

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Wilton v. Koestlmaier*,
2018 BCSC 1257

Date: 20180726
Docket: S162181
Registry: Vancouver

Between:

**Larry Wayne Wilton and Daryl Price Ashley Wilton, Co-Executors of the Will of
Maxine Ruth Wilton, Deceased**

Plaintiffs

And

Elizabeth Nancy Koestlmaier, James Gordon Wilton, Natasha Maxine Wilton

Defendants

Before: The Honourable Madam Justice Loo

Reasons for Judgment

Counsel for the Plaintiffs:

J. Murphy, QC
B. Souza

Counsel for the Defendants:

J. Wingson, QC
L. Donaldson
B. Anderson

Place and Dates of Trial:

Vancouver, B.C.
May 7-11, 2018

Place and Date of Judgment:

Vancouver, B.C.
July 26, 2018

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INTRODUCTION

[1] The plaintiffs seek to prove the validity of Maxine Wilton's second codicil dated September 12, 2006. Mrs. Wilton died in June 2011 at the age of 86. She left an estate with a gross value of \$1,954,281. She has been referred to by her first name Maxine, and I will do likewise.

[2] The plaintiffs Larry Wilton and Daryl Wilton are two of Maxine's sons, and the co-executors of her estate and propounders of her Will. The defendants are children of Maxine's eldest son Roger who predeceased her.

[3] Maxine suffered a stroke on December 29, 2004 and was in Lions Gate Hospital in North Vancouver for a few weeks. The plaintiffs contend that Maxine fully recovered from her stroke and that when she made her second codicil on September 12, 2006, she knew and approved of the contents of the second codicil and had the necessary testamentary capacity.

[4] The defendants allege there are suspicious circumstances which tend to call into question Maxine's testamentary capacity and which show that her free will was "overborne by her dependence on others" in making the second codicil which is a marked departure from her last Will dated February 20, 2003 and confirmed by her first codicil dated January 13, 2005. The defendants argue that the "singular suspicious circumstances" is that when Maxine met with the lawyer William Spohn on September 8, 2006, she brought with her two sheets of paper (which the defendants refer to as "instructions") handwritten by Larry and the instructions are directly reflected in her September 12, 2006 codicil.

HISTORY OF THE PROCEEDINGS

[5] When applying for the grant of probate issued on March 19, 2012, Mr. Spohn inadvertently failed to give the requisite notice to Roger's four children who are named in Maxine's February 2003 Will.

[6] On learning that the grant of probate had been issued three of Roger's children Elizabeth Koestlmaier, James Wilton, and Natasha Wilton filed a petition on

October 25, 2014 seeking an order revoking the grant of probate. On November 5, 2015 Larry and Daryl as co-executors brought an application to strike the petition. The petitioners sought to cross-examine William Spohn on his affidavit and the production of the files of Mr. Spohn and William Bice, QC of the then firm Bull Houser & Tupper, as well as the clinical records of Maxine's treating physician and various hospital records.

[7] Eventually, on February 25, 2016 I ordered that the hearing of the petition be adjourned and that there be a trial to determine the following issues:

- (a) whether the deceased knew and approved of the contents of the second codicil;
- (b) whether the deceased had the requisite testamentary capacity when she executed the second codicil; and
- (c) whether the deceased was acting of her own free volition when she made the second codicil.

[8] It was also ordered that the parties could be examined for discovery, the affidavits filed in support of the petition could be used as direct evidence at trial, and that the deponents could be cross-examined at trial. Mr. Spohn's affidavits, and the transcript of his cross-examination on affidavit formed part of the evidence at trial.

[9] The petitioners are the defendants in this proceeding.

BACKGROUND

[10] To avoid confusion with the same surname, and not out of disrespect, I have and may refer to persons and parties by their given names.

[11] Maxine was born in Ontario in March 1925 and married Calvin Wilton in 1945. They had four sons. Roger was born in 1945, Larry was born in 1947, Mark was born in 1955, and Keith was born in 1957. The family moved from Ontario to British Columbia around 1964 and settled in West Vancouver. A fifth son Daryl was born in 1965.

[12] James Wilton died in 1966, leaving Maxine (who never remarried) with five sons ranging in age from 21 years old to one year old. Roger died in December 1997.

[13] The defendants Elizabeth, James, and Natasha are three of Roger's four children. Roger also has a daughter Iasha Wilton (also known as Iacia Wilton) who I was told is not capable of consenting to be a defendant in this proceeding. Iacia will however be mentioned in these reasons.

[14] Elizabeth and James are the children from Roger's first marriage to Lesley. Natasha and Iacia are the children from Roger's second marriage to Victoria.

[15] Neither Elizabeth nor James recall their parents living together because they separated when they were both very young. Elizabeth and James lived with their mother in Richmond, B.C. and recall visiting their father in Mississauga in the summer.

[16] Natasha says that she knows she lived with her father for the first two years of her life and then with her mother in Abbotsford. She does not know where she lived with her father, but thinks that it was in B.C. Elizabeth says that Natasha lived with her father in Richmond, but when her father moved out of the country Natasha went to live with her mother. Elizabeth says that she and Maxine made "a mission of keeping track" of where Victoria, Natasha and Iacia lived because they kept moving and did not have a stable home life.

[17] When Maxine died on June 5, 2011, she was survived by four sons but her son Mark has since passed away. Maxine is also survived by 14 grandchildren. Larry has two children. Roger, Mark, and Keith each have two children from a first marriage and two children from a second marriage. Daryl has no children.

[18] Larry is described as an executive who lived and worked in Ontario until around 1985, and thereafter, in different places in the United States. He has lived in Florida for many years. Keith also lives in the United States, and only Mark (before he died) and Daryl live in British Columbia.

[19] Turning to Roger's children: James was born on September 8, 1972. Elizabeth was born on October 3, 1974. Natasha was born July 9, 1987. According to Natasha, Iacia is about 5 or 6 years older than her, which means that Iacia was born around 1981 or 1982.

[20] For as long as James, Elizabeth and Natasha can remember, Maxine had a relationship with George Lea who lived next door. George was a widower who was 10 years older than Maxine. They had both lost their spouses and became close to each other. According to Maxine's caregivers, Leonora Gabay and Luista Ayala, George was at Maxine's home every evening to watch television. They went out dancing together, they socialized together, and they often travelled together.

[21] Maxine was variously described as an amazing woman, a remarkable woman, vibrant, fiercely independent, strong willed, quick witted and energetic. She kept in touch by e-mail, when many of her age, would not have a computer or know how to send an e-mail. She had a home in West Vancouver where she lived for 47 years, she managed her company Wilton Investments Ltd. which owned property at one time or other in Hawaii, Kamloops and Whistler. She loved to travel and often travelled to Ontario to visit her family there, including her sister Phyllis, and to Florida to visit Larry and his family. After Maxine could no longer drive, George drove her to wherever she needed to go around town. George was devoted to Maxine and always acted in her best interest.

[22] Maxine made a Will on November 27, 1972. In her 1972 Will she appointed Roger and Larry as the executors and trustee of her estate. The Will provides that her estate was to be divided 15% to Roger, 15% to Larry, 20% to Mark, 20% to Keith, and 30% to Daryl who was then under the age of 19.

[23] Maxine made a Will on January 20, 1999 (which is two years after Roger's death). Under the January 20, 1999 Will she appointed Larry and Mark to be the executors and trustees of her Will. She made a specific bequest of \$5,000 each to James and Elizabeth, and divided the residue of her estate in equal shares among Larry, Mark, Keith, and Daryl. If a son failed to survive her, then his share was to be

given to his child or children equally, and who are alive at her death. The Will left nothing to Natasha or Iacia.

[24] Maxine made her last Will on February 20, 2003. She appointed Larry and Mark to be her executors and trustees, and divided the residue of her estate in equal shares among Larry, Mark, Keith, and Daryl as are alive at her death, "...and one further share for Roger's children namely, James, Elizabeth, Iacia, and Natasha. The Will also provided that if any of her sons or any of Roger's children predeceased her, then his or her share was to be given to his or her child or children alive at her death.

[25] On December 29, 2004 Maxine suffered a stroke and was in Lions Gate Hospital ("LGH") for a few weeks before returning home. On January 13, 2005, two weeks after her stroke, Maxine executed the first codicil to her February 20, 2003 Will. The first codicil changed her executors and trustees from Larry and Mark, to Larry and Daryl. The defendants do not allege that Maxine lacked testamentary capacity to make the first codicil.

[26] Both Maxine's February 20, 2003 Will and her first codicil were prepared by William Bice, Q.C., of the downtown Vancouver law firm then known as Bull Houser & Tupper ("Bull Houser").

[27] The defendants served a notice to admit and the following facts are admitted by the plaintiffs:

- In 2006 Larry talked to Maxine about leaving more of her estate to Mark and Daryl and less to him and Keith because they did not have any present need for money;
- On August 23, 2006 Larry called Bull Houser and told the person he spoke to that he wanted to change to a lawyer closer to Maxine's home;
- On September 5, 2006 Larry phoned Bull Houser about picking up Maxine's documents to put them in a safety deposit box;
- On September 6, 2006 Larry attended the office of Bull Houser and picked up the original copies of Maxine's 2003 Will and first codicil;

- On September 8, 2006, Maxine attended the office of William Spohn, in West Vancouver to make the second codicil to her February 2003 Will;
- When she attend Mr. Spohn's office on September 8, 2006, Maxine brought with her two handwritten sheets of instructions.

[28] The handwritten instructions which to me appear to be more hand-printed than handwritten, read as follows:

8/SEPT/2006
MAXINE WILTON WILL
ESTATE DIVIDED AS FOLLOWS
AMONG MY LIVING SONS
MARK WILTON 27%
DARYL WILTON 27%
KEITH WILTON 23%
LARRY WILTON 23%
IF I OUTLIVE ANY OF
MY SON'S HIS SHARE WILL
GO TO THE OTHER SON'S AS
THAT SON WISHES UNLESS HE HAS KIND.
IF HE HAS KIND IT WILL BE EQUALLY DIVIDED
"M.R. Wilton"

[29] It is plain and obvious on looking at the instructions that the signature M.R. Wilton is different handwriting from the body of the instructions. Larry has no recollection of writing the body of the instructions, but admits that he likely wrote them.

[30] While it might be suggested that there was something suspicious with Larry obtaining Maxine's 2003 Will and first codicil from Bull Housser, he was not the only person who had done so. On January 18, 2005, Mr. Bice wrote to George Lea at 1345 Gordon Avenue, West Vancouver (Maxine's address was 1337 Gordon Avenue) enclosing two copies of Maxine's January 13, 2005 codicil, and stated: "I understand that Mrs. Wilton will be giving further instructions regarding personal items." The logical inference is that George was aware of Maxine's estate planning.

THE EVIDENCE AT TRIAL

[31] At trial, the plaintiffs relied on the affidavit and cross-examination on affidavit transcripts of Mr. Spohn, the affidavit of Paul Dunkin, chartered professional accountant, and the affidavits of Maxine's caregivers Leonora Gabay and Luista Ayala. The plaintiffs also relied on the expert report of Dr. Sandra Wiebe, Maxine's former family physician. Except for Mr. Spohn, each of the witnesses was cross-examined at trial.

