Date: 20241213
Docket: CI 23-01-42324
(Winnipeg Centre)
Indexed as: Henuset v. Henuset
Cited as: 2024 MBKB 185

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

GREGORY JOHN HENUSET	)	JESSE ROCK
	)	for the applicant/respondent
applicant/respondent,	)	
	)	
- and -	)	
	)	
VIVIAN ALICE HENUSET,	)	SHARNA NELKO
	)	for the respondent/applicant
respondent/applicant.	)	
	)	
	)	JUDGMENT DELIVERED:
	)	December 13, 2024

PERLMUTTER A.C.J.

INTRODUCTION

[1] These competing applications involve the effectiveness of a notice of intention to sever a joint tenancy between Gregory John Henuset and his mother Vivian Alice Henuset[1] in three quarter sections of farmland located in the Pipestone area of Manitoba.

[2] This notice was served by Vivian on Gregory pursuant to s. 79(1) of ***The Real Property Act***, C.C.S.M. c. R30 (the "***Act***"), which provides:

> 79(1) **The district registrar must not accept for registration an instrument that has the effect of severing a joint tenancy** — other than a

[1] To avoid confusion, the parties first names are used. No disrespect is intended.

> transmission by a trustee in bankruptcy or one giving effect to an order of the court — **unless**
>
> …
>
> (c) **the district registrar is provided with evidence**, satisfactory to the district registrar, **that all joint tenants** who have not executed the instrument or given their consent to it **have been served with a notice of intent to sever**, in an approved form, at least 30 days prior to the registration of the instrument.
>
> [Emphasis added]

[3] Gregory applies for a declaration that the notice is of no force and effect, while Vivian[2] applies for an order declaring the effective date of severance. If the notice is effective, the parties agree that June 14, 2023 is the effective date.

BACKGROUND

[4] Gregory is one of Vivian's six adult children. At the time of service of the notice, Vivian was 90 years old.

[5] At issue is a three-quarter section of farmland, described under two titles. One title is in respect of the north half of the section and the other title is in respect of the southwest quarter of the section (collectively, the "farmland").

[6] On November 7, 2012, Vivian executed a will that mirrored the will of her now late husband (and Gregory's father) Roland Joseph Henuset. The 2012 will provided that should Roland pre-decease Vivian, Gregory would receive the north half of the section with an option to purchase the southwest quarter of the section from Vivian's estate for $50,000. In the event that he failed to exercise this option, the southwest quarter would fall into the residue. The residue would be shared equally among Gregory's five siblings.

[2] Vivian has since passed away. The applications are to be continued under King's Bench Rule 11. For clarity, in this decision, I still refer to Vivian and not her estate.

[7] On September 10, 2015, Vivian executed a new will which provided that Gregory had the option to purchase the southwest quarter at fair market value. As with the 2012 will, the residue would be shared equally among Gregory's five siblings. The 2015 will included:

> … I have not included Gregory … as a residual beneficiary as he has been given some farm land as set out in this Will.

[8] On September 30, 2015, Roland passed away and Vivian became the sole owner of the farmland.

[9] On October 18, 2016, Vivian transferred title to the farmland from Vivian's sole name to her and Gregory's names as a joint tenancy.

[10] On October 5, 2017, Vivian executed a new will which did not include a disposition of the farmland and simply provides that the residue is to be divided into five equal shares among Gregory's siblings. It also included the following:

> I have not included my son, Gregory…, as a beneficiary of the residue of my estate as during my lifetime I transferred to him, a joint tenancy with myself in the [north half] and the [southwest quarter]. It is my intention that this was a gift outright to him and he is to hold title by right of survivorship for his own use absolutely. It was the wish of my late husband and I that this land not be sold and that Gregory should receive it on my decease.

[11] Around the summer of 2020, Vivian arranged to meet with her lawyer Ms Badiou of McNeill Harasymchuk McConnell. Vivian later told Gregory's sister Michelle Gervin that the purpose of this meeting was to change her will back "to the way it was". Vivian also told Michelle about the existence of the 2017 will. Upon Michelle's review of the 2017 will, she learned of Gregory's joint tenancy interest in the farmland. Michelle shared the news of the joint tenancy and the 2017 will with her other siblings.

[12] Michelle deposed that in May 2022, she talked with her siblings, except for Gregory, and the overall sentiment was that Gregory had influenced Vivian to transfer ownership to him in joint tenancy and further influenced Vivian to execute the 2017 will. Michelle also deposed that Vivian had been expressing that she felt she had made a mistake, and Gregory had forced her into something.

[13] In June 2022, Michelle and her siblings, except for Gregory, met with Ms Badiou to convey that they felt Vivian may have been coerced by Gregory into making the changes to the ownership of the farmland. Ms Badiou indicated that she was unable to speak with them as Vivian was her client.

