IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Tribe v. Farrell,***
2003 BCSC 1758

Date: 20031121
Docket: S069575
Registry: New Westminster

Re: The Estate of Jack Jason Tribe, Deceased

Between:

Daniel Tribe

Plaintiff

And

Georgia Farrell

Defendant

Before: The Honourable Mr. Justice Cohen

Reasons for Judgment

Counsel for the plaintiff	T.S. Fowler
The defendant Georgia Farrell	On Her Own Behalf
Date and Place of Trial:	February 3 - 17, 2003 Chilliwack, February 18 - 21, 2003 Vancouver May 28 - 30, 2003, Vancouver, and September 2 - 5, 2003, Vancouver

I THE PLAINTIFF'S CASE AGAINST THE DEFENDANT

[1] The plaintiff, Daniel Tribe, is the son of the late Jack Jason Tribe (the "deceased"), who died on April 20, 2001. At the time of his death, the deceased was not survived by any other children or a spouse, common-law or otherwise.

[2] In July, 1996, at the age of 83, the deceased sold his house and property and moved into a new, older house at 532 East 16th Street, in North Vancouver.

[3] In August, 1996, the defendant, Georgia Farrell, moved into the deceased's home to perform for him certain light housekeeping and various other duties. Prior to moving into the deceased's home, the defendant, who had worked as a legal secretary for some 20 years, was unemployed and on social assistance for health reasons.

[4] On March 17, 1997, the deceased executed a will bequesting to the plaintiff his house and property with its entire contents, including all of his possessions, his automobile and the residue of the estate (the "First Will"). The First Will provided that in the event of the plaintiff's demise, the deceased's entire estate was to become the possession of the plaintiff's wife.

[5] On March 17, 1997, the deceased also executed a Power of Attorney, appointing the plaintiff as his sole Attorney.

[6] The plaintiff alleges that between July, 1996, and the deceased's death, the deceased made certain *inter vivos* transfers of property to the defendant, including the transfer of his 1995 Dodge Neon vehicle, and that during and after the life of the deceased, the defendant converted to her own use all or substantially all of the tangible personal property of the deceased.

[7] The plaintiff also claims that there were numerous cash transfers to the benefit of the defendant during the deceased's life, including a lump sum of $29,000.00 which was transferred on October 19, 1999, from the deceased's bank account at the Lonsdale Branch of the North Shore Credit Union (the "NSCU"), to a "secret" joint bank account in the names of the deceased and the defendant at the Coast Capital Savings Credit Union (the "CCSCU"). The plaintiff claims that this joint account had a right of survivorship which benefited the defendant.

[8] In addition, the deceased was the recipient of a monthly annuity payment in the amount of $929.17 which was directly deposited to his account at the NSCU. The defendant arranged

to have the annuity directly deposited into the joint account at the CCSCU, commencing February 20, 2000.

[9] The plaintiff asserts that the defendant maliciously interfered with the relationship between the deceased and the plaintiff in her attempt to isolate the deceased and convince him that the plaintiff was trying to take away his assets. The plaintiff also claims that in October, 1999, the defendant convinced the deceased to revoke the Power of Attorney in favour of the plaintiff.

[10] On September 22, 2000, the deceased executed a new will (the "Second Will") which contains a bequest to the defendant of all of the deceased's real property and a bequest of the residue of his estate to the plaintiff. The Second Will contains the following clause:

> I have considered my obligations and my responsibility to my son and grandchildren, and I make this Will believing it to be fair in light of their economic disposition and in regard to their needs generally, and to Georgia Farrell who has been my principal caretaker during the past five years. My bequest to her is made voluntarily and after much consideration by me personally and in consultation with third parties.

[11] The plaintiff claims that the Second Will was the result of undue influence, coercion or fraud by the defendant at a time when the deceased was old, frail and scared.

[12] The deceased passed away on April 20, 2001, after being admitted to Lion's Gate Hospital with an aneurysm in his leg. The defendant was told by the deceased's family doctor that the deceased's family should be contacted, but the defendant intentionally failed to notify the deceased's family until after his death.

[13] After the deceased died, the Executrix of the Second Will, a friend of the defendant, renounced her appointment. The parties have now agreed to an independent Administrator to represent the estate.

II THE ISSUES

[14] The issues for determination are:

1. Did the defendant, as a fiduciary or otherwise, exercise undue influence or coercion in respect of the deceased and the deceased's decisions during his lifetime respecting the property of the deceased?

2. Are the gifts or transfers of property from the deceased to the defendant, or her control, void because they were unconscionable transactions arising from the defendant's exercise of undue influence, coercion or fraud?

3. Is the Second Will valid and enforceable?

4. If the Second Will is not valid and enforceable, should the Estate be administered and distributed pursuant to the First Will?

5. If the Second Will is valid and enforceable, what interest in the deceased's Estate should be awarded to the plaintiff pursuant to the ***Wills Variation Act***?

6. If the Second Will is valid and enforceable, should the plaintiff receive punitive or aggravated damages from the defendant's interest in the deceased's Estate by reason of her conduct and alleged malicious behaviour, and the alleged conversion of the majority of the deceased's assets into the defendant's control?

III THE PARTIES' POSITIONS

(i) The Plaintiff

[15] The plaintiff does not take the position that the deceased suffered from dementia at the material times so as to lack capacity. However, the plaintiff submits that the deceased, who was a man in his eighties with health problems,

was susceptible to influence from the defendant, a woman some 35 years his junior, who over the course of their relationship came to dominate the deceased.

[16] The plaintiff also submits that the defendant, as a fiduciary or otherwise, exercised coercion or undue influence, either actual or presumed, over the deceased and the deceased's decisions during his lifetime respecting the property of the deceased. The plaintiff claims that, accordingly, the gifts or transfers of property from the deceased to the defendant, or placed under her control during the deceased's lifetime, most particularly the deceased's automobile and the bank account in the joint names of the deceased and the defendant, are void as unconscionable arising from the defendant's exercise of undue influence, coercion or fraud. Furthermore, the defendant claims that the Second Will should be set aside as not being the product of the deceased's free will, but rather the result of undue influence, coercion or fraud on the part of the defendant.

(ii) The Defendant

[17] The defendant asserts that there is no evidence to support the plaintiff's allegations that the deceased suffered from health problems which affected his soundness of mind and judgment, preventing him from understanding the nature and

effect of the transactions he entered into with the defendant. She also submits that there is no evidence of any physical or mental deterioration in the deceased's health between the time he executed the First Will, and the time when he executed the Second Will, save for the fact that he underwent and successfully recovered from hip surgery in June, 2000.

[18] The position of the defendant is that prior to the deceased's death, the plaintiff never alerted the deceased's doctor of any concerns on the plaintiff's part about the deceased's physical or mental well-being. The defendant says that the plaintiff neglected the deceased throughout their relationship, and that if he believed that the defendant was exercising undue influence over the deceased, he should have taken steps to protect the deceased, or at the very least, he should have asked that the deceased be assessed to confirm or negate any concerns on his part. This was never done, and, in the defendant's view, the evidence does not support any of the plaintiff's allegations against her of undue influence, coercion or fraud.

IV UNDUE INFLUENCE

1. The Law of Undue Influence

[19] The law of undue influence is well settled and most succinctly set out in the reasons of Satanove J. in ***Ogilvie v. Ogilvie Estate***, [1996] B.C.J. No. 1506, affirmed [1998] BCJ No. 722, 49 BCLR (3d) 277, where at paras. 32 - 39, Her Ladyship said as follows:

> The law of undue influence seems well settled. The early English case of ***Allcard v. Skinner*** (1887), 36 Ch.D. 145 set out the basic principles and their rationalization. The Supreme Court of Canada in ***Geffen v. Goodman Estate*** (1991), 81 D.L.R. (4th) 211 confirmed that ***Allcard v. Skinner*** is still good law in Canada today.
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> ***Allcard v. Skinner*** was the case of a woman who entered an Anglican religious order and gave up all her property and possessions in accordance with the Sisterhood's rules. She left the Anglican Church and joined a Roman Catholic convent. Some years later she attempted to recover what she had given to the Anglicans. The action was dismissed at trial because the trial judge found that she had the competent advice of her brother before she joined the Anglican Sisterhood. The Court of Appeal found undue influence but dismissed the appeal by reason of laches.
>
> The question before the court in ***Allcard v. Skinner*** was whether at the time the Plaintiff executed the transfer she was under such influence as to prevent the gift being considered as "that of one free to determine what should be done with her property". Cotton, L.J. referred to two classes of decisions where the Court of Chancery had set aside voluntary gifts executed by parties who were under such influence as enabled the donor afterwards to set the gift aside:
>
> > These decisions may be divided into two classes --First, where the Court has been satisfied that the gift was the result of influence expressly used by the donee for the purpose;

