

CANADA / JUDGMENT

Gibb Estate (Re)

2021 BCSC 2461

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Supreme Court of British Columbia

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2021 BCSC 2461 Gibb Estate (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gibb Estate (Re),

2021 BCSC 2461

Date: 20211217

Docket: 200990

Registry: Victoria

In the Matter of the Estate of John Alexander Gibb, Deceased

Before: The Honourable Mr. Justice Punnnett

Reasons for Judgment

Counsel for the applicant, John Ronald Service:

A. J. Broadley

Counsel for the respondent, Galen Toews:

P. B. Newman

Place and Date of Hearing:

Victoria, B.C.

September 29 and

October 1, 2021

Place and Date of Judgment:

Victoria, B.C.

December 17, 2021

Introduction

- [1] John Ronald Service ("the applicant"), a close friend of the deceased John Alexander Gibb, seeks an order pursuant to s. 58 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 ("WESA") that a document drafted by the deceased's lawyer shortly before his death, but not signed by the deceased, is fully effective as his will.

Background

- [2] Mr. Gibb died on November 17, 2017 at the age of 68 following a heart attack. At the time of his death, he had been separated from his wife, Moira McPhedran, since August 2014. They were not divorced. Mr. Gibb had no children, although his wife had two from a previous relationship, both of whom were adults when Mr. Gibb and Ms. McPhedran's relationship began in 1997. They are Galen Toews ("the respondent"), who opposes this application, and Kara Toews.
- [3] Mr. Gibb was survived by his sisters Elaine Gibb and Jean Moore and close friends, the applicant, the applicant's spouse Carol Service, and Carol Greaves.
- [4] Mr. Gibb left a will dated March 14, 2011 (the "2011 Will") as well as a testamentary document drafted by his lawyer on instructions given November 9, 2017 (the "2017 Will"), eight days before Mr. Gibb's death.
- [5] The 2011 Will names Ms. McPhedran as executor and sole beneficiary. Ms. Elaine Gibb is named as alternate executor, and she, Ms. Moore, the respondent, and Ms. Toews are equal alternate beneficiaries. In the 2011 Will, Ms. Toews' portion of the estate was to be held in a discretionary trust to be administered by the respondent.
- [6] On November 8, 2017, the Deceased suffered a major heart attack while on business in Campbell River, BC and was admitted to the intensive care unit of the Campbell River Hospital ("CRH").
- [7] On the morning of November 9, 2017, a physician at the CRH notified the applicant of Mr. Gibb's hospitalization and of his request to see his lawyer. The applicant contacted Mr. Gibb's lawyer, Kevin Simonett, who attended at the CRH immediately to take Mr. Gibb's instructions to prepare a new will. Mr. Simonett maintains a general practice in Campbell River. He was familiar with Mr. Gibb and his affairs, having acted for him in various business matters since December 2016.
- [8] Also present at the CRH that morning were two of Mr. Gibb's friends, Janet Lawson and Carol Greaves, who were there to visit him. Ms. Lawson had known Mr. Gibb since high school. She and Ms. Greaves woke Mr. Gibb up that morning. While she noted that Mr. Gibb was visibly tired, Ms. Lawson deposed that he spoke to them coherently about what had

happened and why he was in the hospital. The two friends were present when a doctor came and explained to Mr. Gibb he had the option of staying at CRH or being medivacked to Victoria. Mr. Gibb informed Ms. Lawson and Ms. Greaves that he wanted to see his lawyer and insisted that he do so before being moved to Victoria. It was at this point that Mr. Simonett was contacted and attended.

- [9] Ms. Lawson heard Mr. Gibb inform his lawyer he wanted to change his will and Mr. Simonett say that he wanted to ensure Mr. Gibb was competent. A social worker from the hospital was invited into the room and both she and Mr. Simonett asked Mr. Gibb questions. Ultimately, both were satisfied with Mr. Gibb's answers. Ms. Lawson stated that this included a long explanation by Mr. Gibb of why he was in Campbell River and his plans for a charter flight on November 9, 2017. Ms. Lawson arranged for the flight to be cancelled as Mr. Gibb was concerned about it.
- [10] After the social worker left, Mr. Gibb told his lawyer that he wanted to include Ms. Greaves in his will. Mr. Simonett then asked her to leave the room. Ms. Lawson remained in the room to witness Mr. Gibb's instructions. After taking Mr. Gibb's instructions Mr. Simonett left. Ms. Lawson and Ms. Greaves remained with him until he was medivacked to Victoria.
- [11] Mr. Simonett was alive to the possibility that the Deceased might have diminished capacity because he was in the intensive care unit. He spoke to the attending physician who confirmed that Mr. Gibb was not taking any drugs that would affect his capacity but who expressed concerns about his capacity. Counsel's handwritten note states "Capacity Borderline", but it is not clear if that was the doctor's comment or that of counsel.
- [12] Mr. Simonett used a document entitled "Capacity Assessment Worksheet" created by the BC Centre for Elder Advocacy and Support (the "Worksheet") for reference as he assessed Mr. Gibb's capacity. The Vancouver Island Health Authority Social Worker Coordinator was present for this assessment. Mr. Simonett asked Mr. Gibb questions about how he had ended up in the hospital that day, as well as Mr. Gibb's businesses, their structure, his assets, and the ongoing issues Mr. Simonett had previously assisted Mr. Gibb with. Satisfied that Mr. Gibb understood these matters and was capable of providing instructions, Mr. Simonett took his instructions to prepare a new will.
- [13] Mr. Gibb informed Mr. Simonett that the 2011 Will no longer reflected his wishes and that he wanted to be certain that it was void. He provided Mr. Simonett with the names of the lawyers who had drafted the 2011 Will. Mr. Gibb was particularly concerned that no part of his estate should go to Ms. McPhedran because of alleged ill-treatment of him by her prior to their separation. He instructed counsel to draft a statutory declaration to that effect ("the Declaration").
- [14] At one point during Mr. Simonett's visit to the CRH, Mr. Gibb lost focus and Mr. Simonett and Ms. Lawson stepped back while a nurse provided him with a transfusion. Within a few minutes, Mr. Gibb was once again lucid and continued his instructions.

