

**CITATION:** Whitfield v. Glover, 2024 ONSC 1266  
**COURT FILE NO.:** CV-23-00696421-00ES  
**DATE:** 20240304

**SUPERIOR COURT OF JUSTICE – ONTARIO**

**TORONTO ESTATES’ LIST**

**IN THE MATTER OF THE ESTATE OF TAMARA LEIGH WHITFIELD, Deceased**

**RE:** William David George Whitfield, Applicant

**AND:**

Donald Murray Glover, in his capacity as Estate Trustee of Tamara Leigh Whitfield, deceased, and in his personal capacity, Respondent

**BEFORE:** C. Gilmore J.

**COUNSEL:** *Tijana Potkonjak and Charlie Fuhr*, Counsel for the Applicant

*Peter Askew and Nicole Cianci*, Counsel for the Respondent

**HEARD:** February 2, 2024

**ENDORSEMENT ON MOTIONS**

**Introduction**

- [1] There are two motions before the court. The Respondent’s (“Murray”) motion to dismiss the Applicant’s (“Bill”) Will Challenge and Bill’s cross-motion for productions and other relief.
- [2] Murray’s motion seeks to dismiss the Will Challenge on the grounds that Bill has not met the minimum evidentiary threshold to show there are grounds for calling into question the validity of the deceased’s Will (the “Will”). If the Will Challenge is not dismissed, Bill seeks a copy of the deceased’s medical records for the six months prior to the execution of her Will on June 14, 2022. He seeks those records from Princess Margaret Hospital, Scarborough Grace Hospital and Toronto Western Hospital.
- [3] In addition, and again assuming the Will Challenge is not dismissed, Bill seeks preservation of the deceased’s Facebook account and to strike out certain paragraphs of various affidavits submitted by non-parties in support of Murray.
- [4] For the reasons set out below, I have granted Murray’s motion to dismiss the Will Challenge. Bill’s motions are therefore moot.

## Background

- [5] The deceased (“Tammy”) died on August 19, 2022 at age 51 from cancer. She had no married spouse or children. She was predeceased by her parents and survived by her brother Bill and his daughter Kaitlyn Whitfield (“Kaitlyn”), Tammy’s niece.
- [6] Murray and Tammy were co-workers at Brinks where they worked for 30 years. In September 2017, Murray moved in with Tammy at her home on 36 Ainsdale Road, Toronto (“Ainsdale”) when he was going through a separation with his wife. Murray insists that he and Tammy began a romantic relationship in January 2018 which continued until the date of her death. Bill, Kaitlyn and other third-party witnesses deny that Murray and Tammy were in a romantic relationship.
- [7] Murray has deposed that he and Tammy were very close and when she was diagnosed with brain cancer in late 2020, he was her sole caregiver and support person. Bill has a very different position, claiming that Murray was motivated by financial gain and was neglectful of Tammy. Each of the parties has adduced evidence in support of their position that Murray and Tammy were or were not in a romantic relationship. That evidence is particularized below.
- [8] Bill and Tammy were siblings. There is contradictory evidence as to Bill’s involvement with Tammy after her diagnosis of cancer. Tammy was also close to Kaitlyn, but there was an incident in June 2021 that created a problem between them. It was alleged that Kaitlyn and her friends gained entry to Ainsdale with garden shears and stole cash and jewellery. Tammy reported the matter to police and Kaitlyn was subject to a restraining order which did not permit her to come near Ainsdale for a period of time and required to make restitution to Tammy. According to Murray, this incident caused a serious rift in the relationship between Tammy and Kaitlyn. Bill and Kaitlyn disagree. They have deposed that after the restraining order ended, Kaitlyn and Tammy resumed their relationship and were as close as they had always been. Bill has provided evidence to support his contention that Murray attempted to keep Kaitlyn away from Tammy.
- [9] Tammy named Murray as her attorney for property on January 29, 2021 (the “POA”). Murray’s evidence is that he never acted under the authority of the POA as Tammy remained competent until her death.
- [10] On June 14, 2022, Tammy made a Will which she prepared herself. The Will was witnessed by two long-time friends of Tammy, Tina Goldis (“Tina”) and Robert Proteau (“Rob”). Each have sworn affidavits as to the capacity of Tammy at the time of execution of the Will and her understanding of its contents.
- [11] The Will names Murray as the Estate Trustee and Bill as the alternate. Tammy gives the residue of the estate to Murray. In the event Murray predeceased her, the residue of the estate would be divided in Bill’s discretion with certain other specific gifts as stated in her Will, copied below:

b) To provide residue of my estate to Donald Murray Glover with the exceptions listed below. If Murray pre-deceases me, I declare that my executor/trustee will have full power and absolute discretion to distribute the residue of my estate as they see fit, including to themselves.

- all mom's family rings in my jewellery box go to my brother as he bought some for my mom
- all my hoop earrings on the carrusel [*sic.*] go to Tina Goldis
- all other pieces of my jewellery can be disbursed among the ladies in my family with the exception of my parents wedding ring and my engraved fossil watch they stay with me
- Should something dire happened to me my father's ashes are to remain with me as well there are two blue velvet box on the shelf in the living room there is one blue velvet box downstairs on my entertainment unit one is to be given to Kaitlyn my niece and my brother

- [12] Bill has provided evidence that during the period in which the Will was executed and after, Tammy was unwell, delirious and there had been a serious decline in her mental state. Bill and other non-party witnesses have sworn that Murray isolated Tammy after her cancer diagnosis and prevented family members and friends from speaking to her by phone or visiting her.
- [13] Bill has deposed that Tammy made a previous Will or Wills in which she left her house to Kaitlyn, however Bill has no information as to when such a will was made, nor has he seen it. No previous wills executed by Tammy have ever been found or produced. Kaitlyn has deposed that her aunt told her on many occasions that she intended to leave Ainsdale to her.
- [14] After her diagnosis of cancer in 2020, Tammy continued to work but took time off as needed for medical appointments and treatment. On June 30, 2022, Tammy was admitted to Scarborough Grace Hospital and treated for vertigo and nausea. She was discharged on July 4, 2022. On July 6, 2022, she was admitted to Toronto Western hospital and died there on August 19, 2022.
- [15] Bill seeks production of Tammy's medical records for the six months prior to her death. He has provided evidence of her condition which he says puts in issue her susceptibility to undue influence and her capacity.
- [16] Bill also seeks preservation of Tammy's Facebook page as proof of the relationship between Tammy and Kaitlyn. The affidavit redactions relate to references to Kaitlyn's criminal charges which were laid when she was still under the age of 18 and are subject to privilege and confidentiality.

