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ONTARIO

SUPERIOR COURT OF JUSTICE

IN THE ESTATE OF JOHN JOHANNES JACOBUS KAPTYN, DECEASED	FOR THE PROPOUNDERS OF THE WILL (JASON KAPTYN & JONATHAN KAPTYN) *Michael W. Kerr* & *Kelly A. Charlebois* FOR THE OBJECTOR (ALEXANDER KAPTYN) *Archie J. Rabinowitz, David M. Lobl* & *Reena Goyal* FOR THE TRUSTEE DURING LITIGATION (SIMON MARIA KAPTYN) *Brian Schnurr* & *Jordan D. Oelbaum* FOR THE TRUSTEE DURING LITIGATION (HENRY WILHELM KAPTYN) *Ian M. Hull* & *Megan F. Connolly* FOR DOREEN KAPTYN *Thomas Bastedo, Q.C.* & *Adam Black* FOR THE CHILDREN'S LAWYER *Brian E. Cohen* **HEARD:** Sept. 15-29, 2008

LEDERER J.:

[1] This case asks whether John Kaptyn had testamentary capacity on April 25, 2007 when he executed a codicil to an earlier will.

Onus

[2] If a will is shown to have been executed with the required formalities, it can be probated. However, if a party with an interest in the will raises an issue of capacity, the will must be proved at trial, on the balance of probabilities. The onus to do this lies on those who support the will:

> …the moment the capacity is called into question then at once the onus lies on those propounding [supporting] the will to affirm positively the testamentary capacity…
>
> (*Robins v. National Trust Co.*, [1927] 2 D.L.R. 97, [1927] W.W.R. 692, [1927] A.C. 515 (P.C.) at pp. 100 D.L.R., 696 W.W.R. 519 A.C.)

[3] During the course of this trial, from time to time, reference was made to the case of *Vout v. Hay*, [1995] 2 S.C.R. 876, [1995] S.C.J. No. 58 (Q.L.). This has become a seminal case in understanding the onus where testamentary capacity is made an issue before the court. It serves to confirm that where capacity is an issue and where suspicious circumstances are raised, the onus remains with, or reverts to, the supporter of the will to show that knowledge and approval were present (see: *Vout v. Hay*, *supra*, at paras. 26 and 27).

[4] In the context of this case, it is worthwhile to note the role onus plays as a factor in coming to a decision. This has been noted in the following terms:

> But onus as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no such conclusion. Then the onus will determine the matter. But if the tribunal, after hearing and weighing the evidence, comes to a determinate conclusion, the onus has nothing to do with it, and need not be further considered.
>
> (*Robins v. National Trust*, *supra*, at pp. 519-520)

[5] In this case, I have come to a "determinate conclusion". The evidence, taken as a whole, points clearly to the decision contained in these reasons.

John Kaptyn

[6] John Kaptyn died on May 8, 2007. He left a substantial estate valued in the area of $75 million. Throughout his life, certainly since his arrival in Canada in 1954, he was dedicated to his businesses and, based on the evidence presented to the court, committed to his family.

[7] John Kaptyn had two sons, Henry Kaptyn and Simon Kaptyn. He had five grandchildren: the two sons of Simon, being Jason and Jonathan, and the daughter and two sons of Henry, being Samantha, Robert and Alexander.

[8] The most poignant evidence pointing to the complex character of John Kaptyn came not from his sons or the two grandchildren who testified (Jason and Samantha), but from his nephew, Simon Kapteijn. Like all the family members who testified, he identified that his uncle was a strong personality, determined to win, stubborn, generous and competitive. Simon Kapteijn went on to describe his last visits with his uncle, all of which took place during the final weeks of his life, in the month of April, 2007. He received a call that his uncle wished to see him. On this occasion, he was reprimanded for being six minutes late. Over the course of these visits, they spoke of his uncle's illness. John Kaptyn realized this was not something he could overcome. They talked about love. His uncle was glad to have experienced this. They discussed family "back home". It was painful for his uncle to speak of, or to, his family in Holland. And he acknowledged that, at some point with his uncle, one always talked about business.

[9] Apart from his family, others provided evidence as to the character of John Kaptyn. From this testimony, it became clear that he was a knowledgeable and experienced businessman, who was committed to understanding his commercial and investment interests.

[10] Sheldon Carr, an accountant with a private firm, had worked with John Kaptyn for many years. He testified that he looked on John Kaptyn as being very sophisticated in his understanding of the tax issues he confronted. He was astute. They tracked the success of the businesses and planned how taxes were to be dealt with. Money was moved between corporations in a fashion designed to minimize taxes, at least during the life of John Kaptyn.

[11] In May 1992, Michael Haschyc was hired jointly by John Kaptyn and his son, Simon. They needed help in working out issues that had arisen with their bank. Michael Haschyc is a chartered accountant. When the work with the bank was complete, in 1996, he became the Chief Financial Officer of the Kaptyn group of companies. It was the evidence of Michael Haschyc that John Kaptyn was very knowledgeable in respect of real estate and knew finance very well.

[12] Lawrence Fine is a solicitor who had, over the years, beginning in 1977, prepared wills for John Kaptyn. He described his client as a man "certain about what he liked and didn't like" and knew "what he wanted and didn't want". John Kaptyn was an intelligent and private man.

[13] What also became apparent is that John Kaptyn was not always the easiest person to deal with. Michael Haschyc said he was a demanding person. He was "pleasant with me", but could be "abrupt with others". At one point, based on the evidence, he had what must have been a difficult confrontation with his son, Simon. Not only did he reprimand his nephew, Simon, for

being late; when his stepson, Andrew, failed to appear at an arranged time, John Kaptyn telephoned and demanded that he come, which he did.

Introduction to the Issue

[14] John Kaptyn left behind two Wills, a Primary Will and a Secondary Will, both executed on April 5, 2007. As it was explained to the court, this represents a structure which allows for a saving in probate taxes. The Primary Will deals with those assets which are required to be subject to probate. The Secondary Will provides direction with respect to all other assets, in this case, generally, private corporations held within the family. The Secondary Will is not intended to be probated. As such, the value of the assets it deals with is not subject to probate taxes. This approach was confirmed by the case of *Granovsky Estate v. Ontario* (1997), 156 D.L.R. (4th) 557, 21 E.T.R. (2d) 25 and has been widely utilized since that time. On April 25, 2007, John Kaptyn executed two codicils: a codicil to his Primary Will and a codicil to his Secondary Will.

[15] This hearing is part of a larger proceeding directed to resolving problems which have arisen with respect to the estate of John Kaptyn. By order of Mr. Justice Archibald made on April 24, 2008, the hearing of the larger proceeding was bifurcated. The first part (the part reflected in these reasons) was to respond to a concern raised with the testamentary capacity of John Kaptyn and the second is to deal with the interpretation of certain aspects of the testamentary documents.

[16] This trial concerned whether, on April 25, 2007, John Kaptyn had the testamentary capacity and the "knowledge and approval" necessary to execute the Codicil to the Secondary Will. This was an issue raised, in this court, on behalf of his grandson, Alexander.

[17] It is difficult to understand how, on the same day, at the same time, John Kaptyn could not have the capacity to execute a Codicil to the Secondary Will and yet have been able to properly execute a Codicil to the Primary Will. This was raised with counsel at the outset.

[18] The Codicil to the Primary Will added a bequest to one of the three sisters of John Kaptyn. The evidence indicated that this had been "missed" in previous testamentary documents. Early in this proceeding, the court was advised that the two trustees during litigation, being the two sons of John Kaptyn, who are by his Wills appointed estate trustees, confirmed that the legacy granted by the Codicil to the Primary Will will be respected. Accordingly, the Codicil to the Primary Will was not directly relevant here.

Background

[19] Much was said concerning the history, evolution and organization of the business interests of John Kaptyn. While useful as background, this information is not central to the determination the court is asked to make.

[20] A large part of the value of the estate of John Kaptyn is in real estate holdings. Over the course of the years, these assets were acquired and managed a complex corporate structure developed through which they were held. (see: Schedule “A” found at the end of these reasons)

[21] An understanding of this structure begins with Marktur Limited. The equity in this corporation was 100% owned by John Kaptyn. While no evidence was led, counsel advised that there is an issue as to who had voting control of this company. It may be that the ownership structure of Marktur Limited will have an impact on the ability of the estate to act on some of the terms of the Wills of John Kaptyn. This may be an issue in the second part of this proceeding, but is not relevant here.

[22] Marktur Limited does not directly own any real estate. It was variously described as a holding company and a banker. This latter description reflects the fact that it held mortgages on real estate owned by other companies in which John Kaptyn held an interest. It made loans to and received loans from other companies and its own shareholders. The former description arises from its ownership of shares, particularly in Captain Investments Inc.

[23] Captain Investments Inc. is the vehicle through which John Kaptyn purchased real estate in the United States. As it was explained to the court, he utilized $10 million borrowed from the Bank of Nova Scotia through a company called Captain Developments Limited. With the $10 million, Captain Developments Limited purchased preference shares in Captain Investments Inc., thus making the money available to that company to acquire property in the United States. The bank was unaware that the money would be used in this way and required that the preference shares be "taken off the books" of Captain Developments Limited. This was accomplished by the bank loaning $4 million to a shell company that had been purchased by John Kaptyn. The shell company used the loan to purchase the preference shares from Captain Developments Limited at a discount. Although nothing specific was said about this, the value of the discount was presumably demonstrated by the difference in the loans ($6,000,000). The shell company, having served its purpose, was rolled into Marktur Limited, which became the owner of the preference shares of Captain Investments Inc. The preference shares, and how they were dealt with within the estate of John Kaptyn, are at the root of the issue before the court.

[24] Captain Investments Inc. owns two pieces of real estate in Naples Florida: the first, a shopping plaza and the second, a beach house. For the purposes of estate planning and throughout this trial, the value of the beach house was said to be $6,600,000. It may or may not be that this value has fluctuated since it was established. The beach house and how it was treated within the estate of John Kaptyn was the subject of some evidence and considerable debate during the trial. In the end, it did not play a significant role in what the court was asked to decide.

