IN THE COURT OF PROBATE FOR NOVA SCOTIA
Citation: *Hawes (Estate of) v. Hawes*, 2024 NSSC 161

Date: 20240527
Probate Court No. 62612
Docket: Hfx No. 520420
Registry: Halifax

Between:

Sheldon K. Hawes, in his capacity as the personal representative of the Estate of Ada Catherin Hawes

Applicant

v.

Derwin Hawes, Jerry Hawes, Valerie Boutilier, Andrea Hawes, Kenny Hawes and Brian Hawes

Respondents

Decision

Judge:	The Honourable Justice Ann E. Smith
Heard:	June 5, 12, 2023, August 18, 25, 2023, September 14, 2023, & November 24, 2023, in Halifax, Nova Scotia
Counsel:	Peter Rumscheidt, for the Applicant
	Respondent's Counsel: Tracy S. Smith, for Derwin Hawes
	Respondent's Counsel: Tanya L. Butler and Articled Clerk Meaghan Rout (for Probate Proceedings) and Rebecca Hiltz LeBlanc, K.C. (for Supreme Court Proceedings): Jerry Hawes, Valerie Boutilier, Andrea Hawes, and Kenny Hawes
	Self-Represented Respondent: Brian Hawes (not participating)

By the Court:

Introduction

[1] This decision pertains to two proceedings in respect of the estate of Ada Catherine Hawes.

[2] First, several siblings bring an application in court in the Court of Probate for proof in solemn form of a document written by the testator dated October 31, 2001. The siblings rely on ss. 6(2) and 8A of the *Wills Act*, RSNS 1989, c. 505.

[3] The second application follows the first, being an application in court in Supreme Court for an interpretation of the October 2001 document.

[4] The applicant in both proceedings is Sheldon K. Hawes (Sheldon), in his capacity as executor. The respondents comprise all but one of the testator's children, taking two opposing positions. Opposing the applications is the respondent Derwin Hawes (Derwin), while his three siblings Jerry Hawes, Valerie Boutilier, Andrea Hawes, and Kenney Hawes (the" siblings") support the application. Another brother, Brian Hawes, took no position in the proceedings. Due to the similarity in last names, I will generally refer to the individual parties, as well as the testator, by their first names. The siblings have separate counsel for each application.

Issues

1. **Is Ada's Letter a holograph testamentary instrument as contemplated by section 6(2) or 8A of the *Wills Act,* RSNS 1989, c.505?**
2. **What is the proper interpretation of Ada's Letter, if it is a testamentary instrument which conveys a testamentary intent?**
    a) **Is Derwin's hearsay affidavit evidence admissible and corroborated?**
    b) **Is Ada's letter to Andrea admissible and what is its import?**
    c) **The matter of repugnancy.**

[5] Ada Catherine Hawes died on May 18, 2015. Her husband Wallace C. Hawes had predeceased her in 2000. Ada and Wallace ran a trucking company, Hawes Trucking & Excavating Limited (the "Company"). The Company operated from the

property where Ada and Wallace lived, in Spry Harbour, NS (the "Property"). The disposition of the Property is the principal focus of these proceedings.

[6] Ada left a will dated October 26, 2001, (the "Will"). She named her brother-in-law Sheldon Hawes as executor. The Will provided various specific gifts – including an uneven distribution of her 98 shares in the Company to the four sons – and left the residue equally to her six children. As to the Property, the Will states, *inter alia*:

> To give to DERWIN HAWES the land containing my house and both the old and new garages used by Hawes Trucking and Excavating Limited, on the condition that if DERWIN HAWES should predecease me, the said land is to be given to JERRY HAWES.

[7] Jerry Hawes's affidavit includes a sketch of the Property, with labels for the "Old Garage", the "Office", the "Work Shop" (also referred to by Jerry as the "Business Garage"), and the "Dwelling", among others. The sketch was prepared by Greg Skelhorn of North Star Surveying and Engineering Limited. According to Jerry, a road across the Property is used by the Company's trucks to access a 36-hectare quarry lying behind the Property. Jerry's evidence is that the Company also used the driveway serving the house to access the quarry.

[8] Sheldon received a grant of probate on September 29, 2015. At the reading of the Will Sheldon read to the siblings a letter addressed to him from Ada, dated "Oct 31/01", which is the subject of the application for proof in solemn form. The letter to Sheldon deals with two things: the Property, and the family cottage. The letter states, in part, as follows:

> Dear Sheldon,
>
> Thank you for being the executor of my will. Didn't get a chance to call you and I am going for the test tomorrow, so I'm leaving a few notes for you. I didn't quite get in my will what I really wanted as far as the house, old garage and business garage goes.
>
> Derwin says he will see it gets done if anything happens to me. (Derwin gets house and land containing the 2 garages.) If he doesn't want it, it goes to Jerry. (he + Jerry will have to work that one out. They may trade houses or a sum of money.) Derwin promised to see that the house and old garage are separated from the Business garage, one piece of property containing the house and the old garage, line to go down past old garage to road, making sure there's enough road frontage for the business garage lot, from old garage line to Jerry's line is to go to the boys personal (not to Hawes Trucking). The property in back will belong to the boys (in my will)

> so that will be their right of way. (This separation wasn't put in the will because municipal laws might interfere and cause a lot of problems for the executor and I didn't want that.
>
> The 2nd thing I didn't accomplish was to have the cottage delt [*sic*] with (so it isn't/wouldn't in my will). I had wanted to deed it over to Valerie, Jerry, Brian, Derwin, & Andrea (Kenney didn't want to be in on it), wasn't enough time to do this. It's not listed in my will but these five children are to get it (Kenney also, if he changes his mind) after Estate taxes are paid (cottage will fall into residue of the estate) taxes paid on it then deeded to them – Sheldon I am going to list the Lots of lands that would be involved. Any questions call Andrea.

[9] The letter concludes by listing various items "named in will" and two others – identified as "Mason Lot" and "Cottage Lot"- have the notation "would go to residue of Estate/To children (5)". Ada also refers to a GIC with the Bank of Montreal "that will go into the Estate to look after taxes & etc, probate fees and personal bills...". The text of the letter concludes with the words "Andrea know" and the salutation "Thanks Sheldon. Ada."

[10] According to Sheldon's affidavit, the letter was left with Ada's Will. Sheldon states that the letter was found in Ada's safety deposit box along with the Will when Sheldon and Ada's daughter Andrea Hawes opened the box several days after Ada's death. There is no dispute that the letter is in Ada's handwriting. I refer to this letter in this decision as "Ada's Letter" or ("the letter" or "Ada's letter to Sheldon".

[11] Sheldon conveyed the Property out of the estate to Derwin on June 8, 2017. Before he did so, Sheldon did not bring the letter before the Court. The siblings and Derwin disagree as to the effect, if any, of the statements in Ada's Letter. They also disagree as to whether Ada's letter is (a) a holograph testamentary instrument or (b) whether it is a document which embodies Ada's testamentary intentions.

Issue 1: Is Ada's Letter a holograph testamentary instrument as contemplated by section 6(2) or 8A of the *Wills Act?*

Holograph testamentary documents

[12] The first issue is whether the Ada's Letter is a holographic testamentary instrument, as contemplated by section 6(2) or 8A of the *Wills Act*, RSNS 1989, c 505.

Subsection 6(2)

[13] Ada's Letter does not meet the formalities of execution required of a valid will under section 6(1) of the *Wills Act*, given that it is not witnessed. However, s. 6(2) provides that "[n]otwithstanding subsection (1), a will is valid if it is wholly in the testator's own handwriting and it is signed by the testator."

[14] The siblings submit that, being in Ada's own handwriting and signed by her (albeit with her first name only), the letter complies with section 6(2). Counsel for Derwin suggests that the use of the first name alone suggests that the letter was not "signed" as required. The Court was provided no authority suggesting that there is a particular form required for a signature. In *Morrison v. Manderville*, 2018 NBQB 43, Ferguson J, in setting out various principles governing holograph documents, said:

> ... A purported testamentary instrument signed: 1) by the "initials of the testator" or 2) by some other name known to have been used by the testator in correspondence such as: "Your Loving Mother" are valid signatures; *Shultz Estate (Re)* [1986] S.J. No. 18 (S.C.A.), as to the use of initials and *In The Estate of Cook* [1960] 1 All E.R. 689 as to the latter signature, "Your Loving Mother"... [para. 35]

[15] Counsel for Derwin suggests that Ada could be taken to be aware that her full name was required for a "formal" signature, having executed a will and a memorandum to the Will with the assistance of legal counsel.

[16] This Court finds that this is too far to stretch any possible inference about Ada's intentions in writing the letter to Sheldon. It is equally plausible that she simply signed her first name because the letter was addressed to someone she knew.

[17] Given the lack of dispute respecting the handwriting, and the use of the name "Ada", this Court is satisfied that the Ada's Letter was written and signed by Ada. Accordingly Ada's Letter is a valid codicil pursuant to s. 6(2) of the *Wills Act* providing that it expresses a testamentary intent.

Subsection 8A

[18] In the alternative, if Ada's Letter is not established as a holograph testamentary instrument under s. 6(2), the siblings rely on section 8A of the *Will Act* to establish it as a document embodying the testamentary intentions of the deceased as if it had been validly executed under section 6. Section 8A states:

> **Writing not in compliance with formal requirements**
>
> 8A Where a court of competent jurisdiction is satisfied that a writing embodies
>
> (a) the testamentary intentions of the deceased; or

> (b) the intention of the deceased to revoke, alter or revive a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a will,
>
> the court may, notwithstanding that the writing was not executed in compliance with the formal requirements imposed by this Act, order that the writing is valid and fully effective as if it had been executed in compliance with the formal requirements imposed by this Act.

[19] The burden under section 8A is on the applicant to establish the requirements of the section on a balance of probabilities. Gogan J. (as she then was) addressed the application of this provision in *MacKinnon v. MacKinnon (Estate of)*, 2021 NSSC 272:

> [44] The parties to this application each cite various authorities on the interpretation of s. 8A of the *Wills Act*. Broadly speaking, it is clear from these authorities that the section is remedial and intended to give effect to testamentary intentions not compliant with the formalities otherwise required. The onus is on the applicant who must satisfy the requirements of the section on a balance of probabilities. Discharging the onus is said to require "substantial, complete and clear evidence relating the deceased's testamentary intentions to the document in question" (*George v. Daily*, (1997) M.J. No. 25 (Q.B.) at para. 97).

[20] In the within case the parties on both sides of the dispute are respondents, but for purposes of the burden, it is the sibling respondents, as the proponents of Ada's Letter as a testamentary document, who must show that the requirements of section 8A are met.

[21] Derwin maintains that the Ada's Letter does not meet the requirements of section 8A, in part because it contains no revocation clause. However, this position is inconsistent with the language of s. 8A, which sets up two alternative routes to finding a writing to be valid. Counsel for Derwin provided no authority indicating that a revocation clause is essential.

