

CANADA / JUDGMENT

Lavictoire v. Schwarz

2025 BCSC 2565

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2025 BCSC 2565 Lavictoire v. Schwarz

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lavictoire v. Schwarz,

2025 BCSC 2565

Date: 20251230

Docket: S189319

Registry: Vancouver

Between:

Angela Lavictoire

Plaintiff

And

Josef M. Schwarz, Executor of the Will of Zofia Rymgaillo, Deceased,

Veronica Piechota, Piotr Korpa, Douglas Warne as Litigation Representative to Wanda Warn, and
Charlene Leduc

Defendants

Before: The Honourable Madam Justice Francis

Reasons for Judgment

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No other appearances

Place and Dates of Trial:

Vancouver, B.C.

September 25 - 26 and

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Place and Date of Judgment:

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I. Introduction

- [1] Testamentary capacity is a complex and nuanced subject. Whether or not a person is capable of making a will is subject to a legal test informed by medical evidence, but also by the evidence of lay witnesses. The legal test has remained mostly unchanged for over 150 years while our scientific understanding of cognitive decline, dementia, and capacity has evolved rapidly, particularly in recent decades. This has made testamentary capacity a thorny issue, especially in cases in which someone who suffers from some measure of cognitive decline wishes to make a will late in life.
- [2] In this summary trial application, the plaintiff seeks a declaration pronouncing against the validity of the last will of Zofia Rymgaillo, deceased (the "Deceased"). The executor has brought a cross application for proof in solemn form of the Deceased's last will.
- [3] The Deceased died on December 13, 2016, leaving the alleged last will dated May 11, 2012 (the "Will"). The Will was made just weeks after the Deceased's granddaughter commenced a committee ship petition (the "Committeeship"), seeking control of the Deceased's person and finances. In the Committeeship, two doctors had sworn affidavits opining that the Deceased was medically incapable of managing her affairs or her person.
- [4] Capacity to make a will is not the same as capacity to manage one's finances or person. There is clear authority for the proposition that someone who has been declared incapable of managing their person or affairs may possess testamentary capacity: *Royal Trust Company v. Rampone*, [1974] 4 W.W.R. 735 at 743, [1974] B.C.J. No. 612 (S.C.), citing *Canada Permanent Toronto General Trust Co. v. Whitton*, [1965] 51 W.W.R. 484 at 492-493, [1965] B.C.J. No. 53 (S.C.). However, where a will-maker's cognitive challenges are such that a committee ship order is required, a very careful review of the evidence is necessary in order for the court to be satisfied that the test for testamentary capacity has been met and the will in question is valid.

- [5] In this case, the plaintiff challenges the validity of the Will on the basis of incapacity, lack of knowledge and approval, and undue influence. Because I find that the capacity issue is determinative of this case, I have only considered arguments relating to testamentary capacity in these reasons for judgment.

II. Facts relevant to testamentary capacity

A. The Family and the Terms of the Will

- [6] The Deceased had two sons, Joseph and Alexander, both of whom predeceased her. Alexander left two surviving daughters, the Deceased's only grandchildren, Charlene Leduc and the plaintiff, Angela Lavictoire. The Deceased also had a sister, Veronica Piechota, who predeceased her. Ms. Piechota had three children: Wanda Warn, Piotr Korpa, and Krystyna Huitema. Ms. Huitema predeceased the Deceased. Ms. Warn survived the Deceased but has since died. Mr. Korpa is therefore the only surviving child of Ms. Piechota.
- [7] Under the Will, Robert Burgess, the drafting solicitor, is the named executor. If he is unable or unwilling to act, Josef Schwarz is the alternative executor. As Mr. Burgess had retired by the time of the Deceased's death, Mr. Burgess renounced the executorship. Mr. Schwarz now seeks to propound the Will.
- [8] Under the Will, the residue of the Deceased's estate is distributed in six equal shares to Ms. Piechota (the Deceased's sister), Mr. Korpa (the Deceased's nephew), Ms. Huitema (the Deceased's niece), Ms. Warn (the Deceased's niece), Ms. Lavictoire (the Deceased's granddaughter), and Ms. Leduc (the Deceased's granddaughter). The Will stipulates that if any of the residual beneficiaries predecease the Deceased, their share should be distributed amongst the remaining residual beneficiaries.
- [9] Because Ms. Pietchota and Ms. Huitema both predeceased the Deceased, the distribution of the residue of her estate under the Will would be one quarter to the estate of Ms. Warn (who survived the Deceased but has since died) and one quarter to each of Mr. Korpa, Ms. Leduc, and Ms. Lavictoire.
- [10] The Deceased had a prior will, which the plaintiff submits is her last valid will, dated June 21, 2006 (the "Prior Will"). The Prior Will left the Deceased's entire estate to her two sons and contained no gift-over clause in the event of their deaths. Because the Deceased's two sons predeceased her, if the Prior Will stays in place, the Deceased's estate will pass on an intestacy. Her estate will therefore be divided into two equal shares and distributed to her granddaughters, Ms. Lavictoire and Ms. Leduc.

