

CANADA / JUDGMENT

Chou (Re)

2022 BCSC 783

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Supreme Court of British Columbia

DECIDED

11 May 2022

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2022 BCSC 783 Chou (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Chou (Re),

2022 BCSC 783

Date: 20220511

Docket: P182006

Registry: Vancouver

In the Matter of the Estate of Ho Ching-Yeh Chou, Deceased

Before: The Honourable Mr. Justice Milman

Reasons for Judgment

Counsel for the Applicant, Mei Huei Chou:

H. Chun

Counsel for the Respondents, Chih-Chun Chou and Yi Chen Chou:

D.D. Way

Place and Date of Hearing:

Vancouver, B.C.

April 8, 2022

Place and Date of Judgment:

Vancouver, B.C.

May 11, 2022

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I. Introduction

- [1] The deceased, Ho Ching-Yeh Chou, died in Taiwan on December 14, 2016. She was 82. She is survived by, among others, her adopted daughter, the applicant, Mei Huei Chou, who is a resident of British Columbia.
- [2] Although she was a resident of Taiwan at the time of her death, the deceased spent a considerable amount of time during her lifetime visiting the applicant in British Columbia. During one such visit, on October 27, 2004, the deceased appears to have signed a document that purports to be her last will and testament. On its face, it appoints the applicant as the deceased's executor and distributes all of the deceased's assets to the applicant.
- [3] That document is the subject of this application. The applicant seeks an order under s. 58 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA], recognising and giving effect to it as the deceased's will, despite the fact that it does not meet the requirements for a valid will under s. 37 of WESA.
- [4] The application is opposed by the respondents, Chih-Chun Chou and Yi Chen Chou, also known as Yi-Jhen Chou, who are two of the deceased's grandchildren. Their father was the adopted son of the deceased, who predeceased her.

- [5] The respondents dispute the authenticity of that document, which they believe to be a forgery. They also dispute that it reflects the deceased's true testamentary intentions. Instead, they say, the deceased did not wish to make a will and therefore died intestate. In related litigation in Taiwan concerning the deceased's estate, the Taiwanese court has indeed concluded that the deceased died intestate.
- [6] At issue on this application is therefore the fate of the deceased's assets in Canada, which are as follows:
- a) a property located at 1308-4655 Valley Drive, Vancouver (the "Valley Drive Property"); and
 - b) bank accounts containing approximately \$22,000.
- [7] If the applicant succeeds on this application, she will be the executor of the deceased's estate in Canada and those assets will pass solely to her under the will. If not, then, in the resulting intestacy, she will receive one half of their value and the other half will go to the respondents.
- [8] For the reasons that follow, I have concluded that the application should be allowed.

II. The Facts

A. The Deceased and her Relationship to the Parties

- [9] The deceased was born in 1934. She married her husband, Wen Chung Chou, in her teens. Although they had no children together, they adopted two children from the deceased's extended family, as is customary in Taiwan. The first of these, Hong Long Chou, was a son of the deceased's elder sister. The second was the applicant, Mei Huei Chou, whose biological mother was a cousin of the deceased.
- [10] Hong Long Chou married Pei-Tzu Lee in 1985. They had two children together, a son (Chih-Chun Chou, born 1956) and daughter (Yi Chen Chou born 1986), who are the respondents on this application.
- [11] The family's main assets in Taiwan are a pair of hotels, known as the "Old Hotel" and the "New Hotel". They were built on land that Wen Chung Chou had inherited from his extended family. Construction of the Old Hotel, originally with 25 rooms, was completed in 1962. The New Hotel, with 40 rooms, was completed in 1985.
- [12] In Taiwan, title to buildings is held separately from that of the land on which they are situated. The ownership of, and right to revenue from, the New Hotel was the subject of a legal dispute within the family that eventually led to litigation in Taiwan, particularly after the death of the deceased's adopted son, Hong Long Chou, on February 17, 1993 and that of her husband, Wen Chung Chou, on October 4, 1995. According to the applicant, the deceased was eventually successful in that litigation as against her daughter-in-law, Pei-Tzu Lee, but the dispute led to lasting bitterness between the two sides of the family.

