

CANADA / JUDGMENT

Wilson Estate (Re)

2025 BCSC 457

COURT

Supreme Court of British Columbia

DECIDED

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2025 BCSC 457 Wilson Estate (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wilson Estate (Re),

2025 BCSC 457

Date: 20250314

Docket: S254552

Registry: New Westminster

In the Matter of the Estate of

Joan Gwendoline Wilson, Deceased

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for Petitioners, Edward Wilson and Randolph Wilson:

D. Magnus

Counsel for the Respondents, Amelia Brown, Amanda Cawston, and Melissa Sanderson:

C. Bow

Place and Date of Hearing:

Vancouver, B.C.

January 28, 2025

Place and Date of Judgment:

New Westminster, B.C.

March 14, 2025

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INTRODUCTION

- [1] In this proceeding, the petitioners seek an order that the Last Will and Testament of their mother, Joan Gwendoline Wilson, be proven in solemn form and that a grant of Probate be made to them.
- [2] The relief sought is opposed by the respondents, who are three of Ms. Wilson's grandchildren. The respondents benefitted under Ms. Wilson's will, albeit to a lesser degree than they had expected.
- [3] On August 29, 2023, the respondents filed a Notice of Dispute in this proceeding, opposing the relief sought. That Notice has since expired, but their objections remain.
- [4] The respondents argue that this matter should be referred to the trial list so that they can undertake certain investigations, obtain documents and test the evidence advanced by the petitioners. In the alternative, the respondents object to probate of the will, arguing that the evidence is not sufficient to establish Ms. Wilson's competency to execute the will or establish that she was aware of what she was executing.

BACKGROUND FACTS

- [5] Joan Wilson was born in Alberta. She died in North Vancouver, British Columbia on July 1, 2023, having elected to terminate her life using Medical Assistance in Dying (MAiD). I refer to all family members by their first names to avoid confusion, and without meaning any disrespect.
- [6] Joan had four children, namely Rebecca Cawston ("Becky"), Leslie Sanderson ("Sue") and the petitioners, Randolph Wilson ("Randy") and Edward Wilson ("Ted").
- [7] Joan has six grandchildren:
 - a) The respondents, Amelia Brown ("Amy") and Amanda Cawston ("Mandy") who are the children of Becky, who passed away in 2000;
 - b) The respondent Melissa Sanderson ("Melissa") and also, her brother, Matthew Sanderson ("Matt"), who are the children of Sue, who passed away in 2019; and
 - c) Rachel Wilson ("Rachel") and Elizabeth Wilson ("Elizabeth"), who are the children of Randy.
- [8] Joan's husband passed away on July 15, 1969, so she was not survived by any spouse.
- [9] Joan is survived by her two sons, Randy and Ted, along with her six grandchildren. Ted has no children.
- [10] Joan's estate is modest. Its total aggregate value is approximately \$815,000, largely consisting of the value of her North Vancouver, BC townhome.
- [11] There were a substantial number of affidavits filed, including from Randy and Ted, and most of the grandchildren and many other family members. In addition, affidavits from many of Joan's friends are before the Court.
- [12] The evidence also includes the complete file of the lawyers who prepared the will and witnessed it, save for the legal account that was sent afterwards.

JOAN'S WILLS

- [13] On May 13, 1996, Joan executed a will (the "1996 Will").
- [14] In the 1996 Will, Joan:
 - a) appointed all four of her children as co-executors and trustees;
 - b) gave a \$5,000 bequest to Amy, Mandy, Melissa and Matt;
 - c) gave \$20,000 to Becky, Randy and Ted (acknowledging that she had previously given \$20,000 to Sue); and
 - d) gave the residue of her Estate to her four children equally, provided that if any of them predeceased her, that child's share would go to that child's children (ie. her grandchildren).

- [15] On August 12, 2011, Joan executed a codicil to the 1996 Will (the "Codicil"). She revoked the \$20,000 bequest to Becky, Randy and Ted, but otherwise confirmed the 1996 Will. By this time, Becky had passed away, such that any bequest to Becky would have been bequeathed to Amy and Mandy, her daughters.
- [16] Joan's most recent will - and the one that is propounded at this hearing - was executed by her on May 3, 2021 (the "Will"). At the time, Joan was in hospital at Lions Gate Hospital ("LGH") in North Vancouver. By this time, both Becky and Sue had died.
- [17] In the Will, Joan:
- a) Revoked any prior wills, including the 1996 Will and Codicil;
 - b) Appointed Randy and Ted as co-executors and trustees;
 - c) Bequeathed \$10,000 to each of her grandchildren, being Amy, Mandy, Melissa, Matt, Rachel and Elizabeth; and
 - d) Divided the residue of her Estate into two shares, with one share to Ted and Randy, provided that if Randy or Ted predeceased her, that son's share would go to that son's children (ie. Rachel and Elizabeth for Randy).
- [18] In addition, on the day of Joan's death in July 2023, Randy and Ted were present. Before the medical practitioners started the procedures for MAiD, Joan made her sons promise that they would distribute certain gifts or small amounts to Amy, Melissa, her family doctor and her friend (Doreen Liggett) and Trish (aka Patricia Harrison).

CIRCUMSTANCES OF THE SIGNING OF THE WILL

- [19] In 2020, Joan was diagnosed with bone cancer in her right leg, necessitating surgery and numerous treatments at LGH.
- [20] By April 2020, Ted had moved in with his mother and relocated from his home in the Okanagan in order to assist his mother. He would eventually live with Joan for the next 18 months, moving back to Kelowna in December 2021.
- [21] In the fall 2020, Randy and his wife, Susan, had a brief discussion with Joan at which time Joan mentioned that she was thinking of making changes to her 1996 Will. Randy does not recall Joan mentioning any particular reason for the changes or what those changes might be.
- [22] Similarly, after Ted had moved in with Joan for about six months, Joan mentioned to her sister, Dorothy Nerison, that she was thinking of changing her will to give Ted two-thirds of her condominium, explaining that Randy and his wife had received significant assistance from another source.

