

[3] Phyllis passed away on July 14, 2017.

[4] The defendants, Ria Dawn Hyde ("Ria") and Perry Dean Hyde ("Perry"), are Phyllis's children. In their defence and counterclaim, they allege that at the time Phyllis made the Will, she lacked the mental capacity to do so, or, otherwise, Phyllis did not know or approve of the Will's contents. They also allege Phyllis was unduly influenced by the Godmaires to believe Ria had moved to Cuba and Perry was an alcoholic.

[5] Although not beneficiaries under the Will, Ria and Perry nevertheless inherited \$15,000 each pursuant to a \$30,000 life insurance policy taken out by Phyllis when alive.

[6] For the following reasons, I declare the Will valid and dismiss the Hydes' claims.

THE LAW

[7] The following legal principles apply to this case:

- Testamentary capacity is presumed where a will was executed in accordance with the requisite formalities.
- Suspicious circumstances may be raised by:
 - circumstances surrounding the preparation of the will,
 - circumstances tending to call into question the capacity of the testator, or
 - circumstances tending to show the free will of the testator was overtaken by another party's undue influence, coercion or fraud.
- Where the applicant establishes suspicious circumstances are present, the person seeking to uphold the will (sometimes referred to as the propounder) must establish the will was executed with the knowledge and approval of the

testator. If the mental capacity of the testator is an issue, the propounder also must establish capacity at the time the will was signed.

- Testamentary capacity means the maker of the will appreciated:
 - (a) the nature and extent of their property
 - (b) those who are among the possible beneficiaries of their estate
 - (c) the testamentary provisions they are making
 - (d) the connection among factors (a) to (c)
 - (e) they are disposing of their estate in an orderly way
- Assuming the propounder of the will establishes the testator's knowledge, approval and capacity, the onus shifts to the person challenging the will's validity.
- The court will not intervene based on influence alone. It must be established that the alleged conduct overcame the free will of the testator.

See ***Vout v. Hay***, [1995] 2 S.C.R. 876 at paras. 19–27, 1995 CanLII 105 (SCC); ***Tecter v. Reimer Estate***, 2021 MBQB 133 (CanLII) at paras. 44–45, 56; ***Schwartz v. Schwartz***, 1970 CarswellOnt 243 (WL Can) at para. 44 (CA), aff'd [1972] S.C.R. 150, 1971 CarswellOnt 163 (WL Can) (SCC); ***Weiss Estate v. Weiss; Weiss v. Weiss Estate***, 2022 MBQB 13 (CanLII) at para. 52.

[8] The Hydes do not dispute the Will was executed in accordance with the requisite formalities.

DISCUSSION

[9] After considering all the evidence, I am satisfied suspicious circumstances have not been established in this case. Even if I were to accept the Hydes' contrary view (which I do not), I find the Godmaires have established Phyllis had capacity to make the Will with full appreciation and knowledge of its contents and she was free of coercion.

PHYLLIS'S RELATIONSHIP WITH THE GODMAIRES

[10] At the time of her passing, Phyllis and the Godmaires had been neighbours for approximately ten years. The evidence establishes the neighbours regularly assisted each other by, for example, generally keeping an eye out, caring for pets, and assisting with maintenance. As Phyllis had considerable accounting experience, she would prepare the Godmaires' tax returns each year. She provided this tax service to the Godmaires (and others, including the Hydes) right up until the year she passed away. Phyllis's relationship with the Godmaires was more than chore related. It was social too, including dining out together and celebrating birthdays and anniversaries.

[11] The Godmaires had no knowledge of the Will, the Power of Attorney naming them attorneys, or the Health Care Directive naming them proxies, including a second, more recent Health Care Directive prepared by Phyllis in 2017.

[12] Despite Sharon having a relationship with Phyllis, she did not testify at trial. All the evidence about the history and relationship between the Godmaires and Phyllis came from Alain. At the outset of trial, the Godmaires tendered an affidavit from Dr. Margaret Ochonska, attesting Sharon suffers from "Crohn's Colitis" as well as an anxiety disorder, manifesting in panic attacks, chest pains, heart palpitations, shortness of breath,

numbness, and bowel issues. The doctor strongly recommended against Sharon testifying, which recommendation Sharon followed. I factored this absence of testimony into my weighing of the evidence as a whole.