- [15] On November 10, 2017, counsel drafted the 2017 Will and the Declaration based on the instructions provided to him by Mr. Gibb the previous day. The 2017 Will names the applicant as executor and distributes Mr. Gibb's estate as follows:
- a) Ms. Greaves receives the Deceased's residential property at 2585 Lower Road, Robert's Creek, British Columbia, free of encumbrances; and
 - b) The residue of the Deceased's estate be divided into two shares, with Ms. Greaves to receive one share and the applicant and his wife, Ms. Service, to receive the remaining share jointly.
- [16] As a result, his spouse was no longer executor and sole beneficiary, nor were her two children alternate beneficiaries. His sisters were also no longer included.
- [17] As noted later that day, November 9, 2017, Mr. Gibb was transferred by air ambulance from CRH to Royal Jubilee Hospital ("RJH") in Victoria to receive further medical care.
- [18] On November 11, 2017, at Mr. Gibb's request, Mr. Simonett drove from Campbell River to Victoria for the purpose of executing the 2017 Will. When he arrived, Mr. Gibb's condition had declined and medical staff advised that he was not capable of dealing with legal documents at that time. Mr. Simonett returned to Campbell River with the 2017 Will unsigned. He did not leave a copy of the 2017 Will for or with Mr. Gibb.
- [19] On November 14, 2017, Mr. Simonett phoned RJH to talk to Mr. Gibb. Mr. Gibb told Mr. Simonett that he was up, walking and feeling well and Mr. Simonett should not bother driving to Victoria as he was going to beat his medical issues. However, at Mr. Simonett's suggestion Mr. Gibb agreed to review the 2017 Will line-by-line in order to confirm it represented his wishes. They spent about 30 minutes on the phone. Mr. Simonett read the entire 2017 Will to Mr. Gibb, stopping after each sub-section to confirm its effect and his wishes. Counsel states Mr. Gibb confirmed each sub-section to him and did not direct any changes. They then went through the same process with the Declaration. Mr. Simonett states that "[n]othing in my conversation with Mr. Gibb gave me reason to doubt that he had regained his legal capacity".
- [20] As Mr. Simonett had existing plans to be in Victoria on November 17, 2017, Mr. Gibb agreed to his suggestion that he drop by RJH to execute the 2017 Will on that date. Unfortunately, Mr. Gibb passed away on November 17, 2017 while Mr. Simonett was en route to Victoria.
- [21] Mr. Gibb left behind a complex estate comprising of an interest in at least 13 companies, with some of these companies actively operating, with contractual obligations, employees, and substantial debt. He had been successful in the logging industry for many years, though his businesses encountered increasing financial and legal difficulties in the last decade of his life. Mr. Gibb also had various real estate holdings subject to foreclosure proceedings when he died.

- [22] Since his death, there has been uncertainty as to the proper executor and beneficiaries of Mr. Gibb's estate as he left both the unsigned 2017 Will and the 2011 Will. Grant Thornton Limited applied for and was appointed under s. 132 of WESA, as temporary administrator of this estate on December 22, 2017, and continues to act in this capacity.
- [23] As of the date of this Application, the administration of Mr. Gibb's estate remains incomplete and the net value of the assets available for distribution to beneficiaries remains unknown. Grant Thornton also continues to defend at least two actions against the estate in this court involving commercial and family law matters commenced after Mr. Gibb's death.
- [24] On October 30, 2019, the applicant delivered notice of his intention to apply for permanent administration of the estate under the 2017 Will to the beneficiaries of the both the 2011 Will and the 2017 Will. He filed his submission for estate grant seeking authorization to obtain estate information on December 7, 2020.
- [25] Only the respondent opposes this application. He submits that Mr. Gibb lacked testamentary capacity at the time the 2017 Will instructions were given and that the 2017 Will does not represent Mr. Gibb's testamentary intentions. While Ms. McPhedran filed a response to the application, she takes no position on the relief sought noting only that she has filed a notice of family claim against the estate of Mr. Gibb. Neither Ms. McPhedran nor her counsel, Ms. Toews, Ms. Gibb nor Ms. Moore appeared on the hearing.

Position of the applicant

- [26] The applicant submits there are two primary issues before the Court: whether the unsigned will can be cured, and the capacity of the deceased to make a will at the material times.
- [27] The applicant says that Mr. Gibb had testamentary capacity when he gave instructions to Mr. Simonett in the CRH on November 9, 2017, and when he was read the contents of the newly drafted 2017 Will by Mr. Simonett on November 14, 2017 and confirmed its contents. In the applicant's submission, the 2017 Will can be cured and represents Mr. Gibb's fixed and final intention with respect to the disposition of his estate, including his desire to revoke the 2011 Will.

Position of the respondent

- [28] The respondent submits that the 2017 Will cannot be cured. As a result, the respondent states the 2011 Will is the binding will and has not been revoked.
- [29] He argues that Mr. Gibb had three previous wills each of which complied with the formal requirements therefore he would have known that the 2017 Will was not valid until the final, witnessed execution. The respondent also submits that the 2017 Will is not a "record" as is usually described in WESA, as Mr. Gibb never actually saw the document.

- [30] The respondent also points to the "drastically" different distributions from the 2011 Will, noting that while the Declaration addresses the change in respect of Ms. McPhedran, Mr. Gibb's disinheriting of his own sisters and step-children is not explained.
- [31] The respondent submits the medical history and records of Mr. Gibb raise his capacity as a significant issue. The respondent notes as well discrepancies between the affidavits of the applicant and Mr. Simonett regarding the content of their conversations with Mr. Gibb and when they occurred.
- [32] The respondent submits there are no authorities that square with these facts. He argues that the facts in this case exceed the limits of s. 58 as the 2017 Will was never reviewed by Mr. Gibb. The respondent notes that usually a document that is cured pursuant to s. 58 has been drafted or reviewed by the deceased themselves, showing on its face the deceased's intentions. In the respondent's submission a phone call review is insufficient to establish knowledge and approval and the high burden on the applicant has not been met.

Evidentiary Issues

- [33] The respondent produced the medical records of the deceased from the heart attack until his death and selected records from prior years. The applicant disputes the latter records as their authenticity has not been proven, nor is it conceded. The applicant accepts the medical records from November of 2017 are authentic and are admissible under the business records exception, but that they are not admissible for any opinions in them.

