

CANADA / JUDGMENT

Goldberg Estate (Re)

2025 BCSC 1585

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Supreme Court of British Columbia

DECIDED

15 August 2025

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2025 BCSC 1585 Goldberg Estate (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Goldberg Estate (Re),

2025 BCSC 1585

Date: 20250815

Docket: P234380

Registry: Vancouver

In the Matter of the Estate of John Goldberg, Deceased

Before: The Honourable Madam Justice V. Jackson

Reasons for Judgment

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Counsel for Application Respondent,

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Place and Date of Hearing:

Vancouver, B.C.

June 12, 2025

Place and Date of Judgment:

Vancouver, B.C.

August 15, 2025

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I. OVERVIEW

- [1] As many of the parties to this application share the same last name, at times I refer to them by their first names, intending no disrespect.
- [2] The applicant, Shawna Lee Goldberg and John Goldberg (the "Deceased") began living together in 1992. They married in 1997. On or around July 1997 John and Shawna entered into a marriage Agreement (the "Marriage Agreement").
- [3] John and Shawna lived together from 1992 until he died on April 18, 2023.

- [4] John was survived by Shawna, the Deceased's children from an earlier marriage the respondents David Howard Goldberg, Judith Ann Reeson, and Susan Carol Goldberg (the "Children") and a number of grandchildren.
- [5] John made a will dated October 29, 1999 (the "Will") naming Shawna and David as co-executors of the estate (the "Estate"). The executors obtained a grant of probate on January 9, 2024.
- [6] On June 17, 2024, Susan commenced a wills variation action pleading that the Will does not make just, adequate, and equitable provision for her. On November 8, 2024, Judith filed a counterclaim advancing a similar claim.
- [7] At the time the Marriage Agreement was entered into, John was the sole shareholder of Princeton Equity Corporation (the "Company"). In October 2016, John transferred all of his shares in the Company to himself and Shawna jointly. It is common as between all of the parties that the shares in the Company belong solely to Shawna by right of survivorship.
- [8] At the time of his passing, the gross value of the Deceased's assets less secured debts was \$7,156,059.07.
- [9] Shawna, in her capacity as one of the executors of the Estate and in her personal capacity, applies for a declaration that the Estate owes her a debt in the amount of \$2,486,400 (the "Debt"), in her personal capacity, pursuant to the Marriage Agreement, an order under s. 155(3)(c) of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA] that the executors of the Estate shall immediately pay out the sum of \$2,486,400 to Shawna in her personal capacity in satisfaction of the Debt, and special costs payable out of the assets of the Estate. Shawna relies on the entirety of the Marriage Agreement, in particular s. 4, which provides:
4. In the event that John predeceases Shawna while the parties still remain married and living together, then Shawna is to receive 30% of the value of John's assets as set out in Schedule "A" hereto or 50% of the increase in such value from the present to the date of his death, whichever may be greater.
- [10] Shawna argues because she and the Deceased had remained married and John predeceased her, s. 4 of the Marriage Agreement creates a debt to her payable upon John's death in the amount of \$2,486,400, calculated as being 30% of the value of John's assets set out in Schedule "A" of the Marriage Agreement, which is greater than 50% of the increase in value from the date of the Marriage Agreement until the Deceased's death. Her position is that she is both a beneficiary under the Will but also a creditor under the Marriage Agreement, and that the Debt, as with all debts of the Estate, must be paid first before the residue terms of the Will can be triggered. She argues the Debt amount is not available for potential redistribution in Susan and Judith's wills variation claims.
- [11] The Children take the position that the Marriage Agreement does not create a stand-alone debt, but rather that the Marriage Agreement is a testamentary document, and amounts owing are testamentary gifts that must not be distributed until the wills variation actions

commenced by Susan and Judith have been resolved. The Children also argue that the Marriage Agreement and the Will are in conflict causing uncertainty as to what Shawna is entitled to under the Marriage Agreement. Judith also argues it is necessary to imply a term in the Marriage Agreement to avoid absurdity.

- [12] For the reasons that follow, I have concluded the Marriage Agreement is not a testamentary document, that the Marriage Agreement and the Will are not inconsistent, and that there is no need to imply a term in the Marriage Agreement. I declare that the Marriage Agreement gave rise to a Debt in the amount of \$2,486,400, payable upon John's death by the Estate to Shawna as a creditor, and order the executors of the Estate to immediately pay the Debt to Shawna in her personal capacity in satisfaction of the Debt.

