

CANADA / JUDGMENT

Swift v. Nazaroff

2023 BCSC 1602

COURT

Supreme Court of British Columbia

DECIDED

12 September 2023

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2023 BCSC 1602 Swift v. Nazaroff

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Swift v. Nazaroff,

2023 BCSC 1602

Date: 20230912

Docket: S47225

Registry: Penticton

Between:

Nataline Swift

Petitioner

And

Wallace Nazaroff, by his Litigation Guardian, the Public Guardian and Trustee,

Holly Tina Burrow and Terry Burrows

Respondents

Before: The Honourable Justice Hardwick

Reasons for Judgment

Counsel for the Petitioner:

N. Zaseybida

Counsel for the Respondent,

Public Guardian and Trustee:

D. Polley

Counsel for the Respondents

Holly Burrows and Terry Burrows:

E. MacKinnon

Place and Dates of Trial/Hearing:

Kelowna, B.C.

July 14 and August 2, 2023

Place and Date of Judgment:

Penticton, B.C.

September 12, 2023

- [1] This petition results from a dispute about ownership and use of a certain parcel of improved real property arising between siblings after the passing of their mother. The dispute has effectively caused lines to be drawn in the proverbial sand and resulting in possibly irreparable damage to certain sibling relationships.
- [2] The underlying factual matrix, combined with the legal issues, are complicated and has been looming like a dark cloud over the family for some years. I am thus very grateful for the able submissions of all counsel to allow me to render judgment in a timely way. I would not have been able to do so without their assistance.

Suitability for Summary Determination

- [3] By coincidence, this petition came on before me in chambers in March of 2022 on an interlocutory basis.
- [4] I subsequently pronounced an order on March 24, 2022 (which was entered on May 10, 2022) that put in place the following procedures:
1. The Parties shall within thirty (30) days of this order exchange Lists of Documents including any documents which, in accordance with the Supreme Court Civil Rules and which are not already appended to affidavits in this petition proceeding, may prove or disprove a material fact as it relates to the three subject areas, which are generally described as:
 - i. the Intention of Doris Nazaroff;
 - ii. the physical, financial, and mental health circumstances of Wallace Nazaroff; and
 - iii. payment of expenses and maintenance of the property at the material time by Wallace Nazaroff.

2. Each of the parties shall be entitled to up to two and a half hours (2.5) of cross-examination of the other parties on the affidavits filed in this petition proceeding or any additional documents disclosed in accordance with the previous order by Justice Hardwick. This shall occur, unless otherwise agreed by between the counsel, within ninety (90) days of this order. Examinations will be conducted before the court reporter and, if all parties agree, may occur via MS Teams or similar videoconferencing.
 3. For the purposes of the above order (paragraph 2), Holly and Terry Burrows shall be treated as a single party due to the alignment of their interest and will be cumulatively entitled to up to two and a half (2.5) hours of cross-examination even though they are individually named.
 4. The entirety of the transcript of any cross-examination conducted pursuant to this order shall be admitted into evidence before the Judge hearing the petition on its merits.
 5. The Petition shall be reset for hearing at a mutually convenient date forthwith after the receipt of all transcripts of the cross-examinations conducted pursuant to this Order.
 6. The application to transfer or consolidate this proceeding is dismissed, as the Court is not satisfied that the evidentiary basis for such relief was made out and further, the Court ultimately does not believe it would assist in resolving this matter in a way that accords with the principles of the Supreme Court Civil Rules.
 7. Costs of this appearance shall be in the cause, based upon it being a half (0.5) day application.
- [5] The parties all complied with my March 24, 2022 order and I have the benefit, as a result, of the transcripts of the cross-examination of Wallace Nazaroff, Holly Burrows, Terry Burrows and Nataline Swift on their affidavits.
- [6] In my view, this process is entirely compatible with the principles set forth in *Cepuran v. Carlton*, 2022 BCCA 76.
- [7] As has been articulated by this Court previously, prior to *Cepuran, British Columbia (Milk Marketing Board) v. Saputo Products Canada G.P. / Saputo Produits Laitiers Canada S.E.N.C.*, 2017 BCCA 247, commonly known as *Saputo*, was the authority for converting a petition to an action under the Supreme Court Civil Rules. The "Saputo rule" was that a petition must be referred to the trial list where there was a bona fide triable issue. The Court of Appeal in *Cepuran* stated, however, that the existence of a triable issue is no longer a good reason to convert a petition into an action. This new approach advocated by the Court of Appeal is to tailor the procedure to the proceeding. This is in line with the modern approach to civil procedure as encouraged by the Supreme Court of Canada as set out above in *Hryniak v. Mauldin*, 2014 SCC 7. The approach is intended to allow parties and trial courts to tailor the pre-trial and trial procedures to a given case in the interests of proportionality and access to justice, while preserving the court's ability to fairly determine a case on its merits.

- [8] I thus have concluded that it is appropriate to determine this matter on its merits as sought by the parties. Although there still remain some discrepancies in the evidence, even with the benefit of the cross-examination transcripts, I conclude I can find the necessary facts to determine what are primarily legal issues. Further, to convert the petition to an action would not be proportional and would unduly limit the access to justice.