[32] Each of the three defendants gave *viva voce* evidence at trial; that is, they gave their direct examination orally, and were cross-examined. The defendants also relied on the expert reports of Dr. John Sloan who consults in geriatrics, and Mr. Jean M. Kovacs, a forensic document examiner. Dr. Sloan was cross-examined. Mr. Kovacs was not required to attend for cross-examination.

[33] Much of the evidence relates to each of the defendant's relationship with Maxine, including how often he or she visited her or were in contact with her. However, there is no legal obligation flowing to or from Maxine and her grandchildren. Maxine could include or exclude her grandchildren from her Will. In that sense the evidence is not relevant. It is however relevant in terms of each of the defendant's observation of their grandmother Maxine, and the issue of whether she had the requisite capacity on September 12, 2006.

THE PLAINTIFFS' WITNESSES

William F. Spohn

[34] Mr. Spohn has been a lawyer since 1983. He practises primarily in the areas of corporate law, real estate, and wills and estates. His wills and estates practise includes preparing wills, administering estates, and applying for probate. His office is in West Vancouver.

[35] Mr. Spohn's first contact with Maxine was through her friend George Lea. Mr. Spohn did not know George personally, but George's son John was a long standing acquaintance of Mr. Spohn's. George brought Maxine to his office on September 8,

2006 and told him that Maxine needed some estate work done and would he help her out. He replied that he could, and then he met with Maxine alone. She gave him a copy of her Will dated February 20, 2003, a first codicil to the Will dated January 13, 2005, and the instructions signed by her.

[36] In accordance with those instructions he prepared a second codicil to the Will, in which Maxine changed the percentages of the residue to her sons, and eliminated a share of residue to the defendants and Iacia. He then met with Maxine again on September 12, 2006 when she signed the second codicil. He had not met or spoken with, or had any communication with any of Maxine's sons prior to or at the time of the signing of the second codicil on September 12, 2006.

[37] Mr. Spohn specifically recalls that Maxine had a "crusty" personality. They chatted generally about her family situation and although he knew that she had sizeable assets, they did not go into that in any detail. Maxine wanted to get down to business. He recalls that she became somewhat irritated with him when he reviewed the codicil with her in detail. She thought that was unnecessary and a waste of time. However, he needed to ensure that she understood that the effect of the codicil would be to disinherit Roger's children. He does not remember Maxine's exact words, but she told him that she understood this and that she wanted to only benefit her then-living sons. Maxine also wanted a power of attorney, which he had prepared and which was also signed on September 12, 2006.

[38] On their meetings in September 2006, Mr. Spohn had no questions or qualms about Maxine's mental competency and no reservations about her signing legal documents. Obtaining a doctors certificate as to Maxine's legal capacity never crossed his mind since she appeared to be functioning completely normally mentally and was certain of what she wanted.

[39] To the best of Mr. Spohn's recollection, Maxine did not discuss with him in September 2006 anything about her company or corporate reorganization. However in late 2006 and early 2007, he dealt with Daryl regarding corporate matters, including bringing the corporate minute book up to date with resolutions and the like,

which were needed by the accountants, and also replacing Maxine as a director with Larry and Daryl. He sent documents to Daryl for signature and received them back, including Maxine's resignation as a director, apparently signed by her.

[40] Mr. Spohn was advised in the summer of 2011 that Maxine had passed away. He accepted a retainer from Larry and Daryl to handle Maxine's estate matters, including dealing with accountants, handling the legal side of corporate issues and the sale of Maxine's house, and preparing the documents to obtain a grant of letters probate of the 2003 Will and the two codicils of 2005 and 2006. It was a simple oversight on the part of his office that notices were not sent to Roger's children. Since original documents could not be found, he remembers gathering additional evidence in support of an application to allow copies to be admitted to probate. He believes that the oversight regarding notices to the intestate heirs occurred because it was not certain that a copy of the Will would be probated, which it ultimately was, rather than going through the administration process.

[41] Mr. Spohn was cross-examined on his affidavit on January 20, 2016. He gave this evidence concerning Maxine's capacity when he met with her on September 8 and 12, 2006:

Q69 Please describe her from what you recall during this meeting. What impression did you get of Mrs. Wilton?

A69 She was a lady in her early 80s. She may have had a cane, I'm not sure, but was certainly mobile. And I don't recall what she looked like. I recall my discussions with her but, other than that, I can't specify.

Q70 Okay. Were you aware at that time, when you first met her, that she had had a stroke at the end of December 2004?

A70 I don't recall being told that.

Q71 Okay. And do you recall what her speech was like?

A71 She could speak without difficulty.

Q72 Okay. There wasn't any slurring of speech or –

A72 Not that I recall, no.

Q73 Okay. Do you know who made the appointment for Mrs. Wilton?

A73 George Lea.

Q74 Okay. And who is George Lea?

- A74 He's a gentleman who also lives in West Vancouver and he was the father of a school friend of mine.
- Q87 All right. And we're now January 20, 2016, and you're saying that you recall Mr. Lea bringing her to your office?
- A87 That's correct.
- Q88 Now, what has caused your recollection to improve?
- A88 I located my appointment books which I had thought might have been thrown out.
- Q98 And so he brings her in, and tell me what happens after that.
- A98 He introduced her to me – I gathered they were friends – and he told me she needed to – or wished to do some estate work and could I help her out. I said yes. And I don't recall any other discussion with Mr. Lea. And then I met with her alone.
- Q106 -- ... So, other than what you have in those notes, do you have any independent recollection of your meeting on September 8, 2006, with Mrs. Wilton?
- A106 Yes.
- Q107 Okay.
- A107 She brought a note of what she wanted me to do and we went over that.
- Q108 Okay. So tell me what you recall apart from the note itself. So I'm asking you for your recollection, not for what's on paper.
- A108 Okay. Well, I went over the note and talked to her about it, and I also questioned her on assets and things, and she took a bit of umbrage at that, which happens with the elderly sometimes. And it was at that point I was asking her about where her family was, who they were, what sort of assets did she have, where did she live, that sort of thing.
- Q109 And what did she say?
- A109 She named all of her sons. She and Mr. Lea had brought in her will – her existing will and codicil, which I read, and so I asked where all of these beneficiaries were, and when they saw them last and that sort of thing, to see if her mental acuity was sufficient, and I didn't see any problems with that, and --
- [42] On his discussion with Maxine regarding her assets, Mr. Spohn testified:
- Q112 Okay. So when you asked her about her assets, you said she took umbrage, so tell me some more about that discussion.
- A112 I asked her about her house in West Van. There was no problem with that. I asked her whether she had business-interest bank accounts.
- Q113 And what did she say?

A113 And she said yes, she did. I asked her was she sure that she wanted to do what the notes [the instructions] said she wanted to do, and that's when she took umbrage and -- I can't give you her exact words, but she said, well, of course I did; that's why I came in here. She didn't like being questioned.

Q114 Okay. So did you ask her how much money she had in the bank?

A114 No.

Q115 Did you ask her what was the value of her home in West Vancouver?

A115 No. It wasn't really necessary. I live in West Van.

Q116 Okay.

A116 I have a general idea of what real estate is worth there.

Q117 So what idea did you have regarding the value of her house in West Vancouver?

A117 Back in 2006, in the area she was in, it would have been in \$6-, \$700,000 range, normally.

Q118 And did you discuss that with her, that her house was worth about \$6- or \$700,000?

A118 No, I don't recall --

Q119 Okay.

A119 -- discussing that specifically.

Q120 Did you discuss with her whether she owned other property at her meeting in 2006?

A120 I don't recall specifically asking her about other real estate.

Q121 Okay. And --

A121 Although it would have been one of the normal questions I ask.

Q122 But in this case she took umbrage and didn't like being questioned?

A122 Well, she took umbrage at me asking specifics --

Q123 Yes.

A123 -- like, you know, what's the size of your bank account?

Q124 Right. Right.

A124 She didn't take umbrage about answering that, yes, she had some sort of investments.

Q125 Okay.

A125 It was the amount, I think, that was the problem for her.

Q127 And you didn't have an appreciation of Mrs. Wilton's knowledge of the exact value of her assets at that time?

A127 Did I know that she knew about her assets? Yes. Did I know that she knew to the dollar their value? No.

Q128 Okay. And you didn't discuss with her even generally what was the cumulative value of her assets?

A128 No.

[43] Mr. Spohn questioned Maxine about the reasons why she wanted to change from an equal to an unequal distribution for her sons, and why she wanted to revoke the gift to Roger's children:

Q192 Okay. And you then met with her again on September 12, 2006, which is the date that she signed the codicil.

A192 That's right.

Q193 And what do you recall of your discussions with her on that date?

A193 I showed her the draft codicil and spoke with her about exactly what she was doing. She was removing Roger's children, it's plain from the codicil, because it cites the entire clause that she was revoking and the new clause that she was putting in, and the changes were revoking the gift to Roger's children and going from equal shares on the other four to unequal shares, and I discussed with her whether that was exactly what she wanted and why she thought that should happen.

Q194 And what did she say?

A194 She indicated that she felt that two out of the four sons had more need and that that's why she wanted to skew the distribution that way.

Q195 Now, are you having a specific recollection that discussion with her --

A195 Yeah.

Q196 -- or is this from what you gathered while you were administering the estate?

A196 No, no, I remember that discussion.

Q197 Okay.

A197 Now let me just think. Yeah, she told me she had good reason for wanting to make it slightly unequal.

Q200 And what about --

A200 -- anything else.

Q201 -- the cutting out of Roger's children? What discussion did you have about that?

A201 I just asked her if she was sure she wanted to do that, and she said -- again, I can't quote exact words -- she said, I'm concerned with my living sons, my living children.

Q210 Yes.

A210 No, I didn't get any impression that she had any antipathy for the people who were being removed.

- Q211 Right.
- A211 I think her focus had changed.
- Q212 Okay. Did you discuss with her why she made such a change?
- A212 And she said that she was concerned about her living kids.
- Q347 Okay. So, Mr. Spohn, you recognize in this first sheet of exhibit 7 [the instructions] as the document that Mrs. Wilton brought to her first meeting with you in September 2006?
- A347 That's correct.
- Q348 Okay. And at the bottom it says -- it has "M.R. Wilton." Did she sign that in your presence?
- A348 No.
- Q349 Okay. So she came in with the document --
- A349 Yes.
- Q350 -- already signed?
- A350 Yes.
- Q353 Okay. Now, tell me about your discussion with Mrs. Wilton about this document.
- A353 Well, it was the starting point for the discussion about what she wanted in her codicil, and as I think I said previously, she wanted to amend the proportions that she was giving to her living sons and, plain reading, indicates that she wanted everything to go to just them, revoking the gift to her deceased son, and I asked her that and she said, yes --
- Q354 Okay.
- A354 -- I'm concerned with my living sons, or something to that effect.
- Q355 So you have a specific recollection of that, or are you just --
- A355 No, I do, because she got angry with me.
- Q356 Okay. Tell me about that.
- A356 She just got, yeah, I don't know, huffy about that. She was a pretty strong personality.
- Q357 She got angry about you prying?
- A357 I don't know that this was prying. It was more along the lines of, I put down what I want; why won't you listen to me; I meant what I said.
- Q358 Okay, but you --
- A358 I don't know that it was prying. Like, the implication there is something different.
- Q359 Right. But you recognize that this wasn't Mrs. Wilton's handwriting?
- A359 Yes.

