

CITATION: Koster v. Koster, 2018 ONSC 2321
COURT FILE NO.: 259/14
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ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
Sandra Koster, Kenneth Koster, James)
Lolas, Kathleen Mortsakis and Patricia) David N. Delagran, for the Objectors
Vassilakis)
)
Objectors)
)
– and –)
)
Elizabeth Anna Koster) Peter Quinlan, for the Respondent
)
)
Respondent)
)
) **HEARD:** March 6 and 9, 2018

2018 ONSC 2321 (CanLII)

THE HONOURABLE MR. JUSTICE R. J. NIGHTINGALE

[1] The objectors are five of a number of nephews and nieces of the late George Koster (“George”) who died at the age of 94 on June 6, 2014. They brought their application to challenge the validity of the four primary and secondary wills of the testator made between February 17, 2011 and October 4, 2012 in favour of the respondent Elizabeth Anna Koster (“Elizabeth”), his widow as estate trustee. They are doing so based on allegations of undue influence and suspicious circumstances due to her conduct involving those wills.

[2] The respondent brings this motion for summary judgment to dismiss that application and to allow them to carry out the provisions of the 2012 wills.

Factual Background

- [3] The respondent provided affidavit evidence of Elizabeth, the testator's family physician Dr. Nikore, the testator's lawyer Mr. Portelli who prepared and attended to the signing of the wills, and lay witnesses including his long-time family friend and visitor Dr. DeMarchi, Arlene Windsor and his accountant Martin Dixon. George's priest Rev. Marinos also filed an affidavit. Elizabeth, Mr. Portelli and Rev. Marinos were cross-examined on their affidavits but none of the others were.
- [4] The objectors all filed their own detailed affidavit evidence. Only Ken Koster was cross-examined on his affidavit.
- [5] Some of the facts that are not in dispute from the parties' evidence include that George had been married to Anasthasia ("Tess") Koster for 62 years until she died in March 2006. They had no children.
- [6] The respondent Elizabeth who was 17 years younger than the deceased and who had been residing in Vancouver for a number of years, visited George in 2006 shortly after his late wife's death. Her evidence was that from 2006 to 2008 George would periodically visit her in Vancouver and she also visited him in Brantford. Her evidence was that George invited her to move to Brantford to live with him which she did in late January 2008 moving into his home at 23 The Strand. She left his house in the spring of 2009 after a heated argument returning from their Florida vacation with him when he no longer wished her to live there. She returned to Vancouver but then returned to reside with George once again she states in May or June 2009 although the objectors state it was not until sometime in August 2009.
- [7] She and George had had an affair over several years during his marriage to Tess in the mid-1960s out of which a son George Hare was born in November 1966 who would be entitled to a share in George's estate in the event of an intestacy.
- [8] Her evidence and that of the objectors is that George before his marriage to Tess in 1944 fathered a child Georgia Koster born in 1940 who would also be entitled to a share in George's estate in the event of an intestacy. It is not known if Georgia is still alive and, if so, what her whereabouts are.

- [9] George was diagnosed with prostate cancer and received radiation and chemotherapy treatment for that in July and August 2009. Elizabeth arranged a surprise 90th birthday party for George on August 30, 2009.
- [10] George gave instructions to Mr Portelli on December 10, 2009 for a new will and signed it on March 11, 2010 which now left 10/11 of his substantial estate to his adult nieces and nephews including the objectors. The respondent Elizabeth would receive the other 1/11 share.
- [11] George had a heart attack on October 28, 2010 requiring hospitalization. He was discharged from hospital on November 10, 2010.
- [12] George gave Mr. Portelli instructions on December 14, 2010 to prepare a new will which now left his house to Elizabeth with the remaining residue to be divided among his nephews and nieces including the applicants which instructions he confirmed on January 21, 2011 with Mr. Portelli and which will was scheduled to be signed by him on February 8, 2011.
- [13] Mr. Koster was scheduled for heart surgery on February 10, 2011 to insert a stent because of his heart attack.
- [14] Elizabeth's evidence was that George on Sunday, February 6, 2011 asked her to marry him and to do so immediately. They were married the next day February 7, 2011 in a civil ceremony before the municipal Clerk in Simcoe. There is no challenge by anyone including the objectors to the validity of the marriage. She admitted in cross-examination that neither she nor George told their family and friends ahead of time in part because their plans arose so quickly.
- [15] George then attended Mr. Portelli's office by himself the next day February 8, 2011 and advised Mr. Portelli of his marriage and asked if it were true that a marriage voids all prior wills. He was advised it did and then gave instructions to Mr. Portelli to make a new will which now disinherited all his nephews and nieces including the applicants and which gave his entire estate to his now spouse the respondent Elizabeth. George

