COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Paige v. Noel,*
2025 BCCA 358

Date: 20251023
Docket: CA50514

Between:

Jennifer Elise Paige

Appellant
(Respondent)

And

Michelle Dianne Noel, in her capacity as Executor of the Estate of Barbara Ann Kissel

Respondent
(Petitioner)

And

Adrian Joseph Kissel

Respondent
(Respondent)

Before: The Honourable Madam Justice Fisher
The Honourable Mr. Justice Butler
The Honourable Justice Mayer

On appeal from: An order of the Supreme Court of British Columbia, dated February 19, 2025 (*Kissel Estate (Re)*, 2025 BCSC 260, Vancouver Docket S234402).

Counsel for the Appellant:	K. Suprynowicz (via videoconference) B.L. Alcaide
Counsel for the Respondent, Michelle Dianne Noel, in her capacity as Executor of the Estate of Barbara Ann Kissel:	K.A. Dotten
Counsel for the Respondent, Adrian Joseph Kissel:	G.T. Behan P. Storey

Place and Date of Hearing:	Vancouver, British Columbia October 2, 2025
Place and Date of Judgment:	Vancouver, British Columbia October 23, 2025

Written Reasons by:
The Honourable Madam Justice Fisher

Concurred in by:
The Honourable Mr. Justice Butler
The Honourable Justice Mayer

Summary:

The appellant challenges the judge's order under s. 58 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13, that certain communications between the deceased and her friend constituted a testamentary intention to remove the appellant as a beneficiary under her will. The appellant says the communications did not represent the fixed and final intention of the deceased and the extrinsic evidence suggests otherwise. Held: Appeal allowed. The judge overlooked the requirement of s. 58 that the deceased must intend for the communications themselves to be testamentary in nature. Her conclusion of a fixed and final intention was not supported by the evidence.

Reasons for Judgment of the Honourable Madam Justice Fisher:

[1] This appeal is about the scope of a judge's discretion to relieve against the consequences of non-compliance with testamentary formalities in a "record, document or writing" pursuant to s. 58 of the *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13 (*WESA*). The "record" in issue comprises communications between the deceased and a close friend in a text and an email in which the deceased expressed an intention to redo her will and remove the appellant as a beneficiary. The chambers judge concluded the communication reflected the deceased's fixed and final intention to do so and ordered that the record was fully effective to alter the will.

[2] The appellant challenges the judge's interpretation and application of testamentary intention within the meaning of s. 58 of *WESA*.

[3] For the reasons that follow, it is my view that the judge erred in both respects, and I would allow the appeal.

Background

[4] Barbara Ann Kissel (the deceased) died on January 7, 2023. She left a will dated August 7, 2014 that named the appellant, Jennifer Paige, and the respondent, Adrian Kissel, as residual beneficiaries in equal shares, and appointed the respondent, Michelle Noel, as executrix (the 2014 will). For ease of reference, I will refer to the parties where necessary by their given names, intending no disrespect. I will also refer to the respondents together, as Michelle adopted the submissions of Adrian.

[5] The deceased had been in a common law relationship with a woman named Sheila Paige for about 16 years, from 1980 to 1996. During that time, Sheila adopted Jennifer, and the deceased adopted Adrian. Jennifer and the deceased had a close relationship; she was also the deceased's goddaughter. After the deceased and Sheila separated, Adrian lived with the deceased and Jennifer lived with Sheila. Jennifer maintained her close relationship with the deceased over the years.

[6] At the time the deceased made her will in 2014, Jennifer was living in Vancouver with her spouse and Adrian was living in Quebec with his spouse. Jennifer remained close to the deceased but some conflict developed between them after 2021.

