IN THE COURT OF PROBATE FOR NOVA SCOTIA
Citation: Coleman Estate (Re), 2008 NSSC 396

Date: 20081231
Probate District: Kings
Probate File: 11,990

Between:

Gary Coleman

Applicant

- and -

Estate of Jessie May Coleman

Respondent

Judge:	The Honourable Justice Gregory M. Warner
Heard:	March 25, March 26, April 14 and May 9, 2008
Final Written Submissions:	June 25, 2008
Counsel:	Walter O. Newton, Q.C. and Jonathan Cuming, counsel for the applicant Gary Coleman Daniel Oulton, proctor for the estate of Jessie May Coleman, and the estate of her daughter Kathleen Gould William H. Clarke, residual beneficiary under the contested will, self-represented

By the Court:

A. Issues

[1] Gary Coleman applies for proof in solemn form of the Last Will of his 99-year-old grandmother, Jessie May Coleman, executed on June 20, 2005. She died on March 22, 2007. The Will replaced a will that divided the testator's estate between her son Ronald ("Ron") Coleman and daughter Kathleen ("Kaye") Gould. The Last Will leaves her entire estate to Kaye and Kaye's only child William ("Bill") Clarke. Kaye died at age 82 on April 20, 2007, leaving her entire estate to Bill.

[2] The issues were:

(1) Were the formalities of execution as set out in the **Wills Act** (s. 6 and 7) complied with?
(2) Did the testator lack testamentary capacity?
(3) Did the testator know and approve or appreciate the will's contents?
(4) Was the testator's will overborne by undue influence?

[3] In post-hearing submissions, the applicant admitted that the execution of the Last Will complied with the formalities of the **Wills Act**.

B. Background

[4] Jessie May Coleman resided for much of her adult life at 525 Main Street, Kentville, Nova Scotia. Her husband Lebaron "Barry" Coleman died about 20 years ago. The Colemans had operated, among other businesses, an antique business together. They had five children, three of whom lived to adulthood. The first, John ("Jack") Coleman, died in 1986 and was survived by six children. The second, Ronald Coleman ("Ron"), a Calgary lawyer and businessman, died on July 3, 2005, and was survived by three children. The third, Kathleen Gould ("Kaye"), died on April 20, 2007, and was survived by one child, William H. Clarke ("Bill").

[5] In a Will prepared by lawyer Jean Dewolfe, Q.C., and executed March 24, 2000, the testator: (a) appointed her son Ron as executor, and Scotia Trust as alternative executor, (b) made small bequests to four churches and a friend, (c) divided her antique furniture between Ron and Kaye, and (d) divided the residue equally between her son Ron and daughter Kaye, *per stirpes*.

[6] In the fall of 2000, her daughter Kaye moved into the testator's home. In February 2002, Bill and his wife Barbara Clarke, who had recently returned from living in Ontario and were residing at 17 Webster Street, Kentville, also moved into 525 Main Street for the purpose of caring for the testator and Kaye. In July 2004, Barbara separated from Bill and returned to Ontario. Bill continued to reside with his grandmother and mother.

[7] To remain in her home, the testator was in need of full-time nursing care. Her only income was a small pension. The testator had asked her son Ron for help over the years and he provided it.

When she needed full time care, he agreed to provide it, first on the basis of promissory notes that would be paid at her death, and (apparently) subsequently simply on the expectation of repayment on her death. Professional caregivers and Bill were paid by Ron to provide full-time care (Bill was paid about $500.00 per month); as well, Ron paid other basic needs to enable his mother to reside independently at 525 Main Street. The testator's pension income was to be used by her to pay for some personal needs such as food and clothing. In later years, the cost to Ron (and his estate, which continued the payments after his death) increased from about $2,000.00 per month to about $8,000.00 to $10,000.00 per month.

[8] In June 2005, it became apparent that Ron was seriously ill. He died on July 3, 2005. In the meantime, Bill contacted a young lawyer, Andrew Waterbury, to prepare a new will for his grandmother. When Mr. Waterbury was advised that she was 99 years old, he recommended to Bill that he obtain a professional opinion as to the testator's mental competence before he interviewed her. Bill arranged for a psychiatrist, Dr. Brian Garvey, to interview her in her home. On June 28, Dr. Garvey, who knew nothing about the testator, interviewed her for 20 minutes in her living room and provided a letter to Mr. Waterbury that the testator had, in his opinion, testamentary capacity. On July 20, 2005, Bill drove the testator to Mr. Waterbury's office where Mr. Waterbury took instructions from the testator (alone and not in the presence of Bill), immediately prepared the Last Will and a power of attorney, and within a few hours reviewed and caused the testator to execute the Will and power of attorney, while seated in Bill's vehicle.

[9] As previously noted, the Last Will names Kaye as executrix and Bill as the alternative executor, bequeaths listed personal effects to Kaye and Bill, devises her home to them as joint tenants, and leaves the residue to Kaye.

[10] On November 30, 2005, the testator was assessed by Dr. David Mulhall, a psychiatrist, as to her capacity to make financial decisions. His report, provided to the Department of Health and the testator's family doctor, concluded that she was not capable of making financial decisions. The Minister of Health applied to the Family Court for an Order that the testator was an adult in need of protection under the Adult Protection Act, which included a claim that Bill was a source of danger to her.

[11] By an undated oral decision (Exhibit 24), and Order dated February 24, 2006, the Family Court found that the testator was an adult in need of protection and not mentally competent to decide whether to accept assistance, and that Bill was a source of danger to her. The Court authorized the Minister to provide services under the **Adult Protection Act**, including placement of the testator in an approved facility, and ordered that Bill vacate the testator's residence.

[12] On August 16, 2006, an application was made to the Supreme Court pursuant to the **Incompetent Persons Act**. The Court found that the testator was incompetent and appointed Susan Balcom, a relative, to be her guardian.

[13] On November 20, 2006, the testator was hospitalized with a diagnosis of loss of consciousness and pneumonia, and on March 22, 2007, she died.

