COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Aulinger v. Oda,*
2026 BCCA 13

Date: 20260116
Docket: CA50644

Between:

Reinhart Jean Aulinger

Appellant
(Applicant)

And

Shawna Lee Oda

Respondent
(Respondent)

Before: The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Justice Gomery
The Honourable Justice Warren

On appeal from: An order of the Supreme Court of British Columbia, dated April 4, 2025 (*Siebert Estate (Re)*, 2025 BCSC 617, Vancouver Docket P240123).

Counsel for the Appellant: D. Parlow
D.P. Lucas

Counsel for the Respondent: P. Harrison

Place and Date of Hearing: Vancouver, British Columbia
December 9, 2025

Place and Date of Judgment: Vancouver, British Columbia
January 16, 2026

Written Reasons by:
The Honourable Justice Gomery

Concurred in by:
The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Justice Warren

Summary:

The appellant challenges an order declaring a 1995 joint will to be of no force and effect in consequence of a 2019 will in which one of the joint testators revoked all prior testamentary dispositions. The respondent seeks to adduce fresh evidence. Held: Fresh evidence application dismissed and appeal allowed. The judge erred in holding that the 1995 will was revoked by the 2019 will. The judge's interpretation derives from an incorrect understanding of the legal nature of a joint will and does not approach the interpretive problem as a search for testamentary intent, consider the surrounding circumstances favouring the appellant's interpretation, or have regard for the presumption against an intestacy. The 2019 will was only made by one testator and could not revoke the other testator's prior testamentary dispositions.

Reasons for Judgment of the Honourable Justice Gomery:

Overview

[1] Johannes and Daniela Siebert together made a will in Germany on January 18, 1995. The will was handwritten by Daniela Siebert and signed by both of them. It states, simply:

> Testament
>
> In case of our death, we, Daniela and Johannes Siebert, name Mr. Martin Steger and Ms. Gertrud Steger as universal heirs of our entire estate.

[2] The named beneficiaries, Martin and Gertrud Steger, were Daniela Seibert's parents.

[3] The judge found that the 1995 will was validly made pursuant to German law and admissible to probate in British Columbia, so long as it was not subsequently revoked. This finding is undisputed on appeal. The judge went on to find that the 1995 will was revoked by a further will made by Ms. Siebert in 2019. She died later in 2019 and Johannes Siebert in 2022. At issue is the disposition of his estate.

[4] Martin Steger has died. The appellant brings this appeal on behalf of Gertrud Steger, who will inherit land in British Columbia under the 1995 will, if it is admitted to probate.

[5] The chambers judge dismissed the appellant's claim to propound the 1995 will. His order provides as follows:

a) The 1995 will (described in the court's order as a "holograph joint will") was formally valid and admissible to probate;

b) However, the 1995 will "had no force or effect following Daniela Siebert revoking all prior testamentary dispositions" by her 2019 will; and

c) Mr. Siebert therefore died intestate.

[6] The appellant maintains that the chambers judge misinterpreted the 1995 will and misunderstood its legal nature. In the appellant's submission, the 1995 testamentary document contained two wills in a single document. One was Ms. Siebert's will, and the other was Mr. Siebert's. The 2019 will made by Ms. Siebert could not in law revoke the 1995 will made by Mr. Siebert. The judge erred in concluding that Mr. Siebert died intestate and in refusing to accept the 1995 will as Mr. Siebert's last will upon proof in solemn form.

[7] As in the Court below, the appellant's claim is resisted by the respondent, Shawna Oda, who claims that she entered into a spousal relationship with Mr. Siebert in the period prior to his death. Ms. Oda contends that the judge neither misinterpreted the 1995 will nor misunderstood its legal nature. She submits that, as a matter of interpretation, the judge was correct not to interpret the 1995 will as a joint will consisting of two wills in single document. Alternatively, she seeks to adduce fresh evidence addressing the legal validity and effect of the 1995 will under German law.

[8] For the reasons that follow, I would dismiss the application to adduce fresh evidence and allow the appeal. The 1995 will was a valid will made by Mr. Siebert, it was never revoked by him, and it should be admitted into probate on proof in solemn form.

