

CANADA / JUDGMENT

Conner Estate v. Worthing

2021 BCCA 231

COURT

British Columbia Court of Appeal

DECIDED

26 May 2021

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2021 BCCA 231 Conner Estate v. Worthing

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Conner Estate v. Worthing,

2021 BCCA 231

Date: 20210526

Docket: CA46739

Between:

Keith Woodburn Purvin-Good,

as Executor of the Will of Jean Ingrid Conner

Respondent

(Plaintiff)

And

Denis Worthing

Appellant

(Defendant)

And

Kristen Okimaw as Litigation Guardian of Brett David Timm

Respondent

(Defendant)

And

Faron Lee Alexander Black,

Tracey Marcella Black also known as Tracey Reimer,

Krislynn Richelle Reimer, Ronald Conner, Rhonda Carr-Hagar,

Glenn Conner, William Conner, William Croy, Chelsey Conner,

Tiffany Conner, Athina Conner, Adriann Conner, William Conner Jr.,

Richard Tyler Worthing, Travis Ryan Worthing,

Kolby Robert Alexander Bisson and Shayna Rolene Bisson

Respondents

(Defendants)

Before:

The Honourable Madam Justice Stromberg-Stein

The Honourable Madam Justice Fenlon

The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated

February 7, 2020 (Conner Estate v. Worthing, 2020 BCSC 150, Kelowna Docket S109690).

Oral Reasons for Judgment

Counsel for the Appellant

(via videoconference):

T.M. McCaffrey

Counsel for the Respondent, Keith Woodburn Purvin-Good, as Executor of the Will of Jean Ingrid Conner

(via videoconference):

G.W. White

A.A. Mortimore

Counsel for the Respondent, Kristen Okimaw as Litigation Guardian of Brett David Timm

(via videoconference):

K.D. Darling

Place and Date of Hearing:

Vancouver, British Columbia

May 25, 2021

Place and Date of Judgment:

Vancouver, British Columbia

May 26, 2021

Summary:

The appellant appeals orders of the trial judge declaring the Will of the testator was proven in solemn form on the basis the two attesting witnesses did not validly subscribe the Will and there existed suspicious circumstances sufficient to rebut the presumption of testamentary capacity, and for costs. Held: Appeal dismissed. The judge did not err in finding the Will was proven in solemn form on the basis that something less than a signature can constitute a valid subscription of a Will, and that the printed names and initials of the two witnesses sufficed in this case. The judge made no error in concluding the appellant had not raised any suspicious circumstances regarding the testator's capacity to make the Will. Finally, the appellant failed to demonstrate any error in the judge's costs order. The appellant will bear his own costs of the appeal and pay the respondents' ordinary costs into the estate. The respondents are entitled to special costs payable from the estate.

STROMBERG-STEIN J.A.:

OVERVIEW

- [1] On 14 May 2013, Jean Ingrid Conner (the "Testator") died of cancer. She was 63 years old. The appellant, Denis Worthing, was her spouse. He challenged her Will (the "Will") dated 25 January 2013 on a number of grounds with respect to formality of execution, testamentary capacity, undue influence and rectification. Following a summary trial, the judge concluded the Will was proven in solemn form, made a grant of probate to the respondent, Keith Woodburn Purvin-Good (the "Executor"), rectified the Will, and made an order for costs.
- [2] The issues on appeal are:
1. Whether the trial judge erred in finding the Will was proven in solemn form either by:
 - a. concluding the two witnesses who initialed each page and printed their names at the appropriate location on the Will fulfilled the requirements of s. 4 of the Wills Act, R.S.B.C. 1996, c. 489; or
 - b. determining that the appellant had not established suspicious circumstances in respect of Ms. Conner's testamentary capacity.
 2. Whether the trial judge erred in making the order for costs.

- [3] If this Court concludes that the trial judge did not err in finding the Will was proven in solemn form, the appellant is not alleging on appeal that the judge erred in rectifying the Will. Nor is the appellant alleging undue influence on appeal.

