

SUPREME COURT OF NOVA SCOTIA

Citation: *Wamboldt v. Wamboldt Estate*, 2010 NSSC 81

Date: 20100304

Docket: Hfx No. 310112

Probate Court No. 54475

Registry: Halifax

Between:

Randy J. Wamboldt

Applicant

v.

Estate of Harry Gordon Wamboldt

Respondent

Judge:

The Honourable Justice M. Heather Robertson

Heard:

August 31, September 1, 2, 3 and 4, 2009

Written Decision:

March 4, 2010

Counsel:

Allen C. Fownes and Lisa Avramenko, for the applicant
John T. Shanks and Tanya Butler, for the respondent

Robertson, J.:

Will: Proof in Solemn Form:

[1] Harry Gordon Wamboldt (known as Gordon) died on March 2, 2005. He was 89 years of age and had resided alone in his home at 6521 Berlin Street, in Halifax after his wife's death in 1991.

[2] However, at the age of 80 on August 8, 1996 he suffered a right middle cerebral artery territory infarct, a "stroke." He was admitted and treated at the QE II that same day and remained there for six weeks. He was then discharged to the Nova Scotia Rehabilitation site of the QE II for further rehabilitation before going back home. He spent six weeks in rehabilitation.

[3] While still a patient at the Nova Scotia Rehabilitation site, he twice left the hospital to visit his solicitor, Erin Edmonds, Q.C., at the Clayton Park Professional Centre once to provide her with instructions for his last will and testament and a second visit to execute the document.

[4] In that will dated October 15, 1996, he left cash bequests to his grandchildren; \$5,000 to Melissa Wamboldt for her university education (she is the daughter of Susan Wamboldt) and \$1,000 gifts to each of his other grandchildren Julie, Jonah, Krista, David and Melanie.

[5] The will provided that the residue of his estate was to be divided equally between his three children: Susan, Graham and Randy. Gordon Wamboldt appointed his daughter Susan to be his executrix and his son Graham as the alternate.

[6] Susan Wamboldt's evidence was that she was not present in the solicitor's office when her father executed this will, did not then know of its provisions and was only told by her father several days later, that he had divided his estate equally between his three children.

[7] Upon Gordon Wamboldt leaving the Nova Scotia Rehabilitation site, Susan Wamboldt moved in with her father, on Berlin Street, to care for him. She stored the will he had just executed in a strong box in the front hall closet.

[8] Four years later and in declining health, he executed another will dated August 12, 2000, prepared by his daughter which provided for a \$10,000.00 gift to each of his sons and left the residue of his estate to Susan Wamboldt.

[9] This will is challenged by one of Gordon Wamboldt's sons' Randy Wamboldt, by this application for proof in solemn form.

[10] In a proceeding for proof in solemn form, executions of the wills in question must be in compliance with the Wills Act, R.S.N.S. 1989, c. 505 (as amended).

[11] The relevant sections of the *Wills Act* are as follows:

3 (1) Any person may devise, bequeath or dispose of by will, executed as in this Act provided, all real property and all personal property to which the person is entitled, either at law or in equity, at the time of the person's death and which if not so devised, bequeathed or disposed of would devolve upon the person's heirs-at-law or representatives.

6 (1) No will is valid unless it is in writing and executed in manner hereinafter mentioned:

(a) it shall be signed at the end or foot thereof by the testator or by some other person in the testator's presence and by the testator's direction;

(b) such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and

(c) such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation is necessary.

7 Every will is, so far only as regards the position of the signature of the testator or of the person signing for the testator, deemed to be valid if the signature is so placed at, after, following, under, beside or opposite to the end of the will that it is apparent on the face of the will that the testator intended to give effect by such signature to the writing signed in the will, and no such will is affected by the circumstance that

- (a) the signature does not follow, or is not immediately after, the foot or end of the will;
- (b) a blank space intervenes between the concluding word of the will and the signature;
- (c) the signature is placed among the words of the testimonium clause or of the clause of attestation, follows, is after or is under the clause of attestation, either with or without a blank space intervening, or follows, is after, is under or is beside the names or one of the names of the subscribing witness;
- (d) the signature is on a side or page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will is written above the signature; or
- (e) there appears to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature,

and the enumeration of the above circumstances does not restrict the generality of the above enactment, but no signature is operative to give effect to any disposition or direction which is underneath or which follows it nor does it give effect to any disposition or direction inserted after the signature was made. R.S., c. 505, s. 7.

12 Every devise, bequest or appointment, other than an appointment of an executor or executrix or a charge or direction for the payment of debts, to an attesting witness of the will, or to the wife or husband of such witness, is void, and such witness shall be admitted to prove the execution of the will or the validity or invalidity thereof except that, where there are two competent witnesses to the will beside such person, such devise, bequest, or appointment is not void. R.S., c. 505, s. 12; 2006, c. 49, s. 4.

14 No person shall on account of being an executor of a will be incompetent to prove the execution of such will or to prove the validity or invalidity thereof. R.S., c. 505, s. 14.

