1993 **S.H. No. 93-1548**
102785

IN THE SUPREME COURT OF NOVA SCOTIA

BETWEEN:

MARY BARRY, Administrator of the Estate of EugeneTurner, deceased

Plaintiff

- and -

DELORES BEZANSON and **LARRY BEZANSON**

Defendants

D E C I S I O N

HEARD: **Before the Honourable Justice David W. Gruchy at Halifax, Nova Scotia, on January 16, 17 and 18, 1995**

DECISION: **March 8, 1995**

COUNSEL: **Nancy Elliott and Bernadette Maxwell, Counsel for the Plaintiff**
Wendy Johnston and Cheryl Hodder, Counsel for the Defendants

GRUCHY, J.

On January 18, 1993, Eugene Turner signed a Designation of Beneficiary form for certain retirement plan benefits whereby Delores Bezanson, his niece, became the beneficiary. The death benefits of the plan totalled $81,396.55. Mr. Turner died in the Victoria General Hospital in Halifax on March 3, 1993. He was then 59 years of age. He was a single man with no children. He was survived by his three sisters, Lydia Jarvis, Rosalie Falls and Mary Barry. Mary Barry was appointed administrator of Eugene Turner's estate on March 26, 1993.

In her capacity as administrator of the estate of Eugene Turner, Mrs. Barry has taken this action whereby she has claimed that the designation of Delores Bezanson as the beneficiary was obtained by fraudulent means, the designation was void for lack of proper execution by the deceased who lacked the capacity to execute such a designation, and that Delores Bezanson and her husband, Larry Bezanson, used undue influence on Eugene Turner to obtain his signature on the designation form. The claim is therefore for the return of all monies paid under the plan and, in effect, to void the designation.

ISSUES

The issues to be addressed are as follows:

1. Did Eugene Turner have the requisite capacity at the time of the signing of the designation of beneficiary?
2. Did the defendants, or either of them, exert undue influence upon Mr. Turner and thereby induce him to designate Delores Bezanson as the beneficiary?
3. Was there proper execution of the designation?

Factual Overview

Eugene Turner worked for 18 years as a janitor for the Department of National Defence. He was well regarded by his superiors and fellow employees. He had lived with a partner for approximately 7 years and then became ill in 1992. Until December of 1992 Mr. Turner resided with his partner but then he became so ill that his partner was unable to care for him. He then, for brief periods of time, resided with his sister, Mary Barry, and at other times was a patient at the Victoria General Hospital in Halifax.

Mr. Turner and members of his family had come originally from Yarmouth, N.S. Some of the family remained at Yarmouth, and some had come to Halifax. Mr. Turner was single and had maintained familial relationships with various members of his family. Much evidence was led concerning these relationships, but I found the various perceptions of closeness of relationships were so subjective that I am unable to reach any conclusion as to what Mr. Turner's feelings for any of them were at any particular time. Indeed, the truth is probably that the closeness varied from time to time and person to person according to circumstances then existing.

It is clear that for a period of time the deceased had considered Mary Barry his closest relative inasmuch as in 1988 he had designated her as his next of kin. In 1989 he changed that designation to his companion. As Mr. Turner became ill and required help, the latter relationship appears to have soured and in his final days he turned to his family for support.

Until December 17, 1992, Mr. Turner resided with his companion, when he had to be hospitalized as a result of his illnesses. He remained in hospital from December 17, 1992, to January 5, 1993.

On January 5, 1993, his employment sick leave ended and at approximately the same time he was discharged from the hospital.

When Mr. Turner realized that his sick leave was about to end and he would be required to go on unemployment insurance until his employer's long term disability plan became available, he sought the assistance of his niece, Delores Bezanson, and her husband, Larry Bezanson. Certain forms had to be obtained and filled out. While he had been close to Mary Barry, it was natural and convenient that he should turn to Mr. and Mrs. Bezanson; Mary Barry is illiterate and would not have been able to assist in obtaining and completing the forms to be obtained from the Department of National Defence. There is also a suggestion in the evidence that perhaps Mr. Turner was somewhat concerned about imposing responsibility for financial decisions on Mrs. Barry. On the other hand, Delores Bezanson is a bright, educated person and at that time her husband, Larry, had some time to spare as he was off work as a result of a back injury.

