CITATION: *McCubbin v. McCubbin*, 2026 ONSC 2079
Court File No.: CV-23-00000078-00
DATE: April 8, 2026

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Louise McCubbin Applicant	
– and –	Corey Wall, counsel for the Applicant
Julieanne McCubbin and Nicola McCubbin Respondents	Michael W. Gunsolus, counsel for the Respondents
	HEARD: October 3, 2025

JUDGMENT ON APPLICATION

THE HONOURABLE JUSTICE SUNIL S. MATHAI

A. Introduction

[1] Colin McCubbin and the applicant, Louise McCubbin, were married in 2009 and resided together at 19 McNab Avenue, Peterborough, Ontario (the "Residence"). Colin[1] died on November

[1] Given the shared last name of the parties, I will reference the parties by their first names. I do not intend disrespect in doing so.

17, 2021. Prior to his death, Colin executed a handwritten holographic will. The will, dated January 22, 2015, is the subject of this application.

[2] In the notice of application, Louise seeks declarations with respect to the validity and interpretation of the will. The validity of the will is no longer in dispute. The parties agree that the will is valid.

[3] The primary dispute between the parties is the interpretation of the following two clauses of the will:

> MY WISHES IN THE EVENT OF MY DEATH: LOUISE MCCUBBIN (SPOUSE) SHALL ASSUME OWNERSHIP OF THE FAMILY HOME AND CONTENTS AT 19 MCNAB AVENUE.
>
> IN THE EVENT OF LOUISE'S DEATH, JULIE MCCUBBIN (DAUGHTER) AND NICOLA MCGOEY (DAUGHTER) SHALL UPON SALE OF THE AFORESAID RESIDENCE, RECEIVE EQUAL SHARES IN ANY EQUITY REMAINING AFTER ALL OUTSTANDING DEBTS ARE PAID.

[4] Louise argues that the first clause grants her full ownership of the Residence. She goes on to argue that the second clause is a gift over that only applies if she died before Colin.

[5] The respondents, Colin's daughters from a previous marriage, propose a different interpretation. The respondents argue that the clause grants Louise a life interest in the Residence with a gift over in the amount equal to the net proceeds of the sale of the Residence upon Louise's death. The respondents argue that interpreting the first clause as granting Louise a life interest is the only interpretation that can give any meaning to both clauses.

[6] For the reasons detailed below, I agree with Louise's interpretation.

B. Background

[7] What follows below is a summary of the facts that are not in dispute.

[8] Colin, his daughter Julieanne, and her then husband purchased the Residence in 1988. At that time, Colin lived at the Residence with his first wife, the respondents, and Julieanne's then husband. Colin's first wife passed away in February 2001. Nicola lived at the Residence until 1993. Julieanne lived at the Residence until 2004 or 2005.

[9] Colin and Louise met in 2007 or 2008 and were married on September 25, 2009. At least since their marriage, Louise has resided at the Residence. In August 2010, Louise's mother, Millie Walker, moved into the Residence.

[10] Colin stopped working in 2010.

[11] In February 2015, Colin had quadruple bypass surgery. Prior to his surgery, Colin prepared his will. The will includes the signature of two witnesses but was not witnessed in accordance with

the provisions applicable to formal wills.[2] Nicola's husband, Martin Lang, signed the will on March 24, 2015. Terry Morgan signed the will on February 1, 2015. A copy of the will was provided to Nicola.

[12] Prior to his death, Ms. Walker and Colin paid the property insurance on the Residence. Ms. Walker also helped with Residence-related expenses, including expenses related to the roof, windows, groceries, and other bills.

[13] Colin, Louise, and Ms. Walker lived at the Residence until Colin's death (i.e. November 17, 2021). At the time of Colin's death, there was a small mortgage on the Residence. At the time of his death, Colin was the only person named on the title.

[14] Since Colin's death, Louise has been paying the mortgage and property insurance.

[15] In August 2022, Louise's daughter and son-in-law moved into the Residence. They renovated the basement to provide a living space for Louise's daughter and son-in-law. Louise's mother passed away on December 4, 2022.

[16] Louise continues to reside at the Residence.

