COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Brink v. Reeves Estate*,
2025 BCCA 295

Date: 20250826
Docket: CA50038

Between:

Gordon Ernest Brink, in his personal capacity, Michelle Renee Brink, in her personal capacity, Cynthia Nadine Gillette and Deborah Lavonne Henry

Appellants
(Respondents)

And

Isabel Reeves, Executrix of the Estate of Robert Donald Reeves, Deceased,

Respondent
(Petitioner)

Before: The Honourable Mr. Justice Willcock
The Honourable Madam Justice Fenlon
The Honourable Justice Edelmann

On appeal from: An order of the Supreme Court of British Columbia, dated June 26, 2024 (*Reeves v. Brink*, 2024 BCSC 1118, New Westminster Docket S251645).

Counsel for the Appellants:	S.C. Albert M. Regier H. Klair, Articled Student
Counsel for the Respondent, Isabel Reeves, Executrix of the Estate of Robert Donald Reeves, Deceased:	T.E. Watkins
Place and Date of Hearing:	Vancouver, British Columbia April 2, 2025
Place and Date of Judgment:	Vancouver, British Columbia August 26, 2025

Written Reasons by:
The Honourable Madam Justice Fenlon

Concurred in by:
The Honourable Mr. Justice Willcock
The Honourable Justice Edelmann

Summary:

Appeal from an order interpreting the appellants' mother's will. The testator died in 1984 at the age of 41. A few days before her death, she severed title to a home she held in joint tenancy with her spouse and executed a will disposing of her interest by way of a novel clause. In issue is whether the clause gave the husband (now deceased) a life estate in the testator's interest or a gift of the interest conditional on paying a sum to the testator's children equal to the value of the equity she held in the property in 1984. The judge found the clause granted a conditional gift and the adult children appeal. Held: Appeal dismissed. The appellants' interpretation would render terms of the will redundant. Although the judge erred in making a finding about the capital gains tax implications of the will in the absence of evidence, it was not a material error. The task of the court is to determine the testator's intention at the time the will was drawn; it is not to rewrite the will to make it fairer in light of the amount of time that has elapsed and the increase in the value of the property.

Reasons for Judgment of the Honourable Madam Justice Fenlon:

[1] This appeal concerns the interpretation of a will made in hospital two days before the testator's death. Perhaps as a result of the pressing circumstances in which the will was drafted, it contains a novel clause that has left the parties unable to agree on its meaning.

Background

[2] In August 1984, the testator Diane Brink was 41 and in the last stages of a terminal illness. Two years earlier, she and her common law husband, Robert Reeves, had purchased a home together in Langley ("the Langley Property"), which they held as joint tenants. Five days before her death, Ms. Brink severed the joint tenancy and three days later executed the will in issue on this appeal. Among other things, she disposed of her half interest in the Langley Property to the benefit of her husband and her four (mostly adult) children from a previous relationship.

[3] The clause in dispute directs the executor as follows:

> 3(b)(xii) To deliver to ROBERT REEVES, if he shall survive me, the use, occupation and enjoyment of my divided one half interest in the property known as 20248 - 98A Avenue, Langley, British Columbia (hereinafter referred to as the "Langley Property") and my interest in the furniture, furnishings and other equipment used in connection therewith at the time of my death so long as he shall be living and shall be the owner of the other divided half interest; PROVIDED that no monies from my general estate shall

> be used for the payment, in part or in total, of taxes, insurance, repairs or any other amounts necessary for the general upkeep of the property or for the payments of capital improvement to the property. In the event that Robert Reeves shall sell the Langley Property or upon his death, my divided one half interest in the Langley Property at the time of my death, determined by assessing the fair market value less one half of the indebtedness still owing on the first mortgage, shall be paid to my children per stirpes and Robert Reeves, or his estate, heirs, executors, administrators, successors and assigns shall not be required to pay any interest on this amount.
>
> [Emphasis added.]

[4] In accordance with this provision, Robert Reeves retained full possession of the Langley Property. He married the respondent Isabel Reeves in 1997, and they lived together in the Langley Property from the date of their marriage until Robert's death in March 2021. Ms. Reeves has continued to reside in the home pending resolution of the interpretation of the will.

[5] The appellants are the adult children of Diane Brink: Gordon Brink, Michelle Brink, Cynthia Gillette, and Deborah Henry. They take the position that their mother's will gave Robert Reeves a life estate in her half of the Langley Property, and on his death, (or on an earlier sale) their mother's half interest was to be distributed to them in equal shares.

