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Stumpacher v Dyer, Estate Trustee for the Estate of Stephen John Stumpacher, 2024 ONSC 1588

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CITATION: Stumpacher v Dyer, Estate Trustee for the Estate of Stephen John Stumpacher, 2024 ONSC 1588
COURT FILE NO.: CV-19-00000154-0000
DATE: March 15, 2024

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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
ELFRIEDE STUMPACHER Plaintiff	R. Steven Baldwin, for the Plaintiff
– and –	
DIANE DYER, Estate Trustee for the Estate of Stephen John Stumpacher and THE ESTATE OF STEPHEN JOHN STUMPACHER Defendants	John E. Summers, for the Defendants

HEARD: January 30-31, February 1-3 and July 5, 2023

REASONS FOR DECISION

HURLEY, J.

Introduction

[1] Stephen Stumpacher died June 1, 2018 at the Belleville General Hospital. He was 85 years old. He had been diagnosed with terminal cancer about two weeks before his death.

[2] He executed a will on May 19, 2018 (the "Will") that was prepared by his daughter, the defendant Diane Dyer. His widow, the plaintiff Elfriede Stumpacher, alleges that the Will is invalid. If she is correct, he died intestate and the estate assets should be distributed in accordance with the provisions of the *Succession Law Reform Act*, R.S.O.1990, c.S.26 (the "*SLRA*").

[3] In the alternative, if I find that the Will is valid, she is seeking an equalization payment under s. 5 of the *Family Law Act*, R.S.O. 1990, c.F.3. (the "*FLA*") rather than take under the Will. She is also requesting an order for support from the estate under s. 58 of the *SLRA*.

[4] Ms. Dyer's position is that the Will is valid. She disputes Ms. Stumpacher's calculation of the equalization payment. She also submits that Ms. Stumpacher is not entitled to an order for support.

[5] For the reasons that follow, I find that the Will is valid and that Ms. Stumpacher is entitled to an equalization payment, the amount of which is based on my findings with respect to certain assets and liabilities of the late Mr. Stumpacher at the time of marriage and at his death. I do not make any order for support under s.58 of the *SLRA*.

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The pleadings and litigation history

[6] Ms. Stumpacher commenced this proceeding by notice of application issued on June 18, 2018. She sought a declaration that she was a dependant of Mr. Stumpacher and an order for support under the *SLRA*; an order setting aside the Will; in the alternative, an equalization payment; exclusive possession of the matrimonial home; and a preservation order.

[7] On July 17, 2018, Kershman, J. made an interim order granting Ms. Stumpacher exclusive possession of the matrimonial home located at 2400 County Rd. 3, Carrying Place (the "Property").

[8] On September 11, 2018, I made an order, on consent, appointing Ms. Dyer as the estate trustee during litigation; that she obtain and provide to Ms. Stumpacher the medical records of Mr. Stumpacher for the year 2018; and that the parties exchange sworn financial statements and net family property statements along with supporting documentation by October 5, 2018.

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[9] The application was converted to an action in January 2019. The parties agreed to an order giving directions. Paragraph one of the order of Tausenfreund, J. dated January 15, 2019 states:

> THIS COURT ORDERS that this matter proceed by way of Statement of Claim and that Elfriede Stumpacher shall be Plaintiff and Diane Dyer, in her capacity as Estate Trustee of the Estate of Steve John Stumpacher (also known as Stephen John Stumpacher) (the "Estate") shall be Defendant. Elfriede Stumpacher seeks a declaration that the Will dated May 19, 2018 (the "Will") is invalid and that the deceased died intestate or, in the alternative, a declaration that Elfriede Stumpacher is entitled to an equalization payment as set out in section 5 of the *Family Law Act*, R.S.O 1990,c. F.3. Diane Dyer seeks a declaration confirming the Will as the deceased's valid Last Will and Testament and that the distributions contained therein are binding on the estate of Steve John Stumpacher (also known as Stephen John Stumpacher).

[10] The order provided for the exchange of pleadings. In her statement of claim, Ms. Stumpacher claimed the following relief:

a. Dependant's support from the estate pursuant to s.58(1) of the *SLRA* as well as from assets available under s. 72 of the *SLRA*;

b. An order setting aside the Will;

c. Payment out of the estate to the plaintiff of the preferential share under ss. 45(2) of the *SLRA*, currently set by regulation at $200,000;

d. Payment out of the estate of one half of the residue after payment of the preferential share, pursuant to s. 46(1) of the *SLRA;* and

e. In the alternative, if the Will is not set aside, payment out of the estate equalizing the net family properties of the Applicant and Deceased pursuant to s. (2) of the FLA.

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[11] She did not specifically identify the grounds on which the Will should be set aside.

[12] With respect to the support claim, paragraph 14 of the statement of claim alleges: “The Will did not make proper provision for the plaintiff’s financial needs as a dependant of her husband or her rightful entitlement as his surviving spouse in a long-term marriage.”

[13] Ms. Dyer delivered a statement of defence and counterclaim. She denied that the plaintiff was a dependant within the meaning of s. 57(1) of the *SLRA* or that she had any entitlement under ss. 45(2) or 46(1); asserted that the Will was valid, stating that Mr. Stumpacher was of sound mind and had testamentary capacity when he executed the Will; that the plaintiff was not entitled to an equalization payment under the *FLA* because she had failed to make an election under s. 6(10) or, alternatively, her share upon equalization should be varied pursuant to s. 5 of the *FLA* on the basis that she improvidently depleted her assets during the course of the marriage.

[14] In the counterclaim, she sought the following relief:

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a. A declaration that the Will is the last valid will of Mr. Stumpacher and that a certificate of appointment of estate trustee be issued to the defendant;

b. An order that the plaintiff pay occupation rent with respect to her occupation of the home at 2400 County Road #3, Carrying Place (the "Property") commencing June 1, 2018 up to the date she vacated the Property;

c. An order that the plaintiff pay the property taxes and utility expenses until she vacated the Property;

d. Damages of $50,000 in respect of repair costs to the Property; and

e. An order granting the defendant possession of the Property; and

f. An order directing the sale of the Property.

[15] In her defence to the counterclaim, Ms. Stumpacher asserted that the Property was well maintained and that it was ready to be sold in its current condition.

[16] In August 2019, Ms. Stumpacher brought a motion seeking an order directing the sale of the Property and other terms with respect to its sale. Tranmer, J. ordered that the Property be listed for sale immediately; that Ms. Stumpacher did not owe any occupation rent up to the date of his order (August 13, 2019); that she pay any ongoing household expenses going forward, which he identified as utilities, cable, propane, taxes and insurance, for as long as she lived in the house; and that any such expenses be deducted from her share of the estate assets when they were distributed.

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[17] At a case conference before Muszynski, J. on February 15, 2022, the parties agreed to a summary trial and a timetable for the exchange of affidavits.

[18] At another trial management conference on August 23, 2022, Muszynski, J. gave further directions with respect to the conduct of the trial including the exchange of net family property statements and written opening statements which identified the issues for trial.

[19] After I was assigned the trial, I conducted a trial management conference on January 23, 2023. Counsel confirmed that they had substantially complied with the directions given by Muszynski, J. They agreed that examinations-in-chief would be limited to 30 minutes, with no time limit on cross-examinations.

[20] Ms. Stumpacher's case consisted of the affidavit evidence from her, Jack and Claudette Straiger and Julie Lange. All of them testified. In addition, Ms. Stumpacher called Matthew Getzler, a lawyer retained by Ms. Dyer on behalf of her father. He did not deliver an affidavit in advance of the trial.

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[21] Ms. Dyer's evidence consisted of affidavits from her, Peter Cesnar, Doris Richards and Wolfgang Reisinger. They also testified, with the exception of Mr. Reisinger who died in June 2022.

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Background Facts

[22] There are many facts that are essentially undisputed. Here, I will review relevant evidence which provides important context for the determination of the legal issues in this case.

[23] Mr. Stumpacher was born June 19, 1932 in Austria. He emigrated to Canada after World War II with his wife Helen. They lived in Toronto where Mr. Stumpacher worked for the publishing company Maclean-Hunter in a management position. Ms. Dyer was their only child.

[24] Ms. Stumpacher was also born in Austria, on December 31, 1931. She emigrated to Canada in 1951. She married John Zvaronich. They had two children, Pauline and Bryan.

[25] Mr. Stumpacher and Mr. Zvaronich were friends and coworkers. The Austrian community in Toronto was tight-knit and the couples knew each other and socialized together.

[26] After Mr. Stumpacher retired, he and Helen moved to the Property in December 1997. It was a custom-built, waterfront home on about 3 acres property. They owned it in joint tenancy.