When Mr. Turner was discharged from the Victoria General Hospital, he returned to his apartment which he shared with his companion. He was still sick, however, and his companion did not or could not provide the assistance he needed. Therefore, on January 7, 1993, he asked Mrs. Barry for her help as he said his companion was "not using him right". Mrs. Barry arranged to move Mr. Turner into her home which she shared with Eric Kristjansson. There were, of course, financial considerations as Mrs. Barry had to purchase various things required for his care so Mr. Turner arranged for Mrs. Barry to have access to some money. On January 11 Mr. Turner wrote a letter authorizing Mrs. Barry to cash his cheques. As at that date, Mrs. Barry said that Mr. Turner's "...mind wasn't all that bad". On January 12, 1993, Mr. Turner wrote a letter authorizing the removal of his belongings from the apartment which he had shared with his companion.

During this same period Mr. Bezanson attended at the offices of the Department of National Defence concerning the various forms required and met Mrs. Peggy Buchanan, the administrator involved in such matters. In a conversation between Mrs.

Buchanan and Mr. Bezanson concerning Mr. Turner's affairs and the forms required, Mr. Bezanson had said that in order to have the forms signed, "we'll have to catch him on a good day - some days are not too good." On January 13 or 14 Mrs. Buchanan mailed the necessary forms to Mrs. Barry's residence.

On January 13, 1993, Mr. Turner was re-admitted to the Victoria General Hospital. Mr. Bezanson picked up the forms on January 18 and took them to the hospital. On that date the Designation of Beneficiary was signed. I will explore more fully below the circumstances surrounding the signing of this particular form.

When Mrs. Buchanan forwarded the necessary forms, she included instructions on how they were to be completed and was specific that they should not be dated. Mrs. Buchanan explained in testimony that she had found lay people did not really understand the legalistic method of dating forms and therefore she preferred that they not attempt to do so and she would do it for them. That is precisely what happened. The form was not dated and was delivered back to her on January 19. Mrs. Buchanan then completed the dating of the form and filed it.

On February 12, 1993, there was a family meeting at the Victoria General Hospital attended by various family members and hospital staff, including Mr. Turner's doctor, the hospital social worker and a member of the AIDS Coalition. The purpose of the meeting was to determine how best to care for Mr. Turner upon his discharge from hospital. He was discharged on February 17 and went to stay with Mrs. Barry.

On February 18, 1993, Mr. Turner executed a power of attorney to Mrs. Bezanson.

Mr. Turner stayed with Mrs. Barry from February 17 to February 26. During this period he needed almost constant care. He was very ill and suffered constantly from diarrhea and was unable to help himself. By February 26, 1993, Mrs. Barry said that his

"mind was all mixed up" and he was re-admitted to hospital. On March 3, 1993, Mr. Turner died in hospital.

Mr. Turner was buried in Yarmouth. Much evidence was given concerning this funeral as it apparently opened a rift within the family. Some of the family felt Mr. Turner should have had an expensive funeral, as he had expressed the wish to various people from time to time that he wanted to have a "decent burial". Others within the family felt Mr. Turner had wanted a simple funeral as he had become ashamed of his AIDS. This evidence concerning the funeral was largely irrelevant and I only admitted it for purposes of credibility.

After Mr. Turner's death, Mr. and Mrs. Bezanson obtained some of the death benefits payable pursuant to the group life insurance policy. At the time of the receipt of a cheque for those benefits, Mrs. Buchanan suggested that Mrs. Bezanson obtain legal advice and not spend any of the money until all matters concerning the estate and death benefits were settled.

Issue 1: Did Eugene Turner have the requisite capacity at the time of the signing of the Designation of Beneficiary?

The facts concerning Mr. Turner's mental capacity were examined in detail during the trial. Those facts are relevant as to both his mental capacity and his vulnerability to undue influence.

Mr. Bezanson felt he had had a good relationship with Eugene Turner. Mr. and Mrs. Bezanson had socialized to a relatively small degree with Mr. Turner. Mr. Bezanson had known for a couple of years that Mr. Turner was suffering from AIDS.

