Case Name:

Smith Estate v. Rotstein

IN THE MATTER OF the Estate of Ruth Dorothea Smith, deceased
RE: Lawrence Jerome Berk Smith, Executor and Trustee of the Estate of Ruth Dorothea Smith, Applicant, and
Nancy-Gay Rotstein, Marliyn Chapnik Smith, Cynthia Joy Smith, Ilyse Jan Smith, Natalie Jill Smith, Tremayne-Lloyd Smith and Claude R. Thomson, Trustee of the I. & R. Trust settled on November 7, 1991, Respondents

[2010] O.J. No. 1527

2010 ONSC 2117

56 E.T.R. (3d) 216

2010 CarswellOnt 2282

Court File No. 01-4260/07

Ontario Superior Court of Justice

D.M. Brown J.

Heard: December 14, 15 and 17, 2009.
Judgment: April 15, 2010.

(314 paras.)

[Editor's note: Supplementary reasons for judgment were released July 30, 2010 and July 18, 2012. See [2010] O.J. No. 3266 and [2012] O.J. No. 3375.]

Civil litigation -- Civil procedure -- Judgments and orders -- Summary judgements -- For part of claim -- Motion by the executor for partial summary judgment to set aside and expunge the Amended Notice of Objection filed by his sister allowed -- The objections to the issuance of a certificate of appointment in respect of the 1987 Will and first two codicils were dismissed -- The deceased clearly possessed testamentary capacity in 1987, 1989 and 1991 -- The deceased knew of and approved of the contents of her will and understood that her will operated to exclude the ob-

jector from her estate -- The objector adduced no direct evidence the deceased was coerced by her son -- Rules of Civil Procedure, Rules 20, 20.01, 20.04(2.1).

Wills, Estates and Trusts Law -- Wills -- Preparation and execution -- Undue influence, fraud and mistake -- Undue influence -- Source of influence -- Family member -- Suspicious circumstances -- Testamentary capacity -- Legal capacity -- Knowledge and approval -- Motion by the executor for partial summary judgment to set aside and expunge the Amended Notice of Objection filed by his sister allowed -- The objections to the issuance of a certificate of appointment in respect of the 1987 Will and first two codicils were dismissed -- The deceased clearly possessed testamentary capacity in 1987, 1989 and 1991 -- The deceased knew of and approved of the contents of her will and understood that her will operated to exclude the objector from her estate -- The objector adduced no direct evidence the deceased was coerced by her son -- Rules of Civil Procedure, Rules 20, 20.01, 20.04(2.1).

Motion by the executor Lawrence Smith for partial summary judgment, to set aside and expunge the Amended Notice of Objection filed by his sister, Nancy-Gay Rotstein, to the issuance to him of a certificate of appointment. The parties' mother, who died on November 7, 2007, made several wills during her life. The mother's last will, dated November 4, 1987, was altered by four codicils dated May 24, 1989, November 7, 1991, November 15, 1994, and, June 3, 1998. Nancy-Gay Rothstein filed her notice objecting to the certificate of appointment on the grounds that her mother lacked testamentary capacity, did not have knowledge of nor approve the contents of her will and was subjected to undue influence. Rothstein also asserted that there were suspicious circumstances in respect of the apparent execution of the will. Nancy-Gay was estranged from her mother when the mother made her testamentary instruments. The affidavit of Nancy-Gay Rothstein's husband, Max Rothstein, stated that there had been a lifetime of undue influence and coercion exerted over the deceased by her husband and son. The affidavit stated that most of the deceased's assets were transferred to Smith in 1998, without independent legal advice and with adverse tax consequences, leaving the deceased with few personal assets on her death. Mr. Rothstein's affidavit contained no specific allegation that the deceased lacked testamentary capacity. During cross-examination Mr. Rothstein acknowledged that the deceased was competent during the period from 1993 to 1999, and he testified that he was not aware of what date she had become incompetent. Mr. Thomson, Q.C. who was present when the Will, First Codicil and Second Codicil were signed, said that the deceased had made it clear that she had carefully considered the decision not to make provision for Nancy-Gay in her will. Thomson recalled that Smith was never present during his discussions with the deceased about her estate plans and that the deceased was fully competent and clear about her intentions. The objector argued that neither Thomson nor William Draiman provided the deceased with the required independent legal advice, because both had acted for Smith and the deceased's husband in previous matters. The objector further argued that suspicious circumstances could be found in her mother's use of the same lawyers and accountant as her husband and son. The lawyers and accountant had been long-time family friends. Smith moved for partial summary judgment dismissing his sister's objections to the issuance of a certificate of appointment in respect of the 1987 Will, and the May 24, 1989 codicil (the First Codicil) and the November 7, 1991 the Second Codicil).

HELD: Motion allowed. Given the evidence of Mr. Thomson, Q.C, and the admissions made by Mr. Rotstein, the deceased clearly possessed testamentary capacity in 1987, 1989 and 1991. The uncontradicted evidence was that the deceased knew of and approved of the contents of her will and

understood that it operated to exclude Nancy-Gay from her estate. No air of reality surrounded the objector's claim that her brother exerted undue influence over their mother when she made her 1987 Will and the first two codicils, or during the last nine years of her life. The objector adduced no direct evidence that when the deceased made her 1987 Will and the first two codicils, she was coerced to do so by her son. Neither the objector nor her husband had any personal or direct knowledge of what was going on in the deceased's mind during the very long period of estrangement when the testamentary instruments were made. The mere fact of family members sharing professional advisors did not, per se, create a suspicious circumstance or signify an indicia of undue influence. None of the property transfers prejudiced the deceased.

Statutes, Regulations and Rules Cited:

Legislation Act, 2006, S.O. 2006, c. 21, Sch. F, s. 52(3), s. 52(4)

Ont. Reg. 438/08,

Rules of Civil Procedure, Rule 20, Rule 20.01, Rule 20.02, Rule 20.04(2.1), Rule 20.05(1), Rule 75.03(1), Rule 75.06

Counsel:

R. Shekter and A. Rabinowitz, for the Moving Party, Lawrence Smith.

I. Hull, S. Popovic-Montag and T. Sutton, for the Responding Party, Nancy-Gay Rotstein.

REASONS FOR DECISION

D.M. BROWN J.:--

I. Overview of this motion for summary judgment under Old Rule 20

A. Issues in a nutshell

1 Lawrence Smith moves for partial summary judgment, under the Old Rule 20, to set aside and expunge the Amended Notice of Objection filed by his sister, Nancy-Gay Rotstein, to the issuance to him of a certificate of appointment as estate trustee of the estate of their late mother, Ruth Dorothea Smith. When Ruth died on November 7, 2007 she was 92 years old. Her husband, Isadore, had pre-deceased her on May 16, 1993. Ruth was survived by her two children, Lawrence, or Larry, and Nancy-Gay.

2 Ruth had made several wills during her life, but at her death her last will and testament was one dated November 4, 1987, which had been altered by four codicils -- May 24, 1989; November 7, 1991; November 15, 1994; and, June 3, 1998. As a result of his father's death, Lawrence was the sole appointee as estate trustee under his mother's 1987 Will.

3 Mr. Smith moves for partial summary judgment dismissing his sister's objections to the issuance of a certificate of appointment in respect of the 1987 Will, and the First (1989) and Second (1991) Codicils.

4 For the reasons set out below, I grant partial summary judgment dismissing the Amended Notice of Objection of Nancy-Gay Rotstein in respect of the 1987 Will and the first two codicils.

B. Procedural history

B.1 Application for a certificate of appointment

5 On December 3, 2007, less than a month after her mother had died, Ms. Rotstein filed a notice objecting to the issuance of a certificate of appointment to her brother, without notice to her, on the grounds that her mother lacked testamentary capacity, did not have knowledge of nor approve the contents of her will, and was subjected to undue influence. As well, Ms. Rotstein asserted that there were suspicious circumstances in respect of the apparent execution of the will. As is common with notices of objection, its content was "boilerplate" -- no material facts were set out in support of any of the allegations.

6 Mr. Smith filed an application for a certificate of appointment of estate trustee with a will of his mother's estate on December 17, 2007, listing the value of her estate assets at $1.695 million. In a subsequent affidavit Mr. Smith stated the net value of his mother's estate was $1.24 million.

7 Ms. Rotstein then filed an amended notice of objection on December 20, 2007; her grounds of objection remained the same.

B.2 Motion for summary judgment

8 Mr. Smith initiated this motion for summary judgment in October, 2008. In reasons given November 14, 2008, Himel J. permitted Mr. Smith's summary judgment motion to proceed before a contemplated motion by Ms. Rotstein under Rule 75.06 for an order giving directions for the conduct of her will challenge. Himel J. ordered that the hearing of the summary judgment motion be expedited and heard by the end of June, 2009.

9 Ms. Rotstein sought leave to appeal to the Divisional Court from that order. She abandoned her motion for leave on March 3, 2009.

10 Cross-examinations ensued on the affidavits filed. Ms. Rotstein moved before a master to compel her brother to answer certain questions refused on his examination. In her reasons dated August 14, 2009, Master Birnbaum dismissed that motion and wrote, in part:

> Summary judgment motions require evidence by affidavit; surprisingly, Nancy-Gay has not served an affidavit for the summary judgment motion. Instead, her husband, Maxwell Rotstein ("Maxwell"), who is not a party to the action, has sworn the affidavit.
>
> After hearing the submissions of counsel, my view is that Nancy-Gay and Maxwell have no evidence of undue influence and they wish to indulge in an extensive fishing expedition to find some support for their allegations ...

11 The parties then appeared before me on September 22, 2009, to set a date for the hearing of the summary judgment motion. Counsel for Ms. Rotstein strongly sought a hearing date prior to January 1, 2010, the date very significant amendments to Rule 20 of the *Rules of Civil Procedure* were to come into force. Counsel for Mr. Smith resisted. In the result, I directed that the hearing proceed on December 14, 2009, for three days. That is what occurred.

12 I should note that the responding party objected to the filing of the moving party's Reply Factum, arguing it did not comply with the timetable I had imposed. As a result, I have not read the Reply Factum, save for the portions counsel took me to during the hearing.

C. Schema of these reasons

13 Before identifying the issues on this summary judgment motion, I propose first to recount the history of the wills executed by Ruth Smith during her lifetime. I will then identify the issues at play, followed by a consideration of the principles for summary judgment motions applicable in this case. A brief history of the Smith family, and its internal problems, will follow. I will then set out the law on each of the three key issues -- testamentary capacity, knowledge and approval and undue influence -- including a detailed consideration of the evidence placed before me on each issue. After giving the evidence the required "hard look", I will set out my conclusion on whether a genuine issue for trial exists.

II. History of the wills executed by Ruth Smith

A. The 1975 Will

14 At issue on this motion are objections made by Ms. Rotstein to her mother's 1987 Will and its four codicils. Ruth Smith had executed at least four prior wills, together with a number of codicils to each. There are no material facts in dispute regarding the dates or content of those prior wills and their codicils. The chart below summarizes the key features of those four prior wills:

Will/Codicil	Executors	Residue and Interest of Nancy-Gay Rotstein
1975 WILL		
Will: 25/09/75	Isadore, Larry and Nancy	Life interests to husband. Following his death, residue in 4 equal shares to Lawrence, Nancy-Gay, and the two trusts established for the children of Lawrence (Lawrence Smith Fund) and Nancy-Gay (Nancy-Gay Rotstein Fund).
Codicil: 19/12/75	Isadore and Larry	No change
Codicil: 9/04/76	No change	½ of residue to Lawrence; ¼ of residue to Lawrence Smith Fund; ¼ of residue to Nancy-Gay Rotstein Fund
Note: 9/04/76		Explains decision to exclude Nancy-Gay Rotstein from any share of the residue

15 As the chart discloses, in April, 1976, Ruth Smith made a fundamental change to the beneficiaries who would share in her estate. She disinherited her daughter, Ms. Rotstein. In her 1975 Will she had distributed her residuary estate equally amongst her son, her daughter, her son's children and her daughter's children. Her second codicil changed that, removing her daughter. Ruth Smith's note of April 9, 1976 explained why she did so:

> Nancy-Gay and Larry have always shared equally the love of their parents and all their worldly goods. However, because of Nancy-Gay's recent actions which have deeply grieved us, I feel I must make the revisions in my will which I signed today.

Later in these reasons I will return to the evidence about this change, or what Nancy-Gay Rotstein's husband, Maxwell, described as the family's "Hiroshima".

B. The 1976 Will

16 Ruth Smith revoked her prior wills and made a new one dated November 5, 1976. Its terms showed some change in heart with respect to gifts to her daughter, leaving some portion of the residue to Ms. Rotstein:

1976 WILL	Executors	Residue and Interest of Nancy-Gay Rotstein
Will: 5/11/76	Isadore and Lawrence	Ms. Rotstein to receive a diamond bracelet watch and diamond brooch If shares existed in Sussmill Investments Ltd. on date of division, such shares to go to Lawrence and residue divided into 24 shares: 9 shares to Lawrence, 7 to Nancy-Gay, 4 to Lawrence's issue and 4 to Nancy-Gay's issue; If no shares in Sussmill Investements Ltd. on date of division, residue divided into 20 shares: 9 to Lawrence, 5 to Nancy-Gay, 3 to Lawrence's issue and 3 to Nancy-Gay's issue.
Codicil: 5/11/76		Dealt with Sussmill securities in the event Lawrence was not alive at date of division
Codicil: 10/11/76		No change in beneficiaries. Codicil dealt with income for Isadore.

C. 1978 Will

17 On June 27, 1978, Ruth Smith made a new will in which she excluded her daughter from any share in the residue:

	Executors	Residue and Interest of Nancy-Gay Rotstein
1978 WILL		
Will: 27/06/78	Isadore and Lawrence	Ms. Rotstein to receive a diamond bracelet watch and diamond brooch. Residue divided into 4 shares: 3 for Lawrence, and 1 to be divided equally amongst all grandchildren.
Codicil: 15/05/79		No change in beneficiaries.

D. 1984 Will

18 In her 1984 Will Ruth Smith decided to leave all of the residue to her son, Lawrence:

	Executors	Residue and Interest of Nancy-Gay Rotstein
1984 WILL		
Will: 4/12/84	Isadore or, if unable, Lawrence	No gifts to Nancy-Gay Rotstein. Residue to Lawrence.
Codicil: 13/12/85		No change in beneficiaries.

E. 1986 Will

19 Ruth Smith's 1986 Will continued her decision to leave the residue of her estate to her son alone.

	Executors	Residue and Interest of Nancy-Gay Rotstein
1986 WILL		
Will: 9/09/86	Isadore and Lawrence	No gifts to Nancy-Gay Rotstein Residue to Lawrence
Notice: 9/09/86		
Codicil: 6/01/87		No change.

20 In a "Notice" dated September 9, 1986, Ruth Smith acknowledged that she had not made any provision in her 1986 Will for her daughter. The Notice read:

> To whom it may concern:
>
> I have expressly not made any provision for my daughter, Nancy-Gay Rotstein, and her issue in my will dated at Toronto, Ontario, this 9th day of September, 1986, although I send them my love and best wishes.

F. The 1987 Will and its four codicils

21 The final will made by Ruth Smith, the one at issue on this motion, is dated November 4, 1987. In it Ruth Smith appointed her husband, Isadore, and Lawrence as executors of her estate, made no gift to her daughter, and left the residue to her son, in those respects continuing with the approaches seen in her 1984 and 1986 wills. Ruth Smith signed a "Notice" in which she stated:

> I have expressly not made any provision for my daughter, Nancy-Gay Rotstein, and her issue in my will dated at Toronto, Ontario, this 4th day of November, 1987, although I send them my love and best wishes.

22 Ruth Smith made four codicils to her 1987 Will. Her exclusion of Nancy-Gay Rotstein from any share in the residue of her estate continued; Lawrence remained the sole beneficiary of the residuary estate. But certain codicils made specific gifts to her daughter and to a trust to benefit one of her daughter's children, Marcia Rotstein Evans, known as Marcy:

	Residue and Interest of Nancy-Gay Rotstein
1987 WILL	
1st Codicil: 24/05/89	No change to beneficiaries. Defines the "issue" of her son.
2nd Codicil: 7/11/91	Gifts to her daughter, Ms. Rotstein, a platinum watch and platinum and diamond brooch. $50,000 to the I. & R. Smith Trust, settled November 9, 1991, for the benefit of one of Nancy-Gay's daughters, Marcy.
3rd Codicil: 15/11/94	Increased the cash legacy to the I. & R. Smith Trust to $200,000
4th Codicil: 3/06/98	The cash legacy to the I. & R. Smith Trust is reduced to $150,000 and a necklace is left to Larry Smith's then wife, Tracey Tremayne-Lloyd.

III. Issues on this motion

23 Ms. Rotstein filed a notice objecting to the issuance of a certificate of appointment to her brother which raised four issues: (i) her mother lacked testamentary capacity; (ii) her mother did not have knowledge of nor approve the contents of her will and codicils; (iii) her mother was subjected to undue influence; and (iv) suspicious circumstances existed in respect of the execution of the will. Ms. Rotstein's undue influence claim consumed the better part of the evidence filed before me. Since she did not file any evidence on this motion, one must look to the affidavit of her husband,

Max Rotstein, for particulars of that claim. In paragraph 7 of his affidavit Mr. Rotstein identified what he described as the "real issues". I have divided them according to the following time periods:

The entirety of Ruth Smith's life

(i) There was a "lifetime of undue influence and coercion exerted over" Ruth Smith by her husband and son;
(ii) Larry had longstanding control over family business dealings and commenced "disruptive" litigation against his sister;

From 1998 until her death in 2007

(iii) After 1998 most of Ruth Smith's assets were transferred to Larry prior to her death, without independent legal advice, with adverse tax consequences, leaving Ruth Smith with few personal assets on her death;
(iv) Larry was granted powers of attorney over his mother's property and personal care;
(v) The medical testing of Ruth Smith over the last 10 years of her life;
(vi) The "longstanding deterioration of [Ruth's] health and its effects on her capacity to fully understand testamentary and other legal documents";
(vii) The reconciliation of Nancy-Gay with her mother from 1993 on;

After Ruth Smith's death

(viii) Larry assumed the duties of interim executor without authority.

24 Taking these claims, and others raised during argument, I have identified four issues which arise for decision on this motion -- one procedural in nature, and three substantive:

(i) Is a motion for partial summary judgment available in the circumstances to dismiss the objections to the 1987 Will and the first two codicils, but not to the Third and Fourth Codicils?
(ii) Does a genuine issue for trial exist with respect to the objector's allegation that her mother, Ruth Smith, lacked the capacity to make the Will and the codicils?
(iii) Does a genuine issue for trial exist with respect to the objector's allegation that her mother did not know or approve of the contents of the Will and the codicils?
(iv) Does a genuine issue for trial exist with respect to the objector's allegation that her mother was subject to undue influence when she made her Will and the codicils?

IV. First Issue: Is a motion for partial summary judgment available in the circumstances to dismiss the objections to the 1987 Will and the first two codicils, but not to the Third and Fourth Codicils?

A. Does Old Rule 20 or New Rule 20 apply to this motion for summary judgment?

25 Major changes to Rule 20 of the *Rules of Civil Procedure* came into effect on January 1, 2010. This summary judgment motion was argued in December, 2009. At the scheduling hearing

before me in September, 2009, respondent's counsel vigorously pushed for the motion to be heard before the rule changes went into effect, recognizing the sea-change enacted by the new rules to the powers of judges hearing summary judgment motions.

26 At the conclusion of the motion hearing on December 17, I informed the parties that I would be unable to release my reasons until after January 1, 2010. Counsel for Mr. Smith stated that he was not conceding that Old Rule 20 would apply to the motion in the event that I did not release my decision until after the new rules came into effect.

27 Section 52(3) of the *Legislation Act, 2006*[1] provides that where a regulation, such as the *Rules of Civil Procedure*, is amended, proceedings commenced under the former regulation "shall be continued under the new or amended one, in conformity with the new or amended one *as much as possible*." Section 52(4) provides that the "procedure established by the new or amended ... regulation shall be followed, with necessary modifications, in proceedings in relation to matters that happened before the replacement or amendment."

28 Ont. Reg. 438/08, which enacted the amendments to the Rules, did not contain a transition provision. Several decisions of this Court have held that the absence of a transition provision means that summary judgment motions launched prior to January 1, 2010, but argued after that date, fall to be decided under the New Rule 20.[2] I agree with those decisions.

29 This motion, however, was prepared under the Old Rule 20, it was argued under the Old Rule 20, and the only reason a decision was not released prior to the rule changes was the constraint of my calendar. Under such circumstances I conclude that I must decide this motion by applying the principles that had developed under the Old Rule 20. To decide otherwise, in my view, would work an unfairness on the parties and require me to re-assemble everyone for a further hearing on how the New Rule 20 would impact on the adjudication of the motion. Deciding the motion under the Old Rule 20 is consistent, I think, with the language of section 52(3) of the *Legislation Act, 2006* which, while stating that proceedings commenced under the former regulation shall continue under the amended one, recognizes in the phrase "as much as possible" that, in certain circumstances, it would not be reasonable to so require. This is one such circumstance.

B. Principles governing Old Rule 20 motions for summary judgment

30 The basic obligations of parties to a summary judgment motion are well known. The moving party must establish that there is no genuine issue requiring a trial and that overarching burden never shifts. An evidentiary burden lies on the responding party who may not rest on the allegations or denials in the party's pleadings, but must present by way of affidavit, or other evidence, specific facts showing that there is a genuine issue for trial. A responding party must put her 'best foot forward' and 'lead trump or risk losing all'. Each side must put its best foot forward with respect to the existence or non-existence of material issues to be tried.[3]

31 In *Quinn v. Keiper*[4] I attempted to summarize the principles regarding the scope of the powers exercised by a judge on a summary judgment motion under the Old Rule 20:

> [39] As the appellate jurisprudence has emerged under Rule 20, the Court of Appeal has restricted the circumstances in which a motions court judge can grant summary judgment. Motions judges play a "narrow role"; they do not try facts, but only "determine whether there are genuinely contested issues of material

fact." Whether a claim is weak or strong does not matter; as long as there is a genuine issue with respect to material facts, the case must be sent to trial.

[40] In determining whether a genuine issue exists with respect to a material fact, the Court of Appeal has held that a motions judge:

> will never assess credibility, weigh the evidence, or find the facts. Instead, the court's role is narrowly limited to assessing the threshold issue of whether a genuine issue exists as to material facts requiring a trial. Evaluating credibility, weighing evidence, and drawing factual inferences are all functions reserved for the trier of fact.

Or, as put in a more recent case:

> It is well settled that on a motion for summary judgment, the role of the motion judge is limited to deciding whether a genuine issue exists as to material facts requiring a trial. Although this involves taking a hard look at the evidence presented, a motion judge should not attempt to find facts, assess credibility or decide questions of law. If there is an issue of credibility, it will be virtually impossible for the moving party to satisfy the requirements of Rule 20.

[41] As I read the appellate jurisprudence on Rule 20, for all practical purposes summary judgment only will issue where:

(i) The moving party can establish its case based upon admissions made by the respondent;
(ii) There are no disputed material facts and the applicable law is well settled; or,
(iii) The responding party has offered no evidence to support its claim or defence.

[42] In Rule 20 the word "genuine" is used in the sense of "not spurious". If the record fails to provide any meaningful support for allegations, other than unsubstantiated and bald assertions, they will fall short of any demonstration of real credibility issues, or other genuine issues necessitating a trial. As put recently by the Court of Appeal in *Goldman v. Devine*, [2007] O.J. No. 1491: "Self-serving evidence that merely asserts a defence or a claim without providing some detail or supporting evidence is not sufficient to create a genuine issue for trial ..."

32 These are the principles I intend to apply in deciding this motion, subject to some further clarification below about the scope of inference-drawing by a summary judgment motions judge under the Old Rule 20.

C. Availability of summary judgment in will challenge proceedings

33 Ms. Rotstein submitted that the availability of summary judgment is "especially limited in probate cases" because a probate judgment operates *in rem* and the court's responsibility to the testator requires judicial inquisitorial features "which command a full evidential record."

34 About a decade ago some questions existed about the availability of summary judgment in will challenge cases, especially after an order giving directions had been made.[5] Those questions no longer exist. First, a common practice has emerged to include a provision in an order giving directions that a party may bring a motion for summary judgment. More importantly, subsequent case law clarified that summary judgment is available in will challenge cases. As stated recently by the Court of Appeal in *Chappus Estate (Re)*, "the rules contemplate the possibility of summary disposition in contentious estate matters".[6]

35 Nevertheless, let me address the two points Ms. Rotstein advanced as telling against the availability of summary judgment in will challenge cases. First, while it is true that a probate judgment operates *in rem*, that distinction simply signals that a motions court should adhere to the direction given by appellate courts that it give the record a "hard look" before granting summary judgment.

