IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Anderson v. O'Brien,*
2025 BCSC 200

Date: 20250205
Docket: S202995
Registry: Victoria

In the Matter of the Estate of Sydney Carroll, Deceased

Between:

Annie Elizabeth Anderson,
Executrix of the Estate of Sydney Carroll

Plaintiff

And:

Patricia O'Brien, Karmen Rae Kingsley, aka Carmen Gozdan,
Judyth Carmen Fry, aka Judyth Carmen Honicke, Aiden Fry and Mark Fry

Defendants

Before: The Honourable Justice K. Wolfe

Oral Reasons for Judgment

Counsel for the Plaintiff:	J. Horton
Counsel for the Defendant, Patricia O'Brien:	J. Legh K. Tochor
Place and Date of Hearing:	Victoria, B.C. February 3, 2025
Place and Date of Judgment:	Victoria, B.C. February 5, 2025

Table of Contents

Introduction

[1] The application before the Court concerns the proper interpretation of two specific gifts in the February 8, 2006 last will and testament (the "Will") of the late Sydney Carroll (the "Deceased"). The plaintiff and applicant, Annie Anderson, is the executrix of the estate of the Deceased, and was a long-time friend of the Deceased. She filed this application in the context of an underlying action brought by the estate against the named defendants, the particulars of which are not before me.

[2] The first gift in issue concerns a trust that was to have been created to assist with the care and maintenance of the Deceased's beloved dogs. The dispute is over what the Deceased intended to happen with the trust funds in the event the dogs predeceased her. More specifically, the question is whether the Deceased intended that the funds earmarked for the care of the dogs be paid to the contingent beneficiary, Patricia O'Brien, regardless. Ms. Anderson says the creation of the trust was conditional on the dogs surviving the Deceased, and as they did not survive her, the gift lapsed and those funds simply form part of the residue of the estate. Ms. O'Brien is one of the named defendants in the action.

[3] The second gift in issue concerns an amount that was to have been provided to Karmen Rae Kingsley, also known as Carmen Gozdan ("Ms. Gozdan"), to permit Ms. Gozdan to travel to Victoria to attend and sing at the Deceased's celebration of life. Ms. Anderson says the gift was conditional on Ms. Gozdan being required to travel to Victoria to carry out the Deceased's wishes. As Ms. Gozdan had relocated to Victoria before the Deceased's death, and since there was no celebration of life due to the COVID-19 pandemic, Ms. Anderson says that gift lapsed as well. Ms. Gozdan is also one of the named defendants.

[4] Ms. O'Brien is the only defendant who was served with and responded to the notice of application. During the hearing before me, counsel for Ms. Anderson, as an officer of the Court, advised that the estate has attempted to locate the other defendants, including Ms. Gozdan, but has been unable to find them and thus unable to serve them. Ms. Horton advised the estate believes the other defendants

have left the country, and efforts to locate them by way of email or phone contacts have been unsuccessful. Ms. Horton also advised that the residual beneficiaries under the Will (who are the Deceased's nephew and niece and who are not among the named defendants) instructed Ms. Anderson to bring the present application. They are therefore fully aware of it, despite not having been formally served; they have chosen not to attend. As a result, Ms. Anderson advances her positions on behalf of the estate, rather than taking a neutral position as executrix.

[5] Ms. O'Brien, who was also a long-time friend of the Deceased, disputes the interpretation sought by Ms. Anderson in relation to the first gift. She says the language of the Will is clear that if the dogs did not survive the Deceased, the funds were still to be provided to her. Ms. O'Brien says if the Court finds the language ambiguous, the extrinsic evidence of the surrounding circumstances supports her interpretation as well. Ms. O'Brien says that evidence, which includes evidence from the solicitor who drafted the Will, demonstrates the Deceased made a deliberate change to the Will to address what would happen if the dogs predeceased her. Ms. O'Brien says further that change is not consistent with Ms. Anderson's position that the gift was conditional and lapsed. Ms. O'Brien also says her interpretation makes more logical sense, as it results in the Deceased leaving gifts of equal value to both her and Ms. Anderson.

[6] Ms. O'Brien takes no position with respect to the second gift, but raised whether the estate ought to apply for substitutional service on Ms. Gozdan. Ms. Horton advised that, given the small amount involved in relation to the second gift, and what is asserted to be clearly conditional language, the estate would not provide instructions to seek substitutional service on Ms. Gozdan. Accordingly, Ms. Horton advised that if it was not possible to address that gift as part of this application, it would be left.

