Citation: Small Estate (Re), 2025 MBCA 63
Date: 20250620
Docket: AI24-30-10093

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Marc M. Monnin
Madam Justice Janice L. leMaistre
Mr. Justice James G. Edmond

***B E T W E E N**:*

	)	***J. Aiello** and*
TRACY BLACK-DONALDSON, TODD	)	***F. Aiello***
BLACK and JAN BLACK	)	*for the Appellant*
	)	
(Applicants) Respondents	)	***K. G. Mandzuik, K.C.** and*
	)	***R. H. K. Gorlick***
- and -	)	*for the Respondents*
	)	
RALPH CONIA, as Executor for the Estate of	)	*Appeal heard:*
HELEN SMALL	)	***March 24, 2025***
	)	
(Respondent) Appellant	)	*Judgment delivered:*
	)	***June 20, 2025***

On appeal from *Black-Donaldson v The Estate of Helen Small*, 2024 MBKB 56 [*trial decision*]

EDMOND JA

Introduction

[1] This appeal addresses the proper application of the law of alleged suspicious circumstances surrounding the preparation and execution of the last will and testament of a testator.

[2] The primary issue on this appeal is whether Helen Small (Helen) knew and approved the contents of her last will and testament executed on

November 18, 2014 (the Rentz will) and a codicil executed on December 5, 2016 (the Arthur codicil).

[3] The trial judge reviewed the circumstances surrounding the preparation and execution of the Rentz will and the Arthur codicil and concluded he was not satisfied Helen had knowledge of and gave approval to the contents of those testamentary documents. He granted the application to invalidate the Rentz will and the Arthur codicil and rescinded the probate order that had been previously granted. While the trial judge referred to the correct legal test, I would conclude that the trial judge misapplied the test to determine whether Helen had the requisite knowledge and approval.

[4] As I will explain, I am satisfied the trial judge misapplied the law relating to alleged suspicious circumstances surrounding the preparation and execution of the Rentz will and the Arthur codicil and made palpable and overriding errors in his findings of fact and mixed fact and law.

[5] The trial judge was critical of the lawyers who received instructions and prepared the Rentz will and the Arthur codicil. He focused on their conduct as the primary basis to find that the Rentz will and the Arthur codicil were invalid rather than determining whether the evidence established on a balance of probabilities that Helen knew and approved of the dispositions of her estate.

[6] The trial judge also found that the principle of ademption applied to a condominium property that was owned by Helen and sold prior to her execution of the Arthur codicil. He found that the bequests Helen made from the net sale proceeds had adeemed or otherwise failed.

[7] I would conclude that the trial judge erred in law in his application of the legal principle of ademption. As I will explain, the principle of ademption does not apply to the net sale proceeds from the condominium sold by Helen prior to the execution of the Arthur codicil.

[8] For the reasons that follow, I would allow the appeal, set aside the judgment below, dismiss the application and reinstate the grant of probate respecting the Rentz will and the Arthur codicil.

Background Facts

[9] At the time of her death, Helen's estate was valued at approximately $2.1 million. The Rentz will named Ralph Conia (Ralph) as her executor and gifted approximately $1.2 million to Ralph. Ralph was also named as the beneficiary of Helen's life insurance policy, which paid out $220,000.

[10] Once probate was granted, the applicants filed a notice of application challenging the Rentz will and the Arthur codicil. Ralph filed a notice of application seeking rectification of the Rentz will respecting the distribution of the net sale proceeds of Helen's condominium.

[11] The trial proceeded as a hybrid process with evidence received by way of an agreed statement of facts, affidavits, examinations of the lawyers out of court and cross-examination in court before the trial judge. The following is a summary of the evidence.

[12] Helen and Henry Small (Henry) (together, the Smalls) did not have any children. In 1996, Henry suffered a stroke and remained wheelchair-bound for the rest of his life. Helen was his primary caregiver. In addition to

dedicating herself to Henry's care and well-being, Helen also looked after their banking, finances, investments, paying bills, income taxes and all household matters.

[13] Ralph had a long-standing relationship with the Smalls. In addition to being their financial planner for a few years, Ralph came to know Henry as a friend of his father. He developed an independent friendship and special relationship with the Smalls that lasted during their lifetimes.

[14] In 2000, Ralph's employer implemented a policy that financial planners could not act for "family". Since Ralph considered the Smalls to be family, he decided to no longer act as their financial planner. The Smalls moved to another financial planner and, from that point, Ralph's relationship with them was exclusively personal.

[15] In 2006, the Smalls asked Ralph for a recommendation for a lawyer as they wanted to prepare wills. He recommended Ian Restall (Restall), who was his lawyer. At their request, Ralph arranged for Restall to meet with them at their condominium to take instructions for their wills. On the day of the meeting, Ralph introduced the Smalls to Restall, following which he met privately with them to receive their instructions.

