IN THE COURT OF PROBATE FOR NOVA SCOTIA
Citation: Patterson Estate (Re), 2017 NSSC 221

Date: 20170829
Docket: Probate No. 63343
Registry: Halifax

IN THE ESTATE OF JOAN MARIE PATTERSON, DECEASED
Request for Proof in Solemn Form of Will of Joan Marie Patterson
dated May 13, 2016

And

SUPREME COURT OF NOVA SCOTIA
Docket: Hfx. No. 459967
Registry: Halifax

Between:

Reid Patterson, Randall Patterson and Darlene Marriott

Applicants

v.

Marlene Patterson

Respondent

Decision

Judge:	The Honourable Justice Robert W. Wright
Heard:	May 1, 2, 3, 4, 8, 2017 in Halifax, Nova Scotia
Final Written Submissions:	June 27, 2017
Written Decision:	August 29, 2017
Counsel:	William M. Leahey for the Applicants Peter Rumscheidt for the Respondent

Wright, J.

INTRODUCTION

[1] This case is comprised of two related proceedings involving the estate of the late Joan Patterson who died on June 13, 2016 at age 76. She was predeceased by her husband Watson Patterson who died four months earlier on February 16, 2016.

[2] Exactly one month prior to her death, Joan Patterson executed a new Will in which she named her daughter Marlene Patterson as sole executor and sole beneficiary of her estate. She thereby disinherited her three other children Reid, Randy and Darlene Patterson who had been included as beneficiaries (if she survived her husband) under her previous Will signed in 1998. At the time of her death, the total value of Ms. Patterson's estate was approximately $400,000.

[3] Also, on June 1, 2016 Joan Patterson closed her bank account which she held jointly with her son Randy and transferred the balance to a new bank account which she opened under the names of her daughter Marlene Patterson and herself jointly. That joint account, which carried the right of survivorship, stood in the amount of $31,723 at the time of her death.

[4] With the assistance of a lawyer she retained to act as proctor of the estate, George M. Clarke, Marlene Patterson made application for a grant of probate of her mother's Will under date of July 5, 2016. A grant of probate was thereupon issued on August 9, 2016, the Will having been proved in common form.

[5] A week later, on August 16, 2016, the applicants Reid Patterson, Randy Patterson and Darlene Patterson filed an Application for Proof in Solemn Form challenging the validity of their mother's Will executed on May 13th. That was followed, on January 31, 2017, by their filing a Notice of Application in Chambers seeking an order declaring that the funds held in the joint bank account above referenced are held in a constructive trust by Marlene Patterson for the benefit of the estate. By agreement, both these proceedings were tried together before this Court.

[6] We therefore have the rueful situation in which the three applicant siblings are pitted against their other sibling over their mother's estate. For convenience, I will refer to each of them by their first name in this decision rather than repeating their common family name throughout.

OVERVIEW OF FACTS

[7] Counsel were able to compile a partial Agreed Statement of Facts outlining the family history and a lot of background information. That statement of facts, entered as an exhibit, is reproduced here as follows:

1. Watson Oscar Patterson and Joan Marie Patterson, of East Lawrencetown, in the Halifax Regional Municipality, Province of Nova Scotia, had four children during their lengthy marriage.

2. Joan Marie Patterson was born May 10th, 1940 and passed away at the Dartmouth General Hospital on June 13 th, 2016.

3. Watson Oscar Patterson was born on July 25th, 1935 and passed away on the 16th day of February, 2016 at the home owned by he and Joan located at 2106 Crowell Road in the Halifax Regional Municipality.

4. Watson and Joan were married in Halifax in May, 1959 and remained living together amicably as husband and wife until Watson's death.

5. Watson and Joan had four children, namely:

   (a) Randy Patterson born July 5th, 1969;

   (b) Darlene Marriott born October 22, 1966;

   (c) Marlene Patterson born August 16th, 1960;

   (d) Reid Patterson born August 7th, 1959.

6. In 1991 or 1992 Marlene Patterson became estranged from her parents. In 2012 Marlene Patterson contacted her parents to initiate reconciliation. She continued to visit her parents thereafter on a weekly (or biweekly) basis. When Watson was diagnosed with cancer in the spring of 2015, she increased her visits and overnight stays with her parents through to the date of Watson's death. Following Watson's death, Joan Patterson moved from her home on Crowell Road to the home of Marlene Patterson located at 21 Old Lawrencetown Road where she continued to reside (apart from trips to the hospital) until her death.

7. Randy Patterson, Reid Patterson and Darlene Marriott maintained their relationship with their parents throughout the lives of Watson and Joan until their respective deaths in 2016.

8. On September 9th, 1998 Watson and Joan executed new joint Wills. Each of the Wills, which were identical with respect to dispositions made, stated that if one spouse predeceased the other, the surviving spouse would receive the entirety of the deceased spouse's estate. If both spouses were deceased, each Will provided that Darlene Marriott would receive title to the matrimonial home then located at 2106 Crowell Road, Porter's Lake, while the remainder of the estate of the Testator would be divided equally among the four children of their marriage per stirpes. Each Will appointed Randy Patterson as the alternate Executor in place of the deceased spouse.

9. These Wills remained unchanged until 2014. The originals of the Wills were kept by Watson and Joan while the law firm which had prepared the Wills, Boyne Clarke, retained unsigned copies of these documents.

10. On February 4th , 2014 Cyril Randall of Boyne Clarke prepared and witnessed Codicils to the joint Wills of Watson and Joan. The Codicils made identical changes to the Last Will and Testament of each of Joan and Watson. The Codicils specified that in the event of the death of both Watson and Joan the Trustee was to convey real

property located on the west side of Crowell Road, approximately 6.45 acres in size and identified as PID 41249574, to Randy Patterson for his own use absolutely. Direction was given in the Codicil for the Trustee to make the conveyance if Randy survived each of his parents.

11. Each of the Codicils provided that in all other respects the 1998 Will was confirmed.

12. Also on February 2014 Watson and Joan signed identical Powers of Attorneys under which each spouse granted to the other full power of attorney. In each case, the Power of Attorney provided that if the spouse so appointed could not or would not act or lacked the capacity to act or predeceased the appointing spouse, Randy Patterson was designated the true and lawful attorney in place of the spouse in question.

13. In addition, also on February 4th, 2014 Watson and Joan each executed a Personal Directive appointing the other spouse as delegate empowered to give consent or directions regarding any personal care decision required to be made if the signing spouse was unable to make such decisions for himself/herself. The Personal Directives also appointed Randy Patterson as the alternate delegate if for any reason the appointed spouse could not or would not act. The originals of the Codicil to the Wills, the Power of Attorney and Personal Directive were retained by Watson and Joan while unsigned copies were retained by the law firm of Boyne Clarke.

