

CANADA / JUDGMENT

Fleury Estate (Re)

2025 BCSC 22

COURT

Supreme Court of British Columbia

DECIDED

8 January 2025

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2025 BCSC 22 Fleury Estate (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Fleury Estate (Re),

2025 BCSC 22

Date: 20250108

Docket: S253602

Registry: New Westminster

In the Matter of the Estate of Maureen Katherine Fleury, Deceased

Before: The Honourable Mr. Justice Brongers

Reasons for Judgment

Counsel for the Petitioner, Royal Trust Corporation of Canada:

Q. Jiwan

Counsel for the Respondent, Mark Robert Benson:

A. Dhinsa

No other appearances

Place and Date of Hearing:

New Westminster, B.C.

August 22, 2024

Place and Date of Judgment:

New Westminster, B.C.

January 8, 2025

Introduction

- [1] This is a petition brought by the Royal Trust Corporation of Canada ("Trustee") in its capacity as the trustee of the estate of Maureen Fleury ("Ms. Fleury"). She died on November 30, 2023.
- [2] Ms. Fleury is survived by her three children - Brendan Fleury, Jonathan Fleury, and Shawn Fleury - as well as her sister Sheila Parker ("Ms. Parker") and her spouse Mark Benson ("Mr. Benson"). Ms. Fleury and Mr. Benson were never married, but had been living together in Ms. Fleury's house since 2015.
- [3] The Trustee asks the court to determine whether Ms. Fleury's estate should be distributed in accordance with her will which was formally executed in 2007, or in accordance with one of two draft wills prepared by Ms. Fleury's solicitor based on instructions given just prior to Ms. Fleury's death in 2023.
- [4] The 2007 executed will provides for an equal distribution of the residue of Ms. Fleury's estate to her children through the establishment of three testamentary trusts. The two draft wills prepared in 2023 are largely to the same effect, but they also contain bequests to Mr. Benson. The first draft will provides that Mr. Benson receives \$25,000 and the right to occupy Ms. Fleury's house for up to five years following her death. Under the terms of the second draft will, Mr. Benson is to receive \$50,000 but no right to occupy Ms. Fleury's house.
- [5] While notice of this petition was provided to all five survivors, only Mr. Benson has filed a response. He takes the position that Ms. Fleury revoked her 2007 will but did not replace it with a new one. As such, Mr. Benson argues that Ms. Fleury likely died intestate.
- [6] On my assessment of the evidence tendered in this proceeding, I have concluded that the latter of the two draft wills sets out Ms. Fleury's final testamentary intentions. In particular, I find that Ms. Fleury intended to revoke her 2007 will and replace it with a new one that provides for a bequest of \$50,000 to Mr. Benson, after which the residue of her estate is to be shared equally by Ms. Fleury's own three children. In order to give effect to this conclusion, orders will be issued to permit the Trustee to administer and distribute Ms. Fleury's estate in accordance with the second draft will. My reasons for doing so are set out below.

Background

Factual Background

- [7] The petition record contains very little information about Ms. Fleury's life prior to the period in late 2023 when she was suffering from cancer and had to be hospitalized as a result.