19 No will or any part thereof is revoked otherwise than by

- (a) marriage as hereinbefore provided;

- (b) another will executed in manner by this Act required;
- (c) some writing declaring an intention to revoke the same and executed in the manner in which a will is by this Act required to be executed; or
- (d) the burning, tearing or otherwise destroying the same by the testator, or by some person in the testator's presence and by the testator's direction, with the intention of revoking the same. R.S., c. 505, s. 19.

[12] Randy Wamboldt has posed four questions for the Court:

1. Did Harry Gordon Wamboldt possess the requisite testamentary capacity to make a Last Will and Testament on August 12, 2000 and to revoke his 1996 Will?
2. Are there suspicious circumstances surrounding the drafting and execution of the purported Last Will and Testament of Harry Gordon Wamboldt dated August 12, 2000?
3. Does the 2000 Will seem more a contract between Susan Wamboldt, who prepared the Will, and the testator, Harry Gordon Wamboldt? If so, is it a testamentary instrument i.e. to take effect on death, or describing a consideration for services being rendered?
4. If the purported 2000 Will is a testamentary instrument within the nature of a contract, ought Harry Gordon Wamboldt to have had independent legal advice prior to entering into the same?

[13] Counsel agree that the legal principals testamentary capacity, the concept of the testator of “a sound and disposing mind” is set out in Feeney’s Canadian Law of Wills (4th ed) which states:

2.6 To use the time honoured phrase, a person must be “of sound mind, memory and understanding” to be able to make a valid will. When a will is contested on the ground of mental incapacity, the propounder must prove that the testator understood what he or she was doing: that the testator understood the “nature and quality of the act.” The testator must be able to comprehend and recollect what property he or she possessed, the persons that ordinarily might be expected to benefit, the extent of what is being given to each beneficiary and, finally, the nature of the claims of others who are being excluded.

2.7. While the standard of mental capacity required by the law for wills is high, it is not so high as to exclude eccentric or inefficacious wills. One Ontario judge said that a lack of capacity must amount to something more than entertaining “wrong-headed notions” and that one may be “eccentric and do absurd things and be a person with whom it is impossible to live”, but still be capable of making a will. A will-maker may be capricious or unfair in making dispositions but that does not of itself amount to lack of capacity.

2.11 An aversion to a spouse, children, or other relatives that the testator might be expected to benefit, may indicate a lack of sufficient capacity and wills are often attacked on this basis by disappointed relatives. In *Re Berdenbach*, however, the Manitoba Court of Appeal said that “mere blood relationship, however close, gives no right to object to a gift to a stranger,” and it must be shown that the testator’s false beliefs about the family amounted to delusional insanity that affected the actual dispositions.

[14] In *Re Willis Estate*, 2009 CarswellNS 426, Murphy, J. commented on the interrelation of the issues of testamentary capacity, suspicious circumstances and undue influence at para. 8.

8 The leading decision addressing the requisite elements of proof in determining the validity of Wills is *Vout v. Hay*, [1995] 2 S.C.R. 876. That decision, which has recently been followed by this Court in *Ramsay Estate (Re)*, 2004 NSSC 140 and *Re Jessie May Coleman (Estate)*, 2008 NSSC 396, addressed the confusion surrounding the interrelation of suspicious circumstances, execution, testamentary capacity and undue influence. Justice Sopinka, writing for the Court in *Vout* stated as follows (at p. 889):

[26] ... 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 rebuttable 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.

[27] 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 circumstances 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.

9 The proponents of a will, in this case the Respondents with respect to the Second Will, have the onus to establish on a balance of probabilities that the formalities of the Wills Act were complied with, and that the testator, possessing a disposing mind and memory giving him testamentary capacity, knew and approved its content (*Vout*, paras. 19 and 20). As the Applicant acknowledges that the Second Will was executed (by someone) at a time when James Willis would have had testamentary capacity and the ability to understand and approve contents, the Respondents may be deemed to have satisfied their initial onus as proponents of the Second Will, giving rise to a rebuttable presumption that will is valid.

10 The Supreme Court noted, at para. 25 in *Vout*, that the suspicious circumstances which will rebut the presumption in favour of a will's validity may relate to various issues. The Court identified (1) circumstances surrounding the preparation of the will, (2) circumstances tending to call into question the capacity of the testator, or (3) circumstances tending to show that the free will of the testator was overborne by acts of coercion or fraud.

11 In Macdonell, Sheard and Hall on Probate Practice, 4th Ed., the authors suggest at p. 42 that circumstances arousing suspicion must exist at the time the will is made, but they note that subsequent events may in some cases give rise to the suspicion. The Prince Edward Island Supreme Court in *Coughlan Estate, Re* 2003 PESCTD 75, sanctioned consideration of activity after the will was executed, concluding in para. 140:

Suspicious circumstances were present in this case, but when viewed in the broader context of the entire evidence, both before and after the will was executed, the suspicion has been significantly diminished.

12 Once suspicious circumstances arise and the presumption of validity is spent, the propounder of the will resumes the legal burden of proving due execution, the testator's knowledge and approval, and, if it is an issue, testamentary capacity. Those issues must be proved in accordance with the civil balance of probabilities standard (*Vout*, para. 27, *supra*).