> second, where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor. In such a case the Court sets aside the voluntary gift, unless it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justifies the Court in holding that the gift was the result of a free exercise of the donor's will. The first class of cases may be considered as depending on the principle that no one shall be allowed to retain any benefit arising from his own fraud or wrongful act. In the second class of cases the Court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused. (p. 171)

Lindley, L.J. in the same case described these two classes of decisions, as follows:

> First, there are the cases in which there has been some unfair and improper conduct, some coercion from outside, some over-reaching, some form of cheating, and generally, though not always, some personal advantage obtained by a donee placed in some close and confidential relation to the donor.
>
> ...
>
> The second group consists of cases in which the position of the donor to the donee has been such that it has been the duty of the donee to advise the donor, or even to manage his property for him. In such cases the Court throws upon the donee the burden of proving that he has not abused his position, and of proving that the gift made to him has not been brought about by any undue influence on his part. In this class of cases it has been considered necessary to show that the donor had independent advice, and was removed from the

> influence of the donee when the gift to him was made. (p. 181)

Presumptions are imposed by law to create evidentiary burdens. In criminal law there is a presumption of innocence which might result in a guilty man going free to ensure that an innocent man is not wrongly convicted. But with respect to undue influence it appears that the law has such an abhorrence for "coerced or fraudulently induced generosity" that it is prepared to confiscate what sometimes might be a valid gift to ensure that no one in a position of influence unduly benefits from his position. Thus the usual onus of proof is reversed, creating a presumption in favour of the plaintiff that the influence was undue, which the defendant must then rebut.

In the case of a gift of sufficient magnitude so as not to be accounted for by "ordinary motives on which ordinary men act", all that need be shown by the plaintiff to raise the presumption is some "special relationship". Courts have found the existence of a fiduciary relationship, or something less such as a confidential or advisory or guiding relationship, to be sufficiently influential to raise the presumption (***Geffen v. Goodman***, supra, pp. 221-222). Wilson J. in ***Geffen v. Goodman*** suggested that a preferable way of describing the requisite relationship is where one person has the ability to dominate the will, i.e. exercise a persuasive influence over another, whether through manipulation, coercion or outright but subtle abuse of power. She set out the test for invoking the presumption at p. 227:

> What then must a plaintiff establish in order to trigger a presumption of undue influence? In my view, the inquiry should begin with an examination of the relationship between the parties. The first question to be addressed in all cases is whether the potential for domination inheres in the nature of the relationship itself. This test embraces those relationships which equity has already recognized as giving rise to the presumption, such as solicitor and client, parent and child, and guardian and ward, as well as other

> relationships of dependency which defy easy categorization.

Wilson, J. goes on to say that in situations where consideration is not an issue, such as with gifts and bequests, the Plaintiff needn't prove undue disadvantage or benefit.

> …In these situations the concern of the court is that such acts of beneficence not be tainted. It is enough, therefore, to establish the presence of a dominant relationship.

Therefore, it appears that once the plaintiff has established that the nature of the relationship between the donor and the recipient was such that the potential for influence existed, the onus shifts to the defendant to rebut it. The defendant must show that the donor entered into the transaction as a result of his or her own "full, free and informed thought". This may entail establishing that no actual influence was deployed in the particular transaction and that the donor had independent advice. (***Zamet v. Hyman*** (1961), 3 All E.R. 933). It may also involve an examination of the magnitude of the benefit.

2. Does the Presumption of Undue Influence Arise?

2.1 Discussion

[20] As set out in the quote from ***Geffen v. Goodman Estate*** in ***Ogilvie***, supra, my inquiry should begin with an examination of the relationship between the defendant and the deceased in order to decide whether the potential for domination inhered in the nature of their relationship.

[21] Prior to moving into the deceased's home in August, 1996, the defendant was living on social assistance in Surrey. She

saw an advertisement for free room and board in exchange for looking after an elderly gentleman. She responded to the advertisement by telephone, and met with the deceased.

[22] The defendant discovered at her meeting with the deceased that he had a son living in Langley and that he was looking for someone to drive him around and do some light housekeeping. At the time, the defendant could not afford to give up her social assistance payments of $525.00 per month. She told the deceased that if she accepted room and board in exchange for her services, she would be cut off social assistance.

[23] After discussing her circumstances, the deceased and the defendant entered into an arrangement whereby the defendant agreed to pay the deceased rent of $325.00 per month, plus a $50.00 per month contribution towards his automobile insurance. The routine they established, after the defendant moved into the deceased's home, was that the defendant would cash her monthly social assistance cheque and give the deceased $375.00 cash, which he placed in a container. This money was then used by the defendant for a variety of her needs, including her costs of moving into the deceased's home, attending alternative medicine specialists and purchasing vitamin and health care products. Apparently, at the

beginning of their arrangement, the deceased paid the defendant $60.00 per month for her housekeeping services, which he later increased to $100.00 per month. In return, the defendant was to drive the deceased, and do some light housekeeping. The defendant expected this arrangement to be short term with little responsibility.

[24] As time went by, the defendant and the deceased participated together in some common interests, one of which was reading about spiritual matters. In fact, they visited a medium together. The defendant also took the deceased to the beach and out for dinner on special occasions, such as Father's Day. She testified that she became very close with the deceased, stating that he was the closest person she had in her life and that their relationship became "like a father-daughter close loving relationship."

[25] The defendant testified that she told the deceased not to do anything without consulting with her first, especially matters of a serious nature. She also told him not to sign anything without first checking with her.

[26] According to the defendant, over time her arrangement with the deceased became much more than just light housekeeping duties. About a year before the deceased's hip surgery, he was in a lot of pain and needed assistance to move

around. As well, he was a messy person around the house: he dropped food on his clothing, spat constantly and burned holes in his clothes from pipe smoking. As well, there was constant cleaning required of the carpet and furnishings, even though a cleaning woman was paid to come by the deceased's home on a weekly basis.

[27] Despite the defendant's increased duties, she decided not to leave the deceased because she did not want to abandon him. She promised him that she would stay with him for the rest of his life. She testified that she loved the deceased very much, and that while they did have some arguments, they always apologized to each other afterwards, hugged and said "I love you" to each other.

[28] The defendant said that the deceased was very strong-willed, but that there was a part of him that was vulnerable: she spoke of times when the deceased had his false teeth out of his mouth, and would sit hunched over, looking "like this sweet adorable little man that I wanted to hug to pieces."

[29] In cross-examination, the defendant testified that when she moved into the deceased's home, she was 48 years old, and the deceased was 83 years old. She said that the deceased considered her a close friend, maybe even like a daughter, certainly more than a housekeeper. They said "I love you" to

each other, and he was very kind to her. They had a close relationship and the defendant confided in him and trusted him. When plaintiff's counsel asked the defendant whether the deceased became dependent upon her, the defendant said that in some things he did: he depended on her to drive him, do his shopping, run errands for him, help him in and out of the bathtub, cook some of his meals, and take him to his medical appointments. The defendant said that the deceased depended on her for a lot, and she told him not to hire any person, or to do or sign anything without talking to her first. This latter understanding between the deceased and the defendant is borne out by the testimony of the plaintiff and his wife. They stated that in August, 1999, when the plaintiff asked the deceased to sign a bank signature card to set up a joint account between himself and the deceased, although the deceased initially agreed and signed the card, he was anxious about it because he did not first have a chance to discuss it with the defendant. The plaintiff and his wife both found the deceased's attitude unusual because they felt that up until this point in time, the deceased had always been in control of managing his financial affairs. In their assessment, after the defendant moved into the deceased's house in August, 1996, but especially by the summer and fall of 1999, a significant change had taken place in the deceased's personality.

[30] The defendant said that the deceased was socially isolated after the death of his second spouse. Over time, the defendant and the deceased became very compatible and sociable and, on occasion, the defendant would take the deceased with her to her club and social events. According to the defendant, the domestic arrangement she entered into with the deceased grew into a very close relationship to the point where she felt that they had almost a father and daughter relationship.

2.2 Decision

[31] In my opinion, the circumstances in the instant case fall into the category of undue influence described in ***Allcard v. Skinner,*** set out in paras. 34 and 35 of ***Ogilvie,*** supra, where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor. In such a case, the court sets aside the voluntary gift, unless it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justifies the court in holding that the gift was the free exercise of the donor's will.

