

CANADA / JUDGMENT

## Wilton v. Koestlmaier

2019 BCCA 262

### COURT

British Columbia Court of Appeal

### DECIDED

19 July 2019

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2019 BCCA 262 Wilton v. Koestlmaier

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Wilton v. Koestlmaier,

2019 BCCA 262

Date: 20190719

Docket: CA45539

Between:

Larry Wayne Wilton and Daryl Price Ashley Wilton,

Co-Executors of the Will of Maxine Ruth Wilton, Deceased

Respondents

(Plaintiffs)

And

Elizabeth Nancy Koestlmaier, James Gordon Wilton and

Natasha Maxine Wilton

Appellants

(Defendants)

Before:

The Honourable Madam Justice Dickson

The Honourable Madam Justice Griffin

The Honourable Mr. Justice Butler

On appeal from: An order of the Supreme Court of British Columbia, dated

July 26, 2018 (Wilton v. Koestlmaier, 2018 BCSC 1257,

Vancouver Docket S162181).

Counsel for the Appellants:

J.J. Wingson, Q.C.

L. Donaldson

Counsel for the Respondents:

J.E. Murphy, Q.C.

B.G. Souza

Place and Date of Hearing:

Vancouver, British Columbia

May 2, 2019

Place and Date of Judgment:

Vancouver, British Columbia

July 19, 2019

Written Reasons by:

The Honourable Mr. Justice Butler

Concurred in by:

The Honourable Madam Justice Dickson

The Honourable Madam Justice Griffin

Summary:

The appellants, three grandchildren of the deceased, Maxine Wilton, appeal the dismissal of their challenge to the validity of a codicil made by Ms. Wilton in 2006 which disinherited them. The trial judge found there were no suspicious circumstances surrounding the making of the codicil and that the deceased had the requisite testamentary capacity. The trial judge awarded costs against the appellants without receiving any submissions on costs. The appellants allege the trial judge erred in failing to find suspicious circumstances, in admitting the expert report of the deceased's family physician and in awarding costs against the appellants. Held: Appeal dismissed. The appellants failed to show any error in the trial judge's conclusion that there were no suspicious circumstances. The trial judge relied on evidence from witnesses whom she found to

be reliable, independent and professional. As a result of the appellants' failure to establish suspicious circumstances, the presumption of testamentary capacity remained as the trial judge found that the codicil was executed in accordance with the appropriate formalities and that the testator read and understood its contents. The appellants could point to no error in the judge's exercise of discretion in admitting the report of the deceased's family physician. While it was unfortunate that submissions on costs were not made to the trial judge, this Court is able to examine the judge's reasons and her exercise of discretion in awarding costs against the appellants. Applying the modern approach to costs in estate litigation, the judge did not err in awarding costs to the successful party as there was no reasonable grounds on which to challenge the execution of the codicil and Ms. Wilton's capacity.

Reasons for Judgment of the Honourable Mr. Justice Butler:

- [1] The appellants, Elizabeth Koestlmaier, James Wilton and Natasha Wilton, are three grandchildren of Maxine Wilton. I will refer to the parties and family members by their first name for convenience and mean no disrespect by doing so. They appeal an order of the Supreme Court upholding the validity of a codicil made to Maxine's will on September 12, 2006 (the "Codicil"). The respondents, Larry Wilton and Daryl Wilton, are two of Maxine's sons, co-executors of her estate, and the propounders of her will. The appellants argue that the trial judge erred in concluding there were no suspicious circumstances surrounding the making of the Codicil and that Maxine had requisite testamentary capacity to make the Codicil. They also say the judge erred in awarding costs of the action against them. For the reasons that follow, I would dismiss the appeal.

## Background

- [2] Maxine had five sons with her husband Calvin who predeceased her by 45 years: Roger, Larry, Mark, Keith, and Daryl. Maxine has 14 grandchildren. The appellants are three of Roger's four children. Roger died in 1997. Maxine's other four sons were alive when she died.
- [3] Maxine never remarried after Calvin's death but had a close relationship with a neighbour, Mr. George Lea.
- [4] Maxine made wills in 1972, 1999 and 2003. She executed a first codicil to her will on January 13, 2005. Maxine made no further changes to her will after executing the Codicil in 2006.
- [5] The 1972 will provided that Maxine's estate be divided: 15% to Roger, 15% to Larry, 20% to Mark, 20% to Keith, and 30% to Daryl, who was then under the age of 19. Roger and Larry were appointed as executors and trustees.
- [6] In 1999, after Roger's death, Maxine executed a new will with bequests of \$5,000 each to Elizabeth and James. Natasha and the appellants' other sibling were not included in this will. The remainder of Maxine's estate was to be divided equally among her four living sons. Larry and Mark were made executors and trustees. The will also provided that the gift to any of Maxine's living sons who failed to survive her go to his children equally.

