

SUPREME COURT OF NOVA SCOTIA

Probate Court of Nova Scotia

Citation: *Boutilier Estate v. Boutilier*, 2017 NSSC 93

Date: 20170405

Docket: Hfx. No. 457295

Probate Court File No.: H-62554

Registry: Halifax

Between:

David Austin Boutilier, in his capacity as personal representative of
the Estate of Allister Franklyn Boutilier

Applicant

v.

Timothy Boutilier, Neil Boutilier, Christopher Boutilier,
Michael Boutilier and Janet Whittaker

Respondents

Judge: The Honourable Justice M. Heather Robertson

Heard: January 30 and 31, 2017, in Halifax, Nova Scotia

Decision: April 5, 2017

Counsel: Allen C. Fownes, for the applicant
Lisanne M. Jacklin, for the respondents

Robertson, J.:

[1] This is an application for proof in solemn form of the will of the late Allister Franklyn Boutilier.

[2] The affidavit of David Boutilier in Form 46 is attached to the application, sworn October 31, 2016.

[3] The affidavit of Allen C. Fownes, solicitor for David Boutilier and the Estate of Allister Franklyn Boutilier is filed with the court showing that the application is in compliance with s. 31 of the *Probate Act*, S.N.S. 2000, c. 31 and s. 71 of the *Probate Court Practice* pursuant to s. 106 of the *Act*.

[4] The grounds for seeking solemn form proof of the will of the deceased Allister Franklyn Boutilier are:

- a) That the deceased instructed counsel to make the will's provisions as he did, and duly executed the same in the presence of two witnesses, free of undue influence from any person or beneficiary.
- b) That other beneficiaries under the will have variously brought claims against the estate claiming undue influence and suspicious circumstances in the drafting and execution of the will, the proof of which is on them.

[5] The court has before it the affidavits of Timothy Boutilier, son of Allister Franklyn Boutilier (Exhibit 1, Tabs 6 and 7); and Dana Boutilier, the son of Timothy Boutilier and grandson of Allister Franklyn Boutilier (Exhibit 1, Tab 5).

[6] The court has before it the affidavit of Gregg Yeadon, solicitor for the testator Allister Franklyn Boutilier (Exhibit 1, Tab 3) and his mother Barbara Yeadon, witness to the testator's will (Exhibit 1, Tab 4) and a correcting affidavit sworn on January 27, 2017.

[7] Mr. David Boutilier filed a rebuttal affidavit sworn January 10, 2017.

Background

[8] Allister Franklyn Boutilier died on July 26, 2015, in the QEII Health Sciences Centre, at the age of 95 years.

[9] Mr. Boutilier had suffered a stroke in the late fall of 2014 and was then hospitalized. Until this time, he had been an extremely independent man, who lived in his own home at 5 Blue Jay Lane on Whynachts Point Road, at Tantallon, Nova Scotia. He had been widowed in 1992.

[10] Allister Franklyn Boutilier had six children; five sons and a daughter:

1. Timothy Boutilier,
2. David Boutilier,
3. Neil Boutilier,
4. Christopher Boutilier,
5. Michael Boutilier, and
6. Janet Whittaker

[11] Although Allister Franklyn Boutilier was born in Tantallon and many of his family resided there, he lived for a part of his life in Dartmouth, Nova Scotia, as did his sons Timothy and David. Indeed, David Boutilier lived with his dad in Dartmouth at Monique Avenue, until he moved to Whynachts Point in 1996, building himself a bungalow. Allister Franklyn Boutilier did not move to Tantallon until 2001, when he moved into his own home he built with the help of his sons. He was then the age of 80. He had received a deed to these “family lands” from his brother Ernst. Between 1996 and 2001, Allister Franklyn Boutilier often summered on his land on Whynachts Point in a trailer owned by his son David, until his house was completed.

[12] His eldest son Timothy helped his father build his house, but the two had a falling out around this time and were estranged up to the year before his death when Timothy first went into the hospital following his father’s stroke.

