
CANADA / JUDGMENT

Re Charbonneau Estate

2021 BCSC 2571

COURT

Supreme Court of British Columbia

DECIDED

19 November 2021

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2021 BCSC 2571 Re Charbonneau Estate

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Re Charbonneau Estate,

2021 BCSC 2571

Date: 20211119

Docket: S213242

Registry: Vancouver

Re: Estate of Joseph Armand Benoit Charbonneau

also known as Benoit Joseph Armand Charbonneau

Before: The Honourable Justice Blake

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioners Serge Charbonneau and Diane Charbonneau, appearing by MS Teams:

E.M. Hatch

Counsel for the Respondent Alain Charbonneau appearing by MS Teams:

T. Nesdoly, Articled Student

(as Agent for J. LaLonde)

Place and Date of Hearing:

Vancouver, B.C.

November 5, 2021

Place and Date of Judgment:

Vancouver, B.C.

November 19, 2021

- [1] THE COURT: The petitioners, Serge Charbonneau and Diane Charbonneau (whom I will refer to as Serge and Diane for clarity, intending no disrespect), seek the following relief in their capacity as co-executors of the Estate of Joseph Charbonneau (the "Estate"), pursuant to the will dated May 23, 2019 (the "Will"):
- a) that the court pronounce the force and validity of the Will of Joseph Armand Benoit Charbonneau (the "Deceased") in solemn form of law;
 - b) that the Executors recover their costs of and incidental to this application on a special costs basis out of the Estate of the Deceased; and
 - c) that the respondent pay costs to the Estate.
- [2] The Executors seek to prove the Will in accordance with Rule 24-14(4)(b) of the Supreme Court Civil Rules, B.C. Reg. 168/2009, which requires executors seeking to prove a will in solemn form to start a proceeding by way of petition if there is no existing proceeding within which it is appropriate to seek that order. I note that both Serge and Diane live full-time in Quebec.
- [3] Although the respondent, Alain Charbonneau (whom I will refer to as Alain for clarity, again intending no disrespect) did not file a cross-application seeking an order that the within petition for proof in solemn form of the Will be converted to an action, that is the relief he seeks in his response to petition. All counsel agreed to proceed in the hearing before me on the basis that that is the understood relief he seeks. It was not clear from the record where Alain lives, other than not close to where his father resided.
- [4] By way of brief background, the Deceased died on November 27, 2019, at Canal Flats, British Columbia, at the age of 84. He was survived by his common law spouse, Esperanza De Pu Aguilera ("Ms. Aguilera"), and his three children, Serge, Diane, and Alain. Further to the terms of his Will, Serge and Diane are named the co-executors and trustees under the Will (the "Executors"). The Will provides that after payment of the Deceased's debts, funeral and other expenses, and taxes and duties, the residue of the Estate is to be divided equally between Ms. Aguilera, Serge, and Diane. The Deceased made no provision under the Will for Alain.
- [5] There is no evidence that there is a prior will of the Deceased. None of the parties have either produced a prior will nor asserted the existence of a prior will. It is agreed that if the Will is not valid, then the Deceased's Estate will be distributed on an intestate basis.

[6] Alain and his cousin Benoit Joseph Gino Charbonneau (whom I will call Gino, again for clarity and intending no disrespect) filed a notice of civil claim on October 16, 2020, amended on October 21, 2020, in which Alain seeks an order under s. 60 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA] varying the Will, and in the alternative an order declaring the Will to be invalid. Gino seeks relief from the Estate on the basis of unjust enrichment or quantum meruit. Both Alain and Gino seek an order for removal of the Executors. This action is not before me, but I note that the determination of this petition will determine finally the issue of whether the Will is valid or not. Further, I note that the notice of civil claim is likely procedurally flawed, as it is generally improper to include both a wills variation claim and an action for proof of will in solemn form in the same proceeding, as a valid will is a condition precedent to a variation proceeding: see *Schell Estate (Re)*, 2019 BCSC 2168 at para. 8.