[32] On the whole of the evidence, I find that by August, 1999, the deceased had become physically and emotionally dependant on the defendant to the point where she was able to dominate the will of the deceased and exercise influence over his decision making.

[33] The defendant testified that she was the deceased's only caregiver, that she had the sole responsibility for taking care of his home, and that the care she provided to the deceased benefited him by giving him peace of mind, a sense of security, companionship, friendship, trust, love, protection and enjoyment of life. The defendant said that besides looking after every aspect of the deceased's life including driving him around, cooking some meals for him, doing his laundry and shopping for him, she also took him to social events, took him out on special occasions, found persons to repair his house, advised him on important matters, helped him with personal matters, and visited him while he was in the hospital. Moreover, on the defendant's own testimony, she entered the deceased's life as a housekeeper and within three years was able to form a close enough relationship with the deceased that she could tell him not to make decisions on important matters without first checking with her.

[34] In my opinion, the preponderance of evidence before me establishes that the relationship between the defendant and the deceased was sufficient to raise a presumption of undue influence, and shift the burden to the defendant to disprove it.

3. Has the defendant been able to rebut the presumption?

3.1 Discussion

[35] I turn then to a consideration of whether the defendant has discharged the onus of proof upon her to rebut the presumption of undue influence. The evidence on this point centres around several incidents which took place in August through October, 1999.

[36] In early August, 1999, the plaintiff's wife and the defendant attended a cat show together, an area in which they shared a common interest. The defendant gave the plaintiff's wife details about the deceased's financial circumstances. The fact that the defendant possessed such a detailed knowledge of the deceased's personal affairs worried the plaintiff.

[37] At the time the plaintiff held the deceased's Power of Attorney. In the circumstances, he felt that he should exercise his obligation as the deceased's Attorney to attend

at the deceased's bank and make inquiries. He spoke to the manager of the NSCU, a Mr. Larisch (neither side called Mr. Larisch to testify), who showed the plaintiff and his wife copies of the deceased's bank records. Everything appeared to be in order. However, Mr. Larisch suggested that the plaintiff speak to the deceased about having the plaintiff's name added to the deceased's account as a co-signer.

[38] Following his visit to the NSCU, the plaintiff visited the deceased. They discussed Mr. Larisch's suggestion, and according to the plaintiff, the deceased agreed that it should be done. However, because the deceased had some difficulty getting around, the plaintiff attended at the NSCU, obtained a signature card and brought it to the deceased for his signature. The plaintiff said that at the time the deceased signed the card he appeared agitated that he was not able to contact the defendant first. Apparently, he was worried that he did not have the defendant's permission. In any event, the deceased did sign the card and the plaintiff returned to the NSCU and left the signed card with Mr. Larisch.

[39] A couple of days later, Mr. Larisch advised the plaintiff by telephone that the deceased had changed his mind and did not wish the plaintiff to have signing authority on the account. The deceased had given Mr. Larisch the reason that

he did not know what he had signed. The plaintiff found the deceased's conduct very odd.

[40] In September, 1999, about a month after the signature card incident, the plaintiff and his wife visited with the deceased at his home. It arose that the deceased and the defendant were planning a codicil to the deceased's First Will, leaving the defendant an undisclosed sum of money and the deceased's automobile. The plaintiff asked the deceased for an explanation. According to the plaintiff, the deceased was not willing to discuss the matter and he felt it was pointless to push the deceased on the subject. The deceased did say to the plaintiff that he should talk to the defendant.

[41] On the evening of that day, the plaintiff telephoned the defendant at the deceased's home. Their conversation about the codicil escalated into a loud argument. The defendant told the plaintiff that the codicil left some money to the plaintiff's children, as well as some money and the deceased's automobile to the defendant. The plaintiff told the defendant that she was not deserving of these bequests as he felt that she had been given enough by living in the deceased's home and receiving benefits from him. The plaintiff testified that during this call, he heard the defendant yell at the deceased

in anger over the fact that the deceased had told the plaintiff about the codicil.

[42] The following day, the defendant telephoned the plaintiff and told him, "You will be happy to know I am leaving." She told the plaintiff, "I quit." She made these remarks in a very stern voice. However, as it turned out, the defendant did not quit and did not leave the deceased's home.

[43] The defendant testified that after the telephone call with the plaintiff, she was very upset. She asked the deceased why he had told the plaintiff about the codicil and the deceased replied that he had not. The defendant said that she then believed that the plaintiff must have snooped around the deceased's house when she was not at home and found the codicil. In cross-examination, she agreed that she told the deceased that she could not live with that kind of stress, and that she was afraid that when the deceased was gone the plaintiff would force her to leave the deceased's house. The defendant testified that she told the deceased that she did not think that she should stay with the deceased and the deceased became very upset. She said she did not tell him this in a threatening way: it was more out of fear on her part of what the plaintiff might do to her.

[44] She telephoned the plaintiff that evening and told him he would be happy to know that she would be moving out of the deceased's house. The defendant said that the deceased knew that she told this to the plaintiff. The defendant said that she had overreacted to her fear that the plaintiff would throw her out of the deceased's house. The deceased told her not to worry, that she would be taken care of. In fact, she testified that the deceased "begged" her to stay.

[45] The defendant said that the deceased was very emphatic that he did not want the defendant to tell the plaintiff about the codicil because he did not want to fight with the plaintiff. This is why she was shocked when the plaintiff called and why she believed that the plaintiff spoke to the deceased about the codicil after he discovered it in the deceased's home.

[46] The plaintiff testified that around Thanksgiving, 1999, he had the deceased over for dinner. After dinner, they discussed the codicil. The deceased told the plaintiff that he planned to leave the defendant $10,000.00 and his automobile. The plaintiff apologized to the deceased for what had gone on and told him that it was his own business and if that was what he wanted to do with his money, it was fine with

the plaintiff. According to the plaintiff, the discussion cleared the air somewhat.

[47] The defendant testified that in August, 1999, the deceased decided to vary the First Will. He wanted her to have his automobile and $50,000.00 for taking care of him. She told him that she would prepare a codicil so he would not incur legal fees. She did prepare the codicil, and at the time suggested to the deceased that he leave some money to his grandchildren. The deceased was against this, telling her that when he sent them money they rarely thanked him. The defendant convinced him that he should leave his grandchildren a small amount of money, and the defendant put this bequest in the codicil.

[48] The defendant said that the deceased wanted her to have his automobile because the plaintiff had an automobile, his wife had one, and the plaintiff's son had earlier wrecked an automobile that the deceased had given him.

[49] The defendant stated that the deceased told her that if she needed an automobile she could have his when he was gone. He also wanted her to have some money in appreciation for what she had done for him. The defendant said that the codicil she drafted provided for her to receive the deceased's automobile

and $50,000.00. It also contained bequests of $2,500.00 to each grandchild. However, the codicil was never executed.

[50] The defendant testified during examination-in-chief that though she had discussed the codicil with the deceased, they did not discuss his obtaining independent legal advice, although she felt they should have.

[51] The plaintiff testified that the deceased did not tell him that he was gifting his automobile to the defendant, rather he spoke to the plaintiff about a codicil leaving the defendant his automobile and a sum of money. The plaintiff only found out after the deceased's passing that the automobile was transferred to the defendant a few days before the deceased died. The plaintiff also found out after the deceased died that the defendant had received not $10,000.00 from the deceased, but the entire amount remaining in the joint CCSCU account.

[52] The defendant testified that she knew the plaintiff would challenge anything she received from the deceased. She said that after the plaintiff's strong reaction to the codicil, the defendant and the deceased decided to sign a document transferring the automobile to the defendant. The document was left undated, to be used at an unspecified future time. She said that the undated transfer form was to be used as

"insurance," so that the deceased's automobile could be transferred to her without the plaintiff's interference.

[53] The defendant testified that she and the deceased decided against transferring the vehicle while the deceased was still alive because the defendant had had a minor motor-vehicle accident. She said that if the deceased's automobile had been transferred to her, the insurance costs would have been $40.00 higher per month.

[54] The defendant testified that it was only an oversight that the deceased failed to mention in the Second Will that she was to receive the deceased's automobile. She said that when the deceased was in the hospital in April, 2001, she had a strong feeling that she should transfer the deceased's automobile into her name. She insisted she had no idea that the deceased would die so soon after he was admitted to the hospital. A few days before he died, she went to the deceased's insurer, presented the signed transfer document and the Power of Attorney. The deceased's automobile was then transferred into her name. The transfer form is dated April 17, 2001, and attached to the transfer form is a document entitled "Gift Letter" dated April 10, 2001, which reads as follows:

> I Jack Jason Tribe have given my 1995 Dodge Neon, Serial No. IB3ES27C0SD561405 to Georgia Farrell as a gift with no transaction of money involved.