expressed concern that his nephews and nieces would challenge the will as they had expected that they would probably receive the entire estate.

- [16] The evidence of Mr. Portelli made reference to his concerns surrounding George's capacity and any potential will challenge because of undue influence. Because of that, on February 15, 2011 Mr. Portelli asked George's family physician Dr. Nikore to conduct a capacity assessment. His evidence was that he was told by Dr. Nikore later that day in a telephone conversation that he did have a capacity assessment completed on George and had no issues whatsoever with respect to George's mental capacity and his ability to give instructions and was quite well despite his age.
- [17] Mr. Portelli's evidence was that he was satisfied based on his dealings with George for about two years beforehand with his ability to provide instructions for the will and that he believed he suffered from no mental incapacity issues. Mr. Portelli confirmed that George came to his office by himself and he alone provided the instructions to him at all times. Mr. Portelli at no time met or spoke to the Elizabeth with respect to any of the instructions provided by or his dealings with George with respect to any of the wills he prepared and arranged to have signed by George.
- [18] Mr. Portelli admitted that he did not receive a formal written report from Dr. Nikore with respect to his assessment of George and that he then did a follow-up letter with him approximately one year later but never did receive it. The affidavit evidence of Dr. Nikore was that he had been George's family doctor for approximately 40 years. He outlined his encounters with George beginning February 15, 2011 and continuing to his death on June 6, 2014 stating "Throughout that time I did not note any signs of dementia in him". He refers to the letter he wrote on May 5, 2016 in which he says that in none of his visits to him did he note any signs of dementia and that he was cognizant, lucid, mentally competent and capable of decision-making.
- [19] It is not altogether clear as to what time period Dr. Nikore was referring to when he made that statement i.e. whether it was for the entire 40 years of his checkups with him or just that period since his heart failure which would have been at the end of October 2010. Dr.

Nikore noted that George had memory issues while in the hospital in October 2010 and his having a form of transient delirium as confirmed in the hospital records. He felt that George's memory issues prior to the insertion of the stent was because his heart failure reduced the blood profusion to his brain which along with his medications gave rise to the transient delirium. His memory improved after the insertion of the stent. That stent operation as noted by the objectors was on February 10, 2011 three days after his marriage to the respondent Elizabeth and two days after he provided instructions to Mr. Portelli regarding his new will in which he wanted to leave everything to Elizabeth .

- [20] Dr. Nikore then described the number of his visits he had with George from 2011 until March 27, 2014 and concluded that there had never been any memory issues with George, that he had never been on any medications used in the treatment of dementia and that he was cognizant, lucid and clearly capable mentally and he saw nothing that suggested he was not mentally competent or not capable of decision making in August and October 2012.
- [21] Mr. Portelli also had had discussions with Mr. Dixon, George's long time accountant, regarding his financial affairs at the time who also conveyed to Mr. Portelli the information he had received from George regarding his wishes to draft a new will.
- [22] Mr. Dixon also provided detailed evidence confirming his understanding that at all times of his dealings with George in 2010 and thereafter George was lucid with complete mental capacity and ability to provide instructions regarding his financial affairs to him. He had no concerns whatsoever with respect to any issues of reduced mental capacity or someone exercising undue influence over him. He was not cross-examined on his detailed affidavit.
- [23] The respondent also provided a detailed affidavit from Mr. DeMarchi a chiropractor who was a long-time friend and frequent visitor with George until the time of his death. His evidence was that throughout that entire relationship and during his many visits he always found that George was totally lucid and aware of the circumstances in his financial affairs. He had no issues with respect to his mental capacity or concerns about

anyone exercising undue influence over him. George was happy to have married Elizabeth and did not say or suggest she pressured him into getting married or doing anything. He was not cross-examined on his affidavit by the objectors.

