

CANADA / JUDGMENT

## Wong v. Woo

2025 BCSC 1640

### COURT

Supreme Court of British Columbia

### DECIDED

25 August 2025

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2025 BCSC 1640 Wong v. Woo

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wong v. Woo,

2025 BCSC 1640

Date: 20250825

Docket: S233149

Registry: Vancouver

Between:

Chi Chu Wong

Plaintiff

And

Allan Jack Woo, Grant Chi Nunk Wong,

and Louisa Yuebick Woo, in their personal capacities

and as trustees of the Grace Chui Wong Alter Ego Trust,

and Grant Chi Nunk Wong and Louisa Yuebick Woo

as Executors of the Estate of Grace Chui Wong, Deceased

Defendants

And

Chi Chu Wong also known as Stewart Wong

and Miranda Lee

Defendants by way of Counterclaim

Before: The Honourable Justice Jones

Reasons for Judgment

The Plaintiff, appearing in person:

C. C. Wong

Counsel for the Defendants:

G. Behan

Counsel for the Defendant by way of Counterclaim, Miranda Lee:

G. Douvelos

Place and Date of Hearing:

Vancouver, B.C.

December 9-11, 2024

Place and Date of Judgment:

Vancouver, B.C.

August 25, 2025

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## Introduction

### The Parties

- [1] These reasons relate to two applications regarding the estate of the deceased, Grace Chui Wong, who died on March 23, 2023 at age 93 ("Grace", or the "deceased"). Grace's husband predeceased her.
- [2] For ease of reference and without intending any disrespect to any party, I will refer to the parties by their first names.
- [3] Grace left a will dated August 21, 1987 (the "Will").
- [4] The plaintiff, Chi Chu Wong, also known as Stewart Wong, is Grace's eldest of three children.
- [5] The defendants, Grant Wong and Louisa Woo, are the applicants for the two applications. They are Grace's other two children. The Will names Grant as the executor of the estate.
- [6] Stewart is married to Miranda Lee, a defendant by way of counterclaim.
- [7] Allan Woo is Louisa's spouse.
- [8] For the purposes of these reasons, I refer to Grace's estate as consisting of her former home, a residential property at 338 East 39th Avenue, Vancouver (the "Property"), and deposits and investments (collectively the Property, deposits and investments are the "Estate"); however, I acknowledge that Grant and Louisa's position, disputed by Stewart, is that the Property included in the definition of Estate is owned by the Grace Chui Wong Alter Ego Trust (the "AET"), which was set up and settled by Grant on February 14, 2023, before Grace's death, pursuant to a power of attorney granted to Grant and Louisa on November 7, 2023 (the "POA"). This issue is addressed in the section below on administration of the Estate.
- [9] Here, the focus of these reasons is a determination of the valid testamentary document or documents of the deceased.
- [10] Grant and Louisa submit that the Will is the valid testamentary document.
- [11] Stewart alleges that three notes he says were written by the deceased dated August 3, 2018 (the "First Note"); May 1, 2020 (the "Second Note"); and March 28, 2021 (the "Third Note") (collectively the "Three Notes"), are testamentary documents written by the deceased after the Will, that stand in place of the Will, and they appoint Stewart as executor and gift him the deceased's assets.
- [12] Following the determination of the issue of the valid testamentary document(s), consideration of other issues will follow.
- [13] The Property had an assessed value of \$1,935,300 in 2024 and is mortgage-free.
- [14] The applicants estimate the total value of the Estate to be approximately \$2,300,000.

## The Dispute

- [15] Grant and Louisa in their personal capacities, and as trustees of the AET, and Grant in his capacity as executor of the deceased's Estate, are the applicants in the two applications seeking a number of orders.
- [16] The first application seeks to prove the Will in solemn form and seeks an order of a grant of probate to Grant. Stewart opposes the application. He alleges that the Three Notes are testamentary documents that stand in place of the Will.
- [17] The second application seeks vacant possession of the Property, presently occupied by Stuart, Miranda and their daughter. Stewart claims he is entitled to continue to reside at the Property pursuant to a purported residential tenancy agreement with Grace dated December 25, 2022 (the "RTA").
- [18] Miranda and Stewart are both defendants by counterclaim, opposing the application for vacant possession of the Property, where they presently reside with their daughter.
- [19] The applicants' request for an order for conduct of sale of the Property was adjourned at the request of the applicants.

## Proceedings

- [20] The applicants have separated the issues into two applications because the determination of the valid testamentary document of the deceased must be decided before any other issue.
- [21] Separately, whether the issue of the application for vacant possession needs to be considered depends on the Court's finding relating to the validity of the Will and the Three Notes.
- [22] In a separate proceeding, Stewart seeks a variation of the Will, which depends on the status of the Will and the Three Notes, as a valid will is a condition precedent to a variation proceeding: see *The Public Guardian and Trustee of British Columbia v. Johnson*, 2016 BCSC 1388 at paras. 83-84.

## Issues

- [23] The substantive issues are as follows:
1. Is this matter appropriate for summary determination?
  2. Is the Will a valid testamentary document of the deceased?
  3. Are the Three Notes valid testamentary documents of the deceased?
  4. Should the Court order vacant possession of the Property?
- [24] A fifth issue is the administration of the Estate in light of these reasons.

[25] For the reasons that follow, I find that on the first application:

1. the issues of the validity of the Will and the Three Notes as testamentary documents are appropriate for summary determination;
2. the Will is a valid testamentary document;
3. the Three Notes are not valid testamentary documents.

[26] As a result of these findings, it will then be appropriate to consider the second application. The issue in the second application is whether there should be an order for vacant possession of the Property. For the reasons that follow, that application is adjourned with leave to re-schedule the application after service on the Director of the Residential Tenancy Branch.

[27] The following section provides a summary of the relevant background. Further details of the evidence are discussed in more detail in the analysis below.

## Background

[28] Grace and her husband purchased the Property in or about 1971.

[29] The Will:

- a) appoints Grant as the executor;
- b) appoints Lousia as the alternate executor;
- c) bequeaths all the deceased's jewellery to Louisa;
- d) bequeaths the Property to Grant; and
- e) bequeaths the residue of the Estate to be divided as follows:
  - i. One third of the residue to Stewart;
  - ii. One third of the residue to Louisa; and
  - iii. One third of the residue to Grant.

[30] On November 7, 2003, Grace made the POA.

[31] On March 12, 2012, Grace made a representation agreement appointing Louisa as her representative and Grant as her alternate representative regarding health care and personal care (the "RA").

[32] On February 14, 2023, Grace, by Grant as her attorney under the POA, settled the AET, for Grace as beneficiary.

- [33] Grant, Louisa and Stewart hold a beneficial interest in the AET, which provides for distribution of Grace's assets upon her death consistent with the terms of the Will, as noted above.
- [34] Allan, Louisa's spouse, was the initial trustee of the AET.
- [35] Also, on February 14, 2023, Grace by Grant as her attorney under the POA, transferred by deed of gift the Property to Allan in his capacity as trustee of the AET.
- [36] Legal title to the Property was transferred to the trustee on February 27, 2023.
- [37] On March 4, 2023, Allan resigned as trustee of the AET, and Grant and Louisa accepted appointments as successor trustees.
- [38] On March 23, 2023, Grace died.
- [39] Shortly after Grace's death, Stewart filed a notice of civil claim ("NOCC") on April 24, 2023, and an amended NOCC on May 26, 2023. The amendments included the first disclosure of the Three Notes and the RTA.
- [40] Stewart registered a certificate of pending litigation ("CPL") against the Property on April 25, 2023.
- [41] Stewart filed a notice of dispute on May 1, 2023 in relation to the Estate.
- [42] Stewart claims that Grace executed a power of attorney to Melinda and him on July 27, 2012 ("POA #2").

#### Medical Records

- [43] Evidence of the deceased's medical condition over time is relevant to the issues to be decided in these applications.
- [44] The following is a summary of selected entries from some of the relevant medical reports which relate to the issue of the deceased's testamentary capacity:
- a) 1999: The deceased is diagnosed with frontal lobe dementia, thereafter treated at UBC Hospital Clinic for Alzheimer Disease and Related Disorders.
  - b) 2011-2012: In this time period there are numerous outpatient clinic notes including, for example, references to "very slowly progressive right frontotemporal dementia", and "demonstrable deficits in executive and language function" (April 5, 2012). Treating physicians at the UBC Clinic are Dr. Margot Genge and Dr. Dean Foti.
  - c) June 20, 2012: Letter from Dr. Margot Genge, geriatric psychiatrist, "to whom it may concern", states she saw Grace Wong that day. Dr. Genge did a financial competency assessment, concluding that Grace is not competent to manage her finances or change her power of attorney.

- d) June 21, 2012: Letter from Dr. Genge "to whom it may concern", stating that Grace has poor insight and judgment to make her personal health care decisions on her own and needs her representatives to help her make any health care decisions. Dr. Genge states that Grace is not competent to make a new representative agreement.

An outpatient clinic note dated June 21, 2012, following up on the June 20 report, refers to the death of Grace's husband last week and lack of competency relating to finances and health care decisions, as noted in the June 20 and 21, 2012 letters, above.

- e) 2013-2015: Outpatient clinic notes indicate slowly progressive frontal-temporal dementia, for example: December 2, 2015.
- f) May 27, 2016: Outpatient clinic note of Dr. Genge, including an assessment of Grace's ability to make changes to her will: "Grace said she has a will. She assumes it is in the bank. She has no plan to change her will at this time. She says that her only assets are her house. She has no idea of the value of her assets." Dr. Genge states that, "at this point, I do not think she is capable of making a new will. She has no idea how her assets would be distributed. She has difficulty with memory, which would interfere with her ability to make business transactions and to understand how to divide up her property."
- g) January 10, 2018: Outpatient clinic note of Dr. Genge, including Dr. Genge's assessment of Grace's competency to make a will. Dr. Genge's notes include Grace's response that she did not know to whom and what she would give away in a will, and she did not understand what Dr. Genge was talking about when asked about her assets.
- h) April 4, 2018: Outpatient clinic note of Dr. Genge refers to Grace having been deemed incompetent of person and finances years ago. Louisa and Grant have joint power of attorney and are representatives for health for her.
- i) June 3, 2020: Outpatient clinic note of Dr. Dean Foti regarding a telephone visit because of COVID-19. Dr. Foti's note records that he spoke to Ms. Wong briefly, she was perplexed and did not seem to understand who he was or why he was calling, with no recollection of having the appointment. Dr. Foti also records that Stewart came on the line after a few minutes and demanded to know why Dr. Foti was calling. Dr. Foti recorded that Stewart informed him she does very well on her cognitive testing and he was under the impression that she was intact cognitively. Dr. Foti referred to Ms. Wong's last brain imaging in 2017 which showed significant frontotemporal atrophy that was not normal for her age. Dr. Foti recorded "that there is not any real question about the diagnosis of a dementia."

[Emphasis added.]

Issue #1 - Is this matter appropriate for summary determination?

- [45] The first issue is the question of whether or not this matter is suitable for determination by summary trial.

## Parties' Positions

### Plaintiff's Position

- [46] Stewart argues that the matters before the Court are inappropriate for summary trial determination because:
- a) Document disclosure is incomplete and examinations for discovery have yet to occur;
  - b) The proceedings concern complex facts and a variety of claims; and
  - c) If the Court determines the issues before it summarily, the underlying litigation will be decided "in slices".
- [47] Stewart's application response submits that the action is unsuitable for resolution by summary trial, referring to the significant amount involved which is not small relative to the cost of a conventional trial. His response also submits that there are significant issues of credibility to be resolved to adjudicate the plaintiff's claims; however, at the hearing, Stewart agreed to proceed with the summary trial, submitting that there were some credibility issues, but that any such issues could be resolved.

