SUPREME COURT OF NOVA SCOTIA
AND
COURT OF PROBATE FOR NOVA SCOTIA
Citation: *Bates v. Bates*, 2024 NSSC 102

Date: 20240410
Probate No: 67731
Docket: 517097
Registry: Halifax

Between:

Paula Bates

Applicant

v.

Pierrette Ricard, Personal Representative for the Estate of Donald Armstrong Bates

Respondent

Proof in Solemn Form &Testator and Family Maintenance Applications
DECISION

Judge: The Honourable Justice Christa M. Brothers

Heard: November 14, 15, and 16, 2023 in Halifax, Nova Scotia

Counsel: Patrick Eagan for the Applicant, Paula Bates
Peter Rumscheidt for the Respondent, Pierrette Ricard, in her capacity as Personal Representative for the Estate of Donald Armstrong

By the Court:

Overview

[1] Donald Armstrong Bates, a stubborn man of few words who rarely showed emotion, died on August 5, 2021. At the time of his death, he was in a long term, common-law relationship with Marie Solange Pierrette Ricard ("Ms. Ricard"). In July 2018, Mr. Bates was facing a significant surgery and decided to execute a will. In the Last Will and Testament of Donald Armstrong Bates (the "Will"), dated July 31, 2018, Ms. Ricard is named as Executor and sole beneficiary of Mr. Bates's estate. Brenda MacDonald, the deceased's youngest daughter, is named as alternate beneficiary of the residue of the estate should Ms. Ricard predecease Mr. Bates. The testator made no other provision in his Will for any of his three daughters, Paula Bates, Heather Manning and Brenda MacDonald. On September 22, 2021, a Grant of Probate was issued to Ms. Ricard.

[2] Prior to his death, Mr. Bates ran a successful dog breeding business with Ms. Ricard. Mr. Bates had hoped that someone would continue this venture, which had been a labour of love for him for several decades. His youngest daughter, Brenda MacDonald, agreed to continue the dog breeding business, keeping the revenues earned.

[3] Paula Bates and Heather Manning were not happy about their disinheritance and brought two applications to challenge their father's Will. The first is an application under s. 31(a) of the *Probate Act* for proof in solemn form, seeking an order setting aside the Will and distributing the undistributed proceeds of the estate in their favour. The second application, brought in the alternative, is for relief as dependants under s. 3 of the *Testators' Family Maintenance Act* ("*TFMA*") on the basis that Mr. Bates did not make adequate provision for the applicants in his Will.

[4] Both applications were heard together on consent of the parties. At the beginning of the hearing, it was acknowledged that Heather Manning was withdrawing her claims and her affidavit. Ms. Manning filed a Notice of Discontinuance on November 3, 2023, and has discontinued her participation in both applications.

[5] As noted earlier, Mr. Bates's Will left the entirety of his estate to Ms. Ricard and nothing to his three children. Brenda MacDonald was well aware of the

applications and had ample opportunity to advance her own claims for relief but chose not to do so. She was called as a witness for the respondent.

[6] Ms. Bates filed two sworn affidavits in this matter – one dated August 11, 2022, and the second on February 16, 2023. Ms. Ricard swore an affidavit on July 4, 2023, and a supplemental affidavit on September 28, 2023. A joint exhibit book was entered with the consent of all parties. The parties agreed that the two appraisals contained in the joint exhibit book – one dated March 10, 2023, stating an appraised value of $75,000 and the second dated March 20, 2023, stating an appraised value of $520,000 – could be admitted and relied on by the court without any witnesses being called to speak to those appraisals.

Issues:

[7] The following issues must be determined.

1. Does the Will meet the requirements of the *Wills Act*?
2. Has Ms. Bates established entitlement to relief under the *Testators' Family Maintenance Act*?
3. If yes, what is the proper relief?

Proof in Solemn Form

Validity of Mr. Bates's Will

[8] Mr. Bates's Will was drafted and executed in the presence of solicitor William Thomson, who has been a member of the Nova Scotia Barristers' Society since 1980. The applicants challenge the Will based on:

- Lack of testamentary capacity.
- Lack of intention to have disposing effect.
- Lack of knowledge and approval as to the content and effect of the Will.
- Not intending to be entirely dependent on the death of the testator for its operation, but rather depending on the discretion of the Executrix.
- Undue influence of Ms. Ricard and Ms. MacDonald.

- Mistake of fact of the testator induced by the solicitor drafting the Will.

[9] The applicant contends that the evidence pointing to Mr. Bates lacking testamentary capacity includes:

- Mr. Bates was "extremely anxious about his surgery" and was under "extreme pressure" to finalize a Will before the procedure.
- Mr. Bates was not aware of his obligations under the *TFMA*.
- Mr. Bates did not understand the concept of a life interest.
- Mr. Thomson did not seek information about Mr. Bates's estate.

[10] Sections 6, 8A and 19 of the *Wills Act*, R.S.N.S. 1989, c. 505, govern the validity of a will:

> **Formalities of execution**
>
> 6 (1) No will is valid unless it is in writing and executed in manner hereinafter mentioned:
>
> > (a) it shall be signed at the end or foot thereof by the testator or by some other person in the testator's presence and by the testator's direction;
> >
> > (b) such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and
> >
> > (c) such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation is necessary.
>
> (2) Notwithstanding subsection (1), a will is valid if it is wholly in the testator's own handwriting and it is signed by the testators.
>
> . . .
>
> **Writing not in compliance with formal requirements**
>
> 8A Where a court of competent jurisdiction is satisfied that a writing embodies
>
> > (a) the testamentary intentions of the deceased; or
> >
> > (b) the intention of the deceased to revoke, alter or revive a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a will,
>
> the court may, notwithstanding that the writing was not executed in compliance with the formal requirements imposed by this Act, order that the writing is valid

> and fully effective as if it had been executed in compliance with the formal requirements imposed by this Act.
>
> . . .
>
> **Conditions for revocation of will**
>
> 19 No will or any part thereof is revoked otherwise than by
>
> (a) marriage as hereinbefore provided;
>
> (b) another will executed in manner by this Act required;
>
> (c) some writing declaring an intention to revoke the same and executed in the manner in which a will is by this Act required to be executed; or
>
> (d) the burning, tearing or otherwise destroying the same by the testator, or by some person in the testator's presence and by the testator's direction, with the intention of revoking the same.

[11] The proponent of a will has the onus of establishing, on a balance of probabilities, that the formalities of the *Wills Act* were complied with, and that the testator knew and approved of the contents of the will (*Vout v. Hay*, [1995] 2 S.C.R. 876). Once these two elements are satisfied, the proponent of the will has the benefit of a rebuttable presumption that the testator had testamentary capacity at the relevant time. However, if there is evidence of circumstances giving rise to a well-grounded suspicion that the will does not express the intention of the deceased, then the court must look beyond the presumption (*Leger et al. v. Poirier*, [1944] S.C.R. 152).

[12] The following evidence is relevant to the issues in this matter.

William Thomson

[13] The first witness was Mr. William Patrick Thomson, a practicing lawyer who provided services to Mr. Bates. He testified that his practice consists largely of real estate matters, and that the preparation of wills makes up less than 10%, and perhaps a little as 5%, of his files. While his evidence revealed some inadequate file management practices, I am satisfied that the steps taken in this case demonstrate that the Will was executed freely and voluntarily and reflects the testator's intent.

[14] Mr. Thomson testified about his standard approach to preparing wills and powers of attorney. As will be discussed later, while this approach is not in keeping with best practices, the deficiencies do not impact my decision on these applications. Mr. Thomson uses email to gather the pertinent information in advance of client meetings to sign the documents. He does not take any notes and there are no notes in his files related to the preparation of Mr. Bates's Will. He testified that his

handwriting is terrible and that he works best with emails. Mr. Thomson said he had several phone calls with Mr. Bates during this process, but they were "nothing of substance" and he did not take any notes of the conversations. He also testified that the documents before the court may not include every email communication between himself and Mr. Bates because Mr. Thomson had a system failure at one point, and some emails may have been lost as a result. For example, the initial instructions to Mr. Thomson from Mr. Bates were contained in a Word document attached to an email which Mr. Thomson cannot locate.

[15] Mr. Thomson said he obtains basic information from his clients to prepare a draft will, which he sends to the client via email. After his client has reviewed the draft and answered any questions, he meets with them to discuss any remaining issues and to obtain the client's signature. His assistant witnesses the execution.

[16] Mr. Bates was referred to Mr. Thomson by an existing client. He asked Mr. Thomson to prepare a power of attorney and the Will. Mr. Bates provided an email outlining particulars of who he was, including that he was divorced, and that he had a common-law spouse and three adult children. The initial email from Mr. Bates to Mr. Thomson reads as follows:

> Mr. Bill THOMSON
>
> I have lived with Marie Solange Pierrette RICARD db 12 Feb 58 since 1 Oct 2001 under a Cohabitation Agreement, copy attached. Pierrette retired from NavCanada 13 Fb 14.
>
> I was married to Yvonne Patricia BATES, we had three girls; Paula Dawn BATES db 9 Mar 70, Heather Lee (Bates) MANNING d 28 Jun 71, lives USA and Brenda Ann (Bates) MacDONALD db 2 Aug 72. I am divorced from Patsy since mid 1980s soon after I retired from RCMP.
>
> Pierrette and I live at 16 Memorial Dr., Dartmouth B2W 3P1 without mortgage. The house is worth at least $300,000.00. Neither Pierrette nor myself have any outstanding debts including credit cards. I owm (*sic*) two very small parcels of land in NB, part of my family farm. I own a waterfront lot in Economy, NS a building lot in Cooks Brook, NS and two waterfront lots (approx. 20 Acres) in Seaforth, NS
>
> I started Doindogs Kennel in late 1990s. Doindogs Kennel breeds and trains Labrador Retrievers, Pierrette has become very important and involved partner. Pierrette wishes to remain in our home and continue operating the kennel, I would like to make that possible.
>
> My youngest daughter Brenda has been the only one of the girls to make much effort to not go against my wishes at every opportunity. I feel no obligation toward the other two.

> Donald Armstrong BATES
>
> 16 Mmorial (*sic*) Dr., Dartmouth NS B2W 3P1
>
> Mr Rod McSTAY of 1415 Myra Rd., Porters Lake B3E 1G9 has agreed to act as Executor and his son James Jonathan as alternate.

[17] After Mr. Thomson reviewed this information, he and Mr. Bates exchanged a series of additional emails. On July 30, 2018, at 10:07 am, Mr. Thomson wrote:

> Hi Don,
>
> Is all your estate going to Brenda?
>
> Regards,
>
> Bill
>
> William (Bill) Thomson
>
> Barrister & Solicitor

[18] On July 30, 2018, at 11:56 am, Mr. Thomson wrote again:

> Hi Don,
>
> If Brenda is your beneficiary then why is she not your Executor?
>
> Executor receives a maximum of 5% of the value of your estate.
>
> Brenda would not claim an executor's commission if she is the beneficiary.
>
> Who do you want as your power of attorney – Brenda?
>
> Regards,
>
> Bill

[19] On July 30, 2018, at 2:13 pm, Mr. Bates wrote:

> I want Pierrette to be able to stay in the house and continue to operate doindogs kennel, make any repairs or changes she wants but not be able to sell or will it to any of her relatives. Brenda has an interest in digs (*sic*) and might want to continue with what I have started. She will probably help Pierrette and become more educated and interested.
>
> I have only concerns, not solutions
>
> Don

[20] In the next email, at 5:16 pm on July 30, 2018, Mr. Bates wrote:

> Please just make two normal wills. You can leave everything to Pierrette.

> This surgery is very risky, the need to have one is greater than the need to have the final one.
>
> Don

[21] Mr. Thomson replied just over an hour later, at 6:20 pm:

> Don,
>
> There is time to do the will as you were first requesting.
>
> It will just be more time and thus more cost.
>
> I already have paragraphs in mind.
>
> Shall I proceed with your original request?
>
> Regards,
>
> Bill

[22] Mr. Bates replied one hour later with a single line:

> Approximately how much more?