[14] Later, Michelle contacted the lawyer at the law firm of Meighen Haddad LLP, through whom Vivian had executed the 2017 will. This lawyer also advised Michelle he could not discuss the matter as Vivian was his client.

[15] Michelle deposed that at the end of 2022, and persisting into 2023, Vivian became increasingly upset about the prospect that Gregory would receive the farmland in its entirety upon her death. As a result, in early 2023, Michelle contacted Kelli Potter, who was a lawyer with whom Michelle had previously worked, and advised Ms Potter that Vivian wanted to make changes to her will.

[16] Following a number of phone and in-person meetings with Ms Potter, on April 12, 2023, Vivian signed the notice, and on May 10, 2023, Vivian signed her last will. This 2023 will presumes that severance of joint tenancy occurred, and Gregory would be given first option to purchase Vivian's interest in the farmland, following which the proceeds

would be divided equally among her other five children. On May 15, 2023, the notice was served on Gregory.

PARTIES' POSITIONS

[17] It is the position of both parties that for the purpose of these proceedings, the legal principles to determine the effectiveness of the notice are those applied in a testamentary context. I agree that, in the unique circumstances of this case, the notice is to be treated as a testamentary document as it is apparent that Vivian executed and served the notice to allow her to make a testamentary disposition of the farmland.

[18] Gregory concedes that service of the notice is sufficient to constitute severance of the joint tenancy of the farmland. However, it is Gregory's position that when the notice was executed and served, Vivian lacked testamentary capacity to instruct counsel and/or provide those instructions because of Michelle's undue influence over her. As such, Gregory seeks whatever order is appropriate to block severance of the joint tenancy.

[19] Vivian disagrees and seeks an order declaring the severance of the joint tenancy effective, with related registration under the ***Act***. In support of this position, Vivian argues that:

(i) Gregory's application is to be dismissed because Gregory missed the 30-day deadline under the ***Act*** following service of the notice to sever by which Gregory had to file evidence with the district registrar that proceedings in court were taken pursuant to the notice;

(ii) Vivian benefits from the presumption that she, as an adult, has the mental capacity to validly perform a legal act and that it is presumed that she knew

and approved of the contents of the notice to sever and had the necessary capacity;

(iii) There were no suspicious circumstances to rebut the latter presumption (item (ii) above) and if there were, she has met her burden of proving due execution, knowledge and approval, and/or establishing capacity in accordance with the civil standard; and

(iv) Gregory has not met his onus of establishing undue influence.

PRELIMINARY ISSUE – ADMISSIBILITY OF EVIDENCE OF VIVAN'S STATEMENTS TO MICHELLE AND MS POTTER AND CONVERSATIONS WITH MICHELLE'S OTHER SIBLINGS

[20] In oral submissions, Gregory's counsel objected to the admissibility of evidence included in Michelle's affidavit, in part, reflecting in the factual background (above) regarding statements Michelle deposed were made to her by Vivian or by Michelle's other siblings. These statements were largely about how Vivian and Michelle's siblings felt about the joint tenancy of the farmland, with the result that Gregory would own the farmland in its entirety upon Vivian's death. I agree with Gregory's counsel that statements by Michelle's siblings, as relayed in Michelle's evidence, are inadmissible hearsay. As such, I have ignored them.

[21] With respect to Vivian's statements to Michelle, as relayed in Michelle's evidence, I have limited the admissibility of these statements to narrative so far as necessary to understand the sequence of events and the conduct of the parties. It is only the fact that these statements were made that is admissible and not proof of their contents. For example, Michelle's evidence about Vivian arranging to meet with Ms Badiou is what

Michelle deposed led to her becoming aware of the joint tenancy and led to Michelle's unsuccessful attempts to elicit information from Ms Badiou. The evidence that at the end of 2022 and persisting into 2023, Vivian became increasingly upset about the prospect that Gregory would receive all the farmland is what led to Michelle's unsuccessful attempt to elicit information from the Meighen Haddad lawyer through whom Vivian executed the 2017 will and Michelle's contact with Ms Potter, who Vivian engaged to prepare the 2023 will and notice at issue.

[22] Gregory also objects to the admissibility of Vivian's statements to Ms Potter as reflected in Ms Potter's evidence. As will be further discussed below, these statements are also not admitted for their truth, but rather are only admitted to explain the basis for Ms Potter's assessment of Vivian's capacity.

