SUPREME COURT OF YUKON

Citation: *Sheardown v Henke,* 2024 YKSC 64

Date: 20241211
S.C. No. 24-A0012
Registry: Whitehorse

BETWEEN:

Catherine Mae Sheardown, proposed Executor of the Estate of Jean Marie Kurtin

PLAINTIFF

AND

Christopher Allen Henke, Catherine May Henke & Makai Henke

DEFENDANTS

Before Chief Justice S.M. Duncan

Counsel for the Plaintiff — Arthur A. Mauro

Appearing for the Defendants — Christopher Allen Henke

REASONS FOR DECISION

Introduction

[1] This is a dispute about which of two wills of the deceased, Jean Marie Kurtin, is valid; who should be the executor; and the costs of the litigation. The proposed executor of the will executed on May 27, 2021, the plaintiff Catherine Sheardown, seeks a declaration of its validity. One of the two beneficiaries of a holographic will executed on October 26, 2021, the defendant Christopher Henke, seeks a declaration of that will's validity. He also seeks to replace the proposed executor in both wills, Catherine Sheardown, in whichever will is found to be valid. Finally, Catherine Sheardown seeks

her costs of the litigation on a solicitor and client basis, as well as an order that Christopher Henke pay party and party costs into the estate.

[2] The first determination is whether the circumstances satisfy the requirements for presumptive validity of either will. If a will is found to be presumptively valid, is there any basis for a rebuttal of the presumption of validity, also referred to as suspicious circumstances?

[3] The primary concern in this case is testamentary capacity. The testator was diagnosed with a major neuro-cognitive disorder in February 2021, was found to be incapable of managing her financial affairs as of June 16, 2021, and then further assessed as incapable of managing her legal, health, medical, and personal affairs as of October 6, 2021.

[4] The second issue is the circumstances in which the named proposed executor may be passed over in favour of granting administration of the estate to another person. In this case, the defendant Christopher Henke wants to replace Catherine Sheardown because he does not trust her. This lack of trust stems in part from his perception that she is friends with and favours his sister, Catherine Henke, with whom he has a relationship of animosity and hostility.

[5] The final issue of costs determination requires a review and application of the modern approach to costs in estate litigation and an exercise of discretion after considering all of the circumstances.

Brief Conclusion

[6] The May 27, 2021 will is presumptively valid. In fact, Christopher Henke has conceded its validity in his statement of defence and response to notice to admit. He has not identified any relevant suspicious circumstances to rebut its validity.

[7] Christopher Henke argues the May 27, 2021 will is superseded by the holographic will of October 26, 2021. There is no evidence that the holographic will is in the handwriting of the deceased. Further, the proposed named executor in both wills, Catherine Sheardown, had no knowledge of the holographic will, and she raises concerns about the deceased's testamentary capacity at that time. The three medical assessments finding the deceased incapable in various areas before October 26, 2021, and the observed significant and rapid deterioration of her mental state after her relocation to the Thomson Centre in March 2021 validate the capacity concerns. Other concerns arising from the circumstances including the content of the will establish its invalidity.

[8] There is no clear evidence of any basis to pass over the named executor, Catherine Sheardown.

[9] Catherine Sheardown may have her costs indemnified by the estate on a solicitor-client basis. Christopher Henke shall bear his own costs and is required to pay party and party costs into the estate, fixed at $2,500.

Background

[10] The deceased, Jean Marie Kurtin, was born on May 25, 1940, and died on November 4, 2023, at age 83. She had two children, Catherine May Henke and

Christopher Allen Henke. She had one grandchild, Makai Henke, son of Catherine. The deceased was divorced from her husband.

[11] Catherine Henke lives in Whitehorse, Yukon, with her son Makai. Christopher Henke lives in Calgary, Alberta.

[12] On May 3, 2009, the deceased wrote a will appointing her friend Catherine Sheardown, who lives in Whitehorse, as executor. The estate was divided equally between her two children.

