SUPREME COURT OF NOVA SCOTIA
Citation: Baird Estate (Re), 2014 NSSC 266

Date: 20140711
Docket: Pictou Probate No. 20947
Registry: Pictou

IN THE ESTATE OF HELEN BAIRD

Application by Grace Whitford for Proof in Solemn Form

Judge:	The Honourable Justice Cindy A. Bourgeois
Heard:	June 2, 3 and 5, 2014, in Pictou, Nova Scotia
Written Decision:	July 11, 2014
Counsel:	Keith MacKay, for the applicant Jill Graham-Scanlan for Edward Baird and Barbara D'Eon

By the Court:

[1] The Court has before it an application for Proof in Solemn Form. The surviving children of Helen Baird are at odds over whether or not she had the requisite testamentary capacity at the time she gave instructions for, and executed a Will in November of 2011. The Applicant Grace Whitford submits, supported by her sister Margaret Anderson, that there are suspicious circumstances relating to Helen Baird's capacity and as such the burden of proving she had testamentary capacity rests with Edward Baird and Barbara D'Eon who assert the Will is valid.

Background

[2] Helen Baird died on May 30, 2013, while a patient at St. Martha's Hospital in Antigonish, N.S. She was 91 years of age at the time of her death.

[3] Mrs. Baird was predeceased by her husband James Archibald Baird, who died in 1993 and a son, Ernest Wayne Baird, who died in 1992. She was survived by 4 children Edward Baird, Barbara D'Eon, Grace Whitford and Margaret Anderson.

[4] At the time of her death, Mrs. Baird was the owner of modest savings, a house and vacant land located at Caribou Island, Pictou County, Nova Scotia.

[5] Mrs. Baird had executed a Will in November of 2006 in which she appointed her daughters Grace and Margaret as co-Executrices, left bequests of property, and divided the residue of her estate equally amongst her children. She executed two subsequent Codicils.

[6] On November 25, 2011 Mrs. Baird executed a Will in which she appointed her son Edward as Executor of her Estate, left bequests to her children and divided the residue of her Estate equally among her 4 children.

[7] Edward Baird made an Application for a Grant of Probate on June 10, 2013 in reliance upon the November 2011 Will, with a Grant being issued the same day.

[8] On August 13, 2013 Grace Whitford filed a Notice of Application "asking the Court to hear the Will of the said Helen Baird executed on November 25,

2011, proved in solemn form and to determine the validity of the said will, pursuant to subsection 31(1) of the *Probate Act*, S.N.S. 2000, c. 31 as amended". In support of the Application, Grace Whitford filed an affidavit sworn August 12, 2013 in which she asserts the following:

> On November 25, 2011, my mother was 90 years old and had been clearly suffering from dementia for at least two years. She did not have the testamentary capacity necessary to execute a Will on that date and, for that reason, the will is not valid.

[9] On August 21, 2013 both Edward Baird and Barbara D'Eon filed Notices of Objection to the application brought by Ms. Whitford. In their affidavits in support of the objection they each assert that Helen Baird had testamentary capacity when executing her Will on November 25, 2011, she did not suffer from dementia, nor did she suffer from any medical condition which would affect her testamentary capacity.

Legal Principles

[10] The Supreme Court of Canada has set out the required elements of proof for determining the validity of wills in **Vout v. Hay** [1995] 2 S.C.R. 876. That decision has been followed many times by this Court – see for instance **Re Willis Estate,** 2009 NSSC 231, **Nieuwland v. Yorke Estate,** 2011 NSSC 19, and **Re Fawson Estate,** 2012 NSSC 55.

[11] In **Re Willis Estate, supra** Justice Murphy helpfully reviewed the Supreme Court of Canada's decision and the principles to be taken therefrom as follows:

> 8. The leading decision addressing the requisite elements of proof in determining the validity of Wills is *Vout v. Hay*, [1995] 2 S.C.R. 876 (S.C.C.). That decision, which has recently been followed by this Court in *Ramsay Estate, Re*, 2004 NSSC 140 (N.S. Prob. Ct.) and *Coleman v. Coleman Estate*, 2008 NSSC 396 (N.S. S.C.), addressed the confusion surrounding the interrelation of suspicious circumstances, execution, testamentary capacity and undue influence. Justice Sopinka, writing for the Court in *Vout* stated as follows (at p. 889):
>
> > [26] . . .Although the propounder of the will has the legal burden with respect to due execution, knowledge and approval, and testamentary capacity, the propounder is aided by a rebuttable