[7] On the basis of Ms. Horton's submissions that the residual beneficiaries were aware of the present application and that their interests were being advanced, and given that Ms. O'Brien was prepared to proceed, I was satisfied it was appropriate to

hear the application. While it would have been preferable to provide the Court with an affidavit regarding the estate's efforts to locate the other defendants, and specifically Ms. Gozdan, in the particular circumstances of this case, I am also satisfied it is appropriate to address the second gift.

Issues

[8] The parties agree the Court's role is to determine the Deceased's testamentary intention. In relation to each gift, and given Ms. Anderson's contention that they were conditional and have lapsed or abated, the Court must ask:

a) Can the Deceased's intention be discerned from the Will itself?

b) If not, can the Deceased's intention be determined from the surrounding circumstances?

Background

[9] As noted, the Deceased executed her Will on February 8, 2006. The Deceased was divorced and had no children, but was a dog-lover and treated her dogs like her children. At the time she executed her Will, the Deceased had two poodles. The parties agree that providing for the care of the dogs was a priority for the Deceased.

[10] The Deceased made her Will with the assistance of a lawyer, John Jordan. Mr. Jordan worked with the Deceased on her Will between February 2004 and February 2006. There is no dispute that both of the Deceased's dogs predeceased her – one in 2014 or 2015 and the second in 2018. The uncontested evidence before the Court is that Ms. Gozdan relocated to Victoria in or about 2012, and was living in Victoria when the Deceased passed away. The Deceased did not contact Mr. Jordan after executing her Will to request any changes.

[11] The Deceased died on January 6, 2020. Given the timing of the Deceased's death and the COVID-19 pandemic, no celebration of life was held. A grant of probate was issued to Ms. Anderson on July 31, 2020. Ms. Anderson was the

alternate executrix under the Will, the original executrix having renounced her role. After being advised of the Deceased's death by counsel dealing with probate, Mr. Jordan made the original Will available. He subsequently provided an affidavit in June 2021 to assist with questions about the construction of the two specific gifts in issue on this application. To complete that affidavit, Mr. Jordan deposes that he reviewed his client file for the Deceased. Ms. Horton advised that the existence of Mr. Jordan's affidavit was not known until later; his affidavit was not filed until November 22, 2024, days before this notice of application was filed.

[12] As a result of alleged inconsistencies between Mr. Jordan's affidavit and his client file for the Deceased, counsel for Ms. O'Brien sought to cross-examine Mr. Jordan on his affidavit during the hearing of this application. The entire client file was in evidence before the Court as an exhibit to the Affidavit #1 of Jordin Dams, made December 20, 2024. Ms. Anderson consented to the request for cross-examination.

[13] After considering the factors identified in *Cowichan Valley (Regional District) v. Cobble Hill Holdings Ltd.*, 2015 BCSC 1995, I exercised my discretion under Supreme Court Civil Rule 22-1(4) to permit cross-examination of Mr. Jordan during the hearing. I considered the material facts at issue and my assessment that cross-examination would serve a useful purpose and would not lead to unreasonable delay or cost. I will discuss Mr. Jordan's evidence further below.

[14] Ms. Anderson provided a reply affidavit (Affidavit #1 of Chen Liu, made December 24, 2024) which attaches, as an exhibit, notes from the file of the counsel who dealt with probate. Ms. O'Brien objected to that affidavit, and Ms. Anderson withdrew her reliance on it. As a result, I have not considered that affidavit.

The Will

[15] The Will was drafted by Mr. Jordan. A series of draft versions preceded the final version. Mr. Jordan's evidence is that he met with the Deceased at her home, and would also take instructions from her over the phone, but that he would bring drafts of the Will to her house to review together and so he could obtain clarification.

Consistent with Mr. Jordan's evidence that the Deceased changed her mind multiples times, his client file contains multiple drafts with handwritten notations, as well as notes of various phone calls with revised instructions. In addition to the Will itself, Mr. Jordan assisted the Deceased to create a memorandum, also dated February 8, 2006, addressing the disposition of various personal, domestic and household use or ornamental articles. It was incorporated into the Will.