## The Evidence of Tammy's and Murray's Alleged Romantic Relationship

### *Bill's Evidence*

- [17] Bill deposed that Murray came to live with Tammy around March 2018 while their father was still alive. He needed a place to live while he was going through his separation. Murray was given an upstairs bedroom. Tammy always slept in the basement apartment.
- [18] Bill's evidence was that Murray and Tammy never presented as a couple, always told other people they were friends and maintained separate bedrooms. Bill was candid that he never liked Murray. He avoided him because any conversation with Murray was always about Murray.
- [19] After Tammy was first diagnosed with cancer and hospitalized, she came home from the hospital just before Christmas in 2020. Bill called to speak to her, but Murray would not let Tammy speak to Bill.
- [20] Around this time, Bill's wife Kim Monckton ("Kim") asked Tammy if she had a Will as she was concerned about the cancer diagnosis. In the presence of Bill, Tammy stated that she intended to leave Ainsdale to Kaitlyn. It would be left in trust to Tammy's cousin Shawna Becking ("Shawna") until she was old enough to inherit it.
- [21] In December 2021, Tammy was hospitalized again. Bill deposed that Murray began in earnest to alienate Tammy from her family. Whenever Bill and his family would call, Murray would answer the phone and put them on speaker phone. He would always be present in the background commenting on the conversation.
- [22] Bill would often offer to take Tammy to treatments or medical appointments and asked to visit her. Other than on a very few occasions, Murray declined Bill's assistance.
- [23] Tammy was in remission by June 2022. She told Bill that she and Murray intended to take a trip out west and were leaving on June 25, 2022. On June 28, 2022, Murray called Bill and asked him to check on Tammy. He had gone out west and left Tammy alone. Tammy was suffering from vertigo and was very disoriented. Bill described Tammy as being in a state of delirium. She looked unkempt, did not know where she was and was not oriented to time or place. She was taken to hospital the next day by ambulance. Murray was still out west.
- [24] Tammy was discharged on July 4, 2022. Her discharge summary states that she was suffering from vertigo and nausea likely caused by her brain cancer. A note in the discharge summary stated that Murray as POA requested that no further investigations with neurology be completed at hospital.
- [25] Murray never told anyone publicly that he and Tammy were a couple. It was only at the funeral, to everyone's surprise, that he called Tammy the "love of his life."

*Murray's Evidence*

- [26] Murray deposed that he was a friend and co-worker of Tammy's for 30 years. Their relationship became a romantic one in December 2018. He moved into Ainsdale in September 2017 at the invitation of Tammy's father David, who died in November 2017. They began to sleep in David's bedroom on the main floor around January 2019. They lived together at Ainsdale until Tammy's death.
- [27] Murray's evidence was that he and Tammy travelled and entertained together, went to movies and plays and attended all of his family functions together. After Tammy was diagnosed with cancer in 2020, Murray became her main caregiver and support. They began to travel and go out more so that Tammy could enjoy as much as she could after her diagnosis.
- [28] Tammy frequently told Murray that everything she had was his. She named him her POA on January 29, 2021. On June 14, 2022, Tammy met with her friends Tina and Rob to have them witness her Will. Tina and Rob were trusted and long-time friends of Tammy.
- [29] Murray's evidence was that he was not involved in drafting the Will. He was in the house when it was signed and witnessed but knew nothing about its contents until Tammy showed it to him after it had been signed. Murray is not aware of, nor did Tammy ever talk about having signed any previous Wills.
- [30] Murray stated that although Bill and Tammy were siblings and loved one another, Bill often planned events which excluded Tammy and rarely came to visit her.
- [31] Murray described Kaitlyn as a "troubled" child. It was agreed that she would move in with Tammy and Murray in September 2019 because she was not getting along with her parents. Kaitlyn became aggressive and hard to manage and Tammy sent her back to her parents seven or eight months later.
- [32] In June 2021, there was incident in which Kaitlyn and her friends were at Ainsdale without Tammy's permission. It was alleged that Kaitlyn and friends had stolen certain items from the home. Murray denies the allegation by Bill that he hid his ring and cash in order to "frame" Kaitlyn and her friends. He calls the allegation "ridiculous." As a result of the theft incident, Kaitlyn was subject to a restraining order and a restitution order. Despite the restraining order, Kaitlyn still came to Tammy's house. Murray would phone Bill to come and pick up Kaitlyn as Tammy and Murray no longer wanted Kaitlyn there.
- [33] Murray denies that Tammy repeated an intention either to him or to others to give Ainsdale to Kaitlyn. After Kaitlyn's unruly behaviour in 2019 and the theft incident in 2021, their relationship became more distant.
- [34] After Tammy was diagnosed with brain cancer in December 2020, she continued to work and enjoy life despite painful chemotherapy treatments. Tammy and Murray had taken time off work to make a planned trip to Edmonton on June 27, 2022 to visit Murray's family. However, Tammy began to feel unwell and suffered from vertigo, so she told Murray to

go on his own. It was hoped that Tammy could join him in Edmonton if she felt better but she did not recover. When Murray arrived back home, Tammy had been admitted to hospital for her vertigo. She was discharged on July 4, 2022. Murray denies that he “abandoned” Tammy as alleged by her family. There was no indication that Tammy was suffering from anything other than vertigo or Murray deposed he would never have gone to Edmonton.