[23] Mr. Thomson responded at 7:26 pm:

> The cost depends on the time involved.
>
> Take a look at what I have sent you maybe that will do.
>
> Regards,
>
> Bill

[24] Mr. Bates responded at 7:34 pm that he was unable to find the draft and asked Mr. Thomson to resend it as an attachment. Mr. Thomson did so at 7:35 pm.

[25] The next email from Mr. Bates, sent at 8:27 pm, reflects his wish to prevent his brother or his brother's family from ever acquiring ownership of Mr. Bates's land in New Brunswick:

> Bill,
>
> Re: 12. POWER TO SELL TO FAMILY – to sell to any member of my family any asset or assets of the Trust Estate, either at public auction or by private contract, even though the purchaser is Trustee hereunder;

> I would like to prevent my brother Robert Stephen Bates or any of his family from owning any of the land I own in NB.

[26] Mr. Bates emailed again at 8:49 pm, clarifying that he did not want his youngest daughter to immediately inherit everything upon his death:

> Bill,
>
> I don't want Brenda to have everything as soon as I die! Probably my confusion is due to my ignorance of this subject. I would surely like to meet with you tomorrow, with Pierrette. She is naturally upset to think Brenda would get everything and she would be gone.
>
> If this is the only way then perhaps we must take the longer, more expensive route?
>
> Don

[27] In his response at 9:09 pm, Mr. Thomson explained that Mr. Bates was his client, not Ms. Ricard, and that it was Mr. Bates alone who needed to make the decisions about his estate:

> Don,
>
> In estate matters, I can only serve one client at a time.
>
> I can put in place what you want but it is you who must make the decisions.
>
> No amount of you talking to me at $300.00 an hour will help you to decide what you want.
>
> Everything need not be dictated by what your will states.
>
> You can control who an asset goes to by making them the beneficiary of it; insurance, investments, bank accounts, etc…
>
> Think of your whole life not just what is happening now.
>
> Think of who is deserving of what you have acquired in your whole life.
>
> It is the big picture that is important.
>
> Regards,
>
> Bill

[28] The discussions between Mr. Bates and Mr. Thomson continued into the next day. At 9:06 am on July 31, 2018, Mr. Bates wrote:

> I'm considering giving everything to Pierrette with Brenda being the executor. Going out to see Rod now Don

[29] He wrote again at 11:35 am, expressing concern about Ms. Ricard's family:

> I need your advise on this. Pierrette will be here as long as she wishes then Brenda. I'm afraid to give to Pierrette but will take your advice. I'm only afraid of her family, should something happen to her.
>
> Don

[30] Mr. Bates wrote once more at 12:49 pm:

> Bill
>
> We have decided to go with everything going to Pierrette with Brenda being the Ex
>
> Please let me know where and when to go for signatures. We are in Port Williams now but returning home Don

[31] Mr. Thomson wrote at 2:21pm

> Don,
>
> If everything is going to Pierrette here (*sic*) is no reason for Brenda to be the Executor of your estate.
>
> When do you want to meet?
>
> Regards,
>
> Bill

[32] Mr. Bates and Mr. Thomson agreed to meet later that day and the Will was executed.

[33] Mr. Thomson gave evidence about his discussions with Mr. Bates and the evolution of his client's instructions for the Will. Mr. Thomson believed that the first email initiated by Mr. Bates with regards to his estate planning was dated July 29, 2018. That email is not in evidence. Mr. Thomson later said he could not recall a specific date, but that he believed there were conversations and emails pre-dating the signing by a month or two. However, the emails in evidence, do not support Mr. Thomson's belief that he and Mr. Bates were involved in ongoing discussions for weeks or months before July 30, 2018. Mr. Thomson provided no legal file in the disclosure, no notes and no bill generated for time spent on the preparation of the Will. His email disclosure was incomplete, given the computer system failure suffered at his office. Mr. Thomson does not photocopy any documents and keeps information on his phone. He said his practice would be to take a client's ID and keep that information on his phone; however, he could not provide that evidence in

this matter because he had changed his phone and did not transfer over all of the information. Mr. Thomson could not recall the details of any phone conversations of substance that he had with Mr. Bates.

[34] The initial draft Will prepared by Mr. Thomson included a life interest to Ms. Ricard in the property located at Memorial Drive in Dartmouth. Initially, the Will named Brenda MacDonald as Trustee, with Ms. Ricard named as alternate. In the draft Will, the residue of the estate was left to Ms. MacDonald. The initial draft further provided that if Ms. MacDonald predeceased Mr. Bates, the residue of his estate would go to Ms. MacDonald's children. Paula Bates and Heather Manning were excluded from the draft Will. Ms. Ricard was named as Mr. Bates's power of attorney, with Ms. MacDonald named as alternate.

[35] Mr. Thomson testified that Mr. Bates had initially wanted his daughter Brenda to benefit from his estate. Mr. Bates was concerned, however, about her abilities to execute his wishes with regards to the disposition of his assets. He wanted Ms. Ricard to be able to stay in the home so that she could continue with the dog breeding business. Mr. Bates hoped that Brenda would take more of an interest in that business and help run it after his death. Mr. Thomson pointed out that creating a life interest is complicated. He also advised Mr. Bates that he should think about his assets spanning his entire life and disburse to those who were deserving.

[36] Ms. Ricard's life interest in the Memorial Drive property was changed in subsequent drafts. Mr. Thomson testified that this change was made as a result of discussions he had with Mr. Bates about the nature of a life interest and the "checks and balances" that would have to be put in place if one was created. Mr. Thomson testified that Mr. Bates did not want to incur any further expense with regard to detailing and clarifying the life interest and setting out the reserves necessary to maintain the property.

[37] Mr. Thomson further testified that he did not believe Mr. Bates wanted to create a life interest, but merely wanted Brenda to have the remainder of his estate after Ms. Ricard's death. Mr. Thomson believed that Mr. Bates wanted to control his assets from beyond the grave. Mr. Thomson testified that he did not advise Mr. Bates that he could not control his estate from beyond the grave if he gave it completely to Ms. Ricard upon his death, but he did tell Mr. Bates that he could not control Ms. Ricard once she was the sole beneficiary.

[38] The Will was subsequently revised to reflect that Ms. Ricard would be the sole beneficiary. The Will was signed on July 31, 2018. It provides that Ms. Ricard

is the Executor and Trustee. Pursuant to clause 6.1, the residue of Mr. Bates's estate was left to Ms. Ricard, but if Ms. Ricard did not survive Mr. Bates, the residue would go to Ms. MacDonald. Mr. Thomson testified that the Will was signed in his office on the Bedford Highway with himself and his assistant (daughter), Vanessa Thomson, and Mr. Bates. Mr. Thomson reviewed the Will with Mr. Bates, ensuring that he understood the contents and had an opportunity to ask questions or make changes. Mr. Thomson advised that if changes were made later, Mr. Bates would not be charged for them.

[39] Mr. Thomson met with Mr. Bates for half an hour to an hour and it was the only time they met. Mr. Thomson had no concerns about Mr. Bates's capacity or any concerns about his ability to understand the contents of the Will. Mr. Thomson did not think that Mr. Bates was confused even though, in one of his emails, Mr. Bates said, "I also thought the executor was the person to supervise the execution of the Will?" Mr. Thomson said this was not evidence of confusion as Mr. Bates had given clear instructions.

[40] Mr. Thomson had no concerns that Mr. Bates was being forced into signing this Will contrary to his intentions. He testified that he did not think anyone could force Mr. Bates to do anything, as he was "ex RCMP". The evidence from the other witnesses corroborates Mr. Thomson's description Mr. Bates as a man who knew his mind and was not easily influenced or influenced at all for that matter.

[41] Initially, Mr. Bates' intention was to provide a life interest in the Memorial Drive home to Ms. Ricard with the residue to Ms. MacDonald, but that is not the Will that Mr. Bates ended up signing. Mr. Thomson maintained that everything was in place in to create a life estate for the benefit of Ms. Ricard. The only thing that had to be developed were directions for the Trustee and reserves to ensure that the residence was maintained. Mr. Thomson admitted that he could not specify what needed to be documented and arranged for the residence, but simply indicated that there was more work to be done. It is clear that Mr. Thomson was not familiar with creating life estates, but he knew that he would need more information from Mr. Bates and would have to consult another lawyer if Mr. Bates decided to pursue the life estate. Mr. Thomson maintained on cross-examination that the basic clauses for a life estate were drafted originally and more needed to be delineated with regards to the trustees' responsibilities.

[42] Mr. Thomson said the life estate was not contained in the final Will because Mr. Bates did not want to turn his mind to the additional details required to properly

create one. Mr. Bates did not want to take the time to explore the ramifications of a life interest.

[43] Mr. Thomson admitted on cross-examination that he did not ask Mr. Bates any questions about the content of his initial memo setting forth his intentions. He did not ask Mr. Bates to further explain why he was disinheriting his other two daughters. They had no further discussion about the disinheritance. It would have been preferable for Mr. Thomson to have included the reasons for disinheritance in the file to ensure that there was no confusion upon his death. A statutory declaration or another such instrument would have been helpful.

[44] Mr. Thomson did not believe that Mr. Bates was ever confused or uncertain about his intentions. Mr. Bates was facing a serious surgery and wanted the Will completed and was content to forego the life estate. Mr. Thomson thought that Mr. Bates may reconsider his Will after his surgery. Lastly, Mr. Thomson said he did not review the cohabitation agreement because he was "not interested in it."

[45] Mr. Thomson on discovery said that Mr. Bates last wish was for Ms. Ricard to be the beneficiary and his youngest daughter, Brenda MacDonald to have the remainder of his estate once Ms. Ricard died. He maintained that Mr. Bates knew that he was giving his estate to Ms. Ricard outright.

[46] When all of the evidence is considered, I cannot conclude that Mr. Bates was confused about the Will. He may have had some initial misunderstanding about the role of an "executor", but he was clearly an intelligent man who comprehended what he was signing.

Capacity

[47] Mr. Thomson said he tested Mr. Bates's capacity and was satisfied that he was competent. Mr. Thomson met with Mr. Bates, knew his background through the exchange of emails, including that he was ex-RCMP, he was a businessman, he was in a common-law relationship with an intelligent woman, and that she had been employed as a federal public servant. He knew that Mr. Bates would soon be undergoing a serious surgery. As noted earlier, Mr. Thomson met with Mr. Bates for 45 minutes to an hour. Mr. Thomson did not have any concern about Mr. Bates being unduly influenced by Ms. Ricard, despite the email that said she was upset with the idea that his youngest daughter would get everything when he died.

[48] Mr. Thomson did not have much additional information and knowledge about Mr. Bates. Mr. Thomson knew nothing about Mr. Bates's medical condition or the surgery that was required. However, his evidence about Mr. Bates wanting his estate to go to Ms. Ricard and the lack of undue influence is corroborated by Ms. Ricard, Brenda MacDonald, and, to some extent, by the descriptions of Mr. Bates given by the applicant herself.

Brenda MacDonald

[49] Brenda Ann MacDonald testified for the respondent. She is employed as a LPN at the Nova Scotia Health Authority. Ms. MacDonald has held the same position for the last 17 years, working in mental health and addictions. She resides with her spouse, Anthony MacDonald, in Eastern Passage. Ms. MacDonald provided some background in relation to her childhood and her parents. Her mother, Yvonne Bates, is still living. Her parents separated when she and her siblings were quite young. Her father was transferred to Ottawa with the RCMP when she was six years of age. He returned when she was 13 and the marriage dissolved. Ms. MacDonald testified to having a good childhood and spending a lot of time with her father and wanting to be around him. Her other siblings did not have as close of a relationship with their father as she did. Ms. MacDonald said she was always closer to her father than her siblings were. She did not think they had much of a relationship with him during their teen years and went years without having any contact with him.

