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(Winnipeg Centre)
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COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

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GAUTHIER, AS EXECUTRIXES OF THE)	
ESTATES OF THE LATE HERMINE RITA)	<u>Kelly P. Land</u>
GAUTHIER AND LEO EUGENE JOSEPH)	for the plaintiffs
GAUTHIER, DECEASED,)	
)	
plaintiffs,)	
- and -)	<u>George J. Orle, Q.C.</u>
)	for the defendant
REYNALD RAYMOND JOSEPH GAUTHIER,)	
)	JUDGMENT DELIVERED:
defendant.)	June 22, 2017

ABRA J.

Introduction

[1] On June 2, 2008, Leo Eugene Joseph Gauthier ("Leo") and Hermine Rita Gauthier ("Hermine") entered into two written agreements with their son, the defendant, Reynald Raymond Joseph Gauthier ("Reynald"). One agreement was a Bare Trust and Agency Agreement ("Bare Trust Agreement"). The other agreement was a Grant of First Refusal and Option to Purchase Agreement ("Option Agreement").

[2] The Bare Trust Agreement in essence provided that:

- (a) for valuable consideration of \$10, the receipt and sufficiency of which were acknowledged, the parties agreed that Reynald became the owner of five parcels of land. As nominees, Leo and Hermine held legal title to the five parcels of land as bare trustees for Reynald;
- (b) title to the five parcels would be transferred to the names of Leo, Hermine and Reynald as joint owners;
- (c) Leo and Hermine would have no equitable or beneficial interest in the five parcels. Those interests vested solely in Reynald;
- (d) any benefit, interest, profit or advantage that Leo and Hermine received from the five parcels would be for the sole use, benefit and advantage of Reynald. Leo and Hermine would have to account to Reynald for any money that they received related to the five parcels;
- (e) Leo and Hermine could not deal with five parcels of land in any manner whatsoever without Reynald's consent; and
- (f) upon discharge of Mortgage No. 1055623 Leo and Hermine would transfer title to all five parcels to Reynald.

[3] Each of the five parcels had separate Certificates of Title ("CT") registered in the Morden Land Titles Office ("MLTO"). The CTs and the legal descriptions are as follows:

CT1896004

NE ¼ 29-8-7 WPM and SE¼ 29-8-7 WPM
EXCEPTING – ALL MINES AND MINERALS AS SET FORTH IN THE
ORIGINAL GRANT FROM THE CROWN

CT1896007

SE¼ 36-8-8 WPM
EXCEPTING – ALL MINES AND MINERALS

CT1896013

SE¼ 30-8-6 WP

CT1896015

SE¼ 32-9-7 WPM

CT1896017

NW¼ 24-8-8 WPM and the N½ of SW¼ 24-8-8 WPM
EXCEPTING
FIRSTLY – ALL MINES AND MINERALS
SECONDLY – PUBLIC ROAD PLAN 2148 MLTO

[4] Part of the parcel of land in CT1896004 has a house and other farm buildings on it. It is the Gauthier family homestead ("homestead"). It is just outside St. Claude, Manitoba.

[5] The Option Agreement in essence provided that Reynald had a right of first refusal and/or an option to purchase other parcels of land from Leo and Hermine. The price would be determined by agreement between the parties or after appraisals of the respective parcels.

[6] Three of the parcels that were subject matter of the Option Agreement are different than all five of the parcels of land referred to in the Bare Trust

Agreement. But there is a significant issue that will be hereinafter described related to whether the parcel of land in CT1896004 was also subject to the Option Agreement.

[7] On April 30, 2009, Leo and Hermine initially commenced proceedings by filing a notice of application seeking a declaration that CT1896004 and CT1896007 should not have been included in the Bare Trust Agreement. It was alleged that Reynald had exercised undue influence upon them and that neither of them had the mental capacity or the understanding to enter into a binding agreement with Reynald with respect to those two parcels of land.

[8] In support of the application, an affidavit of Hermine sworn April 15, 2009 ("Hermine's affidavit") was filed. There was no cross-examination on that affidavit.

[9] When Reynald opposed the notice of application and filed his own affidavit, it became clear that *viva voce* evidence would be necessary because the credibility of relevant and important witnesses, including Hermine and Reynald, was being contested. On August 20, 2010, Leo and Hermine therefore commenced this action by statement of claim alleging that there had been undue influence by Reynald upon Leo and Hermine. It is further alleged that either Leo or Hermine, or both of them, were without sufficient understanding and/or mental capacity to enter into the Bare Trust Agreement.

[10] Thereafter on March 8, 2011, Reynald filed a statement of defence.

[11] In the statement of claim, the plaintiffs are seeking, *inter alia*:

- (a) a declaration that the inclusion of CT1896004 and CT1896007 in the Bare Trust Agreement was obtained by Reynald through undue influence and/or that either Leo or Hermine, or both of them, were without sufficient understanding and/or mental capacity to enter into the Bare Trust Agreement; and
- (b) a declaration that the Bare Trust Agreement is not binding upon Leo and Hermine with respect to CT1896004 and CT1896007; and
- (c) an order vacating the caveats filed by Reynald with respect to CT1896004 and CT1896007.

[12] Leo passed away on January 8, 2011. Hermine passed away on April 15, 2011. By order dated March 2, 2012, the statement of claim was amended to name Lucille Gauthier ("Lucille") and Marielle Gauthier ("Marielle"), as plaintiffs. They are two of Leo and Hermine's daughters and are executrices of Hermine's estate. Upon his death, no application for probate was made for Leo's estate. Probate of Hermine's will was granted on November 7, 2011.

[13] During the course of this trial, the plaintiffs applied to have Hermine's affidavit tendered as an exhibit in the cause in order that the plaintiffs could rely upon its contents as evidence. Needless to say Reynald was opposed to that application. Written argument was submitted for me to decide this issue, in addition to the written arguments that were submitted by the parties for me to decide this claim.

Background and Facts

Testimony of Marielle Gauthier

[14] There are six children in Hermine and Leo's family. Marielle is the oldest. She is presently 53 years of age. She was raised on the homestead. The other children are her brothers Reynald and Gilbert, and her sisters Annette, Pauline and Lucille.

[15] Marielle left the homestead and moved to Winnipeg in or about August 1981 after graduating from high school. In 1990 she moved to Cornwall, Ontario and then in 1993 moved to Saskatoon, Saskatchewan. Throughout the time that Marielle lived away from her parents, she kept in regular contact with them and spoke with them by telephone at least once a week.

[16] Prior to 2002, Reynald was the owner of three parcels of land namely, CT1896013, CT1896015 and CT1896017, hereinbefore referred to in paragraph 3. Reynald farmed those three parcels on his own. In 2002, however, Reynald got into financial difficulties. As a result, he and Leo entered into a written agreement dated June 19, 2002, prepared by a lawyer, Mona Brown ("June 19, 2002 agreement"), wherein CT1896013, CT1896015 and CT1896017 were transferred to Leo.

[17] Thereafter Leo arranged for Mortgage No. 1055623 with the Dufferin Credit Union in the sum of \$346,155. The mortgage pertained to the three parcels of land that Reynald had transferred to Leo and the two additional

parcels of land owned jointly by Leo and Hermine described in CT1896004 and CT1896007.

[18] According to the terms of the June 19, 2002 agreement, Reynald was responsible for making the mortgage payments, for ensuring that all of the five parcels of land had insurance and for paying the taxes. The agreement further provided that, once Mortgage No. 1055623 had been paid in its entirety and was discharged, Leo would transfer back to Reynald the three parcels of land that Reynald had previously owned.

[19] In or about 2005, Leo's mental health was deteriorating. Marielle was first advised of this information by her brother Gilbert. In April 2007, her sister Annette provided to Marielle a copy of a report that Dr. Howard Zacharias had sent to Leo's family doctor, Dr. S. Fikry, which diagnosed Leo with dementia and which indicated that his condition would continue to deteriorate.

[20] In the meantime, Marielle had herself witnessed numerous incidents wherein Leo exhibited dementia. For example, when Leo tried to write a cheque to his brother Raoul, who farmed with Leo, Marielle had to write out the cheque. When she gave it to Leo to sign, he did not know what to do.

[21] Marielle described other occurrences that supported her concern about Leo's mental health. These included:

- on one occasion, when Leo became agitated for no apparent reason, Marielle asked him what was wrong. He replied that he

thought that someone was trying to steal the farm. But he did not know whom it was, or how the person was doing it;

- on another occasion Leo tried to drive one of the farm trucks. He could not figure out how to release the parking brake inside the truck. He therefore got out and released the exterior brake on one of the wheels. The truck started to move forward and it rolled over Leo's foot; and
- one summer day when it was hot in the house, Marielle opened all of the windows to let in fresh air. Shortly thereafter she saw that the windows had been closed. She reopened them and then saw Leo again closing them. When she asked him why, he replied "They're coming to get me. They're after me." He seemed to be very paranoid.

[22] In December 2007, Marielle and her other siblings, including Reynald, met with Dr. Fikry about Leo's declining mental health. Dr. Fikry told the family members that they needed to get Leo's affairs in order because his mental health was going to continue to decline.

