

KING'S BENCH FOR SASKATCHEWAN

Citation: 2025 SKKB 50

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File No.: SUR-MJ-00114-2024
Judicial Centre: Moose Jaw

BETWEEN:

THE ESTATE OF KENNETH JOSEPH FEDYK
As represented by ROBERT CHURCH, EXECUTOR

APPLICANT

- and -

MELONIE KARMARZNUK

RESPONDENT

Counsel:

Kyla K. Dilling
Devin R. Wilder

for the applicant
for the respondent

FIAT
MARCH 27, 2025

BROWN J.

[1] Robert Church [Mr. Church], as executor of the estate of Kenneth Joseph Fedyk, applies pursuant to ss. 46.4(1) of *The Administration of Estates Act*, SS 1998, c A-4.1 for direction of the Court concerning the interpretation of the Last Will and Testament of Kenneth Fedyk, dated December 12, 2023 [Will]. The basis set out in the application is that the language of the residual clause on page 3 of the Will is consistent with two possible interpretations:

- 1) The residue should be invested in a manner that protects it for the benefit of the testator's daughter; or

- 2) A portion of the residue should be invested in such manner and the balance distributed to the testator's daughter.

[2] The respondent daughter of the testator, Melonie Dawn Karmarznuk [Ms. Karmarznuk], submits that there is but one appropriate interpretation of the subject provision and that interpretation is clear from the face of the document. She objects to the extrinsic evidence filed by Mr. Church as aides to the interpretation of this Will.

[3] In Ms. Karmarznuk's view the clear language of the Will results in an interpretation that she, as the testator's daughter, gets both the benefit of an annuity and all of the residue. Mr. Church does not aggressively dispute this but merely desires to ensure his actions as trustee of the deceased's estate are appropriate in all the circumstances.

[4] It is to be noted that Mr. Church was a friend of the deceased and was sought out by the deceased to be executor rather than using a family member to be his executor. This is not without meaning and Mr. Church is not to be criticized for his actions herein. The application properly raises the issue of what ought to inform the interpretation of this provision and thereafter what interpretation to glean from it.

[5] The Will begins as follows:

LAST WILL AND TESTAMENT

I, **KENNETH JOSEPH FEDYK**, of the City of Moose Jaw, in the Province of Saskatchewan, do hereby publish and declare this to be my Last Will and Testament.

I REVOKE all former Wills and Codicils whatsoever by me at any time heretofore made.

I DIRECT that all my just debts, funeral and testamentary expenses be first paid out of my Estate.

I DIRECT my Executor(s) and Trustee(s) shall receive the sum of two per cent (2%) of the value of my Estate as his/their Executor(s) fee, plus all out-of-pocket expenses, for his/their services in acting as such Executor(s).

I NOMINATE, CONSTITUTE AND APPOINT my accountant, **ROBERT CHURCH**, to be the Executor and Trustee of this my Will; PROVIDED THAT should my said accountant predecease me, or after my death die, or refuse to act or become incapacitated, I THEN NOMINATE, CONSTITUTE AND APPOINT my sister, **DIANNE BEVERLY ANTONOVITCH**, and my sister, **SHELLEY MAE FEDYK**, or the survivor, to be the Executors and Trustees of this my Will.

I GIVE, DEVISE AND BEQUEATH all my Estate, both real and personal whatsoever and wheresoever situate, and also all Estate over which I have the power of appointment and disposal at the time of my death to my Executor(s) and Trustee(s) to hold upon the following trusts, namely:

I GIVE to my Executor(s) and Trustee(s) full power and authority to effect sales or other disposal of my said Estate, both real and personal, at such time or times and upon such terms as my Executor(s) and Trustee(s) in his/their sole discretion may decide, with power and discretion to postpone the conversion of my Estate or any part or parts thereof for such length of time as my Executor(s) and Trustee(s) may see fit, and to invest the proceeds of my Estate in any security or investment as my Executor(s) and Trustee(s) in his/their sole discretion may see fit.

I DIRECT my Executor(s) and Trustee(s) deliver the following cash bequests to the following persons, provided he/she survives me:

- Twenty-five Thousand (\$25,000.00) Dollars to my granddaughter, **KELSEY FEDYK**;
- Twenty-five Thousand (\$25,000.00) Dollars to my granddaughter, **KARLEY KARMARZNUK**;
- Ten Thousand (\$10,000.00) Dollars to **KARLEY KARMARZNUK**; it is my wish that she use these funds for my great-granddaughter, her child, whose name I do not know;

- One Hundred Thousand (\$100,000.00) Dollars to my brother-in-law **DOUGLAS CROSBIE**;
- One Hundred Thousand (\$100,000.00) Dollars to my sister, **SHELLEY MAE FEDYK**;
- Twenty Thousand (\$20,000.00) Dollars to my sister, **DIANNE BEVERLY ANTONOVITCH**;

for his or her sole use and benefit absolutely.