II. ANALYSIS

- [13] None of the parties suggest provisions of the Marriage Agreement can be severed, with some constituting testamentary gifts and others being inter vivos obligations. They all argue the Marriage Agreement is either a contract or a testamentary document, not both.

A. The Marriage Agreement is not a testamentary document

- [14] The Marriage Agreement is not a testamentary document.

- [15] In *Norman Estate v. Watch Tower Bible and Tract Society of Canada*, 2014 BCCA 277 at para. 18, the Court held that the settled test for determining whether a disposition is testamentary is as set out in *Cock v. Cooke* (1866), L.R. 1 P. & D. 241 at 243, which Justice MacKenzie quoted as follows:

It is undoubted law that whatever may be the form of a duly executed instrument, if the person executing it intends that it shall not take effect until after his death, and it is dependent on his death for its vigour and effect, it is testamentary.

- [16] The words "vigour and effect" are not applicable to the result to be obtained by, or to the performance of, the terms of the instrument, but to the instrument itself: *Norman* at para. 19, citing *Wonnacott v. Loewen*, 44 B.C.L.R. (2d) 23 at 26-27, 1990 CanLII 976 (C.A.).

- [17] In *Norman*, at paras 20-22, the Court endorsed the following general principles for distinguishing an inter vivos disposition from a testamentary disposition:

- The question of whether a disposition is or is not testamentary depends upon the intention of the maker;
- The intention of the maker is a question of fact. In determining the intention, the court is not restricted to the wording of the document alone, but can and should consider extrinsic evidence relevant to the transaction;
- If the document is not intended to have any operation until the maker's death, it is testamentary;

- If the document is intended to have and does have the effect of transferring some interest in the property or of setting up a trust thereof in praesenti, it is not testamentary;
- The reservation of a right to revoke the transfer or bring a trust to a close does not necessarily have the effect of making the document testamentary;
- Cases where documents are held to be testamentary often include the following factual elements: 1) no consideration passes; 2) the document has no immediate effect; 3) the document is revocable; and 4) the position of the donor and donee does not immediately change;
- Even where an intended disposition is revocable by the maker or where enjoyment of it is postponed until the death of the maker, if, at the time of its execution, the document is legally effective to pass some immediate interest in the property, no matter how slight, the transaction will not be classified as testamentary: James MacKenzie, *Feeney's Canadian Law of Wills*, 4th ed. (Markham, ON: LexisNexis Canada Inc., 2000), para. 1.20;
- The level of control the donor exercises over the property during his or her lifetime is a factor to be considered in determining whether a disposition is inter vivos or testamentary and the more control the donor exercises, the more likely the disposition will be considered testamentary; and
- The central question is whether the maker of the document intended the document to pass some immediate interest or whether the maker intended the document to have no effect until his death. The degree of control the donor retains over the property during his or her lifetime is relevant to ascertaining that intention. However, if it is clear that the document is intended to have immediate effect it is not testamentary even if the donor retains control, such as the ability to call for the return of the property during his or her lifetime.

[18] I find as a fact that at the time John entered into the Marriage Agreement his intention was that the Marriage Agreement have immediate effect. The Marriage Agreement had vigour and effect prior to John's death.

[19] At the time the Marriage Agreement was executed, division of matrimonial property was governed by Part 5 of the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA]. Under the FRA, a marriage agreement was an agreement entered into by two people before or during their marriage, to take effect on the date of their marriage or on the execution of the agreement, whichever is later, for management of family assets or other property during marriage, or ownership in, or division of, family assets or other property during marriage, or on the making of an order for dissolution of marriage, judicial separation or a declaration of nullity of marriage: FRA, s. 61(2). Under the FRA, a marriage agreement was required to be in writing, signed by both spouses, and witnessed by one or more other persons: FRA, s. 61(3).

[20] The Children say the FRA is not applicable because, they argue, Shawna "opted out" of the FRA by virtue of s. 13 of the Marriage Agreement which provides:

13. Each party expressly waives the protection of Part 5 of the British Columbia Family Relations Act or similar legislation in any other jurisdiction where they may happen to reside.