- [24] The respondent also provided an affidavit of Anita Wilson who confirmed that she and her spouse traveled on a number of occasions with George and his spouse Elizabeth from 2011 onward. Her affidavit, on which she was not cross-examined, confirmed that throughout the entire time George exhibited no signs of mental incapacity and was a very strong-willed gentleman with the inference from the evidence that Elizabeth did not exercise any undue influence over him.
- [25] As indicated above, George made 4 wills from February 17, 2011 until his last ones on October 4, 2012. In that last secondary will, he now provided for each objector and other nieces and nephews to receive \$20,000 from his estate. The balance of George's estate under both his primary and secondary wills of October 4, 2012 went to George Hare after the life interest to Elizabeth in the residue with her ability to encroach on the capital.
- [26] The deceased and Elizabeth according to her affidavit and that of Rev. Marinos were remarried in the Greek Orthodox church on June 29, 2013 . Elizabeth's affidavit evidence was that George had been advised by the priest that if he wanted to continue receiving the sacraments, he was going to have to either be married or stop living in a common-law relationship. She said George then made that decision to marry her in both February 2011 and in Church in 2013.
- [27] However, the affidavit evidence of Rev. Marinos is that he did not know in 2013 when he spoke to George that they had already been married in a civil ceremony in 2011 which contradicts Elizabeth's evidence on the reason for the 2011 marriage. Otherwise, he confirmed the evidence of Elizabeth that it was George who wanted to marry in the church in 2013 because of his Greek heritage. Elizabeth was not of Greek heritage and had no reason to go through that ceremony.
- [28] Her evidence was also that George Koster insisted that George Hare, his son with the respondent who was born in 1966, be baptized in that church as he wanted his son to be

recognized by the Greek community. George Hare was baptized in that church June 27, 2013 traveling from British Columbia to do so and to attend the wedding ceremony two days later also in that church.

- [29] The evidence of Elizabeth in her affidavit was that she had nothing to do with and knew nothing of any of the will instructions provided by George to Mr. Portelli nor did she ever insist that the changes in his will provide everything for her with nothing to his nephews and nieces who were the previous sole beneficiaries of the estate. She never went to Mr. Portelli's office when George did so to talk to him and did not provide any documents or papers with respect to will instructions that he was to take with him. Her evidence was that she didn't know when he was going there.
- [30] Her evidence in cross-examination, however, was only that she could not remember whether she had ever seen draft copies of his wills that his lawyer had given to him and could not say for certain if she was aware of what the wills provided.
- [31] Her evidence as well was that she at no time took George away from or cloistered him from his nephews and nieces and that if they had not seen or talked to him, it was their own choosing over the last years. Her evidence essentially was that none of the nieces and nephews made any effort to maintain any contact with George from 2010 or 2011 and without any conduct on her part discouraging them from doing so. She denied that she did anything to discourage their relationship with him since she started to reside with him. She furthermore denied that she did so for the purpose or with the result that he changed his wills.
- [32] Her evidence was that after George's prostate cancer treatment in 2009, she invited all of the objector nephews and nieces to their house for his 90th birthday party. Only Ken Koster and Sandra Koster showed up but none of the others. She said that George was upset that they did not call him very much as they had in the past and did not attend his 90th birthday party.