- Q360 Okay. And you actually have said that it's unusual for someone to come in with --
- A360 That's correct. They're --
- Q361 -- handwritten instruction.
- A361 -- not usually that organized
- Q369 Okay. And I just want to confirm, I think you've already said this, you didn't ask her who wrote the note?
- A369 That's correct.
- Q370 Okay. Now, did you not ask these things because she was a bit crusty and wasn't receptive to you asking such questions?
- A370 No, I did ask her about her assets and things, and she was crusty, but I didn't ask her about this [ask her who wrote the instructions] because it was her clear intention -- and she confirmed it to me explicitly -- that her estate go to her living sons.
- Q373 Right.
- A373 -- and she had indicated she had other assets. As far as her relationship with the other people, I didn't ask her if she like Mark more than she like Keith or whatever. I said, are you sure this is exactly what you want to do; you're removing people who were in before and you're focusing on these people? And she said yes.
- Q380 Thank you.
- Now, on exhibit 7 [the instructions], there is written there that if she outlives any of her sons, "his share will go to the other son's [sic] as that son wishes unless he has kind." Did you talk to her about what that meant?
- A380 I assumed that somebody had written it out for her and that it was just a basis for explaining what the division would be, so, no, I didn't ask her what she thought that meant.
- Q381 Okay.
- A381 I asked her if she was sure she wanted those percentages, if she was sure she wanted her estate to go to just those four, if she was sure that if one of them died, the share that that son would have taken should go to his children, and she said yes.
- Q382 Now, are you recalling those specific details of your discussion with her, particularly your discussion --
- A382 Yeah.
- Q383 Let me finish.
- A383 Sorry.
- Q384 -- particularly -- what I'm asking about, your discussion with her about "if I outlive any of my son's [sic]" -- are you recalling that discussion with her or are you just taking it what would have been on the sheet you would have discussed with her?

A384 No, I already told you that I asked her about the gift to Roger's kids and she indicated that that wasn't to be in there anymore.

[Underlining added]

Paul Dunkin

[44] Paul Dunkin has been in the accounting profession for approximately 22 years. He is an associate with the firm Shannon and Company, where Maxine and her company Wilton General Investments Ltd. were clients from 2003 until her death and the dissolution of her company.

[45] Between 2003 and November, 2006 Mr. Dunkin met with the Maxine eight to ten times for either personal or company tax matters. Most of the time he met with Maxine alone, but on rare occasions Larry came with her. She was usually accompanied to the office by George.

[46] At first, Maxine appeared completely 'normal' to him physically. At some point in the middle of their relationship she appeared to have had a small stroke, and after that when she came to his office, she moved slower and used a cane. That was the only obvious physical impediment that he observed.

[47] At all times during their business relationship, Maxine spoke well and Mr. Dunkin never had any difficulty understanding her speech or conversing with her. Her speech did not change to his observation, and it remained as it had always been.

[48] Mr. Dunkin did notice however that mid-way during their relationship Maxine's signature became more shaky. He witnessed her signing many, many documents over their roughly three-year relationship. Initially her signature appeared normal, but for the last year or more, up until he stopped seeing her, her signature was not as strong and sometimes it was not well placed on the page.

[49] There were some difficult tax issues facing Maxine and her company over that three year period, and Mr. Dunkin took instruction from Maxine alone. At no time did he ever have reason to question her mental competency and at no time did it

ever occur to him to 'bring in' one of her sons to assist with her affairs. Maxine was always sharp and clear in her dealings with him. To the best of his observation, Maxine's mental functioning never changed during the period in which he dealt with her.

[50] Apart from Mr. Dunkin's meetings with Maxine, documents were routinely sent from his office to her for review or information. He never had any reason to question this practice and at no time did he think she would not be able to read and understand them in his absence, or to follow directions for the return of signed documents, and the like.

[51] Mr. Dunkin remembers Maxine clearly. She was an elderly woman but completely reasonable, rational, intelligent and in control with respect to her affairs. She was a bit of an 'oddy' in that she liked to come in regularly and personally, and she and her boyfriend George were a very 'cute' elderly couple who made an impression.

[52] Maxine's company owned what appears to have been commercial property in Kamloops. The company sold the property by way of an agreement for sale pursuant to which the company received the down payment, and the sale price was paid in an amount each year until December 2006 when the full purchase price and interest was paid. Mr. Dunkin explained that structuring the sale in this manner deferred taxes until the company received the full amount of the purchase price.

[53] Mr. Dunkin was cross-examined on two handwritten entries that he made in his client notes forms dated May 18, 2006 and June 20, 2006. The May 18, 2006 entry reads:

wants to pay out mortgage early (June/July) – due in Dec. 06

Call Monica – get details

Should there be penalty for early payout?

What should she do with \$600k +

May 25/06

Larry (son) will be here in mid June.

Maxine will talk with him first

[54] The June 20, 2006 entry, when both Maxine and Larry met with Mr. Dunkin, reads:

Larry indicated that the original agreement does not have an early payout clause so he thinks Maxine should just wait until December for the final payment

Could we work out what the final payment should be?

Any tax owing? – NO

How to get money out of company?

dividends – taxable

capital dividends – no tax

[55] It appears that the last two or three lines may have been written by Mr. Dunkin on June 31, 2006 or September 1, 2006. Those dates appear to the right under a column headed “Follow Up”.

[56] In cross-examination he testified that at some point he could tell that Maxine had suffered a stroke because she used a walker or a cane (he cannot recall which), her once “quite firm” signature “was much shakier than it used to be”, became progressively worse, and “her speech was a bit slower than it was before”.

[57] Mr. Dunkin was challenged many times on whether Maxine had a “small stroke”, and whether he had difficulty understanding her. With respect to the phrase “small stroke”, he testified that he was not a medical expert, but if someone had a severe stroke, they would probably be completely disabled and in bed.

[58] In cross-examination it was suggested that it was more difficult for him to communicate with Maxine after her stroke, but he did not resile from his position that what he deposed to in his affidavit in 2015 is what his recollection was at the time: Maxine spoke a bit slower than she used to speak, but he understood what she was saying to him.

Leonora Gabay

[59] Leonora Gabay was Maxine's caregiver from August 2006 until her death in June 2011. Ms. Gabay is 61 years old. She came to Canada in 1988 and was initially a nanny but then from 1996 until 2006 she cared for an elderly lady. In August 2006 Larry who was in Vancouver at the time, contacted her and interviewed her for the position of part-time home help for Maxine. Ms. Gabay started work right away and went to Maxine's home twice a week for three hours a day. That quickly became three days a week and by the time Maxine left for Florida at the end of October 2006 Ms. Gabay was working for Maxine five days a week.

[60] When she was hired, Maxine was using a walker. She needed certain household help and help with some personal care. Her balance was not perfect. For safety reasons, Ms. Gabay was there when she was in the shower. Maxine had a chair in the shower and Ms. Gabay helped her bath, washed her hair and cut her toe nails. She also tidied up the house, changed the bed, did the laundry and periodically prepared Maxine's dinner on the days she was there. She basically had a few routine things to do, and if there was time, Maxine might ask her to do something extra. She was Maxine's only help.

[61] During August, September and October 2006 until Maxine went to Florida, Ms. Gabay saw that Maxine was independent except for the things she did for her. Maxine drove her car, went shopping with George and went into her garden. She sometimes went to get her hair done at a hairdressers. With respect to driving her car, it was usual for Maxine to drive leaving her home with George in the front seat beside her, and then for George to drive home with Maxine beside him. She saw this many times. Maxine was totally clear mentally, very chatty and they talked a lot. Maxine was interested in Ms. Gabay's family, whether she liked her job, and whether she was happy. Maxine really enjoyed people and visiting. They talked about what was on the news and she had her own thoughts on that. Maxine loved soap operas on TV ("As the World Turns" and "Young and the Restless") and they talked about those shows. Apart from walking and balance issues, Maxine was fine physically at that time. She used a cane in the house and a walker if she went out.

[62] Maxine was sometimes demanding but always in control. While always pleasant, she could be critical of how Ms. Gabay watered the plants, how she folded or put away clothes, and which towels to put out. This was largely non-verbal but she let you know she was not pleased, by how she looked. There were never any cross words and Ms. Gabay was treated very well. Maxine had a great sense of humour and they laughed together at silly things. She knew exactly what she wanted and what she (and others) were doing.

[63] Maxine did not talk a lot about her family but she did tell Ms. Gabay what her children and sisters were doing. If Ms. Gabay asked Maxine about her grandchildren she said nothing negative, but would shake her head from side to side, get a tight look on her face and look down. Ms. Gabay recognized this as signs of displeasure. She was especially disappointed in Natasha who Maxine said used to live with her and went for holidays with her but now Natasha did not phone or visit.

[64] During this period in August, September and October 2006, Maxine chose her own clothes and dressed herself, fed herself and prepared her own meals except if Ms. Gabay made something for her dinner on the days she was there. She liked her garden. She used the toilet independently. She saw no signs that Maxine had a small stroke before she knew her. During all the time she knew Maxine until her death, she always felt that she was normal mentally.

[65] In October 2006 Maxine and George left on a trip to Florida to see Larry and his family, and then they were going to Ontario to visit Maxine's family. But Ms. Gabay was told by George that she had a stroke in Ontario. Daryl brought her home by airplane and they came straight home from the airport. Maxine stayed at the house for about a week and Daryl and Ms. Gabay looked after her. The doctor and nurses came, and then Maxine was taken to Lions Gate Hospital.

[66] Maxine was in the hospital for about a month and then spent about three months at Evergreen House (a residential care facility near or adjacent to Lions Gate Hospital). Ms. Gabay visited her seven days a week, every single day; Daryl and Larry wanted Maxine to have someone familiar visiting her. Maxine always appeared

happy to see Ms. Gabay and she had no doubt that Maxine knew who she was. Maxine had a feeding tube for several months which made it hard for her to talk. But she would make sounds, move her head and say 'yes' or 'no' but not clearly. When Maxine saw Ms. Gabay coming, she raised her arm a bit and tried to wave.

[67] In about March 2007, Maxine came home and Ms. Gabay worked eight hours a day for her. She could not be left alone and others came when she was not there. She was not mobile and needed full time care. She came home with the feeding tube which made talking difficult for her but Ms. Gabay spoke to her and always knew Maxine understood by her responses. Maxine could answer with moving her head or making sounds and 'yes / no'. After several months, the feeding tube came out and life became easier for Maxine. She began to feed herself although slowly.

[68] For exercise and giving her control, Maxine fed herself until she became too tired. She got out of bed with assistance and into a wheelchair. She was talking better and would let Ms. Gabay know which plants to water, or if she needed changing (she wore diapers) or if she wanted tea etc. Maxine knew exactly what she wanted. Ms. Gabay felt that Maxine's mind was clear as it always had been. She loved her TV shows. She loved having visitors and became animated. She was able, with effort and softly, to make conversation. When she got tired she said "I want bed/sleep". She had several visitors come from the church and one of them came about twice a week.