- [13] The applicant was born in 1965. She married her husband, Chin-Chang Chen, on April 14, 1994. They have two daughters together, born in 1996 and 1999 respectively. They immigrated to Canada together in 1997 and became citizens of Canada in 2000, but Mr. Chen was unable to find work in this country. He returned to find work Taiwan in 2001 but was again unemployed between 2009 and 2015. He provided no financial support for the applicant and the children after 2009. They separated in 2017 and were divorced in 2019.
- [14] The applicant and her daughters were supported after 2009 primarily by the deceased. The deceased gifted funds to help the applicant purchase an apartment in Taipei, an interest in Taiwanese hotels, an agricultural property and other investments. After the applicant arrived in Canada, the deceased gifted her funds to help her cover day-to-day living expenses and to purchase two properties in British Columbia, including the home where she resided with her daughters and a commercial property from which the applicant ran a tutoring business.
- [15] Between 1997 and 2015, the deceased made numerous extended trips to British Columbia to spend time with the applicant and her daughters. The applicant has listed the dates and durations of those visits as follows:
- a) August 15, 1997 - September 12, 1997 (28 days);
 - b) December 3, 1997 - January 8, 1998 (36 days);
 - c) September 9, 1998 - October 6, 1998 (27 days);
 - d) March 1, 1999 - February 20, 2020 (356 days);
 - e) May 28, 2000 - June 15, 2001 (383 days);
 - f) August 11, 2001 - August 15, 2002 (369 days);
 - g) February 28, 2003 - September 2, 2003 (186 days);
 - h) August 3, 2004 - May 8, 2005 (278 days);
 - i) December 21, 2006 - July 26, 2007 (217 days); and
 - j) June 19, 2015 - July 19, 2015 (30 days).
- [16] After that last visit, the deceased returned permanently to Taiwan, where she remained as her health deteriorated until her death on December 14, 2016.

B. The Purchase of the Valley Drive Property and the Making of the Alleged Will

- [17] The applicant says that during the visit between August 3, 2004 and May 8, 2005, the deceased decided to purchase an income-generating property for the applicant and her daughters. After viewing several prospects, they decided to purchase the Valley Drive Property.

- [18] Two friends of the applicant and the deceased, Shao-Yuan Chiu and Tai Mei Chen, recall accompanying them to view various properties before they decided to purchase the Valley Drive Property. They also recall the deceased telling them that she intended to purchase the Valley Drive Property for the applicant and her daughters.
- [19] According to the applicant, the deceased had originally intended to put title in the applicant's name but the applicant's husband objected to that arrangement. He wanted the deceased to take title herself, for the following reasons:
- a) the high carrying costs that he thought the applicant would have to bear if she took title herself;
 - b) his belief that a detached home was comparably priced but would be a better investment;
 - c) the exchange rate with the Taiwanese dollar was not favourable at the time;
 - d) the tax burden would be too great if the applicant took title herself; and
 - e) the investment should benefit their daughters rather than the applicant.
- [20] The applicant says that to placate her husband, she suggested to the deceased that the deceased purchase the Valley Drive Property in the deceased's name and, at the same time, execute a will leaving her property to the applicant when she died. According to the applicant, the deceased agreed to do so.
- [21] On December 6, 2004, the deceased entered into a contract to purchase the Valley Drive Property. The completion date was January 10, 2005.
- [22] After an inspection was successfully completed on October 21, 2004, the applicant turned her attention to preparing a will for the deceased. She did not seek professional advice. Instead, she found a generic form of will on the internet. It was a pre-printed form with blank spaces to be filled in by the will-maker.
- [23] On October 27, 2004, the applicant and the deceased went to a community centre in Richmond to meet a friend, Mei Hsueh Lu. The deceased asked Ms. Lu if she would witness her will and Ms. Lu agreed to do so. The three of them then returned to the applicant's home and there reviewed the document.
- [24] The applicant says that she translated the document from English into Mandarin and Taiwanese for the deceased because the deceased could not speak or read English. The applicant says that she completed the form in her own handwriting based on the deceased's wishes, as expressed to her orally in Mandarin and Taiwanese by the deceased. According to the applicant:

the Deceased told me that she knew what a will was and that her will would pass on among other things the Valley Drive Property to me after she died.