Admissibility of Medical Records

- [34] In *Singh Estate (Re)*, 2019 BCSC 272, Madam Justice D. MacDonald considered the admissibility of a deceased's medical records. In that case, the petitioner sought to introduce medical records to establish the first-hand observations of the authors not as "proof of accuracy of the author's opinion or for the correctness of the statements." (para. 35) but as an exception to the rule against hearsay pursuant to the standard business records exception.
- [35] She summarized the applicable law:
- [48] While clinical records are hearsay, they are admissible under the business records exception both at common law and under s. 42 of the Evidence Act. The requirements for the admission of medical records as business records are set out in *Ares*. The Supreme Court of Canada held at 626:

Hospital records, including nurses' notes, made contemporaneously by someone having a personal knowledge of the matters then being recorded and under a duty to make the entry or record should be received in evidence as *prima facie* proof of the facts stated therein.

- [49] Justice Burnyeat in *McTavish* summarized the principles from *Ares* at 311-12:

1. The notes taken must be made contemporaneously.
2. The notes must be made by someone having a personal knowledge of the matters being recorded.
3. The notes must be made by someone who has a duty himself or herself to record the notes or to communicate the notes to someone else to record as part of the usual and ordinary course of their business.
4. The matters which are being recorded must be of the kind that would ordinarily be recorded in the usual and ordinary course of that business.
5. A statement in the records of the fact that a certain diagnosis was made will be admissible.
6. Recorded observations, diagnosis and opinions will be admissible providing they are recorded in accordance with points 1 through 4.
7. The fact that the referring doctor relied upon another doctor's opinion to assist in coming to his or her own diagnosis and opinion is only evidence of that fact so that the other opinion does not become evidence unless it is otherwise admissible. Accordingly, it is only evidence of the fact that the referring doctor wished or required that opinion to be received before forming his or her own opinion.
8. Statements made by parties or by experts which are recorded in the usual and ordinary course of business but which lie outside the exception to the hearsay rule are hearsay and will not be admitted into evidence unless they can be brought within Section 14 of the Evidence Act which allows for the admissibility of such statements if it can be shown that they are proof of a prior inconsistent statement.

[50] The issue of third party statements was addressed in *Cambie Surgeries*. Justice Steeves provides:

...any statement by the patient or any third party that is not within the observation of the doctor or person who has a duty to record such observations in the ordinary course of business is not admissible for any purpose and will be ignored by the trier of fact...

...

- [54] The respondents' third objection to the admissibility of the records was their lack of relevance due to their remoteness in time. The respondents cited para. 29 of *Edmondson* for this proposition.
- [55] Justice Ballance held in *Laszlo v. Lawton*, 2013 BCSC 305 [Laszlo], that evidence of symptoms exhibited by a will-maker before and after making a will can support an inference of capacity at the time the will was made:

- [190] The diminishment of mental capacity, particularly in the elderly, will frequently emerge and worsen over time. In light of that, evidence of symptoms exhibited by a testatrix both before and after the making of the will may support an inference relevant to the determination of the presence or absence of testamentary capacity at the material time: see generally, *Smith v. Tebbett* (1867), L.R. 1 P.& D. 354 at 398; *Kri v. Patterson*, [1989] O.J. No. 1817 (Surr. Ct.); *Fawson Estate (Re)*, 2012 NSSC 55; *Moore v. Drummond*, 2012 BCSC 170 at para. 47 [Moore]; *Coleman v. Coleman*, 2008 NSSC 396 [Coleman].
- [56] The respondents' concerns regarding the timing of the records is not a threshold issue of admissibility.
- [57] In summary, the medical records are admissible as business records for the fact that the statements therein were made. The direct observations of the various medical practitioners are admissible and relevant to the issue of suspicious circumstances. The respondents' concerns regarding remoteness go to the weight of the records rather than their admissibility.
- [36] I accept that the medical records from the time of the deceased's heart attack to his death are admissible except for any opinions they contain. They are relevant to the determination of the presence or absence of testamentary capacity at the material time.
- [37] However, the selected medical records from prior years that the respondent tendered are not admissible for any purpose. While a court considering a s. 58 application will "benefit from learning as much as possible about all that could illuminate the deceased's state of mind, understanding and intention regarding the document" (*Hadley Estate (Re)*, 2017 BCCA 311, at para. 40) these medical records illuminate nothing. They are not relevant, not authenticated, not complete and not admissible under the business records exception to hearsay. Nor have I considered the other portions of the respondent's affidavit that are hearsay, irrelevant or inflammatory.

Legal Framework

- [38] The formalities required for a valid will continue to be required in WESA at section 37:
- 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 his or hers, 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.

[39] Section 58 of WESA provides:

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.
- (4) If an alteration to a will makes a word or provision illegible and the court is satisfied that the alteration was not made in accordance with this Act, the court may reinstate the original word or provision if there is evidence to establish what the original word or provision was.
- [40] Section 58 is a "curative" provision. The first such provision in Canada was considered by the Manitoba Court of Appeal in *George v. Daily*, 143 DLR (4th) 273 (1997) where quoting Professor J.H. Langbein, the court described the rule of literal compliance with formal requirements as "a snare for the ignorant and the ill-advised, a needless hangover from a time when the law of proof was in its infancy" (para. 1).
- [41] The Manitoba Court of Appeal conducted a detailed analysis of the principles that guide the application of a curative provision. They found:

- a) "...[T]he greater the departure from the requirements of formal validity ... the harder it may be for the court to reach the required state of satisfaction (para. 19, citing Nicholson J. in *In the Matter of the Will of Lobato; Shields v. Caratozzolo* (1991), 6 W.A.R. 1 (Sup. Ct.) at p. 8)."
- b) The standard of proof on an application to cure an imperfect will is a balance of probabilities (para. 20).
- c) The guiding principle for the court is the duty to give effect to the testator's intentions wherever possible. With this in mind, the document should be "construed benignly and every effort made to avoid any construction which would invalidate the will (para. 27)."
- d) The document need not contain the deceased's handwriting (para. 29).
- e) Not every expression of a person, oral or written, concerning the disposition of their estate embody a deceased's testamentary intentions (para. 62).
- f) Ultimately, the question is whether the document expresses the deliberate or fixed and final intention of the deceased with respect to the disposal of their property on death (para. 65).