- [8] That said, there is no dispute that Ms. Fleury was then 73 years old, retired, and living in a house that she owned in Coquitlam (the "House"). She resided there with her common-law spouse - Mr. Benson - and her two youngest children - Shawn Fleury and Jonathan Fleury. Her eldest child - Brendan Fleury - lived elsewhere. Ms. Fleury also had a close relationship with her sister - Ms. Parker - who resides in Napanee, Ontario.
- [9] On February 8, 2007, Ms. Fleury executed a will. It provides that, along with the Trustee, Ms. Parker is to be the co-executor of Ms. Fleury's estate and co-trustee of three trusts to be set up pursuant to the will. Those trusts were to be for the benefit of Ms. Fleury's three children, and are referenced in the will as the "Brendan Trust", the "Jonathan Trust", and the "Shawn Trust". The will further provides that the residue of Ms. Fleury's estate is to be divided equally among the three trusts and then distributed to her three children accordingly. Significantly, Ms. Fleury's will states that Ms. Parker had also agreed to establish trusts for the benefit of Ms. Fleury's three children in Ms. Parker's will.
- [10] On the other hand, Ms. Fleury's 2007 will makes no mention of Mr. Benson. This is understandable since the will was made approximately eight years before Ms. Fleury and Mr. Benson started living together.
- [11] As has been noted, Ms. Fleury developed health problems which were eventually diagnosed as cancer. In mid-October 2023, Ms. Fleury was admitted to Eagle Ridge Hospital in Port Moody. She was discharged on October 27, 2023, but was re-admitted soon afterwards, on November 5, 2023.
- [12] On November 6, 2023, Ms. Fleury arranged for her estate solicitor, Harman Singh ("Mr. Singh"), to attend at the hospital to take instructions with respect to drafting a new will. They met that afternoon in the presence of Ms. Parker and Mr. Singh's legal assistant, Andrea Oishi ("Ms. Oishi"). Ms. Fleury's instructions included the following:
- (a) Mr. Singh is to prepare a new will for Ms. Fleury based on the terms of Ms. Parker's will that was executed on October 19, 2023, one that provides in particular for the establishment of three separate testamentary trusts for each of Ms. Fleury's three children - Brendan, Jonathan, and Shawn;
 - (b) the new will is to also make provision for two gifts to Mr. Benson, namely:
 - i. \$25,000; and
 - ii. a "life estate" in respect of the House for a period of five years after Ms. Fleury's death, on condition that Ms. Fleury's son Shawn and her cats reside in the House at the same time, and that Mr. Benson pays the costs of maintaining the House; and
 - (c) Ms. Parker is authorized to further instruct and communicate on behalf of Ms. Fleury's directions regarding the drafting of the new will.

- [13] Mr. Singh prepared a draft will based on the instructions provided by Ms. Fleury at the November 6, 2023 meeting. This draft will was sent by email to Ms. Parker and Ms. Fleury on November 16, 2023. The cover email authored by Ms. Oishi contained a number of questions and a request that Ms. Parker and Ms. Fleury provide comments on the content of the draft will.
- [14] On November 18, 2023, Ms. Parker met Shawn Fleury on her way to visit Ms. Fleury at the hospital. Shawn Fleury told Ms. Parker that he did not want to live with Mr. Benson, and that he had only tolerated Mr. Benson because of his mother's relationship with Mr. Benson. Shawn Fleury also expressed his fear that Mr. Benson might try to evict his brother Jonathan Fleury from the House. Ms. Parker encouraged Shawn Fleury to raise his concerns with Ms. Fleury directly, which he did two days later.
- [15] During the evening of November 20, 2023, Ms. Fleury told Ms. Parker about the conversation she had with her son Shawn Fleury earlier that day. Ms. Fleury also told Ms. Parker that she now wanted to make the following changes to the draft will:
- (a) the life estate provision for the benefit of Mr. Benson is to be removed;
 - (b) the amount of cash bequeathed to Mr. Benson is to be increased from \$25,000 to \$50,000; and
 - (c) provision should be made to permit Shawn Fleury to assume ownership of the House if he is able and willing to buy out his two brothers' share of the property, failing which the House should be sold with the proceeds added to the residue of the estate.
- [16] On November 21, 2023, a telephone call took place between Mr. Singh's office, Ms. Parker, and Ms. Fleury in relation to the latter's desire that changes be made to the draft will. The discussion covered such issues as the disinclination of Ms. Fleury's children to reside with Mr. Benson, the possibility of affording Shawn Fleury an opportunity to buy the House, and the granting of a potential life estate to one of the other children.
- [17] During a subsequent phone call on November 27, 2023, Ms. Parker confirmed to Mr. Singh that the terms of the bequest to Mr. Benson in the draft will should be updated so as to gift Mr. Benson \$50,000, but not to gift any life estate in the House. Mr. Singh then asked that Ms. Fleury provide him directly with final confirmation and instructions regarding her testamentary wishes. Ms. Parker explained that this was not possible at that time since Ms. Fleury had been given pain medication shortly before the call.
- [18] On November 29, 2023, Mr. Singh and Ms. Parker spoke again on the telephone. Ms. Parker informed him that Ms. Fleury's condition had worsened, that Ms. Fleury had been given more pain medication, and that Ms. Fleury was unable to sign documents or provide verbal instructions.
- [19] Ms. Fleury died the next day, on November 30, 2023.

