

SUPREME COURT OF NOVA SCOTIA

Citation: *Billard v. Billard Estate*, 2022 NSSC 167

Date: 20220614

Docket: Ken. No. 506551

Registry: Kentville

Between:

Tanya Arlene Billard

Applicant

v.

Estate of George William Billard

Respondent

Judge: The Honourable Justice Gail L. Gatchalian

Heard: March 28 and March 29, 2022 in Kentville, Nova Scotia
April 20, 2022 in Windsor Nova Scotia

Counsel: Jillian Gallant, for the Applicant
Jonathan Cuming, for the Estate

By the Court:

Introduction

[1] George William Billard died of cancer on February 24, 2020 in Windsor, Nova Scotia, at the age of seventy-four. George is survived by his five adult children – from eldest to youngest: Dennis Billard, Dwayne Billard, Brian Billard, Tanya Billard and Jessica Shaw.

[2] Dennis, Dwayne, Brian and Jessica live in Ontario. Jessica came to visit George for a week in November, 2019, after she learned that his cancer was terminal. Tanya lived in Ontario until December 21, 2019, when she, her common law spouse, Julien Bennett, and their three children moved to Windsor to live with George so that Tanya could care for him. Dennis, Dwayne and Brian came to visit George in February of 2020 to say their good-byes. During their visit, George and his sons stayed at the home of Faye Paris, George’s girlfriend of five years.

[3] George’s children are in a dispute about the validity of George’s last will, which he executed on February 13, 2020, while Dennis was visiting. In the February 13, 2020 will, George left his two pieces of real property in Windsor to Dennis and named Dennis as his executor. In a previous will, executed in 2018, George had left his entire estate, including the properties, to Tanya and named her as the executor. Tanya and Ms. Paris did not know about George’s meeting with his lawyer on February 13, 2020, or that George had executed a new will, until Dwayne told them on or about February 17, 2020, after Dennis had returned to Ontario.

[4] Tanya has applied for Proof in Solemn Form of George’s last will under the *Probate Act*, S.N.S. 2000, c.31. She alleges that George lacked testamentary capacity, that he did not know or approve of the contents of the February 13, 2020 will, and that George was unduly influenced by Dennis because:

- George was dying from cancer, was overusing prescription opioids to manage his pain, and according to his health care providers and the people closest to him, George lacked decision-making capacity in the weeks before and in the days after he executed the new will on February 13, 2020.

- The changes that George made on February 13, 2020 do not make sense because George had always had a close relationship with Tanya, he always intended and expressed his intention that Tanya would inherit the properties, and he did not have a close relationship with Dennis.
- Dennis drove George to the lawyer's office on February 13, 2020, during Dennis' short visit from Ontario, without telling Tanya or Ms. Paris about the new will, and Dennis benefitted the most from the February 13, 2020 will.

[5] Tanya's position is supported by Ms. Paris and Jessica. Tanya also relies on the evidence of George's family physician, Dr. Paige Stevens.

[6] In response, Dennis says that:

- George changed his will because his relationship with Tanya and Julien had deteriorated, he disliked Julien, and did not want Julien to benefit from his will.
- Dennis did not observe any signs that George lacked capacity during his visit in February of 2020.
- Michael MacKenzie, George's lawyer, did not observe any signs that George lacked capacity when he met with George on February 13, 2020 to take instructions and to witness George execute the new will.
- Other than driving George to his lawyer's office on February 13, 2020, at George's request, and agreeing to be the executor after George executed the new will, Dennis had nothing to do with the changes that were made.

[7] Dennis' position is supported by his brother Dwayne and by the evidence of Mr. MacKenzie.

[8] In order to determine whether George had testamentary capacity on February 13, 2020, whether George knew and approved of the contents of the will, and whether he was unduly influenced by Dennis, I will consider the following seven topics:

1. George's relationship with Tanya and his expressed intention to leave the properties to her.

2. George's relationship with Dennis.
3. The observations that George's health care providers made about his mental capacity in January and February of 2020.
4. The observations that Mr. MacKenzie made about George's mental capacity on February 13, 2020.
5. Whether George's relationship with Tanya and Julien deteriorated after they moved in with George.
6. The observations made by Dennis, Dwayne, Tanya, Ms. Paris and Jessica of George's mental capacity in January and February of 2020.
7. Dennis' involvement, if any, in the changes that George made to his will on February 13, 2020.

[9] There is no material factual dispute about the first four topics: (1) George's relationship with Tanya and his expressed intention to leave the properties to her, (2) George's relationship with Dennis, (3) the observations of George's health care providers about his mental capacity in January and February of 2020, or (4) Mr. MacKenzie's observations of George's mental capacity on February 13, 2020.

[10] There is a dispute between Dennis and Dwayne, on the one hand, and Tanya, Julien, Ms. Paris and Jessica, on the other hand, about the next three topics: (5) whether George's relationship with Tanya and Julien deteriorated after they moved in with George; (6) the observations they made of George's mental capacity in January and February of 2020; and (7) Dennis' involvement, if any, in the changes that George made to his will on February 13, 2020. Therefore, before addressing these last three topics, I will discuss my credibility assessment.

