

CANADA / JUDGMENT

## Harshenin v. Khadikin

2015 BCSC 1213

### COURT

Supreme Court of British Columbia

### DECIDED

14 July 2015

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2015 BCSC 1213 Harshenin v. Khadikin

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Harshenin v. Khadikin,

2015 BCSC 1213

Date: 20150714

Docket: 9763

Registry: Rossland

Between:

Darren George Harshenin and Kerry Jane Janneman

Plaintiffs

And

Ronald Walter Khadikin the Estate of Walter Khadikin

Ronald Walter Khadikin, Executor of the Estate of Walter Khadikin

Defendants

Before: The Honourable Madam Justice Dardi

Reasons for Judgment

Counsel for the Plaintiffs:

J. Gelber

The Defendant:

In Person

July 14-18, 2014

Counsel for the Defendant:

T. Napora

November 4-6, 2014

Place and Date of Trial/Hearing:

Rossland/Nelson, B.C.

July 14-18, 2014

November 4-6, 2014

Place and Date of Judgment:

Rossland, B.C.

July 14, 2015

## **introduction**

- [1] This dispute relates to the estate of the late Walter Khadikin (the "Deceased"), a widower, who died on April 19, 2009 at the age of 92. His wife predeceased him in 1991. The Deceased and his late wife had two children. Their son, Ronald Walter Khadikin, is the defendant in this action. Their daughter, Elizabeth, predeceased her father in 1996. Her children, Darren George Harshenin and Kerry Jane Janneman, are the plaintiffs in this action.
- [2] The Deceased lived on a rural acreage at 6024 Hutchins Road, in Taghum, an unincorporated community located near Nelson, in the province of British Columbia (the "Property"). At the material time, he was the sole registered owner of the Property. On or about September 23, 2008, the Deceased executed a transfer of the Property in favour of himself and the defendant as joint tenants. The transfer of the Property was registered in the Land Title Office on October 14, 2008.
- [3] The plaintiffs allege that the Deceased did not intend to gift a beneficial interest in the Property to the defendant and that accordingly he holds his interest in the Property in trust for the Deceased's estate.
- [4] The Deceased allegedly executed a will on March 15, 2009, (the "Alleged Will"). The defendant is appointed as the sole executor and named as the sole beneficiary. A grant of probate of the Alleged Will was issued to the defendant on June 16, 2009.

- [5] In this action, the plaintiffs seek a declaration that the Alleged Will is invalid and a revocation of the grant of probate. It is common ground that the Deceased did not have a prior will. Accordingly, the plaintiffs also request a declaration that the Deceased's estate devolve according to the law of intestate succession. Pursuant to the provisions of the former Estate Administration Act, R.S.B.C.1996, c. 122, the plaintiffs and the defendant are the Deceased's sole intestate heirs.
- [6] Several of the individuals I refer to in these Reasons share the common surname of Harshenin. I will refer to them and the plaintiff, Kerry Janneman, by their first names for convenience and without intending any disrespect.

### **PROCEDURAL AND evidentiary matters**

- [7] The defendant represented himself at trial from July 14 through July 18, 2014. The trial did not complete in the time allotted and submissions were scheduled to be heard in Nelson on November 4, 2015. After the evidence was heard and before closing submissions, the defendant retained counsel. His counsel brought an application to reopen the trial, which was heard on November 4, 2014.
- [8] In a ruling on November 5, 2014, I concluded that it was in the interests of justice that the trial be reopened to permit the court to hear the testimony of Stuart Layfield, the conveyancing solicitor who prepared the transfer documents for the Property. Mr. Layfield testified on November 5, 2014. I will address his testimony later in these Reasons.
- [9] The defendant alleges that the Deceased executed the Alleged Will in the presence of two witnesses. One of the witnesses, Louise Poitras, testified at trial. The other witness, Barbara Poitras, passed away prior to trial. Louise Poitras is Barbara Poitras's daughter and they were both friends of the defendant. Barbara Poitras was never deposed or cross-examined on her affidavit that was filed in these proceedings. In my ruling on November 5, 2014, I determined that her affidavit, which was sworn before a lawyer on November 24, 2009, possessed sufficient hallmarks of threshold reliability to justify its admission. I determined that I would assess the weight to be accorded to her affidavit evidence in the context of the totality of the evidence at trial.

the Family Background

### **Kerry Janneman**

- [10] The plaintiff, Kerry Janneman, who is 43 years old, is the Deceased's granddaughter. As I mentioned, she is the daughter of Elizabeth Harshenin, who died of pancreatic cancer on September 1, 1996, and George Harshenin. She is married with a child. She currently resides in Florida and is employed as a licensed massage therapist.

- [11] Kerry grew up in Tarrys, B.C., a small community in the West Kootenays that is an approximately 25-minute drive from the Property. She describes being "quite close" to her grandfather during her childhood; she spent many days with him at the Property during the summer.
- [12] Kerry moved to Vancouver after finishing high school. In 1995, after her mother's cancer diagnosis, Kerry was married at Lake Tahoe in Nevada, with only her parents in attendance. She related to the court that she had understood from her mother that her grandfather was disappointed that she did not marry "a Russian man". However, he did send her a wedding card enclosing a \$1,000 cheque. Kerry's husband was in the military and they eventually moved to Whidbey Island, Washington. During the periods that she lived in Vancouver and in Washington State she visited the Nelson area approximately two or three times a year. On those trips, she always visited her grandfather. Each year, she sent her grandfather a birthday card and every Christmas she telephoned him and sent him a card and gift. He sent her a Christmas card and cheque every year.
- [13] Kerry moved to Florida in 1998. After that time, she was only able to visit her grandfather once a year. Her last visit with him took place in August 2008. During this visit, she introduced him to her young daughter. He was very pleased to meet his great-granddaughter. He gave Kerry a cash gift at this visit. Kerry subsequently spoke to her grandfather by telephone in October 2008, on December 27, 2008, and finally in mid-January 2009. In their last call, she advised him that she had not received his Christmas card and cheque and suggested that he put a stop payment on the cheque, which he did.

### Darren Harshenin

- [14] The other plaintiff, Darren Harshenin, who was 44 years old at the date of trial, is the Deceased's grandson. He is divorced from his first wife and currently lives with his common law spouse. He has one adult daughter from a prior relationship. He lives in Krestova, B.C. which is near Castlegar, and he operates a snow and brush removal business.
- [15] During his youth, Darren had a good relationship with his grandfather and visited with him at the Property during summer holidays. The Deceased attended Darren's wedding in 1998 and gave him a cheque for \$300.
- [16] Darren described his mother, Elizabeth, who was by all accounts a kind-hearted woman, as the "glue" in their family. He candidly acknowledged that after her death in 1996, there were no longer any family gatherings or holiday or birthday celebrations with the Deceased. After his mother's death, Darren saw the Deceased a few times a year at most, and they seldom spoke on the telephone. From 2002 to 2008, he worked out of town logging and lived in the Nakusp area during the week. He made little effort to remain in touch with his grandfather. The last time Darren saw the Deceased was when he went to the Property during the 2007 Christmas season.