- [35] Tammy was re-admitted to hospital on July 6, 2022. Murray’s evidence was that this was the point when Tammy’s health began to seriously decline.
- [36] Murray denies the allegations of undue influence and his alleged attempts to control Tammy. He described Tammy as a strong-willed woman who spoke her mind. Murray stated that he never prevented Tammy from having a relationship with her family or friends. Tammy would never have tolerated that. When Bill called Tammy, it was Tammy’s decision to put him on speaker phone. Murray deposed that Tammy shared her life with him and she wanted to include him on calls she received from family and friends. Further, Murray often sent out texts to Bill and other family members updating them on Tammy’s condition.
- [37] Murray refutes the allegations made by Sylvia Duncan (“Sylvia”). He deposed that Tammy and Sylvia were never close as adults. Tammy did not know where Sylvia lived, nor did Sylvia ever attend any medical appointments with Tammy. Further, Tammy never mentioned to Murray that she intended to benefit Sylvia in her Will. Sylvia was always a closer friend to Bill than she was to Tammy as they all went to grade school together.
- [38] Sylvia is not in a position to comment on the sleeping arrangements between Tammy and Murray as she only visited Tammy once when Murray was living there.
- [39] Murray denies the allegations made by Sylvia that he “fat-shamed” Tammy. Tammy had gastric by-pass surgery before their relationship began. She had the surgery for health reasons. It led to a weight loss which was a health benefit for her.
- [40] Murray denies Sylvia’s allegations of Tammy’s mental regression in March or April 2022. Tammy was still working and had no issues that prevented her continuing with her daily activities until the vertigo began in late June 2022 before they were to leave for Edmonton.
- [41] Murray denies deleting any of Tammy’s Facebook posts and deposed that they are still accessible by clicking on Tammy’s page.

#### *The Evidence from Non-Parties*

- [42] Kim Monckton is Bill’s wife. She deposed that her husband and sister were very close. Tammy never had any serious boyfriends, so her parents and Kaitlyn were the most important people in her life.
- [43] After Tammy’s first admission to hospital in 2020, Kim and Tammy had a discussion about Tammy’s Estate. Tammy told Kim that she intended to leave Ainsdale to Kaitlyn.

- [44] Kim was present when Bill called Tammy after her first hospital admission. Murray would always answer the phone and put it on speaker phone so he could hear what was discussed. She agreed with Bill that Murray attempted to isolate Tammy from her family.
- [45] Kim recalled that when Tammy became ill, she was very worried about her financial future. She was working and taking treatment, but her work was insisting that she either come back full time or go on long-term disability. Tammy did not think she could afford the household expenses on disability payments.
- [46] Kim was also present on June 28, 2022 when she and her husband went to check on Tammy. She deposed that Murray had “abandoned” Tammy who was in a state of extreme mental deterioration and delirium.
- [47] Shawna Becking is Bill and Tammy’s first cousin. Her mother Dianne Becking is the sister of Bill and Tammy’s mom.
- [48] Tammy confessed to Shawna many times that she was in love with Murray, but she felt he was unattainable. At one point Tammy told Shawna that Murray had gone out west to meet a woman for a romantic rendezvous. Tammy was very sad but told Shawna she had no right to be upset because she and Murray were not together. Tammy told Shawna that Murray never told her why he was going out west. She found out about the rendezvous by going through his phone. She never told Murray this.
- [49] A year or two after Murray moved into Ainsdale, he texted Shawna a picture of his genitals. Shawna was shocked and deleted the photo. She was concerned that Murray was manipulating Tammy who was naïve and inexperienced.
- [50] Shawna also deposed that Murray was attempting to alienate Tammy from her family. When she would call to speak to Tammy, Murray would flirt with her and ask her what she was wearing. Shawna knew Tammy well enough to know that Tammy was upset by these exchanges.
- [51] Shawna recalled having a telephone call with Tammy around the time that the Will was signed. She recalled that Tammy said some very strange things including that she had gone to a birthday party, and someone had dumped hydrogen peroxide on her birthday cake, cleaned it with milk, but she had eaten it before it was cleaned. She told Shawna that this was the reason she had not been feeling well. Shawna deposed that she had several other calls with Tammy in which Shawna questioned her capacity. Tammy told Shawna that she knew something was wrong with her and that she was experiencing brain fog and disorientation.
- [52] A few days after Tammy was admitted to hospital in late June 2022, Shawna sent a text to Murray. She said the following (excerpted and produced in its original form):

Your using her and I know it, my family has always been close and since you’ve come into the picture she’s lost her brother her neice and now your attempting to push her aunt uncle and cousin away! I hope you feel good about yourself. I could

cut ur little game quick, should we show Tammy the pic that you sent to me after u moved in with her?? Tell me you care about her, I don't think so!

- [53] Shawna confirmed that she was very close to Tammy and knew better than to speak badly of Murray in her presence. However, Shawna was convinced that Tammy was being isolated and manipulated by Murray. She was completely shocked when Murray announced at the funeral that Tammy was the “love of his life.”
- [54] Shawna recalled that Tammy’s Facebook profile noted her as “single” and that in a Facebook post from June 15, 2021, she referred to Murray as a friend and her “primary caregiver.” Shawna provided two subsequent Facebook posts in which she refers to Murray as her primary caregiver.
- [55] Sylvia Duncan was Tammy’s oldest friend. She knew Tammy for 45 years. For many years she lived outside of Toronto, so she did not see Tammy often, but she deposed that they remained emotionally close. She confirmed that Tammy and Murray never presented as a couple publicly. In January or February 2022, Tammy called Sylvia and asked for her address. She told Sylvia that she intended to leave her a gift in her Will and wanted to send her a copy of the Will.
- [56] Whenever Sylvia would call Tammy, Murray would put the phone on speaker phone and constantly interject into the conversation. Prior to moving into Tammy’s home, Sylvia was aware that Murray would “fat shame” Tammy and told her he did not want to be with anyone who was overweight. Sylvia said this prompted Tammy to undergo gastric bypass surgery. She was devastated when Murray still showed no interest in her.
- [57] At one point Sylvia went to Tammy’s for dinner. Her evidence was that Murray dominated the conversation and she could not talk to Tammy. After that, she visited and called Tammy at times when Murray was not there.
- [58] By March or April 2022, Sylvia deposed that Tammy had regressed to a “toddler” state. She would use a singsong voice and there would be long pauses before she answered questions. After she got off the phone she cried about Tammy’s deteriorated state.
- [59] Kaitlyn has known Murray for many years because she knew all of her aunt’s co-workers. At first Kaitlyn thought Murray was nice but that changed over time as he became bossier, more negative and would not let her see her aunt. When Tammy became sick, Kaitlyn was not permitted to visit her without permission from Murray. She would text Murray and ask to visit. He would say it was not a good time or not answer at all.
- [60] Murray always told Kaitlyn that he and Tammy were best friends and that he was there because he needed a place to stay after his divorce.
- [61] James Themelkos (“Jim”) was a close friend of Tammy and Bill. He lived next to Tammy for 21 years and worked with Bill for many years.