[16] Paragraph III(d) of the Will directs the trustee to pay cash legacies to various individuals, including $50,000 to Ms. Anderson (at paragraph III(d)(iii)) and $10,000 to Ms. O'Brien (at paragraph III(d)(vii)). Both of those gifts are conditional on the friends surviving the Deceased. The gifts at issue on this application are also in paragraph III(d) and the particular subsections read as follows:

> (ii) In the event either or both of my poodle dogs, Danielle and Albert survive me, to set aside and keep invested the sum of **FORTY THOUSAND DOLLARS** (**$40,000**) (hereinafter referred to as "the fund") to be used for the maintenance and benefit of my poodle dogs, Danielle and Albert during their lifetimes. I request that my friend, **PATRICIA O'BRIEN**, take the responsibility of caring for my dogs. I direct my Trustee to pay to my friend, **PATRICIA O'BRIEN** the whole or such part of the net income derived from the fund together with such part or parts of the capital of the fund as my Trustee in her absolute discretion deems advisable during the lifetimes of my said poodle dogs for those expenses incurred by **PATRICIA O'BRIEN** in the caring for my dogs. Any income not so paid or applied in any year shall be accumulated by my Trustee and added to the capital of the fund to be dealt with as part thereof;
>
> Upon the death of the survivor of my said poodle dogs, or, if they both die before me, the fund or the amount thereof then remaining shall be paid to **PATRICIA O'BRIEN** if she is alive at the date of death of the survivor of me and my poodle dogs, or, if **PATRICIA O'BRIEN** dies before the survivor of me and my poodle dogs, then the fund shall fall into and form part of the residue of my estate to be dealt with as part thereof.
>
> […]
>
> (iv) To **CARMEN GOZDAN** of Toronto, Ontario if she survives me, the sum of **FIVE THOUSAND** (**$5,000**) DOLLARS to reimburse her for the cost of air fare and accommodations in Victoria to allow her to sing at the celebration of my life. My wish is that she sing Ave Maria by Schubert;

[17] In relation to the first gift, it is the language of the second, unnumbered portion of paragraph III(d)(ii), and particularly the words "or, if they both die before me", that gives rise to the dispute between the parties. Both parties agree those

particular words were added to the final version of the Will before it was executed, and did not appear in any earlier versions.

[18] The Will provides that the residue of the estate is to be divided into two equal shares, with one such equal share to be paid to each of the Deceased's nephew and niece. There are further directions if either residual beneficiary predeceases the Deceased (paragraph III(e)). It is common ground that if either (or both) of the two gifts in issue is found to be conditional and to have lapsed or abated, the value of that gift would form part of the residue of the estate.

Analysis

The legal framework

[19] The parties generally agree on the principles that apply when a Court is asked to interpret a will. Those principles were conveniently set out by Justice Burke in *Vopicka v. Vopicka Estate*, 2017 BCSC 2197 at paras. 12-13:

> [12] While there have been somewhat different approaches utilized by the BC Court of Appeal as to when the courts can look beyond the will itself to ascertain the intention of the testator, as noted recently in *Killam v. Killam*, 2017 BCSC 175, at para. 60, the starting point for any analysis is the language of the will. The court then looks to the surrounding circumstances existing at the time the testator made the will.
>
> [13] A succinct summary of the principles to be applied in interpreting the will are set out in *Dice v. Dice Estate*, 2012 ONCA 468 [*Dice*], at paras. 36-38:
>
> > [36] The parties agree on the proper approach to the interpretation of a will. First, and foremost, the court must determine the intention of the testator when he made his will. The golden rule in interpreting wills is to give effect to the testator's intention as ascertained from the language that was used: *National Trust Co. Ltd. v. Fleury*, [1965] S.C.R. 817 at p. 829; *Brown Estate (Re)*, [1934] S.C.R. 324, at p. 330; *Singer v. Singer*, [1932] S.C.R. 44, at p. 49. Underlying this approach is an attempt to ascertain the testator's intention, having regard to the will as a whole.
> >
> > [37] Where the testator's intention cannot be ascertained from the plain meaning of the language that was used, the court may consider the surrounding circumstances known to the testator when he made his will - the so-called "armchair rule": *Re Burke*, [1960] O.R. 26 (C.A.), at p. 30; *Re Shamas*, [1967] 2 O.R. 275 (C.A.), at p.279, citing *Perrin v. Morgan*, [1943] A.C. 399 (U.K. H.L.), at pp. 420-21.