**Ronald Khadikin**

- [17] As I mentioned, the defendant, Ronald Khadikin, is the Deceased's son. He obtained a law degree and was called to the British Columbia Bar in approximately 1984. In 1986, sometime after his conviction for willfully attempting to obstruct the course of justice, he relinquished his practice certificate. He did some form of work in Africa in 1994 and 1995, and subsequently returned to Nelson. The defendant has not been gainfully employed since 1995. In or about 2000, the defendant was convicted of trafficking in cocaine. He received disability/income assistance payments from 1995 until May 2009. The record does not reliably establish the particulars of his disability.
- [18] The defendant is not married and has no children. He lived with his father in the Property from 1995 until his father's death. There was a paucity of reliable evidence regarding whether, and to what extent, the defendant may have provided any assistance to his father or contributed financially to the household during this period.
- [19] The evidence supports a finding that the relationship between the Deceased and the defendant was difficult and stormy. They frequently bickered and addressed one another in very derogatory terms.

**The Deceased**

- [20] The Deceased was one of eight children of Russian immigrants who eventually settled in the Nelson area, where there is a large Doukhobor population.
- [21] The Deceased owned the Property, which was a large acreage, and worked as a millwright. He led a relatively simple life. His wife suffered from dementia, and had been in care for several years prior to her death in 1991. He was devastated by the death of his beloved daughter, Elizabeth, in 1996. The loss of his wife and daughter and the distressing circumstances of his son, in whom he had once taken so much pride, left the Deceased a rather embittered man.
- [22] I found the testimony of the Deceased's nephews, Bob Hunter and Walter Khadikin, regarding their observations and interactions with the Deceased, to be credible. They both presented as plain-spoken and objective witnesses.
- [23] The evidence supports a finding that the Deceased was a foul-mouthed, cantankerous, and irascible individual. In his later years, at least, he judged others harshly. He was outspoken, strong-willed, and independent. He was also very frugal. Up until shortly before his death, the Deceased tended his garden, maintained the fruit trees and lawn on the Property, and generally remained very active. He presented as younger than his actual age.

- [24] According to Kerry, whose evidence I accept, her grandfather had a good command of the English language, including written English. She received cheques and cards from him which were signed in his own handwriting. A wedding card and birthday card, which I accept were in the Deceased's handwriting, were tendered into evidence at trial.
- [25] The preponderance of evidence supports a finding that the Deceased bore a considerable degree of antipathy towards his son-in-law, George, primarily because of certain events that transpired in or around the time of Elizabeth's passing. He also felt neglected by his grandson Darren. He was clearly fond of Kerry and was saddened by the fact that she lived so far away and could not visit as much as he would have liked.
- [26] In the year or so preceding his death, the Deceased's nephew, Walter Khadikin, who resided in Vernon, initiated some discussions and made some inquiries with respect to the Deceased moving into an assisted living facility. There were ensuing communications with the Interior Health Authority about a possible placement. According to Kerry, the Deceased told her in the fall of 2008 - after a brief period of respite care in a facility in Nelson - that "the home was not for him".
- [27] The evidence on the subject of the plans for the Deceased's move into a care facility was not well-developed. In any case, it never transpired. He passed away in the hospital on April 19, 2009, shortly after sustaining a hip fracture in a fall in his home.

#### STATEMENTS MADE BY THE DECEASED

- [28] The evidence led at trial included a significant focus on various statements allegedly made by the Deceased. During the trial, I expressed concern about the admissibility of some of these statements, given their hearsay nature. I determined that I would permit the witnesses to relay these statements in their testimony and that I would reserve my ruling as to the admissibility of, and corresponding use, that could be made of those statements.
- [29] The essential issue is whether the Deceased's declarations, as tendered through the various witnesses, are properly admissible.
- [30] Hearsay evidence relied on for the truth of its contents is presumptively inadmissible. In some instances, the statements attributed to the Deceased are not relied on for the truth of their contents. In other cases, statements are admissible as an established exception to the hearsay rule which permits evidence to be given of statements made by deceased persons as to their state of mind or emotional state: *Modonese v. Delac Estate*, 2011 BCSC 82 at paras. 82-85. In *R. v. P (R.)* (1990), 58 C.C.C. (3d) 334 (Ont. H.C.J.), Doherty J. explained this principle as follows, at 341:

Assuming relevance, evidence of utterances made by a deceased (although the rule is not limited to deceased persons) which evidence her state of mind are admissible. If the statements are explicit statements of a state of mind, they are admitted as exceptions to the hearsay rule. If those statements permit an inference as to the speaker's state of mind, they are regarded as original testimonial evidence and admitted as circumstantial evidence from which a state of mind can be inferred.

[31] The authorities establish that in order to benefit from this "traditional" exception to the rule against hearsay, the evidence must have some measure of trustworthiness: *R. v. Panghali*, 2010 BCSC 1114 at paras. 18-21.

[32] Statements attributed to the deceased sometimes require consideration of the "principled approach" to hearsay. Four decisions of the Supreme Court of Canada guide the court's inquiry regarding the principled approach: *R. v. Khan*, [1990] 2 S.C.R. 531; *R. v. Smith*, [1992] 2 S.C.R. 915; *R. v. Starr*, 2000 SCC 40; and *R. v. Khelawon*, 2006 SCC 57. The admissibility of hearsay under the principled approach is summarized in *Khelawon* at para. 2:

When it is necessary to resort to evidence in this form, a hearsay statement may be admitted if, because of the way in which it came about, its contents are trustworthy, or if circumstances permit the ultimate trier of fact to sufficiently assess its worth. If the proponent of the evidence cannot meet the twin criteria of necessity and reliability, the general exclusionary rule prevails.

[33] The onus is on the party tendering the hearsay evidence to establish the necessity and reliability on a balance of probabilities. The court in this case must assess both the threshold reliability of the statement at issue and the statement's ultimate reliability having regard to the entirety of the evidence: *Khelawon* at para. 2.

[34] In this case, because the declarant is deceased, necessity is clearly established. That leaves for determination the issue of the reliability of the various statements attributed to the Deceased.