- [25] The document in evidence consists of three pages, all of which were partly pre-printed with some handwriting added in both Chinese characters and English.
- [26] The first page begins with a pre-printed heading in large and bold font, stating: "This is the Last Will and Testament." The next pre-printed line states in regular, smaller font "of me," followed by handwriting stating the name of the deceased in Chinese characters and Latin letters. On the next line, where an address for the will-maker was supposed to be inserted, the applicant wrote down her own address (9760 Pendleton Road, Richmond), followed by the date (October 27, 2004).
- [27] Further down on the first page there is a section for the appointment of an executor. The pre-printed form states "I appoint" and on the blank line that follows, the applicant added her own name and what appears to be part of her address (only the number "9760" is written in that space).
- [28] On the second page of the document, the following pre-printed words appear: "I distribute my assets as follows" and "I distribute any residue of my estate as follows". After both, the applicant wrote: "All to Meihuei Chou".
- [29] On the third page of document there are two signatures, both in Chinese characters. The first is what purports to be the signature of the deceased, the second that of the single witness, Ms. Lu, with her address.
- [30] The applicant says that she kept the document until filing it in this litigation.
- [31] The purchase of the Valley Drive Property completed on January 10, 2005. When the applicant subsequently reviewed the package of transaction documents, she saw that the notary had included a pamphlet explaining how to prepare a will, including a form to complete for that purpose. The applicant says that she asked the deceased if she wanted to have the notary prepare a will for her, but the deceased responded that she was satisfied with the one they had just made themselves.

C. Other Evidence Bearing on the Deceased's Intentions

- [32] The applicant has adduced evidence from other family members and friends of the deceased who recall the deceased mentioning having made a will in Canada.
- [33] For example, Ms. Chiu has deposed that in 2005, "the Deceased told me she had made a will so that her property would go to [the applicant] when she died."
- [34] Tsan-Chu Ho Cheng was the deceased's sister in law and her primary caregiver for a period of time after she returned permanently to Taiwan. Ms. Cheng has deposed that in 2005, the deceased told her about the purchase of the Valley Drive Property and that "she made a will in Canada leaving everything in Canada for [the applicant]" but wanted this to be kept a secret from the respondents and their mother.

[35] Although the deceased took title to the Valley Drive Property in her own name, she never took part in managing it and did not share in the rental income that it generated. The applicant appears to have routinely signed leases as landlord on behalf of the deceased, writing the deceased's name in Latin letters rather than Chinese characters when she did so.

[36] The respondent, Chih-Chun Chou, has deposed that:

- a) he and other family members asked the deceased to make a will but she refused to do so;
- b) the deceased never told him that she had made a will in Canada, or that it was her intention to leave her assets to the applicant;
- c) the deceased told him that one of her properties in Taiwan "must be given to you";
- d) when he spoke to the deceased while she was in Canada, she told him that she was quarreling every day with the applicant about money;
- e) when the deceased became ill and entered hospital in Taiwan, she told family members not to notify the applicant;
- f) the deceased in her final years was less favourably disposed towards the applicant; and
- g) he recalls a conversation with the deceased in late 2015 or early 2016 in which she told him that she had three Canadian properties that she had paid for and that were registered in her name.

D. This and Related Litigation

[37] Proceedings in relation to the deceased's estate are ongoing both in this Court and in the Taiwan Chiayi District Court.

[38] Some of the materials filed in the Taiwan proceeding have been reproduced in evidence on this application. The estate is said in those materials to contain 39 properties, three buildings, bank accounts and other valuables. The total value of the estate is estimated to be approximately \$1.76 million. That sum includes the Valley Drive Property (valued at \$733,000) and \$18,745 in funds held in the deceased's Canadian bank accounts.

[39] The applicant also applied in Taiwan to have the document in issue on this application recognised as a will there, but the application was refused, for failure of the document to meet the formal requirements of a will under Taiwanese law.