- [23] In early 2021, while they were living together in Joan's home, Joan told Ted that she had decided to change her will. Prior to her going into LGH, Joan asked Ted to contact her lawyer, Naeem Bardai, at Lakes, Whyte LLP, to give him the necessary information for the purpose of a new will, since she did not have email.
- [24] Neither Ted or Randy have any idea how Joan came to select Mr. Bardai to prepare a new will.
- [25] On April 27, 2021, Ted emailed Mr. Bardai confirming that Joan had requested that he contact their law office and give them the information that she was seeking to change in her will. Ted offered to drop off Joan's will at their law offices and also email them with the changes to the will.
- [26] Mr. Bardai immediately responded and confirmed that Ted could drop off the will at their offices. Mr. Bardai also asked Ted for details of the legal names for Joan, and the family members involved, being Randy and Ted and all six grandchildren.
- [27] On April 28, 2021, Ted emailed Mr. Bardai with the information as to the names and indicated that he would drop off Joan's will that day. In that email, Ted also indicated that "Each grandchild is to receive \$10,000.00".
- [28] Ted indicates that he was not privy to any other changes to the Will, including how Joan was instructing that her residue be distributed.
- [29] While Joan was in LGH being treated for a bladder infection, she did not have a phone. As a result, she asked Ted to call Mr. Bardai and arrange to have her sign the new will at LGH. Ted is not aware that anyone "took" the lawyers to LGH to see Joan, although their law offices are very close to LGH.
- [30] The direct evidence as to Joan's signing of the Will is given by Mr. Bardai and his associate, Navrita Brar, also of the same law firm.
- [31] Mr. Bardai described that, during his meetings with Joan, he had enquired about her family members, her assets and wishes regarding the distribution of her estate, although it is not clear when those meetings occurred. As a result, Mr. Bardai was satisfied that Joan had capacity to make a will and that her instructions were given freely and of her own volition. Both Ted and Randy confirm that they had no involvement in such meetings.
- [32] In addition, Mr. Bardai had reviewed the 1996 Will and the Codicil.
- [33] On May 3, 2021, Mr. Bardai and Ms. Brar attended at LGH, in Palliative Care, to visit Joan. They came with the Will that had been prepared by Mr. Bardai. Mr. Bardai described that Joan was talkative, alert and reading a book when they arrived.
- [34] Both Mr. Bardai and Ms. Brar confirm that, prior to signing the Will, Joan read through it carefully and discussed specific points with the lawyers. Mr. Bardai asked Joan if the Will reflected her wishes and she said it did. These actions are reflected in both lawyers' brief

notes of this meeting. Ms. Brar says that, as a result of their review of the Will with Joan, she was satisfied that Joan had capacity to execute a will, stating that Joan appeared to be in relatively good health/spirits and she was talkative and competent, as confirmed by Ms. Brar's notes.

[35] No person was present in the room when the Will was signed by Joan, other than Mr. Bardai and Ms. Brar.

[36] Randy did not see the Will until Joan's passing.

LEGAL PRINCIPLES

[37] The Will is presumptively valid as being executed in accordance with the statutory formalities under s. 37 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA]. The Will is in writing, it is signed by Joan, and it was signed by two witnesses in the presence of Joan.

[38] In addition, a rebuttable presumption of validity arises from the evidence, in that the Will was read by Joan, and she appeared to understand the Will. As such, the presumption is that Joan knew and approved of the contents, and that she had necessary testamentary capacity: *Leung v. Chang*, 2013 BCSC 976 paras. 25-28, citing *Vout v. Hay*, [1995] S.C.R. 876 at para. 26.

[39] Both parties agree that a party opposing proof of a will may rebut the presumption of validity through "suspicious circumstances", as discussed in *Leung*:

[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.

ISSUES

- [40] The respondents raise two separate issues:
- Whether this petition proceeding should be converted to an action; and
 - If not, whether Randy and Ted have proven the Will, in terms of Joan's competence and the lack of undue influence.
- [41] For reasons that will emerge below, I will address the second question first, in the context of the evidence presented at this hearing, before turning to a consideration of the first question.

WAS JOAN COMPETENT WITH SIGN THE WILL?

- [42] The respondents submit there are suspicious circumstances that rebut the above presumptions in respect of Joan's capacity. They say that Joan executed the Will when she was hospitalized and that she was age 96. They point to "mistakes" in the Will; for example, Ted's middle name is spelled incorrectly (in one spot, but not in others) and the Will addresses a situation where Ted has children, when he has none. They also say that there is "very little analysis around the time of instruction and signing about the capacity issue". Finally, they say that there are no medical records in evidence that could possibly show

Joan's capacity level around the time of making the Will.

[43] Further, the respondents say that there are several "important facts and documents" that are either missing or unknown from Mr. Bardai's file and affidavit:

- There is no information about how Mr. Bardai was retained in the first place, and whether Joan initiated the call to the lawyers at Mr. Bardai's offices;
- There are no intake notes about Joan's instructions and about who was present when will instructions were given. There are no notes about during the instructions about competency or undue influence;
- There are no notes of Joan's understanding of how the new will would operate differently from the 1996 Will; no notes about Joan's family; no notes about Joan's financial picture; and, no notes about the reasons why Joan wished to change her will;
- There are no notes about two daughters predeceasing Joan;
- There are no instructions to staff about how to draft the Will;
- There are no draft copies of any will; and
- Mr. Bardai's account for the Will is specifically omitted from the lawyer's file and there is no information as to who paid the account.

[44] The respondents say that Randy and Ted have failed to rebut the presumption of capacity in light of these "suspicious circumstances".

[45] Randy and Ted deny that any suspicious circumstances have been shown to exist. In the alternative, if they do, and the burden of proof has shifted to them, they say that the evidence overwhelmingly supports that Joan was competent to execute the Will.

[46] Randy and Ted's counsel refers to *Laszlo v. Lawton*, 2013 BCSC 305 at paras. 185-198 on the issue of capacity. In that case, the Court stated:

[185] In order to make a valid will, a testator must have a baseline level of mental acuity sufficient to appreciate judicially delineated components of the nature and effect of the testamentary act, referred to as testamentary capacity.

