

CANADA / JUDGMENT

Singh Estate (Re)

2019 BCSC 272

COURT

Supreme Court of British Columbia

DECIDED

1 March 2019

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2019 BCSC 272 Singh Estate (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Singh Estate (Re),

2019 BCSC 272

Date: 20190301

Docket: S168198

Registry: Vancouver

In the Matter of the Estate of Shiv Kumari Singh, deceased

Between:

Uma Kant Singh and Sharda Singh

as Executors of the Estate of Shiv Kumari Singh

Petitioners

And:

Sneh Kant Singh, Pushp Lata Arora, Ramesh Arora, Manjula Devi Kalra, Sunil Kant Singh, Kushwaha Kant Singh, Sneh Lata Joon, Dalip Singh Joon, Pushp Kant Singh, Ravi Kalra, Ashika Singh, and Savitri Singh

Respondents

Before: The Honourable Justice D. MacDonald

Reasons for Judgment

Counsel for the Petitioners:

D. Taylor

Counsel for the Respondents:

Kushwaha Kant Singh and Sunil Kant Singh

D. Hunter

S. Denholm

Place and Dates of Hearing:

Vancouver, B.C.

October 30, 31

and November 1, 2018

Place and Date of Judgment:

Vancouver, B.C.

March 1, 2019

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I. Introduction

- [1] Shiv Kumari Singh ("the deceased") died on April 28, 2016, at the age of 92. Her eight children and most of their spouses are now embroiled in a dispute over her estate.
- [2] A will executed by the deceased on February 14, 2013 ("2013 Will") names the petitioners Uma Kant Singh ("Uma") and Sharda Singh ("Sharda") as the executors of her estate. The petitioners gave notice to all of the beneficiaries of the deceased's estate that they intended to apply for a grant of probate in May 2016. The respondent Kushwaha Kant Singh ("Kushwaha") filed a notice of dispute in June 2016, providing a copy of a will executed by the deceased on February 22, 2016 ("2016 Will") naming him as executor of her estate.
- [3] The petitioners seek the following orders:
- a) that this Court pronounce the force and validity of the 2013 Will in solemn form of law;
 - b) that this Court pronounce against the force and validity of the 2016 Will;
 - c) that the 2013 Will be admitted to probate with the petitioners as the executors of the deceased's estate;
 - d) that the notice of dispute filed by Kushwaha be set aside; and
 - e) costs.
- [4] The respondents oppose the petition and seek the following orders:
- a) that the relief sought in the petition be dismissed;
 - b) that this Court pronounce the force and validity of the 2016 Will in solemn form of law; and
 - c) special costs payable from the deceased's estate.
- [5] The parties agreed that if the 2016 Will is not valid, there are no validity issues with the 2013 Will.

II. Issues

- [6] The primary issue before me is whether the 2016 Will is valid and enforceable as the last will of the deceased. I must also determine the admissibility of the deceased's medical records as a preliminary evidentiary matter.

III. The Children and their Spouses

- [7] The petitioner Uma is the eldest son of the deceased. His wife is Uma Singh, also known as Umi. The petitioner Sharda is the deceased's daughter-in-law. She is married to Sneh Kant Singh ("Sneh Kant"), a son of the deceased and a respondent to this petition.
- [8] The response was filed by Kushwaha and Sunil Kant Singh ("Sunil"), both sons of the deceased.
- [9] The other respondents, besides Sneh Kant, Kushwaha, and Sunil are: Pushp Kant Singh, Savitri Singh, Ashika Singh, Pushp Lata Arora, Manjula Devi Kalra, Sneh Lata Joon ("Joon"), Ramesh Arora, Ravi Kalra, and Dalip Singh Joon. These are the children of the deceased and most of their spouses.
- [10] For the sake of clarity and intending no disrespect, I refer to the parties by their given name or names.

IV. Evidence

- [11] The evidence was entered by affidavit. The affidavit evidence entered was from three of the deceased's children and from the lawyers who drafted the 2013 Will and the 2016 Will, respectively. Aside from the lawyers' affidavits, no evidence was entered from an independent third party familiar with the deceased. No expert medical evidence was entered from a treating physician or otherwise.
- [12] The deceased was born in Fiji in 1923. She and her husband, Raghu Singh ("Raghu"), immigrated to Canada in 1979. They resided with their son, Uma, and his wife, Umi, in various homes within the City of Vancouver. In 1996, a house located at 8049 Victoria Drive, Vancouver (the "Property") was purchased and registered in the names of Raghu, the deceased, Uma, and Umi as joint tenants. Each individual had a one-quarter interest in the Property.
- [13] There is some dispute in the evidence regarding the extent to which Uma and Umi contributed financially to the Property, and to what extent they paid for upgrades to their living accommodations. Uma deposed that he and his wife purchased the Property with their own resources. From time to time, they were able to upgrade their accommodations at their own expense. Kushwaha deposed that his parents helped purchase the home with the proceeds of the sale from their previous home. He also testified that his parents contributed to household expenses and improvements.