On January 13 Mr. and Mrs. Bezanson went to the hospital together to see Mr. Turner. Mr. Bezanson told Mr. Turner that his papers were in order for his

unemployment insurance benefits. After some conversation, Mr. Turner paused and rested and then told Mrs. Bezanson about his wishes for his funeral. He was upset and emotional. He told Mrs. Bezanson that he wanted to be buried in Yarmouth. He was apparently ashamed of the way he was dying. He asked Mrs. Bezanson to assure him that he would be buried in Yarmouth. According to Mr. Bezanson, he expressed some concern about who was going to get his money and then he said he wanted Delores to be his beneficiary. Both Mr. Turner and Delores Bezanson were emotional. Mr. Turner apparently expressed anger against other members of the family and wanted Delores to have his money. He wanted her to make sure his bills were taken care of. She said that he didn't have to do that - that is, give her his money. According to Mr. Bezanson, Mr. Turner was emphatic and said words to the effect that he wanted her to have it, "...those bastards won't be smoking up on my money".

On January 18 Mr. Bezanson took the various forms, including the Beneficiary Designation form, to the hospital around 1:00 p.m. He was alone. He had two "blue forms", or disability application forms, and the Beneficiary Designation form. Mr. Bezanson understood that the two blue forms were required as soon as possible in order to continue Mr. Turner's income. When Mr. Bezanson came into Mr. Turner's ward they conversed and Mr. Turner asked Mr. Bezanson if he had the papers. They talked about the blue forms and Mr. Bezanson filled them in. Pursuant to Mrs. Buchanan's instructions, Mr. Bezanson did not fill in the dates. Mr. Turner then signed the blue forms, undated. Mr. Bezanson said that Mr. Turner then asked if he had the beneficiary form and told Bezanson to go get someone to witness it. He suggested getting the Catholic Priest. Mr. Bezanson inquired, but the Priest was not available. Mr. Turner then told him to get the head nurse. He asked a nurse's aide to witness the form, but she went to get another person. That person, who Mr. Bezanson considered to be the head nurse, came in about 10 or 15 minutes later. Mr. Bezanson said that "Eugene was good". They chatted while they waited for the nurse to come. When she arrived, Mr. Bezanson asked her if she would witness the form and she agreed. The various details on the form concerning the personal identification of Eugene Turner were already typed in. Only the name and particulars of the beneficiary, the date,

the signature of Mr. Turner and that of a witness were required. Mr. Bezanson says he passed this person the paper and she read it. She asked Mr. Turner who he wanted as beneficiary and Mr. Turner had replied, "Delores Bezanson". Mr. Bezanson said that the nurse had trouble spelling the name Bezanson, but it was filled in, passed to Mr. Turner who then signed it. After he signed it, the nurse told Mr. Bezanson to witness it. They talked about the fact that the beneficiary was Mr. Bezanson's wife. Mr. Bezanson signed in the position indicated on the form as "witness (other than beneficiary)".

At discovery, Mr. Bezanson gave a somewhat different version of the signing: he had said: "So after the nurse come, she took the papers and read them and asked Eugene what did he want. And Eugene told him (sic) that he wanted his niece, Delores, to be designated on his paper. So I filled out the paper, put the name and that on it, and then he signed it and I asked the nurse, the head nurse, to witness it. But she said No, she said, I didn't have to witness it. She said you can witness it. So she read the paper and she says, anybody other than the beneficiary can sign it as a witness, so I witnessed the paper with her there." A little later in the discovery he described the signing as follows:

Q. Did you date the form when it was signed?

A. I don't remember dating the form.

Q. And you were the one who filled in who the beneficiary was?

A. Yeah.

Q. And was that filled in before or after Eugene signed it?

A. I can't say for certain, but I think he signed it, it was verbally mentioned, and then filled it in afterwards and then I witnessed it.

Q. So Delores' name wasn't on it when he signed it?

A. No, because I filled out my part after he -- after the nurse looked it over first, she asked him and he verbally said it and then I filled in what I had to fill in.