Overview of the Parties

- [9] I shall return to the facts in more detail, but in order to put into context the relief sought it is necessary to understand who the parties are and what the dispute as between the parties centres upon.
- [10] Before doing so, I confirm that I will, upon identifying the parties and the affiants who provided evidence in support of any of the parties, be referring to them by their chosen name given the commonality of surnames. I do so with no disrespect but in the interest of clarity and judicial efficiency.
- [11] The Petitioner, Nataline Swift ("Nataline"), resides in Castlegar, BC.
- [12] Doris Nazaroff ("Doris"), also formerly a resident of Castlegar, BC, died on January 16, 2017, leaving a Will that was executed on September 17, 1998 (the "Will").
- [13] Doris Nazaroff was a widow and survived by six children:
1. Nataline;
 2. the respondent Holly Tina Burrows ("Holly");
 3. Michael Nazaroff ("Michael");
 4. Wallace Nazaroff ("Wallace");
 5. Andy Nazaroff ("Andy"); and
 6. Sonia Nazaroff ("Sonia").
- [14] Holly is married to the respondent, Terry Burrows ("Terry").
- [15] The Will appointed Doris' daughters, Nataline and Holly, to be co-executrixes of the Will and co-trustees of the Doris's estate (the "Estate").
- [16] On October 4, 2018, this Court granted probate of the Will to Nataline and Holly in Supreme Court of British Columbia Nelson Registry Action #19798 (the "Probate Action").
- [17] At the time of her death, Doris was:
- a) the registered owner of property located at 3462 Yeatman Road, South Slocan, BC, and legally described as:

PID: 009-642-463

Parcel A (Reference Plan 530651)

District Lot 2088

Kootenay District

("the "Property").

- b) the joint registered owner, along with Holly, of an account at the Kootenay Savings Credit Union (the "Credit Union Account"); and
- c) the owner of certain personal effects.

[18] Of significance is that on July 10, 1998, Doris signed a Form A Freehold Transfer purporting to transfer the Property into joint names with herself and Nataline (the "Form A Transfer"). Although in registrable form, the Form A Transfer was not actually registered in the Land Title Office prior to the death of Doris. It was instead stored by Doris in a safe at the Property.

[19] Of further significance, Nataline admits in her evidence that she raised the failure to register the transfer with Doris in or about September 2016, some approximately 18 years later. This was not long prior to Doris' death but a time at which Doris, on the evidence before me, I am satisfied still had requisite capacity to manage her personal affairs. I am further satisfied Doris told Nataline not to register it at that time but to instead have it registered when she died. Nataline deposes that Doris further told her that there was money in the Credit Union Account to pay for the costs associated with the transfer. In my view, this latter evidence is of limited probative value. None of the parties in this petition are affluent but there is no reasonable suggestion that the modest cost of registering the Form A Transfer was a genuine impediment to Doris implementing her intentions vis-à-vis the Property.

[20] After Doris passed on January 5, 2017 Nataline did, I accept on the balance of probabilities, obtain the originally signed Form A Transfer with Holly's knowledge from the safe at the Property. The evidence of Holly and Nataline does diverge somewhat on the specific events of this day but, in my conclusion, these conflicts are not material. Holly was residing at the Property at the material time (along with Terry). Nataline requested access to the safe and Holly granted her request. Holly left the Property to walk her dog while Nataline was reviewing the contents of the safe and gathering documents. Thus, while Holly may not be able to confirm exactly what Nataline removed from the safe, the evidence establishes that Holly had access to the safe prior to and did not consider it necessary to supervise Nataline's review and removal of its contents.

[21] Nataline deposes that she thereafter took the originally signed Form A Transfer for the property to the law firm of Polonicoff & Perehudoff in Castlegar. This was some approximately five months after Doris passed away. She further deposes she left it with a lawyer by the name of Christopher Cook and requested that he attend to registering the same in the applicable Land Title Office. After some notable delay, Nataline states that she

checked back with said lawyer, Mr. Cook, as to the status of the registration of the Form A Transfer. Nataline deposes she was then advised by the law firm staff that the transfer had not been registered and, more importantly, they were unable to locate the original Form A Transfer.

- [22] In December 2021, again after significant delay, Nataline personally attempted to attend at the law office of Polonicoff & Perehudoff to address the whereabouts of the Form A Transfer. Upon doing so, Natalie learned that the law firm no longer occupied its prior office space. Nataline made several attempts to contact the law office by telephone and there was similarly no answer. The Law Society of BC lists Jacob Polonicoff as a former lawyer and there are no listings for Alex Perehudoff and Mr. Cook.
- [23] Counsel for the respondents and the Public Guardian and Trustee raise some issue with the lack of corroboration of these events. In my view, Nataline's credibility on this point was not successfully challenged on cross-examination. I accept that despite some vague language in her affidavit that she did in fact leave the Form A Transfer she took from Doris' safe with Mr. Cook's office, that the Form A Transfer left was likely an original, that it ultimately cannot be located and that Polonicoff & Perehudoff ceased operations as a law firm. I do consider it material though that Nataline did not pursue this issue with any degree of diligence in contrast to the greater diligence she pursued the probate of Doris' Estate. In my view, this is consistent with Nataline's view that the Property would flow to her through the Estate versus by right of survivorship as I will return to.

The Petition - Relief Sought

- [24] The Petition, filed January 10, 2022, seeks various declaratory relief and ancillary orders. I have reproduced in its entirety on a verbatim basis and as such, the defined terms do not necessarily correspond identically to the remainder of these reasons for judgment:

The Applicant applies for a Declaration that:

1. At the date of the death of Doris Nazaroff, January 16, 2017, Wallace Nazaroff had a permanent residence in the City of Whitehorse, Yukon

The Applicant applies for Declarations to the following questions:

2. If the Form A Freehold Transfer that Doris Nazaroff signed on July 10, 1998 was to be registered in the Land Title Office upon the death of Doris Nazaroff, do the terms of occupancy of the Property by Wallace Nazaroff set out in the Will of Doris Nazaroff apply?
3. If Wallace Nazaroff had a permanent residence on the date of the death of Doris Nazaroff, is Wallace Nazaroff entitled, pursuant to the Will of Doris Nazaroff, to occupy the property civically described as 3462 Yeatman Road, South Slocan, B.C. and legally described as:

PID: 009-642-463

Parcel A (Reference Plan 530651) District Lot 2088 Kootenay District
(the "Property")

4. If Wallace Nazaroff disposed of his permanent residence after the death of Doris Nazaroff, is he entitled, pursuant to the Will of Doris Nazaroff, to occupy the Property?
5. If Wallace Nazaroff is entitled to occupy the Property, under what terms is Wallace Nazaroff entitled to occupy the Property; and is he entitled to allow anyone else to occupy the Property?