The document is signed by the deceased and the defendant.

[55] The plaintiff testified that the same evening around Thanksgiving, 1999, that the plaintiff and the deceased discussed the codicil, they also discussed the Power of Attorney in favour of the plaintiff. The plaintiff had heard from Mr. Larisch that the deceased and the defendant had attended at the bank to revoke the Power of Attorney. According to the plaintiff, the deceased agreed with him that it was neither necessary, nor would it be a good idea, to revoke the Power of Attorney. However, about two weeks later, the plaintiff received a telephone call from Mr. Larisch, telling him that the defendant had brought in the legal document to the bank to revoke the Power of Attorney. The plaintiff called the deceased in shock. The deceased told him that he had done it because it would cause less friction at home with the defendant, and that he did not want to lose her and have to look for another housekeeper.

[56] The plaintiff said that during this telephone conversation, he heard in the background a discussion between the deceased and the defendant. The plaintiff had asked about having his name placed on the deed for the deceased's

property, and the defendant told the deceased that if he agreed with this step, the plaintiff would turn him out of his house and place him in a home.

[57] The defendant testified that the deceased told her he was upset because he had learned that the plaintiff had gone to the bank behind his back and obtained copies of his bank statements. He asked the defendant to take him to the bank where he met with Mr. Larisch for about half an hour. The deceased went to the bank for a second time to meet with Mr. Larisch, at which time he and Mr. Larisch signed a document dated September 23, 1999, which reads as follows:

> I, Jack Tribe, hereby advise North Shore Credit Union that it is my intention to revoke the Legal Power of Attorney granted to my son Daniel Tribe. I no longer wish that my son have any access to my Financial Account at North Shore Credit Union from this time forward. I do realize that my son is named Executor of my Will. I hereby also recognize that North Shore Credit Union has suggested I receive legal advice on the matter of the Power of Attorney and Estate planning in general. I commit to informing North Shore Credit Union of a legal resolution to this matter by the 7th of October, 1999.

[58] The defendant said that the deceased was very upset, and the bank wanted to have the deceased be very clear about his intentions and did not want to be held liable in any way. In any event, the defendant said that she saw the document that

the deceased and Mr. Larisch had signed, but could not recall whether she took the deceased to a lawyer.

[59] The defendant testified that she had nothing to do with the deceased's decision to revoke the Power of Attorney in favour of the plaintiff. When asked why the deceased moved his funds away from the NSCU, the defendant said the deceased did not trust the plaintiff. The plaintiff had not returned the Power of Attorney, and the deceased was concerned about the plaintiff getting his money. She said that this was the deceased's decision, that he was sound of mind, that he did not want his son to have his money, and that he wanted the defendant to have it.

[60] On October 19, 1999, the deceased and the defendant opened the joint account at the CCSCU. According to the defendant, the deceased did not feel comfortable having $29,000.00 deposited at the NSCU and told her he wanted to put it in a different bank where "Danny could not get his hands on this money." The deceased also mentioned to her that the only time the plaintiff was interested in him was when it came to money. She said it was definitely the deceased's idea to take the money out of the NSCU and put it into a different bank. The deceased asked the defendant where he should deposit the money and she suggested the CCSCU branch in West Vancouver.

[61] The defendant testified that she could not recall whether the deceased received any legal advice between the first meeting between the deceased and Mr. Larisch, and October, 1999. She did not think he received any legal advice, even though he was told to. He never mentioned to her that he wanted to see a lawyer, but she was aware that at the second meeting between the deceased and Mr. Larisch, that Mr. Larisch suggested to the deceased that he obtain legal advice. The defendant was pretty sure that the deceased had not received any legal advice before he told her he wanted her to have the money and they opened the joint account.

[62] She said that when the joint account was opened, the deceased told her that he wanted her to have the money after he was gone, but that if she needed it while she was alive, she could access the money. She said the deceased told her that he did not want the plaintiff to have the money.

[63] The defendant said that there were two reasons why the deceased wanted her to have his money:

(1) so that she would have something to live on after he was on gone;

(2) so that if she was forced into litigation with the plaintiff, she would have funds for that purpose.

[64] The defendant said that given the way the plaintiff had treated the deceased, she had no feelings of guilt. She felt that the plaintiff was neglectful of the deceased. She said that even after the plaintiff became suspicious of the defendant, he did not spend more time with the deceased. Rather, he spent even less time than before, and she could not make any sense out of it.

[65] The defendant said that the joint account was a chequing and savings account, but that the bulk of the funds were invested into a term deposit. The defendant was also named as a joint owner of the term deposit.

[66] The defendant testified that the deceased wanted the account at the CCSCU to be a secret account. The deceased was concerned that the plaintiff would take his savings away and he wanted an account of which the plaintiff would be unaware.

[67] In cross-examination, the defendant said that she had used the joint account a few times. The deceased had asked her to pay property taxes from the joint account, and at times he wanted funds out of the account for which she made some withdrawals of cash. She agreed that a cheque dated October 29, 2001, in the amount of $1,099.54, was a loan she made to a third party, to pay off their taxes. The defendant said that $25,146.95 was removed from the joint account when she closed

the account after the deceased passed away. For her convenience, she moved the funds to a nearby branch of the Bank of Montreal. Apparently, she has expended a substantial amount of the money in the joint account for legal services and living expenses.

[68] The plaintiff only learned of the joint account after he commenced this action. In fact, at her first examination-for-discovery the defendant failed to disclose the existence of the joint account. At her second examination-for-discovery she testified as follows:

> 1299 Q Let's talk about Coast Capital Savings.
>
> A Yes.
>
> 1300 Q Why did you not tell me about this bank account at the last discovery?
>
> A Several reasons.
>
> 1301 Q Well, tell me.
>
> A Number one, this was something that Mr. Tribe arranged way before his death and was not part of the estate. Secondly, I didn't want your client to know. I knew he was going to find out eventually because he was aware of these monies because he used the power of attorney to go to Mr. Tribe's North Shore Credit Union and got copies of all his financial records, so I knew he was going to find out. I didn't - just wanted to post-pone

> it. I wanted to discuss it with my lawyer, which I did not have one…

[69] When plaintiff's counsel asked the defendant why she had perjured herself at the discovery about the existence of the joint account, she testified that she did not know how to answer the questions. She was afraid that the plaintiff would discover the account, and she needed the money to retain a lawyer and to live on. She said that the deceased gave her the money because he was fond of her and that he loved her.

3.2 Decision

[70] I found the plaintiff and his wife to be straight forward, honest witnesses who did not exaggerate their evidence. I accept the plaintiff's evidence that he heard the defendant yelling in anger at the deceased over the fact that the deceased talked to the plaintiff about the codicil; that he heard the defendant tell the deceased that if he agreed to place the plaintiff's name on the deed to his real property, the plaintiff would place him in a home; and that the deceased told the plaintiff that he wanted to revoke the Power of Attorney granted in the plaintiff's favour so that there would be less friction at home.

[71] On the other hand, I do not consider the defendant's testimony to be entirely reliable. For example, I do not accept the defendant's testimony that the deceased told her that he wanted to place his $29,000 in a different bank where "Danny could not get his hands on this money." I also do not accept the defendant's testimony that the deceased told her that the only time the plaintiff was interested in him was when it came to money. This testimony simply does not accord with the weight of the evidence which I do accept.

[72] First, apart from the fact that the plaintiff used his Power of Attorney to access information about the deceased's bank records, there is absolutely no evidence of any attempt by the plaintiff to get his hands on the deceased's money. Furthermore, there is no history of the plaintiff asking the deceased for money apart from one occasion when the plaintiff approached the deceased for a loan to purchase an automobile. He later decided not to pursue the loan.

[73] Moreover, I do not accept the defendant's evidence that when the joint bank account was opened in October, 1999, the deceased told her that he wanted her to have the money in the joint account. I think this evidence runs directly contrary to the fact that in the Second Will the deceased left his money to the plaintiff, and the plaintiff's evidence, which I

accept, that the deceased told him that he would receive the deceased's money.