[50] Ms. MacDonald is six years younger than her sister Heather, who lives in the United States, and seven years younger than the applicant, Paula Bates. She could not recall much about her parents' relationship, saying she was sheltered from that. She said they all had some difficulty with Mr. Bates because he was a strong, stern man and it was "his way or no way." Although she did not know the particulars about the difficulties in her parents' marriage, she knew there were difficulties and that her mother had left a few times with the girls. She could not speak directly to whether there was any physical violence in the relationship, and anything she had heard from anyone else would be hearsay.

Testator's Relationship with Heather

[51] Brenda MacDonald testified that her sister Heather was married, but the marriage dissolved, and she left Nova Scotia approximately 15 years ago when she married her second husband. Heather has lived outside of Canada for a number of

years and presently lives in Virginia. Ms. MacDonald testified that her father did not go to her sister's second wedding.

[52] Ms. MacDonald testified that she was married in Las Vegas on April 1, 2010. Mr. Bates walked her down the aisle. Heather also attended the wedding. Ms. MacDonald said that her wedding was the first time that Heather had seen Mr. Bates in a very long time. He did not acknowledge Heather at the wedding. Mr. Bates had an issue with Heather's husband and had never met him. Ms. MacDonald testified that Heather's husband is associated with an organization that Mr. Bates did not approve of. Before Mr. Bates's death, Heather had sent flowers and was on the phone with her father. Heather reunited with Mr. Bates when he was suffering from bladder cancer in 2018. Ms. MacDonald testified that she did not know the extent of the relationship between her father and Heather between 2018 and 2021. She surmised that Heather had likely sent him Christmas cards and may have stopped in to say hello when she was in town, but she could not recall.

[53] It is clear from Brenda's evidence that Heather had a very limited and strained relationship with her father. They went years without seeing one another, likely due to distance and Mr. Bates's disapproval of Heather's husband.

Testators' Relationship with Paula

[54] Ms. MacDonald indicated that she did not have any information about the relationship between Paula and her father. Paula first drove for Metro Transit Authority and then drove a sweeper truck for the HRM. She worked nights and Ms. MacDonald worked days.

[55] Brenda recalled that during their teen years, Paula Bates did not have a relationship with Mr. Bates. She said her father did not speak with her about that issue as he kept things very close to his chest. She recalled that her father had helped Paula do some work on her house. He had also tried to help her when she needed a car and needed work done on the car. Ms. MacDonald also recalled that during Christmas and birthdays, Paula would come out to visit her father.

[56] Ms. MacDonald's sense of Paula's financial situation was that she has had her struggles. She said Paula did not budget well and was generous with her daughter, Lisa, and four grandchildren. Ms. Bates testified that Lisa had struggles with mental health and addiction, and that Paula regularly helped her daughter and grandchildren.

[57] Ms. MacDonald recalled her father voicing concerns about Paula's daughter and Paula wasting money on her daughter and grandchildren. He was critical of Lisa's drug use and was worried about Paula giving assets or money to her daughter. Mr. Bates did not have any relationship with Lisa or his great grandchildren.

[58] Ms. MacDonald did not know whether Paula had approached Mr. Bates for financial assistance. She did not know if her father gave any money to Paula. However, Ms. MacDonald knew that her father helped Paula with regard to a car. She knew that they went car shopping and that her father helped fix the car up for Paula.

[59] Ms. MacDonald said her father was not generous with money and that he wanted his daughters to be financially independent. She described her father as liking people who lived life on the straight and narrow. Everyone knew that Mr. Bates was a strait-laced man. He was a former RCMP officer who did not tolerate people who were slouches or who didn't follow societal norms.

Testator's Intention

[60] Ms. MacDonald testified that on one occasion when she was visiting her father, he asked her if she would be interested in taking over the dog business if anything happened to him. She recalled being upset and asking him why he was asking that question. She said she was floored and shocked that he would have said this and told him that she needed to discuss it with her husband to see if they could. A few days later, she went back and told her father that they would be willing to try and take over the business, but she wanted to know why and whether he was dying. Mr. Bates advised Ms. MacDonald that his intention was that Ms. Ricard would be able to stay in the house and take care of the dogs, and that after that, his estate would all go to Ms. MacDonald.

[61] Ms. MacDonald recalled a time when she, Mr. Bates, and Ms. Ricard were driving to Pete's Frootique. Her father informed her that he had a will, and that Ms. Ricard would receive the estate once he died. Ms. MacDonald said she became upset and cried and told him that she did not think it was fair that this was done with no discussion. She told him that the only thing she would have wanted was the property in New Brunswick. Ms. MacDonald reminded Mr. Bates about one of his friends who had passed away and did not give any of his estate to his children. Ms. MacDonald advised her father that she could not believe that he would do that to his daughters. Mr. Bates said nothing in response and simply kept driving. Ms.

MacDonald said Ms. Ricard told her that she could have the New Brunswick property.

[62] Once Mr. Bates passed, Ms. MacDonald said she was shocked to learn that his entire estate went to Ms. Ricard. Ms. MacDonald spoke to Ms. Ricard before her father's passing about a trip she had taken with her father to Economy. She advised Ms. Ricard that her father had told her that if there was anything she wanted from his estate to ask Ms. Ricard. She told Ms. Ricard that she wanted the property in New Brunswick. Ms. Ricard did not agree to it immediately, but subsequently changed her mind. Ms. MacDonald testified that Ms. Ricard has told her that she will continue to care for the dogs, and that when she dies, she will leave the remainder of Mr. Bates's estate and the house at Memorial Drive to his three daughters. Ms. MacDonald said she has not seen Ms. Ricard's will.

[63] Ms. Ricard continues to care for the dogs and when the female dogs are close to giving birth, they go to Ms. MacDonald's home where she cares for them and the puppies, eventually selling the puppies and keeping the money.

[64] Ms. MacDonald said she was in contact with her father in the weeks and months leading up to his surgery in 2018. During that time, her father was able to care for his personal needs, the dogs, and his business. There was no issue communicating with him. He was clear in his speech even up to the day of surgery. Her evidence supports that he had capacity and was more than capable of expressing himself and making decisions. Ms. MacDonald said her father did not share a lot of information. He was a protective individual who would make a decision and stick to it. She testified that he knew his own mind and would make up his own mind easily.

[65] Ms. MacDonald was very emotional while speaking about her father's sudden passing as a result of liver cancer. She testified that Ms. Ricard, Paula Bates and herself were there throughout the last few days of his life.

[66] Ms. MacDonald was asked about the following paragraph in Paula Bates's affidavit of August 11, 2022:

> 11. A few years or before my father's death, I was told, however, by Brenda – who Ms. Ricard referred to as my father's "favourite" – that there was either a previous will or a plan to draft a will that had my father's estate split equally between Brenda and Ms. Ricard.

[67] Ms. MacDonald denied ever making this statement to Ms. Bates. Ms. MacDonald said at one point she thought Ms. Ricard would remain in the home until she died and then the assets would all go to Ms. MacDonald.

[68] Ms. MacDonald frequently visited her father and Ms. Ricard. They had moved into the home on Memorial Drive approximately 20 years prior. Ms. MacDonald was aware that Ms. Ricard was in a common-law relationship with her father and that they were more than roommates.

[69] I was impressed with Brenda MacDonald as a witness. She struck me as an earnest individual who tried hard to ensure that she gave accurate testimony. I accept Ms. MacDonald's evidence and accept it over the evidence of Paula Bates where there is any conflict between the two.

Pierrette Ricard

[70] Ms. Ricard testified both through affidavit and *viva voce* evidence. Ms. Ricard swore an affidavit on July 4, 2023, which provides an overview of her relationship with Mr. Bates. Ms. Ricard is 66 years of age. She first met Mr. Bates in 1994-1995. They began a relationship, but it ended a few months later. They resumed their relationship in May 2000. At that time, Mr. Bates was residing at Memorial Drive and Ms. Ricard moved into the property on October 1, 2001. She resided there at the time of Mr. Bates' death on August 5, 2021, and was still living there at the time of the hearing.

[71] Ms. Ricard referred to a co-habitation agreement that she and Mr. Bates entered into on January 28, 2002. The agreement indicates that the parties had been co-habiting since October 1, 2001.

[72] Ms. Ricard acknowledged para. 20 of the co-habitation agreement:

> 20. **WILLS**
>
> Donald and Pierrette agree that they will each make a will to reflect their respective obligations under this Agreement and shall be bound by the terms of this Agreement with respect to their respective entitlement. Donald and Pierrette further agree that they have each made wills providing for their respective families and both parties acknowledge that the wills reflect their respective intentions.

[73] At the time she signed the co-habitation agreement, Ms. Ricard understood this provision to mean that she and Mr. Bates would each draft a will and neither one would inherit from the other. Ms. Ricard indicated that she had drafted a will

when she was 23 but had not drafted a new one after signing the co-habitation agreement. She does not have any children.

[74] Ms. Ricard said that both she and Mr. Bates had entered the relationship with their own assets and money and had decided that they would not co-mingle their resources. At paragraph 26 of her affidavit, Ms. Ricard indicated that she and Mr. Bates did not have any specific discussions regarding the contents of their respective wills. Initially, the couple agreed to keep their finances separate and neither had details of the each others assets or specifics of income. They had no joint accounts nor any joint property.

[75] Within a year or two of Ms. Ricard moving to the property, Mr. Bates became more active with the dog breeding business. He operated the business from their property. Ms. Ricard assisted him with the dogs but otherwise had no role in the business or knowledge of its finances. Throughout the time they lived together, Mr. Bates paid for the property taxes and cell phone. Ms. Ricard paid for the property insurance, heat and power, water, groceries, cable and internet. Around 2009 or 2010, Mr. Bates took over the payment of the water bill. In 2015, when the heated garage was built on the property, the couple agreed that Mr. Bates would contribute the difference between the power and heat bill priors to construction of the garage and post-construction. In 2015, Mr. Bates paid to install a new roof on the property.

[76] During their relationship, the couple accumulated a number of assets including two boats, four used tractors and numerous vehicles. Ms. Ricard stated that she believed that Mr. Bates would not have been able to acquire these assets without her financial contributions to their household expenses.

[77] Seventeen years after the co-habitation agreement was signed, in May 2018, Mr. Bates was diagnosed with bladder cancer. While he was in daily discomfort leading up to the surgery in July 2018, he was not on any medication, and none had been recommended for pain management.

[78] Ms. Ricard described Mr. Bates as a man who was not given to hysterics. He was a very matter-of-fact man who kept going and simply dealt with business. He never expressed any concern to her about his upcoming surgery, despite his doctor's advice that it was a serious operation and that some patients did not recover.

[79] In the face of this advice, Mr. Bates started planning his estate. Mr. Bates asked Ms. Ricard what she wanted as part of the Will. Ms. Ricard told him that she wanted the dogs and to be able to continue living in their home at Memorial Drive.

She said he did not respond, and they did not speak further about it. She knew that Mr. Bates had received the answer and they moved on. Ms. Ricard described Mr. Bates as a man who did not discuss things at length. He would ask questions, receive answers and that was it. Ms. Ricard said Mr. Bates initially told her that she would have a life interest in their home on Memorial Drive. She became emotional in response to this information as she thought it meant that she would be out of the house, with no dogs and no say. Ms. Ricard did not understand the nature of a life interest. Ms. Ricard recalled that she had told Mr. Bates about her fear that if there was no will in place and nothing in writing allowing her to remain in the home that Heather MacDonald's husband or someone else could come and put her out on the street. She had never met Heather until 2018 after the Will was signed. Ms. Ricard could not recall what, if anything, Mr. Bates said in response to her concerns and said it was not like him to discuss anything. She described Mr. Bates as having no reaction to her emotional response to the proposed life interest. He would simply absorb the information and carry on. She said the two of them moved on and he had his answer. He did not explain to her what a life interest was or discuss it any further.

