

CANADA / JUDGMENT

## Cooper Estate

2024 BCSC 218

### COURT

Supreme Court of British Columbia

### DECIDED

9 February 2024

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2024 BCSC 218 Cooper Estate

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cooper Estate,

2024 BCSC 218

Date: 20240209

Docket: P231014

Registry: Vancouver

In the Matter of the Estate of Donald William Cooper, Deceased

- and -

Docket: S248864

Registry: New Westminster

In the Matter of the Estate of Donald William Cooper, Deceased

Before: The Honourable Justice Majawa

Reasons for Judgment

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No other appearances

Place and Dates of Hearing:

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August 21-23, 2023

Place and Date of Judgment:

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## OVERVIEW

- [1] This matter involves two petition proceedings concerning the estate of the late Donald Cooper (the "Deceased"). One proceeding was filed in the New Westminster registry by the Deceased's brother, Grant Cooper. The other proceeding was filed in the Vancouver registry by Beverly Wighton. Ms. Wighton alleges that she was the Deceased's common law spouse at the time of his death. The matters in each proceeding are inextricably linked and the

hearing proceeded on the basis that the affidavit material filed in each proceeding could be used in the other.

- [2] The overarching issue that this Court must decide is which, if any, of the Deceased's testamentary documents govern the disposition of his estate. The legal status of the relationship between the Deceased and Ms. Wighton at the date of the Deceased's death is also at issue in the petition proceedings. However, counsel for all parties have agreed that this Court need not decide now on whether Ms. Wighton was the Deceased's spouse. Rather, that issue will be the subject of future court proceedings given that my determination of the overarching issue will have a significant bearing on the nature of any subsequent proceedings involving the Deceased's estate, as well as on the parties entitled to participate in those proceedings. Similarly, the parties agree that the issuance of a grant of probate or administration will be the subject of future proceedings.
- [3] The Deceased died on July 13, 2022, and he left two testamentary documents. The first was a will created in 1989 (the "1989 Will"). There is no issue that the 1989 Will complies with the formal requirements of the Wills Estates and Succession Act, S.B.C. 2009, c. 13 [WESA]. The second testamentary document was created in 2017 by the Deceased's law partner (the "2017 Draft Will"). There is no issue that the 2017 Draft Will does not comply with the formal requirements of s. 37 of WESA. The issue then is whether the curative provisions found in s. 58 of WESA operate to revoke the 1989 Will or validate the 2017 Draft Will in whole or in part.
- [4] Ms. Wighton seeks to have the revocation provision found in the 2017 Draft Will cured pursuant to s. 58 of WESA. The result of this position is that the Deceased's estate would pass on an intestacy.
- [5] Grant Cooper seeks to have the 2017 Draft Will cured in its entirety pursuant to s. 58 of WESA such that it would govern the disposition of the estate. Alternatively, he seeks the same relief as Ms. Wighton (i.e. that the 2017 Draft Will revoked the 1989 Will). Grant Cooper also advanced two further alternatives arguments in the event that neither his nor Ms. Wighton's principal positions are successful and the 1989 Will is found to be the document that governs the Deceased's estate. The first alternative argument is that there was a mistake in the 1989 Will worthy of rectification pursuant to s. 59 of WESA. The second alternative argument is that certain bequests made in the 1989 Will are revoked pursuant to a novel interpretation of s. 56(2) of WESA.
- [6] The respondents to the petitions are Jason and Todd Mikolas. They are the Deceased's adult stepchildren from a marriage that ended over twenty years ago. They are the residual beneficiaries of the Deceased's sizeable estate under the 1989 Will. They ask this Court to find that the 1989 Will be the proper document to govern the disposition of the Deceased's estate.

- [7] For the reasons that follow, I have determined that s. 58 of WESA operates to cure the revocation clause in the 2017 Draft Will such that the 1989 Will is revoked. I have also determined that s. 58 cannot go so far as to cure the 2017 Draft Will in its entirety. Consequently, the Deceased's estate will pass on an intestacy.
- [8] Given that many of the individuals involved share the same last names, I will refer to some of them by their first names only to avoid confusion. I mean no disrespect in doing so.

## BACKGROUND FACTS

- [9] The Deceased was 69 years of age at the time of his passing on July 13, 2022, and was a retired lawyer. The Deceased was not married at the time of his passing, and had no natural children.
- [10] Grant Cooper ("Grant") is 72 years of age and is the Deceased's older brother.
- [11] Kathryn Reimer is the Deceased's ex-wife. The Deceased married Ms. Reimer in 1989. Ms. Reimer had two sons from a previous relationship, Jason and Todd Mikolas ("Jason" and "Todd"). At the time of their marriage, Jason and Todd were teenagers. Approximately six months after their marriage, the Deceased and Ms. Reimer each made wills.
- [12] In the 1989 Will, the Deceased appointed Ms. Reimer as executor and trustee of the estate. Grant was appointed as alternate executor and trustee of the estate. In the event that Ms. Reimer pre-deceased the Deceased, a number of cash gifts were made to members of the Deceased's family including Grant, his sister Karen Cooper ("Karen"), Grant's children, and the Deceased's mother.
- [13] The residue of the Deceased's estate was gifted to Ms. Reimer, or in the alternative, to Jason and Todd (to be held in trust until they reach the age of 24). If the gift of the residue to Ms. Reimer, Jason and Todd failed, the residue of the Deceased's estate was to be shared equally between Grant and Karen. Karen died before the Deceased.
- [14] The Deceased did not adopt Jason and Todd. The Deceased's marriage with Ms. Reimer broke down in the late 1990s/early 2000s. As I understand it, the two separated in 2001 and the divorce was finalized in or around 2004. By all accounts, the divorce was acrimonious. By operation of s. 56 of WESA, when the Deceased and Ms. Reimer ceased to be spouses, her appointment as executor and the testamentary gifts provided to her were revoked. Consequently, if the 1989 Will is still valid, then Grant is now the executor of the Deceased's estate. Furthermore, under a conventional interpretation of the 1989 Will, the residue of the Deceased's estate would pass to Jason and Todd.
- [15] There is some dispute about the nature of the Deceased's relationship with Jason and Todd during the time that he was married to Ms. Reimer. A number of the Deceased's friends have provided affidavits in which they say that the Deceased routinely described his relationship with Jason and Todd as being difficult and that the views he expressed about Jason and Todd were almost universally negative during the time that he and Ms. Reimer were together.

Counsel for Ms. Wighton and Grant suggest that the Deceased may not have ever considered Jason and Todd to be his children. On the other hand, Ms. Reimer and Jason describe the relationship as being a typical family relationship in which the Deceased cared a great deal about Jason and Todd. No explanation was provided for why Todd did not provide any evidence in these proceedings.