- [7] Maxine's 2003 will provided that her estate be divided in five equal shares, one for each of her living sons, and a further share for Roger's children.
- [8] On December 29, 2004, Maxine suffered a stroke. She was admitted into the hospital for a few weeks before returning home.
- [9] On January 13, 2005, Maxine executed the first codicil to her 2003 will which changed the executors and trustees from Larry and Mark, to Larry and Daryl. Both Maxine's 2003 will and the first codicil were prepared by a lawyer at, what was then, Bull, Housser & Tupper LLP in Vancouver. The validity of the first codicil was never challenged.
- [10] On September 12, 2006, Maxine executed the Codicil. It purports to divide the estate: 27% to Mark, 27% to Daryl, 23% to Keith, and 23% to Larry. The Codicil excludes Roger's children. It was prepared with the aid of William F. Spohn, a lawyer and acquaintance of Mr. Lea's son. Mr. Lea arranged Maxine's first meeting with Mr. Spohn. The following facts about the making of the Codicil were admitted by the parties at trial:
- In 2006, Larry talked to Maxine about leaving more of her estate to Mark and Daryl and less to him and Keith because they did not have any present need for money;
  - On August 23, 2006, Larry called Bull Housser and told the person he spoke to that he wanted to change to a lawyer closer to Maxine's home;
  - On September 5, 2006, Larry phoned Bull Housser to inquire about picking up Maxine's documents to put them in a safety deposit box;
  - On September 6, 2006, Larry attended the office of Bull Housser and picked up the original copies of Maxine's 2003 will and first codicil; and
  - On September 8, 2006, Maxine attended Mr. Spohn's office in West Vancouver to make the Codicil. She brought with her two handwritten sheets of instructions, which purport to divide the estate: 27% to Mark, 27% to Daryl, 23% to Keith, and 23% to Larry, and exclude Roger's children.
- [11] The judge concluded that the instructions in the handwritten sheets were in Larry's handwriting, and that the signature at the bottom was Maxine's. Mr. Spohn confirmed that Maxine understood the contents of the instructions and the effect that the Codicil would have on her estate, including that it would disinherit Roger's children. Mr. Spohn did not question Maxine's mental competency during this meeting, concluding that Maxine appeared to be functioning normally and certain of what she wanted. She returned to Mr. Spohn's office to execute the Codicil on September 12, 2006.
- [12] In November 2006, Maxine suffered a second, more severe stroke. She died in June 2011.

## Trial Judgment

- [13] In lengthy reasons following a trial with affidavit and viva voce evidence, the judge upheld the validity of the Codicil. The judge found there were no suspicious circumstances surrounding the making of the Codicil. She concluded that Maxine knew and approved of the contents of the Codicil and had the requisite testamentary capacity to execute the Codicil, which she did of her own free volition.
- [14] The judge provided an extensive review of the evidence presented at trial. Larry and Daryl led evidence from Mr. Spohn, Maxine's business accountant (Paul Dunkin), Maxine's two caregivers (Leonora Gabay and Luista Ayala), Maxine's nephew (Laurie Howe), and Maxine's family doctor (Sandra Wiebe). Elizabeth, James and Natasha testified themselves and led evidence from Dr. John Sloan, an independent physician, and Jean Kovacs, a forensic document examiner. The judge found the appellants' evidence to be unreliable and self-serving in comparison to the evidence of the executors' witnesses, who she found to be independent, professional and generally more familiar with Maxine during the relevant time. To the extent that the appellants' evidence disagreed with that of the executors, the judge preferred the executors' evidence.
- [15] The judge assigned no weight to the evidence of Dr. Sloan. She found that his opinion, which was based solely on a review of records and not on any personal knowledge of or interaction with Maxine, had changed immediately before trial. The judge accepted the evidence of Mr. Kovacs that impressions from a piece of paper overlaying the handwritten note might have shown Larry working out the dollar figure effects of varying the distributions in the will. The judge found that the handwritten note Maxine brought to the meeting with Mr. Spohn was written by Larry and signed by Maxine, whose signature had become fainter and less legible following her stroke in 2004.
- [16] The judge found that although Maxine may have suffered from physical impairment and been slower to communicate after her 2004 stroke, she nevertheless possessed the mental and cognitive ability to make decisions about her financial affairs in September 2006, including testamentary dispositions. The judge found that Maxine was mostly independent in August, September and October of 2006. In the judge's words: "I find that Maxine was a strong willed, independent woman who made her own decisions, and decided what to do and when to do it. She was also very organized.": at para. 191.
- [17] The judge concluded there were no suspicious circumstances surrounding the making of the Codicil. The judge found nothing suspicious about Larry sitting in on a meeting between Maxine and Mr. Dunkin, helping Maxine make arrangements to use a lawyer closer to her home to prepare the Codicil, or writing out instructions for its preparation given Maxine's difficulty with writing at the time. The judge also found nothing suspicious about Larry discussing Maxine's estate plans with her and concluded that he was helping Maxine -- a person of strong will -- achieve her aims.

[18] The judge awarded the costs of the action to the executors against the appellants.

#### Issues on Appeal

[19] The appellants submit the judge erred:

- a) in mixed fact and law, by concluding there were no suspicious circumstances surrounding the making of the Codicil to rebut the presumption of testamentary capacity;
- b) in law, by failing to apply the test for testamentary capacity from *Banks v. Goodfellow* (1870), L.R. 5 Q.B. 549 (U.K.);
- c) in mixed fact and law, by concluding Maxine Wilton had the requisite testamentary capacity to make the Codicil;
- d) in the exercise of discretion, by admitting the expert medical report of Dr. Sandra Wiebe dated September 7, 2016 into evidence; and
- e) in the exercise of discretion, by awarding costs against the appellants.

[20] At the hearing of the appeal, the appellants resiled from two additional arguments in their factum related to adverse inferences and the rule in *Browne v. Dunn* (1893), 6 R. 67 (H.L.).

