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Wills, Estates and Estate Litigation Newsletter

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IN THIS ISSUE -

Ontario Makes Significant Changes to the Law of Wills and Estates Administration.....1

Court of Appeal Upholds Armchair Rule of Will Interpretation.....2

Court of Appeal Finds Suicide Note to be a Valid Will.....4

Costs Awarded for Obstructionist Behaviour and Unfounded Allegations of Fraud.....7

Court of Appeal Finds Life Interest Not Licence in Home, Voids Condition Subsequent for Uncertainty.....8

Ontario Makes Significant Changes to the Law of Wills and Estates Administration

Significant changes to the law of wills and estates administration in Ontario have been made as a result of the *Accelerating Access to Justice Act, 2021* ("Bill 245"). Bill 245 received Royal Assent on April 19, 2021 and makes a number of important changes to the *Succession Law Reform Act*, R.S.O. 1990, c. S.26 (the "*SLRA*") and the *Substitute Decisions Act, 1992*, S.O. 1992, c. 30 (the "*SDA*"), most of which came into effect on January 1, 2022.

As discussed in our Spring 2020 Newsletter, the Ontario Legislature previously passed temporary measures in response to the COVID-19 pandemic to allow for the remote execution and witnessing of wills and powers of attorney in counterpart. Bill 245 amends the *SLRA* and the *SDA* to make these measures permanent. These amendments have already gone into effect, and apply to wills or powers of attorney made on or after April 7, 2020.

The remainder of the amendments discussed below came into effect on January 1, 2022.

Sections 15(a) and 16 of the *SLRA* will be repealed, meaning that a testator's marriage will no longer revoke an existing will in Ontario.

Section 17 of the *SLRA* currently provides that that if a testator gets divorced from his/her spouse, or if the marriage is declared a nullity, the testator's will shall be construed as if the former spouse had predeceased the testator. New amendments will extend the effect of section 17 to spouses who were separated, but not divorced. Under the new provisions, a spouse who was living separate and apart from the testator at the time of his/her death as a result of the breakdown of their marriage will be excluded from the will if, prior to the testator's death:

- they lived separate and apart as a result of the breakdown of their marriage for a period of three years, if the period immediately preceded the death;

- they entered into an agreement that is a valid separation agreement under Part IV of the *Family Law Act*;

- a court made an order with respect to their rights and obligations in the settlement of their affairs arising from the breakdown of their marriage; or

- a family arbitration award was made under the *Arbitration Act, 1991* with respect to their rights and obligations in the settlement of their affairs arising from the breakdown of their marriage.

Similarly, a new section 43.1 will be added to the *SLRA* to provide that the spousal entitlements under Part II of the *SLRA* if a person dies intestate in respect of any or all property do not apply if the person and the spouse were separated, as determined under the section, at the time of the person's death.

The amendments to sections 17 and 43.1 contain transitional provisions which have been the subject of comment for their seemingly inconsistent effects. For spouses who have lived separate and apart as a result of their marriage breakdown for a period of three years immediately preceding the death of one spouse, the amendments provide that the spouses must also have *begun* to live separate and apart on or after the date the provisions came into force (January 1, 2022). Accordingly, the transition provisions appear to allow for different results depending on whether the spouses separated before or after the coming into force date.

The Ontario Bar Association sought to address this issue by proposing alternative transitional provisions covering spouses who have been living separate and apart for a period of at least three years when the first spouse died, regardless of whether they separated before, on or after the date the provisions come into force, however this proposal was not incorporated into the amendments.

Finally, a new section 21.1 will be added to the *SLRA* allowing the Ontario Superior Court of Justice to make an order validating a document or writing that was not properly executed or made under the *SLRA*, if the Court is satisfied that the document or writing sets out the testamentary intentions of a deceased or an intention of a deceased to revoke, alter or revive a will of the deceased.

Bill 245's amendments to the *SLRA* make significant changes to the law of wills and estates administration in Ontario. Parties should consider these amendments to ensure that they understand how their rights and entitlements may be affected.

Alex Smith, Associate

— KC —

Court of Appeal Upholds Armchair Rule of Will Interpretation

In *Ross v. Canada Trust Company,* 2021 ONCA 161, the Ontario Court of Appeal upheld a motion judge's application of the "armchair rule" for the interpretation of a will.

