IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Hix v. Ewachniuk,***
2008 BCSC 811

Date: 20080623
Docket: S068326
Registry: Vancouver

Between:

Neeva Gayle Hix and Mary Anne Runnalls

Plaintiffs

And

Alexander Theodore Ewachniuk, Executor of the Estate of Sophia Ewachniuk, Deceased

Defendant

Before: The Honourable Mr. Justice Hinkson

Reasons for Judgment

Counsel for the Plaintiffs	Georges E. Sourisseau Scott Baldwin
Counsel for the Defendant	J.D. Vilvang, Q.C. M. Hamilton
Date and Place of Trial:	February 18-22 and 25-29, 2008 Vancouver, B.C.

INTRODUCTION

[1] Sophia Ewachniuk passed away on June 1, 2006 at the age of 90. She was predeceased by her husband Roman Ewachniuk who passed away on November 30, 1984.

[2] Roman and Sophia Ewachniuk had three children: the plaintiffs, Mary Anne Runnalls born August 18, 1943; Neeva Gayle Hix born April 6, 1945; and the defendant, Alexander Theodore (Ted) Ewachniuk born October 28, 1939.

[3] The defendant is the named executor of the will of Sophia Ewachniuk pursuant to a will drawn by him and executed by Sophia Ewachniuk on January 11, 2004.

ISSUES

[4] The plaintiffs allege that the will was drafted and executed under suspicious circumstances and is not a true and valid will because:

a) Sophia Ewachniuk was not of sound disposing mind and lacked testamentary capacity when the will was executed;

b) the will was procured by undue influence;

c) certain provisions of the will are impossible to fulfill; and

d) the will contains a condition that is contrary to public policy.

BACKGROUND

A. Regent Holdings Shareholdings

[5] During their lifetimes, Roman Ewachniuk, Sophia's father Alexander Pylypchuk, and Sophia's brother Victor Pylypchuk created a company called Regent Holdings Ltd. ("Regent Holdings"). The company was incorporated in 1954. It acquired hotel properties from time to time, and obtained an interest in a mortgage on one of the hotels and a property in Richmond, British Columbia.

[6] The company was intended, in part, to provide financial stability for the extended Ewachniuk family. The plaintiffs both received assistance in the form of loans from the company for the purchase of their homes.

[7] Victor Pylypchuk and his wife had no children. Following his death on June 9, 1963, he directed that his estate purchase all of the 15,000 shares of Regent Holdings held by B. B. Enterprises, and that those shares then be delivered in equal shares to the two plaintiffs and Ted Ewachniuk.

[8] The parties generally agreed that Alexander Pylypchuk's shares in Regent Holdings passed through his estate upon his death on December 25, 1964. Ted Ewachniuk said that he was to receive all of his grandfather's shares, but his mother urged him to avoid the sort of unfairness with which she had earlier been treated and suggested that his sisters should receive some shares in Regent Holdings. Ted Ewachniuk said that he acceded to his mother's request, but since his sisters were minors, their shares were given to his mother in trust for them.

[9] Alexander Pylypchuk's will was produced, but makes no specific mention of his shareholding in Regent Holdings.

[10] According to the Central Securities Register, on May 10, 1966 Victor Pylypchuk owned 15,000 shares in Regent Holdings, Roman Ewachniuk owned 9,000 shares in the company, Ted Ewachniuk owned 8,000 shares in the company, and Sophia Ewachniuk owned 6,000 shares in the company in her own name and 3,500 shares in the company in trust for each of the plaintiffs.

[11] The Central Securities Register also discloses that on January 4, 1978, Sophia Ewachniuk transferred 3,500 shares held in trust to each of the plaintiffs, and that 5,000 of the 15,000 shares previously held by Victor Pylypchuk were transferred at that time to each of the plaintiffs and Ted Ewachniuk.

[12] The Central Securities Register further indicates that on December 23, 1980, the remaining 6,000 shares held by Sophia Ewachniuk and the 9,000 shares held by Roman Ewachniuk were transferred to Ted Ewachniuk. This left Ted Ewachniuk with 28,000 shares in the company and each of his sisters with 8,500 shares in the company.

B. The Development of Regent Holdings

[13] Roman Ewachniuk had a debilitating stroke and was unable to work after 1957.

[14] In the 1970's, Ted Ewachniuk was a law student at the University of British Columbia. It was at that time that Regent Holdings encountered difficulty in paying its taxes, and Sophia Ewachniuk later formed the view that it only survived due to the efforts of Ted Ewachniuk. The Richmond property owned by Regent Holdings had housed an abandoned cannery which was ultimately torn down by Ted Ewachniuk and John Short, a man he described as

his partner, and replaced with a marina, an office, and a restaurant rental space.

[15] In 1986, Neeva Gayle Hix brought proceedings against Regent Holdings seeking its liquidation as a result of her frustration in obtaining financial information about the company.

[16] Sophia Ewachniuk was unhappy with her daughter for commencing those proceedings, and swore an affidavit dated September 17, 1986 crediting Ted Ewachniuk alone with accomplishing the survival of the company. Her affidavit contains a number of statements that are at odds with other evidence and the spelling of each of her daughters' names is incorrect in a number of locations in the affidavit.

[17] Sophia Ewachniuk incorrectly stated in her affidavit that she and her husband shared equally in the 15,000 shares initially provided at the incorporation of the company. She also incorrectly said in her affidavit that Alexander Pylypchuk transferred all of his shares to Ted Ewachniuk, and that Ted Ewachniuk gratuitously gave 3,500 of his shares to each of his sisters in 1956 or 1957.