- [16] In my view, it is not necessary to resolve this conflict in the evidence. That is because it is uncontroverted that the Deceased had no direct contact whatsoever with Jason and Todd between 2002 (the time while he and Ms. Reimer were separating), and the Deceased's death in 2022. As will be discussed later, I find this fact to be relevant to the Deceased's state of mind at the time the 2017 Draft Will was made.
- [17] Ms. Wighton alleges that she and the Deceased began a romantic relationship in or around 2004. Ms. Wighton was a colleague of the Deceased at the law firm at which he practiced. Ms. Wighton says that at the time she began her relationship with the Deceased, she was married to another man with whom she had a child. Ms. Wighton says that the complexities of her relationship with the Deceased led them to not openly broadcast their relationship status, particularly to other members of the law firm.
- [18] It does not appear to be controversial that Ms. Wighton and the Deceased had a romantic relationship of some sort. However, the legal nature of that relationship is very much disputed. As referenced earlier, the parties have agreed that no conclusion should be made at this time as to the legal status of their relationship at the time of the Deceased's death. I have intentionally limited my discussion of Ms. Wighton's and the Deceased's relationship so as to not suggest that the Court has come to any conclusions about its legal status. Nothing in these Reasons should be taken as being indicative of the Court's disposition with respect to the legal status of that relationship and I make no findings in that respect.
- [19] In February 2017, the Deceased suffered a stroke at the age of 63. Approximately one week later, the Deceased return to work at the law firm. Sometime relatively shortly after returning to work, the Deceased had a conversation with his friend and colleague, Kerry Shepard. They discussed the Deceased executing a power of attorney and representation agreement. The Deceased asked Kerry to pass along some information to Kerry's spouse, Mary Hamilton, K.C., who was also a colleague and lawyer, and at that time, practiced at the same firm as the Deceased and Mr. Shepard. Ms. Hamilton has more than 35 years practice as a solicitor in wills and estates planning.
- [20] Mr. Shepard passed the information on to Ms. Hamilton as the Deceased had requested and Ms. Hamilton arranged for the power of attorney and representation agreement to be drafted by a paralegal who then sent drafts to the Deceased. When Ms. Hamilton dropped by the Deceased's office on March 27, 2017, she attests that the Deceased confirmed he approved the terms of the draft power of attorney and representation agreement. The two discussed his estate planning and Ms. Hamilton encouraged him to consider updating his will. Ms. Hamilton says that the Deceased advised her that he wanted a new will.

- [21] During the discussion on March 27, the Deceased told Ms. Hamilton that he wanted Grant to be the executor of his new will and that he would consider who would be the backup executor. The two also discussed how the Deceased might want to divide his estate and among whom. The Deceased told Ms. Hamilton that he "wished to consider dividing his estate in some fashion among" a number of beneficiaries including his cousin, Grant, Grant's ex-wife Wendy Cooper, Grant and Wendy's children (i.e. the Deceased's niece and nephew), Jason's ex-spouse Michele Gammie and her two children, and the Lions Gate Hospital. Although the Deceased did not maintain a relationship with Jason and Todd after 2002, he did maintain a relationship with Ms. Gammie and her children.
- [22] In light of Ms. Wighton's allegations in respect of her relationship with the Deceased, it is somewhat notable that the list of beneficiaries discussed at the March 2017 meeting did not include Ms. Wighton. Ms. Wighton and Ms. Hamilton suggest that this can be explained by the fact that no one at the law firm knew about the relationship at that time, and that the Deceased did not want others at the firm to know given the value he placed on personal privacy. I include this reference merely to provide one explanation for what might seem to be an oversight. Of course, the other explanation is that the Deceased did not intend to benefit Ms. Wighton. Given that the nature of their relationship will be the subject of a future proceeding, I make no finding in respect of either possibility.
- [23] While the Deceased suggested some beneficiaries, Ms. Hamilton attests that the Deceased did not tell her how he wished to divide his estate among the beneficiaries that were discussed. However, Ms. Hamilton does attest that the Deceased clearly indicated to her that he no longer wanted his estate to go by way of the 1989 Will and that he wanted a new will. Ms. Wighton provides evidence that is consistent with Ms. Hamilton's: Ms. Wighton attests that, following his stroke, she and the Deceased had conversations in which he told her he was discussing updating his will with Ms. Hamilton (whom Ms. Wighton also knew given they worked at the same law firm). Ms. Wighton says that the Deceased agreed that the 1989 Will, which following his divorce left everything to his ex-wife's children, did not reflect his current wishes and he wanted to update his plans.
- [24] On March 28, 2017, Ms. Hamilton emailed one of the firm's paralegals with instructions to prepare a draft will for the Deceased based on the discussion they had the previous day. The paralegal prepared the 2017 Draft Will which was dated March 29, 2017, in accordance with Ms. Hamilton's instructions. Ms. Hamilton hand-delivered the 2017 Draft Will to the Deceased on or about March 30, 2017. Having not heard from the Deceased, the paralegal emailed the Deceased a further copy of the 2017 Draft Will on May 24, 2017, as Ms. Hamilton requested.
- [25] The 2017 Draft Will was marked "Draft" on each page and includes the statement "For Discussion Purposes Only" on the top right-hand corner of the first page. The first clause of the document reads

#### Revocation of Prior Wills

1. I revoke all my prior wills and codicils.

[26] Consistent with Ms. Hamilton's notes and instructions to the paralegal, the 2017 Draft Will contains a number of placeholders given that the Deceased had not provided Ms. Hamilton with certain information. For example, there is a placeholder for the backup executor as indicated by the entry of the following text: "<relationship> <Full Name>". An entry follows as a "Note to draft" asking the Deceased to advise the drafters who he wants to appoint as an alternate trustee and suggests a couple of individuals.

[27] The individuals discussed as beneficiaries during the March 27 meeting are listed by name in the 2017 Draft Will as beneficiaries of the residue of the estate. However, placeholders are used in this section as well. Portions of the relevant section read as follows:

#### Residue of the Estate

(f) to divide the residue of my estate into <number> of equal shares, and:

A list of beneficiaries follows and each beneficiaries' share is prefaced with the same placeholder where specific shares would usually be: "give <number> share to "

[28] On June 30, 2017, Ms. Hamilton left the law firm at which she practiced with the Deceased and moved to a different firm. The Deceased's estate planning was not transferred to Ms. Hamilton at her new firm and she had no further contact with the Deceased regarding his estate planning after this time (although they continued to see each other socially).

[29] It is not clear why but it is undisputed that the Deceased did not provide any further instructions to anyone in respect of the 2017 Draft Will and he did not sign the 2017 Draft Will.

[30] On July 10, 2022, the Deceased suffered a second stroke while he and Ms. Wighton were at a home he owned in Penticton. He died on July 13, 2022. After his death, the Deceased's niece located a copy of the 2017 Draft Will at his residence in North Vancouver.