> [38] Under this rule, the court sits in the place of the testator, assumes the same knowledge the testator had of the extent of his assets, the size and makeup of his family, and his relationship to its members, so far as these things can be ascertained from the evidence presented. The purpose of this exercise is to put the court in, as close as possible to, the same position of the testator when make his last will and testament.

[20] At para. 13 of *Killam v. Killam*, 2018 BCCA 64 [*Killam BCCA*], the British Columbia Court of Appeal acknowledged that the Courts have recognized two approaches to determining a will-maker's intention:

> [13] The "four corners" approach provides that the intention of the testator is to be gleaned from the will itself, and surrounding circumstances are only to be taken into account if the testator's intention cannot be established from the will. The "armchair" approach requires the court to put itself in the position of the testator at the time the testamentary document was written and to consider the contemporaneous surrounding circumstances in order to ascertain the subjective intentions of the testator. Implicit in the "four corners" approach is recourse to the "armchair" approach if the testator's intent cannot be made out from the text of the will alone.

[21] At paras. 51-52 of *Killam BCCA,* the Court of Appeal endorsed Justice Blok's conclusion below, confirming that the "ultimate question in constructing a testamentary document is to determine the testator's intention, and… the appropriate "starting point" is the language of the will" (at para. 52). The goal is to ascertain the actual meaning the will-maker ascribed to the words used, as opposed to what the will-maker may have meant to do: *Thiemer Estate v. Schlappner*, 2012 BCSC 629 at paras. 46-48.

[22] If the Deceased's intention cannot be discerned from the language of the Will itself, such that extrinsic evidence may be needed, s. 4(2) of the *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13 [*WESA*] limits the admissibility of such evidence (see *Roberts Estate (Re)*, 2021 BCSC 1732 at para. 8):

> **Construction of instruments**
>
> 4(2) Extrinsic evidence of testamentary intent, including a statement made by the will-maker, is not admissible to assist in the construction of a testamentary instrument unless
>
> (a) a provision of the will is meaningless,
>
> (b) a provision of the testamentary instrument is ambiguous

> (i) on its face, or
>
> (ii) in light of evidence, other than evidence of the will-maker's intention, demonstrating that the language used in the testamentary instrument is ambiguous having regard to surrounding circumstances, or
>
> (c) extrinsic evidence is expressly permitted by this Act.

[23] While the Will was drafted in 2006, pursuant to s. 185 of *WESA,* s. 4 applies regardless of whether a person died before or after that section was brought into force. Accordingly, applying the above framework, I will consider each gift in turn.

The first gift

The parties' positions

[24] Ms. Anderson says the legacy created by paragraph III(d)(ii) of the Will was conditional on the dogs surviving the Deceased. Ms. Anderson says the language of the Will is clear that the intent was to create a trust fund to ensure there was money to care for the Deceased's dogs. While Ms. Anderson accepts that the Will charged Ms. O'Brien with responsibility to care for the dogs, Ms. Anderson says the text is clear that the fund was to be held separately and controlled by the trustee, who had absolute discretion to pay Ms. O'Brien out of the income and capital of the fund for "expenses incurred by [Ms. O'Brien] in the caring for [the Deceased's] dogs". Ms. Anderson says if the Deceased had intended the full $40,000 trust fund to be paid to Ms. O'Brien, it would have been a direct gift to Ms. O'Brien.

[25] Ms. Anderson acknowledges the language in the second, unnumbered portion of paragraph III(d)(ii), and particularly the words "or, if they both die before me", could be viewed as inconsistent with the interpretation she advances, thereby creating an ambiguity. She says the language of the first sentence of that provision – "In the event either or both of my poodle dogs… survive me" – makes the establishment of the trust fund as a whole contingent on the dogs being alive at the Deceased's death. Since the dogs died first, Ms. Anderson says no trust fund was created at all, and therefore there is nothing that could pass to Ms. O'Brien under this gift.

