SUPREME COURT OF NOVA SCOTIA
Citation: *Nieuwland v. Yorke Estate*, 2011 NSSC 19

Date: 20110121
Docket: Hfx No. 277576
Probate Court File No. 55424
Registry: Halifax

Between:

Barbara Lynn Yorke Nieuwland

Applicant

v.

Elizabeth Yorke, as Executor of the Last Will and Testament of the Late Madge Avis Yorke, Deceased

Respondent

Judge:	The Honourable Justice M. Heather Robertson
Heard:	July 6, 7, 8 and 12, 2010, in Halifax, Nova Scotia
Written Decision:	January 21, 2011
Counsel:	William L. Ryan, Q.C. and Sara Scott, for the applicant Hugh Wright and Joseph McNally, for the respondent

Robertson, J.:

[1] The applicant Barbara Lynn Yorke Nieuwland has applied to the court requesting that the last will and testament of her mother Madge Avis Yorke be proved in solemn form.

[2] Elizabeth Yorke is the respondent in the application, as the sole executrix and trustee of the estate of her mother.

[3] The applicant and the respondent are sisters and the only children of the testator Madge Yorke, whose last will and testament is dated February 9, 2006. Mrs. Yorke died September 7, 2006, at the age of 94.

[4] Barbara Nieuwland requests that this will not be admitted to probate, but her mother's previous will dated March 30, 2005 be admitted to probate.

[5] Proof in Solemn Form first requires that the court determine if the will is in compliance with the *Wills Act*, Chapter 505, Revised Statutes 1989. The relevant sections are:

> 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.
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> 6 (1) No will is valid unless it is in writing and executed in manner hereinafter mentioned:
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> (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;
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> (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
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> (c) such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation is necessary.

(2) Notwithstanding subsection (1), a will is valid if it is wholly in the testator's own handwriting and it is signed by the testator. R.S., c. 505, s. 6; 2006, c. 49, s. 1.

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.
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> 19 No will or any part thereof is revoked otherwise than by
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> (a) marriage as hereinbefore provided;
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> (b) another will executed in manner by this Act required;
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> (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
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> (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.

[6] The applicant is not challenging the technical compliance with the *Wills Act,* but she does assert that her mother lacked the necessary testamentary capacity to create a valid will in February 2006, when the document was executed.

[7] The law respecting testamentary capacity is well settled. A general statement of the law in this regard may be found at section 2.6 of James MacKenzie, *Feeney's Canadian Law of Wills,* 4th ed. (Markham: LexisNexis, looseleaf updated December 2010) 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 proved 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.
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> 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.

2.13 An elderly person's mental powers may so reduced that he or she has lost testamentary capacity. Nevertheless, a person diagnosed as suffering from senile dementia may be able to make a will. The mind of the old person must be capable of carrying apprehension beyond a limited range of familiar and suggested topics. Merely to be able to make rational responses is not enough, nor to repeat a tutored formula of simple terms. The mind must be able to comprehend of its own initiative and volition. . . .

2.14 Conversely, the courts, ought not to be too eager to reject the wills of the elderly. Diminished capacity does not mean there is a lack of capacity and the courts should strive to give effect to the intentions of testators. In *Candido v. Ciardullo,* Robinson J. quoted with approval the words of the Supreme Court of Canada in *Laramee v. Ferron*:

> We must be careful not to substitute suspicion for proof. We must not be an extensive doing so render ti impossible for old people to make wills of their little worldly goods. The eye may go dim, the ear may lose its acute sense, and even the tongue may falter at names and objects its attempts to describe, yet the testamentary capacity be ample.
>
> To deprive lightly the aged thus afflicted of the right to make a will would often be to rob them of their last protection against cruelty or wrong on the part of those surrounding them and of their only means of attracting towards them such help, comforts and tenderness as old age needs.

2.15 It is a question of fact – one of degree – in each case whether the person has sufficient mental power left to appreciate and understand the testamentary act. There may be good reasons for the apparent asymmetrical or adverse treatment of family members in a will. We have an increased awareness of the prevalence of Alzheimer's disease which was likely present in many older decisions of senile dementia. Diagnosis of this condition is not conclusive of testamentary capacity, particularly as, like senile dementia generally, it is progressive. In *Fuller,* the court seemed to suggest that the delusions that may accompany Alzheimer's disease, may not in themselves be sufficient to vitiate the required mental capacity, but may be evidence of a general lack of capacity.

[8] The issue of the "relevant time" must also be examined. Relevant time was defined in *Feeney* as follows:

> 2.16 Subsequent incapacity does not invalidate a valid will made previously and an incapacitated person cannot revoke or change a will made before becoming incapacitated. The first relevant time for the necessary capacity to make a will is when instructions for the preparation of the will are given. If a person has capacity then, she may make a good will later, so long as she knows that she is executing a will for which she has previously given instructions and is physically capable of showing her assent thereto. In *Brownhill Estate*, O'Hearn J. (at 223) discussed the relevant time for determining the efficacy of execution:
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> > The law is clear that the time for determining testamentary capacity is the time of giving instructions and executing the will. Various subtleties attach to these two times and their inter-relationships. Theoretically, a testatrix could give instructions when she was not really competent to do so but could upon subsequently becoming competent accept the will as drafted according to the instructions as her true and proper will and execute it validly. On the other hand, there are cases where the testatrix may when fully competent give instructions and subsequently execute the will drafted thereon, in the confidence that it embodies her will, even though in the meanwhile, her mental powers have deteriorated to the extent that she is not able to understand the language of the will.