[13] Allister Franklyn Boutilier’s solicitor of many years was Gregg Yeadon. Over the years, Mr. Yeadon drafted a series of wills with different provisions made for his children and different choices of executors. Some were executed, some remained unsigned.

[14] It is useful to summarize these wills of Allister Franklyn Boutilier.

1. Will – December 9, 1998 (Exhibit 1, Tab 9) (unsigned) left everything he had to Timothy Boutilier and his wife Katherine whom he named as executors.
2. Will – April 2002 (Exhibit 1, Tab 10) (unsigned) named Gregg Yeadon as executor, gave jewelry to his daughter Janet and the rest and residue was to be divided equally among his six children.
3. Will – December 30, 2002 (Exhibit 1, Tab 11) appoints David Boutilier and Neil Boutilier as executors and otherwise mirrors #2 will above. This will was executed.
4. Draft Will – 2003 (Exhibit 1, Tab 12) not executed – appointed David Boutilier and Neil Boutilier executors and divided the estate equally among the six children.
5. Will – October 17, 2003 (Exhibit 1, Tab 13) retains David Boutilier, Neil Boutilier as executors, transfers jewelry to daughter Janet and divided the balance of his property equally between his five named children, excluding his eldest son Timothy from the division with the exception of a bequest of \$1000 made to him.
6. Will – December 2012 (Exhibit 1, Tab 15) appoints Michael Boutilier and Neil Boutilier as executors, gave jewelry to Janet and divided the rest and residue among his five named children again excluding Timothy but for the \$1,000 bequest. Additionally, this draft will gave Janet the right to live in Allister Franklyn Boutilier's home at 55 Blue Jay Lane, for her lifetime, with provision for the gift to lapse if she does not live there.
7. Will – January 2013 (unsigned) (Exhibit 1, Tab 16) appoints Michael Boutilier and Neil Boutilier as executors, gives jewelry to Janet and life interest in his home to Janet, with provision for it to lapse if she does not reside there and divided the balance of the estate among the named five children, excluding Timothy who is no longer to receive any cash bequest or any bequest.
8. Will – January 24, 2013 (Exhibit 1, Tab 17). This is an executed version of will as No. 7 above.

9. Will – November 2014 (Exhibit 1, Tab 18) (unsigned) names David Boutilier as executor and Michael and Neil extras in his stead should he die or be unable to act.

This will continues to give Janet a life interest in Allister Franklyn Boutilier’s home, along with jewelry and divides the balance of the estate equally between the five named children, again to the exclusion of Timothy, who does not receive any bequest.

10. Will – dated July 25, 2015 (Exhibit 2). This executed will is a departure from the previous wills of 2002-2013. Allister Franklyn Boutilier names David Boutilier as executor, Michael and Neil as alternates, and gives his home and contents at 5 Blue Jay Lane to David Boutilier. It makes monetary bequests of \$20,000 to each of his sons Michael, Neil and Christopher, and \$10,000 to Janet. Timothy is excluded from any bequest under the will. This is Allister Franklyn Boutilier’s final will entered into probate. He died the day following its execution.

Law and Argument

[15] The proponent of a will has no legal and evidentiary burden of establishing on the balance of probabilities that the formalities of the *Wills Act*, R.S.N.S. 1989, c. 505, were complied with and that the testator knew and approved the contents with his will, *Vout v. Hay*, [1995] 2 S.C.R. 876.

[16] If this is proven, then the proponent has a rebuttal presumption that the testator had capacity at the relevant time.

[17] The proponent of the will relies on the evidence of the will’s draughtsman Gregg Yeadon, an experienced lawyer, practising for over 33 years at the Bar in Nova Scotia who has extensive knowledge of wills and estates. Mr. Yeadon took instructions from Allister Franklyn Boutilier on July 15, 2015 during a one-hour interview, at which time he concluded Allister Franklyn Boutilier had the capacity to make his will. Mr. Yeadon and his mother Barbara Yeadon attended at the QEII for its execution, on July 25, 2015. Mrs. Yeadon proved the will.