[18] Sophia Ewachniuk further swore in her affidavit that in approximately 1980, her husband told Ted Ewachniuk that he would sell the shares held by him and Sophia Ewachniuk to Ted Ewachniuk, and provide the proceeds from the sale of those shares to their three children on the demise of the parents. Sophia Ewachniuk swore that an agreement was entered into providing for the sale of the shares at a price determined by the company accountant. The sale price was $750,000.00, secured by a promissory note dated December 23, 1980 payable one year after demand, without interest.

[19] No payments were ever made as against this promissory note. During the divorce proceedings from his first wife in June 2000, Ted Ewachniuk took the position that repayment of the note was expected. In his evidence in this action, Ted Ewachniuk said that at some time shortly after the divorce his mother decided to forgive the required payment for both her and her husband's shares. Indeed, Sophia Ewachniuk stated this intention in a statutory declaration dated October 12, 2000, the same date as she executed a power of attorney appointing Ted Ewachniuk as her attorney.

[20] This forgiveness on her part is contrary to her affidavit evidence that the proceeds from the sale of the shares belonging to her and her husband would be shared by her three children on the demise of the parents.

C. Sophia Ewachniuk's Role in Regent Holdings

[21] Neither of the plaintiffs had any real involvement in Regent Holdings. Both said that this was not due to disinterest by them, as each said that they offered their respective expertise to assist the company, but that they were not given any opportunity to participate in the company's affairs.

[22] Ted Ewachniuk was, as indicated above, actively involved in the affairs of the company. At least recently, it appears that he treated the assets of the company as his own. For example, in 2004 he paid a judgment against him personally of some $540,000.00 from company funds.

[23] The plaintiffs argued that their mother had a large role in Regent Holdings through collecting the rents and doing the company books. Ted Ewachniuk gave evidence that his mother's role in the company was integral, but at times her role was minimal, and that he had simply created a job for her in order to allow the company to provide her with income. Patricia Ewachniuk, Ted Ewachniuk's present wife confirmed in part her husband's evidence that, at least laterally, Sophia Ewachniuk stopped the limited activity in which she had been engaged for the company, and that Patricia Ewachniuk took over those duties.

[24] While I accept that Sophia Ewachniuk was proud of the role that she felt that she played in the affairs of the company, I do not accept that her role was of any great significance. I find that it was, as Ted Ewachniuk stated in some of his evidence, more a case of giving her a job to justify a salary. As Patricia Ewachniuk stated, it was a job that Sophia Ewachniuk turned over to her following her stroke in July of 2002, as by then she was no longer to perform even the limited duties of rent collection and bookkeeping.

D. Sophia Ewachniuk's Expressed Intentions

[25] Both sides in these proceedings agreed that Sophia Ewachniuk was from an era of male dominated business activities, and was influenced by and idolized her son Ted. The parties agreed that Sophia Ewachniuk preferred to avoid confrontation within her family.

[26] The plaintiffs each gave evidence that their mother was critical of her sister-in-law and their aunt, Victoria, for her role in the family's affairs, and that she repeatedly insisted that her children would share equally in her estate.

[27] Alexander Pylypchuk's widow, Mary, passed away in the summer of 1998. Her home was located down the lane from that of Sophia Ewachniuk, and in her will, Mary Pylypchuk left her estate in four equal shares to Sophia and Sophia's three children. Ted Ewachniuk purchased Mary Pylypchuk's home from his grandmother's estate, and lived there with his wife Patricia.

[28] Ted Ewachniuk gave evidence that his mother credited him with the success of Regent Holdings, and felt that he and he alone should receive the benefit of the company's success. The import of this evidence is that Sophia Ewachniuk apparently ignored the fact that the success of Regent Holdings began with the Richmond property that was not acquired, but was developed by Ted Ewachniuk. It also requires the assumption that she abandoned her earlier position that the plaintiffs should have shares in the company and ignores the bequest to her daughters from her brother.

E. Sophia Ewachniuk's Physical and Mental Health

[29] Sophia Ewachniuk encountered various health difficulties in her later years. By 2000, she needed assistance from a caregiver. In April 2000, she was involved in a motor vehicle accident injuring her left shoulder. After this accident she was unable to dress herself without assistance, and the need for her caregiver increased. In the summer of 2002, she suffered a significant stroke, and had a less serious stroke the following year.

[30] The plaintiffs both lived in the Toronto area, but visited their mother regularly. As Ted Ewachniuk lived down the lane from his mother, he and his wife Patricia provided considerable assistance to Sophia Ewachniuk. They looked in on her several times on most days, supervised her care workers, and filled in for them on weekends between the shifts of weekend aides. Ted Ewachniuk often slept at his mother's home on weekend nights.

[31] The plaintiffs said that they had concerns about their mother's mental abilities prior to January 2004, as she complained of not knowing where she was when driving and experienced hallucinations. However, they said that they had no reason to turn their minds to her testamentary capacity, as they were not told of what Ted Ewachniuk described as the change in her testamentary plans. In the result, their evidence as to testamentary capacity is less precise than it might otherwise have been.

[32] Ted Ewachniuk gave evidence that his mother was alert and indeed decisive until shortly before she left her home to move into the Amherst care facility in September of 2005. While I have concluded that Ted Ewachniuk's evidence on this point is exaggerated, it does not follow that his mother lacked testamentary capacity in January of 2004.

[33] Mr. Gordon Slobin, a former neighbour of Sophia Ewachniuk, was called by the defence to give evidence as to Sophia Ewachniuk's mental abilities. Mr. Slobin was 88 years of age when he gave evidence. While he described his interaction with Sophia Ewachniuk in terms that would support a finding of testamentary capacity on her part in and around January 2004, he was clearly confused as to the timing of events, such as Sophia Ewachniuk's significant stroke in 2002. I conclude that his evidence as to Sophia's testamentary capacity in January 2004 cannot safely be relied upon.

