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(Winnipeg Centre)

## **COURT OF QUEEN'S BENCH OF MANITOBA**

**IN THE ESTATE OF: WALTER JULIUS CHEZICK, Deceased**

**BETWEEN:**

RUSSELL KLAPRAT,	)	APPEARANCES:
applicant,	)	
- and -	)	Antoine F. Hacault
	)	and Melissa D.L. Beaumont
	)	for Alfred and Susan Chezick
	)	
ALFRED HERMAN CHEZICK,	)	Eugene G. Zazalenchuk
respondent.	)	for Patricia Klapat
	)	
	)	Melissa D.L. Beaumont
	)	for Artur Alex
	)	
	)	Kalyn Bomback
	)	for Russell Klapat
	)	
	)	JUDGMENT DELIVERED:
	)	June 1, 2017

### **DEWAR J.**

#### **INTRODUCTION**

[1] Walter Chezick was a retired farmer who died on October 28, 2013 at the age of 86 years while a resident in a personal care home. He was a bachelor throughout his life. He was the eldest son of nine children and was raised and lived throughout his life on a farm midway between Whitemouth and Seven

Sisters, Manitoba. He was survived by his sister Marge, a resident of Burnaby, British Columbia, and his brother Freddie, a resident of New Zealand, his brother Alfred, a resident near Walter's farm, and several nieces and nephews.

[2] Walter died leaving three testamentary documents. There exists a will dated 1996 in which Walter bequeathed his estate to his nieces and nephews alive at his death (the "1996 Will"). This is followed by a will dated September 14, 2007 (the "2007 Will") appointing Russell Klapat as executor, and Artur Alex as alternate executor and which distributes Walter's estate to Russell and in the event of his predecease to Patricia Klapat, Russell's wife. This is followed by a document dated October 3, 2007 signed by Walter which purported to revoke all previous wills and powers of attorney which he may have given. Finally, there is a will dated April 15, 2008 (the "2008 Will") in which Walter, then 80 years of age, named Alfred as executor and Alfred's wife Susan Chezick as alternate executor, and which bequeathed his assets to Alfred, and in the event of Alfred's predeceasing, to Susan.

[3] In addition to the before mentioned testamentary documents, there also existed a power of attorney signed in 1996 which appointed Russell as attorney and Walter's lawyer as alternate attorney, a power of attorney on September 14, 2007 (the "2007 Power of Attorney") which appointed Russell as attorney and Artur as alternate attorney, and a power of attorney on April 8, 2008 (the "2008 Power of Attorney") which appointed Alfred as attorney and Susan as the alternate.

[4] Evidence, which I accept, was led at trial which indicated that for a number of years Walter was close to the Klaprat family. Patricia testified that they lived in the same vicinity as Walter, that the relationship appeared to have begun because Walter was a good friend of Russell's father, and that Russell and Patricia, while they cohabited, included Walter in their family gatherings and provided assistance to him over the years. Evidence was led through Artur, who was a friend of Russell, that he began to lease some of Walter's land in 1996 and gradually over the years extended his tenancy to all of Walter's cultivated lands. In 2003, Artur acquired the cultivated lands as well as a remainderman interest in approximately 37 acres on which the house and farm buildings used by Walter were situated.

[5] The 2008 Power of Attorney was signed by Walter when he was a patient in the Deer Lodge Hospital where he was being assessed for placement following hip surgery that had taken place in December 2007 as a result of a fall at home. The 2008 Will was executed on April 15, 2008, on the same day that Walter was discharged from the Deer Lodge Hospital to live at the home of his brother Alfred and sister-in-law Susan. He lived there for almost four years before he was placed in a personal care home where he lived for the last six to eight months of his life.

[6] Acting under the 2008 Power of Attorney, Alfred began a lawsuit in February 2009 alleging that Russell had acted inappropriately under the 2007 Power of Attorney, that Patricia had converted \$100,000 of Walter's money

without his consent, and that the transaction pursuant to which Artur acquired an interest in Walter's farmland in 2003 was unconscionable. In December 2009, purporting again to act pursuant to the 2008 Power of Attorney, Alfred issued a statement of claim with respect to the 37 acre home parcel against Artur and the solicitors who handled the land transaction. In February 2013, again relying upon the authorities contained in the 2008 Power of Attorney, Alfred commenced an action against Sunova Credit Union Limited in respect of the \$100,000 amount obtained by Patricia.

[7] The defendants in all of the subject actions filed statements of defence in effect denying that any of them had taken advantage of Walter, that the money paid to Patricia was a gift and the land transaction with Artur was properly concluded. In each case, Russell, Patricia, and Artur in their statements of defence allege no knowledge or deny the allegations that Alfred was properly acting under the 2008 Power of Attorney.

[8] It is the existence of these statements of claim which appears to be motivating the objections to Alfred's attempts to propound the 2008 Will.

[9] Following Walter's death in October 2013, the court record shows that in November 2013, Patricia filed a caveat in the probate registry alleging that Walter executed certain wills when he lacked testamentary capacity and raising fears that some were procured by undue influence and fraud. A similar caveat was filed approximately one month later in December 2013 by Russell. Following the issuance of a 30 day notice, on January 22, 2014, Russell commenced an

application in this court opposing the probate of the 2008 Will and claiming an accounting from Alfred of the monies which he expended while purportedly acting as Walter's attorney under the 2008 Power of Attorney. Given the existence of the lawsuits detailed above and Russell's application contesting the 2008 Will, the matter proceeded to case management. In addition to the parties already participating in the existing litigation, notice of the proceedings was given to the nieces and nephews of Walter, two of whom ultimately applied for status. On April 7, 2015, the case management judge ordered that Russell, Alfred, Susan, Patricia, Artur, and those nieces and nephews who communicated an intention to participate as a party in the proceedings, would be parties in a trial of four issues, namely:

1. whether Walter Julius Chezick had capacity to make the 2008 Will;
2. if the answer to issue 1 is in the negative, whether Walter Julius Chezick renounced the 2007 Will and the 1996 Will;
3. if the answer to issue 2 is in the negative, whether Walter Julius Chezick had capacity to make the 2007 Will; and
4. costs.

