Court of Appeal File No. COA-22-CV-0319
SC File No. 05-90/14

COURT OF APPEAL FOR ONTARIO

IN THE ESTATE OF BEVERLY GRACE ROE, Deceased

B E T W E E N:

ROBERT MARK ROE

Applicant
(Appellant)

-and-

RAYMOND CHRISTOPHER ROE, in his capacity as Estate Trustee of the Estate of Beverly Grace Roe, Deceased, and RANDALL SCOTT ROE, in his capacity as the Estate Trustee of the Estate of Beverly Grace Roe, Deceased, the Estate Trustee of Richard Thomas Roe, Deceased, and in his personal capacity

Respondents
(Respondents in appeal)

AND

SC File No. 05-121/16

IN THE ESTATE OF BEVERLY GRACE ROE, Deceased

B E T W E E N:

ROBERT MARK ROE

Plaintiff
(Appellant)

-and-

RAYMOND CHRISTOPHER ROE, in his capacity as Estate Trustees of the Estate of Beverly Grace Roe, Deceased, and in his personal capacity and RANDALL SCOTT ROE in his capacity as the Estate Trustee of the Estate of Beverly Grace Roe, Deceased, the Estate Trustee of the Estate of Richard Thomas Roe, Deceased, and in his personal capacity

Defendants
(Respondents in appeal)

**FACTUM OF THE RESPONDENT,
RANDALL SCOTT ROE**

August 16, 2023

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AND TO: **THE REGISTRAR OF THIS HONOURABLE COURT**

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PART I – OVERVIEW

1. In this appeal from the judgment of Sugunasiri J. dismissing the Appellant's will challenge application, this Court should affirm her Honour's decision, because her reasons on the issues of insane delusions, testamentary undue influence and the assets element of the incapacity test, were sufficient and based on the correct law. Further and alternatively, the record supported the conclusions reached.

2. In the parties' factums herein, two limited controversies of law arise in relation to undue influence by fraud, and, to a lesser extent, on the assets element of the capacity test under *Banks v Goodfellow*. Those issues apart, the Appellant asks this Court to hold the reasons below inadequate wherever they do not explicitly summarise and dismiss every the most desperate permutation of his case theory, and to take that opportunity to reweigh the evidence and to substitute its own decision.

PART II – FACTS

3. Beverly Grace Roe ("**the Deceased**"), who died aged 89 on July 12, 2014, had four adult sons with her husband, who had predeceased her by nineteen years: Richard Thomas Roe ("**Rick**"), who died on April 13, 2020, the Respondent in appeal, Randall Scott Roe ("**the Respondent**"), the Appellant, Robert Mark Roe ("**the Appellant**"), and Raymond Christopher Roe ("**Chris**").

4. The Appellant first raised the prospect in March 2000 of the Deceased transferring the chalet then in her name. Discussions took place later that year among the Deceased and her sons, centring on a transfer to the four sons so as to minimize capital gains tax. However, as there was already a sense of mistrust between Rick and the Appellant, an

agreement could not be reached to provide for future contingencies. Ultimately, the Deceased decided to convey the property to the four sons at once without waiting for them to reach such an agreement.

Appeal Book and Compendium ("ABCO"), Tab 4: Reasons for Judgment, at para 17
Compendium of the Respondent ("RCOM"), Tab 1: Letter written by Appellant, dated December 18, 2000

5. The Appellant interfered in the course of the Deceased's retainer of a real estate solicitor, so that she ultimately went forward with another whose name she withheld from the Appellant. The Deceased and Rick maintained that the Appellant had told the initial solicitor that the Deceased was not mentally competent. The learned trial judge, referring to correspondence from the Appellant to the family at the time, found that he was "already raising the sceptre [*sic*] of future challenge".

ABCO Tab 4: Reasons for Judgment, at para 18

6. In 2001, following a conversation in which the Deceased commented on Rick's behaviour at home, the Appellant and his wife, Kathryn Roe ("**Kathy**"), began a series of consultations with a family services worker, Ellie Sheridan ("**Ms. Sheridan**"). The Appellant's initial letter to Ms. Sheridan contained a catalogue of Rick's idiosyncrasies marshalled in support of the view that the Deceased was being subjected to elder abuse, none of which were the subject of any findings in the Court below.

ABCO Tab 4: Reasons for Judgment, at para 20
RCOM Tab 2: Letter written by Appellant, dated March 7, 2002

7. After about a year during which the Appellant and Kathy had pressured the Deceased to meet Ms. Sheridan, the Deceased did so in September 2002, and the latter no further steps thereafter. The Deceased told the Respondent that it was a waste of time and told the

Appellant that she did not wish to meet her again.

ABCO Tab 4: Reasons for Judgment, at para 22
RCOM Tab 3, p 33: Affidavit of Randall Scott Roe, sworn February 16, 2018 ("Respondent's Affidavit"), paras 44-45; Tab 4: Extract of transcript of audio recording of telephone call between Appellant and Deceased, on March 2, 2003

8. In early 2003, the Appellant and Kathy involved the police by suggesting that the Deceased was the victim of elder abuse by Rick and arranged a meeting with the police for the Deceased to attend. The Appellant involved Chris but kept the intended meeting a secret from the Respondent until the day before. The Appellant and Chris tricked the Deceased into believing that she was going to meet a social worker. The Respondent tried to make the Deceased understand, over the telephone, that she would be taken to the police, but she replied, "Mark would never do that to me".

RCOM Tab 3, pp 33-34: Respondent's Affidavit, at paras 47-49

9. The Appellant, Kathy, Chris and the Deceased were present at the initial meeting on March 21, 2003, attended by PC Green, who testified at trial, and a female officer, but no social worker. The meeting was kept secret from Rick for several weeks.

ABCO Tab 6: Affidavit of Robert Mark Roe, sworn January 31, 2018 ("Appellant's Affidavit"), at para 97; Tab 62, p 372: Examination for Discovery of Richard Thomas Roe, Q 721
RCOM Tab 5, pp 52-53: Notes made by Deceased, dated in March and April 2003 ("Deceased's notes"); Tab 6, pp 70-71: Affidavit of Richard Thomas Roe, sworn February 21, 2018 ("Rick Affidavit"), at paras 27-28

10. From this point, the relationship between the Appellant and the Deceased began to deteriorate rapidly. Two days after the meeting with the police, the Appellant and Deceased had a telephone conversation in which the Deceased emphasised her preference for dealing with her problems without further involvement of the police. The Appellant warned her that she was "going to see a different Mark from here on in".

ABCO Tab 4: Reasons for Judgment, at paras 3 and 23

11. On March 24, 2003, before Rick was aware of the police involvement, the Deceased contacted the police to state her view that she was not a victim of elder abuse.

RCOM Tab 7: Extracts of notes and records of Family Services Association of Toronto, dated April 25 and March 28, 2003; Tab 6, p 71: Rick Affidavit, at para 28

12. On April 9, 2003, the police asked Rick to attend at the station. Upon learning of this, the Deceased spoke with the Appellant and asked him to call off the police and told him that there was no problem that needed addressing.

ABCO Tab 4: Reasons for Judgment, at para 24

13. On April 11, 2003, Rick attended at the police station. The Deceased and the Respondent elected to support him by attending too. Mr. Green described the meeting as "very successful". At his suggestion, the family members agreed to attend a mediation. The Deceased, however, lost interest in mediation when she learned that Kathy had had one-to-one contact with the mediator ahead of time, when she expected the process to involve only herself and her sons.

