IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Laszlo v. Lawton,*
2013 BCSC 305

Date: 20130227
Docket: S084176
Registry: Vancouver

Between:

Eugene Laszlo, Peter Laszlo, Judith Laszlo,
Fary Jozsefne, Szentesi Andrea, Ifju Czuczor Lajos,
Czuczor Ildiko and Czuczor Gabriel

Plaintiffs

And

Richard Dale Lawton, Penticton United Church and
The British Columbia Society for Children with Disabilities

Defendants

Before: The Honourable Madam Justice Ballance

Reasons for Judgment

Counsel for Plaintiffs:	W. Mussio
Counsel for Defendants:	E.F. Macaulay
Place and Date of Trial:	Vancouver, B.C. May 9-13, September 8-9, 2011, April 30-May 2, 2012
Place and Date of Judgment:	Vancouver, B.C. February 27, 2013

INTRODUCTION

[1] The late Magdolna Czuczor (the "Deceased") was born on January 19, 1924 in an area of Romania that was under the rule of the then-Kingdom of Hungary. She and her husband, Eugene Czuczor, immigrated to Canada sometime in the early 1950s.

[2] Eugene Czuczor had four siblings, one of whom was his sister, Roslia. She married John Laszlo, and together they had three children, Eugene (Gene) Laszlo, Peter Laszlo and Judith (Judy) Laszlo. All three children are plaintiffs in this action. For the sake of clarity and intending no disrespect, I will refer to them individually by their given names and collectively as the "Laszlo plaintiffs". The remaining five plaintiffs in this action are the adult children of Eugene Czuczor's other siblings. They reside outside of Canada and did not testify at trial.

[3] The plaintiffs challenge the validity of the Deceased's last will and testament executed on December 15, 2000 (the "2000 Will") on the ground that she lacked testamentary capacity as well as contend it was the product of coercion and/or undue influence brought to bear by her husband. In the alternative, the Laszlo plaintiffs assert a claim against the Deceased's estate based on the doctrines of *quantum meruit* and unjust enrichment.

[4] For the reasons that follow, I have concluded that the Deceased did not possess the requisite testamentary capacity to make her 2000 Will. In light of my finding, it is unnecessary to examine the allegations of coercion and undue influence or to address the alternative position advanced by the Laszlo plaintiffs.

BACKGROUND

The Property

[5] Soon after arriving in Canada, the Czuczors purchased and settled on a fruit orchard of mostly cherry trees near Skaha Lake in Okanagan Falls, British Columbia (the "Property"). The Property spanned approximately 8.18 acres and consisted of

three separate legal titles. The Czuczors owned one title as joint tenants and held the other two equally as tenants-in-common.

[6] The evidence establishes that except during the summertime when the cherry crop was harvested, the running of the orchard was not a full-time endeavour. At some stage, Mr. Czuczor obtained employment as an x-ray technician with the local hospital in Penticton, leaving his wife to tend to a good deal of the gardening and other chores in and about the orchard. Even so, he remained integral to the upkeep of the Property and laboured in the orchard along with the hired fruit pickers during the busy summer harvest. He also helped transport the cherries to fruit stands in the lower mainland where they were sold.

The 1967 Will

[7] The Deceased made a will on August 18, 1967 (the "1967 Will") under which she named her husband as the sole executor and beneficiary. In the event he failed to survive, two individuals (who shared the surname of Czuczor) were appointed as alternate executors and, in the Deceased's words, the residue of her estate was to be divided equally among:

- my mother, Ida Czuczor;
- my brother, Lejos Czuczor;
- my sister, Ida Czuczor;
- my sister, Roslia Laszlo.

[8] Although the Deceased described the residuary beneficiaries as *her* mother and siblings, they were her husband's blood relatives and were related to her through marriage only.

[9] Mr. Czuczor's will, made the same day, was a mirror image of his wife's.

The Laszlos' work on the Property

[10] The Laszlo plaintiffs were all born in Hungary. Judy, the eldest, was born in 1961, followed by Peter and Gene in quick succession in 1970 and 1971.

[11] The Deceased and her husband were unable to have children of their own. They visited the Laszlo family in Hungary in 1972 and possibly on other occasions, and invited them to relocate to Canada and reside at the Property. Sponsored by the Czuczors, John and Roslia Laszlo arrived at the Property in about 1975 with their three children in tow, then aged 14, 5 and 4 years.

[12] The main house on the Property had been constructed to accommodate two families. Over time, a second, smaller home and eventually a cabin were also erected.

[13] Believing that hard work built fine character, the Czuczors adhered to a strong work ethic and expected nothing less of the Laszlo family. In those early years, the Laszlo parents and Judy helped daily with all sorts of chores while at the same time keeping watch over the little Laszlo boys. Judy credibly recalled toiling long days in the highly regimented atmosphere imposed by the Czuczors where she was only permitted short scheduled breaks for particular reasons. She gardened, pruned trees, picked and sorted cherries, and performed an array of household tasks. She periodically accompanied her aunt and uncle, and sometimes her father, on trips to Vancouver to sell the cherry crop.

[14] The Laszlos and the Czuczors communicated with one another exclusively in the Hungarian language. The Deceased had a very limited formal education. She wrote in Hungarian and spoke in broken English with a heavy Hungarian accent that could be difficult to understand. The evidence amply establishes that the Deceased could not read or write English in any meaningful way beyond signing her name. She depended mainly on her husband and, at times, on various of the Lazlos to interpret from English to Hungarian all manner of written materials, including menus, birthday cards and the television guide.

[15] John Laszlo is a trained mechanical engineer. Due to his limited proficiency in English, he found it difficult to find work within his profession. A career opportunity took him and his family, other than Judy, to Surrey, British Columbia, for a number of

months in or around 1976. During that time, Judy remained with her aunt and uncle and attended the local high school in Penticton.

[16] Approximately one year later, Mr. Laszlo moved his entire family, including Judy, to Toronto to pursue an engineering/drafting position. For several years thereafter, Gene and Peter, often joined by their mother and sometimes by Judy, dutifully returned to the Property most summers to spend most of the school break helping the Czuczors in the orchard. The Laszlo plaintiffs were given little time to play and were seldom allowed to enjoy Skaha Lake located only 400 metres away.

[17] After Roslia Laszlo died in June 1984, Mr. Laszlo and his sons left Toronto and resettled in Montréal for a short time. By then, Judy was attending York University and remained in the Toronto area. As had been the pattern before their mother's passing, the Laszlo plaintiffs spent most of the summer of 1986 at the Property carrying out their usual chores in or about the orchard. That September, the boys and their father moved to Coquitlam, British Columbia, and Judy returned to Ontario to continue her post-secondary schooling.

[18] Throughout the time they lived in Toronto and Coquitlam, Gene and Peter spent a good part of their summer holidays carrying out a host of physically demanding chores at the Property. The boys laboured long days, easily 12 hours, and were permitted very little leisure time of their own. If they did not perform a task to the Czuczors' high standards, they were required to redo it until they got it right.

[19] Gene saw his aunt and uncle frequently before his graduation from high school in 1990. Although he maintained contact with them and still helped out in the orchard after that, it was on a more intermittent basis.

[20] In around the mid-1990s, Mr. Czuczor retired from his job at the hospital.

[21] In 1995, Gene moved to Kelowna, British Columbia, which placed him in much closer proximity to his aunt and uncle. I accept his evidence that he visited them regularly during that period and that he did chores practically every time he

dropped in. At his aunt's request, he even used his personal vacation time on at least one occasion to assist in the summertime harvest.

[22] In 1997, Gene married Rhonda and his career as an officer with Correctional Services necessitated them relocating to the Lower Mainland. After he moved, he did not have as much face-to-face interaction with the Czuczors. However, he was still able to lend a hand at the Property "a few times" and, until approximately 2005, spoke to his aunt once or twice a week.

[23] Peter also worked in the orchard and continued to help transport the cherries to fruit stands in the Lower Mainland until he reached the age of 20 or 21. While still residing in the Lower Mainland, he would visit his aunt and uncle once or twice per year, ordinarily staying for just the day. He was sometimes accompanied by his girlfriend, Darlene, whom he later married. There were several times that his aunt and uncle visited Peter and Darlene when they came to the Lower Mainland. Peter was eventually promoted to the position of Deputy Sheriff. He has lived in Courtenay with his wife and three children since 2002.

[24] Judy obtained an undergraduate degree in liberal arts from York University and subsequently earned a nursing diploma in 1991. While attending post-secondary school, she frequently came to British Columbia during the summer to see her father and brothers. Those trips typically spanned two or three weeks, and she would almost always make time to go to the Property to see her aunt and uncle for a couple of days. Visits with them had become more social than chore-oriented.

[25] Judy eventually married and left Canada. She relocated to Texas in 1992, and then moved to Florida in 1994, where she lived for approximately two years. She testified, and I accept, that during that period she kept in touch with her aunt by telephoning her once or twice a month. I also accept Judy's evidence that before she moved to each of those states and once while living in Florida, she returned to British Columbia to see her father and brothers. On each of those occasions, she made a point of spending one or two days with the Czuczors at the Property.

[26] Judy left Florida and moved to Seattle where she resided for a few months. In 1997, she settled in Richmond, British Columbia. Her son, Jamie, was born in March 1997. Since about 1999, she has worked as a nurse in forensic psychiatry at an assessment and treatment hospital in the Lower Mainland.

[27] The evidence establishes that neither Gene nor Peter were ever paid by the Czuczors for their work in the orchard. Judy too denied ever receiving payment. However, the evidence shows that she was issued two cheques, one in July 1980 and the other in August 1983, both signed by Mr. Czuczor and totalling the sum of $1,900. Judy professed to have no recollection of these cheques, going so far as to suggest that what appears to be her signature endorsing the back of the cheque did not belong to her. Her evidence on this point strained credulity. Apart from this single taint, Judy impressed me as a straightforward and credible witness. I do not view this one failing to be of consequence in the overall assessment of her credibility or the reliability of her evidence.

[28] Gene and Peter were credible witnesses across the board.

Relationship with their Aunt and Uncle

[29] The Laszlo plaintiffs were the Deceased's godchildren. They each gave credible evidence, which was persuasively supported by their father, that they enjoyed a close and warm relationship with their aunt. Judy and her aunt forged an enduring mother and daughter-like bond, and the Deceased treated Peter and Gene as though they were her own sons.

[30] Judy testified that her aunt had been rather vague about her family tree, revealing little more than her own mother had died "early on". She always portrayed herself as an orphan, and often lamented to Judy that she had no children or next of kin and had "no one other than her godchildren", namely the Laszlo plaintiffs.

[31] Although loyal and obedient to their uncle Eugene, the relationship with him was more guarded and distant. His personality was more "hard-nosed" and "no nonsense", and his temper percolated close to the surface. Judy recalled that if he

was displeased with the way she performed her chores on any given day when she was a teenager, he would accuse her of being lazy and "no good". She also disapproved of the manner he sometimes treated her aunt, particularly when he had been drinking.

The Motor Vehicle Accident – 1980

[32] It is an agreed fact that the Czuczors were involved in a serious car accident in 1980. The accident left the Deceased in pain and with injuries to her back and foot. In the aftermath, she was unable to walk without the use of a cane and became constrained in the scope of her physical activities on the Property.

[33] It is also agreed that in the 1980s, the Czuczors received a sizeable financial settlement in relation to the accident.

Break and Enter at the Property – 1986

[34] The Czuczors kept cash and valuables in their home. There was a break and enter at the Property in about 1986. A significant amount of cash, which I find consisted of a portion of the settlement proceeds from the accident, and several personal items, such as a Rolex watch and antique Hungarian coins, were stolen. The incident was deeply upsetting to the Czuczors, especially the Deceased who ruminated about it for years to come.

[35] With no arrest having been made in the ensuing year, the Czuczors asked the R.C.M.P. to conduct a more thorough investigation. The officer they dealt with at that time was the defendant, Richard Lawton, and he revived the investigation. His recollection was that the amount of stolen cash was between $70,000 and $80,000.

[36] For a time, the Czuczors would come by the detachment once a month or so to speak to Mr. Lawton about the status of the investigation. They became friendly and, as is the custom in small towns, Mr. Lawton would stop in at the orchard for a chat and a cup of coffee if he was passing by. According to Mr. Lawton, the Deceased suspected that "everyone", including the bank manager, might have been involved in the theft and she brought up the issue regularly. That said, he was not

certain whether she ever expressed suspicion of the involvement of any family members.

[37] In the end, no one was charged in respect of the theft and the stolen items were never recovered.

The 1986 Will

[38] The Deceased signed a fresh will on December 22, 1986 (the "1986 Will"). She appointed her husband as the primary executor and designated the solicitor who prepared the 1986 Will and another individual as alternates. She left her entire estate to her husband, with the following dispositions in case he failed to survive her by 30 days:

- the establishment of a $5,000 post-secondary education trust fund for Peter and the same for Gene, each of whom she described as "my nephew";
- division of the residue of the estate equally among those of the eight plaintiffs to this action who survive her.

[39] Mr. Czuczor executed a reciprocal will on the same day.

[40] It is not alleged, and there is no evidence to suggest, that the 1986 Will is invalid on any ground. Nor is there any evidence that the Deceased made another will after she executed the 1986 Will and before she signed the 2000 Will. Accordingly, if the 2000 Will is found to be invalid, the 1986 Will would govern the disposition of the Deceased's estate.

Statements about the Property and Wills

[41] The Laszlo plaintiffs credibly testified that throughout their longstanding relationship, their aunt spontaneously and repeatedly told them the Property would one day belong to them. In this regard, Gene testified that when they would be discussing various farming chores around the orchard, the Deceased would interject with comments to the effect, "let us teach you", "the orchard is who you are" and

"this will be yours one day". Peter recalled how the Deceased would say to him and Gene that the reason they were expected to toil in the orchard was because they were "family" and that the Property was "all being left to family". She pledged that the Property would be "yours one day" and "that's why we brought you from Hungary". Gene added that she told him, "one day I will be old and it will be up to you to look after the orchard". Judy elaborated that the Deceased characterized the orchard as a "family legacy" and assured them it would one day belong to them.