C. The Parties' Positions on the Law
C.1 Applicant's position

[14] The applicant's position is contained in counsel's briefs of March 19, May 23 and June 11, 2008. The applicant submits that the proponent of the will (the Estate) has the onus of establishing on a balance of probabilities that the formalities of the **Wills Act** were complied with and that the testator knew and approved of the contents of the will (**Vout v. Hay** [1995] 2 S.C.R. 876 at ¶ 20, following **Barry v. Butlin** (1838) 12 E.R. 1089 (P.C.)).

[15] When these two elements are satisfied, the proponent of the will has the benefit of a rebuttable presumption that the testator had testamentary capacity at the relevant time, but "if, in the course of proving the will, it becomes apparent that there are circumstances raising a well-grounded suspicion as to whether the document indeed expresses the true will of the deceased, then a heavy burden lies on the Court to look beyond the presumption created by compliance with these formalities and be satisfied that the will was the free act of a testator who at the time had a "disposing mind and memory" in the sense defined by Rand J. in **Leger et al v. Poirier** [1944] S.C.R. 152 at p. 161, where he described such a mind and memory as "one able to comprehend, of its own initiative and volition, the essential elements of will making, property, object, just claims to consideration, revocation of existing dispositions, and the like; . . ." (**MacGregor v. Ryan** [1965] S.C.R. 757 at ¶ 9).

[16] With respect to the role of suspicious circumstances, the applicant cites ¶ ¶ 23 to 30 in **Vout v. Hay**.

[17] The applicant also submits that where a fiduciary (in this case, Bill) is a beneficiary and is instrumental in having the will prepared in his favour, the burden of establishing knowledge and approval, and testamentary capacity, is on the propounder of the will per **Feeney's Canadian Law of Wills**, Fourth Edition (Butterworths, 2000, looseleaf) c. 2.32.

[18] For the general test for determining testamentary capacity, the applicant cites **Banks v. Goodfellow** (1870) L.R. 5 Q.B. 549 at 565:

> It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties–that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.

[19] The applicant continues that the real question is whether the testator's mind and memory were sufficiently sound to enable her to appreciate, per **Field v. James,** 1999 CarswellBC 1365 (BCSC) at ¶ 52, the nature of the property she was bequeathing, the manner of distributing it, and the objects of her bounty.

[20] In addition, the applicant cites **Re Keddy Estate**, 2003 NSCA 55 and **Fergusson v. Fergusson**, 1980 CarswellNS 175 (NSCA), for the proposition that determining mental capacity is a question of fact not law; **Re Ramsay Estate**, 2004 NSSC 140, for the test for finding undue influence; **Vout v. Hay**, for the role of suspicious circumstances on the various burdens; and **Re Muise Estate**, 2002 NSSC 131, for the application of **Vout v. Hay** and the assessment of medical evidence as to testamentary capacity.

C.2 Estate's position

[21] The Estate's position is contained in its briefs of March 19, June 10 and June 19, 2008.

[22] In its first brief, the Estate identified the issue as the testator's testamentary capacity as of July 20, 2005.

[23] It agrees that the test of testamentary capacity is that contained in **Banks v. Goodfellow**, amplified by ¶ 26 and 27 in **Vout v. Hay**. It further cites Ian M. Hull in his textbook **Challenging the Validity of Wills** (Carswell, 1996), in respect of what is and is not testamentary capacity, the treatment of lay witness evidence versus expert medical evidence, and the duties of a solicitor preparing a will in circumstances of very elderly testators, as follows:

At page 19:

> While there is much jurisprudence about what is and what is not testamentary capacity, they can generally be rolled into my own definition: to know and understand that one is executing a testamentary document disposing of assets, the general value and nature of which are known to the testator or testatrix, after having considered all persons having a moral claim to the assets being disposed of.
>
> Generally speaking, if one has that knowledge and strength of mind one can dispose of one's assets by a will as one pleases. While it has been held that a testator or testatrix may be eccentric, in my view such eccentricity might be short of whimsy.

At page 24:

> When assessing testamentary capacity one can rely on the evidence of the doctors and of laypersons. In *Davis, Re* the Ontario Court of Appeal has made it clear that when considering whether or not the testatrix had a sound and disposing mind, so far at least as evidence based on observations and experiences is concerned as contrasted with evidence based on pathological findings, that evidence may be answered by laypersons of good sense as well as by doctors. . . . the testimony of experts should not outweigh the testimony of eyewitnesses who had opportunities for observation and knowledge of the testatrix.

[24] With regards to the solicitor's duties in cases where there is suspicion of lack of testamentary capacity, the Estate cites **Re Seabrook** (1978) 4 E.T.R. 135 which in turn cites **Murphy v. Lamphier** (1914) 31 O.L.R. 287 as follows:

> A solicitor is usually called in to prepare a will because he is a skilled professional man. He has duties to perform which vary with the situation and condition of the testator. In the case of a person greatly enfeebled by old age or with faculties impaired by disease, and particularly in the case of one

> labouring under both disabilities, the solicitor does not discharge his duty by simply taking down and giving expression to the words of the client, without being satisfied by all available means that testable capacity exists and is being freely and intelligently exercised in the disposition of the property.
>
> In drawing the will of one considerably impaired or of doubtful capacity, the solicitor should regard himself as the professional *alter ipse* of his client, and seek to touch his mind and meaning and memory, to learn of the property to be dealt with and of the usual objects of his regard, as far as may be, by questioning as shall elicit particulars, and thus to satisfy himself that he has done or tried to do all in his power to find out the real situation. Nor is it a counsel of perfection to suggest that a memorandum of results, apart from the formally expressed will should be jotted down and preserved.
>
> The solicitor may in some perfunctory way to far enough to satisfy himself as to capacity, but it is to be remembered that his duty is to go far enough to satisfy the Court that the steps he took were sufficient to warrant his satisfaction.