[10] It is important to emphasize that the only challenge to the testamentary documents in this case was on the issue of capacity. No one challenged knowledge and approval. No one raised the notion of undue influence.

[11] A trial proceeded from April 24 to and including May 1, 2017. Alfred and Susan (collectively referred to as the "Propounders") presented their evidence to

propound the 2008 Will, and to support the 2007 revocation of any earlier wills, including the 2007 Will. Their evidence was contested by Russell, Patricia, and Artur with counsel for Patricia cross-examining the plaintiff's evidence and presenting evidence for all three (collectively referred to as the "Opposing Parties"). The two nieces who had responded to the initial solicitation did not appear nor were they represented at the trial. In a pre-trial meeting with counsel, I had directed that an additional notice of the trial should be given to the siblings of Walter other than Alfred who were still alive, and no appearance at trial was requested by either.

[12] At the end of the case led by Alfred and Susan, counsel for the Opposing Parties withdrew their attempts to propound the 2007 Will suggesting that they would be unable to prove that Walter had the capacity to make the 2007 Will. Notwithstanding the withdrawal, I conclude that the evidence as to Walter's capacity in September 2007 may have some relevance to his capacity in April 2008 when the 2008 Will was executed and therefore allowed some evidence in that regard.

[13] In support of the 2008 Will and the 2007 revocation document, counsel for Alfred and Susan called five witnesses and read in excerpts from the examination for discovery of Russell, Patricia, and Artur. The six witnesses called were Ms. Kari Michelle, Dr. Christopher Engel, Mr. Derek Alexander, Mr. Michael Stienstra, Alfred and Susan. In response, the Opposing Parties called Patricia and Artur as witnesses. Russell did not testify.

## **ISSUE 1 - DID WALTER HAVE CAPACITY TO MAKE THE 2008 WILL?**

### The Test for Testamentary Capacity

[14] The basic authority on this issue is *Banks v. Goodfellow* (1870), L.R. 5 Q.B. 549 (Eng. Q.B.), at p. 565.

It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties — that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.

[15] As with many issues that arise during a trial, the dispute here does not lie with the legal test, but rather whether there is enough evidence to conclude that Walter met the legal test when he made the 2008 Will.

[16] In the case of *Vout v. Hay*, [1995] 2 S.C.R. 876, Sopinka J., writing for the Court, concluded:

26 ... 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.

[17] However, this presumption may be rebutted upon proof of the existence of suspicious circumstances. Sopinka J. wrote:

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.

### The Onus

[18] The requisite formalities with respect to the execution of the 2008 Will appear to have been followed. Therefore, the first question for consideration is whether there are suspicious circumstances surrounding the execution of the 2008 Will such that the onus of proof regarding capacity should be placed back on the shoulders of Alfred and Susan, the propounders of the 2008 Will.

[19] I accept that suspicious circumstances exist in this case. The uncontested evidence before me indicates that Walter initially had a constant and close relationship with both Russell and Patricia. Patricia's evidence supported this notion as did the evidence of Artur. It is also supported by the existence of a power of attorney in 1996 that appointed Russell as attorney, a will in 1996 that appointed Russell as an alternate executor, and the existence of a will in 2007 which named Russell as executor and beneficiary. The conflict in evidence between Alfred and Susan on the one hand and Patricia and Artur on the other was not really directed towards the extent of the relationship between Walter and the Klaprats, but rather on the extent of the relationship between Walter and his brother and sister-in-law. Patricia gave evidence that placed in issue the contention that Alfred and Susan had been a material part of Walter's life, whereas Alfred and Susan did not question that Walter had spent significant time with the Klaprats. I am satisfied that there was a relationship between the Klaprats and Walter that explains the older powers of attorney and the 2007 Will.

Without concluding any ulterior motives on the part of Alfred and Susan, a new power of attorney and a new will favouring Alfred and Susan in circumstances where they were then the main supports in Walter's life, including their assistance in taking Walter to have the will executed, coupled with some degree of mental infirmity on the part of Walter, as well as evidence that since the spring of 2007 Walter had been slipping, raises enough flags to create suspicious circumstances. However, I hasten to add that such a finding does not equate to a conclusion that the 2008 Will is invalid. It only pushes the onus of proof back onto Alfred and Susan to demonstrate on a balance of probabilities that Walter had testamentary capacity to make the 2008 Will.

#### Positions of the Parties

[20] What evidence exists to support the notion that Walter had testamentary capacity when he made the 2008 Will? Counsel for Alfred and Susan points to the evidence of Alfred and Susan, as well as the evidence of Kari Lynn Michel and Dr. Christopher Engel, both from Deer Lodge Hospital where Walter was resident at the material time, and Derek Alexander, the lawyer who drafted and participated in the execution of the 2008 Will. Counsel also points to the existence of the 2007 Power of Attorney and Will and asks that I draw an inference that Walter was competent at that time since Russell otherwise would never have arranged for that will. Further, he asked that an adverse inference should be made against the Opposing Parties in that none of them called the lawyer who drafted the 2007 Will and because Russell did not testify, nor did

Patricia or Artur attempt to lead evidence through Russell. He also argued that since Russell and Artur each withdrew in 2009 as Walter's attorneys under the 2007 Power of Attorney, they should somehow shoulder responsibility for the deficiencies in Alfred and Susan's case because they made no early specific contest of Walter's capacity in respect of the 2008 Power of Attorney. Finally, he relies upon certain evidence read into the record from examinations for discovery of Russell, Patricia and Artur.