#### Suspicious Circumstances

[21] The appellants allege the judge erred in concluding there were no suspicious circumstances surrounding the making of the Codicil, based on the judge's assessment of the evidence. They say the fact that Larry wrote out the instructions which ultimately led to an increase in his inheritance should have piqued the court's suspicion. They also argue the changes made by the Codicil were sweeping enough to be deemed suspicious. Additionally, they submit that the judge misapprehended or failed to consider the following crucial evidence in failing to find suspicious circumstances:

- a) There was no evidence that Larry discussed the Codicil with Maxine;
- b) There was no evidence that Maxine was aware of the extent of her assets;
- c) Mr. Kovacs testified that the signature on the handwritten note was not Maxine's;
- d) There was no evidence that Larry was a dutiful son who helped his mother;
- e) The evidence disclosed that Maxine's health declined following her stroke in 2004, leading to reliance on others and "uncharacteristic behavior";
- f) There was a lack of notes and records from Mr. Spohn and Dr. Wiebe; and
- g) There was no explanation for why Maxine disinherited the appellants.

## Standard of Review

- [22] A judge's decision to dislodge the presumption of testamentary capacity based on circumstances surrounding the drafting and execution of a will is inextricably bound up in the judge's appreciation of the facts. Accordingly, whether the circumstances surrounding the making of a will are sufficiently suspicious to rebut the presumption of testamentary capacity is a question of mixed fact and law subject to deferential review on a standard of palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 26-28.
- [23] Palpable error is error that is "plainly seen": *Housen* at paras. 5-6. Overriding error is one that must or may well have affected the result: *Nelson (City) v. Mowatt*, 2017 SCC 8 at para. 38. As explained by Justice Stratas, "[w]hen arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.": *Canada v. South Yukon Forest Corp.*, 2012 FCA 165 at para. 46.

## Law

- [24] The propounder of a will bears the burden of proving that: (1) the formalities of will-making were complied with; (2) the testator possessed the requisite capacity to make the will; and (3) the testator knew and approved of the will's contents. Propounders are aided in this task by a rebuttable presumption of testamentary capacity, which directs the court to presume that testators have capacity to make a will where it is duly executed in accordance with the appropriate formalities and read by or to the testator, who appeared to understand it: *Vout v. Hay*, [1995] 2 S.C.R. 876 at paras. 25-26.
- [25] Where challengers to a will are able to satisfy the court that there were suspicious circumstances surrounding a will's preparation which call into question the testator's mental capacity to understand and approve of its contents on a balance of probabilities, the presumption is spent, and the propounder reassumes the legal burden of establishing testamentary capacity on the civil standard: *Vout* at para. 27.

## Analysis

- [26] The appellants have not shown a palpable and overriding error in the judge's conclusion that there were no suspicious circumstances surrounding the making of the Codicil. There was ample evidence supporting the judge's findings of fact which led to her determination. The judge accepted the evidence of the executors' witnesses that Maxine was independent, made her own decisions, and decided what to do and when to do it in September 2006. She found that Maxine suffered from physical impairment, affecting her balance and speech following her stroke in 2004, but that Maxine's cognitive and mental functioning were not affected. The judge rejected the appellants' testimony that Maxine was not able to converse after 2004, concluding that the appellants' recollections were mistaken. To this end, the judge preferred the independent evidence of Maxine's physician and caregivers at the time, who she concluded had spent much more time with Maxine following her stroke in 2004 than the

appellants.

- [27] The judge found nothing untoward about Larry's involvement in Maxine's estate planning as her adult son and executor and trustee of her estate, especially given the judge's findings that Maxine suffered from physical impairment and could not effectively write by hand following the 2004 stroke. The judge found Larry's conduct and the handwritten instructions to be consistent with Maxine's wishes, based on the evidence of Mr. Spohn, who had discussed the Codicil with Maxine in detail, and who concluded that she understood its effects. It was open for the judge to make these findings based on the evidence before her.
- [28] The appellants rely on the classic Ontario trial decision of *Murphy v. Lamphier* (1914), 31 O.L.R. 287 (H.C.J.), aff'd (1914) 20 D.L.R. 906 (Ont. C.A.), for the proposition that a sweeping change made to a will by an elderly testator is, by itself, sufficient to rebut the presumption of testamentary capacity.
- [29] In *Murphy*, an elderly testator's will was changed several times between 1903 and 1912. Each version of her will prior to 1912 was found to be highly detailed and personalized. However in 1912, the will was changed by a "bald and colourless division in general words of all property to all the children". The court found this change from a personalized distribution scheme in all preceding wills, spontaneously made 16 months before the testator's death while she was suffering from senility and a progressive brain disease, to be sufficiently "sweeping" to call for proof of capacity. The court reasoned that the following circumstances raised suspicion:

What, then, are the things out of the common which invite the inspection and consideration of the Court? In brief outline, these: (a) the will is made during the temporary absence of Mrs. Lamphier from her husband; (b) made without reference to or communication with her natural protectors; (c) made whilst she was in the hands and under the care of two married daughters who were dissatisfied with a former will and had recently sought to have it changed; (d) made by an old lady verging on eighty years of age, suffering under a double process of deterioration from the impairments of senility and the inroads of a progressive disease affecting her brain; (e) made by a solicitor who could not be regarded as an independent adviser and who was not chosen by the testatrix; (f) made on the spur of the moment, where the method of testamentary disposition, originating nine years before and carried through a series of wills down to the one made in 1911, was displaced and superseded by a method of equal distribution desired by Mrs. Brown and Mrs. Hayes and the other dissentients. [At 307-308.]