C. Law and Analysis

Governing Principles

[17] Courts have long held that "[t]he golden rule in interpreting wills is to give effect to the testator's intention as ascertained from the language that was used" (see *Dice v. Dice Estate*, 2012 ONCA 468, 111 O.R. (3d) 407, at para. 36; *Trezzi v. Trezzi*, 2019 ONCA 978, 150 O.R. (3d) 663, at para. 14; and *Ross v. Canada Trust Company*, 2021 ONCA 161, 458 D.L.R. (4th) 39, at para. 36).

[18] The basic approach to the construction of a will was described by the Ontario Court of Appeal in *Burke (Re)* (1960), O.R. 26 (C.A.), at p. 30:

> Each Judge must endeavour to place himself in the position of the testator at the time when the last will and testament was made. He should concentrate his thoughts on the circumstances which then existed and which might reasonably be expected to influence the testator in the disposition of his property. He must give due weight to those circumstances in so far as they bear on the intention of the testator. He should then study the whole contents of the will and, after full consideration of all the provisions and language used therein, try to find what intention was in the mind of the testator. When an opinion has been formed as to that intention, the Court should strive to give effect to it and should do so unless there is some rule or principle of law that prohibits it from doing so.

[19] Key to this approach is the content of the will; however, the court must consider the entire will, not just the provisions in dispute (*Ross*, at para. 38). In conducting this exercise, the court

[2] Holographic wills do not have to be witnessed (see s. 6 of the *Succession Law Reform Act*, R.S.O. 1990, c. S.26).

will employ the "armchair rule." The armchair rule allows the court to consider the surrounding circumstances known to the testator when he made his will (see *Burke (Re)*, at p. 30; and *Dice*, at para. 37). When applying the "armchair rule," the court sits in the place of the testator and assumes the same knowledge they had of the extent of their assets, the size and makeup of their family, and their relationship to the family members, based on the evidence presented (see *Jonas v. Jonas*, 2022 ONCA 845, 475 D.L.R. (4th) 720, at para. 13). The court employs the "armchair rule" because it is assumed that the testator used the language in the will in view of the surrounding circumstances known to him or her when the will was made (see *Ross*, at para. 39).

[20] In the past, courts only resorted to the "armchair rule" where the testator's intention could not be ascertained from the plain meaning of the will's language (see *Dice*, at para. 37). The more recent jurisprudence does not support such a limitation. In *Ross,* Brown J.A. described the evolution of the law in this area as follows, at paras. 40-41:

> In the past, courts usually have resorted to the "armchair rule" where the testator's intention cannot be ascertained from the plain meaning of the will's language: *Dice v. Dice Estate*, 2012 ONCA 468, 111 O.R. (3d) 407, at para. 37.
>
> More recently, courts are treating the "armchair rule" as an overarching framework within which a judge applies the various tools for will construction at his or her disposal. As put by the Court of Appeal of Manitoba in *Zindler*, at para. 14:
>
> > Feeney's [Canadian Law of Wills] concludes that "the most recent trend in Canadian cases seems to indicate that evidence of surrounding circumstances should be taken into account in all cases before a court reaches any final determination of the meaning of words" (at para. 10.54). This is true even if the words, themselves, do not appear to be ambiguous or unclear…

[21] Based on the above, the core principles of the proper interpretation of a will can be distilled to the following:

> (i) A will must be interpreted to give effect to the intention of the testator. No other principle is more important than this one;
>
> (ii) A court must read the entire will, as a whole. The words used in the will should be considered in light of the surrounding circumstances (also known as the "armchair rule");
>
> (iii) A court must assume that the testator intended the words in the will to have their ordinary meaning; and
>
> (iv) A court may canvas admissible extrinsic evidence to ascertain the testator's intention.
>
> (see *Barsoski Estate v. Wesley*, 2022 ONCA 399, 469 D.L.R. (4th) 165, at para. 21)

D. Application of Legal Principles

(i) Extrinsic Evidence

[22] In support of their position on the application, the respondents filed an affidavit from Nicola and her husband, Mr. Lang.