[69] In May 2007 Daryl hired Luisita Ayala to share days and nights with Ms. Gabay, and Ms. Gabay dropped back to working 3 ½ days a week. Ms. Gabay and Ms. Ayla shared 24/7 care of Maxine by working 3.5 days each. Except for the half-day, they worked 24 hour shifts and slept at Maxine's home. It stayed that way until Maxine died.

[70] Maxine loved attention and was pleased to have visitors or receive calls. After the feeding tube came out and she got stronger, she held the phone herself until she got tired and then Ms. Gabay would hold the phone to her ear for her. She gave all appearances of following the conversation and responding by sounds or soft words.

Larry called at least once a week and Daryl came twice a month. From 2007 until her death in 2011, and during Ms. Gabay's work days, Maxine rarely received phone calls from her grandchildren. She estimates maybe once or twice per year. She recalled that on a couple of occasions, Elizabeth said she was coming with her children to visit and then never showed up.

[71] Ms. Gabay remembers in 2007 when Maxine first came home, she still had the feeding tube. She was preparing a meal in the kitchen and George came in Maxine got jealous when she was joking with George. She was not happy at that and said to her "you kissed George". She thought Maxine could talk more clearly when she really wanted.

[72] James used to come by periodically to pick up the keys for the Whistler cabin. Most of the time, Ms. Gabay saw him go around to the downstairs door, take the keys and leave without coming upstairs to visit Maxine. Maxine would either see him from the front window where she sat in her wheelchair, or she would hear him. She got upset if James did not come up to say hello, which he rarely did, and if he did, the visit would be only a couple of minutes.

[73] In the five years Ms. Gabay worked for Maxine, she estimates that she saw Elizabeth maybe three times in total, James more often because of the keys but he visited Maxine briefly just three or four times, and Natasha she saw three times at the very most.

[74] Ms. Gabay saw Larry visit Maxine every two or three months. Daryl came very often and called a few times a month.

[75] After her recovery in 2007 and her feeding tube came out, Maxine could answer her callers, softly and slowly, and for not too long. Her family in Toronto called regularly. Her sister Phyllis came out every spring to visit for five or six days and stayed at Maxine's. This was after 2007 when Maxine was home, and every spring until Maxine died.

[76] In May 2008 Maxine had the idea that she would like to go on a cruise. Her passport had expired, so Ms. Gabay took her in her wheelchair to get photographs done. Maxine thought that she could do a cruise if Ms. Ayala and Ms. Gabay were there to take care of her. The cruise never happened but she got pleasure out of thinking about it and planning for it.

[77] Maxine was from time to time a bit forgetful but Ms. Gabay never saw her mind not good. She knew what she wanted and how to ask for it. She loved calls and visitors and always knew who was calling or visiting. On her 85 birthday in 2010 both Ms. Ayala and Ms. Gabay were at the little party put on at her house by Larry and Daryl. Larry and his wife, Daryl and his wife, Dave (a friend of Larry's) and his wife were there, but no one else to her recollection except perhaps George or a sister. Maxine got lots of birthday cards which Ms. Gabay opened for her. Maxine read the cards herself. Ms. Gabay then arranged the cards for Maxine to look at and enjoy.

[78] Ms. Gabay does not recall Maxine discussing her Will with her. The only thing she remembers is that on a couple of occasions, Maxine told her that her ring was going to go to Elizabeth because she was the first girl.

[79] In summary, Ms. Gabay's direct evidence is that she had no doubt that during the time she worked for Maxine from 2006 until 2011, she knew Maxine well. She always felt that Maxine knew what was going on around her, knew what she wanted, had her own opinions, and that while her body was failing her, her mind remained sharp and clear. Ms. Gabay cannot recall Maxine ever being confused, talking silly or getting things mixed up.

[80] It was Ms. Gabay's job to look after Maxine but she loved her and thought Maxine loved her too. She wanted Maxine to be happy and did all she could to get her to laugh. She made sure she dressed nicely and her hair and nails were done. Maxine liked to look nice – it was important to her.

[81] Ms. Gabay's evidence was not shaken on cross-examination. She was asked many questions relating to Maxine's relationship with her grandchildren, such as whether Elizabeth, James, and Natasha were the only grandchildren to visit Maxine, whether Maxine talked to Ms. Gabay about her grandchildren, whether she loved her grandchildren or said bad things about anyone, but none of that is relevant to the central issue.

[82] When asked about her statement that from time to time Maxine was a bit forgetful, Ms. Gabay replied "Yes, but she knows exactly what's going on in the house".

Luista Ayala

[83] Ms. Ayala is 55 years old. She came to Canada in 1987. She was initially a nanny for a couple of years but then took a caregivers course, and from the early 1990's to date she has been a caregiver. She works for a business and also has private clients.

[84] When Ms. Ayala started work for Maxine in May 2007, she was at home but her physical functioning was not good. She had a feeding tube, could barely talk, and was difficult to understand. When she tried to talk, she tired very quickly. Ms. Ayala believed then and now that she was still clear mentally. If she asked Maxine something she would reply by making a sound, moving her head or saying 'no' or 'yes'.

[85] Things got better for Maxine around the end of the summer or early fall when the feeding tube was removed. After that she could feed herself with a spoon, sit up in her wheelchair and talk better. She made her wants clear by asking, although her speech was slow and soft, and you had to bend down to listen. Most of the time Ms. Ayala helped by asking Maxine questions and then Maxine could nod or shake her head and speak just a little.

[86] Maxine liked having visitors and would perk up when people came. Larry came from Florida regularly and Daryl from Vancouver Island more often. Both of

them phoned regularly. Maxine could hold the phone for a little while and talk on the phone until she got tired. Her family called from Ontario and that pleased her. Her sister Phyllis came out to visit and stayed at the house each year for about a week. She heard Phyllis and Maxine talking a lot about the old days.

[87] Ms. Ayala cannot remember any of Maxine's grandchildren calling her on the phone except one of them called on Mother's Day one year. Ms. Ayala never met Natasha. She did not see Elizabeth at all in 2007 or 2008 and believed she saw her and her family once in 2009 and 2010 but not in 2011, the year Maxine died. James came to the house from time to time to pick up the key to the Whistler cabin, but he rarely came upstairs to see Maxine. Maxine got upset if she saw James come to the house but did not come to say hello. She got a tight look on her face, closed her eyes and put her head down. Ms. Ayala never saw any of the grandchildren take Maxine out or bring her food or a treat.

[88] Maxine liked to go out in her wheelchair and from 2008 onwards, Ms. Gabay would go to Maxine's on her day off and she and Ms. Ayala took Maxine to Ambleside Beach and walked along to Park Royal. The three of them would have lunch at Park Royal and then take a taxi home. Maxine told them what she wanted from the menu and she fed herself. These outings happened two or three times a month, if the weather was good.

[89] Ms. Ayala remembers Maxine's 85 birthday party at her house. She does not recall any of Maxine's grandchildren phoning Maxine that day.

[90] Ms. Ayala never knew Maxine to be not well mentally. She knew what she wanted. She loved calls and visits and enjoyed having a conversation, even though her side of talking was difficult for her. But she understood and replied. To understand her, you had to put an ear down towards her face. She liked being taken out of bed and sitting by the front window. She would do her best to ask for what she wanted. She could tell Ms. Ayala if she was wet. She asked for tea or a snack. She could feed herself simply. If she was upset, Ms. Ayala could see it on her face and

then Maxine smiled and seemed grateful if she tried to make it better. Her mobility and speech were not good but there was nothing wrong with her mind.

[91] Ms. Ayala's evidence was also not shaken on cross-examination. She too was asked questions relating to which grandchildren visited Maxine, but she never contradicted herself. Ms. Ayala never found Maxine "a bit forgetful" or unable to understand. She might miss things if people were talking too fast, but that happens to many people who have full mental functioning.

Laurie Howe

[92] Laurie Howe who lives in Appin, Ontario is Maxine's nephew. He is the son of Maxine's sister Dorothy. Mr. Howe was not required by the defendants to attend trial and be cross-examined on his affidavit. It is agreed that Mr. Howe did not discuss with Maxine her financial affairs, her estate planning, her Will or codicils, or what would happen to her assets after her death.

[93] Maxine had an extended family in Ontario and she visited Ontario every couple of years. Routinely, the family had at least one get-together for her, with as many siblings, nieces and nephews attending as possible. Mr. Howe attended most if not all of these parties, and feels that he was thus well acquainted with Maxine.

[94] In mid to late August 2006 at Maxine's invitation, Mr. Howe and his two daughters flew from London, Ontario to Vancouver to spend a week visiting Maxine and sightseeing. His cousin Larry picked them up at the airport and drove them to Maxine's house. They stayed at Maxine's house except when they went to Vancouver Island for a couple of days. While at Maxine's, she made them breakfast every morning, and they went out for lunch and dinner since they did not want to be tied to going back to West Vancouver to eat. Their days were filled with sightseeing. Maxine herself had planned out their itineraries for each day, and they were very full days. They were usually out of the house by 8:00 in the morning and usually did not return until after dinner.

[95] George was always with them, and he drove them around in his car, with Maxine in the front seat. She went everywhere that Mr. Howe and his daughters

went for the most part and although she was tired by the end of the day, he never saw her take an afternoon nap. Mr. Howe recalls that the day they arrived, Maxine was eager to show them her back garden and in particular some tree or trees that were special to her. She walked with a cane but from time to time when they were out and about, she used a walker. With her cane or walker she was fully mobile.

[96] The following is a photo of the five of them (Mr. Howe, his two daughters, Maxine, and George) taken during that visit.



[97] Mr. Howe remembers going to the Capilano Suspension Bridge, Stanley Park, Whistler, downtown Vancouver, Gastown, Ambleside and to Larry's apartment on the water. Maxine wanted to show them where her husband Cal was buried in North Vancouver and they walked around the cemetery. The five of them went everywhere together and were together for meals. When they went to Whistler, Maxine and George stayed in the village or at Maxine's cabin while he and the girls went up the mountain. Maxine told them to take all the time they wanted since she and George would poke around the village or have a cup of tea.

[98] They all went to Vancouver Island to visit his cousin Daryl and his lady friend. Maxine made all the arrangements for the trip. She and George went with them and George drove. Maxine wanted him and the girls to get out on the water and do some fishing, and this was arranged with Brian who was a friend of Daryl's. Maxine and

George did not come with them on the boat, but he and the girls went out on Brian's boat and they caught some fish. Daryl barbequed the fish that evening for dinner.

[99] The following is a photo of everyone that evening sitting outside Daryl's house having dinner (Maxine is the third person from the left and wearing white).



[100] In August 2006 Maxine was "on top of the world". She was lively and animated and very talkative. She told him and the girls all sorts of family history, and was interested in their lives and activities as well. Mr. Howe is absolutely certain that she was one hundred percent normal mentally. There was no slurring of speech, no searching for words in conversation, her voice was strong and she did not lose track of what she was saying. She spoke well and there was no 'foolish' talk. Her thought processes appeared completely normal. She was always a perfect lady with no inappropriate behavior or talk. He saw no change in her from the Maxine that he had always known, except for the walking aide.