The Applicant applies for Orders that:

6. An Order that 3462 Yeatman Road, South Slocan, B.C, and legally described as:
PID: 009-642-463

Parcel A (Reference Plan 530651) District Lot 2088 Kootenay District
("3462 Yeatman Road")

be vested in the name of Nataline Swift;

7. Counsel for the Petitioner is at liberty to file a Court Certified Copy of this Court Order with the Land Title Office for the purpose of vesting title of 3462 Yeatman Road in the name of Nataline Swift.
8. Upon a Court Certified Copy of the Court Order vesting title of 3462 Yeatman Road in the name of Nataline Swift being filed with the Land Title Office, the Registrar of Land Titles shall register title of PID; 009-642-463 Parcel A (Reference Plan 530651) District Lot 2088 Kootenay District in the name of Nataline Swift.
9. Wallace Nazaroff vacate the Property, within 30 days of written notice to vacate from Nataline Swift.
10. Holly Tina Burrows and Terir Burrows vacate the Property within 30 days of written notice to vacate from Nataline Swift.
11. Costs

Doris' Will

[25] The Will provides that:

IN THE EVENT my daughter, Nataline Swift, has not obtained my house & property known as Parcel A, District Lot 2088, Kootenay District Plan 530651, by right of survivorship (hereinafter referred to as "Parcel A"), then I GIVE, DEVISE AND BEQUEATH all right, title and interest in Parcel A to my daughter, NATALINE SWIFT, for her use absolutely and forever, subject however, to the right of my son, WALLACE nazaroff, to occupy the premises in such circumstances and for such time as may be required when he has no other permanent residence, provided, however, that my son, WALLACE NAZAROFF, shall be responsible for all expenses, including taxes, utilities

and upkeep (maintenance) while he resides on the property."

Further Factual Background

- [26] Wallace was born in 1961. He is currently 62 years of age.
- [27] Wallace completed high school but through a modified program called "Aspire" for children with challenges operated through L V Rogers Secondary school in Nelson. His sister Sonia, who is the sibling who is not involved in the litigation due to her health and personal circumstances, attended the same modified program.
- [28] Prior to 1985, Wallace primarily resided with his parents. He had attempted to reside independently in Nelson, BC, for a period of time in 1985 and did obtain employment in that community, but that was ultimately not a successful experience for Wallace.
- [29] In 1985, Wallace moved to Whitehorse in the Yukon Territory. At that point in time, Nataline and her spouse were living in Whitehorse. Wallace stayed with Nataline and her spouse briefly for approximately a month before obtaining his own residence.
- [30] Wallace lived in Whitehorse for approximately 32 years. Nataline and her spouse left the community well prior, in 1990.
- [31] When Doris passed away in 2017, Wallace was working as a janitor/custodian at the Yukon College in Whitehorse and maintained a residence in a mobile home park in Whitehorse which he purchased in or about 1998. Wallace had other employment while living in the Yukon Territory which, in the early years, included working in a remote camp. There are other details as to his employment history in his affidavit but I am not detailing this evidence as, in my view, those are not material as I conclude he did have a residence of his own as of the date of Doris' death and was economically self-sufficient.
- [32] Wallace, I accept, however, has complex health issues - both from a physical health perspective and a mental health perspective. As a child, Wallace suffered from what he deposes was a "medical seizure disorder". This continued into adulthood. Wallace's mental health challenges began in the 1990s. They are significant. It is not necessary in Wallace's privacy interests to detail the diagnoses and extent of his mental health issues as I make a finding of fact that they are established on the evidentiary record. Wallace also struggled with substance misuse for a time. He has sought treatment for these challenges, which included regular physician visits, counselling and periodic hospitalizations. Compounding this, Wallace contracted an incurable virus that weakens his immune system and for which he takes medication and he also receives medical treatment for. The date upon which Wallace was formally diagnosed with having contracted this virus is unclear in the evidence but was, it would appear from his cross examination, during the time he resided in Whitehorse.

- [33] Doris was aware of Wallace's health issues and stayed in regular contact with him. When Wallace was non-responsive due to mental health issues, Doris would contact the police to conduct a wellness check on him. This happened on more than one occasion.
- [34] Of significance, Nataline in her evidence, I find, significantly downplays Wallace's medical and physical health issues. I conclude she does so as this serves her self-interest in obtaining title to the Property free from any obligations to or rights of Wallace.
- [35] Also, of significance, prior to Doris' death, Holly and Terry moved onto the Property and commenced living on the Property.
- [36] After Doris died, Wallace returned to the Kootenay region of British Columbia for her funeral. A family meeting was called during his visit and tensions were clearly high as between certain of the siblings. Wallace had genuine difficulty, I accept, coping with these tensions and the grief over his mother's passing. Nataline, in contrast, wanted to proceed with the administration of Doris' estate forthwith.
- [37] The passing of Doris and corresponding familial conflict created more challenges for Wallace. Upon returning to Whitehorse, his situation deteriorated.
- [38] In or about mid February of 2017, Wallace attempted to hitchhike "home" to the Kootenay region of British Columbia from Whitehorse. Wallace has no real memory of his actions until the police picked him up from the side of the road and he was admitted to a hospital in Prince George. The distance between Prince George to Whitehorse is some approximately 1,600 kilometres. Having regard to his health issues and the stressors in play at the given time, I do not consider his inability to recall this period of time as detrimental to his credibility. To the contrary, I conclude they are consistent with the significant mental health challenges Wallace has dealt with over the years and why Doris was particularly cognizant of recognizing this as his mother.
- [39] After an extended hospitalization in Prince George, Holly and Terry assisted Wallace in organizing his affairs and moving back to the Property where, as noted, they were already residing.
- [40] As part of the above process, Wallace left his employment as a janitor/custodian at the Yukon College where he had been working for many years and sold his manufactured home in Whitehorse in or about September 2017. Wallace moved into the house on the Property in or about October 2017. Wallace receives a pension from the Yukon College and has, during certain of the material times since coming to reside at the Property worked at Save-on-Foods.
- [41] Holly and Terry, I accept, provide considerable support to Wallace with respect to both his mental health and physical issues. All three reside on the Property at present. It is their desire to continue to remain on the Property with Wallace and continue to provide that support. They have refused Nataline's requests to vacate the Property.