Background

The testator's will provided for the disposition of a cottage property, first through life interests to her two daughters, and then to her grandchildren as joint tenants. If the grandchildren could not agree to accept the transfer of the property as joint tenants, then the trustees were directed to sell the property with the proceeds to be distributed among the grandchildren in equal shares in accordance with the relevant provisions on the residue of the estate.

Only one of the testator's daughters (Margaret) had children. Margaret had five children, but one of them (Jane) pre-deceased her. Margaret and her husband became the beneficiaries of Jane's estate. When Margaret died, she left her estate to just one of her four surviving children (Gordon).

After both of the testator's daughters passed away, the trustee sold the cottage property and proposed to distribute the proceeds in equal 25% shares among the testator's four surviving grandchildren. However, Gordon argued that because his mother Margaret inherited his sister Jane's estate, and Margaret had left her entire estate to him, that meant that he inherited his deceased sister's interest in the property as well. Gordon argued that based on the residue provisions of the testator's will, the proceeds of the sale should instead be divided into five equal shares, with two of the shares (40%) going to him.

The motion judge interpreted the will and found that there would be a patent inconsistency if the general residue clause was incorporated into the clause dealing specifically with the cottage property. Because of this inconsistency, the motion judge relied on the "armchair rule", in which the Court determines the testator's intentions by putting itself in the position of the testator at the point when he or she made his or her will, and, from that vantage point, reads and construes the will, in the light of the surrounding facts and circumstances. The motion judge ordered that the proceeds of the sale be divided into four equal shares among the four surviving grandchildren. Gordon appealed, while the other three grandchildren agreed with the judgment but cross-appealed on the motion judge's reasons.

The Court of Appeal's Decision

The Ontario Court of Appeal began by setting out the standard of review for an appeal from the interpretation of a will, finding that the Supreme Court of Canada's decision in *Sattva Capital Corp. v. Creston Moly Corp.,* 2014 SCC 53 adopted a deferential standard of review for the interpretation of written contracts, and that the Ontario Court of Appeal applied this deferential standard to the interpretation of a will in *Trezzi v. Trezzi*, 2019 ONCA 978. Accordingly, the interpretation of a will in light of its surrounding circumstances is, absent an extricable error of law, subject to the deferential "palpable and overriding error" standard of review.

The Court upheld the motion judge's application of the armchair rule. The motion judge appropriately attempted to first discern the testator's intentions from the plain language of the will and only resorted to the armchair rule when this proved impossible due to the conflict between the general residue clause and the clause dealing specifically with the cottage property. The Court found that the motion judge correctly took a step back to consider the "bigger picture", and there was nothing in his interpretative methodology that would warrant appellate intervention. The motion judge's reasoning was sound, and there was no palpable or overriding error in his conclusion based on the evidence before him that the testator's intention was for the proceeds from the sale of the cottage property to benefit only the surviving grandchildren.

For example, the clause directing that the grandchildren receive the property as joint tenants rather than tenants in common suggested that the testator intended to keep the property within her immediate family to the extent possible, and an interpretation allowing for a deceased grandchild's estate to inherit an interest in the property would frustrate that intention.

Finding no palpable or overriding error in the motion judge's application of the armchair rule, the Court dismissed the appeal and upheld the equal distribution of the proceeds among the four surviving grandchildren. The

Court also dismissed the cross-appeal on the basis that an appeal lies from the order or judgment itself, not from the reasons for them, and accordingly the cross-appeal was misconceived and without merit.

Takeaways

This case confirms that the standard of review for an appeal from the interpretation of a will is highly deferential. An appellate court will only intervene in a lower court's interpretation of a will where the lower court made a palpable and overriding error. Additionally, the case sets out the principles for applying the "armchair rule", which is generally only relied upon if the testator's intention cannot be determined from the plain language of the will, and which involves the court construing the will in light of the surrounding facts and circumstances from the perspective of the testator when he or she made the will, in order to better understand his or her intentions.

Alex Smith, Associate

— KC —

Court of Appeal Finds Suicide Note to be a Valid Will

In *McGrath v. Joy,* 2022 ONCA 119, the Ontario Court of Appeal held that a testator's suicide note was his valid will after determining that he had the requisite testamentary capacity, while also providing guidance on the modern approach to costs in estate litigation.