- [30] The constellation of factors in *Murphy* are easily distinguishable from the case at bar. The fact that Larry's share of Maxine's estate increased from 20% in 2003 to 23% after the Codicil was executed in 2006 is not, in my view, a material change which should itself raise suspicion surrounding his involvement in Maxine's estate planning. Larry's share fluctuated several times between 1972 and 2006 within a band of 10% of the total value of the estate. The impugned Codicil increased Larry's share by only 3%. In my view, this was not such a marked departure from Maxine's earlier wills as to arouse the court's suspicion. Moreover,

the fluctuation in Larry's share was proportionate to the overall changes made to the will.

- [31] Similarly, the fact that Roger's children were not provided for in Maxine's will after 2006 is not in itself a suspicious circumstance. Maxine's first will did not expressly provide for any grandchildren. Although her 1999 will gifted over the shares of Larry, Mark, Keith, and Daryl to their children if those sons predecease her, Roger's children were not included in this gift over. Rather, the 1999 will expressly gave only \$5,000 each to Elizabeth and James, and nothing to Roger's other two children. While Maxine's 2003 will gifted a 20% share to Roger's children, the judge found Maxine had clear and deliberate intent to remove the appellants, who she had no legal obligation to provide for, from her will in September 2006. There is, in my view, nothing inherently suspicious about Maxine restoring her will back to a state of affairs that more or less existed less than a decade earlier in which Roger's children received little or nothing from her estate.
- [32] Furthermore, unlike the solicitor and two daughters in *Murphy*, who were found to have inappropriately aligned interests, the conduct of Mr. Spohn and Larry did not raise suspicion in the trial judge's determination. Maxine was directed to Mr. Spohn by Mr. Lea, who the parties agreed always acted in Maxine's best interest. While Larry helped make arrangements to transfer Maxine's affairs from her former lawyer to Mr. Spohn, Mr. Lea also assisted with the transition, made the September 8, 2006 appointment, and brought Maxine to Mr. Spohn's office that day.
- [33] Mr. Spohn met with Maxine alone, and discussed her estate plans as manifest in the handwritten note to ensure that she understood the effects of what the instructions purported to do. The judge found Mr. Spohn to have acted independently. There was no suggestion that Larry was dissatisfied with Maxine's former will, conspired with Mr. Spohn, or exercised any undue influence or control over Maxine. On the contrary, the parties admit that Larry had spoken to Maxine in 2006 about varying the will to reduce his own inheritance. The judge's findings, which are afforded deference in this Court, were not shown to be palpably wrong. There was evidence which she could and did accept to arrive at her findings. Maxine was entitled to make the change to her will without arousing the court's suspicion.
- [34] The appellants also refer to *Russell v. Fraser* (1980), 118 D.L.R. (3d) 733 (B.C.C.A.), to argue that suspicious circumstances must be found where a beneficiary under a will prepares instructions for its variation. However, this is an incomplete characterization of the circumstances in *Russell*, which are more fully encapsulated in the following passage from the trial judgment quoted on appeal:

The burden resting on the defendant, Fraser, to show that the testatrix knew and approved the contents of the will and in particular the residue clause is made more onerous, however, by reason of his having prepared the instructions for the will and at the same time having taken a substantial benefit under the will. Under those circumstances he must satisfy the conscience of the Court that the testatrix knew and approved of the contents of the will. [At 739.] [Emphasis added.]

[35] The authorities reviewed in Russell involved situations where a beneficiary instigated a substantial change to a will resulting in significant windfall for themselves. In Russell, the executor, who was the testator's banker, varied her will to gift the residue to himself. The change resulted in the executor receiving a sum that more than doubled the gifts to any other single legatee, including the testator's relatives. The Court found that the change was not discussed with the testator such that she did not know or approve of it. Here, the Codicil did not substantially increase Larry's inheritance, which was proportionate to the shares gifted to Maxine's other then-living sons. The judge found that Maxine knew and understood the Codicil's contents and effects. Russell is therefore distinguishable and has no application in the circumstances.

[36] I will now briefly address each of the impugned findings of fact.

### **Evidence that Larry discussed the Codicil's effects with Maxine**

[37] The appellants' Notice to Admit dated March 13, 2018, requested admission of the fact that Larry discussed the approximate value of Maxine's estate with her before her meeting with Mr. Spohn on September 8, 2006. Larry and Daryl's reply dated March 19, 2018, denied the request to admit this fact. Larry did not testify at trial. However, the judge found that Maxine's physical condition and ability to write had deteriorated after the stroke in 2004 such that she could no longer effectively write by hand. The judge found that Larry wrote out the instructions and that Maxine was aware of their contents, which were consistent with her wish to benefit only her then-living sons, based on the evidence of Mr. Spohn. The judge found the testimony of the executors' other witnesses corroborated Mr. Spohn's account of Maxine's independence and mental acuity in September 2006. Finally, the judge also found that impressions on the handwritten note likely showed Larry working out the dollar amount effects of varying the will. In light of these findings, it was open for the judge to infer that, given Maxine's difficulties with handwriting which necessitated assistance from Larry, and Mr. Spohn's account of Maxine's demonstrated understanding of the contents and effects of the written instructions, that Larry and Maxine had discussed the Codicil and the approximate value of her estate while Larry wrote out the instructions in advance of Maxine's meeting with Mr. Spohn. In any event, the legal requirement is for Maxine to have understood the Codicil's effect. The judge found that she did. In light of the evidence, no error has been shown.