[9] In the assessment of testamentary capacity the issues of suspicious circumstances and undue influence often arise.

[10] In *Willis Estate (Re)*, 2009 NSSC 231, Murphy J. reviewed these principles:

> 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 P.E.S.C.T.D. 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*, *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.

[11] *Feeney, supra*, comments at para. 2.19:

> 2.19 ... The idea of suspicious circumstances originated in *Barry v. Butlin.* Davey L.J. advanced the general proposition that "wherever a will is prepared under circumstances that raise a well-grounded suspicion that it does not express the mind of the testator, the court ought not to pronounce in favour of it unless that suspicion is removed." . . .
>
> 2.25 In *Ostrander v. Black,* Granger J. summarized the results of *Vout*, and added that a mere allegation of lack of capacity was not enough to defeat the presumption of capacity and knowledge and approval of contents – those attacking the will must establish some basis in evidence for the proposition that the testator lacked capacity. Suspicious circumstances could constitute the evidentiary base, and, in the event, the propounder would regain the formal onus of proving capacity which would inevitably entail removing the suspicions. In other words, a court might draw an inference from the facts before it (from the "suspicious circumstances"), that there was either a lack of capacity or a lack of knowledge and approval of contents of the will. In such cases the propounders of the will would have to meet or rebut that inference with positive evidence of capacity and knowledge and approval of contents to secure probate. If the

> evidence in this regard is not clear and convincing, if the propounders offer little or no responsive evidence, the will will be rejected. The more recent judgment in *Scott v. Cousins*, also addressed the relationship between evidence of suspicious circumstances that is sufficient to rebut the presumption of testamentary capacity and such evidence that might be necessary to establish undue influence. The decision confirms that the strength of inference lies on a continuum depending upon the evidence in a particular case. This decision also establishes that testimony of interested deceased persons (in this case the person who was alleged to have exerted undue influence on the will-maker), while a species of hearsay evidence, is nevertheless admissible to establish undue influence as it might also be so admissible to rebut the notion of undue influence. Similarly, in *Mitchell v. Mitchell*, the admissible statements were those of the testator.

EVIDENCE AND ANALYSIS

Madge Yorke's Assets

[12] Madge Yorke had been a career school teacher, with a teaching certificate from the Normal College in Truro. She never gained a higher license by further education. Her husband was a mechanic. He died in 1969. They owned their home – a set of flats on 6032 - 6034 Williams Street in Halifax and had in fact managed to accumulate savings over the years, represented by investment certificates and shares in Emera and Aliant.

[13] At the time of her death Madge Yorke's income was approximately $40,000 per year. This was made up of her teacher's pension (approximately $12,000 per annum), C.P.P. and Old Age Security, monthly receipts from an annuity and rent of $650 per month from the downstairs flat. The house assessed at her death for $264,600 was by far the most significant asset of the estate.

THE WILLS MADE BETWEEN 1999 - 2006

[14] The applicant Barbara Nieuwland testified that she had never actually seen any of the wills her mother had made, but knew her wishes well. "She always wanted everything divided equally." She testified that she was surprised by the contents of the 2006 will and only after deciding to challenge this will did she see the earlier wills previously made.

[15] It is useful to review these earlier documents. The earliest will in evidence is a handwritten document dated August 10, 1999 (Exhibit 1, Tab A). That will divided the estate between the two daughters and provided for certain gifts (1) $200 to the Grace United Church in Port Greville, Cumberland County and (2) $5,000 to each of Madge Yorke's five grandsons. Elizabeth Yorke never married and had no children. Her daughter Elizabeth Yorke and her son-in-law William Nieuwland were appointed co-executors.

[16] The first codicil to this will is handwritten and dated December 18, 2000. The codicil provides for three additional gifts, beyond those stipulated in the will. These gifts were as follows:

> 1. Pay or transfer the sum of $2,000.00 to my son in law, William Nieuwland for his own use absolutely;
>
> 2. Pay or transfer the sum of $1,000.00 to my friend, Joanne Keating, of Halifax, Nova Scotia for her own use absolutely;
>
> 3. to give to my friend, Joanne Keating, an article of personal or domestic use and an ornament from my house of her choice in consultation with my executor.

[17] The codicil was prepared by lawyer George Clarke, Q.C., who attended at the Queen Elizabeth II Hospital and wrote the document out in his own hand at Madge Yorke's instruction. It was the first time he had met Mrs. Yorke.

[18] In evidence, he did not remember when and where the execution of the document took place, but the evidence of Barbara Nieuwland confirms Mrs. Yorke was in the Queen Elizabeth II Hospital at the time, the day she arrived from Ontario to visit.

[19] From this date forward he was involved in the preparation of her wills and power of attorney.