[7] The record in issue is comprised of two electronic messages sent by the deceased to Michelle in October 2022 (which I will refer to as the Messages, as did the chambers judge). The first was a text exchange sent on October 6, 2022:

The deceased:	On a completely different note ... *I have an appointment with the notary on the 14th to redo my will* ...
Michelle:	Oh boy, a redo?
The deceased:	*Yes ... redo … Jennifer is out ...*.
Michelle:	Well I don't blame you, that wasn't an easy decision and one I know you didn't make lightly
The deceased:	I agree ... Jennifer has cut off her nose to spite her face. Once the redo is done I will give you a copy and explain more ....
	…
	Oh jeez…I didn't even ask you…will you continue to be my executrix?

> Michelle: Oh absolutely
>
> The deceased: MERCI beaucoup
>
> [Emphasis in original.]

[8] The second was an email sent on October 15, 2022:

> … Just to have a paper trail … here is an update regarding my will. The notary I am using is Blandyna Skowronska …
>
> I met with her yesterday and conveyed the changes I wanted. She said it would take about two weeks for the new will to be drawn up and registered. She said one option I had was to destroy all copies of my current will which would remove Jennifer immediately. However, should I pass away before the new will is registered, my estate, such as it is, would go to probate court and could be tied up for years. Going to probate also means that the governments have a say in distribution of assets. So, the current will that you have will stand until I get a new one.

[9] The extrinsic evidence of the deceased's state of mind as to her testamentary intention before, when and after the Messages were created was as follows.

[10] In 2019 the deceased's health began to decline, and in June 2021 she had abdominal surgery. Jennifer assisted the deceased with her health and personal needs throughout this period. A rift apparently developed between Jennifer and Adrian in 2021, having to do with Adrian being unable to come to Vancouver to assist the deceased with her recovery from the surgery. The deceased told Michelle that she was unhappy with Jennifer's treatment of Adrian.

[11] A year later, in the summer of 2022, Adrian and his family came to Vancouver for a visit. Jennifer did not attend a birthday party for Adrian's son or otherwise visit him while he was there. The deceased told Michelle she was deeply hurt about this. After Adrian left, the deceased and Jennifer discussed this conflict. According to Jennifer, they shared their perspectives and reconciled. However, in early October 2022, the deceased began texting Michelle about her negative feelings for Jennifer. She made statements such as "what has happened cannot be undone". It was shortly after this that the deceased sent the Messages.

[12] In the following month, on November 3, 2022, the deceased sent another message to Michelle, telling her to "disregard the information I sent you a while back regarding the notary I was using":

> … Long and short of it is as of yesterday, still no new will. I went by her office today and picked up my old will and will have to start the process again with another notary. I will keep you posted.

[13] The next day, the deceased texted Michelle to say she had made an appointment with a new notary. That appointment was to have taken place on November 8, 2022, but the deceased cancelled it, stating it was for health reasons, and she would reschedule once she was better. She never rescheduled this appointment.

[14] Almost two months later, on January 3, 2023, the deceased sent an email to a neighbour (a lawyer) asking if her law firm dealt with wills, stating she wanted to "make a very minor change" to her will. On receiving a positive response, the deceased asked if the neighbour could have a wills and estates lawyer give her a call "so I can explain what I need". According to Adrian, the deceased told him during a video call on January 6, 2023, that she had reached out to her neighbour about changing her will to remove Jennifer from it and she had "all of her papers in order and was ready to do what needed to be done".

[15] The deceased passed away the next day, January 7, 2023, without seeing the lawyer and without making a new will.

Legal principles

[16] The formal requirements for revoking all or part of a will are set out in s. 55(1) of *WESA*, which provides in relevant part:

> 55 (1) A will … or a part of a will … is revoked only in one or more of the following circumstances:
>
> (a) by another will made by the will-maker in accordance with this Act;
>
> (b) by a written declaration of the will-maker that revokes all or part of a will made in accordance with section 37;
>
> (c) by the will-maker, or a person in the presence of the will-maker and by the will-maker's direction, burning, tearing or destroying all or part of the will in some manner with the intention of revoking all or part of it;
>
> (d) by any other act of the will-maker, or another person in the presence of the will-maker and by the will-maker's direction, if the court determines under section 58 that
>
> (i) the consequence of the act of the will-maker or the other person is apparent on the face of the will, and

> (ii) the act was done with the intent of the will-maker to revoke the will in whole or in part.
>
> [Emphasis added.]