FACTS

- [4] Mr. Worthing and Ms. Conner began living together in 2000 and were married in 2002. They had no children together. Ms. Conner had two adult children from a prior relationship, three adult grandchildren, and two minor great-grandchildren. Ms. Conner also had a sister, two brothers, and several step-children and step-grandchildren.
- [5] The primary asset in Ms. Conner's estate was her residence at 375 Woods Road in Kelowna, valued at approximately \$592,000 (the "Kelowna Residence"). Her other assets amounted to less than \$5,000 or passed outside the Will to Mr. Worthing (including RRSPs, TFSAs, and insurance policies).
- [6] The drafter of the Will, and the appointed executor, was Mr. Purvin-Good, a solicitor who had known Ms. Conner since 2000 and who had drafted three earlier Wills for Ms. Conner.
- [7] The Will was witnessed by Brett Love and Debbie Cook, two employees of the funeral home where Ms. Conner was making her funeral arrangements. Each printed their name in the appropriate location but there was no signature line and neither signed the Will. They initialed each page of the Will, including the last page where they printed their names, addresses and telephone numbers.
- [8] The Will had several errors on its face. The Will provided for the distribution of 150% of the sale proceeds from the Kelowna Residence, bequeathed the residue of Ms. Conner's estate twice, and was missing words in one of the paragraphs.
- [9] Mr. Worthing filed a citation precluding the Executor from obtaining probate. He contended that Ms. Conner did not have the requisite capacity to sign a Will in January 2013; that she was unduly influenced by her sister, Rhonda Carr-Hagar; and that the Will was not signed by the witnesses and was therefore invalid by operation of s. 4 of the Wills Act.
- [10] The Executor petitioned to prove the Will in solemn form and rectify the errors. Brett David Timm, a minor beneficiary in the Will, was represented by Kristen Okimaw (the "Litigation Guardian").

SUMMARY TRIAL JUDGMENT

- [11] The trial judge determined he could hear both the probate and construction matters in one summary trial: *Ali Estate (Re)*, 2011 BCSC 537.

Subscription

- [12] The judge noted that Ms. Conner died prior to the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA] coming into force in British Columbia. Accordingly, its predecessor statute, the Wills Act, applied to Ms. Conner's estate and the remedial powers in ss. 58 and 59 of the WESA could not cure any deficiencies or rectify the Will. Section 4(c) of the Wills Act required that the Will be signed by the testator in the presence of two witnesses who "subscribe" the Will in the presence of the testator. The judge noted that since the Wills Act contained no "substantial compliance" provision, the Will was either valid or not.
- [13] The judge accepted that the two witnesses had handwritten their names, addresses and telephone numbers on the Will and initialed each page. He remarked that it was undoubtedly the intention of the drafter of the Will that both witnesses would sign the Will, but there was nothing printed on the Will resembling a signature line. The judge identified the issue as whether something less than a signature of a witness would suffice as a subscription for the purposes of s. 4(c) of the Wills Act. He considered the language of s. 4 as a whole, as well as the decisions in *Hindmarsh v. Charlton* (1861), 11 E.R. 388 (U.K. H.L.): *Bolton v. Tartaglia et al*, 2000 BCSC 576; and *Payne & Anor v. Payne*, 2018 E.W.C.A. Civ. 985 [Payne], and determined that facsimiles or marks can suffice as a subscription, and the intention of the witness is a relevant consideration. He found the witnesses knew they were witnessing a Will, but there was no place on the Will for them to sign. The judge concluded their printed names and initials on each page satisfied the statutory subscription requirement.

Essential Validity

- [14] The judge considered two issues relating to the essential validity of the Will. The first was whether Ms. Conner had capacity and knew and approved the contents of the Will. The second issue was whether Ms. Conner was unduly influenced in the making of the Will by her sister. The judge found there was no evidence of undue influence and this second issue is not raised on appeal.
- [15] The judge referred to the test in *Banks v. Goodfellow* (1870), L.R. 5 Q.B. 549, noting that to have testamentary capacity, the testator must be aware of her assets and the beneficiaries of her assets and understand the effect of making a Will. He noted capacity may be presumed. Evidence of suspicious circumstances can rebut the presumption. The judge found nothing in the record to indicate suspicious circumstances regarding Ms. Conner's capacity. He concluded there was no evidence that Ms. Conner's cancer diagnosis had impacted her capacity. The judge found the facial errors on the Will were a reflection of the drafter (Mr. Purvin-Good), not the testator, who did not have legal training. He remarked that neither her lawyer nor her doctor had any concerns about her capacity. He also noted that Ms. Conner had designated Mr. Worthing as beneficiary of her life insurance policy shortly after executing the Will and her capacity to do that had never been questioned.

Rectification

- [16] The judge rectified the Will to fix the three errors to reflect Ms. Conner's intentions. To ascertain Ms. Conner's intentions, the judge considered Mr. Purvin-Good's notes of a telephone conversation with Ms. Conner and a typed letter of instruction from Ms. Conner to Mr. Purvin-Good regarding the Will. The rectification is not challenged on appeal if the Will is found to be valid.

