NOVA SCOTIA COURT OF APPEAL
Citation: *Devlin Estate (Re)*, 2022 NSCA 33

Date: 20220428
Docket: CA 506865
Registry: Halifax

Between:

Catherine Ruth Summerfield

Appellant

v.

Hazel Rigby, The Arthritis Society and the Canadian Cancer Society

Respondents

Judge:	The Honourable Justice Carole A. Beaton
Appeal Heard:	March 14, 2022, in Halifax, Nova Scotia
Cases Considered:	*Devlin Estate (Re)*, 2021 NSSC 151; *Leonard v. Zychowicz*, 2022 ONCA 212; *Tardiff v. Mongrain*, 2007 MBCA 54; *Wittenberg v. Wittenberg Estate*, 2015 NSCA 79; *Vout v. Hay*, [1995] 2 S.C.R. 876; *Devlin Estate (Re)*, 2020 NSSC 77; *Re Weidenberger (Estate)*, 2002 ABQB 861; *Whitford v. Baird*, 2015 NSCA 98; *Yeas v. Yeas*, 2017 ONSC 7402
Subject:	Appeal; Costs; Holograph will; Testamentary capacity; Testamentary capacity—suspicious circumstances; Wills; Wills—proof in solemn form; Wills—testamentary capacity
Summary:	Mr. Devlin made a will in 2016. In 2018 he sent Ms. Summerfield a one-page handwritten document identified as his will, which named her as residual beneficiary. Ms. Summerfield applied to the court to be granted proof in solemn form of the 2018 document, and to be granted probate of that will as Administrator of the Estate.

The judge was persuaded the document constituted a holographic will. She was not persuaded Mr. Devlin possessed the requisite testamentary capacity when he prepared it, owing to the state of his mental and physical health at that time. Ms. Summerfield's application was dismissed. She appealed that decision.

Issues: Did the application judge err in:

(1) identifying the principles relating to proof in solemn form of a will, and, in particular, testamentary capacity?
(2) applying the principles of testamentary capacity to conclude the existence of suspicious circumstances?

Result: The judge correctly identified and applied the principles relating to proof in solemn form of the holograph will, and testamentary capacity. The presumption of testamentary capacity which operated in Ms. Summerfield's favour was displaced by the judge's conclusions as to the presence of suspicious circumstances. The burden then returned to Ms. Summerfield to establish testamentary capacity on a balance of probabilities. On the evidence before her, the judge was not persuaded Ms. Summerfield had met her burden. The judge committed no errors in applying the principles of testamentary capacity. The conclusions the judge reached were available to her on the evidence.

Appeal dismissed, with $1,000 costs payable by the appellant to the respondent Hazel Rigby.

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Respondents

Judges:	Bourgeois, Fichaud and Beaton JJ.A.
Appeal Heard:	March 14, 2022, in Halifax, Nova Scotia
Held:	Appeal dismissed, with costs, per reasons for judgment of Beaton J.A.; Bourgeois and Fichaud JJ.A. concurring
Counsel:	Andrew Christofi, for the appellant Hazel Rigby, respondent in person Chelsea Barkhouse (for Richard Norman), watching brief for respondents Canadian Cancer Society and the Arthritis Society Melissa MacKay, for Nova Scotia Office of the Public Trustee

Reasons for judgment:

[1] In *Devlin Estate (Re)*, 2021 NSSC 151 the Honourable Justice Diane Rowe of the Supreme Court of Nova Scotia ("the judge") described the late Michael Devlin as:

> [1] […] an accomplished man, with caring friends and family in England and Canada. He had settled in Nova Scotia's South Shore upon immigrating to Canada from England, and became an active community member. He was retired at the time of his death, and well established financially. In Lunenburg County, he was known as a colourful "character", who could be generous and kind.
>
> [2] He was also a man who struggled throughout his life with significant mental illness. This was managed with medication, but unfortunately from time to time he would decompensate. Then he would alternate into periods of suspicion, paranoia, and physical neglect. He would rail against his neighbours, friends, and others in the community and many local businesses.

[2] The appellant Ms. Summerfield appeals from the judge's decision ("the decision") dismissing her application to be granted proof in solemn form of a holograph will Mr. Devlin prepared in October 2018 approximately seven months before his death.

[3] For the reasons that follow, I would dismiss the appeal.