[6] The provision at issue immediately follows and says:

I DIRECT my Executor and Trustee deliver the rest and residue of my said Estate to my daughter, **MELONIE DAWN KARMARZNUK**, for her sole use and benefit absolutely. PROVIDED HOWEVER, I DIRECT my Executor and Trustee to purchase an annuity for my said daughter, which annuity will provide for an annual income in the amount of Twenty-Four Thousand (\$24,000.00) Dollars per year [Two Thousand (\$2,000.00) Dollars per month], and which annuity will provide such income for as long as my said daughter shall live, or until all funds have been disbursed, whichever first occurs; such annuity shall begin as soon as possible after my death and shall continue to be payable monthly thereafter. Such purchase from a company that provides for annuities, shall be made in the discretion of my Executor and Trustee. I DECLARE that my said daughter shall not be allowed to have the value of the said annuity in lieu thereof; and IN CASE of the happening of any act or event whereby the said annuity or any part thereof, if belonging to my daughter absolutely would become vested in or charged in favour of any other person or persons, the said annuity shall cease to be payable to my daughter and shall thenceforth form part of the rest and residue of my Estate.

[7] The immediately following provision adds to the central paragraph at issue here by dealing with residue once more:

UPON the death of my daughter, **MELONIE DAWN KARMARZNUK**, I DIRECT my Executor and Trustee divide the rest and residue of my said Estate into two (2) equal shares and deliver one (1) such share to each of my grandchildren,

KELSEY FEDYK and KARLEY KARMARZNUK, or the survivor, for their sole use and benefit absolutely.

[8] The remainder of the Will contains the following provisions:

I DIRECT that for the purposes of *The Family Property Act* of Saskatchewan, and/or other similar legislation, that all bequests made by me under this my Will are made to the beneficiary as named, and that such bequest shall not be considered a bequest to my beneficiary and his or her spouse (or equivalent to spouse, as defined by *The Family Property Act*), as the case may be.

IT IS MY DESIRE that my body be cremated, and I DIRECT my Executor and Trustee to make suitable arrangements for that purpose.

IT IS MY WISH that Moose Jaw Funeral Home be entrusted with my funeral arrangements, and I DIRECT my Executor and Trustee to make suitable arrangements for that purpose.

[9] The Part I assets of the estate identified in the application have a value of \$1,904,448.64. In addition, there were Part II assets valued at \$41,101.64 consisting of insurance proceeds with Ms. Karmarznuk as the beneficiary. Presumably Ms. Karmarznuk has received these already given that the testator died in May 2024.

ISSUE

[10] The issue before the Court is the interpretation to be given to the above noted clauses in the Will related to the residue and annuity for Ms. Karmarznuk. Associated with this is the question regarding whether extrinsic evidence, if any, is to be utilized in arriving at the appropriate interpretation.

Discussion

[11] It is submitted by Mr. Church that there is an ambiguity in the Will and that extrinsic evidence ought to therefore be relied upon for its interpretation. This leads to the question of whether there is ambiguity in this Will and if so, of what type. This in turn requires guidance in relation to what type of extrinsic evidence is available for an interpretation of the provisions in this Will.

Is There Ambiguity and if so, of What Type?

[12] Not every will that creates confusion is the same. Some wills are ambiguous and confusing on their face. There are also wills which, on their face, have no ambiguity whatsoever but become contradictory and confusing when certain surrounding circumstances become known. The categories of “latent ambiguity” and “patent ambiguity” arise so as to categorize the type of ambiguity and confusion at issue.

[13] *Missilinda of Canada Ltd. v Husky Oil*, 2007 MBCA 24, 212 Man R (2d) 252 describes a patent ambiguity as a confusing provision that requires no surrounding circumstances to show itself but instead is obvious simply from a reading of the document alone. A latent ambiguity on the other hand differs from a patent ambiguity in that the ambiguity is not observable on the face of the document as there is no apparent contradiction within its terms. The ambiguity becomes evident only when one attempts to apply the clear words to the facts once known.

[14] In a number of authorities the following appears as a helpful description, this one taken from *Worobetz, Re* (1974), 49 DLR (3d) 349 (WL) (Ont H Ct) at para 20:

20 *Theobald on Wills*, 13th ed. (1971), states at paras. 430-1:

430. *Evidence as to objects of gifts.* The court has not only to construe the will as a piece of English, it has also to apply it to the existing facts. It has to ascertain who the objects of the testator's bounty are, and in the case of specific gifts, what the subject-matter of these gifts is. For this purpose the important distinction must be borne in mind between evidence of the testator's intention — for instance, declarations by him as to what he meant — and evidence of surrounding circumstances from which his intention may be inferred. The former evidence is hardly ever, the latter is in most cases, admissible.

[15] Here the question of interpretation arises because the language of the Will itself is internally contradictory. The uncertainty here is not created only once surrounding circumstances are known. This Will does not contain a provision which seems obvious and straightforward on its face but, upon understanding the facts aside from the Will, is seen to create confusion. We are not faced here with a situation where the same gift is provided to more than one person or given to two people with the same name, each laying a competing claim to a bequest. Nor has a particular item gifted by the Will been previously disposed of by the testator whilst a similar property owned by the testator remains unmentioned.