[25] In its June 10 brief, the Estate refers the court to the further understanding of the **Banks v. Goodfellow** test, enunciated as a three-part test by the English Court of Appeal in **Sharp v. Adam** [2006] EWCA Civ 449:

> It is essential to the exercise of such a power, that a Testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object that no disorder of mind shall poison his affections, pervert his sense of right, or pervert the exercise of his natural faculties - that no insane delusion shall influence his will in disposing of his property and bringing about a disposal of it which, if the mind had been sound, would not have been made.

[26] It further notes that the testator's awareness need not be very high. Perfection of mind is not a prerequisite. As noted in **Murphy v. Lamphier** at ¶ 126, "capacity may be diminished almost to the vanishing point and yet sufficient be left to sustain a will made in extremis, especially where the alternative is intestacy".

[27] As to the legal burden, the Estate acknowledges that the burden on the challenger can be satisfied by adducing or pointing to some evidence which, if accepted, would tend to negate knowledge and approval or testamentary capacity; in which event, the legal burden reverts to the propounder of the will, per ¶ 28 in **Vout v. Hay**. It further notes that the extent of proof required is proportionate to the gravity of the suspicion and the degree of suspicion varies with the circumstances of each case, per ¶ 24 in **MacGregor v. Ryan**.

[28] The Estate asks the Court to consider the commentary by Fiona Burns in **Reforming Testamentary Undue Influence in Canadian and English Law** (2006) 29 Dalhousie L.J. 455, which commentary, the Estate submits, suggests that an "unintended gap" was created by the case law whereby testamentary capacity and the suspicious circumstances' rule may be used in factual situations where undue influence is also alleged, resulting in wills not being admitted to probate based on the propounder's inability to assuage a Court's concerns about the testator's capacity, thereby bypassing the traditional onus that rests on the challenger to prove testamentary undue influence.

[29] Based on this analysis, and what the Estate describes as the lack of any witnesses available to the Estate to disprove undue influence, the Estate asks that "the evidentiary burden upon those attacking the 2005 will should be in the extreme given the propounder's limitations to calling evidence in reply". Failure to do so would result in the "outcome not being equitable".

[30] Finally, the Estate cites David A. Howlett in his text **Estate Matters in Atlantic Canada** (Carswell, 1999) at p. 176 as follows:

> A testator may be able to make a will, even though her mental capacity is impaired. A testator's awareness need not be at a very high level at all. "Perfection of mind" is not required, and it is common place for testators to make valid wills while their "physical and mental powers are in decline". As stated by Hall, J. in the Nova Scotia Probate Court in **Massey Estate**, "a testator may be mistaken as to a belief in certain facts, but so long as the belief is not the result of insane delusions or brought about by fraud, undue influence or other misconduct, the mistaken belief will not affect the validity of the will".

C.3 Bill Clarke's Position

[31] In lengthy post-hearing submissions dated June 9 and June 19 (received June 25), 2008, he addressed the evidence and not the law.

D. The Law

[32] As the life expectancy in our society has increased, there has come an increase in the occasions when increasingly elderly and vulnerable persons are making wills in circumstances which require attention and vigilance to the issues of testamentary capacity, knowledge and appreciation of the will's contents, and undue influence.

[33] The general principles are not difficult to enunciate; the difficulty is in their application. Of the four common grounds for challenging wills: lack of formal validity, lack of testamentary capacity, lack of knowledge and appreciation of the contents, and the presence of undue influence, the applicant initially challenged the Will on all four grounds, but in his post-hearing submissions, dropped the first.

[34] The parties' submissions on the relevant legal principles are not in conflict, and except for the Estate's submission described in ¶ 29 of this decision I agree with Counsels' statements of the relevant legal principles. They are consistent with the analysis of James MacKenzie in the seminal text **Feeney's Canadian Law of Wills**, Fourth Edition (Butterworths, looseleaf to release 19-7/08, c. 2 and 3), upon which I largely rely.

D.1 Testamentary Capacity

[35] Whether a testator had the requisite mental capacity ("a sound and disposing mind") is a question of fact determined from all of the circumstances (**Feeney**, S. 2.4; **MacGregor v. Ryan**, **Re: Keddy Estate**), and no two circumstances are exactly alike.

[36] While medical or scientific evidence is relevant and admissible, it is not required or conclusive. The thoroughness of the factual inquiry based on lengthy personal observation and interaction with the testator can be as helpful as to the opinion of experts (**Feeney**, c. 2.5).

[37] Testamentary capacity was legally defined by Chief Justice Cockburn of the English Queen's Bench division in **Banks v. Goodfellow**. He wrote that determination of testamentary capacity involves three inquiries: (1) whether the testator understood the nature of the act and its effects; (2) whether the testator understood the extent of the property he/she is disposing of; (3) whether the testator was able to comprehend and appreciate the claims to which he/she ought to give effect; and, in respect of (3), whether any disorder of the mind poisoned his or her affections, perverted his or her sense of right, or perverted the exercise of his or her natural faculties - that no insane delusion influenced his or her will to dispose or brought about a disposal which, if sound of mind, would not have occurred.

[38] **Banks** has been relied upon as the analytical framework for assessing testamentary capacity in literally hundreds of Canadian decisions, cited with approval in at least five decisions by the Supreme Court of Canada, and was recognized in **Sharp** v. **Adams** [2006] EWCA Civ. 449, an English Court of Appeal decision that articulately updated **Banks**, describing it as "the leading authority on testamentary capacity . . . a decision which has withstood the test of time". (¶ 66).

[39] Interestingly, in **Leger v. Poirier**, a 1949 decision of the Supreme Court of Canada, Justice Rand described testamentary capacity in similar terms, but without reference to **Banks**, as follows:

> 17. . . there is no doubt whatever that we may have testamentary incapacity accompanied by a deceptive ability to answer questions of ordinary and useful matters: that is, the mind may be incapable of carrying appreciation beyond a limited range of familiar and suggested topics. A "disposing mind and memory" is one able to comprehend, of its one initiative and volition, the essential elements of will- making, property, objects, just claims to consideration, revocation of existing dispositions, and the like; . . .
>
> 18 Merely to be able to make rational responses is not enough, nor to repeat a tutored formula of simple terms. There must be a power to hold the essential field of the mind in some degree of appreciation as a whole, and this I am satisfied was not present here.

