

CANADA / JUDGMENT

Hadley Estate (Re)

2017 BCCA 311

COURT

British Columbia Court of Appeal

DECIDED

5 September 2017

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2017 BCCA 311 Hadley Estate (Re)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Hadley Estate (Re),

2017 BCCA 311

Date: 20170905

Docket: CA43663

Between:

The Canada Trust Company, Administrator of the Estate of Eleanor Lena Hadley, Deceased

Respondent

(Applicant)

And

R. Bruce Macdonald and Daniel J. Pierce

Appellants

(Respondents)

And

Virginia Maziak, Anita Berecz, Grace Gagner

and Carol Fitzsimmons

Respondents

(Respondents)

Before:

The Honourable Mr. Justice Lowry

The Honourable Mr. Justice Harris

The Honourable Madam Justice Dickson

On appeal from: An order of the Supreme Court of British Columbia, dated
April 29, 2016 (Hadley Estate (Re), 2016 BCSC 765, Vancouver Docket P152560).

Counsel for the Appellants:

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and Carol Fitzsimmons

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Place and Date of Hearing:

Vancouver, British Columbia

January 19, 2017

Place and Date of Judgment:

Vancouver, British Columbia

September 5, 2017

Written Reasons by:

The Honourable Madam Justice Dickson

Concurred in by:

The Honourable Mr. Justice Lowry

The Honourable Mr. Justice Harris

Summary:

The appellants challenge the judge's order that a will executed in 2008 governs the estate of the deceased. The order was made based on her finding that a handwritten will in a journal did not represent a deliberate and final expression of the deceased's testamentary intentions, such that it

could not be declared fully effective pursuant to s. 58 of the WESA. The appellants say that the judge reached this conclusion based on irrelevant extrinsic evidence. Held: appeal dismissed. The judge's determination that the document did not represent the deceased's testamentary intentions is entitled to deference, and the extrinsic evidence she considered was relevant to this issue. The finding that the document did not represent the deceased's testamentary intentions and, accordingly, could not be cured under s. 58 is without error.

Reasons for Judgment of the Honourable Madam Justice Dickson:

Introduction

- [1] On March 31, 2014, the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 came into force in British Columbia. Known as the WESA, it represents a significant reform of this province's wills and estate administration law. One of its most far-reaching provisions is s. 58, which confers a broad discretion on the court to relieve against the consequences of non-compliance with testamentary formalities. The new curative power is a marked departure from the traditional principles of formalism that previously governed the creation, alteration and revocation of wills in British Columbia.
- [2] This appeal represents this Court's first opportunity to consider s. 58. It concerns an entry in the personal journal of a 93-year-old woman, Eleanor Hadley. Handwritten shortly after a sudden health scare, headed "This is my last Will" and referred to below as the 2014 Will, it purports to leave Ms. Hadley's estate to three beneficiaries, two of whom are the appellants, Bruce Macdonald and Daniel Pierce. For reasons indexed as Hadley Estate (Re), 2016 BCSC 765, the chambers judge concluded that the 2014 Will did not represent a deliberate and final expression of Ms. Hadley's testamentary intentions. As a result, she declined to grant an order under s. 58(3) declaring it fully effective as a valid will or an alteration of a will and ordered instead that a will executed in 2008 governs Ms. Hadley's estate.
- [3] The appellants contend that the judge erred in law by relying on irrelevant extrinsic evidence when she decided the 2014 Will did not represent Ms. Hadley's testamentary intentions. Alternatively, they say, she made palpable and overriding errors of fact. They seek an order setting aside the order below and replacing it with an order that the 2014 Will represents Ms. Hadley's testamentary intentions and admitting it to probate on the basis that it varies the 2008 Will by changing the beneficiaries, together with special costs payable by the estate for all parties regardless of the outcome.
- [4] For the reasons that follow, I would dismiss the appeal.