[20] The next document in evidence before me is an enduring power of attorney dated October 23, 2003 appointing Elizabeth Yorke of Toronto as her attorney. A power of attorney was also apparently executed soon after the codicil in 2000 also appointing Elizabeth Yorke as attorney. This is confirmed by the evidence of both

Elizabeth Yorke and Barbara Nieuwland, but that power of attorney is not in evidence.

[21] Mr. Clarke was contacted by Elizabeth Yorke with instructions to prepare the power of attorney for her mother in October 2003, so that "Liz could manage her mother's affairs," he testified. Her mother would then have been 91 years of age. Mr. Clarke prepared the document and attended Madge Yorke's home on October 23, 2003, where Madge Yorke executed the document.

[22] Next followed a will executed October 27, 2003, which only differed from the earlier holograph will in that it provided that the testatrix's home at 6032 - 6034 Williams Street in Halifax now had to be conveyed or transferred to her daughter Elizabeth Yorke on condition that she pay one-half of its assessed value at the time of her death to her daughter Barbara Nieuwland. The residue was then to be divided equally between them.

[23] Mr. Clarke testified he met Madge Yorke again on October 27, 2003, having again received his instructions by telephone from Elizabeth Yorke. His notes are found in Exhibit 1, Tab D, and indicate that Elizabeth is to get the house on condition she pay one-half of the assessed value to her sister Barbara Nieuwland, "she feels Eliz should not have to pay half the fair market value because it will be high and Barb's family is getting money as well."

[24] The original of this will was shredded when it was replaced by the March 30, 2005 will. A copy of this 2003 will is found at Exhibit 1, Tab E. Mr. Clarke's notes of the changes to that instrument are found at Exhibit 1, Tab F.

[25] Mr. Clarke testified as to his practice. Upon receiving instructions from a member of the family, he drafts the will and brings the document to the testator, if they cannot attend his office. He meets privately with the testator, in the presence of a witness from the office. It is his practise to go through the document from start to finish to be assured these are the testator's personal wishes and competency.

[26] Next, follows the will dated March 30, 2005. Mr. Clarke had noted the requested changes on the unexecuted copy I just referred to. This will appointed Elizabeth Yorke the sole executrix to the exclusion of William Nieuwland, eliminated the $200 gift to the United Church at Port Greville and reduced William Nieuwland's $2,000 gift to $200. The provision respecting the testatrix giving

Elizabeth the house so long as she paid one-half of the assessed value to her sister Barbara remained the same as did the residue clause.

[27] Next followed the present will which is contested dated February 9, 2006. In this will Elizabeth Yorke remains the sole executrix and trustee. Again, Elizabeth Yorke gave Mr. Clarke the instructions for changes to her mother's previous will by telephone.

[28] The will provided now that the house on 6032 - 6034 Williams Street be conveyed to Elizabeth Yorke for her own use absolutely. It provided for additional bequests of personal property: a secretary desk to Elizabeth Yorke; a pink and white bedspread to Joanne Keating; a set of green glass dishes to Barbara Nieuwland; a quilt and article of personal possession to each of the five grandsons; a $200 gift to William Nieuwland; and a $1,000 gift to her caregiver Martha DeBaie.

[29] The residue of the estate was now divided twenty-five percent to her daughter Barbara Nieuwland and the balance to be divided equally between her five grandsons.

[30] By this will, Barbara Nieuwland was effectively cut from the estate, left with only a small interest in the residue, i.e. bank accounts that were being depleted for the testatrix's care in her old age. At her death, the value of these accounts, G.I.C., and share certificates was $75,000 of which Barbara Nieuwland would receive twenty-five percent after all the estate expenses were paid, a sum something less than $15,000, while her sister would be conveyed the family home whose value was $264,000. The inventory of the estate is shown in Exhibit 3.

[31] The issue is, did Madge Avis Yorke intend this result when she made her last will and testament on February 9, 2006 and did she have the legal capacity to make this will?

[32] Madge Yorke executed this will at her home in her bed, in the presence of George Clarke and his articled clerk George Ash, who met with her alone. Mr. Clarke read each clause of the will to her and was satisfied that she was aware and understood the document and agreed to its execution. Mr. Ash related how Madge Yorke greeted him and asked where he was from and appeared to be competent in their brief conversation.

[33] In the two years and four months that passed from the execution of the 2003 will, Madge Yorke's handwriting in 2006 is very noticeably different and very frail writing. Mr. Clarke testified that Madge Yorke "started to sign up at the top and I brought her down to the line." Mr. Clarke testified that there have been other occasions in his practice where he had not been certain of a testator's competency and had asked for a letter from their physician as to testamentary capacity. On other occasions, he simply refused to allow the execution of the document.

[34] Mr. Clarke did not ask Madge Yorke to outline her assets for him and had not obtained a list of her assets from Elizabeth Yorke. He did testify that he spoke to her about the significant change in the will, giving her home to Elizabeth absolutely. He testified that Madge Yorke said her daughter Barbara lived in Ontario with her husband, that she had given her money in the past and felt it was reasonable. The review of the document and the execution took about one-half hour he testified.