[4] By way of background, Ms. Summerfield and Mr. Devlin became friends in 2016. They met when Ms. Summerfield opened a café Mr. Devlin liked to frequent. In that same year Mr. Devlin, with the assistance of a lawyer, prepared and executed a will before witnesses. The judge described its contents:

> [8] The Will provided for testamentary gifts to a number of individuals, including 5000 pounds sterling to Ms. Rigby, several registered charities, and St. Barnabas Anglican Church. It was quite specific in regard to his interment and funeral, which was to be held formally with a Church service. The Will provided specific bequests to the O'Dowd family, a local family who he trusted.

[5] In 2018 Ms. Summerfield departed Nova Scotia to reside in British Columbia. After that, Mr. Devlin corresponded with her, sending what the judge described as "love poems and entreaties for her return to live with him".

[6] In October 2018 Mr. Devlin mailed to Ms. Summerfield a handwritten, signed document dated October 4, entitled "Last Will and Testament of Michael John Devlin dob 30/3/1944". In it, Mr. Devlin structured his affairs differently

than in his 2016 will, this time bequeathing money to three charities and a cousin in England, and omitting any funeral instructions. He provided for his residual estate to go to Ms. Summerfield. That document formed the basis of the judge's decision, now challenged by Ms. Summerfield.

[7] Ms. Summerfield put a copy of the document before the judge in support of her application. Although not the subject of this appeal, the evidence before the judge was that the original document had been lost or misplaced prior to filing the application. The judge was prepared to rely on independent evidence that a true copy of the document was before her.

[8] Ms. Summerfield asked the court to grant proof in solemn form of the will as a holographic instrument, and she sought probate of the will as Administrator of Mr. Devlin's estate. The respondent Ms. Rigby objected to the application, challenging the validity of the holograph will. In support of her position she provided evidence from friends and relatives of Mr. Devlin.

[9] The judge was persuaded the document, not witnessed, was in Mr. Devlin's handwriting and constituted a holograph will on its face. However, she found Mr. Devlin's situation at the time he made the holograph will gave rise to suspicious circumstances. Ms. Summerfield's application was dismissed when she could not persuade the court, in view of those suspicious circumstances, that Mr. Devlin was possessed of the requisite testamentary capacity at the time he authored it.

[10] Before this Court, Ms. Summerfield itemizes numerous grounds of appeal, which encompass assertions the judge erred by:

i. not properly applying the test for testamentary capacity to the facts of the case;

ii. wrongly finding Mr. Devlin lacked testamentary capacity;

iii. failing to make findings on two branches of the test for testamentary capacity: Mr. Devlin's understanding of the nature and extent of his property, and of his moral obligations; and

iv. wrongly finding suspicious circumstances.

In oral argument, Ms. Summerfield emphasized the latter two of those concerns.

[11] I take the liberty of distilling the matters raised by Ms. Summerfield, to address whether the judge erred:

i. in identifying the legal principles relating to proof in solemn form and, in particular, testamentary capacity?

ii. in applying the principles of testamentary capacity to conclude the existence of suspicious circumstances?

[12] The applicable standard of review was recently described in *Leonard v. Zychowicz*, 2022 ONCA 212:

> [13] The determination of testamentary capacity involves the application of a legal standard – the test in *Banks v. Goodfellow* – to a set of facts. The question, therefore, is one of mixed fact and law. If the application judge has applied the correct standard, has considered the requisite elements of that standard and has made no error in principle, either in the application of the standard or otherwise, the decision will only be set aside if the judge has made a palpable and overriding error in the assessment of the evidence: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 26, 36; see also *Wilton v. Koestlmaier*, 2019 BCCA 262, 48 E.T.R. (4th) 12, at paras. 22-23.
>
> [14] On the other hand, where the application judge has made an error in principle, for example, by failing to consider the requisite elements of the legal test or standard, or has erred in the application of that test or standard, the court is entitled to intervene. For a recent example of such intervention, see this court's decision in *McGrath v. Joy*, 2022 ONCA 119.

See also *Tardiff v. Mongrain*, 2007 MBCA 54 at para. 12; *Wittenberg v. Wittenberg Estate*, 2015 NSCA 79 at para. 10.