- [21] The Marriage Agreement is a valid marriage agreement. It is in writing, signed by both John and Shawna, witnessed, and it provided for the ownership and division of family assets and other property, during and at the end of their marriage.
- [22] The Marriage Agreement was made on July 22, 1997 and the obligations and benefits agreed to under the Marriage Agreement were effective on July 27, 1997, being the date Shawna and John were married: FRA s. 61(2). There was consideration for the Marriage Agreement, including the waiver of the protections afforded by Part 5 of the FRA: s. 13 of the Marriage Agreement. Even without consideration, the Marriage Agreement would still be binding: FRA, s. 61(4). The positions of John and Shawna immediately changed on entering into the Marriage Agreement. The Marriage Agreement immediately created legal and enforceable rights. Further, even though John maintained control over his Schedule "A" separate property during his lifetime (ss. 2(a), 7 and 8 of the Marriage Agreement), the Marriage Agreement provided Shawna with, inter alia, a guaranteed percentage of the value of that property upon certain circumstances: Marriage Agreement, s. 3.
- [23] The language of the Marriage Agreement also supports my finding that the Marriage Agreement is not a testamentary document. Beyond the title of the document itself (which is "Marriage Agreement"), the terms of the Marriage Agreement also reflect that John intended for the Marriage Agreement to take effect prior to his death, and not an intention that the Marriage Agreement not take effect until after he died.
- The Marriage Agreement reflects that John and Shawna entered into the Marriage Agreement to determine ownership, management and division of all property "during their marriage, on the making of an Order for dissolution of marriage or a declaration of nullity of marriage" as well as if one of them were to die: Recital B;
 - The Marriage Agreement reflects that their shared intention was to have the Marriage Agreement "determine their mutual rights and obligations regarding property, maintenance, and other matters ... during cohabitation or upon ceasing to cohabit", both "during their marriage" and "following their marriage": Recital H;
 - The Marriage Agreement reflects that they both believed the Marriage Agreement would "bring certainty and confidence to their relationship" and "encourage and strengthen their role as a family within society": Recital I;
 - The Marriage Agreement governed what would happen in the event that the parties separated or lived separate and apart, events that, rem manifestam, would precede death: ss. 3, 12;
 - The Marriage Agreement was intended to survive either John or Shawna seeking a divorce and provided obligations in such proceedings and proceedings with respect to their property and responsibilities to each other: ss. 9, 10, 11

- [24] Although David argues the Marriage Agreement was revocable until John's death, I disagree. The Marriage Agreement does not contain any reservation of a right to revoke the Marriage Agreement. Under the FRA, once made a marriage agreement was binding on both parties: FRA, s. 61(4). The Marriage Agreement was not unilaterally revocable by John during his lifetime.
- [25] The language of s. 3.2 of the Will confirms John's intention in entering into the Marriage Agreement was to set out his and Shawna's "respective rights with respect to our property upon the termination of our marriage by, inter alia, death". The Will directs the executors "to carry out the provisions of [the Marriage Agreement]": s. 3.2.
- [26] Several hypothetical examples also demonstrate that the Marriage Agreement was not dependent on John's death for its vigour and effect. If John and Shawna had separated the day before John died, s. 3 of the Marriage Agreement was operative, and Shawna would have been entitled to the benefits as set out in that term of the Marriage Agreement, namely the greater of 10% of 30% of the value of John's separate property at the date of cohabitation for each year they had continued to live together from 1992 to 2002, or 50% of the increase in value of John's separate property from 1992 to the date of separation.
- [27] If John and Shawna had not separated, and John had died with no will, in breach of s. 6 of the Marriage Agreement, Shawna had enforceable rights that arose under the Marriage Agreement.
- [28] The Children rely on several cases, which they argue are analogous to the facts of this case, to support their position that the Marriage Agreement was a testamentary document. In my view, all of those cases are distinguishable from the facts of this case and do not support the Children's position. All these cases involve agreements to make future bequests via a will or provide insufficient information about the nature of the agreement that preceded the will to add anything to the analysis required in this case.
- [29] *Dillon v. New Zealand (Public Trustee)*, [1941] 3 W.W.R. 865, 1941 CanLII 383 (P.C.) was a covenant to bequeath case. The testator had entered into a contract three years before making his will, in which he agreed that he would "by his last will devise and bequeath" his farming lands to his trustees for the benefit of three of his children. He did so. The deceased's second wife brought a wills variation claim for provision to be made from the deceased's estate on the basis that inadequate provision had been made for her by the will. The trial judge determined inadequate provision had been made and reduced the children's benefits under the will (in the form of encumbering the deceased's farmlands) to pay for the supplementary provisions to be paid to the second wife. The children were successful in their initial appeal but lost before the Privy Council on the basis that the lands, being a bequest under the will, formed part of the estate and as such, they were "bound to accept the position that the provision made for them is liable to be reduced by order of the Court in favour of their stepmother, unless indeed their claim on the estate could be regarded as constituting a debt which has to be discharged before benefits are distributed": p. 870.