[16] Ralph was not privy to any discussions respecting the Smalls' instructions to Restall nor the contents of their wills.

[17] Helen's will (the Restall will) and Henry's will were executed on May 31, 2006 (together, the Restall wills). Ralph was one of the two witnesses. The mutual wills left each spouse their entire estates. Their nephew, Todd Black (Todd); niece, Tracy Black-Donaldson (Tracy); nephew,

Jan Black (Jan); and Helen's sister, Margaret Rudnick (Margaret) were named as contingent beneficiaries. Helen was named as the executor for Henry and vice versa. The Restall will named Todd and Restall as the alternate executors.

[18] When Henry passed away in November 2006, Helen inherited the whole of his estate. As the executor, Helen managed and settled Henry's estate.

[19] Prior to Henry's death, Henry asked Ralph to promise to look after Helen and he stated that he was determined to honour that promise. Following Henry's death, Ralph continued to support Helen, including by visiting her, shopping for her and doing anything she requested.

[20] The chief executive officer of the Reh-Fit Centre, Sue Boreskie (Boreskie), was involved with the Smalls for many years and her evidence is part of an agreed statement of facts. The agreed evidence describes her involvement and visits with Helen in some detail, including visiting her at Riverview Health Centre (Riverview). She states she got to know Helen "really well over the years." She described Helen as "manag[ing] her own funds", "bright and astute" and that "[s]he knew what she wanted." She witnessed Helen write out cheques and balance her cheques in her cheque registry. She described Helen paying for and tracking the renewal of Todd's Reh-Fit membership. She described Helen's donations to the Reh-Fit Centre over the years and two specific "[s]tock in kind donations" as follows:

- In 2007, Helen made a donation of $51,163.84 by gifting stocks in kind to take advantage of the capital gains benefits.

- In 2008, Helen donated $53,109.80 also by way of stock in kind gift.

The Rentz Will

[21] In 2014, Helen decided to retain a lawyer to assist in making a new will. Both Henry and Margaret had passed away. She advised Ralph that she had received a mailer at the condominium from the Robert Arthur Law Office (Arthur Law) and that she wished to retain a lawyer from that firm. At Helen's request, Ralph contacted Arthur Law and arranged for a lawyer to meet her at the condominium.

[22] In November 2014, Ralph met Sarah Rentz (Rentz), an associate with Arthur Law. He introduced her to Helen. Helen met privately with Rentz to provide her instructions and to execute the will, a power of attorney and a health care directive.

[23] The Rentz will was witnessed by Rentz and her common-law partner. Rentz testified that prior to Helen executing the Rentz will, she went through the will paragraph by paragraph, explaining in "Coles Notes" what it said. Ralph was not present and did not witness the signing of the Rentz will.

[24] Helen did not discuss the contents of the Rentz will with Ralph in advance of the meeting or after it was executed. Ralph described her as an extremely private person with respect to her personal and financial affairs.

[25] In 2015, Helen gave Ralph a sealed envelope that contained notarial copies of her power of attorney and health care directive. She advised Ralph that she had named him in both documents and instructed him to put them in

a safe place. After Helen passed away, Ralph found the originals together with the Rentz will in a safety deposit box.

2015-2016

[26] In 2015, Helen also gave Ralph a box and told him that everything he would need at the time of her passing was inside of it. Ralph only opened the box after Helen's death. It contained a note with her handwritten instructions for her funeral. It also listed jewelry she wanted to wear when being entombed.

[27] In 2015, when Helen was in the hospital, Ralph visited her there regularly and took her to her hairstylist as he had done in the past. Helen entrusted him with the keys to her condominium. She also asked him to pick up her personal requirements, regularly check on the condominium and bring her the mail.

[28] In September 2015, Helen was assessed for home care. Ralph was not present, nor did he participate in the assessment. The assessment summary under the heading "Social/Support" states: "[She] is supported by her friend Ralph Conia and his wife" and "[her] friend Ralph also assists with shopping and whatever [she] needs him to do".

[29] Helen was panelled and, in March 2016, she moved to Extendicare Tuxedo Villa (Tuxedo Villa). Ralph assisted her with the move to Tuxedo Villa and continued to visit her regularly, as well as pick up groceries and other items for her.

[30] In October 2016, Ralph assisted Helen with a move into Riverview and continued to visit her regularly. At her request, he attended family meetings and annual care planning with the health care staff at Riverview.

Condominium Sale

[31] In approximately August 2016, after her condominium had been vacant for about one year, Helen decided to sell it. Ralph assisted Helen in selling the condominium through ComFree, as well as getting the property ready for sale and showing it to prospective buyers.

