

Court of Queen's Bench of Alberta

Citation: Petrowski v. Petrowski Estate, 2009 ABQB 196

Date: 20090331
Docket: 0303 16218
Registry: Edmonton

Between:

Peter Petrowski

Plaintiff

- and -

Joan Doreen Petrowski, Executrix of the Estate of Nick Petrowski, Deceased and Joan Doreen Petrowski

Defendants

**Reasons for Judgment
of the
Honourable Madam Justice A.B. Moen**

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I. INTRODUCTION

[1] Nick Petrowski farmed near Viking, Alberta. He had two children, Peter Petrowski, the Plaintiff and challenger of Nick Petrowski's Will and Joan Petrowski, executrix of the Will and Defendant in this action. I will refer to them as Peter, Nick and Joan, not out of disrespect but because they all have the same last name and it will be clearer for the reader.

[2] Nick Petrowski died on February 21, 2001, at the age of 92. In his Will, which he made in August, 2000 (Will or 2000 Will), he left all of his property to his daughter, Joan whom he also made the executrix of his Will. Three months before he passed away he executed transfers of all of his farm and mineral titles into joint names with his daughter Joan.

[3] When Peter was between 18 and 22 years old, Nick bought him farmland and gave him cattle. Nick and Peter used Nick's machinery and Nick helped Peter farm his land. Peter lived with Nick. When Peter married Annette in 1963, he and Annette lived in a house on Nick's farm where they resided until 1967 when they moved to Peter's land.

[4] After Nick's wife died in December 1973, Joan moved from Edmonton to live with her father on her father's farm where she looked after her father and assumed a major role of managing the farm. She also went into a business of training and boarding race horses on that farm. Throughout her time on the farm, as Nick's cattle were sold, the new cattle were put in Joan's name until at the time of Nick's death, all the cattle had her brand. However, the revenue for the cattle was always claimed by her father, Nick, on his income tax return.

[5] Peter challenges the Will and certain transfers of Nick's land and minerals to Joan prior to Nick's death. Peter says that his father, Nick, was not of sound mind and/or that Nick was under undue influence of Joan when he executed his Will and transferred the property to Joan.

[6] Further, Peter says that if Nick was of sound mind, that Nick ought to have left part of the estate to Peter, who, when he was thirty years old, had a farming accident which caused him to be paralysed from the chest down for the rest of his life. Peter says that this made him a dependant adult.

[7] The issues before me therefore are:

1. Did Nick Petrowski have testamentary capacity when he executed his Will on August 10, 2000?
2. Was Nick Petrowski subject to undue influence when he executed his Will?
3. Did Nick Petrowski have mental capacity when he executed transfers of lands, mines and minerals into joint names November 18, 2000?
4. Was Nick Petrowski subject to undue influence when he executed those transfers?
5. If Nick Petrowski was of sound mind and not subject to undue influence when he executed the transfers, what was the nature of the transfers?
6. In the event the Will and/or the transfers are declared valid, is Peter Petrowski entitled to a claim under the *Family Relief Act*? If so, what is the value of his claim?
7. In the event the Will and the transfers are declared to be invalid, is Joan Petrowski entitled to a claim for unjust enrichment?

[8] For the reasons set out herein, I find that Nick did have testamentary capacity, that he had capacity when he executed the transfers, that Joan did not exert undue influence on Nick when he made his Will and executed the transfers and that Peter does not have a claim to relief under

the *Family Relief Act*. Finally, I find that there was unjust enrichment by Nick or Nick's estate at the detriment of Joan.

II. DISCUSSION

A. Did Nick Petrowski have testamentary capacity when he executed his Will on August 10, 2000?

[9] The Plaintiff submits that the Last Will and Testament of August 10, 2000 made by Nick Petrowski should be set aside because Nick lacked testamentary capacity. Should the Will be set aside, Nick's estate would then be divided among his surviving children, Peter and Joan, pursuant to the *Intestate Succession Act*.

[10] To determine if the Will is valid in the circumstances of this case, there are three steps in the analysis. First, Joan Petrowski, as the proponent and executrix of the Will, has the burden of proving on a balance of probabilities the required formalities of the Will, that is that the Will was read over by or to the testator who appeared to understand it and that the Will was duly executed. If the propounder does so, there is a rebuttable presumption that there was testamentary capacity: *Vout v. Hay* [1995] S.C.J. No. 58 at para. 26.

[11] Second, the challenger to a will may raise suspicious circumstances to negative testamentary capacity. Evidence of suspicious circumstances is "evidence which, if accepted, would tend to negative knowledge and approval or testamentary capacity" *Vout* at para. 27. Here, Peter must raise enough evidence to satisfy the Court of suspicious circumstances before the burden shifts again to the propounder, Joan, to prove testamentary capacity on a balance of probabilities.

[12] Testamentary capacity or "sound disposing mind" are demonstrated when the testator understands the nature and effect of a will, recollects the nature and extent of his or her property, understands the extent of what he is giving under the will, remembers the persons that he might be expected to benefit under his will, and, where applicable, understands the nature of the claims that may be made by persons he is excluding from the will: *Hall v. Bennett*, [2003] O.J. No. 1827 (C.A.) at para. 14.

[13] There are three categories of suspicious circumstances: first, circumstances surrounding the preparation of the will; second, circumstances tending to question the capacity of the testator, or third, circumstances tending to show that the free will of the testator was overborne by acts of coercion or fraud: *Vout* at para. 25. In the case before me, Peter suggests that there are suspicious circumstances in all three of these categories which circumstances invite this Court to look more closely at the preparation of the Will.

[14] Here, at trial Peter acknowledged that the formalities of the Will had been proved and therefore that the onus shifted to him, as Plaintiff, to raise suspicious circumstances. Nevertheless, Peter has raised circumstances surrounding the formalities that he says are suspicious.

[15] Therefore, I must first determine if Joan has proved the Will on a balance of probabilities with respect to execution, knowledge and approval of the Will. Then I will consider the evidence of the challenger to determine if Peter has raised enough evidence to raise suspicious circumstances pertaining to testamentary capacity. In this regard, I shall discuss the circumstances that Peter says are suspicious with respect to the formalities of the Will and testamentary capacity. Then, if I am satisfied that suspicious circumstances exist, the burden shifts again to Joan to prove testamentary capacity.

[16] With respect to the third category of undue influence, the burden lies on Peter to show undue influence or fraud on a balance of probabilities: *Vout* at para. 28.

[17] The trial commenced with the Plaintiff who put in evidence of suspicious circumstances and then the trial shifted to the Defendant to put in evidence of testamentary capacity. There was no rebuttal evidence put in by the Plaintiff.

1. Are the required formalities of the Will proved?

[18] Although it was conceded by the Plaintiff that the formalities had been proved, for the purposes of this analysis I intend to review the evidence that goes to whether the propounder of the Will has first proved the validity, that is the formalities, of the Will and therefore the presumption of testamentary capacity. The propounder must prove the formalities on a balance of probabilities.

a) How the Will came about

[19] Here, I review the evidence surrounding the giving of the instructions and the execution of the Will by Nick. The evidence before me is largely that of Derek Milen, (Milen), the lawyer who drew up the Will. Peter raises a number of objections to Milen's evidence which I will address in the section on whether Peter has raised suspicious circumstances.

[20] Milen practices law in Lloydminster, a rural community in Alberta on the Saskatchewan border. He studied law in Regina, Saskatchewan where he articulated in 1975. He said that he had been preparing wills since 1979. Given his rural practice, Milen said the preparation of wills takes up a reasonable percentage of his legal practice. He has partners who also practice in the area.

[21] As I discuss in more detail later, Milen knew Nick through Joan's horse racing business. He had met Nick many times over four years both at the races and on Nick's farm prior to his taking instructions from Nick for Nick's Will.

i) Instructions for the Will

[22] On August 4, 2000, in the context of a horse race in Edmonton, Milen was asked by Joan to come to the tack room to discuss estate planning matters with Nick. He offered to do so at

about 11 a.m. on August 5. When he arrived at the tack room, both Joan and Nick were there. Milen met with both of them.

[23] During the meeting he observed Nick, whom he had known at that point for four years. He was not concerned about Nick's health, mental or physical, as Nick looked and acted pretty much the same as he had for the four years he had known him.

[24] They discussed estate planning. Milen asked Nick about the nature of his assets. Nick told Milen about his lands, 3 sections in two counties, the County of Beaver and the County of Minburn, mines and minerals, cattle, grain and money in the bank. What Milen was told was consistent with Milen's visits to the farm in the previous four years.

[25] After Nick told Milen about his assets, Nick told Milen that he (Nick) had made a Will already in 1974 (1974 Will), in which everything was to go to Joan. Milen recalled that Joan had previously explained to Milen that Nick had settled up with Peter.

[26] During the course of the conversation, Nick told Milen that he had married Mary Juba. Milen enquired as to when this had occurred and Nick said he was married until the early '80s. Nick could not remember the date of his marriage to Mary. He also said that he did not think he was ever divorced. Nick explained to Milen the terms of the settlement agreement he had entered into with Mary when they separated. From that information, Milen told Nick that he was sure the original Will predated Nick's second marriage and therefore the 1974 Will was void. Nick was shocked because Nick did not know that the marriage invalidated his will.

[27] Milen understood that he had met that day with Nick to discuss estate planning, not anything to do with a will.

[28] Milen suggested they continue with the estate planning discussion and asked Nick what his objectives were. Nick told Milen that he wanted it clean and simple when he died. He wanted Joan to get everything. Milen asked him if he wanted to involve anyone else in his will. Nick told Milen that he had previously settled up with Peter by giving him land and implements and Nick wanted to give Joan the farm, just as he had set it out in his 1974 Will.

[29] Nick and Milen continued to discuss the estate plan. They discussed a number of complicated subjects which Milen said that Nick understood. They discussed probate and the complexities of probate. They discussed a number of options that would provide a tax neutral way to accomplish the transfer including transferring the land before Nick's death to Joan by way of a rollover under the *Income Tax Act* thereby incurring no tax. They discussed the option of using the capital gains exemption. Milen explained to Nick that both of those options would result in everything going to Joan immediately. They also discussed joint tenancies and what would be involved, including joint tenancy for estate planning purposes only - whoever lived the longest would end up with everything which was likely to be Joan as survivor on Nick's death. Nick said that he liked that arrangement where everything remained in both hands. At the end, Nick instructed Milen to prepare documents for a joint tenancy.

[30] Milen then asked for additional information about the lands, mines and minerals and the settlement agreement with Mary and the original Will. Because Nick and Joan told Milen that they might not have the documents, Milen was instructed to contact the legal counsel involved in the settlement agreement with Mary. On August 10, the lawyer faxed Milen a copy of the agreement between Nick and Mary. Milen was satisfied from his review of that document that everything Nick had told him was consistent with the settlement agreement. In fact, Nick was correct that there had never been a divorce.

[31] Milen understood that Joan would look in the safety deposit box for the 1974 Will. However, Milen was never given a copy of the 1974 Will.

[32] Milen also asked Nick for a valuation of the mines and minerals which were producing revenue on Nick's lands. In order to transfer the mines and minerals, a fair market value of the mines and minerals had to be ascertained. This was a difficult task. Milen asked Joan for any information that they had on this subject. In order for Joan to swear a value of the mines and minerals, she had to have proper evidence. She ultimately obtained a written opinion from a gas company as to the value of the mines and minerals. Joan gave those numbers to Milen.

[33] At the end of the meeting in the tack room, which lasted for about an hour, Milen told Nick that they needed to discuss a will and an enduring power of attorney. However, Milen had to leave for brunch with his wife, and therefore asked to meet with Nick at the conclusion of the races on the tarmac at the bottom of the grandstand.

[34] After the races were over at about 5:30 that afternoon, Nick met Milen in Nick's car. This was a private meeting between the two of them. Milen asked Nick a number of questions. Milen told Nick that Nick did not have a valid will. Milen asked him a number of questions about the contents of a new will. Nick told Milen that Joan would be the executor and the will was to give everything to Joan as he had in the 1974 Will. They then discussed an enduring power of attorney. Milen explained all the powers that Joan would have - they were numerous. Milen explained that he could curtail the powers. Nick said that he trusted Joan and that Milen should give Joan everything. Milen asked Nick when he wanted it to come into effect. Nick told him to make it immediate.

[35] The discussion was short about the will and reiterated the morning discussion. It lasted about 20 minutes. At the end of that second meeting, Milen understood that his instructions from Nick were that he was to draw a new will, a power of attorney and documents transferring the lands and mines and minerals into Joan and Nick's name in joint tenancy.

[36] What Nick told him that day was consistent with Milen's knowledge about the family.

[37] I take particular note of the fact that Milen knew Nick well over four years. Nick and Joan were two people that had not just walked in off the street to Milen's office. Milen had observed them over the course of four years at the races and at their home at the farm. That day in August, Nick was alert, answering questions. He was the same as he had been over four years.

Also, Milen understood he was given instructions to prepare a will which was the same as the earlier will. Everything Nick said was consistent with Milen's observations over the four years.

[38] Milen said he had no reason to be suspicious.

ii) Execution of the Will

[39] Milen prepared the Will (2000 Will or Will) and Enduring Power of Attorney over the next five days. On August 9, he told Joan that he wanted to see Nick. They arranged for Milen to meet with Nick on the farm on August 10 for lunch. Milen's purpose for going to the farm was to review the Will and the Enduring Power of Attorney with Nick and to have Nick execute the documents.

[40] Whenever Milen visited the farm there was usually someone else besides Nick present, including Joan or a hired hand. In August, 2000, Nick was 91 years old and before Nick executed the Will, Milen wanted to ensure that Nick had testamentary capacity. Milen had lunch, prepared by Joan, in Joan's dining room with Nick and hired hands. Milen observed Nick at lunch for about an hour and saw no changes in him. Nick was alert, involved in the conversation and did not require assistance with moving or eating. Nick ate a whole plate of food. Milen said that Nick was the same man as he had seen five days earlier and the same as he had known for four years.

[41] After lunch, because Milen wanted to have a few words with Nick alone, Nick and Milen went to Nick's trailer where they chatted for a few minutes. The notes Milen made about that meeting stated that he wanted to observe Nick as to his capacity. Milen looked to see if Nick was paying attention, how he responded to questions, if he was alert. Milen said that he saw no difference in Nick from times he had met with him previously.

[42] After a few minutes in Nick's residence and before Nick executed the Will and Power of Attorney, Nick requested that Joan come into his trailer while they went through the formalities of executing the Will. There was a rectangular table in Nick's kitchen. Milen sat on the long part of the table with Nick to his right and Joan to his left both, on the shorter two sides of the table. Before Milen reviewed the Will with Nick, he asked Nick to tell him again what was to happen to his assets: as to the land – he said “all to Joan”; as to the mines and minerals – he said “all to Joan”; as to the cattle – he said “all to Joan”; as to the bank accounts – Nick raised his hands and said “all to Joan”.

[43] As Milen explained the Will to Nick, Nick listened to Milen and looked directly at Milen, not at Joan. Milen was within touching distance of Nick. Milen pointed out to Nick the various clauses of the Will including those which involved Joan being the executor and those which were specific bequests. They discussed the specific clauses of the Will. In each case Milen asked Nick if this is what he wanted to happen. In every case Nick said yes. Throughout the conversation Joan said nothing.

[44] Milen's uncontradicted evidence was that he reviewed the 2000 Will with Nick, Nick understood and approved the contents of the 2000 Will in the presence of Jeff Watt, (Jeff), and Milen, and Jeff and Milen both signed the 2000 Will as witnesses.

iii) *The Enduring Power of Attorney*

[45] After he discussed the Will, Milen discussed the Enduring Power of Attorney with Nick. I am satisfied from the evidence given at trial by Milen that he thoroughly went over the Enduring Power of Attorney and explained the effect of that document to Nick. Nick again said that he trusted Joan and wanted to sign.

[46] When Nick was ready to sign the documents, the hired hand, Jeff, was asked by Joan to come in to witness the Will and the Enduring Power of Attorney. Once the documents were signed by Nick and witnessed by Jeff, Jeff left. Nick instructed Milen to give the original documents to Joan.

[47] Milen prepared a memo with respect to these events and discussions.

iv) *Discussions about the Estate Plan*

[48] Once the Enduring Power of Attorney and the Will were executed, Nick discussed the estate plan with Milen. As discussed above they had earlier discussed transfers of the land to joint tenancy. Joan was present during those discussions between Nick and Milen. They talked about the mines and minerals and a number of other things relating to the lands. Milen reminded them he required the valuations for the mines and minerals.

[49] After Milen had his instructions that day, he went back to his office and between the August 10 meeting and November, Milen worked on the estate plan and prepared the transfers.

v) *Conclusion on formalities of Will*

[50] I conclude that Joan has proved the formalities of the Will. Therefore, the onus shifts to Peter to show on a balance of probabilities that there are suspicious circumstances surrounding the preparation and execution of the Will.

b) *Circumstances raised by Peter as suspicious - first category*

[51] As I set out above, there are 3 categories of suspicious circumstances. Peter states that there are suspicious circumstances in all three. I will deal with all three categories.

[52] In this section, I deal with the first category, that being circumstances surrounding the preparation of the Will. I have set out the circumstances surrounding Nick's giving of instructions for and execution of the Will. Here, I will outline Peter's complaints in this regard.

[53] In the first category, Peter says that the suspicious circumstances surrounding the preparation and execution of Nick's Will are as follows:

- executed in secrecy from Peter;
- prepared by a lawyer who was Joan's friend and business partner and who had a vested interest in the Will because he boarded his horses on the farm, and he was defending the Will he had prepared;
- Nick was not provided with independent legal advice;
- Nick's instructions were provided at the horse races and the Will was executed at his home;
- the lawyer asked no questions regarding capacity or undue influence;
- Nick insisted Joan be present when the Will was executed;
- Nick was not asked about his moral duty to leave something to Peter;
- Nick was not asked about the extent of his estate;
- the lawyer wrote off his fees for preparation of the Will; and
- the court should draw an adverse inference because the hired hand who witnessed the Will was not called by the Defendant.

I will deal with each of these points.

i) Secrecy

[54] Peter says that the Will was executed in secrecy. I do not accept this. There was simply no evidence before me of any attempt or intention to prepare the 2000 Will in secrecy from Peter. The fact that Peter was not present does not suggest to me that it was done in secret.

[55] I do not know of any law that suggests that all children must know about their parents' preparation of a Will. Therefore, even if Nick was surreptitious about the preparation of his Will, that, in and of itself, is no reason to raise suspicious circumstances.

ii) Relationship between Milen and Joan

[56] Peter says that the Will was prepared by a lawyer who was Joan's friend and business partner, who had a vested interest in the Will because he boarded his horses on the farm, and who was defending the Will he had prepared. These are three separate points which I will deal with in turn.

[57] I turn first to Milen's relationship with Joan. Joan's occupation throughout most of her adult life was to raise and train race horses for others. Milen knew Joan through his hobby of horse racing.

[58] Milen connected with Joan in 1996 through friends of his, the Pages, who owned race horses and were using Joan for a number of services relating to their horses.

[59] The Pages were also clients of Milen's. When they asked him if he wanted to go into ownership of a horse with them, he inquired as to how the horse would be cared for. He was told by the Pages that Joan provided services included boarding, training, feeding, transporting and finding jockeys to race the horses. There were two arrangements possible with Joan: one was to pay a per diem to her for boarding the horses, the other was to give a percentage ownership in the horse to Joan with a certain amount contingent on the horse winning. Milen liked that arrangement because it was an incentive contingency. The arrangement between the parties was that Joan would board the horse, take the horse to Calgary in its second year and teach the horse what racing was all about. The contribution by Milen and the Pages was to buy the horse.

[60] Milen decided to go into this arrangement, and he and the Pages bought their first horse together and made arrangements with Joan in the summer of 1996.

[61] Throughout the summer of 1996 he visited Joan's place many times. Thereafter, he said he visited the farm three or four times a year. He loved to see the horses because it lowered his blood pressure. When Milen visited the farm, he spoke with Nick and with the hired hands. He described Joan as a gracious host. He and his wife when they visited the farm would sometimes have lunch with Joan and with Nick. When they had lunch, it was always served in the dining room in Joan's part of the house at the farm. Typically there would be eight people around the table including some of the hired hands.

[62] When he went to the races to watch his horses, he would visit with Joan and when Nick was there he would visit with him. When the horses were in Edmonton, Milen said that Nick was often at the races. The evidence established that Nick was at the races fairly frequently when Joan was there. When one of the horses which Joan trained won, there was always a picture taken in the winner's circle and that picture was not taken until Nick was present.

[63] Peter urges me to find that Joan and Milen are business partners and as such I should not trust Milen's evidence. Peter says Milen would have prepared the Will in Joan's interest and, therefore, gave evidence that was not trustworthy.

[64] There is nothing in the case law, the statute law, or the Rules of the Law Society to suggest that lawyers cannot do legal work for business partners, if, in fact, Joan was his business partner. Milen's evidence was consistent. The way he carried out his legal practice here is not inconsistent with the practice of a rural lawyer.

[65] Finally, I am not aware of anything to suggest that a lawyer cannot perform legal work for a friend.

[66] I observed and listened carefully to Mr. Milen's evidence. He was forthright. I could find no reason in the substance of his evidence nor in his demeanor to disbelieve him.

[67] Next, Peter suggests that Milen had a vested interest in the farm, presumably because he boarded his horses there and that Joan looked after them and trained them. I presume that Peter

is suggesting that Milen would have skewed the Will in Joan's favour because he wanted to continue to board the horses on the farm and have Joan train them.

[68] The fact that Milen boarded his horses on the farm should hardly have influenced him as to his duties as a lawyer in preparing the Will. There was no evidence to suggest that there were no other alternatives to Milen for boarding his horses in the event the farm was sold. I do not find that Milen was in a conflict of interest by providing legal advice and drawing up documents for Nick because he boarded his horses on that farm, nor do I find that Milen persuaded Nick to give the farm to Joan, nor did anything wrong as a lawyer to gain an advantage so that his horses could continue to be boarded on Nick's farm.

[69] Finally, Peter says that Milen was defending the Will he had prepared. If this aspect were to be accepted by me, then I would have to presume that all lawyers who wrote wills were to be disbelieved simply because they were defending what they had written. Usually the most important evidence we have about testamentary capacity is the evidence of the lawyer who prepared the Will and executed it. Because of the strict rules of the Law Society and the probability that a lawyer would be sanctioned for lying to the court, I would think the presumption is that the lawyer is telling the truth, unless there is objective evidence to the contrary or the court finds on all the evidence that the lawyer cannot be believed. In this case, there is no evidence to the contrary and I found Milen's evidence to be forthright and honest.

[70] I find that Milen did nothing to suggest that I should not trust him. I reject entirely Peter's argument that Milen did anything to ensure that Joan would receive the estate. In fact, I find that these suggestions are absurd. There is nothing illegal nor unethical in Milen's behaviour in preparing the Will.

iii) Independent legal advice

[71] Next, Peter says that Nick was not provided with independent legal advice. Milen **was** his independent legal advice. As I discussed above there is no reason for me not to accept the evidence given by Milen in its entirety as to what happened during the course of the preparation and execution of the Will. Milen gave evidence that up until the time he dealt with Nick and not until after Nick's death did Milen give Joan any legal advice or act for her in any capacity as a lawyer. I accept that evidence. Therefore, I conclude that Nick was being given independent legal advice by Milen.

iv) Location for giving instructions and execution of the Will

[72] Peter's next complaint is that Nick's instructions were provided to Milen at the horse races and the Will was executed at Nick's home. I find absolutely nothing sinister in this. There is nothing requiring lawyers to take their instructions in their office nor requiring that Wills or other documents must be executed in lawyers' offices. I reject this argument.

[73] Further, I would think that this behaviour is consistent with what rural lawyers do. I accept the evidence of Milen that he sometimes took instructions for documents and had documents executed away from his office.

v) *Lawyer's duties in preparing and executing Wills*

[74] Peter also says that the lawyer asked no questions regarding capacity or undue influence and that this is a suspicious circumstance. I deal with undue influence later. I refer to my narrative set out above concerning the taking of instructions, preparation and execution of the Will.

[75] I note that the Plaintiff called no expert evidence about the standard of care for lawyers in rural Alberta respecting the preparation of Wills and ensuring testamentary capacity.

[76] The Plaintiff cites the case of *Murphy v. Lamphier*, [1914] O.J. No. 32, appeal dismissed [1914] O.J. No. 102 for the proposition that Milen did not execute his duties as a solicitor preparing the Will. The Plaintiff also cites *McArdle's Estate v. Cushman (No. 2)*, [1989] A.J. No. 1394 (Q.B.) to support its contention that Milen did not execute his duties appropriately.

[77] In particular, the Plaintiff states that these two cases stand for the broad propositions that:

- instructions must be taken directly from the testator and not in the presence of any potential beneficiaries;
- the solicitor should question the testator why he wishes to prefer one person over another; and
- the solicitor should keep careful notes of the questions asked and responses received from the testator.

[78] In fact, the court in *Murphy* states the legal proposition concerning the duties of a solicitor as follows:

A solicitor is usually called in to prepare a will because he is a skilled professional man. He has duties to perform which vary with the situation and condition of the testator. In the case of a person greatly enfeebled by old age or with faculties impaired by disease, and particularly in the case of one labouring under both disabilities, the solicitor does not discharge his duty by simply taking down and giving legal expression to the words of the client, without being satisfied by all available means that testable capacity exists and is being freely and intelligently exercised in the disposition of the property. The solicitor is brought in for the very purpose of ascertaining the mind and will of the testator touching his worldly substance and his comprehension of its extent and character and of those who may be considered proper and natural objects of his bounty. The Court reprobates the conduct of a solicitor who needlessly draws a Will without getting personal instructions from the testator, and, for one reason, that the business of the solicitor is to see that the will represents the intelligent act of a free and competent person: [at para. 120].

[emphasis added]

[79] In addition, the Court in *Murphy* says:

“Instructions for a will should be taken from the testator himself, and full inquiry should be made as to his personal position and that of his family, and of the objects of his bounty, and as to the nature and extent of his property.” The passage condensed appears also in the 13th edition of Hayes and Jarman, p. 122.

[80] To these suggestions I would add that in dealing with people needing protection and advice it is important to find out if there be a former will, and its nature, with a view of getting at the reasons for any variation or changes therefrom, if such changes be contemplated: [at paras. 123, 124]. [emphasis added]

[81] The Court in *Murphy* goes on to say: “I do not forget that capacity may be diminished almost to the vanishing point and yet sufficient be left to sustain a will made in *extremis*, especially where the alternative is intestacy.”[at para. 126].

[82] I do not find in *Murphy* the principles set out above by the Plaintiff. Rather, the court in that case looked at all the circumstances in that case and found that together those circumstances demonstrated that the testator in that case did not have testamentary capacity. The case before me is completely different.

[83] In *Murphy* the court summarizes the suspicious circumstances in that case as follows:

What, then, are the things out of the common which invite the inspection and consideration of the Court? In brief outline, these: (a) the will is made during the temporary absence of Mrs. Lamphier from her husband; (b) made without reference to or communication with her natural protectors; (c) made whilst she was in the hands and under the care of two married daughters who were dissatisfied with a former will and had recently sought to have it changed; (d) made by an old lady verging on eighty years of age, suffering under a double process of deterioration from the impairments of senility and the inroads of a progressive disease affecting her brain; (e) made by a solicitor who could not be regarded as an independent adviser and who was not chosen by the testatrix; (f) made on the spur of the moment, where the method of testamentary disposition, originating nine years before and carried through a series of wills down to the one made in 1911, was displaced and superseded by a method of equal distribution desired by Mrs. Brown and Mrs. Hayes and the other dissentients: [at para. 83].

[84] In *Murphy* the circumstances were quite different than they were in this case. The will in question in *Murphy* changed four earlier wills, one of which had been drawn 11 months prior to the will in question. The court comments that the will was in remarkable contrast to all that preceded it. The court comments that, among other things, because there were such remarkable changes from the four previous wills, it called for clear proof of capacity “equal not merely to some testamentary act, but to this important revocation of former dispositions and to a new direction given to the property” [para. 24]. The circumstances in *Murphy* differ considerably

from the one before me. Here, there was only one prior will made some 26 years earlier and which was absolutely consistent with the Will made in the year 2000.

[85] Further, in *Murphy*, at the time that the will was made, the testatrix did not even remember her husband to whom she had been married about 56 years.

[86] In *Murphy* the solicitor who drew the will did not know the testatrix. In fact he had acted for both of the daughters involved in the preparation of the will in other matters. He had been consulted with respect to the fact that those two daughters were not happy with the Will already in place by the testatrix, their mother. Instructions were given to that solicitor by one of those daughters with the mother present [para. 80]. In this context, the solicitor drew the will, which was in that case overturned by the court. The court described the situation with respect to the solicitor as being “delicate”.

