IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Ramsay Estate (Re) - 2004 NSSC 140

Date: 20040712
Docket: Probate No. 52617
Registry: Halifax

In the Court of Probate

In the Matter of:

The Estate of Marion Araminta Ramsay

Judge: The Honourable Justice Robert W. Wright

Heard: February 16, 17, 18 and April 6, 7 and 8, 2004 at Halifax, Nova Scotia

Written Decision: July 12, 2004

Counsel:
Counsel for the Applicants - Richard Bureau
Counsel for the Respondent - Joseph Cooper, Q.C. and Derek Land

By the Court:

INTRODUCTION

[1] This is an application for proof in solemn form of the last Will and Testament of Marion Araminta Ramsay who died at Halifax on October 27, 2002 at age 81. She left as her survivors a son and two daughters.

[2] The impugned Will was executed on September 18, 2002 and named her son Garnet Allen Ramsay as the sole executor and the sole beneficiary of her estate, except for a $1,000 bequest made by the testatrix to each of her two daughters, Dorothy Ramsay and Joanne Ramsay. The total value of the estate as at the date of death was approximately $140,000.

[3] This proceeding pits the two daughters as opponents of the Will against their brother Garnet Allen Ramsay as the proponent of the Will. The validity of the Will is challenged on two bases. First, it is alleged that the testatrix lacked testamentary capacity when she made it. Secondly, it is alleged that she was victimized by undue influence exercised over her by her son Garnet.

EVOLUTION OF LAST WILL AND TESTAMENT

[4] The relevant history begins in 1999 when the testatrix, following the death of her husband, decided to make a new Will. The subject came up during discussions she had with her two daughters at the family home in Amherst, Nova Scotia which led Joanne Ramsay to initially contact Carole Beaton, then a practising lawyer in Amherst. Ms. Ramsay provided Ms. Beaton with a copy of her mother's previous Will from 1995 on which she annotated various suggestions as to what the new Will should contain. In particular, the suggestion was made to

Ms. Beaton that her mother's good friend Marilyn Smith be appointed executrix, with Ms. Beaton named as alternate executrix. As to the disposition of the estate, Ms. Ramsay's written suggestion was that the estate assets be divided into three equal parts, with each part to be divided by each child and their respective grandchildren in equal shares. Ms. Ramsay also proposed, and expected, that she be the person appointed under her mother's enduring Power of Attorney.

[5] Ms. Beaton's office file, which was entered in evidence, discloses that she met with the testatrix on August 26, 1999 to take instructions (after receiving the suggested provisions from Joanne Ramsay). After taking instructions from the testatrix, Ms. Beaton sent the draft materials to her client with a copy to Joanne Ramsay on the former's direction. Joanne Ramsay then sent to Ms. Beaton some further suggested revisions for the new Will and asked for confirmation that she had been appointed under the Power of Attorney.

[6] Ms. Beaton then contacted the testatrix who clearly confirmed that it was her wish that her friend Marilyn Smith have Power of Attorney. When Joanne Ramsay learned that from her mother, she telephoned Ms. Beaton's office and advised her assistant that the Power of Attorney was incorrect and that it was she who should have been appointed under the Power of Attorney. Joanne Ramsay insinuated that it must have been Ms. Beaton who talked her mother into appointing Ms. Smith under the Power of Attorney, rather than herself.

[7] Because the events unfolded that way, Ms. Beaton felt she had no choice but

to withdraw and recommended that the testatrix seek other counsel to prepare her Will.

[8] As a result, Joanne Ramsay then contacted William Fairbanks, a senior law practitioner in Amherst, and outlined to him what her mother wanted in her new Will. Mr. Fairbanks understandably insisted on talking with the testatrix himself and an appointment with her was thus made.

[9] Mr. Fairbanks then held a client meeting alone with the testatrix which lasted for about an hour and a half. Mr. Fairbanks has a wealth of experience in the practice areas of Wills and Estates and went through his usual routine in taking instructions for the preparation of a Will, beginning with an assessment of the competency of the maker of the Will. Mr. Fairbanks testified that he found the testatrix to be intelligent, able, and a careful and competent elderly lady. He was satisfied that she knew what she was doing and knew her own mind.

