

CANADA / JUDGMENT

Walker Estate (Re)

2024 BCSC 792

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Supreme Court of British Columbia

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2024 BCSC 792 Walker Estate (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Walker Estate (Re),

2024 BCSC 792

Date: 20240503

Docket: 213134

Registry: Victoria

Re: The Estate of Alice Elizabeth Walker, Deceased

Before: The Honourable Justice Wolfe

Oral Reasons for Judgment

Counsel for the Petitioner, Catherine Lynn Walker:

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Counsel for the Respondent, Cathy Cook:

P. B. Newman

Place and Date of Hearing:

Victoria, B.C.

April 29, 2024

Place and Date of Judgment:

Victoria, B.C.

May 3, 2024

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Introduction

- [1] These are my oral reasons for judgment on this petition.
- [2] The petitioner, Ms. Catherine Lynn Walker, is the executor of the estate of her late mother, Alice Elizabeth Walker (the "Deceased"). I will refer to her as the petitioner, but note that in the materials, she is referred to as Lynn. In her capacity as executor, the petitioner applies to this Court under s. 58 of the Wills, Estates and Succession Act, SBC 2009, c. 13 ("WESA") for a determination of whether a handwritten note dated July 7, 2016 (the "Note"), purportedly written by the Deceased, operates to both revoke a February 25, 2016 Codicil (the "Codicil") and revive certain clauses of the Deceased's July 8, 2015 Will (the "Will").
- [3] The petitioner seeks a declaration and orders setting out the results of and giving effect to the Court's determination regarding the testamentary effects, if any, of the Note. The petitioner also seeks costs on a full indemnity basis payable from the estate. I have taken this to be a request for an order for special costs under Rule 14-1(1)(b) of the Supreme Court Civil Rules.

- [4] Ms. Cathy Cook, the petitioner's sister-in-law, filed a response to petition opposing the petition in part. I will refer to her as Ms. Cook or the respondent. While she consents to the Court determining the status of the Note and granting a declaration and orders accordingly, Ms. Cook disputes both the authenticity of the Note and that it has any testamentary effect. In her response, Ms. Cook opposed the order for costs, but at the hearing she submitted full indemnity costs should be paid to both parties from the estate.
- [5] At the hearing, counsel for Ms. Cook advised that she also represents Ms. Cook's sons, Colin Walker and Tom Walker, who are the petitioner's nephews and the Deceased's grandchildren. The petition was made on notice to Colin Walker and Tom Walker, but the response to petition was not filed on their behalf, and only Ms. Cook provided an affidavit. As set out in more detail below, in at least one respect, Ms. Cook's position appears contrary to her sons' interests. Given that, and because I took counsel's submissions during the hearing to reflect Ms. Cook's position, I have not listed Colin Walker or Tom Walker as parties of record to this proceeding.
- [6] For the reasons that follow, I am satisfied the Note is authentic, and that it records the Deceased's fixed and final expression of her testamentary intentions respecting disposal of her property - namely to revoke the Codicil and revive the previous clauses of the Will which the Codicil had replaced.

Factual Background

- [7] The evidence before the Court consists of two affidavits from the petitioner and one from Ms. Cook. The petitioner's second affidavit was provided in response to Ms. Cook's affidavit. There are also two affidavits from legal assistants, the second of which attaches a copy of a Forensic Document Examination Report written by Jean M. Kovacs, B.Sc., dated August 15, 2022.
- [8] In the course of submissions, I was advised that there is other litigation arising from this estate. I was alerted to the decision of Justice Tindale in *Walker Estate (Re)*, 2024 BCSC 250, and advised there is an outstanding costs application and an outstanding appeal. The parties touched briefly on the circumstances of that matter, which involves different issues. I have focused my consideration on the facts relevant to the issues before me for determination. The following background facts do not appear to be in dispute.
- [9] The Deceased was born on February 19, 1919 and died on December 13, 2020 at Courtenay, British Columbia, at the age of 101. The Deceased had two children - the petitioner and a son, Barry Walker, who died on May 1, 2015. For ease, I will refer to him as Barry, without meaning any disrespect. The respondent, Ms. Cook, is Barry's widow. The Deceased's spouse predeceased her in July 2000.

- [10] The Deceased moved to an independent retirement residence in Comox in 2010. As she aged, and as a result of a fall, the Deceased required additional care, eventually moving to a different type of facility still in the Courtenay-Comox area in December 2017. There is no medical evidence before the Court about these matters, but it is common ground the Deceased had increasing difficulty hearing and seeing as she aged, and by early 2016, could barely see. She also suffered from short-term memory problems in her later years.
- [11] Prior to his death, Barry and the petitioner were the Deceased's attorneys under a Power of Attorney. Although the actual text of the Deceased's previous will, dated October 18, 2000, was not in evidence before me, other evidence establishes Barry and the petitioner were named as co-executors in that earlier will. After Barry's death, the petitioner was the Deceased's sole attorney and assisted with managing her financial affairs. The Deceased also updated her previous will following Barry's death.
- [12] As there is dispute about some of the facts relating to the preparation of the Will, the Codicil and the Note, I will deal with each separately.