[23] According to Marielle, after that meeting with Dr. Fikry, Reynald commented to her that he wanted Leo and Hermine to give him some acres of their land so that he could build a house. Marielle reiterated what Dr. Fikry had said in the December 2007 meeting. Marielle told Reynald that Leo had dementia.

[24] Marielle testified that she told Reynald not to talk to Leo on his own. Leo would not understand what was being said to him. Reynald assured her that any transaction about transferring land would be done through lawyers.

[25] Marielle first became aware of Leo's existing will dated April 16, 2002, and a codicil to it dated June 12, 2002, that was prepared by Mona Brown. The codicil provided that Leo was leaving upon his death the parcel of land described in CT1896007 to Reynald if Reynald survived Leo by 30 days.

[26] On June 24, 2008, Leo and Hermine executed new wills that were prepared by Ken Tacium of the Winnipeg law firm Tacium Vincent Orlikow. Leo named Hermine as executrix and Hermine named Leo as executor. The alternate executrices in both wills were Marielle and Lucille. In their respective wills, Leo and Hermine each left the parcel of land described in CT1896007 to Reynald.

[27] According to Marielle, when Hermine and Leo had their wills executed, she and Hermine were already concerned about Leo's mental health. Hermine knew that Leo had dementia. Marielle could not remember whether she or Hermine told Ken Tacium of their concerns about Leo's mental health.

[28] Marielle first learned that Leo and Hermine had signed the Bare Trust Agreement and the Option Agreement shortly after they were signed in June 2008. She did not actually see copies of either of the documents until December 2008.

[29] According to Marielle, she asked Hermine about the signing of the documents and Hermine confirmed that she had signed some papers. But she did not know what they were. She thought that she was renewing a mortgage on some of their land.

[30] Later, after Marielle had received copies of the two documents, she discussed them with some of her brothers and sisters. They were all very upset. Marielle then talked to Hermine again who told Marielle that she did not understand the documents.

[31] In cross-examination, Marielle testified that her grandparents, Ovila Gauthier and Lucienne Gauthier, had originally owned the homestead. Leo was their oldest son and had inherited the farm from his parents. Reynald is the oldest son in Leo and Hermine's family.

[32] After Marielle left the homestead in 1981, Reynald continued to live there with Leo and Hermine. Reynald left in 1984 to go to university in Winnipeg. After he completed an agricultural degree, he moved back home and continued to assist Leo in farming.

[33] Marielle testified that she never talked to Leo about how the family farm land would be distributed.

[34] Marielle was shown copies of affidavits of execution that had been taken by Ken Tacium, both dated June 24, 2008, related to the wills that had been prepared for Leo and Hermine respectively. In each of the affidavits of execution Ken Tacium attested that, in his opinion, both Hermine and Leo were of sound

mind, memory and understanding at the time of execution of their wills. Ken Tacium has since died.

Testimony of Annette Labossière

[35] Annette Labossière ("Annette") is another daughter of Hermine and Leo. She is at present 43 years of age. Annette got married in 1995 and moved away from the homestead. She still lives near St. Claude.

[36] According to Annette, she saw her parents at least once a week and would regularly take Hermine grocery shopping. After 2005 Annette saw more of her parents because Leo's health was declining.

[37] In July 2006 Hermine left the homestead and moved into St. Claude. Leo continued to live on the homestead with his brother Raoul. In August 2007 Leo moved into St. Claude and joined Hermine.

[38] In or about 2005 Annette noticed a significant difference in Leo's behaviour. He had lost interest in farming, whereas in years previous he had loved farming and spent 18 to 20 hours a day on the land.

[39] Leo also lost interest in other activities including reading and socializing with his friends. Previously he had read regularly and had been very sociable. There were various other changes in behaviour that Annette noticed in or after 2005. For example:

- on more than one occasion, when Annette took Hermine home after shopping, Leo told Hermine that someone had phoned. But he could not remember whom it was;

- Leo saw a photograph of one of his daughters, Lucille, but did not recognize her;
- in December 2007, after Leo was living in St. Claude, he saw an advertisement for a camper trailer that was for sale. He wanted to walk to see it, notwithstanding that it was a considerable distance away from where he and Hermine were living and it was in the middle of winter;
- on at least one occasion Leo dressed himself by putting on two button shirts, one over the other;
- Leo telephoned her in 2007 and accused her of stealing his mail. He was very agitated and upset;
- on more than one occasion Lucille saw Leo driving on the shoulder of roads near St. Claude. He was driving very slowly and it appeared as if he did not know where he was, or where he was going;
- on at least one occasion she took Leo shopping for groceries. He walked up and down the aisles and said that he was looking for certain groceries. However, he could not tell her what it was that he was looking for;
- when she spoke to Dr. Fikry about Leo's behaviour, Dr. Fikry suggested that together they meet with Leo. Dr. Fikry does not speak French and, since Leo's first language is French, Annette

translated into French what Dr. Fikry said to or about Leo. Notwithstanding this translation, Leo clearly did not understand what Dr. Fikry was saying.

[40] In April 2007 Annette received a copy of Dr. Zacharias' letter to Dr. Fikry. She sent a copy of it to all of her brothers and sisters. She recalls specifically sending a copy to Reynald.

[41] According to Annette, at or about the same time, Reynald telephoned her and asked what was wrong with Leo. She told Reynald that Leo had dementia and that he should no longer be signing any documents.

[42] Annette testified about the meeting with Dr. Fikry in December 2007. She testified that all of the siblings, including Reynald, were at the meeting. Dr. Fikry said that Leo had dementia and that the children should help get his affairs in order.

[43] In December 2007, after Leo had moved into St. Claude with Hermine, a home care agency took over looking after him. However, Annette continued to visit her parents regularly to help out whenever she could.

[44] Annette testified that she was at Leo and Hermine's home in St. Claude on June 2, 2008, the day that the Bare Trust Agreement and the Option Agreement were signed. She arrived at approximately 9:00 a.m. with the intention of taking Hermine shopping. According to Annette, Hermine told her that she could not go shopping because Reynald and a lawyer were coming to their home. When Annette asked why, Hermine replied that Reynald wanted a piece of land.

[45] Annette testified that she told Hermine not to sign anything, and not to permit Leo to sign anything, because he was not in his right mind. Hermine said to Annette that Leo was fine. Annette then looked at Leo and asked whom she was. He could not answer. He did not recognize her. Nevertheless, Hermine did not change her mind.

[46] Annette left the home and went grocery shopping. She was gone approximately 25 minutes. When she returned she found Reynald, Hermine, Leo and the lawyer sitting at the kitchen table. As far as Annette was concerned, Leo was trying to understand what the lawyer was saying. The discussion was in English and she overheard Leo say to the lawyer that he did not understand what the lawyer was saying.

[47] Annette remembered the lawyer being identified as Edwin Sloane ("Ed Sloane"), although she was not actually introduced to him.

[48] Annette admitted that she left without raising any objection to the lawyer. She did not want to make a scene. Specifically, she did not ask Hermine, Leo, Reynald or the lawyer what they were up to.

[49] In cross-examination, Annette indicated that, after she left the homestead in 1995, Reynald continued to live there with Hermine and Leo.

[50] When referred to Dr. Zacharias' report, she admitted that there was nothing in the report that indicated that Leo should not be signing documents. The only reference in the report was to Leo's driving ability. Similarly Annette

was not aware of any other report from any doctor indicating that Leo should not sign documents.

[51] When Hermine moved from the homestead to St. Claude, Annette could not remember whether Leo was upset. But she remembered that he did want to stay on the homestead.

[52] In reference to the meeting of June 2, 2008, Annette admitted that Hermine did not hide from her that Reynald and a lawyer were coming to the house. But she specifically recalled telling Hermine that Leo should not sign anything. She could not recall whether she told Hermine not to sign anything herself.

[53] Annette knew that Hermine had a power of attorney for Leo's affairs. But Annette did not tell Hermine not to sign anything for Leo.

[54] When Annette returned to the home on June 2, 2008, at approximately 9:30 a.m. after shopping, she specifically recalled that there were four people at the table. She was sure that Reynald was at the table along with Ed Sloane. Ed Sloane was talking to Leo and she remembered Leo leaning towards Ed Sloane to try to hear better. He was not ignoring Ed Sloane, or looking off into the distance.

[55] Annette stayed less than five minutes, dropped off the grocery bags and left the house. She later contacted her brother Gilbert and told him about what she had seen.

Testimony of Dr. Howard Zacharias

[56] Dr. Zacharias is a specialist in geriatric medicine. His qualifications to provide an expert opinion on the mental faculties of Leo were admitted by the defence.

[57] Dr. Zacharias graduated from the Faculty of Medicine of the University of Manitoba in 1971 and thereafter did a residency in internal medicine and geriatric medicine. Prior to his retirement in 2015, he spent his medical career holding various geriatric medicine positions and acting as a consultant to various hospitals throughout Manitoba and elsewhere in Canada.

[58] From 2004 to 2015 Dr. Zacharias was an assistant professor in the Department of Medicine at the University of Manitoba. He was specifically attached to the geriatric medicine department.