- [42] For the record, there is also affidavit evidence before me from other family members as to statements Doris allegedly made about her intentions regarding the Property over the approximately 18 years between the date of the Transfer and Doris' passing. None of these witnesses were cross-examined on their evidence. More importantly, I ultimately do not find their evidence to be probative to the issues at hand given that:
- a) Nataline's own evidence is that Doris did not instruct her to have the Transfer registered prior to her passing. This is in contrast, as I will return, to the registration of the transfer of the adjacent property in 2006 (to be defined in due course as "Lot 1"); and
 - b) The Will is clear and unambiguous on its face that Doris intended Nataline to inherit the Property. The ambiguity arises solely because of the language used regarding Nelson having a "permanent residence" and whether the language used conveys a mere licence versus a life estate.
- [43] Consistent with my above finding, I conclude, is Wallace's unchallenged evidence under cross-examination that Doris apparently never had discussions with him about what she put in the Will and that he never asked her as to the contents of her Will. He also was unchallenged on his evidence that he had no input into the preparation of the Will. Wallace has a clear self-interest in the relief sought in the petition and there would perhaps be a temptation to tailor one's evidence to be consistent with his position that Doris intended to grant him a life estate. He did not do so. I put greater weight on this admission against interest than the evidence of other family members who align with Nataline about statements Doris might have made in passing over the years about her intentions.
- [44] The house on the Property is presently uninsurable. While this is a concern, it is an issue that arose well prior to Doris' passing. It is not one of recent creation which would give much greater concern of potential wasting of an asset.
- [45] As I alluded to earlier and relevant to the relevant family dynamics is the fact that on April 10, 2006, Doris signed a freehold transfer which was promptly registered in the Land Title Office on April 18, 2006, transferring title of the vacant land adjacent to the Property to Holly and Terry. This property, which is some approximately 4.6 acres and is undeveloped, is legally described as:

PID 017-384-834

Lot 1 District Lot 2088

Kootenay District

Plan NEP 19354

("Lot 1")

- [46] In the Will, Doris gifted Lot 1 to Holly if she had not transferred Lot 1 to Holly prior to her death. So effectively Doris made similar provisions in her Will for Natalie and Holly except that Doris made special accommodation for Wallace regarding the Property. However, Doris actually carried through with registering the transfer of Lot 1 well prior to her passing. She did not, as I have outlined, do so with the Property despite specific inquiry from Natalie.
- [47] On April 7, 2016, Holly and Terry transferred title to Lot 1 to their daughter Jasmine Burrows and Wallace, in joint tenancy. Wallace is thus registered as a joint owner of Lot 1. The true motivation behind this transfer is rather unclear. As noted, there are no structures on the property and Wallace requires assistance and support, I accept, with functions of daily living. The utility of him having vacant residential property does not make clear sense to me, even if the carrying costs of Lot 1 are modest due to its rural location and undeveloped status.
- [48] Returning to the chronology, initially steps were taken to probate Doris' Estate in the Probate Action. As part of that process, Natalie swore an affidavit which included the Property as part of the Estate. Said another way, Natalie did not at that time assert that the Form A Transfer was effective as such a position would have allowed the Property to, as is clear, transfer into her sole name by right of survivorship and thus not form part of the Estate. This is inconsistent with her current position as to the efficacy of the Form A Transfer.
- [49] Natalie and Holly were unfortunately unable to work together as executors to finalize Doris' Estate. There is evidence before me in this regard but ultimately, the particulars of the disagreements, respective failures to respond and general disdain of the other are not material given my analysis of the issues which I will detail below.
- [50] On January 19, 2021, Natalie filed a notice of application in the Probate Action to have Holly removed as co-executor and trustee of Doris' Estate.
- [51] On February 16, 2021, by consent, an order was made appointing a Judicial Trustee to complete the administration of Doris' Estate and Natalie and Holly were removed as Trustees. At that time, it was anticipated that a lawyer in Kelowna would act as Judicial Trustee. Said lawyer declined to act. As a result, no Judicial Trustee has even been named or been appointed in respect of Doris' Estate.
- [52] Notwithstanding this, all parties, including counsel for the Office of the Public Guardian and Trustee (the "PGT") which now acts on Wallace's behalf since on or about April 8, 2023, are content to proceed with a hearing of the petition on its merits.

Legal Analysis Regarding the Form A Transfer

[53] Nataline relies on *Chan v. Chan*, 1995 CanLII 2088 (B.C.S.C.) (a decision also available through the www.bccourts.ca search judgment function by name with a release date of February 22, 2005 but without a neutral citation) for the proposition that the signed Form A Freehold Transfer was effective the date it was signed by Doris and carried with it the right to apply for registration of the transfer even after her death.