- [14] Raghu, the deceased's husband and father of the children, died in December 2005. His estate was bequeathed to the deceased, except for the stipulation in his will that his one-quarter interest in the Property be transferred to Uma. However, the Property was not part of his estate because all the occupants were joint tenants. By operation of law, Raghu's one-quarter interest in the Property devolved to the three remaining joint tenants, meaning Uma, Umi, and the deceased. Each held a one-third interest upon his death. The deceased continued to live with Uma and Umi in the Property.
- [15] There is a conflict in the evidence regarding what Uma and Sneh Kant, husband of the petitioner Sharda, received when their father died. Kushwaha deposed that the deceased told him that Uma received Raghu's Cadillac car and that Uma and Sneh Kant received survivor benefits under Raghu's Canada Pension Plan. Uma and Sneh Kant deposed that they received nothing from Raghu's estate.
- [16] Raghu's 2005 Will states the following:
4. I am leaving my interest in the property located at 8049 Victoria Drive, Vancouver, British Columbia to my son UMA KANT SINGH in accordance with paragraph 3(a) above because I have lived with him since moving from Fiji. He contributed most of the funds to purchase the property, has paid household expenses, taxes and mortgage payments, and many of my personal expenses, and has given me his time and assistance, and supported me in many other ways for which I am most grateful.
- [17] In 2009, the deceased severed the joint tenancy ownership of the Property. Thereafter the deceased held her one-third interest as a tenant-in-common. Kushwaha deposed that Uma, Umi, and the deceased severed the joint tenancy together and all three owners had full knowledge of the severance. The petitioners testified that they only became aware of the deceased's severing of her interest in 2012. Kushwaha admitted in his examination for discovery that he had no idea who severed the joint tenancy.
- [18] On February 14, 2013, the deceased executed the 2013 Will. There is no dispute that the 2013 Will satisfies the formalities required by the Wills, Estates and Succession Act, S.B.C. 2009 c. 13 [WESA]. The 2013 Will is in writing and it was signed by the deceased in the presence of two witnesses, one of whom was her lawyer.
- [19] The 2013 Will states the following:
3. I am leaving my interest in the property located at 8049 Victoria Drive, Vancouver, British Columbia to my son UMA KANT SINGH in accordance with paragraph 2(c) above because I have lived with him since moving from Fiji. He contributed most of the funds to purchase the property, has paid household expenses, taxes and mortgage payments, and many of my personal expenses, and has given me his time and assistance, and supported me in many other ways for which I am most grateful.

- [20] In or around 2014, the deceased began to experience health issues. She periodically saw her doctor, Dr. James Hii, at Vancouver General Hospital. Dr. Hii also occasionally made house calls at the Property.
- [21] Uma and Sneha Kant gave evidence regarding the deceased's well-being. They asserted that she began having delusions in 2014 and by 2015 she was forgetful and confused.
- [22] In January 2016, the deceased slipped, fell, and hit her head. She was taken to Vancouver General Hospital. There are medical records regarding this visit, discussed later in these reasons. When the deceased was discharged, she returned to living at the Property with Uma and Umi.
- [23] There was a second hospitalization in January 2016. After her discharge from Surrey Memorial Hospital in January 2016, the deceased moved from Uma's home to the home of her daughter, Joon. She later moved from Joon's home to the home of Sunil. Uma was not sure exactly when she moved to Sunil's home. He deposed that he visited the deceased every other day while she was at Joon's home. Kushwaha deposed that the deceased lived with Joon for only a week. During his discovery he stated:

Q: So to your knowledge until she passed away, with the exception of stays in hospital, at all times she lived at your sister's house in 2016?

A: From the time she moved out from the other house--

Q: Yes.

A: -- to my sister's house, yes.

Q: Ok. And just to be clear, at no time did your mother reside with you or your brother Sunil? Correct?

A: Yes.

Q: Ok. You're clear on that?

A: Mmm-hmm.

- [24] Kushwaha's lawyer later corrected these statements, stating that the deceased lived with Joon from January to April 2016. He further stated she moved into Sunil's home in April 2016, just prior to her final admission to Surrey Memorial Hospital.
- [25] Unbeknownst to the petitioners, on February 22, 2016, the deceased executed the 2016 Will. According to Kushwaha, earlier in February 2016 the deceased asked him to find a Hindi-speaking lawyer to draft a new will. He stated the following in his affidavit:

In or about February, 2016, the Deceased asked me to arrange for her to see a Hindi-speaking lawyer to draft a new will in which she would treat her children equally. I arranged for her to meet with Solicitor Razman Jussa to discuss estate planning and the power of attorney. Savitri and I drove her to a meeting with Mr. Jussa at his office. I was not in the meeting when the Deceased spoke about her will, but I was called into the meeting to discuss the issue of Power of Attorney.

I do not recall any unusual behaviour from the Deceased at that time. She did believe in "black magic" and ghosts, but that was not unusual for her, it was not unusual in Fijian culture, she had held those beliefs all her life. Although she was weak physically, she was not weak mentally so far as I could tell.

[26] There was some evidence that Kushwaha refused to go and see the deceased when she was living with Joon. However he did assist her in making an appointment with the lawyer and in twice getting her to the lawyer's office in his car. It is not clear in the evidence whether Kushwaha encouraged his mother to speak to a lawyer or whether she drove the endeavour.

[27] The 2016 Will is signed by the deceased but her signature looks different from her signature on her 2013 Will. Kushwaha stated as follows regarding the signing of the 2013 Will:

On February 22, 2016, Savitri and I drove the Deceased to Mr. Jussa's office again. The building did not have an elevator, and the Deceased did not feel that she could climb the many stairs. Mr. Jussa and an assistant agreed to meet with the Deceased in the car to review her will and sign it. They met with her for period without me. I saw the Deceased sign the will.

[28] The lawyer deposed that there was no one in the car when the deceased signed the 2016 Will apart from himself, the deceased, and his assistant.

[29] In March 2016, the deceased was admitted to the acute care ward at Surrey Memorial Hospital for a period of time. In April 2016, the deceased was re-admitted to Surrey Memorial Hospital. She was discharged on April 14, 2016. Uma testified that he, Umi and his sisters were prevented from visiting the deceased by hospital staff under instruction from Kushwaha, who had been granted power of attorney over the deceased, and Sunil.

[30] As noted, the deceased died on April 28, 2016.

[31] On May 27, 2016, the petitioners delivered a notice of proposed application in relation to estate to all of the beneficiaries under the 2013 Will. The 2013 Will provides that the deceased's interest in the Property be left to Uma, that all loans provided to Pushp Kant and Ramesh are forgiven, and that the deceased's personal belongings and residue of her estate be divided equally amongst all eight children.

[32] In response, Kushwaha filed a notice of dispute on June 8, 2016, and provided the petitioners with a copy of the 2016 Will.