[80] Mr. Bates was extremely devoted to his dogs and the business. He wanted the dogs to be able to continue living on the property and this was extremely important to him. He relied on Ms. Ricard to stay on the property to look after the dogs. He did not expect Ms. MacDonald to do this. Although Brenda would be involved in the breeding, she would not be involved in the day-to-day care of the dogs.

[81] Ms. Ricard could not recall whether Mr. Bates expressed the concern she had about being thrown out of the property after his death to the lawyer, Mr. Thomson. However, she was copied on an email of July 30, 2018, at 8:49 pm with regards to the life interest.

[82] The surgery was scheduled for August 2, 2018, and Ms. Ricard recalled that Mr. Bates wanted to complete the Will beforehand. She said that she recalled them going to Mr. Thomson's office. She remembered this time in their lives as being a whirlwind. They received the cancer diagnosis; a medical operation was needed, and Mr. Bates had a painful recovery. She recalled waiting in the car while Mr. Bates was in the office reviewing the signing the Will. She believed that once he signed it and returned to the car that he did tell her what was contained in the Will.

[83] Leading up to the signing of the Will, Mr. Bates made some statements to Ms. Ricard about not wanting to leave anything to his daughters. He told her that he did not want to leave anything for Paula and Heather. The reasons he gave were that he

did not see them much; that Paula was not good at managing money; and that Heather's husband was involved in an organization and with activities that he did not approve of, and he had not seen her until 2018. Ms. Ricard said Mr. Bates did not give much other information about why he was not going to leave anything to Paula or Heather, and that he was not a man to provide details or explanations for anything.

[84] Ms. Ricard recalled that Mr. Bates had assisted Paula by paying for glasses for her. In addition, when she needed a car, he went to Maritime Auto Salvage to help get the car and he fixed it. Paula provided him with post-dated cheques payable on the first of each month to pay Mr. Bates back for the car. Ms. Ricard understood the agreement was that if Paula missed any payments, Mr. Bates would repossess the car.

[85] Ms. Ricard said she hardly saw Paula before the 2018 operation, perhaps two times per year but not much more. She said the two were on civil terms, but that things are a little difficult now. Ms. Ricard had no recollection that Paula came around more after 2010. Ms. Ricard cannot say whether there was more contact by text after 2018, as she did not see the texts. She did not witness many phone calls and thought there might have been half a dozen in the run of a year. Ms. Ricard did not see Paula visiting Mr. Bates at the hospital in 2018.

[86] Ms. Ricard recalled that at one point, Paula brought over her grandchild for a meal. Mr. Bates was not pleased with the child's table manners and found it difficult to be around the grandchild. The child was only five years old at the time. After that, he saw the other grandchildren once or twice in the backyard, and only briefly.

[87] The testimony of Ms. Ricard and Ms. MacDonald certainly paints the picture of Mr. Bates as a very stern, reserved, detached, distant, hard to please, unemotional individual. Ms. Ricard recalled that Mr. Bates expressed no interest in a relationship with his grandchildren. There were no gifts for them at Christmas and Ms. Ricard did not think it was her place to suggest anything.

[88] After the Will was executed, Ms. Ricard believes Mr. Bates told Ms. MacDonald that she could have anything that was his if she wished to make a request. Ms. Ricard said she never questioned that, although she did not have a discussion directly with Mr. Bates about that. Ms. Ricard remembered the car ride where Ms. MacDonald expressed surprise and upset over the fact that she was not a beneficiary of the Will. Ms. Ricard recalled telling Ms. MacDonald that she did not want the New Brunswick property and that she could have it. Ms. Ricard denied

ever telling Brenda that she would execute a will splitting the remainder of Mr. Bates's assets among the daughters. She indicated that she and Mr. Bates did not want each other's families to inherit the other's estates, and their separate assets would go to their respective families. Ms. Ricard has deeded two properties to Ms. MacDonald in Bellisle Bay.

[89] Ms. Ricard described the error she made on filing the first Inventory. She said she skipped the easy parts of the Inventory and simply missed them. She then corrected the error. She assessed $64,000 in personal property as a result of the cars that Mr. Bates had, and the tools he also owned.

[90] Ms. Ricard appended her tax records going back to 2016. In addition, she has evidence of a bank draft of $8,500 payable to her as a result of the sale of one of Mr. Bates's vehicles after his death. The bank draft is dated December 20, 2021. Additionally, she sold his 2015 Nissan Juke for $12,500 on March 18, 2022. Ms. Ricard also provided invoices for various veterinary services required for the care of the dogs since Mr. Bates's death. These expenses were paid by Ms. Ricard and total $17,695.64. Ms. Ricard's monthly sources of income include Public Pension Plan, Old Age Security, Canada Pension Plan, Veterans Affairs and Nav Canada Pension, for a total of $6,528.29.

[91] I found Ms. Ricard to be a credible witness and I accept her evidence. It was internally and externally consistent. She was not contradicted nor disturbed in any serious way on cross-examination. While some of her duties as executor were not met, such as the posting in the Royal Gazette, and she made a mistake on filing the Estate inventory, I find that she tried to give truthful and accurate evidence.

Proof in Solemn Form

[92] The applicant admits that the Will meets the requirements pursuant to the *Wills Act*. The Will was signed by Mr. Bates and witnessed by two individuals. Mr. Bates reviewed the Will prior to signing it. Accordingly, there is a presumption that the Will is valid. As set forth in *Wittenberg v. Wittenberg Estate*, 2015 NSCA 79:

> 11 The burden of proving a will rests with those who propound it. However, they are assisted by a presumption of knowledge and approval as well as of capacity where the will has been shown to be duly executed. In this case, Mr. Wittenberg has also alleged suspicious circumstances in the making of his mother's will. If there are facts that may support this allegation the presumption is spent, and the propounders of the will must establish that the testatrix knew and approved of the contents of the will. Similarly, if those circumstances relate to mental capacity, the

> propounder must establish testamentary capacity on the civil standard of a balance of probabilities.

[93] The applicant argues that there are suspicious circumstances and, if I accept there are facts which may support this allegation, Ms. Ricard would need to prove that Mr. Bates had knowledge and gave approval of the contents of the Will.

[94] There is no dispute that Mr. Bates read over the Will before signing it and knew that it made Ms. Ricard the sole beneficiary. There is no suggestion by the applicant that Mr. Bates did not mean to sign the Will. There is no dispute that Mr. Bates had satisfactory mental fitness and was competent to sign the Will.

[95] The applicant argues that for a Will to be valid, the testator must approve the contents and the Will must express their intention. The applicant says Mr. Bates's initial instructions were that he intended for a life estate to be provided to Ms. Ricard and the residue would go to Ms. MacDonald. The applicant suggests that since the Will does not reflect Mr. Bates's intention of a life estate, his estate devolves into an intestacy.

[96] The applicant further argues that there was undue influence on Mr. Bates at the time he signed the Will. She suggests that undue influence can take many forms, including innocent influence. She argues that Ms. Ricard influenced Mr. Bates to resile from the life estate. The applicant argues that Mr. Thomson appeared to be nonresponsive to Mr. Bates and focussed on getting something done as opposed to doing what he was asked to do by the client. The applicant submits that Ms. Ricard's concerns about being left on the street despite having half a million dollars in her own bank strains credulity. The applicant says Ms. Ricard had a lot of anxiety around what would happen in the Will and the lawyer did nothing to help with the situation.

[97] The applicant argues that Mr. Bates never wanted Ms. Ricard to have his estate unconditionally and that he always wanted the remainder of the estate to go to Ms. MacDonald.

[98] The applicant says Mr. Thomson did a great disservice to everyone by not drafting a Will that reflected Mr. Bates's intention. She argues that Mr. Thomson's ineffectiveness left Mr. Bates in an extremely vulnerable position and susceptible to influence. The applicant raises concern with Ms. Ricard, arguing that she swore a false inventory. She missed lines in the inventory and swore a false affidavit because she knew there was cash on hand in the Memorial Drive location, as well as the

CIBC bank account. The applicant submits that the Will does not reflect Mr. Bates's intentions or, if it does, it is only as a result of undue influence.

[99] Ms. Ricard was aware that Mr. Bates was consulting Mr. Thomson regarding the preparation of a Will. She had no communications with Mr. Thomson and said she did not pressure Mr. Bates in any way. Ms. Ricard opined that Mr. Bates had no capacity issues at the time that he executed his Will.

[100] There is no question that the evidence as a whole demonstrates that Mr. Bates had full knowledge and approved of the contents of the Will. With regards to testamentary capacity, the general test is set forth in *Banks v. Goodfellow* (1870) L.R. 5 Q.B. 549 at 565 as follows:

> 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 disposition of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.

[101] Testamentary capacity is the capacity to know and understand that one is executing a testamentary document disposing of assets. The general value and nature of the assets are known to the testator and execution of the will is only completed after considering and being able to comprehend and appreciate claims which ought to be given effect.

[102] There was no medical evidence proffered on this application to suggest that Mr. Bates lacked testamentary capacity. There was only lay opinion evidence of Mr. Thomson, Ms. Ricard and Ms. MacDonald. There was no suggestion by any of them that he was of unsound mind. The question is whether the evidence demonstrates that Mr. Bates understood the nature of the act and its effect, and whether he understood the extent of the property he was disposing. Whether he was able to comprehend and appreciate the claims to which he ought to give effect and lastly, whether any disorder of his mind impacted his sense of right or wrong or influenced him to dispose of the property in a specific way.

[103] The emails between counsel and Mr. Bates show that he did approve and appreciate the contents of the Will. He discussed those specifics with his lawyer as well as with a friend, a "Ron", and Ms. Ricard. He later spoke to Ms. MacDonald

about what was in his Will and these discussions demonstrate that he appreciated the ramifications of his decision.

Suspicious Circumstances

[104] In *Re: Jessie May Coleman (Estate)*, 2008 NSSC 396, Justice Warner reviewed the legal doctrine of suspicious circumstances as follows:

> [53] The effect of suspicious circumstances on the application of the general principles to individual factual matrices originated in Barry v. Butlin, and over the years created some ambiguity and difficulties in those situations where the burden was decisive. Some case law might have supported the idea that the doctrine of suspicious circumstances affected the burden of proving undue influence and fraud; however, Justice Sopinka for the Supreme Court of Canada in Vout v. Hay clarified the relationship between the doctrine and the various burdens of proof at 23 to 30, and in particular at 27 and 28:
>
> > 27 Suspicious circumstances in any of the three categories to which I refer above will affect the burden of proof with respect to knowledge and approval. The burden with respect to testamentary capacity will be affected as well if the circumstances reflect on the mental capacity of the testator to make a will. 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 rebuttal 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.
> >
> > 28 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 circumstance 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.

[105] The applicant argues that Mr. Thomson was grossly negligent in the preparation of the Will which supports a finding of suspicious circumstances.

[106] While initially Mr. Bates's intent appeared to be to provide Ms. Ricard with a life interest, he certainly did change his mind. However, there is a lack of sufficient evidence proving coercion or under influence on the part of Ms. Ricard. Simply because Mr. Bates decided to make Ms. Ricard sole beneficiary rather than giving her a life interest does not, in and of itself, support a finding of suspicious circumstances.

[107] The applicant suggests that Mr. Bates was emotionally and physically dependent on Ms. Ricard because he wanted her to look after his dogs and run his breeding business after his death. Again, there is no evidence by any of the witnesses that Mr. Bates was emotionally or physically dependent upon anyone. The evidence supports quite the opposite – an independent and stubborn individual. In fact, his daughter was the one who agreed to continue the breeding business. There is no evidence that there was a *quid pro quo* between Mr. Bates and Ms. Ricard that she would not look after the dogs unless she was the sole beneficiary.