Viscount Simon L.C. on behalf of their Lordships held that the children were beneficiaries of the lands under the will, and not creditors under the earlier agreement, because by making the testamentary disposition under the will "the testator [had] done what he contracted to do": p. 870.

- [30] In *McNamara v. Hyde*, [1943] 3 D.L.R. 396, 1943 CanLII 397 (B.C.C.A.), a widower brought a wills variation application and, although lost at first instance, was successful before the Court of Appeal. Although the judgment expresses agreement with the trial judge's conclusion that "the petitioner is not precluded from seeking relief by the terms of the separation agreement referred to in the proceedings" and refers to *Dillon*, there is no information about the content of the separation agreement, and as such the case adds nothing more to the analysis required in this case beyond what is provided for in *Dillon*.
- [31] *Re Dawson*, 61 B.C.R. 481, 1945 CanLII 318 (B.C.S.C.) was also a covenant to bequeath case. The deceased and his son had entered into an agreement, with valuable consideration passing, that the deceased would bequest his son and his grandson certain farmland, livestock and equipment. The deceased made a will which included the testamentary bequests he had agreed to make. In considering the will variation claims of the deceased's two daughters, the Court cited *Dillon* as support for the proposition that "[s]uch arrangement or agreement however would not restrict the Court's power under the Act to redistribute the estate in a proper case": at 483.
- [32] *Kreutziger v. Perkins*, 2005 BCSC 435 was also a covenant to bequeath case. The Court held that a settlement agreement which obliged the testatrix "to make, and maintain up to the date of her death, a valid Will whereby she will bequeath to each of Gerald and Oscar an undivided one-half interest in the property", which she did, meant that the farmlands remained part of the testator's estate such that they would have been available for the wills variation claim: at para. 152.
- [33] The Marriage Agreement is different than the agreements at issue in all of these covenant to bequeath cases. In all of those agreements the property was not transferred by and as a result of the legal effect of the earlier agreements; the earlier agreements only required the testators to transfer the property by way of their wills. The Marriage Agreement is a valid agreement, effective as at the date of John and Shawna's marriage, that created a debt payable to Shawna upon certain future contingent events, including John's death.
- [34] The Marriage Agreement is more analogous to the agreement at issue in *Cooperman v. Cooperman*, [1978] 5 W.W.R. 518, 3 E.T.R. 39 (B.C.S.C.). In *Cooperman* the testator and his wife entered into a separation agreement which required the payment of spousal and child support and provided that the matrimonial home proceeds be divided equally. The Court found that the separation agreement established a debt due from the estate to the widow and children. Like the separation agreement in *Cooperman*, the Marriage Agreement created an amount due to Shawna. The Deceased's death is only relevant in determining the quantum and timing of the payment due under the Marriage Agreement.

[35] The Children argue their position that the Marriage Agreement is a testamentary document is supported by s. 6 of the Marriage Agreement and s. 3.2 of the Will.

[36] Section 6 of the Marriage Agreement provides:

6. John will maintain a will in these terms (inter alia) until the parties separate.

[37] Section 3.2 of the Will provides:

3.2 Marriage Agreement

I DECLARE that Shawna and I have entered into a pre-nuptial agreement dated July 22, 1997 setting out our respective rights with respect to our property upon the termination of our marriage by, inter alia, death and I DIRECT my Trustees to carry out the provisions of our pre-nuptial agreement and all amendments thereto.

[38] The Children argue these provisions reflect that it is the Will that creates the disposition and not the Marriage Agreement.

[39] I disagree. Section 6 is a mechanism by which the parties agreed to outwardly recognize the legal obligations to which they agreed in the Marriage Agreement and it supports and facilitates the enforcement of the binding terms agreed to by the parties in the Marriage Agreement. The legal obligations do not arise from the Will; this is not a covenant to bequeath. Similarly, s. 3.2 of the Will does not create a testamentary disposition. It too is a mechanism by which John communicated his pre-existing legal obligations under the Marriage Agreement and directed his executors to carry out the legal obligation to pay to Shawna the amount he had agreed by the Marriage Agreement was to be paid on his death. Reference to the Marriage Agreement in the Will does not convert the Marriage Agreement to a testamentary document.