[23] Mr. Lang attests to the following:

(a) He took a trip to Florida with Colin in 2014. During the trip, Colin told Mr. Lang that the Residence would go to the respondents for their inheritance;

(b) Colin was very protective of the Residence and paid all the expenses of the Residence except for the groceries. Louise was very protective of her cottage;

(c) Colin wrote his will on January 22, 2015, while he was in the hospital awaiting his bypass surgery. Mr. Lang, Nicola, and Louise were present;

(d) As Colin was writing the will, he said he wanted Louise to continue to live in the Residence but that he wanted to leave it to the respondents. Colin was not sure about whether to leave the Residence to Louise's daughter as well. Louise told Colin that he did not need to leave anything to her daughter, as she was going to inherit the cottage; and

(e) Louise said that the Residence can go to the respondents and Colin said something to the effect that "[Louise] can stay in the house until she passes away and then it goes to the girls."

[24] In her affidavit, Nicola attests to the following:

(a) Colin paid for all expenses related to the Residence and Louise paid for groceries;

(b) On January 22, 2015, Colin wrote his will in a hospital bed in Toronto before his bypass surgery. Nicola, Colin, and Louise were present.

(c) Colin joked that he needs to sign the will in case he is going to die;

(d) Colin talked to Mr. Lang about the will he was writing;

(e) Colin gave her a copy of the will after he signed it. At that time, Colin said that "[Louise] gets to live in the house, and then you and Julie get it when she passes away";

(f) Colin and the respondents' mother repeatedly made it clear that the Residence would be left to the respondents;

(g) Family members have told Nicola that Colin wished to leave the Residence to the respondents; and

(h) The respondents enjoyed a close relationship with Colin.

[25] Louise argues that I can only consider the extrinsic evidence if there is an ambiguity in the will (applicant's factum, at paras. 22-23). I disagree.

[26] Louise's argument is based on earlier jurisprudence that limited the use of extrinsic evidence to situations where there was a genuine ambiguity in the will (see *Dice*, at para. 37; *Estate of Stanley Moore v. Moore*, 2018 ONSC 6420, at para. 10). As noted above, the law has evolved since *Dice*. Both this Court and the Court of Appeal for Ontario have held that a court may rely on admissible extrinsic evidence to ascertain the testator's intention in the absence of an ambiguity (see *Jones*, at paras. 40-41; *Bridgewater v. Stockey*, 2024 ONSC 6165, at para. 10; *Pierce v. Oswald*, 2025 ONSC 5344, at para. 22).

[27] Having determined that I am entitled to consider the extrinsic evidence, I must go on to determine what extrinsic evidence is admissible pursuant to the "armchair rule."

(ii) Direct Evidence of Colin's Intention is Not Admissible

[28] The respondents rely on direct evidence on Colin's intention. Specifically, Nicola and Mr. Lang deposed that Colin told them that the respondents would inherit the Residence. These statements are inadmissible.

[29] Colin's statements to Nicola and Mr. Lang about his intentions with respect to the Residence are not admissible. When interpreting a will, direct evidence of the intentions of the testator are generally not admissible (see *Rondel v. Robinson Estate*, 2011 ONCA 493, 106 O.R. (3d) 321, at paras. 23-27; *Gorgi v. Ihnatowych*, 2023 ONSC 1803, at para. 21; *Love v. Wheeler*, 2019 ONSC 4427, at para. 23; *Hofman v. Lougheed et al*, 2023 ONSC 3437, 87 E.T.R. (4th) 263, at para. 42; *Royston et al v. Alkerton et al*, 2016 ONSC 2986, at para. 14; Albert H. Oosterhoff *et al*., *Oosterhoof on Wills*, 9th ed. (Toronto: Carswell, 2021), at § 13.6.3; Ian Hull & Suzana Popovic-Montag, *Feeney's Canadian Law of Wills*, 4th ed. (Toronto: LexisNexis, 2023), at § 10.26).[3]

[30] Inadmissible direct evidence of a testator's intention includes: (i) handwritten notes of the deceased directly stating her intentions regarding the disposition of property; (ii) statements made by the deceased to another about his intention; and (iii) the instructions the testator gave to her solicitor and the advice she received on the legal effect of the document under interpretation (see *Estate of John Kaptyn; Kaptyn v. Kaptyn*, 2010 ONSC 4293, at paras. 36-37; *Laur v. Estate of Rosemary Eileen Ball et al*, 2025 ONSC 1366, at para. 204).