[74] Nor does the weight of the evidence support the defendant's contention that the plaintiff was neglectful of the deceased. After the deceased's second wife died in 1993, the plaintiff became much closer to the deceased and spent time with him at the deceased's house, where the deceased was more comfortable than he was travelling to the plaintiff's home. I accept the evidence of the plaintiff's wife that she and the plaintiff visited the deceased and the deceased visited them for family functions and dinners, and that they spoke frequently by telephone. The visits became less frequent after the fall of 1999 due to strains in the relationships between the deceased, the defendant and the plaintiff.

[75] The plaintiff testified that prior to the incidents which are at the centre of this dispute, the relationship he had with the deceased was excellent. He also said that initially after the defendant moved into the deceased's house that he and his wife got along with the defendant and that the deceased and the defendant came to his home for dinner. In fact the plaintiff was pleased that the defendant was living with the deceased because he felt less need for worry and

concern about the deceased. The plaintiff still spent time with the deceased one on one.

[76] In addition, there is very credible evidence from Mr. Henry Lynch who lived next door to the deceased until the deceased's move in 1996. In my view, his evidence strongly corroborates the testimony of the plaintiff and his wife regarding their relationship with the deceased. Mr. Lynch testified that the deceased and the plaintiff had a good rapport, and that the plaintiff visited the deceased more than once a month. He said that both he and the plaintiff helped the deceased fix things around the deceased's house and that the plaintiff was very concerned about the deceased. He felt that the plaintiff loved the deceased and cared about his well-being, and he also felt that the deceased cared for the plaintiff.

[77] The nature of the relationship between the deceased and the plaintiff is also borne out by the evidence of Ms. Mardi Denis, an occupational nurse, and a co-worker of the plaintiff. She testified that the plaintiff consulted her frequently to talk about his concerns about the deceased. She understood from the plaintiff that he visited the deceased as often as he could and that the deceased visited the plaintiff's home for dinners. She said that in the fall of

1999 the plaintiff was especially concerned about what was happening between the deceased and the defendant and that the plaintiff told her that he did not want to "rock the boat" or upset the deceased.

[78] Ms. Denis also testified that she referred the plaintiff to counselling. He was concerned that the defendant was taking over the deceased's money and signing his possessions over to her. The plaintiff told Ms. Denis that he did not want to consult a lawyer because he did not want to cause trouble between the deceased and the defendant, and that he did not want to upset the deceased and create discord.

[79] In cross-examination, Ms. Denis said that the plaintiff's concern was that the defendant was controlling the deceased and that the deceased was not making correct decisions. She said that the plaintiff expressed no concern to her that he would be disinherited. Her impression of the plaintiff was that of a son who cared about the well-being of his father and who did the best for his father.

[80] Therefore, although the relationship between the plaintiff and the deceased was not one of daily contact by telephone or visitation, I am satisfied, on the whole of the evidence, that the plaintiff visited the deceased and the deceased visited the plaintiff and his family from time to

time during the years leading up to the fall of 1999, and that this arrangement was entirely satisfactory to the plaintiff and the deceased.

[81] In fact, the relationship between the deceased and the plaintiff was satisfactory enough that in 1997, when the deceased executed the First Will, he bequested the entirety of his estate to the plaintiff. I am satisfied, on the evidence, that the plaintiff did not mislead the deceased about the content of the First Will at the time of its execution as alleged by the defendant. On this point I accept the evidence of the plaintiff's wife that she typed the First Will and that the deceased told her what to include in its content. I also accept the evidence of the plaintiff that it was the deceased's request to make a new will and that he wished to leave the entirety of his estate to the plaintiff and if anything happened to the plaintiff then the deceased's estate was to pass to the plaintiff's wife. The plaintiff said that the First Will was simple and clear and the deceased was happy with its content.

[82] I also find that in the late summer, or early fall of 1999 there was a significant change in the relationship between the plaintiff, the deceased and the defendant. The change was triggered initially by reason of the fact that the

plaintiff used his Power of Attorney to access the deceased's bank records at the NSCU in August, 1999. This led to the plaintiff approaching the deceased to make the plaintiff a co-signer on the deceased's account. I find on the evidence that the deceased agreed with this step and signed the card but later contacted the bank and told Mr. Larisch that he had changed his mind, giving him the reason that he did not know what he had signed. I am of the view, in the context of the evidence as a whole, that it is reasonable to infer that the deceased changed his mind, not because he did not know what he had signed, but rather because of the influence of the defendant who had told him not to sign anything without first consulting with her.

[83] The signature card incident led to a strain in the relationship between the deceased and the plaintiff, a strain which triggered certain events which appear to have been, if not largely orchestrated by the defendant, at the very least encouraged and fostered by her to keep the deceased's assets out of the hands of the plaintiff.

[84] Within about a month of the bank card incident the defendant prepared a codicil for the deceased's signature, without the plaintiff's knowledge, that, according to the defendant, bequested to her the deceased's automobile and

$50,000. When the plaintiff learned of this fact he confronted the defendant and they had an argument, one which upset the defendant and the deceased. The defendant went so far as to tell the deceased that she would have to leave the deceased's home over her concern that if something happened to the deceased then the plaintiff would throw her out of the deceased's house. She also told the deceased that the plaintiff would place him in a home.

[85] According to the defendant, it was directly due to the plaintiff's reaction over the codicil that the defendant suggested the deceased sign an undated form transferring the deceased's automobile to her so that the plaintiff could not interfere with the transfer.

[86] It was in the fall out from the argument between the defendant and the plaintiff over the codicil that the defendant took the deceased to the NSCU to revoke the plaintiff's Power of Attorney. Mr. Larisch advised the deceased to think this step over, and had him sign a letter indicating that he would get legal advice. According to the testimony of Mr. Brian Williams, an employee of the NSCU, the bank was reluctant to carry out the deceased's wish to revoke the Power of Attorney without his first receiving legal advice. He said that the only record in the bank's file

indicating that the deceased received legal advice is a copy of the Power of Attorney granted in favour of the defendant drawn in September, 2000, by Mr. Eric Rutledge, the same lawyer who drew the Second Will. The bank's file also establishes that it received a document dated October 30, 1999, revoking the plaintiff's Power of Attorney.

[87] The defendant, who knew of the bank's concern, and the letter signed by the deceased to the effect that he would obtain legal advice, also knew that the deceased did not receive legal advice. Without obtaining legal advice, the deceased withdrew his funds from the NSCU and, on the defendant's suggestion, deposited his funds in the CCSCU so that they could not be found by the plaintiff. Without the deceased having the benefit of legal advice, the defendant became the joint owner of the deceased's bank account and term deposit at the CCSCU.

[88] In my opinion, the defendant has failed to rebut the presumption of undue influence. I am satisfied that the defendant influenced the deceased in his decisions to gift the automobile to her, to put her name on the CCSCU account and term deposit as a joint owner, and to revoke the plaintiff's Power of Attorney. I find, on the whole of the evidence, that the defendant was able to influence the deceased to take these

steps because of what had transpired in the relationships between the defendant, the deceased and the plaintiff during the summer and fall of 1999.

[89] The deceased, without receiving independent advice, decided with the defendant in August, 1999, to vary the First Will by codicil. The defendant drafted the codicil to provide a $50,000.00 cash bequest to herself, and receipt of the deceased's automobile. The understanding between the deceased and the defendant was that the plaintiff was not to know about the codicil.

[90] Regardless of how the plaintiff came to learn of the existence of the codicil, the fact remains that the codicil was drafted without the deceased receiving independent advice or being free of the defendant's influence at the time. I think the defendant's relationship with the deceased, as described by her, made it incumbent upon her to ensure that the deceased was free of her influence and that he receive independent advice when they planned to vary his First Will.

[91] Furthermore, not only did the defendant fail to ensure that the deceased was free of her influence and that he receive independent advice regarding the codicil, she suggested to the deceased, and he accepted her suggestion, that he sign an undated transfer form to gift his automobile

to her, and open a secret joint bank account at the CCSCU. This was done after the defendant had told the deceased that she would have to leave his home because of her fear of what the plaintiff would do to her if the deceased was no longer in the picture. In this context of animosity between the plaintiff and the defendant, and the deceased's concern that the defendant, upon whom he had become emotionally and physically dependent, not leave him (the defendant testified that the deceased "begged" her to stay), it is my opinion that the deceased's decision to take these steps was not free of the defendant's influence and domination over him.

[92] As I have decided that the presumption of undue influence has not been rebutted by the defendant, I find therefore that the defendant's ownership in the joint account and term deposit, and the gift to the defendant of the deceased's automobile are presumed to have been made by the deceased to the defendant involuntarily, and as a result of the defendant's undue influence over him. Therefore, I find that these transactions must be set aside as invalid on the ground of undue influence.