- [33] The terms of the 2016 Will disinherit Sneha Kant and Uma on the basis that they received "their share" from Raghu's estate. The 2016 Will makes no mention of forgiving debts.
- [34] The lawyer who prepared the 2016 Will provided affidavit evidence. I set out paras. 3-20 of his affidavit:
3. On February 10, 2016, Shiv Kumari Singh ("Mrs. Singh") attended at my office to give instructions on preparing her will and attached hereto and marked as Exhibit "A" are true copies of my notes.
 4. At our meeting, I spoke to Mrs. Singh in Hindi and sometimes in English, and she answered me in Hindi. I was satisfied that she understood the purpose of a will, and that by her will, she would give instructions on how her assets would be dealt with after her death.
 5. It is my usual practice to obtain valid identification from a client to confirm their identity which I also did in respect of Mrs. Singh.
 6. As it has always been my practice, I met with Mrs. Singh alone. I advised her that our communications were confidential, and she said she understood. She described to me her family situation and assets. I asked Mrs. Singh if she was on any medication, and she said no.
 7. Mrs. Singh explained to me that she had six children and two of her children, Uma Kant Singh and Sneha Kant Singh, had already received their share of assets from her husband's estate when he passed away and accordingly, she did not wish to bequest anything to them. She wished for her remaining assets to be equally distributed to her other children. Mrs. Singh named each of her other children and provided me with the correct spelling of their said names, which I noted on a yellow sticky note in my file.
 8. Mrs. Singh also directed me to prepare a Power of Attorney to allow her son, Kushwaha Kant Singh, to act on her behalf. I informed Mrs. Singh about what a Power of Attorney meant and that Kushwaha Kant Singh would be able to access her assets and instruct her physicians and other professionals on her behalf during her lifetime. Mrs. Singh said she understood and trusted her said son and instructed me to prepare the Power of Attorney.
 9. It is my invariable practice to meet with wills clients alone. I advise them that their communications with me are confidential. By speaking with a client alone I am able to assess whether the client can speak clearly, is able to give independent instructions, understands and reacts appropriately to questions, and is acting independently without the influence of others.
 10. If I suspect that a client does not have the mental capacity to understand and instruct me about their will, it is my usual practice to decline taking any instructions from them on their will. I did not do so for Mrs. Singh.

11. If I suspect a client is in a relationship of dependency, domination, or influence, it is my usual practice to require further and other information before I will agree to be retained, and to make a note of my suspicions in my file. I did not do so for Mrs. Singh.
12. At our meeting on February 10, 2016, I was satisfied that Mrs. Singh had sufficient capacity to provide me with her instructions to prepare her will and Power of Attorney, without undue influence by anyone.
13. During our meeting on February 10, 2016, Mrs. Singh spoke clearly, she made appropriate comments, she appeared aware of why she was attending at my office. She did not appear to be acting under duress or pressure from any outside influence. Based on my discussions with Mrs. Singh, I had no doubt that she was of sound mind and that she was acting voluntarily and not under duress.
14. Based on Mrs. Singh's instructions, I subsequently prepared her Will and Power of Attorney and then made an appointment for Mrs. Singh to attend at my office on February 22, 2016, to review and if approved to execute the Will and Power of Attorney.
15. My office is on the second floor and there is no elevator in the building. Because Mrs. Singh was unable to climb the stairs on February 22, 2016, I agreed to meet with Mrs. Singh in her car, parked on the street in front of my office. Yasmin Jussa ("Mrs. Jussa"), my secretary, was also present in the car to witness the signing. No one else was present.
16. At that meeting, I explained the Will to Mrs. Singh. Mrs. Singh confirmed that she understood the Will that I had prepared, and she approves of it.
17. However, on reviewing the Will she noticed a spelling mistake on page one, and she initialed its correction. She noticed an error on page 3, and she initialed its correction.
18. It is my invariable practice to ask if a client understands their will as I drafted it, and if they agree with its contents. It is my invariable practice to decline to witness a will for anyone for whom I have concerns that they do not understand or agree with its contents. I had no such concerns regarding Mrs. Singh.
19. It is my invariable practice to ask if a client is feeling pressured to execute a will as drafted and to ask if a client is acting on the basis of her own free will. If I have any concerns about their answers, I will advise them not to sign the Will and I will decline to witness their will. I had no such concerns regarding Mrs. Singh.
20. Mrs. Jussa and I witnessed Mrs. Singh executing her Will and Power of Attorney on February 22, 2016. After she did so, Mrs. Jussa and I signed as witnesses in the presence of Mrs. Singh and each other. Attached hereto as Exhibit "B" is Mrs. Singh's will, duly executed by me and Mrs. Jussa as witnesses.

V. Admissibility of Medical Records

[35] The petitioners adduced a number of the deceased's medical records. The petitioners concede that I can only admit the records to establish the first-hand observations of the authors. They submit that they rely on the medical records not as proof of accuracy of the author's opinion or for the correctness of the statements.

[36] As a preliminary matter, I must determine whether these records are admissible.

A. Position of the Parties

[37] The petitioners argue that the records are admissible and relevant to determining whether there are suspicious circumstances. The petitioners state that the medical records are an exception to hearsay statements pursuant to the standard business records exclusion.

[38] The petitioners argue that s. 42(2) of the BC Evidence Act, R.S.B.C. 1996 c. 124 [Evidence Act] permits the admissibility of a statement of fact in a business document. Section 42 provides:

42 (1) In this section:

"business" includes every kind of business, profession, occupation, calling, operation or activity, whether carried on for profit or otherwise;

"document" includes any device by means of which information is recorded or stored;

"statement" includes any representation of fact, whether made in words or otherwise.

(2) In proceedings in which direct oral evidence of a fact would be admissible, a statement of a fact in a document is admissible as evidence of the fact if

(a) the document was made or kept in the usual and ordinary course of business, and

(b) it was in the usual and ordinary course of the business to record in that document a statement of the fact at the time it occurred or within a reasonable time after that.

(3) Subject to subsection (4), the circumstances of the making of the statement, including lack of personal knowledge by the person who made the statement, may be shown to affect the statement's weight but not its admissibility.

(4) Nothing in this section makes admissible as evidence a statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to a fact that the statement might tend to establish.

(5) For the purpose of any rule of law or practice requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated, a statement rendered admissible by this section must not be treated as corroboration of evidence given by the maker of the statement.

