IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Wicklund v. Denis and Yvone Blakely 2015 Joint Partner Trust,* 2025 BCSC 1894

Date: 20250929
Docket: S242066
Registry: Vancouver

Between:

Cindi Gail Wicklund, Evan Derek Wicklund and Kirsten Cara Wicklund

Plaintiffs

And

Kevin Blakely and Victoria McCarvill, in their capacity as Trustees of the Denis and Yvonne Blakely 2015 Joint Partner Trust, Kevin Blakely and Victoria McCarvill in their personal capacities, and the Denis and Yvonne Blakely 2015 Joint Partner Trust

Defendants

Before: The Honourable Justice Douglas

Reasons for Judgment

Counsel for the Plaintiffs:	D.P. Dahlgren
Counsel for the Defendants, Kevin Blakely and Victoria McCarvill, in their capacity as Trustees of the Denis and Yvonne Blakely 2015 Joint Partner Trust:	M.C. Ohama-Darcus C. Harris B. Briscoe, Articled Student
No other appearances	
Place and Dates of Summary Trial:	Vancouver, B.C. June 10–11, 2025
Place and Date of Judgment:	Vancouver, B.C. September 29, 2025

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I. OVERVIEW

[1] At issue on these two summary trial applications is the validity and enforceability of an amended trust agreement, originally settled on July 28, 2015, and purportedly amended less than three months later, on October 19, 2015.

[2] Denis and Yvonne Wicklund, now both deceased, were the settlors of the trust. For convenience, I refer to them, and to their children and grandchildren, many of whom share a surname, using their first names. In doing so, I intend no disrespect.

[3] Denis and Yvonne met in their 50s; both had previously been married and raised families with their former spouses. They began cohabiting in the early 1990s, later married, and ultimately lived together for about 24 years until Denis' death in 2016.

[4] Denis began his career as a journeyman lineman; he later became the manager of transmission for southern British Columbia with BC Hydro. Denis married his first wife at the age of 18 and they had three children together by the time he was 22: son, Kevin Blakely, a lawyer, and daughter, Victoria McCarvill, trustees of the Denis and Yvonne Blakely 2015 Joint Partner Trust, and daughter, Roberta Al Housani.

[5] Yvonne married her first husband at the age of 16; they too had three children together: plaintiff, Cindi Gail Wicklund, and two other children from whom Yvonne was estranged at the time of her death, Frank Joseph Cousins and Debra Lynn Caldwell. Cindi has two adult children: Kirsten Cara Wicklund and Evan Derek Wicklund, the other two plaintiffs in this action.

[6] Yvonne did not graduate from high school, nor did she complete any post-secondary education. She initially worked part-time at a hair salon and later part-time at Eaton's, where she was employed for about 20 years.

[7] Denis was diagnosed with terminal cancer. He entered palliative care in late December 2015 and died on January 3, 2016, at the age of 75. Yvonne had Alzheimer's disease and she died on November 14, 2023 at the age of 84.

[8] The plaintiffs commenced this action on March 27, 2024, seeking to set aside the trust amendment on the grounds that it is invalid, void, and unenforceable. They allege that suspicious circumstances were present in October 2015, that Yvonne lacked the mental capacity to amend the trust, and that she was subjected to undue influence by Denis in doing so.

[9] The trust amendment redistributed Yvonne's effective one-half share of the trust residue by decreasing her gift to the plaintiffs (from 90% to 30%) and increasing her gift to charity (from 10% to 70%). The plaintiffs describe these changes as drastic and illogical. They seek to set aside the trust amendment and to restore the original trust, the validity of which is not in dispute. The plaintiffs claim entitlement to $456,000 of the funds currently being held in the trust account.

[10] For the reasons which follow, I find Yvonne had the capacity to amend the trust on October 19, 2015, that she did so with knowledge and approval of its nature and effect, and that the evidence does not support the presence of suspicious circumstances or a finding that Yvonne was unduly influenced by Denis when she made the trust amendment. It follows that the plaintiffs' claims must be dismissed.

II. PRELIMINARY EVIDENTIARY ISSUES

A. Admissibility of Hearsay Evidence

[11] All parties rely on hearsay evidence which purports to attribute various statements, wishes, and intentions to Denis and Yvonne.

[12] Rule 22-2(13) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*SCCR*] governs the content of affidavits and provides as follows:

> An affidavit may contain statements as to the information and belief of the person swearing or affirming the affidavit, if
>
> (a) the source of the information and belief is given, and

> (b) the affidavit is made
> (i) in respect of an application that does not seek a final order, or
> (ii) by leave of the court under Rule 12-5(71)(a) or 22-1(4)(e).

[13] The parties seek a final order and, accordingly, the exception in *SCCR*, R. 12-2(13)(b)(i) does not apply here. Rather, they seek leave to rely on hearsay evidence, as contemplated by *SCCR*, R. 22-2(13)(b)(ii).

[14] Hearsay statements cannot be tested by cross-examination and are presumptively inadmissible: *Davy v. Davy*, 2019 BCSC 1826 at para. 26; *R. v. Khelawon*, 2006 SCC 57 at para. 2. This presumption of inadmissibility may be overcome if the evidence falls into a traditional exception or the principled exception to the general rule: *R. v. Mapara*, 2005 SCC 23 at para. 15. Under the principled exception, hearsay evidence may be admissible if it is necessary and the surrounding circumstances provide sufficient assurance that the statement is reliable: *Khelawon* at para. 47; *R. v. Bradshaw,* 2017 SCC 35 at para. 18

[15] Threshold reliability can be established by showing that: (1) there are adequate substitutes for testing truth and accuracy (procedural reliability); or (2) there are sufficient circumstantial or evidentiary guarantees that the statement is inherently trustworthy (substantive reliability): *Bradshaw* at para. 27. Circumstantial guarantees or indicia of reliability can include the declarant's disinterest; the declaration being made before the dispute or litigation; and the peculiar means of knowledge of the declarant: *Williams Estate v. Vogel of Canada Ltd.*, 2016 ONSC 342 at para. 22.

[16] In *Gutierrez v. Gutierrez*, 2015 BCSC 185 at para. 34, Justice Voith (then of this Court) identified the following factors as relevant to an assessment of the threshold reliability of a hearsay statement:

a) The presence or absence of a motive to lie;

b) Independent corroborative evidence that goes to the trustworthiness of the statement;

c) Timing of the statement relative to the event (i.e., contemporaneity);

d) The declarant's mental capacity at the time of making the statement; and

e) Solemnity of the occasion and whether the declarant's statement was made in circumstances that could arguably be akin to the taking of an oath where the importance of telling the truth and the consequences of making a false statement were properly emphasized.

[17] As noted, Denis and Yvonne are both deceased. I accept it is necessary to obtain their evidence on relevant matters, to the extent possible, as this goes to the heart of the issues in this action: *Stanway v. Wyeth Canada Inc.,* 2013 BCSC 2250 at para. 37; *Lam v. Law Estate*, 2024 BCSC 1561 at para. 149. The parties agree, as do I, that the common law requirement of necessity is met.

[18] At issue is the reliability of the hearsay evidence. I consider the threshold reliability and corresponding weight of the tendered hearsay when I review the evidence in detail below.

B. Admissibility of Medical Records

[19] Extracts from the clinical notes and records of Yvonne's treating healthcare providers are in evidence. The admissibility of these documents is not seriously challenged.

[20] Records made or kept in the usual course of business may be admitted into evidence as an exception to the hearsay rule if the threshold requirements set out in s. 42(2) of the *Evidence Act*, R.S.B.C. 1996, c. 124 are met: *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2018 BCSC 859 at paras. 15–17. Section 42(2) of the *Evidence Act* provides that:

> (2) In proceedings in which direct oral evidence of a fact would be admissible, a statement of a fact in a document is admissible as evidence of the fact if
>
> (a) the document was made or kept in the usual and ordinary course of business, and
>
> (b) it was in the usual and ordinary course of the business to record in that document a statement of the fact at the time it occurred or within a reasonable time after that.

[21] The clinical records of Dr. David Apps and Dr. Christina Kanagaratnam, Yvonne's former family physicians, and Dr. Mary Parr, the geriatric specialist involved in Yvonne's care, are appended to Affidavit #1 of Kimm Otto, legal assistant, made April 16, 2025, together with copies of the letters requesting these records, and the letters written in response to requests for them. The authenticity of these medical records is not in dispute.

[22] The trustees submit, and the plaintiffs do not dispute, that:

a) Yvonne's treating physicians are individuals with personal knowledge of the matters recorded in their medical records;

b) Physicians have a duty to make clinical records in the usual and ordinary course of their business; and

c) Yvonne's medical records are the kind of documents that are ordinarily created in the usual and ordinary course of providing medical care.

[23] I accept that the clinical notes and records in evidence were made:

a) Contemporaneously, on or about the dates indicated;

b) By someone with personal knowledge of the matters being recorded;

c) By someone who had a duty to record the notes, or to communicate the notes to someone else to record, as part of the usual and ordinary course of their business; and

d) In a manner consistent with the kind of information that would ordinarily be recorded in the usual and ordinary course of their business.

[24] I find that the medical records in evidence are business records within the meaning of s. 42 of the *Evidence Act*. The plaintiffs do not challenge this conclusion.

[25] Opinion evidence is not admissible under the business records exception: *Cambie Surgeries Corporation* at para. 18. The parties do not rely on any opinions contained in Yvonne's medical records for the truth of their contents. The trustees argue that a testator's symptoms, as set out in medical records, can support an inference of capacity or incapacity: *Laszlo v. Lawton*, 2013 BCSC 305 at para. 190.

[26] I conclude that the medical records in evidence comprise admissible evidence of facts recorded in them in the usual and ordinary course of business. I also rely on these business records as evidence that statements of opinion recorded in the usual and ordinary course of business, were made, but not for their truth: *D.J.W. v. Biswal,* 2023 BCSC 148, citing *Seaman v. Crook*, 2003 BCSC 464 at para. 14.

C. Admissibility of Unsworn Estate Documents

[27] The trustees rely on written statements by Denis and Yvonne, attached to their 2014 Advanced Directives, as some evidence of the nature of their relationship. They also rely on an undated note, apparently sent by Denis to Yvonne, which refers to Yvonne as “my valentine”. On Victoria’s evidence, she discovered this note after Denis had died and Yvonne had moved into an assisted living facility. Victoria believes Denis wrote it in February 2014, after he had completed chemotherapy and radiation treatment, and before his cancer returned in early 2015.

[28] Pursuant to *SCCR*, R. 22-2(13)(a) and R. 22-2(13)(b)(ii), an affidavit may contain statements as to the affiant’s information and belief if the source of the information and belief is provided, and, where the application seeks a final order, by leave of the court under *SCCR*, R. 12-5(71)(a) or R. 22-1(4)(e).

[29] The trustees submit that these documents are reliable as they were written when neither Denis nor Yvonne had any knowledge of the present dispute and no interest in falsifying statements about their love for one another and their families. They say the fact these documents were attached to the September 2014 Advanced Directives of Denis and Yvonne provides additional substantive reliability.

[30] While evidence on chambers applications must be given by affidavit, the court may receive other forms of evidence: *SCCR*, R. 22-1(4)(e). The court may accept unsworn documents as “other types of evidence”, subject to proper identification of the source of a deponent’s information and belief: *SCCR*, R. 22-2(13); *Kokanee Mortgage MIC Ltd. v. 669655 B.C. Ltd.*, 2014 BCSC 458 at para. 29; *GC Capital Inc. v. Westfield Business Centre Ltd.*, 2024 BCSC 2396 at para. 8; *Re: Pepe*, 2012 BCSC 24 at para. 19.

[31] Personal writings of a deceased person can be admissible to show the author's state of mind at that time: *Hildebrand v. Butler* (1979), 11 B.C.L.R. 234, 1979 CanLII 320 (S.C.). In *Hildebrand*, the deceased's letters to his friends and family were admitted for the limited purpose of attempting to determine his state of mind towards his wife but they were ultimately given no weight as they cast no light on that matter: *Hildebrand* at para. 13.

[32] I conclude that the unsworn estate documents are admissible as evidence that the factual statements in them were made. I find the unsworn estate documents, and the undated note from Denis to Yvonne, are also admissible as some evidence of the authors' states of mind when they created these documents: *Brisco Estate v. Canadian Premier Life Insurance Co.,* 2012 ONCA 854 at para. 36.

III. THE TRUST

[33] Yvonne and Denis settled the trust with the assistance of an experienced trusts and estate planning lawyer, Valerie Pawson, on July 28, 2015. The trust provides, in part, as follows:

a) The settlors intended to create a "joint partner trust" for the purposes of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.);

b) The trust assets comprised real property in Surrey, BC (the former family residence of Denis and Yvonne) and a Scotia McLeod investment account;

c) The settlors could, in their discretion, until the time of distribution, use capital (defined as that part of the trust settlement fund that is not income) for their individual or joint benefit, during their lifetimes;

d) After the death of the last surviving settlor, the trustees would deal with the trust assets to pay administration expenses, taxes, and, at the trustees' discretion and in limited circumstances, other expenses of the last surviving settlor;

e) Thereafter, the appointed trustees would divide and distribute any remainder of the trust fund into three unequal shares as follows:

    i. 45% to Yvonne's side of the family (the "Yvonne Family Share");

    ii. 45% to Denis' side of the family (the "Denis Family Share); and

iii. 10% to charity (the "Charitable Share");

f) The Yvonne Family Share was to be divided into unequal thirds, with 36% to Yvonne's daughter, Cindi, and 32% to each of Cindi's two children, Kirsten and Evan (or their survivors);

g) The Yvonne Family Share provided for no distribution to Yvonne's two estranged children, Frank and Debra;

h) The Denis Family Share was to be divided into equal thirds to each of Denis' three children, Roberta, Victoria, and Kevin (or their survivors);

i) The settlors, acting jointly, retained the power to alter, amend, or vary the trust at any time and from time to time by them by an instrument signed by them; and

j) The settlors expressly designated the trust as irrevocable.