Costs

- [17] The judge awarded the Executor and the Litigation Guardian costs payable on a full indemnity basis from the estate. Although he used incorrect language by referring to full indemnification, it is clear from the entered order that he intended these to be special costs awards within the meaning of Rule 14-1 of the Supreme Court Civil Rules. See *West Van Holdings Ltd. v. Economical Mutual Insurance Company*, 2019 BCCA 110 at para. 95; *Tanious v. The Empire Life Insurance Company*, 2019 BCCA 329 at para. 45.
- [18] The judge found the Litigation Guardian was entitled to costs because her attendance was necessitated by the errors on the face of the Will and because costs were sought against her, and the appellant has not challenged this costs award. The judge noted that executors are entitled to indemnification for costs properly and reasonably incurred while acting within the scope of their office, unless they are guilty of reprehensible conduct. The judge rejected the appellant's argument that the Executor should be denied his costs because of the errors in the Will. He concluded Mr. Purvin-Good was before the court as Executor, not in his personal capacity as drafter of the Will. While costs may be awarded against a non-party, the judge commented this is only done in limited circumstances, none of which were present in this case. He found Mr. Worthing was attempting to frame a professional negligence claim as a costs determination.
- [19] The judge considered the general rule that costs follow the success of the litigation. He identified an exception to the rule in testamentary law where the litigation was caused by the deceased. The judge concluded that costs regarding the issues of capacity and undue influence should be awarded against the unsuccessful party in the normal course. He noted Mr. Worthing chose to pursue those issues despite the fact they were clearly weak; however, he declined to award special costs against him. The judge also found "the evidence as to whether the witnesses had printed their names on the Will was something that had clearly been established well before the hearing" and costs should follow in the usual course: 2020 BCSC 1012 ("Costs Reasons") at para. 32. He ordered Mr. Worthing to pay the costs of the estate for the probate proceeding at Scale B.

[20] The judge concluded that rectification of the Will required intervention of the Court and fell within the exception to the general rule regarding costs. He awarded Mr. Worthing his costs relating to rectification from the estate on a full indemnity basis. Finally, he ordered the costs of the parties to be allocated equally between the probate and the rectification proceedings.

POSITIONS OF THE PARTIES

Appellant

Formal Validity

- [21] The appellant submits that courts do not have any discretion in applying s. 4 of the Wills Act and strict compliance with its formalities requirement is necessary in order to have a valid Will. He maintains strict compliance was not met in this case because the testator did not sign the Will before the lawyer who drafted it; the Testator only signed the last page of the Will; and the judge erred in accepting Payne (an English decision) as authority in British Columbia and ignoring British Columbia precedent requiring signatures from witnesses.
- [22] The appellant also submits there is no evidence that the two witnesses printed their names and addresses on the Will or that they intended that printing to represent a mark of authenticity, which cannot be considered a subscription unless that intention is shown.
- [23] Finally, the appellant submits Mr. Purvin-Good testified in cross-examination that the initialing on each page was only meant to show that page was part of the original Will and therefore the initials cannot be considered a subscription.

Essential Validity

- [24] Because the Will was not executed with the requisite formalities, the appellant submits a presumption of capacity cannot be relied upon and the propounder of the Will must establish testamentary capacity.
- [25] The appellant submits there was no evidence that the Will was read by, brought to the attention of, or understood by the deceased. Moreover, the appellant submits suspicious circumstances are shown by the following:
- a. The deceased was in end-stage cancer when she signed the Will;
 - b. The deceased did not acknowledge to the drafter of the Will or the witnesses that she read and understood the Will and approved its contents;
 - c. Drafts of a Will had been provided to the deceased prior to her signing the Will;
 - d. The Will has facial errors, which the deceased surely would have recognized had she read and understood it;
 - e. The Will was not signed by the witnesses; and

- f. There was no explanation in the Will of the rationale for significant changes to its contents when compared to the deceased's previous Wills.

Costs

- [26] Mr. Worthing submits this case presented exceptional circumstances that ought to have been taken into consideration in assessing costs. Those circumstances included:
- a. Mr. Purvin-Good was both the drafter of the Will and the Executor of the estate.
 - b. It was necessary for the Executor to seek an order proving the Will and having it rectified regardless of the appellant's position because:
 - i. The witnesses did not sign the Will; and
 - ii. The Will contained facial errors that needed to be rectified in order for the Will to be capable of application.
 - c. Fifty percent of trial time was associated with the application to prove the Will in solemn form and fifty percent was associated with rectification of the Will. That time spent proving the Will in solemn form was unavoidable, notwithstanding the appellant's opposition to the witnessing of the Will. The time spent rectifying the Will was solely caused by the drafter of the Will or the deceased, not the appellant.
- [27] Moreover, the appellant asserts that his challenges to the validity of the Will, concerning the lack of witness signatures and the deceased's testamentary capacity, were reasonable. It is common that all parties have their costs paid out of the estate unless their positions were unwarranted.
- [28] The appellant also submits the Executor should have been made to bear the costs associated with rectification because he was responsible for the drafting errors. He asks that any costs (at trial or on appeal) related to the issues of proving the Will in solemn form and of the testamentary capacity of the deceased be paid to him from the estate on a party and party basis at Scale B. He also asks that costs arising from the rectification issue should only be awarded in favour of him from the estate on the same basis. He submits the overwhelming majority of the time spent at trial was on the rectification issue.