The Will

- [13] The petitioner's evidence is that following Barry's death, Terry Swan, a lawyer at Jones Emery Hargreaves Swan in Victoria, who had been the Deceased's lawyer for over 30 years, contacted the petitioner and asked her to bring the Deceased to Victoria so she could update her will. The petitioner deposes that "on the advice of Terry Swan," the Deceased signed the Will on July 8, 2015.
- [14] While the respondent submitted the Will was not prepared by Mr. Swan personally, it is clear that the Will was prepared through his firm. The witnesses to the Will - a lawyer, Kirsten McGhee, and a legal assistant, Lisa Woodward - were both from Mr. Swan's firm, and at the Deceased's request, Ms. McGhee sent the Deceased a copy of the Will in December 2015. On the evidence before me, I am satisfied that Mr. Swan was involved in some capacity in advising the Deceased with respect to the Will.
- [15] Paragraph III(d) of the Will provides that the residue of the Deceased's estate is to be divided into four equal shares paid as follows:
- two shares to be paid to the petitioner (or to the petitioner's son on reaching the age of 30 if the petitioner dies before the Deceased);
 - one share to be paid to Colin Walker on reaching the age of 30; and
 - one share to be paid to Tom Walker on reaching the age of 30.

- [16] Paragraph III(e) of the Will requires the executor to hold the shares of any grandchild in trust until the grandchild reaches the age of 30, with authority for the trustee to pay certain expenses the trustee considers necessary or advisable (such as education expenses). Paragraph IV(a) of the Will permits the executor to make payments from the trust for Colin Walker and Tom Walker to a parent or guardian, or to anyone directly providing goods or services to them.

The Codicil

- [17] On February 25, 2016, the Deceased signed a Codicil to the Will. It was not prepared by Terry Swan's firm. The Codicil revokes Paragraph III(d) of the Will in its entirety, substituting different provisions for distributing the residue of the estate. The Codicil first provides that a \$50,000 cash bequest be paid to each of the petitioner and Ms. Cook. The remainder of the estate is then to be divided into two main shares payable as follows:
- a) one equal share to be paid to the petitioner (or to the petitioner's son on reaching the age of 30 if the petitioner dies before the Deceased, on the trust terms set out in the Will); and
 - b) one equal share to be further divided among Barry's "issue" (defined as "lineal descendants of a person" in the Codicil) who survive the Deceased on new trust terms set out in the Codicil.
- [18] The Codicil refers specifically to Colin Walker and Tom Walker but also makes provision in the event Barry had other children. The evidence before the Court does not suggest this is the case. In any event, the substituted trust terms make Ms. Cook the trustee of the trust for her sons and any other "remoter issue" of Barry. As trustee, Ms. Cook has authority to make trust payments she considers advisable until the beneficiary reaches the age at which the trust can be paid out.
- [19] The Codicil does not expressly revoke Paragraph III(e) of the Will, which establishes the original trusts for all three grandchildren, or Paragraph III(f), which addresses how to handle any trust for the petitioner's son if there is a pre-existing trust for him. Instead, the Codicil purports to create a different trust structure and trustee for Colin Walker and Tom Walker, as part of revoking Paragraph III(d) and substituting a replacement. In my view, this appears to give rise to an interpretation question about the interaction between the various trust provisions which the parties did not address and I have not been asked to determine. However, as the petition seeks an order under s. 58(3) of the WESA reviving all three of Paragraphs III(d), (e) and (f) of the Will, the fact that the Codicil does not appear, on its face, to revoke Paragraphs III(e) and (f) will have a bearing on the request for relief that has been sought.

- [20] Practically, the Codicil does not impact the petitioner as a beneficiary. While the two cash bequests are taken out of the residue off the top, the petitioner is entitled to one of those equal bequests. The petitioner also remains entitled to half of the residue of the estate. The Codicil does reduce the petitioner's responsibilities as executor by appointing Ms. Cook the trustee for the trusts for her sons and any other child of Barry.
- [21] The Codicil does impact Colin Walker and Tom Walker (and any other child of Barry) as beneficiaries in that their collective entitlement to the other half of the residue is reduced by the \$50,000 cash bequest to be paid to Ms. Cook. This is the conflict or contrary interest of which I spoke earlier.
- [22] The petitioner's evidence is that she was unaware the Deceased had signed the Codicil until after the Deceased's death on December 13, 2020. The petitioner says she learned of the Codicil when she received an email on January 8, 2021, attaching a letter of the same date, from Andrea Rowe, a lawyer at Swift Datto Law Corporation in Courtenay. The letter advised the petitioner that the Deceased retained Ms. Rowe in 2016 to "make changes to her Will", and attached a copy of the Codicil, acknowledging that the petitioner may not have been aware of it. By way of explanation, the second paragraph of the letter states in relevant part:

In essence, [the Deceased] wished to make certain cash gifts to you and Cathy Cook and then appoint Cathy to be the trustee of funds set aside for Cathy's sons. She also "cleaned up" an issue with the Will that would have permitted Tom and Colin to call for their funds at age 19 even though the Will refers to age 30

- [23] As the petitioner was not involved when the Deceased made the Codicil, the circumstances surrounding its creation are only set out in the respondent's evidence. Ms. Cook deposes that after Barry died, the Deceased was candid with her about her financial affairs and in December 2015, requested assistance to contact Solguard Financial about the beneficiary designations on the Deceased's investments. The respondent says she assisted by calling Solguard for the Deceased, but the Deceased relayed that the Solguard representative would only speak to the Deceased in Ms. Cook's absence.
- [24] Ms. Cook deposes that she left, however, Solguard's December 18, 2015 follow-up letter was addressed to Ms. Cook at her home, rather than to the Deceased, and was not copied to the Deceased. The letter begins "[a]s discussed with yourself and [the Deceased]" and explains that the beneficiaries were updated to the estate in July 2015. The respondent says the Deceased gave Solguard permission to communicate with her but does not attempt to address or explain why the letter would reference a "discussion" with the two of them.
- [25] The respondent does not specify how she received the December 18, 2015 letter from Solguard, nor does the letter indicate on its face how it was sent. However, Ms. Cook says that on receipt, she became concerned about the petitioner's influence. It is not clear what about the Solguard letter triggered concern. Ms. Cook says she spoke with the Deceased about whether she had made a new will. The respondent says the Deceased was uncertain

and became upset, so she assisted the Deceased to contact Terry Swan's firm to arrange a phone appointment. The respondent deposes she was not present when the Deceased was contacted, but the Deceased subsequently shared with her a copy of a letter from Ms. McGhee and the enclosed copy of the Will.

