SUPREME COURT OF NOVA SCOTIA
Probate Court of Nova Scotia
Citation: Wittenberg Estate (Re), 2014 NSSC 301

Date: 20140820
Docket: Ken No. 396940
Probate No.: 12641
Registry: Kentville

Between:

Richard Wittenberg

Applicant

v.

Estate of Gerda Theodora Wittenberg

Respondent

Judge:	The Honourable Justice Glen G. McDougall
Heard:	July 22, 23, 24 and 31, 2013 and January 14 and 15, 2014 in Kentville, Nova Scotia
Final Written Submissions:	Applicant: February 24, 2014 Defendant: April 7, 2014 Reply: April 17, 2014
Counsel:	Bernie Conway, Ll.B. and Jon Cuming,Ll.B. for the Applicant Robert Stewart, Q.C., for the Respondent

By the Court:

[1] The applicant, Richard Wittenberg, is the son of the Late Gerda Theodora Wittenberg who died on or about the 14th day of February, 2012.

[2] The Late Mrs. Wittenberg died testate. Her Last Will and Testament was executed on the 22nd day of August, 2008. She appointed her daughter, Linda Helen Cashen, to be the Executrix of her Will

[3] An application for a Grant of Probate was made to the Registrar of Probate for the County of Kings and a Grant of Probate in Common Form was issued to Linda Cashen on the 25th day of April, 2012.

[4] Then, on June 8, 2012, Richard Wittenberg filed a Notice of Application for Proof in Solemn Form.

[5] Lawyers for the named executrix, Linda Cashen, filed a Notice of Objection to the application brought on behalf of Richard Wittenberg. The Notice of Objection was filed on the 11th day of October, 2012.

[6] The basis for the application for Proof in Solemn Form focussed on the testamentary capacity of the testatrix and an allegation of undue influence by Linda Cashen and her daughter, Melanie Cashen.

[7] At the same time that Gerda Wittenberg signed her new Will, she also signed an instrument giving a Power of Attorney to her daughter and granddaughter, the aforementioned Linda and Melanie Cashen. She also granted authority to her daughter to make decisions in regard to the management of her health care while naming her granddaughter, Melanie, as a substitute. This was not the first time Gerda Wittenberg had named her daughter, Linda, and her granddaughter, Melanie, as her attorneys. On July 4, 2007 she signed a similar Enduring Power of Attorney that had been prepared by Mr. Edward B. "Ned" Chase, Q.C. Mr. Chase was with TMC Law. He had done legal work for Mrs. Wittenberg in the past but due to a potential conflict of interest Mr. Chase recommended to Mrs. Wittenberg that she see Ms. Ernst to have her new Will prepared. Mr. Chase's firm also did legal work for Richard Wittenberg. I will have more to say about the circumstances surrounding this referral later in my decision.

[8] Richard Wittenberg also brought an action on behalf of the Estate of his deceased mother against his sister for wasting and converting assets to her own use prior to their mother's death. The outcome has yet to be determined.

[9] The hearing to determine the Will's validity began on July 22, 2013. It continued on July 23rd and 24th and after a brief adjournment it picked up again on July 31st.

[10] The proponents of the Will called three witnesses. They included the lawyer who took instructions and prepared the Will, Ms. Trinda L. Ernst, Q.C., and her legal assistant, Ms. Shelly Egan.

[11] The other witness was Dr. Brian Garvey, M.D. Dr. Garvey was a registered psychiatrist who worked at the King's Regional Hospital and maintained a private practice in Nova Scotia since 1975. The Court qualified Dr. Garvey as an expert in general psychiatry and capable of performing assessments and offering opinions regarding testamentary capacity.

[12] Dr. Garvey's services were retained initially not by the proponents of the Will but rather by Richard Wittenberg who had concerns about his mother's ability to give instructions for a new Will. I will discuss Dr. Garvey's evidence and his written opinion of Gerda Wittenberg's testamentary capacity in more detail later in my decision. For now I will simply point out that Dr. Garvey met with Mrs. Wittenberg on June 9, 2008 "to conduct an assessment of [her] with respect to her mental capacity to manage her own affairs and take care of herself and secondly to execute a last will and testament." This meeting took place around the time that Mrs. Wittenberg was meeting with Ms. Ernst and a little more than two months prior to executing the Last Will and Testament that is the focus of this court challenge.