13 When undue influence is alleged, the burden of proof does not revert to the proponent of the will, but rests with those attacking it. In *Vout*, the Supreme Court of Canada stated at para. 28:

[28] It might have been simpler to apply the same principles to the issue of fraud and undue influence so as to cast the legal burden onto the propounder in the presence of suspicious circumstances as to that issue Nevertheless, the principle has become firmly entrenched that fraud and undue influence are to be treated as an affirmative defence to be raised by those attacking the will. They, therefore, bear the legal burden of proof. No doubt this reflects the policy in favour of honouring the wishes of the testator where it is established that the formalities have been complied with, and knowledge and approval as well as testamentary capacity have been established. To disallow probate by reason of circumstances merely raising a suspicion of fraud or undue influence would tend to defeat the wishes of the testator in many cases where in fact no fraud or undue influence existed, but the propounder simply failed to discharge the legal burden. Accordingly, it has been authoritatively established that suspicious circumstances, even though they may raise a suspicion concerning the presence of fraud or undue influence, do no more than rebut the presumption to which I have referred. This requires the propounder of the will to prove knowledge and approval and testamentary capacity. The burden of proof with respect to fraud and undue influence remains with those attacking the will. See *Craig v. Lamoureux*, [1920] A.C. 349; *Riach v. Ferris*, [1934] S.C.R. 725; *Re Martin*, [1965] S.C.R. 757, *supra*.

14 This Court in *Ramsay, supra*, reaffirmed the direction in *Vout* that the burden of proving undue influence remains with those attacking the will, and that to establish undue influence it is not sufficient to show only that the beneficiary had the power to coerce the testator, but it must be demonstrated that the overbearing power was exercised and that because of its exercise the will was made (*Ramsay*, paras. 32, 33, 50).

15 The respective burdens of proof were succinctly summarized by the Court in *Coleman, supra*, at para. 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.

16 To resolve the issues raised in this case, the Court must therefore determine:

(a) whether suspicious circumstances are present so that the initial presumption of the Second Will's validity ceases to operate;

(b) if suspicious circumstances surrounding the preparation of that will are established, whether the Respondents as proponents of the Second Will have met their civil burden to establish execution;

(c) if the Respondents establish that James Willis executed the Second Will but circumstances raise a suspicion that the testator's free will was overborne by coercion, whether the Applicant who attacks the Second Will satisfies the burden to establish undue influence.

[15] Counsel for the applicant and the respondent have cited various cases relating to proof in solemn form. I have considered these authorities. Each turns on its particular facts, as does this application. The cases cited by the applicant were *Pollard Estate v. Falconer*, [2008] BCSC 516, 2008 CarswellBC 820; *MacKenzie v. MacKenzie Estate*, [1998] N.S.J. 253, 162 D.L.R. (4th) 674, 169 N.S.R. (2d) 224; *March Estate: Fryer et al v. Harris et al*, [1991] N.S.J. 230, 41 E.T.R. 225, 104 N.S.R. (2d) 266; *Sandra Vout v. Earl Hay et al*, [1995] A.C.S. 58, 7 E.T.R. (2d) 209, 125, D.L.R. (4th) 431; *Jessie May Coleman (Estate)*, 2008 NSSC 396; and those relied on by the respondent were *Willis Estate, Re*. 2009 NSSC 231, 2009 CarswellNS 426; *Muttant v. Jones*, [1995] N.S.R. No. 2, 137 N.S.R. (2d) 116; *Goodman Estate v. Geffen*, [1991] S.C.J. 53, 80 Alta. L.R. (2d) 293, [1991] 5 W.W.R. 389; *Butler v. Bird* 2002 NSSC 189, 206 N.S.R. (2d) 364; *Morash Estate Re*, 2002 NSSC 244, 209 N.S.R. (2d) 288; *Legg v. Nicholson* 2002 NSSC 217, 208 N.S.R. (2d) 142; and *Thorsen Estate v. Thorsen*, 2002 NSSC 23, 2002 CarswellNS 43.

The evidence:

[16] I heard the evidence of Gordon Wamboldt's three children: Susan, Graham and Randy, as well as evidence of his granddaughter Melissa and his daughters-in-law Janet and Carol Wamboldt. A witness to the last will dated August 12, 2000, Jean Foisy also testified, as did a Dr. Finlay Spicer, general practitioner. From this

evidence, the following picture of Gordon Wamboldt's last few years emerges.

[17] Gordon Wamboldt was a retired locomotive engineer with Canadian National Railway. He and his wife married in 1943. They purchased their first home at 6521 Berlin Street in 1968. It was a one-storey pre-fab house.

[18] After his wife's death in 1991, Gordon Wamboldt lived happily and independently with his Welsh Terrier dog, in this home.

[19] At discharge from the rehabilitation site, Gordon Wamboldt could walk with the help of a cane, but was significantly impaired on the left side and quickly chose to sit in a wheelchair his son Randy had bought for him.