Summary of the Legal Principles

Burden and Presumption of Testamentary Capacity and Knowledge and Approval

[11] The burden of proving the February 13, 2020 will rests with the Estate, as the party seeking to uphold the validity of the will. The Estate is assisted by a presumption that George had testamentary capacity and that he knew and approved of the contents of the will, as the will complies with the formalities of execution

required by s.6(1) of the *Wills Act*, R.S.N.S. 1989, c.505: *Wittenberg v. Wittenberg Estate*, 2015 NSCA 79 at para.11.

Suspicious Circumstances

[12] However, if there are facts that may support an allegation of suspicious circumstances in the making of the will and related to George's mental capacity, the presumption does not apply, and the Estate must establish, on a balance of probabilities, that George had testamentary capacity and that he knew and approved of the contents of the will: *Wittenberg, supra* at para.11 and *Vout v. Hay*, 1995 CanLII 105 (SCC), [1995] 2 S.C.R. 876, [1995] S.C.J. No. 58 at paras.25-27.

Testamentary Capacity

[13] Whether George had testamentary capacity ("a sound and disposing mind") is a question of fact determined from all of the circumstances: *Coleman Estate*, 2008 NSSC 396 at para.35. While medical or scientific evidence is relevant and admissible, it is not required or conclusive: *Coleman Estate, supra* at para.36. Evidence of lengthy personal observation and interaction with George can be as helpful as the opinion of experts: *Coleman Estate, supra* at para.36. The determination of George's testamentary capacity involves three inquiries: (a) whether he understood the nature of the acts and its effects; (b) whether he understood the extent of the property he was disposing of; and (c) whether he was able to comprehend and appreciate the claims to which he ought to give effect or whether any disorder of the mind poisoned his affections, perverted his sense of right, or perverted the exercise of his natural faculties: *Coleman Estate, supra* at para.37.

Knowledge and Approval

[14] In addition to having testamentary capacity, George must know of, and approve or appreciate, the contents of the will. There is a presumption that, absent suspicious circumstances, knowledge and approval are established by evidence that the will was read by or to George, or that the contents were otherwise brought to his attention: *Coleman Estate, supra* at para.41. If George lacked testamentary capacity, he would not be capable of knowing and appreciating the contents of the will. Because of this, the same factual evidence and findings will be relevant to the issues of testamentary capacity and knowledge and appreciation: *Coleman Estate*

at para.43. If George is found to have testamentary capacity, he may nonetheless fail to know or appreciate the contents of the will as a result of a simple or innocent mistake or as a result of being induced by the fraud of another: *Coleman Estate, supra* at para.44.

Undue Influence

[15] With respect to undue influence, the burden is on Tanya to prove, on a balance of probabilities, that George's mind was overborne by the influence of Dennis such that he did not voluntarily approve of the contents of the new will: *Coleman Estate, supra* at para.48. Tanya must establish that Dennis' influence was so great and overpowering that the will reflects the intent of Dennis, as the beneficiary of the will, and not George's intent. Tanya does not have to prove physical violence, confinement or threats, but proof of mere influence by itself is not sufficient. The test is whether in all of the circumstances, George did not have an independent mind that could withstand the competing influences. See *Coleman Estate, supra* at para.50.

Corroboration by Material Evidence

[16] Any potential heir or interested party in this proceeding (in particular, Dennis, Dwayne, Tanya and Jessica) cannot obtain a decision on his or her testimony alone or that of his or her spouse (in this case, Julien) or both the individual and their spouse with respect to any dealings with George, or with respect to any act, statement, acknowledgement or admission of George, unless such testimony is corroborated by other material evidence: s.45 of the *Evidence Act*, R.S.N.S. 1989, c.154.

George's Relationship with Tanya and Expressed Intention to Leave Properties to Her

[17] I find that, at least until late December of 2019, after Tanya and her family moved to Windsor to live with George, George had a very close relationship with Tanya, and he repeatedly expressed an intention to leave the properties to her in his will. These facts were not disputed by Dennis or Dwayne.

[18] When George was still living in Ontario, he and Tanya's mother separated. After the separation, Tanya lived with George from about the age of 13 to the age of 23. She had a child at 17, and George helped to raise him. After George moved

to Nova Scotia in 2008, George and Tanya spoke daily and visited each other often. When George had health crises in 2004, 2018 and in the spring of 2019, Tanya came to help him, staying weeks at a time. When he had his last health crisis in the spring of 2019 – a diagnosis of liver cancer and subsequent liver surgery - Tanya and Julien decided that they would move to Nova Scotia in the summer of 2020 to live with George so that Tanya could care for him. When George told Tanya on November 1, 2019 that his cancer had come back and that it was terminal, Tanya, Julien and their three children moved in with George on December 21, 2019. Tanya became George's primary care giver at that point. She took over the mortgage payments.

[19] George bought the two Windsor properties in 2004, when he was still living with Tanya in Ontario. George told Tanya that she would inherit both properties. He executed a will in 2018 that left his entire estate to Tanya. George also designated Tanya as the sole beneficiary of his life insurance policy. Only an unsigned copy of the 2018 will was in evidence. It was provided to Tanya by Mr. MacKenzie's office. Mr. MacKenzie's office, as is their practice, destroyed the original signed 2018 will when George executed the new will on February 13, 2020.