[188] One hundred years after *Banks*, Laskin J.A. (dissenting on other grounds) provided a modern restatement of the test in *Re Schwartz* (1970), 10 D.L.R. (3d) 15 at 32 (Ont. C.A.):

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

- [189] Timing is key. In general, the first relevant time that testators must have testamentary capacity is when they give will instructions; the second is when the will is executed. In recognition of the fact that faltering mental capacity is prone to fluctuate, the authorities permit variation of the degree of capacity required at these pivotal times. For example, the will of a testator who is competent to give instructions, but has lost capacity when the will is executed, may be valid so long as, at the time of execution, the testator was capable of comprehending that she was executing a will drawn in accordance with her previous instructions: *Parker v. Felgate* (1883), 8 P.D. 171; *Brownhill Estate* (1986), 72 N.S.R. (2d) 181 (Co. Ct).
- [47] Before turning to the specific events in early-mid 2021 before Joan signed the Will, it is important to gain a more fulsome understanding of who she was. In that respect, a substantial number of the affidavits before me greatly assist in addressing that matter.
- [48] The answer to the question from all of the deponents was overwhelming to the effect that Joan, although she had physical difficulties and ailments particularly from 2020, was a mentally sharp, competent and fully engaged person to the day she died.
- [49] Randy and Ted point to the following evidence on that point:
- a) Randy and his wife Susan saw Joan most weekends since they lived in Surrey. They both describe Joan as strong-willed and an independent person who was socially engaged and liked to travel. Joan stayed busy at home doing crossword puzzles, watching TV and reading novels and newspapers to keep up to date. Randy and Susan say that Joan was mentally sharp until the day she died. Similarly, Susan confirms that she last saw Joan about two weeks before she passed away in 2023. Susan describes her mother-in-law as determined, independent and assertive in expressing her opinions. Susan confirmed that Joan continued to deal with her own finances and manage her financial affairs to the end of her life and she continued to maintain her home in terms of repairs and maintenance to that time.
 - b) Randy and Susan's daughter, Elizabeth, also visited with Joan along with her parents. Elizabeth describes having many engaging discussions with her grandmother and listening to her grandmother's many opinions up until the 2022/2023 timeframe. Elizabeth describes that Joan offered to pay for her sister Rachel's tuition given a learning disability, but stayed firm in denying Elizabeth any financial support for her education since she did not have any disability.
 - c) Ted saw Joan daily from April 2020-December 2021 since he lived with her. He confirms that, although he assisted Joan with such things as shopping and doctor's appointments, Joan was fully engaged in her own activities. He describes his mother as mentally sharp, and he says that he would have noticed any decline given his profession as a clinical psychotherapist.
 - d) Joan's sister, Ms. Nerison, had weekly telephone discussions with Joan for about an hour. They discussed their families and politics. Like Randy and Ted, Ms. Nerison describes Joan as engaged and opinionated.

- e) A neighbor, John Russell, knew Joan for about three-and-a-half years before she passed. He says that Joan had a sound mind and that she was "very sharp". He describes Joan as engaged in current affairs about their strata building.
 - f) Joan's friends described their relationship with Joan over the decades they knew her. Doreen Liggett saw Joan frequently when Ms. Liggett would drop by to see Joan. Ms. Liggett also confirms Joan's grasp of current affairs and her engagement in discussions. A tight-knit circle of Joan's friends, all former teachers like Joan, being Catherine Vassiliadis, Anne Belanger and Anne Stevenson, saw Joan on a bi-monthly basis and also had telephone discussions with Joan. They all describe Joan as engaged, articulate, thoughtful and generous to the day Joan died. Ms. Belanger spoke to Joan just weeks before Joan's death and never detected any decline in Joan's mental acuity.
 - g) Patricia Harrison, a domestic cleaner and health care worker who assisted Joan from time to time in her daily activities, says that Joan was in charge of her own day-to-day life and that she was mentally sharp until they last saw each other in June 2023. Ms. Harrison describes Joan as her friend.
 - h) Ingrid Sigurdsson, Joan's long-time hairdresser, had known Joan since 2010. Ms. Sigurdsson says that even when Joan was age 97, it appeared to her that Joan was in a very sound mind and could talk intelligently about current and past events.
 - i) Even on her deathbed, Joan had the wherewithal to obtain promises from her sons to distribute certain personal items or cash to particular people in her life, indicating an awareness of her assets and her friends and family members.
- [50] In their Notice of Dispute, the respondents state that the "suspicious circumstances" include that Joan was in the hospital when the Will was signed, that she was suffering from a number of maladies and that Joan's "cognitive functioning was deteriorating".
- [51] Yet, the respondents have not referred to any evidence that would support any decline in Joan's cognitive functioning, let alone refute the substantial evidence before the Court decidedly to the contrary. As counsel argues, the respondents' evidence is largely inadmissible unattributed hearsay (often double hearsay), opinion, speculation, conjecture and argument.
- [52] In fact, the respondents' own evidence supports the position of Randy and Ted:
- a) Amy, who lives in Surrey, describes her grandmother as a "very astute woman who was keen to pay attention to all details";
 - b) Mandy lives in the Netherlands and it appears that she did so in 2021. Mandy's affidavit is mostly argument in the guise of evidence. In addition, Mandy's evidence is rife with her beliefs, concerns, and doubts, albeit unsupported, about what she thought her grandmother was going through in her life and what her grandmother would or would not do in respect of her children, her grandchildren and her estate. In fact, Mandy confirms her view of Joan in

that her grandmother was well aware of her personal and financial affairs, and the circumstances of her various family members;

- c) Amy and Mandy's father, Reg Cawston, lives in Delta. He describes meeting Joan every three months or so for lunch. He also describes Joan as outgoing, talkative and up-to-date on current affairs. His reference to Joan tiring mentally and physically over these lunches is not compelling in the face of the contrary evidence from those who saw her daily or more regularly, although the irregularity of these lunches hardly shows any consistent pattern;
- d) Melissa lives in Victoria along with her partner, Sean Oliver. They used to visit Joan in North Vancouver; however, after the pandemic in 2020, they did not visit her personally, instead opting to use the phone or text. Melissa also states that Joan was "sharp, engaging, and intelligent", as confirmed by Mr. Oliver. Indeed, on the day that Joan signed the Will, Joan texted Melissa in response to Melissa's question about how Joan was feeling. Joan replied:

I think I am coming along very well today. Will talk to you when I get home Friday or sooner. love as always.