LAW

[23] The parties agree, as do I, that ***Vout v. Hay***, [1995] 2 S.C.R. 876, is the governing law regarding knowledge and approval, testamentary capacity, and undue influence. In ***Drewniak v. Smith***, 2024 MBCA 86, albeit where the issue was the validity of an enduring power of attorney, Pfuetzner J.A. explained the principles emanating from ***Vout***, as follows (paras. 28-30 and 35):

> *Vout v Hay*, 1995 CanLII 105 (SCC) [*Vout*] is the leading Canadian case on the burdens of proof in contested Wills matters and its statement of the law is consistent with the law's historical origins in the probate courts. The propounder of a Will has the persuasive legal burden to prove due execution, knowledge and approval and testamentary capacity. In a common form proceeding, this persuasive legal burden is typically discharged by the propounder of the Will filing affidavit evidence that the Will was read over by the testator who appeared to understand it and the Will was executed with the requisite legal formalities. Upon establishing these facts, capacity and knowledge and approval are presumed (see *Vout* at para 26). I will refer to this rebuttable presumption as the *evidentiary presumption arising from due execution*. [Emphasis in original]

> If a person seeks to attack a Will on the basis that the testator did not in fact execute the Will, lacked capacity or lacked knowledge and approval of the Will's contents, that person has the evidential burden to point to some evidence that, if accepted, would establish those facts (see *Otis* at para 49; *Vout* at para 27). One way that this evidential burden can be satisfied is by pointing to suspicious circumstances surrounding the origins of the Will. In *Vout* at para 25, Sopinka J noted that:
>
> > The suspicious circumstances may be raised by (1) circumstances surrounding the preparation of the will, (2) circumstances tending to call into question the capacity of the testator, or (3) circumstances tending to show that the free will of the testator was overborne by acts of coercion or fraud.
>
> If the attacker is successful in discharging their evidential burden, the propounder can no longer rely on the evidentiary presumption arising from due execution to satisfy their persuasive legal burden. The propounder must lead sufficient evidence to prove due execution, capacity and knowledge and approval, as the case may be, on a balance of probabilities. If the person attacking the Will has pointed to evidence that the Will was the product of fraud or undue influence, they have the persuasive legal burden of proving fraud or undue influence on a balance of probabilities …
>
> …
>
> To summarize, the persuasive legal burden to prove the validity of a Will never shifts from the propounder in either a common or solemn form proceeding. However, upon the attacker satisfying their evidential burden to raise a question regarding the Will's validity, the propounder can no longer meet their persuasive legal burden by simply relying on the evidentiary presumption arising from due execution. The propounder must lead evidence to satisfy the trier of fact of due execution, capacity and knowledge and approval on a balance of probabilities. A person seeking to attack a Will based on fraud or undue influence has the persuasive legal burden to prove those allegations. The respective persuasive legal burdens of proof do not change. An evidentiary presumption of undue influence does not arise in probate proceedings ... [Citations omitted]

(See also, ***McLeod Estate v. Cole et al***, 2022 MBCA 73, paras. 14-20)

[24] In ***Vout***, the Supreme Court of Canada also noted the following regarding suspicious circumstances (paras. 26, 28):

> Suspicious circumstances in any of the three categories to which I refer above will affect the burden of proof with respect to knowledge and approval. The burden with respect to testamentary capacity will be affected as well if the circumstances reflect on the mental capacity of the testator to make a will.…
>
> …

> … Accordingly, it has been authoritatively established that suspicious circumstances, even though they may raise a suspicion concerning the presence of fraud or undue influence, do no more than rebut the presumption to which I have referred. This requires the propounder of the will to prove knowledge and approval and testamentary capacity. The burden of proof with respect to fraud and undue influence remains with those attacking the will … [Citations omitted]

ANALYSIS

Should Gregory's application be dismissed because following service of the notice he missed the 30-day deadline under the Act by which he had to file evidence with the district registrar that proceedings in court were taken pursuant to the notice?

[25] The ***Act*** provides in s. 79(3), as follows:

> At any time before the expiration of 30 days from the time notice of intent to sever has been given under subsection (1) the party served may file with the district registrar evidence to the satisfaction of the district registrar of proceedings in court taken pursuant to the notice, and the district registrar shall not proceed with any registration of an instrument under subsection (1) until the matter is disposed of by an order of the court.

[26] Vivian points out that Gregory did not commence a court proceeding within the 30-day required timeframe, nor did he seek an extension of time under s. 79(4) of the ***Act***. As such, it is Vivian's position that Gregory's application ought to be dismissed.

[27] The ***Act*** provides in s. 170, as follows:

> No proceeding under this Act is invalid by reason of any informality or technical irregularity therein or of any mistake not affecting the substance of the proceeding.

[28] Ms Potter, who was Vivian's lawyer that prepared the notice, deposed that less than 30 days after service of the notice, she was contacted by Gregory's lawyer who indicated that Gregory intended to contest the severance. In these circumstances, I am satisfied that for the purpose of s. 79(3) of the ***Act***, this contact by Gregory's lawyer amounts to an "informality" or "mistake" under s. 170 of the ***Act***. As well, there is no

compelling evidence that the substance of these proceedings have been affected. Therefore, I decline to dismiss Gregory's application on this basis.