[10] Prior to their meeting, Mr. Fairbanks had received from Joanne Ramsay a draft of the proposed new Will. The draft provided for the appointment of Marilyn Smith as the sole executrix and a division of the estate assets in three parts, essentially as above described. Mr. Fairbanks informed Marion Ramsay of her daughter's suggestions but Marion Ramsay was adamant that she wanted to name her son Garnet Ramsay as sole executor and to appoint him under her Power of Attorney. Mr. Fairbanks testified that Marion Ramsay resented her daughter's attempts to influence her decision-making and that she didn't like someone trying to have her do something she didn't want to do. Mr. Fairbanks said that he based

this testimony on what the testatrix had said to him in his office. In a subsequent communication, Mr. Fairbanks informed Joanne Ramsay that because of solicitor-client privilege, any information she requested surrounding the preparation or contents of the new Will would have to be obtained from her mother directly.

[11] Mr. Fairbanks further testified that he had no discussions in 1999 with either Garnet Ramsay or Dorothy Ramsay. He said that it appeared to him that the testatrix trusted her son and wanted him to be in control as executor and under her Power of Attorney. Mr. Fairbanks said that it was untrue that he had expressed to Joanne Ramsay by telephone that her mother was concerned because Garnet Ramsay was already trying to get her money, a statement attributed to him in an e-mail from Joanne Ramsay.

[12] Mr. Fairbanks then proceeded to draft the new Will and Power of Attorney in accordance with the instructions of Marion Ramsay. Garnet Ramsay was named as sole executor and as having Power of Attorney with Joanne Ramsay named as alternate under both instruments. Both documents were executed on October 7, 1999. Joanne Ramsay was not made aware of her appointment as an alternate because, as she testified, her mother informed her by telephone on October 6, 1999 that the Will was her own business and that she would not be sending out a copy of her Will or Power of Attorney. With that, Joanne Ramsay never brought the subject up again with her mother.

[13] The next development was in June of 2001 when Marion Ramsay again

contacted Mr. Fairbanks to make revisions to her Will. Mr. Fairbanks met with his client and determined that the changes that she wanted to make were not a major departure from her previous Will. Essentially, she wanted to dispose of her estate by making equal bequests to her three children, without including the grandchildren. She also left unchanged the appointment of Garnet Ramsay as sole executor with Joanne Ramsay as alternate. She did not then change her Power of Attorney.

[14] During this process, Mr. Fairbanks testified that he followed his usual approach, including a competency assessment of the testatrix, and did not detect any difference in Marion Ramsay from his earlier experience with her two years before. It appears that none of the three children had any involvement in, or knowledge of, the new Will executed by Marion Ramsay on June 19, 2001.

[15] Marion Ramsay thereafter continued to reside alone in the family home in Amherst in reasonably good health. However, in March of 2002, she suffered an infection from a cat bite for which she was hospitalized for several days. Although she recovered, it appears that she lost some of her vitality from the ordeal, according to the testimony of her son Garnet Ramsay, who visited her fairly regularly during the spring and summer months.

[16] As the summer of 2002 wore on, Garnet Ramsay, according to his testimony, realized the time had come when he felt he had to do something to help his mother. He said that he began to feel a sense of urgency to give his mother the option of moving into his own home in Tantallon with his wife and three children.

He talked it over with his wife and they agreed to take on the commitment if his mother so wished. He recounted that after thinking it over for a day or so, Marion Ramsay agreed to take her son up on his offer and shortly thereafter, the Amherst home was listed for sale.

[17] In conjunction with that, Garnet Ramsay made a visit to Mr. Fairbanks at the beginning of August. He wanted to engage Mr. Fairbanks to handle the sale of the property and also to set up an appointment for his mother for the preparation of a new Power of Attorney. Mr. Fairbanks thereafter met with Marion Ramsay alone at some length to take instructions. He testified that Marion Ramsay wanted her son Garnet to continue as the appointee under the Power of Attorney but that she wanted to remove her daughter Joanne as the alternate appointee. Mr. Fairbanks said that no specific reasons were given but that he was satisfied with her competence and her abilities and prepared it in accordance with her instructions. The new Power of Attorney was executed on August 2, 2002 and on that same date, Mr. Fairbanks made a file note to himself that "I examined her alone and her mind seemed good".