[20] Dwayne acknowledged that, after Tanya and her family arrived in Nova Scotia in December of 2019, he and his wife called George and asked him about his life insurance policy. At that time, Tanya said that George assured her that everything was taken care of in the will, that no one could take anything away from her, and for her not to worry.

[21] Ms. Paris confirmed that, during the five years that she and George were together, George had a close relationship with Tanya and Julien. George often told Ms. Paris that Tanya was going to inherit the properties, and that Tanya would not have to worry about it. When Ms. Paris and George spoke about his will, he did not ever mention Dennis. Ms. Paris was present in December of 2019 when George received a phone call from Dwayne and his wife, who asked him who the beneficiary of his life insurance policy was. George was upset, and told Tanya that she had nothing to worry about, as the policy was in her name.

[22] George spoke to Jessica about his will in 2018, telling her that Tanya would inherit the two properties. George explained to Jessica that he wanted Tanya to own the houses because she was the only one of the siblings who did not own a house. George told Jessica that he was worried that this would cause hard feelings

amongst the siblings. When Jessica visited George in November of 2019, George again told her that he wanted Tanya to have the houses. George told Jessica that he knew Tanya was changing her whole life to move to Nova Scotia for him, and he wanted her to have a place to live when he passed away.

George's relationship with Dennis

[23] I find that, compared to his relationship with Tanya, George had a distant relationship with Dennis.

[24] Dennis agreed in cross-examination that he saw his father about once every two years, and that he last saw George in 2016, four years before Dennis' last visit. Dennis agreed that he spoke to George four or five times per year. Dennis was not a beneficiary of the 2018 will.

Observations of Health Care Providers of George's Mental Capacity

[25] The evidence of Dr. Stevens, George's family physician, satisfies me that George's mental capacity was severely impaired on January 2, February 3, February 6, February 16, February 18, and from February 19, 2020 until his death on February 24, 2020:

- During an in-person appointment on January 2, 2020, Dr. Stevens observed that George was sedated.
- During a telephone appointment on February 3, 2020, Dr. Stevens noted that George sounded very sedate, that his speech was garbled, that he was at times confused, and that he was unable to understand her simple directions.
- On February 6, 2022, a Licensed Practical Nurse wrote in a chart note to Dr. Stevens that George's speech was "extremely garbled" during a telephone appointment that day.
- On February 16, 2020, George was seen in the Emergency Department. The attending physician noted that George looked unwell, was sleepy and was jaundiced.
- On February 18, 2020, Dr. Stevens received call from a Palliative Care Registered Nurse, while George was in her office, stating that he

was extremely somnolent and confused, and that he had increased the dosage of one of the opioids on his own.

- George was admitted to hospital for the last time on February 19, 2020.
- George died on February 24, 2020.

[26] Tanya offered a report from Dr. Stevens as expert opinion, in which Dr. Stevens gave the opinion that "... [g]iven the above, the biochemical/clinical evidence of hepatic dysfunction and the overuse of opioids, it is my opinion that Mr. Billard's decision making capabilities as it relates to medical decisions, was negatively impacted for several weeks prior to his death on February 24th, 2020."

[27] I do not find Dr. Stevens' opinion, as distinct from her observations of George, to be helpful. First, only one of the two bases for her opinion was established (George's overuse of prescription opioids). Counsel for Tanya agreed that Dr. Stevens was not qualified to give expert opinion evidence on the symptoms of terminal liver cancer. Second, Dr. Stevens acknowledged that the potential side effects of the opioids are dose-dependent, she did not know how much if any opioids George might have taken on the morning February 13, 2020, and therefore it would be difficult for her to say how much George's decision-making capabilities might have been impaired at the time he executed the will.

Mr. MacKenzie's Meetings with George on the morning of February 13, 2020

[28] The strongest evidence offered by Dennis and the Estate in support of George's testamentary capacity is the evidence of George's lawyer, Mr. MacKenzie. Mr. MacKenzie has been practicing law since 1977. He had drafted George's 2018 will.

[29] Mr. MacKenzie confirmed that George came to his office in Windsor on February 13, 2020 for the purpose of drafting a new will. Mr. MacKenzie could not say who made the appointment for George. He could not remember whether someone accompanied George to the office that day, but he was certain that he met with George, alone, to take instructions. Mr. MacKenzie could not remember whether George gave him instructions and then executed the will on the same date. I find that George met with Mr. MacKenzie in the morning to give him instructions, and then returned later that morning to execute the will and to provide the original signed 2018 will to be destroyed.

[30] The notes that Mr. MacKenzie took while meeting with George were in evidence. They were not lengthy, consisting of one and a half pages. The notes reflect the following instructions as to how the new will should be different from the 2018 will:

Codicil

Delete Clause 2

add

son Dennis George Billard of Ontario

alt. Brian Phillip Billard or Woodbridge Ont

Delete 3(v)

New 3(v)

I direct that from my life insurance policy with London Life which should be payable to my Estate that the debt I owe to the Bank of Nova Scotia should be paid from the proceeds and the balance made payable to my daughter Tanya Arlene Billard

- to divide my belongings among my issue
- to transfer to my grandson Tyler Billard my automobile 2002 Chevrolet Cavalier
- transfer to my son Dennis George Billard my two homes situate at 331 and 333 Nesbitt Street, Windsor
- Rest & Residue to my issue per stirpes
- Made changes to will as he loves all of his children but has serious issues with Tanya's CL spouse

[31] The new will dealt with all of George's assets and debts.