[108] The applicant further argues that suspicious circumstances arose after Mr. Bates's death involving Ms. Ricard's interaction with Ms. MacDonald, including:

- deeding the land in New Brunswick to Ms. MacDonald;
- loaning her a motorboat;
- leasing the dogs to her to breed;
- Ms. MacDonald not objecting to nor challenging the Will; and,
- Ms. Ricard advising of her intention to draft her own Will to benefit some or all the children of Mr. Bates.

[109] Again, there was no evidence as to why any of these alone or all of them taken collectively prove or support a finding of suspicious circumstances. It was clear throughout that Mr. Bates intended to have Ms. MacDonald carry on the breeding business. The evidence is that he told both Ms. Ricard and Ms. MacDonald while on a drive that Ms. MacDonald needed only to ask Ms. Ricard for anything she wanted.

[110] Furthermore, all the witnesses agreed that Ms. MacDonald had the closest relationship with her father. The fact that she did not challenge his Will does not rise to the level of suspicious circumstances. Instead, it was consistent with her having a close relationship with him, and with Mr. Bates's own observation to Mr. Thompson that she "has been the only one of the girls to make much effort to not go against my wishes at every opportunity."

[111] The applicant suggested that Ms. Ricard and Ms. MacDonald were in collusion against Ms. Manning and Ms. Bates. There is no evidence supporting this allegation.

[112] In *Vout v. Hay*, *supra*, the court stated the following about the burden of proof with regards to suspicious circumstances and how to address such an allegation:

> 25 … The suspicious circumstances may be raised by (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. Since the suspicious circumstances may relate to various issues, in order to properly assess what effect the obligation to dispel the suspicion has on the burden of proof, it is appropriate to ask the question "suspicion of what?" See Wright, *supra*, and *Macdonell, Sheard and Hull on Probate Practice* (3rd ed. 1981), at p. 33.
>
> 26 Suspicious circumstances in any of the three categories to which I refer above will affect the burden of proof with respect to knowledge and approval. The burden with respect to testamentary capacity will be affected as well if the circumstances reflect on the mental capacity of the testator to make a will. 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.
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> 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.
>
> 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. See Wright, *supra*, and *Macdonell, Sheard and Hull on Probate Practice*, supra, at p. 33. Indeed the reference in *Barry v. Butlin* to the will of a "free and capable" testator would have supported that view. 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*, 1919 CanLII 416 (UK JCPC), [1920] A.C. 349; *Riach v. Ferris*, 1934 CanLII 13 (SCC), [1934] S.C.R. 725; *Re Martin*, *supra*.

[113] The propounder of the Will, representative of the Estate, Ms. Ricard, has the burden to prove knowledge, approval, and testamentary capacity. She has met the burden. The burden of proof remains on the applicant who is attacking the Will. Ms. Bates has fallen far short of that burden.

[114] The evidence is that Ms. Ricard did not ask for everything; her concern was to be in the house with the dogs. She did not get what she had asked for from Mr. Bates – she actually got more. All the arguments advanced by the applicant are in the nature of speculation and are not supported by *viva voce* or documentary evidence.

Undue Influence

[115] The applicant argues that Ms. Ricard and Ms. MacDonald placed undue influence on Mr. Bates with regards to his Will. The evidentiary burden is on the applicant to prove that the mind of Mr. Bates was overborne by the influence exerted by one of those two individuals. The influence has to be such that there is no voluntary approval of the contents of the Will. The burden on the applicant is on a civil balance of probabilities.

[116] The various witnesses did not agree on much, but they all agreed that Mr. Bates was stubborn, a man who did not discuss his emotions much, and was not someone who could be deterred from his viewpoints. There was no evidence that anyone had unduly influenced him with regards to his estate planning or, for that matter, could have influenced him in any way. With regard to wills, undue influence amounting to outright overpowering or coercion must be established by the party disputing validity.

[117] In *Wingrove v. Wingrove* (1885), 11 P.D. 81, the court said that undue influence requires "to sum it up in a word - coercion...it is only when the will of the person who becomes a testator becomes coerced into doing that which he or she doesn't desire to do that it is undue influence" (p. 82).

[118] In *Re Marsh Estate* (1990), 99 N.S.R. (2d) 221, 1990 CarswellNS 231 (Prob. Ct.), aff'd 104 N.S.R. (2d) 266 (S.C.A.D.), Bateman Prob. Ct. J. (as she then was) quoted with approval the following passage from Feeney, *The Canadian Law of Wills*, 3d ed. at p. 42:

> The burden of proof of undue influence is on the attackers of the will to prove that the mind of the testator was overborne by pressure exerted by another person. It is not enough to show mere persuasion; the influence exerted on the testator must amount to coercion to be undue influence. Coercion has been defined to mean that the testator has been put in such a condition of mind that if he could speak his wishes to the last he would say. 'This is not my wish but I must do it.' [quoted in *Marsh Estate* at para. 38]

[119] In *Wittenberg, supra*, the court stated:

> 78 Undue influence is a serious allegation and must be proven with positive evidence. The opportunity to exercise influence is not proof Mrs. Wittenberg was influenced: *Maddess v. Racz*, 2008 BCSC 1550 (B.C. S.C.), aff'd *Maddess v. Racz*, 2009 BCCA 539 (B.C. C.A.), leave to appeal to SCC ref'd, [2010] S.C.C.A. No. 72 (S.C.C.).
>
> 79 Likewise, mere opinion - even of a solicitor - that a will was obtained by undue influence is not sufficient unless there is evidence of that influence: *Nickerson Estate, Re* (1996), 155 N.S.R. (2d) 289 (N.S. Prob. Ct.). It is not improper for a potential beneficiary to discuss the will with a testator and urge favourable consideration for herself. Unless the influence is coercive, it is not undue.

[120] When considering whether there was undue influence upon Mr. Bates by Ms. Ricard, I must consider whether the potential for domination or persuasive influence existed in their relationship. There is absolutely no evidence that Ms. Ricard could or did wield domination or this type of persuasion. In fact, the evidence is quite the opposite. All of the witnesses agreed on one thing and that was that Mr. Bates was a strong, stubborn person.

[121] Justice Warner in *Coleman (Estate)*, *supra*, spoke about what constitutes undue influence at para. 50.

> … To set aside a will on the ground of undue influence, the challenger must establish that the influence was so great and overpowering that the will reflects the intent of the beneficiary and not the testator. To establish such coercion does not necessitate establishment of physical violence or confinement or threats but on the other hand mere influence by itself is not sufficient. The test is whether in all of the circumstances the testator did not have an independent mind that could withstand the competing influences. As put in **Feeney**: "it is not improper for any potential beneficiary to attempt to influence the decision of a testator provided the pleading does not amount to coercion and the latter continues to act as a free agent. Some begging is permissible."

[122] There has been little evidence to support a finding that Mr. Bates did not have an independent mind and that Ms. Ricard had such great and overpowering influence that the Will did not reflect Mr. Bates' intentions. In fact, all of the evidence is to the contrary.

[123] In fact, the applicant's brief on this motion stated the following in para. 11:

> 11. Mr. Bates was, it would have to be admitted by all, a difficult man who had unshakeable views and attitudes, and exacting expectations. …

[124] This statement is in direct contradiction to her suggestion that Mr. Bates was susceptible to undue influence by Ms. Ricard.

[125] The applicant places a lot of weight on the use of the term "we" in the email from Mr. Bates to Mr. Thomson sent on July 31, 2018, at 12:49 pm. In it, Mr. Bates says, "We have decided to go with everything going to Pierrette with Brenda being the Ex". Mr. Thomson was asked about the email's use of the term "we" and whether he turned his mind to the possibility that it denoted undue influence. He said that he did not ask Mr. Bates about this. The applicant argues that the "we" is Ms. Ricard and Mr. Bates, but this falls far short of amounting to proof of undue influence or suspicious circumstances. Ms. Ricard was the woman Mr. Bates lived with in a common law relationship for 17 years. It would be unusual if spouses were not talking to each other about estate planning.

[126] Unlike the testator in *Johnson v. Pelkey*, 1997 CanLII 2935 (BC SC), Mr. Bates was never dependent on Ms. Ricard or Ms. MacDonald for anything and certainly was not vulnerable to any influence. In *Johnson*, *supra*, the testator was characterized as being "too ill, too passive and too dependent to assert himself." This is in stark contrast to Mr. Bates who all described as being strong, independent, and stubborn.

[127] The totality of the evidence strongly supports the conclusion that Mr. Bates understood and had knowledge of his circumstances, understood the extent and value of his assets, and had testamentary capacity. Mr. Bates had the cognitive capacity to understand the nature of making a will, understood the particulars of his property, understood what he would be disposing of and comprehended and appreciated the claims to which he ought to give effect. He did this all freely, without any suspicious circumstances surrounding the preparation and execution of the Will and without any undue influence being exerted upon him. I find the Will is valid in the circumstances.

[128] I reach this conclusion despite the fact that Mr. Thomson unfortunately did not do everything he could have to provide the court with evidence going to Mr. Bates's capacity. There was a lack of notes, and missing emails. However, the evidence Mr. Thomson provided about Mr. Bates's capacity, understanding and knowledge was corroborated by Ms. Ricard, Ms. MacDonald and, as will be seen later, by the applicant herself.

Doctrine of Mistake

[129] The applicant argues that Mr. Thomson's claim that he was not qualified to draft the Will that Mr. Bates asked for, including the life interest to Ms. Ricard, induced Mr. Bates into thinking that he had no choice but to draft a will leaving everything to Ms. Ricard.

[130] The evidence, however, does not support this bald assertion. In fact, the evidence is that Mr. Bates had years after the Will was signed to go back and change it if he wanted Ms. Ricard to have a life interest. The court is not aware of any attempt by Mr. Bates to try to obtain a new will.

[131] There is no doubt whatsoever based on the evidence that Mr. Bates did not want an intestacy. On its face, the Will signed by Mr. Bates is crystal clear. The applicant argues that his true intention was a life interest with the residue to Ms. MacDonald. However, if Mr. Bates had the capacity to understand the first draft of the Will, there is no reason to believe that he lacked capacity or understanding when the second draft was presented to him. He may have been confused about what was entailed to effect a life interest, but he did not wish to incur the time and expense to pursue it any further and the Will he signed reflected his final intentions. It is a matter of fact based on all the evidence that he was a strong-willed individual. He knew the terms he was signing and there is no indication that he did not understand

the contents of the Will. In fact, he explained those terms to Ms. MacDonald after he signed the Will, had no confusion, and expressed no regret.

[132] Mr. Bates was looking very carefully at the documentation and closely reviewing the draft. He even pointed out a spelling error and informed Mr. Thomson on July 30th at 5:18 pm. On July 31st at 5:16 pm, Mr. Bates decided his Will would leave everything to Ms. Ricard. He was turning his mind to getting something done, acknowledging that he could change his will later if he wished. Mr. Bates continued to consider his estate matter and indicated he may consult with a friend. He also spoke about worrying about Ms. Ricard's family and preventing his brother and others in his family from owning his land in New Brunswick. It is clear in an email to Mr. Thomson on July 30th at 8:27 pm that Mr. Bates was carefully reviewing the clauses in the draft Will. The list included Schedule "A" and the trust powers. This supports that he was not casually flipping through the documents.

[133] It may be that Mr. Thomson did not provide enough information to Mr. Bates about all the intricacies of a life estate and what needed to be contained in the trust provisions. Mr. Thomson merely said that it was complicated and more work had to be done and it would cost more to put all the specifics in the Will. However, Mr. Bates clearly understood that a life estate would be more complicated and more expensive, and he made a decision to go with the simpler option. He instructed Mr. Thomson to prepare a simpler Will, which he reviewed carefully and signed. There is no evidence that that Will did not reflect Mr. Bates's intention on the day it was signed. Then, there is evidence from both Ms. Ricard and Ms. MacDonald of a discussion with Mr. Bates at some point after the Will was signed, as they were driving on their way to Pete's Frootique. He advised Ms. MacDonald that he had made a Will and left everything to Ms. Ricard. There certainly was no confusion in his description of his Will. Three years went by from the time of the signing of his Will until he died. Nothing was changed.