[20] Following Ms. Fleury's death, Mr. Benson moved out of the House. He says that he did so because of certain unspecified threats made against him by Brendan Fleury.

Procedural Background

[21] On May 13, 2024, the Trustee filed the present petition. The Trustee is represented by its counsel, Mr. Jiwan, who is a colleague of Ms. Fleury's estate solicitor, Mr. Singh. Both lawyers are members of the law firm of Garton & Harris.

[22] Attached to the petition are three documents. They are indexed as Schedule "A", Schedule "B", and Schedule "C", respectively.

[23] Schedule "A" is Ms. Fleury's will executed on February 8, 2007 (the "Signed Will").

[24] Schedule "B" is a draft will prepared by Mr. Singh further to instructions provided by Ms. Fleury on November 6, 2023 (the "First Draft Will").

[25] Schedule "C" is a draft will prepared by Mr. Singh reflecting instructions provided by Ms. Parker on behalf of Ms. Fleury on November 27, 2023 (the "Second Draft Will").

[26] In the "Orders Sought" portion of the petition, the Trustee seeks relief in the following terms (reproduced verbatim):

1. A declaration and determination of which testamentary document, attached hereto as:
 - a. Schedule "A", the Deceased's first will, executed on February 8, 2007 (the "2007 Will"); or
 - b. Schedule "B", the Deceased's first testamentary document drafted (the "First Testamentary Document"); or
 - c. Schedule "C", the Deceased's second testamentary document (the "Second Testamentary Document").

(collectively, the "Testamentary Documents")

represents the testamentary intentions of Maureen Katherine Fleury, deceased ("Deceased").

2. A declaration that the Testamentary Document selected by the court is cured of any deficiencies and is fully effective as though it had been made as the will of the Deceased;
3. An Order that all assets, real, and personal, of the Deceased's estate be vested in the Petitioner effective on the date of entry of the order;
4. An Order that a grant of probate of all the Estate which by law devolves to and vests in the executor of the Deceased's estate, be issued to the Petitioner;
5. In the alternative, directions pursuant to Rule 25-14(8) of the Supreme Court Civil Rules respect the issues to be decided with respect to the Deceased's estate; and

6. An Order that the Petitioner be entitled to payment of their reasonable costs and expenses of and incidental to this proceeding out of the Estate of the Deceased, payable as special costs on a full indemnity basis.
- [27] Notice of the petition was provided to Ms. Parker, Brendan Fleury, Jonathan Fleury, Shawn Fleury, and Mr. Benson. Only Mr. Benson filed a response to petition. He did so on August 2, 2024. Mr. Benson is represented by his counsel, Mr. Dhinsa.
- [28] Mr. Benson opposes the granting of orders 1 to 4, consents to order 5, and takes no position on order 6. In the "Legal Basis" portion of his response to petition, Mr. Benson succinctly sets out his position as follows:
- a) The original Will of February 8, 2007 cannot stand as [Ms. Fleury] had a "deliberate or fixed intention" to change her will.
 - b) However, the First Testamentary Document and the Second Testamentary Document both lack some crucial factors to create a valid Will, e.g.:
 - i) the documents were not signed; and
 - ii) the document was made at a time when [Ms. Fleury] was in ill health.
 - c) It is possible that [Ms. Fleury] inadvertently created an intestacy.
- [29] Mr. Benson has also indicated that he intends to bring a wills variation claim in the event any of the purported wills are probated.
- [30] The petition came on for hearing before me in general chambers in New Westminster. The petition record consists of two affidavits made by Ms. Parker, one affidavit made by Mr. Singh, and one affidavit made by Mr. Benson. I also heard oral submissions from Mr. Jiwan on behalf of the Trustee and from Mr. Dhinsa on behalf of Mr. Benson. Neither counsel suggested that this petition raises any triable issues, and I am of the view that it may be adjudicated on the basis of the record as presently constituted.