[31] The rationale for this principle of admissibility is anchored in preserving the role of the written will as the primary evidence of the testator's intention and avoiding displacing the written will with an "oral will" gleaned from the evidence of the testator's declarations of intent (see *Kaptyn*, at paras. 35-37).

[32] A second policy reason for the exclusion of direct evidence of the testator's intention is that the routine admissions of evidence of third parties about a testator's intention would create

[3] This can be contrasted with the approach taken when the court is determining whether a will is valid or what documents constitute the will. When a court is performing a "probate" function, the court's jurisdiction is inquisitorial and the court can accept direct evidence of the testator's intention (see *Elizabeth Casey Cooke Family Trust v. Dioguardi*, 2026 ONCA 85, at paras. 16-17).

uncertainty in estate litigation if disappointed beneficiaries could challenge a will based on their own beliefs as to the testator's intention (see *Love*, at para. 230).

[33] The jurisprudence reveals two exceptions to the inadmissibility of direct evidence of the testator's intentions. The first exception has been described as equivocation: where the words of the will describe two or more persons or things equally well. In that situation, a declaration of testamentary intention can be used to establish which of the persons or things was intended by the testator (see *Kaptyn*, at paras. 35-37).

[34] A second exception arises where there is an argument that there was a drafting error in the will. In that situation, a testator's instructions to the drafting solicitor can be considered to establish a drafting error where the evidence comes from the solicitor who drafted the will and made the error, and can swear directly about the testator's instruction (see *Re Estate of Blanca Esther Robinson*, 2010 ONSC 3484 ("*Robinson Estate SCJ*"); aff'd *Rondel v. Robinson Estate*, 2011 ONCA 493, 106 O.R. (3d) 321 ("*Robinson Estate OCA*")).

[35] The respondents do not rely on either exception.

[36] In light of the above, Colin's statements to Nicola and Mr. Lang about his intentions with respect to the Residence are inadmissible. For the same reason, Nicola's evidence that family members, including the respondents' mother, agreed that Colin intended to leave the Residence to the respondents is inadmissible. The family members' beliefs are also inadmissible hearsay.

[37] Even if Colin's statements to Nicola and Mr. Lang were admissible, I would have trouble accepting Mr. Lang's and Nicola's evidence on this point for two interrelated reasons.

[38] First, the evidence is completely self-serving. Both Nicola and Mr. Lang stand to gain significantly if Louise was only granted a life interest in Colin's most significant asset.

[39] Second, about four months after Colin's death, Nicola texted Louise asking whether her family could have Colin's "red car." The text message reads as follows:

> Hi [Louise] hope your [sic] doing ok. I need to ask what are your plans with Dads [sic] red car? I've been wanting to ask if our family could have it for sentimental reasons. It would never be sold just kept in the family. This is the only thing we ask for as his kids, grandkids and great grandkids. You have the [house and everything else [please] let us have it. It meant alot [sic] to him.

[40] Nicola's affidavit is unequivocal. Nicola believes that Colin always intended to leave the Residence to the respondents. Nicola's text message, on the other hand, is inconsistent with her belief that Colin always intended to bequeath the Residence to the respondents. Nicola's text message casts doubt on the sincerity of her evidence and Mr. Lang's evidence that Colin told them that the Residence would be bequeathed to the respondents.

(iii) Admissible Extrinsic Evidence

[41] Nicola and Mr. Lang's indirect evidence on the circumstances that were known to Colin at the time of the drafting of the will are admissible (see *Robinson Estate OCA*, at para. 24; *Kaptyn*, at para. 37; *Baert v. Baert*, 2024 ONSC 2747, at para. 7). This admissible evidence includes:

> (a) Colin's assets at the time of preparing the will;
>
> (b) The close relationship Colin had with his daughters;
>
> (c) That Colin prepared the will prior to having bypass surgery;
>
> (d) That Colin joked that he needs to sign this will in case he died; and
>
> (e) Louise told Colin that her daughter would inherit her cottage. This statement is not inadmissible hearsay, as it was made by Louise, a party to this application (see *MJL Enterprises Inc. v. SAL Marketing Inc.*, 2025 ONCA 120, at para. 17). If I accept that the statement was made, then the evidence is admissible as it forms the circumstances known to Colin at the time he was drafting the will. It is not direct evidence of Colin's intentions (see *Feeney's Canadian Law of Wills*, at § 10.30). I will have more to say on this issue when I evaluate the words used in the will.