[20] Although all three children and their spouses were anxious to help their dad, and Graham asked him to come and live with him and his wife in Tantallon, it was agreed that Susan Wamboldt and her daughter Melissa would live with him, because he wanted to remain in his own home. Susan Wamboldt's eldest daughter Melanie was then independent and not at home. The difficulty was room. It was a single-storey small pre-fab home.

[21] Susan Wamboldt lived in a subsidized housing unit with her daughter paying \$500.00 per month. At first Susan left her daughter Melissa then age 18 at home in the apartment and stayed with her dad. Susan Wamboldt soon developed the plan to build a second storey on the house and create a unit for Susan Wamboldt and Melissa, as Gordon Wamboldt did not want to go to a second storey bedroom and practically speaking nor could he. Melissa did not move in until 1998 when the construction was complete.

[22] Susan Wamboldt received three quotes for the projected work, testified she chose the middle quote and construction was completed in six months; between late summer 1997 and February 1998. The work was financed by a mortgage placed on the property made between Harry Gordon Wamboldt and League Savings and Mortgage with Susan Wamboldt as a guarantor. The first dated January 2, 1998 was for \$45,000.00 An amending agreement dated February 20, 1998 increased the mortgage to \$55,000.00 An amending agreement dated September 30, 2004 increased the mortgage to \$61,990.00. A further amending

agreement dated November 29, 2004 increased the mortgage to \$86,720.00. This was less than one year before his death.

[23] The assessed value of the property in 1996 was \$79,100. There is evidence that a realtor had suggested that if the property were to have been placed on the market at that time the fair market value would have been approximately \$100,000.

[24] After the renovations were complete the property was appreciated in value and in 2007, the property was assessed for \$231,000. The house was eventually sold for \$275,000.00 and the balance of the funds after the mortgage payout and closing costs remains in the trust account of Susan Wamboldt's solicitor pending a decision in this proceeding. This is virtually the entire value of the estate.

[25] With respect to the construction costs, it was Susan Wamboldt's evidence that the mortgage of \$45,000.00 was not a sufficient amount to pay for the second storey addition which cost \$55,000.00 when completed. The contractors were fully paid with these funds in February, 1998.

[26] Susan Wamboldt testified that she completed further renovations in 2004, repairs to a garden wall in the back yard, replacement of basement windows and construction of a wheelchair accessible bathroom on the first floor of the house, as well as other repairs and renovations to the chimney, furnace, plumbing and kitchen. The amount of the mortgage was increased to meet these costs. Susan Wamboldt made all the arrangements for the additional financing and testified that the lawyer came to the house for Gordon Wamboldt's execution of the document.

[27] The mortgage proceeds went into Susan Wamboldt's bank account as she testified she looked after paying the contractors, because she did not want the contractors to "harass dad about money."

[28] Gordon Wamboldt's income in retirement was approximately \$1,500.00 per month made up of old age security \$461.55, CPP \$616.71 and his CNR pension \$449.56. These are gleaned from Government records of October, 2003. Susan Wamboldt's evidence is that when she first moved in with her dad, his income was around \$1,200.00 but grew to \$1,500.00 per month before he died.

[29] Susan Wamboldt's evidence that her dad did use a bank card and withdraw funds at an automatic teller that she would drive him to, but that he stopped using

the ATM in 1998 - 1999. She continued to use this card and his pin number. Susan Wamboldt was a joint signatory on his bank account. She testified that he never really liked shopping. She looked after the banking from then on. The mortgage payments all came out of Gordon Wamboldt's account and at the time of his death were \$948.00 per month, in principal interest and taxes.

[30] Susan Wamboldt testified that she cut up Gordon Wamboldt's Visa credit card three and one-half years before his death, yet nevertheless there was an outstanding balance of \$5,000.00 on his Visa, at death.

[31] Susan Wamboldt's evidence was that Gordon Wamboldt paid the mortgage, taxes and heat and that she and her daughter paid for the cable, phone, water and electricity.

[32] Susan Wamboldt's income during these years varied between \$20,000.00 and \$30,000.00 per annum.

[33] Randy Wamboldt's evidence was that he knew of the planned renovation to the house, a second storey to accommodate his sister and his niece, but that from the outset she led him to believe she would pay the mortgage and may also have had some Band Council funds to contribute to the capital cost. Susan Wamboldt had native status through her mother.

[34] For the three months following his death the sum of \$950.00 per month was transferred from Gordon Wamboldt's (then estate) account to Susan Wamboldt's, a sum equal to the monthly mortgage payment requirement. Susan and her daughter continued to live in the house, but chose to sell it in 2008, when this controversy arose.

[35] Gordon Wamboldt was a taciturn man, to say the least. All of the children testified that he was a man of few words, throughout their lives, but was a loving father and good provider. I would say it was a traditional family life where their mother was the primary figure, as they grew up.

[36] After his stroke, he became uncommunicative and his health deteriorated rapidly. I find this as a fact, having considered all versions of the children's evidence about their experience with him at home, or in their homes, following the stroke.

[37] It is true that Susan Wamboldt and Melissa Wamboldt spent more time with him, because they lived in the house with him, but sons Graham and Randy, also helped in their father's care, particularly to give respite to Susan Wamboldt who bore the vast majority of the caregiving for her father.

