

CANADA / JUDGMENT

Stephens v. Austin

2003 BCSC 341

COURT

Supreme Court of British Columbia

DECIDED

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2003BCSC0341

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Stephens et al. v. Austin et al.,

2003 BCSC 341

Date: 20030305

Docket: S000729

Registry: Vancouver

Between:

Gilbert Keith Stephens

and William John Stephens

Plaintiffs

And

Lynda Maureen Austin, Laura Charlotte Austin

Monika Doucelin, Marilyn Carr, Marjorie Miller,

Dorothy Bates, Linda Dionne, Frederick Stephens,

Lena Fisher and Lois Priester

Defendants

Before: The Honourable Madam Justice Neilson

Reasons for Judgment

Counsel for the Plaintiffs

E. Rice, Q.C.

& K. Baldwin

Counsel for the Defendant,

Lynda Austin

H. Low

& C. Watson A/S

Date and Place of Trial:

October 7-11, 15-18, 21,23,

28 & 29,

December 2 & 3, 2002

Vancouver, B.C.

INTRODUCTION

- [1] This is a dispute over the estate of Albert Stephens, who died on December 4, 1999 at the age of 95. I will refer to him as Albert, since a number of the participants in these events share the same surname. Albert and his brother Thomas, who were both confirmed bachelors, lived together in a small house in Surrey until Thomas' death at the age of 94 on September 25, 1996.
- [2] The plaintiffs are the sons of Albert's cousin. Gilbert Stephens ("Gilbert") is 64 and William Stephens ("Bud") is 65. Both are bachelors, and they live together in a small town in Alberta, where their family has farmed for generations.
- [3] The defendant, Lynda Austin, is a registered nurse who became acquainted with Albert when she provided home care nursing to Thomas just before he died. Following Thomas' death, she agreed with Albert to provide assistance to him so that he could remain in his own home. Between September, 1996 and January, 1997 Albert effectively transferred all of his considerable assets to Ms. Austin, through a series of inter vivos and testamentary dispositions.
- [4] The plaintiffs seek to set aside those dispositions, on the basis that Albert was unduly influenced by Ms. Austin, or that they were unconscionable transactions, or constituted a breach of a fiduciary duty owed by Ms. Austin to Albert.

- [5] The plaintiffs discontinued the action against Laura Austin, Ms. Austin's daughter, and Monika Doucelin, one of Albert's care-givers. The other defendants are Albert's remaining next of kin, who have played no role in the action, but must be parties pursuant to Rule 62 of the Rules of Court.

CHRONOLOGY OF EVENTS

- [6] Albert and Thomas moved to their home in Surrey in 1953. Evidence about their circumstances prior to Thomas' death was provided by health care workers, their neighbour, Andree Agius, their banker, Keri Grieve, and the plaintiffs.
- [7] In the mid-1990's, Thomas and Albert were still relatively healthy and independent. They looked after their home and garden without assistance. Albert was quite deaf, but still medically fit to drive. They were frugal to the point of eccentricity, regularly collecting bottles and cans to return for deposit.
- [8] Their frugality was well-known to Ms. Grieve. She testified that she had dealt with both brothers at the HSBC Bank Canada since 1978, and knew them well. Together, they had about \$900,000, held in personal and joint accounts and GICs.
- [9] Dr. Johnson was their family doctor from 1994 to 1997. She saw Albert during those years for a number of complaints. She testified that she never had a concern about his mental capacity, or any reason to formally assess it. She said that in 1995 both brothers had told her they wanted to continue to live independently.
- [10] Ms. Agius lived across the street from the brothers with her aging father for many years. She also testified to their independence in caring for themselves and their home. She said that years before Albert met Ms. Austin, both brothers had told her that they planned to leave their estate to whomever cared for them, and asked her if she would look after them in the future.
- [11] Gilbert and Bud kept in touch with Albert and Thomas by telephone, and visited periodically, usually on their annual fishing trips to the coast. They both testified that Thomas and Albert had said that they would be the beneficiaries of their estates, as they were the only relatives who visited. They were unaware of the extent of Thomas' and Albert's assets.
- [12] Between July and November, 1995 Albert had several hospital admissions for pneumonia, deep vein thrombosis, pulmonary emboli, and cellulitis. During these admissions, Welman Lee, a medical social worker, assessed him periodically to determine what services he would need at home on discharge.
- [13] Mr. Lee testified that he had a clear recollection of Albert, as it was unusual to see two men in their 90's living independently and managing well. He described Albert as very sharp and mentally alert, stubborn, determined, and independent. He discussed options such as a care facility or home care services with Albert several times, and said that Albert appeared

willing to consider these when he was feeling unwell. However, as he improved, he rejected such options, and made it clear he wanted to return home and live independently with his brother. Mr. Lee said that he never had any doubt that Albert understood their discussions, or that he was mentally capable of making decisions about his care, and understood the risks he was accepting in doing so.

- [14] Mr. Lee said that, although Albert wanted to remain at home with Thomas, he was negative about his brother, describing him as lazy and good for nothing. He also made derogatory comments about his relatives in Alberta, saying they had little contact with him, and only wanted his money.
- [15] Periodically after discharge from hospital, Albert had home care nursing services provided by the Continuing Care Division of the South Fraser Health Region ("CCD"). He had six visits in the fall of 1995, from Judy Fassbender, a home care nurse. Ms. Fassbender said that CCD was sceptical about the brothers' ability to continue on their own. She was concerned that Albert was at risk for falls, as he was using a walker and had some dizziness. However, he was managing his own medications and oxygen, and he told her he still drove, gardened, and cleaned the house with his brother when he was well. He was proud of their independence, and adamant that they did not require a homemaker, and would not consider a move to a care facility. Ms. Fassbender said there was no question that Albert had the capacity to make that choice, and her office had to respect his decision.
- [16] In 1996, Thomas was diagnosed with cancer, and his health deteriorated. Albert cared for him, and took on most of the duties at home. That summer, Thomas was hospitalized for several weeks. Gilbert visited Albert and Thomas following his discharge on July 18, 1996, and said that Thomas was bed-ridden, and Albert was concerned and withdrawn.
- [17] Once out of hospital, Thomas received home nursing care from CCD. Ms. Fassbender was again one of the nurses who visited the home. She testified that the brothers were still living without home-making assistance. Albert usually participated in her visits, talking about his own concerns, and seeking advice.
- [18] Ms. Fassbender said that Albert frequently talked to her about his financial circumstances. He told her that he had a lot of money, and offered her substantial payments for any help she could give him. She said that she found this odd, and she was concerned that his openness about his wealth may make him vulnerable to abuse. She explained to him that nurses do not take money for the services they provide.
- [19] Ms. Fassbender went on holidays in August, and Ms. Austin took her place in providing home care nursing for Thomas. She visited the house seven times between August 1 and 18, 1996.

- [20] Ms. Austin was 51 years old. She obtained her R.N. in 1966, and worked full-time with CCD. She was divorced, and had six children between the ages of seventeen and twenty-seven. Her youngest daughter was living with her in White Rock while she went to university. Her mother, who also lived in White Rock, was very ill and Ms. Austin was spending considerable time with her.
- [21] Ms. Austin testified that during her visits to Thomas, she observed that Albert was giving him excellent care, cooking their meals, and doing their laundry. He also maintained an impressive vegetable garden. The house-keeping, however, was neglected, and the house was smelly and cluttered. She convinced them to try a home-making service, but this did not work out as, when the home-maker came, they felt she was intruding and would not let her do anything.
- [22] On August 18, 1996 Thomas was readmitted to hospital. Ms. Austin learned of this on August 19, 1996 when she arrived for a home nursing visit. Albert asked her if she would be coming the next day, and she explained to him that since Thomas was now in hospital, he was no longer a patient of CCD and the nurses would not come anymore. She told him they would only return if Thomas came home and was referred back to CCD. She explained to him that Thomas, not Albert, was their patient, to be sure he understood. She testified that Albert did not appear worried or frightened, but agreed he seemed to be clinging to her somewhat. As she was leaving, he asked her if she would drop by sometimes just to see how he was doing, and she agreed she would. She said that she had acquiesced to similar requests before.
- [23] Ms. Austin testified that from then until Thomas' death on September 25, 1996, she saw Albert several times. Her evidence varied as to the number of these encounters. Sometimes she dropped in on him at home, sometimes she took him to see Thomas at the hospital, and sometimes she drove him to his doctor, or on other errands. One evening Albert cooked her dinner at his home, and at least once they went to a restaurant for dinner. He also asked her to be present when he met with a funeral director, to plan Thomas' funeral. She agreed she had little time for such visits, but said Albert was always glad to see her, and asked when she would be back.
- [24] Mr. Young, the funeral director, testified that Ms. Austin set up a meeting with Albert to discuss arrangements for Thomas' funeral. He met with them at Albert's home on August 26, 1996. He knew Ms. Austin was a home care nurse, but understood she was there as a family friend. He said he discussed the options with Albert, who made appropriate selections. He found Albert bright, articulate, humorous, and responsive. Albert was firm that he would drive himself to the cemetery to take the necessary steps there.
- [25] Ms. Austin testified that on one of their visits to Thomas at the hospital, Thomas told Albert he wanted to give her some money for what she had done for him. Ms. Austin told them that would be inappropriate as the care she had given was part of her job.

- [26] Ms. Austin said that her visits with Albert were social, and unrelated to her employment with CCD. She provided no nursing or home care services for him. Albert was gregarious and humorous. They talked about gardening and their family backgrounds, and a friendship developed between them. She said that Albert told her many unflattering stories about Thomas, and she learned that despite the fact the brothers had shared a home for so long, Albert had little respect or affection for his brother. She realized that Albert might require assistance after Thomas died, and spoke to him about his plans and options. He made it clear he wanted to stay in his own home until he died, and that he wanted nothing to do with government intervention, a care facility, or having strangers in his home. She said they never discussed his financial circumstances. She just assumed he and his brother were old age pensioners.
- [27] Welman Lee testified that he saw Albert at the hospital on one of his visits to Thomas, and he was still bright, functioning well, mentally clear, and capable of making decisions about his care and financial affairs. He had no concern that Albert was vulnerable to influence.
- [28] Thomas remained in hospital until his death on September 25, 1996. Ms. Austin arranged to be notified of his death, so she could communicate it to Albert. She said she was concerned that, because of his deafness, Albert might not understand if a stranger called him with the news. When she went to his house to tell him Thomas had died, Albert was not emotional. He thanked her and asked if she would help him with the arrangements. She agreed to do that, and left. She said Albert did not appear to need further support. Nor did he show any emotion or grief in the days that followed. She knew family was coming from Alberta, and assumed they would give Albert assistance with his future plans, and that would be the end of her dealings with him.
- [29] Ms. Grieve, the banker, testified that on September 26, 1996 Albert came to the bank with Ms. Austin, and removed Thomas' will from a safety deposit box for probate. He introduced Ms. Austin as a friend. He did not display any grief or depression, and in fact seemed more talkative and happier than usual. She said that Albert appeared to know what he wanted and where to go to get it done.
- [30] Mr. Young testified that he met with Albert and Ms. Austin on September 26, 1996 to confirm and implement the funeral plans. He said Albert was much the same as at their first meeting. He showed no sign of emotion or grief. He provided the necessary information, and understood the documents required. He referred to his Alberta relatives as "vultures", and said that thistles would be an appropriate flower arrangement for Thomas.
- [31] Ms. Austin said that it was during this meeting that she first learned about Albert's wealth. He took out three bank books and told her the balance in them was around \$300,000. She was extremely surprised.
- [32] Ms. Fassbender testified that on September 27, 1996 she made a bereavement visit to Albert. She said that this is a standard service offered by CCD after the death of a patient, to assess how the family is coping and whether they require a referral for support. She said she found

Albert grief-stricken and crying. She felt he was scared and lonely, and looking for someone he knew to help him. He mentioned that Ms. Austin had taken him for supper and to do some errands. Ms. Fassbender said she felt sick when she heard this, as she believed having dinner with him went beyond the proper scope of nursing care, and that he would be vulnerable to financial abuse in his grief-stricken and frightened state. While he was mentally competent, she feared it was an opportune time for someone to take advantage of him. She did not, however, report her concerns to CCD or anyone else.