Identification of legal principles

[13] The judge was required to identify and apply correct legal principles. I am not persuaded she erred in her identification or application of those principles. She began her analysis with a recognition Ms. Summerfield was required to prove the handwritten document was "a valid holograph will", in order to be granted proof in solemn form. The judge referenced the long-standing direction in *Vout v. Hay*, [1995] 2 S.C.R. 876 set out in *Devlin Estate (Re)*, 2020 NSSC 77 (an earlier decision on a motion for security for costs made by Ms. Summerfield):

> [53] The proponent of the will has to prove, on a balance of probabilities, that the formalities for execution were complied with (para. 19). In the case of an alleged holographic will, the requirement is for proof that the writing embodies "the testamentary intentions of the deceased": s. 8A(a) of the *Wills Act*, R.S.N.S. 1984, c. 505 as amended by S.N.S. 2006, c. 49.

> [54] The proponent also has to prove "that the testator knew and approved of the contents of the will": also para. 19 of *Vout*.
>
> [55] Thirdly, the proponent has to prove testamentary capacity. That is to say "the testator had a disposing mind and memory": para. 20 of *Vout*.
>
> [56] Finally, an opponent of a will proven as required under the first three principles bears the onus to establish fraud or undue influence: para 21. However, proof of suspicious circumstances may negative knowledge and approval or, as well, testamentary capacity: para. 27 of *Vout*.

[14] The judge had to be satisfied Mr. Devlin had testamentary capacity when the holograph will was prepared. Testamentary capacity is presumed, and that presumption operated in favour of Ms. Summerfield as proponent of the will. Only if the evidence offered by Ms. Rigby raised suspicious circumstances would the presumption be displaced and the burden return to Ms. Summerfield to prove testamentary capacity on a balance of probabilities.

[15] The judge's reasons reflect proper application of the principles to the evidence, and the eventual shifting of the burden to Ms. Summerfield to establish testamentary capacity owing to the judge's conclusion as to the presence of suspicious circumstances.

[16] Ms. Summerfield is correct that the presumption of testamentary capacity operated in favour of her application; however, it is clear the judge understood her task:

> [51] However, as part of determining the validity of this Holograph, and upon reviewing the totality of the evidence before me, I am required to consider whether Mr. Devlin had testamentary capacity at the time of the Holograph's creation, taking into account the surrounding circumstances and the objection of Ms. Rigby.

[17] In *Wittenberg v. Wittenberg Estate*, the three-part test for establishing testamentary capacity was described:

> [39] In *Re Coleman Estate*, 2008 NSSC 396, Justice Warner nicely summarized the legal approach to testamentary capacity:
>
> > [37] Testamentary capacity was legally defined by Chief Justice Cockburn of the English Queen's Bench division in *Banks v. Goodfellow*. He wrote that determination of testamentary capacity involves three inquiries: (1) whether the testator understood the nature of the act and its effects; (2) whether the testator understood the extent of the property he/she is disposing of; (3) whether the testator was able to

> comprehend and appreciate the claims to which he/she ought to give effect; and, in respect of (3), whether any disorder of the mind poisoned his or her affections, perverted his or her sense of right, or perverted the exercise of his or her natural faculties - that no insane delusion influenced his or her will to dispose or brought about a disposal which, if sound of mind, would not have occurred.

[18] There, the Court also recognized the factual nature of a determination of testamentary capacity, in its discussion of the associated burden of proof:

> [11] The burden of proving a will rests with those who propound it. However, they are assisted by a presumption of knowledge and approval as well as of capacity where the will has been shown to be duly executed. In this case, Mr. Wittenberg has also alleged suspicious circumstances in the making of his mother's will. If there are facts that may support this allegation the presumption is spent, and the propounders of the will must establish that the testatrix knew and approved of the contents of the will. Similarly, if those circumstances relate to mental capacity, the propounder must establish testamentary capacity on the civil standard of a balance of probabilities.

[19] Ms. Summerfield points to the judge's finding the holographic characteristics of the will "would demonstrate an intention of Mr. Devlin to dispose of his property upon his death". She says this helps satisfy whether Mr. Devlin understood his assets and his moral obligations, going favourably to those two elements of the test for testamentary capacity. She relies on *Re Weidenberger (Estate)*, 2002 ABQB 861 to assert that a testator's mental illness is not determinative of whether they possess the requisite testamentary capacity. While I do not disagree, the judge was not persuaded Mr. Devlin possessed the requisite capacity, owing to her findings about the circumstances and events surrounding the making of the will:

i. Mr. Devlin had reported to several of the witnesses that he had stopped taking medications prescribed to stabilize his mental health, prior to the time when the will was prepared;

ii. Mr. Devlin's bi-polar disorder was known to those around him, who testified the nature and severity of it interfered with his life, and that he had "descended into a spiral as his physical and mental health deteriorated";

iii. Mr. Devlin was experiencing "serious physical and mental impairments" around the time the will was made;

iv. Mr. Devlin had serious physical impairments that were becoming more aggravated during the time period of the making of the will; and

v. Mr. Devlin had "significant personal dysfunction" at the time prior to his death.

