

CANADA / JUDGMENT

Horton v. Bruce

2017 BCSC 712

COURT

Supreme Court of British Columbia

DECIDED

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2017 BCSC 712 Horton v. Bruce

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Horton v. Bruce,

2017 BCSC 712

Date: 20170501

Docket: 19137

Registry: Nelson

Between:

Margaret Horton

Plaintiff

And

Diane Bruce, James Alexander Bale, William Martin Bale, Sharlene Fern Wood, John Russel Bale, Patricia Ann Bale, the Estate of Jack Shepherd, John Arthur Shier, Frances Arlene Jamison, the Estate of Barbara Elaine Jaramillo, the Estate of Linda Jean Rudichuk, Christie McCrory, Timothy Michael McCrory, Elizabeth Storey, the Estate of Rick Dimock, Ron Dimock, Lynn Romano and Gloria Byington

Defendants

Before: The Honourable Madam Justice Maisonville

Reasons for Judgment

Counsel for the Plaintiff :

T.W. Pearkes

Defendants:

No appearances

Place and Date of Trial (via video conference):

Nelson, B.C.

April 5, 2017

Place and Date of Judgment:

Nelson, B.C.

May 1, 2017

introduction

- [1] Margaret Horton is the niece of the deceased, Jean Agnes Shepherd, who passed away on April 4, 2015 in Trail, B.C. at 88 years of age. This action concerns two documents: a 1993 will of Ms. Shepherd, executed in accordance with the requirements in place at the time, and a document from 2011, which is a draft unwitnessed will of Ms. Shepherd (the "2011 Draft").
- [2] In respect of the relief sought, Ms. Horton relies on the common law and the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA] in support of her claim that the 2011 Draft, indicated her intention to revoke the Will she had made in 1993 (the "1993 Will"), of which only a copy could be found at the notary's office.
- [3] Ms. Horton seeks an order of the Court that the revocation clause of that document be "cured" pursuant to s. 58 of the WESA. Ms. Horton relies additionally on the common law presumption of destruction to establish that the 1993 Will was revoked. She also seeks a declaration that the estate of Ms. Shepherd proceed as an intestacy under WESA; that she be appointed the administrator of the estate without bond; and that she be awarded special costs from the estate. Ms. Horton originally sought to have the 2011 Draft be admitted to probate in its entirety, but has since abandoned this claim.
- [4] No one appeared on behalf of the defendants. All were served with the Notice of Civil Claim except for the Estate of Jack Shepherd and the Estate of Barbara Elaine Jaramillo, for whom no legal representative could be found. Not all who were served with the Notice of Civil Claim filed Responses. Responses were filed by the Estate of Rick Dimock, Gloria Jean Byington (Dimock), Ronald Graham Dimock, Donna Lynn Romano (Dimock), James Alexander Bale, Elizabeth Alice Storey, and Frances Arlene Jamison.

- [5] Notices of Withdrawal were later filed by Ron Dimock, Lynn Romano, Gloria Byington, and the Estate of Rick Dimock. The three remaining parties, namely, James Alexander Bale, Elizabeth Alice Storey, and Frances Arlene Jamison, were served with the Notice of Trial but agreed not to participate further if Ms. Horton agreed to abandon the claim for relief that the 2011 document be admitted to probate in its entirety.
- [6] Ms. Shepherd was married to Robert William Shepherd. Her maiden name was Jean Agnes Bale. Ms. Shepherd and Mr. Shepherd had no children. Mr. Shepherd had one sibling, his brother, Jack Shepherd, who passed away in approximately 2008. Jack had no children.
- [7] Ms. Shepherd was the youngest of five siblings. She had two older brothers, Hector, who passed away in 2011, and Martin, who passed away in 1989, and two older sisters, Annie, who passed away in 2012, and Margaret Ethel, who passed away in 2005. Ms. Shepherd's sister Annie was the mother of Ms. Horton.
- [8] Ms. Shepherd and Mr. Shepherd had entered into Wills which they executed on September 20, 1993. Under mirror provisions, they named each other as the sole primary beneficiary of their respective estates, and in the event that either one of them predeceased the other, Ms. Shepherd and Mr. Shepherd each named 17 individuals as alternate beneficiaries in differing percentages, ranging from three to eleven percent. The alternative beneficiaries were Ms. Shepherd's nieces and nephews, Mr. Shepherd's brother, and various children of parents, who at the time were close family friends of Ms. Shepherd and Mr. Shepherd.
- [9] Mr. Shepherd passed away on February 13, 2010. His solicitor was Lewis J. Bridgeman. Mr. Bridgeman assisted Ms. Shepherd with the probate of Mr. Shepherd's Will. Probate was granted on May 7, 2010.
- [10] Ms. Horton and Ms. Shepherd, her aunt, had always enjoyed a close relationship. In fact, Ms. Shepherd viewed Ms. Horton as her daughter.