B. History of Deceased's Cognitive Issues

- [11] Around October 2010, Ms. Lavictoire began to have concerns about the Deceased's capacity. With her husband, Ms. Lavictoire moved into the Deceased's home to assist in her care. According to the evidence of Ms. Lavictoire, around June 2011, the Deceased began having hallucinations and disruptive episodes at night. On a number of occasions, the Deceased called 911 for unexplained reasons.
- [12] By January 2012, the Deceased was no longer able to make her own meals or administer her own medication. In January 2012, she wandered away from home and got lost in a park. She ended up at Royal Columbian Hospital. She had two further admissions to the hospital in February 2012, the first related to a fall and the second related to an infection. During her second February 2012 hospital admission, the Deceased was assessed by geriatric specialists.
- [13] The Deceased's clinical records from early 2012 are admissible as business records for the truth of the observations made therein: *Seaman v. Crook*, 2003 BCSC 464; see also *Samuel v. Chrysler Credit Canada Ltd.*, 2007 BCCA 431 at para. 36. The clinical records demonstrate that the Deceased was agitated, violent, and had periods of delirium when first admitted to the hospital on February 15, 2012. On February 21, 2012, she was seen by Dr. Hem Phaterpekar, a psychiatrist, who noted that her thinking appeared quite disorganized and her insight and judgment were not good. By March 2, 2012, Dr. Michael O'Conner, a geriatric medicine specialist, noted that the delirium had subsided and the Deceased appeared to be back to her baseline. However, in speaking to her about her personal care and financial needs, Dr. O'Conner observed that she had "limited or no knowledge" in these areas. The Deceased was seen again by Dr. Phaterpekar on March 12, 2012, and he noted that she did not believe she owned a home, could not tell him the address or value of her house, and was unable to tell him where she banked. She was unable to tell him the amount of money she received each month or what her expenses were. She could not tell him the cost of common items in the grocery store. She told him she thought she lived alone, which was incorrect, and she had no awareness of her own medical issues.
- [14] On April 12, 2012, Ms. Lavictoire commenced the Committee'ship and sought to be appointed committee of person and estate of the Deceased. In support of the petition, she filed affidavits sworn by Dr. O'Conner and Dr. Phaterpekar (the "Doctors' Affidavits").
- [15] In his March 22, 2012, affidavit, Dr. O'Conner deposed that he first began to follow the Deceased when she was admitted to Royal Columbian Hospital in January 2012. He assessed her following her admission on February 15, 2012, and again on February 29, 2012. He concluded that the Deceased suffered from moderate to severe dementia due to either Alzheimer's disease or Lewy Body Dementia.
- [16] With respect to her capacity to manage herself or her finances, Dr. O'Conner opined:

In terms of her capacity to care for herself and manage her finances, the Patient displayed a lack of skills to perform routine tasks for daily living since her admission and was unable to answer basic questions concerning her finances, demonstrating little or no knowledge of this area. In my view she is incapable of looking after herself or managing her financial and legal affairs and will require decisions to be made on her behalf on an ongoing basis.

[17] Dr. O'Conner further noted that recovery from the condition suffered by the Deceased was rare and that it was unlikely she would become capable in the future.

[18] In his affidavit, also sworn on March 22, 2012, Dr. Phaterpekar observed that the agitation and hallucinations suffered by the Deceased had subsided somewhat since her February 15, 2012, admission. However, he noted the following with respect to her understanding of her financial circumstances:

The Patient shows no understanding of her assets and liabilities, being unable to recall that she owns a home, nor indicate the address of her home or its value. She could not tell me the names or locations of any of the banks she deals with. Her calculation abilities were extremely poor and she was unable to indicate any details regarding her monthly income or expenses or the cost of common items at grocery stores. Although she believes that her memory is normal, she scored 10/30 on a Folstein Memory Test.

[19] Dr. Phaterpekar opined that the Deceased suffered from Lewy Body Dementia. He further opined that her condition was progressive and that she was therefore likely to deteriorate further.

[20] The plaintiff seeks to tender the Doctors' Affidavits in this proceeding by including them in the application record for this summary trial. They were not attached as exhibits to an affidavit sworn by the doctors in this proceeding or by anyone else. The defendants object to their admissibility.

C. The Making of the Will

[21] Robert Burgess is the lawyer who prepared the Will. He swore an affidavit in this application and was cross-examined before the Court. Because Ms. Huitema has since died, Mr. Burgess is the primary witness to the making of the Will.

[22] According to Mr. Burgess, Ms. Huitema first called him on May 4, 2012, and made an appointment to bring the Deceased to see him for the purpose of making a will. Mr. Burgess' notes from that phone call indicate that Ms. Huitema advised him that she had been served with materials in the Committeeship on April 25, 2012. She also advised Mr. Burgess that the Deceased's major asset was her home.

[23] Mr. Burgess met with the Deceased and Ms. Huitema together on May 11, 2012. Ms. Huitema acted as a Polish interpreter in giving instructions to Mr. Burgess because the Deceased's English vocabulary was limited.