[34] Denis and Yvonne both signed the trust. The plaintiffs do not challenge Yvonne's capacity to settle the trust on July 28, 2015, or her capacity to understand its nature and effect. The plaintiffs admit the trust is valid and enforceable.

IV. ENDURING POWER OF ATTORNEY

[35] On July 28, 2015, the same day the trust was settled, Yvonne signed an enduring power of attorney, appointing Denis as her attorney and two of his children, Victoria and Kevin, as alternate attorneys. The plaintiffs do not challenge the validity of this document, or Yvonne's capacity to execute it.

V. WILL AND REPRESENTATION AGREEMENT

[36] On September 2, 2015, Yvonne signed a last will and testament and representation agreement. In her will, Yvonne:

a) Appointed Denis as the executor of her will and the trustee of her estate;

b) Appointed Victoria and Kevin to be the co-executors of her will and co-trustees of her estate in Denis' place, if Denis was unable or unwilling to act or continue to act in this capacity; and

c) Distributed the remainder of her estate into two equal shares as follows:

i. One share to her daughter, Cindi, or, if Cindi was not alive on the distribution date, Cindi's share would be divided equally among her living children; and

ii. One share, divided into equal portions, to each of Denis' living children.

[37] Yvonne made no provision for Frank and Debra, her two estranged children in her will, for reasons Yvonne explained in her will. The plaintiffs do not dispute the validity or enforceability of this will, or Yvonne's capacity to make it. Since Yvonne's death, they have neither commenced a wills variation action nor challenged the validity of this will.

[38] Yvonne named Denis as her primary representative in the representation agreement. If Denis was unable or unwilling to act or continue to act, Yvonne named Victoria as her alternative representative, and if Victoria was unable or unwilling to act or continue to act, she named Kevin. The plaintiffs do not dispute the validity of Yvonne's representation agreement, nor Yvonne's capacity to execute it.

VI. THE TRUST AMENDMENT

[39] At issue in this action is the validity and enforceability of the settlors' amendment to the trust on October 19, 2015. The trust amendment altered the distribution of the settlors' effective one-half shares of the trust assets as follows:

a) Yvonne's share of 50% of the trust was re-distributed to grant 30% to the plaintiffs, and 70% to charity; and

b) Denis' share of 50% of the trust was re-distributed to grant 100% to his three children, with 0% to charity.

[40] On Kevin's uncontradicted affidavit evidence, Denis telephoned him at his law office on October 15, 2015, in Yvonne's presence, to advise that Yvonne wished to change the allocation of her one-half share of the trust assets. Kevin attests that Denis told him Yvonne would be making a substantial change to her previous distributions, and that Yvonne, whom Kevin deposes he could hear in the background, said her "children were going to get very little".

[41] On Kevin's evidence, Denis confirmed that Yvonne would receive 50% of the trust, to be divided according to her wishes, and that the charitable portion of her share "might be 60%". Kevin agreed to meet with Denis and Yvonne at his law office the next day. Kevin's contemporaneous handwritten notes of this telephone call are in evidence and have been transcribed as follows:

> Tcf Dad
> 15/10/15
> Oversight in Trust 12:04
> - Yvonne changing her mind (cell)
> - Timing is important
>
> was satisfying Dad recommendation to divide assets (re: Yvonne's share)
> #s are going to change
> "very little" Yvonne
> - 60% to children's Hosp.
> - 50% to Yvonne & her wishes
> - Ø done on Evan + Kirsten's side
> Re: wills
> - no call backs
>
> Dad & Yvonne will come in and see me
> Tomorrow

[42] Kevin met with Denis and Yvonne at his law office on October 16, 2015. Kevin attests that he initially met with them both together, and that he subsequently met with Yvonne alone, before meeting with Denis and Yvonne together again. On Kevin's uncontradicted evidence, Yvonne told him during his meeting with her alone that she wanted 70% of her share of the trust to go to charity, and 30% to be divided equally between her daughter, Cindi, and Yvonne's grandchildren, Kirsten and Evan, Cindi's children. On Kevin's evidence given at his examination for discovery, Denis and Yvonne probably would have been at his office for a couple of hours in total that day.

[43] Kevin deposes that he recalls Denis and Yvonne both wanting Yvonne's charitable donation to go to a children-based charity like a children's hospital; Kevin's contemporaneous notes from his meeting with Denis and Yvonne on October 16, 2015 corroborate this evidence. Accordingly, Kevin attests that he added the words "such as BC Children's Hospital Foundation" to the trust

amendment to reflect this intention. On Kevin's evidence, Denis and Yvonne agreed that this language satisfied their wishes. Kevin denies that Denis ever attempted to encourage or dissuade Yvonne from changing the distribution of her share of the trust.

[44] Kevin provides detailed evidence about the steps he took, in conjunction with his assistant, Jenny Tay, to draft the trust amendment. He deposes that when he prepared the preliminary draft, he was under the impression that Denis was not changing the distribution of his 50% share of the trust. That is, of Denis' share, Kevin thought 90% was to be divided amongst Denis' children and 10% to charity.

[45] A preliminary draft of the trust amendment that Denis and Yvonne signed in Kevin's office on October 16, 2015 is in evidence. It changes the distribution of Yvonne's share of the trust to provide that 30% will be distributed equally to Cindi, Kirsten, and Evan, with the remaining 70% to "charitable purposes", to be distributed by the trustees, "among one or more qualified Donees, such as B.C. Children's Hospital Foundation, as the Trustees in their discretion specify".

[46] Kevin testified at his examination for discovery that he recalled telling Yvonne, before she signed the trust amendment in his office, that it reflected her wishes of dividing her one-half share of the trust: namely, 30% to Cindi and her two children, Kirsten and Evan, and 70% to charity. Ms. Tay witnessed the signatures of both Denis and Yvonne on this document. Kevin then provided the signed originals to Denis; he did not retain signed copies.

[47] On Kevin's evidence, Denis subsequently contacted him to advise that Kevin had made a drafting error in the trust amendment that he and Yvonne had signed in Kevin's office. Specifically, this document did not indicate that Denis no longer intended to make a 5% charitable donation, and that this 5% would instead be distributed to the beneficiaries of his one-half share of the trust: namely, Denis' three children, Victoria, Kevin, and Roberta. Kevin attests that, when he showed Denis and Yvonne the document he had drafted, Denis "stated forcefully" that he did not want to leave any of his share to charity, and that it "was enough that Yvonne was

leaving 70% of her share to charity". On Kevin's evidence, Yvonne raised no objection to Denis' charitable donation being redistributed to his beneficiaries (i.e., to Victoria, Kevin, and Roberta).

[48] Kevin admitted this draft of the trust amendment contained an error and that he forgot to increase the Denis Family Share by 5% (to account for Denis' decision to eliminate his charitable donation, given Yvonne's decision to increase her charitable donation). Kevin agreed that he corrected this drafting error after Denis pointed it out to him. This error affected only Denis' distribution of his share of the trust. On Kevin's evidence, Yvonne's wishes were clear, "were always 30/70", and never changed.

[49] Kevin deposes that he advised Denis it was unnecessary for Denis and Yvonne to return to his office to sign the corrected version of the trust amendment, as the trust contained no specific requirements for the witnessing of amendments to the trust. He recommended that Denis and Yvonne ask a neighbour to witness their signatures on this document.

[50] Ms. Tay has worked as Kevin's legal assistant for more than 20 years. She attests that she has some recollection of Denis and Yvonne attending Kevin's law office on October 16, 2015. Ms. Tay deposes, in part, as follows:

a) Yvonne recognized and remembered her on October 16, 2015, and from Ms. Tay's perspective, there was nothing out of the ordinary about Denis' and Yvonne's visit to Kevin's office that day;

b) Kevin initially met with Denis and Yvonne and, at some point before Ms. Tay's lunch hour, he asked Denis to step out of the office, following which Kevin met with Yvonne alone in the firm's boardroom while Ms. Tay remained at her desk and ate her lunch;

c) Kevin's meeting with Yvonne alone lasted five to ten minutes; and

d) Sometime thereafter, Kevin asked Ms. Tay to witness Yvonne's signature on a document and Ms. Tay did so.

[51] None of the plaintiffs were present at Kevin's office on October 16, 2015. Accordingly, they are unable to contradict the evidence of Kevin or Ms. Tay about

what transpired there that day. It follows that there are no material conflicts in the evidence about any of those matters.

VII. LAW AND ANALYSIS

A. Is this matter suitable for summary trial?

[52] All parties agree that this matter is suitable for summary trial.

[53] Rule 9-7 of the *SCCR* permits a party to an action (to which a response to civil claim has been filed) to apply to the court for summary judgment, either on an issue or generally. A party may tender evidence by affidavit, answers to interrogatories, evidence given on an examination for discovery, admissions, and expert reports.

[54] If it is possible to find the facts, a chambers judge must give judgment unless it would be unjust to do so for any proper juridical reason: *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 at 214, 1989 CanLII 229 (C.A.) at para. 53; *Brissette v. Cactus Club Cabaret Ltd*., 2017 BCCA 200 at para. 26. The court must consider whether the evidence is sufficient for adjudication and is not obliged to remit a case to the trial list just because there are conflicting affidavits: *Inspiration Management Ltd.* at paras. 55–56.

[55] In deciding whether it is just to proceed by summary trial, relevant factors include the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of proceeding with a conventional trial relative to the amount at stake, the course of the proceedings, and whether the evidence is sufficient to decide the dispute: *Inspiration Management Ltd.* at para. 49; *Cepuran v. Carlton*, 2022 BCCA 76 at paras. 149–150. Other relevant factors include the cost of the litigation, the time required for the summary trial, whether credibility is a critical factor in determination of the dispute, whether the summary trial may create unnecessary complexity in the resolution of the dispute, and whether the application would result in litigation in slices: *Gichuru v. Pallai,* 2013 BCCA 60 at para. 31.

[56] A conventional trial is not required if summary disposition can achieve a fair and just adjudication, provide a process that allows the judge to make the necessary findings of fact and apply the law to those facts, and comprises a more proportionate, expeditious, and less expensive means of achieving a just result: *Hryniak v. Mauldin,* 2014 SCC 7 at paras. 2–5, 23–33.

[57] The plaintiffs deny there are significant conflicts in the evidence and note that the presence of evidentiary conflicts does not preclude a summary trial. They argue that a summary trial would be in the best interests of all parties in this case and the most proportionate means of resolving this dispute.

[58] Counsel for the trustees agrees and submits that, to the extent there are conflicts in the evidence, they can be resolved on a balance of probabilities on the documentary record. She relies on *Barkwill v. Parchomchuk*, 2010 BCSC 951, where Justice Rogers found that, “at its best”, the plaintiff’s evidence “amounted to an invitation to infer that [the testator] must have lacked testamentary capacity or been subject to undue influence because had she been in her right mind or operating with a free will, she would have crafted her gift to him differently”: para. 17.

[59] Applied here, the trustees argue that, at best, the plaintiffs’ evidence amounts to an invitation to infer that Yvonne lacked capacity or was subject to undue influence because, had she been in her right mind or operating with free will, she would have distributed all or most of her share of the trust to Cindi, Kirsten, and Evan only. The trustees submit that, even if the plaintiffs’ beliefs and sense of personal entitlement are genuinely held, they lack any factual or evidentiary basis.

[60] The parties seek judgment on a discrete issue: namely, the validity and enforceability of the trust amendment. Determination of this issue will resolve this action in its entirety in a timely, cost-effective, and proportionate manner relative to the amount at stake. Many material facts are non-contentious or uncontradicted. Credibility is not a central issue. I accept that the plaintiffs’ asserted beliefs regarding Yvonne’s wishes and intentions related to the distribution of her share of the trust

are genuinely held. I have considered the factual and evidentiary foundation for those assertions.

[61] Ultimately, I conclude that I can make the findings of fact necessary to resolve the issues on these summary trials and that it would not be unjust to do so.

B. Is the trust an *inter vivos* or testamentary trust?

[62] A threshold issue in this case is whether the trust is properly characterized as a testamentary disposition or an *inter vivos* trust. The plaintiffs say the trust amendment is a testamentary disposition because: 1) the beneficiaries acquired no immediate legal rights pursuant to the trust amendment; and 2) Denis and Yvonne did not intend their distributions to take effect until after their deaths.

[63] The trustees contend that the trust, which had immediate effect once settled, is an *inter vivos* trust. They say that, in settling the trust, Denis and Yvonne intended to create a trust which had immediate effect, and which was not dependent on the death of either one of them. The trustees argue that this intention is demonstrated by the express terms of the trust, the validity of which is not challenged, and the fact that Yvonne benefitted directly from the trust during her continued residence in the former family home after Denis' death, and in the final years of her life in a private care facility.

[64] Whether a trust is testamentary or *inter vivos* is a question of fact and depends on the intention of the maker: *Norman Estate v. Watch Tower Bible and Tract Society of Canada*, 2014 BCCA 277 at paras. 18–22. If a settlor intends that a trust will not take effect until after their death, it is testamentary; if, by contrast, a settlor intends to create a trust to take immediate effect, it is an *inter vivos trust*: *Waslenchuk Estate*, 2020 BCSC 1929 at paras. 83, 116–117; *Norman Estate* at para. 18.

[65] A testamentary disposition is invalid if it does not comply with s. 37(1) of the *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13 [*WESA*]: *Norman Estate* at

para. 15. Those formal requirements do not apply to the settlement of an *inter vivos* trust: *Quinn Estate,* 2018 BCSC 365 at para. 65, aff'd 2019 BCCA 91.