[18] Therefore, the proponent says the presumption of capacity arises. I shall say more about Mr. Yeadon’s critical evidence in due course.

[19] The proponent then correctly says the burden has shifted to the respondents to prove that their father lacked a sound disposing mind and memory. The Supreme Court of Canada has said, “one able to comprehend, of its own initiatives and volition, the essential elements of will making, property, objects, just claims to consideration, revocation of existing dispositions, and the like”: *Re Martin*, [1965] S.C.R. 757, at 761 citing *Leger et al v. Poirier*, [1944] S.C.R. 152, at 161.

[20] The respondents point to the following concerns:

1. Compliance with the *Wills Act*, as it was Mr. Yeadon who filled in or changed the date following the will’s execution, contrary to s. 20 of the *Act*.
2. Due to the testator’s declining health July 2015, the respondents say he did not have the capacity.
3. That the stroke he suffered limited his ability to communicate and give clear instructions.
4. That the significant change to his will in bequeathing his main asset, his home to David Boutilier, rather than providing for an equal distribution between five of his children, as in earlier wills, is suspicious.
5. That the testator was heavily medicated during this time.
6. That at the time of execution of the will, the testator did not read and approve the entirety of the will.
7. That from the time of his stroke in November 2014, the testator was heavily dependant on David Boutilier his primary caregiver who could have asserted an undue influence upon him in the preparation of this last will.
8. That from the time of his stroke in November 2014 the testator was isolated from family and friends, only going home occasionally with David Boutilier, when he felt up to it.
9. That the affidavit evidence of the respondents along with their testimony confirms the suspicious circumstances surrounding the preparation and execution of the will and they seek to have this will judged invalid.

[21] The respondents rely on the authorities of *Vout v. Hay*, [1995], SCR 876; *Coleman v. Coleman*, 2008 NSSC 396; *Re, Davis* 1963 CanLII 188 (ON CA);

Nieuwland v. Yorke Estate, 2011 NSSC 19; and Caroline E. Ebela and Kristi Collins, “Litigating through the Grey Zone: The Law of Testamentary Capacity” *Annual Review of Civil Litigation* (2014) at 101-163.

[22] It is first important to review the state of Allister Franklyn Boutilier’s failing health and his circumstances before he made this last will in July 2015.

[23] Although aged, up until November 2014 Allister Franklyn Boutilier had lived in his own home at Whynachts Point, Tantallon, Nova Scotia, which he helped build himself at the age of 80 in 2000-2001.

[24] He lived, in retirement, in his home with some assistance. His son David came over the hill from his own nearby property to visit daily and mow the grass and take care of snow removable, the out-of-doors chores.

[25] Allister Franklyn Boutilier maintained his own house inside and lived like a bachelor, cleaning up before guests arrived or in later life before the Victoria Order of Nurses (“VON”) arrived.

[26] He did not drive a car after age 80 and depended on David and his wife to take him to the bank, medical appointments and to get groceries.

[27] He frequently walked over the hill to visit his son David up until the last few years of his life, when he then would use the lawn tractor to go to David’s, this of course in the warmer months of the year.

[28] He received friends and family in his home, whether tidy or not, as evidenced from various photos taken by family members.

[29] He enjoyed family gatherings, when his other children came to Tantallon to visit, also chronicled in the photos before the court.

[30] In November 2014, he had a stroke and was taken to the QEII hospital. He began his recovery, was sent to the Nova Scotia Rehabilitation Center in December 2014 and eventually came to reside at the veterans’ residence wing of the Abbey Lane (a part of the QEII) in March 2015.

[31] His recovery was far from complete. He walked with a walker, and also had a feeding tube, as the stroke prevented him from easily swallowing.

[32] Nevertheless, he went out on outings in the car with David who came into see him daily. He took some day trips down to his house but did not stay overnight.

[33] He was optimistic about living and thought he might have a few more years in him as expressed to Gregg Yeadon.