[26] I note that the letter from Ms. McGhee was also dated December 18, 2015, and references a telephone call between the Deceased and Ms. McGhee's assistant on the same date. For the respondent's description of events to be accurate, it would be necessary for her to have done all of the following on December 18, 2015:

- a) received the Solguard letter the same day it was dated;
- b) gone to speak with the Deceased immediately or in short order; and
- c) assisted the Deceased to contact Terry Swan's office sufficiently early so that, after Ms. Cook left, Ms. McGhee's assistant was able to call back and speak with the Deceased and then relay the conversation to Ms. McGhee, so that the letter from Ms. McGhee sending a copy of the Will could be drafted that same day.

While not impossible, the timelines are challenging and they raise concerns for me about the accuracy of the respondent's evidence on these points.

[27] The respondent says that after reviewing the Will with the Deceased, and particularly the trust provisions, they had a "frank conversation". The respondent admits she was unhappy with the petitioner acting as trustee for her sons' inheritance until they reached 30. The respondent deposes that, unlike under a June 4, 2011 codicil to the Deceased's previous will, the Will did not permit the trustee to pay out her sons' inheritances to her as their parent or guardian. Although this is disputed, the respondent says there was discord between her family, including Barry, and the petitioner, and that the Deceased was aware of this. In support of this assertion, the respondent attaches to her affidavit a March 31, 2004 letter written by the Deceased, which she characterized as the Deceased acknowledging the "difficulties" Barry and the petitioner had in "getting along" and expressing an intention for the estate to "equally benefit each family".

[28] The respondent deposes the Deceased understood Ms. Cook's concerns about the petitioner being the trustee and wanted to "fix her will" to entrust her grandchildren's inheritances to Ms. Cook. The respondent says the Deceased requested she make an appointment with a lawyer, but did not request Mr. Swan.

[29] The respondent deposes she discussed the situation with her neighbour, Ms. Rowe, to get information about the "easiest way to change the trustee of her sons' inheritance", and Ms. Rowe volunteered to visit with the Deceased to discuss. The respondent says that Ms. Rowe met with the Deceased and the Codicil was made February 25, 2016. The Codicil is in very large font, consistent with the fact of the Deceased's failing eyesight. The respondent's evidence is that the Deceased showed her a copy of the Codicil in early 2016, and she was surprised by the inclusion of the cash bequest to her. The respondent says the Deceased

confirmed that the Codicil had "'fixed" her will to her satisfaction," and she and the Deceased did not discuss estate issues again prior to the Deceased's death.

[30] As noted, the petitioner disputes that there was discord between herself, Barry and his family, and says that until she read the respondent's affidavit in this proceeding, she had "no indication from [Ms. Cook] that we did not get along." The petitioner relates numerous instances of cooperation and apparent good relations, including after the Deceased's death, and says she and Barry worked well together in caring for and assisting the Deceased. In submissions, the petitioner's counsel suggested that to the extent there is discord, it is more likely the result of disputes about the value of the estate that are at play in the other litigation. The figures in the present petition regarding the value of the estate were not supported by any evidence, and while Justice Tindale's decision references evidence provided in that proceeding, the value of the estate is not directly relevant to the issues before me.

[31] Having reviewed the March 31, 2004 letter from the Deceased, I am unable to ascribe to it the characterization urged by the respondent. The letter is addressed to both the petitioner and Barry and begins:

Everything has been left to you two equally and I hope as joint Executors you will be able to work together as friends. It was hard to know what to do for the best (and I really miss Dad on this), but I hope this won't cause any trouble between you [emphasis added]

[32] The letter set out at some length information about the Deceased's various accounts, investments, jewelry and artwork, including their locations in what must have been the family home. The letter concludes:

Although "Lynn" and "Barry" are the only names appearing in the will, I think you both know that any money you receive is a legacy for the whole family. I hope you will use it wisely and be able to enjoy a few trips [emphasis added].

[33] The language used by the Deceased throughout the letter is not consistent with that of a parent writing to two warring factions. The letter generally uses the plural "you" in a manner that suggests an existing relationship of cooperation, except where acknowledging potential gifts specific to one or the other of Barry and the petitioner. Further, there is no reference to benefitting "each family" as separate entities, but rather a clearly expressed intention to benefit "the whole family". This accords with the petitioner's evidence of amiable relations and communications, and joint family events and vacations with the Deceased. While Ms. Cook may well hold certain views and potentially as a result of the estate litigation, on the evidence before me, I do not accept her narrative of such a strained relationship between Barry and the petitioner that it would have caused the Deceased concern.