Background

- [5] Ms. Hadley was a rather extraordinary individual. A long-time resident of Vancouver's West End, she was a committed community activist and repeat candidate for the Vancouver Park Board. When she died on March 6, 2015, she had no living immediate family members, but she had nieces in Ontario and close friends in Vancouver. The respondents, Virginia Maziak, Anita Berecz, Grace Gagner and Carol Fitzsimmons, were four of her nieces. The appellants, Mr. Macdonald and Mr. Pierce, were two of her friends.
- [6] In 2008, Ms. Hadley made a will in which she divided her estate into six shares: two to go to Ms. Maziak, one to each of Ms. Berecz, Ms. Gagner and Ms. Fitzsimmons, and the last divided equally among three other beneficiaries. The 2008 Will was prepared by a Vancouver lawyer, Alan Walker, who was also one of the two witnesses to her signature. The Canada Trust Company was named executor and trustee.
- [7] Shortly before she made the 2008 Will, Ms. Hadley met Mr. Macdonald at a public meeting of the Vancouver Park Board. They developed a close friendship while engaged in an effort to save a tree in Stanley Park known as the "Hollow Tree". Ms. Hadley met Mr. Pierce shortly after she made the 2008 Will, also in connection with the tree-saving effort. Both friendships continued after the Hollow Tree was successfully saved.
- [8] Ms. Hadley kept a handwritten journal in a spiral-bound notebook. On September 1, 2014, she made an entry, pages 2-4 of which the judge referred to as the 2014 Will in her reasons for judgment. Parts of the entry, and the pages preceding and following it, are reformatted and reproduced in the reasons. The beneficiaries under the 2014 Will are Ms. Maziak, Mr. Macdonald and Mr. Pierce. For present purposes, I will summarize it and set out only its key extracts.
- [9] On page 1 of the 2014 Will, Ms. Hadley described having just experienced a frightening episode of bright flashes in both eyes and dizziness, and a present feeling of confusion. On page 2, headed "This is my last Will", she wrote, in part:

As of this time in my life I leave all my estate (my money in bonds & my apartment #205 Seacrest Apts. Ltd. Company - self owned to the following people who were kind to me (1) My niece Virginia Maziak who live lives in Windsor Ontario @ [address omitted]. Virginia (Ginger) was continually kind to me. (2) Bruce Macdonald - [phone no. omitted] Because he contributed so much to save the Hollow Tree in Stanley Park and was kind to me. (3) Daniel Pierce [phone no. omitted] a young Film Producer who worked so hard and was kind to me.

- [10] On page 3, Ms. Hadley wrote, in part:

I hope to see Mr. David Ebby in person to write this will. I just had a scare - that prompted me to hastily [?] write this will. Many people have helped me. However [illegible] for personal reasons they are not included in my will.

Also, I do have some old penny stocks that faded away and in my box (deposit) Royal Bank corner of West Georgia & Burrard Streets where my previous will is.

[11] On page 4, she wrote, in part:

My will Continued:

Re: If Mr. David Ebby is willing I would like him to sue all the Seacrest Shareholders named in this will for criminally destroying my life since 1997

[12] Ms. Hadley signed her full name at the bottom of page 2 of the 2014 Will. She also wrote "P.S. David Ebby is to be my lawyer" in the margin, signed her name again and initialled the bottom of pages 3 and 4. On the following journal page, she described a conversation with a telephone operator regarding a police complaint.

[13] A few days before Ms. Hadley wrote the 2014 Will, Canada Trust sent her a routine letter asking if the 2008 Will and Canada Trust's appointment as executor were still current. The original and a copy of the letter, with notations indicating that she received the letter on September 4, 2014 and read it on September 6, 2014, were found in her apartment after she died. On the bottom of the original, Ms. Hadley wrote "I want to make a new will as soon as I can". The letter set out two choices, one confirming that Canada Trust was the executor of her will and the other advising she had made a new will in which Canada Trust was not appointed. However, Ms. Hadley did not check off either box, nor did she sign or date the letter. On the back of the envelope, among other things, Ms. Hadley wrote: "Oct/2014 Make an pp appt. Now will."