[16] In *Moodie (Estate) v Lakeview United Church*, 2018 SKQB 69 [*Lakeview Church*], Justice Elson noted the difference between patent and latent ambiguities is significant because direct extrinsic evidence of testamentary intention should only be admitted in the case of equivocations or latent ambiguity. The same conclusion was reached by Justice Vertes in *Bruce Estate, Re*, 1998 CarswellYukon 36 (WL) (YKSC).

[17] The question of interpretation at issue here arises because what appears to be a complete gift is limited by a subsequent direction and possibly contradicted by language in the Will itself. The confusion here is a patent ambiguity rather than a latent

ambiguity or equivocation.

What Evidence Ought to be Considered?

[18] In James MacKenzie, Ian M. Hull & Suzana Popovic-Montag, *Feeney's Canadian Law of Wills*, loose-leaf (Rel 114, September 2024) 4th ed, (Toronto: LexisNexis, 2024) at pages 10-22 – 10-24, the writer explains how a Court can further ascertain the intentions of a testator:

§10.46 The court puts 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 the will, and construes it, in the light of the surrounding facts and circumstances. This approach is commonly referred to as the “armchair rule”. . . .

§10.47 Historically, an important limitation under this rule is that the only facts and circumstances that existed when the will was made ought to be considered by a court. . . .

[19] There is, however, some divide in the law as to what types of situations enable the use of indirect extrinsic evidence and which enable use of direct extrinsic evidence of the intent of the testator. Both types of evidence are submitted in this matter. As this is a Saskatchewan will being probated in Saskatchewan, the law as it exists here is key.

[20] In *Haidl v Sacher* (1979), 106 DLR (3d) 360 (CanLII) (Sask CA) [*Haidl*], our Court of Appeal considered what role extrinsic evidence might play when being asked to determine the intention of a testator within the context of the “ordinary meaning” rule of construction. The situation in *Haidl* was one of patent ambiguity as there were two possible interpretations apparent on the face of the will itself. No resort to the circumstances was required to plainly see the two possible interpretations which existed.

[21] *Haidl* records a detailed historical examination of English and Canadian jurisprudence on the issue. The question in *Haidl* was in relation to whether surrounding circumstances were permissible to consider so as to find the testator's intention regarding two possible interpretation scenarios presented by the language of the will. The conclusion was that in Saskatchewan some surrounding circumstances should be taken into account as a matter of course.

[22] Chief Justice Bayda on behalf of the Court noted, however, that there is a difference with respect to indirect extrinsic evidence and direct extrinsic evidence in such tasks:

[7] Before proceeding to answer these questions, I note two matters. First, there is no disagreement between the parties that the proper approach in construing the clause under scrutiny here requires the application of the "ordinary meaning" rule of construction as the initial step and that it should so be done in the light of the contents of the whole will. The disagreement lies in the role that the surrounding circumstances should play, if any, in the application of that rule. The second matter is that the term "surrounding circumstances" as used in these reasons refers only to indirect extrinsic evidence. It has no reference whatever to direct extrinsic evidence of intent, the admission of which is governed by a different set of conditions. The former consists of such circumstances as the character and occupation of the testator; the amount, extent and condition of his property; the number, identity and general relationship to the testator of the immediate family and other relatives; the persons who comprised his circle of friends; and any other natural objects of his bounty (see Feeney, *The Canadian Law of Wills: Construction* (1978), p. 17). An example of the latter is the instructions which the testator gave to his solicitor for the preparation of the will (as one finds, for instance, in *Reishiska v. Cody* (1967), 62 W.W.R. 581 (Sask. C.A.)).

[23] The conclusion in *Haidl* was that in all such situations, indirect extrinsic evidence was appropriately utilized. The explanation provided was that this assisted in meeting the objective the Court is to pursue in all interpretation scenarios:

[21] ... it is the approach most likely to elicit the testator's intention and for that reason is the more desirable approach. After all, ascertaining the testator's true intention is the real and only purpose of the whole exercise. Hence, the learned chambers judge, in the matter before us, did not err in admitting evidence of the testator's relationship to the beneficiaries named in his will, particularly those mentioned in cl. (h), as part of the surrounding circumstances in the light of which he then sought to interpret the testator's language by applying the "ordinary-meaning" rule.

[24] With regard to the use of direct extrinsic evidence of the testator's intention in *Haidl*, this was noted as being "governed by a different set of conditions" which were not fully expanded upon as they were not required in that instance (para. 7). Thus *Haidl* only stands for the proposition that when the Court seeks to interpret a provision in a will, indirect extrinsic evidence is to be considered in each instance.

[25] Subsequent to *Haidl*, in *Goian Estate, Re* (1995), 139 Sask R 29 (WL) (QB) [*Goian*], Scheibel J. confirmed that use of extrinsic evidence is routinely to be used so as to ascertain a testator's intention. In *Goian* there was, on the face of the holographic will, an unconditional gift of real property. This was then followed by a condition that the beneficiary farm the land for six years or the gift was not to be effective. As can be seen, this bears some similarities to the Will here; it is a situation of patent ambiguity. Justice Scheibel identified the approach to utilize in such instance:

11 In construing a will it is the duty of the Court to ascertain the intention of the testator on a reading of the entire will rather than on the words used in any ambiguous clause (Thomas G. Feeney, *The Canadian Law of Wills*, 3rd ed., vol. 2 (Toronto: Butterworths, 1987), at p. 20).