[21] On the other side is the evidence led from the Opposing Parties. Evidence indicated that in the summer of 2007, Walter was taken by the RCMP at the request of Patricia and a home care worker for an assessment. Later, there was also a meeting at the Whitemouth Personal Care Home. Evidence was led from Patricia and Arthur that Walter showed signs of failing commencing in the spring of 2007. The purpose of this evidence was to demonstrate that Walter was losing his faculties in 2007 and could no longer live on his own without supports. Counsel for the Opposing Parties also points to the refusal of Michael Stienstra to make a power of attorney and will in the fall of 2007 when requested to do so by Walter in the presence of Alfred and Susan.

[22] Can these competing positions be reconciled, and if not, which position is to be preferred?

#### The Evidence

[23] I start by briefly reviewing the evidence that was led at trial.

Susan Chezick

[24] Susan's evidence was that Alfred and Walter maintained a relationship over the years. She testified that they did not interact daily, or even frequently, unless there was something to be discussed or done. She testified that she and Alfred became more intimately involved with Walter after receiving a call from a home care worker who was servicing Walter. I estimate this call to have occurred during the late summer or early fall of 2007. As a result of that conversation, Susan understood that consideration was being made to have Walter moved into a personal care home. Susan testified that she and Alfred went to talk to Patricia who expressed to them that Walter "was not Wally anymore" and also told them that Russell had had a power of attorney for Walter since 1996. Susan testified that as a result of that discussion, she and Alfred went to see Walter and told him that the Opposing Parties (who she described as "they") were going to put him in a personal care home. Susan testified that Walter was upset at that suggestion. She testified that she and Alfred then became more involved in Walter's well-being. She said that in August and September 2007 and thereafter, Alfred would visit Walter daily or every second day, and she would accompany Alfred on some of those occasions. She testified that she never had any trouble with conversations with Walter during that period. She attributes any smell in Walter's house to his use of a slop pail from time to time. Any smell was ended when the pail was removed.

[25] Susan testified that at some point during the fall of 2007, she learned that Walter had signed a power of attorney in favour of Russell and Artur and this was discussed with Walter. She testified that about a week after the power of attorney was signed, Walter expressed to Alfred and her that he did not trust Russell, and he asked Alfred to go to the credit union with him and see whether he could withdraw his money. Therefore, at some point shortly before October 3, 2007, Walter, Alfred and Susan went to the credit union and requested a draft in Walter's name in the amount of \$100,000. They were not obliged at first, but rather were asked to leave and come back in an hour. When they returned, the credit union manager indicated that Walter was not allowed to take his money out of the bank. Susan testified that when Walter heard that, he wanted to revoke the 2007 Power of Attorney. Therefore, Susan made an appointment with a lawyer, Michael Stienstra, who had an office in Beausejour for the purpose of making new powers of attorney. Susan testified that when she, Alfred, their son Dean and Walter attended at Mr. Stienstra's office and explained the situation including that in early August the RCMP had taken Walter to the Health Sciences Centre in Winnipeg for an assessment and including that Walter had recently signed a power of attorney and will, Mr. Stienstra instructed them to go and get the power of attorney and will which had recently been signed in the office of another Beausejour lawyer, Mr. Gerald Hawranik. The four people immediately retrieved the documents from Mr. Hawranik's office and

brought them back to Mr. Stienstra. Mr. Stienstra then drafted and witnessed Walter's signing of a document which reads as follows:

"I, Walter Chezick of the Rural Municipality of Whitemouth revoke all previous wills and powers of attorney which I may have given."

(the "Revocation Document")

[26] Susan testified that although Mr. Stienstra was prepared to draft the Revocation Document, he was not prepared to draft a new power of attorney or will for Walter without having additional medical information concerning Walter's capacity. As a result, Susan testified that she unsuccessfully attempted to enlist the assistance of Dr. Spence, Walter's family doctor, but could not obtain a referral for Walter to see a psychiatrist.

[27] Susan testified that she was present on the day that Walter fell and broke his hip. She said that Alfred was in the house taking breakfast to Walter and she and a friend were in the car. Alfred came out to the car to tell them that Walter had a fall. Other evidence puts this date at a point in early December 2007. Susan testified that Walter was taken to the hospital in Pinawa and then transferred for surgery to the Grace Hospital in Winnipeg. Following the surgery, Walter was returned to the Pinawa Hospital. During his stay in the Pinawa Hospital, a meeting was arranged amongst health care providers and family and interested parties. This meeting took place, according to Susan, in Whitemouth, and was attended by Dr. Spence, health care persons Diane Amos and Melanie Schumilak (sic), Russell, Artur, Alfred and Susan. During this meeting, Alfred

and Susan indicated that Walter could come to live with them and that course was agreed.

[28] However, Walter's recovery was delayed as a result of some movement in one of the pins that had been installed during the hip surgery. Therefore, he was transferred to the Deer Lodge Hospital in Winnipeg and placed in the assessment and rehabilitation unit.