[59] In April 2007, Dr. Fikry referred Leo to Dr. Zacharias to provide an opinion on Leo's mental faculties. In particular, Dr. Zacharias was requested to provide an opinion on Leo's ability to drive.

[60] Dr. Zacharias met with Leo on April 10, 2007. Also present at the meeting were Hermine, Reynald, and one of the daughters whom Dr. Zacharias did not identify.

[61] After his examination of Leo, Dr. Zacharias provided a report to Dr. Fikry dated April 16, 2007. It was tendered as an exhibit at the trial.

[62] According to Dr. Zacharias, Leo was not forthcoming in their meeting. He was passive and quiet, although he occasionally became very animated and

agitated about certain events. A CT scan that had previously been done on Leo showed that he had suffered a stroke on the left side of his brain. There were also signs of a stroke on the right side of his brain.

[63] Dr. Zacharias wrote in his report:

On mental state examination, his difficulties become quite obvious.

[64] In reference to a Mini-Mental State Examination ("MMSE"), Dr. Zacharias wrote that, on the date of his examination, Leo was able to score 18/30.

Dr. Zacharias went on to write:

... He had difficulties in every domain. He was unable to attempt serial 7 subtractions even with pen and paper. He was unable to draw a clock (inspite of having been a watch maker in the past). He is quite disorientated to time.

[65] Dr. Zacharias concluded his report as follows:

In summary this man has an organic dementing disorder. He is in stage 4 on the Global Deterioration Scale and one can predict with confidence that he will have a progressive dementia. I am unable to conclude that he should not be driving locally at the present time. However one can anticipate that this will need to be revisited annually. I have asked the son to be vigilant about his father's driving and to report to you or me if he feels it is no longer safe. ...

[66] Also filed as an exhibit was Dr. Zacharias' analysis of Leo in a report dated September 20, 2007. Prior to the report, Dr. Zacharias had again examined Leo.

He wrote in the report:

... Mr. Gauthier has had a recent mishap where his truck rolled over his foot while he was trying to disengage the hand break. He has spent the subsequent weeks living with his wife.

At interview it is very difficult to get a coherent history from Mr. Gauthier. He [has] word finding difficulties and for example is quite unable to describe the events leading to his injury to me in a comprehensible way. His wife reports that he has been contented living with her, that he enjoys watching television programs. He continues to insist that he has work to do on the farm. The son reported to me previously that Mr. Gauthier is unable to do any meaningful work but simply putters around machinery on the farm.

... I feel he is unsafe to drive. ... I have therefore sent a notice to the Motor Vehicle Branch to indicate that his license should be revoked unless he is able to pass a driving test.

In conclusion, I think Mr. Gauthier has a progressive dementing disorder. The degree of severity is very difficult to assess because of his degree of communication difficulty which seems disproportionate to his general functional level in regards to ADLs. ...

[67] Dr. Zacharias confirmed that he had notified the Motor Vehicles Branch to remove Leo's driver's licence. Dr. Zacharias testified that there had been no significant progress in Leo's dementia from April 2007 to September 2007.

[68] Dr. Zacharias filed a third report to Dr. Fikry dated May 6, 2008, which was also tendered as an exhibit. In that report he wrote:

... As you are aware Mr. Gauthier has a progressive dementia with an MMSE of 15/30. He is in stage 5 on the Global Deterioration Scale.
....

[69] The results of an MMSE test of Leo that was performed on April 4, 2008, showed that there had been a rapid progression of his dementia between the period April – December 2007 and April 2008. In a Global Deterioration Scale, by April 2008 Leo was at stage 5 and beginning to enter stage 6. In Dr. Zacharias' opinion, there had been much more rapid deterioration than in other patients whom he has seen with dementia.

[70] Dr. Zacharias had been provided with copies of the Bare Trust Agreement and the Option Agreement that Leo had signed on June 2, 2008. By letter to counsel for the plaintiffs dated July 31, 2013, which was tendered as an exhibit, Dr. Zacharias wrote:

... In my opinion, by 2008 Mr. Gauthier lacked the capacity to give informed and independently reasoned instructions to a lawyer regarding his estate. Furthermore, his speech difficulties were such that instructions given would have been largely incomprehensible. In May, 2008 Mr. Gauthier was considered in stage 5/7 on the Reisberg Global Deterioration Scale. He could no longer live alone and required help with basic activities of daily living as well of instrumental activities of daily living such as making financial decisions or other legal decisions. In my opinion, he would not have understood information relevant to complex decision making and he would not have appreciated the foreseeable consequences of various options open to him in this regard. ...

[71] Dr. Zacharias did testify that Leo might have understood simple documents and might have understood that he was transferring land to Reynald. But Dr. Zacharias reiterated that Leo could not make any complex decisions regarding his estate. Any astute observer should have understood that Leo was impaired.

[72] In cross-examination, Dr. Zacharias testified that he saw Leo a total of four times. The first three examinations were at the request of Dr. Fikry and he provided the reports hereinbefore described. The fourth examination of Leo was at the Treherne Hospital at the request of an attending physician, Dr. Vorster.

[73] Dr. Zacharias admitted that none of the letters of referral from Dr. Fikry asked for Dr. Zacharias' assessment of Leo's ability to deal with finances and/or property. Furthermore, he admitted that none of Leo's family members had

asked Dr. Zacharias for information, or for any opinion, about Leo's handling of property or finances.

[74] Dr. Zacharias also admitted that, in every component of the MMSE test, the results could vary from day to day.

[75] Dr. Zacharias testified that he had never addressed directly Hermine's cognitive ability. He had, however, heard from other physicians that Hermine may also have had cognitive problems. But on the occasions that he had visited Leo, Dr. Zacharias did not notice anything abnormal about Hermine's cognitive ability.

[76] Dr. Zacharias did not receive any calls from Dr. Fikry, or from any of Leo's family members, with further requests for information about Leo in June, July or August 2008.

Testimony of Charlotte Hince

[77] Charlotte Hince ("Charlotte") was Leo's niece. Her mother was Leo's sister.

[78] Charlotte is a registered nurse. Since 1985 she has been attached to the Southern Manitoba Regional Health Authority. She specifically works at the St. Claude Health Centre as a clinical nurse. She is also a qualified public health nurse and does home care nursing.

[79] Charlotte performed four MMSE tests on Leo, the results of which were introduced into evidence through Dr. Zacharias. The first test was July 10, 2006. Leo's scored 28/30. At that time he had some difficulty expressing himself. On

April 4, 2007, Leo scored 22/30. During the testing, he was more agitated and anxious. He seemed to recognize that Charlotte was a relative of his, but he could not express the nature of their relationship.

[80] On December 11, 2007, Leo was assessed at 18/30. He was disoriented. He came into the health centre in an agitated state. He did not seem to know where he was, although he had been in the health centre earlier that year and in year's previous.

[81] Charlotte identified the charting that she had done in home visits to Leo on January 7 and January 19, 2007. During that time, she had to change the procedures for the dispensing of medication to Leo because he was unable to follow directions properly. This caused her to arrange for the family meeting with Dr. Fikry on December 7, 2007, to discuss Leo. She did not attend the meeting.

[82] On June 2, 2008, Charlotte attended Leo and Hermine's home in St. Claude. When she entered the house, Leo and Hermine were sitting at the kitchen table. A man with a briefcase was sitting with them and Reynald was also present. The man asked whom she was. She replied that she was Leo's niece and his nurse. Hermine then said that the man with Reynald was Reynald's lawyer.

[83] According to Charlotte, she said in French to Hermine words to the effect that she hoped that she and Leo did not sign anything without their own lawyer

having seen it. Hermine did not answer. Leo said nothing. Charlotte then left medication for Leo and exited the home.

[84] A couple of days later Charlotte returned to the home. According to her, Hermine was upset. She said that she had done a terrible thing by signing some papers. When Charlotte asked what papers, Hermine replied that the papers had to do with a first will that had been prepared by Mona Brown.

[85] In Charlotte's words, Hermine was in a "flap." She said that she had tried to get a hold of Reynald, but had been unable to do so.

[86] In cross-examination, Charlotte testified that she knew that Mona Brown was a lawyer. Hermine had mentioned on prior occasions that Mona Brown had prepared wills for her and Leo.

Testimony of Gilbert Gauthier

[87] Gilbert Gauthier ("Gilbert") is 49 years of age. He is the third child of Leo and Hermine. He is younger than Reynald. He also farms outside St. Claude.

[88] After finishing high school, Gilbert attended Red River Community College for one year and then returned to St. Claude. In or about 1991 he bought his own quarter section of farm land. Shortly thereafter he got married. Although he has lived in Winnipeg since his marriage, he has continued to commute daily to St. Claude for his farming.