- [62] Jim met Murray in 2018. His evidence was that Murray always acted like a tenant. He never helped with outdoor maintenance such as snow shovelling, grass cutting or yard maintenance. When Murray was outside, he was tanning or seeing to his car. According to Jim, Murray did not like Kaitlyn and when she came to visit, he would remark that she should not be there.
- [63] Jim was unaware of any romantic relationship between Tammy and Murray. He described it as a “friendly cohabitation.” He never referred to Tammy as his girlfriend or partner and mentioned he was there until he could get back on his feet.
- [64] Bill told Jim he did not like Murray as he felt that Murray was preventing him from seeing his sister.
- [65] Murray would sometimes leave Tammy alone for days at a time. Jim would send his children over to check on her. On one occasion, they found her on the floor with a cut on her head. When Murray went out west in June 2022, he left Tammy alone when she was very sick. Kim came over and had to assist Tammy who went to the hospital by ambulance the following day.
- [66] In July 2022, Jim and another neighbour helped get Tammy into the car so she could be taken to hospital by Murray. Tammy could not walk on her own. Murray was very rude to Tammy, telling her she needed to make a better effort to walk and talking to her like a child.

*The Evidence of the Alleged Intention to Gift Ainsdale to Kaitlyn*

- [67] Kaitlyn deposed that she was very close to her aunt Tammy and Tammy often told her she was like a daughter to her. Tammy frequently told Kaitlyn that it was her intention to leave Ainsdale to her. Kaitlyn concedes that she had her challenges when she was a teenager, but this did not affect her relationship with her aunt.
- [68] In the summer of 2021, Kaitlyn and some friends went to Tammy’s house to swim in Jim’s pool. Tammy did not know about this. Bill went over to Tammy’s and found Kaitlyn and her friends there. They left soon after. After Murray arrived, he alleged that a wedding ring and \$300 in cash had been stolen from his room. Tammy reported the incident to the police. While no charges were laid, Kaitlyn was not to have contact with Tammy for a period of time and had to make restitution. Bill believes that Murray hid the ring and the money and then reported it missing the next day in order to alienate Tammy from Kaitlyn.
- [69] Bill’s evidence was that Tammy doted on Kaitlyn from the day she was born. It was common knowledge within the family that Tammy intended to leave Ainsdale to Kaitlyn. Tammy expressed this to Bill directly many times during her life. Bill’s wife Kim confirmed this evidence and deposed that she had heard Tammy state this intention many times as well.
- [70] Tammy expressed to Shawna on several occasions during her life that she intended to leave Ainsdale to Kaitlyn. Tammy often posted on Facebook and would refer to Kaitlyn as the

“sunshine of her life” and the “reason she wakes up in the morning.” It appears that since Tammy’s death, those posts have been deleted. Shawna deposed that Murray told her more than once that he intended to do everything that he could to keep Kaitlyn away from Tammy.

- [71] Tammy always told her neighbour Jim that Kaitlyn was like a daughter to her. She often told Jim and others that she intended to leave her house to Kaitlyn. Bill was aware of Tammy’s intentions with respect to Ainsdale and therefore never expected to receive anything from his sister’s estate.
- [72] Sylvia Duncan deposed that it was common knowledge that Tammy intended to leave Ainsdale to Kaitlyn. Tammy had expressed this to Sylvia directly on many occasions. She gave evidence that Tammy made regular Facebook posts that referred to Kaitlyn as the “sunshine of her life” and the reason she woke up in the morning.
- [73] About a year before Tammy’s death, Sylvia was at Tammy’s house for a visit. Kaitlyn was there as well. In Kaitlyn’s presence she told Sylvia that she intended to give Ainsdale to Kaitlyn but that Kaitlyn did not want her pet bird. Sylvia offered to take the bird when the time came.

*The Evidence of Geraldine Glover*

- [74] Geraldine Glover (“Geraldine”) is Murray’s sister. She deposed that after the death of Tammy’s father in November 2017, Tammy and Murray’s relationship changed and they became a domestic couple. Tammy and Murray attended many Glover family functions together, including Canada Day barbeques, Christmas and Geraldine’s birthday dinner. Geraldine’s evidence was that Murray loved Tammy very much.
- [75] Geraldine was aware of Tammy’s cancer diagnosis in December 2020. Tammy asked Geraldine if she could recommend a lawyer to assist her in drafting a Will as she wanted to put her affairs in order. Tammy never mentioned that she already had a Will that she intended to change.
- [76] Geraldine deposed that Murray never prevented Tammy from having a relationship with Bill or any other members of her family and Murray would regularly send out texts to Tammy’s family to update them on her condition.
- [77] Tammy told Geraldine that she was upset when she saw Kim after her discharge from hospital in December 2020 and the first thing Kim asked her was if she had a Will. She did not even ask how Tammy was feeling. Tammy told Geraldine this when she was recounting how frustrated she was about Bill’s minimal involvement in her care. Geraldine is unaware of any occasion on which Bill offered to take Tammy to chemotherapy or other medical appointments.
- [78] Tammy never mentioned to Geraldine her intention to gift Ainsdale to Kaitlyn. Tammy did tell Geraldine about having to file a police report in relation to the June 2021 incident and how hurt she was by the entire matter.