[101] When it was time for Mr. Howe and the girls to leave BC, Maxine with George driving took them to the airport and Mr. Howe never saw Maxine again.

Dr. Sandra L. Wiebe

[102] Dr. Wiebe was Maxine's family practitioner from 2000 until April 2007 when her care was transferred to Dr. Garry Jenkins. Despite efforts, Dr. Wiebe's clinical records cannot be located but Dr. Wiebe relied on her recall and other records including the documents provided by Continuum Medical Clinic (150 pages) and Lions Gate Hospital documents (566 pages). Most if not all of the consultation reports in Lions Gate Hospital's files were seen by Dr. Wiebe at or around the time they were written because she was copied on the reports, and her offices were at Lions Gate Hospital. In her affidavit, Dr. Wiebe deposes:

I was responsible for Maxine Ruth Wilton's medical care needs both in the community and during her admissions to Lions Gate Hospital as a full service family practitioner from 2000 – 2007. On April 18, 2007 she transferred her care to Dr. Garry R. Jenkins after a significant CVA (cerebral vascular accident) in November 2006. Dr. Jenkins assumed her medical care needs with her being more homebound and requiring house calls in the community after this significant physical disability with this CVA.

My qualifications include a Master in Science from the University of Manitoba in 1981 followed by my Medical degree in 1987 also at the University of Manitoba. Followed by a residency program in Family Practice at St. Boniface Hospital until 1988. Upon graduation, I moved to Toronto area where I worked as an emergency physician until 1992. In 1992, I moved to North Vancouver and established my family practice from Lions Gate Hospital where I have worked full time to the present date. I currently work with many of the same specialists who have consulted on Maxine Ruth Wilton's mental wellbeing and capability. Furthermore, the nursing team; occupational therapy; physiotherapy; social worker and other health support workers who work in a multi-disciplinary capacity for VCH (Vancouver Coastal Health) are well known to me both in the community and in the hospital. They have served an active and integral part in Maxine's health care, particularly post stroke(s) and have been instrumental in documenting Maxine's cognitive health. The detailed multi-disciplinary documentation by the above named professionals is in the hospital records. I have reviewed the above stated records between the years 2000 and 200[7] to support my opinion about Maxine's mental and cognitive ability to make a decision about her financial affairs in September 2006.

...

Maxine Ruth Wilton, (prior to transferring her care in April 2007) well known to me in my family practice is remembered by her very pleasant strong willed, socially engaging and independent personality. She really enjoyed life with her friend George despite the strokes (minor TIA in 2002 and CVA's in 2004, 2005 and November 2006) that she suffered which certainly challenged her physical well being. She was determined to travel to Hawaii and to visit her family in Ontario even after her November 2006 stroke. Her physical and

mental will was strong and matched her cognitive ability to make decisions about her life.

Maxine Ruth Wilton required physical care and support to conduct her affairs after her first major stroke in December 2004. At this time, she was admitted to Lions Gate Hospital under my care which was supported by the neurologists Dr. Vance Makin and Dr. John Stewart. Both neurologists were in agreement that she had suffered a left MCA (middle cerebral artery) stroke. This stroke was associated with physical impairment of dysarthria and word finding problems with right upper extremity strength and balance disability but without detected cognitive impairment. A MMSE (mental status exam) performed by the occupational therapy team was excellent for age with a score of 26/30. As with her subsequent strokes, it is important to note that patients with speech impediments post stroke are often assumed to have associated cognitive impairment when their speech is slurred or soft and they cannot get out the words for communication. This is considered medically to be expressive speech change (dysphasia) with decreased intelligibility and should not be confused with receptive dysphasia and cognitive impairment. Maxine Ruth Wilton rehabilitated well from this stroke as documented in the inter-disciplinary notes in the hospital records which I have reviewed carefully.

... At no time in her many medical history reviews was there a history of cognitive impairment or dementia. Moreover, mild depression was well controlled with a serotonin agent and was not agitated or associated with confusion or mental impairment. In my opinion, she suffered more from mild emotional liability than from her physical disabilities which impacted her independence and her ability to live a full and active life.

To the best of my knowledge and based on the medical documentation, Maxine Ruth Wilton's medical status was stable up until her stroke in November 2006 and well past the time of date she changed her will in September 2006. Dr. ... It is important to document the subsequent course in 2006 and 2007 because there is clear documentation that despite another major stroke in November 2006, she remained cognitively intact. Unfortunately for this woman, she suffered additional significant physical disability with this CVA.

On December 2nd 2006, (page 118) Dr. Sherril Purves, a neurologist, diagnosed a right MCA stroke involving the pons with dysarthria, dysphagia, and a left hemiparesis. These are physical impairments; namely with speech difficulty, difficulty swallowing and left-sided sensory and motor weakness, respectively. She was aroused over a four day period and became alert and able to clearly advocate that she did not want to be in extended care.

...

On December 18, 2006, Dr. Deviana Maher, (page 116) a very skilled geriatric specialist, who specializes in elder patient cognitive function, did not document a significant effect of this stroke on her mental function. She was described in December 2006 as being alert and oriented but requiring total physical care. Up to and including her neurological rehabilitation which extended into 2007, Maxine was rehabilitated for the above noted physical impairments and not for cognitive decline. Incidentally, she did require a PEG

gastroscopy tube for feeding to bypass swallowing difficulty. She was capable of the decision making and consent around this tube placement by Dr. Richard Lewis (page 3).

Further review of Maxine Ruth Wilton's medical hospital record in December 2007 under now Dr. Jenkins medical care further substantiated by multi-disciplinary health professional assessments at Lions Gate Hospital and Evergreen Hospital concluded that Maxine Ruth Wilton was oriented, alert and with able thought processes.

Finally, in response to the question asked of me to provide a medical opinion concerning Maxine Ruth Wilton's medical capability in November [September] 2006. I am of the opinion that she was mentally capable of making a decision to change her will. There simply is no evidence to support that she was confused or with significant memory loss for her age of 80 [81] years in the documentation and my recollection of her functioning. Furthermore, there was no clinical reason to warrant more detailed cognitive function testing. She was clearly physically disabled from her numerous strokes dated (2004, 2005 and 2006) but not mentally disabled in my opinion.

[Underlining added]

[103] Thomas Lathrop Stedman, Stedman's Medical Dictionary, 26th ed., (Baltimore, MD: Williams & Wilkins, 1995) defines dysarthria as a "disturbance of speech and language due to spasticity of the muscles used for speaking". The word dysphagia is defined to mean "difficulty in swallowing", and dysphasia is defined to mean "impairment in the production of speech and failure to arrange words in an understandable way."

[104] In cross-examination, Dr. Wiebe was asked questions relating to a number of documents in the extensive records that she did not specifically refer to in her report. They are documents that are relied on by Dr. John Sloan. Most of the documents relate to comments attributed to George in relation to Maxine's memory. The comments include:

- handwritten notes read "George has noticed changes – "comes & goes"; and
- handwritten notes read "Friend (George) reports ↓ but client has not noticed a change."

[105] A December 2, 2006 neurological consultation report by Dr. Sherrill Purves has the following statement:

This is an 81-year-old woman who is seen today accompanied by her family where actually I have been able to finally obtain a somewhat clearer history.

The history is one of a gradual failure in mobility and maybe thinking but primarily in her mobility and swallowing over the last six to seven months.

[106] The most contentious documents on which Dr. Wiebe was cross-examined, relate to the results of a Modified Mini Mental State Exam (“MMSE”) that was administered to Maxine on June 20, 2005. She scored 26/30. Maxine was administered a further MMSE on November 21, 2007. She scored 21/30. Dr. Wiebe did not agree that the score is necessarily indicative of a steady decline. She testified that it may be a “possible red flag”, but in this case it was not. The MMSE is a screening tool; it is not a diagnostic too. The MMSE is a good screen for memory and recall, but that is only part of a test if you are assessing cognitive functioning or status. It is also not uncommon for patients in a hospital setting to have poor recall. The full scheme interpretation score indicates that a score of 26 is considered to be mild to normal cognitive impairment, and although there was a change in the scores, they were “still kind of in the same ball-park”.

[107] Dr. Wiebe’s opinion did not change on cross-examination.

THE DEFENDANTS’ WITNESSES

James Wilton

[108] James is 46 years old. His father Roger was an executive who had jobs across the country, including Mississauga for a time. He and his sister, Elizabeth spent summers with their father in Ontario, and sometimes Maxine came and stayed for weeks, if not months. When he was a teenager, he moved to Reno where his father (and his third wife) had been transferred. When his father moved to California, he stayed in Reno until he returned to Richmond B.C. around 1996 or 1997.

[109] James described his interactions with Maxine which included going on a family trip with her to Maui where she had a condominium, and the occasional time he talked to her on the phone. In 1997 he started work as an airline customer service representative at Vancouver International Airport. Because of his shift work schedules he did not see a lot of Maxine.

[110] I found James' evidence relating to his visits to Maxine consistent with the evidence of Maxine's caregivers, Ms. Gabay and Ms. Ayala.

[111] James testified about how Maxine was before and after her stroke in December 2004. Before her stroke in 2004, Maxine was quite a remarkable woman. It was remarkable that she travelled as much as she did. She travelled more than many people he knew, and he worked at the airport. She was very vibrant, very independent, very adventurous, strong willed, socially engaging, quick witted, and humorous. He was aware that she had a company that for many years owned a cabin in Whistler's Alta Vista development, and property in Kamloops. Maxine gave him the impression that in her relationship with George, she was in charge. She was in charge of making their plans, and George followed her social schedule.

[112] After her stroke in 2004 "everything kind of slowed down for her, her speech, her mobility and her social and travel schedules". She was slower and more difficult to understand. Her conversations were not as free-flowing as it was before. It took her longer to communicate and that seemed to frustrate her because she was unable to express herself as eloquently as she would have liked. However, he never saw her confused.

[113] Around 2005 Maxine phoned and asked him to take her to her cabin at Whistler. The long-time renter was moving out of the cabin and Maxine needed his help. James was a bit surprised by the phone call because Maxine had always managed the properties by herself.

[114] He drove Maxine to Whistler in her car. She had a cane, and he had to help her into the car. When they arrived at the cabin, he needed to help her out of the car, and up some uneven stairs.

[115] The cabin was rather derelict and James undertook renovations. When he was going to Whistler, he would pick up the key from Maxine's and drop off the key on his return. His evidence on this point is consistent with the evidence of Ms. Gabay and Ms. Ayala.

[116] James testified that the stroke Maxine had in 2006 “seemed to be more severe than the first stroke. Her mobility was taken to almost zero I think”. Her speech became “un-understandable”.

Natasha Wilton

[117] For the first two years of her life Natasha lived with her father and then with her mother in Abbotsford. She lived with Maxine from 2002 to 2003 when she was 15 years old and attended Sentinel High School in West Vancouver. However, she found she was not happy at Sentinel, she missed her friends, and returned to Abbotsford, although she did not live with her mother for long.