As with her cousin Mandy, Melissa's evidence is replete with her beliefs, concerns, and doubts about what she thought her grandmother would or would not do, particularly as to her estate and what she was told or understood earlier about her and her brother inheriting Sue's part of Joan's estate;

- e) Matt is not a respondent, but stands to gain if the Will is set aside. He and his wife, Melanie, who both live in Victoria, have both filed affidavits. Matt says that he had regular discussions with Joan up to the time she died, but he makes no mention of any decline in Joan's mental faculties. He simply refers to Joan being in hospital and "medicated for pain management", leading to his suspicions and concerns about Joan's mental health, although not supported by any evidence. Like many others, Melanie also says that Joan was an engaged person with strong opinions;
- f) Rob Sanderson, who lives in Surrey, is the father of Melissa and Matt. Mr. Sanderson describes that he was in constant phone contact with Joan and that he visited her every couple of weeks. He makes no mention that he noticed any mental decline on Joan's part, including over 2021.

[53] I agree that some details as to how Joan contacted Mr. Bardai's office are not clear from the evidence. The respondents question why he was retained when Joan had used a different lawyer--Eric Rutledge--to prepare the Codicil in 2011. The explanation may be that Mr. Rutledge retired from practice in December 2016. In addition, an entirely different lawyer had prepared the 1996 Will, so clearly Joan was willing and able, if not required, to change lawyers as necessary.

- [54] Before this proceeding was underway, the petitioners' counsel requested the entirety of Mr. Bardai's file. That file included the 1996 Will, the Codicil, the Will, the April 2021 email exchanges between Ted and Mr. Bardai, a copy of Joan's driver's license, the lawyers' notes of their meeting with Joan when the Will was signed and finally, the reporting letter to Joan dated May 13, 2021. Mr. Bardai indicated that he had removed the financial information, including his bill, from the copies.
- [55] In November 2024, the petitioners' counsel forwarded Mr. Bardai's file to the respondents' counsel, which was sent after he had received most of the respondents' evidence raising issues as to the circumstances of the signing of the Will.
- [56] I agree that Mr. Bardai's file materials do not contain notes or memorandums to answer all the questions raised by the respondents. However, it is not necessary that the evidence answer every single question or outline the minutiae of the circumstances. The petitioners are only required to prove matters on a balance of probabilities. Regarding one of their complaints, alleging no notes referring to Becky and Sue having predeceased Joan, Mr. Bardai would have been well aware of Joan's daughters, since he would have reviewed the 1996 Will and Codicil that Ted delivered to his offices. Mr. Bardai also says that he discussed Joan's family members with her when her instructions were given.
- [57] In my view, the evidence recounted above overwhelmingly establishes that Joan was competent to make the Will in May 2021.
- [58] As was noted in Laszlo at para. 189, timing is key from the perspective of both when instructions were given and when the will was signed. In this case, the evidence supports that Joan was fully capable at both times. Mr. Bardai's file and Ted's evidence is to the effect that Joan gave instructions for the Will in April 2021, prior to May 1, 2021 when she was admitted to LGH for a bladder infection. Mr. Bardai says that he met with her to get these instructions and was satisfied as to her capacity at that time. In addition, the evidence of both Mr. Bardai and Ms. Brar are to the effect that Joan was fully capable on May 3, 2021, after establishing that she fully understood the effect of the Will and that it reflected her testamentary wishes.
- [59] The respondents have failed to refer to any evidence to rebut that process by which the Will was executed, beyond vaguely referring to Joan's hospitalization and that she was on pain medication. However, there is no evidence that Joan was in a drugged or diminished state of capacity as a result of being in LGH. The evidence of the lawyers who were present is completely contrary to any assertion that Joan was in a diminished capacity.
- [60] On that score, the respondents also argue that there is a lack of medical evidence in May 2021 as to Joan's mental condition. In Laszlo, the Court stated:

- [198] Testamentary capacity is not a medical concept or diagnosis; it is a legal construct. Accordingly, scientific or medical evidence - while important and relevant - is neither essential nor conclusive in determining its presence or absence. Indeed, the evidence of lay witnesses often figures prominently in the analysis. Where both categories of evidence are adduced, it is open to the court to accord greater weight to the lay evidence than to the medical evidence, or reject the medical evidence altogether
- [61] In 2020, Joan was diagnosed with bone cancer in her leg and she suffered from frequent bladder infections (such as required her to be hospitalized for a few days in May 2021 when she signed the Will). As a result, Joan received assistance from various caregivers to tend to her physical needs, such as showering, laundry and meal preparation. In addition, Randy and Susan (and other family members) assisted with Joan's tasks, such as grocery shopping, when they saw her.
- [62] I fail to see how Joan being briefly hospitalized for a physical ailment per se gives to any concerns about mental capacity. The fact that Joan was on painkillers in May 2021 for her bladder infection is not surprising, but that fact does not inexorably lead to the conclusion that a person lacks mental capacity as a result. The same comment can be made regarding Joan being of advanced age. While I accept that advancing age can and is frequently accompanied by a decline in mental capacity, it is also not a foregone conclusion. Joan appears to have been in the latter category.
- [63] Notwithstanding that testamentary capacity is a legal concept and not a medical test, there is medical evidence in the record that supports the contention that Joan was mentally competent in spring 2021 and until she died. Joan's family doctor, Dr. Eb Briscoe, who saw her regularly in her last years, states that she:
- never had any reason to conduct an assessment for dementia or a screening for depression in [Joan]. She was consistently oriented to time, place, and date, and her coherence was evident. Additionally, her recall of both recent events in her family and remote events was reliable . I had no concerns regarding her competency. She appeared lucid and competent in my interactions with her.
- [64] The respondents also advance arguments expressing shock and surprise that Joan availed herself of MAiD for her death. While Joan earlier disclosed her intentions to Ted and certain of her friends, she only involved Ted and Randy in the latter stages of that process and in the act itself. It must be presumed that Joan gave her informed consent to this procedure in accordance with the applicable legislation, as would have been confirmed by the participating medical practitioners.
- [65] While a MAiD assessment may not be determinative in terms of a legal assessment of capacity, it can be of assistance to the court regarding capacity in the absence of other medical evidence: Noel Estate (Re), 2023 BCSC 2473 para. 35. In any event, any such MAiD assessment is of limited assistance in this case, since Joan died over two years after the Will was executed. Clearly, the critical time frame is when the Will was signed, not when Joan

died, although as I have described above, no person in Joan's life mentions any mental decline even at that later date.