- [79] Geraldine described Tammy as strongminded and a person who spoke her mind freely. She denies that her brother is prone to anger or could bully Tammy. Tammy could hold her own.
- [80] Murray cared for Tammy throughout her illness which at times was not a pleasant task. He was her primary caregiver.

*The Evidence of Robert Proteau*

- [81] Rob was a friend of both Tammy and Murray and met them about ten years ago. As Rob lives in Ottawa but works in Toronto, Tammy offered to rent him a room in her house during the week. He rented from Tammy for about ten years. He was aware that Tammy and Murray were good friends and that they became a couple in the last several years before Tammy's death.
- [82] Rob observed Tammy and Murray cooking and laughing together and was aware that they often went out for lunch or to concerts. During the time he was residing at Tammy's home, he never heard or saw Tammy and Murray have a disagreement.
- [83] Murray cared for Tammy when she became ill which included bathing and feeding her.
- [84] On June 14, 2022, Tammy asked Rob if he would witness her Will. Murray was in the house but not present for the signing of the Will or any of the discussions related to it. Robert read Tammy's Will and asked her if this was what she wanted. She confirmed that it was. Robert then witnessed Tammy's signature. Rob deposed that Tammy was acting normally throughout and there was nothing in her demeanour that concerned him about her ability to understand what she was signing.
- [85] Rob gave evidence that he did not recall Bill or Kim ever calling or visiting Tammy during the time he lived there.

*The Evidence of Tina Goldis*

- [86] Tina met Tammy and her parents 20 years ago when they moved across the street from her. Tina described Tammy as having a good soul and being sharp and witty. She remained the same even after her cancer surgeries in December 2020 and 2021.
- [87] Between the summer of July 2021 and July 2022, Tammy mentioned to Tina that she wanted Murray to inherit her house because she was so appreciative of his care for her and her late father when he was ill. She also wanted to be cremated and her ashes placed at her parents' burial plot. Tammy repeated these wishes to Tina on more than one occasion.
- [88] On June 14, 2022, when Tina arrived home from work, Tammy asked her to come over to her house. She showed Tina her Will and asked her to read it. Rob and Murray were in the house but not in the same room as Tina and Tammy when this discussion took place. Tina read through the Will and noted that it was consistent with the conversations she and Tammy had had about intentions in the past. Murray was not present when the Will was

signed and witnessed. Tina noticed nothing about Tammy's demeanour that day that was out of the ordinary. Her view was that Tammy understood what was in her Will and what she was doing.

- [89] Tammy often told Tina about her disappointment with Bill and how little he visited. Tammy was also upset about Kim's questions about whether Tammy had a Will before she even asked how Tammy was doing after her December 2020 diagnosis. Tina's evidence was that she rarely saw Bill, Kim or Kaitlyn visit Tammy's house.
- [90] Tammy was also very upset by Kaitlyn's behaviour in the spring of 2021. She had said some hurtful things to Tammy and then she and her friends broke into Tammy's house and stole some money and other items. Tammy was devastated by this and her relationship with Kaitlyn was never the same.

#### *The Evidence of Ryan Cribbie*

- [91] Ryan Cribbie ("Ryan") is Tammy's cousin. Ryan considers himself to have been a close friend of Tammy. He worked part-time for Brinks so knew both Murray and Tammy from work as well. He was aware that Tammy and Murray were close friends who began a romantic relationship in 2018. When Tammy was with Murray, she was the happiest that Ryan had ever seen her.
- [92] Murray was Tammy's caregiver and was everything to her. Murray never kept Tammy from her family. She had a strong personality and would have spoken up if she was concerned. Bill's allegations against Murray have left many family members speechless and distraught.
- [93] Tammy was very emotional before she passed away and told Ryan how much she appreciated the caregiving she had received from Murray. She told Ryan in June 2021 that she intended to leave her home to Murray.
- [94] Ryan visited with Tammy often but never saw Bill there. Tammy told Ryan that when Kaitlyn was living there, she was very disrespectful towards her, and Tammy told her father she would have to return home. After the police incident in June 2021, Tammy's relationship with Kaitlyn was never the same.

#### *The Evidence of Ross Hunter*

- [95] Ross Hunter ("Ross") was a friend of both Tammy and Murray. He met them through his work at Brinks where he has been employed for 37 years. He described Tammy as a well-respected member of the Brinks' management team who could not be pushed around.
- [96] Ross visited Tammy and Murray for dinner at Ainsdale. Tammy and Murray were a committed couple, but Ross did not let others at work know this in order to respect their privacy. Ross was aware that Tammy and Murray travelled to Mexico together and that Murray provided care for Tammy after her cancer diagnosis.

- [97] Ross deposed that he spent a significant amount of time at Ainsdale but never saw Bill there.
- [98] A year before Tammy's death, Tammy told Ross that she intended to leave Ainsdale to Murray. This did not surprise Ross given how close they were. She never mentioned any previous Will or an intention to leave anything to her niece Kaitlyn.
- [99] Tammy continued to work at Brinks up to two weeks before her death. She seemed to be her normal cheerful self. Tammy had been looking forward to her planned trip to Edmonton in June 2022 with Murray, but her illness got in the way and her health deteriorated after that.

*The Evidence of Omar Ullah*

- [100] Omar Ullah ("Omar") was a friend of Tammy and Murray. He was employed as a truck driver with Murray at Brinks. He was a pallbearer at Tammy's funeral. Omar described Tammy as the "go-to" person at Brinks who was the "heart" of the company and was loved and respected by everyone.
- [101] Omar would often drop by Ainsdale. He deposed that for those who were close to Murray and Tammy, it was no secret that they were in a romantic relationship. Tammy was a strong-willed woman who would not tolerate disrespect. Omar's view was that she could not be dominated by Murray.
- [102] Omar observed that Tammy continued to work at Brinks after her cancer diagnosis except for her scheduled treatments and doctors' appointments. He was very concerned when he heard about Tammy's illness and her sudden decline in July and August 2022. He visited Tammy in hospital in August 2022 and was saddened by her appearance.