[89] According to Gilbert, around 2005 Leo began to "fade away" mentally. Gilbert specifically witnessed various incidents in 2005 and thereafter wherein Leo's actions caused him considerable concern. They included:

- Leo almost drove a farm truck into the family house;
- after 2005 Leo could not remember how to properly vaccinate the cattle. It is a difficult and dangerous job. Nevertheless, Leo insisted upon continuing to be involved in the vaccinations;
- he and Leo were harvesting together in 2006. Leo was operating the combine. Gilbert left for approximately an hour and when he returned Leo had not moved the combine at all. When he opened the door and asked Leo what was wrong, Leo got very agitated and told Gilbert that he could not remember how to start the combine; and
- Gilbert witnessed the incident in August 2007 when Leo released the wheel brake on the truck and it ran over his foot.

[90] From Gilbert's experience, Reynald continuously caused problems for Leo and the rest of the family. Although Reynald farmed his own land after 1999, he regularly borrowed Leo's farm equipment such as tractors, combines, trucks and swathing machines. Reynald often damaged the equipment, but he invariably returned it and did not tell anyone what had happened. Leo or other family members only learned that the equipment required repairs when they tried to use it.

[91] According to Gilbert, in 2007 and 2008 he regularly visited Hermine and Leo at their home in St. Claude. In his opinion, Leo mentally was "not there."

[92] In cross-examination, Gilbert testified that he was aware of the arrangements that had been made in 2002 between Leo, Hermine and Reynald wherein Reynald transferred farm land to Leo and Leo put a mortgage on the five parcels of land. Gilbert was aware that Reynald was responsible for making the mortgage payments. Eventually the mortgage was paid off. He was also aware that there was an agreement that, once Reynald had paid off the mortgage, Leo and Hermine would return Reynald's land to him.

[93] Gilbert admitted that he had a physical fight with Reynald over farm equipment that he alleged Reynald had damaged.

[94] Gilbert knew that Leo had been the oldest child in his family. He had inherited the family farm from his father. Raoul was Leo's younger brother. He worked on the family farm with Leo.

Testimony of Pauline Gauthier

[95] Pauline Gauthier ("Pauline") is presently 46 years of age. She is the fourth of Leo and Hermine's children. She is a registered nurse. She left the homestead in 1988 to go to Winnipeg for training. Thereafter she returned to St. Claude for a couple of years and then left to live elsewhere in Canada.

[96] Pauline returned to live in St. Claude in May or June 2008. Hermine had heart problems and Pauline came home to be Hermine's primary caregiver. She took Hermine to medical appointments and did the cooking and chores for Leo and Hermine.

[97] By 2007 Pauline noticed significant changes in Leo's mental and physical health. He was not as active physically. More significantly he had difficulty conversing. He had to search for words and got frustrated when he could not express himself. On occasion he could not remember how to sign his name.

[98] Pauline was present at the family meeting with Dr. Fikry in December 2007. Leo had already been diagnosed with dementia. Dr. Fikry told the family members at the meeting, including Reynald, that Leo could no longer manage his financial affairs. After that meeting, Pauline and Hermine took over looking after the family finances.

[99] According to Pauline, in or about March or April 2008, Reynald had mentioned to her that he wanted Leo and Hermine to sign some papers for him. She told Reynald not to have their parents sign anything without their lawyer, Ken Tacium, being present. She alleged that she specifically told Reynald "Not to pull any stunts." She and her sisters would not let him get away with it.

[100] In June 2008, Pauline learned from Marielle that Leo and Hermine had signed documents that Reynald had brought to them with a lawyer. Pauline asked Leo and Hermine what they had signed. It was clear to her that both Leo and Hermine were very confused. Leo did not seem to understand what Pauline was talking about. Leo had a blank stare on his face and then finally answered "We'll do what's best." When she asked Hermine what had been signed, Hermine was unable to answer.

[101] After Pauline learned about the documents being signed, she phoned the lawyer who had attended, Ed Sloane, and asked him what had happened. She also asked for copies of the documents that had been signed.

[102] According to Pauline, Ed Sloane told her that George Ulyatt had arranged for the signing of the documents and that she should ask George Ulyatt for copies.

[103] Pauline testified that she had called George Ulyatt's office on at least two occasions, but her calls were never returned. On the second occasion, she spoke to George Ulyatt's assistant and asked that she be provided with copies of the documents. She finally received copies of the documents in or about August 2008.

[104] Pauline testified that she and Hermine had a number of arguments over the signing of the documents. There was no point in discussing the issue with Leo because he had no recollection of what had happened.

[105] Pauline also testified that she had discussed Hermine and Leo's wills with Hermine. According to Hermine, the value of the family farm was to be divided amongst the six children. But it was intended that the sons would receive the land and would buy out the interests of the daughters.

[106] Pauline alleged that, after learning of the signing of the documents, she attempted to contact Reynald a number of times. He did not return any of her calls. She alleged that Hermine had also called Reynald every day and left messages. He never returned Hermine's calls.

[107] Some of Hermine's messages included demands that Reynald undo what he had done. According to Pauline, one of Hermine's concerns related to Hermine and Leo's finances. They had continuous home care and had to pay for it. They were gradually running out of money.

[108] Pauline testified that, after Leo's death, she called Reynald and told him that he owed money to Hermine and that Hermine needed to pay for home care. Reynald replied that, if Hermine could not afford private nursing care, she should move into a nursing home.

[109] When Pauline told Hermine about Reynald's comment, Pauline alleged that Hermine told her to call Ken Tacium to redo Hermine's will to take Reynald out of it. She was unable to reach Ken Tacium before Hermine went into the hospital and died on April 15, 2011.

[110] In cross-examination, Pauline testified about the family meeting in December 2007 with Dr. Fikry. She recalled Charlotte being present. Five of the six children were present, including Reynald. Lucille was the only one who was not present. She was living in Whitehorse, Yukon.

[111] Pauline admitted that, after the meeting, no steps were taken to have Leo committed. No one asked Dr. Fikry for a written note indicating that Leo was no longer capable of managing his affairs. After the meeting, Leo continued to have signing authority for financial matters. That authority was never taken away from him.

Testimony of Edwin Sloane

[112] Ed Sloane was called to the Bar in 1976. He was a Crown Attorney with Manitoba Justice off and on for approximately 15 years. In between those years, and thereafter, he was in full-time private practice in rural Manitoba and in Winnipeg. He is presently practising part-time in Morden, Manitoba.

[113] Ed Sloane testified that he received a phone call from George Ulyatt of the Winnipeg law firm Tapper Cuddy LLP. George Ulyatt left a message that he wanted Ed Sloane to give independent legal advice to the parents of a client. George Ulyatt did not know the name of the client.

[114] Shortly thereafter Reynald telephoned Ed Sloane and introduced himself as George Ulyatt's client. Reynald said that he had documents that needed signing and suggested that they meet at the Shell gas station in St. Claude, Manitoba.

[115] When Ed Sloane met Reynald at the Shell on June 2, 2008, Reynald produced an envelope containing various documents. There were two sets of Bare Trust Agreements, one of which had four Certificates of Title attached to it and the other which had five Certificates of Title attached to it.

[116] There were also four copies of the Option Agreement. The envelope also contained an Order to Pay addressed to the Dufferin Credit Union related to the payment and discharge of Mortgage No. 1055623.

[117] In view of the two different sets of Bare Trust Agreements, Ed Sloane telephoned Chris Doell, who was an articling student associated with George Ulyatt.

[118] After Ed Sloane explained to Chris Doell his confusion about the two sets of Bare Trust Agreements, Chris Doell instructed him to get signed the Bare Trust Agreements with the five Certificates of Title attached.

[119] Reynald instructed Ed Sloane to follow him to his parents' home. They arrived at approximately 9:30 a.m. A home care worker was present in the home. He was introduced to her, but could not remember her name.

[120] It was Reynald who explained that they should wait for the home care worker to leave. Reynald did not explain the reason for this.

[121] Inside the house, Reynald spoke to Leo and Hermine in French. Reynald asked Ed Sloane if he spoke French and he replied that he did not. As a result Reynald then began to speak to his parents in English.

[122] The only information that Ed Sloane received about Leo's medical condition was that he had suffered a broken foot. That was one of the reasons for him having moved into St. Claude. Ed Sloane testified that he could not recall that anyone had ever mentioned to him that Leo had dementia.

[123] According to Ed Sloane, Hermine advised him that a number of years previously Reynald had transferred parcels of land to Hermine and Leo because Reynald had financial problems. A mortgage had been placed on the parcels of

land. Reynald had placed insurance on the land and had made the mortgage payments.

[124] After Ed Sloane was advised of the history of the land, Reynald left the house, went into the yard and sat in a truck. But shortly thereafter Reynald rushed back into the house and said that one of the sisters was coming. Reynald commented that she was not to be advised of what was going on.

[125] Ed Sloane was introduced to the sister. She spoke briefly to Hermine and left. Ed Sloane admitted that he did not pay much attention to what was being said. However, he did testify that he was beginning to feel uneasy because he was getting the distinct impression that "there were secrets in this family."

[126] Before Reynald left, Leo had communicated with him in French. After Reynald and the sister had left, Hermine did most of the talking. Leo was very quiet.

[127] Ed Sloane did recall that he was told during the meeting that Leo had previously had a stroke. He had lost his driver's licence. Leo previously had lived on the homestead, but once he had lost his licence, he moved into St. Claude with Hermine.