- [66] The respondents also argue that Joan was not the type to make last minute changes. However, Joan contacted Mr. Bardai prior to going to the hospital and she did not change her instructions after she entered LGH, such that it was not a last minute or rushed change. Further, in the 2020 timeframe, Joan was already talking to Randy, Ted and her sister about changing her will, indicating that Joan had put some thought into the matter well before May 2021.
- [67] The respondents raise issues about what they describe as the "obvious mistakes" in the Will. However, one is only a minor typographical error in referring to the paragraph numbers. The second one is simply a misspelling of Ted's middle name in one instance (missing an "S"), but not where his full name was later set out. Finally, where the Will referred to Ted's children as possibly not surviving Joan, I consider that would have simply been a will drafting technique that was mirrored in the provision relating to Randy's children.
- [68] Finally, the respondents argue that suspicions are raised regarding Joan's Will given that it removed the gifts of Becky and Sue's share to their children, which was the treatment under the 1996 Will and Codicil. They say that this is unfair, strongly suggesting that their grandmother would not have treated them that way. However, Joan had no obligation to her grandchildren or her deceased children and she was fully capable of deciding to distribute her estate to others.
- [69] In any event, there is evidence as to the reasons why Joan changed her will as she did.
- [70] Ted says that after the Will was signed, he asked her why she had executed it. Ted says that Joan told him that her grandchildren did not need the money as their fathers (Mr. Sanderson and Mr. Cawston) would provide for them. Ted understood that both families had accumulated substantial wealth, although the Sanderson and Cawston families deny this. Similarly, Ms. Nerison says that Joan expressly told her that Joan was considering changing her will to more greatly benefit Ted, given his personal circumstances at the time. Joan also told her sister the reason not to maintain the earlier gifts to her grandchildren, saying "her grandchildren were just fine and needed nothing".
- [71] Whether or not Becky and Sue's children were "just fine" and would be cared for by their fathers is beside the point. Even if Joan was in error in that respect, it certainly was an opinion she appeared to hold and she was fully competent to act on that opinion as she wished in relation to them. Joan's views as to who should benefit from her assets, as set out in the Will, is consistent with how she viewed "need" in relation to her consideration and decision in terms of supporting or not supporting Randy's children, Elizabeth and Rachel, as I have set out above.

- [72] I have already referred above to the comments in Leung at para. 32 in that the parties objecting to the will must provide evidence beyond mere speculation and that evidence must raise a "specific and focussed suspicion". This same sentiment is found in Laszlo:
- [206] A "general miasma of suspicion that something unsavoury may have occurred" will not be enough: *Clark v. Nash* (1989), 61 D.L.R. (4th), 409 at 425 (B.C.C.A.). In *Maddess v. Racz*, 2009 BCCA 39 at para. 31, the B.C. Court of Appeal reminded that merely "some evidence" was not sufficient and emphasized the stipulation in *Vout* that in order to elevate general suspicion to the threshold of suspicious circumstances, the evidence, if accepted, must tend to negative knowledge and approval or testamentary capacity.
- [73] I find that the respondents have done nothing more than raise general suspicions, founded on their concerns and belief that their grandmother would not have done this to them. These concerns do not amount to any "suspicious circumstances."
- [74] Even if I had found that there were suspicious circumstances, which I have not, the result is simply that the presumptions of validity do not apply. As stated in *Bull Estate v. Bull*, 2015 BCSC 136:
- [122] successfully invoking the doctrine of suspicious circumstances does no more than require the plaintiff to prove knowledge and approval of the contents of the will and testamentary capacity. The question of testamentary capacity does not stand or fall on the presence or absence of suspicious circumstances: [*Chalmers v. Uzalac*, 2004 BCCA 533] at para. 41.
- [75] I find that the evidence presented at this hearing, including from the respondents, overwhelmingly supports the conclusion that Joan was in full control of her mental capacity in May 2021 and that she had the necessary testamentary capacity to execute the Will.

WAS THERE UNDUE INFLUENCE?

- [76] The respondents submit there are suspicious circumstances that suggest that Ted influenced Joan to execute the Will. They say that:
- a) Joan had told the respondents on many occasions that they would receive their mother's share of her estate, which had been in place under the 1996 Will. In the Notice of Dispute, the respondents contend that the Will is "contrary to the known wishes of [Joan]";
 - b) Joan had an opportunity to change her 1996 Will in light of Becky dying, but she did not alter that plan in the Codicil;
 - c) The only instructions for the Will that are the lawyers' file are contained in Ted's email, where he states in part "I can also then, email you the changes she is looking to have done";
 - d) Ted dropped off the 1996 Will and Codicil at Mr. Bardai's office;
 - e) In his affidavit #1, Ted claimed that he was not aware why his mother was making changes to her will;

- f) Ted was living with Joan during the period she wished to change her will;
- g) Mr. Bardai's letter dated May 13, 2021 confirming execution of the Will was addressed to Joan, but c/o Ted's address in Kelowna (while Ted was still living with Joan in North Vancouver); and
- h) Ted (and Randy) stands to benefit more from the Will than under the 1996 Will.

