SUPREME COURT OF NOVA SCOTIA
Citation: *Matthews v. Matthews*, 2024 NSSC 138

Date: 20240510
Docket: SPH 508543
Registry: Port Hawkesbury

Between:

Dougald Matthews

Applicant

and

Clarissa Matthews

Respondent

DECISION

Judge: The Honourable Justice Jamie Campbell

Heard: April 23, 2024, in Port Hawkesbury, Nova Scotia

Counsel: Wayne MacMillan, for the Applicant
Douglas MacKinlay, for the Respondent

By the Court:

[1] Mary Josephine Burke died on October 17, 2020, in Grande Anse. She was 89 years old and had 14 surviving children. Her common-law husband of over 40 years, Thomas Joseph Matthews died in 2014. There are two documents that each purport to be Mary Burke's will. And this case is about which, if indeed either of them, is her real will.

[2] Clarissa Joan Matthews is the daughter of Mary Burke and Thomas Matthews. She applied for a Grant of Probate in January 2021, having been named as executor in a document purported to be her mother's will. That document is dated March 27, 2015, and while noting that Ms. Burke had 13 other children, granted her entire estate to Clarrisa Joan Matthews. Clarissa Joan Matthews was issued a Grant of Probate on January 6, 2021. She filed an Inventory on August 6, 2021, and in that document lists no real property and personal property with a total value of $2,133.63.

[3] The family home had been addressed under the will of Thomas Matthews. In that will, the home was granted to Clarissa Matthews with a life interest to her mother Mary Burke. While Mary Burke's interest would almost certainly have been greater than a life interest in the home, the will of Thomas Matthews was not contested by any members of the family. When Ms. Burke signed the will in 2015, she also signed a Quit Claim deed relinquishing her life interest, in favour of Clarrisa Matthews. So, at the time of her death in 2020, Mary Burke's estate was valued at just over $2,000 and Clarissa Matthews had both the house and the entire estate. Ms. Burke also named Clarissa Matthews as her attorney under an Enduring Power of Attorney.

[4] Then, on July 6, 2021, one of Mary Burke's sons, Dougald Matthews filed an Application for Proof in Solemn Form attaching a note said to be written by Mary Burke on April 24, 2019, revoking the 2015 will and making specific requests to several of her children, including Dougald Matthews. Dougald Matthews says that the 2019 document is the will of his mother Mary Burke and he should be appointed as executor under that will.

[5] One might well ask why any of this matters. The estate is only worth about $2,000. Dougald Matthews says that if the 2015 will is upheld his sister Clarissa Matthews would continue as executor. He says that she took money from their mother's bank accounts when she was acting under the Power of Attorney between

2015 and 2018. She would be unlikely, as executor, to take legal action against herself for the missing funds.

[6] The parties agreed to a consent order on September 10, 2021 by which the distribution of the estate was delayed until this Application for Proof in Solemn From was resolved.

Issues

[7] Is the will of Mary Burke, the 2015 document, the 2019 document or neither of them?

Circumstances of Signing the 2015 Document

[8] When Thomas Matthews died in December 2014 the home that he shared with Mary Burke was to be transferred to their daughter Clarissa Matthews subject to Mary Burke having a life interest in the property. The will notes that there was an unequal distribution of the estate among the couple's children because it was Clarrissa Matthews' intention to live with the survivor of him or Ms. Burke, to provide care in the home. She would then inherit the home on the death of the survivor, who turned out to be Mary Burke. Clarissa Matthews' common-law spouse Bernard Larue was appointed as executor. The validity of Thomas Matthews will has not been challenged.

[9] Before the death of Thomas Matthews in December 2014, Clarissa Matthews had been spending 3 or 4 days a week in the home with her parents to provide care. Her father had been diagnosed with cancer. Just after her father died, she moved into the home, with her husband, Bernard Larue. Clarissa Matthews is 61 years old. She completed Grade 8, and her work throughout her life has been providing personal care services, whether as a babysitter for the children of her siblings or in caring for her parents.

[10] About three months later, Clarissa Matthews, one of her sisters and Mr. Larue took Ms. Burke to see a lawyer, Jason Boudrot. He was the lawyer who had drafted Thomas Matthews' will, and Clarissa Matthews said that her mother specifically wanted to see him. She said that she was not involved in any discussions about the disposition of the estate before that meeting and that it was Ms. Burke who asked to go to see Mr. Boudrot. Clarissa Matthews said that her mother met privately with Mr. Boudrot. Her only interaction with Mr. Boudrot was

after the meeting when he explained the arrangements to the family members who were there.

[11] As executor of Thomas Matthews' estate, Mr. Larue had transferred the property to his wife, Clarissa Matthews. Ms. Burke signed a Quit Claim deed which in effect gave up her life interest in the property to her daughter, Ms. Matthews. No explanation was given for why the Quit Claim Deed was necessary for estate planning purposes. It would have allowed Clarissa Matthews to sell the home, though she has not.

[12] Ms. Burke also signed a will that day. In the will she named Clarissa Matthews as her sole executor, and the sole beneficiary of the estate. None of the other children were named in the will and it states,

> I have chosen to leave my entire estate to my daughter, Clarissa Joan Matthews, because she and her common-law spouse, Bernard Larry Larue, are now residing with me and they provide me with a great deal of assistance. Given that I have fourteen (14) children altogether, I have decided to leave all that I have to my daughter, Clarissa Joan Matthews.