36 As to her second point, it is true that in *Ettore* Cullity J. stressed the need for a "full evidential record" on a motion for summary judgment in contested wills cases. Nonetheless, the general case law concerning summary judgment motions also has stressed the need for the parties to "lead trump", and the court expects that on a motion for summary judgment, of whatever nature, the parties will adduce all the evidence one could expect to see at trial.

37 New Rule 20.04(2.1), which expands the powers of the motions judge to weigh evidence, highlights the need for a full evidential record in all cases by providing that judges may exercise their enhanced powers "unless it is in the interest of justice for such powers to be exercised only at a trial". Lack of completeness of the evidentiary record, then, may play a factor in any summary judgment motion -- probate or otherwise -- in deciding whether or not to send the matter to trial.

38 In any event, the evidentiary record in the case before me is full. Indeed, it is massive -- motion records totaling five volumes; nine volumes of compendia; an eighteen volume medical brief; an eight volume transcript brief, a fourteen volume document brief; plus sundry other briefs.

39 In sum, Rule 20 -- both Old and New -- contains evidentiary requirements and safeguards sufficient to address any special concerns associated with *in rem* proceedings and, in all other respects, contested will challenges constitute just another species within the larger genus of civil proceedings.

D. Notices of Objection and summary judgment motions

40 Before turning to the issue of partial summary judgment, let me touch on the issue of the role of Notices of Objection in summary judgment motions. In a contested will case a motion for summary judgment may be brought before or after a motion for an order giving directions under Rule 75.06. In the latter case, an order giving directions typically requires the parties to exchange pleadings, and those pleadings, in turn, define the claims, issues and material facts in support thereof. A summary motions judge can then assess whether material facts are in dispute by referring to the issues and materials facts contained in the pleadings.

41 In the present case Himel J. permitted Mr. Smith's summary judgment motion to proceed before Ms. Rotstein moved for an order giving directions. As a result, the only "pleading" of the

objector, so to speak, is her notice of objection. Yet the notice of objection in this case provides the court with little guidance about the real nature of the reasons the objector challenges the issuance of a certificate of appointment. In saying that I am not being critical of counsel who drafted the notice; it contains the standard "boilerplate" one sees in typical notices of objection. A practice has developed amongst the Estates Bar of filing boilerplate notices of objection; I think it is an unhealthy practice. Form 75.1, the Notice of Objection, requires an objector to indicate her reason for objecting to the issuance of a certificate and continues: "such as lack of testamentary capacity, undue influence or unfitness to act as estate trustee". Although such language simply illustrates the types of objections which can be made, in practice objectors tend to go no further than to include some, or all, of those general objections in their notice.

42 Use of such boilerplate, in my view, is inadequate and does not comply with the requirement of Rule 75.03(1) to state the "nature ... of the objection". For example, for the objector in the present case to state in her notice that one of the reasons for opposing the issuance of a certificate is that "the deceased was subjected to undue influence" is, with respect, meaningless. Undue influence by whom? When? By what conduct? Answers to those questions would more properly flesh out the "reason" for the objection, as required by Form 75.1 and, as well, identify the "claim" in respect of which summary judgment might be sought. While I will not take into account on this motion the vagueness of the reasons set out by Ms. Rotstein in her notices of objection, I strongly anticipate that in future summary judgment motions under New Rule 20 the failure of an objector to provide detailed reasons for his or her objection may well operate as a factor in a court's assessment of whether a genuine issue requiring a trial exits.

E. The general availability of partial summary judgment in will challenge proceedings

43 After initiating his motion for summary judgment, Mr. Smith informed Ms. Rotstein that he was amending the relief sought to seek only partial summary judgment. His position was set out in his counsel's letter of April 14, 2009:

> I have been instructed to advise that in connection with our motion for summary judgment, we will not be seeking summary judgment in relation to the Third and Fourth Codicils dated November 5, 1994 and June 3, 1998, respectively. Accordingly, upon completion of the summary judgment motion, whatever the outcome, we will then be prepared to litigate, in the ordinary course, with respect to the validity of those two testamentary documents. We believe that by narrowing the scope of the summary judgment motion, a significant time and cost-saving will be achieved in the case overall.

Ms. Rotstein submitted that the form of partial summary judgment sought by her brother is not available under Old Rule 20.

44 Rule 20.01 provides that summary judgment may be sought "on all or part of a claim" or to dismiss "all or part of the claim". Old Rule 20.05(1) recognized that summary judgment could be "granted only in part". In its general application Old Rule 20 certainly permitted a court to grant summary judgment in respect of only part of a claim. In *Ford Motor Company of Canada, Limited v. Ontario Municipal Employees Retirement Board*,[7] the Court of Appeal held that the availability of partial judgment in a particular case was defined and limited by the purpose of Rule 20 as articulated in the *Irving Ungerman Ltd. v. Galanis*[8] and *1061590 Ontario Ltd. v. Ontario Jockey Club*[9] cases:

> [44] The purpose of the summary judgment provisions of Rule 20 was described in this way by Morden A.C.J.O. in *Ungerman Ltd. v. Galinas, supra,* at p. 550:
>
> > A litigant's 'day in court', in the sense of a trial, may have traditionally been regarded as the essence of procedural justice and its deprivation the mark of procedural injustice. There can, however, be proceedings in which because they do not involve any genuine issue which requires a trial, the holding of a trial is unnecessary and, accordingly, represents a failure of procedural justice. In such proceedings the successful party is being both unnecessarily delayed in the obtaining of substantive justice and is being obliged to incur added expense. Rule 20 exists as a mechanism or avoiding these failures of procedural justice.
>
> [45] In *Ontario Jockey Club*, the purpose of Rule 20 was described in this way:
>
> > The purpose of Rule 20 is clear. The rule is intended to remove from the trial system, through the vehicle of summary judgment proceedings, those matters in which there is no genuine issue for trial ...

45 The Court of Appeal in *Ford Motor Company* observed that cases in which summary judgment had been granted for "part of" a claim seemed to fall into three groups -- where the evidentiary basis for the judgment consists of an admission by the opposite party; where a party seeks recovery of an amount equal to or less than its "inevitable recovery at trial"; and,

> ... actions where the evidence establishes that there is no genuine issue for trial in respect of a discrete claim. These partial summary judgment cases require no further comment except to say the result of summary judgment for "part of" a claim is consistent with the purpose of Rule 20; the partial summary judgment removes a discrete issue from the issues to be tried and thus shortens the trial. This is consistent with "procedural justice" concerns referred to by Morden A.C.J.O. in *Ungerman* and with the purpose of Rule 20 as referred to in *Jockey Club*.[10]

46 Where an objection to a will involves multiple "claims" regarding its invalidity, I see no reason why partial summary judgment could not be granted dismissing some of the claims provided the result was consistent with the purpose of Rule 20 in removing a discrete issue from the list of those to be tried, thereby shortening the trial. Whether or not to grant partial summary judgment would require an exercise of judicial discretion in the particular circumstances of a case. For example, in *Slater v. Slater, supra.*, the court granted summary judgment in respect of some, but not all, issues set out in an order for directions regarding the validity of a will -- summary judgment was granted dismissing claims that the will was executed under undue influence or without testamentary capacity, but not granted in respect of a claim of lack of due execution of the will.

F. The specific availability of partial summary judgment in respect of only some of the testamentary documents

47 Ms. Rotstein submitted that the court lacks the jurisdiction to grant partial summary judgment in this case because here, unlike in the *Slater* case, there are multiple testamentary documents

-- the 1987 Will and four codicils -- and granting partial summary judgment would leave claims against some testamentary documents outstanding. She advanced three reasons in support of her position:

(i) Since Mr. Smith applied for probate of the Will and the four codicils, the law requires that they be read together;
(ii) The law of republication prevents any grant of partial summary judgment; and,
(iii) Mr. Smith effectively seeks a grant of partial probate on this motion which is not available where there is a will and several codicils.

48 I will deal with each argument in turn. But before doing so, let me summarize, again, the contents of the two testamentary instruments in respect of which Mr. Smith does not seek summary judgment -- the Third and Fourth Codicils. In paragraph 8 of her 1987 Will Ruth Smith directed how her trustees were to distribute her net estate. Paragraph 8(c) contained cash legacies of $50,000.00 to each of Larry's three children -- Cynthia, Ilyse and Natalie -- followed by the transfer of the residue to her son. In her second codicil Ruth Smith amended paragraph 8(c) of her will by adding a cash legacy of $50,000.00 to a trust, the I. & R. Smith Trust, set up to benefit one of Nancy-Gay's children, Marcy. The only alteration made by the Third Codicil was to increase the cash legacy to that trust to $200,000.00. The Fourth Codicil made two changes: the gift to the trust was reduced to $150,000.00 and a piece of jewellery was left to Ruth Smith's daughter-in-law, Tracey Tremayne-Lloyd Smith.

F.1 The need to read all the testamentary documents together

49 A will and its codicils should be construed together as one testamentary disposition. As put in *Williams on Wills, Ninth Edition*:

> The will and all the codicils thereto are *construed* together as one testamentary disposition, although not as one document and the same principles in general apply to the construction of a codicil as of a will. For the purpose of explaining the will or any codicil, the court may and is bound to look at the will and at all the other codicils.[11] (emphasis added)

50 But the issue on this motion does not involve the *construction* of testamentary documents; it concerns the *validity* of testamentary documents. The common law recognizes that proceedings involving wills may involve two distinct questions: (i) inquiring into which document constitutes the will of which the testatrix knew and approved; and, (ii) interpreting what the language of the will means: *Balaz v. Balaz.*[12] This proceeding engages the first question only. Once it is determined which documents constitute the will of Ruth Smith, subsequent questions of interpretation may or may not arise.

51 In my view Ms. Rotstein's argument conflates a task not yet before this court -- the interpretation of valid testamentary documents -- with one that is -- ascertaining which testamentary documents are valid. Ms. Rotstein has put in issue the validity of her mother's last will and codicils. Her brother's Rule 20 motion requires the court to determine whether a trial is necessary or unnecessary to determine the validity of those testamentary instruments. Put another way, the questions on this motion are which of the testamentary instruments require a trial to determine their validity and which, if any, do not? If the answer is that some do not require a trial, then the objections to their validity can be dismissed and what remains for trial will be the validity of the other testamentary

instruments. Once the validity of all testamentary documents has been ascertained, either on this motion or at trial, it may or may not be necessary to engage in questions of interpretation of those testamentary instruments which have been found valid, but that is an exercise for another day and another place.

F.2 Does the doctrine of republication or confirmation prevent granting partial summary judgment?

52 Ms. Rotstein submitted that when considering the validity of a will with four codicils, one must begin by assessing the claims as against the last testamentary document, in this case the 1998 Fourth Codicil. In that codicil Ms. Smith (i) amended a provision in the previous codicil, (ii) added a new provision to her will, and then concluded with the following clause:

> 3. In all other respects, I hereby confirm the terms and provisions of my Will and the various codicils thereto referred to above.

As I understood his submission, Ms. Rotstein's counsel argued that clause 3 of the 1998 Codicil re-published the entire will and, by so doing, became the lynchpin testamentary document. So, if a court were to find that Ms. Rotstein lacked capacity with respect to the 1998 Fourth Codicil, then the three previous codicils and the 1987 Will also would be rendered invalid. Ms. Rotstein argued that the failure of Mr. Smith to seek summary judgment in respect of the 1998 Fourth Codicil renders it impossible for the court to grant partial summary judgment in respect of the 1987 Will and the first two codicils.

53 I respectfully disagree that the principles of republication or confirmation work such a result.

54 A codicil usually operates as a testamentary document which supplements, explains, modifies or subtracts from a will bearing an earlier date.[13] The codicil takes effect as annexed to the will and is regarded as a constituent part of the will to which it belongs.[14]

55 The law regards a codicil as confirmation of the will, except as to any express alterations it makes.[15] Building on this, the doctrine of republication holds that a codicil confirming a will shifts the date of the will to the date of the codicil.[16] But, the effect of republication or confirmation has certain limits vis-à-vis the prior testamentary instruments. As put by Justice Romer in *In re Hardyman*:

> It is, however, clear that the effect of republication is not such that one must necessarily construe the will for all purposes as though it had been made at the date of the codicil. That that was so was pointed out by Barton J. in an Irish case of *In re Moore*, and I am told that Eve J., in a recent case which is unreported, has taken the same view. <u>It is not right therefore to say that the effect of republication of a will is that you must necessarily and for all purposes construe the will as though it had been made at the date of the codicil.</u> Barton J., in the case of In re Moore, in my opinion, accurately sums up the law on the subject when he says: "[...] <u>the Courts have always treated the principle that republication makes the will speak as if it had been re-executed at the date of the codicil not as a rigid formula or technical rule, but as a useful and flexible instrument for effectuating</u>

> a testator's intentions, by ascertaining them down to the latest date at which they have been expressed.[17] (emphasis added)

56 A will is not altered by a codicil any further than is necessary to give effect to the intentions of the testator shown by the will and codicil taken together, and the effect of a confirmation "bringing the dispositions of the will down to the date of the codicil" is without prejudice to the original effect of the will and intermediate codicils.[18]

57 What emerges from a review of the principles of republication and confirmation is that they play a role in interpreting or construing testamentary documents in order to give effect to a testator's intentions. Specifically, the date at which a will operates can be of importance in two circumstances -- where a devise or bequest is worded so as to restrict the gift to the property which the testator owned at the date of the will, or where a devise or bequest might fail by reason of a beneficiary having witnessed one of the wills or codicils. In each case, by "bringing down the date of the will" to the date of its last republication, gifts may be saved that otherwise might fail.[19]

58 Republication, therefore, acts as a tool for interpreting or construing a will. None of the authorities to which the parties referred suggested that the principles of republication or confirmation act so as to require any inquiry into the validity of multiple testamentary instruments to start at the last confirming document and then to work one's way back to the original will.

59 Also, starting the inquiry into testamentary validity at the end and working back to the beginning also cuts against the grain of two principles. First, as mentioned, codicils are designed to effect alterations, not wholesale changes, to a will. Usually if a testatrix contemplates making significant changes to a will, she simply makes a new will. Second, a court may find a codicil valid, while concluding the will is invalid. In such cases, the codicil has an independent existence and can be a valid testamentary instrument.[20]

F.3 The availability of partial probate where there is a will and several codicils.

60 As her final argument against the court's ability to grant partial summary judgment in a wills challenge case involving multiple testamentary instruments Ms. Rotstein submitted that the court "*should* not grant what effectively amounts to probate of part of the Deceased's testamentary documents without taking into account the totality of such documents".[21] This argument does not assert that the court lacks the jurisdiction to grant partial probate, but contends that in the particular circumstances of this case the court should exercise its discretion not to grant partial summary judgment which, Ms. Rotstein submitted, would amount to a grant of partial probate.

61 I think Ms. Rotstein is correct to frame her argument not as one of jurisdiction, but as one of discretion. As Mr. Smith pointed out in his submissions, the case law is full of examples where probate of a will and codicils which do not affect the appointment of executors has been granted separately -- e.g. where a codicil exists and a will is not forthcoming at the testator's death; where a codicil exists, but a will and a separate codicil are not forthcoming; and, where a codicil exists and a will is revoked by destruction.[22]

62 Ms. Rotstein argued that to approach the evidence by only looking at the issue of the validity of the 1987 Will and the first two codicils could blind the court to evidence surrounding the circumstances of the execution of the last two codicils which could raise genuine issues for trial extending back to the validity of earlier testamentary instruments. Specifically, she contended that evidence about undue influence by Mr. Smith on the making of the Third and Fourth Codicils could

permit the drawing of inferences -- at trial, not on this motion -- that he exercised undue influence over his mother when she made her 1987 Will and first two codicils. I think the solution to that concern is quite simple. On this motion I will examine the evidence filed by both parties which covers the period of all testamentary instruments -- 1987 to 1998 -- to see whether it creates a genuine issue for trial on the claim of undue influence.

G. Conclusion

63 By way of summary, I conclude that as a summary motions judge applying Old Rule 20 I enjoy the jurisdiction to entertain Mr. Smith's motion for partial summary judgment in respect of the 1987 Will and the first two codicils.

V. Smith Family history up until 1987

64 Before turning to the issues regarding the existence, or not, of genuine issues for trial, I need to spend a bit of time describing the history of the Smith family, a history which informs the claims, or objections, asserted by Ms. Rotstein in this proceeding. In so doing I intend to make frequent references to the evidence, including evidence that emerged during cross-examinations. I shall designate any reference to the cross-examination of Mr. Lawrence Smith as, "Larry CX", to that of Mr. Maxwell Rotstein as "Max CX", and to those of the other witnesses by their last names. By using such abbreviations I intend no disrespect to any witness, but simply think it a ready way to refer to their testimony.

65 As mentioned, Isadore and Ruth Smith had two children, Larry, a professor of economics, and Nancy-Gay, a lawyer with a 1987 call to the Ontario Bar. Larry has three children, Cynthia, Ilyse and Natalie. Nancy-Gay is married to Max Rotstein, a lawyer with a 1964 call to the Ontario Bar. They have three children, Tracy, Stephen and Marcia, or Marcy.

A. The 1976 rift -- "Hiroshima"

66 Ruth Smith had a university education and she briefly articled as a lawyer around the time she married Isadore. Following their marriage she did not engage in paid employment, but was very active as a volunteer in charitable endeavors. According to her son, Ruth also was involved in an interior decorating undertaking which she called "Ruth Smith Interiors", travelled frequently with her husband, and enjoyed golf and bridge.

67 Relative harmony appeared to prevail in the Smith family up until 1975 or so. According to Max Rotstein, his wife maintained a loving relationship with her parents until then. In their 1975 wills Isadore and Ruth divided the residue of their estates equally between their two children and their families. Then a deep rift emerged between Nancy-Gay and her parents over the conduct of the family's business affairs. Max Rotstein, on cross-examination, agreed that beginning in 1974 Nancy-Gay began to take positions that upset her father in connection with family business activities, culminating in a 90-day period around April, 1976 which Mr. Rotstein described as "the Hiroshima. That was the atom bomb in the family that really ripped the family apart."

68 Isadore Smith engaged in the real estate and mortgage business. He included his two children in some of the business opportunities he pursued. In a lengthy hand-written note dated April 5, 1976, Isadore recounted how two transactions in 1975 and 1976 unfolded, particularly with respect to his daughter's interests in them. In the April Note Isadore stated that he had always tried to accommodate Nancy-Gay's wish that she did not want to borrow money from a bank or assume per-

sonal liability on any mortgage covenant in order to obtain an interest in her father's real estate investments.

69 According to the April Note, the first transaction involved Larry's proposed purchase of a property in Toronto at the corner of Briar Hill and Bathurst Street. Isadore recorded that he asked his son to let Nancy-Gay have part of the deal. Lawrence agreed, but only if he had full control of the property. Isadore then invited his daughter and her husband to his summer place where he explained the deal to her. As Isadore recounted the events, Nancy-Gay stated she wanted to be on an equal basis with her brother. Max, a lawyer, insisted that Nancy-Gay should get independent legal advice. According to Isadore, "everyone got excited and I said to forget about the deal", Max then left, the conversation swung back to the deal, and Nancy-Gay stated she wanted the deal and would sign an agreement her father had drafted. Isadore then continued his recollection of events:

> While I was reviewing the agreement Max rushed in -- his eyes were blazing. He grabbed me physically and shouted that I was cheating my daughter. I was startled and told him to leave my home and never come back. I actually chased him out as I never had anyone speak to me the way he did. He shouted that he wanted his children and wife to go with him. His mother was visiting us at that time and he asked her to go with him also. She refused. He and his family left and within the hour he telephoned and spoke to my wife and asked her if he could come back and apologize. I consented.
>
> When he returned I asked both my wife and his mother to come into the den so that all of us could hear what Max had to say. He said that he was sorry ... I asked him what he meant when he said that I cheated my daughter. He denied that he said this. His mother then said to Max that even though you are my son I must say that I heard you say that. He then said that if his mother said so, then it must be so but that he found it difficult to believe that he had said it. I said that I accepted his apology. I did not further pursue his reasons for stating that I cheated my daughter.

Nancy-Gay ultimately participated in the Briar Hill transaction after receiving independent legal advice. Max Rotstein took issue with Isadore's description of events at the cottage, describing them as "self-serving".[23] Ms. Rotstein offered no evidence on the point.

70 The second transaction involved the acquisition of an apartment building in Sarasota, Florida, which Isadore began to pursue in 1975. In his April Note Isadore wrote:

> During a visit to Nancy-Gay's summer place, on the pier, I told her that we were considering buying part of an apartment building in Sarasota. She said that if we did buy it could she have part. I said yes but that it had to be understood that Larry would be in charge of his and her investment in the deal similarly to what she had agreed or was asked to agree to by me on the Briar Hill deal. She said this was fine and that she definitely wanted the deal if it materialized. Ruth was present.

71 According to Isadore, documents were prepared to acquire the Sarasota apartment, including an interest for Nancy-Gay, but on the day that Larry was to go to Sarasota to close the deal, Nan-

cy-Gay phoned her father to ask that he make available the money to enable her to acquire an interest. He agreed to loan her money, but said she would have to pay interest. His April Note continued:

> She said what would the interest charges be. I said that I could arrange prime rate plus a 1/4%. She did not like this as she thought that the rate should be fixed. She also told me that she wanted it understood that she would not sell College Street. I said that she did not have to sell College Street but I wanted to discuss it with her. She said that there was nothing to discuss and if I wanted to give her the money fine -- she would go to Larry's office, see the agreement and probably take the deal. This statement upset me. I told her that I changed my mind about her taking the deal and that I would take it myself. She hung up on me. I was annoyed, as I felt that she was reneging as everything had been set up for her to have a Florida corporation similar to Larry's Florida corporation.

72 Four days later, on April 9, 1976, Isadore and Ruth executed codicils to their 1975 wills. Paragraph 1 of Isadore's codicil stated:

> I HEREBY DECLARE that I am making this third Codicil because certain activities of my daughter, NANCY-GAY ROTSTEIN, have displeased me and caused concern and grief to me and my wife RUTH DIANE and for the purpose of excluding my said daughter from any benefits under my said last Will and Testament or under the first, second or third Codicils thereto except to the extent specifically provided for. I also declare that it is my wish and desire that neither my said daughter nor her husband, MAX ROTSTEIN, should serve as an executor, executrix, trustee or co-trustee for any purposes of or under this my last Will and Testament as amended by the first, second and third Codicils thereto.

73 Max Rotstein conceded that he was not surprised by Isadore's exclusion of his daughter from his will.[24]

74 In her codicil of the same date Ruth Smith also excluded her daughter from any benefits under her will. Her handwritten note of April 9, 1976, explained her decision:

> Nancy-Gay and Larry have always shared equally the love of their parents and all their worldly goods. However, because of Nancy-Gay's recent actions which have deeply grieved us, I feel I must make the revisions in my will which I signed today.

Max Rotstein conceded that he was not surprised that Ruth had decided in that document to disown Nancy-Gay -- "I'm not surprised that there was this bitterness and ugliness 33 years ago".[25]

75 When asked on cross-examination whether he was suggesting that anybody made Ruth write that handwritten note, Max Rotstein replied: "Her husband may have".[26] That is not the way Ruth viewed matters, at least according to the diary entry she made four days later on April 13, 1976:

> N.G. phoned -- said I have gone too far. I have called Marj. and threatened to take her children -- and that I am using Cynthia to get to Marcy.

> She said she is going to destroy me legally and socially -- in Toronto and Fort Lauderdale -- so that I will not be able to show my face anywhere -- and be the wandering Jew.
>
> She said when I die all I will get from her will be a circle of stones around my grave.
>
> She said all this started with Marilyn's Machiavellian cunning --
>
> When I called her back and said we love her and will give her anything she wants -- she said we have to give her everything she asked for in the letter that we called an insult to her brother and us. And when she gets what we took away from her in Sarasota and give her everything that is in her name and held in trust for her she will never see any of us again.
>
> She said that since last August I have made her life hell -- and 1/4 of the hell I have put her through is enough to burn up the world.
>
> She mentioned we had the chutzpah not to answer her letter for 6 weeks.
>
> She said that when Nana was in hospital I was pouring poison in her ear -- when I said I didn't understand (and for the minute I really didn't) she said "poison verbiage". (emphasis added)

76 Max Rotstein acknowledged on cross-examination that in 1976 Nancy-Gay consulted a lawyer, Doug Laidlaw, to consider suing her father over the Sarasota transaction, and that Ruth Smith was aware of the potential lawsuit.[27] Following the Sarasota transaction Nancy-Gay withdrew all of her business papers from her father's firm and severed her business ties with him.[28]

77 There began an estrangement between daughter and parents that lasted at least 14 years, according to Mr. Rotstein. (My reading of the evidence, especially admissions by Max Rotstein, reveals that the estrangement lasted considerably longer, reaching into the early 2000s.) Max Rotstein agreed that the estrangement lasted until at least 1989.[29] According to Mr. Rotstein, during that period of estrangement the Smith and Rotstein families had virtually nothing to do with each other, apart from the exchange of flowers at Jewish new years and birthday wishes.[30] He acknowledged that the estrangement included the inability of Ruth and Isadore to see their Rotstein grandchildren.[31] Max Rotstein described the prolonged estrangement as "very painful on both sides"; "a very bitter estrangement"; "there was great bitterness on both sides"; "a lot of ugliness and unhappiness"; the "dark period"; "this blackout period".[32]

B. The absence of any evidence from Nancy-Gay Rotstein

78 What does Nancy-Gay have to say about her parents' recollection of the events in 1976 and their exclusion of her from their wills? Nothing. And therein lies the most extraordinary feature of this motion. In response to her brother's motion for summary judgment Nancy-Gay Rotstein, a member in good standing of the Law Society of Upper Canada and presumably thereby aware of the requirement on a respondent to "lead trump" or risk losing all, did not file any responding affidavit.