[29] Susan gave evidence that she and Alfred visited Walter two or three times per week while he stayed at the Deer Lodge Hospital. She testified that at that time Walter was able to carry on appropriate conversations with them. They were introduced to Kari Michel, a social worker involved in Walter's care. Susan testified that Ms. Michel indicated to her that she would assist in finding a lawyer for Walter so that a new power of attorney could be made. She testified that Ms. Michel therefore enlisted the assistance of Mr. Derek Alexander. She testified that on April 8, 2008, she and Alfred came into Walter's room just as he was signing the 2008 Power of Attorney in the presence of Derek Alexander and Ms. Michel. As to the 2008 Will, Susan testified that it was executed by Walter on the same day that he was discharged from Deer Lodge Hospital. She testified that both she and Alfred were present when it was signed. Although she was not positive, she believed that it was signed in the truck in a parking lot near the office of Derek Alexander. She had that belief because she recollected that Walter was still in a degree of pain when he moved around, and such a

procedure would have saved him the discomfort of walking up to Mr. Alexander's office.

[30] Susan further testified that upon his discharge from Deer Lodge Hospital, she and Alfred took Walter to their home. They had done some renovations to accommodate his living with them. She testified that he was clearly able to know what was what and participated in reasonable discussions with many people until about six or seven months before he finally died in 2013.

[31] Evidence was led by Patricia during the trial that in the spring of 2007, Walter became unhappy with Patricia and she stopped going to visit him at his home. During her rebuttal evidence, Susan was asked by her counsel as to whether Walter ever gave any indication why he would not want Patricia in his house. She testified that Walter indicated that although he had successfully loaned Patricia \$1,000 earlier, he loaned her \$1,000 at a later stage and she did not pay it back. I have seen no physical evidence of such a loan nor was Patricia asked to comment upon it when she gave her evidence.

Alfred Chezick

[32] Alfred gave evidence during the trial. His evidence lacked detail. It was explained to me that his memory on certain matters is failing. He is 79 years of age. Although no medical evidence was placed before me, I was advised by counsel that the case management judge had already made an order for his evidence on the other litigation to be taken before trial, presumably for preservation purposes. When he gave his evidence before me, details such as

the dates of death of his siblings, when he first learned of the land sale to Artur, where the will was signed, where he met Mr. Stienstra, what was meant by allegations in the statements of claim in the other litigation, and descriptions of events involving the RCMP and Walter, lead me to reluctantly conclude that I should not accept his evidence without some additional support elsewhere in the evidence. I am prepared to accept his statement that he did have some contact with Walter over the years, although it was not regular or necessarily frequent, especially given his work history. This was confirmed by his wife Susan. I also am prepared to accept his evidence that Walter expressed to him that he (Walter) did not wish to go into a personal care home. This was confirmed by Ms. Michel and Dr. Engel. I am prepared to accept his evidence that Walter expressed a degree of animosity against Patricia because she did not repay a \$1,000 loan. I find support for this from the evidence of Susan, and no contest from Patricia. I also accept that shortly before a meeting with Mr. Michael Stienstra, that he, Walter, and Susan attempted to withdraw \$100,000 in Walter's name from the credit union where Walter kept his accounts and were prevented from doing so. Susan tells much the same story.

*Kari Michel*

[33] Counsel for Alfred and Susan called Ms. Kari Michel and Dr. Christopher Engel to support the notion that Walter had capacity when he signed the 2008 Power of Attorney and the 2008 Will. Ms. Michel testified that she was part of a care team who had responsibility to assess, rehabilitate and prepare an elderly

patient for discharge from the hospital. She testified that the team members, including nurses, doctors and therapists, discuss together their clients with a view to providing an informed and successful health service. She recorded that Walter was admitted to Deer Lodge Hospital on March 13. In the case of Walter, she testified that she saw him each day she worked during his stay, although the visits would be of varying lengths. She testified that she discussed with him his background, where he had been living, his finances and his concerns. She testified that Walter expressed to her that he wanted to be discharged to live with Alfred and Susan. In addition, she testified that Walter was worried about things that had been done by neighbours, including those who were his current attorneys. She testified that given Walter's concerns and his desire to receive the help of Alfred and Susan, she arranged an appointment for Walter with a solicitor, Derek Alexander, to discuss the preparation of the 2008 Power of Attorney and the 2008 Will. She was of the view at the time that Walter was mentally able to revoke his existing power of attorney and to name new attorneys. She acknowledged that Walter had some limitations in his insight as well as impaired problem-solving skills, but believed that he was in a position to communicate his wishes regarding management of his finances and his discharge location. She did not hear anything to the contrary from other members of the health care team and further enlisted the support of Dr. Engel in expressing that view. She prepared a letter which is dated April 9, 2008 which Dr. Engel signed and which, although recognizing some impairments, said that Walter "is in a

position to communicate his wishes regarding his life and the management of his finances.” She testified that had she doubted his capacity, she would not have pursued the preparation of the power of attorney and will.

Dr. Christopher Engel

[34] Dr. Engel gave evidence that he was the physician attached to the health care team who had charge of Walter’s rehabilitation at the Deer Lodge Hospital. He gave evidence about the medical services which he provided to Walter from his first attendance on admission to his discharge on April 15, 2008. Relying upon his recent review of Walter’s chart, and in particular, the notes and memoranda which he made, he expressed the opinion that as of April 9, 2008 and the date of discharge, Walter had a mild cognitive impairment but was able to make decisions about what he wanted, and in particular in this case, that he wanted his brother to take care of him and he wanted to avoid a nursing home. He had a number of meetings with Walter. He said that at some point he was asked by Ms. Michel to sign a letter prepared by Kari Michel. He said that he specifically spoke separately to Walter and to Alfred before he signed the letter.