- [39] The petitioners argue that the records are adduced to demonstrate that there were a number of statements made regarding the deceased's capacity, whether or not the statements are true: *Edmondson v. Payer*, 2011 BCSC 118 [Edmondson] at para. 38; *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2018 BCSC 859 [Cambie Surgeries] at para. 18. The records are not adduced to determine the deceased's capacity but to establish suspicious circumstances.
- [40] The petitioners argue that the legal test to prove suspicious circumstances is different than that to determine capacity. The dicta in the case law makes that clear.
- [41] The petitioners rely on *Ares v. Venner*, [1970] S.C.R. 608 [Ares] at 626, wherein the Supreme Court of Canada held that medical records can be admitted as an accurate record of facts of the author, and that the author had first-hand knowledge of those facts.
- [42] The respondents raise three objections regarding the admissibility of the medical records.
- [43] First, they argue that the records are not admissible as business records because the petitioners are attempting to admit the records for the truth of the statements contained therein.
- [44] The respondents argue that the petitioners are attempting to use the records to prove the central point in the case, namely whether the deceased suffered from dementia or paranoia. They argue that the petitioners conflate expert evidence with evidence of observations in an attempt to establish suspicious circumstances. This is not permitted. The respondents rely on *Baas v. Jellema*, 2000 BCCA 24, where the Court of Appeal held that a medical record containing a fact or first hand observation is admissible to prove a fact, but it is not admissible to prove the truth of a medical opinion.
- [45] On the third day of the petition, the respondents advised the court that they were not maintaining the objection regarding the admissibility of the medical records as business records. They agree that the documents are authentic (they had in fact ordered them according to the affidavit evidence of Kushwaha). Under the business records exception the records are admissible for the purpose of recording observations. Any concern regarding the records entered as business records goes to their weight.
- [46] Second, the respondents argue that the medical records include third party statements from family members, which is double hearsay. Neither the Evidence Act nor the common law permit the admissibility of such second hand statements: *McTavish v. MacGillivray* (1997), 38 B.C.L.R. (3d) 306 (S.C.) [McTavish] and *Ares*. Due to the double hearsay, these third party statements are entirely unreliable.

[47] Third, the respondents argue that the records are inadmissible in their entirety due to relevance: none of the medical records are within days or even weeks of the dates on which the deceased gave instructions for the 2016 Will on February 10, 2016 or when she executed the Will on February 22, 2016. There is no record that provides information at the relevant time regarding the deceased's capacity. They are not probative of testamentary capacity in February 2016.

B. Law

[48] While clinical records are hearsay, they are admissible under the business records exception both at common law and under s. 42 of the Evidence Act. The requirements for the admission of medical records as business records are set out in *Ares*. The Supreme Court of Canada held at 626:

Hospital records, including nurses' notes, made contemporaneously by someone having a personal knowledge of the matters then being recorded and under a duty to make the entry or record should be received in evidence as *prima facie* proof of the facts stated therein.

[49] Justice Burnyeat in *McTavish* summarized the principles from *Ares* at 311-12:

1. The notes taken must be made contemporaneously.
2. The notes must be made by someone having a personal knowledge of the matters being recorded.
3. The notes must be made by someone who has a duty himself or herself to record the notes or to communicate the notes to someone else to record as part of the usual and ordinary course of their business.
4. The matters which are being recorded must be of the kind that would ordinarily be recorded in the usual and ordinary course of that business.
5. A statement in the records of the fact that a certain diagnosis was made will be admissible.
6. Recorded observations, diagnosis and opinions will be admissible providing they are recorded in accordance with points 1 through 4.
7. The fact that the referring doctor relied upon another doctor's opinion to assist in coming to his or her own diagnosis and opinion is only evidence of that fact so that the other opinion does not become evidence unless it is otherwise admissible. Accordingly, it is only evidence of the fact that the referring doctor wished or required that opinion to be received before forming his or her own opinion.

8. Statements made by parties or by experts which are recorded in the usual and ordinary course of business but which lie outside the exception to the hearsay rule are hearsay and will not be admitted into evidence unless they can be brought within Section 14 of the Evidence Act which allows for the admissibility of such statements if it can be shown that they are proof of a prior inconsistent statement.

[50] The issue of third party statements was addressed in *Cambie Surgeries*. Justice Steeves provides:

any statement by the patient or any third party that is not within the observation of the doctor or person who has a duty to record such observations in the ordinary course of business is not admissible for any purpose and will be ignored by the trier of fact

C. Analysis

- [51] Since the medical records were made and contain statements of facts that were recorded in the usual and ordinary course of business, and because the petitioners are not adducing them for the truth of their contents, they are admissible as business records under the Evidence Act. This is not in dispute.
- [52] I do not accept the respondents' first argument that the medical records were being admitted for the truth of their contents. The petitioners adduced the records for the fact that particular statements were made. They argue that the mere fact the statements were made gives rise to suspicious circumstances regarding the deceased's testamentary capacity and her knowledge and approval of the contents of the 2016 Will.
- [53] In terms of the respondents' second objection, regarding third party statements, Steeves J. clarified that a patient or other third party must be within the observation of the medical practitioner who has a duty to record the observations in the ordinary course of business: *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2016 BCSC 1896 at para. 10, citing Justice Metzger in *Seaman v. Crook*, 2003 BCSC 464. I apply this test to the third party statements made in the medical records before me.
- [54] The respondents' third objection to the admissibility of the records was their lack of relevance due to their remoteness in time. The respondents cited para. 29 of *Edmondson* for this proposition.
- [55] Justice Ballance held in *Laszlo v. Lawton*, 2013 BCSC 305 [Laszlo], that evidence of symptoms exhibited by a will-maker before and after making a will can support an inference of capacity at the time the will was made:
- [190] The diminishment of mental capacity, particularly in the elderly, will frequently emerge and worsen over time. In light of that, evidence of symptoms exhibited by a testatrix both before and after the making of the will may support an inference relevant to the determination of the presence or absence of testamentary capacity at the material time: see generally, *Smith v. Tebbett* (1867), L.R. 1 P.& D. 354 at 398; *Kri v. Patterson*, [1989] O.J.

No. 1817 (Surr. Ct.); Fawson Estate (Re), 2012 NSSC 55; Moore v. Drummond, 2012 BCSC 170 at para. 47 [Moore]; Coleman v. Coleman, 2008 NSSC 396 [Coleman].