Analytical and Legal Framework

- [31] The fundamental question to be determined on this petition is the extent to which the three purported "testamentary documents" - the Signed Will, the First Draft Will, and the Second Draft Will - are valid and effective under the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA].
- [32] The legal framework that applies to this assessment is well-established and not in dispute.
- [33] The starting point is s. 37 of the WESA. It sets out the statutory requirements for a valid will as follows:
- 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.
- (3) The requirement under subsection (1)(a) that a will be in writing is satisfied if the will is in electronic form.
- (4) An electronic will is a will for all purposes of this Act and any other enactment.
- [34] In other words, if a will is made in writing, is signed by the will-maker in the presence of two witnesses, and is signed by the two witnesses in the presence of the will-maker, the will is then considered to have met the basic conditions for formal validity. If these conditions are not met, however, s. 37(2) of the WESA allows for the possibility that the will may nevertheless be found formally valid if it is: (a) "cured" pursuant to s. 58 of the WESA, (b) recognized as valid because it was made in accordance with other laws pursuant to s. 80 of the WESA; or (c) is found to be valid under another provision of the WESA.
- [35] Testamentary documents that do not comply with the formal requirements of s. 37 of the WESA may be cured in accordance with s. 58 of the WESA. Its relevant portions provide:
- 58(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.

[36] The leading case that has interpreted s. 58 of the WESA is our Court of Appeal's decision in *Hadley Estate (Re)*, 2017 BCCA 311. Its principles have been helpfully discussed in such cases as *Re Cook Estate*, 2019 BCSC 417 at paras. 61-73; *Bishop Estate v. Sheardown*, 2021 BCSC 1571 at paras. 7-11; and *Re Clarke Estate*, 2023 BCSC 103 at paras. 29-39. These principles can be briefly summarized as follows:

- (a) in order to cure a purported testamentary document under s. 58 of the WESA, the court must be satisfied on a balance of probabilities that the document is: (1) authentic; and (2) represents the fixed and final, although not irrevocable, testamentary intentions of the deceased at the material time;
- (b) the material time for determining testamentary intentions varies depending on the circumstances, but will usually be when the document was created; and
- (c) assessment of this issue is fact-specific and the court may consider a wide array of extrinsic evidence to determine the deceased's testamentary intentions.

[37] Also of relevance to this petition is s. 55 of the WESA. It addresses how otherwise valid wills may be revoked:

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.

- [38] In other words, a will that is found to have been valid pursuant to s. 37 of the WESA can also be found to have been subsequently revoked in accordance with s. 55 of the WESA. While a will-maker can effect such revocation by making a new will in accordance with the formal requirements of s. 37, revocation can also be effected pursuant to s. 58 of WESA.
- [39] Furthermore, when exercising its curative powers in respect of a purported testamentary document, the court may find that the document effected a revocation of a prior will pursuant to s. 55 of WESA but did not establish a new will. This may also result in a finding of an intestacy: *Cooper Estate*, 2024 BCSC 218 at paras. 44-51, citing *Horton v. Bruce*, 2017 BCSC 712.
- [40] I will apply these principles to my assessment of the validity and effectiveness of each of the three purported testamentary documents attached to the petition as Schedule "A" (the Signed Will), Schedule "B" (the First Draft Will), and Schedule "C" (the Second Draft Will).

Analysis: Validity and Effectiveness of the Signed Will

- [41] There is no dispute that the Signed Will executed February 8, 2007 complies with the statutory formalities prescribed by s. 37 of the WESA, that Ms. Fleury had the requisite testamentary capacity, and that Ms. Fleury knew and approved of its contents. I therefore find that the Signed Will is a valid one.
- [42] The only issue is whether the Signed Will remains effective or whether it was revoked prior to Ms. Fleury's death. That issue will be addressed below.

