

CITATION: De Smedt v. Cheshire et al., 2023 ONSC 249
COURT FILE NO.: CV-19-00005230-00ES
DATE: 20230112

ONTARIO
SUPERIOR COURT OF JUSTICE
TORONTO ESTATES LIST

IN THE MATTER OF THE ESTATE OF ARNOLD CHESHIRE, deceased

BETWEEN:)	
)	
Simone De Smedt)	<i>Jonathan B. Schrieder</i> , Counsel for the
)	Applicant
Applicant)	
)	
– and –)	
)	
John Cheshire and the Estate of Arnold)	<i>Raymond Murray</i> , Counsel for the
Cheshire)	Respondents
)	
Respondents)	
)	
)	HEARD: December 13-15, 2022

C. GILMORE, J.

REASONS ON MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

- [1] This is the Applicant’s motion for summary judgment framed as a challenge to the Will. The Will was signed by the deceased, Arnold Cheshire (“Arnold”), on September 28, 2017 (the “2017 Will”). Arnold passed away on February 5, 2019.
- [2] The Will challenge is advanced by the Applicant Simone De Smedt (“Simone”), Arnold’s common law partner of 34 years. Simone seeks to set aside the 2017 Will and have Arnold’s 1991 Will declared valid.
- [3] Arnold’s son John Cheshire (“John”) seeks to propound the 2017 Will which names him as Estate Trustee and leaves the residue of the Estate equally to John and Simone. On the same date as he executed the 2017 Will, Arnold named John as his Power of Attorney (“POA”) for Personal Care and Property. Arnold’s previous Will executed in 1991 named Simone as the sole beneficiary (the “1991 Will”). Simone was named as Arnold’s POA for Property and Personal Care in 2003.

- [4] Simone claims the 2017 Will was signed under suspicious circumstances while Arnold was hospitalized and suffering from severe dementia. The 2017 Will was prepared by a lawyer arranged by John who had never previously dealt with Arnold. Simone was away working at the time the arrangements for the 2017 Will were made. The lawyer who drafted the 2017 Will, Ms. Adrienne Swift (“Ms. Swift”) had Arnold “sign off” on the known risks of signing the 2017 Will in the circumstances.
- [5] For the reasons set out below, the Applicant’s motion for summary judgment is granted. While execution requirements were met and there may not have been any intentional undue influence, there was overwhelming evidence of incapacity at the relevant times.

The Lawyer’s Affidavit and Appended Medical Records

- [6] Ms. Yalda Aziz (“Ms. Aziz”) is an Associate at the Zarek Taylor Grossman Hanrahan law firm in Toronto. She swore an affidavit in this proceeding dated June 16, 2022. Ms. Aziz does not represent Simone, nor has she worked on this case. Medical records for Arnold for the period of August 26, 2013 to December 21, 2017 were attached to her affidavit as Exhibits. These exhibits included notes and records from St. Joseph’s Health Centre (“St. Jo’s”) and reports from Arnold’s geriatrician Dr. Tal and psychiatric assessments done by Dr. Richard Stall (“Dr. Stall”) while Arnold was at St. Jo’s.
- [7] Ms. Aziz conceded in cross-examination that she had no personal knowledge of the medical records, nor had she spoken to any of the doctors or other medical staff who treated Arnold during that time. To be clear, counsel had already received **all** medical records in this case. Due to inadvertence, the Applicant did not seek to have the medical records attached to the Aziz affidavit admitted into evidence for trial until after cross-examinations had been completed.
- [8] On December 1, 2022, counsel agreed that the medical records could be admitted into evidence, but John’s counsel reserved the right to argue that the Court must determine the weight and reliability of the records where the author of those records has not sworn an affidavit.
- [9] The Respondent’s counsel submitted that it was not his onus to ensure the Applicant has put her best foot forward on this summary judgment motion. Putting one’s best foot forward includes evidence that is provided directly by witnesses who have first-hand knowledge of critical events. A lawyer’s affidavit falls far short of this because it shields those with first- hand knowledge from cross-examination.
- [10] Where a party seeks to rely on expert medical evidence, they must do so in a manner that will permit cross-examination of the expert, otherwise the Court may draw an adverse inference.
- [11] By way of example, John’s counsel objected to the Court’s reliance on a Shift Summary Note dated September 18, 2017. Counsel submitted that the entries could be interpreted differently, are contradictory and could not be relied upon without calling the author of the note as a witness.

- [12] Simone's counsel submitted that the medical records in issue are critical, and their probative value is crucial to the case. Ms. Aziz did not purport to express any opinion in her affidavit, it was intended as a method of adducing the evidence.
- [13] The parties identified early on who they would be calling as witnesses and who would be cross-examined. Counsel for Simone submitted he would have been more than willing to accommodate examinations with limitations given that the records were authored by dozens of different people. In any event, the Respondent could have examined Dr. Tal or Dr. Stall pursuant to r. 39.03 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.
- [14] In *Diao v. Zhao*, 2017 ONSC 5511, the Court dismissed a motion for summary judgment. In doing so it made specific reference to doctor's clinical notes appended to information and belief affidavits sworn by persons who were unqualified to testify on the issue at hand. The Court held, among other findings, that the moving party was not prejudiced by a law clerk's affidavit as the written statement attached as an exhibit had been in the plaintiff's possession for over a year and that the plaintiff had made it an exhibit to its original affidavit.
- [15] The Respondent relies on *Diao* with respect to knowledge and belief affidavits shielding witnesses. However, the *Diao* case dealt with a lawyer's affidavit which contained legal argument and parties who were not ready to proceed based on the record before the Court.
- [16] The Respondent also relies on *Dupont Heating & Air Conditioning Ltd. v. Bank of Montreal*, 2009 CanLII 2906 (Ont. S.C.). In that case the Plaintiff attempted to sue the bank which processed forged cheques from his former bookkeeper. The Court rejected an expert opinion which was not sworn or supported by an affidavit from the expert. Dupont was decided before *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87.
- [17] Given all of the above, I find that significant weight should be given to the medical records appended to the Aziz affidavit for the following reasons:
- a. The records are well-known to the Respondent and have been in their possession for the same amount of time as the Applicant. While there was no specific evidence on this point, I infer that it was long before June 2022.
 - b. The Respondent has had since June 2022 (or earlier if they chose) to confirm that they intended to summons the authors of the records to be cross-examined at trial.
 - c. The Respondent could have examined any of the authors of the records pursuant to r. 39.03 on the grounds that they had relevant evidence to give.
 - d. Rule 20.04 permits this Court to draw reasonable inferences from the evidence. With respect to shift summary reports I infer that they are based on pre-populated but unfortunately badly designed forms (such as the one at page 117 of the records attached to the Aziz affidavit). The bolded portion on the left side of the form provides headings and possible responses. The responses are not bolded and represent the entries made by the shift nurse or other professionals. This is clear

and obvious from the form. The Respondent submits this is not clear and that the author of the note would have to confirm its meaning. I disagree. The Court cannot be responsible for badly designed record keeping but it can draw logical conclusions from such records based on the evidence as a whole. I infer that the form is designed to offer a number of possible responses. The author may choose one of those or make their own entry based on observations. I accept the responses as being the observations of the author and find that there can be no doubt as to their meaning.

- e. The records were made contemporaneously and provide important information about Arnold's condition at critical points in this case. Giving them little or no weight would be counter-productive and unrealistic in all of the circumstances. It would also result in effectively excluding objective evidence when much of the evidence in this case is contradictory.

[18] In summary I find that this Court may rely on the medical records appended to the Aziz affidavit and ascribe them the significant weight that should be given to critical and contemporaneous notes made by third parties with no interest in this case.

The Evidence of Simone and John

[19] Arnold and Simone met in 1985 when Arnold was working as a pilot and Simone as a flight attendant. They commenced living together the same year. Simone is now retired. She gained seniority over the years such that she generally worked the long-haul flights. This meant she was often away from home for 48 hours or more at a time. Simone was working in this capacity during the period of August to December 2017.

[20] Simone owned a condominium at 50 Quebec Avenue in Toronto ("the Condo") where the couple spent most of their time. Arnold owned a home in Barrie located at 75 Little Lake Drive ("the Barrie home"). Arnold and Simone often spent time at the Barrie home on weekends during the summer. The Barrie home has been sold by the Estate Trustee During Litigation and proceeds of approximately \$450,000 remain from that sale.

[21] John was 12 years old and living with his mother when Simone and Arnold began living together. John was adopted by Arnold and his ex-wife when he was four months old. Simone's observation was that John's relationship with Arnold was strained and at times non-existent. John was not close to Arnold's sister Marian Nolan ("Marian") either. Simone testified that John was never involved in Arnold's care prior to September 2017. Her evidence was that she stayed away from John after she discovered he had taken money out of her handbag when he was in his late teens.

[22] In contrast, John's evidence was that he had a very close relationship with his father and spent significant time with him at the Barrie home. John agreed that there was an incident with his father just before his first year of university in 1993. They argued and did not speak for a few months. However, his father came to visit him in Ottawa a few months later and they reconciled. The relationship was very close thereafter.

- [23] John conceded that he called his father more often than he saw him because he was living in Ottawa and his father was often working on long-haul overseas flights when he was a pilot. John told the Court that he did have a relationship with Simone, and they often talked about Arnold's health problems. He agreed that his relationship with Simone could not be described as a close one.
- [24] Simone was Arnold's full-time caregiver until the date the September 2017 POA for Personal Care was signed. Arnold needed significant care from approximately 2015 onward. Simone had to hire outside caregivers for Arnold when she was working. One of those caregivers was Dana Leonardi ("Dana"). Arnold had other Personal Support Workers ("PSWs") who were assigned by the Community Care Access Centre ("CCAC").
- [25] Simone described Arnold's medical history which included the following:
- a. Admission to Mount Sinai hospital for one month in 1994 due to pancreatitis.
 - b. Two hospitalizations in 1995 for pneumonia.
 - c. In 2003 Arnold had his colon removed, suffered two pulmonary embolisms, developed C difficile and was hospitalized for three months. Arnold required a colostomy bag after his colon was removed.
 - d. In 2008 Arnold had a routine diagnostic scope with an adverse result resulting in him being put on life support and a medically induced coma; Arnold did not do well with the anesthetic.
 - e. In 2012 Arnold was diagnosed with dementia by his geriatrician Dr. Tal and required 24-hour care beginning in 2015. CCAC began assisting with Arnold's care twice a day in 2015. This increased to three times a day by 2017. John was not aware of his father's dementia diagnosis until 2018 when this litigation started. He explained that his father was a very proud man, and it did not surprise him that he would not have shared this information.
 - f. Arnold was admitted to hospital on July 16, 2017 for a fall. He left the hospital on July 21, 2017. During this period, he was noted as being disoriented as to time and place with severe dementia. He was a confused historian who made tangential utterances. During that admission it was determined that Arnold was incapable of making decisions with respect to his future care accommodation.
 - g. In August 2017 Dr. Tal diagnosed Arnold with severe progressive vascular dementia and as dependant for all basic activities of daily living ("ADLs"). His mini mental score had fallen from 29 to 15. In August 2017 Dr. Jaksa of the Local Health Integration Network confirmed the dementia diagnosis. By this point Arnold was unable to read or hold a pen or cutlery. His handwriting had become illegible.