ABCO Tab 4: Reasons for Judgment, at para 25
RCOM Tab 8: Extract of transcript of voicemail left by Ron Green, dated April 11, 2003

14. On April 10, 2023, Kathy had telephoned Dr. Roy, then covering for the Deceased's general practitioner, Dr. Wynnychuk, who was on maternity leave. When the Deceased later saw the note made by Dr. Roy of that call, she inferred that Kathy had said that she was no longer driving and that she needed psychiatric treatment of some kind. On April 24, 2003, the Deceased executed a new will removing the Appellant as an executor, and new powers of attorney in favour of the other three sons only.

ABCO Tab 4: Reasons for Judgment, at para 26; Tab 39: Copy of Deceased's 2003 will

15. Between April and September 2003, the Appellant and the Deceased did not

communicate, other than through letters.

RCOM Tab 9: Extract of cross-examination of Appellant; Tab 10, p 102: Extract of transcript of audio recording of telephone call between Appellant and Deceased, in Fall 2003

16. While staying with Chris in 2003, the Deceased had a telephone call with the Appellant. The Appellant was insisting that he should be able to ask the police and the doctor to correct what he said were misimpressions formed by the Deceased about what the Appellant or Kathy had said about her to them. The Deceased, however, told him eleven times that she did not want to hear from the policeman again. The Appellant recognised the existing breakdown in his relations with the Deceased, asking, "…where do we, we, me and you, where do we go from here?"

RCOM Tab 10, pp 93-94: Extract of transcript of audio recording of telephone call between Appellant and Deceased, in Fall 2003

17. At the end of 2003, the Deceased wrote to her sons to tell them that she wanted the chalet to be sold, since maintaining it "has been enormously stressful, painful + destructive to everyone within the family".

ABCO Tab 4: Reasons for Judgment, at para 28
RCOM Tab 11: Letter written by Deceased, dated November 4, 2003

18. Throughout 2004, the Deceased struggled to make the Appellant abide by her wishes, in particular, regarding how contact with the real estate professionals would be handled. As summarised by the learned trial judge, further letters from the Deceased "threatened disinheritance of any son who did anything to scuttle the sale".

ABCO Tab 4: Reasons for Judgment, at para 28
RCOM Tab 12, p 110: Extract of transcript of audio recording of telephone call between Appellant and Deceased, on January 29, 2004

19. The chalet was eventually sold in February 2005.

20. The Deceased consulted a neurologist, Dr. Roussev, in April 2005, who arrived at a working diagnosis of early Alzheimer's based on standard cognitive testing and made the usual referral to the Ministry of Transportation.

ABCO Tab 4: Reasons for Judgment, at para 29

21. On May 24, 2005, the Deceased attended an appointment with Dr. Roy, who was told by both the Deceased and Rick that the Deceased's estate would be divided equally. The Deceased was eager that Dr. Roy should delete from her chart what Kathy had said on the telephone on April 10, 2003, but Dr. Roy answered that she could not "legally do this".

ABCO Tab 4: Reasons for Judgment, at para 30
RCOM Tab 13: Extract from Dr. Roy's notes and records, dated in 2005

22. On May 29, 2005, the Deceased told the Appellant that she was severing her relationship with him and Kathy and that she did not want him contacting her doctor further. The Appellant replied, "I don't accept that. That's not an acceptable answer." The very next day, Kathy telephoned Dr. Roy's office and made an appointment for the Deceased without her knowledge. The Deceased learned of the appointment by chance before it was scheduled to take place and cancelled it. She saw this interference as the last straw.

RCOM Tab 14, p 129: Extract of transcript of audio recording of telephone call between Appellant and Deceased, on May 29, 2005; Tab 3, p 44: Respondent's Affidavit, at para 77

23. In August 2005, the Deceased brought a copy of her 2003 will and a list of assets to a solicitor, Donna Guidolin, whom she instructed to prepare a new will (the "**2005 will**"), in which she bequeathed her estate to Rick, the Respondent and Chris. Ms. Guidolin met the Deceased alone to obtain instructions.

24. In September 2005, a letter was obtained from Dr. Roy stating that the Deceased was competent, and, in October 2005, the Deceased attended Ms. Guidolin's office again to give her a letter written for the latter's file, explaining why she had disinherited the

Appellant (the "**2005 letter**"), which Ms. Guidolin commissioned. The Appellant did not see this document until commencing the within proceedings.

ABCO Tab 4: Reasons for Judgment, at para 31; Tab 6: Appellant's Affidavit, at para 3

PART III – RESPONSE TO ISSUES RAISED BY APPELLANT

A. SUFFICIENCY OF REASONS

25. The learned trial judge was required to give reasons that allow for meaningful appellate review, and that explain to the losing party and the public how the result was reached.

26. The Supreme Court of Canada has held:

> Reasons are sufficient if they are responsive to the case's live issues and the parties' key arguments. Their sufficiency should be measured not in the abstract, but as they respond to the substance of what was in issue. The "trial judge's duty is satisfied by reasons which are sufficient to serve the purpose for which the duty is imposed, i.e., a decision which, having regard to the particular circumstances of the case, is reasonably intelligible to the parties and provides the basis for meaningful appellate review of the correctness of the trial judge's decision" … Moreover, "[w]here it is plain from the record why an accused has been convicted or acquitted, and the absence or inadequacy of reasons provides no significant impediment to the exercise of the right of appeal, the appeal court will not on that account intervene" ... The duty to give reasons "should be given a functional and purposeful interpretation" and the failure to live up to the duty does not provide "a free-standing right of appeal" or "in itself confe[r] entitlement to appellate intervention" … (emphases added)

Book of Authorities of the Respondent ("AOR"), Vol. I, Tab 1 ("I-1") ***R v Walker*, 2008 SCC 34, at para 20**

27. In the context of judicial review, but based on argument equally applicable to civil appeals, the Supreme Court of Canada has said:

> Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis" … or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" … To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice.

AOR, I-2 ***Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, at para 128**

28. In husbanding scarce judicial resources, a trial judge needs flexibility to determine which issues, sub-issues, case theories and parts of the factual matrix in dispute actually merit

attention in the written analysis, and which are so obviously resolved in one way rather than another as not to require remark. Assuming trite law, the less evenly balanced the parties' cases are in point of plausibility as they appear in the record, the lower the burden on the trial judge to commit her full analysis of their relative merits to writing.

29. This is consistent with the jurisprudence on the force of the record and the presumption of correct application: "[i]t is only where ambiguities, in the context of the record as a whole, render the path taken by the trial judge unintelligible that appellate review is frustrated".

AOR, I-3 ***R v GF*, 2021 SCC 20, at para 79**

B. INSANE DELUSIONS

i. The test is not plausibility in the view of the finder of fact

30. There are two kinds of insane delusions, but their division is not correctly stated by the Appellant at paragraph 52 of his Factum. The two kinds are:

(a) the belief in things impossible; and

(b) the belief in things possible, but so improbable, under the surrounding circumstances, that no man of sound mind would give them credit, and the carrying to an insane extent impressions not in their nature irrational.

AOR, I-4 ***Banton v Banton* (1998), 164 DLR (4th) 176, at 198**
AOR, I-5 ***From Estate*, 2019 ABQB 988, at paras 132 and 134**
RCOM Tab 15: Extract from closing submissions of Mr. Donovan

31. The overarching question animating the whole doctrine is whether the will proceeded from and on account of a deranged mind. Said differently, the delusion "must be one of

insanity". It "cannot be one of misinterpretation, capricious whims or idiosyncrasies".