[17] The court's power to cure deficiencies is set out in s. 58:

> 58 (1) In this section, "record" includes data that
>
> (a) is recorded or stored electronically,
>
> (b) can be read by a person, and
>
> (c) is capable of reproduction in a visible form.
>
> (2) On application, the court may make an order under subsection (3) if the court determines that a record, document or writing or marking on a will or document represents
>
> (a) the testamentary intentions of a deceased person,
>
> (b) the intention of a deceased person to revoke, alter or revive a will or testamentary disposition of the deceased person, or
>
> (c) the intention of a deceased person to revoke, alter or revive a testamentary disposition contained in a document other than a will.
>
> (3) Even though the making, revocation, alteration or revival of a will does not comply with this Act, the court may, as the circumstances require, order that a record or document or writing or marking on a will or document be fully effective as though it had been made
>
> (a) as the will or part of the will of the deceased person,
>
> (b) as a revocation, alteration or revival of a will of the deceased person, or
>
> (c) as the testamentary intention of the deceased person.
>
> [Emphasis added.]

[18] There is no question that a determination as to whether the court should exercise this curative power in respect of a non-compliant document is intensely fact-sensitive, as noted in *Estate of Young*, 2015 BCSC 182 at para. 34. This is why most of the jurisprudence in this area is at the trial level, and the results clearly vary depending on the facts: see, for example, *Bailey Estate (Re)*, 2016 BCSC 1226; *Poulk Estate*, 2018 BCSC 1321; *Akins Estate (Re)*, 2019 BCSC 738; *Hubschi Estate (Re)*, 2019 BCSC 2040; *Jakonen Estate (Re)*, 2022 BCSC 2261; *Cooper Estate*, 2024 BCSC 218; *Godfrey Estate (Re)*, 2024 BCSC 1493.

[19] This Court had occasion to consider s. 58 in *Hadley Estate (Re)*, 2017 BCCA 311, some three years after *WESA* came into force. Justice Dickson, writing for the Court, noted that the statute represented a significant reform of wills and

estates law in British Columbia, with s. 58 being "[o]ne of its most far-reaching provisions":

> [33] British Columbia was a "strict compliance" jurisdiction prior to passage of the *WESA*. Under s. 4 of the *Wills Act*, R.S.B.C. 1996, c. 489, testators were obliged to comply strictly with execution and attestation formalities for creating a will for it to be valid. The same was true for revoking, altering or reviving a will: *Wills Act*, ss. 14, 17, 18. These formal requirements sometimes led to a will-maker's testamentary intentions being defeated for no good reason. As a result, the British Columbia Law Institute recommended the introduction of a dispensing power to relieve against the consequences of non-compliance with testamentary formalities as part of a general reform of wills and estate administration law: BCLI, *Wills, Estates and Succession: A Modern Legal Framework* (BCLI Report No. 45, June 2006) at xiv.
>
> [34] Section 58 of the *WESA* is the legislative response to the BCLI recommendation. Remedial in nature, it confers a broad discretion on the court to order that a "record or document or writing or marking on a will or document" be fully effective, despite non-compliance with the statutory requirements…

[20] The court's task under s. 58 is "to determine, on a balance of probabilities, whether a non-compliant document embodies the deceased's testamentary intentions" at the material time — which is usually when the document was created. Extrinsic evidence of the deceased's state of mind before, when and after the document was created, as it relates to testamentary intention, is admissible: *Hadley Estate* at paras. 37, 40.

