

CITATION: Abbruzzese v. Tucci, 2024 ONSC 957
COURT FILE NO.: 03-099/16
DATE: 20240215

ONTARIO
SUPERIOR COURT OF JUSTICE
ESTATES LIST

BETWEEN:)
)
ANGELA ABBRUZZESE)
) *David Delagran and Genevieve Madill, for*
Applicant) *the Applicant*
)
- and -)
)
BERNADETTE TUCCI a.k.a.)
BENEDETTA IANNARELLI, personally) *Romeo D'Ambrosio, for the Respondent*
and as Estate Trustee of the Estate of) *Bernadette Tucci*
ASSUNTA MARIA IANNARELLI,)
JOSEPH SANDRO NAZZICONE, and)
THE OFFICE OF THE PUBLIC)
GUARDIAN AND TRUSTEE)
Respondent)
)
)
) **HEARD:** January 4-5 and 8-12, 2024

C. GILMORE, J.

Introduction

- [1] The Applicant Angela Abbruzzese (“Angela”) challenges the validity of the 2016 Will of her mother Assunta Maria Iannarelli (“Maria”) on the grounds that she lacked capacity and was subject to undue influence at the hands of Angela’s sister, the Respondent Bernadette Tucci (“Bernadette”, sometimes referred to as “Betty” and “Benedetta”).
- [2] On the day that the impugned Will was signed, Maria also signed a transfer of her home on McLeod Avenue in Toronto (the “McLeod Home”) to her and Bernadette jointly.

- [3] Angela seeks to set aside the *inter vivos* transfer of the McLeod Home on the grounds of either a lack of capacity and undue influence, or on the grounds that no gift was intended and the McLeod Home is held on a resulting trust for Maria's Estate (the "Estate"). Angela is also seeking to set aside the 2016 Will based on a lack of capacity and undue influence.
- [4] Bernadette defends the Application on the grounds that her mother had capacity at the time of signing her 2016 Will and the transfer. Further, there is ample evidence that Maria wanted Bernadette to have a larger share of her Estate in recompense for the 12 years of caregiving that Bernadette had provided to her mother, and that Maria carried out this objective without influence from Bernadette.
- [5] For the reasons set out below, I reject Bernadette's arguments and find that Maria was subject to undue influence as a result of concerted efforts on Bernadette's part and that she was particularly vulnerable due to her diminished capacity. Her 2016 Will and property transfer are set aside and the provisions of Maria's 2007 Will will prevail.

Background Facts

- [6] Maria was born on July 22, 1930 and died on March 5, 2018. Her husband Carlo Iannarelli ("Carlo") predeceased her on December 21, 2005. Maria and Carlo purchased the McLeod Home on November 22, 1961. After Carlo's death, Maria continued to live in the McLeod Home until her death in 2018. Maria was described by her daughters as both stubborn and strong-willed, although Angela's evidence was that her mother's will weakened in the last two years of her life during her most significant decline.
- [7] Maria was a first-generation Italian immigrant who never learned to read or write English and did not speak English fluently. She had only three years of formal education. Angela testified that her parents would watch Italian television programs, but she never saw any Italian newspapers or magazines at their home. During her working years, Maria did piece work as a seamstress in a uniform factory and retired at age 65. Carlo worked in construction until he retired at age 65. After retirement he kept busy by working part-time at a sandwich shop.
- [8] Bernadette is 64 years old. After her first marriage ended, Bernadette married Michael Tucci and moved to Texas in 2000. After she separated from Michael Tucci, she moved back to Ontario and in with her parents in 2009. Bernadette has two children from her first marriage: Tamara, aged 41 and Stefan, aged 38. Tamara has two children: EJ, aged 14 and TG, aged 6. Stefan has one child with his former partner, Chloe Benloulou ("Chloe") namely PP, aged 9. Bernadette continues to live in the McLeod Home.
- [9] Bernadette described her and her mother as similar people. They were both hard workers and family oriented. She did not deny that she and her mother sometimes argued because her mother always wanted things her way. However, her mother was her best friend, and she told her mother everything.

- [10] Angela is 71 years old. She emigrated from Italy with her parents when she was 18 months old. She has taught English as a Second Language for over 30 years with the Peel Board of Education. She continues to work part time. Angela has been married to her husband Luigi for 45 years. They had three children together: Joseph (“Joey”), aged 43 and Andrew, aged 34. Their son Carlo, who was born in 1982, was tragically killed in a car accident in 2000.
- [11] Angela told the court that she had a good relationship with her parents. She called them three to four times a day when her father was still alive. She was unable to visit them as often as she wanted because she was working full time and raising three children. Her mother understood that as it had been the same for her when Angela and Bernadette were growing up. However, they were always in touch. They would spend special occasions and holidays together including Christmas, Easter, Mother’s Day, Father’s Day and birthdays.
- [12] If her parents needed her, she was there for them. When their house was broken into, Angela dealt with the insurance company for her mom. When her furnace broke down, her husband and son went to her home in the middle of the night to help out.
- [13] Angela described her mother as a “homebody” who preferred to stay at home rather than go out and visit. Her mother would come to her house for family occasions when invited but she preferred to stay at home.
- [14] Angela’s evidence was that her mother paid for everything with cash. She and her father did not believe in investing their money. They had two bank accounts, a savings account and a chequing account, and nothing else. If she had extra expenses such as a home repair, Maria would go to the bank and take out cash to pay for it. Angela told the court that her mother was mostly independent in all respects up until her surgery in September 2015. After her polymyalgia rheumatica (“PMR”) diagnosis in September 2012 her health declined.
- [15] After her father’s death, Angela would sometimes take her mother to the dentist, for a haircut, to the bank or to do some shopping on a Saturday. Because she continued to work full time, she usually did not take her mother to medical appointments. Bernadette took her mother to those appointments because she was not working. Angela does recall attending an appointment with Dr. Ingber in late 2014 with her mother and Bernadette in order to receive the results of Maria’s geriatric assessment.
- [16] Maria and Carlo were generous to their daughters. When Angela was married, her parents gave her \$20,000 to buy a home. When they sold that home and bought their next house, Maria and Carlo gave Angela and her husband a further \$45,000. Angela received a further \$95,000 from her mother. Maria told Angela that she had given Bernadette money to help with her divorce in Texas and thought it was fair to give Angela money too. In total, Angela agreed that she had received \$160,000 from her mother by way of gifts. It was suggested that Maria gave Angela’s husband another \$10,000 for his business but Angela insisted that it was a loan that had been paid back. Angela had no proof of repayment. Bernadette’s evidence was that her parents gifted Luigi \$50,000 in 1980.

- [17] Bernadette bought a home on Riverhead Drive in 1995 for \$250,000 (the “Riverhead Home”). Maria and Carlo gave Bernadette \$150,000 for the down payment. Bernadette’s friend Joseph Nazzicone has lived in the Riverhead Home since 2013. He paid rent for two years and then stopped.
- [18] Bernadette’s evidence was that Angela was hostile towards her despite Bernadette’s efforts to support her over the years. When Angela’s son Carlo was killed in a car accident, Bernadette came back from Texas the same day and stayed with Bernadette for two months. She told the court that Angela had hated her for her entire life despite her attempts to assist her.
- [19] In 2001, Maria’s family doctor was Dr. Leone. Maria began to have memory problems and on Dr. Leone’s recommendation, Maria attended an appointment with geriatrician Dr. Marotta, who confirmed she had no memory issues at that time. She returned to Dr. Marotta in October 2002, and he noted no changes in Maria’s memory. A further appointment was arranged for Maria in April 2005. He concluded that she had very mild memory issues and a fair bit of anxiety.
- [20] After her husband’s death in December 2005, Maria wanted to prepare a new Will and Powers of Attorney (“POAs”). Angela and Bernadette arranged to take her to solicitor Joseph Tanzola in March 2007. In her 2007 Will, she left her Estate to her daughters equally. Her POAs named Angela and Bernadette jointly as her POAs for Property and Personal Care. Angela and Bernadette were aware of the terms of their mother’s 2007 Will because they were in Mr. Tanzola’s office with their mother when the terms of the 2007 Will were discussed.
- [21] In 2012, Maria was diagnosed with PMR. She was dragging her foot and could not lift her arms. She had difficulty getting out of bed. She improved with treatment but still lacked full mobility in her arms and could not shower herself or go up and down stairs without assistance. She continued to have pain in her arms. Bernadette described her mother’s health as rapidly declining at that point. Maria could no longer cook or do laundry. She required a walker. The Community Care Access Centre (“CCAC”) provided support for Maria for two hours a week beginning in 2012.
- [22] Despite this decline, Bernadette testified that her mother was still in charge of her own finances, but she could no longer walk to the bank. Bernadette took over buying the groceries and household supplies. In the Application to Pass Accounts, Bernadette’s evidence was that she had managed all of her mother’s affairs since 2005. At trial Bernadette testified this was not correct.

The Passing of Accounts Application

- [23] Bernadette was ordered to commence an Application to Pass Accounts for the period of January 1, 2015 to the date of death on March 5, 2018 when it was alleged she was acting as her mother’s POA for Property. Bernadette’s position was that she never acted as POA for Property for her mother as her mother remained competent until death. Angela

disagreed and took the position that Bernadette had a duty to account from January 1, 2015, given the decline in her mother's health. In particular, Angela questioned the diminution of her mother's accounts from approximately \$80,000 to approximately \$3,000 in the four months following the signing of a bank POA in Bernadette's favour in early March 2016.

- [24] My decision in relation to the contested Passing of Accounts Application may be found at 2023 ONSC 7672. Bernadette sought repayment from the Estate of \$100,006.02, which was made up of a request for compensation of \$10,000, reimbursement for Estate-related expenses, and reimbursement for certain expenses she claimed to have paid on Maria's behalf when Maria was alive.
- [25] Angela did not agree with Bernadette's claims and sought to have her repay the sum of \$82,196.70 to the Estate on the grounds that Bernadette had improperly removed funds from Maria's bank account or failed to properly account for expenses. Angela also denied that Bernadette was entitled to compensation due to her breach of fiduciary duty in removing funds from Maria's account.
- [26] Pursuant to that decision, Bernadette was ordered to repay the sum of \$24,510.53 to the Estate after consideration of certain Schedule A expenses for which she was entitled to be reimbursed. Her compensation was reduced from a requested \$10,900 to \$6,000 as a result of accounting deficiencies, including large amounts taken from her mother's bank account which she either inadequately explained or which I found did not meet the test for an *inter vivos* gift. The balance of compensation was awarded on the grounds of the caregiving that Bernadette had provided to her mother which would otherwise have been paid for from her mother's resources.

Events in 2014

- [27] After their father's death, Bernadette called Angela sometime between 2005 and 2007 and told her that their mother was having memory problems. She was forgetting where she had put things as well as her children's and grandchildren' birthdays. She had lost her wedding band and sometimes called Angela by Bernadette's name.
- [28] After Dr. Leone retired, Maria's family doctor became Dr. Neil Ingber. In May 2014, he referred Maria to Social Worker Jenny Stark for a geriatric assessment, due to concerns noted by the triage team at Humber River Hospital related to cognition, memory and caregiver stress. Bernadette was present at the assessment. Angela asked to be notified about the assessment but did not receive any notification of the date. A detailed description of the assessment is set out given the extensive references made to this assessment by the expert witnesses.
- [29] Bernadette attended for the assessment on May 9, 2014. As Ms. Stark did not speak Italian, Bernadette provided the translation of Ms. Stark's questions for her mother.
- [30] Ms. Stark's report dated May 20, 2014 noted that Maria was highly dependent on Bernadette for daily living tasks including transportation, shopping, meal preparation, housework, laundry, banking and outdoor maintenance. Ms. Stark noted that Bernadette

advised that her mother's cognition had been declining since her husband passed away in 2006 and that her mother's long-standing fears and phobias had been worsening over the years. Bernadette also told Ms. Stark that she was overwhelmed as a caregiver because she had custody of her two granddaughters at that time, one of whom was a baby, and was going through family court issues related to P. She had no help from her sister Angela despite many requests for assistance.

- [31] Bernadette also told Ms. Stark about her mother's depression and sadness. Bernadette described that her mother still missed her father, called out to him and was very sad when triggering events occurred.
- [32] Ms. Stark further noted that Maria had been functionally declining since her diagnosis of PMR two years prior, that she had three falls over the previous year, and that she was an inconsistent historian who showed poor insight into her medical, functional and social issues. Maria also displayed elements of depression including social isolation. She was noted as being reluctant to receive in-home support.
- [33] In terms of mobility, she was reported to have difficulty getting in and out of bed, difficulty walking and needed to hold onto a handrail to go up and down stairs.
- [34] Maria scored 17/29 on a Mini Mental State Exam ("MMSE") administered by Ms. Stark. A normal score is in the range of 25. Maria scored 0/5 for attention and calculation and 0/3 on recall. On the clock drawing exercise, Maria drew the clock circle and number placement correctly other than the numbers 12 and 1, which were written outside of the clock circle. She was not able to correctly complete the hand placement.
- [35] With respect to cognition, Maria was noted as displaying poor insight into her declining cognition and memory. She was fearful of being in the house or using the stairs when alone. During cognitive testing she was oriented to place but not time, had poor recall and difficulty following instructions. Ms. Stark noted that Maria's minimal education and English skills must be noted in terms of interpreting her findings. Ms. Stark recommended that Maria be referred to a specialist, that she undergo a gait assessment, that home safety equipment be purchased and that she be referred to resources for dementia. While Bernadette testified that she agreed with Ms. Stark's recommendations, she did not recall the recommendation about dementia resources and did not agree that her mother had ever been diagnosed with dementia.
- [36] An appointment was subsequently arranged with Dr. Ingber on June 16, 2014, to review the results of the assessment. Angela attended the appointment at her mother's request. According to Angela, Bernadette was upset to find her there. Angela testified that at that point she suspected that Bernadette was trying to prevent her from being involved in her mother's care.
- [37] A further MMSE administered by Dr. Ingber on June 16, 2014 rendered the same result as Ms. Stark's assessment, 17/29. Dr. Ingber recommended donepezil for dementia. The daughters did not agree to giving their mother this drug due to its known side effects.

- [38] Dr. Ingber recommended that Maria use walking aids (she had refused them to this point) and that modifications would need to be made to the McLeod Home because of her mobility issues. He stressed a proper diet as Maria had lost weight. He encouraged Maria to become involved in a day program and noted that she would be fitted for hearing aids. He did not refer Maria to a specialist. He requested a social worker home visit with a CCAC representative.
- [39] On September 8, 2014, Bernadette and Angela had a serious disagreement. Angela had agreed to take her mother to four dentist appointments between July and September 2014. Her mother needed some extractions and work done on cavities. It was agreed that Angela would pick up her mother and take her to the bank so she could withdraw money for the dentist, whom she always paid in cash. She would then take her mother to the dentist and bring her mother home with her to stay overnight.
- [40] After the second dentist appointment, Maria had a fall at Angela's home. An ambulance was called. Maria required four to five staples in her head. Angela called Bernadette about the accident and Bernadette came over. Angela and Bernadette began to argue. Bernadette insisted that she had asked Angela to assist her by caring for Maria one weekend per month and Angela had refused. Angela denied this and said she was more than willing to help but her mother would not come to stay at her home because she preferred to stay at her own house. A serious dispute arose in the course of which various allegations were made. In the heat of the argument Angela poked her sister in the shoulder. Bernadette's evidence was that Angela slapped her and lunged at her like she wanted to strangle her. Angela denied that allegation. The sisters became very distanced after that incident.
- [41] Angela testified that after the argument with Bernadette she was not able to speak with her mother very often. She took her mother to her next two dentist appointments, but her mother did not stay overnight at her home. The next time Angela saw her mother for a planned visit was on Mother's Day in 2015 for a very short time. Her evidence was that Bernadette permitted only a ten-minute visit. Angela did not want to stay after Bernadette arrived home for fear of another confrontation.
- [42] Sometimes Angela and her husband would drive by her mother's house and if Bernadette's car was not in the driveway she would stop in for a short visit. Her son Joey did the same. She tried to call her mother sometimes, but her mother did not answer. She did not see her mother again for any extended visits until she visited her in hospital in September 2015.
- [43] Angela would try to call her mother when she knew Bernadette was not there, but it was difficult because her mother was unable to use the phone without assistance. Her mother reported to her that she and Bernadette had loud arguments sometimes. Her mother called Bernadette the equivalent of "the Beast" in Italian. She knew Bernadette was keeping information about their mother from her and alleged that Bernadette was cloistering her mother from the rest of the family.

