CITATION: Kates Estate, 2020 ONSC 7046
COURT FILE NO.: CV-05-157/17
DATE: 2020/11/18

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
MONA (KELLY) BERNARDI, THERESA PUPULIN and SHELDON SHOIB, in their capacity as Estate Trustees of the Estate of Ellen Kates (also known as Helen Joan Kates)	*Paul Trudelle*, for the Applicants, Mona Bernardi and Sheldon Shoib *A. Sean Graham* for the Applicant, Theresa Puplin
Applicants	
– and –	
NICOLA FATICA and FIONA PEACEY Objectors	*David Goodman* and *Deborah Squires*, for the Objectors, Nicola Fatica and Fiona Peacey
MARA KATES, MAX MUSYNSKI, AVRA KATES, BENJAMIN KATES, TOM PEACEY, EMMA PEACEY, MICHAEL FATICA, MATTHEW FATICA, DANIEL FATICA, SEBASTIAN DAY, TASMAN DAY, OLIVE PESTER, DOREEN SEARS, JOHN MEDINA, MAUREEN MEDINA, DR. SHOU CHUN CHEN, LAURA TARCEA, PAULINE VAN VEEN, DAVID COOKE, ADAM FALARDEAU, JOANNE KATES, LEON MUSYNSKI, AMNESTY INTERNATIONAL, ART GALLERY OF ONTARIO, THE ARTHRITIS SOCIETY, CANADIAN CANCER SOCIETY, CANADIAN RED CROSS, CANADIAN STAGE COMPANY, CANADIAN WILDLIFE FEDERATION, CNIB, DAILY BREAD FOOD BANK, DAVID SUZUKI FOUNDATION, THE FRIENDS OF ALGONQUIN PARK, THE CANADIAN	*Matthew Rendely*, for the Respondents, Mara Kates, Max Musynski, Avra Kates and Benjamin Kates *Richard J. Worsfold* and *Reshma Kishnani*, for the Respondents, Charities *Andrew Sader*, for the Respondent, The Office of the Children's Lawyer

GOLDEN RETRIEVER ADOPTION SERVICE INC., SICK KIDS FOUNDATION, HUNTSVILLE DISTRICT MEMORIAL HOSPITAL, MADD, ONTARIO WILDLIFE FOUNDATION, THE SALVATION ARMY, SECOND HARVEST, ST. MICHAEL'S HOSPITAL FOUNDATION, TARRAGON THEATRE, TORONTO SYMPHONY ORCHESTRA, UNICEF CANADA, UNITED WAY CENTRAIDE CANADA, TVO, METHSCHILDE OBERDORF, ALLAN TOFF, JUNE MASON, PHIL MASON, JEANINE LEE, MARIA REGO, EVA LIMAS, LUCILLE MACDONALD, ELY MARKSON, EDWARD MUNSAYAC, GEOFF BROWN, MICHELLE MILUSE MARAS, DAVE LAVENDER, SPENSER JAMES, VERN ZIEBARTH, EDWIN FILLIER, LILY FILLIER, SUE DEVOE, DARYL BREWER, ROBERT CHRISTIE, PEARU TAMM, JANET SHIELDS, LOUIS LADOUCETT AND ALEX DUPUIS and THE OFFICE OF THE CHILDREN'S LAWYER	)	
Respondents	)	**HEARD:** September 21, 22, 23, 24, 25, 29, 30, October 1 and 2, 2020

GANS J.

REASONS FOR JUDGMENT

The Facts

A Brief Chronology

[1] The Park,[1] as it is affectionately referred to by tens, if not hundreds, of thousands of Ontarians and others who have camped, tripped and travelled through its borders, holds the situs

[1] Algonquin Park, affectionately referred to as simply the “Park”, for those of us who were lucky enough to have been bred and educated by its splendour, or viewed its marvels through the landscapes painted by Tom Thomson and others of the Group of Seven, was the prescient creation of the Ontario Government in the late 1800’s when the preservation of nature and natural habitats was not in the forefront of our collective psyches.

of ground zero of the intrigue surrounding the issues arising from the 2011 codicils of the late Ellen Joan Kates ("Helen"). The beauty, if not majesty, of this protected land mass in north-central Ontario has been immortalized by Tom Thomson and other of the Group of Seven artists, only to be sullied by the contest over the residue of Helen's estate. Helen was, through various corporate instrumentalities, the owner of Arowhon Pines (the "Pines") and other properties and assets, which, in the aggregate, were fairly sizable.

[2] Helen, as she was referred to by her friends, acquaintances and family alike, was born in England in 1931 and died in Toronto in 2017. It was her 86th year. She had been married to Eugene Kates, a famous Park personage, for some 39 years before his death in 2007. But for certain specific bequests contained and enumerated in his last will made in 2004, he left her all his assets and holdings.

[3] She and Eugene did not have any children although Eugene had two children from a previous marriage, Joanne and Robert, the latter of whom predeceased Helen. Each of Joanne and Robert have two children, all four of whom are named as residuary beneficiaries (the "Kates Grandchildren") under the challenged codicils which form the subject matter of this litigation (the "August Codicils").

[4] Helen had one sibling, Colin Day, who predeceased her in early 2017. Colin, as he was referred to throughout the litigation, had three children, namely, Nicola Fatica, Fiona Peacey and Jonathan Day, the former two of whom have taken issue with the validity of the Codicils (the "Objectors"). Colin had seven grandchildren (the "Day Grandchildren") who share equally with the Kates Grandchildren in 75% of the residue of Helen's estate, the balance being divided among 25 charities.

Wills, Powers of Attorney and Codicils

[5] At this moment in time, I intend to review, but briefly, certain historic testamentary and other *inter vivos* instruments, which I think provide some backdrop to analyzing the matters in issue.

[6] Eugene and Helen had basically mirror image wills prepared in 2004 ("the 2004 Wills"). The bulk of both estates then, as at the time of Helen's passing, was composed of ownership, personally or through holding companies, of the Pines, 51% of Camp Arowhon, a popular children's camp a few lakes over from the Pines in the Park (the "Camp"), a property in Markham ("Steelcase"), a large home in the Casa Loma area (the "Lyndhurst House"), an office/house in the Mt. Pleasant/St. Clair area of Toronto ("Balliol"), a condominium in Florida and significant brokerage accounts (the "Brokerage Accounts").

[7] On his demise, Eugene left the bulk of his entire estate to Helen. Had she not survived him, it was his intention to transfer the balance of the ownership of the Camp to Joanne, Steelcase to Robert, with ownership of the Pines to be divided among the then-current senior staff, including the 'applicant' Theresa Pupulin ("Theresa"). The remainder of his estate, again had Helen not survived him, was to be divided equally between Joanne and Robert, save for certain specific bequests of cash to an array of family, friends and the Kates Grandchildren.

[8] Helen's 2004 Will, but for a few tweaks, paralleled Eugene's in respect of the major property transfers described above but included specific, not insignificant, bequests to Colin and his children, including the children of the Objectors.