[22] There is no express language in Ada's Letter that would suggest a revocation of the will. Where a formal will already exists, it is necessary to consider whether the new document proffered for probate is intended to revoke all or part of the will. Duncan J. (as he then was) considered revocation in *Re Peters Estate*, 2015 NSSC 292:

> [20] The next question I have to look at, when I consider the documents, is whether they are intended to revoke any previous documentation. The revocation can be a revocation of all of the previous document or part of it. But even if it was

> considered to be a revocation of all or part of a previous document, it would only be effective to revoke that part of the previous document, the Will, to the extent that it is inconsistent with those. So if the Will says something and the subsequent document contradicts that, then maybe that is the only thing that gets changed by the subsequent document. Where the subsequent document, these notes for example, insert entirely new concepts that are not in the Will, then there is no inconsistency and no evidence in that situation to support a conclusion that it was intended to revoke some other specific bequest...

[23] The siblings submit that when Ada's Letter is read alongside the Will, "it is logical to assume that Ada intended it to have effect upon her death; the Property would [be] subdivided as she outlined, and the cottage would go to her children". As such, they submit, Ada likely viewed Ada's Letter as a way of supplementing, not revoking her Will. The combined effect of the letter and the Will, they submit, is that Ada "intended to leave the family home to Derwin, and the land on which the Company operates to either all or most of the shareholders" of the Company. Derwin does not suggest that there was any indication of revocation, taking the position that Ada's Letter simply reaffirms the Will.

[24] In oral argument, counsel for the siblings asserted that the Will and Ada's Letter are inconsistent as to the treatment of the real property. To the extent that the letter indicates a different treatment of the land than the straight gift to Derwin indicated by the Will, this Court agrees. As suggested by *Re Peters Estate*, if the letter does express a testamentary intention, the result would be to revoke that portion of the Will.

[25] Does Ada's Letter embody a testamentary intent?

Testamentary intention

[26] In addition to the statutory requirements of ss. 6(2) and 8A of the *Wills Act*, in order to be a valid testamentary instrument, a document must demonstrate a testamentary intention. Fauteux J., for the majority, in *Re Gray*, [1958] S.C.R. 392 (*sub nom Bennett et al. v. Toronto General Trusts Corporation*), stated at p. 396:

> There is no controversy, either in the reasons for judgment in the Courts below, or between the parties, that under the authorities, a holographic paper is not testamentary unless it contains a *deliberate or fixed and final expression of intention* as to the disposal of property upon death, and that it is incumbent upon the party setting up the paper as testamentary to show, by the contents of the paper itself or by extrinsic evidence, that the paper is of that character and nature... [Italics in original.]

[27] In *Re Gray* the deceased had a will, but wrote a letter to her lawyer expressing her wishes for a new will. While she met with her lawyer several times in the subsequent three years before she died, no revised will was ever prepared. In these circumstances, the Court held that there was no testamentary intention established:

> What took place from the date of the letter, September 27, 1952, to the day of the death of Mrs. Gray, April 5, 1956, affords no evidence either that her letter contained a deliberate or fixed and final expression of intention or that it acquired such a testamentary character by subsequent and sufficient manifestation of intention on her part. Indeed the evidence shows that Mrs. Gray failed to pursue what she indicated in her letter she contemplated doing subject to consultation with Mr. Dysart, though there were, during this lengthy period of time, the fullest opportunities and facilities to do so, and that the most reasonable explanation for this failure is the abandonment of her original intention. No decision was ever reached as to the choice of an executor; nor was even the disposal of the residue of the estate ever considered ; nor did she, at any time, decide to instruct Mr. Dysart to proceed with the preparation of the will, notwithstanding that both were perfectly aware that the formal will, executed by Mrs. Gray at the same time as that of her husband on January 6, 1949, was still in existence. There were, moreover, intervening facts affecting the contemplated apportionment of her estate. Thus there was, at a time unrevealed by the evidence, a change of mind as to the disposal of the guest-house, of which Mrs. Gray apprised Mr. Dysart on May 29, 1953, on the occasion of the second and last interview during which the matter of the will, amongst others, was considered. This change is cogent evidence of a still deliberating mind. There was also subsequently, in April 1954, the gift of $10,000 she made to her daughter Dorothy. [pp. 397-398.]

[28] In *Canada Permanent Trust v. Bowman*, [1962] SCR 711, the deceased did not have a will, but a handwritten and signed document found after her death set out certain bequests. While the document had words struck out, did not name executors or dispose of residue, and was not found in a strongbox with other important papers, the Court nevertheless found that it embodied a testamentary intention. Martland J. referred to *Re Gray* and said, for the court, at p. 714:

> In my opinion the contents of the paper in question here do contain the evidence to show the kind of intent to which he refers in this passage. The wording of the document is a statement of the wishes of the deceased respecting the disposal of her property and it is implicit in the document read as a whole that she wished such disposition to be made following her death. In addition, the word "bequests", which she used following reference to various dispositions previously mentioned in the document, is a term which is ordinarily applicable to property taken by will...

[29] The Court in *Re Gray* also considered extrinsic evidence that the deceased had told a niece of her intention to make a will (p. 715).

[30] Philp J.A. considered a provision authorizing the court to treat documents as testamentary despite non-compliance with strict requirements for a will in *George v. Daily* (1997), 143 D.L.R. (4th) 273, [1997] M.J. No. 51 (Man. C.A.):

> 60 It remains a fundamental and universal proposition "that nothing can receive probate which was not intended to be a testamentary act by the testator": per Lord Selborne L.C. in *White v. Pollock* (1882), 7 App. Cas. 400 at p. 405. In Bailey's *The Law of Wills*, (7th ed. 1973, Pitman Publishing) the principle is stated (at pp. 65-6): "No will is entitled to probate unless the testator executed it with the intention that it should take effect as his will." (It is not necessary to review cases such as *Milnes v. Foden*, [1890] 15 P. 105, in which instruments have been admitted to probate even though the deceased was unaware that he/she had performed a testamentary act. The principle remains the same: the intention that the instrument record the final (but revocable) wishes of the deceased as to the disposal of his/her property after death.)
>
> 61 Section 23 can be invoked to give effect to the testamentary intentions of a deceased in the face of imperfect compliance, even noncompliance, with the formalities of the Act. Section 23 cannot, however, make a will out of a document which was never intended by the deceased to have testamentary effect. In *Re Balfour Estate* (1990), 85 Sask.R. 183, Gerein J. explained the principle:
>
> > Yet, it must he kept in mind that the section's [s. 35.1 of the *Saskatchewan Wills Act*] purpose is to overcome non-compliance with formal requirements. It does not empower the Court to render a document testamentary in nature when it is otherwise not so. In the instant case, the document does not manifest a true testamentary intention and therefore does not meet the threshold requirement of the section.
>
> 62 Not every expression made by a person, whether made orally or in writing, respecting the disposition of his/her property on death embodies his/her testamentary intentions. The law reports are filled with cases in which probate of holographic instruments has been refused because they did not show a present intention to dispose of property on death. *Re Gray*; *Bennett et al. v. Toronto General Trusts Corporation et al.*, [1958] S.C.R. 392, was such a case.
>
> [Emphasis added]

[31] Philp J.A. concluded that the document did not meet the standard required by *Re Gray*. While it "detailed the way in which ... she would like her will to be made out, the letter did not embody her testamentary intentions" (para. 64). He continued:

> 65 The term "testamentary intention" means much more than a person's expression of how he would like his/her property to be disposed of after death. The essential quality of the term is that there must be a deliberate or fixed and final expression of intention as to the disposal of his/her property on death...

> 66 In my opinion, these are the principles which must be applied in the determination under s. 23 as to whether or not a document or writing embodies the testamentary intentions of the deceased. Whether it is the deceased's own instrument or the notes or writing made by a third-party, the crucial question to be answered is whether the document expresses the *animus testandi* of the deceased - a deliberate or fixed and final expression of intention as to the disposal of his/her property on death.
>
> [Emphasis added]

[32] In *Re Hayward Estate*, 2010 NSSC 6, the testator executed a will, naming his wife as sole executor and beneficiary. Nine years later they divorced. Their separation agreement, though it dealt with property division, did not address the will, and the testator did not revoke it or make a new will. He died four years later. The issue was whether the separation agreement was "a writing" pursuant to s. 8A, and whether it amended the will notwithstanding that it was not executed in compliance with the section 6 requirements under the *Wills Act*.

[33] A. Boudreau J. held that the separation agreement was "a writing" under section 8A, but that it did not alter the deceased's testamentary intentions as expressed in the will because the agreement was silent with respect to the will:

> [65] The separation agreement is "a writing" that was not executed in compliance with the formal requirements of the *Wills Act*. Michael Hayward says the separation agreement expressed an intention by his father to alter his "testamentary intentions," in that it "expressed testamentary intentions of George Hayward that the agreement was a final settlement between the Haywards." This would be a strained application of s. 8A, given that the separation agreement made no reference to Mr. Hayward's Will. I therefore find that s. 8A could not operate to revoke Mr. Hayward's Will.

[34] Section 8A was considered again in *Robitaille v. Robitaille Estate*, 2011 NSSC 203. After her husband died, the deceased went to her lawyer to give instructions for a new will. The lawyer prepared a draft, but before the new will could be executed, the deceased became ill. The lawyer e-mailed the draft will, which the deceased signed in the hospital, but without witnesses present when she did so. It was not a holograph will, not being entirely in the deceased's handwriting. In admitting the draft will to probate, LeBlanc J. (as he then was) found that the deceased would have executed the will in accordance with the *Wills Act* had she not become ill, and that the will was "a deliberate or fixed and final expression of her intention to dispose of her property on death" (paras. 27-30).

[35] In *Komonen v. Fong*, 2011 NSSC 315, the deceased had executed a will, but a printed will form was found in his home after his death. It began with the words ""[t]his is the Last Will and Testament of me, Dannie Wing Fong....."", with the name and other part of the document in pencil (para. 3).

[36] Smith A.C.J. (as she then was) held that the section 8A burden was not met:

> [25] There are a number of facts in this case that support a conclusion that this document embodies the testamentary intentions of the deceased. These include the fact that: (1) Mr. Fong used a preprinted will form to write on rather than a blank piece of paper; (2) the fact that the document is signed (albeit in pencil); (3) the fact that the document is dated (albeit there are two different dates) and (4) the fact that the document refers to funeral arrangements (cremation before burial.)
>
> [26] On the other hand, there are a number of factors that do not support the conclusion that this document expresses a deliberate or fixed and final expression of intention as to the disposal of Mr. Fong's property upon death. I refer, in particular, to the fact that: (1) the document has been completed in pencil (which, in my view, indicates a lack of finality); (2) the fact that some portions of the document have been left blank and (3) the fact that the document was not witnessed. In relation to this latter point, I note that Mr. Fong would have been aware of the formalities involved in executing a will - having signed such a document in 1997.

[37] The Court considered extrinsic evidence, including diaries and other written communications dating from after the date on the printed will form in which the deceased referred to decisions he needed to make about his estate "such as who should be his executor(s) and what should be done with his home". Most of these comments were made after the dates printed on the will form. Smith, A. C. J., found that all of that supported the suggestion that he had not yet formed a fixed and final intention as to the disposal of his property upon death other than with his 1997 Will" (para. 32).

[38] In *Re Peters Estate*, 2015 NSSC 292, the deceased had a will, but five additional handwritten documents (some signed or dated, some not) were also found after his death.

[39] Duncan J. (as he then was) provided a list of considerations that had been applied in the caselaw to determine whether a testamentary intent was established:

> [18] The question to be posed is taken from the well-known case of (Re) Gray Estate, [1958] S.C.R. 392, at page 396 and that is whether the note contains (and this is the operative language) "*a deliberate or fixed and final expression of intention as to the disposal of property upon death*." An alternate way of saying

this is: does the note demonstrate testamentary intention or *animus testandi*? Evidence can be extrinsic evidence and/or found in the contents of the paper itself.