[18] It was only a few days after that when Marion Ramsay suffered a weak spell which lead to her hospitalization. It was determined that she required a pacemaker implant which was carried out on or about August 12th. She was ultimately discharged from hospital to her home on August 20th with medical advice that she shouldn't be living alone. On the following day, with both Garnet Ramsay and Dorothy Ramsay present, she signed an agreement for the sale of her Amherst home (with a closing date of September 10th). During the following week, Garnet

Ramsay, with the assistance of his wife Carrie, arranged and assisted with the move of his mother to their family home in Tantallon.

[19] Some time around the closing date of September 10th, Mr. Ramsay again visited Mr. Fairbanks' office, advising him that his mother wanted to make another new Will leaving everything to him, and asking if he would prepare it. Mr. Fairbanks was uncomfortable with this request and declined to prepare another Will, indicating to Mr. Ramsay that it would be more convenient if a local solicitor in the Halifax area did the work. Although he was discreet about it with Mr. Ramsay, Mr. Fairbanks testified that his real concern was that based on his earlier dealings with the testatrix, he didn't feel that such a new Will would represent her wishes. He was aware of the dissension between Garnet Ramsay and Joanne Ramsay and anticipated that such a new Will would create problems with which he did not want to be involved. In declining the work, Mr. Fairbanks did not speak directly with Marion Ramsay. He stated the obvious that he could not prepare a new Will for her on her son Garnet's instructions any more than he could have done so on her daughter Joanne's instructions three years earlier.

[20] In the result, Garnet Ramsay decided to contact the Tantallon law office of Jeanne Deveaux. Ms. Deveaux had earlier notarized Marion Ramsay's execution of the deed to the Amherst property in her office on September 3rd. Ms. Deveaux testified that at that time, although Marion Ramsay was quite frail physically, she was both authoritative and articulate in their private meeting for the notarization of the deed. Ms. Deveaux said that when Mrs. Ramsay left, she indicated there was some other work she wanted done and might be calling again.

[21] Shortly thereafter, on September 12 ,2002, Garnet Ramsay placed a call to Ms. Deveaux to make an appointment for his mother with a view to making another new Will. Ms. Deveaux was then newly admitted to the Bar (three months earlier) but prior to that had pursued a 20 year career in the profession of a Licensed Practical Nurse. In starting her legal career, she took a special interest in the practice area known as Elder law, the focus of which includes estate planning, health care issues, wills and estate work. She is currently Vice Chair of the Elder law section of the Nova Scotia Branch of the Canadian Bar Association and sits as well as a member at large of the national section of the CBA. Ms. Deveaux has also taken a number of courses on the care of the elderly, holds a certificate in gerontology and is a frequent instructor to health care professionals.

[22] With this special interest in the needs of seniors, Ms. Deveaux agreed to make a house call for the taking of instructions of a new Will. She went to the Ramsay home in Tantallon on September 17, 2002 with no prior discussion with Garnet Ramsay as to what the contents of the Will should be. Mr. Ramsay greeted her at the door but thereafter excused himself so that Ms. Deveaux and Marion Ramsay could meet privately.

[23] Ms. Deveaux testified that in taking instructions for the Will, she followed the recommended steps laid out in the Nova Scotia Bar Society Practice Manual. In beginning with a competency assessment, Ms. Deveaux asked Garnet Ramsay to provide a list of the medications that his mother was presently taking. She reviewed this list and testified that she had no concerns over any of the subject

medications as they related to her ability to make a new Will. Ms. Deveaux testified that although Mrs. Ramsay was physically unwell following her pacemaker implant, she appeared immaculately dressed in a very matriarchal fashion and was very authoritative in her instructions. Those instructions were that if she had anything left at the time of her death, anticipating that her estate might be dissipated by nursing home or home care costs, she wanted it to go to her son Garnet. She initially informed Ms. Deveaux that she did not wish to make any provision for her daughters because, as Ms. Deveaux's contemporaneous file note reads, she was "estranged from daughters". Ms. Deveaux recounted the conversation that she was told by Mrs. Ramsay that she was angry with her daughters over certain items that had been taken from the family home in Amherst earlier "like I am already dead".