Respondents

- [29] As an overarching statement, the respondents submit the appellant fails to point to any error on the part of the trial judge and simply seeks a retrial on the same issues.

ANALYSIS

Factual Mischaracterizations

- [30] The appellant has made a number of factual or evidentiary mischaracterizations that run contrary to the evidence at trial and the findings made by the trial judge. First, the appellant maintained there is no evidence to show the two witnesses printed their names and addresses on the Will. I agree with the respondent that the appellant conceded at trial that the witnesses had printed and initialed the Will and he cannot resile from this position on appeal. In fact, the appellant also attempted to resile from this position at trial by raising late in the trial the argument that the witnesses might not have been the ones to write their names on the Will; this was objected to by opposing counsel and counsel for the appellant accepted that the appellant had made this concession when questioned by the trial judge. In the Costs Reasons, the trial judge wrote:
- [32] On the execution issue, Mr. Worthing took a position in submissions before the Court that was contrary to his own application response. Although there may have been some uncertainty as to some of the facts surrounding the execution of the will at first instance, the evidence as to whether the witnesses had printed their names on the will was something that had clearly been established well before the hearing.
- [31] In another mischaracterization of the evidence, the appellant maintained there is no evidence the Will was read by, brought to the attention of, or understood by the Testator prior to her signing it. To the contrary, one of the witnesses to the Will, Ms. Cook, was cross-examined by counsel for the appellant and stated multiple times the Testator read the Will prior to signing it. Ms. Cook stated that the two witnesses and the Testator sat at a table going through the Will in its entirety together for upwards of an hour.
- [32] Finally, the appellant has submitted there was no explanation given for the major changes in the Will as compared to past Wills of the Testator. However, Mr. Purvin-Good offered an explanation at trial (accepted, in part, by the trial judge: see 2020 BCSC 150 ("Trial Reasons") at para. 22) that the Testator felt the appellant had been harassing her seemed only interested in money, and she would have divorced him had she not been dying at the time.

Did the Judge Err in Finding the Will Solemnly Proved?

Formal Validity

- [33] In dispute is whether the printed names and initials of the two witnesses were facsimiles or marks that could suffice as a subscription within the meaning of s. 4 of the Wills Act. As I have indicated, the appellant conceded at the summary trial that the two witnesses printed their names on the Will and initialed each page of the Will.
- [34] Section 4 of the Wills Act provides:

Signatures required on formal will

4 Subject to section 5, a will is not valid unless

- (a) at its end it is signed by the testator or signed in the testator's name by some other person in the testator's presence and by the testator's direction,
- (b) the testator makes or acknowledges the signature in the presence of 2 or more attesting witnesses present at the same time, and
- (c) 2 or more of the attesting witnesses subscribe the will in the presence of the testator.

[35] There is no real dispute in this case about the legal principles applicable to the formal validity of Wills under the Wills Act. The judge considered s. 4 and noted the differences in the language between s. 4(a) and s. 4(c). The former requires a signature by the testator, while the latter only requires that witnesses "subscribe" the Will. The judge concluded that something other than a signature may suffice as a subscription, otherwise the legislature could have used consistent language across the provision. I see no error in the judge's reasoning.

[36] There is no dispute there is no doctrine of substantial compliance with respect to s. 4 of the Wills Act. The judge referred to Bolton, where the court held that a stamp did not suffice as a subscription under s. 4(c) of the Wills Act because the witness who affixed it did not intend for the stamp to be her mark in place of her normal signature. She had intended to sign the document as well, but had inadvertently failed to do so: at para. 10. The court opined that a stamp might suffice in some cases as long as the requisite intention was for the stamp to be accepted as a mark in place of a signature. The court also relied on the English decision of Hindmarsh. In that case, the House of Lords held that a valid subscription and attestation of a Will must include either the name of the witness "or some mark intended to represent it": quoted in Bolton at para. 13.

[37] The judge compared the facts of this case to Bolton and concluded that the requisite intention did exist in this case. The appellant argues it did not, but has identified no error in the judge's conclusion.

