CITATION: Marder v. Geller, 2025 ONSC 6611
COURT FILE NO.: CV-23-00708158-00ES
CV-25-00734133-00ES
DATE: 20251128

ONTARIO

SUPERIOR COURT OF JUSTICE

(ESTATES LIST)

BETWEEN:	)	
	)	
SHLOMO MEYER MARDER and JOSEPH JOHN O'DONOGHUE in their capacities as Estate Trustees of the Estate of Barbara Fenton Nash	)	*Archie Rabinowitz* and *Holly Cunliffe*, for the Applicants
Applicants	)	
– and –	)	
BARRY ROBERT FENTON, in his personal capacity, ANDREW GELLER, BRANDON DAVID GELLER, CORINNE GELLER COPELAND, AND WHITNEY D. GELLER	)	*Andrew Winton* and *Anne Posno*, for the Respondent, Barry Robert Fenton *Ian Hull*, *Patrick Cotter*, and *Shawnee Matinnia*, for the Respondents, Andrew Geller, Brandon David Geller, Corinne Geller Copeland, and Whitney D. Geller
Respondents	)	
	)	**HEARD:** July 25, 2025

B. DIETRICH J.

REASONS FOR JUDGMENT

Overview

[1] Barbara Ellen Nash Fenton ("Barbara"), an accomplished speech and language pathologist, died on May 16, 2017, at 64 years of age.[1]

[2] Barbara is survived by her second husband, the respondent, Barry Robert Fenton ("Barry"); her adult children from her first marriage, the respondents, Andrew Geller, Brandon David

[1] Where persons referred to in these reasons share a common surname, for clarity, I will refer to them using their first names. In doing so, I intend no disrespect.

Geller, Corinne Geller Copeland ("Corrine"), and Whitney D. Geller ("Whitney") (collectively, the "Geller Children"); and two adult stepchildren, being Barry's children.

[3] Barbara was predeceased by her father, Isadore Nash ("Isadore"), and her mother, Mirien Nash ("Mirien").

[4] In her last wills and testaments, Barbara left a legacy to the Geller Children in an amount equal to the value of all funds, investments, and any other assets that were, and were to be, inherited by her from her parents, Isadore and Mirien. In her wills, she referred to such property, collectively, as her "Inheritance". She left the residue of her estate (the "Estate") to Barry.

[5] Central to the within application for advice and direction (the "Interpretation Application")[2] is whether "Inheritance" includes the value of certain private company shares owned by Barbara at the time of her death. The private company shares were distributed to Barbara during her lifetime from a family trust established by Isadore and Mirien as part of a capital reorganization and estate freeze undertaken by them for tax purposes.

[6] The applicants on the Interpretation Application are Shlomo Meyer Marder and Joseph John O'Donoghue (the "Applicant Estate Trustees"). They are two of the three executors and trustees of the Estate. The third executor and trustee is Barry.[3]

[7] The Geller Children submit that the value of these private company shares or, alternatively, the shares themselves, are included in the "Inheritance". If necessary, in their within application (the "Rectification Application")[4], they seek an order rectifying Barbara's wills to achieve that result.

[8] Barry submits that neither the value of those shares nor the shares themselves are included in the "Inheritance". Rather, those shares, and their value, fall into and form part of the residue of the Estate.

[9] For the reasons that follow, I find that neither the value of the private company shares that Barbara received from the family trust, nor the shares themselves, form part of the Inheritance. Rather, they fall into and form part of the residue of the Secondary Estate. Accordingly, an order rectifying Barbara's last wills and testaments is not necessary or available to the Geller Children.

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[2] Court File Number CV-23-00708158-00ES, brought by two of the three executors and trustees named in Barbara's wills.

[3] Because Barry is a beneficiary of the Estate, he has recused himself as an executor and trustee of the Estate regarding any decision relating to the issues raised in the Interpretation Application.

[4] Court File Number CV-25-00734133-00ES, brought by the Geller Children.

Background Facts

[10] During their lifetime, Isadore and Mirien built a substantial portfolio of real properties in the City of Toronto.

[11] In May 1990, as part of a capital reorganization, including an estate freeze, Isadore formed two private companies, Briar Patch Holdings Inc. ("Briar Patch") and Nash Family Holdings Inc. ("Nash Family Holdings"), to hold the portfolio of real properties. Briar Patch owned and continues to own apartment buildings in the City of Toronto and some other investments. Nash Family Holdings has fewer assets.

[12] As part of the reorganization, the capital of each of Briar Patch and Nash Holdings was structured such that the then-value of each company was frozen. That frozen value was represented by fixed value voting preference shares of each respective company (collectively, the "Preference Shares"). The preference shares for each company had a redemption value equal to the fair market value of that company at the time of the estate freeze. All the Preference Shares were issued to Isadore.

[13] The common shares of Briar Patch and Nash Family Holdings then had nominal value, but they represented the future growth and appreciation in value of Briar Patch and Nash Family Holdings. Sixty common shares of each of Briar Patch and Nash Family Holdings (collectively, the "Common Shares") were issued. They were issued to Mirien's brother, Oscar Markovitz. Mr. Markovitz then transferred the Common Shares to a family trust, established on May 16, 1990 (the "Nash Family Trust").

[14] The beneficiaries of the Nash Family Trust were Isadore, Mirien, and their issue, including their three children, Barbara, Judith Gail Minster ("Judith"), and Brian Geller ("Brian"). The terms of the Nash Family Trust provided that the three children were equally entitled to the property remaining in the Nash Family Trust at the "time of division"[5]. If any such child was not alive at the time of division but left issue, such issue would benefit in the place of such child, in equal shares *per stirpes*.

[15] Neither Isadore nor Mirien ever received any of the Common Shares.

[16] Isadore died on June 10, 2008. Mirien inherited Isadore's Preference Shares.

[17] On May 3, 2011, prior to the twenty-first anniversary of the settlement of the Nash Family Trust, and six years prior to Barbara's death, the trustees of the Nash Family Trust exercised their discretion and distributed all the Common Shares held by the Nash Family Trust. They distributed the Common Shares equally among Barbara, Judith, and Brian. The trustees then wound up the Nash Family Trust.

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[5] The "time of division" was defined in the Nash Family Trust agreement and included a date, prior to January 1, 2040, as determined by a majority of the trustees in their absolute discretion by instrument in writing, which was to be delivered to each adult beneficiary of the Nash Family Trust at the time of signing.

[18] Each of Barbara, Judith, and Brian signed a Certificate of Transferee confirming receipt of 20 common shares of each of Briar Patch and Nash Family Holdings.

