerning problems Mrs. Magee felt she was having with the appellant, her niece, Mrs. Holland.
- [152] Mrs. Peterson, a long time friend and near contemporary in age to Mrs. Magee, had been a neighbour of Mrs. Magee for a number of years. As I have determined from the evidence, the two saw each other pretty regularly until late 1990. Mrs. Peterson often visited with Mrs. Magee and regularly provided her with car transportation. Apparently, the two women saw a local newspaper ad concerning the Clinic at which the law student, Ms. Prohl, worked in the summer of 1990. With a view to seeing if anything could be done about the problems Mrs. Magee felt she was having with the appellant, Mrs. Peterson drove the testatrix to the Clinic where Ms. Prohl interviewed the two. There was a subsequent interview where Ms. Prohl interviewed Mrs. Magee alone to ensure that she was not being influenced by anyone. Arising out of these consultations, Ms. Prohl wrote a letter asking Mrs. Holland, in effect, to leave the premises where she resided with Mrs. Magee. Nothing ever came of the letter because, as a tenant in common, the appellant had as much right to be in the house as did Mrs. Magee. It seems clear from the evidence that, on a later occasion in September, there was another meeting between Mrs. Magee and Ms. Prohl where the 1990 will was drawn up.
- [153] How Mrs. Peterson came to be a defendant in this case has about it a quality of the fortuitous that reminds one of scenes in novels where missing persons turn up at the eleventh hour. When this litigation was commenced, as can be seen from the Reasons of my colleagues, the contestants were Mrs. Longmuir, and Mr. and Mrs. Holland. The trial had barely gotten underway, in March of 1997, when it came to the attention of counsel that the wills of 1986 and 1991 might not be the only competing wills. The 1990 will had surfaced. Thereafter, the trial had to be adjourned and it reconvened in the fall. By then, amendments had been made to the pleadings to recognize the new realities. Counsel for

Mrs. Longmuir, who was propounding the 1986 will, had to launch an assault on the validity of the 1990 will as well as the 1991 will. Thus, Mrs. Peterson and Mr. Bonar became defendants along with the appellant and her former husband.

[154] Mrs. Peterson was called as an adverse party by counsel for Mrs. Longmuir and she was cross-examined pursuant to the provisions of Rule 40(20). It is clear from her evidence that Mrs. Magee frequently complained to Mrs. Peterson, in the period around 1989 and 1990, that relations between her and Mrs. Holland were less than amicable. I took it, from the evidence of Mrs. Peterson, that she was not very well disposed to the appellant, Mrs. Holland. The following is a portion of her evidence, at 216-217 of the trial transcript:

Q And you were driving at the time? A Umm-hmm. Q And you would go out with Nellie and I think you said go sightseeing? A We were seeing all sorts of things. Q All right. A Different subdivisions, different stores, different -- any place that was interesting. Q All right. And you saw her regularly until the year 1990? A Hmm-hmm. Q And that's the year when you stopped seeing her; is that right? A Yeah. Q And did you try to see her after that? A I tried to see her or tried to phone her and I couldn't get through to her on the phone and I couldn't get in because of those damned dogs. Q Right. A They made such a big bark. I was scared of them. Q Now, the dogs had been there for some time? A Oh, yeah. Q And you had managed to get by the dogs on your visits? A Yeah, but then there would be somebody in there to tell them to shut up or hang on to them until I got in. Q All right. A I never had to fight my way in with them until, I guess it would be 1990. I didn't take a chance on it. I was scared of them. Q And did you go to the house and have the problem with the dogs on more than one occasion? A I don't know. Q There was an occasion when you went there to visit with the purpose of visiting Nellie and the dogs were there and Peggy Holland was present; is that right? A Hmm-hmm. Q What happened on that occasion? A I couldn't get in the gate. The dogs kicked up a rowse, they're big dogs, and she was standing at the end of the lot near her entrance, and that was as far as I got. Q And you could see her from the gate? A Nobody opened the gate. Q No, you could see Peggy Holland from where you were? A Hmm-hmm. Q And did she look at you? A I could imagine so. I don't know. I didn't pay any attention to her. What I was trying to do is to figure a way of getting in. Q All right. And you were outside the gate and the dogs were right in front of the gate? A I was outside the gate and the dogs were inside. Q All right. And you tried calling her on the telephone, as well. A Couldn't get her.

[155] On one hand, an inference could be drawn from the evidence of Mrs. Peterson that Mrs. Holland was not too keen for Mrs. Peterson to continue seeing Mrs. Magee. On the other hand, it is difficult to be certain because it may have been the fear Mrs. Peterson had, of what she graphically described as "those damned dogs", which led her to stop seeing Mrs. Magee.