[27] Mr. Stumpacher made a will in December 2002. A local lawyer, Peter McCabe, prepared it. Under this will, he appointed two friends, Ian Reilly and Garry McLean, as the estate trustees. Helen was the sole beneficiary. Ms. Dyer was the sole beneficiary in the event her mother predeceased her father.

[28] Mr. McCabe also prepared powers of attorney. Mr. Stumpacher named Ms. Dyer his attorney for property and personal care.

[29] Helen died on December 14, 2002.

[30] Mr. Zvoranich had died in 1989. Sometime in 2003, Mr. Stumpacher contacted Elfriede who was still living in Toronto at the time and asked her

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to lunch. Their relationship developed from there and, either later that year or in early 2004, she moved to the Property. They were married on October 20, 2007.

[31] Ms. Stumpacher owned two properties, a cottage in Denbigh and a home in Toronto. She sold the cottage in 2006 for $165,000 and her Toronto home to her daughter Pauline in 2007 for $200,000. Both were mortgage-free. She invested most of the sale proceeds with a brokerage in Belleville, ScotiaMacLeod, on the recommendation of Mr. Stumpacher. This brokerage also handled his investments.

[32] On the date of their marriage, Mr. Stumpacher had $310,700 invested there, the bulk of which was in a RRIF. Ms. Stumpacher had $282,817.

[33] They used the same investment advisor, Julie Lange, but kept their investments separate. They also opened a joint bank account to which they made equal monthly contributions of $1,500 to cover household expenses. There was no mortgage on the Property.

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[34] By all accounts, they had a happy and successful marriage. They did not live extravagantly but enjoyed many trips together. When they travelled, Ms. Stumpacher paid for her share of the trip's cost.

[35] Ms. Dyer is 58 years old. She has lived in Florida with her husband Larry since 1994. She had a very good relationship with her father, speaking to him frequently and regularly travelling to the Property to visit him. Mr. Stumpacher also visited her in Florida, both when her mother was alive and after he remarried. Ms. Dyer and Ms. Stumpacher also had, until the eruption of this legal dispute, a close relationship.

[36] In 2012, Mr. Stumpacher designated Ms. Dyer the beneficiary of his RRIF and Ms. Stumpacher designated her daughter Pauline as the beneficiary of her RRIF.

[37] Mr. Stumpacher was in relatively good health for a man of his age until May 2018. After a trip to the emergency department early that month due to a persistent cough, he learned that he had terminal cancer with a life expectancy of 2 to 4 months.

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[38] Mr. Stumpacher was formally diagnosed by Dr. Negar Chooback on May 16, 2018. He had had imaging studies done before that date which indicated that he probably had cancer. On May 9 and May 14 he was seen by, respectively, a cardiologist, Joseph Campbell, and a gastroenterologist, Colin Struthers, who both noted that they discussed the imaging results with him.

[39] In a chart note dated May 14, Dr. Struthers wrote "Steve was quite shocked to hear the news that his imaging was very convincing for cancer. He is fully aware of his diagnosis."

[40] In a chart note dated May 16, Dr. Chooback wrote: "We had a long discussion about what treatment would look like to Steve. Initially, he was fixated on the idea of wanting to go home and spend as much time with his family as possible. Steve has agreed for me to make arrangements for a biopsy and staging investigations."

[41] After learning of her father's condition, Ms. Dyer and her husband Larry travelled to the Property, arriving on May 16.

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[42] Ms. Dyer knew about the will that her father had made in 2002 and had a copy of it. Soon after her arrival at the property, she prepared another will using this prior will as a template. Ms. Dyer was named as the estate trustee in the new will. It contained a term designating her and Ms. Stumpacher as the beneficiaries of his RRIF and RRSP with the stipulation that $100,000 would be paid from these plans to Ms. Stumpacher with the balance paid to Ms. Dyer. There was also a bequest to Ms. Stumpacher of all "items, chattels and furnishings" located at the Property. He bequeathed the Property "and any of its contents not chosen to be kept by Elfriede Stumpacher" to Ms. Dyer and "any and all funds in my bank accounts, Registered Savings Accounts and Investment Accounts minus the funds paid to Elfriede Stumpacher as described in Section 4 of this Last Will and Testament." The only other difference between the 2002 will and the new will was a term that he be cremated and his ashes disposed of as Ms. Dyer deemed appropriate.

[43] While Ms. Dyer was in Belleville, she, her father and Ms. Stumpacher went to a branch of the Scotiabank in Belleville where Mr. Stumpacher had a safety deposit box. He closed the safety deposit box and Ms. Dyer was added as a joint account holder to his Scotiabank account. The date of this trip to the bank is disputed; Ms. Dyer says that it happened on May 19, the same day that the Will was signed; Ms. Stumpacher thought it was on May 17.

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[44] Ms. Dyer asked Claudette and Jack Straiger, who were longtime friends and neighbours of the Stumpachers, to come to the house to witness the execution of the new will on May 19. They did. Mr. Stumpacher signed the Will in their presence and they signed it as witnesses.

[45] Ms. Dyer and her husband returned to Florida on May 21.

[46] On May 22, Ms. Dyer contacted Matthew Getzler, an experienced estate lawyer, for advice on estate planning issues.

[47] That same day, Ms. Lange's assistant, Elissa Lee, whose title at ScotiaMcLeod was "Senior Associate, Branch Administrator" attended the Property for the purpose of taking Mr. Stumpacher's instructions about the liquidation of his investment portfolio. She met with him and he signed a document prepared by her which authorized ScotiaMcLeod to redeem his nonregistered account in its entirety; redeem specific securities in his RRIF; and deposit $25,000 into Ms. Stumpacher's account at Scotiabank with the balance deposited in his joint bank account with Ms. Dyer. These transactions were completed by ScotiaMcLeod on May 23.

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[48] Mr. Stumpacher's next attendance at the hospital was on May 26. He went to the emergency department because he had experienced worsening dyspnoea (laboured breathing) and a cough over the past three days. He was admitted to the Intensive Care Unit and remained there until he died on June 1.

[49] The physician who assessed him on May 26, Dr. Daniel Soliman, noted:

> When talking to Mr. Stumpacher regarding his recent cancer diagnosis, he understands that his cancer is quite advanced and that his prognosis is relatively poor. He does state that his goal of this hospitalization is to return home and to spend more time at home with his wife and family.

[50] Dr. Soliman went on to write under "Assessment and Plan":

> Mr. Stumpacher understands the prognosis of the malignancy and the extent of it. His goals for quality of life are not quantity of life at this time. His family is fully supportive and I described to the family that he would not be a candidate for CPR or intubation. I did not offer any prospect of any vassopressors. He does understand that if he was to get worse that we would have this conversation again and he might be towards his end of life if our medical interventions do not manage to wean him off the BiPAP or do not treat his CHF or his pneumonia appropriately.

[51] Both Dr. Soliman and another physician who saw Mr. Stumpacher on that date, Dr. Roger Leong, described him as alert and oriented.

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[52] On May 30, he was seen by a respirologist, Dr. Miriam Harrison. The respirology resident, Dr. Kristin Nesse, wrote in a Consultation Note:

> On exam today, he was sitting comfortably and able to speak in full sentences despite wearing a BiPAP.
>
> Dr. Harrison had a prolonged discussion with the patient and his family today about his prognosis. She discussed the fact that his respiratory status is currently the most concerning feature, and that his cancer was secondary to his lung pathology. She described that he was on appropriate therapy and not improving and thus there was a significant risk that this would not improve and his lifespan would be limited to days, and at best, weeks. Steve understood and indicated that his primary concern was whether or not he would be able to go home.
>
> He and his family were very interested in ongoing medical therapy with all current medications to see if he could turn a corner and if his O2 requirements could decrease. If his oxygen requirements do become manageable, there is a possibility that he would be able to go home with palliative care.
>
> He and his family recognize that at this point in time, with his respiratory status and likely two incurable cancers, that his prognosis is very poor and time is very limited.

[53] Mr. Stumpacher's health deteriorated. According to a Discharge Summary prepared by Dr. Carolyn Tram on June 1, Mr. Stumpacher and his family spoke to the on-call physician on the night of May 31, Dr. Andrew Samis, to request palliation. This was initiated and the following morning, he passed away.

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[54] Ms. Stumpacher had given a copy of the Will to Jack Straiger a few days before. He did not think she was treated fairly in the Will and advised her to contact a lawyer. He scheduled an appointment for her with Richard Wright, a local lawyer. Ms. Stumpacher saw an associate lawyer at Mr. Wright's office, Josiah Sawatsky, on June 1. That same day, Mr. Sawatsky wrote to Ms. Lange stating that Ms. Stumpacher disputed the validity of the Will and requested that all of Mr. Stumpacher's accounts be frozen.