[66] There is no dispute that two individuals did not witness the signatures of Denis and Yvonne on the trust amendment, as required by s. 37(1) of *WESA*. The plaintiffs say that fact makes the trust amendment invalid, void, and unenforceable. The trustees disagree.

[67] In my view, the trust amendment cannot be viewed in isolation. It forms an integral part of the trust which the trust amendment purports to amend. Accordingly, I have considered both documents together, as constituent parts of the trust. I find that the trust, as amended by the trust amendment, is an *inter vivos* trust. The evidence unequivocally supports the conclusion that the trust took immediate effect (rather than becoming effective only on the death of the settlors) and that Yvonne benefited significantly from it during her lifetime.

[68] Kevin attests that, for about three years after Denis' death, the trust paid all expenses related to the maintenance of the trust property, where Yvonne resided until she moved to a private care facility. Kevin deposes further that, while Yvonne was alive, and after she moved into a private care facility, the trust paid almost all of her medical and care expenses, in the total amount of approximately $500,000, with income and capital from the trust.

[69] On Victoria's unchallenged evidence, she is the recordkeeper for the trust and the person responsible for all day-to-day banking matters, including the processing of trust expenses and the drafting of trust cheques. Victoria provides detailed evidence about the breakdown of annual expenses that the trust paid directly from 2016 to 2024. She deposes that, by mid-2018, Yvonne's Tax Free Savings Account and Registered Retirement Income Fund were fully depleted and that Yvonne's personal income from her Eaton's and government pensions were insufficient to cover her care costs. Accordingly, on Victoria's undisputed evidence, the trust's share of Yvonne's care costs increased significantly thereafter.

[70] I find the trust is an *inter vivos* trust, which took immediate effect once settled. It follows that the requirements in s. 37(1) of *WESA* do not apply here.

C. Did Yvonne sign the trust amendment?

[71] The plaintiffs suggest that Yvonne may not have signed the trust amendment. The trustees submit that Yvonne's signature on this document is authentic; they deny there is any evidentiary basis for concluding otherwise.

[72] The trustees concede that the person identified as a witness on the trust amendment did not actually see Yvonne sign this document. However, both Kevin and Ms. Tay depose that they witnessed Yvonne sign an earlier draft of the trust amendment on October 16, 2015. There is no dispute that this earlier signed draft contemplated the same distribution of Yvonne's share of the trust assets as that set out in the final version of the trust amendment dated October 19, 2015.

[73] There is no expert evidence before the Court regarding the authenticity of Yvonne's signature on the trust amendment dated October 19, 2015. The parties agree that expert evidence is unnecessary on this issue.

[74] Under s. 8 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, handwriting may be proven by comparison, by expert or lay witnesses, of a disputed handwriting with one that has been proved to be genuine, and which has been received in evidence for the purpose of comparison: *R. v. Megill*, 2021 ONCA 253 at para. 86. Section 8 does not oust the common law rule; it does not preclude a trier of fact from comparing disputed handwriting with admitted or proved handwriting in documents which are properly in evidence and drawing available inferences: *Megill* at para. 87.

[75] I have compared the signature attributed to Yvonne on the disputed trust amendment to her unchallenged signatures on the following documents in evidence:

a) The trust settled on July 28, 2015;

b) Yvonne's Enduring Power of Attorney dated July 28, 2015;

c) Yvonne's letter stating her wishes for end-of-life care dated July 28, 2015;

d) Yvonne's representation agreement dated September 2, 2015; and

e) Yvonne's last will and testament dated September 2, 2015.

[76] I am unable to discern any material differences between Yvonne's signatures on these documents, and the signature attributed to her on the trust amendment. I conclude, as in *R. v. Flynn*, 2010 ONCA 424 at paras. 17–18, that a side-by-side comparison of the above-noted signature samples reveals consistent characteristics in the manner in which particular letters are written. Cindi admits the signature attributed to Yvonne on the trust amendment looks "similar to" her mother's signature. Absent any evidence to the contrary, beyond mere speculation, I find that Yvonne signed the trust amendment on October 19, 2015.

D. What is the applicable test for capacity?

[77] The parties disagree about the applicable test for capacity. The plaintiffs submit that the testamentary capacity test applies; the trustees say the test for *inter vivos* capacity governs.

[78] The plaintiffs argue that, even if the trust amendment is not a testamentary disposition, this Court has often applied the testamentary capacity analysis to *inter vivos* transfers or gifts when such transfers or gifts comprise the most significant asset in the donor's estate or are made as part of an estate plan: *Geluch v. Geluch Estate*, 2019 BCSC 2203 at para. 105; *Slover v. Rellinger*, 2019 ONSC 6497 at para. 277; *Kalanj v. Kalanj Estate*, 2022 BCSC 427 at paras. 55–56.

[79] The capacity required to make an *inter vivos* trust requires only that a donor be able to understand the nature and effect of the gift they are making: *Geluch* at para. 103. There is a rebuttable presumption of adult capacity for *inter vivos* dispositions: *York v. York*, 2011 BCCA 316 at para. 36. The threshold of capacity for an *inter vivos* disposition may be less extensive and less complicated than the requirement for testator capacity: *Geluch* at para. 104; *Miller* at para. 32.

[80] By contrast, if the applicable test is akin to that of testamentary capacity, the presumption of capacity is rebuttable with proof of "suspicious circumstances":

Geluch at paras. 110-114, citing *Vout v. Hay*, [1995] 2 S.C.R. 876, 1995 CanLII 105 (S.C.C.); *Laszlo* at para. 202; *Wilton v. Koestlmaier*, 2019 BCCA 262 at para. 25.

[81] Where an *inter vivos* gift is made as part of an estate plan or the gift comprises the most significant asset in the donor's estate, the court may apply the test for testamentary capacity to the question of whether a donor had capacity: *Geluch* at paras. 104–105; *Kalanj* at paras. 55–56. The more that an *inter vivos* gift resembles a testamentary disposition, the greater the similarity in the required capacity: *Miller v. Turney*, 2010 BCSC 101 at para. 32. Justice Blake explained the test for testamentary capacity in *Jung Estate v. Jung Estate*, 2022 BCSC 1298 at para. 77:

> The most frequently quoted test for testamentary capacity is the English decision of *Banks v. Goodfellow* (1870), L.R. 5 Q.B. 549 (Eng. Q.B.) at 567, which remains relevant today. To prove that a will-maker had testamentary capacity, the proponent of the will must lead evidence that establishes that the will-maker:
>
> > a) understood the nature of the act of making a will and its effects;
> >
> > b) understood the extent of the property of which he or she is disposing;
> >
> > c) was able to comprehend and appreciate the claims to which he or she ought to give effect; and
> >
> > d) had no disorder of the mind or insane delusion that influenced his or her making of the will.

[82] I have determined that the trust is an *inter vivos* trust. However, as amended by the disputed trust amendment, the trust effectively provides for the distribution of Yvonne's entire estate. In the circumstances, I conclude that it is appropriate to apply the testamentary capacity test here. I must therefore consider whether the presence of suspicious circumstances rebuts the presumption of testamentary capacity, thereby shifting the burden from the plaintiffs to the trustees to prove that Yvonne had the capacity required to amend the trust in October 2015.

E. Are suspicious circumstances present?

1. Parties' Positions

[83] The plaintiffs submit that the trust amendment was made under highly suspicious circumstances and that, accordingly, the trustees have the onus of proving that Yvonne had the requisite testamentary capacity to sign it, citing *Geluch* at paras. 113–117.

[84] The trustees dispute the presence of suspicious circumstances, despite Yvonne's early-stage dementia and Kevin's status as both a lawyer and beneficiary under the trust. They deny the plaintiffs have discharged their burden of displacing the presumption of capacity.

2. Legal Framework

[85] "Suspicious circumstances" are circumstances that raise a well-grounded suspicion that an impugned disposition does not express the mind of the testator: *Geluch* at paras. 113–115, citing *Vout* and *Laszlo*. Suspicious circumstances must raise a "specific and focused suspicion": *Jung Estate* at para. 40. A "general miasma of suspicion that something unsavoury may have occurred" is not sufficient to meet the threshold for specific circumstances: *Jung Estate* at para. 40, *Laszlo* at para. 206.

[86] As noted by Justice Ballance in *Laszlo* at para. 207, suspicious circumstances can arise in multiple different scenarios:

> Suspicious circumstances have been found to exist in a wide array of situations and are not necessarily sinister in nature. There is no checklist of circumstantial factors that will invariably fit the classification. Commonly occurring themes include where a beneficiary is instrumental in the preparation of the will (especially where the beneficiary stands in a fiduciary position to the testator), or where the will favours "someone who has not previously been the object of [the testator's] bounty and does not fall within the class of persons testators usually remember in their wills, that is to say their next of kin": *Longmuir v. Holland, 2000 BCCA 538* (CanLII), at para. 69 *[Longmuir]; Heron Estate v. Lennox,* 2000 BCSC 1553 (CanLII) at para. 67 *[Heron Estate*]. In *Moore,* N. Smith J. found the fact that the testatrix's doctor had described her as no longer capable of managing her affairs and as suffering dementia around the time she

> made her will constituted a suspicious circumstance sufficient to rebut the presumption.

[87] If suspicious circumstances are proven, the propounder no longer has the benefit of the presumption of testamentary capacity, and reassumes the burden of proving testamentary capacity, knowledge, and approval: *Geluch* at para. 114, citing *Vout* at 889.

3. Analysis and Conclusion

[88] The plaintiffs allege multiple grounds for suspicious circumstances. I consider them both individually and holistically.

a) Yvonne's Mental Status

[89] The plaintiffs submit that Yvonne was unsophisticated in business and estates matters and, given her diagnosis of Alzheimer's disease and associated progressive dementia, was in a highly vulnerable state in October 2015. They focus heavily on a two-point decline in Yvonne's score on a Mini Mental Status Examination ("MMSE") between March 2015 and November 2015, something they describe as significant and, on the expert evidence, generally consistent with cognitive decline. They underscore that Yvonne's mental and testamentary capacity was not assessed at the time of the trust amendment.

[90] There is no dispute that Yvonne was living with Alzheimer's disease in October 2015. The parties disagree about the extent to which this condition had then progressed, and its impact on Yvonne's mental capacity. I turn next to the evidence regarding Yvonne's physical and mental status in October 2015. I begin with the evidence that I consider to be most the most probative on this issue, and to which I assign the most weight: namely, the contemporaneous clinical notes and records of Yvonne's treating healthcare providers.

i. Medical Records

[91] I have determined that the records of Yvonne's treating healthcare providers are admissible as business records pursuant to s. 42 of the *Evidence Act*. In my

view, the recorded facts in these contemporaneous business records comprise the most objective and reliable information about Yvonne's evolving physical and mental condition over time. I conclude that a careful review of these records demonstrates no material decline in Yvonne's functional cognitive status between July 28, 2015 or September 2, 2015, and October 19, 2015.

[92] Dr. David Apps was Yvonne's family physician from March 1984 until September 2015, when Dr. Kanagaratnam assumed Yvonne's primary care. Based on Dr. Apps' clinical record of Yvonne's visit to his office on February 28, 2014 (at which time Yvonne was 76 years old), Yvonne then reported subjective complaints of gastrointestinal symptoms, weight loss, and forgetfulness. Dr. Apps recorded Yvonne's height as 165.1 cm and her weight as 104 lbs. His assessment and plan noted: "Memory loss – lab now and then MMSE".

[93] Dr. Apps' objective clinical note dated March 5, 2014 references a "[p]rolonged visit for counselling re cognitive decline" of more than 20 minutes. His notes refer to "MMSE 26/30 May 2013" and "MMSE 24/30", apparently from March 1, 2014. Dr. Apps recorded his plan to refer Yvonne to the "Specialized Seniors Clinic".

[94] Dr. Mary Parr's outpatient clinic notes dated April 3, 2014, from the Peace Arch Hospital ("PAH") Specialized Seniors Clinic are in evidence. Dr. Parr notes that Yvonne was accompanied by her husband, Denis; she references Yvonne's referral, primarily due to reported cognitive decline and secondarily, regarding weight loss and nutrition. Under the heading "History of Present Illness", Dr. Parr records, in part, that:

a) Denis and Yvonne reported:

    i. A gradual decline in Yvonne's short-term memory over approximately the last two years;

    ii. No changes in Yvonne's long-term memory; and that

    iii. Yvonne continued to converse to the same extent she always had;

b) Yvonne had some word-finding difficulties, had been lost on at least one occasion, and had lost their vehicle in an unfamiliar parking lot at least three times (which was noted to be unusual for her);

c) Denis did not think Yvonne's personality had changed significantly and noted that she had been under "a great deal of stress" since last spring, apparently due to Denis' health issues;

d) Denis reported that Yvonne often had trouble recalling dates and days of the week and was getting more mixed up in the kitchen if she was interrupted from a task;

e) Denis was generally assisting Yvonne with planning and temperature regulation on the stove or oven;

f) Yvonne was independent with her medications but there had been some issues with this;

g) Historically, Denis had looked after their bills and investments;

h) Yvonne was still driving and there had been no related issues;

i) Yvonne was still capable of doing all her own housework, was completely independent with her personal care, and used no ambulatory aids; and

j) Yvonne reported that she remained active, energetic, and busy in her garden.

[95] Dr. Parr recorded her impression that, based on the history obtained and cognitive testing completed on April 3, 2014, it appeared that Yvonne likely had early dementia and probable Alzheimer's disease. This diagnosis is not disputed. Dr. Parr noted that Yvonne was pleasant and cooperative but rather quiet, and that Denis provided much of the history.

[96] On May 20, 2014, Dr. Apps reassessed Yvonne. He noted that she had seen a dietician, increased her calories, and looked "frail". On July 22, 2014, Dr. Apps recorded in his objective note that Yvonne then weighed 104 lbs.; he recorded "weight loss NYD" [not yet diagnosed].