The Note

- [34] The petitioner's evidence is that after Barry's death, she called the Deceased virtually every evening. Prior to his death, Barry and the petitioner had an alternating schedule to call. In early 2016, the petitioner says the Deceased began expressing distress over something she had done with her Will during their evening phone calls, and this happened in numerous calls over many months. The petitioner deposes that the Deceased said she had "done something stupid with the will because I can't see". The petitioner's consistent evidence is that she asked the Deceased for more details, but the Deceased was unable to provide more details, and referenced her poor eyesight. As the petitioner was unaware of the Codicil at this time, she thought the Deceased was confused, and she did not take the Deceased's concerns as seriously as she would have if she had known about the Codicil. The petitioner says that because the Deceased could not remember having updated the Will in July 2015 due to her short-term memory issues, the petitioner responded to the Deceased's expressions of concern by reminding her that the Will had been updated on the advice of Terry Swan to reflect Barry's death. The petitioner says the Deceased was "relieved" by these reassurances.
- [35] The petitioner's evidence is that in or about the summer of 2016, the Deceased provided her with the original Note, which she put with other papers she was keeping for the Deceased at her home. The petitioner is uncertain about the exact date, but believes the Deceased gave her the Note when they went on a short holiday to a rental suite in Comox that summer so they could cook the Deceased's favourite foods together. There is no evidence about any further conversations the petitioner had with the Deceased about the Note at the time it was provided or afterwards.
- [36] The Note is a single piece of paper, with a date of July 7, 2016 and one handwritten sentence over three lines. It reads "I, Alice Walker revoke any changes to my 2015 will with Terry Swan." The Note is signed "A Walker".
- [37] The respondent says the Deceased trusted professionals to assist with her affairs. The respondent also offers her opinion that the Note was not written by the Deceased and references a "preliminary opinion from a handwriting specialist." The respondent did not produce any evidence in support of her opinion, or any expert's report. I will deal with the respondent's dispute about the authenticity and the effect of the Note below.

Issues

- [38] The issues for determination are as follows:
- Is the Note authentic, in that it was written by the Deceased?
 - Does the Note represent a "deliberate or fixed and final expression" of the Deceased's testamentary intention to revoke the Codicil?

- c) If yes, did the Deceased also intend to revive and give effect to the parts of the Will which had been revoked by the Codicil?

[39] In submissions, the parties also raised high-level questions about capacity and potential undue influence, although neither issue was argued extensively nor was I taken to the legal tests in case law specific to those issues. After noting the relevant statutory framework, I will briefly address those matters as part of my analysis of the second issue below. I will also address costs.

Relevant Statutory Provisions

[40] The WESA establishes the relevant statutory framework. In particular, s. 37 of the WESA sets out the formal validity requirements for making a will. To be valid, s. 37 requires that a will be in writing, be signed by the will-maker in the presence of two or more witnesses who are present at the same time, and be signed by the two or more witnesses in the presence of the will-maker. Section 37(2) provides in relevant part that a will that does not comply with subsection (1) is invalid unless a court orders it to be effective under s. 58.

[41] Section 55 of the WESA specifies how to revoke a will and s. 57(4) specifies how a will is revived:

How to revoke will

55 (1) A will other than an electronic will or a part of a will other than an electronic will is revoked only in one or more of the following circumstances:

- (a) by another will made by the will-maker in accordance with this Act;
 - (b) by a written declaration of the will-maker that revokes all or part of a will made in accordance with section 37 [how to make a valid will];
 - (c) by the will-maker, or a person in the presence of the will-maker and by the will-maker's direction, burning, tearing or destroying all or part of the will in some manner with the intention of revoking all or part of it;
 - (d) by any other act of the will-maker, or another person in the presence of the will-maker and by the will-maker's direction, if the court determines under section 58 that
 - (i) the consequence of the act of the will-maker or the other person is apparent on the face of the will, and
 - (ii) the act was done with the intent of the will-maker to revoke the will in whole or in part.
- (2) A will is not revoked in whole or in part by presuming an intention to revoke it because of a change in circumstances.

Revival of will

57 (4) A will or part of a will that has been revoked may not be revived except

- (a) by an order of the court under section 58 if the court is satisfied that the will-maker intended to give effect to the will or part of the will that was revoked, or
- (b) in accordance with any other provision of this Act that recognizes the revival of a will.

[42] Section 58 of the WESA is a curative provision that permits a court to address deficiencies in the making of a will or other testamentary document that would otherwise render the will or document invalid. Sections 58(2) and (3) provide:

Court order curing deficiencies

58 (2) On application, the court may make an order under subsection (3) if the court determines that a record, document or writing or marking on a will or document represents

- (a) the testamentary intentions of a deceased person,
 - (b) the intention of a deceased person to revoke, alter or revive a will or testamentary disposition of the deceased person, or
 - (c) the intention of a deceased person to revoke, alter or revive a testamentary disposition contained in a document other than a will.
- (3) Even though the making, revocation, alteration or revival of a will does not comply with this Act, the court may, as the circumstances require, order that a record or document or writing or marking on a will or document be fully effective as though it had been made
- (a) as the will or part of the will of the deceased person,
 - (b) as a revocation, alteration or revival of a will of the deceased person, or
 - (c) as the testamentary intention of the deceased person.

[43] There is no dispute that the Note does not meet the formal validity requirements under s. 37 of the WESA or the formal requirements for revocation under s. 55. The petitioner concedes this at para. 5 of Part 3 of the petition. As a result, the petitioner, in her capacity as executor, brought the present application. The testamentary significance of the Note, if any, can only be determined by the Court under s. 58 of the WESA, and until that determination has been made, the petitioner cannot proceed with an application for a Grant of Probate.