[24] Ms. Deveaux says that she cautioned her client to perhaps try to heal the rift with her daughters and moreover, that there might be legal repercussions if no provision was made for them in the Will. Her client's first reaction was to leave her daughters one dollar each but at the urging of Ms. Deveaux, that was increased to $500 and ultimately $1,000 to each of them. Ms. Deveaux testified that the overwhelming theme of the conversation which they had was her client's concern that there might not be anything left in the estate when she eventually passed away because of the high cost of nursing homes and the "clawback" that the Department of Social Services is able to make against monies given to family members during a specified period. Although Ms. Deveaux testified that she kept recommending an increase in the amount of the bequests to be made to each of the two daughters, her client kept raising the concern that if she did, the dissipation of her estate from

possible nursing care or private home care costs might mean that her son Garnet might end up with less than any increased bequest to her two daughters.

[25] Ms. Deveaux testified that she also suggested to her client that her daughter Joanne be appointed as an alternate executor as she had been in the 1999 Will. However, she says that Marion Ramsay was adamant that her daughters were to have nothing to do with it and she conveyed the impression to Ms. Deveaux that she was very fond of her son Garnet.

[26] Ms. Deveaux was asked at trial whether or not she had any discussion with her client about the exercise of duress or undue influence by anyone. She testified that she was told by Marion Ramsay that this time she was going to do what she wanted and that she was very clear in her instructions that she wanted to appoint her son Garnet as sole executor (with her daughter-in-law Carrie as alternate)and leave everything to him, apart from a bequest of $1,000 to each of her daughters. Ms. Deveaux stressed that her client appeared to understand the likelihood of a nursing home placement for her in the future and the associated costs. She said that as she left, Mrs. Ramsay made the parting comment with her son Garnet present that if there was anything left, he would get it.

[27] Ms. Deveaux then returned to her office to prepare the new Will and returned the following day for its execution. Again, she was greeted at the door by Garnet Ramsay who then excused himself. Ms. Deveaux then met privately with her client (along with her legal assistant who she brought along as a second witness) whereupon she read out the contents of the Will to Marion Ramsay in its

entirety. She said that Mrs. Ramsay expressed no concerns or questions over the contents of the Will and it was signed in the required fashion. Ms. Deveaux also testified that she again encouraged her client to reconcile with her daughters in which case she could easily change her Will back to its former state.

[28] Once again, Ms. Deveaux described her client as being immaculate in appearance and very much in control of what she was doing. She said that her client understood the likelihood of having to go into long term health care at some point and that she wanted her son Garnet to benefit from her estate; hence, the preparation of the new Will. On neither occasion did Ms. Deveaux have any concerns whatsoever about her client's mental abilities. Indeed, she recorded the word "lucid" on her file note made at the time.

[29] During her two visits to the Ramsay home, Ms. Deveaux testified that she did observe, from her nursing background, that Marion Ramsay had obvious symptoms of ankle edema suggestive of a congestive heart failure condition. As it happened, Marion Ramsay was shortly thereafter admitted to hospital in Halifax for her edema on September 26, 2002 where she remained until her death on October 27, 2002.

[30] It was not long afterwards that the two daughters, upon being informed of the existence of the new Will and its provisions, brought this application challenging its validity.

LEGAL PRINCIPLES

[31] The leading decision on the requisite elements of proof in determining the validity of Wills is *Vout v. Hay* [1995] 2 S.C.R. 876. That decision finally resolved the confusion which had surrounded the interrelation of suspicious circumstances, testamentary capacity and undue influence which had perplexed the courts for over 150 years. Justice Sopinka, writing for the Court, articulated it as follows (at page 889):

> 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.
>
> 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.
>
> 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...
>
> 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.