[13] Mary Burke also signed an enduring power of attorney and personal directive naming Clarissa Joan Matthews as her attorney and health care guardian.

[14] When the 2015 will was signed the only evidence of a lack of capacity on the part of Mary Burke were the comments from Dougald Matthews that his mother was becoming forgetful. Otherwise, the evidence is that Ms. Burke was capable of making decisions for herself until she became ill and suffered a rapid deterioration in her health in the spring of 2017.

Capacity Assessments

[15] Ms. Matthews and Mr. Larue lived with Mary Burke from early 2015 until May 2017 when Ms. Burke was hospitalized. There is a dispute within the family about the kind and level of care that they provided to Ms. Burke. Clarissa Matthews acted as her attorney and caregiver during that time.

[16] Dougald Matthews says that shortly after the will and other documents were signed, Clarissa Matthews started reporting that her mother was becoming more forgetful and over the course of the next two years told her mother's health care team that she needed to be in a nursing home. Dougald Matthews says that his mother was neglected, and Clarissa Matthews appeared to be isolating their mother

from other family members. He says that his mother would look to Clarissa Matthews for affirmation before speaking with other members of the family.

[17] Mary Burke's capacity to make decisions was assessed three times in 2017. The first was done by Dr. Michele Murphy on May 12, 2017, the second was done by Dr. Lawrence McNeil on July 9, 2017 and the third assessment was by Dr. Mary Gorman, on September 28, 2017. By May 2017 Ms. Burke's physical and mental health had deteriorated and she was hospitalized. Dr. Murphy's assessment was that she was incapable of making decisions regarding personal care and health care. She went into hospital on an extended basis. Dr. O'Neil's assessment was also that Mary Burke lacked the capacity to make personal care or health care decisions for herself. Dr. Gorman's assessment at the St. Martha's Hospital Geriatric Clinic was also that Mary Burke lacked the capacity to make personal care decisions. Dr. Gorman noted that Mary Burke did not want to be in the nursing home and wanted to "go home".

[18] When Ms. Burke was able to leave the hospital Clarissa Matthews, as her mother's decision maker under a personal directive, moved her mother to RK MacDonald Nursing Home. That decision was not accepted by Dougald Matthews and another brother Martin Matthews.

Circumstances Surrounding the Signing of the 2019 Document

[19] Linda Matthews-Mont is the daughter of Dougald Matthews and the granddaughter of Mary Burke. She said that she observed her grandmother had been making meaningful choices. In the fall of 2018 she hired a lawyer, Daniel Boyle to visit Mary Burke in the nursing home. That visit took place around October 4, 2018. In that meeting Ms. Burke signed another power of attorney and a new personal care directive naming Linda Matthews-Mont as her attorney and decision maker. Mary Burke left the nursing home and was brought to the home of another one of her son's, Martin Matthews. She remained there until she died, two years later.

[20] In November 2018 Linda Matthews-Mont arranged to have her grandmother assessed by Dr. Cheryl Murphy, a geriatric psychiatrist. Dr. Murphy's was the fourth assessment of Ms. Burke's capacity. In a letter to Daniel Boyle dated December 13, 2018, Dr. Murphy provided her impression regarding Mary Burke's ability to appoint an attorney and delegate for personal care and health related decisions. She noted that though there was continued evidence of "some cognitive impairment" she saw significant improvement in cognitive testing. Ms. Burke had

a previous diagnosis of dementia, but Dr. Murphy said that she suspected Ms. Burke had suffering from delirium related to a medical condition or medications "superimposed on her baseline cognitive impairment" when she was declared incompetent. Dr. Murphy said that delirium is a reversable condition that causes cognitive impairment that can persist for several months after the underlying cause has been treated. Dr. Murphy went on to say that on her assessment, Ms. Burke was able to "clearly and consistently" communicate a choice. She understood and appreciated the role of an attorney and delegate decision maker. She was able to clearly describe her reasoning around who she would appoint, and Dr. Murphy did not find that her reasoning for those decisions was impaired or unduly influenced by an underlying psychiatric or cognitive condition.

[21] Linda Matthews-Mont says that when her grandmother, Mary Burke was in the nursing home she had begun asking her about where her most recent will was. She could not get the earlier will from Clarissa Matthews and Linda Matthews-Mont says that her grandmother told her that she denied having signed such a will. Then, on April 24, 2019, Mary Burke wrote the document that Dougald Matthews has filed as her will. Linda Matthews-Mont and her cousin Tamara Burns were there when Mary Burke wrote the document. Ms. Matthews-Mont said that her grandmother was sitting at the kitchen table in Martin Matthews' home. She started writing but then stopped because she heard someone come in. In her affidavit Ms. Matthews-Mont says that "Grandma informed me and I do verily believe that she intended to revise it later."

[22] Ms. Matthews-Mont said that Ms. Burke kept saying that she did not remember writing or signing a will and that she had not signed the house over to Clarissa Matthews. But Ms. Burke clearly had done both those things. She had signed a will in 2015 and she had signed the house over to Clarissa Matthews and that had been done before Jason Boudrot.