14. On February 24th, 2015 Mr. Cyril Randall of Boyne Clarke prepared and had Watson and Joan execute a Deed conveying the above mentioned 6.45 acre property bearing PID 41249574 to Randy Patterson and his wife Laura Lee Patterson as joint tenants and not as tenants in common. A deed transfer tax affidavit was sworn by Randy Patterson stating that the transaction was exempt from deed transfer tax as it was a gift from parents to child.

15. In May, 2013 Watson and Joan added Randy's name to their personal bank account held with the Bank of Montreal, Cole Harbour branch. Randy was authorized to make withdrawals using his own signature only. Randy never utilized his authority under this appointment. The bank account number in question was 2747 8010 283.

16. On or about June 1 st, 2016 the account in question was closed at the request of Joan who was then residing with Marlene. Karen Duggan, an employee of the Cole Harbour Branch of the Bank of Montreal, attended at the home of Marlene Patterson at 21 Old Lawrencetown Road. While Marlene remained in the room Joan executed for Ms. Duggan documents closing the original joint account which listed Randy, Joan and Watson as the joint owners and bore account number 2747 8010 283. In addition, at the same time and place a new joint account for Joan and Marlene was opened under account number 27473971-157. This account was set up on a joint basis

with the right of survivorship. Both Joan and Marlene signed the required documents to set up the new account.

17. At Joan's request the necessary steps were taken to transfer the balance of funds in the old account into the new account. The balance transferred was $31,856.65.

18. On or about the 4th day of March, 2016 Joan Patterson moved from her home at 2106 Crowell Road to the home of Marlene Patterson located at 21 Old Lawrencetown Road.

19. On the 13th day of May, 2016 Joan Patterson executed a new Last Will and Testament as well as a new Power of Attorney and Personal Directive. The new Last Will and Testament appointed Marlene Patterson as Executor and left the entirety of the Estate of Joan Patterson to Marlene. The new Personal Directive and Power of Attorney also appointed Marlene Patterson as the primary person to exercise the powers granted under both the Power of Attorney and the Personal Directive.

20. On the 13 th day of June, 2016 Joan Patterson passed away while a patient of the Dartmouth General Hospital.

21. On the 18th day of August, 2016 Marlene Patterson removed $25,000.00 from the joint account held at the Bank of Montreal, Cole Harbour Branch, and used these funds to pay off the mortgage on her home. The balance of funds in the account, $7,382.73, remains there to this day.

22. At the time of her death Joan Patterson had, among the personal possessions that she took with her to the home of Marlene Patterson, cash in the form of Canadian currency currently in an amount the parties have not agreed upon.

23. On July 7th, 2016 Marlene Patterson deposited to an account in her name at the Bank of Montreal bearing account number 2747 7043 550 the sum of $7900.00 from her mother's funds which Marlene Patterson states were located in a garment bag.

24. On July 20th, 2016 Marlene Patterson removed $9,500.00 from the cash and deposited it to her own account at the Bank of Montreal bearing account number 2747 7043 550. Pursuant to an Interim Order of this Court, that cash, as well as the $7900.00, was later deposited by Marlene Patterson to the trust account of Boyne Clarke where it remains to this day.

25. At some point in August, 2016, Marlene Patterson provided an additional $3,300.00 from the cash in the possession of her mother to the law firm of Boyne Clarke in the

form of a cheque payable to the Registrar of Probate to be used to pay probate fees with respect to the opening of the Estate of the late Joan Patterson.

26. On Friday, October 14th, 2016 Marlene Patterson brought into the office of her counsel, Peter Rumscheidt, a garment bag containing $44,440.00 in 10's, 20's, 50's and 100 dollar bills. At Mr. Rumscheidt' s suggestion, these funds were taken directly to Boyne Clarke and deposited in trust with that firm. Marlene Patterson advised both Mr. Rumscheidt and Mr. Clarke that the funds in question represented the balance of cash which was in the possession of her mother at the time of her death.

27. The following children of Watson and Joan received the following conveyances from their parents:

(a) Warranty Deed dated August 28th, 1985 to Reid S. Patterson and his then spouse Maxine Patterson conveying lands described in Schedule "A" to this agreed statement of facts.

(b) Warranty Deed dated April 1 1 1987 to Marlene Melody Patterson conveying lands described in Schedule "B".

(c) Warranty Deed dated September 29th, 1997 to Randall Scott Patterson and his then wife Natasha Joanne Patterson conveying lands described in Schedule "C".

(d) Warranty Deed dated February 24th, 2015 conveying to Randall Scott Patterson and his then wife Laura Lee Patterson lands described in Schedule "D".

[8] At the outset of trial, counsel confirmed additional agreements they had reached which can be summarized as follows:

(a) The value of the lot of land conveyed to Reid in 1985 was then $25,000;

(b) The value of the lot of land conveyed to Marlene in 1987 was then $10,000;

(c) The value of the lot of land conveyed to Randy in 2015 was then $45,800;

(d) A family meeting referred to in the affidavit of Cyril Randall (which will be revisited later) in which Joan was said to have acknowledged that she

already had a meeting with all her children to discuss her plans to leave everything to Marlene, did not happen;

(e) The requisite formalities for proper execution of a Will were complied with; and

(f) Certain medical records of Joan Patterson would be admitted in evidence by consent.

[9] The foregoing overview of facts can be supplemented by the following chronology of events which are undisputed:

Fall of 2015 – a sharp decline in Watson's health (who had been diagnosed with cancer) and a noticeable decline in Joan's health who was suffering from pulmonary disease.

December 14-23, 2015 – Joan was hospitalized from progression of her pulmonary disease during which she expressed her intention to change her Will (specifically to exclude Randy as a beneficiary).

December 23, 2015 – Joan was discharged from hospital but required a hospital bed at home and a homecare plan by caregivers.

January 11, 2016 – a contentious family meeting was held between the four siblings and their parents during which Joan stated her intention to remove both Randy and Reid from her Will.

January 12, 2016 – Watson said to Reid and later to Darlene that no changes would be made to their Wills.

February 16, 2016 – Watson passed away.

February 23, 2016 – Watson's funeral was held following which various options were are discussed within the family for Joan's living arrangements.

March 4, 2016 – Joan moved into Marlene's house after choosing that option.