[24] During his meeting with Ms. Huitema and the Deceased, Mr. Burgess completed a "Master Information Sheet" which set out information from the meeting and the proposed distribution under the Will. This document states that the residue of the Deceased's estate was to be divided into six shares and distributed among each of the Deceased's surviving family members. Under the "Other Comments" heading, there is a handwritten notation: "T: ESL. Symptoms of Dementia?" Additionally, under the heading "Testamentary Capacity Assessment," Mr. Burgess wrote:

- ü 1. Oriented to time and place
- ü 2. Understands the nature and effect of will
- ü 3. Understands the extent of property involved
- ü 4. Understands the nature of the Wills Variation Act

[25] Mr. Burgess testified that this checklist recorded his analysis of the Deceased's testamentary capacity and that he was "satisfied that Zofia was able to fulfil all these considerations." On cross-examination, he admitted that he took no notes of the questions he asked, or the answers given, to satisfy himself of the above points. He testified that his notes were "just me hitting the high points" but that he would have asked questions to satisfy himself that the Deceased understood the nature of a will and what her assets were.

[26] With respect to the Deceased's knowledge of her family members, Mr. Burgess deposed that they "went through her family tree" and she was able to name all the beneficiaries she wanted in her will. He further deposed that he reviewed her assets and next of kin with her and she was able to "verify her assets and the living members of her family."

[27] In his affidavit, Mr. Burgess deposed that he did not have any concerns about the Deceased's testamentary capacity but knew he had to take careful steps to satisfy himself that she was capable, given the pending Committeeship. He noted that:

If I had any substantial concerns about Zofia's capacity, I would have sent her to a geriatric specialist to assess her capacity. I did not do this.

[28] Mr. Burgess admitted on cross-examination that, in the May 4, 2012, phone call with Ms. Huitema, he took some information from Ms. Huitema about the Deceased's will. His evidence about whether he took instructions from Ms. Huitema about what would be contained in the Will was not clear. The following exchange took place during his cross-examination:

Q Okay. And you are now recollecting that Ms. Huitema would have told you about the distribution although you didn't make a note about it?

A I -- yeah, I would have asked the testator when we met to confirm what the distribution was. I wasn't relying on Ms. Huitema.

Q No, I'm not saying you were.

A Yeah.

Q You just said you would have asked her to confirm. You had prepared the draft will before she came to -- on the 11th.

A Right.

Q So Ms. Huitema was the first person who told you about the distribution?

A I can't say that that's necessarily correct.

Q Well, then you prepared the draft will with the distribution. Who told you about it before you met with the testator?

A Well, it may have been her. It may have been Ms. Huitema.

Q Okay. Thank you.

A Or -- or there's another possibility that I had not finalized even a draft, that it was very loosey-goosey when she came in on the 11th. And it may have been as a result of going through the distribution of her estate, what was in the estate as a result of a conversation -- three-way conversation between Ms. Huitema and me and Ms. Rymgaillo.

Q And - -

A And then from that point the draft will was modified. I wouldn't be at all surprised that it went to the secretary for some modification before it was signed. In other words, it evolved from a first draft, a rough draft to the one that she eventually signed.

Q So you've just given us an alternative, or "it may have been." You are not remembering this.

A Not very really clearly, no.

Q Yeah. You said it was kind of loosey goosey.

A M'mm-hmm, m'mm-hmm.

Q Yeah. So you don't have a recollection of what you were told?

A If you're asking me that on May the 4th I took instruction from Ms. Huitema as to what the assets were and what the distribution was proposed to be, I don't agree with that. I wouldn't have done that for obvious reasons.

[29] It is therefore unclear whether Mr. Burgess initially took instructions from Ms. Huitema or from the Deceased herself about the distribution under the Will.

[30] Mr. Burgess' handwritten notes say "review assets + next of kin with T" and "T able to identify assets + next of kin." However, he has no notes of what those assets were or what the Deceased told him about her assets. On the basis of his evidence, the only asset of the

Deceased that Mr. Burgess knew about at the time the Will was made was the Deceased's house in New Westminster, which Ms. Huitema informed him of in their May 4, 2012, telephone call. It appears that at the meeting he did not ask the Deceased about the value of her home or about other assets she may own. If he did, there is no notation of it. He did not find out that she held joint accounts with Ms. Huitema until he learned of them in the course of the Committeeship, after the Will was made. To the extent that she had bank accounts, he did not ask, at the time he made the will, how much money was in those accounts. He knew about the existence of the Deceased's Prior Will but was unclear about the provisions of that will and did not discuss the implications of any changes that would result from the making of the Will with the Deceased.

- [31] Mr. Burgess was aware of the pending Committeeship when he met with Ms. Huitema and the Deceased. He deposed that one of the reasons he recommended himself as an executor was that he expected that there would likely be a challenge to the validity of the Will and, in those circumstances, a lawyer would be better positioned to defend the Will. He further deposed that:

Since I was alerted to the committeeship application, I was alive to the potential that Zofia's capacity was being challenged, and I had to take careful steps with respect to capacity. I expressly turned my mind to Zofia's capacity and competence because of this.

- [32] After the Will was prepared, Mr. Burgess asked his colleague, Karol Wince, to meet with the Deceased. Mr. Wince speaks Polish and Mr. Burgess thought it prudent to have Mr. Wince review the Will with the Deceased in her native language. Mr. Wince did so.
- [33] Mr. Wince also swore an affidavit in this application. In his affidavit he deposed that Polish is his first language. At the meeting on May 11, 2012, he interpreted the terms of the Will into Polish for the Deceased. After reading each paragraph, he stopped and asked the Deceased whether she understood what he had just said and she nodded or said "yes" in Polish. She did not ask any questions when he was reading the Will to her in Polish. Mr. Wince deposed that he was comfortable that the Deceased understood and confirmed the terms of the Will when they were translated for her into Polish.
- [34] Mr. Schwarz swore an affidavit regarding his involvement in the making of the Will. He deposed that he briefly attended the meeting with the Deceased at the time that Mr. Wince was interpreting the Will into Polish. He does not recall anything unusual about the meeting.