[25] A significant portion of the real estate holdings owned by John Kaptyn and corporations in which he had an interest are located in Richmond Hill, Ontario in the area of Leslie Street and Highway 7. 9005 Leslie Street Inc. owns a property at that address. The company was 80% owned by John Kaptyn and 20% owned by the Simon Kaptyn Family Trust. Similarly, 9011 Leslie Street Inc. owns property at that address. Initially, the material presented in evidence explained that this company was 100% owned by John Kaptyn. Subsequently, his son, Simon Kaptyn, testified that the ownership in this corporation mirrored that of 9005 Leslie Street Inc., which is to say that it was 80% owned by John Kaptyn and 20% owned by Simon Kaptyn, either through the family trust, by him personally, or through one of his corporate holdings. Simon Kaptyn went on to say that he had agreed with his father that the ownership interests would be transferred so that John Kaptyn owned 100% of both companies. In evidence, he said that these transfers could be, would be, but had not been, undertaken. It may be that the issues of ownership of these two corporations will present problems in the realization of some of the bequests contained in the Wills of John Kaptyn. This may be an issue in the second part of this proceeding, but is not relevant here.

[26] John Kaptyn owned 100% of West Beaver Creek Management Ltd. It owns two properties: the first is located at 650 Highway 7, East Richmond Hill; the second is described in the material presented to the court as the Hensin Property. These properties are the subject of direct bequests in the Secondary Will of John Kaptyn. The first is to go to the children of his son, Simon, and the second to the children of his son, Henry. The holdings in this company stand apart from the other real estate dealt with by the estate of John Kaptyn. Unlike the others, the two properties held by West Beaver Creek Management Limited were to be distributed subject to the mortgages in place at the time of the death of John Kaptyn. It may be that the fact that these properties were owned, not by John Kaptyn, but by a corporation, will present problems in the realization of these bequests. This may be an issue in the second part of this proceeding, but is not relevant here.

[27] John Kaptyn also owned 100% of 1171757 Ontario Ltd. which, in turn, owned 50% of Parkway Hotels and Convention Center Inc. and 50% of Parkway Hotels and Convention Center Partnership. The remaining 50% of these entities was owned by corporations, in turn, owned by Simon Kaptyn. While the details of this part of the corporate structure were never fully explained, the upshot is that, through these corporate holdings, John Kaptyn owned 50% of two hotels, a Sheraton Hotel and a Best Western Hotel, located on property on the northeast quadrant of land at the intersection of Leslie Street and Highway 7 in Richmond Hill.

[28] The corporate structure presented in evidence indicated that John Kaptyn had other corporate holdings. They were not referred to during the trial and are not relevant. It is also clear that John Kaptyn held other more liquid assets including: shareholder loans receivable from Marktur Limited, cash on hand and a stock portfolio valued in the area of $20 million. The treatment of some of these assets in the Wills of John Kaptyn may be an issue in the second part of this proceeding, but is not relevant here.

Estate Planning

[29] In the summer of 2006, John Kaptyn determined to restructure his estate. He wanted to "skip a generation". He wanted his real estate assets to be distributed to his grandchildren. He wanted his wife looked after and to make some charitable donations. The residue would go to his sons.

[30] He wanted the assets left to the children of his son, Henry, to be equal in value to the assets left to the children of his son, Simon. The families were to be treated the same. There was to be no shared ownership between them. This necessitated a consideration of the division of the assets. Given that the family of his son, Simon, already owned half of the hotel complex and that the hotels were being managed by Simon and his son, Jason, John Kaptyn determined that the remaining 50 % of the ownership of the hotel complex should be left to the two sons of Simon (Jason and Jonathan). Given the value of the hotels, it would be necessary to develop a grouping of properties to be left to the children of his son, Henry. This would be done by leaving them the two properties in Florida (the plaza and the beach house) and some additional Canadian properties. John Kaptyn also determined that he wished his grandchildren to receive these assets free of any tax and inter-company debt then present in his holdings. Money needed to be set aside for this purpose. It was determined that Marktur Limited would be liquidated and the money acquired from the liquidation used for the purpose of dealing with these liabilities. The stock portfolio which was held by John Kaptyn would be added to the resources to be used for the payment of taxes, the payment of the inter-company loans and the specific legacies (including the charitable donations). Any value left over would fall into residue and be distributed between his two sons.

The October 6, 2006 Will

[31] During September 2006, Sheldon Carr met with John Kaptyn and subsequently provided instructions to Lawrence Fine. Wills were prepared and executed on October 6, 2006. There was some urgency to this as John Kaptyn was about to leave on a trip to Asia. It was understood that more work would need to be done upon his return. He signed on the basis that these new Wills were better than what he had.

[32] Sheldon Carr advised the court that, by the Secondary Will executed on October 6, 2006, it was the children of Henry Kaptyn who were to receive all of shares in Marktur Limited and Captain Investments Inc. This would include the preference shares in Captain Investments Inc. held by Marktur Limited.

[33] The Primary Will, executed on October 6, 2006, refers specifically to the beach house. The wife of John Kaptyn was given a right of occupancy for a period of "up to two years" after which the property was to form part of the residue of the estate.

[34] John Kaptyn wished to have a complete understanding of the distribution of the properties. He wished to be sure the distribution between the two families would be equal in value and to be certain that the stock portfolio and the liquidation of Marktur Limited would provide the funds necessary to pay the taxes, loans and legacies.

[35] During his absence and at his request, Michael Haschyc prepared schedules ("Schedules") that demonstrated and compared the value of the assets to be distributed to the two sets of grandchildren. They also showed the value of the assets set aside to pay taxes, inter-company loans and legacies. As envisioned by the Schedules, the value of the beach house ($6.6 million) was to be included in the assets attributed to the children of Henry Kaptyn. The preference shares owned by Marktur Limited in Captain Investments Inc. were to be redeemed.

[36] The results of this work were reviewed with John Katpyn in late October, 2006 after his return from Asia. Although the value of the assets to be left to the children of Henry Kaptyn exceeded the value of those to be left to the children of Simon Kaptyn ($20,133,801 as compared to $18,787,229), John Kaptyn considered the difference to be nominal and the proposed distribution appropriate. The value of the liquidation of Marktur Limited when added to the value of the liquid assets of John Kaptyn would provide a considerable sum of money ($30,689,407). Although, at that point, no work had been done to assess the taxes that the estate would pay, Sheldon Carr advised the court that he anticipated that something in the area of $12 million to $15 million would be owed. There would be more than enough to pay the taxes, inter-company loans and legacies. There would be money left to fall into residue and be distributed to the two sons of John Kaptyn.

[37] It was the evidence of Michael Haschyc that the Schedules became the foundation of the estate plan of John Kaptyn. They were not just a guide. He referred to them as the "bible". He said that no departure from the Schedules would have been made in the Wills without him knowing. He also said he was not part of the team employed by John Kaptyn to prepare his Wills. It is apparent from the evidence that John Kaptyn separated his concern for his businesses from his feelings for his family. Michael Haschyc's confidence that he would have known of any change reflects the depth of his loyalty rather than the breadth of his knowledge.

The March 2007 Will

[38] On December 19, 2006, Lawrence Fine, Michael Haschyc and John Kaptyn met to consider further revisions to the Wills. They reviewed the wills that had been executed on October 6, 2006 in order to identify the changes John Kaptyn wished to have made. They reviewed the Schedules and the distribution of assets they contained. Lawrence Fine undertook to make the changes.

[39] The notes made by Lawrence Fine on December 19, 2006 indicate: "loans and pref. shares to be redeemed". It is his recollection that the "preference shares" being referred to are those Marktur Limited held in Captain Investments Inc. The notes also contained the phrase: "Marktur collect loan receivables". This reflected that money owed to Marktur Limited was to be collected. This would be consistent with the plan to liquidate Marktur Limited.

[40] Michael Haschyc testified that Lawrence Fine did not complete the revision of the Wills as he had indicated he would. Telephone calls were made to the office of Lawrence Fine to inquire as to the status of this work. In time, John Kaptyn indicated that he would telephone

Lawrence Fine himself. Be that as it may, no further drafts were prepared until early in the month of March, 2007.

[41] In the meantime, at some point early in 2007, John Kaptyn was advised that he had cancer. He sought treatment in the United States but, in April, 2007, came home to die.

[42] During February 2007, following instructions from Michael Haschyc, Sheldon Carr phoned John Kaptyn in Florida. They talked about certain aspects of the estate plan of John Kaptyn. Among the items discussed were: (1) the role of his grandson Jason, given that he was managing the hotel; (2) whether Henry's children were too young to manage assets and whether the assets should be held until the children were 35 years of age (this proviso was part of the Secondary Will executed on October 6, 2006); and (3) that the grandchildren were to get the bulk of the estate and they were to get the assets after taxes had been paid. As well, John Kaptyn raised with Sheldon Carr his determination that the residue of his estate should not be divided equally between his two sons. At this point, no calculation had been done as to the value of the residue.

[43] Over the weekend of March 3 and 4, 2007, Lawrence Fine had several telephone discussions with John Kaptyn, who was in Florida, and Michael Haschyc regarding the amendments to the Wills. He was told to revise the distribution of the residue so that 80% was left to Henry and 20% to Simon. John Kaptyn was unhappy with Simon. He believed that Simon had not followed through on commitments he had made to help his father with the business and was not appreciative of what his father had done for him. They had an argument during which, the evidence suggests, unfortunate language was used and for which no apology was made.

[44] On March 5, 2007, Lawrence Fine sent the re-drafted Wills to John Kaptyn, who was in Florida. The letter which enclosed the Wills indicated that Lawrence Fine had advised John Kaptyn as to the formalities required to properly execute the Wills and expressed the expectation that they would be signed. These Wills were executed during the month of March, 2007, although the specific day is not shown.

[45] By the Secondary Will, signed during March, 2007, the children of Henry Kaptyn were to receive all of the common, special or preferred shares owned by John Kaptyn in, among other companies, Captain Investments Inc. This would include the preference shares, the bequest of which is central to this trial. Unlike in the Secondary Will, executed on October 6, 2006, no bequest is included which would leave any shares in Marktur Limited to the children of Henry Kaptyn. Rather, by the Secondary Will of March, 2007, the Trustees are directed to liquidate Marktur Limited and to apply the proceeds from the liquidation in repayment of any inter-company loans and in the payment of taxes so that the assets disposed of would be transferred free and clear of such liabilities.

[46] The Secondary Will, executed by John Kaptyn during March, 2007, also recognized the change in the treatment of the residue. Under this Will, Simon Kaptyn was to receive 20% of the residue and Henry Kaptyn the remaining 80%.

[47] The Primary Will, executed by John Kaptyn during March, 2007, refers to the Florida beach house in, generally, the same manner as the Primary Will, signed on October 6, 2006. The only change is that the wife of John Kaptyn was to have a right occupancy for "a period of up to three years" rather than two years. After the right of occupancy had been exhausted, the beach house was to form part of the residue of the estate.