Maria's Hospitalization in 2015

- [44] Maria had a fall in early September 2015 and had hip replacement surgery on September 11, 2015. Angela's evidence was that she was not informed about the fall until after her mother underwent surgery. As Bernadette was in Bermuda, Angela was informed by telephone by Bernadette's son Stefan.
- [45] In cross-examination, Bernadette was asked why she waited five days to inform Angela about Maria's surgery. She claimed to have sent a text to Joey about this (Angela's son). However, no such text was ever produced in evidence.
- [46] When Angela found out about the surgery, she took four days off work to be with her mother in hospital. Angela's evidence was that because of Bernadette's interference and their disagreement she had not seen her mother since September 2014 other than a brief Mother's Day visit in May 2015.
- [47] While she was caring for her mother in hospital, Angela noticed that her mother's eyes were red, and she was scratching frequently. When brushing her mother's hair, she discovered that her mother's head was infested with lice. Angela called the nurse as she was concerned that the lice had been contracted in hospital. The nurse examined Maria and stated that there was a "crown" of lice in Maria's hair and that the lice had been there for a considerable period of time. Angela was also concerned about fungus in her mother's toenails. She questioned her sister's care of their mother as reported in a hospital note dated September 21, 2015. Dr. Reinhartz and the attending nurse told Angela she should throw away her mother's mattress because the lice infestation had been present for months. The note also recorded that Angela and her sister did not get along.
- [48] During one hospital visit in September 2015, Angela and her mother had an argument about the fighting between Angela and Bernadette. When Angela told her mother she did not want to discuss the disputes between her and Bernadette, Maria told her never to come back to the hospital to visit her. Angela responded by saying that her mother should have been the one who died and not her father. Angela left the hospital crying. Angela deeply regretted making this statement but testified that she "lost it" because she was so tired of Bernadette influencing her mother against her. Despite this unfortunate incident, Angela did not stop visiting her mother in hospital.
- [49] In a nursing note from Christina Kent dated September 21, 2015, Ms. Kent noted that Bernadette was yelling at her mother and then became angry with Ms. Kent about the lice issue, claiming that her sister was blaming her for the lice. Bernadette was told to stop yelling at her mother. Bernadette requested that Angela be banned from seeing her mother in hospital. Angela was not aware that her sister had requested this. Bernadette did not recall asking that her sister be banned from seeing their mother. She said she was very emotional at the time because Angela was blaming her for the lice problem.
- [50] Due to ongoing disagreements between Angela and Bernadette, it was agreed that they would visit their mother at different times while she remained in hospital.

- [51] A consultation note from Dr. Reinhartz dated September 22, 2015 noted Maria's past medical history as including dementia. He also noted she had been on a high dose of prednisone for some time, had a language barrier and showed no evidence of delirium.
- [52] Bernadette attended hospital on September 26, 2015 with some lice treatment shampoo. When she saw Angela there, she became angry and a shouting match between them ensued. A nurse's note dated September 26, 2015 recounts Bernadette and Angela were shouting at one another and using foul language. Hospital security was called as well as a nursing supervisor. Dr. Reinhartz also attended. Efforts were made to calm the situation.
- [53] On October 1, 2015, Dr. Reinhartz made a note that Maria's daughters did not get along and that Angela had accused Bernadette of elder abuse. Dr. Reinhartz went on to note that he did not note any abusive behaviour in Bernadette's interactions with her mother.
- [54] Maria was discharged from hospital on October 2, 2015. Her primary diagnosis on discharge was dementia. Angela was not informed when her mother was discharged. After that Maria had regular home care visits by way of surgery follow up.
- [55] After her discharge, Maria went to rehab. A note dated October 5, 2015 by RN N. McFarlane noted that Angela had provided a copy of her 2007 POA. A call had been made to Bernadette about the 2007 POA and she advised that she would be obtaining a more recent POA without Angela being listed. Bernadette agreed that she was displeased when she learned that her sister had faxed a copy of the 2007 POA to the hospital. She testified that she did not recall using the word POA, but she did discuss with the nurse the fact that she was the only one on the medical consent form. Bernadette denied the suggestion that as early as October 2015 she was planning to have her mother prepare a new POA.
- [56] The McFarlane note indicated that Maria was capable of making decisions at that point and the POA was not in effect. Angela was never informed of this conversation until she read the notes in the course of this litigation. The note records that a call was made to Bernadette to discuss her mother's return home. Bernadette advised that Angela had not been involved in Maria's care and had not seen her for 18 months. Bernadette explained to the court that she meant that her sister had not provided any care for 18 months. She was aware that Angela had seen her mother in hospital only a few days before. The note also indicates that Maria could not be left alone and that Bernadette had requested support because her own personal health concerns had been neglected.
- [57] On October 19, 2015, a follow-up visit took place at Maria's home with RN McFarlane. The purpose of the visit was noted as "reassessment/post hospitalization." Ms. McFarlane noted that Maria could not be left alone and needed "limited to extensive assistance" as provided by Bernadette. There is also a reference to Bernadette taking her mother to view Villa Columbo, an Italian-speaking, long-term care home. Angela's evidence was that she knew nothing of this or the extent of her mother's condition at that time as Bernadette did not communicate with her.

- [58] On November 5, 2015, Angela requested information from the home care coordinator regarding her mother's status. The request was denied because Angela was not listed on the health care consent. Bernadette told the care coordinator that Angela had not seen her mother in 18 months.
- [59] On November 17, 2015, Dr. Ingber noted that Maria was unwell and had been going downhill since her discharge from hospital. She was not walking and refused to get out of bed, with a chronic wound on her leg that was not healing.
- [60] Maria was back in hospital on December 16, 2015 as she was unwell. She had an urgent consult for new onset anemia. It was suspected this was prednisone related due to her PMR.

Events in 2016

- [61] Chloe is Stefan's former common-law partner. They have one child together, P. Chloe was included on Angela's witness list but could not be found and therefore did not testify at trial. The main reason she was to testify related to Facebook Messenger messages exchanged between Chloe and Angela in January, February and July 2016.
- [62] Given Chloe's absence at this trial there was an objection to Angela referring to the Facebook messages between her and Chloe as Chloe's messages could not be verified. Angela's evidence was that she printed off the messages herself and did not alter them in any way. While Angela's counsel conceded that there was an issue with respect to this evidence, he submitted it was reliable evidence because issues raised by Chloe (such as Bernadette's intention to have her mother sign a new will) turned out to be true.
- [63] The court had concerns about this evidence as well, given a dispute between Chloe and Bernadette related to a child protection proceeding involving P. Angela admitted that she knew that Chloe and Stefan were no longer together, that Chloe had been addicted to heroin and that P. was addicted to heroin when she was born. She was told in 2022 that P. was removed from her mother's care and that Chloe was not permitted access pending Chloe providing proof of treatment for her heroin addiction. Angela believed that Bernadette now had custody of Chloe. She was also aware that Chloe had started a GoFundMe page to raise funds for legal fees to regain custody of P.
- [64] Angela has also helped Chloe financially. She has given her a total of approximately \$1,000 to buy medicine for P. that was not covered by Social Assistance. She conceded that Chloe had told her that if she helped her out, she would help out Angela at this trial. Angela's evidence was that she declined that offer. She had not made any specific efforts to locate Chloe for this trial. She did not have any current information about her whereabouts or her contact information.
- [65] I permitted Angela to be questioned on the messages with the focus on verifying her responses. I give less weight to this evidence in these circumstances given that Chloe clearly has her own motives with respect to who she will assist in this trial. In any event, there is other evidence that is more significant and reliable than the Messenger exchanges.

- [66] Given that Angela was permitted to testify about the notes, the evidence from those notes can be summarized as follows:
- (a) On February 16, 2016, Chloe alerted Angela that Bernadette was arranging to have Maria's 2007 Will changed and that Angela would be receiving less under the new proposed Will.
 - (b) On March 21, 2016, Chloe wrote to Angela that Bernadette was a monster to her mother and has Maria brainwashed not to talk to Angela.
 - (c) On July 24, 2016, Chloe wrote to Angela that Maria "has no clue what's going on at certain times." She gave an example of Maria being concerned that P. was wearing a bathing suit, as it was snowing outside. This was on July 23, 2016.
- [67] While Angela was not surprised to hear about her sister's behaviour, she was shocked about the information that her mother may change her 2007 Will. She asked Chloe to find out more about it but heard nothing further.

The Bank POA

- [68] On March 4, 2016, Bernadette arranged for two CIBC bank employees to attend at the McLeod Home in order to change Maria's banking arrangements. After her 2015 surgery, she had mobility issues and was not able to walk to the bank as she had in the past. As such, two bank employees from CIBC, Ms. Pompea Bifulchi and Ms. Liliana Prete, came to the home to assist with the execution of a CIBC continuing Power of Attorney in favour of Bernadette ("the Bank POA").
- [69] Ms. Prete deposed that she had never met Bernadette or Maria before the March meeting. It was Maria who suggested opening a joint account with Bernadette. Ms. Prete discouraged Maria from doing this and instead suggested a bank POA. Maria understood the reasons for this suggestion and accepted her recommendation. She noted that Bernadette did not "coach" her mother and that the reason for the Bank POA was to allow Bernadette to pay bills on her mother's behalf because of mobility issues. Ms. Prete had no concerns about Maria's ability to give instructions for or sign the Bank POA. She described Maria as "on the ball" and "very sharp."
- [70] Ms. Bifulchi deposed that she had worked for CIBC as a Customer Service Representative for 50 years. She had known Maria as a regular banking customer for years. Maria often asked for her because she spoke Italian. Prior to the March 2016 meeting, Maria always attended at the bank personally to pay her bills and make withdrawals. Ms. Bifulchi testified that Maria would come into the bank once or twice a week. Ms. Bifulchi described Maria as a person who was strong minded and knew what she wanted. She did not recall a caution having been put on Maria's account nor did she recall that pre-authorized withdrawals for bills had been set up for Maria in 2012.

- [71] Ms. Bifulchi was aware that the March 4, 2016 meeting was set up because of Maria's hip surgery and her associated mobility issues. When she arrived at Maria's home, Maria was in a wheelchair.
- [72] Ms. Bifulchi's evidence was that while Bernadette was present at the meeting, Maria gave all of the instructions regarding the new Bank POA. She noted that Maria was the same strong-willed woman she had always known, and Maria was clear that Bernadette be given the authority to assist with her banking. Ms. Bifulchi never saw Maria attend at the bank after the Bank POA was signed.
- [73] Bernadette was aware that after the Bank POA was signed, she could make withdrawals from her mother's account. She denied removing almost all of the \$80,000 in the following two months. She referred to the alleged loan of \$50,000 from her mother to Joseph. Bernadette testified that when the loan was repaid by Joseph it was loaned to Joey who had lost his job. There was no evidence of this. This issue was dealt with in the Passing of Accounts Application. I ordered that Bernadette was required to repay this amount to the Estate.
- [74] Bernadette agreed that after the withdrawals were made between March and May 2016, her mother's savings were reduced to \$2,500.
- [75] On March 29, 2016, Dr. Ingber's notes indicated Maria feeling unwell, lightheaded and weak. She was referred for a sleep study and Holter monitor.

The New Will and POAs

- [76] Bernadette arranged for her mother to see solicitor Angelo Vumbaca on March 31, 2016. She called a lawyer she knew and asked for a referral to an Italian-speaking wills and estates lawyer. She was asked why she did not return to Mr. Tanzola, the lawyer who drafted the 2007 Will. Bernadette claimed that she did not know him and did not choose him.
- [77] Bernadette's evidence was that it was her mother who asked her to do this. Bernadette told the court that after her hip surgery in 2015, her mother's mobility was impacted, and she wanted to make some changes. For example, her mother suggested that Bernadette sell the Riverhead Home and put an extension on the back of the McLeod Home so she could have a main floor bedroom, bathroom and sitting area. Bernadette suggested that Maria discuss this plan with Angela.
- [78] Mr. Vumbaca had been practicing law in the areas of corporate commercial, real estate and wills and estates for 19 years by that date. He had prepared more than 200 wills in the course of his practice. He had never met or acted for either Bernadette or Maria prior to the first appointment.
- [79] Mr. Vumbaca recalled that when he met Maria for the first time on March 31, 2016, they spoke in Italian. Bernadette drove her mother to the appointment, but Mr. Vumbaca met with Maria alone. Bernadette left the building and went for coffee.

- [80] Maria told Mr. Vumbaca that she had done a previous will and POAs but was not sure where they were and was too afraid to ask her daughter Angela if she had a copy.
- [81] During the March 31, 2016 meeting, Mr. Vumbaca made a list of Maria's assets including the McLeod Home. He does not recall asking her to estimate the value of the Home. He also noted that she had \$80,000 in a bank account. He did not ask her to verify that this was the correct amount or whether she was the sole account holder.
- [82] He was aware that Maria was 86 years old at the time and took notes to satisfy himself that she knew the extent of her assets, and how she was feeling. He recalled that Maria used a cane to walk and he is certain he would have asked about that. He stated that he was looking for "red flags" indicating that something was out of the ordinary. As per his usual practice, he asked Maria whether she had been diagnosed with a mental disorder or dementia. He then asked about her marital status, and the names and dates of birth of her children and grandchildren. Maria was able to provide this information to him without difficulty. He did not have any medical records for Maria and accepted by way of their conversation that she was capable of signing a new Will and POAs.
- [83] Mr. Vumbaca deposed that he has had situations where he has required his client to undergo an assessment before continuing with the execution of a Will or POAs. This occurs when he sees a client struggling with basic information such as their marital status, the names of their children or what assets they own. He did not require Maria to undergo an assessment.
- [84] According to his notes, Maria told Mr. Vumbaca that Bernadette did everything for her including banking, grocery shopping, cooking, financial matters, repairs and doctors' appointments. He also noted that Maria told him that she had a strained relationship with her daughter Angela who did little to help her.
- [85] Maria told Mr. Vumbaca that she wanted to transfer the McLeod Home into joint names with Bernadette. This instruction is contained in Mr. Vumbaca's notes. Mr. Vumbaca was aware of the pitfalls of acting for an elderly client who wanted to transfer property to one child and leave out another. As such, he went through the nature and consequences of transferring the McLeod Home into joint ownership and made sure that she was very clear that she wanted to take that step, including confirmation that no one was pressuring her to do it. Although Mr. Vumbaca did not have specific notes about this, he deposed that he would have told Maria the actual consequences of such a transfer including giving up control and having to ask for Bernadette's consent in order to sell or mortgage the McLeod Home.
- [86] Maria also told Mr. Vumbaca that she wanted to make the transfer to avoid the payment of estate administration tax on the McLeod Home post-death. Mr. Vumbaca told Maria that he would be asking her to sign a Waiver of Independent Legal Advice in relation to the transfer when they met again to sign documents.
- [87] While Mr. Vumbaca agreed that transferring the McLeod Home into joint names was likely not necessary to avoid probate fees in this case, he advised there were other reasons for the

transfer, including the strained relationship with Angela and the fact that Bernadette was her primary caregiver. His notes reflect the following: “Given Bernadette’s help with everything, Assunta [Maria] wants to gift her the house they both live in. She feels this is the fair and right thing to do to give Bernadette’s sacrifices over the years”. Maria told him that she wanted the balance of her assets divided between Bernadette and Angela after the house was transferred to Bernadette.

