

CANADA / JUDGMENT

Waibel Estate (Re)

2023 BCSC 322

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2023 BCSC 322 Waibel Estate (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Waibel Estate (Re),

2023 BCSC 322

Date: 20230306

Docket: P211482

Registry: Vancouver

In the Matter of the Estate of Andreas Michael Waibel, deceased

Before: The Honourable Mr Justice Crerar

Reasons for Judgment

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Place and Dates of Hearing:

Vancouver

November 22-23, 2022

January 19, 2023

Place and Date of Judgment:

Vancouver

March 6, 2023

Table of Contents

Paragraph Range

I. INTRODUCTION

[1] - [7]

II. SUITABILITY FOR SUMMARY DETERMINATION

[8] - [10]

III. DECISION AND DISCUSSION

[11] - [39]

A. Presumption of validity

[11] - [15]

B. Suspicious circumstances

[16] - [39]

IV. ADDITIONAL EVIDENCE

[40] - [42]

V. CONCLUSION

[43] - [45]

I. INTRODUCTION

- [1] Solus Trust Company Limited ("Solus") applies for proof of a will in solemn form. Solus was appointed the executor of the estate of the late Andreas Waibel pursuant to his will dated April 4, 2019 (the "Will").
- [2] An overview of the family members and parties:
 - a) Andreas Waibel: died of a brain tumour (glioblastoma multiforme ("GBM")) on December 6, 2020, aged 58;
 - b) Sabeeha Kurji: married Andreas on April 6, 2019 (two days after the Will); cohabited since 2009;
 - c) Gisela Waibel: Andreas's mother, now in her 80s;
 - d) Joachim Waibel: Andreas's brother;
 - e) Alexander Waibel: Joachim's son; Andreas's nephew.
- [3] Ms Kurji endorses the relief sought by Solus.
- [4] Gisela, Joachim, and Alexander (the "Waibel Parties") oppose the application. They argue that there exist sufficient suspicious circumstances such that the matter should be referred to the trial list, or discovery orders be made. They bring their own cross-application to that effect.
- [5] The key dates to this dispute:
 - a) May 31, 2017: Andreas, Joachim, and Gisela settle various disputes between them with respect to their substantial real estate holdings, held in family trusts or holding companies. Among the terms, Gisela agrees to pay Andreas \$5 million from her alter ego trust;
 - b) November 20, 2017: Andreas makes a will, leaving his principal residence to Ms Kurji and the residue of his estate to Gisela. Gisela, Joachim, and Reinhart Aulinger (Andreas's then-lawyer) are named executors;
 - c) July 2018: Andreas is diagnosed with a GBM brain tumour;
 - d) August 21, 2018: Andreas begins radiation treatment in Houston, Texas with Dr Paul Klimo;
 - e) late 2018 or early 2019: Andreas begins to plan his estate;
 - f) January 2019 - April 2019: Andreas, with Joachim, meets with various legal and accounting advisers concerning his estate;
 - g) February 14, 2019: Andreas first meets with estates solicitor Stephanie Daniels for estate planning assistance, on the referral of Gerry Mazzei, a business lawyer who generally assisted Andreas and his family. Andreas and Ms Daniels had at least eight meetings and telephone calls leading up to the execution of the Will seven weeks later;

- h) April 4, 2019: Andreas attends Farris LLP and signs the Will in front of Ms Daniels and two witnesses. The Will establishes a trust over Andreas's shares, including his shares in the family rental property holding company. From the trust, Ms Kurji is to receive \$360,000 per year, with the remainder, on her death, to Alexander (or to Joachim if Alexander predeceases his father). Ms Kurji is to receive the residue of the estate. The Will removes Gisela as a beneficiary and as executor. Solus is named executor;
 - i) April 6, 2019: Andreas and Ms Kurji marry. Gisela attends;
 - j) December 6, 2020: Andreas dies;
 - k) January 29, 2021: Solus sends notice to the parties that it will apply for probate of the Will;
 - l) May 3, 2021: Solus applies for probate;
 - m) August 20, 2021: Joachim files a notice of dispute, alleging that Andreas lacked mental capacity when he signed the Will;
 - n) December 8, 2021: Solus files and delivers this application to prove the Will in solemn form.
- [6] The issue before the Court is narrow: did Andreas have capacity to execute his Will on April 4, 2019? More specifically, have the Waibel Parties established suspicious circumstances such as to dislodge various legal presumptions that Andreas had capacity such that the Will is valid?
- [7] For the reasons that follow, the Court concludes not only that the Waibel Parties have failed in their onus, but that there is copious compelling evidence that Andreas affirmatively did have capacity before, on, and after that date.