[48] The Wills, executed by John Kaptyn during March, 2007, were not the last Wills he signed.

The April 5, 2007 Will

[49] On March 14, 2007, Sheldon Carr and Michael Haschyc telephoned John Kaptyn, who was in Florida, to discuss a further re-draft of the Wills. It was the recollection of Sheldon Carr that Lawrence Fine took part in this call; however, his records do not confirm this and Lawrence Fine made no reference to having participated.

[50] On March 20, 2007, Sheldon Carr, Michael Haschyc and Lawrence Fine met to discuss the further revisions to the Wills of John Kaptyn. They spoke to John Kaptyn on that day, but only for a short time. He had delivered a memo outlining the amendments he wished to have made. Among other things, the memo listed a number of legacies to be left to employees, family and friends and specifically considered his step-children. It made no reference to the preference shares Marktur Limited held in Captain Investments Inc., but it did suggest that the occupancy period for the Florida beach house be returned to two years and that after that time, the house be sold.

[51] Among the issues discussed on March 20, 2007, were the problems and tax issues which would occur because the Wills distributed assets that were owned by corporations and not directly by John Kaptyn. Sheldon Carr advised the others that these problems could be minimized through a re-organization of the structure of the corporations involved. Simply put, this restructuring would place the assets to be distributed to the grandchildren in corporations without other assets. The distribution could then be completed by a distribution of the shares of those companies. The instructions from John Kaptyn were to "figure it out and get it done". Among the corporations that would be part of such a re-organization was Marktur Limited. At the end of the meeting, it was decided that Sheldon Carr would utilize the tax expertise in his firm to assist in finding the solution to the issues that had been reviewed.

[52] Sheldon Carr involved Cary Heller, a tax practitioner with his firm, who, in turn, contacted Robert Trainor, an American, with whom they had worked in the past with respect to tax issues involving the affairs of John Kaptyn. This resulted in a memo prepared by Cary Heller and sent to Sheldon Carr. It outlined a process directed to isolating the common shares of Captain Investments Inc. and moving all of the other assets and liabilities held by Marktur Limited into a new corporation. The proceeds of the liquidation of Marktur Limited would be held in the new corporation making them available to pay taxes, inter-company loans and legacies. The transfer of the any real estate held through Marktur Limited would take place through the transfer of its shares. The common shares of Captain Investments Inc. would, through this transaction, be moved to the designated grandchildren and, through this means, the real estate that remained in that company would be transferred.

[53] At the same time, beginning after the meeting of March 20, 2007, Lawrence Fine prepared a series of drafts of both the Primary and Secondary Wills. On April 4, 2007, Michael Haschyc sent a set of revisions to clause 4(d.1) of the Secondary Will. This is the clause which directs the liquidation of Marktur Limited. Among the changes outlined was the inclusion of the phrase "and redemption of preference shares". This is repeated in an e-mail sent that day (April 4, 2007) by Michael Haschyc to Sheldon Carr in which he explained, "I've made some further changes to incorporate proceeds available in the estate to repay inter-company loans and I've added- redemption of preference shares". While the other amendments were made, this one was not. Lawrence Fine was unable to explain this beyond conceding that he missed the reference.

[54] Sheldon Carr also commented on the drafts being prepared by Lawrence Fine. He made note of the possible re-organization of Marktur Limited. In an e-mail to Lawrence Fine, on April 3, 2007, he noted:

> There is discussion that we are going to reorganize the assets of Marktur Limited and therefore have a Newco owned by John Kaptyn and/or his Estate which will own all the inter-company accounts and/or the preference shares of Kaptain [*sic*] Investments Inc. I think we have to comment on the possibility of reorganizing assets in order that the shares of Kaptain [*sic*] Investments Inc. can be dealt with as set out in Paragraph 4(f).

[55] The memo from Michael Haschyc to Lawrence Fine enclosing revisions ends with the observation: "see you at 3:00 PM". This reflected the fact that John Kaptyn had flown back to Canada in an air ambulance and, on April 4, 2007, was at the Markham/Stouffville Hospital. Lawrence Fine and Michael Haschyc were to visit him there in the hope of getting the revised Wills signed. Michael Haschyc advised the court that he did see John Kaptyn at the hospital on that day. John Kaptyn was on a "gurney" in a corridor and was not happy at the treatment he was receiving. He said that he would sign the Wills the next day at home. Only one person at a time was permitted to see John Kaptyn and Lawrence Fine followed after Michael Haschyc. Lawrence Fine confirmed the dissatisfaction of John Kaptyn with his treatment by the hospital. John Kaptyn was sufficiently distressed by this that he determined to remove a substantial

bequest to the hospital that was, at the time, a term of his Wills. They did not review the Wills. Lawrence Fine knew that he would be going to the house the next day.

[56] On April 5, 2007, Sheldon Carr, Michael Haschyc and Lawrence Fine attended at the home of John Kaptyn. The Wills were reviewed with John Kaptyn. They were discussed on a global basis without the values attributed to the specific properties being discussed. John Kaptyn did not read the Wills word for word. According to Sheldon Carr, he flipped through the Wills as they were reviewed with him. Lawrence Fine testified that John Kaptyn used his hand to read line by line. Consistent with his determination of the day before, John Kaptyn struck out the bequest to the Markham/Stouffville Hospital. The re-organization proposed in the memo of Cary Heller was brought to his attention. He was advised that money would be saved if the re-organization was completed. John Kaptyn felt this could be done later, after he had passed away. Sheldon Carr was of a view that there was not enough time for the restructuring to be undertaken. Among the reasons provided in evidence was the concern that the death of John Kaptyn was imminent. On being advised that the tax issues had not been resolved, John Kaptyn told them not to worry about it. He was no longer looking for tax deferrals. The taxes were to be paid so that his grandchildren received the real estate free of tax. Sheldon Carr testified that John Kaptyn believed his children would pull together and do what he wished. Michael Haschyc advised the court he did not play an active role in the conversation. He sat, on his own, at the end of the bed and reminisced. Nonetheless, he recalled that John Kaptyn told them not to worry about the tax issues.

[57] Lawrence Fine made notes which, while not well-organized, did provide some information to the court. They record that he was instructed to delete the bequest to the Markham/Stouffville Hospital and that a memo was to be attached to the Wills explaining to his son, Simon, the decision that his son, Henry, was to receive the larger share of the residue (80%) of his estate. The notes include the phrase: "review recent changes". While the notes are unclear, and Lawrence Fine did not specifically recall, it was his evidence that he would have discussed both the Primary and Secondary Wills. To do otherwise would have been a departure from his practice and there was no reason why this would not have taken place. There is no doubt in my mind that the changes to both the Primary Will and the Secondary Will were reviewed with John Kaptyn.

[58] On April 5, 2007, John Kaptyn signed a new Primary Will and a new Secondary Will.

[59] The Secondary Will does reflect some of the changes proposed by Michael Haschyc in his e-mail of April 4, 2007, but not the amendment which would have included reference to the "redemption of preference shares". The Secondary Will, executed on April 5, 2007, continued to direct that the children of Henry Kaptyn were to receive all of the common, special or preferred shares owned by John Kaptyn in Captain Investments Inc.

[60] The Primary Will, executed by John Kaptyn on April 5, 2007, refers to the Florida beach house in, generally, the same manner as the Primary Will, signed on October 6, 2006, and the Primary Will, executed during the month of March, 2007. The right of occupancy of the wife of

John Kaptyn was returned to a period of up to two years, as it had been in the Primary Will of October 6, 2006, from the period of three years as it was in the Primary Will of March, 2007. After the right of occupancy was exhausted, the beach house was to be sold on the open market and the proceeds to form part of the residue of the estate. In the previous Wills, the beach house, *in specie*, was to fall into the residue.

The Codicils of April 25, 2007

[61] There was one further set of changes made to the Wills of John Kaptyn. Sometime after the execution of the Primary and Secondary Wills, Michael Haschyc had an opportunity to read them over carefully. He testified that this took place "mid month", "around April 15, 2007". He was concerned that the Secondary Will only referred to "the payment of taxes imposed by an American jurisdiction" and not to Canadian tax requirements. He realized that the change to include the reference to the redemption of the preference shares had not been made. Michael Haschyc telephoned the home of John Kaptyn and was advised by his wife, Doreen Kaptyn, that she would call him back. He wanted to find out what John Kaptyn wished him to do.

[62] He did not speak to John Kaptyn until April 24, 2007. (The delay is consistent with a period of delirium suffered by John Kaptyn to which I will refer later in these reasons.) John Kaptyn advised Michael Haschyc of two changes he wished to have made to his testamentary documents: (1) he wished to make a legacy to a third sister who had been "missed"; and (2) he wished to require that his grandson, Jonathan, give a power of attorney to his brother, Jason, to ensure that Jason had the authority to operate the hotel complex. They reviewed the concerns of Michael Haschyc, being the omission of the reference to Canadian taxes and the omission of the reference to the redemption of the preference shares. With instruction from John Kaptyn, Michael Haschyc telephoned Lawrence Fine and directed him to make the changes. That day, Lawrence Fine delivered drafts of the Codicils for both Primary and Secondary Wills to Michael Haschyc "for your review and comment". Michael Haschyc sent back comments. In particular, he was still not happy with the provision dealing with the preference shares. He prepared his own wording which he delivered to Lawrence Fine. This wording indicated that the preference shares of Captain Investments Inc. owned by Marktur Limited were to be redeemed at a price of $1,000.00 US per share. It was incorporated into the Codicil to the Secondary Will of John Kaptyn.

[63] Arrangements were made for Michael Haschyc and Lawrence Fine to attend at the home of John Kaptyn at 11:30 a.m. on April 25, 2007 to have the Codicils signed. They went into the bedroom. Lawrence Fine went through both of the Codicils. John Kaptyn read along as the changes were read to him. He followed along, all four fingers following line by line. As both Michael Hasschyc and Lawrence Fine recalled, when the redemption of the preference shares was reviewed, John Kaptyn asked Michael Haschyc to confirm that this was what they had talked about. Lawrence Fine asked if John Kaptyn had any questions or concerns. He did not. He expressed gratitude, particularly with respect to the inclusion of the bequest to his sister.

[64] It is the capacity of John Kaptyn in respect of the execution of the Codicil to the Secondary Will that is in issue in this trial. In particular, it is the treatment of the preference shares held by Marktur Limited in Captain Investments Inc. that is of concern.

Capacity

[65] In the context of this trial, the term "capacity" accounts for both "mental capacity" and "knowledge and approval". Did John Kaptyn lack either so that the Codicil to the Secondary Will should be revoked?