### Applicants' Position

- [48] The applicants, Grant and Louisa, submit that the issues can be decided on the basis of the affidavits filed by the parties for the following reasons:
- a) The Court may rely on "hundreds of pages of medical records regarding the Deceased" and "independent evidence", including the expert opinion of Dr. Passmore, to resolve any conflicts in the evidence regarding the deceased's capacity.
  - b) The matter is not novel or overly complex.
  - c) The cost of trial would be disproportionate to the value of the property at issue.
  - d) There has already been significant delay.
  - e) There is some urgency because the condition of the Property is deteriorating under Stewart and Miranda's occupancy, and there may be fire or other safety risks.
- [49] Despite the agreement of the parties on this first application to proceed by way of summary trial, I must consider and assess whether the matter is suitable for resolution by summary trial.

### Legal Framework - Summary Determination

- [50] Rule 9-7 of the Supreme Court Civil Rules, B.C. Reg. 168/2009 includes the following provisions regarding a summary trial application:
- (15) On the hearing of a summary trial application, the court may

- a) grant judgment in favour of any party, either on an issue or generally, unless
  - (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
  - (ii) the court is of the opinion that it would be unjust to decide the issues on the application,
  - b) impose terms respecting enforcement of the judgment, including a stay of execution, and
  - c) award costs.
- (17) If the court is unable to grant judgment under subrule (15) and considers that the proceeding ought to be expedited, the court may order the trial of a proceeding generally or on an issue and may
- (a) order that the parties attend a case planning conference,
  - (b) make any order that may be made under Rule 5-3 (1), or
  - (c) make any other order the court considers will further the object of these Supreme Court Civil Rules.
- [51] General principles regarding the suitability of a matter to be decided by summary trial are set out in *Hryniak v. Mauldin*, 2014 SCC 7 at paras. 1-5, in which the Supreme Court of Canada encourages trial judges to interpret summary judgment rules broadly to favour proportionality and access to the affordable, timely and just adjudication of claims.
- [52] A trial judge has a broad discretion under the provisions of Rule 9-7 (15) and (17) to grant judgment on an issue or generally, and to make case planning orders available under Rule 5-3(1), or make any other order the court considers will further the object of the Rules: see *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.*, 36 B.C.L.R. (2d) 202, 1989 CanLII 229 (C.A.) at paras. 51 and 57.
- [53] In *Greenleaf Brewing Corporation v. Lonsdale Quay Market Corp.*, 2023 BCSC 2005 at paras. 19-26, Justice Stephens summarized the principles to be considered in assessing the suitability of a matter for summary trial, including the consideration of conflicts in the evidence, as follows:
- [23] Conflict in the evidence per se is not necessarily always a reason to render a summary trial application unsuitable. As the Court of Appeal stated in *MacMillan v. Kaiser Equipment Ltd.*, 2004 BCCA 270:
- [22] The principles relating to the applicability of the summary trial procedure are not in dispute. It should be noted that the mere fact that there is a conflict in the evidence does not in and of itself preclude a chambers judge from proceeding under Rule 18A. A summary trial almost invariably involves the resolution of credibility issues for it is only in the rarest of cases that there will be a complete agreement on the evidence. The crucial question is whether the court is able to achieve a just and fair result by proceeding summarily.

[24] However, a court should not decide an issue of fact or law solely on the basis of preferring one conflicting affidavit over another. There must be documentary evidence, evidence of independent witnesses, or undisputed evidence that undermines the affidavit of one of the parties on critical issues or some other basis for preferring one affidavit over another: Brissette at para. 27, citing *Cory v. Cory*, 2016 BCCA 409 at para. 10.

[25] In addition, as a prerequisite to deciding a case as a summary trial, the court must be able to find the facts necessary to decide the issues of fact or law and must be of the opinion it would not be unjust to decide the issues.

[Emphasis added.]

[54] The factors to be considered regarding the suitability of a matter for summary trial are set out in *Gichuru v. Pallai*, 2013 BCCA 60 at para. 30, quoting *Inspiration Management*, as follows:

- a) the amount involved;
- b) the complexity of the matter;
- c) its urgency;
- d) any prejudice likely to arise by reason of delay,
- e) the cost of taking the case forward to a conventional trial in relation to the amount involved;
- f) the course of the proceedings; and,
- g) any other matter which arises for consideration on this important question.

[55] In *Gichuru*, other factors added to the list include the cost of the litigation and the time of the summary trial, whether credibility is a critical factor in the determination of the dispute, whether the summary trial may create an unnecessary complexity in the resolution of the dispute, and whether the application would result in litigating in slices: *Gichuru* at para. 31, citing *Dahl et al. v. Royal Bank of Canada et al.*, 2005 BCSC 1263 at para. 12, *aff'd* 2006 BCCA 369.

[56] On the issue of credibility, in *Lu v. Li*, 2023 BCSC 271, Justice Schultes considered credibility in relation to Rule 9-7, as follows:

[104] With respect to the determination of credibility, "[i]n appropriate circumstances, it is perfectly acceptable for a summary trial judge to make credibility findings on affidavit evidence alone": *ARC Digital Canada Corp. v. Amacon Alaska Development Partnership*, 2023 BCCA 34 at para. 40, citing *Orangeville Raceway Ltd. v. Wood Gundy Inc.*, 1995 CanLII 2663 (BC CA), [1995] 6 B.C.L.R. (3d) 391 (C.A.)

[107] More generally, when a summary trial is set down, the parties are obliged "to take every reasonable step to put themselves in the best position possible...[and] cannot, by failing to take such steps, frustrate the benefits of the summary trial process." As in the case of discovery "the defendant may not simply insist on a full trial in hopes that with the benefit of viva voce evidence, 'something might turn up': Everest Canadian Properties Ltd. v. Mallmann, 2008 BCCA 275, at para. 34.

[Emphasis added.]

[57] On the issue of an allegation of fraud, in *Cotter v. Point Grey Golf and Country Club*, 2016 BCCA 260 at para. 55, the Court of Appeal states that while allegations of fraud may make an action unsuitable for disposition by way of summary trial, the question must be assessed on a case-by-case basis. The fact that an allegation of fraud is made by a party will not preclude the determination of an action under Rule 9-7.

### Analysis - Summary Determination

[58] For the following reasons, based on my review of the evidence and the legal principles including the factors in *Inspiration Management*, I consider the issues of the validity of the Will and the Three Notes to be suitable for summary determination.

[59] The first factor to be considered is the amount involved. The Property had an assessed value of \$1,935,300 in 2024 and is mortgage-free. The applicants estimate the total value of the Estate to be \$2,300,000.

[60] As a result, the Property makes up a significant proportion of the value of the Estate, and it is at the centre of the dispute between the parties.

[61] The value of the Estate is not so large that this factor weighs in favour of a full trial.

[62] Regarding the complexity of the matter, this is not the type of "complex, fact-intensive, multi-party and multi-issue case" that would weigh against the Court exercising its discretion to make a summary determination: *Morin v. 0865580 B.C. Ltd*, 2015 BCCA 502.

[63] The issues of the deceased's valid testamentary document is focussed on the Will and the Three Notes. The analysis has some complexity; however, the analysis involves a relatively straightforward and focused assessment of the documents and evidence in relation to the well-established tests for assessing the validity of testamentary documents.

[64] In answer to Stewart's concern about litigating in slices, given the number of issues to be decided, and the need to determine the valid testamentary document first, other issues will logically follow that determination, including the RTA and the application for vacant possession, potential sale of the Property, and Stewart's wills variation claim, all of which may constitute the subject of more than one hearing before all of the issues between the parties can be resolved.

- [65] The applicants submit that there is urgency based on the state of the Property, alleging that Stewart and Miranda's occupation raises health and safety risks, including a fire risk.
- [66] In support of this position, the applicants have provided photographs of the inside of the Property in early March, 2022. They also point to a note from a home support worker in early October, 2022, which states "there are many fruit flies in the client's bedroom and kitchen area. Rotten foods in the fridge. Boxes pile up in the house".
- [67] However, both the photos and the report are from when the deceased was still alive and living with dementia, a condition that interfered with her ability to take care of herself and her home, although Stewart and Miranda were also living in the residence at those times.
- [68] While the photos show a cluttered interior and the note suggests some lack of hygiene, they are not enough to support a finding that Stewart and Miranda's current occupation of the home has created an existing urgent health and safety risk.
- [69] Nevertheless, while there may not be urgency, I do consider that there is likely some prejudice by reason of delay as the Estate needs to be administered and the issues between the parties resolved.
- [70] Regarding the course of the proceedings, while Stewart states that document disclosure is incomplete and examinations for discovery have yet to occur, the applicants provide evidence that they have taken timely steps in the litigation, while Stewart has not.
- [71] Stewart is the plaintiff, but it is the applicants that have attempted to move the litigation forward. It is now over two years after Stewart filed his amended NOCC, the amendments including a reference for the first time to the Three Notes and the purported RTA.
- [72] The applicants served lists of documents on September 15, 2023, and three days later demanded Stewart's documents.
- [73] The applicants scheduled a hearing on March 14, 2024 for the application for proof of the Will in solemn form. The hearing adjourned that day by Justice Ahmad based on a medical note from Stewart regarding his need to retain counsel.
- [74] The applicants made a further demand for Stewart's documents on March 15, 2024. Following further demands, Stewart and Miranda produced lists of documents in late July, 2024.
- [75] A two day hearing was scheduled to commence on August 15, 2024, but there was no judge available at that time, followed by the hearing before me on December 9-11, 2024.
- [76] As a result, Stewart has had sufficient time to produce documents and conduct examinations for discovery. As stated in Lu, quoted above, "when a summary trial is set down, the parties are obliged 'to take every reasonable step to put themselves in the best position possible... [and] cannot, by failing to take such steps, frustrate the benefits of the summary trial process.'": at para. 107.

- [77] Credibility is another factor in the Court's consideration of whether or not the matter is suitable for summary determination.
- [78] Here, the parties' affidavit evidence conflicts on central issues.
- [79] The applicants submit that the deceased had capacity when she wrote the Will.
- [80] The applicants submit that the deceased did not have capacity and was acting under undue influence when she wrote the Three Notes.
- [81] Stewart asserts the opposite: that the deceased was under undue influence when she wrote the Will but was acting with capacity and on her own volition when she wrote the Three Notes.
- [82] While these conflicts go to central issues and put credibility at issue, in my view they can be resolved by looking to documentary evidence: *Brisette v. Cactus Club Cabaret Ltd.*, 2017 BCCA 200 at para. 27.
- [83] The affidavits append as exhibits a number of documents, including the Will, the Three Notes, extensive medical records of the deceased, an expert report authored by Dr. Michael Passmore, and a report authored by Dr. John Sloan.
- [84] As a result, this is not a case in which I am left to simply choose between one affidavit or another in the absence of other evidence: *Cory v. Cory*, 2016 BCCA 409 at para. 10, *Ferrier v. Johnscross Properties (B.C.) Ltd.*, 2010 BCSC 492 at para. 14, and *Brisette* at para. 27.
- [85] To determine the validity of the Will and the Three Notes, the Court may look to the Will and the Three Notes, and whether they meet the requirements for formal validity under the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA], and to other documents.
- [86] The Court may also look to the medical records and other documents which speak to the deceased's capacity in the final years of her life, and whether there were suspicious circumstances, dependence, or domination when the purported testamentary document was written.
- [87] Even though the consideration above of the factors weigh towards determining the validity of the Will and Three Notes summarily, the Court must still consider if it is able to make the necessary findings of fact and law on the evidence before it: Rule 9-7(15)(a).
- [88] Here, as set out below, I have found that I am able to make the necessary findings of fact and law on the evidence tendered by the parties on the application relating to the determination of the valid testamentary document. Having reviewed the evidence and the parties' submissions, I am also of the view that it is not unjust to decide the issues by summary determination.
- [89] Having found that the issues of the validity of the Will and the Three Notes are matters suitable for summary determination, the first issue is the validity of the Will.