[40] In addition to the proceedings in Taiwan, the parties have commenced at least four different estate actions in this Court, all of which depend on the outcome of this application.

- [41] On February 28, 2018, the respondent Chih-Chun Chou (to whom I will refer in the remainder of these reasons as Mr. Chou) delivered to the applicant a Notice of Proposed Application in Relation to Estate, dated February 26, 2018. That document stated that Mr. Chou intended to apply in the Vancouver Registry for a grant of administration without will annexed.
- [42] On March 14, 2018, the applicant's counsel wrote to Mr. Chou's counsel enclosing a unfiled Notice of Dispute and advising him that the applicant was in possession of the deceased's will and that she intended to apply to have it admitted to probate.
- [43] On March 16, 2018, the applicant filed a Notice of Dispute in the Vancouver Registry under file number V-180011. In it, she asserted that she would be a more suitable administrator for the estate but made no mention of a will.
- [44] On April 23, 2018, Mr. Chou filed in the New Westminster Registry under file number P-23086, a Submission for Estate Grant seeking a grant of administration without will annexed.
- [45] On July 12, 2018, the applicant filed in the Vancouver Registry under file number P-182006 a Submission for Estate Grant, attaching a Schedule for Grant of Probate or Grant of Administration with Will Annexed. Mr. Chou filed a Notice of Dispute in that proceeding on August 16, 2019, as well as an amended version of that same document on August 23, 2019.

III. The Legal Framework

- [46] The parties agree that this Court has jurisdiction to determine the validity of the alleged will according to British Columbia law, and, if it is found to be valid, to give effect to it in connection with the estate's assets in British Columbia, regardless of the conclusion of the Taiwanese Court (see WESA, ss. 80 and 129(2)).
- [47] Pursuant to s. 37(1) of WESA, to be recognised as valid, a will must be:
- in writing;
 - signed by the will-maker (or the signature must be acknowledged by the will-maker as her own in the presence of two or more witnesses); and
 - signed by at least two witnesses in the presence of the will-maker.
- [48] It is common ground that the document in issue does not meet those criteria, if only because it was signed by only one witness. The respondents also allege that the purported will-maker's signature appearing on it is not really that of the deceased.
- [49] It follows that, pursuant to s. 37(2) of WESA, the document cannot be considered a valid will unless this Court makes an order under s. 58 to give effect to it as if it were. This application seeks such relief under ss. 58(2) and (3), which state in relevant part as follows:

- (2) On application, the court may make an order under subsection (3) if the court determines that a document represents
 - (a) the testamentary intentions of a deceased person
- (3) Even though the making of a will does not comply with this Act, the court may, as the circumstances require, order that a record or document be fully effective as though it had been made
 - (a) as the will of the deceased person .

[50] The test to be applied in determining whether such an order should be made was set out in *Estate of Young*, 2015 BCSC 182. In her decision in that case, Dickson J. (as she then was), began her analysis by highlighting the legislative policy behind the then recently-enacted provision, as follows:

[16] The WESA came into force in British Columbia on March 31, 2014. Its enactment represents a significant change in wills and estate administration law in this province. Section 58 is one of the WESA's most far-reaching remedial provisions. It marks a departure from the traditional principles of formalism that previously governed the creation, alteration and revocation of wills in British Columbia.

[17] Section 58 of the WESA is a curative provision. It confers a discretion on the court to relieve against the consequences of non-compliance with testamentary formalities in a "record, document or writing or marking on a will or document". In prescribed circumstances, s. 58 permits the court to address and cure issues of formal invalidity in such documents. It cannot, however, be used to uphold a will that is invalid for substantive reasons such as testamentary incapacity or undue influence.

[51] She noted that other Canadian provinces had already enacted similar provisions, with the closest analog being that in Manitoba, enacted in 1995. She therefore took guidance primarily from Manitoba jurisprudence on the point, particularly the leading case of *George v. Daily*, [1997] M.J. No. 51, 143 D.L.R. (4th) 273 (Man. C.A.). She found that those authorities focused on two main considerations, as follows:

[34] As is apparent from the foregoing, a determination of whether to exercise the court's curative power with respect to a non-compliant document is inevitably and intensely fact-sensitive. Two principal issues for consideration emerge from the post-1995 Manitoba authorities. The first is an obvious threshold issue: is the document authentic? The second, and core, issue is whether the non-compliant document represents the deceased's testamentary intentions, as that concept was explained in *George*.