*The Evidence of Donna Mary-Lynn Wood*

- [103] Donna Wood ("Donna") is Tammy's paternal aunt. She has known Murray for 30 years. She recalls that he got along very well with her late brother, Tammy's father David. Donna is aware that after David's death, Tammy and Murray began a romantic relationship. Murray supported Tammy when she was grieving for her father after his death in November 2017.
- [104] Donna is aware that Tammy and Kaitlyn had been close but as Kaitlyn got older, Tammy found her hard to deal with. Their relationship was affected by the theft incident in June 2021.
- [105] Donna came to Toronto from her home in Perth for two weeks in July 2022. She visited Tammy in hospital every day and noted that Murray was there every day from 7:00 a.m. to 8:00 p.m. Donna never saw Bill or Kaitlyn at the hospital during any of the times she was there.

**The Test and Legal Analysis**

- [106] A person with a financial interest in an estate must adduce some evidence to form the basis of their Will Challenge. This is referred to as the minimum evidentiary threshold. The threshold must be met before any order giving directions will be issued by the court allowing the case to proceed.
- [107] In *Giann v. Giannopoulos*, 2023 ONSC 5412, the deceased made a Will in 2016 in which he left his estate equally to his four children. In 2021, he changed his Will and left his dry cleaning business solely to his son Nick. The 2021 Will was challenged by the other siblings on the grounds of capacity and undue influence. The deceased left a note with his 2021 Will explaining that he left his business to his son Nick because he was the only one who stood by him and showed any interest in him.
- [108] On the motion before the court, similar to the within case, the applicants sought production of financial, legal and hospital records. The court pointed out the difference between estates cases and other civil cases. In a routine civil matter, documentary production from both sides would be required but production of a lawyer's file would be protected by privilege. The court set out that in estates' cases, the *Rules of Civil Procedure* and the common law have placed an initial hurdle before such productions can be made to ensure that one litigant does not use the civil litigation process to "punish the rest of the family": at para. 14. As such, the applicant's allegations must be tested.
- [109] The requirement for a "hurdle" in estates cases is best illustrated by small estates, where the needless expense of baseless will challenges could deplete the estate entirely.
- [110] Further, the court must guard against allowing someone whom the testator has explicitly excluded from his or her will from parsing through their private financial, legal and medical information based on meagre allegations: see *Seepa v. Seepa*, 2017 ONSC 5368, at para. 49.
- [111] The burden of proof on the applicant at this preliminary stage was addressed in *Johnson v. Johnson*, 2022 ONCA 682, 81 E.T.R. (4th) 7, where the Court of Appeal made it clear that the motions judge's job is to decide whether the applicant has adduced sufficient evidence to meet the initial hurdle, not whether that evidence is true. In the case at bar, the court must look to whether there is evidence that actually puts the deceased's capacity in issue and whether there is any *prima facie* evidence of undue influence.
- [112] In *Giann*, the court found that the testator suffered from "age-appropriate decline and symptoms of dementia" but there was no evidence that he lacked capacity at the time he signed his Will: at para. 26. Further, the court found that all of the allegations of undue influence were completely answered by the respondents. The court found that the evidence of undue influence and suspicious circumstances was "conjecture and mudslinging" rather than actual evidence from which an inference could be drawn. The court dismissed the motion and the application for directions.
- [113] The findings in *Giann* and *Johnson*, however, do not mean that the court cannot weigh the evidence and assess credibility. Both exercises are permissible and necessary.



*Tammy's Alleged Lack of Capacity*

- [114] The case of *Banks v. Goodfellow* (1871), L.R. 5 Q.B. 549, at pp. 567-569, is old law but still necessary to evaluate whether or not a person has testamentary capacity. In *Banks*, the court set out the following criteria for assessing testamentary capacity:
- (1) understanding the nature of the act of making a will and its consequences;
  - (2) understanding the extent of one's assets;
  - (3) comprehending and appreciating the claims of those who might expect to benefit from the will, both those to be included and excluded;
  - (4) understanding the impact of the distribution of the assets of the estate; and
  - (5) that the testator is free of any disorder of mind or delusions that might influence the disposition of his or her assets.
- [115] Not only must the abovementioned criteria be present, but so long as the testator has met the *Banks* test, he or she need not be kind or considerate and may even be capricious in the manner in which they leave their estate: see *John Gironda v. Vito Gironda et al.*, 2013 ONSC 4133, 89 E.T.R. (3d) 224, at para. 51.
- [116] The evidence is clear that Tammy and Murray intended to go on a trip to Edmonton in late June 2022. Tammy was unable to go because of her vertigo. Bill and Kim describe Tammy on June 28, 2022 as being in a “state of delirium and deterioration that was beyond medical comprehension. She [Tammy] had little orientation as to time or place. She was unkempt.” However, the summary discharge statement from Scarborough Grace Hospital on July 4, 2022 described Tammy as being treated for vertigo and nausea. No comments were made about her mental state. Kim admitted on cross-examination that the discharge note does not support the contentions in her affidavit. Bill also agreed on cross-examination that he was not aware of any previous finding of cognitive impairment in relation to Tammy.
- [117] Murray submits that Kim and Bill's observations are unsupported and should be rejected as any evidence of incapacity on June 14, 2022.
- [118] Sylvia Duncan's affidavit outlined a concerning call with Tammy in March or April 2022 in which she claimed that Tammy had regressed to a “toddler state.” On cross-examination Sylvia agreed that this conclusion was based on one ten-minute call with Tammy and that she did not see Tammy personally in 2022 nor did she tell anyone about her concerns other than her boyfriend William, who did not file an affidavit in this proceeding.
- [119] Shawna recounts a conversation with Tammy about hydrogen peroxide having been spilled on her birthday cake. In cross-examination, Shawna conceded the call lasted no more than ten minutes and she did not contact Murray or a doctor about it. While she claims to have told her mother, her brother and Kim about it, they do not mention it in their evidence.