Issue #2 - Is the Will a valid testamentary document of the deceased?

### Parties' Positions - Validity of the Will

- [90] The applicants submit that the Will meets the formal requirements of WESA, s. 37, and the deceased had capacity and she knew and approved of the Will's contents, all in support of their submissions that the Will is the valid testamentary document of the deceased.
- [91] Stewart submits that in and around the time that the Will was executed, the deceased and her late husband were pressured by Louisa and Grant to provide for Grant.
- [92] For the reasons that follow, I find that the Will is a valid testamentary document, I find that the Will is proven in solemn form, and probate of the Will is granted to Grant as executor, subject to conditions relating to the administration of the Estate and the AET pending resolution of other issues in dispute.

### Legal Framework - Validity of the Will

- [93] The onus is on the party asserting the validity of a will to show the following:
1. the will meets formal requirements;
  2. the testator had capacity, and
  3. the testator knew and approved of the will's contents: *Wilton v. Koestlmaier*, 2019 BCCA 262 at para. 24.
- [94] As a result, the burden of proof is on the applicants to show these requirements are met in respect of the Will, and on Stewart with respect to the Three Notes.
- [95] WESA sets out the requirements for formal validity of a will, as follows:
- 37 (1) To be valid, a will must be
- (a) in writing,
  - (b) signed at its end by the will-maker, or the signature at the end must be acknowledged by the will-maker as the will-maker's signature, in the presence of 2 or more witnesses present at the same time, and
  - (c) signed by 2 or more of the witnesses in the presence of the will-maker.
- (2) A will that does not comply with subsection (1) is invalid unless
- (a) the court orders it to be effective as a will under section 58 [court order curing deficiencies],
  - (b) it is a will recognized as valid under section 80 [validity of wills made in accordance with other laws], or
  - (c) it is valid under another provision of this Act.

[Emphasis added.]

## Testamentary Capacity

- [96] In addition to the formal requirements set out in s. 37 of WESA, a will is only valid if the deceased had testamentary capacity and acted without undue influence.
- [97] If this onus is met, then the burden of proving incapacity shifts to those who challenge the will: *Halliday v. Halliday Estate*, 2019 BCSC 554 at para. 31.
- [98] Where a will meets the requirements for formal validity and it has been read by or to the testator, then the Court will presume that the testator had capacity: *Wilton* at para. 24, citing *Vout v. Hay*, [1995] 2 S.C.R. 876, 1995 CanLII 105.
- [99] This presumption is rebutted when the party challenging a will shows there were suspicious circumstances surrounding its preparation: *Wilton* at paras. 24-25.
- [100] If suspicious circumstances are shown, the burden shifts back to the propounder of a will to establish capacity on a balance of probabilities: *Wilton* at para. 25.
- [101] In *Wilton*, the Court of Appeal summarized the principles of testamentary capacity as follows:
- [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 CanLII 105 (SCC), [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.
- [49] The decision in *Banks* remains the leading authority on testamentary capacity. The factors applied to determine testamentary 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.

[Emphasis added.]

- [102] The reference to *Banks* is *Banks v. Goodfellow* (1870), L.R. 5 Q.B. 549 at 565, as follows:

It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties -- that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.

[Emphasis added.]

[103] The relevant times for assessing the capacity of the testator are when the testator gives instructions for the will; the second is when the will is executed: *Laszlo v. Lawton*, 2013 BCSC 305 at para. 189.

[104] Banks sets out the essential factors for establishing capacity, which are articulated in *Wilton* at para. 49 as follows:

- a) The testator must understand the nature of the act of making a testamentary document and the effect of the document;
- b) The testator must 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.

[105] Testamentary capacity is a legal construct, not a medical standard: *Stevens v. Esak*, 2025 BCSC 331 at para. 339. Because of this, medical evidence may support a finding regarding testamentary capacity but it is not necessarily conclusive: *Stevens* at para. 339.

## Suspicious Circumstances

[106] In *Laszlo*, Justice Ballance refers to Vout regarding the interrelationship between the doctrine of suspicious circumstances and the issue of testamentary capacity, knowledge and approval, undue influence and fraud, as follows.

[201] Vout affirmed that the legal burden of proving due execution of the will and both testamentary capacity and that the testator knew and approved of the contents of the will is with the party propounding the impugned will. Put succinctly, the party seeking to uphold the will must prove that it was duly executed and is the product of a free and capable testator.

[202] In discharging its burden of proof, the propounder is aided by a rebuttable presumption. It is presumed that the testator possessed the requisite knowledge and approval and testamentary capacity where the will was duly executed in accordance with the statutory formalities after having been read by or to the testator, who appeared to understand it. Vout clarified that this presumption may be rebutted by evidence of well-grounded suspicions, known as "suspicious circumstances", relating to one or more of the following circumstances: (1) surrounding the preparation of the will; (2) tending to call into question

the capacity of the testator; or (3) tending to show that the free will of the testator was overborne by acts of coercion or fraud (para. 25).

- [203] The presumption places an evidentiary burden on the party challenging the will to adduce or point to "some evidence which, if accepted, would tend to negative knowledge and approval or testamentary capacity": Vout at para. 27.
- [204] Where suspicious circumstances arise, the presumption is said to have been spent, meaning it does not apply and has no further role to play, and the propounder reassumes the legal burden of establishing both approval and capacity. Proving testamentary capacity as well as knowledge and approval of the will provisions, necessarily entails dispelling the suspicious circumstances that have been raised: see generally, *Ostrander v. Black* (1996), 12 E.T.R. (2d) 219 at 235 (Gen. Div.).
- [205] The usual civil standard of proof, namely proof on a balance of probabilities, applies. That said, as a practical matter the extent of the proof required will be proportionate to the gravity of the suspicion, which will vary with the circumstances peculiar to each case: Vout at para. 24.
- [206] A "general miasma of suspicion that something unsavoury may have occurred" will not be enough: *Clark v. Nash* (1989), 1989 CanLII 2923 (BC CA), 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.
- [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": *Longmuir v. Holland*, 2000 BCCA 53, at para. 69 [Longmuir]; *Heron Estate v. Lennox*, 2000 BCSC 1553 at para. 67 [Heron Estate]. In *Moore, N. Smith J.* found the fact that the testatrix's doctor had described her as no longer capable of managing her affairs and as suffering dementia around the time she made her will constituted a suspicious circumstance sufficient to rebut the presumption.

[Emphasis added.]

## Undue Influence

[107] Section 52 of WESA concerns undue influence. Under this provision, if a party asserting undue influence shows that another person was in a position in which dependence or domination of the will-maker arose, then the party seeking to enforce the will bears the burden of showing that there was no undue influence. Section 52 states:

52 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.

[Emphasis added.]

[108] In *Ali v. Walters Estate*, 2018 BCSC 1032, the principles relating to undue influence are reviewed as follows:

[31] In *Leung v. Chang*, 2013 BCSC 976, Dardi J. helpfully outlined the meaning of undue influence, as developed through the common law and codified in WESA:

[35] In order to invalidate a will on the grounds of undue influence, the asserting party must prove that 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. The undue influence must constitute coercion which could not be resisted by the will-maker and which destroyed his or her free agency. It is well-established on the authorities that if the will-maker remains able to act freely, 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: [citations].

[32] As Fenlon J. (then of this Court) explained in *Woods v. Woods Estate*, 2013 BCSC 1030 at para. 37, mere influence is not equivalent to coercion. To amount to undue influence, something more is required that causes the testator to express something that they do not really mean, or that does not express their own mind or free will. Sometimes this same concept is expressed as requiring that the donor acted of their own "full, free and informed thought" in the transaction: *Geffen v. Goodman Estate*, 1991 CanLII 69 (SCC), [1991] 2 S.C.R. 353 at

378-379.

[33] In *Stewart v. McLean*, 2010 BCSC 64, Punnett J. helpfully summarized the factors that assist a court in determining whether the donor gave the gift as a result of their own "full, free and informed thought":

[97] To rebut the presumption of undue influence, the defendant must show that the donor gave the gift as a result of her own "full, free and informed thought": Geffen at 379. A defendant could establish this by showing:

- a. no actual influence was used in the particular transaction or the lack of opportunity to influence the donor (Geffen at 379; Longmuir at para. 121);
- b. the donor had independent advice or the opportunity to obtain independent advice (Geffen at 379; Longmuir at para. 121);
- c. the donor had the ability to resist any such influence (*Calbick v. Warne*, 2009 BCSC 1222 at para. 64);
- d. the donor knew and appreciated what she was doing (*Vout v. Hay*, 1995 CanLII 105 (SCC), [1995] 2 S.C.R. 876 at para. 29, 125 D.L.R. (4th) 431); or
- e. undue delay in prosecuting the claim, acquiescence or confirmation by the deceased (Longmuir at para. 76).

Another relevant factor may be the magnitude of the benefit or disadvantage (Geffen at 379; Longmuir at para. 121).

[34] The Court of Appeal in *Cowper-Smith v. Morgan*, 2016 BCCA 200, adopted these factors as follows, referring to *Stewart*:

[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.

[Emphasis added.]

## Curative Provisions

[109] Even if a will does not comply with the requirements under WESA, the legislation grants the court the power to cure deficiencies. On application, the court may order that a document represents the testamentary intentions of a deceased person and order that it be made fully effective, as though it had been made as the will or part of the will of a deceased person: WESA, ss. 58(2)-(3).

[110] Section 58 cannot be used to uphold a will that is invalid for substantive reasons such as testamentary capacity or undue influence: Estate of Young, 2015 BCSC 182 at para. 17.

[111] WESA also includes provisions that allow the court to appoint an administrator of an Estate pending a proceeding to determining the validity of a will, or to appoint an administrator because of special circumstances: WESA, ss. 103 and 132.

#### Analysis - Validity of the Will

[112] The applicants submit that the Will is valid on the bases that:

- a) It meets the requirements for formal validity and is presumptively valid.
- b) Stewart has failed to meet the burden of showing that the deceased was unduly influenced.

[113] Stewart submits that the Will is not valid because, he alleges, Grant and/or Louisa exerted undue influence on the deceased.

[114] Stewart also asserts that the Three Notes are valid and stand in place of the Will.

[115] Here, the Will meets the requirements for formal validity under s. 37 of WESA. The Will is in writing and signed by the will-maker and two witnesses-a lawyer and a legal secretary. The text above the signatures states that the witnesses were both present when the deceased signed the Will.

[116] Each page of the Will appears to have been initialled by Grace and the two witnesses, providing evidence that Grace knew and approved of its contents.

[117] There is no dispute that Grace had capacity at the time of the making of the Will, 36 years before her death.

[118] She was diagnosed with dementia in 1999, more than a decade after executing the Will.

[119] It was not until June, 2012 that Dr. Margot Genge assessed the deceased and determined that she was unable to make financial and health decisions on her own.

[120] Stewart alleges undue influence in the making of the Will. Stewart's response to the application alleges that Louisa and Grant were in a position where the potential for domination the deceased was present, and they used that position to unduly influence the deceased; however, Stewart does not provide any support for that allegation, and the documentary evidence does not support his allegation.