[34] Father Michael Fourik, Sophia Ewachniuk's priest at the Holy Resurrection Orthodox Church, was also called by the defence to give evidence. He described how he visited Sophia Ewachniuk every three or four weeks before, during and after January 2004. He described Sophia Ewachniuk in terms that were consistent with a woman of her years, other than her physical appearance which he said belied her age.

[35] Evidence was given by Dr. Saul Pilar, the general practitioner for both Sophia and Ted Ewachniuk. With the exception of one visit on May 12, 2003 when Sophia Ewachniuk didn't recognize him, he said that he considered Sophia Ewachniuk to be aware and incisive until January of 2005 when he recorded signs of dementia in his

records for the first time. Dr. Pilar did prescribe anti-depressant medication for Sophia Ewachniuk in January 2004 after she cried in his office and complained of loneliness. While he recorded no visits with Sophia Ewachniuk between January 20, 2004 and January 12, 2005, I accept that it was his view that Sophia Ewachniuk was mentally competent in January 2004.

[36] Dr. Lee Pulos, one of the witnesses to Sophia Ewachniuk's execution of the will on January 11, 2004, also gave evidence. His evidence was that he was not forewarned that he was going to witness the execution of a will, and that had he been so warned, he would have taken notes on the occasion. However, he did recall that he witnessed Sophia Ewachniuk and her other witness, Magdalene Johnston, sign the will on that date, and that his relatively brief exchanges with Sophia Ewachniuk on that date raised no concern on his part as to her mental abilities.

[37] Sophia Ewachniuk's health further declined after January 2004, but the parties do not agree upon the timing or the extent of the deterioration. In September 2005, Sophia Ewachniuk moved to the Amherst seniors' home where she remained until her death.

F. Events Leading to the Execution of the Will on January 11, 2004

[38] In 1978, Mary Anne Runnalls and her husband told Sophia and Roman Ewachniuk that they needed $54,000.00 or would face the loss of their home. The parents asked Ted Ewachniuk to assist his sister and brother-in-law. Instead of providing the loan from the assets of Regent Holdings, Ted Ewachniuk personally loaned them the money in exchange for a promissory note with interest at the higher of 14.78% or 1.50% above the prime commercial lending rate published by the Bank of Montreal.

[39] When Mary Anne Runnalls and her husband divorced, she paid her brother $30,000, but he calculates that she still owes him in excess of $500,000.00 on the note. It is apparent that Sophia Ewachniuk was aware of the outstanding obligation of Mary Anne Runnalls to her brother as a result of the promissory note, although perhaps not the extent of the obligation.

[40] It was in the late summer or early fall of 2003 that Ted Ewachniuk says that his mother decided to redo her will. Ted Ewachniuk said that an offer from his sister's friend, Ms. Linda Meinhardt was one of the things that precipitated his mother's decision to change her will.

[41] Ted Ewachniuk said that Ms. Meinhardt offered to mediate an unspecified issue between him and his sisters. Although Ted Ewachniuk said that the issue to be mediated was not specified, Ms. Meinhardt knew about the shareholdings in Regent Holdings. He said that he advised his mother of this offer, but that his mother instructed him to decline the offer which he did, in the presence of his wife Patricia.

[42] Sophia Ewachniuk's will that existed until that time left her estate in equal shares to her three children. That will may have been destroyed. Although in his statement of defence Ted Ewachniuk admitted that he destroyed it, he denied doing so in his *viva voce* evidence. In cross-examination he said that his mother took the former will, but that he did not know what she did with it, and that his mother was near the paper shredder in her home when he last saw her with it.

[43] Ted Ewachniuk said in cross-examination that he never spoke to his mother about what she did with the former will.

[44] Ted Ewachniuk gave evidence that in December 2003, his mother told him that she wanted to ensure that he enjoyed the benefit of the family company. In order to do so, she told him that she wanted to rewrite her will so that her daughters would receive nothing under her will unless they transferred their shares in the family company to their brother.

[45] The plaintiffs both visited their mother for Christmas in 2003. There is no evidence that during her lifetime, Sophia Ewachniuk ever asked either of her daughters to give their shares in Regent Holdings to Ted Ewachniuk. Neeva Gayle Hix said that she was never asked to do so.

[46] Ted Ewachniuk said in his evidence that he tried to talk his mother out of changing her will to eliminate any bequest to his sisters unless both transferred their shares to him, but claimed that his mother was insistent. He gave further evidence that he suggested that his mother leave at least something to her daughters if they did not

transfer their shares to him, and the sum of $5,000.00 each was decided upon.

[47] Ted Ewachniuk said in evidence that he suggested to his mother that if only one sister transferred her shares to him she should receive her one-third share in the mother's estate, but that his mother rejected that suggestion.

[48] Ted Ewachniuk testified that in January 2004 his mother was fully aware of the value of both her estate and the family company, and of the fact that his sisters' respective18.8% interests in the company were significantly greater than one-third of her estate.

[49] Ted Ewachniuk gave evidence that he tried to persuade his mother to retain a senior lawyer with expertise in wills and estates, but that his mother refused to spend the money to do so and wanted to keep her intentions secret from everyone except him.

[50] Yielding to his mother's wishes, Ted Ewachniuk said in his evidence that he warned his mother that his sisters would resist her efforts, and that she would need a witness who was beyond reproach to witness the will. Despite her reasonably close relationship with her priest Father Michael Fourik and her friendship with her neighbour Mr. Gordon Slobin, Sophia Ewachniuk did not propose either as a witness. According to Ted Ewachniuk, his mother proposed Dr. Pilar, but he rejected that suggestion on the basis that attending as a witness would interfere with Dr. Pilar's work.

[51] Ted Ewachniuk said that his mother did name Dr. Lee Pulos, a psychologist, as a witness who would be beyond reproach. It was Ted Ewachniuk who contacted Dr. Pulos. Dr. Pulos agreed to witness the execution of a document on a Sunday as he was occupied with his normal duties during the week.