Analysis

- [33] In her motion for summary judgment under Rule 20, the onus is on the respondent to establish on a balance of probabilities that there is no genuine issue requiring a trial.
- [34] On a motion for summary judgment, the Court is entitled to assume that the parties have provided all of the relevant evidence that will be presented at the trial and that there will be no further evidence.
- [35] The two main issues raised by the objectors in this case pertain to that of undue influence and suspicious circumstances arising from the respondent's conduct.
- [36] The law is clear that the objectors have the high burden of establishing on a balance of probabilities undue influence by the respondent Elizabeth Anne Koster on George Koster. Undue influence involves domination of the will of one person by another and it exists when the testator is coerced into doing something that he does not desire to do. Circumstantial evidence can be used by the objectors challenging the will to discharge their burden. *Trotter Estate*, 2014 ONCA 841 @ paras. 58 and 59; *Wingrove v. Wingrove*, [1885] 11 PD 81.
- [37] The Court in *Gironda v. Gironda*, 2013 ONSC 4133 confirmed the indicators of undue influence include where:
- a) the testator is dependent on the beneficiary for emotional and physical needs;
 - b) the testator is socially isolated or is cloistered;
 - c) the testator has experienced recent family conflict;
 - d) the testator has experienced recent bereavement;
 - e) the testator has made a substantial pre-death transfer of wealth to the respondent;
 - f) the testator has made a new will not consistent with prior wills;
 - g) the testator has failed to provide a reason or explanation unexpectedly for excluding a family member from the will;

h) the respondent conveys instructions to the drafting lawyer on behalf of the testator.

[38] Evidence of undue influence may also trigger the doctrine of suspicious circumstances. Upon proof that the will was duly executed with the requisite formalities, it will generally be presumed that the testator knew and approved of the contents and had the necessary testamentary capacity. Where, however, suspicious circumstances are present i.e., there is evidence which if accepted would tend to negative knowledge and approval or testamentary capacity, then the presumption is spent and the propounder of the will reassumes the burden of proving knowledge and approval of the contents of the will. In addition, if suspicious circumstances relates to mental capacity, the propounder of the will reassumes the legal burden of establishing testamentary capacity. *Vout v. Hay* [1995] 2 SCR 876.

[39] The Court in *Vout* confirmed three types of situations which give rise to suspicious circumstances:

a) circumstances surrounding the preparation of the will;

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

c) circumstances tending to show that the free will of the testator was overborne by action or fraud.

[40] The respondent's evidence on its own as indicated above without considering the objectors' evidence would establish on a balance of probabilities that there would be no triable issue regarding those issues of undue influence and suspicious circumstances. The evidence of all the respondent's witnesses as a whole confirms there was no undue influence or suspicious circumstances.

[41] Given that finding, the evidentiary burden is on the objectors to establish that there is admissible evidence that is capable of supporting their position i.e., there still remains a triable issue in order to avoid a finding in favour of the respondent on her summary judgment motion. *Esses v. Bank of Montreal* 2008 ONCA 646 @ paras. 44 and 45.

[42] The objectors' position is that they have done so based on the detailed evidence in their affidavits they have filed on which only Ken Koster was cross-examined. Their position is that based on that evidence ,there are still serious issues of credibility involving the respondent estate trustee Elizabeth involving her having undue influence over George and there also being suspicious circumstances regarding George's 2011 and last 2012 wills because of her conduct . As a result, all of the four wills of the late Mr. Koster from and including his will of February 17, 2011 up to and including his last wills of October 4, 2012 are invalid.

[43] Their position is that the contradictory evidence on the main issues from the objectors on the written record does not allow me to make the necessary findings of fact, apply the law to the facts in this summary judgment motion which also would not be a more proportionate and expeditious and less expensive means to achieve a just result. *Trotter*, above page 24.

Objectors' Evidence

[44] The following are the examples of undue influence and suspicious circumstances which the objectors on their evidence state require a trial given the conflicts in the evidence and because of there being no cross-examination on their conflicting evidence.

Circumstances of the Marriage

[45] As indicated above, the evidence of respondent Elizabeth was that it was George who insisted on getting married on February 6, 2011 immediately and arranged for that the very next day on February 7, 2011. George was 92 years old at the time .The inference from that evidence was that she did not press him to marry her or exert any pressure on him to do so.

[46] The respondent Patricia Vassilakis in her affidavit provided a transcript of a taped conversation with George when he visited her in New York City on December 21, 2009, one year before he married in which he said that he was not going to marry her. He told

Patricia on at least one occasion “I am not going to marry her and if I did I would divorce her”.