[35] Mr. Clarke testified on cross-examination that he knew Madge Yorke had a fall and was bedridden. He was not aware that she had hearing loss in her right ear, but had in any event sat on the left side of her bed.

[36] Mr. Clarke also testified that he was unaware Dr. Gibbon was her personal physician or that there had been any previous concerns about her mental capacity as reflected in Dr. Gibbon's notations of June 2005 – "marked restriction in remembering" – “does not know date – day month? knows me?” – "dementia – family feels confused few days" and another notation on October, 5, 2005 – "dreams she's pregnant – ruminates on this during the day – disoriented to time 1990 place and person.”

[37] Mr. Clarke testified that had he been aware that there were any previous concerns about Madge Yorke losing mental capacity, he would have asked for a physician’s opinion and a formal medical assessment of her competency.

[38] He also testified that he did not phone Madge Yorke and confirm with her personally the instructions he received from her daughter.

[39] Mr. Clarke agreed that he had not asked Mrs. Yorke to list her assets orally or in writing and tell him of her wishes before he began his clause by clause review

of the will nor had he sent a draft will by post, before he arrived at her home for the execution of the will.

[40] In fairness to Mr. Clarke, he had met Madge Yorke only four times before February 2006. He knew she was aging, but did not notice a significant difference. He had not been briefed by Elizabeth Yorke on her physical or mental decline over this period. He saw the same gracious lady, resting in bed in seeming agreement with each clause of the will that he read to her.

[41] As he was unaware of the value of the estate he accepted the notion that Barbara Nieuwland had received money in past years and would with her sons receive the residue of cash, as Elizabeth Yorke was getting the house and had given up her interest in the residue. He testified he did not consider the *Testator's Family Maintenance Act* or the issue of an unfair distribution of the estate.

[42] In my view, he was perhaps lulled into a sense that Mrs. Yorke was a lady who made a change in her will from time to time and asked her daughter Elizabeth Yorke to assist her in this cause. He was use to receiving instruction from Elizabeth Yorke and there were no alarm bells or cautions raised by Elizabeth Yorke about her mother's declining health.

[43] In the course of this application a profile of Madge Yorke's family has emerged, as both her daughters testified. This is important evidence as it reflects Madge Yorke's relationships and dealings with her daughters.

[44] Elizabeth Yorke is a social worker. She is 64 years old, just 13 months older than Barbara, who was born in March 1947. Barbara is a school teacher. Both girls graduated for Queen Elizabeth High School. Elizabeth went to Mount Allison University for her undergraduate degree and Barbara went to Queens University.

[45] Elizabeth Yorke testified that as sisters they were never close and their relationship was strained in the 1980's.

[46] Barbara testified that they were close in the early years, even living together in Toronto in the summer of 1967. Barbara spent from 1969 to 1972 living in France teaching English and studying. Elizabeth visited her there. Upon Barbara's return she testified she lived with her sister in Toronto for two years, before meeting and marrying Bill Nieuwland.

[47] By Barbara's account, they spent a lot of time together. She had helped her sister look for a house to buy in Toronto. She and Bill Nieuwland were married in the backyard of that house. Bill had helped sand the floors and refurbish a bathroom. They thought of Elizabeth's house as a second home.

[48] Barbara Nieuwland had five boys between 1979 and 1989. The eldest Martin is now 31 years of age, Jonathan 28, Ben 24 and twin's David and Matthew 21.

[49] How often each of the girls visited their mother in Nova Scotia has been an issue in this proceeding with each daughter assuring the court they were close to their mother and attentive to her needs.

[50] Barbara Nieuwland testified that as her family grew in the 1980's her mother often visited her in Midland, Ontario, about one and a half hours north of Toronto. She testified that her mother visited as many as four times a year, in some years. Barbara Nieuwland tried to get home to Nova Scotia each year, often bringing one or two of the boys with her on each visit. Her mother spent most Christmases in Midland with the Nieuwlands. Madge Yorke's last visit to Midland was in 1998, when she announced it was getting too difficult for her to travel. She was then 86 years of age.

[51] Barbara testified that a rift in the family developed in the early 1980's about six months after her second son Jonathan was born. Elizabeth Yorke, no longer wanted to see Barbara or her mother. When urged by the court to explain this rift she testified that Elizabeth had a nervous breakdown and blamed her difficulties on her mother, resulting in a lot of hurt, that took many years to heal.

[52] Barbara Nieuwland testified that when Madge Yorke then came to Midland, Elizabeth would not come to Barbara's home and the only way Madge could visit her was to take public transit from Midland to Toronto, a one and a half hour long trip. She testified her mother took her own sister with her on these visits and had not stayed overnight with Elizabeth after 1982. Elizabeth had earlier asked that Barbara and Bill return the key they had to her home in Toronto.

[53] Barbara Nieuwland testified that her mother always tried to keep the door open to Elizabeth so that their relationship could be restored.

[54] Barbara Nieuwland testified that she did not see her sister for several years and in fact made a point of taking her seven-month-old son to visit her at Christmas in 1986.

[55] Elizabeth Yorke's evidence is that she was a social worker in the 1980's, working at the Princess Margaret Hospital from 1983 to 1986, but later gave up social work in the 1990's to become a management consultant, who did private contract work. She also once ran for public office in 1988 but lost.