- [56] The respondents' concerns regarding the timing of the records is not a threshold issue of admissibility.
- [57] In summary, the medical records are admissible as business records for the fact that the statements therein were made. The direct observations of the various medical practitioners are admissible and relevant to the issue of suspicious circumstances. The respondents' concerns regarding remoteness go to the weight of the records rather than their admissibility.

VI. Law and Analysis

A. Validity of a Will

- [58] The respondents seek to propound, meaning convince this Court of the validity, of the 2016 Will. In an action for proof of will in solemn form, the propounder must prove the formality of the will, that the will-maker had knowledge and approval of the will, and that the will-maker had testamentary capacity. The propounder is aided by a rebuttable presumption.
- [59] A valid will must satisfy all of the necessary formalities, namely that it is in writing, signed at the end by the will-maker in the presence of two or more witnesses, and signed by the witnesses in the presence of the will-maker: WESA, s. 37(1). The will-maker must also be above 16 years of age.
- [60] If the will satisfies these statutory formalities and was duly executed after having been read over by or to the will-maker who appeared to understand it, a presumption of testamentary capacity arises: Devore-Thompson v. Poulain, 2017 BCSC 1289 [Devore-Thompson] at para. 57, citing Vout v. Hay, [1995] 2 S.C.R. 876 [Vout] at para. 26.
- [61] To rebut this presumption, the burden is on the contestor of the will to prove there were issues surrounding the creation of the will, such as fraud, undue influence, coercion, or suspicious circumstances, regarding the will-maker's capacity or knowledge and approval.
- [62] If the court is satisfied that one or more of these issues exist, the burden shifts to the propounder to prove the will-maker knew and approved of the contents of the will and that he or she had testamentary capacity on the balance of probabilities: Vout at paras. 19-20. A will cannot be probated if these elements are not met.

1. Formal Validities Analysis

- [63] The deceased gave instructions to her lawyer at his office on February 10, 2016. She was unable to climb the stairs when she came back to sign the will on February 22, 2016, so she met with her lawyer in the car. She signed the will in the car in the presence of her lawyer and his assistant, who both signed the will as witnesses. Kushwaha deposed that he also saw the deceased sign the will, although he was outside the vehicle throughout this meeting.
- [64] Upon review of the 2016 Will, it is clear that there is a signature at the end of the document above the deceased's typed name. The names and signatures of the lawyer and his assistant are also evident at the bottom of the document.
- [65] The petitioner argued that the signature on the 2016 Will did not match the signature of the 2013 Will. It is different, but I note that the deceased was physically frail at the time she signed the 2016 Will and there is no evidence contradicting that of the lawyer or Kushwaha with regards to signing. There is no requirement that a person maintain the same signature over time, and it may be impossible due to age or disability. On a balance of probabilities, I am satisfied the deceased signed the 2016 Will as the will-maker given the evidence before me.
- [66] I find that the 2016 Will satisfies the formalities set out in s. 37(1) of WESA. The deceased is presumed to have known and approved of the Will's contents and to have had testamentary capacity when it was executed.

B. Suspicious Circumstances

1. Law

- [67] Testamentary capacity means that the will-maker is:

sufficiently clear in his understanding and memory to know, on his own, and in a general way (1) the nature and extent of his property, (2) the persons who are the natural objects of his bounty and (3) the testamentary provisions he is making; and he must, moreover, be capable of (4) appreciating these factors in relation to each other, and (5) forming an orderly desire as to the disposition of his property.

- [68] This summary of testamentary capacity is from *Re Schwartz* (1970), 10 D.L.R. (3d) 15 (Ont. C.A.) at 32, wherein Laskin J.J.A. (dissenting on other grounds) provided a modern restatement of the test from the seminal case of *Banks v. Goodfellow* (1870), L.R. 5 Q.B. 549 (Eng. Q.B.) [Banks]. This restatement has been adopted by this Court: see *Laszlo* at para. 188.
- [69] To rebut the presumption of testamentary capacity by establishing suspicious circumstances, the contestor of the will must raise: (1) suspicious circumstances surrounding the preparation of the will; (2) circumstances tending to call into question the capacity of the will-maker; or (3) circumstances tending to show that the free will of the will-maker was overborne by acts of coercion or fraud: *Vout* at para. 25.

[70] The contestor must demonstrate that there is some evidence "which, if accepted would tend to negative knowledge and approval or testamentary capacity": Vout at para. 27, see also Peterson v. Welwood, 2018 BCSC 1379 [Peterson] at para. 102. This test is akin to the prima facie test in other legal contexts.

[71] In Peterson at para. 102, Dardi J. suggested that the requisite evidence for rebutting the presumption is that which "excites the suspicion of the court." Justice Dardi cited Clark v. Nash (1989), 61 D.L.R. (4th) 409 at 425 (B.C.C.A.) for the proposition that 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'".

2. Analysis Regarding Suspicious Circumstances

[72] Here the petitioners say there were suspicious circumstances in both the preparation of the 2016 Will and the capacity of the will-maker. Although acts of undue influence, coercion or fraud were pleaded, these arguments were abandoned at the hearing.

[73] The petitioners do not need to establish that the deceased lacked testamentary capacity; they must simply establish that there were suspicious circumstances when the Will was executed to rebut the presumption.

[74] Here the statements in the medical records are admissible evidence of suspicious circumstances. The following table outlines some, but not all, of the statements made by various medical professionals who treated or attended to the deceased prior to her executing the 2016 Will:

Date

Medical Professional

Location

Summary of Relevant Comments

November 27, 2015

Family physician

Dementia/delirious?

January 2, 2016

Paramedic

Ambulance

Patient hit head yesterday. Family concerned because patient has been expressing ideas of people out to get her and drug her since last night and this morning. Patient does not express paranoia presently.

Triage nurse

VGH

Complaint: bizarre/paranoid behaviour.

Emergency physician

VGH

Over past several days increasing confusion and paranoid ideation about people and family out to hurt/drug her. Never been confused before.

Final diagnoses: falls and functional decline, intermittent confusion and paranoia? mild delirium? dementia.