- [88] Mr. Vumbaca notes contain a reference that Maria confirmed all of her instructions to him alone. Further, that “Assunta was very coherent and appeared to understand everything and communicated with me in Italian clearly and without doubt.” Mr. Vumbaca was aware that in cases where a child was being disinherited, a Will challenge is possible. He wanted to ensure that his views on Maria’s capacity to give instructions was well documented. He confirmed that Maria appeared neither anxious nor confused while meeting with him. If she had, he would have made a note of it.
- [89] When Bernadette drove Maria home from the appointment, they discussed what had happened. Maria told Bernadette that when her own mother died, she left her house to her aunt because her aunt had been the one who cared for her. Maria wanted to do the same for Bernadette.
- [90] Mr. Vumbaca had a further meeting with Maria on April 25, 2016 to review the Will, POAs and transfer documentation with her. He translated the documents into Italian and read them to her. The new Will named Bernadette as the primary executor and Joseph Nazzicone as the alternate. Bernadette was named as the primary Attorney on both POAs and Joseph Nazzicone as the alternate. Mr. Vumbaca confirmed that Maria told him that Joseph Nazzicone was Bernadette’s former boyfriend but also a close friend and trusted advisor to Maria. Maria then signed all of the documents including the transfer documents in Mr. Vumbaca’s presence and the presence of another witness. Maria, Mr. Vumbaca and the other witness initialled each page and signed the last page of the 2016 Will and POAs.
- [91] Mr. Vumbaca’s evidence was that during this meeting Maria did not appear hesitant to sign any of the documents nor did she express any intention to change her instructions. She fully understood that she was irrevocably transferring a joint interest in the McLeod Home to Bernadette for no consideration. Bernadette was not present when the 2016 Will, POAs and transfer documents were signed by Maria. She estimated that her mother was with Mr. Vumbaca to sign the documents for 15 minutes before she was called in.
- [92] After completing his meeting with Maria, Mr. Vumbaca met with Bernadette to sign the transfer of the McLeod Home into joint names. He required Bernadette to sign a conflict acknowledgement document before she signed the transfer. He also required that Maria sign the Waiver of Independent Legal Advice they had discussed on March 31, 2016 in which Maria acknowledged that Bernadette had not induced her to sign the transfer by way of undue influence.
- [93] Mr. Vumbaca was asked why it was necessary to make a gift of the McLeod Home in the new 2016 Will and transfer the property into joint names when one or the other would have

accomplished the intended result. His response was that he wanted to ensure the testator's intention was reinforced and that if the 2016 Will was challenged, the transfer would still be in effect.

- [94] Bernadette was asked about the transfer and stated under oath that she did not know her mother had transferred the McLeod Home to her until after the fact. However, the records from Mr. Vumbaca's file clearly show that Bernadette signed the conflict documents and the Waiver on April 25, 2016. Bernadette's evidence was that she may have been mistaken about the date on which she and her mother first discussed the house transfer.

Maria's Hospitalization in May 2016

- [95] On May 28, 2016, Maria underwent a second hip operation at Humber River Hospital. After the operation she was moved to Baycrest Hospital for rehabilitation. In a physician's note dated May 28, 2016, Maria was noted as having multiple medical conditions ranging from hypertension and anemia to dementia. The specific reference is "Baseline patient is confused with dementia." After the surgery was completed on May 28, 2016, Bernadette told hospital staff that she did not want Angela to see her mother until she was more awake and that she wanted to ask her mother if she wanted to see Angela.
- [96] On May 29, 2016, Angela called to speak with the hospital team leader for the day. The hospital noted that there was a conflict between the sisters regarding the POA with both daughters claiming they had a valid POA. The nurse went to speak to Bernadette and Maria who both agreed that Angela could visit. Maria was noted as consenting to both daughters visiting her but worried about them arguing if in the same room. It was agreed that the sisters would visit at different times. Angela visited her mother every day when she was in hospital. After Maria was discharged to Baycrest for rehabilitation after her surgery, Angela visited her twice a day.
- [97] Angela went to visit her mother in hospital on May 29, 2016. She brought the 2007 POA with her and was advised by hospital staff that there was a more recent POA dated in 2016. Angela was noted as becoming very emotional and telling staff that her mother had dementia and does not remember signing any legal documents. The 2016 POA was shown to Maria by nursing staff when Angela was not in the room. Maria told the nursing staff that she did not remember signing the document and that she wanted both of her daughters as POAs. This discussion with Maria was not disclosed to Angela. Angela did not see the 2016 POA until it was disclosed in the course of this proceeding.
- [98] Angela stayed overnight and accompanied her mother when she went for x-rays the next morning. When she returned from the x-rays, Bernadette was there waving a manilla envelope. According to Angela, Bernadette told her to "wait and see what she had done." Bernadette did not permit her to accompany her to visit the doctor to receive the surgery report.
- [99] Given Angela's concerns about the new POA, she attended hospital between May and July 2016 and videotaped her mother during certain visits. The videotapes have been translated

from Italian to English. Neither the translation nor the admissibility of the video transcription was contested.

- [100] Angela's purpose of videotaping the visit with her mother was to provide some proof related to her concerns about her mother's capacity. During the course of the videotape on May 30, 2016, Angela asked her mother if she had gone to a lawyer and signed the McLeod Home and "everything else" to Bernadette. Her mother denied going to a lawyer. Maria then changed her story and said that she had gone to a lawyer "because she [Bernadette] is in the house" and "if I need something she is always there inside."
- [101] During the June 16, 2016 videotape, Angela asked Maria if she remembered the nurse showing her the 2016 POAs. Maria asked, "What did I sign for?" and asked when it happened. She then said that her money was in the bank and no one could touch it. She said, "Angela, your sister cannot take any of the money.... Those 100,000 dollars are there. Nobody can touch them.... At my death they belong to both of you!" Angela then asked her mother about the house. Maria is noted as being upset but said, "[T]he house too, of both of you." When asked who she was leaving her "stuff" to, Maria replied, "nobody" and then later said, "I have two children." Angela's evidence was that this was always her mother's response regarding her Estate planning, meaning that she intended to leave her Estate to her children equally. Angela's evidence was that she was concerned her mother had been duped into transferring the McLeod Home by Bernadette and that she wanted to protect what her mother and father had worked their whole lives for.
- [102] Angela expressed concerns about the fact that her mother had put Bernadette's name on her bank accounts. Maria knew Bernadette's name was on the account but told Angela that Bernadette could not take out money without her knowing about it. She stated that she still had \$100,000 in the bank, no one could touch it and it was intended for both of her daughters when she died. She then told Angela to mind her own business because she and Bernadette would kill one another if she put them both on the account. By June 2016, Angela was aware that large amounts of money had been taken out of the account as she had hired a lawyer and was receiving monthly statements.
- [103] Angela testified that after the Bank POA was signed she went to her mother's bank to find out if money had been taken out of her accounts. Bank personnel told her they could not tell her anything other than there had been a lot of activity on the account.
- [104] Angela agreed that during her mother's hospitalizations starting in 2015, Maria accused Angela of only being involved with her care because she wanted her money. Angela did not disagree that her mother made those accusations, but she testified that she found this shocking and that her mother had never made such accusations in the past. She blamed Bernadette for putting these ideas on her mother's head.
- [105] Despite Angela's confirmation to hospital staff that her mother had dementia and was incapable of signing any new POAs, she had her mother sign a release form on June 21, 2016, in order to obtain a full set of her mother's hospital records. She believed her mother

was capable of signing the release form. Angela received disks containing approximately 1,200 pages of hospital records.

- [106] On June 22, 2016, Bernadette told hospital staff that that she did not want any details related to her mother to be shared with Angela and that she did not want Angela visiting their mother unless Maria approved the visit. The hospital note from that date also refers to Maria as having long-standing mood issues, not willing to see friends anymore and refusing to attend day programs.
- [107] Bernadette withdrew the majority of the funds in her mother's bank accounts within three months of her mother signing the Bank POA. This left virtually no residue in Maria's Estate and therefore very little to divide with Angela.
- [108] Angela was not aware that the McLeod Home had been transferred to joint names until she went to the Land Titles office on July 4, 2016, and saw the title abstract. Angela videotaped her mother on July 7, 2016 and told her that her house was no longer hers alone. Maria told her not to worry because "she is in my house." Angela immediately hired a lawyer following her discovery of the title transfer. The within Application was issued in August 2016.

The Evidence of Non-Party Witnesses

Liliana Li Preti

- [109] Maria's cousin Liliana Li Preti gave evidence in relation to her affidavit sworn on May 19, 2022. She is 77 years old and now retired. She worked for CIBC for over 40 years. Maria and Liliana were close. They would visit and speak by phone regularly. Liliana's evidence was that after Bernadette moved in with her mother it was more difficult to call and visit Maria. Whenever she would visit Maria, Bernadette was always there and she was unable to visit with Maria alone. She visited Maria a few times when she was in hospital and while at Baycrest. She told Liliana that she did not want Angela to come to her house in order to reduce fighting between the sisters.
- [110] In 2007, Maria approached Liliana and asked if she would keep her 2007 Will, POAs and her CIBC bank passbook. The 2007 Will was in a sealed envelope and the POAs were stapled to the envelope. The bank passbook was in a bag. She told Liliana that everything had been left to her daughters jointly and that there was \$80,000 in her bank account. She wanted Liliana to keep the documents because she was afraid that Bernadette might attempt to alter her Will or take money out of her account.
- [111] Liliana recalled that in 2012, she helped Maria set up pre-authorized withdrawals for many of her ongoing expenses such as Bell, hydro and water bills. She knew that Maria usually paid for everything with cash and did not have an ATM card. She was aware that Maria had put a caution on her bank account which alerted bank tellers to a requirement that Maria had to be present in order for money to be withdrawn from the account. Liliana was aware of this because she happened to be working in the branch where Maria banked when

the caution was originally signed and placed on the account. This would have been in the 1980s.

- [112] At some point in 2015, Angela came to Liliana and asked for a copy of the POA for Personal Care as she was having difficulty accessing her mother in hospital. Liliana made a copy for her. She did not provide a copy to Bernadette as Bernadette did not request one.
- [113] Liliana was very surprised to hear about the 2016 Will. In her affidavit she deposed that she did not believe that Maria was “fully aware” when she signed her 2016 Will; however, she could not provide any factual basis for this opinion except her evidence that Maria told her that she wanted to leave things to Bernadette and Angela equally. Liliana could not recall the last time Maria told her this before she died but she estimated Maria told her sometime during the six years prior to her death.

Joseph “Joey” Abbruzzese

- [114] Joey Abbruzzese is Angela’s oldest son. He is 43 years old and lives in Brampton. He swore an affidavit in this proceeding and testified that he was close to his grandmother and visited her often. She often made him meals and they would chat.
- [115] Joey does not speak Italian. His grandmother communicated with him using what English she had. When her health began to decline it was harder for her to speak in English. During his last few visits in early 2016, she spoke to him only in Italian and was not mobile. Joey interpreted this as a cognitive decline in his grandmother.
- [116] Joey testified that in 2015 and 2016, his visits to his grandmother were restricted by his aunt Bernadette, who also restricted access to his grandmother by his mother, father and his brother Andrew. On May 8, 2016, Joey’s parents visited Maria for Mother’s Day. Joey had texted his aunt to let her know they were coming. Bernadette arrived during this visit and the visit promptly ended.
- [117] Joey visited his grandmother only three or four times in 2016 due to the conflict between his mother and his aunt. He would drop in to see his grandmother if he saw that his aunt’s car was not in the driveway. On one of these occasions in March 2016, his grandmother asked him to help her call Angela. Joey made the call and gave the phone to his grandmother. They spoke for about ten minutes in Italian. Bernadette returned home during the call and his grandmother quickly hung up the phone. Joey’s evidence was that his grandmother seemed afraid when Bernadette came in. Bernadette yelled at Joey and asked why he was there. An argument ensued but Bernadette and Joey talked it out and continued to communicate by text after that.

Joseph Nazzicone

- [118] Joseph Nazzicone (“Joseph”) swore an affidavit in this proceeding dated March 2, 2023. He said he has known the Iannarelli family since he was in high school, and he and Bernadette dated for about six years. They are now friends.

- [119] Joseph has lived in the Riverhead Home, owned by Bernadette, continuously since 2012. He does not pay rent.
- [120] Joseph was very close to Maria and visited her every day or every second day. After her hip surgery he helped out by driving her to the bank and to do grocery shopping. Joseph speaks fluent Italian and always spoke to Maria in Italian. He told the court that Maria treated him like a son. He described Maria as “tough” and a person who spoke her mind.
- [121] His view was that Maria’s mental abilities remained intact until her death in 2018. She had physical limitations that arose only after her surgeries. She told him she wanted to stay in her home until she died because she and her husband sacrificed everything for the McLeod Home. She did not want it sold even after her death.
- [122] Joseph told the court that he rarely saw Angela visit her mother. He agreed that he attended a birthday party at Angela’s house in 2013 or 2014. He did not agree that Bernadette restricted Angela, her family or anyone else from visiting Maria. He did not agree that Bernadette was hostile towards Angela’s family or Angela.
- [123] Joseph was shown the transcript of the videotaped interview with Section 3 counsel, Natalia Angelini (discussed in more detail below). Specifically, he was directed to the beginning of the videotape in which Bernadette is heard telling her mother what to say to Ms. Angelini. Joseph denied that this demonstrated any type of influence by Bernadette over her mother. He viewed it as Bernadette simply telling her mother who would be coming to see her and what to expect. He saw nothing wrong with that.
- [124] Joseph was also shown the transcript of a video he took of Maria sometime in 2016. He confirmed that it was a videotape of an exchange between him and Maria. The conversation was in Italian. There was an English transcript. Angela’s counsel objected as the translation was not certified. I permitted Joseph to be questioned on the videotape with the understanding that the court would address the weight to be given to the videotape in its reasons. Joseph was asked about the following exchanges:

Joe: You said that you did not put your signature, for Angela to get your documents. Did you put your signature

Maria: Ya, but it was like this. Joe, she came in the night to the hospital and she said. Do you need something. I said no. I do not need anything. Well, if you do not put your signature, if you want something, they will not give it to you. So I signed

Joe: So, she took you for stupid

Maria: She took me by the ass not for stupid. Yeah, but she cannot do anything, because I, because, there we are ruined. She even said that if this house was left to her, she would sell it immediately

Joe: And then, it is said on the papers that you hate me, that you can't look at me

Maria: Ma, what

Joe: She did in on purpose

Maria: Yes, she did it on purpose, all of it, yeah. God bless her father that will make her pay later, five years after his death. Think about it that she already knows that I gave the house to Angela

Joe: To Benedetta

Maria: To Benedetta,

[125] It was suggested to Joseph that he was attempting to rile Maria to get her angry at Angela. Joseph denied this. When asked why he made these videos (there were four of them) he said that he thought it would be in “our” best interest to make them. He told the court that by “our” he meant in the best interest of him and Bernadette.

[126] He was also asked why he would tell Maria that Angela’s court documents said that Maria hated Joseph when that was not true. Joseph responded that he was sure that it was in the court documents somewhere. It was suggested to him that he told Maria this simply to incite anger towards Angela. He denied this was the case.

[127] In another videotape made around the same time, the following exchange took place between Joseph and Maria (excerpted):

Joe: You wanted Benedetta to get the house, right.

Maria: Yes

Joe: Nobody forced you.

Maria: Who forced me?

Joe: Now, Angela looks at it, because she has washed her hands, she does not want to see you, she does not want to do anything for you,

Maria: [unknown]

Joe: Now she is putting all these lies, that Benedetta forced you, all lies.

Maria: All lies.

[128] The same objections were made by Angela’s counsel with respect to the translation of this exchange, with the same response by the court in terms of what weight is to be given to the exchange. Joseph again denied that he made those statements to Maria in order to incite anger on her part towards Angela.