March 9-16, 2016 - Joan was hospitalized again for chronic pulmonary fibrosis complicated by pneumonia (followed by three visits to the emergency department in April).

April 20, 2016 – Joan met with the family lawyer, Cyril Randall, to give instructions for a new Will, naming Marlene as sole executor and sole beneficiary of her estate.

May 13, 2016 – Joan executed a new Will, Power of Attorney and Personal Directive prepared by, and in the presence of, George Clarke (and his assistant) to whom Mr. Randall had referred the file.

May 26, 2016 – A home visit was made by Dr. Paige Moorhouse who found that Joan had no baseline cognitive issues but had reached the severe stage of idiopathic pulmonary fibrosis such that she was approaching the end of life.

June 1, 2016 – Joan met with a representative from the Bank of Montreal to open a new bank account jointly with Marlene as earlier recited.

June 13, 2016 – Joan passed away after being readmitted to hospital two days earlier.

[10] Most of the contentious facts in this case pertain to the period between March 4th (when Joan moved to Marlene's house) and May 13th (when she executed her new Will). These will be addressed later in this decision when the issues to be decided are dealt with and the requisite findings of fact are made.

POSITIONS OF THE PARTIES

[11] The theory of the applicants' case is that after being estranged from her family for some 20 years, Marlene inveigled her way back into her parents' lives in or around 2012, motivated by resentment and revenge, with the objective of

gaining their favour and ultimately, becoming the beneficiary of their estate. They have primarily built their case on the grounds of undue influence, particularly during the period after March 4, 2016 when Joan moved into Marlene's house and hence was under her control. The main thrust of their position is that through the means of isolation of their mother and false statements made to her by Marlene, that Joan came to form the belief that her children had abandoned her and no longer cared or took any interest in her well being to the point where she became vulnerable to making a new Will leaving everything to Marlene (who was by then her main caregiver).

[12] In post-trial written submissions, the applicants have expanded the grounds of their challenge to the validity of the Will by further contesting that Joan knew and approved of the contents of the Will at the time that she signed it and that she lacked testamentary capacity in the sense that she was delusional in having formed the belief that her other children no longer cared about her. The main crux of the case, however, as viewed by the Court is whether or not the Will should be declared invalid on the grounds of undue influence.

[13] The position of the respondent Marlene Patterson is simply that her mother independently and of her own free will chose to make a new Will naming her as the sole beneficiary, without any undue influence in any form whatsoever having been perpetrated by her.

LEGAL PRINCIPLES

[14] It is well established that to sustain the validity of a Will, it must be proven that:

(1) the formalities of the *Wills Act* have been complied with;

(2) the testator had the requisite knowledge and approval of the contents of the Will;

(3) the testator had the requisite testamentary capacity at the time the Will was made; and

(4) the Will was not the product of undue influence exerted upon the testator.

[15] The leading decision clarifying the law on the requisite elements of proof and the burdens of proof in determining the validity of a Will is **Vout v. Hay**, [1995] S.C.J. No. 58. The applicable legal principles are conveniently summarized in a recent decision of the Nova Scotia Court of Appeal in **Wittenburg v. Wittenburg Estate**, [2015] N.S.J. No. 339. Justice Bryson there wrote as follows:

11. The burden of proving a will rests with those who propound it. However, they are assisted by a presumption of knowledge and approval as well as of capacity where the will has been shown to be duly executed. In this case, Mr. Wittenberg has also alleged suspicious circumstances in the making of his mother's will. If there are facts that may support this allegation the presumption is spent, and the propounders of the will must establish that the testatrix knew and approved of the contents of the will. Similarly, if those circumstances relate to mental capacity, the propounder must establish testamentary capacity on the civil standard of a balance of probabilities.

12. In *Vout v. Hay*, [1995] 2 S.C.R. 876, [1995] S.C.J. No. 58, Justice Sopinka speaking for the court set out the interplay between testamentary capacity, suspicious circumstances and undue influence:

> [25] With respect to the second problem, although *Barry v. Butlin* and numerous other cases dealt with circumstances in which the procurer of the will obtained a benefit, it has been determined that the dictum in *Barry v. Butlin* extends to any "well-grounded suspicion" (per Davey L.J. in *Tyrrell v. Painton*, [1894] P. 151, at pp. 159-60). This was reaffirmed in this Court by Ritchie J. in *Re Martin*, [1965] S.C.R. 757 *supra*. The suspicious circumstances may be raised by (1) circumstances surrounding the preparation of the will, (2) circumstances tending to call into question the capacity of the testator, or (3) circumstances tending to show that the free will of the testator was overborne by acts of coercion or fraud. Since the suspicious circumstances may relate to various issues, in

order to properly assess what effect the obligation to dispel the suspicion has on the burden of proof, it is appropriate to ask the question "suspicion of what?" See *Wright, supra*, and *Macdonell, Sheard and Hull on Probate Practice* (3rd ed. 1981), at p. 33.

[26] Suspicious circumstances in any of the three categories to which I refer above will affect the burden of proof with respect to knowledge and approval. The burden with respect to testamentary capacity will be affected as well if the circumstances reflect on the mental capacity of the testator to make a will. Although the propounder of the will has the legal burden with respect to due execution, knowledge and approval, and testamentary capacity, the propounder is aided by a rebuttable presumption. Upon proof that the will was duly executed with the requisite formalities, after having been read over to or by a testator who appeared to understand it, it will generally be presumed that the testator knew and approved of the contents and had the necessary testamentary capacity.

[27] Where suspicious circumstances are present, then the presumption is spent and the propounder of the will reassumes the legal burden of proving knowledge and approval. In addition, if the suspicious circumstances relate to mental capacity, the propounder of the will reassumes the legal burden of establishing testamentary capacity. Both of these issues must be proved in accordance with the civil standard. There is nothing mysterious about the role of suspicious circumstances in this respect. The presumption simply casts an evidentiary burden on those attacking the will. This burden can be satisfied by adducing or pointing to some evidence which, if accepted, would tend to negative knowledge and approval or testamentary capacity. In this event, the legal burden reverts to the propounder.

