

Date: 20020725
Docket: S. N. No. 104514

IN THE SUPREME COURT OF NOVA SCOTIA

[Cite as: *Butler v. Bird*, 2002 NSSC 189]

BETWEEN:

**JUNE BUTLER, ERNESTINE CAMERON, ALICE BENVIE,
and JAMES DUGUID, JR.**

PLAINTIFFS

- and -

**MARLENE BIRD and JAMES W. DUGUID, SR., as
represented by his Guardian, Marlene Bird**

DEFENDANTS

D E C I S I O N

HEARD: At Sydney, Nova Scotia, before the Honourable Justice C. Richard Coughlan, on February 26, 27 and 28, 2002 and final submission April 6, 2002

DECISION: July 25, 2002

COUNSEL: Hugh R. McLeod, for the Plaintiffs
Darlene MacRury, for the Defendant, Marlene Bird

COUGHLAN, J.:

[1] James W. Duguid, Sr. died on August 8, 1997. His daughter, Dorothy LeDrew looked after Mr. Duguid as long as her health permitted. Mrs. LeDrew died December 10, 1994. In 1990, Mr. Duguid made a will which, except for a small gift to his church, left his estate to his daughter, Dorothy LeDrew. At the same time he deeded “the Lodge”, the boarding house he owned in Sydney, Nova Scotia to himself and Dorothy LeDrew as joint tenants. After Mrs. LeDrew’s death, Mr. Duguid made a new will replacing his daughter with his granddaughter, Marlene Bird, daughter of Dorothy LeDrew, as beneficiary. He also made a deed conveying “the Lodge” to himself and Marlene Bird as joint tenants. The plaintiffs seek to have the deeds and wills set aside.

ISSUES:

- [2] The issues for the court are:
- Was Mr. Duguid mentally competent at the time of execution of the deed and will in 1990?
 - Was Mr. Duguid mentally competent at the time of execution of the deed and will in 1994?

- Was the relationship between Mr. Duguid and Dorothy LeDrew such as to give rise to a presumption of undue influence?
- Was the relationship between Mr. Duguid and Marlene Bird such as to give rise to a presumption of undue influence?
- If the presumption of undue influence exists, has it been rebutted?

BACKGROUND:

[3] Mr. Duguid was a taxi driver and purchased the Rosedale Tourist Lodge in the early 1960's. He and his wife had five children, the plaintiffs and Dorothy LeDrew. His wife died in 1965. He had a taxi stand which he lost after his wife died. He then worked for a taxi company. He stopped driving taxi prior to having his leg amputated in 1982. After his wife died, Dorothy LeDrew assisted her father. He continued to operate the Lodge. Marlene Bird started cleaning the Lodge in the early 1980's. Marlene and her mother did the laundry and prepared meals for Mr. Duguid. In 1993, Marlene moved into the Lodge and operated it. In the early 1990's, Mr. Duguid moved to Dorothy LeDrew's home to reside. Dorothy looked after her father, preparing his meals, giving him his medications and in the late 1980's and 1990's assistance with his personal care.

- [4] Alice Benvie, one of the plaintiffs, testified her father was closest to Dorothy of all his children. Dorothy and Marlene were the family members who assisted with the Lodge. Alice Benvie had a good relationship with her father, he gave her his car in 1998 about a year after he stopped driving and helped her financially. Alice Benvie said Dorothy was very good to Mr. Duguid. Alice Benvie described an incident in 1989 - 90 when her father hallucinated and told her he had been in the church lot all night and so was everyone in the house. She stated this was very unusual for her father. She told Dorothy of the incident and she did not know if it was high sugar that caused the hallucination, and left it to Dorothy to call the doctor.
- [5] Another plaintiff, June Butler, testified Mr. Duguid got along well with his children. She visited him two or three times a week at the Lodge and at Dorothy's home. In the late 1990's, her father gave her \$2,000.00 toward the purchase of a car. She remembered her sister, Alice, telling her Dot (Dorothy) was in Dad's will concerning the Lodge. She said her father was quiet and kept things to himself.
- [6] It is clear from the evidence of all witnesses that Dorothy LeDrew was the person in the family who looked after Mr. Duguid and assisted him in operating the Lodge. As he aged, Mr. Duguid's needs increased and, as long

as she was able, Dorothy met those needs. Marlene Bird assisted her mother in helping Mr. Duguid and continued to assist him after Dorothy's death.