[42] The Laszlo plaintiffs maintain that the Deceased remained consistent in her view of the Property as a family holding. Peter and Gene each testified, however, that there were occasions when their aunt and uncle would speculate about selling the Property sometime in the future.

[43] I accept Peter's evidence that both his aunt and uncle occasionally mentioned to him that they had made a will that included "family", or included him and his siblings. He testified that they made statements to that effect "pretty much" over the entire span of the relationship. Judy had no recollection of either of the Czuczors raising the topic in her presence.

Listing the Property for sale before the 2000 Will

[44] In 1992, after he retired from the force, Mr. Lawton obtained his real estate licence. The Czuczors approached him in 1993 and asked that he list the Property for sale. In late August that year he listed it for $800,000. They also sought his assistance to have the Property exempted from the agricultural land reserve.

[45] Mr. Lawton testified that although he dealt with both of the Czuczors, there was no doubt in his mind that the Deceased was the one in charge of the sale and that Mr. Czuczor tended to defer to her decisions on that subject. Although the evidence is not entirely clear, it seems that no offers were received during the currency of that listing which appears to have ended December 31, 1993.

[46] Mr. Lawton claimed to be surprised to hear the Laszlo plaintiffs testify that the Deceased did not understand English because that did not accord with his

experience. Yet at the same time, acknowledged that due to the Deceased's limited proficiency in English, he had to explain the listing agreements and related documents to her before she signed. He recalled that if he used a word the Deceased did not understand, she would turn to her husband and speak to him in Hungarian seemingly seeking and obtaining his clarification. Mr. Lawton does not understand Hungarian and, therefore, could not know what the Czuczors were saying when they conversed in their native language.

[47] In the context of this exchange in cross-examination, plaintiffs' counsel reminded Mr. Lawton of a letter he had written on August 15, 1994 to the Agricultural Land Commission concerning the Czuczors' application for removal of the Property from the land reserve. In it, he wrote that he was aware that the Czuczors "have problems understanding English" and asked the land commission to communicate with him in relation to their application. When confronted with his statement, Mr. Lawton acknowledged that he had written the letter, but said it did not capture "the total truth" in that Mr. Czuczor had no difficulty with English. There can be no doubt that the Deceased was functionally illiterate in English, as noted earlier.

[48] On October 17, 2000, the Czuczors relisted the Property with Mr. Lawton. This time, the sale price was set at $1.5 million and entitled Mr. Lawton to a straight commission of 5%.

The Deceased's declining mental health

[49] The Laszlo plaintiffs say that over the years they had grown accustomed to their aunt's oftentimes quirky and even odd behaviour. It is not disputed that she had long been vocal of her suspicion about her husband's infidelity. Their collective evidence is that in about 1997, she began to display obvious signs of confusion and forgetfulness, and that her conduct became ever more peculiar and sometimes bizarre. Their testimony chronicling her escalating abnormal and impaired behaviour in the few years leading up to the time that she made her 2000 Will was compelling.

[50] The Laszlo plaintiffs recounted instances where the Deceased professed to have the ability to absorb or transmit information simply by touching objects or

people. She also claimed that she had psychic powers and was able to read the minds of others and communicate telepathically. A particular instance that stood out in Gene's memory occurred before she made her 2000 Will, when he drove his newly-acquired pickup truck to the Property to show to his aunt and uncle. His aunt placed her hand on the truck and declared that she could discern that it was "very bad" and "possessed", and advised Gene to "get rid of it".

[51] The Deceased had blamed transient fruit pickers who had worked at the orchard, among others, of committing the break and enter in 1986. Around the time of Gene's wedding in 1997, she began to point a finger at John Laszlo. I accept Peter's evidence that despite her accusations, his father was still welcomed by the Deceased whenever he came to visit.

[52] Judy recalled several similar incidents between 1998 and the end of 2000. Within that time frame, her aunt would report that she was able to transmit "luck" to Judy's young son, Jamie. She would frequently speak in a language that was neither Hungarian nor English, which she referred to as her "healing code". More than once, she placed her hand on Jamie and explained to Judy that she was transmitting the history of Hungary and a code for the language to him. She asked Judy if she could have Jamie in exchange for the Property or "before he was too old to run away". Along the same theme, she suggested to Judy that they should take a train to town and "pick up all the little orphans along the way". These increasingly strange antics disturbed Judy and prompted her to curtail her son's exposure to her aunt.

[53] Judy also testified that her aunt confided that the television was imparting "secret information" to her, and that some of the people shown on the television screen were communicating with her. Judy recounted an incident where her aunt pointed to the TV screen and announced that the children were transmitting information to her. She cautioned Judy not to disclose that this was happening because it was a secret. Another of Judy's specific recollections is observing her aunt come racing into the house and frantically trying to barricade the doors,

claiming, with obvious distress, there was a “man-eating” animal lurking in the orchard. She also noticed that her aunt’s moods became more labile and that she was frequently upset and tended to cry easily.

[54] According to John Laszlo, in the same general period, the Deceased began to declare that she wanted to look for “her child”. Mr. Laszlo, who had known the Deceased since 1955, was certain that she had never had a child. That was consistent with the understanding shared by the Laszlo plaintiffs.

[55] Judy visited her aunt and uncle between Christmas 1999 and New Year’s Day. The Deceased demonstrated to her how she was able to “absorb” the contents of a Christmas card simply by placing it over her heart. She also claimed that she had received special knowledge from the computers of the world. Her Christmas gift to Judy that year was a piece of paper with her signature and numbers. She told Judy to take the paper to the bank, instructing her to the effect, “they know me and will do what I want. I want you guys to have it. Tell him if he has hard time, tell him I’ll go after him with my cane.” The Deceased then removed the gold-coloured necklace she was wearing and gave it to Judy. She was evidently unaware or had forgotten that, as a precaution, her husband had replaced her good jewellery with inexpensive costume jewelry and that the necklace she gave to Judy was from a dollar store.

[56] The evidence establishes that the Deceased’s forgetfulness was developing into confusion and a short-term memory deficit of concern in the two years before the 2000 Will. Gene recounted a number of occasions where his aunt appeared confused, irritable and suffering difficulties with her short-term memory. She was unable to remember what he did for a living, despite him telling her time and again. She had to be constantly reminded who Gene’s wife was, even though she had accompanied her husband on many of his trips to see his aunt. By the year 2000, he found that when he saw his aunt he would routinely have to “start at square one” and cover old ground about his basic information, such as who his wife was and the job he held. Many times, she told him she was confused and complained of “not

doing very well". Peter gave similar evidence about the Deceased's growing confusion and forgetfulness.

[57] On occasion, the Deceased would appear uncertain about who Judy was, sometimes asking if she was Roslia's daughter. When Judy would answer that she was, the Deceased would carry on calling her by her mother's name. There were times when she was confused about who Jamie was or seemed to not recognize him at all.

[58] In 1998 or 1999, the Deceased misplaced the Canada savings bonds that she and her husband owned. Mr. Lawton agreed to act as a guarantor in their application to have the bonds reissued. In the process, he learned that the aggregate value of the misplaced bonds was very significant – between $300,000 and $340,000. Mr. Lawton knew of no situation where they would have spent the bonds before the 2000 Will and agreed that the Czuczors owned them at that time.

[59] In October 2000, Peter and his wife hosted a wedding reception for family and friends. The Czuczors attended and gave Peter and his wife a gift of $1,000 to take a cruise. John Laszlo described his sister-in-law as crying and speaking nonsense, partly in English and partly in Hungarian, at that event. All of the Laszlo plaintiffs, as well as their father, persuasively recounted another disturbing display of the Deceased's faltering memory at that celebration. She did not recognize Peter's wife, Darlene, whom she had met many times over the years. Staring at Darlene, she suddenly asked, "who is this?". When Peter explained that it was Darlene, the Deceased became visibly upset and accused Peter of "sleeping around", and that he had eloped to Las Vegas and married "some other woman". After her outburst, Mr. Czuczor told his wife that she was confused and instructed her to sit down, explaining to those present that "she doesn't know what she's talking about".

[60] That marked Peter's last encounter with his aunt prior to the 2000 Will. He did not see her again until well after Christmas that year, however, he continued to speak to her on the telephone from time to time throughout 2001 and beyond. Her coherency would fluctuate; sometimes she made sense and other times she did not.

Gene added that the ability to communicate effectively with their aunt became challenging as her mental health deteriorated. They all learned there was little point trying to rationalize with her or correct her confused and peculiar statements because those approaches just served to upset her.

[61] Coinciding with the deterioration of her aunt's psychological and cognitive well-being before the 2000 Will, Judy started to notice that her uncle began to restrict her access to her aunt. He stated that he was not happy with his wife's situation and suggested that Judy's visits upset her. He told her it was best she not visit and that, if she did, she should stay in a hotel. When Judy would telephone the house, her uncle was usually the one who answered and he would offer several excuses about why his wife was not able to take the call. There were times that Judy could hear her aunt crying on the line. His rudeness intensified to the point where he was sometimes openly hostile. According to Judy, depending on where he was with his drinking, he could explode in anger and demand she "leave us the hell alone". She attributed his harsh demeanour to his drinking.

[62] Gene testified that his relationship with his uncle waned over the years but that he always maintained a close relationship to his aunt. Peter testified about his uncle complaining over the phone that "we don't love our aunt enough" or we were "not helping out enough." He was not asked to clarify when his uncle made those statements.

[63] When Judy and her son visited the Deceased in the summer of 2000 (abiding by her uncle's request to stay in a hotel), they enjoyed a pleasant afternoon together. However, in the evening the Deceased became very upset. She seemed convinced that the groundwater had been poisoned by certain land developers and other people whom she believed controlled the water pipes. The following day, while at the lake, the Deceased fed Jamie sand and grass, insisting to Judy that it was nutritious. She also told Judy that she had eaten grass as a little girl when she roamed the plains of Hungary, which Judy believed to be possible.

[64] The Deceased's auditory and visual hallucinations continued unabated. While they watched television together during Judy's visit in the fall of 2000, the Deceased said that the TV was telling her that "my orphans are coming to me", and matter-of-factly stated that she therefore no longer "needed Jamie". In another instance, she directed Judy's attention to a woman in a shampoo commercial and commented along the lines, "she is winking at me, she's your uncle's mistress and she's gonna take my money". The Deceased also began to frequently speak of a disturbing belief that her husband had forced her to throw a child down the well. Peter places the start of her making this statement in around 2000 and continuing thereafter. I am satisfied that is accurate.

[65] Even though Judy found her aunt's increasingly compromised state to be of intense concern, it was understood she could not raise the matter with her uncle. She credibly testified that her uncle would not have seen it as "her place" and would not have tolerated her asking any questions about his wife's strange behaviour. When Judy tried to broach the issue with him softly, he would say the Deceased was sick or not feeling well, or would scold "never mind, I got it". Gene and Peter persuasively corroborated their sister's evidence. I also accept their evidence that if their uncle was present during the episodes of the Deceased's more outlandish behaviour, he would attempt to diffuse the situation in his own way, which was generally neither kind nor sensitive. For example, he would say his wife was "nuts" or use other pejorative descriptors of her, and tell those present to just ignore her while assuring them that she would be fine.

Dealings with TD Canada Trust

[66] Randolph Guest was the branch manager of the TD Bank (later, TD Canada Trust) in Penticton. From 1997 until approximately 2004, he had several dealings with the Deceased, always in the company of her husband.

[67] Their interactions centered largely on discussions about the Deceased's various deposits with the bank. I accept Mr. Guest's evidence that she invariably asked him to explain her account passbooks and bank statements. For her benefit,

he would highlight the printouts of the account statements and explain the meaning of the various entries to her "over and over again". To his eye, the statements revealed nothing out of order.

[68] According to Mr. Guest, in at least half of those meetings the Deceased would cry, raise her voice and present generally as very upset. She would usually accuse her husband of lying and stealing her money, often exclaiming, "my money is gone". During the other half of those meetings, she would mostly sob and fiddle through her purse for a tissue. Mr. Guest recalled that Mr. Czuczor would deny her accusations and attempt to console her, and the two of them would often bicker.

[69] Mr. Guest testified that sometimes when they were in the process of leaving, Mr. Czuczor would quickly pop back into Mr. Guest's office, without his wife, to thank him and say words to the effect, "she doesn't understand" and "she gets emotional".

[70] Mr. Guest came to find the meetings with the Czuczors time consuming and tedious. He would sometimes arrange for another staff member to join them to ensure that he did not lose his patience. He recalled that the Deceased's outbursts and accusations about the bank's "theft" of her money heightened over time. There was an occasion where she shoved her husband, prompting Mr. Guest to call for police intervention. He was not able to pinpoint when that incident took place in relation to the making of the 2000 Will.

[71] When asked whether the Deceased understood the highlighted bank statements that Mr. Guest repeatedly reviewed with her, he answered that he did not know. He noted that after he explained the entries, the Deceased would usually say "okay", which he supposed was a way of confirming that she understood. It was his impression that the Deceased seemed to understand his explanations by the time she left the bank. Any understanding she may have gleaned from Mr. Guest was plainly temporary; each time they met, Mr. Guest had to cover the same ground with the Deceased time and again. This was their pattern for a prolonged period before she made her 2000 Will.

[72] Dr. John Dimma had been the Deceased's family physician since late 1978. Certain extracts of his clinical records were in evidence. He also provided a written expert opinion dated June 11, 2008. He did not testify at trial. Counsel agreed that Dr. Dimma's records and all other clinical and medical records were admitted as proof of the fact that the Deceased or her husband made the recorded statements and that the attending physician or record-maker made the recorded observations and prescribed the recorded treatments. They were not admitted for the truth of any opinion or diagnosis contained in them.