[55] Ms. Stumpacher remained living at the Property until October 2020. It was sold that month for $1,580,000. The net proceeds of sale have been held in two interest-bearing trust accounts of the lawyers who acted for the parties at the time of its sale. She has lived with her daughter Pauline in Renfrew since leaving the Property.

[56] As of the date of her husband's death, Ms.Stumpacher had $287,880 in investment portfolio at ScotiaMcLeod. She had no debt. According to her 2017 tax return, her line 150 income was $46,161,96. Her investment portfolio now has a value of $314,823. Her current income consists of Old Age Security and Canada Pension Plan benefits.

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The Issues

[57] The principal issues are the validity of the Will; the calculation of the equalization payment; and the support claim under the *SLRA*.

[58] Turning to the first issue, Ms. Stumpacher challenges the validity of the Will on multiple grounds: whether the formal requirements under s.7 of the *SLRA* were met in the circumstances; Mr. Stumpacher's knowledge and approval of the contents of the Will; his testamentary capacity; undue influence; and suspicious circumstances.

[59] With respect to the equalization payment, the parties were able to narrow the disputed issues. The major ones are: the value of the Property as of the date of death; the ownership of funds in the joint bank account (i.e. whether the funds belong to the estate or were a gift to Ms. Dyer); the value of a vehicle and boat; and an alleged loan to Mr. Stumpacher's nephew, Walter Reisinger (this dispute is twofold – was there, in fact, any such debt existing as of the date of Mr. Stumpacher's death and, if there was, whether the claim is statute- barred because of the expiration of the limitation period).

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[60] In relation to the claim for support under the *SLRA*, the questions for determination are entitlement to support and quantum.

[61] Ms. Stumpacher also raised an issue about alleged ambiguities in the Will. This was not pleaded and only arose during the course of the trial. Ms. Stumpacher did not request leave to amend the statement of claim to plead this allegation. According to Ms. Stumpacher, the alleged ambiguities are relevant to Mr. Stumpacher's testamentary capacity. I will consider this particular submission when I review the issue of testamentary capacity but otherwise it is not a legal claim that Ms. Stumpacher can advance in this litigation.

[62] There are other legal issues of less significance which I will identify and discuss later in this decision.

The validity of the Will

[63] I begin by outlining the applicable legal principles.

[64] Subsections 4(1) and 7(1) of the *SLRA* provided at the time:

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> 4(1) Subject to sections 5 and 6, a will is not valid unless
>
> (a) at its end it is signed by the testator or by some other person in his or her presence and by his or her direction;
>
> (b) the testator makes or acknowledges the signature in the presence of two or more attesting witnesses present at the same time; and
>
> (c) two or more of the attesting witnesses subscribe the will in the presence of the testator.
>
> 7 (1) In so far as the position of the signature is concerned, a will, whether holograph or not, is valid if the signature of the testator made either by him or her or the person signing for him or her is placed at, after, following, under or beside or opposite to the end of the will so that it is apparent on the face of the will that the testator intended to give effect by the signature to the writing signed as his or her will.

[65] In *Silano v Silano,* 2019 ONSC 2776, Dietrich, J. set out the legal principles with respect to knowledge and approval of the contents of the will and the doctrine of suspicious circumstances at paras. 26-31:

> A will is only valid to the extent that the testatrix knew and approved its contents. As a result, a court may strike out passages or phrases in a will that have been inserted by mistake where it can be demonstrated that the testatrix did not intend or approve those words: See *Balaz Estate v. Balaz,* [2009] O.J. No. 1573 ("Balaz Estate") at para. 7, citing with approval *Barylak v. Figol*, [1995] O.J. No. 3623 (Gen. Div.), paras. 25 and 26 and *Feeney's Canadian Law of Wills (Fourth Edition),* § 3.28.
>
> In *Balaz Estate*, Justice Brown, as he then was, confirms, at para. 9, that: "[t]he Superior Court of Justice exercises exclusive jurisdiction in testamentary matters – it grants probate and interprets wills." At para. 10, Justice Brown states: "Suffice it to say, where a court seeks to ascertain whether the testatrix knew and approved of certain language in her will, it can take account of the evidence about the circumstances

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surrounding the making of the will, including referring to earlier wills or drafts of the particular will, as well as direct evidence of her intention [citations omitted]."

As set out in *Vout v. Hay*, 1995 CanLII 105 (SCC), [1995] 2 SCR 876, at para. 26, if a will is 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.

However, the presumption may be rebutted by evidence of suspicious circumstances relating to one or more of: i) circumstances surrounding the preparation of the will; ii) circumstances tending to call into question the capacity of the testator; or iii) circumstances tending to show that the free will of the testator was overborne by acts of coercion or fraud: *Vout v. Hay,* para. 25. Where suspicious circumstances are present, the presumption is spent and the propounder of the will reassumes the legal burden of proving knowledge and approval: *Vout v. Hay*, para. 27.

As stated in *Neuberger Estate v. York*, 2016 ONCA 191: "*Vout v. Hay* established that if such evidence is adduced, the legal burden reverts to the propounder." To discharge the burden of proof, the propounder must dispel the suspicious circumstances.

Suspicious circumstances are pieces of evidence which go to a testator's knowledge and approval. It is the onus of the propounder of the will to dispel all suspicion arising from them before the Court will grant probate: *Re Sguigna Estate*, 1994 CarswellOnt 2700, 47 A.C.W.S (3d) 1132 at paras. 6-7.

[66] Some of the factors that I should consider when suspicious circumstances are alleged include: did the will in question constitute a significant change from a former will; the extent of any physical or mental impairment of the testator around the time the will was signed; whether the will generally

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seems to make testamentary sense; the circumstances surrounding the making of the will; and whether a beneficiary was instrumental in the preparation of the will: *Royal Trust Corporation of Canada v. Saunders*, 2006 CanLII 19424 at para. 78.

[67] The onus rests with the propounder of the will to establish testamentary capacity: *Vout,* at paras. 21, 26. I assess testamentary capacity as of the date the will is executed: *Gironda v. Gironda*, 2013 ONSC 4133, at para. 50. In *Stekar v. Wilcox*, 2017 ONCA 1010, the Court stated at para. 14:

> The test for testamentary capacity has been well-established since the Supreme Court of Canada, in *Skinner v. Farquharson* (1902), 1902 CanLII 87 (SCC), 32 S.C.R. 58, adopted the formulation of the test offered in *Banks v. Goodfellow* (1870), L.R. 5 Q.B. 549, at p. 565:
>
> > It is essential to the exercise of such a power [of testamentary capacity] 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.

[68] The party who alleges undue influence has the burden of proving that the mind of the testator was overborne by the influence exerted by another person such that there was no voluntary approval of the contents of the will.

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This requires "proof that the testator's assent to the will was obtained by influence such that instead of representing what the testator wanted, the will is a product of coercion": *Vout,* at paras. 20-21. It is not sufficient to show the existence of persuasion or influence; rather, "actual coercion through the 'effective domination' of the testator's (free) will by that of another must be demonstrated: *Botnick v. The Samuel and Bessie Orfus Family Foundation*, 2021 ONSC 3043, at para. 254.

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Application of the Legal Principles

[69] The main witnesses were Ms. Stumpacher and Ms. Dyer. The other witnesses, with the exception of Mr. Getzler, knew the Stumpachers and had contact with them within the same period of time. Their evidence was directed to the knowledge of the financial arrangements between Mr. Stumpacher and Ms. Stumpacher, their observations of Mr. Stumpacher around the time the Will was executed and afterwards and conversations they had with both of the Stumpachers.

a. Were the formal requirements under the *SLRA* met?

[70] Mr. Stumpacher signed the Will in the presence of two witnesses, Jack and Claudette Stragier. That evidence is not disputed. The pages of the Will were not initialed by Mr. Stumpacher and the Stragiers but the *SLRA* does not require any such initialing of the pages of a Will.

[71] I find that Ms. Dyer has established that the formal requirements with respect to the execution of the Will were met in this case.

b. Were there suspicious circumstances?

[72] I will start my review of the evidence with the testimony of Ms. Dyer and the witnesses that she called. [1]

[73] Ms. Dyer knew that her father and Ms. Stumpacher kept their assets separate and that Ms Stumpacher contributed $1,500 each month to the household expenses. She characterized this as “rent”. Her father had told

1 Mr. Baldwin, in final submissions, asked that I draw an adverse inference from Ms. Dyer’s failure to call her husband Larry as a witness, relying on the decision in *Levesque v. Comeau*, 1970 SCC 4. This decision has been restricted to its particular facts: see, for example, *Amtim Capital Inc. v. Appliance Recycling Centers of America*, 2022 ONSC 6877, at paras.88-92. Mr. Baldwin asserts that the adverse inference should be that Mr. Dyer would not corroborate the evidence of his wife. There is no basis for drawing such an inference in this case. Mr. Baldwin could have taken legal steps to obtain Mr. Dyer’s evidence for the trial if he thought it might contradict that of Ms. Dyer. At the very least, he should have raised this issue in advance of the summary trial (or during it) so that Ms. Dyer would have been on notice of his position and been able to respond rather than leaving this legal argument to final submissions.