[20] It is important to remember that, with the exception of item (iv) above, each of these conclusions reached by the judge was grounded in part or in whole on evidence provided by Ms. Summerfield herself.

[21] Ms. Summerfield asserts the judge erred when she concluded the state of Mr. Devlin's mental health by October 2018, when the will was prepared, left doubt as to his testamentary capacity. She refers to the discussion by this Court in *Whitford v. Baird*, 2015 NSCA 98 as to the impact of an assertion of "delusions" upon testamentary capacity:

> [14] The burden of establishing capacity which rests with the propounder of a will includes dispelling any proved delusions. Justice Estey summarized the necessary inquiry in *O'Neil v. The Royal Trust Co.*, [1946] S.C.R. 622 at p. 632:
>
> > [...] That while the burden of proof always rests upon the party supporting the will, and that the existence of proved hallucinations and delusions often presents a "difficult and delicate investigation", it remains a question of fact to be determined as in civil cases by a balance of probabilities. ***In the determination of this fact the contents of the will and all the surrounding circumstances must be considered*** by the jury or the Court called upon to arrive at a decision. If satisfied that at the relevant time the testator was not impelled or directed by hallucinations or delusions and was in possession of testamentary capacity, the will is valid. *Boughton v. Knight*; *Smee v. Smee*; Halsbury, 2nd Ed., Vol. 2, p. 38.
>
> [15] The application judge referred to *Re Fawson Estate*, 2012 NSSC 55 with respect to the test for testamentary capacity and in particular quoted from paragraphs 208 and 209 regarding insane delusions:
>
> > [208] The authors then consider the effect of delusions on testamentary capacity saying in the following paragraph:
> >
> > > **3-03** A delusion in the mind of a testator deprives him of testamentary capacity if the delusion influences, or is capable of influencing, the provisions of his will. But a delusion does not have this effect if it cannot have had any influence upon him in making his will.

> ***A testator suffers from a delusion if he holds a belief on any subject which no rational person could hold***, and which cannot be permanently eradicated from his mind by reasoning with him.
>
> […]
>
> In practice it may be difficult to distinguish between grave misjudgment and delusion, particularly in relation to a testator's assessment of the character of a possible beneficiary under his will. …
>
> A will is not invalid merely because in making it the testator is moved by capricious, frivolous, mean or even bad motives. If he has testamentary capacity he 'may disinherit...his children, and leave his property to strangers to gratify his spite, or to charities to gratify his pride. […]
>
> [Emphasis in original]

[22] The judge was required to determine, on the evidence she accepted, whether Mr. Devlin possessed the requisite testamentary capacity. Evidence provided by Mr. Devlin's friends and neighbours persuaded the judge his testamentary capacity was impaired, which Ms. Summerfield, as propounder of the will, was ultimately unable to displace. I am satisfied the judge identified and applied the proper legal principles; furthermore, I see no error in relation to her factual findings.

[23] I would not allow the appeal on the basis of any error in the judge's identification or application of the principles of testamentary capacity.

Suspicious circumstances

[24] Ms. Summerfield's arguments before this Court focused to a considerable extent on the judge's analysis and conclusions concerning the notion of suspicious circumstances. Ms. Summerfield relies on the discussion in *Vout v. Hay*, *supra* as to the burden of proof related to an assertion of suspicious circumstances:

> 24 […] it has now been established that the civil standard of proof on a balance of probabilities applies. The evidence must, however, be scrutinized in accordance with the gravity of the suspicion. As stated by Ritchie J. in *Re Martin*; *MacGregor v. Ryan*, [1965] S.C.R. 757, at p. 766:
>
> > The extent of the proof required is proportionate to the gravity of the suspicion and the degree of suspicion varies with the circumstances of each case.