[13] In early January 2021, the deceased asked Catherine Sheardown to be present during a meeting with her lawyer to discuss changes to her will. The deceased spoke to her lawyer by telephone from her residence on January 12, 2021, in the presence of Catherine Sheardown and advised the lawyer of the following changes: her car and gold watch would go to her grandson, Makai; any other articles of personal property would go to her daughter, Catherine; and any residue would be divided 80% to Catherine and 20% to Christopher, as a result of outstanding loans made to Christopher by her that had not yet been repaid.

[14] Catherine Sheardown attested that the deceased was clear and confident when providing those instructions.

[15] On February 24, 2021, the deceased was diagnosed with a major neuro-cognitive disorder, mild to moderate, by Dr. Michael Passmore, a specialist in geriatric psychiatry.

[16] On or about March 21 or 23, 2021, the deceased moved into care at the Thomson Centre.

[17] The will containing the changes noted above with one exception was signed by the deceased and properly witnessed by the lawyer and the legal assistant on May 27, 2021. The exception was that the residue of the estate was divided equally between Catherine and Christopher Henke and any outstanding debts owed by Christopher Henke were forgiven.

[18] The power of attorney granted to Catherine Henke on March 8, 2018, was revoked at the same time as the May 27, 2021 will was signed. No one was appointed to replace her.

[19] On August 18, 2021, Dr. Passmore, after assessing the deceased again, declared her incapable of managing her financial affairs as of June 16, 2021, the date on which an occupational therapist had performed a financial management assessment.

[20] On October 6, 2021, Dr. Duncan Day, a specialist in clinical neuropsychology, performed a full psychological assessment of the deceased and determined she was incapable of making financial, legal, health, or personal care decisions. Dr. Day also noted her condition would continue to deteriorate progressively.

[21] Catherine Sheardown noted the accelerated deterioration in the deceased's mental condition after she moved into the Thomson Centre in March 2021. The quality of their interactions declined and the deceased's ability to engage in activities diminished.

[22] On October 26, 2021, Gerald Miller, a friend of the deceased, assisted her in creating a holographic will. This will appointed Catherine Sheardown as executor, provided enduring powers of attorney to Gerald Miller, Christopher Henke, and Maxine Vreim. The will stated she had no property; the car had been transferred to her

daughter; she had told Christopher Henke years ago she was giving the watch to him and Catherine Sheardown was to pick it up to give to one of the three people given enduring powers of attorney through this will. Christopher Henke was the beneficiary of the balance of the estate. The will also stated, “all assets to be liquidated as my daughter planned premeditated intentions to take my money (Elder Abuse) without my permission” and “since Cathy Henke taken over $120,000”.

[23] On October 28, 2021, the Adult Protection Unit of the Public Guardian and Trustee sent a warning notice to lawyers stating that they believed the deceased was vulnerable to undue influence and coercion.

[24] On October 20, 2022, Christopher Henke filed an application for guardianship over the deceased in the Supreme Court of Yukon. He relied on the incapability assessment of occupational therapist Joy Vall, who in turn reviewed, relied on and attached to her assessment the reports of Dr. Passmore and Dr. Day. The application was unopposed. Guardianship of the deceased in the areas of financial, legal, health, medical, and personal daily living affairs was granted to Christopher Henke on November 10, 2022.

[25] Catherine Sheardown attested she was denied access to the deceased by Christopher Henke after he was appointed as guardian. This included at the Thomson Centre and at Copper Ridge Place, where the deceased subsequently moved.

[26] After the deceased’s passing on November 4, 2023, Catherine Sheardown began carrying out her activities as executor until she received a phone call from Christopher Henke, advising her of the holographic will. She then ceased her activities and sought legal advice.