Is Vivian aided by the following rebuttable evidentiary presumption arising from due execution:

> ***Upon proof that the will was duly executed with the requisite formalities, after having been read over to or by a testator who appeared to understand it, it will generally be presumed that the testator knew and approved of the contents and had the necessary testamentary capacity (Vout, para. 26; Drewniak, para. 28)?***

[29] Ms Potter's deposed that during her April 12, 2023 meeting, where Vivian signed the notice, she first read the notice to Vivian line by line to ensure that she understood its contents and implications. Ms Potter also deposed that she was satisfied that Vivian understood the contents of the notice, and did, in fact, want to sever her joint tenancy with Gregory. I find that there is no compelling evidence which contradicts this evidence of Ms Potter. In these circumstances, I am satisfied that Vivian is aided by the evidentiary presumption arising from due execution.

Suspicious Circumstances

[30] With the aid of the evidentiary presumption arising from due execution, the evidentiary burden falls to Gregory to adduce or point to some evidence which, if accepted, would establish that Vivian lacked capacity or lacked knowledge and approval of the notice's contents (there is no suggestion that Vivian did not in fact execute the notice).

[31] The test for determining capacity is provided in ***McLeod Estate v. Cole et al.***, 2021 MBQB 24, aff'd 2022 MBCA 73, leave to appeal to S.C.C. refused, [2022] S.C.C.A. No. 23, as follows (paras. 17-19):

> 17 The seminal statement of the test is found in the case of *Banks v. Goodfellow*, (1870), L.R. 5 Q.B. 549, at p. 565:
>
> > It is essential to the exercise of such a power [of testamentary capacity] that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties -- that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.
>
> 18 However, it is also clear that the adoption of too strict a standard could result in the persons of advanced age being deprived of the right to dispose of their property. This is made clear in the Goodfellow case, at pp. 567-68:
>
> In the case of *Den v. Vancleve* [2 Southard, at p. 660] the law was thus stated:
>
> > By the terms 'a sound and disposing mind and memory' it has not been understood that a testator must possess these qualities of the mind in the highest degree; otherwise, very few could make testaments at all; neither has it been understood that he must possess them in as great a degree as he may have formerly done; for even this would disable most men in the decline of life; the mind may have been in some degree debilitated, the memory may have become in some degree enfeebled; and yet there may be enough left clearly to discern and discreetly to judge, of all those things, and all those circumstances, which enter into the nature of a rational, fair and just testament. But if they have so far failed as that these cannot be discerned and judged of, then he cannot be said to be of sound and disposing mind and memory.
>
> 19 The modern restatement of the *Banks v. Goodfellow* test was articulated this way in *Schwartz v. Schwartz*, 1970 CanLII 32 (On CA), [1970] 2 O.R. 61, at p. 78:
>
> > The testator must be sufficiently clear in his understanding and memory to know, on his own, and in a general way (1) the nature and extent of his property, (2) the persons who are the natural objects of his bounty and (3) the testamentary provisions he is making; and he must, moreover, be capable of (4) appreciating these factors in relation to each other, and (5) forming an orderly desire as to the disposition of his property ... [Citations omitted]

[32] Gregory contends that the following suspicious circumstances surround the preparation of the notice and tend to call into question Vivian's capacity:

a) At the time of the notice, Vivian was 90 years old and was not able to see well enough to read a document.

b) During the salient period, Michelle provided "day-to-day care" for Vivian, including assisting with the coordination and scheduling of Vivian's various appointments, transporting Vivian to appointments, grocery shopping, and ordering and receiving Vivian's prescription medications.

c) Vivian had significant memory impairment. As an example, Gregory's counsel points to evidence that in August 2020, Vivian forgot about the appointment she had scheduled for Ms Badiou to meet with her.

d) Gregory recorded portions of a visit with Vivian on May 19, 2023, where it was evident that Vivian was unable to recall:

- Transferring property ownership to Gregory;
- At first hiring Ms Potter, Ms Potter's name, or being aware that Ms Potter did not work at the law firm she normally worked with; and
- Making a new will, even though the making of the new will had taken place only about ten days earlier.

e) Vivian had difficulty using her phone.

f) Ms Potter was not Vivian's regular lawyer. She regularly used the services of McNeill Harasymchuk McConnell, which had done wills for Vivian and Roland on at least two occasions.

g) Vivian had been brought to Ms Potter by Michelle and Michelle had been with Vivian during their initial phone call and at the commencement of each meeting.

h) Vivian made statements to Ms Potter about things Michelle had asked her not to do, showing that there had been discussions outside of her office pertaining to Ms Potter's retainer.

i) Vivian acted in a manner that would indicate being confused and agitated. In particular, at first, she did not instruct Ms Potter to prepare the notice, then on March 7, 2023, contacted her by telephone and asked her to prepare the notice. She contacted her again a few days later and left a voicemail stating she wanted more time to "think about things", and finally contacted her again on April 3, 2023, to ask her to proceed. Ms Potter gave evidence that Vivian displayed "genuine upset", was "concerned and conflicted", and made statements to the effect of "I'm so bothered by this".

j) Vivian's narrative of the circumstances surrounding the land transfer were inaccurate. Ms Potter's evidence was that Vivian told her that Gregory took Vivian to Meighen Haddad, both in 2016 to transfer ownership of the land in joint tenancy to him and again a year later to execute the 2017 will. It is undisputed that Gregory had no prior relationship with Meighen Haddad, had never retained that firm, and never accompanied Vivian to any appointments at that firm. The 2016 transfer was completed through Vivan's regular counsel Rene McNeill.