The letter reads:

April 9, 2008

To Whom It May Concern:

Re: Walter Chezick

Mr. Chezick was admitted to Deer Lodge Centre on March 12, 2008, for inpatient Rehabilitation services following a hip fracture. **Though Mr. Chezick has impairments in his executive functions, he is in a position to communicate his wishes regarding his life and the management of his finances.**

Although Mr. Chezick requires assistance in making decisions globally, he communicated his desire to have his brother, whom he advised that he trusts, to assist him with the management of his finances. He has clearly indicated his wishes to Ms. Kari Michel, Unit Social Worker, and met with a Lawyer on April 8, 2008. At that time, the Lawyer was also satisfied with Mr. Chezick's understanding of the proceedings and a new Power of Attorney document was completed.

Mr. Chezick has revoked all previous Power of Attorneys and has chosen to have his brother Alfred and sister-in-law Susan (if need be) as his attorney.

Sincerely,

NOT WRITTEN BY, BUT IN AGREEMENT WITH

Dr. Chris Engel  
3 East Attending Physician  
Deer Lodge Centre

[35] During his direct examination, Dr. Engel testified that rather than using the words "Though Mr. Chezick has impairments in his executive functions", it should have read "Though Mr. Chezick has mild cognitive impairments ...."

[36] On the letter, he wrote the following in his handwriting

He has directed me today to change his P of A → brother Alfred.

[37] During cross-examination, he acknowledged that the handwriting suggests that on April 9 or 10, Walter told him that his power of attorney should be changed to Alfred as attorney, even though Walter had already done so on April 8. Counsel for the Opposing Parties argues that Walter's mind at the time was such that he could not remember what he had done the day before and that this demonstrates an inability to remember what was necessary to remember at the time of making a will. Nonetheless, Dr. Engel maintained his opinion of Walter as disclosed in his letter.

Derek Alexander

[38] Derek Alexander was the lawyer who drew the 2008 Power of Attorney and the 2008 Will. Mr. Alexander did work for an age and opportunity organization for which he dedicated Tuesdays and Thursdays to seeing elderly patients in various locations, including hospitals, who were referred to him under the age and opportunity program. At the beginning of April 2008, Mr. Alexander was contacted by Kari Michel who advised that she had a patient who wished to make a new power of attorney. Mr. Alexander testified that when he would normally receive these referrals, it was his practice to raise the capacity of the subject person with the referring party, and believes that he did in this case. I accept that he did because on April 3, 2008, he received a letter sent by fax from Ms. Michel which provided information about Walter, Alfred and Susan in order to facilitate the preparation of a power of attorney. The letter also contained the following language:

After assessing Mr. Walter Chezick, I believe that he is in a position to revoke his existing Power of Attorney and to name a new "attorney(s)".

[39] The 2008 Power of Attorney was drafted and Mr. Alexander attended on April 8 to the Deer Lodge Hospital to meet Walter. Mr. Alexander believed that he met with Walter, Ms. Michel, Alfred and Susan together. He testified that he would have explained the power of attorney to Walter and then had it executed. He also took instructions from Walter as to a will. He took one page of notes with respect to this meeting which demonstrates that a discussion occurred with Walter in which Walter directed that Alfred should be his executor (and failing

Alfred, then Susan), and further directed that his estate would be left to Alfred, and in the event of Alfred predeceasing him, then to Susan. The notes do not detail what is in Walter's estate, nor do they contain any information about Walter's demeanour during the course of this interview.

[40] Mr. Alexander further testified that following the attendance of April 8, he went back to his office and the will was prepared. He believed that the will was executed in his office on April 15. There are no notes of this meeting other than the affidavit of execution attached to the 2008 Will. He testified that Walter would have been brought to his office by Alfred and Susan. He testified that he would have gone through the will with Walter outside the presence of Alfred and Susan and summarized the language in the will to confirm that it was in accordance with the instructions given to him on April 8. He, along with his assistant, witnessed the execution of the document.

[41] Mr. Alexander testified that he had no reservations about Walter's capacity at the time because he would not have had Walter sign the will if he had noticed anything untoward, and because he had been told on April 3 that Walter had been assessed at the hospital and that Ms. Michel had believed he was in a position to make a new power of attorney. I also note that within Mr. Alexander's file was a copy of Dr. Engel's letter with a fax transmission detail dated April 10, 2008 at 9:51 a.m. Mr. Alexander had no recollection as to how this document came into his file, but I infer that Ms. Michel sent it to him and that it was in his file at the time that the will was signed on April 15. I am

convinced that he therefore believed that in the minds of the people at the Deer Lodge Hospital, capacity was not an issue for Walter, and he saw nothing in his observations of Walter that would disabuse him of that same opinion. I might add that where a lawyer is in receipt of medical information relating to the capacity of a client, the onus upon the lawyer to investigate capacity himself will consequently be more relaxed.

Michael Stienstra

[42] One of the witnesses called on behalf of Alfred and Susan was Mr. Michael Stienstra, a lawyer who practiced in Winnipeg, but who also had an office in Beausejour. Mr. Stienstra testified that on October 3, 2008, he had a meeting with Walter, Alfred, Susan and their son Dean at his office in Beausejour. The four people visited him and told him that Walter had recently been the subject of an involuntary mental health assessment following which he had been released. After his release, he had been taken to see Gerald Hawranik, another Beausejour lawyer, at which time he made a new will and power of attorney in favour of Russell and Artur. Mr. Stienstra was told that prior to this, Walter had made an earlier will in 1996. Mr. Stienstra testified that Walter wanted to get "them" (meaning Russell and Artur) out of his hair and that he did not want Russell and Artur as his attorneys under his power of attorney. He wanted his brother Alfred to be his power of attorney. During the course of this discussion, Mr. Stienstra believed Walter to be rational and coherent.