[34] However, in mid July after he had given Mr. Yeadon the instructions for his last will, medical staff made an error in changing and cleaning his feeding tube and his bladder was perforated. This repair required surgery and his health failed almost immediately after surgery.

[35] So, although a stroke victim, he had adjusted to life in the veterans' residence. The medical mishap changed everything. It certainly changed his immediate condition between the drafting and execution of his will. He was noticeably frail and weak and ill when Gregg Yeadon attended for execution of the will at the QEII hospital (where he had been taken for surgery and where he died).

[36] Justice Idington in *Laramée v. Ferron*, [1909] 41 S.C.R. 391 reflected:

We must be careful not to substitute suspicion for proof. We must not by an extensive doing so render it impossible for old people to make wills of their little worldly goods. The eye may grow dim, the ear may lose its acute sense, and even the tongue may falter at names and objects it attempts to describe, yet the testamentary capacity be ample.

To deprive lightly the aged thus afflicted of the right to make a will would often be to rob them of their last protection against cruelty or wrong on the part of those surrounding them and of their only means of attracting towards them such help, comforts and tenderness as old age needs.

[37] It is for me to determine if Allister Franklyn Boutilier had capacity to execute his will on July 25, 2015.

[38] I would not wish to deny Allister Franklyn Boutilier his right to choose his beneficiary, unless I am satisfied he was unduly influenced and that suspicious circumstances surrounding this will prevailed. Or was Allister Franklyn Boutilier merely an elderly man, expressing his final wishes, who was caught by a medical mishap that ended his life earlier than had expected?

[39] Mr. Gregg Yeadon testified that he received a phone call from David Boutilier explaining that his father Allister Franklyn Boutilier wanted him to visit

so that he might have a power of attorney executed and give directions about a new will.

[40] Mr. Yeadon testified that he knew Allister Franklyn Boutilier well, having acted as his solicitor for many years, in drafting many wills and in property matters such as securing the lands of Whynachts Point in 1998.

[41] Although David Boutilier made the call to Mr. Yeadon, he did not give him any instructions nor was he present when Mr. Yeadon first took instructions from Allister Franklyn Boutilier on July 15, 2015, or when the will was executed on July 25. Mr. Yeadon was on his own with the testator to receive instructions. Mr. David Boutilier may have been at the hospital on one of these two occasions, but was not present in the room.

[42] Mr. Yeadon testified that he spent an hour with Allister Franklyn Boutilier in taking instructions as Mr. Boutilier had difficulty talking. He did not speak very loudly or clearly, but he could be understood “absolutely” Mr. Yeadon testified.

[43] According to the Nova Scotia Barristers’ Society will preparation protocols, Mr. Yeadon took notes, which are shown as Exhibit B to his affidavit, sworn November 23, 2016. He also confirmed Allister Franklyn Boutilier’s identity, age, etc., and this led to an amusing story; Allister Franklyn Boutilier telling how the hospital had recorded the wrong birthdate on his hospital identification wrist band, incorrect by one year.

[44] Mr. Yeadon testified that Allister Franklyn Boutilier knew all the assets he owned and how he wanted them distributed. He noted he knew how much was in his bank accounts almost to the penny. He also wanted David Boutilier to have his house. Mr. Yeadon testified that Allister Franklyn Boutilier was aware of his circumstances and clear in his instructions.

[45] Mr. Yeadon testified that he had past experience with other clients where he refused to take instructions due to a capacity issue, but that in his view he had no doubt about Allister Franklyn Boutilier’s competency and he had no hesitation taking his instructions. He testified Allister Franklyn Boutilier clearly understood what he was doing.

[46] Mr. Yeadon reviewed his notes and highlighted the instructions with respect to the bequest of his home: “going to give the property to David anyway” and “David is the only one that lives here.”

[47] Allister Franklyn Boutilier also asked an interesting question “In your opinion do you think I’m stable enough?” Mr. Yeadon said he replied “yes” and said the question is, “Is there undue influence? I might die before I get out of here but right now I think it’s good but think might be better not to sign over any deeds now.” He went on to say the property value of his home was \$57,000 per acre undeveloped and that it used to be \$150 an acre.”