DYNAMICS AND RELATIONSHIPS AMONG PHYLLIS AND HER CHILDREN

[13] The evidence addressing the dynamics and relationships among Phyllis, Ria and Perry was not extensive. The evidence I did hear included:

- Until divorcing in 1978, Phyllis was married to Lawrence Hyde, the father of Ria and Perry.
- Phyllis had a third child with another partner. That child tragically died in an accident in 1994. He was 15 years old.
- Throughout her adult years, Phyllis was subjected to emotional and physical abuse by one or more of her romantic partners.
- Phyllis was an alcoholic who, for many years preceding her death, was sober and regularly attended Alcoholics Anonymous or similar meetings. She was adamant no one, family or friend, consume alcohol in or on her property.
- Phyllis did not share personal financial information with either her children or her friends.
- As noted earlier, at the time of making her Will in 2013, Phyllis named the Godmaires attorneys under a Power of Attorney and health care proxies. She named them again in a subsequent 2017 Health Care Directive.
- Neither Ria nor Perry had any knowledge of the Will, the Power of Attorney, or the Health Care Directives.

- Phyllis never spoke to Perry about what would become of her assets when she died. Perry simply assumed he would inherit from his mother since Ria had inherited from their father.
- Over his adult years, Perry assisted Phyllis in maintaining her property and, for a period of approximately two years commencing in or around 2008, Perry resided with Phyllis.
- Perry has a history of alcohol abuse resulting in, among other things, numerous impaired driving convictions and related sentences.
- Perry was known to consume alcohol from time to time on his mother's property despite her clear disapproval thereof and to her annoyance.
- Ria and Perry concede that until shortly before her passing, and in addition to her accounting abilities, Phyllis managed her own affairs, including banking, shopping, paying bills, cooking, driving herself, and scheduling/attending appointments.
- Ria moved away from Manitoba in 1985 at the age of 14 years to live with her father, Lawrence Hyde, in British Columbia. She lived in British Columbia until 2013 when she became engaged to a Cuban national, moving to Cuba in the early fall of 2013. This is the same period of time when Phyllis prepared the Will.
- In the course of winding up her affairs in British Columbia, Ria resided from time to time with Phyllis in Manitoba. Thereafter, she would return for a couple of months each year, again residing at Phyllis's. According to Ria, it was

stressful during those periods of cohabitation. Ria also conceded Phyllis was disappointed when Ria chose to marry in Cuba without her mother being present.

- Ria had no expectation of inheriting from Phyllis and never wanted anything from Phyllis. Phyllis knew this.
- Throughout the third party medical documents filed in evidence and in one text message tendered as Exhibit 4, there are expressions of concern by Phyllis respecting a history of verbal abuse from Ria.

EVIDENCE FROM LAWYER WHO PREPARED THE WILL

[14] Lawyer Richard Alcock was retained by Phyllis to prepare the Will, the Power of Attorney, and the first Health Care Directive. At the time, Mr. Alcock had been practising as a solicitor for about twenty-four years with a significant portion of his practice devoted to wills and estates. At trial, Mr. Alcock's memory was assisted by his original file, but he also had specific recollections of Phyllis in part because they both shared an interest in horses.

[15] Mr. Alcock met with Phyllis on two occasions — once several days prior to October 21, 2013 to take instructions and then again on October 21, 2013 to review the Will and other documents with Phyllis and attend to execution.

[16] Mr. Alcock's notes of his first meeting with Phyllis are in evidence. The notes are consistent with the Will. Mr. Alcock testified the notes are as detailed as they are because Phyllis's instructions were to gift her property to the Godmaires rather than her two surviving children. The notes also refer to "30K life ins", "son - alcoholic", and "daughter -

moved to Cuba". As well, the notes reflect Phyllis had made funeral arrangements and was considering selling her property to the Godmaires even before she died.

[17] Mr. Alcock testified he noted no suspicious circumstances, including in respect of capacity or undue influence. If he had, a notation would have been made. At the second in-person meeting on October 21, 2013, Mr. Alcock reviewed the draft Will with Phyllis paragraph by paragraph with Phyllis ultimately executing the Will and other documents in the presence of Mr. Alcock and his assistant. In the Affidavit of Execution attached to the Will and other documents, Mr. Alcock specifically attests Phyllis was of sound mind, memory, and understanding. The book of documents contains the Statement of Account issued to Phyllis on October 21, 2013, describing the services provided and, in handwriting, that Phyllis paid the invoice that day by cheque written by herself.

[18] Phyllis attended both meetings with Mr. Alcock on her own.

EVIDENCE FROM PHYLLIS'S FAMILY DOCTOR

[19] Phyllis was a patient of Dr. Frederik Jacobus (Erik) Badenhorst from 2008 until her passing in June 2017.

[20] Dr. Badenhorst testified he saw Phyllis approximately twenty times over the years, mostly when Phyllis had a specific issue or required a prescription. At the time of making her Will, Phyllis had prescriptions for medication addressing anxiety and insomnia. According to Dr. Badenhorst, the anxiety medication was a low dose and the sleeping medication was short acting. There were no addiction issues in respect of those drugs.

[21] It was the opinion of Dr. Badenhorst that throughout the period he treated Phyllis, including into June 2017, Phyllis was of sound mind and oriented in terms of time, place, and focus. He saw no cognitive issues.