[14] On September 23, 2014, Ms. Hadley met with Robin Smith of Canada Trust to discuss executing a new power of attorney. At the meeting, she confirmed that Canada Trust was still her executor and mentioned that she wanted to change the 2008 Will. In response, Ms. Smith suggested that Ms. Hadley address the changes with Mr. Walker, the lawyer she would contact about the new power of attorney and who had prepared the 2008 Will. Ms. Hadley did not mention to Ms. Smith that she had recently made a new will.

[15] When Mr. Walker spoke to Ms. Hadley the next day, she told him that she wanted to change her will but did not describe the proposed changes. Mr. Walker was about to take a holiday, so they could not arrange an appointment until after his return in late October. However, when he returned, Mr. Walker could not reach Ms. Hadley because she had been admitted to hospital with pneumonia.

[16] Ms. Hadley stayed in hospital for most of the remaining months of her life. Mr. Macdonald and his wife, Ms. McDermott, visited her regularly, as, from time to time, did Mr. Pierce. Ms. Hadley, who was very private, apparently did not tell anyone about the 2014 Will, but, in February 2015, she asked Ms. McDermott to take home a valise from her locker and keep it safe, saying that it was important to her. Ms. McDermott agreed. When she looked inside the valise, she found some loose papers, a few bills, the journal containing the 2014 Will and Ms. Hadley's wallet. Shortly thereafter, Mr. Macdonald contacted Mr. Ebby to tell him that his

name came up in an unclear conversation with Ms. Hadley in which a will was mentioned. Mr. Eby responded that he had never in his legal career prepared a will for anyone.

- [17] On March 6, 2015, Ms. Hadley died in hospital. When looking for information to share at her memorial gathering, Ms. McDermott discovered the 2014 Will in the valise. A wills search did not disclose the existence of any will other than the 2008 Will. After Mr. Macdonald and Mr. Pierce delivered the journal containing the 2014 Will to Canada Trust, the company applied under s. 58 of the WESA for a determination of which will governed Ms. Hadley's estate and, in particular, whether the 2014 Will was a testamentary disposition.

Reasons for Judgment of the Chambers Judge

- [18] The judge began her reasons by summarizing the nature of the application and the background facts, which were uncontroversial. Turning to the applicable legal principles, she set out s. 58 and quoted from *Estate of Young*, 2015 BCSC 182, in which the meaning and impact of s. 58 were first described. She noted that s. 58 is a curative provision which confers a discretion on the court to relieve against the consequences of non-compliance with testamentary formalities in a "record, document or writing or marking on a will or document" that represents testamentary intentions, as that concept was explained in *George v. Daily* (1997), 143 D.L.R. (4th) 273 (Man. C.A.). Citing *Yaremkevich Estate (Re)*, 2015 BCSC 1124, she also noted that extrinsic evidence is admissible to determine whether a document is a valid will and whether the deceased had testamentary intentions.
- [19] The judge found the 2014 Will was authentic given that it is in Ms. Hadley's handwriting. She also found there was no issue of lack of capacity or undue influence and focused her analysis on the key question: did the 2014 Will represent Ms. Hadley's testamentary intentions? To answer the question, she reviewed numerous factors which could support or weigh against a finding of testamentary intentions. For example, in support, she noted that Ms. Hadley handwrote the 2014 Will immediately after a significant health episode and in contemplation of her death, headed it "This is my last Will", signed and initialled in various places, made three bequests, and left it in the safekeeping of friends. On the other hand, weighing against a finding of testamentary intentions, the judge noted that Ms. Hadley described her state of mind when writing the 2014 Will as confused, did not expressly revoke her 2008 Will, did not explain why she was cancelling previous bequests to family members, and later expressed a desire to "make a new will as soon as I can".
- [20] After weighing these and other factors, the judge concluded, on a balance of probabilities, that the 2014 Will did not represent a deliberate and final expression of Ms. Hadley's testamentary intentions. In reaching this conclusion, she identified the factors upon which she placed particular weight:
- [60] Ms. Hadley did not disclose the existence of the 2014 Will to anyone. In her dealings with both Ms. Smith and Mr. Walker, she communicated that she wished to make changes to her 2008 Will. She did not say anything to either of them to the effect that she had already made