AOR I-4, III-36 ***Banton v Banton, supra,* at 199, citing Thomas E Atkinson, *Handbook of the Law of Wills*, 2nd ed ("*Atkinson on Wills*") (St Paul: West Publishing Co, 1953), at 246**
AOR I-6 ***Boughton v Knight* (1873) LR 3 P&D 64, at 68-69**
AOR I-7 ***Taylor Estate v McCully* (1995), 12 ETR (2d) 131, at para 84**

32. Illustrating the boundaries of the insane delusion doctrine in the context of testamentary capacity more generally, Sanfilippo J. held:

> [370] To lose testamentary capacity on the basis that the testator lacks a sound and disposing mind, a lack of mental capacity or mental disorder must be established. This is more than being "eccentric, unfair or capricious": *Royal Trust*, at para. 59; also, *Gironda*, at para. 51. It is more than entertaining "wrong-headed notions" and doing "eccentric … absurd and foolish acts": *Beal v. Henri*, 1950 CanLII 76 (ON CA), [1950] O.R. 780 (C.A.), at p. 786. "Such things as imperfect memory, inability to recollect names and even extreme imbecility, to not necessarily deprive a person of testamentary capacity" provided that the testator's mind is sufficiently sound to understand the nature of the property being bequeathed: *Woodward v. Grant*, 2007 BCSC 1192, at para. 125... A will-maker can be unfair, capricious and even mean but still have testamentary capacity so long as the testator does not suffer from a mental disorder … "A testator has the right to treat hopeful beneficiaries unjustly", so long as there is testamentary capacity: *Tate v. Gueguegirre*, 2012 ONSC 6890, at paras. 167-168.
>
> [371] I accept and apply Cullity J.'s statement in *Banton*, at para. 47, that: "an unreasonable conclusion drawn from facts is not by itself sufficient to amount to a delusion that will give rise to testamentary incapacity". The expression of this principle is based on the Supreme Court's statement in *Skinner*, at p. 60: "It is not the law that anyone who entertains wrong-headed notions, capricious whims, or absurd idiosyncrasies cannot make a will". (emphases added)

AOR I-8 ***Slover v Rellinger*, 2019 ONSC 6497, at paras 370-71**

33. On this view, the touchstone applied by the learned trial judge, in asking herself, "Can I understand how a person in possession of their senses could have believed the fact or facts that has impacted the will-making?", remains quite correct. This heuristic in fact originated in *Boughton v Knight*, and it enables the trier of fact to control for beliefs that are not the product of a deranged mind, even ones that the tier of fact thinks unfounded.

AOR I-6 ***Boughton v Knight, supra,* at 68**

34. Courts have warned of the danger of the finder of fact comparing his view of the truth of a given proposition with that of the testator, and then determining the testator's capacity accordingly. Thus, Goss J. in *From Estate*, in the Alberta Court of Queen's Bench:

> …the court must be careful not to construct and substitute what the court identifies to be a reasonable and rational opinion of what the will-maker, on a balance of probabilities should have felt in place of

> what the will-maker actually felt, and then call the will-maker's view a delusion. Misunderstandings are part of family life, and often grow into grudges or rifts between family members. These are the sad but not uncommon products of family life and, at the end of the day, are inevitably characterized by unreasonably negative views about the opposing party in the rift. That has nothing to do with delusions. Parents remain free to disinherit their children…

AOR I-5 ***From Estate, supra,*** **at para 135**
AOR I-6 **See also, *Boughton v Knight, supra,* at 68**

35. In fact, where an impugned belief amounts to a value judgment, or an opinion about the motives of others, this Court has asked whether it was in "direct conflict with what [the testator] must have known if he had not been cognitively impaired" (emphasis added). A harsh but unfounded opinion of another's motives, based on facts that a testator might believe in the absence of cognitive impairment, is not an insane delusion.

AOR I-4 ***Banton v Banton, supra,*** **at 200**
AOR II-9 ***Sivewright v Sivewright's Trustees*** **[1920] SC (HL) 63, at 67**

36. The test that the Appellant asks this Court, at paragraph 85 of his Factum, to adopt – in effect, "Do I find plausible the fact or facts that has impacted the will-making?" – would cast the net beyond wills that proceed from a deranged mind.

37. The language quoted from *Stekar v Wilcox* at paragraph 87 of the Appellant's Factum is taken out of context: in that case, where the testator had an existing medical history of "delirium, hallucinations, delusions, confusion and drug abuse", the evidence before the Court on one hand contradicted his imputations against an excluded former beneficiary, and, on the other, was silent as to how the Deceased came by those beliefs. The quoted passage represents the trial judge directing himself as finder of fact that it was open to him on the evidence to find that the imputations were delusions. It does not reflect a process of applying the law to reach that conclusion.

AOR II-10 ***Stekar v Wilcox*****, 2016 ONSC 5835, at paras 67-75, aff'd 2017 ONCA 1010, at paras 12-13**

ii. Individual alleged delusions at issue

(1) That Appellant and Kathy tried to frame Rick

38. Contrary to the Appellant's contention at paragraph 59 of his Factum, her Honour referred to the recorded conversations between the Appellant and the Deceased as relevant context for the conclusion that the belief was not a delusion. Summarising her findings of fact, her Honour noticed the salient events in the Deceased's interaction with Mr. Green, and remarked of Ms. Sheridan, "Her notes are part of Exhibit 1. She simply reports what Mark and Kathy tell her…".

ABCO Tab 4: Reasons for Judgment, at paras 45, 21 and 23

39. There was evidence was capable of showing that the Deceased could be in possession of her senses and think nonetheless that the Appellant had tried to frame Rick:

(a) removing Rick from her house was a longstanding preoccupation of the Appellant's and a subtext of his discussions with the Deceased at this time;

RCOM Tab 16: Extract of examination for discovery of Appellant, QQ 10-12; Tab 17: Extract from transcript of audio recording of telephone call between Appellant and Deceased, on March 23, 2003

(b) she had heard that the Appellant, seeking to recruit the Respondent to his elder abuse ploy, had said that Rick would be removed through police involvement;

(c) at the meeting on March 21, she had heard the police refer to "forcing Rick out of my house", Kathy's notes of a call with the policewoman days later reveal an elaborate design on the part of the police to do so and Dr Roy's note of Kathy's call refers to a consensus that Rick must leave the Deceased's house;

RCOM Tab 5: Deceased's notes; Tab 18: Extract of Kathy's notes, dated in April 2003; Tab 19: Extract from Dr. Roy's notes and records, dated April 10, 2003

(d) the Respondent, whose sanity is not in question, told the police that the information with which the Appellant supplied them "was only meant to cause my brother Richard trouble with you";

RCOM Tab 20: Letter written by Respondent, dated July 2, 2003

(e) she heard the Appellant threaten to frame Rick with the Revenue; and

RCOM Tab 21: Extracts from transcript of audio recording of telephone call involving Appellant, Deceased, Kathy and Rick, on March 30, 2003

(f) in a conversation with the Appellant, she acknowledged that she had wanted help, while nonetheless deploring the methods that he had practiced, remarking on the coincidence in timing between Rick's police interview and the comment to her doctor about the police's involvement and, at a time when her capacity was not questioned, doubting that the Appellant was acting for her welfare.

RCOM Tab 22, pp 149-150, 154-55: Extracts from transcript of audio recording of telephone call between Appellant and Deceased, on December 12, 2003

40. The extended forms of the "framing" delusion mentioned at paragraphs 62-65 of the Appellant's Factum are simply instances of hyperbole or dramatization by the Deceased. The learned trial judge found this kind of expression to be a family trait.