### **Evidence that Maxine was aware of the extent of her assets**

[38] The judge concluded that Maxine was experienced in managing her financial affairs and was aware of the value of her assets. The judge accepted the evidence of Mr. Dunkin that Maxine alone had instructed him on complex tax issues facing her company between 2003 and November 2006. Mr. Dunkin testified that he remembered Maxine as "completely reasonable, rational, intelligent and in control with respect to her affairs". The appellants assert there is no evidence that Maxine was aware of the nature, extent and value of her assets at the time of her meeting with Mr. Spohn, specifically with respect to certain real estate owned by her company in Kamloops and Whistler, because there was no evidence that Mr. Spohn was aware of these properties until after the Codicil was executed. However this misapprehends the issue. The extent of Mr. Spohn's enquiries into the value of Maxine's estate is not conclusive of whether Maxine was aware of her assets. The evidence of Mr. Dunkin suggests that Maxine was in control of her financial situation up until November 2006. Control of her financial situation, and advising her accountant on sophisticated tax issues would require Maxine to have knowledge of the nature, extent and value of her property. Moreover, as previously discussed, impressions on the handwritten note suggest that Larry and Maxine had considered the total value of her estate and the rough effects the Codicil would have on its devolution in advance of the September 8 meeting with Mr. Spohn. The judge accepted evidence to this end and drew the capable inference that Maxine knew the value of her estate. I see no error.

### **The handwritten note was signed by Maxine**

[39] The appellants submit that the only evidence regarding the signature on the handwritten note was Mr. Kovacs' opinion that it was not written by Maxine. It goes without saying that courts are not required to accept all of the evidence presented at trial, especially where facts are contested. The judge found that the legibility and quality of Maxine's signature had diminished in 2004 following her stroke. This is consistent with the evidence of Mr. Dunkin that Maxine's signature had become shakier and fainter partway through their relationship, during which she signed many financial documents. From this and her examination of Mr. Kovacs' report and other documents signed by Maxine, the judge inferred that the signature on the note was Maxine's. The judge was not required to defer to Mr. Kovacs' opinion. It was open for the judge to make that finding. I cannot say the judge made a palpable error.

### **Evidence that Larry was a dutiful son who helped his mother**

[40] The appellants argue the judge erred in concluding that Larry was a dutiful son who helped his mother. They say there was no evidence to support this finding. The judge found that Larry visited Maxine every two to three months despite living in Florida. The judge also found that Larry helped Maxine with her needs, specifically by hiring a caregiver for Maxine and helping to ensure that her estate planning was in order. The judge found further support for this finding in Larry's conduct. While a valuable ring belonging to Maxine was

never formally bequeathed to Elizabeth, Larry saw to it that Elizabeth receive the ring, as he believed this to be consistent with Maxine's wishes. In addition, Larry was the only son Maxine appointed as executor and trustee of all of her wills. There was sufficient evidence for the judge to infer that Larry was a dutiful son who helped his mother fulfill her estate planning wishes.

Maxine's decline in health, reliance on others and uncharacteristic behavior following the 2004 stroke

- [41] Under this heading, the appellants argue the judge erred by accepting Mr. Spohn's evidence that Maxine could speak without difficulty and had a "crusty" personality at their September 8, 2006 meeting. They say Mr. Spohn's account of Maxine's speech and personality is contradicted by the other witnesses. However, the judge did not accept the evidence of Mr. Spohn regarding Maxine's speech as alleged by the appellants. She found that Maxine had some difficulty speaking following the 2004 stroke. Furthermore, the judge did not appear to place any weight on Maxine's disposition or demeanour at the September 8 meeting as described by Mr. Spohn. Indeed, she does not appear to make any finding of fact in that regard. It is moreover unclear how such a finding, if made in error, would rise to the level of palpable and overriding error, and the appellants have not explained how it could have overborne the judge's conclusion that the circumstances surrounding the making of the Codicil were not suspicious.
- [42] The judge accepted the evidence of Maxine's physician and caregivers regarding her health and need to rely on others. She accepted that in September 2006 her need for assistance was limited to issues related to her physical impairment, such as balance. She preferred that evidence to the appellants' testimony, which she found to be self-serving and based on limited and irregular interactions with Maxine. The judge was entitled to make these findings.

### The lack of notes and records

- [43] The appellants say the lack of notes from Mr. Spohn's meeting with Maxine, Dr. Wiebe's lack of records from 2006, and the fact that an executed copy of the Codicil was not found among Maxine's possessions are suspicious circumstances sufficient to rebut the presumption of testamentary capacity. In my view, there is nothing inherently suspicious about such gaps in certain witnesses' written records, especially given the passage of time. While it is unfortunate that Mr. Spohn and Dr. Wiebe could not find notes or records relating to the events described in their testimony, the judge accepted that they each had a sufficient general recollection of the circumstances. This was permissible: *Chalmers v. Uzelac*, 2004 BCCA 533 at para. 67.
- [44] The appellants do not suggest that Mr. Spohn and Dr. Wiebe attempted to suppress or conceal records. Nor do they seriously question the reliability of any particular aspect of their testimony due to a lack of contemporaneous notes. Rather, the appellants rely on

Klassen v. Ewert, 2002 BCSC 1540, to suggest that a solicitor's lack of complete notes from meetings with a testator constitutes a suspicious circumstance. However, the situation in Klassen is distinguishable. The court in Klassen found the solicitor's recollection of events to be too sparse to substantiate a legal determination of testamentary capacity: at para. 93. Here, the judge found the evidence of Mr. Spohn to be reliable, independent and professional. Leaving aside professional standards, Klassen does not create a rigid requirement for solicitors to have complete notes from every meeting with their clients in order for the legal documents they draft to be enforceable. For the presumption of testamentary capacity to be rebutted, the actual circumstances surrounding the events described in a witness' testimony must raise suspicion when combined with the witness' incomplete recollection and lack of contemporaneous notes. Here, the judge accepted Mr. Spohn's evidence based on his recollection and the available documents. She was entitled to accept that evidence and I see no error.