[54] In my view, Chan is distinguishable on the basis of its very unique facts. This is made clear in the overview set forth in paragraphs 1 to 4 of Chan:

1 This is an application by the petitioners, for an order cancelling the registration, at the New Westminster Land Title Office, of three Freehold Transfer forms, each dated August 11, 1993, and made by the late Wai Tung Chung in favour of himself and the respondent, in joint tenancy. The three Freehold Transfer forms, pertaining to property owned by Mr. Chung at 1785 East Kent Avenue North, 2128-2130 East Pender Street and 3489 Quebec Street, all in the City of Vancouver, were accepted for registration by the New Westminster Land Title Office on July 22, 1994.

2 The additional facts, which are not in dispute, are as follows: The petitioners are the representatives of the Estate of Mr. Chung, a sculptor, formerly of the City of Vancouver. Mr. Chung died intestate on July 21, 1994 in Hong Kong. Letters of administration in respect of the deceased's estate were granted on October 24, 1994, and the grant was sealed by the court on November 2, 1994.

3 The forms were prepared in Vancouver by a notary public, Mr. Peter Woo, and executed by Mr. Chung on August 11, 1993, each for a stated consideration of \$1.00. On July 2, 1994 Mr. Chung, who was then in Hong Kong, phoned Mr. Woo and instructed him to register the three forms before Mr. Chung returned to Vancouver "at the end of July". Mr. Chung died in the presence of the respondent, on a plane on the way to Vancouver from Hong Kong, on July 21, 1994. Mr. Woo was then informed of Mr. Chung's death by the respondent. Mr. Woo then filed the three forms at the Land Title Office.

4 The petitioners maintain the position that the registration of the three forms, after the death of Mr. Chung, and before his personal representatives were appointed, were illegal. Counsel agree that the only issue before me is whether or not the registrations were illegal. Such matters as the validity of the transfers, or the legality of the respondent's claim to be a beneficiary of the estate, and so on, are not before me. Simply put, the petitioners say that upon his death, Mr. Chung's estate, including the three properties, immediately devolved to and became vested in them, as his personal representatives.

- [55] As will be apparent, there were clear instructions provided to the solicitor to register the transfers at a time contemporaneous to the passing of Mr. Chung. Mr. Chung had given instructions to the notary less than three weeks prior and was literally on route to Canada at the time of passing. As such, Justice Hood's conclusion was appropriate. The instructions had been given and there had been no revocation or even variation of those instructions prior to Mr. Chung's passing. The solicitor was thus entitled to act upon those instructions.
- [56] Further, Justice Hood made very clear it was a very narrow issue that was before him.
- [57] This is a different factual matrix. As I have articulated, the Form A transfer was prepared in 1998. It is uncontradicted Doris made an intentional decision not to register it but instead store it in a safe at the Property. She also expressly declined Nataline's request to register the Form A Transfer in 2016 prior to her passing. In contrast, she did actually authorize the registration of the transfer of Lot 1 to Holly and Terry.
- [58] I thus conclude that the misplacement of the Form A after being provided to Mr. Cook at Polonicoff & Perehudoff is actually something of a "red herring". Had Doris intended to transfer title to Nataline to allow her to obtain sole title to the Property by right of survivorship, I conclude she would have done so in the more than 18 years after the Form A Transfer was executed. She did not.
- [59] As I will return to, this does not change the fact that Doris still intended Nataline to obtain ownership of the Property as set out in her Will. However, by keeping the Property within her Estate she continued to make provision for Wallace, as might be required, in accordance with the terms of her Will. Upon registration of the Form A Transfer, Doris no longer had such authority as the use and any possible disposition of the Property would be solely in Nataline's authority upon her passing.

Law Regarding Licenses to Occupy and Life Estates

- [60] In *Re Zalopsky Estate*, 2009 BCSC 24, Madam Justice Ross set out the following instructive principles regarding the importance of determining testamentary intention. Specifically, paragraph 13 provides as follows:

- [13] The primary purpose of the court in the construction of a will is to determine the intention of the testator having regard to the language used, and the circumstances in which the will was made. The general principles to be applied by the court were set out in *Re Campbell Estate*, 2005 BCSC 1561, 49 B.C.L.R. (4th) 148 as follows at para. 10 and 11:

The construction process has been described in *Re Burke*, [1960] O.R. 26, 20 D.L.R. (2d) 396 at 398 (C.A.) (cited with approval in *Davis Estate v. Thomas*, (1990), 40 E.T.R. 107 (C.A.):

The Court is now called upon to construe a particular document and at the outset I emphasize what has been said before so frequently. The construction by the Court of other documents and decisions in other cases respecting the intention of other testators affords no assistance whatsoever to the Court in forming an opinion as to the intention of the testator in the particular

case now under consideration. Other cases are helpful only insofar as they set forth or explain any applicable rule of construction or principle of law. Each judge must endeavour to place himself in the position of the testator at the time when the last will and testament was made. He should concentrate his thoughts on the circumstances which then existed and which might reasonably be expected to influence the testator in the disposition of his property. He must give weight to those circumstances in so far as they bear on the intention of the testator. He should then study the whole contents of the will and, after full consideration of all the provisions and language used therein, try to find what intention was in the mind of the testator. When an opinion has been formed as to that intention, the Court should strive to give effect to it and should do so unless there is some rule or principle of law that prohibits it from doing so.

In the construction of wills the primary purpose of the court is to determine the intention of the testator. The court will only resort to rules of construction or presumptions when it cannot determine the testator's intention with certainty by giving his or her words their natural and ordinary meaning: *Fleury Estate v. Fleury Estate*, [1965] S.C.R. 817, 53 D.L.R. (2d) 700. In construing the will, the courts should give effect to the probable intent of the testator, taking into account the general scope and purpose of the will: *Cullen Estate v. Patricia L. Cullen Composers' Trust* (1997), 17 E.T.R. (2d) 197 (Ont. Gen. Div.). Where the testator's language is ambiguous, the court is entitled to consider not only the will itself but also the circumstances surrounding the making of the will at the time it was made: *Re Kline* (1980), 21 B.C.L.R. 273, 7 E.T.R. 176 (C.A.).