> presumption. Upon proof that the will was duly executed with the requisite formalities, after having been read over to or by a testator who appeared to understand it, it will generally be presumed that the testator knew and approved of the contents and had the necessary testamentary capacity.
>
> [27] Where suspicious circumstances are present, then the presumption is spent and the propounder of the will reassumes the legal burden of proving knowledge and approval. In addition, if the suspicious circumstances relate to mental capacity, the propounder of the will reassumes the legal burden of establishing testamentary capacity. Both of these issues must be proved in accordance with the civil standard. There is nothing mysterious about the role of suspicious circumstances in this respect. The presumption simply casts an evidentiary burden on those attacking the will. This burden can be satisfied by adducing or pointing to some evidence which, if accepted, would tend to negative knowledge and approval or testamentary capacity. In this event, the legal burden reverts to the propounder.

9 The proponents of a will, in this case the Respondents with respect to the Second Will, have the onus to establish on a balance of probabilities that the formalities of the *Wills Act* were complied with, and that the testator, possessing a disposing mind and memory giving him testamentary capacity, knew and approved its content (*Vout*, paras. 19 and 20). As the Applicant acknowledges that the Second Will was executed (by someone) at a time when James Willis would have had testamentary capacity and the ability to understand and approve contents, the Respondents may be deemed to have satisfied their initial onus as proponents of the Second Will, giving rise to a rebuttable presumption that will is valid.

10 The Supreme Court noted, at para. 25 in *Vout*, that the suspicious circumstances which will rebut the presumption in favour of a will's validity may relate to various issues. The Court identified (1) circumstances surrounding the preparation of the will, (2) circumstances tending to call into question the capacity of the testator, or (3) circumstances tending to show that the free will of the testator was overborne by acts of coercion or fraud.

11 In *Macdonell, Sheard and Hall on Probate Practice*, 4th Ed., the authors suggest at p. 42 that circumstances arousing suspicion must exist at the time the will is made, but they note that subsequent events may in some cases give rise to suspicion. The Prince Edward Island Supreme Court in *Coughlan Estate, Re*,

2003 P.E.S.C.T.D. 75 (P.E.I.T.D.), sanctioned consideration of activity after the will was executed, concluding in para. 140:

> Suspicious circumstances were present in this case, but when viewed in the broader context of the entire evidence, both before and after the will was executed, the suspicion has been significantly diminished.

12 Once suspicious circumstances arise and the presumption of validity is spent, the propounder of the will resumes the legal burden of proving due execution, the testator's knowledge and approval, and, if it is an issue, testamentary capacity. Those issues must be proved in accordance with the civil balance of probabilities standard (*Vout*, para. 27, supra).

13 When undue influence is alleged, the burden of proof does not revert to the proponent of the will, but rests with those attacking it. In *Vout*, the Supreme Court of Canada stated at para. 28:

> [28] It might have been simpler to apply the same principles to the issue of fraud and undue influence so as to cast the legal burden onto the propounder in the presence of suspicious circumstances as to that issue . . .Nevertheless, the principle has become firmly entrenched that fraud and undue influence are to be treated as an affirmative defence to be raised by those attacking the will. They, therefore, bear the legal burden of proof. No doubt this reflects the policy in favour of honouring the wishes of the testator where it is established that the formalities have been complied with, and knowledge and approval as well as testamentary capacity have been established. To disallow probate by reason of circumstances merely raising a suspicion of fraud or undue influence would tend to defeat the wishes of the testator in many cases where in fact no fraud or undue influence existed, but the propounder simply failed to discharge the legal burden. Accordingly, it has been authoritatively established that suspicious circumstances, even though they may raise a suspicion concerning the presence of fraud or undue influence, do no more than rebut the presumption to which I have referred. This requires the propounder of the will to prove knowledge and approval and testamentary capacity. The burden of proof with respect to fraud and undue influence remains with those attacking the will. See *Craig v. Lamoureux*, [1920] A.C. 349; *Riach v. Ferris*, [1934] S.C.R. 725; *Re Martin, supra*.