- [45] The judge also accepted Dr. Wiebe's evidence, finding her to be reliable, independent and professional. She was entitled to make that finding even though Dr. Wiebe did not have clinical records from 2006.
- [46] Similarly, the fact that an executed copy of Maxine's will and the Codicil could not be found among Maxine's possessions is not, in my view, a suspicious circumstance. The execution of the Codicil was proved through the evidence of Mr. Spohn. No one questions Maxine's awareness of the Codicil's existence. Whether or not Maxine had an executed copy of the Codicil among her possessions after the fact says little about her capacity to make the Codicil at the time it was drafted and executed.

### **The lack of explanation for disinheriting the appellants**

- [47] Mr. Spohn testified that he reviewed the Codicil with Maxine at their September 8, 2006 meeting. He testified that he did so to ensure that Maxine understood the effect of the Codicil would be to disinherit Roger's children. He said Maxine explained her intent was to only benefit her then-living sons. The judge accepted this testimony. Maxine was free to leave as much or as little to her grandchildren as she wanted. The fact the appellants were removed from the will is not, on its own, a suspicious circumstance. There is no legal requirement for an explanation as to why certain grandchildren are provided for differently in a will.
- [48] The appellants have failed to demonstrate a palpable and overriding error in the judge's assessment of the evidence relating to the allegedly suspicious circumstances surrounding the making of the Codicil. Accordingly, this ground of appeal must fail.

## Testamentary Capacity

[49] The decision in *Banks* remains the leading authority on testamentary capacity. The factors applied to determine testamentary capacity are not controversial. It is essential that a testator: understand the nature of the act of making a testamentary document and the effect of the document; understand the extent of the property of which she is disposing; and be able to comprehend and appreciate the claims to which she ought to give effect. The appellants allege the judge erred in law by failing to apply the test from *Banks*. The appellants also allege the judge misapprehended the evidence which led her to conclude Maxine knew and understood the contents of the Codicil.

### Standard of Review

- [50] A failure to apply the appropriate legal test is an error of law reviewable on the correctness standard: *Housen* at para. 8.
- [51] The determination of testamentary capacity involves the application of a legal standard to a particular set of facts, and is thus a question of mixed fact and law. The legal question here cannot be extricated from the judge's appreciation of the factual matrix. Thus the judge's holding may not be disturbed absent palpable and overriding error: *Housen* at paras. 26-28.

## Law

- [52] As the appellants have failed to rebut the presumption of testamentary capacity by showing suspicious circumstances surrounding the making of the Codicil, Maxine's capacity to make the Codicil is presumed, provided that the will was duly executed in accordance with the appropriate formalities and read by or to the testator, who appeared to understand it: *Vout* at para. 26.

## Analysis

- [53] The judge did not err in not applying the *Banks* test. The test from *Banks* applies where a will's propounder is required to prove testamentary capacity. As explained in *Vout*, testamentary capacity is presumed in the absence of a finding of suspicious circumstances. As the presumption of testamentary capacity was not rebutted in this case, the presumption persisted. In these circumstances, the judge was not required to assess testamentary capacity by resort to the test from *Banks*. There is no legal error.
- [54] The appellants do not challenge that the Codicil followed the appropriate formalities. The appellants do challenge the trial judge's appreciation of the evidence, which led her to find that Maxine understood the contents of the Codicil. As has been explained, the judge found that Mr. Spohn reviewed the Codicil with Maxine in detail on September 8, 2006 to ensure that she understood its contents. The judge accepted Mr. Spohn's evidence that Maxine understood and appreciated the Codicil's effect. It was open for the judge to make these findings of fact, which she found were supported by the evidence of other witnesses. No

palpable and overriding error has been shown. Accordingly, I would dismiss this ground of appeal.

### **Admissibility of Dr. Wiebe's Evidence**

- [55] The appellants argue the judge erred in admitting into evidence and relying on the expert medical report of Dr. Wiebe dated September 7, 2016. The appellants say the report did not meet the requirements of Rules 11-6(1)(c) and 11-6(1)(f)(i) of the Supreme Court Civil Rules because Dr. Wiebe's report did not include a description of the instructions given to her in relation to the proceeding or the factual assumptions on which her opinion was based. The appellants also submit that Dr. Wiebe was not qualified to render an opinion on Maxine's testamentary capacity. Finally, they challenge Dr. Wiebe's impartiality as a witness. They say Dr. Wiebe was "an advocate for Maxine, and by extension, the respondents".
- [56] Dr. Wiebe was Maxine's family doctor from 2000 to April 2007. Dr. Wiebe's clinical records during this time could not be located. Her report relied on her recall and other medical records concerning Maxine that were put before her.

### **Standard of Review**

- [57] A trial judge's decision to admit or exclude expert evidence is a discretionary ruling entitled to deference on appeal: *R. v. D.D.*, [2000] 2 S.C.R. 275 at paras. 12-13, 47. This is so because trial judges are in a better position to assess whether such evidence is necessary or whether the danger of admitting the evidence outweighs its benefit. A court's exercise of discretion is reversible only where the court has misdirected itself, came to a decision that is so clearly wrong that it amounts to an injustice or where the judge gave no or insufficient weight to relevant considerations: *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 at para. 27.