[6] Robert Reeves' estate takes the position that the will gifts Diane Brink's half interest in the Langley Property to Robert, conditional upon his payment to her children of the value of her share of the equity in the Langley Property at the time of her death.

[7] Construction of the will in accordance with one position or another has significant consequences. The Langley Property was valued at approximately $50,000 in 1984, with a mortgage of about $22,000. It is currently valued at $1.2 million and is mortgage free. If the appellants are correct, they will each receive 25% of $600,000. If the respondent's interpretation is correct, the appellants will each receive 25% of $14,000, and their mother's interest in the Langley Property will fall to Robert's estate to be distributed in accordance with his will.

[8] In order to resolve the parties' disagreement, Ms. Reeves filed a petition in the BC Supreme Court seeking construction of the disputed provision.

The Court Below

[9] The judge began by setting out the legal principles to be applied in interpreting a will, as stated in *Smith v. Smith Estate*, 2010 BCCA 106 at paras. 18, 28; *Killam v. Killam*, 2018 BCCA 64 at paras. 13, 52 [*Killam BCAA*]:

1. The primary objective is to determine the testator's intention;
2. The will must be considered in its entirety;
3. If there is no ambiguity on the face of the will it should be interpreted according to the language used (the "four corners approach"); and
4. Only if there is ambiguity should the court resort to evidence of surrounding circumstances (the "armchair rule").

[10] The judge found no ambiguity on the face of the will, so used the "four corners" approach to interpretation, looking at the ordinary meaning of the words used. She determined that the will provided for a distribution to the appellants of the value of their mother's half interest in the Langley Property at the time of her death in 1984. In coming to that conclusion, the judge found it to be significant that the paragraph in issue provided a formula for determining the amount that was to be distributed to her children: "my divided one half interest in the Langley Property at the time of my death, determined by assessing the fair market value, less one half of the indebtedness still owing on the first mortgage". She also found it significant that the paragraph provided that neither Robert Reeves nor his estate were required to pay interest on the fair market value that was to go to Diane's children.

[11] The judge concluded that interpreting the will as the appellants proposed—giving them the fair market value of Diane's interest at the time of Robert's death—would not give meaning to either the words "at the time of my death" or those waiving interest payable by Robert. In construction of a will, redundancies are to be

avoided if possible: *Killam v. Killam,* 2017 BCSC 175 at paras. 80, 96, aff'd *Killam BCCA*.

[12] Although the judge found that the four corners approach to interpreting the will sufficed, she also considered the armchair approach to interpretation in the alternative. That approach requires the court to put itself in the position of the testator at the time the testamentary document was written and to consider the contemporaneous surrounding circumstances in order to ascertain the subjective intentions of the testator: *Killam BCCA* at para. 13. This approach, too, led the judge to conclude that the testator intended to grant Robert a gift of her half interest conditional upon payment to the children of the fair market value of Diane's interest at the time of her death.

[13] The judge made the following order:

> 1. Paragraph 3(b)(xii) of the Last Will and Testament of Diane Margaret Brink also known as Diane Margeret Brink dated August 13, 1984, is properly construed to mean that the estate of Robert Donald Reeves is required to pay to the four individual Respondents a total sum equal to one-half of the fair market value of the real property at 20248 - 96A Avenue, Langley, British Columbia determined as at August 15, 1984, the date of death of the testatrix, less one-half of the indebtedness owing on the mortgage of that property as at that same date. and that accordingly the Respondent estate shall be obligated to transfer the estate's interest in that property to the Petitioner estate upon receipt of the sum so determined.

On Appeal

[14] The appellants contend the judge made five errors, which I would reframe slightly as follows:

> 1. Failing to consider and apply s. 23 of the *Land Title Act*, R.S.B.C. 1996, c. 250 [*Land Title Act*], and the presumption that Diane's estate continues to hold the full value of her undivided one-half interest as a tenant in common;
>
> 2. Failing to take into account the entire will in interpreting paragraph 3(b)(xii);

3. Making a finding in the absence of evidence to support it;

4. Failing to consider the surrounding circumstances of the testator resulting in an unreasonable interpretation; and

5. Making an order the testator's estate cannot comply with.

[15] The construction of a will is a question of mixed fact and law, reviewable on a deferential standard of palpable and overriding error unless an extricable error of law is identified: *Killam BCAA* at paras. 29–32.

[16] I turn now to the first ground of appeal.

1. The *Land Title Act*

[17] The appellants argue the judge failed to consider the *Land Title Act* and in particular the presumption that Diane's interest in the Langley Property has always, from the moment the joint tenancy was severed to the present day, been held by Diane's estate. They contend that the judge did not appreciate this fact and, in particular, did not recognize that the estate holds the current value of Diane's interest as a tenant in common, not the value of that interest at the date of her death.