[40] To illustrate how the fact specific contexts can lead to different conclusions when applying the same test, one need only look at the opposite results in **Banks** (where the will was upheld), and **Sharp** (where the will was not upheld); this is succinctly described in the commentary "Lest We Forget Banks v. Goodfellow" by Rodney Hull, Q.C. (2007) 31 E.T.R. (3d) 15, and at c. 2.5 in **Feeney**.

D.2 Knowledge and Approval/Appreciation of the Wills' contents

[41] A testator must both know, and approve or appreciate, the contents of the will. These requisites are disjunctive. There is a presumption that, absent suspicious circumstances, they are

established by evidence that the will was read by or to the testator, or that the contents were otherwise brought to the testator's attention.

[42] Knowledge and approval overlap the issue of testamentary capacity but are also related to the separate (for analytical purposes) issue of whether the testator may be mistaken with regards to the contents of the will.

[43] If a testator lacks testamentary capacity, he or she would not be capable of knowing and appreciating the contents of the will. Because of this, the same factual evidence and findings are often relevant to the issues of testamentary capacity and knowledge and appreciation.

[44] Where testamentary capacity is found to exist, a testator may fail to know or appreciate the contents of the will as a result of a simple or innocent mistake or as a result of being induced by the fraud of another. (**Feeney**, c. 3.16)

[45] As in the case of testamentary capacity, questions of knowledge and approval/appreciation, based on mistake, are matters of fact determined from all of the evidence. (**Feeney**, c. 3.4)

[46] Where the mistake is alleged to be based upon fraud, the onus always remains with the opponent of the will to prove the elements of fraud. Fraud involves an intentional misrepresentation and deceit; innocent representation does not constitute fraud so as to invalidate a will.

[47] More difficult to analyse than a mistake induced by fraud is the accidental or innocent mistake which is described in **Feeney** as applying both to the validity of the will and to the interpretation of a valid will. If it can be shown that the testator did not approve of the contents of the will by innocent mistake then probate may be refused. This again is a fact driven analysis based on all of the circumstances. While cases of accidental mistake may consist of several types (see **Feeney**, c. 3.22), the type advanced by the applicant in this case appears to be that the testator was motivated to make her will by a belief in mistake of fact.

D.3 Undue Influence

[48] While the presumption of testamentary capacity, and of knowledge and approval/appreciation, may be exhausted by evidence of suspicious circumstances, thereby placing an evidentiary burden on the proponent of the will, the burden of proof of undue influence (and of mistake based on fraud) is always on the party challenging the will to prove that the mind of the testator was overborne by the influence exerted by another person such that there was no voluntary approval of the contents of the will. The burden is a civil burden on a balance of probabilities.

[49] Contrary to the submissions of the applicant, there is no fiduciary presumption of undue influence in the case of wills. (**Feeney**, c. 3.7)

[50] What constitutes undue influence is articulated and succinctly described in **Feeney** c. 3.10 to 3.14. To set aside a will on the ground of undue influence, the challenger must establish that the

influence was so great and overpowering that the will reflects the intent of the beneficiary and not the testator. To establish such coercion does not necessitate establishment of physical violence or confinement or threats but on the other hand mere influence by itself is not sufficient. The test is whether in all of the circumstances the testator did not have an independent mind that could withstand the competing influences. As put in **Feeney**: "it is not improper for any potential beneficiary to attempt to influence the decision of a testator provided the pleading does not amount to coercion and the latter continues to act as a free agent. Some begging is permissible." (c. 3.12)

D.4 Suspicious Circumstances

[51] As noted above, the burden of proving both a sound and disposing mind and knowledge and approval/appreciation of contents are on the propounder of the will and are on the ordinary civil burden of balance of probabilities.

[52] Where it is shown that the will was understood and executed by the testator, the burden is not heavy.

[53] The effect of suspicious circumstances on the application of the general principles to individual factual matrices originated in **Barry v. Butlin**, and over the years created some ambiguity and difficulties in those situations where the burden was decisive. Some case law might have supported the idea that the doctrine of suspicious circumstances affected the burden of proving undue influence and fraud; however, Justice Sopinka for the Supreme Court of Canada in **Vout v. Hay** clarified the relationship between the doctrine and the various burdens of proof at ¶ 23 to 30, and in particular at ¶ ¶ 27 and 28:

> 27 Suspicious circumstances in any of the three categories to which I refer above will affect the burden of proof with respect to knowledge and approval. The burden with respect to testamentary capacity will be affected as well if the circumstances reflect on the mental capacity of the testator to make a will. Although the propounder of the will has the legal burden with respect to due execution, knowledge and approval, and testamentary capacity, the propounder is aided by a rebuttal presumption. Upon proof that the will was duly executed with the requisite formalities, after having been read over to or by a testator who appeared to understand it, it will generally be presumed that the testator knew and approved of the contents and had the necessary testamentary capacity.
>
> 28 Where suspicious circumstances are present, then the presumption is spent and the propounder of the will reassumes the legal burden of proving knowledge and approval. In addition, if the suspicious circumstances relate to mental capacity, the propounder of the will reassumes the legal burden of establishing testamentary capacity. Both of these issues must be proved in accordance with the civil standard. There is nothing mysterious about the role of suspicious circumstance in this respect. 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 legal burden reverts to the propounder.

[54] **Feeney** (c. 2.24-2.30) cites several decisions that describe and apply the Sopinka analysis.

[55] For example, Justice Cullity in **Banton v. Banton** [1998] O.J. No. 3528, described a spent presumption as not being rebutted but being discarded with no further role to play. Justice Granger

in **Ostrander v. Black** [1996] O.J. No. 1372, noted that mere allegation of lack of testamentary capacity was not enough to defeat the presumption but where some evidence supports the suspicious circumstances, the propounder regains the formal onus of proving testamentary capacity, and knowledge and approval/appreciation. Said differently, a court may draw inferences from the suspicious circumstances contained in the evidence of the absence of testamentary capacity, or knowledge and approval, unless this evidence is countered by other evidence. If the evidence in totality is not clear and convincing, the proponent will not discharge its civil burden.