ABCO Tab 4: Reasons, at paras 45, 46 and 50

41. Mark's denial that he had copies of the Deceased's power of attorney and will fails to explain how they came to be exhibited in his initial affidavit in these proceedings. The Deceased's observation that the Appellant had a written list of Rick's apparent transgressions was borne out in cross-examination. It is safe to conclude that her version on the power of attorney and will, whether accurate or not, was not delusional.

RCOM Tab 23: Copies of powers of attorney, dated February 20, 2001, and will dated May 6, 2001; Tab 5: Deceased's notes; Tab 24: Extract of cross-examination of Appellant

42. The Respondent does, however, raise separate grounds for disposing of the "framing" delusion and its extended forms, at paragraphs 95 and following below.

(2) Kathy's telephone call to Deceased's doctor

43. Based on her knowledge of the note in the doctor's file, the learned trial judge concluded that the Deceased could be in possession of her senses and believe Kathy to have told the doctor that she was no longer driving.

ABCO Tab 4: Reasons for Judgment, at paras 47-49; Tab 49: Excerpts from notes and records of Dr. Roy, dated April 10, 2003

44. The variation on this allegation that the Appellant says was not considered is that the Deceased believed Kathy to have done so to get revenge. Like other alleged delusions, this version involves the Deceased attributing a bad faith motive to the Appellant and/or Kathy. The learned trial judge, in the context of another such alleged delusion, saw the mistrust that the Deceased had developed towards the Appellant as a sufficient explanation for her to have conceived that genre of belief.

ABCO Tab 4: Reasons for Judgment, at para 50

45. Dr. Ferguson's notes of his meeting with the Deceased demonstrate at the very least that she remained capable as late as 2006 of being reasoned out of the belief that Kathy caused the loss of her licence. That belief therefore does not qualify as a delusion, which is a fixed belief that a testator cannot be persuaded by reason to disavow.

ABCO, Tab 55: Report of Dr. Ferguson, dated May 30, 2006
AOR I-5 ***From Estate, supra*, at para 132**
AOR I-6 ***Boughton v Knight, supra*, at 68-69**

(3) Contact with Deceased's doctor preplanned

46. The learned trial judge recounted at length, both in her summary of events and in her analysis of the alleged delusions, an increasingly fraught relationship between the Deceased and the Appellant between 2000 and 2005.

ABCO Tab 4: Reasons for Judgment, at paras 23-25, 46-49

47. Contrary to the Appellant's contention, her Honour's finding that it was not a delusion for the Deceased to have believed that the Appellant and Kathy had preplanned to contact her doctor to cause trouble, was not based solely on the Deceased's having seen a note of the doctor's name in their keeping, but also on the accumulation of events that had opposed the Deceased and the Appellant throughout the intervening time: "her view is grounded in the history of the family relationships and relationship with Mark".

ABCO Tab 4: Reasons for Judgment, at para 50

48. Her Honour adequately judged the degree of detail that she was required to go into, in proportion to the intrinsic plausibility of the submission in light of the record: the Appellant had thwarted the Deceased's wishes by contacting third parties before, in the Bulmer episode; he recorded himself threatening to do just that in 2004, and to air the family's dirty laundry among her friends, in a 2005 telephone call; in 2006, he threatened that he would reveal certain financial secrets to Rick if she did not end the estrangement.

ABCO Tab 4: Reasons for Judgment, at para 18
RCOM Tab 12, p 110: Extract of transcript of audio recording of telephone call between Appellant and Deceased, on January 29, 2004; Tab 14, p 132: Extract of transcript of audio recording of telephone call between Appellant and Deceased, on May 29, 2005; Tab 6, pp 81-82: Rick Affidavit, at paras 56-57

C. UNDUE INFLUENCE

i. Coercion

49. The learned trial judge adequately considered circumstantial evidence relevant to the exercise of undue influence by Rick, including (1) the Deceased's cognitive impairment, (2) the proximity between the Deceased and Rick, and (3) the shared living arrangements.

ABCO Tab 4: Reasons for Judgment, at paras 53-55

50. In asking this Court to substitute its own balancing of the circumstantial evidence for that of the Court below, the Appellant relies on two tenuous propositions, namely, that the *inter vivos* gifts made from 2006 onwards, and Rick's personality, make it more probable than not that the Deceased was coerced to make the 2005 will.

51. Dating from 2006 to 2008, the *inter vivos* gifts cast thin light on the nature of the relationship between the Deceased and Rick in 2005. Further, without finding that the later gifts had themselves been extracted using pressure, it would be perverse to treat them as tending to prove that the will was also. The gifts were made to and with the privity of all three legatees of the 2005 will, and with the knowledge of the Deceased's accountant. Her Honour decided rightly not to place preponderant weight on them.

RCOM Tab 6, pp 80-81: Rick Affidavit, at paras 52-54

52. It is not tenable to say that the learned trial judge failed to take into account Rick's personality. Her Honour was fully aware of the thrust of the evidence, writing:

> Mark, Chris, and to a lesser extent Randy agree that Rick was a difficult person and could be intimidating and controlling of the whole family. Mark noted that Rick was anti-social, aggressive at times, volatile and bad tempered and that these traits have been with him since childhood.

However, her Honour goes on to observe:

> Chris describes his relationship with Rick as up and down, and generally described Beverly and her sons as having strong personalities with no hesitation to express their feelings. Chris' description of

> him, Mark and Randy accords with my own observations of them when responding to questions on cross-examination.
>
> **ABCO Tab 4: Reasons for Judgment, at para 16**

53. Specifically in analysing the Appellant's contention on undue influence, her Honour wrote:

> Beverly was a feisty matriarch who knew exactly what was happening with herself and her family prior to and in August of 2005…
>
> … the facts do not support an inference that Beverly was susceptible to Rick. Despite her own complaints about Rick, she had lived with him for his entire life and there is nothing to suggest that, though difficult, he was someone she could not handle or particularly wanted handled by others. I accept Mark's evidence that Rick would make it difficult for Mark and Kathy to contact Beverly. However, as apparent was the fact that Beverly simply worked around Rick.
>
> **ABCO Tab 4: Reasons for Judgment, at paras 54-56**

54. Rick's "leverage" comment in 2014 is an inherently weak foundation for inferring that he had exercised coercion over the Deceased to make the 2005 will, because:

(a) the Appellant's own version is confused, having Rick apply leverage on July 12, 2014, to bring about a conveyance that had been completed on July 10;

ABCO Tab 6: Appellant's Affidavit, at paras 24-28, 32

(b) Rick's comment was contained in a letter postmarked August 28, 2014;

ABCO Tab 58: Card from Rick to Peter Silverberg, dated July 11, 2014

(c) neither Rick, Chris nor the Respondent agreed with the Appellant as to what the "leverage" consisted of;

RCOM Tab 25: Extract of cross-examination of Chris, pp 62, l 20 - 64, l 19; Tab 26: Extract of cross-examination of Respondent, pp 24, l 10 - 26, l 3; Tab 27: Email from Chris, sent July 10, 2014

(d) in the version of both Rick and the Respondent, the leverage involved holding Chris to an earlier engagement that they believed him to have entered into;

(e) to hold someone to a promise does not show propensity to use undue influence;

(f) as bad character evidence, it is not even admissible unless falling within the similar fact exception, which requires its probative value to be "so high that it displaces the heavy prejudice which will inevitably inure…where evidence of prior immoral or illegal acts is presented", an unlikely conclusion here in light of the tortuous chronology and wholly unexplained context of the remark.