[121] Stewart's amended NOCC makes the bare allegation that Grant exerted undue influence on the deceased to bequeath the Property to him.

[122] Stewart's affidavit made August 1, 2024, states the following:

7. In and around the time my parents were making their will in 1987, they expressed to me that they felt pressure from Louisa and Grant to provide for Grant. Grant was increasingly expressing anger and frustration in the Home to the point he punched a hole in the wall.
- [123] The allegation in the amended NOCC, and Stewart's hearsay evidence of his parents' express of having felt pressure, does not meet the requirement of s. 52 of WESA that Stewart establish that Louisa and/or Grant was in a position where the potential for dependence or domination of the will-maker was present.
- [124] In addition to Stewart's statement being heresay, the statement does not specifically state that the deceased expressed she felt pressure, it is the "parents" he alleges expressed they felt pressure, which could be one or both of them, but Stewart's evidence is not clear.
- [125] Further, even if it is accepted that Stewart's parents "felt pressure" as alleged, that does not adequately establish undue influence to shift the burden of proof to the applicants to establish that Louisa and/or Grant did not exercise undue influence over the deceased with respect to the Will.
- [126] The deceased made the Will when her husband was alive. She was 57 years old, approximately 36 years before her death in 2023. There is no suggestion that the Deceased was cognitively impaired in 1987, 12 years before she was diagnosed with dementia. There is no evidence that the deceased was vulnerable or susceptible to influence in 1987 when the Will was drafted.
- [127] There is no evidence suggesting Grace was dependent on or dominated by either Grant or Louisa at the time of signing the Will, or that Grant or Louisa exerted undue influence on the deceased in 1987.
- [128] The fact that the Will was witnessed by a lawyer and a legal secretary in the same office provides some evidence that the deceased received legal advice regarding the Will. There is no evidence that Grant or Louisa were involved in the preparation of the Will.
- [129] Stewart has failed to raise well-grounded suspicions, or "suspicious circumstances" in relation to the preparation of the Will, the capacity of the deceased, or coercion or fraud, that would rebut the presumption that the deceased knew and approved the contents of the Will: Laszlo at paras. 200-207, citing Vout.
- [130] As a result, the evidence does not establish on a balance of probabilities that Louisa or Grant were in a position in which there was potential for dependence or domination of the deceased. There is no evidence that there was undue influence on Grace in the making of the Will.

## Conclusion on the Validity of the Will

- [131] Based on the above, I find that the Will is valid because it meets the formal requirements under s. 37 of WESA, Grace had testamentary capacity at the time of the making of the Will, and she knew and approved of its contents.
- [132] Stewart has failed to meet the burden of showing that there were any suspicious circumstances relating to Grace's making of her Will, nor has he demonstrated that Grace was unduly influenced in the making of her Will.
- [133] Having concluded that the Will is a valid testamentary document, the next issue is whether the Three Notes are valid testamentary documents. Stewart's submissions are that the Three Notes reflect the true testamentary intentions of the deceased, and they revoke or stand in place of the Will.

Issue #3 - Are the Three Notes valid testamentary documents of the deceased?

- [134] The following analysis of the Three Notes first describes the content of the Three Notes, followed by an analysis based on the same legal principles as set out above with respect to the Will.

### First Note - August 3, 2018

- [135] The First Note dated August 3, 2018 is three lines of handwritten Chinese text with the purported signature of Grace Wong below it. The certified translation of the First Note is as follows:

I want my eldest son, Stewart, to be the Executor of my Estate. I do not want Louisa and Grant to be the Executors. If Stewart's wife want to be an Executor, she can also be an Executor.

Grace Wong

August 3, 2018

### Second Note - May 1, 2020

- [136] The Second Note dated May 1, 2020 is a half page of handwritten Chinese text with the purported signature of Grace Chui Wong below it, translated as follows:

#### May 1, 2020

I want to have someone to come and help me to clean the inside and outside of the house, but there hasn't been anyone to come to help me for several months. I used to be able to access Chinese TV programs, but I haven't been able to do so for more than 6 months. I have no money to buy things with right now because Louisa and Grant have not helped me to buy things, nor have they given me any money to buy things with. I have asked them to give me money to spend but they don't listen to me. This should not happen. Louisa and Grant don't let me see my bank deposit statements. They haven't let me see them for a long time. It makes me very disappointed

and sad. I have asked them to let me see my bank deposit statements, but they don't let me see them. I have a bank safety deposit box, but Louisa has taken my key away. I have asked her to return the key to me many times, but she doesn't return it to me. It makes me feel hurt.

I want Louisa and Grant to give me back the money I have in my bank account and the key. I want to cancel the power of attorney that I have granted to Louisa and Grant. I don't want them to represent me. They do not show me proper respect as their parent. I don't want to give a share of my Estate to them and their families--i.e. Louisa and Grant. I want to cancel the shares of my Estate for Grant and Louisa if that was mentioned in my will. I don't want to give them a share of my Estate because they have been disrespectful to me as their parent and do not listen to my instructions, but they have been in charge of me and my money, so that I don't even have any money to buy things with. They have been in charge of me and have not allowed me access to the bank. I very much want Stewart to help me and to act on my behalf. As to my Estate, I only want to give it to my eldest son, Stewart, and his wife, Marinda.

[Signature:] Grace Wong

### Third Note - March 28, 2021

[137] The Third Note dated March 28, 2021 is a half page of handwritten Chinese text with the purported signature of Grace Wong below it, translated as follows:

#### March 28, 2021

I will not give my Estate to Louisa and Grant; both of them are in charge of my money. I don't want them to be in charge of me and my Estate.

My Estate consists of a house and some bank deposits, which have a total value of more than CAD\$330,000. The house is worth more than CAD\$1,300,000.

I don't want Louisa and Grant to be in charge of me. They have taken away my bank book and do not allow me to look at it. That makes me feel very hurt. I have no money to spend on things I need.

I want to cancel and not give Louisa and Grant Wong and their families their shares of the Estate. I want to give my Estate to my eldest son, Stewart. I want him to act on my behalf and to act as my executor.

Grace Wong

#### Two Memos

[138] Stewart also relies on two "memos", purportedly signed by Grace, the first of which is worded as follows:

I want my eldest son Stewart to be at my properties as he deems to be needed. (with no limit)

Grace Chui Wong

Agreed 6/1/2018

### **Ratified Aug 22, 2019**

[139] This first memo is typewritten, except for the words "with no limit" and the dates including the words "agreed" and "ratified" are handwritten and located beneath the signature.

[140] The second memo is worded as follows:

I authorize my eldest son Stewart & his advisory board to do due diligence, to protect & defend me. I authorize him to install any equipment he deems necessary, including new phone lines, & wireless communications.

Grace Chui Wong

Agreed 6/1/2018

### **Ratified Aug 22, 2019**

[141] This second memo is also typewritten, except for the words "with no limit" and the dates including the words "agreed" and "ratified" are handwritten and located below the signature.

[142] These two memos do not appear to be related to the Three Notes as alleged testamentary documents. The two memos do not refer to the Will, the Three Notes, Grace's assets, or any bequests.

[143] I understand that Stewart refers to the two memos and the RTA in relation to Stewart's claim that he is entitled to reside at the Property, which relates to the applicants' application for vacant possession of the Property.

### **Legal Framework - Validity of the Three Notes**

[144] The same legal principles summarized above relating to the validity of the Will apply to an analysis of the validity of the Three Notes as purported testamentary documents.

### **Analysis - Three Notes**

[145] The applicants question the authenticity of the Three Notes. Without deciding the issue, assuming the Three Notes are authentic, the Three Notes do not meet the formal requirements of a will in s. 37 of WESA. The Three Notes are in writing, they appear to be signed by Grace, but they have not been signed by two or more witnesses in the presence of Grace at the time the Three Notes were signed.

[146] A document that does not meet the formal requirements of s. 37 of WESA may be cured pursuant to s. 58(2) and (3) of WESA, as follows:

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

[147] A document cannot be cured by s. 58 if the document is invalid for substantive reasons such as the person's lack of capacity or undue influence: see *Estate of Young* at para. 17.

[148] Grant and Louisa submit that there are suspicious circumstances in relation to the deceased's testamentary capacity and knowledge and approval at the time of the making of the Three Notes that shift the onus on Stewart to prove that the deceased had testamentary capacity and she knew and approved of the contents of the Three Notes.

[149] Grant and Louisa also allege Stewart exercised undue influence on the deceased relating to the Three Notes, putting the onus on Stewart to prove that undue influence was not exercised in making the Three Notes.

[150] As a result, Grant and Louisa submit that the Three Notes are substantively invalid; however, even if the deceased is found to have had capacity and was not unduly influenced, they submit the Three Notes should not be cured under s. 58 of WESA, submitting the authenticity of the Three Notes has not been established, and the Three Notes do not represent the fixed and final testamentary intentions of the deceased.

[151] Stewart's position is that the deceased had the capacity to make a will at the time he asserts that the deceased wrote the Three Notes.

[152] Stewart appears to rely on a report authored by Dr. John Sloan dated July 11, 2012, in which Dr. Sloan opines that the deceased at that time was capable of making and revoking a power of attorney.

[153] The applicants submit that Dr. Sloan's report was not served as an expert report, and it was authored six years before the first of the Three Notes, limiting any relevance to the deceased's capacity at the date of the Three Notes. Dr. Sloan's report may be relevant to the issue of the RTA as Stewart submits that the RTA is valid as signed by the deceased, or valid as signed by Stewart pursuant to POA #2.

[154] Grant and Louisa's submissions raise the following issues regarding the Three Notes as alleged testamentary documents:

- a) Are the Three Notes authentic?
- b) Did the deceased have testamentary capacity at the time of the making of the Three Notes? Are there suspicious circumstances in relation to the testamentary capacity and knowledge and approval at the time of the making of the Three Notes?
- c) Was the deceased unduly influenced in the making of the Three Notes?
- d) Do the Three Notes represent the fixed and final testamentary intentions of the deceased?

[155] The first issue relating to the Three Notes is whether the Three Notes are authentic.

- a) Are the Three Notes authentic?

[156] For the reasons set out below regarding my finding that the Three Notes are not valid testamentary documents on the basis of testamentary capacity, and undue influence, I have not made a finding regarding the authenticity of the Three Notes. Authenticity is assumed for the purpose of the analysis; however, I do not consider the authenticity of the Three Notes to have been proven.

- b) Did the deceased have testamentary capacity at the time of the making of the Three Notes?

### Analysis - Testamentary Capacity

[157] The legal principles relating to testamentary capacity have been outlined above with respect to the Will. The same principles apply to an assessment of the Three Notes.

[158] Assuming, without making a finding of fact, that Grace wrote the Three Notes, they do not meet the formal requirements under WESA: they are not signed by any witnesses to Grace's signature.

[159] As a result, the Three Notes do not benefit from the presumption that Grace had the testamentary capacity to make the Three Notes as testamentary documents.

[160] Even if the Three Notes did meet the formal requirements, Grant and Louisa submit that there are suspicious circumstances that shift the onus to Stewart to prove that the deceased had testamentary capacity and she knew and approved of the contents of the Three Notes: Wilton at para. 25.