[22] In fact in January 2014, Phyllis requested from Dr. Badenhorst a letter confirming her competency to make binding decisions in regard to her personal affairs. In response, and after an assessment, Dr. Badenhorst provided the letter. According to Dr. Badenhorst, his competency opinion was based on his assessment of Phyllis's physical appearance, emotional state, thought process, decision-making abilities, cognition, and overall connection to reality. He had, and has, no doubt about his conclusion.

[23] In April 2017, Phyllis attended Dr. Badenhorst's office on her own initiative, requesting the updated Health Care Directive be placed on her medical file.

[24] Dr. Badenhorst last saw Phyllis on June 22, 2017. At that time Phyllis was not well and was driven to the appointment by someone who Dr. Badenhorst could not identify. Tests were ordered and Phyllis was told to go to the hospital. Even then, it was Dr. Badenhorst's opinion Phyllis was competent in all respects, noting that Phyllis even queried whether her symptoms could be signs of Lyme Disease.

[25] Unrelated to Dr. Badenhorst, but relevant to Phyllis's health, the hospital admission records from June 2017 record no capacity concerns. Moreover they refer to Phyllis inquiring in respect of medical assistance and dying and to her living on her own, making meals, and driving.

DECISION

[26] As noted in my introduction, the Hydes challenge the Will, alleging suspicious circumstances in the nature of lack of capacity, lack of awareness, and undue influence. They say the Godmaires should not benefit from the presumption of capacity and that the Godmaires have not proved the validity of the Will. I cannot agree.

[27] I find that at all relevant times, Phyllis had capacity, knew and appreciated the contents and effect of the Will, and was not unduly influenced. In fact, I find there was an absence of suspicious circumstances as that term is used in the case law. However, even if I am wrong and some suspicious circumstances existed, I am satisfied the validity of the Will has been established.

[28] This conclusion is clearly supported by the evidence of Mr. Alcock, the lawyer who prepared the Will and witnessed its execution. In contrast to the parties to this litigation, Mr. Alcock has no personal interest in Phyllis's estate or relationship with any of the interested parties. There is no reason to question the truthfulness or objectivity of his evidence.

[29] Mr. Alcock's perception of Phyllis is supported by the evidence of Dr. Badenhorst, another truly independent witness, including the competency letter written very shortly after the Will was executed.

[30] Phyllis's competency is supported by the Hydes' own evidence that in October 2013 Phyllis was independent, managed her own affairs, did her own banking, prepared tax returns, and drove herself. In fact in October 2013, she was pursuing Spanish lessons in

anticipation of Ria's wedding in Cuba. It is clear to me her capacity continued until she was admitted to hospital in June 2017.

[31] I have no doubt Perry is disappointed and perhaps was surprised he did not inherit under the Will. I also hear Ria's concern about Phyllis's frame of mind given the Will's execution date was October 21,¹ the birthday of her son who died in an accident. I also understand the emotion generated by the prospect of the Godmaires' inheriting land on which the ashes of Phyllis, her son, and Lawrence Hyde are buried. Unfortunately those sentiments, genuine as they might be, do not offset the overwhelming objective evidence of Phyllis's capacity at the time she made the Will.

[32] I have considered Perry's allegations of elder abuse and brainwashing by the Godmaires. However, those allegations are speculative at best. No compelling credible evidence was presented to support them. In respect of the allegation the Godmaires financially abused Phyllis by taking money from her, I accept Alain's evidence that while there were two occasions when Phyllis loaned money to the Godmaires, the loans were for specific purposes disclosed to Phyllis, were voluntarily made by Phyllis, and were repaid in full.

[33] The gift in the Will is not incongruent with the evidence pertaining to the family dynamics and relationships at the relevant time, including, among other things, the fact Ria had moved to Cuba and Perry was abusing alcohol. It also is relevant that Phyllis did not exclude her children entirely. The Hydes were designated beneficiaries under Phyllis's \$30,000 life insurance policy.

¹ That said, it is clear Phyllis contemplated the gifts in the Will before October 21. The first visit to her lawyer was before that date. The Will is consistent with the lawyer's notes made during that first visit.

CONCLUSION

[34] In the circumstances, I find the Will is valid.²

[35] The Hydes shall pay the Godmaires costs in this action on a party-and-party basis in accordance with the tariff of the Manitoba, *Court of King's Bench Rules*. If the parties cannot reach agreement on the amount of costs, the matter can be brought to me for a decision.

_____J.

² So there is no uncertainty, in reaching my conclusion I did consider the evidence of the Hydes' witnesses, Ramona Forest and Lanna Diamond. Especially in the case of Ms. Diamond, I had considerable concerns in respect of its relevance, admissibility, credibility and reliability.