> 14 This Court in *Ramsay, supra*, reaffirmed the direction in *Vout* that the burden of proving undue influence remains with those attacking the will, and that to establish undue influence it is not sufficient to show only that the beneficiary had the power to coerce the testator, but it must be demonstrated that the overbearing power was exercised and that because of its exercise the will was made (*Ramsay*, paras. 32,33,50).
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> 15 The respective burdens of proof were succinctly summarized by the Court in *Coleman, supra*, at para. 48:
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> > While the presumption of testamentary capacity, and of knowledge and approval/appreciation, may be exhausted by evidence of suspicious circumstances, thereby placing an evidentiary burden on the proponent of the will, the burden of proof of undue influence (and of mistake based on fraud) is always on the party challenging the will to prove that the mind of the testator was overborne by the influence exerted by another person such that there was no voluntary approval of the contents of the will. The burden is a civil burden on a balance of probabilities.

[12] Justice Hood has recently had the opportunity to consider "suspicious circumstances" and in particular the nature of the evidentiary burden to establish same. In **Re Fawson Estate,** 2012 NSSC 55, she writes:

> 202 In *Nieuwland v. Yorke Estate*, 2011 NSSC 19 (N.S.S.C.), Robertson, J. canvassed the issue of suspicious circumstances. She quoted Feeney's *Canadian Law of Wills*, 4th ed. (Markham: Lexis Nexis, Looseleaf updated Dec. 2010) as follows in para. 11:
>
> > 2.19 …The idea of suspicious circumstances originated in *Barry v. Butlin*. Davey, L.J. advanced the general proposition that 'wherever a will is prepared under circumstances that raise a well-grounded suspicion that it does not express the mind of the testator, the court ought not to pronounce in favour of it unless that suspicion is removed" . . .
> >
> > 2.25 In *Ostrander v. Black*, Granger, J. summarized the results of *Vout*, and added that a mere allegation of lack of capacity was not enough to defeat the presumption of capacity and knowledge and approval of contents – those attacking the will must establish some basis in evidence for the proposition that the testator lacked capacity. Suspicious circumstances could constitute the

> evidentiary base, and, in the event, the propounder would regain the formal onus of proving capacity which would inevitably entail removing the suspicions. In other words, a court might draw an inference from the facts before it (from the 'suspicious circumstances'), that there was either a lack of capacity or a lack of knowledge and approval of contents of the will. In such cases the propounders of the will would have to meet or rebut that inference with positive evidence of capacity and knowledge and approval of contents to secure probate. If the evidence in this regard is not clear and convincing, if the propounders offer little or no responsive evidence, the will will be rejected. The more recent judgment in *Scott v. Cousins*, also addressed the relationship between evidence of suspicious circumstances that is sufficient to rebut the presumption of testamentary capacity and such evidence that might be necessary to establish undue influence. The decision confirms that the strength of inference lies on a continuum depending upon the evidence in a particular case . . .

203 She also quoted Feeney in para. 7 as follows:

> 2.15 It is a question of fact – one of degree – in each case whether the person has sufficient mental power left to appreciate and understand the testamentary act. There may be good reasons for the apparent asymmetrical or adverse treatment of family members in a will . . .

204 In *Scott v. Cousins*, [2001], O.J. No. 19 (Ont. S.C.J.), Cullity, J. referred to the burden to rebut the presumption of testamentary capacity, saying in para. 41:

> 41. The reference to an evidential burden in proposition 5 and 6 refers to a burden of adducing sufficient evidence to "raise an issue" of knowledge and approval or testamentary capacity – cf., Sopinka, Lederman, Bryant, *The Law of Evidence in Canada* (2nd edition, 1999), para. 3.15. It is not necessary for those opposing probate to do more than this. In particular, they do not have to disprove knowledge and approval or testamentary capacity on a balance of probabilities. While, in most other areas of the law, evidence sufficient to raise an issue is said to be that from which a rational trier of fact could find in favour of the person with the evidential burden on the particular issue – *ibid*, at paras. 3.15, 3.16, 3.20 and 5.37ff – it seems that, in the context of contested wills it may be preferable, at least until further guidance has been provided, to describe the standard in terms of the time-honoured

> phrase, "excites the suspicion of a court"; *cf. ibid*., para. 3.21. I say this because it has sometimes been said in the past that all the persons opposing probate have to do is to raise 'a doubt'; for example, *Re Davis*, [1963] 2 O.R 666 (Ont. C.A.), at page 683. This, and evidence which, if accepted, would raise 'a well-grounded suspicion' or would 'tend to negative knowledge and approval or testamentary capacity', may or may not, be something less than a triable issue for the purposes, for example, of Rule 20 of the Rules of Civil Procedure.