[42] Louise argues that this extrinsic evidence should be given little to no weight because Nicola and Mr. Lang were impeached during cross-examination. Specifically, Louise argues that Nicola and Mr. Lang swore that Colin paid for all expenses of the Residence. Louise argues that this is inconsistent with the "evidence" that Louise and Ms. Walker contributed to expenses of the Residence prior to Colin's death.

[43] I reject this argument for three reasons.

[44] First, in cross-examination, both Nicola and Mr. Lang were asked whether they would be "surprised" if records demonstrated that Louise contributed to the expenses of the Residence. In response, both testified that they were not aware that Louise financially contributed to the household bills and expenses. For example, the following exchanges occurred during cross-examination:

> **Nicola's cross-examination**
>
> Q. So in 2012, when your -- your father's EI ran out, you wouldn't have been aware that Louise started paying for household expenses, correct?
>
> A. No.
>
> ***
>
> Q. So if -- if records showed that my client made regular contributions – financial contributions to the household bills and upkeep, that would be a surprise to you; something that you weren't aware of?

A. Yes.

Mr. Lang's cross-examination

Q. Okay. So if -- if my client paid all of the expenses related to the house when Colin's Employment Insurance ran out, that would be news to you?

A. Yes.

[45] To state the obvious, counsel's questions are not evidence. To impeach Nicola and Mr. Lang on this point, Louise was required to lead evidence establishing that she contributed to the expenses of the Residence prior to Colin's death. Louise's affidavit merely states that she paid the mortgage and property insurance *after* Colin's death. There is no evidence that establishes that Louise contributed to the expenses of the Residence at any time prior to Colin's death. In the absence of such evidence, I find that neither affiant was impeached.

[46] Second, at its highest, the above exchanges demonstrate that Nicola and Mr. Lang were unaware that Louise contributed financially to the Residence. This does not demonstrate that Nicola and Mr. Lang's affidavit evidence was untruthful. It merely means that they *may* have been mistaken. Such a mistake would be understandable as both affiants relied on statements made by Colin who may not have told them that Louise contributed to the Residence's expenses. Again, there is no evidence before me that Louise contributed to the Residence's expenses prior to Colin's death.

[47] Third, Nicola readily admitted in cross-examination that Ms. Walker contributed to the expenses of the Residence, including expenses related to the roof, window, property insurance, and various bills. Nicola accepted that these payments were made by Ms. Walker as, "her paying – not rent, but like that was her part as in helping out around there." As Nicola and Mr. Lang's affidavits were focused on Louise's contributions, I find that any inconsistency between their affidavits and their evidence on cross-examination is minor and does not undermine the credibility or reliability of their evidence.

[48] Given the above, I accept Nicola and Mr. Lang's extrinsic evidence as detailed in paragraph 40 above. That said, this evidence does not convince me that Colin used the phrase "assume ownership" when he intended to use the word "reside."

(iv) The Will

[49] The respondents argue that if the first clause is intended to grant Louise "ownership" of the Residence, then the second clause attempts to do something that is impossible – bequeath the Residence to the respondents upon Louise's death. To avoid such an interpretation, the respondents argue that the first clause should be interpreted as granting Louise a "life interest" in the Residence.

[50] In evaluating the respondents' argument, it is helpful to review the jurisprudence on the rule of repugnancy and the approach that should be taken when a will contains a possible inconsistency. As will be discussed below, a review of the history of the rule of repugnancy

demonstrates that the court will endeavour to give effect to the will as a whole and avoid, where possible, any inconsistency.

[51] In *Re Walker* (1925), 56 O.L.R. 517 (C.A.), the Court of Appeal for Ontario reversed the trial judge's decision that the will at issue granted the testator's wife a life interest in the estate. In that case, the clause at issue read as follows:

> I give and devise unto my said wife all my real and personal property saving and excepting [there follows description of certain jewellery] and also should any portion of my estate still remain in the hands of my wife at the time of her decease undisposed of by her such remainder shall be divided as follows ....