[9] After Eugene's death, Helen had her solicitor, Barry Smith, prepare primary and secondary wills,[2] into the second of which she 'placed' her interests in the various Kates corporations, which covered notably ownership in the Camp, the Pines and a condominium in Florida (the "2008 Wills").

[10] Leaving aside the names and amounts of certain testamentary specific monetary bequests, which changed from the 2004 Will, the previously outlined bequests of the ownership of the Camp, the Pines, but for the designated percentage ownerships, and Steelcase, basically remained the same.

[11] The significant changes centred around the fact that Colin was not only to be an estate trustee, together with Helen's longstanding friends and colleagues, Theresa and Mona Kelly Bernardi ("Mona"), but was also to receive the remainder of the estate, which had previously been earmarked for Eugene's children.[3]

[12] In May 2009, Helen went to another law firm (for reasons which I never fully understood), at which moment in time she executed two standard form Powers of Attorney, one each for property and personal care (the "2009 POAs"). The specified attorneys were then to be Colin, Mona and Theresa. The 2009 POAs provided for the decisions of the attorneys to be unanimous.

[13] In late 2009, Helen went to the same law firm with the concurrence of Smith and, apparently, on the recommendation of her broker. At that time, Helen executed two new primary and secondary wills (the "2009 Wills").

[14] As best as I can discern, the 2009 Wills, but for the inclusion of a significant number of "estates' boilerplate", changes in specific legatees and amounts, the proposed percentage interest in the Pines, and the conveyance of the Florida condominium to Mona, tracked the tenor and substance of the 2008 Wills.

[15] Colin was still to be an estate trustee, together with Mona and Theresa, and, significantly, was to receive the remainder of the estate.[4] In addition, the intended transfers of ownership of the Camp, the Pines and Steelcase were to remain as previously provided for.

---

[2] I was told that, in the estate planning world, testators who have significant assets and holding companies often divide their estate into primary and secondary wills to minimize fees and estate taxes payable on death of the testator. Since Helen 'inherited' ownership to two holding companies, Smith thought it appropriate to incorporate this planning into the wills that he then prepared for Helen. (See the decision of the Div. Ct. in *Milne Estate (Re),* 2019 ONSC 579, 143 O.R. (3d) 129 for an explanation of this estate planning device.)

[3] There was one other section in the 2008 Primary Will which I am of the view is telling. Further reference will be made to that section (8) later in these reasons.

[4] An 'alternate trustee', the Applicant and Helen's accountant, Sheldon Shoib, was also named.

[16] Of some moment, in my view, was the fact that the decision of the estate trustees was then to be made by a majority and need not be unanimous, as was previously set out in the 2004 Wills.

[17] In late October 2010, Smith prepared two new powers of attorney, one for each of property and personal care (the "October 2010 POAs"). Of significance was the change of the decision-making process from unanimity to a majority, which dovetailed with the decision-making process in the 2009 Wills.

[18] At the same time, Helen executed a codicil to the Secondary 2009 Will by which she 'fixed' the proposed percentage ownership of the company that owned the Pines ("Arowhon Limited"), the net effect of which meant, among other things, that Theresa would be granted more than a simple majority of the shares of Arowhon Limited on Helen's passing (the "October 2010 Codicil").

Helen's Cognitive Decline

[19] Before outlining the meetings of the attorneys under the POAs in the Winter of 2011 and the execution of the August Codicils, it may be helpful to describe Helen's mental state of health that was apparently manifest in the Fall of 2010 running through to the following Fall, which formed part of the backdrop for Colin's actions.

[20] The focus of the evidence in this respect came, in part, from Theresa and Mona, and, in some important measure, from her solicitor of some standing, Smith. I am satisfied on the oral evidence of these three individuals, none of whom, but minimally, arguably, for Theresa, had any skin in the game, and which evidence was amply supported by a plethora of emails, memos and Smith notes-to-file, that their reportage of Helen's state of mind and overall demeanour during the relevant time period was accurate.[5]

[21] Helen was bereft after Eugene died in 2007. Indeed, Theresa and Mona suggested that she was seemingly depressed for a long time after his passing. The two of them, at least, had ample interchange with Helen. Theresa saw Helen at the Pines for much of the spring, summer and fall of each year. Mona, meanwhile, saw Helen in the 'shoulder seasons' since they lived in the same area, would walk their dogs with some frequency and attended concerts and other cultural events together.

[22] In the Fall of 2010, they were concerned enough about her behaviour, if not apparent dishevelment and forgetfulness, that they were instrumental in having her seen by her family doctor, who thereupon referred her to Dr. Ron Keren at the University Health Network Memory Clinic in early December 2010. Keren, in his report not released until early February 2011 (again for reasons I never understood), diagnosed Helen with "moderate Alzheimer's disease" (the "Keren Report"). He was also of the opinion that she was "…no longer able to manage her own

[5] By way of example, I found Smith to be a credible witness. His contemporaneous memos-to-file, which the Propounders had smartly transcribed for the Court's assistance, Exhibits 7-13, were invaluable in providing me with an almost contemporaneous record of the events as they then unfolded.

finances and that her financial power of attorney be fully invoked".[6] He apparently caused her driver's licence to be surrendered as of the December assessment, as well.

[23] The Keren Report was further fleshed out for me by Drs. Kenneth and Richard Shulman, two unrelated (but equally prominent) Rule 53 Psychiatric Experts retained by each of the Propounders and Objectors to perform a retrospective analysis of Helen's testamentary capacity. The Drs. Shulman, at my request, provided me with a joint collaborative report (the "Collaborative Letter") in which they articulated their concurrent opinions, which occupied most of the report, and the point of departure, which they left for me to determine.[7] [8]

[24] The Collaborative Letter concluded, in part, as follows:

> Helen was suffering from a progressive dementia at the time the conflict between her attorneys erupted and had significant cognitive impairment as documented in particular by Dr. Keren's report in December of 2010 and his follow-up assessment in February of 2011. There is little doubt that she did suffer from a dementia, most likely of the Alzheimer type. However, we both acknowledge that suffering from dementia does not, *ipso facto*, make one incapable. Capacities are both fact-specific and situation-specific. The two medical assessments (Dr. Keren and Dr. Silberfeld) on record differ significantly in their strengths and limitations. Dr. Keren's assessment appears to accurately reflect the nature and severity of Helen's cognition and reflects the difficulty Helen had in assimilating and appreciating new information. This is helpful to a point in assessing Helen's mental capacity. However, Dr. Keren was not asked to assess her testamentary capacity although he did offer an opinion regarding her capacity to manage finances on February 7, 2011 and recommended that her attorneys activate the power of attorney that was in place. He also determined that she was not competent to drive and contacted the Ministry of Transportation accordingly on December 10, 2010. He did not probe the issues relevant to her Will change or change

---

[6] Joint Book of Documents (JBD) Tab K1.