[7] Much of the evidence dealt with Mr. Duguid's mental status. The plaintiffs called two expert witnesses: Dr. Magbul A. Mian and Dr. James M.

Archibald.

[8] Dr. Mian was qualified as an expert medical doctor with a specialty in psychiatry. Reports prepared by him dated August 9, 2000 and September 6, 2000 were put in evidence; however, his evidence is not of assistance to the Court. As Dr. Mian testified, he never met Mr. Duguid. His sole source of information were Mr. Duguid's medical records, the discovery evidence of Dr. Archibald and Marlene Bird and a letter from Dr. D. MacKenzie dated September 14, 1999. Dr. Mian stated very rarely would he give evidence of the competency of a person without seeing the person. He has only done it three times since 1964. He agreed on cross-examination that hospital records are taken at a person's low point. At the end of the cross-examination, Dr. Mian stated that all he could say was Mr. Duguid's mental capacity was worse in 1994 than 1991. He was not able to make any comments on Mr. Duguid's mental capacity in 1990.

- [9] Dr. John Archibald is a family doctor, licensed since 1974. He became Mr. Duguid's physician in 1991. Reports by Dr. Archibald dated December 22, 1997, January 23, 1998 and August 30, 1999 were entered into evidence. While Dr. Archibald has no knowledge of Mr. Duguid in 1990, he did state in his report of December 22, 1997:

During my visits to this gentleman in 1991 regarding some ulcers on his remaining lower extremity at his home on 14 Prince Street he seemed to be well oriented at this time and we were able to carry on a conversation and he was able to answer me directly pertaining to the nature of his problems. He also seemed to be quite aware of his surroundings and was well aware of person, place and time on this visit.

Based upon this information I feel he was quite capable of executing the deed as noted on March 27, 1990; however, as to his exact circumstances on that date I would not be able to comment.

- [10] With regard to Mr. Duguid's condition in 1994, Dr. Archibald stated in his report of December 22, 1997:

It is my opinion, based on my care of Mr. Duguid, that at the time of his admission to the Breton Bay Nursing Home which would be in December of 1994 and for some time prior to that while at home Mr. Duguid suffered with chronic organic brain syndrome presumably of the Alzheimer's type. He had progressive deterioration of his cognitive abilities and he was not, at times, fully orientated. It was difficult to question him and he was quite forgetful and he would not have had enough memory to keep track of any transactions and his judgment would be impaired by an altered intellectual function. He was seen in hospital in January 1996 by Dr. A. Costantino, Neurologist, who felt he had marked confusion. He was under the opinion that at that time this gentleman's rather marked confusion was a consequence of his illness at that time including congestive heart failure and a gastrointestinal problems and possibly some dehydration. His present

medication superimposed on an underlying diminished cerebral functioning as a consequence of age. ...

- [11] It is important to note Dr. Archibald had no file records, no notes concerning Mr. Duguid as Mr. Duguid did not come to his office, rather Dr. Archibald visited Mr. Duguid in his home. Dr. Archibald testified he has 2000-3000 files each year and on average sees 50-60 patients each day.
- [12] In a discharge summary prepared by Dr. Archibald on February 24, 1992, it was noted Mr. Duguid was seen in consultation by Dr. Costantino, neurologist, who felt Mr. Duguid's confusion may have been related to some of his medication, and at the time of the discharge he was "quite alert and his sugars were good". Dr. Archibald agreed a diagnosis of "significant organic brain disease" should be noted, but he did not make any such note. Dr. Archibald did not make any note about Mr. Duguid's decline. He never discussed any concern about Mr. Duguid's mental condition with any member of the family. Dr. Archibald never conducted a formal competency test on Mr. Duguid. Dr. Archibald confirmed Mr. Duguid was in hospital many times to have his blood sugar level brought under control.
- [13] Nursing notes from the Cape Breton Regional Hospital for October 19, 1994 contain the entry, "Resting, quiet, advised going to S.C.H. for Cystoscopy & Consent signed for same." Nursing notes from Cape Breton Regional

Hospital for November 12, 1994 contain the entry, “Dr. Boudreau phoned - consent for cysto & S.P. obt’d.”