[128] Neither Leo nor Hermine had seen the documents previously. Ed Sloane therefore read out loud significant parts of the documents and paraphrased their meaning to Hermine and Leo. Ed Sloane did not go through each document word for word. He admitted that he found the documents difficult to explain in lay language.

[129] Ed Sloane recalled that he had to ask Hermine not to talk so much. Leo was being very quiet and Ed Sloane wanted Leo to sign the documents on his own.

[130] Ed Sloane specifically recalled that Hermine said to Leo two or three times, words to the effect that, he knew what the documents were or meant. Ed Sloane admitted that, in retrospect, he wished that he had asked Leo more questions.

[131] When Ed Sloane asked each of Hermine and Leo whether they had any questions, Hermine said no. Leo nodded his head, but said nothing.

[132] Ed Sloane then asked Hermine and Leo to sign the documents. At one point, when Leo was signing the Option Agreement, he swore out loud because he had misspelled his name.

[133] It took Leo a considerable period of time to sign each of the documents. As a result Ed Sloane did not ask him to initial each page because it could have taken all day.

[134] Ed Sloane recognized that there are two provisions in the Bare Trust Agreement that seem to be contradictory. They are paragraph 3(d) and paragraph 6. Paragraph 3(d) provides:

The Nominees will, upon the direction of the Owner, deal with the Property and do all acts and things in respect of the Property at the expense of and as directed by the Owner from time to time and will assign, transfer, convey, lease, mortgage, pledge, charge or otherwise deal with the Property or any portion thereof at any time from time to time in such manner as the Owner may determine, to the extent permitted under all relevant laws; without limiting the generality of the

foregoing, the Nominees will transfer legal title to the Property to or as directed by the Owner forthwith upon the demand of the Owner;

[135] Paragraph 6 provides:

TRANSFER TO OWNER – Upon the discharge of Mortgage No. 1055623 the Nominees agree to execute a transfer to transfer the Property into the name of the Owner as sole owner of the property.

[136] Ed Sloane could not recall how he explained that contradiction to Leo and Hermine.

[137] According to Ed Sloane, no one ever advised him which of the parcels of land, that were the subject matter of the two agreements, had belonged previously to Reynald and to Leo and Hermine respectively. Furthermore, he never saw any of the documents wherein Reynald had transferred three parcels of land to Leo in 2002.

[138] Once all of the documents were signed, Ed Sloane left the house. Reynald was out in the yard, along with a woman whom Ed Sloane did not know. She entered the house as Ed Sloane was leaving. Ed Sloane did not recall seeing anyone else with Reynald in the yard.

[139] Ed Sloane testified that it is his usual practice, after providing independent legal advice and having documents signed, to take the documents back to his office. Thereafter he forwards them on to the referring lawyer with a covering letter. He did not do that in this case because Reynald told Ed Sloane that he was going to Winnipeg to see George Ulyatt to sign the documents himself and

that he would take the documents to George Ulyatt. Ed Sloane phoned George Ulyatt to tell him that Reynald was taking the documents to Winnipeg for signing.

[140] Ed Sloane also called Chris Doell who asked him to send copies of the documents to him. Ed Sloane kept one copy of each of the signed documents for his own file. When he returned to his office he dictated a memorandum of what had transpired. The memorandum was tendered into evidence.

[141] Subsequently Ed Sloane was contacted by the plaintiffs' lawyer who advised him that there was a problem with the documents. The specific problem was that the Option Agreement provided that one of the parcels of land that was shown as being the subject matter of the agreement was not supposed to have been included.

[142] Counsel for the plaintiffs sent to Ed Sloane copies of the signed documents. Ed Sloane compared them to the copies that he had kept. He saw that the Option Agreement, that he had kept, included only three Certificates of Title in the schedule that described the parcels of land that were the subject matter of that agreement. They were CT1896010; CT1896012; and CT1896018. None of them were included in the Bare Trust Agreement.

[143] The Option Agreement that was sent to Ed Sloane by the plaintiffs' counsel had four Certificates of Title described in the schedule. The additional Certificate of Title was CT1896004, which was one of the parcels owned by Leo and Hermine that was subject of the Bare Trust Agreement. Ed Sloane admitted that this problem might have been alleviated if he had asked Leo and Hermine to

initial each of the pages in both the Bare Trust Agreement and the Option Agreement.

[144] In cross-examination, Ed Sloane agreed that:

- Reynald was not in the room when Hermine and Leo signed the documents;
- Hermine did not seem apprehensive at all;
- Leo was very quiet, but did not show any concerns. Specifically, Leo did not express any surprise about the documents;
- during the meeting, Leo never interrupted.
- Leo did not say that he was not prepared to sign any documents;
- Leo raised no objection to anything being said or done; and
- neither Leo nor Hermine ever said that they wanted anyone else present. Specifically, when the daughter came into the house, they did not ask that she remain.

[145] In the memorandum that Ed Sloane later prepared, he referred to one of the parcels described in the agreements as being transferred to Reynald as a gift. He testified that he believed Hermine had given him that information.

[146] To the best of Ed Sloane's recollection, the conversations that Reynald had with Hermine and Leo, prior to Reynald leaving the house, did not seem out of the ordinary. Notwithstanding that Ed Sloane does not speak or understand

French, he did not detect there was any animosity or anger between Reynald, Hermine or Leo.

[147] In response to questions from me, Ed Sloane testified that he did not talk to George Ulyatt at all about the independent legal advice. He just received a message asking him to be involved. He left a message in reply for George Ulyatt saying that he was prepared to do so. Ed Sloane received no background or information from George Ulyatt about the transaction.

[148] Ed Sloane also admitted that he was somewhat surprised that Reynald had contacted him and told him that he had the documents to be signed. Generally Ed Sloane's experience had been that lawyers provide to him the documents for which he is to provide independent legal advice. He can then review them in advance and arrange for their signing.

Testimony of Reynald Gauthier

[149] Reynald testified on his own behalf. He is presently 51 years of age.

[150] Reynald lived on the homestead with his parents and siblings and worked on the farm through high school. After high school he lived in Winnipeg and attended university in order to get a diploma in agriculture. He continued to work on the farm on weekends and during the summer.

[151] In 1990 Reynald bought his first parcel of farm land. Subsequently, in 1992 and 1998 respectively, he bought two additional parcels of farm land. Notwithstanding that he farmed his own land, he also continued to assist Leo in farming the family farm.

[152] Reynald financed the purchase of his three pieces of farm land, one through the Caisse Populaire, one through the Bank of Montreal and one through a private lender. The interest rate from the private lender was eighteen per cent per annum whereas the rates of interest on the mortgages with the two financial institutions were much lower.

[153] Reynald testified that on the family farm he seeded grain, ploughed and cultivated. Every summer, in haying season, he swathed and baled hay. In the fall he worked on the harvest by hauling grain to the various bins while his father combined.

[154] Reynald testified that every day he arose as early as 5:30 a.m., worked all day and into the evening and went to bed as late as midnight or 1:00 a.m. Notwithstanding all of the work that he put into the family farm, Reynald was not paid anything.

[155] According to Reynald, he generally got along very well with Hermine. But Leo was tough to work with and was stubborn. He had to be in full control of every situation on the farm. He was single minded and had to have the last word. Reynald and his father often sparred verbally, but eventually they would make up, apologize and move on.

[156] Reynald testified that he stopped working on the family farm in August 1999. This was as a result of a severe beating that he got from his brother, Gilbert. Reynald had borrowed a tractor and the transmission had seized. The

tractor had a great number of hours on it and he had not done anything wrong to cause it to seize.

[157] According to Reynald, some three days later Gilbert showed up while Reynald was sitting at the kitchen table with Hermine. Gilbert came into the house, came up from behind Reynald, grabbed his hair and pulled him outside. Reynald was unable to defend himself. Once he was on the ground, Gilbert kicked him numerous times. It resulted in Reynald losing some teeth.

[158] After the fight Leo told Reynald that he did not want him working on the family farm anymore. However, Reynald did continue to live in the family house on the homestead until 2007.

[159] In addition to farming, Reynald owned a business wherein he baled hay and sold it to feed lots. Most of the income that he generated had to go to pay the mortgages. But after the beating that Reynald received from Gilbert in 1999, for the balance of that year he was unable to farm his land or to bale hay.

[160] Thereafter, in the years 2000, 2001 and 2002, Reynald's farming was generally unsuccessful. In 2000, due to excessive rain there was overland flooding which destroyed his crop. In 2001, it was also wet and Reynald was unable to seed approximately 200 of his acres. Then there was an early frost which destroyed much of the crop that was seeded.

[161] By 2002 Reynald was unable to make his mortgage payments. Foreclosure proceedings were commenced. Reynald explained his financial woes

to Leo who in turn instructed him to see the loan manager at the Dufferin Credit Union in Carman.

[162] Leo and Reynald met with the manager. Eventually it was agreed that Leo would put up two parcels of his and Hermine's farm land as security to get Reynald out of his financial difficulties. Mona Brown drew the necessary mortgage documentation that blanketed Reynald's three parcels of land and Leo's/Hermine's two parcels of land. Reynald and Leo also entered into a written agreement drawn by Mona Brown wherein Reynald was obligated to make all of the payments.