[26] In light of the potential ambiguity, Ms. Anderson says the Court should consider the extrinsic evidence of surrounding circumstances. She say that evidence supports the common theme that the Deceased's focus was on leaving money for the care of her dogs, not providing a gift to Ms. O'Brien. In particular, Ms. Anderson points to Mr. Jordan's affidavit, where he deposes (at para. 22) that, to the best of his knowledge, the Deceased did not provide instructions that would result in the sum of $40,000 being paid to a contingent beneficiary and if the dogs did not survive the Deceased, it was his "expectation that the trust funds for [the dogs] would abate and be part of the residue of the estate".

[27] On cross-examination, Mr. Jordan acknowledged that that statement in his affidavit, and his general expectation of what would happen if the dogs died first, is not consistent with the actual words of the Will which direct payment to Ms. O'Brien "if [the dogs] both die before me". However, Ms. Anderson says, unlike with other changes to the Will, there are no notes to explain or document that change. In fact, the last note in the client file was from November 1, 2005, which reflected instructions that Ms. O'Brien was to receive "any left over" money from the trust fund. Further, given the passage of almost 20 years, Ms. Anderson suggested the Court should be cautious in relying on Mr. Jordan's testimony that he would not have included the words in question other than on instructions.

[28] For her part, Ms. O'Brien says there is no need to resort to extrinsic evidence. She says the text of the Will is clear on its face about what should happen if, as here, the dogs died first. She says the deliberate choice to include the words "or, if they both die before me" in paragraph III(d)(ii) reflects an intention by the Deceased not to make the gift conditional on her dogs surviving her. Ms. O'Brien says there is no ambiguity, especially viewed in light of Mr. Jordan's testimony that there "must have been a reason" for that change, and he would not have added those words to the final version without instructions. The construction sought by Ms. Anderson would require the Court to ignore the plain words of the Will.

[29] Ms. O'Brien says her interpretation is also supported by the fact that the direction is to pay to Ms. O'Brien "the fund or the amount thereof then remaining" [emphasis added]. If the Deceased only intended Ms. O'Brien to receive any funds left over after the dogs died, then the full amount would never be available to Ms. O'Brien and the words "the fund" ought not to have been included. Ms. O'Brien says the Court "must strive to give effect to all the words in the will [and] should not assume that the testator has used additional words without some purpose": *Vopicka* at para. 30. On the basis of the text alone, Ms. O'Brien says the $40,000 gift was not conditional, did not lapse and must be paid to her.

[30] If the Court is persuaded there is ambiguity, Ms. O'Brien says the surrounding circumstances also support her interpretation. There can be no doubt the Deceased chose Ms. O'Brien to care for her dogs because she trusted her. Mr. Jordan's notes indicate the Deceased considered Ms. O'Brien to be the dogs' "godmother". Consistent with that trust, the Deceased appointed Ms. O'Brien her representative under a Representation Agreement in March 2017 and her attorney under a Power of Attorney executed in September 2017 (when Ms. Anderson, the Deceased's previous attorney, was injured in a motor vehicle accident). Ms. O'Brien says the change to ensure she would benefit from the $40,000 fund makes sense in context. Around the same time, the draft versions show the Deceased modified her instructions to reduce the original cash legacy to Ms. O'Brien from $25,000 to $10,000. When coupled with the trust fund legacy, Ms. O'Brien stood to receive approximately $50,000, on par with the cash legacy left to the Deceased's other trusted friend, Ms. Anderson.

[31] Ms. O'Brien says Mr. Jordan's testimony on cross-examination also supports her position. After being taken through his file, Mr. Jordan confirmed the change was made after he met with the Deceased on October 28, 2005, and he would have added the words in question on her instructions. Further, based on his memo to file after the Will was executed, Mr. Jordan confirmed that although the Deceased was impatient to sign the Will, he dealt "at length with paragraph III(d)(ii) concerning the trust fund for the two poodle dogs on February 8, 2006" and he was "confident" that

the Deceased understood the terms of her Will. To the extent there are inconsistencies between Mr. Jordan's earlier affidavit and his testimony before the Court, Ms. O'Brien says the affidavit was sworn for a different purpose and after having a chance to reflect on matters and his file more closely, he came to a different conclusion about the outcome of the provision in question.

[32] As a last resort, Ms. O'Brien says, if the two portions of paragraph III(d)(ii) cannot be reconciled, the last provision should prevail: *Killam v. Killam*, 2017 BCSC 175 at para. 62.