II. SUITABILITY FOR SUMMARY DETERMINATION

- [8] The Waibel Parties have applied to convert this application into an action. They argue that they require additional disclosure and cross-examination. In the alternative, they argue that the Court should issue directions, per *Cepuran v. Carlton*, 2022 BCCA 76 at para 160, for such discovery under a hybrid proceeding.
- [9] This matter is suitable for summary determination, now. Under Rule 25-14(4) of the Supreme Court Civil Rules, BC Reg. 168/2009, an application for proof of a will in solemn form is presumptively brought summarily. There is generally no discovery process. Even before *Cepuran*, the court may decide the issues on a summary basis if there is no credible challenge to the validity of the will or if there is no genuine issue for trial: *Cook Estate (Re)*, 2019 BCSC 417 at para 72. Efficiency, affordability, and proportionality drive this policy: *Cook Estate (Re)* at para 73, citing *Seepa v. Seepa*, 2017 ONSC 5368 at para 49. Unwarranted discovery would put estates to unnecessary expense, unduly delay the administration of estates, undermine the intentions of testators, erode privilege, and consume judicial time. Accordingly, a party opposing summary determination is expected to provide a "minimal evidentiary threshold": *Seepa* at paras 27-28; *Neuberger v. York*, 2016 ONCA 191 at para 88,

leave to appeal to SCC ref'd, 36998 (15 September 2016).

- [10] As set out below, the evidence in support of the application relevant to Andreas's capacity is largely undisputed, and is corroborated by objective affiants and contemporaneous documents. Disputed evidence for the most part concerns matters irrelevant to the issue of capacity, such as personal allegations levelled between Joachim and Ms Kurji.[1] The Waibel Parties have not pointed to any compelling and relevant issues where discovery would be anything more than a fishing expedition. In any case, they have not applied for any specific discovery orders. As will be evident in the remainder of the reasons, the Waibel Parties have failed to raise a triable issue sufficient to require ancillary orders or a hybrid proceeding (as per *Cepuran* at paras 158-59), let alone conversion of the matter to an action.

III. DECISION AND DISCUSSION

A. Presumption of validity

- [11] In an proceeding seeking proof of a will in solemn form, the party propounding the will must prove on a balance of probabilities that:

- a) the will was executed in compliance with the statutory formalities;
- b) the will-maker knew and approved of the contents of the will; and
- c) the will-maker had testamentary capacity.

Leung v. Chang, 2013 BCSC 976 at para 26, aff'd 2014 BCCA 28, leave to appeal to SCC ref'd, 35951 (6 November 2014), citing *Vout v. Hay*, [1995] 2 SCR 876 at 887.

- [12] While the propounder of the will bears the onus of proving these three facts, the propounder is assisted by several rebuttable presumptions:

- a) due execution, where the will is supported by an attestation clause, and where it appears on its face to be duly executed: *Leung* at para 46;
- b) the testator knew of and approved of its contents, even in the absence of specific evidence that the contents of the will were read by the testator or brought to the testator's attention, if the will has been duly executed in accordance with the formal requirements of the Wills, Estates and Succession Act, SBC 2009, c 13 [WESA] and has an attestation clause: *Grace Estate (Re)*, 2022 BCSC 1283 at paras 24-26;
- c) the testator knew and approved of its contents and understood them, where there is evidence demonstrating that a testator read a will, or had it read to them: *Leung* at para 28; *Vout* at 888-89;
- d) the testator was capable at the time of execution, if the will is duly executed with an attestation clause, and if knowledge and approval is established (including by means of the above presumptions).