12 When "...construing the language of the testator where it is ambiguous [the court is] entitled to consider not only the provisions of the will, but also the circumstances surrounding and known to the testator at the time when he made the will, and adopt the meaning most intelligible and reasonable as being his intention." *Smith v. Chatham Home of the Friendless*, (sub

nonm. *Re Tyhurst* [1932] 4 D.L.R. 173 at 178 (S.C.C.). This statement was quoted with approval by Gerwing J.A. in *Jessop Estate, Re* (1987), 55 Sask. R. 18 (C.A.).

13 In *Jessop* at p. 20, the court also quoted with approval from *Re: Freeman; Hope v. Freeman*, [1910] 1 Ch. 681 at 691, to describe the principles to be applied in interpreting a will. The court stated:

There are only two principles to be applied. The first principle is that which every court of construction has to apply in every will case which comes before it. That is the duty of the court of construction to read the language of the testator and to ascertain his intention from the words he has used. On the one hand the court must not vary his language, on the other hand it must not tie itself so strictly down to the literal meaning of the words as to give the go-by to the intention which is to be found expressed in the words. The second principle is that a clear gift in a will is not to be cut down by anything subsequent which does not with reasonable certainty indicate the intention of the testator to cut it down . . .

14 The Court of Appeal in *Jessop* also adopted the statement of Lord Romer in *Perrin v. Morgan*, [1943] 1 All E.R. 187 (H.L.), where he stated at p. 197:

. . . I take it to be a cardinal rule of construction that a will should be so construed as to give effect to the intention of the testator, such intention being gathered from the language of the will read in the light of the circumstances in which the will was made. In order to understand the language employed the court is entitled, to use a familiar expression, to sit in the testator's armchair. When seated there, however, the court is not entitled to make a fresh will for the testator merely because it strongly suspects that the testator did not mean what he has plainly said . . .

[26] In *Goian*, Justice Scheibel relied on evidence of both the age of the beneficiary as well as the relationship the beneficiary had to the testator to provide indirect context to the interpretation. In addition, reliance was placed on direct evidence of intent in the form of what the deceased had told other people he planned to do with

his property, including leaving the entire estate unconditionally to the named beneficiary. The Court ultimately removed the conditions placed on the absolute gift given the contradiction.

[27] Not specifically addressed in *Goian* was the distinction identified in *Haidl* and expanded upon and clearly applied in *Lakeview Church* with regard to indirect context evidence and direct evidence of intention. Reference in *Goian* was made to *In re Tyhurst, Deceased*, [1932] SCR 713 [*Tyhurst*]. However, *Tyhurst* itself did not draw on direct evidence of the testator's intention but relied exclusively on indirect extrinsic evidence.

[28] In *McCrank v Reader*, 2024 SKKB 212, Justice Robertson cited the *Malo v Markowsky*, 2014 SKQB 261, 453 Sask R 220 [*Malo*] decision, noting that it is still of primary importance to ascertain the intention of the testator, whether ambiguous or otherwise, with reference to the appropriate process and rules at play:

[57] In *Malo* at paras 11 and 13-15, Tholl J. wrote:

[11] The primary principle of interpretation of a will requires a court interpreting the will to determine the meaning of any impugned or ambiguous terms by identifying the intentions of the testator. ...

[13] The will is to be read as a whole and each clause is to be read within the context of the entire will. Taking into account the will as a whole, the specific words used are to be given their *prima facie* or ordinary meaning, unless the testator's intention cannot be determined, in which case the rules of construction must be relied upon. (*Andrews v. Steele*, 2006 SKQB 250, [2006] S.J. No. 385 (QL), at para. 21; *Stevenson Estate v. Armstrong*, 2012 SKQB 342, [2012] S.J. No. 538 (QL) at paras. 7 to 8 and 13; *Eremko Estate v. St. Peter's Hospital Foundation*, 2010 SKQB 226, 357 Sask.R. 146, at para. 14)

[29] Surrounding circumstances were mentioned in *Malo* in the following way:

[15] Pursuant to s. 24 of *The Wills Act, 1996*, S.S. 1996 c. W-14.1, every will is to be construed as speaking, and taking effect, as if it had been executed immediately before the death of the testator, unless a contrary intention is shown. Although the will speaks as of the date of death, it is the testator's intentions on the date he made the will that are relevant and need to be identified. Only the facts and circumstances that existed when the will was made may be considered by a court in determining the testator's intention. (*Ratzlaff Estate, Re*, 2002 SKCA 53, 217 Sask. R. 284; *Lenz v. Lenz Estate*, 2005 SKQB 5, 259 Sask. R. 301, at para. 15)

[30] However, in *Malo* no extrinsic evidence was submitted along with the application for directions interpreting the admittedly ambiguous provisions of the will in issue there.

[31] Recently Justice Curry in *Gilchrist v Gilchrist*, 2023 SKKB 187, [2023] 11 WWR 660 [*Gilchrist*] made these observations regarding the armchair evidence rule relating to extrinsic evidence admissible to the task of interpreting a will:

The Armchair Rule

[12] Where a will is unambiguous, routinely courts interpret the will without reference to any other information. The absence of ambiguity means that there is no need to go beyond the testator's written words to ascertain and implement the testator's testamentary intention. . .