[66] To answer this question, it is necessary to consider the observations of those who saw and spoke to John Kaptyn at the material time.

[67] While the capacity of John Kaptyn on April 5, 2007 is not in issue here, an understanding of how he presented on that day helps in setting the context for what followed. On April 5, 2007, Sheldon Carr, Michael Haschyc and Lawrence Fine were all present when John Kaptyn executed his Primary and Secondary Wills. While they each have a somewhat different recollection of the physical appearance of John Kaptyn, they all agree as to his involvement in the discussion, his understanding of what was said and the nature of his participation in the discussion.

[68] Sheldon Carr recalled that John Kaptyn looked weak and older from his illness. Lawrence Fine testified that John Kaptyn was well-groomed and was sitting up. He presented as he always had. To Michael Haschyc, he was his usual self. Michael Haschyc said: “If he had not told me he was ill I would not have known”.

[69] Whatever his appearance, they agreed that John Kaptyn was alert and lucid. He spoke well, in fluid conversation, using full sentences. He was focussed on the issues. Lawrence Fine saw no intellectual change. Michael Haschyc testified he was in bed, but his normal self. In executing the Wills, John Kaptyn pointed out to Lawrence Fine that he always signed at the end of the text and not in the corner of the page. He explained that he did this to make it more difficult for improper changes to be made later. This reflected an experience he had had earlier in his career. Lawrence Fine saw no reason to believe that John Kaptyn did not have testamentary capacity.

[70] On April 7, 2007, John Kaptyn was visited by his nephew. Simon Kapteijn told the court that his uncle was “fine”. He had lost a lot of weight. Their conversation was in depth. His uncle was himself. He was sharp, with it. He realized that he was going to die.

[71] April 8, 2007 was the birthday of John Kaptyn. His grandson, Jason Kaptyn, testified that his grandfather was “fine”. They had a nice birthday. They watched the Masters golf tournament and talked about hockey. At the time, significant renovations were being undertaken at the hotels. This was required in order that the Sheraton licence agreement be renewed. His grandfather wanted to know how this was progressing and when it would be finished.

[72] From this point on and for the next week or so, John Kaptyn entered a low period. This is exemplified by a letter written by Dr. Ronald G. Oda. Dr. Oda was the family physician of John Kaptyn, who had been his patient since 2000. The letter reflects conclusions arrived at by Dr. Oda following his visit to John Kaptyn on April 10, 2007. The letter is dated April 11, 2007. Dr. Oda was not called to give evidence because it was accepted that his conclusions are limited to the day his observations were made. In his letter, Dr. Oda noted:

> I found [John Kaptyn] quite confused and disoriented. When questioned about his level of pain and discomfort, his response was unintelligible and inappropriate.

[73] Simon Kaptyn was present when Dr. Oda examined his father and confirmed that John Kaptyn was not responsive to the questions that the doctor asked.

[74] Jason Kaptyn testified that, on the following day (April 11, 2007), his grandfather was not doing well. He had trouble speaking.

[75] This condition continued until April 16, 2007. Simon Kaptyn testified that his father remained sluggish and non-responsive until that day. On April16, 2007, his father "rebounded". His father was lucid, coherent and engaged. Jason Kaptyn confirmed the change. He told the court that, on that day, his grandfather read the newspaper. They had a detailed discussion concerning the "Bell takeover": should they sell his grandfather's holdings and take the profit? John Kaptyn wanted to know if "Teachers" would up their bid. They talked about selling some of his grandfather's holdings. John Kaptyn and his grandson watched television together. They discussed the commodities market. John Kaptyn explained that gold prices appreciate as the value of the dollar goes down. His grandfather was bullish on gold and commodities, in general.

[76] The family was excited about the changed condition of John Kaptyn. He was better. They could speak to him. At least some consideration was given to whether they should look for treatments that would extend his life. Jason Kaptyn described his grandfather as being back to his old self.

[77] John Kaptyn remained interested in the stock market. On April 19, 2007, Jason Kaptyn spoke to his grandfather and they decided to sell the remainder of John Kaptyn's holdings in Bell Canada.

[78] Over the course of the period from April 16, 2007 to April 25, 2007, Simon Kaptyn had a series of conversations with his father. They talked about a sailboat John Kaptyn had as a child in Holland. They spoke of the family of the mother of Simon Katpyn and they talked about a CT-scan being done to better assess the condition of John Kaptyn.

[79] On April 26, 2007, Jason Kaptyn was asked by his father to visit his grandfather. John Kaptyn wanted to sell stock he owned in Manulife and review with his grandson research Jason had been asked to undertake with respect to possible investment in Canadian banks. When Jason Kaptyn arrived, his grandfather was sitting up and reading the newspaper. They talked about the

market. John Kaptyn felt that, as growth in China slowed, the value of the commodities market would cool. This would be affected by the end of the Olympics in that country. They discussed the portfolio of the wife of John Kaptyn. John Kaptyn was concerned that her holdings were concentrated in a single stock. His grandfather explained to Jason Kaptyn that Marktur Limited had loaned his wife the money to establish that position. If this was so, Jason Kaptyn was instructed that the stock be sold and re-purchased in his grandfather's account. They talked about Michael Haschyc and how helpful he had been. His grandfather wanted to be sure that Michael Haschyc would have a position with the Kaptyn family for as long as he pleased. They reviewed the state of the renovations at the hotels. They were to be completed within a few days and John Kaptyn wanted to visit, albeit with a wheelchair. Jason Kaptyn and his grandfather discussed further stocks to be purchased. He wanted to buy stock in the New York Stock Exchange and in BankAmerica. They had surplus money and John Kaptyn wanted to expand his American holdings. The New York Stock Exchange had recently merged with a European market. The price had come down and John Kaptyn wanted to buy. John Kaptyn was familiar with BankAmerica which he had held in the past.

[80] Jason Kaptyn continued, in the days that followed, to discuss stock transactions with his grandfather. Jason Kaptyn referred specifically to discussions they had concerning "Apple" and "Google".

[81] Having said this, there is no doubt that John Kaptyn was dying. He was receiving treatment. He did take naps. He had good times and bad times. Jason Kaptyn recalled May 3, 2007. It was his birthday. His grandfather could still speak, but not as he had in late April. They still had meaningful conversations, but slower. This was the last such conversation they had.

[82] This takes me back to observations made on April 25, 2007, the day on which the Codicils to the Primary and Secondary Wills were signed by John Kaptyn. Simon Kaptyn testified that, before Lawrence Fine and Michael Haschyc arrived to review the Codicils, he saw his father. He was propped up in bed, reading a newspaper. They discussed China and the view of John Kaptyn that the infrastructure being built there was driving the commodities market. Simon Kaptyn told the court that his father was interested in China and, on this day, offered the view that the Chinese system was an efficient way to govern so many people. John Kaptyn told his son that he wanted to sell his stock in Manulife. Hurricane season was coming and insurance companies would have to pay for losses that occurred. This would affect the value of their shares.

[83] Lawrence Fine and Michael Haschyc were taken into the bedroom of John Kaptyn. Lawrence Fine testified that when he entered, John Kaptyn "knew it was me". He was thinner, but in every other respect presented as he had on April 5, 2007. Michael Haschyc testified that John Kaptyn was his usual self. He was sitting up in bed. Other than the fact that he was not wearing a toupee, he was the same in his grooming. In respect of his health, John Kaptyn acknowledged "he was not the greatest". Lawrence Fine testified that John Kaptyn knew he was there to discuss the Codicils. He knew that one of his sisters had been omitted from his Wills.

He believes John Kaptyn said: "Yeah, that's my favorite sister". John Kaptyn said his executors would have looked after this anyway. Lawrence Fine acknowledged that he asked no questions directed to assessing whether John Kaptyn could identify himself, knew where he was or was familiar with the issues raised by the Codicils. He was not concerned about the mental capacity of John Kaptyn. Lawrence Fine advised the court that there was no suggestion that John Kaptyn lacked ability to focus on the issues being reviewed. He spoke clearly and in sentences. He was "clued-in". By way of demonstrating this, Lawrence Fine testified that Michael Haschyc brought up a business issue regarding a third party seeking a quit claim deed in respect of which John Kaptyn had an interest. This matter was irrelevant to the Will or the estate. Lawrence Fine advised the court that John Kaptyn understood and knew about the issue. He was focussed on the business aspect of the question he was being asked. John Kaptyn said it could wait. John Kaptyn said he wanted to deal with the Codicils.

[84] It was the recollection of Michael Haschyc that the question of the quit claim deed was raised, not on April 25, 2007, but on April 5, 2007. Following the execution of the Codicils, Lawrence Fine returned to his office and dictated a memo to file. It refers to the discussion concerning the quit claim deed as having taken place on that day. On this point, I prefer the evidence of Lawrence Fine because of the existence of the memo. There is no reason for me to believe that it was not prepared as attested to by Lawrence Fine and does not recount what had taken place only a short time earlier.

[85] On April 25 2007, after the Codicils had been signed and after Lawrence Fine and Michael Haschyc had left. Simon Kapteijn arrived for what turned out to be his last visit with his uncle. His uncle had lost "body mass". He did have trouble with phlegm. It was on this occasion that John Kaptyn telephoned his stepson and ordered him to "get over here". Simon Kapteijn testified that he had a good conversation, a normal conversation, with his uncle who, he said, never missed a beat. He was surprised at how "with it" his uncle was. From an intellectual perspective, he saw no difference in the conversation he had with John Kaptyn.

[86] At the trial, the propounders of the Will called Dr. S Lawrence Librach, an expert in palliative care. Dr. Librach had never met and did not treat John Kaptyn. He was retained in April, 2008 to provide an opinion as to the testamentary capacity of John Kaptyn. He examined the notes of the treating doctors: Ronald G. Oda and Eileen Lougheed. He reviewed the examinations-for-discovery of the doctors who were examined. He read the Wills and the Codicils. And, most importantly, he read the nursing notes that recorded the treatment and condition of John Kaptyn after his arrival at home late on April 4 or early on April 5, 2007 until his death on May 8, 2007. The evidence of Dr. Librach confirmed and explained observations made by the members of the family of John Kaptyn with respect to what I referred to earlier as the low period he suffered from April 10, 2007 to April 16, 2007.

[87] It was the evidence of Dr. Librach that, during this time, John Kaptyn suffered from delirium brought on by opioid toxicity. Delirium is an altered state of consciousness demonstrated by a mixture of drowsiness, agitation, confusion and hallucination. Opioid toxicity occurs with the overdose of opioid drugs. It may be caused by the interaction of these drugs with

each other. For example, one drug may impact the metabolism such that it slows the absorption of another drug causing what might otherwise be a response the body can tolerate to be exaggerated. Dr. Librach reviewed the drugs being administered to John Kaptyn and offered the opinion that this explained the low period observed by the family of John Kaptyn.