[97] On August 22, 2014, Dr. Apps' chart summary records Yvonne's diagnosis of mild dementia and probable Alzheimer's disease. He referenced MMSE scores of 26/30 from May 2013, and 24/30 from March 2014.

[98] Nursing progress notes dated March 31, 2015, from the PAH Specialized Seniors Clinic record, in part, the following information:

a) Yvonne reported that she did not feel her cognition had changed but Denis reported he had noticed a slight decline, and a little more confusion and repetitiveness;

b) Denis noted that Yvonne had always been shy and that he made a point of getting her out to increase her social interaction;

c) There was no change in Yvonne's MMSE score of 23/30 from October 2014;

d) Yvonne remained independent with most of her activities of daily living, but Denis had taken on most of the cooking;

e) Yvonne continued to have a valid driver's license, was still driving locally, and Denis felt she was a safe driver; and

f) Yvone and Denis both reported that they felt things were then stable, but they wished to explore medical treatment options.

[99] On June 11, 2015, Yvonne returned to the PAH outpatient clinic with Denis and was reassessed by Dr. Parr who noted, in part, that:

a) Yvonne had done very well on her medication;

b) Her appetite and weight were unchanged, and Yvonne reported no further gastrointestinal issues; and

c) Follow-up was planned in six months.

[100] On June 15, 2015, Dr. Apps noted that Denis had terminal cancer, was undergoing chemotherapy, and might not live long. He wrote that a family lawyer had recommended a joint partner trust so that Denis' and Yvonne's assets would benefit only them, and that they had requested a "certification of Yvonne's capability".

[101] On June 22, 2015, Dr. Apps recorded the following subjective note in his clinical records:

> [Yvonne] is aware that the issue is to draw up a legal document to confirm [her] mental competency to retain and instruct legal counsel.

[102] The same day, Dr. Apps recorded the following objective note:

> I interviewed [Yvonne] and she understands the reasons for the letter which is in part to protect her when [Denis] is gone. Alert, oriented, and is able to express her wishes clearly.

[103] Dr. Apps' letter dated June 22, 2015, addressed "To Whom It May Concern", states as follows**:**

> I am the family doctor of Carol Yvonne Blakely. [Yvonne] has been my patient since March 27, 1984. I have been asked to provide a medical opinion in relation to [Yvonne's] mental competency to retain and instruct legal counsel in respect of matters concerning her estate and testamentary wishes.
>
> I am aware that [Yvonne] has been diagnosed as being in the initial stages of dementia, probably Alzheimer's. I have been involved in the investigation and management of this condition. I have been provided with and reviewed copies of all investigations and reports in relation to [Yvonne's] diagnosis.
>
> Following my chart review including specialists' reports from my long term involvement with her as her Family Physician, and having interviewed [Yvonne] in person on June 22, 2015 it is my opinion that:
>
> 1**.** [Yvonne] has the capacity to retain legal counsel.
>
> 2. [Yvonne] has the capacity to provide legal counsel with instructions in respect of her estate and testamentary wishes.
>
> 3. [Yvonne] does on occasion experience deficits with respect to her short term memory but such deficits do not affect her ability to form an estate plan.
>
> [Yvonne's] current care plan includes the avoidance of stress and attention to proper hydration, nutrition and sleep. When the care plan is carried out [Yvonne] is capable of functioning normally in all aspects of her dally living.

[104] Family physician, Dr. Kanagaratnam, became involved in Yvonne's primary care in September 2015. Her clinical notes dated September 23, 2015, record the following information:

a) Yvonne was then under Dr. Parr's care for cognitive impairment;

b) Yvonne remained active, was still driving, and lived with Denis who had terminal cancer; and

c) Yvonne had been extensively investigated for weight loss and all investigations were apparently normal.

[105] On November 12, 2015, Dr. Parr reassessed Yvonne, who was accompanied by Denis, and recorded the following information in her clinic notes:

a) Yvonne reported remaining quite healthy since her last visit in June and Yvonne and Denis reported that cognitively, Yvonne was much the same;

b) Yvonne's short-term memory was still problematic but was not causing any significant worries;

c) Yvonne was looking after her own blister packs and was missing only one pill at most per week, if that;

d) Denis and Yvonne had a housekeeper attend their home every two weeks, in part, according to Denis, to get Yvonne accustomed to having strangers in the home;

e) Denis and Yvonne were trying to cope with his illness by taking a meditation course; and

f) Yvonne's MMSE score was repeated on November 12, 2015, and her score was 21/30, a two-point decline from May.

[106] Dr. Parr recorded her impression and recommendations as follows:

> Although she is down 2 points from the spring, [Yvonne] still falls within the mild realm of her dementia. […] Of course, the added stress of [Denis'] health issues is likely contributing.

[107] A Home Health Service Line referral form dated December 9, 2015 indicates that Yvonne's "main carer", Denis, was then in hospital and possible palliative care, Yvonne was living alone, and she needed support with the activities of daily living.

[108] A letter dated May 20, 2016 from Dr. Parr to "Whom it May Concern" states, in part, that:

a) Yvonne had been her patient since April 2014; and

b) At the time of Yvonne's last formal follow-up in May of 2016, her clinical diagnosis was mild dementia, probable Alzheimer's type.

[109] Based on my review of the records of Yvonne's treating healthcare providers in evidence, I make the following findings:

a) Denis regularly accompanied Yvonne to her medical appointments;

b) Denis was Yvonne's main source of support at home after her diagnosis of Alzheimer's disease until his admission to hospital in December 2015;

c) Yvonne's cognitive decline and corresponding increased need for external supports coincided with Denis' admission to hospital and palliative care in December 2015; and

d) There are no recorded concerns in these documents of family violence or reports of Denis' conduct being domineering, oppressive, or controlling, or of Yvonne being subjected to undue influence by Denis.

[110] In my view, the medical records in evidence do not support the conclusion that there was a material change in Yvonne's physical or mental condition between July 28, 2015 (when the trust was settled), September 2, 2015 (when Yvonne finalized her will and representation agreement), and October 19, 2015 (when the trust amendment was signed).

ii. Expert Evidence

[111] The parties retained two experts to opine on Yvonne's mental capacity: Dr. Sandi Ann Culo, psychiatrist and certified subspecialist in Geriatric and Forensic Psychiatry, and Dr. Larry Dian, internal medicine specialist with special competence in Geriatric Medicine. These experts offer competing retrospective opinions, based on the factual assumptions they made, and their review of records received. Neither of these experts had an opportunity to conduct their own clinical assessment of Yvonne, a fact which, in my view, significantly undermines their opinions.

[112] The plaintiffs retained Dr. Culo. Dr. Culo states that, during her 20 years in practice, she has assessed patients' cognitive impairment, personal and financial competency, and testamentary capacity. The trustees do not challenge her qualifications.

[113] Dr. Culo prepared a report dated May 15, 2025, commenting on Yvonne's decision-making capacity regarding the trust amendment dated October 19, 2015. She offered the following opinions:

a) Yvonne's dementia was in the mild to moderate range between April 2014 and July 2015;

b) Yvonne likely had moderate Alzheimer's disease in October 2015;

c) There appeared to be a decline in Yvonne's cognition between July 28, 2015 (when Yvonne signed the trust) and November 2015 (when she met with Dr. Parr);

d) This decline may have occurred due to the natural course of Yvonne's dementia and/or the stress of her husband's worsening condition;

e) When assessing the severity of dementia, it is essential to consider how the individual's cognitive impairment interferes with their independence in day-to-day tasks;

f) Yvonne would have struggled to understand and appreciate how the trust amendment would change the trust; and

g) It is very unlikely that Yvonne's dementia rendered her incapable of making all personal, financial, or legal decisions.

[114] Dr. Culo acknowledges that there is limited information in the medical records which she reviewed about Yvonne's functional abilities around October and November 2015.

[115] Dr. Culo discusses MMSE scores in her report:

a) A score of 26/30 is "borderline";

b) A score of 23/30 is generally consistent with cognitive impairment (i.e., early or mild dementia) but clinical and functional correlation is required;

c) A score of 21/30 is generally considered to be on the borderline between mild and moderate dementia;

d) Dementia severity or progression is more accurately made by assessing the individual's capacity to manage their day-to-day tasks and examining how they behave and communicate;

e) An MMSE score alone would not differentiate between mild versus moderate dementia;

f) The MMSE is not sensitive enough to detect subtle changes, and it was not designed for this purpose;

g) Research suggests that on average, MMSE scores decline by zero to 1.5 points per year when individuals are treated with cognitive-enhancing medications; and

h) A decline of two points in the MMSE in less than one year is noteworthy, especially when an individual is taking cognitive-enhancing medication.

[116] Dr. Culo concludes her report by stating: "I feel there is enough evidence in the source materials for me to opine that, on balance, [Yvonne] would not have had the requisite capacity (from a clinical perspective) to make changes to the July 2015 Trust".

[117] The trustees retained Dr. Dian. Dr. Dian has been in practice for 35 years; his clinical experience includes the assessment of patients' functional status, cognitive impairment, and dementia.

[118] Dr. Dian authored a medical legal report dated June 5, 2025. He commented on Dr. Culo's report dated May 14, 2025, and offered an opinion regarding Yvonne's mental condition and decision-making capacity in October 2015. Plaintiffs' counsel submits that Dr. Dian's assumption about the accuracy of information contained in Kevin's affidavit regarding what transpired at his law office on October 16, 2015, undermines his opinions. Specifically, Dr. Dian assumes:

a) On October 16, 2015, Kevin met in person with Yvonne at his law office to hear her wishes for a trust amendment and reduce them to writing;

b) Prior to this meeting, Kevin was familiar with Yvonne's Alzheimer's related memory issues;

c) During this meeting, Kevin asked questions of Yvonne and observed that she:

   i. Exhibited awareness and engagement throughout and no forgetful behaviour; and

   ii. Expressed her wishes to change the distribution of her share of the trust (70% to charity and 30% to Cindi and her children) in a calm and direct manner;

d) For part of this meeting, Kevin met independently with Yvonne, without Denis, and confirmed her wishes regarding the trust amendment; and

e) The trust amendment reflected Yvonne's wishes to distribute her share of the trust (70% to charity and 30% to Cindi and her children).

[119] Plaintiffs' counsel submits that these factual assumptions are based on Dr. Dian's acceptance of Kevin's evidence regarding the ultimate disputed issue between the parties: namely, the validity of the trust amendment.

[120] Dr. Dian clearly sets out in his report the factual assumptions on which his opinions are based. If experts rely on factual assumptions which are not supported by the trial evidence, the opinions on which they are based may have little or no weight; the solution is not an effective withdrawal of this evidence: *Mazur v. Lucas*, 2010 BCCA 473 at para. 33. In this case, Dr. Dian's factual assumptions about what transpired at Kevin's law office on October 16, 2015, are supported by Kevin's uncontroverted affidavit evidence.

[121] Dr. Dian critiques Dr. Culo's report and opines as follows in his report:

a) The MMSE and the MoCA (Montreal Cognitive Assessment) are screening tools which can be used to screen for and potentially identify individuals with cognitive impairment who may meet the criteria for dementia or Minimal Cognitive Impairment (MCI);

b) Generally, a lower score indicates a poorer cognitive status, but it is important to note that there has never been a passing or failing score on the MMSE;

c) The limitations of the MMSE and the MoCA in assessing progress or deterioration in cognitive function are widely accepted;

d) A two-point decline in a patient's MMSE (like the change in Yvonne's MMSE from 23/30 to 21/30 between March 2015 and November 2015) is a change of "such a small degree" that it is of "very limited value in determining the severity of cognitive change";

e) The critical information required to determine whether a patient's dementia has progressed requires a loss of function, such as a loss of ability to perform activities or instrumental activities of daily living, or an emergence of behavioural symptoms;

f) A patient's response to treatment with cholinesterase inhibitors is determined based on an assessment of their function, and not their MMSE score;

g) Physicians generally chart by exception and note only new changes when assessing patients in follow-up;

h) Patients with moderately severe dementia typically reside in a complex care facility;

i) Yvonne's clinical picture between May and November 2015 is more consistent with "late" early dementia, transitioning into moderate dementia;

j) Yvonne did not meet the criteria for moderate to severe dementia in October 2015;

k) Yvonne's decision-making ability was stable in the months before October 19, 2015; and

l) Yvonne maintained decision-making capability on October 19, 2015.

[122] Dr. Culo critiqued Dr. Dian's opinions in a response report dated June 9, 2025. Dr. Culo concedes that the diagnosis of dementia cannot be based solely on cognitive test scores which, while useful, can be of limited value. She expressly agrees with Dr. Dian that evaluating function is essential when assessing the progression of dementia. Notably, Dr. Culo purports to diagnose Yvonne with moderate dementia in October 2015, contrary to the opinion of Yvonne's treating specialist, Dr. Parr, despite (unlike Dr. Parr) not having an opportunity to assess Yvonne's clinical or functional status. Ultimately, Dr. Culo states that, while she respects Dr. Dian's expertise, her original opinions remain unchanged.

[123] While expert medical evidence can assist in determining a person's capacity at a particular point in time, it is not determinative: *Geluch* at para. 95. Testamentary capacity is neither a medical concept nor a diagnosis but rather a legal construct: *Jung Estate* at para. 80, citing *Laszlo* at para. 198.

[124] In my view, the plaintiffs overstate the importance of a two-point decline in Yvonne's MMSE to the assessment of her mental capacity in 2015. Unlike plaintiffs' counsel, neither Dr. Culo nor Dr. Dian describe this change as significant. Both acknowledge the limitations of this screening test when considered in isolation and recognize the importance of assessing a person's functional status in determining whether their dementia has progressed.