III. Testamentary Capacity

A. The Test for Testamentary Capacity

- [35] *Laszlo v. Lawton*, 2013 BCSC 305, remains one of the most instructive cases from this Court on the questions that arise when a will-maker's testamentary capacity is called into question. In *Lazlo*, Justice Ballance described testamentary capacity as follows:

- [185] In order to make a valid will, a testator must have a baseline level of mental acuity sufficient to appreciate judicially delineated components of the nature and effect of the testamentary act, referred to as testamentary capacity.
- [36] The test to determine testamentary capacity has remained relatively unchanged since *Banks v. Goodfellow* (1870), L.R. 5 Q.B. 549 (Eng. Q.B.), and the case remains apposite. A will maker shall be held to be capable of making a testamentary document if they:
- a) understand what a will is - that it disposes of the will-maker's property on death;
 - b) understand the extent of the property of which they are disposing;
 - c) have in mind family and others who would be natural objects of the will-maker's bounty; and
 - d) are suffering no delusion or disorder of the mind that would poison their affection, pervert their sense of right, or prevent the exercise of their natural faculties.
- [37] Merely being able to provide rational responses is not sufficient or conclusive of capacity; rather, "there must be a power to hold the essential field of the mind in some degree of appreciation as a whole": Leger at 162.
- [38] Capacity is a nuanced concept. A person can be capable of doing one act, and not another. A diagnosis of dementia or any other impairment of cognitive functioning, while relevant, is never determinative of testamentary capacity. Justice Ballance expressed this well in the following passage from Laszlo:
- [192] Implicit and explicit in the jurisprudence is an acknowledgement of the complexity and subtleties of diminished cognitive functioning and the way in which we perceive, present to and interact with the world around us. For example, although it is recognized that dementia can impair a testator's mental powers such that he is not capable of making a will, a diagnosis of dementia, standing alone, does not automatically correspond to testamentary incapacity: *Royal Trust Corp. of Canada v. Ritchie*, 2007 SKCA 64 at para. 13; *Otto v. Kapacila Estate*, 2010 SKCA 85 at para. 36 [Otto]; Moore at para. 36. Similarly, a person who is judicially declared incapable of managing his or her affairs pursuant to adult guardianship legislation or suffers a chronic psychotic illness such as schizophrenia may still have the capacity to make a valid will: *Otto* at para. 36; *Royal Trust Co. v. Rampone*, [1974] B.C.J. No. 612 (S.C.); Moore at para. 36; *Hoffman v. Heinrichs*, 2012 MBQB 133.
- [39] It is therefore critical that the court, in any probate action in which a will-maker's capacity is called into question, consider the medical evidence as only one of many sources of evidence from which the court may draw in order to ascertain whether a will-maker possesses testamentary capacity.

B. The Shifting Burden in Probate Actions

- [40] In *Vout v. Hay*, [1995] 2 S.C.R. 876, 1995 CanLII 105, the Supreme Court of Canada established the evidentiary burdens and presumptions that govern the determination of the validity of a will.
- [41] At common law, the onus of establishing the validity of a will is on the propounder of the will. This means the propounder of the will must prove, on a balance of probabilities, that the will was validly executed, that the will-maker had knowledge and approval of the contents of the will, and that the testator had testamentary capacity: *Vout* at para. 26.
- [42] The propounder is aided in this regard by a rebuttable presumption. If it is proven that the will was duly executed with the requisite formalities, after having been read over by a will-maker who appeared to understand it, then it will be presumed that the will-maker knew and approved of the contents and had the necessary capacity. If these circumstances are established, then the propounder of the will no longer has the burden of proof with respect to knowledge and approval or capacity: *Vout* at para. 26.

C. Suspicious Circumstances

- [43] The burden of proof may shift onto the propounder again if suspicious circumstances are established. Suspicious circumstances are circumstances which raise a "well-grounded suspicion" that the will does not express the mind of the testator. Suspicious circumstances must relate to one of more of the following circumstances: (1) surrounding the preparation of the will; (2) tending to call into question the capacity of the testator; or (3) tending to show that the free will of the testator was overborne by acts of coercion or fraud: *Vout* at para. 25.
- [44] If suspicious circumstances are proven, the propounder no longer has the benefit of the presumption and they reassume the burden of proving knowledge and approval and testamentary capacity: *Vout* at para. 27.
- [45] Examples of suspicious circumstances were described by Ballance J. in *Lazlo*:
- [207] Suspicious circumstances have been found to exist in a wide array of situations and are not necessarily sinister in nature. There is no checklist of circumstantial factors that will invariably fit the classification. Commonly occurring themes include where a beneficiary is instrumental in the preparation of the will (especially where the beneficiary stands in a fiduciary position to the testator), or where the will favours "someone who has not previously been the object of [the testator's] bounty and does not fall within the class of persons testators usually remember in their wills, that is to say their next of kin": *Longmuir v. Holland*, 2000 BCCA 538 (CanLII), at para. 69 [Longmuir]; *Heron Estate v. Lennox*, 2000 BCSC 1553 (CanLII) at para. 67 [Heron Estate]. In *Moore, N. Smith J.* found the fact that the testatrix's doctor had described her as no longer capable of managing her affairs and as suffering dementia around the time she made her will constituted a suspicious

circumstance sufficient to rebut the presumption.