[33] I agree with Gregory's counsel that the foregoing points to some evidence that, if accepted, would establish that Vivian lacked capacity or lacked knowledge and approval of the notice's contents.

[34] In addition, Gregory submits that there were circumstances tending to show that Vivian's free will was overborne by acts of coercion or fraud (which are also pertinent to the question of capacity and knowledge and approval — see ***Vout***, paras. 25-26). Gregory argues that it was because of Michelle's own concerns, also shared by Ms Potter, about undue influence on Vivian by Gregory leading to the joint tenancy in 2016, along with Michelle not wanting the farmland to be given to Gregory, that led to Michelle coercing Vivian to serve the notice. I am satisfied there is evidence of circumstances tending to show undue influence.

[35] In my view, it is suspicious that it was not until after Michelle became aware in 2020 of the 2016 property transfer from Vivian into joint tenancy with Gregory that Vivian took steps to sever the joint tenancy or change her will. It is also suspicious that around the summer of 2020, Vivian made arrangements to meet with Ms Badiou (whose firm prepared the 2016 transfer of farmland into joint tenancy), but it was not until she met with Ms Potter, almost three years later, in the spring of 2023, as arranged by Michelle, that steps were taken towards severing the joint tenancy and changing her will. It raises suspicion that Michelle attempted to discuss the 2016 transfer and 2017 will with both of Vivian's lawyers, in circumstances where Vivian did not provide the requisite consent for these lawyers to speak with Michelle. From 2020 onward, Michelle concedes that she had numerous discussions with Vivian about this transfer and the related 2017 will.

During the salient timeframe, Vivian's day-to-day care fell to Michelle. As argued by Gregory's counsel, Michelle was the only sibling who had day-to-day access to Vivian. These circumstances, coupled with the evidence that Michelle was present with Vivian for an indeterminate amount of time prior to each in-person appointment with Ms Potter, also raise suspicion.

Capacity and Knowledge and Approval

[36] With Gregory discharging his evidentiary burden, Vivian can no longer rely on the evidentiary presumption arising from due execution of the notice to satisfy her persuasive legal burden. However, I find that Vivian has led sufficient evidence to prove capacity and knowledge and approval on a balance of probabilities because the legal requirements set forth in ***Goodfellow*** were met. While I appreciate that the focus of the ***Goodfellow*** test is on capacity, in the circumstances of the case at hand, meeting the ***Goodfellow*** requirements also demonstrates that Vivian knew and approved of the contents of the notice.

[37] Vivian deposed to her ownership of the farmland and the effect of joint tenancy, which she deposed she did not believe she understood when she initially agreed to the joint tenancy with Gregory. Gregory submits that this evidence by Vivian is at odds with the provisions in her 2012 and 2015 wills dealing with the farmland and in particular is inconsistent with Vivian's 2017 will where she provides the rationale for the joint tenancy. As noted, Vivian's 2017 will expressly provides that "[i]t is my intention that this was a gift outright to [Gregory] and he is to hold title by right of survivorship" and it "was the wish of my late husband and I that this land not be sold and that Gregory should receive

it on my decease". Nevertheless, in support of her application, Vivian has also clearly deposed to her present intention as follows:

> Regardless of what I may or may not have understood at the time of the transfer of the joint tenancy to Gregory, my intention is to ensure, as much as possible, that my six children inherit an equal amount from me upon my death.
>
> If Gregory were to receive the whole of the three quarter-sections on my death, this would not be equal. I would not have enough other assets in my Estate to ensure that my other five children received assets comparable in value.
>
> As a result, I do not believe that the current ownership status of the three quarter-sections is right or fair, and want to fix it.
>
> In order to 'fix' the current ownership status and make things fair and equal as between my children, I have begun the process of severing my joint tenancy with Gregory. I understand that the effect of a severance means that:
>
> (a) Gregory would only receive half of the three quarter-sections on my death; and
>
> (b) the remaining half of the three quarter-sections would be distributed as I set out in my Will.