[13] As with the oral testimony of Dr. Garvey, I will look more closely at his written assessment dated June 13, 2008 [Exhibit # 2] later in this decision.

[14] After hearing from these three witnesses, the applicant, Richard Wittenberg, testified. Similar to Ms. Ernst, Mr. Wittenberg had provided an affidavit in support of his application. In addition to confirming the contents of his affidavit, Mr. Wittenberg supplemented it with oral testimony and, like Ms. Ernst, was extensively cross-examined by opposing counsel.

[15] In addition to Richard Wittenberg's evidence, counsel for the applicant with the agreement of opposing counsel tendered an affidavit of Duane Saulnier, C.A.

[16] Mr. Saulnier is Richard Wittenberg's accountant. At the request of Mr. Wittenberg's lawyer, he conducted a review of Gerda Wittenberg's Scotiabank statements covering the period from January 18, 2009 to January 17, 2012. The account was made joint with Linda Cashen sometime in and around February of 2009.

[17] Mr. Saulnier's affidavit stated that additional documentation or information was needed to determine the nature of withdrawals after January 1, 2007 totalling $194,754.00 (Mr. Saulnier must have been provided with bank statements for the period from January 1, 2007 to January 17, 2009 from some source other than Linda Cashen).

[18] Prior to June of 2007, Richard Wittenberg assisted his mother with her finances and banking. It was only after she accused her son of stealing her mail that he became angry with her and as he said "I lost it" and "washed my hands of her." From that point onward, their relationship was severely strained.

[19] Mrs. Wittenberg then began to depend on her daughter, Linda, and her granddaughter, Melanie, for assistance in managing her financial affairs and to deal with the challenges of daily living.

[20] When counsel for the applicant closed their case, counsel for the Estate, Mr. Stewart, gave notice of his intention to call additional witnesses. This was met with an objection by counsel for the applicant. Rather than calling further evidence, Mr. Stewart instead presented a motion for a directed verdict. After hearing the arguments of counsel, the matter was adjourned to give the Court time to reflect on its ruling. After doing so, the Court refused to grant the motion stating that the applicant could point to some evidence of suspicious circumstances thus putting the onus on the propounders of the Will to show that the testatrix had the requisite testamentary capacity to make a Will while leaving it to the applicant to meet the legal burden of establishing, on the balance of probabilities, that the testatrix' ability to provide instructions were overborne by external sources that amounted to undue influence.

THE FACTS OF THIS CASE

[21] The Late Gerda Wittenberg and her husband, the Late Gerrit Wittenberg, emigrated from Holland in 1952. They first settled in Ontario where he found work in a gypsum mine. Eventually Gerrit and Gerda moved to Nova Scotia. Gerrit had a brother who lived in Nova Scotia. Gerrit, like his brother, got involved in farming – an option that was not available to him in Holland after the war.

[22] The Wittenbergs adopted two children – a daughter, Linda and a son, Richard. By dint of hard work the Wittenbergs were able to provide for themselves and their children.

[23] Eventually Mr. and Mrs. Wittenberg sold the farm to their son. There were suggestions that Richard Wittenberg and his wife acquired the farm for less than market value. Certainly this was Gerda Wittenberg's belief which she shared with her daughter and her lawyer, Trinda Ernst.

[24] After divesting themselves of the farm, Gerrit and Gerda Wittenberg built a new house on a 2.54 acre piece of land carved out of the larger farm property. The new house at 1105 Middle Dyke Road in Upper Canard was situated only about 200 yards up the road from their former farm house bearing civic number 1042 Middle Dyke Road.

[25] Up until his death on August 2, 1997 the senior Mr. Wittenberg continued to work the fields. His son and his wife focussed their attention on the poultry business. They acquired several other properties and expanded their ownership of poultry units considerably. Like his parents, Richard Wittenberg, was not averse to hard work. The same can likely be said of his wife. Together they have grown a very successful poultry business along with ownership interest in other farm related businesses.

[26] After Gerrit Wittenberg died, his widow, Gerda, continued to reside at 1105 Middle Dyke Road. Richard Wittenberg and his wife maintained daily contact with her. They kept a close eye on things and helped her to maintain the property. They also assisted her in attending medical appointments, getting groceries and other daily activities. They were good to her.

[27] Richard Wittenberg took a very active, hands-on approach in assisting and advising his mother with regard to investment decisions and her overall finances.