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her in the past that he and Ms. Stumpacher had agreed that their respective assets would be left to their adult children.

[74] After she arrived at the Property on May 16, her father told her that he wanted to update his will. Although his doctor had informed him that he had a life expectancy of 2 to 4 months, he wanted to make sure that his estate was in order and to make a new will immediately. He also said that he wished to avoid probate fees. Ms. Dyer observed that he was having some problems with his breathing but she had no concern over his mental capacity.

[75] Her father told her that Mr. McCabe, who had prepared the 2002 will, had retired. She discussed the terms of a new will with her father over the next two days. She used the 2002 will as a template and made changes to it that were in accordance with her father's wishes. He wanted her to receive all of his assets but the will was to include a bequest of $100,000 to Ms. Stumpacher and also include a term that she could take any furnishings from the house that she wanted. He had a burial plot in Richmond Hill but now preferred cremation and that Ms. Dyer have control of the ashes.

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[76] Although Ms. Dyer was the beneficiary of her father's RRIF, her father wanted to liquidate it to ensure that the bequest of $100,000 was available to Ms. Stumpacher without Ms. Dyer having to sell the Property.

[77] According to Ms. Dyer, both she and her father discussed the terms of the proposed will with Ms. Stumpacher and that she was grateful about the $100,000 bequest.

[78] Ms. Dyer purchased a printer on May 18 and prepared the new will that day. Ms. Dyer testified that both her father and Ms. Stumpacher reviewed it.

[79] On the morning of May 19, Ms. Dyer, her father and Ms. Stumpacher went to a branch of the Scotiabank located at the Quinte Mall in Belleville. Her father closed his safety deposit box and made her a joint owner of his bank account.

[80] That afternoon, Ms. Dyer asked the Straigers to come to the house to witness her father's execution of the will that she had prepared. She was

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present in the kitchen with her father and the Straigers when the three of them signed the Will.

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[81] Following the execution of the Will, the Straigers stayed at the house for a period of time. Ms. Dyer and her husband took some photographs and a short video. These were included as exhibits to her affidavit. The metadata indicated that the images and video were taken on May 19 shortly before 6 p.m. Ms. Dyer described her father as being relaxed and coherent that day which is consistent with his appearance and the conversation recorded on the video.

[82] Mr. Stumpacher kept the original Will. Ms. Dyer made copies for herself and Ms. Stumpacher. She returned to Florida with her husband on May 21 to take care of some personal matters there, intending to return to Belleville later that week.

[83] Ms. Dyer contacted Mr. Getzler on May 22 on the recommendation of a Toronto accountant, Fred Solmon. The purpose for consulting him was to receive estate planning advice in relation to transfer of the Property to her and her father as joint tenants and the transfer of her father's investment portfolio to her. Mr. Getzler was formally retained to act on her father's

behalf. Mr. Getzler recommended that Mr. Stumpacher consult Andrew Chris, a family law lawyer he knew.

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[84] In an email to Ms. Dyer dated May 24, Mr. Getzler wrote, in part: “Have you spoken with your father and/or your stepmother and confirmed whether she’s willing to provide her consent to the transfer from your father to you and your father? Have you discussed her needs generally? I would also implore you to reach out to Andrew Chris to discuss the family law matters with him further.”

[85] Ms. Dyer’s husband replied to this email indicating that Ms. Dyer intended to address those issues when she returned to Belleville on May 25 and that she would also reach out to Mr. Chris.

[86] Later the same day, Ms. Dyer emailed Mr. Getzler. She wrote: “Thank you so much Matt. I will have the discussion regarding the title on the house as soon as possible with Dad and Frieda. Hoping we can be at the stage of getting documents executed early next week. If you could prepare a draft that I could show them this weekend, that would be awesome.”

[87] Mr. Getzler prepared a memorandum dated May 25, 2018 addressed to Mr. Stumpacher and copied to Ms. Dyer. The purpose of it, he stated, was to "summarize the tax consequences and benefits associated with the proposed estate plan whereby Diane Dyer will become a joint holder of the real property known municipally as 2400 Rednersville Road and certain investment accounts currently owned by you." Mr. Getzler enclosed drafts of the documents that Mr. Stumpacher and Ms. Dyer would need to sign in order to implement the proposed estate plan.

[88] Ms. Dyer flew back to Canada on May 25 arriving at the Property in the evening. Either late that night or early the next morning, Mr. Stumpacher was taken to the hospital. Although he was quite ill, he remained lucid over the next few days. Ms. Dyer gave him one of the draft documents that Mr. Getzler had prepared entitled "Acknowledgement and Direction" relating to the transfer of the Property which he signed on May 27.

[89] In cross-examination, she agreed that, in an affidavit sworn September 6, 2018 that was filed in response to the application commenced by Ms. Stumpacher, she deposed that Mr. Getzler spoke to her father and provided instructions to him. She acknowledged that this was not true, stating that her lawyer at the time was responsible for the inaccuracy. She explained

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that she presented that document to her father and he signed it because it was in accordance with his wishes and they both knew he would die soon.

[90] Ms. Dyer testified that she had no plans at the time to sell the Property and expected that Ms. Stumpacher would continue to live there for a period of time and that she and her husband would visit her at the Property.

[91] Mr. Csenar and Ms. Richards were longtime friends of Mr. Stumpacher. Mr. Csenar had known him for more than 60 years; Ms. Richards for 40 years. They also knew Ms. Stumpacher quite well. After learning of Mr. Stumpacher's diagnosis, they visited him at the Property on May 25 and spent most of the day with him and Ms. Stumpacher.

[92] Mr. Csenar described Ms. Stumpacher as "very much the same person as he always had been", that he was coherent, aware of what was going on around him and that he had accepted his terminal prognosis. Ms. Richards described him in similar terms.

[93] Both knew that the Stumpachers had kept their assets separate during their relationship; that Ms. Stumpacher made a monthly contribution of

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$1,500 to their common living expenses; and that they planned to give their respective assets to their adult children.

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[94] At some point during the day, Mr. Csenar asked Mr. Stumpacher if he could help out with respect to his estate. They had talked many years before about Mr. Csenar being an estate trustee for him. Mr. Stumpacher told him that Ms. Dyer was going to be his estate trustee and that it was a simple estate with all the money going to her. He did not tell him the specific terms of the Will.

[95] Ms. Richards spent time alone with Ms. Stumpacher that day. She told Ms. Richards that she knew that Mr. Stumpacher was giving the Property to Ms. Dyer and she had no objection to that, telling Ms. Richards that “the house was Helen’s and never hers.” She had said the same thing to Ms. Richards in the past.

[96] She described Ms. Stumpacher as very anxious. Ms. Stumpacher was worried about her finances and told her that Mr. Stumpacher had always helped manage her investment portfolio. She was unsure where all her financial records were and, when they got back to the house, Mr.

Stumpacher got the file for her. Ms. Stumpacher "seemed relieved" after she received them.

[97] Ms. Stumpacher showed her a copy of the Will. She recalled that it included a bequest of $100,000 to Ms. Stumpacher and stated that the Property was going to Ms. Dyer. Ms. Richards testified that she was not surprised by its contents and thought that Mr. Stumpacher was being generous in bequeathing her $100,000 because of their prior arrangements to keep their assets separate and give them to their children. Ms. Stumpacher did not make any complaint to her about the contents of the Will.

The evidence of Ms. Stumpacher and her witnesses

[98] In her affidavit, Ms. Stumpacher stated that Ms. Dyer arrived at the Property on May 16 and that she, her husband and Ms. Dyer to the Scotiabank at the Quinte Mall the following day. She understood that her husband intended to open a joint account in her and Ms. Dyer's name and deposit $200,000 in it for the two of them to use for the upkeep of the house until it was decided what was going to happen with it. However, upon arrival at the bank, Ms. Dyer "pushed me aside" and, contrary to her husband's

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express wishes, a joint account was not opened. Mr. Stumpacher also closed the safety deposit box at that time.

[99] According to Ms. Stumpacher, neither her husband nor Ms. Dyer discussed the contents of the Will with her. She did not know that Ms. Dyer had prepared one. She did not see it on May 19 and was taken aback when the Straigers came to the house to witness the Will. She did not know of any plan by her husband to sign a will on that date. She was present when the Will was signed by her husband and the Straigers.