[52] According to Ted Ewachniuk, his mother had met Dr. Pulos some thirty years earlier at a party at her home. Dr. Pulos had also served as an expert witness for Ted Ewachniuk some considerable time before January 2004, and had been interviewed on a radio program some weeks before the will was executed. Sophia Ewachniuk had apparently heard the radio interview.

[53] Sophia executed what is advanced as her final will on January 11, 2004, in the presence of her friend and contemporary, Magdalene Johnston, and Dr. Pulos.

[54] The will provided, in part:

> …
>
> **4. DISPOSITION OF ESTATE:**
>
> **4.1 To My Two DAUGHTERS, Mary Anne Runnalls and Neeva Gayle Hix, both residing in Toronto, Ontario : the option of sharing equally with their brother the residue(that is after all debts and expenses) of my estate, that is 1/3 each <u>providing and subject to the following requirement</u>: that both daughters transfer/assign all of their shares in Regent Holdings Ltd. to my son or transfer to anyone he designates at his direction and without any cost or expense to him within 90 days of receiving notice of this absolute requirement and this will. Only if both daughters comply with this stipulation then they will each receive the additional sum of five thousand dollars ($5,000.00) as a specific additional benefit (sic) for complying with this specific direction and my son A. Ted Ewachniuk will receive ten thousand dollars ($10,000.00) less. Alternatively and in the event that either or both fail to comply or delay for any reason whatsoever the aforementioned transfer of shares within that time limit then <u>each</u> of my two daughters will receive only the sum of Five Thousand Dollars ($5,000.00) or a total of Ten Thousand Dollars ($10,000.00) and nothing further; the remainder of the residue of my estate passes or goes to my son, A. Ted Ewachniuk. The aforesaid applies should any one of my three children predecease myself and to their heirs and executors. I have deliberated and wanted this to happen in this manner whilst my husband was alive and since his demise as we both appreciated our son's efforts and assistance.** [Emphasis in original.]
>
> I did not want any conflict or controversy whilst I was alive similar to Neeva Gayle Hix's legal action

which occured (sic) in the 1980's and my daughters ought to accept this direction without any question as they both know and fully appreciate the facts concerning my son, A. Ted Ewachniuk's role in developing the company from a virtullay (sic) valueless company with major income tax obligations and other debts as well as financially supporting my husband and myself for many years. For greater clarity of the financial history of Regent Holdings Ltd. and those facts, as well as my son A. Ted Ewachniuk's involvement were described and contained in my affidavit prepared in response to an earlier lawsuit commenced by my daughter Neeva Gayle Hix/Ewachniuk's law suit in a minority shareholders action which she filed and abandoned in the 1980's. That affidavit was clear and I further stated in a statutory declaration signed by myself on the 12 th day of October, 2000 "THAT my son A. Ted Ewachniuk has supported myself and my late husband since 1961 and in the course of doing so, he has spent significant time developing the asset known as Regent Holdings Ltd. for the purpose of providing a cash flow for which we have lived in a most enjoyable manner. Accordingly, the shares from my late husband were transfered (sic) to A. Ted Ewachniuk and no funds are owing in accordance with that transfer. This transfer was in the form of an estate plan so that he would retain control of that Company. I acknowledge and attest to this operation of Regent Holdings by my son over the years..." Furthermore, and for greater clarity: Regent Holdings Ltd. was next to bankrupacy (sic) in 1961; my husband was unemployed and shortly thereafter suffered a severe incapacating (sic) stroke and it was my sons efforts that advanced the development of this company through which he supported us; whereas my Daughters contributed nothing or nothing of any significance that I can recall. My son and the accountant created a bookeeping (sic) job for myself which for a large part was preformed by my son's office staff. Accordingly and as my husband so desired, I want my son to receive Regent Holdings Ltd. in its entirety as it was he that created and maintained this company while supporting and assisting myself, my late husband and other family members at my direction. Simply put, Regent Holdings Ltd.was always to go to my son and without any expense to him and not to go to my daughters or either of them.

4.2 Family Relations Act:

I have been advised of the provisions of the *Family Relations Act* in British Columbia and having regard to the size of my estate at the present time leave everything in the aforesaid manner.

…

ANALYSIS

A. Formalities of Execution

[55] The ***Wills Act***, R.S.B.C. 1996, c. 489 sets out the formal requirements necessary to execute a valid will. The will must be in writing (s. 3), and be signed at its end by the testator or by another person in the name of the testator, in his or her presence, and by his or her direction (s. 4(a)). The signature must be made or acknowledged by the testator in the presence of two or more witnesses who are present at the same time (s. 4(b)), and who subscribe the will in the presence of each other and the testator (s. 4(c)). The testator must be at least 19 years old unless he or she is or has been married, or is in the armed forces (s. 7).

[56] A will may be revoked by the testator's subsequent marriage (s. 14(1)(a)), or by another will made in accordance with the ***Wills Act*** (s. 14(1)(b)). A will may also be revoked by a writing which declares an intention to revoke the will and executed in accordance with the ***Wills Act*** (s. 14(1)(c)), or by the destruction of the will by the testator or any other person acting in the presence of the testator and by his or her direction, with the intention to revoke it (s. 14(1)(d)).

[57] Sophia Ewachniuk's will was witnessed by Magdelene Johnston and Dr. Pulos. By the time of the trial, Magdalene Johnston was unable to give evidence due to her own cognitive difficulties.

[58] I am not prepared to accept Ted Ewachniuk's evidence as to the execution of his mother's will. However, I accept the evidence of Dr. Pulos that both he and Magdalene Johnston witnessed Sophia Ewachniuk sign the will and initial each page on January 11, 2004, and that they both initialled each of the first nine pages and each

signed the tenth page in the presence of each other and Sophia Ewachniuk.