[38] With respect to the first ***Goodfellow*** requirement, I am satisfied that Vivian was sufficiently clear in her understanding and memory to know on her own, as reflected in her affidavit evidence (above and below), in a general way, the nature and extent of her property. There is no doubt Vivian understood her ownership of the farmland and there is no compelling evidence that she did not understand in a general way the nature and extent of her other assets. Vivian expressed an inaccurate recollection to Ms Potter about how the farmland came to be jointly held with Gregory. However, there is no evidence to contradict Vivian's understanding that she owned the farmland with Gregory, which meets the requirement in ***Goodfellow***.

[39] Vivian deposed "while I am significantly visually impaired and my memory may not be what it used to be, I know what I own and know who I would like to receive my assets

upon my death". In my view, the court's comments in ***Scramstad v. Stannard*** (1996), 40 Alta. L.R. (3d) 324 (Q.B.) (para. 136) are apt:

> … it is important to keep in mind at all times, the instruction contained in *Goodfellow*, *supra*, to the effect that: **just because a person's mind and memory is not what it used to be, does not mean that such person lacks testamentary capacity**; the test to determine testamentary capacity is not therefore one of certainty or satisfaction beyond a reasonable doubt.
>
> [Emphasis added]

[40] There is no dispute that Vivian showed that she understood who are the natural objects of her bounty (the second ***Goodfellow*** requirement), namely her children. In this sense, her very reason for severing the joint tenancy was to "make things fair and equal as between [her] children". No compelling evidence was led that the result of the severance would not achieve this objective.

[41] The foregoing evidence from Vivian also demonstrates that she was sufficiently clear in her understanding in the effect of the notice (the third ***Goodfellow*** requirement), being that it was the first step in a severance which would result in Gregory continuing to own half of the farmland and she would be able to dispose of the rest in her will. This evidence also demonstrates that Vivian was capable of appreciating the first three ***Goodfellow*** factors in relation to each other (the fourth ***Goodfellow*** requirement). As well, this evidence, along with her description (above) about how the severance of the joint tenancy is part of her efforts to "make things fair and equal as between my children", demonstrate that Vivian formed an orderly desire as to the disposition of the farmland (the fifth ***Goodfellow*** requirement).

[42] Gregory asserts that notwithstanding Vivian's evidence, there were circumstances that Ms Potter herself identified as requiring special attention as they may indicate

diminished capacity or be otherwise suspicious. As such, Gregory submits that Ms Potter should have refused to do the work or asked for a medical opinion as to Vivian's capacity.

[43] I agree with the submission of Vivian's counsel that the evidence demonstrates that Ms Potter took steps to assess Vivian's capacity throughout the entirety of her retainer with a view to ensuring that the legal requirements set forth in ***Goodfellow*** were met.

[44] Ms Potter first met with Vivian at Vivian's home on February 28, 2023. This meeting lasted approximately one hour. Ms Potter gave evidence that Vivian presented as alert and clear, displaying good historical recall of her affairs, a good understanding of her current assets, family circumstances, landholdings, and financial circumstances. Vivian also offered thoughtful comments and ideas on the crafting of a new will. Ms Potter deposed that Vivian appeared genuinely upset when Ms Potter explained to her that due to the way the farmland was held with Gregory, she was unable to leave her interest to her other children. Ms Potter confirmed that Vivian did not need to make any decisions then.

[45] On March 7, 2023, Vivian called Ms Potter and asked that she go ahead with preparing the documents to sever the joint tenancy. On March 10, 2023, Vivian left a voicemail for Ms Potter stating that she wanted some more time to think about things. On April 3, 2023, Vivian called Ms Potter to instruct that she apply to sever the joint tenancy. On April 12, 2023, Ms Potter met with Vivian at her home, and she ultimately signed the notice. Ms Potter noted that Vivian presented as alert and oriented. As Vivian's vision was poor, Ms Potter read the notice to her line by line to ensure that she understood

its contents and implications. She also asked her if she had any questions and if she needed more time to think things over.

[46] Regarding Gregory's submission that Vivian acted in a manner that would indicate being confused and agitated, on cross-examination on her affidavit, Ms Potter confirmed that she did not view Vivian's taking of time with her decision as "changing her mind". Instead, Ms Potter had encouraged Vivian to take her time and was glad that Vivian did as it indicated to her that Vivian appreciated the importance of her decision. Given the significance of Vivian's decision, including its impact on Gregory, in the circumstances, it is my view that this was sensible.

[47] Gregory objected to the admissibility of Ms Potter's evidence of the statements made by Vivian to her on the basis that they are hearsay. To the extent that I have alluded to these statements above, I have not admitted them for their truth. That is, I have not treated these statements as evidence, for example as to the truth of Vivian's current assets, family circumstances, landholdings, and financial circumstances. Rather, they are only relevant and admitted to explain the basis for Ms Potter's assessment of Vivian's capacity as well as to explain the work undertaken by Ms Potter.