[73] Included in Dr. Dimma's chart is a notation of a telephone message that he or his office received from Mr. Guest on June 29, 2000. The notes made next to the message slip are titled "TD Bank" and record words such as "incompetent", "mind changes", "paranoia", "monies at risk" and "confusion", all in relation to the Deceased. Mr. Guest did not recall placing a call to Dr. Dimma. He testified, however, that had he been asked how he perceived the Deceased's state of mind, those remarks would accurately reflect his sense of her, with the modification that he would have described her more as confused than incompetent. Mr. Guest did not say when it was in the years of his dealing with the Deceased, that is whether before or after the 2000 Will, that those descriptors applied.

Medical evidence before the 2000 Will

[74] On August 2, 2000, Dr. Dimma administered a Mini Mental Status Examination ("MMSE") to the Deceased on which she scored 28 out of 30. In his chart for September 27, 2000, he noted that she disclosed she had not been taking her diabetes or blood pressure medications; indeed, she denied that she had diabetes, and maintained that her blood pressure was "okay". His chart also records that she claimed that her husband had "sold house and land". It also shows that Dr. Dimma was informed by one of the Czuczors that the Deceased was accusing her husband of "unreasonable business deals, etc.".

[75] Dr. Dimma referred the Deceased to Dr. Michael Cooper, a geriatric psychiatrist, to be assessed for Alzheimer's disease. She refused the appointment

with Dr. Cooper, but agreed to be treated by another psychiatrist, Dr. Ali Ghaed, who she recalled having seen back in 1976 when she was admitted to hospital for an overdose of Valium.

[76] Prior to making her 2000 Will, the Deceased had four sessions with Dr. Ghaed, which took place between October 18 and December 5, 2000. Dr. Ghaed noted that she spoke in broken English and he found her difficult to understand at times. Mr. Czuczor was present at all of his wife's appointments.

[77] Dr. Ghaed's clinical records were admitted into evidence on the agreed basis described earlier. He also provided a written expert report dated July 8, 2010, which was tendered by the defendants as part of their case, and testified at trial.

[78] Plaintiffs' counsel methodically took Dr. Ghaed through many of his clinical notations made before and after the 2000 Will. Dr. Ghaed confirmed and expanded upon his findings of the Deceased's mental state at various points throughout the timeline. It was not always made clear whether certain pieces of information recorded by Dr. Ghaed had come from the Deceased, her husband or both.

[79] When Dr. Ghaed first met with the Deceased, he administered the MMSE and the Deceased scored 29 out of 30, being one point better than when she tested with Dr. Dimma two months earlier. Dr. Ghaed did not have an immediate concern about the possibility of Alzheimer's disease. From his perspective, the features of her condition at the forefront were her paranoia, delusions and accusatory behaviour. During their initial meetings, the Deceased eschewed taking medication for any of her symptoms, and Dr. Ghaed agreed to treat her by way of psychotherapy.

[80] Dr. Ghaed summarized the appointments prior to the 2000 Will in a written psychiatric assessment transcribed on December 15, 2000. In that assessment, he wrote that the Deceased "is of Protestant background, but occasionally goes to the Catholic Church". At trial, Dr. Ghaed was adamant that this piece of information had been relayed to him by the Deceased and that he had accurately transcribed it. I do not doubt that. Unbeknownst to Dr. Ghaed, the Deceased was baptized a Catholic.

The Laszlo plaintiffs testified convincingly that although their aunt did not attend church, throughout her life she considered herself a Catholic and always described herself as one. A crucifix necklace hung on her wall. Even when she was significantly mentally unstable following her husband's death in 2005, she insisted that he have a Catholic funeral. The Laszlo plaintiffs explained that it was their uncle, not their aunt, who had distanced himself from the Catholic faith. He often made disparaging and sarcastic remarks about the Catholic Church, characterizing the Pope and the Church as a "bunch of garbage". Mr. Lawton confirmed that it was Mr. Czuczor who despised the Catholic Church, even though, like his wife, he too was a Catholic. The evidence is clear that the Deceased was not of "Protestant background" as she reported to Dr. Ghaed.

[81] According to Dr. Ghaed's notes, the Deceased told him that she had no relatives in this country and that some were in Transylvania. She referred to "a couple of distant cousins in Transylvania with whom she had no contact", while at the same time indicating that "two cousins" had come to Canada for a visit in 1992 and 1996 and complaining that her husband would not agree to help them return to Canada. The only reliable evidence of any relative of either of the Czuczors coming to Canada besides the Laszlos was a visit by the plaintiff, Ildiko Czuczor, the daughter of one of Mr. Czuczor's brothers. I accept Peter's evidence that she spent a summer, likely in the 1990s, pitching in with chores around the orchard and helping the Deceased in the kitchen. Ildiko Czuczor is a cousin of the Laszlo plaintiffs and not of the Deceased. There is no evidence of any cousin to the Deceased or of any other of her relatives visiting her in Canada. The evidence indicates that the relatives who came to visit the Czuczors at the Property were all related to the Deceased through marriage, and that she considered her husband's side of the family to be her own relatives.

[82] During the appointments prior to the 2000 Will, the Deceased also made these statements to Dr. Ghaed:

- she and her husband had no children. She had two miscarriages and came to accept the fact that she could not have a child, but now wished she had;

- her husband had signed a paper for a girl to come from Czechoslovakia whom she suspected was his "secret girlfriend". She expressed a longstanding suspicion that her husband had some secret affairs, and claimed to have caught him in bed with a girl in Vancouver many years ago;
- her overdose in 1976 was accidental;
- she was easily angered, becoming quite forgetful, and her concentration was "not good" if she is upset;
- she experienced anxiety and tension on a transient basis.

[83] During the course of these psychotherapy sessions, Mr. Czuczor informed Dr. Ghaed as follows:

- in 1986, they had lost over $200,000 in cash which was hard on the Deceased, and after the break and enter, she had become suspicious and accused him of theft and infidelity;
- she has "no trust in anybody";
- she did not trust keeping $40,000 worth of savings bonds in the safety deposit box, and brought them home, hid them somewhere, and cannot find them;
- the Deceased was afraid that he was going to leave her, and believed one of the ladies at the bank was his girlfriend, and that he was receiving the Deceased's interest/money from the bank;
- when he went close to the waterline, the Deceased thought he fell into a well and was crying when he returned;
- she expressed worry about her money being invested in the bank, and had accused the Royal Bank (where she had accounts in addition to those held at TD Canada Trust) of stealing her money.

[84] Dr. Ghaed confirmed that based on his examinations of the Deceased before December 15, 2000, he had diagnosed her condition as delusional disorder characterized by jealousy, suspiciousness, accusing people of stealing her money, believing her husband wanted to leave her, etc. He was also careful to say that some of her statements and accusations could be classified either as delusions or

the product of confusion. When he was taken to her statement to Dr. Dimma made in September 2000 that her husband "sold the house and land", Dr. Ghaed first characterized it as a delusion but later conceded it could also be evidence of confusion on the part of the Deceased.

Preparation and execution of the 2000 Will

[85] In early December 2000, the Czuczors met with a notary public in his office to discuss the preparation of their new wills. At the time that he met with the Czuczors, the notary had acquired considerable experience in drafting wills, and had taken specialized courses on the topic of will drafting and interviewing techniques.

[86] The parties had never met before and it was not clarified how the Czuczors came to choose the notary and arrange the appointment. I am satisfied that none of the defendants were involved in the procurement, preparation or the giving of instructions in respect of the 2000 Will.

[87] The notary had no independent recollection of his dealings with the Czuczors or the preparation of their wills. His evidence concerning his recollection of the Deceased was based entirely on the relatively sparse contents of his client file, including the absence of notations, interpreted in the context of his standard practice in the drawing and execution of wills.

[88] At all times, the notary met with both of the Czuczors together. Their initial meeting lasted between 30 and 45 minutes.

[89] The notary usually starts a will interview involving a couple by asking basic questions of the wife, such as her name, address, birth date, date of marriage and the like. He then turns to the husband and asks the same questions. Of particular interest to the notary is whether this is the clients' first marriage and if they have children. Attuned to the issue of testamentary capacity, he would normally pay attention to whether any of the responses to his introductory questions flagged a concern about competency. Among the things that the notary would look for is

whether a spouse appeared to struggle to remember the home address or other simple information, or provided an incorrect birth date.

[90] The notary's practice is to complete a preprinted form as part of the interview process, and he did so in this case. As a general rule, he makes a file notation about anything arising in the interview that he considers to be out of the ordinary or triggers a concern about a client's testamentary capacity.

[91] As part of his usual protocol, the notary would next ask for information regarding the clients' assets and where and how they were held or registered, as a means of "roughly" determining the size of their estates. He explained that when dealing with spouses, he directs his questions to the "couple", but encourages both to participate and solicits information from each of them. He testified that he takes care to ensure that one spouse does not dominate the conversation over the other. If it appeared to him that a client was encountering difficulty itemizing the assets, he would make a notation to that effect in his file.

[92] After canvassing the subject of assets, the notary's general practice is to ask the clients how they wish to dispose of their estate, including their personal effects. Once he has obtained their instructions, he would draw a simple flow chart to show the clients at a glance how their estate assets would devolve in accordance with their instructions, and review it with them. The flow chart is later used by the notary's assistant to prepare the draft wills for his review. Following that, he would ordinarily move to the topic of the choice of executor and answer any questions the clients may have about the estate administration. He would typically highlight certain basic estate administration steps and explain the entitlement of an executor to charge "up to five percent" as remuneration.

[93] The notary testified that he did not deviate from his usual practice and procedure when dealing with the Czuczors.

[94] The notary was raised in a household where English was spoken with a heavy Eastern European accent. He testified that he had no trouble understanding

the Deceased and recalled no difficulty eliciting basic information from her. He based his conclusion not on any specific recollection of the actual meeting but, rather, on the absence of a file notation to the contrary. He added that if there had been a language barrier that hampered effective communication with the Czuczors, he would have referred them to a notary who spoke their language, something he has done in the past with respect to other clients.

[95] The Deceased told the notary her name was "Mary Olga", which he later came to learn was incorrect. This error would have come about either because the Deceased was mistaken about her own name or because the notary did not understand her accent as well as he thought he did. The probabilities of the evidence favour the latter reason.

[96] The Deceased described herself as a homemaker and mentioned nothing of her involvement in the operation of the cherry orchard. Once the notary ascertained that this was the Czuczors' first marriage and that they had no children, and hence there were no potential claimants under the *Wills Variation Act*, he made no further inquiry about their respective next of kin or who might reasonably expect to benefit under their wills.

[97] The notary did not have a copy of any of the Czuczors' prior wills and did not ask about and was not told of their contents.

[98] The information about the Czuczors' assets recorded by the notary in his file is cryptic. Without always differentiating between their ownership, his notes indicate that the Czuczors had:

- joint accounts at two financial institutions: the Valley First Credit Union and Canada Trust;
- a safety deposit box and vehicle;
- no life insurance;
- Canada savings bonds in the amount of $40,000 and in the amount of $10,000;

- Old Age Pension $400, Canada Pension Plan and Old Age Pension (Superannuation) – “spouse – beneficiary”;
- RRSPs at Royal – “spouse”;
- Principal Residence – ten acres, registered in joint tenancy, market value $1.5 million;
- no additional interests in real property;
- no interests in a business partnership for a private company.

[99] At times the notary testified that he obtained the information concerning the Czuczors’ assets from both clients. At other times, he said he posed the questions pertaining to their assets to “them” and that his file notes reflected the answers that “they” gave to him. It was the notary’s “opinion” that both the Czuczors would have provided him the information he recorded about their assets or, failing that, he would have received “confirmation” of their assets from both of them. However, he has no specific recollection of the Deceased providing him with any particular asset information, or of her confirming that the asset information given by her husband was accurate. As well, his file does not specify the extent to which the Deceased may have provided him with any information about the assets. At this late stage, he could not know with any degree of confidence how much, if any, of the asset information he gathered during the joint interview was relayed or confirmed to him by the Deceased and how much by her husband.

[100] Additionally, the notary was not given a complete or accurate picture of the Czuczors’ assets. His understanding from “them” was that the Property comprised ten acres and consisted of one legal title which they held in joint tenancy. He was not aware that the Property was nearly two acres smaller than that and was comprised of three separate titles, two of which were held by his clients equally, as tenants in common. The value of the Canada savings bonds he was provided with was significantly less than the $300,000-$340,000 in bonds they owned. His notes do not indicate the amounts on deposit in the joint bank accounts or in the RRSPs, the name(s) in which the Canada savings bonds and RRSPs were held, or the contents (if any) of the safety deposit box. The notary testified that if the Deceased

had informed him that she had accounts in her name alone, he would have written that down. There were no notations to that effect. The separate line on his pre-printed checklist meant to record details of a client's term deposits was left blank (as will be seen, the Deceased owned substantial term deposits at the time). There can be little doubt that had he been provided with the foregoing asset particulars, he would have recorded them in his file.

[101] The crude flow chart composed by the notary during the course of the initial meeting indicates that the Czuczors' individual estates were to pass to the survivor of them and, on the death of the survivor, their joint estate would be distributed this way:

- five percent to Richard Lawton, in addition to his fee as executor;
- one-half of the residue to the Crippled Children Society; and
- one-half of the residue to the United Church.

[102] The notary testified that "they" chose each other as executor, and named Mr. Lawton as the alternate. It was his evidence that the selection of the surviving spouse seemed appropriate given that many of their assets were held jointly and that the survivor was to receive the entire estate. It would have struck him as odd if one of the Czuczors had suggested someone other than the spouse to be the first-named executor. That seems reasonable enough.

[103] The notary acknowledged that the gift to Mr. Lawton over and above his executor's remuneration was "unusual" and would have originated with the Czuczors, although he could not say which one. He says he advised them that when coupled with his executor's fee, Mr. Lawton would be receiving a sizeable gift. He did not ask the Czuczors about their reasoning behind making the gift to Mr. Lawton, or the substantial residuary gifts to the charities, and simply "assumed" that they had given it some thought.