- [33] Gilbert came for Thomas' funeral, which was on September 30, 1996. He testified that Albert was tired, depressed, and withdrawn. He said that he knew Ms. Austin as one of Thomas' nurses, and she drove him and Albert around. Ms. Austin testified that on the way home from the funeral, Albert told Gilbert that Thomas had wanted to pay her for her care, and she reiterated that this would be inappropriate as it was part of her job. Gilbert agreed there was some conversation about Albert or Thomas offering her \$20,000, and that she had declined the payment.
- [34] Gilbert testified that the day after the funeral, he and Albert talked about Albert's estate and future plans. Albert told him that he thought he had \$200,000 and he wanted Gilbert and Bud to share \$100,000, and have their siblings split the other \$100,000. Gilbert advised Albert to have a lawyer do his will, and Albert said he would. Albert also told Gilbert that while he wanted to stay in the house, he was afraid to live alone, and concerned about whether he could manage on his own. They talked about a lodge and Albert agreed it might be a good idea to look into this. Gilbert also told him that he and Bud had paid someone \$1,000 a month to look after their mother at home. Ms. Austin's name did not come up at all in this discussion. Gilbert said he thought Albert would be all right on his own for a little while, and left for home shortly after. He agreed that he had no concerns about Albert's mental capacity at this time.
- [35] Dr. Johnson testified that she felt Albert became more frail following his hospitalizations in 1995, and the burden of Thomas' illness. She said that when Thomas died, she had the impression that Albert gave up and became less attached to the world, as many elderly people do after losing a long-time companion. She also felt he was afraid to be alone, particularly after he experienced cardiac problems later in 1996. She agreed, however, that these were only her impressions, and that Albert never directly expressed such concerns to her.
- [36] A few days after the funeral, Albert went to mail something and fell and hit his head. When he returned home, he asked Ms. Agius for help but did not want to go to the hospital. Ms. Agius suggested calling Ms. Austin, whom she knew had been Thomas' nurse, and whom she had seen at the house with Albert.
- [37] Ms. Austin said that when she got Ms. Agius' message, she went to see Albert after work. She was surprised to find that his family had already left. Albert was fine, and she again spoke to him about other living arrangements with more support. She said that Albert made it clear

he did not want to go to a home. He told her that Gilbert and Bud had paid someone \$1,000 a month to look after their mother at home, and he asked her if she would be interested in doing that for him. She told him that would be impossible, as she had a full-time job, and was spending time with her mother each day. She did tell him that she would do whatever she could to help him stay in his home. Albert thanked her and asked her to help him arrange a lawyer to probate Thomas' will. Ms. Austin made an appointment with a Mr. Redmond, and took Albert to see him around October 9, 1996. She said that Albert's living arrangements remained a topic between them, and she continued to encourage him to get help.

- [38] Ms. Agius testified that at some point after Thomas died, Albert told her he did not want to go to a home, and he planned to stay in his house until he died. He told her that if she would look after him, he would give her everything he had - his house, money, and car. She said that he wanted her to move into his house and be something like family, caring for him, and looking after the cleaning and meals. She declined as she had a heart condition and had to look after her father.
- [39] Ms. Agius testified that sometime later, Albert brought Ms. Austin to visit her and her father, and Mr. Agius told Albert he should make the same offer to Ms. Austin as he had to Ms. Agius. He said that as a nurse, she would be able to care for him. Albert told them later that he planned to do this, and Mr. Agius told him to put it in black and white. Ms. Agius said that the next time they saw Albert, he told them he had done it, and that if he died, everything would go to Ms. Austin, and if she died, everything would come back to him.
- [40] Ms. Austin testified that, sometime before Thanksgiving, during a visit with Ms. Agius and her father, the father asked Albert why he didn't make the same offer to Ms. Austin as he had to Ms. Agius, and told him to get it in writing if he did. Ms. Austin said she did not know what he meant, but when they went back to Albert's, he told her that if she would guarantee that he could stay in his house for the rest of his life, he would give her \$200,000 and she would also inherit the house.
- [41] Ms. Austin said she realized this was a large amount of money, but also a large commitment. She told Albert it was a very generous offer, and she would think about it. She spoke to her children, her ex-husband, and some friends. She knew her mother would not live much longer, and that would free her time somewhat. She considered Albert a friend and she liked him. However, she felt the arrangement would be like having two full-time jobs, with significant responsibility and impact on all aspects of her life, that might last for years.
- [42] She ultimately decided to accept Albert's offer. She testified that she told him that she would come to his house several times a week to help him, and do her best to ensure he remained at home. However, she wanted to keep her job with CCD, so she would hire other caregivers for him at his expense when she could not be there. She also insisted that he clean up the house, which smelled and was rat-infested. She said Albert readily agreed to these terms. She acknowledged that they did not discuss the market value of the services she was to

provide, or any limit to be placed on the expenses she incurred. Nor did they talk about what would happen if either of them changed their minds, or if the arrangement did not work out for other reasons. There was no discussion of reducing their agreement to writing, or of obtaining legal advice about it. This arrangement, which I will refer to as the "home care agreement" was concluded prior to Thanksgiving, and Albert spent Thanksgiving with Ms. Austin and her family.

- [43] Ms. Austin said that soon after they finalized the home care agreement, Albert gave her a cheque for \$100,000 and asked her not to cash it until Thomas' estate had been probated. They then went to see Ms. Grieve at the bank, and Albert had her open an account in Ms. Austin's name and put \$100,000 from his account in it.
- [44] Ms. Grieve confirmed that on October 16, 1996 Albert came to the bank with Ms. Austin and instructed her first to open an account in Ms. Austin's name and transfer \$100,000 from his account to that account. Ms. Austin said this was not necessary, but Albert was adamant. Ms. Grieve spoke to Albert alone to confirm his instructions, and said he understood what he was doing and was determined to do it. She explained the situation to her supervisor and got her approval, because of the amount involved, and then carried out his instructions. She said Albert then told her to transfer the joint accounts he had with Thomas to his name alone.
- [45] Ms. Grieve testified that she spent about two hours with Albert carrying out these transactions. He was bright and alert, and she had no concern about his mental capacity. He understood what he was doing, seemed confident about it, and she believed he was doing it of his own free will.
- [46] On October 17, 1996 Ms. Austin's mother died. Her family held a wake for her, and Albert attended. While there, he met Philip Tonstad, a lawyer whose mother had been a close friend of Ms. Austin's mother, and whom Ms. Austin retained to probate her mother's estate. Mr. Tonstad testified that Ms. Austin told him Albert was a friend whom she had met in the course of her duties as a public health nurse. She said that his brother had recently died, and Albert was unhappy with the lawyer handling his estate and wanted a new one. She also told Mr. Tonstad that Albert had given her \$100,000 and was leaving his house to her, and that he wanted a lawyer to do a new will for him. Mr. Tonstad said that he told her firmly not to send Albert to see him since he knew her and had a family connection with her.
- [47] Ms. Austin testified that Albert's emotional state throughout the summer and fall of 1996 was stable. He was not desperate, or affected by grief due to Thomas' death. Had he been, she said she would not have entered the home care agreement. She believed that he understood exactly what he was doing, and said that she exerted no pressure on him whatsoever. As their arrangement was put in place, he was optimistic and happy, and seemed satisfied that he had made a good deal.

- [48] During November and December, 1996 Albert's house was cleaned up, and a number of modifications were made to it. Ms. Austin said he readily agreed to these, played an active role in making the decisions, and also did some of the physical work himself. About 200 bags of junk were removed from the house, and several dumpsters were filled. Her family helped with some of this. She and Albert chose colours for interior paint together, and friends of her daughter, Laura, did the painting. She paid the painters and her family for their help with Albert's money.
- [49] Ms. Austin's daughter, Laura, testified that she first met Albert during the clean-up. Her mother had told her about the home care agreement. She said that she was surprised at how bright and in control of events Albert was. He gave them directions about what should stay and go in the house, and offered her Thomas' clothes, telling her, "That bastard won't need them where he's going, it's too hot."
- [50] Ms. Austin testified that once the house was cleaned and painted, she arranged new carpets, linoleum, blinds, and some furniture with Albert's assistance and consent. They put a fan in the living room, and Albert bought a new refrigerator. They also got a dog and cat. She and Albert painted the outside stairs and bottom of the house in the spring of 1997, and they put in a number of security measures.
- [51] On November 7, 1996 Albert asked Ms. Austin to drive him to the Land Title Office to transfer his home from joint tenancy with Thomas to his name alone. Then, he spontaneously asked her to take him to see Mr. Tonstad, to ask him to take over probate of Thomas' estate, and to make his own will. Ms. Austin said she and Albert did not discuss what he wanted in his will. She assumed he would leave her the house, but did not know if he was contemplating a further bequest to her. She neither discouraged this, nor pressed him to do so. She did not feel it was her business to tell him what to do with his money. It never occurred to her that he should have legal advice from someone who was not also her lawyer.
- [52] Mr. Tonstad saw them without an appointment. He testified that he reminded Ms. Austin that he had told her he did not want to see Albert. Ms. Austin said Albert was insistent. Mr. Tonstad then took Albert into his office alone. Albert told him he had three issues: he was unhappy with the lawyer dealing with Thomas' estate and wanted to switch that work to Mr. Tonstad; he wanted to put his house in joint tenancy with Ms. Austin; and he wanted a new will.
- [53] Mr. Tonstad said he reviewed the status of Thomas' estate with Albert, and told him it was not cost effective to transfer the file to him.
- [54] Mr. Tonstad then told Albert he felt it was inappropriate for him to do the work on the other matters, because he and Ms. Austin had a family connection, and he was acting for her regarding her mother's estate. Mr. Tonstad said he did not see it as an actual conflict of interest so much as a potential for a perception of impropriety. He agreed that the initial impression of an elderly man making a substantial gift to a younger woman in a somewhat

unusual relationship was a red light regarding issues of capacity and influence, and he felt the will would be a stronger instrument if Albert used a lawyer who did not know the woman.

- [55] Mr. Tonstad said he spent 10 or 15 minutes debating this with Albert, whom he described as grimly determined, vigorous, and forceful. Albert told him it was his money, he could give it to whomever he wanted, and hire whatever lawyer he wanted. He was not impressed by Mr. Tonstad's advice that the will might be more effective if he used a different lawyer. He dug in his heels, and Mr. Tonstad thought he would not leave unless he agreed to act for him. He finally agreed to take his instructions, if Albert would agree to take the documents to another lawyer for independent legal advice. He explained this would cost more money, and Albert was not pleased by that but accepted it.
- [56] They then discussed the nature of Albert's assets, his personal information, and his next of kin. Albert advised Ms. Austin was to be his executor. He said he had two relatives in Alberta to whom he would leave a bequest, and the balance would go to Ms. Austin, or her daughter, Laura, if Ms. Austin predeceased Albert. They discussed an appropriate bequest for the relatives, and Mr. Tonstad said he stressed the importance of leaving them a substantial gift to avoid a future challenge to the will. Albert initially said \$500,000, but then changed this to \$200,000 each, and then \$100,000 each. Mr. Tonstad again emphasized that the larger the gift to them the better, as a challenge to the will was a real risk if he left the bulk of his estate to an unrelated third party. He said Albert replied forcefully, "It's more than they deserve."
- [57] Mr. Tonstad asked why Albert was leaving his estate to Ms. Austin and Albert said, "Because I love her and she takes care of me." He told Mr. Tonstad his life was better and he was happy with her as a friend around him. He was less clear as to why he wished Laura to be the residual beneficiary, except that she was involved in his life as well, and he liked her. They did not discuss the contents of Albert's earlier will, which had left everything to Thomas.
- [58] They then discussed transferring the house into joint tenancy with Ms. Austin. Mr. Tonstad advised Albert there should be a trust agreement, as the interest in the house was a significant gift, and he might want to change his mind. He explained to Albert that a trust agreement would delay the transfer of the beneficial interest in the house until his death. He said Albert strenuously objected to this, because he felt it was an insult to Ms. Austin. He wanted his gift of the house to be absolute. Mr. Tonstad pursued this at length, but Albert would not accept a trust agreement.
- [59] Mr. Tonstad believed he also spoke with Albert about the gift of \$100,000 that he had made to Ms. Austin, because he was concerned about what was happening, and it increased his own comfort level to raise it. He could not recall Albert's response. Mr. Tonstad agreed that he did not know how well Ms. Austin and Albert knew each other, or Albert's circumstances and options after Thomas died. He was unaware of the home care agreement until he was cross-examined at trial. He agreed that such information was potentially relevant to capacity and voluntariness, and said that, had he known of this arrangement when he prepared the

will, he would have explored the circumstances further. He was nevertheless uncertain that these facts were critical, given Albert's firm demeanour and clear state of mind.