[42] The court also stated with respect to documents drafted by a third-party:

[66] At the very least, a third-party document would have to be one that had been made at the request of the deceased, or with his/her knowledge; and, in any event, with his/her awareness that the document recorded the deliberate and final expression of his/her wishes as to the disposition of his/her property on death. Another of the principles which have survived the enactment of s. 23 is that the court must be satisfied that the deceased knew and approved of the contents of the document which is presented for probate. *Guardhouse v. Blackburn* (1866), L.R. 1 P. & D. 109, which has not been overruled by the enactment of s. 23, is authority for that principle. Although this has been considered as a question of evidence rather than of substantive law, the rule takes on a heightened significance when the document is a third-party one. [Emphasis added]

[43] George was first considered by this Court in *Estate of Young*, 2015 BCSC 182. Madam Justice Dickson summarized the principles that guide the exercise of the court's curative power:

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

[35] In *George* the court confirmed that testamentary intention means much more than the expression of how a person would like his or her property to be disposed of after death. The key question is whether the document records a deliberate or fixed and final expression of intention as to the disposal of the deceased's property on death. A deliberate or fixed and final intention is not the equivalent of an irrevocable intention, given that a will, by its

nature, is revocable until the death of its maker. Rather, the intention must be fixed and final at the material time, which will vary depending on the circumstances.

- [36] The burden of proof that a non-compliant document embodies the deceased's testamentary intentions is a balance of probabilities. A wide range of factors may be relevant to establishing their existence in a particular case. Although context specific, these factors may include the presence of the deceased's signature, the deceased's handwriting, witness signatures, revocation of previous wills, funeral arrangements, specific bequests and the title of the document: Sawatzky at para. 21; Kuszak at para. 7; Martineau at para. 21.
- [37] While imperfect or even non-compliance with formal testamentary requirements may be overcome by application of a sufficiently broad curative provision, the further a document departs from the formal requirements the harder it may be for the court to find it embodies the deceased's testamentary intention: George at para. 81. [Emphasis added.]
- [44] The principles enunciated in Young were affirmed by the British Columbia Court of Appeal in Hadley Estate.
- [45] The law of testamentary capacity is also relevant. Madam Justice Balance summarized that law in *Laszlo v. Lawton*, 2013 BCSC 305:
- [185] In order to make a valid will, a testator must have a baseline level of mental acuity sufficient to appreciate judicially delineated components of the nature and effect of the testamentary act, referred to as testamentary capacity.
- [186] The law of testamentary capacity is heavily rooted in jurisprudence dating back to the middle of the 19th century
- [187] Another 19th century authority, *Banks v. Goodfellow* (1870), L.R. 5 Q.B. 549 [Banks], has proved even more enduring. Recognized as the leading authority on the subject of testamentary capacity - a proposition supported by its ubiquity in the case law - the decision contains the classic statement by Chief Justice Cockburn, at 565, setting out the essential requirements for establishing the validity of a will:

It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties - that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.

- [188] One hundred years after Banks, Laskin J.A. (dissenting on other grounds) provided a modern restatement of the test in *Re Schwartz* (1970), 1970 CanLII 32 (ON CA), 10 D.L.R. (3d) 15 at 32 (Ont. C.A.):

The testator must be sufficiently clear in his understanding and memory to know, on his own, and in a general way (1) the nature and extent of his property, (2) the persons who are the natural objects of his bounty and (3) the testamentary provisions he is making; and he must, moreover, be capable of (4) appreciating these factors in relation to each other, and (5) forming an orderly desire as to the disposition of his property ...

[189] Timing is key. In general, the first relevant time that testators must have testamentary capacity is when they give will instructions; the second is when the will is executed. In recognition of the fact that faltering mental capacity is prone to fluctuate, the authorities permit variation of the degree of capacity required at these pivotal times. For example, the will of a testator who is competent to give instructions, but has lost capacity when the will is executed, may be valid so long as, at the time of execution, the testator was capable of comprehending that she was executing a will drawn in accordance with her previous instructions: *Parker v. Felgate* (1883), 8 P.D. 171; *Brownhill Estate* (1986), 72 N.S.R. (2d) 181 (Co. Ct).

...

[194] It is well-settled that a testator's ability to provide rational responses to questions or follow a learned pattern or habit is not conclusive of capacity. The reasons of Mr. Justice Rand writing for the majority of the Supreme Court of Canada in the important decision of *Legeret al v. Poirier*, [1944] S.C.R. 152 at 161, remain instructive of the point:

But there is no doubt whatever that we may have testamentary incapacity accompanied by a deceptive ability to answer questions of ordinary and usual matters: that is, the mind may be incapable of carrying apprehension beyond a limited range of familiar and suggested topics. A "disposing mind and memory" is one able to comprehend, of its own initiative and volition, the essential elements of will-making, property, objects, just claims to consideration, revocation of existing dispositions, and the like...

[195] His Lordship, at 161-62, surveyed a number of authorities in support of that proposition:

Marsh v. Tyrrell and Harding:

It is a great but not an uncommon error to suppose that because a person can understand a question put to him, and can give a rational answer to such question, he is of perfect, sound mind, and is capable of making a will for any purpose whatever; whereas the rule of law, and it is the rule of common sense, is far otherwise: the competency of the mind must be judged of by the nature of the act to be done, and from a consideration of all the circumstances of the case.

Quoting from the *Marquess of Winchester's Case*, Sir John Nicholl adds:

By the law it is not sufficient that the testator be of memory, when he makes his will, to answer familiar and usual questions, but he ought to have a disposing memory so as to be able to make a disposition of his estate with understanding and reason.

[196] Following his review, his Lordship concluded, at 162:

Merely to be able to make rational responses is not enough, nor to repeat, a tutored formula of simple terms. There must be a power to hold the essential field of the mind in some degree of appreciation as a whole, and this I am satisfied was not present here.

[46] With these principles in mind, I turn to their application to the facts in this matter.

Analysis and Discussion

[47] In this instance authenticity is not in issue. However, before a court can grant relief under s. 58 of WESA it must be satisfied that the testamentary document is authentic and that it represents the deceased person's fixed and final testamentary intentions. This flows from the curative nature of s. 58, which is meant to prevent imperfect compliance or a lack of compliance with the technical requirements of a will from defeating the testamentary wishes of the deceased.