[104] The notary ordinarily asks wills clients whether they wish to have a power of attorney. Upon reviewing his file notes, he confirmed that the Czuczors instructed him to prepare general enduring powers of attorney in favour of each other.

[105] Nothing the notary observed during his meeting with the Czuczors alerted him to the possibility that the Deceased's testamentary capacity might be compromised. At the bottom of his standardized form, under the heading "Comments 1. Testator/ Testatrix's Testamentary Capacity", he wrote: "Fine. Nice Couple. Interviewed for about (1/2 hour 45 min)".

[106] The notary had not been made aware of the Deceased's psychiatric symptoms or symptoms suggestive of cognitive deterioration or that she had recently come under the care of a psychiatrist on the referral of her family doctor. He clearly proceeded throughout on the footing that capacity was not in issue.

[107] The precise legal identity of the "Crippled Children Society" was not entirely clear after the initial meeting with the Czuczors, as there was no charitable entity that matched that name. A member of the notary's staff identified four charities that might approximate the Crippled Children Society: B.C. Coalition for People with Disabilities; Desert Rose Society; B.C. Paraplegic Association; and the British Columbia Lions Society for Children with Disabilities.

[108] In drawing the 2000 Will, the notary made the gift the Czuczors intended for the United Church to the Penticton United Church, and the gift intended for the non-existent Crippled Children Society to the British Columbia Society for Children with Disabilities. That latter society was not a charity that his staff had identified. My inference is that the notary had intended to insert the British Columbia Lions Society for Children with Disabilities identified by his staff, but due to inadvertence, the word "Lions" was omitted.

[109] There was no satisfactory evidence explaining why it was that the notary decided to insert the defendant society (albeit in error, intending to name the British

Columbia Lions Society for Children with Disabilities) or the defendant church into the 2000 Will.

[110] The notary arranged a second meeting with the Czuczors seven to ten days later. He had not communicated with them in the interim. They were shown into a private area of the office to review the documents on their own. About 10 or 15 minutes after that, they met with the notary. The notary testified that it was his practice to run through the contents of the wills with the clients and obtain their confirmation that the wills accurately captured their testamentary wishes. Confident that he would have adhered to his general practice in the case at hand, the notary testified that he would have obtained the Czuczors' confirmation of the dispositive provisions of their wills and their choice of executor. Specifically, he said he would have confirmed that "they" approved of the residuary gifts to the two charities as they were named in the wills he had drawn.

[111] The notary's notes do not record that the Deceased had any difficulty understanding his summation of the provisions of her 2000 Will or that he had any concerns about her comprehension. He testified that he believed that she understood and appreciated what she was signing. It must not be overlooked that he founded his belief on his assumption that he had followed his general practice, relying on the absence of a file note indicating otherwise, and without the benefit of any awareness of her active psychiatric and cognitive symptoms.

[112] There is no question that the Deceased executed her 2000 Will in accordance with the formalities of execution imposed by the *Wills Act*, R.S.B.C. 1996, c. 489.

After the 2000 Will

[113] The Deceased's first visit to Dr. Ghaed after signing the 2000 Will took place on January 8, 2001. During that appointment, she declared that she had won the lottery in Hungary or Transylvania for "half a million dollars." Dr. Ghaed testified that during the session she told him that she had problems with English and that her husband would read "every time to me the papers we get." Mr. Czuczor confirmed

to Dr. Ghaed that he did so, explaining that she had become suspicious of his translations.

[114] The Deceased had a further four treatments with Dr. Ghaed between January 22 and June 19, 2001. Dr. Ghaed's evidence is that she appeared to be experiencing confusion and delusions throughout that time frame. He recorded that she was not eating or sleeping well, exhibited a low mood and crying spells, and continued to steadfastly refuse to take psychiatric medication. During this period, she made statements to Dr. Ghaed along the following lines:

- repeated accusations that items were being stolen;
- reiterated her complaint that her husband would not sponsor the immigration of her "nieces";
- accused her husband of bringing her to Dr. Ghaed's office in order to put her in an "old folks' home", and that he "wants to make it that I am crazy";
- described the problem as being "our relatives" and accused her husband's relatives of taking their "stuff", "my clothes";
- claimed that two to three million Romanian-Hungarians were coming to Canada as refugees and asked for Dr. Ghaed's help in settling them here; and
- stated that "people" were stealing from them.

[115] Mr. Czuczor reported to Dr. Ghaed that within this period his wife had gone to City Hall claiming that she had no money with which to buy food. He also said that while sometimes she did not trust anybody, at other times she was "alright".

[116] In late February 2001, the Deceased finally relented and tried antipsychotic medication, but did not take it consistently. Dr. Ghaed's impression during his session with her on March 13, 2001 was that she was delusional, irrational and highly paranoid. At trial, he testified that his file notation that she was "completely scrambled up" and disorganized in her thought processes also accurately described her. Dr. Ghaed suggested to Mr. Czuczor that his wife ought to be committed to the

psychiatric unit of the local hospital. For reasons not explained at trial, her admission was not carried out at that time.

[117] In the meanwhile during that spring, the Deceased and her husband signed a fresh listing agreement with Mr. Lawton to sell the Property for $1.5 million. Mr. Lawton testified that at some stage he began to argue with the Czuczors about the listing price. He believed that they had set it too high, but said the Deceased was adamant it be listed at the upper end of the price range. Mr. Lawton became frustrated that the Deceased refused to obtain an appraisal, even when he offered to pay for it himself. He claimed that as part of these discussions, he reminded the Czuczors that he had spent time and effort trying to sell the Property in the past, all to no avail, and complained that if they continued to price it at the upper end, he would "lose more time and effort".

[118] According to Mr. Lawton, the Deceased told him not to worry and assured him that he would be "looked after". He took that to mean that he would receive some kind of compensation or in some way be involved in the transaction in the event the Property was sold. Neither of the Czuczors had ever disclosed to him the dispositive provisions of their respective wills. Mr. Czuczor had only mentioned to Mr. Lawton that he was named as a back-up executor. It was not until after Mr. Czuczor died and Mr. Lawton saw Mr. Czuczor's will that he realized the Czuczors had planned to give him 5% of their estates.

[119] Implicit in Mr. Lawton's testimony is the notion that the pledge that he would be "looked after" is connected to and explained by the gift to him under the 2000 Will. I have difficulty attaching credit to that ostensible link. Although Mr. Lawton said that the Czuczors listed the Property with him "off and on" over the span of approximately 12 years, the evidence shows that his listings were more "off" than they were "on" prior to the making of the 2000 Will. Indeed, there is no evidence of any listing agreement for close to seven years between January 1994 and October 17, 2000. He had clearly not exerted much time and effort in relation to the sale of the Property in the years leading up to the 2000 Will. I would add that the

Czuczors did not list the Property at the upper end of the price point for very long. It was first listed at $1.5 million in October 2000 and again in early April 2001; however, on May 23, 2001, the Czuczors agreed to reduce the asking price to $1.25 million and extended Mr. Lawton's listing agreement for twelve months.

[120] While it is true that Mr. Lawton had assisted the Czuczors in obtaining the release of the Property from the Land Reserve, that matter had resolved itself long before the Deceased made her 2000 Will and before she is said to have assured Mr. Lawton he would be "looked after".

[121] On June 19, 2001, at the urging of Dr. Dimma, Dr. Ghaed contacted Dr Cooper and together they arranged for the Deceased's involuntary committal to the psychiatric ward.

[122] Central to that process was Dr. Ghaed's completion the following day of a form required under the *Mental Health Act*. In it, he described the Deceased in these terms:

> She is highly delusional, with disorganized cognition, suspicious, secretive, has hidden things from her husband, including his car keys, and cannot be managed by him anymore. She has zero insight and grossly impaired judgment. She admits to auditory/visual hallucinations.

At trial, Dr. Ghaed confirmed that this was an accurate characterization of the Deceased at that date.

[123] On his wife's committal, Mr. Czuczor reported to Dr. Cooper that over the past two years, his wife had become increasingly forgetful, especially with respect to recent memory, and confirmed she had a long-standing history of delusional thinking. He also reported episodes of increased confusion, but explained she was still able to manage her activities of daily living.

[124] Dr. Cooper found it difficult to administer all 30 questions of the MMSE because of the Deceased's language difficulties. She scored 18 out 22. There was no evidence about the implications of that test outcome one way or the other.

[125] During her hospital stay on that occasion, the Deceased was given antipsychotic medication. She was discharged by Dr. Cooper on June 28, 2001, conditional on her taking her medication and attending follow-up appointments with an assigned mental health treatment team.

[126] Dr. Ghaed resumed treating the Deceased after her release from hospital. She continued to exhibit delusional thinking and impaired cognitive functioning. On August 28, 2002, she was re-admitted to the psychiatric ward with the assistance of the RCMP and was discharged on September 9. After her release, Kathy Miller, a community nurse, followed up with the Deceased in her home every two weeks until the end of the year.

Langley Property

[127] Within this same general time frame, most probably in the late summer of 2002, the Czuczors asked Richard Kent, a real estate agent, to look for a home for them to purchase in the Lower Mainland area.

[128] Mr. Kent did not have a complete recollection of his dealings with the Czuczors and was not able to recall the reason they had decided to relocate from Okanagan Falls. That matter was not developed in the evidence through other witnesses. He remembered that he dealt with both of them, although more often with Mr. Czuczor than with the Deceased. He observed the Deceased's thinking to be occasionally disorganized and recalled witnessing a few "flare-ups" between the couple.

[129] On September 10, 2002 (just a day or so after the Deceased's release from the psychiatric unit), the Czuczors signed a contract to purchase a residential property in Langley, British Columbia, for the sum of $315,000 (the "Langley Property"). Mr. Kent could not say whether or not the Deceased was able to read English. He testified that he verbally summarized the contents of the purchase agreement for her benefit and encountered no difficulties when communicating with her in English.

[130] One event that stood out in Mr. Kent's mind took place when the Czuczors were in the Lower Mainland around mid-October 2002 to sign the transaction papers. The Deceased had brought along the sum of $150,000 in cash, in her purse, only to discover that she had forgotten it at a Tim Horton's restaurant. The funds were evidently retrieved; however, Mr. Kent found the incident to be highly unusual.

[131] Within ten days or so of closing the purchase on the Langley Property, the Czuczors informed Mr. Kent that they wished to sell it. The reason they gave him was that the Deceased was unhappy with the sunken living room. Mr. Kent was troubled by their sudden change of heart because the Deceased had indicated to him that she "loved" the home and the garden. Attempting to dissuade the Czuczors from making a rash decision, he advised them that for a relatively modest cost they could raise the living room floor to match the floor level of rest of the house. He was not able to change their minds. Mr. Kent was so concerned by the Czuczors' sudden decision to sell that he composed a letter, which the Czuczors each signed, confirming that he had suggested to them that they not "sell their house at this time, that they take the time to think about this decision and to not make a hasty move".

[132] The Czuczors forged ahead and re-listed the Langley Property with Mr. Kent. Upon the expiration of that listing in early January 2003, they listed it with another agent.

[133] At his uncle's request, Peter and his wife raked leaves and performed yard maintenance at the Langley Property pending its sale. He testified that his aunt had told him she decided to sell the Langley Property because she did not care for where the fireplace was situated.

[134] The Langley Property was ultimately sold a few months into 2003 for about $10,000 more than the Czuczors paid for it. According to Mr. Kent, once the fees and commissions were taken into account, they had actually suffered a loss on the transaction.

Events from 2003 until the Deceased's death

[135] In the meantime, the Deceased continued to suffer on-going and worsening psychiatric and cognitive decline. Although she experienced stable intervals when she was on her psychiatric medication, her medication compliance was poor. She was again committed to the psychiatric ward in January 2003 and readmitted in October that year. Ms. Miller resumed providing community nursing support each time the Deceased was discharged.

[136] The Deceased began to refuse to attend appointments with Dr. Ghaed and last saw him in October 2003. Further committals to the psychiatric ward followed in the ensuing years.

[137] Mr. Czuczor died on October 10, 2005. At that time, the Deceased was a patient in the hospital psychiatric ward and remained there until she could be placed into a long-term care facility.

[138] Mr. Lawton, the substitute executor under Mr. Czuczor's will, obtained a grant of probate and administered Mr. Czuczor's estate.

[139] The Laszlo plaintiffs applied to be appointed the committees of the Deceased's person and estate. An order to that effect was granted on March 7, 2006. As part of the committeeship application, Dr. Cooper swore an affidavit on December 16, 2005 expressing his opinion that the Deceased was incapable of managing both herself and her affairs by reason of mental infirmity arising from severe dementia of the Alzheimer's type. The Deceased's family doctor, Dr. Lawrie (who had taken over Dr. Dimma's practice upon his retirement), swore the other supporting medical affidavit.

[140] The Deceased passed away on April 12, 2008 at the age of 84.

Estate assets at the time of the 2000 Will

[141] The evidence necessary to reliably ascertain, in even general terms, the Deceased's financial assets at the time she made her 2000 Will was sorely lacking.

The determination of that core fact was made more difficult by the significant gaps in the banking records and by the absence of an accurate picture of her investment assets at and as a result of her husband's death, and the date of the committeeship order for the purposes of cross reference. The Deceased's income tax returns and accompanying T5 slips that would have shed light on her invested funds were not in evidence. Instead, single page income tax return information summaries for the years 1999 through 2004 were admitted. They show the Deceased received investment income of $13,754 in 1999, $11,076 in 2000, and a similar range in 2001 and 2002, but do not report the sources of that income or the applicable rates of return.

[142] Despite these shortcomings, the available financial evidence assessed in the context of the whole of trial evidence supports the findings set out below (all figures are rounded to the nearest dollar).

(i) Valley First Credit Union

[143] The Czuczors had a joint account at this credit union from as early as 1992. By January 1993, the Deceased had opened a savings account in her own name. As at July 2002, she held a term deposit in the amount of $65,720. That term deposit was intact well into 2005 and, therefore, was not redeemed in order to purchase the Langley Property.