[13] All of these presumptions exist in the present circumstances:

- a) The Will was executed by Andreas, with an attestation clause, creating the presumption that Andreas knew and approved of its contents;
- b) Ms Daniels affirms that Andreas read the Will in her presence, that they went through the Will paragraph-by-paragraph, that they discussed its contents, and that she confirmed that he understood its contents;
- c) The Will complies with WESA, s. 37(1): it is (a) in writing, (b) signed at its end by the will-maker, and (c) signed by two or more of the witnesses in the presence of the will-maker.

[14] The Waibel Parties do not vigorously dispute these presumptions, with one exception. They dispute that there is evidence that Andreas read the Will. They argue that ambiguity exists in Ms Daniels's averment that she believes that she followed her usual practice of reading through the Will "paragraph-by-paragraph" with Andreas, that they discussed its contents, and that she confirmed that he understood its contents. They argue that "paragraph-by-paragraph" may not indicate complete reading of the Will as would be communicated by the phrase "clause-by-clause" (contrasting that phrase, used in *Stewart v. McLean*, 2003 ABQB 96 at para 195).

[15] There is no ambiguity in this language. The proponent is entitled to this presumption as well. The onus thus shifts to the Waibel Parties to rebut these presumptions, by establishing suspicious circumstances.

B. Suspicious circumstances

[16] Leung sets out how the party opposing the proof of the will may rebut the presumption of validity through suspicious circumstances:

[29] This presumption may be rebutted by evidence of "well-grounded suspicions", referred to in the jurisprudence as "suspicious circumstances", relating to one or more of the following circumstances:

- i. surrounding the preparation of the will;
- ii. tending to call into question the capacity of the will-maker; or
- iii. tending to show that the free will of the will-maker was overborne by acts of coercion or fraud: *Vout* at para. 25.

[30] If suspicious circumstances are established, then the presumption is spent and the legal burden of proof reverts to the propounder of the will. The propounder of the will then reassumes the legal burden of proving knowledge and approval, as well as proving testamentary capacity, if the suspicious circumstances reflect on the mental capacity of the will-maker to make a will: *Woodward v. Grant*, 2007 BCSC 1192 at para. 108. In order to discharge the burden, the propounder of the will is required to dispel the suspicious circumstances that have been raised: *Ostrander v. Black* (1996), 12 E.T.R. (2d) 219 at para. 30

(Gen. Div.).

- [31] In *Vout*, the Court affirmed that if a court determines that suspicious circumstances exist, the applicable standard of proof is a balance of probabilities. However, the evidence must be scrutinized in accordance with the gravity of the suspicion raised in any particular case.
- [32] In order to rebut the presumption of validity, those attacking the will must meet the threshold of demonstrating that there is some evidence "which, if accepted, would tend to negative knowledge and approval or testamentary capacity": *Vout* at para. 27; *Maddess v. Racz*, 2009 BCCA 539 at para. 31. The court in *Scott v. Cousins* (2001), 37 E.T.R. (2d) 113 (Ont. S.C.J.) describes the requisite evidence as that which "excites the suspicion of the court". A "general miasma of suspicion that something unsavoury may have occurred" is insufficient to rebut the presumption of validity; the evidence must raise a "specific and focused suspicion": *Clark v. Nash* (1989), 61 D.L.R. (4th) 409 at 425 (B.C.C.A.).
- [33] The court in *Laszlo* provides the following instructive observations regarding the doctrine of suspicious circumstances at para. 207:

Suspicious circumstances have been found to exist in a wide array of situations and are not necessarily sinister in nature. There is no checklist of circumstantial factors that will invariably fit the classification. Commonly occurring themes include where a beneficiary is instrumental in the preparation of the will (especially where the beneficiary stands in a fiduciary position to the testator), or where the will favours "someone who has not previously been the object of [the testator's] bounty and does not fall within the class of persons testators usually remember in their wills, that is to say their next of kin.