[48] The notes also detailed Allister Franklyn Boutilier’s recital of amounts of money in his bank accounts, the gifts of \$20,000 each to his named sons, but \$10,000 for Janet “as she doesn’t need it.”

[49] Mr. Yeadon then testified how David Boutilier called again to say his father went in for some kind of surgery and it did not go too well. On July 25, Mr. Yeadon and his own mother, went to the hospital so Allister Franklyn Boutilier could execute the will.

[50] Mr. Yeadon described how upon their arrival at the hospital Allister Franklyn Boutilier was sleeping. He testified he inquired of the nurse about his state and she suggested they return when he awoke. He and his mother went for lunch and returned. Allister Franklyn Boutilier was then awake and alert, he testified.

[51] Mr. Yeadon described Allister Franklyn Boutilier as “tired, not lively or engaging, but communicating.” He said hello to my mother when I introduced her, he answered my questions and he reaffirmed the bequests. Mr. Yeadon reviewed his written notes of this meeting which lasted about 10 minutes. He testified how Allister Franklyn Boutilier struggled with this signature, he had the opportunity to look at each of the five pages of the will. Mr. Yeadon reviewed in detail the page with the dispositions and confirmed, “let’s stick to the plan.”

[52] Mr. Yeadon explained that in the event Allister Franklyn Boutilier had changed his mind and wished to make an even distribution of his estate to all his children, he had drafted a version, (Exhibit 1, Tab 19) which did that “to divide the rest and residue of my estate equally among my children who shall survive me.” Allister Franklyn Boutilier rejected that idea and told Mr. Yeadon to “stick with the plan.”

[53] Mr. Yeadon did this alternate draft will of his own initiative and said Mr. Boutilier chose to execute the will he had instructed Mr. Yeadon to prepare on July 15, 2015.

[54] Mr. Yeadon testified that Allister Franklyn Boutilier was obviously much weaker than when he had seen him to take his instructions on July 15, but that he was not heavily medicated or slipping in and out of consciousness. Mr. Yeadon testified that Mr. Boutilier expressed that he did not want to make an even distribution. He confirmed he wanted David to get the house.

[55] On cross-examination, Mr. Yeadon agreed he did not review and read each page of the will, but discussed the bequests. He said, "I went through the will with him and he confirmed what he wanted."

[56] Mr. Yeadon accounted for certain discrepancies in the will document. Before going to the hospital with the document, he said he had been moving his office and his assistant had given him a disk with all the drafted wills on it. He had written in the date July 2, placing the 2 to the left so he could add the number 5, making July 25 the date of execution. He testified he did not do this at the hospital in front of Allister Franklyn Boutilier, but added the balance of the date, before he probated the document. Mr. Yeadon testified that as well the numbering of the clauses, shows no clause 4, as he had worked from an earlier draft version and deleted clause 4 and not correctly renumbered all the clauses, but he testified that nothing was missing from the will. It reflected all of the instructions given by Allister Franklyn Boutilier on July 15, 2015.

[57] I do not find that these discrepancies in date and paragraph numbering should void the document, under s. 20 of the *Wills Act*. The document executed by the testator is a valid will and is in compliance of the *Act*.

[58] The only issue for me is to decided is that of the competency of the testator.

[59] The applicant objected to certain portions of the affidavits of the respondents Timothy and Dana Boutilier. They state the affidavits are pejorative (photographs surreptitiously taken at an earlier time of Allister Franklyn Boutilier's life in an untidy home or sleeping on a sofa) and suggested that David Boutilier as his father's primary caregiver did not properly look after him in his elderly years.

[60] The applicant also objected to references being made to the testator being heavily medicated and incommunicative while in the hospital or not capable of being understood by reason of the deficits from the stroke he suffered.

[61] Rather than strike inappropriate or irrelevant portions of the affidavits I agreed to hear the evidence of the proponents and deal with the issues in my analysis of the evidence.