[163] According to Reynald, in or about March and/or April 2008, he prepared two documents in his handwriting directed to George Ulyatt. One document is dated March 19, 2008 and was purportedly signed by Leo and Hermine on April 1, 2008. It confirms that Leo and Hermine have left the parcel of land described in CT1896007 to Reynald in their wills. It requests that George Ulyatt add Reynald's name to the Certificate of Title in order to facilitate the transfer of land to Reynald.

[164] In the other document, which is undated and which does not have either Leo's and/or Hermine's signatures, they purportedly agree to sell to Reynald the land described as the SE $\frac{1}{4}$ of 29-8-7, which is part of the land described in CT1896004. George Ulyatt is instructed to draw up the necessary documents in that regard.

[165] According to Reynald, the Bare Trust Agreement and the Option Agreement were drawn up by George Ulyatt on Reynald's instructions. They were supposedly based upon the two documents hereinbefore described in the previous two paragraphs.

[166] Reynald asked George Ulyatt to see his parents to have them sign the documents. George Ulyatt told him that he was in a conflict of interest and that they needed an independent lawyer to handle the matter. George Ulyatt suggested Ed Sloane.

[167] Reynald received from George Ulyatt the copies of the Bare Trust Agreement and the Option Agreement approximately one week before they were signed. He went to George Ulyatt's office and picked them up. They were in a sealed envelope. He did not open the envelope.

[168] Thereafter Reynald went to Alberta for about a week. While he was there, Hermine telephoned him and asked if the documents were ready. When he replied that they were, Hermine said to arrange with Ed Sloane to come to Leo and Hermine's home the following Monday for them to be signed. Hermine went on to say that Pauline soon would be returning home and that Hermine wanted the documents signed without any interruptions.

[169] Reynald contacted Ed Sloane and they agreed to meet at the Shell station in St. Claude on Monday morning. He gave the envelope with the documents to Ed Sloane. Hermine had told Reynald that they should not come to the house before 9:30 a.m. because the home care worker would still be there.

[170] Ed Sloane opened the envelope, looked at the documents and phoned one of the lawyers who worked with George Ulyatt. Ed Sloane then followed Reynald to Leo and Hermine's home in separate vehicles.

[171] They arrived at approximately 9:25 a.m. Hermine answered the door and asked them to wait until the home care worker had left. Reynald recognized the home care worker. It was not Charlotte. After she left the house, Reynald and Ed Sloane entered. He introduced Ed Sloane to Hermine and Leo and then left the house.

[172] Shortly thereafter Reynald walked back into the house and told Hermine that Annette had showed up. Hermine told Reynald that she did not want to be interrupted. Annette stayed in the house for about five minutes and then left. According to Reynald, he was not in the house while Annette was in it.

[173] Reynald was not present when Ed Sloane met with Hermine and Leo. Ed Sloane was inside the house for approximately an hour and a half. In the meantime, Reynald remained outside with Kevin Landin.

[174] According to Reynald, when he saw his parents, they were normal. After Ed Sloane came out of the house, he gave the sealed envelope to Reynald. Ed Sloane told him to take the envelope to George Ulyatt. Reynald went into the house, told Hermine and Leo that he was taking the documents to George Ulyatt and they said that was fine.

[175] Reynald and Kevin Landin then went together to the offices of Tapper Cuddy in Winnipeg. He told Kevin Landin to stay in the truck. He went up to the

offices. He signed the Bare Trust Agreement and it was witnessed by Karen Burnichon. He signed the Option Agreement and it was witnessed by Chris Doell.

[176] According to Reynald, he went back to see his parents that afternoon. He told them that the documents had been delivered to George Ulyatt. In days following he had regular contact with both Hermine and Leo. Neither of them expressed any reservations to him about what had happened and what they had signed.

[177] In cross-examination, Reynald:

- admitted that he had discussed Leo's driving with Dr. Zacharias;
- denied ever having seen Dr. Zacharias' letter of April 16, 2007;
- admitted that he had attended the meeting of December 27, 2007, with Dr. Fikry. To his recollection, Charlotte, Murielle, Gilbert, Pauline and Annette were all there. He had asked Dr. Fikry why he was there;
- admitted that Dr. Fikry had said that Leo might possibly have dementia. He did not ask Dr. Fikry what dementia is;
- did not recall that Dr. Fikry had said that Leo had brain damage as a result of a stroke;
- was not aware how much home care assistance Leo and Hermine were receiving;

- denied that he had any conversation with Murielle about Leo's dementia;
- denied that Murielle had told him not to deal with his father on financial matters;
- denied having any conversation with Pauline or Annette about Leo's health and dementia;
- denied that Pauline had instructed him that he should not deal with Leo on any financial matters;
- admitted that he did not tell Ed Sloane that Dr. Fikry had said that Leo had dementia. He did tell Ed Sloane that the land that he previously had sold to Hermine and Leo was being returned to him;
- could not recall whether either he or Hermine had said that the documents should be put away when Annette came into the house; and
- denied seeing Charlotte when he was at the house for the signing of the documents.

[178] Reynald specifically denied that he ever opened the sealed envelope that Ed Sloane had given to him after the documents had been signed. He drove directly to Tapper Cuddy. To his recollection he signed both documents at the same time. One was witnessed by Chris Doell and the other by Karen Burnichon. He then left the documents at Tapper Cuddy. He never received copies of either the Bare Trust Agreement or the Option Agreement.

Testimony of Kevin Landin

[179] Kevin Landin is a friend of Reynald's. In 2008 he was living in Alberta. Reynald visited him and he then returned with Reynald to Manitoba.

[180] The morning after he and Reynald arrived in Manitoba, he accompanied Reynald to meet Ed Sloane at the Shell station and then accompanied Reynald to Leo and Hermine's home. Reynald went into the house with Ed Sloane while Kevin Landin remained outside. Reynald came outside again a few minutes later.

[181] At some point in time Kevin Landin alleges that he was introduced to Leo, Hermine and one of Reynald's sisters. He alleged that Leo seemed normal. Leo asked Kevin Landin numerous questions about Alberta. They discussed farming generally between themselves. Hermine also seemed normal. In Kevin Landin's opinion, both Hermine and Leo were very welcoming.

[182] Kevin Landin remembered Ed Sloane being in the house for approximately one to one and one-half hours. He then came out alone and had an envelope with him, which he gave to Reynald. He told Reynald to take it to the lawyer in Winnipeg.

[183] Kevin Landin accompanied Reynald to Winnipeg. He did not see Reynald do anything with the envelope during the drive to Winnipeg. He remained in Reynald's truck while Reynald was in the lawyer's office.

[184] In cross-examination, Kevin Landin testified that he did not see anyone else in Leo and Hermine's house while he was there. He did not know whether Reynald had other documents with him in the truck besides the envelope.

[185] On September 2, 2016, George Ulyatt, who was Reynald's counsel in this action, applied for and received an order granting him leave to withdraw as counsel. The reason given was that he was in a conflict of interest with Reynald. Thereafter, on September 7, 2016, Reynald made a motion on his own behalf to adjourn the trial that was scheduled to begin on September 19, 2016. That motion was granted and the trial was rescheduled. It began on November 21, 2016, with Reynald being represented by his present counsel.

Analysis

Admissibility of Hermine's Affidavit

[186] The plaintiffs submit that, although the contents of Hermine's affidavit are hearsay evidence, such an affidavit can be admissible in either a civil or a criminal trial if the contents of the affidavit are necessary and reliable. In the criminal context, the plaintiffs rely on *R. v. Rockey*, [1996] 3 S.C.R. 829. McLachlin J. (as she then was) wrote that any hearsay evidence is not admissible at a trial unless the requirements of necessity and reliability are met.

[187] The plaintiffs did not refer to the more recent decision of *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787, wherein Charron J. wrote (at para. 35):

.... Our adversary system puts a premium on the calling of witnesses, who testify under oath or solemn affirmation, whose demeanour can be observed by the trier of fact, and whose testimony can be tested by cross-examination. We regard this process as the optimal way of testing testimonial evidence. Because hearsay evidence comes in a different form, it raises particular concerns. The general exclusionary rule is a recognition of the difficulty for a trier of fact to assess what weight, if any, is to be given to a statement made by a person who has not been seen or heard, and who has not been subject to the test of cross-examination. The fear is that untested hearsay evidence may be afforded

more weight than it deserves. The essential defining features of hearsay are therefore the following: (1) the fact that the statement is adduced to prove the truth of its contents and (2) the absence of a contemporaneous opportunity to cross-examine the declarant. ...

[emphasis added]

[188] In a civil context, the plaintiffs rely on *Pierre v. Stajer* (1999), 61 B.C.L.R.

(3d) 381, 1999 CanLII 6115 (BCSC), wherein Fraser J. wrote (at para. 33):

... it has long been the law that an affidavit sworn by a deponent who afterwards has died can be admissible at trial.

[189] According to Fraser J. (at para. 36) one of the criteria for deciding whether affidavit evidence is admissible is whether the opposing party had the opportunity to cross-examine the deponent, but did not do so.