- [60] Mr. Tonstad testified that when he dealt with Albert on November 7, 1996 he assessed his mental capacity and was satisfied that he was capable of providing instructions, and that he was doing so voluntarily. He believed that Albert was not someone who could be pushed around. He agreed that his knowledge of Ms. Austin and her family played some role in his comfort level, but denied that he dismissed the possibility of undue influence on that basis. He said he was also comforted by the safeguard of independent legal advice.
- [61] Ms. Austin testified that after they left Mr. Tonstad's office, Albert told her that he had made a will which left his relatives \$200,000, and the house and the rest to her. He said that Mr. Tonstad had wanted to set up an agreement whereby the house would be in their joint names, but he could sell it or remove her from title anytime. He said that if she died first, he would get everything back, and if they both died, everything would go to Laura.
- [62] Ms. Austin said she believed Albert left her this large bequest because he valued how he would live the rest of his life, and was prepared to provide well for those who carried out his wishes. She denied putting any pressure on him to give her more than they had originally agreed to.
- [63] On November 8, 1996, Albert experienced some dizziness and faintness, and Dr. Johnson sent him to the hospital for cardiac investigations. He remained there from November 8 to 12, 1996, and a decision was made to install a pacemaker in a few weeks. Ms. Austin said he was not in visible distress and remained animated, but he told her that he was concerned he had not signed his will, and asked her to call Mr. Tonstad. She did so, and told Mr. Tonstad that Albert wanted to see him in the hospital.
- [64] Mr. Tonstad said that he heard from his secretary on November 9, 1996 that Albert had been taken to hospital by ambulance. He assumed the situation was serious, and he was concerned that he follow Albert's instructions as quickly as possible if he had the capacity to execute the documents. He also thought of his potential liability to Ms. Austin if he did not carry out Albert's instructions. His secretary prepared the will and the transfer to joint tenancy, and Mr. Tonstad took them to the hospital. He said he deliberately did not contact Ms. Austin.
- [65] Mr. Tonstad testified that when he arrived at the hospital he found Albert sitting up in bed flirting with the nurse. Albert asked what he was doing there. Mr. Tonstad told Albert that he had asked for him, and he had brought the will in case it was necessary, but since he was obviously well it could be signed later at his office. Albert said since Mr. Tonstad was there they should do it.

- [66] Mr. Tonstad testified that he satisfied himself that Albert had satisfactory mental capacity to sign the will. He could not recall the details of what he did, but said he ordinarily tests a client's memory, orientation, and understanding of what they are doing. He also checked with Albert's nurse to ensure he was not having any treatment that would impair his mental ability. He then went over the will and explained it to Albert, and confirmed the bequests.
- [67] Mr. Tonstad said he was more than satisfied that Albert understood what he was doing, and he executed the will with appropriate witnesses. He also signed the transfer of the house, but Mr. Tonstad told Albert he would not act on it until a trust agreement was done. He said it was his intention to try again to persuade Albert to have a trust agreement because it was in his best interests, and it would also give the arrangement more protection if it was attacked. In that sense, he agreed a trust agreement would be beneficial to Ms. Austin as well, but said that when he proposed it, Ms. Austin's interests did not enter his mind. It was for Albert's protection and the fulfillment of his expectations.
- [68] Shortly after Albert was discharged from hospital, Ms. Austin said he told her he wanted to give her a power of attorney so she could do his banking for him. They went to see Ms. Grieve.
- [69] Ms. Grieve testified that she met with Albert and Ms. Austin on November 14, 1996, and Albert told her he wanted Ms. Austin to have a power of attorney over his accounts. Ms. Grieve spoke to him in Ms. Austin's absence, and explained the implications of this. She told Albert several times that he must ensure Ms. Austin was someone he could trust completely, as she would be able to empty his accounts. He indicated he understood, and said that he had total trust in Ms. Austin. Ms. Grieve determined to her satisfaction that he understood and that he was doing this of his own free will, and then met with both of them to execute the bank's power of attorney.
- [70] From the time she had the power of attorney until Albert's death, Ms. Austin paid all household expenses from his account, including his caregivers' salaries, and her own food, gas, and other expenses related to her care of him. She said there was an understanding that Albert's money would be used for him first, but she did not believe she had made that express commitment to him. She maintained her own account for her employment income and expenses unrelated to Albert.
- [71] Ms. Austin testified that some time in November Albert began to express concern about the reliability of her older car and her safety as she drove back and forth to his house. He also said he wanted a new car so they could take trips to the Okanagan. She did not want a new car, but he insisted, and bought a 1997 Honda for her. He paid \$22,000 and she traded in her vehicle and paid for the insurance.

- [72] The clean-up of the house continued, and Ms. Austin said at one point Albert told her there was money hidden in the garage. She found over \$6,000 in a box and took it to the bank. Ms. Grieve confirmed that Ms. Austin called her about finding old money, and brought it to the bank on November 15, 1996, to put in Albert's account. She said this enhanced her assessment of Ms. Austin.
- [73] Bud testified that Ms. Austin called and asked them to help with the clean up, and Albert offered them an old van if they came to pick it up, so Bud and a friend, Mr. Smigalski, came to visit around November 20, 1996. Both testified that the basement was filthy and rat-infested, and they spent several days clearing it into dumpsters. Both also said that when they left, Albert offered them \$100,000 for their help, which they refused. Bud said he had not heard Albert do that before, but he was not concerned about his mental state. They did not take the van with them as it was not fit.
- [74] They met Ms. Austin for the first time during this visit. They said she cooked for them, and had a bed in Thomas' room, where she spent one night. Bud said Albert introduced her as his nurse, and Bud believed the government employed her to look after Albert. Albert told them he had bought her a car, and that he was paying her an extra \$200 a month as the government did not pay her enough. Both Bud and Mr. Smigalski testified that on one occasion, Ms. Austin asked Albert for a kiss, and Albert gave her one and said, "I'm in love." Bud said he was shocked, as Albert had never had a relationship with a woman before. He felt something was up, but could not put his finger on it. He did not ask either of them about her role.
- [75] Ms. Austin denied the incident with the kiss, and said that there was never any romantic element to her relationship with Albert. Her daughter, Laura, confirmed this. She said that Albert was included in every family event they had while her mother cared for him, and he became a part of their family. He had a warm and caring relationship with her mother, her sister, and herself, but his relationship with her mother was never romantic.
- [76] Ms. Austin said that after Bud left, Albert told her that he had told Bud about their arrangement, and he had also told him that Thomas had no money. He knew this was false, but said that it was none of Bud's business.
- [77] Both Bud and Gilbert testified that once Ms. Austin was in the picture, they did not communicate with Albert as often. They said that, although they asked her to keep in touch with them by telephone about Albert, she never called. Nor would she tell them when Albert was hospitalized. When they asked her about this, she said Albert did not want to worry them. They tried to call Albert, but it was difficult due to his deafness, and their calls were often not returned.

- [78] Ms. Austin denied that she tried to alienate Albert from the plaintiffs, or that she withheld information from them. She said that she told Albert they wanted her to call monthly, and he was irritated by that and said they could call him at their expense. When they did call, she said she spoke to them and passed them on to Albert, but he did not always want to speak to them.
- [79] Mr. Tonstad testified that on November 29, 1996 he saw Albert again. He reviewed the will with him to ratify his decisions concerning his bequests. He then explained the trust agreement to him again, and this time he agreed to sign it. He also executed a general power of attorney in favour of Ms. Austin. Mr. Tonstad could not recall the circumstances of the latter, but said he would not have prepared it unless Albert instructed him to. He said Albert was in a jovial mood, and he had no concern about his capacity to understand or sign these documents.
- [80] When Albert had signed the documents, Mr. Tonstad invited Ms. Austin into the meeting and explained the trust agreement to her. He told her she would need to retain other counsel for any advice or concerns she might have, but she was satisfied with his explanation, and signed it. She said that Mr. Tonstad told her that Albert had given her a half interest in his home, and all of it on his death, but the agreement allowed him to change his mind without any recourse for her.
- [81] Mr. Tonstad prepared a certificate of independent legal advice, and set up a meeting between Albert and John Lee, another lawyer. He told Mr. Lee the situation involved an elderly man with nephews as his next of kin, who was making a significant gift to a younger woman who was his caregiver. Mr. Tonstad said he viewed the appointment with Mr. Lee as simply ratification. He considered Albert to be his client, and did not believe that the fact he knew Ms. Austin, or that he was acting for her with respect to her mother's estate, compromised his ability to give Albert legal advice. He had no information from one that was prejudicial to the other, so he did not consider it a conflict. Had he believed that there was a conflict, Mr. Tonstad said he would not have acted for Albert. Nevertheless, he remained concerned to carry out Albert's instructions as well as he could, and to create an instrument which would withstand challenge.
- [82] Mr. Lee testified that he had been a lawyer for 12 years. He met with Albert for almost an hour, but had little independent recollection of their meeting. He relied primarily on his notes and his usual practice in giving his evidence. He said that, when seeing a client for independent legal advice, he routinely explains any documents to them, and asks if they understand why they are seeing him, and what they hope to accomplish through the documents. This permits him to assess their understanding of the contents of the documents and the consequences of the transaction. Mr. Lee said Albert was aware of and clear about the consequences of what he was doing, and he believed Albert had sufficient capacity and understanding to dispose of his estate in the manner he chose.

- [83] Mr. Lee said he routinely asks questions about duress or undue influence. He recorded this verbatim statement from Albert: "Nobody's forced me I done it myself I got no family in B.C." Albert also told Mr. Lee that he had told his other relatives he was leaving it to Ms. Austin and they said it was all right. As well, he said that he had known Ms. Austin for many years.
- [84] Mr. Lee signed the certificate of independent legal advice, and sent it back to Mr. Tonstad. He said that if he knew that Albert had only known Ms. Austin since August, or that he had given Ms. Austin \$200,000, he would not have signed the certificate without more information from Albert. He nevertheless agreed that the length of a relationship is not determinative of duress or undue influence.
- [85] Ms. Austin said that Albert was in good physical and mental condition on November 29, 1996. He understood that he saw Mr. Lee to ensure his decisions were voluntary, and that he was not being influenced. On the way home, he told Ms. Austin that he did not think the second lawyer was necessary, as he knew what he wanted. He said Mr. Lee had asked how long he had known her, and he had told him "a long time." Ms. Austin said that she told Albert that had not been a good thing to say, and he told her to forget about it.
- [86] Albert was in hospital on December 6 and 7, 1996 to have a pacemaker installed.
- [87] Ms. Austin said that sometime in December, she brought out the first cheque for \$100,000 that Albert had given her, and offered to give it back, as she was aware she would receive his money under his will anyway. He refused to take it and told her to cash it, so she did. She said she kept this and the other \$100,000 in a separate account for some time, in case Albert changed his mind about their arrangement.
- [88] Ms. Austin said she and Albert moved to her mother's apartment in White Rock for several weeks in December while they painted his house. She and her family had a birthday party for Albert, and he also spent Christmas with them. Once he moved back to his home, Ms. Austin hired caregivers for him during the day when she was at work. She came by most evenings to cook his dinner, and frequently spent the night in the bedroom set aside for her use there.
- [89] Monika Doucelin was the primary caregiver Ms. Austin hired. Ms. Doucelin and Ms. Austin had met when Ms. Doucelin was having medical problems, and Ms. Austin was her home care nurse. They developed a friendship which continued after Ms. Doucelin no longer needed medical care. Ms. Doucelin said Ms. Austin was a good friend, and had even helped her pay for expensive medical treatment that Ms. Doucelin had been unable to afford.
- [90] Ms. Doucelin cared for Albert during the day from late 1996 until his death. Ms. Austin paid her \$7 an hour from Albert's funds. Initially, she just worked part-time as a companion, helping Albert with his meals and personal care, and taking him shopping, to doctors' appointments, and on other errands. She spent more time with him as he became more frail. When he had to be admitted to hospital, she visited him daily, and assisted with his care there. She said they got along famously from the outset, and formed a close

relationship.