discussion

Preliminary Issue - Hearsay

- [11] Ms. Horton sought to present evidence of statements that Ms. Shepherd made to her. I find that these statements are admissible on the basis of the principled approach to the hearsay rule exceptions and the well-recognized exception for the deceased's state of mind, as the evidence is both necessary and reliable and required in order to determine Ms. Shepherd's intention.
- [12] Justice Dardi discussed the principled approach to hearsay evidence at para. 30 in *Harshenin v. Khadikin*, 2015 BCSC 1213, citing *R. v. P (R.)* (1990), 58 C.C.C. (3d) 334 (Ont. H.C.J.). She stated that, on the "principled approach" to hearsay exception, hearsay evidence is presumably inadmissible when relied upon for the truth of its contents, however, if the statement is not proffered for its truth but rather offered pursuant to a well-established exception such as the deceased person's state of mind, the hearsay evidence is then

admissible.

[13] Justice Dardi also held:

[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

[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

[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

[Citations omitted.]

[14] First, I find that it is likely, on a balance of probabilities, that the statements were made by Ms. Shepherd. I further find that here, because Ms. Shepherd is deceased, necessity is clearly established. I also find that the evidence is reliable. I accept Ms. Horton's evidence which was forthright and candid. The documents additionally support much of the evidence tendered by Ms. Horton orally.

Facts

[15] Over the years, Ms. Horton and her husband had visited Ms. Shepherd and Mr. Shepherd regularly at their home in Trail, B.C. Ms. Horton also hosted them in their homes first in Nanton and then later in Claresholm, Alberta. Their home in Nanton was where Ms. Horton resided prior to moving to their Claresholm, Alberta home.

[16] Ms. Horton was treated by Ms. Shepherd as the daughter that she never had. After Mr. Shepherd's passing and during Ms. Shepherd's widowhood, Ms. Horton would visit Ms. Shepherd to help her.

[17] Ms. Horton had, in fact, assisted Ms. Shepherd with her application for grant of probate of Mr. Shepherd's Will by attending with Ms. Shepherd at Mr. Bridgeman's office.

- [18] Ms. Shepherd became hospitalized for four months in 2011 and 2012. Following that, Ms. Horton and her husband helped Ms. Shepherd's transition to Columbia View Lodge, an extended care facility in Trail, B.C., and continued to visit her there regularly. Ms. Horton was with Ms. Shepherd on the day that she passed away.
- [19] Ms. Horton was appointed Ms. Shepherd's attorney, pursuant to a general power of attorney Ms. Shepherd executed on April 27, 2010. Ms. Horton was also appointed as Ms. Shepherd's personal representative, pursuant to a representation agreement dated May 6, 2010.
- [20] Ms. Horton testified at trial that, when Ms. Shepherd attended at Mr. Bridgeman's office in order to obtain a grant of probate for Mr. Shepherd's Will, Ms. Shepherd brought with her two "formal looking" envelopes. In one was Mr. Shepherd's Will, and in the other, presumably, was Ms. Shepherd's own 1993 Will, although Ms. Shepherd never said what was in the envelope.
- [21] As noted, a draft of a new Will was eventually prepared for Ms. Shepherd in 2011 by Mr. Bridgeman. The 2011 Draft was to replace the 1993 Will. Ms. Horton further testified that she was never shown the contents of the 2011 Draft, nor did she have anything to do with Ms. Shepherd's meeting with Mr. Bridgeman when the 2011 Draft was prepared. Ms. Horton had no knowledge of the new distribution scheme of Ms. Shepherd's estate under the 2011 Draft until she received a copy of it.
- [22] Ms. Horton recalled that Ms. Shepherd spoke with her about her reasons of having the 2011 Draft prepared. Ms. Horton said Ms. Shepherd told her that she prepared a new Will because a number of the named beneficiaries in the 1993 Will had passed away. In addition, Ms. Shepherd felt that a number of these named beneficiaries in the 1993 Will would not need her assistance as they were already financially well off, thus making the bequest of her estate in the 1993 Will to these alternate beneficiaries in the form of differing percentages unnecessary.
- [23] A draft new Will was prepared, which included the following clause:
2. I HEREBY REVOKE all Wills by me heretofore made.
- [24] One of the key issues in this case is whether the evidence of Ms. Horton establishes on a balance of probabilities that there was, in fact, an intention on the part of Ms. Shepherd, to nullify or render void the prior existing distribution scheme of her estate according to the 1993 Will.
- [25] The evidence of Ms. Horton was that Ms. Shepherd handed her a copy of the 2011 Draft. Entered into evidence at trial was a copy of the document. It was signed by Ms. Shepherd but was not properly witnessed, in accordance with the legislation. The 2011 Draft was dated by Ms. Horton, in her handwriting, the date that it was handed to her.
- [26] In addition, as noted, Ms. Shepherd had asked Ms. Horton to be her personal representative as well as her alternate executor.