[19] Following receipt of their allotment of the Common Shares, Barbara, Judith, and Brian signed annual shareholders' resolutions approving the financial statements, electing directors, appointing the company's accountants, and ratifying all acts of the directors and officers of Briar Patch and Nash Family Holdings. Barbara signed an annual shareholders' resolution seven days after signing her last wills and testaments.

[20] Following the wind up of the Nash Family Trust, Barbara's counsel, Robins Appleby & Taub LLP ("Robins Appleby"), prepared a document titled "Summary of Wills drafted for Barbara Fenton", dated January 23, 2012 (the "Will Summary"). They also prepared a draft Primary Will, dated January 24, 2012 (the "Robins Appleby Draft Will").

[21] Robins Appleby subsequently asked Barry for details of Barbara's assets.

[22] Both the Will Summary and the Robins Appleby Draft Will contain a reference to an "inheritance" from Barbara's parents.[6]

[23] The Will Summary provides as follows under the heading "Legacies for your children":

> An amount equal to the value at the time of your death of all of funds, investments and other assets inherited from your parents is to be divided equally among your children, Andrew Geller, Brandon Geller, Corinne Geller and Whitney Geller, who either survive you or have surviving issue.
>
> If any of your children predeceases you, his or her share is divided equally among his or her issue pursuant to the Trust for Issue terms (see below).
>
> If he or she has no issue, the share is divided equally among your surviving children (or their issue if not alive).

[24] In May 2015, Barbara was diagnosed with pancreatic cancer.

[25] Barry's long-time lawyer, Joseph John O'Donoghue ("Mr. O'Donoghue"), was retained to prepare a will for Barbara. Mr. O'Donoghue prepared two wills for Barbara, known as the Primary Will and the Secondary Will (sometimes referred to collectively as "the Will").

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[6] The Robins Appleby Draft Will was not made an exhibit to any examination. Robins Appleby's file was not produced, and Robins Appleby was not summonsed as a witness. The legacy provision in the Robins Appleby Draft Will (as included in the factum of the Applicant Estate Trustees) reads as follows: "To set aside an amount equal to the value at the time of my death all of my funds, investments and any other assets that were inherited by me from my parents, ISADORE NASH and MIRIEN NASH (collectively my "Inheritance"), including any assets substituted therefor and traceable to my Inheritance, and my trustees shall divide such amount into as many equal shares as there shall be children of mine … who survive me …

[26] On May 27, 2015, Mr. O'Donoghue sent an email to Barry attaching a draft of the Primary Will and the Secondary Will. Mr. O'Donoghue included a note that read: "Here are Barb's wills, revised as per our most recent discussion. Only the primary will actually had the clause re her parents."

[27] On examination, Mr. O'Donoghue confirmed that the discussion referred to in the email was between Barry and himself.

[28] Mr. O'Donoghue engaged with Barbara on June 15, 2015, when he sent a note to Barry and her offering will-drafting services as a lawyer and a friend. In the note, he stated that he was not an estate lawyer. He also stated:

> At this point I am named as one of the executors in all of the draft Wills, as a friend and lawyer. I know that it expresses Barry's wishes but may not express Barb's as she may wish to have her own lawyer involved. I am prepared to act for both of you in the preparation of the documents, but would need to meet with you independently to confirm… If I represent both of you in the preparation of the documents there would be no secrets or independent instructions I could act upon.

[29] On July 30, 2015, Barbara executed each of the Primary Will and the Secondary Will.

[30] Mr. O'Donoghue testified that he did not review the Primary Will and Secondary Will with Barbara, clause by clause, and that he was not present when she signed them.

Pertinent terms of the Primary Will

[31] Clause 4 of the Primary Will defines the "Primary Estate" as follows:

> … the whole of my property of every nature and kind whatsoever … but excluding the following assets or interests with respect to which a grant of authority to my trustees by a court of competent jurisdiction is not required for the transfer, distribution or realization thereof:
>
> (a) shares in the capital stock, held by me or in trust for me, and any amounts receivable by me [other than secured amounts] from, and property held in trust for me [other than secured amounts] by, any one or more of BARBARA-BARRY HOLDINGS LIMITED, LANDSBRIDGE REALTY CORP., 1563697 ONTARIO LIMITED or any other private corporation in which I or any members of my family have a direct or indirect interest at the time of my death (hereinafter collectively referred to as the "Corporations") …

> It is my intention to exclude such assets from this my Primary Will and to deal with their disposition only pursuant to my Secondary Will.

[32] Clause 5(c) of the Primary Will, regarding the Children's Legacies, states as follows:

> (c) Legacies – Inheritance from my parents
>
> To set aside an amount equal to the value of all funds, investments and any other assets that were, and are to be, inherited by me from my parents, **ISADORE NASH** and **MIRIEN NASH**, (collectively my "**Inheritance**"); the value is to be determined as of the date of death of which of my said parents my Inheritance or part thereof is received, or to be received, by me, provided however, that if any asset is not sold or converted into cash or equivalent, but rather is retained in the form it was at the date of inheritance then the value shall be as determined by Canada Revenue Agency in the terminal income tax return of my respective parent and/or of the final tax return of his/her estate as applicable, or as accepted by the court for the purposes of probate in the estate of my applicable parent, and as of the date of his/her death, whichever of such values is highest in the event of a discrepancy. My trustees shall divide the amount of the total value of my Inheritance determined as aforesaid, into as many equal shares as there shall be children of mine, namely **ANDREW GELLER, BRANDON GELLER, CORINNE LEAH GELLER** and **WHITNEY DAWN GELLER WILKINSON**, who survive me, and I will and declare that if any aforementioned child of mine shall have predeceased me …
>
> I wish to advise my trustees that if there are insufficient assets in my Primary Estate to satisfy the legacies/bequests set out herein, a provision appears in my Secondary Will to the effect that any deficiency is to be satisfied from the residue of my Secondary Estate.
>
> (the "Legacy Clause")

[33] Clause 4(c) of the Secondary Will, regarding a deficiency in the Primary Estate, states as follows:

> Primary Will Deficiency Satisfaction
>
> To the extent that those assets of my Primary Estate, which are governed by my Primary Will, which Primary Will was executed prior to this my Secondary Will, are insufficient to fully satisfy the legacies / bequests as set out in Article 5(c) thereof, my trustees shall satisfy any such deficiencies out of the capital of the residue of my Secondary Estate, and to that extent I incorporate such provisions of

> my Primary Will into this my Secondary Will by reference, *mutatis mutandis*.[7]

[34] Barry is the sole beneficiary of the Secondary Will, subject to the direction in para. 4 of the Secondary Will that any shortfall in funds in the Primary Estate to satisfy the legacies described in the Legacy Clause are to be covered by the assets included in the Secondary Will.

[35] Mirien died on July 9, 2016.