[125] Ultimately, I conclude that the conflicting expert opinions of Drs. Culo and Dian are of limited assistance in determining Yvonne's mental capacity in October 2015. Both acknowledge the limitations associated with evaluating a patient's MMSE score absent a clinical assessment. Unlike Yvonne's treating physicians, neither had an opportunity to assess Yvonne's clinical or functional status.

iii. Other Documents

[126] Two contemporaneous emails in evidence arguably have some relevance to an assessment of Yvonne's mental capacity in October 2015. On November 14, 2015, Denis emailed Cindi to provide her with an update on Yvonne's status:

> Hi Cindi
>
> Good news. Nana had her annual visit with the specialist re AD and was advised "no appreciable memory changes, since last year, no changes in meds, and relative weight is trending up["].
>
> All good news and we're very happy. D

[127] Cindi's reply, if any, to this email is not in evidence.

[128] On January 1, 2016, Cindi emailed Kevin and Victoria, stating, in part, as follows:

> I agree that Mom is managing quite well in the daytime. Her mood seems relatively good, with just 1-2 sad moments during the day (today none that I observed). I also think resistance to in-home care is somewhat typical of a person who up until now has been living her life "normally" with the day to day tasks. […]
>
> Since last Sunday I stepped up my care and presence by staying overnight all week and making sure Mom was not alone during this very new grieving period – thank you both for helping out on short notice. This was to determine how she would handle the news and the realization that he is gone. I think we all agree that she seems to have a good grasp on that fact during the daytime. However, only a few hours after presenting the news, she had no recollection. I think the extreme confusion in the late evening hours between 10 pm - 1 am (phone calls to you, Vicki, and myself, or in-person conversations with me) has been remedied by way of melatonin in the evening to help her sleep, bypassing that time period. Vicki and I also talked about the fact that perhaps we (and by we I mean me) may be overprotecting her. So yesterday I left her alone for a several hours [*sic*] and today all afternoon. I know she will improve if we have confidence in her and decline if we do everything for her. Grocery shopping has been a good exercise for me to take her lead.

[129] Thereafter, Cindi's email outlines in some detail various concerns about her mother's condition and care needs. Plaintiffs' counsel concedes that there are no comparable emails in evidence which Cindi sent in or about October 2015.

[130] The above-noted emails were both created and sent before the start of this litigation, a fact which, in my view, enhances their reliability. I give these documents substantially less weight than the contemporaneous records of Yvonne's treating healthcare providers, but more weight than the plaintiffs' subsequent general, retrospective assertions. I find that neither of these contemporaneous emails suggests a material decline in Yvonne's functional or cognitive status between July 28, 2015 and October 19, 2015. I find they are, instead, more consistent with a notable decline in Yvonne's condition associated with Denis' deteriorating heath, his admission to hospital for palliative care of his terminal cancer in December 2015, and his death in early 2016.

[131] This conclusion is supported by Dr. Parr's observation in her clinic notes of November 12, 2015 that Yvonne's MMSE score was "down 2 points from the spring" and her statement that "[o]f course, the added stress of her husband's health issues is likely contributing". Dr. Culo expressly acknowledged in her first report that Dr. Apps, Yvonne's longstanding family doctor, "made particular note of the fact that stress could impair [Yvonne's] capabilities". Dr. Culo concedes that the two-point decline in Yvonne's MMSE score (between July 2015 and November 2015) "may have occurred due to the natural course of [Yvonne's] dementing illness and/or the stress of her husband's worsening condition". As noted, no steps were taken to arrange any external supports for Yvonne until after Denis' December 2015 admission to hospital.

iv. Plaintiffs' Evidence

[132] I begin by commenting generally on the quality, content, and overall tenor of the plaintiffs' evidence. Their affidavits are characterized by many striking similarities:

a) They use identical language to describe how "shocked and stunned" they were on learning of the trust amendment;

b) All profess certainty that Yvonne would not have intended to amend the trust and would have been unable to understand the implications of doing so;

c) All assert that Yvonne's condition declined in the fall of 2015, but offer no clear examples or corroborating documentation to support their assertions;

d) All describe Denis using the same language; and

e) Cindi and Kirsten both describe the changes to the trust, as set out in the trust amendment, as "drastic".

[133] The plaintiffs' affidavits contain many sweeping, uncorroborated assertions. The evidence of Kirsten and Evan largely mirrors that of Cindi, their mother. In essence, the plaintiffs suggest that the *only* rational decision Yvonne could have made regarding the distribution of her share of the trust assets, was for her to have given all, or substantially all, of her estate to them, a premise I do not accept.

[134] Cindi deposes that she "directly observed" her mother's mental and physical condition significantly worsen from August 2015 to January 2016. This is a relatively wide timeframe given the comparatively narrow issue in this case: namely, Yvonne's cognitive status between July 28, 2015 and October 19, 2015. By way of example, Cindi mentions taking Yvonne for groceries in "the fall of 2015", at which time she says Yvonne did not appreciate the need to pay. Cindi does not specify when in the fall of 2015 this occurred, relative to the signing of the trust amendment on October 19, 2015. Cindi also deposes that she noticed Yvonne was confused by simple concepts like how locks worked in August 2015. However, it is unclear on Cindi's evidence whether this was then a new problem and, if so, when it emerged. Yvonne reported forgetfulness and memory loss to her family doctor in February 2014.

[135] Cindi also deposes that, in December 2015, Yvonne forgot Denis was in the hospital and, in 2016, Yvonne forgot "numerous times" that Denis had died. Based on the records of Dr. Parr, Yvonne's treating specialist, and Dr. Culo, the plaintiffs' expert, I conclude that Denis' terminal cancer diagnosis, admission to palliative care,

and death could explain a decline in Yvonne's cognitive status in December 2015 and January 2016.

[136] It is my general impression that some of the plaintiffs' broad assertions overstate the evidence in their favour. There are some notable inconsistencies between Cindi's evidence and the medical records of Yvonne's treating physicians. Where there are such conflicts, I generally prefer the contemporaneous medical records which I conclude are a more detailed, objective, and reliable source of information.

[137] Cindi attests that she thinks Yvonne's "dementia had worsened from June of 2015 to October of 2015". Cindi neither particularizes this assertion nor corroborates it with any documentation; I find it is supported by neither the contemporaneous clinical records in evidence nor Denis' email of November 14, 2015.

[138] At her examination for discovery on April 16, 2025, Cindi admitted she did not know what medications her mother was taking in June 2015. Cindi conceded that Denis was the person who was spending the most time with Yvonne in November 2015. The clinical records in evidence suggest that Denis, not Cindi, was Yvonne's primary support person until his December 2015 admission to hospital. On all of the evidence, I conclude that this situation prevailed until Denis' final hospital admission in December 2015. For this reason, to the extent there are conflicts, I assign more weight to Denis' factual statements, as recorded in the contemporaneous clinical notes of Yvonne's treating healthcare providers, than the plaintiffs' general, retrospective, and uncorroborated assertions.

[139] Based on the clinical notes and records in evidence, Yvonne was diagnosed with Alzheimer's disease, associated with early dementia, in April 2014. Dr. Apps noted in May 2015, that Yvonne's specialist was trying to start her on medication but had concerns about possible further weight loss. The medical records in evidence indicate that, by October 2015, Yvonne had been on medication for some time and, as noted by Dr. Parr at a medication review on June 11, 2015, was then doing very well.

[140] Cindi deposes that she noticed her mother was “becoming very frail and forgetful” in August 2015. By contrast, the clinical records of Yvonne’s treating physicians indicate that neither of those issues was then new. On May 20, 2014, Dr. Apps recorded in his clinical notes that Yvonne had seen a dietician to increase her calories, and a geriatrician that week about her memory; his recorded “objective note” the same day indicates that Yvonne “looks frail”. Notably, his May 2014 clinical note pre-dates Cindi’s assertion that her mother was “becoming very frail” in August of 2015, by more than one year. Dr. Apps’ clinical notes record Yvonne’s subjective concerns about forgetfulness and memory loss as early as February 2014. His clinical notes dated February 28, 2014, indicate that Yvonne reported subjective concerns about her weight and memory loss. On September 23, 2015, Dr. Kanagaratnam noted that Yvonne had been extensively investigated for weight loss.

[141] As a further example of the discrepancy between the plaintiffs’ general assertions and the contemporaneous medical records, Cindi attests that Yvonne was unable to drive in August 2015. By contrast, on September 23, 2015, Dr. Kanagaratnam recorded in her clinical notes that Yvonne remained active and was still driving.

[142] Ultimately, these examples persuade me that the general picture the plaintiffs paint of Yvonne’s declining physical and cognitive status in the “fall of 2015” is not consistently reliable. As noted, Kirsten and Evan largely echo their mother’s evidence in their own affidavits. Kirsten expressly “agree[s] with and adopt[s] the evidence my mother gave in her affidavit”. Like Cindi, Kirsten deposes that she “directly observed from August of 2015 to January of 2016” that Yvonne’s “mental and physical condition worsened during this period” and that “her memory worsened and she was frequently more confused”.

[143] Evan similarly agrees “with the evidence my mother gave in her affidavit”. He deposes that he noticed a decline in Yvonne, “especially in the fall of 2015”, when Denis was “close to passing away”. Evan does not state precisely when in the fall of

2015 he noted these alleged changes in Yvonne. As noted, Denis was admitted to hospital in December of 2015, entered palliative care in late December 2015, and died in January of 2016.

[144] Some of the plaintiffs' evidence arguably comprises inadmissible opinion evidence which they are not qualified to provide. Kirsten deposes that, based on her direct observations, she does not think Yvonne would have: 1) "had the mental ability to understand or appreciate the contents and implications of the [trust amendment]" or 2) "been able to understand that the [trust amendment] would result in 70% of her estate going to charity at the expense of me, my mother and Evan". Apart from Kirsten's general assertion that she "directly observed from August of 2015 to January of 2016 that [Yvonne's] mental and physical condition had significantly worsened during this period", Yvonne's memory had worsened, and she was frequently more confused, Kirsten provides no factual foundation for her conclusions.

[145] Evan similarly attests that Yvonne "had a rapid decline in 2015, likely due to stress and her dementia". He deposes further that based on his "direct observations", the details of which he does not provide, he does "not think [Yvonne] would have had the mental ability to understand or appreciate the contents and implications of the [trust amendment]". Evan does not specify when in 2015 Yvonne "had a rapid decline"; he does not provide the factual foundation for his statements, or explain how he is able to comment on the cause of Yvonne's alleged decline.

[146] Yvonne and Denis were living together when Denis was admitted to hospital in December 2015. In outpatient notes dated November 12, 2015, Dr. Parr recorded, in part, the following information:

> [Yvonne] reports remaining quite healthy since our last visit in June. Her review of systems is negative. She maintains good energy. Cognitively, she feels that she is much the same as does her husband. Her short term memory is still problematic at times, but is not causing any significant worries. […]

[147] At her examination for discovery on September 24, 2024, Cindi accepted as accurate Dr. Parr's reference to Yvonne's energy and lifestyle in her outpatient clinic notes dated November 12, 2015; Cindi agreed it was consistent with her own recollection of Yvonne's condition at that time.

[148] On November 12, 2015, Dr. Parr wrote that while Yvonne's MMSE was "down 2 points from the spring", she "still falls within the mild realm of her dementia". As noted, she added that "[o]f course, the added stress of [Yvonne's] husband's health issues is likely contributing".

[149] I accept that the plaintiffs' sworn statements reflect their genuinely held beliefs. However, in my view, the overall sameness, quality, and tenor of their evidence detracts from its persuasiveness. As their own lawyer acknowledged, the plaintiffs have an obvious interest in the outcome of these proceedings; it follows that I must approach their evidence with some caution. I have done so here.

v. Trustees' Evidence

[150] I do not have the same concerns about the trustees' evidence. I found the affidavits of Kevin, Victoria, and Roberta to be more precise, nuanced, and more consistently corroborated than those of the plaintiffs. Kevin makes several candid admissions on which the plaintiffs rely regarding his meeting with Denis and Yvonne on October 16, 2015.

[151] Denis' capacity to change the distribution of his share of the trust assets in the trust amendment (i.e., to increase the amount he gave his children from 90% to 100% of his total share) is not in issue. By extension, Kevin, Victoria, and Roberta do not have the same interest in the outcome of these proceedings as the plaintiffs; Yvonne's disputed changes to her share of the trust do not impact Kevin, Victoria, or Roberta.

[152] Kevin deposes that when he met with Yvonne alone on October 16, 2015, he "detected no confusion or any lack of understanding in Yvonne conveying her wishes" and that, while he knew her to be a quiet and non-confrontational person,

she was also willful and strong-minded, and this is the person who presented herself to him during their private conversation that day. On his evidence, Yvonne was "fully engaged" in their private conversation, in Denis' absence, as they discussed the changes she wished to make to the distribution of her share of the trust on October 16, 2015. There is no evidence to the contrary. I accept this uncontroverted evidence and make these findings of fact.

[153] On Kevin's evidence, Yvonne never lost the ability to "say what she wanted or did not want", even during times of emotional stress (including, for example, when she expressed her clear wishes about not inviting Debra, her estranged daughter, to an informal memorial for Denis). Kevin deposes that Yvonne began receiving hired caregiver assistance in December 2015, after Denis was admitted to hospital, around the time Denis began to receive palliative care. This unchallenged evidence is corroborated by the Home Health Service Line referral form in evidence dated December 9, 2015, and by Victoria who provides detailed evidence about the progressive increase in Yvonne's level of care, as documented by the multiple invoices appended to her affidavit.