- [27] On numerous occasions after she gave Ms. Horton the 2011 Draft, Ms. Shepherd would ask her if she still had the 2011 Draft ensuring that Ms. Horton had retained it. As noted, Ms. Shepherd also explained and shared her view with Ms. Horton as to why she no longer wished certain named beneficiaries in the 1993 Will to benefit from her estate, as well as who had not been included in her estate distribution under the 2011 document.
- [28] When Ms. Shepherd had to move out from her home into the assisted living facility, Ms. Horton assisted in clearing out Ms. Shepherd's home. She identified and reviewed all of Ms. Shepherd's papers and personal effects. Neither the original of the 1993 Will nor a copy of it was ever located at Ms. Shepherd's home. It was presumed by Ms. Horton that it had been destroyed by Ms. Shepherd.
- [29] Also entered as evidence into Court was a document entitled "Acknowledgment of Joint Tenancy Trust Agreement". In it, one of the parcels of a property that Ms. Shepherd held in New Denver, B.C. in joint tenancy was struck out by Ms. Shepherd and a handwritten note was added to the bottom stating that the bare lot was to be sold after her death and was to form part of her Will and to be distributed according to her Will. The original document read:

RE: 1006 10A Avenue AND 1008 10A Avenue, Nakusp Rural, BC

Legal Description:

PID 014-428-415 & 012-876-071

- [30] 1008 10A Avenue and PID 012-876-071 were struck through and initialed on the document tendered in court.
- [31] The agreement was signed by Jean Agnes Shepherd and Margaret Anne Horton, with their signatures witnessed by Kathleen Plaa, a notary public. Added later to the bottom of the Joint Tenancy Trust Agreement, and initialed by Kathleen Plaa and Ms. Shepherd, was the following handwritten notation:

Jean has decided to continue renting Lot 3 @ 1008 10A Avenue - and sell it after her demise to form part of her will & to be distributed according to her will.

The Position of Counsel

- [32] Counsel suggests that the above facts suggest that Ms. Shepherd is considered to have changed her Will.
- [33] Another fact which points to Ms. Shepherd having revoked the 1993 Will is the fact that she apparently did not retain its original. Only a copy of it was located at the notary public's office. According to a letter from Mr. Bridgeman to Fred Romano dated April 7, 2015, Mr. Bridgeman wrote (in part):

I provided some legal services to Jean Shepherd, in the course of which I obtained a signed photocopy of her Will dated September 20, 1993 from the Notary's office. The Notary advised that Mr. and Mrs. Shepherd signed their Wills out on September 20, 1993, and thus the original was apparently in Jean's possession virtually as soon as it was signed.

- [34] As noted above, Ms. Shepherd took possession of the 1993 Will and following her death, no original or copy of the 1993 Will was ever found among Ms. Shepherd's possessions. Accordingly, the issue becomes whether the 2011 Draft, although unwitnessed and remaining in the form of a written draft, was such as to express a revocation of the 1993 Will. As well, the issue of the common law presumption of destruction and intention of revocation arises.
- [35] One factor that points to the intention of Ms. Shepherd to make the 2011 Draft effective to revoke the 1993 Will is the fact that she gave a copy of the 2011 Draft that bears her original signature to Ms. Horton, telling her that it was her "Will". Ms. Horton was the alternate executor named in the 2011 Draft.
- [36] Also, an original of the 1993 Will was never found. There were only two copies of it and those were both obtained by Mr. Bridgeman from the offices of the notary public, suggesting that the original may have been destroyed.
- [37] Counsel for Ms. Horton also points to the fact that the 1993 Will provided bequests to 12 different people while the 2011 Draft gives bequests only to six beneficiaries. Three different people were left out of the 2011 Draft.
- [38] Counsel for Ms. Horton submits that one of the other important factors that the Court relies upon in exercising its discretion to determine if the 1993 Will is revoked is the conduct of the deceased. Is the action of the deceased consistent with the revocation? Here, Ms. Shepherd spoke to Ms. Horton on a number of occasions about the reasons why she had left out some of the named beneficiaries from the 2011 Draft.
- [39] There is also a letter from Mr. Bridgeman to Ms. Shepherd dated February 16, 2011, in which he discussed the document:

I confirm that I provided you with a copy of your husband's Will which you believe to match your own Will which you are unable to locate. Assuming that your husband's Will and your Will match, then if you compare this new draft Will that is enclosed (and which you have not signed), you are cutting down the number of beneficiaries significantly. After the gift of the hospital is made, you are naming 6 beneficiaries. There are several people who appear to be named in the existing Will who would not be named in this new Will if you choose to sign it.

I look forward to hearing from you.

- [40] Mr. Bridgeman never heard further from Ms. Shepherd and, accordingly, Ms. Horton submits that this indicates Ms. Shepherd had the intention to revoke the 1993 Will. Also, Ms. Shepherd checked persistently with Ms. Horton as to whether Ms. Horton still had the 2011 Draft in her possession which she had given to her, the alternate executor. Ms. Shepherd explained to Ms. Horton that she was cutting down on the beneficiaries and that significant bequests were revoked as a consequence.
- [41] Ms. Horton also submits that it is reasonable to assume that Ms. Shepherd had properly executed the 2011 Draft because she said to Ms. Horton that "this is your copy of my will".

Issues

- [42] The main issue to be determined is whether Ms. Shepherd's 1993 Will was revoked by the 2011 Draft, either through the common law presumption of destruction or through the curative provisions of s. 58 of WESA being applied to cure the provision of the 2011 Draft that revokes all of Ms. Shepherd's previous wills.

Law Respecting will revocation

- [43] Respecting revocation, s. 55 of the WESA provides as follows:

55 (1) A will or part of a will is revoked only in one or more of the following circumstances:

- (a) by another will made by the will-maker in accordance with this Act;
- (b) by a written declaration of the will-maker that revokes all or part of a will made in accordance with section 37 [how to make a valid will];
- (c) by the will-maker, or a person in the presence of the will-maker and by the will-maker's direction, burning, tearing or destroying all or part of the will in some manner with the intention of revoking all or part of it;
- (d) by any other act of the will-maker, or another person in the presence of the will-maker and by the will-maker's direction, if the court determines under section 58 that
 - (i) the consequence of the act of the will-maker or the other person is apparent on the face of the will, and
 - (ii) the act was done with the intent of the will-maker to revoke the will in whole or in part.
- (2) A will is not revoked in whole or in part by presuming an intention to revoke it because of a change in circumstances.

- [44] Pursuant to s. 14 of the Wills Act, R.S.B.C. 1996, c. 489, the legislation in place prior to WESA in B.C., a will or part of a will was revoked only in one of the following circumstances:

- (a) marriage of the testator, subject to section 15;
- (b) another will made in accordance with this Act;

- (c) a writing declaring an intention to revoke and made in accordance with the provisions of the Act governing the making of a will;
- (d) the burning, tearing or destruction of it in some other manner by the testator, or by some person in the testator's presence and by the testator's direction, with the intention of revoking it.

[45] The two ways the 1993 Will is alleged to have been revoked here are:

- i) by the common law presumption of destruction, which would satisfy s. 55(1)(c) of WESA; or
- ii) by the application of the curative provisions of s. 58 of WESA to cure the revocation portion of the 2011 Draft, which would satisfy s. 55(1)(b) of WESA.

I will first address the common law presumption of destruction.

[46] In *Andersson v. Khan Estate*, 2006 BCSC 521, aff'd 2007 BCCA 532, Justice Williams was considering the issue of the validity and enforceability of a Will. Justice Williams had to consider as well the issue of the revocation of a Will and at para. 36 set out the earlier provision of the Wills Act.

[47] Justice Williams discussed the common law presumption of destruction at paras. 37-38:

[37] In addition to the above circumstances of revocation, a will may be presumptively revoked if the party propounding the will cannot provide the original will and fails to prove that the will was merely lost and not destroyed. In *Sigurdson v. Sigurdson*, [1935] 4 D.L.R. 529 (S.C.C.) at [para.] 4, Lamont J. cited this principle as follows:

Where a will duly executed, traced to the testator's possession and last seen there, is not forthcoming on his death, the presumption is that it was destroyed by himself. To rebut it there must be sufficient evidence that it was not destroyed by the testator *animo revocandi*.