[21] Testamentary intention is not simply an expression of how a person would like to dispose of property after death. In *Hadley Estate*, the Court adopted the summary of the curative power set out in *Estate of Young*, which in turn relied on the description of testamentary intention originally penned by the Manitoba Court of Appeal in *George v. Daily* (1997), 143 D.L.R. (4th) 273 at para. 65:

> … The essential quality of the term is that there must be a deliberate or fixed and final expression of intention as to the disposal of … property on death.

[22] As the court explained in *Estate of Young* at para. 35:

> A deliberate or fixed and final intention is not the equivalent of an irrevocable intention, given that a will, by its nature, is revocable until the death of its maker. Rather, the intention must be fixed and final at the material time, which will vary depending on the circumstances.
>
> [Emphasis added.]

[23] The importance of the words “fixed and final at the material time” cannot be understated. As I explain further below, this is because s. 58(2) requires that the record, document or writing represents the testamentary intention of the deceased person, whether to make a will or to revoke or alter an existing will. A fixed and final intention must be grounded in the document itself, in that the document is intended to effect the testamentary intention.

The decision below

[24] After reviewing the evidence, the chambers judge referred to the principles to be applied in making a determination under s. 58 of *WESA*, as set out in *Hadley Estate* and *Estate of Young*.

[25] In concluding that the Messages represented the deceased’s fixed and final intention to alter the 2014 will to remove Jennifer as a beneficiary, the judge made the following findings (at para. 53):

- the deceased did not waiver from her stated intention from October 6 up to her death;
- her reasons for removing Jennifer were clear;
- she was taking steps to accomplish this by seeking the assistance of two notaries and a lawyer; and
- for reasons beyond her control, she was not able to complete a new will.

[26] The judge placed significant weight on the evidence of Michelle and Michelle’s mother, neither of whom had a financial interest in the matter. She placed no weight on Jennifer’s evidence that the deceased’s conduct towards her was inconsistent with an intention to remove her as a beneficiary. She reasoned that the evidence demonstrated the deceased “was upset and displeased with Jennifer from around July 2021 up to the time of her death, even though her words and actions towards Jennifer may appear otherwise” and did not appear to share Jennifer’s view that they had reconciled in August 2022 (at paras. 58–59). While the judge did not consider Jennifer’s perspective to be unreasonable, she considered it irrelevant. She held it was only the deceased’s state of mind that was relevant to the determination of testamentary intention (at para. 64).

[27] The judge did not interpret the deceased's statement in the second of the Messages that "the current will … will stand until I get a new one" to negate or undermine the deceased's intention to remove Jennifer from her will. Her reasoning is at para. 52:

> Although in the last sentence of the October 15 email, the Deceased stated that the current Will would stand until she got the new one, in my view, when considered in the context of the entire email, this statement only demonstrates the Deceased's unwillingness to have her estate tied up if she were to die intestate. This statement must also be considered in the context of the Deceased's understanding based on the email that it would take a relatively short period of time, i.e. about two weeks, to get a new Will done. In the circumstances, I do not interpret the October 15 email to have the effect of negating or undermining the Deceased's intention to remove Jennifer from the 2014 Will.

[28] Nor did the judge interpret the deceased's reference to making a "minor change" in her will on January 3, 2023 to be inconsistent with her intention, stating (at para. 65):

> … In my view, while the impact of removing a beneficiary is often significant, the required amendment to the Will could be a minor one, as is the case here.

[29] Although the judge appreciated that the Messages contemplated the preparation of a new will, she concluded that they reflected the deceased's fixed and final intention to remove Jennifer from her 2014 will.

On appeal

[30] Jennifer contends the chambers judge erred by:

(a) failing to properly apply *WESA*'s formal requirements for revocation of the 2014 will;

(b) treating informal text and email messages as evidence of a final testamentary intention;

(c) assessing conflicts in the evidence in a summary proceeding; and

(d) finding an email from the deceased's notary to be inadmissible hearsay.