Emergency nurse

VGH

Primary diagnosis: bizarre, paranoid behaviour.

Emergency physician requesting a geriatric psychiatry assessment. Family requesting additional support regarding patient's increased agitation and bizarre behaviour.

Emergency social worker

VGH

Family concerned patient's bizarre behaviour and agitation increasing and it's making it more difficult to care for her.

January 7, 2016

Paramedic

Ambulance

Fell from standing height

Mental status: normal

Registered nurse

Patient has been having increased falls, ?nighttime wandering & confusion. Family requesting patient be placed in residential care.

January 27, 2016

Paramedic

Ambulance

History of fall three weeks ago

Pneumonia

Mental status: confused

Emergency physician

VGH

Dementia

Pneumonia

February 2, 2016

Family physician

Authorized refill of eight prescriptions.

- [75] On March 30, 2016, approximately five weeks after the deceased executed the 2016 Will, a physician at Surrey Memorial Hospital stated that her post-discharge diagnoses included dementia and cognitive impairment. The physician stated that the deceased "has been found unfortunately to be suffering from depression with significant delirium and paranoia [and] quite significant dementia."
- [76] Similar statements were recorded when the deceased was hospitalized in April 2016.
- [77] These records establish that the deceased had been in the hospital prior to the signing of the 2016 Will and that various medical professionals made statements regarding the deceased's mental capacity.
- [78] Whether true or not, numerous medical professionals made statements about bizarre and paranoid behaviour on the part of the deceased, dementia, confusion and the numerous medications she was prescribed in the month before and the month after she executed the 2016 Will. Her children described unusual behaviour of the deceased to the medical professionals, which they duly recorded.
- [79] The deceased's possible confusion is not surprising, as her environment dramatically changed in the few months leading up to her death at the age of 92. Her confusion was observed by a number of caregivers.
- [80] The existence, rather than the correctness, of a physician's opinion that the will-maker was suffering from dementia can raise suspicious circumstances. As stated by Justice N. Smith in *Moore v. Drummond*, 2012 BCSC 1702 [Moore] at para. 41:
- [41] [The will-maker] made her will at approximately the same time that her doctor was saying that she was no longer capable of managing her affairs and was suffering dementia. The fact that Dr. Blouw had sufficient professional concern to express that opinion in itself constitutes a suspicious circumstance that leaves the executors unable to rely on the presumption of validity.

- [81] Without determining the truth of the records, the statements found in the records are troubling: *Peters (Estate of) v. Ewert*, 2002 BCSC 1540 [Peters], at paras. 31-35, and 86-87.
- [82] The evidence before me raises suspicious circumstances which, if accepted, would negate the deceased's testamentary capacity and therefore her knowledge and approval. As held in *Laszlo* at para. 240, "[i]t is axiomatic that a testatrix who lacks testamentary capacity is without capacity to know and approve the contents of her will": referring to *Maliwat v. Gagné*, 2009 BCSC 1447, *aff'd* 2010 BCCA 323.
- [83] Additional factors relevant to this analysis is the deceased's decision to disinherit two of her children on the basis that they had received "their share" under their father's will many years prior, and her place of residence in the last few months of her life: *Peters* at para. 92.
- [84] The deceased lived with Uma and Umi for 37 years, which encompasses almost her entire life lived in Canada. The only time the deceased lived away from them was in the four months prior to her death, which is also when she executed the 2016 Will and ostensibly disinherited Uma and Sneh Kant, abruptly departing from her 2013 Will.
- [85] As held in *Laszlo*, "[s]uspicious circumstances have been found to exist in a wide array of situations and are not necessarily sinister in nature": para. 207. I am not suggesting that the deceased was improperly moved into the homes of some of her other children to be cared for while she faced health problems. As stated, arguments of undue influence, coercion, or fraud were not argued at the hearing. I am satisfied, however, that the move and its potential impacts on the deceased, taken in light of comments found in the medical records, contribute to the suspicious circumstances that surround the execution of the 2016 Will.
- [86] I find that comments regarding the deceased's capacity in her medical records, her decision to disinherit two of her sons based on events that would have occurred years prior to the execution of both of her Wills, and her change in environment shortly before she executed the 2016 Will suggest, on a balance of probabilities, suspicious circumstances.
- [87] Given these suspicious circumstances, the petitioners have rebutted the presumption of testamentary capacity or knowledge and approval regarding the 2016 Will. The burden shifts to the respondents to prove the validity of the Will.

C. Testamentary Capacity

1. Law

- [88] To establish testamentary capacity, it must be shown that the will-maker was of sound mind, memory and understanding in order to be able to make a valid will: *Banks*.

- [89] Assessing whether a will-maker possesses testamentary capacity is a question of fact and is a "highly individualized inquiry": Peterson at para. 96. The will-maker must have had the mental capacity to "appreciate and comprehend the nature and effect of the essential elements of the testamentary act", including an appreciation of the claims of persons who are the "natural objects of [his or] her estate," as well as an appreciation of the extent of the property to be disposed: Peterson at paras. 92-95, see also para. 67 of these reasons.
- [90] The criteria requiring the will-maker to understand the nature and extent of the property being disposed of is a common area of uncertainty: Laszlo at para. 242.
- [91] In *Russell v. Fraser* (1980), 118 D.L.R. (3d) 733 (B.C.C.A.) [Russell], the will-maker gave instructions that \$76,000 of her estate be left to several beneficiaries. Her bank manager, who assisted in preparing the will, realized that substantial assets would still remain in her estate and asked her how she wished to dispose of the residue. The manager suggested, "partly facetiously", that the residue be left to him after the will-maker declined to enlarge her existing gifts. The will-maker agreed, leaving him approximately \$130,000. There was no evidence that she was aware of the value of the residue.
- [92] The court held that it was not enough that the will-maker was aware of the balance in her bank accounts; she must also have understood the approximate value or magnitude of the residue of her estate at the time she executed her will.
- [93] In *Moore*, the will-maker knew that she owned a house and had two bank accounts, but could not accurately recall the balances in those accounts. She told her lawyer that one contained \$25,000, when in actuality one held approximately \$3,500 and the other approximately \$45,000. This less than exact understanding of the balances was considered adequate.
- [94] Testamentary capacity is a legal rather than a medical construct. Medical evidence is relevant but is not conclusive or required. The evidence of lay witnesses is often given significant weight in determining testamentary capacity: Peterson at para. 97, citing Laszlo at para. 198.
- [95] For example, in *Laszlo* it was held that delusions do not always demonstrate a lack of testamentary capacity. Delusions can only invalidate a will if they constituted an "actual and compelling influence" on it: at paras. 208, 216 and 221.
- [96] Testamentary capacity is determined at the time the will-maker gives instructions and executes the will. Evidence of symptoms before and after the will was executed can support an inference regarding testamentary capacity: Laszlo at paras. 189-90.