- [161] I agree with Grant and Louisa's submissions that there are suspicious circumstances in relation to the deceased's testamentary capacity and knowledge and approval at the time of the making of the Three Notes, evidenced as follows:
- a) The Three Notes are stated to have been written in 2018, 2020 and 2021, when the deceased was approximately 88, 90 and 91, which is well after the deceased was diagnosed with frontal lobe dementia in 1999, and she had been suffering from progressive cognitive decline thereafter, as evidenced in the medical records summarized above.
  - b) The deceased required daily assistance following her husband's death in 2012 when she was 82.
  - c) As noted above, in June 2012, it was the opinion of Dr. Margot Genge, geriatric psychiatrist, that Grace had poor insight and judgment to make her personal health care decisions on her own and needs her representatives to help her make any health care decisions. Dr. Genge opined that Grace was not competent to make a new representative agreement.
  - d) As also noted above, in May 2016 Dr. Genge opined that Grace was not capable of making a new will, explaining she had no idea how her assets would be distributed and she had difficulty with memory, which would interfere with her ability to make business transactions and to understand how to divide up her property.
  - e) As also noted above, an outpatient clinic record of Dr. Genge on January 10, 2018 includes Dr. Genge's assessment of Grace's competency to make a will. Dr. Genge's notes include Grace's response that she did not know to whom and what she would give away in a will, and she did not understand what Dr. Genge was talking about when asked about her assets.
  - f) Dr. Passmore's opinion is that the deceased was not capable of making a testamentary document as of the dates of the Three Notes: August 3, 2018, May 1, 2020, March 21, 2021.
- [162] Grant and Louisa cite Singh Estate, 2019 BCSC 272 regarding the admissibility of the medical records as business records for the fact that the statements made in the medical records were made, admissible and relevant to the issue of suspicious circumstances (paras. 52, 57, 61 and 80).
- [163] Here, in addition to the medical records, there is also the expert opinion of Dr. Passmore regarding the deceased's capacity at the time of the making of the Three Notes, which is based on the medical records, including Dr. Passmore's review of Dr. Sloan's report.
- [164] As stated in Laszlo at para. 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." In Laszlo the Court also stated that:

- [1204] Where suspicious circumstances arise, the presumption [of testamentary capacity] is said to have been spent, meaning it does not apply and has no further role to play, and the propounder reassumes the legal burden of establishing both approval and capacity. Proving testamentary capacity as well as knowledge and approval of the will provisions, necessarily entails dispelling the suspicious circumstances that have been raised: see generally, *Ostrander v. Black* (1996), 12 E.T.R. (2d) 219 at 235 (Gen. Div.).
- [165] Here, the medical records are compelling on the issue of capacity as they provide evidence of experienced geriatric medical practitioners who had the opportunity to meet with and assess Grace over a lengthy period of time, a period when they viewed in Grace the onset and progressive advance of dementia.
- [166] The documents support a finding that Grace did not have capacity to revoke or alter her Will, or to author a new will at the time the Three Notes were written.
- [167] The applicants also provide evidence that well before 2018, following the death of her husband in 2012, they arranged for home support workers to assist Grace. By 2013 she received home support daily.
- [168] Louisa and Grant also provide evidence of Grace's declining cognition and decreasing ability to care for herself over time. For example, by 2018 they state that Grace was not able to independently attend to her own personal, health care and finances. She was forgetful, with memory issues evidenced by her leaving the stove on and leaving spoiled food out. They also refer to Grace not understanding her healthcare, and acting in unusual ways.
- [169] Grant and Louisa managed Grace's finances as her attorneys, arranged for groceries, meals and supplies to be delivered to Grace at her home, arranged for home support workers to administer Grace's medication, and managed and assisted with medical appointments.
- [170] I also note my analysis of the wording of the Three Notes below in the section on testamentary intention, which is further evidence of suspicious circumstances.
- [171] In my view, the medical evidence and the applicants' evidence regarding Grace's progressively declining cognitive abilities establish that there are clearly suspicious circumstances relating to testamentary capacity and Grace's knowledge and approval of the Three Notes.
- [172] Given the evidence of suspicious circumstances, the burden of proof is on Stewart to rebut the presence of suspicious circumstances and show the deceased had testamentary capacity when the Three Notes were written and executed. This would require Stewart to demonstrate on a balance of probabilities that Grace knew, on her own, the following: (a) the nature and extent of her property; (b) the persons who are the natural objects of their bounty; and (c) the testamentary provisions she was making: see *Schwartz v. Schwartz*, [1970] 2 O.R. 61, 1970 CanLII 32 (C.A.).
- [173] The parties agree that Grace was diagnosed with frontal lobe dementia in 1999.

- [174] The Three Notes are dated August 3, 2018, May 1, 2020, and March 28, 2021. By these dates, the medical evidence is that by 2012 Grace's frontal-temporal dementia was slowly progressing since at least 2012.
- [175] Dr. Margot Genge had been seeing Grace since at least 2011 at the UBC Hospital Clinic for Alzheimer Disease and Related Disorders, and she continued to see Grace periodically until at least 2020 according to the condensed medical records viewed at the hearing of the applications.
- [176] In June 2012, over six years before the First Note, Dr. Genge documented that in her view Grace was not competent to manage her finances or change her power of attorney, and she was not competent to make a new representative agreement.
- [177] The Three Notes were also written well after a report by Dr. Genge, dated May 26, 2016, quoted above, in which Dr. Genge stated that she did not think that Grace was capable of making a new will. Dr. Genge noted that "at this point, I do not think she is capable of making a new will. She has no idea how her assets would be distributed. She has difficulty with memory, which would interfere with her ability to make business transactions and to understand how to divide up her property."
- [178] Dr. Michael Passmore is a staff geriatric psychiatrist with Providence Health Care. According to his affidavit he has conducted numerous capability evaluations for medico-legal purposes.
- [179] Dr. Passmore did not assess the deceased's capacity while she was alive, his opinion is based on an extensive medical file review.
- [180] In Dr. Passmore's expert report dated December 13, 2023 ("Passmore Report") concludes that the deceased probably did not have testamentary capacity on the dates of the Three Notes. In his opinion, the deceased was "probably suffering from Major Neurocognitive Disorder ... due to multiple etiologies (frontotemporal dementia and vascular), in the moderate range." (Passmore Report, p. 38).
- [181] Dr. Passmore also opines that Grace was probably susceptible to undue influence as of the dates of the Three Notes (Passmore Report, p. 42), based on his experience, as follows: "persons suffering from Major Neurocognitive Disorder due to frontotemporal dementia have a specific type of cognitive and functional impairment such that they can be susceptible to undue influence from others. This susceptibility is a result of the impaired insight and judgment that is imposed upon them by the neurocognitive disorder."
- [182] Stewart relies on the report of Dr. John Sloan dated July 11, 2012, in which Dr. Sloan was asked whether in his opinion Grace was capable of revoking a power of attorney granted to her daughter.
- [183] I note that Dr. Sloan's report pre-dates the first of the Three Notes by six years.

- [184] Dr. Sloan notes in his report that his experience includes, among other qualifications, consulted in geriatric care for 16 years, presented well over 100 lectures on topics in geriatrics, authored a short textbook on primary care geriatrics, and done hundreds of capability evaluations.
- [185] Dr. Sloan also states that his opinion is based on a single assessment of Grace, although his report refers to him meeting with her twice. He did not conduct a physical examination, nor did he study Grace's health history.
- [186] I treat Dr. Sloan's opinion with some caution. His report refers to his questions to Grace about a power of attorney. He describes her being uncertain about the questions, which resulted in Dr. Sloan leading her with appropriate answers. For example, when Dr. Sloan asked Grace about what it means to give someone a power of attorney, she replied "to tell you what to do". When he followed up by asking her "to do about what", she said she did not understand. He then gave examples of healthcare and money, and she replied "money".
- [187] Dr. Sloan then asked her what it means to give someone a power of attorney and she said she did not understand the question. He explained that giving a power of attorney to someone allows them to manage your money. She responded, "I don't want to."
- [188] Dr. Sloan's reporting of his further questions to Grace and her answers indicates that Dr. Sloan had to repeat and explain the questions in order for Grace to provide a responsive answer.
- [189] The answers upon which Dr. Sloan appears to have based his opinion that Grace had the ability to make and revoke a power of attorney, are for the most part, based on Dr. Sloan's responding to Grace's misunderstanding of the question, or her inappropriate response to the question, followed by Dr. Sloan's explanation of the question and a suggested answer, followed by Grace's purported understanding of the power of attorney concepts put to her by Dr. Sloan.
- [190] When Dr. Sloan asked her about the value of her assets, her answers were not accurate. She came back eight days later and Dr. Sloan asked her the same question. Her answers were more accurate than at the first appointment; however, this suggests the possibility of some coaching on the correct answers in the intervening period between appointments.
- [191] Dr. Sloan's report refers to s. 12 of the Power of Attorney Act, R.S.B.C. 1996, c. 370, concluding that Grace did not meet any of the criteria in that section to describe someone who is incapable of understanding the nature and consequences of an enduring power of attorney; however, while the report refers to some of the criteria, Dr. Sloan does not set out the criteria (s. 12(1)(a)-(g)), nor his assessment of Grace on each of the criteria.

- [192] In my view, Dr. Sloan's report of his meeting with Grace and the questions and her answers, as summarized above, is not supportive of her capacity, rather it provides evidence of Grace's apparent incapability of understanding the nature and consequences of a power of attorney.
- [193] As a result, on the question of Grace's testamentary capacity at the date of the Three Notes, I give greater weight to Dr. Passmore's opinion, and less weight to Dr. Sloan's report for the following reasons:
- a) Dr. Passmore conducted an extensive review of Grace's medical history. His conclusions are supported by Dr. Genge's observations and conclusions in 2016 and 2018 noted above regarding Grace's incapacity to make a will, and earlier conclusions in 2012 on Grace's incapacity to make a power of attorney and representation agreement.
  - b) Dr. Sloan's interview and report was done six years before the date of the first of the Three Notes, during which time Grace's mental abilities were declining as evidenced by the medical evidence. As a result, Dr. Sloan's report is not a timely assessment of Grace's capacity at the date of the Three Notes.
  - c) Dr. Sloan's report also provides evidence that Grace was coached during and after her visit with Dr. Sloan. In my view, little weight can be given to the report for that reason.
- [194] As a result, I find, based on Dr. Passmore's report, the medical records of Dr. Margot Genge and Dr. Dean Foti, and the evidence of Grant and Louisa, that at the time of the making of the Three Notes, Grace did not have testamentary capacity. In my view, Dr. Sloan's record of his assessment of Grace, six years before the first of the Three Notes, provides additional evidence of Grace's incapacity at that time.
- [195] I also find that Stewart has not met the burden of proving on a balance of probabilities that Grace had testamentary capacity when the Three Notes were written and executed. Based on the review of the evidence above regarding Grace's progressive dementia and incapacity, Stewart has failed to demonstrate that Grace knew, on her own, the nature and extent of her property, the persons who are the natural objects of her bounty and the testamentary provisions she was making.
- [196] Since a document which is invalid for substantive reasons such as the person's lack of capacity cannot be cured by s. 58 of WESA, the Three Notes cannot be cured; however, since the applicants also submit that there was undue influence relating to the making of the Three Notes, and that the Three Notes do not represent the fixed and final testamentary intentions of the deceased, I will briefly consider these issues in relation to the Three Notes, as follows.
- c) Was the deceased unduly influenced in the making of the Three Notes?
- [197] The applicants allege that Stewart unduly influenced Grace in making the Three Notes.