Ms. Deka Islow

- [129] Ms. Islow was unable to testify at trial due to illness. Counsel agreed that her affidavit sworn March 6, 2023 would be used as her evidence, with certain agreed upon redactions given that Ms. Islow was not available for cross-examination.
- [130] Ms. Islow is a Personal Support Worker who worked with Maria between January 2015 and October 2017. She is fluent in Italian and prior to taking on this position she had never met Maria or Bernadette.
- [131] Ms. Islow's evidence was that she attended at Maria's home for two hours each morning and each evening. It is unclear from her affidavit whether the schedule included weekends. During the time she worked for Maria, Bernadette and her granddaughter were also living in the McLeod Home. Ms. Islow never saw Angela during the time she worked there.
- [132] When she arrived in the morning, Bernadette would update her on her mother's condition, the food she had prepared for her mother, and the clothes she had set out. Bernadette would then leave for work. Ms. Islow would assist Maria with her shower and dressing and help her with her exercises or a walk. When she returned in the evening, she helped Maria change into her pajamas and get ready for bed.
- [133] Ms. Islow described Bernadette as a good daughter who prepared her mother's meals and set out clean clothes and towels for her mother. She never witnessed any conflict between Bernadette and her mother. She described Maria as being a happy person who was very calm and nice and as a person who has worked a lot with the elderly, Ms. Islow did not witness any indication that Maria was incapable although counsel conceded that Ms. Islow was not qualified to make such an opinion.

Section 3 Counsel – Natalia Angelini

- [134] Ms. Angelini was called to the Bar in 2001. She practices estates litigation with Hull & Hull LLP in Toronto. She has been doing work as Section 3 counsel since approximately 2015. Ms. Angelini was appointed to act as Section 3 counsel for Maria in November 2016. She had her first meeting with Maria on December 14, 2016. She had never met Maria or Bernadette prior to that meeting. She also met with Maria on January 12, 2017, and October 5, 2017. Ms. Angelini agreed that Maria presented as reasonable, rational and sensible during those meetings. She described Maria as engaged and responsive to her questions. She spoke to Maria in Italian during those meetings.
- [135] The first meeting with Maria on December 14, 2016 lasted one and a half hours. Ms. Angelini requested that Bernadette leave the house and she met with Maria alone. She noted that Maria remained engaged throughout the meeting, although at times she had to raise her voice in order to be heard by Maria.
- [136] In the course of that meeting, Maria told Ms. Angelini that she had not seen Angela for six years and that Bernadette was a "good girl." Ms. Angelini told Maria that she had prepared new POAs and named Bernadette as her Attorney and Joseph Nazzicone as the alternate.

Maria said Joseph was like a son to her. Maria was not surprised or unaware of the new POAs according to Ms. Angelini. Maria advised Ms. Angelini that she had told Angela about the new POAs.

- [137] Maria denied the allegation that Bernadette was verbally abusive to her. She told Ms. Angelini that she is not concerned if Bernadette was using her money and that she had given her house to Bernadette because Bernadette deserved it. Maria said she thought Angela was just upset because she is jealous about the house.
- [138] Ms. Angelini discussed the possibility of a capacity assessment with Maria and in particular the consequences of a finding of incapacity, including that Angela could be appointed her guardian and that the house transfer and POAs could be set aside. She noted that Maria was cost oriented and felt that if she was found to be capable that would end the litigation quickly. Maria also commented that she would not want Angela to be her guardian because she had not seen her in years, and she was a liar when she alleged that Bernadette was preventing Angela from visiting her.
- [139] Ms. Angelini's next meeting was on January 12, 2017, when she met with Maria for about 40 minutes at her home and without Bernadette present. Ms. Angelini confirmed that Maria understood that her capacity to transfer the McLeod Home into joint names with Bernadette, to make new POAs, and to make a new Will was being challenged and that Angela was alleging that Bernadette forced her to do it. Maria denied the allegation and explained that she transferred the McLeod Home out of the goodness of her heart and because Bernadette does everything for her. She has not seen Angela and does not want to see her.
- [140] Ms. Angelini noted that during that meeting Maria would ask her to repeat a question if she did not understand it. Ms. Angelini felt that Maria was expressing her wishes to her.
- [141] The next meeting Ms. Angelini had with Maria was on October 5, 2017. Once again, she met with Maria at her home without anyone else present. By that point the results of Dr. Bruto's assessments were available, and Ms. Angelini reviewed the assessments with Maria. Maria did not agree with Dr. Bruto's conclusions. Ms. Angelini discussed the possibility of disputing Dr. Bruto's conclusions and requesting a further assessment from a different doctor. Maria was hesitant to obtain a second opinion given the cost. She was aware that Ms. Angelini's legal fees to that point were in the range of \$14,000. However, Maria also did not want the litigation to be prolonged and was open to the idea of mediation.
- [142] Ms. Angelini is not sure whether she raised the issue or Maria did, but Maria repeated to her that she gifted the house to Bernadette because Bernadette has done everything for her and stayed in the house since her husband died. She added that Angela does not visit anymore and had abandoned her.
- [143] Ms. Angelini was asked whether she thought there was any substance to Angela's allegation that Maria had been forced to change her 2007 Will, POAs and transfer the McLeod Home. She testified that her own dealings with Bernadette were not pleasant, and

her concerns were not so much about capacity as about whether there might be some influence at play. However, she did not have enough contact with Bernadette and Maria for the issue to be raised beyond a concern. Ms. Angelini deposed that she knew that Maria was not cognitively perfect but because of how Maria engaged with her she was not too concerned. As for the undue influence, Ms. Angelini described it as a “spidey sense” that there was possibly some undue influence happening. She said she was not certain if, for example, Bernadette had prepped her mother for the meetings. She noted that Maria often repeated the same things (such as her reasons for gifting the McLeod Home to Bernadette) without being prompted.

- [144] Ms. Angelini noted that Bernadette attempted to discuss the case with her on more than one occasion. This prompted her to write to Bernadette’s lawyer once or perhaps twice to request that he discuss this issue with his client and remind her that Ms. Angelini could not discuss the case with her. Ms. Angelini noted that she felt that when she went to Maria’s home that Bernadette was aggressive and she was not warmly received.
- [145] After this meeting took place, Ms. Angelini was advised that it had been recorded. She was unaware during the meeting that it was being recorded. Bernadette’s evidence was that she recorded the meeting at her mother’s request.
- [146] The first five minutes of the tape is a conversation between Maria and Bernadette just before Ms. Angelini arrived. Bernadette reminded her mother that the lawyer was coming to visit that day. Bernadette told her mother what she was to tell the lawyer as follows:
- (a) That from the first day her father died, Bernadette did not leave her for one minute and that is why she left the house to Bernadette;
 - (b) That she does not want to go Angela’s house or an old age home;
 - (c) That Bernadette doesn’t work in order to take care of her mother;
 - (d) That Maria was to say the above to the lawyer without the lawyer asking first.
- [147] When the recording was played for Ms. Angelini, she gave evidence that it raised red flags for her. She said it validated her concern that Maria was being influenced because some of the things that Bernadette reminded her mother to say in the meeting were the same things she told Ms. Angelini.
- [148] Bernadette denied coaching her mother. She simply wanted to ensure that her mother knew how to properly raise her concerns with her lawyer. Ms. Angelini was very soft spoken, and Bernadette was concerned that her mother would not hear her and further that she might not understand legal terms used by Ms. Angelini. Bernadette was adamant that information given to Ms. Angelini was entirely voluntary and not discussed in advance. Bernadette’s evidence was that her mother wanted to stay in her own home and that she had promised her father she would never put her mother in a nursing home.

The Expert Evidence

A. *Dr. Venera Bruto*

- [149] Dr. Venera Bruto was called as an expert by the Applicant. Dr. Bruto is a certified Clinical Neuropsychologist, Clinical Psychologist, Rehabilitation Psychologist and Health Psychologist. She has a Ph.D. in psychology and neuroscience. She has practiced in the field of psychology and neuroscience for 33 years.
- [150] Dr. Bruto does clinical assessments related to treatment and capacity assessments mostly related to older adults. She was a qualified roster capacity assessor under the *Substitute Decisions Act, 1992*, S.O. 1992, c. 30 (the “*SDA*”), for ten years. She resigned from the roster in 2022. The capacity assessments prepared for this litigation were all done while Dr. Bruto was on the *SDA* roster. Dr. Bruto has prepared both private and court-ordered assessments both in relation to *SDA* matters and other types of assessments such as the capacity to make a Will or instruct counsel. Dr. Bruto speaks fluent Italian and spoke with Maria in Italian during all interviews for the assessments she performed.
- [151] No issue was raised as to Dr. Bruto’s qualifications as an expert. She was qualified by the court to testify as an expert on capacity and capacity assessments.
- [152] Dr. Bruto prepared eight different reports as per the joint instructions of counsel for Angela, Bernadette and Section 3 counsel, seven of which were dated August 1, 2017. Dr. Bruto found that Maria lacked capacity in all decisional domains both contemporaneously and retrospectively when she signed the transfer, 2016 Will and POAs in April 2016. The reports consisted of the following:
- (a) A contemporaneous assessment of Maria’s capacity to name an Attorney for Personal Care (August 1, 2017);
 - (b) A statement under s. 49(2) of the *SDA* as to Maria’s capacity to manage her personal care (August 1, 2017);
 - (c) A contemporaneous assessment of Maria’s testamentary capacity (August 1, 2017);
 - (d) A contemporaneous assessment of Maria’s capacity to manage her finances (August 1, 2017);
 - (e) A statement under s. 9(3) of the *SDA* with respect to Maria’s capacity to manage her finances (August 1, 2017);
 - (f) A contemporaneous assessment of Maria’s capacity to name an Attorney for Property (August 1, 2017);
 - (g) An assessment of Maria’s capacity in all of the abovementioned decisional domains as of April 2016 (August 1, 2017); and

- (h) Reply report to Dr. Mitchell's report (September 7, 2021).
- [153] Dr. Bruto met with Maria on three different occasions in June 2017 for the assessments dated August 1, 2017. Each meeting was an hour to an hour and a half. Dr. Bruto met with Maria alone in her office.
- [154] Dr. Bruto relied on a number of medical reports. For the contemporaneous assessments, Dr. Bruto's evidence was that the medical reports were simply for context and often irrelevant. Dr. Bruto told the court that if the medical records reveal a diagnosis of dementia, it helps her understand the circumstances in which she is preparing her report, but it would not change her opinion. For example, if the medical records suggest the person has dementia, that would not overrule her opinion if she thought the individual was nonetheless capable.
- [155] Dr. Bruto was directed to several physicians' notes related to Maria that did not mention dementia. She was asked why she did not include those in her report. Her response was that she used the medical notes to inform her of anything related to Maria's mental state. That did not necessarily mean a reference to or diagnosis of dementia. She explained that dementia was not the target of her contemporaneous assessments as a form of short cut to incapacity. For example, not all of Maria's clinicians agreed on her diagnosis or were thorough. Maria's medical conditions, such as decreased hearing, renal problems and sleep apnea could have implications for brain function. Dr. Bruto testified that her job was not to analyze the medical records, critique them or provide a clinical opinion as to whether Maria had dementia. That would not have been appropriate given her instructions.
- [156] Dr. Bruto testified that health records almost never address issues related to whether a person can appreciate the foreseeable consequences of their decisions. That is because health records are created to assist in providing assessment and treatment in the clinical world.
- [157] What informs Dr. Bruto's opinion on capacity in a contemporaneous assessment is how the individual responds to her questions. For example, sometimes Dr. Bruto will provide certain information to the person being assessed and then have them confirm that information 45 minutes later.
- [158] Although her reports were done seven years ago, Dr. Bruto had an independent recollection of Maria being bright, engaged and smiling. However, much of what she said did not make sense. For example, Maria would make certain statements about transferring her home or her opinions about Angela. The statements would be made randomly and not in response to questions asked. Dr. Bruto called these statements "ritualistic" because Maria could not explain why she was making them. She could not tell Dr. Bruto what Angela had done to upset her, why she stated that Angela only thought of herself, nor could she explain why one daughter was good to her and the other was not. She could not tell Dr. Bruto when she had last seen Angela or what they had discussed at that time. When asked to explain what she meant by those statements, Angela would simply repeat the same refrain.

- [159] Dr. Bruto also concluded that Maria's presentation was consistent with cognitive impairment and moderate to severe dementia including deficits in learning new information, retention and recall of previously known information and impaired reasoning.
- [160] In assessing retrospectively whether Maria had capacity in April 2016, Dr. Bruto did rely on the medical reports to assist her in coming to her conclusions. She reviewed what she called certain "landmark" records including Jenny Stark's assessment in 2014 and Dr. Ingber's notes from that time.
- [161] Dr. Bruto was thorough in her review of Maria's medical records and noted the following:
- (i) In 2001, Maria was referred by her family doctor at the time, Dr. Leone, to geriatrician Dr. G. Marotta for short-term memory concerns. Dr. Marotta's conclusion was that Maria was suffering from depression due to the deaths of her sister and her grandson Carlo.
 - (ii) In 2002, Dr. Marotta reported that Maria's cognitive condition remained stable.
 - (iii) In 2005, Dr. Marotta reported that Maria's performance on cognitive testing was "quite good."
 - (iv) In 2012, Dr. Nadajafi saw Maria regarding her PMR and prescribed prednisone.
 - (v) In May 2014, Maria saw Dr. Ingber, her new family doctor. He referred her to the Geriatrics Outreach Team at Humber River Hospital for an assessment.
 - (vi) On May 20, 2014, Social Worker Jenny Stark provided a report in accordance with Dr. Ingber's referral. She noted that Bernadette told her that her mother's cognitive functioning and memory had declined since her husband's death in 2006, that she tended to fixate on ideas, had a poor appetite and was uninterested in activities. Ms. Stark described Maria as being oriented to place and not time and that she had poor insight into her medical, functional and social status and her declining cognition and memory. Maria scored 17/29 on the MMSE, which was an impaired score. She had difficulty following instructions, paying attention, recalling three words that she had previously correctly repeated, and correctly drawing the time on a clock face. Ms. Stark recommended a follow up with Dr. Ingber for her low mood and cognitive decline.
 - (vii) On June 2, 2014, RN Kerry Rowsell-Doucet of CCAC noted that Maria's health status had declined and she needed assistance with activities of daily living. She required supervision for meal preparation, medication management and her decisions with respect to daily decision making were impaired.
 - (viii) On June 16, 2014, Dr. Ingber met with Maria, Angela and Bernadette regarding Ms. Stark's assessment report. He discussed the results of the MMSE and recommended that Maria be started on Donepezil, a medication used to treat dementia. Angela and Bernadette did not agree to this medication and Maria denied

that she suffered from depression. Dr. Ingber opined that Maria was at risk of falls and recommended home modifications.

- (ix) On July 28, 2014, Dr. Ingber noted that Maria had fallen, hit her head, and required three stitches.
- (x) On April 7, 2015, Ms. Ilena Bisgould from CCAC reported that Maria had fallen within the previous 90 days and that Maria had short-term memory problems as well as difficulty finding words and finishing thoughts. Prompting was often needed. She appeared to miss part of the intent of messages. She required help for phone use, meal prep and finances. Sometimes her decisions were poor and she needed supervision. Her clinical issues were documented as cognition, communication disorders, depression, poor vision, falls, and difficulties with activities of daily living and medication management.
- (xi) On September 10, 2015, Maria had another fall. She was admitted to hospital on September 11, 2015, and was admitted for surgery to repair a hip fracture. On pre-operative assessment, Dr. Spiegelman queried whether Maria suffered from cognitive impairment.
- (xii) On September 16, 2015, Maria was admitted to the rehab unit at Humber River Hospital following her surgery. Dr. Chiang noted the queries regarding Maria's cognitive impairment.
- (xiii) On September 22, 2015, Dr. Reinhartz reported a history of dementia along with other conditions. He noted no evidence of delirium on that date.
- (xiv) On October 2, 2015, Maria was discharged from rehab. In his discharge summary, Dr. Reinhartz listed all of Maria's conditions and noted that her history included dementia. A geriatric outreach assessment was recommended.
- (xv) On October 2, 2015, Ms. L. Garcia of CCAC reported that Maria's cognitive skills for decision making were impaired and that she needed assistance and supervision for meal preparation and medication management.
- (xvi) On October 15, 2015, RN N. McFarlane of CCAC reported that Maria was alert but forgetful and required extensive assistance with daily activities such that she could not be left alone. She was at high risk for falls and suffered from a self-care deficit and cognitive impairment. She further noted that Maria had short-term memory difficulties, missed messages and needed prompting, and required help with phone use, medication management and finances. She further noted that Maria had conditions which made her cognition and daily living patterns unstable.
- (xvii) On November 17, 2015, Dr. Ingber's notes indicate that Maria's condition had been declining since her discharge from rehab in October 2015. She was not walking and refused to get out of bed.