[7] Alain filed a notice of dispute in B.C. Supreme Court Action No. 29781 at the Cranbrook Registry on January 24, 2020, which he amended on August 26, 2020, and which provides as follows:

The disputant is filing this notice of dispute because there is a conflict of interest with the current executors acting in their roles. Additionally, this disputant believes there were issues concerning the validity of the deceased's last Will, including issues with the deceased's mental capacity and undue influence/coercion.

[8] Both of these notices of disputes have expired pursuant to Rule 25-10(12)(a) of the Supreme Court Civil Rules. The parties are agreed that the amended notice of dispute has expired and so is no longer of any force and effect.

[9] The Executors provided information to Alain as a result of his filing the notice of dispute, specifically:

- a) on August 28, 2020, counsel for the Executors delivered to counsel for Alain the file of the notary who prepared the Will;
- b) on September 2, 2020, counsel for the Executors delivered to counsel for Alain the medical records in the Executors' possession; and
- c) on October 6, 2020, counsel for the Executors delivered to counsel for Alain the entire medical file of the Deceased.

[10] Notwithstanding this information, Alain refused to remove his amended notice of dispute and maintains his position that the Will is invalid.

[11] The parties agree that the Executors have proven the formal validity of the Will in accordance with s. 37 of the WESA. That is that the Will is in writing, is signed at the end by the will-maker in the presence of two witnesses present at the same time, and is signed by those witnesses in the presence of the will-maker.

- [12] In the circumstances where the executors have proven the formal validity of a will, then the testamentary capacity of the deceased and his knowledge and approval of the content of the will are presumed. This presumption is subject to satisfactory evidence being adduced on a balance of probabilities sufficient to rebut this presumption and, if so, then the burden reverts to the executors to prove knowledge and approval and testamentary capacity by dispelling the suspicious circumstances raised: see *Vout v. Hay*, [1995] 2 S.C.R. 876 at para. 89 [Vout], and *Lantzius Estate*, 2015 BCSC 935 at paras. 62 and 63 [Lantzius Estate].
- [13] Alain's position, as set out in further detail below, is that he has provided affidavit evidence of suspicious circumstances surrounding the making of the Will sufficient to rebut this presumption and accordingly the Executors have the burden of proof to prove the validity of the Will in solemn form of law. As succinctly expressed by Justice Gropper in *Lantzius Estate* at para. 64:
- [64] If there are suspicious circumstances present in respect of the knowledge and approval or testamentary capacity, then the presumption is rebutted and the burden reverts to the applicants to prove knowledge and approval and testamentary capacity by dispelling the suspicious circumstances raised. The application standard of proof is a balance of probabilities: *Vout* at 889. However, the evidence is scrutinized in accordance with the gravity of the suspicion raised in a particular case: *Leung v. Chang*, 2013 BCSC 976 at para. 31, *aff'd* 2014 BCCA 28 (B.C.C.A.Q.), leave to appeal *ref'd* [2014] SCCA No. 261 (S.C.C.)
- [14] Alain argues that there are suspicious circumstances surrounding the Deceased's execution of his Will and he takes the position that the within petition must be converted into a trial. I will address the suspicious circumstances alleged by Alain in turn later.

Conversion of a Petition to a Trial

- [15] First, the parties agree that the legal test for the conversion of a petition to a trial is that a petition must be referred to the trial list where there are disputes of fact or law, unless the party requesting the trial is "bound to lose". This test incorporates the test for summary judgment into the question of whether it is appropriate to determine matters by way of a petition hearing or whether it is necessary to refer the petition to the trial list: see *British Columbia (Milk Marketing Board) v. Saputo Products Canada G.P.*, 2017 BCCA 247 at para. 43, and *Ghag v. Ghag*, 2021 BCCA 106 at para. 41 [Ghag].
- [16] In the recent unanimous B.C. Court of Appeal decision of *Ghag*, the court noted:
- [43] Even applying the test derived from the summary judgment context, mere evidentiary conflicts alone will not preclude a decision on a petition. Instead, an evidentiary conflict will only prevent judgment if it relates to a material fact or raises a triable issue: *Canada (Attorney General) v. Lameman*, 2008 SCC 14 at para. 11.