[87] In the case before me the solicitor knew Nick very well. Nick gave Milen the instructions for his Will, first with Joan present and then alone with Milen in the car. This is completely different than the situation in *Murphy*.

[88] The will in *Murphy* was witnessed by two people who did not know the testatrix. In the situation before me the Will was witnessed by two people both of whom knew Nick.

[89] The testatrix in *Murphy* had a disease of the mind. She had made her will in 1912. Prior to that, in 1909 she suffered a stroke which caused her to be unable to speak [para. 25]. The court also addressed other issues with her health that a doctor said would impact on her mental ability. Her mental capacity was also put into doubt by her spiritual adviser who had visited her many times, and by others who had known her for many years [paras. 30-32, 36].

[90] The court in *Murphy* found on the evidence before it that “there is no clear indication of any desire on the part of the testatrix; but the control of the field ... was in Mrs. Brown's hands, and she made the announcement that the mother wanted her will made, and [the solicitor] thereupon volunteered to do it” [para. 82]. The situation in the case before me again is quite different. It was not Joan who gave instructions to Milen, it was Nick.

[91] With respect to the Plaintiff's allegation that Milen did not ask questions about capacity, I am not quite sure what questions a lawyer asks about capacity or undue influence specifically. It is clear that a lawyer must ask a number of questions intended to determine whether a testator has capacity. The case before me is not a case where a lawyer is called to a complete stranger's bedside to draw up a will where the beneficiaries are inconsistent with anything that the testator has done before. In this case, Milen had known Nick for four years in the context of horse races and in the context of Nick's home. Milen was very definite that there was no difference between the Nick that gave him instructions and executed the Will and the Nick he had known for four years. This is powerful evidence. Given that I believe Milen, and taking into account the evidence he gave as set out above, I find no suspicious circumstances in the questions asked by Milen, nor his evidence that Nick was of sound mind.

[92] Peter urges me to find that in fact the Will was not consistent because of the intestacy caused by Nick's marriage to Mary Juba on April 16, 1977. Peter says that Nick was aware of the intestacy and that the intestacy would mean that Joan and Peter would share equally in Nick's estate. There was no evidence to support that Nick knew about the intestacy caused by his marriage. There is evidence to suggest that Nick did not know about the intestacy. I believe Milen when he said at trial that Nick was genuinely surprised that he was intestate and that the 1974 Will was not valid. I find that Nick was surprised to find out that he was intestate. I find that his intentions all along were to leave the farm to Joan. The 1974 and 2000 Wills are completely consistent. Consistency of the wills was a matter of great importance to the court in *Murphy*. The court in that case found that the testatrix changed her will from earlier wills and the will in question was inconsistent with the earlier wills.

[93] *McArdle's Estate* is another case with very different circumstances than the case before me. The circumstances in that case all taken together cast doubt on the testamentary capacity of the testatrix in that case. I will not go through the *McArdle's Estate* case in detail. However, from my review of that case, I cannot find that it stands for the principles suggested by Peter as set out above. In both *Murphy* and *McArdle's Estate* the courts turned to the principles enunciated in *Banks v. Goodfellow* (1870), L.R. 5 Q.B. 549.

[94] With respect to the instructions taken by Milen from Nick, the Plaintiff suggests that those instruction should have been taken directly from the testator. I find they were. Further, the Plaintiff suggests that the instructions should not have been taken in the presence of the potential beneficiary, Joan. I could find nothing in the case law cited by the Plaintiff to suggest that this in and of itself casts doubt on the validity of the Will and the testamentary capacity of the testator. There must be more. I find in this case there was not. Therefore, I make nothing of the fact that Joan was present during some period of time in which Nick gave instructions to Milen. I also note that Milen took Nick to a private place and confirmed the instructions without the presence of Joan. Therefore, I find that Milen in this respect did everything he ought to have done as a lawyer.

[95] The Plaintiff also suggested that I should be suspicious of the lawyer's behaviour because he did not keep careful notes of the questions asked and responses received from Nick. Exhibits 59, 60 and 61 were entered as typewritten memos transcribed by his secretary from his handwritten notes made by Milen as he received his instructions from Nick for the Will and during the execution of the Will. Milen acknowledged that he did not make handwritten notes when he had his conversation with Nick in the car. Those notes demonstrate Milen's awareness of the necessity of his determining Nick's mental capacity. Further, the notes support the evidence given by Milen about the events surrounding the dates in question.

[96] I would not expect any lawyer to keep verbatim records of instructions given for a will as suggested by the Plaintiff. None of the cases provided to me suggest this as necessary.

[97] Peter also objected that Nick insisted Joan be present when the Will was executed. Again, in the context of all of the evidence I find nothing suspicious about this. Milen had ensured himself that Nick was executing a will that expressed clearly Nick's full intentions. As I said

before, the circumstances surrounding the Will as described by Milen in his evidence can bring me to no other conclusion than that there is nothing suspicious about Nick asking his daughter to be present. Further, there is nothing in the law to suggest that a will cannot be signed in the presence of a beneficiary provided the beneficiary is not a witness to the will. Milen's evidence was clear that Joan did not interfere in the execution of the will and that he had Nick's complete attention throughout the process.

[98] Peter says that Nick was not asked about his moral duty to leave something to Peter. First, there is, to my knowledge, no "moral duty" to leave anything to one's children. I will deal with the issue of the *Family Relief Act* later. From my review of the evidence given by Milen, he did ensure that Nick knew he was not leaving anything to Peter and was leaving everything to Joan for reasons that Milen understood related to the fact that Nick had set Peter up when Peter was very young. Some of Milen's information clearly came during his four years of knowing both Nick and Joan.

[99] Peter's next complaint is that Nick was not asked about the extent of his estate. This is simply not true. Milen did ask Nick about his estate and Nick gave a fairly complete description of his estate to Milen which description was consistent with Milen's knowledge of the farm from having visited the farm numerous times.

vi) Issue of the lawyer's fees

[100] Finally, Peter complains that the lawyer wrote off his fees for preparation of the Will. This is perhaps the strongest point made by Peter.

[101] With respect to payment for his services, Milen sent an account to Nick for costs only, not charging his fees, because he said that Joan had worked with his and Pages' horses and it was Milen's view that the compensation arrangement with Joan in the first four years of that association was an unfair arrangement for Joan, as the horses were not that productive. Although Joan did not complain, Milen said that he appreciated the work that she had done and he decided that he would not charge Nick because of all Nick and Joan had done for him. In fact, Milen wrote off his time for the preparation of the Will, Power of Attorney and land transfers.

[102] Milen's explanation for not charging his fee portion makes complete sense. Milen's horses had benefited from Nick's farm and from Joan's work over the course of the four years. I find it entirely consistent with his relationship with Nick and Joan that he would make this gesture. The total in fees that he wrote off was less than \$3,000.00.

[103] I find that although this is the most suspicious of the circumstances alleged by Peter, in the total context, it does not meet the threshold that would require me to find that there are suspicious circumstances.

vii) Adverse Inference

[104] The Plaintiff suggests that I should make an adverse inference against the Defendant because, the Plaintiff says, Joan chose not to call the second witness to the Will, Jeff Watt, who was employed on the farm in August, 2000 and was still employed by Joan at the time of trial. The Plaintiff says Jeff Watt interacted daily with Nick. The Defendant agrees.

[105] An adverse inference may be drawn when a party fails to call witnesses “who would have knowledge of the facts and would be assumed to be willing to assist the party. ... or a material witness over whom he or she has exclusive control and does not explain it away”: J. Sopinka, S.N. Lederman and A.W. Brian in *Law of Evidence in Canada*, 2nd edition (1999), at 297.

[106] The decision to draw an adverse inference is discretionary. The court must look at the specific circumstances including:

- Is there a legitimate explanation?
- Is the witness equally available to both parties?
- Has the witness material evidence to provide?
- Is the witness the only person or the best person to provide such evidence?

[107] Watt was on the Defendant’s list of witnesses and it was not until the case of the defence was closed that the Plaintiff knew that Watt would not be called. When the Plaintiff knew Watt would not be called, it did not make an application for an adjournment so as to contact Watt and call him as a witness.

Explanation

[108] First, I asked the Defendant whether there was an explanation for its failure to call Watt. Watt was a witness to the Will. It was incumbent upon the Defendant, Joan, to prove the validity of the Will.

[109] In this case, the parties had agreed that the Will was executed with the requisite formalities and it was entered as a full exhibit. Given that the Plaintiff admitted the formal validity of the Will, it was not necessary for the Defendant to call anybody respecting the formalities of the Will.

[110] After the formalities are proved, the onus shifts to the Plaintiff, Peter, to show suspicious circumstances surrounding the making of the Will. In this case, if Watt had evidence about how Nick was doing around the time that the Will was made that would tend to show that Nick did not have the capacity to make a will and this would have assisted the Plaintiff’s case, then the Plaintiff would be expected to call Watt to cast suspicion on the validity of the Will. The Plaintiff did not do so.

[111] The Defendant said that by the time the Plaintiff had put in its case, it was of the view that the Plaintiff had failed to prove suspicious circumstances and had failed to prove that Nick

did not have testamentary capacity. The Defendant says that it therefore is of the view that it was unnecessary to call Watt as a witness. As set out above, I have found that the Plaintiff has, in fact, failed to raise suspicious circumstances. Therefore, it was not necessary for Joan to call any witnesses to rebut the Plaintiff's case.

[112] Given the explanation from the Defendant, I find that it has given a legitimate reason for not calling Watt.

Equal Access to a Witness

[113] I turn next to the question of whether the Plaintiff had access to Watt as a witness.

[114] The Plaintiff argues that Watt was not available to them. To assist its argument the Plaintiff states that Watt was an employee of Joan and therefore not available to the Plaintiff. In this regard the Plaintiff states that if an employee has knowledge that would bear substantially and directly on the issue before the court, the employer is the natural and logical party to call their evidence: *Vector Energy Inc. v. Pacific Gas and Electric Co.*, [2000] A.J. No. 326 at para. 35.

[115] The Defendant states that although Watt is an employee of Joan, she was not being sued in her corporate or business capacity, she was being sued in her personal capacity and capacity as executrix. Consequently, had Watt been called as a witness it would not have been in his capacity as an employee of Joan. The Defendant says that it is simply not the law that the propounder of the Will has control over witnesses to the Will. However, notwithstanding this subtle difference, if Watt is employed by Joan, there is not an equal relationship between Joan and Watt similar to an independent witness to a will and the executor to the will. I note, however, that there are varying degrees of control between two people. It is my view that the law does not extend to say if there is any kind of inequality in a relationship that an adverse inference should be drawn if that witness is not called.

[116] Although Watt is not, strictly speaking, equally available to both Joan and Peter, nevertheless, he was available as a witness and if the Plaintiff thought that he was important, it should have called him in its case. If there was any indication while Watt was giving evidence that he was adverse to the Plaintiff, the Court could have declared Watt an adverse witness and the Plaintiff permitted to cross-examine him. However, here, I have no evidence that Watt was adverse.

[117] I am aware that Watt was on the Defendant's witness list and this may have lulled the Plaintiff into the belief that he would be available for cross-examination. Nevertheless, when Watt was not called by the Defendant, the Plaintiff, if it thought Watt's evidence was important, should have made an application at the end of the trial for an adjournment to enable the Plaintiff to call him as a witness in rebuttal.

Has the witness material evidence to provide?

[118] Certainly Watt could have given evidence about the mental state of Nick as compared to his mental state over many years prior to that time. It may have been useful but it was not necessary. Also, Watt was minimally involved in the circumstances surrounding the making of the Will. He was not the only witness to the signature of Nick on the Will itself. I agree with the Defendant that it was Milen who was in the best position to assess Nick's testamentary capacity.

[119] Watt would have given material evidence. However, this is not the test. Many, many witnesses can give material evidence. Each litigant must draw the line at the number of witnesses it calls.

Is the witness the only person or the best person to provide such evidence?

[120] The Plaintiff says that Watt would have been able to give the best evidence. The Plaintiff suggests that Watt's evidence as a layperson would be essential to proving capacity. I remind the Plaintiff that it was its onus to cast suspicion on Nick's capacity before the Defendant was called upon to provide any evidence about capacity.

[121] The Plaintiff says that I should suspect the evidence of Milen and Joan as to Nick's capacity at the time that he gave instructions and executed the Will. To assist his argument, the Plaintiff cites case law and textbooks. One case he cites is *Babchuck v. Kutz*, [2006] A.J. No. 1650 at para. 249 which is a decision of mine. In that decision I was distinguishing the evidence given by a physician who had barely known the testator with lay people and a lawyer who had known the testator for some period of time. Here, we are not dealing with a physician at all. Here we have a lawyer that had known the testator for about four years.

[122] As I have set out above, the Plaintiff's evidence did not cast suspicions on Nick's capacity. Therefore, the evidence of Milen and Joan in this regard is irrelevant.

[123] As I understand the Plaintiff's argument, the Defendant should have called Watt because he would have provided the best evidence. I am somewhat perplexed by this argument because the Plaintiff says that I cannot trust the evidence of Milen. Given this analysis, I do not understand how I can trust the evidence of Watt given that Watt is an employee of Joan. Surely, this would have an impact on how much weight I could give Watt's evidence if it were in favour of Joan.

[124] The test in this case which I will apply is whether or not the witness could give the only evidence. There is a great deal of medical evidence and the evidence of Nick's family which the Plaintiff has put forward to cast suspicion on the making of the Will. There is also the evidence of Milen and of Joan that I have recited and weighed.

[125] The difficulty that any lawyer faces is whether to call interminable lists of witnesses to prove a particular point. Certainly the evidence that Watt could have given in this trial may have been helpful. However, he was not the only person who could provide that evidence.

[126] Given that I have found that there are no suspicious circumstances sufficient to cast doubt on the capacity of Nick when he made his Will, the Defendant did not have to call anyone to prove Nick's testamentary capacity. Therefore, it was not necessary for the Defendant to call Watt for this purpose.

[127] The Plaintiff says that Watt was on the list for the defence as a witness. The Plaintiff further says that it was given no notice that Watt was not being called as a witness. It is my view that it is bad practice not to advise the other side if an intention changes to call a witness. Perhaps it is strictly a matter of courtesy, but in this case, if there was an intention not to call Watt that intention as soon as it was determined by the Defendant, should have been made known to the Plaintiff.

[128] Taking all of these circumstances into account, I will not exercise my discretion to declare an adverse inference to be drawn in this case. I do so because the evidence that Watt would have given as to the formalities of the Will was given by the lawyer, Milen. Therefore, Watt's evidence as to the validity of the Will was not strictly necessary.

[129] Secondly, I do not have anything other than a suspicion that Watt was under the influence of Joan to the extent that the Plaintiff could not have called Watt as a witness, either in his case or in rebuttal. I am drawn to the inference that the Plaintiff knew that Watt could not add anything to its case.

c) Have the formalities of the Will been proved?

[130] Taking all of Peter's complaints together and in the context of the evidence given by Milen, I cannot find any suspicious circumstances surrounding the giving of instructions, nor the preparation and execution of the Will. I note that I have not taken into account any of Joan's evidence in coming to this conclusion. Specifically, I find that no adverse inference can be drawn from the fact that the Defendant did not call Jeff Watt.

[131] I find that Joan has met her duty as propounder of the Will to show *prima facie* testamentary capacity surrounding the preparation and execution of the Will, and I find that Peter has raised no suspicious circumstances regarding the preparation and execution of the Will, that is the formalities of the Will: *Vout* at para. 26.

2. Has Peter raised suspicious circumstances surrounding testamentary capacity?

[132] I turn now to the second category, suspicious circumstances relating to testamentary capacity. The onus now shifts to Peter to show that there are suspicious circumstances surrounding the testamentary capacity of Nick.

[133] In the second category, Peter claims suspicious circumstances arising from alleged earlier and later illnesses of Nick which, Peter says, cast doubt on Nick's testamentary capacity at the time he gave instructions and executed the Will.

[134] If this second category is made out by Peter, that is, if Peter raises suspicious circumstances, then the onus shifts to Joan to prove testamentary capacity.

[135] In analyzing whether suspicious circumstances are in fact present here, I may consider a number of factors including:

- whether the will in question constituted a significant change from a former will;
- the extent of any physical and mental impairment of the testator around the time the will was signed;
- whether the will in question generally seems to make testamentary sense;
- the factual circumstances surrounding the making of the will; and
- whether a beneficiary was instrumental in the preparation of the will.

Rufenack v. Hope Mission 2002 ABQB 1055 at para. 66.

I will deal with the latter point when I discuss undue influence.

a) Differences between the Will and the 1974 Will

[136] I have already discussed above the factual circumstances surrounding the preparation of the Will. The 2000 Will was the same in substance as the Will made in 1974. The two wills are exactly the same as to the beneficiary and as to the executor. The second will has a few more clauses that are entirely legal and *pro forma* but make no difference to the substance of the Will. As set out above, I do not accept that the intestacy because of marriage as described above made any difference to Nick's actual intentions.

b) The extent of any physical and mental impairment of Nick

[137] Here, I will address the extent of any physical and mental impairment of the testator around the time the Will was made.

[138] The testator must have a sound and disposing mind or testamentary capacity at the time he gives instructions for and executes his will: *Hall v. Bennett*, [2003] O.J. No. 1827 (C. A.) at para. 15. In order to have a sound and disposing mind a testator must:

- understand the nature and effect of the will,
- recollect the nature and extent of his property,
- understand the extent of what he is giving under the will,
- remember the persons that he might be expected to benefit under his will, and
- where applicable, understand the nature of the claims that may be made by persons he is excluding from the will.

[139] There is nothing to suggest there was any difference in Nick from when he gave his instructions until the Will was executed. Therefore, I will treat those times together as to whether Nick had testamentary capacity.

[140] Peter says that the circumstances tending to call into question the capacity of the testator include:

- family observations of Nick's deterioration in April of 2000;
- Milen's failure to assess formally Nick's testamentary capacity;
- diagnosis of dementia on November 9, 2000, approximately 3 months after the Will was executed; and
- Nick's probable oxygen levels at the time the Will was executed.

[141] The evidence I shall consider relating to this category comes from observations made by Peter and his family, from hospital records surrounding a hospitalization of Nick in October, 2000, and expert opinion given by a number of doctors. I also consider other evidence including photographs and testimony of Milen and Joan.

i) General observations of Nick in 2000 prior to his hospitalization

[142] I start with the family observations of Nick in April, 2000. I then compare this to other lay evidence given at trial for the period after April, 2000 and before October, 2000 when Nick was hospitalized.

[143] On the Easter weekend in April, 2000 Brenda Lee Petrowski Morgan, granddaughter of Nick and daughter of Peter, visited her grandfather. She was accompanied by other members of her family including Peter, his wife Annette, and Brenda's husband. It is significant that Brenda is a trained social worker.

[144] At trial, she said that at the time she was concerned about her grandfather because he was not looking after himself, his trailer was unkempt and untidy, he was in bed when she visited him at approximately 2 p.m. in the afternoon, his room smelled of urine, he was dirty, and he was apathetic. At that time I note, Nick was 90 years old. She visited with him in his bedroom for about one hour while the others remained in the kitchen. Apparently he told her he was an old man and wanted to die in peace. He was, he said, not afraid of dying. In her evidence, she said that Nick was engaged in the entire conversation with her and that he demonstrated an awareness of what death was and what it meant to die. She also said that she had a special relationship with her grandfather and they often talked about things philosophical.

[145] After Nick and his granddaughter, Brenda, visited for about an hour, they joined the other family members at the kitchen table for coffee for about half an hour.

[146] It is significant to me that she did not describe any cognitive impairment in Nick at the time. None of those family members gave evidence that Nick had any problem with his cognitive functioning that day.

[147] It is not surprising to me that a man of his age would have had a discussion with his granddaughter who is a social worker about life and death and wanting to die in peace. This appears to be a man who is functioning normally for his age.

[148] Brenda said at trial that at the time of her visit her grandfather was weak and vulnerable but when she talked about it to her family, her family dissuaded her from speaking to Joan to keep peace in the family. She did not call her Aunt Joan to tell her what she had seen and to tell Joan about her concerns.

[149] I find this difficult to reconcile. As a trained social worker and Nick's granddaughter, if Nick was in any difficulty, it was her duty to follow up, at least with her Aunt Joan. As a trained social worker, I would expect her at least to bring it to Joan's attention. Apparently Joan was away for a few months at that time racing her horses in Calgary and Edmonton. While Joan was away, Nick cared for himself and managed his daily activities on his own. If Brenda was concerned about his condition, as a trained social worker she should have contacted her Aunt Joan.

[150] If Nick was in such poor condition, I would have expected his close family, being Brenda and Peter, to ensure that his clothes were washed and his room tidied. Further, I would expect that they would have brought this to Joan's attention knowing that she was out of town a considerable amount of time around then. The family did neither. I can only conclude that Nick was not in such poor condition as was described at trial.

[151] Finally, none of this evidence about Nick's condition in April, 2000 gives me any concern for his mental capacity at that time. This evidence was put in by the Plaintiff to establish that there were suspicious circumstances surrounding the preparation of the Will in August. I find that this evidence does not establish that there was any concern about Nick's mental capacity in April, 2000. Given that none of the witnesses on that day could say that Nick was impaired in his cognitive functioning, I conclude that this evidence was put in at trial for one purpose - to cast a shadow on Joan's character so that the court would be biased against her with respect to Nick's testamentary capacity.

[152] Consistent with the evidence of Brenda, there was other evidence about Nick's functioning between June and October 15, 2000 which does not show any lack of mental functioning on the part of Nick. He attended the horse races at Northlands Park, sometimes as often as two to three times per week. Clearly, he was attending the horse races during August, 2000 when he gave instructions for his Will. Not only was there the evidence of Joan and Milen in this regard, there were photographs taken August 5 and August 7, 2000, of two winning horses trained by Joan in the winner's circle with Nick in the pictures substantiating that he was in fact at the races. August 5 is the date Nick gave instructions for the Will and August 7 is three days before he executed the Will.

[153] Shortly after Nick executed his Will, he attended the funeral of Annette's (Peter's wife) mother. Nick visited with the members of his family. None of Peter, Annette or Brenda gave any evidence that at the time of the funeral, Nick was suffering from any kind of cognitive impairment.

[154] From all of this evidence which brackets the time in which Nick gave instructions for and executed his Will, there is simply no evidence from ordinary witnesses that Nick was suffering from any kind of cognitive impairment before he entered the hospital in October, 2000.

ii) Plaintiff's medical evidence and medical opinions

[155] Notwithstanding this lay evidence, Peter maintains that Nick at the time he was hospitalized in October was suffering from an oxygen deprivation which impacted on his cognitive functioning in August when he made his Will such that he did not have testamentary capacity. Central to the opinions of the doctors that Nick did not have testamentary capacity is the evidence of oxygen deprivation. This evidence is found in the hospital charts - doctors and nurses. Peter cites the evidence of two doctors who treated Nick in the hospital, Dr. Jackman and Dr. Cunningham, one expert who reviewed the evidence of Dr. Jackman and Dr. Cunningham and gave an opinion, the hospital charts, and the evidence of other medical personnel.

[156] Here I remind myself that expert opinions must be based on facts proved at trial. The opinions of Dr. Jackman and Dr. Cunningham are based on the charts made during Nick's hospitalization. Their notes made at the time and the nurses' notes form a factual basis for the case before me. I can trust those as being true without the makers being called. When Dr. Jackman and Dr. Cunningham gave expert opinions, the rules respecting expert opinion apply notwithstanding that they were treating physicians at the time. I will, therefore, examine the evidence underlying their opinions at trial to determine if those opinions have a factual basis. I will then review their opinions and evidence respecting cognitive impairment or mental incapacity.

[157] With respect to the opinion evidence of Dr. Malloy, I shall examine his opinion in light of the underlying factual matrix. I note he relied heavily on the opinions of Drs. Jackman and Cunningham in forming his opinion.

[158] From this medical evidence I shall determine if the Plaintiff has raised suspicious circumstances that must then be answered by the Defendant.

[159] In this section I will not review the expert evidence of the Defendant with respect to the mental capacity of Nick when he gave instructions for and executed his Will. I will leave that evidence to later in these reasons.

Prior to Nick's Admission to the Hospital

[160] As background, prior to his admission to hospital on October 21, 2000, Nick was taking medication for his high blood pressure. He had not seen a doctor since January 26, 2000 when Joan took Nick to see Dr. Cunningham for his annual physical examination. At that time, Dr. Cunningham performed a complete examination of Nick, including his cardiovascular system, respiratory system and urological assessment. Blood and urine tests were ordered. Other than high blood pressure and an aortic stenosis, Dr. Cunningham concluded that Nick was perfectly healthy. There was nothing in Dr. Cunningham's notes to suggest that Nick was suffering from a delusion, delirium, dementia or cognitive dysfunction. Between January 26 and October 21, 2000, Nick did not require or receive any medical care.

[161] Dr. Cunningham agreed at trial that Nick's annual attendances for physical examinations demonstrated that both Nick and Joan were making good efforts to ensure Nick's medical condition was being properly managed.

Nick's Admission to the Hospital

[162] When Nick was admitted to the hospital he was seen by Dr. Bredesen who became responsible for his care throughout Nick's stay. During Nick's stay in the Viking Health Centre ("Viking hospital") between October 21, 2000 and November 9, 2000, Nick would have been seen by Dr. Bredesen, Dr. Jackman and Dr. Cunningham on a rotational basis. Prior to Nick's stay in the Viking hospital, he was not seen by either Dr. Bredesen nor Dr. Jackman. The two doctors who saw Nick in the hospital that gave evidence in this trial were Dr. Jackman and Dr. Cunningham.

[163] Nick was taken to the Viking hospital by Joan. Because of Nick's shortness of breath, Joan was concerned that her father was suffering from a heart attack.

[164] At the time of admission to the Viking hospital, there were a number of forms filled out and Nick was seen by a number of medical people. Those documents included the Emergency record; the History and Physical Examination taken by the admitting physician, and the Nursing Assessment. These were the only documents about Nick's health on admission to the Viking hospital.

[165] Nick was seen by Dr. Bredesen in the Emergency and notes were kept of Dr. Bredesen's examination of Nick.

[166] The admission records state that Nick complained of having nausea and vomiting for a few days. Nick said that he had difficulty swallowing solids (dysphagia) and that he had shortness of breath for several months which had become worse in the few days prior to admission.

[167] The record also states that Nick had lost 50 pounds in the past year. The Viking hospital record does not say where this information came from. However, Joan gave evidence that she

was the one that said Nick had lost 50 pounds but she had no basis for this. She said that she tossed it out. At the time, she was worried that Nick was suffering from a heart attack and she wanted the hospital to get on with it. It is clear from all the evidence that Nick had lost weight, but how much is very much in issue. The Plaintiff maintains that this is important in assessing Nick's mental capacity.

[168] However, the medical records show that Dr. Bredesen at the time Nick was admitted to the Viking hospital, noted that Nick was obese. There were no medical records put in from Dr. Cunningham, Nick's family doctor, to show what Nick's weight was in January, 2000, when Nick had his annual checkup. There was also a nursing assessment done at the time of Nick's admission to the Viking hospital which shows Nick's weight at 98 kg (or over 200 pounds). His height was about 5'5" tall.

[169] At the time of his admission to Viking hospital, Nick's oxygen saturation level was recorded at 81%. A normal level of oxygen saturation is about 97%. The admitting doctor was Dr. Bredesen who did the initial assessment. The measurements were taken using an instrument which gives a rough measure of oxygen levels at a particular point in time. A blood sample gives a more accurate reading. The Viking hospital did not have the equipment needed to measure those levels accurately.

[170] The nursing assessment on admission shows that Nick was being given oxygen by nasal prongs. The nurses note shows that for the few days before Nick was admitted to Viking hospital he was very short of breath and weak, he had problems with swallowing and he was slightly confused and sleeping a lot. There is no indication as to how long the "slightly confused" had been going on.

[171] Dr. Bredesen made a provisional diagnosis at the time of admission which was coronary artery disease, possible esophageal pathology, and increased blood pressure. There is no mention made of pneumonia or of any respiratory problems relating to lung function. There is no mention of cognitive dysfunction or disorder.

[172] It is notable that there is nothing in Nick's admitting records to indicate any concern on the part of the admitting physician or nurse of a cognitive dysfunction of any kind. Nor were any notes made at that time as to the family having said anything about a problem with cognitive functioning.

[173] The nurses' patient care plan made October 22, 2000, showed Nick's problems as dyspnea due to coronary artery disease and that Nick had difficulty caring for himself due to weakness. The nurses' assessment of the patient at that time was that Nick could perform his aides to daily living with minimal assistance. In other words, Nick was capable of dressing, eating and cleaning himself and his trailer with little assistance.