13**.** Suspicious circumstances may relate *to knowledge and approval of the will*, *testamentary capacity* and to *undue influence*. With respect to capacity, the burden of proof remains with those propounding the will; with respect to allegations of undue influence or fraud, the burden of proof rests with those alleging this. To recapitulate *Vout*, suspicious circumstances may be raised by:

(a) Circumstances surrounding the preparation of the will;

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

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

14. When suspicious circumstances are present:

(a) The civil standard of proof on a balance of probabilities applies; however that evidence must be scrutinized in accordance with the gravity of the suspicion;

(b) After overcoming the initial burden that the formalities have been complied with and the testator has approved the contents of the will, the propounder of the will reassumes the legal burden of establishing testamentary capacity;

(c) The burden on those alleging the presence of suspicious circumstances can be satisfied by adducing or pointing to some evidence which, if accepted, would tend to negative knowledge and approval or testamentary capacity.

(d) The burden of proof on those alleging undue influence and/or fraud remains with them throughout.

[16] It is abundantly clear that in proving undue influence and/or fraud, the burden of proof falls upon the applicants and that the standard of proof to be met is the civil standard of a balance of probabilities. There is no presumption of undue influence at play, even with the presence of suspicious circumstances.

[17] In pressing their grounds of fraud as a subspecies of undue influence, the applicants rely on the following passage from the text book *Capacity and Undue Influence* (Carswell 2014) authored by John E.S. Poyser (at pg. 318):

> Testamentary undue influence is typically thought of in terms of coercion. There is good reason for that. Dozens of cases have stated that conduct must amount to coercion if it is to amount to testamentary undue influence. Yet there are also abundant comments in the same cases and others that open the door to characterize testamentary fraud as a second type of conduct that can amount to undue influence. Coercion forces a person to do something against his or her will. Fraud operates differently. Testamentary fraud is an effort to fool a person into believing a false state of affairs that is then instrumental in causing that person to make a testamentary gift that otherwise would not have been made. As indicated earlier, persuasion is permitted, but persuasion is not permitted when it is mounted on a foundation of deliberate lies. Testamentary undue influence by coercion is difficult to establish. It is often pled but rarely proved as the facts rarely sustain it. Undue influence by fraud will be more easily sustained. Isolation, falsehood, and ingratiation are a common recipe employed by predatory family and peers in a bid to subvert a vulnerable person's property at death.

[18] In the pages that follow, the author traces the development of fraud as a subspecies of undue influence in the case law. He refers to the decisions in **Anderson v. Walkey**, 1961 CarswellOnt 91 and in **Timlick v. Crawford**, 1965 CarswellBC 86 as instances where Canadian courts have invalidated a Will on the

grounds of undue influence, not as the result of coercion, but as the result of manipulation and deceit.

[19] It is also noted (at pg. 324) that the party alleging undue influence has to prove not only the impugned conduct but that it in fact caused the Will-maker to sign the Will.

[20] For reasons that follow, I am satisfied that the formalities of execution under the *Nova Scotia Wills Act* have been met, and that Joan Patterson had the requisite knowledge and approval of the contents of her new Will, and that she had the requisite testamentary capacity at the time the Will was executed. That leaves as the main issue to be decided here of whether the new Will was the product of undue influence on the part of Marlene, whether through acts of coercion or acts in the nature of testamentary fraud.

EVIDENCE AND FINDINGS ON ISSUE OF UNDUE INFLUENCE

[21] Typically, in cases alleging undue influence there will rarely be direct evidence of acts of coercion because they are invariably made in private, without witnesses. Such evidence will usually be circumstantial. However, it is open to a Court to draw inferences from the circumstances in a particular case and to find, on the balance of probabilities, that undue influence has in fact occurred. That is the challenge facing the Court in the case at bar.

[22] By December of 2015, Watson was terminally ill with cancer and Joan was hospitalized for 10 days with the progression of her chronic pulmonary fibrosis disease. It was during that hospital stay that Joan stated that she wanted to change her Will to exclude son Randy as a beneficiary because of her displeasure with his

marital situation. With these rumors swirling amongst the family members, the parents called a family meeting on January 11, 2016 which was attended by all four children.

[23] During that meeting, Joan stated her intention to remove both Randy and Reid as beneficiaries under her Will. Not surprisingly, the meeting did not go well and harsh words were exchanged between various siblings. There was obviously a lot of upset at the time.

[24] However, it was the evidence of Reid, supported by others, that Watson told him the next day that he had talked it over with Joan and they had decided they were not going to make any changes to their Wills.

[25] It was the evidence of Darlene that approximately five days after the family meeting, Marlene approached her and asked her to help in trying to convince Joan to take the boys out of the Will. Darlene said she asked Marlene why she wanted her to do this and the answer was that she, Marlene, was very angry about the meeting, and that the boys had already gotten enough such that they shouldn't be in the Will. She further attributed the statement to Marlene that while they were growing up, it was always about the boys and that Marlene and Darlene had gotten nothing.

[26] Darlene went on to attest that her reply to Marlene was that she wasn't going to have anything to do with such a scheme and that she would have nothing to do with changing her mother's mind about taking anyone out of the Will.

[27] The difficulty with this piece of evidence is that it was not mentioned in Darlene's first affidavit sworn six months earlier nor did she mention it during her

discovery examination in the interim. Her explanation for not raising it until her supplemental affidavit sworn February 24, 2017 is that she did not want her brothers to then think that she was in cahoots with Marlene to perpetrate such a scheme, even though she refused to be a part of it, and further that she hoped that the dispute would be settled without the need for a trial. This explanation is consistent with the Court's general impression that Darlene was one to try and avoid confrontations.

[28] Darlene went on to attest that shortly thereafter, she approached her father to speak to him about what Marlene had said. During a visit to her parents' home, with all three being present, she said that both her mother and her father had agreed that nothing would be changed and that the Will would stand as it was.

[29] Darlene further attested that she asked Marlene at some later point if she had ever given her mother any advice or suggestions on her Will. Marlene's reply, as attributed to her by Darlene, was that she had given her mother lots of suggestions and opinions about her Will.

[30] Darlene also testified that Marlene repeatedly played on her mother's feelings of guilt by asking her mother why she was forced to leave the family in 1991 and why Joan tolerated Watson's abusive behaviour towards her, Marlene.

[31] Although Darlene was at times emotional when giving her evidence and prone to embellishment, and obviously has an interest in the outcome of this case, she exhibited sincerity on the witness stand.

[32] It was only about a month after the family meeting, on February 16th, that Watson died. It was Marlene who made most, but not all, of the funeral

arrangements. Her parents themselves had pre-purchased a funeral package and it was their granddaughter Jenna who provided the eulogy and a slideshow with music. However, it was Marlene who looked after the funeral arrangements per se and in so doing she persuaded her mother to use her own pastor and her own music instead of the longstanding family pastor and the church choir. These changes were met with disapproval by her other siblings, who viewed it as another dimension of Marlene's control over their mother.