[56] Elizabeth Yorke testified that she tried to come to Nova Scotia once a year through the 1980's to visit her mother but not in the year 1988.

[57] Her travels to Nova Scotia increased in the 1990's and she testified she came to Nova Scotia about four times per year.

[58] Elizabeth Yorke became interested in the "blueberry lands" located near Parrsboro, Nova Scotia, lands her mother owned that had been in her father's family. She wanted to build a cottage on these lands and asked her mother to deed the lands to her. The parcel was 50 acres in size, of which approximately 12 acres was cultivated in blueberries.

[59] Madge Yorke consulted Barbara with respect to giving the land to Elizabeth. Barbara Nieuwland agreed to the conveyance as she testified that her mother had given her significant sums of money to help her in the 1980's and 1990's as her family grew.

[60] Both Barbara Nieuwland and her husband Bill were teachers although Barbara Nieuwland only taught half-time for a period when her family was young from 1982 to 1996, but returned almost full-time in 1997 and full-time in 1998. The land transfer to Elizabeth was intended to even the ledger for the sums of money advanced to Barbara. Both girls testified of their agreement to this arrangement.

[61] During her mother's life Barbara Nieuwland was quite involved in her care. In 1979, Madge Yorke had back troubles and Barbara Nieuwland came to Halifax and stayed with her mother for five weeks, bringing her newborn first son with her.

In 1984, her mother had breast cancer. She came and stayed with her mother for two weeks. Her mother recovered.

[62] In 1987, Barbara Nieuwland's son was badly burned and was hospitalized for two months requiring seven surgeries. Madge Yorke came to Midland, Ontario and stayed for two weeks to help Barbara with her family.

[63] During the period of the late 1990's, Barbara Nieuwland continued to be involved in her mother's well-being and spoke often with a close friend and neighbour of Madge Yorke – Joanne Keating, whom she described as being like a third daughter in the family.

[64] Barbara Nieuwland remembers her mother having dizzy spells in 1998 and 1999 possibly due to her mixing up in her medications. When she became disoriented, Joanne Keating called Barbara Nieuwland and she flew to Halifax to ensure her mother got medical attention. She did. Exhibit 2, p. 64.

[65] In the year 2000, Joanne Keating called both daughters to say that Madge was having heart troubles and that she had taken her to the hospital. Both sisters came from Ontario, Elizabeth Yorke arriving first. Their mother had surgery and recovered fully after angioplasty.

[66] Around this time Barbara Nieuwland testified her mother told her that Elizabeth wanted a power of attorney for her and was that okay. Barbara Nieuwland testified she said yes, relieved to know Elizabeth Yorke would be helping out and was involved in her mother's life, although she and her sister were not close. She was surprised to learn a power of attorney was also executed on October 23, 2003.

[67] Barbara Nieuwland's life was busy with her large family, but became more complicated from 2000 onward – until her mother's death and I have no doubt this has some bearing on Elizabeth Yorke's greater involvement with her mother's care.

[68] From the 1990's, Elizabeth Yorke visited her mother about four times a year and even more regularly in 2005 and 2006. She had by now completed her cottage built between 1997 -1999, and had secured contract work in Nova Scotia. She could arrange business travel and visits to her mother, travelling to Nova Scotia 12

times in 2005 and six times in 2006 before her mother's death. She had very admirably committed herself to ensuring her mother stayed in her home and had good care until her death.

[69] By March 2005, she was taking care of her mother's finances and arranging payment of caregivers who stayed with her mother almost six hours per day, although it became apparent to her that her mother required more care.

[70] In 2003, Barbara Nieuwland's son Jonathan had a brain haemorrhage and was diagnosed with a microscopic tumor at the back of the brain, known as an arteriovenous malformation. This is a congenital problem that also later affected a second son David at the age of 16. Jonathan had two subsequent surgeries in June 2005, 10 days apart to fully remove the tumor. David was admitted that same month for his brain surgery and spent 25 days in hospital. Barbara Nieuwland testified that in an earlier time Madge Yorke would have responded with great concern to these events. In 2003, she did not even tell her neighbour and lifelong friend Hazel Peters of her grandson's Jonathan's brain surgery and Hazel Peters was consequently upset with Barbara Nieuwland for not visiting enough. Nor did Elizabeth Yorke tell Mrs. Peters of Barbara Nieuwland's circumstances.

[71] In the meantime, Barbara Nieuwland's husband Bill, who had suffered from depression throughout their marriage was hospitalized in 1999 for three months, in the year 2000 for one month, in the year 2005 in a two-month treatment programme in Guelph, Ontario and later a five-week residential programme in 2006. This was really a period of crisis for Barbara Nieuwland and she was grateful that her sister was involved with her mother.

[72] Barbara Nieuwland's evidence was that she was trying to educate her sons in university and maintain their home, pay all the bills herself and look after her husband. She had not budgeted properly and in March 2005 asked her mother for financial help. She was uncertain if she had asked for five or ten thousand dollars. By this time her sister Elizabeth was in charge of her mother's finances and now concerned about her cost of future care told Madge Yorke to say no to her daughter's request. It is Barbara Nieuwland's evidence that her mother could not then fathom the gravity of both her sons' illnesses and imminent surgery.