a new will. Ms. Hadley's notes on the original and copy of the August 28, 2014 letter, expressing a desire to make a new will, are inconsistent with the 2014 Will representing her testamentary intentions. Ms. Hadley knew what was involved in making new a will [sic], and she expected to communicate the changes she wanted to make to a lawyer, who would prepare a new will for her. The changes (unlike the contents of the Journal) were not going to be kept secret. She took steps to make an appointment with Mr. Walker in respect of changing her 2008 Will. For Ms. Hadley, the contents of the Journal were quite different from a will. They were notes only to herself. Finally, Ms. Hadley had a very large estate, one that could certainly accommodate generous gifts to Mr. Macdonald and Mr. Pierce, without completely disinheriting the beneficiaries (other than Ms. Maziak) under her 2008 Will.

[61] I conclude, therefore, that the 2014 Will does not have testamentary status and cannot be "cured" under s. 58 of the WESA.

[Emphasis of the chambers judge.]

[21] In the result, the judge ordered that the 2008 Will governed Ms. Hadley's estate.

Positions of the Parties

[22] The appellants contend that the judge erred by relying on irrelevant extrinsic evidence when deciding the 2014 Will did not represent Ms. Hadley's testamentary intentions. In doing so, they say, she made extricable errors of law which are reviewable on a standard of correctness. Alternatively, she made palpable and overriding errors of fact by drawing unsupportable inferences from the same evidence. In either event, the appellants submit, the judge erred in law by failing to give effect to the 2014 Will under s. 58 of the WESA as a variation of the 2008 Will and by declining to admit it to probate.

[23] In support of their submission, the appellants argue that the judge proceeded as if she could consider unlimited extrinsic evidence when determining Ms. Hadley's testamentary intentions. For example, she considered events that occurred long after Ms. Hadley wrote the 2014 Will and focused on her failure to mention its existence to others and her hope to formalize it at a later date. She also considered the size of Ms. Hadley's estate and her failure to revoke the 2008 Will expressly or to explain why previous bequests were being cancelled. However, according to the appellants, none of these events, non-events, actions or non-actions were probative of Ms. Hadley's testamentary intentions at the time the 2014 Will was made, which was the only material time for purposes of the analysis. They say that she erred by relying on them to infer that Ms. Hadley did not have a fixed and final testamentary intention when she wrote the 2014 Will.

[24] The appellants go on to say that the judge should have based her conclusion on other evidence which was genuinely probative of the central issue, namely, Ms. Hadley's intentions when the 2014 Will was written. For example, she should have focused on Ms. Hadley's sound reasons for leaving them bequests, the "will-like" language and form of the 2014 Will, and her conduct in placing it in safe-keeping with Ms. McDermott just before she

died. In the appellants' submission, it is clear from this and other probative evidence that Ms. Hadley had testamentary intentions when she wrote the 2014 Will, and her hope to formalize them later does not detract from that reality. Accordingly, the judge erred in failing to give effect to the 2014 Will under s. 58(3) of the WESA. As to costs of the appeal, in their submission, all parties should recover their special costs, on a win or lose basis, from the estate.