- [91] Ms. Doucelin described Albert as friendly, talkative and witty, but also strong-willed and stubborn. She said you could not make him do anything he did not want to, and he was the master of the house with everyone, including Ms. Austin. He could be angry and irritable, particularly when he was not feeling well, or was on certain medications. He was mentally alert and still physically active when she was hired, mowing the lawn, gardening, and fixing things around the house.
- [92] Ms. Doucelin said that as she got to know Albert better, he told her about his life and family. He never had anything good to say about Thomas, and seemed glad he was gone and he could now do as he wished. She said he was similarly uncomplimentary about the plaintiffs. He consistently told her that they were only after his money, that they did not care about him, and they just wanted to put him in a nursing home. She said that he did not welcome their visits, and sometimes refused to speak to them on the phone. He did not want them notified when he was in hospital. She said she did nothing to encourage these negative feelings. Nor did she hear Ms. Austin encourage them.
- [93] Ms. Doucelin said that as Albert became more comfortable with her, he talked about his finances. He told her that he had about \$800,000. He also told her that he had given Ms. Austin \$200,000 and that his house would go to her when he died, or if she died first, it would come back to him. He said he did this so she could have some money of her own to buy what she needs, because she worked so hard and had six children, and never thought of herself. Ms. Doucelin said she was not surprised by this, and had no concern that Ms. Austin had persuaded Albert to give her the money. She believed that Albert was good to the people who were good to him, and he would do whatever he wanted with his money.
- [94] Laura Austin was also involved in Albert's care, staying with him when her mother could not, or when she needed respite. Like Ms. Doucelin, initially she provided companionship, but later did more as he needed more assistance. She said Albert was mentally sharp except when he was ill, and he became more demanding. He liked to joke, but had a very strong personality. She said Albert gave her \$1000, to help with school, and later offered her more money, which she declined. Both Albert and her mother told her that Albert had made her a beneficiary under his will. Albert said that if her mother was no longer there, he wanted to help her six children, and he saw Laura as the one to do that.
- [95] Laura testified that Albert did not like the plaintiffs. He did not want to speak to them on the phone, and would say that they were only calling to see if he was dead, so they could come to get his money. He told her that he was concerned they would come after her mother when he died, and "put her out in the street", and he asked Laura to help her stay safe.
- [96] In mid-January, Gilbert came to visit. Ms. Austin said that when he arrived, he noticed an outside stair was weak, and said he would fix it. Later, she overheard Gilbert ask Albert what his plans were for the house when he died, and Albert told him it was all taken care of and Ms. Austin would get it. When she came into the room, Gilbert asked her if this were true,

and she confirmed it. Almost immediately, Gilbert said he would have to leave the next day, and he did so, without fixing the stair. She said Albert was very upset. He believed Gilbert left because he was not getting the house, and he told Ms. Austin he was not going to leave his relatives anything if they couldn't even help him with a step. He asked her to make an appointment with Mr. Tonstad.

- [97] Ms. Doucelin was also there when Gilbert arrived, and testified that she heard him tell Albert he would fix the stairs, and then almost immediately ask what he was doing with the house. When Albert told him the house was going to Ms. Austin, Ms. Doucelin said there was silence. The next day she was called on short notice to stay with Albert, as Gilbert had left unexpectedly. She found Albert in a foul mood, and he told her, "Them bastards are not going to get a red cent", and that he planned to change his will because he was only going to help those who helped him. The rest would get nothing. Ms. Doucelin testified that she told him he should not be so angry, but this had no effect. She said that she did nothing to encourage him, but nor did she try to dissuade him as she knew he would do whatever he wanted.
- [98] Gilbert agreed that, during this visit, he told Albert the house steps were weak, but he denied offering to fix them. He also denied that he learned Albert was leaving the house to Ms. Austin. Gilbert said that by then he knew Albert had given Ms. Austin a car, and that Ms. Austin had a power of attorney and looked after Albert's bills. He said he had some concerns about this, because he believed that she worked for the government as Albert's nurse, but he did nothing about it.
- [99] Ms. Austin said that Albert remained upset after Gilbert left. She denied feeding his negative feelings towards his relatives, or trying to influence him or give him advice. He was determined to speak with Mr. Tonstad, so she set up a meeting at Albert's home. Ms. Austin said she was not present, and did not know Albert's intentions.
- [100] Mr. Tonstad said that in January 1997, Ms. Austin called him and then put Albert on the phone, who forcefully told him he wanted to cut the plaintiffs out of his will completely. Mr. Tonstad said he discussed this with Albert on the phone at some length, telling him he had just made his will, and repeating his earlier advice that a larger gift to his relatives would be the best means of avoiding a challenge to his will. Albert was not prepared to listen to him, so he told Albert he would not change his will without seeing him. Mr. Tonstad said he wanted to review the consequences of such a change with Albert, and strongly advise him against it.
- [101] He arranged to meet with Albert alone at his home. Albert repeated that he wanted his relatives out of his will completely, because they did not deserve anything, and he wished Ms. Austin to have his entire estate. He told Mr. Tonstad it was his money and he could do what he wanted with it. Mr. Tonstad said he was sympathetic, but felt obliged to explain again the practical consequences of such a move, and repeatedly told Albert that a larger gift to his relatives made a stronger will. He was satisfied that Albert understood, and Albert

eventually agreed to leave them each \$15,000, emphatically repeating that this was more than they deserved.

- [102] Mr. Tonstad said that Albert gave him no reason for the change, but made it clear his affection for Ms. Austin exceeded anything he felt for his relatives. He was firm and determined, but pleasant, and indifferent rather than angry toward the plaintiffs. Mr. Tonstad said that, mentally, Albert was alert, capable, dynamic, and determined to do it his way. Mr. Tonstad said he was not concerned about the rationality of Albert's decision. It all made sense in the context of their previous dealings.
- [103] Ms. Austin testified that Albert later told her that he wanted to cut the relatives out of his will completely, but Mr. Tonstad had convinced him to leave them something, so he had left them each \$15,000. He said he was unhappy about leaving them even that much, and told her he wanted to place all of his bank accounts in his and Ms. Austin's joint names, so she would receive all of his money when he died. He told her the accounts would be hers as well as his, and that she should feel free to use the money for her own needs. She took him to the bank to see Ms. Grieve.
- [104] Ms. Grieve testified that she met with Albert on January 20, 1997, and he told her he wanted his accounts placed jointly in his name and Ms. Austin's. He said that his home was already in Ms. Austin's name, and that he wanted her to have all of his assets on his death, and to do everything possible to ensure his wishes would be followed. He was concerned that his relatives would create problems on his death. He told Ms. Grieve that they were after his money, and only visited when they wanted something. He related that during a recent visit, when they learned Ms. Austin was getting his house, they had left without repairing his stairs as they had promised.
- [105] Ms. Grieve said that she explained the implications of joint accounts to Albert, who was bright and alert. They had had previous discussions in which he expressed similar views about his relatives and Ms. Austin. She was not concerned that Ms. Austin was forcing this transaction. By now, she had seen Ms. Austin interacting with Albert, and she was loving and caring with him, treating him as a daughter would. Albert was always very happy with her, and never voiced any concerns to Ms. Grieve. Ms. Grieve followed Albert's instructions.
- [106] Ms. Grieve said that for about a year after Ms. Austin received control of Albert's accounts, they continued to come to the bank together, and Albert conducted his own transactions. Gradually, as it became harder for him to walk, he remained in the car and Ms. Austin did the banking. Ms. Grieve sometimes visited with him in the car, and said he seemed happier than he had been in a long time. He told her he had lived longer because of Ms. Austin.
- [107] From January 23-29, 1997 Albert was in hospital with kidney and urinary tract problems, and underwent a prostatectomy.

- [108] On January 30, 1997 Mr. Tonstad came to Albert's home to execute a codicil that reduced his bequest to each plaintiff to \$15,000. Monika Doucelin was there as a second witness. Mr. Tonstad said he spoke to Albert alone first, and again expressed his concern about the small bequest to the relatives. Albert dismissed this, and confirmed his wishes. Ms. Doucelin then came in and the codicil was executed.
- [109] Ms. Doucelin testified that Mr. Tonstad explained to her what she was signing and made sure she understood. Albert had told her many times that Ms. Austin was a beneficiary under his will, and she understood that he was reducing the amount he was leaving to the plaintiffs. She said Albert had told her he did not want to leave them anything, but Mr. Tonstad had insisted he give them something. Ms. Doucelin testified that from the time of Gilbert's visit earlier in January until the codicil was signed, Albert's mental state was fine and he understood everything.
- [110] Mr. Tonstad said that, when the codicil was signed, he spoke to Albert alone again, and advised him to get independent legal advice with respect to the codicil. Albert refused, and Mr. Tonstad again reviewed with him the need to make the will as strong as possible. He said Albert was pleasant, but would not change his mind. Mr. Tonstad got the impression that Albert had agreed to leave a bequest to the plaintiffs only to please him, as Albert then told him that he was considering putting all of his assets in joint tenancy. Mr. Tonstad told him that the will would then be of no effect, and Albert smiled and said, "I know."
- [111] Ms. Doucelin testified that, after the codicil was signed, Albert told her that he had put everything jointly in his name and Ms. Austin's so the relatives would not get a "red cent". He warned her that they would come back when he was gone to make trouble for Ms. Austin, and told Ms. Doucelin that she must be strong for Ms. Austin and stand by her when they did.
- [112] Albert had a series of hospital admissions after January 1997 for a variety of complaints. I am not going to set out the details of each admission, as I am satisfied that these medical problems do not play a role in the issues I must determine. Very briefly, they demonstrate that Albert's health was deteriorating in a number of respects, and that he was periodically confused or depressed due to those problems, or in some cases, the medications he took for them. Any change in his mental status, however, appears to have been short-lived, and rectified with appropriate medical care.
- [113] Gilbert visited again in July, 1997. He said there was no discussion about Ms. Austin's involvement in Albert's affairs, and he trusted her to look after him. While Gilbert and Bud both believed that they visited Albert annually, neither had a clear recollection of another visit until 1999.
- [114] Ms. Austin said that sometime in August 1997 Albert asked to meet with Mr. Tonstad again about estate planning, and she arranged a meeting between them at Albert's home. She was not present, but said Albert was reassured by the visit. Mr. Tonstad testified that he had little recollection of this meeting. He believed they discussed the implications of joint

tenancy, but his recollection overlapped with their discussion on this topic in January 1997. He recalled that Albert proudly gave him vegetables from his garden at this meeting. This was the last time he saw Albert.