## CURATIVE PROVISIONS OF SECTION 58 OF WESA

[31] Before 2014, the Courts of British Columbia had little ability to correct mistakes or forgive oversights in the execution, alteration, revival, or revocation of a testamentary document. As a result of this strict compliance regime, some testators' wishes were thwarted, sometimes due to a small oversight during the execution of a testamentary document: Mark S. Weintraub and Amy A. Mortimore, *British Columbia Estate Litigation*, (Toronto: LexisNexis Canada, 2020) at 71. This changed with the coming into force of WESA in March 2014, and in particular with the enactment of s. 58.

[32] In *Hadley Estate (Re)*, 2017 BCCA 311 [Hadley], the Court of Appeal described the underlying purpose of s. 58 of WESA as follows:

- [1] On March 31, 2014, the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 came into force in British Columbia. Known as the WESA, it represents a significant reform of this province's wills and estate administration law. One of its most far-reaching provisions is s. 58, which confers a broad discretion on the court to relieve against the consequences of non-compliance with testamentary formalities. The new curative power is a marked departure from the traditional principles of formalism that previously governed the creation, alteration and revocation of wills in British Columbia.
- [33] British Columbia was a "strict compliance" jurisdiction prior to passage of the WESA. Under s. 4 of the Wills Act, R.S.B.C. 1996, c. 489, testators were obliged to comply strictly with execution and attestation formalities for creating a will for it to be valid. The same was true for revoking, altering or reviving a will: Wills Act, ss. 14, 17, 18. These formal requirements sometimes led to a will-maker's testamentary intentions being defeated for no good reason. As a result, the British Columbia Law Institute recommended the introduction of a dispensing power to relieve against the consequences of non-compliance with testamentary formalities as part of a general reform of wills and estate administration law: BCLI, Wills, Estates and Succession: A Modern Legal Framework (BCLI Report No. 45, June 2006) at xiv.
- [34] Section 58 of the WESA is the legislative response to the BCLI recommendation. Remedial in nature, it confers a broad discretion on the court to order that a "record or document or writing or marking on a will or document" be fully effective, despite non-compliance with the statutory requirements. Although s. 58 cannot be used to uphold a will that is substantively invalid, it permits the court to cure issues of formal invalidity in prescribed circumstances.

[Emphasis added.]

- [33] The prescribed circumstances in which the court can cure non-conforming wills are set out in s. 58:

#### Court order curing deficiencies

58 (1) In this section, "record" includes data that

- (a) is recorded or stored electronically,
  - (b) can be read by a person, and
  - (c) is capable of reproduction in a visible form.
- (2) On application, the court may make an order under subsection (3) if the court determines that a record, document or writing or marking on a will or document represents
- (a) the testamentary intentions of a deceased person,
  - (b) the intention of a deceased person to revoke, alter or revive a will or testamentary disposition of the deceased person, or

- (c) the intention of a deceased person to revoke, alter or revive a testamentary disposition contained in a document other than a will.
- (3) Even though the making, revocation, alteration or revival of a will does not comply with this Act, the court may, as the circumstances require, order that a record or document or writing or marking on a will or document be fully effective as though it had been made
  - (a) as the will or part of the will of the deceased person,
  - (b) as a revocation, alteration or revival of a will of the deceased person, or
  - (c) as the testamentary intention of the deceased person.

[Emphasis added].

- [34] Put simply, the relevant parts of s. 58(2) of WESA permits the court to make an order that a record or marking on a document represents either the testamentary intentions of a deceased person, or that it represents the deceased's persons intention to revoke a previous will, or gift in previous will, in whole or in part. Pursuant to s. 58(3), the court has the discretion to order that same record or document to be fully effective as a will, or as a revocation or alteration of a previous will, even though it does not comply with the provisions in WESA respecting the making, revocation, or alteration of a will.
- [35] In Hadley Estate at para. 35, the Court explained that under s. 58 of WESA the Court must be satisfied that a document represents the testamentary intentions of the deceased but stated that there is no "minimum level of execution or other formality for a testamentary document to be found fully effective".
- [36] At para. 37, the Court explained that in most cases, the material time for determining a deceased's testamentary intentions in the context of a s. 58 application is the time when the non-compliant document in question was created. Thus, the Court must determine, on a balance of probabilities, whether a document that does not conform with the statutory requirements represents a deceased's testamentary intention at the time the document in question was created: Hadley Estate at para. 40.
- [37] As this Court clearly set out in Young Estate (Re), 2015 BCSC 182, paras. 34-37 and Hubschi Estate (Re), 2019 BCSC 2040, at para. 31, the party seeking to have a non-compliant document cured by s. 58 must satisfy the Court, on a balance of probabilities that:
  - a) the testamentary document or portion thereof is authentic; and
  - b) the testamentary document or portion thereof represents a deceased person's fixed and final testamentary intentions.
- [38] Determining a deceased's testamentary intention is a highly contextualized exercise. When considering an application under s. 58 of WESA, extrinsic evidence of events that occurred before, when, and after the document was created are admissible. That is because the Court will benefit from learning all that it can about all of the circumstances that could shed light

on a deceased's state of mind and their understanding and intention with respect to the non-compliant document: Hadley Estate at para. 40, and Skopyk Estate, 2017 BCSC 2335 at para. 23.

[39] In Young Estate, Justice Dickson (as she then was) discussed the concept of "testamentary intention" as distinct from a person's mere expression of wishes, and referred to a non-exclusive list of factors that is to be considered with respect to determining a deceased's final testamentary intentions in a non-compliant record:

[35] [T]estamentary 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.

[40] To grant either Ms. Wighton's or Grant's applications, I must be satisfied that the 2017 Draft Will, or parts of it, represent the Deceased's full and final testamentary intention and can be saved by s. 58. If only the revocation clause meets this test, then the 1989 Will is revoked and the Deceased died intestate. In that circumstance, who will administer the estate and how it will be distributed will be the subject of future court proceedings. If the 2017 Draft Will can meet the test and be saved by s. 58 in its entirety, then the will would appoint Grant as executor and the estate would be distributed pursuant to the construction of its terms.

#### THE 2017 DRAFT WILL REVOKED THE 1989 WILL

[41] Sections 37 and 55, respectively, of WESA provide for when a will is valid and when a will or part of a will is a revoked:

##### How to make a valid will

37 (1) To be valid, a will must be

- (a) in writing,
- (b) signed at its end by the will-maker, or the signature at the end must be acknowledged by the will-maker as the will-maker's signature, in the presence of 2 or more witnesses present at the same time, and
- (c) signed by 2 or more of the witnesses in the presence of the will-maker.