[7] As part of the Trial management process, I asked the psychiatrists retained by each of the parties to provide a "file review and assessment of Helen's testamentary capacity and vulnerability to undue influence" to "Hot Tub", a process which I have been heralding for many years. (See Arthur Gans, "Litigating in the Time of COVID-19: Try Hot-tubbing…While Keeping a Safe Distance" (2020) 39:2 Adv J 37.) The well-respected psychiatrists, Drs. Kenneth and Dr. Richard Shulman (no relation) were, apparently, from their Collaborative Letter, only too happy to participate in what they perceived was a "precedent-setting opportunity" to provide focused evidence to assist the trier of fact. I am indebted to each of the Drs. Shulman for their assistance—and sense of adventure. (Kates Collaborative Letter Signed Sep. 14, 2020, Exhibit 5). While it became unnecessary in the final analysis for me to do so, had I been compelled to choose between the "evidence in chief" of either Dr. Shulman from their respective initial reports, Exhibits 3 and 4, I preferred the evidence of Dr. Richard Shulman to that of Dr. Kenneth Shulman. The report of the former was far more detailed, analytical and less conclusory than that of the latter. Mercifully, such a review was not required in light of all the other evidence upon which I relied for my conclusions, expressed below.

[8] I ordered the Hot Tubbing because, intuitively, I had some measure of difficulty understanding how much weight could be given to a retrospective analysis of testamentary capacity, even by skilled psychiatrists, who had to form their opinions based on the reports of others, which may or may not have been fulsome, complete or accurate at first instance. I drew solace from the fact that my colleague Penny J. had the same reservations about retrospective assessments which he expressed more artfully in *Gironda v Gironda*, 2013 ONSC 4133 at para. 92 and *Botnick et al. v The Samuel and Bessie Orfus Family Foundation et al.*, 2011 ONSC 3043 at paras. 216-218.

in Powers of Attorney nor did he address any psychosocial conflicts in her social environment.[9]

The Eruption of the Conflict

[25] Within days of the Keren Report and the invocation of the POAs, Smith convened a meeting of the POAs, which Colin attended by telephone from England.

[26] A multitude of topics was covered at this meeting, ranging from Helen's current to long-term care needs, if warranted, continued operation of the Pines under Theresa's management, the Brokerage Accounts and whether Helen's then salary, which had been in place since Eugene's death, should be reduced. I gather no decision on this last issue was made at that time.[10] It appears from the contemporaneous emails prepared by Smith and Colin that the meeting was instructive and cordial.

[27] Things apparently took a marked turn for the worse after the POA meeting on March 2nd. At that meeting, Colin took strong exception to any attempted change to Helen's then salary from the Pines, any proposed payback of a sizable Visa account that she had run up over the prior several year period unless and until he had been provided with the details and backup for the account, and other matters which he believed impacted Helen's interest in the Kates holding companies.

[28] Without detailing the back and forth emails exchanged between and among Smith, Colin, Theresa and Mona, and even the involvement of the accountant, Sheldon Shoib, and the evidence of all, but Colin, at trial, who passed in early 2017, suffice it to say that the bloom had effectively gone off the attorneys' participatory rose, all of which ended with Colin's retainer of David Goodman, counsel for the Objectors before me, in mid-March.

[29] Mr. Goodman's initial four-plus page 'salvo', addressed to Smith with copies to each of Theresa, Mona and Shoib, leads me to the inalterable conclusion that he had to that point been provided with reams of documents and information underscoring Colin's view of the alleged mismanagement by others of Helen's affairs.

[30] The bottom line was that Mr. Goodman, although, notionally, seeking further information for clarification purposes was, for all intents and purposes, articulating, if not parroting, Colin's complaints about the management by Helen's other attorneys. Neither Mr. Goodman nor Colin were pulling their punches in any respect. The matter, and the dispute between the attorneys, simply escalated beyond that point to early June when Colin, through Mr. Goodman's offices, brought a guardianship application seeking to replace all the attorneys then in place under Helen's then-extant POAs with a complete 'stranger' to her world (the "Application").[11]

---

[9] Kates Collaborative Letter Signed Sep. 14, 2020, Exhibit 5 at page 2.
[10] JBD Tabs K43, K45, K46, K47, K49.
[11] Richard Worsfold, who is counsel for the Propounder Charities, argued that, and I quote:

[31] I do not intend to parse the emails and letters and memos to file that were introduced into evidence which purport to describe, almost in real time, the dispute that was increasing in intensity from the date of Mr. Goodman's initial letter in March to the end of April when Smith, yet again, attended on Helen to review the matters then in issue. Each document is instructive in its own way and reasonable inferences can be drawn from their contents.[12]

[32] I digress to make one observation. Smith, who had been Helen's, if not Eugene's, solicitor for at least 7 years by the Spring of 2011, would best be described as an 'old-school' solicitor. He was not only a generalist, who made 'house calls', but was a man who was involved or involved himself with every aspect of a client's affairs. He made copious notes to file, which I found to be unassailable in terms of providing me with the details of the events as they unfolded during the Spring and into the Summer of 2011.[13]

[33] Smith's note of his meeting with Helen on April 27th is a case in point.[14] I am satisfied on the evidence, even to that moment on the continuum of the dispute between Colin and the other attorneys, that Helen was aware that Colin was threatening to replace her attorneys, including her friends of long and close standing, with a complete stranger. Further, I am satisfied that Helen was also aware that Colin was of the view that Theresa and Mona were attempting to 'steal' from her, a proposition which she categorically rejected.

[34] I am not prepared to accede to Mr. Goodman's suggestions that Helen had not been apprised of all the details of the accusations, including his argument that she was never told that Colin viewed the proposed salary changes, by way of example, to be the touchstone of his complaints.

[35] This position, among others, had been articulated by Colin, if not by Mr. Goodman, in innumerable emails, letters and phone calls with Helen and to the other attorneys. It had also been articulated to Smith, if not Shoib. It was repeated yet again in Colin's affidavit in support of the Application.[15]

> If Mr. Day's "real motivation" was to have the Court rule on questions related to her salary or the transfer of assets in her lifetime, a *Substitute Decisions Act*, Section 39 Motion for Directions concerning the operation of the Power of Attorney could have been brought, and the attorneys Helen Kates trusted left in place. (Closing Submissions of the Applicants, Mona (Kelly) Bernardi, Sheldon Shoib and Respondent Charities at para. 15).

While it is not within my purview to second guess counsel on the litigation strategy chosen, I muse whether or not this litigation could have been avoided had a less drastic remedy been chosen instead of a Guardianship Application.

[12] See, in particular, JBD Tabs K56-70.

[13] I make two observations about Smith and his evidence: Where there is a modest discrepancy between his oral evidence (the evidence of a long-retired gentleman in his 80s) and his notes, I accept unqualifiedly his notes which supported his oral evidence. I am further indebted to counsel for the Propounders who smartly arranged to have Smith's notes transcribed. The transcriptions which were marked separately as exhibits were of great assistance in understanding this 'saga'.