Mr. Bezanson said at both trial and on discovery that Mr. Turner was, "just as good as he could be, like, he wasn't disoriented...." He had no problems.

Professional' s Evidence

Dr. Frederick Willms is well experienced in H.I.V. disease. He treated Mr. Turner at the Victoria General Hospital. He was unavailable to give evidence at trial, but had written a report dated October 18, 1994, and was examined in discovery on November 23, 1994. By agreement Dr. Willms' qualifications, the report and the transcript of the discovery evidence were placed before me. It was agreed that I could refer to and rely upon the report and the evidence.

Dr. Willms' first-hand recollection of Mr. Turner was vague, but he reviewed the entire hospital chart and explained it in his report and evidence. In particular, Dr. Willms reviewed the chart with respect to determining the mental capability of Mr. Turner to sign a beneficiary form at or about the date on which the evidence showed it was signed. Between January 13 and 20, 1993, Mr. Turner was examined by one intern and two residents at different times and all three reported that his neurological examination was "grossly normal". Dr. Willms concurred with the assessment. He said,

> The term "grossly normal" neurological in general terms should include an assessment of mental status and competence to consent for treatment. Every physician is trained in a neurological examination and has the opportunity to perform mental status examinations in their training so that their neurological assessments subsequently include a mental status examination as part of their "grossly normal" neurological exam. This would vary from physician to physician and I cannot comment on the details of the examination performed by the various physicians as their (sic) not recorded on the chart.

On January 22 Dr. Willms noted on the chart that Mr. Turner appeared "able to consent to treatment". In order to make that assessment the patient is provided with information which he or she can understand, must be able to reiterate that information back

to the doctor and then interpret that information with respect to his or her own well being. As late as Mr. Turner's final admission to hospital, it was noted that he was still capable of consenting to treatment. Earlier, for a period in January, Mr. Turner "had an element of depression", but anti-depressant medication improved that condition. In any event, Dr. Willms opined that the clinically present depression did not impair Mr. Turner's ability to consent to treatment. His financial competence was not assessed. Dr. Willms final opinion was as follows:

> Given the multiple neurological assessments (for which I cannot attest to their details) my assessment that he was able to consent to treatment on 22 January, 1993, and Dr. Mann's subsequent assessment that he was able to consent to treatment suggest to me that at least as far as treatment is concerned Mr. Turner was competent to make decisions about his health. I am unable to comment on his financial competence.

On discovery Dr. Willms explained in more detail the inquiries made relative to the ability of a patient's consent to treatment. He said that one objective of such an inquiry of a patient is to ascertain that the patient was "in touch with reality". On January 23, 1993, Dr. Willms was satisfied that Eugene Turner was able to give informed consent to treatment. Dr. Willms was concerned about the possibility of AIDS-related dementia, but Mr. Turner did not have any indication of such a condition.

At discovery Dr. Willms was led carefully through Mr. Turner's chart and he commented on all aspects of it as were put to him by counsel. It is clear that Dr. Willms did not change his mind following such review. He found nothing during the period to indicate or cause concern regarding Mr. Turner's ability to consent to treatment. I take it from his report and evidence that he was satisfied that Mr. Turner's mental status and capacity to consent to treatment were normal at the relevant times. That comment, however, must be put into the context of certain questions and answers given at discovery, at p.60 of the transcript:

Q. Okay. Dr. Willlms, you're not not able to comment at all, are you, about Mr. Turner's mental state at the time he apparently signed the document designating a beneficiary for his life insurance?

A. I don't have any notes on that date on the chart. And I don't remember him well enough to make that kind of comment. No.

Q. Okay. But the notes on or about that date indicate that he had spiking fever, crampy abdominal pain, ongoing intractable diarrhea, and that he was withdrawn, vague -- these are again -- again and again, repeated the words , "vague, withdrawn, flat affect, lethargic, but always co-operative. It's probably fair to say that he was -- Mr. Turner was miserable. Utterly miserable. Do you agree?