- [17] As expanded below, the Waibel Parties point to various frailties suffered by Andreas, to argue that Andreas lacked testamentary capacity. They also argue that the Will itself, and various recounted conversations, establish suspicious circumstances.
- [18] The Waibel Parties' arguments fail as a matter of law and fact. They fail to raise even a "general miasma of suspicion", let alone "specific and focused suspicions."
- [19] Leung confirms that the requisite testamentary capacity to make a will is modest:
- [27] In order to make a valid will, the will-maker must have a "baseline level of mental acuity" or a "disposing mind and memory", sufficient to appreciate and comprehend the nature and effect of the essential elements of the testamentary act. This encompasses an appreciation of the claims of the persons who are the natural objects of her estate and the extent of her property of which she is disposing: *Laszlo v. Lawton*, 2013 BCSC 305 at para. 185; *Banks v. Goodfellow* (1870), L.R. 5 Q.B. 549; *Leger v. Poirier*, [1944] S.C.R. 152 at 161. The assessment of whether a will-maker possesses testamentary capacity is a highly individualized inquiry and is a question of fact to be determined in all the circumstances: *James v. Field*, 2001 BCCA 267 at para. 51; *Laszlo* at para. 197.

[20] Understandably, as many persons make their wills while ill, infirm, or elderly, the testamentary capacity to make a will is not set overly high. Sufficient mental capacity to make a will may exist despite significant cognitive deterioration: *Banks* at 566.[2] As noted in *Laramée v. Ferron* (1909), 41 SCR 391 at 409, cited in *Candido v. Ciardullo* (1991), 45 ETR 99 (BCSC) at 103-04:

We must be careful not to substitute suspicion for proof. We must not by an extensive doing so render it impossible for old people to make wills of their little worldly goods. The eye may grow dim, the ear may lose its acute sense, and even the tongue may falter at names and objects it attempts to describe, yet the testamentary capacity be ample.

To deprive lightly the aged thus afflicted of the right to make a will would often be to rob them of their last protection against cruelty or wrong on the part of those surrounding them and of their only means of attracting towards them such help, comforts and tenderness as old age needs.

It seems to me pertinent to speak thus for this very case, I rather think, furnishes an illustration of what people have to suffer at the hands of those that have not been as kindly treated as they had a right to expect.

[21] The Waibel Parties fail in their onus to dislodge the presumption of testamentary capacity. One would expect Andreas's own mother and brother to have abundant evidence or examples of erratic behaviour or loss of cognitive function around the date of the Will. They provide no compelling evidence of suspicious circumstances or insufficient capacity to make a will.

[22] The Waibel Parties cite Andreas's self-reports, in the notes of Ms Daniels, that the chemotherapy was making him "fuzzy and slow." But those same notes reflect Andreas discussing and providing input into sophisticated financial and estate planning matters. Andreas's self-descriptions are ordinary and understandable descriptions of the effects of chemotherapy, and fall far short of the *Banks* level of incapacity.

[23] They also cite Andreas's reports to Joachim that during his brain cancer treatment, he suffered a stroke, as well as failing vision, tinnitus, fatigue, short attention span, memory loss, and depression. Again, even if these reports are true (and they are generally not supported by independent evidence, let alone objective medical evidence, and are generally rebutted by the evidence of Ms Kurji and Dr Klimo), they also fall far short of the *Banks* level of incapacity. Of course, many testators suffer or have suffered from these or similar conditions when they draft wills.

[24] Finally, Joachim claims that Andreas "complained to me that he had difficulty understanding information on documents relating to his taxes and estate planning." Even if true, this statement is understandable, given the complexity of the family businesses and trusts. As set out below, Ms Daniels's notes and affidavits amply illustrate Andreas's sufficient understanding and considerations of those complex issues, on which he posed questions, and provided directions.