[73] The sisters' relationship had not been good for some time. Elizabeth characterizes her sister as always looking for money from her mother, while she

Elizabeth had to be the fiscally responsible daughter and ensure there would be money for her mother's care.

[74] From my own analysis of the evidence, I believe it is obvious that both girls sought and took money from their mother often over the years. Barbara Nieuwland's needs were greater as she had five boys. Yet, between 1997 and 1999, Elizabeth Yorke took between forty and fifty thousand dollars from her mother to complete her cottage at Fox River near Parrsboro, over and above the deed of the blueberry lands. In my view, both girls felt a sense of entitlement to funds from their mother during her lifetime and it is remarkable that Madge Yorke had been so frugal through her lifetime and been able to give in excess of $91,000 to Barbara Nieuwland and her family and give in excess of $82,000 to Elizabeth Yorke plus the blueberry lands. A reconciliation of funds given to the girls is found at Exhibit 5 and Exhibit 7, and although it may not contain every transaction it is agreed by Barbara and Elizabeth that the total amounts given to each daughter were probably largely accurate.

[75] What is abundantly clear to me is that Madge Yorke kept detailed records of the monies she gave her daughters and was always very careful to ensure neither daughter received more than the other.

[76] As far back as 1984, when she helped Barbara Nieuwland purchase a new car with her $12,000 gift, she then gave Elizabeth Yorke $13,000. Later she gave the blueberry lands to Elizabeth Yorke to even the ledger as Barbara Nieuwland had received more cash gifts to that date.

[77] Barbara Nieuwland's evidence is that once her mother refused her when she asked her mother for her shares in Aliant. She wanted to keep them for her own security. Barbara Nieuwland's last request for cash was in March 2005, when her sister wrote to her on March 17, 2005, saying "Our mother has found your continued demands for money extremely upsetting to deal with . . . ." She did offer to pay "reasonable hotel expenses while Jonathan is in Toronto receiving medical care."

[78] Elizabeth Yorke then wrote in May 2005, the following:

> May 20, 2005

> Dear Barbie & Bill:
>
> Please find enclosed a cheque for $500.00 to subsidize your expenses while Jonathan is in hospital the end of this month.
>
> As I explained in my letter of March 17, 2005, our mother has very little money left and what she does have needs to be kept intact for any future care she may require to continue to age in place, at home. She is unable to give you any additional funds. If you are experiencing financial stress, I trust that you are both making efforts to deal with it yourselves, such as having summer jobs for either or both of you, and I wish you the best in these endeavours.
>
> Elizabeth

[79] Considering the real crisis in Barbara Nieuwland's life, with her husband seriously depressed and hospitalized and two sons requiring brain surgery, at the same time Elizabeth Yorke's correspondence lacks any warmth or understanding of her sister's situation.

[80] I accept that from 2003 onward Barbara Nieuwland was really unable to look after her mother or even visit frequently. Barbara Nieuwland acknowledged that in 2002 she visited her mother for one week. In 2004, she visited for a long weekend in November. In August 2005, she visited for the first week of August with her sons, Martin, Benjamin and David and returned three weeks later for a visit with her husband Bill and son Jonathan.

[81] Barbara Nieuwland's evidence is, however, that she kept in touch by speaking on the phone to both her mother and her caregivers and spoke with their family friend Joanne Keating frequently. In January 2006, Barbara Nieuwland testified she asked her mother about Joanne Keating and her mother responded that "Joanne is in the playhouse with Barbie." There was in fact an old playhouse in the backyard, built by Mr. Yorke when the girls were children.

[82] Barbara Nieuwland's evidence was that she knew her mother was failing from 2002 onward, when she stopped going to the bank herself and needed Joanne Keating's help to get there. Barbara Nieuwland also testified she spoke with Dr. Gibbon her mother's physician from time to time of her failing health.

[83] Barbara Nieuwland testified that her mother spent many hours of the day in bed, indeed as much as 18 hours and lost interest in life, also becoming very forgetful. Her mother lived in the upstairs flat and did not want to navigate the stairs to leave her home and seldom did.

[84] Although she had less face to face contact with her mother, I accept Barbara Nieuwland's evidence of her knowledge of the state of her mother's decline and her lack of competence.

[85] The court heard evidence from two caregivers as to the state of Madge Yorke's health and level of competency in June 2005 and beyond. Trish Pickrem was a caregiver hired for the month of June 2005, to assist Lorraine Peters, a neighbour and caregiver who had been taking care of Madge Yorke, a few hours a day from March 2005. The idea was to increase the number of hours of care available to Madge Yorke each day. Ms. Pickrem's daughter a university student sometimes also sat with Madge Yorke.

[86] Ms. Pickrem met Elizabeth Yorke in early June 2005. She testified that Elizabeth Yorke told her that her mother had dementia and that her cognitive skills were not what they use to be.