[32] There was a discrepancy between Mr. MacKenzie's notes and the February 13, 2020 will: the notes reflect George's instructions that his life insurance policy first be used to pay his bank debt, and that the balance be paid to Tanya. Instead, the will leaves the balance of the life insurance proceeds to George's children in equal shares. Mr. MacKenzie was not able to explain this discrepancy.

[33] George also asked Mr. MacKenzie that day to submit a form to London Life changing the beneficiary designation on his life insurance policy to his estate. He signed the form.

[34] Mr. MacKenzie asked George about the reason for the changes, and George responded that he loved all of his children, but that he had serious issues with Tanya's common law spouse. Mr. MacKenzie says that the first part of this note, that George loved all of his children, was a verbatim statement. However, the second part of the note was Mr. MacKenzie's very short summary of their conversation about Tanya's common law spouse. Mr. MacKenzie said that George was very, very adamant and very animated when expressing his views about Tanya's common law partner, that George did not like this individual in no uncertain terms, that George made this very clear, that he did not want this person to get anything and was concerned that he would if the will was not changed.

[35] Mr. MacKenzie was not asked, and he did not say, whether George gave him a reason or reasons for his dislike of Julien.

[36] Mr. MacKenzie, as is his practice, discussed the *Testators' Family Maintenance Act*, R.S.N.S. 1984, c.465 with George. Mr. MacKenzie explained that one's obligation under the *Act* is first to one's spouse. He explained that there is some case law that suggests that one's obligation to children is not limited to dependent children. Mr. MacKenzie said that he would have asked George if he was influenced by anyone.

[37] Before George executed the will, Mr. MacKenzie reviewed its contents with George, and had George initial the bottom of each page. With the exception of Mr. MacKenzie's legal assistant, who was present for the will's execution, no other person was Mr. MacKenzie's office during his meetings with George.

[38] Mr. MacKenzie said that while he knew that George was not well, George gave no indication to him of having any difficulties, his instructions were clear, and the reasons offered for the changes were reasonable. Mr. MacKenzie had no reservations about George's ability to understand the contents of the will, the extent of his estate, the possible claims against his estate, and the legal effect of executing the will.

Credibility Assessment

[39] Before going on to discuss the next topics, I will set out my credibility findings. I have carefully considered all of the evidence in making my assessment of the credibility of Dennis, Dwayne, Tanya, Julien, Ms. Paris and Jessica.

[40] As they have an interest in the outcome of this Application, I approach the evidence of Dennis, Dwayne, Tanya and Julien with caution. For the following reasons, I accept the evidence of Ms. Paris and Jessica where it conflicts with that of Dennis and Dwayne, and I accept the evidence of Tanya and Julien where it is consistent with that of Ms. Paris and Jessica.

[41] Ms. Paris is the only witness without an interest in the outcome of this Application. She is not a beneficiary of either will. Moreover, Ms. Paris had the best opportunity of all the witnesses to observe and know George, including after Tanya and her family moved in with George in December of 2019. Ms. Paris spent almost every day and night with George for five years, during which they either stayed at his house or her house.

[42] Jessica acted contrary to her own interests by supporting Tanya's position that the February 13, 2020 will is invalid, as Jessica is a residual beneficiary of the February 13, 2020 will and does not benefit from the 2018 will. Jessica also had frequent contact with George, speaking to him on the phone or by video almost every day in January and February of 2020.

[43] I found both Ms. Paris and Jessica to be credible witnesses. I found no reason to question their trustworthiness. Ms. Paris did change her evidence somewhat between her first affidavit and her rebuttal affidavit. In her first affidavit, she said that Dennis did not call George and that Dennis did not visit George when George and Ms. Paris were in Ontario. In her rebuttal affidavit, Ms. Paris said that she did not witness phone calls between Dennis and George except for one recent call, and that Dennis visited George once when George and Ms. Paris were in Ontario. I find that Ms. Paris voluntarily corrected these errors or oversights, and that they are minor as they do not change the fact, acknowledged by Dennis, that he saw and spoke to George infrequently, and that it had been four years since he last saw George.

[44] I have further reason to accept the evidence of Ms. Paris over that of Dennis and Dwayne: their evidence caused me to doubt their honesty.

[45] Dennis did not tell Ms. Paris or Tanya about George's meeting with Mr. MacKenzie or that George changed his will. This was a significant event: the changes took place when Dennis knew that George was terminally ill, within days of Dennis arriving for a short visit after having not seen George in four years; Dennis knew that George had left the two properties to Tanya in his 2018 will; Dennis knew that Tanya had moved in with George and was his primary caregiver;

and Dennis knew that George and Ms. Paris had been in a relationship for years. Dennis had ample opportunity to tell Ms. Paris and Tanya about the meeting with Mr. MacKenzie and the new will. Tanya was at George's house when Dennis and George were there to retrieve the original signed will on the morning of February 13, 2020, in between George's meetings with Mr. MacKenzie. Dennis and George were staying at Ms. Paris' house during Dennis' visit, and Ms. Paris was home when they returned from Mr. MacKenzie's office. In these circumstances, I find that Dennis' failure to disclose George's meeting with Mr. MacKenzie and the new will to Ms. Paris or to Tanya was deliberate and involved a level of deception.