[19] In looking at the cases that deal with determining the intent, a number of factors have been looked at, and these are not intended to be an all-inclusive list, but these are some of the things that one sees in looking at other cases where judges have had to consider these questions:

- ➢ What is the degree of the formality of the language in the document?
- ➢ Is it dated?
- ➢ Is it signed?
- ➢ Has it been sealed?
- ➢ Was it delivered to a person, a specific person, with or without instructions as to what to do with it?
- ➢ Were there are any statements made by the testatrix, either at the time of delivery, or in the document itself that speak to the anticipation of death; that the document was intended to reflect a disposition after death?
- ➢ Is there any indicia of when it was expected that the document would read?
- ➢ The certainty of the bequests set out in the document.
- ➢ Whether there are reasons offered for gifting as set out in the document.
- ➢ Whether there is a reference to an existing Will that might tie it back to a Will.
- ➢ How permanent was the document intended to be - was it written in ink, or in pencil? i.e., Was this just a penciled thought for erasing later or not? (You have heard me in my preliminary comments about looking at the originals today and noting that there are some deletions in Note 3 that I will speak to a little bit later. Having the original document here allows me to better assess that type of issue.)
- ➢ Whether the document was on a form or is it entirely, as in these notes, in the handwriting of the testatrix.

So these are but a few factors the courts have looked at. I will consider as well what I see in the individual documents.

....

[21] Overall, as is indicated in the case law, the question is what is the intention of…can we glean the intention of the deceased person? That is really the sole guide and control for making the determination that I have to make today.

[40] The court in *Re Peters* admitted to probate one of the five documents that had been found. After reviewing the relevant terms of the will (paras. 24-30), Duncan J. turned to the other documents. With respect to the single document admitted to probate, he found a degree of formality in titling it "memorandum", with individually signed and numbered pages. The language identified specific beneficiaries, most of whom were already beneficiaries under the will. Additionally, most of the bequests in the memorandum related to specific provisions of the will (paras. 31-43).

[41] Derwin says *Re Peters* is distinguishable in that Ada's reference to the Will in the letter "is one clearly stating that her instructions were not to be included in this Will and including her reasons for this choice".

[42] In *Re Jones Estate*, 2017 NSSC 300, the executor located four handwritten memoranda after obtaining a grant of probate. Two of the documents were found in the testator's house, and two in a bank safety deposit box with the original will. Wright J. admitted to probate the two documents found in the safety deposit box, holding this to be "an indication that the memo was intended to accompany the Will as a testamentary instrument", particularly where the will "directed the personal representative to distribute any items of a personal nature as directed in any written list attached to or with my Will" (para. 26). Wright J. found the two memoranda to be codicils, containing "additional bequests which are relatively minor compared to the total value of the estate. These new bequests are set out with certainty and were obviously made in contemplation of death" (para. 31).

[43] Derwin says *Re Jones* is distinguishable because it is not clear that Ada herself put the letter in the safety deposit box, in view of evidence that other family members placed letters in the box before Ada's death.

[44] Finally, in *Re Casavechia Estate*, 2014 NSSC 73, affirmed on this issue, 2015 NSCA 56, the document in question, made after the will, was entirely in the deceased's handwriting and was signed and dated. In assessing the language of the document for the purpose of determining whether it showed testamentary intent – and concluding that it did – McDougall J. found that the letter showed a degree of formality in the manner in which the deceased described his daughter, in dating and signing the document, and placing it in a sealed envelope and giving it to his daughter "with instructions not to open it for the time being. These facts all suggest that this letter was a significant document that William Casavechia - a man who had reached the age of 93 years by 2010 - did not want his daughter to read until he passed away" (para. 54). McDougall J. continued:

> [55] The letter uses the language of "gift". William Casavechia states that the note is to confirm a promise that he will give his daughter a lakefront building lot and he describes the location of the specific lot in detail. All parties agree that the letter refers to the same lakefront lot that the deceased typically reserved to himself when negotiating a sale of the property during his lifetime. The gift is to take effect when William Casavechia's lakefront property is sold. The deceased does not state that the gift is to take effect when he sells the property, but rather, when it is sold. As in *Bowman*, it can be implied from the language used by the deceased that the disposition is to be made following his death.
>
> [56] William Casavechia goes on to say, "I hope this will be agreed with all concerned". Counsel for Mrs. Casavechia argued that by using this language the deceased intended to make the gift conditional on the agreement of all interested parties. I disagree. According to Mrs. Casavechia's evidence, the deceased was not a person who sought the permission of others to dispose of his property during his lifetime. The interpretation more consistent with the evidence is that this language was an expression of William Casavechia's hope that there would be no disagreements when his wishes were carried out after his death. Finally, the deceased provides a reason for giving his daughter the lot - he never gave her a wedding/honeymoon gift and feels guilty about it. The most reasonable inference is that William Casavechia wanted anyone who would read the letter to understand why he was giving the land to Shannon Noseworthy because he would not be there to explain the gift himself.

[45] McDougall J. went on to consider extrinsic evidence indicating that the testator "often spoke of selling the property and giving his daughter the lakefront lot. He also spoke of his desire to draft a new will" (para. 57). He concluded that the document was a valid holograph codicil entitling his daughter to ownership of a parcel of a piece of property that was "described in general terms"; he left it to the parties "to try to reach an agreement on the exact location and dimensions of the lot in accordance with existing subdivision requirements", failing which the executor could "make the final determination or seek the assistance of the Court" (paras. 61-62). He retained jurisdiction for this purpose (para. 62).

Analysis

[46] The siblings submit that Ada's Letter discloses a testamentary intention. They raise several points in support of this position, referring generally to the considerations identified in *Re Peters Estate*.

[47] While it is not sealed, the letter is entirely in Ada's handwriting (not on any kind of form), and is signed. The document looks like a fair copy, in that there are

no cross-outs. Given that the document before the court is a photocopy of a missing original, it appears to be ink, but this is not certain. The letter is dated "Oct 31/01." The letter is directly tied to the Will by express reference.

[48] As to delivery, Ada's Letter was found in Ada's safety deposit box with the Will. There is no specific evidence as to how it got there. It was found in an envelope with Sheldon's name handwritten on it. The siblings acknowledge that Ada was not the only person with access to the safety deposit box. However, the letter was handwritten by Ada within days of making her Will, and was specifically addressed to Sheldon. The siblings argue that it can be inferred that she intended the letter to be read along with the Will.

[49] As to statements by the testatrix, either at the time of delivery, or in the document, that speak to the anticipation of death and that the document was intended to reflect a disposition after death, the siblings submit that the language used in the letter indicates that Ada was not satisfied with the Will she had just signed, based on the statement that "I didn't quite get in my will what I really wanted as far as the house, old garage and business garage goes." According to the siblings, this indicates that she "was trying to remedy the lacunae in her Will by writing out a statement of her fixed and final wishes to her executor prior to going in for medical tests". The statements are in the past tense and, in the siblings' submission, do not suggest that Ada had changed her mind about what she wanted after making her Will. Her remark about "going for the test tomorrow" and the statement "if anything happens to me" both suggest that the potential of health issues and death was in her mind.

[50] With respect to the specificity of Ada's intentions, the siblings maintain that there is "no question that Ada envisioned the subdivision of the Property" upon her death, given her statement that the "separation" of the Property she refers to "wasn't put in the will because municipal laws might interfere and cause a lot of problems for the executor, and I didn't want that". Counsel for the siblings submits that "certainty" in this context means that the subject and object of the gift can be sufficiently identified so as not to be void for vagueness. Precise metes and bounds descriptions, or precise lawyer's drafting, are not required to make a lay person's directions sufficiently certain.

[51] The siblings submit, then, that Ada's Letter to Sheldon is a holograph codicil intended to give effect to Ada's testamentary intentions by supplementing, not replacing, the existing Will. If Derwin's promise alone had satisfied her, they argue, there would have been no reason for Ada to write the letter to Sheldon. Further, counsel notes, Derwin's evidence was that he told Ada that the estate would pay the costs of subdivision. This would only make sense if the promise reflected a

testamentary intention; otherwise there would be no obligation on the estate to comply.

[52] Derwin says Ada's Letter expresses an intention *not* to alter or revoke any part of the will, pointing to her reference to potential complications resulting from municipal laws, and her statement that "I didn't want that." Derwin says Ada deliberately decided not to include certain terms in the Will to avoid causing complications for Sheldon as executor in administering the estate. In short, Derwin argues that the language of Ada's Letter cannot support a finding of a deliberate or fixed and final expression of intention when it does not give a testamentary instruction, but in fact expresses a decision not to take the steps mentioned. Further, her reference to "municipal laws" gives no specifics. The reference to Derwin's promise, Derwin submits, has no binding effect, but is only an expression of Ada's wishes.

[53] In arguing that there is no certainty of intent established in the letter, Derwin submits that the disposition of the Property to him is "clear and unambiguous" in Ada's Will, and the letter does not purport to change it. In his submission, Ada merely expresses a wish for him to act in accordance with his promise. Her references to potential problems arising from subdivision, he says, indicate that such a requirement was purposefully left out of the Will. Derwin also submits that the lack of certainty to be found in the letter is apparent from the fact that the parties disagree on the terms of subdivision.

[54] The siblings note that Derwin does not take a position on the disposition of the cottage suggested by the letter. Counsel submits that the letter must stand or fall in its entirety. While the cottage is not in issue in the proceeding, Ada referred to its disposition as "the 2nd thing" she did not accomplish in her Will. The siblings say this indicates that she is writing to her executor to remedy a gap in the Will. Her concerns about creating complications at the time the Will was made does not mean that she abandoned the intention to require subdivision; as the siblings describe it, "[h]aving been persuaded not to include subdivision in her will, Ada clearly sat on the issue for all of five days before revisiting it with her executor" by means of the letter.

[55] With respect to the cottage, Derwin notes that the letter says "the cottage will fall into the residual of the estate." He says the letter does not indicate an intention to change this to a specific bequest. The children are the residual beneficiaries under the Will. He also notes Ada's reference in the letter to paying estate taxes before the cottage is deeded. As such, Derwin says, the letter simply affirms that the cottage

would go into the residue. (He says the same thing would happen to a GIC referenced in the letter.

[56] The siblings note that the passages of the letter Derwin points to as evidence of her intention not to alter the dispositions in her Will are framed in the past tense; this, they say, indicates that she was explaining why she had previously been persuaded not to include a subdivision requirement in the Will, but her fixed and final intention was as expressed in the letter to Sheldon. The letter, they submit, was "a lay person's attempt to remedy the omissions in her current Will". They further point out that "silence on the subject would have been the way to ensure that her executor did not deal with the Property except as provided in the Will. If she was content to trust that Derwin would implement her fixed and final intentions to subdivide the Property, why would Ada have mentioned the subdivision to her executor at all?".

[57] Finally, as to Derwin's claim that there is no certainty to be found in the language of the latter, the siblings reply that "Ada described her testamentary intentions with admirable certainty given her lack of legal training and the fact that she was not a surveyor", and any uncertainty arose from her "inability to predict the criteria for subdivision approval or subdivision as of right in the future".