B. The Marriage Agreement and the Will are not inconsistent

[40] The respondents argue the Will contradicts the Marriage Agreement by "providing bequests to Shawna that effectively exceed Shawna's maximum 30% share and creates a situation of double recovery". The Children argue this double recovery is evident because Shawna "would recover the full amount of the Deceased's art collection and jewelry - valued at \$174,450 in the Statement of Assets and Liabilities - in addition to the 30% value of those same items in Schedule 'A'" and 30% of the value of the Company shares in Schedule "A", plus the same Company shares that she acquired through the right of survivorship, even though s. 5 of the Marriage Agreement limited Shawna's entitlement.

[41] There is no inconsistency between the Marriage Agreement and the Will.

[42] First, the Will deals with specific property. These properties may or may not have remained the Deceased's property as at the time of his death, such that they were capable of forming the basis of a testamentary gift. For example, the parties all agree that the Deceased transferred certain assets to himself and Shawna during his lifetime - the British Columbia

residence and the shares in the Company - which pass to her by operation of law through the right of survivorship. By contrast, the Marriage Agreement creates obligations with respect to the payment of money, quantified by the value of certain property at specific points in time.

[43] Sections 4 and 5 of the Marriage Agreement provide:

4. In the event that John predeceases Shawna while the parties still remain married and living together, then Shawna is to receive 30% of the value of John's assets as set out in Schedule "A" hereto or 50% of the increase in such value from the present to the date of his death, whichever may be the greater.
5. It is the intention of the parties that the foregoing provision [which I interpret as s. 4] shall constitute Shawn's sole entitlement to a share in or claim against John's estate in the event of his death, and she hereby undertakes to execute all or any such documents as may be necessary or required in order to give evidence to such intention in the event that John shall require such intention to be further evidenced in a form of trust or waiver document for the purposes of estate planning for himself and his children and grandchildren.

[44] There is no evidence John ever requested any such documents to be executed.

[45] I interpret s. 5 of the Marriage Agreement as creating a floor, not a ceiling. Although Shawna's sole "entitlement" upon John's death was determined by s. 4 of the Marriage Agreement, the Deceased continued to have testamentary authority to leave testamentary gifts to her in his Will. The Marriage Agreement did not preclude the Deceased from providing for testamentary gifts that exceeded Shawna's entitlement under the Marriage Agreement.

[46] Understood in that light, there is no inconsistency.

C. WESA does not preclude payment of any amount due to Shawna under the Marriage Agreement

[47] The Children argue the relief sought by Shawna is precluded by s. 155(2) of WESA, which provides:

155(2) The personal representative of a deceased person must not distribute the estate of the deceased person after the period referred to in subsection (1) [within the 210 days following the date of the issue of a representation grant] without consent of the court if

- (a) a proceeding has been commenced to determine whether a person is or is not a beneficiary or intestate successor in respect of the deceased person's estate,
- (b) relief is sought under Division 6 [Variation of Wills] of Part 4 [Wills], or
- (c) other proceedings have been commenced which may affect the distribution of the estate.

- [48] The Children argue Susan and Judith's WESA claims therefore preclude distribution of any part of the Estate to satisfy the Marriage Agreement.
- [49] However, that provision does not affect the ability to make a payment to a creditor: WESA, s. 155(3).
- [50] The parties agree that if Shawna is a creditor as a result of the Marriage Agreement, payment of the Debt is not prohibited by WESA. My determination that Shawna is a creditor is determinative of this argument.