Not only that, in a letter dated February 4, 2009, Ms. Rotstein's counsel stated that she would not be produced for examination. On February 13, 2009 her counsel wrote:

> I confirm that we will not produce Nancy-Gay Rotstein voluntarily for an examination. If you serve a Notice of Examination for Nancy-Gay Rotstein, we will move to set it aside.

79 Old Rule 20.02 provided that "an adverse inference may be drawn, if appropriate, from the failure of a party to provide the evidence of persons having personal knowledge of contested facts." In this case I consider it appropriate to draw an adverse inference from the failure of Nancy-Gay Rotstein to file an affidavit or make herself available for examination. I conclude that she failed to put forward evidence because it would not contradict the evidence filed by the moving party relating to communications between herself and her parents, as well as communications between herself and her brother. For the purposes of this motion for summary judgment I shall treat any evidence of communications from Ruth and Isadore Smith to their daughter, and Lawrence's recollections of his communications with his sister, as uncontested facts. Nancy-Gay Rotstein should be taken to admit such facts by virtue of her silence.

80 Instead of responding directly to this motion for summary judgment, Nancy-Gay Rotstein had her husband, Max, file the sole responding affidavit on behalf of her position. As he acknowledged on cross-examination, however, Mr. Rotstein lacked personal knowledge of events during the critical period of time which included the times when Ruth Smith executed her 1987 Will and its first two codicils. He agreed that from 1976 until early 1990 he had "virtually no verbal contact with Ruth" or Isadore.[33] He described his source of knowledge about events during that 14-year period as follows:

> Q. 305. So again, your only knowledge of what Ruth and Isadore were feeling and thinking and discussing, to the extent that you have any at all, is based entirely on what your wife later told you sometime after the period of estrangement, in relation to discussions she had had, or she said she had, with her parents?
>
> A. And the two other sources I've mentioned, the -- all those letters and correspondence that your client has attached, and Marci's comments.[34]

Mr. Rotstein admitted that he was in no position to evaluate Ruth's feelings during the period of estrangement.[35]

81 Mr. Rotstein stated that in the period between 1993 and 1997 when his wife began to see her mother, Nancy-Gay did not discuss with him her visits to her mother in any great detail.[36] He said his relationship with Ruth Smith after the estrangement only began in about 1995.[37]

82 I also wish to note that in reading the four transcripts of the cross-examination of Max Rotstein I was quite surprised by the extent to which one of Ms. Rotstein's counsel intervened during the examination to protect Mr. Rotstein from clear, but difficult, questions. A cross-examination that occurs outside of the courtroom stands in no different position than one that takes place inside -- counsel for the witness must not unduly interfere with the cross-examination. Principle 21 of *The Principles of Civility for Advocates* published by The Advocates' Society makes the point clearly: "Advocates, during examination for discovery, should at all times conduct themselves as if a judge were present." The same principle applies to out-of-court cross-examinations on affidavits. Unfortunately, I must conclude that, in the case of Mr. Rotstein's cross-examination, his wife's counsel

crossed the line from objecting to improper questions to frequently protecting and assisting the objector's sole witness under proper cross-examination. If this sort of intervention by counsel has become the norm in out-of-court cross-examinations in this city, then the forensic rules governing cross-examination are not being observed.

83 Objections taken during the course of Mr. Rotstein's cross-examination also blocked obtaining information about Nancy-Gay's knowledge of affairs. One example will suffice. The objector asserts on this motion, through the affidavit of her husband, that her brother prevented her from obtaining information about her mother's medical condition during her final years. On Mr. Rotstein's cross-examination counsel for Mr. Smith attempted to ask questions about a letter dated April 21, 2003[38] from Larry Smith to Nancy-Gay on the issue of access to medical information. Counsel for Ms. Rotstein objected, as the following exchange at page 255 of the transcript indicates:

> Mr. Sutton: Counsel, counsel, don't read [the letter] into the record.
>
> Mr. Shekter: Well, I'm going to because I'm going to ask about his knowledge of the background. He's here. Nancy-Gay is not. That seems to be a recurring theme. And I'm entitled to ask him the basis of his knowledge because he seems to have so much when it's of assistance to him and none at all when it doesn't.
>
> Mr. Sutton: I'm not going to let you do indirectly what you can't do directly as far as this document. So if you read it to him and ask him a question, I'm going to object.

I conclude from the exchange that Nancy-Gay Rotstein, having decided not to file an affidavit and subject herself to cross-examination, was not prepared to permit her husband to respond fully to proper questions put to him on his cross-examination. In sum, I have no hesitation in concluding that on this motion Nancy-Gay Rotstein, as a matter of deliberate strategy, elected not to "lead trump".

C. Smith family events between 1976 and Isadore's death in 1993

84 On November 5, 1976, Ruth made a new will, reducing the amount of the residue of her estate left to Nancy-Gay. Then, on June 27, 1978, Ruth made a further will excluding Nancy-Gay from any share in the residue, but giving Nancy-Gay's children an interest in the residue and leaving her daughter a watch and brooch.

85 The depth of the estrangement between Nancy-Gay and her parents found expression in several writings and communications by her parents. A handwritten note of Isadore dated September 8, 1980, some four years after the estrangement began, stated:

> [Nancy-Gay] phoned at about 10:20 AM Monday Sept 8/80 and speaking quietly she said that she did not wish to see us anymore and that we should stay away from her children. She said that Ruth had no right to deliver a gift to Tracy, who had been ill, and to tell her that she was her grandmother. She said that she had loved me very much and when she found out what I had done to her it caused her illness. She said that the same way that survivors from concentration camps only wanted to look at the future, not backwards, that she wanted nothing to do with us.

86 In 1982 Isadore and Ruth consulted a lawyer, Barbara Landau, in an effort to establish access as grandparents to Nancy-Gay's children, but did not pursue any legal avenues.

87 In an undated note, but probably made in the period 1983 or so, Ruth Smith wrote:

> Not allowed to communicate in any way with grandchildren -- not permitted in house, not allowed to speak to them on phone, present & cards not received and/or not acknowledged ...
>
> I waited seven years -- hoping and praying for a natural transition to normalcy. If it is not forthcoming immediately, I am going to Family Court.

88 In January, 1982, Ruth's granddaughter, Marcy, had her Bat Mitzvah. Ruth and Isadore were not invited. On cross-examination Max confirmed that the decision had been made by Nancy-Gay. On January 10, 1982, Ruth wrote a note to her granddaughter, Marcy, starting with these words:

> Darling Marcy,
>
> You and your brother and sister, your mother and your daddy are in our thoughts every day and we speak of you constantly.
>
> But on Saturday, the 23rd of January you will be with us every minute of the day, even though we can't be with you. We will be thinking of you, anticipating your excitement, proud of your accomplishments, even joining you in the few anxious moments before you enter the Sanctuary. We will be praying with you and for you ...

89 In 1984 Nancy-Gay and Max did not invite Ruth and Isadore to the Bar Mitzvah of their grandson, Stephen.

90 On December 4, 1984, Ruth met with a lawyer, William Draimin, to discuss making a new will. Her will of that date left nothing to Nancy-Gay or her children. In his notes of his meeting with Ruth Smith Mr. Dramin recorded Ruth's statements:

> I've deleted jewellery to Nancy Gay. I'm hurt & angry. When I changed my will 4 years ago & left jewellery to Nancy Gay it was because I felt notwithstanding our problems she should have heirloom of her grandparents. The intervening 4 years has indicated there is no reason to confer any family benefit on her.

91 On March 20, 1985, Isadore wrote a letter to Nancy-Gay inviting her to attend his 70th birthday party. Isadore's note read, in part:

> Dear Nancy-Gay:
>
> Mother and I are now coming closer to the final chapter. Our love for you, which also flows over to your family, continues to be very strong.
>
> I have reviewed over and over again in my mind, during our years of misunderstanding what may have caused our differences, real or imagined. Regardless of

> all the inclusive conclusions that I have reached the one dominant fact remains outstanding is that we should heal our breach, look forward to the remaining future and once again become a family united in love and understanding for each other.
>
> I entreat you to cast aside any hatreds that may exist. One cannot go through life without errors being made. Some are minor, others major. Regardless, let us all be big and tolerant enough to put aside our differences ...
>
> I now ask you to please come with your family to my 70th birthday party. I am certain that if you do so you will be received with open arms and joy by all. You will add immeasurably to my pleasure and the warm reception you will receive will make you all very happy.
>
> With love and hope,
>
> Your father always,
>
> Dad

Nancy-Gay did not attend her father's 70th birthday party.

92 In the fall of 1986, a decade after the estrangement had begun, Ruth and Isadore recorded messages to Nancy-Gay on audio cassettes. Their lawyer, Claude Thomson, Q.C., sent them to Tom Heintzman, the lawyer for Nancy-Gay and Max. Ruth and Isadore never received a response. Ruth's handwritten note of September 5, 1986, from which she dictated her audio message read:

> Hello darling
>
> It is wonderful to be talking to you, even if it is a one-way conversation and through such strange channels.
>
> I miss you & the children so much Nancy-Gay. I miss the fun we had together, the advice and help & love we shared -- and of course the closeness with our bright, loving grandchildren & you.
>
> Time is moving so quickly now. I feel there are so many exciting things left to share. The children are so grown up, I probably don't know their preferences anymore. Does Marcy still like shrimps & is Steven still a big Blue Jay Fan? It shouldn't take long for me to catch up.
>
> Please darling, let us become a family again. Let the children know they have grandparents who love and miss them. Let us become part of one another's lives again.
>
> Just come as far as you can -- and I'll go the rest of the way to meet you!

I love you very much.

93 Isadore's handwritten note of September, 1986, from which he dictated his audio message, read in part:

> Nancy-Gay -- this is your father. I am taking this unusual approach to let you know that I love you very much and miss seeing you, Max and the children.
>
> It would be wonderful if once again we became a loving family, endeared to each other.
>
> Actually very few days have gone by without my thinking of you and the wonderful things we did together and the fun we had. I remember when mother you and I took our trip out west -- to Banff, Lake Louise, the ice fields and the Calgary Stampede, and then on to Los Angeles and the Grand Canyon. The incidents such as a bear with its cubs on the golf course, going fishing in the cold drizzle for trout, your going horse back riding with Mother in the rain. The sensation we had when the bus at the Grand Canyon drew along the precipice as we all thought that the bus would topple over. New York when as a tiny girl you told the waiter that you wished to see a menu with the price list. After dinner telling the waiter to extend your compliments to the Chef. I could go on and on. The time that you fell off your horse just past a rock pile and immediately got on the horse again. You were very brave. Niagara Falls, Washington, Hollywood Beach Hotel, White Hall, Sarasota ...
>
> Nancy-Gay honey let us look forward and once again enjoy being with each other, going fishing and doing things together. We can bring back the fun and happiness we enjoyed ...
>
> Let us not consider who was right and who was wrong. Let us attach no blame to anyone. It was all a terrible and unfortunate misunderstanding. Let us now do what is right.
>
> Darling please telephone me. I have tried many times to reach you but you have been away or unable to come to the phone.
>
> I love you very much.

94 Mr. Thomson's brief letter to Mr. Heintzman read:

> Dear Tom:
>
> I write you as a friend of Ruth and Isadore and not as their lawyer. My message is not related to the law or to business.
>
> As I told you during our last meeting, Mr. and Mrs. Smith will do anything possible to re-establish personal ties with their daughter and her family. They have

> prepared brief messages which are recorded on the tapes that I enclose. Would you please see that they are delivered to Mrs. Rotstein. I hope that you can see fit to urge her to listen to the messages.
>
> Yours sincerely,
>
> Claude

95 On cross-examination Max could not recall whether he knew about the tapes at the time, nor could he recall whether Mr. Heintzman delivered the letter and two tapes to Nancy-Gay -- "I can't recall. I really can't. I -- I'm taxing my memory, and I can't."[39] He was then asked whether he had inquired of his wife whether she had actually got the tapes; Ms. Rotstein's counsel directed Mr. Rotstein not to answer that question.[40] Nancy-Gay Rotstein did not file an affidavit on this motion, so I draw the adverse inference that she did receive the tapes from Mr. Heintzman. Whether she listened to them or not is a matter on which I cannot draw any inference.

96 On September 9, 1986, a few days after recording the tapes Ruth and Isadore made new wills which disinherited Nancy-Gay and her children. Ruth's "Notice" acknowledging their exclusion was reproduced above.

97 In July, 1987, Ruth attended the Bar Mitzvah of a friend's son. Afterwards she wrote a note to her daughter:

> Dear Nancy-Gay:
>
> So many years have passed that I hardly know how to talk when I do meet you. I was so excited to suddenly see you before me at the Bookman Bar Mitzvah, that I could only say "I love you so much". I hope I said it aloud.
>
> I miss you and the children so much darling. I miss the fun we had together, the advice and help and love we shared and of course our closeness about our bright, loving grandchildren and you.
>
> Time is moving so quickly now. I feel there are so many exciting things left to share. The children are so grown up, I probably don't know their preferences anymore. Does Marcy still like shrimps and is Stephen still a Blue Jay fan? It shouldn't take long for me to catch up.
>
> Please darling, let us become a family again. Let the children know they have grandparents who love and miss them. Let us become part of one another's lives again.
>
> I will be happy to reestablish our relationship on any level that suites you.
>
> I know it won't be easy, at first. Just come as far as you can -- and I'll go the rest of the way to meet you.
>
> I love you very much.

Mother

98 It is not in dispute that in the summer of 1987 Ruth and Isadore enlisted the help of Rabbi Gunter Plaut of the Holy Blossom Temple in an effort to bring about a reconciliation with Nancy-Gay. The attempt was unsuccessful. Ruth and Isadore also requested a Dr. Jameson to approach Nancy-Gay to bring the families together, but that did not work.

99 In November, 1987, Ruth signed her 1987 Will which continued the exclusion of Nancy-Gay from any inheritance. Again she made a "Notice" acknowledging the exclusion, as set out above.

100 In respect of the period of estrangement up to 1987, Mr. Rotstein conceded that he had told Ruth and Isadore that if they were to contact their daughter "it would be harmful to her", "because she was so angry that her parents had preferred Larry over her".[41]

101 On May 2, 1988, Isadore made a handwritten note in which he set down several points he wanted to discuss a few days later with Mr. Thomson. The note recorded a conversation that Isadore had had with Nancy-Gay. The notes indicated that father and daughter talked about the Sarasota property deal that had precipitated their estrangement. Several of the points noted by Isadore included:

> 6) I told her that I was getting older & time was running short.
> 7) She said that she had gone to good lawyers who told her she had a criminal case against me & would take the case -- also confirmed by Attorney Generals office -- said that money did not mean that much to her and she certainly would not put her father in jail -- She said that she is now a lawyer & knows that this be done but not to worry as time to ran by the statue of limitations.
> 8) Said that she could not consider reconciliation until I proved how I felt about her by returning the money. She said, which is so, that during the summer we had spoken repeatedly about the Sarasota deal and it was hers ...
> 12) Ruth was greedy.
> 13) I told her to consider carefully what I had told her. She did not respond to this but said that she had to rush to a meeting.

102 Point No. 10 noted by Isadore dealt with the tape recordings sent by Ruth and him to Nancy-Gay:

> 10) She never heard of the tapes & [therefore] did not hear them -- I said that you [Claude Thomson] had given them to Heintzman with the understanding that he was to give them to her personally.

103 On December 28, 1989, Isadore wrote a note to his daughter which read:

> Darling Nancy-Gay:
>
> I am writing to tell you that you and your family are constantly in my thoughts. I miss you all. I love you very much. I always have and always will.

> Please tell me what can be done to bring us together again.
>
> I wish you, Max, Marcy, Stephen, and Tracy a healthy and happy New Year and hope that all of your wishes this coming year and through life are fulfilled.
>
> Love, Dad

104 Ruth made her Second Codicil on November 7, 1991, leaving two pieces of jewellery to Nancy-Gay and $50,000.00 in a trust for her granddaughter, Marcy.

105 As to the relationship between Marcy and her parents, Max and Nancy-Gay, Mr. Rotstein acknowledged that he and his wife were estranged from Marcy for a number of years and, during that time, Ruth Smith provided her granddaughter with "a loving and warm relationship", which included paying for a few years of Marcy's university education, buying her a car, paying for her wedding reception -- a reception Marcy's parents did not attend -- and funding the deposit on the home for Marcy and her husband.[42] Mr. Rotstein also confirmed that at some point during what he styled as the 14-year period of estrangement, Ruth and Isadore began to develop a fairly close relationship with his daughter, Marcy.[43]

106 Mr. Rotstein asserted that Isadore had "re-established a partial relationship with his daughter" by 1991.[44] He acknowledged, however, that Isadore and his daughter had argued that year over business matters, specifically the Smith Trust, prompting Nancy-Gay to leave her parents' house, and leading Isadore to write Nancy-Gay a letter around September 5, 1991, which read, in part:

> Darling Nancy-Gay:
>
> I apologize from the bottom of my heart. I meant no harm. I was very, very wrong. I will never again mention anything relating in any way whatsoever to business ...
>
> Please do not allow me to have blown everything. I love you and all members of your family. I have always loved and respected you and will forever.
>
> Please give me your understanding and forgiveness.
>
> All my love,
>
> Dad

107 Although rank hearsay, Mr. Rotstein conveyed how his wife had described that meeting with her father to him:

> A. 1043 And Nancy, you know, just said that she had an upsetting visit with her father and he was trying to get her to consider busting the trust. And she was a lawyer by that time and knew about the state of legislation before parliament, et cetera, so she wasn't really concerned about the legality. She was more concerned that her father would have blown the opportunity to re-establish relationships.

Q. 1044 And she said that she told him that he had blown an opportunity. He had blown another family, that's what she told him, or words to that effect?

A. On that occasion, yes.

108 When Isadore was dying in 1993, Ruth sought to have Nancy-Gay visit her father. It was only through the intervention of Rabbi Dov Marmur that Nancy-Gay saw her father before his death. Mr. Rotstein conceded that Nancy-Gay had not seen her father "for two months or so" prior to his death, notwithstanding that Isadore had been confined to his apartment following a heart attack in 1992.[45] Despite that admitted fact, Mr. Rotstein contended that by the time of Isadore's death, father and daughter had "emotionally reconciled. I'm not sure if they fully reconciled".[46] Yet when taken to the September, 1991 argument between father and daughter, Mr. Rotstein revised his description of their reconciliation, stating that "they were making tentative efforts to reconcile".[47]

D. Smith family events from the time of Isadore's death to Ruth's death in 2007

109 Following her father's death in 1993 Nancy-Gay began to have some contact with her mother, although significant differences remained. Max Rotstein described the stages of reconciliation in various ways: (i) in 1998 and 1999 Nancy-Gay and her mother were "re-establishing a relationship"[48]; (ii) after her father's death the relationship was "fragile at first. It was very fragile and it continued to be fragile for a number of years":

> [Ruth] lived at the Palace Pier in those days, and it was difficult for my wife to visit with her ... but [Ruth] phoned at least twice a week in the early '90s, and almost daily in 1998."[49]

110 Ruth Smith swore an affidavit in 1998 filed in litigation seeking a variation of the Smith Trust in which she described her relationship with Nancy-Gay at that time as "fragile".

111 In 1998 a dispute arose amongst Ruth, Nancy-Gay and Larry about the sale of a family cottage on Lake Simcoe. I will deal with the Cottage Dispute in more detail later. A dispute then arose in 1999 about some pieces of jewellery in the context of Isadore's estate. I will examine that dispute later. In his affidavit Mr. Rotstein deposed that the litigation in 1998 "predictably caused a breakdown" in the relationship between Nancy-Gay and her mother. Max Rotstein described the relationship between Nancy-Gay and her mother in 1998 and 1999 as "warm but not great"[50], or "warming".[51]

112 On cross-examination Mr. Rotstein acknowledged that he could not produce one picture for the period 1993 to 2000 which would show his children and their grandmother because his children were not involved with Ruth Smith prior to 2000.[52]

113 In oral submissions counsel for Ms. Rotstein pointed to entries in Ruth Smith's daytimer recording dinners or outings with Nancy-Gay and Max as evidence of her reconciliation with them -- between 1991 and 2004 there were four such entries.

114 Larry Smith acknowledged that Nancy-Gay began to see his mother occasionally in the early 2000s -- "I would not call them having a relationship, but there were occasional visits".[53] Mr. Rotstein conceded that Nancy-Gay never volunteered to pay any bills for her mother, or organize her financial affairs, or accompany her on medical appointments.[54]

115 Ms. Tracey Tremayne-Lloyd, Larry Smith's former wife, agreed that the Rotstein family had attended Ruth's 90th birthday party, as well as a few Passover dinners at Ruth's Avenue Road

condo. Ms. Tremayne-Lloyd did not recall Nancy-Gay Rotstein visiting her mother with any frequency until the fall of 2005.[55]

VI. Second Issue: Does a genuine issue for trial exist with respect to the objector's allegation that her mother, Ruth Smith, lacked the capacity to make the Will and the first two codicils?

A. Applicable legal principles

116 The principles regarding testamentary capacity are well-summarized in *Feeney's Canadian Law of Wills*:

> To use the time-honoured phrase, a person must be "of sound mind, memory and understanding" to be able to make a valid will. When a will is contested on the ground of mental incapacity, the propounder must prove that the testator understood what he or she was doing: that the testator understood the "nature and quality of the act." The testator must be able to comprehend and recollect what property he or she possessed, the person that ordinarily might be expected to benefit, the extent of what is being given to each beneficiary and, finally, the nature of the claims of others who are being excluded.[56]

117 In respect of elderly persons, it is a question of fact in each case whether the person has sufficient mental power left to appreciate and understand the testamentary act.[57] An aversion to a child that the testator might be expected to benefit may indicate a lack of insufficient capacity, but not if the aversion can be explained.[58]

118 The time for determining testamentary capacity is at the time of giving instructions and executing the will. Subsequent incapacity does not invalidate a valid will previously made.[59] That said, while proven incapacity at a later date does not establish incapacity at the time of execution of the disputed will, neither is that fact irrelevant -- its weight depends upon how long after the crucial time the incapacity is shown to exist, and its relationship to matters that have gone before or arose at or near the time of the execution of the will itself.[60]

119 In *Vout v. Hay*[61] the Supreme Court of Canada clarified the relationship amongst the concepts of burden of proof, suspicious circumstances, testamentary capacity and knowledge and approval as follows:

> 25 ... The suspicious circumstances may be raised by (1) circumstances surrounding the preparation of the will, (2) circumstances tending to call into question the capacity of the testator, or (3) circumstances tending to show that the free will of the testator was overborne by acts of coercion or fraud. Since the suspicious circumstances may relate to various issues, in order to properly assess what effect the obligation to dispel the suspicion has on the burden of proof, it is appropriate to ask the question "suspicion of what?" See Wright, supra, and *Macdonell, Sheard and Hull on Probate Practice* (3rd ed. 1981), at p. 33.
>
> 26 Suspicious circumstances in any of the three categories to which I refer above will affect the burden of proof with respect to knowledge and approval. The burden with respect to testamentary capacity will be affected as well if the circumstances reflect on the mental capacity of the testator to make a will. Although the

> propounder of the will has the legal burden with respect to due execution, knowledge and approval, and testamentary capacity, the propounder is aided by a rebuttable presumption. Upon proof that the will was duly executed with the requisite formalities, after having been read over to or by a testator who appeared to understand it, it will generally be presumed that the testator knew and approved of the contents and had the necessary testamentary capacity.
>
> 27 Where suspicious circumstances are present, then the presumption is spent and the propounder of the will reassumes the legal burden of proving knowledge and approval. In addition, if the suspicious circumstances relate to mental capacity, the propounder of the will reassumes the legal burden of establishing testamentary capacity. Both of these issues must be proved in accordance with the civil standard. There is nothing mysterious about the role of suspicious circumstances in this respect. The presumption simply casts an evidentiary burden on those attacking the will. This burden can be satisfied by adducing or pointing to some evidence which, if accepted, would tend to negative knowledge and approval or testamentary capacity. In this event, the legal burden reverts to the propounder.