- [115] Mr. Tonstad testified that throughout his dealings with Albert he had no question about his mental capacity. He based this on his observations of Albert, and Albert's ability to converse with him knowledgeably about the issues they discussed. Mr. Tonstad said he would have insisted on a medical opinion with respect to capacity if there had been any indication it was warranted.
- [116] Mr. Tonstad agreed that the question of influence by Ms. Austin was a potential concern from the outset. He saw no sign that she was influencing Albert, however, and felt that her influence over him, like everyone else's, was limited. It was his view that Albert clearly knew what he wanted to do and why. Albert was assertive, vigorous, and a remarkable man for his age. He insisted on his own way despite advice to the contrary, and Mr. Tonstad did not believe he could be easily influenced by anyone.
- [117] Mr. Tonstad agreed that, in considering the potential for undue influence, his knowledge of Ms. Austin carried some weight. He was impressed, however, that she had told him about her \$100,000 gift from Albert. He believed that she would not have brought Albert to a lawyer who knew about that, if she was influencing him improperly.
- [118] Mr. Tonstad described the relationship he saw between Albert and Ms. Austin as very much like family. He saw nothing romantic between them. He never heard Albert express concern that Ms. Austin might withdraw her services.
- [119] Mr. Tonstad later acted for Ms. Austin in two conveyances. He also agreed that his office had mistakenly copied her with correspondence directed to Albert. He maintained, however, that he was not in a conflict of interest in acting for both of them. He said that the transactions he conducted for Albert were done in accord with Albert's instructions. The fact that they also served Ms. Austin's interests was incidental to his retainer with Albert.
- [120] Ms. Austin and Ms. Doucelin testified that later in 1997 Albert offered to give Ms. Doucelin his old vehicle, because he had difficulty climbing into her van. Ms. Doucelin said she was uncomfortable with this, but Albert was insistent, and Ms. Austin told her it was fine, so she accepted.
- [121] Ms. Doucelin testified that at one point Albert had also offered to give her money to pay off her mortgage, because she was having financial problems. Her mortgage was \$148,000, but she did not tell him this, and said she refused his offer, because she did not want to take his money. She felt if he wanted to leave her something later on, that would be all right.
- [122] In late 1997, Ms. Austin bought a house in White Rock for her and her family. She said she paid for it with her own money, and a mortgage in her name. None of Albert's money was used to buy it, or to make the mortgage payments.

[123] Ms. Austin testified that Albert repeatedly expressed concern that his relatives would try to get his assets when he died, making comments like, "Them buggars will come back and make trouble for you when I'm gone, and try to throw you out of the house." She said that she knew Albert had taken all the proper steps to prevent a dispute over his estate, but she was concerned enough that she decided to surreptitiously tape a conversation with him in October, 1997. This tape was played at trial, and includes this exchange between Ms. Austin (A) and Albert (S):

A I was worried today when Monika told me you were worried about giving me that money, Albert.

S I give you money?

A You gave me the \$200,000. Do you remember that?

S I don't remember Lynda. I don't think about money.

A Ya! But you remember giving that to me?

S No I don't.

A Don't you?

S I forgot all about that [unclear]

A I was just worried that you were worried about it and I was going to tell you.

S No No No Dear. I won't live long enough to use what I got.

A I just wanted you to know that you could have that money back any time you want it Albert.

S I don't want it Dear. I gave it to you. When I die, I want you to have the rest of it because I want you to be cared for when I am gone. I don't want to see you suffering for the want of anything else.

A You know that if you want, you know, to take care of your relatives, that is okay with me.

S To hell with the buggers. If they come here I've got a good mind to tell them to get out [unclear] They don't come here to help me. I told them the last time they was here that if it was not for Lynda, I says, I wouldn't be able to live here. I would have to go to a home and then I wouldn't be treated right. I said she is worth her weight in gold that person, and you are, you are a wonderful girl.

...

S It's gonna stay in a joint account as long as I live because, dear, I love you so much.

A I know Albert.

S There's nothing in the world I love more.

A Well, I love you too.

S You've been so good to me. Taking an old person like me and looking after me and I, I don't forget that.

A I just don't want anybody to think that I've taken advantage of you Albert, that's all.

S You ain't taken no advantage of me. God must of loved me or else I wouldn't have got a person like you.

[124] It is clear at the outset of this exchange that Albert has forgotten about the home care agreement. Ms. Austin explained this lapse by saying that, at the time, Albert was having good and bad days. He was being treated for depression, and had some short term memory loss, which she felt might be related to his medications. She also agreed that she had not had the conversation with Monika to which she refers at the outset of the tape. She said she used this hypothetical conversation as a ruse to introduce the topic of the money into her conversation with Albert.

[125] Ms. Austin described Albert's general physical and mental condition during 1997. She said early in the year he was still very independent, looking after his own care and doing some cooking and shopping. He was somewhat weakened by the series of hospitalizations, but helped to paint the house and gardened in the spring and summer. Mentally, she said that his condition changed very little. He was alert for the most part, and chose his daily activities. He enjoyed reading the paper, watching TV, and monitoring the goings on in the neighbourhood. While he was ill at times, most of the time he enjoyed life and was able to function very well.

[126] Albert was in hospital from January 13 to February 25, 1998. During this admission, he was sometimes delusional and acutely confused. Ms. Austin testified that at one point he proposed to her. She said that he ultimately recovered most of his mental abilities. He had some short term memory problems, but was conversant, appropriate, and able to make decisions.

[127] During this admission, Welman Lee, the hospital social worker, saw Albert again and learned that Ms. Austin was providing home care for him, and that she had his power of attorney. He testified that he was concerned about the potential for abuse, and spoke to her employer at CCD to do a character check. He was satisfied with his inquiries, and said that as he observed them, he became impressed with Ms. Austin and what she was doing for Albert. He testified that Albert was still stubbornly refusing placement in a care facility, and the care Ms. Austin provided with Ms. Doucelin allowed him to stay in his home. Albert trusted her and was very complimentary about her care. He told Mr. Lee that Ms. Austin was "the daughter I never had". He also enjoyed Ms. Doucelin, who Mr. Lee said was kind and gentle with Albert.

- [128] Mr. Lee dealt with Albert during later hospital admissions in 1998 as well, and said he had no concern about discharging him home to the care of Ms. Austin and Ms. Doucelin. He believed their arrangements for him were entirely appropriate. He said the fact Ms. Austin was a nurse was not an essential factor. What was important was to have someone with him. Mr. Lee agreed, however, that her nursing knowledge was useful in being able to instruct his other care givers.
- [129] Mr. Lee testified that he had no concerns about Albert's mental capacity during his 1998 admissions, except during periods of confusion when he was acutely ill. At one point, Albert told him he had changed his will to make Ms. Austin a beneficiary. Mr. Lee knew nothing about their financial arrangements, but said he was not concerned as Albert was clear about what he had done and why. He was not easily influenced, and if he chose to benefit Ms. Austin, Mr. Lee believed it was because Albert clearly wanted to do that.
- [130] Mr. Lee was unaware of the home care agreement until much later, but said he was not surprised when he heard its terms, given her involvement with Albert. He did say, however, that he would not have accepted such an offer himself.
- [131] In late 1998, Ms. Austin moved some of Albert's funds from the HSBC Bank Canada to her own investment advisor, Andrew Bay, as she felt the interest rate earned on the GICs was too low. She approached Ms. Grieve initially, who referred her to an investment advisor with the bank. However, Ms. Austin ultimately spoke with Mr. Bay about managing Albert's money. She said it did not occur to her to choose someone independent of her. She did not know other financial advisors, and felt Mr. Bay had given her good advice.
- [132] Mr. Bay testified that Ms. Austin told him she was taking care of Albert and coordinating his money through a power of attorney. She sought his suggestions because she was concerned about the increasing cost of Albert's care, and whether his assets would be sufficient to meet those. Mr. Bay said he obtained details of Albert's situation from her, and prepared a proposal to transfer the funds to reasonably conservative investments with a higher income, which he felt would suit Albert's needs. He said he had no indication from Ms. Austin that there were other needs to be concerned about.
- [133] Mr. Bay said that, although he could have done the transfers on Ms. Austin's authority alone, she was insistent that he meet with Albert as well to get his approval. He met with Albert alone at his home. Mr. Bay said he explained the proposal, and Albert asked appropriate questions. He also discussed the tax implications, and Albert made negative comments about the government or his relatives getting his money, and made it clear that Ms. Austin was his only beneficiary. At the end of the discussion, Albert gave his approval to Mr. Bay's plan. Mr. Bay testified that Albert was cheerful, attentive and engaged during their discussion, and he had no concern about his ability to understand or give instructions. Ms. Austin rejoined them, and Albert told her to transfer all of his money to Mr. Bay, but she suggested it would be prudent to transfer only part of it at first. Mr. Bay said he observed a close bond between them.

- [134] Mr. Bay testified that thereafter his dealings were with Ms. Austin. He initially received \$100,000 to invest for Albert, and later about \$400,000 more. The portfolio lost no principal, and its value was \$538,000 at Albert's death. Mr. Bay said that after Albert died, Ms. Austin transferred additional funds to him and told him to invest them more aggressively. These investments did not do well and she lost money.
- [135] On December 17, 1998 Ms. Austin held a 95th birthday party for Albert. Her daughter, Laura, took a videotape of the gathering which was played at the trial. It shows Albert at home, nicely dressed, seated in his chair, and surrounded by guests. He appears elderly and frail, and he misses a good deal of the conversation due to his deafness, but his behaviour is appropriate and he is clearly enjoying the party. The house is nicely decorated for Christmas. Albert opens presents and cards with some help, and there is a meal and a birthday cake. At one point, Ms. Austin, Laura, and Ms. Doucelin make facetious comments to Albert about how much the plaintiffs love him, and they encourage him to make disparaging comments about his relatives. In their evidence, each said that their comments were instigated by Albert, who had earlier mocked his relatives when they called him for his birthday.
- [136] Asked to describe Albert's physical and mental health in 1998, Ms. Austin said that he had several hospital admissions early in the year. During some of these, he was delusional, and acutely confused. Some of the hospital records mention dementia of an Alzheimer's type. However, she said that in May, 1998 a new family doctor altered his medication regime, which led to significant improvement. He was less depressed, and more active. He was aware of what was going on, and read the newspaper and enjoyed visitors. He required more care, as he became incontinent, but was still able to wash and dress himself. He was less mobile, and used a wheelchair to go out to malls and antique shows, which he enjoyed.
- [137] Ms. Doucelin said that Albert had good and bad days in 1998. He was sometimes confused, but she saw no dementia except during one hospital admission when he was on an anti-depressant that made him hallucinate.
- [138] Gilbert and Bud each visited Albert at different times in 1999, and reported he was failing and more confused. Both felt Ms. Austin did not welcome their visits, although relations between them were cordial. Bud said that she told him that Albert had asked her to marry him and she had declined.
- [139] Ms. Austin said that, during 1999, Albert became slower physically and someone was with him almost twenty-four hours a day. He remained alert, however, reading the papers, enjoying visitors, and still doing a good deal of his personal care. He had two brief hospital admissions for urinary and renal problems, before his final admission in November, 1999. He still asked her not to call the plaintiffs to let them know he was in hospital. Gilbert happened to call to arrange a visit when Albert was in the hospital in November, and Ms. Austin discouraged this, telling him it would be better to visit when Albert got home. However, Albert died in hospital on December 4, 1999.