- [46] Justice Blake offered the following helpful guidance on suspicious circumstances in *Jung Estate v. Jung Estate*, 2022 BCSC 1298:
- [40] Suspicious circumstances must raise what has been described as a "specific and focused suspicion"; a "general miasma of suspicion that something unsavoury may have occurred" is not sufficient: *Leung* at para. 32; citing *Clark v. Nash* (1989), 61 D.L.R. (4th) 409 at 425 (B.C.C.A.). Such suspicions must be "well grounded" and will generally relate to circumstances (1) surrounding the preparation and execution of the will, (2) calling into question the capacity of the will-maker, or (3) tending to show that the free will of the will-maker was overborne by acts of coercion or fraud: *Vout* at para. 25; *Allart Estate* at para. 32. There is no checklist of suspicious circumstances, but one commonly occurring theme is where a beneficiary is instrumental in the preparation of the will (especially where they stand in a fiduciary position to the testator): *Laszlo* at para. 207.
- [47] Whenever there is a marked departure from a previously existing pattern in the disposition by a testator of their estate, the court must ascertain from the circumstances the reason for such change. If no reason is provided, this may give rise to a finding of suspicious circumstances: *Murphy v. Lamphier* (1914), 31 O.L.R. 287 at 291-292, 307-308 (H.C.J.), *aff'd* 20 D.L.R. 906, 1914 CanLII 535 (ON CA); *Re Price, Spence v. Price*, [1946] 2 D.L.R. 592 at 594-595, 1945 CanLII 339 (O.N.C.A.), *Henderson J.A. dissenting*. .

D. Role of the Solicitor in Testamentary Capacity Cases

- [48] A drafting solicitor bears a heavy burden when drafting a will for a person with potentially compromised capacity. In *Friesen v. Friesen Estate* (1985), 33 Man. R. (2d) 98 at para. 87, 1985 CanLII 3778 (M.B.Q.B.), the Court set out the following helpful principles:
5. Neither the superficial appearance of lucidity nor the ability to answer simple questions in an apparently rational way are sufficient evidence of capacity.
 6. The duty upon a solicitor taking instructions for a will is always a heavy one. When the client is weak and ill, and particularly when the solicitor knows that he is revoking an existing will, the responsibility will be particularly onerous.
 7. A solicitor cannot discharge his duty by asking perfunctory questions, getting apparently rational answers, and then simply recording in legal form the words expressed by the client. He must first satisfy himself by a personal inquiry that true testamentary capacity exists, that the instructions are freely given, and that the effect of the will is understood.
- [49] It is important to be mindful that this is not a solicitor's negligence case. Whether or not Mr. Burgess met his standard of care is of little relevance to the matters before me. However, where a drafting solicitor fails to make the necessary inquiries so that they can, if called upon to testify at a later date, satisfy the court that the will-maker met the Banks test, the propounders of a will may have difficulty proving the validity of the will. These were the

circumstances considered by Justice D. MacDonald in *Singh Estate (Re)*, 2019 BCSC 272. In that case, the Court found that the propounders of a will failed to satisfy their burden of proving testamentary capacity, in part because the drafting solicitor's evidence was insufficient to prove that the deceased understood what she owned at the relevant time or that she comprehended the revocation of existing dispositions under a new will: *Singh Estate (Re)* at paras. 105, 109.

IV. Analysis

A. Admissibility and Use of the Doctors' Affidavits

[50] Before considering the question of capacity, I must first deal with a challenge raised by the defendants to certain evidence that the plaintiff seeks to tender. Specifically, the plaintiff seeks to introduce the Doctors' Affidavits into evidence. Rather than tender the doctors' evidence by way of an affidavit in this proceeding, she has simply included the Doctors' Affidavits in the application record for this matter. The defendants object to this and say that the Doctors' Affidavits are inadmissible in this application for any purpose.

[51] The Doctors' Affidavits raise three distinct evidentiary problems:

- a) Can the Court receive affidavit evidence sworn in another proceeding that is neither sworn in this proceeding, nor is tendered as hearsay evidence by way of being attached to another affidavit, but rather is simply included in the application record? Can such a document be admitted into evidence without being authenticated in the usual manner?
- b) If the Doctors' Affidavits are authenticated, what use can the Court make of the hearsay evidence therein? Specifically, can the Court:
 - i. accept as true that the questions were asked of the Deceased and the answers given as recorded in the Doctors' Affidavits?
 - ii. accept the medical diagnoses made by the doctors for the truth of the diagnosis, or must the Court reject the diagnoses as they are expert opinions that have not been properly tendered in this case?

1. Authentication

[52] The defendants do not take issue with the authenticity of the Doctors' Affidavits. While no formal admission has been made, the defendants accept that the Doctors' Affidavits were duly executed and properly tendered in the Committeeship.