Dr. Jackman's Evidence and Opinion

[174] Peter's belief that Nick suffered from a lack of testamentary capacity when he executed his Will in 2000 was partly based on the expert evidence of Dr. Jackman. Dr. Jackman was personally involved in the care of Nick at the Viking hospital in October, 2000 and he gave opinion evidence at trial.

[175] The Plaintiff sought to qualify Dr. Jackman as capable of giving opinions in the area of an assessment of a patient's overall health, physical disabilities and cognitive functioning. The Defendant suggested that he was not an expert in the area of cognitive functioning and could give only general opinions as a family doctor. Dr. Jackman has never practised medicine in a tertiary healthcare centre, nor had he obtained any specialist qualifications. Dr. Jackman acknowledged that if there are difficulties with a patient's care at the Viking hospital, the patient must be transferred into a tertiary healthcare centre which, I infer, meant that none of the doctors there, including Dr. Jackman had the expertise to treat patients with serious medical problems.

[176] In particular, Dr. Jackman acknowledged that he is not an expert in oxygen saturation, nor in how oxygen saturation can affect a person's mental capacity. Dr. Jackman said that he would "absolutely" defer to an internal medicine specialist as to opinions on oxygen saturation.

[177] Dr. Jackman gave a written opinion that Nick's low oxygen condition, that is the recorded oxygen level of 81% at admission to the Viking hospital, had been present for at least six months prior to Nick's admission. He further gave an opinion that "Nick's low oxygen was present on 10 August 2000 when he made his last will and testament and would have impaired his cognitive ability and his rational and logical ability to make an intelligent will and testament." However, Dr. Jackman admitted that he had no means of determining what Nick's oxygen levels were at any other time outside of the hospital either before or after his stay in Viking hospital.

[178] In his written opinion dated January 11, 2007, Dr. Jackman further stated that his opinion about Nick's impaired cognitive functioning was supported by the chest x-rays taken during Nick's admission to Viking hospital in October, 2000. Dr. Jackman said "The chest x-ray showed previous asbestosis of his lungs and this had progressed over the years. This asbestosis condition of his lungs caused the low oxygen and was present for in fact many years and this low oxygen impaired his ability to make a rational decision with regard to his last will and testament" [at page 2].

[179] I do not accept this opinion for a number of reasons.

[180] First, at trial Dr. Jackman derogated from this opinion changing his views from those expressed in his written opinion in a number of respects. Second, some of his underlying assumptions were not held out to be true during his evidence at trial. Finally, he conceded several times that his opinion should give way to the opinion of an expert in internal medicine. Later, I will review the opinions of an internal medicine specialist who disagrees with Dr. Jackman's opinion.

[181] Dr. Jackman opined that Nick had been suffering from low oxygenation that had been going on for more than two months and that the low oxygen would have affected Nick's mental capacity to such an extent that he was unable to make a will in August, 2000. At trial, Dr. Jackman withdrew his written opinion that Nick had been suffering from low oxygen levels for six months and changed it to "several months" which is a chronic condition as opposed to an acute condition.

[182] I shall review his testimony about the oxygen levels to determine if he had, when he gave his written opinion or when he gave his testimony at trial, any factual foundation for his opinion that Nick had low oxygen levels in August, 2000.

[183] Dr. Jackman's opinions given in his expert report and then at trial *viva voce* changed with the wind. His first opinion was that Nick was cognitively impaired because of asbestosis, then Dr. Jackman gave an opinion that "something" was causing oxygen impairment, then that low oxygen levels were caused by Nick's high respiratory rate. I shall canvass all of these.

[184] Fundamental to Dr. Jackman's written opinion was that Nick did not have testamentary capacity because he was impaired by low oxygen levels caused by the asbestosis. At trial, Dr. Jackman said that he was no longer of the opinion that the asbestosis caused the low oxygen level. Dr. Jackman acknowledged that the asbestosis had nothing to do with the low oxygen levels. He said he was unsure of what caused the low oxygen level. He postulated that Nick had perhaps a chronic pneumonia.

[185] X-rays taken while Nick was at the Viking hospital showed a pleural plaque most likely caused by asbestos exposure. However, Dr. Jackman acknowledged that the lung tissue responsible for oxygen absorption was not affected by that plaque. Only the pleura which had nothing to do with Nick's lung function was affected. Dr. Jackman at trial also opined that three x-rays taken in early 2001 at the Royal Alexandra Hospital in Edmonton showed asbestos exposure, minor in amount - not to the lung tissue, and were consistent with the Viking hospital x-rays. Dr. Jackman agreed that there was no evidence on the x-rays taken on October 23 and October 25 nor at the Royal Alexandra to show any damage to the lung tissue.

[186] Even though Dr. Jackman acknowledged that the plural plaque from asbestos had no effect on Nick's oxygen levels, he stuck to his guns that prior to Nick's coming into the Viking hospital he had a lack of oxygen for several months. He insisted that "something" was causing low oxygen prior to Nick's admission. Dr. Jackman never identified what that "something" was although he speculated that it might have been chronic pneumonia.

[187] What then does the evidence say about what caused Nick's low oxygen levels at the time of his admission and does that evidence support a finding that Nick was suffering from cognitive impairment at the time he made his Will?

[188] The evidence suggests that Nick was suffering from pneumonia when he was admitted in October, 2000. Further, that the pneumonia was acute and not chronic. A review of the nurses

notes at the Viking hospital show very early signs of pneumonia. Dr. Bredesen's notes at Nick's admission on October 21, showed that he ordered a chest x-ray and an electrocardiogram, and that Nick be given oxygen via nasal prongs.

[189] Dr. Jackman agreed that the first level of oxygen assistance was to provide nasal prongs. More serious cases require oxygen masks and the most serious require pressurized masks. Dr. Jackman acknowledged that the oxygen levels for Nick went from 81% to 92% while Nick was still in the emergency room on nasal prongs. This suggested to Dr. Jackman that Nick had a respiratory problem that was easily corrected.

[190] Chest x-rays were taken of Nick on October 23, 2000, two days after he was admitted to the Viking hospital. The diagnosis of the October 23 x-ray was a "patchy consolidation in the upper left lobe compatible with pneumonitis".

[191] Nick had a second x-ray at the Viking hospital on October 25, 2000. In that x-ray, it stated that the left upper lobe consolidation has significantly decreased. Dr. Jackman said this showed that Nick was recovering from pneumonia. The second chest x-ray was not taken to determine if Nick was recovering from pneumonia. The hospital records show that the second chest x-ray was ordered because Nick had aspirated some barium during a gastroscopy performed to explore the reasons for Nick's inability to swallow. When the doctors received that October 25 chest x-ray they ordered chest physiotherapy, not because of the pneumonia but because of the aspiration of the barium.

[192] Dr. Jackman agreed that the treatment for pneumonia would be antibiotics. No doctor prescribed antibiotics for the pneumonia. The only logical inference I can draw from all of this is that the doctors (all three of them) in the face of a clear diagnosis of pneumonia did not think it sufficiently serious to administer antibiotics. On October 28, Nick was diagnosed with a urinary tract infection for which he was given antibiotics commencing on that day. Dr. Jackman agreed that the antibiotic would also have a benefit for respiratory infections such as pneumonia but was not prescribed for the pneumonia.

[193] The Viking hospital records show that oxygen was discontinued on November 2 at 11:15 in the morning. Nick was at 91% oxygen saturation on room air at that time. I infer from this that the doctors did not consider that Nick needed further oxygen treatment at 91% and that his condition was not then serious or needing any treatment.

[194] For the balance of his time in Viking hospital Nick did not receive any additional oxygen and his oxygen levels were as high as 96% in that period of time, while he was breathing room air. When this was pointed out to Dr. Jackman, he prevaricated. He pointed out that ideally oxygen levels should be at 98% and that Nick was still low at 92%. This should be taken in the context of Dr. Jackman's evidence that doctors are not concerned until oxygen levels are below 90%, nor his evidence that the guideline for oxygen support at home is 90%, above which a patient does not qualify for oxygen support at home.

[195] Dr. Jackman acknowledged an assessment done on Nick on November 7, 2000, to determine whether he was going to need oxygen equipment at home. The testing done at that time showed that Nick's oxygenation was between 91 and 95% while lying in bed and breathing room air and that when he was sitting up it was between 94 and 97% breathing room air. Based on that, Nick was not eligible for government assistance for oxygen. I take it that once a person has reached those levels of oxygenation it is no longer of concern.

[196] Dr. Jackman acknowledged that in the Viking hospital, Nick had "a pneumonia process". Further, he acknowledged that the condition that had put Nick's oxygen levels down to 81% as they were at admission was pneumonic. Dr. Jackman also observed that Nick did not have the level of pneumonic symptoms requiring hospitalization until about a week before he was hospitalized on October 21, 2000. Dr. Jackman would not concede that the fact that the pneumonia cleared up fairly quickly in the hospital without the assistance of antibiotics would indicate that the pneumonia was a mild form of pneumonia.

[197] Although Dr. Jackman acknowledged that pneumonia is more transient than asbestosis, he said there is a chronic form of pneumonia, but the only indication of this was Nick's report that he had been short of breath for several months. There is nothing in the evidence to suggest that the pneumonia had been long term.

[198] Dr. Jackman nevertheless maintained his opinion that Nick had been suffering from long term oxygen deprivation which caused serious cognitive impairment. He said the major reason that he gave the opinion about low oxygen levels causing cognitive impairment was because Nick had said on admission that he had been short of breath for several months. Dr. Jackman assumed that shortness of breath equalled low oxygen levels which would lead to cognitive impairment. He concluded from this that when Nick was admitted to the Viking hospital he was suffering from chronic low oxygen levels. So what do the records say about Nick's shortness of breath and oxygen levels?

[199] Dr. Jackman pointed out that on November 7 when Nick was resolved from pneumonia and when Nick was being assessed for oxygen help at home, that Nick was breathing at a rate of 24 breaths a minute which Dr. Jackman said was double the rate he should have been breathing. He said that the normal oxygen levels that Nick demonstrated after the pneumonia was resolved was in part because he was breathing rapidly. Dr. Jackman said that this was indicative of an underlying problem with his lungs that had lasted for several months.

[200] On November 3 just after midnight, when his oxygen levels were at 92%, the nurse notes that Nick "becomes easily short of breath". I can only infer from this that shortness of breath is not associated with oxygen levels. Further, after Nick was taken off oxygen on November 2, 2000, he was short of breath but his oxygen levels were not of concern to the doctors. Dr. Jackman agreed with counsel for the defence that simply because somebody is short of breath did not mean that their oxygen levels are below 90%. Further, Dr. Jackman did not give the opinion that persons with oxygen levels below 90% would suffer from cognitive impairment.

[201] Further, given Dr. Bredesen's provisional diagnosis of coronary artery disease, Nick was given an electrocardiogram. The internist who looked at the electrocardiogram reported that there was a suspicion of ischemia. However, Dr. Jackman said that for a man of 91 years old, this was to be expected and they would not follow it up. However, he also acknowledged that this could also explain shortness of breath. At another point in his evidence Dr. Jackman said that the shortness of breath was **not** caused by any coronary heart disease. He gave no other explanation for the shortness of breath.

[202] Dr. Jackman maintained that there was an underlying lung problem that had gone on for months related to the pneumonia but never identified what that problem was. He also maintained his opinion that Nick suffered from cognitive impairment in August, 2000 when he made his Will because he suffered from some lung impairment that would have caused oxygen deprivation.

[203] When asked about his review of the literature with respect to low oxygen levels and cognitive ability, Dr. Jackman said he had done no reading. However, he went on to say that his observations were that if a healthy individual's oxygen levels dropped suddenly (acutely) below 90%, the person would lose consciousness. However, a person with chronic low oxygen levels would have to go down to levels in the range of the upper 70% before they would lose consciousness. A person, he said, could learn to function cognitively with fairly low oxygen levels if it is a chronic condition.

[204] Dr. Jackman conceded that the only evidence he had of long-term respiratory problems was Nick's report of shortness of breath for several months.

[205] Dr. Jackman, in his written report, made errors. He referred to Nick being on continuous oxygen while he was in the Viking hospital. Dr. Jackman withdrew this because Nick's chart showed clearly that he in fact came off oxygen on November 2 and was not released until November 9.

[206] In addition to his evidence on oxygen deprivation, pneumonia and cognitive impairment, Dr. Jackman gave evidence about a number of other problems that Nick had.

[207] Nick was diagnosed with dysphagia (problems swallowing) and with a urinary tract infection. He was also given a provisional diagnosis of coronary artery disease.

[208] On November 6, there was a dysphagia screen performed by a trained occupational therapist. The doctors were still concerned about Nick's inability to eat and drink. At the time he was on a diet of puréed food and thickened fluids.

[209] Dr. Jackman had expressed the opinion that loss of weight could be caused by a chronic lung disease. However, given the diagnosis of dysphagia, Dr. Jackman agreed that if a patient had dysphagia and had nausea and vomiting, all of those things could cause a person to lose weight. This has nothing to do with lung function.

[210] On October 23, at one o'clock in the morning, the nurses' chart shows that Nick exhibited some confusion. Dr. Jackman said it's not unusual for the elderly to exhibit confusion if they awake in the middle of the night in hospital. This happens sometimes within the first few days of admission such as it was here.

[211] On October 28, a urinalysis was performed which showed an increase in bacteria and Nick was diagnosed with a urinary tract infection. An antibiotic was first administered to Nick on that day. This was a full week after Nick was admitted to the Viking hospital and five days after the doctor had received the x-ray done October 23. The antibiotic administered to Nick on October 28 was one specialized for urinary tract infections.

[212] Another urinalysis was performed on November 4, after Nick had been on a course of antibiotics and at that point it showed few bacteria.

[213] In his report, Dr. Jackman also referred to Nick developing "mini strokes" on 3 November while his oxygen levels were at that time still under 90%. This statement about the oxygen levels is incorrect as the Viking hospital records indicate that subsequent to November 2 there was no such measurement below 90%. Dr. Jackman acknowledged that there was only one reference to a seizure spell the whole time Nick was in hospital, which Dr. Jackman acknowledges has nothing to do with respiratory problems.

[214] Further, I infer that it was not considered to be important by the nursing staff nor by the doctors in the Viking hospital because although this so-called spell was at 7:53 a.m. no one checked on Nick for almost three hours after that because he apparently recovered quickly and the nurse was reassured. This "spell" has no relevance, Dr. Jackman acknowledged, to his own opinion about the reason for cognitive impairment.

My analysis of Dr. Jackman's evidence

[215] I infer from the evidence above that when Nick was admitted to Viking hospital he had pneumonia; that by November 2, he was no longer suffering from pneumonia, even without treatment other than oxygen from nasal prongs. After November 2, there was no measurement of oxygen levels below 90% even though Nick was off nasal prongs and breathing room air. Oxygen levels above 90% do not impair cognitive functioning. Even though the pneumonia had resolved, Nick was breathing more quickly, or in other words, he had shortness of breath. Finally, the shortness of breath was not caused by the low oxygen levels.

[216] Dr. Jackman maintained his opinion that Nick was suffering from a mental incapacity amounting to testamentary incapacity when he made his Will in August, 2000. However, Dr. Jackman could point to no objective evidence that substantiated his opinion. His opinion amounted to a belief that Nick suffered from some kind of chronic lung problem that deprived his brain of oxygen sufficient to make him cognitively impaired more than two months before he was admitted to Viking hospital. This opinion was given in spite of the evidence of lay witnesses which gave absolutely no evidence of cognitive impairment.

[217] I reject Dr. Jackman's opinion.

Dr. Bredesen

[218] Dr. Bredesen was Nick's admitting physician and was responsible for his care in the Viking hospital. He was not called as a witness. Dr. Bredesen's evidence is in the written record which must be taken for the truth of its contents. I discuss his notes in several places in these reasons. His notes are relied upon by Drs. Jackman and Cunningham.

[219] I turn now to the opinion and other medical evidence given by Dr. Cunningham.

Dr. Cunningham's Evidence and Opinions

[220] Dr. Cunningham was Nick's family physician and was qualified as a specialist in family medicine, capable of giving opinions in the areas of physical disabilities, health and wellness, and cognitive functioning including mental capacity but limited to the expertise of a family medicine specialist.

[221] Dr. Cunningham does not have any training in any particular area of specialty and said he would defer to specialists. Specifically, Dr. Cunningham acknowledged that he is not an expert in oxygen saturation, nor in how oxygen saturation can affect a person's mental capacity. He said that he would defer to an internal medicine specialist as to opinions on oxygen saturation.

[222] Dr. Cunningham provided a written opinion in which he said that "based on review of notes and actually being involved with [Nick's] treatment during his time in hospital on October 23, 2000 to November 9, 2000, that his oxygenation in the months prior to his admission was in all probability low and could indeed impair his capabilities of making decisions." I note that Nick was in hospital from October 21 and that the first time that Dr. Cunningham saw him was October 28.

[223] As with Dr. Jackman, on cross-examination, Dr. Cunningham modified his opinion.

[224] Dr. Cunningham had been Nick Petrowski's personal physician for over 30 years. Nick did attend regularly on Dr. Cunningham for physical checkups. To Dr. Cunningham this is a sign of good physical care. At the time of Nick's visit on January 26, 2000, Dr. Cunningham described Nick as a healthy man even though he was 91 years old. As a result of that visit, blood work was ordered but after that work came back, Dr. Cunningham had no reason to bring Nick back to him nor to refer him to anyone else. At that visit, Dr. Cunningham tested Nick's sight and gave him the necessary approval for renewal of his driver's license.

[225] Between January 26, 2000 and October, 2000, Dr. Cunningham confirmed that he had not seen Nick at any time. Therefore, Dr. Cunningham said that he could not in fairness say what Nick's mental or physical condition was in August of 2000.

[226] At the time of Nick's admission there was a Nursing Assessment completed by the nurse. The Assessment recorded that Nick reported being very short of breath and that he was slightly confused. Dr. Cunningham said that slightly confused is not equated with a loss of mental capacity.

[227] The nurse in the admission record had recorded that Nick was alert and oriented to time, place and person. Dr. Cunningham said that the nurse would have been trained to complete the assessment and would complete such forms on at least a daily basis.

[228] Dr. Cunningham was of the opinion from reviewing the Viking hospital records that Nick was admitted because he was suffering from pneumonia. Dr. Cunningham had never, prior to that hospital visit, treated Nick for pneumonia.

[229] With respect to measurement of oxygenation of Nick's blood, Dr. Cunningham agreed that the particular instrument used on Nick is not accurate. Further, he said that oxygen measurements in the blood vary in any person from time to time. Finally, Dr. Cunningham said that the measurements of Nick's oxygen taken in the Viking hospital could not predict Nick's oxygen levels two months earlier.

[230] Dr. Cunningham agreed with Dr. Jackman's evidence at trial that the asbestos exposure found in the x-rays would not impact on Nick's lung functioning as it would not impact on the part of the lungs which we use to breath. Further, he stated that the asbestos problem would not impact on Nick's oxygen levels. In this regard, Dr. Cunningham disagreed with Dr. Jackman's written opinion that asbestos caused problems with Nick's oxygen levels.

[231] Dr. Bredesen when he admitted Nick on Saturday, October 21 ordered a chest x-ray for Monday, October 23 rather than immediately. Dr. Cunningham said that this indicated that the admitting doctor did not think there was any emergency.

[232] Dr. Cunningham was unequivocal that the problems with Nick's oxygen levels were attributable to the pneumonia. Dr. Cunningham said that Nick was brought to the Viking hospital because of the pneumonia. Dr. Cunningham said that it was his opinion that Nick was suffering from pneumonia which would resolve in the normal course in about 2 weeks. If it lasted longer than this, Dr. Cunningham said this would be serious in someone of 91 years old. If it had lasted a long time it may even kill a patient of that age.

[233] Dr. Cunningham noted that the pneumonia was clearing up by October 25 when the second x-ray was taken. The doctors in the Viking hospital were not concerned with the pneumonia after October 25. Dr. Cunningham also noted that Nick's pneumonia cleared up without the use of antibiotics and simply with the use of oxygen.

[234] It was Dr. Cunningham's opinion that the pneumonia was a mild to moderate form of pneumonia. He explained that some seniors can have a mild form of pneumonia for a long time and it is only when the oxygen levels suddenly go down that they go into hospital. Nick, he said, was doing very well for a 90 year old man.

[235] Dr. Cunningham had to deal with the fact that Nick was short of breath on admission to the Viking hospital and was still suffering from shortness of breath after the pneumonia had resolved. Dr. Cunningham noted that when the nasal prongs were removed and Nick came off oxygen on November 2, 2000 the pneumonia had resolved. Nick was then breathing room air. He also noted that Nick on November 3, on room air was at 92% oxygen levels but was still exhibiting shortness of breath. Dr. Cunningham agreed that oxygen levels of 90% were satisfactory but doctors usually preferred to keep oxygen saturation at or above 94%. Dr. Cunningham agreed with defence counsel that this evidence indicates that shortness of breath does not necessarily correlate to low oxygen levels.

[236] With respect to Dr. Jackman's opinion that Nick's breathing rate indicated an underlying lung problem, Dr. Cunningham agreed with an article in the British Medical Journal, entered as a exhibit at trial, that normal respiratory rates for the elderly were between 16 to 25 breathes per minute. Clearly the 24 breathes per minute was at the higher end but within that range.

[237] Dr. Cunningham also noted that by November 3 the antibiotic prescribed on October 28 for the urinary tract infection was treating the pneumonia.

[238] Finally, Dr. Cunningham said that the pneumonia would leave permanent damage so that the oxygen levels would not achieve the base line that Nick had before the pneumonia but he would have recovered to a baseline only a little lower than his baseline before the pneumonia.

[239] Because there was no medical evidence of Nick's baseline oxygen levels before the pneumonia, we can only conclude that the oxygen levels he achieved by the end of his stay in Viking hospital being at least 92% meant that the oxygen levels before he contracted pneumonia were above that. Further, taking into account Dr. Cunningham's evidence that the pneumonia would last for a short time, I cannot conclude, not did he, that Nick had pneumonia for two or more months. Therefore, I can only conclude that Nick's oxygen levels in August ,2000 were high enough not to interfere with his testamentary capacity.

[240] Another issue dealt with by Dr. Jackman was with respect to Nick's loss of weight as an indicator that Nick was suffering from some kind of lung dysfunction. Dr. Cunningham said that Nick's difficulty with swallowing could account for a loss of weight.

[241] With respect to the "seizure spell" documented by the nurse on November 3, Dr. Cunningham diagnosed it as an transient ischemic attack (TIA) in his notes made a short while later. Dr. Cunningham, when he saw Nick later that day, said that Nick had recovered from the incident but the doctor had made no notes of his visit to Nick. Further, Dr. Cunningham did no follow-up to his diagnosis but gave Nick Ticlid, a drug. In Nick's entire stay in the Viking hospital, this was the only TIA incident recorded.

[242] In the Assessment made by the nurse on Nick's admission, the history noted dribbling urine. While Nick was in Viking hospital, an enlarged prostate was diagnosed. Dr. Cunningham said that the dribbling urine could be attributable to the prostate problem. Dr. Cunningham

explained that a person who is having prostate problems, as was diagnosed for Nick in the hospital in October, 2000, can have leakage of their urine. These conditions in elderly men are not unusual. I point this out because it provides an explanation for the evidence given by Brenda Petrowski, Nick's granddaughter, that she smelled urine on Nick when she visited him in April, 2000.

[243] Near the end of Nick's stay in Viking hospital, the family and medical staff became involved in assessing whether Nick could return to his home or whether he required long term care.

[244] Dr. Cunningham said that Nick preferred to remain at home with Joan and with hired hands. On October 31, there was a family meeting with Joan, Annette and Jackie. Dr. Cunningham was not present at that meeting. On Nov 1, there was a reference to Dr. Cunningham speaking to Nick about long term care. Nick declined the LTC application but conceded he would consider it if his daughter, Joan, agreed he should do this. There was then another family conference on November 6. At that time it was time for Nick to leave the Viking hospital and the question was where he would go to live, home with help, or to a long term care facility.

My conclusion on the Evidence of Dr. Cunningham

[245] Taking all of this evidence into account, I conclude that Dr. Cunningham has derogated from his opinion that Nick suffered from a lack of oxygen which lead to mental incapacity in August, 2000. Therefore, I do not accept the opinion he gave in writing that Nick suffered from an impairment of capacity at the time he made his Will.

[246] I turn now to the evidence from the Viking hospital records and from Drs. Jackman and Cunningham about Nick's mental capacity.

Cognitive Impairment

[247] About cognitive impairment, Dr. Jackman agreed that someone should have noticed cognitive impairment in Nick because there should have been periods of confusion demonstrated in the months prior to his admission to the Viking hospital. Dr. Jackman acknowledged that there was nothing in the admission records to indicate any cognitive impairment of Nick on his admission. If Nick had demonstrated a lack of mental capacity prior to his admission, it would be a very important thing to let the doctor or the nurses know. Dr. Jackman said that one would expect that Nick's history taken on admission should have showed cognitive impairment. It did not.

[248] Given that family members said that they had visited Nick two or three times a month for the years prior to Nick's admission, Dr. Jackman was surprised that the family members did not know about or mention cognitive impairment to the admitting doctor or nurses. Given that not one family member reported an incident of cognitive dysfunction prior to Nick's admission to

Viking hospital in October, 2000, Dr. Jackman agreed that would counter his opinion that Nick had a medical condition that lowered his oxygen at the time he made his Will.

[249] Although Dr. Jackman insisted in his evidence that because Nick's oxygen levels were low when he came into the Viking hospital on October 21, that he had been having low oxygen for some period of time causing cognitive impairment, he acknowledged that there was not one word in any of the records as a result of his rounds and his review of Nick's status that suggested any cognitive impairment of any kind.

[250] However, notwithstanding this evidence, Dr. Jackman refused to derogate from his opinion that given there was low oxygen on admission, it would indicate a lack of cognitive functioning at the time Nick made his Will in August, 2000.

[251] Dr. Cunningham said that if Nick had been experiencing a lack of mental capacity in the two months leading up to his admission to Viking hospital it should have been obvious to someone. If family members were seeing him up to three times a month, every month leading to his admission, they should have seen signs of loss of cognition. Given that nobody gave evidence to say that they saw that Nick exhibited signs of lack of mental capacity leading up to his hospitalization, Dr. Cunningham said that this would erode the opinion he gave in writing that Nick suffered bouts of lack of mental capacity. Further, Dr. Cunningham said that if any family member had observed this, he would expect it to form part of the admission records. However, the doctor could see no reference to this anywhere.

[252] Given the evidence of Dr. Jackman, it is rather strange that the Viking hospital sought and received Nick's consent to medical procedures more than once while he was in the Viking hospital. Joan was by this time his Power of Attorney but she was not asked once to fill in any forms or give approval to any of the procedures Nick underwent in hospital.

[253] First, there was the issue of the dysphagia in Nick's throat, that is his complaint that he could not swallow and was not able to eat solid foods. A gastroscopy was ordered by Dr. Bredesen on October 23, 2000. In order for the doctors to perform such a procedure, they had to get the consent of the patient or of a guardian of the patient. In this case, they obtained the consent of Nick who signed the Consent and Authorization for Special Procedures/Operation on October 23, 2000.

[254] Dr. Jackman pointed out that when Nick signed this form on October 23, he was on oxygen and that his oxygen levels had achieved 92% after he had been on oxygen for two days. I can take from this that 92% oxygen is enough for mental capacity.

[255] Near the end of his hospital stay Nick signed the Consent for Release of Information form dated November 6, 2000.

[256] After the family conference near the end of Nick's stay in the Viking hospital, an application for long term care was prepared, Nick signed the form on his own behalf in the

presence of his family as well as staff at the Viking hospital. He also signed another form as to Choice of Continuing Care Location.

[257] Clearly the Viking hospital staff and the doctors considered that Nick had sufficient capacity to sign forms concerning his treatment in the hospital and his long term care. This indicates to me that they were not concerned about his cognitive abilities while he was in hospital.

[258] In addition to the consents given by Nick to hospital procedures and other matters, toward the end of Nick's hospital stay, there were six assessments or other reviews done on Nick by nursing or other medical staff:

1. Dr. Bredesen's Discharge Summary dictated November 28, 2000;
2. The nursing discharge plan completed on November 6, 2000;
3. Regional Continuing Care: Referral Summary, undated.
4. A nursing dysphagia screen completed on November 6, 2000;
5. The Assessment for Long Term Care completed on November 9, 2000; and
6. The nursing assessment completed for oxygen equipment November 7, 2000.

These assessments notably did not record cognitive dysfunction or mental deterioration.

Dr. Bredesen's Discharge Summary

[259] The Discharge Summary prepared by Dr. Bredesen was dictated on November 28, 2000 and signed on December 4, 2000. In that report, Dr. Bredesen said the most responsible diagnosis was pneumonia. Other diagnoses included type II diabetes (untreated), esophagitis (relating to the dysphagia), benign prostatic hypertrophy, constipation, possible transient ischemic attack. There is no mention of any cognitive dysfunctioning.