Background

The deceased, Mr. Joy, died by suicide in the early morning hours of July 13, 2019. Shortly before his death, he wrote a suicide note in which he asked his business partner, Steve Ramsundarsingh, whom he had named his executor in a previous will made in 2016, to ensure that his wife, Ms. Joy, did not "get anything". He wrote a declaration that anything left to his wife in his previous will was void, and asked that "everything" be given to his stepson ("Mr. McGrath") and his grandson.

Mr. McGrath brought an application to the Ontario Superior Court of Justice to have the suicide note declared Mr. Joy's valid will and admitted to probate. The application was opposed by Ms. Joy and Dexter Ramsundarsingh ("Mr. Ramsundarsingh"), the son of Mr. Joy's business partner Steve Ramsundarsingh and a long-time friend of Mr. Joy. Both Ms. Joy and Mr. Ramsundarsingh (collectively, the "Respondents") were beneficiaries under Mr. Joy's 2016 will, but Mr. Ramsundarsingh was not mentioned in the suicide note and Ms. Joy was expressly disinherited.

There was no dispute that the suicide note met the requirements of a holograph will under section 6 of the *Succession Law Reform Act*, R.S.O. 1990, c. S.26 (the "*SLRA*"), however the Respondents argued that Mr. McGrath did not meet the evidentiary burden of showing that Mr. Joy had testamentary capacity to make a will when he wrote the suicide note. Mr. Ramsundarsingh also argued in the alternative that if Mr. Joy did have testamentary capacity, then his suicide note should be construed as a codicil to his 2016 will.

The application judge held that Mr. McGrath failed to meet the evidentiary burden of establishing Mr. Joy's testamentary capacity, for reasons which included the fact that Mr. Joy had been drinking alcohol and using drugs the day before he committed suicide, his handwriting was sloppy and nearly illegible, and the suicide note was a "profanity laced diatribe" against his wife. Given this conclusion, the application judge did not need to consider Mr. Ramsundarsingh's alternative argument that the suicide note was a codicil to Mr. Joy's 2016 will.

The application judge also made a blended costs order, with some of the costs being payable from Mr. Joy's estate, while ordering

Mr. McGrath to pay the majority of costs himself on the basis that he acted unreasonably in attempting to have the suicide note admitted as Mr. Joy's will. Mr. McGrath appealed to the Ontario Court of Appeal challenging both the application judge's finding that Mr. Joy lacked testamentary capacity and the costs order.

The Court of Appeal's Decision

On appeal, the Respondents argued that the highly deferential "palpable and overriding error" standard of review applied. However, the Court of Appeal disagreed, emphasizing that although the application judge stated the correct legal principles for making a determination about testamentary capacity, he made no attempt to apply them. The Court of Appeal cited the Supreme Court of Canada's decision in *Housen v. Nikolaisen*, 2002 SCC 33 for the principle that a failure to apply the relevant legal principles is an error warranting an appellate court's intervention. Given the failure to apply the relevant legal principles, the application judge made no findings of fact which attracted deference on the palpable and overriding error standard of review.

The Court of Appeal cited the same long-standing principles for determining testamentary capacity which had been cited by the application judge. In order to have a "sound disposing mind", a testator must: (a) understand the nature and effect of a will; (b) recollect the nature and extent of his or her property; (c) understand the extent of what he or she is giving under the will; (d) remember the people that might be expected to benefit under his or her will; and (e) where applicable, understand the nature of the claims that may be made by persons he or she is excluding under the will.

The Court of Appeal applied these principles to the facts of the case and determined that Mr. Joy clearly had testamentary capacity when he wrote the suicide note. The fact that Mr. Joy set out his last wishes and provided instructions to Steve Ramsundarsingh, the executor of his previous will, on how to dispose of his assets indicated that Mr. Joy understood that he was writing his will. Mr. Joy's understanding of the nature and extent of his property and what he was giving was evident from the fact that he declared his previous dispositions to be void and clearly expressed his intention to bequeath all of his property, no matter the nature and extent of it, to Mr. McGrath and his grandson. The fact that Mr. Joy did not refer to Mr. Ramsundarsingh did not necessarily mean that he forgot the people who might be expected to benefit under his will.