- h. On August 31, 2017, Arnold fell and suffered head trauma. He was taken by ambulance to St. Jo's. His admission/discharge diagnosis was dementia. He was discharged on September 2, 2017.
 - i. Arnold was admitted to St. Jo's again on September 15, 2017 and discharged on October 18, 2017. He was admitted again on November 13, 2017 where he remained until his transfer to Sunrise Senior Living ("Sunrise") in December 2017. Several assessments and reports were done during this period that noted that Arnold suffered from dementia, was disoriented as to time and place and believed that he did not have any medical difficulties other than his colostomy bag.
- [26] Simone was assisted with Arnold's care by Dana, CCAC and a neighbour. It is alleged that Simone's caregiving was substandard in that she drank to excess and did not attempt to control Arnold's drinking, that she improperly administered his medications, that she physically abused Arnold, and that she told others that she could no longer handle her caregiving role and wanted to commit suicide or let the "government" take over Arnold's care. Simone denied all of these allegations and denied making any such statements.
- [27] Simone's evidence was that she ensured Arnold was always cared for and she made special arrangements for the times she was away working. Simone was directed to a Care Coordination note authored by Nurse Practitioner, Blessing Osawaru ("Ms. Osawaru") on August 17, 2017. In that note, Ms. Osawaru wrote that a private PSW noted that Simone emptied 240 Percocet pills into a bowl for Arnold to take as he pleased. The PSWs assigned to work with Arnold were noted to be uncomfortable and felt unsafe in Arnold's home when both he and Simone were intoxicated. Simone denied the contents of the note and told the Court that Arnold's pills were administered by Dana or PSWs from blister packs of premeasured medication. Simone stated that she made all of Arnold's food and left it to be heated up either by Dana or by other caregivers if she was not there. The food had to be specially prepared given Arnold's medical conditions.
- [28] Simone denied the accuracy of Ms. Osawaru's note with respect to PSWs feeling unsafe at the Condo when Arnold and Simone were drinking. Her evidence was that the PSWs would see wine glasses around and assume she and Arnold were drinking. In fact, in August and September 2017 she and Arnold were on medications which prohibited any combination with alcohol. Before she and Arnold were on those medications, they would each have one glass of wine in the evening after the PSWs left. The medical evidence shows that Simone told Arnold's doctors that she tried to control Arnold's alcohol intake but that it was difficult because when she was working, he would just order alcohol by phone and have it delivered by taxi.
- [29] Simone's evidence was that as Arnold's dementia worsened, he became more difficult to handle. He became aggressive towards his PSWs sometimes calling them "monkeys" or "bitches" and refused to allow them to touch or bathe him. She told the Court that this behaviour was both insulting to the PSWs and completely uncharacteristic for Arnold. It led to problems with respect to PSWs refusing to work at the Condo.

- [30] Simone and Arnold's relationship was somewhat tumultuous. According to John, they loved one another but they often argued, and it can be gleaned from all of the evidence that Simone could be mercurial at times. It was suggested to Simone that both she and Arnold drank alcohol to excess. In a report from Arnold's geriatrician Dr. Tal dated September 17, 2013, he noted that "alcohol abuse remains a problem for both of them [Arnold and Simone]. They each take a litre of white wine per day. I have asked them to both taper down to half a litre per day."
- [31] Simone testified that Dr. Tal was more concerned about Arnold's wine consumption than hers because it could exacerbate his cognitive disorder. She said she tried to get Arnold to drink dealcoholized wine, but he hated it. She restricted him to one glass a day. Simone denied drinking the amount suggested by Dr. Tal. She told the Court that as a flight attendant she could not drink alcohol 24 hours before a flight, during a flight or on layovers. She was subject to random testing which she had never failed. She also noted that Dr. Tal was not her physician nor had she undergone testing with any physician for alcohol abuse.
- [32] John was unaware of Dr. Tal's view that as of February 2014 Arnold was already in a cognitive decline. On discharge from St. Jo's after a fall in May 2014, he was diagnosed with dementia, alcohol dependency and delirium. John was not aware that that his father had delirium.
- [33] John's evidence was that his father continued to drive to the Barrie home until 2016. He was not aware that his father's health professionals had told him to stop driving as early as 2013/2014 or that he and Simone planned to sell his car as per Dr. Tal's note of February 13, 2014. He did not dispute the Occupational Therapy ("OT") Assessment of December 14, 2016, which reported that Arnold had not driven for seven to eight months. John conceded that he was not aware that his father's cognitive impairment had declined to that point by December 2016 and deferred to the medical report.
- [34] John testified that when he spoke to his father by phone, he appeared oriented as to time and place. He was referred to a February 5, 2017 EMS report in which Arnold stated that the current date was May 3, 1967. John was seemingly unaware of his father's level of confusion in December 2016 when he was described in an OT assessment as presenting with severe cognitive impairment. During that assessment on December 14, 2016, his father asked the OT to please get him a tissue. When she returned he did not recall asking for it. He was described as vague, disorganized and an unreliable historian.
- [35] John visited his father in mid February 2017 for two days and testified that he did not get the impression that his father was seriously confused. He denied seeing any signs of aggression, delusion or paranoia. He was then shown an Outpatient Record from St. Jo's dated February 22, 2017 in which his father was described as being verbally and physically aggressive, delusional and subject to paranoid thoughts. John responded that he had not observed his father suffering from that level of confusion.
- [36] John was not aware until this litigation that Arnold was admitted to St. Jo's on July 16, 2017 due to an injury. On admission Arnold was reported to have been agitated, aggressive and attempted to hit a hospital porter.

- [37] John was not aware until this litigation of an OT Assessment done on his father on July 16, 2017, after he was admitted to hospital, which reported that Arnold suffered from severe cognitive impairment. He was also not aware that Simone reported to the OT that Arnold screamed during the night, was resistant to care, agitated and becoming more aggressive.
- [38] The OT noted that the patient's reporting was unreliable. Under "Additional Findings", the assessment noted that Arnold reported that "he is in an electric company." Arnold was unable to tell the OT the month or the year.
- [39] John's evidence was that when he spoke to his father by phone in July 2017, he did not perceive that level of cognitive impairment or that his father was subject to tangential thoughts, aggressive or delusional. He stated that at most his father was occasionally confused or repetitive. He deferred, however, to the medical reports and did not disagree with Dr. Stall or Dr. Tal's findings. He also did not disagree that Simone had been a dedicated caregiver.
- [40] In an inpatient Swallowing Assessment done on July 17, 2017, Arnold is noted to be oriented only to person with "obvious cognitive deficits noted in conversation with vague history at times and frequent tangential utterances."
- [41] In a nursing report dated July 19, 2017 at 3:35 a.m., Arnold is noted as being restless, confused and pulling all his personal belongings into his bed.
- [42] Psychiatrist Dr. Stall examined Arnold on July 19, 2017. Dr. Stall noted the following on that date:
- a. Arnold was unable to give his own history.
 - b. Arnold believed he could manage just fine at home, with help, and that he would rather die than go into a nursing home.
 - c. Arnold had previously been assessed by CCAC as being incapable of making a decision regarding a nursing home.
 - d. Arnold's thought process was noted as being tangential, disorganized, and without a realistic appreciation of his current limitations.
- [43] In his discharge summary dated July 21, 2017, Dr. Stall noted Arnold's diagnosis was dementia and hip pain. He also noted that Simone was suffering from caregiver burnout and that Arnold's previous refusal to go into long-term care had to be revisited as Arnold was not capable of making a decision regarding future accommodation.
- [44] In a Psychosocial Assessment done on July 21, 2017, Arnold was noted as being disoriented as to place and time, presenting with reversed day-night functioning cycle, poor memory and a lack of insight as to his care needs. It was noted that Simone was a dedicated caregiver but reported both frustration and burnout. She recognized the need for a long-term care placement but felt guilty because she knew Arnold would not agree to the plan.

- [45] In an Ambulatory Care Report completed by Dr. Tal on August 9, 2017, Dr. Tal reported that Arnold had severe and progressive vascular dementia and is dependent for all ADLs 24 hours a day. Dr. Tal indicated that Arnold was appropriate for long-term care. He noted that Arnold's mini mental score had dropped from a 29 four years earlier to 15 in February 2017. His verbal reasoning score was six in February 2017 which Dr. Tal noted was significantly below the threshold for impairment.
- [46] Sandy McCamus ("Sandy") performed a Capacity Evaluation for a Long-Term Care placement on Arnold on August 17, 2017. It was noted that there was no answer given to the question about what time it was. When asked the date Arnold responded that it was July and late fall. It was actually August 17, 2017. Arnold was able to tell Sandy where he lived, his date of birth, and that he had been a pilot. He told Sandy that "Simone makes my life very easy...she bears the brunt of everything."
- [47] Arnold reported to Sandy that he did not have any health problems other than living with his colostomy bag. He believed the best living arrangement was for him to stay at the Condo because Simone organized everything. He referred to being in long-term care as being "locked up" but he knew that eventually it would happen. When asked about how other people would feel about a move to long-term care he said he thought Simone would be happy and that "I have a sister and a son whom we have a problem with. Problems have arisen with them in the last day or so." He was noted as showing insight into his limitations and understanding the possibility of long-term care in the future. Sandy assessed Arnold as "capable" in that he understood his limitations, that his health would deteriorate in the future, and that he could not manage without other people's support.
- [48] John attempted to have Sandy testify at trial, however, she has since retired from CCAC and John was unsuccessful in locating her.
- [49] Arnold was admitted to hospital again on August 31, 2017 when he fell and hit his head. The admitting physician's diagnosis was dementia. In a discharge summary dated September 2, 2017, Dr. Tal requested that an urgent long-term care placement request be made. He also noted that Arnold was "not competent to make any decisions related to personal care, accommodation, medication use or property."
- [50] Arnold was readmitted to hospital on September 15, 2017 after he called 911 because of some weakness in his right arm and slurred speech. Arnold was reported to have been concerned because Simone left "in a rage." Arnold was noted as presenting with confusion and a history of dementia. Simone's evidence was that she did not leave in a rage. She came back from grocery shopping and Arnold was gone. Later that day, Simone came to visit Arnold at the hospital. She advised that he had called the hospital in error and that Arnold should be brought back home. At 9:50 p.m. that evening Arnold was noted as not knowing why he was in the hospital, his ostomy bag was leaking and he had "poop" on all his fingers. The next morning he was once again noted as being disoriented as to time and date.
- [51] On September 18, 2017, Arnold was noted by Dr. Feighan as being disoriented as to place and time and on September 19, 2017, he was noted as being confused. On September 27,

2017, he was noted as being disoriented to place and confused. On September 27, 2017, he was visited by Social Worker Hanna Poznanski ("Ms. Poznanski"). She accidentally discovered that Arnold had multiple decayed and abscessed teeth which required extraction. The dental surgery was tentatively scheduled for September 30, 2017. Ms. Poznanski noted that Arnold was not competent to make medical or accommodation decisions due to a well-documented history of dementia.