[18] Respectfully, I see no merit in this ground of appeal. Although the judge did not address this aspect of the appellants' *Land Title Act* argument, it was not relevant to the issue before her. As I have noted, the judge was faced with competing interpretations of the will: the appellants said the will provided for a life estate to Robert with the property to go to the children upon his death, and the respondent said the will provided for a gift of the testator's interest in the Langley Property to Robert conditional upon him paying the appellants a sum equal to the value of Diane's one-half interest in the property in 1984, either when he sold the property or upon his death. In either case, Diane's one-half interest remained with her estate until Robert's death or the sale of the Langley Property during his lifetime. This is accordingly a neutral factor that could not affect the interpretation of the will.

2. Failing to consider the entire will

[19] The appellants submit the judge erred in her interpretation of paragraph 3(b)(xii) because she failed to take into account the entirety of the will, focusing instead on the words of that paragraph alone.

[20] **First**, the appellants say the judge did not grapple with the absence of language granting a gift of the testator's interest in the property to Robert. The appellants say the clearest aspect of paragraph 3(b)(xii) is the granting of a life estate to Robert in the usual language. Since there is no express gift to him, the language in issue ("my divided one half interest in the Langley Property at the time of my death, determined by assessing the fair market value […] shall be paid to my children") must be construed as a gift of the remainder to the appellants. They stress that in order for a gift to a beneficiary to be implied, an irresistible inference is required.

[21] I cannot agree that the judge erred by failing to grapple with this argument. The absence of an express gift to Robert was not identified by the appellants in the response to petition, nor does it appear to have been pressed as an issue at the hearing in the Court below. Rather, both parties focused their submissions on whether paragraph 3(b)(xii) required the children's interest in the Langley Property to be valued at the time of Diane's death, or at current market value. It is accordingly not surprising that the judge did not directly address the absence of a term expressly gifting the Langley Property to Robert.

[22] In any event, the judge did grapple with the question of the testator's intended recipient of the interest in the Langley Property. She concluded that the testator intended to gift to her children the value of the interest in 1984, and to gift the half interest in the Langley Property to Robert. As described above, the judge held that the waiver of interest clause only made sense if Robert was the one who held the property and therefore had the obligation to make a payment to the children. In short, the judge implicitly found an "irresistible inference" of a gift of the property to Robert.

[23] I address here the appellants' related submission that the judge did not take into account the terms of the will gifting specific bequests to her children. In each case, the will uses clear, express language, as set out in the following examples:

> (i) To deliver my black alaskan ring to my daughter, CYNTHIA NADINE GILLETTE, for her own use absolutely.
>
> (iv) To deliver my gold band to my daughter, DEBORAH LaVONNE BRINK, for her own use absolutely.
>
> (v) To deliver my coin collection to my son, GORDON ERNEST BRINK, for his own use absolutely.
>
> (vi) To deliver my gold chain to my daughter, MICHELLE RENEE BRINK, for her own use absolutely.

[24] The appellants contend the express nature of these gifts should have led the judge to conclude that it was not open to her to imply a gift to Robert. Rather, they say the judge should have concluded that Diane intended to dispose of the remainder of the life estate through the residue clause at paragraph 3(d), which directs the trustee "[t]o hold the residue of [Diane's] estate in trust for my issue alive at my death in equal shares per stirpes…".

[25] I would not accede to this argument. In my view, the specificity of the 11 bequests made in paras. 3(b)(i)–(xi), covering everything from jewelry to LP and 45 rpm records and cassette tapes, tends against an inference that the testator did not intend to dispose of her major asset and only real estate in paragraph 3(b)(xii), leaving it to fall into residue instead.

[26] **Second**, the appellants contend the judge failed to consider paragraph three of the will, which gifted, devised, and bequeathed all of Diane's property "of every nature and kind" to her trustee, on certain directions. They stress that the direction in paragraph 3(b)(xii) for payment to them should therefore have been read as requiring the trustee to make the payment of the fair market value rather than Robert.

[27] Again, I would not accede to this argument. The requirement for the payment to the children is stated in a passive voice and in the same sentence that relieves

Robert or his estate of the obligation to pay interest on the amount. As the judge found, that provision only makes sense if Robert is the one who has an obligation to pay the sum due to the children.