[13] For situations where a will provision is ambiguous, courts have developed rules of interpretation. Such rules require a court to determine the circumstances surrounding the testator's execution of the will, in order to ascertain the testator's testamentary intention and thus to interpret the ambiguity in the will. At para. 20 Justice Ball continued the above excerpt from Justice Tholl's remarks as follows:

And at p. 719 Lamont, J., stated:

In construing the language of the testator where it is ambiguous, we are entitled to consider not only the provisions of the will, but also the circumstances surrounding and known to the testator at the time when he made the will, and adopt the meaning most intelligible and reasonable as being his intention.

...

[14] This approach to interpreting a will is known as the armchair rule, by which a court "sits in the armchair of the testator", inferring the testator's intention from the surrounding circumstances and then using that inference to interpret the will.

...

[15] As Justice Belobaba put it in *Resnick v McGuire*, (2007), 39 ETR (3d) 298 (QL) (Ont Sup Ct) at para 22:

22 It is settled law that when a court interprets a will, it must determine the testator's intention at the time that she made her will. The court must use common sense, giving the words their ordinary meaning in an attempt to achieve, from the wording of the will, the result that the testator intended. Only when the testator's intention cannot be arrived at by this method should the court resort to the judicially developed rules of construction, such as the so-called "armchair rule." When the testator's intention cannot be ascertained from the plain meaning of the words used in the will, the court can sit in the "testator's armchair", assume the knowledge she had of the extent of her assets, the size and makeup of her family and her relationship to its members, so far as such things can be ascertained by the evidence, and in this way, determine and give effect to the testator's intention: *Dobson Estate v. Dobson*, [2000] O.J. No. 552 (S.C.J.) at paras. 7-8; *Matzelle Estate v. Father Bernard Prince Society of the Precious Blood*, [1996] O.J. No. 5107 (Gen. Div.) at paras. 17 and 21.

[16] As noted in the above decisions, application of the armchair rule typically requires the existence of an ambiguity in

the will — an ambiguity that leaves the court needing more insight into the testator's testamentary intention. This is because an absence of ambiguity typically means that there is no need for further insight into the testator's testamentary intention. As Justice Ball said in *Ellingson* [2017 SKQB 14, 23 ETR (4th) 221] at para 22:

If the testator's intentions are clear from the words used in the will, there will be no need to apply rules of construction. ...

[32] Justice Curry addressed various arguments advanced before him regarding when extrinsic evidence is available in situations requiring interpretation of a will at para. 17:

[17] Here Glendon asserts that the judicial approach to the armchair rule has evolved. No longer is the armchair rule restricted to cases of ambiguity, he says. He points to the decision of the Ontario Court of Appeal in *Ross v Canada Trust Co.* 2021 ONCA 161, 458 DLR (4th) 39, in asserting that the armchair rule now can and should be used to ascertain the testator's testamentary intention — and to interpret the will accordingly — even where there is no ambiguity in the will. Glendon cites the remarks of Justice Brown in *Ross* at paras 40-41:

40 In the past, courts usually have resorted to the "armchair rule" where the testator's intention cannot be ascertained from the plain meaning of the will's language: *Dice v. Dice Estate*, 2012 ONCA 468, 111 O.R. (3d) 407, at para. 37.

41 More recently, courts are treating the "armchair rule" as an over-arching framework within which a judge applies the various tools for will construction at his or her disposal. As put by the Court of Appeal of Manitoba in *Zindler* [2015 MBCA 33, 319 Man R (2d) 16], at para. 14:

Feeney's [Canadian Law of Wills] concludes that "the most recent trend in Canadian cases seems to indicate that evidence of surrounding circumstances should be taken into account in all

cases before a court reaches any final determination of the meaning of words" (at para. 10.54). This is true even if the words, themselves, do not appear to be ambiguous or unclear...

[Emphasis in original]

[18] This broader approach to the armchair rule, Glendon asserts, is consistent with the overarching task of a court "to ascertain and give effect to the intention of the testator", as Justice Ball put it in *Ellingson*.

[19] Glendon argues that the armchair rule must be applied here so that Dawn's intention, that none of her estate would go to William, will be implemented.

[33] With respect to inferring an intention not evident from the words used or the permissible extrinsic evidence so as to conclude what the testator would or ought to have said, this had not yet been the extent of the evolution of the law:

27 In support of his application, Glendon asks me to rule as the Ontario Superior Court of Justice ruled in *Frohlich Estate v Wedekind*, 2012 ONSC 3775. In that case, after reviewing the evolution of the use of the armchair rule, Justice Gunsolus said at para. 21:

21 The court finds that the intent of the deceased would have been that the lapsed gift be shared among her surviving, specifically named, residuary beneficiaries, with whom she shared a special relationship.

[Emphasis added]

28 Glendon accurately identifies *Frohlich* as a case in which the court determined what would have been the testator's testamentary intention if she had turned her mind to a particular circumstance, and if she then had addressed that circumstance in her will. With respect, though, I am not persuaded that the armchair rule has evolved to empower a court to do so.