[44] As noted in *Lameman*, each side must put its best foot forward at the hearing. The chambers judge is permitted to make inferences of fact that are strongly supported by the undisputed facts. Further, a self-serving affidavit is not sufficient in itself to create a triable issue in the absence of detailed facts and supporting evidence: *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 at para.31.

[Emphasis added.]

[17] Alain relies upon the decision of *Robertson v. Dhillon*, 2015 BCCA 469, which was also relied upon in the *British Columbia (Milk Marketing Board)* decision, which characterizes the test in the following manner at para. 55:

[55] On the hearing of a petition, a judge must be satisfied that there is no dispute as to the facts or law which raises a reasonable doubt or which suggests that there is a defence that deserves to be tried: *Douglas Lake Cattle Co. v. Smith* (1991), 54 B.C.L.R. (2d) 52 (C.A.) at 59. If such a dispute exists, the judge may refer the matter to the trial list, pursuant to R. 22-1(7) (former R. 52(11)(d)).

[18] Counsel for the Executors quite correctly did not emphasize the responding affidavits to Alain's submitted materials, but focused their submission on whether Alain's affidavit materials raises a reasonable doubt or suggests a defence that deserves to be tried.

[19] Alain's position is that his filed affidavit materials raise a reasonable doubt as to the Deceased's capacity at the time the Will was executed due to what he says were suspicious circumstances surrounding its creation and execution, and that he has a defence which deserves to be tried. He asks that I remit this matter to the trial list to allow him the opportunity to conduct examinations for discovery of the Executors and to cross-examine them (and potentially other witnesses) at trial.

Suspicious Circumstances and Undue Influence

[20] Before considering Alain's argument and evidence, it is important to put his argument that there are suspicious circumstances surrounding the execution of the Will into the context of the applicable legal framework.

[21] Tarralin Hanson ("Ms. Hanson"), is the notary public who prepared and witnessed the Will. Her affidavit attaches her handwritten notes from her initial meeting with the Deceased on May 1, 2019, when she obtained his instructions regarding the Will, and her handwritten notes from her second meeting with the Deceased on May 23, 2019, when he executed his Will. Her evidence is she met alone with the Deceased both times and never spoke with nor met any of his children. In her affidavit, Ms. Hansen deposes, inter alia, the following:

- a) on May 1, 2019, she, along with her staff member, met with the Deceased alone to obtain the Deceased's instructions for the Will. She had no concern regarding the Deceased's mental capacity to give her instructions. The Deceased understood well and did not have difficulty answering her questions and carrying on conversation;
 - b) on May 23, 2019, she, along with her staff member, met with the Deceased alone to review and execute the Will. She had no concerns regarding the Deceased's mental capacity to execute the Will. The Deceased reviewed the Will by himself, and then she reviewed each paragraph with him. The Deceased raised an issue regarding paragraph 7 of the Will because it referred to his common law partner as his wife, and he requested an assurance from Ms. Hanson that the reference to "wife" was sufficient, given he and his partner were common law but were not legally married;
 - c) the Deceased's instructions to her on May 23, 2019, remained unchanged from the May 1, 2019, meeting;
 - d) the Deceased executed the Will by handwriting his signature in the presence of Ms. Hanson and her staff member. Ms. Hanson and her staff member then signed the Will as witnesses in each other's presence and in the presence of the Deceased; and
 - e) Ms. Hanson had no concerns regarding any coercion or influence exerted by anyone over the Deceased with respect to his instructions, review, or execution of the Will. She met with him alone at both meetings.
- [22] Alain correctly acknowledges that the Executors have proven the formal validity of the Will and that he has the burden to prove there were suspicious circumstances present in respect of either the Deceased's knowledge and approval of the contents of the Will, or his testamentary capacity at the time he made the Will.
- [23] The presumption of the validity of the Will may be rebutted by evidence of "well-grounded suspicions". Suspicious circumstances generally relate to circumstances surrounding the preparation of and execution of the Will, calling into question the capacity of the Deceased or tending to show that the free will of the will-maker was overborn by acts of coercion or fraud: see Vout at para. 25; Singh Estate (Re), 2019 BCSC 272 at paras. 69 to 71 [Singh Estate], and Allart Estate v. Allart, 2014 BCSC 2211 at para. 32 [Allart Estate].
- [24] As explained by Madam Justice Dardi in Leung v. Chang, 2013 BCSC 976 at paras. 32 and 33 [Leung], affirmed 2014 BCCA 28, leave to appeal ref'd [2014] SCCA No. 261:
- [32] In order to rebut the presumption of validity, those attacking the will must meet the threshold of demonstrating that there is some evidence "which, if accepted, would tend to negative knowledge and approval or testamentary capacity": Vout at para. 27; Maddess v. Racz, 2009 BCCA 539 at para. 31. The court in Scott v. Cousins (2001), 37 E.T.R. (2d) 113 (Ont. S.C.J.) describes the requisite evidence as that which "excites the suspicion of the court". A "general miasma of suspicion that something unsavoury may have occurred" is insufficient to rebut the presumption of validity; the evidence must raise a "specific and focused