[77] Section 52 of WESA addresses undue influence:

In a proceeding, if a person claims that a will or any provision of it resulted from another person

- (a) being in a position where the potential for dependence or domination of the will-maker was present, and
- (b) using that position to unduly influence the will-maker to make the will or the provision of it that is challenged,

and establishes that the other person was in a position where the potential for dependence or domination of the will-maker was present, the party seeking to defend the will or the provision of it that is challenged or to uphold the gift has the onus of establishing that the person in the position where the potential for dependence or domination of the will-maker was present did not exercise undue influence over the will-maker with respect to the will or the provision of it that is challenged.

[78] In order to invoke s. 52 of WESA, the respondents must first prove that the petitioners were in a position of dependence and domination over Joan.

[79] The meaning of undue influence was discussed by Justice Girn in *MacKinnon Estate (Re)*, 2023 BCSC 1396, as follows:

[103] Undue influence occurs when "the influence exerted against the will-maker amounted to coercion, such that the will did not reflect the true intentions of a free will-maker and was not the product of the will-maker's own act": *Leung v. Chang*, 2013 BCSC 976 at para. 35, *aff'd* 2014 BCCA 28, leave to appeal to SCC *ref'd*, 35951 (6 November 2014).

[104] At common law, the burden was on the person asserting undue influence on a balance of probabilities. However, s. 52 of WESA has modified the common law, and now shifts the burden of proof to the person seeking to defend a will when there are allegations of undue influence: [Section Omitted]

[106] As such, pursuant to s. 52, the party claiming undue influence must establish that the will resulted from another person being in a position where the potential for dependence or domination of the will-maker was present, and that they used that position to unduly influence the will-maker to make the will. If they are able to establish that the other person was in a position where "the potential for dependence or domination of the will-maker was present" then the party seeking to defend the will has the onus to establish that undue influence was not exercised over the will-maker with respect to the will.

- [107] In Halliday at para. 209, after reviewing s. 52, Chief Justice Hinkson stated:
- [209] Nevertheless, it is insufficient to establish that a person had the ability to unduly influence the will-maker. The evidence must provide that in the particular case the power was exercised, and that the will is a product of that exercise of power. The exercise of significant advice or persuasion on the will-maker, or an attempt to appeal to the will-maker, or the mere desire of the will-maker to gratify the wishes of another, will not amount to undue influence.
- [80] In *Cowper-Smith v. Morgan*, 2016 BCCA 200 (rev'd on other grounds 2017 SCC 61) the court summarised the law of undue influence:
- [49] A presumption of undue influence is established when the nature of the relationship between the parties demonstrates the potential for domination. To rebut the presumption, the donor must be shown to have entered into the transaction of her own "full, free and informed thought". See *Geffen [v. Goodman Estate]*, 1991 CanLII 69 (SCC), [1991] 2 SCR 353] at 378-379, 381.
- [50] Factors to be considered in determining whether the donor acted of her own "full, free and informed thought" in entering the transaction include: (i) the lack of actual influence or opportunity to influence the donor; (ii) the receipt of or opportunity to obtain independent legal advice; (iii) the donor's ability to resist any such influence; and (iv) the donor's knowledge and appreciation about what she was doing. See *Stewart v. McLean*, 2010 BCSC 64 at para. 97.
- [81] The respondents say that Ted was in a position of dominance or dependence in relation to Joan, such that he has the onus of disproving that he exercised that dominance or dependence to influence Joan to execute the Will. The respondents further say that Ted has failed to establish a lack of undue influence through the evidence.
- [82] I disagree. Again, the evidence at this application fully supports that Ted had no such influence.
- [83] Ted denies exerting any pressure on Joan, directly or indirectly, to change her will. Again, he refers to his mother's sharp mind and strong personality. He states that Joan was opinionated, open to discussion, but unwavering once she had made up her mind, consistent with other and independent witnesses.
- [84] It is clearly the case that Joan made considered and independent decisions in relation to her family. She made decisions in terms of supporting or not supporting Randy's children, Elizabeth and Rachel. She also made a considered decision not to tell any of her family, other than Randy and Ted, about her decision to use MAiD.

- [85] The fact that Joan changed her will and did not discuss it with other family members was consistent with her past behavior. She clearly felt no need to even tell Melissa about the fact that she had signed or was about to sign the Will on the same day when they were communicating by text in a very kind and loving manner.
- [86] I cannot see that Joan was, even in a general way, dependent on Ted.
- [87] The respondents allege that Ted isolated Joan around the time that she signed the Will. However, the evidence does not support that contention. In fact, COVID-19 procedures were still in place at that time and would have restricted visitors in any event. Further, Joan was using text messages to communicate with her family while she was at LGH, including to a group that included all of her grandchildren. As above, Joan texted with Melissa the very day she signed the Will.
- [88] The evidence is that Joan was fiercely determined to continue to live in her home as long as she could. As stated above, Joan lived life on her own terms and she continued to undertake many regular tasks, including addressing all financial matters that arose. Joan was assisted in her day-to-day tasks by numerous caregivers, but only as required. She also had a strong network of friends who she interacted with frequently and entirely independently of Ted. In fact, at one point, after Ted had moved in with her, Joan told Mr. Sanderson that she was ready for Ted to head back home and hoped he would move on with his life.
- [89] The respondents argue that Ted was "very involved in the process", meaning the process leading to the execution of the Will. However, that is not the case. Ted was not involved in instructing the lawyers and did not attend any meetings between the lawyers and Joan - not just as stated by Ted, but also confirmed by the lawyers. The respondents say that Joan was reliant on Ted to provide information and documentation to the lawyers. That is so, but only because she was the hospital at the time. In addition, it appears that Joan often relied on family members, including Ted and others, to run errands for her. The delivery of some documents and information to the lawyers, as directed by Joan, does not suggest any dependence or domination.
- [90] Finally, the respondents argue that the only evidence that Joan was leading this process relating to the Will comes from Ted. This is plainly false, in light of Mr. Bardai's evidence. He describes a very professional relationship with Joan that was entirely independent of any direct involvement by Ted and where Mr. Bardai confirmed Joan's understanding of the Will and that it was her own decision and not influenced by anyone.
- [91] In respect of undue influence, the respondents have failed to provide any particulars or evidence to substantiate their allegations, either directly from witnesses or by inference based on proven facts (*Richter Estate v. Richter*, 2018 BCCA 238 at para. 35). At the time the Will was executed, Joan was not in a position where Ted had the potential for dependence or domination on Joan. As such, s. 52 of WESA is not engaged.