[46] Dwayne was dishonest when he stated in his affidavit that "I had no knowledge that ... Tanya ... had planned to move with her family into my father's home ... until approximately one week prior to it occurring," and that he "understood that [Tanya] had intended to visit our father ... but that it was to be a temporary visit." This is not true. Dwayne sent a text message to Tanya on November 3, 2019, approximately one month and three weeks before she and her family moved to Windsor, asking "Are you moving down to Dad's," to which Tanya replied, "Yes we were planning on moving down the summer anyways to help him out."

[47] As will be seen, Dennis and Dwayne both allege that Ms. Paris made specific statements to them supportive of a conclusion that George's relationship with Tanya and Julien had deteriorated and that Julien had acted inappropriately towards George. These are allegations about key facts. Ms. Paris explicitly denied making these statements to Dennis and Dwayne. For the reasons above, I accept Ms. Paris' evidence and I reject the evidence of Dennis and Dwayne. In my view, the credibility of Dennis and Dwayne on all matters is damaged by the instances of dishonesty I have already reviewed and the fact that they made what I find are untrue allegations about what Ms. Paris told them on key issues.

Deterioration in George's Relationship with Tanya and Julien?

Evidence of Dennis and Dwayne

[48] Dennis said that, during his five-day visit with his father from February 9 to February 14, 2020:

1. George told Dennis that, when Tanya offered to come to Nova Scotia to assist with his care, she did not mention that she intended to relocate permanently and to bring her family.

2. George told Dennis that he did not feel comfortable in his home, so they stayed at Ms. Paris' house.
3. Ms. Paris told Dennis that Tanya and Julien left George alone with their children and animals for hours at a time.
4. Ms. Paris told Dennis that Tanya refused to drive George or Ms. Paris anywhere.
5. George told Dennis that he had a poor relationship with Julien in Ontario and that their relationship worsened when Julien moved into George's house.

[49] Dwayne said that, during his visit with George from February 13 to approximately February 17, 2020:

1. George told Dwayne that he had no idea that Tanya's whole family was intending to move into his home.
2. George told Dwayne that, during a recent disagreement, Julien threatened to fight George, and that during the argument, Julien threw a coffee mug at George, which smashed against the wall.
3. Ms. Paris confirmed to Dwayne that the coffee mug incident had happened.
4. George told Dwayne that he did not like Julien, that he was not comfortable around him, and that he hated the way Julien treated Tanya.
5. Ms. Paris told Dwayne that Tanya and Julien, since arriving in Nova Scotia, would disappear three to four times a day, leaving George with their children and pets.
6. George told Dwayne that he changed his will because he was concerned that Julien would receive the greatest benefit if his previous will was left untouched.

Evidence of Tanya, Julien, Ms. Paris and Jessica

Did George know that Tanya and her Family Were Moving in Permanently?

[50] Tanya said that George called her on November 1, 2019 and told her that his cancer had come back and it was terminal. She said that, during this conversation, George asked her family to move to Nova Scotia early to help take care of him. Tanya said that George told her several times how excited he was that she and Julien were moving to be with him, and that George was looking for a job for Julien.

[51] Ms. Paris said that she was present for the phone call when George asked Tanya and her family to move to Windsor.

[52] Jessica said that, during her visit with George in November of 2019, George told her repeatedly that he was excited for Tanya and her family to move in with him.

Why was George Staying at Ms. Paris' House?

[53] Tanya denied that George felt uncomfortable staying at his house with her and her family. Her understanding was that George was staying at Ms. Paris' house during his sons' visit because there was more room at Ms. Paris' house.

[54] Ms. Paris said that George stayed at her house during his sons' visit because there was more space at her house, and not because he felt uncomfortable staying in his home.

[55] The evidence of Tanya and Ms. Paris on this point is supported by text messages between Dennis and Tanya on February 7, 2020. Dennis wrote to Tanya, "Got room for 3 more lol are we able to stay at Fayes' if we were to show up." Tanya responded, "Of course we got room, u know that ...". Dennis then wrote to Tanya that his daughter was worried about having room, and "that's why I asked about Faye's."

Did Tanya and Julien Leave George Alone with their Children and Pets?

[56] Tanya said that she never left George alone with her children and pets. She said that her eighteen year old son was able to watch her younger children if she and Julien had to be out.

[57] Ms. Paris said that she did not tell Dennis that Tanya and Julien left George alone with their children and pets, and her evidence was that Tanya and Julien did

not leave George alone with their children and pets. Ms. Paris said that Tanya's older son would look after the other two children if they were not home.

Did Tanya Refuse to Drive George and Ms. Paris Anywhere?

[58] Ms. Paris said that she did not tell Dennis that Tanya refused to drive she and George anywhere, and her evidence was that Tanya did not refuse to drive her and George.

Did George Have a Poor Relationship with Julien?

[59] Tanya said that George and Julien had a wonderful relationship. She said that, over the 18 years she had been with Julien, George stayed with them many times, and she always observed them to be close. Julien said that his relationship with George was always good.

[60] Ms. Paris said that, during her relationship with George, he and Julien always seemed to get along all right, and that in all of those years, she had not heard George say anything negative about Julien.

Did Julien Threaten to Fight George and Throw a Coffee Mug at Him?