[35] A court is required to assess the reliability of a statement sought to be adduced by way of hearsay evidence by examining the circumstances under which that statement was made. A circumstantial guarantee of trustworthiness is established if the statement was made in circumstances which "substantially negate" the possibility that the declarant was untruthful or mistaken: *Smith* at 933.

[36] As a preliminary threshold issue, the court must first find on a balance of probabilities that the statement was made by the Deceased before it goes on to determine the treatment and weight of such evidence: *Creutz v. Estate of Kristian Winther*, 2007 BCSC 1463 at para. 99. In essence, this assessment turns on the credibility of the various witnesses: *Halfpenny v. Holien* (1997), 37 B.C.L.R. (3d) 186 (S.C.).

[37] In my view, there is a real question in this case about whether certain of the statements were made by the Deceased.

[38] With the foregoing principles in mind, I will address the admissibility of the statements attributed to the Deceased as part of the analysis of the substantive issues in this case.

### issues

[39] In broad terms, the issues that must be determined in this case may be summarized as follows:

- (i) Does the defendant hold his interest in the Property in trust for the estate of the Deceased?
- (ii) Is the Alleged Will valid?

### ANALYSIS

- (i) Does the defendant hold his interest in the Property in trust for the estate of the Deceased?

[40] On September 23, 2008, the Deceased executed a transfer of the Property into joint tenancy with the defendant for "\$1.00 and other good and valuable consideration". As I mentioned, the transfer was executed before Mr. Layfield, a solicitor in Nelson.

[41] The focus of the inquiry regarding this gratuitous transfer is to ascertain the Deceased's intention at the time of the transfer. Certain common law rules have developed to guide a court's inquiry in relation to intention: *Pecore v. Pecore*, 2007 SCC 17 at para. 5.

### Legal Framework

[42] This analysis must begin with a consideration of the historical approach to ascertaining the intent of the transferor. Historically, when A gratuitously transferred property to B, the "presumption of resulting trust" arose. Equity recognizes a distinction between legal and beneficial ownership. Because equity presumes bargains, not gifts, it was presumed that A only intended to convey the legal title to B and that B held the beneficial interest in the property on a "resulting trust" in favour of A. It follows that the onus was on B to prove that A had intended to give the beneficial title along with the legal title. However, when the transfer was made by a husband to wife or father to child it was presumed that he intended to make an absolute gift of both the legal and beneficial interest. This presumption came to be known as "the presumption of advancement" and placed the onus of rebutting the presumption on the party challenging the transfer: *Pecore* at paras. 20-27.

[43] While the Court in *Pecore* concluded that the longstanding common law presumptions continue to have a role to play in disputes over gratuitous transfers, in a significant modification of the "traditional rule", it held that the rebuttable presumption of advancement is limited to transfers between parents and their minor children. The Court reasoned that when a parent transfers property gratuitously to an adult independent child, it is presumed that the parent intended that the child hold the property on a resulting trust in the parent's favour. Because the presumption is rebuttable, it will be displaced where the child adduces sufficient evidence that a gift was intended: *Pecore* at para. 41.

- [44] The court must weigh all of the relevant evidence, both direct and circumstantial, in an attempt to ascertain on a balance of probabilities the transferor's actual intention. The assessment may include any reasonable inferences that are sought to be drawn from the evidence, including the "inherent probability or improbability of competing explanations as to the transferor's intent": *Fuller v. Harper*, 2010 BCCA 421 at para. 49. In other words, the court may consider if the transferor had any rational purpose for the transfer, other than as a gift.
- [45] The traditional rule was that evidence adduced to show the evident intention of the transferor "ought to be contemporaneous or nearly so to the transaction": *Pecore* at para. 56. However, this rigid rule has lost much of its force, and the Supreme Court of Canada concluded at para. 59 of *Pecore*:
- [59] Similarly, I am of the view that the evidence of intention that arises subsequent to a transfer should not automatically be excluded if it does not comply with the *Shephard v. Cartright* rule. Such evidence, however, must be relevant to the intention of the transferor at the time of the transfer: *Taylor v. Wallbridge* (1879), 2 S.C.R. 616. The trial judge must assess the reliability of this evidence and determine what weight it should be given, guarding against evidence that is self-serving or that tends to reflect a change in intention.
- [46] The court therefore must approach any evidence of intention that arises subsequent to the transaction at issue with considerable caution and carefully assess the weight it ought to be accorded.
- [47] In *Pecore*, the Court summarized the principles that inform the analysis at paras. 23 and 44:

The presumptions provide a guide for courts in resolving disputes over transfers where evidence as to the transferor's intent in making the transfer is unavailable or unpersuasive. This may be especially true when the transferor is deceased and thus is unable to tell the court his or her intention in effecting the transfer.

\* \* \*

As in other civil cases, regardless of the legal burden, both sides to the dispute will normally bring evidence to support their position. The trial judge will commence his or her inquiry with the applicable presumption and will weigh all of the evidence in an attempt to ascertain, on a balance of probabilities, the transferor's actual intention. Thus, as discussed by Sopinka et al. in *The Law of Evidence in Canada*, at p. 116, the presumption will only determine the result where there is insufficient evidence to rebut it on a balance of probabilities.

- [48] It is settled in British Columbia that the presumptions established in *Pecore* apply to transfers of real property. The statutory presumption of title in s. 23(2) of the *Land Title Act*, R.S.B.C. 1996, c. 250, as conclusive proof of title, may, in certain circumstances, be displaced to take into account the beneficial interests of the parties: *Schouten Estate v. Swagerman-Schouten*, 2014 BCSC 2320 at para. 4.

- [49] In this case, the defendant paid no consideration for the transfer of the Property. Accordingly, the transfer gives rise to a rebuttable presumption of resulting trust. The defendant must therefore demonstrate on a balance of probabilities that, at the time of the execution of the transfer, his father's actual intention was to gift him a joint interest in the Property with a right of survivorship. If he fails to do so, the presumption of resulting trust will not be displaced and the defendant will be found to be holding his interest in the Property in trust for his father's estate.