[52] On September 28, 2017 at 9:39 p.m., Dr. Feighan again noted that Arnold was disoriented as to place and time and was confused.

[53] On October 12, 2017, Arnold was again assessed by psychiatrist Dr. Stall. Dr. Stall's observations are of importance in understanding Arnold's condition within two weeks of signing the 2017 Will and have been reproduced below:

1. Accommodation: patient states that he is coping well at home. He denies having fallen despite the fact that most of his recent admissions have documented falls. He denies having had frequent hospitalizations, despite the fact that this is writer's second meeting with him in 3 months. He believes he can continue staying at home by choice. He does acknowledge that he needs help with all IADLs and ADLs. He gave vague answers when writer asked how he believes his wife is coping with him at home. When probed specifically about LTCs, patient "has started thinking about going to a long-term care facility just last month". He does confirm that his partner "hits me" and "yells at me", and "there are nights when I sleep with my back facing her because I know that's the part of my body that can handle the most damage".

2. Finances: patient believes he can handle his own finances. However, he had trouble remembering what bank he banks with ("credit union? maybe royal bank?"), and was unable to do simple calculations for a hypothetical scenario requiring calculating change from a grocery store. He states his pension is only 400-500 dollars /month but "we always have leftovers by the end of the month". He states his wife has been handling his finances in recent years.

MSE: unkempt gentleman appearing stated age, in hospital gown, sitting, ++ food crumbs over body, good eye contact. No other motor abnormalities noted, speech quiet. Mood "okay", affect somewhat blunted. Thought process tangential, thought content devoid of SI/HI/any other acute safety concerns. Insight and Judgment poor - not able to understand his level of risk for falls, does not acknowledge he has been frequently admitted to hospital recently due to failure to cope. Cognition - Not currently oriented to time or place.

Impression: 80 yo referred for capacity assessment re: personal care and finances. Given his inconsistent history and lack ability to do basic calculation questions such as calculating change, and his lack of insight on the increasing difficulty to cope at home (ie. denying falls etc), he does not possess capacity to make decisions re: personal care or finance.

[54] On November 15, 2017, Dr. Stall did a follow up report on Arnold. Dr. Stall asked Arnold if he knew what a POA was. Arnold responded as follows:

His explanation about a power of attorney was that it is someone who can act on your behalf. When I asked him more specifically what sorts of things they could do, and he stated for example, they could start cutting your grass if it was bothering your neighbor.

I asked him more specific questions. I asked him whether a power of attorney could decide where he lives. He responded that they could not do that.

I asked him if powers of attorney can have access to your bank account and his response was that they cannot have access to your bank account.

I asked him if powers of attorney can make decisions about your health care and possible treatment, and his reply was that they could not.

[55] Dr. Stall's diagnosis of Arnold's condition at that time was that he had a neurocognitive disorder, an alcohol use disorder and depression.

[56] After Arnold's admittance to hospital on September 15, 2017, John became more involved in what was going on. He told the Court he was in constant contact with Arnold's sister Marian and his father and began to make plans to visit him in Toronto. After the family meeting on September 7, 2017 (described in more detail below) he called his father and they discussed the team's recommendation that Arnold name a new Attorney for Property and Personal Care. John arrived in Toronto on September 28, 2017 and stayed for two days. He spent all day with his father on September 28, 2017 but did not note any signs of disorientation or confusion. He did notice that his father repeated himself sometimes. He denied that his father presented as unkempt and covered in crumbs as noted by Dr. Stall. He was not aware of Dr. Stall's October 12, 2017 and November 15, 2017 reports until this litigation started.

[57] It was suggested to Simone that she sometimes left Arnold alone despite his requirement for 24/7 care. She denied this and told the Court that if she was not there either Dana, a PSW or a neighbour were always with Arnold. When she went out to do errands or shop, she took him with her as he enjoyed the outing.

[58] Simone was directed to a "Transition Planner Progress Note" made by Social Worker Mandy Zhou ("Ms. Zhou") on September 1, 2017. In that note, Ms. Zhou reports that Simone is not coping well and has threatened suicide more than once. Ms. Zhou reported that one of the hospital's resource planners reported to her that Simone was leaving to fly to Europe and that she told staff that Arnold was the responsibility of the government. Ms. Zhou's note also makes reference to both Arnold and Simone abusing ETOH (alcohol).

[59] Simone denied the contents of this note. She wanted to care for Arnold, but it was difficult. She was desperate for more assistance from CCAC by way of PSWs. She implied that her extreme desperation for help was misinterpreted by staff.

- [60] Simone was aware that a family meeting had been arranged on September 7, 2017 regarding Arnold's care. She knew that Arnold's sister Marian (who lived in California) participated in the meeting by phone as did John. Simone believed Arnold's private nurse Dana was also present for the meeting. Simone's evidence was that she was at home when this meeting took place but was asleep after an exhausting flight. No one woke her up to participate in the meeting. She denied the suggestion that she was not asleep but passed out from alcohol consumption.
- [61] Simone was directed to a note from Sandy, RN, regarding the September 7, 2017 meeting held at the Condo. The meeting had been requested by Arnold's sister Marian. She had contacted the Mobile Crisis Unit as she was concerned about her brother's care. Those present at the meeting included Dana, mobile crisis worker Brendan, Sandy and Marian and John by phone. Simone was not present as described above.
- [62] Sandy recorded that both John and Marian were concerned that Arnold was not being properly cared for by Simone and should be removed from the Condo. They expressed concern that Simone changed Arnold's number and they could no longer contact him. John offered to become Arnold's POA for Personal Care and Arnold agreed. Plans for Arnold being moved to long-term care were underway. Sandy noted that Arnold was still taking Oxycontin and not the medications in the blister pack. A follow-up meeting was scheduled for September 20, 2017.
- [63] When Arnold was admitted to hospital on August 31, 2017, it was discovered that he had abscessed teeth and would require dental surgery. This was very concerning given his severe reaction to anesthetic in 2008. The requirement for surgery prompted the hospital to request that a new POA must be appointed right away to make decisions in the event there were complications from the surgery. This request was based on their information that Simone no longer wished to care for Arnold and a new substitute decision maker was needed.
- [64] Originally the dental surgery was planned for September 30, 2017 but had to be deferred until October 6, 2017. Simone's evidence was that she waited for Arnold during the operation and slept with him that evening in hospital. While John was already appointed Arnold's POA for Personal Care at this point, he left Toronto on September 29, 2017.
- [65] Arnold was discharged from St. Jo's on October 18, 2017. On November 13, 2017, Simone called EMS. The EMS report documents that Simone stated that Arnold had urinated and defecated on himself and that she was leaving because she could not take it anymore after 22 years. She stated she would leave the apartment door open. When EMS arrived, Arnold was found on the bed with fecal matter on him and on the floor. His colostomy bag was leaking. Simone was not on site to answer questions. Arnold was noted as having dementia and being incapable.
- [66] Simone denied the narrative in the EMS report. She told the Court she went downstairs to the parking garage to find something and did not lock the door. She did not recall contacting EMS although the note said the call came from her. She testified that Arnold called EMS

several times in June and July 2017 when he was confused. Simone denied making any statement that she was leaving because she could not take it anymore.

- [67] Simone had managed Arnold's finances for many years. Based on a note from Social Worker Ms. Zhou dated November 22, 2017, Simone was advised that the hospital would be honouring John's POA. The note reported that "Simone appears angry over the phone and didn't acknowledge the decision by the ethical care team." The note references a further family meeting to be held on November 27, 2017
- [68] A Social Work note from Ms. Zhou was produced in relation to the planned November 27, 2017 family meeting. Those present at the meeting included Arnold, John, Simone, Maya (a neighbour who cared for Arnold), Ms. Zhou, and Social Worker Barbara Ross. The purpose of the meeting was to discuss discharge planning for Arnold. Discussions at the meeting focused on where Arnold should be placed. John wanted Arnold to go to Amica in Barrie. Simone did not agree.
- [69] Simone's evidence was that she went to the hospital to visit Arnold on December 22, 2017 and he was gone. The hospital would not tell her where he was. It took her three days to find out where he was. She objected to his placement at Sunrise in Mississauga as it was too far away, and Arnold had always told her he did not want to go into long-term care. Arnold died at Sunrise in February 2019.

Credibility of John and Simone

- [70] I found John to be a candid witness. He reasonably conceded points as appropriate during cross-examination including situations where his assessment of his father's condition differed from the medical records during the same time frame.
- [71] John was frank about his relationship with Simone. He agreed it was strained but he pointed out that at times she was very kind to him and his father. Apart from his criticisms about Simone's drinking John's biggest issue with Simone was her lack of predictability. He was never sure how he would be treated. While he described her as having mental health issues, he conceded that he had no evidence to support that contention.
- [72] While John insisted he had a very close relationship with his father, there was some evidence that was inconsistent with that statement.
- a. Simone's evidence was in direct conflict with John's on that point. Her evidence was that they were not close at all.
 - b. John lived in Ottawa and did not see his father in person regularly. Even when Arnold was in a serious decline in 2017 John visited him in February for two days and then in September for two days. Their relationship appeared to be one which took place mostly by phone.
 - c. There was no evidence that Arnold and Simone or even Arnold on his own visited John in Ottawa on a regular basis.

- d. There were no photographs or other mementos in evidence to corroborate the allegedly close relationship.
- e. For a father and son who were so close it did seem somewhat unusual that Arnold had never left anything to John in his Will except in the 2017 challenged Will.