AOR II-12 ***JG v Tyhurst*, 2003 BCCA 224, at paras 18-19, leave to appeal ref'd [2004] 1 SCR xv.**

ii. Fraud

55. As the Notice of Application alleged fraud only in relation to the belief that Kathy had commented on the Deceased's driving, and the Appellant has failed to adduce evidence capable of establishing its legally required elements, this ground of appeal should fail.

(1) Fraud must be specifically pleaded

56. The *Rules of Civil Procedure* contain a blanket requirement to plead fraud with "full particulars" in an action. While the rule does not itself apply to applications, authorities in other jurisdictions show that the common law applies the same underlying principle to allegations of fraud forming the basis for a will challenge.

***Rules of Civil Procedure*, RRO 1990, Reg 194, rule 26.05(8)**
AOR II-13 ***Elder Estate v Bradshaw*, 2015 BCSC 1807, at paras 24-25**
AOR II-14 ***Trustee for the Salvation Army (NSW) Property Trust v Becker* [2007] NSWCA 136, at para 66-69**

57. The Notice of Application charges Rick with having induced the Deceased only to believe that the Appellant or Kathy had advised her doctor that she should not drive.

RCOM Tab 28: Notice of Application, issued August 26, 2014, at para 2(q)

58. In his initial affidavit, Rick set out the true sequence whereby the Deceased came to hold that belief, beginning with her appointment with the doctor that June and culminating in

her becoming privy to the note in the chart. The learned trial judge agreed: "Beverly received a copy of this note and interpreted." Not surprisingly, this was the Deceased's version too, when the Appellant himself, later that year, taxed her with the allegation that she had been deceived by Rick to form this belief:

> MARK ROE: …and, and for you to think that Kathy would do – you know, I'll tell you something. I know you, you, Rick has pumped you full of bad thoughts about….
>
> BEVERLY ROE: No, no, it's just the note I read. Nobody has [*indiscernible*] at all.

ABCO Tab 4: Reasons for Judgment, at paras 26 and 47
RCOM Tab 29: Affidavit of Richard Thomas Roe, sworn October 29, 2014, at para 12
RCOM Tab 22, pp 152-53: Extracts from transcript of audio recording of telephone call between Appellant and Deceased, on December 12, 2003

59. The attack on the 2005 will based on fraud should end there, as well in this Court as in the Court below. The remaining submission on this issue concern the case theories not pleaded by the Appellant.

(2) The elements of undue influence by fraud

60. Neither Canadian nor English courts have purported to set out comprehensively the elements that constitute fraud in the testamentary context. The Appellant has not done so either in his submissions at trial or in his Factum before this Court.

61. Mr. Poyser, in the most detailed treatment in Canada, counsels that the "fraud under consideration here and applicable to wills is common law fraud, not equitable fraud".

AOR III-35 John E S Poyser, *Capacity and Undue Influence*, 2nd ed (Toronto: Thomson Reuters, 2019), at 366
AOR III-37 See also, *Atkinson on Wills*, *supra*, at 263, 265-66

62. The Privy Council held, "The undue influence, and the importunity which, if they are to defeat a Will, must be of the nature of <u>fraud or duress</u>, exercised on a mind in state of debility, are insinuated but not proved" (emphasis added). The significance of "fraud or

duress" is that, among the grounds for traversing a deed made by an unimpaired adult, these two uniquely are admitted not only in equity but also at common law.

AOR II-15 ***Barry v Butlin*** **(1838) 2 Moo PC 480, at 491**
AOR III-38 Dominic O'Sullivan KC et al, ***The Law of Rescission*****, 3rd ed (Oxford: Oxford University Press, 2023), at para 29.66**

63. Because it encapsulates the law that various courts, without defining it, have been applying in the testamentary context, Mr. Poyser's observation is sound. The same criteria required to raise a claim in the tort of deceit or to avoid a deed for fraud at common law apply to a proceeding to have a will pronounced invalid.

64. The Supreme Court of Canada approved the following definition of fraud in an action in deceit: "Fraud is a false representation of fact, made with a knowledge of its falsehood, or recklessly, without belief in its truth, with the intention that it should be acted upon by the complaining party, and actually inducing him to act upon it."

AOR II-16 ***Parna v G & S Properties Ltd*****, [1971] SCR 306, at 316**

65. The terms that this Court used in summarising the plaintiff's allegation in *Anderson v Walkey* are only germane if an allegation of fraud requires the representor to lack a belief in the truth of the representation, for instance, those underlined in the following passage:

> …The gist of the charge is rather that Bessie Walkey gave false information to the testator, namely, that his daughter, Ida Houge and her husband were endeavouring to have him placed in a rest home; that by this artful contrivance she had succeeded in poisoning the mind of the testator against his daughters, creating such a prejudice in his mind and inculcating in him such an aversion against them, that he was thereby prevailed upon to revoke his earlier will, reduce the benefits given to his daughters thereunder and divert such benefits to the defendant Walkey. What is alleged against this defendant is not fraud in the strict sense, but a subtle species of fraud involving the making of false and insidious suggestions whereby mastery was obtained by the defendant Walkey over the mind of the testator…
>
> (emphases added)

AOR II-17 ***Anderson v Walkey*****, [1961] OR 289, at 300-301 (CA)**

66. The Supreme Court of Canada, considering the equivalent doctrine under Quebec law, but referring to common law authorities, likewise used language suggesting that lack of belief in the truth of the representations is required: "most insidiously effective",

"improperly influence", "directed his efforts to the fostering of this false impression", "détestables artifices", "poison", "mains perfides", "le mensonge", "l'astuce" and "coupables manœuvres".

AOR II-18 *Mayrand v Dussault* (1907), 38 SCR 460, at 462 (per Fitzpatrick CJ), and 467-8 (per Girouard J)

67. The English Chancery Division has explicitly held that, "…if a person believes that he is telling the truth…then even if what he tells the testator is objectively untrue, the will is not liable to be set aside on that ground alone…".

AOR II-19 *Re Edwards* [2007] EWHC 1119 (Ch), at para 47

68. With respect to "but for" causation, the language already quoted from *Anderson* at paragraph 65 above sufficiently shows that it is a required element in the testamentary as context. This conclusion is supported by comments of the House of Lords in an early decision on the subject of undue influence by fraud:

> For if the person by whom it was made was not at the time of making it of sufficient mental capacity to enable him to dispose of his property, or if having sufficient disposing mind, he executed it under coercion, or under the influence of fear, or in consequence of impressions created in his mind by fraudulent misrepresentations, – in none of these cases can the instrument be properly described as being his will.
> …
> The inquiries must be … secondly, was the instrument in question the expression of his genuine will, or was it the expression of a will created in his mind by coercion or fraud?
> …
> But if in these circumstances the young man, influenced by his regard for the person who had thus led him astray, were to make a will and leave to him everything he possessed, such a will certainly could not be impeached on the ground of undue influence. Nor would the case be altered merely because the companion had urged, or even importuned, the young man so to dispose of his property; provided only, that in making such a will the young man was really carrying into effect his own intention formed without either coercion or fraud. (emphasis added)

AOR II-20 *Boyse v Rossborough* (1857) 6 HLC 1, at 44, 45, 48 (per Lord Cranworth LC)
AOR II-21 See also, *Allen v M'Pherson* (1847) 1 HLC 191, at 208-209

69. Finally, the authorities illustrate that the representor must have intended the testator to rely upon the misrepresentation, in fact, to do so by altering his testamentary dispositions.