[38] The judge also referred to Payne, which the appellant submits he was not entitled to do. Payne was an English decision with similar factual circumstances to this case. In Payne, the English Court of Appeal held that a Will was valid despite the fact the witnesses had only printed their names. The Court relied on the following facts in determining the Will had been validly subscribed:

[26] When asked to explain in his own words what had happened in May 1998, he said that he had received a telephone call from Mrs Payne asking him to pop down to their house (they lived in the same road) and that he had then done so. The persons present were the Deceased, Mrs Payne, and a friend of theirs who was unknown to Mr Gordon. They all sat around a table, for the purpose of executing the 1998 Will. The Deceased signed it first, and

the two witnesses then filled in their names, addresses and occupations in the appropriate places on the form, each using his own pen to do so. When the process was complete, they had a cup of tea together and the witnesses then left the house.

- [27] The two witnesses were each present when the Deceased signed the will, and by separately filling in their details in the specified places on the will form the natural inference to draw is that they thereby intended to write their names as witnesses of the Deceased's signature. That was why they had been asked to come to the Deceased's home, and there can be no sensible reason to doubt that they were doing precisely what the printed attestation clause said they were doing, namely subscribing their names as witnesses. ...The absence of a conventional signature is hardly surprising, given that the form provided no separate place for their signatures to be appended.
- [39] Based on the foregoing analysis, the judge held that "something less than a signature of each witness will suffice as to a subscription" under the Wills Act: Trial Reasons at para. 44. He wrote:
- [45] In this case the two witnesses initialed each page and printed their names in their own hand at the appropriate location on the document. They knew they were witnessing Ms. Conner's will. I conclude that they subscribed the will as required by s. 4 of the Wills Act.
- [40] I agree with the respondents that the appellant simply seeks a different conclusion without identifying any legal error by the trial judge, apart from asserting an alleged error in his reliance on Payne. I disagree the judge's reliance on Payne was an error. Referring to and considering authorities from other jurisdictions is routine. There is no indication the judge treated the decision as binding in British Columbia. In any event, the judge also referred to Canadian authorities such as Bolton, which is consistent with Payne, as both decisions acknowledge that modern subscription permits something less than a signature so long as the requisite intention to attest to the Will is present.
- [41] The appellant points out that the two witnesses did not sign the attestation clause, but s. 4(c) does not require that they sign the attestation clause; only that they subscribe the Will in the presence of the Testator. He also submits that Mr. Purvin-Good testified that his intention in having the witnesses initial the Will was to show each page formed part of the original document. However, Mr. Purvin-Good's intention is not relevant in determining whether a valid subscription took place, as he was not a witness. Finally, the appellant submits the Testator did not sign the Will in the presence of her lawyer (the drafter) and only signed the last page. Section 4 requires only that a Will be signed by the testator at the end, in the presence of two attesting witnesses. None of the appellant's objections impacted the formal validity of the Will.

- [42] The judge concluded the witnesses knew they were there to witness the Testator's signature on a Will and they intended to subscribe the Will when they handwrote their names on the document. They believed the Testator was competent to sign the Will and understood that the document she signed was a Will. They were both present with the Testator at the time that all three "signed" the Will. Both witnesses provided sworn evidence to this effect.
- [43] The judge also explained that, like in *Payne*, there was no obvious place on the Will for the witnesses to sign but that it was clear the witnesses intended to witness the Will.
- [44] The appellant has referred to this Court's decision in *Yen Estate v. Chan*, 2013 BCCA 423, where this Court discussed the presumption of due execution. The trial judge never raised any presumption of due execution. The presumption relied on by the trial judge was that the testator had the necessary capacity and knew and approved of the contents of the Will.

Essential Validity

- [45] There is no dispute the judge correctly identified the legal test governing capacity to make a Will. The judge set out the oft-quoted test for testamentary capacity from the English decision in *Banks*. To have testamentary capacity, the testator must be aware of her assets, appreciate who the beneficiaries are, and understand the effect of making a Will. The test does not require the testator to view the Will with the "eye of a lawyer."
- [46] Furthermore, the trial judge correctly identified the burden of proof regarding capacity to make a Will. Capacity may be presumed where the Will was properly executed and read by the deceased, but that presumption may be rebutted by evidence of suspicious circumstances. If the presumption is rebutted, the burden reverts to the propounder of the Will to prove capacity on a balance of probabilities: *Vout v. Hay*, [1995] 2 S.C.R. 876 at paras. 19-27.
- [47] The appellant first submits the presumption of capacity was unavailable because the Will was not executed with the requisite formalities or read or understood by the deceased. I have dealt with both of these arguments and have concluded the Will was executed with the requisite formalities and there was evidence the Testator read and understood the Will. As a result, I agree with the judge that the presumption of capacity was available in this case.
- [48] The only issue is whether the judge erred in finding the appellant had not shown suspicious circumstances capable of rebutting the presumption.
- [49] The trial judge characterized the appellant's capacity argument as being weak: *Costs Reasons* at para. 31. I agree.
- [50] The judge referred to many of the allegations of suspicious circumstances raised by the appellant and dispelled them. For instance, the judge found that there was nothing in the evidence to suggest the appellant's cancer prognosis had impacted her capacity: *Trial Reasons* at para. 26. He also found the errors in the Will were a reflection on Mr. Purvin-Good, but not on Ms. Conner, who had only a middle school education and was