- [140] Ms. Austin notified the plaintiffs, and Gilbert came for the funeral. She gave him some of Albert's personal effects, but they had no discussion about the will or his estate. Gilbert testified that he and Bud were expecting to share \$100,000 from Albert's estate.
- [141] Albert's estate was worth about \$1 million when he died. Ms. Austin sought advice from Mr. Tonstad about the estate, and he advised her that probate was not required as all Albert's assets were owned jointly with her. As a result, there was no estate from which to pay the plaintiffs the \$15,000 each was to receive under the codicil, and she was under no obligation to do so. She nevertheless did send Bud and Gilbert \$15,000 each from the estate. Ms. Austin said that she also paid Ms. Doucelin \$15,000 when Albert died, as Albert had told her that Ms. Doucelin was in a financial fix, and they had discussed helping her.
- [142] When the plaintiffs received their cheques, they requested a copy of Albert's will and codicil, and ultimately commenced this action.
- [143] Ms. Austin was asked to describe her life with Albert. She said it was interesting, sometimes difficult, and sometimes a lot of fun. He was determined and independent, with his own ideas of how he wanted things done, but he was also kind, generous, and fair. During the time she cared for him, his life superceded everything in her life except her job. She was at his home almost every day after work, and frequently spent the night there, particularly when he was ill. She was his caregiver and much more, managing his finances, maintaining his home, and making sure all of his needs were met. She and her family included him in holiday and birthday celebrations. With time, they developed an affectionate relationship, much like a father and daughter. She said that her involvement in his care kept him in his home where he wanted to be, and prolonged his life. She believed Albert appreciated this, and got what he bargained for in the home care agreement.
- [144] Ms. Austin denied that she had used any pressure or influence in making the home care agreement with him, and she said that she felt it was fair. She agreed that, on Albert's death, he left her assets with a much greater value than she received under their original agreement, but said that Albert's progressive decisions to give her everything he owned was his own idea. She did not ask him or force him to do that, and she had no input into these decisions.
- [145] Ms. Austin agreed that she told Albert several times that he could have his money back, but denied doing this in a manner that suggested she would withdraw her services, in order to put pressure on him.
- [146] Ms. Doucelin testified that Ms. Austin and Albert were like a father and daughter. She believed the care and kindness Albert received from Ms. Austin and his other care-givers gave him more of a family than he had ever had before. She said Albert adored Ms. Austin, and waited eagerly for her arrival at the end of each day. He repeatedly spoke of how grateful he was to her. Ms. Doucelin denied, however, that Ms. Austin could influence Albert, saying that no one could influence him if he did not wish to be influenced. Ms. Doucelin said she never heard Albert express concern that Ms. Austin would withdraw her

services. He trusted her completely.

- [147] Each party called an expert in nursing ethics. There was little disagreement between them as to the ethical principles that govern the nursing profession. They agreed that a nurse/client relationship carries the potential for a nurse to assume a dominant role with the client. They said that the burden is on the nurse to recognize the potential for abuse arising from this imbalance, and guard against taking advantage of vulnerable clients in any way. Personal gifts to nurses from clients are strongly discouraged, as is the development of an interpersonal relationship between a nurse and a client while the professional relationship is still ongoing. While a subsequent interpersonal relationship with a client is not absolutely forbidden, the nurse is obliged to clearly terminate her professional relationship with the client first. There must be no overlap. The experts testified that these guidelines may apply to family members of the client as well, where the nurse has been involved with them in caring for the client.
- [148] Neither expert ventured an opinion as to whether Ms. Austin and Albert were in a nurse/client relationship when they became acquainted.
- [149] Ms. Fassbender, the home care nurse who cared for both Albert and Thomas, was critical of Ms. Austin for having dinner with Albert after Thomas was re-hospitalized. She believed that in doing so, Ms. Austin breached the ethical guidelines for a nurse. She said that while Thomas was, strictly speaking, the patient, a nurse does not treat a patient in isolation, but interacts with his family as well, who come to trust and depend on the nurse. Thus, a nurse owes ethical obligations to the family as well as the patient. Ms. Fassbender strongly believed that by accepting a large amount of money from Albert, Ms. Austin breached nursing ethics.
- [150] Ms. Austin took no issue with the ethical guidelines that govern a nurse's relationship with clients. She agreed the rules forbidding gifts and personal relationships are there due to fear of potential domination of the patient by the nurse. However, she maintained that the situation with respect to family members of patients is not as clear. She said it was not unusual for her to visit a past patient or his family after nursing services were no longer required.
- [151] Ms. Austin said that according to CCD policies, Thomas, not Albert, was the patient for home nursing care in the summer of 1996. She agreed that Albert knew she was a nurse, that the palliative care plan developed by CCD for Thomas covered family concerns and support as well, and that she discussed Thomas' care and condition with Albert during her visits. However, she said that she gave no care to him, and had no nurse/client relationship with him. They became friends while she nursed his brother, and their friendship continued after Thomas was hospitalized and died.

- [152] She acknowledged that CCD, through Ms. Fassbender, made a bereavement visit to Albert after Thomas died as part of their nursing service, but said this did not mean he was a client, and in any event, she played no role in it. By that time, she had transferred to a different CCD office in White Rock.
- [153] Ms. Austin testified that when she and Albert discussed the home care agreement, he had no need for nursing services, and their arrangement had nothing to do with the fact she was a nurse. He did not ask her to be his nurse, but to help him stay at home. She undertook to provide companionship and home-making care for him, not nursing care. She agreed that it is likely a 90-year-old man will ultimately require nursing care, but said that when Albert needed this later, he got it in the hospital and not from her. It was not something she considered at the outset. She said that she would not have let the same relationship with Albert develop had he been her patient.
- [154] Later, as Albert's physical condition declined, she said it was important to have someone at home with him, but it was never necessary that his care-giver be a nurse. She did not perform professional nursing services for him, and provided no more medical care than his other care-givers like Ms. Doucelin. She did agree that, when she accompanied him to his doctors' appointments, she could deal with the information they provided with more skill and knowledge than a layperson, but denied that she was monitoring Albert's health as a nurse.
- [155] Ms. Austin said that neither she nor Albert in her presence referred to her as his nurse. The hospital and nursing records refer to her at times as a nurse, but also describe her in other terms, such as friend and caregiver.

ANALYSIS

1. Evidentiary Value of Statements Made by Albert

- [156] I will deal first with this evidentiary issue, which involves the use I may make of evidence from various witnesses as to statements allegedly made by Albert. During the trial, I expressed concern about the admissibility of some of these statements, given their hearsay nature. Counsel agreed that it was most efficient to permit the witnesses to relate Albert's statements as part of their narrative, and deal with the use that can be made of them during argument.
- [157] Having had the benefit of that argument, like Bauman J. in *Halfpenny v. Holien* (1997), 37 B.C.L.R. (3d) 186 (S.C.) at 191-92, I am satisfied that Albert's statements are properly admissible. In some cases the parties do not rely on the truth of their contents. In other cases, they fall within recognized exceptions to the hearsay rule, being statements against pecuniary or proprietary interest, or declarations of an existing state of mind or intention, J. Sopinka, S. Lederman & A. Bryant, *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999) at paras. 6.225-6.242.

[158] As well, I am satisfied that these statements are admissible on the basis of the principled exception to the hearsay rule established in *R. v. Khan*, [1990] 2 S.C.R. 531. Clearly, the admission of such statements meets the test of necessity as Albert is deceased. The requirement of reliability gives me more concern where his statements are reported by interested parties. Nevertheless, in my view they meet the threshold requirement of reliability, and the fact that the witness relating them has an interest in the outcome of the case may be adequately dealt with in determining the weight to be attributed to them.

2. The Plaintiffs' Standing to Attack Albert's Gifts and Bequests

[159] The plaintiffs attack the series of gifts and bequests made by Albert to Ms. Austin between September 1996 and January 1997 on a variety of grounds. Their allegations can be conveniently separated into four main groups:

1. the home care agreement, and the associated transfers of \$200,000 and the interest in the house, are attacked on the basis of undue influence, unconscionability, and breach of Ms. Austin's fiduciary duty to Albert as his nurse/caregiver.
2. the will of November 9, 1996 is attacked on the basis of undue influence, and also as part of the home care agreement, since the bequest of the house was accomplished through the will;
3. the codicil of January 30, 1997 is attacked on the basis of undue influence;
4. other gifts, such as Albert's purchase of a car for Ms. Austin, and his decision to place his bank accounts in their joint names, are alleged to be the result of undue influence.

[160] The first question that arises is the plaintiffs' status to attack these transactions. Under ss. 58 and 59 of the Estate Administration Act, R.S.B.C. 1996, c. 122, upon death, any right of action vested in the deceased passes to his executors under his will, or his administrators if he dies intestate. Thus, the plaintiffs' right to attack the gifts and bequests to Ms. Austin depends on the validity of the will. If it is upheld, any right of action that Albert may have had will be vested in Ms. Austin as his executor, and the plaintiffs will have no standing to bring action with respect to the other transactions. If the will is invalid, the plaintiffs as Albert's next of kin would become his administrators on intestacy, and would have standing to attack the gifts made to Ms. Austin.

[161] The first issue for determination must therefore be the validity of the will. The plaintiffs make no claim with respect to the formalities and execution of the will. They originally claimed lack of testamentary capacity but that claim has been abandoned. They seek to set aside the will solely on the basis of undue influence.

3. The Validity of the Will of November 9, 1996

[162] In the case of testamentary instruments, the burden of proof with respect to undue influence lies on those attacking the will. Suspicious circumstances surrounding its execution, while relevant, do not give rise to any presumption that assists in discharging that burden: *Vout v. Hay*, [1995] 2 S.C.R. 876 at para. 28.

[163] The key to undue influence is coercion. The degree of influence that must be established was described by Viscount Haldane in *Craig v. Lamoureux*, [1920] A.C. 349 at 357:

Undue influence, in order to render a Will void, must be an influence which can justly be described by a person looking at the matter judicially to have caused the execution of a paper pretending to express a testator's mind, but which really does not express his mind, but something else which he did not really mean.

[164] In *Banton v. Banton et al* (1998), 164 D.L.R (4th) 176 (Ont. Gen. Div.) Cullity J. summarized the nature of the influence at 209:

A testamentary disposition will not be set aside on the ground of undue influence unless it is established on the balance of probabilities that the influence imposed by some other person on the deceased was so great and overpowering that the document reflects the will of the former and not that of the deceased. In such a case, it does not represent the testamentary wishes of the testator and is no more effective than if he or she simply delegated his will-making power to the other person.

At 220, he approved the following passage from *Eady v. Waring* (1974), 2 O.R. (2d) 627 (C.A.) as a useful list of the factors to be considered in ascertaining whether there has been undue influence:

... the evidence from which the Court's conclusion is to be drawn will in most cases be largely circumstantial. It is quite proper to consider the background of the testator, the nature of his assets, his relatives and others having claims upon his bounty, and his relationship to them, and his capacity at times subsequent to the execution of the will, to the extent that it throws light upon his capacity at the time of the making of the will.

[165] In *Scott v. Cousins*, [2001] O.J. No. 19 (Ont. S.C.) at paras. 112-114, Cullity J. reiterated that undue influence extends considerably beyond the exercise of significant influence or persuasion. He set out this list of the factors that a court may consider in deciding if it has been established: the willingness or disposition of the person alleged to have exerted the influence; the opportunity to exert such influence; the vulnerability of the testator; the absence of a moral claim or other reason why the deceased should choose to benefit this person; and a radical departure from the bequests made in previous wills.

- [166] While a fiduciary or similar relationship between the testator and the beneficiary is a factor to be considered in determining whether a bequest was the result of undue influence, such a relationship does not give rise to a presumption of undue influence in the testamentary context: J. MacKenzie, *Feeney's Canadian Law of Wills*, looseleaf, 4th ed. (Toronto: Butterworths, 2000) at 3.6 - 3.7.
- [167] The plaintiffs argue that the question of undue influence with respect to the will cannot be considered in isolation. The will was the product of the relationship between Albert and Ms. Austin that began in August, 1996. It also constituted partial performance of the home care agreement, as it effected the transfer of Albert's house to her on his death. I agree that the validity of the will must be examined in the context of these preceding events.
- [168] The plaintiffs say that Albert's age, his deteriorating health, his unsophisticated background, and the death of Thomas, all made him vulnerable to influence. He was depressed, lonely, and grieving for his brother. He was also in a period of transition, and desperate to find a means of remaining in his own home. He had few options apart from Ms. Austin, and she knew this and took advantage of it.
- [169] They argue that Ms. Austin improperly used her position as a nurse to insinuate herself into Albert's life, and influence him. He quickly became dependent on her, and that permitted her to pressure him into entering the home care agreement, and into making subsequent gifts and bequests to her, that were out of all proportion to the services she agreed to provide to him.
- [170] While the plaintiffs concede that there is no direct evidence that Ms. Austin exerted influence on Albert, they say a number of circumstances establish coercion by her. These include the unequal terms she negotiated in the home care agreement, her failure to ensure that he obtained truly independent legal advice, her role in arranging his impetuous dealings with Mr. Tonstad and Ms. Grieve, and her complete control over his finances, and many other aspects of his life. They say that, while Albert appeared stubborn, it is telling that he never acted contrary to Ms. Austin's advice or interests.
- [171] The plaintiffs say that, to accomplish her aims, Ms. Austin deliberately alienated Albert from them, convincing him that they did not care about him, and limiting his communication with them. She supplanted their affection for Albert with that of her own family, and made Albert feel that she alone was on his side, thus enhancing her position of influence: *Danchuk v. Calderwood* (1996), 15 E.T.R. (2d) 193 (B.C.S.C.). They say Mr. Tonstad increased Albert's negative feelings towards them, by advising him that they would act against his wishes and challenge his will.
- [172] The plaintiffs argue that Ms. Austin had no moral claim on Albert's estate. He had known her for less than four months when he executed the will, whereas they had a familial relationship with him which they had fostered over many years. He had given them a legitimate expectation they would be his beneficiaries.