B. Ruth Smith's testamentary capacity in 1987

B.1 Evidence adduced by the moving party

Larry Smith

120 Mr. Smith deposed that at the time she made each of the five testamentary instruments at issue in this proceeding his mother "was an intelligent, independent, and capable woman who made decisions that were well thought out and without the undue influence of anyone." As to the 1987 Will he deposed:

> At the time that my mother signed her Will, she was a competent, intelligent, articulate and a perceptive woman who fully thought out her decisions before embarking upon them. While I was aware generally of what my parents were intending to do in their Wills, I made no attempt to influence them in their decisions. I did not attempt to persuade my parents, one way or the other, to either include or exclude Nancy-Gay or her children under her Will. I did not unduly influence my parents in connection with any aspect of their testamentary disposition. The decisions that they came to in that regard were theirs and theirs alone. Similarly, I am unaware of any other individual's attempt to influence my parents in connection with the disposition of their Wills, unduly or otherwise.

Although Mr. Smith was cross-examined for two days, no questions were put to him concerning his mother's capacity at the time that she made any of the five testamentary instruments. The closest objector's counsel came to questioning Mr. Smith on his mother's capacity was in respect of a 2000 note made by a Dr. Chan which recorded that "two years ago, started to develop decreased memory".

Claude Thomson, Q.C.

121 Ruth and Isadore Smith's 1987 wills were prepared by the Campbell, Godfrey and Lewtas firm. Their contact there was Mr. Claude Thomson, Q.C., who had advised the Smiths on legal matters, including litigation with Nancy-Gay, since 1971. He had talked with them when they prepared their 1976 wills.[62] In addition to being their lawyer, Mr. Thomson was the Smiths' friend, spending time at their cottage and fishing with Mr. Smith, both on Lake Simcoe and in the Caledon Hills.

122 The Smiths had told Mr. Thomson about "a total break down of the personal and family relationships between Nancy-Gay one the one side, and my clients, Isadore, Ruth and Larry on the other." Ruth and Isadore told Mr. Thomson that "they were prepared to do virtually anything to bring their daughter back into the family", and Mr. Thomson had a continuing discussion with Ruth and Isadore about what they should do in fairness to Nancy-Gay, her brother, and themselves.[63] In paragraph 3 of his second affidavit Mr. Thomson deposed:

> [Ruth] was very angry about what Nancy-Gay had done to her and in connection with their relationship and Ruth's non-relationship with Nancy-Gay's children, her grandchildren. She made it abundantly clear to me, in no uncertain terms, as far back as 1978, that she had no interest in leaving any of the residue of her estate to Nancy-Gay.

123 In 1987 Ruth and Isadore told Mr. Thomson that they wished to revise their wills once again. They provided him with instructions. Mr. Thomson testified that he would not have accepted instructions from Isadore to do a will for Ruth.[64] Mr. Thomson reduced those instructions to a memorandum dated October 8, 1987, to one of his estate partners, Ms. Beth Moore. Ms. Moore drafted the new wills, and Mr. Thomson testified that he fully expected Ms. Moore had consulted the Smiths in so doing.[65] By a letter dated October 29, 1987, addressed to Isadore Smith, Ms. Moore sent out copies of both wills for the Smiths to consider.

124 Mr. Thomson was present when Ruth Smith signed her 1987 Will on November 4, 1987. According to Mr. Thomson, Ruth made it clear to him that she had carefully considered the decision not to make provision for Nancy-Gay in her will. As an expression of that intention she signed the Notice which is reproduced above. As Mr. Thomson put it in his second affidavit:

> I specifically discussed the contents of the Will with her at that time as well as the terms of the Notice. Ruth was fully competent at that time and was clear about her intentions in that regards. She was fully aware of the terms of the Will and the fact that it excluded Nancy-Gay and her children as heirs to her estate. She told me that was what she wanted to do, and from her perspective, as she expressed it to me, Ruth had a very good reason to act as she did.

125 Mr. Thomson recalled that Larry Smith was never present during his discussions with either Ruth or Isadore concerning their estate plans. As he deposed in his second affidavit: "Those meetings were always conducted, intentionally, in Larry's absence." Mr. Thomson also recalled that Larry was not present when Ruth Smith signed her 1987 Will.[66]

126 Mr. Thomson described Ruth Smith as "an extremely articulate strong-willed person" and independent.[67] As to his observations of Ruth Smith's capacity to make the 1987 Will, Mr. Thomson deposed:

> When she signed her Last Will and Testament of November 4, 1987, Ruth Smith was a healthy, attractive and articulate woman who understood the terms of the Will that she was signing. She signed the Will freely and without pressure or undue influence from anyone. Ruth felt badly about the decision to disinherit her daughter, but felt she had no other choice considering all the circumstances. It was also clear to me that this was not a new decision that she was making in 1987, but was simply a decision that she had made years before.

He elaborated in his second affidavit:

> When it came to matters of (sic) concerning their respective Wills and Estates, Ruth and Isadore, like many couples, were also of a similar mind. They each were devastated by what they perceived to be their daughter's unconscionable conduct in relation to, and rejection of, the family. For that reason, they wanted to provide first for the financial well being of each other and then, in turn, leave the balance of their respective estates, with minor exceptions, to their son Larry, to the exclusion of Nancy-Gay and her offspring, with the subsequent exception of their granddaughter Marcia. That decision was made, not as a result of any application of influence by Isadore or Larry, undue or otherwise, but because of what Ruth perceived to be Nancy-Gay's unconscionable conduct towards her, Larry and her husband, Isadore.

Mr. Thomson was not cross-examined on this evidence. Mr. Rotstein acknowledged on cross-examination that Mr. Thomson is "a most honorable lawyer".[68]

127 Larry Smith deposed that he was not present when his mother signed her 1987 Will, nor was he present at meetings when his parents discussed matters concerning their estates with, or gave instructions to, Claude Thomson. Mr. Smith testified that it was Max Rotstein who had introduced him to Mr. Thomson in the 1970s.[69]

B.2 Evidence adduced by the responding party

128 I have read Mr. Rotstein's affidavit carefully several times. In his affidavit he deposed that one of the "real issues" in this matter was "the longstanding deterioration of [Ruth's] health and its effects on her capacity to fully understand testamentary and other legal documents", and he concluded his affidavit with the statement that there were genuine triable issues relating to "my Mother-in-Law's capacity". Notwithstanding those two statements, his affidavit contained no specific allegation that Ruth Smith lacked testamentary capacity when she executed her 1987 Will and its four codicils, let alone any specific evidence, direct or circumstantial, to suggest that she lacked testamentary capacity at those times, critical omissions given the claim of testamentary incapacity advanced by Nancy-Gay Rotstein in her Amended Notice of Objection.

129 The reason for those omissions emerged during Mr. Rotstein's cross-examination -- he conceded that Ruth Smith possessed testamentary capacity at the material times. Mr. Rotstein stated that Ruth Smith, in his opinion, possessed testamentary capacity in 1976, 1990 and when Isadore died in 1993.[70] The following exchange occurred during his cross-examination:

> Q. 637. And you have no evidence that she lacked testamentary capacity at any point up to and including the death of her husband, do you?

A. No, I do not.

Q. 644. ... In relation to 1994, you have no evidence to suggest that Ruth Smith lacked testamentary capacity?

A. Correct.

Q. 646. ... but clearly Nancy-Gay never told you as early as 1994 that her mother was losing it or lacked testamentary capacity or anything else of that nature as early as '94?

A. No, she didn't.

C. Ruth Smith's testamentary capacity in 1989 -- the First Codicil

C.1 Evidence adduced by the moving party

Claude Thomson, Q.C.

130 According to Mr. Thomson, Beth Moore also prepared the First Codicil to the will. Mr. Thomson discussed its contents with Ruth Smith:

> She understood the terms of the First Codicil. When she signed it Ruth Smith was still a healthy, attractive and articulate woman who understood the terms of the First Codicil that she was signing. She signed the First Codicil freely and of her own will, and without pressure or undue influence from anyone.

In his second affidavit Mr. Thomson deposed:

> I expressly discussed the contents of that document with Ruth and I have no doubt that she understood the terms of it and its legal import. As with the execution of the 1987 Will, I was completely satisfied that Ruth was under no undue influence of anyone, including Larry and her husband Isadore. She made the Will of her own free will.

Mr. Thomson was not cross-examined on this evidence.

Larry Smith

131 Mr. Smith deposed that he was not present when the First Codicil was signed at Mr. Thomson's office and that "[a]t the time that my mother signed her Codicil, she was an intelligent, independent, and capable woman and I did not attempt to influence her in connection with its contents, unduly or at all."

C.2 Evidence adduced by the responding party

132 As noted above, Mr. Rotstein acknowledged that Ruth Smith, in his view, possessed testamentary capacity in 1990 and when Isadore died in 1993.

D. Ruth Smith's testamentary capacity in 1991 -- the Second Codicil

D.1 Evidence adduced by the moving party

Claude Thomson, Q.C.

133 Mr. Thomson deposed that the Second Codicil was prepared by his partner, Mr. John Fuke. Mr. Thomson had discussed its contents with Ruth. Mr. Thomson deposed:

> Ruth understood the terms of the Second Codicil. When she signed it Ruth Smith was still a healthy, attractive and articulate woman who understood the terms of the Second Codicil that she was signing. She signed the Second Codicil freely and of her own will, and without pressure or undue influence from anyone. As before, Ruth was well aware of what she was doing and was acting freely to give effect to the decision that she had made over the previous few months.

In his second affidavit Mr. Thomson deposed:

> I expressly discussed the terms of the Codicil directly with Ruth and was satisfied that she understood its contents, including the reaffirmation contained therein of the terms of her 1987 Will. She confirmed that the terms of the Codicil expressed her intentions in that regard and she knew full well what she was signing and why. I was also satisfied that she was under no undue influence of Larry, Isadore, or anyone else.

Again, Mr. Thomson's evidence on this point was not challenged on cross-examination.

134 Contemporaneous with the execution of the Second Codicil Mr. Smith established the I. & R. Smith Trust and named Mr. Thomson as the sole Trustee. Mr. Thomson testified that the purpose of the trust was to allow Ruth and Isadore to make a gift upon their death privately to their granddaughter, Marcia, without the knowledge of her mother, Nancy-Gay:

> Ruth and Isadore told me that they believed that in order to protect Marcia from criticism from her mother and her family, and the possibility of being disinherited, the bequest would have to be made secretly.

Larry Smith

135 Larry Smith deposed he was not present when the Second Codicil was signed. As to his mother's capacity, he deposed:

> [S]he was still a competent, intelligent and perceptive woman, who made up her own mind and made her own decision. I did not attempt to persuade my mother, one way or the other, with respect to any bequest involving Nancy-Gay or her children. I did not influence my mother, unduly or at all, with respect to the terms of the Second Codicil. I am not aware of any other individual who unduly influenced my mother in the preparation of that testamentary document.

D.2 Evidence adduced by the responding party

136 As noted, Mr. Rotstein acknowledged that Ruth Smith, in his view, possessed testamentary capacity in 1990 and when Isadore died in 1993.

E. Ruth Smith's testamentary capacity in 1994 -- Third Codicil

E.1 Evidence adduced by the moving party

William Draimin

137 William Draimin was retained to draft Ruth Smith's Third Codicil. Mr. Draimin is a 1965 call and has practiced as a sole practitioner. His parents had been close friends of Ruth and Isadore Smith. He had known the Smith family since his early childhood, attending the Smith cottage on Lake Simcoe as far back as 1941. Mr. Draimin had been a close friend of Larry Smith for many years. He began to act for Isadore and Ruth Smith in the mid-1980s on a variety of matters; he also acted for Larry Smith on several transactions.

138 Preparing Ruth's Third Codicil was not Mr. Draimin's first involvement in her testamentary instruments. At her request, he had prepared her December 4, 1984 will. At that time he had acted for Ruth alone; to his knowledge Isadore did not make a mirror will then. Mr. Draimin also prepared Ruth's First Codicil to that will in 1985. In respect of both those testamentary instruments, Mr. Draimin deposed that "there was no indication of any influence, undue or otherwise, being brought to bear on Ruth at that time."

139 As to his preparation of the Third Codicil, Mr. Dramin met with Ruth Smith on October 7, 1994 for 35 minutes. She was alone. He described the issue she posed in the memo he prepared of that meeting -- "The issue was how she could provide for greater benefit to Marcie Rotstein under her Will." Ruth described the financial support that she and Isadore had given to Marcy, and the memo recorded that "Ruth anticipates another $50,000.00 will go to Marcie as well as the grandchildren on her death, but does not feel this will provide Marcie with enough security for shelter." Mr. Draimin's memo continued:

> It was agreed that Ruth would approach Larry, and ask his advice as to the amount which should be allotted to Marcie.
>
> ...
>
> No instructions were given with respect to the Will, pending her meeting with Larry. *If for any reason Larry does not agree with the concept of providing additional benefits to Marcie, Ruth intends to proceed on her own, "Because, after all, it's my Estate!"* (emphasis added)

Mr. Draimin deposed that this description of the meeting reflected the "strong-willed and coherent instructions of a lucid and independent person, namely Ruth."

140 Ruth attended Mr. Draimin's office on November 15, 1994, and signed the Third Codicil. In his affidavit Mr. Draimin deposed:

> Ruth consistently demonstrated to me that she knew exactly what she was doing and, in particular, was independent of her son Larry ...
>
> I have no hesitation in stating that Ruth had testamentary capacity when she executed the Third Codicil on November 15, 1994 and that she knew and approved of its contents. I am also satisfied that Ruth was not subject to undue influence from anyone, including Larry, who was not present or involved when Ruth gave the instructions to prepare the Third Codicil or when she signed it in my presence.

141 Mr. Draimin's evidence about Ms. Smith's testamentary capacity and knowledge and approval of the contents of the will was not challenged on his cross-examination. Indeed, the only question put to Mr. Draimin on that topic was the following:

> Q. 492. And December 1994, around the time of the third codicil, I think you've told us you didn't have concerns about her competency, correct?
>
> A. I had no concerns whatsoever about her competency.

Larry Smith

142 Mr. Smith was not present when his mother signed her Third Codicil. He deposed:

> My mother was a competent, intelligent and perceptive woman, who made up her own mind and made her own decision ... I did not influence my mother, unduly or at all, with respect to the terms of the Third Codicil, nor I am aware of any other individual who unduly influenced my mother in the preparation of that testamentary document.

143 Larry recalled talking with his mother about the allocation to Marcy Rotstein. He testified that his mother was concerned periodically about whether Larry's children were going to feel that they were not as favoured.[71] Ruth also talked to Larry about leaving something for his then wife, Tracey Tremayne-Lloyd.[72]

E.2 Evidence adduced by the responding party

144 Mr. Rotstein stated on cross-examination that he had never challenged Ruth Smith's capacity as at 1993.[73]

F. Ruth Smith's testamentary capacity in 1999 -- the Fourth Codicil

F.1 Evidence adduced by the moving party

Larry Smith

145 Mr. Smith was not present when his mother signed her Fourth Codicil. He deposed:

> I did not influence my mother, unduly or at all, with respect to the terms of the Fourth Codicil, nor am I aware of any other individual who unduly influenced my mother in the preparation of that testamentary document. At the time of her execution of the Fourth Codicil, my mother was a competent, intelligent and perceptive woman who made up her own mind and made her own decisions.

William Draimin

146 Ruth Smith went to see Mr. Draimin at his office on October 31, 1997. They met for one hour. In his October 31, 1997, memo to file Mr. Draimin wrote, in part:

> Ruth walked gingerly with a cane but came and left on her own. She said her helper was driving the car. Her mind was active, and her memory of the sequence of events regarding the execution of the various Codicil's and the Will was accurate.

They discussed the amount left to Marcy in the Third Codicil and leaving "a memento" to Larry's wife. Ruth instructed Mr. Draimin to prepare a Fourth Codicil, which he did.

147 Ruth signed the Fourth Codicil on June 3, 1998. Mr. Draimin deposed:

> I have no hesitation in stating that Ruth had testamentary capacity on June 3, 1998 and knew and approved of the contents of the Fourth Codicil. She was lucid and coherent throughout my discussions with her and I saw no evidence of any undue influence being exerted upon her by anyone, including Larry.
>
> In my view, all decisions which Ruth made in connection with her Third Codicil dated November 15, 1994 and her Fourth Codicil dated June 3, 1998 were decisions which she freely and independently made (just as was the case when she executed the 1984 Will). Ruth knew exactly what she was doing and acted independently and voluntarily without pressure from any third party whatsoever ...
>
> I state that I knew Ruth for over 60 years. I saw her socially as well as professionally. At all material times, there was never any question in my mind as to her testamentary capacity and I never saw any evidence of undue influence from anyone. In addition, I saw no suspicious circumstances nor am I aware of any. Any instructions I received from Ruth and any changes that she asked me to make to her testamentary documents seemed to be rational and well-reasoned, particularly in light of the most unfortunate family dynamics which existed.

148 Ruth met with Mr. Draimin about two years later on June 29, 1999 to discuss the issues with Nancy-Gay. Two portions of Mr. Draimin's notes of that meeting touch upon the issue of competency. He wrote:

> [Ruth] was even more businesslike than usual. She immediately stated she was here to discuss the issue of "the Jewellery", and had not as yet made up her mind ...
>
> When we got to Codicil 3 she reminded me we had subsequently reduced the 200K to 150K for [the] I & R Trust. I was impressed because it had slipped my memory until I checked [the] will book & found codicil 4 in the file.

149 Mr. Draimin's evidence about Ms. Smith's testamentary capacity and knowledge and approval of the contents of the codicil was not challenged on his cross-examination.

Tracey Tremayne-Lloyd

150 Ms. Tracey Tremayne-Lloyd acted for Ruth in the 1999 jewellery litigation. At the time she was married to Lawrence Smith. Ms. Tremayne-Lloyd deposed that in May, 1999, "Ruth was a bright, articulate, perceptive, and entirely competent woman who was fully in control of her mental faculties." She described her contact with Ruth Smith when she prepared her affidavits recounting family events for three pieces of litigation in 1998 and 1999:

> Ruth had no difficulty in recalling those events, some recent, some quite dated. She was able to provide me with very specific factual details, many of which

> were ultimately included in the affidavit material that I prepared for her signature. She was careful when she reviewed the documents because she wanted to make sure that the information contained therewith was accurate. At no time during my many meetings with her did I ever have concerns about any aspect of her mental capacity or competence.

Dr. Robert Kingstone

151 Dr. Robert Kingstone was Ruth Smith's family physician from 1975 until October, 2002. He swore an affidavit that was filed by the moving party. It was limited to his recollection of a meeting with Max and Nancy-Gay Rotstein in 2003. A dispute exists between Dr. Kingstone and Max Rotstein as to what was discussed at that meeting. In paragraph 5 of his affidavit Dr. Kingstone deposed:

> With respect to my opinion concerning Mrs. Smith's mental competency between 1987 and 1998, I would be pleased to provide that information to you if I am served with a summons requiring me to attend an out of court examination, or, alternatively, upon presentation of a court order permitting me to do so.

152 Ms. Rotstein's counsel required Dr. Kingstone to attend for cross-examination. Dr. Kingstone brought his file on Ruth Smith, which was marked as an exhibit. The cross-examination of Dr. Kingstone by Ms. Rotstein's counsel covered some 85 pages of transcript. During that cross-examination Dr. Kingstone was not asked to express his opinion about Ruth Smith's competency based on his lengthy history of treating her. When, on re-examination, Dr. Kingstone was asked about Ruth Smith's competency in 1998, counsel for Ms. Rotstein strongly objected. Dr. Kingstone ultimately answered the question. In his opinion Ruth Smith was capable in 1998 and was not cognitively impaired even to a moderate degree based on his examination of her.[74]

153 Dr. Kingstone acknowledged that his clinical notes contained a consult report from Dr. Little in March, 2009, which, for the first time, diagnosed Ruth Smith with progressive supranuclear palsy. When asked on cross-examination whether that condition was associated with some dementia, Dr. Kingstone replied: "I don't know that to be the case ... The diagnosis of progressive supranuclear palsy was made. I don't have enough knowledge to say there was dementia associated with that."[75]

154 I should note that the responding party filed 18 volumes of medical records for Ruth Smith, amounting to some 5,308 pages. Most covered the period from 2002 on. Dr. Kingstone's clinical records as Ruth Smith's family physician totaled 384 pages, extended back to at least September, 1978, and contained clinical notes, lab reports and consult reports from other doctors covering the entire period of the testamentary instruments in question in this proceeding -- 1987 until 1998. Notwithstanding the availability of those medical records for expert review, Nancy-Gay Rotstein did not file any opinion from a medical practitioner offering a view of Ruth Smith's competence at the material times.

155 Instead, Ms. Rotstein relies on a passage in her husband's affidavit in which Max Rotstein deposed that around 2002 he and his wife met with Dr. Kingstone and showed him an affidavit Ruth Smith had filed in the Smith Trust litigation in 1998. Mr. Rotstein deposed: "Dr. Kingstone opined that given her medical condition, my Mother-in-Law could not have understood the consequences of the affidavit." In his responding affidavit, and during his cross-examination, Dr. Kingstone

acknowledged that he had met with Nancy-Gay Rotstein and her husband in February, 2003, but he denied that any conversation had transpired dealing with Ruth Smith's 1998 affidavit.

156 Counsel for Ms. Rotstein submitted that this difference in recollections between Dr. Kingstone and Max Rotstein gave rise to an issue requiring an assessment of credibility, which could not be done on an Old Rule 20 motion, therefore a trial was required. I disagree. First, I have set out in the next section the numerous admissions by Max Rotstein that in his view Ruth Smith was competent in 1998. Nancy-Gay Rotstein is bound by those admissions of her husband, especially since she saw fit not to file her own affidavit on this motion. Second, as I have noted, Nancy-Gay Rotstein did not file a medical opinion about her mother's competence on this motion. She had obtained the medical records that would permit her to do so, but, for whatever reason, decided not to -- another instance of Ms. Rotstein failing "to lead trump". In such circumstances, when looking at the evidence filed on this motion as a whole, I do not regard the dispute between Dr. Kingstone and Max Rotstein as to what was said at a meeting in February, 2003, as giving rise to a "genuine" dispute on material facts relevant to an issue in question, in large part because Mr. Rotstein admitted that Ruth Smith was competent in June, 1998 when she made her Fourth Codicil.

F.2 Evidence adduced by the responding party

157 On his cross-examination Mr. Rotstein acknowledged that Ruth Smith was competent during the period 1993 to 1999.[76] When shown an affidavit Ruth Smith had sworn in the 1998 trust variation litigation that was critical of Nancy-Gay, he initially stated that he was "not sure" that Ruth was competent when she swore the affidavit.[77] When questioned further, however, he clarified that he was not saying that Ruth was incompetent at that period of time.[78]

158 On cross-examination Mr. Rotstein acknowledged that in 1998 Ruth "was functioning in the real world on her own", was dating and was still driving.[79] He also agreed that neither he nor Nancy-Gay had any concerns about Ruth Smith's competence with respect to signing legal documents in 1998, including the 1998 settlement agreement concerning the Combewood cottage.[80] These exchanges also occurred when Mr. Rotstein was cross-examined about Ruth's competence in 1998:

> Q. 862 "Not at the time," and that despite the fact that Nancy-Gay had direct dealings with her mother during that period and expressed no concerns to you about her mother's apparent state of competence?
>
> A. That's right.
>
> ...
>
> Q. 864 But you don't have any evidence to suggest that she was not competent to understand what she was signing or doing in December of 1998?
>
> A. No, nor am I suggesting that she wasn't competent.

159 Mr. Rotstein conceded that there was no evidence in the medical records about Ruth Smith suggesting that she lacked testamentary capacity in 1998 or before, except for a reference to a history of supranuclear palsy, but he was "not sure it had any effect on -- when it developed and what effect it would have on her mind".[81] He made it clear, however, that "I'm not challenging her capacity in 1998":[82]

Q. 1257. You don't have any evidence in your records, sir, that she was infirm mentally in 1998 at all, do you?

A. No, I do not.

160 Mr. Rotstein testified that "I am not aware as of what date [Ruth] became incompetent. I really am not."[83]

161 Those admissions are powerful and undercut Nancy-Gay Rotstein's claim that her mother lacked testamentary capacity in 1998. That said, during the course of the cross-examination of Mr. Smith, and during oral argument before me, the objector made much of a March 2, 2000, note by a Dr. Chan who, in the course of his examination of the 84-year old Ruth Smith, wrote: "Two years ago started to develop decreased memory". Larry testified that: he did not observe a noticeable change in his mother's memory prior to her 1999 fall; after the fall Ruth suffered some memory lapses; she seemed to recover and her memory was fine; and, Larry did not become concerned about her memory until 2003.[84]

162 At the hearing Larry's counsel submitted that Dr. Chan's note might constitute an "iota" of conflicting evidence about Ruth's capacity at the time of her last testamentary instrument, a possibility which led the moving party to seek only partial summary judgment. For sake of completeness I would observe that in his note Dr. Chan wrote that the onset of decreased memory "was gradual & slowly progressive" and he recorded that after her 1999 fall Ruth had lost her memory for two weeks.

