SUPREME COURT OF NOVA SCOTIA
Citation: *Black v. Silver Estate*, 2022 NSSC 296

Date: 20220922
Docket: *Bwt*. No. 506247
Registry: Bridgewater

Between:

Shirley Black

Applicant

v.

Estate of Carolyn Esther Silver and Shelley Lee Ross-Jeschke

Respondents

Judge:	The Honourable Justice Diane Rowe
Heard:	March 25, 2022 in Bridgewater, Nova Scotia
Final Written Submissions:	March 18, 2022
Oral Decision:	September 20, 2022
Counsel:	Mark Taylor, for the Applicant Celia Melanson, for the Respondent

By the Court – Orally:

[1] Ms. Carolyn Silver executed a Last Will and Testament on October 21, 2003 ("the 2003 Will"). The 2003 Will left her Estate to Ms. Shelley Ross-Jeschke, her daughter who she placed for adoption at birth. Ms. Ross-Jeschke was adopted legally, and reconnected as an adult with her birth mother, Ms. Silver in 2003. This reunion was in accordance with the Department of Community Services' policy concerning contact between adoptees and birth parents.

[2] Ms. Black asks that the Court conclude that Ms. Silver substantially executed a different Will, if not in final executed form, as an act of revocation of the 2003 Will. The Applicant relies on parol evidence, primarily, to advance this and asks that the Court presume that in the absence of a document, that the newer Will is lost. Further, the Applicant submits that the contents of this newer Will is not intended to be proven, as the Applicant does not seek to have the subsequent Will enforced, but to demonstrate there is sufficient proof of revocation to displace the 2003 Will. If revocation is found, then Ms. Black will become the sole beneficiary of Ms. Silver's Estate, in accordance with the *Intestate Succession Act.* R.S.N.S. 1989, c. 236.

[3] The Estate of Ms. Carolyn Silver responds that the 2003 Will was not revoked by the testator, by her words or by document, and requests that the application by Ms. Black to set aside the 2003 Will be dismissed, with costs.

Issue

[4] Did the deceased, in anticipation of death, indicate by her statements and actions the requisite intent to revoke a validly made Will?

Law

[5] What is the test for a Court to apply when considering whether a testator has revoked a will?

[6] Section 19 of the *Wills Act* R.S.N.S. 1989, c. 505, provides for the revocation of wills. The revocation of a will is presumed upon marriage, upon the execution of another will in accordance with the *Act*, by writing declaring an intention to revoke a will with execution in accordance with the *Act*, and the destruction of the will by the testator or on the testator's instruction. Further, s. 18 of the *Wills Act* provides that "no will is revoked by any presumption of an intention to revoke the same on the ground of an altercation in circumstances."

[7] The burden of proving the existence of the newer Will falls to the Applicant, with such proof to be established on a balance of probabilities. If the newer Will is proven then there is a presumption of revocation, but there must also be proof before the Court to demonstrate that full enquiries were made to obtain the asserted lost Will. (J. MacKenzie*, Feeney's Canadian Law of Wills,* 4th Ed. Toronto: Lexis-Nexis Canada, 2021) (loose-leaf at Ch. 5.64). It was also noted in *Feeney* at ch. 5.65 that "…The presumption (of revocation) may also be rebutted by the conduct of the will-maker, such as placing it in a safe or evidence that destroying the Will would have been out of character…"

[8] It is also helpful to recall s. 45 of the *Nova Scotia Evidence Act* R.S.N.S. 1989 c. 154 which provides that:

> 45 **On the trial of any…proceeding in any court, the parties thereto, …shall, except as…provided, be competent and compellable to give evidence, …, provided that in any action or proceeding in any court, by or against the heirs, executors, administrators or assigns of a deceased person, an opposite or interested party to the action shall not obtain a verdict, … on his own testimony,…with respect to any dealing, transaction or agreement with the deceased, or with respect to any act, statement, acknowledgment or admission of the deceased, unless such testimony is corroborated by other material evidence.** [Emphasis added].