Assessment for Long Term Care

[260] On November 9 at the end of his stay in Viking hospital, Nick was assessed by a nurse for a placement for long term care (LTC). Nick had made the application for long term care on November 6, 2000 as Plan B as Nick was being discharged home with a private care giver, family help (that is Joan's care) and the involvement of Vermillion Home Care.

[261] The evaluation for LTC was done by the nurse after she had met with the family, and after Dr. Cunningham had done his assessment. She did not mention anything about any kind of mental incapacity.

[262] On the LTC referral form, the primary area of concern expressed by the nurse was that Nick had lost strength and mobility with a risk of falling, that there was a risk of choking as he was suffering from dysphagia, and he would have problems with caring for his indwelling Foley catheter, installed as a result of his urinary tract infection.

[263] Further, in the LTC forms, Dr. Bredesen gave a diagnosis of coronary artery disease, cricopharyngeus hypertrophy, gastroesophageal reflux, and urine retention.

[264] The LTC Assessment covers many areas including the areas of communication, mental status and psychological status. It is notable that the nurse says that Nick is able to communicate verbally and be understood and that Nick understands verbal communication. Further, she says that he was consistently responsive, that he was oriented to person, place and time, noting a disorientation at night but reorients easily; immediate and recent memory impaired, remote memory generally intact. Nick stated that he could remember the good old days better than yesterday. With respect to judgment and decision-making ability, the nurse noted that Nick was reality based in his perceptions, concentration, judgments, decision making logically related to events, circumstances, all of which are noted as 0 meaning no concern. I also note that there was no mark beside the item "Check Re: Onset/Change" regarding judgement and decision making ability. There was nothing to indicate there was any change over the last three months. The nurse also said that anxious behaviour was not apparent and that depression was not apparent.

[265] In the section on "Management of Alterations in Mental & Psychosocial Status" the nurse marked that there was no need for intervention.

[266] In fact, that nurse said there was no alteration in Nick's awareness, orientation, or judgement and that Nick had excellent long term memory with some short term memory deficit. On the short-term memory score, she gave Nick a 1 out of 6 which is very minor indeed. Further she said there was no difficulty with anxiety, depression, suspiciousness and coping. None of this indicates a person with serious dementia.

[267] There was simply nothing in the LTC assessment to suggest that Nick had any significant cognitive impairment on his last day in Viking hospital. The only remark was that of Nick indicating that his short term memory was not as good as his long term memory.

[268] Nick and Joan preferred that he live at home but the nurse recommended long term care because of Nick's requirements for physical care.

[269] The assessment stated that Nick, on discharge from Viking hospital, would live at home and Joan would provide care either herself or would hire the appropriate care. Nick was to have 24 hour attention because of his physical difficulties. Annette and Jackie said that they would be available to spell off the hired care where necessary.

[270] Nick told that nurse that he would prefer being at his own farm and that he would "like to be out with the horses more".

Regional Continuing Care: Referral Summary

[271] The form, which was completed concerning Nick's referral for long term care, sets out baseline health data which lists a number of problems none of which relates to Nick's mental

health or any cognitive dysfunction. The referral was made at the time because of Nick's recent functional decline and a recent change in health status.

[272] The form also stated that Nick had been living independently until the hospitalization so no other care options had been tried as yet. The concerns expressed were a risk of choking, a risk of falling, problems with his Foley catheter, and re-occurrence of the urinary tract infection. There is absolutely no mention of any problem with cognitive functioning.

Dysphagia screen

[273] On November 6, Nick is also given a dysphagia screen by a nurse who indicates on her form that Nick was feeding himself, that he was able to follow instructions, his responses were reliable and he was alert.

Discharge Plan

[274] A nurse prepared Nick's discharge plan, shortly before Nick left the Viking hospital. That nurse had access to the records in the hospital. She would have met with Nick. The first page of the plan says that Nick is behaving appropriately and normally. The only concerns noted on the first page are physical: bladder function, ability to walk and bowel function. However, the following pages describe difficulties with the Foley catheter, difficulties swallowing solids and that Nick was at risk for falling. Further, there is a discussion about the home oxygen assessment and the fact that Nick did not qualify. Nick was noted to be short of breath on exertion at times.

[275] In the discharge plan there is no mention about any kind of cognitive dysfunction.

Oxygen Assessment

[276] On November 7, 2000, a nurse assessed Nick for home oxygen. There is no mention of cognitive dysfunction. Further, Nick did not qualify as discussed earlier in these reasons.

Dr. Cunningham's diagnosis of dementia

[277] Although Dr. Cunningham had been Nick's physician for 30 years, he had never diagnosed Nick with dementia. He also said that Nick had never shown any signs of delirium nor delusion, nor had Dr. Cunningham ever diagnosed Nick with any cognitive disorder or dysfunction. However, after Dr. Cunningham met with the family, he completed an assessment of Nick. In that assessment, he diagnosed dementia, transient ischemic attacks, among other things. This is the first and only time that the word "dementia" shows up in the medical records in the Viking hospital.

[278] Dr. Cunningham said that the diagnosis of dementia came after he had reviewed the medical records and had a meeting with the family.

[279] When questioned about his diagnosis of dementia on cross-examination, Dr. Cunningham considerably tempered his diagnosis. First, he said that Nick **may** have been exhibiting early signs of dementia.

[280] On being questioned about the discharge summary that was prepared by Dr. Bredesen who was the primary caregiver of Nick in the Viking hospital, Dr. Cunningham said that Dr. Bredesen did not comment on the family comments about early dementia because he missed it. Dr. Bredesen did not mention anything in his diagnosis about any kind of mental impairment. All of the records focussed on the urinary tract infection and the dysphagia. The pneumonia was cured and the coronary artery disease was discounted.

[281] Dr. Cunningham focussed on the one incident of a “spell” or the TIA. Dr. Cunningham acknowledged that there was only one recorded TIA. Further, he opined that this would not have an impact on Nick’s mental functioning. Finally, he agreed that a bout of confusion or disorientation is not the same as a lack of mental capacity or testamentary capacity.

iii) My conclusion on the medical evidence in the Viking hospital.

[282] From my review of all of the evidence from the Viking hospital records and the evidence of Drs. Jackman and Cunningham, I cannot find suspicious circumstances about Nick’s mental functioning at the time he made his Will.

[283] I will now go on to discuss the expert opinion of Dr. Malloy, called by the Plaintiff.

iv) Dr. Malloy’s Expert Opinions

[284] The Plaintiff called Dr. Malloy to give expert evidence on the testamentary capacity of Nick when he made his will. Dr. Malloy was presented as a physician who specializes in geriatrics medicine in the Province of Ontario. His curriculum vitae is 32 pages long with an impressive list of publications.

[285] I qualified Dr. Malloy as a geriatric specialist capable of giving opinions about mental capacity. However, given the evidence on the *voir dire* concerning his qualifications I specifically excluded opinions in the area of the competence of a lawyer in ascertaining testamentary capacity. This is not an area for expert evidence from a doctor as this is a question of mixed fact and law within the knowledge of the court. The only expertise that might be admitted in this area is that of a lawyer who has special knowledge about the standards of a reasonable lawyer in this jurisdiction who prepares wills and administers estates in rural areas of Alberta.

[286] Experts are permitted to give opinion evidence because they have a special body of knowledge permitting them to interpret facts that are in a realm not ordinarily in the knowledge of a judge. Their opinions are intended to assist the court to determine essential facts necessary for a decision. Their opinions are not intended to substitute the findings of fact and the application of those facts to the law which is the responsibility of the judge.

[287] Unfortunately, this doctor is on a mission. His written opinion and his oral evidence revealed him to be an advocate, not an expert in the sense we mean it in our litigation system. He named himself to be the leader in how a lawyer should interview elderly patients to determine if they have testamentary capacity. He claims to know how to instruct lawyers as to determining testamentary capacity. Dr. Malloy describes a new book published by him that describes a new process for assessing decision-specific capacity for health care, personal care, finances and property, advanced directives, sexuality and intimacy and wills and powers of attorney. He claims a special expertise in the area of development and testing of instruments to measure capacity in a variety of domains that interest health care workers, members of the legal profession and researchers who measure capacity and cognitive impairment in a variety of settings. He has developed “a variety of different tools to measure capacity objectively. These tools are multidimensional and use structured questionnaires and semi-structured interviews to assess capacity.” [at p. 5, Dr. Malloy’s opinion].

[288] By his own evaluation, measurement of capacity is a complex area and few people understand and can measure it. If this is true, then there are few wills in Canada that are valid.

[289] Dr. Malloy’s view is that many of us are fooled because social behaviour does not equate with capacity. In particular, he said that just because Nick had intact social skills, did not mean that he had intact cognition. Further, Dr. Malloy said that if people are not trained to do these assessments, do not do the assessments routinely, or have never done such assessments, “they really cannot assess capacity properly.” This description probably describes most of the rural lawyers in Alberta who routinely prepare wills for elderly clients.

[290] I have no doubt that Dr. Malloy has special expertise as he avows in his opinion, nor do I doubt that he has led a team of healthcare professionals, ethicists, and lawyers, who have developed and tested models of capacity on a variety of clinical cases and in research studies. It is clear that Dr. Malloy has spent a great deal of time developing a model for testing capacity. It was clear in his evidence he was proselytizing this model.

[291] It appeared to me that the Plaintiff called Dr. Malloy to give opinions about how Milen should have interviewed and tested Nick to ensure that Nick had testamentary capacity.

[292] Precisely because persons of advanced years are not as “sharp” as they were when they were younger, the court must be very careful not to presume loss of testamentary capacity simply because they are more frail. Once testamentary capacity has been proven *prima facie*, as it is in this case, we turn to whether or not there are suspicious circumstances. However, we must not substitute mere suspicion for proof of suspicious circumstances. This principle is described rather aptly as follows:

The eye may grow dim, the ear may lose its acute sense, and even the tongue may falter at names and objects it attempts to describe, yet the testamentary capacity be ample:
***Laramie v. Ferron*, (1909) 41 S.C.R. 391 at page 409.**

[293] As is stated in *Scramstad v. Stannard* (1996), 40 Alta L.R. (3rd) 324, "... the adoption of an overly strict test could and probably would result in many testators, especially the elderly, being stripped of the right to dispose of their assets as they see fit" at para. 132.

[294] As a matter of law, evidence of a possible impairment of mental capacity will not disprove testamentary capacity: *Scramstad* at para. 133. Further, a testator who is found incompetent to manage his own affairs does not necessarily lack testamentary capacity: *Lynch v. Lynch Estate* (1993), A.R. 41 at para. 95; *Houle Estate v. Houle* (1996), 186 A.R. 359 at para. 72.

[295] I cite this law here because it emphasizes the care with which we must look at suspicious circumstances so as not to deprive a senior person of the ability to make a last will and testament even when they are frail. Taking this into account I shall review Dr. Malloy's opinions.

[296] In his written opinion, he stated: "The circumstances surrounding the will are suspicious and I would have to be convinced that this man was capable. I would have to be convinced by very clear notes and inquiry that specifically examined his mental state. The question I want to have answered is "why" he did this. What was the reasoning behind this? Why did he choose the lawyer that his daughter was in a business partnership with? He had never used this lawyer before. I would have to see very clear notes from the solicitor who took instructions and executed this Will and Power of Attorney to convince me of his capacity and to ensure that he was not subjected to any undue influence to make these changes."

[297] It was his opinion after reviewing the documents that I have dealt with above in these reasons, that Nick was most likely not competent to make his Will. He relied on the written opinions given by Drs. Jackman and Cunningham and he relied on factual information found in Dr. Jackman's report which I have shown above was not true and which was admitted by Dr. Jackman at trial not to be true.

[298] Given his comments about having to be convinced, it appears to me that Dr. Malloy was coming at this question from the wrong end. In the circumstances of a case such as the one before me, the court presumes that there is mental capacity, or testamentary capacity, and must be convinced on a balance of probabilities that there are suspicious circumstances.

[299] Dr. Malloy was certain that there were suspicious circumstances surrounding the preparation of the Will. In coming to his conclusion that Nick was most likely not competent to make his Will, Dr. Malloy relied on both the underlying medical conditions and the circumstances surrounding the preparation and execution of the Will. In giving this opinion Dr. Malloy is treading on the exclusive jurisdiction of this court.

[300] Dr. Malloy points to the fact that Nick, when he made his Will on August 10, 2000, left out his son and gave everything to his daughter. He commented that this is unusual, which it is. On these facts alone, I may certainly find suspicious circumstances. However, Dr. Malloy does not take into account that Nick set his son up when his son was 18 years old, nor, that his son had amassed land which was very valuable and was able to have an income from the land,

amongst other things. Further, the doctor appeared to be unaware that during this period of time, Nick did not give his daughter anything except a few head of cattle.

[301] Dr. Malloy takes the fact that Joan had looked after her father and the farm for many years as a negative and as evidence that Joan had exerted undue influence on her father. I will deal with his evidence on undue influence in that section of this judgment.

[302] Dr. Malloy suggests that the fact that the initial meeting was held at a racetrack should raise suspicions. He criticizes the lawyer in this case for failing to undertake a formal capacity assessment.

[303] I have already discussed above just how much a lawyer does in terms of his assessment of capacity depends considerably on how well the lawyer knows the person in question. In this case, the lawyer knew Nick well. I am not sure that Dr. Malloy knew this. In cases, where a family member brings an elderly parent to a lawyer's office, which lawyer has never previously met that elderly person, the circumstances would be completely different in assessing testamentary capacity.

[304] I have discussed the evidence of Drs. Jackman and Cunningham above and have shown that their opinions cannot be accepted by this Court as proving that there are suspicious circumstances surrounding the preparation of Nick's Will.

[305] To be fair to Dr. Malloy, he did not hear all of the evidence in the trial before me on which to base his opinions. For example, Dr. Malloy did not hear Dr. Cunningham who admitted that perhaps Nick did not have low oxygen levels when he executed his Will in early August, 2000. Nor was he given a theoretical question based on the facts before the Court. It is usual for counsel when asking an expert to give an opinion to put a hypothetical to the expert so that the court can determine if the factual underpinnings to the opinion have been proved. This was not done.

[306] Further, Dr. Malloy assumed that Nick was vulnerable as a 91-year-old man. I heard no evidence to suggest that Nick was particularly vulnerable. He was certainly getting frail but the evidence did not support that he was so frail that his will was overborne by anybody.

[307] Dr. Malloy said that the ability to make a will is predominantly a cognitive capacity. That is rather obvious. Dr. Malloy said that in this domain a person (presumably the lawyer) should examine the testator's cognitive capacity to ensure that the testator knows the choices available and appreciates the consequences of each possible choice. He says "to make a will, a person must understand what it means to be dead, inasmuch as they will not be able to make their wishes known at that time (after death).": (at page 7). He goes on to state that a person must decide how he wants his estate distributed, he should know what's in the estate, the testator must decide who will benefit and who will not. This is a restatement of the law which I have already cited. Therefore, this is not helpful to me.

[308] He goes on to say that if a person changes their will they should supply good reasons for these changes. It was apparent from his evidence that Dr. Malloy was not aware of the 1974 Will which was identical in its effect to the one Nick made in the year 2000. Therefore, there would be nothing for Nick to explain.

[309] Dr. Malloy says that the person who is in the best position to determine testamentary capacity is the lawyer who draws up the will. With this I agree. As I have stated above, I will not accept Dr. Malloy's comments about competency with respect to a lawyer assessing testamentary capacity. In fact, I have set out above in detail what happened around the making of the Will and why Milen determined that Nick had testamentary capacity. I have satisfied myself above, that this lawyer, Mr. Milen, satisfied himself that Nick had testamentary capacity.

[310] Dr. Malloy discussed the notion of consistency as being important in capacity assessments. He said there were two types of consistency: internal consistency and external consistency. Internal consistency, he said, deals with the person's ability to make the same choice over time. Here, over 26 years, Nick made exactly the same choice, that is to leave his entire estate to Joan. I would conclude from this that there is perfect internal consistency.

[311] The balance of Dr. Malloy's discussion about internal consistency bears no resemblance to what happened in this case.

[312] Dr. Malloy discusses external consistency as referring to the relationship between choices and the person's values and goals in the broadest sense. He discusses an example to show that external consistency exists where a person's choices are consistent with his life's experiences. In the case before me, Nick's choices are externally consistent. As I discussed above he had ensured that his son had lands, cattle and was able to care for himself. Nick made his Will after his son had his accident and after Nick's wife had died. It was entirely consistent for Nick to leave his farm to his daughter, especially given that she had lived with him for most of her adult life and had taken over the management of the farm after he turned 65.

[313] Further, Dr. Malloy appeared to be completely unaware as to how Joan and Nick conducted their affairs over the years. There are numerous exhibits at trial that show that the financial affairs of Nick and Joan were intertwined for many years. The earliest exhibit is a Form from the Alberta Treasury Branches (ATB) for a Credit Account in the joint names of Nick and Joan Petrowski. Then there are a number of ATB Term Deposits in the names of Joan and Nick Petrowski, the first of which is dated April 30, 1980. There are several other financial documents, including a demand loan made in 1997, which over the years show that Nick and Joan were approaching the management and running of the farm as a joint project. This all occurred long before anyone could say that Nick was old and frail and incapable of making financial decisions.

[314] Finally, the evidence clearly establishes that Joan put her funds into the farm and mixed them so thoroughly with Nick's that it is difficult to trace them after this many years.

[315] The external consistency of Nick and Joan's actions are perfectly congruent with a will that would leave the farm to Joan.

[316] The facts on which an expert bases his opinion must be proved at trial. The facts on which Dr. Malloy relied in his written opinion were not proved at trial. He relied on the findings of Dr. Jackman and Dr. Cunningham. At trial, they reneged on a number of important facts. Dr. Malloy ignored or was not told about other facts that could have had an impact on his opinion. Therefore, many of the facts on which Dr. Malloy based his opinion were not proved and Dr. Malloy's opinion cannot, therefore, stand.

[317] Finally, there is nothing in Dr. Malloy's evidence that suggests, when taken in the context of the facts before me, that Nick did not have testamentary capacity in August, 2000 when he gave instructions for and executed his Will.

c) Whether the Will generally seems to make testamentary sense

[318] I have discussed this aspect several times. It is the analysis above suggested by Dr. Malloy as to internal and external consistency. I will not repeat that analysis here.

d) The factual circumstances surrounding the making of the Will

[319] I have discussed this above. There is nothing suspicious about those circumstances.

e) Whether a beneficiary was instrumental in the preparation of the Will.

[320] I found on the facts set out above that Joan was not instrumental in the preparation of the Will. That is, she did not give instructions for the Will. She did obtain certain information for Milen and her doing so was with the knowledge of Nick.

f) Conclusion on suspicious circumstances relating to testamentary capacity

[321] I have reviewed the evidence of the two physicians who treated Nick in the Viking hospital and referred to the records of the third physician, Dr. Bredesen, who was the named treating physician in the hospital. As set out above, the opinions of Dr. Cunningham and Dr. Jackman as to Nick's mental capacity in August, 2000 have little basis in fact. The evidence is clear that Nick, when he left the hospital on November 9, 2000 had mental capacity.

[322] I recognize that Dr. Cunningham, who had treated Nick for 30 years knew Nick well. The only reference to dementia was in Dr. Cunningham's notes just before Nick left the hospital. There was nothing factual to support this note. A thorough review of the hospital records showed one bout of confusion in the middle of the night, admitted by Dr. Cunningham as being normal in the first few days in hospital, particularly in the elderly, and one incident recorded by the nurse as a seizure spell, which Dr. Cunningham thought was a TIA. Dr. Cunningham agreed that a TIA would have nothing to do with cognitive impairment on the part of Nick.

[323] There was also a comment recorded by a nurse that Nick said he could remember things a long time ago better than recent events. While it is true as described by the experts that short term memory is the first to go with dementia, there is no exploration by anyone as to what this meant. Was this something simply that had happened in the Viking hospital? Was it something that had been going on for some time? I have nothing factual to establish the extent and nature of Nick's memory. Therefore, Dr. Cunningham had no cause to make his diagnosis of dementia. He conceded that if dementia was present it was early stages. If so, then when did it begin? It was not present in January when Dr. Cunningham saw Nick. Further, there is no evidence from anywhere to establish that it existed when Nick made his Will. If it was, by Dr. Cunningham's assessment it was minor in the hospital and presumably even more minor in August.

[324] The Plaintiff cites *Baker Estate v. Myhre*, [1995] A.J. No. 314, para. 40 for the proposition that the burden on the propounder of the will increases when the testator is found to be suffering from a mental disability proximate to the making of the will.

[325] Here, there is a two month period between the making of the Will and Nick's hospitalization. I am unconvinced that Nick was suffering from a mental disability in the Viking hospital. Therefore, I find that *Baker* does not apply in the case before me.

[326] I have no doubt from the medical evidence put before the court by the Plaintiff that Nick was of a sound and disposing mind when he gave instructions for and executed his Will. Taking the evidence of Dr. Jackman, Dr. Cunningham, and Dr. Malloy together, I come to the conclusion that there is nothing in the medical evidence that raises suspicious circumstances.

[327] I also note that not one member of the family that saw Nick between April, 2000 and October, 2000 described a person who had any cognitive impairment.

[328] Finally, the Plaintiff in its argument suggests that the Will has not been proved because the lawyer failed to do a number of things that are suggested by Dr. Malloy as absolutely essential before the evidence of a lawyer about testamentary capacity can be accepted by a court. From my review of the law, it has not yet reached the state where a lawyer is required to do a rote test of capacity as described by Dr. Malloy failing which a will is not proved. The court must take into account all of the circumstances in the case before deciding if the testator was of a sound and disposing mind.

[329] From all of the evidence which I have set out above, taking into account the medical evidence and the evidence of the lawyer, Milen, and the evidence of Peter, Annette and Peter's daughters, I find that the Plaintiff has not raised suspicious circumstances surrounding the making of the Will by Nick.

[330] Therefore, I need not go on to discuss whether testamentary capacity is proved by Joan. However a great deal of evidence was put before the Court by the Defendant about Nick's testamentary capacity and I am therefore going to review that additional evidence.

3. *If Peter has raised suspicious circumstances, has Joan proved testamentary capacity?*

[331] In this section, given that I have not found suspicious circumstances, I will address the additional law and evidence that would go to prove testamentary capacity had I found suspicious circumstances.

[332] Whether the testator has the necessary mental capacity to make a will is a question of fact to be determined by the trial judge in all the circumstances: *Feeney's Canadian Law of Wills*, 4th ed. (LexisNexis Canada Inc., 2007), at 2.4. The testamentary wishes of the testator must be the product of a sound and disposing mind: *Hall v. Bennett* at para. 15. A “disposing mind and memory” is one able to comprehend, of its own initiative and volition, the essential elements of will-making, property, objects, just claims to consideration, revocation of existing disposition, and the like ...”: *Leger v. Poirier*, [1944] S.C.R. 152 at 161, paras. 17-18.

a) Family Background

[333] I start with some background to the family. The background gives us clearer reasons why Nick would leave the farm to Joan and leave nothing to Peter.

[334] On November 15, 1936, Nick married Katherine. They were the parents of both Joan and Peter. Peter was older. Peter married and had children, Joan never married.

[335] Peter quit school when he was 15. He said that his father needed him on the farm. When Peter was 17 years old, Nick began to assist Peter to establish his own farm by giving land and assisting Peter with machinery, vehicles, and cattle. One of those quarters Peter later sold back to Nick. Nick also assisted Peter personally, working on the land that he had given to Peter. Because Peter had been given a gift of lands, he was able to obtain loans using the land as security to acquire an additional three quarters of land. At trial, Peter owned 6 quarters of land.

[336] In November, 1968 at the age of 30, Peter was injured in a farming accident which paralysed him from the chest down. He was hospitalized until June, 1969. Since the accident, Peter regained strength and use of his upper body. He continued to manage and operate his farm. He was able to walk for short distances with the aid of crutches, and he made modifications to his vehicles and his tractor so he could operate them and actively participate in his farming operation. As a result of his confinement to a wheelchair, Peter had several other physical complaints which I will deal with later.

[337] Joan spent her entire childhood on her parents' farm. As an adult, she moved into Edmonton to work for about 20 years until her mother died on December 25, 1973, after which Joan moved back to the farm where she has lived virtually her whole adult life except for the periods each year when she was away for months because of her horse racing business. She had a house in Edmonton where she lived when she worked in Edmonton and, after she began living on the farm, lived when she was in Edmonton with the horses.

[338] In 1974, Nick executed a will. He was 65 years old at the time and there is no reason to believe he was not of sound mind, nor that he was under any undue influence by anybody. The 1974 Will was prepared by a lawyer and in the Will Nick left his entire estate to Joan. I find this

fact particularly significant, because at that time Nick had already assisted Peter to establish himself on his own farm. Further, at the time that the 1974 Will was executed, Peter had already suffered his farm injury. It appears perfectly natural to me that Nick would set his son up on a farm and prepare to leave the farm that he lived on to his daughter when he died.

[339] During his lifetime, Nick did give cattle to Joan, but that was all that he gave her. There is also no evidence to suggest that he provided her with any funds for her own personal use.

[340] The evidence establishes to my satisfaction that in 1974 when Nick executed the Will he told Joan that he planned to retire and that the farm was now hers to manage. Nick was 65 years old at the time. Joan in fact took on most of the management of the farm after her father turned 65. The farm consisted of growing grain and a cow-calf operation. There were hired men on the farm who assisted with the farm work.

[341] I am also satisfied on all of the evidence that Nick, throughout his life after Katherine died, assured Joan that she would inherit the farm. Significantly, Nick did not transfer the farm to Joan at that time. It was apparent from the evidence that Nick was attached to his land. It does not surprise me that he would not want to give up that connection to the land before he died.

[342] Joan also began to train and race horses in 1975. The money she earned went into paying for repairs, improvements and expenses on the farm, including necessary improvements for her own operation. The evidence also established that Joan was responsible for cooking and cleaning and caring for the house in which she, her father, and hired hands lived.

[343] In 1977, Nick met and married Mary. As Mary did not like the farm, Nick moved into town purchasing a house for Mary and himself. They were married for seven years after which they separated, entering into an agreement whereby Mary retained ownership of the house and abandoned any other claim to Nick's estate. Nick returned to the farm when he was 75 years old. In the meantime, Joan had lived on the farm and continued to manage it.

[344] The Plaintiff tries to make something of the fact that Nick was legally intestate from the time of his marriage to Mary until his Will in 2000. While this is legally true, it is clear from the evidence that this was not Nick's intention. Further, the Plaintiff tries to make something of the fact that Nick's estate had increased and changed significantly between 1974 and his death. Oil royalties began in 1975, surface leases were entered into in 1974, land prices increased. The Plaintiff said that none of these things would have been in Nick's mind when he made his 1974 Will. Of course, but they happened very soon after his Will (with the exception of the increase in land values) and Nick did not change his Will even though it must have been in his mind at the time. As to the increase in land value, Peter's land has also increased in value.

b) Defendant's medical opinion evidence

[345] I turn now to the medical evidence of the Defendant as to Nick's capacity. I note here that both Dr. Cunningham and Dr. Jackman said that they would defer to the opinions of an internal medicine specialist.

[346] At trial, Dr. Hamilton was qualified as a specialist in internal medicine to provide opinion evidence with respect to Nick's medical condition in general, but with particular emphasis on the nature of Nick's medical condition during his admission to the Viking hospital between October 21 and November 9, 2000. Further, Dr. Hamilton was qualified to give opinion evidence with respect to whether Nick's medical condition would have any effect on his mental capacity in general, but with particular emphasis on his capacity to execute his Will on August 10, 2000. Dr. Hamilton also gave evidence with respect to Nick's capacity when he made the land transfers which I discuss later in these reasons.

[347] Dr. Hamilton said that an oxygen saturation reading will only tell you what the level of oxygen is in the bloodstream at a particular moment in time. It does not tell you anything about what a person's oxygen saturation was at any other time. This applies regardless of the method used to determine oxygen saturation.

[348] Dr. Hamilton also gave evidence about asbestos-related damage to the lung. However, given both Dr. Cunningham and Dr. Jackman acknowledged that this had nothing to do with Nick's oxygen levels or mental capacity, I shall not review the evidence except to say that Dr. Hamilton agreed with both doctors in this regard.

[349] Dr. Hamilton explained that low oxygen saturation (he called this hypoxemia) does not necessarily change cognitive function. In fact, he explains that the body transfers oxygen to the brain at the expense of all other parts of the body. Further, over time, patients with chronic lung disease will develop physiological adaptations to assist in managing the lower oxygen levels that arise. There was no evidence before me of Nick exhibiting any of the physiological adaptations or changes described by Dr. Hamilton if Nick had suffered from a chronic lung disease.