163 In terms of Ruth's mental abilities in 1998, Mr. Rotstein acknowledged that Ruth travelled down to Florida until 1999 on her own, was still driving in 1997 and 1998, and sat on the Board of Directors of Mount Sinai Hospital in 1997 and 1998.[85] Mr. Rotstein acknowledged it was in the months immediately preceding March, 2003, that there was a significant deterioration in Ruth's intellectual capabilities.[86]

G. Analysis

G.1 Ruth Smith's testamentary capacity in 1987 (Will), 1989 (First Codicil) and 1991 (Second Codicil)

164 Given the evidence of Mr. Thomson, Q.C. who was present when the Will, First Codicil and Second Codicil were signed, and the admissions made by Mr. Rotstein during his cross-examination, no genuine issue for trial exists whatsoever regarding Ruth Smith's testamentary capacity in 1987, 1989 and 1991. No material facts are in dispute. Ruth Smith clearly possessed testamentary capacity.

G.2 Ruth Smith's testamentary capacity in 1994 (Third Codicil) and 1999 (Fourth Codicil)

165 Since Mr. Smith is not seeking summary judgment in respect of the Third and Fourth Codicils, I will not express any view as to whether any material facts are in dispute about Ruth Smith's testamentary capacity at the times she executed her Third and Fourth Codicils. I have set out the evidence above.

VII. Third Issue: Does a genuine issue for trial exist with respect to the objector's allegation that her mother, Ruth Smith, did not know or approve of the contents of the Will and the first two codicils?

A. Applicable legal principles

166 The law concerning a testatrix's knowledge and approval of the contents of her testamentary instruments is succinctly summarized in *Feeney's Canadian Law of Wills*:

> s. 3.1 Those who propound a will for probate have the evidentiary burden of proving not only requisite capacity but also that the testator knew and approved of the contents of the will. In satisfying the court about knowledge and approval of contents those who probate wills are aided by the presumption that the contents of a will were known, and approved, either if the will had been read over to a testator, or if the contents were otherwise brought to his or her attention ...
> s. 3.3: There is a distinction between knowledge and approval of contents of the will and undue influence; a testator may be fully aware of what he or she is doing but have his or her independence of will completely overborne.

167 As noted above, the *Vout* decision clarified the relationship between suspicious circumstances and proof of knowledge and approval.

B. Evidence adduced by the moving party

168 In addition to the evidence of Mr. Thomson reproduced in the above section on testamentary capacity, in his second affidavit Mr. Thomson deposed:

> As a lawyer in the Province of Ontario for many years, I was fully and completely aware of my responsibilities to ensure that, at the time of her execution of her Will and two Codicils Ruth understood what she was signing, appreciated the legal and economic significance of what she was doing, and that she was signing these documents of her own free will and without undue influence of any other person. I conscientiously fulfilled my legal and ethical obligations in that regard and stand by my opinions held then and now. I can categorically state that I know of no evidence, or information that would contradict my conclusion in that regard. Further, reviewing the affidavit of Max Rotstein carefully, he has not referred to or relied upon any actual evidence to suggest otherwise.

Mr. Thomson was not cross-examined on this portion of his affidavit.

169 Although Mr. Smith was cross-examined for two days, no questions were put to him concerning his mother's knowledge and approval of the five testamentary instruments that she made.

C. Evidence adduced by the responding party

170 Mr. Rotstein's affidavit does not contain any specific allegation, let alone any specific evidence, direct or circumstantial, that Ruth Smith did not know and approve of the contents of her 1987 Will and four codicils. As I mentioned above on the issue of testamentary capacity, Mr. Rotstein simply deposed that one of the "real issues" in the matter was "the longstanding deterioration of [Ruth's] health and its effects on her capacity to fully understand testamentary and other legal documents", and he concluded his affidavit with the statement that there were genuine triable issues relating to "my Mother-in-Law's capacity".

D. Analysis

171 The uncontradicted evidence filed on this motion is that Ruth Smith knew and approved of the contents of her 1987 Will and the first two codicils. From the objector's written and oral submissions I gather her main argument is not that Ruth Smith lacked knowledge of her will's contents, but that neither Claude Thomson nor William Draimin provided Ruth Smith with the required independent legal advice on her testamentary instruments because both had acted for Isadore and Larry in various matters. In the absence of true independent legal, the objector argues, Ruth could not make a valid will.

172 I do not understand the law to prevent a husband and wife from using the same lawyer to prepare their wills, especially wills such as the 1987 wills of Isadore and Ruth which provided for the other during his or her lifetime, and then both left any residue to their son. In fact, the current version of the Law Society of Upper Canada's *Rules of Professional Conduct* treats, as a joint retainer, the receipt of instructions from spouses to prepare one or more wills based on their shared understanding of what is to be in each will.

173 Moreover, neither Claude Thomson nor William Draimin was a stranger to Ruth, placed before her only at the instance of her son. On the contrary, Mr. Thomson testified that he and his wife had socialized for years with the Smiths, and so did William Draimin's parents. Ruth had known Mr. Draimin since he was an infant. In sum, both lawyers were long time family advisors well-known to Ruth.

174 From the Notice she made at the time of her 1987 Will it is clear that Ruth Smith knew and understood that her will operated to exclude her daughter, Nancy-Gay, from her estate.

175 In light of this evidence, I conclude that no genuine issue for trial exists as to whether Ruth Smith knew and approved of the contents of her 1987 Will and her first two codicils. She obviously did. Given the request of the moving party for only partial summary judgment, I offer no view with respect to the Third and Fourth Codicils.

VIII. Fourth Issue: Does a genuine issue for trial exist with respect to the objector's allegation that her mother, Ruth Smith, was subject to undue influence when she made her 1987 Will and the first two codicils?

A. Applicable legal principles

176 Proof of undue influence requires proof of coercion, such that the mind of the testatrix was overborne by the influence exerted by another person so that there was no voluntary approval of the contents of the will.[87] As put by Cullity J. in *Banton v. Banton*:

> A testamentary disposition will not be set aside on the ground of undue influence unless it is established on the balance of probabilities that the influence imposed by some other person on the deceased was so great and overpowering that the document reflects the will of the former and not that of the deceased. In such a case, it does not represent the testamentary wishes of the testator and is no more effective than if he or she simply delegated his will-making power to the other person.
>
> It follows that the degree of influence is greater than that required to set aside *inter vivos* dispositions other than, perhaps, *gifts mortis causa*. In the words of Sir James Hannen in *Wingrove v. Wingrove* (1885), 11 P.D. 81:

> "to be undue influence in the eye of the law there must be -- to sum it up in a word -- coercion." at p. 82[88]

See also: *Scott v. Cousins*.[89]

177 Or, as put by Taliano J. in *Duschl v. Duschl Estate*:

> To constitute undue influence, there must be coercion. The attackers of the will must prove that the mind of the testator was overborne by the influence exerted by another person such that there was no voluntary approval of the contents of the will. Undue influence sufficient to invalidate a will extends a considerable distance beyond an exercise of significant influence or persuasion on a testator: as indicated above, coercion is required. Essentially, the testator must have been put in such a condition of mind that if he could speak he would say, "This is not my wish, but I must do it". A testamentary disposition will not be set aside on the ground of undue influence unless it is established on a balance of probabilities that the influence imposed by some other person or persons on the deceased was so great and overpowering that the document reflects the will of the former and not that of the deceased testator. Further, it is not sufficient to simply establish that the benefiting party had the power to coerce the testator, it must be shown that the overbearing power was actually exercised and because of its exercise the will was made ...[90]

178 Where an objector claims that a testamentary instrument was made as a result of undue influence, the focus of a court's inquiry will be to ascertain whether the testatrix, in giving instructions for, and executing, her wills was acting under the influence of another to such an extent that they should be regarded not as expressions of her will, but of the other's. Or, put another way, was the person incapable of making an independent decision with respect to the disposition of her property by her will, and the decision she purported to make on that occasion was an expression of the will of another, not her own?[91] Although those questions must be the focus of the court's attention, as Cullity J. pointed out in the *Banton* case, some post-execution evidence may be relevant to the inquiry, but only to a certain extent:

> The relevance of the evidence with respect to the relationship between George Banton and Muna is, of course, confined to the presence or absence of undue influence at the times of the execution of the wills. I believe, however, that the following passage from the judgment of the Court of Appeal delivered by Arnup J.A. in *Eady et al. v. Waring* (1974), 2 O.R. (2d) 627 (C.A.) is as applicable to the issue of undue influence in this case as it was to the question of testamentary capacity that the Court was considering:
>
> > While the ultimate probative fact which a Probate Court is seeking is whether or not the testator has testamentary capacity at the time of the execution of his will, the evidence from which the Court's conclusion is to be drawn will in most cases be largely circumstantial. <u>It is quite proper to consider the background of the testator, the nature of his assets, his relatives and other having claims upon his bounty, and his relationship to</u>

> them, and his capacity at times subsequent to the execution of the will, to the extent that it throws light upon his capacity at the time of the making of the will. Proven incapacity at a later date obviously does not establish incapacity at the time of execution of the disputed will, but neither is that fact irrelevant. Its weight depends upon how long after the crucial time the incapacity is shown to exist, and its relationship to matters that have gone before or arose at or near the time of the execution of the will itself. at p. 639 (emphasis added)[92]

179 It is not sufficient to establish that the benefitting party had the power to coerce the testatrix; it must be shown that the overbearing power was exercised and that it was because of its exercise that the will was made.[93] Moreover, suspicion of undue influence is not sufficient; the objector must prove actual coercion.[94]

180 In *Vout v. Hay*, the Supreme Court discussed the relationship between the concept of suspicious circumstances and the burden of proof in respect of a claim of undue influence. Cullity J. provided a nice summary of the principles which emerged from *Vout* in his decision in *Scott v. Cousins*:

> The principles that I believe are established by the decision of the Supreme Court, and that are relevant here, can be stated as follows:
>
> 1. The person propounding the will has the legal burden of proof with respect to due execution, knowledge and approval and testamentary capacity.
> 2. A person opposing probate has the legal burden of proving undue influence.
> 3. The standard of proof on each of the above issues is the civil standard of proof on a balance of probabilities.
> 4. In attempting to discharge the burden of proof of knowledge and approval and testamentary capacity, the propounder of the will is aided by a rebuttable presumption.
>
> Upon proof that the will was duly executed with the requisite formalities, after having been read over to or by a testator who appeared to understand it, it will generally be presumed that the testator knew and approved of the contents and had the necessary testamentary capacity.
>
> 5. This presumption "simply casts an evidential burden on those attacking the will."
> 6. The evidential burden can be satisfied by introducing evidence of suspicious circumstances -- namely, "evidence which, if accepted, would tend to negative knowledge and approval or testamentary capacity. In this event, the legal burden reverts to the propounder."
> 7. The existence of suspicious circumstances does not impose a higher standard of proof on the propounder of the will than the civil standard of proof on a balance of probabilities. However, the extent of the proof required is proportionate to the gravity of the suspicion.
> 8. A well-grounded suspicion of undue influence will not, per se, discharge the burden of proving undue influence on those challenging the will:

> ... It has been authoritatively established that suspicious circumstances, even though they may raise a suspicion concerning the presence of fraud or undue influence, do no more than rebut the presumption to which I have referred. This requires the propounder of the will to prove knowledge and approval and testamentary capacity. The burden of proof with respect and fraud and undue influence remains with those attacking the will.[95]

181 Instances of undue influence on the making of a will have included: (i) where the condition of a lonely, depressed, terminally ill, severely disabled and cognitively impaired elderly person made him an easy prey for a younger person;[96] (ii) an elderly testator in failing health, who changed his will in an unexpected way, and whose absorption into the family of the main beneficiary under the new will resulted in a marked transformation in his manner of living, his associations, and his habits;[97] and, (iii) the testatrix's husband, by a second marriage, sought to override the terms of their marriage contract, and there was a last-minute change in the pattern of the testatrix's wills with the absence of any plausible explanation for the change.[98]

B. Claims based on undue influence and summary judgment

182 Ms. Rotstein submitted that summary judgment cannot issue where an objector challenges a will on the basis of a claim of undue influence because assessing the explanations for particular circumstances alleged to point to the presence of undue influence requires drawing inferences from facts and making findings of credibility, tasks not permitted under Old Rule 20. Or, as Mr. Hull put it in his submissions, an adjudication of the objector's undue influence claim against her brother would require a trial judge "to see the whites of Larry's eyes".

183 The objector pointed to the decision of the Court of Appeal in *Transamerica Occidental Life Insurance Co. v. Toronto-Dominion Bank* where the court stated that a motions judge under Old Rule 20 should not "draw inferences from conflicting evidence, or from evidence not in conflict when more than one inference is reasonably available."[99] As the subsequent decision of the Supreme Court of Canada in *Guarantee Co. of North America v. Gordon Capital Corp*.[100] illustrated, however, the matter was not so clear cut under Old Rule 20. The motions judge in the *Guarantee* case, [1997] O.J. No. 573, had granted summary judgment finding that Gordon Capital had failed to commence an action for recovery under a bond within the contractually prescribed period from the discovery of facts that would cause a reasonable person to assume that a loss of a type covered by the bond "has been or will be incurred". The Supreme Court of Canada noted that the motions judge had "inferred that it could reasonably be assumed that a loss of the type covered by the policy was or would be incurred", and stated that "we are of the view that the undisputed facts in this case lend strong support to the motion judge's inference."[101] The Supreme Court of Canada reversed the decision of the Ontario Court of Appeal, [1998] O.J. No. 1197, and restored the motion judge's grant of summary judgment.

184 Mr. Sutton submitted that *Guarantee* involved a situation where a judge drew inferences about what state of affairs a reasonable person could assume (the language of the contract), a circumstance quite different than in the present case where the claim is one of undue influence.

185 I do not accept that distinction because two years ago the Supreme Court of Canada, in *Papaschase Indian Band No. 136 v. Canada (Attorney General),* cited *Guarantee* as standing for

the proposition that a motions judge "may make inferences of fact based on the undisputed facts before the court, as long as the inferences are strongly supported by the facts."[102] In *Papaschase*, the plaintiff (responding party) had failed to file evidence countering that submitted by the moving party defendant to the effect that the claim had been discoverable with due diligence at a date which would render the claim statute-barred. The court commented that "on this state of the evidence, the only available inference" was that the claims were statute-barred.[103]

186 I would note that on January 1, 2010, Rule 20 was amended to specify that a motions judge could exercise the power of "drawing any reasonable inference from the evidence" in determining whether there was a genuine issue requiring a trial: Rule 20.04(2.1) 3. In my view that amendment did not signal that under Old Rule 20 a motions judge could not draw any inferences of fact -- in *Guarantee* and *Papaschase* the Supreme Court of Canada clearly stated that a motions judge could make inferences of fact based on the undisputed facts before the court, as long as the inferences were strongly supported by the facts. What Rule 20.04(2.1) 3 adds, in my view, is the power of the motions judge to draw inferences from disputed facts.

187 Finally, guidance on this issue can be found in the recent decision of the Court of Appeal in *Chappus Estate*, which dismissed an appeal from a motion granting summary judgment dismissing a will challenge. The objector had alleged that suspicious circumstances surrounded the execution of the will and codicil, particularly because of a "presumption of undue influence" that arose between the testatrix and the executor/beneficiaries in light of their status as her lawyer and doctor. In dismissing the appeal Sharpe J.A. wrote:

> The motion judge concluded that there was an absence of evidence of suspicious circumstances and no triable issue as to the validity of the will. I see no error in the reasons of the motion judge that would justify the intervention of this court. *The respondents gave detailed explanations of the circumstances the appellant contends are "suspicious" and, significantly, the appellant offered no evidence to the contrary.* In the absence of any evidence to challenge the substantial body of evidence led by the respondents to support the validity of the will, I see no basis for concluding that the motion judge erred in concluding that there remained no triable issue and that it was appropriate to award summary judgment declaring the impugned will to be valid.[104] (emphasis added)

C. Allegations of undue influence: the objector's theory

188 Through her husband's evidence and her counsel's submissions, Nancy-Gay Rotstein asserted that since the 1970s her brother, Larry, had exerted undue influence on her mother, and such undue influence continued until Ruth's death in 2007. Her counsel described Larry as an "undue-influencer" and, pointing to events in 1976, submitted that "once an undue-influencer, always an undue-influencer". The objector's counsel also characterized Larry as an "asset grabber", in this respect focusing on a series of transactions that occurred after Ruth Smith had made her Fourth, and final, codicil in June, 1998. The breadth of Nancy-Gay Rotstein's attack on her mother's wills can be seen from her counsel's submission at the hearing that any will Ruth made over the last 30 years of her life which did not treat her daughter in an equal fashion with her son was invalid as the product of Larry's undue influence.

189 Let me make a few preliminary comments about the objector's undue influence theory. First, notwithstanding the observation of the Court of Appeal in *Eady* that post-execution conduct

might be relevant to a claim of undue influence, I have great difficulty in understanding how events in 1976, or from 1999 until Ruth's death in 2007, are capable of being relevant to an inquiry into whether Ruth was subjected to undue influence when she made her 1987 Will, 1989 First Codicil, and 1991 Second Codicil. Proof of undue influence requires proof of coercion at the time the testamentary instruments in question were made. It was apparent that the objector wanted to rely on evidence from 1976, and the period 1999 until 2007, because neither she, nor her husband, Max Rotstein, had any personal or direct knowledge of what was going on in her mother's mind during the very long period of estrangement when her mother made her testamentary instruments. In addition, the form of reasoning employed by the objector against her brother -- "once an undue-influencer always an undue-influencer" -- strikes me as a form of propensity reasoning not permitted by the rules of evidence.

190 Notwithstanding my concerns that much of the evidence advanced by Nancy-Gay Rotstein in support of her claim of undue influence may well be irrelevant and might not be admissible at trial, I will take her claim at its highest and consider such evidence.

191 Next, I wish to make a general comment about Mr. Rotstein's evidence which formed the main platform on which Nancy-Gay Rotstein attempted to construct her claim of undue influence. I have held that I am deciding this motion under Old Rule 20. Consequently, I cannot make findings of credibility. However, in examining whether a "genuine" issue exists for trial on an issue, or in respect of sets of facts, it is open to me to consider the evidence of any witness as a whole to see whether it is capable of supporting the claim advanced. In the case of Mr. Rotstein, his affidavit contained serious allegations in respect of Larry Smith, Ruth Smith and others. Under cross-examination, many of those allegations were revealed to lack any evidentiary foundation, or were seriously qualified. Where Mr. Rotstein qualified his initial allegations, I intend to focus on his evidence as tested, and not on the broader allegations contained in his affidavit, in order to determine whether a genuine issue for trial exists.

192 Finally, the objector contended that as long as she could point to some evidence which could fall within a recognized *indicia* of undue influence, then her claim must go to trial. With respect, that is not the law regarding Old Rule 20 motions for summary judgment. In *Re Chappus Estate* the appellant submitted that since the respondents -- the testatrix's lawyer, doctor and accountant -- all received substantial bequests under the challenged wills, the circumstances were inherently suspicious by reason of the status of the beneficiaries and a trial was required. The Court of Appeal rejected that submission. It noted that the motions judge had carefully considered all of the available evidence, the respondents had explained their respective roles, and the motions judge did not err in concluding "that there was an absence of evidence of suspicious circumstances and no triable issue as to the validity of the will".[105]

D. Knowledge of Ruth Smith's motivation or state of mind at time of testamentary instruments

193 The objector adduced no direct evidence that when Ruth Smith made her 1987 Will and the first two codicils, she was coerced to do so by her son. Due to the period of estrangement which Mr. Rotstein contended ran from 1976 until early 1990, Mr. Rotstein could not speak about the relationship between Ruth Smith and Larry during that period.[106] As a result, Mr. Rotstein did not know what motivated Ruth Smith when she made her 1984 wills -- "I can't get into someone's head."[107] Accordingly, he did not know whether Ruth's decision to cut out Nancy-Gay and her children from

her 1984 will "was her own idea initiated by her own sense of bereavement."[108] As Mr. Rotstein put it in his answer at Question 590:

> During the period of estrangement, I don't know what was going on in the family or in her head, and I don't think I could -- no matter how many times you ask me that question, I'm not going to be able to fathom it ...

At questions 592 to 595 Mr. Rotstein stated:

> A. I'm not able to tell you anything about that period [of estrangement] except that her mother, in -- sorry, in 1985, her mother came to her graduation at Osgoode Hall Law School, and also wrote a letter of congratulations when my wife was appointed as a director of the Canada Council, and she received that, which I think is in the material.
>
> Q. Right.
>
> A. But other than those brief points, I don't know what was in her mind, no.
>
> *Q. And you don't know -- or what was influencing it?*
>
> *A. No, or what -- or who -- what or who was influencing it.* (my emphasis)

194 In respect of Ruth's 1987 Will, Mr. Rotstein admitted that he did not know what was motivating Ruth Smith to act as she did when she made it:

> Q. 597. Whether she was influenced by Nancy-Gay's conduct and her sense of betrayal by Nancy-Gay?
> A. Or whether she was influenced by her husband. I have no idea.

195 So, too, in respect of the 1989 First Codicil Mr. Rotstein conceded that he did not know what was operating in Ruth's mind or who was operating on her mind when she made her first codicil.[109] As to the 1991 Second Codicil, Mr. Rotstein also did not know what was operating on Ruth's mind that caused her to continue to exclude Nancy-Gay and his two other children from the terms of her will.[110] The following exchange took place on Mr. Rotstein's cross-examination:

> Q. 283 I didn't ask that. I was talking about Ruth --
>
> A. Well, I can't talk about their --
>
> Q. 284 And Isadore.
>
> A. What was in their heart.
>
> Q. 285 How about what was in their heads?
>
> A. I don't know. I have no idea.

196 Mr. Rotstein admitted that during the period of estrangement he had no relationship with Ruth, did not know what she was thinking or intending, did not know her motivation at the time or who was operating on her mind at the time that caused her to do what she did.[111] Having described what he called the 14-year period of estrangement as one of "great bitterness on both sides", Mr.

Rotstein was asked whether the estrangement would have been a motivating factor for Ruth deciding whether or not Nancy-Gay would benefit from her will. He replied: *"I assume that was one of the -- her motivations at that particular point in time."*[112]

197 Mr. Rotstein admitted that he did not know what went on in the Smith household between 1976 and 1990:[113]

> Q. 2110. So putting it another way, you don't know, because you weren't there, what, if any, control Ruth Smith exercised in relation to her own finances during that period between '76 and '90, do you?
>
> A. I do not.
>
> Q. 2111. And because you weren't involved with Ruth and Isadore, you don't know what control, if any, Ruth exercised over her own finances between 1990 and 1994, do you, sir?
>
> A. No, I do not.

198 Mr. Rotstein acknowledged that Ruth Smith respected and loved her husband and had total faith in his business acumen, and that she respected her son, Larry.[114]

199 In contrast to the responding party, Mr. Smith filed direct evidence from Mr. Thomson and Mr. Draimin that they saw no signs of any undue influence exerted on Ruth Smith when she made her 1987 Will and the four codicils. As well, Larry Smith denied that he had exerted any such influence.

E. Allegations of undue influence in 1976 advanced against Lawrence Smith

E.1 General comment

200 Mr. Rotstein asserted in his affidavit that Ruth Smith "could not overcome a lifetime of coercion and manipulation by Smith Family men to assert her own independence and free will." As I read the record, that statement stands as mere bald assertion without any specific evidentiary support. Indeed, there is some irony to his assertion because just a few paragraphs earlier in his affidavit Mr. Rotstein identified a number of lawyers "who acted for my wife, but looked to me for instructions ... In all these cases, I gave instructions to counsel on my wife's behalf."

201 Mr. Smith characterized Mr. Rotstein's description of the "Smith women" as being under the thumb of Isadore and himself as a "complete fiction".

E.2 The Briar Hill and Sarasota transactions

202 Nancy-Gay Rotstein pointed to what happened in regards to the 1975 and 1976 Briar Hill and Sarasota transactions described earlier as evidence of Larry's undue influence. The undisputed facts about those transactions show two things. First, Nancy-Gay Rotstein agreed to the Briar Hill transaction; she signed the July 31, 1975 agreement on behalf of Mount Birch Limited. She had been married to Max Rotstein for eight years by that point of time and presumably received his advice on the deal. Second, the family-splitting dispute emerged as the result of the disagreement between Nancy-Gay and her father about how those investments were to be managed. Ruth had no involvement in those transactions and, in my view, they provide no evidentiary support for any allegation of undue influence against Larry in respect of his mother.