Analysis: Validity and Effectiveness of the First and Second Draft Wills

- [43] It is also beyond dispute that neither of the two draft wills meet the formal validity requirements of s. 37 of the WESA. This is because neither was signed by Ms. Fleury. As such, they cannot be effective unless they are cured in accordance with s. 58 of the WESA. As has been noted, this power can only be exercised in respect of a draft unsigned will if the court finds it to be both authentic and reflective of the deceased's last testamentary wishes.
- [44] There is no suggestion that either of the draft wills lack authenticity. To the contrary, it is apparent that both the First Draft Will and the Second Draft Will were prepared by the law firm of Garton & Harris further to instructions as understood by Mr. Singh. The real issue is whether either of the draft wills reflects Ms. Fleury's fixed and final testamentary intentions.
- [45] While perhaps trite, it bears repeating that the task of ascertaining such intentions is challenging because the person best able to speak to those intentions - the deceased - is not available to testify: *Hadley Estate* at para. 40. However, in the case at bar the court's task is greatly facilitated by the affidavit evidence of Ms. Parker, the sister of Ms. Fleury. Ms. Parker deposes in considerable detail to the discussions she had with Ms. Fleury at the hospital in November 2023 in relation to the specifics of the new will that Ms. Fleury wanted to prepare to replace the Signed Will executed in February 2007.

- [46] Furthermore, Ms. Parker was always privy to Ms. Fleury's communications with Mr. Singh, and Ms. Fleury had entrusted Ms. Parker with the authority to convey and provide Ms. Fleury's testamentary instructions to Mr. Singh. These instructions included the use of Ms. Parker's recently executed will as a template for the preparation of Ms. Fleury's new will.
- [47] It is also clear that Ms. Fleury and Ms. Parker had a very close relationship, even though Ms. Parker ordinarily resides in Ontario. In addition to the fact that Ms. Parker was almost continuously by Ms. Fleury's hospital bedside in November 2023, further evidence of their tight bond can be drawn from the fact that Ms. Parker has provided in her own will that a considerable portion (75%) of the residue of Ms. Parker's estate is to pass to Ms. Fleury's sons Brendan, Jonathan, and Shawn. It is also worth noting that neither of the draft wills at issue provides that Ms. Parker is to inherit anything from Ms. Fleury's estate other than the latter's personal, domestic, household, and ornamental items. In my view, Ms. Parker's very limited potential financial interest in Ms. Fleury's estate bolsters the credibility of Ms. Parker's assertions regarding the testamentary intentions of Ms. Fleury.
- [48] Accordingly, I am satisfied on a balance of probabilities that Ms. Parker's two affidavits provide credible and reliable evidence of Ms. Fleury's testamentary intentions during the month of November 2023.
- [49] On the basis of these affidavits, I find that Ms. Fleury's testamentary intention on November 6, 2023 included the following elements:
- (a) revocation of Ms. Fleury's Signed Will executed February 8, 2007;
 - (b) replacement of the Signed Will with a new one that tracks the format of Ms. Parker's will executed October 19, 2023, especially with respect to the establishment of three separate testamentary trusts for Brendan Fleury, Jonathan Fleury, and Shawn Fleury;
 - (c) provision of a gift of \$25,000 to Mr. Benson;
 - (d) provision of a limited life estate to Mr. Benson that would permit him to occupy the House for a period of five years after Ms. Fleury's death on condition that (1) Shawn Fleury and Ms. Fleury's cats were residing in the House at the same time, and (2) Mr. Benson pays all of the House maintenance expenses, including taxes and insurance; and
 - (e) provision for the residue of Ms. Fleury's estate to be distributed equally to her three children - Brendan Fleury, Jonathan Fleury, and Shawn Fleury - through their namesake testamentary trusts.
- [50] These intentions were communicated to Mr. Singh on November 6, 2023 and I accept that they are generally reflected in the First Draft Will.