[48] As discussed above, Vivian gave evidence about her children, that she knows what she owns, including the farmland, and how she seeks to use her assets to provide a fair distribution upon her death. Her statements to Ms Potter are therefore admissible to support Ms Potter's assessment of Vivian's capacity. To this extent, Ms Potter's evidence about what she was told by Vivian does not violate the hearsay rule or, for that matter,

the rule against oath-helping (evidence adduced solely for the purpose of proving that a witness is truthful is inadmissible).

[49] I reject Gregory's submission that Ms Potter ought to have required a medical assessment of Vivian before proceeding to take her instructions. As indicated in ***McLeod Estate***, the "necessary degree of understanding by a transferor [of land] can be attained with the assistance of professional advisors, such as … lawyers" (para. 30). Ms Potter has provided detailed evidence regarding her assessment of Vivian so as to support her conclusion that she could accept Vivian's instructions. Ms Potter's evidence was that she spoke or met alone with Vivian on several occasions and Vivian was alert, oriented, and understood what she was doing. I accept from Ms Potter's evidence that based on what Ms Potter observed and heard, she was satisfied that Vivian understood the contents of the notice and, in signing the notice, Vivian wanted to sever her joint tenancy with Gregory. Based on Vivian's evidence and based on Ms Potter's observations from her multiple points of contact with Vivian, I am satisfied that Ms Potter took reasonable steps to assess Vivian's capacity through the entirety of her retainer.

[50] I give little weight to Gregory's recording on May 19, 2023 of his questions to Vivian that he relies upon as evidence of incapacity and undue influence for two reasons. First, this recording occurred after the notice was signed on April 12, 2023. Second, I find that the circumstances in which the questions were posed to Vivian by Gregory are tantamount to an interrogation by Gregory aimed at challenging Vivian's decision regarding the notice. It includes suggestions by Gregory about who was instrumental in arranging the execution of the notice and presupposing it could not have been Vivian's

own decision. As noted in ***McLeod Estate*** (para. 26), "mental capacity for any legal act is time and task or situation specific and cannot be assessed without a complete understanding of the factual matrix in existence at the time a legal act was undertaken". There is no indication that similar circumstances existed to those at the time of Gregory's recording of Vivian when the notice was signed at Vivian's meeting with Ms Potter.

[51] In sum, I find that Vivian has met her persuasive legal burden of proving knowledge and approval as well as establishing capacity. On a balance of probabilities, the evidence demonstrates that Vivian knew, understood, appreciated, and approved of the notice and Vivian had a sufficient ability to choose how to deal with the farmland.

Undue Influence

[52] I now turn to the question of undue influence. That is, Vivian may well have appreciated what she was doing but was doing it because her free will was overborne by pressure from Michelle (***Drewniak***, para. 54; ***Vout***, para. 29). In ***Ronald v. Ronald***, 2003 MBQB 122, Beard J. (as she then was) provided the following principles applicable to a case where undue influence is alleged (para. 19):

> (n) The party who alleges undue influence has the burden of proving that the mind of the testator was overborne by the influence exerted by another person such that there was no voluntary approval of the contents of the will.
>
> (o) The burden is the civil burden of proof on a balance of probabilities.
>
> (p) The degree of influence required to constitute undue influence is that which is so great and overpowering that the testator is forced or coerced into doing that which he or she does not want to do.
>
> (q) It is not improper for any potential beneficiary to attempt to influence the decision of the testator, and a person may act towards a testator in a way that will induce him or her to provide a benefit, provided the influence does not amount to coercion such that the testator cannot act as a free agent.

> (r) It is not sufficient to establish that the benefiting party had the power to coerce the testator; it must be shown that the overbearing power was actually exercised and that it was because of its exercise that the will or disposition was made.

[53] While Gregory has pointed to evidence (as discussed above) that the notice was the product of undue influence by Michelle, an evidentiary presumption of undue influence does not arise in probate proceedings. In all the circumstances, I find that Gregory has not met his persuasive legal burden of proving undue influence on a balance of probabilities for the following reasons.

[54] First, proof of knowledge and approval will go a long way in disproving undue influence. If it is established that the testator knew and appreciated what she was doing, in many cases there is little room for a finding that the testator was coerced. (***Vout***, para. 29)

[55] Second, Vivian deposed that she understands that Gregory has concerns about whether her decision to sever their joint tenancy is her own and she can confirm that this decision is solely her own. She deposed that she is not being influenced by any of her other children.

[56] Third, Ms Potter's evidence reflects her appreciation as to the potential for undue influence. It is my view that Ms Potter demonstrated reasonable diligence to address this potential. Ms Potter gave evidence that she spoke and met alone with Vivian on numerous occasions and that while she was alive to potential capacity issues and undue influence, she ultimately had no doubts about Vivian's capacity to provide instructions or make decisions at any time during her retainer. Similarly, Ms Potter had no concerns about Vivian's independence or that she was being unduly influenced. I am satisfied that

nothing in the cross-examination of Ms Potter or any other evidence undermines this evidence.