- [25] The respondent nieces submit that the judge did not err, legally or factually, in concluding the 2014 Will did not represent Ms. Hadley's testamentary intentions. In support of their submission, they emphasize the considerable breadth of relevant extrinsic evidence admissible on an application brought pursuant to s. 58 of the WESA. The evidence relied upon by the judge fit well within those broad legal and logical parameters, they say, and her conclusion is entitled to deference. According to the respondent nieces, the appeal should be dismissed, the appellants should bear their own costs, and their special costs and those of Canada Trust should be recovered from the estate.
- [26] As a neutral executor, Canada Trust takes no position on the outcome of the appeal. Instead, it confines itself to urging this Court to affirm the broad scope of extrinsic evidence admissible on a s. 58 inquiry, which it says, depending on the circumstances, may include evidence of events that occurred long after the document in question was created. It also asks this Court to affirm that a narrow palpable and overriding error review standard applies to a determination of testamentary intentions.

Issues

[27] The issues for determination are:

- a) What is the applicable standard of review?
- b) Did the judge err when deciding that the 2014 Will did not represent Ms. Hadley's testamentary intentions?
- c) If the judge erred, should the 2014 Will be admitted to probate on the basis that it varies the 2008 Will?
- d) What costs order should be made on the appeal?

Discussion

What is the applicable standard of review?

- [28] The scope of this Court's role differs with the nature of the issue under consideration. As Madam Justice Saunders observed in *Easingwood v. Cockroft*, 2013 BCCA 182 at para. 30, referring to *Housen v. Nikolaisen*, 2002 SCC 33, as to extricable questions of law, we consider whether the decision on the point of law is correct. As to questions of fact or mixed fact and law, we interfere only if there is an obvious (palpable) and material (overriding) error. The key difference between a question of law and a question of mixed fact and law is the degree

of generality of the challenged proposition, which, in turn, affects its degree of precedential value: *Housen* at para. 28. A central purpose of distinguishing between them is to limit appellate intervention to cases where the results will predictably have an impact beyond the parties to the particular dispute: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 51.

- [29] An extricable question of law, reviewable for correctness, may be identified within a question that appears to be one of mixed fact and law. For example, contractual interpretation typically involves questions of mixed fact and law that are reviewed on a standard of palpable and overriding error. However, extricable questions of law may arise in the interpretation process, such as the application of an incorrect principle, the failure to consider a required element of a legal test or the failure to consider a relevant factor. In addition, where the question of interpretation involves a standard form contract, it will be characterized, exceptionally, as a question of law and reviewed for correctness where such a contract has no meaningful factual matrix specific to the parties and its interpretation is a matter of precedential value: *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37 at paras. 21, 24.
- [30] It is often difficult to extricate legal questions from factual matters. Where the legal principle in question is not readily extricable, the matter is one of mixed fact and law and is subject to the palpable and overriding error review standard: *Housen* at para. 36. In *Norman Estate v. Watch Tower Bible and Tract Society of Canada*, 2014 BCCA 277 at para. 16, Madam Justice MacKenzie explained that the palpable and overriding error review standard applies to the question of whether a person who disposes of property in an instrument has testamentary intentions:
- [16] Whether the person who disposes of property has an animus testandi is a question of that person's actual intent, even if the instrument appears to be a record of testamentary intention on its face: *Lister v. Smith* (1863), 164 E.R. 1282, 3 Sw. & Tr. 282. The trial judge was required to determine the Normans' actual intention in accordance with the wording of the instrument and the surrounding circumstances. Where, as here, the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent a palpable and overriding error: *Housen* at para. 36.
- [31] In my view, the appellants have not identified a readily extricable question of law for our consideration. As I understood it by the end of oral submissions, their contention is not that, in principle, extrinsic evidence may never be considered on a s. 58 inquiry. Nor is it that the only possible material time with regard to a will-maker's testamentary intentions is when the document at issue was created. Rather, the appellants contend that the material time in this case was when Ms. Hadley made the 2014 Will, which is not controversial. They also contend that the judge misapplied the relevance standard to the evidence and facts when deciding whether the 2014 Will represented a deliberate and final expression of Ms. Hadley's testamentary intentions at the material time.