[118] Natasha described Maxine during the time that she lived with her. Maxine had a very dominant personality. She was definitely a person in charge. She was vibrant, full of life, fiercely independent, very strong willed, witty, and funny.

[119] Maxine made her breakfast, and most days she cooked dinner. Sometimes George came over for dinner, but most often he came over in the evening to watch their television shows together and drink wine. They played cards, and sometimes Maxine and George went out on dates or dancing, and then Natasha would “have to fend for herself”.

[120] George was Maxine’s boyfriend. They loved each other very much. He was devoted to her, but she was definitely in charge.

[121] Maxine enjoyed travelling the world and visiting new places. Natasha went to Mexico with her during the time she lived with her. Maxine did not travel as much when she was living with her, but after she returned to Abbotsford, Maxine travelled once or twice a month.

[122] Maxine had her first stroke on December 29, 2004, but Natasha did not visit her until November 15, 2005. She saw “significant change” in Maxine, including her mobility and speech. She was slower to respond. Everything was slow. Conversation would not flow like a normal conversation. You would ask her yes or no questions,

and it was very hard to hear her or understand what she was saying. She was not as lively or mobile.

[123] After Maxine had her stroke in 2004, Natasha believed that Maxine “had a mental change”. She was no longer independent, needed assistance, and always needed someone with her. She got confused sometimes and could not find the correct words. You could see that she was struggling with words and that made Natasha think that Maxine may have had a mental change. After her 2004 stroke and before her 2006 stroke, she never improved, and “might be able to say one or two words or half of a sentence.” After her 2006 stroke she “declined significantly” and lost any ability to communicate. She could only communicate with her eyes.

[124] Natasha’s evidence on the frequency of her visits and phone calls to Maxine is consistent with the evidence of Maxine’s caregivers. She visited or called when she could, but it was infrequent. She was busy.

Elizabeth Koestlmaier

[125] Elizabeth went to great lengths to describe her loving relationship with Maxine, the times that she visited, and the reasons why she was not able to visit as often after she became a mother with two young children, and worked full time.

[126] There is little doubt that Maxine loved her first granddaughter Elizabeth and made her feel loved.

[127] Elizabeth described Maxine before her stroke in December 2004 as amazing. She was amazed with her energy, her social life, her trips, her zest for life and her ability to know the birthdays of all of her sons and grandchildren. She was extremely vibrant, unusually active, an avid traveller, and in constant communication with everyone. She was totally in control of her own schedule. She was very proud about being independent, making her own decisions, and deciding what to do, when to do it, and where she wanted to go. She told all of her friends that her grandmother was not a typical grandmother.

[128] Following Maxine's stroke in December 2004, Elizabeth understood that without a feeding tube, her grandmother would die. Conversations with her changed. She had to change the way she conversed with Maxine to make sure she could follow easily and not have to make a great effort to respond. She also had physical challenges. In 2005 Mark brought Maxine to Elizabeth's split-level home which has many stairs. She was "unsteady at best", had to be helped up the stairs, and Elizabeth was concerned about her falling.

[129] Between her stroke in December 2004 and before her stroke in November 2006 she improved to the point where she could speak very slowly and with difficulty, she could only speak one or two, or a few words at a time but could not put together a full sentence.

[130] Elizabeth learned about Maxine's death from James. According to an obituary, at Maxine's request, there was no funeral service. However, at the regular Sunday church service on June 12, 2011 at St. Christopher's Anglican Church in West Vancouver, Maxine's name was mentioned at the service and in the church program.

[131] Either at the beginning or the end of the church service, Larry gave Elizabeth "nana's ring". Since she was a teenager, Maxine had told her many times over the years that she wanted her to have the ring. She cannot recall if Maxine mentioned that the ring would be part of her inheritance because she did not like those conversations, and "shut her [Maxine] down essentially". From the way Maxine spoke to her about the ring, she assumed that the ring was mentioned in Maxine's Will.

[132] A few weeks after the service, James called her and told her that Daryl had said to go over to nana's house to get any personal items of nana's that she wanted. When she went there both Ms. Gabay and Ms. Ayala were there cleaning the house and packing things up. They gave her nana's china, a couple of suitcases full of photo albums, some of her costume jewellery, and an appraisal for nana's ring that Larry had given her. Elizabeth wore the ring when she was testifying.

[133] The appraised value of the ring in 1980 was \$47,475. The appraisal is dated July 9, 1980 and reads:

APPRAISAL

Ladies ring in 18K yellow gold wide shank set with three-.13ct. VVS2 clarity baguette diamonds, one-2ct. VVS2 clarity I colour diamond, "Ragnar Special Design".

Value: \$47,475.00
Plus Prov. S.T.

Dr. John Sloan

[134] Dr. John Sloan is a physician who has practised in Vancouver since 1978. For the last 16 years he has been consulting in geriatric care including evaluation of capability. Dr. Sloan prepared two reports both dated September 27, 2017. In what I will refer to as the first report, he was asked to respond to Dr. Wiebe's report dated September 7, 2016. In his second report, Dr. Sloan was asked to answer the following questions:

1. What was Ms. Wilton's mental condition and what was its potential impact on her mental capacity to make a Codicil to her will in September, 2006?; and
2. How did Ms. Wilton's mental condition affect her ability to act independently in making a codicil to her will in September 2006?

[135] Dr. Sloan never saw Maxine Wilton. His opinions are based on his review of the same records that Dr. Wiebe reviewed, and Dr. Wiebe's September 17, 2016 report.

[136] With respect to his response to Dr. Wiebe's report, Dr. Sloan comments on Maxine's two MMSE scores: 26/30 in February 2005 and 21/30 in November 2007. Dr. Sloan states in his report:

The "MMSE" is a widely-used and well-validated screening instrument for dementia.

Unfortunately none of the complete MMSE forms are available and so it is impossible to tell whether the deficiencies documented there have to do with memory, naming, calculation, orientation, etc.

A rehabilitation team evaluating cognition in January 2005 was told by Ms. Wilton's close friend George that he had "noticed changes" and that in his opinion Ms. Wilton's cognitive ability "comes and goes". The February 2005 Lions Gate Hospital acute care discharge summary stated "Does need some reminders from time to time."

...

Dr. Purves, a brain specialist, evaluating Ms. Wilton in early December 2006 took a collateral history suggesting there had been "gradual failure in mobility and maybe thinking over the past 6-7 months."

It is therefore more likely than not in my opinion that Ms. Wilton had cognitive consequences from her stroke in December 2004, reflected in an MMSE score of 26/30 in February 2005...

The information available to me does not allow a conclusion in respect of Ms. Wilton's meeting the traditional criteria for testamentary capacity.

I am unable to conclude whether Ms. Wilton had or did not have testamentary capacity in September 2006.

[137] Dr. Sloan concludes that he did not think it was possible for Dr. Wiebe to reach the conclusion she did about Maxine's testamentary capacity in September 2006, "even allowing for the familiarity she had with her patient".

[138] Dr. Sloan's second report is almost similar. However, he states:

Ms. Wilton was according to fact mildly physically disabled and also probably mildly cognitively disabled, but she was certainly dependent on others in a variety of ways. Fact also establishes that she received substantial assistance from her family members in making the codicil in September 2006. Some of that assistance (such as making telephone calls and providing the text of a Will change form) would not have been entirely physical in nature.

[139] Dr. Sloan, as in his first report, concludes that it is not possible to determine whether Maxine met the usual criteria for testamentary capacity in September 2006, and that due to her mental condition, she was susceptible to undue influence and her ability to act independently in making a codicil would have been impaired.

[140] When Dr. Sloan was cross-examined, he testified that he had information since he prepared his reports that would change his opinion in both of his reports. When asked when he changed his opinion, he said "about 15 minutes ago, when I read my reports. Both of my reports".

[141] Understandably, Dr. Sloan was not asked how his opinion had changed.

[142] Dr. Sloan went on to explain that the MMSE has value and it has limitations. The “new” information he had were “the specifics of the deficiencies that were found in the MMSE”. They were in the records that he reviewed, but he did not see them.

[143] Dr. Sloan in his reports largely relies on Maxine’s MMSE score of 26/30 in February 2005 to conclude that she had “cognitive consequences” from her December 2004 stroke. He admits that the MMSE is a screening tool, not a diagnostic tool and that there are no protocols or papers suggesting that MMSE scores can be used in this way. He also agrees that there are, as Dr. Wiebe suggested, many ways in which the MMSE can be incorrectly low based on such things as depression, fatigue, medication, and being hospitalized.

[144] Dr. Sloan’s opinion changed 15 minutes before he testified, he was understandably not asked how his opinion had changed, and unlike Dr. Wiebe, he never met or treated Maxine. I give no weight to Dr. Sloan’s opinion.

Jean M. Kovacs, forensic document examiner

[145] Mr. Kovacs prepared two reports. He was not cross-examined on his reports by the plaintiffs. Mr. Kovacs identified Larry as the person who wrote the instructions, but not the signature to the instructions. While Larry admits that he likely wrote the instructions but does not recall doing so, Mr. Kovacs does not suggest that Larry wrote Maxine’s signature at the bottom of the instructions.

[146] Mr. Kovacs opines that Maxine’s first stroke in December 29, 2004, resulted “...in a major change in the appearance and quality” of her signature, with the overall quality of her handwriting being “not very good.” Mr. Kovacs observed poor line quality, pen lifts, and “writing movement discontinuity.”

[147] Mr. Kovacs found with what I will refer to as “lifts”, using an Electro Static Detection Apparatus, and identified a page written underneath the instructions which suggest that before writing out the instructions, Larry wrote figures showing the approximate value of Maxine’s estate, and what each of her sons would receive based on various percentages. The latent indented impressions appear as follows:

● MAX V WILTON
 ESTATE AFTER TAX 2,000,000
 X KEITH / MARK / DARYL / LARRY
 23% 27% 27% 23%
 - ROGER
 2,000,000
 ● 460
 540
 540
 460
~~25 25 25 25~~
 2 27 27 23

[148] The latent indented impressions disclose that Larry wrote on a piece of paper, before he wrote the instructions, that Maxine Wilton had an estate, after taxes, of \$2 million, and changing the percentage from 25 for each of Maxine’s surviving sons to 23% each for Keith and Larry, and 27% each for Mark and Daryl, results in \$460,000 for the sons receiving 23% of her estate, and \$540,000 for the sons receiving 27% of her estate.

[149] In my view it does not take an expert to see from a number of documents signed by Maxine over the years, that following Maxine’s stroke in December 2004, her signature changed for the worse. It became almost illegible compared to what was strong legible handwriting in the years before. As Mr. Kovacs described Maxine’s signatures after her 2004 stroke, they showed “heavy pressure”, “pen lifts”, “a very light and tremulous downward stroke in front of the letter “i” in the surname”, “pressure fluctuations”, and “discontinuity” in some portions of the writing movement, and “major line quality problems”.