[23] The April 24, 2019, document is handwritten and is noted as having been witnessed by Linda M. Mont and Tamara Burns. It says, in part,

> I, Mary J. Burke want to -----(illegible) all previous will'ss (sic) made by me as I don't (sic) remember making them. This is my new will made by me.

[24] The document goes on to say that upon her death Ms. Burke wanted to "give my things to" several family members. The list of things included a family ring, pictures, and dishes. The document makes no reference to any interest in real estate, bank accounts or other money, and does not name an executor.

[25] At the bottom of the page is written: “Witnessed Written By: Linda M. Mont & Tamara Burns. Apr. 24, 2019”.

[26] There is no evidence what if any discussions took place that prompted the creation of the document, other than Ms. Burke not recalling her previous will. There is no evidence to indicate when the document was signed by Linda Matthews-Mont and Tamara Burns, other than the date as noted on the document.

[27] Ms. Burke, according to Linda Matthews-Mont, intended to revise the document later. But there is no evidence about what happened after the interruption that caused Ms. Burke to stop writing, other than that Ms. Burke never did finish it. Ms. Matthews-Mont did not leave it with her grandmother but took it home with her. So, from April 24, 2019, until her death in October 2020, Mary Burke did not have the paper to be able to revise it. It remained in the possession of Linda Matthews-Mont.

Application for Accounting

[28] When Linda Matthews-Mont was named as the attorney in the enduring power of attorney signed by Ms. Burke in October 2018, she made efforts to look into the accounting of her grandmother’s funds. Much of the evidence in this matter was about what Ms. Matthews-Mont determined to be inappropriate use of her grandmother’s assets by Clarissa Matthews. Ms. Matthews-Mont said that she noted that about $50,000 had been withdrawn from Mary Burke’s accounts. She said that even though Ms. Burke had signed over her interest in the home to Clarissa Matthews, Ms. Burke was paying all the household bills. She noticed several credit cards in her grandmother’s name with charges on the related to the time after Ms. Burke had gone into the nursing home and after she, Ms. Matthews-Mont, had been named as her grandmother’s attorney. She said that she asked Clarissa Matthews for an accounting of the monthly credit card statements but was never provided them.

[29] While Ms. Burke was still alive, Ms. Matthews-Mont filed an application in court seeking an accounting of the funds that were spent while Clarissa Joan Matthews was acting as Mary Burke’s attorney. Upon Ms. Burke’s death that application was adjourned without date.

[30] Clarissa Matthews denies any misappropriation or misuse of her mother’s assets. She says that the only money she took out of her mother’s account and put in her own account was $7,000 set aside for funeral expenses. She says that she put

it in a high interest savings account and never touched it until funeral expenses of $5,469.98 were pre-paid on May 23, 2019. She then offered the remaining money, with interest to Linda Matthews-Mont, who was then Mary Burke's attorney.

[31] Linda Matthews-Mont filed bank documents indicating that cash withdrawals were made from Mary Burke's account during the time when Clarissa Matthews was acting as her attorney. She was never provided with an accounting. Clarissa Matthews filed her own reconstruction of the transactions based on her recollection but there are few receipts attached. What is evident however is that during the first few months after the Power of Attorney was signed, Mary Burke was doing her own banking. Withdrawals were made by her and signed by her. There was no issue of her capacity at that time. The pattern of cash withdrawals is consistent with the pattern of withdrawals made by Clarissa Matthews on her mother's behalf in the months and years that followed.

The "Real" Issue

[32] The family is divided, as some are when dealing with estates. But this is an Application for Proof in Solemn Form of the 2019 document purporting to be the will of Mary Burke. It is not an accounting of Clarissa Matthews' handling of her mother's estate while she was attorney under an Enduring Power of Attorney.

[33] The issue of the alleged misuse of funds from 2015 until 2018, was argued to be relevant for context. Mr. MacMillan, on behalf of Dougald Matthews argued that the misuse of funds shows that Clarissa Matthews did not act in her mother's best interest so that the 2015 will prepared by Jason Boudrot was also not in Mary Burke's interest but in Clarissa Matthews' interest. Dougald Matthews and his daughter Linda Matthews-Mont, along with some others in the family, believe that Clarissa Matthews essentially hoodwinked Mary Burke into signing a will giving everything to her, signing over the life interest in the family home, and allowing Clarissa Matthews to access to her money while she was still alive. They want an accounting of what they believe to be missing funds. If Clarissa Matthews is the executor, under the 2015 will, that accounting may never happen.

[34] If the 2019 document is the will of Mary Burke, it revokes her previous will and there is no requirement then to consider the validity of the 2015 will. The logical starting point is whether that 2019 document can be given effect as a will.

Testamentary Intentions

[35] Section 8A of the *Wills Act*, RSNS 1989, c. 505, provides that where a court is satisfied that a writing embodies the testamentary intentions of the deceased person, or embodies the intention of a deceased person to revoke, alter or revive a will, the court may order that the writing is a valid will even though it was not executed in compliance with the formal requirements for the execution of a will. The document signed by Mary Burke on April 24, 2019, does not comply with the formal requirements for execution of a will. That issue is not contested. It was, for one thing, not signed by Mary Burke. The issue is whether it embodies her "testamentary intentions".