[56] This burden does not include proving the "righteousness of the transaction".

[57] Because suspicious circumstances may arise about any aspect of the will making process, the involvement of a beneficiary in the preparation and execution of the will attracts very close examination. (**Craig v. Lamoureux** [1920] A.C. 349). As the author of **Feeney** notes "participation of the beneficiary in the will making process is a matter of circumstantial evidence relating to the question of the knowledge and approval of the contents and, unless additional factors are present, the will should not be denied probate by that fact alone." (c. 2.29)

E. Analysis

E.1 Testamentary Capacity

[58] I have concluded that the testator lacked testamentary capacity at the time she met with the lawyer, gave instructions for and executed the will on July 20, 2005.

[59] This conclusion is not reached because of the burden or the "doctrine of suspicious circumstances". Rather, in my view, the totality of the evidence strongly supports the conclusion that Ms. Coleman, aged 99 years at the time, and in a state of significant decline in both her physical and cognitive health, had some knowledge of some of her circumstances - specifically as they relate to historic events and antiques which were her career in earlier life, but she clearly did not know the extent and value of her assets or obligations, nor the names and status of family members who would normally be expected to benefit, nor much else of her current circumstances.

[60] While all of the evidence leads to the clear conclusion that she lacked testamentary capacity in July 2005, in drawing this conclusion I have relied most heavily on the evidence of Dr. Filipowicz, Dr. Mulhall, Michael Forse, Q.C., and the one and a half hour video taken during her 99th birthday party on April 9, 2005, by Bill.

[61] I paid particular attention to the evidence of Dr. Brian Garvey, Mr. Andrew Waterbury, and the review by Dr. Paige Moorhouse of Dr. Mulhall's and Dr. Filipowicz's examinations and observations (and, to a lesser extent, Mr. Wilfred MacPhee). I concluded that, since neither Dr. Garvey nor Mr. Waterbury knew the testator before their very brief interviews with her, and since neither had obtained from her or other sources sufficient information as to her medical (physical and mental) health, her family members and others who may have had a moral entitlement to consideration in her estate, or her current assets and obligations, neither was in a position to conclude that the testator had testamentary capacity.

[62] The video of the testator's 99th birthday party on April 9, 2005, clearly shows a very pleasant but deaf, disorientated and confused person. The testator was introduced to one of her fourteen grandchildren, Barry Coleman, and clearly had no idea who he was. Despite suggestions in closing arguments that this could be attributed to the noise of the party, time of day (late afternoon), her poor hearing or her poor eye sight, I reject these explanations on the basis of the video itself which clearly shows great effort by Bill to describe to Ms. Coleman who Barry Coleman was and his relationship to her. Barry Coleman gave her two boxes of chocolate; despite being clearly advised as to what the gifts were, she insisted on calling them, mistakenly, either jars of jam or bottles of pickles.

[63] Dr. W. A. Filipowicz carries on a family medical practice from an office situate immediately adjacent to the testator's home. Since October 5, 2002, when the testator was 96 years old, she has been his patient. She never attended his office; he always made house calls, usually at the end of his office hours. His oral evidence was corroborated by his extensive office notes and various written opinions. He saw her one to three times a month and was more frequently in contact with members of her family, including often Bill. He diagnosed her with several physical and mental ailments.

[64] Long before July 2005, Dr. Filipowicz diagnosed the testator with progressive dementia. On March 26, 2004, a CAT scan corroborated anatomically his opinion of dementia; that is, she suffered from diffused cerebral atrophy, a decrease in the size of the brain.

[65] While Ms. Coleman had good and bad days, she was increasingly and more frequently confused and agitated. She had a poor short term memory and poor orientation to place and to time. By 2004 she was hearing voices, and, by his observation, paranoid, and put on medications. Dr. Filipowicz's medical notes are full of references to her confusion and agitation throughout 2005 and her difficulty coping with the death of her son Ron. Her good days were relative to her generally poor mental and physical condition. The respondents made more of some entries in Dr. Filipowicz's notes in and about July 2005 of her mental or cognitive abilities at that time, than he was prepared to make. Dr. Filipowicz was of the same view as Dr Mulhall. His evidence supported the conclusion of Dr. Mulhall.

[66] In September 2005, Dr. Filipowicz asked for a competency assessment to be conducted by Dr. Mulhall, the hospital psychiatrist. When Bill learned of this, he objected and cancelled the appointment.

[67] Dr. Filipowicz was not a partisan in this litigation or in respect of the various members of the family. He had many interactions with the testator between 2002 and 2007. His training and trade gave him an ability to make more astute observations about the testator than laypersons. Recognizing the dangers of assessing reliability of any witness (and more so an expert) upon how they testify, I found his observations and opinions respecting Ms. Coleman's cognitive skills and testamentary capacity to be the most reliable and factually helpful of any presented during the several days of evidence. His basic observations were not shaken during cross-examination.

[68] I accept that Dr. Filipowicz's role and involvement was as the family doctor, unrelated to issues of testamentary capacity; however, his observations and evidence were directly relevant to the testator's capacity to understand and recall her current circumstances, her family members, her property and those other factors which impact on her testamentary capacity.

[69] Dr. Mulhall was refused access to the testator by Bill on September 21, 2005. He did carry out a cognitive assessment on November 30, 2005, about four months after the will was made, at the request of the Department of Health pursuant to the **Adult Protection Act**. His assessment was conducted using conventional cognitive assessment techniques. His extensive evidence before the Family Court on the Adult Protection application was relied upon by that court. His reports are before the court. He diagnosed the testator as "DSM-IV 290.00 dementia, senile onset, Alzheimer type, moderate, with an opinion that she was not competent to make decisions regarding her finances, personal care, or residence . . . [or] in regards to making a will . . ."

[70] Among other things, Dr. Mulhall conducted the standard mini-mental scale test (MMSE) and the testator scored 16 out of 30 points. He stated that the standard rate of decline in mental or cognizant capacity on that test is three points in twelve months (which works out to about one point every four months). He concluded on that basis that the testator would not have been competent to make a will on July 20, 2005.