[73] John appeared to have a distorted view of his father's condition. When the medical records described his father as disoriented, delusional, confused or having paranoid thoughts John seemed unaware of any of this. He was of the view that his father occasionally repeated himself but nothing more serious than that. He was completely unaware of his father's diagnosis of dementia going back to 2012 until he received the medical records in the context of this litigation. While John explained this away as his father being a proud person who did not like to admit to any weakness, it is difficult to reconcile John's complete unawareness of his father's serious condition with his assertion that he and his father were very close.

[74] In summary, while I accept most of John's evidence, his evidence with respect to his relationship with his father and his view of his father's condition must be viewed cautiously in the context of the above.

[75] Simone's evidence was much less candid than John's. There is no doubt that Arnold and Simone's relationship was a rather turbulent one. They often argued loudly, even when Arnold was in hospital. According to John, Arnold described Simone as suffering from bipolar disorder and manic depression. This was referred to in Ms. Swift's notes although it is unclear if she was told this by John or by Arnold. No evidence was before the Court with respect to Simone's mental health other than John's bald assertion. Simone denied having any mental health issues.

[76] Some might have considered Arnold and Simone's lifestyle as unhealthy or dysfunctional. However, they were two consenting adults and if they chose to abuse alcohol that was certainly their own business. In Simone's case, her denials about her and Arnold's drinking habits rang somewhat hollow given the evidence in the medical records and John's affidavit. However, it must be noted that Simone had a responsible job which was tightly regulated. She was a senior flight attendant who had worked for Air Canada for years. No evidence was tendered that she had ever been suspended or not passed the required random checks. While working, Simone could not drink 24 hours before a flight, during a flight or during a layover. Dana's evidence must also be considered on this point. Her evidence was that she never saw Arnold or Simone consume alcohol to excess.

[77] As such, I accept that Simone's evidence on the drinking issue may have been somewhat self-serving but in the end, it is doubtful she could have still been employed in the position she was if her alcohol abuse was as described by John. It must be noted that at the critical period of the summer and fall of 2017 Simone was still working full time.

[78] Dana's evidence was that Arnold and Simone loved one another unconditionally. She never saw Arnold abused or neglected by Simone. She noted that Simone cooked Arnold's favourite meals and had them ready for Dana to heat up. Simone had Arnold's medications

in order and ready to be administered. Simone booked all of Arnold's medical appointments and took him to those appointments. She never saw Arnold or Simone drink alcohol to excess. Dana's evidence should be given considerable weight on these points. I find that Simone was a loving caregiver for Arnold until Arnold became impossible to manage.

- [79] Some of the medical notes and John's evidence indicated complaints by Arnold about his treatment by Simone. He complained that she hit him, yelled at him and left him alone at times. This evidence must be viewed in the context of Arnold's decline and confusion. Over and over, medical professionals reported that he was not a reliable historian. It must also be viewed in the context of Simone's obvious caregiver burnout. She was admittedly overwhelmed by caring for Arnold. She knew he should go into long-term care but felt guilty about supporting that because it was not what he wanted. His constant hospital admissions in 2017 were alarming and destabilizing.
- [80] In summary, despite the flaws in Simone's evidence, any attempt to depict Simone as a mentally ill alcoholic are unfair, gratuitous and not borne out by the evidence as a whole. She was certainly not perfect, but her lifestyle and personal choices were not the subject of this trial. Any attempt to bolster an argument that Arnold wanted to change his Will because Simone was a bad person must therefore fall short.

The Evidence of Dana Leonardi and Credibility Assessment

- [81] Dana has been a qualified Registered Nurse since 2008. She first met Simone and Arnold when working for Nurse Next Door. She provided care for Arnold at the Condo. After she left Nurse Next Door, Simone contacted her directly to ask if she would agree to look after Arnold during her overnight shifts. These were 48-hour periods four to five times a month. Dana agreed and provided this care for Arnold from 2015 until he was moved to Sunrise in December 2017. Dana would sometimes visit Arnold when he was in hospital. She did so as a friend and not a caregiver.
- [82] Dana provided companionship for Arnold and looked after his medical needs. She noted the unconditional love between Arnold and Simone and noted that Arnold showed no signs of abuse or neglect from Simone. She said Arnold was happy at the Condo and did not complain. She denied that Simone drank to excess. She never saw her either passed out or drunk. Dana agreed that Arnold liked white wine. He and Simone enjoyed drinking wine with their meals in moderation. She denied that Arnold was drinking wine throughout the day while taking Oxycontin. Arnold was never intoxicated when she was at the Condo.
- [83] Dana noted that Simone took Arnold to all his medical appointments, prepared all his meals and drinks and ensured he had reading material. Dana observed that Arnold was very forgetful and confused. His orientation to time was inaccurate and over time as his dementia progressed, he became delusional. Over time Dana also noticed that it was increasingly difficult for Arnold to hold books or newspapers as he had trouble with anything involving fine motor skills.

- [84] Arnold required outside care as well as Dana's services. She noted him to sometimes be combative with PSWs. He did not understand who they were and thought they were intruders.
- [85] Arnold had a lot of physical impairments including bad knees, shoulders, hands and feet. His fingers were stiff which made it very difficult for him to use cutlery. If he tried to eat on his own, much of the food landed on the floor.
- [86] Dana recalled a phone conference with someone from CCAC, as well as John and Marian which she agreed was likely on September 7, 2017. She believed they discussed long-term care options for Arnold. This was a topic which came up frequently. Dana thought of herself as a neutral party. She recalled offering to ensure that John and Marian were able to contact Arnold when Simone changed the home phone number. Dana did not recall any discussion about John becoming Arnold's POA at the telephone meeting. She knew there was what she called "drama" between John and Simone.
- [87] Dana visited Arnold when he went to Sunrise. He was unhappy there and missed Simone. He was lonely and did not understand why Simone did not visit him. Dana attempted to explain that John had given this direction to Sunrise but Arnold blamed Simone.
- [88] Over time Dana noticed that Arnold became vulnerable, dishevelled, gaunt and grey while at Sunrise. He did not participate in any activities. Dana continued to keep in touch with Simone after Arnold's death and observed the distress this litigation has caused her.
- [89] While Dana did not give *viva voce* evidence, she was cross-examined on her affidavit. Dana started out as a caregiver for Arnold but over time became a friend to both. While her evidence differs from others on points such as alcohol consumption and Simone and Arnold's relationship, it must be kept in mind that she was the **only** witness in this trial who had spent significant time with both Arnold and Simone and was integrally aware of their situation. For that reason, I give her evidence significant weight.
- [90] Dana attempted to be neutral when she offered to connect Arnold with Marian and John when Simone changed the home phone number. She clearly wanted what was best for Arnold and was not taking sides within the family. Despite all of the time she spent with Arnold, she never saw any signs of abuse from Simone. This must be contrasted with John and Marian's insistence that Simone was not providing proper care for Arnold when he was at home.
- [91] I also rely on Dana's evidence with respect to her direct observations of Arnold's decline including that he was forgetful, confused, delusional and not oriented as to time. I further rely on her observation that Arnold often viewed PSWs as intruders and acted in a combative manner towards them. Dana was a trained nurse and her observations of Arnold's condition, while not a medical opinion, must be given some weight.

Marian Nolan's Evidence and the Weight to be Given to her Affidavit

- [92] Marian Nolan is Arnold's younger sister and John's aunt. She swore an affidavit on May 7, 2018. Marian died in 2019. She was never cross-examined on her affidavit.
- [93] Marian's evidence was that she and Arnold had always been close. She lived in California but kept in regular touch with Arnold by phone. Simone denied this and testified that Arnold was never close to Marian.
- [94] Marian deposed that Simone had always hated John and attempted to exclude him from the Cheshire family. She made it difficult for John to spend time with his father.
- [95] Marian viewed Simone as dangerous for her brother because she was unstable, irresponsible and vindictive. Marian described Simone calling and demanding that she come to Toronto to look after her brother. She deposed that Arnold had told her there were multiple domestic violence calls to the police who always determined that Simone was the abuser. It should be noted that no police reports have been filed in this proceeding to corroborate that allegation.
- [96] Marian described Simone as flying into rages, humiliating Arnold, isolating Arnold from his family and passing out drunk on the floor. When Simone changed the home phone number, Marian called the Elder Abuse hot line and the CCAC. She also called the police three times to do wellness checks on her brother. Dana recalled being there when the police arrived for one of the wellness checks. After the third wellness check CCAC became involved and initiated the September 7, 2017 meeting. At that meeting Marian was clear that her brother was very specific that he wanted John to take care of him and he wanted to leave the Condo. Marian fully supported John being named Arnold's POA or Guardian.
- [97] Given that Marian Nolan died after swearing her affidavit and before the trial of this matter, an issue arose as to the weight to be given to her affidavit in the circumstances.
- [98] John argues that the affidavit should be admitted as an exception to the hearsay rule. As the evidence was sworn under oath John submits it is reliable. Of course, such reliability is dependent upon whether the affiant had a motive to lie, the occasion on which the statement was made, the nature of the information and the relationship of the affiant and the person in question. Further, Simone's counsel had time to cross-examine Marian before her death in 2019 and chose not to do so.
- [99] Simone submits that Marian's evidence is entirely unreliable because it is based on phone calls with Arnold who had advanced dementia. None of the incidents recounted by Marian were observed by her personally.
- [100] Simone's evidence was that Arnold and Marian were not close and that he was completely estranged from his other sister Marjorie. John's evidence was that Arnold and Marian were close.

- [101] Counsel raised this issue at the commencement of trial. I advised that I would not determine what weight to give to the affidavit until I had heard all of the evidence.
- [102] I agree with the Applicant's submissions on the weight to be given to Marian's affidavit. While Marian's evidence was taken under oath, and there would have been an opportunity to cross-examine her, Marian did not observe any of the many incidents she recounts in her affidavit. She lived thousands of miles away, was never involved in her brother's caregiving and received all of her information by phone. It is clear that she had extreme animus towards Simone, some of which was generated in relation to an incident involving a family Bible which has nothing to do with this proceeding.
- [103] Marian's evidence is to be contrasted to that of Dana, an individual who spent significant time with both Simone and Arnold, was cross-examined and was medically trained. While Marian's evidence is admissible, I give nominal weight to it in all the circumstances.