203 I should note that notwithstanding the allegations the objector made about those transactions, Max Rotstein conceded in cross-examination that during a meeting in April, 1976, Isadore, Ruth, Larry, Nancy-Gay and Max met to discuss financial matters. Larry made a presentation, and Max complimented him on it. Max also recalled that Larry offered to meet directly and separately with Nancy-Gay to discuss any other business matters she wished to address.[115]

204 In respect of the general allegation of undue influence against Larry, Mr. Rotstein made the following concessions on cross-examination:

> A. 2125 But I do know that I had discussion with [Ruth] prior to the -- to 2000. I recall having a conversation with her and she said, "Larry is looking after my business affairs." That's what she said.
> Q. 2126. Nothing inappropriate about that?
> A. I didn't say there was.
> Q. 2127. So you would agree with me? There's nothing inappropriate about Larry looking after his mother's business affairs, is there?
> A. By itself, no.

Another exchange:

> Q. 2137 Prior to 1998, sir, what decision did Larry make, if any, contrary to his mother's wishes in relation to her assets? Prior to 1998.

A. I have no knowledge of that.

Continuing with the period before 1998:

> A. 2141. I have no evidence to offer as to any control over the assets that Larry conducted. Did she object? No, she didn't object because she told me that Larry looks after her and looks after her assets and her income. She has no idea what she's worth.
> Q. 2141. She was satisfied with the administration of her assets, of the assistance provided by Larry, wasn't she?
> A. Yes, she was during that period.

E.3 The April 9, 1976 Codicil

205 In paragraph 36(a) of her factum Ms. Rotstein argued that the circumstances surrounding her parents' alteration of their wills on April 9, 1976, to disinherit her evidenced the undue influence Larry asserted over his mother:

> Immediately after the Sarasota dispute in 1976, Nancy-Gay was disinherited by codicil to Larry's benefit. There are indicia of coercive behavior even at this early stage. The circumstances are suspicious. Despite his denial at the outset, Larry was present and involved in the preparation of this codicil to the Deceased's 1976 will.

206 Given that Isadore was alive at that point of time and that he changed his will in the same fashion as his wife, I have difficulty understanding the claim of undue influence made against Larry. But the objector points to Larry's presence at a meeting with a lawyer, Roger Doe, on the day the

1976 codicils were prepared and executed as evidence of his undue influence. Mr. Doe did not file an affidavit; I cannot tell whether he is still alive or not. However, Ms. Rotstein's counsel relied heavily on Mr. Doe's April 15, 1976, memorandum of that meeting, so I think it fit to reproduce significant portions of it so that the flow of the entire meeting is understood. Mr. Doe wrote:

> The purpose of this memorandum is to record the reasons given to me by Mr. and Mrs. Smith for making their respective codicils on April 9, 1976, some background information given to me by them and by Claude Thomson and the events of that day ...
>
> My first meeting with Isadore Smith commenced about 10:15 a.m. at which was present Claude Thomson and Larry Smith, Isadore's son. Claude Thomson provided background on certain litigation either pending or threatened by Nancy-Gay in relation to certain property purchased in Florida ... It appeared to me that, although the fact of that litigation was disturbing, the most upsetting factors to Isadore were the express or implied allegation by Nancy-Gay of dishonesty on the part of Isadore and Larry and the fact that settlement discussions which had been scheduled for the same morning were aborted because of the insistence stated by Nancy-Gay's counsel and confirmed by Claude Thomson that a precondition of any discussion would be, in effect, an admission by Isadore and Larry of the validity of Nancy-Gay's litigation claim ...
>
> During our meeting Ruth Smith telephoned and, over the loudspeaker, told us that a meeting she had planned with Max Rotstein's mother for the morning at 10:30 in an attempt to heal the family breaches had been cancelled by a telephone call from Max Rotstein which, as Ruth Smith said, sounded as though it was a recording because he simply identified himself and stated that his mother would not be attending on Mrs. Smith and repeated that same statement before hanging up ...
>
> In a second telephone call from Ruth Smith which was taken by Isadore Smith, he discussed with her the changes which she wished to effect in her will. Isadore reported that she first said that she wanted her jewellery to be diverted from Nancy-Gay and to go directly to the grandchildren and then confirmed that she wished to delete Nancy-Gay from any monetary bequests under the will ...
>
> It should also be noted that although Isadore asked Larry, as well as Claude Thomson and myself, for advice in connection with the two numerated points above, Larry did not make any effort to persuade Isadore to increase or decrease any amounts which he or his children might get nor to influence the selection of trustee except to confirm that being a co-trustee with Nancy-Gay in the circumstances would be most difficult ...
>
> On these instructions, I prepared Isadore's codicil and requested Karen Trotter to prepare Ruth's.

207 Mr. Doe's memorandum recorded that later that afternoon Larry called him inquiring whether the codicils were ready for his parents to sign. Mr. Doe suggested that Larry come in advance of his parents to review the drafts to ensure they complied with the instructions he had received. Larry did so. The memorandum continued:

> Isadore and Ruth arrived about 5:30 p.m. as pre-arranged ...
>
> In connection with Ruth's codicil, substantial changes were made. The will and codicil as it previously stood provided for the residual estate to be divided 25% to Nancy-Gay if she survived, 25% to Larry if he survived, 25% to Nancy-Gay's issue (augmented by her 25% if she pre-deceased) and 25% to Larry's issue (augmented by his 25% if he predeceased). Karen Trotter had changed the 25% to Nancy-Gay by diverting it to Larry who then got 50% but had assumed that if he predeceased then the entire estate would be divided equally amongst the grandchildren, i.e., 50% to each group.
>
> Ruth indicated that this was not her wish and that the 50% going to Larry would, if he predeceased her, go to his issue. During the discussion of this aspect, Isadore made certain comments but Larry did not. It was my clear understanding that Ruth made up her own mind on this point.
>
> Karen Trotter also reported to Ruth that, because of time difficulties, she had been unable to review the will and codicil in their entirety with a view to eliminating Nancy-Gay as executrix or co-trustee and making all the consequential changes. Ruth was most unhappy about this for the same reasons as in the case of Isadore's will, i.e., joint operation with Larry would be most difficult and, at her insistence, we added a provision to the effect that Crown Trust Company would be substituted for Nancy-Gay wherever she appeared for these purposes and all consequential changes made stating that this was not a desirable way of doing it but would probably be effective.
>
> Ruth also raised the possibility that there might be included in her codicil a statement along the lines of what appears in Isadore's as to the reasons for the codicil. This was not done simply because of typing time but it was suggested that she might if she wished do a handwritten note explaining her reasons. It was apparent that she was very much concerned about explaining to Nancy-Gay why she was disinherited and to state that until this time she had not been disinherited ....
>
> Both Isadore and Ruth indicated that they hoped the family rift would be resolved in short order and that the codicils could be removed. We were instructed to review the wills and codicils from an overall viewpoint with a view to replacing them with a single will as restated around the end of April.

208 Mr. Doe concluded his memorandum with the following observations about the role of Larry Smith in the discussions of that day:

> Although Larry was present throughout and his parents obviously had respect for his views, at no time did he make any suggestions or comments which would lead to the decrease in any benefits to Nancy-Gay or her family or any increase in benefits to himself or his family but rather any comments he made were in relation to the method of implementing in detail the general decision which had already been made or to stating the difficulty of operating as a co-trustee with Nancy-Gay. My impression was that both Isadore and Ruth were very much disturbed by the dispute with Nancy-Gay, felt that the codicils were an appropriate reaction, applied their minds to and fairly understood what they were doing and the details of how it was being done and hoped that the dispute would be subsequently resolved at which time Nancy-Gay would be reinstated.

209 When the Doe memorandum is read as a whole, rather than just the parts relied upon by the objector, it is not capable of providing evidentiary support for Ms. Rotstein's claim that the circumstances surrounding her parents' alteration of their wills on April 9, 1976 so as to disinherit her indicated that Larry had exerted undue influence over his mother.

210 Further, seven months later, on November 5, 1976, Ruth Smith made a new will in which she restored Nancy-Gay to some entitlement in her residual estate. It is difficult to conceive how Ruth could have effected that change if, as her daughter contended on this motion, she was operating under Larry's coercion from April, 1976, until her death. Ruth kept Nancy-Gay as a residuary beneficiary until June 27, 1978, when she excluded her daughter from the residue of her estate, a condition that did not change before her death.

E.4 Conclusion on allegations of 1976 undue influence

211 At issue on this motion for summary judgment is whether a genuine issue for trial exists regarding the 1987 Will, the 1989 First Codicil, and the 1991 Second Codicil. As noted above, inquiries into the relationship between the testatrix and others having a claim on her bounty both before and after the making of testamentary instruments may be relevant to the key question of whether the testatrix was coerced at the time of making those instruments. But, the weight of such evidence will depend upon its proximity to the time the testamentary instrument was made.[116] On a motion under Old Rule 20 I am not permitted to weigh evidence; I am required, however, to assess the genuineness of an issue the responding party contends should go to trial. To do so, I can consider whether the proffered evidence is capable of supporting the inference the responding party contends should be drawn from it. Here, Ms. Rotstein founds her claim of undue influence in respect of the 1987, 1989 and 1991 testamentary instruments in part on events which occurred in 1976, some eleven years before the 1987 Will was executed. In my respectful conclusion, no air of reality attaches to those claims. The evidence she has pointed to is not capable of supporting the inferences she has put forward. Her claims do not give rise to a genuine issue for trial. The assertion, "once an undue-influencer, always an undue-influencer", while evocative, is, with respect to the allegations concerning events in 1976, just mere assertion, without any evidentiary foundation.

F. Allegations of undue influence during the period 1998 until Ruth's death in 2007

F.1 The life Ruth Smith led from 1998 until her death

212 Turning to the allegations of undue influence Nancy-Gay Rotstein made against her brother in respect of the 1998 to 2007 period of time, I think it important to start by setting out the undis-

puted facts about Ruth Smith's life from 1998 until her death so that an accurate picture of her emerges.

213 In 1998 Ruth Smith continued to play golf and bridge;[117] she dated a gentleman, met him in New York, and he visited her cottage.[118] She was not accompanied by anyone on those trips and, according to her son, he discussed the issue of contraceptives with her mother in 1998.[119]

214 Ruth travelled by herself to her Florida condominium at the start of the 1998-99 winter. Mr. Rotstein acknowledged that Ruth travelled down to Florida until 1999 on her own.[120] Ruth was still driving in 1997 and 1998 and was on the Board of Directors of Mount Sinai Hospital in 1997 and 1998.[121] Ruth had passed her driving licence test in 1998, but she stopped driving by 2000.[122]

215 Ruth suffered a fall while in Florida in early 1999. She moved from her Palace Pier condominium to one on Avenue Road in early 2000.[123] After Ruth recovered from her 1999 fall she took golf lessons, continued to play bridge, and dated another boyfriend in 1999 or 2000.[124] In Larry's view his mother's decline started at the time of her boyfriend's death in 2003 when she went into a depression.[125]

216 Ruth Smith did not require full-time care and assistance until around October, 2002.[126] She continued to use credit cards until about 2003.[127] Ruth was found to be incompetent in September, 2005. She was admitted into the Baycrest Centre in late November, 2006. By that time Ruth was confined to her bed.

F.2 Existence of Ruth's power of attorney

217 Mr. Rotstein contended during his cross-examination that Ruth's granting of a power of attorney for property to her son in 1995 "proved" that she was under Larry's undue influence.[128]

218 Larry acknowledged that in June, 1995, his mother granted him powers of attorney for property and personal care which were drafted by Mr. Draimin.[129] Mr. Smith recalled exercising the power of attorney around 2000 in order that his mother could loan $42,500.00 to Marcey Rotstein, and her husband, Tim, so that they could buy their first house[130] -- "My mother asked me to do that and to make the loan to Marcy."[131]

219 Mr. Smith testified that the administration of Ruth's financial tasks -- such as banking, taxes, etc. -- continued in much the same fashion after his father's death in 1993, as before, with some expenses, such as realty taxes, paid by the family business, Smith & Son. However:

> My mother was very independent. She did a lot of things on her own. She continued to do things on her own after [Isadore's death], as well as before.[132]

220 Prior to Isadore's death, he and Ruth maintained their personal accounts at the same bank, with one exception -- Ruth had a separate account at a separate bank.[133] That separate account was closed around 1999 or 2000. Larry had signing authority over his mother's bank accounts starting in the 1960s or early 1970s, except for the one separate account. That account was closed around 2000 because it was at a branch near the Palace Pier condominium which had been sold.[134]

221 Max Rotstein acknowledged that it would not surprise him that Larry also had signing authority over Isadore's bank accounts from 1970 on "because they did a lot of travelling" and "spent five months a year in Florida", so someone had to look after the bills.[135] This exchange then followed:

Q. 2091 And there's nothing sinister about giving a son cheque signing authority in relation to a parent's account, is there?

A. There's nothing sinister about that, no.

Q. 2092. No. and in fact --

A. I never suggested it was sinister ... (emphasis added)

222 When asked on cross-examination to give a specific example of an instance where Larry exercised complete physical control over his mother prior to her fall in February, 1999, Mr. Rotstein replied: "I can't give you a specific incident. I've just given you a general impression of my observations."[136] He conceded that he had no idea of what control, if any, anyone had over Ruth Smith during the period that she wintered in Florida.[137]

223 In his affidavits Claude Thomson deposed as to his observations about whether Ruth Smith had been subject to any undue influence. Some of his evidence is reproduced above. In paragraph 8 of his second affidavit Mr. Thomson also deposed:

> I had numerous conversations with Ruth and Isadore over many of those years that I acted for them, and saw no indication of coercion and manipulation by Isadore or Larry. Had there been such coercion or manipulation, I'm sure I would have seen it. I did not.

224 Mr. Thomson offered evidence directly in response to Max Rotstein's allegation that the Smith women were subject to the Smith men:

> In light of my direct and extensive involvement with the Smith family over those many years, and in particular, with Ruth and Isadore, I believe I am in a position to comment upon the suggestion that the so called "Smith Family Women" were subject to coercion and manipulation by the so-called "Smith Family Men". I saw no evidence at any time to believe that they were so subject. Further, throughout the time that I was involved with Ruth, she was decidedly her own woman. She was independent and proud and fundamentally held her own views and opinions about things. While she certainly respected the business acumen of her husband, Isadore, and her son, Larry, it did not prevent her from expressing her opinions and holding opinions that may or may not have been contrary to those of the other male members of her family.

Mr. Thomson was not cross-examined on this part of his evidence.

F.3 Surrounding Ruth Smith with advisors whom Larry knew and used

225 In respect of the making of the Third Codicil (1994), Max Rotstein testified that the following evidence indicated that Lawrence unduly influenced his mother's execution of that instrument: the codicil was drawn by William Draiman, a lawyer who had been a close friend of Larry's for decades;[138] Larry was smarter than Bill Draiman and as a result was "the dominant one in that relationship";[139] Mr. Draiman had acted for Larry on numerous real estate transactions and "couldn't, by any stretch of the imagination, be independent"[140] or offer independent advice to Ruth Smith;[141]

and, that Mr. Draimin did not understand his professional duty to give Ruth Smith independent advice.[142]

226 Mr. Rotstein qualified that evidence by conceding: (i) he had not been out socially with Larry and Bill since 1976;[143] (ii) he was not going so far to say that when Mr. Dramin took instructions for the Third Codicil "he was telling Ruth what to do because Larry told him what to do";[144] (iii) he was not suggesting that Bill Draimin should have declined to act for Ruth Smith on her Third Codicil;[145] (iv) he was aware that Ruth and Isadore Smith had been friends of Mr. Draimin's parents even before he was born and that Ruth Smith had known Bill Draimin for most of his life.[146]

227 Mr. Rotstein also avoided directly answering the following clear question put to him on cross-examination:

> Q. 696. Are you saying that Bill Draimin would not have been able to act contrary to the interests of Larry Smith when he was acting for Ruth Smith?
>
> A. You would have to ask Bill Draimin.

228 On cross-examination Mr. Rotstein was asked:

> Q. 709: Do you have any evidence to suggest that it wasn't [Ruth Smith's] initiation and her idea to retain Bill Draimin?
>
> A. I do not.

229 It appears that Mr. Rotstein's complaint about Bill Dramin, and presumably the position of his wife, the objector, was that between 1998 and 2002 Bill Dramin and Larry Smith "worked together to have Mrs. Smith divest herself of her assets".[147] When asked whether the codicils were part of that divestiture he answered:

> No. They were part of getting Mrs. Smith to acknowledge her wills, which was of concern to Larry as he saw my wife and her mother re-establish their relationship.[148]

230 The Third Codicil, which was prepared by Mr. Draimin, increased the benefits to Marcy Rotstein through the I. & R. Smith Trust from $150,000 to $200,000. When asked whether Larry would have forced his mother to give money to Marcy, her father, Mr. Rotstein, replied: "I wasn't privy to their conversations".[149]

231 The precise nature of Mr. Rotstein's allegation respecting Mr. Draimin's involvement in the preparation of Ruth's Third Codicil is unclear. He contended that Ruth was under Larry's undue influence when she prepared her third codicil.[150] However, that assertion was followed immediately by the following exchange on his cross-examination:

> Q. 1757. Thank you. Now -- and was it because of the undue influence that she made the third codicil, sir?
>
> A. I can't say that. I don't know -- I don't know what William Draimin encouraged her to do, I wasn't there.
>
> Q. 1758. So if I understand you then, she wasn't -- she was generally under Larry's undue influence in life, but in relation to a specific testamentary document like

the 1994 codicil, you don't know whether it was the undue influence of Larry Smith that prompted her to make that document?

A. I don't know that, no.

Q. 1759. So you would agree with that proposition that I just said?

A. I would agree that I don't know.

Mr. Rotstein could not say whether Ruth Smith was under Larry's undue influence when she made her Third Codicil.[151]

232 Although Isadore and Ruth had been using the Campbell Godfrey firm for their wills since 1976, Max acknowledged that Ruth, on her own, had decided to use Bill Draimin in December, 1984 to make a new will, notwithstanding that Isadore had not followed the same course of action.[152]

233 Ms. Rotstein submitted that suspicious circumstances could be found in Ruth's use of the same lawyers (Claude Thomson and William Dramin) and accountant as her husband and son. (Interestingly, that claim did not extend to the choice of Ruth's family physician, Dr. Kingstone, presumably because he was also the family doctor for Max and Nancy-Gay Rotstein.) The lawyers and accountant had been long-time family advisors; they were not strangers foisted on Ruth by Larry. I see nothing suspicious in Ruth using such trusted family advisors for her own affairs, just as I see nothing suspicious in some of the staff at the family company, Smith & Son, taking care of some of Ruth's bills, such as property taxes and utilities. The mere fact of family members sharing professional advisors does not, *per se*, create a suspicious circumstance or signify an *indicia* of undue influence. One must look into the conduct of such advisors to ascertain whether they acted against the interests of a person so as to suggest they were trying to impose the will of another on that person.

234 The record on this motion simply discloses no evidence of that having occurred in respect of Ruth's interests. More specifically, Mr. Draimin testified on cross-examination that he did not discuss any matter in relation to Ruth Smith's codicils with Larry prior to talking with Mrs. Smith.[153] He also stated that he did not suggest that Ruth Smith obtain advice from another lawyer in respect of her Third and Fourth Codicils because "[i]n terms of the contents of the two codicils, there was no reason to get independent legal advice with regard to the distribution of money to Marcy Rotstein and with respect to the jewellery."[154]

F.4 Creation of joint tenancies between Ruth Smith and her son

235 In support of the theme that Larry Smith was an "asset grabber", Mr. Rotstein alleged in his affidavit that through creating joint tenancies for three pieces of his mother's property, Larry Smith had shrunk Ruth's $4 million estate down to $800,000. On cross-examination it became apparent that Mr. Rotstein's valuation of the estate at $4 million was not based upon any knowledge of the actual value or performance of particular assets, but simply a loose guess on his part.[155] His evidence on cross-examination disclosed that neither he nor his wife regarded this motion for summary judgment as the time to substantiate allegations with evidence. When Mr. Rotstein was asked to justify his valuation of Ruth's estate, he said, "at a trial I will provide the ... licensed valuator who will be able to give all these answers",[156] "[b]ut the thing is that the values that I'm going to give you now are my best guesstimate today. At a trial, we can have valuators and actuaries -- we'll probably need an actuary."[157] Simply put, Mr. Rotstein, on behalf of his wife, was not prepared to "lead trump" to justify his allegation.

236 In his affidavit Mr. Rotstein pointed to three transfers of property title from Ruth to herself and her son as joint tenants as evidence of conduct that benefitted Larry "to his mother's detriment". He deposed that "it is my *belief* that Larry unduly influenced Ruth to transfer the bulk of her assets out of her estate to preserve his financial interest in her estate, *preventing her from changing her Will to benefit Nancy-Gay with any of these assets*." When it was put to Mr. Rotstein that placing assets into joint tenancies was a common, effective way to insulate an estate from probate fees, curiously he disagreed: "It is the worst possible advice a lawyer could give to a client."[158]

237 Let me review the evidence put forward on each of those three properties.

(a) Palace Pier condominium

238 Mr. Rotstein deposed -- and these facts are not in dispute -- that in May, 1998, Ruth Smith transferred title in her Palace Pier condominium to Larry as joint tenant for no consideration. Mr. Rotstein asserted that "there was no benefit to Ruth for doing so, other than perhaps avoiding probate tax on death." Mr. Rotstein identified a detriment to Ruth by transferring the property into joint tenancy -- "she lost control over a substantial asset during her lifetime". Indeed, the underlying theme to Ms. Rotstein's submissions during the motion was that a chance somehow existed that her mother might change her mind before she died and include Nancy-Gay Rotstein in her will, but the joint tenancy transactions frustrated any such possibility.

239 Ruth Smith sold the condominium a year after the creation of the joint tenancy in order to purchase the Avenue Road condominium.

240 Mr. Draimin acted on the sale of the Palace Pier condominium. He took instructions from both Ruth and Larry Smith because title was in both their names.[159] The motivation for joint title had been to probate-proof the asset.[160] When asked whether he recommended that Ruth receive independent legal advice on that sale Mr. Draimin testified:

> No. Following all these questions, there was no requirement to do so because in the opinion -- in my opinion, we were simply following the terms of her will and her intentions, and this is what she wanted to do.[161]

241 Mr. Draimin denied that the transfer into joint tenancy would have triggered tax consequences as a deemed disposition because the property was Ruth's primary residence.[162] Mr. Smith testified that he had received oral tax opinions in relation to the both the Palace Pier and Avenue road transactions that there would be no income tax to pay because the properties qualified as his mother's principal residence thereby attracting the exemption from capital gains tax.[163]

242 In oral submissions counsel for Ms. Rotstein submitted that when, in 1995, Ruth had given Larry a power of attorney in respect of her property, Larry became a fiduciary. Consequently, a transfer of the condominium's title into a joint tenancy with Larry would constitute a form of self-dealing by Larry as a fiduciary and could not be done without a court order. In support of that submission reference was made to an extract from *Underhill and Hayton: Law Relating to Trusts and Trustees*, Seventeenth Edition which states that the self-dealing rule renders the disposition of trust property to a trustee automatically voidable by a beneficiary however fair the transaction may be.[164]

243 I have three comments on this submission. First, the excerpt from *Underhill and Hayton* continues by identifying several exceptions to the self-dealing rule, including where the beneficiary

acquiesces in the transaction. At the time of the creation of the Palace Pier joint tenancy (and the Avenue Road joint tenancy discussed below), Larry was the sole residuary beneficiary under Ruth's will. Second, Ruth suffered no detriment -- she continued to live in the Palace Pier, and then Avenue Road, condominiums in the style to which she had become accustomed until ill-health necessitated her transfer to the Baycrest Centre. Finally, the blanket, unqualified proposition advanced by the objector would increase significantly the costs of probate-proofing one's estate -- if a parent were to give a power of attorney to a child, and then wished to transfer an asset into joint ownership with the child, the objector's theory would require the property owner in all cases to obtain court approval. The law does not go that far; the rule against self-dealing is more nuanced, and context-specific, than the blanket proposition put forward by Ms. Rotstein. Tellingly, no authority was advanced by the objector for such a proposition in circumstances where the joint tenant, such as Larry, was also the sole residuary beneficiary under the other joint tenant's will.