[9] The "other material evidence" offered in this Application that would corroborate Ms. Black's testimony that the testator had revoked the 2003 Will is the evidence of her son, Stephen Black, concerning statements and directions

made to him by Ms. Silver concerning her assets and intentions. Mr. Stephen Black is not a named beneficiary in the 2003 Will, and is not purported to be a beneficiary to a more recent Will as asserted. Ms. Black submits that his evidence may be accepted by the Court, as Stephen Black is not caught by s. 45 of the *Evidence Act*.

[10] Ms. Black's position is that if the Will fails, then s. 8 of the *Intestate Succession Act.* R.S.N.S. 19889, c. 236, s. 1. prevails. She submits that as Ms. Silver was unmarried at the time of her death and her only natural child was legally adopted by another family, that as the only sibling of the deceased she should be the sole heir by operation of law.

[11] Ms. Silver's nephews, Mr. Stephen Black and Mr. Richard Black, would not be heirs to the estate on an intestacy, as s. 9 of the *Intestate Succession Act* is not applicable. It is possible that they could benefit if their mother, Ms. Black chose to benefit them, or they might not. Therefore, Ms. Black submits that the evidence of Ms. Black's sons is not received in contravention of s. 45 of the *Evidence Act*, to the extent that it provides material corroboration of their mother's evidence.

[12] It should be noted that the weight of such corroborative evidence may be adjusted by the Court, if the Court finds that the witness may be motivated by self interest or is not credible or consistent in their evidence. (See also more recently, *Billard v. Billard Estate,* 2022 NSSC 167 para [16] for an application of the principles).

[13] In *Cole v. Cole Estate,* 1994 NSCA 123, which both the Applicant and the Respondent rely upon, Roscoe, JA noted the following:

> Once the trial judge made the determination that he believed the evidence of Phyllis MacLellan and Janice MacLean that they sae and read the will of Robert Cole after his death, the presumption of revocation by the testator did not apply to this case. The will was found to be in existence after the testator's death, so it was neither "last in the possession of the testator" nor was it "not found at his death", to use the words of **Sugden v. Lord St. Leonards, supra**. Once this finding of fact was made, the other well-known presumption in the law of wills come into effect, that is the presumption of due execution embodied in the maxim omnia praesumuntur rite esse acta which is explained in the following passages from **Harris v. Knight** (1890), 15 P.D. 170 at page 179:
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> > **"…The maxim, 'omnia praesumuntur rite esse acta,' is an expression, in a short form, of reasonable probability, and of the propriety in point of law of acting on such probability, the maxim expresses an inference which may reasonably be drawn when an intention to do some formal act is established; when the evidence is consistent with that intention having been carried into effect in a proper way; but when the actual observance of all due formalities can only be inferred as a matter of probability.** The maxim is not wanted where such observance is proved, **nor has it any place where such observance is disproved. The maxim only comes into operation where there is no proof one way or the other; but where it is more probable that what was intended to be done was done as it ought to have done to rend it valid;** rather than that it was done in some other manner which would defeat the intention proved to exist, and would render what is proved to have been done of no effect." [Emphasis added].

Facts

[14] Shirley Black is Ms. Silver's sister and sole sibling. She relies upon a letter written by Scotia Wealth Management ("Scotia"), addressed to Mr. Taylor (her counsel in this proceeding), dated February 17, 2016, as evidence that her sister had given direction for a new Will and Power of Attorney in a manner that differed from the 2003 Will. The letter appears to be a formal direction letter from Ms. Christy Sandles, an estates consultant for the bank, to Mr. Taylor, who was then addressed as acting as Ms. Silver's solicitor.

[15] This record falls within the business record exception as it meets the requirements of the common law and the *Evidence Act* as it was made contemporaneously, is an original made in the usual course of business, by a recorder with knowledge of the thing recorded, and who had no motive to misrepresent. It was accepted as evidence in keeping with the business records exception, and there was no objection to it by the Respondent. (paras 45-49 of *R. Wilcox et. al*, 2001 NSCA 45).