[53] Nevertheless, it bears noting that the affidavits have not been tendered in this summary trial application in accordance with the Supreme Court Civil Rules, B.C. Reg. 168/2009 [Rules]. The requirement that evidence in chambers be tendered by way of an affidavit in the proceeding is not one to be lightly disregarded; it protects the integrity of the court process.

- [54] While evidence in chambers applications must be given by affidavit, the Court may receive other forms of evidence: Rule 22-1(4)(e). The Court has discretion to accept unsworn documents as "other types of evidence": *Kokanee Mortgage MIC Ltd. v. 669655 B.C. Ltd.*, 2014 BCSC 458 at para. 29; *Wicklund v. Denis and Yvone Blakely 2015 Joint Partner Trust*, 2025 BCSC 1894 at para. 30.
- [55] In these circumstances--in which no issue is raised as to the authenticity of the Doctor's Affidavits and where the Doctor's Affidavits contain evidence that has been sworn under oath, albeit in a different proceeding--I find it would disrupt the truth-seeking function of the Court to simply disregard the Doctors' Affidavits. I am satisfied that the Doctors' Affidavits are authentic sworn statements. But for the failure of the plaintiff to have the doctors re-swear their evidence in the context of this proceeding, there would be no issue at all about the Court's ability to accept their evidence. I find this is an appropriate case to receive the Doctors' Affidavits pursuant to Rule 22-1(4)(e).
2. Hearsay Issues with Respect to Statements Made in Doctors' Affidavits
- [56] In the Doctors' Affidavits, each doctor deposes that he had the opportunity to question the Deceased about her understanding of her assets and her family. Her responses to those questions suggest that, at least at the time the doctors met with her, she was unable to answer questions about her assets. This is relevant evidence that the plaintiff seeks to rely on in support of her position that the Deceased lacked testamentary capacity.
- [57] The defendants argue that this evidence is inadmissible.
- [58] Evidence of statements made by a witness at a former adjudicative proceeding are hearsay if tendered for proof of the facts testified to in the other forum: *R. v. Hawkins*, [1996] 3 S.C.R. 1043 at paras. 58-60, 1996 CanLII 154. The Doctors' Affidavits are hearsay. As a result, the Court must approach the question of whether the evidence contained therein is admissible under a hearsay exception.
- [59] The evidentiary approach in Canada is to scrutinize a statement from a witness in another proceeding under the principled exception to hearsay: *Hawkins* at para. 65.
- [60] Under the principled approach to hearsay, a hearsay statement will be admissible for the truth of its contents if it meets the separate requirements of "necessity" and "reliability": *R. v. Khan*, [1990] 2 S.C.R. 531 at 546-547, 1990 CanLII 77.
- [61] The necessity requirement is generally met when a witness is unavailable to give evidence due to, for example, death or incapacity. However, the statement of a declarant may still meet the necessity criterion in limited circumstances where the declarant is not unavailable in the strict physical sense: *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740 at 797-799, 1993 CanLII 116.
- [62] The plaintiff has tendered no evidence to explain why Dr. O'Conner and Dr. Phaterpekar were not available to swear affidavits in this proceeding.

- [63] The reliability requirement will be satisfied where the hearsay statement was made in circumstances which provide sufficient guarantees of its trustworthiness. In this case, the Doctors' Affidavits are sworn testimony from another proceeding. They have a high degree of reliability. While the tendering of affidavits from another proceeding can sometimes give rise to reliability concerns due to the lack of cross-examination, in this case, both the prior proceeding, a committee application, and this proceeding, are applications in which evidence was tendered by affidavit. Cross-examination of the doctors was not sought by any party. In the circumstances of this particular case, I find that the Doctors' Affidavits are reliable.
- [64] The concepts of necessity and reliability are not separate thresholds but rather work together and should be considered with a degree of flexibility to the relevant circumstances and the particular hearsay danger arising before the court: *Fawley et al. v. Moslenko*, 2017 MBCA 47 at para. 99, citing *R. v. Baldree*, 2013 SCC 35 at para. 72.
- [65] While the plaintiff's evidence falls short on the issue of necessity, I find that the Doctors' Affidavits are sufficiently reliable that the dangers of admitting hearsay evidence are attenuated. I therefore find that the hearsay evidence contained in the Doctors' Affidavits is admissible for its truth.
3. Admissibility of Doctors' Diagnoses
- [66] The defendants' resistance to the admissibility of the evidence contained in the Doctors' Affidavits is not grounded in the fact that the evidence is hearsay. Rather, they submit that everything in the Doctors' Affidavits, including the evidence of questions asked and answers given by the Deceased, is inadmissible opinion evidence and should be excluded on that basis. They rely on *Egli et al v. Egli et al*, 2003 BCSC 1716, in support of this proposition.
- [67] The plaintiff argues that I can and should rely on the fact that the doctors both diagnosed the Deceased with dementia in March 2012 when considering the question of testamentary capacity.
- [68] In *Egli*, Justice Garson ruled on the admissibility of Mr. Egli's medical records for the purpose of proving the truth of the medical opinions contained therein. She admitted the medical records as business records for the purpose of proving the factual records of the communications the records contained. She held that the statements of opinion about Mr. Egli's capacity contained in the records were not admissible for proving the truth of the opinions: at para. 27.
- [69] Egli does not support the defendants' position that the entirety of the Doctors' Affidavits, including the factual record of what was discussed when the doctors met with the Deceased, is inadmissible opinion evidence. While the admissibility of the doctors' diagnosis of the Deceased is a more complex question which is discussed below, the defendants have pointed to no authority for the proposition that the otherwise admissible hearsay evidence contained in the Doctors' Affidavits about the contents of their interviews with the Deceased

is not admissible.

