

**CITATION:** Lester v. Lester, 2023 ONSC 1450  
**COURT FILE NO.:** CV-20-40872  
**DATE:** 23/02/2023

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**IN THE ESTATE OF ROBERT ELTON LESTER**

**BETWEEN:** )  
 )  
**STEVEN LESTER** )  
 ) David Delagran for the Applicant  
Applicant )  
 )  
– and – )  
 )  
**GLENN LESTER and CATHY LESTER** ) Margot Pomerleau for the Respondents  
 )  
Respondents )  
 )  
 )  
 )  
 ) **HEARD:** November 23, 2022

**RULING ON APPLICATION FOR CERTIFICATE OF APPOINTMENT AS ESTATE**  
**TRUSTEE**

**Justice Sally Gomery**

[1] Robert Lester died on March 22, 2020 in Ottawa, at the age of 89. In May 2020, his son Steve Lester applied for a certificate of appointment as Estate Trustee pursuant to his father’s February 21, 2020 will (the “2020 Will”). In June 2020, Robert Lester’s two other children, Steve’s siblings Glenn and Cathy Lester, filed a notice of objection to the proposed appointment. They take the position that their father either lacked the capacity to execute the February 2020 Will, or did not have sufficient knowledge of its contents and could therefore not approve it, or that he lacked both capacity and knowledge. Further to an order issued on a motion for directions, I heard the application on November 23, 2022.

[2] For the reasons that follow, I grant Steve Lester's application for appointment as Estate Trustee pursuant to the 2020 Will and dismiss Glenn and Cathy Lester's objections.

### **Facts**

[3] Since the parties to the application share the same surname, I will refer to them by their first names. I will refer to their father Robert Lester as Bob.

### **Bob's 2016 Will and events from September 2019 to early January 2020**

[4] The basic chronology of events is fundamentally not in dispute.

[5] Bob was an insurance broker who owned his own brokerage in Ottawa until he retired. Steve is a portfolio manager and wealth advisor with RBC Dominion Securities. He lives in Oakville. Glenn is a certified financial planner and mutual funds dealer. Both he and Cathy live in Ottawa. Cathy has health issues and is currently unemployed.

[6] Bob enjoyed relatively good health into his late eighties. His former wife, the parties' mother, passed away in 2011. In September 2019, Bob was living in a house at 18 Kingbird Court he owned with his romantic partner, Sally MacKenzie.

[7] Bob executed a will on June 22, 2016 (the "2016 Will") with the assistance of a solicitor, Doug Gadiant. Under the terms of the 2016 Will, each of Bob's three children were equal beneficiaries of the residue of his estate. Cathy was also gifted Bob's car and Glenn was given an option to purchase his cottage in Eganville, Ontario, for \$200,000 within two years of his father's death. If Glenn exercised this option, the purchase price would be deducted from his share of the Estate.

[8] According to Mr. Gadiant, when Bob contacted him about updating an earlier 2000 will in 2015, he instructed him to set the value of the cottage at \$180,000 based on his most recent property tax assessment. Before the 2016 Will was finalised and executed, Bob told Mr. Gadiant to increase the option price to \$200,000, based on a more recent assessment notice. Mr. Gadiant recalls that he told Bob, at the time, that the assessed value is often lower than the fair market value of property.

[9] The 2016 Will also contained bequests to Ms. MacKenzie. If they continued to live together at the Kingbird Court house at his death, she would have the right to stay under the terms of a Cohabitation Agreement they signed in 2002. She was also entitled to \$25,000 from the residue of the Estate, before the balance was distributed to Bob's children.

[10] On September 24, 2019, Bob had a small stroke in the left temporal parietal lobe. He was hospitalized and discharged home three days later. At the time, he scored 26/30 on the Montreal Cognitive Assessment (MCA), a standard cognitive assessment tool. Bob was prescribed anti-coagulant medication, given advice about his risk factors and how to reduce them, and told to return to the hospital if he experienced further signs or symptoms of a stroke. When he was assessed at a stroke rehabilitation clinic after discharge, he was found not to need any outpatient services. There were no concerns about his ability to drive a month after his stroke.

[11] On November 15, 2019, Bob returned to the emergency room complaining of severe back pain. He reported falls since the stroke. His speech was slurred but his judgment was intact. Bob was referred to the Geriatric Assessment team and prescribed pain killers including Dilaudid (hydromorphone). On November 28, 2019, he scored 17.5/30 on the MCA.

[12] On December 6, 2019, Bob was hospitalized for acute delirium, including visual hallucinations, falls, and lower back pain. His MCA score had declined further to 14/30. Bob was diagnosed with Sweet's Syndrome, a form of blood cancer. During his admission, he was assessed by Dr. Kim, a geriatrician, who confirmed the diagnosis of delirium and noted that Bob's hallucinations began only after he began taking hydromorphone. In a later summary of Bob's medical evolution in early March 2020, Dr. Finestone endorsed the view that the delirium was probably triggered by hydromorphone, with prednisone prescribed for Sweet Syndrome as "an additional potential contributor to cognitive decline". Dr. Kim did not diagnose Bob with dementia during the December 2019 admission. Another geriatrician who assessed Bob during the hospital admission, Dr. Spilg, noted that the delirium was resolving and that, once it had fully resolved, the medical team might be able to determine if he had "an element of vascular dementia post stroke".

[13] On January 2, 2020, Bob was transferred from the hospital to the Bruyère Centre, a convalescent home. His delirium had improved and his back pain managed with tapered doses of

Dilaudid and Tylenol. Overall, he was noted to be medically stable and “keen to continue with physiotherapy and occupational therapy”. His cognition had clearly declined since his September 2019 stroke, but it was unclear whether this impairment was permanent or temporary:

Cognition - Decline since stroke - Son reports word-finding difficulties, slowed processing and repetition - MoCA 26/30 (Sept 2019), 18/30 (Nov 29), 15/30 (Dec 12) during delirium episode in GDH, 18/30 (Dec 29) - Recommended by team that patient refrain from driving and will be followed up at the GDH to reassess. MTO not filed as impairment may be temporary and patient agreed to not drive.