The Court of Appeal then turned to the application judge's concerns which led him to conclude that Mr. Joy was not of sound disposing mind. The Court of Appeal cited prior case law which suggested that a pattern of heavy drinking did not necessarily mean testamentary incapacity. The evidence demonstrated that despite his daily use of alcohol and drugs, Mr. Joy was never diagnosed or treated for a condition that could support a finding of testamentary incapacity, and he continued to function at work. Although there was evidence that he had been intoxicated the night before he committed suicide, the people who last spoke to him confirmed that he was still coherent, comprehensive, and responsive, and not delusional, irrational, or abnormal. The Court of Appeal also dismissed the application judge's reliance on the sloppy handwriting and profane language in the suicide note, finding that these were not indicators that Mr. Joy lacked testamentary capacity.

Having concluded that the application judge failed to apply the relevant legal principles to the facts of the case, and that the evidence demonstrated that Mr. Joy had testamentary capacity, the Court of Appeal then addressed Mr. Ramsundarsingh's alternative argument that the suicide note was a codicil to the 2016 will. The Court of Appeal rejected this argument on the basis that the suicide note clearly met the requirements of a holograph will under section 6 of the *SLRA*, and to

construe it as a codicil would be a maladministration of Mr. Joy's bequest of "everything" to Mr. McGrath and his grandson.

The Court of Appeal also overturned the application judge's costs order, noting that traditionally in estate litigation, the parties' costs are paid from the testator's estate. This is due to public policy considerations such as the need to give effect to valid wills that reflect the intention of competent testators and the need to ensure that estates are properly administered. Where there are reasonable grounds to question the execution of a will or the testator's capacity, it is in the public interest that those questions be resolved without cost to those questioning the will's validity. Where the difficulties or ambiguities giving rise to the litigation are caused by the testator, it is again appropriate for the testator's estate to bear the costs of their resolution.

However, over time, it became apparent that the courts had to guard against allowing their processes to be used to unnecessarily deplete a testator's estate and a modern approach to costs in estate litigation emerged. The Court of Appeal considered the prior jurisprudence on the modern approach, which it summarized as follows: "at first instance, when deciding costs in estate litigation, the court must begin by carefully scrutinizing the litigation to determine whether one or more of the public policy considerations applies. If so, as a general principle, the parties' reasonable costs are to be paid from the testator's estate."

The Court of Appeal held that the application judge failed to take the necessary first step of this analysis. Rather than considering whether any of the public policy considerations applied, the application judge improperly started with the civil litigation presumption that the losing party must pay costs. Had he applied the modern approach, he would have found that public policy considerations applied, and that Mr. McGrath's application was necessary to ensure that Mr. Joy's estate was properly administered. Mr. Joy's mental state and alcohol and drug usage meant that his suicide note was written in suspicious circumstances, which created reasonable grounds to question his testamentary capacity at the time he wrote it. It was Mr. Joy's conduct that led to the litigation, and Mr. McGrath acted reasonably in bringing the application to determine whether the estate should be administered pursuant to the suicide note or the 2016 will. Accordingly, the Court of Appeal held that there was no reason to depart from the general principle that costs awards in estate litigation are to come out of the testator's estate.

The Court of Appeal allowed the appeal and declared that the suicide note, as Mr. Joy's valid will, be admitted to probate. The Court of Appeal also set aside the application judge's costs order and ordered that the costs of the application and the appeal be paid out of Mr. Joy's estate.

Takeaways

The Court of Appeal's decision provides guidance on the legal principles used to determine whether a testator had testamentary capacity to write a will and how the costs of estate litigation are to be paid and confirms the modern approach to costs in estates litigation which protects parties who raise reasonable questions about a will's validity from facing cost consequences for doing so, and emphasizes the need for an application judge to ground his or her findings regarding testamentary capacity in the relevant legal principles. In particular, the Court of Appeal confirmed that a testator's mental distress or substance abuse do not necessarily demonstrate a lack of testamentary capacity to write a will, but it is reasonable for a party to bring an application to determine how the estate should be administered when the testator dies or writes a will in suspicious circumstances.