[59] I therefore find that the will was validly executed in compliance with the formal requirements contained in the ***Wills Act***.

B. Suspicious Circumstances

[60] The Supreme Court of Canada clarified the doctrine of suspicious circumstances and its relationship to testamentary capacity, knowledge and approval of contents, undue influence, and fraud in ***Vout v. Hay***, [1995] 2 S.C.R. 876, 125 D.L.R. (4th) 431 [***Vout*** cited to S.C.R.].

[61] The court considered the validity of the will of an 81 year old testator which named a 29 year old friend as executrix and major beneficiary of his estate instead of the members of his family. Sopinka J., for a unanimous court, observed at para. 25 that suspicious circumstances may be raised by:

a) circumstances surrounding the preparation of the will;

b) circumstances tending to call into question the capacity of the testator; or

c) circumstances tending to show that the free will of the testator was overborne by acts of coercion or fraud.

[62] At para. 22 of that decision, Sopinka J. stated:

> Any discussion of the role of suspicious circumstances must start with the statement of Baron Parke in *Barry v. Butlin*, *supra*, at p. 1090 E.R.:
>
> [F]irst ... the *onus probandi* lies in every case upon the party propounding a Will; and he must satisfy the conscience of the Court that the instrument so propounded is the last Will of a free and capable Testator.
>
> [S]econd ... if a party writes or prepares a Will, under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true Will of the deceased.

[63] Sopinka J. explained that while the civil standard of proof on a balance of probabilities applies, it is necessary to scrutinize the evidence offered in accordance with the gravity of the suspicion. He then explained at paras. 26-28 how suspicious circumstances in any of the three categories affect the burden of proof.

[64] Generally, the propounder of a will has the legal burden with respect to due execution, knowledge and approval, and testamentary capacity. Upon proof that the will was duly executed with the requisite formalities, after having been read over to or by the testator who appeared to understand it, the propounder is aided by a rebuttable presumption that the testator knew and approved of the contents and had the necessary testamentary capacity.

[65] The burden of establishing suspicious circumstances rests on those attacking the will. If evidence can be adduced or pointed to which, if accepted, would tend to negative knowledge and approval or testamentary capacity, this burden is satisfied and the legal burden reverts to the propounder.

[66] Therefore if suspicious circumstances are established, the presumption that the testator knew and approved of the contents and had the necessary testamentary capacity is rebutted. The propounder of the will reassumes the legal burden of proving knowledge and approval and establishing testamentary capacity.

[67] On the other hand, the legal burden with respect to fraud and undue influence remains on those attacking the will, even in the presence of a suspicion concerning fraud or undue influence.

[68] There were many good reasons for Ted Ewachniuk not to involve himself in the preparation of Sophia Ewachniuk's will, and no good reasons for him to do so. Despite the fact that he said that he had drawn simple wills for family members, he had no real expertise in drafting wills. He said himself that he recognized that what he said

his mother wished to accomplish was bound to upset his sisters, and lead to a challenge to the estate.

[69] At first instance, the instructions that Ted Ewachniuk said led to his drafting of his mother's will were inconsistent with what his mother had said about how she intended to treat his sisters. On his evidence, he immediately questioned her instructions. According to Ted Ewachniuk, when his mother remained resolute in her instructions, he pointed out the fact that if either sister refused to give him her shares in Regent Holdings the other sister would lose entitlement to all but $5,000.00 of her estate.

[70] Ted Ewachniuk said that he recognized that the will would have to be witnessed by someone who was beyond reproach, leaving the clear inference that he expected the will to be questioned.

[71] As he expected to benefit from the provisions of the will, the fact that the will was to be kept secret was another clear indication as to why it should not have been drafted by Ted Ewachniuk. The cost of legal services, if they truly were a concern for Sophia Ewachniuk, could well have been absorbed by Ted Ewachniuk as he stood to gain so much from what he said his mother wanted to accomplish by her will.

[72] Ted Ewachniuk should never have agreed to draw the will signed by his mother in January 2004. The fact that he did in the circumstances does more than raise suspicion; it cries out for it.

C. The Testamentary Capacity of Sophia Ewachniuk up to and Including January 2004

[73] Due to the presence of suspicious circumstances surrounding the making of Sophia Ewachniuk's will, Ted Ewachniuk must dispel those circumstances and prove that Sophia Ewachniuk had the necessary testamentary capacity.

[74] The capacity required to direct the distribution of one's estate by will is modest. To be of a sound and disposing mind and memory, a testator must:

1) be aware they are making the will that takes effect on their death;

2) understand the nature and extent of the estate to be disposed of by will;

3) be aware of those having a claim to the estate;

4) have no disorder of the mind.

see ***Banks v. Goodfellow*** (1870), L.R. 5 Q.B. 549 at 567.

[75] I have carefully considered the evidence of the plaintiffs and the witnesses other than Ted Ewachniuk as to the testamentary capacity of Sophia Ewachniuk in January 2004. Despite one occasion where Sophia Ewachniuk failed to recognize Dr. Pilar and some anecdotal evidence from the plaintiffs, the clear preponderance of the evidence satisfies me that Sophia Ewachniuk had the necessary capacity to direct the disposition of her estate by will up to and including January 11, 2004.

D. Sophia Ewachniuk's Knowledge and Approval of the Contents of the Will

[76] In addition to proving that Sophia Ewachniuk had the requisite testamentary capacity, the suspicious circumstances raised in this case require Ted Ewachniuk, as the propounder of the will, to prove that she knew and approved of the contents of the will.

[77] Is there any reliable evidence that Sophia Ewachniuk read or had her will read or explained to her? The only evidence that counsel for Ted Ewachniuk was able to point to on this issue was the fact that the document states that it was read by Sophia Ewachniuk, and the evidence of Ted Ewachniuk. The former is not without problems, and the latter rests upon Ted Ewachniuk's credibility.