[58] Based on the internal evidence of the document itself, Ada wrote the letter to Sheldon less than a week after executing her Will. The letter expresses her dissatisfaction with certain provisions of the Will, and Ada clearly states that she "did not get what [she] wanted." Derwin argues that the language of the letter does not show a deliberate, fixed, or final intention; among other things, he points to the past tense of "didn't get what I wanted", compared to the present tense of "Derwin gets house and land containing the 2 garages." Counsel also points to the use of the word "direct" in a signed memorandum attached to the will, noting that Ada does not use this term in the letter to Sheldon.

[59] In this Court's view this places excessive nuance on Ada's choice of words and strains the text to the breaking point to suggest that Ada's intention was to inform Sheldon that this was simply an expression of her past intentions. Rather, I find this is a statement of what Ada still intended to happen. Ada also explains why the subdivision requirement was omitted from the Will. What the text points to is a lay person's attempt to see her testamentary intentions carried out while trying to avoid certain legal complications for her executor.

[60] External circumstances also point to the conclusion that Ada intended the letter to guide the disposition of her estate. The letter was found with the Will in a

bank safety deposit box, addressed to Sheldon. While counsel for Derwin rightly points out that the circumstances under which the letter was left in the box are not clear on the evidence, there is no dispute that the letter is in Ada's handwriting, nor does there appear to be any dispute that she intended it to come to Sheldon's attention. Moreover, there is no dispute that Ada did indeed want the land subdivided. The clear inference from the circumstances is that Ada left the letter for Sheldon to find, so that he would be aware of her testamentary intentions outside the will.

Issue 2: What is the proper interpretation of Ada's Letter, if it is a testamentary instrument which conveys a testamentary intent?

Interpretation of testamentary documents

[61] It is not disputed that Ada wanted the Property to be subdivided. Both parties have submitted proposed plans. Put simply, the interpretation turns on the location of the subdivision line between Derwin's property – which is the old family home and garage, roughly occupying the southern portion of the undivided Property – and the Hawes Trucking property, to the northeast. The undivided :property fronts on the highway to the east, with Jerry's property lying to the north and the quarry to the west.

[62] Derwin's proposed line would run close to the Hawes Trucking office and workshop straight in the direction of the road, before turning south very near the road. It also includes a new right of way from the road to the quarry over the northeastern end of the Hawes Trucking property, parallel with Jerry's property line.

[63] The siblings' proposed line runs from the quarry to immediately north of the old garage, then turns roughly southeast straight to the road. The more southerly line proposed by the siblings makes more space for Hawes Trucking.

[64] As noted earlier, Ada's Will leaves the Property to Derwin and is silent on subdivision. However, Ada's Letter, which I have found to be a testamentary document, expands on Ada's intentions:

> Derwin says he will see it gets done if anything happens to me. (Derwin gets house and land containing the 2 garages.) If he doesn't want it, it goes to Jerry. (he + Jerry will have to work that one out. They may trade houses or a sum of money.) Derwin promised to see that the house and old garage are separated from the Business garage, one piece of property containing the house and the old garage, line to go down past old garage to road, making sure there's enough road frontage for the

> business garage lot, from old garage line to Jerry's line is to go to the boys personal (not to Hawes Trucking). The property in back will belong to the boys (in my will) so that will be their right of way. (This separation wasn't put in the will because municipal laws might interfere and cause a lot of problems for the executor and I didn't want that.

[65] The issue now is to interpret the letter to Sheldon as a codicil to the will. The parties have provided competing interpretations, resting on distinct bodies of extrinsic evidence.

[66] The leading text on wills, *Feeney's Canadian Law of Wills*, says the following about the object and purpose of interpreting a will:

> In interpreting a will, the objective of the court of construction should be to determine the precise disposition of the property intended by the testator. The court should attempt to ascertain, if possible, the testator's actual or subjective intent, as opposed to an objective intent presumed by law. The court should be concerned with the meaning that the particular testator attached to the words used in his or her will rather than with a hypothetical standard that might by that of an average or reasonable person. This approach requires the court to consider the testator's peculiar and unique use of language, all the circumstances surrounding his or her life, and all the things known to him or her at the time he or she made his or her will, which might bear on the type of dispositions he or she actually intended to make by the will... [James MacKenzie, *Feeney's Canadian Law of Wills*, 4th ed. (LexisNexis; looseleaf) at §10.1. Emphasis added.]

[67] Moir J. accepted an earlier version of this passage as an accurate statement of the law in *Skerrett v. Bigelow Estate*, 2001 NSSC 116 at para. 13. See also *Re Peach Estate*, 2011 NSSC 74, at para. 34, and *Re Gates Estate*, 2018 NSSC 266, at para. 35.

[68] In *Re Maskell Estate*, 2017 NSSC 305, Hunt J applied the "roadmap" (para. 54) provided by Davison J. in *Re Carter Estate* (1991), 109 N.S.R. (2d) 384 (NSTD), to the exercise of interpreting a will:

> [53] At this point I want to turn to a consideration of the state of the law on how a Court must approach a question of interpretation and construction such as the one before the Court. An often cited summary in this jurisdiction is found in Justice Davison's ruling in *Re Carter Estate*... This has often been referred to as a "roadmap" for the interpretation exercise.
>
> > 16. The principles used in interpretation of wills or considered by the Appeal Division of this Court in *Re O'Brien* (1978), 25 N.S.R. (2d) 262 at 266 where Cooper, J. A. approved of the rules enunciated by Kelly, J. of the Ontario High Court in *Re Kirk* (1956), 2 D.L.R. (2d) 527 at 528 as follows:

> In my opinion, the first duty of the Court in construing a will is to ascertain the intention of the testator from the language used in the will. The proper procedure is to form an opinion, apart from the cases, and then determine whether the cases require a modification of that opinion; the Court should not begin by considering how far the will resembles others on which decisions have been given: *Re Blantern, Lowe v. Cooke*, [1891] W.N.54.
>
> There are certain rules of construction to which a Judge ought to adhere:
>
> 1. To read the Will without paying any attention to legal rules;
>
> 2. To have regard not only to the whole of the clause which is in question, but to the will as a whole, which forms the context to the clause;
>
> 3. To give effect, if possible, to all parts of the will and so to construe the will that every word shall have effect, if some meaning can be given to it and if some meaning is not contrary to some intention plainly expressed in other parts of the will;
>
> 4. When the Judge thus determines the intention of the testator he should inquire whether there is any rule of law which prevents effect being given to it.
>
> 17. I approve of the approach of Mr. Justice Krever in *Re Crawley* (1976), 68 D.L.R. (3d) 193 which is not inconsistent with the previous authority to which I referred. Krever J. stated at 195:
>
> As to the particular language used by the testator, the following propositions are, in my view, so well established that they need no citation of authority to support them:
>
> 1. A fair and literal meaning should be given to the actual language of the will;
>
> 2. An opinion as to the meaning should be formed first without regard to the cases, which would afterwards be looked at to see if modification of the opinion is required;
>
> 3. The ordinary and grammatical sense of the words should be assigned;
>
> 4. The words should be given the meaning that was intended by the testator, in view of the context and the surrounding circumstances;
>
> 5. A natural and ordinary meaning should be given in preference to a secondary meaning.

[69] Hunt J. noted (at para. 55) Hamilton J.A.'s remark in *Price Estate v. Mann*, 2001 NSSC 16, at para. 4, that the court "is to determine the testator's intention from the words in the testamentary document and not from other *indicia* of dispositive intent." Hunt, J. went on to consider the "armchair approach" to assessing evidence of testamentary intention, as described by Goodfellow J. in *Re Peters Estate*, 2007 NSSC 103:

> [56] Justice Goodfellow in *Re Peters Estate* ... expanded on this point by commenting, at para. 13 as follows:

> …only when such intention cannot be arrived at with reasonable certainty by giving the natural and ordinary meaning to the words which he has used is resort to be had to the rules of construction which have been developed by the Courts in the interpretation of other wills.

Courts obviously do recognize that situations will arise where an ambiguity may be made out. Direction has been provided on how to proceed in such a situation. Nova Scotia Courts have referred to and applied the concept of "armchair evidence". See for example the decision of Justice Moir in *Skerrett v. Bigalow Estate*, 2001 NSSC 116. Justice Moir expressed it this way:

> The Court puts itself in the position of the testator at the point he or she made his or her will, and from that vantage point, reads the will and construes it, in light of all the surrounding facts and circumstances.

The law on this subject is reasonably well developed and I would summarize it as follows:

[70] Justice Hunt acknowledged the policy reasons for caution in using outside evidence of intention, but noted that "they will not be a bar to the receipt of probative armchair evidence" (para. 58). He cited *Prevost Estate v. Prevost Estate*, 2013 NSCA 20, where Bryson J.A. said, for the court:

> [7] Much has been written about the principles governing the interpretation of wills. Often there is a debate about how far the court may stray beyond the language used by the testator in her will. But there is unanimity on the beginning (*Smithers v. Mitchell Estate*, 2004 NSCA 149):
>
> > [19] The first duty of the court is to ascertain the intention of the testator from the language used in the will. Regard must be had, not only to the whole of any clause in question, but to the will as a whole, which forms the context of the clause. Effect must be given, if at all possible, to all parts of the will. A fair and literal meaning should be given to the actual language of the will, the ordinary and grammatical sense of the words to be assigned unless the context otherwise dictates. The context may well include "surrounding circumstances". Only after the language employed by the testator has been approached in this fashion need resort be had to case law and legal rules to see if any modification is required... [Emphasis in *Prevost Estate*.]
>
> [8] One might have thought that ascertaining intention is a question of fact. But courts have long held that ascertaining the intention of a deceased as expressed in her will is a question of law (Thomas G. Feeney and Jim Mackenzie, *Feeney's Canadian Law of Wills*, 4th ed., looseleaf (Toronto: Butterworths, 2000) ¶10.1)...

> [9] Sometimes it is necessary for the court to consider "surrounding circumstances" and to make findings of fact or mixed fact and law...
>
> [10] The Court's interpretative task is to try and ascertain the intention of the testator from the language used – not to import and impose an intention from other cases, dictionary meanings, evidentiary presumptions, maxims of construction or other principles external to the Will and the language of the testator, unless the testator's intention cannot be settled without recourse to those principles. The language of the will itself must be examined contextually. Justice Ritchie expressed it well in *Alberta Giftwares, supra*:
>
> > ...it is an error of law to attribute a fixed meaning to a word of variable connotation by selecting one of alternative dictionary definitions without regard to the context of the paragraph or sentence in which the word is used.

[71] I note that the authoritative test *Feeney's Canadian Law of Wills* suggests that the direction of the law is towards a broader acceptance of evidence of surrounding circumstances: the authors observe that "[t]he most recent trend in Canadian cases seems to indicate that evidence of surrounding circumstances should be taken into account in all cases before a court reaches any final determination of the meaning of words" (James MacKenzie, *Feeney's Canadian Law of Wills* (LexisNexis: looseleaf) at §10.54. Among the authorities cited in support of this statement are *Re Peach Estate*, 2011 NSSC 74, and *Mitchell Estate v. Mitchell Estate*, 2004 NSCA 149.