[100] Ms. Dyer gave her a copy of the Will on May 21 before she left for Florida. She claimed that she did not look at it until after her husband had died. She testified that she showed it to Mr. Straiger before his death and he told her that she should see a lawyer. She said that she did not want to see one. Mr. Straiger later told her that he had made an appointment with a lawyer for her so that she could “see how badly you were treated”.

[101] She denied that she had shown her copy of the Will to Ms. Richards or discussed its contents with her.

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[102] In her affidavit, Ms. Stumpacher deposed that her husband had always told her "what was his was mine." Because of this statement, she found it "inconceivable" that he would not make her a co-executrix in his Will and that her inheritance would be only $100,000 and the household furnishings. She averred: "He [Mr. Stumpacher] knew that our combining of financial resources was the reason we maintained the home and property without his having to otherwise sell the property".

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[103] In her testimony, Ms. Stumpacher said that when she had discussed selling her Toronto home with Mr. Stumpacher, he had told her "Don't you worry. This is our home. This is your house. This is my house. Your house. This is our home."

[104] In cross-examination, she agreed that she invested the sale proceeds of her Toronto home and the cottage solely in her name. She testified as follows about their financial arrangements:

> Q: And in terms of your finances with Mr. Stumpacher, I understand that you always – you paid your own way, right?
>
> A: Yes, I did.
>
> Q: You were-you were independent and you-you paid your way and he paid his way?
>
> A: Exactly, yes

Q: Alright. As an example, when you would travel-when you were in Florida, Mr. Stumpacher may pay for the plane tickets on his credit card but you would pay him back?

A: I reimbursed. Yes, when we got back, I gave him the money back, yes.

Q: Okay. And I also understand that when you got married, your agreement was that you would keep your financial matters separate, is that right?

A: Yes. My husband… My husband wanted it that way.

Q: I also understand in terms of any joint accounts, the two of you only had one joint account, that correct?

A: Yes.

Q: And I understand throughout the duration of your marriage you – every month – would deposit $1500 into that joint account?

A: Yes

Q: Is that right?

A: Exactly

Q: And that was to cover living expenses?

A: So, my husband put the same amount into the joint account with me and I also took some extra money out for my- for my investments.

[105] Ms. Stumpacher gave evidence about her husband's medical treatment in May 2018 but did not say anything about his mental acuity during that period of time. She thought that he "wasn't the same" on the date that he signed the Will but did not explain what she meant by that other than he did not appear as alert as he usually was.

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[106] The Straigers swore affidavits in support of Ms. Stumpacher's application in June 2018. Both were dated June 15. The same affidavits were filed for the summary trial. The affidavits are essentially identical and both are brief (Mr. Straiger's was 11 paragraphs in length and his wife's was 10).

[107] In his affidavit, Mr. Straiger deposed that he went to the house on May 19, 2018 to witness the signing of the Will. Both Ms. Stumpacher and Ms. Dyer were present in the room when the Will was executed. According to him, Ms. Dyer remained living at the property until June 8 and he spoke to her several times after her father's death.

[108] Ms. Straiger deposed that she and her husband had entertained Ms. Dyer at their home on May 18. Ms. Dyer told them that her father's will pre-dated her mother's death in 2002 and needed to be updated. She said that she intended to prepare a new will for him because he was ill and likely to die in the near future. She did not discuss the terms of this new will. However, Ms. Dyer had told her on multiple occasions in the past that Ms. Stumpacher had no right to the Property and that, when Ms. Straiger replied this was unfair because it was the matrimonial home, Ms. Dyer's verbatim response was "Elfriede will never go to a lawyer." The balance of

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the affidavit confirmed that she and her husband witnessed the execution of the Will the next day.

[109] In their testimony, both added significant details about what took place on May 19. Further, Mr. Straiger testified about conversations he had with Mr. Stumpacher, Ms. Stumpacher and Ms. Dyer both before and after May 19 that were not mentioned in his affidavit.

[110] Both testified that they went to the house in the evening of May 19. Ms. Straiger said the house was in darkness and Mr. Stumpacher was sitting at the kitchen table. She was shocked by his appearance. She described the atmosphere as “surreal”. Mr. Stumpacher required Ms. Dyer’s assistance to sign the Will. He did not say anything; only Ms. Dyer spoke. She and her husband left within minutes.

[111] Mr. Straiger testified-in-chief that when Ms. Dyer and her husband were at their house on May 18, Ms. Dyer told them that she wanted them to witness the new will and that she was the estate trustee. Mr. Straiger told her that she should not be the estate trustee because she was a resident of Florida. They had a discussion about the terms of the will including that the Property was being given to her. He told her that she should get legal

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advice because it was the matrimonial home. When Ms. Dyer called him to come over to the house to witness the signing of the Will, he told her that he did not want to do so and repeated his advice that they should get a lawyer. However, he and his wife agreed to come over.

[112] He testified that they went to the house in the evening, around 8:30-9 p.m. He described Mr. Stumpacher as looking like a "zombie". He did not speak. They witnessed the signing of the Will and immediately left. He estimated that he and his wife were in the house for less than five minutes.

[113] He testified that he spoke to Mr. Stumpacher the next day, which was Monday, about his estate. Mr. Stumpacher told him that he wanted to get the Property sold and that Ms. Stumpacher would move into a condominium. Mr. Stumpacher also told him that he had about $250,000 invested in cash and securities. He described Mr. Stumpacher as "his usual self".

[114] On Friday or Saturday, after Mr. Stumpacher had been admitted to the hospital, Ms. Stumpacher showed him a copy of the Will. He was "stunned" by its terms, believing it was contrary to what he had discussed with Mr.

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Stumpacher earlier that week. He told Ms. Stumpacher to get legal advice and he scheduled the appointment with Mr. Wright's office for June 1.

[115] He described Ms. Stumpacher as distraught on the day of her husband's death and he discussed cancelling the appointment with her. However, she wanted to go to it and he took her to Mr. Wright's office.

[116] In cross-examination, he insisted that there were no photos taken on May 19 after the execution of the Will. When he was shown the photographs with the metadata indicating the date and time, he contended that Ms. Dyer could have manipulated the data. He claimed that the only photos which were taken occurred on May 23 and disputed that Ms. Dyer was in Florida on that date. He suggested that Ms. Dyer had engaged in some form of photoshopping to create photographs that supported her position in this lawsuit.

[117] He was not aware of Ms. Stumpacher's financial circumstances and specifically that she had her own investment portfolio as a result of selling properties she had owned. He was not aware that the Stumpachers kept their financial affairs separate and apart but knew that Ms. Stumpacher contributed $1,500 month to a joint account. He believed that a surviving

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spouse was legally entitled to one-half of the value of the matrimonial home and expressed surprise that, under the terms of the Will, Ms. Stumpacher was, in his view, “disinherited”.

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[118] In her affidavit, Ms. Lange confirmed that the Stumpachers kept separate investment accounts at ScotiaMcLeod, both of which she managed. They had instructed her in 2004 to withdraw equal monthly amounts from their respective portfolios which they used for living expenses. The money was deposited in their joint bank account. This arrangement continued until Mr. Stumpacher’s death.

[119] In 2015, she recommended to Mr. Stumpacher that he get a new will but to her knowledge he did not follow her advice. Other than this, she did not have any estate planning discussions with either of the Stumpachers but deposed that Mr Stumpacher “was especially clear to me that he wanted Elfriede to be looked after”.

[120] She went to the hospital on June 1 and spoke to Mr. Stumpacher before he died. According to her, he pulled her close to him and “asked that I ensure that Elfriede was looked after.”

[121] She was “shocked” to learn about the contents of the Will, opining that “Elfriede lost security of joint family finances as well as the home in which she resided, and helped pay for, during the marriage”.

[122] In her examination-in-chief, Ms. Lange confirmed that Ms. Stumpacher paid her share of any travel costs. She would arrange for additional payments from their investment portfolios for these trips. She described the Stumpachers as having a modest but comfortable lifestyle.

[123] She testified that she met with Ms. Dyer on the Sunday before Mr. Stumpacher’s death. Ms. Dyer brought a copy of the Will with her. The Will did not look like a normal one to her and she was very surprised by its terms. She thought that nothing of substance was left to Ms. Stumpacher. She believed that Ms. Stumpacher should have received a life estate in the Property and that splitting their assets evenly would have been reasonable. Later in cross-examination, she said that this meeting took place on June 4, after Mr. Stumpacher had passed away.

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[124] She acknowledged in cross-examination that she did not know if the Property had a mortgage on it. She assumed that Mr. Stumpacher had purchased it before he married Ms. Stumpacher in 2007. She did not know that he owned it in joint tenancy with his former wife. She appeared not to know that Mr. Stumpacher had designated Ms. Dyer as the beneficiary of his RRIF in 2012 nor that Ms. Stumpacher had designated her daughter Pauline as the beneficiary of her RRIF despite an email to that effect in her file. She was not aware that that the money which Ms. Stumpacher had invested with ScotiaMcLeod came from the sale of two properties she had owned.