[52] In allowing the appeal, Middleton J.A. described the inconsistency in the clause as follows:

> When a testator gives property to one, intending him to have all the rights incident to ownership, and adds to this a gift over of that which remains in specie at his death or at the death of that person, he is endeavouring to do that which is impossible. His intention is plain but it cannot be given effect to. The Court has then to endeavour to give such effect to the wishes of the testator as is legally possible, by ascertaining which part of the testamentary intention predominates and by giving effect to it, rejecting the subordinate intention as being repugnant to the dominant intention.

[53] The older jurisprudence took the approach that where the will demonstrated that that the first taker was bequeathed an absolute gift, then the "gift over" was repugnant and void. This approach was followed in cases like *Re Scott* (1926), 1 D.L.R. 151 (C.A.), and by a majority of the Court (Laidlaw J.A., dissenting) in *Re Hornell* (1945), O.R. 58 (C.A.).

[54] This rule, however, has been overtaken by the principle that effect should be given so far as possible to all parts of the will. The Court of Appeal for Ontario described the evolution of the law on this point in *Re Shamas* (1967), 2 O.R. 275. In that case, the will at issue provided:

> I give all I belong to my wife. I want her to pay my debts -- raise the family. All will belong to my wife until the last one comes to the age of 21 years old. If my wife marries again she should have her share like the other children if not, she will keep the whole thing and see that every child gets his share when she dies.

[55] In finding that the will granted a life estate to the testator's wife, McKay J.A. found as follows, at paras. 12-13:

> These cases [*Re Walker, Re Scott* and *re Hornell*], together with others in other Canadian appellate Courts are discussed in an article ["Gift by Will to W: At Her Death 'What Remains' to the Children"] (1950) 28 Can. Bar Rev. 839, by Professor Gilbert D. Kennedy. Professor Kennedy points out, as did the Nova Scotia Court sitting en banc, in *Re McGarry*, 1949 CanLII 282 (NS SC), [1950] 1 D.L.R. 715, 25 M.P.R. 121 [affd 1950 CanLII 271 (NS CA), [1950] 4 D.L.R. 523 sub nom. *Montreal Trust Co. v. Tutty*, M.P.R. loc. cit.] that in *Re Walker*, the Court had applied the common law rules of repugnancy applicable to property law, to construction of the will. In the case of deeds, it is the form of the grant that

> establishes the interest conveyed. In construing wills, the entire document and the relevant surrounding circumstances are looked at to determine the interest intended to be granted, so that while one passage in a will taken by itself would appear to grant an absolute interest, other passages may indicate that this was not the testator's intention, so that the question of repugnancy does not arise.
>
> ***
>
> I am of the opinion that a reading of the will in question as a whole expresses the intention of the testator Michael Albert Shamas that his estate vest in his children in equal shares subject to a life interest therein to his widow (subject to that interest being divested on her remarriage, and that in such case she would take an equal share with the children) with the right to postpone realization of the assets of the estate, to carry on the business as she saw fit and to encroach, in her discretion, upon the capital of the estate for the support and maintenance of herself and the children, until the youngest child should reach the age of 21 years.
>
> (see also *Re Schumacher* (1971), 20 D.L.R. (3d) 487, at p. 494)

[56] The law in this area was fully canvassed by Matheson J. in *Mayhew Estate, Re* (1989), 63 D.L.R. (4th) 198. In that decision, Matheson J. explained that a review of the jurisprudence "shows a divergence of opinion as to whether the rule against repugnancy should predominate in the interpretation of a will where there has been an attempted gift over, or whether the intention of the testator should predominate" (at para. 5). After reviewing the jurisprudence, Matheson J. concluded as follows, at para. 25:

> In construing a will one must look at the entire document not just one passage which, when looked at alone, would appear to grant an absolute interest. As Mr. Justice Laidlaw stated in *Re Burke*, the court should after full consideration of the provisions and language of the will ascertain the intentions of the testator and strive to give effect to it, unless there is some principle of law that prevents it from doing so.