Testators' Family Maintenance Act

[134] The applicant seeks relief under the *TFMA*. Initially, in the applicant's pre-trial brief and prior to Ms. Manning filing her Notice of Discontinuance, the remedy sought was that the two applicants each receive 40% of the estate with 20% to Ms. Ricard. There was some discussion about the court continuing to consider Heather Manning's application and providing relief to all dependants, despite Brenda being aware of the application and not seeking to join it and after Heather specifically discontinued her application. I refer to section 15(b) of the *TFMA*, which states:

Notice of application to interested person

15 Where an application is made by or on behalf of a dependant,

> (a) the judge shall not make any order until the judge is satisfied upon oath that all persons who are or may be interested in or affected by the order have been served in accordance with the Civil Procedure Rules with notice of the application and every such person shall be entitled to be heard in person or by counsel at the hearing; and
>
> (b) the application shall, except as otherwise ordered by the judge, be deemed to be an application on behalf of all dependants who have been so served. R.S., c. 465, s. 15.

[135] Counsel has not provided any authority for the notion that s. 15(b) was intended to be used to provide relief to dependants who the court is satisfied have been made aware of their rights to make a claim and have elected not to do so. In other words, counsel has failed to persuade the court that s. 15(b) ought to be invoked to override the decisions of the dependants themselves.

[136] Additionally, in oral submissions, the applicant asked for the estate to be distributed under the *TFMA* with 65% to Ms. Bates. This would be a substantial departure from the Will as well as from the testator's intentions as supported by the evidence. As stated in *David v. Beals Estate*, 2015 NSSC 288:

> 25 I must bear in mind that the Act does not give this Court an unfettered discretion to interfere with a testator's intentions. As noted in *Redmond v. Redmond Estate* (1996), 155 N.S.R. (2d) 61, [1996] N.S.J. No. 443 (N.S. S.C. [In Chambers]), "The starting point on an application such as this must be that the testator has a basic right to dispose of his own property in such manner as he may choose to do so" (para. 23). And in *Walker v. Walker Estate* (1998), 168 N.S.R. (2d) 231, [1998] N.S.J. No. 235 (N.S.S.C.) at para. 40 [*Walker*], Goodfellow J. quoted with approval the following statement of the New Brunswick Court of Appeal:
>
> > [27] The common law right to dispose of one's assets by will is deeply rooted and must only be avoided where there is a clear case made by the claimant. Although a liberal interpretation must be favoured, some attention must be given to the fact that the freedom of testamentary disposition has not been abolished ...
>
> 26 More recently, in *McIntyre*, *supra* at para. 6, Forgeron J. stated:
>
> > At common law, a testator has the right to dispose of his/her property in any way he/she so chooses. Courts must, therefore, be cautious about rewriting the will of a testator: *Walker v. Walker Estate*, (1998), 168 N.S.R. (2d) 231 (S.C.) per Goodfellow J. Although the *Testators' Family Maintenance Act*

> places a limit on the right of testamentary disposition, interference is to be avoided except when a clear case has been made out by the claimant ...

[137] While an individual's testamentary freedom is an important right, the *TFMA* recognizes that it is not unlimited. The Act allows a judge to make an order for the adequate support of a dependant:

> **Order for adequate maintenance and support**
>
> 3 (1) Where a testator dies without having made adequate provision in his will for the proper maintenance and support of a dependant, a judge, on application by or on behalf of the dependant, has power, in his discretion and taking into consideration all relevant circumstances of the case, to order that whatever provision the judge deems adequate be made out of the estate of the testator for the proper maintenance and support of the dependant.

[138] As noted in *David v. Beals Estate, supra*:

> 30 Thus, one may lose their right to complete testamentary freedom when they fail to meet their basic legal and moral obligations to their spouse and children. The Act aims to address such transgressions. It provides a limited avenue for relief where a testator has failed to make proper and adequate provision for their spouse and children. Where an applicant shows a "clear case" of inadequate provision, I can order that the applicant be provided for out of the testator's estate, notwithstanding the terms of a will.

[139] Section 5 of the *TFMA* outlines the factors to be considered when determining whether the court should exercise its discretionary authority:

> **Inquiry by judge**
>
> 5 (1) Upon the hearing of an application made by or on behalf of a dependant under subsection (1) of Section 3, the judge shall inquire into and consider all matters that should be fairly taken into account in deciding upon the application including, without limiting the generality of the foregoing,
>
> (a) whether the character or conduct of the dependant is such as should disentitle the dependant to the benefit of an order under this Act;
>
> (b) whether the dependant is likely to become possessed of or entitled to any other provision for his maintenance and support;
>
> (c) the relations of the dependant and the testator at the time of his death;
>
> (d) the financial circumstances of the dependant;
>
> (e) the claims which any other dependant has upon the estate;

> (f) any provision which the testator while living has made for the dependant and for any other dependant;
>
> (g) any services rendered by the dependant to the testator;
>
> (h) any sum of money or any property provided by the dependant for the testator for the purpose of providing a home or assisting in any business or occupation or for maintenance or medical or hospital expenses.

[140] The court's power to make an order under the Act must be exercised according to rules of reason and justice. It must be exercised within a rational framework: *Walker v. Walker Estate, supra*, paras. 58-61.

[141] Recently, the Nova Scotia Court of Appeal in *Nova Scotia (Attorney General) v. Lawen Estate,* 2021 NSCA 39, confirmed that adult independent children are included as dependants for the purpose of relief under the *TFMA* and need not exhibit financial need to obtain that relief. The term "dependant" is defined at s. 2(b) as "the widow or widower or the child of a testator." Financial dependency is not required, although that is one of the considerations under s. 5(a) of the Act. A child is defined in s. 2(a) as follows:

> 2(a) "child" includes a child
>
> (i) lawfully adopted by the testator,
>
> (ii) of the testator not born at the date of the death of the testator,
>
> (iii) of which the testator is the natural parent

[142] Once the applicant shows she is a dependant, then she has the onus of demonstrating on a balance of probabilities that the testator did not make adequate provision for her proper maintenance and support. In this case, Paula Bates is one of Mr. Bates's three children. She is clearly a dependant as defined in s. 2(b) of the *TFMA*.

[143] The applicant must both prove a need for maintenance relative to the size of the estate and a moral claim. It is the moral aspect of the claim that is emphasized, not the economic one (*Garrett v. Zwicker* (1976), 15 N.S.R. (2d) 118 (C.A.)).

[144] In *Brown v. Brown Estate*, 2005 NSSC 271, the court reviewed a claim advanced by a son who had made substantial contributions to a property he expected would be given to him in his father's will. When his father died and he did not receive the property, he brought a claim under the *TFMA*. The circumstances in *Brown* are vastly different than before the court in this matter. In that case, the son

had done an extensive amount of work on a property in expectation of owning it one day. In assessing the claim, the court stated:

> 35 In applying the Act, s. 5(1) requires me to "inquire into and consider" several other factors, including whether the applicant's conduct or character should disentitle him to an order under the Act (s. 5(1)(a)); whether the dependant is likely to become possessed of or entitled to any other provision for his maintenance and support (s. 5(1)(b)); the relations between the applicant and the testator at the time of the testator's death (s. 5(1)(c)); the financial circumstances of the applicant (s. 5(1)(d)); the claims of the other dependants upon the estate (s. 5(1)(e)); and any provision made by the testator during his lifetime for any of the dependants (s. 5(1)(g)). The Court's power to make an order is a discretionary one, requiring the Court to consider "all relevant circumstances of the case, to order that whatever provision the judge deems adequate be made out of the estate of the testator for the proper maintenance and support of the dependant" (s. 3(1)). In my view, the services provided by the applicant to the testator, in these circumstances, must be balanced with other considerations.

[145] There is no evidence that Paula Bates made any contributions to her father's property or anything else that forms part of his estate.

Evidence

[146] Mr. Bates's instructions were that his daughters were to receive no benefit from his estate. Mr. Thomson had numerous conversations with Mr. Bates, but not about the reasons for the disinheritance. He had no discussions with Mr. Bates about the *TFMA* and he did not discuss the potential legal implications of excluding his children as beneficiaries under the Will. Furthermore, in 2018, Mr. Thomson's understanding was that the *TFMA* was applicable to dependant children and spouses. He did not think that the daughters were "dependants" under the *Act*. The only evidence from Mr. Bates himself as to the reasons for disinheriting his children are in the initial undated email where he noted:

> My youngest daughter Brenda has been the only one of the girls to make much effort to not go against my wishes at every opportunity. I feel no obligation toward the other two.

[147] Unfortunately, Mr. Thomson did not follow the practice suggested decades ago in *Kuhn v. Kuhn Estate* (1992), 112 N.S.R. (2d) 38:

> 45 Section 5(3) of the Act allows a consideration of the testator's reasons, as far as ascertainable, for making the dispositions made in the will or for not making

> provision for a specific dependant. In this case, the solicitor who prepared Mr. Kuhn's last three wills testified that he knew Mr. Kuhn had a third son who was not being provided for by the will, and when he inquired as to the reasons, Mr. Kuhn stated "I have my reasons." The solicitor did not pursue the matter. The solicitor kept no notes of his instructions or discussions with Mr. Kuhn for any of the three wills. In view of s. 5(3) of the Act, I think it is incumbent upon solicitors, who take instructions for wills, to keep a record of their instructions and to advise a testator who plans to disinherit a spouse or child of the effects of the *Testators' Family Maintenance Act*. This view is shared by the authors of the Nova Scotia Bar Admission Course Materials for Wills and Probate, 1991 …

[148] Mr. Bates did not provide any statutory declarations or other memorandum outlining the reasons for his decision. There was no other direct evidence from Mr. Bates about why he was not including his daughters in the Will. Instead, the only other evidence came from witnesses who testified that Mr. Bates had issues with some of his daughters' choices.

[149] Little of Ms. Bates's affidavit evidence or testimony was relevant to the application for proof in solemn form. Her evidence focuses on her claims under the *TFMA*. Paula Bates filed two affidavits: one on August 12, 2022, and the second supplemental affidavit on February 17, 2023. Ms. Bates did not know about the Will until the death of her father.

[150] Ms. Bates testified that she was not aware of her father's common-law relationship with Ms. Ricard as of October 2001. She stated that she knew that Ms. Ricard lived at Memorial Drive, but she thought she was a worker and not her father's common-law partner. She testified that for the last 20 years, she had thought that Ms. Ricard was a roommate and a worker helping her father with his business. She said that Ms. Ricard and Mr. Bates did not show love and affection or say that they loved each other in front of her. Ms. Bates's evidence in this regard was strange, and it strained credulity. It became clear, from her further testimony, that she knew they were more than roommates. Moreover, the following text message from Ms. Bates to her father on July 20, 2021, was included in the more than 150 pages of messages put before the court:

> I love pierrette for being in your life all these years. You 2 are good for each other.

[151] As the evidence unfolded, it became obvious that Ms. Bates was making a desperate attempt to diminish Ms. Ricard's relationship with Mr. Bates in an effort to increase her chances of success on this application.

Dependency

[152] Ms. Bates is 52 years of age and has not been married. She is presently single and lives alone in an apartment in Halifax. Ms. Bates has been employed by the HRM since 2015, mainly as a street sweeper driver, working nights. At the time of the application, she had been off work as a result of a workplace injury which took place on April 7, 2021. Her current income of approximately $1,800 gross per month is solely from workers' compensation benefits. When working, her gross annual income is approximately $55,000.