Background

[9] Ms. Siebert was ill with cancer when she made the 2019 will. She died less than a month later.

[10] Like the 1995 will, the 2019 will is handwritten and in German. Unlike the 1995 will, it is made by Ms. Siebert alone. It states:

> My Last Will “Testament”
>
> With this testament, I revoke any prior binding declarations in the form of a disposition of property on death. Only that which has been written here shall apply.
>
> I, Daniela Gabriele Siebert, born on 22 April 1964, designate as the sole heir: My husband Johannes Siebert, born on 12 April 1956 in Lubeck.
>
> Nelson, B. C., 29 March 2019
>
> Daniela Siebert, nee Steger, born on 22 April 1964 in Munich.
>
> [signature] Daniela Siebert

[11] Mr. Siebert died accidentally in September 2022 without making a fresh will. So far as he is concerned, there is only the 1995 will.

[12] The appellant applied in the Supreme Court of British Columbia for a grant of administration with the 1995 will annexed, seeking an order that the will be proved in solemn form. The application included an affidavit of a German lawyer giving expert evidence of German law. Ms. Oda opposed the application. When it came on for hearing in November 2024, she objected to the admissibility of the German lawyer’s affidavit. The judge directed that the lawyer attend for cross-examination. After hearing the cross-examination in February 2025, he ruled the affidavit admissible: reasons, paras. 27–30.

[13] While the appeal involves a contest between the appellant (on behalf of Ms. Steger) and Ms. Oda, even if the appeal succeeds and the 1995 will is admitted to probate, there remains the possibility of a claim by Ms. Oda to vary the will pursuant to Division 6 of Part 4 of the *Wills, Estates and Succession Act,* S.B.C. 2009, c. 13 [*WESA*].

Chambers judge's reasons

[14] In the Court below, the thrust of the appellant's argument focused on the theory that the revocation issue was governed by German law. He relied on the German lawyer's opinion that, under German law, the 2019 will did not revoke the 1995 will. The appellant lost this argument. The judge came to two conclusions that are not disputed on appeal.

[15] First, German law governed the making of the 1995 will and its formal requirements were satisfied in the making of the will. Section 80(1) of the *WESA* accordingly provides for the recognition and admission to probate of the 1995 will, unless the will was subsequently revoked: reasons at paras. 33–37.

[16] Second, whether the 1995 will was revoked by the 2019 will is determined by the law of British Columbia: reasons at para. 65.

[17] The remaining issue, according to the judge's analysis, was whether the 2019 will revoked the 1995 will. The judge characterized the 1995 will as a mutual or joint will. In the judge's view, the terms "mutual will" and "joint will" are synonymous: reasons at paras. 68–71. The judge described such a will as involving a reciprocal promise not to revoke, which may result in a constructive trust to restrain an attempted revocation by the surviving testator, following the death of the other. The judge noted, however, that there was no evidence of such an agreement in the case at hand and, in any event, Ms. Siebert revoked the 1995 will in 2019 while Mr. Siebert was still alive: reasons at para. 73.

[18] The judge then reasoned that the will made by Ms. Siebert in 2019 revoked the 1995 will so far as both Ms. Siebert and Mr. Siebert were concerned. He stated:

> [74] What, then, became of the 1995 Will under British Columbia law when Ms. Siebert revoked her will? I will reproduce the operative language of the 1995 Will here for ease of reference:
>
> In case of our death, we, Daniela and Johannes Siebert, name Mr. Martin Steger and Ms. Gertrud Steger as universal heirs of our entire estate.
>
> (Emphasis added).

> [75] The reference to “our death” indicates that the 1995 Will would only have force and effect if Mr. and Ms. Siebert died simultaneously or if the first to die died without revoking his or her participation in the joint bequest.
>
> [76] Ms. Siebert clearly intended to revoke her participation in the bequest. She wrote in the 2019 Will:
>
> I revoke any prior binding declarations in the form of a disposition of property on death.
>
> [77] In my view, the 1995 Will had no force or effect once Ms. Siebert revoked her participation. As a result, the 2019 Will revoked the 1995 Will. Accordingly, I find that Mr. Siebert died intestate under British Columbia law.