[36] The leading case on the issue is *George v. Daily*, [1997] M.J. No. 51. The Manitoba Court of Appeal considered a provision in the Manitoba *Wills Act*, C.C.S.M., c. W150, that has similar wording to the Nova Scotia *Wills Act*, s. 8A. In that case Mr. Daily, who was then 85 years old, met with his accountant and told him that he wanted to change the will that he had made about 2 years before. Mr. Daily said that he did not want his children to inherit any money because they had not cared for him and were just waiting for him to die. The accountant, Mr. George, reviewed the prior will with Mr. Daily and made notes on it, crossing out certain portions. Mr. Daily told Mr. George that he wanted his son to receive some specific items of personal property but that everything else should be divided among some charities. Mr. George wrote to Mr. Daily's lawyer detailing the instructions for the preparation of a new will. The lawyer met with Mr. Daily 10 days after Mr. Daily's meeting with the accountant, Mr. George. Mr. Daily confirmed that he wanted to revoke his prior will and confirmed how he wanted to dispose of his estate. Mr. Daily wanted to sign the will that day, but the lawyer advised him that he should get a certificate from his doctor confirming his mental capacity. Two months later, Mr. Daily died. The new will had never been prepared.

[37] The motions court judge held that the letter from the account to the lawyer should be treated as Mr. Daily's will. Mr. Daily's son appealed.

[38] The Court of Appeal noted that imperfect compliance, or even non-compliance, with the formal requirement maybe excused. The purposes and functions of those formalities must be considered. The main purposes and functions of the requirements for writing, signature and attesting witnesses are to impress upon the participants the solemnity and legal significance and to provide the court with reliable evidence of the testamentary intent and terms of the will. The "channelling function" results in a degree of uniformity in the organization, content, and language of wills. The "protective function" protects the testator from

fraud. The evidentiary and cautionary functions are particularly relevant to the determination of whether or not a written document embodies the testamentary intentions of the deceased. The Court cited the 1980 Manitoba Law Commission Report, "*The Wills Act and the Doctrine of Substantial Compliance*". With respect to that cautionary function the Commission wrote that for a will to be valid it must be established that the testator intended their words to be legally operative and it must be clear that the finality and solemnity of the occasion were impressed upon them. Writing is more final than an oral declaration. Most people will not lightly sign a document called "Last Will and Testament". The witnessing provisions, "presence, attestation, and subscription", make the process ceremonial and impress upon the testator the importance of their actions.

[39] The purpose of the remedial provision was to overcome the hardship and injustice of having form triumph over substance. The remedial provision, like s. 8A of the *Wills Act*, was to ensure that a finding that a formal or execution defect would not lead to automatic invalidation of a will. Those seeking to enforce it should have the opportunity to show that the defect is a harmless one. That involves satisfying the court that despite the defect the document represents the intent of the testator and satisfies the intent of the *Wills Act*.

[40] The instrument must record the final though revocable wishes of the deceased as to the disposal of their property after death. The provision cannot be used to make a will out of a document that was never intended by the deceased to have testamentary effect. The Manitoba Court of Appeal noted that the term "testamentary intention" means much more than a person's expression of how they would like their property to be disposed of after death. "The essential quality of the term is that there must be a deliberate or fixed and final expression of intention as to the disposal of his/her property on death" (*George v. Daily*, para. 65).

[41] The onus is on the party setting up the document as testamentary to show, by the contents of the paper itself or from the surrounding circumstances, that the paper is an expression of testamentary intention. The Court of Appeal noted as well the admonition of Nicholson J. in the West Australian case, *In the Matter of the Will of Lobato*; *Shields v. Caratozzolo*, (1991), 6 W.A.R. 1 (Sup. Ct.), who said that in deciding whether the deceased intended the document to constitute their will, "the greater the departure from the requirements of formal validity…, the harder it may be for the court to reach the required state of satisfaction" (*George v. Daily*, para. 19).

[42] In *George v. Daily* the Court of Appeal determined that the evidence was not sufficient to meet the onus of showing that the document disclosed a testamentary intention. In that case Mr. Daily died two months after meeting with the lawyer and there was no intervening contact or communication with him. That unexplained hiatus was cited as another factor militating against finding a testamentary intention.

[43] *George v. Daily* has been cited as authority many times by courts across Canada. The issues have been most recently addressed in Nova Scotia in *Sweeney Estate v. Sweeney*, 2023 NSSC 339. Victor Sweeney died in August of 2016. His wife predeceased him. They had no children. He left a properly executed type-written will dated July 7, 1999. It had substantial parts crossed out and handprinted amendments made in pen. The changes, among other things, substituted his brother, Malcolm Sweeney, as executor. Malcolm Sweeney brought the application for an order declaring the will, with the hand-applied changes, a valid will. Justice Muise cited the decision of Justice Duncan (as he then was) in *Peters Estate (Re)*, 2015 NSSC 292, in which the court set out a non-exhaustive list of factors to consider when assessing whether testamentary intent has been established.