(b) Avenue Road condominium

244 In December, 1999, Ruth Smith acquired a condominium on Avenue Road as a joint tenant with her son. Mr. Rotstein acknowledged that Ruth Smith continued to live at the Avenue Road condominium as her own principal residence after the transfer had occurred.[165]

245 Mr. Draimin acted on the acquisition of the Avenue Road condominium. He acknowledged that although Ruth entered into the agreement of purchase and sale, on closing title was taken by Ruth and Larry Smith as joint tenants.[166] Mr. Draimin took his initial instructions from Ruth Smith, and instructions on title from Ruth and her son.[167] When asked why title was taken jointly when Ruth had signed as purchaser, Mr. Draimin testified:

> During that particular period of time I became aware that it was becoming common practice to probate proof estates, particularly the real estate, by placing title in the name of both the primary owner and secondary owners as joint tenants.[168]

(c) Vaughan Road

246 Sole ownership in an apartment building on Vaughan Road had been acquired by Ruth Smith in the late 1960's. On January 7, 2002, when Ruth was 87 years old, Ruth executed a transfer of the property from her name alone into hers and Larry's as joint tenants. In respect of the transfer Larry executed an indemnity agreeing to reimburse his mother "for any cash deficiencies with respect to after tax income that may be incurred by you resulting from the transferring of the Property".

247 In her factum,[169] Nancy-Gay Rotstein submitted that at the time of the January, 2002 transaction Ruth's capacity was "very much in doubt". I question whether that is a fair characterization of Ruth's medical condition at the time. Although on June 18, 2002, Dr. Kingstone found Ruth incapable with respect to health-care facility admission decisions, the Qualicare records for late 2002 paint a picture of an elderly woman who was still capable at times of engaging in intelligent and intelligible conversation. Both Larry and Max agreed, however, that by early 2003 Ruth was displaying significant memory problems. However, on this motion under Old Rule 20 I cannot weigh evidence, so, accepting the objector's assertion for purposes of argument, what follows from it? If the transfer into the joint tenancy was voidable by reason of Ruth's lack of capacity at the time, the entire Vaughan Road property would fall into Ruth's estate and Larry would take the residue. Of course,

the major theme of Ms. Rotstein was that her mother could have changed her will before her death. But, if Ruth's capacity was "very much in doubt" at the start of 2002, as the objector put it, how could Ruth make a new will? Ms. Rotstein's key argument contains a significant internal contradiction.

248 Mr. Rotstein deposed that the transfer had "disastrous consequences for Ruth" from a tax standpoint, triggering a tax liability that could have been deferred until her death. Mr. Smith testified that the transfer resulted from advice to structure the property so as to avoid probate tax, and that the overall effect of the transaction was to save about $80,000.00 for the estate and its beneficiaries.[170] Mr. Smith testified that his mother continued to receive the income from the Vaughan Road property until her death.[171]

F.5 Transactions involving the Main Street, Hamilton property

249 Isadore Smith had owned an apartment building on Main Street in Hamilton jointly with his brother-in-law, Irving Sussman. Under Isadore's will, Ruth enjoyed a lifetime interest to the net income owned by the assets of Isadore's estate.

250 In 1999, Ruth and Larry, in their capacities as the estate trustees of Isadore's estate, assigned the estate's 50% interest in the Main Street property to a company known as Combewood Inc.[172] Ruth derived income from the Main Street property through the estate of Isadore, and then through the new structure employing Combewood Inc.[173] Ruth received the net after-tax income.[174] In 2003 Combewood brought a partition application, the Main Street property was sold, and Combewood received 50% of the sale proceeds. Those proceeds were distributed between Combewood Trust and the estate of Isadore Smith, and Ruth continued to receive the income from both the Estate and the trust.[175]

251 In his affidavit Mr. Rotstein alleged: "it does not appear that Ruth received the net income owed to her." Larry testified that Ruth's income from the property remained the same under the amended ownership structure.[176] Mr. Rotstein significantly modified his allegation during the course of his cross-examination. As to Ruth's life interest in the income generated from Main Street, the following exchange occurred on his cross-examination:

> Q. 2519. So knowing what you're knowing, and I'm not being critical of it, I'm just saying knowing what you know now, you would agree with me, sir, that with respect to Main Street you have no evidence to suggest that Ruth Smith did not maintain the income that she had out of the Main Street property between 1999 and 2003 when it was put into this new vehicle?
>
> A. I have no evidence.
>
> Q. 2520. And that as a result of the difficulties with the Sussmans and the sale in 2003, that probably Ruth's income, if not increased, was certainly normalized?
>
> A. I would agree with that.

252 Mr. Rotstein also agreed that he did not have any evidence to suggest that Ruth Smith did not receive the same net after-tax income both before and after the estate freeze involving the Main Street property.[177]

253 Mr. Draimin testified that he did not discuss with Ruth Smith any implications of the transfer to her personal interest because she was a trustee of the trust on the transaction.[178] Mr. Smith testified that the 1999 land transfer tax affidavit for the Smith's restructuring of their ownership interest in the Main Street property was filed in Oshawa in order to keep it private from their co-owners, the Sussmans.[179]

F.6 Larry started disruptive litigation in effort to make Nancy Gay look bad

254 Much was made in the evidence and argument about three pieces of litigation that arose amongst Larry, Nancy-Gay and their mother in 1998 and 1999. As I understand the evidence filed on behalf of the objector, the relevance of this litigation is as follows:

> I believe that Larry used [Ruth] as a pawn in his various disruptive lawsuits against Nancy-Gay in order to drive a wedge between Nancy-Gay and her mother, and thwart their reconciliation.[180]
>
> Notwithstanding her sense of grievance, the only instances in which Nancy-Gay commenced litigation prior to 2005 were in 1984 to correct the injustice done to her with the acquisition of the Briar Hill Property and in 1999 when Larry did not tell her about my Father-in-Law's jewellery bequest.[181]

(a) The Cottage -- the Combewood Litigation

255 In 1964 Isadore purchased a cottage on Lake Simcoe, called Combewood. In 1965 he transferred it to his two children, Nancy-Gay and Larry, as co-tenants, subject to a leasehold interest during the lifetimes of Ruth and himself. Isadore spent over $100,000.00 on renovating the cottage. In an agreement dated June 29, 1965, the two children agreed that they would not sell the cottage during their parents' lifetimes without their consent. If the cottage was sold, Nancy-Gay and Larry agreed to pay some of the proceeds, in accordance with a formula, to Isadore or Ruth "as the cost of the renovations and alterations".

256 On July 27, 1998, Ruth wrote to Nancy-Gay and Larry, stated she could no longer use the property, wished it sold, and indicated that she wanted to "handle this in any manner I choose." Mr. Rotstein deposed he believed "Larry wanted to control the sale process himself and was using [Ruth] to achieve this end." Max stated that he "found it out of character" for Ruth to have wanted to sell the cottage.[182]

257 Nevertheless, on August 27, 2008, Nancy-Gay replied to her mother:

> Dear Mom,
>
> I am sorry to hear that you are not getting as much use out of Combewood this summer as you expected. I understand that you feel it is better not to go up to the cottage anymore.
>
> As you know, Larry and I are the owners of the property, and therefore have the responsibility of deciding on the next step. I will make arrangements to contact Larry in connection with the property.

With love,

Nancy-Gay

258 As I read the record, there is no dispute that Nancy-Gay and Larry could not reach an agreement on how to sell the cottage, Larry brought a partition application, Nancy-Gay's lawyer proposed a settlement under which Ruth would not receive any money for the improvements as Isadore had specified in the 1965 agreement, and ultimately some form of settlement resulted in the sale of the cottage. Mr. Rotstein described the partition application as a "forty-day fight which really was a sideshow to the trust litigation."[183]

259 Mr. Rotstein stated that he did not remember the terms on which the cottage litigation was settled.[184] Larry Smith testified that the litigation continued until about 2000 -- "Although I thought it had ended previously, but Mr. Rotstein terminated an Agreement of Purchase and Sale, so it carried on."[185] Ms. Tremayne-Lloyd, who acted in the cottage litigation, stated that although an agreement for partition was reached in December, 1998, the parties could not reach agreement on the listing agent, listing price and offers, so the matter went to binding arbitration in 2000.[186]

260 Although Mr. Rotstein alleged that it was out of character for Ruth to have interested herself in the sale of real estate, he agreed that in 1996, following her husband's death, Ruth had sold her Fort Lauderdale condominium and purchased another in the Boca Raton area.[187] Neither Max nor Nancy-Gay ever went to the latter condominium. Max conceded that he had no knowledge of the details of the sale and purchase, so he could not comment on what role Ruth had played in the transactions.[188] When asked why in his affidavit he made a blanket statement that Ruth had never engaged in the purchase or sale of real estate, Mr. Rotstein replied: "I didn't put my mind to the Florida property."[189]

261 Mr. Rotstein also did not know who retained the real estate agent who sold the Palace Pier condominium.[190] Max did testify that Ruth had told him Larry thought it would be better for her socially to move to Avenue Road than remain in a more isolated location like the Palace Pier.[191] Ruth told Max that "she was much happier at Avenue Road."[192]

(b) The jewellery litigation

262 1999 saw litigation involving two pieces of jewellery in the Smith family. One piece was a watch that came from Isadore's mother, Sara Smith. Ruth Smith wore the watch for the better part of 50 years. In the second codicil to his final will Isadore had directed his trustees to deliver to Nancy-Gay Rotstein the watch "which was owned by my mother" and a brooch, which "was acquired as a replacement for a brooch which my wife had received from her mother" "if they are owned by me at my death". Ruth also gifted the same jewellery to Nancy-Gay in her Second Codicil, tracking the language used by her husband, "if they are owned by me at my death". In sum, Isadore and Ruth created parallel gifts-over of the two pieces of jewellery.

263 The following chronology of events is not in dispute. Mr. Rotstein stated that his wife made no attempt to see her father's will from the date of his death in 1993 until a few months before the 6-year limitations period was up.[193] Mr. Rotstein contended that his wife only commenced litigation over the jewellery because she thought that her father owned the pieces and that Larry, as his father's executor, was depriving her of that which was rightfully her own.

264 On his cross-examination Max Rotstein vigorously asserted the position that Isadore actually owned the watch because his mother died intestate so the watch passed to him, not Ruth Smith.[194] Yet when asked how Ruth came to wear the watch for 50 years, Mr. Rotstein replied: "I don't know the relationship -- I don't know whether [Isadore] gave it to [Ruth]."[195] The second piece of jewellery, a brooch, Mr. Rotstein acknowledged came from Ruth's mother, but he contended that Nancy-Gay believed her father owned it because he mentioned it in a codicil.[196]

265 Of course, we do not have Nancy-Gay Rotstein's evidence on the point. Counsel for the moving party submitted that if, by 1998, Nancy-Gay's reconciliation with her mother had progressed as far as Max Rotstein intimated, why would the daughter not know which pieces of heirloom jewellery belonged to her mother, as opposed to those which belonged to her father?

266 On April 8, 1999, Mr. Heintzman wrote to Mr. Draimin requesting delivery of the jewellery to Nancy-Gay. The next day Mr. Draimin faxed Ms. Dietrich, a lawyer at McCarthys, asking her to draft "the usual receipt and release form to be signed by Nancy-Gay", upon which he would be "content to transfer the two pieces to either Mr. Heintzman or yourself in exchange for the signed receipt and release. Please call me to make the arrangements."

267 Just stopping there, in oral argument counsel for Ms. Rotstein submitted that it was improper for Mr. Draimin, on behalf of Isadore's executor, Larry, to insist on a release from Nancy-Gay before delivering the two pieces of jewellery, citing *Widdifield On Executors and Trustees*, Sixth Edition, that while it is common practice for an executor to seek a release before distributing a share of the estate, an executor cannot hold a portion of the estate's assets "hostage in order to extort from the beneficiary" a release.[197] That submission, with respect, ignores what was transpiring at the time. Ruth was taking the position that the jewellery belonged to her, not to Isadore's estate, but to promote a better relationship with her daughter, she was prepared to part with the two pieces. Requesting a release in those circumstances strikes me as a very prudent thing to do.

268 What happened over the three weeks following Mr. Draimin's offer to deliver up the jewellery is not clear from the record, but on April 27, 1999, Mr. Heintzman wrote Mr. Draimin asking him to call following May 3 to ensure the jewellery was delivered. It appears that a dispute arose over the terms of the receipt and release, the particulars of which I cannot discern from the record. In the result, Nancy-Gay Rotstein issued a notice of claim against her father's estate in May, 1999.[198]

269 Later that month Ruth Smith filed an affidavit in the proceeding in which she deposed that both pieces of jewellery were hers -- she had worn the watch "with pride and love from 1957 to the present". She continued:

> 9. In March, 1999, I was advised by our family solicitor, William Draimin, that Nancy Gay wished to receive these items of jewellery, notwithstanding that they were not my husband's to give away and that I continued to wear both the Watch and the Brooch.
> 10. My son, [Larry], asked me to give both items of jewellery to him so that he could give them to Mr. Draimin to be delivered to Nancy Gay. I was most reluctant to surrender these pieces as they held (and continue to hold) great sentimental value to me, and because they were rightfully mine, but Larry prevailed upon me in an attempt to improve family relations
> 11. I gave both items of jewellery to my son, and I am informed by Larry and verily believe that he gave the Watch and the Brooch to Mr. Draimin ... I subsequently

> learned that Nancy Gay was refusing to sign the release and receipt for the items which had been drafted by her own solicitors, and was threatening to sue Larry and me ...
>
> 13. After learning of Nancy Gay's threat to sue her family for family heirlooms, I no longer feel it appropriate for Nancy Gay to receive these items which have been passed on in love from generation to generation. Accordingly, I have asked for my jewellery to be returned to me.

270 Under cross-examination Max denied that he was suggesting that Ruth had been forced to sign her affidavit, but at the same time he really did not believe its contents.[199] He conceded that he did not have any evidence that Ruth was forced to sign this affidavit against her will.[200]

271 Ms. Tracey Tremayne-Lloyd acted for Ruth in the jewellery litigation. She attended at a pre-trial conference with Ruth Smith before Mr. Justice Sutherland. Nancy-Gay did not attend the conference. Ms. Tremayne-Lloyd deposed that "Ruth brought the two pieces of jewellery in her purse and was intending to give them to Nancy-Gay personally that morning at the Pre-Trial conference. Nancy-Gay never showed up." Max Rotstein testified that he attended in the stead of his wife.

272 Ms. Rotstein's claim went to a hearing where it was dismissed. J. Wilson J. made the following endorsement as to costs:

> In my view in this rather sad convoluted family problem there shall be no order of costs. *I make this order based on the submission of Mr. Heintzman and his assurance that Ms. Rotstein has no intention of pursuing this issue in this forum or any other.* (emphasis added)

273 Mr. Rotstein's evidence about the jewellery litigation illustrates how difficult it is to divine the precise nature of his allegations. In paragraph 81 of his affidavit he deposed:

> I note that Ruth's lawyer in the jewellery litigation was Larry's wife at the time, Tracey Tremayne-Lloyd. Ms. Tremayne-Lloyd stands to benefit from my Mother-in-Law's estate if Larry's position is upheld, in that she will receive a valuable piece of jewellery which I believe to be worth approximately $200,000.00.

Ms. Tremayne-Lloyd filed an affidavit in this proceeding. On cross-examination Mr. Rotstein was asked whether in his affidavit he was implying that Ms. Tremayne-Lloyd perjured herself because she stood to gain under the Will. He replied: "I'm not saying that".[201] When then asked where he got the number of $200,000.00, Mr. Rotstein stated, "I got it from my own head". It became apparent that he had no knowledge of the appraised value of the piece of jewellery and ultimately he conceded that since he was not a gemologist, he could not offer opinions about the value of jewellery.[202] More specifically, he did not know the value of that piece of jewellery.[203]

274 In her Fourth Codicil Ruth Smith gifted a necklace to her then daughter-in-law, Tracey Tremayne-Lloyd. Ms. Tremayne-Lloyd separated from Larry Smith around 2008, and she did not become aware of the bequest until after that separation.[204] Ms. Tremayne-Lloyd testified that in September, 2008, she wrote to Mr. Smith and renounced any entitlement to that piece of jewellery.[205] Mr. Rotstein was unaware that Ms. Tremayne-Lloyd had relinquished her interest in the piece of jewellery.[206]

(c) The Smith Trust variation litigation

275 Nancy-Gay's grandfather, Samuel Smith, had established a trust for his two children, Isadore Smith and Renee Sussman. Disputes arose between the two families, leading to a severance of the trust into two others, one of which was the Smith Trust. At the time of that re-arrangement, Isadore appointed his two children, Larry and Nancy-Gay, as trustees of the Smith Trust, along with himself. Mr. Rotstein acknowledged that although Isadore was under no obligation to appoint Nancy-Gay, he did so.[207]

276 From the materials in the record it is evident that at least from 1984 onwards disputes about the operation of the Smith Trust arose which saw Nancy-Gay Rotstein take different positions on operational issues from her father and brother. At a September, 1984 Trustees meeting Isadore proposed that the trust be wound-up given the "continuing animosity among the trustees and long standing lack of co-operation among the Trustees". The minutes of that meeting recorded that "Nancy-Gay Rotstein stated that she is satisfied with the current operation of the Trust and recommended no change in same." The following month, however, her counsel wrote Mr. Draimin, who was counsel for the Trust, to voice Nancy-Gay's objection to the sale of trust assets.

277 The disagreement amongst the three trustees was not resolved during Isadore's lifetime. In 1998 Larry brought an application to vary the trust or, alternatively, to remove his sister as a trustee. In his affidavit he explained that because of changes to the tax law the Smith Fund was facing a deemed disposition of its assets after December, 1998 unless the trust was varied or the fund's assets distributed. Mr. Smith received accounting advice that the potential tax related to a deemed disposition could be as high as $1.2 million, leaving the Fund with a cash deficiency of about $1 million. Ms. Rotstein refused to vary or dissolve the trust. Mr. Smith initiated the variation litigation. A settlement was reached at the last minute on December 31, 1998 which included the transfer of the beneficial ownership of certain trust properties to Nancy-Gay Rotstein and Larry Smith, the primary beneficiaries of the fund.

278 The focus of Mr. Rotstein's complaint about the Smith Fund litigation was that "Larry unduly influenced my Mother-in-Law to file an affidavit in these 1998 Smith Trust proceedings. My Mother-in-Law's intervention was unnecessary as she had no financial interest in the Smith Trust". In her affidavit of October 13, 1998, Ruth Smith recounted the history of estrangement between Nancy-Gay and her parents, expressed concern that the incurring of a large tax liability that could be deferred "would be disgraceful to Isadore's memory, and catastrophic to the beneficiaries of the Trust, if this tax liability were not deferred as it should be, and so much money were to be thrown away", and then commented on her reluctance to become involved in the Trust litigation:

> 30. I would like to reiterate that I make this Affidavit with great reluctance, after much reflection, and after feeling much concern for both of my children. Further, I hope that this proceeding does not harm the fragile relationship I have just recently begun to rebuild with Nancy-Gay, and which is very precious to me. Based on what I have witnessed over the past several decades, however, it is clear to me that the Trustees are not able to act together in the best interests of the Trust. It is equally evident, in my view, that the reason for the "deadlock" between the Trustees is Nancy-Gay's unwillingness to cooperate with Larry in any way, including with respect to the management of the Trust.

279 Mr. Rotstein conceded that Ruth would have had a personal concern about the welfare of the trust and its financial well-being because of her interest in her family and her grandchildren and that concern might have been a motivating factor for her to come forward at the time of the trust litigation.[208]

280 It was Ms. Rotstein's position that Ruth swore the affidavit under the influence of Larry. However, on cross-examination Max Rotstein acknowledged that his wife had been entitled to cross-examine her mother on that affidavit in the trust variation proceeding, but had not done so.[209]

F.7 "Cloistering" of Ruth Smith

281 Ruth moved into her Avenue Road condo in 2000. By that time, after her fall, Larry had arranged for a caregiver to be with her 24 hours a day. In October, 2002, Qualicare was retained to oversee the caregivers because of Ruth's deteriorating physical condition.[210] Three volumes of records prepared or maintained by Qualicare were filed on the motion, totaling some 1,160 pages. I have not reviewed all those records; indeed, few references were made to them in the written and oral arguments. But, I have reviewed the Qualicare records for the last quarter of 2002, when Qualicare came on the scene, and for April and May, 2003 (a random choice), to see what they have to say about who saw Ruth Smith during those periods of time.

282 The Qualicare records focus on Ruth's on-going medical and living needs and do not appear to constitute a record of everyone who saw her. They show that during the last quarter of 2002 Ruth was going through a rough patch, experiencing significant physical weakness and fatigue. The records reveal two outings by Ruth with her gentleman friend, Nat, including one to the opera and another for dinner; attendance at a Hanukkah party; and the receiving of some visitors, including a granddaughter. During April and May, 2003, Ruth went out for a number of dinners with Nat, including one at the home of Nat's daughter; attended a baby-naming; went out with Larry and his family; attended a Mother's Day celebration; and went out for lunch "with a relative". The records revealed that with the better weather Ruth went outside periodically for walks, but had periods of fatigue and cancelled a few appointments because of the concerns around SARS.

283 Andrea Nathanson, a nurse with Qualicare who acted as Ruth's personal care co-ordinator, recorded the following about a conversation she had with Ruth on April 16, 2003:

> Wanted me to know that her daughter had asked for my phone # to enquire about her health care. She clearly told me that I am not to give her any information regarding her healthcare status. I told her that I would not do that & would inform her if she contacted me.

Ms. Nathanson did record that at that time she had informed Nancy-Gay Rotstein that Ruth's two care-givers had not come into contact with anyone with SARS.

284 Mr. Rotstein deposed that Larry "had complete physical control" over Ruth in her last years, hired and paid for her caregivers, and set their hours. Yet, that assertion by Mr. Rotstein stands in direct conflict to his contention that during the 2000s Nancy-Gay's contact with her mother increased, leading to a warming in their relationship. For example, Max Rotstein testified that he and Nancy-Gay took Ruth to the ballet, restaurants and other outings in 2002 and 2003.[211] Mr. Rotstein stated that Ruth celebrated Passover with Nancy-Gay and him in her Avenue Road condominium for several years around 2002. Nancy-Gay began to visit her mother with some frequency, leading her counsel to contend in argument that the privacy of mother and daughter had been vio-

lated by Ruth's care-givers who had left on a Fisher Price-style baby monitor which had been installed in Ruth's room to enable her care-givers to know when she needed help. Since that complaint was based on the frequent visits Max contended his wife made to see her mother, it seems inconsistent with an allegation against Larry of "cloistering" his mother.

285 On cross-examination Mr. Rotstein was asked whether it was his evidence that Larry Smith essentially attempted throughout the later years of Ruth's life to turn Ruth against Nancy-Gay, Mr. Rotstein answered: "That's not my evidence. When do I say that?"[212] He then continued:

> Q. 2252. So you would agree with me that Larry was cooperative in relation to various efforts Nancy-Gay made to assist her mother in making her life better?
> A. I know of no knowledge of him doing that, although Nancy-Gay and I were always concerned he would bar us from the apartment.
> Q. 2253 But he never did?
> A. No, he did not.
> Q. 2254 And in fact, sir, I'm going to suggest to you that, based on the record that we do have, it's apparent that Larry was supportive of anything that would make his mother's life more full?
> A. Yes. And I think that was the reason for the move to the condominium, to give her more social interaction.
> Q. 2255. In fact, he was instrumental in providing instructions to the staff at Avenue Road in order to assist his mother to attend your daughter Tracey's wedding?
> A. He was very supportive of that, yes.
> Q. 2256. And he instructed the staff to do whatever they could to make sure that it was a pleasant experience for his mother because he felt it was in her interests? You would agree with that?
> A. Yes

F.8 Lack of access to medical information about her mother

286 In his affidavit Mr. Rotstein complained that when Ruth was ill in her final years Larry "steadfastly prevented Nancy-Gay and I from obtaining any and all medical records of" Ruth, and that Larry had used the power of attorney granted him by his mother "to prevent Nancy-Gay and I from speaking to any of the medical staff at Baycrest involved in [Ruth's] care".

287 Max Rotstein conceded that he was not aware that in 2003 Larry offered to let his sister have whatever information she wanted.[213] He also later admitted that nothing was withheld from Nancy-Gay up to 1998 or 1999 because Nancy-Gay was talking to her mother at that time.[214]

F.9 Ruth Smith's "strongbox" -- other undisclosed wills?

288 In his affidavit Mr. Rotstein deposed that "it is my belief that [Ruth] may have made or attempted to make a new Will after she reconciled with Nancy-Gay. [Ruth] asked me several times to help her get a lawyer." At one point on his cross-examination Max Rotstein asserted that he believed Ruth Smith had made other testamentary documents which had not been disclosed.[215] He conceded that he had not seen them, nor did he know their whereabouts.[216] Nor did he have any direct information about any wills subsequent to the 1987 one.[217] The only evidence he had to support that allegation were "comments that Mrs. Smith made to me when I was with her."[218] He recalled that the conversation took place in 2003, 2004 or 2005; he couldn't be more specific.[219] Ultimately

when asked directly whether it was his evidence that Ruth Smith made a testamentary instrument after 1998, Mr. Rotstein stated: "I don't know that today."[220]

289 When asked whether he had any evidence that after 1998 Ruth Smith intended to add a codicil or change her will, Mr. Rotstein responded that he only recalled some discussions with her "sometime in the period 2003 through 2005" in which Ruth said "she wanted to get a lawyer and that she wanted to revoke her power of attorney to Larry"[221] -- "we discussed the issue of a lawyer to make changes in her will on a number of occasions, at least half a dozen occasion."[222] On cross-examination Mr. Rotstein did not volunteer what those changes might have been.