[78] Ted Ewachniuk insisted that his mother was exacting in the accuracy of legal and other documents such as her affidavit of September 17, 1986. His insistence as to his mother's care with that document was curious as it contained a number of inaccuracies such as the spelling of his sisters' names.

[79] The last page of the will refers to Sophia Ewachniuk subscribing her name to "this and the preceding 10

pages" of the document presented as her last will and testament. The document consists of only ten pages in total. Counsel for Ted Ewachniuk argued that the reference to ten pages on the final page was meant to include that page as well, but in my view, that interpretation is inconsistent with the care that Ted Ewachniuk said his mother took generally with documents that she was asked to sign.

[80] In relation to the clause in the will entitled "4.2 ***Family Relations Act***", Ted Ewachniuk conceded in cross-examination that he had no idea what the provisions of the ***Family Relations Act***, R.S.B.C. 1996, c. 128 were. He also agreed that he could not have explained them or their reference to them in the document to his mother.

[81] Neither of these points support that Sophia Ewachniuk read the document carefully, if at all, before she signed it on January 11, 2004.

[82] I do not accept Ted Ewachniuk's evidence in chief that his mother carefully read her will and discussed it with him on five or six occasions before she signed it on January 11, 2004.

[83] I also do not accept Ted Ewachniuk's evidence in chief that he reviewed every sentence of the will with his mother. By the time his cross-examination was underway, Ted Ewachniuk was forced to retreat from this evidence.

[84] Although it was Ted Ewachniuk's evidence that his mother read her will over in front of Dr. Pulos, Dr. Pulos was clear that she did not.

[85] Ted Ewachniuk said that Dr. Pulos asked Sophia Ewachniuk if she had read the will and understood its contents when he witnessed execution of its contents. Dr. Pulos gave no evidence that could be said to be consistent with this evidence, and I reject Ted Ewachniuk's evidence in this regard.

[86] When challenged with the apparent difference between his mother's signature on the will of January 11, 2004, and her affidavit of September 17, 1986, Ted Ewachniuk recalled that his mother complained that the space for her signature was too small. Dr. Pulos did not recall this comment by Sophia Ewachniuk while she was signing the will. The difference in the signatures is not sufficient to raise any real concern, but given the evidence of Dr. Pulos, I reject the evidence of Ted Ewachniuk as to the commentary he attributed to his mother when she signed the will.

[87] Despite the rejection of Ted Ewachniuk's evidence concerning his mother's execution of the will of January 11, 2004, I conclude that Sophia Ewachniuk knew of the provisions of the document she signed on January 11, 2004. However, there is distinction between knowledge and approval of contents of the will and undue influence; a testator may be fully aware of what he or she is doing but have his or her independence of will completely overborne: see James MacKenzie, *Feeney's Canadian Law of Wills*, 4th ed. (Toronto: Butterworths, 2000) at 3.1.2 [*Feeney's*].

E. Was Sophia Ewachniuk's Will Procured by Undue Influence?

[88] Despite the presence of suspicious circumstances, the burden of proving undue influence rests on the plaintiffs. Undue influence can be established on a balance of probabilities through circumstantial evidence: see ***De Araujo v. Neto***, 2001 BCSC 935 at para. 132, 40 E.T.R. (2d) 169.

[89] While a testator may appreciate what he or she is doing, it may still be the result of coercion or fraud: see ***Vout*** at para. 29. What amounts to undue influence was expressed by Viscount Haldane in ***Craig v. Lamoureux***, [1920] 50 D.L.R. 10 at 15, [1920] A.C. 349 (P.C.):

> As was said in the House of Lords when *Boyse v. Rossborough* (1856), 6 H.L. Cas. 2, was decided, in order to set aside the will of a person of sound mind, it is not sufficient to shew that the circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue influence. It must be shewn that they are inconsistent with a contrary hypothesis. Undue influence, in order to render a will void, must be an influence which can justly be described by a person looking at the matter judicially to have caused the execution of a paper pretending to express a testator's mind, but which really does not express his mind, but something else which he did not really mean. And the relationship of marriage is one where it is, generally speaking, impossible to ascertain how matters have stood in that regard.

> It is also important in this connection to bear in mind what was laid down by Sir James Hannen in *Wingrove v. Wingrove* (1885), 11 P.D. 81, and quoted with approval by Lord Macnaghten in delivering the judgment of this Board in *Baudains v. Richardson*, [1906] A.C. 169, that it is not sufficient to establish that a person has the power unduly to overbear the will of the testator. It must be shewn that in the particular case the power was exercised, and that it was by means of the exercise of that power that the will was obtained. [Emphasis added.]

[90] Because no one but Ted Ewachniuk knew of the preparation and terms of the will signed January 11, 2004 prior to the death of Sophia Ewachniuk, the only evidence from which to assess the presence or absence of coercion is his.

[91] It must be clear that this does not suggest that the onus lies upon Ted Ewachniuk to disprove coercion, as clearly it does not. However, the reality of the situation that he created is such that I must assess that the allegation of coercion by testing his evidence against "the preponderance of probabilities that rationally emerge out of all the evidence in the case": see ***Faryna v. Chorny***, [1952] 2 D.L.R. 354 at 359, 4 W.W.R. 171 (B.C.C.A.).

[92] Ted Ewachniuk was a very poor witness. He was argumentative and non-responsive to questions asked by both his own lawyer and counsel for the plaintiffs. I am satisfied that when he was challenged in cross-examination, he said whatever he felt would assist his case regardless of whether it was true or not.

[93] When Ted Ewachniuk was caught in clear inconsistencies he obfuscated and gave long, rambling, and largely deflecting answers. He mentioned the names of various well-known individuals without any apparent reason, other than to seemingly try to benefit from associating himself with those people.