[32] The Supreme Court in *Vout* also set out (at page 887) the requirements of proving testamentary capacity and undue influence. It was affirmed that testamentary capacity requires the propounder of the Will to establish that the testator had a disposing mind and memory. It was also affirmed that establishing undue influence requires proof that the testator's assent to the Will was obtained by influence such that instead of representing what the testator wanted, the Will is a product of coercion.

[33] It should also be observed that it is not sufficient to establish only that the beneficiary had the power to coerce the testator; it must be shown that the overbearing power was exercised and that it was because of its exercise that the Will was made.

[34] The Supreme Court also drew a distinction between undue influence and knowledge and approval of contents of the Will; a testatrix may be fully aware of what she is doing, but have her independence of will completely overborne.

[35] Bearing these legal principles in mind, I now turn to the two specific bases on which the validity of the Will is challenged and a review of the evidence relied upon. It should be noted that the opponents of the Will concede that the formal requirements of its execution were met.

TESTAMENTARY CAPACITY

[36] Neither of the opponents of the Will had any personal contact with their mother at the time the Will was made on September 18, 2002. Joanne Ramsay resides in rural British Columbia and had last visited in 1999. She kept in contact with her mother by telephone from time to time, however, and last spoke with her on October 25, 2002 to let her know she was coming for a visit the following week (which did not materialize since her mother died two days later). Prior to that, Joanne Ramsay last telephoned her mother at her brother's home on September 22, 2002 (four days after the Will was executed) which was uneventful.

[37] Dorothy Ramsay resides in Jeddore, Nova Scotia and last saw her mother, prior to the execution of the Will, on August 21-22, 2002 when she visited the family home in Amherst. Subsequent to that, she says she spoke with her mother by telephone at her brother's home on perhaps three occasions after the move to Tantallon but again, these calls were uneventful. Both described their mother in these telephone calls as having seemed detached and not forthcoming with information but neither was able to comment adversely on her testamentary capacity.

[38] What Dorothy and Joanne Ramsay do rely upon in challenging their mother's testamentary capacity is the expert opinion evidence given by Dr. Daniel Carver, called as a witness on their behalf (and the only medical expert to testify at trial). Dr. Carver's qualifications to give expert opinion evidence in the field of geriatric medicine were accepted by the court.

[39] Dr. Carver did not at any time examine the testatrix himself but rather had to base his opinion on the medical records provided to him from various sources. After reviewing all the medical records, particularly those spanning the period from March, 2002 until her death, Dr. Carver formed the opinion that there was sufficient documentation to raise significant concerns about Mrs. Ramsay's ability to arrange for a new Will on September 18, 2002. He opined that there is a high likelihood that she had difficulty with decision-making capability, based on a combination of medical illness, cognitive impairment, mood disorder and medication. In the latter respect, Dr. Carver identified two medications of particular concern that can play a role in depressed cognitive functioning, although he acknowledged that these drugs in isolation are unlikely to cause significant difficulty with decision-making capabilities.

[40] Dr. Carver was very informative about various aspects of geriatric medicine and presented himself as a very knowledgeable and capable physician. He also gave his evidence in a candid and balanced manner. The difficulty with his opinion, however, is the underlying weaknesses in its foundation. First of all, he did not at any time ever meet the testatrix, nor did he have the opportunity to speak to any family members or any of the treating physicians whose records he reviewed. Rather, he was in a position of having to base his opinion entirely on medical records written by others which, he acknowledged, contained incomplete information. He candidly acknowledged that there is no well documented description of Mrs. Ramsay's cognitive function or mental state prior to the execution of the Will. He did refer to an assessment performed by an employee of Home Care Nova Scotia on September 13, 2002 which documented a significant

decline in cognitive functioning over the previous months, but acknowledged that it was only a rudimentary test that was administered. Neither is there any evidence establishing the assessor's qualifications.