A. I would think so. Yes.

There is no doubt that Mr. Turner was very sick. I have reviewed carefully the medical charts and information submitted to me. I have been unable to pinpoint any notation which would lead me even to suspect in any strong fashion that Mr. Turner lacked the competence to sign the form in question. There were certainly indications that at various times he reacted to the drugs administered to him. As late as January 12, 1993, however, even Mrs. Barry appeared to be prepared to rely upon the written permission which Mr. Turner gave her to remove his personal effects. Well into February the notes indicated at various times Mr. Turner was alert, coherent and making plans for the future, including the family meeting at which time his condition and future were discussed.

Physician's progress notes from January 13, 1993, to January 18, 1993, which I consider to be the crucial period, are not especially revealing, except as noted by Dr. Willms. On January 18 at 2:00 p.m. there is a note to the effect that Mr. Turner was "feeling slightly better". The progress notes for the period January 20 to 30, 1993, while not especially germane to the precise condition of Mr. Turner on January 18, portray a very physically sick man, but one who appears from these notes to have participated in day to day decisions concerning himself. He appears to have been able to give appropriate histories to those treating him as, for example, on January 20, 1993. On January 22, 1993,

Dr. Willms made a note that he discussed the diagnosis and prognosis with Mr. Turner and he appeared to comprehend the discussion. After further discussion on the same date, Dr. Willms made the note, "We explained that CPR in his situation is futile and not indicated. He agreed with all of the above." During the remainder of the period to January 30 there are indications occasionally of conditions ranging from hallucination, to confusion, to brighter, to being not confused. In my view, however, these comments relate to a period later than the range of this inquiry. There are further physician's notes for the period from January 31 to February 17, 1993, which I have examined, but which I do not consider to be helpful. I do note again, however, that Mr. Turner voluntarily participated in a family discussion on February 12, 1993, concerning his future. In addition to the hospital notes concerning that discussion, I have also considered the testimony concerning that discussion in evidence before me. I conclude that even as late as that date there were periods - probably prevalent - in which Mr. Turner was quite capable of making decisions related to his own management.

On February 8, 1993, there is a note signed by one Krista Buchanan, a therapist, which contained the following: "Mental status - oriented x 3, alert at time of interview". The nursing basic care flow sheets for the period January 13 to 15 all show his mental status as either alert and oriented, alert and fully oriented, with one exception during the period from 11:00 a.m. of January 14 to 7:00 a.m. of January 15 when he was shown to be vague.

The nurses' notes from January 13 to February 1, 1993, show a wide variety of comments. Commencing on January 17 the notes indicate that Mr. Turner was tired and lacking energy, but oriented to person, time and place. On January 18 he apparently slept well overnight but refused to get up in the morning. At 2:00 p.m. he again refused to get up, but there was no note of confusion or disorientation. Notes for the period subsequent to January 18 again show a wide variety of conditions.

Lay Evidence

There was also a variety of descriptions of Mr. Turner's condition given to me by lay witnesses. Except for Mr. Bezanson, these witnesses were generally unable to be precise as to Mr. Turner's condition on about January 18. Several witnesses gave evidence concerning vague statements of intention made at various times, but I found none of these statements of intention, with the exception of those made to Mr. and Mrs. Bezanson, were sufficiently precise to be of assistance.

On January 11, 1993, Mr. Turner wrote a note to Mary Barry giving her permission to cash his cheques; on January 12 he signed an authorization for her to enter his apartment to obtain his personal cheques. As late as February 18, 1993, Mr. Turner signed a power of attorney in the presence of one Darlene Jefferies who did not give evidence. I have, however, descriptions of the signing of that document by other witnesses which satisfy me that Mr. Turner apparently understood then the import of that particular document.

There were two lay witnesses whom I found to be particularly credible - John Edward Glasgow and George Franklin Cornelius. Mr. Glasgow had been a patient in the same room with Mr. Turner for a period of time in January. He described the relationships he observed between Mr. Turner and some members of his family who upset him. He said that Mr. Bezanson obviously had a calming effect on Mr. Turner. On the other hand, Mr. Turner was obviously angry at Mary Barry and Mr. Kristjansson. During the period of time when Mr. Glasgow and Mr. Turner were in the same ward, Mr. Glasgow said, on cross-examination, that Mr. Turner was not hard to understand, he was not mixed up, but was angry from time to time at Mary Barry. Indeed, Mr. Glasgow's testimony was that Mr. Turner's expressed intention was not to give money to Mrs. Barry. Margaret Rose Barry, another niece of Mr. Turner, also gave evidence of her observation of his condition. I found her to be quite credible and she gave much the same evidence. She also said that Mr. Turner indicated to her that Delores Bezanson would be the beneficiary and would have a