[14] Volume 3, Tab 68—Transcription of memo dated 27-APR-2011, Exhibit 8. See also the transcript of the conversation that Smith recorded between Helen and Colin, albeit but one side of the conversation: JBD Tab K63.

[15] JBD Tab O1, page 1179, paragraph 23(b).

[36] For Mr. Goodman to argue that, while he did not have evidence to suggest that Helen had not read Colin's affidavit when the Application was served on her, but if she had, she did not have the ability to process this oft-repeated mantra based on the Keren Report, amounts to pure speculation. The language of paragraph 23 of the Affidavit is very straightforward on its face and would not have been beyond her ken.

[37] I digress to note that counsel for all the parties provided me with a hyperlinked, chronologically-based Joint Book of Documents ("JBD"), which I found to be invaluable during the task of writing this judgment. These documents, together with the additional exhibits filed during the trial, which were also hyperlinked, made my task all the more manageable.

[38] Indeed, while wading through the chronology and the array of hyperlinked emails, filed as part of the JBDs, I came upon an email from Smith to Paul Trudelle, Helen's litigation counsel in the Application contest which not only suggests that Helen read both of Colin's affidavits, but, as well, had the wit to instruct counsel on the details of at least Colin's Supplementary Affidavit.[16] Respectfully to Mr. Goodman, this last mentioned email undercuts, if not renders improbable, his thesis that Helen was kept in the dark about Colin's 'concerns' and motivation in launching the Application.

[39] Alternatively, if he thought the proposition that Helen did not have the capacity to process information had legs, he should have called Drs. Keren or Snider, Helen's family doctor, to give such evidence if it were available.

[40] That said, and while on the point of what was or was not communicated to Helen at the relevant time, I note an email from Colin to Smith sent on the 28th of April. Ironically, it would appear that Colin objected to Smith and others "discussing matters related to the Legal situation going on". It was his position that these conversations merely upset her "…and this legal affair has nothing to do with her…She does not need to know any detail which she cannot understand".[17] I'm not sure this email doesn't undercut Mr. Goodman's argument, particularly when it is read in light of the Smith interlineations on its face upon which Smith was not cross-examined, as I recall.

The $1-4 Million Gift: Sideshow or Relevant to the Matters in Issue?

[41] At the beginning of October 2010, Helen sent an email to her accountant, Sheldon Shoib, inquiring about her ability to 'gift' $1 million to Colin. She was apparently concerned about the tax and other implications of a gift of that magnitude.[18]

[42] It is evident from the intervening emails and correspondence that followed in short order that Helen not only communicated her intentions to Colin to gift him this money, but consulted with Shoib, if not Theresa, about this proposal.

---

[16] JBD Tab K105. See also JBD K95.
[17] JBD Tab K70.
[18] JBD Tab K35.

[43] Shoib's position, as expressed in his emails, and evidence before me, was that a gift of this magnitude before year end would trigger a myriad of problems engendered by the sale of assets, personal or corporate, to finance the gift and the tax consequences flowing as a result. His advice, which I conclude was made in the best interests of his client, Helen, and her various companies, appears to be well reasoned in the circumstances.

[44] Colin, however, upon being told of the proposed gift, was apparently anxious to set the gifting wheels in motion, which put him on a collision course with the other attorneys, particularly Mona.

[45] As best as I can determine from the email chains and Theresa's evidence, she adopted a relatively neutral position in respect of Helen's intentions at that moment in time and was prepared to facilitate matters if the attorneys, Smith and Shoib were on side.[19]

[46] I am also satisfied on the evidence that Smith concurred with Shoib, for strictly business/tax reasons, that a gift to Colin of that magnitude before year end was ill-advised, a conclusion with which Helen was evidently in agreement.[20] Smith concluded, in early November, that the issue that whatever controversy had manifested itself in October had pretty well fizzled out.[21]

[47] It seems to me, in the final analysis, that other than creating ill will at the time, particularly between Mona and Colin, the issues surrounding the proposed gift were really of no moment.

[48] I am also satisfied from the evidence that Smith and Shoib discharged their responsibilities as Helen's consiglieres, a fact which becomes relevant later on, and that, at least in October 2010, Helen had the capacity to understand her affairs on a global if not a detailed daily basis.

The Events of Late Spring and Summer

[49] In the late-April memo to file, Smith noted that Helen was upset with Colin over his threatened lawsuit which was then looming large on the horizon.[22] They discussed whether she could remove him "from the POA and from the will". Smith advised her that she would need to be assessed for capacity, a process which she found distressing. As the memo indicates, he discussed with her, among other things, the consequences of such an assessment.[23]

---

[19] JBD Tabs K36, K37, and K38.
[20] JBD Tab K41.
[21] JBD Tab K42.
[22] Volume 3 Tab 68—Transcription of memo dated 27-APR-2011, Exhibit 8.
[23] JBD Tab K71. Smith, as the prudent solicitor he undoubtedly was, prepared countless memos of conversations with anyone tangentially related to Helen's affairs, including Eugene's children, Shoib and others. He no doubt was alive to the fact that with a lawsuit pending, all issues should be 'papered' carefully. I would observe that I do not recall that he was 'tripped-up' on any note during his cross-examination.

[50] In early May, she was assessed by Dr. Michel Silberfeld, who at the time was the 'dean' of assessors in the estates world.[24] Silberfeld's POA assessment can be distilled into the following paragraph excerpted from his report:

> In sum, Ellen Kates was capable of giving or revoking a continuing power of attorney for property. She did know what kind of property she has and its approximate value. She did know the attorney will be able to do on her behalf anything in respect to property she could do if capable subject to conditions and restrictions set out in the power of attorney except make a will. She knew the attorney must account for her dealing with her property. She did know that she had to be capable in order to revoke the continuing power of attorney. She did appreciate that, unless the attorney manages the property prudently, its value may decline. She did not believe that the attorneys would misuse the authority.[25]

[51] He also prepared a report in respect of Helen's capacity to instruct counsel during the Application, in which he concluded that she "…did understand the information that is relevant to making decisions to oppose…" the Application.[26]

[52] Smith met with Helen, in early May, in the company of a colleague, to have her execute a new POA (the "May POA"). Notwithstanding the fact that Silberfeld had completed his own assessments, the results of which I presume Smith was aware, Smith, as a prudent solicitor, made notes of his own observations of her 'capacity' and ability to execute the May POA, covering her knowledge of the people, the extent of her property, the purpose of the POA and, as a corollary, the removal of Colin as an attorney.