[27] Christopher Henke alleges the following against Catherine Sheardown:

(i) Catherine Sheardown did inadequate work as an executor because of a delay in sending him insurance documents from November 2023, when he gave her his address, to January 2024, when he received the documents;

(ii) she was not present for the guardianship application;

(iii) his sister Catherine unlawfully took money from their mother's estate through the joint account and she and his sister were "in cahoots" with one another;

(iv) receipts provided to the deceased for renovations on her home are for lesser amounts than those on the cheques provided from the deceased's account as payment and Catherine Sheardown should have noticed these discrepancies;

(v) on or about May 25, 2022, the deceased allegedly told Christopher Henke that Catherine Sheardown was 'probing and prying' into her life, and she did not trust her;

(vi) Catherine Sheardown bought personal clothing items for the deceased when she moved into the Thomson Centre and should have known that Catherine Henke had thrown out all of the deceased's clothes;

(vii) Catherine Sheardown did not try to visit the deceased over Christmas 2022 and never called the Thomson Centre staff to check on the deceased.

Analysis

Issue #1 – Is the May 27, 2021 will valid?

Legal Principles

Proof of a valid will

[28] To prove a will in solemn form, the party seeking to do so (called the propounder) must prove on a balance of probabilities:

(i) the will was properly executed;

(ii) the testator had testamentary capacity; and

(iii) the testator knew and approved of its contents.

[29] Rebuttable presumptions exist at law to help establish the above-noted conditions. Where a will has an attestation clause and appears on its face to be duly executed (*Waibel Estate (Re)*, 2023 BCSC 322 ("*Waibel*") at para. 12), the first condition will be satisfied.

[30] Testamentary capacity can be established where the testator understands the nature and effect of the will, recollects the nature and extent of his or her property, understands the extent of what he or she is giving under the will, remembers the people he or she might be expected to benefit under his or her will, and understands the nature of the claims that may be made by persons he or she is excluding under the will (*Dujardin v Dujardin*, 2018 ONCA 597 ("*Dujardin*") at para. 60). The assessment of testamentary capacity has been described as "a highly individualized inquiry and is a question of fact to be determined in all the circumstances" (*Waibel* at para. 19, quoting *Leung v Chang*, 2013 BCSC 976 ("*Leung*") at para. 27, aff'd 2014 BCCA 28, leave to appeal to SCC refused). However, it is significant to note that the required testamentary

capacity is not overly high. Accepting the reality that many people make their wills when they are older or ill, courts have found the existence of testamentary capacity even where there are cognitive deficits (*Waibel* at para. 20, referencing *Banks v Goodfellow* (1870), L.R. 5 Q.B. 549 ("*Banks*") at 566). "To deprive lightly the aged thus afflicted of the right to make a will would often be to rob them of their last protection against cruelty or wrong on the part of those surrounding them and of their only means of attracting towards them such help, comforts and tenderness as old age needs" (*Waibel* at para. 20 quoting from *Laramee v Ferron* (1909), 41 SCR 391 at 409).

[31] If there is evidence that the testator read the will or had it read to them, there will be a presumption that they knew of and approved the contents of the will (*Leung* at para. 28; citing *Vout v Hay*, [1995] 2 SCR 876 ("*Vout*") at 887). If there is no evidence the testator read the will, as long as the will was duly executed under the necessary formalities of the governing statute and has an attestation clause, there will be a presumption the testator knew of and approved the contents of the will.

[32] A party who challenges the validity of a will may rebut these presumptions with evidence of suspicious circumstances. These circumstances may be (*Vout* at para. 25):

> …. (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. …

[33] The evidence of suspicious circumstances must be specific and focused: bare allegations and mere suspicion without an air of reality are not sufficient to meet the required threshold (*Dimakarakos v Alimena*, 2022 ONSC 4386 at para. 19). If the evidence is sufficient to establish suspicious circumstances surrounding the preparation of the will or questioning the capacity of the will-maker, then the presumption of validity

is defeated. The propounder of the will must then legally prove the will and defeat the specific suspicious circumstances raised on a balance of probabilities. Further, if undue influence or coercion is established, the legal burden remains with the party raising the allegation.

[34] If there is evidence of suspicious circumstances that relate to testamentary capacity, this displaces both the presumption of testamentary capacity and the presumption of knowledge and approval of the will's contents (*Dujardin* at para. 46).

Proof of a holograph will

[35] Section 5(2) of the *Wills Act,* RSY 2002, c 230 ("*Wills Act*") provides:

> A holograph will, wholly in the handwriting of the testator and signed by the testator, may be validly made, without any requirements as to the presence of or attestation by any witness.