He also introduced his mother to a local financial advisor and recommended that she use the same accounting firm that he used to obtain income tax advice.

[28] Richard Wittenberg also persuaded his mother to add his name and his sister's name to an investment at Scotia McLeod. This investment has continued to increase in value and is still maintained in joint names even after Gerda Wittenberg's death. On February 29, 2012 (just two weeks after her death) the investment fund stood at $194,422.00. A request by Mr. Stewart to have this fund rolled into the Estate account was rejected by Richard Wittenberg. Given the provisions of the Will that is in contest, his refusal to transfer this asset to the Estate is understandable. He does, however, open himself up for criticism. But, there is no shortage of that from both sides in this case.

[29] Richard Wittenberg continued to assist his mother for approximately ten years after his father's death. In May of 2007, Gerda Wittenberg accused her son of taking her mail and stealing from her. This did not go down well with Richard. He flew into a rage and over-turned the table she was sitting at along with a couple of chairs. The puzzle Gerda Wittenberg was working on fell in pieces on the floor. Immediately following this incident Richard Wittenberg called his sister and in so many words told her that he was washing his hands of his mother and from that point onward Linda would have to look after her.

[30] Gerda Wittenberg was obviously upset by all this and so left her house and went to stay with her granddaughter, Melanie, overnight. She subsequently went to live with her daughter. She only returned to her house on the Middle Dyke Road in November of that year.

[31] In 2008 Gerda Wittenberg listed her property for sale with a local realtor and family friend, Klaus Gerrits. When Richard Wittenberg became aware of this he sent an email to Mr. Gerrits pointing out several problems with the property's well water, sewage system and water drainage. He also indicated that the sale of the property to someone outside the family would be contrary to his deceased father's desire to keep the property as part of the overall farm. The email also suggested that "this would have been the perfect place for Evan; he wants to learn about chicken farming." Evan is Richard and Gail Wittenberg's son. They have two other children – Tara and Ashely.

[32] Shortly after the property was put on the market, Richard Wittenberg and his wife, Gail, went to the house to visit Gerda Wittenberg. A hand-written note was produced which indicated that the house was listed for sale for $189,900.00 and

that "Rick thinks its worth $160,000.00 Mom is willing to sell the house to Rick for $50,000.00" and included the following in Gerda Wittenberg's handwriting: "sold to Rick for $50,000." It also bore Gerda Wittenberg's signature.

[33] Efforts to enforce this patently unconscionable deal were thwarted after Linda and Melanie Cashen persuaded Gerda Wittenberg to seek legal advice from Trinda Ernst, Q.C.

[34] Subsequently a higher offer to purchase the property was made by Richard Wittenberg and another offer was made by his son, Evan Wittenberg. Neither of their offers was accepted. The property was eventually sold for $163,000.00 to a non-family member.

[35] After the unfortunate falling out between Richard Wittenberg and his mother, she entered into an agreement to purchase a house at 127 Oakdene Avenue in Kentville. The property was located across the street from the church she regularly attended and just down the street from where her daughter, Linda, resided. According to the evidence, Mrs. Wittenberg had a change of heart about purchasing the property but rather than risk a lawsuit she went ahead with the closing. Gerda Wittenberg did not take occupancy of this house. Instead, she put it back on the market for sale. When the property sold, the deed of conveyance was signed by Linda Cashen and Melanie Cashen on behalf of Gerda Wittenberg pursuant to an Enduring Power of Attorney. This Power of Attorney had been prepared for Mrs. Wittenberg by her then lawyer, Mr. Edward B. "Ned" Chase, Q.C. This Power of Attorney was executed by Mrs. Wittenberg on the 4th day of July, 2007 a little more than a month after Richard Wittenberg had severed his relationship with her.

[36] Fortunately for Gerda Wittenberg her daughter and granddaughter were there to offer their assistance when she needed it.

[37] The sale of the Oakdene Avenue property marked the only occasion that Linda and Melanie Cashen used this Power of Attorney to act on Gerda Wittenberg's behalf. The sale of Oakdene Avenue occurred on or about April 11, 2008.