205 The Applicant must not prove Margaret Fawson had a delusion but only present some evidence to rebut the presumption of testamentary capacity, leaving it to Sandra Deveau to then satisfy the court that Margaret Fawson did in fact have testamentary capacity when she executed her will.

[13] Given the nature of the evidence before the Court, it is helpful to also note Justice Hood's comments regarding the effect of "delusions" on testamentary capacity. She notes:

> 207 In *Theobald on Wills* (16th ed., London, Sweet & Maxwell, 2001), the authors set out the test for testamentary capacity in para. 3-02:
>
> 3-02 In order to have testamentary capacity a testator must understand:
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> (i) The effect of his wishes being carried out at his death, though it is not necessary that he should view his will with the eye of a lawyer and comprehend its provisions in their legal form;
>
> (ii) The extent of the property of which he is disposing; and
>
> (iii) The nature of the claims on him. The testator must have "a memory to recall the several persons who may be fitting objects of the testator's bounty, and an understanding to comprehend their relationship to himself and their claims upon him" so that he can decide whether or not to give each of them any part of his property by his will.
>
> 208 The authors then consider the effect of delusions on testamentary capacity saying in the following paragraph:
>
> > 3-03 A delusion in the mind of a testator deprives him of testamentary capacity if the delusion influences, or is capable of

> influencing, the provisions of his will. But a delusion does not have this effect if it cannot have had any influence upon him in making his will.
>
> A testator suffers from a delusion if he holds a belief on any subject which no rational person could hold, and which cannot be permanently eradicated from his mind by reasoning with him.
>
> . . .
>
> In practice it may be difficult to distinguish between grave misjudgment and delusion, particularly in relation to a testator's assessment of the character of a possible beneficiary under his will . . .
>
> A will is not invalid merely because in making it the testator is moved by capricious, frivolous, mean or even bad motives. If he has testamentary capacity he 'may disinherit . . . his children, and leave his property to strangers to gratify his spite, or to charities to gratify his pride.

209 In *Royal Trust Corp. of Canada v. Saunders* [2006] CarswellOnt 3478 (Ont. S.C.J.), 2006 CanLii 19424, Blishen, J. said at para. 62:

> [62] In order to affect testamentary capacity, a delusion must;
>
> 1. be one of 'insanity'; and
>
> 2 be in relation to the testator's property or expected beneficiaries.

[14] In summary, the above authorities establish that provided that the requirements of the *Wills Act* have been met in terms of the execution of the November 2011 Will, there is a presumption that Mrs. Baird signed the same with full knowledge and approval of the contents, and was possessed of the necessary testamentary capacity. That presumption can be dispelled if the Applicant adduces sufficient evidence which gives rise to suspicious circumstances. This evidence cannot be a mere allegation, but also needs not meet the threshold of probability in order to shift the evidentiary burden onto Mr. Baird and Ms. D'Eon. As the Supreme Court in **Vout, supra** outlined, such evidence can relate to not only the

capacity of the testatrix, but also the circumstances surrounding the making of the Will, and issues relating to fraud and undue influence.

Issues

[15] The issues before the Court can be posed in terms of the following:

> a) is the evidence before the Court sufficient to give rise to "suspicious circumstances" surrounding the making of the November 2011 Will, including concerns as to whether Mrs. Baird had sufficient testamentary capacity, executed the Will with full knowledge of the contents, or was induced to sign the Will because of fraud or undue influence?
>
> b) if the Court finds there is suspicious circumstances surrounding the making and execution of the November 2011 Will, have the Respondents met their onus to establish on a balance of probabilities that Mrs. Baird possessed testamentary capacity and executed the Will with full knowledge and approval of its contents?

[16] At this juncture, it is important to note that the Applicant has confirmed that the bare requirements of execution as required by the legislation have been met, although it is submitted that the circumstances surrounding execution should be part of the Court's consideration under the first inquiry outlined above. Secondly, the Applicant has not raised as an independent ground of attack of the Will, that Mrs. Baird was unduly influenced or a victim of fraud. Rather, it is submitted that concerns in that regard can be properly considered by the Court in reaching a determination as to whether or not suspicious circumstances exist. I agree.