[38] At first upon coming home from the rehabilitation site, he made progress and probably regained some mental function, although remaining physically impaired on the left side. Everyone agreed there were concerns about his memory and if left alone he could place the kettle on the lit stove and simply forget about it. Certainly the family all agreed he was competent to make the 1996 will.

[39] As to his competency to make a will and execute a will on August 12, 2000, I am not convinced Gordon Wamboldt was then of "a sound and disposing mind" despite the apparent formalities of proper execution of the will.

[40] Graham Wamboldt testified that in the first year after his stroke, his father's mental capacity was changed to the extent that while watching a programme on the television he would cry when he ought to be laughing or laughed instead of crying, but was "otherwise pretty much himself." He testified his father could then speak of the past or present, and even seemed to recover from the laughing/crying reversal, during this first year.

[41] He testified his father offered no opinions as to the merit of building a second storey on his house.

[42] He testified that one day after Melissa moved in his father called him and said "come and get the dog, he's not allowed here anymore." Susan had been complaining about allergies and the dog went to live with Graham, then his daughter until it died in 2002.

[43] Graham testified that his father missed the dog terribly, but came to visit the dog every week or two at Graham's house. He testified that with the departure of the dog from his house his father began to decline. He lost interest in life.

[44] Between 1996 and 1998, his father had been able to chat about regular family matters and asked of Graham's children, David and Krista and his daughter-in-law Carol.

[45] After 1998, he was less responsive.

[46] With respect to his continence, Graham testified that between 1996 and 1999, his father would occasionally have accidents and soil his pants, and say to his son “I had an accident.” However, by the year 2000, he did not react when he soiled himself and seemed unaware of this problem.

[47] With respect to a plan of inheritance, Graham testified that in late summer or early fall 1997, he, Randy and Susan were in the backyard at Berlin Street and “Susan produced a paper where mum wrote what she expected dad to carry out, that each grandchild would get \$1,000.00, Melissa, \$5,000.00, 25 percent to Randy, 25 percent to Graham and 50 percent to Susan.

[48] Graham testified that in 1997, he knew nothing of the will his father had executed the year before, until his father told him that “everything was in place,” sometime in the early part of the summer of 1997.

[49] Graham testified that at the meeting in the backyard, in the absence of knowing the contents of the 1996 will, he accepted that the division Susan proposed was his mother’s wish. He recalled this note was typed not handwritten and was unsigned. Graham testified he did not believe his mother knew how to type and did not own a typewriter. He testified this note only surfaced in 1997.

[50] However, Graham also testified that his father always recognized him and his children up to 2004.

[51] Graham testified that Susan Wamboldt made him aware of the 2000 will and its contents. He did not discuss this will with his father. Graham seemed to accept the proposition that he and his brother had then owned homes and as Susan was committing to the care of her father, for more years than they had expected, she would end up with the family home on Berlin Street. He recalled being told by her, he and Randy would each receive \$10,000.00 and “whatever way she could, she’d pay us off.”

[52] Graham testified on discovery that he knew they had needed to mortgage the house to fund the construction and that he “didn’t have any objection to what they planned to do.”

[53] Graham's wife Carol described Gordon Wamboldt as a man who never spoke much, but testified that after the stroke he declined each year. She described how he sat in this chair, did not talk, but could understand. She testified that before the year 2000 he could sit in front of the television, watching a snowy screen and could not tell the difference.

[54] She testified that her husband's testimony about when Gordon Wamboldt's dog came to their house was mistaken. She clearly remembered the dog came in 1997 (not the year 2000), finally got cancer and was put down in the year 2000. She testified that Gordon Wamboldt was devastated thereafter, become uncommunicative and unresponsive, never reading, maybe thumbing through a magazine, but no more.

[55] Randy Wamboldt's wife Janet testified. She is a registered nurse having graduated with a Bachelor of Nursing in 1977. From the summer of 1997 to the fall of 1998, she testified Gordon Wamboldt came to their house on most Sundays, but was not again in their home after Christmas 1998. She testified that after 1998, he never initiated conversation and often appeared to be blank and unresponsive.

[56] Dr. Finley Spicer's evidence is that he was Gordon Wamboldt's family physician from the early 1990's to 2005, when he died. He testified that the stroke changed Mr. Wamboldt's life dramatically and that he had been pretty independent before then. Reading from his file notes, he testified he saw Gordon Wamboldt once in 1992 and once in 1993, three times in 1994, once in 1995, and once in 1996. He noted on November 5, 1996, "still has the dog" and noted a massive stroke August 8, 1996 ... Susan caring for him."

[57] On April 29, 1997, his notes reveal "memory deficit." He testified he did not conduct any mental status examinations. He was seen again on July 16, 1997, for a cold and again in October 1997. On July 23, 1998, he noted "voids a lot - no control" and the word "pathology." His notes chronicle further visits: October 1998 for a chest cold; June 1999, "83 years old - walking slowly - athletes foot - cream for it"; October 18, 1999, "84 years old - no particular problems - flu shot"; October 27, 2000, "85 years old - flu shot" and Dr. Spicer then treated him for a bed sore on his left hip. He made a visit in November 2002 and again in 2003 to administer a flue shot. He last saw Harry Gordon Wamboldt November 7, 2004 and noted "did not recognize me."