[36] The validity of a holograph will once it meets the statutory requirement in the *Wills Act* is then determined by examining the intention of the deceased when it was written. The Supreme Court of Canada in *Bennett v Toronto General Trusts Corp*, [1958] SCR 392 said at 396:

> … a holographic paper is not testamentary unless it contains a deliberate or fixed and final expression of intention as to the disposal of property upon death, and that it is incumbent upon the party setting up the paper as testamentary to show, by the contents of the paper itself or by extrinsic evidence, that the paper is of that character and nature; … [citations omitted].

[37] The holograph paper must be read as a whole and according to its ordinary and natural sense. The person propounding the holograph will has the onus to show that the will was a deliberate or fixed final expression of intention as to the disposal of the

property (*Rezaee (Re)*, 2020 ONSC 7584 ("*Rezaee*") at para. 22 referencing *Bertolo v Nadalini*, [2007] OJ No 335 (ONSC) at para. 31).

[38] A reviewing court must also assess whether there are any "suspicious circumstances", similar to the exercise in rebutting the presumption of validity of a non-holographic will. Suspicious circumstances may arise if there is evidence of compromised capacity, undue influence, or a previous will. Where suspicious circumstances exist, the onus lies with the party relying on the will to demonstrate on a balance of probabilities testamentary capacity and knowledge and approval of the contents (*Rezaee* at para. 23). See *McGrath v Joy*, 2020 ONSC 7454 at para. 35:

> Holograph wills play an important role in a testator documenting his or her intentions prior to death. As long as they are hand-written by the testator and signed by him or her, they can be admitted to probate provided that capacity is not an issue. But caution must be exercised when there are special circumstances. Unlike a formal will prepared by a lawyer, notes and observations of the lawyer taking instructions, reading over the will and due execution do not take place. Even a typed will signed by the testator and witnessed by two people can provide an opportunity for at least the witnesses to be examined as to their observations when the will was signed. Again, even this modest level of scrutiny is not available for a holograph will.

Application of law on validity of will dated May 27, 2021

[39] Although Christopher Henke has admitted the validity of this will, his allegations in this case make it important to review the circumstances surrounding the preparation of this will to confirm its validity.

(i) The will was properly executed

[40] The May 27, 2021 will was properly executed. It meets the formalities set out in s. 5 of the *Wills Act:* it is in writing; signed at the end by the testator; was duly witnessed

by the lawyer and legal assistant, who are not beneficiaries; and there was an attestation of the witnesses attached.

(ii) There was testamentary capacity

[41] The affidavit of execution of the will (the attestation) states that before signing the will, the testator read the will and the witness believed she understood it. In addition, Catherine Sheardown attested that in January 2021, she was present during instructions provided by the deceased to her lawyer about changes to the 2009 will, and the deceased was clear and confident at that time. More specifically, Catherine Sheardown attested:

> … She answered the lawyer's questions easily and consistently. The deceased seemed well aware of the consequences of her actions and the reasons that she was requesting the changes. I had no question of the deceased's capacity to be providing those instructions.

[42] Those same changes were reflected in the May 27, 2021 executed will, with the exception of the division of the residue, which remained as it was set out in the 2009 will: an equal division between Christopher and Catherine Henke.

[43] Although the deceased was diagnosed with a major neuro-cognitive disorder on February 24, 2021, it was described at that time as mild to moderate and the geriatric psychiatrist, Dr. Passmore, noted she still showed reasonable judgment. He further found she had no delusion, no hallucination, and no features of delirium at that time.

[44] Given the individualized and fact-based nature of the inquiry into testamentary capacity and the relatively low threshold to be met to establish capacity because of the circumstances in which many wills are made, I find that the deceased had testamentary capacity to make the changes that appeared in the May 27, 2021 will. The evidence of

Catherine Sheardown about the deceased's capability during the telephone meeting with the lawyer in January 2021, the description of her state by Dr. Passmore as of February 24, 2021, and the attestation to the will indicating the witness' views that she understood the will's contents, all support her testamentary capacity.