- (xviii) On March 29, 2016, Maria was noted as being unwell and lightheaded. She required an urgent cardiac consult, blood work and a sleep study.
 - (xix) On May 28, 2016, Maria underwent her second hip surgery.
 - (xx) On June 1, 2016 Dr. A. Craft noted that Maria's family reported no concerns regarding Maria's cognition. Dr. Craft later prescribed an anti-depressant, Zoloft, for Maria. Throughout June 2016, there were doctor's notes indicating that Maria suffered from left leg pain, an inability to walk and failure to cope.
 - (xxi) On September 20, 2016, Dr. Ingber reported that Maria appeared to be of sound mind at that time. However, he queried the inconsistency between that conclusion and the geriatric assessment report from 2014.
- [162] Dr. Bruto was taken to Social Worker Jenny Stark's report dated May 21, 2014. Maria was referred to the Humber River Hospital Geriatric Outreach Program, of which Ms. Stark is a part, by Dr. Ingber who noted some cognitive decline, thought Maria had dementia and recommended Aricept, a medication for dementia.
- [163] Dr. Bruto was asked about Ms. Stark's note in her report that Bernadette had noted a functional decline in her mother since her diagnosis of PMR two years prior. Ms. Stark also noted that Maria displayed "poor insight" with respect to her medical, functional and social issues and was an "inconsistent historian." Dr. Bruto viewed Dr. Ingber's observations and Ms. Stark's report as a trajectory for Maria's decline starting in 2014.
- [164] It was pointed out to Dr. Bruto that Ms. Stark did not speak Italian and relied solely on Bernadette as her interpreter. She was asked whether this would affect her view of the efficacy of Ms. Stark's report given the possibility of bias on the part of the interpreter. She agreed that the validity of Ms. Stark's report could be questioned on that basis but she did not view the data in that report as useless. In many cases, clinicians rely on family members as interpreters as there is often no other option. Further, Ms. Stark's assessment was intended as a screening tool for red flags only and not an assessment of Maria's cognition, as she was not qualified to give a diagnosis of dementia. Ms. Stark recommended that Maria see a specialist, but Dr. Ingber chose not to pursue that.
- [165] Dr. Bruto was asked about the effect of Maria's hip surgeries in 2015 and 2016 on her brain function. Her opinion was that such surgeries "tend not to be kind" to brain function in older adults. The surgeries, the Stark report, Dr. Ingber's opinion, Bernadette's reporting of her mother's decline and the CCAC observations that Maria was having functional and cognition problems all led to Dr. Bruto concluding that Maria could not have understood the complexities of making a Will and POAs in April 2016.
- [166] Dr. Bruto was asked about her conclusion that Maria held "strong opinions." She explained that she was referring to Maria's ritualized statements that Angela should not be involved and that Bernadette was always beside her. Maria said these things as if she truly believed them but she could not explain why she believed them. Dr. Bruto testified that one can hold strong opinions and still be incapable. She also commented on Maria's continuous request

for approval for having transferred her home to Bernadette and her laughing at inappropriate times.

- [167] Dr. Bruto was directed to Dr. Ingber's note of September 20, 2016, which stated that upon seeing and assessing Maria, he found her to be of sound mind. He mentioned the geriatric assessment in 2014 in which she tested in the cognitive impairment range. He specifically noted that he had difficulty reconciling how Maria appeared to him that day and the 2014 assessment. Dr. Bruto responded that if Dr. Ingber truly felt that Maria had no cognitive issues he would never have referred her for a geriatric assessment in 2014 or suggested she go on medication for dementia. Suddenly in September 2016, Dr. Ingber noted that Maria appeared to be fine, but he gives no information as to how he came to that conclusion. Further, there were many other clinicians and individuals who worked with Maria who had queried the possibility of cognitive impairment.
- [168] Dr. Bruto was asked to prepare an additional report in September 2021 when Mr. Vumbaca's notes and Dr. Mitchell's report were available. Dr. Bruto asked to receive all of the same medical records reviewed by Dr. Mitchell. Her opinion, having reviewed Mr. Vumbaca's notes and Dr. Mitchell's report, did not change. In fact, her evidence was that the additional information strengthened her opinion.
- [169] Dr. Bruto disagreed with Dr. Mitchell's assessment of Maria's trajectory of cognitive decline. Dr. Bruto's opinion was that there was significant evidence in the medical records that Maria's trajectory of decline continued after the 2014 Stark assessment and that this was noted by CCAC personnel who saw her in her own environment as well as Bernadette. The descriptions in the medical records were similar to what Dr. Bruto had noted during her interviews with Maria and included a lack of insight into her own deficits, and memory and problem-solving issues.
- [170] Dr. Bruto questioned Mr. Vumbaca's view that Maria was capable of signing a Will and POAs. She did not view his statement that Maria understood everything as sufficient. She felt he should have gone farther to query whether she knew what her Estate comprised of, exactly who she was leaving it to, and who her natural heirs were. For example, Dr. Bruto queried whether Maria understood the foreseeable consequences of Joseph making her healthcare decisions for her if Bernadette could not do so and whether she understood that she could have named one her grandchildren (like Joey) instead. Dr. Bruto wondered if Maria was telling Mr. Vumbaca things that did not make sense as she had done in their interviews or whether he simply discarded those parts of the interview. She felt as a capacity assessor that his notes were vague.
- [171] In cross-examination, Dr. Bruto was asked about the fact that since Mr. Vumbaca had never met Maria before and since they met alone, he could only have received the information about her assets from her and that information was therefore correct. Dr. Bruto suggested that Mr. Vumbaca should have asked the question in different ways. For example, rather than Maria simply telling Ms. Vumbaca how much money she had in her bank account, he should have later asked to confirm whether it was \$80,000 or \$150,000.

- [172] Dr. Bruto was also asked about the fact that during her interview with Mr. Vumbaca, Maria correctly recited the names and dates of birth of all her children and grandchildren. It was suggested to her that this was evidence of Maria's capacity at that time. Dr. Bruto's response was that it depended on how the question was asked of her. Further, in 2017 when Dr. Bruto interviewed her, she did not know the answers to any of those questions.
- [173] Dr. Bruto was cross-examined extensively on Dr. Marotta's reports in 2001, 2002 and 2005. Those reports indicated that Maria did not have any real cognitive decline but may have been suffering from depression. Dr. Bruto did not respond to those reports as she found that there was no information as to exactly what testing Dr. Marotta had done, and they were too dated to be helpful given that capacity is very time specific.

B. Dr. Sara Mitchell

- [174] Dr. Mitchell was called as an expert witness by Bernadette. She is a doctor with postgraduate and specialty training in behavioural neurology and neuropsychiatry. She completed a five-year neurology residency at the University of Toronto. She has also done a fellowship in cognitive behaviour, neurology and degenerative diseases. She has a current academic focus on testamentary capacity and has participated in conferences and given lectures in this area from a medical perspective.
- [175] Dr. Mitchell's qualifications were not contested, and she was permitted to give expert evidence in the area of testamentary capacity. However, Angela's counsel objected to her giving evidence in the area of undue influence. He submitted that Dr. Mitchell did not have the required training or expertise to opine on the issue of undue influence in this case. He noted that in the peer-reviewed publications in Dr. Mitchell's CV, there was no indication she had ever published in the area of undue influence. She has never been qualified as an expert witness in the Superior Court in the area of undue influence. Finally, Mr. Delagran submitted that other published articles on the topic of undue influence related solely to contemporaneous assessments and not retrospective assessments.
- [176] Dr. Mitchell's evidence was that undue influence and cognition are inversely related. A medical expert must look at both the testator's cognition and their susceptibility to undue influence. The concepts are interrelated.
- [177] Dr. Mitchell was permitted to testify as to the relationship between cognition and undue influence but with the understanding that the current caselaw in this area is limited to contemporaneous expert opinions on undue influence: see *Abrams v. Abrams*, 2008 CanLII 67884 (Ont. S.C.).
- [178] Dr. Mitchell was retained to comment on whether Maria had the requisite mental capacity to validly execute the Will and transfer her home to herself and Bernadette jointly in April 2016. Dr. Mitchell's report was prepared more than two years after Maria died. She never met Maria. Dr. Mitchell concluded that Maria had capacity at the relevant times.
- [179] Dr. Mitchell testified that she did a thorough review of the medical documentation with which she was provided. She noted that Dr. Marotta's reports between 2001 and 2005

contained the only formal assessments of Maria's cognition and they did not note any abnormalities. He attributed most of Maria's issues at that time to depression and mood issues.

- [180] With respect to the Jenny Stark assessment, Dr. Mitchell's evidence was that results of the MMSE were not reliable due to Maria's English deficiency, lack of education and the use of a translator (Bernadette) who may have had her own biases. She felt that Maria did relatively well with the clock drawing exercise. She noted that Ms. Stark was not tasked with making any diagnosis but was to collect information, assess functioning and determine what programming Maria might benefit from. She further noted that the tools used by Ms. Stark were only for screening purposes. It would have been helpful to have a series of screening tools administered over time so that the scores could be compared.
- [181] Dr. Mitchell was asked about Mr. Vumbaca's notes and his comment that Maria was not aware of whether she had any RRSPs and did not provide a value for her home. Dr. Mitchell responded that the test was whether Maria had a general understanding of the nature and extent of her assets. Dr. Mitchell testified that she would not have expected Maria to know the value of her home, nor was she asked to give it. The fact that she did not know if she had any RRSPs was not a significant enough deviation to change Dr. Mitchell's opinion. Maria knew that she wanted to leave her house to Bernadette and the rest of her estate to her daughters equally. She was consistent in her intention to leave a preferential share to Bernadette. That was enough to satisfy the required test in Dr. Mitchell's view.
- [182] Dr. Mitchell did not mention Dr. Bruto's reports in her assessment. A few days before testifying, she was given those reports to review. She agreed that a contemporaneous assessment of one's capacity is more effective than a retrospective one. Further a contemporaneous assessment permits the assessor to conduct cognitive testing, physical examinations, give a diagnosis, assess demeanour, observe how the individual answers questions and ask follow-up questions. None of these things are possible with a retrospective assessment.
- [183] Dr. Mitchell was asked about Dr. Bruto's reference to Maria's "trajectory of decline." She agreed that each patient is different but with a cognitive disease there will always be a decline.
- [184] Dr. Mitchell commented on Dr. Bruto's report in 2017 which opined on Maria's capacity in April 2016. She testified that she would have done some things differently including a repeat of cognitive testing and reviewing contemporaneous medical records. She described Dr. Bruto as having missed an opportunity to do a detailed cognitive assessment.
- [185] Dr. Mitchell was asked about Maria's comorbidities and how those may have affected her cognitive decline. She agreed that they can have an effect because they affect a person's "cognitive reserve." She agreed that after each of her hip surgeries Maria declined but more so after the May 2016 surgery.

[186] Dr. Mitchell was asked about the effect of depression, mood issues and isolation on undue influence as there were repeated references to depression and mood issues in Maria's medical records. She did not deny they would have an impact but took all of that into account when concluding that Maria had the requisite capacity to make a Will and transfer her property in April 2016.

Analysis and Legal Argument

[187] Maria Iannarelli was the subject of a plan by her daughter Bernadette. Through coercion, persuasion and indoctrination, over time she convinced her mother that her sister Angela was undeserving and absent. Through repetition and coaching at a time when her mother was vulnerable, she persuaded her mother that her caregiving efforts were worthy of her receiving almost the entire family estate. What was left to be divided between Bernadette and her sister was then conveniently dissipated to almost nothing by Bernadette by their mother's date of death.

[188] The behaviour of neither sister in this case deserves any praise from the court. Their conduct towards one another and towards their mother was at times shameful, vengeful and shocking. However, in the end I accept that had it not been for Bernadette's influence over her mother at a time when her mother was most vulnerable, the Estate would have been divided between the parties as originally intended by the testator.

[189] To begin, I accept the invitation of counsel for Angela that where her evidence conflicts with that of Bernadette, I prefer the evidence of Angela. The reasons for doing so are set out below. I note that Angela also gave some contradictory evidence; however, that evidence related to corollary issues and not to the substantive issues before the court.

[190] Overall, I found Bernadette to be a less credible witness than Angela. She was insistent that Angela had hated her for years but could not really say why. She wanted the court to believe she had sacrificed everything for her mother when in fact she enjoyed rent-free accommodation at her mother's home for years, which included shelter and expenses paid for her both herself and for granddaughters at various times.

[191] Maria constantly repeated that Bernadette gave up her job to move home and care for her parents. I find that is also not true. There was no evidence that Bernadette could actually work when she lived in Texas as she never became a U.S. citizen so she could not have given up any job. She moved home when her marriage broke down. The reality is that it was convenient for her to move home with her mother and continue to rent out her other home. She never engaged in any significant paid work once she came home, even during the years that her mother was cognitively and physically well.

[192] Bernadette's attempts in the Passing of Accounts Application to have the Estate repay her for amounts she claimed to have paid on her mother's behalf were almost entirely rejected by this court. Her dissipation of her mother's savings to almost nil, thereby leaving a negligible amount for her sister, were also disallowed in large part by this court and

Bernadette was required to repay more than \$60,000 to her mother's Estate (before the deduction of Estate expenses).

- [193] Bernadette claimed that her sister slapped her when they had their argument in 2014 but there was no evidence to corroborate this. I accept Angela's evidence that the heated argument may have prompted her to poke her sister in the shoulder but nothing more.
- [194] I further find that Bernadette was instrumental in fostering the idea that Angela was a bad person who was absent from her mother's life. Not only did she repeat this to her mother who in turn repeated it to others, she told hospital staff and medical professionals no doubt to ensure they also had a negative view of her sister. She attempted to minimize Angela's contact with her mother while in hospital and when she was frustrated with Angela's continued attempts to access her mother, she decided she would cut Angela out completely and have her mother sign a new POA.
- [195] Bernadette claims that the choice of Mr. Vumbaca to prepare the 2016 Will, POAs and transfer was based on the recommendation of another lawyer she knew, Mr. John LoFaso. This is also not borne out by the evidence. Mr. Vumbaca had a connection to Laura Nazzicone, who is Joseph's sister. Mr. Vumbaca's evidence was that Laura Nazzicone was a client and the referral came through her. Why not return to the lawyer who had drafted Maria's 2007 Will? Bernadette's response to this question was that she could not recall the previous lawyer's name or where he was located. She certainly could have asked Angela for this information. However, the most telling evidence was Bernadette's response in cross-examination that the lawyer who drafted the 2007 Will was not "her choice."
- [196] Other troubling contradictions surround the recording of Ms. Angelini's evidence. I will leave aside the serious breach of solicitor-client privilege that resulted from this recording; however, the entire premise for this recording is quite disturbing and is explored more below.
- [197] There was also significant contradictory evidence about when Maria became dependent on Bernadette. Bernadette insisted that her mother was independent in most aspects until her surgery in 2015. This is not accurate. After her diagnosis of PMR in 2012, she could not make meals, do laundry, or shower alone, and she required a walker. This dependency was adverted to by Bernadette during the Stark assessment in 2014. There is also Bernadette's own evidence at the hearing of the Passing of Accounts that her mother had been dependent on her since approximately 2005 and referred to below. She conveniently corrected this evidence at trial.
- [198] Bernadette relies on the unfortunate exchange between Angela and her mother during the 2015 hospital stay as evidence that Angela truly did not care about her mother and was only concerned about her money. The exchange occurred during the course of an argument between Angela and her mother while she was in hospital, in which her mother told Angela she never wanted her to visit her again. Angela responded that she wished her mother had died instead of her father.

[199] I accept that Angela left the hospital in tears and that the argument was an emotional one. Angela was frustrated about the negative comments about her that were repeated to her mother by Bernadette. She found it impossible to defend herself from the continuous onslaught of negativity fed to Maria by Bernadette. I do not view this isolated incident as being determinative of the relationship between Maria and Angela. In this family, it appears that conflicts were often resolved by emotional arguments where those involved lashed out. In the end, this argument did not prevent Angela from returning to visit her mother every day at the hospital.