[33] In any event, following Watson's death there were various discussions between family members about Joan's future living arrangements. Several options were identified but the one chosen by Joan was to move to Marlene's house a short distance away. At that point, Joan required a hospital bed at home and regular visits by a personal caregiver who for the most part was Lisa Metcalfe from the We Care company.

[34] Shortly thereafter, on March 4th, Joan moved into Marlene's house only to be hospitalized five days later after contracting pneumonia layered upon her pulmonary disease. This hospitalization, incidentally, was followed by three emergency department visits in April with the continuing decline in Joan's health.

[35] Up until her move to Marlene's house, Joan lived in the matrimonial home which was adjoined on either side by the homes of Randy and Reid respectively. Also, Darlene had been living with her parents at the family home since 2012 providing household assistance to her parents on a daily basis. Joan very much maintained an open door policy whereby her children were constant visitors as well as being in regular telephone contact. The evidence also affirms that up until

that move, all four of her children were regularly providing assistance to her in various household ways.

[36] All that changed after Joan's move to Marlene's house on March 4th. Marlene testified that she told her siblings that they were always welcome to visit their mother at her house. However, Marlene acknowledged in her discovery evidence entered at trial that she did not have an open door policy but rather wanted family members to call ahead to make sure that their mother was up to a visit. This arrangement also ensured, of course, that Marlene would be present for those visits as well.

[37] Although Joan maintained her existing land line telephone number at Marlene's house, Marlene arranged for all incoming calls to that number to be forwarded to her own land line or, whenever she was out, to be forwarded to her own cell phone number. She said she did this so as not to miss any incoming calls from the providers of Joan's caregiving or prescription medications. The fallacy of that explanation is that she could have simply provided her own direct telephone numbers to those providers which could easily have been done.

[38] Marlene went on to explain that Joan also had her own cordless phone at her bedside which had a call display feature. She testified that her mother was therefore at liberty to pick up the telephone if she wished to do so when incoming calls were made even though they were simultaneously being forwarded to Marlene (in the case of Marlene's land line). However, she acknowledged her evidence on discovery that it was not very often that her mother would answer the phone herself in this situation. She agreed that most of the time, the calls went directly to her cell phone or her own home phone number.

[39] All of these new arrangements resulted in a significant decline in the ability of the other three children to contact their mother on a regular basis, whether in person or by telephone. The conclusion drawn by the other three siblings was that Marlene was trying to isolate their mother from them to gain control.

[40] As will be detailed shortly, over the seven week period following the move to Marlene's house, Joan formed the belief that her other three children no longer cared about her or her well-being because she seldom heard from them anymore.

[41] I now turn to the two most critical events in this saga. The evidence begins with the affidavit of Cyril Randall who was the long time family lawyer for Watson and Joan Patterson. His affidavit evidence (on which he was not cross-examined) is that in mid April of 2016, he was contacted by Marlene who advised that her mother wished to make changes to her Will and to prepare other estate planning documents.

[42] As requested of him, he attended Marlene's home on April 20th where he eventually met privately with Joan. Mr. Randall recites his conversation with her and being told that she wished to prepare a new Will and it was her intention to leave all of her property to Marlene.

[43] Mr. Randall advised Joan that this could cause problems with her other children. He attested that Joan acknowledged this possibility but confirmed her intention to leave all of her property to Marlene. He recites that he was told by Joan that she had already had a meeting with all of her children to discuss her plans (although it is common ground between the parties that such a meeting did not ever happen).

[44] Mr. Randall then advised Joan that if she wished to do this, it would be wise to write a letter detailing why she wanted to prepare a new Will which left all of her property to Marlene. He also advised her that he would be referring the matter to his colleague George Clarke of the same firm to prepare the necessary documents.

[45] Upon his return to the office, Mr. Randall prepared an internal memorandum summarizing the meeting which he gave to Mr. Clarke. Mr. Randall attested that he was confident and satisfied that Joan displayed absolutely no signs of any mental deficiency and had expressed that this was not anything that she was being pressured to do by her daughter. He further attested that Joan appeared certain with respect to her stated intentions for the terms of her new Will and he was satisfied that those intentions were voluntary and not the result of any pressure placed on her in his presence.

[46] In her cross-examination, Marlene acknowledged that on the night before Mr. Randall's visit, she helped her mother make notes in preparation for that visit. She further acknowledged that she knew that the purpose of the visit was to give instructions for a new Will and that her mother had told her that she was going to leave all of her property to Marlene. Marlene said that she told her mother to think about that but that her mother replied that there was nothing to think about and that as for the other siblings, she should do whatever she wanted to do.

[47] Marlene further testified that the notes she helped her mother with also extended to the preparation of other documents including a Power of Attorney and the transfer of her parents' car to her as a gift. She said she gave these notes to her mother and that she thinks her mother gave them to Mr. Randall although Mr.

Randall makes no mention of them whatsoever in his affidavit. Those notes are therefore not in evidence.

[48] Upon taking over the file, Mr. Clarke had the new testamentary documents prepared under his supervision and arranged a meeting at Marlene's home to have them executed on May 13th.

[49] In cross-examination, Marlene acknowledged that her mother made preparatory notes on a piece of paper the night before in her presence concerning the changes to be made to her Will. She said her mother asked for and was given a piece of paper and writing implements and that Marlene sat with her on a couch beside the bed while her mother made those notes in her presence.

[50] When asked whether Joan told her that she needed the paper in order to write up notes to explain the reasons for changing her Will, Marlene acknowledged that Joan apparently knew that. However, she denied having had any discussion that evening with her mother whatsoever about what to put in those notes. She said they were just sitting there quietly, doing their own thing.

[51] Marlene went on to testify that on the next morning of the 13th, her mother again asked her for some paper. She acknowledged that Joan had the notes made from the night before and hence had two pieces of paper, namely, those notes and a blank pad of paper.

[52] The purpose of having the blank pad of paper was to enable Joan to write out the letter explaining the reasons for the changes she was making to her Will, as Mr. Randall had recommended that she do. Before Mr. Clarke and his assistant arrived

at the house, Marlene went out and left her mother in the company of Lisa Metcalfe, her regular caregiver from We Care.

[53] It was the evidence of Ms. Metcalfe that Marlene said to her mother before she left that she wanted the letter to be done while she was out. Ms. Metcalfe went on to say that at some point, Joan seemed to be having trouble writing the letter. When asked if she needed some help, Joan replied that she didn't know how to spell or understand these big words. It should be noted that Joan had only a Grade 5 education.