(iii) The testator knew and approved of the will's contents

[45] There is no evidence in this case to rebut the presumption that the deceased knew and approved the contents of the will, created by the existence of an attestation clause and the fulfilment of the other formalities. Further, the changes appearing in the will from the 2009 will were consistent with the instructions provided by the deceased in January 2021 in the presence of Catherine Sheardown, except for the equal division of the residue between Catherine and Christopher Henke.

[46] Christopher Henke has not provided evidence of any suspicious circumstances surrounding the making of the May 2021 will. Nor has he raised any suggestion of duress.

[47] As a result, I find the May 27, 2021 will to be valid.

Application of law on validity to holographic will dated October 26, 2021

(i) The will may not have been properly executed

[48] Section 5(2) of the *Wills Act* provides that a holograph will, wholly in the handwriting of the testator and signed by the testator, may be validly made without any requirements as to the presence of or attestation by any witness.

[49] In this case, there is no evidence that the holograph will was written by the deceased. The defendant Christopher Henke testified he had the original of the will, but he provided no evidence that the handwriting of the will matched the handwriting of the

deceased. Thus, although the will was purportedly signed by the deceased, it is not clear that it was written by her.

[50] Although this in and of itself is enough to confirm the invalidity of the will, I will continue with the analysis for the sake of completeness.

(ii) Fixed and final expression of intention about the disposal of property

[51] There is no question that the contents of the holograph will demonstrate a fixed and final expression of intention of the deceased about the disposal of her property. The choice of words used, the specific directions provided, and the references to the liquidation of her assets all show a final intention.

(iii) There were suspicious circumstances – lack of testamentary capacity

[52] The timing of the making of the holograph will and the deceased's progressive neuro-cognitive disorder raise concerns about her testamentary capacity on a balance of probabilities. On June 16, 2021, Dr. Passmore saw the deceased for the second time and requested an occupational therapist to complete a financial management assessment. On August 18, 2021, Dr. Passmore re-assessed her, reviewed her occupational therapy assessment reports, including the financial management assessment and the Montreal Cognitive Assessment (13/30). He concluded she had compromised insight and judgment about her own financial management, had poor short-term memory but no delirium. She expressed concern her daughter was allegedly taking advantage of her financially and she would trust her son in Calgary to help with healthcare decisions. He further concluded she was incapable of managing her financial affairs, as of June 16, 2021, the date of the financial management assessment.

[53] Dr. Duncan Day's extensive and thorough assessment on October 6, 2021, lead to his conclusion of her incapability in managing her financial decision-making, personal care, legal matters and health care decisions. He wrote:

> Overall, she did not appear to exhibit an understanding of her financial status, daily self-care needs, how to obtain housing elsewhere, how to seek legal counsel or the ability to understand options or consequences of taking or failing to take actions, and she could not demonstrate an understanding of the risks and measures required to manage finances, costs or payments. She also lacked an understanding of her health status, history, prognosis, and what her care needs might be. The history she presented was vague and impoverished. She is vulnerable to the influences and suggestions of others, and she appears to have little or no insight into or understanding of her current financial management matters, health status or care needs. She is unable to describe options for decision-making or demonstrate a grasp of the need for assistance. … She struggled to explain even basic aspects of her current status, including why she was within a long-term care facility receiving considerable supports.
>
> … The most likely reason for her lack of understanding is the marked memory and executive impairment associated with the aforementioned major neurocognitive disorder.

[54] Dr. Day confirmed she had a progressive and irreversible neuro-cognitive disorder and her future ability to make decisions would likely continue to deteriorate.

[55] Further examples of her mental status at that time were as follows:

- the deceased was unable to name anyone other than Gerry [Miller] that could act as her substitute-decision maker;
- the deceased was unable to state where she was, why she was there, or how long she has been there at the time of the interview;
- when asked if she had any children, the deceased stated she only had a daughter and a grandchild, omitting her son;

- the deceased did not demonstrate any knowledge of her current finances and was unable to state roughly how much she has or where it was kept.