[31] The respondents contend the chambers judge made no reversible error. They say Jennifer is re-arguing the petition and improperly asking this Court to re-

weigh the evidence.

[32] It is not necessary to consider Jennifer's argument about the summary proceeding. The matter was brought by way of petition. It was appropriately determined as a summary proceeding and the question of referral to the trial list was not raised before the chambers judge.

[33] Nor is it necessary to consider the hearsay issue. Jennifer contends the judge was wrong to conclude that an email from the first notary the deceased contacted was inadmissible hearsay. The email was attached to an affidavit filed on behalf of Michelle that responded in the negative to an inquiry from her counsel as to whether the deceased had provided the notary with any written instructions for a new will. The judge added a comment in *obiter* that indicated such evidence, if admissible, was inconsistent with other evidence (also inadmissible in my view) that suggested the notary had some knowledge of the change the deceased wanted to make to her will. Importantly, other than the deceased's statement in the October 15 email that she had conveyed to the notary the changes she wanted, there was no evidence in the record that the deceased gave instructions to anyone else after she terminated that notary's services. The absence of such evidence was a relevant consideration in the circumstances.

[34] In my view, the real issue in this appeal concerns the chambers judge's interpretation of s. 58 of *WESA* and her application of the requirement of a "fixed and final" testamentary intention to the record in issue in the context of the relevant extrinsic evidence.

[35] As I explain below, it is my opinion that the chambers judge erred in two ways. First, she failed to appreciate the, perhaps nuanced, meaning of "fixed and final intention" as outlined above and therefore erred in principle in her interpretation of s. 58. Second, in her application of s. 58, the judge failed to give effect to the words expressed in the record before her (the Messages) and to consider all extrinsic evidence relevant to the deceased's state of mind at the material time.

Analysis

[36] As a preliminary matter, Jennifer suggests that electronic communications such as the Messages in this case are in themselves insufficient to revoke a will.

She does not dispute that an electronic document can constitute a “record” as defined in s. 58(1) but says the informal nature of text and email communications — which are in effect a recording of verbal statements — do not meet the required threshold. She also suggests that treating such communications as valid expressions of testamentary intention will create uncertainty in estate planning and open the floodgates for future disputes.

[37] The definition of “record” in s. 58(1), which is defined broadly to include data that is stored electronically, can be read by a person and reproduced in visible form, can include electronic documents such as text messages and email. However, no cases have been referred to us where the record consisted of text messages or email communications similar in nature to the Messages, and a brief review of the jurisprudence shows that records (whether electronic or not) which are informal in nature are unlikely to be sufficient to meet the requirements of s. 58.

[38] For example, in *Estate of Young*, there were two records in issue. The first was a signed document that listed certain property to be distributed to six named beneficiaries with instructions to sell the items not taken. The second was an unsigned document written “To Whom This May Concern”, which referred to some property without naming the beneficiaries and differed from the first document as well as the deceased’s will. The judge found the first document sufficient to establish testamentary intention but not the second, as there was no explanation for why the second document was unsigned and it was headed more in the style of a letter than a testamentary document.

[39] In *Lane Estate*, 2015 BCSC 2162, the records in question were notes written on the back of receipts, grocery lists, calendars, or other scrap paper. The court found that this informality was suggestive of impermanence, rather than a fixed and final intention.

[40] Similarly, in *Henderson v. Myler*, 2021 BCSC 1649, the deceased had left an unsigned, handwritten note with her will. The note, written on a page from a yellow notepad, purported to make changes to the will that included an increase of specific amounts payable to certain beneficiaries, the deletion of gifts to other beneficiaries and the addition of specific gifts to persons not named in the will. There were many factors that did not support a finding that the note represented

the deceased's testamentary intention, which included the lack of formality due to the note being unsigned, not titled, written on a page from a notepad and not containing formal language.