[54] Ms. Metcalfe testified that at no time did she read or become aware of the contents of that letter. The contents of the letter will be examined in greater detail later in this decision but its main thrust was that Joan intended to make the changes in her Will as she did because she felt that her other children no longer cared about her or her well-being.

[55] The innuendo here, espoused by the applicants, is that Joan in writing the letter was copying from notes she had made the night before with Marlene's participation if not authorship (which notes Marlene confirmed were disposed of and no longer exist). This is obviously an important piece of evidence but it must be considered in light of the fact that Ms. Metcalfe clearly harboured animosity towards Marlene because she felt that Marlene was responsible for her later being fired from her job. Ms. Metcalfe also made the outlandish statement that she believed that Marlene had intentionally caused her mother's death (through control of her oxygen supply and medication levels). The fact of the matter is that following a visitation to the house on May 26th (only two and a half weeks before Joan's death), Dr. Moorhouse prepared a report which is in evidence describing her

severe stage of idiopathic pulmonary fibrosis and expressing the belief that Joan was approaching the end of life. Dr. Moorhouse further recommended that Joan receive homecare through the palliative care benefit.

[56] Although this animus towards Marlene colours Ms. Metcalfe's testimony, it is at the same time bolstered by the fact that she attested to this evidence from the outset (in her August 30, 2016 affidavit) which was several months before the preparation of these notes was first corroborated by Marlene. On a balance of probabilities, I accept Ms. Metcalfe's evidence in this regard.

[57] At all events, Mr. Clarke and his assistant, Alyssa MacDonald made the home visit on May 13th, arriving after Marlene had returned. Mr. Clarke, who was cross-examined on his affidavit, attested that he reviewed with Joan the contents of her new Will and cautioned her about the interplay of the *Testator's Family Maintenance Act* in excluding her other children as beneficiaries. He testified that he was informed by Joan that she wanted to leave all her property to Marlene, indicating she was very grateful to Marlene in taking her into her home and for all of the assistance Marlene had been providing to her there. She also mentioned she had some concerns with the conduct of Randy concerning his lack of involvement in the administration of her late husband's estate (it should be noted that Randy was only an alternate executor to Joan). He said that Joan also indicated to him that Marlene was willing to take care of her until her death and this was further reason for leaving her estate to her.

[58] Joan then produced to Mr. Clarke the two page handwritten letter above referred to explaining the reasons why she wanted to make such changes in her Will. Mr. Clarke read the letter and had Joan confirm that it was in her own

handwriting which she did. On further questioning, Joan told Mr. Clarke that she had written the letter herself and was not in any way pressured into doing so. Mr. Clarke did not specifically go through the contents of the letter with her but says they did have a general discussion about it contents. After those discussions, Joan signed the letter and gave Mr. Clarke the original copy.

[59] Mr. Clarke went on to attest that based on his observations and discussions with Joan on May 13th, he had no reason to be concerned that she lacked the necessary capacity to understand and sign the Will and that it did not occur to him that she was under undue influence, although he acknowledged that they didn't actual speak in those terms. Rather, he testified that he simply had no reason to believe that Joan was in any way influenced or pressured by anyone to sign the Will.

[60] Some time after that, Mr. Clarke asked his assistant to write a memorandum describing the events of that meeting which she eventually completed but not until some months later. Ms. MacDonald's affidavit and attached memorandum are largely confirmatory of the evidence of Mr. Clarke above recited.

[61] To complete the chronology, Joan was readmitted to hospital on June 11th and died there two days later.

[62] I return now to the contents of the letter handwritten by Joan on the morning of May 13th which she provided to Mr. Clarke. This evidence is highly significant.

[63] That letter begins with the words "Here are the reasons I decied (sic) to make a new Will". The following statements then appear:

(1) Ever since my husband was diagnosed with cancer, Marlene was the one who took him to all his doctors appointments, made sure he got all his medicines and looked after him right up until he passed away;

(2) She (Marlene) also made all the arrangements for his funeral and memorial service;

(3) As I have been in a hospital bed since Christmas last year, my other three children didn't want anything to (do) with seeing that we were taken care of;

(4) She (Marlene) has been looking after me 24 hours a day since then;

(5) None of my other three children made any effort to help Marlene with any care or to help her to deal with all my medical problems;

(6) In the past, all my other children have received either pieces of land or large amounts of money and I feel that should be enough.

[64] While the last of the foregoing statements is partially true (as identified earlier in this decision) the *inter vivos* gifts made to the four siblings pales in comparison to the $400,000 value of the estate (I interject here that the net amount of cash received by Darlene from her parents after her repayments was only about $8,000). However, the rest of these stated reasons have been demonstrated to be false. Indeed, Marlene herself in her cross-examination has acknowledged them to be false.

[65] For the sake of completeness, it should also be noted that this letter contains the following additional statements:

(1) Marlene said that I could move in with (her) after Watson passed away because I did not want to be alone and cannot look after myself;

(2) She (Marlene) makes sure that I get all my medications and anytime I have to (sic) hospital, she spends almost all of her time with me there;

(3) She (Marlene) also looks after all of my bills and personal affairs.

[66] While these last three statements are true, the main thrust of the letter is that Joan had decided to exclude her other three children as beneficiaries under the Will mainly because she had formed the belief that they no longer cared about her or her well-being and had essentially abandoned her. I have no doubt from hearing the evidence that the exact opposite was true and that Reid, Randy and Darlene were feeling frustrated about their restricted access to their mother after she moved to Marlene's house compared to the open door policy they had previously enjoyed.

[67] All of the witnesses in this case, bar none, described Joan as an honest, truthful and straightforward person who spoke her mind. I conclude from that evidence that Joan had formed these beliefs in her mind, false as they were, which she then acted upon by instructing her lawyers to prepare a new Will leaving all her property to Marlene and completely disinheriting her other three children. I also have no hesitation in concluding that this letter was handwritten by Joan herself and signed by her in the presence of Mr. Clarke.

[68] These conclusions beg the perplexing question of what happened to create these false beliefs in Joan's mind after she moved to Marlene's house. The contention of the applicants as noted earlier is that these false beliefs were induced by Marlene through the isolation of her mother from her siblings and making false assertions about them. The applicants maintain that Marlene manipulated and deceived her mother into forming these false beliefs.

[69] Marlene steadfastly denies that she ever did anything to influence her mother's testamentary wishes. Rather, she maintains that her mother made her new Will independently and voluntarily and of her own free will.

[70] This leads me to an assessment of Marlene's credibility.