[36] Amongst other things, Barbara inherited from her mother one-third of the Preference Shares owned by Mirien at the time of her death.

[37] Following her death in 2017, Barbara's 20 common shares of each of Briar Patch and Nash Family Holdings ("Barbara's Common Shares"), which formed part of the Secondary Estate, were transferred to Barry, as the sole beneficiary thereof.

[38] The Geller Children were unaware of the Nash Family Trust or the distribution of one-third of the Common Shares to Barbara during her lifetime. They acquired their knowledge of Barbara's assets after the within litigation was commenced.

[39] Barry did not disclose the Will to the Geller Children for nearly six years following Barbara's death.

[40] In October 2020, Barry arranged a videoconference meeting between the Geller Children, Mr. O'Donoghue, and himself. At that meeting, the Geller Children were not provided with a copy of the Primary Will or the Secondary Will. They were permitted to view three excerpted pages of the Will. Mr. O'Donoghue told them that there would be a distribution among them of approximately $2 million but nothing more. Neither Barry nor Mr. O'Donoghue made any mention of Barbara's Common Shares held by her at the time of her death.

[41] Subsequently, the Geller Children received various payments in respect of their entitlement under the Will, including cheques from Barry's real estate companies.

[42] Despite their efforts to see the Will and to better understand the Estate, it was not until October 2022 that Barry finally arranged for the Geller Children to attend at Mr. O'Donoghue's office to read the Will. They were then advised that Barry would not permit them to take any copies of the Will.

[43] Following that meeting, the Geller Children retained counsel.

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[7] This clause was rectified to correct a typographical error, in accordance with an order made by me on January 26, 2024 on consent of the parties.

[44] By letter dated January 31, 2023, Barry's counsel denied that the Geller Children had any entitlement to Barbara's Common Shares or their value under the Legacy Clause.

[45] In response to their lawyer's demand, the Geller Children received complete copies of the Will in February 2023.

[46] A dispute between the Geller Children and Barry arose regarding the interpretation of the Will and who was entitled to the value of Barbara's Common Shares. In the course of the litigation, the Geller Children learned that the executors and trustees of the Estate had transferred Barbara's Common Shares to Barry a few months prior to their October 2020 meeting with Mr. O'Donoghue.

[47] The Applicant Estate Trustees then brought the Interpretation Application.

[48] Within the Interpretation Application, the Geller Children brought a motion for an order for the production of Mr. O'Donoghue's file regarding the Will, and an order permitting them to examine Mr. O'Donoghue. I granted that motion.

[49] Subsequently, the Geller Children brought the Rectification Application seeking an order to rectify the Legacy Clause.

[50] The rectification they seek would result in a revision to the Legacy Clause to include in the definition of "Inheritance" assets received by Barbara from her parents "directly or indirectly, by way of *inter vivos* trust created for estate planning purposes and/or by way of testamentary bequest."

Issues

[51] The issues on the Interpretation Application and the Rectification Application are as follows:

(i) Does Barbara's use of the word "Inheritance" in the Will ground a claim that she intended to include i) assets acquired by her from her parents during their lifetimes through their estate planning, including the estate freeze in 1990 (namely, Barbara's Common Shares); and ii) assets distributed to her on the death of her parents through their respective estates?

(ii) If the use of the word "Inheritance" grounds such a claim, should the Will be rectified to clearly give effect to that intention?

Positions of the Parties

The Geller Children

[52] The Geller Children submit that Barbara intended to bequeath to them the substantial gifts she received from her parents. This bequest would include gifts Barbara received by way of an *inter vivos* transfer as a result of the estate freeze, and by way of testamentary gifts on their respective deaths. They submit that Barbara repeatedly and consistently

communicated this intention to them, specifically, Corrine and Whitney, as well as to her brother, Brian. They further submit that Brian's direct evidence of intent is admissible in this case.

[53] The Geller Children assert that the definition of "Primary Estate", when read together with the Legacy Clause, including therein the clause providing for valuation of the inheritance (the "Valuation Clause"), gives rise to ambiguity and equivocation regarding the words "inherited by me". They assert that this phrase is equally capable of two meanings: (i) property acquired by Barbara only as a result of a testamentary bequest; and (ii) property acquired by Barbara from her parents' estates, whether during their lifetimes or on death. Accordingly, they assert that direct extrinsic evidence of Barbara's intention is admissible.

[54] The Geller Children further assert that the evidence shows that Barbara intended the second of these two meanings. They assert that the Primary Will can and should be interpreted accordingly. Further, they assert that if an order for rectification is necessary to give effect to Barbara's intention, the order can and should be made.

The Applicant Estate Trustees

[55] The Applicant Estate Trustees submit that any possible ambiguity in the word "Inheritance" does not meet the test for equivocation and, as such, the evidence submitted by the Geller Children that addresses what Barbara intended to include in the Will is inadmissible. Further, they submit that such evidence is not probative of Barbara's instructions or testamentary intentions, which must be ascertained from the admissible surrounding circumstances.

Barry

[56] Barry submits that the plain and ordinary meaning of the word "Inheritance" evinces that Barbara did not intend for the Common Shares or the value of the Common Shares to be governed by the Primary Will. Rather, Barbara intended for Barbara's Common Shares, and their value, to form part of the residue of the Secondary Estate, of which Barry is the sole beneficiary.

[57] Barry submits that the Rectification Application fails and must be dismissed, and the executors and trustees of the Will should be directed to interpret the Will in a manner that gives effect to the plain wording of the language used by Barbara, having regard to the wording of the Will as a whole.

[58] Barry relies on the language in the Valuation Clause, which addresses the method and timing of the valuation of the inherited property, and other language in the Will in support of his position that "Inheritance" means property that came into Barbara's possession as a result of the death of one of her parents.

Law

Evidence regarding a testator's intention

[59] Indirect extrinsic evidence of the testator's intention is generally admissible: *Ross v. Canada Trust Company*, 2021 ONCA 161, 458 D.L.R. (4th) 39, at para. 38. Such evidence includes: a) the character and occupation of the testator; b) the amount, extent, and condition of his or her property; c) the number, identity, and general relationship of the testator to the immediate family and other relatives; d) the persons who comprised his or her circle of friends; and e) any natural objects of his or her grant: *Hofman v. Lougheed et al.*, 2023 ONSC 3437, 87 E.T.R. (4th) 263, at para. 42; *Estate of John Kaptyn; Kaptyn v. Kaptyn*, 2010 ONSC 4293, 102 O.R. (3d) 1, at para. 38.

[60] The surrounding circumstances are those that existed at the time of the execution of the will and which might reasonably be expected to influence the testator in the disposition of their property.