[144] The evidence is capable of supporting several competing inferences as to the approximate date that the Deceased might have established her term deposit. I am not persuaded that it was in existence at the time she made her 2000 Will.

[145] The amount, if any, on deposit in their joint account at that time is unclear.

(ii) Scotiabank

[146] When the 2000 Will was made, the Czuczors jointly owned a Scotiabank guaranteed investment certificate in the amount of $14,000 due to mature in May 2001.

(iii) TD Canada Trust

[147] The parties held a joint account at this institution when the Deceased made her 2000 Will. I am satisfied that this is the account the notary referred to as "Can. Trust" in his checklist. The account balance at the material time cannot be reliably discerned from the evidence.

[148] The Deceased held two term deposits and two or three other active accounts in her name alone at TD Canada Trust. The aggregate balance of her funds on deposit was $150,526 as at December 8, 1999 and $127,486 as at May 27, 2002. The evidence reasonably supports the inference that when the Deceased made her 2000 Will, the value of her invested funds at that institution fell somewhere between those two sums.

[149] Mr. Czuczor held his own term deposit at this institution at December 8, 1999 in the amount of $42,916. I think it more likely than not that he continued to own that investment at the time his wife made her 2000 Will.

[150] The evidence amply supports the finding that the monies the Czuczors used to acquire the Langley Property were derived from two principal sources. One of them was the large term deposits the Deceased held with TD Canada Trust. I find that the proceeds of redemption of those term deposits represented all or nearly all of the $150,000 in cash that she had in her purse when she mislaid it at the Tim Horton's in October 2002. The other source came from redeeming a portion of the re-issued Canada savings bonds that the couple owned jointly.

[151] It is notable that the Deceased's 2003 investment income was significantly less than in the preceding four years. I conclude that was the case because she had collapsed her TD Canada Trust term deposits and had redeemed considerable Canada savings bonds near the end of 2002 in order to facilitate the purchase of the Langley Property. Her 2004 investment income attained previous levels after the Langley Property was sold and the proceeds were reinvested.

(iv) Royal Bank

[152] There is no evidence of either party owning an RRSP at this or any other bank when the 2000 Will was made contrary to what the notary indicated on his checklist. However, Mr. Czuczor did own a RRIF with a value of $45,708 (represented by a guaranteed investment certificate), of which the Deceased was the designated beneficiary.

[153] As at November 1998, the Deceased had at least two guaranteed investment certificates registered solely in her name at this bank, with a total face value of not less than $60,000. While there was evidence of a falling out of sorts between the Royal Bank and the Deceased, at the date she made her 2000 Will, the records show that her husband still held his RRIF with that bank. Moreover, there is no evidence that the Deceased collapsed her term deposits and transferred the proceeds to another bank or otherwise spent or invested them elsewhere before she made her 2000 Will. The probabilities of the situation support the conclusion that she continued to hold the guaranteed investment certificates at the material time.

(v) Bank of Montreal

[154] The Deceased had a chequing account in her name with an undetermined balance and a guaranteed investment certificate in the amount of $52,145, which was locked in from August 1999 until February 2001. I conclude that she owned that certificate when she made her 2000 Will.

[155] As at October 17, 2003, the Czuczors were joint owners of a Bank of Montreal guaranteed investment certificate worth approximately $310,212. The probabilities of the evidence are persuasive that they did not hold this investment certificate when the Deceased made her 2000 Will. I find that the funds represented by this certificate consisted of the proceeds received by the Czuczors in early to mid-2003 in respect of the sale of the Langley Property. That is not to say, however, that the Czuczors did not hold those funds in other forms of investment assets at the time in question – they clearly did.

Summary of Financial Assets

[156] Based on the foregoing, I conclude that the financial assets owned by the Czuczors at the time of the making of the 2000 Will were approximately as set out below.

(i) In the Deceased's name alone:

- $60,000 term deposit – Valley First Credit Union;
- $150,000 term deposits and other funds – TD Canada Trust;
- bank accounts at TD Canada Trust and Bank of Montreal – balances unknown;
- $60,000 term deposits – Royal Bank; and
- $52,145 guaranteed investment certificate – Bank of Montreal.

  Approximate total: $322,145

(ii) Jointly:

- $14,000 guaranteed investment certificate – Scotiabank;
- account at Scotiabank – funds on deposit unknown; and
- $300,000 – $340,000 in Canada savings bonds.

  Approximate range in value: $314,000 to $354,000

(iii) In Mr. Czuczor's name alone:

- $42,916 term deposit – TD Canada Trust; and
- $45,708 term deposit within his RRIF, under which the Deceased was designated as the beneficiary – Royal Bank.

  Approximate total: $88,624

[157] I recognize that, given the poor state of the evidence, there may be a degree of overlap between the Deceased's holdings in various institutions at various points in time, carrying the potential of some double counting of her assets. Discounting for that contingency, I conclude that when she made her 2000 Will, the Deceased owned assets solely in her name with an aggregate value in the range of between $260,000 and $320,000, and joint assets with her husband of not less than

$300,000. None of her substantial personal investments and only a significantly understated amount of the Czuczors' joint assets were made known to the notary.

Medical Experts called by the plaintiffs

(i) Dr. John Dimma

[158] In his opinion dated June 11, 2008, Dr. Dimma wrote that more than a year before the 2000 Will, Mr. Czuczor reported encountering increasing problems in managing his wife.

[159] The Deceased seemed a little more co-operative to Dr. Dimma in 2001 after she had started taking the antipsychotic medications prescribed by Dr. Ghaed. He observed that when she went off her medication, she was not overly rational and continued to suffer paranoia, poor functioning and confrontations.

[160] Dr. Dimma goes on to opine:

> Certainly [the Deceased] had a problem with delusional thoughts and behaviour. At times she was very angry, hostile, uncooperative, forgetful, confused and paranoid. At other times she could be quite rational, particularly when taking medication for this condition. She signed her will on Dec the 15th 2000, and that will is quite similar to the will that her husband signed on the same date.
>
> I cannot state in what frame of mind she was in at the time of the signing but perhaps the Notary who witnessed this might comment upon that.
>
> As far as her mental ability at the time of the signing, she may have been quite cooperative and may have understood things or she may have had a bad moment. I am not in a position to say how she was.

[161] In declining to venture an opinion on the Deceased's competency at the time of the 2000 Will, Dr. Dimma suggested that Dr. Ghaed, who had the most to do with the Deceased's care and "understanding of her mental condition" during the relevant period, may be able to comment further.

(ii) Dr. L.J. Sheldon

[162] The plaintiffs also tendered the expert opinion dated October 19, 2008 of Dr. Sheldon, a geriatric psychiatrist. The defendants did not require Dr. Sheldon to present himself for cross-examination.

[163] Dr. Sheldon provided his opinion regarding the Deceased's mental state and its potential impact on her mental capacity at the time she made her 2000 Will. He had never met or examined her. His opinion was based entirely on his extensive review of certain records, including: hospital records from 1979 through to 2005; Dr. Ghaed's psychiatric assessment of the Deceased typed on December 15, 2000 and his subsequent consultation reports to Dr. Dimma; the materials filed in support of the committeeship application; and the 1986 Will and the 2000 Will.

[164] Dr. Sheldon provided instructive commentary in relation to some of Dr. Ghaed's findings and other facts. He considered Dr. Ghaed's opinion that the Deceased suffered from a form of delusional disorder to be a particularly ominous factor, explaining that the onset of such a disorder often heralds an unrecognized and, therefore, untreated somatic illness, impacting brain function or degeneration of the brain itself.

[165] In Dr. Sheldon's opinion, the short-term memory impairment suggested by the Deceased having forgotten where she had hidden the savings bonds prior to the 2000 Will was indicative of a frontal lobe brain dysfunction or executive function deficits. In his view, the fact that both she and her husband described her as increasingly forgetful around that time, in combination with other collateral factors such as the concerns brought forward to Dr. Dimma by TD Canada Trust and Dr. Dimma's reported suspicion of cognitive deterioration for some time, strengthened the likelihood that the Deceased was suffering an executive deficit. He noted that compromised executive function is common in early Alzheimer's disease and explained that such individuals often have impaired interfaces with the environment. As illustrative of the point, Dr. Sheldon elaborated that such individuals may believe that television characters are real people leading real lives.

[166] Turning to the act of making a will, Dr. Sheldon wrote:

> Executive function serves to maintain organization of their ideas and memories before their awareness, to maintain their awareness of making a Will, and provides analysis of contingencies in their decision making. Language function serves to convey their ideas to others. Persons suffering

> deficits in these functions may have less ability to formulate and understand a Will when compared to their abilities in a previous state of health.

[167] Based on his assessment of the extensive record before him and drawing on his clinical experience and knowledge, Dr. Sheldon opined that the Deceased was:

> ... on the balance of probabilities, experiencing the early stages of Alzheimer's disease and psychosis on 2000 December 15. Thus both diminished mental function and unnatural mental processes were probably present at that time.
>
> The presence of the early stages of Alzheimer's disease, causing diminished function of [the Deceased's] mind and introducing unnatural mental processes into [the Deceased's] mind, would, on a balance of probabilities, be a potential factor in giving rise to a disruption of testamentary capacity.

[168] Of interest is Dr. Sheldon's uncontradicted statement that an MMSE score as high as 29 out of 30 achieved by the Deceased on testing by Dr. Ghaed would not rule out frontal lobe dysfunction or executive function deficits. That is because the MMSE is not sensitive to those factors in the early stages of dementia. Dr. Sheldon's observation was consistent with Dr. Ghaed's explanation at trial that the MMSE is used as a yardstick – a "rough estimate" – to determine whether an individual has dementia. Also of importance is his opinion to the effect that the delusions experienced by the Deceased could be part of the symptomology of her Alzheimer's disease or other degenerative disease of the brain.

(iii) Dr. Michael Cooper

[169] Dr. Cooper shares Dr. Sheldon's opinion that the Deceased was suffering the early stages of Alzheimer's disease when she made her 2000 Will. He noted the possibility that individuals in the early stage of that disease may be able to exhibit testamentary capacity.

[170] Dr. Cooper expected there would be little decline of mental functioning from when Dr. Ghaed administered the MMSE on October 11, 2000 (the correct date was October 18), and the date of the 2000 Will. Relying mainly on the assumption that the information concerning Dr. Ghaed's MMSE testing was accurate, Dr. Cooper opined that it would be unlikely that the progression of dementia in the intervening

period – that is, between the date of such testing and the date of the 2000 Will – would have substantially affected the Deceased's capacity to make a will. It is not known what Dr. Cooper understood to be the constituent elements of testamentary capacity for the purposes of his opinion.

[171] It is apparent that Dr. Cooper's opinion is heavily weighted on the premise that the Deceased's MMSE score in October 2000 would support the likelihood of testamentary capacity despite the early onset of Alzheimer's disease. I accept Dr. Sheldon's opinion that the MMSE is a rather blunt tool in its efficacy to detect frontal lobe dysfunction or deficits in executive functioning, which are common to Alzheimer's disease. I have virtually no other evidence of the reliability of that test or the relative importance it might play in the legal determination of testamentary capacity. More to the point, this is not a case that can properly rise or fall on an MMSE score elicited on a single occasion.

[172] Of perhaps greater significance to Dr. Cooper was the Deceased's psychiatric disorder, which he described as a "fluctuating course with periods of increased paranoia associated with irrational thinking and impaired judgment". Despite his observations, Dr. Cooper considered that he could not provide any opinion with regard to the Deceased's mental state as it existed on December 15, 2000 because he did not examine her around the time she executed her 2000 Will, .

Medical Expert called by the defendants

Dr. Ali Ghaed

[173] Unlike Drs. Cooper and Sheldon, Dr. Ghaed's opinion is that the Deceased did not suffer from any obvious dementia at the time of her 2000 Will. Dr. Ghaed's view is that, despite her delusional state, she had the capacity to form "real and true intention". In his words: "[s]he suffered from islands of delusions (false beliefs) surrounded by a sea of rational thinking."

[174] Although not entirely clear on the face of his report or clarified at trial, the facts and underlying assumptions that appear to have informed Dr. Ghaed's

conclusion with respect to the Deceased's capacity to form "real and true" intent include:

- in October 2000, her MMSE score was in the normal range;
- his stated presumption that the Deceased had made her 2000 Will "with seriousness and was aware of its consequences"; and
- his finding that the Deceased did not have significant brain disease or depression at the time.

[175] In reaching his conclusion, Dr. Ghaed also made a general reference to his December 15 psychiatric assessment and periodic progress reports to Dr. Dimma. He did not identify the aspects of those reports to which he fastened his opinions except to refer to the bottom of page 2 of his December 15 assessment. I do not know whether he meant to refer solely to the last sentence of page 2, which mentioned the Deceased's MMSE score, or whether the reference was intended to encompass other information recorded near the bottom portion of that page.

[176] Dr. Ghaed continued his analysis:

> With regards to "a disposing mind and memory" there are three conditions to be met:
>
> (I) That she knew what she had. In her background history, she gives a clear picture of what she had, although I did not ask her to specify her possessions. I knew they had a house on 10 acres of orchard and a variety of savings in banks and retirement accounts.
>
> (II) That she knew whom she gives to – or whom she considered in her Will. From my report, this question did not arise, but my inference is that she had a divided loyalty between her blood relatives in her December 1986 Will – and a spiritual loyalty to her faith in the Will of December 2000. [redacted].
>
> (III) [redacted]
>
> She [redacted] rational [redacted] not withstanding her delusional state.
>
> There was a three way race in her own mind between emotional thinking, spiritual thinking and rational thinking.
>
> There was an older truth and a new truth in her wills – namely her emotional and rational thinking coalesced in her Will of December 1986 – but the spiritual and rational thinking prevailed in her last Will, dated 15 December 2000.

> In her last Will, she was trying to look after her soul in a rational way. She chose the spiritual and rational thinking as her new truth – over her emotional and rational thinking, which was the old truth.