[71] As part of Dr. Mulhall's lengthy cross-examination, he was presented with his evidence in the proceedings before the Family Court in the Adult Protection matter in February 2006 as well as his various written opinions and reports. I concluded that Dr. Mulhall answered the questions in a rational manner consistent with his prior evidence and written opinions, and in a manner supportive of the conclusion that Ms. Coleman lacked testamentary capacity on July 20, 2005.

[72] The results of the MMSE and Dr. Mulhall's other specific inquiries as to the testator's finances and family confirmed that she lacked knowledge of her finances and her family in November 2005 to such an extent that, absent a factual basis for finding that a precipitous event occurred between July 20 and November 30 as would very significantly accelerate the normal progression of her dementia, she could not have had testamentary capacity on July 20, 2005.

[73] One example of her lack of knowledge of her assets was her statement to Dr. Mulhall that 60 years before she had paid $2,900.00 for her house and in November 2005 would be willing to accept an offer of $10,000.00 for it. I believe the property was assessed for approximately $180,000.00 at the time.

[74] Equally striking was Dr. Mulhall's evidence that, while the testator spoke of a close bond with the grandson who was with her at her home the day of his assessment, she was unable to name him or identify his relationship to her. That person was Paul Coleman, son of Ron, who had moved to Kentville to provide for her care when Ron died and who was paying her bills. She was also confused about her pension income.

[75] Dr. Mulhall was questioned closely on what intervening events could cause her MMSE score to decrease faster than the "standard" three points in twelve months (one point in four months). His answers were reasonable and consistent with his conclusion that it was not likely that her mental capacity was better in July, absent a precipitating event. Based on the other evidence heard during this hearing and, more particularly, the lack of any evidence of a precipitous intervening event, the Court is satisfied that there were likely no intervening events that would have caused Dr. Mulhall's estimate of her MMSE score to have declined at a significantly faster rate than the normal rate.

[76] I considered with care the evidence of Dr. Moorehouse, who has conducted many assessments for dementia for Capital District Health Authority, but who never interviewed or assessed the testator. Her evidence was focussed on critiquing Dr. Mulhall's evidence. She noted the various causes of dementia, and the importance of familiarity with the testator's physical condition at the time of the cognitive assessment because of the fact that the testator's condition may vary from day to day.

[77] The most relevant aspects of Dr. Moorhouse's evidence were her statements that the current thinking in the field is that the functional ability to make a specific decision is a more relevant inquiry than general competency assessments based on the MMSE, that while dementia can affect competence, they are not synonymous, and that, because of variances, competence at one point in time is a dangerous basis upon which to project an earlier state of competence.

[78] Dr. Moorhouse's observations are, in a general sense, accepted as reasonable concerns that apply to the evidence of all witnesses who are in the position to testify as to testamentary capacity.

[79] The only basis for determination of testamentary capacity at present is the observations of witnesses, whatever their qualifications are. To express concerns about the validity of a family doctor's observations made over several years including in close proximity to July 20, 2005, and those of a psychiatrist who actually examined the testator, using standard competency techniques, would logically suggest that the observations of anyone with lesser skills are meaningless.

[80] Dr. Moorhouse discounted the testator's affirmative answer to Dr. Mulhall's question about whether the testator thought an offer of $10,000.00 would be a good price for her home, was somehow not valid for an assessment of testamentary capacity. I have difficulty with this conclusion. It is directly relevant to an understanding of whether the testator had a basic understanding of the extent of her assets, one of the three **Banks** factors.

[81] Dr. Mulhall's more detailed inquiries of the testator, and his keeping of much more detailed records of his assessment, supports my conclusion that Dr. Garvey's brief and superficial inquiries, with no written record or notes of his interview other than the brief letter to Mr. Waterbury, should be given no weight, and in contrast the detailed observations of Dr. Filipowicz and Dr. Mulhall should receive much more weight.

[82] Michael Forse, Q.C., has practiced law in Kentville since 1972. He had a long association as a lawyer with the testator and her daughter Kaye. He was contacted by Bill in the summer of 2005

(I have concluded from the other evidence likely in June 2005, although the exact date is not critical) and advised that the testator was considering mortgaging her home and asked if there were any liens on the property, including in particular in regards to her arrangement with Ron who was advancing money at a substantial rate to permit her to remain living in her residence with full-time professional care. Mr. Forse inquired and found that there were no liens.

[83] Mr. Forse testified that, within a few days, he dropped into the testator's residence to advise of the search results and to discuss the intended mortgage. Mr. Forse testified, and I accept, that during a brief discussion he had with the testator, she did not recognize him and clearly did not understand what a mortgage was and generally "made no sense". He concluded that she was not capable of making a mortgage and left.

[84] Although Mr. Forse's evidence is in direct contradiction to that of Bill, Bill did not cross-examine him at all. Mr. Forse had prepared earlier wills for the family, and later Jean Dewolfe had prepared wills. He did not expect to be asked to prepare the will in 2005, because he expected that Ms. Dewolfe would do it.

[85] Where the evidence of Mr. Forse and Bill differ, I accept the evidence of Mr. Forse. It was given clearly and without guile; Mr. Forse had no motive to colour his evidence.

[86] Gary Coleman is the son of Ron and grandson of the testator. He described the family history; he described how his father, on an increasing basis, had been asked by the testator to assist her in her living expenses, and that he did so because he was the only person in the family financially able to do so.

[87] The testator's needs increased significantly when she needed home care to remain living in her home. The expenses incurred by Ron were initially in the range of $1,000.00 to $2,000.00 per month to enable the testator to remain in her home, including paying a salary to Bill. It grew to about $8,000.00 to $10,000.00 per month near the end. I believe the evidence was that it totalled about $250,000.00.

[88] It was Gary Coleman's evidence that his father, his grandmother and Kaye all agreed that the monies being advanced by Ron were loans that would be in effect repaid after the death of his grandmother. Initially the loans were evidenced by Promissory Notes but this became cumbersome and ceased.