[350] Dr. Hamilton said that impairment of capacity is not caused by low oxygen levels unless they are profound, that is in the 70% range. He told the Court that it is not low oxygen levels that cause cognitive impairment but rather the level of carbon dioxide in the blood. There is no evidence before me that Nick had suffered at any time from an increase in carbon dioxide retention.

[351] The evidence was that Nick had been short of breath for several months prior to his admission to Viking hospital. Dr. Hamilton said that there were several possible explanations for this. One, he said, was coronary artery disease, another was diabetes and a third was hypertension. The medical evidence supported that Nick was suffering from all of these problems. Dr. Hamilton referred to various tests that Nick had undergone from January 26, 2000 to tests suggestive of disease to the left side of the heart. We know that Nick had high blood pressure because he was being treated for that by Dr. Cunningham. Finally, the report made by Dr. Bredesen when Nick was discharged diagnosed diabetes.

[352] Dr. Hamilton was asked about the reason for Nick's weight loss and he said it was probably because of dysphagia and not because of chronic lung disease or dementia.

[353] It was Dr. Hamilton's opinion that when Nick was admitted to Viking hospital on October 21, 2000, he was suffering from a community acquired viral pneumonia which was mild in nature and which resolved on its own. He based his opinion on the evidence I have discussed above which is as follows:

1. The x-ray reports taken at the Viking hospital confirmed the finding of consolidation in the left lower lobe. This was described by Dr. Hamilton as the "gold standard" for diagnosing pneumonia.
2. The pneumonia was mild because it resolved shortly after Nick's admission to hospital, and significant improvement was noted in the period between the x-rays of October 23 and October 25.
3. The pneumonia resolved spontaneously without treatment (other than the oxygen) or antibiotics. Antibiotics, as set out above were prescribed for the urinary tract infection after the pneumonia was resolving.
4. Although Nick's oxygenation levels were at 81% when he was admitted to the hospital, they improved as soon as he was put on nasal prongs to 91%.

[354] Dr. Hamilton said that given the pneumonia was mild and viral in nature, he concluded that Nick had been suffering from pneumonia for only a few days prior to admission. He said that Nick's shortness of breath for several months could be explained by coronary artery disease and the worsening condition of his shortness of breath shortly before he was admitted to Viking hospital could be explained by the viral pneumonia.

[355] Dr. Hamilton further said that there was no evidence that he had seen in the medical records or any other evidence that Nick was suffering from low oxygen levels in August, 2000.

[356] Dr. Cunningham diagnosed an incident of a TIA in the Viking hospital. Dr. Hamilton was asked for his opinion as to whether it was a TIA and what might have caused it. Dr. Hamilton commented on the two episodes described in the nursing records, one being October 27, 2000 and the other being November 4, 2000. On the November 4 incident, Dr. Hamilton said it was likely a seizure as opposed to a TIA. He said both incidents were likely aspiration events. Both took place while Nick was eating and Nick had a history of dysphagia. Dr. Hamilton said that it is common for elderly persons to aspirate in the hospital and for their oxygen levels to drop at the same time, which can compound the problem.

[357] Finally, Dr. Hamilton said that the signs and symptoms of dementia would have been clearly noticeable to family members and persons around him. In this regard, he agreed with the observations of Drs. Jackman and Cunningham made in their evidence at trial.

[358] The defence also put in opinion evidence of Dr. Sadavoy, who was qualified as a geriatric psychiatrist to provide opinion evidence as to Nick's medical condition and cognitive functioning in general but with particular reference to whether Nick had testamentary capacity

when he executed his Will on August 10, 2000. He also gave opinions with respect to Nick's capacity when he executed transfers of land in November, which I discuss later.

[359] Dr. Sadavoy described dementia as a syndrome that required a number of signs and symptoms to be present before the label could be applied. To determine if dementia is present, he looks at the person's day-to-day life or he conducts clinical testing. He also explained that if symptoms of dementia are present, but they are not impairing an individual's ability to function, the diagnosis of dementia may not apply.

[360] He explained that dementia can either come on gradually or suddenly. A sudden onset of dementia is caused by stroke. Clearly this was not the case with Nick.

[361] The gradual onset of dementia can be caused by a number of things including Alzheimer's disease and vascular dementia. Vascular dementia is damage to microscopic blood vessels which knock out part of the brain. If this occurs an important part of the brain can be damaged.

[362] Dr. Sadavoy took into account the fact that no family members describe any symptoms during the period from January 26, 2000 to October 21, 2000 that Dr. Sadavoy said would be required for a diagnosis that Nick was suffering from any form of dementia.

[363] Given the above and the fact that dementia is usually a slow and progressive disease, Dr. Sadavoy concluded that it is improbable that Nick deteriorated from a normal, healthy person on January 26, 2000 to suffering from dementia by August 10, 2000.

[364] I find that Dr. Sadavoy's evidence was balanced and fair and I accept his opinion.

c) Conclusion on Testamentary Capacity

[365] I find that the medical evidence put forward by the Defendant was from qualified experts whose opinions are supported by the evidence. I find that Nick was of a sound and disposing mind when he gave instructions for and executed his Will in August, 2000.

[366] This brings me to the question of whether Nick was under undue influence when he made his Will in 2000.

B. Was Nick Petrowski subject to undue influence when he executed his Will?

[367] With respect to the third category of suspicious circumstances Peter says that there are suspicious circumstances surrounding the making of the Will showing that the free will of Nick was overborne by acts of coercion or fraud. Peter says that the suspicious circumstances are that Nick as an elderly parent was vulnerable to the fiduciary relationship, duty, and relationship of Joan as his adult child. If undue influence exists here, Nick's Will must be declared invalid.

[368] Given that the Plaintiff alleges undue influence, the Plaintiff bears the burden of proving it. The person attacking the will has the burden of proving that the testator was overborne by the influence exerted by another person such that there was no voluntary approval of the contents of the will: *Vout v. Hay* paras. 21 and 29.

[369] It is not enough to show that a person is in a position to exert persuasion on the testator to execute a will in their favour or to show that such will was executed in their favour as a result of persuasion. In fact, influence is permissible so long as it does not amount to undue influence. Undue influence must amount to coercion or victimization and be so overpowering as to be clear that the will is not the will of the testator but that of another person: *Ravnysyn v. Drys*, [2005] B.C.J. No. 831 at paras. 103 and 104.

[370] In Alberta, undue influence has been defined as follows:

“To constitute undue influence in the eyes of the law there must be coercion; pressure if exerted so as to overpower the volition without convincing the judgment is a species of undue influence which will invalidate a will.”

McCardell’s Estate v. Cushman (No. 2) (1989), 107 A.R.161, [1989] A.J. No. 1394 at para. 191 citing *Re Sample Estate* (1955), 15 W.W.R.(N.S.) 193, at 198, quoted in *Re Cosgrove Estate* (1988), 73 Sask. R. 42, at page 48.

[371] For me to find undue influence, the Plaintiff must establish that the influence imposed on Nick by Joan was so great and overpowering that the Will reflects the will of Joan and not Nick: *Banton v. Banton*, [1998] O.J. No. 3528 at para. 58.

[372] The Defendant says that undue influence will not be established simply by providing evidence that the party is in a position to influence the deceased: *Gamache v. Gamache* (2005), 389 A.R. 256 (Q.B.), 2005 ABQB 944 at para. 59. The Defendant further says that the fact that a beneficiary may have assisted in the preparation of a will is only relevant to the question of whether the testator had knowledge of and approved of its contents. It is not enough to show that the circumstances surrounding execution are consistent with undue influence. It must be shown that they are inconsistent with the contrary hypothesis: *Craig v. Lamoureux*, [1920] A.C. 349, [1920] C.C.S. NO. 151.

[373] Peter says that there was a relationship of dominance by Joan over Nick. He says that the relationship between them leads inexorably to the inference that the Will is the product of undue influence and that it does not reflect Nick’s true testamentary intent. The Plaintiff invites the court to review the relationship in the context of the weakened mental faculties of Nick at the time he gave instructions for the Will and executed it. On that basis, the Plaintiff invites me to declare the Will to be invalid.

[374] The Plaintiff says that undue influence is found by taking into account all of the circumstances surrounding the preparation of a Will. I discuss above in more detail Nick’s mental faculties at the time of the making of the Will. I find that Nick’s faculties were fine.

[375] Peter says that this Court must take into consideration whether the mental faculties of Nick, the testator were in a weakened state saying that it was this basis on which the court found undue influence in *McCardell's Estate v. Cushman (No. 2)*.

[376] Peter says that there is eyewitness evidence that Nick was in a weakened mental state in April of 2000. I have discussed this above but I will emphasize here that from the evidence given by Peter and the other members of his family, I cannot find that Nick was in a weakened mental state. I accept that he was talking about death and dying with his granddaughter but that is not unusual for someone who is 90 or 91 years old. The evidence given by the Plaintiff simply does not achieve the threshold of a weakened mental states.

[377] The Plaintiff submits that there should be a presumption of undue influence found in the relationship between Joan and Nick. The Plaintiff in this case suggests that because the relationship between Nick and Joan was of a parent and child that a presumption of undue influence arises and the onus shifts to Joan, who is the beneficiary of this case, to prove that undue influence did not exist.

[378] The Plaintiff suggests that the circumstances in the relationship between Joan and Nick giving rise to the presumption of undue influence are the following:

1. Joan was the only beneficiary under the Will;
2. She was an adult child who lived with her elderly father; and
3. She in essence ran the farm, controlled bank accounts and the racing operation on the farm towards the end of her father's life.

[379] The Plaintiff states that the test is found in *Geffen v. Goodman Estate*, [1991] S.C.J. No. 53 at paras. 42 to 45:

1. first, one must look at the relationship between the parties and whether the relationship itself creates the potential for dominance;
2. then, if the required relationship exists, then the court must examine the nature of the transaction.

[380] If the presumption arises from this analysis, the Defendant has the burden of proof to show there was no undue influence.

[381] First, courts of equity recognize those relationships which give rise to the presumption such as solicitor and client, parent and child, and guardian and ward. It is obvious that none of those apply in this case, we do not have a parent and child but rather a child and elderly parent. However, equity recognizes that as well as the recognized relationships, other relationships of dependency may also be included which defy easy categorization. To determine that there is a presumption in this case, the Plaintiff must establish that Joan was dominant over Nick.

[382] In the case of an old and sick parent, a child may assume a relationship of dominance over that parent. Some case law has identified such relationships as being ones of dependency: *Canadian Imperial Bank of Commerce v. Ohlson*, [1997] A.J. No. 1185 (C.A.); *Stewart v. Book*, [1992] A.J. No. 539 (Q.B.).

[383] In this case, at the time that the Will was made I have found that Nick was not sick. I take into account the three complaints set out above. Nick was certainly getting on in years but I have found that there is no evidence that he was unwell mentally or otherwise at the time he made his Will. Therefore, the situation between him and Joan does not give rise to the presumption that Joan exerted dominance over Nick.

[384] Aside from some minor evidence about a couple of times that Joan yelled at Nick, once after he was out of the hospital when he was not eating, there is simply no evidence to establish that Joan was dominant over Nick. In fact, prior to his entering the Viking hospital the evidence is clear that Joan was not at home for many months in a year while she was on the racing circuit. In fact, Peter made a point of this in his evidence.

[385] Peter said that Joan was gone for 9 months of the year, training horses, but that she would return to the farm from time to time. At this point in his evidence, Peter was clearly trying to minimize the contribution that Joan gave to her father, presumably to show the court that she did not deserve the farm.

[386] During the times Joan was away, Nick looked after himself with the assistance of hired hands. The predominant evidence is that Joan was a loving, caring daughter who looked after her father and the farm but left him a great deal of independence.

[387] The Plaintiff's expert, Dr. Cunningham, who had treated Nick for three years, gave evidence that Joan was a caring family member. Further, the Plaintiff's expert, Dr. Molloy, refused to provide an opinion as to whether there was undue influence in this case. From the facts I have recited above, it was not Joan who encouraged Nick to prepare the 2000 Will but rather Mr. Milen upon recognizing that the 1974 Will was no longer valid.

[388] With respect to the nature of the transaction, this was a bequest, so the court is concerned that the bequest not be tainted. The Supreme Court in *Geffen* says that it is enough to show a relationship of dominance for the presumption to be triggered. I find that the presumption is not triggered because there is no relationship of dominance established by the Plaintiff.

[389] I find that Nick entered into the making of his Will as a result of his own full, free and informed thought. Milen gave absolutely no evidence whatsoever to suggest to this court that anything that Joan did during the course of the instructions for the Will or the execution of the Will influenced her father at all. I accept the evidence of Milen. Further, I am satisfied that Milen carefully went over the Will and explained it to Nick. Although it was in the presence of Joan, there is no evidence to suggest she exerted any influence on Nick during this process.

[390] It cannot be the law that simply because a child has lived with and cared for a parent that the child should be denied benefits under a will for simply that reason alone.

[391] From all of the above, I find that Joan did not exert any undue influence over Nick during the course of the preparation of the Will and the execution of the Will. I find that the Plaintiff has not raised the presumption of undue influence in this case.

C. Was Nick Petrowski of sound mind when he transferred the lands and minerals into joint names?

[392] The mental capacity required to give effect to an *inter vivos* transfer is the same as that for the execution of a will: *Lynch v. Lynch Estate* at paras. 87 to 91. The standard for capacity applied to an *inter vivos* transfer is no less stringent than that for testamentary dispositions: *Mathieu v. San Michel*, 1956 CarswellQue 36 (S.C.C.).

[393] The Plaintiff suggests that the validity of the transfer of Nick's farmland into joint tenancy with Joan should be evaluated with the Will because they were conceived at the same time. I agree with the Plaintiff.

[394] The Plaintiff suggests there were a number of suspicious circumstances surrounding the execution of the *inter vivos* transfers:

- Nick's diagnosis of dementia by Dr. Cunningham nine days prior to the transfer;
- Nick's transient ischemic attack during his hospitalization in October, 2000;
- the fiduciary relationship between Nick and Joan, in which Joan could dominate Nick;
- the transfers were drafted and witnessed by Joan's business associate, Milen;
- Nick was not provided independent legal advice prior to the transfers; and
- Nick was not advised of the monetary value of the land he was transferring.

[395] The Plaintiff says that the arguments with respect to the *inter vivos* transfer exactly mirror those already made with respect to the Will itself. I have discussed above the alleged "suspicious circumstances" in the context of the Will and have concluded that none of them were suspicious. Therefore, they are not suspicious for the purpose of the *inter vivos* transfers. I earlier found that Nick had testamentary capacity up to the time he left Viking hospital on November 9, 2000. My findings with respect to Nick's capacity when he gave instructions for the land transfers and the transfers of the mines and minerals into joint tenancy with Joan must be the same.

[396] Here, I point out that I have already determined that the transient ischemic attack was not seen by any of the doctors, including Drs. Jackman and Cunningham, to have anything to do with mental capacity. I have also determined that Joan did not exert undue influence on Nick. I have dealt with the relationship between Joan and Milen and my findings here are the same. Milen was Nick's independent legal advice.

[397] I have discounted Dr. Cunningham's diagnosis of dementia, as did he in his evidence at trial. Opinion evidence of Dr. Hamilton and Dr. Sadavoy as to Nick's mental capacity when he executed the transfer documents on November 18, 2000, was that Nick had mental capacity on that date.

[398] To put the land transfers into context, I shall review the facts.

[399] In August, 2000, Nick gave Milen instructions to prepare transfers of lands and mineral rights. Nick instructed Milen at the race track on August 5 and then when he executed his Will on August 10. On August 10, Nick gave further instructions to Milen to proceed with preparation of the necessary documents. Nick's instructions, after a discussion with Milen about Nick's options for estate planning, were to prepare transfers of the lands into joint tenancy with his daughter, Joan. The estate plan included the transfer of the surface rights and the mines and minerals in joint tenancy to himself and Joan.

[400] Joan was to prepare an affidavit of the value of the land and the mines and minerals as that was required for the transfer. She did so, but it took some time.

[401] Milen proceeded to gather in the documents and information he needed to prepare the transfers. That information was collected, in part by Joan and in part by Milen in August and September, 2000.

[402] By the time Nick was discharged from Viking hospital on November 9, he had recovered from his pneumonia and his oxygen saturation had returned to normal. After November 9, 2000, Peter and Annette described several visits to see Nick on the farm. They gave no evidence as to any cognitive dysfunction or impairment at any time when they visited Nick. Further, the medical records (Nick was receiving home care and returning to hospital at around this time to deal with his indwelling catheter) do not suggest that Nick had any issues with mental capacity and normal cognitive functioning at or around November 18 when he executed the transfers.

[403] Milen saw Nick on November 18, in Joan's kitchen. Milen returned that day to the farm with his wife, Janice for the purpose of having Nick and Joan execute the transfers. They got there early at about 11:00 a.m. Milen and Janice stayed for lunch prepared by Joan. Lunch was also attended by a groom named Stephanie, Joan, Nick and other hired hands. Lunch lasted for about 1 hour. There was open dialogue among everyone including Nick. Milen had an opportunity to observe Nick for over an hour and compare his observations of Nick to those he had made of Nick on August 10, 2000 and many other times previous to that. Milen observed that there was no change in Nick's communication style but there was a change in his physical output. Nick was moving slower and he looked more tired. Milen was of the view that Nick's cognitive functioning was intact.

[404] After lunch, Joan and Nick and Milen went to Nick's kitchen to review and discuss the estate planning and transfer documents. There was no one else present. They were seated the same as when Nick signed the will. When Milen reviewed the transfer documents with Nick, Milen satisfied himself that Nick understood and approved them before they were executed.

[405] In addition to those alleged suspicious circumstances, the Plaintiff raises two others in the context of the *inter vivos* transfers:

- Joan, not Nick, arranged for Milen to draft and attend for the execution of the transfers; and
- Joan was already acting as Nick's power of attorney.

[406] I have dealt with the arrangement for the meeting between Nick and Milen for the discussion of the estate plan. Yes, Joan did make the arrangement. However, I have determined there was nothing sinister in this. As for the execution of the transfers, it is natural that Milen would call the house and Joan would answer and make the arrangements. She made arrangements for many appointments for Nick.

[407] Although Joan was acting as Nick's power of attorney at the time that the transfers were executed, she was not at the time that the instructions were given. From the evidence of Milen, there was not much to do on the date of the execution of the transfers except ensure that Nick still had capacity and to sign the transfers. The instructions had been given by Nick prior to the execution of the power of attorney. Further, there was simply no evidence to substantiate that Joan was using the power of attorney to run Nick's life. Even though the power was in place when Nick was in the Viking hospital, Joan left him to sign all the necessary documents and he was thoroughly consulted on whether he was going into long term care. Even though Nick said that he wanted to consult with Joan before he made the final decision to go into long term care, this is perfectly natural between a daughter who had lived with her father for many years, and who had looked after him and the farm. Nick's concern for her wishes demonstrates that he was of sound mind and capable of thinking about how his decision would impact on her.

[408] I find that Nick had capacity when he executed the *inter vivos* transfer documents putting his land and the mines and minerals into joint names with himself and Joan.

D. Was Nick Petrowski subject to undue influence when he executed those transfers?

[409] I have dealt with undue influence with respect to the Will as set out above. I will now address specifically whether there was undue influence relating to the *inter vivos* transfer of the lands, mines and minerals.

[410] To prove undue influence with respect to the transfer of lands, that is of the *inter vivos* gift, the party attacking the transfer can prove undue influence in the presence of two circumstances:

1. If there is sufficient evidence adduced that undue influence was used to secure the gift in favour of the donee; or
2. Fiduciary or some similar relationship exists between donee and donor that would place the donee in a position to over bear the will of the donor.

Re: Craig, [1971] Ch. 95 at 100 and 104.

[411] I have set out above the circumstances surrounding the giving of the instructions for the transfers of the land and mines and minerals. There was nothing in those facts to suggest that Joan was placing undue influence over Nick for the transfer of the lands into joint tenancy. The requirements for undue influence are set out above and are the same here.

[412] For exactly the same reasons given earlier with respect to the making of the Will, I find that there was no undue influence on Nick when he gave instructions for and executed the *inter vivos* transfers.

[413] I turn now to the nature of the transfers.

E. If Nick Petrowski was of sound mind and not subject to undue influence when he executed the transfers, what was the nature of the transfers?

[414] The Plaintiff argues that even if the *inter vivos* land transfers are valid, the presumption of a resulting trust arises from Nick's transfer into his name and Joan's in joint tenancy. The Plaintiff cites *Pecore v. Pecore*, [2007] S.C.J. No. 17 for this principle. The Plaintiff says that Joan must rebut the presumption and that Joan has not proved that Nick intended to give her the land as a gift.

[415] Given that I have found that the Will is valid, one could ask why it would matter about the nature of the transfers. This question must be decided because it impacts on whether there is an estate which could be subject to a claim by Peter for support under the *Family Relief Act*. I deal with this claim later in these reasons. If the *inter vivos* transfer is a resulting trust, there would be an estate against which Peter could make a claim under that Act: *Albert v. Albert* (1984), 24 Alta L.R. (2d) 258 (QB) at paras. 18-20.

[416] When the transfers were executed by Nick in 2000 and when Nick died in 2001, the law in Canada was that there was a presumption of advancement when *inter vivos* transfers of property were made by a parent to a child. That is, there was a presumption that the parent had made a gift to the child while the parent was alive. In Alberta, as recently as 2005, the Court of Queen's Bench has found that *inter vivos* transfers of joint accounts created by a father with his daughter for the express purpose of defeating any testamentary challenge were valid and as a result the property did not form part of the estate: *Erickson Estate v. Erickson*, [2005] A.J. No. 548 at paras. 57-59. The law is that *inter vivos* transfers may be valid, even if the effect is to defeat a family relief claim. The fact that Peter is making such a claim has no bearing on the nature of the transfer from Nick to Joan: *Hossay v. Newman* (1998), 22 E.T.R. 2(d) 150 (B.C.S.C.), [1998] B.C.J. No. 3289 at para. 10; *Dower v. Alberta (Public Trustee)* (1962), 38 W.W.R. 129 (Alta T.D.) at 141; *Collier v. Yonkers* (1967), 61 W.W.R. 761 (Alta A.D.), 65 D.L.R. (2d) 223 (C.A.) at para. 5.

[417] Therefore, I must determine if this transfer was a gift by Nick to Joan during his lifetime or whether the transfer into joint names was simply a resulting trust. In the latter case, Joan

would hold the trust until Nick's death and then the property would go back into Nick's estate to be distributed according to his Will and subject to any other claims against his estate. Here, she is the sole beneficiary but there is a family relief claim against Nick's estate made by Peter, which I discuss later in these reasons.

[418] The presumption of advancement was reversed in 2007 by the Supreme Court of Canada in *Pecore*. In that case the Court acknowledged that today many aging parents make *inter vivos* transfers into joint names with their children so as to facilitate the efficient management of that parent's affairs: at para. 36. *Pecore* articulates the new presumption of resulting trusts which arise when a parent transfers title to property into a child's name and where the child has given no value for the property. This is presumed to be a gratuitous transfer. The child is a fiduciary. The transferee is therefore under an obligation to return the property to the original title owner. The court found that there is a rebuttable presumption that the adult child is holding the property in trust for the aging parent, that is, the Supreme Court states that where a transfer is made for no consideration, the onus is placed on the transferee to demonstrate the transfer was intended as a gift: at paras. 20 and 24.

[419] In this case, the transfer into joint names was made for \$1.00. Joan is the transferee. The return of the original property to Nick would be into his estate.

[420] The Plaintiff says that *Pecore* applies in this case and that Joan must rebut the presumption of a resulting trust and she has not rebutted this presumption. Therefore the land still forms the bulk of Nick's estate. Accordingly, the Plaintiff says the onus is on Joan, the transferee of the land, to rebut the presumption of the resulting trust and prove that Nick intended to give her the land as a gift.

[421] One difficulty that I face here is that there has been a significant change in the law since Nick executed the transfers and the date of his death. It would not be expected at that time that Milen as legal counsel would have advised Nick that the transfers were anything but a presumption of advancement given the state of the law. Should I treat this transaction as a resulting trust or as a presumption of advancement.

[422] Further, we also have the advancement by Nick to Peter of lands. Is this also a resulting trust? The Defendant did not argue this. However, it serves to point out that we should not apply the law retroactively unless it is clear that the court intended us to do so.

[423] I find that the presumption of advancement applies in this case because that was the law when Nick executed the transfers and when he died. To apply the law retrospectively would be unfair to Nick in this case.

[424] Because I have found the presumption of advancement applies, it is the responsibility of the challenger to those transfers to rebut the presumption.

[425] I shall review some of the facts that pertain to this question. I do so to put the presumptions in perspective and to demonstrate why Milen would not be expected to explain the presumptions to Nick.

[426] First, I note Nick's long time intention to transfer the farm to his daughter, Joan, because it appears that Nick was satisfied that he had taken care of his son, Peter, when Peter was very young. Further, I note that Joan was responsible for taking care of the farm. There was no evidence led to suggest that anyone else was doing this. Peter tried to make something of the fact that hired hands were used to care for the farm. I am not convinced by this argument. Joan was primarily responsible for looking after the farm and her father from the time he was about 65 years old - some 25 years.

[427] Next I turn to the explanation given by the lawyer, Milen, as to the underlying reasons for the transfer documents.

[428] Milen discussed an estate plan with Nick. Nick said that when he died he wanted everything to be clean and simple. He said he wanted everything to go to Joan.

[429] Milen told Nick that he could avoid probate and accomplish the transfer of the land to Joan in a tax neutral way. Milen told Nick to remove the lands and the mines and minerals from his estate. Milen told Nick the options. Milen told Nick that he could transfer the land to Joan by way of a roll over under the Income Tax Act so that there would be no tax. Milen and Nick also talked about using the capital cost exemption and bump up Joan's cost base. Both of those options Milen explained to Nick would result in the land and the mines and minerals being transferred to Joan immediately.

[430] Nick asked for other options. Milen then discussed joint tenancies and what would be involved. The joint tenancy would be for estate planning purposes only. There would not be any income tax implications. The joint tenancy would have a right of survivorship. Milen explained that the person who outlived the other would end up owning the lands and mines and minerals. Milen told Nick that in the normal course, Joan would outlive Nick and then she would be the sole owner of the land and mines and minerals. Milen also said that this would be quick and inexpensive. Nick said that he preferred the joint tenancy arrangement.

[431] Milen explained to the court that the language chosen for the transfer documents was so because of possible tax consequences that could arise on Nick's death and the transfer of the property shown. Milen said that Nick's clear intent as described when he gave his instructions in August was to provide a gift to Joan of a joint interest in the land and mines and minerals.

[432] Given the language of the transfer agreement which states that it was executed for "estate planning purposes only", the Plaintiff says that the presumption of a resulting trust is not rebutted.

[433] I find that the presumption of advancement applies to this transfer of lands and mines and minerals from Nick into the names of Nick and Joan. I also find that the Plaintiff has not rebutted that presumption.

[434] Further, even if the law to be applied in this situation were that the *inter vivos* transfer could be a resulting trust, the actions of the parties, including Nick, as described above lead inevitably to the conclusion that Nick intended for the property to transfer as a gift from Nick to Joan, that is there is a presumption of advancement based on the facts in this case.

[435] Therefore, I find that Joan was entitled to have the lands and mines and minerals transferred to her on Nick's death.

F. Is Peter Petrowski entitled to testamentary relief?

[436] Peter Petrowski makes an application pursuant to the *Family Relief Act*, R.S.A. 2000, C. F-5, for relief on the basis that he is disabled and requires testamentary relief. There are two issues to discuss. The first is whether Peter is entitled to that relief. The second is, if Peter is entitled to relief, what is the quantum of the relief and how it should be structured.

[437] Whether the Will is valid or invalid makes no difference to this analysis. If the Will is valid, Peter can make his claim against the whole estate subject to any claim by Joan for unjust enrichment. If the Will is not valid and Nick died intestate, Peter is entitled to a ½ share of the estate subject to any claim that Joan may have for unjust enrichment. The question on an intestacy is whether Peter is entitled to more than his ½ share of the estate, after Joan's unjust enrichment claim is satisfied.

[438] However, if I am correct that Nick had capacity when he made the *inter vivos* transfers, and that Joan exerted no undue influence over him, then there is no property against which Peter can make a claim under the *Family Relief Act*. However, if I am wrong and the *inter vivos* transfers are invalid or were a resulting trust, then Peter may have a claim against Nick's estate under the *Family Relief Act*. I will now consider whether he has such claim in those circumstances.

1. Relevant legislation

[439] The present *Dependants Relief Act*, R.S.A. 2000, c. D-10.5 replaced the *Family Relief Act*, R.S.A. 2000, c. F-5. The *Family Relief Act* was in place when Nick died and is the legislation that applies to this case. The relevant provisions of these Acts are, however, very similar.