[16] This letter indicates that Ms. Silver asked Scotia to correspond directly with Mr. Taylor to convey her details for estate planning preparation, however, it also contains an underlined and bolded direction to Mr. Taylor to confirm the

information in the letter and the fee structure directly with the client. No drafts of potential testamentary documents was tendered in Court by Mr. Taylor on Ms. Black.

[17] I will note that neither Mr. Taylor, who is appearing in this matter on behalf of the Applicant, Ms. Black, nor Ms. Sandles gave evidence concerning this instruction letter. The Court is left to infer that the confirmatory instruction did not take place.

[18] I will also note that there is a handwritten notation in the section headed "Disposition of Personal Effects" striking out the words "…charity in the executor's discretion" with the words "SHAID Tree Animal Shelter" but without any identification for the person whose handwriting it is. The Court will note that it is implicit that the correspondence is in regard to creating a trust, as there is a reference to a "donor" but there is no indication of intended beneficiaries.

[19] The only person named by Ms. Sandles in Scotia's correspondence is as follows:

> "Ms. Silver is divorced and her former spouse is deceased. She has one daughter, Shelley Lee Ross-Jeschke, whom she gave up for adoption at birth, but who reconnected with Ms. Silver as an adult."

[20] There is no instruction on a trust with Ms. Ross-Jeschke as the beneficiary, or anyone else for that matter, or of specific gifts that may have been the subject matter of a possible Will, although residuary beneficiaries are named.

[21] In one aspect, it does tend to corroborate the affidavit evidence of Ms. Shelley Lee Ross-Jeschke, as it shows a linkage between her statement that a trust vehicle was explored by Ms. Silver in 2016 with Ms. Ross-Jeschke as a beneficiary. At a minimum, it shows that Ms. Silver identified Ms. Ross-Jeschke as her "daughter", indicating their ongoing relationship thirteen years after the 2003 Will was created. There are no other family members referenced, although again, none of this was executed. This is an element that is supportive of Ms. Ross-Jeschke's credibility as the document was tendered by a party who is adverse in interest.

[22] Ms. Black's evidence was that she was estranged from her sister for about seven years from 1989 to 1996. She confirmed that Ms. Ross-Jeschke was Ms. Silver's birth daughter, and that Ms. Silver had placed her for adoption. She knew that they had reconnected in 2003, and saw the two together about twice since that time before Ms. Silver's death in 2020.

[23] Ms. Black confirmed that Ms. Catherine Schofield was a close friend of Ms. Silver. Ms. Black's evidence was that she was attending her sister's care "every day" but she had to press Ms. Silver to discover the close nature of her relationship with Ms. Schofield. This point was not credible as both Ms. Black and Stephen Black confirmed that Ms. Schofield was Ms. Silver's named close contact in accordance with the strict hospital policy limiting visitors during the Covid-19 lockdown in place at the time of her death.

[24] Ms. Black stated that at no time did Ms. Silver say her sister was to be her beneficiary or executor. It was of interest to the Court that in answer to the question of whether Ms. Black felt that her children should benefit from Ms. Silver's Estate as they were her family by law, her answer was "Yes." Ms. Black's admission of interest that the Estate should be to the benefit of her own children, leads the Court to be cautious concerning her evidence.

[25] Ms. Black's evidence was that she did not see the 2003 Will until after Ms. Silver's death as she did not look for it "but her son did" look for it. She did not see any other writing by Ms. Silver setting out directions for her Estate but that she "just knew" what her sister wanted due to her statements to her. I do not find that this statement was supported by the parol evidence offered by her son Stephen in this regard, as I will canvass on reviewing his evidence.

[26] Ms. Black did not contact Ms. Ross-Jeschke to tell her she had the 2003 Will that appointed her the executor or even that Ms. Silver had died. She appeared to be defensive at this point.

[27] Ms. Black's evidence was that her son Stephen directed the funeral home to not give Ms. Ross-Jeschke a death certificate, which she requested when Ms. Ross-Jeschke was eventually informed of Ms. Silver's death by a friend of her biological mother's.

[28] Ms. Black was not consistent in her evidence concerning entering her sister's home prior to death and in regard to changing the locks on her home. She indicated at first that Ms. Silver told her to do so prior to her death, with her son Richard Black then changing the locks. This would have required entry to the home. She then indicated that the locks being changed occurred after Ms. Silver's death. I did not find Ms. Black consistent or reliable on this point, and therefore, not credible.