Analysis

[44] As a preliminary matter, the affidavits provided by the petitioner and the respondent each contain hearsay regarding statements made by the Deceased in various conversations, as well as statements that appear to be lay opinion. Hearsay statements attributed to the Deceased may be admissible under the state of mind exception to the hearsay rule or through the application of the principled approach to hearsay, provided the Court is satisfied that the statements were actually made by the Deceased. The latter requirement

turns on an assessment of credibility of the witnesses who report the statements: Knelsen Estate, 2020 BCSC 134, at paras. 115-117; Jakonen Estate (Re), 2022 BCSC 2261, at paras. 8, 10.

- [45] Generally, the statements attributed to the Deceased are admissible as an exception to the hearsay rule, provided I am satisfied the statements were made. I have already noted above where I have concerns about the credibility and reliability of certain portions of the respondent's evidence.
- [46] In certain instances, both the petitioner and the respondent appear to offer their opinions as to the Deceased's intentions and actions. In at least one case, the petitioner's evidence is supported by independent evidence, including in the form of a letter written by the Deceased in March 2004. Where there is no such supporting evidence, I have ignored those portions of the affidavits.

Authenticity of the Note

- [47] The authenticity of the Note - in the sense of whether it was written by the Deceased - became an issue as a result of the response to petition and Ms. Cook's affidavit. The petitioner's evidence is that the Deceased gave the Note to her, and, given her responsibilities as executor, I have assumed the petitioner remains in possession of the original. However, there is no evidence of a witness to the Note who could address the circumstances of its creation. It appears to have been written in isolation.
- [48] As noted, at the end of her affidavit, Ms. Cook expressed her opinion that the Deceased did not actually write the Note. She referenced the Deceased's "limited vision and slipping cognitive capacity", as well as a "preliminary opinion from a handwriting specialist" that the handwriting was not that of the Deceased.
- [49] Presumably in response, the petitioner obtained a Forensic Document Examination Report from Jean M. Kovacs, B.Sc, dated August 15, 2022 (the "Handwriting Report"). Counsel for the petitioner served the Handwriting Report on Ms. Cook's counsel on September 20, 2022. It is before this Court as Exhibit "A" to the affidavit of Sarah Bostrom, a paralegal in the office of petitioner's counsel. The Handwriting Report attaches the author's curriculum vitae, as well as copies of the sample writing specimens that were used to conduct the comparative analysis of the handwriting in the Note to other documents written by the Deceased. The sample writing specimens included cards, cheques, the Codicil and the March 31, 2004 letter, all of which were written or signed by the Deceased.
- [50] The expert explains the materials examined, the methodology and the principles involved in handwriting identification. The Handwriting Report ultimately concludes that "there is a very strong probability that the writer of the [sample writing specimens including signatures] wrote the questioned handwriting and A. Walker signature on [the Note]" (emphasis in original). The Handwriting Report includes the requisite acknowledgment by the expert of their duty as an expert to not be an advocate for any party, as well as confirmation that the Handwriting Report was prepared in conformity with that

duty and that the expert would give testimony in conformity with that duty if called on to do so.

- [51] Despite Ms. Cook's reference in her affidavit to a "preliminary opinion" from a handwriting specialist, the respondent did not provide a responding expert report after being served with the Handwriting Report. The respondent also did not seek to challenge the qualifications of the expert, or request the expert's attendance for cross-examination. In submissions, respondent's counsel maintained that Ms. Cook's position is that the Note was not written by the Deceased, but conceded that position is not based on any evidence that is before the Court.
- [52] In the absence of any evidence to the contrary and to contradict the conclusions in the Handwriting Report, I accept those conclusions. As a result, I am satisfied that Note is authentic and was written by the Deceased.

Does the Note represent a "fixed and final intention" to revoke the Codicil?

- [53] The parties agree that the key principles for the Court to consider on an application under s. 58 of the WESA are as summarized by the Court of Appeal in *Hadley Estate (Re)*, 2017 BCCA 311, at paras. 33-36. *Hadley Estate* refers, in turn, to the BC Supreme Court's decision *Estate of Young*, 2015 BCSC 182, and, because of the similarity to Manitoba's curative provision, also to Manitoba's leading appellate authority, *George v. Daily* (1997), 143 DLR (4th) 273 (CA).
- [54] At para. 35 of *Hadley Estate*, the Court of Appeal confirms that on a s. 58 application, the Court must be "satisfied that a document represents the testamentary intentions of the Deceased person. However s. 58 does not require a minimum level of execution or other formality for a testamentary document to be found fully effective."
- [55] If the document in question satisfies the threshold issue of authenticity, the "core issue" is whether the document records a "deliberate or fixed and final expression of intention as to the disposal of the deceased's property on death": *Hadley Estate* at para. 36, citing *Estate of Young* at para. 35. Paragraphs 36 and 37 of *Estate of Young* (also cited at para. 36 of *Hadley Estate*) address the burden of proof and the context specific nature of the inquiry:
- [36] The burden of proof that a non-compliant document embodies the deceased's testamentary intentions is a balance of probabilities. A wide range of factors may be relevant to establishing their existence in a particular case. Although context specific, these factors may include the presence of the deceased's signature, the deceased's handwriting, witness signatures, revocation of previous wills, funeral arrangements, specific bequests and the title of the document: *Sawatzky* at para. 21; *Kuszek* at para. 7; *Martineau* at para. 21.
- [37] While imperfect or even non-compliance with formal testamentary requirements may be overcome by application of a sufficiently broad curative provision, the further a document departs from the formal requirements the harder it may be for the court to find it embodies the deceased's testamentary intention: *George* at para. 81.