Issues

[19] The parties’ arguments have evolved since the hearing before the chambers judge, and the appellant relies on authorities as to the nature of a joint will that were not brought to the judge’s attention. As noted, the appellant now accepts that British Columbia law governs the revocation issue.

[20] While the legal arguments have evolved, the issues now presented for decision (with the exception of the fresh evidence application) were ones that were and had to be addressed by the chambers judge. They were the interpretation and effect of the 1995 will, if it was not revoked, and whether it was revoked. The interpretive and revocation issues were interconnected in the judge’s analysis at para. 75 of his reasons, reproduced above.

[21] I would frame the issues on appeal as follows:

1. Should fresh evidence be admitted?

2. Did the chambers judge err in his interpretation of the 1995 will?

3. Did the chambers judge err in holding that the 1995 will was revoked by the 2019 will?

Legal framework

[22] It is helpful to canvass at the outset aspects of the legal framework that provide context for an appreciation and analysis of the issues.

[23] The common law distinguishes joint wills and mutual wills. Canadian courts have ratified the following description of a joint will from *Halsbury's Laws of England*, (4th ed. reissue, 1998) vol. 50, para. 257:

> 257. Joint wills. A joint will is a will made by two or more testators contained in a single document, duly executed by each testator, and disposing either of their separate properties or of their joint property. It is not, however, recognised in English law as a single will. It is in effect two or more wills; it operates on the death of each testator as his will disposing of his own separate property; …

Re Creelman, McIntyre v. Gushue (1956), 2 D.L.R. (2d) 494 at 498, 1956 CanLII 357 (N.S.S.C.); *Benjamins v. Chartered Trust Company,* [1965] S.C.R. 251 at 271, 1965 CanLII 7; *Re Stanley Estate* (1968), 69 D.L.R. (2d) 431 at 432–433, 1968 CanLII 594 (B.C.S.C.); *Re Hnatiw,* [1977] W.W.R. 764 at para. 3, 1976 CanLII 909 (S.K.Q.B.).

[24] Mutual wills are wills made by two or more testators that confer reciprocal benefits. Mutual wills may be contained in separate documents, or may be contained in a single joint document, in which case it is also a joint will: *Halsbury's* at para. 258; James MacKenzie, *Feeney's Canadian Law of Wills (Fourth edition)* (Toronto: LexisNexis) (looseleaf updated November, 2025 release 122) at 1.44.

[25] An agreement (which may be implied) not to revoke reciprocal dispositions is sometimes viewed as a defining feature of a mutual will and sometimes not: Robert Chambers, "Constructive Trusts in Canada" (1999) 37:1 Alta LR 173; compare *Halsbury's* at para. 128, *Feeney's* at 1.45. Whether or not such an agreement is a characteristic feature or whether the term "mutual will" can be used more broadly is not a question that has to be decided in this case. Where there is such an agreement then, prior to the death of one of the testators, the agreement is revocable, but unless revocation occurs, the death of one testator makes it binding on the survivor: *Halsbury's* at para. 258.

[26] In the case of mutual wills contained in a joint will, the existence of an agreement not to revoke may be implied by the terms of the wills themselves: *Re Johnson,* 8 D.L.R. (2d) 221, 1957 CanLII 188 (S.K.C.A.) at paras. 15–16; *Re*

Gillespie, [1969] 1 O.R. 585, 1968 CanLII 281. In the case of mutual wills contained in separate documents, extrinsic evidence is required to prove an agreement not to revoke.

[27] Equity's answer to a survivor's attempt to revoke a bequest contained in a mutual will that has become binding is the imposition of a constructive trust in favour of the originally intended beneficiary: *University of Manitoba v. Sanderson Estate* (1998), 47 B.C.L.R. (3d) 25 (C.A.) at paras. 46–59, 1998 CanLII 4328 [*Sanderson Estate*]. The trust is imposed on the survivor's estate, after the death of the first to die. It does not invalidate the survivor's new will, but prevents it from coming into full effect contrary to the terms of the agreement that accompanied the making of the mutual wills.