[41] In contrast, the informal nature of a text message did not exclude it from being found to establish testamentary intention in an Australian case, *Nicol v. Nicol* [2017] QSC 220. The text, which was unsent, was addressed to the deceased's brother and found on the deceased's cell phone at the time of his death. It stated "My will" at the bottom and provided instructions for the deceased's brothers to "keep all that [he] had", advised where to locate cash and where to place his ashes, and that his wife would "take her stuff only she's ok gone back to her ex AGAIN I'm beaten".

[42] It is important to note that every case turned in relevant part on the extrinsic evidence unique to each. And while there is a wide range of factors that may be relevant, in general, the further a document departs from formal requirements, the harder it will be for a court to find it represents the deceased's testamentary intention: see *Estate of Young* at paras. 36–37.

[43] Here, had the deceased's communications with Michelle on October 6 and 15, 2022 taken place by telephone or in person, no application under s. 58 would be possible. The fact that these communications were recorded in an electronic record does not transform a casual conversation into a legally operative testamentary record unless the content of that conversation demonstrates a fixed and final intention to effect a testamentary disposition. I point this out to underline the care that is required to properly assess whether a document that consists of informal communications such as those in the Messages represents a deceased's testamentary intention. Such an approach should address Jennifer's concern about uncertainty and opening the floodgates.

Interpretation of s. 58

[44] The interpretation of s. 58 raises a question of law reviewable on the standard of correctness.

[45] As noted above, the chambers judge referred to the principles to be applied in making a determination under s. 58 of *WESA*, as set out in *Hadley Estate* and *Estate of Young*. However, it is in her application of those principles that the

reasons for judgment reveal a misconception of the meaning of “fixed and final intention” in the context of the curative power of the court. The judge appears to have considered a fixed and final intention to be equivalent to an unwavering stated intention, rather than an intention that the document represents the testamentary intention of the deceased at the material time. As I explain below, what this means is that the deceased must have intended the Messages to effect her intention to remove Jennifer as a beneficiary.

[46] The respondents submit s. 58 does not require an intention that the document itself be testamentary. Counsel referred us to equivalent Australian legislation, s. 18 of the *Succession Act 1981* (Qld), which was applied in *Nicol*. They contrast the wording of s. 58 with the express requirements in s. 18:

> (1) This section applies to a document, or a part of a document, that
>
> (a) purports to state the testamentary intentions of a deceased person; and
>
> (b) has not been executed under this part.
>
> (2) The document or the part forms a will, an alteration of a will, or a full or partial revocation of a will, of the deceased person if the court is satisfied that the person intended the document or part to form the person’s will, an alteration to the person’s will or a full or partial revocation of the person’s will.
>
> [Emphasis added.]

[47] I accept that this provision placed an express limitation on the curative power that required proof that the document itself was intended to constitute a person’s will or an alteration or revocation of the person’s will. However, it does not follow that the absence of this specific limitation in s. 58 of *WESA* means there are no limitations on the curative power.

[48] Reading s. 58(2) in accordance with the well-established modern approach to statutory interpretation as described in *Rizzo & Rizzo Shoes Ltd.* [1998] 1 S.C.R. 27, I interpret the words of s. 58(2) — that the court is to determine that a “record, document or writing … represents the testamentary intentions of a deceased person” or “the intention of a deceased person to revoke, alter or revive a will” — to require that the document is intended to effect the deceased’s testamentary intention — in other words, to be legally operative as a will or other testamentary disposition. Otherwise, there would be no basis on which the document could be admitted to probate.