[92] Even if s. 52 of WESA had been engaged, I find that the evidence adduced by Randy and Ted proves on a balance of probabilities that Ted did not unduly influence Joan or influence her at all.

SUITABILITY TO HEAR THIS MATTER SUMMARILY

[93] The respondents argued at the outset that this petition proceeding should be converted to an action to allow the Court to hear all the evidence and decide on the facts. In the alternative, the respondents say that much of the evidence needed to determine the issues was lacking and that they required further disclosure and time to conduct cross-examinations of the various deponents.

[94] In August 2024, this petition proceeding was properly brought as such pursuant to the Supreme Court Civil Rules, BC Reg. 168/2009 [SCCR], R. 25-14(4)(b). At that time, the petitioners also filed and served on the respondents the large number of affidavits (15) that contains most of the evidence at this hearing.

[95] In October/November 2024, the respondents filed their response and the bulk of their affidavits. Around that same time, the respondents' counsel began stating to the petitioners' counsel that the matter should be moved to the trial list to allow more discovery procedures. The petitioners' counsel did not agree.

[96] At no time did the respondents' counsel file any application to move this matter to the trial list or apply to the Court for further document production or allow cross-examinations on affidavits, as was available to them: Rules 22-1(7)(d) and 16-1(18). In particular, even after the matter was adjourned from the November 6, 2024 hearing date, when no judge was available, the respondents still did not seek a hearing to determine procedure.

[97] Rather, the respondents have waited since fall 2024, when the issues were joined, to submit at this hearing that the Court should now make such orders, pursuant to Rule 25-14(8) which states:

Without limiting any other power of the court under this or any other Part of these Supreme Court Civil Rules, the court may, on its own motion or on application, give directions concerning the procedure to be followed in any matter under this Part and, without limiting this, may give directions respecting any of the following:

- (a) the issues to be decided;
- (b) who the parties will be, including directions for the addition or substitution of a party;
- (c) how evidence may or must be presented;
- (d) summary disposition of any or all issues in the matter;
- (e) the trial of any or all of the issues in the matter;

- (f) pleadings;
- (g) examinations for discovery and discovery of documents;
- (h) service or delivery of a notice, process, order or document on any person;
- (i) dispensing with service or delivery;
- (j) representation of any person or interest.

[98] The leading case on the test to be applied in converting petition proceedings to actions under the SCCR is *Cepuran v. Carlton*, 2022 BCCA 76. The court stated:

[158] It should be kept in mind that the starting point for those matters that are properly brought by way of petition is that the Rules contemplate that a summary procedure will be appropriate: *Conseil scolaire* at paras. 29-30. This is different than the starting point for an action. There should be good reason for dispensing with a petition's summary procedure in favour of an action. The mere fact that there is a triable issue is no longer a good reason.

[159] The modern approach to civil procedure, as encouraged in *Hryniak*, is to allow parties and the 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 the merits. In my view, R. 16-1(18) and R. 22-1(4) work to reflect this modern approach within a petition proceeding.

[160] To summarize, I am of the view that a judge hearing a petition proceeding that raises triable issues is not required to refer the matter to trial. The judge has discretion to do so or to use hybrid procedures within the petition proceeding itself to assist in determining the issues, pursuant to R. 16-1(18) and R. 22-1(4). For example, the judge may decide that some limited discovery of documents or cross-examination on affidavits will provide an opportunity to investigate or challenge the triable issue sufficiently to allow it to be fairly determined by the court within the petition proceeding, without the need to convert the proceeding to an action and refer it to trial.

....

[165] I commend the reasoning of Justice Ballance in *Boffo Developments (Jewel 2) Ltd. v. Pinnacle International (Wilson) Plaza Inc.*, 2009 BCSC 1701, and Justice Dardi in *Terasen Gas Inc. v. Surrey (City)*, 2009 BCSC 627, as setting out some factors that may be relevant in deciding whether to convert a petition proceeding to an action. These decisions were before their time in that they were before the adoption of R. 16-1(18). The factors that may be relevant will evolve with time and the circumstances of a particular case.

[166] At a minimum, when considering whether to order the use of hybrid procedures within the petition proceeding itself, or to refer the matter to trial, the court will need to be mindful of the object of the Rules set out in R. 1-3: to secure the just, speedy and inexpensive determination of every proceeding on its merits, and so far as can be achieved, in ways that are proportionate to the amount involved, the importance of the issues, and the complexity of the proceeding.

[Emphasis added.]

[99] The factors referenced in para. 165 of *Cepuran* - that might be considered on this question - were summarized at para. 51 of *Boffo Developments (Jewel 2) Ltd. v. Pinnacle International (Wilson) Plaza Inc.*, 2009 BCSC 1701 as including:

- (a) the undesirability of multiple proceedings;
- (b) the desirability of avoiding unnecessary costs and delay;
- (c) whether the particular issues involved require an assessment of the credibility of witnesses; and
- (d) the need for the Court to have a full grasp of all the evidence; and
- (e) whether it is in the interests of justice that there be pleadings and discovery in the usual way to resolve the dispute.

[100] The respondents assert that there are "triable issues", which I take to mean issues relating to Joan's testamentary capacity and undue influence. They say that examinations for discovery or cross-examinations on affidavits of the parties and cross examinations on affidavits may be necessary. They certainly want a pre-trial examination of Mr. Bardai. They also refer to an examination of Ms. Nerison, Joan's sister, in relation to the evidence in her affidavit about her discussions with Joan about changes to Joan's will.

[101] The respondents also say that these issues require further document discovery, including:

- a) The lawyer's "complete" set of notes and documents notes from their meetings with Joan, asserting that there must be more notes beyond the notes of their May 3, 2021 meeting with Joan (even though there is no evidence to suggest that further notes exist);
- b) Hospital records regarding Joan in May 2021 and in June/July 2023;
- c) MAiD records (which were requested by petitioners' counsel, but denied by the health authority since the Will had not been probated); and
- d) Dr. Brisco's clinical records in the years before Joan's death.