(2) A will that does not comply with subsection (1) is invalid unless

- (a) the court orders it to be effective as a will under section 58 [court order curing deficiencies],
- (b) it is a will recognized as valid under section 80 [validity of wills made in accordance with other laws], or

- (c) it is valid under another provision of this Act.

.

### How to revoke a will

55 (1) A will other than an electronic will or a part of a will other than an electronic will is revoked only in one or more of the following circumstances:

- (a) by another will made by the will-maker in accordance with this Act;
- (b) by a written declaration of the will-maker that revokes all or part of a will made in accordance with section 37 [how to make a valid will];
- (c) by the will-maker, or a person in the presence of the will-maker and by the will-maker's direction, burning, tearing or destroying all or part of the will in some manner with the intention of revoking all or part of it;
- (d) by any other act of the will-maker, or another person in the presence of the will-maker and by the will-maker's direction, if the court determines under section 58 that
  - (i) the consequence of the act of the will-maker or the other person is apparent on the face of the will, and
  - (ii) the act was done with the intent of the will-maker to revoke the will in whole or in part.
- (2) A will is not revoked in whole or in part by presuming an intention to revoke it because of a change in circumstances.

[42] Ms. Wighton submits that the curative provisions of s. 58, as discussed above, can operate to cure a portion of a possible testamentary record - in this case the clause in the 2017 Draft Will that revokes the Deceased's previous will - independently from the rest of the 2017 Draft Will. While Grant's primary position is that s. 58 operates to cure the 2017 Draft Will in its entirety, he supports Ms. Wighton's position as his first alternative.

[43] It appears that Jason and Todd take issue with the proposition that s. 58 permits this Court to cure part of a document independently from the remainder, such as the revocation clause in the 2017 Draft Will. If the Court is permitted to do this, they take the position that in the circumstances of this case, the revocation clause found in the 2017 Draft Will cannot be cured by s. 58 because the evidence does not support a conclusion that it was the Deceased's fixed and final intention to revoke the 1989 Will. Furthermore, they argue that curing the revocation clause in the manner proposed by Ms. Wighton would lead to a flood of applications to revoke a previous will simply on the basis that a more recent draft will had been prepared but not properly executed.

Section 58 Permits a Part of a Contested Document to be Cured Separately from the Rest of the Document

- [44] In their written and oral submissions, Jason and Todd suggested that I should not follow the decision in *Horton v. Bruce*, 2017 BCSC 712, where Justice Maisonville of this Court cured only the revocation clause found in a non-compliant will. As I understand their position, they suggest that *Horton* should not stand as good authority that only a single clause in a disputed or draft will can be cured separate and apart from the rest of the document. I disagree.
- [45] In *Horton*, the deceased and her spouse (who subsequently pre-deceased the testator) had made mirror spousal wills in 1993 leaving their respective estates to one another, with the survivor leaving varying shares to different beneficiaries. In 2011, the surviving spouse began preparing a new draft of her will because many of the beneficiaries in her 1993 will had either pre-deceased her or were not in need of financial support. The 2011 draft will made bequests to different beneficiaries than the 1993 will. The Court considered whether s. 58(3) provided it with jurisdiction to make an order that the revocation clause could be cured separate and apart from the dispositive provisions.
- [46] Justice Maisonville conducted a review of the legislative scheme and the relevant authorities regarding statutory interpretation and concluded, at para. 62, that "the legislature clearly contemplated that only a part of a document or a writing could be cured" by s. 58 of WESA.
- [47] Jason and Todd suggest that Maisonville J.'s conclusion that only a part of a document can be cured by s. 58 should not be followed because the application before the judge was unopposed, and therefore, the matter was not fully considered by the Court. Thus, they say that the decision in *Horton* should not be followed pursuant to the authority of the Supreme Court of Canada's decision in *R. v. Sullivan*, 2022 SCC 19. I disagree. In my view, the decision in *Horton* does not fall within the very narrow circumstances in which it is appropriate to depart from *stare decisis*.
- [48] In *Sullivan*, the Supreme Court of Canada held that trial courts should only depart from the principle of *stare decisis* in respect of decisions issued by a court of coordinate jurisdiction in very narrow circumstances. Jason and Todd do not suggest that the first two circumstances discussed in *Sullivan* at para. 75 are engaged in this case (i.e. that the rationale of the earlier decision has been undermined by subsequent appellate decisions or that the earlier decision was reached through carelessness or inadvertence). Jason and Todd rely on the third circumstance identified in *Sullivan*: that the decision in *Horton* was not "fully considered."
- [49] However, Jason and Todd's conception of what is meant by "fully considered" is not supported by the Supreme Court's decision in *Sullivan*. The Court described what it means by "not fully considered" at para. 77:

a judge may depart where the exigencies of the trial required an immediate decision without the opportunity to consult authority fully and thus the decision was not fully considered. An unconsidered judgment is not binding on other judges [Citations omitted].

- [50] One cannot conclude that this Court's decision in *Horton* was not "fully considered" simply because it was unopposed. First, the decision was provided nearly one month following the trial, and thus, there is no indication that the decision was made in exigent circumstances without the opportunity to consult authority. In any event, *Maisonville J.* obviously did consult authority. This is evident by her thorough review of the relevant jurisprudence and legislative provisions in respect of WESA and her review of the appropriate principles of statutory interpretation as set out by the Supreme Court of Canada in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42. Despite the fact that the matter was unopposed (as many matters heard by this court are), it is clear that *Maisonville J.* fully considered the matter when she concluded that s. 58 provides this Court with the ability to cure part of a document separate from the rest.
- [51] For these reasons, I do not agree with Jason and Todd that Ms. Wighton's argument that the revocation clause may be severed from the remainder of the 2017 Draft Will is without merit. I see no reason why I should not follow *Maisonville J.*'s well reasoned conclusion to the contrary.

## Analysis

- [52] Pursuant to the test set out in the authorities discussed above, Ms. Wighton, (and Grant pursuant to his first alternative position), have the burden of proving that the revocation clause found in the 2017 Draft Will should be cured by s. 58. To do so, they must satisfy the Court, on a balance of probabilities that:
- a) the 2017 Draft Will, or portion thereof is authentic; and
  - b) at the time the 2017 Draft Will was created, the Deceased had formed a fixed and final intention that he did not want the 1989 Will to govern the distribution of his estate.
- [53] In my view, Ms. Wighton and Grant have satisfied this test and I have decided to exercise my discretion to give effect to the revocation clause found in the 2017 Draft Will such that the 1989 Will is revoked.

## The 2017 Draft Will is Authentic

- [54] Jason and Todd do not contest that the 2017 Draft Will was prepared for and emailed to the Deceased, and that it was provided in hard copy to the Deceased by Ms. Hamilton. Nonetheless, Jason and Todd dispute that a document in the nature of the 2017 Draft Will can be "authentic" as required by the authorities referenced above. They say this because the words contained in the 2017 Draft Will are not the words of the Deceased. They further submit that there is no evidence that the Deceased read the 2017 Draft Will or approved of its contents.