[35] In *George* the court confirmed that testamentary intention means much more than the expression of how a person would like his or her property to be disposed of after death. The key question is whether the document records a deliberate or fixed and final expression of intention as to the disposal of the deceased's property on death. A deliberate or fixed and

final intention is not the equivalent of an irrevocable intention, given that a will, by its nature, is revocable until the death of its maker. Rather, the intention must be fixed and final at the material time, which will vary depending on the circumstances.

- [36] The burden of proof that a non-compliant document embodies the deceased's testamentary intentions is a balance of probabilities. A wide range of factors may be relevant to establishing their existence in a particular case. Although context specific, these factors may include the presence of the deceased's signature, the deceased's handwriting, witness signatures, revocation of previous wills, funeral arrangements, specific bequests and the title of the document: *Sawatzky* at para. 21; *Kuszak* at para. 7; *Martineau* at para. 21.
- [37] While imperfect or even non-compliance with formal testamentary requirements may be overcome by application of a sufficiently broad curative provision, the further a document departs from the formal requirements the harder it may be for the court to find it embodies the deceased's testamentary intention: *George* at para. 81.
- [52] Those remarks were later adopted by the Court of Appeal in *Hadley Estate (Re)*, 2017 BCCA 311. There, *Dickson J.A.*, now sitting as a judge of that Court and writing for the Court, added this:
- [40] Sitting as a court of probate, the court's task on a s. 58 inquiry is to determine, on a balance of probabilities, whether a non-compliant document embodies the deceased's testamentary intentions at whatever time is material. The task is inherently challenging because the person best able to speak to these intentions - the deceased - is not available to testify. In addition, by their nature, the sorts of documents being assessed will likely not have been created with legal assistance. Given this context and subject to the ordinary rules of evidence, the court will benefit from learning as much as possible about all that could illuminate the deceased's state of mind, understanding and intention regarding the document. Accordingly, extrinsic evidence of testamentary intent is admissible on the inquiry: *Langseth Estate v. Gardiner* (1990), 75 D.L.R. (4th) 25 at 33 (Man. C.A.); *Yaremekewich Estate (Re)* at para. 32; *George*. As is apparent from the case authorities, this may well include extrinsic evidence of events that occurred before, when and after the document was created: see, for example, *Bennett*; *George*; *Estate of Young*; *Re MacLennan Estate* (1986), 22 E.T.R. 22 at 33 (Ont. Surr. Ct.); *Caule v. Brophy* (1993), 50 E.T.R. 122 at paras. 37-44 (Nfld. S.C.).

IV. Discussion

A. Is the application statute-barred?

- [53] This application was originally filed on July 2, 2021.
- [54] The respondents argue that it is time-barred pursuant to s. 6(1) of the Limitation Act, S.B.C. 2012, c. 13, because it was filed more than two years after the applicant's cause of action arose. That provision states as follows:

6(1) Subject to this Act, a court proceeding in respect of a claim must not be commenced more than 2 years after the day on which the claim is discovered.

[55] In their written application response, the respondents originally asserted that the two-year limitation period began running on August 23, 2018 and therefore expired in August 2020. As the applicant notes, however, even if the governing limitation period had begun to run on August 23, 2018, it would not have expired until August 2021 (after the filing of the application), by virtue of the postponement of all such limitation periods through the enactment, in the interim, of the COVID-19 Related Measures Act, S.B.C. 2020, c. 8.

[56] In their oral argument at the hearing, however, the respondents attempted to sustain their limitation argument on different grounds, suggesting that the two-year limitation period began running instead on March 14, 2018, which is when the applicant's counsel first provided the respondents with notice of the existence of the will. In support of that approach, they rely on *Sung Estate*, 2019 BCSC 1202. In that case, G.C. Weatherill J. found that an application to strike previous orders of the court, including one granting letters of administration, was statute-barred because it had been brought more than two years after the underlying claim was discovered by the applicant.