[190] In my view that criteria does not apply in this case. Hermine's affidavit was filed in support of the notice of application. As indicated previously, the reason that these proceedings were converted to an action, and a statement of claim and a statement of defence respectively were filed, was because the credibility of witnesses is very important in deciding this case.

[191] In order for credibility to be properly analyzed, it is by far preferable that witnesses provide *viva voce* evidence upon which they can be cross-examined in the presence of a judge.

[192] It is the position of the plaintiffs that Reynald could have arranged to cross-examine Hermine on her affidavit before she died. I reject that argument. As there was going to be a trial of the issues in this case, clearly it was the

expectation of Reynald and his counsel that Hermine would testify and she would be cross-examined at the trial. I reiterate that, in my view, in order to properly assess credibility, it is by far preferable that a trial judge see and hear direct examination followed by cross-examination.

[193] As indicated previously, this action was commenced by statement of claim on August 20, 2010. As hereinbefore indicated in paragraph 96, Pauline testified that Hermine was suffering from heart problems as early as 2008. She did not die until April 2011.

[194] In that time period, pursuant to Queen's Bench Rules 36.01 and 36.02, with leave of the court, the plaintiffs could have sought an order to have Hermine's evidence taken in advance of the trial. At such time she could have been cross-examined by the defence.

[195] Notwithstanding that the statement of defence was not filed until March 8, 2011, it is not unusual for such orders to be granted and for such evidence to be presented notwithstanding that pleadings have not closed.

[196] The same situation was commented upon in *Khelawon*. Charron J. wrote (at paras. 104 and 105):

Since Mr. Skupien had died before the trial, he was no longer available to be seen, heard and cross-examined in court. There was no opportunity for contemporaneous cross-examination. Nor had there been an opportunity for cross-examination at any other hearing. Although Mr. Skupien was elderly and frail at the time he made the allegations, there is no evidence that the Crown attempted to preserve his evidence by application under ss. 709 to 714 of the *Criminal Code*. He did not testify at the preliminary hearing. The record does not disclose if he had died by that time. In making these comments, I do not question the fact that it was necessary for the Crown to resort to Mr. Skupien's evidence in

hearsay form. Necessity is conceded. However, in an appropriate case, the court in deciding the question of necessity may well question whether the proponent of the evidence made all reasonable efforts to secure the evidence of the declarant in a manner that also preserves the rights of the other party. That issue is not raised here.

The fact remains however that the absence of any opportunity to cross-examine Mr. Skupien has a bearing on the question of reliability. The central concern arising from the hearsay nature of the evidence is the inability to test his allegations in the usual way. The evidence is not admissible unless there is a sufficient substitute basis for testing the evidence or the contents of the statement are sufficiently trustworthy.

[emphasis added]

[197] Sections 709 to 714 of the *Criminal Code* authorize a party in a criminal proceeding to apply for an order to take evidence in advance from a witness who is not likely to be able to attend the trial. The purpose of these sections is similar to the purpose of Queen's Bench Rules 36.01 and 36.02 for civil trials.

[198] Generally the modern practice for the taking of such evidence is for the direct examination and cross-examination of the witness to be not only transcribed, but also video recorded. By such means, the presiding trial judge can see the witness testify, in the event that the evidence is tendered at trial.

[199] Based upon the plaintiffs' failure to arrange for the taking of Hermine's evidence in advance of trial, Reynald has had no opportunity to test Hermine's evidence through cross-examination.

[200] For these reasons, I am not prepared to admit Hermine's affidavit as an exhibit in the cause.

Leo and Hermine's Mental Incapacity

[201] In *Fowler Estate v. Barnes et al.* (1996), 142 Nfld. & P.E.I.R. 223, 1996

CanLII 11726 (NL SCTD), Green J. wrote (at paras. 27 and 28):

[27] A contract or deed purportedly entered into by a mentally incompetent person is voidable at the option of that person or somebody acting on his or her behalf, if the following conditions can be established:

- (1) that at the time of execution, she was mentally incompetent;
- (2) by reason of such mental incompetence, she was not-capable of understanding the terms of the document and of forming a rational judgment of its effect upon her interests; and
- (3) the other party had knowledge, actual or constructive, of such mental incompetence.

See *Bank of Nova Scotia v. Kelly* (1973), 5 Nfld. & P.E.I.R. 1 (P.E.I. S.C.).

[28] It is not mental incapacity in the abstract which renders the contract liable to be set aside. The mental incapacity that has this effect must be such that it impairs the ability to contract, that is, an ability to understand the nature of the transaction being entered into and its general effect. See Perell, *Remedies and the Sale of Land* (1988), p. 8.

See also *Stacey and Chafe v. Stacey*, 2009 NLTD 139, 290 Nfld. & P.E.I.R. 12 (NL SCTD).

[202] Based upon the evidence of Dr. Zacharias, and the testimony of Marielle, Annette, Charlotte, Gilbert and Pauline, all of which I believe and accept, I am finding on a balance of probabilities that Leo did not have the mental capacity to understand the contents or the meaning of the Bare Trust Agreement. He was mentally incompetent.

[203] According to Dr. Zacharias, by April 2008 Leo's dementia had progressed to a stage that he was satisfied that Leo lacked the capacity to give informed and

independent instructions to a lawyer regarding his estate. He would not have understood the consequences of what he was signing.

[204] From a nursing point of view, Dr. Zacharias' opinion is supported by Charlotte. Notwithstanding that she is not a psychiatric nurse, she regularly does testing for the mental capacity of clients.

[205] Gilbert and Leo's daughters who testified had known Leo all of their lives. They were all of the opinion that Leo was mentally incompetent. His change of personality and his behaviour all emphasized that he was suffering from dementia and had been for at least two or three years before he signed the Bare Trust Agreement.

[206] I simply do not believe and I reject Reynald's evidence that he did not think that there was anything wrong with Leo. Reynald had been present at the December 2007 meeting with Dr. Fikry. He was well aware of Dr. Fikry's concerns about Leo's mental capacity.

[207] I accept the evidence of Marielle, Annette and Pauline, all of whom testified that they told Reynald that Leo had dementia and should not be signing any documents or making any decisions related to financial matters and his estate. I totally reject Reynald's denial that he spoke to any of his siblings about this issue.

[208] Reynald denied that he had seen Dr. Zacharias' written reports. I do not believe him. Copies of them were provided to him and I do not accept that he did not read them.

[209] I do not find the evidence that Ken Tacium prepared a will for Leo in June 2008, and took the affidavit of execution, to be significant. There was no application made for probate of that will. As a result, it was unnecessary for anyone to consider challenging that will based upon Leo's mental incompetence.

[210] With respect to Kevin Landin, I do not accept his testimony about Leo seeming to be normal on the day that Leo signed the Bare Trust Agreement and the Option Agreement. There is no evidence that he ever went into the house to meet Leo and Hermine. Nor is there any evidence that they ever came out of the house to meet Kevin Landin. I am satisfied that Kevin Landin was not truthful in that regard because he wanted to assist Reynald.

[211] Based upon all of this evidence, I am satisfied that Reynald was well aware of Leo's mental incompetence. Yet he proceeded to arrange to have Leo sign the Bare Trust Agreement, the contents of which were clearly to Reynald's advantage.

[212] It was submitted on behalf of Reynald that the inclusion of CT1896007 in the Bare Trust Agreement had no significance because that parcel of land was being left to Reynald in Leo and Hermine's respective wills in any event. In my view that argument ignores the impact that the Bare Trust Agreement had on Leo and Hermine while they were still alive.

[213] As a result of the contents of the Bare Trust Agreement, both Leo and Hermine effectively lost control over the land described in CT1896004 and

CT1896007. They were no longer the owners of those parcels of land. Therefore they could not use any of the parcels as collateral to borrow money.

[214] Clearly this became a significant problem for Hermine, in particular, because she had concerns about being unable to afford continuing home care. According to Pauline, Reynald was unsympathetic to this situation. He arrogantly suggested that Hermine should move into a nursing home to save money.

[215] Furthermore, although both Leo and Hermine have died since the signing of the Bare Trust Agreement, Reynald is not necessarily going to obtain unconditionally the land described in CT1896007. If the Bare Trust Agreement is not valid, that parcel of land will become an asset of Hermine's estate. It will then be subject to the terms of Hermine's will, which includes a clause that the parcel of land described in CT1896007 will be valued and each of Marielle, Pauline, Annette and Lucille will obtain either cash, or a transfer of land, in a sum equivalent to the value of the land described in CT1896007.

[216] With respect to the land described in CT1896004, it is Reynald's position that Leo and Hermine had always promised that he would receive the homestead. But it is not just the homestead in CT1896004 that is the subject matter of the Bare Trust Agreement. The parcels of land described in CT1896004 are two one-half sections, of which the homestead is only part. In the Bare Trust Agreement, Reynald is obtaining ownership of all of the land.