[38] This principle was later applied in *Kumar v. Kumari*, [1993] B.C.J. No. 108 (Q.L.), in which the original of the deceased's last Will and Testament could not be found. The plaintiff sought to have an original copy of the will admitted into probate. The court stated at [para.] 8:

The plaintiff is faced with rebutting the presumption of revocation. This principle of law provides that where a will is shown to have been in the custody of a testator, and is not found on his death, the presumption arises that the will has been destroyed by the testator for the purpose of revoking it.

[48] This case was appealed but not in respect of these issues and was affirmed by the Court of Appeal.

[49] In *Andersson*, the defendants, who were the sons of the deceased, Dr. Khan, could find little evidence from which the court was able to infer that the Will was lost and not destroyed. Additionally, the evidence of the deceased's action following the making of the Will supported a continuing intention not to adhere to the dispositions made in the Will. Williams J. cited Justice Cohen in *Kumar v. Kumari*, [1993] B.C.J. No. 108 (S.C.). In *Kumar*, at para. 16, I note Cohen J. set out:

In *In re Bobersky Estate* (1954), 11 W.W.R. (N.S.) 488 (Alta. D.C.), Buchanan, C.J.D.C. dealt with the conditions which may rebut the presumption of revocation. He quoted the following passage from Macdonell and Sheard's *Probate Practice*, referred to by McPherson, C.J.M. in *In re Matt Estate* (1954), 11 W.W.R. (N.S.) 28 (Man. C.A.):

As to the conditions which may rebut that presumption, McPherson, C.J.M. quotes from the same learned authors, thus:

"* * * the facts that the will was eminently reasonable in its provisions in view of the testator's known feelings towards the beneficiaries, and that there had been no change in such feelings [are relevant]. And declarations or letters of the testator are admissible, not to establish or refute the fact of destruction, but to show his continued intention to adhere or not to adhere to the dispositions made in the will. The evidence necessary to rebut the presumption need not be such as to amount to a positive certainty, but only such as to produce moral conviction."

[50] Consequently, the court in *Andersson* looked at the steps taken following the creation of a Will to see whether there was compelling evidence that there had been a change of mind with respect to the provisions in the new Will and looked at whether they were inconsistent with the previous Will.

[51] The court in *Andersson* noted that, while there may not be strict revocation pursuant to the provision of the Wills Act, a presumption of revocation arose out of the absence of the original Will and was supported by the deceased's actions following its making. Williams J. found that the presumption was not displaced in that case: see para. 74.

[52] Justice Ehrcke also considered the issue of revocation on the basis of the presumption of destruction in *Thierman Estate v. Thurman*, 2013 BCSC 503. In that case, no one was able to find an original of the Will amongst the deceased's effects. Only a copy of it had been found. The issue before the court was whether the Will had been destroyed or simply lost. In *Thierman Estate*, Ehrcke J. considered the burden of proof of the person propounding the missing Will:

[42] The petitioner relies on the rebuttable presumption referred to in *Haider v. Kalugin*, 2008 BCSC 930 at paras. 9-11:

- [9] If a Will last known to be in custody of testator is not found at his death, the presumption is that the testator destroyed it with the intention of revoking it ("animo revocandi"). However, that presumption may be rebutted by evidence, written or oral, of the facts. The strength of the presumption will depend upon the character of the custody which the testator had over the Will: *Sugden v. Lord St. Leonards* (1876), 1 P.D. 154 (English C.A.).
- [10] In *Sigurdson v. Sigurdson* [1935] 2 D.L.R. 445 (S.C.C.), at paragraph 49, Davis J. said:
- [49] It needs very clear and convincing evidence to establish what is alleged to be a lost will. ... The person propounding such a will has a burden of proof that persists throughout the whole trial to satisfy the court at its conclusion that the will is in fact lost and was not destroyed by the testator with the intention of putting an end to it. Each case of course turns upon its own facts but the principles respecting the well-settled presumption against the Will must be applied to the facts.
- [11] In *Welch v. Phillips* (1836) 1 Moo PC 299, at 302, referred to in *Bobersky Estate (Re)* [1954] A.J. No. 12 (Alta Dist. Crt.), at paragraph 6, the court said:
- [6] If a will traced to the possession of the deceased, and last seen there, is not forthcoming on his death, it is presumed to have been destroyed by the deceased himself; and that presumption must have effect, unless there is good and sufficient reason to repel it. It is a presumption founded on good sense, for it is highly reasonable to suppose that an instrument of so much importance would be carefully preserved, by a person of ordinary caution, in some place of safety and would not be either lost or stolen, and if, on the death of a maker, is not found in his usual repositories or else where he resides, it is in a high degree of probable that the deceased himself has purposely destroyed it. But this presumption, like all others of fact, may be rebutted by others, which raises a higher degree of probability to the contrary.
- [43] Although some cases, such as *McBurnie v. Patriquin* [1975] N.S.J. No. 447 (S.C.(A.D.)), refer to the "very heavy burden" upon the party attempting to rebut the presumption, I do not find such language helpful in explaining the standard of proof: see *Pecore v. Pecore*, 2007 SCC 17; and *Jorsvick Estate*, 2011 BCSC 528. The presumption recognizes that the burden of proof is on the party attempting to rely on a non-original copy of a will. Thus, the presumption of destruction of a will that had been in the testator's possession but cannot be found on his death may be rebutted by evidence establishing on a balance of probabilities that the will was inadvertently lost or misplaced.
- [53] After reviewing the burden of proof, Ehrcke J. then reviewed the various factors that should be considered in deciding whether the presumption applies, and, if so, whether it has been rebutted in the circumstances:
- [44] At paras. 13-14 of *Haider v. Kalugin*, the Court enumerates some of the factors to be considered in deciding whether the presumption applies, and if so, whether it has been rebutted:

[13] Some of the factors considered in determining whether the presumption has been overcome are:

* whether the terms of the Will itself were reasonable: *Pigeon Estate v. Major*, [1930] S.C.R. 252 (S.C.C.);

* whether the testator continued to have good relationships with the beneficiaries in the copy of the Will up to the date of death: *Pigeon*, supra;

* where personal effects of the deceased were destroyed prior to the search for the Will being carried out: *Pigeon*, supra;

* the nature and character of the deceased in taking care of personal effects: *Pigeon*, supra;

* whether there were any dispositions of property that support or contradict the terms of the copy sought to be probated: *MacBurnie v. Patriquin*, supra; *Anderson v. Kahan Estate*, [2006] B.C.J. No. 716 (B.C.S.C.);

* statements made by the testator which confirm or contradict the terms of distribution set out in the will: *Bobersky Estate*, supra, *Anderson*, supra, *Holst Estate v. Holst*, [2001] B.C.J. No. 1560 (B.C.S.C.), *Re Green Estate*, [2001] A.J. No. 1253 (Alta. Q.B.);

* whether the testator was of the character to store valuable papers, and whether the testator had a safe place to store the papers: *Bobersky Estate*, supra, *Brimicombe v. Brimicombe Estate*, [2000] N.S.J. No. 157 (N.S.C.A.);

* whether there is evidence that the testator understood the consequences of not having a Will, and the effects of intestacy: *Bobersky Estate*, supra;

* whether the testator made statements to the effect that he had a will: *Bobersky Estate*, supra.

[14] However, the presumption of revocation does not apply where the Will cannot be traced to the possession of the testator: *Brimicombe v. Brimicombe Estate*, supra, at paragraph 7.

When considering whether a Will has been revoked, accordingly, those factors are important.

[54] It is important to recall that the issue in this case is related to the 1993 Will and whether:

- i) the 1993 Will can be considered presumptively destroyed by Ms. Shepherd; and/or
- ii) whether the 2011 Draft reflects Ms. Shepherd's intention to revoke the 1993 Will.

[55] Again here, Ms. Horton does not seek to rely upon the distribution portions of the 2011 Draft, but merely on the revocation clause. She wishes to have the estate distributed on the basis of Ms. Shepherd dying intestate.

[56] Counsel for Ms. Horton points out the importance of Ms. Shepherd attending at counsel's office to probate her husband, Mr. Shepherd's Will where Ms. Shepherd had two "formal looking" envelopes with her and one contained Mr. Shepherd's original Will. The additional factors were the Ms. Shepherd's determination to change the distribution, her speaking of

the 2011 Draft to Ms. Horton as her "Will", the fact that the original 1993 Will was never found nor was a copy of it found among Ms. Shepherd's papers. On these facts, it is submitted that the Court can determine that Ms. Shepherd had the original of her 1993 Will and had destroyed it with the intention of revoking it.