[48] The burden is on the propounder of a purported will to establish that the document is authentic and represents a deceased person's testamentary intentions on a balance of probabilities. The court may rely on extrinsic evidence of events that occurred before, at the time, and after the document was created: *Hadley Estate* at paras. 38-40.

[49] A crucial part of establishing that the document in issue represents the deceased person's testamentary intentions is to show that the deceased had testamentary capacity at the relevant time. That capacity requires an individual to understand of the nature and extent of their property, the persons who are the natural objects of their estate, the testamentary provisions they are making, and to appreciate these factors as they inter-relate: *Laszlo* at para. 188, citing *Re Schwartz*, [1970] 2 O.R. 61-84.

[50] Mr. Gibb's capacity between the time of his heart attack and his death fluctuated. At times he clearly lacked capacity, while at others he was much more alert and had the necessary capacity. The times when testamentary capacity is necessary are when instructions are given for the purported will, and when, in the normal course of events, the purported will would have been executed.

[51] Here, the relevant times are November 9, 2017 when Mr. Simonett attended the hospital to receive instructions, and November 14, 2017 when Mr. Gibb and Mr. Simonett reviewed the 2017 Will over the telephone.

The November 9, 2017 instructions

[52] The medical records state that on November 8, 2017, Mr. Gibb was "not speaking in full sentences" and "he was able to answer simple questions and open his eyes on command". He was placed under sedation. As of November 8, 2017, the records reveal he had a very poor prognosis and that the plan was to withdraw sedation and reassess his neurological status.

- [53] On November 9, 2017, the records reveal that overnight Mr. Gibb became "relatively more stable. He awoke and was able to follow commands". His poor prognosis was explained to him, and he understood. He appeared to have recovered somewhat from his cardiac arrest and CPR and had been up walking around.
- [54] As noted earlier, Mr. Simonett was satisfied that Mr. Gibb had the capacity necessary to give instructions for a new will, albeit his capacity was "borderline" and towards the end of their meeting around 12:00 pm Mr. Simonett noted a "loss of capacity". Ms. Lawson, who had known the deceased for many years, deposed that Mr. Gibb was speaking to her and Ms. Greaves coherently on November 9, 2017, and informed her and Ms. Greaves he wished to see his lawyer. The applicant could also hear Mr. Gibb requesting him to contact his lawyer when he spoke to the CRH physician on November 9, 2017.
- [55] Ms. Lawson was present when Mr. Simonett and a social worker assessed Mr. Gibb's capacity and when he instructed and explained his instructions to Mr. Simonett. Ms. Lawson's evidence indicates Mr. Gibb was aware of his assets, who he wished to be his executor, and what he wanted done with his assets.
- [56] While the respondent challenges the evidence relied on to support a finding of capacity on November 9, 2017 as inadequate in various ways, he did not seek to cross examine either the applicant or Mr. Simonett. The respondent is in my view parsing the evidence to too great a degree. The alleged concerns do not undermine a finding that on November 9, 2017, Mr. Gibb had the testamentary capacity necessary to instruct Mr. Simonett to prepare the 2017 Will.
- [57] I am satisfied the applicant has established that on November 9, 2017, Mr. Gibb had the capacity required to provide the 2017 Will instructions to Mr. Simonett. Mr. Simonett was alert to the issue of capacity, as any lawyer would be when visiting a client in intensive care. He approached the situation as a professional taking instructions for a will and was satisfied that Mr. Gibb sufficiently understood his assets, potential claims on those assets, and the disposition he wished to effect. Mr. Gibb was also aware that he had a previous will he wished to change and had reasonable explanations for making those changes.
- [58] The events on November 9, 2017 bear the hallmarks of a new will being desired and steps taken to have it prepared. Mr. Gibb initiated the process by requesting to see his lawyer for that purpose and the result was a draft will valid on its face in that it is complete, revokes an earlier will, and is not ambiguous nor does it result in a partial intestacy. In addition, it makes sense given the deceased's circumstances at the time, including his choice of executor and alternative executor and his choosing to benefit his friends, not his estranged spouse. While her children were potentially beneficiaries under the earlier 2011 Will, he had no legal obligations to them. They were adults when Mr. Gibb and Ms. McPhedran commenced living together. Mr. Simonett's account of that meeting is corroborated by Ms. Lawson and the CRH social worker's notes.

[59] Had the will been prepared and signed at that time, it would have been a valid will as Mr. Gibb had the capacity. However, as summarized earlier, efforts to execute the 2017 Will failed. Therefore, the validity of the 2017 Will turns on the November 14, 2017 telephone call between Mr. Gibb and Mr. Simonett.

The November 14, 2017 telephone call

[60] The central issue then is the sufficiency of the telephone discussion between Mr. Gibb and Mr. Simonett on November 14, 2017 where the 2017 Will, prepared on Mr. Gibb's November 9, 2017 instructions, was reviewed. The sufficiency of the call depends on both Mr. Gibb's testamentary capacity at that time, and the broader question of whether Mr. Simonett was able to assess Mr. Gibb's capacity over the telephone.

[61] The medical records show that Mr. Gibb's mental state fluctuated between November 10 and 15, 2017. The Critical Care Patient Record dated November 14, 2017, "Neuro" states, "Disoriented to date ", and the Patient Progress Record states:

[Time illegible]: Pt. reassessed as spontaneously awoken. Remains calm oriented + pleasant

[Time illegible]: Confused to date/time although appears a lot clearer neurologically than yesterday

1810: pt sitting on edge of bed saying 'I need to see the Dr, I've not pee'd for 4 days'. Reassured that he has a foley insitu and is making urine

[62] His mental state clearly varied over the course of his hospitalization. This included multiple incidents of confusion and disorientation at times to such an extent that for example, on November 11, 2017, hospital staff advised counsel that Mr. Gibb was not able to deal with legal issues at that time. Mr. Simonett accepted their assessment and did not attempt to have the 2017 Will executed that day.