- [120] Shawna claimed that this call took place on the date the Will was executed but made no notes of the call, nor did she provide any other evidence to corroborate the date of the call. Shawna admitted in her cross-examination that she has no concept of time and difficulty with dates.
- [121] Jim's evidence was that Tammy was mentally like a child and that at times she did not make sense. However, Jim was unable to recall when these conversations took place. There is no evidence they took place in the month of June 2022 or even in 2022. Further, Jim was not involved in Tammy's caregiving.
- [122] Tammy continued working after her cancer diagnosis in December 2020. She took time off only in December 2020 and December 2021 for her surgeries. She otherwise maintained her management-level position at Brinks. There was no evidence that her work performance was affected by her cancer diagnosis until she was admitted to hospital in July 2022 and died a month later.
- [123] I note that Tammy prepared the Will herself. Further, she told others of her intentions with respect to her estate as far back as 2021 and 2022. She told her neighbour Tina and her cousin Ryan that she wanted to leave everything to Murray in appreciation for his caregiving. She also told Russ Hunter this, as well. None of those third parties were cross-examined on this evidence.
- [124] Both Tina and Rob deposed that Tammy knew what she was doing in giving her estate to Murray and that on the date of execution she was acting normally. Tina described Tammy as "sharp and witty." Rob's evidence was that he reviewed the Will with Tammy twice to make sure she understood its contents and agreed with them. Neither Tammy nor Rob was cross-examined on this critical evidence.
- [125] Despite much evidence concerning Tammy's alleged intention to leave her estate to Kaitlyn, there was no evidence that she actually took steps to do so. No Will was ever produced nor did Tammy mention any other Will to Bill, Murray or the other third-party witnesses.
- [126] I agree with Mr. Askew that many of the affidavits relied on by Bill make similar conclusory statements about Tammy's capacity. Most importantly, what Bill has failed to adduce is any real evidence of cognitive impairment.
- [127] The court is being asked by the Applicant to find that because Tammy had a brain tumour, she lacked capacity to make a Will. I decline to make such a finding. On the contrary, I find that there is evidence to support that Tammy did have the requisite capacity as follows:
- a. Tammy's ability to carry on with her work on a full-time basis without any evidence of concerns about her work performance;
  - b. The lack of evidence of any other conditions which might have impacted on her cognition;

- c. The evidence of Tammy’s expression to others of her intention to leave her estate to Murray and then doing so by drafting her own Will and having Tina and Rob witness it;
- d. The unrefuted evidence of Tina and Rob that Tammy was acting normally on June 14, 2022, and understood what she was doing; and
- e. The lack of corroboration of the bald statements of Bill and his witnesses that Tammy did not make sense or was reduced to a child-like state.

[128] In *Johnson*, the court dealt with a Will Challenge brought by a sibling who had been left out of her mother’s will. The challenge was brought on the grounds of undue influence and a lack of capacity. The applicant in that case relied in part on a brief letter written by the deceased’s doctor which provided a dementia diagnosis. The court held, at para. 13, that a mere diagnosis of dementia does not determine capacity because doing so would risk “falling into impermissible stereotypes about individuals with mental health and other challenges”.

[129] In the case at bar, there is no evidence of any cognitive impairment. Rather, as listed above, the evidence supports that Tammy was fully functional, employed and knew what her assets consisted of and what she wanted to do with them.

[130] Bill suggests I should order production of the medical records in order to fill in any gaps in the evidence, including any gaps related to Tammy’s cognition. I disagree. There is other evidence to support that Tammy had no cognition issues, including that of the witnesses to the Will (Tina and Rob), Murray’s evidence and the evidence of her co-workers. As I mentioned above, the evidence supports that Tammy was fully functional and employed before her decline in July 2022.

### *The Evidence of Undue Influence*

[131] On the issue of undue influence, the person challenging the Will must be able to show on a balance of probabilities that the will is the product of coercion and does not actually represent what the testator intended. The threshold is a significant one for Bill to meet.

[132] In *Banton v. Banton* (1998), 164 D.L.R. (4th) 176 (Ont. Gen. Div.), the court described undue influence as an “influence imposed by some other person on the deceased [that] was so great and overpowering that the document reflects the will of the former and not that of the deceased.”

[133] The first area of undue influence alleged by Bill is that Murray isolated Tammy from her family and controlled her phone calls and social contacts. Bill claimed that when he called Tammy, Murray would put her on speaker phone and interject himself in conversations. Bill and his family would ask to come over and visit with Tammy only to be rebuffed by Murray, who said it was not a good time.