[28] Accordingly, joint wills and mutual wills are conceptually different. Joint wills are contained in a single document, and mutual wills need not be. Joint wills may but need not necessarily confer reciprocal benefits. A joint will is not a single will—it operates on the death of each testator as that testator's will disposing of that testator's own separate property. The revocation of a joint will by the testator who dies first is not a revocation of the joint will as it pertains to the surviving testator—it is only a revocation of the revoking testator's will: *WESA*, s.55.

[29] The conceptual distinction between joint and mutual wills was not addressed in the Court below, and as noted, the judge considered the terms "mutual will" and "joint will" to be synonymous. Importantly, he received no assistance on the effect in law of the revocation of a joint will by the testator who dies first and, as will be seen, this led to an error material to his reasoning.

Analysis

1. Should fresh evidence be admitted?

[30] As a general rule, appellate courts are limited to considering evidence in the record of the proceedings in the court below. Exceptionally, this Court is authorized to admit additional evidence, but this discretionary authority is limited and is

exercised on the basis of the *Palmer* criteria (from *Palmer v. The Queen,* [1980] 1 S.C.R. 759, 1979 CanLII 8): *Barendregt v. Grebliunas,* 2022 SCC 22 at para. 29. The *Palmer* test is purposive, fact-specific, and driven by an overarching concern for the interests of justice: *Barendregt* at para. 31. The *Palmer* criteria are:

> (i) the evidence could not, by the exercise of due diligence, have been obtained for the trial (provided that this general principle is not applied as strictly in a criminal case as in civil cases);
>
> (ii) the evidence is relevant in that it bears upon a decisive or potentially decisive issue;
>
> (iii) the evidence is credible in the sense that it is reasonably capable of belief; and
>
> (iv) the evidence is such that, if believed, it could have affected the result at trial.

[31] I would dismiss the application to adduce fresh evidence because it fails to satisfy two of the *Palmer* criteria. With the exercise of reasonable diligence, it could have been obtained and tendered in the Court below. Also, it does not offer adequate evidentiary support for the argument the appellant wishes to advance.

[32] In the Court below, the issues were defined by the appellant's notice of application and Ms. Oda's application response. They included the validity of the 1995 will, its legal effect, and whether it was revoked by the 2019 will. In part 5 of her application response, Ms. Oda contended:

> The revocation of the joint Will by Daniela Siebert revoked the entirety of the 1995 Testament and Johannes Siebert died intestate.

[33] The fresh evidence Ms. Oda proposes to adduce is a March 2024 report of a German court's ruling addressing the manner in which a joint will may be revoked under German law. Ms. Oda asks this Court to admit the report and infer from this law report that German law does not permit a joint will to be interpreted as the individual will of a person who only signed it (in this case, Mr. Siebert) but did not

write it out. Ms. Oda relies in part on articles of the German Civil Code obtained from a German government website and reproduced in her factum.

[34] With the exercise of reasonable diligence, the proposed fresh evidence could have been obtained and tendered in the Court below. The German court's ruling was available well in advance of the hearing in the Court below. The appellant was tendering evidence of German law. The character and validity of the 1995 will under German law were in issue. Reasonable diligence required Ms. Oda and her counsel to seek out and tender this evidence, if they wished to rely upon it.

[35] Moreover, the German court ruling does not offer adequate evidentiary support for the argument Ms. Oda wishes to advance, and the court cannot take judicial notice of provisions of the German Civil Code. Foreign law is proven through the testimony of a qualified expert: *Friedl v. Friedl,* 2009 BCCA 314 at para. 20. While Ms. Oda notes that there are circumstances in which a court may make its own assessment of the statutes and cases relied upon by expert witnesses (citing *Friedl* at para. 21), this does not assist her argument. This Court cannot take judicial notice of provisions of the German Civil Code turned up by counsel. The court decision is attached to the affidavit of a translator who cannot speak to the authenticity of the report she has translated.

[36] Even if the legislation and court decision were properly before us, judicial humility is called for in interpreting translated source materials from a distinctively different legal tradition. We lack sufficient understanding of the legal context to reliably draw the inference Ms. Oda would have us draw.

[37] Accordingly, the fresh evidence application fails on two of the *Palmer* criteria. It is not in the interests of justice that the fresh evidence be admitted.