[14] On January 30, 2020, Bob was discharged from the Bruyère Centre to the assisted living floor of Timberwalk, a retirement home. His delirium was “slowly but steadily resolving with no visual or auditory hallucinations over the past three weeks and no fluctuations noted”, although Bob reported that his memory and ability to focus had not yet fully recovered. He was assessed by a geriatrician as having mild cognitive impairment as opposed to dementia. He was also noted as being forgetful. He was moving around on his own with a walker. He was independent for the activities of daily living such as dressing, eating, and toileting, but needed some help bathing and sometimes tying his shoelaces. He might have needed encouragement, but not cueing, escorting, or reminding.

#### **Estate planning from January to March 2020**

[15] Beginning in January 2020, Bob implemented an estate plan intended to minimize taxes and administrative fees when he died. This plan ultimately included:

- The execution of a secondary Limited Property Will disposing of Bob’s corporation valued at \$337,000 without requiring probate. The beneficiaries of this Will are the three siblings, equally;
- Changing the beneficiaries on Bob’s RIF, valued at roughly \$286,000, to exclude Ms. MacKenzie as one of the beneficiaries. The money in this account would instead be transferred directly to his children equally on his death;

- The transfer of most of Bob’s other investments into a Joint Gift of a Beneficial Right of Survivorship Account with the Royal Bank of Canada (the “Joint Gift Account”). This account would not form part of his Estate. As a result, the amount of \$715,000, would pass directly to the three siblings, as equal beneficiaries, at Bob’s death; and
- The execution of a new primary will disposing of Bob’s remaining assets.

[16] Bob also took steps to sell his interest in the Kingbird Court house to Ms. MacKenzie as their relationship had ended by this time.

[17] Beginning in early January 2010 Bob’s children discussed amongst themselves estate planning for their father, his living arrangements once he was discharged, and what should be done with the house on Kingbird Court. In a two-page email sent to his siblings on January 10, Glenn listed specific items they should address and provided a link to an electronic folder with the documents he had been able to obtain from Bob at that point. This email shows that Glenn was actively participating in estate planning with his father. With respect to an account that Bob held at BMO, for example, Glenn wrote: “Dad wants confirmation that this account is closed with no balance”. With respect to the new will that Bob would execute, he noted: “Dad was OK with my suggestion to remove Martin Payne (accountant) as co-executor as this would add an unnecessary expense (executor fee % of total estate assets) and Steve could manage the job (assuming Steve, you are OK as sole executor)”.

[18] The children also discussed Bob’s cottage. They had seen a will that Bob had executed in 2000 but not the 2016 Will. In the 2000 will, Bob had gifted the cottage to Steve and Cathy jointly. In their discussions in January 2020, the children agreed that Glenn should get it if at all possible.

[19] Following these first discussions between the children, either Steve or Glenn called Bob’s solicitor, Mr. Gadiant, to inform him that Bob was having health issues and wanted to execute a new will. Mr. Gadiant was also told that Bob was not well enough to come to his office. Mr. Gadiant would accordingly have to meet with Bob at his residence or receive written instructions.

[20] On January 15, 2020, Mr. Gadiant provided Steve and Glenn with a copy of the 2016 Will. In Steve’s view, the Will was not tax efficient. It also included a bequest to Ms. MacKenzie. He

and his siblings discussed the advantages of a secondary will dealing with Bob's corporation and the proposed Joint Gift Account, as well as the need to alter arrangements that Bob had made earlier for Ms. MacKenzie. This is reflected in exchanges of emails on January 14 to 16, 2020 between the siblings.

[21] The emails also show that Steve and Glenn both discussed estate planning with Bob. Glenn and Steve worked jointly to prepare letters of authorization, signed by Bob, allowing them to obtain records from Bob's lawyer and his accountant. They also took steps to get their father to sign a new power of attorney for property, as the existing one could not be used unless and until Bob was found to lack capacity.

[22] On January 15, 2020, Steve sent Glenn and Cathy a draft letter of instruction that he had prepared for Mr. Gadiant on behalf of their father. There is no evidence that Glenn and Cathy expressed the view that the instructions did not reflect Bob's wishes or that substantive changes were made based on any input they provided.

[23] On January 20, 2020, Steve visited Bob at the Bruyère Centre. In cross-examination, Steve said that they discussed the letter of instructions' contents, which according to Steve was consistent with other discussions they had had prior to that date. Bob signed the letter. In it, he told Mr. Gadiant that he wanted a separate will to deal with the shares of his company; he wanted Steve to be named as his sole executor (instead of Steve, Glenn, and his accountant, as specified in the 2016 Will), and he wanted Ms. MacKenzie removed as a beneficiary. With respect to his cottage, Bob instructed Mr. Gadiant as follows:

My bequest of the cottage should be to my son Glenn Lester (no purchase option & no time limit) but I want to make sure that he also receives a \$15,000 maintenance allowance (cash from Residue not a "fund") and that the value of all my assets on a net basis after tax, including the cottage be distributed evenly to my 3 children Steve, Cathy, & Glenn.

[24] In the letter of instructions, Mr. Gadiant was told that, if he had any questions or needed clarification, he could communicate with Steve or Glenn, who would discuss any issues with him and get back to him.