70. The House of Lords in *Boyse v Rossborough* held:

> If a wife, by falsehood, raises prejudices in the mind of her husband against those who would be the natural objects of his bounty, and by contrivance keeps him from intercourse with his relatives, to the

> end that these impressions which she knows he had thus formed to their disadvantage may never be removed, such contrivance may, perhaps, be equivalent to positive fraud, and may render invalid any will executed under false impressions thus kept alive.
> …
> The undue influence must be an influence exercised in relation to the will itself, not an influence in relation to other matters or transactions. (emphases added)

AOR II-20 ***Boyse v Rossborough, supra,* at 49, 51 (per Lord Cranworth LC)**

71. In *Allen v M'Pherson*, the House of Lords held:

> There cannot be a stronger instance of fraud than a false representation respecting the character of an individual to a weak old man, for the purpose of inducing him to revoke a bequest made in favour of the person so calumniated.

Later on, quoting an earlier, unreported decision in *Butterfield v Scawen* (1775):

> If it should appear, as in the case stated by your Lordships, that an old and infirm testator who had bequeathed a legacy to A. B., had been induced by false and fraudulent representations with reference to the conduct of A. B., made to him for the purpose by C. D., to make a subsequent codicil revoking that bequest, and substituting for it a much smaller legacy, the effect of which would be to give a larger share of the residue to C. D. than he otherwise would take, I conceive that the Ecclesiastical Court would not, under such circumstances, grant probate of such revoking codicil, provided it should be clearly established in point of evidence that such act and intention were produced by such false and fraudulent representations. (emphasis added)

AOR II-21 ***Allen v M'Pherson, supra,* at 207, 208-209 (per Lord Lyndhurst, in the majority)**

72. Where a legatee, convicted of theft from the testator occurring during the latter's lifetime, was alleged to have fraudulently assumed the character of a confidant toward the testator, Lane J.A. in the majority in the Court of Appeal for Saskatchewan, said:

> Further, the cases suggest the purpose of the fraud must be to obtain the legacy. Even if there was fraud within the meaning of the authorities in this case, one cannot state with confidence the assumption by Mr. Simon of the character of a trusted friend was for the purposes of receiving the legacy. If one is to make an assumption it is equally tenable, on the material, to accept that Mr. Simon assumed the character of trusted friend and confidant for the purposes of stealing from Mr. Bolianatz which theft began before the will was even executed and thus the assumption would be unrelated to the will. (emphases added)

AOR II-22 ***Bolianatz Estate v Simon*, 2006 SKCA 16, at para 31 (per Lane JA)**

(3) Application of the elements of fraud to the Appellant's submissions

73. The Appellant's case rests on the observation that Rick, in discovery in 2016, expressed some of the beliefs that the Deceased is alleged to have held. Beyond showing that the beliefs were common to both of them, he led no evidence to show:

(a) that Rick made any representations to the Deceased in those terms;

(b) that Rick did not believe those matters to be true;

(c) that Rick intended the Deceased to rely on a belief in the truth of those matters;

(d) that her mistaken belief created by Rick brought about the 2005 will.

74. For example, the Court below was not bound to draw the inference that, because Rick knew that the Deceased had failed a driving test, he could not have believed that Kathy had any role in her losing her licence.

75. The greater likelihood is that the account of Mark shouting, "It will never be over", which appears in her 2003 notes, originated with the Deceased and migrated to Rick, who accepted it as true. Indeed, in a conversation on March 30, 2003, the Deceased said to the Appellant, "Well, I think it could be all over", to which he answered, "It won't be over. It's not all over. It's not all over."

RCOM Tab 30: Extracts from transcript of audio recording of telephone call involving Appellant, Deceased, Kathy and Rick, on March 30, 2003

76. Had the Deceased's beliefs about Appellant and his wife's behaviour and attitude remained unchanged except as to his shouting, "It will never be over," she still would have made the 2005 will. Exaggeration of the conduct of beneficiary towards a testator is not sufficient to render void a new will made to his exclusion.

AOR II-17 ***Anderson v Walkey, supra,*** **at 302**

77. Her Honour was justified in not giving preponderant weight to Chris's comments on the recording of his 2002 conversation with the Appellant, or the comments of his wife, Imogen, in her emails to Kathy. This evidence could justifiably have been ruled inadmissible, because (1) they were statements of pure opinion, (2) they were bad character evidence shorn of the requisite similar fact situations and (3) Imogen's emails, as exhibits to Kathy's affidavit, were hearsay for the truth of the matter stated.

78. In *Re Patterson Estate*, the Court found that the false beliefs of the testatrix had been "induced…through manipulation and deceit on the part of Marlene". This finding was made on the evidence as a whole, not simply on the circumstance of Marlene's silence in the face of her mother's mistaken beliefs, as suggested by the Appellant, who elides an entire paragraph describing Marlene's involvement in the making of the will.

AOR II-23 ***Re Patterson Estate*, 2017 NSSC 221, at paras 86-87**

(4) Re Patterson Estate *should not be followed if it admits of "fraud" through non-feasance*

79. Alternatively, this Court should reject *Re Patterson Estate* if it holds that the failure of one who knows of a testator's false beliefs to correct them amounts to fraud.

80. This is doctrinally unsound because it lets in the possibility of holding a will void for pure non-feasance on the part of the alleged perpetrator of the fraud. The simple coincidence of a testator's mistaken belief and another's desire that it continue does not make the latter the author of the belief.

81. As the Supreme Court of Canada's noted in *Mayrand*, the relevant dichotomy is that "on peut dire que l'acte de libéralité n'est pas l'expression exacte de la volonté libre et vraie du disposant, mais bien plutôt l'expression de la volonté de celui qui l'a fait faire"

(emphasis added). This accords with the dichotomy often drawn in the coercion context: "…his will must be the offspring of his own volition, not the record of someone else's".

AOR II-18 ***Mayrand v Dussault, supra*****, at 468**
AOR II-24 ***Rivard v Rivard*****, 2016 ONSC 4436, at para 14**

82. Thus, the line drawn between valid and void wills is between the product of the testator's own will and the product of another person's will, not between more and less perfect circumstances more generally for the testator to take a decision.

83. The proposition sought to be extracted from *Re Patterson Estate* has undesirable implications, as a matter of policy. There is nothing in the decision to limit it to parties with an interest in the new will. Even so limited, the doctrine places an excessive burden of altruism on people whom a testator may genuinely wish to benefit. Depending on the character of the testator, they may risk estrangement or disinheritance themselves by contradicting mistaken assumptions dictating his bounty.

D. ABILITY TO UNDERSTAND ASSETS

84. The ability of a testator to understand then nature and extent of the property being disposed of is an element of testamentary capacity under *Banks v Goodfellow*. The question that faces the finder of fact on any such element is whether a testator could rise to a given cognitive task, not whether he did.

85. The test as a whole is sometimes summarised by the label "sound and disposing mind and memory". In speaking of the test generally, the Supreme Court of Canada has said:

> A "disposing mind and memory" is one able to comprehend, of its own initiative and volition, the essential elements of will-making, property, objects, just claims to consideration, revocation of dispositions, and the like… (emphasis added)

AOR II-25 ***Leger v Poirier*****, [1944] SCR 152, at 161 (per Rand J)**
AOR III-35 Poyser, ***Capacity and Undue Influence, supra*****, at 46-48**

86. A leading case in Ontario expressly confirms this understanding of *Banks v Goodfellow*, as do decisions of the Courts of Appeal of both England and Nova Scotia. Boyd C. held:

> … The testator must not only be able to understand that he is by his will giving the whole of his property to one object of his regard, but he must also have capacity to comprehend the extent of his property and the nature of the claims of others whom by his will he is excluding from all participation in that property.
>
> … The question for decision was said to be, not whether the testator knew that he was giving all to his wife and excluding all other relatives, but whether he was at that time capable of recollecting who those relations were, of understanding their respective claims upon his regard and bounty, and of deliberately forming an intelligent purpose to exclude them from any share in his property.
>
> (emphases added)

AOR II-26 ***Murphy v Lamphier*** **(1914), 31 ORL 287, at 318, aff'd (1914), 32 OLR 19 (CA)**
AOR II-28 ***Wittenberg v Wittenberg Estate*****, 2015 NSCA 79, at paras 69-71**
AOR III-29 ***Hoff v Atherton*** **[2004] EWCA Civ 1554, 33-35**

87. The requisite ability to understand the nature and extent of one's assets varies with complexity of the distributional scheme involved in the will. Thus, a simple bequest of residue imports a threshold lower than a more involved set of dispositions.