[53] The next event in sequence was the service of the Application which further upset Helen and exacerbated matters. I quote from a memo that Smith prepared in the wake of a conversation he had with Helen and Theresa on June 16th:

> Helen was extremely upset and could not understand why Colin would be doing this. This reaction was no different to her reaction in the past. She asked several times what she could do in order to get Colin to stop the process. She made such comments as not understanding why he would take any legal action against his sister and against Theresa, her closest friend and business partner, and like a daughter, and her friend Mona, whom she's known for a long time. She asked about being able to change her Will and I said that she certainly could do that and if she wanted to pursue that and then it would be advisable for her to have another visit with Dr. Silberfeld to confirm that she has capacity. I also suggested that under

---

[24] Dr. Silberfeld testified before me, in particular, about Helen's capacity in respect of the execution of the August Codicils. While I will have more to say about his evidence, what I found to be noteworthy was the fact that Dr. Silberfeld was not able to locate any of his 'assessment' files which he suggested were lost as a consequence of his various office and home moves leading up to his recent retirement. I found this information to be concerning not only because it undercut, in some respects, the value of his evidence, but because, in my view, it may place him in contravention of the *General Regulation* enacted under the *Medicine Act*: O. Reg 14/94, s. 18.

[25] JBD Tab K72.

[26] JBD Tab K73.

> the circumstances and the challenges from Colin about capacity and undue influence, that it would be advisable to have Rachel do the Will.[27] (emphasis added)

[54] Shortly after the receipt of the application material and the above-noted conversation, Helen sent a fax to Smith in early July instructing him to prepare a new 'will' which would, among other things, 'delete' Colin from her will and 'give the money instead' to friends, staff and ex-staff of the Pines and the Camp, family, namely the Kates grandchildren and the Day grandchildren, and charities to be settled upon later.[28]

[55] Smith followed up the receipt of the above-noted fax with a conversation with Helen by telephone, since she had by then decamped to the Pines for the summer. In his memo to file he noted and repeated the items she had included in her earlier fax. They discussed the sizes of the proposed bequests, which she indicated she would consider, discuss with Theresa and then provide him with further instructions.[29]

[56] Early to mid-July was punctuated with multiple calls between Helen and Smith and apparently Helen and Robert Kates, Eugene's son, who at that time was deathly ill. Helen wanted to either transfer Steelcase to Robert straightaway or ensure that she could provide him with a six-figure gift to assist him in his then current desperate circumstances.

[57] To do anything for Robert required Colin's approval since there was an interim order in place as part of the Application prohibiting this kind of transfer or disposition. Colin's concurrence was forthcoming, through Mr. Goodman, and an agreement for the future transfer of Steelcase and an immediate gift of $100,000 was made on a without prejudice basis.[30]

[58] I am satisfied by Theresa's evidence, which she provided in a frank, forthright and understated manner, in the main, that she and Helen worked on the preparation of individual and charitable bequests throughout the month of July, in which she had no financial or other interest, and which was later appended as a 'schedule' to the August Codicil of the Primary Will.[31] The

---

[27] JBD Tab K83.
[28] JBD Tab K88.
[29] Volume 3 TAB 89—Transcription of memo dated 6-JUL-2011, Exhibit 9. Robert died in the August 2011. He did receive the $100,000 payment that month. The actual transfer of Steelcase took place in late December of that year.
[30] JBD Tabs K97, K98
[31] For ease of reference, I have labelled the list of individual bequests as a schedule to the August Codicil Helen executed in respect of her 2009 Primary Will. In point of fact, it was not a schedule to that codicil but was an attachment to Helen's sworn declaration made in early September, 2011 when the Application was settled at a mediation (The "Secret Trust"). Putting it otherwise, the subject Primary Will codicil created, ostensibly, a bequest in favour of Theresa, Mona and Shoib, each of whom acknowledged that they were not to benefit from any such bequest, but, were mere trustees of an amount of money that was intended to be distributed to friends and Pines' staff designated in the list that was prepared, I find, at Helen's request with Theresa's assistance. Apparently, no one took issue with respect of the legal validity of this Secret Trust, as it was referred to in the trial, which was not only replete with typos and incorrect dates, but, from the fax byline, seemed to have been transmitted on a date before the mediation was settled. It was all a great mystery to me which was never really pursued at the trial, and no doubt would not have shed any light on Helen's testamentary capacity. (See JBD Tab O6, page 1387 (a) and (b).)

details surrounding the preparation of these sets of lists, which the two of them worked on for days in Helen's cabin at the Pines, was not only credible, if not completely unassailable, but reliable.

[59] In the meantime, Smith was engaged in the preparation of the August Codicils, a task which I suspect he did not relish performing since his earlier work product of October 2010 and May 2011 were being challenged as part of the Application.[32] As best as I can determine from the documents, Smith completed almost-finished if not finished drafts of the August Codicils by the end of July, which together with other historical documents, he shipped over to Dr. Silberfeld, whom he retained with Helen's concurrence, to perform another set of testamentary assessments.[33]

[60] Before proceeding with the Smith evidence of his attendance on Helen at the Pines during the full weekend of August 5th to have the August Codicils executed, I wish to comment on the evidence of Dr. Silberfeld, which I found to be of marginal assistance. As previously indicated, Silberfeld did not have any notes and records of his attendance at the Pines and had no real independent recollection of his two sessions with Helen, although he naturally had a clear recollection of the splendour of the Pines, which he had not visited before.

[61] His evidence can be put no higher than what was contained in his report to Smith of August 10th. While I think the criticism of his evidence found at pages 18-23 of the Objectors' written argument has some merit, his conclusory remark that Helen did have "…capacity to make a codicil to her will", and his rationale for arriving at that conclusion is but of modest assistance.[34] But then again, this opinion, for what it might be worth, is not dispositive of the issues of testamentary capacity and undue influence.

[62] I think what is of greater moment is the evidence of Smith, first and foremost, buttressed by the evidence of Theresa, about which I have previously commented, and in a distant third, the evidence of Helen's friend, Lucy Waverman, who coincidentally happened to be at the Pines that same weekend.

[63] Smith went to the Pines on Friday the 5th with hard copies of drafts of the August Codicils. He met with Helen several times over the weekend at which time, I am satisfied on the evidence, he reviewed the salient features of both codicils with her. He made detailed notes of his meetings, recording, in particular, the rationale for her actions in having him prepare the codicils, reviewing the nature and extent of her assets, whom she wanted to benefit with what and to what extent.[35] They discussed the details of Robert's condition and how pleased she was that a payment had been made to him as she directed be done with dispatch earlier in July.

[64] The notes also suggest they discussed the details of the specific bequests to friends and staff, although the names of some of the proposed legatees, but not their jobs, eluded her from time to

---

[32] There is some evidence to suggest that Smith tried to retain Rachel Blumenfeld in early July 2011, a lawyer then at Miller Thomson who had prepared the 2009 Wills. See JBD Tab K90. She smartly declined the retainer when she learned there was a Guardianship Application ongoing.
[33] JBD Tab K99.
[34] JBD Tabs K101 and K102.
[35] Volume 3, TAB 100—Transcription of Note dated August 5th/6:00 pm., Exhibit 12.

time. In addition, they reviewed the proposed legacies to the Kates and Day Grandchildren, the extent of which I am satisfied she had reviewed with Theresa on a 'macro' basis.