- [14] Mr. Duguid went to reside at Breton Day Nursing Home in late 1994. The plaintiffs entered certain records from the nursing home in evidence, including a Pre-admission Nursing Assessment dated December 1, 1994, which showed his physician as Dr. J. Archibald and had the following comments under the heading “Behaviour”:

| Behaviour: | Yes | No |
|--------------------------|---|-----------|
| a. Cooperative | ✓ | |
| b. Anxious | | ✓ |
| c. Depressed | | ✓ |
| d. Withdrawn | | ✓ |
| e. Aggressive | | ✓ |
| f. Wanders | | ✓ |
| g. Sociable | ✓ | |
| <u>Please Elaborate:</u> | <i>Very quiet nice man sweetheart</i> | |

And under the heading “Mental Condition”:

| Mental Condition: | Yes | No |
|---------------------------|--------------------------------|-----------|
| a. Lucid | ✓ | |
| b. Mildly confused | | |
| c. Very confused | | |
| d. Oriented to: | Time ✓ | |
| | Place ✓ | |
| | Person ✓ | |
| Memory (Good, Fair, Poor) | | |
| Short Term | ✓ | |
| Long Term | ✓ | |
| <u>Please Elaborate:</u> | <i>Smart man - very bright</i> | |

[15] On February 3, 1995, a meeting was held to discuss a possible transfer to home for Mr. Duguid. Attending the meeting, in addition to Mr. Duguid, were among others: Marlene Bird, June Butler, Alice Benvie and other members of the family. The record of the meeting sets out Mr. Duguid's position as follows:

Mr. Duguid was asked what he wants to do. He stated that he wants to go home, but is also willing to wait until his mobility improves to the point where he can be more independent.

[16] Under the heading "Requirements" the following entry is noted:

Mr. Duguid's family discussed the needs of their father/grand-father. His sugars would have to be constantly monitored, his mobility is still in question, and his catheter would require care. Julia Townsend stated that Mr. Duguid is a stand-by transfer. Jane Ballah said that Mr. Duguid's needs (i.e. transfer ability) vary depending on how he feels. Marlene Bird concurred. She said that Mr. Duguid has periods when he is able (according to her history with him) to do more for himself than other times. ..."

[17] A mentally incompetent person does not give consent for medical treatment, nor is asked his opinion of his future care, nor described as a "sweet man - very bright".

[18] In reviewing the evidence as a whole, I find Mr. Duguid suffered from diabetes and when his blood sugar level got out of balance, he became confused and experienced hallucinations, as Alice Benvie testified about the incident in 1989-90, when Mr. Duguid said he had spent the night in the church lot, "It (the incident) was very unusual for him. I didn't know if it was high sugar or what."

- [19] There is no evidence Mr. Duguid was incompetent in 1990. In fact, Dr. Archibald expressed the opinion he was competent in 1990. I find Mr. Duguid was mentally competent in 1990.
- [20] Considering Dr. Archibald's evidence, the lack of a medical file or notes concerning Mr. Duguid, the volume of Dr. Archibald's practice, Dr. Archibald not raising any concerns about Mr. Duguid's mental capacity with family members, the records from the Cape Breton Regional Hospital and Breton Bay Nursing Home of Mr. Duguid's condition, and Mr. Duguid giving consent for various medical procedures, I reject Dr. Archibald's diagnosis of "significant organic brain disease" in 1994.
- [21] In reviewing all the evidence, including the records of Breton Bay Nursing Home, Mr. Duguid's history of diabetes with resultant confusion and hallucinations when his blood sugar level was imbalanced, the medical consents he was signing in 1994, I find Mr. Duguid was mentally competent on December 15, 1994.
- [22] The question remains whether Dorothy LeDrew or Marlene Bird exercised undue influence on Mr. Duguid to bring about the deeds and wills in 1990 and 1994. The Supreme Court of Canada dealt with the issue of undue influence in **Geffen et al. v. Goodman et al.** (1991), 81 D.L.R. (4th) 211. In discussing the presumption of undue influence, Wilson, J. states at p. 226:

When then is the nature of the relationship that must exist in order to give rise to a presumption of undue influence? Bearing in mind the decision in *Morgan*, its critics and the divergence in the jurisprudence which it spawned, it is my opinion that concepts such as "confidence" and "reliance" do not adequately capture the essence of relationships which may give rise to the presumption. I would respectfully agree with Lord Scarman that there are many confidential

relationships that do not give rise to the presumption just as there are many non-confidential relationships that do. It seems to me rather that when one speaks of “influence” one is really referring to the ability of one person to dominate the will of another, whether through manipulation, coercion, or outright but subtle abuse of power. ...”

and 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.