[88] As explained by Dr. Librach, the notes of Dr. Lougheed, a palliative care doctor who attended to John Kaptyn, and the nursing notes demonstrate the course of the delirium. On April 4, 2007, the emergency room physician at the Markham/Stouffville Hospital, Dr. Anna Fu, asked Dr. Lougheed to see John Kaptyn. Her notes and those of the Dr. Fu show no evidence of a lack of capacity. Dr. Lougheed noted:

> Pt. is alert and appropriately communicative and is requesting no aggressive life prolonging measures…

[89] Dr. Librach pointed out that, on April 5, 2007, the day that John Kaptyn executed this Primary and Secondary Wills, the nursing notes say he "declined hydromorphone as personal matters need to be dealt with and wishes to stay alert". This suggested that the pain was bearable and, Dr. Librach testified, suggested his judgment was not impaired.

[90] On April 7, 2007, the nursing notes indicate he was "alert and oriented x 3". Dr. Librach explained that "oriented x 3" indicates the patient knew who he was, where he was and the time. At this time, there were "no voiced concerns".

[91] The following day, at 14:45, the nursing notes state: "Pt awake, alert and oriented. A little slow @ processing info." This may have signified the beginning of the delirium. It is possible that John Kaptyn was just very tired. At 18:28, the same day, the nursing notes say: "remains alert & oriented". This is not surprising and not inconsistent with the previous reference. Dr. Librach explained that fluctuations are expected in terminal patients in palliative care.

[92] On April 10, 2007, at 13:10, the nursing notes review changes to his medication. This is the day on which Dr. Oda attended and observed that John Kaptyn was disoriented and confused as discussed in his letter of April 11, 2007. Dr. Librach saw no reason to disagree with Dr. Oda. At this point, John Kaptyn would have been in temporary delirium. Dr. Librach associated this with the interaction of the drugs. In his opinion, John Kaptyn was becoming toxic.

[93] On April 11, 2007, the nursing notes indicate that the patient had told his wife that there were “many ants in the ceiling”. He was requesting a bug spray. This hallucination was part of his delirium. On April 13, 2007, John Kaptyn was having difficulty swallowing and the nursing notes indicate that he expressed the concern that water is poisonous. Dr. Librach testified that this was indicative of his continuing delirium.

[94] April 16, 2007 is the day that Simon Kaptyn testified his father rebounded. The nursing notes indicate, in part: "Pt. Woke up when the lights went on. Alert, oriented x 3" and "Pt. watching TV & reading the newspaper, spouse quite excited". For Dr. Librach, this is

demonstrative of the delirium clearing. This is the day Jason Kaptyn advised the court of a lengthy conversation he had with his grandfather concerning the stock market. The nursing notes, for that day, go on to say: "Clt. alert giving advise [*sic*] re: the stock market etc."

[95] April 24, 2007 is the day Michael Haschyc reported he had spoken by telephone with John Kaptyn and received instructions to make the changes ultimately contained in the codicils. The nursing notes for three o'clock that afternoon state: "client is alert, oriented + in good spirits chatting + interacting with family members + friends".

[96] On April 25, 2007, the day the codicils were executed, at noon, the nursing notes observe: "client awake, oriented + coherent, chatting with son + friends". Dr. Librach interpreted the nursing notes for that day as suggesting that the cognitive function of John Kaptyn was intact. His delirium was and remained cleared.

[97] The evidence and opinions provided by Dr. Librach are consistent with, and the nursing notes demonstrative of, the observations of Simon Kaptyn, Jason Kaptyn, Simon Kapteijn and the professionals who visited with John Kaptyn over this period.

[98] To this point, one might reasonably wonder what evidence there was that would suggest that John Kaptyn did not have testamentary capacity, either mental capacity or "knowledge and approval", when he executed the Codicil to the Secondary Will on April 25, 2007.

[99] Two doctors, in addition to S. Lawrence Librach, gave evidence. Dr. Kenneth I. Shulman, like Dr. S. Lawrence Librach, never met and did not treat John Kaptyn. He is a psychiatrist with a specialty in geriatric psychiatry. He has assessed testamentary capacity in a large number of cases, but is not a palliative care physician. He read most, if not all, of the available material concerning John Kaptyn, including a variety of transcripts of examinations of family members and the professionals who worked on the testamentary documents respecting the estate of John Kaptyn. He read the Wills, the Codicils and the nursing notes, doctor's letters and medical records. He also reviewed two letters prepared by KPMG to which no other reference was made during the course of this trial. They were not presented in evidence.

[100] I have a great deal of difficulty accepting and relying on the conclusions of Dr. Shulman.

[101] It is not his conclusion that John Kaptyn was without testamentary capacity. Rather, it is his view that, given the complexity of the estate and the nature of the change represented by the Codicils, we cannot be certain that the required capacity was present. In the circumstances, Dr. Shulman believed that it was necessary that further inquiries be made at the time the Codicils were executed to ascertain and ensure that John Kaptyn had the mental capacity and the knowledge and approval of the content of the Codicils.

[102] The difficulty I have accepting this begins with the conclusion that the Wills are complex. In a letter dated, August 22, 2008, addressed to counsel for Alexander Kaptyn, Dr. Shulman advised that he had read "John Kaptyn's Will of April 5, 2007. He offers the

conclusion that this is "a complicated Will and difficult to follow…". Dr. Shulman read the "Codicil of April 25, 2007". In the letter, he suggests "that the fundamental change from the original Will is the liquidation of a company known as Marktur Limited". While he may be an expert in geriatric psychiatry and considered testamentary capacity in "75 to 100 cases", there is nothing which says he has the training or experience to come to conclusions which, in an absolute fashion, define a will as complex or the change in a codicil as fundamental. By absolute, I mean independent of any consideration other than his own reading of the Wills and Codicils.

[103] Having arrived at these conclusions, from reading the testamentary documents, Dr. Shulman refers to the work of KPMG. He notes that KPMG was asked by the sons of John Kaptyn to provide "an analysis of the various provisions in Mr. Kaptyn's primary and secondary estate". He provides a synopsis of the conclusions of KPMG and interprets the impact of those conclusions. The letter from Dr. Shulman, among other things, stated:

> In short, the letter from KPMG reinforces the extremely complex nature of this Codicil with its ambiguities and possible interpretations. Without clear documentation of Mr. Kaptyn's understanding of these issues and appreciation of the potential consequences of the Codicil, it is impossible to suggest that he did have the capacity to understand this extremely complicated document as it was even for a financial expert from KPMG.

[104] No one from KPMG gave evidence at this trial. The work they did, the analysis they performed and any reports they prepared are not before the court and were not subject to cross-examination. In the context of this trial, the information provided by Dr. Shulman in respect of the work of KPMG is, if anything, hearsay and should not be relied on by me.

[105] In any event, the issue is not whether the Will appeared complex, or the change in the Codicil fundamental, to Dr. Shulman or to employees or partners at KPMG. The question is whether, given his experience, knowledge and past involvement in the preparation of his estate, John Kaptyn had the requisite mental capacity and knowledge and approval at the time he executed the Codicil. The evidence of Dr. Shulman as to the complexity of the Will and nature of the change in the Codicil do not provide guidance in how to assess this question.

[106] Dr. Shulman advised the court that the analysis to be undertaken is a measure of the relationship between testamentary capacity and the "situational complexity" confronting the testator. This demonstrates the need to look beyond the document and understand the knowledge, experience and understanding of the testator, as well as the condition and circumstances of the testator, at the time the will or codicil was executed. In simple terms, the level of cognition required to be “capable” bears a direct relationship to the situational complexity the testator confronts. The more complex the situation facing the testator, the higher the level of cognition he or she would be required to have. As Dr. Shulman suggested,

depending on the circumstances, a testator could be incapable of managing his or her finances, but be capable of executing a Codicil.

[107] Dr. Shulman wrote a second letter to counsel, dated September 12, 2008. This letter helps understand the parameters of a determination of whether John Kaptyn had testamentary capacity given the "situational complexity" present. The following sentences appear within the paragraph entitled: "Summary":

> Why did Mr. Kaptyn change his instructions and take away preferred shares of CII from the children of Henry Kaptyn? If this information was new in mid-April, it is my clinical opinion that it is far from clear that he was capable of dealing with those issues at that time. He was fluctuating significantly in his level of consciousness and capacity for concentration. If these issues were discussed well prior to mid-April at a time that he could give a clear indication of what his wishes and understanding were, he could simply have *assented* to the Codicil and may still be considered capable of executing the Codicil.

[108] The evidence presented to the court demonstrated that John Kaptyn had a long-standing and sophisticated understanding of his business interests and the tax obligations it produced. Sheldon Carr advised the court that, over the years, the tax implications of redeeming the preference shares had been reviewed and discussed with John Kaptyn in what was an unsuccessful effort to find a way to limit the tax that would be generated.

[109] In the summer of 2006, John Kaptyn determined to restructure his estate so that his real estate assets were gifted directly to his grandchildren. No intention was ever expressed that the grandchildren were to receive the benefits of any of the inter-company holdings, in general, or the preference shares in particular. As demonstrated by the Schedules prepared by Michael Haschyc during October, 2006, the express intention was to redeem those shares as part of the liquidation of Marktur Limited to be utilized to pay taxes, inter-company loans, legacies and, ultimately, to contribute to the residue. The failure of the testamentary documents to account for this intention prior to the Wills of April 5, 2007 or the Codicil to the Secondary Will of April 25, 2007 does not detract from that intention. It just means that it took those preparing the Wills that long to include the expression of that intention in the testamentary documents.

[110] Given the evidence, John Kaptyn understood the structure of his estate. For him, the Wills were not complex. He also understood the change in the Codicil. To John Kaptyn, the change was not fundamental. It was the manifestation of his long-standing intention. In the circumstances, taking into account the words of the quotation above, John Kaptyn was assenting to something with which he was entirely familiar.

[111] The quotation from the second of the two letters from Dr. Shulman (see: para. [107], above) continued:

> He would have had to acknowledge that the resulting distribution could contravene his previously expressed wish to treat the two sets of grandchildren equally. However, I have not seen any evidence yet to show that the complex tax implications of the Codicil were discussed with Mr. Kaptyn at a time when he was able to acknowledge their implications vis-à-vis his grandchildren.