29 The objective of the armchair rule remains the ascertaining of the meaning of the words that a testator has written in the will.

[34] Justice Curry ultimately determined that he was not required to ascertain whether an expansion of the extrinsic evidence rule had occurred in the jurisprudence because whether one line of reasoning (direct extrinsic evidence is available only in the event of ambiguity) or the other (extrinsic indirect and direct evidence is available in all situations) was employed, the result was the same:

32 Even if I were persuaded to take the broader view of the armchair rule, doing so would lead me to attempt to ascertain who Dawn, in March 1991, would have intended to name as an alternate residual beneficiary. There is evidence before me that would support the conclusion that, in August 2022, Dawn intended to name Glendon and Lorraine as residual beneficiaries. The evidence that is before me, though, is not sufficient to support the conclusion that on March 8, 1991 Dawn would have intended to name Glendon and Lorraine as residual beneficiaries. While they were named beneficiaries of specific bequests at that time, there may have been others in Dawn's life in 1991 that she would have considered as residual beneficiaries. The evidence does not establish who, if anyone, Dawn would have chosen as an alternate residual beneficiary in 1991.

33 Therefore, even if I were persuaded to take the broader approach and attempt to ascertain who Dawn would have intended to name as alternate residual beneficiaries, I would not succeed in that attempt. There being no identified residual beneficiaries, the residue still would fall under the provisions of *The Intestate Succession Act, 2019* [SS 2019, c I-13.2].

[35] Very recently in *La Calamita v La Calamita*, 2024 ONSC 4219, widening support for the proposition that extrinsic evidence is both available and useful in ascertaining a testator's intention in virtually all situations was noted:

[55] Brown J.A. stated in *Ross* [2021 ONCA 161, 485 DLR (4th) 39], that the "armchair rule" is "an over-arching framework within which a judge applies the various tools for will construction at his or her disposal", and that recently courts have included reference to surrounding circumstances even when the testator's intention is discernible from a plain reading of the will. Brown J.A. referred to the holding by the Manitoba Court

of Appeal in *Zindler v. The Salvation Army* [2015 MBCA 33, 319 Man R (2d) 16], that extrinsic evidence of surrounding circumstances is admissible and may be taken into account in will interpretation "even if the words, themselves, do not appear to be ambiguous or unclear". The Alberta Court of Appeal made a similar holding in *Hicklin Estate v. Hicklin* [2019 ABCA 136, 85 Alta LR (6th) 1].

[36] While it appears to be the case in Canada that accessing extrinsic evidence to interpret wills is becoming more the matter of course than the exception, there is still a common sense requirement to first read the words of a will in their ordinary sense without regard to surrounding circumstances. If a perfectly clear and straightforward will is presented to the Court, which has no patent ambiguity on its face and no latent ambiguity lurking beneath its surface, there is no practical need to resort to extrinsic evidence so as to properly interpret it.

[37] In addition, utilizing the "overarching framework" approach to interpreting a will by relying on armchair evidence as part of the "ordinary meaning" interpretive rule is not the equivalent of requiring extrinsic evidence in every situation where a will is advanced for the Court's interpretation. The nature of the construction being proposed must still be evaluated to determine if extrinsic evidence is necessary and will be of value. In this regard Ms. Karmarznuk is correct in saying that if the interpretation put forward as the basis for seeking the Court's involvement is patently absurd or clearly unsupportable given how clearly the Will sets out the testator's intention, then armchair evidence is neither required nor helpful. However, I do not agree that this situation is characterized in that way.

[38] Justice Curry determined in *Gilchrist* that some wills are abundantly clear based on the precise language used and their simplicity. A desire to effect a different outcome than the one that results when clear, straightforward language is given, its plain and ordinary meaning is not the entry way to admitting extrinsic evidence. The

hope of bounty alone does not empower the Court to rely on extrinsic evidence to reverse what is plainly and simply expressed in a will. This is particularly important to bear in mind with regard to direct extrinsic evidence of a testator's intention. The limits there have a specific rationale directed at preserving the testator's expressed intentions.

[39] If a legitimate question as to the meaning of the terms of a will does exist, then armchair evidence is admissible and of assistance. The overarching framework which admits indirect extrinsic evidence in such situations will aid in finding the ordinary meaning that this testator placed on these words. Nonetheless, there remains a distinction which recognizes a meaningful difference between patent ambiguities and latent ambiguities insofar as admissibility of extrinsic evidence is concerned.

[40] Thus only when a latent ambiguity is found is direct extrinsic evidence admissible. The rationale for this has been noted in various authorities. In *Re Estate of Marjorie Rose Thompson*, 2005 NLTD 88, 741 APR 298, Justice Barry noted the danger:

15 I do not agree with the submission of counsel for Ms. Godo that the armchair rule means this Court, in considering the surrounding circumstances at the time Marjorie Thompson made her Will, should admit direct parol evidence as to her intention. To take this approach would, as noted by Middleton J. in *R. v. Walker*, [1924] 1 D.L.R. 719 (Ont. Div. Ct.), place the requirement that wills be in writing "in danger of judicial repeal".