AOR III-30 ***Botnick v Samuel and Bessie Orfus Family Foundation*****, 2011 ONSC 3043, at para 106, aff'd 2013 ONCA 225**
AOR III-32 ***Kaye v Chapman*****, 2000 BCSC 1195, at para 68**

88. A lack of precise knowledge of the value of assets need not indicate a lack of capacity where there is "an understanding by testators that they hold certain types of property, and that a disposition in a will would provide a beneficiary with a valuable gift".

AOR III-33 ***Re Culbert Estate*****, 2006 SKQB 454, at para 129**

89. The law does not require a testator to be able to recite his assets and liabilities from memory. A testator may refer to summaries prepared by others.

AOR III-30 ***Botnick v Samuel and Bessie Orfus Family Foundation, supra*****, at paras 177-178**

90. Her Honour considered Appellant's contention that, because the Deceased arrived at Ms. Guidolin's office with a prepared list of her assets, she did not therefore have had an understanding of them. Her Honour was not bound to draw that inference.

ABCO Tab 4: Reasons for Judgment, at para 33

91. The learned trial judge's reliance on the retrospective capacity evidence merely disposed of one avenue of doubt that the evidence might be thought to raise, namely, whether the Deceased's level of cognitive function, clinically considered, stood in the way of her having the requisite understanding. The analysis did not begin and end there, as her Honour went on to note that cross-examination, sc. of Ms. Guidolin and the Respondent, had focussed on lists of assets prepared by the Deceased at different times.

92. At its heart, the Appellant's submission on this point asks this Court to substitute its own view of the evidence for that of the learned trial judge, and the record on which he must invite this Court to correct an allegedly palpable and overriding error does not help him.

93. At best, the circumstance of the Deceased having attended at Ms. Guidolin's office with a list of assets can assist the Appellant in one of two ways: either if the Deceased was not the author of the list; or if she was and it was substantially incomplete. The evidence at trial did not support the existence of either such circumstance.

94. Finally, the *Banks v Goodfellow* test of capacity to make a will concerns her ability to appreciate the property being disposed of. The Deceased's joint assets and accounts with designated beneficiaries fall outside this class.

AOR III-34 *Banks v Goodfellow* (1870) LR 5 QB 549, at 565

PART IV – ADDITIONAL ISSUES

A. LIMBS OF DELUSION ANALYSIS NOT ADDRESSED

i. The trial judge decided only what was necessary to arrive at a conclusion

95. The propositions that the Appellant puts forward as delusions in this appeal cannot entitle him to the order that he seeks unless (1) the Deceased believed those propositions, and (2) they caused her to make the 2005 will. Courts in Ontario have held that, in order to

affect the validity of the will, an insane delusion must prompt him to make a will that he would not otherwise make.

AOR I-7 ***Taylor Estate v McCully, supra,*** **at para 84**
AOR I-8 ***Slover v Rellinger, supra,*** **at paras 309-10**

96. Her Honour limited her written analysis to the point that the parties most agitated, namely, on which side of the line as between mere unreasonable beliefs and insane delusions the alleged beliefs fell. This was understandable. If she found in the Respondent's favour, there was no need to consider the other questions, for he could succeed by convincing the Court of any one of: (1) no actual belief; (2) no causation; or (3) not a delusion. Thus, her Honour decided only what was strictly necessary.

97. In consequence, if this Court should reverse the learned trial judge on whether the propositions at issue amounted to delusions, a decision whether those propositions were believed and caused the will would still be needed, either here or at a new trial.

ii. The Deceased did not believe in 2005 that Kathy caused her to lose her licence

98. The Deceased does not allege that Kathy caused her to lose her licence in the 2005 letter. The Appellant relies on evidence that either postdates the 2005 will or whose date is ambiguous: his own telephone calls with the Deceased in 2008; an answer of Rick's in discovery; and a letter to Chris of which only the last page, without a date, was produced at trial, together with Chris's evidence surrounding that letter.

99. Given the note in Dr. Ferguson's file showing that the Deceased was able, in 2006, to reconstruct the chain of events in which she lost her licence, it is open to the trier of fact to conclude that any false belief about Kathy's role therein arose only subsequently.

ABCO, Tab 55: Report of Dr. Ferguson, dated May 30, 2006

100. Chris's affidavit alone dates the belief about Kathy playing a causal role back to "around the time of" the 2005 will, but the letter, whose date he did not know, refers only to the remarks that the Deceased attributed to Kathy, not results believed to flow from them.

RCOM Tab 33: Extract of cross-examination of Chris, pp 51, ll 2-5, and 52, ll 22-26

101. Rick was not asked what the basis was for his saying that the Deceased believed that Kathy had caused the loss of her licence. Counsel left it to rest at the level of Rick's mere opinion, at Q 315. The answers to QQ 316 and 488 simply do not assist the Appellant.

ABCO Tab 62, p 369-70: Examination for Discovery of Richard Thomas Roe, QQ 315-16, 488

iii. Paying the police: not believed by Deceased, or causative of 2005 will

102. The words that the Deceased used, on which the Appellant relies, are obscure: "I myself would never be employed by someone, if I had to lie because they were lying, expecting me to support their lies." The Court was not bound to infer from this meagre evidence that the Deceased believed that the Appellant and Kathy were paying the police.

ABCO Tab 53: Handwritten letter of the Deceased, sworn October 27, 2005

103. Another interpretation is that the Deceased understood the police practice of putting untrue suggestions to their interrogees, and that she had a low opinion of this technique being practiced on a "respectable senior", meant to be the victim in their investigation.

104. What drove the estrangement of the Deceased and the Appellant, and, ultimately, the 2005 will, was that he involved the police at all, not whether he paid them.

iv. The Deceased did not actually believe the vindictive motives assigned in the letter

105. Expressions in the Deceased's letter of October 2005 suggest that the Appellant and/or Kathy had acted in order to harm her or Rick spitefully. Having been asked to set out her

reasons for disinheriting the Appellant, the Deceased may have felt the need to convince an external authority, unfamiliar with her family history, that he had deserved to be disinherited, and engaged in the family trait of hyperbole for persuasive effect.

106. Notably, on other occasions, the Deceased's focus is on the results of the Appellant's and Kathy's actions on her life, not on their motives.

RCOM Tab 5: Deceased's notes; Tab 34: Letter written by Deceased, dated February 8, 2007

107. The Deceased continually warned the Appellant to stop involving himself in her affairs. This confirms that his refusal to respect her wishes and to stop interfering, rather than the motives under which he persisted, was what continued to incur her displeasure.

RCOM Tabs 10, 12, 14, 22, 30: Extracts of transcripts of audio recordings of telephone conversations between Appellant and Deceased

v. Beliefs about the Appellant and Kathy's motives did not bring about the will

108. Even if the Deceased did believe that the Appellant had vindictive motives, it only fortified her in a decision to disinherit him which the effects of his and Kathy's actions on her life, and the disrespect of her wishes, were themselves sufficient to bring about.