Evidence and Analysis

[17] Several affidavits were entered into evidence with cross-examination flowing therefrom. In support of the application, the Applicant filed her own affidavit (Exhibit 1) and also that of Margaret Anderson (Exhibit 2), both sworn February 25, 2014.

[18] There are three affidavits of Edward Baird before the Court sworn December 20, 2013 (Exhibit 3), May 16, 2014 (Exhibit 4) and May 23, 2014

(Exhibit 5) respectively. The affidavit of Barbara D'Eon, sworn January 8, 2014 and that of Sandra Baird sworn May 16, 2014 are before the Court as Exhibits 6 and 7 respectively.

[19] Three lawyers were called to provide evidence relating to their interactions with Helen Baird, Ms. E. Anne MacDonald; Ian MacLean and Daniel MacIsaac.

[20] Before commenting more specifically on the evidence before the Court, at this juncture, it is important to pause to make an observation. Both the Applicant and the Respondents have to varying degrees, included in the affidavits information attributed to third parties. This includes attached materials from social work and medical professionals who had interacted with Helen Baird in some capacity, such as file and chart notes. None of these individuals filed an affidavit or provided *viva voce* evidence. It is clear not only from the affidavits filed referencing the third party material, but from the submissions of Counsel, that the Court is being asked to consider these statements, at least in part, for the truth of their contents as they relate to Mrs. Baird's mental capacity. That is a central issue before the Court.

[21] In my view, much of the references to third party information is inadmissible hearsay and some is likely crossing the line of expert opinion. It is not clear why these third parties could not have provided direct evidence, especially on an issue as central as Mrs. Baird's mental state.

[22] Section 102 of the *Probate Act* provides:

> Where no provision is made in this Act or in the Probate rules with respect to practice or evidence and in so far as this Act or the Probate Rules do not extend, the *Civil Procedure Rules* apply.

[23] I am not aware of any provision of the *Probate Act* or the regulations made thereunder which permit otherwise inadmissible hearsay evidence to be introduced in probate matters. The Civil Procedure Rules, subject to very narrow exceptions, specifically prohibit affidavits to reference hearsay.

[24] In light of the above, the Court will place no weight on this problematic hearsay evidence as it relates to the central issue of Mrs. Baird's mental capacity.

[25] *Are there "suspicious circumstances" surrounding the making and execution of the November 2011 Will of Helen Baird*?

[26] I agree with the submission of the Respondents that mere allegations of mental incapacity should not be sufficient to displace the presumption of testamentary capacity. The presumption afforded to the propounder of a Will would be rendered meaningless if a challenger needed only to assert, without some foundation, that a testatrix lacked mental capacity.

[27] Here, the Applicant has not merely raised unsubstantiated allegations regarding Mrs. Baird's mental capacity at the time she gave instructions and executed her November 2011 Will. The evidence before the Court was much broader in my view. Although each particular factor may not have been sufficient on its own to give rise to "suspicious circumstances", the Court is satisfied that given a number of concerns, the Applicant has met this initial burden. With respect to concerns surrounding Mrs. Baird's testamentary capacity, the Court notes the following from the evidence:

> a) Mrs. Baird was 90 years of age, and had a number of health concerns in the relevant time frame;
>
> b) The Applicant and Mrs. Anderson testified that their mother's mental capacity had been in decline for a number of years prior to the execution of her November 2011 Will, and she in particular, suffered from dementia. Both women gave examples of how their mother's mental capacity had diminished both in terms of memory, insight, and activities of daily living;
>
> c) Solicitor MacDonald, known to Mrs. Baird for a number of years, testified that she didn't seem like herself when she met with her in August of 2011, and needed to be prompted by Barbara D'Eon regarding what changes she wanted made to her Will.

[28] With respect to whether Mrs. Baird executed the Will with full knowledge and approval of its contents, of course concerns relating to her mental capacity overlap here, as well as the following considerations:

a) Mrs. Baird was hard of hearing, and only had the opportunity to have the Will read to her by Mr. MacIsaac on November 25, 2011;

b) Mr. MacIsaac had not been provided with the two Codicils executed in relation to her 2006 Will when he used that document as a template for his testamentary discussions with Mrs. Baird.