> What is the degree of the formality of the language in the document?
>
> Is it dated?
>
> Is it signed?
>
> Has it been sealed?
>
> Was it delivered to a person, a specific person, with or without instructions as to what to do with it?
>
> Were there are any statements made by the testatrix, either at the time of delivery, or in the document itself that speak to the anticipation of death; that the document was intended to reflect a disposition after death?
>
> Is there any indicia of when it was expected that the document would read?
>
> The certainty of the bequests set out in the document.
>
> Whether there are reasons offered for gifting as set out in the document.
>
> Whether there is a reference to an existing Will that might tie it back to a Will.
>
> How permanent was the document intended to be - was it written in ink, or in pencil? i.e., Was this just a penciled thought for erasing later or not?
>
> Whether the document was on a form or is it entirely, as in these notes, in the handwriting of the testatrix. (para. 19)

[44] Justice Muise in *Sweeney Estate* dealt with handwritten changes made to a formal typed will by the deceased himself. Mr. Sweeney crossed out the date on the original will and replaced it with the word, “PRESENT”. Justice Muise concluded that this was his instruction to his lawyer that the date of execution of the will should be inserted there. The changes to the document constituted a fixed and final expression of Mr. Sweeney’s intention even though he did not make it to a lawyer’s office to have a new will drafted.

[45] In *MacKinnon v. MacKinnon Estate*, 2021 NSSC 272, the deceased Neila MacKinnon had a will dated November 12, 2014. After she died suddenly two pages of notes were found in her living room and they appeared to relate to the disposition of her estate. She had an appointment to meet with a lawyer on estate planning issues on the afternoon of her death. The notes would have the effect of making substantive changes to the 2014 will. Justice Gogan, then of the Supreme Court, held that the notes had been made by Neila MacKinnon and expressed a fixed and final intention about the disposition of her estate. The notes would have formed the basis of a new will had Ms. MacKinnon survived to make it. The notes were legible and written in pen.

> The content of the notes support this inference. They are consistent with the extrinsic evidence and somewhat formalized. They address the role of executor and make specific bequests that appear to include all of her real and personal property. The nature of the intended bequests are clearly testamentary and final. I have no doubt that these notes would have been the basis for a new will if Neila had lived long enough to complete the process. The fact that the notes are not signed or otherwise compliant with the formalities of the *Will Act* is no surprise given Neila's plan to have her intentions formalized. The absence of these formalities does not take away from the fact that the notes clearly document a deliberate and final expression of intent as to the disposal of property on her death. (para. 54)

[46] In *Komonen v. Fong*, 2011 NSSC 315, the deceased died at the age of 85. That was at the end of May, 2010. On November 12, 1997, he had executed a will. After his death a printed will form was found in his home. Portions of it had been filled out in pencil and parts were left blank. The document was signed in pencil but was not witnessed. Two different dates had been printed on the document (June 24, 2009, and July, 2009). The issue before then Associate Chief Justice Smith was whether the printed will form was a testamentary instrument. The court noted that the burden was on the Applicant to satisfy the Court, on a balance of probabilities, that the document in question embodied the testamentary intentions of the deceased.

[47] There were facts that supported a conclusion that the document embodied the testamentary intentions of Mr. Fong. He used a preprinted will form to write on rather than a blank piece of paper. The document was signed, though in pencil. The document was dated though there were two different dates. And the document referred to funeral arrangements.

[48] There were other factors that did not support the conclusion that the document expressed a deliberate or fixed and final expression of intention as to the disposal of Mr. Fong's property upon death. The document had been completed in pencil which, in the view of ACJ Smith indicated a lack of finality. Some portions of the document had been left blank. And the document was not witnessed.

[49] Mr. Fong's diaries and other communications pointed toward the document being an unfinished or draft will. They referred to the document as a "sketch of my will". He said that he had not "completed making a Will" and had not made "firm decisions yet". He referred to a rough copy and said that he had used a pencil "which is not legitimate". And in one exchange Mr. Fong said, "That's why my will is not dome", which likely meant "done".

[50] The document was a work in progress, or a draft could did not amount to expressing Mr. Fong's fixed and final intentions as to the disposition of his assets.

April 24, 2019 Document

[51] The document dated April 24, 2019, was written by Mary Burke. She did not use a form but wrote the document in hand on a blank piece of paper. It was not signed. It does make reference to a previous will which she could not remember making and used the phrase, "This is my new will made by me." It was witnessed by two of her granddaughters, Linda Matthews-Mont and Tamara Burns. It appears that it was signed by them at some time after the interruption that prevented Ms. Burke from finishing the document. Because it was not signed by Mary Burke, they did not witness her signature.

[52] Ms. Matthews-Mont said that her grandmother started writing "the will" and stopped when she heard someone come in. "Grandma informed me and I do verily believe that she intended to revise it later." But she appears to have never done that. The document was written on April 24, 2019 and Ms. Burke lived for about 18 months after that. But there was no revision of the document. It was taken away by Linda Matthews-Mont and there is no evidence about it ever being presented to Ms. Burke to "revise".

[53] The April 24, 2019, document was not signed because it was never completed. The document itself shows changes made in the course of its being written. It does refer to a previous will, but it does not name a new executor. There is no way to know whether, had she turned her mind to completing the document, Mary Burke would have made other changes or what additions she might have made. It was a work in progress. It is not reasonable to conclude that it was a record of Mary Burke's fixed and settled intention with respect to the disposition of her estate upon her death. The April 24, 2019, written document cannot be treated as a will.

The 2015 Will

[54] Mary Burke signed a document purporting to be her will on March 27, 2015. That will complied with the formal requirements. It was signed, dated, and witnessed by two witnesses. It appoints an executor and disposes of the estate. It was drafted by a lawyer and executed in the lawyer's office.