[28] **Third**, the appellants say the judge did not consider the opening words of paragraph 3(b)(xii): "to deliver to ROBERT REEVES, if he shall survive me, the use, occupation and enjoyment of my divided one half interest". They submit this language demonstrates that the testator only wanted Robert to have the use of her half of the Langley Property while he was living, and did not intend to benefit his estate.

[29] I agree with the respondent that this standard language merely makes the ensuing gift conditional on the beneficiary being alive at the time of the testator's death. It does not affect the nature of the gift itself, which must be construed on its terms. That gift provides for a waiver of interest payable by Robert "or his estate, heirs, executors, administrators, successors and assigns", words that are consistent with an intention to make a gift absolute to Robert, which would fall into his estate on his death.

[30] **Fourth**, the appellants say the judge failed to consider the testator's use of the phrase "divided one half interest," which both sides agree is an error since the testator held an "undivided half interest" in the property as a tenant in common. This expression is said to demonstrate that the will was drafted imperfectly, and somewhat colloquially, due to the precipitate circumstances in which it was prepared. They contend the judge should have interpreted the will taking this into account, placing more weight on the words granting Robert a life estate, and less weight on redundancies if the appellants' interpretation of the provision were to be adopted. The appellants stress that the words granting a life estate to Robert are not consistent with a gift to him of the entire interest in the Langley Property.

[31] I agree with the appellants that paragraph 3(b)(xii) is drafted in an unusual way. But I cannot agree that the judge should have ignored parts of paragraph 3(b)(xii) simply because the will erroneously referred to a "divided half interest"—no

doubt reflecting the testator's understanding since she had just "divided" the title by severing the joint tenancy. Although the testator used language typical of a grant of a life estate, she also went on to use language consistent with Robert being gifted the entire half interest in the property on paying a sum certain to her children—i.e., language consistent with a conditional gift. In this regard, I note that the appellants in their response to petition in the Court below acknowledged that the language in paragraph 3(b)(xii): "in the event that Robert Reeves shall sell the Langley Property" suggests he had the power to sell the entire property, which is not a power normally granted to the holder of a mere life estate.

[32] The judge was asked to determine what the testator intended by the words she used. That task required the judge to consider and give meaning, if possible, to all of the words used, both those granting a life estate and those going beyond that structure. As the judge found, the meaning the appellants argue for could have been achieved quite simply by saying "in the event that Robert Reeves shall sell the Langley Property or upon his death, my divided one-half interest shall be paid to my children per stirpes." There would be no need to relieve Robert of paying interest, or to calculate the fair market value of the property less any mortgage. On Robert's death the half interest would remain with Diane's estate to be sold, and the proceeds distributed upon sale. On that scenario, any interest accruing on the sale proceeds would be earned within Diane's estate and would be available for distribution to the children.

[33] In summary on this ground of appeal, I see no error in the judge's conclusion that, reading the will as a whole, the valuation and waiver of interest terms of the will can only be given meaning if Diane intended to gift to her children the value of her interest in the property at the time of her death, and to gift her interest in the property itself to Robert conditional on such payment.

3. The judge relied on evidence that was not in the record before her

[34] The appellants submit the judge erred by making a finding about the capital gains tax implications of Diane's will, pointing to para. 35 of her reasons:

> [35] This interpretation of the interest being a fixed obligation with payment deferred, is also consistent with the overall structure of the Will. If the Will required payment of half of the fair market value at some future date, then the ownership interest would attract capital gains tax and Diane's estate could not be distributed until the taxes and fees had been accounted for. None of this is provided for in the Will.

[35] The parties agree no evidence was led concerning capital gains tax and its implications for the distribution of Diane's estate. All agree that the issue was not before the Court and that the judge introduced the issue in her reasons for judgment. On appeal, the appellants apply to adduce fresh evidence in the nature of an opinion from a chartered professional accountant to the effect that the judge's assumptions were incorrect.

[36] The admission of fresh evidence on appeal is governed by the test set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759:

> 1. The evidence could not, by the exercise of due diligence. have been obtained prior to trial;
>
> 2. The evidence is relevant in that it bears upon a decisive or potentially decisive issue;
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> 3. The evidence is credible in the sense that it is reasonably capable of belief; and
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> 4. The evidence is such that, if believed, it could have affected the result at trial.

The overarching consideration in determining whether fresh evidence should be admitted is whether it is in the interests of justice to do so. That question requires attention to the principles of finality in litigation, efficiency in the administration of justice, and respect for the role of the trial court: *Jiang v. Shi*, 2017 BCCA 232 at para. 8.

[37] In my view, the application to introduce fresh evidence turns on the fourth factor: whether the new evidence, if believed, could have affected the result below.