[29] With respect to the existence of concerns regarding undue influence and fraud, the Court has noted the following from the evidence:

a) Mrs. Baird was physically impaired and dependent upon her caregivers;

b) While living with Ms. D'Eon, it was this caregiver who made the arrangements with three lawyers to have Mrs. Baird effect changes to her Will, including the final appointment being in her home;

c) Several family members, including Ms. D'Eon accompanied Mrs. Baird to see Solicitor MacLean in an attempt to have her Will changed;

d) Solicitor MacIsaac had represented Ms. D'Eon in the past, as well as probated the Estate of her common law husband's mother.

[30] Collectively, the above factors apparent from the evidence, give rise to "suspicious circumstances", and as such, the burden to prove Mrs. Baird possessed the requisite testamentary capacity and had full knowledge and approval of the contents of the November 2011 Will rests with Mr. Baird and Ms. D'Eon.

[31] Before moving on, I will pause to address an issue upon which both sides spent considerable effort. The Applicant submits that the changes made in the November 2011 Will, when compared to the 2006 Will with codicils, were significant and as such, should be viewed as constituting a "suspicious" circumstance. The Respondents submit the changes are minor, and should not give rise to any concern.

[32] I do not find the changes between the two Wills to be significant. The change of executor, and adjustments made to the bequests of small parcels of land

did not, in my view, alter the overriding intent of Mrs. Baird in both instruments to treat all of her surviving children equally. Such a finding however, is very much dependent upon the interpretation of the gift of land contained in both wills to Margaret Anderson. In the 2006 Will, the gift is drafted as follows:

> 2(e) To convey to my daughter, Margaret Ann Anderson, a portion of my land located at Caribou Island, in the County of Pictou and Province of Nova Scotia between the existing lot of Robert MacPhee and Mildred MacPhee and the existing lot of Fraser Miller and Susan Miller, for her own use absolutely. I confirm that my daughter, Margaret Ann Anderson shall be responsible for the cost of the survey work and legal work necessary to effect the conveyance of this parcel of land to her.

[33] In the November 2011 Will, Margaret Anderson is to receive land described as follows:

> 3(d) to convey to my daughter, Margaret Ann Anderson, a 1 ½ acre portion of my land located at Caribou Island, in the County of Pictou and Province of Nova Scotia between the existing lot of Robert MacPhee and Mildred MacPhee and the existing lot of Fraser Miller and Susan Miller, for her own use absolutely. I confirm that my daughter, Margaret Ann Anderson is responsible for the cost of the survey work and legal work required in order to effect the conveyance of these parcels of land to her and also such right of way as is required to access the lot.

[34] The Applicant and Margaret Anderson assert that Mrs. Baird intended in the 2006 Will to gift to Margaret the remaining portion of her vacant lands at Caribou Island, other than those identified as existing rights of way, consisting of approximately 19 acres. The Respondents say the intent was for Margaret to get a lot big enough to build upon. If I accept the Applicant's interpretation of the earlier provision, such would constitute a significant change in terms of the gift to Margaret. I do not accept that interpretation.

[35] Based upon the evidence of Anne MacDonald, as well as the fact that such a large gift to one child would be contrary to Mrs. Baird's intent to treat her offspring equally, I find that the intended gift of land to Margaret in 2006 and 2011 were not materially different. In particular, Ms. MacDonald testified that the notes she made when taking instructions in 2006 reflected that Mrs. Baird intended Margaret to receive a piece of land suitable for an approved building lot. I accept that such was Mrs. Baird's intent in 2006. The change in the 2011 Will

was not a material one, and along with the other changes, fell far short of inciting the suspicion of the Court.

[36] *Have the Respondents proven on a balance of probabilities that Mrs. Baird possessed the requisite testamentary capacity and executed the November 2011 Will with full knowledge and approval of its contents?*

[37] Clearly, medical and other professional evidence could have been placed properly before the Court relating to Mrs. Baird's mental condition. She had interacted with physicians and social workers at various times, whose observations or opinions may have been of assistance to the Court. Although preferable to have this type of evidence, its absence is not a bar to the Court making a determination as to Mrs. Baird's testamentary capacity at the relevant time. There is ample other evidence before the Court from which a conclusion can be reached.