[61] Evidence of the testator's circumstances or the circumstances surrounding the formation of a will may also be admissible in cases where the will is or may be ambiguous without more information regarding the circumstances surrounding the making of the will: *Spence v. BMO Trust Company*, 2016 ONCA 196, 129 O.R. (3d) 561, at para. 92; *Rondel v. Robinson Estate*, 2011 ONCA 493, 106 O.R. (3d) 321, ("*Robinson Estate (ONCA)*"), at para. 29, leave to appeal denied, [2011] S.C.C.A. No. 536.

[62] Indirect extrinsic evidence may be used as an aid in construction when the nature and effect of that evidence is to explain what the testator has written but not what he or she intended to write: *Spence,* at para. 93.

[63] In *Kaptyn*, at para. 36, Brown J., as he then was, explained:

> The rationale for this principle of admissibility rests 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 evidence of the testator's declarations of intent. An exception exists to the inadmissibility of direct evidence of intent in the case of an equivocation where the words of the will describe two or more persons or things equally well -- declarations of testamentary intention can be used to establish which of the persons or things was intended by the testator.

[64] Direct extrinsic evidence of intention is generally inadmissible in the exercise of interpreting a will: *Hofman*, at para. 42. This type of evidence may include a) handwritten notes of the deceased stating his intentions regarding the disposition of property; b) statements made by the deceased to another about his or her intention and c) the instructions the testator gave his or her solicitor and the advice he or she received on the legal effect of the document under interpretation: *Kaptyn*, at para. 37, cited with approval in *Trezzi v. Trezzi*, 2019 ONCA 978, 150 O.R. 3(d) 663.

[65] In *Robinson Estate (ONCA)*, the Court of Appeal held that an exception to the general rule excluding direct extrinsic evidence of intent in a case of construction arises where there is an "equivocation" in the will: at para. 29. The Court of Appeal cited the principle set out in Thomas G. Feeney, *The Canadian Law of Wills*, 2nd ed. (Toronto: Butterworths, 1982), vol. 2 Construction, at p. 56:

> There is an equivocation only where the words of the will, either when read in the light of the whole will or, more usually, when construed in the light of the surrounding circumstances, apply equally well to two or more persons or things. In such a case, extrinsic evidence of the testator's actual intention may be admitted and will usually resolve the equivocation.

[66] *In Kaptyn*, at para. 36, the Court of Appeal for Ontario confirmed that such evidence may be admissible in the case of "an equivocation where the words of the will describe two or more persons or things equally well." In such a case, "declarations of testamentary intention can be used to establish which of the persons or things was intended by the testator."

[67] In *Robinson Estate (ONCA)*, at para. 24, the Court of Appeal held that in the case of a drafting error, "extrinsic evidence of the testator's circumstances and those surrounding the making of the testator's will may be considered, even if the language of the will appears clear and unambiguous on first reading." In such a case, direct extrinsic evidence in the form of the testator's instructions to the drafting solicitor can be considered to establish a drafting error.

Interpretation

Interpretation of the Will

[68] The fundamental principle that guides the interpretation of a will is that effect must be given to the testator's subjective intentions at the time the will was executed, and the testator's intention is discerned from the language used in the will, having regard to the will as a whole: *Dice v. Dice Estate*, 2012 ONCA 468, 111 O.R. (3d) 407, at para. 36; *Ross*, at para. 36; and *Trezzi*, at para. 13.

[69] When a judge interprets a will, the judge will be guided by the four principles set out in *Baroski Estate v. Wesley*, 2022 ONCA 399, 469 D.L.R. (4th) 165, at para. 21:

> (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 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 canvass extrinsic evidence to ascertain the testator's intention.

[70] To ascertain the testator's intention at the time the will was made, the court must interpret the entire will and not just the disputed provisions. In doing so, the court considers the surroundings circumstances – this is known as the "armchair rule": *Ross*, at para. 38; *Trezzi*, at para 13. The court "assumes the same knowledge the testator had at the time of making the will, in regard to the nature and extent of her assets, the makeup of her family, and her relationship to its members": *Ross*, at para. 39. The armchair rule is the overarching framework within which the court applies the various tools for will construction: *Ross*, at paras. 40-41.

Analysis

[71] The parties agreed, and obtained an order confirming that the Applicant Estate Trustees would seek the court's advice and direction on this question: *Having regard to the language contained in the Primary Will dated July 30, 2015 and the Secondary Will dated July 30, 2015 executed by the deceased, Barbara Ellen Nash Fenton, including the language set out in paragraph 5(c) of the Primary Will and paragraph 4(c) of the Secondary Will, is the value of the Common Shares (as defined in the Notice of Application) included in the bequest to the Geller Children pursuant to the Legacy Clause (as defined in the Notice of Application)?*

[72] The parties agree that indirect extrinsic evidence of a testator's intention is generally admissible where a will is or may be ambiguous without more information regarding the circumstances surrounding its making, and the evidence would aid in interpreting what the testator wrote, but not what she intended to write: *Spence*, at para. 91.

[73] In this case, the indirect extrinsic evidence includes the following: a) Barbara was an intelligent, accomplished speech and language pathologist; b) Barbara owned residential properties jointly with her second husband, Barry, to whom she had been married for approximately 20 years; c) Barbara and Barry were, together, shareholders in three private companies; d) Barbara owned Barbara's Common Shares, which she received from the Nash Family Trust established by her parents as part of an estate freeze; d) Barbara did not disclose the value of Barbara's Common Shares or her assets, generally, to Barry, Mr. O'Donoghue, or the Geller Children; and e) Barbara had four children from her first marriage, and two stepchildren from her second marriage to Barry.

[74] Also of note regarding surrounding circumstances is that Barbara had been diagnosed with pancreatic cancer prior to executing the Will. The Geller Children have not challenged the Will on any basis, including lack of testamentary capacity, undue influence, or lack of knowledge and approval of the contents of the Will.

Can an intention to include Barbara's Common Shares, or their value, as part of the "Inheritance", as used in the Will, be discerned from the language used in the Will, having regard to the Will as a whole?

[75] The Geller Children submit that Barbara's use of the words "Inheritance" and "inherited by me" in the Will give rise to equivocation because "inheritance" could apply equally to property passed down from a parent to a child prior to death and to property passed down upon the parent's death. As such, "Inheritance" and property "inherited by [Barbara]" should be interpreted to include assets that Barbara received from her parents, indirectly, as part of the estate freeze (i.e., Barbara's Common Shares) as well as assets she received from their estates following their deaths (e.g., Preference Shares).

[76] The Geller Children rely on the British Columbia Superior Court case of *Lotimer v. Johnston*, 2019 BCSC 2098, in support of their submission that property gifted by an individual during their lifetime can be considered inherited property in the hands of the recipient. In that case, Gomery J. noted that the word "inheritance" does not always connote a gift given on death.