Although I agree with the appellants that it was an error for the judge to consider capital gains implications that were not in evidence before her, in my view the error is not a material one. That is so because, having closely read the words of the will and having concluded that only one interpretation made sense of all of its provisions, the assumption about capital gains tax implications was a further supporting factor, but not a critical one. Put another way, the extrusion of the erroneous assumption would not have altered her determination.

4. Failure to consider the surrounding circumstances resulted in an unreasonable interpretation

[38] I turn next to the appellants' submission that the judge failed to employ the requisite combined approach to interpretation, which required her to consider both the four corners and armchair approaches. The appellants submit the judge's failure to read the words of the will in the context of the surrounding circumstances led to an unreasonable interpretation.

[39] I begin by noting there was little in the record for the judge to consider. The appellants filed no evidence. All the judge had was the affidavit of Isabel Reeves as executor of Robert Reeve's estate. The judge did not even have the ages of the children at the time of Diane's death, their circumstances, the length of Diane's relationship with Robert, or other details concerning the acquisition of the Langley Property. The judge reviewed all of the evidence that was available to her. It is evident that she took the evidence into account in particular when she turned in the alternative to the armchair approach to interpreting the will.

[40] As to the reasonableness of the judge's interpretation, the appellants stress the efforts that Diane went to, arranging to sever the joint tenancy in the Langley Property in the last days of her life. Had she not done so, Robert as a joint tenant would have received her only major asset in its entirety. They say Diane's object in severing the joint tenancy must be taken to have been the preservation of her half interest for her children's benefit. It would, they say, make no sense in these circumstances for Diane to draft a will limiting the gift to her children to the value of

her interest as it stood in 1984, knowing that they could wait years or even decades before receiving anything.

[41] I would not accede to this ground of appeal. The judge was alive to the appellants' submissions and the unfairness they perceive in the will being interpreted in this way. But the judge found this was the interpretation consistent with the expression of Diane's intentions in the will. The judge "put herself in the testator's armchair" and found that interpretation to be a reasonable one in the circumstances known to Diane as she lay in hospital, critically ill, and striving to do the right thing for both her children and her husband. In this regard, the judge said:

> [37] At the time of Diane's death, she and Robert had owned the Property for only about two years. If she had done nothing, the whole title would have passed to Robert. Instead, one week before her death she severed her joint tenancy and executed the Will disposing of her interests. It is reasonable to assume she intended to ensure that her (mostly adult) children from a different relationship received something from her modest estate. It is also reasonable to assume she balanced the interests of her spouse and those children. Her spouse remained solely responsible for all of the taxes, insurance, repairs and upkeep of the Property. She ensured the respondents would not have to make any of those payments and also would not benefit from any improvements to the Property. Her Will also protected her children's interest whether the equity in the Property went up or down by fixing the valuation date of the Property interest and the indebtedness owing on the mortgage. Although the parties do not agree upon what date it is, it is common ground between the parties that the clause contemplates the same date for valuation and determination of indebtedness. That means that on the respondents' construction, the indebtedness could theoretically have increased or decreased in the intervening period.
>
> [Emphasis added.]

[42] It must be remembered that when Diane Brink made her will in 1984, she could not have foreseen the astronomical increase in the value of real estate that was to come. Nor perhaps could she have anticipated that Robert would choose to remain in the Property throughout his long life. If she had known these things, she might have drafted the will differently.

[43] I recognize that there will be for the appellants little solace in these words. They will feel the sting of unfairness in the construction that the Court has placed on their mother's will. But the task of the court is not to rewrite a will to make it fairer in

the present circumstances. It is to identify and respect the wishes of the testator as expressed at the time the will was drawn. In this regard I must respectfully conclude that the judge made no error in carrying out the task before her.

5. The form of the order

[44] Finally, I turn to the appellants' submission that the order made by the judge requiring Diane's estate to transfer her interest in the Langley Property to Robert's estate cannot be complied with. They say Diane's estate is unable to make any distribution until all debts of the estate, inclusive of taxes, are paid.

[45] In my opinion, the order does not compel the estate to take any steps. The petition sought only the construction of one paragraph in the will. No vesting orders were sought or made at the hearing below. The respondent concedes that other steps will have to be taken before a distribution of Diane's estate can occur, including resolution of capital gains taxes attaching to Diane's interest.

Disposition

[46] For the reasons given above, I would dismiss the appeal and the application to adduce fresh evidence. The respondent has not sought costs. I would in any event have ordered that each side bear their own costs of the appeal.

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Mr. Justice Willcock"

I AGREE:

"The Honourable Justice Edelmann"