Alex Smith, Associate

— KC —

Costs Awarded for Obstructionist Behaviour and Unfounded Allegations of Fraud

In *Toller James Montague Cranston (Estate of),* 2021 ONSC 3704, the Ontario Superior Court of Justice awarded $325,000.00 in legal costs against two brothers who engaged in wilfully obstructionist behaviour and brought unfounded allegations of fraud against the estate trustee.

Background

The testator, Toller Cranston ("Mr. Cranston"), was a renowned Canadian figure skater who died in 2015 in Mexico, where he had been living for over 20 years. Mr. Cranston passed away without a valid will, leaving behind an estate worth over $6 million that included hundreds of paintings and two houses. His sister, Phillipa, was the trustee of his estate and was forced into an application to pass her accounts after her brothers, Goldie and Guy, raised over 300 objections to the expenses incurred by the estate and to Phillipa's management of capital receipts.

In a decision from February 2021, the Ontario Superior Court of Justice dismissed all but 5 of the brothers' objections. As a result, Phillipa sought over $390,000.00 in costs. The brothers accepted that they would have to pay costs on a substantial indemnity basis, but argued that an award of $100,000.00 in costs plus disbursements would be more appropriate.

The Court's Decision

The Court cited Rule 57 of the *Rules of Civil Procedure* and the Ontario Superior Court of Justice's decision in *Estate of Francoise Poitras v. Canadian Cancer Society*, 2021 ONSC 406 for the general principles on costs in estate litigation cases.

The Court emphasized that Phillipa was completely successful in refuting the brothers' unsubstantiated allegations of theft and fraud, as well as nearly all of the objections made to her accounts. Given Phillipa's high degree of success on the application, the Court found that the bulk of her legal costs should be paid by the brothers.

The Court commented in particular on the brothers' unreasonable conduct and their unsubstantiated allegations of fraud. Although the brothers had abandoned approximately half of their over 300 objections at the hearing, the Court found that they should have done so much earlier, rather than allowing Phillipa and her legal counsel to incur substantial time and expense for each meritless objection. The brothers also acted unreasonably by bringing an application to have Phillipa pass her accounts only 3 and half months after she was appointed as the estate trustee in Ontario. Their insistence on exchanging affidavits of documents, conducting examinations for discovery, and spending 3 days cross-examining Phillipa on her affidavits turned what should have been a summary proceeding into a complicated hearing. By refusing the Court's request for the parties to narrow the issues prior to the hearing, the brothers required each of the over 300 objections to be addressed separately.

The Court cited the past decisions of *Viertelhausen v. Viertelhausen*, 2020 ONSC 7890 and *Cardinal v. Perreault*, 2020 ONSC 4825 for the principle that unfounded allegations of misconduct and personal attacks on the propriety of an estate trustee can attract an elevated costs award such as substantial indemnity costs. The brothers had maintained their unfounded allegations of fraud at the hearing even after the Court warned them about the consequences of failing to prove such allegations.

The Court found that the disbursements, hourly rates, and time spent by Phillipa's legal counsel were for the most part reasonable, subject to minor exceptions, given the number of objections and the

complexity of the hearing. The Court confirmed that the reasonable expectations of the parties are also relevant when determining costs, and found that the brothers' ought reasonably to have expected that Phillipa would incur substantial legal costs based on their own lawyer's fees and the number of objections they raised.

Considering the relevant factors above, the Court ordered the brothers to pay costs on a substantial indemnity basis in the amount of $325,000.00, inclusive of disbursements.

Takeaways

The case serves as a warning for parties who make unfounded allegations of fraud against an estate trustee, or who otherwise engage in obstructionist behaviour such as making meritless objections to a trustee's accounts or refusing to narrow the issues to be determined in a hearing. As demonstrated in this case, such behaviour can carry serious cost consequences for the unsuccessful parties. The case also serves as a useful overview of the general principles and factors for consideration in determining costs in estates litigation cases.

Alex Smith, Associate

— KC —

Court of Appeal Finds Life Interest Not Licence in Home, Voids Condition Subsequent for Uncertainty

In *Barsoski Estate v. Wesley,* 2022 ONCA 399, the Ontario Court of Appeal held that a bequest providing for a home to be held in trust for a beneficiary was a life interest rather than a licence, and that a condition subsequent requiring the beneficiary to "live" in the home was void for uncertainty.