[65] Of equal importance, they reviewed in some detail the ongoing dispute Colin was then having with her, the Application and its devastating impact on Helen, both physically and emotionally. In the final analysis, I am satisfied she was content and understood that Colin was to be removed as an executor of her estate and would no longer be designated a beneficiary under the 2009 Wills.

[66] At some point in the weekend, Helen met up with her friend Lucy Waverman, the famed Canadian food columnist. During her visit at the Pines the two went for a long walk. Ms. Waverman testified that during their hour-plus walk, and a later visit to the Pines' kitchen where they discussed menus, she did not detect any unusual or aberrant behaviour that would indicate Helen's mental acuity was anything different from what it had been during their past exchanges (which more often than not focused on their shared epicurean interests). These exchanges, and the Helen that Ms. Waverman observed during that weekend, were in marked contrast to the Helen she observed some few years later when the latter was suffering from the ravages of full-blown Alzheimer's.

The Resolution of the Application

[67] Colin, Helen and the other attorneys, but for Theresa who was still at the Pines, attended a mediation session on September 7th, a scant month after the execution of the August Codicils, at which time the Application was resolved by way of minutes of settlement. A companion order formalizing the settlement was signed a month later further memorializing the settlement.

[68] But for a modest tweak to the May POA mandating decisions of the attorneys to be unanimous as opposed to a majority, providing Colin with copies of the monthly brokerage statements and advance notice of any transaction involving Helen's personal or corporate holdings exceeding $25,000, all matters and other challenges to the POAs and the pre-August Codicils were abandoned.

[69] Of equal, if not greater importance, was the fact that Colin acknowledged the May POA and October 2010 Codicil were "valid and subsisting." Put otherwise, with which proposition Mr. Goodman agreed in argument, this concession implicitly conceded the notion that Helen had capacity to execute the aforementioned documents at the time. Furthermore, Mr. Goodman grudgingly agreed she also had capacity to enter into the subject settlement in September 2011, which I suggested to him meant that she had the capacity to execute the August Codicils. Mr. Goodman did not agree with this conclusion although I am not sure I understood his argument in respect to his rejection of this syllogism.

[70] As a sideshow to the settlement of the Application, I asked counsel to address the fact that I did not hear any evidence that Messrs. Trudelle or Smith had advised Colin or Mr. Goodman about the fact that Helen had recently executed the August Codicils.[36]

[71] Mr. Worsfold, in his clear and understated fashion, reminded me of the proposition that no person is obliged to reveal his or her testamentary wishes to another while they are alive. Furthermore, a testamentary document becomes effective only upon death and is subject to change at any point after it is executed provided there remains testamentary capacity. That last notion, he underscored throughout his written argument, remains one of the threshold issues in the case.[37]

[72] He later directed me to excerpts from the discovery of one of the Objectors where the issue of whether or not Helen had been asked whether she had prepared a new will since the Application process had commenced, to which question Mr. Goodman responded that:

> My memory of what happened at the mediation is that we wanted an undertaking that there would be no further codicils or changes to her will and that was not given. That was refused. That is the best I can do.[38]

[73] In my view, both responses bring my unwarranted musings to an end.[39]

Applicable law – Testamentary Capacity

[74] There is very little to separate the parties in terms of the applicable law. The starting point is founded in the principles expressed in the seminal case of *Banks and Goodfellow*,[40] more recently refined by the Ontario Court of Appeal in *Hall v. Bennett Estate*, where it must be demonstrated that the testator:

(a) understood the nature and effect of the Will or Codicil;

(b) recollected the nature and extent of her property;

(c) understood the extent of what she was giving under her Will or Codicil;

(d) remembers the persons that she might be expected to benefit under her Will; and

---

[36] One would think that after 23 years as a judge I would know to limit my musings to matters that were completely within my wheelhouse and not merely tangentially covered by my past practice as a counsel or experiences as a judge.
[37] Closing Submissions of the Applicants, Mona (Kelly Bernardi, Sheldon Shoib and Respondent Charities at paras. 162-172. See *Kraczkowski Estate (Re)*, 2018 ABQB 115.
[38] An extract from the examination of Fiona Peacey at Tab A13 of the Applicant's Read-Ins.
[39] Smith and Helen apparently had a conversation on this very topic in mid-August where it was decided that disclosure of the August Codicils would not be made. See Volume 4, TAB 104—Transcription of Note dated August 17, Exhibit 13.
[40] Banks v Goodfellow (1870), L.R. 5 Q.B. 549 (Q.B.).

(e) where applicable, must understand the nature of the claims that may be made by persons she is excluding from her Will.[41]

[75] The Propounders further argue that the aforesaid tests must be viewed through the lens of two other long-established principles, namely:

(a) That Courts have repeatedly recognized the importance of testamentary freedom and autonomy, which should not be interfered with lightly and only as the law requires;[42] and

(b) That upon proof that a will was duly executed with the requisite formalities, absent suspicious circumstances, a testator is presumed to have known and approved of its contents and possessed the necessary testamentary capacity for its execution.[43]

[76] While the Objectors do not take issue with any of the aforesaid principles, they argue, with which proposition I am in agreement, that there were suspicious circumstances surrounding the preparation and execution of the August Codicils. In my view, the mere fact that Helen had been diagnosed in December 2010 or as late as February 2011 with Possible Alzheimer's Dementia is sufficient to move the evidentiary burden away from the presumption of testamentary capacity, although I hasten to observe that cases have overwhelmingly established that cognitive impairment does not, *ipso facto,* negate testamentary capacity.[44]

[77] I have reviewed in some detail Smith's evidence, in particular that which is readily gleaned from the emails and memos to file which he sent or prepared contemporaneously with the events as they were unfolding, culminating in his detailed notes prepared during the weekend of August 5th, to which reference is made above. This written material supports and buttresses his oral evidence which I found to be both credible and reliable.

[78] I am satisfied that it is more probable than not that Helen:

(a) Understood the nature and effect of the codicils she executed;

(b) Had a fairly clear recollection of the nature and extent of her property and the various holdings in the Kates companies, at least at a high level. Indeed, those details had been canvassed with her countless times in the period from October 2010 to the Summer of 2011;

(c) Understood the specifics of the bequests the codicils were intended to cover, and more importantly that Colin was no longer going to receive the residue of her estate, which she understood to be significant; and

---

[41] *Hall v. Bennett Estate (2003)* 64 O.R. (3d) 191 at para. 14
[42] *Spence v. BMO Trust Co.* 2016 ONCA 196, 129 O.R. (3d) 561 at paras. 30-32
[43] *Vout v. Hay* [1995] 2 S.C.R. 876, at para. 26.
[44] *Walman v. Walman Estate,* 2015 ONSC 185, E.T.R. (4th) 82 at para. 15. See also *Minkofski v. Dost Estate,* 2012 ONSC 5598, 82 E.T.R.(3d) *aff'd* 2014 ONSC 1904, 99 E.T.R. (3d) 154 (Ont. Div. Ct.)