2. Did the chambers judge err in his interpretation of the 1995 will?

[38] The interpretation of a will involves the application of legal principles of construction to the interpretation of a unique private instrument. This is a question of mixed fact and law and, absent an extricable question of law, we may only intervene

on a showing of error by the judge that is both palpable and overriding: *Killam v. Killam,* 2018 BCCA 64 at paras. 29–32.

[39] The essential principles of construction are pithily summarized in *Brink v. Reeves Estate,* 2025 BCCA 295 at para. 9, citing *Killam* at paras. 13 and 52 and *Smith v. Smith Estate*, 2010 BCCA 106 at paras. 18 and 28:

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").

[40] In this case, the entirety of the will is contained in a single sentence, repeated here for ease of reference:

> In case of our death, we, Daniela and Johannes Siebert, name Mr. Martin Steger and Ms. Gertrud Steger as universal heirs of our entire estate.

[41] The interpretive issue concerns the reference to "our death". Ms. Oda contends that it refers only to the event of a simultaneous death of Daniela and Johannes Siebert. The appellant contends that it refers to the death of both of them, no matter the interval between the first death and the second. The judge adopted a third interpretation. He stated:

> [75] The reference to "our death" indicates that the 1995 Will would only have force and effect if Mr. and Ms. Siebert died simultaneously or if the first to die died without revoking his or her participation in the joint bequest.

[42] In my view, there is ambiguity warranting consideration of the surrounding circumstances when the 1995 will was made. The following are pertinent:

a) Johannes Siebert was born in April 1956 in Germany and was a German citizen. In 1995, he turned 39.

b) Daniela Siebert was born in April 1964 and was a German citizen. In 1995, she turned 31.

c) The Sieberts were married. They had one child who had died while still an infant in 1990. Neither had children of other relationships.

d) Mr. Siebert had no siblings and his parents were dead.

e) Ms. Siebert's parents, Martin and Gertrud Steger, were living. They lived in Lenggries, Germany.

f) Ms. Siebert had a brother, also named Martin Steger.

g) The Sieberts decided to move to Canada following a vacation here in 1991 or 1992. They purchased a farm in Lister, British Columbia, in 1993 and made it their primary residence. They kept a secondary residence in Lenggries.

h) Prior to moving to Canada, the Seiberts owned a guesthouse in Germany, which they sold when they purchased the farm.

i) Before and after establishing their primary residence in British Columbia, the Sieberts maintained a close relationship with the Stegers.

j) Mr. Siebert's German passport contains stamps disclosing that he travelled to the Maldives between January 19 and February 2, 1995.

[43] A notable feature of the 1995 will is that it provides only for the disposition of "our entire estate" in the event of "our death". It does not say what is to be done if one of the makers dies before the other. The reference to "our entire estate" suggests an assumption that the property of one would be inherited by the other in the interim. This would be the case for a childless married couple in British Columbia at the time (and remains the case): *Estate Administration Act,* R.S.B.C. 1979, c. 114, s. 98(b); *WESA, s.* 20. Absent proof to the contrary, it may be assumed that the law in Germany was the same: *K.B. v. J.B.,* 2016 BCSC 1904 at para. 47.

[44] Ms. Oda submits that, having regard to the passport stamps, it appears that Mr. Siebert and Ms. Siebert made the will on the eve of a trip to the Maldives during which they might have feared dying together in an accident.

[45] Notwithstanding Ms. Oda's submission, it is implausible that Mr. Siebert and Ms. Siebert would make a will contemplating only the unlikely contingency of their simultaneous death. The judge must have thought so, because he interpreted the will as contemplating a second possibility, namely, the circumstance that the first to die would have died without revoking his or her participation in the joint bequest.

[46] With respect, the judge's interpretation is not supported by the record. The supposition that Mr. Siebert and Ms. Siebert intended to address the circumstance that the first to die would have died without revoking his or her participation in the joint bequest lacks an evidentiary foundation. The judge acknowledged that there was no evidence of an agreement between the Sieberts not to revoke. There is nothing in the text (or the surrounding circumstances, so far as they are disclosed by the evidence) to indicate that they were contemplating revocation at all. What they were contemplating was "our death". Indeed, the judge's formulation, conjoining the possibility of simultaneous death with the complicated hypothetical that one died first, not having revoked, is hard to recognize as a statement of testamentary intent bearing in mind that these were two individuals, not legally trained, who were making a will that is only a sentence long.