- [198] Section 52 of WESA provides that once the party alleging undue influence establishes that the person who is alleged to have exercised undue influence was in a position where the potential for dependence or domination of the will-maker was present, the onus is on the party seeking to uphold the will to prove that undue influence was not exercised: see Halliday at para. 208.
- [199] Further, from Halliday:
- [215] undue influence does not require there to be any malicious intent or reprehensible actions by the influencer. It is sufficient to establish that the will-maker was reliant on a person, and that person exercised dominance over their will through persuasive influence.
- [200] I agree with the applicants that at the date of each of the Three Notes, the evidence suggests that the deceased was in a position which gave rise to the potential for dependence or domination by Stewart. For example, Stewart's evidence is that he moved into the Property in 2018. The medical records summarized above provide ample evidence that by 2018, at age 88, Grace had been experiencing progressive dementia for a number of years, which affected her memory, cognition, and ability to care for herself.
- [201] Louisa's evidence is that after Stewart moved in with Grace, altercations occurred between Stewart and other family members, which on occasion included police attendance. By 2020, Louisa did not feel safe visiting the Property. Louisa also found it difficult to reach Grace by telephone, with Stewart, Miranda or their daughter answering the phone and not letting Miranda speak with Grace.
- [202] Stewart and Miranda's evidence is that they began to look after her nutrition, and her care and wellbeing generally.
- [203] Grant and Louisa continued to assist Grace by managing home support assistance, meal delivery, her finances as her attorneys, the Property, and a subscription to a medical alert system.
- [204] At the dates of the Three Notes, Grace had been unable to independently care for herself for a number of years. She was experiencing progressive dementia and required assistance with all aspects of her life. In these circumstances, with Stewart having moved in with Grace, and with some evidence of Stewart isolating her, the potential for dependence or domination of Grace by Stewart was present in the making of the Three Notes.
- [205] I also refer to the analysis below of whether the Three Notes represent the fixed and final testamentary intention of the deceased. Some of the details of the wording of the Three Notes indicate that, given Grace's condition and previous inability to remember details of her assets, I consider it unlikely that Grace would have been able to independently write the Three Notes without some assistance.
- [206] As a result, the onus is on Stewart to show that he did not take advantage of this position and unduly influence the deceased: WESA, s. 52.

[207] Stewart's response is that Grace had expressed concern over Grant and Louisa's control of her finances and medical care. Stewart's evidence is that Grace wrote notes in Chinese calligraphy script regarding those concerns. He also states that Grace wrote the Three Notes in Chinese script without his input; however, he provides little evidence regarding Grace's cognitive functioning at the dates of the Three Notes, nor does he provide any details regarding the circumstances of Grace making the Three Notes.

[208] In my view, Stewart's evidence falls short of meeting the onus to show that in the circumstances of Grace's condition at the time of the Three Notes, as set out above, he did not take advantage of his position and unduly influence the deceased in making the Three Notes.

[209] As a result, I am satisfied that Grace was in a position where the potential for dependence or domination was present, and I am unable to conclude that the Three Notes were executed in the absence of undue influence.

d) Do the Three Notes represent the fixed and final testamentary intentions of the deceased?

[210] The applicants also submit that the Three Notes do not represent the fixed and final testamentary intentions of the deceased.

[211] In *Estate of Young*, Justice Dickson considered factors relating to the court's curative powers in assessing a testator's "testamentary intention", quoting at para. 26, *George v. Daily* (1997), 143 D.L.R. (4th) 273, 1997 CanLII 17825 (Man. C.A.) at paras. 62 and 65, as follows:

Not every expression made by a person, whether made orally or in writing, respecting the disposition of his/her property on death embodies his/her testamentary intentions

The term "testamentary intention" means much more than a person's expression of how he would like his/her property to be disposed of after death. The essential quality of the term is that there must be a deliberate or fixed and final expression of intention as to the disposal of his/her property on death [citations omitted]

[212] The specific factors referred to by Dickson J. regarding whether a document expresses a testator's testamentary intention are as follows:

- a) the document is authentic;
- b) it is in the deceased's handwriting;
- c) it is signed by the deceased;
- d) it is dated;
- e) it is in the form of a will, identified as a will, and properly filled out;
- f) there is nothing else that refutes the conclusion that the document embodied the deceased's intentions;

- g) it revokes earlier testamentary documents such as a will;
- h) it appoints an executor and provides instructions for the management of the estate including funeral and burial arrangements;
- i) the deceased had a witness sign the document.

[213] Justice Dickson concluded her review of cases referring to these various factors as follows:

[36] The burden of proof that a non-compliant document embodies the deceased's testamentary intentions is a balance of probabilities. A wide range of factors may be relevant to establishing their existence in a particular case. Although context specific, these factors may include the presence of the deceased's signature, the deceased's handwriting, witness signatures, revocation of previous wills, funeral arrangements, specific bequests and the title of the document: Sawatzky at para. 21; Kuszak at para. 7; Martineau at para. 21.

[37] While imperfect or even non-compliance with formal testamentary requirements may be overcome by application of a sufficiently broad curative provision, the further a document departs from the formal requirements the harder it may be for the court to find it embodies the deceased's testamentary intention: George at para. 81.

[214] Each of the Three Notes is considered in relation to these factors as follows.

### The First Note

[215] The First Note dated August 13, 2018 simply states that Grace "wants" her eldest son, Stewart, to be her executor, and not Grant and Louisa.

[216] The First Note is purportedly handwritten, signed and dated by Grace; however, it is not in the form of a will and not witnessed, it does not revoke the Will and it makes no reference to the Will, it provides no instructions for the management of the estate or funeral arrangements, it makes no reference to any of Grace's assets, and it includes no bequests.

[217] As a result, there are limited factors in favour of the First Note as an expression of Grace's final testamentary intention. The greater number and more significant factors weighing against the First Note as expressing the deceased's testamentary intention, I find that, the First Note cannot be considered to embody the deceased's fixed and final testamentary intention.

### The Second Note

[218] The Second Note dated May 1, 2020, purportedly written almost two years after the First Note, makes no reference to the First Note. It is purportedly handwritten, signed and dated by Grace. It refers to her Estate generally, without reference to the separate components of her Estate. For example:

- a) She wants to have someone come and help her clean the house.

- b) She wants money to buy things.
- c) She wants to see her bank statements.
- d) She wants to cancel the power of attorney she granted to Grant and Louisa.
- e) She does not want to give a share of her Estate to Grant and Louisa if that was mentioned in her will.
- f) She only wants to give her Estate to Stewart.

[219] The Second Note is not in the form of a will and it is not witnessed. It does not revoke the Will. The only reference to the Will is the reference to Grace not wanting to give a share of her Estate to Grant and Louisa "if that was mentioned in my will". This wording is evidence that Grace did not know the contents of her Will at the time she purportedly wrote the Second Note. This ambiguous reference to the Will falls short of a revocation of the Will, and the wording does not provide evidence of a fixed and final intention to alter the Will.

[220] I also note that if this Second Note is authentic, for point (d), above, regarding the power of attorney, if Grace had granted "POA #2" to Stewart as alleged by Stewart in 2012, then there would be no need for Grace to mention the power of attorney she granted to Grant and Louisa in 2003; or, she could have affirmatively referred to the purported POA #2 because Stewart's position is that the POA was revoked by the POA #2 purportedly granted to Stewart and Miranda.

[221] This Second Note also provides no instructions for the management of the estate or funeral arrangements, it makes no reference to any of Grace's assets, and it includes no bequests. The majority of the contents of the Second Note refers to other matters unrelated to her Estate.

[222] As a result, similar to the First Note, there are limited factors in favour of the Second Note as an expression of Grace's final testamentary intention. Given the greater number and more significant factors weighing against the Second Note as expressing the deceased's testamentary intention, I find that the Second Note cannot be considered to embody the deceased's fixed and final testamentary intention.

### The Third Note

[223] The Third Note is dated March 28, 2021, almost eleven months after the Second Note. The Third Note is purportedly handwritten, signed and dated by Grace; however, it is not in the form of a will and not witnessed, it does not revoke the Will and it makes no reference to the Will, other than a very vague reference to wanting to cancel and not give Louisa and Grant and their families their share of the Estate, without reference to the Will. It provides no instructions for the management of the estate or funeral arrangements.

- [224] The Third Note has some details regarding the value of her house and bank deposits. It expresses that she wants to give her Estate to Stewart, not Louisa and Grant. These details about the value of her Estate is suspicious given that when Dr. Sloan spoke with her in 2012, almost nine years before the date of the Third Note, she was unable to answer the question about the value of her Estate until she returned eight days later and asked the question again. During the intervening years between 2012 and 2021, there is significant evidence, summarized above, of Grace's progressive dementia. As one example, Dr. Genge's note on January 10, 2018, regarding a will states that Grace did not know to whom and what she would give away in a will, and she did not know what D. Genge was talking about when she was asked about her assets.
- [225] Similar to the First Note and the Second Note, there are limited factors in favour of the Third Note as an expression of Grace's final testamentary intention. Given the greater number and more significant factors weighing against the Third Note as expressing the deceased's testamentary intention, I find that the Third Note cannot be considered to embody the deceased's fixed and final testamentary intention.

### Conclusion on the Validity of the Three Notes

- [226] As set out above, assuming without finding that the Three Notes are authentic, the Three Notes do not meet the formal requirements of s. 37 of WESA.
- [227] There are suspicious circumstances in relation to the deceased's testamentary capacity and knowledge and approval at the time of the making of the Three Notes.
- [228] Stewart has not met his burden of proof on a balance of probabilities that Grace had testamentary capacity when the Three Notes were written and executed.
- [229] I also find that there was undue influence on Grace at the time she is purported to have made the Three Notes, and the Three Notes do not represent Grace's fixed and final testamentary intentions.
- [230] Therefore, for these reasons I find that the Three Notes, individually and collectively, are invalid as testamentary documents.

### Issue #4 - Should the Court order vacant possession of the Property?

- [231] The applicants' second application seeks orders that the purported RTA is invalid and of no force and effect, and an order for vacant possession of the Property, presently occupied by Stewart, Miranda and their daughter.

- [232] A preliminary issue raised by Stewart and Miranda is the jurisdiction of this Court to consider the issue of the RTA. Stewart and Miranda's position is that the Residential Tenancy Branch ("RTB") has the jurisdiction to decide issues relating to the RTA. They also submit that even if this Court does have jurisdiction to consider the issue, the correct procedure is to file a petition and serve the petition on the director of the RTB as required by the Residential Tenancy Act, S.B.C. 2002, c. 78 [Act].
- [233] The applicants assert that the Act does not apply to Stewart's occupation of the Property or, in the alternative, that the Supreme Court does have jurisdiction to consider the matter because it is substantially linked to a matter before the Supreme Court of British Columbia.

## Background

- [234] The applicants gave notice to Stewart and Miranda on March 7, 2023 that it was the applicants' position that Stewart and Miranda were not entitled to occupy the Property, demanding that they vacate the Property by March 31, 2023.
- [235] Stewart and Miranda's response was the filing of a NOCC and CPL in the deceased's name on March 30, 2023, a week after the deceased's death. The evidence suggests that the pleadings were filed by counsel on the instructions of Stewart.
- [236] On April 24, 2023, Stewart filed a NOCC, repeating many of the pleadings from the NOCC earlier filed in the deceased's name.
- [237] On May 17, 2023, the applicants in their capacities as the Trustees of the AET, filed an application for vacant possession of the Property, relying in part on the Will, with no known tenancy agreement.
- [238] In response to the application, on May 26, 2023 Stewart filed an amended NOCC disclosing for the first time the Three Notes and the purported RTA alleged to have been entered into by the deceased with Stewart on December 25, 2022.

Does the Court have jurisdiction to consider the validity of the rental agreement?