[63] Instead, Mr. Simonett reviewed the 2017 Will with Mr. Gibb on November 14, 2017 by phone. He deposed:

On November 14, 2017 I called RJH to talk to Mr. Gibb and check on his condition. When I spoke to the medical staff before they transferred my call to Mr. Gibb, they informed me he was, incredibly, much improved and had been walking around and cracking jokes with the nurses. When I spoke with Mr. Gibb himself, he confirmed that he was up and walking and feeling well. Mr. Gibb specifically told me not to bother coming back to RJH as he was doing better and was going to beat his medical issues. He did, however, agree to my suggestion that we go through his Will together, line by line, on the telephone to confirm it represented his wishes. We spent around 30 minutes on the telephone together as I read the entire Will to Mr. Gibb, stopping after each sub-section to confirm its effect and his wishes. He confirmed each sub-section to me and did not direct any changes. After the Will, we did the same for the Declaration. Nothing in my conversation with Mr. Gibb gave me reason to doubt that he had regained his legal capacity. I had existing plans to return to Victoria on November 17, 2017 and Mr. Gibb also agreed that I could

stop to see him at RJH at that time to execute his Will then. Attached hereto as "Exhibit F" is a true copy of my handwritten note from that call and timeline of events up to that date.

[64] The applicant submits this oral review of the 2017 Will was sufficient to establish the 2017 Will as Mr. Gibb's fixed and final testamentary intention. The applicant points out a testator actually seeing the will is not a requirement of a valid will, as wills are read aloud to blind or illiterate testators and, so long as they confirm its accuracy and sign before two witnesses, deemed valid. He relies on Rule 25-3(18) of the Supreme Court Civil Rules in support of this submission, which states:

Proof of will-maker's knowledge of will

(18) If an application is brought under this rule for a grant of probate, a grant of administration with will annexed, as an ancillary grant of probate or an ancillary grant of administration with will annexed and, at the time of making of the will, the will-maker

(a) was blind,

(b) was illiterate,

...

the application must, unless the will has been proved in solemn form

(f) indicate in the affidavit referred to in subrule (2)(b)(i)(B) which paragraphs (a) to (e) of this subrule apply, and

(g) if the attestation clause of the will does not indicate under paragraph (f) of this subrule applied to the will-maker at the time of the signing of the will, file one or more affidavits, by any person deposing from personal knowledge, respecting the circumstances that raise a presumption, that

(i) the requirements of Division 1 of Part 4 of the Wills, Estates and Succession Act, or the corresponding requirements any law to which reference may be made under section 80 of the Wills, Estates and Succession Act, were met, and

(ii) the will-maker had knowledge of the contents of the will. [B.C. Reg. 149/2018, Sch., s. 8]

[65] The respondent on the other hand emphasizes that the 2017 Will lacks all of the hallmarks of formal validity, including signatures, witnesses, and having been seen by the testator. As noted earlier, he also points out that unlike other s. 58 cases, Mr. Gibb made no notations on the document itself. The respondent submits that Mr. Simonett was simply not able to adequately assess Mr. Gibb's testamentary capacity over the phone, nor to gauge Mr. Gibb's knowledge and approval of the 2017 Will. That is, to make that assessment counsel should have been physically present. While Mr. Simonett was of the opinion Mr. Gibb had the necessary capacity based on their conversation and that Mr. Gibb confirmed each section of the 2017 Will, the phone call alone, in the respondent's submission, is simply not enough to

establish a fixed and final intention on Mr. Gibb's part.

- [66] One issue the respondent points to is that there is no evidence of when on November 14, 2017 the phone call occurred. The timing is important in the respondent's submission given that the medical records indicate that Mr. Gibb's mental state fluctuated that day. The respondent says this is another reason why Mr. Simonett's evidence of the November 14, 2017 phone call should be given little weight.
- [67] There is no recording or transcript of the phone conversation to assist in addressing the broader issue of Mr. Gibb's competence at the time of the phone call. Clearly nothing Mr. Gibb said or did on the call raised any concerns with Mr. Simonett regarding his client's legal capacity. However, his assessment was based solely on how Mr. Gibb sounded and responded on the call. Mr. Simonett did not have the benefit of observing Mr. Gibb during the conversation, nor did Mr. Gibb have the benefit of a hard copy of the 2017 Will before him with which he could follow along. Nevertheless, the two agreed that Mr. Simonett would bring the will to Victoria on November 17, 2017 to execute it. This suggests Mr. Gibb understood the instructions he had provided to his lawyer, and that he was content with the result.
- [68] As the quoted records on November 14, 2017 reveal, while as before his mental state fluctuated, he was at times, described as "oriented and pleasant", at others "[c]onfused to date/time although appears a lot clearer neurologically than yesterday..." There are no records that Mr. Simonett's assessment was of concern, nor are the entries inconsistent with Mr. Gibb having the requisite capacity when he spoke with Mr. Simonett.
- [69] To determine whether or not the phone call on November 14, 2017 is sufficient evidence of the 2017 Will representing Mr. Gibb's fixed and final testamentary intent requires comparison to the s. 58 jurisprudence.
- [70] I keep front of mind Rand J.'s comment in *Legault*, cited by Ballance J. in *Laszlo*, that neither mere "rational responses" nor a "tutored formula of simple terms" are indicative of capacity. The testator must be able to appreciate and hold in their mind the entirety of the disposition to some degree: *Laszlo*, at para. 198. I also recognize that it is the duty of the Court to "...protect a man's last will..." and "...to give effect, if possible, to his intentions...": *George*, para. 27, citing *Re Eames Estate*, [1934] 3 W.W.R. 364 (Man. K.B.) at p. 366.
- [71] In *George* the deceased advised his accountant of changes he wished to make to his will. The accountant wrote to the deceased's lawyer detailing the instructions. The deceased then met with his lawyer to confirm these instructions and sign the will however the lawyer requested a medical certificate of competency before doing so. That did not occur. Two months passed after this meeting without any contact or communication between the deceased and his lawyer. The lawyer had not drafted the instructed will. The deceased took no steps to obtain a letter of medical competency. The instructions largely disinherited the deceased's children, leaving the residue of his estate to certain charities. The motions court judge found the wills instruction letter written by the accountant to be a valid will. The Court of Appeal

overturned that order.