[29] Her son Stephen Black's evidence was that he did not see any other Will than the 2003 Will. He stated that Ms. Ross-Jeschke had never had the 2003 Will in her possession. He was not present for any phone calls that his mother may have had with her sister concerning disposition of Ms. Silver's assets.

[30] Stephen Black did not take Ms. Silver to her medical appointments, and states that he did not visit her in the hospital. Stephen did allude that this was during the Covid pandemic so he could not visit, but on cross examination, he acknowledged that he never visited Ms. Silver in the hospital before the pandemic began when Ms. Silver was hospitalized in Halifax. It is not always clear when or how he obtained all of the instructions he says he received from Ms. Silver.

[31] He did not discuss Scotia Trust with Ms. Silver directly and did not see anything in writing concerning Ms. Silver's intentions to make him a beneficiary. His affidavit evidence was that, around March of 2020, Ms. Silver told him in a phone call that she intended to make him a joint holder on all her accounts and be the main beneficiary of her Estate, which was anticipated to be substantial. He also referenced another subsequent phone call with Ms. Silver in which she expressed interest in creating a Corporation to transfer shares with the intent of minimizing taxes on her estate upon her death.

[32] His affidavit evidence was that he went to Ms. Silver's home on or about August 8, 2020 and noted her health was deteriorating. Stephen Black continued by stating he was informed by his brother Richard Black that Richard

had driven Ms. Silver, with his mother and father, to Scotiabank on August 17, 2020.

[33] On August 20, 2020, Stephen states that he met with his Aunt again and at this meeting she gave him the passwords for her computer, online banking, investor information, and instructed him to change the locks on the house. Ms. Black's evidence was that Ms. Silver told her to change the locks, with Richard doing so. Stephen Black's evidence does not corroborate Ms. Black's in this regard. In any event, the discrepancy was in regard to a fact concerning entry to the home, and neither Stephen Black or Ms. Black were credible on this point.

[34] On August 28, 2020, Ms. Silver fell at home and was found by a care worker. She was transported by ambulance to South Shore Regional Hospital.

[35] Stephen Black's evidence was that after this fall and hospitalization, between September 3 and 8, 2020, he attempted to assist Ms. Silver to create a new Will and Power of Attorney, arranging for Ms. Meredith MacLeod, a solicitor, to receive Ms. Silver's instructions.

[36] Further, his affidavit evidence was that Ms. Black and Richard went to the property to locate the Will or other valuables on September 11, 2020, the day

after Ms. Silver passed away on September 10, 2020. They did not locate the Will at this time.

[37] Stephen Black's evidence during cross examination was that he was made aware of the 2003 Will a few days after Ms. Silver's death and that his brother Richard had it, who had obtained it from Ms. Shelley McKay-Riley who had it in her possession from Ms. Catherine Schofield.

[38] Ms. Black's evidence states that "her son" had the Will. She did not detail which of her sons had the Will in her affidavit or on the stand. Her evidence concerning when she and Richard Black entered the house was not consistent and therefore leads to serious doubts concerning their credibility.

[39] Stephen Black's affidavit includes a text exchange with Catherine Schofield referencing a 2003 Will, in or about September 14, 2020. However, his affidavit evidence was that he had been contacted by Ms. Schofield in regard to "another Will". On reading the text exchange, there is reference by Ms. Schofield to "another very old Will", and also a statement that "I have only one Will. Separate one – the oldest one, is still in her wooden box.." and that "Shelley had the oldest one – she told me she gave to Richard – that's good."

[40] It is difficult to read the text exchange to discern who is texting whom, but there is a statement by Ms. Schofield that: “I’m contacting C’s (Ms. Silver’s daughter) tonight and she was the last wills next of kin and she gets everything – after what Shirley and her boys, did to my best friend in her last days was horrible and I’m glad Shelley gets everything..” (sic). The text exchange supports the direct evidence of Ms. Schofield concerning her interactions with the deceased, Ms. Black and Stephen Black.