Having established the requisite type of relationship to support the presumption, the next phase of the inquiry involves an examination of the nature of the transaction. ...

and at p. 228:

By way of contrast, in situations where consideration is not an issue, *e.g.*, gifts and bequests, it seems to me quite inappropriate to put a plaintiff to the proof of undue disadvantage or benefit in the result. 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.

Once the plaintiff has established that the circumstances are such as to trigger the application of the presumption, *i.e.*, that apart from the details of the particular impugned transaction the nature of the relationship between the plaintiff and defendant was such that the potential for influence existed, the onus moves to the defendant to rebut it. As Lord Evershed M.R. stated in *Zamet v.*

Hyman, supra, at p. 938, the plaintiff must be shown to have entered into the transaction as a result of his own “full, free and informed thought.” ...

[23] Was the relationship between Mr. Duguid and Dorothy LeDrew such as would trigger the presumption of undue influence? I find it was. As he aged, Mr. Duguid depended more and more on Dorothy to assist him in daily needs and operating the Lodge. Because of their relationship and his dependence on Dorothy, she had the ability to dominate Mr. Duguid’s will as set out by Wilson, J. through “manipulation, coercion, or outright but subtle abuse of power”.

[24] Was the relationship between Mr. Duguid and Marlene Bird such that it would trigger the presumption of undue influence? I find it was. Marlene assisted her mother in looking after Mr. Duguid. After Dorothy’s death, Marlene continued to operate the Lodge and maintain her relationship with Mr. Duguid as he resided in Breton Bay. While not looking after him in her home, as Dorothy had done, her relationship with Mr. Duguid gave her the ability to dominate him.

[25] Has the presumption of undue influence been rebutted?

[26] I found Mr. Duguid was mentally competent in 1990. There is no evidence of undue influence on the part of Dorothy LeDrew to bring about the will of March 27, 1990 or the deed of the same date. In fact, June Butler testified her sister, Alice, told her Dot (Dorothy) was in Dad’s will concerning the Lodge. It is clear from the evidence of Alice Benvie and June Butler, Dorothy was the person the other family members looked to to take care of Mr. Duguid. Dorothy was the one who assisted Mr. Duguid.

[27] Mr. Joseph Michael Kuna was the lawyer Mr. Duguid consulted concerning the will and deed in 1990. Mr. Kuna testified he witnessed the deed from James W. Duguid to James

W. Duguid and Dorothy LeDrew dated March 27, 1990. He also prepared Mr. Duguid's will dated March 27, 1990. Mr. Kuna did not have any file notes concerning the documents as his office had burned and his files were destroyed.

[28] Mr. Kuna testified he knew James Duguid and recalls being at Rosedale Lodge. The deed and will were executed in the Lodge. It was the only time in his life he was in the Lodge. The will was executed in a room like a parlour. He remembers everything as old-fashioned as he said, "like out of the Walton's". He remembered the place as it was unique.

[29] He explained that if a person wished to exclude someone from a will, his practice is to take notes and draft an affidavit why the person was excluded. He did not remember if he took an affidavit in this case. His practice when taking instructions from an elderly person, such as Mr. Duguid, is to chat them up - sports, politics, the date, etc. - to determine to the best of his ability if the person has the required capacity. If he has a concern, he would refuse to execute the document - to avoid possible litigation. He assessed at the time Mr. Duguid was fully capable and able to give instructions for the deed and will. Mr. Kuna did not recall if he ever met Dorothy LeDrew.

[30] It is unfortunate Mr. Kuna does not have any notes about the circumstances surrounding the execution of the documents in 1990. He was clear that he makes an assessment of a person's ability to give him instructions. Considering his evidence, Dorothy LeDrew's role in assisting her father, and the evidence as a whole, I find in fact there was no undue influence on Mr. Duguid in relation to the deed and will in 1990, and therefore, the presumption of undue influence has been rebutted.