THE LAW

[150] The law relating to testamentary capacity and suspicious circumstances was extensively canvassed by Madam Justice Ballance in *Laszlo v. Lawton*, 2013 BCSC 305. She canvassed the history relating to the law of testamentary capacity:

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

[189] Timing is key. In general, the first relevant time that testators must have testamentary capacity is when they give will instructions; the second is when the will is executed. In recognition of the fact that faltering mental capacity is prone to fluctuate, the authorities permit variation of the degree of capacity required at these pivotal times. For example, the will of a testator who is competent to give instructions, but has lost capacity when the will is executed, may be valid so long as, at the time of execution, the testator was capable of comprehending that she was executing a will drawn in accordance with her previous instructions: *Parker v. Felgate* (1883), 8 P.D. 171; *Brownhill Estate* (1986), 72 N.S.R. (2d) 181 (Co. Ct).

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

[192] Implicit and explicit in the jurisprudence is an acknowledgement of the complexity and subtleties of diminished cognitive functioning and the way in which we perceive, present to and interact with the world around us. For example, although it is recognized that dementia can impair a testator's mental powers such that he is not capable of making a will, a diagnosis of dementia, standing alone, does not automatically correspond to testamentary incapacity. Similarly, a person who is judicially declared incapable of managing his or her affairs pursuant to adult guardianship legislation or suffers a chronic psychotic illness such as schizophrenia may still have the capacity to make a valid will.

[151] Ballance J. then considered whether testamentary capacity is a medical diagnosis or a legal construct:

[197] The issue of whether a testator has the requisite capacity to make a will is a question of fact to be determined in all of the circumstances: *Knox v. Trudeau* 2001, 38 E.T.R. (2d) 67 (Ont. Sup. Ct. J.). The assessment is a highly individualized and fact-specific inquiry.

[198] Testamentary capacity is not a medical concept or diagnosis; it is a legal construct. Accordingly, scientific or medical evidence – while important and relevant – is neither essential nor conclusive in determining its presence or absence. Indeed, the evidence of lay witnesses often figures prominently in the analysis. Where both categories of evidence are adduced, it is open to the court to accord greater weight to the lay evidence than to the medical evidence, or reject the medical evidence altogether.

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

[152] Ballance J. then thoroughly canvassed the law on the doctrine of suspicious circumstances, paras. 200 to 207 enunciated in the leading decision *Vout v. Hay*, [1995] 2 S.C.R. 876 [*Vout*].

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

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

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

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

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

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

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

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

POSITION OF THE PARTIES

PLAINTIFFS

[153] The relevant issues relating to the validity of Maxine’s second codicil dated September 12, 2006 are:

- a) Capacity;
- b) Knowledge of assets; and
- c) Understanding of the effect of the codicil,

all of which have been proved to show that the codicil was properly executed.

[154] In her 1972 Will, Maxine left unequal share to her five sons.

[155] Following Roger's death, in her 1999 Will, Maxine left a specific bequest of \$5,000 each to Elizabeth and James. She left nothing to Natasha or Iacia.

[156] In her February 20, 2003 Will, she divided her estate into five equal shares, leaving equal shares to her four sons, and the remaining share (20%) to Elizabeth, James, Natasha, and Iacia.

[157] By her first codicil made January 13, 2005 Maxine changed the executors of her February 2003 Will from Larry and Mark to Larry and Daryl.

[158] With her second codicil dated September 12, 2006, she changed her February 2003 by leaving nothing to Elizabeth, James, Natasha, or Iacia.

[159] Maxine met Mr. Spohn twice in September 2006. He met with her the first time on September 8, 2006 when George brought her in to see him. Mr. Spohn met with Maxine alone. She brought with her the instructions on "what she wanted me to do". When he repeatedly questioned her in one way or another on whether that is what she wanted to do, namely, remove Roger's four children from her February 2003 Will, she "took umbrage", indicating to him "well, of course" she did; that is why she came in to see him. She made it clear to him more than once, that she was more concerned with her living sons than with Roger's four children: "I asked her if she was sure she wanted those percentages, if she was sure she wanted her estate to go to just those four [living sons], if she was sure that if one of them died, the share that the son would have taken should go to his children, and she said yes.... I asked her about the gift to Roger's kids and she indicated that that wasn't to be in there anymore".

[160] When Mr. Spohn questioned Maxine on her assets, including her business interests bank accounts, Maxine again took umbrage with those questions relating to the size of her bank accounts, "which happens with the elderly sometimes". However, he found that Maxine spoke without difficulty, and after questioning her, believed that she had testamentary capacity, knew what she had for assets, and understood the effect of the codicil.

[161] Mr. Spohn's evidence is that of an independent professional on the key issues relating to the validity of the September 2006 codicil.

[162] Likewise, another independent professional, the accountant Paul Dunkin, dealt with Maxine eight to 10 times between 2003 and November 2006, and remembers her clearly. She saw him for her personal tax returns, and for the requisite corporate filings and returns for her company. Over the course of that time he could tell that she had suffered a stroke because she had to use a cane, her signature which used to be quite firm, became much shaker than it used to be, and her speech was a bit slower than it used to be. Otherwise, he found Maxine to be completely reasonable, rational, intelligent, and in control with respect to her financial affairs.

[163] The evidence discloses that Maxine was experienced with managing her financial affairs and was aware of her assets:

- she was left a widow responsible for raising five sons. She did that and managed to accumulate significant assets that allowed her a comfortable lifestyle and the ability to travel a lot;
- she made Wills in 1972, 1999 and 2003, and a first codicil in 2005, which shows she had an eye for detail;
- her assets were comprised mainly of her home in West Vancouver's Ambleside, and her company Wilton Investments Ltd. which owned a cabin in Whistler, and was owed approximately \$600,000 from the sale of property in Kamloops under an agreement for sale. Earlier, she or her company owned a condo in Hawaii;
- she had a personality of being "in charge" of her life and having an active lifestyle.

[164] The evidence of the defendants is both unreliable and self-serving. Elizabeth's evidence that her grandmother in September 2006 was only able to put one or two words together, or only answer "yes" or "no", not only contradicts the evidence of the caregivers, the accountant, the lawyer, and Laurie Howe, their

evidence contradicts Lions Gate Hospital rehabilitation records up to May 2005 when Maxine was discharged and returned home. Dr. Sloan agreed on cross-examination that the records including the discharge summary indicate that Maxine likely had no speech problems when she was discharged.

[165] Further, or alternatively, the defendants' evidence concerning Maxine's personality and functioning, more accurately describes Maxine after her late 2006 stroke and is then consistent with all of the other evidence.

[166] Dr. Sandra Wiebe was responsible for Maxine's care from 2000 to 2007. She describes Maxine as very pleasant, and having a strong willed, socially engaging, and independent personality. Even after she suffered a major stroke, despite speech difficulty, difficulty swallowing and motor weakness, she remained cognitively intact.

[167] In *James v. Field*, 2001 BCCA 267 the Court of Appeal recognized that the observation of a lay witness may carry as much weight as those of a doctor:

[75] While recognizing the effects the stroke had had on Mr. Field, the trial judge was nevertheless satisfied that the testator's ability was not so impaired that he was unable to give instructions for the preparation of a will. In arriving at that conclusion, the trial judge appears to have accorded as much if not more weight to the evidence of the lay witnesses as he did to the evidence of the experts.

[76] The learned trial judge noted that the observations of a lay witness as to testamentary capacity may carry as much weight as those of a doctor and referred to *Re Schwartz* (1970), 10 D.L.R. (3d) 15 at 22, in which the Ontario Court of Appeal adopted the words of Laidlaw J.A. in *Re Price*, [1946] 2 D.L.R. 592 at 595 (Ont. C.A.).

[77] The jurisprudence supports the view that a trial judge, engaged in determining whether a testator has testamentary capacity, is entitled to prefer the evidence of lay witnesses to the evidence of experts. ...

[168] As Madam Justice Ballance emphasized in *Laszlo v. Lawton*, 2013 BCSC 305, at paras. 198 and 199, testamentary capacity is not a medical diagnosis. It is a legal construct, and a court may reach a conclusion regarding a testator's capacity that conflicts with a medical diagnosis or the outcome of a medical test, including an MMSE.

DEFENDANTS

[169] The February 7, 2005 Lions Gate Hospital Neurological Rehabilitation Outpatient Program Initial Team Assessment form reads in part (the handwritten portions which I italicize):

NEUROLOGICAL REHABILITATION
OUTPATIENT PROGRAM

INITIAL TEAM ASSESSMENT

DATE: *February 7, 2005*

Present: OT: PT: SW: N: SLP:

Other: *George (next-door neighbour)*

↓
POA

Diagnosis: *Stroke Dec. 29/04*

History of Present Illness: *® leg & arm weakness.*

...

Mobility: a) Walking aids/wheelchair: *Uses cane –
“ 2ww – doesn’t like using
® hand/leg weakness*

b) Stairs: *Uses railings*

Communication:

“On again, off again” - ? word finding problems; knows what she wants to say.

Cognition: (Memory/perception)

George has noticed changes – “comes & goes”

[170] Dr. Wiebe confirmed that Maxine may have had short term memory loss based on George’s observations regarding her cognitive decline, and she agreed that George would be in a better position to assess Maxine than others.

[171] The following evidence discloses that Mr. Dunkin admitted that paragraph 4 of his affidavit regarding Maxine’s speech was inaccurate:

Q: It was just more difficult and took longer to do?

A: A little bit longer

- Q: So you would agree then that her speech did change after the stroke?
A: Yes
Q: That it did not remain as it had always been from the first time you had met with her?
A: Yes
Q: So at paragraph 4 of your Affidavit, the 2nd sentence: "Her speech did not change to my observation" is not accurate, is it?
A: Perhaps my memory is... This is going back a long time, my memories of what her speech was like....
Q: It's not accurate?
A: It may not be.
Q: So you're agreeing that paragraph 4 is not accurate?
Q:[sic] At the time I wrote that, that was my recollection.
A:[sic] Mr. Dunkin, I am asking you to confirm that today, your evidence is that this paragraph is not accurate?
A: That would appear to be the case.

[172] While Laurie Howe spent one week with Maxine in August 2006 and found her during that time to be very lively, animated, and very talkative, neither he, Mr. Dunkin or Ms. Gabay had years of regular contact and a close relationship with her as did James, Natasha, and Elizabeth.

[173] Mr. Howe and Ms. Gabay never discussed with Maxine her financial affairs, estate planning, Wills or codicils, or what would happen to her assets after her death. Ms. Ayala never knew Maxine before her stroke in 2006.

[174] Following her stroke in 2006 Maxine needed assistance from others and was dependant on others: George continued to help her with her errands such as grocery shopping, she needed James' help with the cabin at Whistler, and while Mr. Dunkin usually met with Maxine alone, once George sat in on their meeting on September 25, 2006 (the last time that Mr. Dunkin saw Maxine), and once Larry sat in on a meeting on June 20, 2006. Mr. Dunkin's notes read: "Larry indicated that the original agreement does not have an early payout clause so he thinks Maxine should just wait until December for the final payout". And that is what was done.