entitled to rely on her solicitor's drafting skills: Trial Reasons at para. 23. Other suspicious circumstances raised by the appellant are inaccurate or irrelevant, including the suggestion that the Testator never read the Will and that the Testator had received prior drafts of the Will.

- [51] In rejecting the appellant's arguments, the judge referred to a number of facts that supported the Testator's capacity to make the Will. For instance, the judge noted that Mr. Purvin-Good conducted a routine capacity test of the deceased when she met with him in his office; the Testator's doctors, who met with her around this time, had no concerns about her capacity; and, notably, the deceased made a change to her life insurance policy designating Mr. Worthing as the beneficiary approximately one month after making the Will: Trial Reasons at paras. 24-25. Mr. Worthing, of course, does not raise any issues as to her capacity to do that.
- [52] Contrary to what the appellant asserts, there is an explanation for the changes to the Will with respect to the bequest to the appellant and the choice of executor. Moreover, I agree with the trial judge that the Testator did not need to read the Will with any particular expertise in order to have capacity. Certainly error-spotting is not a prerequisite to capacity and the mere presence of errors on the face of the Will does not rebut the presumption of capacity.
- [53] I see no error in the judge's conclusions with respect to testamentary capacity.

Rectification

- [54] As I have concluded the judge did not err in finding the Will was valid, it follows there is no reason to disturb the judge's rectification of the Will. The appellant has not argued the rectification was otherwise flawed.

Did the Judge Err in Making the Costs Order?

- [55] Costs awards are discretionary and will not be disturbed on appeal unless the judge made an error in principle or the costs award is clearly wrong: *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 at para. 27; *Grewal v. Grewal*, 2016 BCCA 237 at para. 144; *Hollander v. Mooney*, 2017 BCCA 238 at para. 22, leave to appeal ref'd [2017] S.C.C.A. No. 356. This Court has found no error in fact or law in the trial judge's reasons that would entitle this Court to reconsider the summary trial costs award with less deference: *Nolin v. Ramirez*, 2021 BCCA 191 at para. 7.
- [56] The general rule regarding costs was described by this Court in *Giles v. Westminster Savings Credit Union*, 2010 BCCA 282 at para. 72, quoting *Victoria (City) v. Adams*, 2009 BCCA 563 at para. 180:

The general rule with respect to costs is that they follow the event and are assessed on a party and party basis unless the court otherwise orders: Rules 57(9) and 57(1) of the Rules of Court. Courts retain the discretion to depart from the general rule where the circumstances justify a

different approach: *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371 at para. 22. It is a broad discretion, and this Court will only interfere "if there is misdirection or the decision is so clearly wrong as to amount to an injustice": *Agar v. Morgan*, 2005 BCCA 579 at para. 26.

[57] In estate litigation, the executor is generally indemnified through a special costs award against all reasonable litigation costs incurred in the fulfilment of their role: *Hollander* at para. 41.

[58] The trial judge made the following order as to costs:

- a) the costs of the respondent executor for the entire proceeding payable as special costs from the estate;
- b) the costs of the Litigation Guardian for the entire proceeding payable as special costs from the estate;
- c) the costs of the estate for the probate proceeding payable by the appellant at Scale B;
- d) the costs of the appellant for the rectification proceeding payable by the estate as special costs; and
- e) the costs of the parties be allocated equally between the probate and rectification proceedings.

[59] In my view, the appellant's challenges to the costs order are without merit.

[60] The appellant submits he should have had his costs paid out of the estate (apart from the costs of rectification, which he argues Mr. Purvin-Good should have to pay personally). He contends parties often have all their costs paid out of the estate in probate proceedings unless their positions were simply unwarranted. He submits the arguments he raised were not unwarranted, as the lack of witness signatures and suspicious circumstances regarding capacity were serious issues requiring court determination.