[89] After the death of Gary Coleman's father, the estate continued to honour his father's promise to finance the testator remaining in her home for as long as she could. During this time Paul Coleman (brother of Gary Coleman) moved to Kentville to assist in looking out for the testator.

[90] Gary Coleman's evidence was important in two respects.

[91] First, it outlined a strong moral and possibly legal claim of Ron, his family and estate, against the estate of the testator that should have been considered by a testator with testamentary capacity.

While a testator need not necessarily honour any moral claim on her estate, such as the strong moral claim of Ron and his family, it was disconcerting that none of the witnesses relied upon by the respondents can point to any inquiry by persons such as Mr. Waterbury or Dr. Garvey whereby some discussion occurred that might suggest that the testator was aware of that claim or may have considered it. It was referred to by Bill. I found his evidence to be self-interested and not credible or reliable. The absence of any evidence of discussion of that moral claim by the testator is, by inference, supportive of the evidence of Dr. Filipowicz that the testator was confused at that time and did not have testamentary capacity.

[92] The second importance of the evidence of Gary Coleman is its corroboration of other evidence that Bill orchestrated, without consultation with Ron or his branch of the family, the contested will.

[93] It is Bill who arranged for the testator to be seen by a young lawyer with whom she had no prior involvement as opposed to a lawyer who had drafted her prior wills. It is clear that he arranged for and conveyed her to all appointments. It is equally clear that he kept secret the fact of the testator's new testamentary intentions from the Ron Coleman side of the family.

[94] The evidence of Gary Coleman raised suspicions with regards to the involvement of Bill in the creation of the will, in keeping it a secret, and in attempting to prevent a cognitive assessment by Dr. Mulhall in September. Bill was a principal beneficiary of this change. He had close access to and some control over his very elderly and vulnerable grandmother.

[95] Where the evidence of Gary Coleman differed with that of Bill, I accepted the evidence of Gary Coleman.

[96] With respect to the evidence that the testator had testamentary capacity on July 20, 2005, the respondents rely primarily on the evidence of Dr. Brian Garvey. Dr. Garvey conducts a private practice in psychiatry at Canning, Nova Scotia.

[97] Dr. Garvey was asked by Bill to see the testator to determine her competence to make a will because her son, the executor, was terminally ill and she wished to redraft it. Dr. Garvey met with the testator at her home for about 20 minutes at 8:15 a.m. on June 28, 2005. He did not know the testator nor any of her medical (physical or mental) history.

[98] Dr. Garvey said his interview took place in the living room of the residence. The testator was very deaf and they had to speak so loudly that he was aware, and he says the testator was aware, that Kaye and Bill, who were in the residence but not in the living room, could hear everything they said. He attributed this lack of privacy to the reason that the testator did not answer his questions or discuss with him her testamentary intentions.

[99] Dr. Garvey's letter-report of their interview (he destroyed his notes right after writing the report on the same day) is very short. Dr. Garvey says he asked the testator where she lived, how long she had lived there, the number of children and grandchildren she had, and why she needed a

new executor. The letter contains few particulars about her circumstances. One particular is that she stated that she had five children and fourteen grandchildren. In fact, she did have five children, two of whom died in childhood, but she only had ten grandchildren.

[100] Dr. Garvey's evidence with respect to questions asked and answers given about her property were vague. He could only recall that she knew she had a relatively valuable estate.

[101] Dr. Garvey did not perform an MMSE (mini-mental assessment) or any equivalent analytical tool. His inquiries did not compare to Dr. Mulhall's inquiries, and were quite superficial.

[102] Dr. Garvey acknowledged that he had no knowledge of her physical condition (other than her obvious age and extreme deafness) and was not aware of any prior diagnosis of dementia or any other mental or cognitive condition. He did not notice that she was depressed or emotional about the terminal illness of her son Ron whom she expected to die soon.

[103] In Dr. Garvey's June 28 letter/report to Andrew Waterbury he writes:

> I was quite satisfied after a 20 minute discussion that she was of sound disposing mind, that she was free of any mental illness, that she had a reasonable knowledge, for her age, of her assets, and what the role of an executor would be, and who, among her relatives, would be the natural inheritors of her benefice.

[104] Before Dr. Garvey testified in this court, he had apparently been shown Dr. Mulhall's assessment. While he agreed with Dr. Mulhall's assessment as of the date of that assessment, his response to Dr. Mulhall's conclusion, that the MMSE score of 16 points out of 30 would only have been slightly higher as of July, was that it was a conclusion based on a "statistical average" and may be different for each individual. He did not explain the basis upon which the "statistical average" could or would likely be inapplicable to the testator in this case. He did specifically answer that the death of Ron would not be such a precipitating event because, in his words, "old age is merciful - emotions flatten as [one] gets older".

[105] I found Dr. Garvey's evidence to be unhelpful for several reasons:

a) Dr. Garvey had a brief conversation with a very deaf testator whom he did not previously know or about whom he had no medical history.

b) In the conversation, the testator did not properly identify the number of grandchildren she had. This was evidence of a lack of current knowledge and is not inconsistent with her correct answer as to the number of children she had given birth to (historic knowledge).

c) Dr. Garvey did not note sufficient information about the testator's property to determine whether she was aware of the full nature and value of her property, or how he could conclude that she did know the extent of her property.

d) Dr. Garvey did not have information from her family physician or any other persons as to her medical condition.

e) Dr. Garvey did not perform the mini-mental assessment (MMSE) or measure by any similar technique her cognitive skills.

[106] Dr. Garvey's dismissal of the significance of the results obtained by Dr. Mulhall four months later, including his analysis of the rate of decline in the MMSE score, was more rhetorical than substantive. He was not familiar with the medical condition of the testator or any events in her life that would or could have impacted the rate of decline in her cognitive skills.

[107] Dr. Garvey acknowledged on cross-examination that the only persons referred to by name during his interview were Ron, Kaye and Bill. His observation was that it was not important that she be able to refer to her family by their names so much as by their numbers. This evidence was somewhat disconcerting and not supportive of a conclusion that she knew who amongst her relatives would be the natural inheritors under her will.