> 25 […] The suspicious circumstances may be raised by (1) circumstances surrounding the preparation of the will, (2) circumstances tending to call into question the capacity of the testator, or (3) circumstances tending to show that the free will of the testator was overborne by acts of coercion or fraud. Since the suspicious circumstances may relate to various issues, in order to properly assess what effect the obligation to dispel the suspicion has on the burden of proof, it is appropriate to ask the question "suspicion of what?" See Wright, *supra*, and *Macdonell, Sheard and Hull on Probate Practice* (3rd ed. 1981), at p. 33.
>
> 26 Suspicious circumstances in any of the three categories to which I refer above will affect the burden of proof with respect to knowledge and approval. **The burden with respect to testamentary capacity will be affected as well if the circumstances reflect on the mental capacity of the testator to make a will.** […] [Emphasis added]

[25] Suspicious circumstances were raised by the evidence of witnesses called by both Ms. Summerfield and Ms. Rigby. The judge was then obliged to consider whether suspicious circumstances had been established. If she so concluded, then the presumption in favour of testamentary capacity would be negated and the burden would return to Ms. Summerfield to prove testamentary capacity on a balance of probabilities. That is precisely what occurred; the judge was satisfied suspicious circumstances existed at the relevant time, but was not then persuaded Ms. Summerfield had discharged her burden to prove Mr. Devlin's testamentary capacity.

[26] The judge was not persuaded there were no suspicious circumstances relating to Mr. Devlin's mental capacity. There was ample evidence before her demonstrating Mr. Devlin's discrete or particular mental health challenges and delusions had interfered with his testamentary capacity during the relevant time period. There is no basis upon which to interfere with the judge's conclusions in that regard.

[27] Ms. Summerfield asserts Mr. Devlin was not deluded, rather he was not in a position to regulate his emotional responses, which she maintains does not rise to the level of suspicious circumstances. She relies on *Yeas v. Yeas*, 2017 ONSC 7402 as to what might support a finding of suspicious circumstances:

> [248] When considering whether or not there are suspicious circumstances, the Court may consider:
>
> > 1) The extent of physical and mental impairment of the testator around the time of the will was signed;

> 2) Whether the will in question constituted a significant change from the formal will;
>
> 3) Whether the will in question generally seems to make testamentary sense;
>
> 4) The factual circumstances surrounding the execution of the will;
>
> 5) Whether a beneficiary was instrumental in the preparation of the will.
>
> See Brian A. Schnurr, *Estate Litigation*, loose-leaf, 2nd ed. (Toronto: Carswell, 1994) (2016, revision 8), ch. 2.1(c).

[28] While I do not read the above list as prescriptive or exhaustive, the judge's decision reflects she considered, in one way or another, all of the criteria in *Yeas*. She had direct evidence on some, and noted there was "some evidence established by the corroboration of witnesses".

[29] Care should be taken to not overemphasize, as Ms. Summerfield seems to do, the use of the word "delusion" found in *Wittenberg* and the other cases referenced herein. The language of *Banks v. Goodfellow* dates to 1870. The reasonable modern use of the word is likely more akin to referencing a mental health condition, as opposed to a "delusion" per se, which would interfere with a testator's decision-making processes. The judge was persuaded the deterioration in Mr. Devlin's bi-polar condition did so in this case. As the passage from *Vout v. Hay* (at para. 23 herein) reminds us, the "extent of the proof required is proportionate to the gravity of the suspicion", which will vary with each case.

[30] Ms. Summerfield insists the judge was required to consider first whether suspicious circumstances existed at the time the will was created, and if that were found, only then could the judge move to consider whether Mr. Devlin had testamentary capacity. With respect, this may be an overly simplistic description of the judge's task.

[31] As discussed earlier, the judge was required to consider testamentary capacity as a branch of the test for establishing proof of the will; a will does not exist in law if the person making it does not possess the requisite capacity to do so. While a validly executed will triggers the presumption of testamentary capacity, a finding of suspicious circumstances can displace that presumption. I do not see this as definitively requiring the matter of suspicious circumstances always be considered first.

[32] As was done here, a judge starts from the presumption in favour of testamentary capacity, and then addresses a competing assertion of suspicious circumstances. If the suspicious circumstances relate to the testator's capacity, and are established, the onus shifts again. This more rounded approach to the analysis undertaken was described in *Wittenberg*, *supra* this way:

> [13] **Suspicious circumstances may relate *to knowledge and approval of the will, testamentary capacity* and to *undue influence*. With respect to capacity, the burden of proof remains with those propounding the will;** with respect to allegations of undue influence or fraud, the burden of proof rests with those alleging this. To recapitulate *Vout*, suspicious circumstances may be raised by:
>
> (a) Circumstances surrounding the preparation of the will;
>
> (b) **Circumstances tending to call into question the capacity of the testator;** or
>
> (c) Circumstances tending to show that the free will of the testator was overborne by acts of coercion or fraud.
>
> [14] **When suspicious circumstances are present:**
>
> (a) The civil standard of proof on a balance of probabilities applies; however that evidence must be scrutinized in accordance with the gravity of the suspicion;
>
> (b) **After overcoming the initial burden that the formalities have been complied with and the testator has approved the contents of the will, the propounder of the will reassumes the legal burden of establishing testamentary capacity;**
>
> (c) The burden on those alleging the presence of suspicious circumstances can be satisfied by adducing or pointing to some evidence which, if accepted, would tend to negative knowledge and approval or testamentary capacity.
>
> (d) The burden of proof on those alleging undue influence and/or fraud remains with them throughout. [Bolding emphasis added]

[33] Both *Yeas* and *Wittenberg* justify the judge's approach in this case. Suspicious circumstances can relate (among other things) to testamentary capacity. The judge broached both topics together. She eventually concluded suspicious circumstances were present, and later, that testamentary capacity had not been established as Ms. Summerfield had not met her burden. The judge did not, as Ms. Summerfield suggests, wrongly examine the question of testamentary capacity before concluding whether suspicious circumstances may be in play.

[34] Ms. Summerfield maintains there was an absence of evidence capable of supporting the judge's conclusion of suspicious circumstances. She objects to the lack of explanation in the decision as to why Mr. Devlin's bi-polar disorder was capable of affecting his cognition, memory or perception of reality. Ms. Summerfield suggests "there is no factual finding capable of surviving appellate scrutiny that suspicious circumstances existed surrounding the execution of the will" and "the presumption of testamentary capacity stands unrebutted." I cannot agree.

[35] I am guided by *Wittenberg*, which says whether there are suspicious circumstances rests in the context of the case:

> [36] The judge does not say what *Vout* category or categories of suspicious circumstances apply to the facts in this case. Nor does he describe what "circumstances" brought into question her "mental capacity" when she gave instructions to Ms. Ernst, or later when she executed her will. **It is important that a finding of "suspicious circumstances" be contextually derived.** Disinheriting a child may be suspicious in some cases, but not others - for example where substantial property was gifted to a child during the testatrix's lifetime. **The question is not whether a suspicion "could arise", but whether it does arise.** In this respect, I endorse the British Columbia Court of Appeal's observation in *Clark v. Nash*, [1989] B.C.J. No. 1474 (C.A.):
>
> > It is important to recognize that the "suspicious circumstances" referred to in that passage, and in other authorities, are not circumstances that create a general miasma of suspicion that something unsavoury may have occurred, but rather **circumstances which create a specific and focussed suspicion that the testator may not have known and approved of the contents of the will.**
>
> Suspicious circumstances may also apply to testamentary capacity: *Vout, supra*. [Emphasis added]

[36] The record reflects the judge did conduct such a contextual analysis; I see no error in her findings and conclusions flowing from that analysis.

[37] As described earlier, the judge concluded suspicious circumstances were present because of Mr. Devlin's "mental impairments". This correctly led to a shifting of the burden to Ms. Summerfield to prove testamentary capacity, which she was not able to do. The judge made several key findings in that regard:

> [69] I found both Mr. Hensley and Mr. O'Dowd to be credible witnesses. I found that their evidence corroborated one another's and Ms. Summerfield's concerning the severity of Mr. Devlin's physical and mental challenges at about