- [51] However, Ms. Parker's affidavits are also to the effect that Ms. Fleury's testamentary intentions then changed on November 20, 2023 following her conversation with Shawn Fleury. As such, I must conclude that the First Draft Will does not reflect Ms. Fleury's fixed and final testamentary intentions.
- [52] As of November 20, 2023, Ms. Fleury still wished to revoke and replace the Signed Will with a new will similar to that of Ms. Parker that distributes the residue of her estate equally to her three children. However, Ms. Fleury had changed her mind about the nature of the gift she wished to bequeath to Mr. Benson. While she no longer wanted him to have a right to occupy the House, Ms. Fleury now wanted him to receive a larger cash gift fixed in the amount of \$50,000.
- [53] These revised intentions were communicated to Mr. Singh on November 21, 2023. Furthermore, these intentions did not change again prior to Ms. Fleury's death on November 30, 2023, and I find that they are fixed and final. I also accept that these fixed and final intentions are reflected in the Second Draft Will.
- [54] In addition, Mr. Singh's evidence of the communications and interactions he had with Ms. Fleury and Ms. Parker are fundamentally consistent with the information set out in Ms. Parker's affidavits. While there are some minor contradictions between Mr. Singh and Ms. Parker's respective recollections, they relate only to peripheral matters and details that do not bear upon the ultimate issue in dispute.
- [55] Furthermore, I do not find that Ms. Parker's evidence regarding Ms. Fleury's testamentary intentions is undermined in any way by Mr. Benson's relatively brief and vague affidavit. The only mention he makes of his understanding of how Ms. Fleury wanted her estate to be distributed is set out in the following short sentence in Mr. Benson's affidavit made August 2, 2024:
7. In the discussions that took place at the hospital between [Ms. Fleury] and I, she wanted me to live in the [House] with Shawn [Fleury] and rent out a portion in order to meet expenses. ...
- [56] This statement is consistent with Ms. Parker's evidence regarding Ms. Fleury's wishes prior to her conversation with Shawn Fleury on November 20, 2023. However, it does not address Ms. Parker's evidence that Ms. Fleury then changed her mind about wanting Mr. Benson to live in the House following her passing. I prefer Ms. Parker's clear, cogent, and direct evidence on this matter.
- [57] Finally, I acknowledge that Mr. Benson also deposes vaguely in his affidavit to his opinion regarding Ms. Fleury's ability to provide testamentary instructions, as follows:
8. However, during the times when the purported Wills were being prepared, [Ms. Fleury] was heavily medicated and not able to converse or communicate her wishes.

9. I know that [Ms. Fleury] wanted to change her original Will and that steps had been initiated in order for her to make a new Will. However, in my opinion, her medical condition was in such a state where she was not in a condition to sign or understand what she was signing or give proper instructions.
- [58] However, Mr. Benson does not actually argue that Ms. Fleury lacked testamentary capacity. To the contrary, his position is that Ms. Fleury had a fixed and final intention to revoke her Signed Will, although she had not yet finalized her intentions regarding how her estate should now be distributed. Such a position necessarily entails an acceptance that Ms. Fleury was still generally capable of formulating testamentary intentions.
- [59] Even if Mr. Benson had taken the position that Ms. Fleury lacked legal capacity at the time the draft wills were created, however, I would have rejected it as contrary to the preponderance of the evidence before me.
- [60] Specifically, there is no question that there were times in November 2023 when Ms. Fleury was heavily medicated at the hospital and unable to communicate instructions. Ms. Parker deposes to the same in her affidavits. However, I prefer and accept Ms. Parker's detailed evidence regarding Ms. Fleury's specific ability to formulate and communicate her testamentary intentions at the relevant times as follows:

[from Ms. Parker's affidavit made April 9, 2024]:

16. Shawn [Fleury] has advised me that on the morning of November 20, 2023, he had the opportunity to speak privately with [Ms. Fleury] his concerns as described above.
17. When I arrived at the hospital that evening, [Ms. Fleury] told me about her conversation with Shawn [Fleury] and about some changes she wanted to make to her new Will. She directed me to call [Mr. Singh] in the morning and make the following changes:
- a) She directed me to have [Mr. Benson's] life-estate provision removed from her Will and to increase the monetary bequest to [Mr. Benson] to the sum of \$50,000; ...

[from Ms. Parker's affidavit made August 16, 2024]:

7. [Ms. Fleury] experienced a gradual deterioration in her health after her admission to hospital. [Ms. Fleury] remained orientated and was clearly able to express her wants and wishes. [Ms. Fleury] took an active part in determining her treatment and care until just prior to her imminent death.
8. At the time of the initial drafting of her Will on November 6, 2023, [Ms. Fleury] made the assumption that [Ms. Fleury's] son Shawn [Fleury] would be happy to remain in the family home with [Mr. Benson] upon her death. [Ms. Fleury] never had the opportunity to privately discuss her assumed decision, which would affect his life upon her death.