power of attorney. Mr. Cornelius, a fellow employee, visited Mr. Turner in January and found him to be in pretty good spirits and "of sound mind". He as well spoke of Mr. Turner's poor relationship with Mary Barry and Mr. Kristjansson and the fact that they wanted his money. Mr. Glasgow and Mr. Cornelius were impressive in that they were not family members and were not caught up in the obvious rancour now existing within the family.

The law with respect to the burden of proof in cases involving testamentary capacity was reviewed by Mr. Justice Ritchie in **Re Martin; MacGregor v. Ryan,** [1965] S.C.R. 757; 53 D.L.R. (2d) p.126 at p.133 as follows:

> The principle which is here invoked on behalf of the appellant is most frequently referred to in the language in which it was stated by Baron Parke in *Barry v. Butlin* (1838), 2 Moo. P.C. 480 at pp. 482-3, 12 E.R. 1089, where his Lordship formulated the following rules:
>
> > [1] ... the *onus probandi* lies in every case upon the party propounding a Will; and he must satisfy the conscience of the Court that the instrument so propounded is the last Will of a free and capable Testator. [and]
> >
> > [2] ...if a party writes or prepares a Will, under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true Will of the deceased.
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> The second of these rules was stated with added force by Lord Hatherley in *Fulton v. Andrews* (1875), L.R. 7 H.L. 448 at pp. 471-2, where he referred to the nature of the onus lying upon the proponents of a will under such circumstances in the following terms [p.472]:
>
> > But there is a farther onus upon those who take for their own benefit, after having been instrumental in preparing or obtaining a will. They have thrown upon them the onus of shewing the righteousness of the transaction...

The same rule has been restated in a number of cases, most of which are referred to in the judgment of Crocket, J., in *Riach et al v. Ferris*, [1935] 1 D.L.R. 118 at p.122, [1934] S.C.R. 725, in which case Sir Lyman P. Duff, C.J.C. [at p.119], expressly adopted and approved the principle as stated by Davey, L.J. in *Tyrrell v. Painton*, [1894] P.151 at pp. 159-60, where it is stated in this form:

> ... the principle is, that wherever a will is prepared under circumstances which 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 the suspicion is removed.

If a will has been shown to have been duly executed after having been read over to or by a testator who appears to understand it, then it will generally be presumed that he had testamentary capacity at the time of its execution but if, in the course of proving the will, it becomes apparent that there are circumstances raising a well-grounded suspicion as to whether the document indeed expresses the true will of the deceased, then a heavy burden lies on the Court to look beyond the presumption created by compliance with these formalities and be satisfied that the will was the free act of a testator who at the time had a 'disposing mind and memory' in the sense defined by Rand, J., in *Leger v. Poirier*, [1944] 3 D.L.R. 1 at pp.11-2, [1944] S.C.R. 152, where he said:

> A "disposing mind and memory" is one able to comprehend, of its own initiative and volition, the essential elements of will-making, property, objects, just claims to consideration, revocation of existing dispositions, and the like...

That decision was referred to extensively by Wright, J. of the Manitoba Court of Queen's Bench in **Tamblyn v. Leach** (1981), 10 E.T.R. 178, who concluded, as I do, that a "...designation of a beneficiary of the character in issue here can but be compared to a testamentary disposition". Wright, J. also examined the facts in relation to considerations relative to the designation as if it was a gift *inter vivos*. In that case Wright J. examined the facts and upon making certain findings of fact and credibility was not satisfied that the description of beneficiary with which he was dealing had been made by a "free and capable" individual.