[43] Mr. Stienstra testified that having heard the concerns expressed by Walter and his family members, he instructed them to go to Mr. Hawranik's office and pick up copies of the 2007 Will and the 2007 Power of Attorney. He says they came back a little while later with a copy of the 2007 Power of Attorney and an unsigned copy of the 2007 Will.

[44] Mr. Stienstra did not feel that he could draft a new power of attorney and will without more information. He did, however, prepare the Revocation Document.

[45] Walter signed the Revocation Document and Mr. Stienstra witnessed his signature. There was only one witness because Mr. Stienstra did not staff his Beausejour office. Although he was reluctant to draft a new power of attorney and a new will, he felt that he could draft the Revocation Document. His thinking was that if Walter lacked capacity to make the 2007 Will and 2007 Power of Attorney, then they would be as invalid as the Revocation Document which he was drafting because of their proximity in time. If the 2007 Power of Attorney and the 2007 Will were valid, then so also would be the Revocation Document, again because of the proximity in time of the various documents.

[46] Although Mr. Stienstra prepared and witnessed the Revocation Document, he told the parties present that he would not draft a new power of attorney and will without further medical evidence.

[47] Mr. Stienstra testified that he next saw Alfred and Susan on November 27, 2007 in his office in Winnipeg. He does not remember if Walter attended at that

time. He recollects that the family at that time gave him the name of Walter's doctor and a nurse. He testified that he spoke to both and then concluded that he would need some further medical evidence before he would be able to draft new testamentary documents.

[48] Mr. Stienstra testified that in his discussion or discussions with Walter, Walter seemed competent to him, but in light of information which he had received after discussions with Dr. Spence, he was apprehensive about going further without additional medical information supporting Walter's capacity to make a will and power of attorney. Mr. Stienstra had no further dealings with Walter or his family.

Patricia Klapat

[49] Counsel for the opposing parties called two witnesses, namely Patricia and Artur. Patricia testified that she met Walter through Russell when she was dating Russell around 1982. Thereafter, and especially after she and Russell married, she considered Walter to be a good friend. She felt as if he was an uncle. Since 1990, they lived about three miles from Walter. She would see him between one and three times a week. He would drop in to her house when he was going to the store, he would come for meals, and he would spend special occasions such as Thanksgiving, Christmas and Easter with Russell and her. She described Walter as a quiet and honest gentleman who would never want to hurt or upset anyone. She said that Walter never talked about his siblings to Russell and her. She knew Alfred and Susan, but she never saw Alfred and Walter

talking. She related an instance when Walter suffered from an extreme bleeding nose, that he called her (as distinct from Alfred or Susan) to take him to the hospital, and that he spent ten days after his discharge at their house.

[50] Patricia testified that she had been involved in the farm run by Russell and her until approximately 2006 when she suffered an injury from a fall off a farm vehicle. She indicated that that injury coupled with their cattle herd becoming inflicted with mad cow disease caused stress. She testified that she and Russell separated in January 2007 and that she remained in the farmhouse with her 88-year-old mother. She acknowledged at the time that she felt under stress and that her finances were not good. She testified that after her separation, Walter spent more time visiting with her, offering support and consolation.

[51] Patricia testified that in March or April 2007, she noticed some visible changes in the way Walter lived and appeared. She testified that he was not looking after his personal hygiene, that he was no longer cleaning his house and did not wash his dishes. She says that she spoke to Walter's doctor, Dr. Spence and Diane Amos, a health care worker, and relying upon advice received from them, arranged for a public health nurse to visit Walter once per week and a home care person to attend every morning and evening to give him his pills.

[52] Patricia further testified that in May 2007 she noticed that Walter started to become suspicious of her. He accused her of stealing hairpins, or some of his boxes, or taking his rug. She testified that on May 14, 2007, she had been shopping and had to pick some groceries up for him and when she was in his

house, he threw a box of crackers at her. This scared her, she says, and she stopped going to visit him.

[53] Patricia testified that at the end of July or the first part of August, she was requested by Val Bullen, the home care worker for both Patricia's mother and for Walter, to go with Ms. Bullen to see Walter. Patricia testified that when they went in, they found Walter in a house which was very warm, and which smelled. She observed Walter to be glossy-eyed and dehydrated. She observed food on the counter and in the fridge that was rotten. They tried to convince Walter to see a doctor but he refused. They were unsuccessful in contacting a health care superior and since Patricia felt that Walter could not be left alone, she called the RCMP to go and check up on him. Other evidence suggests that the RCMP took Walter to the Health Sciences Centre in Winnipeg to be assessed. No medical information regarding that assessment was placed before the court in a manner that would permit it to be adduced for the truth of its contents. Nonetheless, it is clear that following the assessment, Walter was allowed to return to his home. Patricia testified that following her call to the RCMP, the next time that she saw Walter was at the Pinawa Hospital in December 2007 at which time she observed him simply staring into space.

[54] Much of the cross-examination of Patricia centered around certain financial arrangements which she had made with Walter in early 2007. She testified that she became a signatory on Walter's credit union account for the purpose of helping him keep his bills current. She testified that she paid some of

his bills, although she did not produce any evidence of actual payments. The only payment she identified was a payment from an account to her in the amount of \$100,000, which is the subject of one of the lawsuits that Alfred commenced on Walter's behalf after Walter signed the 2008 Power of Attorney. I will not go into the details of that transaction in these reasons since there remains litigation concerning it. Suffice it to say, Patricia maintained that Walter authorized the transaction in February 2007 although the monies were not withdrawn until April 2007. However, she did also acknowledge that in addition to the \$100,000, she transferred \$628.03 on May 25, 2007 from the account to her own personal account without discussing that withdrawal with Walter.