The Evidence of Testamentary Undue Influence

[200] Starting with the general principles of undue influence, in *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353, the Supreme Court discussed undue influence as an equitable doctrine to save people from their own folly and from being victimized by others. The doctrine may be used to set aside an *inter vivos* transfer or a Will where there is sufficient evidence to show that the transfer or Will is not what testator or donor actually wanted.

[201] The threshold to prove testamentary undue influence is a high one. Indicators on which the court may rely include the following as set out in the case of *John Gironda et al. v. Vito Gironda et al.*, 2013 ONSC 4133, 89 E.T.R. (3d) 224, at paras. 77, 113:

- (a) where the testator is dependent on the beneficiary for emotional and physical needs;
- (b) where the testator is socially isolated;
- (c) where the testator has experienced recent family conflict;
- (d) where the testator has experienced recent bereavement;
- (e) where the testator has made substantial pre-death transfer of wealth to the respondent;
- (f) where the testator has made a new will not consistent with prior wills;
- (g) where the testator has failed to provide a reason or explanation for unexpectedly excluding a family member;
- (h) where the testator uses a lawyer previously unknown to him or her and chosen by the respondent.

[202] I note that all of the *Gironda* factors are present here.

[203] There is also another factor that is not specifically discussed in *Gironda* but is often raised as part of the overall landscape of undue influence. This factor relates to the “influencer” giving instructions directly or indirectly to the testator’s solicitor. There was no evidence that Bernadette gave instructions directly to Mr. Vumbaca although I will address the inference that such “instructions” may have been the subject of coaching by Bernadette.

- [204] Clearly, Maria was dependent on Bernadette. I find that dependency arose when she was diagnosed with PMR in 2012 and became more prevalent over time such that by 2015 and 2016, Maria could do little more than sit in her chair and watch television. She needed assistance with all other aspects of daily living and had both Bernadette and an outside PSW to assist her. The Stark assessment from 2014 also lists a number of areas in which Maria was completely dependent on Bernadette. Bernadette was already complaining of caregiver burnout in 2014.
- [205] I find that Bernadette attempted to minimize the results of the Stark assessment claiming she did not use the word “cognition” with respect to her mother’s declining memory and cognition and did not recall agreeing to the recommendation to avail herself of dementia-related resources. She tried to resile from statements such as the one she made to Ms. Stark that her mother’s cognitive decline began in 2006. Bernadette’s position at trial was that her mother was cognitively intact until the date of her death.
- [206] The Stark assessment ties into the 2012 PMR diagnosis in terms of Maria’s dependency. She was not making her own meals, doing her laundry or her shopping after 2012. She needed assistance with personal hygiene and mobility. As of 2014, there were further concerns about cognitive decline, depression and isolation. It was Bernadette who reported these issues to Ms. Stark. At trial, I found that she backtracked somewhat on the assessment results in an effort to have her mother appear more independent and less vulnerable than she actually was.
- [207] Of interest is Bernadette’s affidavit in the Passing of Accounts Application, sworn October 9, 2018, in which she states that from December 2005 onward, she assisted her mother with **all** activities of daily living and provided all the personal care and support that her mother required until she died. While at trial she described this evidence as incorrect, she relied on it during the Passing of Accounts hearing without correction.
- [208] In Dr. Bruto’s report regarding Maria’s testamentary capacity in 2017, Dr. Bruto recorded that Maria told her that Bernadette was the “boss of everything.”
- [209] I find that as Maria’s dependency on Bernadette increased, so did her vulnerability. This is clear from her insistence to Angela in the videotapes in May and June 2016 that Bernadette could not take money out of her account without her permission. By that point, Bernadette had already drained most of the account. Maria had no idea about this and thought all of her savings were still intact. Maria was vulnerable to Bernadette’s access to her bank accounts and even she was not aware of the degree of her vulnerability.
- [210] Angela was cross-examined about her mother’s dependency. She testified that her mother was independent in all aspects until after her surgery in 2015. The difficulty is that Angela was not aware of the extent of Maria’s dependency because she was not with her and, as explored further below, was not welcome in Maria’s home.
- [211] As for social isolation, there is no doubt that Maria was isolated. The medical reports are replete with references to Maria refusing outside care, refusing to take part in day programs

and having mood and depression-related issues. Between what I have found to be Bernadette's passive and sometimes not-so-passive conduct to discourage outside visitors and Maria's own penchant to self-isolate, she was alone with Bernadette most of the time. This circumstance was ripe for influence from Bernadette.

- [212] There is also evidence of Bernadette cloistering her mother and isolating her from her family. While it is true that Maria was by her own nature somewhat of a loner, family was important to her. Bernadette insisted that any family member was free to visit Maria. Again, the evidence on this point is concerning. First, Maria was not able to use the phone unassisted. This is clear from the visit with her grandson Joey who helped her call his mother. When Bernadette arrived home in the middle of Maria's call with Angela, the call was abruptly terminated by Maria. I accept Joey's evidence that his grandmother seemed afraid of Bernadette's reaction if she found out she was talking to Angela.
- [213] There is also the evidence of Joey and Angela that they did not feel comfortable visiting Maria unless Bernadette was not there. They sought out times when her car was not in the driveway to drop in. I accept that despite Bernadette's alleged open-door policy, the reality was that she made it difficult for family members to visit. I accept Angela and Joey's evidence that whenever a visit to Maria took place when Bernadette was there, a conflict erupted.
- [214] The most compelling evidence in this regard, however, is that of Maria's cousin, Liliana Li Preti, who noted that Bernadette was always there when she visited Maria. The visits felt constrained and supervised.
- [215] There is also the evidence of Bernadette's specific attempt to "ban" her sister from visiting her mother in hospital and control visits. I have dealt with this evidence elsewhere in these reasons and already found that Bernadette's explanation for why she did this was insufficient.
- [216] I agree with Angela that as far back as the geriatric assessment in May 2014, Bernadette had started to withhold information about her mother's care and doctor visits from Angela. This was completely unacceptable given that they were joint POAs for personal care at the time.
- [217] Bernadette may have testified that she did not discourage visitors, but she certainly did not overtly encourage them either. I find that she did not provide a welcoming environment for family to visit. Everyone agreed that Maria was a "homebody." She did not like to go out and she tended to isolate herself. This made it even more important for Bernadette to encourage family connection. I find that she did not and that consciously or not, this was part of her plan to convince her mother that she was the only one who truly cared about her.
- [218] As for the third factor, while Maria had not experienced recent bereavement, she had had past bereavements that deeply affected her, including the tragic death of her grandson in 2000 and the death of her husband in 2005. Indeed, Dr. Marotta's reports make reference

to Maria's sadness over the loss of her grandson and husband. However, the loss of her husband affected her for many years. Bernadette reported that certain events would trigger memories of her father and Maria would become sad. She would even call out to her deceased husband as if he were there and say out loud how much she missed him. So, while these bereavements were not recent, Maria was noted by her health professionals as an individual who ruminated. I find that the loss of her husband in particular continued to affect Maria until the date of her own death. It no doubt contributed to her sadness and mood issues that were repeatedly reported by her doctors. I find that those issues contributed to Maria's vulnerability.

- [219] The fourth factor relates to a pre-death transfer of wealth to Bernadette. Maria transferred the bulk of her Estate to Bernadette in April 2016. Further, despite her intention that her savings account was to be divided between Bernadette and Angela, Bernadette had depleted that asset, as well. In short, all of Maria's assets were in Bernadette's hands well before her death.
- [220] The fifth factor also applies to this case. Maria made a new Will in 2016 which was inconsistent with her 2007 Will, which left everything to her daughters jointly. Maria had forgotten that she had given a copy of the 2007 Will, POAs and her bank book to her cousin Liliana. Notably, Liliana's evidence was that Maria gave her these things because she was concerned about Bernadette taking money out of her bank account or tampering with her 2007 Will without her knowledge. This evidence was not challenged, and I accept it in its entirety as proof that at a time when Maria had no cognition issues, she was concerned about Bernadette's motives. In fact Maria's concerns about Bernadette's possible motives were not misplaced as that is exactly what came to pass.
- [221] The sixth factor requires some explanation and reference to the evidence. The reason for Maria's actions in changing her 2007 Will, her POAs and transferring her property was purportedly to reward Bernadette for everything she had done for her. Bernadette insisted that her mother was doing what her grandmother had done to reward her aunt for her caregiving.
- [222] However, the reasons given by Maria for making the changes must be approached with caution. First, she often repeated her reasons for the change randomly and not in response to related questions. Second, at times her explanations for making the change were nonsensical and indecipherable. At other times she denied having made any changes. Finally, the explanations were often "ritualistic" as described by Dr. Bruto and Maria could not actually explain her reasons for the changes.
- [223] Dr. Bruto noted in her reports that Maria offered ritualistic statements over and over again even when not asked. These statements were similar to ones repeated to health care professionals and others such as Ms. Angelini. The statements may be summarized as "Bernadette is inside the house", "Bernadette is always with me", "Bernadette knows everything", "Bernadette did not leave me for one minute after her father died" and "Bernadette does not work in order to take care of me." Maria offered these statements even without prompting. These were the same type of statements that Bernadette reviewed

with her mother in advance of the interview with Ms. Angelini, and the same statements she made to Mr. Vumbaca, Dr. Bruto and to Ms. Angelini.

[224] At times, Maria's answers with respect to her reason for the changes simply did not make sense. For example, in Joseph's videotape where he asks Maria about the house transfer, she responds as follows:

Maria: I don't like it, because she feels offended. This morning she was crying . . . in jail.

Joe: Who was crying?

Maria: Benedetta.

Maria: Sign this piece of paper. Sign your name. And then, I will complete it. Let's leave it alone this sister. The sister is the one that they have to send to jail. Because she has a mother-in-law that will send her to jail.

Joe: Oh well.

Maria: Look in jail she will be sent. I don't know. Madonna.

[225] Dr. Bruto in her evidence at trial testified that even seven years later, she remembers Maria as being bright and engaged but that much of what she said did not make sense.

[226] In terms of denials, during the videotape made by Angela on June 16, 2016, Maria is being asked by Angela about the nurse showing her the 2016 POAs. She asked Angela what she signed. When asked about the house transfer and who she was leaving her "stuff" to, Maria said "nobody." She then went on to say "the house to... both of you." She repeated that she had "two children" a phrase which Angela said she often repeated and which related to how she intended to divide her assets on death.

[227] On May 29, 2016, only a month after she signed her new Will, POAs and the house transfer, Maria told hospital staff that she did not recall signing the POA and that she wanted both of her daughters to be her POAs.

[228] The "ritualistic" statements described by Dr. Bruto were everywhere in the evidence. Examples are as follows:

Related to Bernadette:

a) To Ms. Angelini:

(i) "I gave the house to Benedetta, because she never went away, ever since the day her father passed away in here."

- (ii) “It’s not that I prefer Benedetta; Benedetta, when her father died, stayed here, whereas Angela never showed up. And Benedetta stayed here. Whether she worked or not, she dropped everything to stay close to me.”
- (iii) “She [Bernadette] does the shopping, prepares my food, cleans...she does everything.”
- (iv) “...because Benedetta never left me for a minute. Never. Angela, on the other hand, I never saw her here.”
- (v) “...and she [Bernadette] does everything for me, everything.”
- (vi) “No, Benedetta, I told you, from the day her father died, she never moved from here.”
- (vii) “...since day one Benedetta never left me, she [Angela] did leave me! She never came, she never said anything. She only did bad things to me. But Benedetta has been close to me since day one, doing everything...everything.”
- (viii) “Because she [Bernadette] never left me. Angela on the other hand, put me in jail.”

b) To Mr. Vumbaca:

- (i) She lives with Bernadette who does everything for her.
- (ii) Bernadette moved back from Texas to take care of her mom and granddaughter.
- (iii) She wants to give her house to Bernadette given Bernadette’s sacrifices over the years.

c) Per Dr. Bruto:

- (i) When unable to recall information when asked, Maria tended to respond with stereotypical statements that she had given all her challenges/tasks to Bernadette to take care of and that Bernadette is always beside her. When asked if she is referring to Bernadette’s devotion to her or whether she is physically beside her, Maria simply repeats that Bernadette has always been by her side and has never left her for a minute. When asked if Bernadette was always beside when she was living in Texas or when she goes out, Maria repeated that Bernadette is always beside her.

d) To Angela:

- i) In response to asking why she transferred the house to Bernadette:
 - (1) “Because she is inside the house, that’s it” (June 16, 2016 video).
 - (2) “Look, Bendetta that what she is doing for me” (July 7, 2016 video).

- (3) “She is doing for me, don’t worry, she is doing for me” (July 7, 2016 video).
- (4) “She is in my house” (July 7, 2016 video).
- (5) “But, I did it because she is there inside with me” (July 7, 2016 video).

[229] Ms. Angelini, an experienced estates lawyer, deposed that while Maria was not cognitively perfect, she had a “spidey sense” about whether some undue influence was happening on the part of Bernadette. She said she was “hyper aware” of the possibility that Maria had been prepared for the meetings by Bernadette. She further noted that on each occasion Maria would tell her the same thing about the reason why she had transferred the McLeod Home to Bernadette.

[230] Ms. Angelini was shown a transcript of the videotape of Bernadette’s conversation with her mother before her first interview with Maria as follows:

Betty: Okay, ma. What do you have to say? What do you have to say, ma?

Mom: I have to tell her that Bernadette that from first day her father died that she did not leave me for one minute.

Betty: And what else?

Mom: That's why I left the house; she does everything.

Betty: You want to stay home.

Mom: I want to stay home.

Betty: You don't want to go to Angie's house or an old age home.

Mom: No, no, I want to stay in my home. We did a lot of sacrifices with my husband and I want to stay in my home.

Betty: M'mmm.

Mom: I want to stay in my house. My daughter does everything. My daughter doesn't go to work to look after me.

Betty: The doctor said that you don't have your head straight.

Mom: Yes, the doctor said that I don't have brains, and I have to ask her why I don't have brains; I am saying the truth.

Betty: Are you going to tell her everything just like this? Are you going to tell her everything?

Mom: Yeah, yeah.

Betty: You have to tell her. You can't wait for her to ask you.

Mom: Sure, I'm going to tell her.

Betty: Okay. I'm going to see, I'm going to see.

- [231] After this recording was played to Ms. Angelini, she deposed that this exchange validated her concerns that Maria was being influenced because she was using the same language that was suggested by Bernadette. It was hard to tell if Bernadette was helping her mother prepare for the interview or coercing her. It is of course concerning that a solicitor with Ms. Angelini's experience would be troubled about undue influence as well as Dr. Bruto.
- [232] I find that there can be no doubt that Bernadette was coercing her mother and that this was not the first time she had done so. The repetition of the reasons for transferring the house appear over and over in the evidence as set out above. The statements were repeated in a programmed or "ritualistic" manner as Dr. Bruto characterized them.
- [233] At the end of the exchange set out, Bernadette's remark that "I'm going to see" is concerning and verges on a form of threat that she would be following up to ensure that her mother did as she was told.
- [234] I reject Bernadette's submission that this exchange was intended as solely preparatory and assistive for her mother. That is not borne out by the exchange itself.
- [235] Further, I find that the coaching in the video dovetails into Bernadette's insistence on controlling the narrative. When Ms. Angelini would not tell her what was going on in their interviews and then complained to Bernadette's lawyer about her repeated attempts to find out information, Bernadette decided to take matters into her own hands and ensure that the conversations were going as planned.
- [236] The second part of the evidence relating to the seventh *Gironde* factor relates to the rote-like manner in which Maria (supported by Bernadette's independent statements as well) repeated that Angela had abandoned her, did not care about her and only wanted her for her money.
- [237] These insidious attempts on Bernadette's part to paint her sister in negative light began as far back as 2014 and the Stark assessment. Angela was not given any notice of date of the assessment. She testified she thought that this was the start of her sister's attempts to exclude her from having anything to do with decisions related to her mother. When Angela came to the interview with Dr. Ingber in June 2014 at her mother's invitation, Bernadette was surprised and upset. She had certainly not invited her sister to attend.
- [238] It is also unfathomable that Bernadette would not have advised her sister of her mother's surgery in June 2015. She claims to have texted her nephew so that he could pass along the information, but no such texts were produced in evidence. In any event, for such an important matter, I simply do not accept that Bernadette could not have called or texted her sister directly. Angela did not find out that her mother had had surgery for five days.