[62] Let me first address the issue of medications taken by the testator.

[63] Although inquiries or requests were made of hospital staff by the parties in this proceeding, the hospital did not respond by providing any opinions or details as to medications or treatment. They did not reply to counsel's correspondence. This appears to be a policy of the capital health district, which is reluctant to be involved where the execution of legal documents and competency of a patient could be at issue. In my experience, Capital District Health Authority, will only respond to court order inquiries.

[64] There is therefore no medical evidence before me respecting Allister Franklyn Boutilier's state of medication on July 25, 2010. I will evaluate the evidence of Gregg Yeadon the Boutilier family members in this regard.

[65] Timothy Boutilier testified that he is the eldest of Allister Franklyn Boutilier's children. He saw a lot of his father when he lived in Dartmouth and also came down to Tantallon to help him build his house in 1999-2000. However, Timothy was laid off from his job at the Esso Oil Refinery and went on disability at age 54. He was retired at age 55 and he and his wife both suffered health issues, physical and psychological, so he testified they were not able to devote the time to his dad any longer. He testified that once his dad moved down to Whynachts Point it was David's turn to take over and care for his dad. There was evidence of an altercation/dispute that occurred as Allister Franklyn Boutilier's house neared completion, between Allister Franklyn Boutilier and Timothy, but the reason for the falling out was not explained. But Timothy Boutilier did not see his father from early 2000 to 2014 when he had the stroke, with the exception of his daughter's wedding. Timothy Boutilier explained this absence as "I was having my own problems."

[66] He did testify that David Boutilier called him to tell him of his dad's stroke and that he came to the QEII to visit and later occasionally visited him at the Nova Scotia Rehabilitation Centre, but only very late at night when others would not know that he had been there.

[67] After the stroke, he described his father as having a communication problem, being very weak and unable to read or write.

[68] He testified that three days before Allister Franklyn Boutilier's death he son Dana called and he went to the QEII and was shocked by his appearance. He testified they had no communication, Allister Franklyn Boutilier was fidgety all over, bloated and in his opinion, did not know him. On the afternoon of his death July 26, he testified he did not see Allister Franklyn Boutilier interact with anyone. He testified that Mr. Boutilier had been brighter on Friday, July 24, when family members did speak with him in raised voices to be understood, and put him on SKYPE to have a "visit" with the other family members not in Nova Scotia.

[69] Although Timothy testified his dad only grunted from the time of the stroke and could not be understood, when he did try to speak.

[70] This does not accord with the evidence of Gregg Yeadon, David Boutilier or even Dana Boutilier, Timothy's son.

[71] In my view, Timothy, had been alienated from his father for many years and was shocked by this dad's stroke and did not thereafter engage in meaningful communication with him.

[72] Dana Boutilier, son of Timothy, testified that he kept in touch with his uncle David and his granddad Allister Franklyn Boutilier, despite the estrangement between Timothy and his father. Indeed, he testified he seldom saw his own father Timothy, who was dealing with his own problems.

[73] Dana Boutilier has a vacation rental business and owns properties in Florida which he has run for the past six years. He spends much of his time in Florida, but when he returns to Nova Scotia he always arranged to see his grandfather, with whom he had a close relationship.

[74] He visited him in the earlier days, a couple of times a year in his home in Tantallon and was invited by David to all the family gatherings when then his aunts and uncles came to visit, particularly in the summer.

[75] About one month before the stroke, Dana testified he visited his granddad and took some photos and a video and posted it on Facebook, recalling his granddad would get up and walk, spoke lovingly of all his family and did communicate well, though soft spoken. He described his mental state as being comprehensive.

[76] He testified that after the stroke "he was in a bad way."

[77] By March 2015 Dana Boutilier testified he could only understand about 20 percent of his grandfather's conversation, that he would get exasperated trying to speak, "then he'd chuckle."

[78] On July 25, 2015, Dana described how he had some private time with his grandfather and told him he loved him and would miss him and that "he patted me on the head."