109. As early as March 2003, the Deceased felt that the actions of the Appellant and Kathy had "ended what I thought was a loving relationship that can never be repaired". The day after she broke off contact, they booked her a doctor's appointment behind her back.

RCOM Tab 5: Deceased's notes

vi. A belief about what the Appellant brought to the police station did not bring about the will

110. The Deceased does not comment in the 2005 letter on the papers that the Appellant had with him at the 2003 meeting with the police. The observation that he had with him her

will and power of attorney appears in her notes dated in 2003.

ABCO Tab 53: Handwritten letter of the Deceased, sworn October 27, 2005
RCOM Tab 5: Deceased's notes

111. Based on resemblances between the two documents, the Deceased likely had her notes of March 2003 to hand when drafting the 2005 letter. The absence in the latter of any remark regarding the documents that the Appellant brought to the police station suggests that, on reflection about the various misdoings of the Appellant, she did not regard this circumstance as contributing to her decision to disinherit him.

B. MERITS OF GIFT ACTION NOT DECIDED

112. Her Honour expressly decided the gifts action on the standing issue alone. Should this Court set aside the judgment on the application, the Respondent submits that the action should be dismissed in any case, for want of proper parties, namely, an estate trustee.

113. The claims raised in the action belonged to the Deceased, and now vest in her personal representatives. None of the parties before the Court could be shown to sustain that character at the time of trial, nor can be presently.

PART V – ORDER SOUGHT

114. The Respondent asks this Honourable Court to dismiss the appeal with costs.

ALL OF WHICH IS RESPECTFULY SUBMITTED

Andrew Rogerson
Nikhil Mukherjee

CERTIFICATE RESPECTING RULE 61.09(2)

I estimate that two hours will be needed for my oral argument in the within appeal, not including reply. An order under subrule 61.09(2) is not required.

Nikhil Mukherjee

August 16, 2023

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SCHEDULE "A" – LIST OF AUTHORITIES

(i) Cases

1. *R v Walker*, 2008 SCC 34, [2008] 2 SCR 245
2. *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65
3. *R v GF*, 2021 SCC 20
4. *Banton v Banton* (1998), 164 DLR (4th) 176 (Ont Gen Div)
5. *From Estate*, 2019 ABQB 988
6. *Boughton v Knight* (1873) LR 3 P&D 64
7. *Taylor Estate v McCully* (1995), 12 ETR (2d) 13 (Ont Gen Div)
8. *Slover v Rellinger*, 2019 ONSC 6497
9. *Sivewright v Sivewright's Trustees* [1920] SC (HL) 63
10. *Stekar v Wilcox*, 2016 ONSC 5835, aff'd 2017 ONCA 1010
11. *JG v Tyhurst*, 2003 BCCA 224, leave to appeal ref'd [2004] 1 SCR xv
12. *Elder Estate v Bradshaw*, 2015 BCSC 1807
13. *Trustee for the Salvation Army (NSW) Property Trust v Becker* [2007] NSWCA 136
14. *Barry v Butlin* (1838) 2 Moo PC 480
15. *Parna v G & S Properties Ltd*, [1971] SCR 306
16. *Anderson v Walkey*, [1961] OR 289 (CA)
17. *Mayrand v Dussault* (1907), 38 SCR 460
18. *Re Edwards* [2007] EWHC 1119 (Ch)
19. *Boyse v Rossborough* (1857) 6 HLC 1
20. *Allen v M'Pherson* (1847) 1 HLC 191

21. *Bolianatz Estate v Simon*, 2006 SKCA 16

22. *Re Patterson Estate*, 2017 NSSC 221

23. *Rivard v Rivard*, 2016 ONSC 4436

24. *Leger v Poirier*, [1944] SCR 152

25. *Murphy v Lamphier* (1914), 31 ORL 287, aff'd (1914), 32 OLR 19 (CA)

26. *Wittenberg v Wittenberg Estate*, 2015 NSCA 79

27. *Hoff v Atherton* [2004] EWCA Civ 1554

28. *Botnick v Samuel and Bessie Orfus Family Foundation*, 2011 ONSC 3043, aff'd 2013 ONCA 225

29. *Kaye v Chapman*, 2000 BCSC 1195

30. *Re Culbert Estate*, 2006 SKQB 454

31. *Banks v Goodfellow* (1870) LR 5 QB 549

(ii) Secondary sources

32. John E S Poyser, Capacity and Undue Influence, 2nd ed (Toronto: Thomson Reuters, 2019).

33. Thomas E Atkinson, *Handbook of the Law of Wills*, 2nd ed (St Paul: West Publishing Co, 1953).

34. Dominic O'Sullivan KC et al, The Law of Rescission, 3rd ed (Oxford: Oxford University Press, 2023).

SCHEDULE "B" – STATUTES, STATUTORY INSTRUMENTS, etc.

***Rules of Civil Procedure*, RRO 1990, Reg 194, rule 25.06**

Rules of Pleading — Applicable to all Pleadings
Material Facts

25.06 (1) Every pleading shall contain a concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved. R.R.O. 1990, Reg. 194, r. 25.06 (1).

Pleading Law

(2) A party may raise any point of law in a pleading, but conclusions of law may be pleaded only if the material facts supporting them are pleaded. R.R.O. 1990, Reg. 194, r. 25.06 (2).

Condition Precedent

(3) Allegations of the performance or occurrence of all conditions precedent to the assertion of a claim or defence of a party are implied in the party's pleading and need not be set out, and an opposite party who intends to contest the performance or occurrence of a condition precedent shall specify in the opposite party's pleading the condition and its non-performance or non-occurrence. R.R.O. 1990, Reg. 194, r. 25.06 (3).

Inconsistent Pleading

(4) A party may make inconsistent allegations in a pleading where the pleading makes it clear that they are being pleaded in the alternative. R.R.O. 1990, Reg. 194, r. 25.06 (4).

(5) An allegation that is inconsistent with an allegation made in a party's previous pleading or that raises a new ground of claim shall not be made in a subsequent pleading but by way of amendment to the previous pleading. R.R.O. 1990, Reg. 194, r. 25.06 (5).

Notice

(6) Where notice to a person is alleged, it is sufficient to allege notice as a fact unless the form or a precise term of the notice is material. R.R.O. 1990, Reg. 194, r. 25.06 (6).

Documents or Conversations

(7) The effect of a document or the purport of a conversation, if material, shall be pleaded as briefly as possible, but the precise words of the document or conversation need not be pleaded unless those words are themselves material. R.R.O. 1990, Reg. 194, r. 25.06 (7).

Nature of Act or Condition of Mind

(8) Where fraud, misrepresentation, breach of trust, malice or intent is alleged, the pleading shall contain full particulars, but knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred. O. Reg. 61/96, s. 1.

Claim for Relief

(9) Where a pleading contains a claim for relief, the nature of the relief claimed shall be specified and, where damages are claimed,

(a) the amount claimed for each claimant in respect of each claim shall be stated; and

(b) the amounts and particulars of special damages need only be pleaded to the extent that they are known at the date of the pleading, but notice of any further amounts and particulars shall be delivered forthwith after they become known and, in any event, not less than ten days before trial. R.R.O. 1990, Reg. 194, r. 25.06 (9).

Court of Appeal File No. COA-22-CV-0319

ROBERT MARK ROE **and** **RAYMOND CHRISTOPHER ROE and RANDALL SCOTT ROE**
Appellant Respondents in appeal

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT TORONTO
(ESTATES LIST)

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