[125] She agreed that ScotiaMcLeod would not have completed the transactions authorized by Mr. Stumpacher on May 22, 2018, if she was not satisfied that he was mentally competent at the time. She knew that her assistant Ms. Lee had visited him at the Property for this specific purpose.

[126] She initially claimed that she was unaware that Ms. Dyer had been added as a joint owner of Mr. Stumpacher's bank account in May 2018 but acknowledged that she knew about it after counsel showed her an email that Ms. Lee sent to her on May 23.

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[127] She agreed that she last saw Mr. Stumpacher on May 28, not June 1, after her memory was refreshed by a lengthy email that she sent to Ms. Lee on that date. In that email she described Mr. Stumpacher as "completely lucid" and that in her opinion he was "fully aware and competent." She referred to discussions she had with both Ms. Dyer and Ms. Stumpacher at the hospital in this email but did not state that Mr. Stumpacher had said anything to her about taking care of Ms. Stumpacher. She also wrote that she told Ms. Stumpacher at the hospital that she would be her "advocate" if necessary.

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Analysis

[128] Ms. Stumpacher contends that the following constituted suspicious circumstances:

i. the Will was prepared by Ms. Dyer rather than a lawyer;

ii. the absence of any evidence, with the exception of Ms. Dyer and contrary to the evidence of others, that Mr. Stumpacher had knowledge of the contents of the Will;

iii. the lack of capacity of Mr. Stumpacher at the signing of the Will as indicated in the testimony of the Straigers and Ms. Stumpacher; and

iv. the retainer of Mr.Getzler without the authority or involvement of Mr. Stumpacher.

[129] I find that Ms. Dyer has dispelled each suspicious circumstance raised by Ms. Stumpacher surrounding the preparation of the Will; his knowledge of its contents; the capacity of Mr. Stumpacher; or tending to show that the free will of Mr. Stumpacher was overborne by acts of coercion or fraud.

[130] My assessment of the evidence begins with the Stumpachers' arrangement of their financial affairs that preexisted the preparation of the Will. It is undisputed that both had substantial assets before the marriage. They kept these assets separate throughout their cohabitation and marriage; it was clearly a "what's yours is yours and what's mine is mine" consensus. This arrangement extended to not only the equal sharing of day-to-day living expenses but also any extraordinary expenses like their favourite pastime, taking trips together.

[131] Further, after their marriage, they designated their respective children as the beneficiaries of their RRIFs. This is cogent evidence of what, I find, they intended to happen upon their deaths – that their adult children would receive what each owned. This estate plan does not invite any suspicion. Indeed, it would be common for a couple who enter into a second marriage late in life to agree that their independent wealth go to their adult children.

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This is especially true when a parent has a very close and loving relationship with their child as Mr. Stumpacher plainly did with Ms. Dyer.

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[132] I accept Ms. Dyer's evidence about the preparation of the Will and the instructions she received from her father. I found her testimony credible and reliable. The Will was based on her father's existing will. The only significant change was to add a bequest to Ms. Stumpacher of $100,000 and any household furnishings she wanted. Mr. Stumpacher took steps, both through the Will and with ScotiaMcLeod the week before he died to ensure that some money would be readily available to his widow, further proof that the Will was in accordance with his wishes.

[133] Ms. Dyer's preparation of the Will was not anomalous in the circumstances. It was a simple one and there was an existing precedent for it. Mr. Stumpacher had just received a wholly unexpected terminal diagnosis and knew that his life expectancy was short. I find that he was anxious, as Ms. Dyer testified, to put his affairs in order which included a new will and some estate planning to reduce probate fees.

[134] I note that Ms. Dyer did nothing to conceal the preparation of the new will in any way. She was open and above board about it. I find that she did

discuss the terms of it with both her father and Ms. Stumpacher. She left the original Will with her father and gave a copy of it to Ms. Stumpacher. She retained an experienced estate lawyer to act on her father's behalf. The witnesses to the Will were longtime friends of the Stumpachers. Other longtime friends of them (Mr. Csenar and Ms. Richards) were aware of the Will and Mr Stumpacher's estate plan. So, too, was Ms. Lee according to the email that she sent to Ms. Lange after meeting with Mr. Stumpacher at the property on May 22.

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[135] Ms. Stumpacher's recollection of some of the events differs from that of Ms. Dyer, Mr. Csenar and Ms. Richards. I found the latter two witnesses credible and their testimony reliable. I do not question the honesty of Ms. Stumpacher's testimony but its reliability. She was, understandably, overwhelmed during this period of time. I have concluded that her memory has been influenced by others (primarily Mr. Straiger and Ms. Lange) and because of her conviction, again affected by what third parties told her, that the Will was unfair and that she did not receive what she should have.

[136] The Will makes testamentary sense. In light of Ms. Stumpacher's age, any additional bequest – such as a one-half interest in the matrimonial home- would be, for all intents and purposes, a transfer of Mr. Stumpacher's

accumulated wealth to her children instead of his own. The Stumpachers lived modestly and it was quite unlikely that Ms. Stumpacher would want to continue living alone at the Property for an extended period of time. The bequest contained in the Will would permit her to make the transition to another living arrangement without any financial hardship. There is no doubt that the Stumpachers loved each other very much and would have continued their life together at the Property but when Mr. Stumpacher learned of his prognosis, I conclude that he wanted his only child to receive most of his wealth. The Will accomplished this objective.

[137] Given my acceptance of the evidence of Ms. Dyer, Mr. Cesnar and Ms. Richards and the surrounding circumstances, it follows that Mr. Stumpacher knew and approved of the contents of the Will. Ms. Stumpacher submitted that s. 13 of the *Evidence Act*, R.S.O. 1990, c. E.23 applies both to her testimony and that of Ms. Dyer; neither is admissible to support their respective positions absent corroboration. While I agree that s. 13 imposes this requirement, the totality of the supporting evidence, both direct and circumstantial, supplies the necessary corroboration in this case and I find that the Will was prepared based on Mr. Stumpacher's instructions and he was fully aware and approved of its contents.

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[138] There was ample evidence that Mr. Stumpacher was mentally competent in May 2018. The hospital records support this conclusion. All of the witnesses, with the exception of the Straigers, had the same view. Ms. Stumpacher did not suggest otherwise, either in her affidavit or her testimony. Her observation that Mr. Stumpacher was "not himself" on the date that the Will was executed does not detract from a finding that he was mentally competent and had the capacity to make a new will that month and when he executed the Will.

[139] I reject the evidence of the Straigers about what happened on May 19, when they came over to witness the execution of the Will. I did not find their testimony credible about the events of that day. The photographs and video contradicted their evidence. Mr. Straiger, in particular, was not believable, insisting in his testimony that Ms. Dyer fabricated this evidence and that she and her husband were still at the Property on May 23 when clearly they were not.

[140] Much of what the Straigers said in the witness stand was not contained in their affidavits. I do not expect in a summary trial that affidavits will cover every issue or potential factual dispute. I also appreciate that, at trial, some discrepancies and contradictions may be revealed through cross-

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examination. In this case, however, evidence on material issues was omitted and I conclude that this was a deliberate trial strategy. If the Straigers were going to significantly expand on what they stated in their affidavits of June 2018, supplementary affidavits should have been filed once the parties agreed on a summary trial. I find that the Straigers decided to become advocates in support of Ms. Stumpacher's legal position and embellished their testimony to the point where I did not find any of it reliable. This was, to a large extent, driven by Mr. Straiger's steadfast opinion that Ms. Stumpacher was legally entitled to receive more than what she did in the Will.

[141] The retainer of Mr. Getzler supports Ms. Dyer's evidence that she was acting on her father's direction and particularly his wish to reduce the amount of the probate fees, which is not an uncommon concern of a testator. The terms of the Will were straightforward but the legal steps that could be taken to reduce the tax consequences flowing from the disposition of assets needed a lawyer's input. It is also noteworthy that Mr. Getzler was retained to act on Mr. Stumpacher's behalf, not as Ms. Dyer's lawyer.

[142] Ms. Dyer was also transparent in her communications with Mr. Getzler and provided him with a copy of the Will. Her actions belie the claim that

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she acted improperly in retaining him for her father. I accept her testimony that she would have abided by the advice given by Mr. Getztler and that he would have dealt with Mr. Stumpacher directly but for the precipitous decline in her father's health in the week before his death.