- [56] On a s. 58 application, in many cases, the material time for determining the deceased person's testamentary intentions is the time when the document in question was created. However, the material time may also vary, depending on the circumstances, and a document may acquire a testamentary character by subsequent and sufficient manifestation of the will-maker's intention: Hadley Estate at para. 37. Further, because the deceased person is not available to testify, and the court will benefit from information that may illuminate the deceased's state of mind, understanding and intention for the document, extrinsic evidence of testamentary intent before, during or after the document was created may be admissible, subject to the ordinary rules of evidence: Hadley Estate at paras. 38-40.
- [57] Noting that the inquiry must be context specific, at paras. 44-45 of Jakonen Estate (Re), the Court summarized a number of factors that may be relevant on a s. 58 application:
- [44] While the analysis is necessarily context specific, there are a number of factors that the courts have considered in other cases that are relevant to the analysis of the documents and records in issue here. These include:
- a) Was the document or record made by the Deceased or by a third party? A document made by the Deceased is more likely to be given effect than a document made by a third party, including a lawyer's draft: *George v. Daily* (1997), 143 D.L.R. (4th) 273 (Man. C.A.).
 - b) Where was the document or record found? If the Deceased left the document or record in a prominent place where it was likely to be found, or with other testamentary documents, the document or record is more likely to be given effect: *Skopyk Estate*, 2017 BCSC 2335 at para. 22.
 - c) Is the document or record signed, or is there any other compliance of the formal requirements for a valid will? The greater the degree of compliance with the formal requirements, particularly if the document is signed, the greater the likelihood that the document or record will be given effect: *Estate of Young*, 2015 BCSC 182 at para. 39.
 - d) Is there a title on the document or record? If a document or record is given the title "will" or "codicil" or a similar notation, it is more likely to be given effect: *Smith Estate (Re)*, 2016 BCSC 350 at para. 23.
 - e) Is the language of the document or record dispositive, and does it have an air of finality? If so, it is more likely to be given effect: *Smith Estate* at para. 23.
 - f) Does the document or record provide for a rational distribution? If so, it is more likely to be given effect: *Skopyk Estate* at para. 27.
 - g) Is the document or record consistent with other evidence of the Deceased's intentions? If so, it is more likely to be given effect: *Estate of Young* at para. 38.

- [45] None of these factors in isolation is determinative; for example, in *Skopyk Estate*, the Court gave effect to a document that was neither signed nor dated but was found in a prominent place on the deceased's bulletin board and provided for a rational distribution of the deceased's estate.
- [58] Both parties reiterated the importance of considering all of the circumstances in making my determination regarding the Note. The petitioner submitted, including with reference to the factors at para. 36 of *Estate of Young*, that the Note has the Deceased's signature, is in her own handwriting and uses the word "revoke" in reference to changes to her Will. The Note is also dated and references the Deceased's long-time lawyer, Terry Swan, who I found was involved in advising her on the Will. As well, the petitioner submits that in the timeframe after the preparation of the Codicil and prior to the creation of the Note, the Deceased told the petitioner on multiple occasions that she had "done something stupid" to her will, which supports the idea that the Note represents the Deceased's attempt to fix the changes that were causing her distress. Finally, the petitioner points to the fact that the Deceased made a point of giving the Note to the petitioner, whom the Deceased knew to be both her Power of Attorney and her executor.
- [59] Consistent with her role as executor, the petitioner also concedes that the Note is quite simple and this Court may not be satisfied that it is specific enough to revoke a Codicil prepared with the assistance of legal counsel.
- [60] The respondent submitted that many factors weighed against a determination that the Note embodies the Deceased's fixed and final testamentary intentions, including the following:
- a) the Deceased did not advise the petitioner or others, including her long-time lawyer, of any intention to make further changes to her Will;
 - b) the Deceased was aware of how to make changes to a Will, as evidenced by the Codicil, and did not follow that process with the Note;
 - c) the Deceased had a history of relying on professionals like lawyers and accountants when conducting business affairs;
 - d) the Deceased was severely visually-impaired so it was strange that she would draft a Note that she could not have seen; and
 - e) the Note, while dated, is vague and does not specifically reference the Codicil.

At core, the respondent submits that the Note represents too much of a departure from the formal requirements for testamentary documents to be found effective under s. 58(3).