[87] Ms. Pickrem recounted frequent episodes of confusion on Madge Yorke's part and indeed hallucinations on more than one occasion when she imagined and thought she saw people in her living room. She also recounted how Madge Yorke misplaced things and lost her cash box for two weeks. It was eventually found in a drawer between quilts. While care had been arranged for her in the morning and returning at suppertime, she could be in a confused and frightened state when alone in the evening. It was clear by June 2005, she required more hours of care and would benefit if a single caregiver could be hired. Elizabeth Yorke hired Martha DeBaie on July 1, 2005. She worked from 9:00 a.m. to 6 p.m. Martha DeBaie said she started staying over night in January 2006. However, there were times between September and December 2005 she stayed overnight as Madge Yorke did not wish to be alone. Her confused state and dementia are the very reason why Elizabeth Yorke engaged Martha DeBaie.

[88] Elizabeth Yorke and Martha Debaie, Madge Yorke's last caregiver through July 2005 until her death, have both testified that Madge Yorke's earlier periods of confusion could be explained either by the presence of a urinary tract infection or

by high sugar levels that could be controlled by diet. Madge Yorke was treated for a urinary tract infection in October 2005. Indeed, they left the impression that after Martha DeBaie took on her duties, Madge Yorke was always clear-headed and alert.

[89] They both testified that she declined in the summer of 2006.

[90] Elizabeth Yorke described her mother as being in good shape, knowing where she was, where her precious things were and knew the story of all of her possessions. She describes her mother in actively hiring her own caregiver, writing cheques, keeping track of her bank balances even in 2005 after Elizabeth Yorke began paying her bills.

[91] Elizabeth Yorke also testified that up until May 2006, she had also discussed with her mother who understood the purpose of a Royal Bank of Canada line of credit on her home, to access the equity of her home to help pay for her care. This is an important episode because after Royal Bank officials spoke with Madge Yorke in May 2006 in her home, Elizabeth Yorke contacted George Clarke and was about to use her power of attorney to execute the mortgage. They discussed Madge Yorke's competency and George Clarke asked that Elizabeth Yorke arrange a medical assessment of her mental capacity. In July 2006, Dr. Gibbon found Madge Yorke to be incompetent. This was, however, four months following the execution of the will.

[92] Elizabeth Yorke and Martha Debaie described how they took Madge Yorke on outings by car to Tim Horton's, the Dairy Queen or just for a drive. To facilitate her mobility on the stairs Elizabeth Yorke purchased a stair glider, which was installed in the spring of 2006.

[93] Elizabeth Yorke also testified that after Barbara Nieuwland's visits in August 2005, her mother spoke to her "about the logistics of the will" and of the house and wanted Elizabeth to have it outright and not have to pay anything to Barbara. Elizabeth Yorke testified that her mother also spoke to Martha about it and Martha had called Elizabeth to discuss this conversation.

[94] Martha DeBaie testified that Madge Yorke was sitting looking out of the kitchen window and began telling Martha how she wished her two girls were closer; that she had given so much money to Barbara, Bill and the boys and said, "I

didn't give Liz nothing." Martha DeBaie testified that Madge Yorke knew what she was saying and said it with conviction. She then testified that Madge Yorke got up one morning and was "sharp as a tack" and asked for her lawyer. Elizabeth Yorke also testified that she had possessed written instructions from her mother respecting her wishes, but threw the paper away.

[95] Martha DeBaie and her husband Blaine live rent-free at Madge Yorke's home, at Elizabeth Yorke's request to stay and look after the place, since January 2006.

[96] Credibility looms as a significant issue in this trial. Frankly, Martha DeBaie was in my view, a poor witness who was too supportive of ElizabethYorke. In her testimony she portrayed Barbara Nieuwland in a negative light when they met in August 2005 testifying Barbara Nieuwland got up and went out all day and did not spend any time with her mother. She also minimized Madge Yorke's cognitive failures, in my view, to support Elizabeth Yorke's defence of the will.

[97] Ms. DeBaie when cross-examined could not remember instances of Madge Yorke's confusion or hallucination and insisted that Madge Yorke as being very sharp after she ensured Madge was eating properly "not just cookies." She did, however, testify that in January 2006, Madge Yorke had a fall and could not remember that it had happened until two weeks later.

[98] This evidence is certainly contradicted by the experience of Barbara Nieuwland and of Madge Yorke's cousin John McCabe and his friend James Allan Scott, who testified about her decline and her vacant responses the last time they had her on an outing for Mother's Day 2005. On that day Madge Yorke struggled to respond to questions asked of her.

[99] Unfortunately Dr. Stephen Gibbon was not of much assistance to the court and although he recorded numerous instances of cognitive problems, he testified that in the absence of his ever having been asked to do a formal cognitive assessment on Madge Yorke, he could not say whether she suffered from dementia or delirium. He agreed that her confusion could be brought on by a medical event such as a urinary tract infection.

[100] On the basis of all of the evidence that is before me, I have grave concerns as to Madge Yorke's competency in February 2006, when she executed the last

will, that is challenged in this proceeding. Indeed, it is my view that she suffered from dementia throughout 2005-2006 when she was in a general state of cognitive and physical decline.