The 2017 Will and POAs

- [104] In 2003 when Arnold underwent his colectomy surgery he was also faced with two pulmonary embolisms and a C difficile infection. Arnold was told his chances with respect to the surgery were 50/50. He decided to arrange his affairs and he and Simone found a lawyer quickly. Arnold signed the 2003 POAs naming Simone as his Attorney for Property and Personal Care. In Arnold's previous Will made in 1991 he left his entire estate to Simone. Arnold also executed a codicil to his 1991 Will which confirmed his 1991 Will and changed the executor to Simone. Both the POAs and the codicil to the 1991 Will were signed while Arnold was in hospital awaiting surgery in 2003.
- [105] John was asked why he thought his father left him nothing in the 1991 Will. John felt this was because his father had a lot of confidence in him. He had paid his own way through school and his father was very proud of John's accomplishments. In short, his view was his father felt he did not need anything from him.
- [106] Adrienne Swift is a lawyer who was called to the Bar in 2006. She has been a partner at Stroud Cohen since June 2017. Ms. Swift practices in the area of Wills and Estates and does some Estate related real estate. About 40 per cent of her practice is related to Will drafting.
- [107] Ms. Swift first met Arnold in hospital on September 28, 2017. She was initially contacted by John about a week before the 2017 Will was signed. They had two brief calls. She asked John for some background about his father in terms of contact information, whether he had a spouse and who his father might be including in his Will. She learned from John that a POA for Personal Care was needed urgently.
- [108] John told Ms. Swift that Simone had anger issues, was possibly bipolar and/or manic and that she would not allow him to go into a nursing home. Ms. Swift's evidence was that Arnold told her that Simone angered quickly, and she believed that he did confirm she was bipolar.

- [109] According to Ms. Swift, John told her that Simone had been a good caregiver for his father but that she was not well. His father had suffered abuse because of improper care and irregular medication.
- [110] Ms. Swift's initial understanding was that Arnold would be having dental surgery while in hospital and that he had not done well with anesthetic in the past. She did not enquire how old Arnold was or why he was otherwise in hospital. John did not tell her that his father had dementia. Ms. Swift's understanding was that the dental surgery was imminent, but she did not know the date.
- [111] Ms. Swift recalled that John told her that his father's understanding had been compromised but now that he was back in hospital he was much better. None of this is recorded in her notes. Ms. Swift advised that she recalled this from memory.
- [112] The day after her call from John, Ms. Swift called Arnold at the hospital based on the contact information given to her by John. She reported that her conversation with Arnold was a difficult one because she had to keep repeating herself. Ms. Swift deposed that Arnold was very clear with her that John was to be his executor, POA and sole beneficiary.
- [113] Following this conversation with Arnold, Ms. Swift contacted John about making arrangements to go and see Arnold at the hospital. She requested that John not be there at the time of signing.
- [114] Ms. Swift attended the hospital with her administrative assistant on September 28, 2017 either late morning or early afternoon. Ms. Swift explained that she brought a witness because hospital staff generally do not like witnessing Wills. She further explained that in her career she has only done somewhere between 12 and 15 Wills that were signed in hospital. These were all done with existing clients.
- [115] She brought two sets of documents with her in the event that changes needed to be made. She also brought a Direction and Authorization to be signed by Arnold which will be discussed below.
- [116] When Ms. Swift arrived at St. Jo's, John was there. He introduced her to his father and left. She described Arnold as older and thin with white hair. He seemed cheerful and cordial. Arnold was in his bed, covered in a blanket but sitting up. Arnold told her his date of birth. When Ms. Swift asked him for identification, he gave her a business card from when he was a pilot. Her evidence was that she asked him to tell her the date. She did not make a note of this although it is generally her practice to do so. She stated that she could recall (from three years earlier) that Arnold gave the correct date despite not making a note of it.
- [117] Ms. Swift asked Arnold for some background. He told her that Simone got angry very fast and that John was going to help him now. He said that Simone did not mean to be that way, but she could not help it and when she got mad, she lost control a bit. He described her as depressed, however, Ms. Swift was not sure he used that term. Ms. Swift admitted to shabby note taking. She noted that Arnold also said positive things about Simone including the fact that she handled their finances and that she was the "financial brain." Ms. Swift

had a note that Arnold wanted to change his documents “for protection.” However, she could not recall if Arnold told her this or John.

- [118] While Ms. Swift said she would have been interested to know that Arnold had been diagnosed with dementia she did not ask him about any of his medical conditions. She obviously knew he was in hospital, that his spouse was managing his affairs, and that part of the reason for the POA was to move him to long-term care, so she inferred his health was deteriorating. She did not ask whether a doctor had ever told Arnold he had cognitive problems.
- [119] Ms. Swift deposed that she conducted her own form of capacity assessment which included a review of assets, family make-up, a discussion about his relationship with Simone and instructions. Arnold told Ms. Swift that he and Simone had been together for 34 years and that she was currently the beneficiary of his Estate. As a result of her interaction with him, Ms. Swift determined that Arnold had capacity to execute the 2017 Will and POAs.
- [120] It was pointed out to Ms. Swift that John is referenced in the 2017 Will and POA documents as John Arnold. His name is John Cheshire. Neither Ms. Swift nor Arnold noticed the error. Arnold told Ms. Swift that he lived at 75 Little Lake Drive in Barrie. This is not true. Arnold lived at the Condo. Arnold told her that his assets were worth a total of around \$1M. However, in her notes the RRIF appears to have been valued at \$1M. She deposed that Arnold wasn't exactly sure since Simone had been in charge of their finances for many years. Arnold told her the Barrie home was worth between \$750,000 and \$1M.
- [121] Ms. Swift did a title search of the Barrie home before she came to see Arnold in the hospital. She wanted to independently verify that Arnold understood what his assets were. The 2017 Will sets out that Arnold lived in Barrie. Arnold did not mention this error upon reviewing the 2017 Will.
- [122] Ms. Swift and Arnold then moved on to talk about the residue of the Estate. In their earlier phone conversation Arnold told Ms. Swift that he wanted John to be the sole beneficiary of his Estate. He explained that this was because he had already given Simone substantial assets. Ms. Swift did not ask what those assets were.
- [123] Once at the hospital Arnold wanted to change the residue clause to a 50/50 split between John and Simone. He told Ms. Swift that he did not think it fair to Simone to leave her nothing given that she had been good to him.
- [124] Ms. Swift watched Arnold sign the 2017 Will with what she called a shaky signature. He had difficulty holding the pen because his hand was weak and very shaky.
- [125] Ms. Swift brought a Direction and Authorization with her to the hospital which she drafted. She described the document as an attempt to record all the “red flags” present in the file and so Arnold could read them himself. Ms. Swift confirmed that she would not have taken on this retainer had she understood that Arnold was not a client of the firm. However, she felt obligated to carry through with it given what she understood to be the urgency of the upcoming surgery. Ms. Swift stated that it was not her practice to do Wills for people who

called in and who were not already known to her or the firm. As she explained, it was hard to independently verify what the client was telling her if she did not have a history with them.

- [126] Ms. Swift's evidence was that she does not generally present a Direction and Authorization like this to her Will clients. She used a precedent from a former member of the firm. She had never used one before and has not used one since.
- [127] Ms. Swift drafted the Direction and Authorization at the time when Arnold told her that his entire Estate was to go to John. She discussed some of the so-called red flags including the fact that John initially contacted her and not Arnold, that a common law spouse of 34 years was not being included and was not present, that Arnold was taking medication, and that the 2017 Will was being done on an expedited basis because of upcoming surgery. She discussed with Arnold the possibility that Simone might challenge the 2017 Will. She described the circumstances of the 2017 Will as "vulnerable."
- [128] The Direction and Authorization included a release of Adrienne Swift and Cohen LLP. Ms. Swift was both the releasee and the witness on the document. A copy of the Direction and Authorization is set out below (the document is reproduced exactly as typed and written):

DIRECTION AND AUTHORIZATION

TO: Adrienne M. Swift

AND TO: Cohen LLP

FROM: ARNOLD CHESHIRE

RE: Release of Power of Attorney for Property Your File No.: 17-1027

I, ARNOLD CHESHIRE, hereby confirm we discussed (including all the associated risks) the the following:

1. My Instructions to have you prepare a Will and Powers of Attorney (Personal Care and Financial), to appoint my son as my exeuctor and attorney and ~~sole beneficiary.~~
2. That I have been in a long term common law relationship.
3. That I requested my son, John Cheshire, find a lawyer for me and that you received the initial call from him
4. ~~That I am making no provisions for my common law spouse and leaving everything to my son~~ Handwritten "Discussed tax consequences of RRIF going to John"

5. That my common law spouse may have claims against my estate as a dependant for support or an equity and may attempt to challenge the Will and Powers of Attorney.

6. The circumstances surrounding the change of my Will and Powers of Attorney are not ideal and may make the Will and Powers of Attorney vulnerable to any challenge. These circumstances, include but are not limited to:

a. The suddenness of the change and the changes being made while my common law spouse was away and without her knowledge;

b. My deteriorating health and medications that are being administered to me by the hospital;

c. The short period of time between my phone call with Adrienne Swift in which my instructions were given over the phone and my requested urgent turnaround time and attendance at the hospital prior to dental surgery.

I confirm the following:

1. Notwithstanding the above, it is my wish and intention to execute the Will and Powers of Attorney put before me and I confirm I do so after careful review and consideration.

2. It is my intention that my son to be my sole attorney (personal care and financial), estate trustee and sole beneficiary.;

3. I direct you to hold in safekeeping my Last Will and Testament, Power of Attorney for Property and the Power of Attorney for Personal Care given by me, on the 28th day of September, 2017, and release same to my son, JOHN ARNOLD, on his request.

This Direction shall constitute your full authorization unless revoked by me in writing with notice to you. I declare that this Direction shall survive any future incapacity on my part.

1, ARNOLD CHESHIRE, on my own behalf and on behalf of my heirs, executors, administrators, successors and assigns hereby release and discharge Adrienne M. Swift and Cohen LLP and their respective heirs, executors, administrators, successors and assigns of and from all actions, causes of action, claims and demands of every nature or kind arising out of or in any way related to or connected with adhering to the terms of this Direction.

DATED at the City of Toronto in the Province of Ontario, this 28th day of September, 2017.