It is common ground that the designation of a beneficiary of a life insurance policy (or death benefit) is a testamentary gift. (See **Fontana et al v. Fontana et al** (1987), 28 C.C.L.I. 232 and **Re Rogers; Rogers v. Rogers** (1963), 39 D.L.R. (d) 141. It is also common ground that the test of mental capacity to be applied is as set out in **Banks v. Goodfellow** (1870), L.R. 5 Q.B. 549 at 564 and 568:

> It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties -- that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.
>
> ...
>
> The testator must, in the language of the law, be possessed of sound and disposing mind and memory. He must have memory; a man in whom the faculty is totally extinguished cannot be said to possess understanding to any degree whatever, or for any purpose. But his memory may be very imperfect; it may be greatly impaired by age or disease; he may not be able at all times to recollect the names, the persons, or the families of those with whom he had been intimately acquainted; may at times ask idle questions, and repeat those which had before been asked and answered, and yet his understanding may be sufficiently sound for many of the ordinary transactions of life. He may not have sufficient strength of memory and vigour of intellect to make and to digest all the parts of a contract, and yet be competent to direct the distribution of his property by will. This is a subject which he may possibly have often thought of, and there is probably no person who has not arranged such a disposition in his mind before he committed it to writing. The question is not so much what was the degree of memory possessed by the testator? as this: Had he a disposing memory? was he capable of recollecting the property he was about to bequeath; the manner of distributing it; and the objects of his bounty? To sum up the whole in the most simple and intelligible form, were his mind and memory sufficiently sound to enable him to know and to understand the business in which he was engaged at the time he executed his will?

There is no evidence before me indicating that Eugene Turner did not possess the requisite mental capacity to execute the designation of beneficiary form on January 18, 1993. Nor is there any evidence which led me to believe that on the crucial date or within that period of time Mr. Turner's capacity was so severely compromised that he was unable to think rationally in the sense contemplated in the case of **Hayward et al v. Thompson** (1960), 25 D.L.R. (2d) 545. The latter case, in addition to dealing with circumstances which led the Supreme Court of Canada to conclude that the testatrix lacked a disposing mind, also dealt with the onus on the promoter of a will who was also a beneficiary. I find that the evidence as a whole convinced me that Mr. Turner had a sound and disposing mind on January 18, 1993, and, further, there was no evidence leading me to the conclusion that there was undue influence. It may well be that Mr. Turner was angry at Mary Barry, but that was his right. See **Boughton et al v. Knight et al** (1873), L.R. 3 P. & D. 64 at p.66:

> ... the law does not say that a man is incapacitated from making a will if he proposes to make a disposition of his property motivated by capricious, frivolous, mean or even bad motives... He may disinherit, either wholly or partially, his children, and leave his property to strangers to gratify his spite, or to charities to gratify his pride, and we must give effect to his will, however much we may condemn the course he has pursued.

2. Did the defendants, or either of them, exercise undue influence upon Mr. Turner and thereby induce him to designate Delores Bezanson as the beneficiary?

In considering whether there was undue influence exercised by Mr. and Mrs. Bezanson, it is first necessary to examine the relationship between them and Mr. Turner to determine whether the potential for domination or exercise of persuasive influence existed in the relationship itself. See **Goodman Estate v. Geffen,** [1991] 5 W.W.R. 389. The familial relationship here - uncle and niece - was not such as to give rise to a presumption of undue influence. On a personal level the relationship had been cordial and then, at Mr. Turner's request, Mr. and Mrs. Bezanson assisted him in securing his continued income. In my view, those services did not amount to a consideration, as in the sense of a commercial

transaction. Rather, I conclude that Mr. Turner wished merely to make a gift for his own purpose. There was no dominant relationship in existence here which precipitated the gift. I conclude on the evidence before me that the presumption of undue influence has not been established. Even if the presumption had been raised, factually I have been persuaded by the evidence of Mr. and Mrs. Bezanson that Mr. Turner made the gift as a result of his own full, free and informed thought. I see nothing in the evidence to show that Mr. and Mrs. Bezanson exercised an ability "to dominate the will of (Mr. Turner), whether through manipulation, coercion or outright but subtle abuse of power". See the decision of Wilson, J. in **Goodman** (supra) at p.406:

> It seems to me rather that when one speaks of "influence" one is really referring to the ability of one person to dominate the will of another, whether through manipulation, coercion, or outright but subtle abuse of power. I disagree with the Court of Appeal's decision in *Goldsworthy v. Brickell*, supra, that it runs contrary to human experience to characterize relationships of trust or confidence as relationships of dominance. To dominate the will of another simply means to exercise a persuasive influence over him or her. The ability to exercise such influence may arise from a relationship of trust or confidence but it may arise from other relationships as well. The point is that there is nothing per se reprehensible about persons in a relationship of trust or confidence exerting influence, even undue influence, over their beneficiaries. It depends on their motivation and the objective they seek to achieve thereby.