## Application of the Act, s. 4

- [239] The Act applies to tenancy agreements, which are defined in s. 1 of the Act as "an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit, use of common areas and services and facilities, and includes a licence to occupy a rental unit".
- [240] Section 4(b) of the Act provides that the Act does not apply to living accommodations in which the tenant shares bathroom or kitchen facilities with the owner of the accommodation. It also does not apply to living accommodations rented under a tenancy agreement for a term longer than 20 years: Act, s. 4(i).

- [241] Here, the applicants argue that the Act does not apply pursuant to s. 4 of the Act because Stewart shared a bathroom and kitchen with the deceased. The applicants submit that there is no evidence that Stewart had separate kitchen or bathroom facilities from the deceased. However, the applicants' evidence regarding the living arrangements at the Property is also limited, and fails to provide convincing evidence that the kitchen or bathroom facilities were shared.
- [242] On the limited evidence of the living arrangements, the Property is a single family residence, approximately 2,500 square feet in size, with four bedrooms and three bathrooms. It appears to have a single kitchen which was used by Grace and Stewart; however, that is not clear in the evidence, and there is also evidence that there were three bathrooms in the residence, which may or may not have been shared.
- [243] The applicants also submit that the Act does not apply because the rental agreement is for a term longer than 20 years. The terms of the RTA do appear to set out an indefinite length of tenancy; however, recognizing the terms of the agreement for the purposes of excluding it under s. 4(i) of the Act conflicts with the applicants' position that the agreement is not valid.
- [244] For these reasons, the applicant's position that the Act does not apply under s. 4 is not sufficiently supported on the evidence for the Court to find that the Act does not apply pursuant to s. 4 of the Act.

### Procedure relating to residential tenancy disputes

- [245] In *Gil v. Lloyd*, 2019 BCSC 1455, the law relating to jurisdiction for residential tenancy relationships was summarized by Justice Warren, as follows:
- [27] In British Columbia, residential tenancy relationships are governed by the Residential Tenancy Act. Subject to two exceptions, that Act requires that all residential tenancy disputes be adjudicated by the Director of the Residential Tenancy Branch and not in any court. Pursuant to s. 84.1(1) of the Act, the Director has exclusive jurisdiction to inquire into, hear, and determine all such matters. In addition, s. 84.1(1) contains a privative clause, which indicates a legislative intent that the court give deference to decisions of the RTB.
- [28] By creating specialized administrative tribunals such as the RTB, the legislature intended to facilitate access to justice for persons with disputes of a type that do not warrant retaining counsel or do not require the more complex and costly procedures that apply in this Court: *Fok v. Metro Personal Care Homes*, [1993] B.C.J. No. 2746 at paras. 14-15 (P.C.) and *Corley v. Rathbone*, [1997] B.C.J. No. 574 at paras. 10-11 (S.C.).

- [29] Pursuant to s. 58(2) of the Act, the Director has the discretion to decline to exercise jurisdiction over a residential tenancy dispute in two circumstances that are material here. The first is where the claim is for an amount that is more than the monetary limit for claims under the Small Claims Act, which, as noted, is currently \$35,000. This exception is specified in s. 58(2)(a). The second is where the dispute is "linked substantially to a matter that is before the Supreme Court." This exception is specified in s. 58(2)(c) [now s. 58(2)(d)].
- [30] Section 58(3) provides that except as provided in ss. (4), a court does not have and must not exercise any jurisdiction in respect of a matter that must be submitted to the Director for dispute resolution under the Residential Tenancy Act. Subsection (4) then provides that this Court "may", on application, hear a dispute referred to in ss. (2)(a) or (c) [now (2)(a),(a.1) or (d)].
- [Emphasis added.]
- [246] Gil quotes *Gates v. Sahota*, 2018 BCCA 375 at para. 33 on the issue of the Court's jurisdiction under s. 58(4) of the Act, specifically regarding the procedure and test to be applied in determining whether a dispute is substantially linked for purposes of s. 58(2)(c) [now s. 58(2)(d)], as follows:
- [42] Section 58(4) of the RTA authorizes the Supreme Court to hear an RTA dispute "on application". That provision does not impose a leave requirement. Rather, by reason of Rule 2-1(2)(b) of the Supreme Court Civil Rules, a petition is required to commence an RTA dispute in that Court...
- [43] As an application under s. 58(4) can affect the Director's interests he petition must be served on the Director, as required by Rule 16-1(3).
- [44] When a party relies on s. 58(2)(a) of the RTA to invoke the Supreme Court's jurisdiction on the basis a dispute involves an amount in excess of the small claims limit, the applicant need only file a petition to initiate proceedings in that Court. However, it is open to the respondent to the petition or the Director to object on the basis that the Supreme Court's jurisdiction has not been properly invoked. It is also open to a judge of that Court to raise that issue.
- [45] When a party relies on s. 58(2)(c) [now (d)] of the RTA to invoke the Supreme Court's jurisdiction on the basis a dispute is "linked substantially" to a proceeding already before the Supreme Court, the applicant must, in addition to filing a petition, file an application for an order under Rule 22-5(8), which provides:

Proceedings may be consolidated at any time by order of the court or may be ordered to be tried at the same time or on the same day.

[46] An application under Rule 22-5(8) is required because the expression "linked substantially" reflects the Legislative Assembly's intention that an RTA dispute must be sufficiently connected to a matter in the Supreme Court to warrant it being heard and decided with that matter. In other words, the "linkage" exception only operates to oust the Director's jurisdiction over an RTA dispute when it is appropriate for that dispute to be adjudicated together with a matter already before the Supreme Court.

[Emphasis added.][Citations and legislation omitted in original.]

See also *Price v. Kehal*, 2021 BCSC 2118 at paras. 17-22.

[247] Here, the applicants have not proceeded in accordance with the procedure set out in *Gates*, that is, commencing a petition, service on the director of the RTB, and an application for consolidation.

[248] The applicants refer to Rule 22-7(1), (3) and (4) regarding a failure to comply with the Rules being an irregularity and not nullifying a proceeding, and the Court not setting aside a proceeding for using an originating pleading other than the one employed.

[249] The applicants submit that service on the director with the pleadings and submissions, and allowing the Director to make submissions to the Court will cure the procedural defects.

[250] Rule 25-14(8) provides that the court may, on its own motion or application, give directions concerning the procedure to be followed in any matter under this Part, including the following: (f) - pleadings; and (h) - service or delivery of a notice, process, order or document on any person.

[251] Also, Rule 1-3 provides that the object of the Rules is to secure the just, speedy and inexpensive determination of a proceeding on its merits, including, so far as practicable, conducting the proceeding in ways that are proportionate to the amount involved, the importance of the issues in dispute, and the complexity of the proceeding.

[252] In my view, requiring the applicants to convert their application to a petition would unnecessarily complicate and increase the complexity and cost of these proceedings. The applicants should have brought the application for vacant possession regarding the RTA dispute by way of petition; however, the existing filed materials set out the issues and provide a significant amount of affidavit evidence regarding the issues in dispute.

[253] The procedure and hearing of the proof of will in solemn form is the subject of the applicants' first application above, separate from the RTA dispute, and a condition precedent to Stewart seeking a variation of the Will: see *Johnson* at paras. 83-84.

- [254] I have also considered the discussion in Price at paras. 40-44 regarding the factors in Hashimi v. Miki, 2019 BCSC 2287 to be considered regarding consolidation of the RTA issue with the existing proceedings. In my view, proceeding in the manner I am directing below will result in savings in procedure, will minimize any inconvenience to the parties, there will be savings in litigation costs including experts' time and fees, and the issues will proceed without prejudice by delay.
- [255] The two applications separate the RTA issues from the testamentary document issue and any will variation issue, similar in principle to separate proceedings and consolidation.
- [256] I have found below that the RTA dispute is substantially linked to the existing Estate proceedings.
- [257] As a result, to formalize the procedure, pursuant to Rule 25-14(8)(f) and (h), I direct that:
- a) The applicants shall serve their application for vacant possession on the Director of the RTB.
  - b) If the Director of the RTB wishes to respond to the application and make written and/or oral submissions, the Director may do so.
  - c) If the Director of the RTB or any party wishes a further oral hearing before me on the application for vacant possession, the parties shall contact Court Scheduling to schedule a hearing at an appropriate date and time. If no hearing is required, the parties may communicate that to Court Scheduling, and I will consider the application for vacant possession based on the existing filed materials and submissions.

### **Jurisdiction - Substantially Linked to a Matter**

- [258] Gil at paras. 34-35 sets out the test for whether a dispute is substantially linked to a matter already before the Supreme Court, the same as the test under Rule 22-5(8), as follows:
- 1) Do common claims, disputes and relationships exist? and,
  - 2) Are the actions so interwoven that it will make separate trials at different times and before different [decision makers] undesirable and fraught with additional expense?
- [259] In answering these questions, "proper considerations include the saving of time and expense and the better administration of justice that might result from a joint trial, given the existence of common questions of law or fact bearing sufficient importance in proportion to the rest of the action": Gil at para. 35.
- [260] In Habib Estate v. Komant, 2017 BCSC 69, the applicants sought an interlocutory injunction restraining the respondents from evicting them, and from entering or occupying the property at issue.
- [261] The respondents argued that they had a right to occupy the property pursuant to a tenancy agreement.

- [262] The Court agreed that the tenancy agreement appeared to fall within the definition of "tenancy agreement" under the Act and, "at first blush," it seemed that the RTB had jurisdiction: *Habib Estate* at paras. 41-42.
- [263] However, the Court went on to find it had jurisdiction to hear the matter because the tenancy issue was substantially linked to an underlying action concerning ownership of the property: *Habib Estate* at para. 46.
- [264] Here, the circumstances are analogous to those in *Habib Estate*. As in *Habib Estate*, Stewart asserts both an ownership interest (that he inherited the Property under the Three Notes) and a possessory interest (that he has a valid rental agreement).
- [265] The issues relating to the RTA, the AET, and the POA and POA #2 are all substantially linked together. They raise common disputes and relationships because the parties are the same and the Property, which makes up most of the deceased's Estate and is the basis of the application for vacant possession, is at the heart of the dispute.
- [266] Furthermore, these actions are so interwoven that separate proceedings would cost excess time and money, and could raise the risk of conflicting decisions. There are overlapping factual circumstances that require determination. The applicants rely on the same medical documents and expert report regarding testamentary capacity and the allegation that Stewart exerted undue influence in the final years of the deceased's life.
- [267] As a result, in my view it is more expedient and cost effective for the Court to consider these documents together, rather than introducing a separate proceeding.
- [268] Perhaps more importantly, introducing a separate RTB proceeding would introduce the risk of conflicting findings. For example, it creates the possibility that the Court could find the deceased lacked capacity in the final years of her life, when she wrote the Three Notes, but the RTB could find that she had capacity to sign the rental agreement in a similar timeframe, based on the same or similar evidence.
- [269] For these reasons, I find that it is within the Court's jurisdiction to consider the validity of the rental agreement in order to decide whether to make an order for vacant possession.

#### Issue #5 - Administration of the Estate

#### **Stewart's Notice of Dispute filed May 1, 2023**

- [270] Stewart filed the notice of dispute on May 1, 2023 in Vancouver Registry No. V-230043 with style of cause "In the Matter of the Estate of Grace Chui Wong, deceased".
- [271] The applicants request an order that the notice of dispute be cancelled.

[272] Grant's evidence is that as a result of the notice of dispute he has faced some difficulties in the administration of the Estate such as accessing the deceased's bank account to pay expenses relating to the deceased and the Estate, and opening bank accounts. Grant must also file a terminal personal tax return for Grace, and Estate tax returns.