[57] None of the defendants came to court today with a view to support the 1993 copy of the Will. I find, in the circumstances, on a balance of probabilities, that the presumption of revocation applies, and the 1993 Will can be presumed to have been destroyed by Ms. Shepherd with the intention of revoking it.

[58] I also find that, pursuant to the provisions of WESA, the Court can apply the curative provisions in s. 58 of WESA to cure the 2011 Draft in respect of the revocation clause. Ms. Horton does not ask that s. 58 be applied to cure the distribution provisions.

[59] Section 58 of WESA, reads as follows:

58 (1) In this section, "record" includes data that

- (a) is recorded or stored electronically,
 - (b) can be read by a person, and
 - (c) is capable of reproduction in a visible form.
- (2) On application, the court may make an order under subsection (3) if the court determines that a record, document or writing or marking on a will or document represents
- (a) the testamentary intentions of a deceased person,
 - (b) the intention of a deceased person to revoke, alter or revive a will or testamentary disposition of the deceased person, or
 - (c) the intention of a deceased person to revoke, alter or revive a testamentary disposition contained in a document other than a will.
- (3) Even though the making, revocation, alteration or revival of a will does not comply with this Act, the court may, as the circumstances require, order that a record or document or writing or marking on a will or document be fully effective as though it had been made
- (a) as the will or part of the will of the deceased person,
 - (b) as a revocation, alteration or revival of a will of the deceased person, or
 - (c) as the testamentary intention of the deceased person.
- (4) If an alteration to a will makes a word or provision illegible and the court is satisfied that the alteration was not made in accordance with this Act, the court may reinstate the original word or provision if there is evidence to establish what the original word or provision was.

Cure of only a clause

[60] Counsel for Ms. Horton argues that, pursuant to s. 58(3) of WESA, the Court has jurisdiction to make an order that the revocation clause in the 2011 Draft, which was stamped "DRAFT", be effective as if it had been made as a revocation of a Will of Ms. Shepherd, and that it revokes the 1993 Will, despite its noncompliance with the required formalities. Counsel for Ms. Horton submits that the Court has the jurisdiction under WESA to cure only this clause of the 2011 Draft and not the distribution provisions.

[61] In *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, Justice Iacobucci reviewed the modern principles of statutory interpretation. He held:

[26] In Elmer Driedger's definitive formulation, found at p. 87 of his *Construction of Statutes* (2nd ed. 1983):

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings: see, for example, *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, at p. 578, per Estey J.; *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*, [1994] 3 S.C.R. 3, at p. 17; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 25; *R. v. Araujo*, [2000] 2 S.C.R. 992, 2000 SCC 65, at para. 26; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 33, per McLachlin C.J.; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 27. I note as well that, in the federal legislative context, this Court's preferred approach is buttressed by s. 12 of the Interpretation Act, R.S.C. 1985, c. I-21, which provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".

[27] The preferred approach recognizes the important role that context must inevitably play when a court construes the written words of a statute: as Professor John Willis incisively noted in his seminal article "Statute Interpretation in a Nutshell" (1938), 16 Can. Bar Rev. 1, at p. 6, "words, like people, take their colour from their surroundings". This being the case, where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive. In such an instance, the application of Driedger's principle gives rise to what was described in *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56, at para. 52, as "the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter". (See also *Stoddard v. Watson*, [1993] 2 S.C.R. 1069, at p. 1079; *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015, at para. 61, per Lamer C.J.)

[62] Guided by *Bell Expressvu*, I find that, given that the plain reading of s. 58 of WESA refers to "record, document or writing or marking on a will", the legislature clearly contemplated that only a part of document or a writing could be cured.

[63] In *Re Young Estate*, 2015 BCSC 182, Justice Dickson, as she then was, considered the curative provision of the new legislation (WESA). She found the curative provision to follow largely the same framework of the curative provision found in the Manitoba wills legislation (see para. 23). Given the similarities, and the then dearth of case authorities on s. 58 of WESA, Dickson J. reviewed a Manitoba case of Justice Philp, *George v. Daily* (1997), 143 D.L.R. (4th) 273 (Man. C.A.). She wrote:

[26] Philp J.A. clearly explained the limits placed on the court's curative powers in his reasons for judgment. At paras. 62 and 65, he stated:

Not every expression made by a person, whether made orally or in writing, respecting the disposition of his/her property on death embodies his/her testamentary intentions...