[102] The first question is, of course, whether the matter is suitable for summary determination or, if not, whether it should be converted to an ordinary trial process or some hybrid procedure.

- [103] The onus lies on the respondents to establish the appropriateness for the remedy that they seek, given the comments in *Cepuran* at para. 158 about a petition being the "starting point" and that a "good reason" has to be shown to displace that presumed procedure. Simply asserting a "triable issue" will not be sufficient to meet the threshold to send a matter to the trial list or justify ordering pre-trial procedures.
- [104] In *Waibel Estate (Re)*, 2023 BCSC 322, Justice Crerar directly addressed this issue. He stated that evidence is required to establish this "good reason", which was not present in that case:
- [9] Under Rule 25-14(4) of the [SCCR], 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. 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. [Footnote removed]
- [105] The issue arose in *Miles Estate (Re)*, 2023 BCSC 873, where Justice G.P. Weatherill stated:
- [34] Rule 25-14(4) governs applications to prove a will in solemn form. Such applications are presumptively brought summarily, with no discovery process, because of the need for efficiency, affordability and proportionality in the administration of estates. 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: *Waibel Estate (Re)*, 2023 BCSC 322, at para. 9. Where there is no credible challenge to the validity of a will or no genuine issue for trial, the court hears the application in a summary fashion on affidavits: *Cook Estate (Re)*, 2019 BCSC 417 at para. 72.

- [106] Allegations of unanswered questions based on self serving allegations, inadmissible hearsay and innuendo amounting to only a fishing expedition are not a sufficient "good reason" to refer a matter to the trial list: Miles Estate at paras. 62 and 63.
- [107] In my view, the respondents have not established any good reason to send this matter to the trial list or delay the matter further to allow pre-trial procedures. The evidence as to Joan's capacity is confirmed by each witness, the majority of whom are independent of Randy, Randy's children and Ted. The respondents' suspicions, concerns and speculation about Joan's mental state while at LGH are entirely unsupported by any evidence, and contrary to the evidence of Joan's family doctor at the time. The same can be said of the respondents' suspicions, concerns and speculation about Ted influencing Joan's decisions.
- [108] As it was in Waibel Estate and Miles Estate, what the respondents want is nothing more than a fishing expedition that will cause substantial cost and delay in the administration of this modest estate. At present, there are insufficient funds to even maintain Joan's residence from the cash on hand, such that the estate needs to be probated and administered as soon as possible.
- [109] The respondents also assert that there are issues of the credibility of the parties and witnesses, who are said to have conflicting accounts. However, I do not see any credibility issues that arise. The body of evidence adduced, including that of the respondents, is largely consistent and significantly, consistent on key issues, such as Joan's competence until she died, her independence from Ted, and her ongoing ability to make her own decisions.
- [110] I conclude that there is no basis to have the matter referred to the trial list and that this matter is suitable for summary determination.

CONCLUSION

- [111] The evidence does not support that Joan lacked testamentary capacity or that Ted exercised undue influence on her to execute the Will.
- [112] The Will is proven in solemn form and a grant of Probate of the Will is made in favour of the petitioners.
- [113] In the petition, the petitioners also sought an order pursuant to Rule 25-10(11) to remove the respondents' Notice of Dispute as not being in the best interests of the estate. Rules 25-10(12) provides that a Notice of Dispute expires after one year unless it is renewed. The Notice of Dispute was filed on August 29, 2023, but it was not renewed. Accordingly, I see no need for such an order to remove the Notice.
- [114] Randy and Ted seek full indemnity special costs of this action or, in the alternative, party/party costs, payable by the respondents, Amy, Mandy and Melissa.

- [115] The costs of this petition proceeding has been solely necessitated by the decision of Amy, Mandy and Melissa to file the Notice of Dispute and contest the hearing of this petition. Costs of probate proceedings may be appropriate when a party has advanced unfounded allegations.
- [116] The petitioners were the successful parties in this litigation. I have found that there was no reasonable basis for Amy, Mandy and Melissa to dispute the validity of the Will. Some of their evidence and criticisms was not relevant at all to the issues, particularly as to the MAiD issue, and also how Randy and Ted dealt with matters after Joan's death.
- [117] In the first instance, the petitioners seek an award of special costs. Special costs may be warranted in exceptional circumstances where a litigant has engaged in reprehensible conduct, which includes conduct deserving of rebuke: *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352. The court may consider the motive or intent of a litigant in this analysis: *Westsea* at para. 43.
- [118] Having reviewed all of the circumstance, I cannot find that Amy, Mandy and Melissa's conduct is sufficiently reprehensible to warrant the punitive sanction of a special costs award. I accept that their motivation in opposing this petition was borne from their extreme hurt and disappointment in terms of how their grandmother, who they loved and respected, chose to recognize their relationship in the Will, a result that they personally felt and continue to feel was unfair.
- [119] Accordingly, I order that Amy, Mandy and Melissa pay party/party costs to the petitioners.
- [120] There is no dispute concerning the costs of the petitioners in this proceeding. It is a long-standing principle that executors are entitled to be indemnified for the costs they properly and reasonably incur while acting within the scope of their office; they will therefore receive a special costs award out of the estate: *Royal Trust Corp. of Canada v. Clarke*, 1989 CanLII 2692, 60 D.L.R. (4th) 257 (B.C.C.A.) at para. 17. This general rule does not preclude the court from ordering that an unsuccessful litigant pay some or all of the executor's costs associated with proving the will in solemn form: *Leung v. Chang*, 2014 BCSC 1243 at para. 83; *Mawdsley v. Meshen*, 2011 BCSC 923 at para. 39.
- [121] It was necessary for the petitioners, as executors under the Will, to bring this proceeding to prove the Will so that Joan's estate could be properly administered. They acted reasonably throughout and, as is obvious, they were successful in proving the Will. The petitioners are therefore entitled to special costs for the entire proceeding out the estate, from which any party/party costs recovered from Amy, Mandy and Melissa will be deducted.

"Fitzpatrick J."

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