[38] Not long after this, Gerda Wittenberg once again consulted her lawyer, Mr. Chase, to have a new Will drafted. When Mr. Chase learned that Mrs. Wittenberg wished to remove her son, Richard, from the Will he decided that it would be best to refer her to another lawyer. Based on the notes made by Trinda Ernst, Q.C. of

the telephone conversation she had with Mr. Chase on May 13, 2008, Mr. Chase's concern was that another one of his partners had done legal work for Richard Wittenberg. The wise and prudent thing to do was refer Mrs. Wittenberg to a lawyer in another firm. Although Mr. Chase suspected that Mrs. Wittenberg might be showing some signs of dementia, he expressed his opinion that she was competent and understood what she had done while he was her lawyer and, furthermore, she understood what she now wanted to have done.

[39] Gerda Wittenberg consulted Ms. Ernst with respect to the note which indicated she had agreed to sell her Middle Dyke Road property to her son for far less than its market value. She also provided instructions for a new Will and a new Power of Attorney. The second Power of Attorney which was signed the same day as the new Will – August 22, 2008 – was nearly identical to the previous Power of Attorney prepared by Mr. Chase save for one clause which stated:

> 8. Joint Bank Accounts. I declare that money in a joint bank account with another individual, or any investments or real property registered jointly in our names are not intended to be transferred to that individual by right of survivorship and are held by that individual on a resulting trust for my estate.

[40] Not only did the 2007 Power of Attorney not have this particular clause, Mr. Chase was later retained to draft an agreement which, if signed, would have held Linda and Melanie Cashen accountable to Richard Wittenberg for any activities involving the investment at Scotia McLeod. This was the same investment that had previously been put in joint names for Gerda Theodora Wittenberg, Richard J. Wittenberg and Linda H. Cashen. This agreement was prepared and sent to Richard J. Wittenberg, Linda H. Cashen and Melanie Cashen by Mr. Chase under a cover letter dated 14 December 2007.

[41] The agreement suggested that the funds "that Gerda Theodora Wittenberg had transferred to Richard J. Wittenberg and Linda H. Cashen and herself as joint tenants are considered to be the accounts, funds and investments held for the benefit of Gerda Theodora Wittenberg."

[42] Clause 1 of the draft agreement goes on to state:

> …that the main reason why these investments were changed to become jointly owned was to facilitate a transfer to Richard J. Wittenberg and Linda H. Cashen upon the death of Gerda Theodora Wittenberg without the necessity of going through Probate with these assets.

[43] Clause 3 of the draft agreement required Linda H. Cashen and Melanie Cashen to "… provide an accounting of the activities to Richard J. Wittenberg every two months if required."

[44] This agreement, not surprisingly, was never executed. It is also interesting to note that the individual who was the source of the funds held at Scotia McLeod was herself not asked to be a signatory to the agreement. Was this because she was no longer considered competent? If so, there was nothing to suggest this in the various recitals contained in the preamble to the operative part of the agreement. It would also have been contrary to the suggestions and opinions expressed by Mr. Chase some five to six months later in the notes made by Ms. Ernst resulting from her telephone conversation with Mr. Chase as mentioned earlier.

[45] Trinda L. Ernst, Q.C. and her assistant, Shelly L. Egan, were both called to testify. Ms. Ernst had earlier provided a comprehensive affidavit of her retention by Gerda Wittenberg which ultimately led to the drafting and execution of an Enduring Power of Attorney, a Medical Authorization and a Last Will and Testament, all of which were executed by Gerda Theodora Wittenberg on the 22nd day of August, 2008.

[46] Ms. Ernst was not initially aware that a mental competency assessment of Mrs. Wittenberg had been done by Dr. Brian Garvey at the request of Richard Wittenberg's lawyer, Mr. Daniel Oulton. She later became aware of this.

[47] Dr. Garvey's assessment of Mrs. Wittenberg took place at the Arbordale Senior Care Home in New Minas. Mrs. Wittenberg was residing there at the time. Arbordale provided her with the opportunity to enjoy independent living in an environment where she could also be properly supervised and offered assistance if she needed it. It was an ideal setting for a person like Gerda Wittenberg who was showing the normal and expected signs of aging. It also offered her the opportunity to assert her independence and to demonstrate her ability and her determination to make decisions that were in her own best interests. She was not the type of person, apparently, who could be easily coerced into doing things she did not want to do. She very much had a mind of her own.