9. ... On my arrival to the hospital on the evening of November 20, 2023 [Ms. Fleury] was cognitively alert and advised me regarding her private conversation with Shawn [Fleury] that had occurred that morning. [Ms. Fleury] instructed me to contact her lawyer regarding her decisions to make alterations to the original draft of her Will which are contained in Paragraph #17 of my 1st Affidavit. This decision was a result from her private conversation with Shawn [Fleury].

...

12. [Ms. Fleury] was able to clearly express her wants and wishes. [Ms. Fleury] was involved in the decision making of her treatments until the morning of November 29, 2023, when her doctors determined that she was no longer capable of making her own informed decisions.
- [61] I, therefore, find that the Second Draft Will is authentic and reflects Ms. Fleury's fixed and final testamentary intention to revoke the 2007 Signed Will and to distribute her estate in accordance with the terms set out in the Second Draft Will.

Conclusion

- [62] In sum, I reach the following conclusions with respect to the three testamentary documents in issue.
- [63] First, I find that while the Signed Will was made validly in accordance with s. 37 of the WESA, it has been revoked in accordance with s. 55 of the WESA and is no longer effective.
- [64] Second, I find that the First Draft Will does not conform with the requirements for statutory validity prescribed by s. 37 of the WESA. It also does not reflect Ms. Fleury's fixed and final testamentary intentions, and therefore cannot be cured in accordance with s. 58 of the WESA. It is not, and has never been, effective.
- [65] Third, I find that while the Second Draft Will also does not conform with s. 37 of the WESA, it is authentic and reflects Ms. Fleury's fixed and final testamentary intentions. I will therefore exercise my authority to cure it in accordance with s. 58 of the WESA, thereby rendering it effective as a valid will pursuant to which the Trustee may distribute Ms. Fleury's estate.

Disposition

- [66] For the reasons set out above, I make the following orders and declarations:
1. The testamentary document attached as Schedule "C" to the petition represents the testamentary intentions of Maureen Katherine Fleury, deceased (the "Deceased").
 2. The testamentary document attached as Schedule "C" to the petition is fully effective as though it had been made as the will of the Deceased.

3. All assets, real and personal, of the Deceased's estate are vested in the Royal Trust Corporation of Canada in its capacity as corporate executor of the estate of the Deceased, effective the date of entry of the order.

4. A grant of probate of all the estate which by law devolves to and vests in the executor of the Deceased's estate is issued to the Royal Trust Corporation of Canada in its capacity as corporate executor of the estate of the Deceased.

[67] Lastly, I turn to the issue of costs.

[68] In *Connor Estate v. Worthing*, 2021 BCCA 231, our Court of Appeal confirmed that in estate litigation, the "modern approach" to fixing costs applies. That means that costs generally follow the event and are to be assessed on a party and party basis, unless there is an applicable exception. In other words, ordinary civil litigation costs principles will generally apply. Parties who participate in estate litigation are not automatically entitled to recover their litigation costs, particularly if their positions are not accepted by the court.

[69] In this case, the Trustee seeks an order that it be paid its reasonable costs and expenses of this proceeding, payable out of the estate of Ms. Fleury, to be assessed as special costs on a full indemnity basis. I accept that such an award is appropriate when an executor or trustee incurs such costs in order to fulfil their role (*Hollander v. Mooney*, 2017 BCCA 238 at para. 41), which I find to be the case here. The Trustee's request for such a costs order is therefore granted.

[70] Mr. Benson's response to petition makes no mention of costs. In addition, the Trustee has not asked that Mr. Benson be required to pay any costs, even though Mr. Benson opposed the Trustee's petition and his opposition was unsuccessful. I am therefore inclined to order that, in these circumstances, Mr. Benson shall simply bear his own costs of participating in this proceeding. However, if Mr. Benson or the Trustee wish to make further submissions on this issue, they are at liberty to request a costs hearing before me provided they do so within 30 days.

"Brongers J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/25/00/2025BCSC0022.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/fleury-estate-re-2025>

Prepared on 28 October 2026 · Esheria