D. A declaration that the Marriage Agreement creates a debt does not predetermine the wills variation actions.

- [51] None of the parties argue there is a risk the Estate is not sufficient to satisfy all debts and gifts: WESA, s. 50(2).
- [52] In Dillon, Viscount Simon wrote that "the contract cannot oust the jurisdiction of the Court" to redistribute the estate under the wills variation provision at issue in that case: at 870. The Children rely on that passage of the Privy Council's judgment as support for their argument that this application would predetermine the wills variation actions of Susan and Judith.
- [53] For clarity, as I understand the argument and that the Children do not suggest Shawna's success on this application would predetermine the substantive issue in their wills variation actions (which is whether the Deceased failed to make adequate provision for Susan and Judith in his Will), but rather that Shawna's success on this application would have the effect of removing the value of Shawna's entitlement under the Marriage Agreement from the Deceased's Estate, thereby drastically reducing what could be available for any additional provision in the event the Court was satisfied there was any basis to do so. However, at the hearing the Children confirmed they were not opposing the determination of Shawna's application on that basis, and no adjournment of Shawna's application was sought.
- [54] In my view, the passage of Dillon relied on by the Children does not advance their argument on this point. Viscount Simon was referring to the specific contract at issue in Dillon, not suggesting that inter vivos contracts in general cannot oust the jurisdiction of the Court to redistribute an estate under the wills variation provision at issue in that case. It is clear from other passages in the judgment that the Privy Council recognized that inter vivos contracts can create a debt, and that had that been the case, the outcome for the Children may have been different: p. 870.
- [55] The circumstances of this case are distinguishable from the circumstances in *Stevens v. Wood Estate (Re)*, 2013 BCSC 2380 upon which Susan relies. In *Stevens*, the executrix had made distributions to several beneficiaries under the will before six months had passed from the issuance of probate, contrary to s. 12 of the now repealed Wills Variation Act, R.S.B.C. 1996, c. 490. Madam Justice Harris noted, at para. 29, that the purpose of s. 12(1) was to keep the estate intact to ensure that a successful wills variation plaintiff is able to recover that to which the Court may conclude they are entitled. But the parties acknowledge

that if Shawna is a creditor under the Marriage Agreement, that debt does not form part of the Estate available for redistribution under any will variation claim. That this is the state of the law does not equate to a determination of this application predetermining the wills variation actions.

E. There is no need to imply a term in the Marriage Agreement

- [56] Judith also argues that in order to avoid an absurd application of the Marriage Agreement and to give it efficacy it is necessary to imply a term: *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711 at 764, 1987 CanLII 55; *R. v. Marshall*, [1999] 3 S.C.R. 456 at para. 43, 1999 CanLII 665; *Zeitler v. Zeitler (Estate)*, 2010 BCCA 216. She argues the officious bystander test necessitates that a term be implied whereby "the value of any of the assets that were listed in Schedule A [of the Marriage Agreement], or any assets that replaced them, received by Shawna upon the Deceased's passing are to be deducted from any entitlement she may have pursuant to the Marriage Agreement and, as a consequence, under the Will". She argues the Marriage Agreement intention was satisfied by way of inter vivos gifts by John to Shawna and the benefits she enjoyed by right of survivorship. Judith argues that had Shawna and John addressed their minds to the post-facto inter vivos gifts by John to Shawna, they would have included such a term.
- [57] In my view this argument fails.
- [58] First, courts should be reluctant to imply terms into contracts because doing so risks inappropriately rewriting the contract for the parties: *Yi Teng Investment Inc. v. Keltic (Brighthouse) Development Ltd.*, 2019 BCCA 357 at para. 48, citing *Zeitler* at para. 27. As observed in *Luxor (Eastbourne) Ltd. v. Cooper* (1940), [1941] A.C. 108, [1941] 1 All E.R. 33 at 52-53, [1941] A.C. 108 (H.L.), cited with approval at para. 27 of *Zeitler*, there is a presumption against adding terms to contracts which the parties have not expressed. The general presumption is that the parties have expressed every material term which they intended should govern their agreement. To avoid an absurd result, the court may sometimes imply a term in a contract, if the implied term is not in conflict with an express term: *Zeitler* at para. 25.
- [59] The term Judith argues should be implied is inconsistent with s. 4 of the Marriage Agreement which provides the formula for calculating the payment due to Shawna in the event that John predeceased her. Further, the parties considered the scenario Judith argues the parties did not address, namely that property put in joint names would devolve, by operation of law, outside of the Estate. This can be seen in s. 8 of the Marriage Agreement which provides that "if any property is placed by one party in the name of the other, or is placed in the joint names of the parties, then that transaction is a gift to the other" and the property "shall be held by the parties, or either of them, in the form in which the title to such property is held ... upon the death of John". Despite addressing their minds to such inter vivos transfers, the parties chose not to include a term reducing the quantum of the payment due to Shawna in the event that John predeceased her.

III. COSTS

[60] The parties asked to be permitted to make submissions on costs after the application was determined. In the event that agreement cannot be reached with respect to costs, the parties are at liberty to arrange an appearance before me in accordance with the Court's Practice Direction 18. Any such Request to Appear must be submitted within 30 days of the date of this judgment.

"V. Jackson J."

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