### Evidence of Mr. Layfield

- [50] Mr. Layfield was called to the bar in 1984. Since that time, he has been practicing in Nelson, B.C., as a solicitor, primarily in the areas of real estate, and wills and estates.
- [51] With respect to the transfer of the Property, sometime in September 2009, Mr. Layfield received an initial communication from the defendant. The defendant either telephoned him or dropped by his office to advise him that his father wanted to transfer his sole interest in his residential property into joint tenancy with himself. Mr. Layfield made it clear to the defendant that prior to preparing the land transfer documents he would have to meet with his father privately to obtain his instructions.
- [52] On or about September 23, 2009, Mr. Layfield requested and then reviewed the 2008 BC Assessment for the Property. He determined that the Property was 12.39 acres. He then conducted a land title search for the Property. Sometime later the same day, the defendant brought his father in Mr. Layfield's office. The defendant left the office, and Mr. Layfield met privately with the Deceased.
- [53] Mr. Layfield credibly testified that he has an independent recollection of meeting the Deceased. He advised the Deceased of the nature and effect of the transfer and explained the difference between joint tenancy and tenancy in common. He was satisfied that the Deceased understood the nature of the transaction and that his intention was to gift half of the Property to his son in his lifetime and that on his death, his son would receive the entirety of the beneficial ownership of the Property as the surviving joint tenant by right of survivorship.
- [54] Mr. Layfield explained to the Deceased that a possible negative consequence of transferring a one-half interest in the Property to his son was that thereafter they would co-own it and, as such, his son would have to sign any land transfer documents. Accordingly, he told the Deceased that he could no longer sell the Property without his son's co-operation. Mr. Layfield also explained to the Deceased that if his son were to predecease him, title to the Property would revert to his sole name. The Deceased told Mr. Layfield that he had no interest in selling the Property, explaining that it had been his home for many years and that it was also his son's property. Mr. Layfield testified that the Deceased made it clear that he wanted his son to have the Property. I accept his evidence on this point. I also accept that the Deceased confirmed that the transfer of the Property into joint tenancy with his son

would give effect to his stated intention, including avoiding the payment of probate fees on the Property.

[55] Mr. Layfield testified as follows:

Q .When you say, "That's what he wanted to do" ---

A Transfer the property to him and his son in joint tenancy.

Q Okay.

A Right. I also explained to him that there was one possible negative consequence of that, for him doing it, which is that if he wanted to sell the property later on, he couldn't sell it on his own anymore, because he would now co-own it with Ronald; and Ronald, therefore, would have to also sign any land transfer document. So if he had any concerns about selling the property subsequently, he should think twice about doing this transfer now. And he told me that, no, he had no interest in selling the property. It had been his home for years. It was also his son's property. He wanted his son to have the property. It would be his son's property when he died, so this was doing exactly what he wanted to accomplish and including avoiding the tax. So we went through all of that fairly - in fairly detailed manner

[Emphasis added]

[56] Mr. Layfield's evidence, which I accept, is that because he had not previously met the Deceased, he asked him if he was being threatened with any consequences if he did not complete the transfer. The Deceased replied "no, absolutely not". Mr. Layfield spoke to the Deceased in English and the Deceased appeared to fully understand the matters they discussed. He described the Deceased as attentive. Mr. Layfield's professional evaluation was that the Deceased understood what he was doing and that the transaction reflected his wishes. According to Mr. Layfield, the Deceased was unequivocal about making the gift to the defendant.

[57] Mr. Layfield prepared the transfer documents and the Deceased returned with the defendant later the same day to execute them. Mr. Layfield witnessed the Deceased signing the transfer documents. According to Mr. Layfield, his voice was strong and his hand was firm when he signed and gave no indication of infirmity or illness. He also observed that the Deceased managed the stairs in his office building without any apparent difficulties. Mr. Layfield was surprised when he was advised of the Deceased's age during the course of these proceedings, as he thought him to be younger.

[58] Mr. Layfield had explained the special property transfer tax return to the Deceased and to the defendant. In due course, Mr. Layfield received a cheque from the Deceased for the registration fees and the applicable taxes and attended to registration of the documents in the Kamloops Land Title Office.

- [59] The defendant contacted Mr. Layfield again on or about October 29, 2008, and told him that his father wanted to meet with him about the preparation of a will. At that time, Mr. Layfield did a land title search to confirm that the transfer of the Property was duly registered. Mr. Layfield arranged with the defendant for his father to come in that day to relay his wills instructions.
- [60] Immediately before the scheduled meeting, Mr. Layfield heard loud voices coming from the stairwell in his office building. The Deceased entered his office and the defendant left. The Deceased told Mr. Layfield that he and his son had been arguing, he was quite upset, and he did not feel he was in the proper state of mind to discuss instructions for a will. He advised Mr. Layfield that he wished to postpone the meeting and that he would arrange to come and see him at another time. As it turned out, Mr. Layfield never saw the Deceased again.

## Discussion

- [61] The most compelling evidence of the Deceased's intentions regarding the transfer of the Property is what he told Mr. Layfield on September 23, 2008.
- [62] I have considered the admissibility of Mr. Layfield's testimony regarding statements made by the Deceased with respect to the transfer of the Property. First, I accept that the statements were made. Additionally, I find them sufficiently reliable to meet the admissibility threshold under the principled approach. There is no basis to suggest that the Deceased had any reason to be untruthful or to make any misrepresentations to Mr. Layfield when they met regarding the transfer of the Property. In my view, the Deceased's statements made to a disinterested professional possess a circumstantial guarantee of trustworthiness. I conclude that the admission of these statements is justified under the principled approach.
- [63] The plaintiffs contend that there were deficiencies in Mr. Layfield's evidence. They argue that he did not have fulsome notes of his interview with the Deceased, nor did he prepare any documentation recording the Deceased's intentions with respect to the Property transaction. In my view, those criticisms do not detract from the strength of Mr. Layfield's evidence. Finally, the plaintiffs raise the fact that Mr. Layfield was not aware that the Deceased's daughter had predeceased him, leaving two grandchildren - being them. It may have been preferable for Mr. Layfield to undertake a broader inquiry as to other parties who may have been interested in the transaction. However, in the circumstances of this case, I am not persuaded that there was an obligation on him to do so. Mr. Layfield was never retained to prepare the Deceased's will.
- [64] I found Mr. Layfield to be a credible and objective witness, whose evidence was reliable. He had a clear recollection of meeting with the Deceased. His years of experience enhanced the weight to be accorded to his testimony. His evidence was not shaken in the face of a thorough cross-examination aimed at exposing shortcomings in his handling of the matter. I accept his evidence in its entirety.