[61] While it is true that the general rule that costs follow the event has not always applied in estate litigation, the modern approach to fixing costs in such cases is to apply the general rule unless the court finds one or more exceptions apply: *Hollander* at paras. 39-40. The trial judge followed the modern approach and considered whether to depart from the general rule on the basis that certain issues were "caused by the deceased," a recognized exception: *Costs Reasons* at para. 26. He determined the rectification issue fell within the exception and awarded the appellant his costs from the estate for that issue. However, he determined there was no other basis to depart from the general rule. He stated that Mr. Worthing had chosen to raise issues of capacity, undue influence and execution formalities in the probate proceedings and was unsuccessful on all of them. He considered the capacity and undue influence issues to be weak. He also noted that Mr. Worthing had adopted a contrary position on the execution issue late in the trial, despite the fact evidence had clearly established the two witnesses had printed their names on the Will prior to the hearing: *Costs*

Reasons at paras. 30-32. In essence, the Executor was required to bring the application to prove the Will in solemn form due to the appellant's allegations, not all of them reasonable: Schell Estate (Re), 2019 BCSC 2168 at para. 20.

- [62] The appellant submits "[t]here is nothing reprehensible about the conduct of the appellant in raising the suspicious circumstances that would warrant a party and party costs award in the appellant's favour only if the court finds the deceased lacked testamentary capacity": Appellant's Factum at para. 96. However, whether the appellant's conduct in the litigation was reprehensible was a question the trial judge considered to determine if an award for special costs was appropriate. In any event, the judge found the appellant's conduct was not reprehensible and declined to award special costs: Costs Reasons at para. 33.
- [63] It was within the discretion of the trial judge to determine whether departure from the general rule was warranted in this case and the appellant has not demonstrated the trial judge erred in declining to do so with respect to the probate proceeding. The appellant generally raises arguments that are divorced from the conclusions and reasoning of the trial judge without showing where the judge fell into error (for instance, he argues he did in fact raise suspicious circumstances such that costs should be awarded to him on this issue).
- [64] The appellant also submits the Executor should have been made to bear the costs of the rectification personally because he was the drafter of the Will and the Will contained errors. The appellant made the same argument below, but does not acknowledge the reasons given by the trial judge for rejecting it. The trial judge concluded there was no basis to order that costs be borne by Mr. Purvin-Good personally, as he was only before the court in a limited capacity as Executor of the Will and not as the solicitor of the deceased. The judge concluded this would be tantamount to awarding costs against a non-party, which is only done in exceptional circumstances not present in this case: Costs Reasons at paras. 9-24. The appellant does not confront the judge's analysis on this point, nor does he raise any legal error in his ultimate conclusion.
- [65] The appellant challenges the balance struck by the trial judge in apportioning costs. He submits the overwhelming majority of the time in the summary trial was spent on the rectification issue. This argument, again, is misconceived. The judge expressly did not apportion the costs solely based on the time spent on each issue and in fact acknowledged that more court time was spent on the rectification issue. However, he held it was not necessary or possible to determine an appropriate allocation with mathematical precision, stating:
- [42] When parties are compensated for costs following litigation, it does not necessarily follow that the time spent at the hearing on each of the issues is indicative of the time spent to prepare. As such, while the arguments regarding undue influence and capacity did not take as much court time as the rectification and validity arguments, the executor was nonetheless required to obtain medical evidence and potentially conduct interviews of potential witnesses.

- [66] Nothing demonstrates the judge improperly exercised his discretion in apportioning the costs equally between the probate and rectification proceedings.

CONCLUSION

- [67] The appellant seeks to re-litigate arguments that were raised before the trial judge and rejected. He has not identified any errors of fact, let alone palpable or overriding errors, nor any errors in the expression or application of the law. There is simply little merit to his challenges to the Will and the costs orders. Substantially for the reasons of the trial judge, I would dismiss the appeal.

SHOULD SPECIAL COSTS BE AWARDED ON APPEAL?