[56] This evidence of the deceased's incapacity by October 6, 2021, shows a significant decline from the evidence of her cognitive impairment earlier that year. The assessment of her incapacity in all areas by a clinical neuropsychologist confirms her lack of testamentary capacity at the time of the making of the holograph will, October 26, 2021.

[57] Further, the content and wording of the will suggests an absence of understanding of its purpose and effect. For example, the words "my daughter planned premeditated intentions to take my money (Elder Abuse) without my permission" and "since Cathy Henke taken over $120,000" are not usual or appropriate phrases for a will. The contents of the will, in particular the failure to include her daughter Catherine Henke and her grandson Makai as beneficiaries and her statement she had given the gold watch to Christopher Henke many years ago and it should be given to him, Gerald Miller, or Maxime Vreim, are consistent with Christopher Henke's objections to the May 27, 2021 will. There is insufficient evidence to show the deceased understood the nature and effect of the will, recollected the nature and extent of her property, understood the extent of what she was giving under the will, remembered the people she might be expected to benefit under her will, and understood the nature of the claims that may be made by persons she was excluding under the will. Further, the will's contents are suggestive of undue influence or coercion, given the nature of the changes in favour of Christopher Henke and removing Catherine Henke, combined with the deceased's lack of capacity by the date the will was drafted.

[58] Catherine Sheardown has raised sufficient evidence of suspicious circumstances calling into question the deceased's capacity at the time the holograph will was prepared.

[59] Christopher Henke has not demonstrated on a balance of probabilities that the deceased had testamentary capacity at that time. His general statements minimizing the seriousness of her mental state are insufficient to displace the conclusions about her incapacity in the reports of Dr. Day and Dr. Passmore. As a result, I find the deceased had no testamentary capacity at the time of the holograph will.

(iv) The testator did not know or approve the contents

[60] Given my finding of testamentary incapacity at the time of the writing of the will, the presumption of knowledge and approval of contents is also displaced.

[61] Christopher Henke has provided no evidence to show on a balance of probabilities that the deceased had knowledge of and approved the contents of the holograph will.

Issue #2 – Passing over Catherine Sheardown as Executor

Legal Principles

[62] Courts have consistently upheld the legal principle that they should not lightly interfere with a testator's choice of executor of their estate (*Gawdun v Lord*, 2020 BCSC 266 ("*Gawdun*") at para. 10 quoting from *Wolfe, Re* (1957), 7 DLR (2d) 215 (BCCA) at 219). Even if the executor is of bad character, bankrupt or likely to create friction with a co-executor, courts generally respect the wishes of the testator (*Chambers v Chambers*, 2013 ONCA 511 ("*Chambers*") at paras. 95 and 96).

[63] Courts have also stated :

- removal of an executor should only occur “on the clearest of evidence that there is no other course to follow” (see *Crawford v Jardine*, [1997] OJ No 5041 (Ont Ct (Gen Div));
- the court’s main guide should be the welfare of the beneficiaries;
- removal should occur when failure to do so will likely prevent proper execution of the estate
- the emphasis is on future proper administration of the estate, in accordance with the fiduciary duties of the executor and ensuring the interests and welfare of the beneficiaries, and not on any past misconduct of the executor, unless it is clear that the past misconduct is likely to continue;

Radford v Wilkins, [2008] OJ No 3526 (ONSC) at paras. 102-107.

[64] Grounds for removal of executors have included: conflict of interest if it is well justified and clearly necessary (*Morelli v Morelli*, 2014 BCSC 106 at para. 30); dishonesty, lack of capacity to execute duties or lack of reasonable fidelity (*Gawdun* at paras. 13 and 14); and such strong animosity between co-executors that it would create a deadlock in the administration of the estate (*Chambers* at para. 99).

Application of legal principles to facts

[65] In this case, the complaints raised by Christopher Henke about Catherine Sheardown were not sufficient to meet the common law test for her removal as executor. In the following, I will address each of the allegations he made against Catherine Sheardown (see para. 27 above).

[66] First, the delay of two months in his receipt of the insurance documents is not evidence of misconduct. Not only is this not an inordinate delay, but Catherine Sheardown was forced to halt her duties as executor after receiving the message from Christopher Henke advising her of the holograph will.