[55] Dougald Matthews says that the 2015 will is not valid because Mary Burke's will was overborne by Clarissa Joan Matthews so that it does not reflect his mother's intentions.

[56] As of March 2015, Thomas Matthews had been dead for about three months. His will was executed on October 31, 2014. In that will Mr. Matthews appointed Bernard Larue as his executor. He gave the family home to Clarissa Matthews subject to a life interest in favour of his common-law spouse, Mary Burke. Other properties were given to other members of the family. Those were a cabin and a vacant lot. He made specific bequests to some family members. The residue of the estate was left to Mary Burke. In the will Mr. Matthews recognized that he had other living children. Paragraph 4(d) goes on to say the following;

> I also recognize that I have not distributed my estate equally among my living children by leaving significant portions to some and not to others. My daughter Clarissa Joan Matthews, upon the death of myself and my common-law spouse, Mary Josephine Burke, intends to reside with the survivor of us, to provide the care to that survivor, that that survivor will eventually require. I have been blessed with a large family however, my estate cannot be divided equally among my children and I do not wish for my estate to be liquidated (sic) the proceeds divided. I have left to each of my children what I consider to be useful to each of them.

[57] Those arrangements may not have been to the satisfaction of all the children of Thomas Matthews and Mary Burke. But that is what the will said. And, as of Thomas Matthews death, Clarissa Matthews owned the family home, subject to her mother's life interest. As the will contemplated, soon after the death of Thomas Matthews, Clarissa Matthews and Bernard Larue began living in the home with her and providing the needed care.

[58] Bernard Larue was issued a Grant of Probate on January 21, 2015. On March 27, 2015, he conveyed the property from the Estate of Thomas Matthews to Clarissa Matthews. That was as the will had provided. The deed notes that it was subject to the life interest of Mary Josephine Burke. On the same day, Mary Burke signed a Quit Claim Deed, conveying her interest in the property to Clarissa Matthews and terminating her life interest in the home. On that same day, March 27, 2015, Mary Burke executed a will, an Enduring Power of Attorney and a Personal Directive. That was all done by Jason Boudrot, the same lawyer who had represented Thomas Matthews when his will was prepared.

[59] There is no direct evidence about the circumstances under which Mary Burke instructed Jason Boudrot to prepare the documents and no evidence about the circumstances under which they were signed. Clarissa Matthews' affidavit of October 7, 2021, states that her mother told her that she wanted a will, so she drove her to the lawyer's office. "What she decided with Mr. Boudrot was confidential between them behind closed doors and it is those discussions which resulted in my mother doing a personal Directive and POA and Will, not my 'arrangements'." Clarissa Matthews said that she had no conversations with Jason Boudrot before her mother's meeting with him. While Dougald Matthews believes that his sister arranged for their mother to see a lawyer and sign the documents, there is no evidence to support that belief or suspicion.

[60] Dougald Matthews says that at that time his mother Mary Burke was forgetful. She was mourning the loss of her spouse of 60 years. He says that Clarissa Matthews and Bernard Larue appeared to be domineering of Mary Burke. Linda Matthews-Mont said that her grandmother, Ms. Burke, would look to Clarissa Matthews for affirmation before answering questions put to her by the family. Those impressions are not evidence of either a lack of capacity or undue influence over Ms. Burke. As people age, they can become forgetful. But they have not by virtue of that forgetfulness lost the capacity to decide how they want to dispose of their estates.

[61] Dougald Matthews and Linda Matthews-Mont allege that Clarissa Joan Matthews and Bernard Larue took control of Mary Burke's money and mismanaged it. That they say is evidence to support the contention that when the will was done she was under their influence. They maintain that the Quit Claim Deed, the Enduring Power of Attorney and the will were all part of the scheme to misappropriate or at least to misuse Mary Burke's money. And that is, in large part, what this case is about. Dougald Matthews wants to be able to have an accounting of the money that was spent by Clarissa Joan Matthews while she acted under the terms of the power of attorney.

[62] Dougald Matthews alleges that there were questionable changes to Mary Burke's bank accounts during the time when Clarissa Matthews acted as her attorney. That included $50,000 of cash withdrawals from Ms. Burke's bank accounts. Clarissa Joan Matthews denies taking any money from her mother. She says that the only money she took form her mother's accounts and put in her own account was money set aside to pay for Ms. Burke's funeral. She put that in a high interest savings account and paid her mother's funeral expenses to the funeral home, prior to Ms. Burke's death, from that account. The remaining money she offered to Linda Matthews-Mont who was by then Ms. Burke's attorney.

[63] Clarissa Matthews' affidavit dated August 5, 2022, provides a list of appropriate expenditures that she made on her mother's behalf. They are estimates only but set out the general expenses that related to Ms. Burke in the years 2015, 2016, 2017, and 2018. This matter is not intended as a full accounting of Ms. Matthews' time acting as her mother's attorney. The issue is addressed only for the purpose of dealing with the inference that could be drawn from the alleged mismanagement of funds to suggest that there are suspicious circumstances surrounding the March 27, 2015 will.