[41] Dr. Carver went on to refer to a cognitive function assessment carried out in hospital on October 10, 2002 (two weeks after her final admission to hospital) by a psychiatry resident which described significant difficulties with cognitive functioning and low mood. He said that this was the first time a well done assessment had been carried out and he considered it relevant insofar as Mrs. Ramsay's condition was progressive and therefore was likely a problem back on September 18th when the Will was made. He acknowledged, however, that it was hard to say to what degree. When asked if he had enough information to base his opinion on, Dr. Carver said that he was comfortable with the contents of his report respecting Mrs. Ramsay's medical state but that there were more unknowns in respect of her cognizant state. He said there were a number of suggestive factors that indicated cognitive impairment but it was not clear if that impairment was of such a degree that it would affect her decision-making ability to make a Will. He was concerned that that would be the case based on the medical records reviewed. He then concluded by saying that it would be nice to have more medical information, but it simply wasn't available.

[42] Dr. Carver also acknowledged that the medical records he reviewed did not record, or otherwise suggest, that Mrs. Ramsay was being manipulated or

influenced by anybody. He was only able to offer the general opinion that an individual who has significant cognitive impairment is at high risk of being controlled or manipulated by others.

[43] Despite these weaknesses underlying Dr. Carver's opinion, which is the only evidence advanced by the opponents of the Will in support of their allegations of lack of testamentary capacity and lack of knowledge and approval of the contents of the Will, his evidence does raise a suspicion on both of those counts so as to revert the burden of proof to the propounder. Dr. Carver's evidence must accordingly be weighed against the evidence of those who actually saw the testatrix at the time the Will was made, as relied upon by the propounder. Those persons are Jean Deveaux, Carrie Ramsay and Garnet Ramsay himself.

[44] The most important of these three witnesses is Ms. Deveaux, whose evidence I have already recited at length. Ms. Deveaux does not have a stake in the outcome of this proceeding, unlike all the lay witnesses who testified, and I found her to be a credible witness. I accept her evidence without reservation as truthful and factual. I am satisfied that she made sufficient inquiry into the testamentary capacity of Mrs. Ramsay when the Will was made. Moreover, I consider her personal observations in that regard, enhanced as they were by 20 years experience as a licensed practical nurse interested in gerontology, to be more persuasive than the more abstract opinion of Dr. Carver. Ms. Deveaux had no cause for concern over her client's testamentary capacity or her knowledge and approval of the contents of the Will and I favour her evidence in that regard.

[45] I was also favourably impressed with the evidence of Carrie Ramsay. Although she is not a disinterested party, I found her evidence to be forthright and credible. She did a great deal to help her mother-in-law settle in to their home in Tantallon and adjust into a daily routine. Their daily interaction was a constant throughout the four to five week period they lived together (during which the Will was made).

[46] Carrie Ramsay testified that during that period, she did not observe any decline in her mother-in-law's medical state or condition, apart from the worsening of her edema and her frustration with that. That is to say, Carrie Ramsay's concern was only in respect of her physical illness. She further testified, and I accept, that she played no part in the preparation of the new Will, nor was she even aware of any discussions going on about it in the household.

[47] Garnet Ramsay testified that his mother, in the relevant time frame, was "sharp as a tack" . However, I do not place much weight on his testimony overall in the circumstances for reasons that will become apparent.

[48] As noted in *Feeney's Canadian Law of Wills* (4th Ed.), there are a number of cases that point out that the evidence of a layperson on testamentary capacity may carry greater weight than that of a doctor. The key point is the opportunity and extent that the layperson had to observe the testator and arrive at an opinion. The dominance of lay evidence is even greater when the medical experts do not examine the deceased personally, and are merely interpreting medical records (see, for example, *Marquis v. Westin* (1993) 49 E.T.R. 262 (NBCA). This proposition

becomes even more forceful when the medical records being interpreted are admittedly incomplete, as is the case here.

[49] Accepting as I do the evidence of Jean Deveaux and Carrie Ramsay, I am satisfied that it has been shown that Marion Ramsay had the testamentary capacity to make her new Will on September 18, 2002 and that she knew and approved of its contents.