Background

Diane Barsoski ("Ms. Barsoski") died in June 2017. She and the appellant, Robert Wesley ("Mr. Wesley") had been close long-term friends, although they were never romantic partners. In her will, Ms. Barsoski provided that her trustees were to hold her London, Ontario home and its contents "as a home" for Mr. Wesley during his lifetime or for such shorter period as he desired. Upon Mr. Wesley advising the trustees that he no longer wished to live in the home or upon his death, the will provided that the home and its contents were to be sold with the proceeds given to a charity called St. Stephen's Community House ("St. Stephen's"). Ms. Barsoski also left $500,000 to be held in trust for the maintenance of the home, and provided that if Mr. Wesley was no longer willing or able to live in the home, the money was to be used for his living and funeral expenses.

After Ms. Barsoski died, a question arose as to whether Mr. Wesley was in fact "living" in the home as required by the will. An investigation funded by St. Stephen's found that Mr. Wesley continued to work full-time in Toronto while his acquaintance lived in the London home. In November 2019, Mr. Wesley started a full-time job in Sault Ste. Marie. He maintained that he used the home as his primary residence for matters like his driver's licence and income tax, spent weekends there once or twice a month, and intended to live there after his upcoming retirement, but until then he needed to maintain an income by working elsewhere. St. Stephen's took the position that Mr. Wesley had not been living in the home, and that it should therefore be sold with the proceeds distributed to the charity. The estate trustee brought an application to determine the nature of the proprietary interest in the home granted to Mr. Wesley, and whether the conditions on his interest in the home were clear and unambiguous or void for uncertainty.

The application judge determined that the interest bequeathed to Mr. Wesley was a licence and not a life interest. She went on to find that the condition that Mr. Wesley live in the home was uncertain and, because of the

nature of his interest, the entire bequest failed.

Mr. Wesley appealed to the Ontario Court of Appeal, arguing that the will conferred a life estate that took effect free and clear of any conditions. In response, the estate trustee argued that the will granted a licence, and that Mr. Wesley breached its terms by living outside the home.

The Court of Appeal's Decision

The Court of Appeal began by reproducing the application judge's description of a licence and a life estate (also known as a life interest). A licence is the permission by competent authority to do an act that, without permission, would be a trespass. A licence with respect to real property is a privilege to go on premises for a certain purpose, but does not operate to confer on, or vest in, the licencee any title or estate in such property. By contrast, the holder of a life estate has the right to immediate possession of the property and to its use as the owner, subject to some restrictions to protect the rights of the person entitled to the property at the end of the life estate.

The issues on appeal were whether the application judge made a palpable and overriding error in concluding that: (1) Mr. Wesley's interest in the home was a licence and not a life estate; and (2) the condition requiring Mr. Wesley to continue to "live" in the home was void for uncertainty.

The Court of Appeal cited the following well-recognized principles for interpreting a will:

(1) a will must be interpreted to give effect to the intention of the testator (this is the most important principle);
(2) a court must read the entire will, as a whole. The words used in the will should be considered in light of the surrounding circumstances (also known as the "armchair rule");
(3) a court must assume that the testator intended the words in the will to have their ordinary meaning; and
(4) a court may canvas extrinsic evidence to ascertain the testator's intention.

Given the importance of the testator's subjective intention, it is possible for the same words and gifts in different wills with different contexts to be interpreted as a licence in one case and a life estate in another. The Court of Appeal cited the application judge's comment that there is no overarching principle that reconciles the results in different cases, and given that each case is an authority only on its own facts, the prior case law is of limited assistance for a court tasked with interpreting a will.

Whether the Bequest was a Licence or a Life Estate

The application judge relied on the Supreme Court of Canada's decision in *Moore et al. v. Royal Trust Co. et al.*, 1956 CanLII 64 in finding that because legal title to the property vested in the trustees rather than in Mr. Wesley himself, the bequest was a licence and not a life estate. However, the Court of Appeal noted that this factor has not been determinative in many subsequent cases, as a life estate has often been found where a property was to be held in trust for a beneficiary's use during his or her entire lifetime, even though legal title remained with the trustees. The Court of Appeal also found that the $500,000 maintenance fund did not support the application judge's conclusion that the bequest was a licence, and accordingly held that she committed a palpable and overriding error in relying on these textual factors.