Undue Influence or Suspicious Circumstances

[64] Mary Burke's 2015 will was executed by her, before two witnesses. It was prepared by a lawyer and there are no issues about the formalities of the will and its execution. When a will has been duly executed there is a presumption of knowledge and approval as well a presumption of capacity. *Wittenberg v. Wittenberg Estate*, 2015 NSCA 79, per Bryson J.A., at para. 11. That means that the party seeking to have the will approved bears the onus but can rely on the presumption that when a person signs a will that person has testamentary capacity

and has approved the contents of the will. A challenger cannot simply say that the person signed it but must not have known what it meant.

[65] And that was essentially the position taken by Dougald Matthews in this case. He acknowledged that his mother, Mary Burke, signed the will in the office of Jason Boudrot, but would not acknowledge that she understood that document to be her will. He believed that she thought the entire process was about providing for her ongoing care needs. To refute the presumption of testamentary capacity or knowledge, the challenger must show "suspicious circumstances" that relate to the preparation of the will or the capacity of the testator. If there are suspicious circumstances the presumption is spent and the party seeking to have the will recognized must prove knowledge, approval and capacity.

[66] The "suspicious circumstances" argued to have been present in the case of Mary Burke's signing of her will, were the suggestion that Clarissa Matthews "arranged" to have the will prepared by Jason Boudrot, Mary Burke's general forgetfulness and Ms. Burke's inability 4 years later to recall having made the will. There is no evidence that Clarissa Mathews "arranged" for the preparation of the will. The only evidence is that Mary Burke asked to meet with Mr. Boudrot and that Clarissa Matthews went to the law office with her, though Ms. Burke met alone with Mr. Boudrot. Even if it were established that Mary Burke was forgetful when she executed the will in 2015, that would not tend to negate her testamentary capacity, or her knowledge or approval of the will. The inability in 2019 to recall having made a will 4 years before would not be surprising given that during 2017 there had been three medical assessments, all of which diagnosed Mary Burke with dementia at that time. Even if Mary Burke in 2019, could not recall making the will in 2015, that would not negate her testamentary capacity, her knowledge, or her approval of the will in 2015.

[67] Suspicious circumstances may relate to the preparation of the will, the capacity of the testator or may tend to show that the free will of the testator was overborne by acts of coercion or fraud. If there are suspicious circumstances around the preparation of the will or the testamentary capacity of the testator, the propounder of the will has the legal burden of proving testamentary capacity and knowledge. In this case, as I have noted, there are no suspicious circumstances that relate to either the preparation and execution of the will or of Ms. Burke's knowledge of its contents and her testamentary capacity. The presumption of knowledge and approval of the will and the presumption of testamentary capacity operate and have not been rebutted.

[68] Even when there are suspicious circumstances regarding undue influence or fraud, the burden of proof remains of those alleged undue influence or fraud. *Wittenberg Estate*, para. 14. There is a policy in favour of honouring the wishes of the testator where it is established that the formalities have been complied with, and testator has approved the will and has testamentary capacity. Disallowing probate because of circumstances merely raising a suspicion of fraud or undue influence would defeat the wishes of the testator in many cases where no fraud or undue influence existed. Suspicious circumstances only rebut the presumptions of knowledge and approval and testamentary capacity. The burden of proof with respect to fraud and undue influence remains with those attacking the will.

[69] The issue then is whether Dougald Matthews has proven on the balance of probabilities that Mary Burke's will was signed under circumstances of undue influence or fraud.

[70] A will can be set aside on the basis of undue influence when the challenger of the will has established that the mind of the testator was overborne by influence exerted by another so that there was no voluntary approval of the contents of the will. The challenger must show that the influence was so great and overpowering that the will reflects the intent of the beneficiary and not the testator. In *Marsh Estate (Re)*, [1991] N.S.J. 230 (N.S.S.C., A.D.), Justice David Chipman said that it "must amount to coercion" (para. 9). In *Marsh* the testator told the solicitor who drafted the will that she was changing her will because her brother-in-law did so much for her. She was dependant on him. The brother-in-law had threatened, directly or indirectly, to withdraw that support if the testator did not change her will.

[71] In *Wingrove v. Wingrove* (1885), 11 P.D. 81, at pp. 82-83, the court said that, as Chipman J.A. said many years later, to be undue influence in the eyes of the law there must be coercion. It is only when the will of the person who becomes a testator is coerced into doing that which he or she does not want to do that it is undue influence. Mere influence is not undue influence. Undue influence takes place in circumstances in which the testator if they could speak, would say that this was not their wish but they "must do it". Undue influence, in order to make a will void, must be an influence that caused the will pretending to express the testator's mind, to be something else that the testator did not really mean. In that case it would be as if the testator had delegated the power to make a will to the other person.

[72] A person may seek to influence a testator or may solicit something in their favour in someone else's will. Some amount of "persuasion" or "mere influence" is permissible provided it does not amount to undue influence. *Kohut Estate v. Kohut*, 90 Man. R. (2d) 245, [1993] M.J. No. 597(Q.B.), and *Caswell Estate (Re)*, [1976] O.J. No. 279 (Div. Ct.).

[73] In this case, Mary Burke's March 27, 2015 will was signed in her solicitor's office. There are no questions about the execution of the will. As of that time there are no grounds for suspicion about Ms. Burke testamentary capacity. Dougald Matthews asserts that his mother's will was overborne. That was for him to prove. The evidence was that Ms. Burke asked to have a will done and to meet with Mr. Boudrot. There is no evidence whatsoever that Clarissa Matthews or anyone else coerced her into doing that.