[79] Dana Boutilier described a good relationship with his uncle David and on cross-examination he stated he did not believe David would have pressured his father into leaving him the property.

[80] The other children of Allister Franklyn Boutilier did not testify, with the exception of David Boutilier, the applicant.

[81] From David Boutilier's testimony I understood that he was a good son who enjoyed having his dad live close by at Whynachts Point. He did do outdoor chores for him, but did not intrude on his father in his own home. He did visit once or twice a day. He agreed his dad, fiercely independent, was his own man. He did not always keep a tidy house in his later years, but cleaned it up when his help came.

[82] David arranged through the Department of Veterans Affairs to have the VON come to the house and help him. He looked forward to their visits. He cooked for himself, but David Boutilier and his wife often also brought him meals.

[83] I am satisfied that David Boutilier, who saw his father daily after his stroke could communicate with him quite well, despite his difficulty speaking. He grew accustomed to his deficits and testified that his dad's health was quite stable once he went to reside in the Veterans Affairs' wing of the Abbey Lane.

[84] David Boutilier was going to be trained to deal with this dad's feeding tube so they could take him home for awhile, although he would have returned him to sleep at the veterans' residence.

[85] Before the mishap of the punctured bladder, David took his dad out for drives once or twice a week, sat with him out-of-doors in the Camp Hill flower garden, watched hockey games with him and saw friends together.

[86] After the surgery, David Boutilier says he knew his dad was dying.

[87] He testified that he had never interfered in his father's business, never knew the instructions he gave his lawyer with respect to earlier wills and never even had a key to his house until after he had the stroke and went in the hospital.

[88] He drove his father to do his banking, groceries and other errands when he was still at home. Only after he was resident in Camp Hill did David use his power of attorney, deposit his cheques to the bank and pay his bills.

[89] David Boutilier was the primary caregiver for his father in the last many years of his life and it is my belief that he did this well, without interfering too much with this very elderly and independent man.

[90] With the exception of Timothy, Allister Franklyn Boutilier seemed to have a good relationship with all his other children who visited a few times a year and made frequent calls to keep in touch.

[91] In cross-examination, Ms. Jacklin challenged David Boutilier as to the degree of influence he asserted over his father, whether he was truly unaware of his father's legal affairs and had the opportunity to rifle through his personal belongings at his home.

[92] The respondents have raised what they consider to be issues to "suspicious circumstances."

1. The testator's age and serious illness;
2. The change he made to his will from almost even distribution to wanting David to have his home;
3. The isolation of the testator from his family;
4. His dependence on his son David; and
5. The irregularities in the will document and discrepancies about the property in Gregg Yeadon's notes.

[93] On all the evidence before me I cannot say that suspicious circumstances and/or undue influence are present in this case.

[94] I do not have knowledge of what was in the testator's mind, nor can I. He may have simply wanted to keep his home in the family and not see it sold. He provided generous cash bequests for his other named children. He discussed, if not

debated with Mr. Gregg Yeadon on July 15, 2015, the merits of even distribution among his children and resolved that he wanted David to have his home.

[95] It is true David was his primary caregiver, son, friend and companion, but I do not sense from the evidence before me, he exerted any undue influence over his father.

[96] His father certainly knew what he owned and had over the years expressed his own varying wishes about how he might divide his estate, until he made his final will.

[97] I accept the evidence of Gregg Yeadon, who is an experienced solicitor and knew his client for over 17 years. He did not sense any undue influence being asserted, over Allister Franklyn Boutilier. He believed he knew his mind and understood the dispositions he made. While ill and in very failing health on the day he executed the will, I accept Mr. Yeadon's evidence that Allister Franklyn Boutilier knew his intentions and wanted "to stick with the plan."

[98] Although facing imminent death, I find he had the capacity to execute the will which expressed his choice of dispositions, on July 25, 2015.

[99] His will shall stand.

[100] In the circumstances, I find the Estate and the respondents should bear their own legal costs in this proceeding.

Robertson, J.