[38] Both parties submit Mr. MacIsaac as the solicitor who took instructions from Mrs. Baird and prepared the November 2011 Will is a key witness. I agree. Mr. MacIsaac has practiced law in Antigonish for 40 years. He has, along with other areas, undertaken estate planning throughout the entirety of his career. The Applicant was highly critical of Mr. MacIsaac's methodology in terms of how he approached the taking of instructions and the thoroughness of his work. By way of example, Mr. MacIsaac never opened a file in relation to the matter, he made minimal notes upon a copy of the 2006 Will which were lost; he failed to inquire about codicils to the instrument; he failed to inquire as to Mrs. Baird's health or medications; he failed to request an assessment to determine her mental capacity.

[39] The Applicant also raised the specter that Mr. MacIsaac may not have been entirely independent in terms of the undivided loyalty expected of a solicitor to his client. It was suggested that he knew both Ms. D'Eon and her common-law partner Mr. Durant, who had also been his clients. Mr. MacIsaac did not suggest that Mrs. Baird obtain independent legal advice.

[40] Firstly, the Court rejects any suggestion, or hint thereof, that Mr. MacIsaac was in any way influenced by Ms. D'Eon or Mr. Durant in terms of his proper representation of Mrs. Baird. Mr. MacIsaac was forthright in acknowledging that he knew both individuals by virtue of living in the same rural community, but had no personal relationship with either. He testified he may have done a Power of

Attorney for Ms. D'Eon, but had no specific recollection of this. He testified he recalled some involvement with Mr. Durant in the past when he was involved in the probating of his mother's estate. Neither Ms. D'Eon nor Mr. Durant was a current client of Mr. MacIsaac. I find that Mr. MacIsaac had only Mrs. Baird's interests in mind when he met with her in November of 2011, and there is nothing about the circumstances which would give rise to a need for her to consider obtaining independent legal advice. Mr. MacIsaac was her lawyer.

[41] The Court agrees with the Applicant that in several respects, Mr. MacIsaac could have done a better job in rendering professional services to Mrs. Baird. The advisability of taking detailed notes surrounding testamentary instructions and issues of capacity and undue influence are well documented in the case authorities. Such notes are of assistance to a solicitor when being asked to recall his interaction with a now deceased client. They further provide by virtue of a record of the questions posed, answers provided and observations documented, assistance to the Court in reaching a determination as to whether or not a testatrix had capacity and was giving instructions freely. Mr. MacIsaac should have made and retained better notes. He should have made further inquiries as to Mrs. Baird's general health and circumstances, so as to better document the conclusion he reached that she was mentally competent, and to provide better assistance to the Court in assessing several years later, whether she had testamentary capacity.

[42] Notwithstanding the above concerns, I accept Mr. MacIsaac's recollection of his interaction with Mrs. Baird as being accurate. Despite the lack of notes to refresh his memory, I am satisfied that the particular circumstances surrounding the meeting with Mrs. Baird were such that they were recalled by him independent of any memory aid. I find as follows:

- Mrs. Baird was alert and oriented both when instructions were taken and the Will was executed;

- Mrs. Baird was able to describe the extent of the real property she owned, as well as the fact that she had approximately $40,000 in her bank account;

- Mrs. Baird was able to discuss the nature of the rights of way which remained owned by her following the disposition of a number of lots to third parties;

- Mrs. Baird was able to engage in conversation with Mr. MacIsaac with no apparent difficulties;

- When read to her, Mrs. Baird indicated agreement with the provisions contained in the newly drafted Will;

- Mrs. Baird's ability to interact with Mr. MacIsaac and her presentation in terms of mental alertness remained unchanged when he took instructions from her in March of 2013 to prepare a Power of Attorney.

[43] Four children and a daughter in law provided evidence as to Mrs. Baird's circumstances. It is generally agreed that in her last few years, Mrs. Baird encountered some health difficulties. She suffered a decline in her physical abilities to the point where walking was difficult, and her ability to live independently was impaired. There is a significant difference of opinion amongst the family members regarding whether or not Mrs. Baird was mentally competent in November of 2011. The Applicant, supported by Ms. Anderson, says she was not, asserting she had "been clearly suffering from dementia for at least two years" at that point. Edward Baird, his wife Sandra and Barbara D'Eon say Mrs. Baird was, subject to memory lapses normal for a person her age, still mentally fit until her death in May of 2013.