- [47] James Koster’s evidence was that in 2008 when he spoke regularly by telephone with George, George complained that Elizabeth was pressuring him about marriage which increased in frequency in their conversations over the next several years. George told him on numerous times during those calls that he would never marry her. He stated during his visit in August 2010 with George that George told him that marriage was not in the cards.
- [48] Kathleen Mortsakis in her affidavit confirmed the George told her in December 2009 that Elizabeth was pressuring him to marry and repeated that twice more on the telephone to her since that time. George told her that whenever Elizabeth would pressure him to marry her and he would not agree, she would leave for a week at a time to punish him.
- [49] James Lolas confirmed George complained to him in their telephone conversations starting around 2008 that Elizabeth was pressuring him about marriage and that George told him on numerous times during these calls he would never marry her. George told James on a visit in Brantford in August 2010 that “marriage was not in the cards”
- [50] Ken Koster stated that Elizabeth was an extremely forceful character and that George had told him and other nephews and nieces that she was pressing him to get married. Ken Koster disagreed with the evidence of the witness DeMarchi that George was happy to have married Elizabeth although he admits he sent Elizabeth an email on November 10, 2010 confirming he had never seen George happier.
- [51] None of the nieces and nephews who had enjoyed close relationship with their uncle George for many years and had regular contact with him were notified of the wedding until after the fact. There is evidence that the marriage was kept secret from George’s nephews and nieces. Jim Lolas stayed with George and Elizabeth for several days in May 2011 three months after the marriage and neither George nor Elizabeth mentioned that they had been married.

George’s Alcohol Consumption

- [52] While the evidence of Elizabeth was that George hardly drank alcohol during their period of cohabitation commencing 2008, Kathleen Mortsakis stated that when they spoke and visited with George, they noticed his visibly stumbling, progressive slurring of his speech and that he was now consuming alcohol significantly.
- [53] Ken Koster's evidence was that for his entire life George never drank alcohol to excess. However when they visited with him from 2009 on, he saw that he was becoming visibly intoxicated frequently which increased as the years passed. He saw George visibly intoxicated during his visits and in fact he staggered during his last visit with him in 2011.
- [54] Sandra Koster also confirmed that when she visited George after his heart attack in late October 2010, she often found both him and Elizabeth intoxicated by alcohol.
- [55] The evidence of James Lolas was that in a visit in May 2011 George stated that his drinking may be the only way he tolerated his relationship with Elizabeth.

Elizabeth's Cloistering of George

- [56] Elizabeth's evidence was that she did not interfere with or discourage George's relationship with his nieces and nephews. Her evidence was also that George was not close at all with his nephews and nieces.
- [57] That evidence was contradicted by the applicants. In particular, Patricia Vassilakis confirmed that even though she had talked to George daily for an hour or so for over 20 years, in and after 2009 her telephone calls with George were now being screened out by Elizabeth who told her that there was no need for them to call any more as she was there now with George. Commencing in 2008 she heard Elizabeth's voice in the background during her telephone calls berating George for speaking with her. Elizabeth would answer the telephone on their calls and tell them that George was napping or was out shopping. Elizabeth would interrupt her telephone calls with George. Her evidence was that Elizabeth tried to dissuade them from staying at George's house when they visited from New York and Michigan and Elizabeth stopped George's annual visits he enjoyed for 55

years every Christmas after the one in December 2009 with the New York relatives and the Michigan relatives at Easter and Thanksgiving.