[41] Stephen Black’s affidavit references attempts made by counsel to locate a newer Will, including inquiries to a presumed past counsel for the deceased, with ads in the Nova Scotia Barristers Society Publication “Inforum” without response. On cross examination, Stephen Black stated that he directed “his lawyer” to not release the 2003 Will to Ms. Ross-Jeschke as he felt there was “due diligence” still required.

[42] Stephen Black denied entering Ms. Silver’s home before her death when she was not present. I found his demeanour to be evasive on this point.

[43] Stephen Black did not know that Catherine Schofield was a person designated to enter the hospital as a visitor during the Covid-19 lockdown, and thought there were three people, including Ms. McKay-Riley and another. He

did not advise Catherine Schofield of Ms. Silver's funeral, although Ms. Schofield was the only person with her when she died. He stated that it was Ms. Silver's instructions to not place any obituary until after the funeral in case "someone" would cause trouble. This seems to be counterintuitive, and may be indicative of Ms. Black and Stephen Black's interests, rather than the deceased.

[44] The Court notes that Richard Black was not called to be examined on the statements attributed to him by either Stephen Black or by Ms. Black seeking to set aside the 2003 Will. The Court cannot accept the evidence of Ms. Black and Stephen Black as offered in their respective affidavits where they attribute actions or words of the deceased as hearsay from Richard Black.

[45] Any evidence by Ms. Black or Stephen Black regarding the deceased's intentions they indicate as attributable to Richard Black are inadmissible, as either double hearsay or inadmissible via the *Evidence Act*.

[46] Ms. Catherine Schofield appeared, despite her ongoing illness, with some difficulty. Ms. Schofield was a close friend of the deceased, having met her in 2018 while they were both undergoing treatment for cancer. She was Ms. Silver's roommate while they were hospitalized in Halifax and they continued

their friendship. Ms. Silver and she had planned on going to Costa Rica when their treatment was over, despite the severity of Ms. Silver's health status.

[47] Ms. Schofield's evidence was that Ms. Silver gave her the key to her home, and that she maintained a toothbrush and personal effects at Ms. Silver's home as she received follow-up treatment at the South Shore Regional Hospital, with Ms. Silver's home close by.

[48] Ms. Schofield stated that after Ms. Silver's fall in late August 2020, she chose her as a visitor, in keeping with the strict restrictions on visitors in place during the Covid-19 pandemic. She was detailed in her recollection of Ms. Silver's decline after her fall at her home.

[49] Her evidence was that Ms. Silver told her to retrieve a Will located at her home in a blanket box. This was the 2003 Will.

[50] Ms. Silver told her that the Black family had access to her house but she wanted Catherine Schofield to go there, with her key, and take the Will in her keeping. Her evidence was that she informed Ms. Silver that when she did go to the house to retrieve the Will that she observed clothes strewn about, with money and jewellery missing. She stated that Ms. Silver then "gave up" emotionally, which the Court interpreted to mean she was depressed at this

development. On cross examination, Ms. Schofield stated it was at this point that Ms. Silver instructed her to keep the Will for safe keeping and to lie to Ms. Black that there was a different Will.

[51] Ms. Schofield was very emotional in giving her evidence as she spoke about her friend's death. In regard to the facts concerning Ms. Silver's instructions to her, Ms. Scofield was quiet, consistent and credible. She recounted that at around this time Ms. Silver spoke about creating another Will, making herself and a Ms. Oickle-Conrad beneficiaries, however this did not occur. She understood that if the meeting had proceeded, this would have occurred on September 10, 2020, which is the day Ms. Silver died. This date coincides with the date that Ms. Black and Stephen Black referenced in their evidence in regard to Ms. Meredith MacLeod's potential meeting to receive Ms. Silver's purported instructions for a new Will to be made to their benefit.

[52] In any event, Ms. Schofield did not anticipate she would have received any benefit even if that meeting had occurred, but was visibly upset that her friend's intentions, especially concerning charities, might not be observed.