- [32] The question raised by the appellants is one of mixed fact and law of little, if any, precedential value. It is highly case-specific, involves the judge's interpretation of the evidence as a whole, and is subject to the narrow palpable and overriding error standard of review.

Did the judge err when deciding that the 2014 Will did not represent Ms. Hadley's testamentary intentions?

Section 58 of the WESA

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

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.
- [35] For an order to be granted under s. 58 of the WESA, the court must be satisfied that a document represents the testamentary intentions of the deceased person. However, unlike the curative provisions in some provinces, s. 58 does not require a minimum level of execution or other formality for a testamentary document to be found fully effective. Regardless of its form, if the court grants an order under s. 58(3), the document may be admitted to probate.
- [36] As discussed in *Estate of Young*, s. 58 is very similar to Manitoba's curative provision and thus the leading appellate authority on its meaning is *George v. Daily*. *George* and several other Manitoba authorities are reviewed in *Estate of Young*, which review need not be repeated. Their import is summarized at paras. 34-37:
- [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; *Kuszek* 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.

The Material Time

- [37] In many cases, as here, the material time for determining testamentary intentions on a s. 58 application is the time when the document in question was created. However, as noted in Estate of Young, depending on the circumstances, the material time may vary on this key issue. For example, after creating a document, a will-maker may, by words or actions, manifest a fixed and final intention that it expresses how his or her property is to be disposed of on death and thus that it operates as a will. In other words, a document may acquire a testamentary character by subsequent and sufficient manifestation of the will-maker's intention: Bennett et al. v. Toronto General Trusts Corporation, [1958] S.C.R. 392 at 397. Nevertheless, in most cases, the focus of inquiry will be the will-maker's intention when the document was prepared and executed: see, for example, Sweeney Cunningham Estate v. Sweeney, 2013 NSSC 299 at para. 29; Komonen v. Fong, 2011 NSSC 315 at para. 23.

The Scope of Admissible Extrinsic Evidence

- [38] The WESA does not indicate what evidence is admissible on a s. 58 inquiry. Accordingly, the ordinary rules of admissibility apply.
- [39] Ordinarily, evidence must be relevant to a live issue and not be subject to exclusion under any other rule of law or policy to be admissible: Sidney N. Lederman, Alan W. Bryant and Michelle K. Fuerst, *The Law of Evidence in Canada* 4th ed. (Markham: LexisNexis Canada Inc., 2014) at §2.40. Relevance must, therefore, be assessed on a case-by-case basis. Mr. Justice Rothstein affirmed the meaning of "relevance" in R. v. White, 2011 SCC 13:

36 In order for evidence to satisfy the standard of relevance, it must have "some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than that proposition would be in the absence of that evidence" [citations omitted].

37 to say that an item of evidence is not relevant; that it is not probative of a live issue; or that it is "equally explained by" or "equally consistent with" either determination of a live issue are three ways of saying the same thing.

- [40] Sitting as a court of probate, the court's task on a s. 58 inquiry is to determine, on a balance of probabilities, whether a non-compliant document embodies the deceased's testamentary intentions at whatever time is material. The task is inherently challenging because the person best able to speak to these intentions - the deceased - is not available to testify. In addition, by their nature, the sorts of documents being assessed will likely not have been created with legal assistance. Given this context and subject to the ordinary rules of evidence, the court 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. Accordingly, extrinsic evidence of testamentary intent is admissible on the inquiry: *Langseth Estate v. Gardiner* (1990), 75 D.L.R. (4th) 25 at 33 (Man. C.A.); *Yaremkewich Estate (Re)* at para. 32; *George*. As is apparent from the case authorities, this may well include extrinsic evidence of events that occurred before, when and after the document was created: see, for example, *Bennett; George; Estate of Young; Re MacLennan Estate* (1986), 22 E.T.R. 22 at 33 (Ont. Surr. Ct.); *Caule v. Brophy* (1993), 50 E.T.R. 122 at paras. 37-44 (Nfld. S.C.).