- [65] The preponderance of the evidence demonstrates a clear intention on the part of the Deceased to gift a joint interest in the Property to the defendant. The Deceased understood and intended that upon the transfer, the defendant would acquire an immediate 50% interest in the Property, and that if he predeceased the defendant, his legal and beneficial interest in the Property would pass to the defendant.
- [66] The relationship between father and son was clearly fraught with difficulties. However dysfunctional their relationship may have been, the plain fact is that they maintained their shared living arrangement at the Property for some 14 years. The evidence supports a finding that the Deceased was profoundly disappointed about the defendant's choices. Nonetheless, he appreciated his son's rather dire personal circumstances and he consistently demonstrated a begrudging, but profoundly paternal concern and responsibility for his son's welfare.
- [67] It accords with the inherent probabilities of the case that the Deceased intended that his son receive the Property by way of an inter vivos gift.
- [68] I am fortified in my conclusion by the evidence given by Jeannie Podgorenko. She is the daughter of Bob Hunter, the Deceased's nephew. From approximately 1999 until the time of the Deceased's death, Ms. Podgorenko lived nearby and visited him at least once a month. She testified that during a visit with him a summer within the last few years of his life, the Deceased expressed annoyance over something the defendant had done. She suggested to him that he sell his house and move to town. His response was "this isn't just my home" and then remarked "what would Ron do?"
- [69] The Deceased's statements to Ms. Podgorenko are unambiguous, indicative of his emotional state and state of mind, and clearly relevant to the issues in the case. It is likely that the Deceased's utterances to Ms. Podgorenko were genuine expressions of the Deceased's state of mind at the time. I conclude that these statements were in fact made, and are admissible pursuant to the traditional exception to the hearsay rule regarding a declarant's state of mind.
- [70] The Deceased's comments in this regard echo what he stated to Kerry on their last visit in August 2008. After she witnessed an unpleasant exchange between the defendant and the Deceased, she asked her grandfather why he did not insist that the defendant move out of the Property. He responded with words to the effect of "where would he go?"
- [71] As I mentioned earlier, the Deceased's nephew, Walter Khadikin, made an effort to assist the Deceased with respect to moving into an assisted living facility, in the year preceding the Deceased's death. He persuasively relayed to the court that the Deceased's resistance to moving out of and selling the Property was attributable, at least in part, to his stated concerns over the defendant's welfare. It can reasonably be inferred that the discussions about his possible move into an assisted living facility prompted the Deceased to make arrangements regarding the Property.

[72] In summary, I find it is entirely consistent with the inherent probabilities of the case that the Deceased intended to gift an interest in the Property to the defendant. I conclude on a balance of probabilities that on September 23, 2008, the Deceased intended to gift a joint interest in the Property to the defendant absolutely. I am satisfied that the Deceased intended to give an undivided one-half interest in the Property to his son in his lifetime and that he intended that on his death, his son would receive the entirety of the Property by right of survivorship.

(ii) Is the Alleged Will valid?

[73] I turn to address the issue of the validity of the Alleged Will.

[74] The Alleged Will, which was purportedly executed on March 15, 2009, reads as follows:

THIS IS THE LAST WILL AND TESTAMENT of me, WALTER NICHOLAS KHADIKIN, of the city of Nelson, in the Province of British Columbia.

1. I REVOKE all former Wills and testamentary dispositions made by me.
2. I APPOINT my son, Ronald Walter Khadikin, to be sole Executor and Trustee of this my Will and I hereinafter refer to him as my "Trustee".
3. I GIVE all my property, including any property over which I may have a general power of appointment, to my Trustee upon the following trusts:
  - (a) To use his discretion in the realization of my estate, with power to my Trustee to sell any part of my estate at such time or times, in such manner and upon such terms, and either for cash or credit, or for part cash and part credit as my Trustee may decide upon, or to postpone the sale of any part of my estate so long as he pleases.
  - (b) To pay my debts, funeral expenses and testamentary expenses and to pay or transfer the residue of my estate to my son for his own use absolutely
4. I have not made provision for my grandchildren Darren Harshenin and Kerry Janneman.

[75] The Alleged Will closes with the following attestation clause:

IN TESTIMONY WHEREOF I have this my last Will and Testament, Written upon this single page of paper, subscribed my name this 15th day of March, 2009.

Signed, published and declared by

The Testator, WALTER NICHOLAS

KHADIKIN, as and for him last Will

and Testament, in the presences of us,

both present at the same time, who at

his request, in his presence and in the

presence of each other, have subscribed  
our names as witnesses.

## Legal Framework

- [76] In a dispute over a will, the party propounding the will must prove, on a balance of probabilities, that the will was executed in compliance with the statutory formalities, that the will-maker knew and approved of the contents of the will, and that the will-maker had testamentary capacity: *Vout v. Hay*, [1995] 2 S.C.R. 876 at paras. 19-20.
- [77] In certain circumstances, the propounder of the will, in discharging the burden of proof in a wills challenge, is aided by a rebuttable presumption of validity. If the will was duly executed in accordance with the requisite statutory formalities after being read over to or by a testator who appeared to understand it, it is presumed that the testator possessed the requisite testamentary capacity and knew and approved of its contents: *Vout* at para. 26.
- [78] The authorities establish that the burden rests on those propounding a will, despite the fact that probate has been granted in common form: *Robins v. National Trust Co. Ltd. et al.*, [1927] 2 D.L.R. 97 (J.C.P.C.); *Re McKenzie*, [1946], 1 D.L.R. 388 at 418 (O.N.C.A.).

Did the Deceased execute the Alleged Will?

- [79] Counsel for the plaintiffs confirmed that his clients were not proceeding with the claims of lack of testamentary capacity and undue influence. Instead, the plaintiffs assert that the Deceased did not execute the Alleged Will. They forcefully dispute the authenticity of the Deceased's signature and argue the Alleged Will is a forgery.
- [80] The starting point in the analytical framework articulated by the Court in *Vout* for determining the validity of a will is to consider whether any legal presumptions apply. In order to engage the legal presumptions, the defendant as the propounder of the Alleged Will, must establish that the Alleged Will was duly executed by the Deceased after having been read over to or by the Deceased, who appeared to understand its contents.
- [81] The crucial issue in this case is whether the Deceased executed the Alleged Will in accordance with the requisite formalities for due execution, set out in s. 4 of the former Wills Act, R.S.B.C. 1996, c. 489:

4 Subject to section 5, a will is not valid unless

- (a) at its end it is signed by the testator or signed in the testator's name by some other person in the testator's presence and by the testator's direction,
- (b) the testator makes or acknowledges the signature in the presence of 2 or more attesting witnesses present at the same time, and
- (c) 2 or more of the attesting witnesses subscribe the will in the presence of the testator.