[74] Mr. MacMillan argued that undue influence could be inferred from the surrounding circumstances, before and after the execution of the will. Clarissa Matthews and her husband Bernard Larue had gone to live with Mary Burke in the home that had been willed to Clarissa Matthews by her father. Mary Burke's interest would have been far greater than a life interest, yet Clarissa Matthews made no attempt to get independent legal advice for her mother. At that time Mary Burke was competent and capable of making decisions for herself. None of the other members of the family contested Thomas Matthews' will and none of them sought to get independent legal advice for Mary Burke. She wanted to see Mr. Boudrot and that is what happened. There was no evidence to indicate that he identified a conflict between his role as having been solicitor for Thomas Matthews and acting for Mary Burke in drafting her will.

[75] Mr. Boudrot prepared a Quit Claim Deed that Mary Burke signed. It waived her life interest granted under Thomas Matthews' will. There is no evidence that Clarissa Matthews asked for that, though if she had that would not necessarily be evidence of undue influence. But the opposite is the case. The only evidence is that Clarissa Matthews did not ask for a Quit Claim Deed to be signed. And there is no evidence to suggest that at any time she made use of that deed to dispose of the home or to obtain a mortgage against it.

[76] Dougald Matthews and Linda Matthews-Mont each said that Clarissa Matthews tried to isolate Mary Burke from her other children and that this was evidence of her exerting influence over her mother. Whether Mary Burke looked toward Clarissa Matthews on occasions before answering questions is hardly

evidence of her undue influence. The family was divided by these disputes. When Mary Burke was placed in a nursing home, she went to the locked dementia unit. Not all family members agreed. Whether restrictions on visits were a result of Clarissa Matthews' requests to the staff or the independent decision of the management of the nursing home to deal with the interfamily disputes within the facility, cannot be determined from the evidence led in this case.

[77] More significantly, Dougald Matthews and Linda Matthews-Mont have made accusations against Clarissa Matthews regarding misuse of Mary Burke's money while she acted as Mary Burke's attorney under the terms of the Enduring Power of Attorney. That misuse of money is a piece of evidence from which they claim undue influence can be inferred. At first, they believed that Clarissa Matthews had taken money from Mary Burke's account intended to be used for her funeral. But there were no "missing funds". The evidence is that Clarissa Matthews put the money in a savings account and used it, as intended, to pay for her mother's funeral. Other money came out of Mary Burke's account but the amounts that were taken out in cash by Clarissa Matthews under the Power of Attorney, are similar to the amounts taken out by Mary Burke on her own for her own purposes. The evidence from Clarissa Matthews was that the money was used by her mother to pay household expenses and for her own entertainment, including the purchase of lottery tickets. Dougald Matthews and Linda Matthews-Mont do not believe that. But their evidence did not refute what Clarissa Matthews said.

[78] Dougald Matthews claim was that his sister, Clarissa Matthews duped and deceived their mother, Mary Burke. She received the life interest from their father on the understanding that she would provide live in care to the survivor of Thomas Matthews and Mary Burke. They say that she did not do a good job of that and soon after was looking for respite care from government. There was not enough evidence to conclude that Clarissa Matthews failed in her duties to her parents. They say that she then managed to get her mother to sign a will, a Power of Attorney, a personal directive and a Quit Claim Deed that terminated Mary Burke's life interest. But the only evidence was that Mary Burke asked to meet with Jason Boudrot herself, met alone with him, and no requests were made of her. They say that she then had her mother placed in a nursing home, where she did not want to be. But three assessments indicated that she was not capable of making decisions. She was not placed in a locked dementia unit for Clarissa Matthews' benefit. Dougald Matthews suspects that Clarissa Matthews took advantage of their mother, by taking her money, taking her home and locking her up in a facility

where she did not want to be. He wants to be able to sue his sister so that she will be held accountable.

[79] When an inference is suggested from the circumstances, those circumstances can be defined as having such a broad scope that all focus is lost. The focus here must remain on whether Clarissa Matthews exerted undue influence in the preparation of Mary Burke's 2015 will. What happened after that may provide some context, but it is not the focus. There is no evidence of any direct influence by Clarissa Matthews on the contents of Mary Burke's will. There is no evidence of any threats or coercion and not even any evidence of a request made by Clarissa Matthews or by anyone on her behalf. Clarissa Matthews' receipt of a Quit Claim Deed raised suspicions in Dougald Matthews and Linda Matthews-Mont. But again, there is no evidence that the deed was requested by Clarissa Matthews. Her failure to keep accounts while acting as her mother's attorney raised suspicions but there is no evidence that she misappropriated any of Mary Burke's money.

[80] Dougald Matthews has not proven on the balance of probabilities that Clarissa Matthews exerted undue influence over Mary Burke with respect to the 2015 will and no evidence that the will was the result of fraud.

[81] The will dated March 27, 2015 purporting to be the will of Mary Josephine Burke, is the will of Mary Josphine Burke. Mr. Matthews application for Proof in Solemn form of the writing dated April 24, 2019 is dismissed.

Costs

[82] The parties may make written submissions on costs within 30 days of this decision.

Campbell, J.