- [173] The plaintiffs say that these factors must lead to a conclusion that Ms. Austin exploited Albert's vulnerability and growing affection for her, and that his will was the direct result of undue influence by her. It must therefore be declared invalid.
- [174] I have considered these arguments in the context of the law and the facts I have set out, and I have concluded that the plaintiffs have failed to establish that the will of November 9, 1996 was the product of undue influence by Ms. Austin. I reach that conclusion for the following reasons.
- [175] Initially, the plaintiffs attacked the will on the ground of lack of testamentary capacity. They wisely abandoned that claim at the conclusion of the trial, as there was virtually no evidence that shed doubt on Albert's mental capacity during the fall of 1996. Thus, my assessment of Albert's personal characteristics, in the context of undue influence, starts with the acknowledgment that he understood and appreciated what he was doing.
- [176] A person who is mentally capable may nevertheless be forced to act against his will. In *Vout v. Hay*, supra, however, at para. 29 the Court acknowledged that, while the concept of mental capacity, and the evidentiary rules related to it, are distinct from undue influence, there is also some 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.
- [177] In considering Albert's frame of mind, the evidence left me with an overwhelming impression of a stubborn, determined, and proudly independent man. Virtually every witness testified to these character traits in him. I found the evidence of Mr. Welman Lee particularly persuasive, in describing Albert's entrenched plan to remain in his own home, months before Ms. Austin appeared on the scene. I also found Mr. Tonstad's evidence instructive, as he described repeated attempts to convince Albert to follow his legal advice, and being met consistently with reasoned opposition.
- [178] The evidence also convinces me that Albert was canny, and even sly, in his ability to get his own way. For example, he clearly grasped the concepts of independent legal advice and joint tenancy, and manipulated them to achieve his own ends. He deliberately lied to Mr. John Lee about the amount of time he had known Ms. Austin, to ensure he obtained the certificate of independent legal advice. He put everything in his name and Ms. Austin's jointly to get around Mr. Tonstad's demand that he leave some bequest to the plaintiffs.
- [179] Albert was in reasonably good physical health throughout the fall of 1996. Although the will was executed while he was in hospital for cardiac investigations, there is nothing to suggest that those health problems influenced his earlier decisions to enter the home care agreement, or to benefit Ms. Austin in his will.
- [180] While Ms. Fassbender, Dr. Johnson, and Gilbert all testified that Albert was deeply affected by Thomas' death, the weight of the evidence convinces me otherwise. Before his brother died, Albert had made negative comments to Welman Lee and Ms. Agius about him, and

Albert consistently expressed the same sentiments about Thomas to Mr. Young, Ms. Grieve, Ms. Austin, and her daughter Laura. I accept that, with Thomas' death, Albert entered a period of some anxiety about his future living arrangements. Ms. Austin's evidence that she found him "clinging" requires particular examination, given the arrangements between them that followed. The evidence, however, convinces me that Albert was not made more vulnerable by this transitional period, but was dealing with it in a practical way by developing a means of implementing his long-time plan to remain in his own home.

- [181] Ms. Fassbender, Ms. Agius, both plaintiffs, and Mr. Smigalski all testified to hearing Albert offer inappropriately large amounts of money to them for their services. Ms. Fassbender expressed the view that this made him vulnerable to abuse. I find it informative, however, that in each case, Albert freely volunteered to give them his money because they had helped him. None of these offers was made in response to pressure from the intended recipients. I conclude that, rather than demonstrating vulnerability, these actions show that money was not important to Albert, and he was generous to those who assisted him.
- [182] The plaintiffs maintain that Ms. Austin improperly used her status as a nurse to insinuate herself into Albert's life, and position herself to take advantage of this generosity.
- [183] While I do not agree with Ms. Austin that her profession was irrelevant to the relationship that developed between her and Albert, I do find that it was not a significant factor in the establishment of that relationship. Nor did it play a definitive role in Albert's decision to benefit her through the home care agreement, or his will. I reach those conclusions for the following reasons.
- [184] There is no question that Albert first met Ms. Austin in her capacity as a nurse. I accept that her nursing care was directed to Thomas, but Albert was also involved in Thomas' care and her visits. I accept her evidence that she explained to Albert that her nursing role was over when Thomas went into hospital in August 1996. I, nevertheless, have some question as to whether Albert would grasp the nuances of the separation between her professional status and her role as his friend.
- [185] I do accept, however, that Ms. Austin's visits with Albert after Thomas was hospitalized did not require nursing skills or knowledge. I find nothing sinister in those visits. Several factors argue against the view that Ms. Austin undertook them as part of a scheme for financial gain.
- [186] First, I accept that she was unaware of Albert's wealth until after Thomas died. I found her account of learning this during the funeral arrangements credible. It would have been more advantageous to her position to say she did not know of it until he approached her about the home care agreement.
- [187] Second, Gilbert supported her testimony that Albert offered her money as a thank you for caring for Thomas, and she declined it.

- [188] Third, Ms. Austin had followed the same pattern in developing a friendship with Ms. Doucelin. This suggests that it was not extraordinary for her to continue to support someone she had met in her nursing role, after her duties were over, out of a genuine concern for the person.
- [189] Fourth, once the funeral was over, Ms. Austin effectively withdrew from Albert's life, as she assumed that the plaintiffs would be making appropriate arrangements for him. She did not plan further visits, and only resumed contact with him because Ms. Agius telephoned her.
- [190] Finally, I put considerable weight on the fact that, prior to broaching the home care agreement with Ms. Austin, Albert had offered the same kind of arrangement to Ms. Agius, who was not a nurse. I found Ms. Agius a guileless and wholly credible witness, and accept her evidence of Albert's offer without hesitation. The fact that she was Albert's first choice, to my mind, definitively rebuts the plaintiffs' contention that Ms. Austin's status as a nurse was fundamental to Albert's decisions to benefit her.
- [191] When Albert did make the offer to Ms. Austin that led to the home care agreement, I expect he may well have viewed her nursing background as a positive factor. I expect that anyone who is over 90 years old, and wishes to remain in his own home, would find it an asset if his caregiver were a nurse. However, I find her professional status was not a definitive factor in reaching the home care agreement.
- [192] I am satisfied that the services provided by Ms. Austin to Albert during the early stages of the home care agreement were not nursing services. They involved home and personal care, home maintenance, and financial management. Later, as Albert's health deteriorated, I have no doubt that her nursing knowledge played a role in her planning for his care. However, I note Welman Lee's testimony that, by 1998 when he saw Albert, the fact that Ms. Austin was a nurse was useful, but not essential to his care. It was more important that he had someone with him all the time.
- [193] I accept that Albert had a limited circle of people to approach to assist him with his future care needs, and that he was anxious about remaining in his own home. Nevertheless, I am unable to find that Ms. Austin's status as a nurse was instrumental in forming the home care agreement.
- [194] Nor do I find that Albert offered the home care agreement to her because she used her professional status, or any other means, to unduly pressure him. In reaching this conclusion, I again find it significant that Albert first offered a similar arrangement to Ms. Agius. It was only after she turned it down, and only at the suggestion of Ms. Agius' father, that Albert then approached Ms. Austin with the same offer. I accept that the home care agreement was very generous to Ms. Austin, and disproportionately valued the services she was to provide. I accept that she knew this. However, it is clear from Ms. Agius' evidence that it was Albert who formulated the offer. It was not initiated by Ms. Austin.

- [195] I accept that Ms. Austin was taken by surprise by it. She did not immediately accept, and instead took time to consult with friends and family. The modified terms she suggested in response, that she keep her job and that the house be cleaned up, cannot be described as unreasonable or greedy, and are not suggestive of unequal bargaining power, or undue pressure.
- [196] It would have been preferable for both parties to have had legal advice about the home care agreement. It would have been preferable to reduce it to writing, and to include terms that dealt with such things as unexpected termination, and other protective measures. The failure to do this, however, potentially jeopardized both parties, and cannot be said to have benefited Ms. Austin alone.
- [197] I have no doubt that there was a considerable element of self-interest in Ms. Austin's decision to accept the home care agreement. However, I do not think her acceptance of the terms formulated by Albert, in the circumstances I have described, supports a finding of undue influence by her.
- [198] While that finding with respect to the home care agreement is not strictly necessary at this stage, it does provide context for the considerations relevant to the will.
- [199] By the time Albert presented himself at Mr. Tonstad's office to give him instructions for his will, the home care agreement had been in place for almost a month. I find that the familial relationship of affection and respect, which so many witnesses described between Ms. Austin and Albert, had begun to develop, and Albert had every reason to believe he had made a wise choice in Ms. Austin. She was taking a significant interest in his welfare, spending time with him, improving his living arrangements, and treating him like a member of her family.
- [200] The plaintiffs claim that by this time Ms. Austin had successfully alienated Albert from them, and improperly influenced him to reduce his bequests to them. The plaintiffs face a heavy onus in establishing this, which was aptly summarized in the headnote of *Pocock v. Pocock et al*, [1950] O.R. 734; *aff'd* [1952] O.R. 155:

Where it is contended that the execution of a will has been induced by undue influence, in that the testatrix's mind has been poisoned against one of her children by allegations made against him by another son (the latter of whom alone receives a benefit under the will), the onus is on those who set up undue influence to establish that the allegations, if made, worked on the testatrix's

mind to such an extent, and so deeply, that unconsciously her mind was brought to function on a basis that was unreal. In other words, whether the charges were true or false is immaterial if it is not established that the testatrix's conduct was influenced by them.

I find they have failed to meet that onus here.