> the time of the Holograph. Mr. Devlin was experiencing serious physical and mental impairments around the time the holographic will was made. This emerged in the interplay of evidence between these three witnesses.
>
> [70] I am satisfied that Mr. Devlin had serious physical impairments, that were becoming more aggravated during the time he is purported to have made the Holograph. The degree of his mental impairment was demonstrated as striking upon reviewing the many Small Claims Court actions Mr. Devlin filed in the two years leading up to his death.
>
> […]
>
> [85] Ms. Summerfield, Mr. Hensley and Mr. O'Dowd, all agree in their evidence that Mr. Devlin suffered from a serious mental illness. Ms. Summerfield's affidavits reference Mr. Devlin having significant personal dysfunction at the time just prior to and coincident with his death. This is corroborated by Mr. O'Dowd's affidavit and oral evidence. This is sufficient to have rebutted the presumption Mr. Devlin had capacity, and proof of his capacity must be established by the applicant.
>
> [86] It is true in law that a person with a mental health issue is not deemed to be incapable, however the proponent of the holograph will must demonstrate that, on a balance of probabilities, the person had the requisite capacity at the time the testamentary disposition took place. If anything, Ms. Summerfield has provided evidence that Mr. Devlin did not have the capacity to make a valid testamentary disposition about the time of the purported Holograph's creation.
>
> […]
>
> [89] Ms. Summerfield was not a credible witness in relation to proving the Holograph. I do, however, accept her evidence that the two were engaged in a relationship of dependency, and with some affection. However, the burden on her was substantial to prove that Mr. Devlin had testamentary capacity in the circumstances.
>
> […]
>
> [95] I find that the applicant has not led evidence that is credible or reliable to prove that Mr. Devlin had the requisite testamentary capacity to create a valid holograph will about the time of its writing. I dismiss the application for proof in solemn form of the Holograph.

[38] The judge's reasons make clear she did not conclude Mr. Devlin lacked testamentary capacity because he was bi-polar, rather it was that his bi-polar condition contributed to her determination there were suspicious circumstances afoot. Those circumstances included Mr. Devlin's varied irrational behaviours, as evidenced by his extremely poor treatment of relatives and previously valued and long-standing friends, and in his flurry of forty-plus Small Claims Court actions

filed in the months before his death, which set out all manner of bizarre and/or ill-advised complaints.

[39] I agree with the comment in Ms. Summerfield's factum that "it cannot be the law that any physical or mental impairment, however serious, raises a suspicious circumstance requiring a will's proponent to prove testamentary capacity". I do not read the decision as making such a suggestion. Rather, it demonstrates the judge concluded the tapestry of evidence before her raised concerns about suspicious circumstances having impaired Mr. Devlin's testamentary capacity.

Testamentary capacity

[40] The presumption having been rebutted, it was for Ms. Summerfield to prove testamentary capacity, which she did not do. The judge's reasons clearly explain why she was not persuaded the resultant onus on Ms. Summerfield to prove testamentary capacity had been met.

[41] In response to Ms. Summerfield's arguments, Ms. Rigby maintains the judge's decision demonstrates consideration of all the evidence before her concerning Mr. Devlin's situation around the time the will was made. She says the judge concluded Mr. Devlin lacked testamentary capacity based "on an evaluation of the cumulative effect of all of the circumstances". I agree. The judge was satisfied the relationship of dependency of Mr. Devlin, a person with significant physical and mental health challenges, upon the propounder of the will, in the context of all the information put before the court, constituted suspicious circumstances. Once found, Ms. Summerfield did not then meet her burden to persuade the judge as to testamentary capacity. I see no reason to displace the judge's findings, nor her conclusions.

[42] Finally, Ms. Summerfield was critical of the judge's refusal to admit the contents of a presentence report prepared February 18, 2018 concerning a criminal matter involving Mr. Devlin. She says the contents of the report were important as they would have illustrated Mr. Devlin's self-perception or self-reporting of his situation at that time. The judge refused to do so on the basis the report contained hearsay information gathered by a probation officer, and did not possess the requisite probative value. I see no error in the judge having exercised her discretion to exclude the report.

[43] The factual findings by the judge are supported by the evidence. This Court must show deference, and is not entitled to interfere absent error, of which I see

none. As *Wittenberg*, *supra* reminds us (para. 17), this appeal is not a re-trial nor an opportunity for the Court to substitute its own findings for that of the judge.

Conclusion

[44] I am not persuaded the judge made any errors in her identification or application of the law to the evidence before her. Nor do I see any palpable and overriding errors of fact were made by the judge. For these reasons, I would dismiss the appeal.

[45] The judge's decision was silent as to the matter of costs. I consider the history of this case, the positions taken by the parties and that Ms. Rigby is the successful party on appeal. I would award her $1,000 costs payable by Ms. Summerfield.

[46] Ms. Summerfield requested this Court award her costs from the Estate, regardless of whether she might be successful on appeal. She has not been successful throughout the litigation. There is no basis upon which to now grant her an award of costs. Furthermore, I hearken to the principles discussed in *Wittenberg* at paras. 98–100, and conclude it would be inappropriate to require the beneficiaries of Mr. Devlin's estate to effectively shoulder the burden of costs to either party.

Beaton J.A.

Concurred in:

Bourgeois J.A.

Fichaud J.A.