[25] Notwithstanding this suggestion, Mr. Gadiant phoned Bob directly to clarify some of his instructions. This call took place sometime between January 20 and February 3. In cross-examination, Mr. Gadiant testified that Bob did not seem surprised to get a call from him or give any indication that he was unfamiliar with the letter. In a July 27, 2020 note to file, Mr. Gadiant said that he sought clarification on two issues: whether it was worthwhile to draft a second will disposing of Bob's company, and how the bequest of the cottage to Glenn should be addressed in the 2020 Will. On the first point, Mr. Gadiant wrote:

I asked Mr. Lester as to approximate value of his numbered company in order to determine whether preparation of the Limited Property Will was worthwhile. He indicated it was approximately \$450,000 which is reflected in my handwritten notes. In light of the fact that probate fees would be \$6,750 if the value of the shares was included in his general estate; the preparation of the Limited Property Will was in fact more than justified,

[26] With respect to the cottage, Mr. Gadiant wrote:

Mr. Lester provided for the outright gift of the cottage/cash to Glenn and that the residue of the estate, including the cottage, was to be divided equally among the three children, I believe the Paragraph was ambiguous and therefore clarified with Mr. Lester that if Glenn accepted the bequest of the cottage and the cash then Steve and Cathy were to receive a cash bequest equal to the fair market value of the cottage plus the \$15,000 with the balance to then be divided equally among the three. This would ensure that the "value of all my assets would be distributed evenly to his three children" as per instructions.

[27] Mr. Gadiant's handwritten notes on the letter of instruction, which he made during his phone call with Bob, are consistent with his description of their discussion in the July 2020 memo about how the 2020 Will would ensure that Steve and Cathy received an equal share of Bob's estate if Glenn accepted the bequest of the cottage. The letter of instruction did not attribute a dollar value to the cottage. The term "fair market value" appears in the notes Mr. Gadiant made during his discussion with Bob.

[28] Following that conversation, Mr. Gadiant drafted the 2020 Will as well as the Limited Property Will. On January 23, 2020, Bob executed documents opening the Joint Gift Account and transferring most of his remaining money to it.

[29] On February 3, 2020, Glenn and Steve each received a copy of the draft 2020 Will from Mr. Gadiant. There were two significant changes from the 2016 Will. First, the 2020 Will did not include any bequests to Ms. MacKenzie. Second, it gifted the cottage to Glenn along with \$15,000 to maintain it. If Glenn accepted this bequest, Steve and Cathy would also each get a bequest consisting of a cash amount equivalent to the cottage's fair market value at Bob's death, as well as \$15,000.

[30] Glenn says that, on February 3 or 4, he phoned Steve to express concern about the dispositions relating to the cottage in the draft 2020 Will. He recalls that Steve told him that he wanted to keep Bob's wishes as similar as possible to the 2016 Will. Steve did not remember the conversation but acknowledged that it may have occurred. In any event, the phone call did not result in any changes being made to the draft. There is no evidence that Glenn took steps to discuss the changes with Bob or to contact Mr. Gadiant to ensure that, in his view, the draft reflected Bob's wishes.

[31] On February 5, 2020, Steve sent Mr. Gadiant an email asking questions about some of the terms of the draft 2020 Will. One of his questions concerned what would happen if Glenn decided not to accept the cottage as a specific bequest. Mr. Gadiant answered these questions by return email that same day. The exchange of emails was copied to Glenn and Cathy. Neither of them communicated with Mr. Gadiant to express any concerns to him about the new Will's terms.

[32] On February 11, 2020, Glenn obtained Bob's signature changing the beneficiary designation for his RIF. Two days later, Bob visited the emergency room for a fall. He was discharged when no serious injury was noted.

[33] Bob was scheduled to attend at Mr. Gadiant's office on February 19, 2020 to sign the new wills and new powers of attorney. When Glenn went to pick his father up, Bob was having trouble walking due to weakness. The trip to Mr. Gadiant's office was cancelled, and Glenn rescheduled the appointment for February 21, 2020 at 10:00 a.m. at Timberwalk. In his affidavit, Glenn says that he observed Bob behaving oddly at dinner on February 15. There is no contemporaneous record of this. This is the only evidence regarding odd behaviour, as opposed to physical weakness, in the days leading up to execution of Bob's new Wills.



[34] When Mr. Gadiant arrived at Bob's residence for the February 21 meeting, Bob and Glenn met him outside his room. Glenn stayed remained in the hallway when Bob, Mr. Gadiant, and another witness, Tim McLean, went into Bob's room.

[35] According to Mr. Gadiant's July 2020 note to file, during this meeting he "briefly reviewed the provisions of each document with [Bob] to confirm that they in fact represented his wishes and he indicated that they did. [Bob] then signed in the presence of Mr. Gadiant and a witness, Mr. McLean". In cross-examination, Mr. Gadiant said he specifically reviewed the provisions with respect to the bequest of the car to Cathy and the cottage to Glenn, and then the specific bequest to Steve and Cathy if Glenn accepted the cottage, so that they would share equally in Bob's Estate. According to Mr. Gadiant, Bob was frail but his speech was not slurred or delayed. He denied that Bob showed any signs of incapacity during their meeting or displayed a lack of understanding of the Wills or powers of attorney.

[36] In cross-examination, Mr. Gadiant acknowledged that he and Bob did not have a long conversation. He did not read the wills aloud to Bob as this is not his practice. He did not have the 2016 Will with him and so did not compare it directly with the 2020 Will. He did not recall whether Bob had his own copy of the 2020 Will when he first arrived. According to Mr. Gadiant, Bob did not ask any questions. The meeting lasted around 30 minutes. Mr. Gadiant left with the executed wills.

[37] According to Glenn, he and Mr. Gadiant had a brief chat in the hallway before he left. Glenn did not mention any concerns to him about Bob's capacity either before or after his father executed his Wills.