Discussion

[33] I agree with Ms. O'Brien that the construction urged by Ms. Anderson requires the Court to ignore or read out the specific words used in the Will, contrary to the guidance at para. 30 of *Vopicka*. However, while I accept that there is additional textual support for Ms. O'Brien's interpretation in the second portion of the paragraph in question, I am not persuaded that, when read as a whole, the first gift is free from ambiguity. In my view, there is at least a potential conflict between the language at the start of paragraph III(d)(ii), which suggests a trust fund is to be created "in the event either or both… dogs" survived the Deceased, and the words "or, if they both die before me" that appear further down in the same provision. The language of the Will gives rise to some tension, or lack of clarity, which makes it appropriate, and permissible under s. 4(2) of the *WESA*, to consider extrinsic evidence of the surrounding circumstances.

[34] In my view, the surrounding circumstances confirm the Deceased's intention was to make a number of deliberate changes to ensure that Ms. O'Brien would benefit from more than just the specific $10,000 cash legacy. The following circumstances are most relevant:

a) The Deceased had a history of making changes to her Will to better reflect her intentions; Mr. Jordan's evidence was consistent on this point. This included changing the contingent beneficiary of the trust fund from Ms. Anderson to Ms. O'Brien in or about August 2005.

b) The previous version of the Will, dated October 28, 2005, which did not include the words "or, if they both die before me", did not end up being signed by the Deceased as anticipated on that day. Mr. Jordan testified that was because further changes were required. His file notes of November 1, 2005 confirm the Deceased was contemplating this very provision, and intended Ms. O'Brien to receive something from the trust fund as well as the cash legacy.

c) As a result of the October 28, 2005 meeting, the Deceased provided instructions to reduce the cash legacy to Ms. O'Brien from $25,000 to $10,000. Given Ms. O'Brien's role in the Deceased's life, this change would not make sense without a corresponding increase elsewhere.

d) Mr. Jordan had an established practice of reading through any changes with the Deceased at the next meeting and confirming her instructions or seeking further clarification. Mr. Jordan's memo to file on February 10, 2006, confirms that he dealt "at length" with the relevant provision when he met with the Deceased to execute the Will on February 8, 2006.

[35] Although Mr. Jordan did not have a specific recollection of why the words "or, if they both die before me" were added to the Will and did not have specific notes of the request for that change, in the circumstances here, that does not cause me concern with respect to Mr. Jordan's evidence. The client file also does not contain notes of how the February 8, 2006 meeting to execute the Will was arranged, but clearly it was. I have no difficulty accepting Mr. Jordan's testimony that he added the words in question to the final Will, that there would have been some reason to do so, and, most importantly, that he would not have added those words unless the Deceased instructed him to do so, since his practice was and is not to add words to a will without client instructions.

[36] To the extent Mr. Jordan's affidavit makes statements that conflict with that testimony, I prefer his testimony before the Court, which was given with a full

appreciation of the dispute between the parties, and after having been carefully taken through his whole client file and asked about each of the changes in sequence. On the whole, I found Mr. Jordan to be a credible witness before the Court. He acknowledged where he could not recall specific details, which is perhaps unsurprising given the passage of time and the number of wills files with which he has been involved. When asked directly, Mr. Jordan admitted that the specific words of the Will are not consistent with his general expectation of what would happen in this type of situation, where the "beneficiaries" of the proposed trust fund (in this case, the dogs) predeceased the will-maker.

[37] Taking all of the above into account, I infer the Deceased's intention was not to create a conditional gift that would only benefit Ms. O'Brien if the dogs, or at least one of them, survived the Deceased. Instead, I find the clear language of "or, if they both die before me", when viewed in the context of the surrounding circumstances set out above, demonstrate a deliberate choice by the Deceased to create a non-conditional gift. Accordingly, despite the fact that the dogs did not survive the Deceased, I find the gift did not lapse, and Ms. O'Brien is entitled to be paid the $40,000 legacy.

The second gift

[38] As set out above, the second gift in issue, at paragraph III(d)(iv) of the Will, concerns a legacy to be provided to Ms. Gozdan to facilitate her travel to Victoria for purposes of singing at and attending the Deceased's celebration of life. In my view, the Deceased's intention with respect to this gift can be discerned solely on the basis of reading the text of the Will. As there is no ambiguity, it is unnecessary to refer to any extrinsic evidence to ascertain the Deceased's intention.