[77] In contrast, Barry submits that the Will, read in whole, does not evince an intention to include in the definition of "Inheritance" Barbara's Common Shares or their value. He submits that "Inheritance" should be given its ordinary meaning, which is property received by a beneficiary on a person's death.

[78] In support of his submission, Barry points to the Valuation Clause, which specifically ties the valuation of the property that Barbara inherited from either parent to the death of the parent from whom she inherited the property. The Valuation Clause states that "the value is to be determined as of the death of which of my said parents my Inheritance or part thereof is received, or to be received, by me." The property is to be valued based on the value shown on that parent's terminal or estate tax return, or the value shown on the application for probate of the deceased parent's estate, whichever is higher. Accordingly, Barry submits that based on the language used in the Will, the property inherited by Barbara from her parents must only include property inherited when each parent died.

[79] Barry also points to the section of the Primary Will in which Barbara defines the "Primary Estate". In the Primary Will, Barbara specifically excludes from her Primary Estate "shares in the capital stock, held by me or in trust for me … of any one or more of BARBARA-BARRY HOLDINGS LIMITED, LANDSBRIDGE REALTY CORP., 1563697 ONTARIO LIMITED, or any other private corporation in which I or any members of my family have a direct or indirect interest at the time of my death (hereinafter collectively referred to as the 'Corporations')" (emphasis added). Based on this language, Barry submits that any shares Barbara may have owned in Briar Patch or Nash Family Holdings at the time of her death would have been excluded from the Primary Estate and would form part of the Secondary Estate.

[80] The parties did not provide the court with any cases in which appellate courts have interpreted the words "inheritance" or "inherited" in their judgments. The judiciary has, seemingly, not coalesced upon a single, legal definition of the word.

[81] While the Geller Children rely on *Lotimer* in support of their contention that the word "inheritance" has an expansive meaning that captures property transferred prior to death, I find that the *Lotimer* case can be distinguished from the case at bar.

[82] *Lotimer* involved a separation agreement between Ms. Lotimer and Mr. Johnston. In that agreement, Mr. Johnston agreed to provide Ms. Lotimer 25 per cent of any inheritance he received from his mother, May Johnston. Between the date of the separation agreement and May Johnston's death, May Johnston gave Mr. Johnston gifts totalling $330,000. Ms. Lotimer contended that she was entitled to 25 per cent of that sum. Mr. Johnston asserted that the gifts given to him during May Johnston's lifetime could not possibly constitute an "inheritance".

[83] Justice Gomery held that Ms. Lotimer was entitled to 25 per cent of the value of the gifts, for two reasons. First, Gomery J. stated, at para. 40: "I do not think that the concept of an inheritance requires that the giver has died. Such gifts are often received on death, but it would not be strange or unusual for a giver and the recipient to view a transfer in the giver's lifetime that is intended as a substitute for a gift effective on death as an 'inheritance'". He also went on to state that such gifts are commonly part of estate transfers; the will is only one of the means by which assets are conveyed from the giver to recipients on or in anticipation of death.

[84] Second, Gomery J. stated that in *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53, [2014] 2 S.C.R. 633, the Supreme Court of Canada held that the interpretation of contractual language is a question of mixed fact and law; as such, the agreement ought to be interpreted in light of the relevant circumstances. On this point, Gomery J. reasoned at para. 35 that "[the relevant sections of the separation agreement] appear from their language to be more the product of the discussions at the kitchen table than careful legal drafting."[8] Thus, in order to give effect to the parties' intentions, the word "inheritance" was interpreted to include the gifts May Johnston gave her son during her lifetime.

[85] In my view, *Lotimer* can be distinguished from the case at bar. *Lotimer* was decided in the family law context, where the concept of "early inheritance" exists. Both in *Lotimer* and in another British Columbia case, *W.R.M. v. D.K.M.*, 2020 BCSC 322, judges found that gifts made by parents during their lifetime form part of their child's inheritance when the gifts are intended as substitutes for gifts effective on death.

[86] An important distinguishing feature is that early inheritance cases are decided in the family law context and largely pertain to excluding a gift from spousal support obligations upon dissolution of marriage; they are not decided in the context of a will interpretation or rectification. While there appears to be some acceptance of the concept of "early inheritance" in the family law context, I was not provided any authority for a similar concept in estate law.

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[8] In the *Lotimer* case, the parties had negotiated their agreement between themselves and sought assistance from lawyers in drafting the written agreement.

[87] For this reason, equivocation pertaining to "inheritance" in the estate context is not obvious. The parties have brought no jurisprudence to the court's attention that shows that "inheritance" could apply equally to an *inter vivos* gift and to a testamentary gift.

[88] There is, however, the case of *In the Matter of the Estate of Mildred Dixon*, 2016 ONSC 7154. This case involved a situation in which the late Ms. Dixon made 10 *inter vivos* payments to various recipients, who were also to inherit under her will. Upon her death, her executors and trustees contended that the payments were advances on account of the inheritances included in Ms. Dixon's will. The issue was whether the *inter vivos* transfers should be considered advances on the beneficiaries' inheritances.

[89] Justice Wilton-Siegel stated that there was no basis for concluding that the *inter vivos* gifts were advances on account of future inheritances. He stated it was not unusual for parents to pay monies to their children during their lifetime to minimize taxes on death. He went on, at para. 21, to state that such payments would not need to be treated as advances "unless the intention is made clear to, and acknowledged by, the recipients." Ultimately, Wilton-Siegel J. found no evident pattern between the *inter vivos* transfers and the intended inheritances such that the transfers could be characterized as advances. Justice Wilton-Seigel stated, at para. 22, that affirmative evidence in the form of documentation would be required to evince such an intention, and in the absence of such documentation, there is no basis for treating *inter vivos* gifts as advances for the purposes of calculating distributions from the estate.

[90] Based on the reasoning in *Dixon*, a court could find an *inter vivos* transfer to be an advance on an inheritance if the testator intended it to be so, and if there is documentation to support such an intention.[9]

[91] Applying the reasoning in *Dixon*, for the Geller Children to succeed on their interpretation of "Inheritance", which would include Barbara's Common Shares, or the value of the Common Shares, they would need to show that Isadore or Mirien, or both, intended for Barbara to receive Barbara's Common Shares as an advance on her inheritance. The Geller Children have not adduced any such evidence.

[92] The Geller Children also submit that because Barbara refers in the Legacy Clause to assets that "were and are to be" inherited from her parents, she intended to include in "Inheritance" Barbara's Common Shares that had already been received by her from the Nash Family Trust when she signed the Will. In other words, these assets had already been inherited. I am not persuaded by this submission. The Will speaks from Barbara's death. It would not be unusual or atypical for her to assume, when making her Will, that at the time of her death, she would have inherited some property from a parent who predeceased her, and that her estate may have an ongoing or additional entitlement to an inheritance from her parents following her death.