[38] Just after Mr. Gadiant left, a personal support worker told Glenn that Bob was not well. Earlier that day, Bob had been observed dragging his left foot, and he was now having trouble moving his left arm. At around 1:00 p.m. that day, Bob went to the emergency room, where he reported that he had some weakness for the past 48 hours and that he had trouble grasping his walker and holding a newspaper. He may also have been slurring some words. A neurology resident who examined Bob noted that he had "moderate dementia" but did not indicate the basis for this observation. Bob was discharged back to his residence the same day after his symptoms

improved. No neurology follow up was ordered. In an email to Steve that evening, Glenn wrote: “No stroke found” and relayed an ER physician’s opinion that a narrowing of a vein in Bob’s neck may have caused his symptoms. In an email later that evening, Glenn noted that Bob may have had a stroke based on a clinical assessment.

[39] Bob reattended the ER and was readmitted on February 23, 2020, for weakness in his left arm and droopiness on the left side of his face. He remained in hospital until March 3, 2020, when he was discharged back to Timberwalk. Observations about his cognitive abilities during his admission varied.

[40] Steve testified that, even in the hospital on February 23, 2020, his father “seemed to understand a lot of complex issues well”. On February 25, a speech language pathologist, Karen Mallet, performed a detailed cognitive assessment. She reported that Bob was able, among other things, to describe abstract procedures and tasks, identify abstract concepts based on description, recall information from past discussions and meetings. She found that he was oriented and had organization and planning abilities “within functional limits”. Similarly, in a progress note on March 2, 2020, an occupational therapist noted that Bob was alert and oriented, aware of the reduced function of his left arm, and could recall information from the weekend.

[41] On the other hand, in a discharge note on March 3, 2020, Dr. Finestone noted deterioration in Bob’s function and “evident” cognitive deficits:

This is an 89-year-old male recently admitted to the Neurovascular/Stroke Unit of The Ottawa Hospital Civic Campus from February 23, 2019, to March 3, 2020, with a diagnosis of a right hemispheric stroke with multiple etiologies including 80% to 90% stenosis of the right carotid artery, hypercoagulability secondary to known Sweet syndrome/microcytic anemia with reticulocytosis/elevated white count (seen by Hematology, possible myeloproliferative process). Has significantly declined in function over the past four months in particular. Left hemiparesis and cognitive deficits are evident. Referred to the Stroke Rehabilitation Inpatient Unit of the Elisabeth Bruyère Hospital for further stroke care.

[42] Notwithstanding Bob’s medical issues, Glenn continued to discuss Bob’s estate plan with him and got him to sign documents to implement it after February 21, 2020. In a February 23, 2020 email, Glenn told Steve that he had discussed the finalization of the Kingbird Court house to

Ms. MacKenzie with Bob, including the ownership of items in the garage. An Agreement of Purchase and Sale conveying Bob's interest in the house to Ms. MacKenzie for \$273,000 was executed on February 25. On March 7, 2020, Glenn obtained Bob's signature on a shareholder resolution for 1302998 Ontario Ltd appointing Steve as a director.

[43] On March 19, 2020, Bob was admitted to the Bruyère Centre for palliative care. He passed away three days later.

[44] In April 2020, the funds from Bob's RIF were distributed equally to his children. The Joint Gift Account has been frozen by RBC pending probate.

[45] In the May 2020 application for a certificate of appointment as Estate Trustee prepared by Mr. Gadiant on Steve's behalf, the assets subject to the 2020 Will included:

- Bob's interest in the Kingbird Court residence, valued at \$273,000;<sup>1</sup>
- his cottage, with an estimated fair market value of \$260,000 on March 22, 2020, based on an appraisal that Steve obtained after Bob's death, but now having a significantly higher value based on a more recent appraisal;
- cash accounts of just under \$20,000;<sup>2</sup>
- a loan payable by Glenn and his spouse of about \$297,000.

[46] The Estate also has liabilities, including capital gains taxes totaling approximately \$230,000 on the cottage, the RIF, and the corporate account; probate fees, legal and accounting fees; and taxes, maintenance, and insurance on the cottage. Steve may also seek compensation for the work he has performed as the executor.

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<sup>1</sup> The sale did not close as expected on March 30, 2020 due to Bob's death and the need to probate his Will.

<sup>2</sup> Although this amount was listed as an Estate asset in the Application, it was jointly owned by Steven and Bob and, due to a right of survivorship, title to it passed to Steven when his father died. Steven has nonetheless used this account to pay for the Estate's expenses, and little now remains in it.

[47] Steve sought Cathy and Glenn's consent to his application for appointment as Estate Trustee. In response, Glenn wrote to Steve on May 8 expressing the view that the 2020 Will did not reflect Bob's wishes with respect to the disposition of the cottage. He denied that the change in the valuation of the cottage had ever been discussed with their father, who would have signed the Will on the belief that all three children agreed with its terms. Glenn did not raise the issue of Bob's capacity, or lack thereof, in the letter.

[48] On June 8, 2020, Glenn and Cathy filed a notice of objection to Steve's application, alleging that Bob lacked capacity when he executed the 2020 Will and that it did not reflect his wishes, and Bob had been subject to undue influence.

[49] In April 2021, Justice McEachern provided directions on what issues would be adjudicated on this application and how the litigation would proceed. The issues to be decided include not only the validity of the 2020 Will, but the validity of the change in the RIF beneficiary designation and the creation of the Joint Gift Account. She denied Cathy and Glenn's motion for the appointment of an Estate Trustee during Litigation, finding that Steve was not in a conflict of interest that prevented him from continuing to act as Estate Trustee pending adjudication of the parties' dispute. She directed that he could, in this capacity, complete the sale of the Kingbird Court house to Ms. MacKenzie. Finally, McEachern J. ordered that the matter continue as an application rather than an action, subject to a variation of this direction by the judge seized with the merits.