[440] Section 3(1) of the *Family Relief Act* applies:

3 (1) if a person

- (a) dies testate without making in the person's will adequate provision for the proper maintenance and support of the person's dependants or any of them,
- (b) dies intestate and the share under the Intestate Succession Act of the intestate's dependants or of any of them in the estate is inadequate for their proper maintenance and support,

A judge, on application by or on behalf of the dependants or any of them, may in the judge's discretion, notwithstanding the provisions of the will or the Intestate Succession Act, order that any provision that the judge considers adequate be made out of the estate of the deceased for the proper maintenance and support of the dependants or any of them. [Emphasis added.]

[441] Only a "dependant" may apply for an order under the *Family Relief Act*. "Dependants" are defined to include spouses, children under 18 and "a child of the deceased who is 18 years of age or over at the time of the deceased's death and unable by physical or mental disability to earn a livelihood": *Family Relief Act*, s. 1(d) [emphasis added]. It is admitted that this is the only category of "dependant" that is available to Peter.

2. *Relevant common-law*

[442] The general common-law principles that guide a court in considering testamentary relief were set by the Supreme Court of Canada judgment of *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807, 116 D.L.R. (4th) 193 and are helpful in the case before me. However, as that case originates from British Columbia, the legislation being interpreted by the Court (the *Wills Variation Act*, R.S.B.C. 1979, c. 435) is different than the legislation which I am charged with interpreting in this case. In my review of the cases decided in Alberta following *Tataryn* many did not recognize the difference between Alberta legislation and the British Columbia legislation being interpreted. Further, cases decided in jurisdictions other than Alberta consider dependant relief legislation which may be quite different than Alberta's *Family Relief Act* and must, therefore, be cited carefully ensuring that the principles in those cases apply to the legislation in Alberta. With this in mind, I shall review *Tataryn* and the case law in Alberta with a view to finding principles that apply in a case such as the one before me and that honour the Alberta legislation.

[443] First, I note that McLachlin J. in *Tataryn* was interpreting the phrase found in the *Wills Variation Act* of "adequate, just and equitable" as it applies to provisions for spouses and children. That phrase is not found in the Alberta legislation. The language that we deal with in Alberta is "adequate provision for proper maintenance and support". Further, the British Columbia legislation applies broadly to spouses and children without limit to age or disability. In Alberta, adult children are specifically excluded unless they are dependant.

[444] How then does *Tataryn* apply in Alberta?

[445] Justice McLachlin (as she then was) suggests that an analysis of testamentary relief legislation should first determine what obligations the testator had to the claimant. She describes them as legal and moral obligations. The legal obligations are those that would be imposed by law on a testator during his lifetime if the claimant made an application for support. The moral obligations are those found “... in society's reasonable expectations of what a judicious person would do in the circumstances, by reference to contemporary community standards.” (at para. 28).

[446] Justice McLachlin indicates a “legal obligation” is intended to create symmetry between the obligations imposed on a person while alive and after death (*Tataryn*, at para. 29). Where a legal obligation arises from the operation of law (common-law or statute) during the testator’s life-time, testamentary relief legislation then extends and continues that obligation to the period after death. Examples of legal obligations include child and spousal support, and equitable remedies such as unjust enrichment (at para. 30).

[447] Therefore, we may take *Tataryn* to mean that we should look to the legal obligations that would have applied during the testator’s life time to assist in the interpretation of the language of the Alberta legislation, which is “adequate for proper maintenance and support”. In *Stang v. Stang Estate*, 1998 ABQB 113, 58 Alta. L.R. (3d) 201, Justice Johnstone deals directly with this issue in paras. 22 to 32. She concludes that the legal obligations after death should form a balance with the legal obligations existing before death. That case was about the rights of a spouse who had not been given the same rights to matrimonial property under the will that she would have had before the testator’s death.

[448] Once it is determined whether there is a legal obligation, then one must turn to the extent of the support that is required. That first requires an interpretation of the language in the statute. *Tataryn* deals with how to approach interpretation of such a statute. First, the language in the statute confers a broad discretion on the court. The Alberta legislation states: “a judge may, in the judge’s discretion, order any provision that the judge considers adequate”. Second, the court must look at the specific circumstances of the case and read the statute in light of modern values and expectations. Justice McLachlin describes this quest for interpretation as “the search for contemporary justice” (at para. 15). It is this latter approach that takes into account the moral obligations of the testator to the claimant.

[449] I find that these principles apply when interpreting the language of the Alberta statute.

[450] McLachlin J. was interpreting the words “adequate, just and equitable” in the British Columbia statute which she said provided for more than the needs of the claimant. The language that we deal with in Alberta, “adequate for proper maintenance and support”, suggests a needs-maintenance approach”: *Stang* at para. 25, citing *Ostrander v. Kimball Estate*, [1996] S.J. No. 444 (Q.B.) at para. 32. The case law suggests that moral obligations inform the interpretation of the language of the statute relating to legal obligations, that is that we test the extent of the legal obligation against contemporary community standards.

[451] In Alberta, following *Tataryn*, a testator has both legal and moral obligations. Those obligations arise separately and must be considered separately. *Tataryn* suggests that even in the absence of legal obligations the testator may owe moral obligations to a dependant. However, moral obligations are second to legal obligations and the award made on the basis of a moral obligation can be limited by the size of the estate and the testator's other legal or moral obligations.

[452] The court is, therefore, to rank the deceased's obligations in evaluating the various competing obligations (*Tataryn* at para. 32). Legal obligations generally have priority over moral obligations, while moral obligations vary in strength on the basis of social expectation. Provisions in a will are adequate when they meet a minimum threshold: "[o]nly where the testator has chosen an option which falls below his or her obligations as defined by reference to legal and moral norms, should the court make an order which achieves the justice the testator failed to achieve." (Emphasis added.) Otherwise, the testator's wishes are to remain undisturbed.

[453] In Alberta, where the court finds as I do here that there are no legal obligations, I question whether the court can award any part of an estate based only on moral obligations. This would be sidestepping the clear intention of the legislature to ensure that a testator only provided for his dependants as defined in the legislation, unlike in British Columbia where the legislation is very broad. I discuss these differences later. I must assess the requirements of the *Family Relief Act* to determine if there are any legal obligations that Nick owed to Peter and then, if there are legal obligations, assess those legal obligations in light of moral standards in our community.

[454] *Tataryn* has been applied in Alberta. Moreau J. in *Siegel v. Siegel Estate* (1995), 177 A.R. 282, 35 Alta. L.R. (3d) 321 (Alta. Q.B.) concluded that, even though the British Columbia and Alberta legislative regimes were distinct, the *Tataryn* approach also applied in Alberta. Division of an estate would be considered on the basis of both the deceased person's legal and moral obligations. This conclusion was confirmed and further developed by Johnstone J. in *Stang*, and while Alberta application of *Tataryn* does not seem to have been considered and expressly endorsed by the Alberta Court of Appeal, *Siegel*, and *Stang*, *supra* have been broadly followed: *Gow v. Gow Estate*, 1998 ABQB 1073 at paras. 78-79, 238 A.R. 39; *Dupere (Next Friend of) v. Spinelli Estate* (1998), 229 A.R. 137 at paras. 14, 31, 84 A.C.W.S. (3d) 610; *Broen Estate (Re)*, 2002 ABQB 806 at para. 11, 324 A.R. 396; *Woycenko Estate (Re)*, 2002 ABQB 640 at para. 39, 315 A.R. 291, *Lumley v. Lumley Estate*, 2002 ABQB 326 at para. 8, 314 A.R. 315; *Gavinchuk v. Mickalyk*, 2003 ABQB 849 at para. 15, 27 Alta. L.R. (4th) 291; *Bidlock Estate (Public Trustee of) v. Vos*, 2003 ABQB 683, 24 Alta. L.R. (4th) 278.

[455] The application of *Tataryn* must always be subject to the legislation applicable in Alberta. That legislation differs in several ways from the British Columbia legislation being considered in that case.

[456] First, there is an important difference between the British Columbia legislation considered in *Tataryn* and the Alberta legislation. The language of the British Columbia legislation says that a court may "order that provision that it thinks adequate, just and equitable

in the circumstances be made out of the estate ...” (S. 2. (1) *Wills Variation Act*). The Alberta legislation on the other hand states that a judge may order “any provision that the judge considers adequate ... for the proper maintenance and support ...”. This language is significantly different and calls for a different interpretation in Alberta. In fact, in *Tataryn* McLachlin J. acknowledges that the Alberta legislation excludes adult independent children (para. 20). The Alberta legislation requires only an adequate distribution, that is, adequate to meet the requirements of the party who has challenged the distribution, that is, a “needs-maintenance approach” (*Stang*, at para. 28.).

[457] One other very significant way that the Alberta legislation differs is that the British Columbia legislation allows “the testator's wife, husband or children” to make an application (*Wills Variation Act*, s. 2(1)). In British Columbia a child of any age whether dependant or not is always eligible to make an application for the purposes of testamentary relief. Under the *Family Relief Act*, s. 1(d) the persons who may benefit are much more narrowly defined. The dependant adult child definition in Alberta legislation grants adult children a far narrower access to testamentary relief than does British Columbia’s legislation. In Alberta the adult child must be disabled and by reason of that disability unable to earn a livelihood.

[458] As a consequence, in *Tataryn* McLachlin J. does not interpret essential elements in the Alberta legislation. She does not address the meaning of “earn a livelihood” nor the implications of legislation placing conditions on whether a person is a “dependant” who may seek testamentary relief. However, McLachlin J. does provide guidance as to the meaning of “proper maintenance and support” and guidance to an analytical framework within which we can interpret the Alberta legislation.

[459] The case before me is about an adult child who claims to be a dependant. Much of the Alberta case-law that has applied *Tataryn* does not address the claims of adult dependants, but instead relates to spouses (*Siegel, Stang, Gow, Broen Estate (Re), Woycenko Estate (Re), Lumley, Gavinchuk, Boychuck (Public Trustee of) v. Boychuck; Boychuk Estate, Re*, 2008 ABQB 38, 439 A.R. 313 or minor children (*Dupere (Next Friend of) v. Spinelli Estate, Woycenko Estate (Re)*). Therefore, Alberta jurisprudence provides relatively limited guidance to this court as how to address an adult dependant child in the context of the legal and moral obligation described in the *Tataryn* analysis.

[460] Thus, it seems generally accepted in Alberta that *Tataryn* provides the principles that should guide testamentary relief in Alberta via the *Family Relief Act*.

3. *Scheme for analysis*

[461] From my review of the cases it appears that there is an analysis that recommends itself in determining Peter’s entitlement under the *Family Relief Act*. Justice Acton has articulated a two-pronged test in *Bidlock Estate (Public Trustee of) v. Vos*, at para. 10:

1. What legal obligations would the testator have had during their lifetime?
and

2. What moral obligations did the testator have?

[462] Here, Nick's potential legal and moral obligations are to Nick's two children, Joan and Peter. Therefore, the questions that we must ask in this case are:

1. What are the legal obligations that Nick had towards his children during his lifetime?
 - a) What legal obligations did Nick have to Joan?
 - b) What legal obligations did Nick have to Peter?
2. What are the moral obligations that Nick had towards his children?
 - a) What moral obligations did Nick have to Joan?
 - b) What moral obligations did Nick have to Peter?

[463] If I find that there are competing legal and/or moral obligations on Nick to support his children, I must then rank those obligations:

3. What are the relative priorities of the obligations of Nick to his children?

[464] Last, taking into account the relative priorities of the legal and moral obligations of Nick to support his children, I must determine whether the division of Nick's estate was adequate to provide for the proper maintenance and support for Peter. If not, then Peter is entitled to testamentary relief, which will have to be determined.

4. Did Nick's division of his assets meet the threshold of adequate provision for the proper maintenance and support for Peter?
5. If Peter is entitled to testamentary relief, what is the quantum of the support and how should it be accommodated?

4. *What are the legal obligations that Nick had towards his children?*

- a) Did Nick have a legal obligation to provide for Joan in his will on the basis of unjust enrichment?**

[465] As I discuss in detail below in Part G, Joan has a valid claim on the basis of unjust enrichment for 50% of Nick's estate. In the context of the *Tataryn* analysis, that claim may also be described as a legal obligation which Nick owed to Joan during his lifetime. Therefore, this legal obligation takes priority over moral obligations and, as I find, over legal obligations Nick may have owed to Peter.

- b) What legal obligations did Nick have to Peter?**

[466] I point out that the first of the two part test set out in *Tataryn* suggests that a legal obligation is one that arises during the testator's life time from legislation or common-law. Most

of the Alberta cases have considered the legal obligation that a spouse owes to the other spouse that arises during the lifetime of the testator. Peter has argued that Nick had a legal obligation to him under the *Maintenance Order Act* R.S.A. 2000, c. M-2 to provide support to him during Nick's life time. I will first examine whether this is so.

i) *Maintenance Order Act s. 2(1) support*

[467] The *Maintenance Order Act* which was in place at the time of Nick's death included a provision that required a father or mother to provide maintenance to a disabled child, or a destitute child who is unable to work:

2(1) The husband, wife, father, mother and children of

(a) an old, blind, lame, mentally deficient or impotent person, or

(b) any other destitute person who is not able to work,

shall provide maintenance, including adequate food, clothing, medical aid and lodging, for that person.

[468] First, I note that the Act has been repealed by the *Family Law Act* and there is no similar provision in Alberta legislation. Therefore, this discussion is for the purpose of this case only and is unlikely to be of assistance in the future.

[469] It appears that Peter cites that statute to support the symmetry Justice McLachlin addresses in *Tataryn*; a pre-death legal obligation that now ought to be extended and considered after Nick's death.

[470] The application for support under the *Family Relief Act* was made after Nick's death, and there had been no application by Peter under the *Maintenance Order Act* during Nick's life-time for support. Nor did Nick provide Peter with assistance in Peter's later adulthood. Aside from the gift of land, cattle and farm machinery from Nick to Peter when Peter was a young man, and the assistance his father gave Peter in terms of helping him on the land from time to time, there was no evidence before me that Peter's father further supported him in any way during Peter's adult life. From 1968 until 2001 there was no evidence that Peter depended in any way on his father for support. In other words, for that period of 33 years, Peter was entirely self-sufficient as far as his father was concerned.

[471] However, any failure of Nick to provide support to Peter during his lifetime does not negate a possible claim against the estate after Nick's death. That Peter did not depend on Nick nor pursue a claim against Nick under the *Maintenance Order Act* during Nick's lifetime does not negate a possible claim against the estate after Nick's death. Dependancy flows from an obligation to support, rather than any support provided or reliance upon that support during the testator's lifetime: *Tataryn* at para. 28. Case-law exists where a successful application under the *Family Relief Act* did not require that a parent supported the child prior to the parent's death:

Ponich Estate v. Ponich, 2008 ABQB 542 at para. 33, 42 E.T.R. (3d) 140, *Kinsella Estate (Re)*, 2004 ABQB 664 at para. 17, 11 E.T.R. (3d) 275, see also *Black v. Kronberger Estate* (1989), 81 Sask.R. 106 at paras. 4, 9, 18 A.C.W.S. (3d) 864 (Sask. Q.B.), affirmed 83 Sask.R. 73, 21 A.C.W.S. (3d) 292 (Sask. C.A.), *Manson v. Shoaf*, [1980] S.J. No. 840 (QL), [1980] 5 W.W.R. 106 (Sask. Surr. Ct.).

[472] The issue then is whether Nick would have had a legal obligation under the *Maintenance Order Act*, had Peter sought support via that legislation while Nick was alive. If not, then the first part of the *Tataryn* test, that of a legal obligation arising during the life time of the testator would not arise in this case.

[473] Clearly in Alberta the *Maintenance Order Act* may have created a legal duty of a parent to a child. That legal duty may lead to an obligation that is relevant to an application under the *Family Relief Act* where the child meets the requirements first of the *Maintenance Order Act* and then of the *Family Relief Act*. The *Maintenance Order Act* has been held to create a legal support obligation upon a testator for the purposes of the *Family Relief Act*: *Bidlock Estate (Public Trustee of) v. Vos*, 2003 ABQB 683 at para. 12, 24 Alta. L.R. (4th) 278.

[474] The *Maintenance Order Act*, s. 2(1) has only been considered by the courts in a relatively limited number of instances. What is important to note is that the person applying must be a “destitute person”. Section 2(1)(a) specifies a list of persons: “old, blind, lame, mentally deficient or impotent”, and s. 2(1)(b) provides that “any other destitute person” who cannot work also has a right to support. Had the legislature intended that s. 2(1)(a) would not include a requirement that the support recipient be destitute, then s. 2(1)(b) should have read “any destitute person who is not able to work”.

[475] Several Alberta judgments interpret “destitute” in this context. Nash J. in *Leung v. Leung* (1996), 179 A.R. 302, 37 Alta. L.R. (3d) 107 (Alta. Q.B.) indicated destitute meant “not possessing the necessities of life and in a condition of extreme want”. In *Zwicker (Next Friend of) v. Zwicker* (1994), 152 A.R. 238, 3 R.F.L. (4th) 403 (Alta. Q.B.), Marshall J. applied the same definition (at para. 4), and concluded that a student who lived on limited means was not destitute. In *Wani v. Wani* (1994), 163 A.R. 319, 52 A.C.W.S. (3d) 373 (Alta. Q.B.) a child who was unable to work for medical reasons was considered destitute as she had neither tangible assets nor other means for support (at para. 74).

[476] The test for support under the *Maintenance Order Act* then is a needs test and is restricted to adequate food, clothing, medical aid and lodging. Peter certainly did not make an application for such relief during Nick’s life time, nor did the evidence support that he would have been successful. Peter, according to the evidence, was well able to support himself and his family at least up to the time of trial. He cannot be considered to have been “destitute” while Nick was alive. A destitute person is one who is literally impoverished and without assets. Clearly, Peter did not meet that requirement.

[477] Therefore, under the *Tataryn* analysis, Peter would fail to meet the first of the required branches, that of a legal obligation arising during the testator's lifetime, and I find that Peter has not raised a legal obligation arising during Nick's lifetime.

[478] However, that does not end the matter because we must address the impact of the *Family Relief Act* on this analysis.

ii) *Family Relief Act, s. 1(d) dependant children*

[479] Does the *Family Relief Act* create a legal obligation arising at death?

[480] As I noted above, the Alberta *Family Relief Act* treats adult children in a very different manner than the British Columbia legislation considered in *Tataryn*. In Alberta, for an adult child to seek testamentary relief, he must be a dependant as defined by the *Family Relief Act*, s. 1(d): "a child of the deceased who is 18 years of age or over at the time of the deceased's death and unable by physical or mental disability to earn a livelihood" (emphasis added).

[481] Clearly, this is a legal obligation - a right created by statute owed by the testator to his dependant adult children. I conclude that this provision creates a distinct legal obligation not discussed in *Tataryn* which legal obligation arises upon the death of a testator under the *Family Relief Act*. That obligation does not arise before the death of the testator. In the case before me, for example, even if Nick had lived until he was 120 years old, he would not have had a legal obligation to Peter until and unless Peter was destitute. When Nick died, however, legal obligations to Peter may have arisen under Alberta's testamentary relief statute. Therefore, in Alberta, even though there may be no legal obligations arising during the testator's life time, one may arise on his death, that is, his estate may be encumbered by an obligation that arises under the statute. Here, I have found that there was no legal obligation that Nick may have owed to Peter during Nick's lifetime. This then is different that a situation as discussed above where the legal obligation was owed prior to the testator's death but no application was made during the testator's lifetime.

[482] So the *Family Relief Act* establishes a legal right of a disabled child over the age of 18 to testamentary relief if he is unable to earn a livelihood by virtue of his disability and subject to other legal obligations of the testator. This right then does not fit within the scheme provided for in *Tataryn*, where legal obligations that existed while the deceased was alive are extended past death, to create symmetry (at para. 29).

[483] I conclude that the legal obligation that flows from the *Family Relief Act* at the testator's death should be analysed as one of the legal obligations on a testator as described in the *Tataryn* analysis, and that the legal obligation should be ranked in the same manner as a legal obligation that arose during the testator's lifetime.

[484] How then do we analyse Nick's legal obligations to Peter under the *Family Relief Act*? First, we must determine if Peter is someone who by disability is unable to earn a livelihood.

[485] Section 1(d) requires that the putative dependant child over age 18 be:

- a) mentally or physically disabled,
- b) unable to earn a livelihood, and
- c) unable to earn that livelihood because of the child's disability.

[486] Determining if a person has a disability is relatively simple, but what does "livelihood" mean in the context of the *Act*? In order for the *Act* as a whole to make sense, that word must be taken in the context of s. 3(1) which provides that where there is a dependant, the court may order "any provision ... that is adequate ... for the proper maintenance and support" of that dependant. Therefore, "livelihood" must be taken to mean "adequate for the proper maintenance and support". In effect, any child over the age of 18 who is unable to "earn a livelihood" is also a person who exists without "proper maintenance and support".

[487] However, testamentary relief under the *Family Relief Act* is not automatic where an applicant has met the criteria for relief (disabled and not having proper maintenance and support), but rather is at the discretion of the judge. There is no right to relief, but a right to apply for relief. Therefore, in our analysis, we must first determine if Peter has a right to apply for relief. If he has, he does not necessarily receive relief, that is in the discretion of the judge which discretion must, of course, be exercised judicially.

iii) When does the legal obligation arise?

[488] We have another issue that is unique to the Alberta legislation, that is, when does the testator's legal obligation to a dependant adult child arise? Does it arise only at the point of death, or may it arise at any time after the testator's death that the adult child becomes disabled and unable to earn a livelihood?

[489] The *Family Relief Act*, s. 1(d) states: "a child of the deceased who is 18 years of age or over at the time of the deceased's death and unable by physical or mental disability to earn a livelihood" (emphasis added). The possible legal obligation of the testator then only arises and is tested at the point of the testator's death. It is a right of the child to seek testamentary relief for proper support and maintenance, where that proper support and maintenance was not provided for on the testator's death by the testator's will or the division of property that flows from intestacy.

[490] This question was commented on but is not decided by our Court of Appeal in *Re. Protopappas Estate* (1987), 78 A.R. 60 at 66-67, 25 E.T.R. 241. In that case it was not necessary to determine finally whether the date of the application or the date of death was the appropriate date on which to make the determination. However, Conrad J. makes a number of points which merit comment here. In particular, she comments on the fact that the long established common law rule was of freedom of testamentary disposition. Therefore, the rule of interpretation that she suggested be applied is that where common law rights are to be abrogated by statute, the statute

must be clear. In the case of a dependant adult child who becomes so after the testator's death, it becomes impossible for a testator to write a will that is enforceable because of unforeseen intervening circumstances. The statute must be expressed in the clearest language if this is the intention of the legislature.

[491] Further, on the basis of policy, an interpretation that would permit an adult dependant child who becomes dependant after the testator's death to attack the will, would lead to uncertainty in the administration of estates, and would lead to delay in the distribution of the estate. It may even encourage an adult child that is otherwise independent to become dependant. This too cannot be the intention of the legislature.

[492] Although the case was not dealing with an analysis of the *Family Relief Act*, Ouellette J. in *Hilstadt Estate*, 2008 ABQB 570, discusses at what time it should be determined on an intestacy as to who should take from the estate. He found that the time should be on the date of death rather than on the date of distribution. He found that the date of distribution is unworkable given that distribution is delayed and circumstances can change throughout the period from the date of death to distribution. He commented that this can lead to "mischief" being attempts to delay distribution of the estate by potential beneficiaries that arise after the death of the testator: at para. 17.

[493] With this approach and rationale I completely agree.

[494] I find that the appropriate time to analyse the legal obligations of a testator under the *Family Relief Act* is at the time of the death of the testator. This is the result in *Lee Estate (Re)*, 2006 NWTSC 13, 22 E.T.R. (3d) 207, at para. 28, which is a decision of Richard J. of the superior court in the North West Territories. The legislation there is similar to the *Family Relief Act*.

[495] I note, however, that one can take into account in the analysis future contingencies that are reasonably foreseeable: *Carter v. Alberta Conference Corp. of the Seventh Day Adventist Church*, [1998] A.J. No. 1479 at para. 28. I discuss this in more detail later.

[496] Given this analytical framework I turn to Peter and his particular circumstances.

iv) Was Peter a dependant child over the age of 18 at Nick's death?

[497] Peter is only entitled to apply to the court for testamentary relief if he is a dependant as defined by the *Family Relief Act*, s. 1(d). The court should consider the evidence of disability, and determine whether the child's inability to earn a livelihood is a consequence of that disability. Further, this analysis must be done at the date of the testator's death, in this case Nick's death in February 2001.

Disabled status of the dependant adult child

[498] Here, there is no doubt that Peter is disabled and was at the date of Nick's death. Peter was injured in a farming accident November 24, 1968 in which his spine was crushed. However, that is not the end of the discussion about whether Peter is a dependant of Nick. That disability must be the cause of Peter's inability to earn a livelihood.

[499] Therefore, I must look at Peter's ability to earn a livelihood.

The ability of the dependant to earn a livelihood

[500] What does "livelihood" mean in the context of the *Act*? I have previously concluded that "livelihood" must be taken to mean "adequate for the proper maintenance and support" of Peter. *Tataryn* did not discuss what "earn a livelihood" means. There has, however, been commentary in Alberta cases which provides some useful guidance:

- a) an adult child who receives government assistance or is institutionalized is able to claim testamentary relief, and thus cannot be able to earn a livelihood: *Bidlock Estate (Public Trustee of) v. Vos, E.A.H. (Dependant Adult) (Re)*, 2005 ABQB 678, 386 A.R. 187, *Stone Estate (Public Trustee of) v. Stone Estate* (1994), 154 A.R. 307, 20 Alta. L.R. (3d) 31 (Alta Q.B.), substantially affirmed 209 A.R. 138, 54 Alta. L.R. (3d) 225 (Alta. C.A.);
- b) a person who is not "capable of self-sufficiency" may claim testamentary relief, and thus cannot be able to earn a livelihood: *Boje v. Boje Estate; Boje Estate, Re*, 2005 ABCA 73 at para. 17, 250 D.L.R. (4th) 271; and
- c) a child is not a dependant where any inability to earn a livelihood is a consequence of the personal choices and/or laziness of the child: *RE Bowers Estate*, [1955] A.J. No. 33 (QL), 19 W.W.R. 241 (Alta. S.C.).

[501] The legislation in the North West Territories is strikingly similar to the Alberta legislation. In *Lee Estate (Re)*, 2006 NWTSC 13, 22 E.T.R. (3d) 207 the court finds that the meaning of "earn a livelihood" is not viewed in the context of any given point in time, but rather as a reflection of a person's life-long economic activity and status. That seems a logical proposition; a person who owns investments providing income such that the person need not work may be said to have a "livelihood", that of being an investor. That person has a means to obtain the funds to maintain and support themselves, and if these means provide an income "adequate for the proper maintenance and support," he has "earned a livelihood." This must be interpreted in light of the discussion in *Tataryn* as to moral obligations.

[502] The phrase "earn a livelihood" then is broad language. It does not state that a person must be "gainfully employed" and it does not refer to a person's trade or occupation. Therefore, the language is broad enough to encompass any means by which a person can earn a livelihood. Earning a livelihood means achieving a threshold income adequate for proper maintenance and support. The means by which that threshold is met are irrelevant: *Family Relief Act*, s. 1(d), *Lee Estate (Re)*, *supra*, at para. 23, *Carter v. Adventist Church*, *supra*, at para. 25.

[503] In *Carter v. Adventist Church*, at para. 28 (QL), a number of factors previously identified in *Pauliuk v. Pauliuk Estate*, (1986), 73 A.R. 314, 48 Alta. L.R. (2d) 25 (Alta. Q.B.) and *Dupere (Next Friend of) v. Spinelli Estate*, (1998), 229 A.R. 137 at para. 28, 84 A.C.W.S. (3d) 610 (Alta. Surr. Ct.) were relevant to determination of the threshold level of maintenance and support:

- i) age and health of the dependant;
- ii) the needs of the dependant;
- iii) likelihood of the needs of the dependant increasing;
- iv) station of life of the deceased and the dependant;
- v) mode of life to which the dependant ought to be accustomed;
- vi) other sources of income of the dependant;
- vii) cost of living; and
- viii) future contingencies that are reasonably foreseeable.

[504] Clearly, many of these factors depend on the circumstances of a specific individual.

[505] In the context of the present matter, an adult dependant child may obtain an “adequate” degree of “support and maintenance” by one of two mechanisms. The child may be able to provide for those requirements without assistance, or if not, then the child has a right to testamentary relief. If he is entitled to testamentary relief, a state of proper maintenance and support is achieved when that child has received an “adequate” allocation of a deceased person’s estate.