- [31] Dorothy LeDrew died December 10, 1994. Ms. Bird testified Mr. Duguid went to Dorothy's funeral. Naturally he was upset at Dorothy's death. Mr. Duguid had a savings account and a chequing account. Marlene obtained papers from the bank to have her name added to the accounts in place of her mother's. Mr. Duguid signed the papers and Marlene testified he asked her to contact Mr. Kuna so that Mr. Duguid could change his will. She called Mr. Kuna and an appointment was made for the lawyer to bring the will and the deed to Breton Bay.
- [32] Mr. Frank Elman, Q.C., testified. He stated he had practiced law for forty-four years and his practice includes estates, wills and deeds. He stated he had prepared a large number of deeds and a lesser number of wills. He identified the signature of Tracey Smith, an employee of his office, as a witness to the deed from James W. Duguid to Marlene Bird and James W. Duguid dated December 15, 1994. He stated he was present when Mr. Duguid signed the deed. Mr. Elman also identified his signature and that of Tracey Smith on the Last Will and Testament of James W. Duguid dated December 15, 1994.
- [33] Mr. Elman had no recollection of meeting with Mr. Duguid, other than notes he dictated. His practice when drafting a will of an older person is to take notes, review the notes with the other witness to the will and put the notes in the file. He reviewed a copy of a memorandum concerning the execution of Mr. Duguid's will, which was obtained by the defendant before Mr. Elman's office fire. He had no recollection of the meeting with Mr. Duguid other than the memorandum. Mr. Elman dictated the memorandum on his return to his office from his visit to Mr. Duguid. The memorandum contains a handwritten

addition, which Mr. Elman thinks is in Tracey Smith's handwriting. The memorandum sets out in part:

December 15, 1994 - Because Mike was to be in Family Court I undertook to look after a file for him involving James Duguid. James' granddaughter Marlene Bird (she had a baby with her that was her neice's (sic)) indicating that since Dorothy, her mother, had died on Saturday that Jim wanted to have Marlene's name substituted where Dorothy's had appeared in his will as well as the deed to the property.

We prepared a new will exactly the same as the one that had been prepared and executed in March of 1990 changing only the name from Dorothy LeDrew daughter to Marlene Bird granddaughter. We also had a deed prepared similar to the deed previously executed and recorded. This time it was James to Marlene and James as Joint Tenants. I also prepared an Enduring Power of Attorney.

Went to Breton Bay with Tracey, Marlene and baby around 10:30 and arrived there and spoke to Jim who I recognized but couldn't place. He was in a wheelchair since he only has one leg. He was waiting for the nurse or attendant to take him to the washroom and after that occurred I went back in the room and sat there along side of him and discussed the will.

Before that however I had asked him how long he had been there and he wasn't sure and then he said "somewheres around a month". I didn't know how long he had been there but that was so. He seemed very alert and during our conversation I asked him where he was born and he said that he was born in Scotland and I asked when he came to Canada he said 1907. I asked him how long he had owned the building and he wasn't really sure but somewhere in the '60's when he bought it. I had no doubt that he was quite competent even though he was 90+ years.

I reviewed the Will document with him first, explaining to him that I had removed Dorothy's name since she had just passed away and that I had replaced it with Marlene's name, her daughter. He well understood what I was saying and then I reviewed the will with him and he said yes that was what he wanted and I then had the will signed by him and witnessed by Tracey. The next document was the Joint Tenancy Deed that he had with Dorothy and again I explained to him that I

changed the name on the Deed from Dorothy to Marlene and asked him if that is what he wanted and he said yes and he understood and we signed the Deed with Tracy being the witness to that. ...

....

After everything was signed we made some small talk about the tourist lodge which he ran on Prince Street and the fact that he had driven taxi in the city. I had mentioned to him that my father had he been alive today would have been around Jim's age and he asked me who my father was and I told him it was Alex and he smiled indicating that he knew my late father. He told us that he had driven taxi for I believe he said Highland Taxi and then Briand's and there may have been another company. We left shortly after 11:00 with the documents.

[34] Mr. Elman testified his practice with regard to the execution of deeds and wills is to determine if the person executing the document is competent. In the case of a deed, he would go over the deed with the person and explain the deed's effect; with a will, he reads the will word by word and asks the client if they understand the will. Mr. Elman testified Mr. Duguid understood the documents he signed on December 15, 1994.

[35] Mr. Elman did not recall if Marlene Bird was in the room when he reviewed the documents with Mr. Duguid - he may have asked her to leave. Marlene Bird says she left the room when Mr. Elman started to review the documents with Mr. Duguid. Mr. Elman said if a client leaves their estate to one child and excludes other children, his practice is to draft an affidavit setting out the reasons for the testator's wishes. He did not draft such an affidavit in this case.

[36] Considering Mr. Elman's evidence and the evidence as a whole, I find in fact there was no undue influence on Mr. Duguid by Marlene Bird in relation to the deed and will in 1994 and, therefore, the presumption of undue influence has been rebutted.

[37] The action is dismissed.

[38] If the parties are unable to agree, they may file written submissions as to costs.

C. Richard Coughlan, J.