[61] Both Tanya and Julien deny that Julien ever threatened to fight George, or that he threw a coffee mug at George.

[62] Ms. Paris said that she never witnessed Julien throw a mug at George. Ms. Paris said that she never witnessed Julien being aggressive towards or fighting with George. She said that it was George who, towards the end of his life, became very aggressive towards everyone, mostly those closest to him, including Julien, and that this was out of character for George.

Conclusion re: Whether George's Relationship with Tanya and Julien Deteriorated in January and February of 2020

[63] Did George's relationship with Julien and Tanya deteriorate and did Julien threaten to fight George and did he throw a coffee mug at George? My conclusion is "no." As stated, I accept the evidence of Ms. Paris, which was that George had a good relationship with Tanya and Julien, that she never witnessed Julien acting aggressively towards George, and that she never heard George say anything

negative about Julien. I accept the evidence of Tanya and Julien on this subject, as it is consistent with the evidence of Ms. Paris.

[64] Did Ms. Paris make the disparaging statements about Tanya and Julien that she is alleged to have made to Dennis and Dwayne? My answer is “no.” I accept the evidence of Ms. Paris that she did not make the statements that she is alleged to have made to Dennis and Dwayne.

[65] Did George make statements to Dennis and Dwayne about Tanya and Julien suggesting that his relationship with them had deteriorated, and did he tell Dwayne that Julien threatened to fight him and that Julien threw a coffee mug at him, even if these events did not happen? My answer is “no.” I have already found that George’s relationship with Tanya and Julien did not, in fact, deteriorate, and that Julien did not, in fact, threaten to fight George or throw a coffee mug at George. It is therefore implausible that George nonetheless made these alleged statements to Dennis and Dwayne. Moreover, as stated, I do not find Dennis or Dwayne to be credible witnesses. Finally, I have further reason for rejecting Dwayne’s evidence that George told him that Julien had threatened to fight him and threw a coffee mug at him during a recent disagreement. Tanya’s evidence, which was not challenged, was that she did not learn of this allegation until she read Dwayne’s affidavit, which was sworn on January 26, 2022, almost two years after the alleged incident. Dwayne said that George told him not to confront Tanya or Julien about the alleged incident because George “didn’t want to get anything started.” Had George told Dwayne in February of 2020 that Julien threatened to fight him and threw a coffee mug at him, I find it implausible that Dwayne would not have told Tanya at some point before filing his affidavit in January of 2022. This is a serious allegation which, if true, might have provided an explanation to Tanya about why George changed his will.

[66] Specifically, I find that:

1. George knew that Tanya and her family were planning to move to Windsor to live with him after they learned that his cancer was terminal. In fact, he asked that they move in with him. George did not tell Dennis that Tanya failed to mention that she intended to relocate permanently and to bring her family.
2. George was staying at Ms. Paris’ house because that is where his sons were staying as there was more space at Ms. Paris’ house. George did not tell Dennis that he did not feel comfortable in his home.

3. Tanya and Julien did not leave George alone with their children and pets, and Ms. Paris did not tell Dennis that Tanya and Julien left George alone with their children and pets.
4. Tanya did not refuse to drive George and Ms. Paris, and Ms. Paris did not tell Dennis that Tanya refused to drive George and Ms. Paris.
5. George had a good relationship with Julien. George did not tell Dennis that he had a poor relationship with Julien and he did not tell Dwayne that he disliked Julien or that he was uncomfortable around him.
6. Julien did not act aggressively towards George, did not threaten to fight George, and did not throw a coffee mug at George. George did not tell Dwayne that Julien threatened to fight him or that Julien threw a coffee mug at him. Ms. Paris did not tell Dwayne that this happened either.

Observations of George's Mental Capacity in January and February of 2020

Tanya

[67] Tanya observed that George's health deteriorated rapidly in January of 2020. She said that he had many outbursts, he became uncharacteristically aggressive towards those closest to him, he was overusing the prescription opioids that he had been prescribed for pain, and he was falling asleep a lot during conversations. On February 16, 2020, three days after he changed his will, when George was brought to the Emergency Department, Tanya observed him to be very unwell, confused and in pain.

[68] When Tanya, Ms. Paris and Dwayne accompanied George to the funeral home on February 14 or 15, 2020 so that he could pay for the funeral expenses, he could not remember his PIN number for his bank card. This was a bank card that he used at a bank machine approximately once per month to deposit money into his Credit Union account, an account that he had had since before Tanya was born.

Ms. Paris

[69] Tanya's evidence was consistent with that of Ms. Paris. Ms. Paris confirmed that George became increasingly aggressive to those close to him starting in January of 2020, and that this was out of character for George. Ms. Paris said that when Dennis arrived at her place on February 9, 2020, George was not doing well.

She said that she did not know where George and Dennis had gone on the morning of February 13, 2020, but when they returned, George was confused and seemed very sad.

[70] Ms. Paris acknowledged that Dwayne took her and George to the Valentine's Day dance at the legion on the evening of February 14, 2020. However, her evidence was that she and George had not planned on going to the dance because George was too sick, she was not dressed to go to a dance, she did not hear George say that he wanted to go, she did not see him going around to talk to people but rather that people came to talk to him, George was not steady on his feet, his feet were swollen and he was in pain, George was not in any condition to be at the dance, and they did not stay very long.