[47] The judge's reasoning at para. 75 of the reasons makes more sense if it is understood not as a statement about the interpretation of the words, "in case of our death", but as an assertion of a legal proposition that the disposition of "our entire estate" could only take effect in the event of simultaneous death or the circumstance where the first to die did so without having revoked the bequest. The premise is that the revocation of a joint will by one maker revokes it for both. However, that legal proposition is incorrect because a joint will is in law two wills, either of which may be revoked without any effect on the other (except in the special case where the two wills are mutual wills with an agreement not to revoke and one of them has died).

[48] Having regard to the surrounding circumstances, the interpretation that makes most sense is that proposed by the appellant. Mr. Siebert and Ms. Siebert were not worried about what would happen if one of them died before the other. They would probably have assumed that each was the other's heir. What they wanted to address was the ultimate disposition of "our entire estate" after both were dead. They were close to Ms. Siebert's parents. Mr. Siebert had no obvious heirs. There is nothing in the will or the known circumstances to suggest that they were thinking about what would happen if one or both of them should subsequently change their minds.

[49] The appellant's interpretation is supported by the principle that favours resolving an ambiguity in a will so as to avoid an intestacy: *Young v. Abercrombie,* 2008 BCSC 389 at paras. 16–20. This principle is termed the presumption against an intestacy. The presumption is engaged because interpreting the will as proposed by Ms. Oda would deprive it of legal effect in all but exceptional circumstances. The effect of the judge's interpretation is less drastic, but still gives rise to an intestacy that it is difficult to imagine Mr. Siebert would have wanted in 1995.

[50] In my view, the judge's interpretation of the 1995 will is obviously, that is, palpably, mistaken. It fails to approach the interpretive problem as a search for testamentary intent. It does not have regard to the surrounding circumstances favouring the appellant's interpretation. It fails to have regard to the presumption against an intestacy. And, it derives from a mistaken understanding of the legal nature of a joint will. In fairness to the judge, he received no meaningful assistance on the conceptual distinction between joint and mutual wills; nonetheless, the interpretive error is central to his reasoning and, as such, it is determinative, or overriding.

3. Did the chambers judge err in holding that the 1995 will was revoked by the 2019 will?

[51] The 1995 will is a joint will as defined in the jurisprudence. It is: (1) made by two or more testators, (2) contained in a single document, (3) duly executed by each testator, and (4) disposing either of their separate properties or of their joint property.

[52] With an appreciation of the true legal nature of a joint will, the judge's error is obvious. The 1995 will was, in law, two wills: one made by Ms. Siebert, and the other by Mr. Siebert. Under British Columbia law, only Mr. Siebert could cause his will to be revoked: *WESA, s.* 55. Ms. Siebert could not.

[53] The two wills contained in the joint will cannot be interpreted as mutual wills with an agreement between the makers that neither would revoke it after the first had died. In my view, this is not a tenable interpretation of the joint will. Even if there had been such an agreement, it would not have been engaged by Ms. Siebert's making a new will in 2019, while Mr. Siebert was still alive. Indeed, this appeal presents the converse of the fact pattern presented in mutual will cases like *Sanderson Estate*. It arises not because Mr. Siebert attempted to revoke the 1995 will after Ms. Siebert's death but because he did not.

[54] In short, in making the 2019 will in which Mr. Seibert did not participate, Ms. Siebert revoked her 1995 will, but she did not revoke Mr. Siebert's 1995 will. It remained in force and came into effect upon his death in 2022.

Disposition

[55] For these reasons, I would allow the appeal, set aside paragraphs 2, 3 and 4 of the order under appeal, and order that:

1. This Court pronounces for the force and validity of the last will of Johannes Karl Georg Siebert dated 18 January 1995, a copy of which will be attached to the order, in solemn form of law; and

2. A grant of administration with the will annexed be made to the appellant, if he is entitled to it.

"The Honourable Justice Gomery"

I AGREE:

"The Honourable Madam Justice DeWitt-Van Oosten"

I AGREE:

"The Honourable Justice Warren"