- [25] In any case, the Waibel Parties' assertions that Andreas lacked testamentary capacity, as well as Joachim's evidence recounted above, are undermined by their own contemporaneous actions.
- [26] The Waibel Parties neither communicated any concern about Andreas's cognitive abilities nor took any actions in that respect before his death. They raised no concerns with his medical professionals or professional advisers. There is no evidence that they discussed with anyone any concerns about Andreas's mental acuity.
- [27] On the contrary, during the relevant time, the Waibel Parties themselves affirmatively asked Andreas to sign legal documents, and co-signed legal documents with him, in a manner factually, legally, and ethically inconsistent with any concerns that he lacked capacity, or suffered cognitive impairment. In March 2019, a month before the Will, Andreas, Joachim, and Gisela signed a document authorizing a lawyer to act on their behalf with respect to assignment of a legal action. The next week, Joachim asked Gisela and Andreas to sign another document authorizing a law firm to act on their behalf in a matter related to a flood on a family property.
- [28] In May 2019, a month after the Will, Mr Rastin (counsel for Gisela in these present proceedings), himself is acting on behalf of, inter alia, Andreas, in two proceedings arising from floods. In reasons issued on December 5, 2022 (Waibel Estate (Re), 2022 BCSC 2274), Justice Macintosh noted that such representation, absent a guardian ad litem, is itself inconsistent with an assertion of incapacity:
- [15] Andreas, Gisela, and Joachim commenced an action against the District of West Vancouver on November 12, 2015, alleging flood damage from a storm sewer system administered by the District. The action was commenced by another lawyer, but Mr. Rastin filed a notice of change of lawyer on May 6, 2019, to act for the three plaintiffs.
- [16] The will is dated April 4, 2019, as noted earlier, which means that Gisela's allegation of Andreas lacking testamentary capacity coincides in time with when Mr. Rastin began acting for him in the first flood litigation action.
- [17] On May 2, 2019, Mr. Rastin, again acting for Andreas, Gisela, and Joachim, commenced a second action against West Vancouver, again alleging breaches of duty by West Vancouver resulting in flood damage to the 1544 Marine Drive property. The style of cause in the second action again simply names the three Waibels as plaintiffs. No litigation guardian was named for Andreas, which implies that he was not perceived to lack capacity as of May 2, 2019, the date of the pleading, approximately one month after the contested will was executed. One or more examinations for discovery were conducted in the second flood action in November 2021, approximately a year after Andreas died. The estate, through Solus, was not consulted about that action and did not know of it.

[emphasis added]

- [29] On the very same day as the Will was executed, Gisela and Mr Aulinger, in their capacity as trustees of the Residence Trust, co-signed with Andreas the "Acknowledgement of Termination of the Bare Trust and Agency Agreement", for the purpose of terminating that trust. In May 2019, Joachim asked Andreas to sign off on German tax documents for the family business.
- [30] Joachim accompanied Andreas to multiple meetings with professional advisors in the weeks before the Will. Pointedly, on March 5, 2019 - a month before the Will - Joachim and Gisela attended a meeting with Andreas to discuss his tax and estate planning, along with the family lawyer Mr Mazzei, as well as Mr Stronach, the long-time accountant for Andreas and his family, and Mr Woolley, the family tax advisor. The four pages of notes generated by that meeting, circulated to the attendees, reflect complicated and complex estate planning discussions and proposals, setting out family assets in various forms, describing transfers between family companies and trusts, and redemption of shares, along with the tax consequences of each, which would largely "depend on the amount of 'refundable dividend tax on hand.'"
- [31] Further, Joachim confirms that Andreas initiated and participated in frequent telephone, text, and email communications in the time period leading up to the Will. These include communications about complex topics, such as his cancer treatment, business affairs, and estate planning. Joachim's own affidavit recitation of those conversations evidences that Andreas possessed decent memory, and remembered and understood upcoming events. Oddly, yet tellingly, Joachim does not attach those actual communications to his affidavit. The Court infers that such documents, had they been attached, would further evidence Andreas's mental competence.
- [32] Finally, Joachim's communications to Andreas indicate his own belief in his brother's mental capacity. In August 2020, over 16 months after the Will, Joachim tacitly expresses confidence in Andreas's capacity to understand family business matters, in forwarding an email chain concerning an issue that had arisen due to a delayed payment: "Why you are not on this email is unbelievable FYI "
- [33] Apart from familial communications, there is ample, strong, and objective evidence to establish that Andreas possessed sufficient testamentary capacity around the time he made the Will.
- [34] In evaluating testamentary capacity, the evidence of the person who took instructions and prepared the will, although not medically trained, is given considerable weight, particularly where that person is an experienced wills and estates lawyer: Laramée at 404, cited in Candido at 103-04, cited in Benekritis v. Gilbert Estate, [1998] BCJ No 171 (SC) at para 41.