- [55] Jason and Todd point to the fact that the Deceased did not sign the 2017 Draft Will, that it was not in his handwriting and nor was it typed by him. These, Jason and Todd say, are hallmarks of authenticity that are missing in this case. They rely on *Quinn Estate*, 2018 BCSC 365, in support of their position that the 2017 Draft Will is so far removed from the formal requirements of s. 37 of WESA, which is tethered to the curative provisions of s. 58, that no part of it can be declared a testamentary document.
- [56] In my view, Jason's and Todd's argument confuses the considerations relevant to whether the Deceased had formed a fixed and final intention (which will be considered next) with whether the document itself is authentic. In effect, they argue that there is some minimum requirement of compliance with s. 37 of WESA in order for a document to be capable of being authentic. However, as the Court of Appeal held in *Hadley Estate* at para. 35, there is no "minimum level of execution or other formality for a testamentary document to be found fully effective." If this is the case, then it must be that there is no minimum compliance requirement with s. 37 in order for a document to be authentic.
- [57] Furthermore, the fact that the words of the revocation clause are likely the words of Ms. Hamilton or her paralegal, as opposed to the Deceased's, does not mean that the 2017 Draft Will is not authentic. As Ms. Wighton points out, Jason and Todd's argument on this point implies that if the Deceased had chosen different words, or tried to draft something freehand, it would necessarily be more compelling. While this may be the case in some circumstances, this argument ignores the context and the circumstances of this case: the Deceased was a lawyer and Ms. Hamilton a very experienced wills and estates solicitor, whom, as Ms. Wighton's counsel points out, is the author of a very commonly used set of precedents for estate planning documents in British Columbia. It can be presumed that the Deceased would defer to Ms. Hamilton's expertise in the use of words to manifest his intent. It would be unreasonable to expect the Deceased to try to draft his own will or choose anything other than the revocation clause chosen by Ms. Hamilton.
- [58] Furthermore, upon consideration of the evidence before me, including Ms. Hamilton's affidavits and notes, I have no trouble in concluding that the 2017 Draft Will was prepared on the instructions of the Deceased and represents the instructions he provided to Ms. Hamilton during the March 2017 discussion. While it is true that the 2017 Draft Will was never signed, I do not agree with Jason and Todd that there is no evidence that the Deceased ever read the document. The 2017 Draft Will was hand delivered to him by Ms. Hamilton. It was later emailed to him by Ms. Hamilton's paralegal. It was further brought to his attention in August 2017 when a legal assistant at the firm emailed the Deceased in relation to the work performed on the 2017 Draft Will. Finally, the 2017 Draft Will was found at the Deceased's primary residence among various of his documents and personal effects. With these circumstances in mind, I find that it is open to me to infer that the Deceased likely read the 2017 Draft Will, and I make that inference. Moreover, there is no indication that the Deceased ever said or wrote anything to anyone that would suggest he did not agree that the 2017 Draft Will accurately represented the instructions he provided to Ms. Hamilton.

[59] There is no suggestion that Ms. Hamilton, or anyone else for that matter, concocted the 2017 Draft Will in the absence of the Deceased's instructions. I am satisfied that the 2017 Draft Will is authentic for the purposes of the application of the curative provisions of s. 58 of WESA. If a signature, or some other formality was required in order to find the 2017 Draft Will to be authentic, the applicability of the curative provisions of s. 58 would be severely restricted. Such a restriction is not supported by the words of the legislation nor by the authorities which have interpreted s. 58 as providing this Court with a wide discretion in respect of the curative power provided in WESA.

### **The Deceased's Fixed and Final Intention was to Revoke the 1989 Will**

[60] As discussed above, what occurred before, when, and after the 2017 Draft Will was created is all relevant to determining the Deceased's state of mind at the time the 2017 Draft Will was created: Hadley Estate at para. 40 and Skopyk Estate, 2017 BCSC 2335 at para. 23. Upon consideration of these relevant circumstances, I conclude that it is more likely than not that the Deceased formed a fixed and final intention to revoke the 1989 Will at the time the 2017 Draft Will was created. Thus, the revocation clause in the 2017 Draft Will is representative of the Deceased's testamentary intention.

[61] The 1989 Will was drafted when the Deceased was married to Ms. Reimer and resided with her and her sons from a previous relationship, Jason and Todd. The 1989 Will gifted the residue of the Deceased's estate to Ms. Reimer (his spouse at the time) and, not unusually given that the Deceased had no natural children of his own, if the gift to Ms. Reimer failed, the residue was to go to Ms. Reimer's sons.

[62] In early 2017, the Deceased, having suffered a stroke, turned his mind to updating his estate plan. While the discussion of doing so may have been instigated by Ms. Hamilton, her evidence is clear that it was the Deceased who told her that he wanted a new will. Ms. Hamilton's evidence is that the Deceased clearly indicated to her that he no longer wanted his estate to go by way of the 1989 Will and that he wanted a new will. Ms. Wighton attests to the Deceased telling her substantively the same thing.

[63] The circumstances in existence at the time the Deceased provided the instructions to Ms. Hamilton are consistent with a fixed and final intention to revoke the 1989 Will. By the time that the Deceased provided the instructions to Ms. Hamilton in March 2017, the Deceased was no longer married to Ms. Reimer. They had gone through an acrimonious separation and divorce that began and concluded more 15 to 20 years earlier. Moreover, the Deceased had not had any direct contact whatsoever with either Jason or Todd for approximately 15 years preceding the instructions to create the 2017 Draft Will. The Deceased had even written Jason a letter in 2002 in which he told him that he did not want to see Jason or Todd.

[64] In my view, Ms. Hamilton's evidence of what the Deceased told her is properly admissible in these proceedings under the principled approach to the admissibility of hearsay as discussed by the Supreme Court of Canada in *R. v. Khelawon*, 2006 SCC 57, and the well-

known cases that preceded it. For obvious reasons, hearsay evidence of a deceased individual is often tendered in estate proceedings. Necessity is clearly established by the fact that the maker of the statement is deceased. As Justice Dardi explained in *Harshenin v. Khadikin*, 2015 BCSC 1213 at para. 35, the reliability requirement of the principled approach is determined by examining the circumstances under which that statement was made. If the statement was made in circumstances which "substantially negate" the possibility the declarant was untruthful or mistaken, a circumstantial guarantee of reliability is established.