[154] On Victoria's undisputed evidence, she and Kevin retained a care service for Yvonne, effective December 14, 2015, when it was apparent that Denis would not be returning home from the hospital to help with food preparation, exercise, activities, and medication administration. I conclude that these invoices provide some objective evidence about the level of care Yvonne received over time and some indirect evidence about the progression of her Alzheimer's disease and the extent to which it impacted Yvonne's daily function. These records indicate:

a) On December 14, 2015, Home Instead was retained to provide Yvonne with periodic companion services, not seven days a week, for a few hours in the morning and from 4 p.m.- 9 p.m., with no overnight assistance;

b) On January 1, 2016, a more structured schedule was implemented, with companion services in place for Yvonne from Monday to Friday (with the same hours as above), leaving Yvonne on her own in the evenings and on weekends;

c) On June 1, 2016, a live-in caregiver was retained to assist Yvonne from Wednesday to Sunday, and to provide increased companion assistance on Mondays and Tuesdays (from 10:30 a.m. - 4 p.m. and from 6 p.m. - 9 p.m., with some modifications), leaving Yvonne on her own overnight on Mondays and Tuesdays;

d) On April 24, 2017, Home Instead was retained to provide "sleepover care" on Mondays and Tuesdays; and

e) In August 2017, a second live-in caregiver was hired to provide Yvonne with assistance on Mondays and Tuesdays.

[155] Victoria deposes that Yvonne was no longer thriving in her own home by mid-2018. I accept this unchallenged evidence.

vi. Summary

[156] In summary, having regard to all the evidence, I find it does not support the conclusion that Yvonne's cognitive status changed materially between July 28, 2015 and October 19, 2015.

b) Denis' Personality and Involvement

[157] The plaintiffs submit that Denis' personality and involvement in effecting the alleged trust amendment give rise to suspicious circumstances. I turn next to the evidence which is relevant to an assessment of that matter.

[158] The plaintiffs variously describe Denis as domineering, controlling, and intimidating. Cindi deposes that he was boisterous, opinionated, had a controlling personality, and did not like to be questioned. On her evidence, Denis was both domineering and controlling of Yvonne, and he was the person in charge of their relationship. By way of illustration, she deposes that Denis "would often answer for [Yvonne] if I asked her a question". According to Cindi, Denis also made sure he was close by when Cindi spoke to Yvonne, and Denis did not like Cindi to take Yvonne out without him. Cindi deposes that Denis looked after Yvonne's finances throughout their marriage, evidence which Victoria corroborates. Cindi does not suggest that Denis did so to his own advantage.

[159] As noted, the affidavits of Kirsten and Evan mesh closely with Cindi's evidence. Kirsten attests that Denis was very domineering and controlling of Yvonne, easily angered, a difficult person, and someone who loved to be in charge. Kirsten deposes that she witnessed Denis "behaving in controlling ways" towards Yvonne on "several occasions", assertions she does not particularize.

[160] Evan employs much of the same language as Cindi and Kirsten to describe Denis. He deposes that Denis was domineering and controlling and adds that Denis "became volatile and emotionally unstable and seemed overwhelmed", made impulsive decisions, was irrational, and frequently lashed out at others and fought with Cindi. Evan neither provides any specific examples of this alleged conduct nor states when or in what context it occurred.

[161] Evan deposes that Denis' behaviour "worsened significantly after his cancer diagnosis". While it is unclear on the evidence precisely when Denis was diagnosed with cancer, this diagnosis clearly predated execution by Denis and Yvonne of the unchallenged trust in July 2015. It appears from Dr. Apps' clinical records from June 2015 that Denis' cancer diagnosis was a catalyst for the decision by Denis and Yvonne to implement the trust and, as Dr. Apps noted, to ensure their assets "would benefit only [Denis] and Yvonne" and "to protect [Yvonne] when [Denis] is gone".

[162] By contrast, Kevin describes Denis as someone who lived life "loud" and "did not suffer fools gladly". On Victoria's evidence, Denis had a "strong", "larger than life" personality, and was full of "joie de vivre". She admitted Denis could occasionally be opinionated and boisterous, and that people did not always appreciate his "zany" sense of humour.

[163] From Victoria's perspective, Yvonne was undaunted by Denis. She deposes that Yvonne had no difficulty expressing her point of view or "putting her foot down" if she disagreed with what Denis said. By way of example, Victoria recalls extending invitations for events to Yvonne and Denis, which Denis declined, Yvonne accepted, and ultimately, they both attended.

[164] The evidence of Kevin, Victoria, and Roberta supports the conclusion that Denis and Yvonne had a close, loving, and supportive relationship. Denis describes their relationship as loving, caring, and traditional; he deposes that Denis was "fiercely protective" of Yvonne whom Denis referred to as the "love of [his] life". Victoria attests that Denis and Yvonne were a "traditional" couple who had defined and complementary roles, with Yvonne managing domestic matters and Denis being the breadwinner and managing the business side of things. Roberta provides evidence about caregiving courses her father took so that he could learn more about how to best support and care for Yvonne.

[165] I accept that the parties' descriptions of Denis' personality reflect genuinely held views, expressed from different vantage points. There is no dispute that the relationship between Yvonne and Denis endured for more than two decades. I find it was a traditional one and that Denis, as the primary breadwinner, was primarily responsible for the couple's finances, while Yvonne's principal domain was their home and family life. On all of the evidence, I am not persuaded that Denis' personality or his relationship with Yvonne gives rise to suspicious circumstances. I am unable to find that there was any material change in Denis' personality or his relationship with Yvonne between July 28, 2015 and October 19, 2015.

[166] The plaintiffs underscore that Denis, not Yvonne, initiated telephone contact with Kevin about amending the trust in October 2015. They assert:

a) When "close to death", Denis initiated contact with Kevin to change the trust;

b) Denis was the "main contact person" with Kevin regarding the trust amendment, and the only one who reviewed drafts of it; and

c) Denis had significant influence and control over Yvonne.

[167] On Kevin's unchallenged examination for discovery evidence, Yvonne was "not a telephone talker". Kevin deposes that, while on the phone with Denis on October 15, 2015, he heard Yvonne in the background saying that "her children were going to get very little". Kevin's contemporaneous notes of this telephone

discussion with Denis, the authenticity of which is not disputed, corroborate this evidence.

[168] On Cindi's evidence, she thinks Kevin "was intimidated by Denis and did not like to question him". Cindi attests that she does "not think Kevin would have said no to Denis or questioned or challenged him in any way in October of 2015", and that she thinks Kevin "would have done exactly what Denis told him to do and would have done it quickly".

[169] In response, Kevin deposes that he and Cindi first met in August 2015, and that Cindi had very limited opportunities to observe his interactions with Denis. On Kevin's uncontradicted evidence, he recalls only one other occasion when he met Cindi in Denis' presence, before Denis' admission to Surrey Memorial Hospital. Cindi admitted at her examination for discovery on September 24, 2024 that the first time she met Kevin and Victoria was in August of 2015. Ultimately, I am not persuaded on the evidence that Cindi knew Kevin well enough to offer any meaningful insight into his relationship with Denis in October 2015. To the extent there are conflicts, I prefer Kevin's evidence on this point.

[170] Kevin flatly denies Cindi's suggestion that he would not say no to Denis, saying this "is incorrect". On Kevin's evidence, he and Denis regularly sparred over their different views on a variety of topics but, as Kevin matured, he learned not to engage with Denis if their differences were unimportant. Kevin denies being intimidated by Denis or afraid to question or challenge him. Kevin attests it was clear to him that Denis telephoned him on October 15, 2015, on Yvonne's behalf. Kevin deposes that he would have refused to follow any unilateral instructions from Denis.

[171] I find nothing surprising or suspicious about the fact that Denis placed a call to his son, Kevin, a lawyer, about the trust amendment, or that Denis, as a settlor to the trust, was involved in the preparation of this document. I find that Denis and Yvonne had distinct but complementary personalities and a loving, supportive, and lasting relationship. I find Denis was generally protective of Yvonne, concerned

about her wellbeing, and intent on taking steps while he was alive, including their settlement of the trust, to ensure her adequate support after his death.

c) Kevin's Involvement and Alleged Conflict of Interest

[172] The plaintiffs argue that Kevin ought to have been highly suspicious of the trust amendment and refused to act. They submit that his involvement in drafting this document gives rise to suspicious circumstances because:

a) Yvonne and Denis did not retain Ms. Pawson, their experienced estates lawyer, to draft the trust amendment;

b) Kevin, a labour lawyer and not an estates lawyer, drafted the trust amendment despite being advised by Ms. Pawson not to be involved if he would benefit from it; and

c) Kevin, a beneficiary and future trustee, had a direct conflict of interest because he personally benefitted from the trust amendment.

[173] I address each point in turn.

[174] The plaintiffs emphasize that Yvonne received no independent legal advice, and that no independent lawyer explained the contents or the legal ramifications of the trust amendment to Yvonne before it was signed. Kevin is a labour lawyer who was called to the bar in 1989; he practices law in Vancouver. Kevin admitted at his examination for discovery on September 23, 2024 that he has no experience in estates law. On Kevin's evidence, he provided no legal advice to Denis or Yvonne; rather, he drafted a document to reflect their clearly stated wishes.

[175] Kevin deposes that when he asked Denis why he and Yvonne were not returning to see Ms. Pawson, the estates lawyer who had drafted the trust, Denis replied that he did not think this was necessary and that Kevin's role would be to help them draft new language to reflect Yvonne's wishes. On Kevin's unchallenged evidence, Denis and Yvonne then lived in South Surrey, Ms. Pawson's office was in West Vancouver, and Kevin's law office was in East Vancouver. Kevin deposes further that he also suspects his father "was just being cheap and did not want to pay to see [Ms. Pawson] again".

[176] In October 2015, Denis was 75 years old and had terminal cancer; Yvonne was almost 77 and had Alzheimer's disease. On Kevin's unchallenged evidence, it was more convenient for them to see him about amending the trust than to travel to West Vancouver to see Ms. Pawson. Notably, Denis and Yvonne could have amended the trust themselves at any time, without the involvement of a lawyer, to change the distribution of their respective shares of the trust.

[177] I have determined that the trust is an *inter vivos* trust and not a testamentary trust. It took immediate effect once settled, and not on the settlors' death. It follows that the formal requirements in *WESA* for amending a testamentary disposition do not apply. The trust document expressly provides that it "may be altered, amended, or varied at any time and from time to time by an instrument signed by the Settlors acting jointly". The trust did not require Denis and Yvonne to retain a lawyer, or to have any changes they made to the trust witnessed.

[178] Plaintiffs' counsel concedes that, if the settlors were of sound mind and understood the nature and effect of the changes they wished to make to the trust in October 2015, they were entitled to amend the trust in any way they wished. Ultimately, I am not persuaded that the fact Denis and Yvonne chose not to return to see Ms. Pawson to amend the trust gives rise to suspicious circumstances.

[179] The plaintiffs further submit that Kevin, as both a beneficiary under the trust and a future trustee, was in a position of conflict and ought to have refused to be involved in preparing the alleged trust amendment. At his examination for discovery on September 23, 2024, Kevin testified that, from his perspective, he was not making a significant change to the trust; rather, he was simply helping Denis and Yvonne draft a document which they would otherwise have drafted themselves, to ensure it was clear. Kevin testified further that he did not think he was in a position of conflict. On his evidence:

> The document was clear that they could make a change to their trust. I was simply making sure that their trust wishes were carried out exactly as they wanted. There was no conflict in doing that.

[180] On October 16, 2015, Kevin emailed Ms. Pawson to ask her if she had any concerns about his involvement in the preparation of the trust amendment. In response, Ms. Pawson wrote:

> Hello Kevin,
>
> No I don't think I have any particular concerns unless of course you were asked to make an amendment that increased the share of the Trust Fund that you are entitled to receive through the first draft that I prepared. If anything you do increases your interest in the Trust Fund it would be a conflict of interest for you to be involved in the amendment in any way. […]

[181] Kevin later provided Ms. Pawson with a copy of the trust amendment. In his email to her on October 28, 2015, Kevin wrote:

> Dad's time is very short. Yvonne is happy in her garden and we have some plans in place for her future home care. I am confident she was lucid and informed when she initiated and completed the change to the division of her portion [of the trust].

[182] On Kevin's evidence given on discovery, "[t]here was nothing that changed in Yvonne's share that had any bearing on what my dad did with his share". The trustees note that the increase to Kevin's beneficial entitlement due to Denis' change to the distribution of his one-half share, was less than 2% of the total trust assets (i.e., one-third of 5%). They deny this change resulted in any significant benefit to Kevin, or that this modest increase in his entitlement had any impact on the allocation of Yvonne's one-half share of the trust or served as any reasonable inducement or influence on Yvonne's own decision-making. I agree.

[183] I find that Denis and Yvonne had decided:

a) to divide the total trust assets between them equally; and

b) that each of them could determine how to distribute their respective one-half shares of the trust assets.

[184] On Kevin's evidence, Denis retired on a full pension after 40 years of work at BC Hydro and he contributed disproportionately to the accumulation of the trust assets. Kevin deposes, based on information from Denis, that Yvonne left her first marriage with virtually nothing, and that her entire income during their marriage was

from her modest part-time sales position at Eaton's, and thereafter from her modest pension income. Kevin attests that Yvonne's former family home that she shared with her first husband was expropriated by the City of Burnaby.

[185] By contrast, Cindi deposes: "As far as I am aware, Denis and my mother went into their relationship owning approximately the same amount or value of assets"; Cindi does not identify the source of this information. By extension, Cindi concludes:

> As a result, my mother contributed at least half of the monies that were in their estate so it makes sense they would have provided in their estate planning that 50% of the residue from their estate would be left to Denis' family and 50% to the Yvonne family.

[186] I prefer Kevin's more precise evidence on this point, based on information from Denis who, by all accounts, managed finances in his relationship with Yvonne. While not directly relevant to a matter in issue, Cindi's evidence on this point reinforces my view that her evidence is often characterized by general assertions, the basis for which is not consistently clear, a factor which undermines the weight of her evidence.