[49] In *George*, the Court's definition of testamentary intention was prefaced by a discussion of the limitations placed on the application of the curative power in s. 23 of Manitoba's *Wills Act*, C.C.S.M., c. W150, which wording is equivalent to s. 58:

> [58] As discussed above, the purpose of remedial provisions is to overcome the hardship and injustice — the consequences of the triumph of form over intent — which have often followed the literal application of the formal requirements found in will statutes…
>
> [59] The Commission did not recommend that the requirements and formalities of the *Act* be revoked, or that testamentary law be profoundly altered. And, in my view, the enactment of s. 23 did not do so. The section must be interpreted and applied in the context of all of the provisions of the *Act* and the jurisprudence which has developed over the centuries.
>
> [60] It remains a fundamental and universal proposition "that nothing can receive probate which was not intended to be a testamentary act by the testator": per Lord Selborne L.C. in *White v. Pollock* (1882), 7 App. Cas. 400 (H.L.) at p. 405. In Bailey's *The Law of Wills*, 7th ed. (Pitman Publishing, 1973), the principle is stated (at pp. 65-6): "No will is entitled to probate unless the testator executed it with the intention that it should take effect as his will." (It is not necessary to review cases such as *Milnes v. Foden*, [1890] 15 P. 105, in which instruments have been admitted to probate even though the deceased was unaware that he/she had performed a testamentary act. The principle remains the same: the intention that the instrument record the final (but revocable) wishes of the deceased as to the disposal of his/her property after death.)
>
> [61] Section 23 can be invoked to give effect to the testamentary intentions of a deceased in the face of imperfect compliance, even non-compliance, with the formalities of the *Act.* Section 23 cannot, however, make a will out of a document which was never intended by the deceased to have testamentary effect. …
>
> [62] Not every expression made by a person, whether made orally or in writing, respecting the disposition of his/her property on death embodies his/her testamentary intentions. The law reports are filled with cases in which probate of holographic instruments has been refused because they did not show a present intention to dispose of property on death. *Re Gray; Bennett v. Toronto General Trusts Corp.*, [1958] S.C.R. 392, 14 D.L.R. (2d) 1 *sub nom. Bennett v. Gray*, was such a case.
>
> [63] In *Re Gray*, the deceased's letter to her lawyer, a holographic document, contained details of "how [she] would like [her] will to be made out". Thereafter, until her death three and one-half years later, she met her lawyer on many occasions, both professionally and socially, but a formal will was never prepared. The court concluded that the letter was not written *animo testandi*; that it did not "record a deliberate or fixed and final expression of intention as to the disposal of property on death". The court's conclusion was supported by its findings that the deceased "did not want that letter to operate as a will"; and that "by her letter, she is committing to [her lawyer] both the finality of her decisions, if not of her deliberations, and that of the form in which they should eventually be expressed in a regular will, the preparation of which is entrusted to [her lawyer] himself".

> [Emphasis added.]

[50] I fully endorse this analysis. It clearly establishes that a document that represents “a deliberate or fixed and final expression of intention” to the disposal of property on death means that the document is intended to operate as a will or as an alteration or revocation of an existing will. To the extent the chambers judge failed to appreciate this requirement, she erred in law.

Application of s. 58

[51] The judge’s application of s. 58 raises questions of mixed fact and law reviewable on the deferential standard of palpable and overriding error.

[52] The judge’s conclusion that the Messages reflected the deceased’s fixed and final intention cannot be reconciled with the content of the Messages themselves or with the surrounding circumstances. It is clear the deceased was unhappy with Jennifer and expressed an intention to alter her will to remove Jennifer as a beneficiary. But that intention cannot be considered fixed and final because it is equally clear that the deceased intended to effect that alteration by making a new will, and until she did so, the 2014 will was to remain operative.

[53] This is expressed in the Messages, first in the October 6, 2022 text:

> … I have an appointment with the notary on the 14th to redo my will…
>
> [Emphasis added.]

And then in the October 15, 2022 email:

> … I met with [the notary] yesterday and conveyed the changes I wanted. She said it would take about two weeks for the new will to be drawn up and registered. She said one option I had was to destroy all copies of my current will which would remove Jennifer immediately. However, should I pass away before the new will is registered, my estate, such as it is, would go to probate court and could be tied up for years. Going to probate also means that the governments have a say in distribution of assets. So, the current will that you have will stand until I get a new one.
>
> [Emphasis added.]