[57] I agree with the applicant that this application does not advance a new claim as did the application that was before the Court in *Sung Estate*. Here, the application seeks to have the alleged will recognised and admitted to probate, which is the same relief that the applicant originally sought in her application filed on July 12, 2018. The various competing applications that the parties have brought in this Court to address the administration of the estate all depend on the outcome of this application, which therefore cannot properly be said to attract its own separate limitation period. To the extent it does, that period would have begun running no earlier than August 2018, with Mr. Chou's filing of the Notice of Dispute.

[58] For those reasons, I am satisfied that the application is not statute-barred.

B. Is the document authentic?

[59] In asserting the authenticity of the document, the applicant relies on various strands of evidence, including the following:

- a) her own account of the circumstances of its creation;
- b) closely contemporaneous statements by the deceased to others that she had made a will leaving her property to the applicant; and
- c) the apparent similarity of the signature appearing on the document to others known to have been made by the deceased, a resemblance supported further by the report of Jean M. Kovaks, a handwriting expert, who concluded that there was a "strong probability" that the signature appearing on the document was indeed that of the deceased.

- [60] In response, the respondents argue that the applicant has failed to meet her burden to show the document to be authentic. They say it is more likely to be a forgery because it was apparently not mentioned by the deceased or anyone else until the estate litigation was well underway. In particular, they say, the applicant herself made no mention of it in her earliest filings in this litigation, particularly her Notice of Dispute filed March 16, 2018 (instead, she sought at that time to be appointed as administrator of the estate solely on the basis that she was said to be the more suitable candidate). In addition, Mr. Chou has deposed that the signature on the document does not look to him like that of the deceased. The respondents argue that Mr. Kovaks' report is not admissible, for failure to meet the requirements of R. 11-6 of the Supreme Court Civil Rules. They also invite me to draw an adverse inference against the applicant due to her failure to adduce any evidence from Ms. Lu, who was supposedly the sole witness to the execution of the alleged will.
- [61] I am satisfied that the evidence strongly supports the authenticity of the document, as the applicant argues.
- [62] First, there is evidence that the deceased did indeed mention the existence of the will to others around the time it was made. That she did not discuss it with the respondents can readily be explained by the history of acrimonious litigation in the family.
- [63] Second, I disagree with the respondents' premise that the applicant did not mention the will until late in the litigation. On the contrary, the applicant's counsel referred to its existence early on, in his letter of March 14, 2018. There would have been no apparent reason for her to raise the matter before then.
- [64] Third, Mr. Chou's evidence as to the authenticity of the deceased's signature was undermined considerably when he was cross-examined on his affidavit. He was unable to provide details as to the precedent signature with which he was comparing it. In this regard, I prefer the evidence of Mr. Kovaks, insofar as it is admissible. I am prepared to admit his report into evidence despite the applicant's failure to comply with the requirements of R. 11-6. It has been held that that Rule applies only at trial and not on interlocutory applications such as this: *L.S. v. G.S.*, 2015 BCSC 377; *Sharp v. Royal Mutual Funds Inc.*, 2019 BCSC 2357; *Enviroleach Technologies Inc. v. Mineworx Technologies Ltd.*, 2022 BCSC 180. I am satisfied that the report meets the common-law test for admissibility and that I may properly rely on it. I would have been prepared to place greater weight on it had it been properly attested with an affidavit directly from Mr. Kovaks, rather than presented in unsworn form attached to the affidavit of a paralegal. In any event, it is not necessary to consider what weight, if any, it should be given because Mr. Kovaks' conclusion is amply supported by other evidence, including the clearly attested examples of the deceased's signature that are in evidence, which appear to be similar.
- [65] Finally, I am not persuaded that the absence of evidence from Ms. Lu justifies an adverse inference against the applicant. The applicant has provided a satisfactory explanation for Ms. Lu's refusal to participate in the litigation. It appears that, after initially agreeing to do

so, she had a series of accidents that led her to believe that her involvement was a source of bad luck. The respondents later served her with a subpoena in an effort to compel her to submit to an examination but she did not attend at the appointed time and place and no further steps were taken to obtain her evidence. In these circumstances, I see no reason to draw any inference as to what that evidence would have been.