[153] Paula deposed that she has neither savings nor investments and lives paycheque to paycheque. Ms. Bates's affidavit indicates that she has accumulated a considerable amount of debt and owes approximately $27,000 between a line of credit and a VISA with Scotiabank. She has a 31-year-old daughter who has a serious drug problem, as well as mental health issues. Her daughter has four children, with whom Ms. Bates is involved with on a regular basis. She stated in her affidavit as follows:

> 32. My struggles with my daughter and various involvements with child protection, have caused me to get considerably behind financially.
>
> 33. My personal possessions and my net worth, including my car and everything I own, would not amount to more than a few thousand dollars. I own no land or other property. There is a small, locked RRSP I have from my short time driving for Metro Transit.

[154] Ms. Bates submitted tax records for the years 2016 to 2021 underpinning her claim for dependency on her father. Although she outlined her debts in her affidavit, she testified that her father did not know the state of her indebtedness and financial stability at the time of his death.

[155] Ms. Bates spoke about the importance of her father assisting her in her affidavit:

> 39. In and about 2015, my mother contacted my father to say that I was struggling financially and my old Chev Impala had died. My father then bought a used 2010 Yaris for me and fixed it up at a total cost to him of about $5,000, which I repaid him in monthly installments of $150.00.
>
> 40. The day that my father handed me the keys to the Yaris after fixing it up, he left on the seat of the car a letter that I had written to him when he was away in Ottawa when I was about 10 years old. It was a loving gesture that brought us

> closer together. My father did have affection for me, but he rarely expressed it to any of us children.

[156] There is no question that Ms. Bates would benefit from her father's estate.

Moral Claim - Relationship

[157] Ms. Bates provided evidence about her relationship with her father. She described her parents' marriage as unhappy. They were married on September 6, 1969. Mr. Bates was a member of the RCMP and was transferred from Nova Scotia to Ottawa around 1981. Ms. Bates and her sisters stayed with their mother in Nova Scotia and their father returned sporadically over the years until their parents' separation in 1986. The distance and the divorce made it difficult for the daughters to maintain a good relationship with their father. From 1986 to 2010, Ms. Bates says, she had contact with her father four or five times a year. She acknowledged that the relationship was "admittedly not the best" but she did not think they were ever estranged. Ms. Bates described reconnecting with her father at para. 38 of her affidavit:

> 38. In or about 2008 both of my grandmother's died, and in early February 2009 my daughter gave birth to a child which I had to help care for given my daughter's problems. My maternal grandfather died within a day of my granddaughter's birth. I was struggling with depression and I reached out to my father to try to improve our relationship, which we did.

[158] Ms. Bates said that after a long absence, she and her father resumed a fairly healthy relationship from 2010 to the date of his death. She said at para. 41 of her affidavit:

> 41. Our reconciliation was, I am sure, facilitated or made easier by the presence of Ms. Ricard.

[159] Ms. Bates maintained in her affidavit that in the last six years or so of her father's life, she went over to his house to help cook, clean, do maintenance and help him with the dogs. She said her interest in the dog breeding business and her helping to care for the dogs gave her and her father something in common. She testified that she helped by coming over to the property on Memorial Drive three to four times to help with the dogs and stay with them. She received renumeration for her help on those occasions.

[160] Ms. Bates said she helped care for her father regularly after he had his bladder surgery in 2018, and that in the two weeks prior to his death on August 5, 2021, she was with him daily.

[161] There was a great number of texts placed into evidence to demonstrate that Ms. Bates and her father were in communication. All agreed that I could accept these texts as evidence that Ms. Bates was in communication with her father, and as a means of rebutting Ms. Ricard's evidence that they did not speak very much. These communications indicate that her father was helping her to shop for a car. The texts span 2017 through 2021 and show ongoing, sometimes regular, and sometimes irregular communication between father and daughter about various things, including maintenance of her vehicle, any needs for Christmas, news reports and her father's business. It appears that in 2017, between Father's Day in June and November, they had not had any cell or text communication. While these texts show they communicated and had a relationship, it does not demonstrate an exceptionally close relationship. However, these texts do shed more light on the relationship and demonstrate that Ms. Ricard was not privy to all their communication.

[162] In a text written in 2021, Ms. Bates stated:

> ♥ love u dad … im sorry I was a rotten kid … but I'm a damn good woman that fiercely loves my family…

[163] Mr. Bates ostensibly responded:

> My problem from day one is I'm unable to say what I mean. That's why I try to show, not say. My throat closes and tears flow!!!

[164] When Ms. Bates was shown this text on the witness stand, she said that it was a couple of weeks before her father died, and she was looking for peace. She testified that her father did not accept the fact that their mother had moved on, and she felt she had to treat him with kid gloves.

[165] Ms. Bates testified that before she turned 10, her father dated a lot of women but he seemed to soften when he "settled down" and lived with Ms. Ricard. This testimony again contradicts her evidence that she believed that they were roommates.

[166] Ms. Bates testified about their ongoing relationship and at para. 47 of her affidavit stated:

> 47. When my father had to have bladder surgery in 2018, I was helping to care for him on a regular basis. My father died of liver cancer in August 2021, following a diagnosis only about 2 weeks prior to his death. He was given 6 to 8 weeks to live, but he did not have that long. My father died at home and I was with him daily through the end following his final diagnosis.

[167] Ms. Bates testified that in 2018 she would often get off work at 7:00 am and would get her father a coffee and the newspaper. She said she would sometimes go back over to visit him with her mother in the evenings.

[168] Ms. Bates said her father knew of her financial struggles after her separation and business failure in or around 2014, and that he helped her financially, buying her new tires for her car and a pair of glasses. When she was selling her home in Dartmouth, he paid to have some cosmetic repairs to the house and yard in order to make it more attractive to buyers.

[169] Ms. Ricard swore in her affidavit to the dynamics of Mr. Bates's family. She observed that he had very little contact with Paula and Heather prior to 2018. On occasion, Paula would come to visit the property and they visited her infrequently at her home.

[170] Heather lives in Virgina. Ms. Ricard has no contact with Heather and did not meet her until the summer of 2018. When Mr. Bates had the operation, in the summer of 2018, Heather came to see him. After that, Heather came to visit once per year, when she was on holidays. Ms. Ricard did not observe any other communication or contact between Mr. Bates and Heather.

[171] Ms. Ricard did not recall Paula being at the property at Memorial Drive to help clean, cook, do maintenance or help with the dogs. She recalled Paula coming to visit but said she did nothing more than spend time with Mr. Bates.

[172] It became clear throughout the testimony and the affidavits that Mr. Bates was displeased with the life choices made by both Paula and Heather. With regards to Paula, he was very disappointed and concerned about her daughter’s drug addiction and the money that Paula spent on her four grandchildren. With regards to Heather, he had grave concerns about her husband’s affiliation with an organization he did not approve of.

[173] While Ms. Bates and Ms. Ricard did not agree on the amount of time Ms. Bates spent with Mr. Bates and what she did for him, it is clear that she did have a relationship with him for years prior to his death.

Testator's Assets

[174] Ms. Bates stated in her affidavit that at the time of his death, Mr. Bates had significant assets which included:

- four tractors which had cost $20,000;
- he paid $20,000, for a John Deere tractor, six months before he died;
- a significant amount of cash on hand in his home;
- a 2010 Mercedes GL350;
- a 2014 Nissan Juke;
- a speedboat;
- a home on Memorial Drive likely valued at $500,000;
- the dog breeding business Ms. Bates suggests is worth a significant amount of money as it generates 50 puppies per year at $2,500 each. She suggested that the gross income for that business is $125,000 a year.

[175] Ms. Bates also referred to Ms. Ricard remodelling and renovating the kitchen in Memorial Drive, as well as performing deck repairs and erecting a new chain-link fence within six months after Mr. Bates's death. Ms. Bates estimates that this work would have cost approximately $30,000.

[176] Ms. Ricard, at para. 37 of her affidavit, indicated that there are currently 11 breeding dogs and that any profits generated are kept by Brenda MacDonald, who runs the dog breeding business. Ms. Bates in her testimony indicated that she did not have any evidence to suggest that this is inaccurate.

[177] Later in her evidence, Ms. Bates resiled from her affidavit, and in particular para. 46, and indicated that her sister Brenda took over the breeding business because Ms. Ricard did not intend to continue and quietly stepped away. She believed that Ms. Ricard did not want to deal with customers.

[178] Ms. Ricard's supplemental affidavit states the following:

> 11. Since Don's death, the dog breeding business has continued in a limited capacity. We have had three litters in two years. The dogs live with me in my home on Memorial Drive in Dartmouth. I cover all of the expenses in relation to this dogs, including feeding them.

> 12. I have an arrangement with Brenda MacDonald ("Brenda"). Brenda is one of Don's daughters. Brenda and I are members in good standing of the Canadian Kennel Club. I officially lease the female dog for four months. This is from breeding to when the pups are ready for their final homes. Under the arrangement I had with Brenda, I keep the female here until one week before birth, and then the female goes to Brenda. Brenda then pays for the pups' veterinary visit and registration with the Canadian Kennel Club. I do not keep any share of the revenue from the sale of the pups.

[179] Despite giving testimony that Ms. Bates did not have any evidence to contest paras 11 and 12, Ms. Bates's position on the application was that any and all revenues from the dog business should be included in the estate.

[180] With regards to the kitchen renovation, Ms. Ricard paid for the work done which began mid-January 2022 and was completed in March 2022. In addition, she also paid for the fence and decking work at the home.

[181] The original Inventory of the estate was dated stamped by the court on April 6, 2022, and totalled $368,400 (which did not include any bank accounts or investments). An updated Inventory of the estate was sent to the Probate Office on September 1, 2022, with an updated total value of $727,233.25. This included a chequing account located at the CIBC with funds of $280,372, as well as cash on hand of $78,461.25.

[182] In her affidavit, Ms. Bates indicated that she did not see her father's Will and that at the funeral home, Ms. Ricard said that everything went to her, and that Ms. Bates did not need to see the Will. Ms. Bates did not have any conversations with her father concerning his assets or his estate or what he intended to do with those assets in the estate after he died. In her affidavit, Ms. Bates maintained that she had a discussion with Brenda to the effect that there was either a previous Will or a plan to draft a Will that had her father's estate split equally between Ms. MacDonald and Ms. Ricard. This evidence was not corroborated by Ms. MacDonald, and I do not accept this.

[183] Ms. Bates maintained that her father held other bank accounts and investments at the CIBC and the Scotiabank. She also maintained that her aunt advised that each of her father and his six siblings received about $100,000 from their late mother's estate in or about 2006. However, this evidence is hearsay, as the aunt was not called to testify, and she did not file an affidavit. There is no evidence that this money exists and was not reported in the inventory by Ms. Ricard.

[184] In her supplemental affidavit, Ms. Ricard acknowledged her monthly source of income from public pension plan, old age security, Canada Pension, Veterans Affairs and NAVCanada Pension for a cumulative total of $6,528.29 a month. She also advised of the sale of several vehicles, including a F250 truck, a Mercedes GL350, a Nissan Juke and a 2006 All terrain vehicle. She has not made any efforts to sell any of the tractors or boats.

[185] With regards to the filing of the inventory, Ms. Ricard said at para. 35 of her affidavit:

> 35. After the filing of that Inventory, Mr. Thomson and I realized that Don had additional personal property that was not reflected in the initial Inventory. As a result, a revised Inventory was prepared. Attached as Exhibit "D" is a copy of Mr. Thomson's letter to the Probate Office dated September 1, 2022 with the updated Inventory.

[186] In *Zwicker v. Garrett*, [1976] N.S.J. No. 20 (S.C. A.D.), Chief Justice MacKeigan described the question being asked on an application under the *TFMA* as a moral one, not an economic one:

> 41 To justify interference with a will a court must thus find a failure to provide "proper maintenance and support", i.e. both a need for maintenance, relative to the size of the estate, and a moral claim, which may be of varying strength.
>
> …
>
> 47 The task before this Court is to determine whether the testator failed to make "adequate provision in his will for the proper maintenance and support" of his adult daughter … so as to warrant interference by the Court. The question to be asked is moral, not economic. In ignoring the respondent in his will, was the testator in all the circumstances guilty of a "breach of morality", or a "manifest breach of morale duty"? [emphasis added]

[187] In *Tataryn v. Tataryn Estate*, [1995] 2 S.C.R. 807, the court, in reviewing the British Columbia's *Wills Variation Act*, which was described in *Lawen Estate, supra* as "substantially similar" to the Nova Scotia *TFMA*, described two interests protected by the legislation as the adequate, just and equitable provision for the spouses and children of testators; and the protection of testamentary autonomy. As the court noted in *Lawen Estate, supra*, at para. 20: “A judge hearing an application for maintenance is required to balance the two interests.”