[35] Ms Daniels, an experienced estates solicitor attending to the preparation and execution of the Will, confirmed that between their first meeting on February 14, 2019 and the execution of the Will in April, she did not notice any change in Andreas's capacity, or have any concerns about his capacity generally:

I did not have any concerns as to Andreas's capacity or the degree of his knowledge regarding his assets. He seemed to me to have a good understanding of his assets, and his family members and their interests. I also believe that he followed and understood my advice."

[36] She bases this assessment not on one or two brief meetings, but on at least eight conversations and meetings with Andreas in February, March, and April, culminating in the long April 4, 2019 meeting where they read, reviewed, and discussed, and he confirmed and signed, the Will.

[37] Specifically, Ms Daniels's detailed affidavits, and detailed and lengthy contemporaneous notes of their meetings and communications, record Andreas discussing and providing input on various aspects of complex and complicated estate planning, including the Andreas Family Trust and the 2017 settlement agreement. Andreas stated his desire to ensure that Ms Kurji had financial security if he died before her. He also told Ms Daniels about his assets, including assets that he co-owned with the family, and also discussed the prior dispute between the family members. He did not indicate that all of his assets would go to Ms Kurji. Instead, he indicated that he wanted some of the capital in the various rental properties to stay in his family.

[38] Further compelling objective evidence indicates that Andreas possessed sufficient testamentary capacity around the time he made the Will:

- a) from February 2019 until his death, Andreas had multiple meetings and communications with legal, accounting, and tax advisors, many of whom had known him for years, for the purpose of receiving advice and instructing on estate planning, and other legal and business matters. The March 5, 2019 meeting is referred to above. On February 12, 2019, Mr Mazzei sent Andreas and other family members information about compensation for trustees and executors. On February 18, 2019, the family accountant sent Andreas and other family members information about West Vancouver properties owned through family corporations. On February 20, 2019, Andreas asked Mr Aulinger to resign as a trustee of the Andreas Family Trust. Throughout 2019 and 2020, Andreas's accountant had complicated communications with Andreas about his personal tax returns, including redemption of preferred shares; he asked Andreas and his family members to sign documents providing for the share redemptions. In November 2019, the accountant sent to Joachim and Andreas a memorandum outlining a plan that could help the family shareholder owners "draw from the co-ownership bank account [to] equate closer to their income for tax purposes." In May and June 2020, Mr Mazzei communicated with Andreas, Joachim, and Giselle with respect to signing a mortgage and an insurance claim. None of these professionals expressed any concern with Andreas's mental capacity, or his advice to receive advice or give instructions;

all would have been professionally bound not to proceed, or make further enquiries, had they had such concerns;

- b) the oncologist Dr Klimo, who treated Andreas from June 8, 2018 to October 5, 2020, met him roughly once a month, and confirmed that "[a]t no time did I have any concerns as to Andreas' cognitive abilities despite the primary diagnosis of GBM." Dr Klimo noted that Andreas followed and contributed meaningfully to their many conversations about the diagnosis, treatments, and treatment options;
 - c) no one suggests that Andreas lacked the capacity to enter into a marriage, which he did two days after the Will;
 - d) consistent with the observations of third-party observers, Ms Kurji's affidavit sets out that from his diagnosis until his death, Andreas remained cognitively alert and functioning. He was generally physically active and social. He was able to drive. He took care of himself, and was actively involved in maintaining his home. He went to restaurants with friends. He regularly practised Qigong therapy;
 - e) in a casual conversation filmed on April 1, 2020, a year after the Will, Andreas recounts in detail his high school sport activities from 35 years previous, including biographical backgrounds of his teammates. There is no hint of mental diminishment: on the contrary, Andreas is colloquial, lucid, warm, and clear.
- [39] Finally, the Will itself is rational. It replaces Andreas's elderly mother with a professional executor. While it disinherits his elderly mother (who appears from the evidence to have no need for an inheritance to support her for the remainder of her years), the Will understandably focuses on providing for his wife-to-be, as well as the next generation of the family. It provides for both sides of this dispute: Ms Kurji and the Waibel Parties. Ironically, Ms Kurji receives less than she would be entitled to under common law, while Joachim and Alexander become contingent beneficiaries, although they were not beneficiaries under the 2017 will. The Will provides for Ms Kurji during her lifetime, but leaves the capital of Andreas's interest in the family rental properties and corporations in the Waibel family, ultimately to be received by Alexander. In this, the Will in fact resembles the estate plan that was proposed at the March 5, 2019 meeting between Andreas, Gisela, Joachim, and the Waibel family's professional advisers.