[54] Counsel for Adrian suggested that the deceased had received poor advice about the consequences of an intestacy, and the fact that she did not rip up her old will did not change her intention to remove Jennifer. I do not accept this suggestion. The judge’s explanation for discounting this statement — that the

deceased was not willing to have her estate tied up if she were to die intestate and understood it would be a relatively short period of time to get a new will done — focuses on the wrong question. It is not the reason why the deceased decided to keep her current will in place until she made a new one that is relevant, but the fact that she did so. The record demonstrates that the deceased was aware of the formalities of making and revoking a will and expressed an intention that was not fixed and final at the time she wrote the Messages.

[55] The extrinsic evidence does not displace the words in the Messages. The deceased expressed the desire to remove Jennifer as a beneficiary to others in October 2022 and again in January 2023. She also set up but did not follow through with an appointment with a second notary in early November 2022 for reasons stated as health reasons. However, there is no evidence about the deceased's state of health after early November that would explain why she did not take any steps to make a new will for almost two months. There is also no evidence that the deceased provided instructions to a notary or a lawyer after early November. The implications of the deceased's email to her neighbour in January 2023 indicating that she wanted to make a "very minor change" to her will are at best unclear. In my view, the judge's interpretation of this as not inconsistent with removing a beneficiary — that the required amendment could be minor despite the significant impact — is speculative.

[56] The record also includes evidence from Jennifer about her positive interactions with the deceased in November 2022 — which was after the deceased's communications with Michelle that were found to indicate an attempt to maintain a semblance of normalcy in her interactions with Jennifer. Moreover, while the judge was entitled to place less weight on Jennifer's perceptions of the deceased's state of mind, that evidence was not irrelevant.

[57] As to Adrian's evidence about what the deceased told him on January 6, 2023, the judge did not rely on it in making her findings, presumably because he was not an independent witness. I will say only that such evidence given by an interested party must be treated very carefully.

[58] On this record, it is not possible to ground a finding that the deceased's intention did not waiver from October 5, 2022 up to her death, or that she was unable to complete a new will for reasons beyond her control. More importantly, it

is not possible to ground a finding that the deceased intended to effect this alteration by the Messages themselves, which clearly expressed an intention to do so by making a new will.

[59] The respondents submit a record that contemplates the preparation of a new will can nonetheless represent a testamentary intention at the material time. That may be so, but as noted above, each case turns on its own facts.

[60] The chambers judge relied in part on *Hubschi Estate* to discount the significance of the deceased's contemplation of preparing a new will. However, the facts in that case were very different. Mr. Hubschi, who had never made a will, left a record in his home computer directing a five-way split of his assets for his "remaining brother and sisters" and indicated who should be his executor. The direction was preceded by a statement to "[g]et a will made out at some point".

[61] The extrinsic evidence was entirely consistent with the direction. The record had been modified on the day of Mr. Hubschi's death. The "remaining brother and sisters" referred to the children of the foster family who had informally adopted him as a child and treated him as their own, to the point where his foster mother had given an equal share of her estate to Mr. Hubschi and her five natural children. Mr. Hubschi never married, had no children and never had contact with his birth family. In light of these circumstances, the judge concluded that Mr. Hubschi's fixed and final testamentary intentions were reflected at the time he created the record and reviewed it on the day of his death.

[62] Here, the deceased had an operative will and expressly stated in the Messages that she intended to make a new will to carry out her desire to remove Jennifer as a beneficiary, and the current will was to stand until that was done. None of the extrinsic evidence contradicts that statement, and in my view, the judge made a palpable and overriding error in concluding otherwise. The Messages are insufficient to meet the requirements of s. 58 of *WESA*.

[63] I would therefore allow the appeal and set aside the order below.

"The Honourable Madam Justice Fisher"

I AGREE:

“The Honourable Mr. Justice Butler”

I AGREE:

“The Honourable Justice Mayer”