[67] Second, Catherine Sheardown's decision not to participate in or oppose the guardianship application is not evidence of any misconduct. It demonstrated her understanding of the deceased's cognitive status, and the appropriateness of one of the deceased's children assuming the guardianship role.

[68] Any actions by Catherine Henke with respect to the deceased's monies while she was alive were not attributable to or the responsibility of Catherine Sheardown.

[69] The evidence from the exhibits in the affidavit showed a $1,879.46 overpayment by the deceased for her bathroom renovation materials, which Catherine Sheardown had agreed to pay and receive reimbursement once the house was sold. The receipts attached to the Sheardown affidavit showed a cost of $5,606.32, and the cheque written as reimbursement for those monies was $7,485.78. Catherine Sheardown attested in her affidavit, however, that the materials cost $7,691.12 and that the deceased chose to reimburse her before the sale of the house instead of after the sale as agreed. While this discrepancy is not explained, it is not sufficient to justify a passing over of Catherine Sheardown as executor. The requirements of clear necessity, the clearest of evidence to justify her removal, the absence of fidelity, honesty, or capacity to protect the assets of the estate and ensure the welfare of the beneficiaries, are not present.

[70] The deceased's alleged complaint about Catherine Sheardown probing and prying into her life occurred in or around May 2022, when the deceased's neuro-

cognitive disorder had progressed and her judgment, short-term memory, and perceptions were not reliable.

[71] It is unclear how Catherine Sheardown should or could have known that Catherine Henke threw out the deceased's clothing, even if that were verified. The clothing provided to the deceased by Catherine Sheardown were small personal items.

[72] Catherine Sheardown attested that once Christopher Henke became the deceased's guardian in October 2022, he prevented her from visiting the deceased at the Thomson Centre and later at Copper Ridge Place. This provides a reason for the absence of visits from Catherine Sheardown with the deceased over Christmas in 2022 and following.

[73] To summarize, Catherine Sheardown is not a beneficiary under the will. She was a friend of the deceased for over 30 years. She was the named executor in the 2009 will, the May 27, 2021 will and the October 26, 2021 holograph will. There is no evidence she is unable to implement the wishes of the deceased and ensure the estate is properly administered. She has shown no conflict of interest, dishonesty, lack of fidelity, or lack of capacity. There are no co-executors. The will is straight forward and the two beneficiaries each receive 50 percent of the residue.

[74] The test for passing over an executor is not met in this case.

[75] As an observation, it appears from Christopher Henke's submissions in his affidavit and orally at the hearing that his real concern is about his sister, not Catherine Sheardown, except to the extent he associates her with his sister. The evidence shows the siblings have had a difficult relationship for many years. Christopher Henke attested in his affidavit and stated orally at the hearing that he became aware of financial issues

in his mother's bank accounts arising from his sister's actions once he became his mother's guardian.

[76] As noted by the Public Guardian and Trustee Adult Protection Unit the account from which Catherine Henke drew money and paid cheques was a joint account with her mother.

[77] I make no finding about any allegations of financial irregularities or improprieties by Catherine Henke with respect to her mother's bank accounts, as that determination is not before me. If this in fact occurred, it explains the frustration and anger of Christopher Henke. However, his remedy is not to request this Court to validate a new will written at a time his mother was without testamentary capacity. Nor is it an appropriate remedy for his disagreements with his sister to pass over Catherine Sheardown as executor. There is no evidence that Catherine Sheardown knew anything about his allegations of financial abuse by his sister and even if she did, she had no responsibility or ability to do anything while the deceased was alive.

Issue #3 – Costs

[78] The plaintiff argues that she should be reimbursed from the estate monies on a solicitor-client basis and the defendant should be required to pay costs on party and party basis into the estate.

Legal Principles

[79] The traditional practice of the Canadian courts followed the approach of the English courts. Courts routinely ordered costs of all parties to be paid by the estate where the litigation dispute arose from the actions of the testator or if there were

reasonable grounds on which to question the will's validity (*McDougald Estate v Gooderham*, [2005] OJ No 2432 (ONCA) ("*McDougald Estate*") at para. 79).