- [61] I have reviewed all of the evidence before me and I am satisfied that, on a balance of probabilities, the Note represents the Deceased's fixed and final expression of her testamentary intentions. In my view, and taking into account the factors referenced at para. 44 of Jakonen Estate, the following factors weigh in favour of my determination that I should give effect to the Note as a revocation of the Codicil:
- a) The Deceased repeatedly told the petitioner she had "done something stupid" with her Will because she could not see. While the Deceased was unable to articulate her specific concerns when asked, I accept the petitioner's evidence that she was concerned enough to raise the matter repeatedly over a period of many months.
 - b) The Note was made by the Deceased, rather than a third party, and it was in her own handwriting and was signed by her.
 - c) The Deceased gave the Note to the petitioner, whom she knew to be her Power of Attorney and her executor.
 - d) While the Note does not have a title, it is dated, and it begins with the language "I, Alice Walker", which is consistent with the language that is used at the start of a testamentary document, such as the Will or the Codicil.
 - e) The Note states "I revoke any changes" with reference the Deceased's existing Will. The use of the term "revoke" is not ordinary language, but rather language commonly used in a testamentary document.
 - f) The Note purports to revoke any changes to the Deceased's "2015 Will with Terry Swan". The only changes that had been made to the Will were contained in the Codicil.
 - g) The Note was prepared after the Codicil had been executed and within the timeframe when the evidence establishes that the Deceased was expressing concerns to the petitioner about something with respect to her Will.
 - h) Revoking the Codicil would result in a distribution of the residue of the estate that is consistent with the Deceased's previously expressed intentions to divide the estate equally between the petitioner and Barry. The respondent took issue with statements in petitioner's first affidavit regarding her parents' intentions because the petitioner did not specifically identify the "source" of her knowledge. In the petitioner's second affidavit, the petitioner clarifies that the source of her knowledge about her parents' intentions comes both from her conversations with her parents and from their previous wills. But even without that, the Deceased's March 31, 2004 letter expressly states an intention to divide the estate equally between Barry and petitioner. Revoking the Codicil restores a distribution of the residue of the estate that is consistent with the Deceased's previously expressed intentions.
- [62] For the foregoing reasons, it is my determination that the Note is fully effective as a revocation of the Codicil.

- [63] I will pause here to deal with the issues of capacity and undue influence.
- [64] The response to petition alludes to a potential question of capacity. The argument is not express or clearly articulated. When pressed in submissions about whether there was a capacity argument being made, respondent's counsel replied that there "might be". Counsel drew my attention to the fact that the common law presumption of capacity does not apply in this context because the Note was not prepared in conformity with s. 37 of the WESA. As a result, capacity may be an issue, and I understand it falls to the petitioner to satisfy the Court that the Deceased possessed the requisite testamentary capacity.
- [65] The parties did not make submissions on this issue with reference to the legal test for testamentary capacity. The respondent pointed to evidence of the Deceased's confusion and the petitioner took the position that the issue of capacity was a "red herring" in this case, given that the Will, Codicil and Note were all created within a short time period of each other, and the Will and Codicil were prepared and executed with the assistance of legal counsel. The petitioner also referenced the fact that forgetfulness did not equate to a lack of testamentary capacity in the decision in *Lane Estate*, 2015 BCSC 2162.
- [66] In *Bull Estate v. Bull*, 2015 BCSC 136, at paras. 114-116, the Court held that the test for testamentary capacity is not a high bar:
- [114] The test for testamentary capacity is not overly onerous. Sufficient mental capacity to make a will may exist despite the presence of cognitive deterioration, and the testator may have sufficient mental capacity even if his/her ability to manage other aspects of his/her affairs is impaired.
- [115] Simply having an imperfect or impaired memory does not in of itself absent testamentary capacity unless it is so great as to leave no disposing memory: *Banks v. Goodfellow* (1870), L.R. 5 Q.B. 549. A disposing mind and memory is "one able to comprehend, of its own initiative and volition, the essential elements of will making, property, objects, just claims to consideration, revoking of existing dispositions and the like " (*Moore v. Drummond*, 2012 BCSC 1702 at para. 34).
- [116] The testator should have an appreciation of the claims of the persons who are natural objects of his/her estate and the extent of his/her property of which he/she is disposing: *Allart Estate v. Allart*, 2014 BCSC 2211 at para. 30; *Leung* at para. 27 and *Laszlo v. Lawton*, 2013 BCSC 305 at para. 158.
- [emphasis added]
- [67] On the evidence before me, I accept that the Deceased suffered from short-term memory loss and occasional bouts of confusion. I note that the Deceased was 96 when she executed the Will, and 97 when she executed the Codicil and wrote the Note. It is not unreasonable given her age that her memory was impaired. I agree with the petitioner that it is relevant that the Will, Codicil and Note were all created within a short period of each other, and counsel who assisted with the creation of the Will and Codicil did not raise concerns about

testamentary capacity. The Note was drafted within approximately 4.5 months of the preparation of the Codicil. There is no evidence before me to suggest that the Deceased's cognitive abilities were in such rapid decline at that point that she would have been capable at the end of February, but incapable by early July.

- [68] Before turning to the question of revival and the last issue, I also wish to briefly address the question of undue influence. During the hearing, both parties referred to concerns about the other having exercised undue influence over the Deceased in relation to her financial and estate matters. Although not expressly stated, the respondent's materials raise concerns about undue influence in relation to the creation of the Will and the designation of beneficiaries for investment purposes. Counsel for the petitioner more directly invited this Court to consider if there had been undue influence by the respondent in the making of the Codicil for costs purposes.
- [69] The petition does not include a challenge to the validity of the Codicil on grounds of undue influence. There is no reference to s. 52 of the WESA, which addresses claims of undue influence. Instead, the petition focuses on determining whether the Note is part of the testamentary documents to be submitted on an application for a Grant of Probate, and if so, what testamentary effect it has. The petitioner seeks relief under s. 58 of the WESA, and my determination that the Note is effective as a revocation of the Codicil means the Codicil is no longer in play. Similarly, while the respondent may have concerns about the creation of the Will or other matters, those matters are not before me. The petition and the response to petition did not squarely raise claims of undue influence, nor did the parties make sufficient submissions on the test for undue influence and the extent to which the evidence before the Court meets that test. While it may remain open to the parties to raise such issues at a future time, I am not prepared to engage with them on this application.