[48] Certainly, Dr. Garvey, felt this way about her. After meeting Mrs. Wittenberg, Dr. Garvey summed up the results of his testing as follows:

> Mrs. Wittenberg is a pleasant, cooperative lady of eighty nine years in full possession of her faculties other than the normal age related cognitive decline that

> may be expected at this age. She does not suffer from Alzheimer's or any other form of dementia and physically she is reasonably fit for her age. She has never suffered from a psychiatric disorder and does not do so now. She is neither depressed nor anxious, neither deluded nor hallucinated and was reasonable and insightful in her comments. (Her mild confusion about the date and day is in my experience normal in people in nursing homes who have no reason to remember which day it is and I discounted it in part of my evaluation). While not willing to put a hard figure on the value of her estate, she is sufficiently aware of the need to make provisions of her will so that her estate is delivered in accordance with her wishes. She was absolutely clear that while a fair sharing between the two children would seem reasonable she saw her daughter Linda's needs as being greater and was somewhat critical of her son Richard's attitudes.
>
> At the end of the interview I was entirely satisfied that she was able to manage her own affairs and that she was happy with the care that she was given at the Arbordale Nursing Home and that she was of a sound disposing mind and capable of executing a valid last will and testament. Indeed I encouraged her to .

[49] While testifying, Dr. Garvey (who unfortunately has since passed away) was challenged in his assessment of Mrs. Wittenberg by counsel for Richard Wittenberg. Dr. Garvey agreed that his opinion of Mrs. Wittenberg's ability to give instructions for a Last Will and Testament could be affected by a fall she took at the Arbordale Nursing Home just a few days after his visit. Apparently Mrs. Wittenberg struck her head on something when she fell and, although she did not require immediate medical care, she had to be taken to the Emergency Department at the local health care facility the following day after experiencing vomiting.

[50] While there, Mrs. Wittenberg suffered several fainting episodes. She had to undergo emergency surgery to have a heart pacemaker inserted. There was no evidence offered that she had suffered a concussion nor was there any evidence that she had been treated for concussion-like symptoms. Any suggestions that her cognitive abilities had been compromised as a result of the fall is sheer speculation. I am not enticed to go down that road.

[51] Ms. Ernst, according to her testimony as supported by her time records which were also tendered in evidence, first met with Gerda Wittenberg on June 16, 2008. Prior to the first meeting, Ms. Ernst had prepared a series of questions designed to elicit information about Mrs. Wittenberg's Estate and to gather other relevant information needed to facilitate discussions and to begin the process of ascertaining what her wishes might be prior to drafting a Will. A great deal of effort was devoted to challenging some of the information provided by Mrs. Wittenberg in answer to some of the questions contained in this questionnaire. In

some instances, no information, whatsoever, was provided by her. This is not necessarily a startling occurrence. Mrs. Wittenberg was, after all, eighty-nine years of age at the time. As Dr. Garvey stated in his report she was "in full possession of her faculties other than the normal age-related cognitive decline that may be expected at this age."

[52] One also has to consider that Mrs. Wittenberg's first language was Dutch and, although she was fluent in English, it was not her language of first resort.

[53] Ms. Ernst testified that, to the best of her recollection, she met with Mrs. Wittenberg alone both on the first occasion and again on August 22, 2008 when the Will was read over and explained to her prior to its execution.

[54] Ms. Ernst's assistant, Ms. Egan, could not recall anything out of the ordinary happening in regard to either the Will's preparation or its execution by Mrs. Wittenberg. She testified as to the normal practice that was followed in their office. Ms. Eagan stated that she could not recall anyone other than herself, Ms. Ernst and Mrs. Wittenberg being present when the Will was signed and witnessed on August 22, 2008. In other words, the normal procedure was followed. There was no one present who could have tried to influence the testatrix to sign something she did not wish to sign. An entry in the notes made by Ms. Ernst at the time she met with Gerda Wittenberg indicated that Mrs. Wittenberg had two children and that they should receive the same. Later in the session Mrs. Wittenberg told Ms. Ernst that she wished to leave more for her daughter, Linda, than her son, Rick, because Richard had been taken care of when he got the farm at a price much less than what it was worth and also because Rick had lied to her. She also indicated that Richard had enough and Linda needed it more. This is similar to what Mrs. Wittenberg had said to Dr. Garvey just a week or so before she met with Ms. Ernst.

[55] Indeed, to a great extent, this is what Mrs. Wittenberg included in her Last Will and Testament at paragraph 8 where it is stated:

> 8. I DECLARE that I have made no provision in my Will for my son, Richard John Wittenberg, because my late spouse and I have already provided for him during our lifetimes.