[66] For those reasons, I have concluded that the document is indeed authentic.

C. Does the document reflect the deceased's testamentary intentions?

[67] An important factor weighing in favour of the applicant's contention that the document reflects the deceased's testamentary intentions is that it bears most of the formal trappings of a valid will. What it lacks is only the attestation of a second witness, a requirement of which the applicant and the deceased appear to have been unaware at the time.

[68] The respondents do not argue that the deceased lacked the capacity to make such a will. Instead, they say that the applicant was in a position to, and apparently did, exert undue influence on the deceased because the deceased spoke no English and relied entirely on the applicant to translate the document and transcribe her wishes into English. They cite *Bhalla Estate*, 2017 BCSC 1867, for the proposition that those factors can amount to "suspicious circumstances", undermining the applicant's contention that the alleged will truly reflected the deceased's intentions at the time.

[69] In *Bhalla Estate*, *Betton J.* found that the will at issue in that case had been completed with the requisite formalities, thereby giving rise to a rebuttable presumption that the deceased knew and approved of its contents and had the requisite capacity to do so. At issue in that case was whether the presumption had been rebutted by evidence showing that the deceased did not understand English and that the contents of the will had been translated for her by an unidentified third party. The applicant in that case had adduced no evidence from the translator. In giving effect to the will despite that evidentiary gap, *Betton J.* referred to *Watson v. Watson and Yelich*, 2004 BCSC 1724, at para 64, where *Wilson J.* stated that "[it] is not sufficient that circumstances create a general miasma of suspicion that something unsavoury may have occurred."

[70] I agree with the respondents that the deceased's inability to read English gave rise to the potential for undue influence, a potential that was much greater here than in *Bhalla Estate*, given that the applicant herself was the initiator, translator and sole beneficiary of the alleged will. It has been held that where the person seeking to propound a will prepared the instructions and takes a substantial benefit under it, the burden of proving that the testator knew and approved the contents is made more onerous: *Grace (Re)*, 2022 BCSC 653.

[71] In this case, however, there is abundant evidence to support the inference that the deceased genuinely intended to create a will leaving her estate to the applicant. First, the deceased appears to have remarked to others soon after signing the document that she had done just that. Second, the deceased had been making significant inter vivos gifts to the applicant

prior to doing so. Indeed, it appears that the deceased originally wished to purchase the Valley Drive Property for the applicant outright, but opted for a testamentary, rather than an inter vivos gift in that case only because the applicant's husband had objected to the idea. Such an inference is also supported by the fact that the deceased appears to have taken no interest in the rental revenue generated by the Valley Drive Property after purchasing it.

[72] On the other hand, the evidence adduced by the respondents does not seriously undermine the strength of that inference. The casual comments that Mr. Chou has attributed to the deceased are vague and, in general, not necessarily inconsistent with the applicant's version of events. In any event, whatever the deceased may have said on those occasions, she made no effort to reduce those comments to writing or otherwise take steps to formalise them, as she evidently had on October 27, 2004 in signing the document in issue. Finally, the fact that Mr. Chou has deposed that the deceased told him about three Canadian properties registered in her name, when only one is in evidence, suggests either that she did not give him accurate information about her estate or that he has not accurately reported what he was told.

[73] In summary, I am satisfied that the document in issue does indeed reflect the fixed testamentary intentions of the deceased.

V. Summary and Conclusion

[74] The application is allowed. The document attached to the notice of application is declared to be valid and effective as the last will of the deceased, and admitted to probate as such, with the applicant as the named executor under the will.

[75] In view of the uncertainty created by the failure to prepare the will in accordance with the formal requirements set out in s. 37 of WESA, coupled with the deceased's inconsistent messaging to the parties and others during her lifetime, both sides should receive their costs to date of all proceedings in this Court in relation to the estate on a full indemnity basis from the estate.

"Milman J."

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Prepared on 25 October 2026 · Esheria