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[9] While this reasoning was advanced in *Dixon*, it does not appear to have been considered by the Court of Appeal.

[93] Based on this analysis, I find that the language used by Barbara in the Will does not rise to the level of equivocation. Accordingly, direct extrinsic evidence of Barbara's intention is inadmissible.

[94] Even if I had found that there was equivocation, and that evidence of Barbara's intention was admissible, I am not persuaded that such evidence would assist the Geller Children in their claim. The admissible direct extrinsic evidence does not show that Barbara intended for Barbara's Common Shares, or the value of Barbara's Common Shares, to be included in the "Inheritance" to be distributed to the Geller Children.

[95] No party has adduced any evidence of any handwritten notes by Barbara stating her intentions regarding the disposition of her property, including Barbara's Common Shares.

[96] The Geller Children adduced oral statements allegedly made by third parties, including their grandparents, and their mother, regarding Barbara's intention to leave the shares or the value of those shares to the Geller Children. There are no documents in support of these statements. Their counsel concedes that the Geller Children do not rely on the evidence of what Barbara told them about her intention regarding property she inherited from her parents.

[97] The Geller Children admitted under cross-examination that they had no knowledge of any shares owned by Barbara in any corporation, and they did not know about the Nash Family Trust or its winding up.

[98] Barbara's brother, Brian, swore an affidavit on which he was cross-examined. He testified to his understanding of the word "Inheritance" and his view that Isadore and Mirien intended the Briar Patch shares, and the Nash Family Holdings shares to be part of the "Nash Family Estate". He testified that the bulk of the wealth of his parents' estate was in Briar Patch, and that it was "part of [the] estate that [Isadore's and Mirien's children] were going to inherit." Brian's understanding or interpretation of the word "Inheritance" does not carry weight in determining whether Barbara intended the property to be included in the definition of "Inheritance" in the Will. It is not reliable evidence.

[99] In contrast to Brian's evidence, Judith, Barbara's sister, testified that she was a successor trustee of the Nash Family Trust, and that she was involved in the operations of Briar Patch and Nash Family Holdings. She confirmed that she had no concern about transferring Barbara's Common Shares to Barry when she was asked to do so. She stated that she would have done so with the benefit of legal advice. Judith adduced no evidence to suggest that Barbara's intention was anything other than as set out in the Will. That is, that Barbara's Common Shares, and their value, were not included in the definition of "Inheritance", and thus passed to Barry under the terms of the Secondary Will.

[100] When examined, Mr. O'Donoghue made the following statements regarding the Will and the matter of the Inheritance. He stated that: a) he met with Barbara twice, at his office; b) Barbara told him that she wanted whatever she inherited from her parents to be dealt with in accordance with the Legacy Clause; c) Barbara would not tell him what her assets were; d) he asked Barbara if she knew what the word "inherited" meant, and he explained to her

that it would be something that was coming to her from the estate of her father or her mother, and she confirmed that "that is what she wanted, was coming from their estate"; e) he knew nothing about an estate freeze; f) he knew that Isadore had died before he was engaged to assist Barbara with her estate planning, but he knew nothing about Isadore's estate; g) regarding the Valuation Clause, he believed that the best way to determine the "value" of the inherited assets referred to in the Legacy Clause would be with reference to a probate filing for the estate or a final income tax return; h) he did not recall discussing the timing of the valuation with Barbara, and he did not recall getting any instructions from Barbara on the timing of the valuation; i) he did not meet with Barbara to oversee the execution of the Will; j) he did not "go over [the Will] clause by clause, sentence by sentence", but he expected that Barbara would have asked him if she had any questions; k) he had no reason to believe that Barbara did not understand the contents of the Will before she signed it; and l) his impression of Barbara was that she was a "smart lady" and "well known in her field".

[101] If this direct extrinsic evidence were admissible, I would find that it fails to demonstrate that Barbara intended to include in the definition of "Inheritance" Barbara's Common Shares. Barbara declined to disclose to Mr. O'Donoghue anything about her assets, including the Common Shares, their value, or the person(s) whom she intended to benefit through a gift of the Common Shares or their value. This lack of disclosure would not have assisted in resolving any possible equivocation regarding which assets were to have been included in the definition of "Inheritance".

[102] For the foregoing reasons, I find that the use of the word "Inheritance" in the Will cannot ground a claim that Barbara intended to include in the definition of that word assets acquired by her from her parents during their lifetimes, namely, Barbara's Common Shares.

Rectification

[103] Considering my finding that a reading of the Will as a whole, considering the surrounding circumstances, cannot support a finding that Barbara intended Barbara's Common Shares, or their value, to form part of the "Inheritance" described in the Legacy Clause, a rectification of the Will to clarify Barbara's intention is not necessary or available.

[104] Rectification is not available to the Geller Children because there has been no error or omission by the drafting lawyer, Mr. O'Donoghue, which requires rectification.

[105] The court's task in a case involving rectification is corrective, not speculative, and rectification is utilized with abundant caution: *Gorgi v. Ihnatowych*, 2023 ONSC 1803, ("*Ihnatowych (ONSC)*") at para. 43, aff'd 2024 ONCA 142. Rectification is concerned with errors in the recording of the true substance of the intention of the testator: *Ihnatowych (ONSC)*, at para. 44.

[106] The principles applicable to rectification of a will are set out in *Re Estate of Blanca Esther Robinson*, 2010 ONSC 3484 ("*Robinson (ONSC)*"). In that case, at para. 25, the Ontario Superior Court of Justice stated that rectification is primarily concerned with "preventing the defeat of the testamentary intentions due to errors or omissions by the drafter of the

will" and may be employed, "where the testator's instructions have not been carried out". At para. 24, the Court listed three circumstances in which a court will rectify a will where there is no ambiguity on the face of the will, and the testator has reviewed and approved the wording:

> (i) Where there is an accidental slip or omission because of a typographical error;
>
> (ii) Where the testator's instructions have been misunderstood; or
>
> (iii) Where the testator's instructions have not been carried out.

[107] In *Lipson v. Lipson*, 2009 CanLII 66904, (Ont. S.C.), at para. 42, Pattillo J. stated that before a court can delete or insert words to correct an error in a will, the court must be satisfied that:

> (i) Upon a reading of the will as a whole, it is clear on its face that a mistake has occurred in the drafting of the will;
>
> (ii) The mistake does not accurately or completely express the testator's intentions as determined from the will as a whole;
>
> (iii) The testator's intention must be revealed so strongly from the words of the will that no other contrary intention can be supposed; and
>
> (iv) The proposed correction of the mistake, by the deletion of words, addition of words or both must give effect to the testator's intention, as determined from a reading of the will as a whole and in light of the surrounding circumstances.