V THE SECOND WILL

1. The Law

[93] After the deceased signed the undated form transferring his automobile to the defendant, the joint account was opened at the CCSCU and the plaintiff's Power of Attorney was revoked, it appears that the focus of the defendant became finding a way to receive the deceased's real property.

[94] According to the defendant, she contacted many lawyers and notaries, but as soon as they learned of the plaintiff's existence they refused to draw a will bequesting the deceased's real property to the defendant. Other steps were considered, including the deceased marrying the defendant, or having the defendant go on title as a joint owner of the deceased's real property. However, after receipt of legal advice by the defendant regarding the available options, she concluded that there was no step that she could take which would avoid a challenge from the plaintiff, so she decided to persist in searching for a lawyer to draw a new will for the deceased.

[95] It was after the defendant met with a lawyer in North Vancouver, who would not draw the will but recommended another lawyer in his building, that the defendant and the deceased attended upon Mr. Rutledge. Mr. Rutledge, after taking instructions from the deceased prepared, but refused to

witness, the Second Will. I turn then to a consideration of the validity of the Second Will.

[96] The law applicable to testing the validity of a will and the duty of a solicitor when making a will is clearly stated by Harvey J. in ***Danchuk v. Calderwood***, [1996] B.C.J. No. 2383, (B.C.S.C.) where at paras. 111 - 120 His Lordship explained:

> The law respecting the onus of proof and the evidentiary standards and shifting burdens of proof that confront the parties in a contest at trial over the validity of a will are set out in ***Vout v. Hay et al*** (1995), 125 D.L.R.(4th) 431. The applicable principles as stated by the Supreme Court of Canada in ***Vout***, supra, are conveniently restated in ***Dieno Estate v. Dieno Estate***, [1966] S.J. No. 494, a decision of Baynton J. of the Saskatchewan Court of Queen's Bench as follows:
>
> 1. The propounder of the will has the legal onus or burden of proof (the civil standard on a balance of probabilities) with respect to its due execution, the knowledge and approval of its contents by the testator, and the testamentary capacity of the testator.
>
> 2. The propounder is aided by a rebuttable presumption that the testator knew and approved of the contents of the will and had the necessary testamentary capacity. The presumption arises upon proof that the will was duly executed with the requisite formalities after having been read over to or by the testator who appeared to understand it.
>
> 3. The presumption simply casts an evidentiary burden on those attacking the will. This burden can be satisfied by adducing or pointing to some evidence which, if accepted, would tend to negative knowledge and approval or testamentary capacity. In this event, the evidentiary burden reverts to the propounder.

4. Evidence of "suspicious circumstances" does not impose a higher standard of proof on the propounder than the civil standard. The presumption that aids the propounder of the will is simply spent if "suspicious circumstances" are present. The propounder then reassumes the evidentiary burden of establishing knowledge and approval (and testamentary capacity if the suspicious circumstances reflect on the mental capacity of the testator to make a will). The evidence tendered by the propounder however must be scrutinized in accordance with the gravity of the suspicion. The extent of the proof required is proportionate to the gravity of the suspicion, and the degree of suspicion varies with the circumstances of each case.

5. Suspicious circumstances may be raised by: (a) circumstances surrounding the preparation of the will; (b) circumstances tending to call into question the capacity of the testator; or (c) circumstances tending to show that the free will of the testator was overborne by acts of coercion or fraud.

6. The burden of proof with respect to fraud and undue influence, (coercion or fraud), remains on those attacking the will. The presence of suspicious circumstances simply rebuts the presumption of knowledge and approval and testamentary capacity, so that the evidentiary burden respecting these elements reverts to the propounder. The burden of proof of fraud or undue influence however remains on those alleging it.

The law appears fairly well settled respecting what constitutes testamentary capacity and how it is proven. To use the time-honoured phrase, a person must be "of sound mind, memory and understanding" in order to be able to make a will. When a will is contested on the ground of mental incapacity, the executors must prove that the testator had a sound disposing mind.

Whether the testator's mind was sound is a practical question. It does not depend on scientific or medical

definition. Medical evidence is not required nor necessarily conclusive when given. The question may be answered as well by laymen of good sense.

Counsel for the plaintiff submits the testimony of Ms. Bellis is the best evidence of the deceased's testamentary capacity at the material times.

In the particular circumstances of this case, I respectfully do not agree.

In keeping with what I understand to be the law applicable to the duty of a solicitor, in the circumstances here, I accept the submission of counsel for the defendants that she failed with respect to that duty.

In my view, in the particular circumstances here, at the outset:

(1) she should have regarded the circumstances as suspicious having regard to the deceased's advanced age and considerable seniority to that of the plaintiff as well as his apparent dependency upon her, including allowing her to speak for him;

(2) she should have undertaken an inquiry, including interviewing the plaintiff and the deceased separately with regard to the age difference and as to the independence of the deceased in giving instructions;

(3) the inquiry should have confirmed whether the deceased had a prior existing will and, if such a will existed, what were the reasons for any variations or changes therefrom prompting the disposition being put forward;

(4) the inquiry should have encompassed why and for what reasons the deceased had given a power of attorney to his daughter in late 1992 and, more importantly, why upon revocation of that power of attorney a new power of attorney was to be given by the deceased to the plaintiff; and,

(5) collateral to (4), supra, the inquiry should have included some investigation of the health of the deceased.

> In this perspective, I understand the law to be that a solicitor does not discharge her duty in the particular circumstances here by simply taking down and giving expression to the words of the client with the inquiry being limited to asking the testator if he understands the words. Further, I understand it to be an error to suppose because a person says he understands a question put to him and gives a rational answer he is of sound mind and capable of making a will. Again, in this perspective, there must be consideration of all of the circumstances and, particularly, his state of memory.
>
> If the solicitor had made such inquiry and had been made aware of the circumstances in a fuller sense, including the medical assessment of the ongoing progression and state of senile dementia, I am satisfied the said will would not have been prepared by her at that time.
>
> For these reasons, I attach little weight to the testimony of the solicitor.

2. Discussion

[97] The defendant testified that before the deceased had his hip surgery, he told her he wanted her to have his house. The deceased even proposed marriage to the defendant. The defendant said the deceased was frustrated because he wanted to make sure that the defendant got the house and he asked the defendant to find some way to do this. She attempted to put the house in their joint names, but she could not find a lawyer or notary who would do it: as soon as they heard that the deceased had a son, they refused to assist.

[98] In cross-examination, plaintiff's counsel asked the defendant whether the marriage discussions were nothing more than a solution for her to get the house. She agreed. When

asked whether she obtained a legal opinion about the marriage, she said that she did after the deceased's second proposal. According to her, ultimately the choice of the deceased and the defendant was to have the deceased bequest his property to the defendant by making a new will.

[99] The defendant admitted that she had had trouble finding a lawyer to draw the will. No lawyer was willing to draw a new will leaving the deceased's property to the defendant, until the defendant found Mr. Rutledge.

[100] The defendant testified that Mr. Rutledge presented the Power of Attorney naming her as the deceased's Attorney when the deceased picked up the Second Will. The defendant could not recall how she found out about the Power of Attorney. She said that the first time she saw it was on September 22, 2000. After execution, the Second Will was placed in the deceased's safety deposit box. The defendant kept the Power of Attorney at home in case of emergency. She used it along with the undated transfer form to transfer the deceased's automobile into her name just days before his death.

[101] The defendant said that leaving her the house was the deceased's idea, and arose due to the plaintiff's long term neglect of the deceased. She said the deceased could not be influenced to give his house to someone he did not want to.

However, she also stated that at the time of the conflict over the codicil, the deceased had begged her to stay saying, "please don't leave me." The defendant was convinced that if something happened to the deceased, the plaintiff would try to throw her out of the deceased's house. The deceased was anxious to find a way to reassure her and ensure that she would stay with him.

[102] The defendant suggested that plaintiff's counsel had no idea what was going on, and neither did his client. She said that the deceased had no family, stating, "when you see someone twice a year for an hour - that's family?" She said that the plaintiff had had 30 years to have a relationship with his father and he had failed to do so.