[101] Mr. Wright has urged the court to focus on her cognitive state on February 9, 2006 alone, suggesting that Madge Yorke does not need a perfect state of mind, as long as she knew what she had and understood the bequests she was making. He urges me to accept that she was clear and cogent on that day, as was testified by George Clarke and George Ash. Relying on *Re Brownhill Estate* (1986), 72 N.S.R. (2d) 181 (N.S. Prob. Ct.) at para. 50:

> 50 The law is clear that the time for determining testamentary capacity is the time of giving instructions and executing the will. Various subtleties attach to these two times and their interrelationships. Theoretically, a testatrix could give instructions when she was not really competent to do so but could upon subsequently becoming competent accept the will as drafted according to the instructions as her true and proper will and execute it validly. On the other hand, there are cases where the testatrix may when fully competent give instructions and subsequently execute the will drafted thereon, in the confidence that it embodies her will, even though in the meanwhile her mental powers have deteriorated to the extent that she is not able to understand the language of the will. In the instant case these particular problems do not seem to arise. I am satisfied that the will was executed in due form of law as prescribed by the Wills Act and that it adequately and justly represents her instructions. The question of a sound disposing mind still arises on the evidence, as well as the question of undue influence. Events subsequent to the execution of the will may throw some light on either or both of these questions.

[102] *Brownhill* is an interesting case, however, where the testatrix received independent legal advice and was left alone for a period of some hours with a lawyer, Mr. C. W. Burchell and where her own handwritten note respecting the disposition of her was in evidence.

[103] Mr. Wright urges the court to accept the reasonable explanation that Madge Yorke had provided for Barbara Nieuwland and her family over the years and now wanted to look after Elizabeth Yorke. It is his view that singular incidents of Madge Yorke's failing health or temporary dementia should not overtake her right to have her testamentary choices respected in the execution of the February 9, 2006 will.

[104] I must respectfully disagree. The burden falls to the proponent of the will where suspicious circumstances are present relating to the preparation of Madge Yorke's will and her mental capacity.

[105] I find that there are suspicious circumstances relating to these two issues. I accept the evidence of Trish Pickrem, who has made independent observations through the full month of June 2005 and noted that Elizabeth Yorke told her that her mother suffered from dementia. This is also supported by Dr. Gibbon's note of June 23, 2005 that "the family feels she is confused." I do not accept Elizabeth Yorke's evidence that her mother was sharp. In particular, I do not accept that her mother was struggling with the logistics of her 2005 will. "She felt her will in 2005 was somewhat cumbersome and that, she wanted, she didn't, she didn't feel satisfied with it." Nor do I accept a rather confused explanation Elizabeth Yorke gave about keeping the equity high in the home and her mother understanding the arrangements being made to mortgage the property.

[106] The one thing that is very clear to me in considering all the evidence is that Madge Yorke went to great pains to ensure her daughters were treated fairly and equally, even during a time Elizabeth Yorke was estranged from her. I do not accept Elizabeth Yorke's evidence when she testified, "Okay, she felt that the, that my sister had been given more funds, and her family, have been given more funds over the years then I had and so, she felt this was one way of smoothing it out and equalizing it."

[107] Madge Yorke kept notes of every gift given and ensured often that the ledger was balanced. I accept that in her failing health it may have been a burden to her to deal with requests from her daughter Barbara for funds in February and March 2005, as she was by then totally reliant on Elizabeth Yorke to look after her financial affairs and was not able to understand the magnitude of Barbara's situation. She was in declining health and frail mental capacity throughout 2005 and 2006. It is my view, she would not and could not have directed her mind to the logistics of the 2005 will as Elizabeth Yorke and Martha DeBaie suggest. I simply do not believe their evidence on this point.

[108] Elizabeth Yorke was no doubt concerned with her mother's financial capacity to pay for full-time care. During the early 2000's, the task fell to her to take care of her mother as Barbara Nieuwland's life was preoccupied with the health of her sons and her husband.

[109] Elizabeth Yorke was in control. She asserted that control in arranging her mother's finances and her will, ensuring that she would receive the bulk of the estate in preference to her sister Barbara. She asserted that control over George Clarke as well, so that the execution of the will was more perfunctory than a careful exercise of testing her capacity by having her instruct him personally on the extent of her assets before the will was ever drafted. This would have been the appropriate time to test a testator's mental capacity, not at the time of execution of a will drafted on the instructions of the person who would become the main beneficiary.

[110] Elizabeth Yorke had a duty to mention her mother's failing physical and mental health to Mr. Clarke. She failed to do so. On all of the evidence that is before me, I do not accept that the will executed on February 9, 2006 expresses the mind and wishes of the testatrix. It is my view, expresses the instructions of Elizabeth Yorke.

[111] The respondent has not in a balance of probabilities removed my suspicions respecting her mother's testamentary capacity. She has not discharged her evidentiary burden to show that Madge Yorke possessed a disposing mind and memory that she understood and approved the contents of her will.

[112] Indeed, I believe she would be unhappy with the inequitable result of the 2006 will given her lifetime of equitable distribution of gifts to her children and her wish to always treat them fairly.

[113] Accordingly, I order that the will dated March 30, 2005 be admitted to probate.

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

Justice M. Heather Robertson