The term "testamentary intention" means much more than a person's expression of how he would like his/her property to be disposed of after death. The essential quality of the term is that there must be a deliberate or fixed and final expression of intention as to the disposal of his/ her property on death [citations omitted]

[27] In *Kuszek v. Smoley*, [1986] M.J. No. 670 (Q.B.), a partially-printed and partially-handwritten document signed by the deceased but not witnessed was found to reflect the deceased's testamentary intentions. The court relied on several factors in making this determination, including:

- (1) the document was in the deceased handwriting;
- (2) the document was signed by the deceased in four places;
- (3) the date was in four places;
- (4) the printed portion identified the document as a will and was properly filled out; and
- (5) there was nothing before the Court refuting the conclusion that the document embodied the deceased's intentions.

In these circumstances, the handwritten document was validated pursuant to s. 23 of the [Manitoba Wills Act].

[64] Justice Dickson then helpfully summarized the issues to consider in applying s. 58 at para. 34 in *Re Young Estate*. The first question is whether the document is authentic. Here, there is no issue that the draft 2011 Draft was an authentic document. It was provided to the plaintiff, Ms. Horton, by Ms. Shepherd and is described by Mr. Bridgeman in his letters to Ms. Horton.

- [65] The second issue is whether the non-compliant document represents the deceased's testamentary intentions as that was explained in *George*. Dickson J. found that to be the case because it was a "deliberate or fixed and final expression of intention" at the material time:
- [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 [citations omitted].

The court found that there was a fixed and deliberated intention as to the disposal of the deceased's property upon death, based upon the fact that:

- i) the deceased had signed the document;
- ii) the deceased placed the document where it would be found by others, shortly before her death; and
- iii) the signed copy was identical to the copy provided by the deceased to another individual from whom she sought assistance in carrying out her wishes.

See *Re Young Estate* (paras. 38-40).

- [66] I also rely on the decision in *Beck Estate (Re)*, 2015 BCSC 676, a decision of Master Young, as she then was, in which she held as follows:
- [18] The Handwritten Record is dated and signed and is written by the deceased. The executor recognizes the handwriting and signature as that of the deceased. Her signature is not witnessed. The wording, "Codicil to my last will" and the words, "To be read out by My Lawyer. Mr. Mote" [sic] suggests to me that this document contains a deliberate or fixed and final expression of intention as to the disposal of her property upon her death. Although the document does not make reference to funeral arrangements, it does make reference to the reading of the Will, which suggests a final expression.
- [19] The fact that the deceased gave this document to her executor for safekeeping one week before her death and told him that she thought the unwitnessed Codicil was a valid Codicil, reinforces my conclusion that this is a final expression of her testamentary intention.

[24] I find that this gift to Adam Minshull is a deliberate expression of the deceased's wish and testamentary intention, so I will exercise the curative power under the authority of s. 58 of the WESA. I order that that portion of the Handwritten Record is fully effective, as though it had been made as part of the Will.

[67] In that case, Master Young found that a gift contained in a handwritten record was a deliberate expression of the deceased's wish and testamentary intention. Accordingly, the court exercised the curative power under the authority of s. 58 of WESA to order that particular portion of the "Handwritten Record" as fully effective as though it had been made as part of the Will.

conclusion

[68] I find here that it was the fixed and deliberate intention of Ms. Shepherd to revoke the 1993 Will through the 2011 Draft. I rely upon the factors as set out in *George, Re Young Estate and Beck Estate (Re)*.

[69] This case is similar to *Re Young Estate*, as Ms. Shepherd signed the document, the 2011 Draft, and ensured that Ms. Horton, the alternate executor, had a copy of it. Additionally, the fact that Ms. Shepherd had explained her reasoning for changing the distribution and referred to the 2011 Draft as her Will in discussions with Ms. Horton clearly establishes she had the intention to revoke the 1993 Will. As well, I find support for the presumption of destruction, as Ms. Shepherd had possession of the original 1993 Will and it was not found amongst her possessions. I also find that I can apply s. 58 of WESA to cure only the revocation clause of the document. As a consequence, I make the following orders:

i) I cure the 2011 Draft to admit it as a testamentary instrument solely for the purpose of admitting the revocation clause to revoke the 1993 Will.

ii) I also declare that the estate of Jean Agnes Shepherd proceed as an intestacy under the provisions of WESA scheme for distribution of the estate.

iii) I appoint Ms. Horton as the administrator without bond as a bond is not required, pursuant to s. 128 of WESA.

iv) I also order special costs of the estate in these circumstances where there was a need to take court proceedings instead of a desk order which derives from the failure of the testator's actions, as is the case here.

"Maisonville J."

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