[71] Acts of dishonesty on the part of Marlene were drawn out early in her cross-examination. First, in her application for a grant of probate dated July 5, 2016 she declared that the estate was comprised of only real property with no personal property whatsoever. What subsequently came to light was that her mother had a collection of cash in the approximate amount of $72,000 which was kept in a garment bag and taken to Marlene's house when the move was made.

[72] Marlene's explanation for this misrepresentation was that she was under the mistaken understanding that the grant of probate was required only because of the real property asset and that it was her intention to declare the existence of this cash when she was later to file an Inventory with the Probate Court.

[73] That explanation bears no credibility whatsoever. Rather, I accept Mr. Clarke's evidence that he advised Marlene of the need to include all assets, real and personal property, in the application for probate and that he could give no reason why she could have misunderstood that. The application form itself specifies that "all the assets of the deceased" are to be listed and valued. Moreover, it was something that was going to have to be stated when the Inventory was filed in any event.

[74] What is even more egregious is that once counsel for the applicants learned from his clients of the existence of a cash box, he wrote to Mr. Clarke inquiring

about it. Mr. Clarke then contacted Marlene to ask whether any such cash box existed. Marlene admittedly lied to Mr. Clarke when she denied the existence of the cash box. Mr. Clarke was clear in his evidence that his inquiry was about the existence of cash generally (not simply whether or not it was in a box) and that he was informed by Marlene that there was no such cash.

[75] Marlene's explanation for this lie was that she knew from Randy's affidavit that the anticipated amount in the cash box was approximately $100,000 and that since the garment bag contained only $72,000, she did not want to have to account to her siblings for the difference of some $28,000 which was not there. Paradoxically, she had nonetheless stated her intention to declare the cash on hand when filing the Inventory with the Probate Court. She further offered the explanation that when faced with this inquiry about the cash, she panicked when giving her reply. None of that adds up.

[76] What does add up is that once counsel for the applicants made a Chambers motion for production of Marlene's banking records, which was bound to be successful, she owned up to having the cash or at least what was left of it (approximately $44,440) shortly before the motion hearing date. In the meantime she took it upon herself to make cash deposits of $7,900 and $9,500 respectively during the month of July into her own bank account. She also withdrew $25,000 from the joint bank account which she used to pay down her mortgage.

[77] The conclusion logically to be taken from this conduct is that Marlene had no intention of disclosing the existence of that cash until she was forced to do so when faced with a Chambers motion for production of her bank records. Marlene

thereupon took the remaining cash to her own lawyer's office and it has since been placed into a trust account.

[78] At first, Marlene denied in her evidence that the amounts of $7,900 and $9,500 taken from the garment bag were chosen so as to be under the bar of $10,000 which might trigger a bank investigation. However, she later admitted that this was so.

[79] Beyond these acts of dishonesty, several inconsistencies were drawn out in cross-examination between Marlene's evidence at trial and that which she gave at discovery. The most significant of these inconsistencies pertains to the questioning of whether or not Joan had ever said anything to Marlene about her thoughts that her three other children no longer cared about her. At trial, Marlene maintained that her mother "never ever" told her any such thing but rather that her mother was pleased with the amount of phone calls and visits she was getting while at Marlene's home. She was then faced with her discovery evidence, however, that there was an occasion about a month and a half after the move (which would be about mid April and shortly before she contacted Mr. Randall) when her mother started crying and said that she felt that her other children no longer cared about her.

[80] When confronted with this at trial, Marlene acknowledged that she herself did believe that her siblings cared about their mother. However, she chose not to tell her mother that at the time or to disabuse her mother of that notion in any way. She simply testified that she chose not to respond to that comment. When pressed on that, her answer was "No particular reason, I just chose not to respond to her comment".

[81] There were a number of other contradictions between Marlene's trial and discovery evidence which need not be recited in the same level of detail. These included a contradiction on the issue of her feelings towards her father and siblings when she terminated her relationship with them in 1991, her diversion of phone calls intended for her mother and, as mentioned, choosing amounts for two bank deposits under $10,000 so as not to attract the bank's attention.

[82] There were several incidences in Marlene's testimony which showed a pattern of retreat in giving her answers once she was confronted with evidence or her discovery testimony to the contrary. She offered various vague excuses which are not credible. Rather, she was simply caught in a number of lies.

[83] Moreover, I found Marlene Patterson to lack forthrightness in answering the questions put to her. She was often evasive or indirect in answering questions and sometimes by giving a deflective answer gave the impression that this was a stalling tactic for time in having to come up with an answer. At other times, the Court had the impression that some of her answers were scripted or rehearsed, particularly in trying to explain away her acts of dishonesty above recited. All in all, Marlene Patterson simply did not make a credible or reliable witness.

[84] There is, of course, no direct evidence of undue influence by coercion. The Court is therefore left with having to draw inferences from the circumstantial evidence in this case which has been accepted and in particular, deciding whether an inference of testamentary fraud on the part of Marlene should be drawn within the sphere of undue influence.

[85] In addition to the restrictions Marlene placed on her siblings' ready access to their mother after the move, there are two telling pieces of evidence that have

drawn the attention of the Court. Both of these have already been recounted earlier in this decision. The first is Marlene's acknowledgement, after her earlier denial, that on one occasion around mid April her mother did express her discouragement that she thought her other children no longer cared about her. Significantly, Marlene chose not to respond to that false belief and did nothing to disabuse her mother of that notion. In effect, Marlene fostered that continued belief in her mother's mind which lead to the call to Mr. Randall shortly thereafter. One can only conclude that Marlene wanted her mother to hold that belief.

[86] The second area of particular interest is Marlene's acknowledgement that on the night before Mr. Randall's visit, she helped her mother make notes in preparation for it. Yet she denied having had any involvement whatsoever in helping her mother make notes on the evening of May 12th before Mr. Clarke's visit when her mother was, in her presence, preparing to write the requested letter outlining the reasons for changing her Will. I simply do not accept Marlene's evidence in this regard and I am lead to the conclusion that in some manner she had a hand in creating the contents of that letter, preying upon her mother's false beliefs that her other children no longer cared about her or her well-being.

[87] It is not only from these suspicious circumstances but rather from the evidence as a whole, including Marlene's lack of credibility, that the Court is prepared to draw the inference that Joan was induced to form the false beliefs she held about her other childrens' lack of caring, through manipulation and deceit on the part of Marlene under whose control she remained after the move. Joan then acted on those false beliefs in changing her Will as she did. I therefore find that the actions of Marlene, on a balance of probabilities, crossed the line into the sphere of undue influence. As noted earlier, while persuasion is permitted without

legal consequence, persuasion of a testator is not permitted when it is mounted on a foundation of untruths induced by the proponent of a Will.