[112] This fails to consider that the equal treatment of his grandchildren is reflected in the equal distribution of real estate and does not include the benefit associated with ownership of the preference shares.

[113] In any event, there is nothing that suggests that, to demonstrate capacity, the testator must acknowledge the effect of any change at the time the testamentary document is being executed. Counsel for the objector proposed that, at the time the Codicil was executed, questions should have been put to John Kaptyn directed to establishing his understanding and his testamentary capacity. Lawrence Fine agreed that he had not asked such questions. In his letters and in his evidence, Dr. Shulman indicated concern that this inquiry was not made. In evidence, he said that it appeared to him as if Lawrence Fine seemed to have backed away from these questions because he was afraid of being insulting. It is not clear to me the basis upon which Dr. Shulman arrived at this conclusion. In considering whether such an inquiry should have been made, reference was made to the recent case of *Pollard Estate v Falconer and others* (2008), 20 B.C.S.C. 516. The case contains the following statement:

> The extract set out above correctly states the law. In *Vout v. Hay* [1995] 2 SCR 876 at 887, the Supreme Court of Canada held that the propounder of a will must demonstrate 'that the testator knew and approved of the contents of the will' (para. 19). Then, in *Johnson v. Pelkey* (1997) 36 BCLR (3d) 40, Baker J summarized the application of that principle, commencing:
>
> [107] At common law, the party seeking to propound a will has the legal burden to prove the testator's knowledge and approval of the provisions of the will. *Vout v. Hay*, [citation omitted] *Russell v Fraser* (1980) 118 D.L.R. (3d) 733 (B.C.C.A.). Any will that does not express the real or true 'intention' of the testator will be set aside, even if the testator had testamentary capacity, and was not subject to undue influence.
>
> [108] In *Russell v Fraser,* cited above, at page 739, the Court of Appeal held that where the person seeking to propound the will prepared the instructions for the will and takes a substantial benefit under the will, the burden of proving that the testator knew and approved the contents of the will is made more onerous.

> [109] The interested party must 'affirmatively prove that the (testator) did in truth appreciate the effect of what she was doing'. *Riach v. Ferris* [1935] 1 D.L.R. 118, [1934] S.C.R. 725 at 736…
>
> [111] In *Russell v. Fraser*, the Court also held that where it cannot be shown that the testator was aware of the value of the gift made to the party who was instrumental in having the will drawn, 'knowledge and approval' cannot be established merely by showing that the testatrix was an intelligent, mentally alert person who knew the value of some of her assets. (p. 746).
>
> [112] At page 746 of the decision, the Court emphasized the duty on the solicitor to:
>
> '…make the necessary inquiries so that if called upon he can show that by reason of the inquiries made by him and his discussions with the testatrix, the testatrix fully appreciated the effect of what she was doing when she made her will.'
>
> [113] The Court noted that the solicitor who drew the will and attended to its execution in *Russell v. Fraser* was unable to establish that he had made the necessary inquiries to show that the testatrix fully appreciated the effect of what she was doing when she made her will.
>
> (*Pollard Estate v. Falconer and others, supra,* at 49)

[114] It was said by counsel for the objector that this case represents the current state of the law. What ever is demonstrated by the paragraphs quoted above, they cannot mean that there is a requirement that such inquiries be made, by a solicitor, preparing a will before a determination of testamentary capacity can be made. Surely, when death is on the horizon, we owe the dying more dignity than that. It may be that there are circumstances where proof of testamentary capacity will be assisted by such inquiry and where it may prove to be necessary. Whether the inquiry is made is a matter of choice and discretion for those involved. It is a decision that, in some cases, may bear an attendant risk where it is subsequently proposed that capacity was lacking.

[115] The factual foundation of *Pollard Estate v Falconer and others, supra*, is substantially different than here. In that case, the testatrix, Mrs. Pollard, was consumed by her concern for her brother who had Down's syndrome. Mrs. Pollard took over the care of her brother, from their mother, at an early stage. The Court referred to her brother as "… in effect, her only child". In 2002, Mrs. Pollard executed a will, which included bequests to her five sisters and provisions necessary to look after and maintain her brother in the event of her death. There was evidence that, in 2004 and 2005, Mrs. Pollard's physical and mental health deteriorated. On August 5, 2005, she executed a new will. It was very different. It left her entire estate to her grandniece

and the husband of the grandniece, the Falconers. There was no provision for the brother in the will, although there was an understanding that the Falconers would look after him.

[116] The lawyer who prepared the new will was introduced to Mrs. Pollard by the Falconers. At her first visit, he found her alert and forthcoming in answer to his questions but, nonetheless, decided, apparently because of her age, that her mental status should be assessed before she signed a will. The lawyer knew that Mrs. Pollard was concerned about what would happen to her brother after her death. Nonetheless, the lawyer did not discuss with Mrs. Pollard whether she needed to provide for her brother in her will. The Court found that the circumstances were suspicious and tended to negative the presumption that Mrs. Pollard, by executing an apparently valid will, after reading it over and appearing to understand, knew and approved of the contents and had the necessary capacity. The Court goes on to make the positive determination that Mrs. Pollard did not have testamentary capacity when she executed the will in 2005. The evidence accepted by the Court indicated significant cognitive decline and some degree of confusion and memory loss. Testing would have revealed a significant deficit by the time Mrs. Pollard signed the will.

[117] The difference between that case and the circumstance which confronts the court lies in the nature of the change in the new testamentary document. The burden of proof lying on the proponents of a will to prove the testamentary capacity is increased where the will constitutes a marked departure from what existed before (*Re: Davis* (1963), 40 D.L.R. (2d) 801; [1963] 2 O.R. 666 (C.A.), at pp. 683 O.R. and 818 D.L.R.). The change in wills in *Pollard Estate v Falconer and others, supra*, was significant. The new will failed to deal with Mrs. Pollard's concern for her brother and ignored her fundamental intention that he be looked after. In the case before the court, an examination of the evidence, beyond the existing testamentary documents, demonstrates a consistent and continuing intention that the preference shares be redeemed and utilized as part of the fund directed to paying taxes, inter-company debt and legacies. There may have been a change to the Wills, but not to the intention of the testator.

[118] In this case, the conclusions of Dr. Shulman do not detract from the observations of Sheldon Carr, Michael Haschyc, Lawrence Fine, Simon Kaptyn, Jason Kaptyn and Simon Kapteijn as to the capacity and knowledge and approval of John Kaptyn when he executed the Codicil to the Secondary Will. The conclusions of Dr. Shulman rely on assumptions and understandings that are not justified by the evidence.

[119] In the first of his two letters, Dr. Schulman refers to and relies on the work of Dr. Eileen Lougheed, a palliative care practitioner. She first saw John Kaptyn on April 4, 2007 at the Markham/ Stouffville Hospital. Dr. Lougheed was called as a witness. Since 1998 to the present, Dr. Lougheed has been, and remains, the Medical Director of the Palliative Care Unit at the Markham/Stouffville Hospital. Subsequent to his leaving the hospital, she saw John Kaptyn on three occasions at his home. She saw him on April 8, 2007, on April 12, 2007 and, again, on April 18, 2007.

[120] The notes and evidence of Dr. Lougheed with respect to her visits on April 8, 2007 and April 12, 2007 are consistent with the observations of family members, of a low period, as confirmed by the nursing notes reviewed by Dr. S. Lawrence Librach. The transcription of her note from April 8, 2007 indicates: "Pt alert and responsive-oriented". She testified that oriented, without the reference to “x 3”, indicated that the patient was oriented to place and person, but she did not ask him about time. John Kaptyn had some cognitive function. He answered questions and knew who she was. He was not as alert or quick in response as he had been when she saw him on April 4, 2007. The transcription of her note from April 12, 2007 indicates: "Pt. less alert – some drowsiness”. Dr. Lougheed testified that, on April 12, 2007, John Kaptyn was less alert than he had been on April 8, 2007.

[121] The third visit of April 18, 2007 plays a different role in this proceeding. Dr. Lougheed received a telephone call from Henry Kaptyn. The family was concerned that John Kaptyn should be relieved of dealing with his businesses during whatever part of his life remained. A Power of Attorney had been prepared and signed by John Kaptyn. To be activated, it required the opinion of two doctors that he was no longer capable of managing his affairs. The letter, prepared by Dr. Ronald S. Oda and dated April 11, 2007, was to be utilized as the first of these letters. Henry Kaptyn wished Dr. Lougheed to examine his father for the purpose of providing a second opinion. Dr. Lougheed indicated that she did not have the accreditation as a capacity assessor and recommended a colleague. Henry Kaptyn prevailed upon her. She agreed and, on April 18, 2007, returned to the home of John Kaptyn. She indicated that this was at the end of a very busy day. She was at the home for approximately twenty minutes and, thereafter, wrote a letter, dated April 19, 2007. She opined that:

> John’s current level of cognition and understanding is severely impaired and is deteriorating.
>
> It is my conclusion, based on my interaction with and assessments of this patient that he is in a state of decisional incapacity to manage his property and financial affairs. It is thus appropriate to activate his designated Power of Attorney at this time.

[122] The capacity to manage property and financial affairs is not the same as testamentary capacity required to execute the Codicil to the Secondary Will (A. H. Oosterhoff, *Testamentary Capacity, Suspicious Circumstances and Undue Influence* (1999), 18 E.T.P.J. 369 at 374; *Banton v. Banton* (1998), 164 D.L.R. (4th) 176 (Ont. Gen. Div.), at para. 6; *Canada Permanent Toronto General Trust Co. v. Whitton* (1965), 51 W.W.R. 484 (B.C.S.C.) pp. 492-493; *Royal Trust Co. v. Rampone*, [1974] 4 W.W.R. 735 (B.C.S.C.) at paras. 30-34). This is all the more so when considering the breadth of the holdings of John Kaptyn. This is demonstrated by the evidence of Dr. Shulman. The more complicated or complex the situation, the higher the level of cognition required to have the necessary capacity (see: para. [106], above).

[123] Even so, in the circumstance of this case, it does not matter.

[124] The evidence of Dr. Lougheed with respect to the condition of John Kaptyn on April 18, 2007 is not reliable. She kept no notes of her visit. The only contemporaneous record is the letter. It provided conclusions, but no observations to support those conclusions. By April 18, 2007, responsibility for the care of John Kaptyn had been transferred to Dr. Oda. In her testimony, Dr. Lougheed said that, on that day, there had been an obvious decline in the status of John Kaptyn. He was somnolent, sleeping and slow to respond. This is inconsistent with the nursing notes written at the time of her visit. They say: "Pt. Being visited by Dr. Lougheed. Pt. alert & oriented".