Artur Alex

[55] Artur gave evidence that he met Walter for the first time in 1985. He said that he had been working with Russell and that Walter was a close friend of Russell's father. Thereafter, he would periodically see Walter when he visited Russell and Patricia as well as in certain minor social settings. Artur testified that after expressing to Patricia and Russell an interest in farming, Russell's father told him to go and see Walter. Commencing in 1996, Artur leased 53 acres of land from Walter and over the years began to rent more and more of Walter's property. By 2003, Artur was renting all of Walter's cultivated acreage.

[56] Artur testified that after Russell separated in early 2007, Russell asked Artur if he would help Russell in taking care of Walter. He would therefore attend Walter's house periodically to see how Walter was doing. He became

aware that he was the alternate attorney named in the 2007 Power of Attorney. At some point in time, Russell and Artur attended at the credit union to obtain signing authorities for Walter's accounts.

[57] Artur testified that he attended a meeting with others at the Whitemouth Personal Care Home to discuss Walter's future. As a result of that meeting, he understood that Russell and he would ensure that Walter's bills would be paid. After the meeting he no longer attended Walter's house.

[58] Artur testified that in the middle to latter part of 2007, Walter showed signs of taking less care of himself and his house. He looked more unkempt and his house and surrounding yard showed signs of neglect.

[59] Artur testified that he visited Walter when Walter was in the Pinawa Hospital after Walter had broken his hip. At that time, he had a short and un concerning discussion with Walter. Artur also testified that he visited Walter twice in the Deer Lodge Hospital. However, he expressed no real concern as to Walter's mental well-being except that on one of the visits, Walter asked him three times what Artur had seeded into the field. Artur told Walter that it was still too early for seeding, but Walter asked him the same question twice more in the space of a 15-minute visit.

[60] The cross-examination of Artur disclosed that when Russell and Artur learned of the \$100,000 withdrawn by Patricia from Walter's account, they made a complaint to the RCMP.

[61] The evidence from Artur and Alfred indicated that following the execution of the 2008 Power of Attorney, Russell took a package of Walter's records to Alfred, believing that Artur was no longer involved in the administration of Walter's affairs. Additionally, Artur testified that in and around the same time, he and Russell went to the credit union to take their names off Walter's accounts.

#### Decision on Issue 1

[62] The issue in this case was neatly summarized by the then Lord Chancellor in *Boyse v. Rossborough* (1857), 10 E.R. 1192 (H.L.) at p. 1210:

... There is no difficulty in the case of a raving madman or a drivelling idiot, in saying that he is not a person capable of disposing of property. But between such an extreme case and that of a man of perfectly sound and vigorous understanding, there is every shade of intellect, every degree of mental capacity. There is no possibility of mistaking midnight for noon; but at what precise moment twilight becomes darkness is hard to determine.

[emphasis added]

[63] I am comfortable in concluding that Walter for many years prior to 2007 had lived an independent, and to some extent solitary, life. He was befriended by Russell and Patricia for many years and enjoyed their company. He saw in Artur a young man who could in time take over his farm. He also had over the years continuing but infrequent contact with Alfred and Susan.

[64] During the cross-examination of Kari Michel, counsel for Patricia described the relationship between Walter and Alfred prior to the time preceding 2008 as "estranged". That description was not accepted by Alfred and Susan and does not accurately describe the relationship. Indeed, the evidence of Patricia and

Artur was simply that they saw little interaction between Walter and Alfred over the years, but even they acknowledged that they were not involved with Walter on a 24-hour or even a day-to-day basis. There certainly was no evidence of a quarrel or a fight that ever occurred between Walter and Alfred which oftentimes can be the precipitator of an "estrangement". Although for many years, the relationship between Walter on the one hand and Alfred and Susan on the other could not be termed as close, contact between them increased after Alfred retired, and it became even more frequent when it became apparent that Walter needed support and could no longer live safely on his own, at which time Alfred and Susan stepped in.

[65] It was suggested by counsel for the Opposing Parties that the motivation of Alfred and Susan to assist Walter was driven by a desire to acquire Walter's funds. That motivation was denied by both Alfred and Susan, although the provision of a statement of account provided by Susan to Artur and their inability to clearly answer what has become of Walter's approximate \$118,000, between the date of their taking over until his date of death, does add some support to the impugned motivation. Nonetheless, their subsequent conduct does not support a purely financial motivation. Walter lived with Alfred and Susan for almost four years following April 2008. In my view, that would not have occurred if the motivations of Alfred and Susan were purely mercenary. It would have been too easy to simply gain control of his assets through a power of attorney which they felt was valid and then immediately send him off to a

nursing home. That did not happen, and the fact that it did not lends support that they were genuinely interested in his well-being.

[66] The bottom line is that I am not prepared to conclude that Alfred and Susan only stepped in because there was money in it for them. Rather, I am content to conclude that they stepped in because Walter, in his later years, needed their help which he had not needed in a big way for most of his life.

[67] In the early to mid-part of 2007, Walter began to show signs of failing. The call by Patricia in early August to involve the RCMP was a clear signal that life was changing for Walter at that time. However, the evidence does not persuade me that in the summer and fall of 2007, Walter lacked capacity. Indeed, even after the RCMP-initiated assessment in early August 2007, Walter was allowed to go home and live alone, albeit with supports. Further, in August and September 2007, Russell made arrangements for Walter to make a power of attorney and a will, something that inferentially suggests that he thought Walter had the capacity to do so. The evidence of Alfred and Susan supports the view that although Walter was failing, he was still able to live alone and carry on a normal, but more limited, existence. Artur testified that he believed that Walter drove until he broke his hip in December. Furthermore, there is no admissible medical evidence as to incapacity on Walter's part during the second half of 2007, or indeed April 2008. The fact that in October 2007 and again in November 2007 Mr. Stienstra declined to make a new power of attorney and will

for Walter is only an indication that he is a careful lawyer, from which no strong inference can be taken that Walter lacked capacity.