[80] Now, however, the modern approach to costs in estate litigation is to follow the costs rules that apply in civil litigation – that is, the unsuccessful party pays costs, unless the challenge to the estate was reasonable, or there was a public policy exception. The policy reason for the unsuccessful party paying the costs is to discourage litigation because of its depletion of estate assets. The policy reason for the payment of costs by the estate in circumstances where there are public policy exceptions, is because society has an interest in ensuring only valid wills are probated. Those exceptions include:

a. cases involving the validity of a will;

b. cases involving the interpretation of a will or trust;

c. cases involving dependant or family relief claims;

d. cases where the cause of the litigation takes its origin in the fault of the testator or those interested in the residue; and

e. cases where there are sufficient and reasonable grounds concerning the testator's testamentary capacity or whether there was undue or [sic] influence on the testator.

(*McAndrew Estate (Re),* 2021 ABQB 56 at para. 4, quoting from *Foote Estate (Re),* 2009 ABQB 654 successful party.)

[81] The rationale was explained in *McDougald Estate* as follows:

> [85] The modern approach to awarding costs, at first instance, in estate litigation recognises the important role that courts play in ensuring that only valid wills executed by competent testators are propounded. It also recognises the

> need to restrict unwarranted litigation and protect estates from being depleted by litigation. Gone are the days when the costs of all parties are so routinely ordered payable out of the estate that people perceive there is nothing to be lost in pursuing estate litigation.

[82] In this case, the litigation was initiated by the executor because of Christopher Henke's position that the October 6, 2021 holograph will is valid, replacing the May 27, 2021 will. The validity of the two wills needed to be determined. This situation was caused in part by the testator. The executor has a duty to ensure the valid will is probated and estate is properly administered.

[83] As a result, the plaintiff shall obtain her costs of the litigation from the estate on a solicitor-client basis. The general practice in estate litigation where executors are awarded costs as the successful party is an award of solicitor and client costs payable from the estate. The rationale for this is that executors have no personal interest in the outcome and no other source of reimbursement for legal expenses (*Morash Estate v Morash*, 1997 NSCA 124 at para. 22).

[84] Christopher Henke was the unsuccessful party and under the modern approach to costs in estate litigation, he is not entitled to the payment of his costs from the estate.

[85] The question is whether he should be required to pay costs on a party and party basis to the estate as a result of his conduct. While the existence and effect of the holograph will needed a validity determination, the information already in Christopher Henke's possession as a result of his guardianship application on the deceased's behalf as well as this litigation, was instructive with respect to her testamentary capacity at the time of the making of the holograph will. The three medical assessments as well as the guardianship assessor's assessment clearly showed her lack of testamentary capacity

in October 2021. For Christopher Henke to continue his opposition to Catherine Sheardown's claim that the May 27, 2021 will was valid in the face of this information was not reasonable. Further, his allegations against Catherine Sheardown to support his request that she be passed over as executor lacked a rational basis. As noted above, his primary motivation for seeking a determination of validity of the holograph will appears to have been to ensure that his sister received no benefits from their mother's estate and that he retained the gold watch. This ulterior motivation led to unnecessary litigation.

[86] I acknowledge Christopher Henke is representing himself. I believe that he genuinely believes, perhaps based on evidence he obtained as a result of his role as guardian, that his sister unfairly depleted their mother's estate during her lifetime. As noted above, I make no determination of this fact, as this issue is not before me, and I have no evidence from Catherine Henke in any event. However, Christopher Henke's approach in attempting to right this perceived wrong through promoting the holograph will was in error. He created significant unnecessary costs to the estate, and inappropriately questioned Catherine Sheardown's ability to do her work as executor.

[87] Both Christopher and Catherine Henke will, as beneficiaries of the estate suffer the consequences of his actions as a result of the payment of the costs of this litigation by the estate. In the circumstances, I will order costs to be payable by him to the estate on a party and party basis, fixed at $2,500.

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DUNCAN C.J.