- [72] The majority of the Court of Appeal noted that to give effect to testamentary intention in a non-compliant document the court must be satisfied the intention was proved on substantial, complete, and clear evidence:
- [97] While s. 23 is a remedial piece of legislation, empowering the court to give effect to testamentary intention contained in a document not otherwise conforming to the Act, the section imposes a significant onus on an applicant. I describe the onus as significant because in disposing of an application under s. 23, the court must be ever mindful that the question for determination is testamentary intention and the person who can best speak to that intention, the deceased, is not present to give evidence. The onus will only be satisfied by the presentation of substantial, complete and clear evidence relating the deceased's testamentary intentions to the document in question. Oral evidence describing the circumstances surrounding the creation of the document and the deceased's actions and words in relation to the document might well afford an applicant a better opportunity of satisfying the s. 23 onus than affidavit evidence alone. [Emphasis added].
- [73] The applicant in George had not met this onus.
- [74] In *Re Bailey Estate*, 2016 BCSC 1226, the deceased instructed her lawyer to make a new will in May 2013. The first draft will was not reviewed for over a year, in July 2014. Further drafts were made. The next meeting between the deceased and her lawyer was in October 2014. The lawyer made notes on the draft will prepared after the July meeting at that time. Later, in December 2014, a completed draft of the will was sent to the deceased by email, to which the deceased confirmed receipt, and stated that she would review it. Several attempts at meeting to finalize the will were made by the lawyer, but the deceased passed away on October 9, 2015 without signing the December 2014 draft will. Her death was unexpected.
- [75] The court declined to cure the December 2014 draft will:
- [53] For over two years, Ms. Bailey did not revoke her 2008 will by word or deed. Unlike Ms. Young, Ms. Beck and Ms. Yaremkeiwich, Ms. Bailey left nothing, either electronic or on paper that the December 2014 draft will represented her final intentions. There simply was no expression by Ms. Bailey whether the December 2014 draft will was a final expression of her testamentary intentions.
- [76] In *Re Poulk Estate*, 2018 BCSC 1321 the court refused to cure a will under s. 58 that was a fill-in-the-blank type of document filled out by the deceased's sister, one of the purported beneficiaries. The deceased was in poor health in hospital at the time that the will was created, and although he apparently attempted to sign it, he failed to do so. The deceased did not appreciate the severity of his health condition. He was administered various opioids throughout his hospitalization, and only able to communicate by gestures and some writing for much of it. The nursing notes four days prior to his death stated:

- [15] ...Pt's family is very focused on doing a Will. Pt has requested that this not be the focus right now and he wants some time to think...
- [77] In declining to cure the purported will, the court stated:
- [41] Even if there was sufficient evidence to establish that the deceased knew and approved the contents of the Will, it is far from clear that the Will was a fixed and final expression of the deceased's testamentary intention. It is apparent from the hospital records of the deceased that he may not have appreciated the severity of his illness or the imminence of his death. Up until the day prior to his death, he continued to express a plan to return home once he was better. This is consistent with the evidence that the deceased requested on June 21, 2017 that the Will not be the focus at the time.
- [42] 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.
- [78] In *Henderson v. Myler*, 2021 BCSC 1649, the court refused to declare that a handwritten note was effective as a codicil to the deceased's 2013 will. The note changed the distribution of the deceased's existing will, reducing the substantial residual gift to a charity to a \$100,000 specific legacy, increasing legacies to some of the deceased's family, and decreasing or eliminating other legacies to other family members. However much of the estate was not addressed and was intestate.
- [79] The note was found with the 2013 will in the deceased's lockbox, but was unsigned and undated. It had markings on it made by her friend and a co-executor named in her will (neither of whom were beneficiaries under the will). While her capacity was in dispute she was found to have the requisite capacity to make a will.
- [80] Regarding the testator's "knowledge and approval" the court stated:
- [276] Knowledge and approval requires the ability to understand and approve the choices that have been made. To have knowledge and approval of testamentary dispositions, it is necessary for the will-maker to be aware of the contents of the will she is executing. While capacity includes the ability to make choices, for knowledge and approval the will-maker must also be aware of the magnitude of the residue of her estate and appreciate the effect of the disposition of her estate: *Geluch v. Geluch Estate*, 2019 BCSC 2203 at paras. 124-127.
- [277] In this case, there is no evidence that Ms. Murray appreciated the effect of the Note on the disposition of her estate, particularly the effect of not dealing with the remaining residue. Both Ms. Myler and Ms. Crawford said they did not discuss the residue of her estate with Ms. Murray. Because the Note does not contain a residue clause, what remained in Ms.

Murray's estate, after the specific bequests were paid to family members, passes on intestacy to the plaintiffs. Two of the plaintiffs, Ron and Daniel, were specifically crossed out on the Note, and Brian was not included at all.

[278] If the Note is a valid will, 75 percent of the residue of Ms. Murray's estate goes to three individuals whom Ms. Murray expressly did not wish to benefit from her estate. It is difficult to see how Ms. Murray could have had knowledge and approved of this result.

[81] The applicant submits these authorities are distinguishable on their facts. Namely, none concern a will prepared by a lawyer, its contents confirmed in a phone call mere days later, with a date set on which it would be executed. Only Mr. Gibb's death intervened.

[82] As noted in Young at para 21:

[s]ection 58 of the WESA does not specify a minimal level of execution or other formal requirement for a testamentary document to be found fully effective...

[83] As a result, strictly speaking, actually seeing the document itself is not essential. The issue is whether Mr. Gibb had the requisite knowledge and approval of its content, and thus, whether he intended it be a final expression of his testamentary wishes.

[84] In the recent decision of Matthews J., *Bishop Estate v. Sheardown*, 2021 BCSC 1571, the deceased gave instructions to her lawyer, reviewed the draft, made a few minor clarifications, but ultimately cancelled her appointment to execute the will. Justice Matthews stated:

[30] Accordingly, on the facts of this case, the issue of whether the unexecuted 2020 will represents Ms. Bishop's deliberate or fixed and final intentions has two dimensions. The first is whether its departure from the formal testamentary requirements considering the context and contents of the alleged substantial invalidity make it impossible to establish testamentary intention. The second is whether the failure to execute the unexecuted 2020 will from when it was ready for execution until Ms. Bishop's death nullifies any intention Ms. Bishop may have had when she made her appointment to execute it in March 2020.

[31] Courts undertaking this analysis are looking, broadly speaking, at whether the document has the hallmarks of being made for the purpose of recording the deceased's fixed and final intentions and whether it was made in a context that supports that conclusion. The court will consider the nature of the document; whether it uses the language of a will; whether the deceased person hired a lawyer to prepare it as part of estate planning; if handwritten, whether it is the handwriting of the deceased; whether it was signed and/or witnessed; whether it revokes previous wills; whether it designates funeral arrangements, etc.: *Beck Estate (Re)*, 2015 BCSC 676 at para. 17 and *Young* at para. 36.