2. Analysis

- [97] There is a significant dispute over whether the deceased had testamentary capacity in executing the 2016 Will. The respondents must prove testamentary capacity on the balance of probabilities: Peterson at para. 100.

- [98] The lawyer gave evidence as to the deceased's behaviour and demeanour while giving him instructions and executing her Will. The lawyer has been in practice for over 40 years and has "extensive experience" preparing wills. He is an officer of the court and was well-positioned to assess the deceased's capacity both when she gave him instructions on February 10, 2016, and when she executed the will on February 22, 2016.
- [99] The lawyer swore in his affidavit that it is his invariable practice to decline taking instructions from clients who he suspects do not have the mental capacity to understand and instruct him about their wills. The lawyer did not do so for the deceased; he agreed to prepare her 2016 Will. He deposed that he was satisfied she had sufficient capacity and he "had no doubt she was of sound mind."
- [100] The lawyer only took notes during their first meeting. These notes are handwritten on one page. More than half of the page is taken up with the names of the deceased's children and some addresses. The lawyer did not make any notes about his assessment of the deceased's capacity.
- [101] The lawyer did not swear or affirm that he asked the deceased if she had any prior wills, nor did he state that he asked the deceased about the nature of Uma and Sneh Kant's supposed inheritance from Raghu.
- [102] To determine whether the deceased had capacity I will consider the five enumerated factors from *Re Schwartz*. All must be met to establish capacity.
- a) Did the deceased understand the nature and extent of her property?
- [103] The lawyer's only mention of the deceased's understanding of the nature and extent of her property is this statement in his affidavit: "[s]he described to me her family situation and assets." In his handwritten notes, he wrote, "[t]he other children did not get anything from their Dad. Therefore whatever I have, I am giving to the other six children in equal share," which I presume to be the deceased's expressed wishes. This is a very general statement. The 2016 Will does not include any detail as to the particulars of the deceased's property.
- [104] As held in *Laszlo* at para. 249:
- [249] The principles to be taken from the authorities are that testators are not expected to know the exact composition of their estate assets and their value with the metronomic precision of an accountant. An appreciation of the general nature of the estate assets and an understanding of their extent, meaning their approximate value or the approximate value of the estate at large, expressed either in terms of dollars or quantitatively (eg. "a lot of money" or "a substantial fortune"), will suffice.
- [105] In no part of the submitted evidence regarding the execution of the 2016 Will is the deceased's one-third interest in the Property mentioned, any bank accounts, or any other assets that may make up her estate. Although the deceased was not required to understand the contents of her estate with "metronomic precision", she was required to understand the

approximate value of her interest in the Property and any other personal assets. The lawyer's statement that she described "her assets" to him does not allow me to find that the deceased understood what she owned at the relevant time.

[106] I find that the deceased telling her lawyer that she wanted to leave "whatever I have" to the beneficiaries is insufficient evidence to meet the threshold of understanding the nature and extent of her property when she executed the 2016 Will.

b) Did the deceased understand the persons who are the natural objects of her bounty?

[107] The deceased clearly listed the names of her eight children to her lawyer when instructing him with regards to her Will and corrected some spelling errors when she returned to execute the Will. I am satisfied that she understood who the objects of her bounty were, those being six of her children, in executing the 2016 Will.

c) Did the deceased understand the testamentary provisions she was making?

[108] The lawyer deposed that he confirmed with the deceased that she understood the testamentary provisions she was making when she executed the 2016 Will. I accept that the deceased understood she was disinheriting two of her sons entirely and leaving her estate to her other six children equally.

[109] However, I am not satisfied that the deceased comprehended any "just claims to consideration" or "revocation of existing dispositions:" *Leger v. Poirier*, [1944] S.C.R. 152 [Leger] at 161. There is no evidence that the lawyer asked the deceased about whether she had any prior wills, nor that she volunteered such information. The only evidence that the deceased recalled that she had a prior will is Kushwaha's statement that she asked him to arrange for a lawyer to "draft a new will", although this information does not seem to have been relayed to the lawyer. Unfortunately, the evidence as to why she decided to depart so drastically from her 2013 Will in February 2016, with significant negative impacts on two of her eight children, is lacking.

[110] The deceased told the lawyer that she wanted to leave nothing to Uma and Sneh Kant because they already benefited under their father's estate in 2005. Regardless of the veracity of this belief, that information would have presumably been available to her upon her husband's death, since she was also a beneficiary under his Will. Although Uma did benefit upon Raghu's death, in that his interest in the Property went from one-quarter to one-third, so too did the deceased. Further, Uma did not receive this benefit due to Raghu's estate but instead due to the nature of joint tenancy. Sneh Kant did not receive this benefit.