- [134] However, the evidence of Murray and other third-party witnesses was that Tammy was a very strong-willed person over whom Murray could not have exerted control. There were samples of texts sent out by Murray updating Tammy's family on her health. There were also samples of Facebook messages where Tammy had posted a visit to the spa and referenced Blue Jays games and an outing with Kaitlyn for her birthday. There was no evidence that Bill or anyone in his family took steps to report this alleged control or cloistering of Tammy.
- [135] Tammy's co-workers' evidence was that she was the "go-to" person at work and would stand her ground. Bill's affidavit stated Shawna told him that Tammy was in love with him and that Tammy would do anything not to make Murray angry so she could be with him. Shawna's affidavit does not confirm that she made this statement to Bill.
- [136] Tammy's family alleged that Murray controlled Kaitlyn's visits with Tammy and would not let her visit without her permission. The issues surrounding Kaitlyn are problematic. It is clear that after the police incident in 2021, Kaitlyn was bound by a restraining order, yet she openly admitted that she continued to visit her aunt. There can be no doubt that this incident put a strain on Tammy's relationship with Kaitlyn as she was the one who reported the incident to the police and even Bill admits in his affidavit that Tammy was upset that Kaitlyn and her friends were at her house without her permission.
- [137] In contradiction to Bill's assertion, Tammy sent Shawna a text with an image of her and Kaitlyn together on September 30, 2021 even though the restraining order was still in place. Clearly, whatever rift had been created by Kaitlyn's actions in June 2021 did not affect their relationship as significantly as Murray suggests. However, I note that it was Tammy who called the police and there was evidence that she confided in friends about how upset she was about the incident and Kaitlyn's behaviour.
- [138] Further, the alleged statements made by Murray that Kaitlyn "should not be there" can be inferred to relate to the provisions of the restraining order. I agree with Murray's counsel that the allegation that Murray deliberately hid his cash and jewellery and then "framed" Kaitlyn for the theft appears far fetched. Further, Bill's evidence that Murray told Shawna that he would do anything to keep Kaitlyn away from Tammy is not actually corroborated in Shawna's evidence.
- [139] Finally, even if Tammy had an intention to gift Kaitlyn her home, Kaitlyn could never be a beneficiary of her Estate because there is no other Will other than the one executed in June 2022, and Kaitlyn would not be a beneficiary on an intestacy.
- [140] In *Di Nunzio v. Di Nunzio*, 2021 ONSC 6689, 73 E.T.R. (4th) 109, the deceased made a Will expressly disinheriting two of her three children. One of the disinherited children commenced a Will Challenge claiming that her sister Teresa had unduly influenced their mother to make the Will or that their mother lacked capacity at the relevant times. She alleged that her mother had significant health issues related to side effects suffered from chemotherapy and pain medication, that Teresa controlled and dominated their mother's financial needs, that there was no cogent evidence as to why the deceased would want to

disinherit two of her children, and that Teresa had financial motives for wanting control of their mother's assets.

- [141] The court dismissed the application and found that there was no evidence that the deceased's chemotherapy treatments or medication had any effect on her mentally at the material times: at para. 71. The court found that the applicant raised only suspicions about undue influence which were not grounded in the evidence.
- [142] In the case at bar, there is no evidence that Murray was involved in Tammy's financial affairs at all. As for her motives, she told others that she intended to leave her Estate to Murray because of his caregiving. There is no evidence that Murray was in any way influencing Tammy to leave him anything in her Will. Finally, there is evidence as to why Tammy would not have wanted to leave anything to Kaitlyn in her Will as already outlined above.
- [143] Bill and his witnesses allege that Tammy and Murray were not a couple. I find that there is evidence they were a couple. Murray has produced photos of him and Tammy on a trip to Mexico in February 2018, a visit to Murray's sister in Florida in 2020, and a visit to Ottawa. Tammy and Murray present as a couple in all of the photographs. There is also evidence from co-workers, friends and relatives of both Tammy and Murray that Murray started as a roommate and the relationship became a romantic one after Tammy's father's death. The witnesses to the Will, Tina and Rob, also deposed that Tammy and Murray were a couple. However, if I am wrong and there was no romantic relationship between them, this would not have prevented Tammy from leaving her Estate to the person she described as her "primary caregiver."
- [144] It is clear that Bill was not Tammy's primary caregiver. His evidence was that although his work partner Jim lived next door to Tammy and they drove to work together each day, his work schedule was different from Tammy's and he did not drop in to see her because she was not there at the times he left for and returned from work. While no one denied that Bill and Tammy loved one another as siblings, the evidence does not support that they were exceptionally close. Bill was candid that he never expected Tammy to leave anything in her Will to him. However, his Will Challenge, if successful, would result in Bill receiving the entire Estate.
- [145] In summary, I find that Bill has failed to meet the minimum evidentiary threshold for undue influence. He has raised some suspicions and concerns, all of which have been answered by the evidence of Murray or those who have sworn affidavits in support of his position.

## **Orders and Costs**

### *Costs*

- [146] Murray submits that there were serious claims made against him. He had to respond to all of them or risk losing everything. Further, the attacks against him were personal and excessive.

- [147] Murray served a Rule 49 Offer to Settle offering to dismiss the application without costs until November 1, 2023. Thereafter, Murray would be entitled to costs on a partial indemnity scale if the offer was accepted. The offer expired two minutes before the commencement of the hearing.
- [148] Murray seeks his substantial indemnity costs of \$83,541. He was required to respond to both motions knowing that there was a possibility that only one or none of the motions would be successful.
- [149] This is a case in which the contents of the Will have not been challenged, nor were there any previous Wills. As such, Tammy's conduct in no way caused this litigation. Murray therefore requests that all costs be paid on a substantial indemnity scale by Bill personally.
- [150] Bill's substantial indemnity costs were \$16,450 plus disbursements of \$2,978 plus HST.
- [151] Murray has had complete success. However, this does not mean that Bill did not raise some valid issues. It is clear from the evidence that at some point there was a general understanding that Tammy would leave her Estate to Kaitlyn. There was also some evidence about the nature of Tammy and Murray's relationship and the extent of any control he may have had over her. Finally, there was some evidence of Tammy acting strangely and an inference this was related to her cancer diagnosis and her capacity. While I did not find that this evidence was sufficient to meet the minimum evidentiary threshold required for an Order Giving Directions, it cannot be ignored.
- [152] Further, had I found differently and the Will Challenge proceeded, I would have granted the relief in the cross-motion.
- [153] Given all of the above, this should be a blended costs award. Costs are fixed at \$45,000 for both motions. Of that amount, \$35,000 shall be paid from the Estate. Bill shall pay the remaining \$10,000 personally such costs being payable within one year of the release of this decision.

*Orders*

- [154] The Respondent's motion is granted. The Applicant's motion is moot and is therefore dismissed.
- [155] Costs of both motions are fixed at \$45,000, of which \$35,000 is payable from the Estate and \$10,000 is payable by the Applicant personally within one year of March 4, 2024.
- [156] The signed Order is attached.
-

**Date:** March 4, 2024