[506] Therefore, I must examine what livelihood Peter has earned throughout his life, and evaluate his ability to provide for his own proper maintenance and support at the time of Nick’s death. I do not have much evidence about Peter’s lifestyle at the time of Nick’s death. The evidence put forth was about his lifestyle and needs at the time of trial. Clearly this is not the relevant time. However, my consideration of the evidence before me does shed some light on his ability to earn a livelihood at the time of Nick’s death. Further, it assists in determining the future contingencies that might have been foreseeable at the time of Nick’s death. I will, therefore, consider Peter’s lifestyle, requirements, income, and resources at the time of Nick’s death and determine if, given the requirements and resources available to him then, he could meet or exceed the threshold level adequate for his proper maintenance and support.

[507] If the resources available to the applicant are such that the applicant may independently provide the threshold level adequate for his proper maintenance and support, then the applicant has ‘earned a livelihood’, and is not a dependant adult child under the *Family Relief Act*. If I should find this with respect to Peter, he should be denied testamentary relief.

[508] First, I must consider how Peter makes his income and his personal resources and assets.

[509] Over his lifetime and as a result of his and Annette’s excellent financial management he has accumulated a sizable estate. He has six quarter sections of agricultural reproductive

pastureland. The appraised value of his land as at August 2006 was \$768,900.00. The value of the land and improvements was \$852,900.00. There is no debt owing on the land. I am aware that as at Nick's death, the land is owned by Peter, Annette and their daughter, Jackie, in joint tenancy. Peter transferred the lands to the joint tenancy in 1999. Nevertheless, it is those lands that provide Peter and Annette with their income.

[510] In addition he has the following assets:

- RRSPs and other savings in the amount of \$45,000.00,
- numerous vehicles, and
- numerous pieces of farm equipment.

[511] Peter is now retired and earning a pension. Throughout his entire adult life, prior to his retirement, Peter worked on his farm. According to his wife, Annette, Peter was the person who made all the decisions about the farm. He also worked on the farm. However, at some point he decided that he could share in crops and rent out his land to make a living. This is the way that he now obtains some his income.

[512] Peter claimed that his income at the time of trial and for a few years before Nick died was not significant. To show that he cannot support himself, Peter put into evidence his tax assessments for his personal income for the years 1997 to 2006, which show that he has earned an income ranging from \$1,935.00 to \$33,473.00 and show a negative income of \$5,884.00 for the year 2006. The difficulty I have with the income stated in his tax assessments is that the income reflects what Peter is able to write off against his income as a result of the farming operation. Peter and Annette were somewhat vague about those write-offs saying that this was accounted for by the accountant. Therefore, I find that this income information is not a true reflection of Peter's income.

[513] Further, on cross-examination, Peter gave additional information that shed a true light on his income. Peter acknowledged he has 160 acres of agricultural reproductive crop land which he rents to other farmers. In 2001 to 2003 he received one third of the crop. In 2004 he rented the land for \$40.00 an acre making \$6,240.00 on that piece of property. In 2005 and 2006 he rented the land for \$42.00 an acre making \$6,550.00. In 2007 he rented the land for \$45.00 per acre making \$7,020.00.

[514] Peter has a further 600 acres of hay land. On that land he contracts with farmers who do the work, that is, swathing, baling and collecting the hay in return for Peter receiving 50% of the yield. Peter sells the hay for \$25.00-\$35.00 per bale. There is a yield of 1300 to 1500 bales per year. Therefore, the potential income that he can generate from the sale of hay is \$16,000.00 per year at the low end to \$26,000.00 per year at the high-end.

[515] The total income from his farming operation ranges from \$23,020.00 to \$33,020.00.

[516] Peter also has two surface leases on his land generating about \$2,500.00 per year on one quarter and \$1,800.00 a year on another quarter for a total of \$4,300.00 per year.

[517] The total income from his land is from \$27,320.00 to \$37,320.00 per year.

[518] I note that even if the land had remained in Peter's name, Annette may have a right to one-half the value of that land under the *Matrimonial Property Act*. Given that their ownership of the land and their financial affairs are integrated to such an extent that it is difficult to distinguish them, I am treating the income and the living expenses together for both. In a case such as this where the incomes, property and expenses are shared by a man and his wife, it is only just to consider the two of them together.

[519] I also note that given that I should be looking at Peter's ability to earn a living at the date of Nick's death taken in the context of Peter's adult life, I have little information about Peter's income throughout his life, or his life style through that period. Therefore, I am taking the best evidence I have, which is Peter/Annette's income through the period just subsequent to Nick's death. I am taking this as representative of the income and lifestyle that he was accustomed to throughout his adult life and, in particular, the years leading up to Nick's death.

[520] In addition to his farming income, Peter also receives an old-age pension, which he started to receive in 1998 before Nick died, of \$487.00 per month and a Canada Pension of \$497.00 per month for a total annual pension income of \$11,808.00. Annette used to work but did not at the trial and I do not have information about her income at the time of Nick's death. Therefore, I am treating her income as nil at the time of Nick's death and I am not taking it into account at all for the purpose of this analysis. This approach is generous to Peter. Peter also receives Aids to Daily Living for special needs.

[521] Peter says that I cannot take into account the two Canadian pensions and the assistance that he receives from the Aids to Daily Living program. He cites case law that says the court is not to take into account government payments because they might not last if government policy changes. Uniformly, Alberta courts appear to conclude that the assistance offered by the state to disabled persons does not discharge a parent's obligation to provide support in a will: ***Stone Estate (Public Trustee of) v. Stone Estate*** (1994), 154 A.R. 307, 20 Alta. L.R. (3d) 31 (Alta Q.B.), substantially affirmed 209 A.R. 138, 54 Alta. L.R. (3d) 225 (Alta. C.A.); ***E.A.H. (Dependant Adult) (Re); Bidlock Estate (Public Trustee of) v. Vos***, 2003 ABQB 683, 24 Alta. L.R. (4th) 278.

[522] These cases deal with government payments for support to disabled persons. I agree that I should not consider this assistance in my calculations of Peter's income going forward. However, I cannot ignore the assistance received by Peter for the period between Nick's death and the trial. Peter did not have to expend any of his money, nor encroach on his estate to provide for those things in that period of time.

[523] The other issue is how to treat the old age pensions to which Peter is entitled, as are all elderly citizens of Canada,. He does not have to qualify for those pensions because he is mentally or physically disabled. He would get those pensions whether or not the court orders Nick's estate to contribute to Peter under the *Family Relief Act*. Therefore, I disagree with the

Plaintiff in this instance that those cases apply and hold that in the circumstances I can take into account his old-age pension and Canada Pension Plan pension.

[524] Conservatively, Peter's and Annette's total annual income, without Peter performing any labour, is between \$39,000.00 to \$49,000.00 per year. This is without any additional income being considered for Annette. Annette's evidence was that she earned income off the farm for many years but had stopped earning that income by the time of trial. I do not have any information as to whether she is receiving a pension. If she is, that would have to be considered in this analysis. The total income must, of course, meet the needs of Peter and Annette.

[525] Finally, in considering Peter's income, I must also take into account that from 2001 to 2006 inclusive, after Nick's death, Peter sold cows and calves for the total sum of \$352,221.65. This is a substantial sum which will assist in providing support for Peter for some time. It could be argued that this is depleting Peter's estate. However, Peter is retired and we must also consider that a person in retirement will use savings and liquidate assets to assist in retirement. I would not expect the case law to suggest that a senior citizen that had saved for their retirement would expect, in Alberta, to share in a parent's estate so that the senior citizen would not have to use some of his assets for retirement.

[526] Nick died in 2001, and for the purposes of evaluating Nick's legal obligation to support Peter that arose on Nick's death, I conclude Peter/Annette's annual income at that point was between \$39,000.00 to \$49,000.00. It was foreseeable that an income in that range would continue into the future. The next question is whether that income is adequate for proper maintenance and support.

v) ***Determination of whether the livelihood is adequate for proper maintenance and support.***

[527] Whether a livelihood has been earned may be inferred from whether a person has met the threshold of adequate maintenance and support, and the economic status of that person. Where that threshold is not met, then a livelihood has not been achieved. An erosion of financial status would be an indication of a failure to meet the threshold of adequate maintenance and support. Where the threshold of adequate maintenance and support has been met by any means, a livelihood has been obtained. If this is the case, then the claimant is either accumulating assets in that person's estate, or that person is adopting a lifestyle that is in excess to that which they are accustomed: ***Stang***, at para. 27-28, ***Lee Estate (Re)***, at para. 24.

[528] In order to determine if this level of income is adequate for proper maintenance and support of for Peter, I must turn to other factors. I start with his age and health. Then I discuss his needs at Nick's death and project them into the future. I also consider whether Peter's income covered those needs.

[529] Peter Petrowski was born on July 6, 1938 which made him 62 when Nick died in 2001. Nick was 92 years old when he died. At the time of the trial, Peter was 69 years old.

[530] As to Peter's health, he was unfortunately injured in a farming accident on November 24, 1968 when he was 30 years old. As a result of that accident, he was paralyzed from the chest down rendering him unable to walk. Although after a long period of recovery he was able to walk with braces, he is no longer able to do so and is now confined to a wheelchair.

[531] It is clear from the evidence and the opinions of the experts put in by Peter and by Joan that Peter had a fair degree of independence after his injury and for most of his adult life. As he aged this independence diminished so that at the time of trial it showed a significant decrease. However, Peter was also aging and some deterioration would be expected. Peter would not qualify if he was becoming disabled by age. That is not one of the criteria.

[532] As Peter aged he developed a number of medical conditions relating to his confinement to a wheelchair. Notably, by the time of the trial, Peter suffered from chronic pneumonia, ulcer pressure sores and was an insulin dependant diabetic. His insulin dependance started in 1996. Dr. Jackman gave evidence at trial about Peter's physical condition saying that he was severely ill with his diabetes. It was Dr. Jackman's opinion as of May 31, 2007 that Peter was completely and permanently disabled.

[533] I turn now to a consideration of Peter's needs. This information came from evidence put before the court by Peter, Annette and Peter's experts.

[534] In Alberta, the threshold level of need is "adequate for the proper maintenance and support" of the individual. This threshold is:

- a) an individual matter, tested by a variety of variables: *Tataryn*, at para. 15;
- b) a reflection of lifestyle and history: *Tataryn*, at paras. 19, 24, *Dupere (Next Friend of) v. Spinelli Estate*, at para. 28, *Pauliuk v. Pauliuk Estate*, *Lee Estate (Re)*, at para. 16; and
- c) an ongoing requirement that may undergo future changes: *Dupere (Next Friend of) v. Spinelli Estate*, at para. 28, *Boje v. Boje Estate; Boje Estate, Re*.

And, as I discussed above, it is based on a needs-maintenance approach.

[535] At the time of the trial, Peter and Annette's annual living expenses were about \$17,000.00 per year. I do not have any information about what they were at the time of Nick's death which is the time for the valuation. In addition, Peter would have medical and dental, clothes and entertainment expenses for an additional \$4,000.00 for a total of about \$21,000.00. I will add an additional \$4,000.00 for Annette bringing the total expenses annually for Peter and Annette of \$28,000.00. Some of those expenses include insurance on five vehicles which he no longer drives. I am not for the purpose of this analysis deducting those costs. As set out above, their income was between \$39,000.00 and \$49,000.00 per year. This leaves a cushion of between \$11,000.00 and \$21,000.00 per year. There were also savings and RRSPs that could be used, and the \$352,221.65 Peter and Annette earned from selling cattle.

[536] The evidence was clear that Peter's condition would not improve. Peter characterized his needs as increasing because of the state of his health deteriorating. Peter put in medical evidence in this trial to show that in addition to his crushed spine he is now, by virtue of old-age, diabetes, infections and other complications, more disabled than he was at the time the 1974 Will was made.

[537] There was no evidence that Peter had required assistance from Nick during his adult life and up to the date Nick died. Nor was there any evidence that Peter had required assistance from Nick at the time of Nick's death. The only evidence I have is that of the Plaintiff's expert as to requirements that Peter may have after the trial. Up until two years before Nick's death, Peter used crutches to get around. He then was confined to a wheel chair but continued to be able to drive, up to the time of trial. However, just before trial he preferred not to drive. All of this related in part to his aging process.

[538] The evidence at trial established that Peter had been independent for his entire life. He, of course, relied on his wife, Annette, for support in many things. As she was getting older and Peter more dependant, it was apparent that she could not continue to look after Peter to the same extent that she had up to shortly before trial.

[539] Peter's only out-of-pocket medical expenses described by Annette related to the prescription for Peter's insulin and insulin testing equipment. The amount to be spent on that I deal with below. All of the other equipment Peter needed came from Alberta Aids to Daily Living and was free. Up to the trial, Peter had not paid for any of this. This may also continue after. However, in the event that the government discontinues Aids to Daily Living and other support programs, I shall review and consider the evidence of Peter's experts about the equipment and other requirements that Peter may face in the future.

[540] Peter's expert, Lorian Kennedy, set out a number of requirements that she opined Peter would need for the balance of his life. The Defendant's expert agreed with many of those costs. I shall review them for the purpose of quantifying the costs that Peter may face in the future as a result of his disability.

[541] First, Ms. Kennedy suggested that his future care in the event that Annette could not continue to care for him would be \$86,241.00 per year. This was to keep Peter in his home with the assistance of home care. The Defendant's expert, Betty Wilson, pointed out that just before trial, Peter's family said that he was not interested in receiving home care. She also pointed out that if Peter required personal care support, that was available publically funded. Further, she said that she did not expect that Peter would require 24 hour care while Annette lived with him. She also said that respite care was available and publically funded. This would accommodate Annette's need for a break. Ms. Wilson agreed that Annette should have a break. Finally, Ms. Wilson pointed out that should Peter require full time care in his home in the event that Annette was no longer able to assist, that the amount Peter would have to pay would be about \$35,000.00 per year.

[542] It appears, therefore, that if Peter required home care that cost would be between \$35,000.00 and \$86,000.00 per year. However, at Peter's age and with his medical needs increasing, I would expect that Peter would have to live in a care facility. Unfortunately, no one put any evidence in about what that would cost compared to the amount he earns annually. In any event, I would expect Peter, if he is being assisted by the estate, to choose the least expensive option.

[543] Peter's expert also suggested that he would require a modified van in the amount of about \$34,000.00. In addition, there would need to be modifications to the van costing about \$11,000.00. This could be a significant purchase, but Peter did not seem inclined to sell any of the farm equipment or vehicles (which are depreciating in value) which he no longer uses and which could be replaced by a modified van. Peter gave an extensive description of farm equipment and automobiles that he had purchased since Nick's death. There was only \$6,000.00 owing on all that equipment. I find that the sale of the equipment and other vehicles he is no longer using would offset the cost of a new van and there is no need to provide for this van. Therefore, I would not allow for this expense.

[544] Peter's expert suggested that he would need a new Quickie LXI Wheelchair at a cost of \$2,450.00 as a one time expense. The expert thought that the one Peter was using would soon need to be replaced. She also said that he would need a power wheelchair for use outdoors. This would cost \$4,150.00. She suggested a portable, folding wheelchair ramp for a once only purchase of about \$1,050.00. These one time expenses would cost in total \$7,650.00. I note that Peter's income could cover these expenses if there was no assistance from Aids to Daily Living.

[545] Further, his expert said that Peter would need a new BHM Voyageur Lift every 15 years which would cost \$3,500.00. He had a new one purchased and installed in December 2003. There was no evidence that Peter had to encroach on his estate to afford this lift. Given that his life expectancy from trial was no more than ten years, this was an unlikely additional expense and I would not allow it.

[546] Peter required a special mattress that cost \$2,650.00 every ten years. I did not have evidence as to when this would require replacing. However, it is necessary and I would guesstimate that he would need it replaced once in his remaining life if there were ten years remaining in his life. Therefore, it would be a one-time cost of \$2,650.00.

[547] The total of the one time costs is \$10,300.00. This, too, is within the \$11,000.00 extra that Peter and Annette earn each year. These one time costs would likely not be incurred in one year but would be spread over several years. Further, if we take into account the money he received from the sale of the cows, he can well afford the one time costs in the first year.

[548] The experts gave evidence about the cost of maintaining the equipment annually. Peter's expert estimated that the cost of maintaining the van after the first year would be \$300.00 per year. His extra costs for drugs for his diabetes would be \$545.00 per year. The cost of maintaining his wheel chair would be \$300.00 per year. Further, he would need to replace his Roho cushions for the wheelchairs in the amount of \$1,062.00 every 8 years for a cost of about

\$133.00 per year. Maintenance of his lift including battery replacement would cost about \$150.00 per year. In addition there were other items excluding his insulin requirements that would cost about \$1,000.00 per year.

[549] The total of all of these annual expenses is under \$2,500.00 per year. This is well within his income if the one time costs are not included. If they are and they are purchased over more than one year, Peter and Annette can well afford these items.

[550] The evidence was clear that Peter had not at the time of Nick's death or even at the time of trial needed to deplete his assets to cover his costs for support relating to his dependency. The evidence also established that up to the time of the trial, almost seven years after Nick's death, most of Peter's equipment for his disability had been paid for 100% by Alberta Aids to Daily Living so he did not need to deplete his estate in purchasing any equipment. There was no evidence that he was required to pay that money back, and he had the income from the sale of the cows to cover that equipment in any event.

[551] Therefore, Peter has met his needs out of his income and does not require any assistance from Nick's estate.

[552] As set out above, another consideration to be taken into account is the station of life of the deceased and the dependant. Here both Peter and Nick were farmers. Both owned land and both made a living from the land. Both lived in modest farm dwellings. Nick lived in a mobile home, Peter lived in a house on his farm. There was not much difference between them as to their station in life. Both of them lived a modest lifestyle commensurate with that of a farmer. Peter and his family had become used to living on their farm throughout many years prior to Nick's death.

[553] Therefore, unlike cases where the parent is living in a lavish lifestyle and the adult child is living in abject poverty, I find that there was not much to distinguish the lifestyles of Peter and of Nick.

[554] There was also no evidence of any life style change on the part of Peter and Annette caused by Peter's disability except at the time of the accident when Peter was 30 years old. The evidence before me established that Peter has lived as a farmer all his life. During his life, notwithstanding his disability, Peter was able to manage his farm and had equipment modified so that he was able to work on the land and to transport himself in a vehicle specially equipped. I did not have any evidence that Peter's lifestyle had changed in the years before Nick's death, nor in the years before trial.

[555] The issue is whether this mode of life to which Peter and his family have become accustomed will continue without the support of Nick. I have set out above the extras that Peter will need to continue to live on the farm and I have found that he can afford those extras. I can find nothing else that would be relevant for this discussion.

[556] The measure of adequate provision for proper maintenance and support of Peter must be compared to what Peter was used to and the fact that he is now retired. Further, it is evaluated against a needs-maintenance standard.

vi) Conclusion on legal obligations of Nick to Peter

[557] I conclude that Peter is capable of and is earning a livelihood. Taking all of the factors into account, his lifestyle before and after Nick's death remained about the same. Peter retired, but that means that his farming income is supplemented by his pension entitlement. There was no evidence that Peter had to encroach on his estate in order to live. His income of between \$39,000.00 to \$49,000.00 per year should be compared to the expenses for maintaining his lifestyle which are currently \$28,000.00 per year. In addition, his expert opined that he would need an additional \$2,500.00 per year for annual medical expenses. This is well within his income and does not need to be covered by Nick's estate. Adding that amount leaves \$8,500.00 that is not needed by Peter and Annette to cover their expenses.

[558] His need for a new vehicle could be met by the sale of vehicles and equipment that he was no longer using. That farming equipment at the time of trial was sitting on his farm not being used. That equipment was depreciating but Peter was unwilling to sell it. Selling this equipment I do not consider to be an encroachment on his estate. By using it to provide himself with a newer vehicle he would be carrying on in the normal course of his life and this would not impact on his quality of life.

[559] The only amount outstanding is for home care in the event that Peter needs it. If he does, the maximum he would need according to the experts on an annual basis is between \$35,000.00 and \$86,000.00. It would, however, not be unreasonable for Peter to move to a long term care facility if that was more economical than the home care. It would also not be unreasonable for Peter to first use the money he had made on the sale of the cows to cover his expenses, and to use the RRSPs and savings to cover some of the expenses which funds were no doubt put aside for both him and Annette in their old age. I would not consider spending some of these funds as encroaching on his estate because those funds were, no doubt, saved for retirement. Taken in the context of his whole life and examining livelihood as a whole, this would follow.

[560] Furthermore, I note that Peter's legal right, if any, flows from the *Family Relief Act*. The relevant date at which I should consider whether Peter had not earned a livelihood would be February, 2001, the point at which Nick died, and the possible legal obligation to Peter would have crystallized. At that point Peter was still in relatively good health, and although he needed a wheelchair he continued to be able to walk with crutches and drive, and was not in immediate need of home care as a disabled person. A deterioration in Peter's condition was possible, and most likely not unexpected given his age. However, this could be said for any person going into their senior years. The *Family Relief Act* was clearly not intended to provide for a child into his senior years, unless the need was directly related to his disability. In Peter's case, that need could not reasonably have been anticipated by Nick at the time of Nick's death.

[561] I find that Nick did not have a legal obligation to Peter at the date of Nick's death.

5. What moral obligations did Nick have toward his children?

[562] I have discussed the legal obligations above. Now I turn to any moral obligations that Nick may have toward Joan and Peter. As I noted above, moral obligations are separate and distinct from legal obligations.

[563] Moral obligations are less obvious than legal obligations and require a contextual analysis depending on “other obligations” and “the absence of circumstances that negate the existence of such an obligation”. Legal rights usually trump moral obligations. Further, the courts should not attempt to apply societal norms in a manner that would trump policy decisions determined by the legislatures and expressed in legislation: *Tataryn* at paras. 31 and 32. Moral obligations are most likely a secondary consideration, and should be met where the size of the estate permits.

[564] Moral obligations are found in society’s reasonable expectations of what a testator would do in the circumstances of a particular case and with reference to community standards. Justice McLachlin in *Tataryn* at para. 31 commented on the moral obligations of parents to provide testamentary obligations to their children:

... most people would agree that an adult dependant child is entitled to such consideration as the size of the estate and the testator's other obligations may allow

[565] *Tataryn* indicates that a child who is dependant under the definition in the *Family Relief Act* may seek testamentary relief on the basis of a moral obligation to meet the threshold of proper maintenance and support. (at para. 31).

[566] However, this statement was made in the context of the British Columbia legislation. I note again that the legislation in British Columbia is considerably different than the *Family Relief Act*. In particular, I find that if there is no legal obligation then there can be no moral obligation. For the court to find a moral obligation when no legal obligation exists would be for the court to legislate.

a) What are the moral obligations of Nick to Joan?

[567] There is no question that the equitable legal obligation to Joan that I previously identified is also paralleled by a moral obligation by Nick to provide for Joan in his estate. Here, we find first a legal obligation and then assess the moral obligation associated with that legal obligation. Joan cared for Nick in both his professional and personal life, and was her father’s companion until his death. Without the inheritance that Nick has attempted to provide via his will, Joan would be left without a home and livelihood. Unquestionably, Nick had a powerful moral obligation to provide for his daughter from his estate. It would be contrary to society’s reasonable expectations and community standards for Nick not to have provided a sizeable inheritance, both to provide support and maintenance, and also to simply provide for his child

who otherwise would be substantially deprived of the benefit of her efforts and contributions. In this sense, Joan more closely resembles a spouse of a deceased, where that spouse had collaborated economically and domestically to build up a family business. This situation then is more consistent with that considered by Acton J. in *Broen Estate (Re)*, where she concluded that in such a scenario, the spouse had a “moral claim ... of the highest order” (at para. 19).

b) What are the moral obligations of Nick to Peter?

[568] I have previously concluded in reference to Nick’s legal obligations to Peter that Peter had without assistance from Nick met the threshold of proper maintenance and support. I refer to the discussion of the income and resources of Peter, above; the future requirements for Peter, also discussed above; and the expectations and lifestyles of Peter discussed above. Therefore, Nick does not owe any moral obligation to Peter.

[569] However, I shall analyse any moral obligations that Nick may have had if I were to have found that he had a legal obligation to Peter, which I have not.

[570] This analysis of moral obligations overlaps that for legal obligations. Many of the factors have already been discussed.

[571] *Tataryn* suggests that Nick had two moral obligations, a strong moral obligation to ensure that Peter’s proper support and maintenance needs were met, and a secondary and lower priority moral obligation for “some provision”, where that obligation has not been negated.

[572] The weaker moral obligation to provide “some provision” does not apply in Alberta if “... the fulfilment of those obligations would have the effect of creating an estate for the surviving spouse's beneficiaries.”: *Stang*, at para. 28. Johnstone J. in that case emphasizes that this is a difference between the Alberta *Family Relief Act* and the British Columbia legislation considered in *Tataryn*. The *Family Relief Act* restricts testamentary relief to a “needs-maintenance approach” (at para. 28).

[573] Therefore, for any moral obligation by Nick to Peter, I would have to find that Peter was required to deplete his estate for his support before I could declare that Nick’s estate owed anything to Peter. I, on the basis of Peter’s income and expenditures at the time of Nick’s death, have found that Nick does not owe anything to Peter. Peter has met his needs and maintenance requirements and will continue to do so into the foreseeable future.

[574] However, in a consideration of moral obligations, I may consider support provided by Nick to Peter during the testator’s lifetime: *Black v. Kronenberger Estate*, at para. 4.

[575] Peter was provided with substantial lands by his father when he was very young. Those lands enabled him to amass more land and it is that land that provides the bulk of Peter’s income. Peter needs to do very little to earn that income. It is somewhat similar to the cases where a person has investments earning interest. In considering the whole of Peter’s life, I may consider

that Nick gave Peter land early in Peter's life which gave Peter a very sound basis to support himself for the balance of his life. Nick had provided a livelihood for Peter in this manner.

[576] When Peter Petrowski was about 14 or 15 years old, he quit school to farm with his father, Nick. On August 30, 1956 when Peter was 17 years old Nick bought Peter's first quarter section of land (NE 26-48-11-4). Peter and his father, Nick, farmed the land for one season and the money they earned from that crop was used to pay the owner, Mr. Bishop. Because Peter did not have any money, the money to pay for the seed for that crop was paid by Nick. Further, Nick paid taxes owing on that property prior to the transfer to Peter. By the time the transfer took place, Peter was 18 years old.

[577] In 1958, Nick bought an entire section from Mae Robertson for which he paid \$7,000.00. Subsequently, on the 10th of November, 1958, Nick transferred E ½ S5-49-11 to Peter for the sum of one dollar and mutual love and affection. At the time, Peter was 20 years old. That land was valued at \$3,500.00. Therefore, as of the year when Peter was 20 years old he owned three quarter sections of land. He had no machinery. His father, Nick, assisted him in farming that land and provided the use of his machinery to do so.

[578] On March 8, 1966, Peter transferred the NE 1/4 S5-49-11 back to his father for the sum of \$7,500.00.

[579] In 1960, Peter and Nick made an arrangement with Mr. Karpinski to plant and harvest crop on SE 28-48-11-W4 and then pay for the quarter section using money from the crop. There was a payment of \$3,000.00 made for the land which I infer was made by Nick because Peter had no source of income at the time. The land was transferred to Peter on April 21, 1961.

[580] Peter was later able to buy an additional three quarter sections of land with financing, no doubt because he already had three quarter sections of land free and clear.

[581] In summary, Nick transferred four quarter sections of land to Peter and then bought one quarter back from Peter for \$7,500.00. Peter continued to live on Nick's farm after Nick bought him land. When Peter married Annette when he was 24, they lived in a house on Nick's farm for about three years until he was 27 years old and the house burned. Then he and Annette moved to their own house on Peter's farm. There is no evidence that Peter paid any rent for the house in which he lived. Although Peter probably worked on Nick's farm, the evidence is clear that Nick also worked on Peter's farm right from the time the land was bought for Peter.

[582] Given that Peter and Annette lost most of their belongings in the fire, Joan cashed in her only savings certificate to buy clothes for Peter.

[583] Peter says that Nick's moral obligation to him should be founded in the fact, Peter says, that he worked on his father's farm from the time he was 15 when he left school, never completing his education. Peter says this resulted in his prospects for alternative employment to be limited. Peter says that the land his father set him up on was in payment for that work he did as a very young man.

[584] I reject this argument. No one in this case argued that Peter did not assist his father on the farm when Peter was young. This is not unusual for children on a farm to assist their family.

[585] As for Peter's education and alternative employment, there is no evidence to suggest that Peter was not capable of returning to school if he so desired. These are choices he made, not those of his father. He cannot now say that his father owed him part of his estate on this moral basis. In any event, Nick made a will entirely consistent with his intentions from the time Peter and Joan were young adults.

[586] Nick took steps to provide for his son that would certainly meet the community standards expected of a parent. He took substantial and effective steps to provide for Peter with the gifts of land to Peter when Peter was very young, and by other support provided at that point. Peter, as an independent child, has no moral claim for some provision from the estate of his father.

i) Adequacy of the testator's intentions

[587] Here, the court considers whether any gift provided, in this case to Peter, would result in Peter obtaining the resources he needs to meet the threshold of adequate provisions for proper maintenance and support. If that threshold is met, relief is denied. If that threshold still remains unmet, the court continues to balance the interests of the beneficiaries of the deceased parent.