[94] Initially he said that he heard his mother give evidence at his divorce proceedings in 2000. However, he quickly resiled from that evidence when portions of the evidence attributed to his mother that were unhelpful to his case were put to him to confirm their accuracy.

[95] Despite his assertion that his sister, Mary Anne Runnalls, is indebted to him for a significant amount of money due to the mortgage between them for which he offered various figures, Ted Ewachniuk agreed that that debt was not disclosed as an asset in his divorce proceedings.

[96] In many instances where another witness could corroborate or contradict the evidence of Ted Ewachniuk, there was a distinct lack of corroboration.

[97] In his evidence in chief, Ted Ewachniuk described a pubic fracture sustained by his mother. He said this was diagnosed as a result of x-rays interpreted by Dr. Pilar. Dr. Pilar denied making such a diagnosis of Sophia Ewachniuk. I accept the evidence of Dr. Pilar over that of Ted Ewachniuk.

[98] In addition, Ted Ewachniuk insisted that Linda Meinhardt offered to act as some sort of mediator to resolve the dispute between him and his sisters. Ms. Meinhardt denied such an offer and said she was unaware of any dispute between Ted Ewachniuk and his sisters. I accept her evidence in preference to that of Ted Ewachniuk.

[99] According to her doctor's evidence and his records, by January of 2004, Sophia Ewachniuk was a sad and somewhat lonely woman. Her daughters lived across the country and her husband and many of her contemporaries had passed away. She was unable to manage her own daily affairs and was dependant on others to assist in her care. For the most part, those others consisted of staff hired and paid for by Ted Ewachniuk. Certainly Sophia Ewachniuk may have had some say in terms of who was hired to assist her, but she was reliant upon her son to locate and pay for this assistance.

[100] To his credit, Ted Ewachniuk was very caring of his mother by all accounts. He and his wife filled in for her caregivers on weekends. Ted Ewachniuk would sleep at his mother's home on weekends when her caregivers did not.

[101] Her groceries and medications were purchased for her by her son or his wife. Any outings that she enjoyed, such as attending church, depended upon being taken by her son. Even her attendances to the Douglas Park seniors program could not reliably depend on the HandyDART system, and thus she was reliant on her son and his wife to attend the program with any regularity.

[102] By January 2004, Sophia Ewachniuk was, as she told Dr. Pilar, a lonely woman, and from the evidence of

the plaintiffs and Ted Ewachniuk, a woman who was beginning to experience some confusion. By this time she was very vulnerable and had become virtually dependant on her son and his wife for all aspects of her existence. She could be easily and improperly influenced by Ted Ewachniuk.

[103] I have concluded that Ted Ewachniuk has an aggressive and domineering personality both in general, and in particular, in his desire for the absolute ownership of the shares in Regent Holdings. I have no doubt that by late 2003, and certainly by January of 2004, Ted Ewachniuk knew that his mother was vulnerable and considerably dependant upon him, and that he was well able to profoundly influence her decisions.

[104] Sophia Ewachniuk received no advice independent from Ted Ewachniuk about the preparation of her will and the manner in which the will addressed the distribution of her estate.

[105] I reject Ted Ewachniuk's protestations that he was not actively seeking ownership of his sisters' shares in Regent Holdings long before the execution of his mother's will. I reject his evidence that others, such as the unnamed banker he referred to in his cross-examination commented that he should have all the shares in the company.

[106] The resolution of this issue requires the exercise of common sense. Why would a mother who was said to be a fair and generous woman by all who gave evidence and who felt that she herself had not been treated fairly in the distribution of assets to which she had a claim, suddenly, and in her declining years, prefer to favour her son in her will over her sisters?

[107] Why would she favour her son when he was apparently not in need when at least one of his sisters was clearly, and to her knowledge, in need?

[108] Why would Sophia Ewachniuk want to keep her intentions a secret from her daughters if she felt that they would accede to her wishes?

[109] Why would she tell her son that his sisters would accept her decision on one occasion, but on another say that he was a big boy who could withstand his sisters' dissatisfaction with her will, if she expected that they would accept her decision?

[110] Why would Sophia Ewachniuk say that her daughters would benefit from "riding Ted's coat tails" and benefit from the value of their shares in the family company if she did not intend them to keep those shares?

[111] Why would Sophia Ewachniuk think that her daughters would give their shares in Regent Holdings to their brother Ted if, as she knew, their value exceeded one-third of the value of her estate?

[112] Why would Sophia Ewachniuk suddenly depart from both her and her husband's intention that their children share equally in the value of their parents shares that were sold to their son, with the express intention that the three children would share equally in that sale price on the death of the parents?

[113] Why would Sophia Ewachniuk insist that both of the plaintiffs had to surrender their shares in Regent Holdings before either would receive a significant share of her estate?

[114] I have concluded that even though Sophia Ewachniuk was aware of the terms of the will she signed on January 11, 2004, that she only signed the will as a result of coercion on the part of her son Ted, and his ability to unduly overbear his mother's will. While some of the questions posed in the preceding eight paragraphs may be capable of answers consistent with another conclusion, the totality of those questions and the evidence adduced at trial persuade me that Sophia Ewachniuk's will of January 11, 2004 was procured by the undue influence of her son.

[115] Ted Ewachniuk's evidence did nothing to dispel this conclusion. There was no situation presented to him that he did not confidently explain away, no matter how implausible his explanation. I am satisfied that he coveted his sisters' shares in Regent Holdings, that he worked on his mother over an extended period of time prior to January 2004 to so overbear her, that she executed a will that was contrary to what she would have done of her own free will.

[116] In weighing the totality of the evidence, I find that the plaintiffs have discharged their burden of proving that the will executed by Sophia Ewachniuk on January 11, 2004, although read and understood by her, was not executed of her own will, but was procured by the undue influence of her son Ted Ewachniuk. As a result, the will is

invalid.