- [201] First, the evidence of Welman Lee, Ms. Agius, and Mr. Young, the funeral director, satisfies me that Albert's negative feelings towards the plaintiffs preceded Ms. Austin's involvement in his life. Moreover, Albert had a rational basis for those feelings. He felt they did nothing for him. The evidence shows that their involvement with Albert was very limited. Their visits with him were brief and infrequent. They offered little assistance to him after Thomas' death when Albert was left on his own.
- [202] Ms. Austin's arrival on the scene did not appear to change the plaintiffs' pattern of involvement with Albert prior to the will. While they complained that she prevented them from reaching Albert by telephone, it was not clear this occurred prior to November, 1996. Ms. Austin was not yet spending a significant amount of time at the house. As well, there were other reasons for this, notably, Albert's deafness, and his unwillingness to spend money to call them.
- [203] They also complained that Ms. Austin did not notify them when Albert was in hospital, but Welman Lee confirmed that these were Albert's instructions, and did not emanate from Ms. Austin. The hospital records also show that Albert gave instructions not to contact the plaintiffs on some admissions.
- [204] Moreover, while the plaintiffs maintained that Albert had told them they would be the beneficiaries under his will, it is clear he was not honest with them about the extent of his estate. Following Thomas' death, Albert told Gilbert he had a total of \$200,000, and that Gilbert and Bud would each receive \$50,000 of that. It therefore appears doubtful that Albert intended to leave everything to the plaintiffs. I note that, in the will, Albert left each plaintiff \$100,000, which was more than he had promised them.
- [205] Ms. Austin claims she took a neutral role in Albert's relationship with the plaintiffs. She said that as time went on, she came to agree with Albert that they did little to assist him, and she made no effort to improve their relationship. It cannot be denied that this played to her advantage. As well, the videotape reflects poorly on her attitude toward the plaintiffs. Nevertheless, this was filmed more than two years after the will, and in the context set out in the preceding paragraphs, I cannot find that Ms. Austin actively turned Albert away from his relatives, or influenced him to decrease his bequests to them.
- [206] Albert's visit to Mr. Tonstad on November 7, 1996 about his will was impetuous. It would undoubtedly have been preferable if Ms. Austin had taken him to a lawyer with no connection to her. However, I agree with Mr. Tonstad that it is unlikely Ms. Austin would have brought Albert to a lawyer who knew about the gift of \$100,000, had she wanted to hide her influence over Albert. Moreover, I found Mr. Tonstad credible in describing his dealings with Albert, and there is nothing in the evidence to suggest that he was acting in concert with Ms. Austin to manipulate Albert's testamentary wishes. In the face of these findings, the wisdom of Mr. Tonstad's decision to act for Albert, and the quality of his advice, have no direct impact on the question of undue influence. The real issue is whether he failed to pay sufficient attention to the possibility of undue influence because of

misplaced confidence in Ms. Austin. I find that was not the case.

- [207] I accept that Mr. Tonstad recognized the potential for conflict of interest and undue influence from his first meeting with Albert. While he did not know about the home care agreement, he was aware that Albert had given Ms. Austin \$100,000, and this, in his words, raised a "red flag" with respect to the possibility of undue influence. I accept that he accordingly always met with Albert alone, and took pains to ensure that Albert's instructions represented his true wishes.
- [208] While Mr. Tonstad's wish to make the will as strong an instrument as possible was as much in Ms. Austin's interests as Albert's, I note that he also took steps to protect Albert in a way that diminished her interests. He insisted on the trust agreement and independent legal advice.
- [209] The plaintiffs claim that Mr. Tonstad unduly influenced Albert against them by repeatedly telling him that they were likely to challenge his will. They say that advice was unnecessarily negative, and played a role in Albert's decisions about their bequests. I find no merit in that submission. It would be advisable to tell a testator in Albert's circumstances about the prospective consequences of his bequests in the context of the Wills Variation Act, R.S.B.C. 1996, c. 490.
- [210] Although the will was executed sooner than expected, when Albert was in hospital, there is nothing in the medical records or other evidence to indicate this created an element of coercion. It was Albert's choice to execute the will that day. Ms. Austin was not there. No changes were made to the instructions he had given Mr. Tonstad at their lengthy meeting prior to his hospitalization.
- [211] Nor am I concerned by the fact that Albert did not receive independent legal advice until after he had executed the will. Had Mr. John Lee's advice swayed him, Albert could simply have destroyed his will. Like Mr. Tonstad, Mr. Lee knew the circumstances were unusual, and that undue influence was a consideration. He had no personal relationship with Ms. Austin that might cloud his judgment. Albert clearly told him that he was doing this himself, without any influence. The information he obtained from Albert was largely consistent with that obtained by Mr. Tonstad, and consistent with Albert's relationship with the plaintiffs and Ms. Austin. The fact that Albert was not entirely truthful with Mr. Lee, and lied about knowing Ms. Austin for a long time, demonstrates to me that he knew exactly what he wanted, and was sly in making sure he got it.
- [212] I find that Albert's dealings with Mr. Tonstad about his will were entirely in keeping with his developing affection for Ms. Austin, and her growing role in his life. His bequests to the plaintiffs were larger than what he had promised them. Throughout his dealings with Mr. Tonstad and Mr. Lee, Albert demonstrated the characteristic determination and canniness that was described by so many of the witnesses. I am left with the impression that Albert was clearly in charge, and made sure his belongings would go where he wanted them to, regardless of what legal advice he got. I find nothing in his dealings with the lawyers to

support a finding that his bequest to Ms. Austin was the product of undue influence.

- [213] There are aspects of Ms. Austin's behaviour that require examination, in considering whether she coerced Albert into leaving the bulk of his considerable estate to her in the will.
- [214] Ms. Austin testified that she played a passive role in each decision Albert took that benefited her. She said that she did not feel it was her business to influence his choices, and she supported whatever Albert chose to do. I find that somewhat disingenuous, given the substantial benefits she was receiving.
- [215] There is no question that Ms. Austin facilitated Albert's visits to Mr. Tonstad and Ms. Grieve, to carry out his bequests and gifts to her. At times, his decisions were impetuous, and she did nothing to encourage him to reflect on them before carrying them out. Nor did she disclose the details of the home care agreement to Albert's advisors, such as Ms. Grieve and Mr. Tonstad, or to the plaintiffs.
- [216] Nevertheless, each of these people had enough information about the financial arrangements between Albert and Ms. Austin to be alert to the possibility of undue influence, and none of them saw anything they perceived as untoward pressure on Albert from Ms. Austin. Ms. Grieve, in particular, had known Albert for over 25 years, and was trained by the bank to watch for such things. She testified that she never thought that Ms. Austin had persuaded him to do anything against his wishes.
- [217] It is true that Ms. Austin arranged significant renovations to Albert's home, that she was destined to inherit. However, the evidence convinces me that Albert enjoyed participating in the changes, and living in greater comfort himself.
- [218] Others who had been offered money by Albert, particularly Monika Doucelin and Laura, Ms. Austin's daughter, were more reticent to accept it than Ms. Austin.
- [219] I find Ms. Austin's self interest clearly exhibited in the conversation she taped with Albert in October, 1997. This was a calculated and manipulative step, taken by her to protect her position in any later litigation by the plaintiffs. Nevertheless, despite the fact that Albert initially had a lapse of memory about his arrangement with Ms. Austin, I found his later comments on the tape genuine and clear, in expressing his affection for her, and his wish to leave her all he owned.
- [220] I conclude that Ms. Austin's passive acceptance of Albert's largesse, and her actions to secure her position, while connoting a significant element of self interest, do not provide a basis for a finding of undue influence.

- [221] Finally, the cases indicate that subsequent behaviour of the parties is relevant to the question of undue influence. There is no question that Ms. Austin carried out her end of the home care agreement. Albert remained in his home until his last hospitalization, a few weeks before his death. By all accounts, his last three years were perhaps the happiest time of his life. Many witnesses described his relationship to Ms. Austin as similar to that of a father and daughter. Through her, he enjoyed a family life he had never had.
- [222] While Ms. Austin gained effective control over Albert's bank accounts in November, 1996, there is no evidence that she misused his money or misappropriated it for herself prior to his death. She paid her expenses related to Albert from his accounts, and spent his money on things that pleased him and made his life better. She maintained a separate account for her employment income, and expenses unrelated to Albert. She did transfer his money to her own investment advisor, Mr. Bay, in 1998, but I am satisfied that Mr. Bay invested it in funds that were appropriate for an older client, and made a profit on it until Albert's death.
- [223] While Ms. Austin offered to return Albert's money to him several times during their arrangement, I find nothing to suggest that she threatened to withdraw her services, as a means of putting pressure on Albert to give her his assets.
- [224] The videotape taken at Albert's 95th birthday in December, 1998, like the audiotape made by Ms. Austin in October, 1997, may have been recorded to serve Ms. Austin's own interests. Nevertheless, both provide a powerful image of Albert in his final years, situated in the house where he wanted to be, and enjoying a life made more comfortable, and happier, by Ms. Austin's considerable efforts.
- [225] After Albert executed the will, he continued to deal with people who were alert to the potential for inappropriate influence. None of them detected anything of concern.
- [226] Albert's mental and physical condition did deteriorate during the last years of his life. However, this took place well after the events related to the will. I note that, even then, Welman Lee undertook an investigation of Ms. Austin's involvement in Albert's life in 1998, and had no concern about it.
- [227] The law is clear that, to succeed on their claim of undue influence, the plaintiffs must prove that Ms. Austin exercised such over-powering influence over Albert that his will cannot be said to express his wishes. I conclude that they have not met that burden. Accordingly, I declare the will executed by Albert on November 9, 1996 is valid and has been proven in solemn form. The plaintiffs therefore have no standing to challenge the balance of the transactions between Ms. Austin and Albert, on behalf of Albert's estate.

4. The Validity of the Codicil

- [228] The plaintiffs do, however, make one further argument they say is unaffected by their lack of standing. This is that the codicil executed by Albert on January 30, 1997 is invalid because of undue influence by Ms. Austin. If they succeed in this argument, they say they are entitled to recover the bequest of \$200,000 set out in the will, rather than the \$30,000 they received under the codicil.
- [229] I believe that proposition is questionable, in view of Albert's decision to put all of his money in joint bank accounts with Ms. Austin, about ten days before he signed the codicil. I will nevertheless deal with this argument.
- [230] Many of the same factors which I have considered with respect to the will apply as well to the validity of the codicil, and I will not repeat them here. Instead, I will mention only the events between the execution of the will and the execution of the codicil which may have some bearing on the question of undue influence.
- [231] During that time, Ms. Austin's place in Albert's life became more established. She saw him daily to look after his needs. She had arranged the renovations to his home, and hired companions for him during the day. He was included in the Austin family events, and they had held a birthday party for him in December, 1996. Albert had people in his life who cared for him, and who compared favourably with the plaintiffs.
- [232] It is apparent that Albert's decision to alter his bequests through the codicil came about because of a relatively small incident, involving Gilbert's failure to fix the stair at the house. The plaintiffs argue that it was irrational for Albert to significantly alter his bequests to the plaintiffs because of this. However, when viewed in the context I have previously set out, I am unable to attribute it to deterioration in his mental state, or any particular vulnerability. Although it was impetuous, Albert's decision was consistent with his views of the plaintiffs, and with his stated philosophy to "only help those who helped him".
- [233] There is nothing to suggest that there had been any significant change in Albert's mental or physical health which influenced his decision. Ms. Grieve observed nothing that concerned her when she met with him about putting his accounts in joint names on January 20, 1997.
- [234] Ms. Austin again acted quickly to facilitate Albert's wishes, in arranging the meetings with Ms. Grieves and Mr. Tonstad. She again did nothing to dissuade him.
- [235] Mr. Tonstad's evidence confirmed that Albert understood his advice, but remained determined to do as he wished. Although he did leave a small gift to each plaintiff as Mr. Tonstad advised him to, the fact that he mentioned placing all his assets in joint tenancy at the end of his dealings with Mr. Tonstad emphasizes to me that Albert was not only determined and alert, but again slyly setting about to ensure that his intention to give everything to Ms. Austin was accomplished. I do not find that Mr. Tonstad's continuing advice with respect to a potential challenge to the will by the plaintiffs was anything other than standard legal advice appropriate to the circumstances.

[236] I conclude, as Mr. Tonstad did, that while Albert's decision to decrease the bequests was perhaps out of proportion to the incident regarding the stair, it was consistent with his earlier views and attitudes towards both the plaintiffs and Ms. Austin.

[237] I conclude the plaintiffs have failed to meet the burden of proving that the codicil was the result of coercion by Ms. Austin. Accordingly, I find the codicil is valid, and has been proven in solemn form.

CONCLUSION

[238] I appreciate that the home care agreement struck between Albert and Ms. Austin, and his subsequent bequests and gifts to her were unusual, but Albert was an unusual man. I find that he knew what he wanted, and set about getting it. He lived the last years of his life in accord with his wishes, and freely rewarded Ms. Austin for providing him with that opportunity. I close with Albert's own words, as reported by Mr. Tonstad and Mr. Lee, that aptly summarize my findings:

It's my money and I can do as I want with it.

I love her and she takes care of me.

Nobody's forced me, I done it myself.

[239] The action is dismissed.

"K.E. Neilson, J."

The Honourable Madam Justice K.E. Neilson

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