- [58] The evidence of Kathleen Mortsakis was that when she found out about George's heart attack on November 13, 2010 and called, Elizabeth told her that she was now George's wife even though they had not yet married. During that conversation with George, he overheard Elizabeth deliberately trying to make George think Kathleen had spoken inappropriately to Elizabeth when she had not.
- [59] The evidence of all the objectors was clearly contrary to Elizabeth's in that they had all enjoyed a close relationship with George including visiting back-and-forth visits for decades prior to Elizabeth moving in with George. They also swore that Elizabeth knew how close George was with his nieces and nephews.
- [60] The evidence of Kathleen Mortsakis was that Elizabeth was cool, rude and distant towards them and that George had told her that Elizabeth did not like the nieces and nephews and that Elizabeth was purposely interfering in their relationship. Kathleen was very close to George who regularly stayed with them for several weeks until 2009 in New York City. At that time George told her that Elizabeth stated to him that his nieces and nephews did not care enough to attend his 90th birthday party and that they were very selfish for not having done so. This was even though George knew she could not attend because of her mother's serious health condition.
- [61] James Lolas' evidence was that he did not attend George's 90th birthday as he felt George would be uncomfortable given the conflict in the family. He continued to call George regularly after that at least weekly but Elizabeth would answer the phone telling him that George was either napping or out shopping. When he did speak to George, there was no mention of George being upset with James and the nieces and nephews for not attending his birthday party in August 2009. He noticed he had been consuming alcohol and George told him that Elizabeth always raced to answer the telephone first when James called and that he didn't know James had called him.

- [62] The evidence of Elizabeth that George had told her not to notify his nephews and nieces of his heart attack in October 2010 was contradicted by the objectors. Both Sandra Koster and Ken Koster stated in their meeting with George in November 2010 that George was surprised when they asked him why they had not been told of his heart attack. George advised them that he had instructed Elizabeth to tell them of his heart attack but that she had failed to do so.
- [63] The evidence of Kathleen Mortsakis was that Elizabeth not telling them of George's heart attack upset them especially because Elizabeth knew how close they were with George and was of the belief that her doing so was on purpose to make George believe that they did not care about him.
- [64] The evidence of Sandra Koster was that Elizabeth successfully isolated George from his nieces and nephews including not informing any of them when he died which was very upsetting to them especially since Elizabeth had all their telephone numbers.

George's Mental Capacity and Undue Influence

- [65] Despite the evidence of Elizabeth, Mr. Portelli, the lay witnesses and Dr. Nikore with respect to the mental capacity of George in 2010 and thereafter, when George was hospitalized for a massive heart attack, the hospital records include a notation from Dr. Jones on October 28, 2010 that George Koster had a history significant for dementia. The Ambulance Call report and hospital triage forms for that date confirm Alzheimer's disease as part of George's patient history. The reasonable inference could be made that that information came from Elizabeth who was there with George as there were no nieces and nephews there.
- [66] There is an issue as to whether or not Dr. Nikore in fact conducted a full mental capacity assessment of George when asked to do so by Mr. Portelli on February 15, 2011. Dr. Nikore did not specifically state in his affidavit that he did so although he did provide his opinion evidence on George's mental state as indicated above. George's initial instructions to Mr. Portelli to change his will were given on February 8, 2011 but his

heart surgery which corrected his blood circulation issue which had caused his transient delirium in the hospital did not take place until February 10, 2011.

- [67] The notes of the social worker of October 28, 2010 refer to a discussion she had with the respondent Elizabeth which indicated that Elizabeth told the social worker that a “do not resuscitate” status was most appropriate since George had a massive heart attack, that he had early Alzheimer’s disease and did not want to suffer from that. The notes indicate that Elizabeth also told his treating physicians on his discharge from hospital on November 10, 2010 that George had been getting forgetful lately.
- [68] Ken Koster’s evidence was that George’s prostate cancer and subsequent treatment in 2009 made him weak and vulnerable and highly dependent on Elizabeth. There is no dispute that George told her to leave his house some months before after returning from Florida because of a heated argument but the objectors’ evidence is that she moved back in August 2009 and was not present with him during his few months of radiation therapy.
- [69] Ken Koster’s evidence was also that after George’s heart attack in 2010, George’s health deteriorated considerably and he was now quiet, tired and depressed and drank more alcohol and with Elizabeth normally answering questions he would ask to George. In general, George was no longer the vibrant, strong man he was before his heart attack. Ken’s evidence was also that George told him that Elizabeth now handled his business for him.
- [70] The evidence of James Lolas was clear that he had spoken to and had seen George many times prior to his death and noticed that in the two-year period from 2012 until his death in 2014 mentally he was not the same person he was before. George appeared pliable and would agree with whatever anyone said. He noted George was slurring his speech which became progressively worse because of his consumption of alcohol which was out of character for him.
- [71] Elizabeth’s evidence was that George was upset at his nieces and nephews for not attending his 90th birthday party and her position in this litigation was that that was one of the main reasons why he deleted them as beneficiaries from his will. However, that