[56] In actuality, Mrs. Wittenberg and her Late husband were generous in helping both their son and their daughter. Mrs. Wittenberg was also very supportive of her granddaughter, Melanie. She covered most of the cost of Melanie's post-

secondary education. She also bought a motor vehicle for her so she could commute back and forth to Halifax to attend classes at Dalhousie University and later at Acadia University in Wolfville.

[57] Trinda Ernst, Q.C. testified that she had no concerns about Gerda Wittenberg's mental competence. She also testified that she met with Mrs. Wittenberg about a year after preparing the Will for her. She had no concerns about her mental capacity at that time either. She testified that, if she had, she would have prepared a memorandum to that effect. She did not nor did she make any notes of any such concerns.

ISSUES

[58] This case raises the following issues:

1. Were the formalities of execution as set out in section 6 of the *Wills Act*, R.S.N.S., 1989, c. 505 (as amended) complied with?
2. Are there suspicious circumstances surrounding the giving of instructions or the execution of the Last Will and Testament of Gerda Theodora Wittenberg on August 22, 2008 that would challenge or negate its due execution, her knowledge and approval of its contents or her testamentary capacity?
3. Is the Will of August 22, 2008 void for lack of testamentary capacity of the testatrix, Gerda Theodora Wittenberg, at the time of execution?
4. Was the testatrix, Gerda Theodora Wittenberg, subjected to undue influence to such a degree that she was coerced into doing something that she did not wish to do?

THE LAW AS IT RELATES TO THE ISSUES AND ITS APPLICATION TO THE FACTS OF THIS CASE

Issue 1: Were the formalities of execution as set out in section 6 of the *Wills Act*, R.S.N.S., 1989, c. 505 (as amended) complied with?

[59] It is clear from the evidence that the formalities of execution as set out in Section 6 of the *Wills Act*, *supra*, have been complied with. This was not seriously challenged by counsel for the Applicant.

Issue 2: Are there suspicious circumstances surrounding the giving of instructions or the execution of the Last Will and Testament of Gerda Theodora Wittenberg on August 22, 2008 that would challenge or negate its due execution, her knowledge and approval of its contents or her testamentary capacity?

[60] In ***Willis Estate (Re)***, 2009 NSSC 231, the Honourable Justice John D. Murphy of this Court spoke of the legal principles pertaining to suspicious circumstances and undue influence at para. 8:

> [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. That decision, which has recently been followed by this Court in **Ramsay Estate (Re)**, 2004 NSSC 140 and **Re Jessie May Coleman (Estate)**, 2008 NSSC 396, 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.

[61] In my earlier ruling dismissing the propounders' (of the Will) motion for non-suit I stated at para 41:

> [41] However, it is worth keeping in mind that the respondent only has an evidentiary burden to point to some evidence that, if accepted, shows suspicious circumstances. This is a very low burden to meet. I may find ultimately that I do not believe the respondent's testimony or do not give it much weight. However, at this stage, I must only ask whether it is possible that the respondent's evidence can show "suspicious circumstances". I would venture to say that it would be the rare case in which somebody attacking a Will could not raise at least some evidence of suspicious circumstances as a matter of law.

[62] In the case of ***Re Willis***, *supra*, Justice Murphy, at para. 10, gleaned from ***Vout***, supra, the following:

> [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.

[63] The case of ***Vout***, *supra*, also established that, in cases where suspicious circumstances are present, the party propounding a Will has the legal burden of proving knowledge and approval and, in cases where the suspicious circumstances relate to mental capacity, the legal burden of establishing testamentary capacity on the civil standard of proof on a balance of probabilities. (See ***Vout***, para. 24)

[64] Para. 24 of ***Vout***, *supra***,** goes on to state:

> [24] …The evidence must, however, be scrutinized in accordance with the gravity of the suspicion. As stated by Ritchie J. in Re Martin; MacGregor v. Ryan, [1965] S.C.R. 757, at p. 766:
>
> > The extent of the proof required is proportionate to the gravity of the suspicion and the degree of suspicion varies with the circumstances of each case.

[65] I might be getting ahead of myself a bit. Before getting into a discussion of whether the propounders have met their legal burden to establish knowledge and approval and testamentary capacity I must first deal with the Applicant's burden to show that suspicious circumstances are present.