IN THE PRESENCE OF: "Adrienne Swift"

Signed "Arnold Cheshire"

- [129] According to Ms. Swift, once the change was made to the residue portion of the 2017 Will, Arnold read it through silently to himself and then Ms. Swift went through and explained each paragraph to him. They discussed the residue paragraph several times.
- [130] Ms. Swift sent her account for services to the Barrie home. She was not aware that Arnold had any other address. In April 2019 she received an enquiry with respect to obtaining the original Will for probate purposes. At that point she noted that the account was still outstanding and requested payment before the 2017 Will would be released. John paid the \$700 account.
- [131] About an hour after she had left the hospital Ms. Swift received a call from John. John advised that his father was upset and had decided to leave everything to John after all because he had already transferred assets to Simone. She then spoke with Arnold directly who told her he may have made a mistake and that he wanted everything to go to John. Ms. Swift suggested to Arnold that he think about the change. That was the last time Ms. Swift spoke to Arnold. Ms. Swift recalled all of this from memory. None of it was in her notes. No further changes were ever made to the 2017 Will.
- [132] John's evidence was that his father wanted to change his 2017 Will because he was upset with Simone for the abuse he had suffered. He could not explain why the 2017 Will referred to his father living in Barrie or the reference to him as John Arnold. He was focused on the POAs and not the Will because he needed the POAs in place for the dental surgery and ultimately his father's long-term care placement. He did not become aware of the Direction and Authorization until this litigation commenced.
- [133] John placed the initial call to Ms. Swift to give her Arnold's contact information in the hospital. He may have referred to Simone as manic depressive and bipolar but he agreed that he had no medical evidence to corroborate such a diagnosis. He did tell Ms. Swift that his father and Simone had problems, but he did not say anything about his father having dementia. This was because he had never heard the term dementia used in relation to his father's condition.
- [134] John told the Court that he discussed the 2017 Will and POAs with his father and told him he was honoured to be named his Attorney and to receive 50 per cent of his Estate. His father told him that was not what he wanted. At that point John offered to put Arnold in touch with Ms. Swift. This is the call referred to by Ms. Swift which occurred about an hour after she left the hospital. John's evidence was that he was not involved in the call to Ms. Swift, he just made the connection for his father. His focus at that time was getting the POA done and getting his father out of the hospital and into long-term care. As Simone had made it clear she was no longer going to care for Arnold, John had to step up.
- [135] John's evidence was that he is not aware of his father having a \$1M RRIF. He testified that his father may have thought he had \$1M but he did not. John has not taken steps to try to locate the RRIF.
- [136] John returned home on September 29, 2017. He was not aware that the dental surgery did not take place until October 6, 2017.

[137] John was not aware of Dr. Feighan's Discharge Summary dated October 19, 2017. In that summary, Dr. Feighan described Arnold as failing to cope, providing inconsistent stories, having paranoia and incapable of making decisions regarding accommodation and finances. Arnold told Dr. Feighan that he lets his wife make those decisions for him. Dr. Feighan noted that Simone and Arnold argued on numerous occasions sometimes even having fights in the hospital. Although discussions took place in relation to removing Simone as Arnold's POA, discussions with Arnold, Simone and the hospital ethicist determined that Simone was largely making decisions in Arnold's best interest. Clearly Dr. Feighan had not been advised of the recent change of Attorney.

The Law and Argument

Issue #1 – Is This Case Appropriate for Summary Judgment?

[138] Counsel have already agreed that this matter is appropriate for summary judgment and have effectively and efficiently designed a mode of trial that permitted the Court to have a complete record before it as well as the in-person cross-examination of Simone and John.

[139] Counsel raised issues with respect to the weight to be given to Marian Nolan's affidavit and the medical records appended to the Aziz affidavit. Those rulings have been made above.

[140] I am satisfied that the record before the Court is complete with respect to all the witnesses the parties agreed should testify, the available medical records and the ability of the Court to observe both John and Simone while they gave evidence. The complete record and the *viva voce* evidence enabled the Court to weigh evidence, evaluate credibility and draw reasonable inferences as per r. 20.04(2). The manner in which this trial unfolded is exactly what the Supreme Court of Canada envisioned in *Hryniak*, a hybrid trial of an issue which was proportionate and timely with respect to the litigation as a whole.

Issue #2 – Were There Suspicious Circumstances Related to the 2017 Will and POAs?

[141] In the well-known case of *Vout v. Hay*, [1995] 2 S.C.R. 876, at para. 25, the Supreme Court of Canada identified the three categories of suspicious circumstances: 1) suspicious circumstances raised by events surrounding the preparation of the Will, 2) circumstances that call into question the capacity of the Testator and 3) circumstances that suggest that the free will of the Testator was overtaken by coercion or fraud.

A. Events Surrounding the Preparation of the Will

[142] It is Simone's burden to lead evidence of suspicious circumstances related to the preparation of the 2017 Will. If successful, the burden shifts to John to prove, on a balance of probabilities that Arnold had capacity at the time the 2017 Will was signed and that he knew and approved of the contents.

[143] The evidence was clear that the idea of John obtaining a POA for Personal Care first came up at the September 7, 2017 family meeting which was attended by John, Marian, Crisis

Worker Brendan, Sandy from CCAC, Dana and Arnold. John, Marian and Dana attended by phone. Concerns had been raised by John and Marian about the care that Arnold was receiving at home from Simone. The notes from the Client Care Conference were taken by Sandy. She recorded that “John would like to become the POA for personal care for client and client is in agreement.” As Simone was Arnold’s POA for Personal Care, a new POA document would be required.

- [144] There was also evidence that Simone was suffering from severe caregiver burnout at that time. She would neither commit to caring for Arnold upon discharge from hospital nor agree that he belonged in assisted care. As Dr. Tsui noted in his discharge summary dated December 22, 2017, Arnold came to hospital because his wife would not care for him anymore. John’s evidence aligned with Dr. Tsui’s note when he stated that Simone refused to take his father back to the Condo and repeatedly told him that his father was his responsibility. Arnold effectively did not have a decision-maker at that point which put the hospital in a difficult position.
- [145] When Arnold was in hospital in September 2017 it was discovered that he had abscessed teeth and needed dental surgery. As Arnold did not do well with anesthetic, hospital staff encouraged John to obtain the POA for Personal Care before the surgery which was scheduled for September 30, 2017.
- [146] The combination of Arnold’s agreement to John obtaining a POA at the September 7, 2017 family meeting, and the hospital’s recommendation that one be obtained prior to Arnold’s dental surgery prompted John to contact Ms. Swift. John found Ms. Swift by way of a Google review. There is no dispute that Ms. Swift was not known to John or Arnold prior to John’s initial call to her. John told Ms. Swift that a POA was needed urgently due to the upcoming surgery.
- [147] On its face, the urgency and the call to an unknown lawyer has badges of suspicious circumstances. However, in this case I accept John’s evidence that he was acting in accordance with the agreement at the family meeting and the hospital’s request that the POA be attended to right away. I also accept that he was focused only on the POA, and it was Ms. Swift and Arnold who decided that other documents were required.
- [148] Ms. Swift’s evidence was that she would not have taken on the case had she initially understood that Arnold was not already a client of the firm. However, once the urgency became apparent, she felt compelled to continue. I find that her communication with John was minimal and that he was not instructing her with respect to the 2017 Will. She took Arnold’s instructions by phone that he wanted to leave his estate to John and name him his Attorney. The reliability of those instructions is another issue, but I accept John did not meddle or attempt to influence Ms. Swift or his father with respect to the initial contact and telephone instructions.
- [149] Further, I accept that it was either Ms. Swift or Arnold who raised the issue of a new Will and not John. It is not clear from Ms. Swift’s notes who first raised the issue of a new Will and her testimony on this point was from memory only. However, the main point is that it

was not John who raised the issue of a new Will. As John repeated several times during his evidence, he was focused on getting a POA for Personal Care at the hospital staff's request.

[150] As well, I accept Ms. Swift's evidence that she met John at the hospital but that he left immediately after introducing her to Arnold. I also accept that Ms. Swift reviewed the draft Will and POAs with Arnold in private and gave him time to read over the documents himself and then explained the documents in detail. Whether Arnold understood what he was reading or what he was told is another issue which I shall address below.

[151] Arnold's signature was illegible, but I accept Ms. Swift's evidence that he signed all of the documents in her presence and with a witness. That is, the required execution formalities of a valid Will were present.

[152] Certainly there are things that could have been done better. That is, it would have been far better for Ms. Swift to have done an initial interview with Arnold and then returned with a Will based on that interview. It would have been better if she had taken more detailed notes of exactly what John told her and what Arnold told her. However, the fact that those things were not done does not mean that suspicious circumstances were present.

[153] In short, I do not find that the circumstances leading up to the Will or the actual execution of it were suspicious. The initiation of the process was a legitimate request by the hospital and John's response to that request. The issue in this case is Arnold's capacity to execute the 2017 Will, POA and the Direction.

B. Events that Call into Question the Capacity of the Testator

[154] As I have not found any suspicious circumstances related to the preparation of the 2017 Will, Simone retains the burden of proving that Arnold lacked capacity at the relevant time and that he could not understand or approve of the contents of the 2017 Will

[155] In *Slover v. Rellinger*, 2019 ONSC 6497, 53 E.T.R. (4th) 60, the Court explained, at paras. 289-290:

[289] The presumption of capacity on the part of the testator places the evidentiary burden on the person challenging the will. However, this rebuttable presumption does not apply when suspicious circumstances exist. The presumption of testamentary capacity is displaced when suspicious circumstances regarding the preparation and execution of the will are established and, if the suspicious circumstances pertain to mental capacity, the propounder also has the legal burden of establishing that the testator had the mental capacity to execute the Will.”

[156] As a result, it appears clear based on the case law that where, as here, there are no suspicious circumstances, the person challenging the Will (in this case Simone) retains the burden of proving a lack of capacity and knowledge and approval of the Will, due to the presumption being firmly in place.

[157] In the decision of *Gironda v. Gironda*, 2013 ONSC 4133, 89 E.T.R. (3d) 224, Penny J. succinctly set out the law governing the determination of testamentary capacity at paras. 50-52 and 57-58:

- The relevant time for determining testamentary capacity is at the time of giving instructions and executing the will or codicil.
- Testamentary capacity requires a person to be capable of understanding the essential elements of making a will such as property, objects, persons who would normally benefit and revocation of prior testamentary dispositions. The testator does not need to be fair, considerate or kind and, indeed, may even act capriciously provided that instructions are given freely from a sound mind, memory and understanding.
- *Banks v. Goodfellow* (1870), L.R. 5 Q.B. 549 (C.A.), at 567-569, is recognized as the leading authority on the criteria for testamentary capacity and requires the following:
 - (1) Understanding the nature of the act of making a will and its consequences;
 - (2) Understanding the extent of one's assets;
 - (3) Comprehending and appreciating the claims of those who might expect to benefit from the will, both those to be included and excluded;
 - (4) Understanding the impact of the distribution of the assets of the estate; and
 - (5) That the testator is free of any disorder of mind or delusions that might influence the disposition of his or her assets.
- It is also important to remember that isolated memory or other cognitive deficits on their own do not establish a lack of testamentary capacity.
- It is unnecessary for a competent testator to know the precise makeup of her entire estate to the last detail. Testators are not required to be accountants or to have an accountant's knowledge and understanding of their estate. Nor is it necessary for the testator to understand the provisions of a will the way a lawyer would.

[158] John relies on the decision of *Kay v. Kay Sr.*, 2019 ONSC 3166, 47 E.T.R. (4th) 198 for the proposition that a testator can still have testamentary capacity notwithstanding a cognitive deficit including a medical diagnosis of dementia.