[177] About two and a half years before Dr. Ghaed authored his report, he responded to questions posed by plaintiff's counsel about the Deceased's testamentary capacity. In that earlier correspondence, he wrote:

> That she knew whom she gives to or considers in her will: From my report, this question did not arise, but my inference is that she would have given to her blood-line relatives, who lived in Transylvania at the time.

[178] Dr. Ghaed denied the suggestion put to him in cross-examination that he had changed his opinion on that fundamental issue over time. Despite his insistence that his answers had remained the same in their substance, they were plainly at odds.

[179] In cross-examination, Dr. Ghaed conceded that he had not actually determined what the Deceased owned from his interviews of her because he had not canvassed that matter with her, and she did not disclose such information. He explained that on one occasion he had visited the Czuczors at the Property and, working on his own assumption that it was worth "half a million dollars", concluded as a matter of "guess work" that they were quite wealthy.

[180] Nor had Dr. Ghaed ever spoken to the Deceased about her 1986 Will, the existence or contents of her 2000 Will or her testamentary plans in a general way. His inference that she experienced a divided loyalty between her "blood" relatives in the 1986 Will and her spiritual loyalty was premised in significant part on his misconception that the Deceased's faith was Protestant. I find that in all likelihood Dr. Ghaed's misunderstanding stemmed from the Deceased's own confused remarks to him about her faith during their initial sessions. As already stated, the evidence establishes that the Deceased was of the Catholic faith, although she was not a practicing Catholic in the sense of attending church. The evidence is uncontradicted that neither she nor her husband had any loyalty to the Protestant faith or any affiliation whatsoever with the United Church generally or the Penticton

United Church in particular. The inference drawn by Dr. Ghaed on this vital point is based on a flawed factual underpinning and cannot be given any weight.

[181] It is perhaps noteworthy that in the context of this analysis Dr. Ghaed does not directly address the matter of the Deceased's testamentary gift to the defendant society. While I suppose it is possible that he had in mind that the Deceased's gift to it was also reflective of her "spiritual thinking" in the broad sense, he did not say so in his report or his testimony.

[182] The foregoing failings combined to fully undermine the validity of Dr. Ghaed's opinion. Moreover, I do not accept that the Deceased was free from dementia at the relevant time and prefer the contrary views expressed by Drs. Cooper and Sheldon. That being said, I make an important exception to my rejection of Dr. Ghaed's opinion evidence. I do accept his testimony at trial concerning certain of his clinical observations and accompanying opinions about the Deceased's mental fitness and functioning in the years 2000 and 2001.

[183] During that timeframe he considered the Deceased to be delusional, paranoid, "completely scrambled up", becoming quite forgetful, having difficulty concentrating when upset, irrational, disorganized in her thought processes, having "zero" insight, demonstrating impaired judgment and warranting involuntary admission to a psychiatric ward. He also regarded her as disdainful of reality in 2000 and 2001, by which he meant that she "had very little regard for reality, abhorred reality and had difficulty knowing what reality was". He did not limit his comments in this regard to the manner in which she perceived her husband. In his expert report, Dr. Ghaed confirmed that he had observed no difference in the Deceased's mental state between her appointments in December 2000 and on January 8, 2001. At trial, he went even further – and this is key. He agreed that there had been no remarkable decline in the Deceased's presentation between the time that he first saw her in October 2000 and continuing into and throughout the year 2001. Specifically, Dr. Ghaed agreed that the Deceased's psychiatric and cognitive symptoms essentially remained the same in that time frame. I consider

that piece of evidence of critical importance in determining the core issue in this case. Leaving aside that his observation does not nicely harmonize with his opinions about the Deceased's capacity when she made her 2000 Will (which I have rejected), it was consistent with, and strengthened by, the testimony of the Laszlo plaintiffs. They credibly maintained there had been no sudden onset of impairment or deterioration on the part of their aunt between 2000 and 2001, and that she had not markedly worsened between the time she made the 2000 Will and the following year.

[184] Based on the evidence of the Laszlo plaintiffs and the features of Dr. Ghaed's testimony that I accept as noted above, I find that the Deceased's seriously compromised mental state in 2001 was consistent with and reflective of her state in the year 2000, including when she made her 2000 Will.

LEGAL FRAMEWORK

The Law of Testamentary Capacity

[185] In order to make a valid will, a testator must have a baseline level of mental acuity sufficient to appreciate judicially delineated components of the nature and effect of the testamentary act, referred to as testamentary capacity.

[186] The law of testamentary capacity is heavily rooted in jurisprudence dating back to the middle of the 19th century. In *Harwood v. Baker* (1840), 13 E.R. 117 at 120, a case decided in 1840, Lord Erskine provided one of the earliest articulations of the concept which is of continuing influence today:

> But their Lordships are of opinion, that in order to constitute a sound disposing mind, a Testator must not only be able to understand that he is by his Will giving the whole of his property to one object of his regard; but that he must also have capacity to comprehend the extent of his property, and the nature of the claims of others, whom, by his Will, he is excluding from all participation in that property; and that the protection of the law is in no cases more needed, than it is in those where the mind has been too much enfeebled to comprehend more objects than one, and most especially when that one object may be so forced upon the attention of the invalid, as to shut out all others that might require consideration; and, therefore, the question which their Lordships propose to decide in this case, is not whether Mr. Baker knew when he was giving all his property to his wife, and excluding all his

> other relations from any share in it, but whether he was at that time capable of recollecting who those relations were, of understanding their respective claims upon his regard and bounty, and of deliberately forming an intelligent purpose of excluding them from any share of his property.

[187] Another 19th century authority, *Banks v. Goodfellow* (1870), L.R. 5 Q.B. 549 [*Banks*], has proved even more enduring. Recognized as the leading authority on the subject of testamentary capacity – a proposition supported by its ubiquity in the case law – the decision contains the classic statement by Chief Justice Cockburn, at 565, setting out the essential requirements for establishing the validity of a will:

> It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.

[188] One hundred years after *Banks*, Laskin J.A. (dissenting on other grounds) provided a modern restatement of the test in *Re Schwartz* (1970), 10 D.L.R. (3d) 15 at 32 (Ont. C.A.):

> The testator must be sufficiently clear in his understanding and memory to know, on his own, and in a general way (1) the nature and extent of his property, (2) the persons who are the natural objects of his bounty and (3) the testamentary provisions he is making; and he must, moreover, be capable of (4) appreciating these factors in relation to each other, and (5) forming an orderly desire as to the disposition of his property ...

[189] Timing is key. In general, the first relevant time that testators must have testamentary capacity is when they give will instructions; the second is when the will is executed. In recognition of the fact that faltering mental capacity is prone to fluctuate, the authorities permit variation of the degree of capacity required at these pivotal times. For example, the will of a testator who is competent to give instructions, but has lost capacity when the will is executed, may be valid so long as, at the time of execution, the testator was capable of comprehending that she was

executing a will drawn in accordance with her previous instructions: *Parker v. Felgate* (1883), 8 P.D. 171; *Brownhill Estate* (1986), 72 N.S.R. (2d) 181 (Co. Ct).

[190] The diminishment of mental capacity, particularly in the elderly, will frequently emerge and worsen over time. In light of that, evidence of symptoms exhibited by a testatrix both before and after the making of the will may support an inference relevant to the determination of the presence or absence of testamentary capacity at the material time: see generally, *Smith v. Tebbett* (1867), L.R. 1 P. & D. 354 at 398; *Kri v. Patterson*, [1989] O.J. No. 1817 (Surr. Ct.); *Fawson Estate (Re)*, 2012 NSSC 55; *Moore v. Drummond*, 2012 BCSC 170 at para. 47 [*Moore*]; *Coleman v. Coleman*, 2008 NSSC 396 [*Coleman*].

[191] To lack testamentary capacity does not mean that the testator must be in a perpetual state of substandard competence. Seemingly rational persons may be without it, while seemingly compromised persons may possess it. A testatrix's cognitive and psychological state is amorphous and seldom static. It may change and fluctuate slightly or wildly, such that at times she is not of sound mind, while at other times she is perfectly lucid. Accordingly, a will made by a compromised testatrix executed during a lucid interval may still be valid.

[192] Implicit and explicit in the jurisprudence is an acknowledgement of the complexity and subtleties of diminished cognitive functioning and the way in which we perceive, present to and interact with the world around us. For example, although it is recognized that dementia can impair a testator's mental powers such that he is not capable of making a will, a diagnosis of dementia, standing alone, does not automatically correspond to testamentary incapacity: *Royal Trust Corp. of Canada v. Ritchie*, 2007 SKCA 64 at para. 13; *Otto v. Kapacila Estate*, 2010 SKCA 85 at para. 36 [*Otto*]; *Moore* at para. 36. Similarly, a person who is judicially declared incapable of managing his or her affairs pursuant to adult guardianship legislation or suffers a chronic psychotic illness such as schizophrenia may still have the capacity to make a valid will: *Otto* at para. 36; *Royal Trust Co. v. Rampone*,

[1974] B.C.J. No. 612 (S.C.); *Moore* at para. 36; *Hoffman v. Heinrichs*, 2012 MBQB 133.

[193] The standard of mental capacity required to make a valid will does not exclude eccentric, frivolous, capricious, absurd or unfair wills: *Skinner v. Farquharson* (1901-1902), 32 S.C.R. 58 at 59 [*Skinner*]; *Beal v. Henri* (1950), [1951] 1 D.L.R. 260 at 265 (Ont. C.A.).

[194] It is well-settled that a testator's ability to provide rational responses to questions or follow a learned pattern or habit is not conclusive of capacity. The reasons of Mr. Justice Rand writing for the majority of the Supreme Court of Canada in the important decision of *Leger et al v. Poirier*, [1944] S.C.R. 152 at 161, remain instructive of the point:

> But there is no doubt whatever that we may have testamentary incapacity accompanied by a deceptive ability to answer questions of ordinary and usual matters: that is, the mind may be incapable of carrying apprehension beyond a limited range of familiar and suggested topics. 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 dispositions, and the like...

[195] His Lordship, at 161-62, surveyed a number of authorities in support of that proposition:

> *Marsh v. Tyrrell and Harding*:
>
> It is a great but not an uncommon error to suppose that because a person can understand a question put to him, and can give a rational answer to such question, he is of perfect, sound mind, and is capable of making a will for any purpose whatever; whereas the rule of law, and it is the rule of common sense, is far otherwise: the competency of the mind must be judged of by the nature of the act to be done, and from a consideration of all the circumstances of the case.
>
> Quoting from the *Marquess of Winchester's Case,* Sir John Nicholl adds:
>
> By the law it is not sufficient that the testator be of memory, when he makes his will, to answer familiar and usual questions, but he ought to have a disposing memory so as to be able to make a disposition of his estate with understanding and reason.

[196] Following his review, his Lordship concluded, at 162:

> Merely to be able to make rational responses is not enough, nor to repeat, a tutored formula of simple terms. There must be a power to hold the essential field of the mind in some degree of appreciation as a whole, and this I am satisfied was not present here.

[197] The issue of whether a testator has the requisite capacity to make a will is a question of fact to be determined in all of the circumstances: *Knox v. Trudeau* 2001, 38 E.T.R. (2d) 67 (Ont. Sup. Ct. J.). The assessment is a highly individualized and fact-specific inquiry. As most cases are unique on their facts, appellate courts will not overturn a finding as to capacity unless the trial judge has made a palpable and overriding error: *James v. Field*, 2001 BCCA 267 at para. 71 [*James*].

[198] Testamentary capacity is not a medical concept or diagnosis; it is a legal construct. Accordingly, scientific or medical evidence – while important and relevant – is neither essential nor conclusive in determining its presence or absence. Indeed, the evidence of lay witnesses often figures prominently in the analysis. Where both categories of evidence are adduced, it is open to the court to accord greater weight to the lay evidence than to the medical evidence, or reject the medical evidence altogether: *Baker Estate v. Myhre* (1995), 28 Alta. L.R. (3d) 428 at para. 39 (Q.B.)*; O'Neil v. Brown Estate*, [1946] S.C.R. 622 [*O'Neil*]; *Spence v. Price* (1945), [1946] 2 D.L.R. 592 at 595-96 (Ont. C.A.); *James* at para. 77; *Miliwat v. Gagné*, 2009 BCSC 1447, aff'd 2010 BCCA 323 [*Miliwat*].

[199] Courts may therefore reach a conclusion regarding capacity that conflicts with a medical diagnosis or the outcome of an MMSE or other medical test. In *Lowery v. Falconer*, 2008 BCSC 516, the family doctor examined the testatrix shortly before she signed the will and concluded that she was competent. Several months later, the doctor performed an MMSE and confirmed that she was capable of managing her own financial and legal affairs. Despite these medical findings, the court concluded that the testatrix lacked capacity and set aside the will. In *Shkuratoff v. Shkuratoff*, 2007 BCSC 1061 at para. 49, the court expressed apprehension about reliance on the score results of the MMSE in the absence of a robust explanation of the role that it plays in making the legal determination of testamentary capacity.

The Doctrine of Suspicious Circumstances

[200] In *Vout v. Hay*, [1995] 2 S.C.R. 876 [*Vout*], the Supreme Court of Canada laid to rest the thread of confusion that had emerged in earlier decisions concerning the burden of proof and the interrelationship between the doctrine of suspicious circumstances and the issues of testamentary capacity, knowledge and approval, undue influence and fraud.

[201] *Vout* affirmed that the legal burden of proving due execution of the will and both testamentary capacity and that the testator knew and approved of the contents of the will is with the party propounding the impugned will. Put succinctly, the party seeking to uphold the will must prove that it was duly executed and is the product of a free and capable testator.

[202] In discharging its burden of proof, the propounder is aided by a rebuttable presumption. It is presumed that the testator possessed the requisite knowledge and approval and testamentary capacity where the will was duly executed in accordance with the statutory formalities after having been read by or to the testator, who appeared to understand it. *Vout* clarified that this presumption may be rebutted by evidence of well-grounded suspicions, known as “suspicious circumstances”, relating to one or more of the following circumstances: (1) surrounding the preparation of the will; (2) tending to call into question the capacity of the testator; or (3) tending to show that the free will of the testator was overborne by acts of coercion or fraud (para. 25).