[72] In *Mitchell Estate*, Chipman J.A., for the Court of Appeal, cited his previous decision in *Re Murray Estate*, 2001 NSCA 25, where he said, for the Court:

> [18] While direct extrinsic evidence of a testator's intention is not generally admissible, evidence of circumstances known to the testator at the time of making the will may be considered by the court. In *Feeney's Canadian Law of Wills* (4th Ed.) the author states at §10.45-10.46:
>
> > §10.45 In the first instance, the court may not be convinced that the testator's intention can be discerned from the will itself. In such a situation, since the testator must be taken to have used the language of the will in view of the surrounding circumstances known to him or her when he or she made his or her will, evidence of such circumstances is necessarily admissible, at least insofar as it corresponds to the facts and circumstances referred to in the will.
> >
> > §10.46 The court puts itself in the position of the testator at the point when he or she made his or her will, and, from that vantage point, reads the will, and construes it, in the light of the surrounding facts and circumstances. This approach is commonly referred to as the "armchair rule".
>
> [19] It is apparent that the words of the residuary clause before us are susceptible of at least two interpretations. There has been debate in the case

> law whether or not an unclear or ambiguous meaning must appear from the language of the will before a court can consider surrounding circumstances. Whatever approach is favoured, there is sufficient uncertainty here to require us to examine the surrounding circumstances, such as the testator's lifestyle, means and assets, and relatives and associations in construing the words of the will.

[73] Chipman J.A. further referred to *Heidl et al. v. Sacher et al.* (1980), 1 W.W.R. 291 (Sask. C.A.), where the court considered whether surrounding circumstances should only be considered if the ordinary meaning could not be discerned from the words of the will:

> [21] The Court of Appeal of Saskatchewan in dismissing the appeal addressed the question of surrounding circumstances. Bayda, J.A., (as he then was) speaking for the court, asked at p. 296 whether the so-called "ordinary meaning" rule of construction should first be applied without admitting and taking into account surrounding circumstances unless it is found that its application produces a meaning which is unclear and ambiguous, or whether the law required the surrounding circumstances to be admitted at the start, and that the "ordinary meaning" rule of construction should be applied in light of them. The former approach was referred to as procedure A and the latter as procedure B.
>
> 22] Bayda, J.A. then embarked upon an examination of authorities in England and Canada and concluded at p. 302 that the Canadian authorities tended to put forward procedure B as the proper approach. In his view, it was the approach most likely to elicit the testator's intention and thus more desirable. In the course of his reasons, at p. 300, Bayda, J.A. quoted from the decision of *Re Burke* (1959), 20 D.L.R. (2d) 396 (Ont. C.A.) where Laidlaw, J.A. said, at p. 398:
>
> > ... I emphasize what has been said before so frequently. The construction by the Court of other documents and decisions in other cases respecting the intention of other testators affords no assistance whatsoever to the Court in forming an opinion as to the intention of the testator in the particular case now under consideration. Other cases are helpful only in so far as they set forth or explain any applicable rule of construction or principle of law. Each Judge must endeavour to place himself in the position of the testator at the time when the last will and testament was made. He should concentrate his thoughts on the circumstances which then existed and which might reasonably be expected to influence the testator in the disposition of his property. He must give due weight to these circumstances in so far as they bear on the intention of the testator. He should then study the whole contents of the will and after full consideration of all the provisions and language used therein, try to find what intention was in the mind of the testator. When an opinion

> has been formed as to that intention, the Court should strive to give effect to it and should do so unless there is some rule or principle of law that prohibits it from doing so.
>
> [23] In my opinion, this is as good a statement as any as to how we should perform our function. It is not strictly necessary here to determine which procedure is preferable because, as I have said, we are driven to examine surrounding circumstances in any event. Obiter, I would express a preference to the view taken by Bayda, J.A. See also *Feeney*, *supra*, §10.53-10.57.

[74] While it was *obiter* in the *Murray* case, Chipman J.A. described this as "as good a statement as any as to how we should perform our function" and referred to comments to this effect in *Feeney's Canadian Law of Wills* (para. 23). To a similar effect, in *Mitchell Estate* Chipman J.A. said, "[a] fair and literal meaning should be given to the actual language of the will, the ordinary and grammatical sense of the words to be assigned unless the context otherwise dictates. The context may well include "surrounding circumstances"" (para. 19). The authors of *Feeney's* add the following remarks:

> §10.55 This trend recognizes that what the court is really doing, in any event, is selecting, from a range of possible, or probable, meanings, the one that seems to accord with the actual intentions of the will-maker. It would follow that even evidence of direct intent would be relevant and admissible, and questions of relative weight and materiality would be the determining issues...
>
> ...
>
> Effectively, the general test is the sound judgment of the courts as opposed to any actual reliance on rules to exclude evidence. But there may be instances when courts will use traditional language to express the results.
>
> §10.56 The recent trend is summarized by Morse J., in *Bergey v. Cassel* [[1995] M.J. No. 272 (Q.B.) at para. 12]:
>
> > Counsel for Mrs. Frost also submitted that extrinsic evidence could not be received by a court unless there is an ambiguity or equivocation in the will and that as the words "Mrs. Donald Bergey" were clear and unambiguous, extrinsic evidence could not be received in this case. There are authorities to this effect, but I think the better view is that the court interpreting the will must endeavour to put itself in the position of the testator at the time the will was made and that the language of the testator must be read in the light of all the circumstances that surrounded and were known to him or her at the time so as to endeavour to give effect to the intention of the testator.

[75] In the within case, the siblings submit that the "four corners" approach – by which interpretation is limited to the "four corners" of the document itself – is insufficient. They argue that Ada's testamentary intentions cannot be derived from the Will and the Ada's Letter alone. As a result, they submit, it is necessary to resort

to the "armchair" approach, placing the court in the position of the testator and considering the circumstances and context known to her.

[76] I agree that the language of the Will and Ada's Letter leaves some ambiguity as to whether Ada intended for the land to be subdivided and, if so, how the location of the line should be determined. The documents speak both of Sheldon receiving the Property and of the Property being divided. There is at least a legitimate dispute as to whether Ada intended for Derwin to take full ownership of the entire Property, or whether Ada intended for it to be subdivided between Derwin, on the one hand, and the brothers, on the other.

(a) Is Derwin's hearsay affidavit evidence admissible and corroborated?

[77] In support of his own position, Derwin relies on conversations he allegedly had with Ada.

[78] In his affidavit dated February 21, 2023, Derwin recounts that around October 28, 2001, Ada approached him "in person and mentioned that she had done up a Will and was leaving me the house and two garages, including the garage which Hawes Trucking operated from", while the Hawes Trucking garage "should go to the four brothers ... who I also understood would also receive the Quarry Land in the Will (paras. 8-9). During the discussion, Derwin says that Ada raised certain "complicating factors" that would have to be dealt with if the property was to be divided, including the need for a new well and relocation of the underground power line for the commercial garage (para. 10). Derwin continued:

> 11. My mother and I discussed placing a division line between the two properties and a right-of-way to access behind Quarry Land. Both would be in the locations that were always discussed when my father was alive. Specifically, my mother and I discussed that the intention was to have the property line dividing the family home and garage from the commercial garage run from a surveyor's pin that was placed up behind a fire shed, down between the garages (the family garage and the commercial "workshop" garage) past the fuel tanks, then veering off to the Highway #7 to allow for enough road frontage from my brother Jerry's personal property to the remaining family home property to allow for the subdivision of the commercial property (the "Commercial Land").
>
> 12. My mother told me, that Jerry wanted the right-of-way to the Quarry Land to run between the family garage and the commercial garage. My mother told me to "sit back and watch the goings on, (your) father always said it was to go over next to Jerry's property on the other side of the (commercial) garage. You will be able to determine that, and ultimately it would be (my) decision".

> 13. During this discussion, my mother advised very clearly that I was free to charge rent to the family company, Hawes Trucking while I owned the Property.
>
> 14. I was also advised by my mother during this discussion that if the proper[ty] is to be subdivided, the subdivision costs would all be paid by the Estate, including the property taxes and expenses.

[79] Derwin adds, "[i]t is, and always has been, my intention to subdivide the Property".

[80] Derwin further states in his affidavit that the surveyor's pin behind the fire shed was removed "at some point in 2001 or 2002, after my father's death in 2000", and that the pin thereafter "stood in the corner on the inside of the big garage for years" (para. 17). Derwin suggests that Jerry removed the pin, based on "the fact that he directed the removal of the fire shed, and I noticed the pin missing after this work was done" (para. 18). Derwin subsequently had a new pin placed by a surveyor, located, "to the best of my recollection, in the same location the prior pin had been in..." (para. 20). The Court notes that there was no evidence to support Derwin's speculation that Jerry removed the pin.

[81] Derwin also comments on what was "intended" for the driveway and right of way:

> 34. The existing access is along an existing gravel/asphalt driveway, which is used to access the family home and is currently used to access the proposed Commercial Land (currently owned by me). It was never intended that this existing access road/driveway would be used on a go-forward basis, for the benefit of the Commercial Land and/or Quarry Land once the subdivision occurred.
>
> 35. I believe the proposed subdivision identified in the survey plan at Exhibit "B", with the proposed access easement, is reflective of my [mother's] wishes.

[82] Derwin's affidavit goes on to recount a discussion with Sheldon after Ada's death:

> 21. After my mother passed away, I had a discussion with the Executor, Sheldon Hawes, wherein he told me that my late mother advised him that "...[Derwin] would know what to do with the property and any subdivision of the property". During this discussion with Sheldon Hawes, I explained to him where the Property dividing line was to go and advised where the new right-of-way/access/entry point was to be given to allow trucks to travel across the newly subdivided Commercial Land through to the Quarry Land behind.
>
> ...

> 28. Sheldon told me, which I verily believe to be true, that he was directed by my mother to come to me as to where the boundary lines and right of way was to go, as it was to be my decision.

[83] In his reply affidavit, Sheldon denies that Ada told him that the location of the boundary lines and the right of way were to be Derwin's decision, as asserted by Derwin at para. 28. Sheldon states that Ada did not provide him with "any verbal directions with respect to where the property lines would go. I received no verbal direction from Ada to approach Derwin for confirmation as to where the boundary lines and right of way were to go. I have no recall of ever saying the Derwin that Ada directed me to consult with Derwin regarding where the boundary lines and right of way were to go" (para. 6).

[84] Derwin goes on to state that his own proposed subdivision is opposed by his siblings. Derwin recounts various incidents arising from this dispute – such as his attempts to obtain rent from Hawes Trucking, and Jerry allegedly placing obstructions in the area – which are irrelevant to the issue of Ada's intentions. Further, he states:

> 36. I equally believe I have no requirement to subdivide the Property, as my mother made it clear it would be ultimately my choice how to deal with the Property, however, I am nonetheless agreeable to subdividing, but request that my brothers, or the estate assist with the subdivision costs.
>
> 37. I recall as a child my parents discussing the access easement to the Quarry Land being eventually put in to the North-East of the Hawes Trucking garage (workshop), in the location as depicted in the survey attached as Exhibit "B". This is the location my mother and I discussed that the access right-of-way for the Quarry Land behind would be placed when we spoke in the fall of 2001.

[85] The details of the discussion as recounted by Derwin appear in his affidavit, and the location of the line as he says he promised Ada is reflected in the survey plan attached as an exhibit to his affidavit. According to Derwin, this plan accords with Ada's direction that the subdivision run past the old garage to the road, and leave sufficient road frontage for the company.