[159] In *Kay*, the deceased's son's spouse, acting as litigation guardian for the deceased's son challenged his mother's ("Mrs. Wotton") Will which left her Estate equally to her son and two grandchildren. The Will was attacked on the grounds that Mrs. Wotton lacked testamentary capacity at the time of execution. The Will was executed on November 2, 2010. In November 2009, September 2010 and October 2010 medical assessments found

that Mrs. Wotton had mild to moderate Alzheimer's, difficulty with language and memory skills and her insight into her cognitive difficulties was grossly impaired.

- [160] The lawyer who drafted the Will and attended on execution formed the opinion that Mrs. Wotton had capacity at the time of execution. A posthumous capacity assessment was prepared by Dr. Francine Sarazin, who gave the opinion that 'there is reasonable evidence in support of a determination of incapacity when Mrs. Wotton gave instructions to draw up a last will and testament.'"
- [161] The Court relied heavily on the drafting solicitor's evidence that Mrs. Wotton was able to answer his questions, had knowledge of her family and her assets, and that found overall his evidence was more persuasive than the retroactive capacity assessment. The Court also found that Mrs. Wotton was not suffering from any delusions or disorders of the mind that impacted on her intentions on the date of execution.
- [162] In the more recent case of *Kates Estate*, 2020 ONSC 7046, 62 E.T.R. (4th) 248, the Court at para. 79 adopted the reasoning in *Kay* that the evidence of the drafting solicitor who had met with and spoken repeatedly to the testator should be preferred over all else, even that of medical professionals.
- [163] In the case at bar, the medical evidence of Arnold's capacity directly contradicts that of both Ms. Swift and John.
- [164] With respect to John, it is clear that he was not on site to observe his father on a regular basis and in fact rarely saw him. His evidence was that he thought his father continued to drive to the Barrie home right up to 2016. However, in February 2014 Dr. Tal had already recommended that Arnold stop driving and Simone told Dr. Tal that they planned to sell Arnold's car.
- [165] John was unaware of his father's earliest dementia diagnosis in 2012. He said he thought his father seemed oriented as to time and place when he called him and was unaware that on February 5, 2017, an EMS report stated that when asked the date Arnold reported that it was May 3, 1967.
- [166] John testified that when he visited his father in February 2017 he did not think his father was confused. John was shown an outpatient record dated February 22, 2017, in which Arnold was described as being verbally and physically aggressive, delusional and subject to paranoid thoughts. John's response was that he had not noted this level of confusion when he visited his father.
- [167] John was not aware of his father's many hospital admissions or that an OT Assessment done on July 16, 2017 noted that Arnold suffered from severe cognitive impairment, his reporting was unreliable and that on that day Arnold did not understand he was in a hospital. He thought he was in an electric company. He was not aware that on July 17, 2017, a hospital record noted obvious cognitive deficits and tangential utterances. This was confirmed by Dr. Stall's note on July 19, 2017, in which he recorded that Arnold was

unable to give his own history and that his thought process was tangential, disorganized and without appreciation for his current limitations.

- [168] John's evidence was that he had spoken to his father by phone in July 2017 and did not note that his father was tangential, aggressive or delusional. He repeated that his view was that at that time his father was only occasionally confused or repetitive but that he deferred to the medical records.
- [169] Arnold was re-admitted to hospital on September 15, 2017. At 9:50 p.m. that evening he was noted as not knowing why he was in hospital. The next morning, he was noted as being disoriented as to time and place.
- [170] On September 17, 2017, it was noted that Arnold was not a good historian due to his history of dementia. He was oriented only to place and was observed to be "pleasantly confused." On September 18, 19, 26 and 27 he was again noted as being confused and/or disoriented as to time and place. On September 27, 2017, Social Worker Ms. Poznanski noted that Arnold presented as not competent to make medical or accommodation decisions.
- [171] There are critical hospital notes available on September 28, 2017, the date the 2017 Will was signed. At 12:56 p.m. Arnold was noted by the shift RN to be disoriented to time. As Ms. Swift's evidence was that she met with Arnold during the late morning or early afternoon, I infer that this note was made either just before or immediately after their meeting.
- [172] A further report was made on Arnold's condition at 9:39 p.m. that evening by a different RN. Arnold was noted as being disoriented as to time and place and confused.
- [173] The next morning at 11:00 a.m. Arnold was noted as being confused. On October 1, 2017, at 9:00 a.m. Arnold was noted as being confused and disoriented as to time. He continued to be noted as confused and/or disoriented as to time and place on October 4, 6, 7, 8, 10, 11, and 12, 14, and on his discharge date of October 18, 2017. On October 13, 2017, Arnold was not oriented to time, date, month, year and did not know the name of the hospital he was in or the floor he was on. He was noted as not being able to make decisions regarding property, personal care or accommodation.
- [174] Arnold's discharge report on October 18, 2017 noted that he had chronic delirium. According to the discharging doctor, Arnold's reporting of being abused by Simone was uncorroborated and "highly inconsistent" on the basis of his underlying dementia and intermittent paranoia. The discharging doctor confirmed the finding that Arnold was not capable of making decisions related to finances. He added that Simone is making decisions in Arnold's best interests. On discharge, Arnold's medications were confirmed to be Melatonin (to assist with sleep), aspirin, Percocet (opioid pain reliever), Atorvastatin (to reduce cholesterol), Risperidone (to treat mania and bipolar disorders), and Aripiprazole (to treat mania, depression and bipolar disorder).
- [175] Arnold was re-admitted to hospital on November 14, 2017. He was again noted as being disoriented as to place and time and/or confused on November 14, 15 (he stated the year

as 1977), 16, 17, 18, 20, 21, 22, 24, 26, 27, 28, 29 and 30, 2017. On November 30, 2017, Arnold insisted that he wanted to leave the hospital against medical advice. The doctor would not permit him to leave given his diagnosis.

- [176] The same observations of Arnold being disoriented as to place and time and/or confused were made daily throughout December 2017 up to the date of Arnold's discharge on December 22, 2017.
- [177] There is a substantial amount of evidence with respect to Arnold's capacity leading up to and around the relevant time. I start with the diagnosis of dementia which goes back to 2012, of which John was unaware. This is followed with a diagnosis by Dr. Tal of dementia and delirium in 2014. Arnold's severe confusion was demonstrated during an OT assessment in December 2016 when he asked for a tissue and when it was brought, did not remember requesting it. There is also the report of EMS in February 2017 when Arnold reported that the date was May 3, 1967, and the description in an outpatient assessment noting Arnold as delusional and suffering from paranoia.
- [178] In July 2017 Arnold told an OT during an assessment that he was in an electric company. Importantly, in that same month on July 19, Dr. Tal noted Arnold's thought processes as tangential and disorganized and that he was incapable of making a decision regarding long-term care.
- [179] Only a month later Sandy assessed Arnold as capable of making a decision about his own long-term care. I do not give this report any significant weight. It is directly contradictory to Dr. Stall's report, the observation of Ms. Poznanski on September 27, 2017, and the discharge report on October 18, 2017.
- [180] I also do not give John's observations about his father's condition any significant weight. It is not clear how John, who claimed to be so close to his father, was not aware of his father's decline, diagnoses and ongoing state of confusion. Observations by medical personnel also described Arnold as delusional, paranoid and having tangential thoughts. All of these observations continued to be made throughout August and September 2017 and right through to the point of Arnold's discharge to long-term care on December 22, 2017. While John deferred to the medical reports, he insisted that he only observed his father repeating himself. He did not observe any of the other conditions continually described in the medical records.
- [181] John described his father as being "much better" to Ms. Swift. This observation must be completely discounted given that John had no real understanding of the extent of his father's decline. Further, he arrived in Toronto on the day of Ms. Swift's meeting with Arnold and therefore had no ability to assess that his father was "much better."
- [182] While *Gironda* makes it clear that isolated memory deficits or cognitive decline do not on their own establish a lack of testamentary capacity, Arnold's memory and cognitive issues can in no way be described as "isolated." They were ongoing. He required 24/7 full-time care since 2015. The medical reports in and around the relevant time and on the day he

executed the 2017 Will note that he was “confused.” There are specific references which demonstrate an alarming decline in Arnold’s cognition some of which was as follows:

- a. In February 2017 Arnold reported to EMS personnel that it was 1967.
- b. Arnold had severe difficulty with respect to his orientation to place for example thinking he was in an electric company in July 2017.
- c. Increasing aggression as reported by Simone and others with respect to his mistreatment of PSWs in this home and an attempt to hit a hospital porter in July 2017.
- d. Dr. Tal’s report in August 2017 related to Arnold’s severe progressive vascular dementia and the significant drop in his mini mental and verbal reasoning scores.
- e. Dr. Tal’s report done only four days after the 2017 Will was signed in which he stated that Arnold was not competent to make decisions about personal care, accommodation, medication use or property.
- f. Dr. Stall’s November 15, 2017 report in which Arnold stated that a person named as his POA could not decide where he lived, could not have access to his bank account and could not make personal care decisions on his behalf but they could cut his grass.
- g. The many medical notes reporting that Arnold did not understand the seriousness of his condition.
- h. The many medical notes reporting Arnold as being an inaccurate and vague historian.
- i. Dana’s observations of Arnold’s decline in that he was forgetful, confused, delusional, not oriented to time and combative with PSWs.

[183] There are many other examples of Arnold’s condition and decline as outlined in the summary of John and Simone’s evidence.

[184] While there is evidence that Arnold wanted to change his Will because of how he had been treated by Simone, I find that conclusion must be questioned in the face of other evidence about their relationship as follows:

- a. Dana’s compelling evidence that John and Simone were devoted to one another.
- b. The observations in Sandy’s August 2017 assessment that Arnold told her that Simone made his life easy and that she bore the brunt of everything.
- c. The discharge report from October 2017 in which Arnold’s reports that he had been abused by Simone were viewed as unable to be corroborated due to his lack of reliability as an historian.

- d. The various reports that Arnold himself was very hard to manage. Examples included his treatment of in-home care personnel, hospital staff and his many calls to emergency. On the occasion of his admission due to weakness in his arm in September 2017 he was noted as not recalling why he actually called EMS. Simone called the hospital and requested that he be brought back home.
- e. The alcohol abuse issue is not one for which Simone should be made the scapegoat. Arnold was offered addiction treatment as early as 2013 and refused it. There is evidence from Simone that when she was away for work, Arnold would have alcohol delivered to the Condo by taxi. Arnold's alcohol abuse contributed to his cognitive decline as reported by Dr. Tal as early as 2013.
- f. While it is true that Simone clearly suffered from caregiver burnout, there is evidence that there was good reason for this. Arnold's unpredictable, delusional and sometimes aggressive behaviour was simply hard to manage. Neither John nor Marian lived with this, and I infer had no idea what Simone was going through.
- g. Arnold and Simone had a rather chaotic relationship and sometimes argued in public. The fact that Simone was quick to anger (as per Ms. Swift's notes) did not mean they were not a devoted couple as observed by Dana.