290 Mr. Rotstein contended that Ruth Smith never saw another lawyer during the period 1998 to 2002 other than Mr. Draimin, "although she kept asking to see other lawyers."[223] Mr. Rotstein's evidence on that point got no more specific than that vague statement. When asked directly, several times, on cross-examination whether Ruth Smith would have made a new will putting Nancy-Gay back as a beneficiary had Bill Draiman not been her lawyer, Max Rotstein refused to provide a responsive answer.[224] Larry testified that his mother never told him that she wanted to see a lawyer apart from Mr. Draimin.

291 Mr. Smith deposed that his mother never told him that she had made any testamentary document after her 1987 Will and the four codicils.

292 Mr. Rotstein testified Ruth Smith kept papers in a lock box, but he said that she had never told him that any of the documents in the box were wills or codicils[225] Larry Smith testified that his mother did not keep a lock box, but maintained an unlocked metal filing cabinet in which she kept papers.[226]

F.10 Lawrence's conduct following his mother's death

293 Finally, Mr. Rotstein contended that an example of Larry's undue influence over his mother was his haste in registering survivorship title documents for the Avenue Road condominium the day following mother's death. Larry testified that he had Mr. Draimin file the survivorship documentation for the Avenue Road condominium immediately following his mother's death because "I assumed that Nancy and Max were going to put some kind of notice on title to prevent me from doing anything."[227]

G. Analysis

294 As I read the record, no disputed material facts really exist regarding what happened to Ruth Smith during the last nine years of her life. Nor does Nancy-Gay Rotstein's undue influence claim against her brother hinge on disputed material facts about what happened when Ruth Smith made her 1987 Will and first two codicils, because none exist. The evidence of Mr. Thomson and Mr. Draimin stands unopposed. Instead, Ms. Rotstein tries to fashion her claim of undue influence by focusing on two issues. First, what characterization, or description, should be attached to Larry's conduct towards his mother during the last nine years of her life? Ms. Rotstein's counsel submitted that the appropriate descriptions were "asset grabber" and "undue-influencer". Second, how should that characterization relate back to the circumstances surrounding Ruth Smith's execution of her 1987 Will, her 1989 First Codicil and her 1991 Second Codicil? Ms. Rotstein submits that if her brother is found to have been an "undue-influencer" over his mother during the last nine years of his life, then he must have been an "undue-influencer" coercing her to make her 1987 Will and the first two codicils -- "once an undue influencer, always an undue influencer".

295 Ms. Rotstein submitted that in order for a court to answer those two questions, it must draw inferences from facts, even if those facts are largely undisputed. Because Old Rule 20, she argued, does not permit a motions judge to draw inferences, a trial necessarily must be directed in respect of her claim that her mother's 1987 Will and first two codicils were made as a result of Larry coercing his mother. As I explained above, I disagree that the jurisprudence under the Old Rule 20 prevents a motions judge from drawing inferences from undisputed facts.

296 In any event, the jurisprudence under Old Rule 20 has always stressed that an important part of the tasks of a motions judge involves determining whether a "genuine" issue for trial exists. For an issue to be "genuine", it must not be spurious.[228]. If the claim cannot be proved on the basis of the undisputed facts and stands "no chance of success", it should not be permitted to go to trial.[229] Put another way, the motions judge must ascertain whether the evidence proffered is capable of supporting a claim or defence.[230] Or, to draw a loose analogy to the criminal law jurisprudence, the evidence proffered must support a claim which possesses an "air of reality".[231]

297 I conclude that no air of reality surrounds Ms. Rotstein's claim that her brother exerted undue influence over their mother when she made her 1987 Will and the first two codicils, or during the last nine years of her life. First, Ruth Smith, through the Notice accompanying her 1987 Will, as well as the numerous pieces of correspondence, diary entries and affidavits that I have reproduced at great length, clearly explained why she had excluded her daughter from her estate, save for two pieces of jewellery. Ruth's decision to exclude Nancy-Gay originated in the mid-1970s and continued until her death. Ruth had perceived that her daughter had done great wrongs to her father and mother, including withdrawing herself and her children from the lives of her parents. As a result, Ruth Smith excluded Nancy-Gay from a share in her estate. The record is clear, unequivocal and overwhelming -- Nancy-Gay's exclusion from her mother's will resulted from Nancy-Gay's own conduct. No one else is to blame. The exclusion had nothing to do with Larry's conduct. Based on my "hard look" at the evidence, no evidentiary basis exists for any suggestion to the contrary.

298 Second, Isadore Smith was alive and living with Ruth when she made her 1987 Will, First Codicil and Second Codicil, a difficult obstacle, one would have imagined, to a son's efforts to coerce his mother. Ruth and Isadore's 1987 Wills first provided for the survivor of the two of them during his or her lifetime. Their trustees were given the power to encroach on capital to support the survivor, hardly a provision for the advantage of Larry, the sole residuary beneficiary.

299 Third, the undisputed facts about Ruth's last nine years of life reveal that Larry's involvement in her changes of residence, banking, hiring of care give-givers, dealing with doctors, and ultimately admitting Ruth to the Baycrest Centre, had nothing to do with a son "controlling" his mother's affairs in some coercive way, but everything to do with a son helping out his mother during the last phase of her life. Ruth Smith's health declined during the last eight or so years of her life. As often happens, a fall seemed to signal the start of the process. The evidence shows that Ruth maintained some independence until 2003, and then became depressed following the death of her boyfriend. Even earlier than that she had begun to require some physical assistance, as many elderly parents do. What was Larry Smith's explanation for providing and arranging that assistance? "I was her son. Somebody had to look after her and there was no one else."[232]

300 A mother was aging; she required assistance; her son provided it. What I see in the record before me is undisputed evidence that during Ruth's last eight years a son helped his mother to enjoy the final stages of her life with dignity. I see nothing in that conduct that could permit a court to

conclude that the son was exercising undue influence over the mind of his mother. All I see in the record is a son performing a child's duty to an aging, and then dying, parent.

301 As to the various pieces of litigation, all I see in the record after giving it a "hard look" is a family incapable, for whatever reason, of resolving its internal differences in a reasonable way. I see no hand of undue influence or coercion in such litigation.

302 Finally, dealing with the property transfers, Larry Smith provided explanations for each transaction. Probate-proofing drove the Palace Pier, Avenue Road and Vaughan Road transactions. Both Mr. Thomson and Mr. Draimin observed that the Smiths, particularly Isadore and Ruth, were tax-driven people. None of those transactions prejudiced Ruth -- she lived in luxurious condominiums until her health prevented otherwise, and she continued to receive the benefit of the net after-tax income from Vaughan Road. Ruth lived in the style to which she had become accustomed until her final days. Further, the effects of the joint tenancy transactions were completely in line with Ruth's selection of Larry as her sole residuary beneficiary.

303 The Main Street transaction resulted from the Smith family's desire to extract themselves from another branch of the family. Ruth's income did not suffer. On the contrary, Mr. Rotstein saw benefit in the income-stabilization effect of that transaction.

304 I conclude that the evidence adduced before me on this motion in respect of Larry's conduct during the last nine years of his mother's life is not capable of giving rise to a claim that he unduly influenced his mother during that period of time. As to Ms. Rotstein's effort to tie that period of time back to the time Ruth made her 1987 Will and first two codicils, no air of reality surrounds that claims.

305 Two final comments. First, I would have thought it was apparent that the two themes pressed by Ms. Rotstein on this motion -- the prospect for a reconciliation with her mother that would result in a will change, and the effort to push back the time of Ruth's mental infirmity to the period when testamentary instruments were made -- were mutually exclusive and worked to undercut each other. Second, Ms. Rotstein's position that if the 1987-based testamentary instruments were held to be invalid, then she would attempt to strike down every prior will until she came to one where her mother treated her equally with her brother, spoke volumes about the lack of "genuineness" of the claims advanced by Nancy-Gay Rotstein in this proceeding.

306 For these reasons, I conclude that no genuine issue for trial exists in respect of the claim by Nancy-Gay Rotstein that her brother unduly influenced their mother when she made her 1987 Will and its first and second codicils.

IX. Conclusion and relief granted

307 For the reasons set out above, I conclude that no genuine issue for trial exists in respect of the validity of Ruth Smith's 1987 Will, May 24, 1989 First Codicil and November 7, 1991 Second Codicil. I grant Mr. Smith's motion for partial summary judgment striking out Nancy-Gay Rotstein's Amended Notice of Objection dated December 20, 2007, in respect of the 1987 Will, First Codicil and Second Codicil.

308 I think this is an appropriate case in which to grant partial probate. The Third and Fourth Codicils deal only with two matters: (i) the amount of the gift to be paid to the I. & R. Smith Trust for the benefit of Marcia Rotstein, and (ii) the gift of a necklace to Tracey Tremayne-Lloyd. Since Ms. Tremayne-Lloyd filed an affidavit confirming that she had renounced that gift, only the amount

of the gift for the benefit of Marcia Rotstein remains in issue. I see no reason to delay the administration of Ruth Smith's estate because of that one issue. I therefore direct the Estates Registrar of the Toronto Region to issue to Lawrence Smith a certificate of appointment as estate trustee of Ruth Dorothea Smith's 1987 Will, First Codicil dated May 24, 1989 and Second Codicil dated November 7, 1991, upon the payment of the usual fees, and upon the filing of an undertaking signed by Lawrence Smith that he will hold back from the distribution of estate assets the sum of $250,000.00 until such time as a certificate of appointment may be issued in respect of the Third or Fourth Codicil, or both.

309 As to the Third Codicil of Ruth Smith dated November 15, 1994 and the Fourth Codicil dated June 3, 1998, in respect of which summary judgment ultimately was not sought, I intend to make directions about further steps in the proceeding pursuant to Old Rule 20.05(1). I have reviewed the probate file in this matter (01-4260/07) and see that the Notice of Application was served on the I. & R. Smith Trust c/o Mr. Claude Thomson, Q.C., at the Fasken's law firm. The Motion Record for summary judgment was served on Marcia Rotstein Evans by serving the Hull & Hull firm. Before making any further directions regarding next steps in this proceeding in respect of the validity of the Third and Fourth Codicils, I require Lawrence Smith to serve his Notice of his Application for a certificate of appointment in respect of those two instruments personally on Marcia Rotstein Evans no later than Friday, April 23, 2010, together with a copy of these Reasons for Judgment. I require Marcia Rotstein Evans to serve on counsel for Lawrence Smith, no later than May 7, 2010, a statement clearly indicating whether she wishes a trial to be scheduled in respect of the Third or Fourth Codicils, or whether she is content that a certificate of appointment issue to Lawrence Smith in respect of them. If Marcia Rotstein Evans does not serve such a statement by May 7, 2010, she shall be taken to not oppose the issuance of such a certificate.

310 If Marcia Rotstein Evans files a statement indicating that she does not oppose the issuance of a certificate, or if she is deemed to be taken not to oppose its issuance, then I direct the Estates Registrar of the Toronto Region, upon the filing of an affidavit by counsel for Lawrence Smith indicating that Marcia Rotstein Evans does not oppose, or is deemed not to oppose the issuance to Lawrence Smith a certificate of appointment as estate trustee of Ruth Dorothea Smith's Third Codicil dated November 15, 1994 and Fourth Codicil dated June 3, 1998, to proceed to issue such a certificate to the applicant.

311 If Marcia Rotstein Evans files a statement indicating that she opposes the issuance of a certificate, then I direct counsel for Lawrence Smith and Marcia Rotstein Evans to seek an appointment from my office for a date on which to attend a hearing for further directions.

312 Given my grant of partial summary judgment in respect of the 1987 Will and the first two codicils, Nancy-Gay Rotstein has no interest in any further adjudication, if required, of the validity of the Third and Fourth Codicils of Ruth Smith, and no notice need be served on her of any further proceedings in respect of the Third and Fourth Codicils.

X. Costs

313 I would encourage the parties to try to settle the costs of this motion. If they cannot, the moving party may serve and file with my office written cost submissions, together with a Bill of Costs, by Friday, May 7, 2010. The responding party may serve and file with my office responding written cost submissions, together with a Bill of Costs, by Friday, May 28, 2010. The costs submissions shall not exceed fifteen pages in length, excluding the Bill of Costs.

314 Finally, I wish to thank all counsel for their very helpful written and oral arguments in this matter.

D.M. BROWN J.

cp/e/qlrxg/qlaxd/qljxr/qlced/qljxh/qlcas/qljxh

1 S.O. 2006, c. 21, Sch. F.

2 *Onex Corporation v. American Home Assurance*, 2009 CanLII 72052 (Ont. S.C.); *Aylmer Meat Packers Inc. v. Ontario*, 2010 ONSC 649.

3 *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, [2008] 1 S.C.R. 372, para. 11; *Sera GMBH v. Sera Aquaristik Canada Ltd.*, [2007] O.J. No. 318 (C.A.), per Sharpe J.A. (in dissent on the result), para. 4; *Dawson v. Rexcraft Storage and Warehouse Inc.*, [1998] O.J. No. 3240 (C.A.), para. 17.

4 *Quinn v. Keiper* (2007), 87 O.R. (3d) 184 (S.C.J.); affirmed (2008), 92 O.R. (3d) 1 (C.A.).

5 *Knox v. Trudeau*, [2001] O.J. No. 352 (S.C.J.).

6 2009 ONCA 279, para. 7. See also: *Papageorgiou v. Walstaff Estate*, 2009 ONCA 136, affirming the grant of summary judgment by Strathy J. at [2008] O.J. No. 2620 (S.C.J.); *Slater v. Slater* (2004), 12 E.T.R. (3d) 246 (Ont. S.C.J.); and, *Ettore v. Ettore*, [2004] O.J. No. 3646 (S.C.J.).

7 [1997] O.J. No. 4298, 1997 CanLII 1302 (Ont. C.A.).

8 (1991), 4 O.R. (3d) 545 (C.A.).

9 (1995), 21 O.R. (3d) 547 (C.A.).

10 *Ford Motor Co., supra*., para. 46.

11 s. 20.3.

12 [2009] O.J. No. 1573, 2009 CanLII 17973 (Ont. S.C.), para. 10.

13 A.H. Oosterhoff, *Text, Commentary, and Cases On Wills*, 2d ed., p. 11; *Williams on Wills*, s. 20.1; *Halsbury's Laws of England*, 4th ed., Vol. 50, at 203, para. 301.

14 *Williams on Wills*, s. 20.3; R. Jennings, *A Treatise on Wills*, Eighth Edition, p. 214.

15 *Crooks Estate* (1957), 130 A. 2d 185 (Pa. S.C.), at 187.

16 *Feeney's Canadian Law of Wills*, Fourth Edition, s. 6.1.

17 [1925] Ch. 287 (Ch.), at 291.

18 *Williams on Wills*, s. 20.3 and 20.4.

19 *Feeney's Canadian Law of Wills*, s. 6.5.

20 *Williams on Wills*, s. 20.3.

21 Respondent's Factum, December 24, 2009, para. 24.

22 J.H.G. Sunnucks, J.G. Ross Martyn & Nicholas Caddick, Williams, Mortimer and Sunnucks *On Executors, Administrators and Probat* e, 18th ed. (London: Sweet & Maxwell, 2000), at s. 23-16.

23 Max CX, Q. 96.

24 Max CX, Q. 558.

25 Max CX, QQ. 566-7.

26 Max CX, Q. 572.

27 Max CX, Q. 198.

28 Max CX, Q. 82-83.

29 Max CX, Q. 248.

30 Max CX, Q. 251.

31 Max CX, Q. 256.

32 Max CX, QQ. 259; 367; 452; 945; 1490; 1691.

33 Max CX, QQ. 264-5.

34 See also: Max CX, QQ. 319-322.

35 Max CX, Q. 1691.

36 Max CX, Q. 650.

37 Max CX, Q. 2082.

38 Max CX, Ex. E.

39 Max CX, QQ. 459; 462.

40 Max CX, Q. 463.

41 Max CX, QQ. 894; 908.

42 Max CX, QQ. 1148-1151; 1157-8; 1167-1170.

43 Max CX, Q. 268.

44 Max CX, Q. 960.

45 Max CX, Q. 1062-1066.

46 Max CX, Q. 492.

47 Max CX, Q. 1051.

48 Max CX, Q. 812.

49 Max CX, Q. 919.

50 Max CX, Q. 1215.

51 Max CX, Q. 1268.

52 Max CX, QQ. 1947-8.

53 Larry CX, QQ. 637-9.

54 Max CX, QQ. 2160-2165.

55 Tremayne-Lloyd CX, Q. 111.

56 s. 2.6.

57 *Feeney, supra*., s. 2.13 and 2.15.

58 *Feeney*, s. 2.11.

59 *Feeney*, s. 2.16.

60 *Eady v. Waring* (1974), 2 O.R. (2d) 627 (C.A.), at 639.

61 [1995] 2 S.C.R. 876.

62 Thomson CX, Q. 65.

63 Thomson CX, Q. 136.

64 Thomson CX, Q. 152.

65 Thomson CX, QQ. 176-8.

66 Thomson CX, Q. 253.

67 Thomson CX, Q. 226.

68 Max CX, Q. 309.

69 Larry CX, Q. 295.

70 Max CX, QQ. 633-636.

71 Larry CX, QQ. 582-586; 600.

72 Larry CX, Q. 586.

73 Max CX, Q. 1133.

74 Kingstone CX, Q. 469-471.

75 Kingstone CX, QQ. 277-281.

76 Max CX, Q. 790.

77 Max CX, Q. 815.

78 Max CX, QQ. 822-3.

79 Max CX, QQ. 832-5.

80 Max CX, QQ. 852; 854; 860.

81 Max CX, QQ. 1174; 1176.

82 Max CX, Q. 1179.

83 Max CX, Q. 2489.

84 Larry CX, QQ. 1223; 1239-1241; 1290; 1362; 1463; 1524.

85 Max CX, QQ. 2219-2223; 2234-5.

86 Max CX, QQ. 2544-2546.

87 *Feeney, supra*., s. 3.5.

88 [1998] O.J. No. 3528, paras. 58 and 59.

89 [2001] O.J. No. 19 (S.C.J.), para. 112.

90 [2008] O.J. No. 1422 (S.C.J.), para. 81.

91 See: *Banton, supra*., paras. 62 and 98.

92 *Banton, supra*., para. 95.

93 *Feeney*, s. 3.13.

94 *Pocock v. Pocock*, [1952] O.R. 155 (C.A.), para. 42.

95 *Scott v. Cousins, supra*., para. 39.

96 *Banton, supra*., para. 99.

97 *Eady v. Waring, supra*.

98 *Scott v. Cousins*, para. 123.

99 (1999), 44 O.R. (3d) 97 (C.A.), at p. 110.

100 [1999] 3 S.C.R. 423

101 *Guarantee, supra*., para. 29.

102 [2008] 1 S.C.R. 372, para. 11.

103 *Papaschase*, para. 18.

104 *Chappus Estate, supra*., para. 14.

105 *Chappus Estate*, paras. 12-14.

106 Max CX, Q. 528.

107 Max CX, QQ. 581; 585.

108 Max CX, Q. 588.

109 Max CX, Q. 605.

110 Max CX, Q. 615.

111 Max CX, QQ. 1696-8.

112 Max CX, QQ. 453; 456.

113 Max CX, Q. 2108.

114 Max CX, Q. 521-2.

115 Max CX, QQ. 1652-1655.

116 *Eady v. Waring* and *Banton, supra*.

117 Larry CX, QQ. 1618-9.

118 Larry CX, Q. 1622.

119 Larry CX, Q. 1623.

120 Max CX, QQ. 2219-2223.

121 Max CX, QQ. 2234-5.

122 Larry CX, QQ. 873; 1247.

123 Max CX, Q. 1296.

124 Larry CX, Q. 1635.

125 Larry CX, Q. 1636.

126 Max CX, QQ. 2225-2227.

127 Larry CX, Q. 1242-3.

128 Max CX, Q. 1751.

129 Larry CX, QQ. 663-4.

130 Larry CX, Q. 702.

131 Larry CX, Q. 707.

132 Larry CX, Q. 844.

133 Larry CX, Q. 422.

134 Larry CX, QQ. 433-435.

135 Max CX, QQ. 2088-2090.

136 Max CX, Q. 2243.

137 Max CX, QQ. 2244-2248.

138 Max CX, QQ. 657-9.

139 Max CX, QQ. 659; 682.

140 Max CX, Q. 686.

141 Max CX, Q. 688.

142 Max CX, Q. 693.

143 Max CX, QQ. 661; 672.

144 Max CX, Q. 674.

145 Max CX, Q. 695.

146 Max CX, QQ. 710; 713.

147 Max CX, Q. 731.

148 Max CX, Q. 733.

149 Max CX, Q. 1720.

150 Max CX, Q. 1756.

151 Max CX, Q. 1760.

152 Max CX, QQ. 1671-4.

153 Draimin CX, Q. 349.

154 Draimin CX, Q. 484.

155 Max CX, QQ. 2279-2402.

156 Max CX, Q. 2329.

157 Max CX, Q. 2338.

158 Max CX, QQ. 2262-3.

159 Draimin CX, Q. 256.

160 Draimin CX, Q. 326.

161 Draimin CX, Q. 281.

162 Draimin, CX, Q. 337.

163 Larry CX, QQ. 1561-1565.

164 At p. 804.

165 Max CX, Q. 2428.

166 Draimin CX, Q. 186.

167 Draimin CX, QQ. 190-2.

168 Draimin CX, Q. 205.

169 Respondent's Factum, para. 22(a).

170 Larry CX, QQ. 1076-1078; 1144.

171 Larry CX, Q. 928.

172 Larry CX, QQ. 985-989.

173 Larry CX, QQ. 1012-1015.

174 Larry CX, Q. 1022.

175 Larry CX, QQ. 1043-1046.

176 Larry CX, Q. 1030.

177 Max CX, Q. 2537.

178 Draimin CX, QQ. 439-441.

179 Larry CX, QQ. 1498-9.

180 Max Affidavit, para. 66.

181 Max Affidavit, para. 66.

182 Max CX, Q. 1350.

183 Max CX, Q. 1440.

184 Max CX, Q. 1430.

185 Larry CX, Q. 618.

186 Tremayne-Lloyd CX, Q. 57.

187 Max CX, QQ. 1332; 1334.

188 Max CX, QQ. 1353-1357.

189 Max CX, Q. 1357.

190 Max CX, QQ. 1363-5; 1371.

191 Max CX, Q. 1382.

192 Max CX, Q. 1386.

193 Max CX, Q. 973.

194 Max CX, QQ. 1837-1843.

195 Max CX, Q. 1864.

196 Max CX, QQ. 1869-1873.

197 Widdifield *On Executors and Trustees*, Sixth Edition, s. 5.1.4.

198 Max CX, Q. 1926-7.

199 Max CX, Q. 1242.

200 Max CX, Q. 1247.

201 Max CX, Q. 1510.

202 Max CX, QQ. 1516-1522; 1528-9; 1537.

203 Max CX, Q. 1582.

204 Tremayne-Lloyd CX, QQ. 21-3.

205 Tremayne-Lloyd CX, QQ. 39; 139-140.

206 Max CX, QQ. 1543; 1565.

207 Max CX, QQ. 1641-1646.

208 Max CX, QQ. 1106-7.

209 Max CX, QQ. 127-129; 193.

210 Larry CX, Q. 864.

211 Max CX, Q. 1212.

212 Max CX, Q. 2251.

213 Max CX, QQ. 777; 869.

214 Max CX, QQ. 796-7.

215 Max CX, Q. 750.

216 Max CX, Q. 750.

217 Max CX, Q. 1145.

218 Max CX, Q. 751.

219 Max CX, Q. 754.

220 Max CX, QQ. 2072; 2075.

221 Max CX, QQ. 2006-7.

222 Max CX, Q. 2016.

223 Max CX, Q. 737.

224 Max CX, QQ. 738-741.

225 Max CX, QQ. 2063-4.

226 Larry CX, Q. 354-6.

227 Larry CX, Q. 1514.

228 *Ungerman v. Galanis, supra*., p. 151.

229 *Aronowicz v. Emtwo Properties Inc.* (2010), 98 O.R. (3d) 641 (C.A.), para. 20.

230 *Dawson v. Rexcraft Storage and Warehouse Inc.*, [1998] O.J. No. 3240 (C.A.), para. 121.

231 *Halsbury's Laws of Canada, Criminal Offences and Defences*, 2007, HCR-472.

232 Larry CX, Q. 881.

---- End of Request ----
Email Request: Current Document: 1
Time Of Request: Wednesday, February 06, 2013 14:56:55