> (d) Remembered with some specificity, if not by proper name, the folks who were expected to benefit under the codicils. I am satisfied that the list of specific charities, that was ultimately settled on, if not some of the named 'staff' beneficiaries, arose, in part, from the work product that Theresa undertook on Helen's instructions.

[79] In this respect, I adopt the reasoning expressed by Maranger J., in *Kay v. Kay Sr.* that the evidence of the drafting solicitor who had met with and spoken repeatedly with the testator should be preferred over all else, even that of medical professionals.[45]

[80] Interestingly enough, the Drs. Shulman are in agreement that it is more probable than not that Helen had testamentary capacity to meet the requirements of the four elements recited above.

[81] In any event, I am of the view that the evidence in respect of the first four criteria from *Hall v. Bennett* set out above is more than sufficient to discharge the testamentary capacity onus.

[82] Where the Drs. Shulman part company and where the Objectors seem to rest their case is in respect of the last-mentioned criteria, namely, whether Helen understood the nature of the complaint that was basically motivating Colin to bring the subject application.

[83] Indeed, when push came to shove, Mr. Goodman distilled his position, as best as I understood it during argument, to the fact that Helen had not been told that Colin was particularly concerned about the proposed salary roll-back, but one item of his complaint.

[84] I do not propose to review yet again the evidence I canvassed above and my conclusion that this thesis did not have an air of reality to it. Put otherwise, I am satisfied that Helen understood that there was a conflict between Colin and the other attorneys in respect of the manner in which he viewed the latter were making decisions concerning her affairs, with which he did not agree.

[85] Furthermore, she understood that he simply wanted to replace her longstanding friends and confidants with a stranger to her affairs, which proposal she could not wrap her head around and which she simply found unnecessary, if not anathematic.[46]

[86] I would observe parenthetically that if the Drs. Shulman had the details of the exchanges between the 'factions' and Smith's notes, they might not have been as unclear about "…what Helen was told about the reasons and what she understood about the conflict".[47]

---

[45] *Kay v. Kay Sr.*, 2019 ONSC 166, 47 E.T.R. (4th) 198 at paras. 21-23.

[46] In argument, Mr. Goodman hypothesized that Helen did not know about the salary complaint since the matter was not traversed in the response material filed by at least Sheldon Shoib. While in retrospect it might have been preferable had Shoib traversed the salary issue and explained why, from an accounting point of view, the manner in which Helen would be receiving her remuneration in the form of salary and dividends was revenue neutral to her and beneficial to Arowhon Limited, Goodman acknowledged that the salary issue was something of a 'straw man' argument, my term not his, since Helen wanted for nothing during the relevant time. She lived at the Pines for almost half of the year, an acknowledged member of the *Relais and Chateau* designation of Inns, and her every need was looked after when she returned to the City.

[47] Kates Collaborative Letter Signed Sep. 14, 2020, Exhibit 5, at page 2.

[87] I am satisfied on the evidence that it is more probable than not that she understood the nature of Colin's complaints. She simply didn't agree with them and felt his concerns were self-centred, and motivated by self-interest, which she characterized as 'greedy', a term that Mr. Goodman fastened on as a notion planted in her head by others.

Applicable Law – undue influence

[88] The last-mentioned epithet allows me to segue into the Objectors' argument that Helen was subject to the undue influence of, I'm presuming, Theresa, Helen, if not Smith. It was never made clear to me who the 'influencers' were alleged to be since but for, perhaps, Theresa, none of them benefitted at all from the August Codicils. Indeed, Theresa did not directly benefit from the August Codicils since neither of them dealt with her ownership in the Pines, which had previously been settled by the October 2010 Codicil, and her management of the Pines.[48]

[89] While I do not normally excerpt large portions of judgments of my colleagues, I doubt I could improve upon the oft-cited judgment of Cullity J. on the test for undue influence found in his judgment in *Scott v Cousins*:

> It is settled law that undue influence sufficient to invalidate a will extends a considerable distance beyond an exercise of significant influence - or persuasion - on a testator. It is also clear that the possibility of its existence is not excluded by a finding of knowledge and approval.
>
> "To be undue influence in the eye of the law there must be - to sum it up in a word - coercion. It must not be a case in which a person has been induced by [strong relationships] to come to a conclusion that he or she will make a will in a particular person's favour, because if the testator has only been persuaded or induced by considerations which you may condemn, really and truly to intend to give his property to another, though you may disapprove of the act, yet it is strictly legitimate in the sense of its being legal. It is only when the will of the person who becomes a testator is coerced into doing that which he or she does not desire to do, that it is undue influence." (*Wingrove v. Wingrove* (1885), 11 P.D. 81 (P.D.), at page 82.)[49]

[90] The presumptions in favour of undue influence that arise out of certain family relationships and that are applied to various kinds of *inter vivos* transactions play no part in the law of wills. The persons against whom the presumptions arise in such transactions are typically those that a testator might naturally wish to share in the estate.

---

[48] The Second Codicil to the Secondary Will contains provisions that arguably favour Arowhon Limited, of which company Theresa was to receive a 65% interest created by the October 2010 Codicil. Whatever 'benefit' was ultimately to bestowed on Arowhon Limited was either actuated by the 2013 transfer of the Balliol Property and the continuous use by Arowhon Limited of the float held by Helen's brokerage firm, both of which matters were the subject of complaint in the Application and settled.

[49] *Scott v. Cousins, (2001), 37 E.T.R. (2d) 113*, paras. 112-113.

[91] Such persons are entitled to press what they perceive to be their moral claims. The following comment in Williams, Mortimer and Sunnucks: Executors, Administrators and Probate (17th edition, 1993) at page 184 on the passage quoted above from *Wingrove v. Wingrove* is, I believe, an accurate statement:

> "Thus undue influence is not bad influence but coercion. Persuasion and advice do not amount to undue influence so long as the free volition of the testator to accept or reject them is not invaded. Appeals to the affections or ties of kindred, to the sentiment of gratitude for past services, or pity for future destitution or the like may fairly be pressed on the testator. The testator may be led but not driven and his will must be the offspring of his own volition, not the record of someone else's. There is no undue influence unless the testator if he could speak his wishes would say "this is not my wish but I must do it." [emphasis added] [50]

[92] There are two further principles that I have distilled from the cases which I believe are relevant to my deliberations:

> (a) The onus of proving undue influence rests on the person alleging the undue influence, all of which is to be proven on a balance of probabilities;[51]
>
> (b) The influence imposed by some other person on the deceased must be so overpowering that the document reflects the will of the influencer and not that of the deceased.[52]

[93] None of the Objectors led any evidence that anyone of Theresa, Mona, Smith and Shoib coerced, bullied or threatened Helen at any time to have the August Codicils prepared and executed. At best, as Theresa's counsel argued, there was but a vague conspiracy theory "unmoored by fact and evidence". I would go further and suggest that any conspiracy theory, which if it has any substance, was rooted in facts which antedated the filing of the Application, which were subsumed, if not spent, in the Order dismissing the Application.