- [239] While it is true that the sisters had had a serious conflict in September 2014, nothing excuses this behaviour, which was clearly intended to exclude Angela and make her look like an uncaring daughter to both her mother and hospital staff.
- [240] Bernadette claims that she never told hospital staff that her sister should be “banned” from seeing her mother, yet that is not borne out by the evidence. The September 21, 2015 nursing note clearly records this statement by Bernadette. When confronted with this in cross-examination, she claimed that she did not recall saying it and blamed her faulty memory on her upset about being blamed for the lice problem. This explanation rings hollow. I accept that Bernadette said exactly that to hospital staff and intended to exclude Angela from visiting their mother at a time when family support was much needed. I infer that Bernadette intended to minimize contact between her mother and Angela so that she could continue to emphasize to her mother than Angela did not care about her.
- [241] Bernadette was furious that Angela had told the hospital staff that Bernadette was not providing proper care for their mother. A question remains about whether this may have been true. Maria had a serious lice issue which was discovered by Angela while her mother was in hospital. Dr. Reinhartz and hospital staff told Angela that given Maria had a “crown” of lice, the lice had been there for a considerable period of time and long before Maria was admitted to hospital in September 2015. Dr. Reinhartz recommended disposing of Maria’s mattress. There is a concern about how this serious lice infestation could have been missed by Bernadette if she was indeed devoting herself to her mother’s full-time care as she claimed.
- [242] In October 2015, RN McFarlane noted that when arrangements were being made for Maria’s discharge, Bernadette told her that Angela had not seen her mother for 18 months. Bernadette was aware that Angela had seen her mother in hospital only a few days prior. Bernadette insisted that the conversation had been misinterpreted and that she had meant that Angela had not provided any care for her mother in 18 months. This explanation also rings hollow as Bernadette claimed that Angela had not provided care for her mother in years, not just months. Once again, I prefer the recorded note over Bernadette’s attempt to explain away her ongoing attempts to paint her sister in negative light.
- [243] The evidence was that Maria was a religious person. Therefore, Bernadette telling her that Angela did not care about Jesus would have also had an impact on Maria.
- [244] There is also the text from Chloe to Angela on March 21, 2016, in which she told Angela that Bernadette was a monster to her mother and that Maria has been brainwashed not to talk to Angela. This note on its own would be given very little weight given that Chloe did not testify but in the context of all the other evidence about Bernadette, it fits into the pattern.
- [245] There is also Maria’s evidence concerning Angela. She told Ms. Angelini that Angela had abandoned her, was a liar, had done bad things to her, did not visit her anymore and had not seen her in six years (none of this was not true). She told Joseph that Angela was a liar and had sent her to jail. She told Dr. Bruto that Angela only thought of herself and that she

had not seen her. She also told Dr. Bruto that she wanted Angela to leave her alone but could not say why. Maria told Mr. Vumbaca that Angela did very little to help her.

- [246] Maria tended to repeat her programmed statements about Angela in the same way she had repeated her reasons to transfer the McLeod Home to Bernadette.
- [247] While there is certainly evidence that the relationship between Angela and her mother had become distanced before her death, there is other evidence that is inconsistent with the statements made about Angela by Bernadette and Maria:
- (a) Once Maria was made aware of her mother's surgeries, she visited her mother every day in hospital and sometimes twice a day when she was in rehab.
 - (b) Angela complained that her mother began saying new things to her such as her insistence that Angela only wanted her for money. Maria had never said such things before. Angela attributed this new stance to Bernadette's influence.
 - (c) Angela was in constant contact with the hospital attempting to obtain information about her mother and was often blocked by Bernadette from receiving that information.
- [248] There is also concerning evidence about Bernadette's motives. As far back as 2012, Maria apparently had concerns about Bernadette accessing her bank account or changing her Will. As indicated previously, I accept Ms. Li Preti's evidence in this regard.
- [249] Bernadette's evidence at the Passing of Accounts Application about the alleged \$50,000 loan and other amounts taken from her mother's account were completely rejected by this court. At trial, she attempted to give yet another explanation for the \$50,000 withdrawal. Before deducting the permitted Estate expenses and compensation (which was also reduced), Bernadette was ordered to repay the sum of \$62,500 to the Estate. That is almost the entirety of her mother's account. This court ordered that the amount was required to be repaid because it was improperly taken or inadequately documented.
- [250] Some mention of Joseph's evidence must be made at this point. After the within Application was issued, Joseph made certain videos of Maria in which he asked her leading questions and made negative comments about Angela. He denied that his videos were intended to "rile" Maria up. He told the court that he made the videos because he thought they would be in "our" best interest to protect themselves, meaning his own interest and that of Bernadette.
- [251] The transcripts of those videos were not certified but even if they are not 100 percent accurately translated, the gist of them is clear. Joseph is telling Maria throughout that Angela does not want to see her, that she is lying and that she took Maria for stupid. Further, Joseph told Maria that Angela said in her court application that Joseph had washed his hands of her and did not want to see her anymore. This is not in the court material and is a pure fabrication on the part of Joseph to influence Maria against Angela.

- [252] I agree with Mr. Delagran that Joseph was attempting to influence Maria against Angela and was acting in tandem with Bernadette in this regard.
- [253] I also find that Joseph's evidence is entirely unreliable and must be rejected in its entirety by this court. His affidavit evidence said that he was the one that recorded the interview between Maria and Ms. Angelini. At trial he denied making any such recording. Bernadette said her mother instructed her to make the recording. That is equally implausible.
- [254] What interest would Joseph have in supporting Bernadette? Most certainly the prospect of having to move out of the Riverhead Home if the McLeod Home had to be sold and having to pay market rent would be enough to support Bernadette in her plan. I further reject any attempt on Joseph's part to paint Bernadette as passive. I do not think that is a proper descriptor for either of these sisters.
- [255] In terms of the last *Gironda* factor, there can also be no doubt that Mr. Vumbaca was a lawyer who was previously unknown to Maria. His meeting with Maria was arranged by Bernadette based on a referral from Joseph's sister. She did not return to Mr. Tanzola because he was not "her choice."
- [256] I also infer that Maria was coached about what to say and do in her interviews with Mr. Vumbaca, as well. The evidence in support of that is as follows:
- (a) Bernadette drove her mother to and from both appointments. There was plenty of time during those rides for Bernadette to tell her mother what to tell Mr. Vumbaca, similar to the coaching prior to the interview with Ms. Angelini.
 - (b) As early as October 2015, Bernadette told hospital staff that she would be replacing her mother's 2007 POAs with updated ones that excluded Angela.
 - (c) Once she had the new POAs, Bernadette waved the envelope in front of Angela at the hospital telling her "Wait until you see what I have done..."
 - (d) While the evidence of Chloe lacks weight, there can be no doubt that what Chloe predicted in her text exchanges with Angela came true, that is, that as early as February 2016, Chloe was aware that Bernadette was arranging to have Maria change her 2007 Will and that Angela would be receiving less under the new Will.
- [257] There is also some concern about what actually happened at Mr. Vumbaca's office. For example, how did Maria know about estate administration tax and how it could be avoided without information from Bernadette? How could Mr. Vumbaca have translated the 2016 Will, the POAs and the transfer and conflict documents into Italian and reviewed them and had them executed by Maria in 15 minutes? Maria told Mr. Vumbaca that she had \$80,000 in a bank account but that was not actually true as of March 31, 2016. By that point, Bernadette had already begun depleting the account but Maria was completely unaware of this. As such, her knowledge of the "extent" of her assets was deficient.

- [258] In addition to the *Gironde* factors, the court may consider the effect of the testator's physical and mental condition on their vulnerability: see *Banton v. Banton* (1998), 164 D.L.R. (4th) 176 (Ont. S.C.).
- [259] I have previously found that Maria's physical decline began in 2012 with her diagnosis of PMR. Bernadette was already complaining of caregiver burnout by the time of the 2014 Stark assessment when she told Ms. Stark that her mother's cognition and memory had been declining since 2006. At that point, Maria's list of medical conditions also included high cholesterol, arthritis, osteoporosis, PMR, GERD, a history of depression, and cataract and eye issues. She had been referred to Dr. Marotta for memory issues as far back as 2001.
- [260] By early June 2014, a CCAC nurse noted that Maria's condition had declined, and she needed assistance for activities of daily living. In late June 2014, Dr. Ingber suggested that Maria be put on medication for dementia.
- [261] In April 2015, CCAC again reported that Maria had short-term memory problems and required help for phone use, meal prep and finances. She was noted as having cognition, depression and communication disorders as well as difficulties with activities of daily living.
- [262] On admission to hospital after her fall in early September 2015, both Dr. Spiegelman and Dr. Chiang queried about Maria's cognition. Her history of dementia was again noted on discharge from hospital.
- [263] In October 2015 CCAC noted that Maria's cognitive skills for decision making were impaired, she needed prompting, missed messages, could not be left alone, and needed help with phone use and daily living tasks.
- [264] In November 2015, Dr. Ingber noted that Maria's condition had been declining since her discharge from hospital in October 2015.
- [265] On March 29, 2016, Maria was noted as being unwell, lightheaded and required an urgent cardiac consult.
- [266] On June 1, 2016, Dr. Craft noted that Maria was having difficulty coping and prescribed an anti-depressant.
- [267] There is a note from Dr. Ingber dated September 20, 2016, in which he indicates that Maria seemed to be of sound mind that day and he was having trouble reconciling this with the Stark assessment results. Bernadette's counsel made much of this observation, but I ascribe very little weight to it in the context of the overwhelming evidence of Maria's decline which started in 2012 and began a rapid trajectory after her first surgery in 2015. As Dr. Bruto also pointed out, the note is a one-line notation and no indication is given that Dr. Ingber did any formal testing on Maria. It appears to be simply an observation without any further follow up.

- [268] By 2016, Maria was immobile. When the bank representatives visited her in early March she was in a wheelchair. During her interviews with Ms. Angelini, she sat in one place and did not get up. The evidence was that she required a walker and had great difficulty getting up and down stairs. The reports are consistent that she could not use the phone on her own, prepare meals, dress, do laundry or really much of anything except fold small items after the laundry was done.
- [269] When her physical constraints are combined with the evidence of cognitive deterioration (as particularly noted by CCAC representatives who saw her in her home environment) and depression, I find that Maria was vulnerable and completely dependent on Bernadette particularly after her discharge from hospital in October 2015.

Does the Evidence Meet the Test?

- [270] With respect to undue influence in relation to testamentary capacity, the caselaw is clear that motive and opportunity are not enough to establish undue influence. It must be shown that the party actually exercised overbearing power and because of that, the Will was made. There is no presumption of undue influence as there is in the case of *inter vivos* transfers. The burden of proof must remain on Angela in this case with respect to setting aside the 2016 Will.
- [271] As Maria's testamentary capacity at the relevant time is disputed in this case, it should be noted that undue influence does not stand or fall on the issue of testamentary capacity: see *Tate v. Guegueirre*, 2015 ONSC 844, at para. 10.
- [272] It is possible to challenge a will solely on the basis of undue influence without the necessity of having a testator who was incapable. In *Re Marsh Estate* (1991), 104 N.S.R. (2d) 266 (N.S.S.C.), the court found coercion and set the will aside. In that case, the testator told the drafting solicitor that she was changing her will because her brother-in-law did so much for her. There was evidence that the brother-in-law had expressly or impliedly threatened to withdraw such support if the testator did not change her will.
- [273] In the case at bar, there is no evidence of such overt threats. However, there is evidence that Maria was changing her Will for reasons similar to those in *Marsh*. Those reasons were repeated over and over in the evidence in a manner which I have already found to be "programmed." Further, Maria was afraid of being alone in her home. She was dependent on Bernadette for all aspects of daily living. She could not use the phone on her own. When she did call Angela with the help of her grandson Joey, she had to quickly hang up on Bernadette's return. She was afraid of the consequences of Bernadette finding out she had been talking to Angela. While there was no overt threat of abandonment by Bernadette if her mother did not change her Will, there was certainly evidence that Maria had no options other than to do what Bernadette asked of her.
- [274] In *Poitras Estate v. Poitras*, 2015 ONSC 5049, the court found that there was evidence that the deceased's children attempted to influence him to change his will but that evidence was insufficient to amount to coercion. One of the factors relied upon by the court was that the

testator lived independently in his own home with his wife and was not dependent on his children.

- [275] Bernadette’s evidence in the Passing of Accounts Application was that she had been assisting her mother since 2005. She changed that evidence at trial, but there is evidence that as early as Maria’s diagnosis of PMR in 2012 she was dependent on Bernadette for daily living tasks. Maria had not been able to live independently for at least four years prior to signing the Will.
- [276] In *Quinlan v. Caron*, 2016 ONSC 8124, the deceased’s daughter challenged her mother’s will which changed a previous will, leaving her estate equally to her children. The new will left everything to her brother. The evidence of undue influence was that the mother was in the early stages of dementia and vulnerable, the mother had made multiple wills and the new will tended to favour the child who accompanied her to the lawyer’s office, and the mother relied on the son and was noted as saying “she had no one else.” Just before the mother was to undergo a capacity assessment, the son spent two hours with her and the capacity assessor explaining why his sister should not receive anything from the estate.
- [277] While the court did find there was some evidence of undue influence, it concluded that the mother retained her strong will throughout and intended to disinherit her daughter. The will was upheld.
- [278] In the case at bar, there is conflicting evidence about whether Maria retained her strong will throughout. The evidence of Ms. Bifulchi from the bank was that in early March 2016, Maria had mobility issues but was the same Maria she had always known. Unfortunately, Ms. Bifulchi had only a customer service representative-client relationship with Maria. While she knew her as a bank customer for years, she really knew nothing else about her personal life.
- [279] Angela gave evidence that her mother’s strength of personality diminished over the last two years of her life and she became more vulnerable and meek.
- [280] Bernadette’s counsel points to evidence that Maria was “with it” and cogent and knew what she wanted. He relies on Mr. Vumbaca’s notes which stated that Maria was not ambivalent about her intentions. The difficulty is twofold in that regard. First, I have already found that Maria’s intentions were not her own; they had been reinforced and fed to her over time, perhaps as early as October 2015 when Bernadette announced to hospital staff that she intended to obtain a new POA which would exclude her sister. Second, the evidence of Dr. Bruto clearly stated that Maria made numerous clear statements about why she had taken certain steps but could not explain why. Her opinion was that Maria sounded convincing until you dug a little deeper and discovered there was no foundation to anything she was saying.
- [281] Given all of the above, I find that the 2016 Will must be set aside on the grounds of testamentary undue influence.