[108] I conclude that Dr. Garvey conducted a very brief, superficial interview with the testator during which he did not obtain, in light of the circumstances of this family as received during this hearing, the minimal information necessary to determine:

a) if she knew who her family was and who would be natural inheritors under her will, especially in respect of Ron's financial assistance;

b) that she had reasonable knowledge of her assets and debts or the extent of her property; or,

c) that she had medical health issues - both physical and mental that could impact upon her testamentary capacity.

[109] Dr. Garvey's reason for not inquiring as to her testamentary intentions, including whom she might consider as an appropriate executor, may have been appropriate because of the lack of privacy in the living room, but it cannot be the basis for his conclusion that she understood the role of an executor and that her intended executor was a possible choice that a competent testator could make.

[110] The role of the Court is not to blindly accept the opinion of an "expert". The role of the expert is to use their special training and skill to evaluate the facts and to draw conclusions. The value of their conclusion depends largely on the thoroughness of their inquiry into the facts and their ability to explain in a rational and transparent manner how those facts lead to their conclusion.

[111] I am not satisfied that Dr. Garvey obtained sufficient facts to make his conclusion reliable and trustworthy.

[112] Similarly, I listened carefully to the evidence of Andrew Waterbury and reviewed his very short file note (Exhibit 13) written after his interview with the testator on July 20, 2005.

[113] Like every witness before the Court, Mr. Waterbury found the testator to be a very pleasant or charming lady and very deaf. I found his evidence with regards to the issues of testamentary capacity to be sparse or lacking in factual basis.

[114] I concluded that Mr. Waterbury spent some time reviewing the lists of her household contents and antiques, a subject matter about which, even with dementia, she would be familiar

because it was historic information, but I did not hear evidence as to inquiries by him of her with respect to the nature of her property and its possible current value. Nor was there evidence nor a record in his notes as to what discussions, if any, he had with respect to who the members of her family were, and what their relationship with her were, or of what claims they may have on her estate. In respect of the latter, the elephant in the room was the very significant contribution that Ron and his family made to the testator to enable her to remain in her home, and about which there was a strong moral, if not legal, claim; nowhere is there evidence (except from Bill, whose evidence was self-serving and not credible or reliable) that the testator was aware of or considered this in the will-making process.

[115] There is no evidence that Mr. Waterbury was aware of the issue of Ron's significant financial assistance, let alone had a discussion with the testator to determine whether she had considered it and the basis on which she determined to change her prior testamentary intention (which was basically to split her estate equally between Kaye and Ron). Mr. Waterbury was not familiar with the testator and had no independent knowledge as to whom her family was and what legal or moral claims any of them may have had on her estate.

[116] Without inquiries of this regard, there is no basis upon which Mr. Waterbury could determine that she had considered all of the moral claims upon her estate.

[117] Mr. Waterbury's notes contain no specifics as to the testator's assets, debts, income or expenses.

[118] Wilfred MacPhee, an antique dealer and auctioneer, testified about seven visits he made to the testator's home between 1998 and September 2005.

[119] The first was to appraise the house contents (antiques) at the request of Ron. Mr. MacPhee appraised them for about $280,000.00.

[120] The next two visits in 2002 and 2003 were at the request of Bill for the purpose of purchasing some antiques from the testator. Because of the testator's deafness, Bill had to repeat whatever Mr. MacPhee said to the testator. He made offers on items they wanted to sell, which the testator accepted. He paid cash.

[121] Mr. MacPhee saw nothing of concern about the testator's condition during these visits.

[122] The fourth visit before September 2004 was at the request of Ron; again he made offers for antiques that the testator accepted.

[123] The fifth visit was the only one made without invitation or notice. Previously the testator had indicated that she used to grow raspberries; he brought her raspberries. Bill let him in and he went into the kitchen where the testator received the raspberries and starting eating them. She recognized who he was.

[124] The sixth visit in September 2005 was at the request of Bill to again purchase antiques from the testator. Bill and Kaye were present. The testator recognized him. He made offers on several items she wanted to sell but she did not accept his offers.

[125] Mr. MacPhee testified that the total amount he paid on his four buying trips was about $7,000.00 to $8,000.00.

[126] Mr. MacPhee's seventh visit was after the death of Ron. While the testator was in the residence, he did not see or speak to her.

[127] Mr. MacPhee's evidence added little to the issue of testamentary capacity. It appears that Ms. Coleman recognized him and she appears to have been familiar with the antiques that she had owned for a long time.

[128] In summary, I am satisfied that Ms. Coleman in July 2005 did not have the cognitive capacity to understand the nature of making a will or its effects, she did not understand the particulars of her property to the extent of understanding what she was disposing of, and she did not comprehend and appreciate the claims to which she ought to give effect.

[129] While mental illness is not *per se* the test for testamentary capacity, I am satisfied on the basis of the evidence of Dr. Filipowicz, corroborated by the evidence of Dr. Mulhall, that for more than a year proceeding July 20, 2005, the testator's condition of progressive dementia was such that she did not in fact have testamentary capacity. In coming to this conclusion, I apply the law as advanced by the applicant and estate (including particularly the passages cited from Murphy v. Lamphier and Leger v. Poirier), and have considered the general framework for the assessment of testamentary capacity advocated by Dr. Moorhouse.

E.2 Knowledge and Approval/Appreciation

[130] Because of the Court's conclusion that Ms. Coleman did not have testamentary capacity, she could not know and approve/appreciate the contents of her will.

E.3 Undue Influence

[131] Because of the Court's conclusion with respect to Ms. Coleman's lack of testamentary capacity, it is unnecessary to determine whether or not Bill, the ultimate beneficiary under the contested will (as a result of the death of his very elderly mother in the interim), acted in such a way as to constitute coercion as opposed to mere persuasion.

F. Conclusion

[132] I find the will invalid by reason of the lack of testamentary capacity of the testator.

[133] I will hear the parties with respect to costs if they are unable to agree.

J.