suspicion": Clark v. Nash (1989), 1989 CanLII 2923 (BC CA), 61 D.L.R. (4th) 409 at 425 (B.C.C.A.).

[33] The court in Laszlo provides the following instructive observations regarding the doctrine of suspicious circumstances at para.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.

[Emphasis added.]

[25] If suspicious circumstances surround the making of the will, or the capacity of the will-maker at the time of the making of the will are established, then the legal burden reverts to the proponent of the will to dispel the suspicious circumstances: see Allart Estate at para. 33.

[26] Alain alleges there are suspicious circumstances which show both undue influence and a lack of testamentary capacity, which I will deal with in turn. His position is that it is necessary to convert this petition into a trial to determine the validity of the Will. He says that the Executor should prove the Will in solemn form of law in a trial proceeding, not on a petition with affidavits. He says there are matters of credibility and conflicting evidence, and that the Will should not be found to be valid without a full trial, including examinations for discovery and viva voce evidence. I will now turn to Alain's allegations of suspicious circumstances.

Testamentary Capacity

[27] First, Alain says that the Deceased lacked testamentary capacity at the time he made his Will. He says that the Deceased:

- 1) was on a number of medications which could have affected his cognitive state in May 2019;
- 2) both Alain and the Deceased's great niece, Amelie Rousseau, witnessed the Deceased being confused in May 2019;
- 3) the Deceased told both Alain and Ms. Rousseau that he recalled signing documents, but could not recall what they were; and
- 4) the psychiatrist who visited with the Deceased in early May 2019 noted the Deceased advised him he suffered from short-term memory loss and mood adjustment.

- [28] The most frequently quoted test for testamentary capacity is the English decision of *Banks v. Goodfellow* (1870), L.R. 5 Q.B. 549 (Eng. Q.B.) at 567, as cited recently in *Conner Estate v. Worthing*, 2020 BCSC 150 at para. 17 [*Conner Estate*]:
- [567] [The testator] ought to be capable of making his will with an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, of the persons who are the objects of his bounty, and the manner in which it is to be distributed between them. It is not necessary that he should view his will with the eye of a lawyer, and comprehend its provisions in their legal form. It is sufficient if he has such a mind and memory as will enable him to understand the elements of which it is composed, and the disposition of his property in its simple forms.
- [29] The deceased must be sufficiently clear in his or her understanding and memory to know, on their own, the nature and extent of their property, the persons who are the natural objects of their bounty, the testamentary provisions they are making, and must be able to appreciate those factors in relation to each other and form an orderly desire as to the disposition of their property: see *Singh Estate* at para. 67, and *Machander v. Drader*, 2012 BCSC 1496 at para. 52.
- [30] The foundation of Alain's argument centres on there being no reason for his father to have excluded him under his Will. He is unsatisfied with the fact he was disinherited by his father under the Will and he is fully entitled to that position. He has commenced a wills variation action which is still outstanding, and that provides him with an opportunity to address his position.
- [31] However, I am not satisfied that Alain has rebutted the presumption of testamentary capacity on the basis of these alleged suspicious circumstances. He has made suggestions that his father was forgetful, suffered from short-term memory loss, and was on a number of medications in the month of May 2019. He argues his father was incorrect when he told Ms. Hanson he had not had contact with Alain for five years, as he had visited him three years ago. He also notes that his father was initially confused on May 2, 2019, as to who he was and mistook him for Serge. I note he has had the full medical file for his late father for over a year and he had the opportunity to obtain affidavits from the treating physicians or expert medical evidence. He has done neither. He does not allege any specific medication had any specific side effect or impact on the Deceased. The same psychiatrist to whom the Deceased reported experiencing short-term memory loss and mood disturbances also noted "he was fully oriented in place, person, and time" and "his speech was normal in tone, volume, and rhythm. He did not have any abnormality of thought, flow, form, or content". The psychiatrist notes no concerns regarding the Deceased's capacity in his notes, testamentary or otherwise.
- [32] Alain alleges that:

On or about the first day of my visit on May 2, 2019, my father mentioned to me "they made me sign something I don't understand". He asked me to find out what it was, and I agreed.

Ms. Rousseau makes a similar allegation in early 2019. However, neither of these allegations could relate to the execution of the Will, as that was not signed until three weeks later on May 23, 2019. It is clear that these allegations, if taken to be true, must be about an unrelated document.

[33] I also note that Alain's evidence confirms that during his visit between May 2 and 6, 2019, he and his father discussed his father's mobile home park (Charbonneau Park) and future plans for the park (such as where they could add another home on the property) and that on the last day of his visit they and Gino had a meeting to discuss the future of Charbonneau Park which he describes as a "constructive meeting where we discussed the work that needed to be done to ensure the business was well cared for." By his own evidence, Alain raises no more than the mere possibility that the Deceased was having some episodic confusion. Alain's evidence leads to the conclusion he had no concerns about his father's capacity when he left on May 6, 2019. The fact that the Deceased may have been experiencing some episodes of confusion is not sufficient to raise a suspicion that he was not capable, particularly when the notary saw him twice alone and had no concerns on either visit that the Deceased had the capacity to both instruct her and to execute his Will.

[34] Alain's general allegations fall far short of raising a specific and focused suspicion which excites the suspicion of this Court. As set out above, Alain was required to put his best foot forward on the hearing of this petition, and there is no evidence before me that leads me to conclude he has not done so. In these circumstances, Alain has not rebutted the presumption that the Deceased had the requisite testamentary capacity. He has raised no evidence which raises a reasonable doubt as to the Deceased's capacity.

Undue Influence

[35] Alain says there are a number of suspicious circumstances that, when taken together, demonstrate that the Deceased was the subject of undue influence in the making of his Will. These alleged suspicious circumstances are:

- 1) Alain and the Deceased had a good relationship which the Deceased may not necessarily have communicated to other members of the family;
- 2) the Deceased was in a vulnerable physical and mental state in May 2019, which would leave him open to potential undue influence, and that Diane and Serge had the motivation to compel the Deceased to disinherit Alain;
- 3) Diane's visit to see her father shortly before he gave his instructions to Ms. Hanson to prepare his Will is suspicious;
- 4) Alain and Ms. Rousseau say the Deceased did not have his glasses with him at the hospital; and

- 5) Serge made comments to his cousin Gino that lead to the inference that Serge participated in the making of the Will.
- [36] Before addressing each of these allegations, it is important to address the evidence necessary to prove undue influence sufficient to invalidate a will on the grounds of undue influence. To succeed on this basis, Alain must prove, on a balance of probabilities, that the influence he alleges was exerted against the Deceased amounted to coercion such that the Will "did not reflect the true intentions of a free will-maker and was not the product of the will-maker's own act. The undue influence must constitute coercion which could not be resisted by the will-maker and which destroyed his or her free agency." See Allart Estate at para. 36. If the will-maker remains able to act freely, then "the exercise of significant advice or persuasion on the will-maker or an attempt to appeal to the will-maker or the mere desire of the will-maker to gratify the wishes of another, will not amount to undue influence." See Allart Estate at para. 36 and Leung at para. 35. I will now address each of Alain's allegations of undue influence in turn.
- [37] First, Alain argues that he and the Deceased had a good relationship and the Deceased would not necessarily have communicated the nature of their relationship to other members of the family. He argues that no one can explain why his father disinherited him and that if his father had a serious issue with him, he would have expected him to bring it up when he visited in early May 2016, and he did not. He deposed as follows in para. 13 of his affidavit:
13. . . . if there were any real or serious problems between himself and another person, he would carefully address these problems with that person directly. I believe that if he were so angry with me that he wanted to write me out of his Will, he would have brought it up to me during our very personal conversations in May 2019.