UNDUE INFLUENCE

[50] As noted earlier, it was affirmed in *Vout* that the burden of proof of undue influence remains with those attacking the Will. In the present case, neither of the two daughters was able to provide any direct evidence of their brother having perpetrated any acts of coercion against their mother in changing her Will as she did. Neither is there any indication of the exercise of undue influence by anyone in the medical records spoken to by Dr. Carver. Rather, the two daughters rely on a body of circumstantial evidence as the basis for their assertion that their brother Garnet coerced their mother into changing her Will in his favour after she moved in with him.

[51] Although the two daughters kept in regular contact with one another, they were virtually estranged from their brother. Indeed, they had only respectively seen their brother three or four times in the past 30 years. They had a long history of non-communication. That history continued when Garnet Ramsay decided to offer his mother the option of selling her home in Amherst and moving in with his family in Tantallon. The two daughters were not informed of this development by

their brother and when they found out, neither of them thought it was a good idea. They saw their brother as seizing control of their mother and her affairs, although both acknowledged that having their mother move in with either of them was not a feasible option for various reasons. The two daughters were also concerned over rumblings they had heard about their brother's history of financial difficulties. As Dorothy Ramsay put it in her evidence, she had concerns over her brother's influence on her mother after the quick decision to sell the Amherst home and the move to Tantallon but felt powerless to do anything.

[52] As mentioned earlier, there was very little contact between either daughter and their mother during the four to five week period that she was living with her son Garnet and his family. Neither knew anything about the preparation of the September 18th Will or their mother's intentions at the time.

[53] After their mother passed away in hospital on October 27th , Garnet immediately informed Dorothy, but not Joanne, in the expectation that Dorothy would tell her. Garnet made all the funeral arrangements on his own and made no effort to accommodate Joanne's intended travel plans from rural British Columbia. Because of weather conditions, she was unable to get a flight in time and was forced to miss her mother's funeral, which only added to the resentment.

[54] After their mother's death, the two daughters learned the details of their brother's handling of their mother's money both before and immediately after her

death. Of concern to them was:

a) after their mother's final hospitalization began on September 26th, Garnet had taken approximately $10,000-$12,000 of their mother's money, purportedly under the new Power of Attorney executed on August 2, 2002, for purposes of paying off his vehicle bank loans and repair bills;

b) beyond that, Garnet's bank records showed deposits to his own bank accounts of approximately $200,000 over the four year period between 1999 and 2003 which exceeded his own sources of income and appeared to them to be unaccounted for;

c) they anticipated that their mother's estate should be worth more than $140,000 (most of which was derived from the sale of the Amherst house), although neither of them had any concrete basis for expecting a higher value;

d) Garnet had charged his mother for all expenses relating to the move to Tantallon, including an hourly rate for the time spent both by himself and his wife;

e) Garnet had charged his mother room and board at the rate of $900 per month after the move to Tantallon, including the month of October during which she was hospitalized before her death;

f) Garnet had carried out a number of improvements and adaptations to his home to facilitate his mother's arrival to live with them, all at his mother's expense;

g) shortly after his mother died, Garnet transferred all the estate funds into his own personal bank accounts which he acknowledged that he did in order to keep the funds away from his sisters;

h) he thereupon took about $33,000 of the estate funds to pay down personal debt;

i) he calculated his executor's commission the day after his mother died;

j) it was Garnet who contacted Ms. Deveaux with a view to her preparing a new

Will for his mother, after Mr. Fairbanks had declined to do so;
k) above all, the terms of the new Will were a marked departure from their mother's earlier Wills which had essentially provided for an equal division of the estate amongst the three children.

[55] The only statements which the two daughters otherwise attributed to their brother as suggestive of undue influence were his statement to his mother in 1999 that she had dishonoured him by intending to change her Power of Attorney to Joanne Ramsay (which did not then materialize) and his later statements to her that he needed money.

[56] None of the foregoing evidence was disputed by Garnet Ramsay with the exception that he provided a general explanation for the history of deposits to his own bank account since 1999 and denied having spent any of his mother's money except for that which she gave him from time to time to help him out (including approximately $7,000 to settle a tax bill and another $4,000 to set up a home bookbinding business). He otherwise attempted to justify his use of the Power of Attorney to pay out his vehicle bank loans and repair bills from his mother's money after her final hospitalization by relating that his mother had said to him beforehand that "if he needed some money, he could help himself".