[187] As noted, Denis' capacity to change the distribution of his effective one-half share of the trust assets in October 2015 is unchallenged. There is no suggestion in the evidence that Yvonne disagreed with the change Denis made to the distribution of his share of the trust assets in October 2015 (i.e., to make no donation to charity but instead to distribute an additional 5% of his one-half share amongst his three children). The Denis Family Share always comprised 50% of the total trust assets. The contested changes to the Yvonne Family Share of the trust neither changed this equal division (as between Denis and Yvonne) nor benefited the Denis family.

[188] While I accept that the parties' present dispute might have been avoided if things had transpired differently, I am not persuaded that Kevin's decision to draft the trust amendment gives rise to suspicious circumstances. In my view, it would be illogical to find that suspicious circumstances arise here because Kevin agreed to draft a document that Denis and Yvonne could have prepared themselves.

d) The Timing of the Trust Amendment

[189] The trust amendment was signed on October 19, 2015, within four days of Denis' initial telephone call to Kevin on October 15, 2015 and less than three months after the trust was settled on July 28, 2015. At issue is whether this timing is suspicious.

[190] On Kevin's unchallenged evidence, Denis telephoned him on October 15, 2015, in Yvonne's presence, about a change to the trust. Kevin deposes that Denis and Yvonne met with him at his law office the next day, October 16, 2015, to discuss and to sign an early draft of the trust amendment. This document was later revised to correct a drafting error which Denis identified. Specifically, Denis noted that the draft which he and Yvonne had signed at Kevin's office on October 16, 2015 did not reflect Denis' wish to eliminate his 5% charitable contribution and instead to distribute those funds to his three children. The final trust amendment was signed on October 19, 2015. I accept this uncontradicted evidence.

[191] At his examination for discovery on September 23, 2024, Kevin testified that Denis was aware his cancer was terminal in October 2015. When asked about the timing of the trust amendment at his examination for discovery, Kevin replied: "It's a simple amendment. They drove in from Surrey. My father was dying. They were in town. They wanted to get it done. There was no reason to delay".

[192] Cindi attests that Denis was "very close to passing away" when the trust amendment was executed. By contrast, Victoria denies Denis was "close to passing away" in October 2015; she deposes that he remained fully functional at home until he was admitted to hospital on December 3, 2015, and to hospice care on December 18, 2015. On Victoria's evidence, she understood that Denis' biggest fear about dying was the prospect of leaving Yvonne on her own.

[193] On all of the evidence, including their respective ages and health concerns, I find Denis and Yvonne had compelling reasons to finalize any amendments they wished to make to the trust promptly in October 2015. Ultimately, I am not persuaded that the timing of the trust amendment gives rise to suspicious

circumstances. Notably, there is no evidence about how long Yvonne and Denis might have considered the changes they made to the trust, before they took steps to implement them in October 2015. The trust expressly provided that the settlors, acting jointly and by signed instrument, could amend it at any time.

e) The Complexity of the Trust Amendment

[194] The plaintiffs argue that the complexity of the trust amendment gives rise to suspicious circumstances. They describe it as a complicated document which is difficult to read and understand.

[195] The plaintiffs rely on Kevin's admission that he did "not believe that Yvonne understood the actual language (i.e., the terms) in the amendment document" when he met with her on October 16, 2015; on his evidence, this lack of understanding was unrelated to Yvonne's Alzheimer's disease. Kevin admits Yvonne did not ask to read the trust amendment; rather, he deposes that Yvonne asked that something be drafted to reflect her wishes, which she clearly expressed to him. On Kevin's evidence, "Yvonne clearly expressed to me on October 16 [2015] that it was her wish to leave 30% of her Trust share to Cindi and Cindi's kids, with the balance to charity". Kevin admitted the effect of the trust amendment was significant.

[196] I accept that the trust, the validity and enforceability of which is not in dispute, is a lengthy and complex document. Denis and Yvonne had the benefit of specialized advice from an independent estates lawyer in the preparation and execution of this document. As a result, I conclude that Yvonne fully understood in July 2015 the nature and effect of the trust, the general composition of the trust assets, and how her share of those assets was to be distributed. There is no evidence that the nature or value of the trust assets changed materially between July and October 2015.

[197] The disputed portion of the trust amendment changed the distribution of Yvonne's share of the trust. Yvonne's entitlement to an effective one-half share of the trust assets did not change. The beneficiaries of the Yvonne Family Share (namely, Cindi, Kirsten, Evan, and charity) did not change. Yvonne's only change

was to increase her contribution to charity (from 10% to 70% of her effective one-half share) and, by extension, to decrease her contribution to Cindi, Kirsten, and Evan (from 90% to 30%).

[198] I acknowledge that there was an error in the preliminary draft of the trust amendment which Denis and Yvonne signed in Kevin's presence at his office on October 16, 2015. I do not agree that this error resulted from any inherent complexity in the trust amendment. Rather, I find it probably resulted from simple oversight: namely, Kevin's failure to include Denis' intended change to his share of the trust (i.e., eliminating Denis' charitable contribution, in response to Yvonne's decision to make a substantial charitable donation and in lieu of their previous decision to donate 10% of the total trust assets to charity).

[199] Ultimately, I am not persuaded that any complexity in the contested change to Yvonne's distribution of her share of the trust gives rise to suspicious circumstances. In essence, the change that Yvonne made was a simple one: she increased her donation to a children-based charity to 70% of her share of the trust. As a result, the portion of her share that went to plaintiffs was reduced to 30%.

f) The Execution of the Trust Amendment

[200] The plaintiffs submit that the execution of the trust amendment gives rise to suspicious circumstances because:

a) This document was not attached to the trust when it was allegedly executed;

b) The evidence suggests that Yvonne did not read the trust amendment and that she did not see the percentages recorded in it; and

c) No one witnessed Yvonne's signature on the trust amendment.

[201] On Kevin's evidence, he met a second time with Denis and Yvonne on October 16, 2015 after his meeting with Yvonne alone, and confirmed that they wanted to change Yvonne's distribution of her share, with 70% going to charity, and 30% to be divided equally between Cindi and her two children.

[202] At his examination for discovery on September 23, 2024, Kevin admitted he did not show Yvonne a copy of the trust on October 16, 2015, saying there was no need to do so and that Yvonne "knew exactly what she was doing". On Kevin's evidence, while he saw Denis and Yvonne sign a preliminary draft of the trust amendment in his office on October 16, 2015, Ms. Tay was the only person who signed this document as a witness.

[203] Kevin conceded at his examination for discovery that he did not see Yvonne sign the final version of the trust amendment, which corrected his drafting error by eliminating Denis' charitable donation and distributing this amount to Denis' three children. Kevin admitted he does not know where or when Yvonne signed the final draft of the trust amendment or who was then present. He agreed that, apart from seeing Yvonne's signature on this document, he does not know if she signed it. As noted, the plaintiffs rely on these admissions, which they describe as significant.

[204] At his examination for discovery on September 23, 2024, Kevin testified that both of the documents which Yvonne signed (i.e., before and after Kevin corrected his drafting error to eliminate Denis' charitable donation) reflected Yvonne's stated wishes. On his evidence: "Yvonne's wishes were 50% of the estate and 70/30 split between charity and the Cindi family. That was Yvonne's wishes. And Yvonne's wishes were [that] my dad could do whatever he wanted with his 50% share, which she understood was going to go to the Denis family kids".

[205] I have found that Yvonne understood the nature and effect of the trust prepared by experienced estates lawyer, Ms. Pawson; the plaintiffs dispute neither the validity of the trust nor Yvonne's capacity to settle it. On Kevin's uncontradicted evidence, which I accept, as corroborated by his contemporaneous handwritten notes dated October 15, 2025, Yvonne had a clear understanding of what she wanted to accomplish with the trust amendment. This change was, in essence, a simple one, regardless of how this document was drafted. As noted, the trust contained no formal requirements regarding the settlors' amendment of it, apart from

requiring Denis and Yvonne to act jointly by signed instrument. The trust amendment complied with this requirement.

[206] I find the manner of execution of the trust amendment does not give rise to suspicious circumstances.

g) The Non-Disclosure of the Trust Amendment

[207] The plaintiffs submit that the trust amendment was drafted in a secretive and suspicious manner. They say that, despite Cindi's close relationship with Yvonne and their weekly contact, Yvonne did not tell Cindi, Kirsten, or Evan that she had decided to leave 70% of her share of the trust to charity.

[208] Cindi deposes that she and Yvonne did not keep secrets from each other. The evidence does not support this conclusion; rather, it confirms that Yvonne neither informed Cindi nor involved Cindi in matters related to her estate planning.

[209] Yvonne appointed Victoria to be her personal representative in September 2015. The plaintiffs do not challenge Yvonne's capacity to execute estate documents, namely, her will and representation agreement, in September 2015. Cindi thinks she learned in December 2015 that Yvonne had neither conferred her power of attorney to Cindi, nor appointed Cindi to be her medical representative. Cindi admits she was "surprised" to learn Yvonne did not appoint "the three of us", meaning Cindi, Kevin, and Victoria.

[210] On Kevin's evidence, Cindi expressed "shock" when she was informed that Yvonne had appointed Victoria to be her personal representative. He deposes:

> In late 2015, it became clear to me that Cindi remained unaware that Yvonne and Denis had not tasked her with any legal responsibilities regarding their affairs and care. In mid-December 2015, shortly after my dad was admitted to Surrey Memorial Hospital, I remember sitting and speaking with my sister and Cindi in the hospital's foyer. During this conversation, Cindi expressed to us that she would be assuming responsibility for Yvonne while my dad was in hospital. When we informed her that we had been appointed as Yvonne's legal representatives in all matters, Cindi expressed shock. Cindi made no mention at that time, or at any other time while my dad or Yvonne remained alive, that she had been promised a role in the Trust by my dad. At no point in

> the seven years that my sister and I performed our legal duties under the Trust did Cindi challenge our appointment.

[211] Kevin attests that despite Ms. Pawson recommending that Denis and Yvonne disclose this information, they explicitly asked him not to tell Cindi about the trust or Kevin's role as one of Yvonne's trusted persons because "Cindi would just cause trouble".

[212] Cindi admits she did not receive a copy of the trust amendment or learn of its existence until 2023, after Yvonne died. On Kevin's evidence, he did not provide the trust amendment to Cindi, Kirsten, or Evan, or to either of his own siblings, because Denis and Yvonne, both of whom were very private people, had asked him not to share their wills or related documents with other family members, and he respected those wishes.

[213] In October 2015, Yvonne was dealing with her husband's terminal illness, and she had health issues of her own. On Kevin's evidence, Yvonne and Denis told him that they anticipated Cindi would "cause trouble" if she knew about the trust. Cindi's assertion that Yvonne did not keep secrets from her is refuted by the unchallenged evidence to the contrary.

[214] Given this evidence, I do not find it surprising that Yvonne decided not to share the details of her estate planning with Cindi. Ultimately, I am not persuaded that Yvonne's decision not to disclose the trust amendment to Cindi, Kirsten, or Evan gives rise to suspicious circumstances.

h) The Effect of the Trust Amendment

[215] The plaintiffs deny there was any logical or practical reason for Yvonne to change her mind less than three months after signing the trust and decide to leave 70% of her estate to charity and only 30% to Cindi and her two grandchildren. They assert that the trust amendment:

a) Is contrary to Yvonne's express wishes, including those set out in the trust; and

b) Significantly reduced the amount Yvonne's heirs would receive from the trust.

[216] The plaintiffs note that, on Kevin's evidence, Yvonne "feared Cindi would be irresponsible with a large sum of money and wanted to ensure that a portion of Cindi's share of the Trust was guaranteed to go to Evan and Kirsten". The plaintiffs submit that a decision to reduce the shares of Kirsten and Evan in the trust "seems illogical and inconsistent" with Yvonne's wish "to guarantee her grandchildren part of her estate". I disagree. I acknowledge that Kirsten and Evan received a smaller percentage of Yvonne's share of the trust assets pursuant to the trust amendment. However, neither the trust nor the trust amendment disinherited Kirsten or Evan; rather, both documents expressly provide that their respective shares of the trust would go to Kirsten and Evan directly, and not to Cindi alone.

[217] Kevin recalls that his father had a "tone of resignation" in his voice when they spoke by telephone about the proposed trust amendment on October 15, 2015. Based on their discussions, he understood that Denis was "not particularly happy with Yvonne's decision to change her distribution" but "was acquiescing to it". On Kevin's evidence, Denis told him that Yvonne had made her original distributions in the trust based on Denis' recommendations and that she had changed her mind about what she wanted to do.

[218] Kevin deposes that, after he provided the trust amendment to Denis and Yvonne, Denis said that it was "likely to make some people very unhappy". On Kevin's evidence, Yvonne's reply that she "was not concerned if it made anyone upset" was both immediate and firm. Kevin attests that Yvonne explained how important it was for her to do something "for the children" and that the charitable contribution was what made her happy. According to Kevin, this exchange was memorable, because Yvonne and Denis were then both teary, and Kevin had only ever seen his father teary perhaps twice in his life.

[219] The plaintiffs challenge the logic, on Kevin's evidence, of Denis initially being unhappy about Yvonne's proposed change to the trust but becoming teary "at the

prospect of being able to do so much good". They question whether Denis was then unduly emotional and acting rationally.

[220] I accept Kevin's uncontradicted evidence that Denis "seemed moved" by Yvonne's decision to make a substantial donation to a children's-based charity during their meeting on October 16, 2015. I find Kevin's explanation for having a clear recollection of Denis being teary on this occasion to be compelling. I do not find Denis' response that day to be either surprising or suspicious. I find it is consistent with Victoria's evidence.