[108] In cases involving rectification, direct extrinsic evidence may be admitted to establish an error in a will when the evidence comes from the solicitor who drafted the will and made the error that requires rectification, and the solicitor can testify to the testator's instructions. Evidence of the circumstances surrounding the making of a will may be considered even if the words in the will appear to be clear on first reading.

Analysis

[109] In their Rectification Application, the Geller Children seek to rectify the Will such that paragraph 5(c) of the Primary Will would be rewritten to include Barbara's Common Shares, which were distributed to her from the Nash Family Trust. Barbara's Estate Trustees would be directed as follows:

> to set aside all funds, investments and any other assets that were, and are to be, inherited by me from my parents, ISADORE NASH and MIRIEN NASH, directly or indirectly, by way of inter vivos trust created for estate planning purposes and/or by way of testamentary bequest (collectively my "Inheritance") … My trustees shall divide my Inheritance determined as aforesaid, into as many equal shares as there shall be children of mine, namely ANDREW GELLER, BRANDON GELLER, CORINNE LEAH

> GELLER and WHITNEY DAWN GELLER WILKINSON, who survive me, and I will and declare that if any aforementioned child of mine shall have predeceased me …. [Emphasis added.]

[110] As part of the rectification, the Geller Children also seek to have the Valuation Clause removed in its entirety on the basis that all of Barbara's Common Shares (and not just their value) would be included in the "Inheritance".

[111] The Geller Children further seek to rectify the Will such that the definition of "Primary Estate" would not exclude any shares, funds, or other asset that form part of the rectified Legacy Clause at paragraph 5(c).

[112] The Geller Children submit that rectification is appropriate in this case. They rely on the principles set out in *Robinson Estate*. That is, a court will rectify a will where there is no ambiguity on the face of the will, the testator has reviewed and approved the wording, and a) where there is an accidental slip or omission because of a typographical error; b) where the testator's instructions have been misunderstood; or c) where the testator's instructions have not been carried out. The Geller Children submit that either b) or c) would apply in this case.

[113] They submit that Barbara's instructions were not carried out or they were misunderstood because it was Mr. O'Donoghue who, of his own initiative, drafted and included the Valuation Clause. They note that the Valuation Clause was not included in the Robins Appleby Draft Will or their Will Summary. Further, based on the Will Summary, the value of the assets forming part of the Inheritance was to be calculated in relation to Barbara's death and not the death of one or both of her parents. The Geller Children submit that Mr. O'Donoghue testified that it was likely his choice to tie the date of death of Barbara's parent to the date of valuation and that he did not recall discussing the matter with Barbara. Accordingly, they submit that Barbara's instructions and intention in this regard were misunderstood or not carried out.

[114] The difficulty with this argument is that there is no evidence to show that Barbara did not approve the Valuation Clause, or that she asked Mr. O'Donoghue to remove the Valuation Clause and that he failed to do so. There is also no evidence to suggest that Barbara preferred the valuation method suggested by Robins Appleby. There is no evidence to show that Barbara approved the Robins Appleby Draft Will, or that she ever reviewed it.

[115] Where the court is considering whether a will should be rectified, the court has admitted evidence concerning the preparation of the will, the execution of the will by the testator, and the instructions to the drafting lawyer: *Ihnatowych Estate v. Ihnatowych*, 2024 ONCA 142, at paras. 36-37.

[116] Mr. O'Donoghue does not admit that the Valuation Clause was inserted in error. His evidence is that in adding the Valuation Clause, he was trying to avoid a dispute about the value of the legacies payable to the Geller Children. He testified that he was concerned about a potential argument over what the value of the "Inheritance" might be in the future,

and that it seemed to him that the best way to address that matter was to have the value determined as of the date mentioned in the Legacy Clause.

[117] In *Robinson Estate (ONSC)*, at para. 27, the Court held that when the mistake is that of the draftsperson who inserted words that do not conform with the instructions received, then provided it can be demonstrated that the testator did not approve those words, the court will receive evidence of the instructions (and the mistake), and the offending words may be struck out. In this case, the striking of the Valuation Clause would only be appropriate if it was found that the word "Inheritance" was not in accordance with Barbara's instructions. If Barbara did not approve the use of the term "Inheritance" in the Will, it would follow that the formula for calculating the value of the "Inheritance", as inserted at the initiative of the drafting solicitor, should be deleted.

[118] However, Mr. O'Donoghue could not recall having received any instructions from Barbara on the Valuation Clause or a valuation date. He did not recall whether he would have discussed the valuation specifics with Barbara at all, and he testified that it was probably his choice as to the valuation date.

[119] Therefore, it cannot be said that Mr. O'Donoghue misunderstood Barbara's instructions or failed to carry them out. Rather, Barbara gave him no instructions on this point. Barbara did, however, have an opportunity to review a draft of the Will before signing it. There is no evidence that Barbara had any questions about the draft or that she asked Mr. O'Donoghue to make any changes to it or to remove the Valuation Clause.

[120] There is also no evidence that the Valuation Clause contradicted Barbara's instructions. It is consistent with the wording of the Will as a whole.

[121] Further, there is no evidence that Barbara had one or more earlier wills. Mr. O'Donoghue acknowledged that he referred to the Robins Appleby Draft Will when preparing the Will for Barbara. However, there is no evidence to show whether Barbara ever reviewed and approved the Robins Appleby Draft Will. Based on the evidentiary record, the Robins Appleby Draft Will was given to Barry, and Robins Appleby had been conferring with Barry in preparing it.

[122] Mr. O'Donoghue testified that if Barbara had intended to include Barbara's Common Shares in the Legacy Clause, he would not have drafted the valuation language as he did because the valuation mechanism would not have worked.

[123] Regarding the execution of the Will, Mr. O'Donoghue admits that he was not present when Barbara signed the Will, and that he did not review it with her clause by clause. He testified that he found her to be an intelligent and accomplished woman, and he believed that if she had questions about the Will, she would have put them to him. He stated that he had no reason to believe that Barbara did not understand the contents of the Will before she signed it.

[124] Unfortunately for the Geller Children, there is no evidence to suggest that the existing language in the Will was not in accordance with Barbara's intention. There is no evidence a) that Barbara did not know what assets she had or that she was confused about her assets;

b) of the value or composition of Mirien's estate, which would be bequeathed to the Geller Children, through the Will, if Mirien predeceased Barbara; or c) of the value of Barbara's assets, including her one-third share of the Common Shares. Mr. O'Donoghue testified that he had no knowledge of the shares in private companies that Barbara owned personally as compared to the shares she owned in companies jointly with Barry.