[41] This rationale has been accepted in subsequent decisions including *Elton Estate v Elton*, 2010 NLCA 2, 902 APR 237.

[42] In a situation where the Court is called upon to interpret a provision in a will and it is not clear on its face what was intended, indirect extrinsic evidence is admissible. In a situation where the interpretation of a will is not clear, obvious and

straightforward, indirect armchair evidence will always be helpful in the pursuit of ascertaining the testator's true intention, which is the ultimate goal. This does not, however, automatically open the door to direct evidence of the testator's intention.

[43] Direct evidence of a testator's intention is only to be admitted when it is truly necessary. Otherwise the Court is at risk of imposing its view of the testator's wishes rather than the testator's own. The situations calling for it involve a latent ambiguity because that is when the nature of the confusion requires it. It is necessary because indirect evidence and the language of the will itself are not sufficient to clear up the type of confusion presented so as to find the testator's true intention. Evidence of the testator's intentions is properly admitted at that point because without it there will be continuing uncertainty. Where two beneficiaries have the same name, where property is misdescribed or has already been disposed of and where property is gifted more than once are some examples. This is not intended to be an exhaustive list.

[44] Thus in situations where the provision is ambiguous on the face of the will, indirect extrinsic evidence is to be considered. This includes the character and occupation of the testator; the amount, extent and condition of his property; the number, identity and general relationship to the testator of the immediate family and other relatives; the persons who comprised his circle of friends; and any other natural objects of his bounty.

[45] However, should a latent ambiguity or equivocation exist and require clarification as part of the interpretative exercise, then direct evidence such as statements of the testator's reasons for using the language he did and instructions to the responsible solicitor become admissible if they will assist in clarifying the confusion.

This Situation

[46] This is a situation of patent ambiguity. This Will is not clearly and simply drafted such that nothing more than the document is required to have certainty regarding the testator's intention. Nothing external to the Will is required in order to identify the confusion that exists.

[47] When considering the provisions in issue, a complete gift of the residue is given to Ms. Karmarznuk. Then follows a diminishment of the comprehensiveness of the gift of residue by virtue of the direction that an annuity is to be established. Following this is a provision which appears to put the annuity back into residue if it becomes vested in or charged in favour of any other person or persons. A presumption appears to exist therefore that there will be some residue remaining after Ms. Karmarznuk's death. That is subsequently identified by directing it to be provided by way of a gift to the deceased's grandchildren after Ms. Karmarznuk's death. This too is potentially contrary to the direction of the entirety of the residue going to Ms. Karmarznuk.

[48] Given the patent ambiguity that exists here, indirect extrinsic evidence is clearly to be considered in this situation. Direct evidence of the testator's intention is not, however, admissible as it is not necessary to resolve the nature of the confusion. Relying on it risks the imposition of the Court's view of intention rather than the testator's.

Interpretation of the Language Here

[49] The structure of the questioned paragraphs is such that Ms. Karmarznuk is firstly stated to be entitled to the entire residue of the estate. This comes after the specific bequests to Kelsey Fedyk, Karley Karmarznuk, Douglas Crosbie, Mae Fedyk

and Beverly Antonovitch. There is then a carving out of a portion of the absolute gift of the residue to Ms. Karmarznuk for the annuity. The testator provides for a portion of the residue to be invested in an annuity such that a minimum monthly and yearly income will be guaranteed to Ms. Karmarznuk for her lifetime. Then follows directions that if something intervenes and somehow affects a catastrophic collapse of the *corpus* of the annuity, meaning Ms. Karmarznuk thereafter may not receive monthly payments, then the *corpus* once again becomes part of the residue. The paragraph in the Will immediately following this then directs the residue of the estate going to the testator's two grandchildren.

[50] This group of provisions create confusion as they express competing priorities. Ms. Karmarznuk is to receive the entirety of the residue of the estate, but a sizeable portion of it is nonetheless to be used to fund the purchase of an annuity paying her \$24,000 per year at the rate of \$2,000 per month for life. There is also direction that the residue of the estate is to go to the testator's grandchildren.

[51] The indirect extrinsic evidence of significance here is that Ms. Karmarznuk is the testator's only child. He had other family members at the time of his death including sisters, grandchildren, a great grandchild and a brother-in-law. They were all provided for specifically in various provisions of the Will. The provision in question was a stand-alone provision directed at the benefits he wished to bestow on his only daughter. The second sentence of the provision under consideration makes it clear he had in mind at least one aspect of the benefit being to provide for her monthly and annually rather than it being given all as a lump sum payment.

[52] Based on the structure of the Will itself, the indirect external evidence of the relationships the testator had to the beneficiaries, the size of the estate and the language used in the provision at issue and the rest of the Will, the testator's intention was for Ms. Karmarznuk to receive the residue of the estate but for an amount to be

used to purchase an annuity. The annuity is to be in an amount that it ensures she will receive \$24,000 per year at the rate of \$2,000 monthly for life.