[39] The plain meaning of the words used in paragraph III(d)(iv) of the Will is that, to the extent Ms. Gozdan was required to travel to Victoria for purposes of attending and singing at the Deceased's celebration of life, she was to be provided a cash legacy of $5,000 "to reimburse her for the cost of air fare and accommodations in Victoria". The wording of the Will is precise and clear. The Deceased intended to

provide a gift for a specific purpose, namely to facilitate Ms. Gozdan's travel and attendance at the celebration of life. On its face, the gift is contingent on Ms. Gozdan being required to travel for that specific purpose. It follows that if she was not required to travel for purposes of attending and singing at the Deceased's celebration of life, the gift would lapse. There is no ambiguity in the language and no suggestion in the text that the gift is to be paid regardless of the need for travel. I find it is a conditional gift.

[40] The evidence before the Court further satisfies me that the gift lapsed. First, by the time of the Deceased's death in January 2020, the uncontested evidence is that Ms. Gozdan was already living in Victoria, and was therefore not required to travel or incur "the cost of air fare and accommodations in Victoria". Second, there was no celebration of life for the Deceased, so Ms. Gozdan's presence was not required for that purpose. Accordingly, I find the conditional gift to Ms. Gozdan in paragraph III(d)(iv) of the Will lapsed and the value of that gift forms part of the residue of the estate.

Costs

[41] Ms. Anderson sought costs in her notice of application but did not specify who was to pay those costs and did not address costs in her initial submissions. At the hearing, Ms. O'Brien submitted that costs for both Ms. Anderson and Ms. O'Brien should be payable out of the estate on a special costs basis, as the parties were led into litigation by the actions of the Deceased, namely, the wording of the Will. Despite having sought costs herself, Ms. Anderson said she was surprised by Ms. O'Brien's position. I did not permit counsel for Ms. Anderson to address matters arising from the underlying action for which there was no evidence before the Court. In my view, Ms. O'Brien's request for costs ought reasonably to have been anticipated.

[42] In *Conner Estate v. Worthing*, 2021 BCCA 231, the British Columbia Court of Appeal endorsed the Ontario Court of Appeal's modern approach to costs in estate litigation from *McDougald Estate v. Gooderham* (2005), 255 DLR (4th) 435

(Ont. C.A.). Under that approach, costs are to be awarded based on civil litigation costs rules (i.e. costs follow the event on a party and party basis) unless the court finds one or more of three public policy considerations applies. The three public policy considerations (described at para. 78 of *McDougald Estate*) were concisely summarized by Justice Tammen at para. 10 of *Chalmers v. Chalmers Alter Ego Trust*, 2018 BCSC 336:

> …
>
> 1. the importance of giving effect to valid wills that reflect the intention of competent testators;
> 2. the appropriateness of the testator, through his or her estate, bearing the costs of the litigation where the difficulties or ambiguities that gave rise to the litigation were caused, in whole or in part, by the testator; and
> 3. the public interest in resolving questions concerning the validity of wills without cost to those questioning the will's validity where there are reasonable grounds upon which to question the execution of the will or the testator's capacity in making the will.

[43] As the dispute arose from the wording of the Will itself, and it was important to resolve the dispute and give effect to the Deceased's intentions, I am satisfied that the first two public policy considerations apply here. On that basis, I award Ms. O'Brien her costs payable from the estate at Scale C. As executrix, I understand Ms. Anderson has the right to recover her Scale C costs of this application from the estate in any event (see *Milwarde-Yates v. Sipila*, 2009 BCSC 277 at para. 83), but if an order is required, I order Scale C costs payable from the estate in Ms. Anderson's favour as well.

Conclusion

[44] In summary, I dismiss the relief sought by Ms. Anderson at paras. 1-2 of her notice of application filed November 25, 2024, and instead declare as follows:

a) Paragraph III(d)(ii) of the Will is not conditional, did not lapse and provides a cash legacy to Ms. O'Brien of $40,000; and

b) Paragraph III(d)(iv) of the Will is conditional and lapsed because Ms. Gozdan was living in Victoria at the time of the Deceased's death. The value of the lapsed gift forms part of the residue of the estate.

[45] I also order the estate to pay the costs of both Ms. Anderson and Ms. O'Brien at Scale C.

"K. Wolfe, J."