- [82] The issue of due execution of a will is a question of fact. The court must examine and weigh the totality of the evidence in this case to ascertain on a balance of probabilities whether the Deceased executed the will in accordance with the statutory formalities.
- [83] The propounder of a will is aided by a rebuttable presumption of due execution which arises when the will contains an attestation clause and appears on its face to be duly executed; Scott at para. 51; Beaudoin Estate v. Taylor, [1998] B.C.J. No. 770 at para. 10, 27 E.T.R. (2d) 208 (S.C.); Yen Estate v. Yen-Zimmerman, 2012 BCSC 1620 at para. 23.
- [84] I turn to summarize the defendant's description of the circumstances surrounding the preparation and execution of the Alleged Will.
- [85] According to the defendant, it was becoming apparent to the Deceased that he would require a will and power of attorney if he were to move into an assisted living facility. The defendant described how, on his father's birthday in 2009, his father mentioned that he wished to make a will as a gift to the defendant. He asked the defendant not to tell anyone that he was making a will. According to the defendant, his father wanted him to draft the will to save on legal costs. The defendant maintains that he had a discussion with his father about the inclusion of the clause, which explained that his grandchildren would not receive an inheritance. The defendant also contends that his father's stated intention was to leave his entire estate to the defendant and that it would be up to him to decide whether Kerry would receive anything from the Deceased's estate. The Deceased however expressly stipulated that Darren was to receive nothing from his estate.
- [86] According to the defendant, the Deceased invited Louise and Barbara Poitras to join him for cake and tea on his birthday. The defendant picked them up and drove them to the Property. It was during this get-together that his father executed the Alleged Will in the presence of Louise Poitras and her mother, Barbara Poitras, on March 15, 2009.
- [87] After the Alleged Will was produced by the defendant in June 2009, the plaintiffs raised questions about the authenticity of their grandfather's signature.
- [88] Despite requests by plaintiffs' counsel, the defendant failed to provide any documents bearing his father's signature. He maintained that, in an effort to clean out the residence following the death of his father, sometime early in the summer of 2009, he recycled his father's papers and documents. Pursuant to a court order, the plaintiffs obtained a number of exemplars of the Deceased's signature from third parties. They obtained a copy of the Deceased's BC Driver's Licence and copies of two personal cheques signed by the Deceased. They also obtained documents bearing the Deceased's original signature from the Bank of Montreal and from the Interior Health Authority.
- [89] To reach a conclusion on the question of the execution of the Alleged Will, I will first consider the expert opinion of Mr. Kenneth Davies, a forensic handwriting and signature analyst. I will then turn to the assessment of the testimony of the defendant and the two witnesses who allegedly witnessed the Alleged Will.

## Expert Evidence

- [90] The plaintiffs retained Mr. Kenneth Davies, a forensic handwriting and signature analyst, to provide an expert opinion regarding the authenticity of the Deceased's signature on the Alleged Will.
- [91] Mr. Davies has some 39 years of experience in examining and analyzing handwriting and signatures. He was trained as a document examiner in the Ontario Ministry of Revenue, has undertaken formal studies of handwriting analysis, and has authored articles on the subject. In 2004, he became a Certified Forensic Consultant with the American College of Forensic Examiners Institute.
- [92] The defendant objected to Mr. Davies' report being tendered in evidence, and took issue with his qualifications. The defendant cross-examined Mr. Davies on his qualifications, as well as on his report. I ruled that Mr. Davies was properly qualified to give opinion evidence in the area of determining authenticity of signatures. I held that his report satisfied the criteria enumerated in *R v. Mohan*, [1994] 2 S.C.R. 9.
- [93] Mr. Davies was provided with five exemplar signatures of the Deceased, the authenticity of which was admitted for the purposes of trial. Mr. Davies compared the known exemplars with the impugned signature on the Alleged Will. Arrangements were made so that he was able to examine the signature on the original of the Alleged Will. He examined the signatures with high-resolution digital scanners macroscopically and microscopically. He studied each of the known exemplars with respect to disclosed stroke characteristics of formation, slant, slope, line quality, rhythm, pressure, compression/expansion, and sequence of stroke. He compared the exemplar signatures with each other to establish and relative variation across the known signatures. He then compared the questioned signature individually and collectively with the known exemplar signatures of the Deceased "to establish and disclose any correlation that may exist between the questioned signature and the exemplar signatures, and to make a determination as to the authenticity of that questioned signature".
- [94] Mr. Davies noted that there is a contradicting, inconsistent slant and slope in the impugned signature that is not representative of the known exemplar signatures. He explained that the formation, rhythm and compression characteristics in the questioned signature are inconsistent with the known exemplar signatures. By way of illustration, he noted that the "W" has a rather open formation in the impugned signature when compared to the exemplar signatures. I also note that the central loop of the "W" of the impugned signature is as high as the first and last branches of the letter. In contrast, the exemplars show that the central loop in the "W" is customarily half the height of the other parts of the letter.
- [95] According to Mr. Davies, the questioned signature has some superficial similarities of compression found only in the exemplar signature on the Deceased's driver's licence. In his view, this was noteworthy because the signature on a driver's licence must be written in a compressed space. The compression characteristics that are to be expected when an

individual executes his or her signature inside a small rectangular area for a driver's licence should not appear when an individual signs a document, such as a will, where there is no such spatial limitation.

- [96] There was no significant correlation between the signature on the Alleged Will and exemplar signatures post-dating the Alleged Will. It is therefore unlikely that advanced age or possible infirmity accounted for the irregular signature on the Alleged Will.
- [97] Mr. Davies opined that the challenged signature presented a slow, conscientious, deliberate, and unsure formation that is not characteristic of the signatures on the exemplar. In his report, he stated:

The overall impression of the questioned signature is that it is more a drawn signature rather than signed in a natural, practiced manner that would be more consistent with a legitimate signature.

- [98] Mr. Davies concluded:

It is of the opinion of this analyst, within a reasonable degree of certainty, that the testator signature presenting as that of Walter Khadikin on the subject Last Will and Testament (exhibit Q to this report) was not made by Walter Khadikin.

- [99] Mr. Davies explained that the phrase "reasonable degree of certainty", expressed mathematically, falls between 80% and 90%. He could not be any more certain because he had been provided with a limited number of exemplars of the Deceased's signature.
- [100] Mr. Davies' opinion was not weakened in his cross-examination. However, I do not consider his opinion to be conclusive of whether the Deceased executed the Alleged Will. In the final analysis, the assistance the handwriting expert brings to the court is limited to pointing out similarities and differences between the known and the questioned signature, and with the benefit of experience explaining the significance of the distinctions identified. The court can then draw its own conclusions as to whether the questioned signature is genuine: *Tsang v. Chang Estate*, [1992] B.C.J. No. 2202 at 8. To this end, I also note that there is a notable distinction between the Deceased's signature on the Alleged Will and the Deceased's signature on the Property transfer form, a copy of which was adduced in evidence. For reasons that were not explained at trial, this document was not provided to Mr. Davies.
- [101] In the end, I find that the evidence of Mr. Davies, in context of the evidence as a whole, offers some support for the contention that the Deceased did not sign the Alleged Will. However, for the reasons that follow, I need not make an affirmative finding on whether the Alleged Will was a product of forgery.