[53] Her evidence concerning Ms. Silver's character and personality were revealing. She indicated that Ms. Silver was critical of others, in particularly of the Black family who were interested in her money.

[54] Her evidence concerning Ms. Shelley Ross-Jeschke was that Ms. Silver did speak about her, and they did have arguments but that Ms. Silver did not speak ill of her biological daughter in the same manner as others. She stated that Ms. Silver told her she had an argument with her daughter but she wanted Shelley Ross-Jeschke to "have a good life, too."

[55] Ms. Schofield indicated that Ms. Silver was misdirecting the Blacks in order to keep them from harassing her to execute documents for their benefit and she would "tell them what they wanted to hear."

[56] Her belief was that Ms. Silver instructed her to lie to the Blacks about a new Will, in order not to waste her energy on arguing, and to deliver to the 2003 Will to Ms. Shelley McKay-Riley. Ms. Schofield did so, and she was informed that Ms. McKay-Riley then delivered this to a member of the Black family.

[57] Ms. Schofield was especially animated in her evidence that the Blacks did not tell Ms. Ross-Jeschke of Ms. Silver's hospitalization and subsequent death.

[58] Ms. Shelley Ross-Jeschke gave evidence, stating that, in her experience, she "had three parents": her adoptive parents who were then also in ill health, and her biological parent who was dying of cancer. She had difficulty in negotiating the demands of the relationships, and acknowledges that she had a falling out with Ms. Silver in December of 2019, and they were unable to restore contact prior to Ms. Silver's death.

[59] Ms. Ross-Jeschke was candid that their relationship had deteriorated by that time. The emotional turmoil in these competing simultaneous demands created the circumstances for an unhappy contest.

[60] Her affidavit evidence is that she was informed four days after Ms. Silver's death by a text from a friend on September 14, 2020 offering condolences on her mother's passing. She was not informed of any funeral or memorial arrangements. The obituary published by the Black family, after the funeral, stated that Ms. Silver had died "not having children of her own."

[61] Ms. Ross-Jeschke retained counsel to write to Ms. Black to request access to Ms. Silver's home to locate the Will, which she was informed by her mother was located in a cedar chest. This was not met with a positive response.

Analysis

[62] The onus of proof is on the Applicant to demonstrate revocation of the 2003 Will, with such proof to be demonstrated on a balance of probabilities. Ms. Black argues that Ms. Silver had "substantially completed" a later Will, as evidenced by Ms. Silver's statements to Stephen Black and herself, but that this Will was subsequently lost.

[63] However, there is insufficient evidence to support the Court in finding this to be proven on a balance of probabilities.

[64] There is a 2016 letter from Scotia Wealth Management to Ms. Black's counsel, alluding to Mr. Taylor as Ms. Silver's lawyer, regarding creating a trust and with testamentary information concerning Ms. Silver's intentions at the time; however, Mr. Taylor did not offer notes or other corroborating evidence of Ms. Silver's intentions and Ms. Sandles did not, either.

[65] Ms. Meredith MacLeod did not appear and give evidence concerning any instruction from Ms. Silver to prepare a Will, or confirm any appointment to receive such instruction occurred in September of 2020.

[66] A "lawyer who became a judge, possibly Judge Warren Zimmer", was identified as a person who possibly drafted a Will for Ms. Silver sometime after

2003, however, there is no evidence of the actual lawyer's identity with certainty and no evidence tendered of such a Will by any counsel.

[67] In terms of documentary evidence, the Court is left with a form letter from the bank and one ambiguous series of text messages exchanged after Ms. Silver's death.

[68] There is also the parol evidence offered by the Applicant and her son, Stephen Black, concerning Ms. Silver's intentions, portions of which I have noted are contradictory, or are hearsay unsupported by corroborated evidence, or inconsistent.

[69] As per *Re Cole*, it is the preponderance of the evidence which the Court must consider, and in this application the Court finds that it is not substantial enough to establish proof of revocation of the 2003 Will to a level that demonstrates a settled testamentary intention countering the 2003 Will. It is not a situation in which there is a balancing between two probable outcomes, requiring a presumption but, rather, that the Court finds it improbable on the evidence that Ms. Silver intended to make an act of revocation.