[68] Using the words of Lord Chancellor, had “twilight become darkness” when Walter made the 2008 Will? Alfred and Susan say it had not. The Opposing Parties say that it had, although they led little evidence that dealt with Walter’s condition in April 2008. Their evidence was more directed to the period prior to and surrounding the signing of the 2007 Will. The Opposing Parties, however, rely on the onus placed upon the Propounders because of suspicious circumstances and argue that the evidence marshalled by the Propounders is not reliable enough to satisfy the onus.

[69] For example, the Opposing Parties question the bona fides of Alfred and Susan and argue that they belatedly came into Walter’s life only because they saw a sibling with an imminent estate which should be directed to them. The Opposing Parties argue that the opinion of Kari Michel is beyond her expertise and is directed to matters other than capacity, and is based upon a limited opportunity to truly know Walter. The Opposing Parties argue that Dr. Engel’s note on the letter of April 9, 2008 confirms Walter’s mental infirmity because it demonstrates that his memory has failed significantly – he could not remember having made a power of attorney one or two days before the note was written. Finally, the Opposing Parties submit that the evidence of Mr. Alexander is unreliable because evidence from a lawyer based upon “usual practice” without the presence of detailed notes has been found lacking by appellate courts in this

province (see *Slobodianik v. Podlasiwicz*, 2003 MBCA 74, 173 Man. R. (2d) 287; *Sheen v. Sheen*, 2003 MBQB 18, 49 E.T.R. (2d) 114, aff'd 2004 MBCA 137, 190 Man. R. (2d) 51).

[70] I accept that there is some merit to the criticisms levelled by counsel for the Opposing Parties at the quality of the evidence led by the Propounders. Nonetheless, all of the points raised by the Opposing Parties go to the question of weight. None of the arguments advanced by the Opposing Parties cause me to completely disregard all of the evidence called by the Propounders. This is a case where the accumulation of evidence becomes important. The observations of Kari Michel, albeit from a non-medical person who knew Walter for approximately one month, are still observations. How did Walter strike her? She said that although Walter had limitations, she felt that he knew what was about him and what he wanted. The evidence of Dr. Engel, notwithstanding his note on the April 9 letter and his focus being on an assessment of how Walter would fare in the community upon release from the hospital rather than an assessment of will capacity, still indicates that Walter impressed as a man burdened by some undefined cognitive impairments who was also possessed of a degree of intellect as to what he wished to do with his life. And even though there are authorities that minimize the evidence of lawyers that do not keep detailed notes, that does not take away from the fact that Mr. Alexander said that he would not have prepared this will if anything about Walter caused him to think that there was no capacity. In addition, what notes he does have cover the appointment of

executors and the disposition of Walter's estate, both indicative of a discussion between Mr. Alexander and Walter concerning the making of a will.

[71] Is it just coincidence that three independent and uninterested witnesses express erroneous views on Walter's mental condition, or is it more likely that there is substance to the opinions which they each expressed? I prefer the latter. It is the totality of this evidence that counts, not the discounted nature of its individual parts.

[72] However, even if that totality did not satisfy the onus, there is one fact that clearly places the case over the threshold created by the balance of probabilities standard. In the circumstances, the 2008 Will makes sense.

[73] More than one witness said that Walter did not want to go into a personal care home. Indeed, in the excerpts read in from Russell's examination for discovery, Russell said that Walter did not even like the presence of home care supports. It must be remembered that Walter was a man independent throughout his life who was now being faced with controls by others and the prospect of living out his remaining years in a personal care home. I mean no criticism by this, but there was no suggestion made before me that Russell or Patricia or Artur were prepared to let Walter live with them. There was, however, an offer by Alfred and Susan to open their home to him. A will leaving his assets to Alfred and Susan is easily explained as an expression of gratitude on the part of Walter for their proposed help, or more cynically, a means of cementing an arrangement which was at that time Walter's only alternative to a

life in a personal care home. Either way, it demonstrates that Walter knew what he wanted and knew how to get it. When this factor is placed alongside the totality of the discounted evidence, the lack of any clear medical evidence impugning the 2008 Will, the lack of admissible medical evidence concerning the events of the summer and fall of 2007, the lack of evidence from Russell, the friction that had developed between Walter and Patricia and then between Walter and Russell and Artur, the lack of any close family members other than Alfred and Susan, and the fact that Russell and Artur, by surrendering Walter's records to Alfred and resigning as signatories to Walter's accounts, implicitly supported the validity of the 2008 Power of Attorney, I conclude that on a balance of probabilities, Walter had capacity to make the 2008 Will. Indeed, to hear that Walter spent the next three plus years outside a personal care home suggests to me that in April 2008, Walter's condition, although slowly deteriorating, had not reached the level where his freedom to make a will should be taken from him.

### Issues 2 and 3

[74] Given this decision, it is unnecessary to deal with issues 2 and 3. However, I simply add that had I concluded that the 2008 Will was invalid on the ground of lack of capacity, I would have concluded that he did have capacity at the time that he made the 2007 Will and the time that he made the Revocation Document in Mr. Steinstra's office on October 3, 2007. Had I been obliged to address that issue I would have been prepared under s. 23 of *The Wills Act*,

C.C.S.M. c. W150, to order that the lack of an additional witness to the Revocation Document was not fatal to the expression of Walter's intention at that time.

**CONCLUSION**

[75] Therefore, I direct that the 2008 Will be admitted to probate. Counsel may speak to me about costs, if otherwise not agreed between them.

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J.