The Judge's Treatment of the Evidence

- [41] The judge conducted her s. 58 inquiry in a thorough, careful, transparent manner. She considered the words and form of the 2014 Will in detail, together with the large and varied body of extrinsic evidence of events that occurred before, when and after it was made. The focus of her analysis was Ms. Hadley's intention when she wrote the 2014 Will, which was the material time for s. 58 purposes. On balance, she concluded that it did not represent a deliberate and final expression of Ms. Hadley's testamentary intentions, which conclusion, though not inevitable, was reasonably available on the evidence as a whole.
- [42] In her reasons, the judge listed or had previously noted virtually all of the factors characterized by the appellants as genuinely probative of the central issue. However, after balancing those factors with others to contrary effect, she simply was not persuaded by their arguments or the validity of their position. I see no error in the manner in which she reached this conclusion or in her interpretation of the evidence and its overall import.
- [43] Contrary to the appellants' submission, the evidence the judge relied upon to support her conclusion was relevant to Ms. Hadley's testamentary intentions when the 2014 Will was written. While not necessarily dispositive, each item of impugned evidence tended to increase the likelihood that the 2014 Will did not express her final intentions for the disposal of her property on death. For example, although she was not obliged to leave bequests to her nieces, she had previously done so in the 2008 Will and an explanation for the change and some form of express revocation might reasonably have been expected, but both were absent: see *McNeil v. Snidor Estate*, 2008 MBQB 187 at paras. 21, 23. As a matter of logic and human experience, their absence tended to make it more likely that the 2014 Will did not express Ms. Hadley's final intentions than it would have been if there was evidence of either or both.
- [44] Similarly, Ms. Hadley's failure to mention the 2014 Will to Ms. Smith or Mr. Walker in conversations which specifically concerned anticipated changes to the 2008 Will tended to increase the likelihood that she did not believe the 2014 Will represented her testamentary intentions. The same is true of her notes expressing a desire to make a new will, which notes were made a few short days after she wrote the 2014 Will. In these circumstances, it was logically open to the judge to find, as she did, that the notes were inconsistent with the 2014 Will representing Ms. Hadley's final intention for the disposal of her property on death.

and to find as a fact that they were "notes only to herself".

- [45] At bottom, the appellants' submissions amount to an invitation to retry the case and substitute alternate interpretations of the evidence. Given the narrow standard of review that applies, that is not a course which is open to this Court. In my view, the judge's findings and the record below reveal no palpable or overriding error. Her conclusions on Ms. Hadley's testamentary intentions are reasonable, entitled to deference and should not be disturbed.

If the judge erred, should the 2014 Will be admitted to probate on the basis that it varies the 2008 Will?

- [46] Given my conclusion that the judge did not err, it is unnecessary to address this question. However, had it been necessary to do so, in my view, this Court would not have been well-placed to determine Ms. Hadley's testamentary intentions and thus to decide whether the 2014 Will should be admitted to probate. Accordingly, a new trial would have been required.

What costs order should be made on the appeal?

- [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: *Milwarde-Yates v. Sipila*, 2009 BCSC 277 at paras. 81-82.
- [48] The judge awarded special costs payable out of the estate to all parties. Her costs award has not been challenged and, in my view, the same costs award is appropriate on appeal. All parties to the appeal were drawn into the litigation because Ms. Hadley wrote the 2014 Will and provided it to Ms. McDermott for safe-keeping. The appeal concerned its validity and legal implications and, while ultimately unsuccessful, was not brought unreasonably.

Conclusion

- [49] I would dismiss the appeal, with special costs payable out of the estate to all parties.

"The Honourable Madam Justice Dickson"

I AGREE:

"The Honourable Mr. Justice Lowry"

I AGREE:

"The Honourable Mr. Justice Harris"

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Prepared on 29 October 2026 · Esheria