[66] As stated earlier, he has only an evidentiary burden to point to some evidence of suspicious circumstances. And, if so established, the presumption that

the testatrix knew and approved of the contents and had the necessary testamentary capacity is spent. It then falls on the propounders of the Will to meet the legal burden of proving knowledge and approval and testamentary capacity.

[67] I am satisfied that the applicant has met this evidentiary burden to show that suspicious circumstances are present. Gerda Wittenberg's decision to remove her son from inheriting anything under her Last Will and Testament as well as the circumstances that bring into question her mental capacity at the time she gave instructions for her Will and when she subsequently executed it raise at least some suspicions. Also her decision to purchase the property at Oakdene Avenue in Kentville and then immediately putting it back on the market without taking occupancy could raise a suspicion.

[68] Without attempting to create an exhaustive list of things that cause concern there is also the fall Mrs. Wittenberg experienced at Arbordale Nursing Home shortly after being assessed by Dr. Garvey. She obviously struck her head on something when she fell as is evidenced by the cuts or abrasions to her forehead. The vomiting that occurred the following day also raised suspicions of concussion-like symptoms. As noted previously, there was no medical evidence of a concussion nor any suggestion that she was treated for any such condition. The only evidence I heard was that a pacemaker was surgically implanted which seemed to remedy the fainting episodes that likely caused the fall in the first place.

[69] Now that the presumption is spent, the propounders of the Will resume the legal burden of proving knowledge and approval and testamentary capacity.

Issue 3: Is the Will of August 22, 2008 void for lack of testamentary capacity of the testatrix, Gerda Theodora Wittenberg, at the time of execution?

[70] The propounders of the Will have shown, through various witnesses, that Gerda Theodora Wittenberg was quite capable of making decisions on her own. As she advanced in age she began showing the normal signs of aging. These signs were more of a physical nature than of cognitive impairments or mental deficits. She became more hard of hearing which was a problem that she had lived with for a great part of her life. She became less mobile in her movements. This, too, is not surprising given her age.

[71] It was reported that Gerda resorted more often to Dutch – her first language. No one, however, testified that she ceased speaking English altogether or that she

could not understand the language. Quite the opposite, she demonstrated a facility in the use of the language that satisfied both Dr. Garvey and Ms. Ernst of her mental competence.

[72] Dr. Garvey, as previously mentioned, was quite satisfied that Mrs. Wittenberg was "*in full possession of her faculties other than the normal age related cognitive decline that may be expected at this age*." (See p. 3 of Dr. Garvey's report of June 13 ,2008 – Exhibit 2)

[73] Dr. Garvey's report (a portion of which was reproduced earlier) goes on to state:

> She was absolutely clear that while a fair sharing between the two children would seem reasonable she saw her daughter Linda's needs as being greater and was somewhat critical of her son Richard's attitudes.

[74] Despite the fall experienced by Mrs. Wittenberg a short time after Dr. Garvey's assessment, the sentiment expressed to him is entirely consistent with what Ms. Ernst's notes of her meeting with Mrs. Wittenberg indicate. The intervening fall does not appear to have had any affect or influence on her stated wish to benefit the child who needed it more. Her decision was likely influenced not only by her son's superior financial status relative to his sister's but also because of his angry outburst towards her and his decision to, as he put it, *"wash his hands of her.*"

[75] One cannot forget that Dr. Garvey was asked to do the assessment of Gerda Wittenberg by a lawyer working for Richard Wittenberg. Dr. Garvey was driven to Arbordale by Richard and Gail Wittenberg. Dr. Garvey's involvement only became known to Linda Cashen after the fact. This information was then passed on to Ms. Ernst who discussed it with Mrs. Gerda Wittenberg when she first met with her about a week or so after the assessment was done.

[76] Richard Wittenberg's concern appears to have been motivated more by self-interest than his mother's well-being. Additionally, suggestions that Lind Cashen orchestrated her mother's introduction to Trinda Ernst, Q.C. are unfounded. While Linda Cashen was familiar with Ms. Ernst, it was Mr. Edward "Ned" Chase, Q.C. who referred Gerda Wittenberg to Ms. Ernst. Mrs. Wittenberg first went to Mr. Chase to get a new Will. Because of the work he and some other members of his firm had done for Richard Wittenberg, Mr. Chase thought it best to refer his former client to another lawyer in order to avoid a conflict of interest.

[77] Ms. Ernst is a very experienced and highly regarded legal practitioner. As a former president of the Canadian Bar Association, Ms. Ernst is well known and well respected in this Province and throughout Canada.