[58] Dr. Spicer could not really testify as to the seriousness of Gordon Wamboldt's memory deficit after 1997, as he said this was after all longer than 12 years ago. He described his visits as quick for the purpose of delivering the annual flu shot, as he had to keep the vaccine chilled for the other patients he made house calls to.

[59] In interrogatories, when asked about Gordon Wamboldt's mental capacity in 1997, he answered:

With respect to your question #5, I believe that Mr. Wamboldt was capable of understanding the essential elements of will making on April 29, 1997.

[60] With respect to his comprehension of documents after 1997, Dr. Spicer answered:

I have no formal knowledge of his ability to read and comprehend a written document during the aforementioned time period.

[61] With respect to his mental capacity, mind, memory or understanding, in 2000, Dr. Spicer replied:

I saw Mr. Wamboldt once in 2000, in the fall, when he presented for his flu shot, and you will recall that I saw him only annually after that, always for a flu shot, and from November 2003 onwards the visits were housecalls. Nothing sticks out in my mind about his 2000 visit, but no formal mental capacity assessment was done, therefore I am unable to comment on question 12.

He continued:

Mr. Wamboldt suffered from a mild dementia, primarily memory, and that it progressed to the point that in 2004 he did not recognize me. I am unable to recall exactly when, given my infrequent contact with Mr. Wamboldt, that his executive functioning may have declined sufficiently to impact upon his ratiocination.

[62] In answer to the particulars of impairment as required for a 1996 Disability Tax Credit Form, Dr. Spicer replied:

Mr. Wamboldt's marked restriction began on the date of his stroke in August 1996, hence the marked restrictions are those of question 717 on the form. Question 9 of part B of form 2201E asks about the impairment, which is the total impairment, and makes no reference to the constituents of the impairment. Note that the new Disability Tax Credit Forms have corrected this flaw, and one may now assign a "value" to the components. In respect to question 20 and 21 of your letter, Mr. Wamboldt's dementia, and hence his memory would have been permanently restricted, but I am unable to comment upon how marked that component of his disability may have been in 1997.

[63] From his testimony and the answers to interrogatories, I find that Dr. Spicer was not in a position to nor did he chronicle, his patient Gordon Wamboldt's mental decline. He was in and out for a flu shot and received some acknowledgement from his patient. In truth, he cared for a disabled geriatric and was never asked to nor did he test his mental acuity. Dr. Spicer's evidence was therefore not much help.

[64] Randy Wamboldt contests this will. He testified that his family had been close as kids growing up with his parents. His relationship with his sister became strained after her divorce as her husband Earl had been his friend. After his mother died in 1991, he bought a house on Almon Street, seven to eight minutes from his father's home. He is a mechanic and worked then at Acadian Bus Lines, also located on Almon Street. He saw a lot of his father in the years following his mother's death and described how on Saturday and Sundays, he came with dog to Almon Street and helped Randy repair cars or do house repairs, etc.

[65] Randy Wamboldt recalled the meeting he had in the backyard with Susan and Graham, in the late fall after his father came home from the rehabilitation site. They agreed Susan would move in because it was best for their father to stay in his own home. He testified he knew of the renovations and planned borrowing by Susan to renovate the house. He testified they agreed the present value was then about \$100,000.00. He testified he asked that day if his siblings knew if their father had made a will and they answered no. Randy had no knowledge of the 1996 will until he visited his solicitor concerning the 2000 will after his father had died.

[66] Concerning his recovery from the stroke, Randy testified that there was some improvement in the first year. He continued to go to Randy's home for visits until 1998 and could get up from the basement to the main floor, until that time.

By late winter 1999, Randy testified his father needed more care and help was hired a few mornings a week to help with bathing, etc. Randy and Graham gave time out to Susan from the winter of 1998-99 onward by taking turns being with him Sundays, so Susan had some time off.

[67] He testified that from 1999 onward his father was incontinent and would simply go in his chair, unaware that he had soiled himself. He sat in a chair in front of the television and never made conversation. He testified that his father would be unaware if he had just eaten or not. Randy testified he spent every second Sunday with him until the month before he died.

[68] He testified that after the dog was taken to Graham's house in 1998, his father decline and was uncommunicative and just got worse and worse with no improvement, not knowing if he had eaten or not.

[69] He agreed his father's short-term memory was really bad and that his father would say yes to the question, "Do you want some ice cream?" then say, "What's that?" upon Randy's return from the kitchen with the dish of ice cream.

[70] Under cross examination, Randy Wamboldt agreed that the backyard meeting could have been held in the fall of 1997 after Susan already lived there. He would not agree with the respondent's counsel that he only came to be with his father on every second Sunday sometime after 2000.

[71] As to the backyard meeting and any agreements made by Gordon Wamboldt's three children, Randy testified on cross examination that the three agreed Susan could have the house. Using a value of \$100,000.00 for the house, they (Randy and Graham) would walk away for \$25,000.00 a piece and give her \$50,000.00 value in the home. He said they agreed she deserved 50 percent, as she was living with their father and bearing the burden.