### **Law**

- [58] As summarized in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 at paras. 16-24, expert evidence is admissible when it is logically relevant, necessary to assist the trier of fact, and not subject to any other exclusionary rule. The expert must be properly qualified and able to fulfil their duty to provide evidence that is impartial, independent and unbiased. If these threshold requirements are met, the trial judge, in a gatekeeper role, must determine if the benefits of admitting the evidence outweigh its prejudicial risk, considering relevant factors including relevance, necessity, reliability, and bias.
- [59] Rules 11-6(1)(c) and 11-6(1)(f)(i) of the Rules provide that an expert opinion must describe the instructions provided to the expert in relation to the proceeding and the factual assumptions on which their opinion is based:

(1) An expert's report that is to be tendered as evidence at the trial must be signed by the expert, must include the certification required under Rule 11-2 (2) and must set out the following:

- (c) the instructions provided to the expert in relation to the proceeding;
- (f) the expert's reasons for his or her opinion, including
- (i) a description of the factual assumptions on which the opinion is based,

[60] Rule 11-7(6)(b) permits the court to allow an expert to provide evidence despite not meeting all of the requirements of Rule 11-6 if the non-compliance is unlikely to cause prejudice:

- (6) At trial, the court may allow an expert to provide evidence, on terms and conditions, if any, even though one or more of the requirements of this rule or Rules 11-1 to 11-6 have not been complied with, if
  - (b) the non-compliance is unlikely to cause prejudice
  - (i) by reason of an inability to prepare for cross-examination, or
  - (ii) by depriving the party against whom the evidence is tendered of a reasonable opportunity to tender evidence in response, or
  - (c) the interests of justice require it.

## Analysis

[61] The judge did not err in admitting or relying on Dr. Wiebe's expert report. Evidence regarding Maxine's health from her physician at the time the Codicil was executed is highly relevant to the legal determination of testamentary capacity. It was necessary for the judge to determine the extent of Maxine's physical and mental impairment following her stroke in 2004, and the effects these would have on her ability to make and understand the Codicil. Dr. Wiebe was a very experienced family physician with specific knowledge of Maxine's medical history and health in September 2006. The judge accepted Dr. Wiebe's qualifications and found her to be an independent, impartial and unbiased witness. She ultimately concluded that the probative value of Dr. Wiebe's medical report exceeded any prejudicial effect it may have had. I see no error in this conclusion. The appellants have not demonstrated that the judge misdirected herself or failed to properly consider any of the relevant factors in her exercise of discretion to admit the report.

[62] The appellants' arguments relating to Rule 11-6(1) are not substantiated. With respect to Rule 11-6(1)(c), Dr. Wiebe's opinion refers to, and attaches a copy of the letter from the executors' counsel dated July 29, 2016 addressed to Dr. Wiebe requesting her expert opinion for the proceeding. The letter sets out clear instructions for Dr. Wiebe to provide her opinion. Similarly, Dr. Wiebe's report also sets out the documents, expertise and factual bases upon which her opinion relied. Furthermore, there was no danger of the appellants

being ambushed or surprised by Dr. Wiebe's evidence. The appellants knew the evidence that they would face at trial. Indeed, the appellants tendered evidence from their own medical professional in response to Dr. Wiebe's report. The judge did not err in admitting or relying on Dr. Wiebe's report. She simply preferred the expert evidence of Dr. Wiebe, who had personal knowledge about Maxine at the relevant time, to that of Dr. Sloan who had never treated or assessed Maxine and changed his opinion immediately before testifying.

- [63] Ultimately, the thrust of the appellants' argument under this ground of appeal rests on the assertion that Dr. Wiebe was not qualified to render an opinion on testamentary capacity because she is a family practitioner without any specialization or formal education in geriatric medicine or the assessment of testamentary capacity. This argument misapprehends the legal assessment of testamentary capacity, which is necessarily rooted in a judge's appreciation of the evidence, be it medical or otherwise. Testamentary capacity is a legal determination for the judge to make, not a medical diagnosis made by experts. A judge is not required to defer to the opinion of any medical expert, and a doctor is not required to have special expertise in geriatric medicine in order to provide evidence to assist the court in determining an individual's legal capacity to make wills. The judge determined that the probative value of Dr. Wiebe's medical report outweighed any prejudicial effect it might have had and relied on the report for her conclusions regarding Maxine's health in and around September 2006. No error has been shown in this determination.

## Costs

- [64] The appellants submit the judge erred in principle by awarding costs to the respondents against them. They say the parties ought to have been awarded special costs of the action out of the estate. They say the proper approach in British Columbia is for the estate to bear all parties' costs in estate litigation where there is a good faith dispute as to a testator's intent.

## Standard of Review

- [65] The award of costs is a discretionary decision. As previously set out, a court's exercise of discretion is reversible only where the court misdirected itself, came to a decision that is so clearly wrong that it amounts to an injustice or where the judge gave no or insufficient weight to relevant considerations: Penner at para. 27.

## Law

- [66] The costs of a proceeding must be awarded to the successful party unless the court otherwise orders: Rule 14-1(9). There must be a principled reason for departing from the normal costs rules in the circumstances: Loft v. Nat, 2014 BCCA 108 at para. 49, leave to appeal ref'd [2014] S.C.C.A. No. 211.