- [65] The circumstances under which the Deceased told Ms. Hamilton that he wanted a new will and that he no longer wanted the 1989 Will to govern the distribution of his estate are such that a circumstantial guarantee of reliability is established. In addition to the circumstances described above in respect of the relationship, or lack thereof, with Jason and Todd, the Deceased was speaking to Ms. Hamilton, his law partner of many years and a very experienced wills and estates solicitor at a time shortly after he had returned to work following suffering a stroke. Ms. Hamilton's evidence in this respect is uncontested: she was not cross-examined on her affidavits and her evidence is consistent with her notes. On a balance of probabilities, I find that the Deceased made the statements attributed to him by Ms. Hamilton.
- [66] There is nothing in the evidence before me which would persuade me that the Deceased changed his mind in respect of his intention to revoke the 1989 Will between the time the 2017 Draft Will was created and when he died in 2022. Nothing changed with his relationship with Jason and Todd in this period. In fact, the most recent first-hand evidence put forward by Jason and Todd in respect of a relationship with the Deceased was from 2001 - 16 years before the 2017 Draft Will was created and 21 years before he died. It is notable that Todd did not provide an affidavit of his own in response to Ms. Wighton's and Grant's applications. I infer that he did not do so because any evidence he would have tendered would not have assisted his position.
- [67] There is no evidence on the record before me from which it could be concluded that the Deceased had any lingering affection towards Jason and Todd. It is clear that neither Jason nor Todd have directly played any role whatsoever in the Deceased's life since 2002. Although he may not have finalized the dispositive parts of the 2017 Draft Will at the time it was drafted, it is clear from Ms. Hamilton's evidence that neither Jason nor Todd were mentioned nor considered by the Deceased when he provided his instructions to Ms. Hamilton.
- [68] In coming to my conclusion that the Deceased had formed a fixed and final intention to revoke the 1989 Will, I have not simply presumed that the will is revoked because there had been a change in circumstances since the 1989 Will was drafted. To presume as such would be contrary to s. 55(2) of WESA. Rather, I have considered the change in circumstances in respect of the relationship with Jason and Todd as part of the unique constellation of factors that is relevant to determining the Deceased's state of mind in March 2017. As discussed

above, I infer that the Deceased reviewed the 2017 Draft Will, including the revocation clause, and the lack of any evidence suggesting he changed his mind is supportive of him having likely formed a fixed and final intention in March 2017.

- [69] There are many differences between this case and the facts in Horton. This is not surprising considering the highly contextual nature of the s. 58 analysis. That being said, in coming to my conclusion that the Deceased had formed a fixed and final intention, as Maisonville J. did in Horton, I have considered and given weight to the fact that the Deceased requested a lawyer to prepare the 2017 Draft Will with the intention of replacing his former will.
- [70] The situation in this case is very different than the situation in Poulk Estate, 2018 BCSC 1321, which is relied upon by Jason and Todd. In that case, the court found that a draft will did not represent the fixed and final testamentary intentions of the deceased. Unlike the case at hand, the draft will in Poulk was a "fill in the blanks" form that was not completed. The judge found that it was the sister of the deceased who filled in the form and not the deceased himself and there was little evidence that the deceased gave instructions or reviewed and read it as he died very shortly after it was prepared. This was particularly concerning for the judge because the draft appeared to have been completed by a beneficiary and it was also not consistent with his previously expressed intentions. After considering these factors, Justice Church states at para. 43:
- [43] The Will departs from the requirements for validity in s. 37 of WESA to a significant degree. While it is in writing, it does not bear the signature or indeed any handwriting of the deceased or the signatures of two witnesses. The absence of those key requirements for formal validity means that compelling and reliable evidence is required to satisfy this court that the Will represents the testamentary intention of the deceased. In this case, there is no such compelling and reliable evidence and what evidence there is before me falls far short of establishing that the Will is both final and authentic.
- [71] I do not disagree with Church J.'s statement of the law. In my view, this is another way of saying that the farther one gets away from the formalities required by WESA, the more difficult it may be to convince the court that the document represents the deceased's fixed and final intention. However, in my view, and as discussed above, the unique circumstances of this case provide compelling and reliable evidence of the Deceased's fixed and final intention to revoke the 1989 Will.
- [72] As Jason and Todd point out, it is true that if the Deceased intended to revoke the 1989 Will, he could have torn up the 1989 Will and presented the torn pieces to Ms. Hamilton to include in her file, or he could have executed a declaration of revocation. Indeed, these methods are provided for in s. 55 of WESA as ways in which a will may be revoked. However, it is always the case that a deceased could have complied with the provisions and formalities of WESA. If one could rely on a deceased's failure to comply with WESA as a means of defeating a s. 58 application, the entire purpose of s. 58 would be have little meaning.

- [73] I do not agree with Jason and Todd that if it is found that the revocation clause in the 2017 Draft Will in this case can be cured to revoke the 1989 Will, the floodgates will open by calling into question every will made in the province where, subsequent to making a will, a person consulted with a lawyer about changing their will, and where a draft will was produced by the lawyer that included a revocation clause, but no further steps were taken to execute or to advance the draft. I agree with Ms. Wighton that there is no reason that every such draft would be assumed to represent a deceased person's fixed and final testamentary intention.
- [74] In order for such a draft will to be cured pursuant to s. 58 it would have to meet the relatively high threshold discussed in these Reasons: the document would have to be authentic and persuasive evidence would have to exist in order for the Court to conclude that the draft document did in fact represent the deceased's intention. As counsel for Ms. Wighton points out, in a case where, for example, a testator had a history of falling out and later reconciling with a relative who had long been the testator's beneficiary, the presence of a draft will that contemplates revoking an existing will benefiting that relative might carry little weight. Similarly, in a case where witnesses presented even a mixed picture about a testator's feelings towards existing beneficiaries, that could be enough to raise doubts about the finality of a testator's desire to revoke the current will. Those factors are not present in this case and each case decided under s. 58 is highly dependent upon its particular facts.
- [75] My conclusion that the 2017 Draft Will is cured by s. 58 to the extent that it revokes the 1989 Will results in the Deceased's estate passing on an intestacy. While it is true that the law favours constructions that avoid intestacy (for example see *Re: The Estate of Lorne A. Campbell*, 2005 BCSC 1561 at para. 49), this presumption does not operate to bar this result in this case. This is because the presumption against intestacy applies to the construction of a will where the court is interpreting a will in circumstances where ambiguity is present. I have been provided with no authority which would support the application of the presumption when the court is considering the validity of a particular testamentary document, or to the application of the curing provisions of s. 58 of WESA. As demonstrated by this Court's decision in *Horton*, the result of an intestacy is not a barrier to the application of a s. 58 to cure a revocation clause in a draft will.

## THE 2017 DRAFT WILL DOES NOT OPERATE TO DISTRIBUTE THE ESTATE

- [76] Although I have found that the Deceased had likely formed a fixed and final intention to revoke the 1989 Will at the time the 2017 Draft Will was created, I do not come to the same conclusion with respect to the validity of the 2017 Draft Will in its entirety. In my view, the dispositive provisions of the 2017 Draft Will cannot be cured by s. 58 of WESA.