[103] The plaintiff testified that in the fall of 2000, he and his wife decided to investigate the future care of the deceased. They visited Dr. McWhinney. While discussing matters with the doctor, he told them that the defendant and the deceased had been in to see him a month earlier with a new will for him to witness. With that piece of information, the plaintiff and his wife visited the deceased. When they asked him about a new will, he was at first evasive, but eventually admitted to making a new will. He told the plaintiff and his wife that the defendant had taken him to a lawyer to sign a

new will and that he was leaving his house to the defendant and the residue of his Estate to the plaintiff. The plaintiff was taken aback and told the deceased that he thought it was the wrong thing for him to have done after they had talked in the past about the deceased leaving a legacy for the plaintiff and his children. However, the deceased was not prepared to talk further about it. The plaintiff testified that the deceased told him that the defendant would get the house and he would get the money, and that if he did not like it he could fight it out with the defendant.

[104] According to the plaintiff's wife, the deceased told her and the plaintiff that he decided to change his will to give the house to the defendant and the money in his bank account to the plaintiff. She said that upon hearing this the plaintiff was very hurt and he later wrote the deceased a card telling him that he could not see him again until he was feeling better about the situation and that he hoped that in the New Year they could regain their relationship. She also said that the deceased sent the plaintiff a card in reply, stating that he was sorry that the plaintiff felt that way and he hoped that the plaintiff could put it behind him.

[105] When asked in cross-examination why he thought the deceased changed his will to exclude the plaintiff from the

benefit of the deceased's property, the plaintiff said that he felt that the deceased was under the influence of the defendant. The plaintiff said that he felt that the deceased's personality had changed in 1999 and 2000.

[106] The plaintiff said that from the time the deceased told him that he was leaving the house to the defendant, there was no contact between them. The plaintiff felt that it was horrendous that the deceased would do that to him. The plaintiff said that the deceased could be a difficult person at times, but that their relationship had continued throughout his lifetime. The plaintiff was very tolerant of the deceased and his personality was something that the plaintiff had become used to. He loved the deceased and he valued the time they spent together.

[107] The plaintiff said that even when the deceased was preoccupied with his second wife, the plaintiff still spent time with the deceased. They had always had time for each other. The plaintiff felt that the biggest change in the deceased came after the defendant had lived in his house for a few years. His personality seemed different, he talked differently and he made many changes in his life.

[108] The Statement of Claim alleges that there are "suspicious circumstances" surrounding the preparation and

execution of the Second Will. In cross-examination, the plaintiff explained that these included the deceased's frailty, lack of energy, and demeanour, especially throughout 1999 and 2000. He said that the deceased did not want a lawyer for the First Will, yet suddenly he had to go to a lawyer for the Second Will, and for some reason went to see his family doctor to have the Second Will witnessed. The plaintiff said that the deceased's frailty and poor health were obvious to him, and felt that it should have been obvious to the lawyer who prepared the Second Will. The plaintiff agreed that there was no evidence, other than his own observations, that the deceased was in frail health.

[109] Mr. Eric Rutledge is a lawyer with 35 years of practice experience. About 15 percent of his practice is in the field of wills and estates. Mr. Rutledge prepared the Second Will and a Power of Attorney naming the defendant as the deceased's Attorney.

[110] During examination-in-chief, Mr. Rutledge recalled the defendant making an appointment and bringing the deceased to his office. He recalled that when he met the defendant, she mentioned to him that she had contacted other lawyers and that they would not prepare a will. He recalled the deceased being an elderly man who walked with two canes.

[111] The defendant sat in the outer office while Mr. Rutledge spoke with the deceased in his office. The deceased wanted Mr. Rutledge to draft a will, his intent being that his real property should go to the defendant. Mr. Rutledge asked the deceased about his reasons for this bequest. The deceased said the defendant had been with him for five years, that she had looked after him, and that he did not see his son anymore and thought it was the best thing for him to do in the circumstances.

[112] Mr. Rutledge spoke with the deceased about his family and his past to assess his level of comprehension. Mr. Rutledge found that the deceased's instructions were clear and that he had a general cognitive idea of what he had and how he wished to dispose of it.

[113] Mr. Rutledge testified that the length of his first interview with the deceased was approximately 20 minutes. When asked by plaintiff's counsel whether during the meeting he detailed the assets of the deceased, he said that the advice he received was that the deceased had a residence and a small amount of cash. Mr. Rutledge did not recall asking the deceased how much cash he had. He could not recall how many bank accounts the deceased had. The extent of his instructions was that the deceased wanted the defendant to

have his house, and his son to get the cash. Mr. Rutledge denied being informed that a large amount of cash was held in a joint account with the defendant with a right of survivorship. He could not recall whether he was told that the deceased had executed a will in 1997, but he said that at no time did he see a previous will.

[114] Mr. Rutledge testified that he had suggested to the deceased alternatives for dividing the estate between the plaintiff and the defendant, but the deceased was not open to any suggestion of modification. Mr. Rutledge told the deceased that his will could be contested, to which the deceased replied that he did not care.

[115] In cross-examination, Mr. Rutledge testified that he did not know the deceased's personal history, medical history, mental capacity or his relationship with the defendant. The deceased's refusal to countenance any other options than the one with which he had entered the office was another source of concern for Mr. Rutledge. He was concerned enough about the relationship between the deceased and the defendant that he would not witness the Second Will and recommended that the deceased have his doctor, and someone else who knew him well, review and witness the Second Will.

[116] At the second appointment, Mr. Rutledge reviewed the deceased's instructions, and the deceased requested a Power of Attorney to enable the defendant to deal with his affairs. Mr. Rutledge said he would draw a limited Power of Attorney to allow the defendant to deal with bank accounts and possessions, but not to deal with his real estate. Mr. Rutledge said that the deceased's instructions were again given in a capable and understanding manner.

[117] Mr. Rutledge also testified in cross-examination that he had a number of "concerns": the deceased's age, his mental capability, the fact that he was disinheriting his son, and the fact that he was giving his real estate to a caregiver. Mr. Rutledge was aware of the 30 year age difference between the deceased and the defendant. Mr. Rutledge said that these are factors which would give any lawyer concerns.

[118] Mr. Rutledge felt that the deceased was mentally able to give instructions, that he understood his instructions, and understood what Mr. Rutledge was saying. However, he said that he could not make a judgment as to the deceased's mental strength, or whether he was capable of dealing with coercion. Mr. Rutledge could not make a judgment as to whether there was any coercion without knowing more. Because of this, he refused to witness the Second Will.

[119] In examination-in-chief, Mr. Rutledge testified that the deceased read the Second Will in his presence and he reviewed it to ensure it was drafted as the deceased wished. At all times the defendant was in the reception area, and the deceased was alone with Mr. Rutledge. The second meeting, including review of the Second Will, and the drafting and execution of the Power of Attorney, took about 20 minutes.

[120] When Mr. Rutledge was asked by plaintiff's counsel whether had he known of the First Will which left everything to the plaintiff he would have made further enquiries, he replied that he had questioned the deceased as to the reasons for the new arrangement of his affairs, and that he had discussed trusts and other options for dividing the estate, but the deceased rejected all suggestions.

[121] In re-examination, Mr. Rutledge referred to the note that he had transcribed after the deceased died. The note dated September 20, 2000, reads as follows:

> Jack spent about ½ hour with me in private answering questions requiring memory, dealing with money and responsibilities, understanding mathematical calculation, options in dealing with property. He was definite in his wishes and totally alert and cognizant of all parts of discussion - he explained his hip operation as he had 2 canes to assist his walking - Georgia brought him to my office. He explained her assistance to him over the past 5 years.

[122] After the receipt of the Second Will, the deceased, Ms. Land (the Executrix) and the defendant attended at the deceased's doctor's office. The deceased went into Dr. McWhinney's office with Ms. Land, while the defendant remained in the waiting room. Dr. McWhinney witnessed the Second Will along with Ms. Land. The Second Will was executed on September 22, 2000.

[123] The defendant testified that Ms. Land is a friend of hers. She said that while they are not "close, close friends," they have been friends for years. She also said that prior to the making of the Second Will the deceased had had some limited contact with Ms. Land.

[124] In cross-examination, Dr. McWhinney stated that the deceased was his patient from July 21, 2000, until his death. He saw the deceased on July 21, 2000, September 22, 2000, November 27, 2000 and April 12, 2001. Dr. McWhinney tended to the deceased in hospital between June 18, 2000, and July 14, 2000, during which period the deceased had his hip replacement surgery. Dr. McWhinney testified that aside from his hip replacement, the deceased's medical issues were mainly heartburn and reflux.

[125] Regarding the Second Will, Dr. McWhinney's initials appear on the pages of the document, and his signature as a

witness appears on the final page. The doctor's note regarding the appointment says only "sign will." He recalled in examination-in-chief that a brunette woman was in his office with the deceased. He did not believe that the defendant was in his office at the same time. He dealt with the deceased's reflux condition and changed the deceased's medication. He said that they asked him to witness the deceased's signature on the Second Will. They made some amendments, the doctor initialled the amendments, and witnessed the Second Will.