[67] Formerly, it was usual in estate litigation for both sides to have their costs paid by the estate. The modern approach to estate litigation in British Columbia is to apply the normal costs rules: *Sato v. Sato*, 2018 BCCA 287 at para. 56.

[68] However, in some circumstances costs may be awarded out of the estate to an unsuccessful party. Such an order is made where the executor has been the cause of the action, such as when it is necessary to construe an ambiguous provision in a will, or there were reasonable grounds to question a testator's capacity at the time the will was made: *Stanton v. Stanton Estate*, 2008 BCCA 362 at para. 11. This was explained in *McDougald Estate v. Gooderham* (2005), 255 D.L.R. (4th) 435 (Ont. C.A.) at para. 85, as cited in *Hollander v. Mooney*, 2017 BCCA 238, leave to appeal ref'd [2017] S.C.C.A. No. 356:

The modern approach to awarding costs, at first instance, in estate litigation recognises the important role that courts play in ensuring that only valid wills executed by competent testators are propounded. It also recognises the need to restrict unwarranted litigation and protect estates from being depleted by litigation. Gone are the days when the costs of all parties are so routinely ordered payable out of the estate that people perceive there is nothing to be lost in pursuing estate litigation.

And at para. 78:

Public policy considerations underlie this approach: it is important that courts give effect to valid wills that reflect the intention of competent testators. Where the difficulties or ambiguities that give rise to the litigation are caused, in whole or in part, by the testator, it seems appropriate that the testator, through his or her estate, bear the costs of their resolution. If there are reasonable grounds upon which to question the execution of the will or the testator's capacity in making the will, it is again in the public interest that such questions be resolved without cost to those questioning the will's validity. [Emphasis added.]

[69] In *Sato*, this Court ordered the estate to pay the parties' trial and appeal costs as special costs because there was a good faith dispute as to the testator's intent which raised an issue as to validity of the will. The Court in *Sato* relied on *McDougald Estate* for the proposition that costs may be awarded against the estate "[w]here the difficulties or ambiguities that give rise to the litigation are caused, in whole or in part, by the testator": at para. 56.

## Analysis

[70] The trial judge did not receive submissions from the parties on costs. She ordered that the respondents were entitled to recover costs of the action paid by the appellants. She did not provide reasons for the costs order, other than the dismissal of the appellants' claims. After the release of the reasons for judgment, the appellants did not ask for leave to make submissions on costs.

- [71] The appellants' argument rests on the argument that there was uncertainty surrounding the preparation of the Codicil such that the costs of all parties ought to be paid by Maxine's estate. It is unfortunate that this submission was not made to the trial judge. Nevertheless, this Court is able to examine the judge's reasons and her exercise of discretion in light of her findings and the applicable law. When I do that, I conclude that the judge did not err in principle by exercising her discretion to apply the normal costs rule and award costs against the appellants.
- [72] The arguments on appeal do not raise any issue as to the construction of the Codicil. There is no suggestion that Maxine caused the dispute by creating an ambiguous testamentary document. The appellants rely on the second category of dispute that can be the basis for an order that an estate pay costs to an unsuccessful litigant. They say there were reasonable grounds upon which to question the execution of the Codicil and Maxine's capacity.
- [73] The difficulty with the appellants' position is that the judge rejected the appellants' evidence and thus the premise behind their claim. At trial, the court was presented with dramatically different portrayals of Maxine. Was she significantly disabled by the 2004 stroke such that she was incapable of speaking in sentences and required a great deal of assistance, or was she a strong willed, independent woman who was capable of making her own decisions and knew what she wanted to do? The judge rejected the appellants' evidence, finding it unreliable and self-serving, and accepted the evidence of the independent witnesses. She also concluded that the appellants failed to prove the existence of suspicious circumstances. Given these conclusions, it is not possible to say that there were reasonable grounds on which to question the execution of the Codicil and Maxine's capacity.
- [74] The circumstances are very different from those in *Sato* where the parties had a genuine dispute as to the testator's intended residence when he made his will. By failing to draft a new will after he married, the testator's conduct gave rise to the litigation.
- [75] The circumstances here are similar to those in *Leung v. Chang*, 2014 BCSC 1243, *aff'd* 2014 BCCA 28, where Justice Dardi declined to award costs to the unsuccessful party. At para. 36, she acknowledged that a court may award costs if "the challenge to the will was reasonable, for example because it was precipitated by highly 'suspicious circumstances' surrounding the preparation of the will". She concluded at para. 38 that there was no reason to depart from the general costs rule:

Applying the analytical framework for costs endorsed by the Court of Appeal in *Stanton*, I note my conclusion that in this case there were no "suspicious circumstances". The Will was executed before a notary and the Codicil was executed before a lawyer. Overall, this is not a case where the parties were forced into litigation by conduct of the will-maker or the residuary legatees. At its core, this was an adversarial dispute between Mr. Chang and Ms. Leung. There is no reason to depart from the general rule that costs follow the event.

[76] The judge here came to similar conclusions. She found that the appellants failed to establish the existence of suspicious circumstances. It is also clear from the judge's reasons that she did not consider the issues which gave rise to the action to have been caused by Maxine. It was therefore within the judge's discretion to award costs against the appellants under the modern approach to costs in estate litigation. I would therefore not give effect to this ground of appeal.

[77] In summary, I would dismiss the appeal.

"The Honourable Mr. Justice Butler"

I AGREE:

"The Honourable Madam Justice Dickson"

I AGREE:

"The Honourable Madam Justice Griffin"

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Prepared on 28 October 2026 · Esheria