[94] The Objectors, almost as an alternative argument, suggest that there existed suspicious circumstances in respect of the preparation of the August Codicils, which coupled with Helen's 'questionable' capacity lead to some form of conclusion that her free will was "overborne by coercion or fraud".[53]

---

[50] John Martin and & Nicholas Caddick, *Williams, Mortimer, and Sunnucks: Executors, Administrators and Probate* (London: Sweet & Maxwell, 1993).
[51] *Scott v Cousins*, *supra* note 49, at para 39.
[52] *Banton v. Banton* (1998), 164 D.L.R. (4th) 176 (OCJ).
[53] *Vout v. Hay*, *supra* note 43 at para 25.

[95] In order to advance this proposition, the Objectors conflate principles extracted from several cases referenced in their written argument which they suggest lends credence to this bald allegation of undue influence.[54]

[96] Penny J. in *Gironda v Gironda* set out a shopping list of 'indicators' of undue influence which the Objectors suggest applies to the facts of the instant case. Respectfully, the facts of the instant case do not nearly meet the circumstances discussed in Penny J.'s case or indeed the case of Sanfilippo J., to which reference was also made.[55]

[97] While admittedly Helen was faced with a 'family conflict', albeit one not of her making, I am not prepared to find that she was dependent, emotionally or physically, on any of the persons or charities who will benefit from the significant re-designation of the residue of her estate. Furthermore, having regard to her network of friends, if not her acquaintances amassed as the 'doyen' of the Pines, she was anything but socially isolated in the months leading up to the execution of the August Codicils.

[98] Cycling back for the moment to the 2008 Wills, Helen had a paragraph included in that will providing that, for all intents and purposes, anyone who took issue with operation of the will would be disentitled from receiving a previously provided-for bequest. When I brought this paragraph to Mr. Goodman's attention, he suggested that this was the first will in which he had ever seen such a paragraph. Be that as it may, he conceded that the evidence, if not that paragraph, indicated that Helen was a woman not to be trifled with.

[99] I would go further to observe that, in at least August 2011, the evidence overwhelmingly supports the notion that she was a woman who, notwithstanding the diagnoses of cognitive impairment, was a force to be reckoned with. To extract from the Collaborative Letter of the Drs. Shulman:

> In this case, significant impairment would make Helen vulnerable to undue influence as determined by the court. However, it also appears that she had a stubborn and independent personality that could counter that level of vulnerability.[56]

[100] In my opinion, it is less than probable that the August Codicils were the product of undue influence in any respect and were reflective of the will of anyone other than Helen, let alone the named attorneys or Smith if an allegation is being levelled against him, even remotely.

Conclusion

[101] I am therefore satisfied that the Propounders of the August Codicils have established, on more than a balance of probabilities, that Helen had the requisite testamentary capacity to execute

---

[54] See the cases referenced at pages 37-41 of the Closing Submissions of the Objectors Nicola Fatica and Fiona Peacey.
[55] *Gironda*, *supra* note 8 at para. 77; see also *Slover v Rellinger*, 2019 ONSC 6497, 53 E.T.R. (4th) 60 at para. 431.
[56] Kates Collaborative Letter Signed Sep. 14, 2020, Exhibit 5.

the subject codicils. I am equally of the opinion that the Objectors have not discharged the onus of persuading me that the codicils were procured by undue influence.

[102] I will leave it to counsel, experienced in estates matters as they are, to fashion a form of judgment which will permit the 2009 Wills and the associated codicils to be admitted to probate, if such is now required. Unfortunately, unless I missed it, the requisite and necessary description of the relief sought is nowhere to be found in the closing arguments.

[103] I will convene a Zoom conference shortly to discuss the parameters for the submission on costs. I suggest counsel consider the admonition of Brown J., as he then was, about treating Helen's Estate as an "ATM" machine.[57] I intend to be guided by his overarching comments.

GANS J.

Released: November 18, 2020

[57] *Salter v. Salter Estate,* 50 E.T.R. (3d) 227 (ONSC).

CITATION: Kates Estate, 2020 ONSC 7046
COURT FILE NO.: CV-05-157/17
DATE: 2020/11/18

MONA (KELLY) BERNARDI, THERESA PUPULIN and SHELDON SHOIB, in their capacity as Estate Trustees of the Estate of Ellen Kates (also known as Helen Joan Kates)

Applicants

– and –

NICOLA FATICA, FIONA PEACEY, MARA KATES, MAX MUSYNSKI, AVRA KATES, BENJAMIN KATES, TOM PEACEY, EMMA PEACEY, MICHAEL FATICA, MATTHEW FATICA, DANIEL FATICA, SEBASTIAN DAY, TASMAN DAY, OLIVE PESTER, DOREEN SEARS, JOHN MEDINA, MAUREEN MEDINA, DR. SHOU CHUN CHEN, LAURA TARCEA, PAULINE VAN VEEN, DAVID COOKE, ADAM FALARDEAU, JOANNE KATES, LEON MUSYNSKI, AMNESTY INTERNATIONAL, ART GALLERY OF ONTARIO, THE ARTHRITIS SOCIETY, CANADIAN CANCER SOCIETY, CANADIAN RED CROSS, CANADIAN STAGE COMPANY, CANADIAN WILDLIFE FEDERATION, CNIB, DAILY BREAD FOOD BANK, DAVID SUZUKI FOUNDATION, THE FRIENDS OF ALGONQUIN PARK, THE CANADIAN GOLDEN RETRIEVER ADOPTION SERVICE INC., SICK KIDS FOUNDATION, HUNTSVILLE DISTRICT MEMORIAL HOSPITAL, MADD, ONTARIO WILDLIFE FOUNDATION, THE SALVATION ARMY, SECOND HARVEST, ST. MICHAEL'S HOSPITAL FOUNDATION, TARRAGON THEATRE, TORONTO SYMPHONY ORCHESTRA, UNICEF CANADA, UNITED WAY CENTRAIDE CANADA, TVO, METHSCHILDE OBERDORF, ALLAN TOFF, JUNE MASON, PHIL MASON, JEANINE LEE, MARIA REGO, EVA LIMAS, LUCILLE MACDONALD, ELY MARKSON, EDWARD MUNSAYAC, GEOFF BROWN, MICHELLE MILUSE MARAS, DAVE LAVENDER, SPENSER JAMES, VERN ZIEBARTH, EDWIN FILLIER, LILY FILLIER, SUE DEVOE, DARYL BREWER, ROBERT CHRISTIE, PEARU TAMM, JANET SHIELDS, LOUIS LADOUCETT AND ALEX DUPUIS and THE OFFICE OF THE CHILDREN'S LAWYER

Respondents

REASONS FOR JUDGMENT

GANS J.

Released: November 18, 2020