[57] The clause at issue in *Mayhew* reads as follows:

> I Give, Devise and Bequeath, to my wife, Katherine Mayhew and my son, Charles Mayhew all my real estate consisting of farms, stock, and all farm equipment, together with all cash, bonds, notes, mortgages, and all personal effects of every kind and nature which I may be possessed with at the time of my decease, share and share alike. At the time of my wife's decease, her share to be the property of my son, Charles.

[58] Ultimately, Matheson J. held that the only interpretation of this clause that gave effect to the testator's intention was that Ms. Mayhew had been bequeathed a life interest in the testator's property (see *Mayhew*, at paras. 26-27).

[59] A similar approach was adopted by Hollingworth J. in *Re Huffman* (1979), 25 O.R. (2d) 521. In that case, a "home-drawn will" stated as follows:

> I hereby give all my estate to my wife Julia Marie Huffman. On her death the estate is to be divided equally except my two sons Gordon and Donald are to receive twice as much as the other children.

[60] In finding that the provision created a life interest in favour of the testator's wife, Hollingworth J. found as follows:

> Applying the canons of construction, I have already cited and considering the cases which I have delineated, I conclude that in determining the testator's intention, it is clear to me that the widow received a life interest with power to encroach. Had the testator wished to make an absolute devise, he would have simply said, "I hereby give all my estate to my wife Julia Marie Huffman" and/or added the word "absolutely". But this does not end the matter. I must look at the whole will, and I must inquire whether or not there is any rule or law "which prevents effect being given to it, that is the intention of the testator".

[61] Where two clauses in a will cannot be reconciled, then the rule of repugnancy will apply. The principle of repugnancy was recognized by Zuber J.A. in *Re Paithouski* (1978), 18 O.R. (2d) 385 (C.A.), reversing (1976), 13 O.R. (2d) 359 (S.C.). In that case, Zuber J.A. held that irrespective of the wishes of a testator, if the will makes it clear that an absolute gift was given, the testator cannot take that away (see also *Baert*, at paras.13-15; *Feeney's Canadian Law of Wills*, at § 10.100). [4]

[62] Neither party argues that the two clauses are inconsistent. Both put forward interpretations that would avoid any repugnancy.

[63] Louise argues that in using the phrase "assume ownership," Colin granted her a full ownership interest in the Residence. Louise goes on to argue that the second clause is, "on the balance of probability an expression of a testamentary intent to have a gift over clause in the event of the death of the applicant rather than a life interest." Put another way, the second paragraph only operates if Louise died before Colin. I agree.

[64] Central to my finding is Colin's use of the phrase "assume ownership." In this regard, Hollingworth J.'s decision in *Re Huffman* is instructive. As noted above, Hollingworth J. found that the testator intended to leave his wife a life interest in his estate because the provision at issue *did not* solely state "I hereby give all my estate to my wife" nor did it state that the estate was

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[4] The respondents define the rule of repugnancy as "where two clauses in a will are contradictory and inconsistent, the later *prima facie* prevails." In Ontario, the two leading cases for this authority appear to be Riddell J.s' decision in *Swayzie Estate, Re* (1912), 21 O.W.R. 95 (Ont. H.C.) and Wells J.'s decision in *Re Masoud* (1958), 16 D.L.R. (2d) (Ont. H.C.). Both decisions appear to be inconsistent with the Court of Appeal's description of the rule in *Re Walker* and *Re Shamas*. As noted in *Feeney's Canadian Law of Wills*, while there is jurisprudence that supports this framing of the rule of repugnancy, it is difficult to see any justification for the rule that the latter clause should prevail. Some courts have resisted applying this rule of construction in favour of determining the dominant intent of the testator (see *Feeney's Canadian Law of Wills*, at § 10.99; *Pearson Estate v. Pearson*, 2012 BCSC 1262, at paras. 104-106; and *Re Galt, Royal Trust Co. v. Martin* (1957), 12 D.L.R. (2d) 140 (B.C.C.A)).

gifted to his wife "absolutely." Unlike the situation in *Huffman*, this case involves a clause that is clear on its face. Colin gifted Louise "ownership" of the Residence.