[588] Here, I have concluded that Nick has no legal or moral obligations to Peter. Peter may himself provide for his own proper maintenance and support.

6. *What are the relative priorities of the obligations of Nick to his children?*

[589] Under the common-law principles articulated in *Tataryn* the court first determines the legal obligations and then the moral obligations of the testator. McLachlin J. indicates at para. 31 that the estate should be divided to meet legal and moral obligations: "How are conflicting claims to be balanced against each other? Where the estate permits, all should be met." Phrased differently, a testator has a duty to meet each legal and moral obligation on his estate. The only circumstances set out by Justice McLachlin where any obligation should not be met during estate re-distribution is when the estate is inadequate to meet every obligation and obligations conflict. In Alberta there is another circumstance – that is where the distribution to a person not named in a will, will result in that person building their estate – there should be no distribution to that person.

[590] If Peter has a right to relief, then the court must enter a balancing analysis of Nick's legal obligations to Peter with Nick's legal obligations to Joan in unjust enrichment. Further, we must then balance any moral obligations that Nick owed to Peter and to Joan. An ordering and balancing of competing legal and moral obligations, based on identified and established legal and moral rights is the last stage of the *Tataryn* analysis. Here I have found that Peter is not

entitled to either a legal or moral claim on Nick's estate. Further, I have concluded that Peter's moral claim to Nick's estate is negated by the support and provision his father had made early in Peter's life. That should be the end of the analysis.

[591] However, if I am wrong and Nick does have a legal or moral obligation to Peter, then I must address how the estate should be divided.

[592] Legal obligations generally rank higher than moral obligations. Here there is only one legal obligation – that is a legal trust obligation to Joan on equitable grounds for half the estate. Given that this legal obligation arose during Nick's lifetime, it takes precedence over any legal obligation to Peter that arose on his death. Therefore, that legal obligation must be satisfied before Peter's legal claim, if he has one.

[593] Nick also had competing moral claims to Joan and Peter (if Peter has any claim at all).

[594] In assessing competing obligations the court considers:

1. the overall size of the estate: *Tataryn*, at para. 32, *Dupere (Next Friend of) v. Spinelli Estate*, at para. 28;
2. the income and resources of the various competing potential recipients: *Dupere (Next Friend of) v. Spinelli Estate*, at para. 28;
3. the present and future requirements of the persons asserting a right to the estate, as dependant on age, health, lifestyle, that are required to meet an adequate standard of support and maintenance: *Tataryn*, para. 31, *Dupere (Next Friend of) v. Spinelli Estate*, at para. 28, *Lee Estate (Re)*, at para. 16;
4. the legitimate expectations and lifestyles of the competing potential recipients: *Dupere (Next Friend of) v. Spinelli Estate*, at para. 28, *Lee Estate (Re)*, at para. 16, *Kinsella Estate (Re)*, at para. 20;
5. the moral obligation that society places on a person to maintain and support persons in certain relationships and circumstances: *Tataryn*, at para. 31, *E.A.H. (Dependant Adult) (Re)*, 2005 ABQB 678 at para. 24, 386 A.R. 187; and
6. other facts that may negate a right to receive a part of the estate: *Tataryn*, at para. 31, *Kinsella Estate (Re)*, at para. 31.

[595] First I compare the overall size of Nick's estate with Peter's estate. Both are comprised primarily of agricultural land which is capable of earning income. Here, when I speak of Nick's estate I am referring to the lands, mines and minerals which I have found passed to Joan on an *inter vivos* transfer of land making those lands, mines and minerals immune to a family relief application. For the purpose of this discussion, I will assume that they form Nick's estate.

[596] The land that was transferred to Joan comprised of ten one-quarter sections plus two parts of quarter sections. In total it amounted to about 11 quarter sections. The appraisal of the land and improvements as at December, 2006 was \$1,672,800.00. The land alone was \$1,296,800.00.

[597] In addition, there were mines and minerals that are producing income. The income from 2001 to 2006 inclusive amounted to \$741,023.29. The annual income varied from \$68,374.00 to \$260,810.00. All of that income has gone to Joan since Nick's death.

[598] That income from the mines and minerals on Nick's land is substantially more than Peter's income from mines and minerals so long as those mines and minerals are producing.

[599] The value of Peter's land as described above is less than Nick's. It is apparent that Peter is older than Joan and may, therefore, require his land for income for a lesser time. Further, the medical evidence suggested that Peter would have a shorter life-span. Certainly Peter's land is important for Annette's income as well, but Nick had no moral nor legal obligation to Annette.

[600] Next I consider the income and resources of the various competing potential recipients. Joan's income and resources are based on her father's estate.

[601] Peter says that without his wife, Annette, and his daughter, Jackie, he would have been unable to earn a farming income. However, in his evidence given at trial in late 2007, Peter acknowledged that:

- he was able to and negotiated all agreements including those relating to leases and surface rights;
- he was able to and made all decisions as to who he will rent his land to and for what price;
- he is able to and negotiates and enters into agreements to purchase all of the equipment and vehicles; and
- he is able to and makes all decisions as to the overall farming operation.

[602] He also said that he has not physically done much of the work. However as a result of his management of his farm he has successfully been able to provide an income for himself and his family, pay off his land, purchase vehicles and equipment, pay his living expenses, and save money.

[603] Each child's needs are significant. Peter's are detailed above, but Joan is also a person who is approaching a typical retirement age, and can be expected to have certain associated expenses. Without her father's estate, to which she contributed substantially, Joan has only limited resources.

[604] The legitimate expectations and lifestyles of each claimant are relevant. I note that Peter did not give evidence that he was being deprived of anything to which he had become accustomed during the lifetime of Nick, nor did he offer evidence that Nick had intended he receive part of the estate. Joan, however, had very legitimate expectations to her inheritance. Her father had promised for many years (from 1974) that she would receive the farm. Further, Joan's lifestyle largely depends on her father's bequest.

[605] Moral obligations are tested on the basis of common social values. I have concluded that Joan has a much stronger moral claim to her father's estate. It is a common-place and common-sense expectation that where a child's efforts strengthen a parent's business, then that child has a greater claim on that business.

[606] Finally, in considering whether there are moral obligations, I must take into account the principle that I should not interfere with the testamentary wishes of Nick unless it is necessary. The liquidity of the estate is one of the factors I should take into account: *Cross v. Currie Estate* (1987), 2 E.T.R. 113 at para. 28. In this case, the bulk of the estate are the lands which make up the farm on which Joan has lived most of her life and on which she runs her business with horses. If I were to order that part of the lands be sold or distributed to Peter, Joan's income from those lands would be curtailed. Further, it is apparent to me that Nick intended that the lands remain intact as his farm.

7. ***Did Nick's division of assets meet the threshold of adequate provision for the proper maintenance and support for Peter?***

[607] I have above assessed in detail the means by which Peter can support himself and his needs. On that basis I have concluded that Peter is well able to support himself and Annette.

[608] In assessing the adequacy of support given by Nick to Peter, the motives of the testator are also an important consideration. In determining motives, the motives of the testator need not be objectively justifiable. However, there must be rational reasons in the sense that there is a logical connection between the reasons and the act of disinheritance: *Kelly v. Baker* (1996), 82 B.C.A.C. 150 at paras. 59-60; 15 E.T.R. (2d) 219 (B.C.C.A.). The onus is on the Plaintiff to discredit Nick's reasons for disinheritance: *Morphy (Guardian ad litem of) v. Mohr*, 1998 CarswellBC 65, at para. 28 (B.C.S.C.). I have considered here everything that Peter has said are reasons for discrediting Nick's leaving everything to his daughter, Joan and nothing to Peter.

[609] *Tataryn* has made it clear that testamentary dispositions are the exercise by the testator of his freedom to dispose of his property. This freedom is not to be interfered with lightly but only in so far as the statute requires: at para. 33. Therefore, any balancing of legal and moral claims to the estate must be interpreted in light of this overall principle. In this case, we must keep in mind what Nick had in his mind when he set Peter up on his own farm when Peter was about 18 years old and why Nick chose to reward his daughter only at his death.

[610] I find that Nick intended to provide for Peter by providing him with the land when Peter was very young. In reviewing Peter's income, his savings for retirement and his income from the

sale of cattle, it appears to me that Peter is adequately provided for and is not entitled to testamentary relief even on a moral ground. I find that it was Nick's intention to provide for Peter when Peter was young by giving him a start as a farmer, and to provide for Joan on his death. In doing so, Nick kept his lands in his name until his death and thereby maintained his independence.

[611] Nick's Will and actions in his lifetime provided for both of his children and he met the threshold of adequate provision for proper maintenance and support for Peter.

8. *If Peter is entitled to testamentary relief, what is the quantum of the relief and how it should be structured*

[612] If Peter is entitled to testamentary relief which I find he is not, then I must consider the quantum to which he is entitled and how he should receive that quantum.

a) Quantum

[613] Earlier in these reasons, I refer to evidence put forward by Peter that he may require support for home care. Although I have found that he has resources to pay for this and that the government at this point in time provides for such care, if I am wrong, then Peter would be entitled to between \$35,000.00 and \$86,000.00 if he actually requires it. As to the balance of his needs, I have found above that he is more than adequately covered by his income. This includes the additional annual income that he may require. Further, it includes the one time expenditures set out above. Those can be met by the income he has received from the sale of the cows and calves or by the RRSPs. I do not find that these resources would be depleting Peter's estate.

b) Structure

[614] If Peter is entitled to relief to cover home care, then I must consider how he will get this amount.

[615] Any relief ordered must be consumed by Peter and should not result in his accumulating resources that would then contribute to his own estate: *Stang, supra* at para. 28. As stated in an earlier case, the object of dependant relief legislation is to provide adequate maintenance under all the circumstances, not to rearrange succession or give preference to one beneficiary: *Re: Smigelski Estate*, [1968] A.J. No. 54 at para. 10 (QL), 64 W.W.R. 456 (Alta. S.C. (A.D.)). This principle was adopted in *Broen Estate (Re)*, 2002 ABQB 806 at para. 11, 324 A.R. 396. Arguably, this 'no accumulation' principle simply reflects that the proper maintenance and support requirements of an applicant represent a threshold. An accumulation of assets means that no proper requirement for support and maintenance existed. The corollary arguably indicates that where an applicant may demonstrate economic depletion, proper support and maintenance is absent.

[616] Further, if it is appropriate to vary a will and make a relief order under the *Family Relief Act*, then the order granted by the court should provide the least disruption to the intended

succession of the deceased's estate. At the common law, a testator had an unfettered right to leave his property as he thought fit. Therefore, statute law which purports to provide for dependants should be construed strictly: *Re: Willan Estate* [1951] A.J. No. 4 at para. 25.

[617] Here, I find that it is not necessary to change the ownership of the lands that comprise Nick's estate, if he has one. Further, it is clear that Peter did not require any additional assistance up to the time of trial.

[618] If Peter is entitled, which I find that he is not, then the part of the estate which will be encumbered for support is the income from the mines and minerals that Joan has been receiving since Nick's death. That income is sufficient to cover Peter's expenses for home care/long term care in the event that he needs such assistance. Therefore, if I am wrong that he does not qualify for testamentary relief and if I am wrong that the *inter vivos* transfers are valid, Joan must hold the mines and minerals in trust for Peter's home care/long term care, in the event that Peter needs that home care/long term care and for so long as Peter needs the home care/long term care. To be clear, Peter will only need home care if there is no suitable long term facility available to him in or near his community and his income as set out above does not cover the cost of that care. Further, he must choose the least expensive option of home care or long term care. If and when Peter no longer needs the home care/long term care, the mines and minerals revert to Joan and the income devolves to Joan.

[619] I emphasize that this will only occur if it is found that I am wrong about the *inter vivos* transfers and about the right of Peter to relief under the *Family Relief Act*.

9. Conclusion on testamentary relief

[620] I find that Peter is not entitled to testamentary relief either on legal or moral grounds.

[621] The evidence from Peter and his family was clear that despite his health, Peter has not been required to deplete his estate in order to pay for his living expenses. The purpose of the *Family Relief Act* is not to enable a person to amass an estate. If I were to make an order in this case under that Act, it would enable Peter to increase the value of his estate. I say this because it is clear that up to trial Peter covered his expenses easily. Further, his future costs could be easily covered by the sale of depreciating assets which Peter seems reluctant to sell and from funds or assets he legitimately would sell to assist in his retirement. That is a decision he can make. It is not a consideration for overturning the Will or charging an estate with an order under the *Family Relief Act*.

[622] Further, I considered as part of Peter's income his senior pensions. We are not dealing here with the kinds of government funding that tends to change over the years. We are here dealing with the Old Age Security and the Canada Pension Plan. Peter has paid into the Canada Pension Plan and is therefore entitled to it. As for the Old Age Security, it has been stable for many decades. It is unlikely in Peter's lifetime that this will disappear.

[623] If he is entitled to testamentary relief, however, I find that he should have assistance with his home care/long term care if it should become necessary and it is not covered by government programs. Further, the requirement for home care should only be met if he cannot find suitable accommodation in a care facility or the cost of the home care is less expensive than a long term care facility. That assistance can come from the income Joan is receiving from the mines and minerals. In this regard, the funds from the mines and minerals are to be held by Joan in trust for Peter's needs for home care or long term care. The ownership of the mines and minerals reverts to Joan when Peter no longer requires home care. Consequently, if the funds are not used, they revert to Joan as well.

10. Peter's Death Prior to Judgment

[624] Before the release of this judgment, I was advised by counsel for the Plaintiff and the Defendants that Peter died on November 9, 2008. Both parties submitted written briefs which addressed two issues for consideration by me, namely: (i) whether the death of Peter can be considered before judgment is entered? and (ii) if so, what effect would Peter's death have on his claim?

[625] The Plaintiff submitted that the court may take judicial notice of a plaintiff's death and issue an order *nunc pro tunc*, backdating the judgment to a date the plaintiff was still alive following the trial for the reason that the court should put the Plaintiff "in exactly the same position as if the Judgment had not been delayed by the Court": *Vollrath v. Bruce*, 2000 ABQB 972 at para. 73. It is suggested by the Plaintiff that the action should not be prejudiced by the delay of the court process: *Barker v. Westminster Trust Co.*, [1941] 3 W.W.R. 473 (B.C.C.A.), at para. 4; and that judgment be entered *nunc pro tunc* as of the date immediately prior to Peter's death (*Vollrath*, para. 70) or the date following the day final submissions were made on March 18, 2008 (*Barker*, para. 4). In support of this position, the Plaintiff referred to the *Survival of Actions Act*, R.S.A. 2000, c. S-27 (SAA), section 2 and *Alberta Rules of Court*, Alta. Reg. 390/1968, Rule 55. The relevant excerpts are reproduced below:

Survival of Actions Act, section 2

2 A cause of action vested in a person who dies after January 1, 1979 survives for the benefit of the person's estate.

Rule 55 of the *Alberta Rules of Court*

55 Whether or not the cause of action survives there shall be no abatement by the death of either party after the hearing of all evidence but before the entry of judgment and judgment may be entered notwithstanding the death.

[626] Further, the Plaintiff argued that proper maintenance under s. 3(1) of the *Family Relief Act*, is not simply a future-oriented type of relief and its determination by the Court should "proceed from the point of view of the judicious father" based on the applicant's need: *Walker v.*

McDermott, [1931] 1 S.C.R. 94 at 96, cited in *Tataryn v. Tataryn Estate*, para. 19, *Boje v. Boje Estate*, 2005 ABCA 73, at paras. 19-21, *Stang*, at para. 29. The Plaintiff submitted that Peter's death did not extinguish the duty imposed on Nick to provide proper maintenance for him because Nick's duty is not based upon Peter's need.

[627] The Plaintiff therefore sought the relief that Peter should be awarded a portion of Nick's estate and that the *nunc pro tunc* order backdating the Judgment should be issued.

[628] The Defendants conceded that the fact of Peter's death is relevant and should be considered when rendering judgment and awarding damages: *Monahan v. Nelson*, [2006] 6 W.W.R. 645 (B.C.C.A.), at para. 61. However, they submitted that the purpose of the *Family Relief Act* is to provide relief payments for the maintenance of the dependant and such order for relief is a future orientated type. The Defendants argued that since future maintenance is not required for a dead person, the dependant relief claims in this matter do not survive the death of Peter; in effect, Peter's claim for future *Family Relief Act* maintenance from the time of his death onward is extinguished by his death: *Re McMaster*, [1957] A.J. No. 64, (A.B.S.C.), at para. 11, *Wetzel v National Trust Co. Ltd.*, [1956] 4 D.L.R. (2d) 1781 (Sask. C.A.), at paras. 16, 29, *Neyedley Estate v. Neyedley Estate*, 2004 CarwellSask 168 (Sask. Q.B.) at paras. 14, 25, *Golverk-Berger v. Berger Estate*, 1986 CarswellOnt 658 (Ont. Surr. Ct.), at para. 3. It is however admitted by the Defendants that Peter's claim pursuant to the *Family Relief Act* up to and including November 9, 2008 survives Peter's death. In the Defendants view, the dependant relief legislation is not intended to assist a dependant to build up an estate and that this would be the consequence if a future award for maintenance is granted to the Plaintiff.

[629] The Defendants have therefore requested me not to grant an award for future maintenance to the Plaintiff; the refusal, the Defendants argued would be consistent with s. 5(1) of the SAA which provides that "[i]f a cause of action survives under section 2, *only those damages that resulted in actual financial loss to the deceased or the deceased's estate are recoverable.*"

[630] On the basis of the agreement by both parties in their written submissions that the fact of Peter's death is relevant and should be considered, I have concluded that it is proper for me to take judicial notice of the date of Peter's death and grant a *nunc pro tunc* Order, as requested by the Plaintiff dating the Judgment back to the day before Peter's death, that is to November 8, 2008.

[631] In respect of the effect that Peter's death would have on his maintenance claim as a dependant adult, I find that Peter's claim pursuant to the *Family Relief Act* up to and including November 8, 2008 would survive Peter's death, if he is found to be entitled to it. For the purpose of clarity, I note that I have earlier refused to make an order under the *Family Relief Act* as requested by Peter, that is to give him a part of Nick's estate. A grant of an order under this Act granting an award for future maintenance and beyond the date of Peter's death would defeat the purpose of the statute and have the practical result of enabling Peter to increase the value of his estate. Therefore, my order concerning support for Peter insofar as he needed it for his home care, stands and extinguishes on November 8, 2008.

G. Is Joan Petrowski entitled to a claim for unjust enrichment?

[632] In the event that the Will and the *inter vivos* transfers are found to be invalid, does Joan have a claim against the estate for unjust enrichment and is that claim to be satisfied before the estate is divided? Further, even if the Will is upheld and the *inter vivos* transfers are invalid, does Joan have a claim against the estate in unjust enrichment prior to any claim Peter may have under the *Family Relief Act*?

[633] The Defendant claims unjust enrichment, detrimental reliance on expectations and equitable distribution of the family property. In the event that I find any of these things the remedy requested by the Defendant is a constructive trust. A constructive trust is, of course, a discretionary remedy.

[634] If there is an unjust enrichment, the remedy is a constructive trust. Lord Denning said that “By whatever name it is described, it is a trust imposed by law whenever justice and good conscience require it.”: *Palmer v Hussey*, [1972] 1 W.L.R. 1286 at 747. It is an equitable remedy.

[635] To find an unjust enrichment, I must find an enrichment on the part of Nick, a corresponding deprivation on the part of Joan, and I must find that there is no legal justification for the enrichment: *Pettkus v. Becker*, [1980] 2 S.C.R. 834 at 848.

[636] With respect to legal justification the court reviews whether the claimant was under any contractual obligation, statutory obligation or otherwise to provide work and/or services to the recipient, here Nick. Another way the courts characterize this is that there is an absence of juristic reasons for the enrichment: *Peter v. Beblow*, [1993] 1 S.C.R. 980 at para. 89.

[637] First, I will address the enrichment to Nick.

[638] Joan spent her entire childhood and virtually her entire adult life on the farm, except for a time in Edmonton where Joan worked in a variety of positions.

[639] At trial, Joan told us about her contribution to the farm. She said that she had started greasing farm machinery at the age of four. She provided a contribution to the farm for over 60 years. When she was a child, she fed animals, carried wood, cleaned the stove and carried water. Joan worked in the garden picking vegetables, canning, feeding the cows and helping with the harvest including butchering chickens and turkeys. She drove the tractor both combining and hauling grain. When she was working in Edmonton she accepted lumber and materials instead of salary and used that material to build fences and other buildings on the farm. Further, when she was working in Edmonton she returned to the farm frequently to assist with the farm work.

[640] From 1973 to the time of trial, Joan worked extensively on the farm using her own money to repair and maintain the farm house. She gave up her own career when her mother,

Catherine, died in 1973. Joan's role on the farm became more important. At that time, Joan was working in Edmonton but she left her job and returned to work on the farm with her father.

[641] Nick retired in early 1974 when he turned 65 giving management of the farm to Joan. In 1977, the management role increased when Nick married Mary and moved to Vegreville. Joan put in aerial photographs of the farm from 1954 to 1977 which showed rather dramatically the improvements that had been made to the farm during the time she was managing it.

[642] Her duties involved directing and managing the hired men, cooking for Nick and the hired men; cleaning the house, negotiating and settling disputes with respect to the mines and minerals interests and many other things.

[643] Joan made a living from her horseracing business. She intermingled her funds from that enterprise with that of the farming operation.

[644] As to Peter's observations, he acknowledged that she assumed the responsibilities in the house traditionally associated with a wife on a farming operation. He also observed that she was away for many months in a year during the horse racing season. Annette observed that Joan returned to the farm often during those months.

[645] All of this clearly was an enrichment to Nick. He could not have retired if she had not taken on these responsibilities.

[646] Now I turn to the corresponding deprivation on the part of Joan.

[647] Joan had obtained post-secondary education but after her mother died did not pursue her career in business so she could assist on the farm. She never married and had no children. The vast majority of her life was spent looking after the farm and ensuring her father's needs were met. Joan received no compensation for these services.

[648] Peter says that she did get ample compensation because she was allowed to live rent free in Nick's home and he gave her space for her horse operation. However, when one looks at the improvements on the farm and the fact that she left a career in Edmonton to return to the farm, this is not so different than a wife. I find that this was not adequate compensation in these circumstances.

[649] One might ask why Joan did all of this for her father and the farm. Clearly there was affection between Joan and Nick. This was observed by Milen. However, over the years, Joan said that Nick stated many times to her that his estate would belong to her when he died. Joan, believing and trusting her father, remained on the farm with the expectation that her father would fulfill his promise to her one day. This explains why she did not insist on compensation and why she did not go back to work in Edmonton. She was working on her farm as well as her father's farm.

[650] Milen made a number of observations in his evidence. He said that Joan is an honest and principled woman and she is kind and considerate. The relationship between Joan and Nick was strong. He had observed that relationship over the course of four years. He described their relationship as a loving strong relationship.

[651] Milen had observed her giving instructions to the hired hands when he visited the farm.

[652] I find that there is a substantial and direct link between the contribution made by Joan and the farm which is the subject of the estate.

[653] Further, Peter would have me hold Joan's loyalty for her father against her. He says that given that she became Nick's Power of Attorney in August 2000 she owed a fiduciary duty to Nick to manage his affairs. Peter says that it should not lie in an Attorney's mouth to complain that performing those duties works an unjust enrichment to the estate of the donor of the Power of Attorney. This, of course, completely ignores everything that happened between when Joan moved back to the farm in 1975 and 2000. When Nick remarried in 1977, he moved off the farm into a house in Vegreville. He then began to move back onto the farm slowly until finally he and Mary separated. Since then, Joan has taken care of him. While he was in Vegreville, Joan managed the farm.

[654] The remedy for unjust enrichment is a constructive trust. Peter says that I should use my discretion not to order a constructive trust because it would harm an innocent third party, that is Peter. Peter is in a very good position with the income he has from his farm. He also has other assets that will keep him and Annette in their old age as I have discussed earlier in these reasons.

[655] Finally, in this case, I cannot consider a monetary award because Joan's services and monetary contribution over at least 25 years are not capable of quantification: *Peter v Beblow* at para. 27.

[656] Given all this, there is no juristic reason why Joan should not receive at least 50% of the estate before the other 50% goes into Nick's estate. Therefore, I declare a constructive trust against Nick's estate, if there is an estate. Joan is entitled to 50% of the lands, mines and minerals.

[657] Joan also claims that she detrimentally relied on Nick's promises. For a detrimental reliance the remedy is a constructive trust: *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 at paras. 21-25. Detrimental reliance has been considered as a separate cause giving rise to a constructive trust: *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38 at para. 38; *Petkus v Becker*, [1980] 2 S.C.R. 834 at 849.

[658] There does not need to be a wrongdoing in these cases. In the case before me, Nick did promise Joan the farm and she relied on it. Her reliance was entirely reasonable in the circumstances. It is not Nick that reneged on his promise, he fulfilled it in his Will. Rather, Peter would have this court by the operation of law amount to the same thing. At equity it would not be fair for Joan to now not have her appropriate share of the farm. Given Nick's promise, that

would be 100% of the farm. There is no juristic reason for this court to deprive Nick of his testamentary wishes and Joan of her reliance. Had there been an obligation on the part of Nick to support his dependant adult child, Peter, that would have been a juristic reason.

[659] Even in those circumstances, Joan would still be entitled to all of the farm but that part that was necessary for the adequate provision of maintenance and support of Peter.

[660] Joan also relies on the doctrine of equitable distribution of family property. Given my findings above, I will not consider this. It too would result in a constructive trust.

[661] Any property that is the subject of a constructive trust must be connected to the enrichment of Nick and the detriment of Joan. The property that formed the estate, if there was one, was the lands, the mines and minerals. The work of Joan on the farm establishes a strong connection to the farm property. There is no question that Nick's estate has been unjustly enriched by Joan's efforts. Further, there is no question that Joan has been deprived by her efforts and contributions to the farm, through her labour and through her financial contributions. She is entitled to at least 50% of the value of Nick's property on a constructive trust. She asks for 50%.

[662] Given the number of years that Joan lived on the farm and contributed her labour and financial support, it would be next to impossible for her to quantify her contribution. If she were Nick's wife, she would be entitled to 50% on the basis of the long time that she was involved on the farm. The court would not attempt to quantify that contribution except in general terms.

[663] The trust is imposed before the estate is distributed. The trust arises during the life of the testator and therefore does not form part of the estate. It does not form part of Nick's estate: *Collier v. Yonkers* (1967), 61 W.W.R. 761 (Alta A.D.) at para. 5. Therefore, on an intestacy only 50% of Nick's property is in the estate to be divided between Nick and Joan. On an intestacy, therefore, Peter would be entitled to 25% of Nick's estate. If the Will is valid, Peter's claim can only be as much as he is entitled to under the *Family Relief Act*.

III. CONCLUSION

[664] I find that Joan has proved the formalities of the Will on a balance of probabilities. Further, Peter has failed to raise suspicious circumstances surrounding the making of the Will by Nick, and even if Peter did raise suspicious circumstances, Joan has proved testamentary capacity.

[665] Similarly, I find that the *inter vivos* transfers of land and mines and minerals by Nick to Nick and Joan in joint tenancy are valid, there is a presumption of advancement by Nick to Joan when he made those transfers which Peter has not rebutted.

[666] Joan did not exert undue influence on Nick either when he made his Will nor when he transferred the lands and mines and minerals into joint tenancy with Joan.

[667] Peter has no claim under the *Family Relief Act* against Nick's estate because there is no estate given the *inter vivos* transfers. Even if the *inter vivos* transfers are not valid, I find that Peter does not have a claim either for legal or for moral reasons. If I am wrong and Peter does have a claim, then that claim is for an amount to cover the costs of home care, if he needs that care and if he does not qualify for government assistance. He is expected to cover those costs to the extent of \$8,500 per year and any balance is to be paid by Joan out of the income from the mines and minerals. As such, if Peter is found to have a claim, the mines and minerals are charged with those costs and Joan holds them in trust for Peter until he no longer needs the income from the mines and minerals at which time the trust no longer exists and the ownership reverts to her.

[668] Given that Peter died in November, 2008, before this decision was rendered, his estate is entitled to any home care costs he incurred to that date from Nick's estate, if those costs exceeded \$8,500.00 from the date of trial to the date of his death.

[669] The parties may arrange to speak to me about costs.

Heard on the 3rd day of December to the 19th day of December, 2007 and the 18th day of March, 2008.

Dated at the City of Edmonton, Alberta this 31st day of March, 2009.

A.B. Moen
J.C.Q.B.A.

Appearances:

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