[61] In *Zalopsky*, Madam Justice Ross further considered the issue of whether the Will (as it is defined in that case) created a life estate in the subject property. Specifically, at paragraphs 14 and 15 she stated as follows:

[14] It was the position of each of the respondents with respect to the first question that the Will created a life estate in the Property. In my view, this is the correct construction. While no particular words are required to create a life estate, the term a grant of the "use" of a property has been found to confer a life estate; see *Christensen v. Martini Estate*, [1999] 10 W.W.R. 417, 232 A.R. 339 (C.A.), *Re Waters* (1978), 21 O.R. (2d) 124, 89 D.L.R. (3d) 742 (S.C.).

[15] In addition, the Will confers not only the "use" but also the "benefit" of the Property to the three daughters. Sale of the Property is not contemplated under the terms of the Will until after the death of the last of the three single unmarried daughters. These daughters made the Property their home at the time the Will was drafted. This is all consistent with the granting of a life estate as opposed to a mere licence to occupy.

[62] In *Barsoski Estate v. Wesley*, 2022 ONCA 399, which is persuasive but not binding authority on this Court, Justice Harvison Young stated as follows on the issue of distinguishing a life interest and a licence:

9 At para. 19 of her reasons, the application judge summarized the difference between a life interest and a licence:

A licence is the permission by competent authority to do an act that, without permission, would be a trespass. A licence with respect to real property is a privilege to go on premises for a certain purpose, but does not operate to confer on, or vest in, the licensee any title or estate in such property. The holder of a life estate has the right to immediate possession of the property and to its use as the owner, subject to some restrictions to protect the rights of the person entitled to the property at the end of the life estate. Rights to use and transfer the property are restricted by the terms of the grant and the common law doctrine of waste. Life tenants are ordinarily responsible for current expenses and routine maintenance. [Citations omitted.]

10 At para. 20, the application judge referred to some examples of testamentary phrases conveying estates:

These cases included examples such as: "shall have the right to the occupation, possession and use of my house ... for as long as she remains in possession of the said premises," *Powell v. Powell* [(1988), 62 Alta. L.R. (2d) 379 (Q.B.)]; "to permit my son ... so long as either of them shall occupy the same to have the use and enjoyment of my property," *Moore et al. v. Royal Trust Co. et al.*, [1956] S.C.R. 880; "to hold my property ... as a home ... until her death or until she is not residing therein personally" *Re McColgan*, [[1969] 2 O.R. 152 (H.C.)].

11 As she correctly noted, "there is no overarching principle that reconciles the results in these decisions": *Kaptyn Est., (Re)*, 2010 ONSC 4293, 102 O.R. (3d) 1, at para. 32. At para. 22, she articulated the principles governing the interpretation of wills:

The prevailing approach to will interpretation requires a court to concentrate on the subjective meaning of the words used by a testator in her will. A court should consider the words used in light of the surrounding circumstances, consider other admissible evidence and give the words placed in a will the meaning intended by the particular testator. Technical legal words are likely to be assigned their technical meaning where they have acquired a fixed meaning in law. A court should put itself in the place of the testator at the time she made her will and concentrate on the circumstances which then existed, and which might reasonably be expected to influence the testator. Direct evidence of a testator's intention generally is considered inadmissible, whereas indirect extrinsic evidence may be used by a court to explain what the testator wrote, but not what she intended to write. Admissible indirect evidence of surrounding circumstances includes such matters as the character and occupation of the testator, the amount, extent and condition of her property, the persons who comprised her circle of friends. [Citation omitted.]

[63] Justice Harvison Young continued at paragraphs 21 -24:

21 The parties agree that the application judge correctly articulated the four fundamental and oft-cited principles that govern the interpretation of wills:

- (i) a will must be interpreted to give effect to the intention of the testator. No other principle is more important than this one;

(ii) a court must read the entire will, as a whole. The words used in the will should be considered in light of the surrounding circumstances (also known as the "armchair rule");

(iii) a court must assume that the testator intended the words in the will to have their ordinary meaning; and

(iv) a court may canvas extrinsic evidence to ascertain the testator's intention.

22 As the principles enunciated above recognize, the same words and gifts in different wills with different contexts may be, and have been, interpreted both as licences and life interests. The cases, in this respect, are irreconcilable, as many of them recognize: *Kaptyn Estate*, at para. 32. For example, in *Moore v. Royal Trust Co.*, a grant of "use and enjoyment" was found to grant a licence, while the same words were found to create a life estate in *Re McLean*, [1941] 1 D.L.R. 722 (N.B.S.C., A.D.).

23 The challenge for any judge interpreting a will is the fact that the case law is of limited assistance precisely because of the importance of the testator's own intentions and of the wide range of factors that may be taken into account in discerning those intentions. While the authorities generally cite the same accepted principles, they often reach apparently irreconcilable results.

24 On the distinction between life interests and licences, the application judge summarized the cases as follows:

These decisions alternately concluded that the grants of the property were a life estate or a licence. Counsel agreed that there is no overarching principle that reconciles the results in these decisions. Since the meaning of words in wills can differ so much according to the context and circumstances in which they are used, it seldom happens that the words of one instrument are a safe guide in the construction of another. Each case is an authority only on the facts involved, except in so far as it may set forth or explain any applicable rule of construction or principle of law: *Kaptyn Estate*, *Re*, at para. 32.