[50] On April 8, 2022, after cross-examinations on affidavits had been completed, Glenn and Cathy amended their notice of objection, abandoning the undue influence allegation. This application was heard on November 23, 2022

### **Legal principles**

[51] In *Neuberger v. York*, 2016 ONCA 191, at paras. 77 and 78, Gillese J.A. summarized the evidentiary burden engaged when a person seeks to prove a will:

Proving a will in solemn form requires the propounder of a will to prove, in open court upon notice to all parties having a financial interest in the estate, that the will was duly executed, the testator had testamentary capacity and that the

testator had knowledge and approval of the contents of the will: *Macdonell, Sheard and Hull on Probate Practice*, at p. 315. The court will also address allegations of undue influence and suspicious circumstances. In this regard, reference must be had to the Supreme Court decision in *Vout v. Hay*, 1995 CanLII 105 (SCC), [1995] 2 S.C.R. 876, [1995] S.C.J. No. 58.

*Vout v. Hay* established that the person propounding the will has the legal burden of proof with respect to due execution, knowledge and approval, and testamentary capacity. Upon proof that the will was duly executed with the requisite formalities, the propounder is aided by a rebuttable presumption, which casts an evidential burden on those challenging the will. That evidential burden can be satisfied by those challenging the will introducing evidence of "suspicious circumstances" -- that is, evidence which, if accepted, would tend to negative knowledge and approval or testamentary capacity. If such evidence is adduced, the legal burden reverts to the propounder. By contrast, if undue influence is alleged, the burden is on those attacking the will: pp. 889-90 S.C.R.

[52] Accordingly, the testator is presumed to have capacity. If, however, the court finds evidence of suspicious circumstances with respect to the testator's competence and knowledge when the will was executed, the propounder of the will cannot simply rely on that presumption.

[53] To obtain the benefit of the rebuttable presumption of testamentary capacity, the propounder of a will need not prove that the entire will was read by or to the testator, or that all of its contents were brought to the testator's attention. As held in *Zaretsky v. Zaretsky*, 2022 ONSC 3165, at para. 12, the propounder must simply establish that "the sense of the will, what was being disposed of, and how and to whom, was read or reviewed by the testator".

[54] Whether or not the propounder benefits from the evidentiary presumption, under the longstanding test in *Banks v. Goodfellow*, (1870) LR 5QB 549, the court must find that the testator was without any disorder of the mind that poisoned his affections and have sufficient memory and awareness, in a general way but unassisted, to:

- (a) Understand the nature of making a will and its effects;
- (b) Understand the extent of his property; and
- (c) Appreciate the claims of those to whom he gives and takes entitlement under the will.

[55] In *Quaggiotto v. Quaggiotto*, 2019 ONCA 107, at para. 7, the Court of Appeal noted that “the law does not require that a testator have an encyclopedic knowledge of her assets”. It endorsed Laskin JA’s statement in *Orfus Estate et al. v. Samuel and Bessie Orfus Family Foundation*, 2013 ONCA 225 at para. 60, that a competent testator “does not have to know the precise makeup of her estate. She only need know in a general way the nature and extent of her property”.

**Have Glenn and Cathy proved suspicious circumstances rebutting the evidentiary presumption of Bob’s capacity?**

[56] Glenn and Cathy contend that Bob had a stroke on February 21, 2020, and that this throws into doubt his capacity, knowledge, and understanding when he executed his 2020 Will that day. Steve argues that the evidence falls short of proving that Bob had a stroke that day but that, even if he did, the circumstances on the whole were not suspicious.

[57] In reviewing the evidence on this issue, I considered whether I needed to hear *viva voce* testimony. I concluded that I did not. Neither party took the position that I could not make findings based on the record before me. In assessing the parties’ evidence, I do not need to weigh whose account of what occurred is more credible, because the witnesses do not really disagree with each other on the chronology of events. Where they differ is in their opinions about Bob’s capacity on February 21, 2020 and on his intentions regarding the disposition of the cottage.

[58] In determining whose opinion is more reliable, I have assessed whether each witness’ testimony is fundamentally plausible by considering whether it is internally consistent and whether it is contradicted by contemporaneous records. By these measures, I find Steve and Mr. Gadiant’s evidence generally reliable, while Cathy and Glenn’s accounts are sometimes not reliable. In cross-examination, Steve and Mr. Gadiant admitted when they had no direct knowledge of or did not recall certain events. They answered questions without obfuscation. Cathy’s evidence was vague and not grounded in observations made at the critical time. As a result, her affidavit has little value. In cross-examination, Glenn was argumentative and took positions that were implausible on their face or squarely contradicted by reliable evidence.

[59] A prime example of this is Glenn’s stated belief that his father did not want to treat his three children equally in his 2020 Will. This belief is inconsistent with every step that Bob took

to settle his affairs in early 2020 and with Mr. Gadiant's account of his discussion with him, which I accept as reliable. It is also inconsistent with Glenn's own statement to his siblings in a January 16, 2020, email, in which he said: "I'm good with keeping the Will simple and "divide by 3" with an option for me to have the cottage in lieu of cash at a value we three agree on at the time." The only difference between the formula for dividing Bob's estate suggested by Glenn in this email and the formula in the 2020 Will is that the valuation of the cottage will not be what the three heirs "agree on at the time" but will rather be determined by an independent appraisal. I find, based on this email, that Glenn cannot sincerely believe that an equal division of Bob's assets was contrary to Bob's intentions in early 2020, and so reject his evidence on this point. I refer to other concerns I have with Glenn's evidence in my analysis below.

[60] The mere fact that a testator has declining health does not, by itself, give rise to a reasonable suspicion that a person lacked the required capacity to execute a will. Many elderly individuals take steps to get their affairs in order after a medical crisis. The focus must be whether Glenn and Cathy have presented evidence which, if accepted, "would tend to negative knowledge and approval or testamentary capacity".