- [77] Grant's primary position is that s. 58 can cure the deficiencies in the 2017 Draft Will such that it should operate to govern the disposition of the Deceased's estate. If successful on this position, Grant would likely be the executor of the estate and the residue would be split six or seven ways amongst a number of the Deceased's family members. Neither Jason, Todd, nor Ms. Wighton are provided for in the 2017 Draft Will.
- [78] Ms. Wighton is joined by Jason and Todd in opposing the relief sought by Grant. They are all of the view that the 2017 Draft Will does not represent the Deceased's fixed and final intentions with respect to the distributive clauses found therein, and thus, s. 58 can not operate to cure the 2017 Draft Will. As discussed above, Ms. Wighton and Grant part ways with respect to their positions on whether the 2017 Draft Will can operate to revoke the 1989 Will.

## Analysis

- [79] The 2017 Draft Will is neither signed by the Deceased, nor is it witnessed by anyone. Thus, it does not conform to s. 37(1)(b) or (c) of WESA. As discussed above, s. 58 of WESA confers discretion on the court to relieve against the consequences of non-compliance if the 2017 Draft Will is found to be both authentic and representative of the Deceased's fixed and final intentions.
- [80] I have already determined that the 2017 Draft Will is authentic for the purposes of s. 58. However, while I am satisfied that the 2017 Draft Will represents the Deceased's fixed and final intention to revoke the 1989 Will, I am not satisfied that the Deceased had made up his mind of how he wished to distribute his estate at the material time.
- [81] As discussed above, Ms. Hamilton's evidence with respect to the Deceased having determined that he wanted to revoke the 1989 Will at the time the 2017 Draft Will was prepared is unequivocal. Ms. Hamilton's evidence in respect of the finality of the Deceased's intentions in regards to the specific beneficiaries, the shares that each would be entitled to, and the overall way in which the Deceased intended to distribute his estate is also unequivocal. However, in the latter, the evidence is unequivocal in the sense that the Deceased had not yet decided these crucial matters when the 2017 Draft Will was created. Indeed, there is little, if any, evidence to support a finding that the Deceased had formed a fixed and final intention in this respect.
- [82] The clause addressing the residue of the estate in the 2017 Draft Will reads: "to divide the residue of my estate into <number> equal shares". The following individuals are then listed as beneficiaries of the residue of the estate:
- a) Grant. The Deceased and Grant had a close brotherly relationship and spoke with each other frequently.
  - b) Wendy Cooper. Ms. Cooper is Grant's former wife with whom the Deceased maintained a close relationship after she and Grant separated in 1997.

- c) Jessica Cooper. Jessica is Grant and Ms. Cooper's daughter (the Deceased's niece). Jessica and the Deceased had a close relationship: they spent time together regularly and the Deceased played a role in many of the milestones of Jessica's life.
  - d) Kurtis Cooper. Kurtis is Grant and Ms. Cooper's son (the Deceased's nephew). The Deceased and Kurtis had a close relationship and spent time together regularly.
  - e) Michelle Gammie. Ms. Gammie is Jason's ex-spouse. Despite not having a continued relationship with Jason and Todd, the Deceased maintained a close relationship with Ms. Gammie and her children (Misha and Matthew) following the Deceased's divorce from Ms. Reimer.
  - f) Misha Mikolas and Matthew Mikolas are Ms. Gammie's and Jason's children. Jessica attests that the Deceased was very fond of Matthew and Misha, and maintained a relationship with them up until the date of his death. Jessica, Misha, and Matthew say that the Deceased would refer to Misha and Matthew as his grandchildren.
- [83] Given the Deceased's life circumstances in or around March 2017, and the nature of his family relationships, I agree with Grant that it makes sense that the Deceased wanted to provide for the individual beneficiaries listed in the 2017 Draft Will: the Deceased was divorced from his former spouse and no longer had a relationship with his former step-children, Jason and Todd. Conversely, those named in the 2017 Draft Will are those who the Deceased had a close relationship with at the time the document was created up until the date of his death. It may also make sense that the Deceased considered benefiting Lions Gate Hospital as that is where he was treated for his first stroke shortly before the 2017 Draft Will was created. However, these facts in and of themselves are not enough to prove that the Deceased had formed a fixed and final intention in this respect.
- [84] While each the above individuals are listed by name, no specific share is attributed to any of them. Rather, each individual's name is preceded by the entry "give <number> shares to". The 2017 Draft Will also provides for a cash gift to the Deceased's cousin and a gift to Lions Gate Hospital. No amount is specified for either of these gifts and a note is included in the draft asking the Deceased how much he wanted to provide and to clarify if he wanted his cousin to receive a cash gift and/or a share of the residue of the estate.
- [85] In the absence of evidence to the contrary, the blanks in the Draft 2017 Will are a strong indication that the Deceased had not yet formed a fixed and final intention with respect to the distribution of his estate. I agree with Ms. Wighton and Jason and Todd that there is no evidence that would support a contrary conclusion.
- [86] In support of his position that the entirety of the 2017 Draft Will can be cured by s. 58, Grant points to the following:
- a) the document is entitled "Last Will and Testament";
  - b) the Deceased provided the contents present in the Draft to his lawyer;

- c) the 2017 Draft Will appoints his brother as an executor; and
  - d) the contents of, and dispositions in, the document are rational based on the Deceased's personal relationships with those named therein.
- [87] While I agree with Grant that the beneficiaries listed in the 2017 Draft Will are rational based on the circumstances at the time, I do not see how the remaining factors could be seen to support a conclusion that the Deceased had formed a fixed and final intention with respect to the beneficiaries and distribution of the estate. In my view, none of the first three items listed above provide an evidentiary basis that leads to the finding sought by Grant. Rather, the items listed are merely factors that are likely present in all draft wills prepared by a solicitor on behalf of a client, irrespective of whether the deceased had definitively made up their mind.
- [88] On the other hand, Ms. Hamilton's evidence is unequivocal that the Deceased neither determined the identity of the beneficiaries with any finality nor had he determined what, if any, gift, or what type of gift (cash; share of residue, etc.) was appropriate to make to any of them. Ms. Hamilton attests that:
- a) The Deceased told her that he wished "to consider dividing his estate in some fashion" among the potential beneficiaries he mentioned.
  - b) The Deceased did not tell her how he wished to divide his estate among those listed. Ms. Hamilton told him that she would prepare a draft and that he would edit the beneficiaries and the proportion of his estate that would be left to each of them and confirm the details of the bequests once he had considered it further.
  - c) She does not specifically recall how settled the Deceased was in his testamentary intentions respecting the distribution of his estate. Ms. Hamilton states that had the Deceased provided her with specific proportions of his estate that he wished to leave to those listed, she would not have referred to dividing the residue into <#> shares. Had she and the Deceased discussed an equal proportion to each she would have instructed her paralegal to include <seven> equal shares in the draft and <one> share to each beneficiary. If any figures had been discussed, even if they were just 'off the top of his head' figures, Ms. Hamilton would have included those figures in the draft.
- [89] The evidence on the record before me is consistent with the ambiguous nature of the dispositive portions of the 2017 Draft Will. I find that the Deceased had not finalized his intentions with respect to the distribution of his estate at the time it was drafted. There is nothing in the evidence that would suggest that his intention changed between then and when the Deceased died in 2022.
- [90] Grant further submitted that the 2017 Draft Will should be cured or interpreted "as if there were no blanks" in the dispositive provisions such that the residue of the estate is to be divided into six or seven equal shares with 1/6 or 1/7 to each of the listed beneficiaries (depending on whether Misha and Matthew were meant to share one of the equal shares or