Jessica

[71] Jessica's evidence is consistent with that of Ms. Paris. Jessica said that, in January and February, 2020, she talked to George by phone or on video almost every day. Jessica said that she noticed, in or around mid-January of 2020, that George's behaviour started to change. George was less coherent, he would often go off topic, lose track of the conversation, mumble to himself and fall asleep during the phone conversations. Jessica said that, during her last phone call with George on February 22, 2020, he was incoherent and all over the place.

Dennis and Dwayne

[72] Dennis said that, within a couple of days of his arrival, George asked him to take him to an appointment that he had made with his lawyer. Dennis said that, on the morning of February 13, 2020, George made breakfast for both of them – tea, boiled eggs and toast. Dennis said that they had a normal conversation until it was time to leave. He said that George was alert and anxious when he walked into the lawyer's office. Dennis said that, after George went into the office the second time, they brought him into the office and told him that he was now the executor. Dennis said that at that point, George negotiated the price of the will down to the 2018 price. Dennis said that they left the office, returned to Ms. Paris' house, and had a normal day. Dennis said that, later that evening, George told him to pick up the important documents from Ms. Paris' house after his death.

[73] Dennis said that, during his visit, George's memory was good, and George told him a family secret that he had kept for 50 years. Dennis also relied on the fact

that George asked to be taken to the funeral home to pay for the funeral expenses, and knew which of his two bank accounts had enough money in it to pay for those expenses.

[74] Dennis said that George was looking forward to going to the Valentine's Day dance at the legion on February 14, 2020. Dwayne said that, when he arrived, George "kept talking about [the dance]." Dwayne said that, when they were at the dance, George saw and remembered the names of many old friends "without hesitation." Dennis and Dwayne provided the Court with a short video of George and Ms. Paris at the legion that evening.

Conclusion re: Observations of George's Capacity in January and February of 2020

[75] The evidence of Dr. Stevens, Tanya, Ms. Paris and Jessica satisfies me that George's mental capacity started to decline in January of 2020, that the decline was progressive, and that George's mental capacity was significantly impaired on several occasions in the weeks before February 13, 2020, and the days following, including on January 2, February 3, February 6, February 16, February 18, and from February 19 to his death on February 24, 2020. I do not find the evidence about George's attendance at the funeral home, his attendance at the Valentine's Day dance, or his disclosure of the family secret, a historical event, to be helpful in determining his mental capacity. I reviewed the short video of George and Ms. Paris at the legion on February 13, 2020. George and Ms. Paris are moving very slowly. The video is not helpful in determining George's capacity.

[76] The question remains whether George had the requisite mental capacity to execute the new will on the morning February 13, 2020. There is no evidence from his health care providers on that date. Neither Tanya nor Jessica gave evidence about George's capacity on that specific date. Ms. Paris' evidence was not detailed: when George returned from Mr. MacKenzie's office, he was confused and he seemed very sad. I place no weight on the evidence of Dennis and Dwayne concerning their observations of George's capacity on or around February 13, 2020, given their interest in the outcome and their lack of credibility. Mr. MacKenzie's evidence does suggest that George may have had the requisite mental capacity on the morning in question. He did not see any signs of cognitive impairment. George dealt with all of his property in the new will.

[77] I am not satisfied, however, that Mr. MacKenzie's evidence establishes that George had the requisite mental capacity to execute a new will on the morning of February 13, 2020, for the following reasons:

- George's estate was not complicated.
- Mr. MacKenzie's interactions with George that morning were very brief. No one asked Mr. MacKenzie how long his meetings with George lasted. I find that, based on his evidence of what they discussed, the first meeting likely lasted no more than several minutes, perhaps fifteen or twenty at the most, and the second meeting was shorter.
- The will does not provide for the life insurance proceeds to be paid to Tanya after first being used to pay George's bank debt, despite George's instructions. George did not notice this discrepancy.
- The reason that George gave for changing the will – his apparent dislike for Julien – does not explain his direction that the two properties be left solely to Dennis, especially given George's statement that he loved all of his children.
- Most significantly, George gave as the reason for changing his will his dislike for Julien. Yet, as I have found, there was no basis in fact for that stated reason. Mr. MacKenzie was not, of course, aware of this.

What, if any involvement, did Dennis have in the changes that George made to his will on February 13, 2020?

[78] Dennis acknowledged the following:

- During his visit, Dennis told George the following about Julien: “[A]lthough Julian has been Tanya's husband for many years and was the father of two of her children, that I really didn't know him as he ignored me when I visited their place. He stayed upstairs in his room and now acknowledging visitors to their home.”
- During his visit, Dennis told George that, although he and his brothers owned their own homes, they still owed money on their mortgages.
- Dennis drove George to the appointment with Mr. MacKenzie on February 13, 2020.

- Dennis drove George to his home to pick up the original, signed 2018 will that was in a safe box in his room.
- Dennis drove George back to Mr. MacKenzie's office, where George executed the will.

[79] Dennis asserted that it was George who asked him what he thought about Julien, and it was George who asked him about his home and his brothers' homes. I reject these assertions, given my credibility findings. I also find the assertions to be implausible, given my finding that George had a good relationship with both Tanya and Julien.

[80] I also find that, on February 13, 2020, George and Dennis left the house before Ms. Paris or any of the other guests were awake.