appears to be contradicted by the evidence that George in fact confirmed just 3 ½ months later in his revised will that he signed in March 2010 that his nephews and nieces would still receive 10/11 of the entire estate. Mr. Portelli has no written notes of George being upset with his nephews and nieces because of that reason at that time. That did not appear in his notes until December 2010. When George visited Patricia while in New York City for a few weeks in December 2009 a few months after his 90th birthday party, nothing was said by George while there expressing his disappointment in any of the nephews and nieces for not attending that party. It is not in dispute that Ken and Sandra Koster were in fact at that 90th birthday party for George which may be indicative of George's mental condition in December 2010 i.e. not actually remembering and/or being convinced by someone that they were not actually there.

Conclusion

- [72] In my view, it is not appropriate to grant the respondent's motion for summary judgment on the written record before me because of the contradictory evidence provided by the objectors on the main issues in contention.
- [73] With respect to the issue of undue influence, the objectors' affidavit evidence does provide some potentially significant confirmation of the testator's dependency on the respondent for his emotional and physical needs and of her socially isolating and cloistering George if their evidence is accepted. There is evidence from the objectors of his deteriorating physical or mental condition starting in 2009 after his heart attack and his significant increase in his consumption of alcohol.
- [74] In addition there is evidence that George continued to suffer health problems after February 2011 including his having further treatment for prostate cancer in May 2012. He completed three further wills in March, June and October 2012. That is potentially relevant to the issue of whether the inference can be drawn on their evidence that the alleged undue influence and suspicious circumstances involving Elizabeth in George's signing of the February 17, 2011 wills continued right up until George's last will of October 4, 2012.

- [75] Furthermore, their evidence confirms the close family relationship between all of the nephews and nieces with George prior to Elizabeth establishing her relationship with George and before her marriage to George. Elizabeth's suggestion that George perceived there was a family conflict with the nephews and nieces who no longer communicated with him was not their doing but rather they state was caused by Elizabeth.
- [76] In this case, according to their evidence, George consistently for years before his relationship with Elizabeth had named his nephews and nieces as the sole beneficiaries of his significant estate until after their marriage when they received nothing in his wills until his last one in October 2012 where they each received \$20,000. The objectors' evidence was that the value of the estate was estimated at approximately \$5-\$6 million. The new wills were not consistent with and were significantly different than the prior wills.
- [77] The objectors are aware that if they succeed in having the 2011 and 2012 wills set aside, an intestacy of George's estate results because of George's marriage to Elizabeth in February 2011. In that event, the objectors understand they will not be entitled to any share of the estate given the entitlement therein by Elizabeth, George Hare and potentially Georgia Koster.
- [78] George's reason for excluding his nephews and nieces as beneficiaries because of their not attending his 90th birthday party appears not to be true as Sandra and Ken Koster did attend and there was no suggestion in December 2009 when he visited Patricia that George was at all concerned with that. In fact, George's instructions at that time and when he signed the new will in March 2010 confirmed they were still to receive almost his entire estate on his death.
- [79] Although Elizabeth denied having anything to do with the instructions George provided to his lawyer, Mr Portelli confirmed he received typed instructions from George who really had minimal typing skills and did not like to type as he would ask Patricia Vassilakis and her husband and others to type and send emails on his behalf according to Patricia Vassilakis' evidence. There is some evidence however of George actually using

email to correspond with Elizabeth while she was in Vancouver. The potential issue is whether Elizabeth had anything to do with the preparation of those typed instructions. In cross-examination, Elizabeth did not deny that she had seen the draft wills Mr. Portelli provided to George before her marriage to him which draft will still gave almost his entire estate to his nephews and nieces.