Undue Influence and the Inter Vivos Transfer

- [282] There are two types of undue influence in relation to *inter vivos* transfers; actual and presumed. Actual undue influence arises in situations where there has been actual and provable coercion. Those cases are rare.
- [283] More often, a claim is made based on presumed undue influence. This arises where the relationship between the donor and the donee creates a rebuttable presumption that the donor was unduly influenced by the recipient to make the transfer. As per *Goodman Estate*, an analysis of presumed undue influence must arise with an examination of the relationship between the parties. A parent and child relationship is one of those types of relationships enumerated in *Goodman Estate* which has a potential for domination.
- [284] In *Modonese v. Delac Estate*, 2011 BCSC 82, 65 E.T.R. (3d) 254, the deceased's daughter sought to set aside an *inter vivos* transfer made to her brother and mother jointly by their mother. The sister's evidence was that their mother was fearful of her brother, who had lived with his mother for years. In that case, the court stated that while a presumption of undue influence does not always arise between a parent and child, it may apply if the relationship between the parent and child is one of dependency: at paras. 104-05, citing *Chender v. Lewaskewicz*, 2007 NSCA 108, 259 N.S.R. (2d) 330. This has been particularized in cases such *Dempsey v. Dempsey*, 2010 NSSC 96, 289 N.S.R. (2d) 159, at para. 44, where the court found that such dependency is more prevalent in situations where the child has played a dominant role in the parent's life, particularly as the parent grew older and had greater health concerns.
- [285] In the *Modonese* case, the court found undue influence on the basis that the mother was afraid of her son, that she relied on him for companionship, help at home and dealing with her affairs, and that he had attempted to isolate her from other family members. In addition, the son kept the transfer secret until his mother died.
- [286] Those factors are all present in this case. I have already found that Bernadette isolated her mother despite her protestations that family members were welcome to visit at any time. Bernadette was in complete control of her mother's affairs from 2012 onward and in charge of her financial affairs as of March 4, 2016. Bernadette did not tell her sister about the transfer. Had it not been for Angela's suspicions after she found out about the new POA and then doing a title search, Angela would not have found out about the transfer until her mother died.
- [287] Once the presumption of undue influence has been triggered, as I find it has been here, it is up to the recipient to rebut the presumption of a contrary intention on a balance of probabilities. The recipient must be able to show that the transfer was the result of the donor's free, full and informed thought.
- [288] In *Bale v. Bale* (2008), 37 E.T.R. (3d) 118 (Ont. S.C.), the deceased left her estate to her three sons equally with a provision that her son John could buy the family farm from his siblings at an appraised price within a year of the date of death. The mother conveyed the

farm to John and his wife prior to her death. His siblings challenged the transfer. There was evidence that the mother relied on John to maintain the farm and assist her with her personal needs and care. The mother was determined not to go into a nursing home and relied on John to keep her in her own home.

- [289] The court set aside the transfer, finding that it occurred at a time when the mother was vulnerable as she had just been released from hospital. The court found that the transfer of the farm was influenced by the mother’s dependence on John and her fear of going into a nursing home. There was no issue that the mother had full mental capacity at the time of the transfer, but the court found that the transfer was not made as a result of the mother’s “full, free and informed thought.”
- [290] In the case at bar, Maria made it clear she did not want to go into a nursing home. She wanted to stay in her home that she and her husband had sacrificed so much for. She told Bernadette she did not want the McLeod Home sold even after her death. She was reliant on Bernadette to see that plan through.
- [291] Maria was also vulnerable at the time of the transfer. While I have found elsewhere in these reasons that she lacked capacity, a finding of incapacity is not necessary to make a finding of presumed undue influence. Maria, like the mother in *Bale*, had undergone surgery only a few months prior to attending at Mr. Vumbaca’s office to change her 2007 Will. That surgery was life changing for her as it seriously affected both her dependency and her mobility.
- [292] I note as well that Maria was unwell a mere two days prior to her first interview with Mr. Vumbaca and was ordered to undergo an urgent cardiac assessment.
- [293] I revert once again to the difference between Maria’s appearance of confidence and understanding of her actions and her lack of understanding of their actual consequences, the programming from Bernadette, and her determination to please Bernadette. For example, Dr. Bruto’s notes indicate that Maria often sought praise or credit for having given Bernadette everything. I also refer to the text from Chloe to Angela in early 2016 that Bernadette was brainwashing her mother and abusing her.
- [294] I therefore conclude that this is a case in which the relationship between Bernadette and her mother, and the latter’s vulnerabilities at the relevant times, give rise to a presumption of undue influence. I further find that Bernadette has not adduced sufficient evidence to rebut the presumption of presumed undue influence. The *inter vivos* transfer must be set aside on the grounds of presumed undue influence. If I am wrong with respect to presumed undue influence, I find that there is sufficient evidence to find that the McLeod Home is held on a resulting trust for the Estate based on the finding of testamentary undue influence.

The Evidence of Incapacity

- [295] I have already found that Maria was vulnerable both with respect to dependency and her relationship with Bernadette. However, that vulnerability is exacerbated by the fact that

Maria was incapable both at the time of her contemporaneous assessment in 2017 and at the time of executing the relevant documents on April 25, 2016.

- [296] I accept the findings of Dr. Bruto. While Dr. Mitchell is well respected in her field, her report did not respond directly to Dr. Bruto's findings and she conceded that a contemporaneous assessment was the gold standard. In a case such as this, where Maria appeared to Dr. Bruto as bright, engaged and smiling, it is imperative that the assessor be given an opportunity to dig deeper. When Dr. Bruto did that she found that Maria's platitudes were delivered with conviction but were nonsensical when parsed. Dr. Mitchell was unable to personally interview Maria and assess that behaviour.
- [297] I agree with Dr. Bruto that Dr. Mitchell's assessment that Maria was "relatively healthy" is puzzling. By April 2016, Maria had been diagnosed with PMR, osteoporosis, arthritis, gastrointestinal reflux, high cholesterol, and depression. She had serious mobility issues after her hip surgery in September 2015 and continued to be afflicted with depression and mood issues.
- [298] In addition to the abovementioned conditions, Maria was assessed in 2014 and prescribed medication for dementia by her family doctor. While that medication was refused by her daughters, it would seem odd that Dr. Ingber would refer Maria for a geriatric assessment and prescribe medication for dementia if he had no concerns about her cognitive condition.
- [299] Dr. Bruto noted that in the months leading up to her appointments with Mr. Vumbaca, Maria's health record not only noted dementia but also "medical conditions with possible implications for brain/cognitive functioning which included chronic hypertension, chronic hyperlipidemia, chronic obstructive pulmonary disease and questions regarding sleep apnea".
- [300] On March 29, 2016, only 27 days before signing her new Will and POAs and the transfer, and only two days from her initial interview with Mr. Vumbaca, Maria was noted in Dr. Ingber's practice to be unwell, lightheaded, and with an irregular pulse and two murmurs. An urgent cardiac consult was recommended.
- [301] Both Dr. Mitchell and Dr. Bruto commented on the effect of multiple health conditions on cognitive functioning. Dr. Bruto described such conditions as being "not kind" to brain function in older adults. Dr. Mitchell opined that comorbidities affect a person's "cognitive reserve."
- [302] I do not agree with Dr. Mitchell that the cognitive tools used to test Maria during the Stark assessment in 2014 cannot be relied upon because an independent Italian interpreter was not engaged. As Dr. Bruto and Dr. Mitchell both agreed, the MMSE that was administered to Maria was simply a screening tool to alert the assessor to possible cognitive issues. While Dr. Bruto agreed that if the test questions were not properly translated by Bernadette then this could have affected the result, she cautioned that the raw data should not simply be discarded. In fact, part of the conclusions drawn by the assessor were based on information

given to her directly by Bernadette, including a notable decline in her mother's cognition since 2006 and dependency upon Bernadette.

- [303] Dr. Mitchell also opined that Maria's low level of education made the validity of the MMSE findings questionable. Dr. Bruto did not disagree that her level of education could have had an effect on her errors in the clock drawing exercise. However, I agree with Dr. Bruto that the inability to understand instructions or draw correctly placed clock hands would not preclude the possibility of cognitive decline or dementia.
- [304] Dr. Mitchell stated that throughout Maria's health record, her cognitive functioning was documented to be largely intact. I disagree. Part of the problem as stated by Dr. Bruto was that Maria's clinicians were largely unable to communicate with her in Italian. However, this does not mean that her cognition was "largely intact." In fact, Maria first went to see Dr. Marotta in 2001 on the recommendation of Dr. Leone due to memory loss concerns. There are few clinical records between Maria's last visit to Dr. Marotta in 2005 and the Stark assessment in 2014. The results of that assessment have been documented in several places in these reasons.
- [305] The CCAC documentation in 2015 and 2016 consistently notes that Maria had impaired cognitive skills, required assistance in daily living tasks, required cues and supervision, had impairments with respect to her daily decision making, needed help managing her medication, and needed prompting to find words and finish thoughts or to understand conversations.
- [306] I also note that twice in 2015, Dr Reinhartz noted Maria's history of dementia. It is true that on September 22, 2015, he noted that there was no evidence that Maria had delirium. However, as Dr. Bruto explained, a diagnosis of dementia does not mean that delirium need be present and vice versa.
- [307] Dr. Bruto opines, and I agree, that the substantial health records from Maria's primary care, hospital care and CCAC support a trajectory of decline from at least two years prior to the signing of the 2016 Will and POAs. I have further suggested that there is evidence to support that trajectory may have started when her mobility began to be affected by her PMR diagnosis in 2012. I note that Bernadette suggested to Ms. Stark that the cognitive decline began in 2006.
- [308] Dr. Mitchell relies on the CCAC note of RN McFarlane on October 5, 2015, in which RN McFarlane states that Maria was capable of making treatment decisions and her POA would not be enforced. Dr. Bruto queries that conclusion as there are no notes or observations with respect to how RN McFarlane came to that conclusion. As well, Maria had already signed a consent for Bernadette regarding treatment. Finally, there is a concern as to how RN McFarlane received information about Maria's ability to make decisions. It does not appear that she could talk to her directly since she did not speak Italian. I query whether the information about Maria's capacity came from Bernadette, who was already formulating a plan to obtain new POAs for her mother around this time.

- [309] As well, when RN McFarlane returned on October 15, 2015 to do an assessment and home visit, she reported that Maria did not participate in the assessment. It is hard to understand how such an assessment could have been completed without Maria's input unless all of the information came only from Bernadette.
- [310] I note as well that on June 1, 2016, Bernadette reported to Dr. Craft that there were no concerns about her mother's cognition, yet this was shortly after Maria's second hip surgery when her trajectory of decline was at its steepest part. Dr. Craft noted later in June that Maria had longstanding mood issues and that she appeared sad and apathetic.
- [311] Dr. Mitchell also referred to Dr. Ingber's note dated September 20, 2016, which stated that from seeing and assessing Maria she seemed to be of sound mind. He noted having difficulty reconciling this with the Stark assessment. This issue was raised at length with Dr. Bruto in cross-examination. I agree with Dr. Bruto that Dr. Ingber did not record exactly what "assessment" he did to come to this conclusion and that it is therefore unclear what his revised opinion was based upon.
- [312] I agree with Dr. Bruto that the totality of Maria's health records support a conclusion that at the time she signed her new Will, POAs and the transfer, she presented with a least mild dementia. Her mood issues, depression and other significant comorbidities would not have "been kind" to her cognition and would have affected her "cognitive reserve."
- [313] The test for testamentary capacity has been well established since the Supreme Court of Canada in *Skinner v. Farquharson*, (1902) 32 S.C.R. 58, at p. 86, adopted the formulation of the test offered in *Banks v. Goodfellow* (1870), L.R. 5 Q.B. 549, at p. 565:
- It is essential to the exercise of such a power (testamentary disposition) that a testator shall understand the nature of the act and its effects, shall understand the extent of the property of which he is disposing, shall be able to comprehend and appreciate the claims to which he ought to give effect, *and with a view to the latter object that no disorder of the mind shall poison his affections, pervert his sense of right or prevent the exercise of his natural faculties, that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.* [Emphasis added.]
- [314] I find that there remains a question as to whether Maria truly understood the nature and extent of her assets when being interviewed by Mr. Vumbaca. First, she did not know whether or not she had an RRSP. Angela's evidence was that her parents never had any investments. They simply did not believe in them. They had always had only a chequing and savings account and paid for most expenses with cash.
- [315] Mr. Vumbaca never followed up on this in the April interview. If Maria had had an RRSP, Mr. Vumbaca would have been obliged to explain to her the issues related to the designation of beneficiaries outside of the Estate. That conversation never took place.
- [316] As well, Maria said she had \$80,000 in the bank as of March 31, 2016. That was simply not true. By that point, Bernadette had already started depleting the bank account. By the

end of March 2016, she had already withdrawn \$20,000 of the \$80,000. Her mother was completely unaware of this because she was unable to go to the bank herself.

- [317] There are also the issues previously raised concerning the avoidance of estate administration tax, an issue which I find that someone of Maria's sophistication level would not and could not have raised on her own. I infer that either Bernadette told her to raise it, or Mr. Vumbaca noted it as a concern of Maria's when he was the one who raised it.
- [318] There was also the issue of the transfer and the gift of the McLeod Home in the 2016 Will. Mr. Vumbaca claimed this was a form of reinforcement of Maria's intention in the event of a Will challenge. There is nothing in the notes to indicate that Maria gave Mr. Vumbaca any such instructions.
- [319] I also find that there are concerns about whether Maria actually understood the effect of what she was doing. Why would she name Joseph as her alternate POA over her grandson Joey, to whom she had been so close for so many years? Why would she leave all of her grandchildren out of her Will? If she understood the consequences of the Bank POA, she would have also understood the potential for there being no money left in the account by the date of her death. She appeared to be under the impression that Angela would receive \$40,000 when she died. By the time Maria died, and without the intervention of these proceedings, Angela would have received nothing.
- [320] One other issue requires comment. Bernadette's counsel raised the fact that Angela had her mother sign a consent for release of medical records in June 2016. If Angela was insisting her mother did not have capacity, why have her sign such a form?
- [321] While this evidence appears inconsistent on its face, I do not find that it changes my opinion in this case. First, the implications of releasing medical records, other than perhaps the obvious privacy concerns, are minor compared to transferring one's property or changing one's will. Second, Angela knew that Bernadette was the sole POA at that point. Based on the evidence in this case, it is unlikely that Bernadette would have cooperated in obtaining those records prior to this litigation being commenced. Angela may have been using some self-help at this point, but I find that the harm and the repercussions of doing so were minimal in the longer term.
- [322] I therefore accept Dr. Bruto's findings of incapacity, both contemporaneous and retrospective, and reject Dr. Mitchell's report. If am wrong with respect to Maria's capacity at the relevant times, I find that her decreased cognition, her other medical conditions, and her dependency made her vulnerable and susceptible such that her physical and mental conditions contribute to a finding of undue influence even if she was technically capable of signing the relevant documents.
- [323] As such, Maria did not have the requisite capacity to sign the 2016 Will, POAs and transfer. They shall be set aside and the 2007 Will shall be given effect.

[324] If I am wrong with respect to Maria's capacity, the 2016 Will and transfer shall be set aside on the grounds of undue influence and the McLeod Home held on a resulting trust in favour of the Estate.

Orders and Costs

[325] Given all of the above, I make the following Orders:

- (1) The claims in Angela's Application are allowed.
- (2) The McLeod Home shall be listed for sale immediately.
- (3) The amounts owed by Bernadette from the Passing of Accounts Application and any costs owed by Bernadette from this Application shall be paid from Bernadette's share of the sale proceeds.
- (4) The costs payable to Bernadette related to the preparation of the accounts for the Passing of Accounts (\$10,000) shall be paid from the joint sale proceeds.
- (5) It is unlikely that Bernadette and Angela can work together as co-Estate Trustees. I am prepared to entertain the appointment of a neutral Estate Trustee to complete the administration of this Estate.
- (6) I encourage the parties to come to an agreement on costs. However, if they are unable to do so, they shall upload to Caselines their written costs submissions on a seven-day turnaround commencing with the Applicant seven days from the date of release of this judgment. Costs submissions shall not exceed three pages in length (double spaced) exclusive of any Offers to Settle or Bill of Costs. Caselaw references and references to any exhibits or evidence in the written costs submissions must be hyperlinked. If no costs submissions are received within 30 days of the date of release of this decision, costs shall be deemed to be settled.
- (7) Mr. Delagran/Ms. Madill may submit an approved Order for my review and signature when ready.

C. Gilmore, J.

Released: February 15, 2024

CITATION: Abbruzzese v. Tucci, 2024 ONSC 957
COURT FILE NO.: 03-099/16
DATE: 20240215

ONTARIO
SUPERIOR COURT OF JUSTICE
ESTATES LIST

BETWEEN:

ANGELA ABBRUZZESE

Applicant

– and –

BERNADETTE TUCCI a.k.a. BENEDETTA
IANNARELLI, personally and as Estate Trustee of the
Estate of ASSUNTA MARIA IANNARELLI, JOSEPH
SANDRO NAZZICONE, and THE OFFICE OF THE
PUBLIC GUARDIAN AND TRUSTEE

Respondent

REASONS FOR JUDGMENT

C. Gilmore, J.

Released: February 15, 2024