[61] With respect to the existence of suspicious circumstances, there were two people, in particular, who dealt with Bob during this period who would have had an opportunity to assess his competence and understanding of his estate plan and the 2020 Will: Mr. Gadiant and Glenn. Mr. Gadiant testified that he had no concerns about Bob's capacity. While Glenn says he did, he did not raise any concerns at the time, and his conduct through this period is inconsistent with a sincere belief that his father lacked capacity or that his capacity was even in doubt.

[62] Mr. Gadiant had known Bob professionally since 1980. They had worked in the same building and interacted for various reasons. Bob was Mr. Gadiant's insurance broker before he retired and Mr. Gadiant prepared wills for Bob in 2000 and 2016. He also drafted his Cohabitation Agreement with Ms. MacKenzie and otherwise did the legal work associated with their purchase of the Kingbird Court house.

[63] Mr. Gadiant had been in practice for about forty years in early 2020. Twenty to twenty five percent of his practice involved drafting wills. I find that he was alive to capacity issues when

preparing a will and witnessing its execution. He demonstrated this with the steps he took when he was retained to assist with Bob's estate planning in early 2020.

[64] First, when the siblings contacted him for a copy of Bob's 2016 Will, Mr. Gadiant had not seen Bob or kept in touch with him since 2016. He was told that Bob had health issues, and so asked if Bob "was no longer capable or lacked capacity". The answer was no. In light of that answer, Mr. Gadiant refused to provide a copy of Bob's 2016 Will to his children without a signed authorization from their father, which he later obtained.

[65] Second, although the January 20, 2020 letter of instructions invited him to contact Glenn and Steve if he had any questions, Mr. Gadiant instead chose to call Bob directly. Based on Mr. Gadiant's July 27, 2020 note to file, Bob demonstrated during that conversation that he understood what assets he had and the impact of his testamentary dispositions on what his beneficiaries would each receive. His estimate of the value of the shares in his company was a bit high but not inordinately so. In discussing the cottage, Mr. Gadiant was satisfied that Bob understood that "if Glenn accepted the bequest of the cottage and the cash then Steve and Cathy were to receive a cash bequest equal to the fair market value of the cottage plus the \$15,000 with the balance to then be divided equally among the three" and that this would ensure that the value of Bob's Estate was equitably distributed among his three children.

[66] Finally, when it came time to execute the 2020 Will and Limited Property Will, Mr. Gadiant spent half an hour with Bob reviewing their terms. In cross-examination on this application, he denied that he had any reason to doubt that Bob lacked the requisite capacity or knowledge when Bob executed the Wills. Asked specifically about the extent of Bob's knowledge, he answered as follows:

310 Q. And in this case did you have any concerns that Bob may not have been aware of who the objects of his bounty were?

A. No, I didn't have any concerns whatsoever on that.

(...)

320 Q. Okay. And do you have any indication that Bob did not know the nature and extent of his assets at the time he signed the will?



A. No, I don't. I did not.

321 Q. Okay. So on the date that Bob signed his will, did you have any concerns whatsoever about his capacity to do so?

A. No, I did not.

[67] Given Mr. Gadiant's experience as an estates lawyer, his longstanding professional relationship with Bob, and his discussions with him about his estate, his evidence has significant weight in assessing whether the 2020 Will was executed in suspicious circumstances. His recollection of events was not seriously challenged in cross-examination. The criticism made was that he should have taken further steps to ascertain whether Bob retained capacity on February 21, 2020. I infer that he did not think he needed to do anything more because the 2020 Will reflected the written instructions he had received from Bob a month earlier and their subsequent discussion during which Bob clarified his wishes, in particular with respect to the cottage. He furthermore saw or heard nothing that day from either Bob or Glenn that suggested to him that Bob's capacity was in doubt.

[68] Of the three children, Glenn was the one who spent the most time with Bob in early 2020. He was his father's attorney for personal care at the time. Based on the emails exchanged with his siblings at the time, he discussed the estate plan with his father on several occasions. This included conversations about how best to dispose of the house and its contents, the need to change the beneficiary designation on his RIF, and whether Bob should bequest money to Ms. MacKenzie in his 2020 Will.

[69] At no point prior to Bob's death did Glenn indicate to Steve or to anyone else that he thought Bob was no longer competent to make decisions. As his personal attorney, Glenn could and should have communicated directly with Mr. Gadiant if he had any concerns about Bob's capacity. Glenn instead sought Bob's signature on a series of legal documents required to implement his estate plan both before and after February 21, 2020. In a January 15, 2020, email, he described his father as "very coherent", while noting that delirium can come and go.

[70] Mr. Gadiant testified that he expected either Steve or Glenn to provide Bob with the draft 2020 Will, based on the January 20 letter of instruction. Steve did not do so. In cross-examination,

Glenn denied that he showed his father the draft 2020 Will between February 3 and 21, even though he was seeing him several times a week. He said that he was focused on his father's health, he was busy with work, and he relied on Steve to deal with legal and administrative issues.

[71] In my view, Glenn's claim that he did not show his father the draft 2020 Will or discuss it with him is either implausible or shows that Glenn had no serious issue with the Will's terms. Glenn could not possibly have expected Steve to provide Bob with a copy of the Will, because his father did not use e-mail and Steve was in Oakville. As I have already noted, Glenn clearly did discuss estate planning with Bob, even though he denied this in cross-examination. He also testified that he would have expected his father to tell him of any change in the cottage bequest during their many conversations in the months prior to his death.

[72] Glenn's failure to raise any concerns about Bob's understanding of the 2020 Will when it was executed is significant. It is inconsistent with his claim, after Bob's death, that the circumstances on February 21 were suspicious. Glenn did not allege Bob's incapacity until June 2020. Bob's putative incapacity was not even mentioned in his May 8, 2020 letter to Steve announcing that he would challenge the 2020 Will. It was instead mentioned for the first time in Glenn and Cathy's original notice of objection.