[203] The presumption places an evidentiary burden on the party challenging the will to adduce or point to “some evidence which, if accepted, would tend to negative knowledge and approval or testamentary capacity”: *Vout* at para. 27.

[204] Where suspicious circumstances arise, the presumption is said to have been spent, meaning it does not apply and has no further role to play, and the propounder reassumes the legal burden of establishing both approval and capacity. Proving testamentary capacity as well as knowledge and approval of the will provisions,

necessarily entails dispelling the suspicious circumstances that have been raised: see generally, *Ostrander v. Black* (1996), 12 E.T.R. (2d) 219 at 235 (Gen. Div.).

[205] The usual civil standard of proof, namely proof on a balance of probabilities, applies. That said, as a practical matter the extent of the proof required will be proportionate to the gravity of the suspicion, which will vary with the circumstances peculiar to each case: *Vout* at para. 24.

[206] A "general miasma of suspicion that something unsavoury may have occurred" will not be enough: *Clark v. Nash* (1989), 61 D.L.R. (4th), 409 at 425 (B.C.C.A.). In *Maddess v. Racz*, 2009 BCCA 39 at para. 31, the B.C. Court of Appeal reminded that merely "some evidence" was not sufficient and emphasized the stipulation in *Vout* that in order to elevate general suspicion to the threshold of suspicious circumstances, the evidence, if accepted, must tend to negative knowledge and approval or testamentary capacity.

[207] Suspicious circumstances have been found to exist in a wide array of situations and are not necessarily sinister in nature. There is no checklist of circumstantial factors that will invariably fit the classification. Commonly occurring themes include where a beneficiary is instrumental in the preparation of the will (especially where the beneficiary stands in a fiduciary position to the testator), or where the will favours "someone who has not previously been the object of [the testator's] bounty and does not fall within the class of persons testators usually remember in their wills, that is to say their next of kin": *Longmuir v. Holland*, 2000 BCCA 53, at para. 69 [*Longmuir*]; *Heron Estate v. Lennox*, 2000 BCSC 1553 at para. 67 [*Heron Estate*]. In *Moore*, N. Smith J. found the fact that the testatrix's doctor had described her as no longer capable of managing her affairs and as suffering dementia around the time she made her will constituted a suspicious circumstance sufficient to rebut the presumption.

Relevance of Delusions

[208] A delusion is more than just getting the facts wrong. It is a persistent belief in a supposed state of facts that no rational person would hold to be true, and thus

exist as real only in the mind of the believer: *Skinner* at 76; *Banton v. Banton* (1998), 164 D.L.R. (4th) 176 (Ont. Ct. J.). It does not follow that a testator who suffers from delusions lacks testamentary capacity. Delusions that fall short of what is considered to be general insanity, as that term is traditionally known in the jurisprudence, and bear no relation to the testator's property or the individuals who might be expected to benefit, will not serve to invalidate the will.

[209] *Banks* remains the judicial touchstone on the relationship between delusions and testamentary capacity. It is therefore instructive to take a closer look at the case.

[210] John Banks had been confined to an insane asylum and later released. After his discharge, he continued to suffer from delusions that he was molested by evil spirits and a long dead acquaintance pursued him from the grave. There was medical evidence that he was insane and incapable of managing his affairs, as well as evidence that he was able to successfully manage his financial funds and interests. Mr. Banks arranged for his will to be made under his own volition and named his niece as the beneficiary.

[211] In the era in which *Banks* was decided, the governing authorities held that any delusion suffered by a testator was sufficient to invalidate a will on the basis that the mind is "one and indivisible": *Waring v. Waring* (1848), 6 Moo. T.C. 341. The result was that any delusion or mental defect, no matter how limited its nature or its effect on the overall soundness of the testator's mind, was considered to undermine testamentary capacity as a whole. In *Banks*, Cockburn C.J. rejected the application of such a strict rule and approached the analysis from the standpoint of preserving testamentary autonomy. According to the Chief Justice, at 560, the "faculties and functions of the mind are various and distinct" and capable of operating independently of each other in instances where one is impaired:

> The pathology of mental disease and the experience of insanity in its various forms teach us that while, on the one hand, all the faculties, moral and intellectual, may be involved in one common ruin, as in the case of the raving maniac, in other instances one or more only of these faculties or functions

> may be disordered, while the rest are left unimpaired and undisturbed;-that while the mind may be overpowered by delusions which utterly demoralize it and unfit it for the perception of the true nature of surrounding things, or for the discharge of the common obligations of life, there often are, on the other hand, delusions, which, though the offspring of mental disease and so far constituting insanity, yet leave the individual in all other respects rational, and capable of transacting the ordinary affairs and fulfilling the duties and obligations incidental to the various relations of life.

[212] His Lordship reasoned, at 566, that because of the mind's ability to function rationally in relation to matters unaffected by delusion, there was no basis for denying testamentary capacity where delusions exist but play no role in influencing the testator's decisions in making the will:

> If it be conceded, as we think it must be, that the only legitimate or rational ground for denying testamentary capacity to persons of unsound mind is the inability to take into account and give due effect to the considerations which ought to be present to the mind of a testator in making his will, and to influence his decision as to the disposal of his property, it follows that a degree or form of unsoundness which neither disturbs the exercise of the faculties necessary for such an act, nor is capable of influencing the result, ought not to take away the power of making a will, or place a person so circumscribed in a less advantageous position than others with regard to this right.

[213] In upholding the jury's verdict that the will was valid, the court concluded that the testator's irrational fear of spirits and a long-dead acquaintance were unconnected to the dispositions he made under his will and could not have influenced his decision-making. In the words of the Chief Justice, at 571:

> [T]he existence of a delusion, compatible with the retention of the general powers and faculties of the mind, will not be sufficient to overthrow the will, unless it were such as was calculated to influence the testator in making it.

[214] Cockburn C.J. also ascribed importance to the perceived surface rationality of the will, which was made in favour of Mr. Banks's niece who had lived with him and was an object of his affection.

[215] *Banks* contains no explicit statement that in order to support a finding of invalidity, delusions must relate to the subject matter of the will in every case. Cockburn C.J. said only that delusions must be "calculated to influence the testator"

and commented on the significance of the lack of connection between the delusions and the will in the case before him. He even discussed a hypothetical scenario, at 561, in which delusions that bore no obvious connection to a family member excluded under the will could nonetheless support an inference of influence on the testator:

> If, as occurs in a common form of monomania, a man is under a delusion that he is the object of persecution or attack, and makes a will in which he excludes a child for whom he ought to have provided; though he may not have adverted to that child as one of his supposed enemies, it would be but reasonable to infer that the insane condition had influenced him in the disposal of his property. [Emphasis added.]

[216] Despite the above passage, *Banks* has generally not been applied in such a manner. The jurisprudence has come to view a connection between delusions and the dispositive provisions of the will as a prerequisite for a finding of influence sufficient to vitiate testamentary capacity.

[217] The leading case on the interplay between delusions and testamentary capacity in Canada is the decision of the Supreme Court of Canada in *O'Neil*. In 1919, the husband of the testatrix predeceased her. His will provided her with $2,000 and an annuity of $150 per month, with a general power of appointment by will over the residue of his estate. He also requested that she make a will disposing of the entire interest in his estate to his sister for life and after his sister's death to his grand nieces.

[218] In 1920, the testatrix executed a will giving substantial effect to her husband's wishes. However, she later became dissatisfied with the amount of support provided to her under her husband's will, believing that she should have received the entire estate. In 1927, she revoked the first will and executed a second will leaving her husband's estate to her own niece and nephew. No question concerning her capacity was raised at the time. In 1929, she revoked her second will and executed a third will, again complying with her husband's wishes by leaving his estate to his grand nieces. The validity of the third will was challenged due to lack of testamentary capacity.

[219] The testatrix admitted herself to a sanitarium in the year preceding the execution of the third will. From the time she was admitted, she experienced delusions that were "transient" and "not directed toward any particular person or persons" (*O'Neil* at 634). She believed that she could taste poison in her food and smell gas forced into her room for the purpose of harming her and claimed to hear voices speaking to her from the grave. When she spoke with her lawyer regarding the third will, she did not mention either the poison or the gas. However, she did mention that she heard voices and that she was in "great torment" (*O'Neil* at 635). She explained that her husband's request was weighing on her conscience and, although she took issue with his will in the past, she now accepted it as proper.

[220] The *O'Neil* Court acknowledged the possibility that a person could conduct herself if a very rational manner and make a rational will, and yet still be motivated and governed by insane delusions. For that reason, the court is to look "below the surface" and determine if in fact the will is the result of a free and capable testator (*O'Neil* at 631).

[221] The parties challenging the will in *O'Neil* argued that a testatrix suffering from delusions should be found to lack testamentary capacity if the delusions were merely *capable* of affecting the will provisions. Their position did not carry the day. In addition to affirming the analysis laid down in *Banks*, the Court ruled that the mere presence of delusions will not invalidate a will unless they constitute "an actual and impelling influence" on it (*O'Neil* at 630). The will was ultimately upheld on the basis that the delusions of the testatrix were unconnected to her motives for making the will.

[222] Turning to the case at hand, for many years the Deceased had harboured suspicions about her husband's infidelity and worried that he would abandon her. Mr. Czuczor made statements to others denying any adulterous escapades. There was no independent reliable evidence about the matter one way or the other, except that Peter recalled hearing "rumours" after his uncle died, to the effect that he indeed had a girlfriend.

[223] It is not known whether the Deceased's suspicions about her husband's extramarital indiscretions amounted to delusions, or were simply declarations about something she knew to be true. On the other hand, the other accusations she expressed about her husband, such as that he stole her money and forced her to throw a child down a well, were probably delusional in nature. The delusional beliefs that the Deceased held about her husband clearly bore no influence in relation to her 2000 Will as he was named as the sole beneficiary of her estate.

[224] The evidence establishes that the Deceased suffered from delusions quite apart from those directed toward her husband. As well, she came to believe that she could communicate telepathically with objects and others merely by touching them. Her visual perception was likewise disturbed and she was prone to both visual and auditory hallucinations, believing that characters on television were communicating to her. The irrational beliefs held by the Deceased were relatively pervasive and expansive in their scope at the time and after she made her 2000 Will.

[225] The thrust of the defendants' position is that once there is evidence showing that a testatrix experienced delusions around the time of making a will, those delusions are only relevant to the issue of testamentary capacity if they are shown to have actually influenced the dispositive provisions of her will. I do not share that narrow view.

[226] It is true there is no cogent evidence that the Deceased's myriad of delusions directly influenced or otherwise affected the dispositive provisions of her 2000 Will. However, delusions may be symptomatic of an impairing degenerative disease of the mind, such as Alzheimer's disease, and their presence may speak to the depth of the mental impairment experienced by a testator in consequence of that affliction: see generally, *Fuller v. Fuller Estate*, 2002 BCSC 157, aff'd 2004 BCCA 218.

[227] I accept the opinions of Drs. Cooper and Sheldon that when the Deceased made her 2000 Will, she was probably in the early stages of Alzheimer's disease, a type of dementia which is a progressive degenerative disease of the brain. Based on Dr. Sheldon's opinion, I consider it likely that some or perhaps many of her

symptoms of psychosis at that time, by which I mean her auditory and visual hallucinations and the delusions she experienced to a greater or lesser extent, were part of her overall presentation of that disease. It follows that the existence of delusions, while not themselves sufficient to defeat testamentary capacity, ought not to be excluded from consideration under the rubric of suspicious circumstances or the ultimate assessment of whether a testator possessed testamentary capacity at the material time. Non-vitiating delusions may reflect the ravages upon the testator's mental functioning at large exacted by dementia or other brain disease, which cannot reasonably be ignored in the overall assessment of testamentary capacity.

[228] The relevance of the presence of delusions in relation to these issues has been alluded to by this Court in past cases. To illustrate, in *Peters Estate v. Ewert*, 2002 BCSC 1540, the court considered a delusion that did not affect the terms of the will in conjunction with other evidence of the testatrix's deteriorating mental health as a suspicious circumstance. In *Brydon v. Malamas*, 2008 BCSC 749, the testatrix was found to lack capacity in part due to delusions concerning a particular beneficiary – a result largely in line with the case law. However, Halfyard J. went on to suggest, *in obiter*, at para. 222, that had that delusion not existed, various other psychotic delusions coupled with an illness suffered by the testatrix could have been sufficient to vitiate capacity despite being unrelated to the subject matter of the will.

[229] In my view, consideration of non-vitiating delusions in this broader sense where the evidence suggests that all or some of the testator's delusions accompany a progressive degenerative brain disease like Alzheimer's does not run afoul of the rule in *Banks* or its lineage.

ANALYSIS

1. Have the plaintiffs established the presence of suspicious circumstances?

[230] To clarify at the outset, while I have referred to certain of the Deceased's involuntary hospital committals and conduct after the year 2001, I have not considered them in assessing the issue of suspicious circumstances or relied upon

them as a basis from which to draw inferences about her testamentary capacity. The relevance of those events touched on other issues, such as the determination of the Deceased's assets at the time she made her 2000 Will, and otherwise formed part of the general narrative.

[231] In my view, the evidence in the case at hand raises gravely suspicious circumstances which, if accepted, would tend to negative the Deceased's testamentary capacity. They can be summarized as follows:

(i) Departure from earlier wills

[232] In making her 2000 Will, the Deceased radically departed from her pattern of testamentary giving reflected in her 1967 Will and her 1986 Will, which benefitted her husband's family unit exclusively. There was no evidence of the reasoning underlying her radical shift in testamentary intention.

(ii) Irrational bequests

[233] The 2000 Will is not rational on its face as it pertains to the two largest residuary gifts. The Deceased had no past affiliation with the defendant society nor had she expressed any interest in or made any donations in support of the charitable work it undertakes. In addition, she had no connection whatsoever to the defendant church or to the Protestant religion. She was baptized a Catholic and held to that faith her entire life.