[86] The siblings say Derwin's evidence of his discussion with Ada is hearsay that does not fall into a traditional hearsay exception, and that it fails to meet the reliability component of the principled analysis.

[87] The Court of Appeal considered hearsay evidence in *McKinnon Estate v. Cadegan*, 2021 NSCA 79. Wood C.J.N.S., for the Court of Appeal, set out the broad principles governing the traditional categorical hearsay exceptions and their

relationship to the principled approach based on necessity and reliability as set out in *R. v. Khelawon*, 2006 SCC 57 (para. 33). He concluded:

> [35] As this passage indicates, once hearsay evidence is determined to fall within a common law exception, the burden shifts to the party opposing admission because inherent reliability is presumed. They must demonstrate the circumstances represent one of the rare cases where the evidence is not, in fact, necessary or reliable. In contrast, under the principled approach, the burden remains on the proponent to establish that the evidence is both necessary and reliable.
>
> [36] In my view, the proper sequence to be followed when considering the admission of hearsay evidence is as follows:
>
> 1. Can the proponent establish that the evidence falls within one or more common law exceptions?
>
> 2. If a common law exception applies, can the opposing party show this is the "rare case" where the evidence should be excluded because it is not necessary or reliable?
>
> 3. If it is not a "rare case", should the evidence be excluded because its prejudicial effect exceeds its probative value?
>
> 4. If not admissible as a common law exception, is the evidence admissible under the principled analysis from *Khelawon*?

[88] The scope of hearsay on an application in court was considered by Norton J. in *Superport Marine Services Limited v. Balodis Incorporated*, 2021 NSSC 237. The basic rule is as set out in Civil Procedure Rule 5.20: "[t]he rules of evidence, including the rules about hearsay, apply on the hearing of an application and to affidavits filed for the hearing except a judge may, in an *ex parte* application, accept hearsay presented by affidavit prepared in accordance with Rule 39 - Affidavit." Further, Rule 39.02 provides that a party "may only file an affidavit that contains evidence admissible under the rules of evidence, these Rules, or legislation" (Rule 39.02(1)) and that where "hearsay permitted under these Rules, a rule of evidence, or legislation" appears, the affidavit "must identify the source of the information and swear to, or affirm, the witness' belief in the truth of the information" (Rule 39.02(2)). As such, hearsay is presumptively inadmissible on an application.

[89] Where an affiant refers to hearsay, the source must be identified, and there must be an expression of the affiant's belief in the truth of the content: *Waverley (Village Commissioners) v. Nova Scotia (Minister of Municipal Affairs)* (1993), 123 N.S.R. (2d) 46 (SC); *M5 Marketing Communications Inc. v. Ross*, 2011 NSSC 32, at para 18.

[90] The siblings submit that most of the facially relevant paragraphs of Derwin's affidavit should be struck as inadmissible hearsay, as well as, in some cases, inadmissible opinion and unsupported statements of belief, as well as some passages of irrelevant material.

[91] Derwin says his statements to his mother about what he would do with the Property are not hearsay. He submits that *David v. Beals Estate*, 2015 NSSC 288, supports the application of the principled exception to hearsay to his evidence. In that case, the applicants, who were the testator's children, unsuccessfully applied to vary their father's will under the *Testator's Family Maintenance Act*. The father had left the entire estate to a grandson who had lived with him. The grandson submitted evidence that the testator had expressed his intentions in a family meeting attended by all of the children and several grandchildren (para. 8). LeBlanc J. admitted this evidence, and accepted it as corroborating evidence under section 45 of the *Evidence Act*:

> [86] ... I find that Mr. Beals' evidence of Garfield Beals' statement to his grandsons is reliable. The statement was apparently made in the formal setting of a family meeting regarding the handling of the testator's and his wife's estate. There is no reason to believe that Garfield Beals would be disingenuous in such circumstances, and in fact, it would be counterintuitive to think that he would be anything but austere. While the evidence is self-serving because it benefits Mr. Beals, there is also convincing corroborating evidence: the Will.
>
> [87] Having found that the two essential elements of reliability and necessity are met, and that s. 45 of the *Evidence Act* is satisfied, I find that the statement is admissible.

[92] The siblings argue that *Beals Estate* is distinguishable. The relevant statements in *Beals* were made in a family meeting convened to discuss estate planning, with all the children present, not in a one-on-one discussion between the testator and the claimed beneficiary. More importantly, counsel submits, the hearsay in *Beals* was corroborated by the will. In this case, the will is silent on subdivision of the Property.

[93] In this Court's view, the evidence of Derwin's conversations with Ada is clearly hearsay, in that he is proffering Ada's statements for their truth as to her intentions. Moreover, Derwin's affidavit includes interpretation and summarizing of his mother's statements, in addition to direct quotes, as well as instances of double hearsay referring to discussions with his father. In paragraph 11, Derwin recounts that he and his mother "discussed" the boundary question. As counsel for the siblings argues, this passage gives no indication of Ada's specific statements, or any other particulars of the alleged discussions. It advances hearsay statements as primary

evidence on the central issue in the proceeding. Paragraph 12 purports to give Jerry's views, by way of their mother, as to the location of the right of way, as well as quoting their father; in both cases amounting to double hearsay. Moreover, Derwin did not attempt to have Jerry corroborate this statement on cross-examination.

[94] We are left with self-serving statements recounted by Derwin, most of them in very general terms, with virtually no *indicia* of reliability. It is true that the Will, on its face, gives him the Property, and that the letter to Sheldon supports Derwin's claim to have discussed the division of the Property with his mother. However, this does not mean his account of what was said in any such conversations is reliable. Other *indicia* tend to speak against reliability: Derwin is giving evidence about details of conversations with his mother – as well as his father – more than 20 years after the relevant conversations occurred. These conversations are generally described in broad terms, using words like "discussed", with the notable exception of the long quotation at paragraph 12 ("sit back and watch the goings on"). Derwin argues that his own promises to Ada are not hearsay, but these statements have little or no probative value outside the context of the conversations he allegedly had with Ada. Ada's own intentions as described in Derwin's affidavit remain hearsay, and, in my view, are inadmissible.

(b) Ada's letter to Andrea

[95] After Ada's death, an envelope labelled "Andrea's Papers" and "Yours Only", with a pair of eyes also drawn on the envelope, was found. According to the answer to Andrea's interrogatories, Ada told Andrea that there would be an envelope for her in Ada's office, and that it would contain the key to, and information about, the safety deposit box. After Ada had a stroke in 2012, Andrea found the envelope while looking for Ada's power of attorney and personal directive. The envelope also contained an unsigned letter or set of notes, headed, "For Ada Catherine Hawes will Oct/01." (I will refer to this document as a "letter", while remaining mindful that Derwin's position is that it amounts to no more than "notes" or "musings".) The most relevant passage states as follows:

> The house and land it sits on is to be separated from the land with the garage used by Hawes Trucking & Excavating Limited. The line to seperate [*sic*] this property is to run from the back line down past the old garage 4-5 feet or legal required amount from a building, on the right side facing old garage and continue to the number 7 highway on a slanting degree between the utility pole and sign H.T.E. The house and land on which it sets [*sic*] go to my son Derwin Hawes. If he does not wish to live here its [*sic*] to go to son Jerry Hawes on condition he gives his house to Derwin or a sum of money not to exceed $50,000. Derwin's choice. The

> remaining land with the garage on it used by Hawes Trucking is to go to sons Kenney, Jerry and Brian.

[96] The siblings summarize their view of Ada's intentions as expressed in her testamentary documents and illuminated by extrinsic evidence, as follows: her Will was prepared and executed, dated 26 October 2001. Five days later she wrote the letter to Sheldon, confirming that she had made a will but that not everything she intended was reflected in it. She intended that the Property be subdivided. The Will and Ada's Letter leave ambiguity as to the details of the subdivision. The letter to Andrea, also dated October 2001, provides extrinsic evidence of Ada's intentions respecting the subdivision when making the Will and writing the letter to Sheldon. Andrea does not have an interest in the Property, as one subdivided parcel is to go to Derwin and the other to the four sons.

[97] Derwin argues that the Andrea letter is hearsay and that it should not be admitted under the principled analysis. He says there are "curious circumstances" surrounding its origins. Among other things, Derwin queries the absence of the original document (though the original envelope is in evidence, with a photocopy of the letter); the presence of tape on the envelope, with the implication (he says) that someone opened it and closed it again; and the fate of other papers that were said to have been seen in Ada's study that have not been produced, given the evidence that other people had access to the house. Andrea testified, but was not cross-examined on the sealing of the envelope. Derwin also discloses his "belief" that he saw the letter in Ada's office along with other handwritten papers, and the other papers disappeared without explanation. As with the question of the sealing of the envelope, Andrea was not cross-examined on what these papers were (assuming she knew), or what, if anything, happened to them.

[98] In the view of this Court, these objections are too speculative to outweigh the *indicia* of reliability. There is no serious dispute that the Andrea letter is what it purports to be – a document in Ada's handwriting, found by Andrea in an envelope addressed to her. Ada had told Andrea that there would be an envelope for her containing the safety deposit box key and instructions. Admittedly, Ada did not tell her there would also be a letter in the envelope, and did not mention the document in the letter to Sheldon; however, we also have Ada's words, "[a]ny questions call Andrea", at the end of Ada's Letter.

[99] Given that the letter to Andrea describes a different division of the Hawes Trucking shares than appears in the Will, Derwin says it follows that it does not reflect Ada's intentions for the division of the Property. He suggests that the fact that

Andrea was not named as executor or alternate executor undermines the reliability of the letter as an indicator of Ada's intentions.

[100] In this Court's view, this is balanced by Ada's reference to Andrea in the letter to Sheldon. Further, on its face, Adnrea's letter was written nearly contemporaneously with the will. While Ada apparently changed her mind about the particulars of the share distribution, I do not believe it necessarily follows that the rest of the document does not represent her intentions. In particular, the statements about the Property division are consistent with Ada's Letter, but provide additional detail.

[101] In this Court's view, the letter to Andrea is admissible under the principled approach.

[102] In addition to their direct relevance to the Will construction issue, the extrinsic evidence is also relevant to the statutory corroboration requirement.

Corroboration under the *Evidence Act*

[103] Where a potential beneficiary advances a claim respecting a favourable intention by the testator, their evidence must be corroborated. Section 45 of the *Evidence Act*, R.S.N.S. 1989, c. 154, states:

> Competency and compellability at trial
>
> 45 On the trial of any action, matter or proceeding in any court, the parties thereto, and the persons in whose behalf any such action, matter or proceeding is brought or instituted, or opposed, or defended, and the husbands and wives of such parties and persons, shall, except as hereinafter provided, be competent and compellable to give evidence, according to the practice of the court, on behalf of either or any of the parties to the action, matter or proceeding, 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, judgment, award or decision therein on his own testimony, or that of his wife, or of both of them, with respect to any dealing, transaction or agreement with the deceased, or with respect to any act, statement, acknowledgement or admission of the deceased, unless such testimony is corroborated by other material evidence. [Emphasis added.]