[73] In his cross-examination in September 2021, the main thrust of Glenn's evidence was that Steve had behaved deviously by orchestrating the introduction of fair market value into the 2020 Will (a belief contradicted by Mr. Gadiant's evidence). Based on his testimony, Glenn's primary objection to the 2020 Will is not that his father lacked capacity on February 21, but his belief that Steve exercised an undue influence on Bob, a legal position that he has since abandoned.

[74] Internal contradictions in Glenn and Cathy's stance as to Bob's capacity substantially undermine their position. A similar situation arose in *Orfus Estate*, in which a testator's daughter alleged that her mother lacked capacity to execute a codicil to her will but had capacity for the purpose of a consent to wind up a company, as a result of which the daughter received a significant financial benefit. At para. 86 of its decision, the Court of Appeal characterized the challenger's contradictory stance on capacity as the most important piece of evidence supporting the motion

judge's decision upholding the codicil. I likewise find that Glenn and Cathy's failure to raise any capacity issues until after they received their share of Bob's RIF supports Steve's position.

[75] In an affidavit, Cathy says she witnessed instances where her father was delirious beginning in late 2019. Her evidence is non-specific. She does not say how frequently she saw such episodes, or whether any of them occurred after Bob was discharged from the Bruyère Centre on January 30, 2020. The medical team that assessed him at the time were tentatively of the view that his delirium was caused by the hydromorphone he had been taking for back pain, and did not assume that any resulting cognitive issues would necessarily be permanent. When he was discharged to Timberwalk, they noted that he had not had any episodes in weeks. I therefore give no weight to Cathy's evidence on this issue.

[76] According to Steve, he discussed his father's estate plan with him several times. He had been Bob's financial adviser for many years. He stated:

As [Bob's] attorney for property, I discussed his financial affairs with him regularly and he knew of the amounts in his RIF account, the value of his interest in the Kingbird Court house that he was selling to Sally, that he was the sole director of 1302998 Ontario Ltd, which held the proceeds of the sale of his insurance brokerage. He was aware that a new account had been set up with a Joint Gift of Beneficial Right of Survivorship using his non-registered investments, but he remained the owner of that account.

[77] Steve also testifies that Bob was aware that Glenn owed him around \$300,000. Since Glenn testified that he did not discuss any of these estate planning issues with Bob, relying on his brother to do so, Steve's evidence on these issues is uncontradicted.

[78] Steve visited his father on January 20, to finalize and sign the letter of instruction. He denies that there were any signs that Bob did not understand his estate plan and, specifically, the disposition of his cottage.

[79] Glenn and Cathy did not obtain an affidavit from Mr. McLean, the second witness to their father's execution of the 2020 Will. Since they have the burden of showing suspicious circumstances, this suggests that Mr. McLean's evidence would not have supported their position.

[80] Glenn and Cathy rely on a report they obtained in September 2022 from Dr. Venera Bruto, a clinical neuropsychologist and designated capacity assessor under the *Substitute Decisions Act, 1992*. Dr. Bruto prepared a retrospective assessment of Bob's capacity on February 21, 2020. Based on her review of Bob's medical records, Dr. Bruto concludes as follows:

Based on all the available clinical information, regarding Mr. Lester's neurocognitive impairments and trajectory of cognitive decline culminating in moderate dementia at the end of December 2019, as well as his evolving stroke on February 21st, 2020, it is my opinion that on the balance of probabilities, Mr. Lester did not have testamentary capacity on January 20th, 2020, or on February 21st, 2020. Mr. Lester's letter of instruction regarding his 2020 wills was dated January 20th, 2020. Mr. Lester met with his lawyer and signed his wills on February 21st, 2020, just before he was taken to the hospital ED.

It is, furthermore, my opinion, that in the context of Mr. Lester's documented cognitive impairments [e.g ., difficulties in attention, memory, and reasoning] in keeping with moderate dementia, and on the balance of probabilities, it is unlikely that Mr. Lester would have understood / recalled or appreciated:

- complex information material to formulating his will
- the nature and extent of his property to be distributed through his will
- the claims of those who would normally be expected to benefit under his will
- the interplay of material information and consequences of testamentary options
- the impact of the information material to his will
- the consequences of the provisions of his wills.

In my opinion, Mr. Lester's probable inability to understand information material to testamentary decisions and his probable inability to appreciate the foreseeable consequences of testamentary decisions may have possibly rendered him vulnerable to financial exploitation.

[81] Steve relies on a responding expert report from Dr. Nathan Hermann, a geriatric psychiatrist. Dr. Hermann disagrees with Dr. Bruto on two key factual issues: whether Bob's cognition declined steadily from September 2019, and whether Bob had moderate dementia in January 2020. As a result, he disputes her conclusion about Bob's capacity at the time.

[82] Having considered the reports, I agree with Dr. Hermann's observations about the shortcomings in Dr. Bruto's report.

[83] Based on the medical record, Bob's cognition varied over time. It declined very rapidly from mid November to early December 2019, when he was having hallucinations as a result of medication he began to take a few weeks earlier. It improved after that, based on his MCA score in late December and clinical observations of his condition in early and late January 2020. There is no evidence that he was in a state of delirium when he signed the letter of instruction or executed the 2020 Will. Furthermore, if I accepted Dr. Bruto's view of the progressive decline in Bob's cognition as of September 2019, I would have to question his capacity to execute any of the documents that he executed from January 2020 on. Glenn and Cathy take the position, however, that Bob had the capacity to execute all of the other legal and testamentary documents he executed both before and after February 21, 2020.