[175] By 2006 Larry became more involved in Maxine's affairs, including:

- a) Maxine phoning Bull Housser on April 27, 2006 informing the law firm that her eldest son, Larry, executor, may want to change lawyers;

- b) On May 25, 2006 Maxine informed Mr. Dunkin that Larry would be here in mid-June and she wanted to talk to him first before giving him instructions about any payout on the agreement for sale relating to the Kamloops property;
- c) On June 26, 2006 Larry attended the meeting with Mr. Dunkin and Maxine when they discussed the mortgage payout and estate issues;
- d) On August 23, 2006 Larry phoned Bull Housser that he wanted to change to a lawyer closer to his mother's home;
- e) On September 5, 2006 Larry phoned Bull Housser about picking up Maxine's documents to put in a safety deposit box; and
- f) On September 6, 2006 Larry picked up from Bull Housser the originals of Maxine's 2003 Will and 2005 codicil.

[176] The plaintiffs Larry and Daryl knew Maxine better than the defendants but did not testify at trial. Larry swore four lengthy affidavits and Daryl swore one lengthy affidavit in response to the defendant's petition, but their affidavits were not tendered at trial. An adverse inference should be drawn against them.

[177] There is no evidence regarding Maxine's knowledge of her assets or their value in 2006. Mr. Spohn made no notes in his file about his meetings with Maxine. With respect to the instructions that Maxine brought with her when she met with Mr. Spohn the first time:

- a) He did know when the instructions were prepared;
- b) He did not know who prepared the instructions or whether one of the beneficiaries had prepared the instructions;
- c) He did not ask Maxine about her relationship with Roger's children who were being cut out of her Will by the instructions;
- d) He did not discuss with Maxine the value of the percentages set out in the instructions or the amount that would not be going to Roger's children.

[178] The evidence of Ms. Gabay or Ms. Ayala should not be preferred because in the case of Ms. Ayala, she did not remember that the service was a regular Sunday church service at which Maxine's name was mentioned. Ms. Gabay said that it was a funeral service for Maxine, when it was not.

[179] The evidence that raises sufficient suspicious circumstances around the making of the 2006 codicil include the following:

- a) Maxine arrived at Mr. Spohn's office on her first visit on September 8, 2006 with the instructions written by Larry, one of the beneficiaries;
- b) Larry made calculations of the expected value of Maxine's estate and the values corresponding to the percentages in the instructions;
- c) Mr. Spohn made no enquiries about the details of the nature and extent of Maxine's assets or the general, cumulative value of her assets;
- d) There is a marked departure to dispositions to beneficiaries from Maxine's February 20, 2003 Will;
- e) Maxine's representations regarding the defendant's inheritances from her estate;
- f) Maxine's declining health which resulted in greater deference to the will of others; and
- g) And the lack of evidence that Maxine had the original or a copy of her 2003 Will and 2006 codicil.

[180] The singular suspicious circumstances is Maxine's arrival at Mr. Spohn's office with the instructions which are obviously not in her handwriting. That alone should have alerted Mr. Spohn to make full and proper enquiries.

[181] In addition, Larry's discussions with Maxine about the percentage distribution in the instructions and his valuation of her estate and those percentages, must arouse the court's suspicion. The suspicion cannot be removed in the absence of evidence from Larry who prepared the instructions and benefits under the 2006 codicil.

DISCUSSION AND CONCLUSION

[182] In my view the preponderance of the evidence of the lawyer for Mr. Spohn points to a finding that Maxine Wilton:

- a) Knew and approved of the contents of the second codicil dated September 12, 2006;
- b) Had the requirement testamentary capacity when she executed the second codicil; and

c) Was acting of her own free volition when she made the second codicil.

[183] I accept the evidence of Dr. Wiebe that as a result of her stroke in December 2004 Maxine suffered the physical impairment of dysarthria (speech difficulty), and dysphagia (difficulty swallowing). She spoke slower and had difficulty finding words. The stroke also left her physically impaired and as a result she needed to use a cane or a walker. However, the December 2004 stroke did not affect Maxine mentally or cognitively. She had the mental and cognitive ability to make a decision about her financial affairs in September 2006.

[184] I do not agree with the defendants' contention that Mr. Dunkin's evidence is more consistent with their evidence than with the evidence of the plaintiffs' other witnesses. The defendants suggest that Mr. Dunkin changed his evidence. If he did, I find that it was on a point that did not deal with her cognitive or mental ability to understand or comprehend. He testified that Maxine spoke a "bit slower" than she did when he first met her, and it may have taken a little longer to understand what she was saying or trying to communicate, but he was able to fully understand what she was saying and communicating to him.

[185] Likewise I accept the evidence of Maxine's caregivers Ms. Gabay and Ms. Ayala who spent more time with Maxine than did any of her grandchildren. None of their evidence was shaken on cross-examination. Maxine was always in control.

[186] During August, September and October 2006 before she went to Florida, Maxine was independent except for the things Ms. Gabay did for her relating to her balance problems. Before Ms. Gabay came to work with Maxine in August 2006, Maxine lived on her own.

[187] The unchallenged evidence of Mr. Howe is that for the week in mid to late August 2006, Maxine was on top of the world, talkative, animated, her voice was strong, she did not lose track of what she was saying, she arranged for all of their outings and sightseeing, and made lunch for them. Except for having to use a cane or a walker, she was the Maxine he had always known.

[188] As for the defendants' evidence, I find they relayed their evidence as best they could. None of them regularly spent much time with Maxine following her December 2004 stroke. They each commented on Maxine's physical impairment and loss of balance, and speech problems. I find that if, as Elizabeth suggests, Maxine between her December 2004 and late 2006 stroke was only able to speak one or two words, and not a full sentence, she is mistaken. That may describe Maxine after her 2006 stroke, but not before.

[189] I find that while the muscles controlling Maxine's speech were affected by her stroke, her cognitive and mental abilities were unaffected. She was treated for physical impairments, but not for any cognitive or mental impairments.

[190] Elizabeth testified that before her stroke in 2004, Maxine was very proud about being independent, making her own decisions, and deciding what to do and when to do it. Following her stroke in 2004 Maxine remained "as strong willed as she could be", but Elizabeth was unable to comment on whether Maxine's personality changed. I conclude on all the evidence that it did not.

[191] I find that Maxine was a strong willed, independent woman who made her own decisions, and decided what to do and when to do it. She was also very organized.

[192] I find nothing untoward about Larry sitting in on a meeting with his mother and Mr. Dunkin. There is nothing untoward about a widowed woman in her eighties who is in control of her own corporate affairs, and engaged in estate planning, to inform her adult children about her financial affairs, or to involve them in her financial affairs. To do otherwise, would be leaving them in the dark on her death.

[193] I also find that there was nothing untoward in Larry wanting to change lawyers to a lawyer closer to Maxine's home. Maxine no longer drove, and it was more convenient for her to have a lawyer in West Vancouver than in downtown Vancouver.

[194] The fact that George who the defendants maintain, always acted in Maxine's best interest, was sent directly from Mr. Bice of Bull Housser, two copies of Maxine's first codicil, with the statement from Mr. Bice to George, that he "understood that Mrs. Wilton will be giving further instructions regarding personal items", leaves the inference that George was directly involved in Maxine's estate planning, or at least, directly aware of her estate plans.

[195] It was George (and not Larry) who made the appointment for Maxine to see Mr. Spohn on September 8, 2006. George was the father of Mr. Spohn's former classmate from many years ago. There is no evidence that Mr. Spohn knew Larry.

[196] It is fair to infer that George knew the reason why Maxine wanted to see a lawyer about her Will and first codicil, and that she wanted changes made because it is George who made the appointment for Maxine to see Mr. Spohn, and it is George who asked Mr. Spohn if he could help Maxine with some matters relating to her estate.

[197] I see nothing suspicious about Larry writing out the instructions. As Mr. Spohn testified, most people are not that organized. Maxine was a take charge person. She was, as Mr. Dunkin inferred, an organized person.

[198] Maxine had difficulty writing her signature. She would have difficulty writing anything. There is nothing suspicious about Larry and Maxine discussing what she wanted to do with her estate. Larry is her eldest son, and all of the evidence discloses that despite living in Florida, he came to see her every two to three months, and like a dutiful son, helped her with her needs, including hiring Ms. Gabay, helping to see that her estate planning was in order, and helping her write it out what she wanted, when she clearly had a difficulty time writing even her own signature.

[199] I see nothing suspicious about Larry talking to Maxine about leaving more of her estate to Mark and Daryl and less to him and Keith because they did not have

any present need for money. As I have indicated, there is nothing suspicious about a parent discussing with her adult son, her plans for her estate upon her death.

[200] Larry was in West Vancouver visiting on September 6, 2006 which is the day he attended the offices of Bull Housser and picked up the original copies of Maxine's 2003 Will and first codicil, which he then gave to her. It is fair to infer that Larry was still visiting Maxine on September 8, 2006 which is the date of the instructions and the date that George took Maxine to see Mr. Spohn.

[201] Maxine was experienced in managing her financial affairs and was aware of the value of her assets. The instructions are consistent with what Maxine wanted to do with her estate. She made that clear to Mr. Spohn more than once. Mr. Spohn's evidence is consistent with the evidence of James and Elizabeth that Maxine was fiercely independent, strong willed, made her own decisions, and decided what to do, and when to do it.

[202] That Larry was simply carrying out what Maxine wanted by writing the instructions is reinforced by what he did with Maxine's ring. Maxine did not leave or bequeath her ring to Elizabeth in her Will or codicil. Both her last Will and the codicils are silent about the ring. However, Larry did what he knew Maxine wanted: to let Elizabeth have her ring. Larry was under no legal obligation to give Elizabeth the ring. However, he did. In 1980 the ring had an appraised value of \$47,475. Using the rate of inflation in the Bank of Canada website <https://www.bankofcanada.ca/rates/related/inflation-calculator>, \$47,475 in 1980 would cost \$145,925 in 2018.

[203] The defendants argue that an adverse inference should be drawn against the plaintiffs, particularly, Larry, because the affidavits that he swore in the petition proceeding were not relied on by the plaintiffs in this proceeding, and Larry did not testify. Mr. Murphy for the plaintiffs stated that he was taken by surprise by that argument. I find his position on this point to be reasonable.

[204] Since as early as the February 17, 2017 case planning conference, the defendants have been aware of the affidavits and evidence that the plaintiffs intended to rely on. The defendants knew and had notice that the plaintiffs did not intend to call Larry or rely on the affidavits he filed in the petition proceeding. The plaintiffs made it clear that they intended to rely on the evidence of independent witnesses and provided the names of those witnesses.

[205] The trial brief filed by the plaintiffs set out the affidavits and the witnesses the plaintiff intended to call. The defendants at no point, until closing argument, raised as an issue, the failure of the plaintiff's to call Larry as a witness to prove that Maxine had the requisite capacity. I am not prepared to draw an adverse inference against the plaintiffs, for not testifying, or relying on their affidavits.

[206] I find that there were no suspicious circumstances surrounding the making of Maxine Wilton's second codicil dated September 12, 2006 and conclude that the deceased Maxine Wilton:

- (a) Knew and approved of the contents of the second codicil dated September 12, 2006;
- (b) Had the requisite testamentary capacity when she executed the second codicil; and
- (c) Was acting of her own free volition when she made the second codicil.

[207] The plaintiffs are entitled to the costs of this action and the petition proceeding, which is dismissed as a result of the outcome of this action.

"Loo J."

The Honourable Madam Justice Loo