[65] The decision in *Mayhew* and *Re Shamas* are also distinguishable. In *Mayhew*, the clause at issue granted joint ownership between the testator's wife and child. Given the joint ownership, it was clear that the testator intended his son to eventually have all his property. In *Re Shamas*, the clause at issue made it clear that the testator's wife was to have all his belongings *until* his last child was 21 years old. This was a clear limitation on the testator's gift to this wife. In this case, there is no limitation.

[66] The respondents' argument that Colin's use of "ownership" is actually a reference to a "life interest" has two prongs: (1) that as a layperson, Colin would not have understood what the phrase "assume ownership" meant; and (2) that the second clause is inconsistent with Louise receiving "ownership" of the Residence. I reject both prongs of this argument.

[67] First, I do not accept that a layperson would not understand the difference between "assume ownership" and "reside." If Colin only intended to permit Louise to reside in the residence until her death, then the first clause would have read, "Louise McCubbin (spouse) shall reside at the family home." Ownership includes a larger bundle of rights than mere occupancy. While ownership has a technical meaning, it would not be lost on a lay person that "assum[ing] ownership" over a residence is very different from only being permitted to reside in a residence. Whether a will was drawn by a solicitor or by a layperson, a court should first read the words used in a will in their grammatical and ordinary sense (see *Muir Estate v. Muir* (1995), 7 E.T.R. (2d) 58 (Ont. C.J. Gen. Div.); *Feeney's Canadian Law of Wills*, at § 10.58-59; and *Re Forsyth* (1963), 1 O.R. 425 (C.A.)). In this case, the ordinary meaning of the phrase "assum[ing] ownership" entails much more than mere occupancy.

[68] Second, there is no inconsistency between the first and second clause that would negate the ordinary meaning of the term "ownership." I accept Louise's argument that the second clause grants the respondents an equal interest in the sale of the Residence *if* Louise died before Colin. When the two clauses are read as a whole, I find that this is the most plausible interpretation and one that accords with the plain and ordinary meaning of "ownership" in the first clause.

[69] The respondents argue that the admissible extrinsic evidence does not support Louise's interpretation of the second clause. Specifically, the respondents argue that at the time of preparing the will, Colin did not contemplate Louise dying before him. Additionally, the respondents argue that granting Louise a life interest in the Residence was consistent with Colin's discussion with Louise about Colin not leaving anything to Louise's daughter.

[70] I find that the extrinsic evidence does not support the position that Colin used the phrase "assume ownership" to mean that Louise was only permitted to reside at the Residence.

[71] While Colin prepared his will prior to his bypass surgery, this does not mean that he prepared a will without any regard to the possibility that he would survive the surgery and live longer than Louise. Similarly, Nicola's evidence that Colin joked about needing to sign the will in case he died from the surgery does not convince me that Colin prepared the will *only* on the

assumption that he would die before Louise. In drafting a will, Colin was preparing for the future and all the uncertainties that come with such forecasting. The timing of Colin's will does not convince me that Colin did not mean what he wrote – that Louise shall "assume ownership" of the Residence.

[72] Finally, I accept Mr. Lang's evidence that Louise told Colin that her daughter would inherit the cottage. I accept this evidence because Louise did not file any evidence to the contrary and because Mr. Lang was not really challenged on this evidence in cross-examination. Consistent with this discussion, Colin did not explicitly bequeath any of his assets to Louise's daughter nor did he bequeath the Residence to Louise's daughter if Louise died before Colin. This evidence does not establish that Colin only intended to grant his wife, with whom he lived in the Residence for at least 12 years, a life interest in the Residence. In arriving at this conclusion, I recognize that Louise may eventually bequeath the Residence to her daughter. This possibility, however, does nothing to displace the ordinary meaning of the phrase "assume ownership."

E. Conclusion

[73] For the above reasons, I grant a declaration that the will bequeaths Louise full legal ownership of the Residence with a gift-over clause in favour of the respondents if Louise died before Colin.

[74] I order costs in favour of the applicant of $9,000.00 (inclusive of H.S.T. and disbursements) to be paid in 60 days. I find that this amount is consistent with the complexity of the case and the reasonable expectations of the parties.

The Honourable Justice Sunil S. Mathai

Released: April 8, 2026