[221] Victoria deposes that she visited Denis many times at the home he shared with Yvonne in October 2015, as he wanted to prepare her to assume Yvonne's care and to manage various other matters after his death. On Victoria's evidence, she recalls "with absolute clarity" Denis crying on October 22, 2015, during one of these visits. Victoria deposes that she was then 53, and that this was the first time in her life she had ever seen her father cry. On her evidence, when she asked Denis why he was crying, he replied: "she's going to cause problems". Victoria attests that, once she read the trust amendment for the first time, after Denis' death, and saw the significant change to the distribution of Yvonne's share of the trust assets, she took Denis' statement to refer to Yvonne and to indicate that he was concerned her beneficiaries (i.e., Cindi, Kirsten, and Evan, the plaintiffs in this action) would challenge (as they have) her decision to give 70% of her share of the trust to charity.

[222] I find Victoria's explanation for clearly recalling this event to be persuasive. The statement she recalls Denis making in late October 2015 is consistent with Kevin's evidence about his stated impression on October 15, 2015, that while not happy about Yvonne's proposed change to the trust, Denis had acquiesced to it.

[223] Cindi deposes that her mother was not a charitable person. The factual foundation for this assertion appears to be Cindi's statement that she was "not aware of [Yvonne] making donations to any charities during her lifetime". At her examination for discovery on September 24, 2024, Cindi testified that she did not "want to say [Yvonne] wasn't a charitable person" but she had "never seen [Yvonne]

give money away to a charity like this [i.e., as in the trust amendment]. When asked to explain her answer, Cindi testified: “Because I had a relationship with [Yvonne], and she wouldn’t give her family money to someone other than me and my children”. Cindi admitted she did not think Yvonne had ever said this to her specifically.

[224] On all of the evidence, I conclude that, despite Cindi’s assumptions and expectations, Yvonne might not have advised Cindi about what, if any, charitable donations she had made during her lifetime. Cindi admitted at her examination for discovery that she was not surprised Yvonne had specified BC Children’s Hospital as a potential beneficiary of her charitable donation. Rather, it was Yvonne’s decision to allocate 70% of her share of the trust to charity that was “shocking” to Cindi.

[225] Cindi’s view that she was the person who was closest to Yvonne after Denis died, and that anything other than distribution of all, or most, of Yvonne’s share of the trust to Cindi and Cindi’s children would be illogical and irrational, permeates her evidence. Cindi deposes that she saw her mother weekly most of her adult life. On her evidence, from 2016 until Yvonne’s death in 2023, no one was closer to Yvonne than Cindi. However, on Kevin’s unchallenged evidence, Cindi did not want to become Yvonne’s caregiver.

[226] Cindi deposes that Yvonne also had a close relationship with Kirsten and Evan. Kirsten attests that Yvonne told her she “would make sure that me, my mother, and Evan would be well taken care of when she was no longer with us” and that “she knew leaving money to Evan and me would have a significant impact on our future”. I accept this unchallenged evidence. In my view, it explains why Yvonne left the plaintiffs almost $200,000.

[227] I do not share the plaintiffs’ view that anything other than distribution of all, or substantially all, of Yvonne’s share of the trust to them is illogical. The plaintiffs have apparently given no consideration to the fact that Yvonne had disinherited two of her three children. The plaintiffs have apparently assumed that they alone would receive any part of Yvonne’s effective one-half share of the trust which might otherwise have

gone to Frank and Debra, if they had not been estranged. In my view, that is a misplaced assumption.

[228] The practical effect of the trust amendment was to give two shares, each equal to approximately one-third of Yvonne's interest in the trust, to charity rather than to Cindi, Kirsten, and Evan. By extension, this effectively equalized the shares of all Denis' and Yvonne's children in the trust as whole. I appreciate there is no evidence to support the conclusion that this was Yvonne's intention. However, viewed in this light, it informs my view of the reasonableness of the trust amendment and whether it is illogical or suspicious.

[229] I find the effect of the trust amendment does not give rise to suspicious circumstances. I also conclude that given the trust amendment, the trust is of limited assistance in ascertaining Yvonne's intentions.

i) Summary

[230] In summary, having regard to all the grounds alleged, viewed individually and holistically, I find they do not give rise to suspicious circumstances, the effect of which would be to displace the presumption of testamentary capacity. This finding is effectively determinative of the issue of capacity.

[231] The above-noted legal presumptions therefore apply. I find the plaintiffs have not rebutted the presumption of testamentary capacity. In the result, I find Yvonne had the requisite testamentary capacity and that she knew and approved of the contents of the trust amendment at the time it was made.

F. Was Yvonne subjected to undue influence?

1. Parties' Positions

[232] The plaintiffs submit that, if Yvonne signed the trust amendment, she must have been unduly influenced by Denis. The plaintiffs rely on many of the same allegations which they say support suspicious circumstances, a finding I have not made. They assert that Yvonne was subjected to undue influence on the following grounds:

a) Yvonne entered her first marriage at the age of 16 and did not have a Grade 12 education;

b) Yvonne was in a highly vulnerable state given her Alzheimer's disease, progressive dementia, and Denis' terminal cancer;

c) Denis had a domineering personality, was in a dominant position, and exercised persuasive influence and control over Yvonne;

d) Denis had his son, Kevin, a beneficiary under the trust, meet with Yvonne and draft the trust amendment;

e) Denis did not retain Ms. Pawson, an experienced estates lawyer, to draft the trust amendment or to meet with Yvonne;

f) Yvonne neither received, nor had an opportunity to receive, any independent legal advice;

g) Denis initiated contact with Kevin, was the main contact person, and the only person who received the draft amendment documents;

h) No one witnessed Yvonne execute the trust amendment;

i) Denis exercised his power and influence over Yvonne to coerce her into signing the trust amendment when she neither understood nor agreed to the changes in this document; and

j) Yvonne was largely dependent on Denis and often did what he said.

[233] For these reasons, the plaintiffs assert that the trust amendment does not reflect Yvonne's true wishes and was not the product of her own free will. They say it is therefore invalid, void, and unenforceable and must be set aside.

[234] The trustees dispute these assertions. They say:

a) Properly characterized, the impugned "transaction" was between Yvonne, the plaintiffs, and a charitable organization (and not between Yvonne and Kevin, or Yvonne and Denis);

b) As pleaded, the plaintiffs' claim of undue influence is grounded in a tenuous assertion that Denis unduly influenced Yvonne to amend the trust, an assertion the trustees deny;

c) Although there is no debate that Yvonne relied on Denis for their joint financial affairs, there is no evidence to support a finding that she simply did what Denis suggested;

d) The weight of the evidence supports a finding that Yvonne exercised agency in amending her allocation of the Yvonne Family Share and that she was not subject to undue influence; and

e) It was Yvonne, not Denis, who initiated and confirmed the change to the Yvonne Family Share, despite Denis' concerns.

2. Legal Framework

[235] As noted, the trust amendment effectively disposed of Yvonne's entire estate. Accordingly, I have applied the test for testamentary capacity. At issue is whether the plaintiffs have met their onus of proving that the trust amendment did not reflect Yvonne's intentions and was not the product of her own act: *Leung v. Chang*, 2013 BCSC 976 at paras. 34–35; *Vout* at para. 28. A suspicion of undue influence will not suffice: *Jung Estate* at para. 164.

[236] The doctrine of undue influence will intervene and set aside arrangements when the testator or gift-giver's volition is dominated by another person, with the result that the person really did not express their mind: *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353, 1991 CanLII 69 (S.C.C.); *Slover* at para. 374. A trust agreement that was the product of undue influence can be set aside: *Geffen* at 368.

[237] Justice Wilson explained undue influence in *Geffen* at 378–379. The inquiry begins with asking whether the nature of the relationship itself gives rise to the potential for domination: *Geffen* at 378. If so, then the court must examine the nature of the transaction: *Geffen* at 378. Commercial transactions are treated differently than gifts, for which there was no consideration: *Geffen* at 378. When the transaction at issue involved a gift and it has been established that there is a relationship that gives rise to the potential for domination, the onus is on the defendant to rebut the presumption of undue influence and that the individual in question (in this case, Yvonne) entered into the transaction as a result of her own "full, free and informed thought": *Geffen* at 379, citing *Zamet v. Hyman*, [1963] 3 All E.R. 933.

[238] A presumption of undue influence does not arise automatically in the relationship between a husband and wife, although courts have acknowledged that such a presumption may arise in circumstances where the wife relies on the

husband in all financial matters and simply does what he suggests: *Terrapin Mortgage Investment Corp. v. Triple S. Farms Ltd.*, 2012 BCSC 1805 at para. 14.

3. Analysis and Conclusion

a) Denis' Relationship with Yvonne

[239] As noted, the plaintiffs characterize Denis as a domineering and controlling individual whose relationship with Yvonne was generally oppressive. They note that Yvonne married her first husband when she was still young and did not complete high school. On Cindi's evidence, Yvonne was neither sophisticated nor computer literate.

[240] By contrast, the trustees submit that the evidentiary record paints a clear picture of a healthy relationship between Denis and Yvonne, characterized by mutual love, respect, and support. Kevin deposes that Denis and Yvonne had a traditional relationship and that, in many respects, each was the master of their own domain. Kevin attests that his father's greatest professed fear at the end of his life was not being around to protect Yvonne as her Alzheimer's disease progressed. On Kevin's evidence, Denis was very focused on putting his affairs in order and providing for Yvonne's future care.

[241] Victoria corroborates Kevin's evidence about the importance of family to Yvonne. Like Kevin, she describes Denis and Yvonne as a "traditional couple" with defined and complementary roles. She describes Yvonne as a strong woman who "did not walk in anyone's shadow" and deposes that Yvonne and Denis were mutually supportive and full partners in the happy, active, and fulfilling life they shared. Victoria denies ever seeing or hearing about any concerning behaviour during their 24 years together.

[242] On Roberta's evidence, Denis informed her by email in May 2015 that he had completed a two-month course in caregiving with the BC Alzheimer's Society to learn more about how to support and care for Yvonne. In this email, Denis advised Roberta that he needed some time to get past some current issues that were "high

on [his] priority list". Denis noted that he hoped to have a caregiver contract in place before he went for any more tests or surgery, in case of complications and him having to leave Yvonne home alone. By email dated October 21, 2015, Roberta wrote to her father, stating "I know you are exceedingly fond of [Yvonne] and if I'm not mistaken, more worried about her than yourself. No matter how well you think she is holding up, she will be devastated when you are gone".

[243] The medical records of Dr. Apps, Dr. Kanagaratnam, and Dr. Parr, and the nursing notes from Yvonne's attendance at the PAH Seniors' Clinic make no reference to any concerns about Denis being a controlling or domineering spouse, or to Yvonne being at any corresponding risk due to any inherent vulnerabilities. Denis is noted to have accompanied Yvonne to many of her medical appointments, apparently in a supportive role.

[244] Personal statements attached to the September 2014 advanced directives of Denis and Yvonne offer some insight into how they viewed their own relationship and life together. Yvonne's personal statement, notes, in part, as follows:

a) I enjoyed raising my family and guiding them to become independent adults each having their own families and relationships.

b) I enjoy my life with Denis very much. We do so many things together life has been very exciting and rewarding. I can say I have never been bored.

c) We have travelled extensively.

d) We like to watch the grandchildren at soccer, field hockey, and enjoy listening to them play the piano.

[245] Denis' personal statement notes, in part, that his enjoyment in life has included watching his children grow into thoughtful, caring adults. He describes Yvonne as a "wildflower in the garden of life" and someone who always goes out of her way to make others feel special. He says Yvonne "is and has been my best friend for more than 25 years" and that he loves sharing his life with her. He says life has never been boring and concludes by stating that he has had a wonderful life.

[246] I accept that Denis was the primary breadwinner in his traditional relationship with Yvonne, and that he handled their finances. I do not agree that the evidence supports the conclusion that Yvonne simply did what Denis suggested. On the evidence I accept, I find Yvonne had a mind of her own and, in this case, was committed to amending the trust and persisted in her decision to do so, despite Denis' expressed concerns about the consequences.

[247] I find Denis and Yvonne had a mutually loving and supportive relationship which was not characterized by undue influence. I find that Denis' conduct as he approached the end of his own life was more likely protective of Yvonne, rather than domineering.

b) Denis' Involvement in the Trust Amendment

[248] At his examination for discovery on September 23, 2024, Kevin testified that, by May or June 2015, Denis knew he was dying and that Yvonne had dementia, and he wanted to ensure their assets were protected and distributed fairly, both on his death and on Yvonne's death. On Kevin's evidence, when it became apparent to Denis that he would not outlive Yvonne, Denis became fearful that, given her dementia, Yvonne could be vulnerable to exploitation or undue influence and that she might change her will. Accordingly, Kevin put Denis and Yvonne in touch with Ms. Pawson who prepared the trust.

[249] This evidence is corroborated by the contemporaneous clinical notes of Dr. Apps from June 2015, and the evidence of Victoria and Roberta about Denis' stated concerns for Yvonne's welfare after he was gone.

4. Summary

[250] In summary, I find the relationship between Denis and Yvonne did not give rise to the potential for domination. By extension, I find the trust amendment was not the product of undue influence by Denis. I find the preponderance of evidence supports the opposite conclusion: namely, that Denis and Yvonne had a longstanding, loving, and supportive relationship. I find the steps Denis took to

ensure that his affairs, and those of Yvonne, were in order before his death, are most consistent with the actions of a caring and protective spouse, and not those of someone seeking to dominate the will of another. Notably, the plaintiffs do not suggest that the trust (which favours them) is tainted by undue influence.

VIII. DISPOSITION

[251] For these reasons, the plaintiffs' claims are dismissed.

[252] If the parties are unable to agree on costs, they are granted leave to file written submissions on costs, to be submitted to Supreme Court Scheduling within 30 days following the release of these reasons, in accordance with deadlines to be determined by counsel or set by the court, as necessary.

"Douglas J."