Does the Note evidence an intention to revive the portions of the Will that were revoked by the Codicil?

- [70] Lastly, I consider whether the Note evidences an intention by the Deceased to revive the previously revoked portions of the Will.
- [71] Section 57(4)(a) of the WESA provides that the Court may make an order under s. 58 if satisfied that the will-maker intended to give effect to the will or part of the will that was revoked. In the circumstances of this case, and given the wording of the Note itself, many of the factors already cited for why I accept, on a balance of probabilities, that the Note represents a fixed and final intention to revoke the Codicil apply equally to my consideration of whether the Note revives the previous paragraphs of the Will.

- [72] In particular, the Note says "I revoke any changes to my 2015 Will with Terry Swan". The only changes to the 2015 Will were made by the Codicil, which revoked Paragraph III(d) and substituted a replacement paragraph. The Deceased repeatedly expressed concern to the petitioner that she had "done something stupid" to her Will. And the Note expressly speaks to the 2015 Will with Terry Swan - and that is a reference to the Deceased's trusted legal advisor for more than 30 years.
- [73] All of the above factors suggest to me that it is more likely than not that when the Deceased indicated she wishes to "revoke any changes" (emphasis added) to her 2015 Will, she was expressing an intention to restore the testamentary effect of the 2015 Will she had prepared with the assistance of Terry Swan. For those reasons, it is my determination that the Note is effective to revive Paragraph III(d) of the Will.

Costs

- [74] At the conclusion of the hearing, and based on the arguments about possible undue influence in relation to the Codicil, the petitioner suggested I may wish to invite further submissions on costs after making my decision on the merits. The respondent argued this Court has sufficient information to decide costs along with the merits, and it would be disproportionate to require further submissions. As I have not felt it appropriate to address the suggestion of potential undue influence, I will address costs now.
- [75] In *Hollander v. Mooney*, 2017 BCCA 238, and more recently in *Conner Estate v. Worthing*, 2021 BCCA 231, the Court of Appeal endorsed the modern approach to costs in estate litigation as described by the Ontario Court of Appeal in *McDougald Estate v. Gooderham* (2005), 255 DLR (4th) 435 (Ont. C.A.). Under the modern approach, the default is that costs should be awarded based on civil litigation costs rules (i.e. costs follow the event on a party and party basis) unless the court finds one or more of three public policy considerations applies. The three public policy considerations are described in *McDougald Estate* at para. 78, and were concisely summarized by Justice Tammen at para. 10 of *Chalmers v. Chalmers Alter Ego Trust*, 2018 BCSC 336, as follows:
1. the importance of giving effect to valid wills that reflect the intention of competent testators;
 2. the appropriateness of the testator, through his or her estate, bearing the costs of the litigation where the difficulties or ambiguities that gave rise to the litigation were caused, in whole or in part, by the testator; and
 3. the public interest in resolving questions concerning the validity of wills without cost to those questioning the will's validity where there are reasonable grounds upon which to question the execution of the will or the testator's capacity in making the will.
- [76] I am satisfied that at least the first two public policy considerations apply to this application. It is very important to give effect to the Deceased's testamentary wishes, especially in light of the evidence that she was concerned she had "done something stupid" to her Will in early

2016. The existence of the Note led to ambiguity on her death about the whether the Codicil was indeed the "last word" in terms of her testamentary intentions. As the Deceased wrote the Note which created that ambiguity, it was the Deceased's conduct that necessitated this litigation. Further, as the Note did not meet the formal requirements for the making of a testamentary document under s. 37 of the WESA, the only avenue to resolve this issue was to seek a determination from this Court under s. 58. Both parties supported the request for this Court's determination.

- [77] While the petitioner is also a beneficiary, this application lacked the kind of adversarial context that is sometimes present in estate litigation because the practical implications for the petitioner as beneficiary were the same regardless of the Court's ultimate determination. Accordingly, this particular application was focused on resolving the content of the Deceased's testamentary instruments in order to permit an application for Probate to proceed. The present application represents a cost properly and reasonably incurred by the petitioner as executor acting within the scope of her office: Conner at para. 57. The petitioner also acknowledged, properly in my view, that the Note is quite brief and the language is not very specific. As a result, it was arguably not unreasonable for Ms. Cook to respond to the petition to offer a counter perspective, particularly as the Note, if a valid testamentary document, would affect her personally and as the trustee for her sons' inheritance under the Codicil.
- [78] In the circumstances, I am satisfied it is appropriate for the estate to bear the costs of this application for both parties without regard to their positions or success. I award costs of this application to the petitioner and to the respondent, payable from the estate as special costs.

Conclusion

- [79] In summary, I allow the petition and make the following orders:
- a) An order, under s. 58(3)(b) of the Wills, Estates and Succession Act, that the handwritten note dated July 7, 2016 (the "Note") is effective as a revocation of the codicil dated February 25, 2016;
 - b) An order, under s. 58(3)(b) of the Wills, Estates and Succession Act, that the Note is effective as a revival of Paragraph III(d) of the will of Alice Elizabeth Walker, dated July 8, 2015; and
 - c) An order that special costs of this application be payable to the petitioner and the respondent from the estate of Alice Elizabeth Walker, Deceased.
- [80] I have not granted a declaration as requested by the petitioner since in my view the order should be sufficient to address the matter and a declaration is not usually granted where it will not serve a purpose.
- [81] If there is something that I have missed, I will invite counsel to let me know. Otherwise I thank the parties for their submissions.

"The Honourable Justice Wolfe"

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