[53] I find it is established that the testator desired to ensure that, come what may, an annual income would continue for the lifetime of Ms. Karmarznuk in the amount of \$2,000 per month. Ms. Karmarznuk is his daughter and he wanted her to receive the lion's share of his estate but also be provided for a base amount for as long as she lives. In achieving this goal, he approached it from two angles: a portion being a lump sum and a portion ensuring that an investment vehicle was arranged whereby she would be able to count on an income for her lifetime. Fortunately, both can be accomplished given the size of the estate. The amount exceeding what is required to fund the income for life can be hers to do with as she desires. These are not opposing concepts. They are readily reconciled.

[54] What though to make of the closing portion of the paragraph in issue here particularly when considered in light of the provision in the Will following it? The language and admissible evidence confirms that the *corpus* of the annuity should not be used, spent, assigned or transferred during the lifetime of Ms. Karmarznuk. If it is, it will become part of the residue which goes to his two grandchildren. It would be contrary to the testator's intention to set up a secure form of income (the annuity) intended to last his daughter's lifetime such that by her own actions regarding the *corpus*, she could have it become part of the residue she receives prior to her death.

[55] Therefore, the intention was for the *corpus* of the annuity, should anything exist at the time of Ms. Karmarznuk's death, to go to the granddaughters. This is also the disposition of the *corpus* of the annuity should Ms. Karmarznuk do something which collapses it, assigns it, withdraws it or otherwise terminates its monthly benefits to her.

[56] The testator may not have understood how much would be required to fund the investment required to provide for Ms. Karmarznuk's lifetime annual income of \$24,000, nonetheless that was an important matter to have arranged upon his death. He directed this to be so, although perhaps a bit clumsily.

[57] Had the testator directed at the beginning of the clause that from the residue of his estate an annuity was to be purchased first, with the remainder of the residue, if any, to go to Ms. Karmarznuk, it is doubtful Mr. Church would have felt he needed to obtain directions. However, by gifting the entire residue first, and then carving out a subset of funds from that to use for the investment, it did create an interpretative scenario that was not as clear as might have been the case.

[58] The testator did not want for there to be an intestacy on any part of the estate. He was providing for the possibility of some amount being left unused in the annuity. If so, it ought to go to the two grandchildren.

[59] It is not the intention of the testator that the entirety of the residue, some \$900,000 or so, is to be held in the estate entirely for investment purposes and then to be gifted over to the grandchildren. This interpretation flies in the face of the wording used including that the "rest and residue" of the estate was to be used for Ms. Karmarznuk's "sole use and benefit". Provision was also specifically made with bequests to both grandchildren earlier in the Will. Finally, they also potentially benefit from the *corpus* of the annuity, if any remains, on Ms. Karmarznuk's death.

[60] Through utilization of the indirect extrinsic evidence to employ the plain meaning rule, an annuity is to be purchased to provide Ms. Karmarznuk \$2,000 per month of reliable income for life from the residue. Once all specific bequests and other estate expenses are taken care of, what remains is Ms. Karmarznuk's to do with as she so decides.

Conclusion

[61] Mr. Church did the right thing by being cautious and bringing this application. There is a patent ambiguity on the face of the Will. Indirect extrinsic armchair evidence was properly tendered and is admissible to resolve the confusion. The Will does not contain a latent ambiguity and therefore Mr. Fedyk's instructions to his counsel and statements of intent including the reasons behind some of his instructions are not admissible. They are not necessary nor helpful in resolving the ambiguity here.

[62] The rest and residue of the estate once specific bequests are paid out and all taxes and liabilities retired is to be used to purchase an annuity for Ms. Karmarznuk which will provide for an annual income in the amount of \$24,000 per year for her at the rate of \$2,000 per month for as long as she is alive. If "any act or event" happens "whereby the said annuity or any part thereof" "becomes vested in or charged in favour of any other person or persons" than Ms. Karmarznuk, then the annuity "shall cease to be payable to my daughter and shall thenceforth form part of the rest and residue of my Estate." The residue referred to therein, being any remaining *corpus* of the annuity, is to go to Mr. Fedyk's granddaughters upon Ms. Karmarznuk's death.

[63] If some unexpected event collapses, removes, or disposes of the annuity, the *corpus* is the granddaughters as the only remaining residue of this estate.

[64] While one may have doubts as to Mr. Fedyk's understanding of how much was required to purchase such annuity, the estate, even after taxes are paid, will have a significant amount remaining, that is the core of his intentions as gleaned from the surrounding evidence and the language of the Will itself.

Costs

[65] As recognized in many authorities including *Gilchrist* and *Ellingson v Ellingson*, 2017 SKQB 14, 23 ETR (4th) 221, the parties' actual costs are to be paid out of the estate. This approach ensures that wills are interpreted in a manner that accurately reflects the intention of the testator rather than the executor taking chances with one particular interpretation that then leads to litigation down the road a ways.

[66] I am not in agreement in the least that Mr. Church is to be criticized for his application, which arose from the circumstances Mr. Church was saddled with, through a confusingly drafted will. It was appropriate for him as executor to bring this forward to the Court. The issue was appropriately left to be resolved here.

[67] All actual legal costs of Ms. Dilling and Mr. Wilder are to come from the estate.

J.
D.J. BROWN