F. Is the Will Invalid as Impossible to Fulfill?

[117] The plaintiffs also assert that Sophia Ewachniuk's will of January 11, 2004 is impossible to fulfill for two reasons:

a) the provisions of the will require each of the plaintiffs to make an election, but unless both make the same election, they cannot receive one-third of their mother's estate; and

b) the will contains a provision that is uncertain.

[118] Sophia Ewachniuk's will of January 11, 2004 put the plaintiffs to an election: they may either both give their shares in Regent Holdings to Ted Ewachniuk and receive one-third or their mother's estate, or if one or both choose to retain their shares they receive $5,000.00 each and their interests in their mother's estate would pass to Ted Ewachniuk.

[119] The law permits the inclusion of certain elections in a will on equitable grounds, but requires that two conditions must be met. First, a beneficiary must be given a bequest under a will in property which the testator had the right to dispose of, and second, the testator must indicate in the will a clear intention to dispose of such beneficiary's own property to a third person: see ***Graham v. Clark et al.***, [1949] 4 D.L.R. 770 at 773, [1949] 2 W.W.R. 1042 (Alta. S.C. App. Div.).

[120] In the case of ***In re Dicey, Dec'd. Julian v. Dicey*** (1956), [1957] Ch. 145 (C.A.) [***In re Dicey***], the English Court of Appeal confirmed that a class of beneficiaries is not exempted from the principle of election merely because each member of that class can contribute only a part of the total subject matter of the gift which the testator has purported to effect.

[121] In the result, the election to which Sophia Ewachniuk put her two daughters is a valid election and does not render the will invalid as impossible to fulfill.

[122] Mr. Sourisseau did argue that the condition that each plaintiff had to surrender her shares in Regent Holdings to Ted Ewachniuk before receiving a one-third share of her estate was impossible for either plaintiff to fulfill, acting alone. I do not read ***In re Dicey*** as supportive of that argument. In this case, as neither plaintiff gave evidence that she was willing to surrender her shares in Regent Holdings to Ted Ewachniuk, the argument is moot. Even if it were not, I do not consider that the condition was invalid because it required the plaintiffs to act together. It was simply a condition that required joint action on their behalf.

[123] In his oral submissions, Mr. Sourisseau abandoned his argument that the will was void for uncertainty.

[124] I therefore reject the plaintiffs' submissions that the will was impossible to fulfill.

G. Is the Will Invalid as Contrary to Public Policy?

[125] The plaintiffs argue that the will contains a condition that is invalid on the grounds that it is repugnant to the mores of contemporary society such that it offends public policy.

[126] A condition may be declared void as contrary to public policy where it is not in the interest of the public or the Crown. Whether a condition is contrary to public policy may vary based on changes in public opinion: see *Feeney's* at 16.27. Provisions that courts have held to be void include conditions provoking the commission of a crime (see ***Shrewsbury v. Scott*** (1859), 141 E.R. 350) or an act prohibited by law (see ***Re Piper***, [1946] 2 All E.R. 503 (K.B.)); conditions inducing the separation of a husband and wife (see ***Brown v. Peck*** (1758), 28 E.R. 637) or an unreasonable restraint on marriage (see ***Jones v. Jones*** (1876), 1 Q.B.D. 279); and conditions that attempt to avoid dependents' relief legislation (see ***Kent v. McKay*** (1982), 38 B.C.L.R. 216, [1982] 6 W.W.R. 165 (S.C.)).

[127] The plaintiffs have provided me with the decision of ***Re Fairfoull*** (1973), 41 D.L.R. (3d) 152, [1973] B.C.J. No. 356 (QL) (B.C.S.C.), aff'd on reconsideration in [1974] 6 W.W.R. 471, 18 R.F.L. 165 (B.C.S.C.) on the issue of public policy. This case holds that a condition requiring a testator's son to divorce his wife in order to receive a gift

was void as contrary to public policy. I do not consider that the reasoning in that case assists the plaintiffs in this case.

[128] Although Mr. Sourisseau argued that the condition of the surrender of the plaintiffs' shares to Ted Ewachniuk within 90 days of their receipt of Sophia Ewachniuk's disposition was contrary to public policy, the plaintiffs have provided no authority in support of such a conclusion, and I see nothing to uphold this argument. I do not consider that a condition requiring the plaintiffs to surrender their shares upon the receipt of their interest in Sophia Ewachniuk's estate is contrary to interest of the public, or contrary to public policy in the same manner as inducing a divorce or the commission of a crime. I therefore reject this argument.

CONCLUSION

[129] I find that the Sophia Ewachniuk's will dated January 11, 2004 is void and accordingly did not revoke her prior will. The only evidence as to the possibility that she shredded her earlier will is that of Ted Ewachniuk, and I find his evidence to be fabricated and offered in the face of an admission in his statement of defence to which no effort was made to formally withdraw.

[130] Given his evidence at trial, there can be no argument that Ted Ewachniuk destroyed the earlier will on the instruction of his mother. In the absence of evidence that that will was destroyed, I find that the earlier will was not revoked.

[131] Although the plaintiffs sought an order for the appointment of an administrator in their pleadings, no submissions were made on this issue. I invite counsel to provide me with submissions on the matter of the appointment of a personal representative of Sophia Ewachniuk's estate, and any other matter relating to my judgment.

[132] The plaintiffs will have three weeks from the date of these reasons for judgment to make whatever written submissions they wish to make with respect to the appointment of a personal representative, with respect to costs in this action, and any other issue arising from these reasons for judgment.

[133] Ted Ewachniuk will have three weeks to respond following the receipt of any submissions on behalf of the plaintiffs. Failing any such submissions, he will have six weeks from the date of these reasons for judgment to make written submissions on any matter arising from these reasons for judgment.

"Hinkson J."