[126] The doctor said there was nothing which indicated to him that he should do a formal assessment of the deceased's mental capacity. He said that there was never difficulty communicating with the deceased. The deceased understood what the doctor had to say and was capable of giving a history, although he was slow and vague at times.

[127] In cross-examination, Dr. McWhinney explained that mental capacity is on a spectrum. In the early stage it is not clear that a person is incapacitated. He said it was possible that the deceased was in the early stage of dementia, but explained that people in their early eighties sometimes experience mental slowness, so that when one calls it dementia it is more severe. He said that he never performed a full

physical examination of the deceased. He testified when a patient has a caregiver who provides assistance and care, then no formal assessment is done by him. Dr. McWhinney said that he only looked after the deceased for about ten months and did not know him very well.

[128] Dr. McWhinney said the meeting at the time of the execution of the Second Will took at most 10 minutes, including a change to the deceased's medication and a discussion of his reflux condition. Dr. McWhinney did not read the Second Will or know of its contents, nor did he have a discussion with the deceased about the Second Will. The doctor had no discussions with Mr. Rutledge. When asked by plaintiff's counsel whether he would have witnessed the Second Will had he known that an 87 year old man was disinheriting his son by giving his house to a housekeeper/caretaker, the Doctor said that in hindsight it would have raised an alarm and he would not have witnessed the Second Will.

[129] Dr. McWhinney recalled that after the deceased's passing, the plaintiff came to see him in his office. The doctor informed him of his father's prior overall state of health, and of his concern that he had not been told of his father's stay in hospital. The doctor explained that the deceased had had aneurysms in both legs which were inoperable,

and had died within eight days of admission. While the deceased was in the hospital, Dr. McWhinney had asked the defendant to contact the plaintiff and make him aware of the deceased's condition, but he later learned that the defendant did not do so.

3. Decision

[130] In this case, the issue as to the validity of the Second Will does not directly turn upon whether the plaintiff has established whether the deceased lacked the capacity to make the Second Will, but rather whether the defendant unduly influenced the deceased to bequest to her his real property, and whether the deceased received independent legal advice at the time he made the Second Will.

[131] In order to render a will void on the ground of undue influence, what is required is proof that the testator's assent to the will was obtained by influence such that, instead of representing what the testator wanted, the will is a product of coercion on the part of the defendant: see ***Vout v. Hay***, [1995] 2 S.C.R. 876 at p. 887.

[132] In the instant case, I have reached the conclusion, on the whole of the evidence, that the context in which the Second Will was made cannot be divorced from the background of

the circumstances which I found led to the gift of the deceased's automobile to the defendant, the revocation of the plaintiff's Power of Attorney and the opening of the secret joint account.

[133] The plaintiff's position is that the defendant worked to isolate the deceased from the plaintiff and his family by sowing the seeds of suspicion that the plaintiff was after his money and other property, thereby creating a level of discord in the relationship between the deceased and the plaintiff.

[134] It is certainly clear to me from the evidence that throughout her relationship with the deceased the defendant created the factual matrix which led to the substantial gifts that she received from the deceased, and the making of the Second Will. While the evidence establishes that the deceased had a penchant for making gifts of cash and kind to his housekeepers, the situation with the defendant was very different. In my opinion, not only did the defendant enter the deceased's house as his housekeeper, by the time she drafted the codicil she had moved herself so completely into his life that she had, for all intents and purposes, become his main source of emotional and physical support and contact with the outside world.

[135] I am satisfied, and find that the deceased's main motivation for gifting the defendant his automobile, making her a joint owner of his bank account and leaving her his real property in the Second Will was his deep concern that if he did not benefit her in this manner that she would leave him.

[136] In my opinion, the evidence as a whole supports a conclusion by me that the deceased's free will was dominated by the defendant and that the Second Will was made specifically as a result of undue influence.

[137] Turning next to the issue of whether the deceased received independent legal advice from Mr. Rutledge at the time he made the Second Will, the inquiries set out in ***Danchuk***, supra, is not an exhaustive list. The authorities generally provide that it is the duty of a solicitor, especially when there are "suspicious circumstances," to make a full and complete inquiry into all of the relevant facts. Only a careful consideration of the particular facts of each case will validate a solicitor's independent advice.

[138] In this case, Mr. Rutledge's inquiry was far from what might considered to be a full and complete inquiry into all of the relevant facts, and on his own testimony he was confronted by what he termed "concerns", but which I find to be "suspicious circumstances". In fact, neither Mr. Rutledge nor

Dr. McWhinney had sufficient information or made detailed enough inquiries to assess the appropriateness of the deceased making the Second Will.

[139] In the case of Dr. McWhinney, he witnessed the Second Will without knowing of its content. This is a critical fact because Mr. Rutledge placed the main burden of determining the capacity of the deceased and whether there was any coercion, on the witnesses to the Second Will. At the end of the day the witnesses failed to perform the checks that Mr. Rutledge obviously felt were necessary (in fairness to Dr. McWhinney this was the first time that he had been asked to witness a will, and he was not aware of Mr. Rutledge's "concerns"). As already mentioned, the doctor did not know that the deceased was bequesting his most valuable asset to his housekeeper/caretaker, and did not assess the mental capacity of the deceased. His main focus was on the deceased's physical condition. The other witness, Ms. Land (who was also named as Executrix), was not only a friend of the defendant, she hardly knew the deceased and so she was in no position to make any kind of an assessment of the deceased's capacity, or free will.

[140] In the case of Mr. Rutledge, he frankly admitted that he had many "concerns" including the age of the deceased, his

lack of personal knowledge of the deceased's personal circumstances, the deceased's mental capacity, and the significant fact that the deceased was leaving his most valuable asset to his housekeeper/caretaker.

[141] As for his inquiries of the deceased in the 20 or 30 minutes that he met with him during their first meeting, Mr. Rutledge could not recall asking the deceased any details respecting how much money the deceased had in the bank, or the type of bank account. This would have proved to be a crucial piece of information as the deceased's instruction to him that the plaintiff was to receive the deceased's money was clearly inconsistent with the fact that the deceased's bank account was jointly held by the defendant. Obviously it was not the deceased's intention to completely disinherit the plaintiff, but for all intents and purposes that is exactly what happened.

[142] Moreover, Mr. Rutledge did not make a detailed inquiry into the nature of the deceased's relationship with the defendant in order for him to assess the likelihood of undue influence. Nor did Mr. Rutledge recall if he knew of the First Will. Certainly he was not aware of its content, and therefore was not in a position to evaluate and give advice upon any changes in the bequests.

[143] In light of the very limited inquiry made by Mr. Rutledge of the deceased and the circumstances surrounding his relationship with the defendant, I find that the deceased did not receive independent legal advice from Mr. Rutledge. I think it is a reasonable inference to draw from the testimony of Mr. Rutledge and Dr. McWhinney that if they had made full inquiries of the deceased and the defendant, and had been aware of all of the circumstances which led to the making of the Second Will, that the Second Will would certainly not have been witnessed by the doctor, let alone drawn by Mr. Rutledge in the first place.

[144] Accordingly, I find that the Second Will is invalid.

VI CONCLUSION

[145] In summary, I find as follows:

1. that the defendant exercised undue influence in respect of the deceased and the deceased's decisions respecting the property of the deceased;
2. that any gifts or transfers of property from the deceased to the defendant, or her control, are void as unconscionable transactions, and that the assets that are the subject of any such gifts or transfers are assets of the deceased's Estate;
3. that the Second Will is invalid;
4. that the First Will is valid;

5. that the equitable interest of the plaintiff pursuant to the First Will in the assets of the deceased's Estate be traced and such assets be returned to the legal representative of the deceased's Estate for distribution pursuant to the First Will;

6. that the defendant shall account for all money or other property of the deceased that came into her possession or control, or the possession or control of anyone nominated or directed by her, at any time after August, 1996;

7. that the defendant shall return any and all assets or property of the deceased, acquired by the defendant as a result of undue influence, to the legal representative of the deceased's Estate appointed pursuant to the terms of the First Will, to be dealt with pursuant to the terms of the First Will; and

8. that the defendant shall account for the property and assets of the deceased's Estate, and any and all revenue or income derived therefrom since the date of the death of the deceased.

9. costs to the plaintiff.

"B.I. Cohen, J."

The Honourable Mr. Justice Cohen