## Evidence Regarding the Deceased's Testamentary Intentions

- [102] The Deceased's neighbour, Mr. Pereversoff, passed away prior to trial. He helped out senior citizens in the area by driving them to appointments and assisting them with the payment of bills. George, the plaintiffs' father, testified that Mr. Pereversoff had told him that the Deceased had told the bank manager at the Bank of Montreal, in his presence, that he had no will. It is not necessary for me to engage in an analysis of the admissibility of this double hearsay; *R. v. Starr* at paras. 171-174. Even if I were to conclude that the evidence is admissible, the record does not establish when the Deceased had made the statement. In the circumstances the evidence has little, if any, probative value.
- [103] George also relayed to the court that Mr. Pereversoff had told him that the defendant was taking advantage of the Deceased and that there were funds missing from the Deceased's bank accounts. Even if this hearsay evidence met the threshold reliability test under the principled approach, I am not able to accord it any weight. That is because the record does not disclose whether the statement was an expression of Mr. Pereversoff's opinion, or speculation on his part, or whether it was based on his own observations.
- [104] In an outburst of profanity shortly after Elizabeth passed away, the Deceased told his nephew, Mr. Hunter, words to the effect that the Harshenins would receive nothing from him on his death. The Deceased's statements to Mr. Hunter are unambiguous, indicative of his state of mind, and clearly have potential relevance to the issues in this case. The Deceased had no reason to misrepresent his state of mind to Mr. Hunter. I find the Deceased's declarations have a sufficient measure of trustworthiness to be admissible under the traditional exception to the hearsay rule. However, I have accorded this evidence limited weight, given that the statement was made many years prior to the Deceased's death.
- [105] The Deceased told each of Darren and Kerry on separate occasions, in response to their raising the topic, that he had no intention of making a will and that they could fight about it after he was gone. The statement to Darren was made sometime prior to 1998, many years before the Deceased's death. The statements to Kerry were made in the last few years of his life. George also testified that he had heard his late wife implore her father to make a will, on several occasions. He consistently refuted her suggestions and responded with words to the effect that "you guys can fight about it when I am dead".
- [106] I find that the Deceased's statements were sufficiently trustworthy to be admissible under the principled approach. The consistency of the Deceased's statements to three different individuals enhances the trustworthiness of the statements. In reaching this conclusion, I have not overlooked the fact that the Deceased had intended, at least at one point, to consult Mr. Layfield about a will. However, by the defendant's own admission, he changed his mind about retaining Mr. Layfield in this regard and never did so.

## Evidence of the defendant

- [107] The factors to be considered when assessing credibility were summarized in *Bradshaw v. Stenner*, 2010 BCSC 1398, at para. 186, aff'd 2012 BCCA 296. They include the firmness of the witness' memory, the ability of the witness to resist the influence of interest in modifying his or her recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his or her evidence during examination for discovery, direct examination and cross-examination, or is otherwise inconsistent in his or her recollections, whether the witness's evidence seems generally unreasonable, impossible, or unlikely, and the witness's demeanour: *A.B.Z. v. A.L.F.A.*, 2014 BCSC 1453 at para. 39. Ultimately, the court's assessment of the credibility of a witness' testimony turns on whether the evidence is in "harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions": *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) at 357.
- [108] It is common ground that it is permissible for the court to consider the defendant's past criminal convictions in the assessment of his credibility. However, in the unique circumstances of this case, I am able to assess the defendant's credibility without reference to his past transgressions.
- [109] I have significant concerns with the credibility of much of the defendant's evidence. I have not relied upon it unless it was supported by other corroborative and credible evidence. Overall, the defendant's evidence was replete with evasions and internal inconsistencies. He frequently rambled and misrepresented facts to advance his own interests.
- [110] For the reasons that follow, I find that the defendant was fundamentally discreditable on the topic of the Alleged Will. The defendant's evidence regarding the circumstances surrounding the preparation and execution of the Alleged Will was not corroborated, and in fact was undermined by the testimony of Louise Poitras. I found his testimony regarding the preparation and execution of the Alleged Will to be untrustworthy and implausible. A few examples which are illustrative of the many difficulties with his evidence on the point will suffice.
- [111] The testimony of the defendant and Louise Poitras conflicts on a material point. At his examination for discovery, the defendant testified that Louise Poitras typed the Alleged Will. At her pre-trial examination, Louise Poitras disavowed having anything to do with the preparation of the Alleged Will. She testified that the first time she saw the Alleged Will was when it was executed. The defendant, after hearing her evidence, changed his testimony. At trial, in his direct evidence, he asserted that to best of his recollection, he had typed the Alleged Will at his father's home. When confronted with this contradiction in cross-examination, he resiled from his testimony that he had typed the Alleged Will and maintained that he could not recall who had typed it. He stated in cross-examination: "I'm not going to be nailed down on that because I don't know".

- [112] There is no suggestion by the defendant that the Deceased could have typed the Alleged Will himself. Nor does he assert that it was produced by a lawyer. The evidence as a whole does not support either of these possibilities.
- [113] The irresistible inference is that the defendant, who is named as the sole beneficiary under the Alleged Will, was instrumental in the preparation of the Alleged Will.
- [114] There were further inconsistencies between the testimony of the defendant and Louise Poitras. The defendant testified at his examination for discovery that he had removed himself from the kitchen and went to sit in the living room during the execution of the Alleged Will. However, Louise Poitras said that he was in the kitchen, near the sink, when the Deceased signed the Alleged Will. In her affidavit, Barbara Poitras also deposed that the defendant was in the room when the Alleged Will was executed. When confronted with the conflicting testimony in cross-examination, the defendant again responded that he would not be "nailed down" on his whereabouts at the time the Alleged Will was signed.
- [115] At trial the defendant contended that the Deceased "had never written anything in his life", other than signing his name, which he "copied". This contradicts his evidence at discovery, where he testified that he had only ever observed his father write and that he had never see him print. He had no satisfactory explanation for the material discrepancy in his testimony. His evidence at trial on this point also conflicts with the objective evidence that the Deceased had written cards, including Christmas cards, to Kerry. It also contradicts the evidence of Mr. Layfield, which I accept, that the Deceased appeared to have no difficulty in executing the transfer documents.
- [116] My further findings are as follows:
- I accept Kerry's evidence that in a telephone call shortly after the Deceased's death, she asked the defendant if the Deceased had left a will. The defendant told her "there is no will but one will arise if need be". In the same telephone call, the defendant offered to pay Kerry \$10,000, which she understood he would pay from her grandfather's estate.
  - At the funeral luncheon held in memory of the Deceased, in response to George's question about the existence of a will, the defendant stated that there was no will but "if need be, one would turn up". I accept that Darren and his daughter, Alyssa Christie, both heard the utterance. The defendant admitted that he made the comment and maintained that he made it flippantly so that George would stop badgering him.
  - The defendant did not produce the Alleged Will or show it to anyone, until after this litigation had been commenced.
  - The defendant testified about what his father allegedly said to him regarding the Alleged Will. I find it implausible that the Deceased made those statements to the defendant. It is therefore not necessary to engage in an analysis of the admissibility of those statements.