[125] It is not just the absence of contemporaneous notes which raises concerns with respect to the observations of Dr. Lougheed. Dr. Lougheed was examined-for-discovery on July 9, 2008. At that time, she said that, on the day following her attendance (April 19, 2007), she had delivered the letter to Doreen and John Kaptyn. She also said that there had been a further consultation and interview with John Kaptyn on April 20, 2007. Subsequently, by letter, dated August 25, 2008, from counsel acting on her behalf, these comments were corrected. On July 9, 2008, Dr. Lougheed recalled delivering the letter when she did not and remembered a second consultation and interview which never took place. This adds to my concern as to the reliability of her evidence.

[126] Finally, in arriving at her conclusion, Dr. Lougheed relied on observations she had made during what has been identified as the period of delirium caused by opioid toxicity. On her examination-for-discovery, she was asked, and replied:

> Q. So is it fair to say you're assuming from what you had seen and the removal of the IV that, as a result, there will be severe impairment?
>
> A. He was barely functioning on the 12th. Surely he's not functioning to a greater extent on the 19th.

[127] This answer demonstrates that Dr. Lougheed relied on her observations of April 12, 2007 in coming to the conclusions demonstrated in her letter of April 19, 2008. She was assuming that the capacity of John Kaptyn was continuously deteriorating, leading to his death. This is confirmed by the question and answer that follows immediately after the quotation above:

> Q. All right. I take it that, however, was an assumption that you had made based on your experience and not by reason of a further consultation and interview?
>
> A. A further consultation and interview occurred on the 20th of April.

[128] In evidence at the trial, Dr. Lougheed indicated there was no consultation and interview on April 20, 2007. There was only the interview on April 18, 2007. There was no interview on April 20, 2007 on which she could rely.

[129] In arriving at her conclusions on April 18, 2007, she relied on her observations from April 12, 2007. She failed to recognize that John Kaptyn was in a temporary state of delirium. I am not prepared and do not accept the conclusions as to the capacity of John Kaptyn as referred to in the letter of Dr. Lougheed, dated April 19, 2007.

The Submissions of Counsel for the Objector

[130] It is in the face of the evidence reviewed that I turn now to consider the submissions made by counsel on behalf of the objector. Counsel submitted that John Kaptyn was without testamentary capacity and lacked the knowledge and approval necessary at the time he executed the Codicil to the Secondary Will.

[131] Testamentary capacity is explained by the words of Lord Erskine:

> Their Lordships are of the opinion that, in order to constitute a sound disposing mind, a testator must not only be able to understand that he is by his will giving the whole of his property to one object of his regard, but he must also have capacity to comprehend the extent of his property, and the nature of the claims of others, whom by his will he is excluding from all participation in that property; and that the protection of the law is in no cases more needed than it is in those where the mind has been too much enfeebled to comprehend more objects than one; and more especially, when that one object may be so forced upon the attention of the invalid as to shut out all others that might require consideration.
>
> (*Harwood v. Baker* (1840), 3 Moo P.C. 282 at 291, 13 E.R. 117)

[132] The submissions made begin with the assertion that during the material time, generally the month of April 2007, John Kaptyn was "compromised" both mentally and physically. I understood this to mean that John Kaptyn was in a weakened condition which would impact his mental capacity. This is in keeping with the evidence of the only two witnesses to whom I have not yet referred. Henry Kaptyn and his daughter, Samantha Kaptyn, testified. They were both brief. Neither could associate their recollections with any specific day.

[133] Samantha Kaptyn was away at university and came home because she had been told that her grandfather was dying. She testified that she arrived on April10, 2007 and, for the next two weeks, visited each and every day and was present in the home of John Kaptyn throughout the day. Thereafter, she obtained the use of a car and visited when she was told by the wife of John Kaptyn that it was a good time. She advised the court that her grandfather had "ups and downs". When he was "down", he would sleep and, when awake, was tired and groggy. When he was "up", her grandfather was still not the man she knew. It was never like speaking with her grandfather. I observe that the two weeks she attended every day, and during which at least

some of these observations must have been made, include the period during which John Kaptyn was suffering opioid toxicity and, to that extent, is consistent with the evidence of others.

[134] Henry Kaptyn testified his father had good days and bad days. He had no recollection of which was which. On the bad days, John Kaptyn would not wake up or there would be a one-sided conversation. I took this to mean that Henry Kaptyn would speak, but his father would not respond. On good days, his father would respond and carry on a conversation. Nonetheless, he was not the "way I'd known him".

[135] This evidence is general in nature and, in the context of the more detailed information provided by others, not helpful. It does suggest, as counsel submitted, that during this period John Kaptyn was compromised. But what does this general observation tell us about the testamentary capacity of John Kaptyn? An answer was provided by Dr, S. Lawrence Librach in a concluding paragraph of his letter of September 2, 2008, addressed to counsel for Jason and Jonathan Kaptyn, where he wrote:

> Both Dr. Lougheed's testimony and Dr. Shulman's letter seem to indicate that palliative care patients with far advanced illnesses are mostly not competent. I certainly disagree with Dr. Lougheed's testimony. Certainly patient's [*sic*] are weak and cannot engage in prolonged discussions. But, often they maintain an ability to engage in decision-making conversations including legacy discussions except in the very last few days or hours of a patient's life.

[136] Undoubtedly, during April 2007, John Kaptyn was "compromised", but this does not mean that he did not have testamentary capacity.

[137] I find that, on April 25, 2007, John Kaptyn had mental capacity necessary to execute the Codicil to the Secondary Will. I accept and rely on the observations of Sheldon Carr, Michael Haschyc, Lawrence Fine, Simon Kaptyn, Jason Kaptyn and Simon Kapteijn. I prefer the evidence of these professionals and family members over the observations made by Dr. Eileen Lougheed (*Leger v. Poirier*, [1944] 3 D.L.R. 1, [1944] S.C.R. 1521; *O'Neil v. Royal Trust Co.*, [1946] 4 D.L.R. 545, [1946] S.C.R. 622; *Re: Davis, supra*, at pp. 674-675 O.R. and pp. 809-810 D.L.R.). I am confirmed in this by the explanations provided by Dr. S. Lawrence Librach, which I also accept and rely on.

[138] Counsel for the objector also submitted that John Kaptyn was without the requisite knowledge and approval when he executed the Codicil to the Secondary Will. This reflects the idea that:

> A will cannot be probated if the testator did not know its contents. Hence, the propounders must prove that the testator knew and approved the contents of the will at the time of execution. However, they are aided by a rebuttable presumption that the

> testator knew and approved the contents once the propounders prove that the will was properly executed after it was read to or by the testator and the testator appeared [*sic*] understand it. The presumption is rebutted if it [*sic*] is shown that the testator did not really understand the contents of the will even though it was read to or by the testator. …
>
> (A.H. Oosterhof, *Oosterhof on Wills and Succession*, 6th ed. (Toronto: Thomson/Carswell, 2007))

In arguing that John Kaptyn did not have knowledge and approval of the Codicil, counsel pointed out that there are two changes in the Codicil which affect the treatment and disposition of the preference shares held by Marktur Limited in Captain Investments Inc. The two changes were:

> (1) The preference shares are to be redeemed. In this regard the codicil specifically included as part of the liquidation of Marktur Limited the '…redemption of any outstanding preference shares of Captain Investments Inc. owned by Marktur Limited which shares are to be redeemed at a price of $1,000 US per share'.

and

> (2) The preference shares in Captain Investments Inc. are removed from the gift to the children of Henry Kaptyn (Samantha Kaptyn, Robert Kaptyn and Alexander Kaptyn) so that what remains is '…all my common shares owned by me in:…Captain Investments Inc.'.

[139] With respect to the first of these two changes, counsel refers to the questions asked by John Kaptyn at the time when Michael Haschyc and Lawrence Fine came to his home on April 25, 2007 for the purpose of having the Codicil executed. Before asking: "Is this what we talked about Mike?" (see: para. [63], above), John Kaptyn asked, "Do we still have to do that?" Counsel submitted that this question demonstrates that John Kaptyn had not previously intended to redeem the preference shares. This is not what should be taken from this question. To me, the use of the word "still" confirms the understanding of John Kaptyn that the redemption of the shares was something that he was aware of. The question as a whole suggests that he thought it had already been done. The second question: "is this what we talked about Mike?" follows naturally from John Kaptyn being advised that this had not been completed which would have served to remind him of his earlier conversation with Michael Haschyc. The second question, taken on its own, indicates John Kaptyn's recollection of the previous discussion – that it raised the need for the Codicil to incorporate his intention that preference shares be redeemed.

[140] To interpret these questions as submitted by counsel for the objector is to deny the evidence that demonstrates that, from at least October 2006, it was the intention of John Kaptyn that the preference shares be redeemed. As noted earlier, the fact that it took so long for this to

be incorporated into the testamentary documents does not detract from the fact it represents the intention of the testator (see: para. [109], above).

[141] In the alternative, counsel submits that John Kaptyn did not realize that he had previously intended that the preference shares be redeemed. John Kaptyn did not ask: "what you talking about?" He asked do we "still" have to do this. Moreover, as Dr. Shulman pointed out, if this issue was discussed with John Kaptyn, at a time when he could give a clear indication that he wished the preference shares redeemed, he could simply assent to the Codicil and still be considered to have the necessary testamentary capacity (see: para. [107], above).

[142] With respect to the second change, counsel for the objector submitted that John Kaptyn did not know that the change requiring the redemption of the preference shares as part of the liquidation of Marktur Limited would require a coincidental change to the gift his Will provided to the children of his son, Henry Kaptyn. The case of *Pollard Estate v. Falconer and others, supra*, makes the following relevant comment:

> [114]…The Court emphasized that in order to affirmatively prove that the testatrix appreciated the effect of what she was doing, she had to be aware of the magnitude of the gift that she was making--whether the gift was small or large. A testator must not only 'know and approve' of the clauses of the will as written, but appreciate the effect of the gifts.
>
> [115] In saying this, I do not mean to say that the testator must understand the provision of the will in the way that a lawyer would. That is not required.
>
> (*Pollard Estate v. Falconer and others, supra*, at paras. [114] and [115])

[143] During his cross-examination of Lawrence Fine, counsel for the objector was at pains to establish that the solicitor had asked no questions concerning the impact of the changes to that gift to the children of Henry Kaptyn. He did not ask John Kaptyn if he knew that the Secondary Will, executed on April 5, 2007, provided that the preference shares would be included in that gift. Lawrence Fine did not ask John Kaptyn if he understood that the changes to the Secondary Will contained in the Codicil would remove that benefit. Given that I have found that John Kaptyn had knowledge and approval regarding the redemption of the preference shares, the proposition is that he had knowledge and approved of part of the effect of the change, but not the other. The evidence of the intention of John Kaptyn was consistent. He wanted the preference shares to be redeemed and the proceeds to be included in the liquidation of Marktur Limited. At the same time, he intended the distribution to the two sets of grandchildren to be equal. He intended his grandchildren to receive real estate, referred to during the trial as "hard assets". There is no reason to distinguish between his understanding of the redemption of the shares and the fact that the shares were not to be part of the gift to the children of his son, Henry Kaptyn.