[70] It is implicit in the application by Ms. Black that the idea of who is or who becomes a family member is a consideration, and what is "family." Ms. Black's

application, if successful, would seek to limit it to blood relations of the deceased's family of origin, recognized by statute. She argues that the statutory disposition of an intestate be applied in this matter. In this regard, the Court observed that the Applicant chose to not tell Ms. Silver's biological child of Ms. Silver's death and memorial ceremony. This was also demonstrated by the choice to not inform Ms. Silver's friend Ms. Schofield, who was with Ms. Silver at her death, of the memorial ceremony.

[71] Ms. Black is relying on the decision in *Strong v. Marshall Estate*, 2009 NSCA 25, to displace any position that Ms. Ross-Jeschke was a "daughter" for the purposes of intestacy. *Strong v. Marshall Estate, supra* is referred to here only for the guidance it could offer the parties concerning the law on disposition of an intestate and the definition of legal "issue". Ms. Black's submission hinges on the Court finding that her sister's testamentary intent had significantly changed in regard to Ms. Ross-Jeschke so as to revoke the 2003 Will. With respect, the Court does not find that to be proven on the evidence.

[72] It is possible that Ms. Silver may have had a more encompassing view of "family." Ms. Silver did create a relationship with her sole biological child in adulthood over the course of many years. She had close friends who were either friends over the years or were friends forged, intensely, in the circumstances of

shared cancer treatment. She also was in contact with her family of origin, but whom she saw rarely and who appeared to be offering support when the likelihood of an inheritance was dangled before them.

[73] A person may choose to include a biological child, who may not be legally entitled by operation of statute law as "issue", to be a named beneficiary to their will. That is not controversial. That their relationship was occasionally contentious over the course of 16 years is also not remarkable. Ms. Ross-Jeschke's experience of Ms. Silver is consistent with the evidence of Ms. Schofield, as a person who could be critical although she did not mean harm.

[74] Ms. Ross-Jeschke's evidence concerning her biological mother's temperament and character were accepted as offering insight to her as a person, and to the nature of her relationship with her. It was corroborated by the evidence of Ms. Schofield. Ms. Schofield impressed the Court as a person who did have a moral and personal perspective on her friend and her friend's experiences, as Ms. Silver told her about her life, her family, and her biological child. Ms. Schofield had nothing to gain, and was still mourning the loss of her friend, Ms. Silver, when she attended Court.

[75] The evidence of the witnesses demonstrates that Ms. Silver was, on occasion, a person who made either misleading or critical comments about and towards others. This may have triggered behaviours in those around her, to either be supportive on her personal behalf emotionally (as she obtained rides, visitors, emotional supports) and to obtain services via these people (again legal supports, medical services, personal matters attended to at her home).

[76] The 2003 Will could have been revoked at any time after 2019, if the testator intended it. She did not do so.

[77] As noted above, the Applicant must prove on a balance of probabilities that the Testator had intention to revoke the 2003 Will.

[78] The evidence shows no notes from the testator concerning her intentions. There is no evidence from any counsel for the testator. The parol evidence offered is hearsay, and corroborated only by a person who is technically able to provide evidence in that manner but whose credibility is undermined by their personal dealings with the deceased concerning her assets for their own potential interests. The text evidence is ambiguous.

[79] It was impressed upon the Court that the testator was a capable woman, who carefully managed her own finances. She was familiar with estate planning, tax

management, investment and the associated legal requirements. Ms. Silver could have changed the 2003 Will or revoked it and, while she had met with legal and banking professionals, she had not actually completed anything. This is akin to the reasoning in the matter of *Re Gray*, 1957 CanLii 235 (MBCA), which is distinguished on the facts before the Court in this matter.

Conclusion

[80] The Court dismisses this application to set aside the 2003 Will, as there is insufficient evidence to establish its revocation, for the reasons set out above.

[81] Costs are awarded to the Estate, in keeping with Tariff C, for a half day hearing. If the parties are unable to agree on costs, I will receive written submissions within 30 days of this decision.

Diane Rowe, J.