[273] There does not appear to be any evidence on the present status of the notice of dispute. Pursuant to Rule 25-10 (12) of the Supreme Court Civil Rules, a notice of dispute ceases to be in effect one year after the date of filing, unless it has been renewed. Also, a notice of dispute ceases to be in effect if the will, in relation to which the notice of dispute relates, is proved in solemn form.

[274] Rule 25-10(12) reads as follows:

(12) A notice of dispute in relation to an Estate ceases to be in effect as follows:

- (a) Subject to paragraph (b), on the date that is one year after the date on which the notice of dispute was filed;
- (b) If the notice of dispute has been renewed under subrule (6), at the end of the renewal period.
- (c)
- (d) If the will in relation to which the notice of dispute relates is proved in solemn form;
- (e) If the court orders, under subrule (11) [if the notice of dispute is not in the best interests of the Estate] or otherwise, that the notice of dispute is removed.

[Emphasis added.]

[275] As a result, because I have found that the Will is proved in solemn form, the notice of dispute ceases to be in effect pursuant to Rule 25-10(12)(d).

### **Administration of the Estate and the AET**

[276] Given my finding that the Will has been proven in solemn form, Grant is the executor entitled to administer the Estate; however, the issue arises that Grant, as a beneficiary of the Estate, may be considered to be in a conflict of interest, particularly as there are some outstanding issues such as the applicants' application for vacant possession and sale of the Property, and Stewart's wills variation claim.

[277] The applicants refer to *Glendale v. Walker*, 2024 BCSC 1947, in which Justice Shergill noted that an executor may be prohibited from acting as an administrator if they have a conflict of interest: at para. 50, citing *Weisstock v. Weisstock*, 2019 BCSC 517. She held that the sole beneficiary to an Estate was in a conflict of interest and that a neutral third-party administrator would be more appropriate: at paras. 50-58.

- [278] Here, Grant is one of three beneficiaries under the Will, but he stands to inherit the majority of the Estate by being gifted the Property.
- [279] The issue of a potential conflict of interest in a beneficiary serving as executor was reviewed in *Haynes Estate (Re)*, 2021 BCSC 669, as follows:
- [21] The starting point here is that the courts are hesitant to interfere with the testator's choice of executor: *Thomasson Estate (Re)*, 2011 BCSC 481 [*Thomasson Estate (Re)*], at para. 19. I refer also to the law governing removal or disqualification of a trustee as summarized by Chief Justice Hinkson in *Parker v. Thompson (Trustee)*, 2014 BCSC 1916, at paras. 37 and 40. Removal of a trustee will not be lightly entertained and should only occur on the clearest of evidence where there is no other course to follow, with the court's ultimate guide being what is in the best interests of the beneficiaries.
- [22] On the other hand, the testator owes a duty of good faith to the Estate, and there is clear authority to disqualify, pass over, or remove an executor where the court is satisfied that the executor is in an impermissible conflict: see *Burke v. Burke*, 2019 BCSC 383 [*Burke*], at paras. 32 to 33, citing *Re Becker*, 1986 CanLII 2596 (O.N.S.C.) and *Thomasson Estate (Re)*. The court can also exercise its authority in this regard where the executor has engaged in conduct demonstrating a lack of trustworthiness and fidelity to the Estate: *Conroy v. Stokes*, 1952 CanLII 227 (BC CA), [1952] 4 D.L.R. 124 (B.C.C.A.), at pages 126 to 127; *Burkett v. Burkett Estate*, 2018 BCSC 320, at para. 246.
- [Emphasis added.]
- [280] In *Haynes*, the executor stood to benefit personally through his alleged entitlement to the intestate portion of the estate, resulting in a concern that the executor may put his interest as a potential beneficiary ahead of his legal duty as executor to act in the interests of the estate.
- [281] In *Haynes*, Justice Riley considered and decided the potential conflict of interest issue as follows:
- [29] Weighing all this evidence up, I agree with counsel for Mr. Haynes that the mere fact of Mr. Haynes being a potential beneficiary does not make him incapable of honouring his obligation as an executor to act in the best interests of the estate. Nor does the fact at that there is interpersonal tension or strife between Mr. Haynes and Ms. Vanden Brink disqualify him from acting as the executor. To quote from *Stewart v. Stewart*, 2018 BCSC 556, at para. 61:
- [61] Mere dissension between the trustees is not sufficient to cause the court to remove a trustee. Rather, the test is that the "conduct of the trustee has endangered the trust property, shows a want of honesty or of proper capacity to execute the duties or a want of reasonable fidelity: *Conroy v. Stokes* (1942), 6 W.W.R. 204 at paras. 4 and 10 (B.C.C.A.). See also *Loftus v. Farrell*, 2001 BCSC 1136 at para. 5.

- [30] That test has not been met here. This is not a case where the executor has taken a position or done something which places his personal interests directly at odds with his duty as the executor. With regard to the application for probate, although Mr. Haynes' approach in failing to list Ms. Vanden Brink as a potential spouse of the deceased could hardly be deemed as the most cautious or prudent course that could be taken, Ms. Vanden Brink was, in fact, listed in the form P2 document as a beneficiary and was entitled to notice under s. 121 of WESA and Rule 25-2(2) on at that basis in any event.
- [32] I also consider the fact that Ms. Vanden Brink's alternative position, appointing a trust company to administer the estate, would require the payment of trustees, and unnecessarily incurring such additional cost may not be in the best interests of the estate: Burke at para. 61.
- [Emphasis added.]
- [282] Finally, Riley J. concluded by putting conditions in place to ensure that Mr. Haynes did not distribute the estate's property that was in dispute until the substantive legal issues were resolved.
- [283] Here, similarly, I am hesitant to interfere with the deceased's choice of Grant as executor. Although there has very obviously been strife and tension between Grant and Louisa on the one side, and Stewart on the other, I do not find that there is compelling evidence that Grant's dealings with the deceased's property to date have endangered the Property and other assets, nor that they show a want of honesty or of proper capacity to execute his duties. Grant's position as a beneficiary does not make him incapable of honouring his obligation as an executor to act in the best interests of the Estate, nor does the tension between the parties disqualify him from acting as the executor.
- [284] Similar to Haynes, by placing conditions on the grant of probate to Grant as I have set out below, the Property and the Estate assets will be protected from distribution pending resolution of the remaining substantive legal issues.
- [285] One of the issues in dispute is the transfer of the Property to the AET in February 2023, which Stewart claims was invalid because he alleges that Grace had revoked the POA to Grant and Louisa, and executed POA #2 in July 2012.
- [286] Although the Property has been transferred to the AET, the issue remains as to whether it is appropriately part of the Estate, or the AET. Practically, subject to further issues to be decided, the result is the same as the trust property is to be distributed in the same manner as the Will at the time of the deceased's death.
- [287] However, pending clarification of further issues relating to the Estate and the AET, I consider it appropriate to set conditions on the grant of probate to Grant as executor of the Estate under the Will pursuant to s. 129 of WESA, and in his and Louisa's capacity as trustees of the AET pursuant to the Trustee Act, R.S.B.C. 1996, c. 464.

- [288] Section 129 of WESA provides that the court may grant probate of a will or administration of an Estate for general, special or limited purposes. Here, given the outstanding issues, I consider it appropriate to grant probate to Grant for the special or limited purposes of administering the Estate as necessary pending resolution of one or more of the issues as necessary before any distribution or substantive steps are taken regarding the Estate.
- [289] As a result, the grant of probate to Grant is subject to the conditions set out in the orders below, and Grant and Louisa's role as trustees of the AET is also subject to the conditions set out in the orders below.

## Conclusion

- [290] To conclude and summarize the above, I find that the issues of the validity of the Will and the validity of the Three Notes are appropriate for summary determination.
- [291] The Will is valid. It meets the requirements for formal validity and the respondent has failed to show that any suspicious circumstances existed at the time it was executed.
- [292] The Three Notes are not valid testamentary documents. The evidence is that the deceased did not have testamentary capacity when they were written and that she was subject to undue influence.
- [293] The issue of vacant possession is adjourned with leave to the applicants to re-schedule the issue before Justice Jones after service of the application on the Director of the Residential Tenancy Branch.

## Orders

- [294] The orders from the above reasons are as follows:
1. The Court pronounces for the force and validity of the last will of Grace Chui Wong dated August 21, 1987 in solemn form of law (the "Will").
  2. The notice of dispute filed on May 1, 2023 in relation to the Estate of Grace Chui Wong, deceased, by Chi Chu Wong, also known as Stewart Wong, on May 1, 2023 in Vancouver Registry No. V-230043, is removed.
  3. A grant of probate of the Will is made to Grant Chi Nuk Wong ("Grant") as executor of the Estate of Grace Chui Wong, subject to the following conditions:
    - a) Grant is entitled to call in the Estate and to expend usual and reasonable costs in relation thereto;
    - b) Grant may access any of the deceased's bank and investment accounts;
    - c) Grant may make use of Estate funds for payment of Estate expenses in the administration of the Estate, including accounting and legal fees on behalf of the Estate;

- d) Grant may arrange for and oversee the investment of Estate funds in accordance with the Trustee Act;
  - e) Grant may pay any taxes, utilities or comparable expenses of the Estate on behalf of and out of the Estate;
  - f) Grant is prohibited from distributing any of the Estate without leave of the Court.
  - g) Grant is prohibited from dealing with the real property and residence located at 338 East 39th Avenue, Vancouver, including any of Grace's personal property at the residence (collectively the real property, residence and personal property are the "Property"), in any way that interferes with the occupation of the Property by Stewart, Miranda and their daughter (the "Family"), except by agreement or further order of this Court, pending further proceedings in this matter. Any application for vacant possession and/or sale of the Property is specifically not to be considered as an interference with the Family's present occupation of the Property;
  - h) Grant is required to make the documents related to his conduct as executor, past and future, available for review by Louisa and Stewart or their nominees within a reasonable time following any reasonable request therefor;
  - i) Grant is at liberty to apply to the Court for such further directions and orders as may be required for the effective administration or management of the Estate.
4. Grant and Louisa Yuebick Woo ("Louisa"), as trustees of the Grace Chui Wong Alter Ego Trust ("AET"), shall administer the AET in accordance with the terms of the AET, subject to the following conditions:
- a) Grant and Louisa may make use of AET funds for payment of AET expenses in the administration of the AET, including accounting and legal fees on behalf of the AET;
  - b) Grant and Louisa may pay any taxes, utilities or comparable expenses of the AET or the Property on behalf of and out of the AET;
  - c) Grant and Louisa are prohibited from dealing with the Property in any way that interferes with the occupation of the Property by the Family, except by agreement or further order of this Court, pending further proceedings in this matter. Any application for vacant possession and/or sale of the Property is specifically not to be considered as an interference with the Family's present occupation of the Property.
5. Regarding the applicants' application for vacant possession of the Property:
- a) the applicants shall serve their application for vacant possession on the Director of the Residential Tenancy Branch ("RTB");
  - b) If the Director of the RTB wishes to respond to the application and make written and/or oral submissions, the Director may do so.

- c) If the Director of the RTB or any party wishes a further oral hearing before Justice Jones on the application for vacant possession, the parties shall contact Court Scheduling to schedule a hearing at an appropriate date and time. If no hearing is required, the parties may advise Justice Jones through Court Scheduling and Justice Jones will consider the application for vacant possession based on the existing filed materials and submissions, and any additional materials or submissions filed by the Director.
- 6. The parties are granted leave to contact Court Scheduling to seek a hearing between 9:00 and 10:00 in person or by MS Teams for the purpose of any clarification with respect to these Orders, or to schedule a case planning conference, and Justice Jones is seized for these purposes.

"Jones J."

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