if each were intended to receive one of the equal shares). I agree with Ms. Wighton that in effect, Grant is asking this Court to simply make up the will. There is no evidentiary foundation for such a disposition. Grant points to nothing in the evidentiary record that would support a finding that the Deceased made any determination as to the distribution, even in a fleeting manner, much less a fixed and final determination. In fact, as discussed above, Ms. Hamilton's uncontroverted evidence is directly contrary to such a conclusion. Furthermore, Grant provides no suggestion as to how this Court would determine the cash gifts to Lions Gate Hospital or to the Deceased's cousin who are listed in the 2017 Draft Will, and who are also presumably "rational" beneficiaries. These possible beneficiaries would stand to receiving nothing under Grant's position despite the fact that they are provided for in the 2017 Draft Will with the same amount of specificity, or lack thereof, as the other beneficiaries.

- [91] Grant points to a number of decisions of this Court in support of his position that the 2017 Draft Will can be cured by s. 58 in its entirety including: *Bishop v. Sheardown*, 2021 BCSC 1571; *Goehly Estate (Re)*, 2023 BCSC 248; *McGavin Estate (Re)*, 2023 BCSC 819; and *Hubschi*. Each of those cases is distinguishable on their facts. In those cases, the deceased either directed how many shares were to go to which beneficiary (*McGavin* and *Goehly*), or directed that the estate should be split equally amongst a specified group of beneficiaries (*Hubschi* and *Bishop*). None of these cases cured a dispositive position in a will in the absence of any fixed dispositive provisions and I am not aware of any authorities in which that has been done.
- [92] In oral argument, Grant suggested that if this Court was only satisfied that the Deceased had come to a fixed and final determination in respect of who the beneficiaries were in the 2017 Draft Will, this Court could determine that the 2017 Draft Will is valid as a will without the need to make a ruling on the portions provided to the beneficiaries listed therein. In that circumstance, he submits that at a later date the beneficiaries could make an application for the Court to construct the will to determine the way in which the estate would be distributed. Without deciding whether this would be appropriate in light of the fact that this particular relief was not sought in Grant's petition, I would not accede to this argument.
- [93] First, as discussed above, I am not satisfied that the Deceased had formed a fixed and final intention with respect to who the beneficiaries of his estate would be at the time the 2017 Draft Will was created. In any event, I fail to see what evidence would be before the Court in the future that is not before the Court now that would shed further light on the way in which the Deceased wanted to distribute his estate. When this Court sits as a court of construction, there are usually two or more arguable interpretations on the face of the document that must be resolved. This is not the situation here. The document in question here provides no competing interpretations for a division of the Deceased's estate; it simply provides blanks. Those blanks must be filled in by the Deceased, not by this Court.

[94] In *Howell v. Estate of Howell*, 1999 BCCA 371 at para. 10, Justice Newbury succinctly put it this way:

It is one thing to try to give effect to a testator's intention where he has used an ambiguous word or phrase -- it is entirely another thing to supply a missing bequest out of thin air. No authority was cited for the proposition that the court can do so or that it can ignore perfectly clear language in order to avoid an intestacy.

[95] Newbury J.A.'s comments are an apt response to Grant's argument. Grant's application to cure the 2017 Draft Will in its entirety is dismissed.

## DISPOSITION AND COSTS

[96] Grant provided two further alternative arguments in the event that neither his nor Ms. Wighton's positions were successful and the 1989 Will remained operative following the s. 58 analysis. The first is that the 1989 Will should be rectified pursuant to s. 59 of WESA in such a manner that would result in Jason and Todd not being provided for. Consequently, the residue of the estate would revert to Grant.

[97] The second alternative argument asks this Court to interpret s. 56(2) of WESA in a novel way. Among other things, s. 56(2) provides for the revocation of a gift made to a spouse in a will if the two cease to be spouses before the will-maker's death. Grant submits that s. 56(2) should be interpreted to also revoke gifts made to step-children in a will where the will-maker and the children's parent cease to be spouses before the will-maker's death. Grant acknowledges that there is no Canadian jurisprudence in support of this position; instead, he relies on comments made in Manitoba and Alberta Law Commission reports and on California jurisprudence in support of this argument. Like with his first alternative, success on his second alternative argument would result in Jason and Todd not being provided for and the residue of the estate would revert to Grant.

[98] In light of my conclusion that the 1989 Will was revoked by the revocation clause in the 2017 Draft Will, it is not necessary for me to decide on either of Grant's alternative arguments.

[99] As discussed above, on the particular circumstances of this case, I have concluded that the revocation clause found in the 2017 Draft Will represents the Deceased's fixed and final intention to revoke the 1989 Will. I have decided to exercise my discretion under s. 58 of WESA and order that section one of the 2017 Draft Will be fully effective as though it had been made as a revocation of the 1989 Will.

[100] I have determined that the remainder of the 2017 Draft Will does not reflect the Deceased's fixed and final intention with respect to the distribution of his estate. As a result of these two findings, the Deceased's estate will proceed as an intestacy under the provisions of WESA.

[101] I make no order as to the administrator of the Deceased's estate, nor do I make any order with respect to the spousal status of Ms. Wighton and the Deceased at the time immediately prior to his death (or at any other time). It will be open to the appropriate parties to make further applications in respect of these matters at future proceedings before any judge of this Court.

[102] In estate litigation, special costs are commonly payable out of the estate to all parties. This is usually the case where the contested issue arises from the conduct of the deceased as opposed to the conduct of one of the parties: Hadley Estate, at para. 47. Given the nature of the arguments put forward by the parties, and the many outcomes that were possible, the parties requested the opportunity to make submissions on costs after judgment was rendered. Consequently, should the parties be unable to come to an agreement on costs, they may arrange with Supreme Court Scheduling to speak to the matter before me. Any such arrangements must be made within 60 days of these Reasons for Judgment.

"Majawa J."

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