[185] I now turn to Ms. Swift's observations of Arnold's capacity and his ability to understand the nature of his assets and the effect of the distribution of his estate.

[186] The concerns this Court has with Ms. Swift's observations of Arnold's capacity may be summarized as follows:

- a. Ms. Swift met Arnold on one occasion. Prior to that they had one phone conversation during which Ms. Swift said she had difficulty understanding Arnold.
- b. Arnold was not an existing client. They had no lawyer/client history. This was a significant issue for Ms. Swift as she was clear she would not have taken the retainer had she not initially understood that Arnold was not an existing client.
- c. Ms. Swift was advised that Arnold's dental surgery was "imminent." In fact, the surgery did not take place until October 6, 2017, long after John had left Toronto.
- d. While understanding that Arnold was in hospital, she did not enquire about his diagnosis, condition or his medications. Had she done so she would have learned that Arnold suffered from severe cognitive decline, various physical conditions and was on opioid medication as well as medication for both bipolar disorder and mania. She accepted John's view that his father was "much better," a view which I have already entirely rejected.
- e. She had information that Simone suffered from mental health issues which she appeared to rely on despite them not being corroborated to any. Yet, Arnold's well documented medical conditions did not merit any enquiry by Ms. Swift.

- f. She admitted to shabby notetaking. As such, much of her critical evidence was from memory. She claimed to have recalled these details after some three years. I find that her notes from her meeting with Arnold were incomplete and unreliable.
- g. She knew that Arnold had a spouse of some 34 years. Yet, she drafted a Will which cut out that spouse entirely. She accepted Arnold's explanation that he had already given Simone assets. She did not enquire what assets or their value so that she could compare those assets with the value of what John would be receiving under the 2017 Will. She did not question the reliability of those instructions because she was unaware of Arnold's diagnosed conditions including a repeated observation that he was an inaccurate historian.
- h. Ms. Swift's notes indicate that the change to the Will was for "protection." She could not recall whether John or Arnold told her. Ms. Swift did not question this motive which on its face makes no sense.
- i. Ms. Swift's notes also say that Arnold wanted to change his Will because Simone "gets angry fast." Again, there is no notation that Ms. Swift questioned Arnold about wanting to cut Simone out of Arnold's Will after a 34-year relationship because she was quick to anger.
- j. Arnold did not understand the nature of his assets. He reported that he had a RRIF worth \$1M, cash and investments in an RBC bank account worth \$100,000. And the Barrie home which he valued at between \$750,000 to \$1M. However, Arnold did say that he wasn't sure if the numbers were accurate because Simone had been in charge of their finances for many years. Ms. Swift's evidence was that Arnold told her that his total assets were worth \$1M including the Barrie home. However, this is not borne out in her notes. The notes show that Arnold had an RRIF worth \$1M. The evidence at trial was clear that this is simply not true. Further, the Barrie home was sold in the last several years for \$450,000.
- k. By 2017 both Simone and Dana noted that Arnold was no longer able to read. Ms. Swift's evidence that Arnold read through the 2017 Will and understood it must be questioned given his medical condition at the relevant time.
- l. The 2017 Will is a marked departure from the 1991 Will. Ms. Swift did not make any enquiries about this significant change. Ms. Swift's notes do not indicate any discussion with Arnold about the implications of such a change for Simone.
- m. While Arnold did provide instructions to change the beneficiary arrangement from John to John and Simone equally, he allegedly told John he wanted to change them back to John being the sole beneficiary within an hour of signing the 2017 Will. There were purportedly three sets of different instructions within a very short period of time. I find that these changes accord with a person who is subject to confusion and unclear as to the implications of their actions rather than being of a "rational nature" as described by Ms. Swift below.

- n. Ms. Swift assessed that Arnold had capacity due to the “rational nature” of their discussion. There is no reference in her notes with respect to Arnold being “rational” or in fact any reference whatsoever in her notes as to how she came to this conclusion.
- o. John’s name and Arnold’s place of residence are incorrect on both the 2017 Will and the POA documents. Neither Arnold nor Ms. Swift noted this consistent error.
- p. Ms. Swift had Arnold sign a comprehensive Direction and Authorization which included a release of her and her firm for any liability. There is nothing in her notes with respect to reviewing this document with Arnold although she testified from memory that she did so. If Arnold did not have capacity to sign a Will, he certainly could not have understood the nature or significant implications of this document.
- q. The Direction and Authorization was a clear crystallization of all of Ms. Swift’s concerns with both the retainer arrangements, Arnold’s capacity and the instructions for the 2017 Will and POA. She was well aware of the various “red flags” which were present including a confirmation that Simone could attempt to challenge the 2017 Will. Despite these red flags and despite her evidence that she had never had any previous client (or any client since) sign such a document, she proceeded with the execution of the 2017 Will. In the face of the concerns set out in the Direction and Authorization it is difficult to reconcile Ms. Swift’s insistence that her cursory assessment of Arnold’s capacity should supersede the opinion of all of Arnold’s medical professionals.

[187] John relies on the *Kay* case with respect to the Court’s heavy reliance on the Will drafting solicitor’s opinion on the capacity of the deceased to conclude that the deceased had capacity. However, I note the factual differences between the *Kay* case and the case at Bar First, in that case the drafting solicitor met with the deceased for an hour and took instructions before drafting the Will.

[188] The impugned Will cut out one of the grandchildren. The change was due to a falling out between the deceased and that grandchild who had made allegations against the deceased’s husband. As such, they were estranged. While the deceased did suffer from mild to moderate dementia, the solicitor was satisfied that the deceased had a good understanding of her assets and family.

[189] In the *Kay* case the solicitor took extensive instructions and had comprehensive written notes. In this case, Ms. Swift had a brief telephone call with Arnold. Her evidence was that it was hard to understand what he was saying. She drafted the 2017 Will based on that conversation.

[190] In the *Kay* case, the solicitor had the client undergo a battery of questions based on a checklist. The solicitor used that checklist to determine capacity. In the case at Bar no such formal steps were taken to assess Arnold’s capacity by Ms. Swift. In fact, there is nothing at all in her notes which indicate how she concluded that Arnold had capacity. The evidence was based on her overall impression from memory some three years later. Added to this is

the Direction and Authorization in which Ms. Swift clearly acknowledges that there are concerning issues surrounding the drafting and execution of the 2017 Will.

- [191] Finally in the *Kay* case, the deceased attended at the solicitor's office for an appointment. She was not hospitalized nor was there any apparent urgency to the new Will. Her diagnosis was mild to moderate dementia. This is to be compared to Arnold's diagnosis of severe progressive vascular dementia, a diagnosis which had been outstanding for some four years at the time of execution of the 2017 Will.
- [192] Finally, I note that even after the 2017 Will and POA were signed, hospital staff at a Case Conference held at the hospital on November 16, 2017 remained concerned about whether Arnold had the capacity to execute the POA on September 28, 2017.
- [193] Given all of the above, there is no reason to give significant weight to Ms. Swift's opinion with respect to Arnold's capacity. She, like John, had no real understanding of Arnold's condition. Arnold himself was noted on many occasions in the medical notes as having no understanding of the seriousness of his own condition. A perfect storm. No one who had any clear understanding of Arnold's condition such as Simone, Dana or his attending nurses and doctors were consulted or even approached on the issue of his capacity.
- [194] I further find that given the above, Arnold was not of sound mind, memory or understanding at the time of signing the 2017 Will and is therefore unable to meet the requirements in the *Banks* case.

C. Undue Influence

- [195] Having found that Arnold did not have capacity to sign the 2017 Will, it is not strictly speaking necessary to address the issue of undue influence. However, if I am wrong, I would have found that there was no undue influence in the drafting or execution of the 2017 Will for the following reasons:
- a. While John initially contacted Ms. Swift, I find she was careful to take instructions only from Arnold.
 - b. While John arranged for Ms. Swift's appointment with his father at the hospital John was not present at the appointment. He introduced Ms. Swift to his father and then left.
 - c. John was concerned mainly about the POA given the upcoming dental surgery and the request from the hospital's ethical care team that a new POA be put in place. I accept that he was surprised to find out he had been made a beneficiary of his father's Will.
- [196] The only real concern in this area is John's call to Ms. Swift after the 2017 Will had been signed and the information he relayed that his father was upset and wanted to change the Will back to him being the sole beneficiary. As no further steps were taken in this regard,

I leave this as a neutral factor. If the Will had been changed back, the situation would have been quite different.

[197] The above facts do not lead this Court to conclude that John coerced his father to the point that he no longer exercised his free will. Such coercion has been found to extend far beyond persuasion or even significant influence (see *Kates Estate*, at para. 91). The coercion must dominate the testator's wishes to the point where the Will reflected John's intentions and not his father's (see *Kates Estate*, at para. 91). There is no evidence that this happened in the case at Bar. I accept that John's focus was on the POA for Personal Care and that while Arnold did not have the capacity to either give instructions or execute a Will, he was not influenced by John in that regard.

FINAL ORDERS AND COSTS

[198] Given all of the above, I make the following Orders;

- a. The 2017 Will and Powers of Attorney are hereby set aside.
- b. The parties shall provide written submissions on costs on a turnaround commencing with the Applicant within seven days of the date of release of this judgment, the Respondent's submissions seven days thereafter, and any reply, five days thereafter. Costs submissions are to be no longer than five pages (double-spaced and hyperlinked) exclusive of any Bill of Costs or Offers to Settle. Costs submissions are to be uploaded to Caselines. If no costs submissions are received within 35 days of the date of release of this judgment, costs will be deemed to be settled.



C. Gilmore, J.

Released: January 12, 2023

CITATION: De Smedt v. Cheshire et al., 2023 ONSC 249
COURT FILE NO.: CV-19-00005230-00ES
DATE: 20230112

ONTARIO
SUPERIOR COURT OF JUSTICE
TORONTO ESTATES LIST
IN THE MATTER OF THE ESTATE OF ARNOLD
CHESHIRE, deceased

BETWEEN:

Simone De Smedt

Applicant

– and –

John Cheshire and the Estate of Arnold Cheshire

Respondents

REASONS ON MOTION FOR
SUMMARY JUDGMENT

C. Gilmore, J.

Released: January 12, 2023