[88] I would add that I do not adopt the theory that this was all a master plan of Marlene's to reunite with her family after a 20 year hiatus out of resentment or revenge to gain an inheritance of her parents' estate. That is not consistent with the affidavit evidence of Rev. Laidlaw who had provided counselling to Marlene for some 10 years past. However, once Marlene knew of her mother's inclination to change her Will by excluding Reid and Randy as beneficiaries, and with her father's terminal illness, I infer that she saw that as an opportunity to influence her mother's testamentary wishes in her favour. I simply do not accept her evidence that she never did anything whatsoever to exercise such influence.

[89] In conclusion, while it has been established that:

(a) The formalities of execution under the *Wills Act* have been met (as agreed by the parties);

(b) Joan had the requisite knowledge and approval of the contents of the Will (as established by the evidence of Messrs. Randall and Clarke);

(c) Joan had the requisite testamentary capacity at the time the Will was executed (as evidenced by the medical report of Dr. Moorhouse in close proximity of time);

I am satisfied that the applicants have met their burden of proof in persuading the Court that undue influence was exercised by Marlene over her mother in the making of the new Will signed on May 13th.

[90] In the result, that new Will is declared to be invalid. Counsel have agreed that if such a finding were to be made by this Court, it follows that Joan's previous

Will signed in 1998 will prevail, the contents of which are summarized in paragraph 8 of the Agreed Statement of Facts above recited.

DISPOSITION OF JOINT BANK ACCOUNT

[91] Both counsel agree that in the circumstances of this case, the presumption of resulting trust applies in respect of the above referenced joint bank account. As described in the leading decision of the Supreme Court of Canada in **Decore v. Decore**, 2007 SCC 17 (at para. 20), "A resulting trust arises when title to property is in one party's name, but that party, because he or she is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner".

[92] Both counsel have referred to the **Decore** decision for general principles that apply for the determination of the beneficial ownership of funds in a joint account upon the death of one of the joint account holders. These general principles can be summarized as follows:

(a) The general rule for gratuitous transfers of money is that a presumption of resulting trust applies and the onus falls upon the transferee to demonstrate that a gift of that money was intended. That onus is to be discharged on the civil standard of proof of a balance of probabilities;

(b) With joint accounts, rights of survivorship vest when the account is opened and therefore the gift is considered to be *inter vivos* in nature. The gift in these circumstances is the transferee's survivorship interest in the account balance, whatever it may be at the time of the transferor's death, and not to any particular amount;

(c) The trial judge will commence the inquiry with the applicable presumption and will weigh all of the evidence in an attempt to ascertain, on a balance of probabilities, the transferor's actual intention;

(d) The presumption of a resulting trust means that it will fall to the surviving joint account holder to prove that the transferor intended to gift the right of survivorship to whatever assets are left in the account to the survivor. Otherwise, the assets will be treated as part of the transferor's estate to be distributed according to the transferor's will.

[93] In the application of these principles, it is acknowledged by counsel for Marlene Patterson that the onus is on her to prove, on a balance of probabilities, that it was Joan's intention to gift to her the right of survivorship at the time that the joint account was opened, such that Marlene would become the beneficial owner of any funds remaining in that account at the time of Joan's death.

[94] In corroboration of her own evidence, Marlene relies upon the affidavit of Karen Duggan, a Financial Services Manager with the Bank of Montreal who handled the subject transfer of funds. Ms. Duggan attested that in mid to late May, 2016 she received a call from Marlene inquiring as to what steps would be required to open a new joint bank account. Up to that point, the existing bank account was held jointly in the names of Joan, Watson and their son Randy.

[95] Ms. Duggan attested that she was told by Marlene that it was Joan's wish to transfer the money from that account to a new account with Joan and Marlene named as joint account holders.

[96] Because of Joan's disability, Ms. Duggan attended at Marlene's home on June 1st with the necessary paperwork to effect the transfer. She said she reviewed with Joan the reason why she was there and that Joan confirmed that it was her intention to close out the existing account and create a new one, naming Marlene and herself as the joint account holders.

[97] Ms. Duggan attested that she then reviewed with Joan the effect of the right of survivorship and that Joan confirmed to her that this is what she wanted. Based on her discussions with Joan, Ms. Duggan formed the impression that she fully understood the contents of those discussions and that she had no reason to have concerns that the steps Joan wanted to take were not her voluntary wishes.

[98] Ms. Duggan also attested that Marlene was present throughout this conversation, which lasted for approximately 15 minutes, but that Marlene did not involve herself in those discussions other than to sign the required documents as a joint account holder. In the result, the transfer of the balance of the funds which then stood at $31,856.65 was thereby effected from the old account into the new account.

[99] I interject here that Marlene acknowledged that none of the funds in that account was hers. Nor did she ever inform Mr. Clarke of the existence of that account.

[100] I am satisfied on this evidence from Ms. Duggan (who was not cross-examined) that Joan did form the intention to transfer the money from the old joint bank account to the new joint bank account as she did, such that Marlene would become the beneficial owner of any funds remaining in the joint account at the time of Joan's death. The question remains, however, whether Joan was induced to form that intention by reason of the same exercise of undue influence on the part of Marlene that has been found to have invalidated the 2016 Will.

[101] I am persuaded by the applicants that the same inferences of undue inference should be drawn in respect of both the 2016 Will and the transfer of funds into the new joint bank account (which occurred about two weeks apart). I need not recite

the evidentiary basis for the drawing of that inference again here. Suffice it to say that I am satisfied that Joan gave the instructions she did for the transfer of the joint bank account in Marlene's favour based on the same set of false beliefs she was induced to form in changing her Will, also in Marlene's favour.

[102] In the result, the June 1st transfer of the existing joint bank account into a new account naming Marlene and Joan as the joint account holders should be invalidated. It follows that the funds in that account at the date of Joan's death are declared to be an asset of Joan's estate.

POSTSCRIPT

[103] It appears that the three sums appropriated by Marlene to herself totalling $42,400 will exceed her one-quarter share of the residue under the 1998 Will. That will require a repayment of the shortfall by Marlene to the estate in an amount to be ultimately calculated by the parties.

[104] Lastly, I will leave it to the parties in the first instance to try to reach agreements on costs of this proceeding, failing which written submissions on costs may be filed with the Court in due course.

J.