[156] It seems clear to me, from the evidence, that, in 1990 Mrs. Magee was hostile to, and at times afraid of, the appellant, Mrs. Holland. A person with no axe to grind in the case, Bruce Mekjian, an accountant who was a friend of Mr. Bonar, testified concerning the mental state of Mrs. Magee, in the fall of 1990, at 119 of the trial transcript:

Q Can you tell me about her mental state? Did you notice anything different between the time in 1981 when you met her and between 1990, October? A Nothing distinguishing, no. About the same. I didn't really notice anything different mentally. Q What about physically? A Physically, yeah. I noticed quite a difference. When I first saw her she was rather heavy and I know when I saw her again -- she had come down, I think it was in '88, 1988, she came down -- and I noticed she was about half the size. And she was a little lighter when I saw her again in 1990, so she was physically not the same person. But mentally I didn't notice any difference.

[157] By the terms of the 1990 will, there was an equal division of the residue of her estate between Mrs. Longmuir, Mrs. Peterson, Mr. Bonar and the appellant, Mrs. Holland. I agree with the trial judge's observation that, when she made this will, Mrs. Magee was in a condition of sound and disposing mind and memory. As well, neither of her nieces nor her great-nephew, Mr. Bonar, could have had any direct influence upon the terms of the 1990 will.

[158] In the summer of 1991, she became unhappy, perhaps justifiably so, with her niece, Mrs. Longmuir, who is the respondent in this matter. This coincides with the making of the will, in August 1991, naming Mrs. Holland as the sole executrix and beneficiary. While it is explicable that Mrs. Magee might cut out Mrs. Longmuir as an object of her bounty, it seems quite inexplicable as to why she would remove Mr. Bonar and Mrs. Peterson as beneficiaries. She had included them as beneficiaries in a will executed just ten or eleven months previously. Was she so confused in her mind that she could not remember them or was her will overborne by the influence of Mrs. Holland?

[159] Dr. Donnelly had only seen Mrs. Magee in late June of 1992. Therefore, she was necessarily somewhat circumspect in her opinion as to her mental state in 1991. However, my reading of Dr. Donnelly's evidence leads me to the conclusion that what she diagnosed was a progressive loss of mental competence. In my judgment, this condition very probably had an adverse effect on her mental competence in 1991. I also note a passage from the evidence of an assessment report completed by Ms. Crivland, an experienced care-worker, as set out by the trial judge in his reasons at para. 130:

88 yr old woman sharing older family home [with] her niece Peggy who has a reputation for keeping client isolated from other relatives. Client is described as eccentric & is difficult to provide help for. Everything in the home needs repairs & client refuses to purchase cleaning materials or pay for repairs. Has fallen due to blackouts. Cause unknown. Memory recall poor. Stories confusing. [160] The care-worker's observations speak to the situation existing at a time about six months after the execution of the 1991 will. Also, having regard to what the testatrix expressed in 1990 to Mrs. Peterson and to Ms. Prohl concerning the appellant, it seems strange to me, to say the least, that Mrs. Magee would suddenly bestow all her bounty upon the appellant in August 1991. I suppose it could be suggested that there is also an element of inconsistency in her making the appellant a beneficiary in the 1990 will. But it may well be that she recognized that Mrs. Holland had been a caregiver to her over many years and she felt that, in fairness the appellant should have a share in the residue of her estate.

- [161] When one considers the factors noted above, it seems to me that the trial judge was entitled to take a very suspicious view of the validity of the 1991 will as being a true expression of the wishes of the testatrix. I am of the view that, on a consideration of all the evidence, it was open to the trial judge to conclude, as he did, that the appellant did not remove that suspicion. She failed to affirmatively prove that the testatrix appreciated the effect of her execution of the 1991 will. It follows that I would sustain the conclusion of the trial judge on this issue and dismiss the appeal concerning the validity of the 1991 will.
- [162] Regarding the question of costs, while there was not a perfect congruence of interests, it could be said that the interests of Mrs. Peterson, Mr. Bonar and Mrs. Longmuir were allied to the extent that it was in their interests to have the 1984 transfer set aside. Likewise, they would all benefit if the 1991 will was found to be invalid. I appreciate that Mrs. Peterson had a very limited role in matters because she was only a beneficiary. She was represented by counsel at trial and on this appeal. The appellant, Mrs. Holland, sought to uphold as valid the 1984 transfer, an undertaking which I would hold to have been successful. However, she was not successful in her efforts to sustain the validity of the 1991 will. Having regard to the divided success that has occurred in this case, it seems to me that a just and appropriate order would be that all parties ought to bear their own costs.

"THE HONOURABLE MR. JUSTICE HALL"

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