- [70] Instead, Egli, and the other two cases relied upon by the defendants, *Seaman and Zak v. Zak*, 2015 BCSC 1993, are all cases that deal with the admissibility of expert opinions contained within clinical records. These cases articulate the long-standing approach of this Court to the admissibility of medical records in civil trials. In *Seaman* at para. 14, Justice Metzger described that approach in the following way:
- (1) That the observations by the doctor are facts and admissible as such without further proof thereof.
 - (2) That the treatments prescribed by the doctor are facts and admissible as such without further proof thereof.
 - (3) That the statements made by the patient are admissible for the fact that they were made but not for their truth.
 - (4) That the diagnoses made by the doctor are admissible for the fact that they were made but not for their truth.
 - (5) That the diagnoses made by a person to whom the doctor had referred the patient are admissible for the fact that they were made but not for their truth.
- [71] The important distinction that must be made, of course, is that the Doctors' Affidavits are not clinical records. They are sworn statements of opinion tendered for the purposes of a court proceeding. They do not suffer from the same frailties or give rise to the same concerns as opinions embedded in clinical records. They are not business records but rather are sworn evidence of opinion which could have been subject to cross-examination. They contain an explanation of the doctors' opinions and the reasons the doctors formed the opinions. For these reasons, I do not think the analogy to business records is apt, nor are the limitations that our jurisprudence has placed on the admissibility opinions contained in clinical records appropriate in this case.
- [72] There is some jurisprudential support for the notion that a doctor's opinion or diagnosis in a parallel committee proceeding is admissible for the purposes of establishing suspicious circumstances in a probate action. In *Nassim v. Healey*, 2022 BCSC 402, Justice Brongers found that the fact that a will was made by a person recently diagnosed with dementia and as being incapable of managing their personal finances was in and of itself a suspicious circumstance: at para. 54.
- [73] In my view, the Doctors' Affidavits should be analyzed not as clinical records containing an opinion but rather as expert opinion evidence, subject to the test for admissibility set out in *R. v. Mohan*, [1994] 2 S.C.R. 9, 1994 CanLII 80 and *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 33 [White Burgess].

- [74] The defendants submit that the opinions in the Doctors' Affidavits are inadmissible but they did not say how the Doctors' Affidavits fail to meet the Mohan/ White Burgess criteria. The Doctors' Affidavits are necessary because they are beyond the scope of experience of the trier of fact, they are relevant to the issue of testamentary capacity, there is no challenge to the doctors' qualifications, and no exclusionary rule has been raised. Any risk inherent in the admission of this opinion evidence is outweighed by its evidentiary value. In my view, the Doctors' Affidavits meet the common law test for admissibility of expert opinion evidence.
- [75] The defendants also argue that the Doctors' Affidavits were not tendered in accordance with Rule 11. Rules 11-6 and 11-7 only apply to expert evidence tendered at a trial. As this is not a trial, these rules do not apply here: *Bhangu v. Honda Canada Inc.*, 2021 BCSC 794 at para. 21.
- [76] It is important at this stage to be clear about the purposes for which the opinions of the doctors are being tendered. Since testamentary capacity is a legal test and not a medical test, the doctors' opinions do not speak to the ultimate issue of testamentary capacity. It is not open to me to find that the Deceased lacked testamentary capacity simply because the two doctors diagnosed her as being incapable of managing her person or her affairs. However, like *Brongers J.*, I find that this type of evidence, including the doctors' diagnostic opinions, is admissible and is highly probative of the issues I must determine, including the presence of suspicious circumstances.

B. Irrelevance of Presumption Against Intestacy

- [77] The defendants argue that I should consider the presumption against intestacy in determining the validity of the will. The presumption against intestacy is a principle of wills construction. It says that if a will is capable of two interpretations, the court will prefer the interpretation which disposes of the whole estate in preference to that which results in an intestacy: *Murray Estate*, 2007 BCSC 1035 at para. 22. The presumption against intestacy has no bearing on whether or not a will is valid and is not a relevant principle in the matters I must determine in this summary trial.

C. Analysis of Suspicious Circumstances

- [78] While the Will was executed with the requisite formalities and was read over to the Deceased, including once in Polish, I find that there are a number of suspicious circumstances in this case that are sufficient to shift the burden with respect to capacity back onto the propounder of the Will. These suspicious circumstances include:
- a) Ms. Huitema, a beneficiary, was instrumental in the making of the Will. She made the appointment with Mr. Burgess shortly after being served with materials in the Committeeship. She sat in on the meeting and acted as a translator for the Deceased, whose knowledge of English was limited. All of the Deceased's wills instructions were made in her presence.