[143] A beneficiary's involvement in the preparation of a will invites scrutiny of the nature and extent of their dealings with the testator but, standing alone, does not equate to a suspicious circumstance. On the totality of the evidence, I find that Ms. Dyer has rebutted Ms. Stumpacher's contention that there were suspicious circumstances surrounding the preparation of the Will or tending to show that the free will of Mr. Stumpacher was overborne by acts of fraud or coercion.

c. Testamentary capacity

[144] I have already outlined my findings with respect to Mr. Stumpacher's mental competency during the relevant period of time concluding on May 19,2018. As the propounder of the Will, Ms. Dyer has to establish testamentary capacity as of the date that the Will was executed. I conclude that she has.

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[145] The evidence of Ms. Dyer, Mr. Csenar and Ms. Richards established that Mr. Stumpacher had the requisite mental capacity. It was not the only evidence. Ms. Lange's testimony also demonstrated Mr. Stumpacher was knowledgeable about his financial affairs and that he was making logical decisions about the disposition of his assets before his death. She was a trusted financial advisor and would have undoubtedly intervened if she thought he was not of sound mind when he authorized the liquidation of much of his investment portfolio. She was unequivocal about his lucidity and mental acuity on May 28. While she may have ultimately disagreed with the terms of the Will, her evidence supports Ms. Dyer's position that he had testamentary capacity. [2]

[146] Mr. Getzler thought there were some ambiguities in the Will. He stressed that this was his personal view and that, as a lawyer, he strives for "clarity" in legal documents like a will. He struck me as a careful solicitor who seeks to remove any potential for misinterpretation of a legal document that he

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2 I have serious reservations about Ms. Lange's testimony. I found her evidence reliable when the substance of it was confirmed to some degree by contemporaneous emails. Her view that the terms of the Will were "shocking" is perplexing given her knowledge of Mr. Stumpacher's very close relationship with his only child and that the Stumpachers kept their investments separate and shared expenses equally. Her opinion may be based on her misapprehension that Ms. Stumpacher helped pay for the Property as she deposed in her affidavit or her belief that she should play the role of an advocate on behalf of Ms. Stumpacher as she stated in her email of May 28.

prepares. I do not believe that there is any ambiguity in the Will and certainly nothing which would cause me to conclude that the wording of it was indicative of a lack of testamentary capacity.

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d. Undue influence

[147] Ms. Stumpacher has the burden of proving undue influence. Again, I have already set out my findings that establish Mr. Stumpacher's knowledge and approval of the contents of the Will. There was no evidence that the free will of Mr. Stumpacher was overborne in any way. The Will expressed his deliberate and final testamentary intention.

The calculation of the equalization payment

[148] I have identified the major issues in dispute. I will review the evidence for each one and then set out my findings. The parties should be able to agree on the equalization payment based on these findings.

[149] Ms. Dyer submitted that Ms. Stumpacher did not make an election in accordance with the *FLA* and is therefore not entitled to an equalization payment. However, the parties agreed to litigate this case in a fair and

efficient manner and consented to an order stipulating the issues for trial. If Ms. Dyer had insisted that only the validity of the Will be tried and, depending on the court's decision on that issue, there would be separate proceedings about Ms. Stumpacher's rights under the *FLA,* a court would have granted an extension of time to make the election. It made good sense for the parties to deal with all the legal issues in a single proceeding. As a result, I find that Ms. Stumpacher is entitled to pursue this claim.

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a. The alleged loan to Wolfgang Reisinger

[150] Mr. Stumpacher had a close relationship with his nephew Mr. Reisinger who lived in Austria. Ms. Dyer asserts that Mr. Reisinger loaned €250,000 to her father in 2012 and that the money was still owing as of the date of her father's death and it remains a debt of the estate. The amount is now about $378,000. Ms. Stumpacher does not dispute that Mr. Reisinger transferred the money to Mr. Stumpacher's bank account in 2012 but denies that it was a loan or that Mr. Stumpacher owed any money to Mr. Reisinger at the time of his death. In the alternative, if it was a legitimate debt, any claim against the estate is statute-barred.

[151] As I stated earlier, Mr. Reisinger died in June 2022. The evidence about the alleged loan consists of an affidavit sworn by Mr. Reisinger on September 23, 2021, a document signed by Mr. Stumpacher dated February 1, 2012, some bank records and conversations that Ms. Dyer, Ms. Stumpacher and Ms. Lange had with Mr. Stumpacher.

[152] According to Mr. Reisinger's affidavit, he decided to invest a large sum of money in Canada at the suggestion of his uncle. Mr. Stumpacher prepared a document entitled "Personal Loan Agreement" which is dated February 1, 2012 and signed by him. This was the date that the funds were sent to Mr. Stumpacher's bank account with the Bank of Nova Scotia in Belleville. The document is four paragraphs in length with the two concluding paragraphs stating:

> This money will be reinvested at my descretion *(sic*) for minimum of 5 Years and repaid on March 1st 2017 at full market value.
>
> If agreed by both parties the repaid money can then be reinvested for additional part of time.

[153] Mr. Reisinger deposed that, when the loan came due in 2017, his uncle was visiting him in Austria. Mr. Stumpacher told that the money was still invested and asked for an extension to repay "because of his personal

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financial needs". They agreed that the money would be repaid within 60 days of a request by Mr. Reisinger. Mr. Stumpacher also told him that if he was unable to repay him or died, the funds would be repaid from the sale of the Property. This agreement was not put in writing.

[154] Mr. Reisinger saw Mr. Stumpacher shortly before he died at the hospital. Again, according to his affidavit, Mr. Stumpacher said in the presence of Ms. Dyer that the loan would be repaid by the estate. Reisinger did not pursue a legal claim after Mr. Stumpacher's death because of the litigation commenced by Ms. Stumpacher. Ms. Dyer testified that she was aware of discussions between her father and Mr.Reisinger and believed that the money was still owed as of her father's death.

[155] According to Ms. Lange, she spoke to Mr. Stumpacher about the proposed plan to invest the money before it was advanced by Mr. Reisinger. When it turned out that, due to regulatory reasons, the money could not be invested with ScotiaMcLeod, she had no involvement in the proposed investment or knowledge of it other than Mr. Stumpacher telling her later on that he loaned the money to Ms. Dyer for the construction of a retaining wall at her home in Florida. Ms. Dyer denied that her father loaned her any money for this purpose. She did not know what her father did with the money.

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[156] There are no records in relation to these funds other than a document which confirms that Mr. Reisinger transferred the money to Mr. Stumpacher's bank account. The money effectively vanished after February 1, 2012.

[157] Ms. Dyer, in her capacity as estate trustee, has the burden of proving that her father owed the money to Mr. Reisinger as of the date of his death. There is no explanation for the complete absence of any paper or electronic trail. This is extraordinary in the circumstances.

[158] If the money was invested by Mr. Stumpacher on his personal behalf, I find that he would have declared any income that he earned on his tax returns. He would have provided some type of written reports to his nephew about how the investment was doing. He would have kept records of the invested funds.

[159] Based on the evidence, Mr. Stumpacher was a knowledgeable and conservative investor, unlikely to lose such a large sum of money or invest it with a person or entity that did not keep records. Although the document is entitled a loan agreement, the wording is unusual – it seems more like an agreement to invest money on Mr. Reisinger's behalf.

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[160] I accept that Mr. Stumpacher and Mr. Reisinger had a very close relationship but if a written agreement was important to them when the money was “loaned”, it would be just as important (if not more so) to record in writing the extension of the loan in 2017 and the terms of repayment. It would have been easy to do so, especially when Mr. Stumpacher was in Austria.

[161] Finally, if the money was still owed in May 2018, I find that Mr. Stumpacher, who was putting his financial affairs in order in contemplation of his short life expectancy, would have acknowledged the debt in writing, probably in his Will.

[162] Mr. Reisinger’s affidavit raises more questions than answers. I give it no weight. The evidence of Ms. Dyer and Ms. Lange is of little assistance. Their evidence does not shed much light on what the arrangement between Mr. Stumpacher and Mr. Reisinger actually was.

[163] I cannot determine, on the evidentiary record before me, that Mr. Stumpacher owed money to Mr. Reisinger on the date of his death.

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Therefore, I find that Ms. Dyer has not proven that it is a debt of the estate or that she can treat it as such for the purpose of calculating the equalization payment.

[164] I do not have to deal with the limitation period issue given this finding. In any event, Ms. Stumpacher is not a beneficiary of the estate because she does not want to take under the Will. Ms. Dyer, as estate trustee, can pay any debt of the estate that she considers to be a legitimate one.

b. The joint bank account

[165] I find that Ms. Dyer was added as a joint account holder with respect to her father's account at Scotiabank on May 19, 2018. She says that her father intended to gift the monies in the account to her. Ms. Stumpacher asserts that Ms. Dyer failed to rebut the presumption of a resulting trust.