One follows from the other. They are part of the same intended consequence. When John Katpyn asked: "Do we still have to do this?" Michael Haschyc replied: "Yes, if you want to conform to the Schedules." The Schedules prepared by Michael Haschyc indicate that preference shares were to be redeemed, that the division between the two sets of grandchildren involved only real estate and did not include the proceeds of the redemption which were to be part of the liquidation of Marktur Limited.

[144] It is in this context that the beach house was referred to in the submissions of counsel for the objector. The Schedules prepared by Michael Haschyc and to which he referred John Kaptyn do show that the beach house was to be part of the distribution to the children of Henry Kaptyn. John Kaptyn did not own the beach house. It was one of the two pieces of real estate owned by Captain Investments Inc. The Secondary Will provided for its transfer to the children of Henry Kaptyn through the gift of the common shares in Captain Investments Inc. This was the subject-matter of the corporate re-organization proposed by Sheldon Carr and Cary Heller. The Primary Wills are not consistent with this treatment of the beach house. The Primary Wills of October 6, 2006, March, 2007 and April 5, 2007 all refer to a right of occupancy being left to the wife of John Kaptyn after which it was to be part of the residue of the estate. This bequest of the beach house was, over time, re-considered and amended. In the Primary Will of October 6, 2006, the right of occupancy was to be two years. In the Primary Will of March, 2007, this was changed to three years and, in the Primary Will of April 5, 2007, returned to two years. Moreover, in the Primary Wills of October 6, 2006 and March, 2007, after the right to occupancy had expired, the beach house was to go to residue, *in specie*, but in the Primary Will of April 5, 2007, it was to be sold on the open market and the proceeds to go into the residue of the estate.

[145] The beach house is not referred to in either of the codicils executed on April 25, 2007. Accordingly, I am not asked to consider whether John Kaptyn had the testamentary capacity in respect of its treatment within the testamentary documents.

[146] Counsel for the objector suggested that the consideration of the beach house is, nonetheless, relevant. He submitted that John Kaptyn did not appreciate that redemption of the preferred shares had an accompanying impact. It would reduce his gift to the children of his son, Henry. Counsel submitted that it follows from this that John Kaptyn thought he was doing two different things with the same asset, the preferred shares. On the one hand, they were being redeemed, but on the other hand, they were to be left to his grandchildren. This would suggest he did not have the necessary knowledge and approval of how the preferred shares were to be dealt with. Counsel suggested that the treatment of the beach house is another example of the same problem. The Primary Will says the proceeds from its sale are to go to residue, whereas the Secondary Will directs it to the children of Henry Kaptyn.

[147] This is an effort to import into this trial something that is not relevant. The capacity of John Kaptyn in respect of the beach house is not before me. Having said this, it also ignores the evidence of Sheldon Carr that the term of the Will directing the proceeds from the sale of the beach house to residue was a "mistake".

[148] It may be that the second part to this proceeding will require that the court interpret the provisions of the Primary and Secondary Wills in respect of the beach house. It may be argued that the inclusion of the beach house or the proceeds from its sale in residue should be struck (*Re: Morris*, [1970] 1 All E.R. 1057; *Re: Reynette-James*, [1975] 3 All E.R. 1037 (C.A.)). Be that as it may, this not relevant here. Counsel for Simon Kaptyn, in his capacity as Trustee during Litigation, submitted that it is not possible to determine what happened in respect of the beach house. He suggested three possible explanations: (1) a mistake in the drafting; (2) a mistake in the communication of instructions; or (3) John Kaptyn departed from his testamentary plan. All of these are possible. None of them necessarily take away from the determinations made herein as to the capacity of John Kaptyn when he executed the Codicil to the Secondary Will on April 25, 2007.

Conclusion

[149] I observe that there are two Notices of Objection.

[150] The first is styled as being in respect of a certificate of appointment of estate trustee limited to the assets in the Secondary Estate. The second is styled as being in respect of a certificate of appointment of estate trustee limited to the assets in the Primary Estate.

[151] The difficulty is that the body of both notices refers to the Primary Estate. Having said this, the parties did not proceed with respect to the Codicil to the Primary Estate. As noted above, the Trustees During Litigation, without objection from any other party, undertook to respect the terms of the Codicil to the Primary Will (see: para. [18], above). The evidence heard dealt only with the Codicil to the Secondary Will. Accordingly, with respect to this, the first part of these proceedings, the order of the court deals only with that Codicil.

[152] I find that John Kaptyn had the necessary knowledge and understanding to approve the contents of the Codicil to his Secondary Will and had the required testamentary capacity when he executed the Codicil to his Secondary Will on April 25, 2007.

[153] In the normal course, I would, at this time, order the issuance of a certificate of appointment of estate trustee to Simon Maria Kaptyn and Henry Willhelm Kaptyn. However, counsel for Alexander Kaptyn has raised the possibility of a further objection. As well, I have indicated to counsel the need to determine the process and timing leading to the issues of interpretation that remain. If, by the release of these reasons, nothing has happened to begin this process, I may be contacted through the court office and the necessary arrangements made. In the course of setting up the procedures to be followed, I will ask for submissions concerning the issuance of certificate of appointment.

Costs

[154] Counsel for the Children's Lawyer has indicated that he will request an order for the costs of the proceeding so far. I have asked that he speak to the other counsel involved to see if he can obtain agreement as to whether such an order should be made; if so, in what amount and by whom should it be paid?

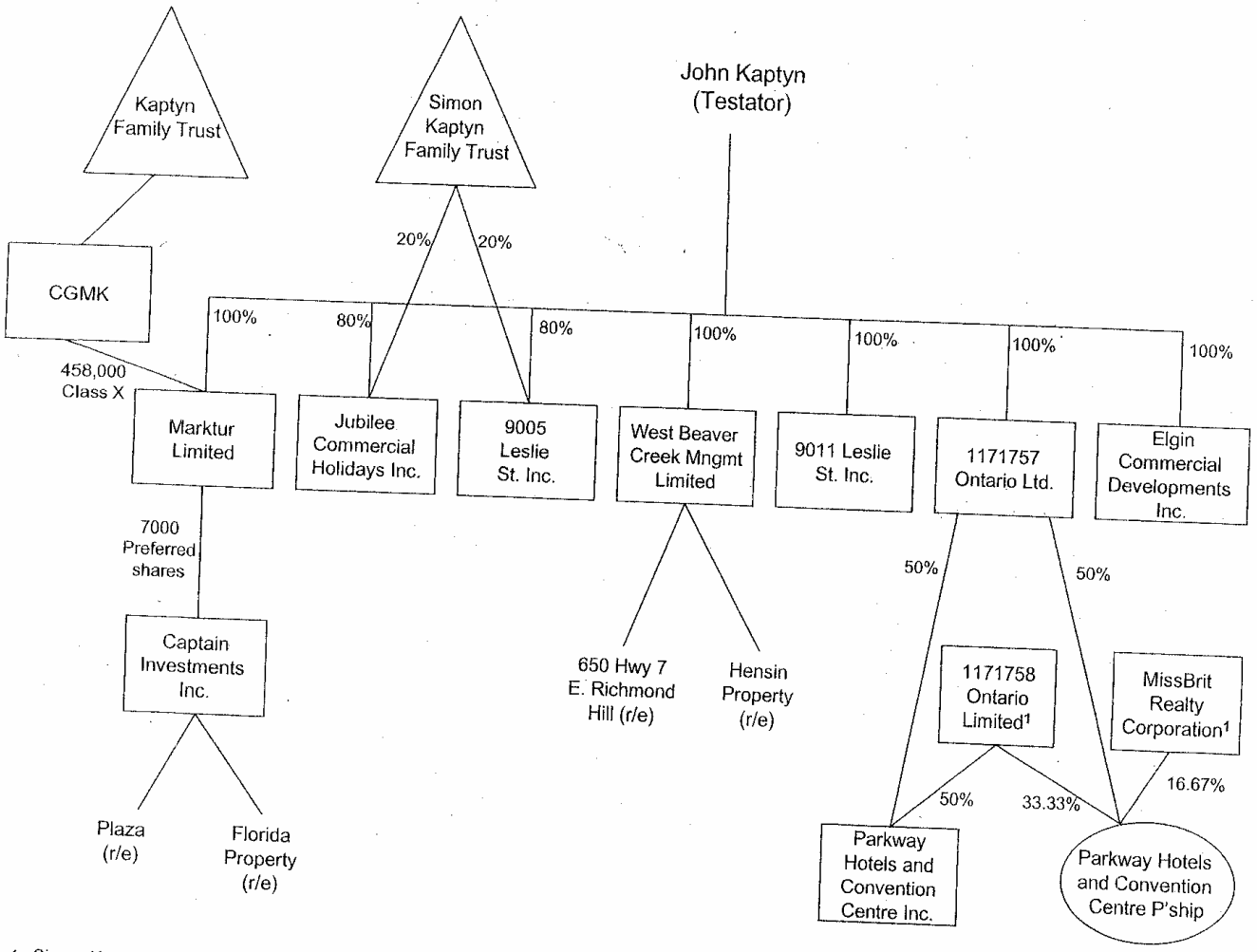
[155] I expect that there will be other parties who will also seek costs. I would ask counsel to work together to see if they can come to an agreement as to costs of the proceeding so far. If they cannot, this is another matter to be dealt with in determining how this matter will proceed from here. For the moment, I observe only that there are too many parties for this to be reasonably done in writing and anticipate that, with the proper documentation provided, this will have to be dealt with in open court.

LEDERER J.

Released: 20081015

SCHEDULE "A"

John Kaptyn – Corporate Organization



1. Simon Kaptyn holds 100% of the common shares

COURT FILE NO.: 05-40/07
DATE: 20081015

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

IN THE ESTATE OF JOHN JOHANNES JACOBUS KAPTYN, DECEASED

JUDGMENT

LEDERER J.

Released: 20081015