- [85] The court found that the deceased had reviewed the draft will, and given her hand written responses to her lawyer. She suggested no substantive changes. After reviewing the surrounding circumstances, Matthews J. stated at para. 43 "it cannot be said that the unexecuted 2020 will "was not seen, or read, or written, or in some way authenticated, or adopted": *George v. Daily* (1997), 143 D.L.R. 273 (Man. C.A.) at para. 56."
- [86] The court went on to note the hallmarks of a fixed and final testamentary intention were present as the document bore the title of a will, it was prepared by a lawyer at the request of the deceased, it revoked a prior will, named executors and beneficiaries, and the beneficiaries made sense. It was held to represent the deceased's fixed and final intention for the disposition of her assets at the time she booked her appointment to execute it. That appointment was cancelled due to the COVID-19 pandemic, preventing her from signing the will. Some four months passed before she died, the will unsigned. However, the court was satisfied the deceased had been waiting to attend in person. Only the pandemic prevented her from attending. There was no evidence of a change in her testamentary intentions. Justice Matthews ordered the unexecuted will to be fully effective.
- [87] There are many similarities between Bishop and the case at bar. Mr. Gibb, like Ms. Bishop, had his lawyer prepare his will. Although Mr. Gibb did not physically review the document or make written notes, in both cases a date was set for the will's execution. As in Bishop, there is nothing to indicate that between confirmation of the will and Mr. Gibb's death his intention with respect to the 2017 Will had changed. The only real difference in that respect is the gap in time between when the will was reviewed and confirmed, and the intended day of execution: less than three days, as opposed to four months. There is nothing to suggest Mr. Gibb would not have signed the will on November 17, 2017.
- [88] The primary concern is whether Mr. Gibb understood in the telephone call with Mr. Simonett on November 14, 2017 that he was reviewing and approving of the 2017 Will prepared on his instructions of November 9, 2017. Mr. Simonett is clear that nothing indicated otherwise. I have no reason to question Mr. Simonett's credibility or reliability. I note as well that the level of understanding required of Mr. Gibb was only that he was approving that which he had earlier instructed his lawyer to prepare.
- [89] The involvement of a solicitor throughout is significant. Mr. Simonett knew the deceased and was familiar with his affairs. He was satisfied that he had successfully communicated the contents of the 2017 Will to Mr. Gibb, and that, from his involvement in the call, Mr. Gibb understood and approved of the 2017 Will as read and explained to him. Mr. Simonett was clearly alive to issues of capacity as his actions throughout indicate this. This includes Mr. Simonett's decision on November 11, 2017 to heed the advice of medical staff and not attempt to execute the 2017 Will that day, despite having driven 265 kilometres for that very purpose.

- [90] The execution of the will did not occur on November 14, 2017 as Mr. Gibb was confident he was going to beat his health challenges. He was optimistic, understandably as he was only 68, hence there was no urgency on that day. There is no evidence he wavered in his intentions in the days after the phone call, nor is there any evidence that he expressed uncertainty or desire to consider the matter further before the planned execution on November 17, 2017. But for his death, there is nothing to suggest he would not have signed the 2017 Will as read to him on November 14, 2017.
- [91] Further, Mr. Gibb's desire to change his will is understandable. He was long separated from Ms. McPhedran and explicitly set out in the Statutory Declaration his reasons for leaving her out of the 2017 Will. Mr. Gibb knew his business matters were complex and the subject of a number of challenges, and that his proposed executor, the applicant, had the knowledge to, and was already dealing with those matters on his behalf. The appointment of the applicant as executor makes sense given his pre-existing involvement in Mr. Gibb's affairs. Likewise, his choice to change his beneficiaries to his close friends makes sense as he had no children. While he did not benefit his sisters and did not explain this, leaving out one's siblings is not determinative or necessarily unreasonable. I also note that they chose to not participate in this proceeding.
- [92] As noted earlier, the duty of the courts is to give effect, if possible, to the intentions of a testator. The test under s. 58 of WESA is on the balance of probabilities.
- [93] In agreeing to meet with his lawyer on November 17, 2017 after reviewing the will by phone, Mr. Gibb showed his intention to execute the 2017 Will. Evidently, Mr. Gibb had only suggested that it was not necessary for Mr. Simonett to drive back down to Victoria as he thought he would soon recover. However, once he knew Mr. Simonett would be in Victoria for other reasons on November 17, 2017 and would not be making a special trip Mr. Gibb readily agreed to meet and sign the will. His death intervened.

Conclusion

- [94] I am satisfied that the applicant has established on a balance of probabilities that the 2017 Will represents Mr. Gibb's fixed and final testamentary intentions. That Mr. Gibb only reviewed and approved the 2017 Will over the phone with counsel does not undermine his testamentary intention. Section 58 exists so that the testamentary intentions of a deceased person are not defeated for mere formal non-compliance, as was often the case when formalities were required. If the 2017 Will is not cured, Mr. Gibb's intentions would be defeated and his estate would go, largely, to individuals he expressly did not wish to benefit from his estate.
- [95] I order the 2017 Will, pursuant to s. 58 of WESA, is effective.

Costs

- [96] The applicant seeks his full indemnity costs from the estate given he had to bring this application given his role in the estate and the needed resolution of whether he was executor or not. The respondent seeks his costs payable by the estate as well. The applicant leaves that to the Court but notes that the respondent was not obliged to dispute the application.
- [97] As noted in Hadley Estate:
- [47] In estate litigation, courts commonly award special costs payable out of the estate to all parties. This practice is based on the principle that where an estate issue must be litigated to remove any doubts, all interested parties must be joined and all are entitled to be heard. In such circumstances, they should not be out of pocket if, in the result, the litigation does not conclude in their favour. The central question as to costs is whether the contested issue arises from the conduct of the deceased or the conduct of another. In the case of the former, an award of special costs from the estate will usually be made...
- [98] In the circumstances of this case, the costs of the applicant and the respondent shall be payable from the estate on a full indemnity basis.

"The Honourable Mr. Justice Punnnett"

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