[166] The legal principles were succinctly summarized by Sanfilippo, J. in *Dixon v. Spencer*, 2023 ONSC 202 at paras.21-22:

> The principles of resulting trust were established by the Supreme Court in *Pecore v. Pecore*, 2007 SCC 17, [2007] 1 S.C.R. 795. In *Pecore*,

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> the Supreme Court considered whether the recipient of a gratuitous *inter vivos* transfer of joint bank and investment accounts held the assets in resulting trust for the transferor. The Supreme Court explained, at para. 20, that "[a] resulting trust arises when title to property is in one party's name, but that party, because he or she is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner."
>
> The Supreme Court stated that gratuitous *inter vivos* transfers between a parent and an adult child are subject to a presumption of resulting trust in favour of the deceased parent's estate: specifically, a presumption that the transferred assets were intended to be held in trust for the transferor. This is referred to as a "rebuttable presumption", being a legal assumption that the Court will make unless sufficient evidence is proven to displace the presumption: *Pecore*, at para. 22. When the transfer is challenged, the presumption allocates the burden of proof, assessed on a civil balance of probabilities, on the transferee to establish that the transferor intended a gift: *Pecore*, at paras. 24, 43-44.

[167] I must determine the actual intention of Mr. Stumpacher on a balance of probabilities. This is a fact driven exercise: *Falsetto v. Falsetto*, 2024 ONCA 149, at para.18. The *Pecore* analysis applies to monies in a joint bank account that become the sole property of the transferee through the right of survivorship: *Calmusky v. Calmusky*, 2020 ONSC 1506, at paras. 27-29.

[168] As I have already found, Mr. Stumpacher intended that Ms. Dyer receive the whole of his estate except for the bequest to Ms. Stumpacher. He instructed ScotiaMcLeod to liquidate a significant portion of his investment portfolio, of which $25,000 would go into a bank account owned solely by Ms. Stumpacher and the balance into the joint account he held with Ms.

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Dyer. His life expectancy, at that point, was short. He was arranging his affairs so that probate fees would be reduced and monies would be available to both his wife and his daughter in their respective bank accounts. I find that Ms. Dyer has proved that her father intended to gift the monies in the joint bank account to her.

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c. The value of the Property

[169] Ms. Stumpacher relies on the sale price of the Property in October 2020. Ms. Dyer contends that it should be the appraised value of $1,250,000. This is based on the appraisal report of Hastings Appraisal Services dated August 6, 2020 prepared by John Van Husen. She did not call Mr. Van Husen as a witness but instead filed his report.

[170] Ms. Dyer argued that, because of the Covid-19 pandemic, the prices of houses increased significantly after her father's death but there was no evidence adduced at the trial that the local real estate market changed in the period 2018-2020 in this way. The appraisal report does not say this. I find that the reliable value of the Property, as the date of death, is the sale price in October 2020.

d. The value of the Honda Odyssey and the boat

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[171] Ms. Dyer's position is that the Honda Odyssey should be valued at $50,000 and the boat at $35,000. Ms. Stumpacher submits that there is no admissible evidence establishing their values.

[172] I find that I can assess the value of the Honda Odyssey based on the evidence at trial but not the boat.

[173] Ms. Stumpacher agreed that Mr. Stumpacher purchased the vehicle new in 2006 and that it was later sold to her daughter Pauline for $4-5,000. I bear in mind the direction of the Court of Appeal in *Cronier v Cusack*, 2023 ONCA 178 at para. 22 that I should evaluate the evidence in light of rules 2(2)-(4) on the *Family Law Rules.* A party does not have to establish "blue book" or "black book" values. I can fix the value of a motor vehicle, applying a reasonable depreciation value: *Wiltman v. Wiltman*, 2002 CarswellOnt 1648.

[174] There is a discrepancy between Ms. Dyer's affidavit and the NFP in respect of the vehicle and the boat. In the former, she estimated the value of both to be $60,000. In the latter, the value of ascribed to them was $85,000.

[175] There was no evidence about when the boat was purchased and whether it was new or used. Similarly, there was an absence of any evidence of when it was sold and for what amount. But there is no doubt that Mr. Stumpacher owned the boat on the date of marriage.

[176] I find that a reasonable combined value of the motor vehicle and boat, as of the date of marriage, is $40,000.

The support claim under the *SLRA*

[177] Ms. Stumpacher submits that a monthly payment of $4,000 retroactive to June 1, 2018 is both "a reasonable allowance for purposes of need" and takes into account the "moral obligation" in the circumstances. Ms. Dyer points out that there was no evidence that Ms. Stumpacher was financially dependent on Mr. Stumpacher or with respect to her financial needs.

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[178] Ms. Stumpacher still has a substantial investment portfolio. It has increased in value since June 2018. She adduced no evidence of her financial needs since leaving the Property or how her standard of living has been affected as a result of Mr. Stumpacher's death.

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[179] Section 58 (1) of the *SLRA* provides:

> Where a deceased, whether testate or intestate, has not made adequate provision for the proper support of his dependants or any of them, the court, on application, may order that such provision as it considers adequate be made out of the estate of the deceased for the proper support of the dependants or any of them.

[180] In *Quinn v. Carrigan*, 2014 ONSC 5682, Corbett, J. stated at paras. 79-80:

> The determination of "adequate" financial provision for a "dependant" under the *SLRA* is discretionary. It is not an exact science. The court must consider "all the circumstances" in arriving at an appropriate award, as is reflected in the long list of pertinent factors in s.62 of the *SLRA*.
>
> Based on *Tataryn*, [*Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807], "a deceased's moral duty towards his or her dependants is a relevant consideration on a dependant's relief application… judges are not limited to conducting a needs-based economic analysis in determining what disposition to make." As stated by the Court of Appeal in *Cummings* [*Cummings v. Cummings*, 2004 CanLII 9339 (ON CA)]:
>
> In short, when examining all of the circumstances of an application for dependants' relief, the court must consider,

> (a) What legal obligations would have been imposed on the deceased had the question of provision arisen during his lifetime; and
>
> (b) What moral obligations arise between the deceased and his or her dependants as a result of society's expectations of what a judicious person would do in the circumstances.

[181] I find that no order should be made in the circumstances. Ms. Stumpacher disclosed her current income and assets but did not allege that she has any past or current financial need. There was no evidence that her accustomed standard of living changed. She and Mr. Stumpacher agreed, from the outset of their relationship, that they would be responsible for their own living expenses. She remained living at the Property from June 2018 to October 2020. This was a benefit to her. She is at a stage in her life where it was quite likely that she would have moved out of the Property by 2020 even if there had been no litigation. I infer that she moved in with her daughter because she wanted to and not due to any inability to afford other accommodation. I am not going to award any amount for occupation rent to Ms. Dyer which I might otherwise have done if I made a support order. The bequest to Ms. Stumpacher in the Will was a meaningful one, particularly in the context of their agreement to keep their assets separate. In exercising my discretion, I find that no support order is warranted in the circumstances.

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Conclusion

[182] In summary, I find that the Will is valid and grant the requested declaration that it is the last valid will of Mr. Stumpacher. I will leave it to the parties to calculate the equalization payment based on my findings. I dismiss the claim for support under the *SLRA*.

[183] Ms. Dyer is entitled to deduct any advance payment made during the litigation from the equalization payment. The interim order of Tranmer, J. applies with respect to the expenses identified in his endorsement with the exception of occupation rent.

[184] In the event that the parties cannot agree on the equalization payment and wish to make either oral or written submissions on this issue, they should schedule a case conference through the trial coordinator and I will give procedural directions about any further submissions at the case conference.

[185] On the assumption that the parties agree on the equalization payment, I direct that they deliver written submissions on the issues of interest and

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costs. The submissions shall be limited to 10 pages exclusive of dockets and written offers to settle. Ms. Stumpacher shall file and upload her submissions to Caselines within 30 days of an agreement on the amount of the equalization payment. Ms. Dyer shall deliver her written submissions within 30 days of receiving Ms. Stumpacher's submissions. Counsel shall notify the trial coordinator when the submissions are filed.

[186] If the parties cannot agree on the equalization payment, I will give directions about the delivery of submissions on interest and costs at the case conference referred to above.



HURLEY, J.

Released: March 15, 2024

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CITATION: Stumpacher v Dyer, Estate Trustee for the Estate of Stephen John Stumpacher, 2024 ONSC 1588
COURT FILE NO.: CV-19-00000154-0000
DATE: March 15, 2024

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SUPERIOR COURT OF JUSTICE

ELFRIEDE STUMPACHER

Plaintiff

– and –

DIANE DYER, Estate Trustee for the Estate of Stephen John Stumpacher and THE ESTATE OF STEPHEN JOHN STUMPACHER

Defendants

REASONS FOR DECISION

HURLEY, J.

Released: March 15, 2024