[57] Ms Potter was unable to confirm or deny whether Michelle was present each time she and Vivian spoke on the phone beyond the initial call. Michelle's evidence is that she was not present. Gregory argues that Vivian had difficulty operating her phone and as such, it is likely that Michelle was present each time she spoke with Ms Potter on the telephone. While Michelle's evidence is that there was a time around May 2023, where Vivian's phone was not working properly such that she was not surprised that she may have had difficulties with it, there is no compelling evidence that Vivian's phone was not working at the times she spoke with Ms Potter on the phone. In these circumstances, I am unable to conclude that Michelle was present for each call between Ms Potter and Vivian.

[58] Fourth, while Michelle's day-to-day involvement with Vivian establishes that Michelle had the opportunity to coerce Vivian, I am not satisfied that she did so. There is no compelling evidence that Michelle spoke with Vivian about Michelle's own concerns regarding Gregory's joint tenancy in the farmland beyond discussion with Vivian that the joint tenancy and the 2017 will as it related to the farmland were a departure from what was included in the prior wills and did not accord with the intentions that Vivian and Roland had previously expressed. This discussion took place in 2020, over two years prior to the execution of the notice. While there is evidence that there may have also been discussions post-May 2022, Michelle withstood cross-examination about her evidence that after the siblings met with Ms Badiou in June 2022, the siblings "let it go"

or "dropped it" as they did not want Vivian worrying about the farmland at this late stage of her life. In late 2022, it was Vivian who brought up concerns regarding the farmland, which led to Michelle contacting Ms Potter. There is no compelling evidence that Michelle encouraged Vivian to make a particular decision. Nevertheless, as indicated in ***Roland***, "[i]t is not improper for any potential beneficiary to attempt to influence the decision of the testator … provided the influence does not amount to coercion such that the testator cannot act as a free agent" (para. 19 (q)).

[59] Fifth, I appreciate that service of the notice is to Gregory's disadvantage and to Michelle's benefit, which supports a finding of undue influence by Michelle over Vivian. However, when taken in the context of the other considerations discussed in my reasoning enumerated above, this evidence does not outweigh my ultimate finding that Gregory has not satisfied his persuasive legal burden to prove undue influence.

[60] In sum, I am not satisfied that the execution of the notice was procured by the practice of some undue influence upon Vivian.

Equitable Undue Influence and the Evidentiary Presumption

[61] It is the joint position of the parties that the analysis I am to perform is limited to an application of the principles relating to testamentary/probate undue influence as I have undertaken above. Nevertheless, for completeness, I have considered whether my conclusion would be any different with the application of the equitable doctrine of undue influence and its "evidentiary companion", the presumption of undue influence, as discussed in ***Drewniak*** (para. 57).

[62] The party seeking to attack a transaction on the basis of equitable undue influence has the persuasive legal burden to prove undue influence on a balance of probabilities. The evidentiary presumption of undue influence may assist the attacker to satisfy their persuasive legal burden to prove undue influence (***Drewniak***, para. 58). Whether the evidentiary presumption is raised begins with the question of whether the potential for domination inheres in the nature of the relationship between the parties to the impugned transaction (***Drewniak***, para. 64). The second stage of the inquiry into whether the evidentiary presumption is triggered is to examine the nature of the transaction – from pure gifts to classic contracts (***Drewniak***, para. 65). For gifts, the court will scrutinize the process leading up to the gifting for "coerced or fraudulently induced generosity" (***Drewniak***, para. 66). In situations where consideration is not an issue, such as gifts, the plaintiff does not need to show that they were unduly disadvantaged or that the defendant was unduly benefitted. It is enough to establish the presence of a dominant relationship (***Drewniak***, para. 66).

[63] For the reasons discussed above regarding suspicious circumstances tending to show undue influence by Michelle over Vivian, I am satisfied that the potential for domination inhered in the nature of the relationship between Vivian and Michelle with respect to the notice to sever. The result of the notice is to add to the residue of Vivian's estate, which impacts the testamentary gift to Michelle. As such, for the purpose of the second stage of the inquiry of whether the evidentiary presumption is triggered, this is a situation of essentially a gift, such that Gregory does not need to show that he would be unduly disadvantaged or that Michelle unduly benefitted. It is enough to establish the

presence of a dominant relationship. While Gregory benefits from the presumption of undue influence, for the same reason that I found that Gregory has not met his persuasive legal burden of proving "probate undue influence", I find that Gregory has not met his persuasive legal burden to prove equitable undue influence on a balance of probabilities.

CONCLUSION

[64] In conclusion, I am dismissing Gregory's application. Accordingly, I find that the notice to sever joint tenancy is, in fact, effective as severance of the joint tenancy of the farmland as of June 14, 2023. Counsel may make an appointment with me if any ancillary orders are required to effect this severance. If costs cannot be agreed upon, counsel may file written submissions.

_____ A.C.J.