[188] In *Tataryn Estate, supra*, the court discussed the nature of moral claims and how a court should approach them, including an independent child's contribution to the estate:

> [30] … The legal obligation of a testator may also extend to dependent children. And in some cases, the principles of unjust enrichment may indicate a legal duty toward a grown, independent child by reason of the child's contribution to the estate. The legal obligations which society imposes on a testator during his lifetime are an important indication of the content of the legal obligation to provide "adequate, just and equitable" maintenance and support which is enforced after death.
>
> [31] For further guidance in determining what is "adequate, just and equitable", the court should next turn to the testator's moral duties toward spouse and children. It is to the determination of these moral duties that the concerns about uncertainty are usually addressed. There being no clear legal standard by which to judge moral duties, these obligations are admittedly more susceptible of being viewed differently by different people. Nevertheless, the uncertainty, even in this area, may not be so great as has been sometimes thought. For example, most people would agree that although the law may not require a supporting spouse to make provision for a dependent spouse after his death, a strong moral obligation to do so exists if the size of the estate permits. Similarly, most people would agree that an adult dependent child is entitled to such consideration as the size of the estate and the testator's other obligations may allow. While the moral claim of independent adult children may be more tenuous, a large body of case law exists suggesting that, if the size of the estate permits and in the absence of circumstances which negate the existence of such an obligation, some provision for such children should be made … (citations omitted) …

[189] In *Welsh v. McKee-Daly*, 2014 NSSC 356, Justice Moir heard an application where daughters were seeking relief under the *TFMA* after their father left his estate to his wife without provision for his daughters or stepdaughter. The court reviewed the principles of the *TFMA* as follows:

> [40] The statute gives the court power to override a will if the testator has not made "adequate provision ... for the proper maintenance and support of a dependant": s. 3(1). The judge is given discretion "to order that whatever provision the judge deems adequate be made out of the estate of the testator for the proper maintenance and support of the dependant": also, s. 3(1).
>
> [41] Despite the statute's references to maintenance, support, and dependency, it is possible to make an order in favour of an independent son or daughter: *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807 and *Zwicker Estate v. Garrett* (1976), 15 N.S.R. (2d) 118 (C.A.). However, the case for an independent son or daughter is weaker than that for a dependent child or surviving spouse: *Tataryn* at pp. 822-823 and Zwicker at para. 38.

[190] The court went on to offer the following guidance as to when the court should disturb a will:

> [49] The decision in *Tataryn* then turns to the will (still at p. 823):
>
> > Any moral duty should be assessed in the light of the deceased's legitimate concerns which, where the assets of the estate permit, may go beyond providing for the surviving spouse and children.
>
> A testator has a "wide range of options, any of which might be considered appropriate in the circumstances": p. 824. A will that is within the range should not be disturbed. Continuing at p. 824:
>
> > Only where the testator has chosen an option which falls below his or her obligations as defined by reference to legal and moral norms, should the court make an order which achieves the justice the testator failed to achieve.

[191] The concept of a testator's moral duty to an adult child was summarized first in *Bell v. Roy Estate* (1993), 75 B.C.L.R. (2d) 213 (C.A.) at pg. 215:

> … for over 60 years the courts have accepted the premise that a parent owes a moral duty to provide for his or her children unless that duty is displaced by special circumstances.

[192] In *Tataryn*, *supra*, the court further discussed the duty to adult children at p. 156 as follows:

> … Similarly, most people would agree that an adult dependent child is entitled to such consideration as the size of the estate and the testator's other obligations may allow. While the moral claim of independent adult children may be more tenuous, a large body of case law exists suggesting that, if the size of the estate permits and in the absence of circumstances which negate the existence of such an obligation, some provision for such children should be made …

[193] Despite these statements, a moral claim of an adult child can be defeated if a testator has provided reasons for disinheriting or not adequately providing for the child. These reasons are sufficient if they are valid and rational (*Kelly v. Baker* (1996), 82 B.C.A.C 150 (C.A.) and *Bell v. Roy Estate*, *supra*).

[194] The respondent seems to suggest that because Ms. Bates did not have a particularly close relationship with her father there is good reason for the disinheritance. However, one needs to consider the role played by Mr. Bates in the state of the relationship. For example, in *Gray v. Nantel and others*, 2002 BCCA 94, the court stated:

> 17 I cannot accept that a child so neglected for his first 18 years and then treated shabbily during a brief reconciliation can be said to forfeit the moral claim to a share in his father's estate by abandoning any further effort to establish a relationship. The fault in this sad story lies with the father and, in my opinion, the onus to seek further reconciliation was on his shoulders. The testator gave the appellant virtually nothing in an emotional or material way; the will was his last opportunity to do right by his son.

[195] The first question is what are Mr. Bates's moral duties toward Paula Bates. According to the case law, while the moral claim of an independent adult child may be tenuous, some provision for independent adult children should be made if the size of the estate permits and in the absence of any circumstances negating the existence of a moral obligation.

[196] In this case, the only individual who has brought an application alleging a moral duty is Mr. Bates's daughter, Paula. Mr. Bates made no provision for Paula in his Will. Based on *McEwan v. McEwan*, 2014 BCSC 916, by not making any provision for Paula, *prima facie*, Mr. Bates did not make adequate provision for her. He has a sizeable estate. In contrast, Ms. Bates is struggling financially and did receive some help from her father when alive. She certainly tried to have a relationship with him. While Ms. Bates seemed to exaggerate with respect to how often she saw her father and how close they were (given the conflicts between her evidence and the evidence of Ms. Ricard, Ms. MacDonald, and the text message evidence), the fact remains that the two had a relationship that was certainly not made easier by Mr. Bates. Despite his complete lack of interest in his grandchild or great grandchildren, Ms. Bates continued to try to connect with him.

[197] In *McEwan*, *supra*, where a testator disinherited his son and gave his whole estate to his two granddaughters, the court decided that the testator had a moral obligation to his son and there was no basis to justify the disinheritance. As a result, the estate, which had an adequate size of approximately $400,000 was allocated with 50% to the son and 25% each to the granddaughters.

[198] The courts have noted that where there is a moral obligation, it is only negated by "valid and rational reasons for disinheritance". In order to be valid and rational, the reasons for the disinheritance must be based on true facts and the reason for disinheritance must be logically connected to the act of disinheritance. The onus is on Paula Bates to demonstrate that the reasons given by Mr. Bates are neither valid nor rational (*Bell v. Roy Estate*, *supra*). The reasons the court can discern from the evidence is that Ms. Bates has a daughter who struggles with addiction and mental

health issues, and that Ms. Bates helps her and the grandchildren. Mr. Bates did not approve of this situation, and he also thought that Ms. Bates was not good with money. The evidence is that Mr. Bates did not want his money to be spent on his granddaughter or grandchildren. Certainly, assisting ones loved ones with mental health and substance addiction seems an odd reason for disinheritance. This reason alone should not negate the moral claim.

[199] As in *Wilson v. Watson et al.*, 2006 BCSC 56, the testator's comments in relation to disinheritance in this case lack specifics and are simply conclusions rather than reasons for disinheritance.

[200] When reviewing s. 5 of the *TFMA*, I have concluded:

1. Ms. Bates's character and conduct did not demonstrate any reason for her to be disentitled to a benefit under the *TFMA*;
2. There is no evidence that she will be entitled to other maintenance or support given that she is a single person, other than perhaps an inheritance from her mother;
3. She had a relationship with her father at the time of his death and for several years prior. While it was not a relationship as close as the one Mr. Bates had with his youngest daughter, he did spend time with Ms. Bates, helping her with various expenses and obtaining a new car. They texted one another and Ms. Bates certainly increased her contact when he was ill;
4. Ms. Bates is currently injured and receiving only a portion of her income. She struggles to make ends meet and has debt;
5. No other dependant has advanced a claim;
6. Mr. Bates did help with some maintenance while he was living but mostly required repayment. He did provide for his youngest daughter by ensuring that she was deeded two properties in NB;
7. There were no services rendered by Ms. Bates to Mr. Bates aside from care, concern, and support when he was sick;
8. Ms. Bates did not provide money or any property for Mr. Bates for the purpose of providing a home or assisting in any business or occupation or for maintenance or medical or hospital expenses.

Conclusion

[201] The relief sought by the applicant that 65% of the estate should be transferred to her is an overreach and would obviate testamentary autonomy.

[202] While the applicant has provided case law where the court has varied a will based on moral claims, none of the cases involved a contest between a common-law spouse and children. The only case with a similar family situation is *Lamperstorfer v. Plett*, 2018 BCSC 89, where a deceased husband and father left the surviving spouse 10% of the estate, but that was not being attacked by the applicant's son who wished to have a fair distribution between him, the other children and other competing beneficiaries.

[203] At common law, a testator does have the right to dispose of their property in any way they choose. Courts take a cautious approach about rewriting the Will of the testator (*Walker v. Walker Estate, supra*). To justify an interference in a testator's choice, an applicant must prove that the testator failed to provide proper maintenance and support relative to the size of the estate and a moral claim. The applicant bears the burden of proof on a balance of probabilities (*Hart v. Hart Estate*, 1993 124 N.S.R. (2d) 333. The court in this case has limited knowledge about why Mr. Bates excluded Paula from his Will. There is his memorandum sent to Mr. Thomson as well as some *viva voce* evidence concerning his discussions about his relationship with Ms. Bates and Ms. Manning versus his relationship to his youngest daughter. However, this does not amount to much and gives the court little to understand if the reasons he may have had were valid and rational.

[204] Taking into account all of the relevant circumstances, the applicant has met the burden to establish that Mr. Bates made inadequate provision in his Will for her maintenance and support and failed to meet his moral obligation. The conditions upon which a judge may make an order for relief are contained in s. 6 of the *Act* which states:

> **Conditions and restrictions of order**
>
> 6 (1) The judge, in making an order for proper maintenance and support of a dependant, may impose conditions and restrictions.
>
> **Order charging estate**
>
> (2) The judge may make an order charging the whole or any portion of the estate, in any proportion and manner that to the judge seems proper, with payment of an allowance sufficient to provide proper maintenance and support, and the judge may order that the provision for proper maintenance and support be made out of the whole or any portion of the estate and out of income or corpus or both, and may be by way of

> (a) an amount payable annually or otherwise;
>
> (b) a lump sum to be paid or held in trust;
>
> (c) the transfer or assignment of particular property either absolutely, in trust, for life or for a term of years to or for the benefit of the dependant; or
>
> (d) any combination of the foregoing methods.
>
> **Directions for transfer of property of estate**
>
> (3) Where a transfer or assignment of property is ordered, the judge may give all necessary and proper directions for the execution of the transfer or assignment either by the executor or other person the judge directs. R.S., c. 465, s. 6. I award the applicant a percentage of the net vale of the estate after the payment of all legitimate debts and fees. I am unable to assign a specific dollar amount because I do not have satisfactory evidence as to the true value of the estate.

[205] In the specific circumstances of this case, and given the level of dependency and relationship, or moral claim, Ms. Bates is entitled to 10% of the Estate.

[206] In the event the parties are unable to agree as to the proper valuation of the 10% ordered, I retain jurisdiction to determine the valuation issues.

[207] If the parties cannot agree to costs, I will accept submissions within 30 days from the date of this decision.

Brothers, J.