IV. ADDITIONAL EVIDENCE

- [40] The Waibel Parties filed several late affidavits. Even if those affidavits are permitted, they make no difference to the outcome of these proceedings.

- [41] Examples include two affidavits from physicians. The Dr Harrison affidavit states that it is possible that a person suffering from Andreas's condition could see letters on a page, but be unable to comprehend them. The Dr Smith affidavit provides evidence about capacity assessments, in reference to the fact that Dr Klimo did not conduct such an assessment of Andreas.[3]
- [42] The doctors themselves did not assess Andreas, and can only address hypotheticals. The contents of these affidavits are speculative, and are, in any case, undermined by the copious specific, first-hand evidence of capacity surveyed above. Further, a capacity assessment, as a matter of law or medicine, is not required to sign a will.[4] These opinions are irrelevant.

V. CONCLUSION

- [43] The Court is affirmatively satisfied that the Will was executed in compliance with the statutory formalities; that Andreas knew and approved of the contents of the Will; and that Andreas had testamentary capacity.
- [44] The Court grants the orders sought by Solus:
- a) the Court declares the force and validity of the Last Will and Testament of Andreas Michael Waibel, dated April 4, 2019, in solemn form of law;
 - b) the notice of dispute filed by Joachim Waibel on August 20, 2021 in Vancouver Court Registry Action No. VLC-S-V-210071 be cancelled; and
 - c) a grant of probate of the Will be made to the applicant.
- [45] Solus and Ms Kurji have indicated their intentions to seek full indemnity special costs of this action, payable by Joachim Waibel, or, alternatively, by the Estate. If those parties wish to proceed with the application for special costs, they should seek a one-day hearing from the Registry for that issue to be heard as soon as reasonably possible. Arguments shall be exchanged and provided to the Court via the Registry ten days before that hearing, with reply arguments exchanged and provided to the Court via the Registry five days before the hearing.

"Crerar J "

- [1] In the interests of the reputations of those individuals, these reasons will not canvass these allegations.
- [2] The jurisprudence provides compelling illustrations of courts finding sufficient testamentary capacity, despite significant infirmities suffered by the testator. In *Banks*, the testator suffered delusions that he was pursued by spirits, and that a man, long dead, had come personally to molest him. As these delusions could not in themselves have had any influence upon his disposition of property, the jury's conclusion of capacity was undisturbed: p. 571. In *Benekritis*, although the deceased was treated for anxiety and depression by a geriatric psychiatrist both before and after her will, and until her death, she

exhibited no psychotic symptoms that would undermine her testamentary capacity. In *Leonard v. Zychowicz*, 2020 ONSC 662, the deceased suffered from cognitive impairment as well as a bipolar disorder, which had resulted in her involuntary hospitalization. The Court found no specific evidence of incapacity at the time the will was made, and noted that concerns were not raised by the solicitor or relatives at the time.

- [3] The affidavits are affirmed on August 17 and 19, 2022, in response to the Solus December 8, 2021 notice of application. They purport to be filed in response to the affidavit of Dr Klimo filed on April 25, 2022, but no compelling explanation is given for the four-month delay.
- [4] Testamentary capacity is a legal question, not a medical one. As stated in the oft-cited passage of Laidlaw JA in *Spence v. Price*, [1946] 2 DLR 592 (ON CA) at 595-96: "Because of the emphasis put in argument by counsel for the appellant on the evidence given by doctors in this case, I desire to express my views in respect of that matter. The quality of a person's mind manifests itself by conduct and expressions of thought. The conclusions to be reached from such evidence do not depend for their correctness upon the possession or exercise of special skill or knowledge. A judgment may be formed by a person of sound mind and reason exercising powers of observation and deduction without the use of any scientific learning whatever. It is a practical question which may be answered by a layman of good sense with as much authority as a doctor. The weight to be properly given to the evidence touching the question depends in part upon the extent of the observations made by a witness."

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