The plaintiff has urged that the suspicious circumstances are amplified by the fact that Larry Bezanson presented to Mr. Turner a blank form and then filled in his wife's name after it had been signed. I agree. It was a suspicious circumstance. I am satisfied, however, that Mr. Turner knew what he was signing and knew the effect of it. While the only evidence before me as to the precise words used at the time of the signing were those related to me by Mr. Bezanson, I have accepted Mr. Bezanson's evidence as truthful. Mr. Bezanson's evidence alone might not have been sufficient to allay my suspicion, but the evidence of Mr. Glasgow, Mr. Cornelius and Margaret Rose Barry persuaded me that his testimony accorded with their observations. Mr. Bezanson's testimony concerning the

execution of the form had the ring of truth about it.

The plaintiff has also submitted that the suspicious circumstance is heightened by virtue of the fact that Mr. and Mrs. Bezanson said nothing to other family members about the beneficiary designation. Mrs. Peggy Buchanan gave evidence to the effect that Mr. and Mrs. Bezanson appeared to be surprised when told of the amount involved in the insurance. I accept that they were in fact surprised. The fact that they did not realize the full significance of the gift until after Mr. Turner's death is an explanation for their failure to mention it.

3. Was there proper execution of the designation?

A designation of a beneficiary of an insurance policy must comply with the provisions of the **Insurance Act**, R.S.N.S. 1989, c.231, s.192(1). That is, a beneficiary may be designated by declaration. Section 173 of that **Act** defines "declaration" as follows:

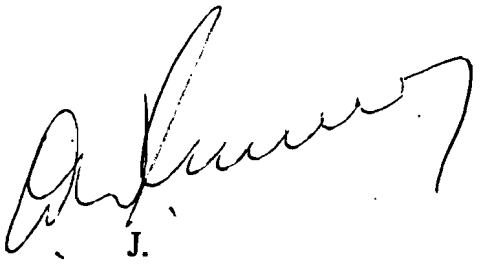
> (g) 'declaration' means an instrument signed by the insured
>
> (i) with respect to which an endorsement is made on the policy,
>
> (ii) that identifies the contract, or
>
> (iii) that describes the insurance or insurance fund or a part thereof,
>
> in which he designates, or alters or revokes the designation of, his personal representative or a beneficiary as one to whom or for whose benefit insurance money is to be payable;

The benefit under consideration herein is in fact a benefit under a superannuation plan. I consider that such plan is the equivalent of an insurance policy. I have concluded that the Beneficiary Designation form complies with the formal requirements of s.173.

The Department of Supply and Services of Canada maintains a manual concerning the administration of superannuation, including the requirements for the naming of beneficiaries. I have concluded that the designation form was completed properly. The identification of Mr. Turner was completed by Mrs. Buchanan and was correct. On the face of the form the designation of Mrs. Bezanson as beneficiary is correct. The signing of the form and the filling in of the beneficiary's name, on the basis of Mr. Bezanson's evidence, was one continuous transaction. There is some doubt as to whether Mrs. Bezanson's name was filled in before the signature, but the fact was that the signature and the printing in of the designation were all done contemporaneously. The form was not completed as to time and place on the instructions of Mrs. Buchanan. I am completely satisfied, however, on the evidence that the form was in fact signed at Halifax on January 18, 1993.

CONCLUSION

I have concluded that the action must be dismissed. Mrs. Barry, however, took this action in her representative capacity as Administratrix of Eugene Turner's Estate. Neither Mrs. Barry nor the Estate should be liable for costs. There will, therefore, be no costs awarded.



J.

Halifax, N.S.