Suspicious Circumstances

[81] I find that there are suspicious circumstances surrounding the preparation of the February 13, 2020 will and suspicious circumstances tending to call into question George's capacity:

- George was gravely ill, was taking opioids to manage his pain, and displayed signs of significant cognitive impairment before and after February 13, 2020. He died eleven days later.
- The changes in the will are inconsistent with his longstanding expressed intention to leave the properties to Tanya.
- The changes are inconsistent with George's close relationship with Tanya and his comparatively distant relationship with Dennis.
- The changes were made suddenly, during Dennis' short visit, Dennis drove George to and from Mr. MacKenzie's office and to and from George's house to retrieve the original signed 2018 will, with no warning and no explanation by George or Dennis to Tanya or Ms. Paris, who were closest to George, and Dennis benefitted most from the changes.

[82] The Estate therefore reassumes the legal burden of proving, on a balance of probabilities, knowledge and approval as well as testamentary capacity.

Testamentary Capacity and Knowledge and Approval

[83] Having carefully considered all of the evidence, I conclude not only that the Estate has failed to discharge the burden on it to prove that George had testamentary capacity when he executed the February 13, 2020 will and that he knew and approved of the contents of the will, but that the totality of the evidence establishes that George did not have testamentary capacity on that date and that he did not know or approve of the contents of the will. My reasons, in summary, are as follows:

- The changes that George made to his will on February 13, 2020 do not make sense in light of his very close relationship with Tanya and his intention that Tanya would inherit the properties, an intention that George expressed a number of times to different people, as late as late December, 2019.
- The changes that George made to his will on February 13, 2020 do not make sense in light of his comparatively distant relationship with Dennis.
- The changes that George made to his will on February 13, 2020 are not explained by a deterioration in his relationship with Tanya and Julien, any behaviour on the part of Julien, or any other reason.
- George was terminally ill, his mental capacity began to decline in January of 2020, the decline in his mental capacity was progressive, and, given the evidence of George's health care providers and those closest to him that establishes that his mental capacity was significantly impaired in the weeks before and in the days after February 13, 2020, I find that it is more likely than not that George's mental capacity was significantly impaired on February 13, 2020.
- George did not notice that the will did not reflect his instructions about the life insurance proceeds.
- The reason that George gave Mr. MacKenzie for changing the will – his apparent dislike for Julien – does not explain his direction that the two properties be left solely to Dennis, especially given George's statement that he loved all of his children.
- George failed to take into account the strong moral claims of Tanya and her children, George's grandchildren, who left their home in Ontario to live with

him in Windsor so that Tanya could care for him and who, as a result of the changes he made to his will, will now be left without a home in Nova Scotia, despite his earlier repeated statements to Tanya that she would inherit the properties.

[84] While it appears that George understood the extent of the property that he was disposing of, I find that George did not understand the nature of the act of making a new will and its effects, and that he was not able to comprehend and appreciate the claims to which he ought to have given effect.

[85] As George did not have testamentary capacity, he did not know of or approve of the contents of the February 13, 2020 will.

Undue Influence

[86] Tanya has satisfied me, on the totality of the evidence, that Dennis unduly influenced George. Although there is no direct evidence that Dennis unduly influenced George, I draw this inference based on the following:

- The terms of the February 13, 2020 do not make sense, given George's close relationship with Tanya, his comparatively distant relationship with Dennis, and the intention he expressed many times to different people that Tanya would inherit the properties.
- The terms of the February 13, 2020 will are not explained by a deterioration in George's relationship with Julien, any conduct on the part of Julien, or any other reason.
- Dennis knew that George was very unwell, had only a short time to live, was in pain, and was taking opioids to manage his pain. In short, George was weak and vulnerable and Dennis knew this.
- During Dennis' visit, Dennis spoke ill of Julien to George.
- During Dennis' visit, he advocated for himself and his brothers by discussing with George the fact that he and his brothers still owed money on their mortgages.

- Dennis drove George to Mr. MacKenzie's office, to George's house so that the original 2018 will could be retrieved, back to Mr. MacKenzie's office, and then back to Ms. Paris' house.
- Dennis' conduct, in keeping this information from Ms. Paris and Tanya, was deliberate and dishonest.
- The reason that George gave Mr. MacKenzie for changing the will – his apparent dislike for Julien – does not explain his direction that the two properties be left solely to Dennis, especially given George's statement that he loved all of his children.
- Dennis benefits the most from the terms of the new will: the properties are left to him alone.

[87] I conclude that Dennis' influence on George was so great and overpowering that the February 13, 2020 will reflects the intent of Dennis, as the beneficiary of the bulk of George's estate, and not George's intent. I find that George did not have an independent mind that could withstand Dennis' influence.

Conclusion

[88] I find in favour of the Applicant, Tanya Billard. Specifically, I find as follows:

- George William Billard did not have the requisite testamentary capacity to execute the February 13, 2020 will.
- George William Billard did not know and approve of the contents of the February 13, 2020 will.
- George William Billard was subject to undue influence by Dennis Billard in the execution of the February 13, 2020 will.

[89] The February 13, 2020 will is not a valid will.

[90] If the parties cannot agree on costs, I will receive written submissions from them within one month of the date of this decision.

Gatchalian, J.