[125] Because there is no evidence of a drafting error in the Will, direct extrinsic evidence in the form of the testator's instructions to the drafting solicitor cannot be considered.

[126] The case at bar is not dissimilar to the *Robinson Estate* case. In *Robinson Estate*, the court found no rectifiable error, but it admitted evidence that addressed facts and circumstances surrounding the making of the will. However, the court did not admit evidence that purported to directly address what the testator intended to include in her will but did not.

[127] In *Robinson Estate*, the lawyer prepared a new Canadian Will for the testator, who wished to revoke her existing Canadian Will. The lawyer included a revocation clause in the new Canadian Will. The effect of the revocation clause was that it revoked the testator's Spanish Will, of which the drafting solicitor was unaware. The testator reviewed and approved the revocation language without thinking that the revocation language would also revoke the Spanish Will.

[128] In *Robinson Estate*, the applicants argued before a judge of this court that to determine whether a testator knew and approved the contents of her will, the court must inquire as to whether the words in the will reflect her intention, and that if the testator was mistaken as to the legal effect of a clause, she did not approve the will. However, the Court made clear that this is precisely what a court cannot do, under the current law: *Robinson Estate (ONSC)*, at paras. 29-30, 40. Quoting Hull and Hull (ed.) *Macdonell, Sheard and Hull on Probate Practice* (1996, 4th ed.) at p. 48, the application judge stated at para. 40:

> The real question is: Are the words of the will the testator's words? If the words are not the testator's words but were drafted or inserted in error by the solicitor, rectification may be available. However, if no errors were made by the solicitor and the words in the will were reviewed and approved by the testator, rectification will not be available simply because the testator was mistaken about their legal effect.

[129] The application judge refused to grant rectification because there was no drafting error on the part of the drafting solicitor. On the contrary, the judge found that the will was drafted pursuant to the instructions received, the will was reviewed "clause by clause" by the testator, and it was signed by her. The Court noted, "if a mistake was made, it was made by the testator": *Robinson Estate (ONSC)*, at para. 29.

[130] On appeal, the Court of Appeal noted that before drafting the will, the drafting solicitor did not ask the testator about her previous will, did not review her assets and their location, and did not canvass with her the people she might consider including in the will: *Robinson Estate (ONCA)*, at para. 31. Nor did the testator offer any of this information to the drafting solicitor. The Court of Appeal held that, taken together, this evidence might give rise to

speculation that the testator did not turn her mind to the effect that the new Canadian Will would have on the Spanish Will and the European assets. However, when considered in light of all the surrounding circumstances, the Court of Appeal held that there was not the slightest equivocation in the testator's new Canadian Will. The words of the new Canadian Will were clear. The Court of Appeal agreed with the application judge that this was not a case about a typographical error, a solicitor's misunderstanding of the testator's instructions, or a solicitor's failure to implement the testator's instructions. Rather, the solicitor drafted the testator's will in accordance with her instructions to deal with the "entire residue of my estate", and she reviewed and approved the language in the will before executing it: *Robinson Estate (ONCA)*, at para. 31.

[131] The Court of Appeal also held that the admissible evidence of the surrounding circumstances could not support the inference that the testator did not intend to revoke the Spanish Will: *Robinson Estate (ONCA)*, at para. 32. Similarly, I find that the admissible evidence of the surrounding circumstances in the case at bar cannot support the inference that the testator intended to include in the definition of "Inheritance" and in the reference to "property inherited by me from my parents" Barbara's Common Shares distributed to her from the Nash Family Trust during her parents' lifetimes. This is not a case about a typographical error, a solicitor's misunderstanding of the testator's instructions, or a solicitor's failure to implement the testator's instructions. Rather, Mr. O'Donoghue drafted the testator's will in accordance with Barbara's instructions to create a legacy for her children equal to the value of the property she had inherited or would inherit from her parents' estates.

[132] Unlike in the *Robinson Estate* case, the drafting lawyer for Barbara, Mr. O'Donoghue, did not review the Will clause by clause with her. He testified that he expected her to ask him questions about the Will if she had any. In *Vout v. Hay*, [1995] 2 S.C.R. 876, at para. 26, the Supreme Court of Canada held that "upon proof that the will was duly executed with the requisite formalities, after having been read over to or by a testator who appeared to understand it, it will generally be presumed that the testator knew and approved the contents and had the necessary testamentary capacity." There is no evidence before this court to suggest that Barbara did not read the Will or appreciate the contents prior to signing it. On a balance of probabilities, I am satisfied that Barbara did read the Will, and she appreciated its contents.

[133] As in the *Robinson Estate* case, one might well wonder whether testator in this case, Barbara, did not turn her mind to the effect of the definition of "Inheritance", and the fact that considerable Nash family assets, which had been distributed to Barbara from the Nash Family Trust, could pass to persons other than descendants of Isadore and Mirien. If she did not, then, unfortunately for the Geller Children, this was Barbara's mistake and not a mistake that the court can rectify.

Disposition

[134] Regarding the Interpretation Application, an Order shall issue directing the Estate Trustees of the Estate to interpret the Will such that the "Inheritance" to be paid to the Geller

Children pursuant to paragraph 5(c), being the Legacy Clause in Barbara's Primary Will, does not include Barabara's Common Shares or the value of Barbara's Common Shares.

[135] Regarding the Rectification Application, an Order shall issue dismissing it.

Costs

[136] Any party seeking costs regarding the Interpretation Application, or the Rectification Application may make written submissions by December 12, 2025. Responding written submissions may be made by December 19, 2025, with reply submissions, if any, by December 30, 2025. Written submissions (other than reply submissions) shall not exceed three pages, double spaced, excluding costs outlines, bills of costs, and offers to settle, if any. Reply submissions shall not exceed two pages, double spaced. Costs submissions may be sent to my judicial assistant, Kristina Archer, at kristina.archer@ontario.ca.

Dietrich J.

B. Dietrich J.

Released: November 28, 2025

CITATION: Marder v. Geller, 2025 ONSC 6611
COURT FILE NO.: CV-23-00708158-00ES
CV-25-00734133-00ES
DATE: 20251128

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

SHLOMO MEYER MARDER and JOSEPH JOHN O'DONOGHUE in their capacities as Estate Trustees of the Estate of Barbara Fenton Nash

Applicants

– and –

BARRY ROBERT FENTON, in his personal capacity, ANDREW GELLER, BRANDON DAVID GELLER, CORINNE GELLER COPELAND, AND WHITNEY D. GELLER

Respondents

REASONS FOR JUDGMENT

B. Dietrich J.

Released: November 28, 2025