[78] Ms. Ernst testified that approximately 30 to 35 percent of her practice involves Wills and Probate. Ms. Ernst, based on her direct involvement with Gerda Wittenberg, was satisfied that she had the requisite mental capacity to give instructions for a Will. She stated that if she had any concerns about her client's testamentary capacity she would have noted it and done a memo to file.

[79] It was suggested by opposing counsel that Ms. Ernst took a "cavalier" or "let the chips fall where they may" approach to the work she was asked to do by Mrs. Wittenberg. These unfortunate comments are without foundation and are totally unjustified. Based on my knowledge of the facts of this case, Ms. Ernst performed her duties both competently and professionally.

[80] I accept Dr. Brian Garvey's assessment of Gerda Wittenberg's mental capacity and I am not persuaded that her ability to give instructions to Ms. Ernst was in any way diminished by her fall.

[81] Based on the evidence presented, I am satisfied that the propounders of the Will have established, on a balance of probabilities, that Gerda Theodora Wittenberg had knowledge and understanding and the requisite testamentary capacity to give instructions and to execute her Last Will and Testament on the 22nd day of August, 2008.

Issue 4: Was the testatrix, Gerda Theodora Wittenberg, subjected to undue influence to such a degree that she was coerced into doing something that she did not wish to do?

[82] In this case, the applicant alleges that Linda and Melanie Cashen exerted undue influence over their mother/grandmother respectively to such a degree that Gerda Wittenberg was coerced into doing something she would not otherwise have done.

[83] In the case of ***Coleman Estate (Re)***, 2008 NSSC 396, the Honourable Justice Gregory M. Warner of this Court had this to say, at para 48:

> [48] 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.

[84] The burden of proof is on the party alleging it. The extent of the undue influence must amount to coercion. Simple influence is not enough. At para. 50 of ***Re Coleman***, *supra*, Justice Warner stated the following:

> [50] What constitutes undue influence is articulated and succinctly described in **Feeney** c. 3.10 to 3.14. 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." (c. 3.12)

[85] If Linda and Melanie Cashen had wanted to conspire to force their mother/grandmother into signing a Will that she did not wish to sign would they have taken her first to Mr. Chase - a lawyer that knew her and had done work for her in the past? I think not.

[86] Furthermore, there is absolutely no evidence that either Linda Cashen or her daughter, Melanie Cashen did anything more than transport Gerda Wittenberg to Mr. Chase's then to Ms. Ernst's office. It is uncertain if either of them even went into the office but if either of them had then they were certainly not present when Ms. Ernst met privately with Mrs. Wittenberg to discuss her wishes and to obtain instructions for a new Will, Power of Attorney and a Medical Authorization.

[87] Similarly, on the day the Will and other documents were executed by Mrs. Wittenberg, Ms. Ernst first met with her alone to review and explain the contents of the various legal documents before calling her assistant in to act as the second witness to the signature of Gerda Theodora Wittenberg.

[88] What little evidence there is falls far short of what would be required to amount to coercion. The applicant has failed to meet his burden of establishing undue influence. The attempt to link Linda and Melanie Cashen to unexplained

withdrawals and cheques written on Mrs. Wittenberg's bank account post May of 2007 is not evidence of undue influence. I have been asked to determine the validity of the Last Will and Testament of the Late Gerda Theodora Wittenberg executed on the 22nd day of August, 2008. I have not been asked to decide if the named executrix remains a proper person to continue in that role. That might be a question for another day if the applicant or any other affected person wishes to challenge her appointment.

CONCLUSION

[89] After reviewing all the evidence, I am satisfied that the testatrix, Gerda Theodora Wittenberg, had the requisite testamentary capacity and executed her Last Will and Testament on August 22nd, 2008 with full knowledge and approval of its contents.

[90] Furthermore, I am not persuaded that Gerda Theodora Wittenberg was subjected to undue influence of such a nature and kind that would amount to coercion.

[91] The application to have the Last Will and Testament of the Late Gerda Theodora Wittenberg set aside for lack of testamentary capacity and undue influence is denied. The probate of the Will that was executed by Mrs. Wittenberg on the 22nd day of August, 2008 which was granted in Common Form on the 25th day of April, 2012 may now proceed.

[92] Counsel for the parties may wish to file written submissions regarding costs. I will allow each side 60 calendar days from the date of this decision to do so.

McDougall, J.