[104] Derwin submits that his evidence of the discussion with Ada is corroborated. He argues that corroboration is not required for every claim, based on a definition from reasons of MacLennan J.A., in *Radford v. Macdonald* (1891), 18 O.A.R. 167 at 173 (Ont. C.A.) where he considered a provision similar to section 45:

> ... 'Corroborate' means to strengthen, to give additional strength to, to make more certain, and if the evidence helps the judicial mind appreciably to believe one or more of the material statements or facts deposed to by the party, then, I think, it is what is required by the statute.
>
> In such cases, the weight of the evidence will vary, but its admissibility cannot depend on its weight. In some cases it may be weak and in others strong, but the Legislature has not said that it must be strong, but merely that it must be sufficient to corroborate, that is, to strengthen, the evidence of the party.

[105] In *Hopgood v. Hopgood (Estate)*, 2018 NSSC 100, McDougall J. gave an overview of the *Evidence Act* corroboration requirement:

> [75] The requirement for corroboration in s. 45 is intended "to discourage dishonest or ill-founded claims against estates*": Johnson v. Nova Scotia Trust Co., (1973)*, 6 N.S.R. (2d) 88, 1973 CarswellNS 90 (N.S.S.C.(A.D.)). In *Murphy Estate (Re)*, (1998) 169 N.S.R. (2d) 284, [1998] N.S.J. No. 324, Justice Davison thoroughly reviewed the law concerning the corroboration required by s. 45. In so doing, he adopted the following list of principles compiled by O'Hearn Prob. Cr. J. in *Re McCarthy* (1970), 16 D.L.R. (3d) 72:
>
> > (a) Corroboration is of no avail if the claimant's story is not believed;
> >
> > (b) A mere scintilla of corroborating evidence is not sufficient;
> >
> > (c) Evidence that is consistent with two views or two opposing views is not corroboration of either.
> >
> > (d) The corroborating evidence need not be sufficient in itself to establish the case.
> >
> > (e) The direct testimony of the second witness is unnecessary for sufficient corroboration.
> >
> > (f) The corroboration may be afforded by circumstances alone.

[106] In *Re Harvey Estate*, 2006 NSSC 118, Warner J. noted the remark of Laskin J.A. in *Burns Estate v. Mellon* (2000), 133 O.A.C. 83 (Ont CA), at para. 5, that a provision such as section 45 "addresses the obvious disadvantage faced by the dead: they cannot tell their side of the story or respond to the living's version of events" (para. 12). Warner, J. added that Laskin J.A. had "rejected the view that the living person's evidence, even if corroborated, should be looked upon with suspicion and the evidence not acted upon unless he/she "removes all doubt from the judicial mind"" and had held that "the case law supported the application of the civil burden of proof where a party must meet the corroboration requirement "or seeks to rebut a presumption of resulting trust"" (paras. 13-14). Warner J. went on to consider the phrase "other material evidence":

> [15] In *Re O'Connell*, 1980 CarswellNS 243 (NS Probate Ct), upheld on appeal [1981 CarswellNS 90 (NSCA)], McLellan, J., reviewed the law in the context of claims against an estate by a common law wife for *quantum meruit* and unjust enrichment. He adopted the words of Killam, J., in Thompson v. Coulter (1903), 34 S.C.R. 261 at paragraph 5:
>
> > . . . A mere scintilla is not sufficient. At the same time the corroborating evidence need not be sufficient in itself to establish the case.
>
> and Tashereau, C.J.C., in *McDonald v. McDonald* (1903) 33 S.C.R. 245 at paragraph 8:
>
> > Circumstantial evidence and fair inferences of fact arising from other facts proved, that render it improbable that the fact sworn to be not true and reasonably tend to given certainty to the contention which it supports and are consistent with the truth of the fact deposed to, are, in law, corroborative evidence.
>
> [16] In *Burns Estate v. Mellon*, *supra*, the Court held at paragraph 29:
>
> > The corroboration required by s. 13 must be evidence independent of the evidence of Ms. Mellon, which shows that her evidence on a material issue is true. The corroborating evidence can be either direct or circumstantial. It can consist of a single piece of evidence or several pieces considered cumulatively.
>
> [17] In that case the trial judge found independent evidence corroborative of a gift in three pieces of circumstantial evidence; the circumstances consisted of inferences, drawn by the court from the absence of evidence, that tended to support the claimant's evidence. The Court relied upon the thorough analysis and "propositions" put forth in *Paquette v. Chubb & Chubb Estate* (1988), 29 O.A.C. 243 (OntCA), which decision in turn relied heavily upon *Smallman v. Moore*, [1948] S.C.R. 295.
>
> [18] *Smallman* was cited by Glube, J., (as she then was) in *Colborne v. Llewellyn Estate and Halifax Insurance Co* (1982), 57 N.S.R.(2d) 31, as establishing that corroboration of a material point need not be by a second witness, but may be afforded by circumstances and that not every fact necessary to establish a cause of action need be corroborated by other evidence.

[107] Derwin's counsel insists that corroboration for Derwin's evidence of his conversations with Ada can be found in the Will, in Ada's letter to Sheldon, and in Sheldon's cross-examination, albeit not every detail. Derwin relies on the same parts of his affidavit that have been challenged by the siblings as hearsay.

[108] While in my view these passages constitute inadmissible hearsay, in the alternative I will consider whether they can corroborate Derwin's version of the circumstances.

[109] **Paragraph 11.** Ada's statements about Derwin getting the Property and where she wanted the subdivision line are allegedly corroborated by Sheldon's evidence that Ada did not give him any directions as to subdivision, but indicated that this would be left to Derwin. The locations that were "always discussed" when his father was alive are said to be corroborated by the letter's direction for the house and old garage to be separated from the business garage. Derwin also points to the location of the former "fire shed", as depicted in the aerial photograph, and points out that Jerry's evidence did not specifically dispel his speculation that Jerry removed a surveyor's pin that was formerly located in that area. (Jerry's evidence was directed at discussions with the surveyor about the pins on Jerry's own property line; there was no clear evidence of the fate of the pin Derwin refers to.) Counsel also submits that the location of the fuel tanks, and the fueling station depicted on Derwin's survey, provide further support, as they leave sufficient frontage for Hawes Trucking, as called for in Ada's Letter.

[110] In my view this evidence falls afoul of several of the principles identified in *Hopgood Estate*: certain of it – such as the alleged location of the survey pin – amount to not more than a scintilla of evidence. Additionally, much of this evidence is equally consistent with the siblings' position, and therefore corroborates neither: in particular, the evidence that Ada's Letter reflects what Derwin's father wanted. (This is also to set aside the fact that it is Ada's intentions when she prepared her Will, not his father's intentions during his lifetime, that are at issue.) To find any corroboration in this evidence would require accepting Derwin's own interpretation of pieces of evidence that say little standing on their own.

[111] **Paragraph 12.** Regarding the location of the right of way to the quarry, and Ada's invitation to "sit back and watch the goings on", Derwin submits that corroboration can be found in the Will granting him the Property, and by Sheldon's evidence that he received no specific direction from Ada. Once again, these items of evidence are no more consistent with Derwin's position than that of the siblings.

[112] **Paragraphs 13-14.** Regarding Ada authorizing Derwin to charge rent and to have any subdivision costs paid by the estate, Derwin refers to a reference to rent being received by the estate in 2015, noted in Sheldon's final accounts, as well as a notation of an "e-mail to lawyer re taxes/rent" on a "tasks performed" list in an exhibit to Sheldon's affidavit.

[113] The siblings note that, firstly, there is a pending objection in Probate Court respecting these documents. They say this evidence should be disregarded for this reason. They further submit, however, that the alleged entitlement to rent is irrelevant to the interpretation of the testamentary documents. Most importantly, the

siblings submit, these references to "rent" lack any context as to what they relate to. Jerry's evidence was that rent had not been paid since he became president, and he did not purport to know what the previous practice had been, if any. This evidence is too vague to be probative, and is no more than a scintilla, if that. I agree that the question of rent is irrelevant as well.

[114] **Paragraphs 21 and 28.** As to his conversation with Sheldon, who allegedly told him that Ada had told him that "Derwin would know" what to do about subdivision, and that Sheldon told him that Ada had "directed" him to go to Derwin on the matters of the location of the boundary lines and the right of way, Derwin submits that Sheldon's cross-examination displaced his statement in his reply affidavit that he had no "verbal direction" from Ada on this. On cross-examination Sheldon said he did discuss this with Ada, and she did not "direct" him on the specifics of the subdivision or locating the right of way, but essentially said the same thing that appears in her letter to him.

[115] This does not alter the thrust of Sheldon's evidence, which was that Ada did not give him any specific direction respecting the subdivision. Once again, this evidence is no less consistent with the siblings' position than it is with Sheldon's.

[116] **Paragraph 36.** Derwin asserts that Ada "made it clear" that how the Property would be dealt with would be his choice. He submits that this is corroborated by the Will giving him the Property, by the statement to that effect in Ada's Letter, and by Sheldon's evidence that Ada did not give him any "direction".

[117] The plain language of the Will would corroborate this, if only Ada's Letter did not indicate that Ada's actual intention was subdivision. Moreover, like much of the recounting of Ada's alleged statements, this is extremely vague, with no indication of what Ada actually said.

[118] **Paragraph 37.** Derwin recounts his parents "discussing the access easement to the Quarry Land being eventually put in to the North-East of the Hawes Trucking garage (workshop)", and says he and Ada discussed this in the fall of 2001. As corroboration he points to the connection made in Ada's Letter between the division of the Property and the right of way, and asserts that this proposed division leaves adequate road frontage. He also suggests that Jerry being made majority shareholder and president of the Company supports this evidence.

[119] Again, even if admitted despite the hearsay and possible double-hearsay statements, this is no more than a scintilla, and is arguably no less consistent with the siblings' position than with Derwin's.

[120] For instance, Derwin's interpretation of the phrase "enough road frontage for the business garage lot" appears to be premised on "enough" meaning the minimum required for regulatory compliance. I am not convinced that is the necessary interpretation of Ada's words. As such, it is not clear that the reference to "road frontage" corroborates one theory more than the other. Nor is it clear how Jerry's position in the Company would amount to more than a scintilla of evidence, or is necessarily inconsistent with the siblings' position.

[121] In relation to Ada's reference to road frontage, there was some objection to counsel's reference to land-use bylaws as a standard, given that there was no evidence establishing how the Property was zoned. It was agreed, however, that none of the potentially applicable zones would require road frontage of more than 100 feet. As such, to the extent that the bylaw is relevant, it appears that either plan would be compliant. Counsel agreed that this was no guarantee of approval.

[122] Derwin submits that the lack of a precise description of the boundaries, and the absence of a reference to the letter to Andrea in Ada's Letter, further corroborates his evidence because it suggests that Ada understood that he would know what she intended.

[123] If the issue was whether Derwin and Ada ever "discussed" the Property division, this would be supportable. However, the issue here is whether Ada's testamentary intention was that the Property should be divided as described in Ada's Letter to Sheldon, and if so, how the decision on how to divide it should be made. Sheldon says Ada's intention was that he would own the Property outright, with no obligation to subdivide.

[124] As further circumstantial evidence of corroboration, Derwin points to Ada naming him her alternate executor and leaving him Property.

[125] This is not even a scintilla of corroboration, given that Ada also advised Sheldon to speak to Andrea if he had questions.

[126] Derwin also asserts that there is no evidence that Ada intended the right of way to remain in the location of the traditional transit route to the quarry; that he is the son least associated with Hawes Trucking; and that Sheldon agreed that his plan did not place the right of way on Jerry's "doorstep". Likewise, none of this is probative beyond the "scintilla" standard.