From a contextual perspective, one of the key factors that the application judge relied on was the fact that Mr. Wesley was Ms. Barsoski's friend and not her spouse. The Court of Appeal found that although contextual factors are crucial to the interpretation of a will, the application judge's

reliance on this particular distinction between a friend and a spouse was a serious and extricable legal error, as it failed to give effect to the uncontested evidence that Ms. Barsoski and Mr. Wesley were very close friends who regarded each other as family, and it arguably contributed to the perpetuation of a now outmoded and exclusionary view of family. Given the uncontested evidence that Ms. Barsoski regarded Mr. Wesley as her family, there was no reason not to give effect to her choice in this regard. The Court of Appeal held that in "this modern age", and considering the relevant contextual evidence, there is no basis for any presumption favouring a licence rather than a life interest when the intended beneficiary is a friend.

Accordingly, the Court of Appeal held that the application judge erred in law when she held that the gift was a licence rather than a life interest.

Whether the Condition that Mr. Wesley "Live" in the Home was Void for Uncertainty

The Court of Appeal agreed with the application judge's finding that the requirement that Mr. Wesley live in the home was a condition subsequent in that it was external to the gift. The evidence supported the inference that Ms. Barsoski, given her knowledge that Mr. Wesley would have to continue to work until retirement and that he would not necessarily be living in the home immediately upon her death given that his employment was unlikely to be in London, contemplated that these terms were subsequent to the vesting of the gift. In other words, she could not have intended that her gift would come to its natural end as soon as it vested.

The Court of Appeal also found that the application judge correctly concluded that the condition subsequent was void for uncertainty. The Court of Appeal accepted the application judge's reliance on the prior case law which establishes that a condition subsequent is void for uncertainty where the condition is "far too indefinite and uncertain to enable the Court to say what it was that the testator meant should be the event on which the estate was to determine."

The Court of Appeal agreed with the application judge's finding that it was impossible to define, on the terms of Ms. Barsoski's will, what it meant to "live" in the house. The will did not explain what Mr. Wesley needed to do to demonstrate that he "lived" in the house or when he needed to establish that act. For example, it was unclear how long he could be absent from the home, or by what date or for how long he needed to occupy the home to be considered "living" in it. Much of the prior case law found that conditions requiring a beneficiary to live, reside, remain or stay on a property are void for uncertainty.

Having found that the condition subsequent contained in the life interest was void for uncertainty, the Court of Appeal found that the gift was effective without the limiting conditions. This is because a condition subsequent is not integral to the interest granted, and therefore can exist without the condition. Accordingly, Ms. Barsoski's bequest of a life interest in the home in favour of Mr. Wesley was maintained free and clear of any requirement that he be "living" in the home.

Takeaways

The Court of Appeal's decision provides guidance on the principles used to interpret a will and to determine whether a bequest was a licence or a life interest, and whether a condition subsequent is void for uncertainty. Both textual and contextual factors are important for giving effect to the testator's intentions, and given the subjective nature of such intentions, the unique circumstances of each case can lead to the same or a similar bequest being interpreted differently as the facts vary.

Alex Smith, Associate

— KC —

News

Keel Cottrelle is pleased to announce that Christopher Wirth has been recognized by Best Lawyers in Canada for 2022. Chris has been recognized in the areas of Administrative & Public Law, Corporate & Commercial Litigation and Labour & Employment Law, and was recognized for those areas in 2019, 2020 and 2021.

Keel Cottrelle is also pleased to announce that on September 1, 2022, Christopher Wirth will assume his role as the incoming Vice-Chair of the Ontario Bar Association's Administrative Law Section Executive and Patricia Harper will assume her role as the incoming Communications Officer for the Canadian Bar Association's Administrative Law Section Executive.

More information about all of the lawyers at Keel Cottrelle can be found on our firm's website - www.keelcottrelle.com. During this unprecedented pandemic period, rest assured that Keel Cottrelle LLP remains open and available to meet your legal needs.

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Keel Cottrelle LLP
Wills, Estates and Estate Litigation Newsletter

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