[57] Even though his mother had helped him out financially before, this was clearly a misuse of the Power of Attorney and something for which Mr. Ramsay

deserves sharp criticism. This, together with his handling of the estate funds following his mother's death, demonstrates all too well his eagerness to relieve his own personal debt load by accessing his mother's money.

[58] The question to be decided, however, is whether or not this body of circumstantial evidence warrants a finding of undue influence. That is to say, was the Will a product of coercion such that Marion Ramsay's independence of will was completely overborne? As noted earlier, it is not sufficient to establish that the beneficiary had the power to coerce the testator; it must be shown that the overbearing power was exercised and that it was because of its exercise that the Will was made.

[59] Coercion, of course, can take on many forms from the overt to the subtle. However, as observed by Bateman, J.C.C. (as she then was) in *Re Marsh Estate* (1991) 99 N.S.R. (2d) 221 (at para. 43), it is not enough that the testator was influenced by the person. Rather, the influence must be "undue". It is only when the influence, insofar as it relates to the testamentary disposition, exceeds what is appropriate that the disposition fails. Bateman J.C.C. went on to say (at para. 46):

> It is not improper for a potential beneficiary to express her wish to benefit and, indeed, to plead her case as to why she should benefit. In other words, it is not improper for a potential beneficiary to attempt to influence the ultimate decision of the testator. The problem arises when that influence becomes coercive, in effect, when the beneficiary dominates the decision of the testator.

[60] In the present case, there is no evidence whatsoever that Garnet Ramsay pressured his mother into selling her home in Amherst and moving to his home in

Tantallon. Neither is there any evidence that Mr. Ramsay pressured his mother into making a new Will after she moved in with him. It is not even accurate to say that Mr. Ramsay arranged for the new Will to be made, merely because he made the initial telephone contact with Ms. Deveaux's office leading to her house call (where instructions for the new Will were privately given).

[61] It is a bit troubling that the bequests in the new Will were so radically changed to the near exclusion of the two daughters but at the same time, it must be recognized that Mrs. Ramsay's circumstances in life had also by then radically changed. For the first time in her life, her physical health was in serious decline and she was no longer living independently. She appears to have been grateful for the opportunity to have moved in with her son Garnet and his family where she anticipated spending the rest of her days. At the same time, however, she recognized the prospects of long-term health care costs (as related by Ms. Deveaux) and the financial drain that might well create. She therefore wanted to bestow on her son Garnet the bulk of her estate, or what would be left of it after anticipated health care costs or government claw backs, in her gratitude towards him. The evidence also indicates that Mrs. Ramsay was very fond of her son and while it may be an overstatement to say that she was estranged from her two daughters (notwithstanding Ms. Deveaux's file note), it appears that her relationship with both of them had become more strained over the years.

[62] With these significant changes in her life, I conclude that there was a rationale for the changes that were made in the preparation of the new Will on

September 18, 2002. Whether the court considers the right choices were made by the testatrix in preparing the new Will is immaterial. The court's only concern is to be satisfied that the Will reflects the testamentary independence of Mrs. Ramsay without undue influence having been exercised upon her.

[63] In the final analysis, I am not persuaded that the two daughters have discharged the burden of proof upon them to show that undue influence was exercised on Mrs. Ramsay by their brother Garnet, thereby depriving her of her own free will in making her testamentary dispositions. The circumstantial evidence upon which the two daughters rely does not warrant such an inference to be taken and Mr. Ramsay's comments to his mother that he needed money does not cross the line into the sphere of coercion. This ground of attack against the Will can therefore not be sustained.

CONCLUSION

[64] In the disposition of this matter, I direct that the last Will and Testament of Marion Araminta Ramsay dated September 18, 2002 be admitted to Probate in solemn form. I will leave it to counsel in the first instance to deal with the matter of costs and failing agreement between them, I will hear written submissions from them by August 10th.

J.