[64] As recognized in *Barsoski*, *Moore v. Royal Trust Co.*, [1956] S.C.R. 880, remains the only Supreme Court of Canada decision with respect to the distinction between a life estate and a license. *Moore* was an appeal from a decision rendered by the British Columbia Court of Appeal.

[65] In *Moore*, the testator granted the "use and enjoyment" of the subject property to his child and spouse "as long as either of them shall occupy same". In delivering the primary judgment on behalf of the court, Justice Cartwright held that the will granted a license not a life interest on the basis that the will vested the subject property's legal estate in the estate trustees, rather than the beneficiaries (see p. 885).

[66] Notwithstanding the decision in Moore, there are other decisions in other provinces which have subsequently considered somewhat similar testamentary clauses and concluded that a life estate was intended despite somewhat imprecise or imperfect drafting. I refer in this regard to the quote from Justice Kent in *Lecky Estate v. Lecky*, 2011 ABQB 802 [Lecky] at para 152:

[S]everal cases considering Moore have found life estate to exist instead of licenses, where the use of a home and contents is granted for life, even where the word "life" was not used [Citations omitted].

[67] The result in *Lecky*, along with its underlying authorities, is reviewed in some detail in Barsoski (see paragraphs 29 - 33).

[68] Returning to Barsoski, the analysis of Justice Harvison Young J.A. on the significance of contextual interpretation starting at paragraph 38 and continuing to paragraph 43 are instructive:

38 It is easier to reconcile the cases, or at least their ultimate results, when one considers the contextual interpretation of the will in the characterization of certain gifts as either licences or life interests. In recent years, courts have increasingly and expressly recognized the important and often determinative significance of the contextual factors when determining whether such gifts grant licences or life interests.

39 In *Lecky*, for example, Kent J. noted, at para. 153, that:

In finding a life estate to exist, case law also appears to give weight to the fact that the testator had resided with his wife in the property, just as Mr. and Mrs. Lecky had. When this is the case, it is likely that the testator intended that she have the right to continue to occupy the property after his death, for the duration of her life. In *Re McColgan*, the Court considered the particular language of the will, "in the context of the particular circumstances of the testator, beneficiaries and the estate itself": para 22. Accordingly, a determination of whether Mrs. Lecky was granted a life estate or a licence requires both a contextual analysis and an examination of the language used in the Will. [Citation omitted; emphasis added.]

40 The Moore case, as I have noted, has been cited as authority that vesting the property in the trustee creates a licence. In that case, the challenge for the courts (including the courts below which had both reached different conclusions: [1954] 3 D.L.R. 407 (B.C. S.C.); [1955] 4 D.L.R. 313 (B.C. C.A.)) was that, while the beneficiaries had been living in the house when the will was made, by the time the testator died and the dispute arose, the son and his wife had moved to Westview to pursue employment. They then moved to White Rock because of their daughter's ill health.

41 Interestingly, while finding that the grant was of a licence not a life interest, the court went on to find that the gift was not defeated because the son and his wife lived outside the house for a few years before the testator's death. Writing for the majority of the court, Cartwright J. stated "I do not think that the words 'so long as' ... necessarily require continuous occupation ... as a

condition of their being entitled to the permission given by the clause, but rather that the testator has used these words as the equivalent of 'while' or 'during the time that' or 'during the time as': at p. 884.

42 For present purposes, the point is that while the Supreme Court applied the text of the gift quite strictly and literally for the purposes of determining whether it was a licence or a life interest, it applied a much more contextual interpretation to the meaning of whether the clause "necessarily" required continuous occupation, and found that the appellants' absence for several years did not bring about a forfeiture of their rights as licencees.

43 Indeed, the context surrounding testamentary bequests often weighs heavily on the court's interpretation. In *McColgan*, for example, Keith J. found that a life estate was "much more consistent in the circumstances peculiar to this will and the persons involved": at p. 578. In *McKay v. Henderson*, Stevenson J. interpreted a testamentary gift according to its terms, "the relationships and the circumstances of the parties": at p. 316. Thus, the context or circumstances frequently provide the distinctions that the words of the will cannot reconcile.

Contractual Analysis Generally

[69] Although it is a Will to which I am being required to interpret, the Will is still a document. As such, and as I raised with counsel in the course of submissions, it thus is to be interpreted in accordance with the guiding principles set forth by the Supreme Court of Canada in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53.

[70] *Sattva* stands for the proposition that the relevant provisions of the Will must be construed by reading the Will as a whole in the context of the surrounding circumstances in which it was made (*Sattva* at para. 47). As further stated at para. 47 of *Sattva*, "Words alone do not have an immutable or absolute meaning".

[71] Further, an ordinary and grammatical meaning of the words are important and the surrounding circumstances must never be allowed to overwhelm the language the parties agreed upon to effectively create a new agreement (*Sattva* at para. 57).

[72] In my view, *Sattva* is consistent with the law forth in *Zalopsky and Barsoski*.

Analysis

[73] Applying the foregoing law in interpreting the Will, I have ultimately concluded that the Will grants Wallace a life estate in the Property versus a license.

[74] Specifically, I conclude that the language "subject however, to the right of my son, WALLACE NAZAROFF, to occupy the premises in such circumstances and for such time as may be required when he has no other permanent residence" in the Will was intended by Doris to give Wallace the right to live on the Property, for his lifetime, as may be required due to his circumstances.