[72] All three children agreed their father was never included in these discussions.

[73] Mr. Jean Foisy testified that she witnessed the execution of the 2000 will. She was a friend of Susan's.

[74] She testified that she, Susan, Gordon Wamboldt and another gentleman (the other witness) were present. It had been years since she saw Gordon Wamboldt and notice he was “a little older, a little more feeble, but seemed all right to me.” She testified he participated in small talk about the weather and their seeing one another again. She also insisted they were in the kitchen, when the will was signed although I am satisfied this took place at his chair in the livingroom. She could not helpfully attest to his competence. I am satisfied that she and Susan Wamboldt were more engaged in conversation together and agreed to Susan Wamboldt’s acquisition of a washing machine that this witness had for sale. Jean Foisy was present only for the execution of the document and was not present for any discussion of contents.

[75] Susan Wamboldt testified that her father decided in August of 2000, he wanted to write a new will. Susan Wamboldt testified she said to her father “let’s go to a lawyer”, but he said no. Finally, she testified she gave in and did the will, her father having told her “I trust you to do what I say.”

[76] Therefore, she took the old will out and “used it as best I could.”

[77] Asked why her father was motivated to want a new will, she testified that he said “Randy and Graham both have their own homes, I want you and the kids to have one too.”

[78] She testified her father did not want to spend the money on a lawyer and that he could be very tight and stubborn. She testified this discussion about hiring a lawyer went on for over an hour. Later, she testified they argued about the lawyer for a couple of days.

[79] After her father told her he wanted her to have the house, Susan Wamboldt testified she said “that’s really nice dad, but you have two sons and you need to give them something too.”

[80] She also testified that after telling her father to leave them a gift , she told him “that’s okay, trust me I’ll give them whatever you want to give them ... it’s your decision.” Susan Wamboldt said her father settled on \$10,000.00 to each boy and she told him “that would be a lovely gift.”

[81] She then testified about the plan to meet this obligation, how she would pay the mortgage once he was gone, recover a good credit rating and after 5 years be in a position to remortgage the house and pay out the gifts to her brothers.

[82] Susan Wamboldt testified how she copied the clauses of the 1996 will and then just put in the paragraphs that he wanted, then called in some witnesses and had the document executed about a month later. She used her own computer and “worked on it here and there” for about a month. Susan testified that her father continued to ask if she had completed the will and she would reply “no, not quite dad.” He would tell her to get a move on.

[83] In describing his mental capacity Susan Wamboldt testified that there was no change in her father between 1997 and 2004. Indeed, she said her father was annoyed by her leaving a plant in his apartment near the door sometime in the year 2000 and that she was annoyed he picked it up and popped it out the front door, just because he was cranky and did not want the plant there.

[84] Susan Wamboldt describes a man who in 2000 could read the newspaper, discuss the lexicon with her as well as news articles from the papers and television. She also testified that he could play along with Jeopardy on television getting the right answers every now and then.

[85] With respect to the final draft of the will, Susan Wamboldt testified she went through it clause by clause with her father and that this took about 45 minutes.

[86] Susan Wamboldt testified that she then put the 2000 will in the same strong box and did not discuss it again with him until 2004 when she told him of her future plan to open a child care centre on the first floor after he was gone, enlisting the help of Melissa, who had by then achieved a Bachelor of Education degree. Susan Wamboldt testified her father told her he thought that was a great idea.

[87] Melissa Wamboldt also testified and supported her mother’s views on Gordon Wamboldt’s mental capacity and level of engagement in conversation, his enjoyment of movies and his interest in her life and particularly her education.

[88] She testified that in 2003, when she was completing her Bachelor of Education degree, her grandfather took an interest in her projects and grades.

Melissa Wamboldt has made a *quantum meruit* claim against the estate for \$4,180.14.

[89] February 2004, Susan Wamboldt testified that her father was incontinent and made a mistake every couple of days.

[90] Susan Wamboldt's testimony was that after she and Melissa returned from Scotland (this trip was taken in 1997), she asked Randy to come and help and give her a break on Sundays. Later in cross examination, Susan Wamboldt insisted Randy did not come and help on Sundays until 2002.

[91] Gordon Wamboldt did have an increasing amount of paid care from 1997 onward, at first 2 or 3 mornings a week, then each day until he required total care just before his death. I am satisfied that from Christmas of 1998 onward both Randy and Graham assisted Susan Wamboldt in their father's care, by attending each Sunday, to allow her a break.

[92] Susan Wamboldt testified that her father was competent and knew what was going on with the various construction in the house "every step of the way." Susan Wamboldt testified that therefore she did not need to use a power of attorney and her father was fully competent to sign for the increased mortgages in September and November 2004.

[93] She vehemently disagreed with Dr. Spicer's view of his state of mind in November 2004, when Dr. Spicer noted "he did not know or recognize me."

[94] Although I accept that there was an execution of the will on August 12, 2000, by the testator in the presence of two witnesses, I am not satisfied on a civil standard that Gordon Wamboldt either directed the execution of this document or instructed his daughter as to its contents. Nor am I at all convinced that Gordon Wamboldt was of a sound and disposing mind in the year 2000, as he clearly was in 1996.