[217] In my view, the language in the Bare Trust Agreement is very legalistic, detailed and complicated. I am satisfied that it is beyond the comprehension of

most people unless they have legal advice or training. Notwithstanding Ed Sloane's testimony about the steps that he followed in explaining the Bare Trust Agreement and the Option Agreement to Leo and Hermine, I am satisfied that Leo did not understand either one of them.

[218] After hearing Ed Sloane's testimony, I am satisfied that, in hindsight, even he questions whether he took sufficient steps to assess Leo and Hermine's mental capacity. Clearly Ed Sloane should have been told that Leo suffered from dementia. Ed Sloane could then have made further inquiries to decide whether it was appropriate to have Leo sign the documents.

[219] I find Reynald's conduct particularly disgraceful in that he failed and/or refused to tell Ed Sloane that Leo suffered from dementia. To the contrary, I am satisfied that Reynald intentionally withheld that information from Ed Sloane.

[220] Reynald's own lawyer was George Ulyatt and he arranged for Ed Sloane to provide independent legal advice. I have no evidence as to whether George Ulyatt was aware that Leo suffered from dementia. I assume that he was not because, in my view, he would have been obligated to advise Ed Sloane of this situation.

[221] This entire situation was as a result of Reynald orchestrating the signing of the Bare Trust Agreement.

[222] For the foregoing reasons, I am satisfied that Leo did not have the mental capacity to understand the contents, or legal significance, of the Bare Trust Agreement.

[223] With respect to Hermine, the only evidence of her lacking capacity is from Dr. Zacharias, wherein he testified that he had heard from other physicians that Hermine may also have had cognitive problems. This is of course hearsay and I am therefore disregarding that evidence. Furthermore, none of Hermine's children who testified for the plaintiffs expressed any concern about Hermine's mental faculties.

Undue Influence

[224] Notwithstanding my finding that Leo did not have the mental capacity to enter into the Bare Trust Agreement, I am making an alternative finding based upon undue influence.

[225] In *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353, Wilson J. wrote (at p. 378):

What then must a plaintiff establish in order to trigger a presumption of undue influence? In my view, the inquiry should begin with an examination of the relationship between the parties. The first question to be addressed in all cases is whether the potential for domination inheres in the nature of the relationship itself. This test embraces those relationships which equity has already recognized as giving rise to the presumption, such as solicitor and client, parent and child, and guardian and ward, as well as other relationships of dependency which defy easy categorization.

Having established the requisite type of relationship to support the presumption, the next phase of the inquiry involves an examination of the nature of the transaction. When dealing with commercial transactions, I believe that the plaintiff should be obliged to show, in addition to the required relationship between the parties, that the contract worked unfairness either in the sense that he or she was unduly disadvantaged by it or that the defendant was unduly benefited by it. From the court's point of view this added requirement is justified when dealing with commercial transactions because, as already mentioned, a court of equity, even while tempering the harshness of the common law, must accord some degree of deference to the principle of freedom of contract

and the inviolability of bargains. Moreover, it can be assumed in the vast majority of commercial transactions that parties act in pursuance of their own self-interest. The mere fact, therefore, that the plaintiff seems to be giving more than he is getting is insufficient to trigger the presumption.

By way of contrast, in situations where consideration is not an issue, e.g., gifts and bequests, it seems to me quite inappropriate to put a plaintiff to the proof of undue disadvantage or benefit in the result. In these situations the concern of the court is that such acts of beneficence not be tainted. It is enough, therefore, to establish the presence of a dominant relationship.

[emphasis added]

[226] Clearly the Bare Trust Agreement, between Leo and Hermine on one hand and Reynald on the other hand, was a commercial transaction. The Bare Trust Agreement describes consideration passing from Reynald to Leo and Hermine in return for which Reynald received the rights described in the Bare Trust Agreement.

[227] As a commercial transaction described in *Geffen* (at p. 378), the plaintiffs have to show that the Bare Trust Agreement was unfair to Leo and/or Hermine and that they were unduly disadvantaged by it. As indicated previously, the evidence in that regard is clear. By not being able to use as collateral the parcels of land described in CT1896004 and CT1896007, Hermine and Leo could not continue to afford home care.

[228] Reynald was totally unsympathetic in that regard. Clearly his reason was that, since the Bare Trust Agreement provided that he was the owner of both parcels of land, he did not want one or both of them to be encumbered. I am satisfied that it was pure greed on the part of Reynald.

[229] There is very strong evidence that Reynald exercised undue influence over both Hermine and Leo. It includes:

- failing to advise Ed Sloane that Leo suffered from dementia;
- failing to provide a copy of the Bare Trust Agreement and/or the Option Agreement to Leo and Hermine in advance in order that they could read them and, if necessary, seek their own independent legal advice rather than it being arranged through Reynald's lawyer. Specifically, a French speaking lawyer would have been invaluable;
- advising Ed Sloane not to discuss the transaction with Annette when she came into the house.

[230] Furthermore, the only logical conclusion to draw from the evidence of the addition to the schedule of the Option Agreement of the parcels of land described in CT1896004, is that Reynald did it. Clearly that Certificate of Title was not in the schedule in the Option Agreements that had been provided to Ed Sloane to be signed by Leo and Hermine. The copy of the Option Agreement that Ed Sloane had kept for his own records did not contain reference to that Certificate of Title.

[231] I accept the evidence of Ed Sloane, and reject the evidence of Reynald, as to whom suggested that Reynald take possession of the copies of the Bare Trust Agreement and the Option Agreement to provide them to George Ulyatt. Ed

Sloane testified that it his usual practice to take signed documents back to his office and to forward them to the referring lawyer along with a covering letter.

[232] But in this case Reynald in effect insisted that he would take the documents to George Ulyatt. I reject Reynald's and Kevin Landin's testimony that it was Ed Sloane who suggested that Reynald take the documents to George Ulyatt. The difference is significant in that it gave Reynald custody of the signed documents.

[233] I simply do not believe Reynald's testimony that he kept the envelope sealed and did nothing to change the documents before he took them to Tapper Cuddy and signed them. Reynald had ample opportunity to change the Option Agreement, either on the drive from St. Claude to Winnipeg, or in the offices of Tapper Cuddy.

[234] If Reynald made the change to the Option Agreement en route to Winnipeg, then clearly Kevin Landin was untruthful in his evidence. On the other hand, Reynald could have made the changes to the copies of the Option Agreement, between the time that he left Kevin Landin in the truck, and the time that he signed the documents and had them witnessed by Chris Doell and Karen Burnichon respectively.

[235] I did not receive any explanation as to the reason for the Bare Trust Agreement and the Option Agreement respectively being witnessed by two different people. The inference that I am drawing is that Reynald initially had only the Bare Trust Agreement witnessed by Karen Burnichon. He then changed

the schedule to the Option Agreement and had it witnessed by Chris Doell. Neither Karen Burnichon nor Chris Doell testified to present an alternative explanation.

[236] The change to the Option Agreement is not specifically relevant to the remedies being sought by the plaintiffs in this action, which relate to the Bare Trust Agreement. But it is very relevant to Reynald's honesty and integrity.

[237] I believe that he inserted CT1896004 into the Option Agreement because he wanted an option and/or right of first refusal to purchase those parcels of land in priority to his siblings. He knew that he already had priority to his siblings to obtain the parcel of land described in CT1896007 because he would inherit it through Leo and Hermine's wills. If it was subsequently decided that, for some reason Reynald could not obtain title to the parcels of land described in CT1896004 and CT1896007 through the Bare Trust Agreement, he would still have priority over his siblings to purchase the land described in CT1896004.

[238] Whatever his motive was for changing the Option Agreement, Reynald obviously had no compunction in doing so, after it had already been signed by Leo and Hermine and witnessed by Ed Sloane.

[239] The only inference that I can draw from all of the circumstances surrounding the signing of the Bare Trust Agreement and the Option Agreement, and the changing of the Option Agreement, is that Reynald controlled the entire process. He did so to the detriment of Leo and Hermine. This in turn amounted to him exercising undue influence.

Conclusion

[240] I am satisfied that when Leo and Hermine entered into the Bare Trust Agreement, they did so when Leo was mentally incompetent. Since he was a joint owner of the land described in both CT1896004 and CT1896007, the Bare Trust Agreement is voidable. I find that it is invalid and is of no force and effect.

[241] Furthermore, I am satisfied that Reynald exercised undue influence over both Leo and Hermine when they signed the Bare Trust Agreement.

[242] I am issuing a declaration that the Bare Trust Agreement is of no force and effect and is not binding upon the plaintiffs.

[243] With respect to the caveats that were filed by Reynald against CT1896004 and CT1896007, notwithstanding that the prayer for relief in the statement of claim seeks an order vacating the caveat filed by Reynald in respect to CT1896007 only, I am satisfied that was an oversight. The body of the statement of claim clearly pleads that the caveats filed against both CT1896004 and CT1896007 should be vacated.

[244] Furthermore, the plaintiffs' written argument clearly describes that they are seeking an order for removal of the caveats from both Certificates of Title. I am therefore making that order without the necessity of amending the statement of claim. Clearly Reynald has not been prejudiced by the oversight.

[245] If the parties cannot agree upon costs, they may be spoken to.

Abra J.