- [75] Said another way, I have specifically concluded that this interpretation of the Will is consistent with Doris' testamentary intention to ensure that Wallace would always, having regard to his recognized challenges, have a place to reside during his lifetime.
- [76] In particular, I find that the use of words "for such time" does not limit Wallace's ability to reside elsewhere at times. Specifically, as I have detailed, Wallace has been hospitalized on a number of occasions, sometimes for extended durations, due to his mental health issues. Doris was aware of this during her lifetime and I conclude Doris would not have wanted Wallace to forego seeking medical assistance as required, including hospitalization, at risk of losing his right to occupy the Property.
- [77] This is also consistent, I find, with my conclusion that if Doris intended to transfer the Property to Nataline free from Wallace's life estate interest she would have done so. This would have placed any possible opportunity for Wallace to reside at the Property at Nataline's whim.
- [78] I further conclude that nothing in the language in the Will precludes Wallace from having a third party or third parties reside on the Property with him to provide him with assistance in his day-to-day living functions. Again, such an interpretation would not be consistent, in my view, with Doris' intentions to ensure that Wallace was looked after. It would be illogical to think that she intended Wallace to have to live alone in a rural property in a relatively remote community with her knowledge of his circumstances and intention to protect his interests.
- [79] This is also not a situation where Wallace is generating rental revenue from the Property. Holly and Terry do receive a benefit from residing on the Property but Wallace is not profiting from this arrangement. Their contribution to expenses for the Property simply allows him to comply with the terms of his life estate by paying the expenses for the Property in accordance with the Will. In addition, and as I have already noted, Holly and Terry provide unpaid services to assist Wallace which justify the present arrangement.

Determination on Relief Sought

- [80] On the basis on the above reasons, I have concluded as follows regarding the relief sought in the Petition, the terms of which are set forth in paragraph 24 of these reasons for judgment:
- a) Paragraph 1- 4: I dismiss the declaratory relief sought by Nataline;
 - b) Paragraph 5: I declare that:
 - i. Wallace is entitled to occupy the Property on the basis of the terms set forth in the Will which I have concluded entitle him to a life estate in the Property;
 - ii. Wallace is responsible, pursuant to the Will, for all expenses, utilities and maintenance of the Property for the duration of his life estate, except as otherwise provided herein;

- iii. Wallace is not precluded from having Holly and Terry reside on the Property with him so long as the Property remains his primary residence. Wallace obviously retains the right, however, to terminate Holly and Terry's right to occupy the Property as invitees, at his discretion, upon appropriate written notice. That is a legal issue as between those parties which I shall not adjudicate further on this issue;
- iv. In the event Wallace were to terminate Holly and Terry's right to occupy the Property during the course of his life estate, Wallace is permitted to have an alternative third-party caregiver or caregivers reside at the Property with him so long as the Property remains his primary residence;
- v. The Property shall continue to constitute Wallace's primary residence in the event that Wallace is hospitalized or residing in a health care facility for the purposes of medical care unless the PGT consents, on Wallace's behalf, that Wallace's primary residence ceases to be the Property on a permanent basis;
- vi. In the event the Property ceases to be Wallace's primary residence with the consent of the PGT as contemplated in subparagraph (iv), Holly and Terry, should they still be residing on the Property, must vacate the Property upon sixty (60) days written notice from Nataline unless otherwise agreed in writing between Nataline, Holly and Terry;
- c) Paragraph 6: I make this order subject to the terms of the life estate granted to Wallace in accordance with paragraph 80(b)(ii) of these reasons for judgment;
- d) Upon transfer of title to Nataline, Nataline is entitled to obtain insurance, if available, on the Property which lists her as first loss payee. If she does so, Nataline is responsible for paying the premiums.
- e) Paragraphs 7 and 8: I grant these orders as sought in the Petition;
- f) Paragraphs 9 and 10: I dismiss this relief as I have addressed these matters in my declaratory relief regarding the nature of Wallace's life estate in the Property at paragraph 80(b) of these reasons for judgment.

Costs

- [81] Costs are awardable at the discretion of the hearing judge.
- [82] The general principle is that costs are awarded to the successful party but those costs are at the discretion of the presiding justice: Supreme Court Civil Rules, R. 14-1(9). This is the same at trial, summary trial or in the case of a petition.
- [83] In *Tisalona v. Easton*, 2017 BCCA 272, the Court of Appeal stated the law regarding costs as follows:
- [71] Rule 14-1(9) . . . grants unqualified discretion to depart from the prima facie rule that the successful litigant should be awarded its costs.

- [72] This discretion must of course be exercised judicially, not arbitrarily or capriciously. An error in principle in an order departing from the usual rule will justify intervention by this court: *Brito (Guardian ad litem of) v. Woolley*, 2007 BCCA 1. Subject to such an error, the discretion is very broad.
- [84] In this case, the respondents have been the successful party.
- [85] I see no reason in the circumstances to deny the respondents, Holly and Terry, the benefit of a costs order.
- [86] Accordingly, I order that Holly and Terry are entitled to their costs of this petition on the basis of it being of ordinary difficulty pursuant to Appendix B of the Supreme Court Civil Rules.
- [87] As it relates to Wallace, his interests since on or about April 8, 2023, have been represented by the PGT. I did not receive specific submissions on how this would factor into an award of costs as he was previously represented by counsel and then self-represented for a period of time.
- [88] I am thus going to order that if costs are sought on Wallace's behalf that the PGT file written submissions within two weeks of the release of these reasons. Counsel for petitioner shall file written submissions two weeks thereafter. No reply submissions are required.
- [89] The written submissions shall be provided to me through Supreme Court Scheduling.
- [90] In the event circumstances arise and counsel are able to reach agreement on a somewhat modified schedule for the exchange of submissions, they have leave to do so. However, they must notify Supreme Court Scheduling before the date upon which any submissions are due based on these reasons for judgment. Failing notification of a consent extension, I shall proceed on the basis that no further written submissions on costs are forthcoming after the expiry of the above timetable.
- [91] Finally, upon receipt of any written submissions with respect to costs, I do still retain my jurisdiction to require the parties to make oral submissions. Those submissions, should they be required, can be done through MS Teams at a date to be arranged with Supreme Court Scheduling.

"Hardwick J."

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