[80] In this case, the evidence of the objectors is both material and conflicting with the evidence provided by the respondent including that of her witnesses. In my view, it is not appropriate to grant summary judgment on the face of this conflicting written evidence. *Trotter*, above. In order for me to make the required findings of fact, it is necessary to conduct the required assessments of the credibility and reliability of all of the named witnesses and parties. In that regard, it is necessary to hear the oral evidence of the parties and the witnesses with the benefit of their evidence after cross-examinations.

[81] I have considered whether it is appropriate for the parties to provide the evidence of themselves and their witnesses orally including cross-examinations for this motion for summary judgment before me and if so, whether only some of the witnesses should be required to give evidence in that fashion.

[82] In my view, it would not be appropriate that only some of the witnesses give evidence orally but not others. That would neither be fair nor reasonable to any of the parties without the evidence of all of the witnesses being available and tested under cross-examination especially as the court could accept some, none or all the evidence of any witness. This is especially so when the important issues are whether the wills of February 17, 2011 were invalid but also whether the reasonable inference can be drawn on all of the evidence that George's last wills of 2012 including October 4, 2012 were also made by him under the continuing undue influence or suspicious circumstances arising from Elizabeth's conduct rendering them invalid.

[83] Because all of the witnesses should be required to give their evidence orally, in this case there is no significant savings of time or expense that can be achieved if I adjourn this matter for the continuation of this motion for judgment to obtain that oral evidence as

compared to simply having the application matter proceed to trial so that all the evidence can be considered by the trial judge. In my view, the court should have the benefit of hearing the witness's testimony in examination-in-chief as well as in cross-examination to ensure that all of their testimony is based on their own observations with George rather than based on what they may believe because of the hearsay evidence they may have been told by others as noted in some of the parties' affidavits.

[84] Moreover, the completion of the administration of the estate has been delayed long enough because of this litigation. It is now almost 4 years since George's death. Given that all of the witness's and parties' evidence before me is all the evidence that should be available at trial subject to cross-examinations, in my view it is more appropriate for all of the parties that I expedite the trial of this matter and add this case to the trial sittings of June 18, 2018. I am assuming both Counsel and the witnesses will be available to proceed. I am prepared to add this case to the earlier May 22, 2018 sittings if the parties agree and are ready to proceed then. No savings of judicial or court administrative time would be accomplished by my remaining seized of this matter. My schedule does not provide for my returning to Brantford for either of those trial sittings and this matter will in fact be heard for trial sooner by another Justice by my adding it to one of those trial lists.

[85] Accordingly, the respondent's motion for summary judgment is dismissed. The objectors' application shall proceed by way of a trial of the issues of undue influence and suspicious circumstances raised by the objectors in their application. The application is to be added to the trial list of this court in Brantford commencing June 18, 2018 or the earlier sittings of May 22, 2018 if the parties agree and are ready to proceed then.

[86] I am prepared to remain seized of this matter for procedural directions to ensure this matter proceeds expeditiously as required regarding such matters including confirming the date for the trial (and any potential request to adjourn the trial due to Counsel's and/or a material witness's unavailability), the objectors' need to prepare an order directing the trial of the issues, determining the pleadings, filing the trial record and confirming the completed cross examinations as constituting the examinations for

discovery of the parties. The parties can make the appropriate and immediate arrangements with the trial coordinator in Brantford for that purpose either by way of a telephone conference call with me or further attendance of Counsel before me.

[87] If the parties are unable to resolve the issue of costs of this motion, the objectors can make submissions of no more than three pages in length plus a bill of costs and any relevant offer to settle within 15 days from the date of this decision. The applicant on this motion can similarly respond within 10 days thereafter.

[88] If no submissions are received, the parties shall be deemed to have settled the issue of costs.

The Honourable Mr. Justice R. J. Nightingale

Released: April 27, 2018

CITATION: Koster v. Koster, 2018 ONSC 2321
COURT FILE NO.: 259/14

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Sandra Koster, Kenneth Koster, James
Lolas, Kathleen Mortsakis and Patricia
Vassilakis

Objectors

– and –

Elizabeth Anna Koster

Respondent

REASONS FOR JUDGMENT

The Honourable Mr. Justice R.J. Nightingale

Released: April 27, 2018