- [68] The respondents seek special costs in this appeal payable into the estate on the basis the appellant seeks to re-litigate this matter and has made significant misstatements of the evidence on key issues, including whether or not the witnesses to the Will wrote their own names and initials on the Will and whether the Will was read by the Testator prior to signing. I have already canvassed these misstatements.
- [69] The authority to award special costs is found in Rule 61(2) of the Court of Appeal Rules. Special costs intended to be punitive in nature are generally reserved for conduct that is considered reprehensible or deserving of rebuke: *Hollander* at para. 23. While special costs might be awarded if an appellant advanced an appeal that was completely unfounded, lack of merit is generally not a reason for awarding special costs in itself: *Tafti v. Davis*, 2021 BCCA 146 at para. 34; *Hollander* at para. 23. Something more is needed, such as improper allegations of fraud, an improper motive in bringing the proceedings, or improper conduct of the proceedings themselves: *Hollander* at para. 23.
- [70] Estate matters may import different underlying considerations concerning an award for special costs, such as where the need for the litigation arose as a result of the deceased's conduct, which led to the need to question the validity of the Will: *Sato v. Sato*, 2020 BCCA 62 at para. 9. However, that is not the case here. The trial judge already concluded that only the rectification issue was considered to be "caused by the deceased" as an exception to the general rule regarding costs: *Costs Reasons* at para. 36. Mr. Worthing has not appealed the rectification issue, suggesting only that the rectification should be set aside if the Will is found to be invalid. His principal grounds of appeal therefore do not stem from issues caused by the Testator's conduct.
- [71] The trial judge declined to award special costs. He held that the appellant's arguments regarding capacity and undue influence were weak and that he chose to pursue them anyway, forcing the Executor to spend time and money responding to them: *Costs Reasons* at para. 31. He also found the appellant took a position in his submissions that was contrary to his pleadings by questioning whether the two witnesses had actually printed their names and initials on the Will, or whether someone else had filled in their information. The judge found this was "something that had clearly been established well before the hearing": *Costs*

Reasons para. 32.

- [72] Nonetheless, the judge did not consider that the appellant's conduct reached the level of reprehensible conduct warranting a special costs award. He noted in particular that the appellant had not attempted to impugn anyone's character in raising his arguments and that the claim of undue influence by the Testator's sister, though weak, had not caused the sister to incur any expense to defend herself as she was not represented at trial: Costs Reasons at paras. 33-34. He felt the appellant had ultimately raised a "constellation of circumstances" that he believed to be suspicious and, while the trial judge disagreed, this did not constitute conduct deserving of rebuke.
- [73] In this Court, the situation is different. The appellant has chosen to raise the same arguments as to capacity that were deemed to be clearly weak by the summary trial judge. I agree with the respondent that he has generally failed to identify any error on the part of the trial judge and simply seeks to re-litigate his arguments.
- [74] In *Kellogg v. Rouches*, 2019 BCCA 90 at para. 15, the Court stated that this Court will only look to proceedings in the Court of Appeal when assessing special costs, not the Supreme Court. In his conduct of this appeal, the appellant has made a number of factual mischaracterizations on serious issues, including reviving the baseless argument that someone other than the witnesses might have printed their names and initials on the Will. This marks the second attempt to resile from a fact that was established by evidence well before the hearing and conceded by the appellant in his pleadings. This could constitute conduct worthy of rebuke, in my view, when coupled with the other mischaracterizations and the appellant's approach to appealing the capacity issue.
- [75] Moreover, with respect to the order for costs made by the trial judge, I would note that the appellant's arguments are generally baseless and misconceive the legal standard to be applied. The argument that the Executor should be made to bear the costs of the rectification personally is without foundation in this case and the trial judge classified it as an attempt to advance a professional negligence claim under the guise of an argument about costs: Costs Reasons at paras. 18-19. Yet the appellant advances the same argument on appeal. While lack of merit is not itself a basis for special costs, the appellant's approach to the ground of appeal concerning costs is a marker of his overall conduct in the litigation. He has forced the respondents to expend time and resources to answer claims for which he has provided no support. The modern approach to costs in estate litigation recognizes the need to protect estates from depletion by unwarranted litigation: *Hollander* at para. 39, citing *McDougald Estate v. Gooderham* (2005), 255 D.L.R. (4th) 435 (O.N.C.A.). It is not reasonable that the estate should be further depleted as a result of the appellant's conduct.

- [76] The respondents have identified a number of reasons for a special costs award against the appellant. However, in my view, while close to the line, this is not a case to award special costs of the appeal against him. The appeal was not entirely without merit, as it raised the issue whether the printed names and initials of the two witnesses could suffice as a subscription within the meaning of s. 4 of the Wills Act.
- [77] In my view, the proper costs order on appeal is to require the appellant to bear his own costs of the appeal. He will pay the respondents' ordinary costs into the estate. The respondents are entitled to special costs payable from the estate.
- [78] FENLON J.A.: I agree.
- [79] DEWITT-VAN OOSTEN J.A.: I agree.
- [80] STROMBERG-STEIN J.A.: The appeal is dismissed. The appellant will bear his own costs of the appeal. He will pay the respondents' ordinary costs into the estate. The respondents are entitled to special costs payable from the estate.

"The Honourable Madam Justice Stromberg-Stein"

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Prepared on 29 October 2026 · Esheria