[95] The propounder of the will Susan Wamboldt bears the legal burden to satisfy the Court as to the due execution, knowledge and approval and testamentary capacity.

[96] The will was solely orchestrated by Susan Wamboldt without the benefit of legal counsel and there is no independent evidence before me of Gordon Wamboldt having read and understood the document before a very perfunctory and quick execution of the document on August 12, 2000. I have carefully considered all the evidence before me that would inform me of his state of mind and level of independence that year. In the face of all of this evidence, I do not accept that Susan Wamboldt can benefit from rebuttable presumption of due execution.

[97] I simply do not accept the evidence of Susan Wamboldt that paints a picture of her father being mentally alert from 1997 through the year 2004, when she had him execute final mortgages on the property.

[98] Her evidence simply did not accord with that of her brothers and their wives, whom I believe truthfully chronicled their father's steady decline from 1997 onward. I am satisfied by their evidence that by 2000, he was not alert to his surroundings, was incontinent, unaware he had soiled himself, was not certain if he had just eaten or not and often sat unaware before a television screen for hours. This is a far cry from the lively man Susan Wamboldt depicted as doing the lexicon with her as well as discussing the news.

[99] In my view, Susan Wamboldt's evidence was self-serving and amounted to a justification of all of her actions, after full disclosure of her father's financial records and the two wills was made after his death and in the course of this litigation. Suspicious circumstances abound in this case.

[100] In particular, I do not accept that this taciturn man, who spoke very little argued with her at length and forced her to prepare this 2000 will. On his own initiative he sought counsel and had a lawyer prepare his will in 1996 and believed his affairs then settled. Nor I do not accept that the typewritten note Susan Wamboldt produced in 1997 setting out her mother's earlier testamentary wishes, on a single typewritten page are even those of her mother.

[101] It appears to me that from the time of the backyard meeting forward Susan Wamboldt was orchestrating placing herself in a better position than her brothers, with respect to the apportionment of the only valuable asset her parents had owned, their house. The boys acknowledged her greater contribution to their father's care and would have acquiesced to such an arrangement. The difficulty was, none of

them discussed the proposal with their father and no one except Susan Wamboldt knew of the contents of the 1996 will.

[102] Three years later, I believe Susan Wamboldt not Gordon Wamboldt, developed the new plan of testamentary disposition, excluding any gift to his grandchildren and providing as follows:

Specific Request

(1)(a) To transfer and deliver the sum of \$10,000.00 to my son Randy John Wamboldt within 5 years after my death. I wish my daughter Susan Elizabeth Wamboldt to have adequate time to obtain the above sum to transfer to my son, Randy.

(1)(b) (1)(a) To transfer and deliver the sum of \$10,000.00 to my son Graham Percy Wamboldt within 5 years after my death. I wish my daughter Susan Elizabeth Wamboldt to have adequate time to obtain the above sum to transfer to my son, Graham.

(1)(c) To transfer the ownership of my property and home situate at 6521 Berlin St. Halifax, N.S. to my daughter Susan Elizabeth Wamboldt. She will continue to pay for the mortgage and taxes as she has been doing all along. (Emphasis added)

[103]] I believe these are not Gordon Wamboldt's words, but those of his daughter. "She will continue to pay the mortgage and taxes as she has been doing all along." We know that was not true. From the onset of the mortgages being negotiated to pay for the renovations to his home, Gordon Wamboldt paid the mortgage and taxes. Indeed, Susan Wamboldt controlled his bank accounts and his income soon after his stroke. All of the mortgage monies went directly to Susan Wamboldt's account. For a man who was known to be frugal and stubborn and independent, I do not believe he would have acceded to these arrangements had he been in control of his own circumstances. Further, he would not have characterized Susan as paying the mortgage if this were not the case.

[104] It further casts doubt on Susan Wamboldt's evidence that she reviewed the will clause by clause with her father for over 45 minutes.

[105] Another troubling aspect to Susan Wamboldt's evidence was her assertion that her father was competent and engaged with the late 2004 mortgage documentation. This flies in the face of Dr. Spicer's notation. Her use of Harry Gordon Wamboldt's bank accounts after his death until they were extinguished also casts Susan Wamboldt in a very poor light.

[106] I also found Melissa Wamboldt's testimony to be too supportive of her mother's and to be less credible than the other family members.

[107] Therefore, on all of the evidence before me, I find that there were significant suspicious circumstances surrounding the preparation and execution of this second will of August 12, 2000. The applicant has succeeded in this respect. Although I accept that Harry Gordon Wamboldt executed this document, Susan Wamboldt has not discharged her legal burden and demonstrated to me on the balance of probabilities that she drafted the will with his full knowledge and approval or that he was aware of its contents. The evidence of his lack of capacity simply overwhelms her testimony.

[108] In the result, I order that Harry Gordon Wamboldt's will dated October 15, 1996, be admitted to probate under common form.

[109] I will be happy to hear submissions in writing on the matter of costs, failing any agreement.

Justice M. Heather Robertson