- [111] Although the legal nature of joint tenancy may not have been appreciated by the family leading up to and after Raghu's death, by 2009 the deceased had decided to sever and hold her interest instead as a tenant in common. This indicates that she had some understanding of the legal differences between these two types of shared ownership at one point in time. This was four years before she executed the 2013 Will, in which she leaves her Property share to Uma.
- [112] The respondents pointed out that the petitioner did not cross-examine the lawyer. However, the burden is on the respondents to prove the validity of the will. There is no duty on the petitioners to do so for them and there was no suggestion that the rule in *Browne v. Dunn* (1893), 6 R. 67 (U.K. H.L.) is applicable here, as the petitioners did not move to impeach the credibility of the lawyer.
- [113] The respondents submit that both Uma and Sneh Kant benefited under their father's will, with Sneh Kant receiving a Cadillac car and both receiving Canada Pension Plan benefits. Uma and Sneh Kant deny this in their evidence. The evidence before me in the form of Raghu's 2005 Will is that his entire estate went to the deceased. Further, it is not clear to me how a non-dependent adult child could receive Canada Pension Plan benefits from a deceased's estate.
- [114] As held in Russell at 746:
- The solicitor must make the necessary inquiries so that if called upon he can show that by reason of the inquiries made by him and his discussions with the testatrix, the testatrix fully appreciated the effect of what she was doing when she made her will.
- [115] I am not persuaded that this was done in the matter at hand.
- [116] Accordingly, the evidence does not support that the deceased understood the testamentary provisions she was making and the general effects the Will would have upon her death.
- d) Was the deceased capable of appreciating these factors in relation to each other?
- [117] The deceased's decision to disinherit Uma means that if the 2016 Will is successfully admitted to probate, there are a number of possible outcomes: the Property may be sold so that the deceased's one-third interest can be distributed amongst the six beneficiaries; Uma may buy out the one-third interest from the estate, if he has access to adequate funds and chooses to do so; or the deceased's interest may be declared to be held in constructive trust for Uma.
- [118] I have no evidence before me as to which of these possibilities is more likely and it would be improper for me to speculate.

[119] However, I also have no evidence as to whether the deceased understood the implications her instructions to her lawyer could have on Uma and his living situation. I have no evidence that she discussed her interest in the Property with her lawyer at all, or that Uma and his wife own two-thirds of the Property as joint tenants. No evidence was presented to this Court about what the estate contains, if anything, apart from the Property interest.

[120] For these reasons, I am not satisfied that the deceased was capable of appreciating the preceding factors in relation to each other.

e) Was the deceased capable of forming an orderly desire as to the disposition of her property?

[121] The petitioners submit that the deceased lacked testamentary capacity, contrary to her lawyer's affidavit, in part due to the statements found in the medical records and Uma and Sneh Kant's affidavits. The affidavits of Uma and Sneh Kant both described the deceased as having mental health problems. Uma deposed that his mother was "suffering from delusions and hallucinations and was having difficulty understanding what was going on around her." Sneh Kant deposed that "[a]fter 2015 and certainly after January 2016, I think it is highly unlikely that my mother would have the necessary mental capacity to execute a new will."

[122] These affidavits were sworn prior to either of them receiving the medical records.

[123] After the 2016 Will was challenged, the respondents deposed that their mother was fine during this time frame. As Kushwaha stated, his mother was mentally competent "so far as [he] could tell."

[124] The lawyer testified that he was satisfied the deceased had capacity because he did not suspect otherwise and she "spoke clearly, she made appropriate comments, [and] she appeared aware of why she was attending my office."

[125] Although I give the lawyer's comments significant weight, he did not testify about any specific questions asked to determine the capacity of the 92-year-old client before him such as: whether she had a prior will; the details of Raghu's estate; what exactly Uma and Sneh Kant received from his estate; why she made the decision to disinherit them years after her husband's death; or questions about the nature of her and Uma's ownership of the Property. His affidavit evidence on capacity is made weaker by these absences.

[126] Given the petitioners' evidence (stated with more conviction than the respondent's), the statements made in the medical records, the lack of expert medical evidence to establish capacity, and the absence of key pieces of information in the lawyer's affidavit, I am unable to find that the deceased was capable of forming an orderly desire as to the disposition of her property when she executed the 2016 Will.

3. Summary

[127] I find that the respondents have failed to prove on a balance of probabilities that the deceased had the requisite testamentary capacity when she executed the 2016 Will.

D. Knowledge and Approval

[128] Even if I am wrong regarding testamentary capacity, there was insufficient evidence from the respondents to persuade me that the deceased possessed knowledge and approval of the 2016 Will.

1. Law

[129] Where a will-maker is found not to have testamentary capacity, the will-maker cannot be found to have had knowledge and approval of the will: Laszlo at para. 240.

[130] Where a will-maker did have capacity, a will that does not express the true intention of the will-maker may still not be admitted to probate. In order to have knowledge and approval of the contents of a will, it is necessary that the will-maker was aware of the value or magnitude of the residue of the estate on the date the will was made: Russell at 743, 744.

[131] The respondents must prove that the deceased had knowledge and approval of her bequests. The deceased must have appreciated what assets she had, their relative value, and who would benefit from the testamentary gifts. Implicit in this test is that the deceased must have understood who would not benefit from her will.

2. Analysis

[132] On its face, the lawyer's affidavit is deficient in light of the fact he was preparing a will for a 92-year-old woman who was disinheriting two children.

[133] The respondents argued that the petitioner is asking for a standard of perfection. Since that standard was not met, the petitioner is asking me to set aside the 2016 Will. The respondents rely on a number of cases where perfection is not required: *Laramée v. Ferron* (1909), 41 S.C.R. 391; *Brydon v. Malamas*, 2008 BCSC 749; *Leung v. Chang*, 2013 BCSC 976; and *Lodge v. Royal Trust Corporation of Canada*, 2003 BCSC 1416 at para. 50.

[134] While the deceased's knowledge and understanding need not be perfect, I find that she needed to demonstrate that she understood what her estate contained and what she meant by equalizing the inheritance. The evidence does not support this conclusion.

[135] On a balance of probabilities, I find that the deceased did not have knowledge and approval of the contents of the 2016 Will for the reasons set out above. This is fatal to its validity.

VII. Conclusion

[136] The 2016 Will is of no force and effect because the deceased lacked the requisite capacity when she executed the document. I order that the notice of dispute filed by Kushwaha Kant Singh be removed.

[137] I conclude that the 2013 Will is a valid and subsisting will proven in solemn form. Uma Kant Singh and Sharda Singh are therefore the executors of the deceased's estate, as set out in the 2013 Will.

[138] I have not heard submissions from the parties on the matters of costs. In the event that the parties are unable to agree on costs, they are at liberty to file written submissions. Counsel may agree as to the timing of the exchange of their written submissions provided that all the submissions are filed with the Court within 45 days of this decision.

"MacDonald J."

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