[44] With respect to Mrs. Baird's mental condition in November of 2011, I find the description offered by the Respondents and Sandra Baird, more reliable than that offered by the Applicant and Ms. Anderson. Although the Applicant and Ms. Anderson had opportunity to observe Mrs. Baird during earlier timeframes, their contact with their mother from August of 2011 until her death was limited primarily to telephone contact. Although the Applicant and Ms. Anderson raised concerns about Mrs. Baird's abilities prior to August of 2011, neither sought to intervene with her affairs using the Power of Attorney they held, other than to give consent to emergency surgery in May of 2010. It was of particular note that in March of 2011, Mrs. Baird signed a "Personal Directive" which appointed Margaret Anderson her delegate pursuant to the *Personal Directives Act*, with Grace Whitford named as an alternate. Ms. Anderson testified she had read this document to her mother, explained its purpose and that it was signed willingly, with Mrs. Baird understanding the purpose of the document. Although executed

prior to the November 2011 Will, if Margaret Anderson felt her mother was mentally capable of understanding a personal directive in March of 2011, it calls into question the reliability of other of her observations in the overlapping time period which suggests Mrs. Baird was lacking in capacity.

[45] I found Barbara D'Eon to be a credible witness, and several important findings of fact arise from her evidence. In relation to the time period of July 2011 to May 2013, I find as follows:

- Mrs. Baird was aware that Margaret Anderson and Grace Whitford had concerns about her mental capacity, which was upsetting to her;

- Mrs. Baird enjoyed residing with Ms. D'Eon in a rural setting, and particularly enjoyed the view of the ocean;

- Mrs. Baird was able to carry on meaningful conversations with family members and a neighbor who visited frequently;

- Mrs. Baird was aware of what prescription medications she needed to take and when;

- Mrs. Baird enjoyed television programs and was able to follow and comment upon the storylines, including solving puzzles on game shows;

- Mrs. Baird enjoyed playing cards, and was still able to effectively do so, well after she had given instructions for her November 2011 Will;

- Mrs. Baird was aware of her personal finances, including income and expenses. She would sign her own cheques, and would often have Ms. D'Eon drive her to the bank to do her own banking, including keeping her withdrawn cash in her own purse.

[46] The evidence also discloses, that in addition to doing routine banking, Mrs. Baird continued to execute important documentation, witnessed by various professionals both before and after the execution of her November 2011 Will.

[47] Based on the above findings, I conclude on a balance of probabilities, that Mrs. Baird was mentally competent in November of 2011, and was able to understand the nature of her estate, and the persons to whom she wished to provide for. She had testamentary capacity.

[48] Some of the above findings further relate to whether the Will was executed with Mrs. Baird's full knowledge and approval. The Applicant raised concerns with respect to whether Mrs. Baird fully understood the contents of the Will, given Mr. MacIsaac did not discuss with her the two codicils to the 2006 Will, that she was hard of hearing, and the document was read to her quickly.

[49] Having found Mrs. Baird mentally competent, I do not find the lack of reference to the two codicils particularly troublesome. She was aware of what she owned and was aware of what she wanted to give to beneficiaries. Although referencing the codicils may have been helpful, failure to do so, with a competent testatrix, does not in my view render the instructions suspect. Further, I have accepted that Mrs. Baird was capable of conversing and carrying on a conversation, despite her having suffered some hearing loss. This is supported not only by the evidence noted above, but also by virtue of the telephone records entered into evidence by the Applicant disclosing lengthy telephone conversations with Mrs. Baird in the months leading to the execution of the Will. I accept that she heard and understood was Mr. MacIsaac was saying and reading to her.

[50] Mrs. Baird's ability to read the Will was impaired by her failing eyesight. It was proper for Mr. MacIsaac to read the Will to her. I accept his evidence that he read Mrs. Baird the document which she ultimately executed, and that she had indicated her approval to each provision. Mrs. Baird was described as being "feisty" and someone who was not reluctant to speak her mind. Having found her mentally competent, the Court would expect her to raise questions or seek clarification if she did not hear, understand, or agree with what was being conveyed to her. She did not. I am satisfied on a balance of probabilities that Mrs. Baird not only was aware of the contents of the Will, but also approved of them.

Conclusion

[51] Having found Mrs. Baird to have the requisite testamentary capacity and fully aware and approving of the contents, the Will executed by her on November 25, 2011 is valid, and as such shall be admitted to probate.

[52] If the parties are unable to agree with respect to costs, written submissions shall be provided by August 31, 2014.

J.