- b) In March 2012, the Deceased was diagnosed by Dr. O'Conner, a geriatric specialist, with moderate to severe dementia due to either Alzheimer's disease or Lewy Body Dementia. At around the same time, she was diagnosed by Dr. Phaterpekar, a psychiatrist, with Lewy Body Dementia.
 - c) Dr. O'Conner and Dr. Phaterpekar both observed that the Deceased was unable to answer basic questions about her finances in March 2012.
 - d) The Will represented a significant change from distribution that would result if the Prior Will stayed in place.
- [79] In my view, these facts raise a specific and focussed suspicion that the Deceased lacked testamentary capacity at the time the Will was made. Because of this, the burden rests on the defendants to prove the validity of the Will.

D. Analysis of Testamentary Capacity

- [80] There is insufficient evidence from which I could find that the propounder has met the burden of proving that the Deceased had testamentary capacity when she made the Will.
- [81] The Deceased had limited English language skills. She was the subject of the pending Committeeship. In the face of these two "red flags," Mr. Burgess instructed himself to act with caution in taking wills instructions. Nevertheless, he allowed Ms. Huitema, a beneficiary under the Will, to play a central role in instructing him.
- [82] There is no evidence that Mr. Burgess asked the Deceased any questions that would elicit information about her knowledge or understanding of what she was doing when she was making a will. On cross-examination, when challenged on his failure to record any notes of any questions asked or answers given in his efforts to satisfy himself on the Banks test, he testified:

No, in fact, this is point form as you can see, 1,2,3,4. And that's just me hitting the high points. But I would have fleshed that out. For example, if she [is] oriented to time and place, I would have asked her, do you know why you're here, do you understand what we're going to do, do you understand the nature of a will? And that was the second point there. And then I would go through does she understand the extent of the assets and does she understand that the will is going to set out how her assets will be distributed and to who.

- [83] There are two concerns that arise from this evidence. First, Mr. Burgess' 4 points in his notes do not correspond to the common law test for testamentary capacity. It is not an element of testamentary capacity that a person be oriented as to time and place, nor is it an element of testamentary capacity that they understand the Wills Variation Act, R.S.B.C. 1996, c. 490 (now Division 6 of Part 4 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13). His checklist misses two elements of the test for a person to be found capable of making a will: 1) that the person was able to comprehend and appreciate the claims to which he or she ought to give effect; and 2) that the person had no disorder of the mind or delusion that

influenced the making of the will.

- [84] Second, and most significantly, Mr. Burgess' evidence suggests that, at best, he asked the Deceased closed "yes or no" questions to determine her capacity. There is no evidence that he asked her the kind of open-ended questions that would be required to elicit meaningful answers and to ascertain her capacity. As the Supreme Court of Canada noted in Leger, merely being able to provide rational responses is not sufficient or conclusive of capacity; rather, "there must be a power to hold the essential field of the mind in some degree of appreciation as a whole": at 162. Mr. Burgess' evidence is insufficient to prove, on a balance of probabilities, that the Deceased understood the nature of a will, the extent of her assets, or the claims of others to which she ought to give effect.
- [85] For example, there is no record, nor does Mr. Burgess have a recollection, of Mr. Burgess asking the Deceased any questions from which he, and now the Court, could meaningfully discern the Deceased's knowledge of her own assets. His notes suggest that he "confirmed" with her that she owned a house. This language suggests that the proposition was put to the Deceased and that she agreed. It is significant that, around the time Mr. Burgess met with the Deceased, Dr. O'Conner and Dr. Phaterpekar both noted that she was unable to answer basic questions about her assets.
- [86] With respect to the third branch of the Banks test, Mr. Burgess deposed that he showed the Deceased photographs of family members and she was able to identify them. This suggests that she at least knew who some family members were. However, on the basis of Mr. Burgess' notes and cross-examination, it appears that the Deceased was shown pictures of only three family members.
- [87] Further, Mr. Burgess did not discuss the Prior Will with the Deceased. Indeed he testified on cross-examination that he did not know what was in the Prior Will, so there was no way for him to determine whether the Deceased understood that the Will would constitute a departure from the distribution that would take effect if her Prior Will stayed in place (i.e., an intestacy leaving her estate to be shared equally by her two granddaughters).
- [88] Mr. Burgess was also unable to say with certainty that he received any instructions about the Will directly from the Deceased. At best, he was able to testify that he confirmed wills instructions with the Deceased but the original source of those instructions, on a balance of probabilities, appears to have been Ms. Huitema, either in her phone call with Mr. Burgess in advance of the meeting or at the meeting, where she communicated with Mr. Burgess and provided instructions that Mr. Burgess then confirmed with the Deceased.
- [89] While two lawyers read over the Will to the Deceased (Mr. Burgess in English and Mr. Wince in Polish), the Deceased had no questions and appears to have asked for no clarification. Neither lawyer asked her to repeat anything back or explain anything. Therefore, their evidence does not shed any light on what, if anything, the Deceased understood when her Will was read to her.

V. Conclusion

[90] In this case, the propounder of the Will has the burden of proving testamentary capacity. I am not satisfied on the evidence before me that the Deceased had a sufficient understanding of the nature of a will, the value of her assets, or the consequences of making the Will (i.e., that the new will would change the distribution of her estate). As such, I find that the Will is invalid on the basis that the Deceased lacked testamentary capacity at the time it was made. The plaintiff's application is therefore granted and the executor's cross application for proof in solemn form of the Will is denied.

[91] Should the parties be unable to agree on costs, they may arrange a short 30-minute appearance before me to speak to same.

"Francis J."

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