Rather, his father was excited to see him, they discussed some deeply personal issues, and their plans to work together on Charbonneau Park. He notes that Ms. Hanson's note details that the Deceased told her he had had no contact with Alain for five years, and that Alain should know why he is being disinherited. Diane also confirms that her father merely told her that he did not include Alain in his Will because of "what Alain did to him". Alain says he visited his father three years prior and he has no idea of what he supposedly did. He stresses that the psychiatric consult on April 19, 2019 records him stating he "has a good relationship with his children". His argument is that the implication is that the Deceased must have been influenced by someone to his relationship with Alain. However, this is mere speculation, not evidence. He provides no detailed facts nor supporting evidence. Neither Ms. Rousseau nor Gino provide any evidence on this point. His argument that no one can explain why his father disinherited him will clearly need to be addressed in his wills variation claim, but it does not go to the material facts at issue in this petition. That is, it does not lead to the conclusion that someone must have unduly influenced the Deceased.

- [38] Second, Alain argues that the Deceased was in a vulnerable physical and mental state in May 2019, which would leave him potentially open to undue influence. He takes the position that Diane and Serge had the motivation to compel the Deceased to disinherit him, in that they have both personally benefited from the Will. However, he has not provided any evidence whatsoever that either Diane or Serge actually unduly influenced their father. A broad allegation by a disappointed beneficiary is not sufficient evidence that undue influence may have occurred. Ironically, Alain visited his father after Diane's visit in April 2019, and had a more recent opportunity than she did to influence their father.
- [39] Third, Alain argues that Diane went to visit the Deceased between April 10 and 20, 2019, and her visit shortly before he gave instructions to Ms. Hanson to prepare his Will is suspicious. Diane visited her father from her home in Quebec. Alain argues that it is suspicious that this visit took place while Ms. Rousseau (who had been visiting her Uncle regularly) was away attending to a different family health matter. He argues that Diane had a significant opportunity to influence her father, and further argues that just because she was not present in British Columbia does not mean Diane could not unduly influence her father. He also says he was told on May 25, 2019, that all communication with the Deceased had to go through Diane. However, this occurred after the execution of the Will on May 23, 2019, and is so not material. Again, the argument that Diane must have unduly influenced the Deceased is mere speculation on Alain's part and is insufficient to suggest that Alain has a defence that deserves to be tried.
- [40] Fourth, he and Ms. Rousseau both allege that the Deceased did not have his glasses with him at the hospital. His inference appears to be that the Deceased would not have been able to read his Will when the notary gave it to him. While in his response to petition, Alain argued that the Deceased could not have read over the Will by himself, he does not dispute that Ms. Hanson may have read over the terms of the Will to him, nor does he suggest that the Deceased did not know the Will he was signing. Rather, he argues that this supports the fact that he was confused. By this, I take it he is arguing that if the Deceased was unable to locate his glasses at the times Ms. Rousseau and Alain were visiting him, it is evidence of his confusion. With respect, without evidence that Ms. Rousseau or Alain observed the Deceased requiring his glasses and being unable to locate them at the time he executed his Will, this is a mere unsubstantiated allegation made without any supporting evidence. I note Ms. Hanson's uncontroverted evidence clearly shows that the Deceased questioned the terms of the Will before execution to ensure his common law spouse would inherit, even though they were not married, which is clear and compelling evidence that he was aware of the terms of the Will he was executing.
- [41] Finally, Alain says that Serge made comments to his cousin Gino that lead to the inference that Serge participated in the making of the Will, particularly when taken in context of all of his other allegations of suspicious circumstances. In his affidavit, Gino deposed:

5. In or around December 2019, I was visiting with my family at the home of Ms. Aguilera. I had a conversation with Serge regarding my uncle's estate. Serge mentioned that "we" made a mistake when we planned the will, "we" did not know "we" couldn't disinherit Alain. He also mentioned that the[y] thought because of the way the Will was drafted it was possible for Alain's disinheritance to work. I specifically remember Serge's use of the word "we". This language stood out to me, because I was under the impression that my uncle was supposed to have had the Will drafted entirely on his own.

[42] I note that this evidence is directly contradicted by the evidence of Ms. Hanson, who met with the Deceased alone and never spoke or met with Serge. However, this evidence does not raise a bona fide issue to suggest that Serge unduly influenced the Deceased to make the Will. It is insufficient to establish that the Deceased was unable to act freely. As set out above, it is well established at law that if the Deceased remained able to act freely, the exercise of significant advice or persuasion on the will-maker or an attempt to appeal to the will-maker or the mere desire of the will-maker to gratify the wishes of another will not amount to undue influence. Alain has adduced no evidence that either Serge or Diane exercised any power over the Deceased, nor that the Will was the product of either of them exercising such a power.

[43] I am satisfied that Alain has put forward insufficient evidence to suggest that he has a defence that deserves to be tried; namely, that the Deceased was unduly influenced to the extent he was unable to exercise his free will to make his Will as he did.

Conclusion and Costs

[44] In conclusion, in respect of whether this matter is suitable for determination by way of the petition and a hearing on affidavits, I am satisfied that I am able to determine the facts necessary to decide the legal issue on the basis of the affidavits before me.

[45] In my view, Alain's allegations of suspicious circumstances and undue influence are largely speculative, not well-grounded in the evidence, and do not bear upon the circumstances associated with the making of the Will. His assertions do not raise a specific and focused suspicion. Rather, they centre on his position that there is no valid and rational reason for his father to have disinherited him under his Will. Those assertions properly should be the subject of his wills variation action, which he has already commenced.

[46] I have also considered whether all of the facts and circumstances presented by Alain, when taken together, would collectively negate testamentary capacity or knowledge and approval. He argues that when taken together, they are evidence of a well-founded suspicion upon which it is reasonable to conclude that the Deceased was subject to undue influence and lacked testamentary capacity. With respect, I disagree. While taken together, his allegations may raise a suspicion that something unsavoury may have occurred, the evidence advanced by Alain does not meet the threshold of suspicious circumstances. I find the evidence does not support a specific and focused suspicion that the Deceased did not know and approve

the contents of the Will, that the Deceased lacked the requisite testamentary capacity or that the Will was not the product of the Deceased's own free will.

- [47] Alain has failed to satisfy this Court that his assertions are sufficient to rebut the presumption that the Will is valid. I am satisfied that there is no dispute as to the facts or law which raise a reasonable doubt or which suggest that Alain has a defence that deserves to be tried. Put another way, I am satisfied that Alain's arguments are bound to lose, and it is appropriate to determine the issues on the basis of the within petition. In all of the circumstances, I am satisfied that the Will expresses the true will of the Deceased. I find that the Executors have proven the Will in solemn form of law and are entitled to an order to that effect.
- [48] The Executors are entitled to recover their costs of and incidental to this application on a special costs basis out of the Estate.
- [49] Further, the modern trend in estate litigation is to carefully scrutinize the litigation and, unless the court finds there is a public policy consideration, to follow the costs rules that apply in civil litigation, which is ordinarily that the unsuccessful party pays the successful party's costs: see Connor Estate at para. 25 and Hollander v. Mooney, 2017 BCCA 238 at para. 39. Alain refused to remove the amended notice of dispute, despite having received both Ms. Hanson's file and the medical records from the Executors in October 2020. In those circumstances, the Executors are entitled to costs from Alain for this petition to be assessed at Scale B of Appendix B to the Supreme Court Civil Rules.

"Blake J."

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