(iii) Special relationship with the Laszlo plaintiffs

[234] The community nurse, Ms. Miller, recalled that in 2004 or early 2005, Mr. Czuczor was critical of the "nephews" for not visiting or keeping in touch. He also mentioned to her that his "brother", which may have been a reference to his brother-in-law, John Laszlo, had not repaid monies that he had loaned him, and said he was upset because he felt that the "niece" was supportive of that. Ms Miller testified the Deceased had conveyed a similar sentiment about the "niece". At the time the Deceased is said to have expressed such a complaint her mental functioning was severely compromised. If Judy was the "niece" referred to by the

Deceased, there is no evidence that she held that view when she made her 2000 Will and, if she did, it has not been established that it played any role in the revocation of her 1986 Will and the making and content of her 2000 Will. This evidence is of no moment.

[235] There is no cogent evidence that the Deceased had a falling out with any of the plaintiffs, in particular the Laszlo plaintiffs, or had grown weary, distrustful or disapproving of them, or that the special relationship she enjoyed with the Laszlo plaintiffs had waned with the passing of the years. The preponderance of the evidence establishes that the Deceased enjoyed a lasting and close familial relationship with her godchildren, although that had not ever been the case with respect to the rest of the plaintiffs.

(iv) Inconsistent with statements made by the Deceased

[236] The 2000 Will is at odds with the assurances that the Deceased, and to a lesser degree her husband, repeatedly made to the Laszlo plaintiffs over the course of many years about who she envisioned would benefit from the Property that she regarded as a "family legacy". It is also inconsistent with the general remarks made to Peter by his aunt and uncle about the contents of their wills.

(v) Mental decline and dysfunction

[237] I have found that at the time the Deceased gave will instructions to the notary and when she executed her 2000 Will, she was suffering from a constellation of on-going symptoms, including delusions, paranoia, auditory and visual hallucinations, confusion, compromised short-term memory, disorganized thought, zero insight, and impaired judgment. Her symptoms were suggestive of not insignificant mental compromise many or perhaps the majority of which were attributable to Alzheimer's disease.

[238] In the event that I am incorrect in taking into account the non-vitiating delusions as part of the Deceased's overall mental condition for these purposes, I am satisfied, as was the court in *Moore*, that the fact that she was in the early stages

of Alzheimer's disease and displaying non-psychotic symptoms of cognitive deficit at the material time is itself enough to constitute a suspicious circumstance sufficient to displace the presumption of capacity. When that circumstance is added to the balance of the circumstances I have identified as suspicious (still leaving the presence of the Deceased's delusions to the side), a serious question arises about whether the Deceased's capacity at the material time fell below the threshold set by the authorities, and the presumption of testamentary capacity is readily spent.

[239] Based on the foregoing, the defendants, being the propounders of the 2000 Will, have lost the benefit of the presumption of capacity and reassume their legal burden to prove that the Deceased had testamentary capacity when she made her 2000 Will.

(2) Have the defendants established the Deceased had testamentary capacity?

[240] Strictly speaking, the defendants must prove in addition to testamentary capacity that the Deceased knew and approved of the contents of her 2000 Will. The fact that the notary inserted the Penticton United Church and a non-existent charity as residual beneficiaries, and the Deceased was not capable of comprehending written English such that she could not have independently read her 2000 Will, certainly trigger a concern about whether she knew and approved of its contents. However, this is not a knowledge and approval case. Because I have concluded that the Deceased did not possess testamentary capacity, the issue of whether she knew and approved of the provisions of her 2000 Will has no significance. It is axiomatic that a testatrix who lacks testamentary capacity is without capacity to know and approve the contents of her will: *Maliwat* at para. 134.

[241] Despite the frequency with which courts invoke *Banks* as the seminal decision on testamentary capacity, most references to it in the case law are rather perfunctory. Much of the judicial analysis is somewhat removed from the general formulae originally laid down in *Banks*, with the result there have been surprisingly few attempts to expound on the constituent elements of the test in a comprehensive

manner. Two of those elements – the capacity of the testatrix to appreciate the nature and extent of her property and to properly consider the persons with a claim on her bounty – are particularly relevant in the case at hand.

[242] Because many issues of testamentary capacity involve elderly testators with failing memory and cognitive functioning, the *Banks* criteria pertaining to the ability to understand the nature and the extent of the property being disposed of is a common area of uncertainty.

[243] In *Russell v. Fraser* (1980), 118 D.L.R. (3d) 733, the B.C. Court of Appeal considered the extent of understanding of the estate residue required of a testatrix in the context of evaluating whether she knew and approved of the contents of her will. There, the testatrix gave will instructions to the manager of her credit union, who was instrumental in its preparation, directing that legacies totalling $76,000 be left to several beneficiaries. Upon realizing that substantial assets remained in her estate, the manager asked how she wished to dispose of the residue. The testatrix declined the manager's suggestions to enlarge the gifts to certain family members or provide the legatees with proportions of the estate rather than fixed sums. The manager then suggested, "partly facetiously", that the residue be left to him. After some discussion, the testatrix agreed. There was no evidence that she was aware of the value of the residue, which was approximately $130,000.

[244] The court held that it was not enough that the testatrix was aware of the balance in her bank accounts; she must also be aware of the approximate value or magnitude of the residue of her estate at the time she executed her will. This principle has been extended to apply to all property - not just property falling into the residue - dealt with under a will: *Johnson v. Pelkey* (1997), 36 B.C.L.R. (3d) 40 at para. 114 (S.C.). It has also been relied upon as a correct exposition of the *Banks* requirement that the testator understand the extent of the property being disposed of by the will in considering the larger issue of testamentary capacity: *Woodward v. Grant*, 2007 BCSC 1192 at para. 119.

[245] In *Moore*, the testatrix knew that her property consisted of her house and two bank accounts, but was unable to accurately recall the current balances of those accounts. She told her solicitor that one of them had $25,000, when in fact one held about $3,500 and the other about $45,000. Her less than exact understanding of the value of her accounts was considered adequate.

[246] In *Coleman,* the testatrix told a doctor shortly after signing her will that she purchased her house 60 years earlier for $2,900 and would be willing to sell it for $10,000. The assessed value of the house at the time was $180,000. In concluding that the testatrix lacked capacity, Warner J. held, at para. 80, that her statement to the doctor "was directly relevant to an understanding of whether the testator had a basic understanding of the extent of her assets, one of the three *Banks* factors."

[247] Although appreciation of the approximate value of one's estate is important, a testator is not required to know its exact makeup. In *Palahnuk v. Palahnuk Estate*, [2006] O.J. No. 5304 at para. 82 (Sup. Ct. J.), the testatrix was able to recall what real property she owned and could describe it. She also knew that she owned investments being managed by the Public Guardian. Although she did not know the specific investments in her portfolio and the amount of revenue they generated, the testatrix was aware that her total estate had a value of $1.2 million and appreciated that was "a lot of money". The court held that her degree of knowledge was sufficient, remarking, at para. 82:

> No more is required under the law. Testators are not required to be accountants nor to have an accountant's knowledge and understanding of their estate. If such a meticulously demanding standard were required ... many testators would be unable to meet it.

[248] In *Kaye et al. v. Chapman et al.*, 2000 BCSC 1195, the real properties and investment funds of a wealthy testator were managed by professional third parties. The testator told the lawyer drafting his will that his financial worth was about $3 million which the lawyer recorded in his file as "+/- $2.5". In rejecting the argument that the testator did not appreciate the magnitude of his estate, the court found, at para. 68, it was sufficient that he understood he was a "millionaire and a

wealthy man" and that he was conferring on the residual beneficiary a "substantial fortune": see also *Pike v. Stone* (1999), 179 Nfld & P.E.I.R. 218, where the testator's understanding that the estate had "substantial value" was sufficient.

[249] The principles to be taken from the authorities are that testators are not expected to know the exact composition of their estate assets and their value with the metronomic precision of an accountant. An appreciation of the general nature of the estate assets and an understanding of their extent, meaning their approximate value or the approximate value of the estate at large, expressed either in terms of dollars or quantitatively (eg. "a lot of money" or "a substantial fortune"), will suffice.

[250] The test in *Banks* also requires that the testator comprehend on his own and in a general way the persons who would ordinarily have a claim on or are the natural objects of his estate. In evaluating this branch of *Banks*, the approach usually taken by the case law has been to assume that family members and individuals with a close personal relationship to the testatrix are entitled to her consideration. In *Banks* itself, the court upheld the will in part because it was made in favour of the testator's niece who lived with him and was "the object of his affection and regard" (at 571).

[251] The B.C. Court of Appeal, writing in regard to the doctrine of suspicious circumstances, commented in *Longmuir* at para. 69 that next of kin usually fall within the class of persons whom testators remember in their wills. In *Heron Estate* at para. 67, the court held that the testatrix's neighbours of less than three years – to whom she had given a power of attorney and named as beneficiaries under her will only days before her death – did not come within the class of persons expected to benefit.

[252] In *Coleman*, the will was struck down partly because the testatrix was unable to comprehend the moral claims of family members. Shortly before her death, she had signed a fresh will removing her son as a beneficiary under a prior will. The son supported the testatrix financially in her final years, providing monthly payments for care services amounting to approximately $250,000. Warner J. held, at para. 114, that the significant contributions of the son and his family constituted "a strong moral,

if not legal, claim". Warner J. also relied heavily upon a home video of the testatrix's 99th birthday party. In addition to showing her to be deaf and disoriented generally, the video made evident that she did not know the identity of one of her 14 grandchildren who handed her two boxes of chocolate, which she insisted on calling either jars of jam or bottles of pickles.

[253] Where a family member or other person who appears to be a natural object of a testator's estate is not included in the will, the courts tend to be interested in the testator's reasoning behind the exclusion. In *Moore*, the 98-year-old testatrix executed a new will disinheriting her son in favour of a married couple who had been her neighbours for about 40 years. In concluding that she had the requisite capacity, N. Smith J. noted as significant that the testatrix had expressed reasons for her decision that were consistent with a negative attitude toward her son voiced by her on many previous occasions.

[254] In the present case, the notary took a rather superficial inventory of the Czuczors' assets and did not probe either one of them further about the matter. There is no evidence that the Deceased asked any sensible questions or demonstrated an active or positive comprehension of this or any other essential matter during the meetings with the notary. The 2000 Will does not contain specific bequests or trust provisions of specified assets or categories of assets that could potentially support the inference of an adequate level of appreciation.

[255] The probabilities of the situation indicate that Mr. Czuczor was likely the one who informed the notary about the parties' joint financial assets as recorded on the checklist. Even then only a partial picture was disclosed. On the notary's own evidence the absence of a notation in his file recording the significant financial assets belonging to the Deceased at the time of her 2000 Will means that he was not told of them by either of the Czuczors, and I find that was the case. Nor did they inform him of the substantially larger value of their jointly held Canada savings bonds. I do not know why Mr. Czuczor did not provide the notary with more fulsome

financial information; however, for the purposes of the issues before me, I do not need to know.

[256] I conclude that the Deceased did not tell the notary about her significant independent financial assets or provide accurate information about the joint assets because she did not have a sufficient understanding of the nature and extent of her property in even a general way at that time. I am not satisfied that she understood and appreciated the composition of her estate beyond, at most, the Property, much less the magnitude of the balance of it subject to disposal by her 2000 Will. Frankly, in light of her statement to Dr. Dimma in September 2000 to the effect that she believed her husband had sold the house and land, I am doubtful that when she met with the notary she adequately appreciated, on her own, that she was a co-owner of the Property.

[257] The Czuczors were frugal people and private about their finances. Judy and Peter gave evidence at their respective discoveries by which they essentially agreed to the general proposition that their aunt had an understanding of her estate or an appreciation that she had a sizeable estate. Gene's discovery evidence was that "they", meaning his aunt and uncle, thought that the Property was worth $1.2 million. Their evidence was not clearly linked to the time frame within which the Deceased made her 2000 Will, and even on the interpretation most generous to the defendants, their evidence does not support an inference that the Deceased appreciated the nature and extent of her estate when she made her 2000 Will sufficient to satisfy that component of *Banks*. Possession of that requisite level of understanding is not remotely captured in the notary's notes and is not compatible with the other evidence I accept. Testamentary capacity is vitiated on this ground alone.

[258] Although unnecessary given my conclusion, I am likewise not satisfied that the Deceased had any appreciation of the persons who were the natural objects of her estate within the meaning of the *Banks* criteria in the event that her husband

predeceased her. Certainly the notary did not pursue the issue or offer persuasive evidence indicating she held that appreciation.

[259] There is fairly extensive evidence that the Deceased had a muddled understanding of her "relatives" in the period leading up to, and I find at the time of, the 2000 Will. She either had no consanguine next of kin or none with whom she was in contact. There is no evidence of any persons, whether they be close friends or other relatives of her husband, having ever occupied the special place in the Deceased's life at the time that she made the 2000 Will enjoyed by the Laszlo plaintiffs. What is abundantly clear is that neither of the residuary charities can reasonably be said to have fallen within that class.

[260] Considering the evidence as a whole, the Laszlo plaintiffs qualified as the only persons who might ordinarily be expected to benefit in any substantial way under the 2000 Will. Their status in that regard does not mean that the Deceased had any obligation to provide for them. The focus of the test is simply to ask whether, in the will-making process, she was capable of turning her mind to them and comprehending of her own initiative and volition their natural claims upon her estate and of appreciating that factor in relation to the other criteria. I am not satisfied that the Deceased possessed this requisite appreciation at the relevant time.

[261] I conclude that the defendants have failed to prove that the Deceased had testamentary capacity when she gave instructions for the preparation of her 2000 Will or when she executed it. In the result, the 2000 Will is invalid.

COSTS

[262] If the parties are unable to agree on costs, they are at liberty to file written submissions. Counsel may agree as to the timing of the exchange of their written briefs incorporating a final filing deadline with the Court of May 31, 2013.

"Ballance J."
Ballance J.