[84] With respect to dementia, as Dr. Hermann notes:

Dr. Bruto relies on the opinion of Dr S. Thebault specifically for the diagnosis of "moderate" dementia, the only clinician to actually use the term. Dr. Thebault was a Neurology resident (a trainee) at the time, and it is completely unclear how experienced he was in determining diagnoses of dementia. He appears to rely on the MoCA score of 14/30 done in Dec 2019 (at the time of Robert's well-diagnosed delirium) to arrive at this opinion. In fact, in his own assessment, when he tested Robert himself, he noted the following: "Oriented x 3, knew the month and his age, can repeat a sentence, 100 -7 okay" (refers to the "serial sevens" concentration task on tests like the MoCA and MMSE), "reversed world okay" (refers to spelling WORLD backwards, another test of concentration from the MMSE). In other words, in his description of the actual cognitive testing he performed, he failed to provide any evidence of significant cognitive impairment to support a diagnosis of moderate dementia.

[85] When Bob was discharged in late January to Timberwalk, he was not assessed as having dementia but rather a mild cognitive impairment and some forgetfulness.

[86] Dr. Bruto either did not see or did not pay attention to evidence inconsistent with her thesis. As Dr. Hermann notes, Dr. Bruto's opinion does not take into account observations about Bob's cognition and awareness. For example, she does not refer to observations made by the speech pathologist and occupational therapist who assessed Bob on February 25 and March 2,

respectively, and found that he had relatively intact cognitive abilities. Dr. Bruto mentions two emails that were exchanged between Steve and Glenn in January 2020, but does not identify them or say why they support her views. She does not mention Mr. Gadiant's evidence nor the evidence of other legal documents that Bob executed from early January 2020 to his death three months later.

[87] Finally, Dr. Bruto's opinion regarding what a testator must be able to understand to have the capacity to execute a will does not, in my view, align with the Court of Appeal's formulation of the test for testamentary capacity. Dr. Bruto asserts that Bob could not validly execute the 2020 Will because he lacked the ability to understand "the complex information material to formulating his will" and "the interplay of material information and consequences of testamentary options". As held in *Orfus Estate*, however, a competent testator need only know "in a general way the nature and extent" of their property" and, as further affirmed in *Quaggiotto*, a testator does not need to have "an encyclopedic knowledge" of their assets.

[88] The weight to be given to a retrospective diagnosis and analysis is a factual inquiry: *Gironde v. Gironde*, 2013 ONSC 4133, at para. 92, and *Kay v. Kay*, 2019 ONSC 3166, at para. 21. Steve's evidence is that his father understood the value and nature of his assets and who would get what under his 2020 Will. There is no evidence that Bob did not understand the nature and object of his bounty, aside from Dr. Bruto's opinion, which I find unconvincing.

[89] I conclude that Glenn and Cathy have not presented compelling evidence of suspicious circumstances regarding their father's capacity, knowledge or understanding when he executed the 2020 Will.

**Does the evidence establish that Bob had capacity when he executed the will?**

[90] Since Glenn and Cathy have not proved suspicious circumstances when the 2020 Will was executed, Bob is presumed to have had capacity. Even if they had established suspicious circumstances, however, I would have found that Bob had the required capacity to execute the Will based on evidence I have already reviewed and findings I have already made. Bob's condition on February 21, 2020 did not raise any red flags for Mr. Gadiant or Glenn, and it was not assessed as serious enough to warrant his admission to hospital or any neurological follow-up. He may

have had some degree of dementia and his physical condition was clearly deteriorating, but the evidence does not establish that he lacked the capacity to understand his assets, the terms of his 2020 Will, and what his beneficiaries would receive.

[91] I would add this. The 2020 Will was one component of a larger estate planning scheme. There was one consistent overarching principle: each of Bob's three children were entitled to an equal share. The 2020 Will divides the residue of Bob's estate equally between Steve, Glenn, and Cathy. This is consistent with the beneficiary designations that Bob executed in early 2020 for his RIF, the Joint Gift Account, and the Limited Property Will.

[92] Glenn and Cathy ask me to find that their father retained the capacity to implement other parts of his estate plan before and after February 21, 2020 — for example, the elimination of Ms. MacKenzie as a beneficiary of Bob's RIF, and the establishment of the Joint Gift Account — but lacked the competence, knowledge and awareness to implement the one component, the 2020 Will, that would have the effect of making it more financially onerous for Glenn to inherit the cottage.

[93] The 2020 Will is not complex. Glenn and Cathy suggest that Bob would not have understood the meaning of fair market value. This is implausible. Fair market value is not an obscure or arcane concept. Given Bob's insurance practice, he would be familiar with it. There is no evidence that Bob lacked the capacity to understand the estate plan as a whole or that he intended to deviate from its central principal in gifting the cottage to Glenn in his 2020 Will.

### **Disposition**

[94] Steve Lester's application for a certificate of appointment as Estate Trustee pursuant to Robert Lester's February 21, 2020 Will is granted, and Cathy and Glenn Lester's objections are dismissed. I find there is no basis to invalidate the 2020 Will, the Limited Property Will, the change in the RIF beneficiary designation, or the creation of the Joint Gift Account.

[95] If the parties are unable to agree on costs, they shall serve and file costs submissions by March 17, 2023 so that I may fix them. Each submission shall be no longer than three pages in length, but may attach relevant documents.

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Justice Sally Gomery

**Released:** March 2, 2023



**CITATION:** Lester v. Lester, 2023 ONSC 1450  
**COURT FILE NO.:** CV-20-40872  
**DATE:** 23/02/2023

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**STEVEN LESTER**

Applicant

– and –

**GLENN LESTER and CATHY LESTER**

Respondents

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**RULING ON APPLICATION FOR CERTIFICATE  
OF APPOINTMENT AS ESTATE TRUSTEE**

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Justice Sally Gomery

**Released:** March 2, 2023