[127] This Court also observes that in most cases Derin's affidavit lacks the indications of knowledge and belief that are required when hearsay evidence appears in an affidavit.

[128] I cannot conclude that Derwin's hearsay evidence of his mother's intentions is either admissible or corroborated.

[129] By contrast with Derwin's evidence, the siblings submit that their evidence of Ada's intentions is corroborated by the letter to Andrea. This appears clear on the face of the document, which provides the outline for the siblings' proposed division. While the letter is silent on the construction of a new driveway or right of way, this is equally supportive of the view that Ada did not want a new right of way or driveway created. As the court stated in *Hopgood*, evidence that is equally supportive of two interpretations does not corroborate either of them.

[130] Derwin says the letter to Andrea amounts to no more than "draft notes" or "musings" that should receive no weight. He says the contents of the letter to Andrea do not match the Will, particularly the different distribution of the shares in Hawes Trucking. However, Derwin does not dispute the existence of evidence – in the form of the answers to Andrea's interrogatories – that Ada told Andrea that there would be an envelope for her, containing the safety deposit box key and information about it. In short, Derwin does not dispute that the notes are in Ada's handwriting. He does dispute that Ada put them in the envelope, and alleges that the circumstances surrounding the appearance of the notes are "suspicious." This is no more than speculation.

[131] For the purpose of section 45 of the *Evidence Act*, I am satisfied that corroboration exists for the siblings' position.

Analysis

[132] As the siblings submit, on its face Ada's Letter makes certain things apparent: Ada's intention to convey her words to him, as her executor; her acknowledgement that the letter varies or alters the will that she had just executed ("I didn't quite get in my will what I really wanted as far as the house, old garage and business garage goes."); that she had spoken to Derwin; that she wanted the Property subdivided, and that Derwin had promised to see this done; that she was concerned about creating complications for the estate and the executor, and therefore intended for her wishes to be carried out by the owner of the Property after her death; that the subdivision line would run past the old garage; and that a right of way would exist to the quarry lands.

[133] The letter to Andrea is consistent with the direction in Ada's Letter for the subdivision line to run "past the old garage", while adding more precise details.

Thus, read in isolation, by the "four corners" approach, Ada's Letter suggests that the line runs straight from the back line to the road, past the old garage. Applying the "armchair" approach, the letter to Andrea adds the bend that takes the line to a point between the Hawes Trucking sign (on Derwin's side) and a utility pole (on the brothers' side). This leaves the existing driveway on Derwin's side, to the point where it widens into the Hawes Trucking area east of the old garage.

[134] Posing the question of what Ada was trying to accomplish by Ada's Letter, counsel for the siblings submits that Ada's aim was to subdivide the land, with the eastern half to go to the four brothers. The letter to Andrea establishes that the dividing line was intended to allow everyone to be able to access the quarry lands, and for Hawes Trucking to continue operating where it had been operating since the 1960s. There was no dispute that the area in question had been used by the Company for that length of time. Nor was there any dispute that the "white road" as shown on the aerial photograph running from the driveway to the back of the Property, has always been the access route to the quarry. The "white road" would thereby be preserved as the right of way to the quarry.

[135] All that being said, counsel for the siblings notes in reply submissions that the purpose of the proceeding is not to decide the location of the right of way, which is not requested in the pleadings

[136] Derwin submits that Ada would have been aware that Hawes Trucking operated on the Property, but says there is no evidence that she was concerned about the future operations of the Company. She would have known that the *status quo* would change if she deeded the Property to Derwin, because he is not closely connected with the Company. Ada knew that there had been a survey pin behind the fire shed (according to Derwin's affidavit). She was familiar with the layout of the Property, having lived there, and knew how much space there was around the commercial garage. She knew she had spoken to Derwin, and she knew the terms of her Will. Counsel submits that Ada did not write to Derwin about the subdivision because she knew they had spoken about it.

[137] Counsel pointed out that Derwin had argued that everything in the Sheldon letter after the words "Derwin gets house and land containing the 2 garages" was no more than a summary of Derwin's unenforceable promise.

[138] The siblings submit that *Morrison v. Manderville*, 2018 NBQB 43, is instructive. The phrase in question in that case was "I think the same of you all so I trust Gordon will do what I want him to do." The Court found these to be "precatory words that express a wish or desire rather than a clear command", but went on to say

that they were not say, “a condition which, if unsatisfied by Gordon Manderville, would impede a finding that there was a fixed and final intention” (para 41).

[139] Similarly, in this case, the point is not Derwin’s promise, but Ada’s intentions, and the siblings submit that the letter to Sheldon contains directive language charging her executor to do specific things. Those include the direction that the line should go “past the old garage”. Derwin’s plan would have this some 25 feet away, which, in effect would have it run “past” the workshop and the office.

[140] This Court concludes that Ada’s intentions were to see the land subdivided on the terms suggested by Ada’s Letter. I also conclude from the circumstances – specifically, the fact that she wrote the letter to Andrea and left it to be found – that she intended the specifics of the subdivision to be informed by the contents of the letter to Andrea. In other words, she did not intend Derwin to take the Property outright, even if that is what is suggested by the strict language of the Will. In my view this is the combined effect of the Will, Ada’s Letter, and the surrounding circumstances, including the circumstances surrounding the creation of the letter to Andrea, and that letter coming to the attention of the family.

[141] The siblings acknowledge that the language in Ada’s Letter as it pertains to the disposition of the cottage is not clear on its face. They submit that Ada’s reference to the cottage going into the residue should not be taken to displace the clear intention that it should go the children. As a layperson, they argue, her use of the technical term “residue” should not displace that manifest intention, particularly where she knew that the same beneficiaries would receive the cottage in either case.

[142] I agree that this construction is more consistent with Ada’s apparent intentions, which should prevail over her layperson’s use of the word “residue.”

(c) Repugnancy

[143] Counsel for the estate raised the issue of potentially triggering the repugnancy principle should the outcome be that the Will devises the full Property to Derwin on the condition that he subsequently subdivide it. Repugnancy is described in *Feeney’s Canadian Law of Wills*:

> §16.9 Of special importance is the question of validity arising when the condition relates to the donee’s right to control and enjoy the property given. The law has always considered that certain interests in property, in particular absolute interests, must of their very nature confer on the owner the right to do as he or she pleases with the property. Therefore, if a testator gives a person an absolute interest in

> property he or she cannot, at the same time, by imposing a condition on the gift, be allowed to deprive that person of any right recognized by law as part of essential nature of an absolute gift. The condition will be void as being repugnant to the estate or interest. Thus a condition that the gift of real property not be sold "as long as grass grows and water runs" was declared to be void. Similarly, a provision limiting the power of alienation of an absolute interest, for example, a condition subsequent under which the interest shall be forfeited if the owner attempts to alienate it, is repugnant and void. A condition may also be found repugnant if a testator provides for a beneficiary to receive an annuity and provides the trustee with a broad discretion to purchase the annuity but prohibits the beneficiary from taking the value of the annuity in lieu of income payments.
>
> However, the principle of repugnancy will not apply if the limited nature of an absolute gift is clear in all of the circumstances, reading the will as a whole. The pertinent question is what the testator intended looking at the will as a whole. The Nova Scotia Court of Appeal has recognized that the repugnancy principle will only apply if there is a contradiction in what is granted, after ascertaining the testator's intention in all of the circumstances.

[144] The decision cited is *Gough v. Leslie Estate*, 2022 NSCA 25, where the Court of Appeal said:

> [69] The principle of repugnancy does not apply if the limited nature of an apparently absolute gift is clear in all the circumstances, as Justice Hallett observed in *Cook v. Nova Scotia* (1982), 53 N.S.R. (2d) 87 (S.C.):
>
> > [45] […] You cannot simply look at the first part of the will and say her intention was to devise an absolute interest. One must look at the whole will and when this is done, her intention is clear. There is no rule of law which prevents effect being given to this intention. In reading the will as a whole, it is apparent that the testatrix intended to limit the estate devised to her husband; it was not a restraint on alienation as he had not been devised the full interest when the will is looked at as a whole. [Emphasis added in *Leslie Estate*.]
>
> [70] The real question is what the settlor or testator intended, looking at the instrument(s) as a whole. The repugnancy principle only applies if there is a contradiction in what is granted, after ascertaining intention in all the circumstances.

[145] Derwin takes the position that the words "Derwin gets house and land" connote an intention to confer an absolute fee simple. In that case, a condition requiring him to subdivide the Property would be repugnant to the fee simple interest. The siblings note that the letter is addressed to Ada's executor, that it indicates an intention to convey direction to Sheldon as executor, that Ada acknowledges that she is varying her intentions as expressed in the Will, and that

she intended the Property to be divided between Derwin, with the house and old garage, and the sons on the other side.

[146] In the view of this Court, it was the subdivision, not Derwin's fee simple, that represented Ada's intentions. The words to be interpreted are those of a layperson informing her executor that she wants her property divided. Looking at the testamentary documents together, Ada clearly regarded Derwin's ownership as no more than a conduit for the intended subdivision. The words of the court in *Cook v. Nova Scotia* (1982), 53 N.S.R. (2d) 87, (SCTD), are relevant:

> 61 In *Hayman v. Nicoll*, [1944] 3 D.L.R. 551, a testatrix bequeathed to her daughter money in a bank account "in full confidence that she will dispose of the same in accordance with the wishes which I have expressed to her." Rand, J., writing for the majority of the Supreme Court of Canada, made the following observation at p. 557:
>
> > Do the words of the codicil, then, create a trust or are they merely precatory, expressive of the wish of the testatrix but not intended to impose upon the legatee an imperative direction? During the past fifty years a marked change has taken place in the attitude of the Courts toward dispositions of this character. The earlier tendency was to treat such expressions as placing a bond upon the person taking, the performance of which Courts of Equity would enforce. But this has given way to an opposite leaning and the present rule is that confirmed in the case of *Re Atkinson, Atkinson v. Atkinson* (1911), 80 L.J. Ch. 370: to give effect to the real intention of the testator, as that is to be gathered from the testamentary instrument as a whole, regardless of any particular words used or of any rule related to them...

[147] The siblings submit that Ada's words were not intended to create a trust, but to impose an imperative direction on the executor requiring the devise of two separate parcels. This is a change to the Will, not a condition placed on the gift in the Will. It is also a change that the letter calls for the Hawes Trucking property to go to the sons; without subdivision there is no land to constitute that property.

[148] In my view, the only supportable construction of the documents in view of Ada's undisputed intention for the Property to be subdivided is that there must be separate devises of subdivided property, not a fee simple grant to Derwin that could only be enforced if it were characterized as a trust imposed by Ada. Accordingly, repugnancy does not arise.

Conclusions

[149] Ada's intentions are reflected in a combined reading of the Will and Ada's Letter, as testamentary documents, as informed by the surrounding circumstances. Based on that evidence, Ada's intention was for the land to be subdivided, not to go to Derwin outright with a discretion for him to subsequently subdivide it.

[150] The relevant surrounding circumstances include the creation of the letter to Andrea, and its coming to the attention of the family. While the Court will not attempt to lay out a precise description of where the line should go, the Court will retain jurisdiction in the event that further direction is needed.

[151] The siblings are entitled to costs. If the parties cannot agree on costs, this Court will receive written submissions within twenty (20) calendar days of counsels' receipt of this decision.

Smith, J.