**Louise and Barbara Poitras**

- [117] The Alleged Will appears on its face to be signed by Barbara Poitras and. Louise Poitras. The plaintiffs obtained a court order compelling them to attend a pre-trial examination. Louise Poitras attended an examination on February 20, 2012, but her mother, Barbara Poitras, did not attend as scheduled. Subsequently, counsel for the plaintiffs made a further court application seeking to obtain oral testimony from Barbara Poitras. Sometime during this process. Barbara Poitras passed away.
- [118] At the request of plaintiffs' counsel, Matthew Leibel, a licensed private investigator and former detective with the Calgary Police, attended the home of Louise and Barbara Poitras in August 2009. His objective was to obtain a statement from them regarding the circumstances surrounding the execution of the Alleged Will. They refused to cooperate.
- [119] For the reasons that follow, I did not find the testimony of Louise Poitras to be credible.
- [120] In addition to the discrepancies in the evidence between Louise Poitras and the defendant, her evidence does not harmonize with the objective evidence. For example, she testified that the Alleged Will was signed by the Deceased, herself, and her mother, using the same pen. When confronted with the Alleged Will, which clearly shows the Deceased's signature written in black ink and the witnesses' signatures in blue ink, she changed her evidence.
- [121] At trial, Louise Poitras asserted that on March 15, 2009, the Deceased spoke to her mother on the telephone and invited them both to his home. She recalled observing and hearing her mother speak on the telephone that day. This evidence conflicts with her earlier testimony at her pre-trial examination where she said that, in fact, she had spoken to the Deceased about the invitation to his home. When confronted with the inconsistency in cross-examination, she stated that her evidence at trial was incorrect. I consider her explanation to be unsatisfactory.
- [122] I found her evidence that the Deceased signed his name in a very slow and deliberate movement and that he copied his signature from another paper to be implausible. It is inconsistent with the body of evidence that I prefer, including Mr. Layfield's evidence of his observations of the Deceased affixing his signature to the transfer documents.
- [123] In assessing its ultimate reliability, I have considered whether the affidavit evidence of Barbara Poitras accords with the preponderance of probabilities a reasonable person would recognize in the circumstances of this case. I find that it does not.
- [124] In short, I reject the evidence of Louise and Barbara Poitras. I found key aspects of their evidence implausible and inconsistent with the inherent probabilities of the case as a whole.

## Summary

- [125] Counsel for the defendant argues that that the plaintiffs bear the onus of proving the forgery they allege. I disagree. The authorities establish that the burden of proof in establishing that the Deceased properly executed the Alleged Will rests with the defendant as the propounder of the will: Tsang at 8; Vout at para. 19.
- [126] I have no confidence in the evidence surrounding the preparation and execution of the Alleged Will. Given the absence of cogent and sufficiently reliable evidence on the point, the defendant has not discharged his burden of showing, on a balance of probabilities, that the Alleged Will was duly executed by the Deceased, in accordance with s. 4 of the Wills Act. If the rebuttable presumption of due execution is applicable because of the presence of the attestation clause, I have no hesitation in concluding that the presumption has been rebutted. To be clear, the defendant has not established on a balance of probabilities that two witnesses saw the Deceased sign or acknowledge his signature on the Alleged Will, while they were both present with him and that each of them then signed the Alleged Will in his presence and in the presence of each other.
- [127] Furthermore, there is no reliable evidence that the Deceased read and appeared to understand the Alleged Will. I reject the defendant's evidence that, at some time prior to meeting with Barbara and Louise Poitras, his father read over the provisions of the Alleged Will. For completeness I note that neither of Louise nor Barbara Poitras' testimony establishes that the Deceased read over the Alleged Will in their presence or that he knew and approved of its contents.
- [128] In summary, the defendant, as the propounder of the Alleged Will, has failed to prove it was duly executed in compliance with the requisite statutory formalities after it was read to or by the Deceased, who appeared to understand it. The defendant is therefore not aided by the rebuttable presumption of validity explained in Vout. In the result, I conclude that the Alleged Will is invalid. The plaintiffs are entitled to a declaration that the grant of probate issued on June 16, 2009, is revoked.
- [129] In view of my findings, it is not necessary to address the plaintiffs' submissions on the doctrine of spoliation or to make an affirmative finding on whether the Alleged Will was a product of forgery.

## conclusion

- [130] I conclude that the Alleged Will is invalid and declare that the grant of probate issued to the defendant on June 16, 2009, is revoked. In the result, the Deceased's estate shall devolve according to the law of intestate succession in British Columbia.

- [131] Counsel for the plaintiff indicated in his opening submissions that, at the time of his death, the Deceased held two bank accounts, the value of which exceeded \$400,000. However, no evidence concerning the value of the estate was adduced at trial. In any case, the plaintiffs are at liberty to take appropriate steps to pursue the appointment of an administrator and to seek an accounting from the defendant with respect to his administration of the estate.
- [132] The plaintiffs' claim that the defendant holds his interest in the Property in trust for the estate is dismissed.
- [133] Given my disposition of this matter, there is no principled basis to maintain the Certificate of Pending Litigation in this action. I order that the Certificate of Pending Litigation with respect of the Property filed by the plaintiffs in the Land Title Office be discharged. The plaintiffs are entitled to judgment against the defendant for the amount of the arrears of property taxes they paid for the Property during the currency of this litigation.
- [134] It is impractical for me to be seized of further proceedings in this matter. The hearing of any future proceedings could be unduly delayed, given my rota and limited opportunity to return to this location, which could cause considerable inconvenience to the parties.

costs

- [135] The parties may reserve a date through Supreme Court Scheduling to address the issue of costs.

"Dardi J."

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