[32] At Helen's request, Restall's law firm handled the completion of the sale transaction. After closing, two cheques representing the net sale proceeds of the condominium were sent to Helen, one dated November 23, 2016, in the amount of $263,765.85 and the other dated December 15, 2016, in the amount of $5,000. Helen used those funds to purchase a guaranteed investment certificate (GIC) with the Royal Bank of Canada (RBC).

[33] After Helen passed away, her assets included the same GIC representing the net sale proceeds of the condominium.

The Arthur Codicil and Discussion About Changes to the Rentz Will

[34] On November 24, 2016, Helen requested that Ralph contact Arthur Law to set up an appointment, as she was contemplating amending the Rentz will. Rentz had left Arthur Law and Robert Arthur (Arthur) received the instructions.

[35] Based on instructions from Helen, Arthur drafted the Arthur codicil. The Arthur codicil reduced the contribution of the net sale proceeds from the

condominium to her great-nephew, Bradley Black (Bradley), from $100,000 to $75,000 and increased the percentage left to the Winnipeg Jets True North Foundation to thirty-five per cent. The Rentz will was otherwise confirmed by Helen to Arthur.

[36] Arthur prepared the Arthur codicil and, on December 5, 2016, he met with Helen at Riverview. Arthur could not recall specific discussions he had with Helen. However, he described her as very demanding and recalled that she knew what she wanted. He stated: "She [was] fairly aggressive in terms of her directing me to do what she wanted and not to question her choice in terms of what she wanted to do." Arthur acknowledged that they did not discuss the value of the assets of her estate. Arthur was not aware that she had sold the condominium just weeks before she had signed the Arthur codicil. Although Arthur stated that he had no concerns about her capacity, he made no notes about testamentary capacity.

[37] In the summer of 2018, Arthur was contacted again by Helen as she was considering making further amendments to the Rentz will. Arthur met with Helen at Riverview to discuss options and take instructions. She indicated that she was considering bequests to other charities in addition to the Winnipeg Jets True North Foundation. They also discussed a further gift to Ralph of $100,000 or possibly a cap on the amount gifted to him. Arthur could not recall exactly what the discussion was about changing the bequests in her will. Helen told him the changes being considered were options and no determination had been made by her. Helen made it clear to Arthur that she had a lot of faith and trust in Ralph.

[38] Arthur looked into other children's charities and prepared a two-page document based on his research. Arthur had a further telephone call with Helen to discuss the charities.

[39] Arthur sent a statement of account dated July 13, 2018. The statement of account states:

> Our fee for professional services in consultation on amendments to will and on-site interview to review will, discuss options and take instructions as to changes desired by Testator, subsequent telephone call to discuss children charities, after research on sport based charities; further telephone cal1 as to banking and investment issues and instructions about all amendments[.]

[40] After Arthur sent his account, Helen phoned him and was upset, stating: "I don't want any more changes. That's it. Good bye."

Other Evidence

[41] Helen advised Ralph that she did not wish her mail to be received at the Tuxedo Villa or Riverview. She requested that her mail be directed to Ralph's home. Ralph followed her directions and brought her mail in for her to review. Helen routinely requested, received and opened her financial statements of her various investments. She stored those investment statements chronologically in a shoebox.

[42] In the Rentz will, Helen bequeathed to Ralph her common shares and mutual funds. The investment statements received by Helen from RBC Direct Investing Inc. described her various investments. The statements with RBC Direct Investing Inc. were confined to two categories: common shares and mutual funds.

[43] Helen also had mutual funds with RBC Mutual Funds Inc. which, at the date of her death, were comprised of $619,378.07 in one account and $89,852.15 USD in the second account. Helen also held a number of GICs and other retirement savings accounts that were not common shares and mutual funds and therefore not bequeathed to Ralph.

[44] Helen managed all financial affairs for the Smalls, both before and after Henry died. Helen had an accountant who assisted in the preparation of tax returns. She received monthly statements from the bank, which were included in the shoebox, which show that Helen reviewed the bank statements and made check marks opposite the cheques.

[45] Affidavits filed by Tracy and Todd raise concerns about Ralph's involvement as the former financial planner for the Smalls and the large bequest to him as opposed to the applicants' families. Tracy states that "[w]e were concerned about Ralph's involvement with her finances, and questioned whether Helen knew what she was doing." Vague references are made to their concerns and conversations Tracy had with Helen, but no evidence supports any undue influence by Ralph. The applicants did not advance the allegation of undue influence when the application was heard.

[46] The applicants also reference a meeting held at the condominium in 2016 to deal with furniture in the condominium that the family may want. Ralph advised them that Helen had instructed him that if there were any arguments, to "shut it down". Tracy stated: "We thought this was odd".

[47] Affidavits were filed from close friends of the Smalls, Evelyne Holenski (Evelyne), Roy Holenski (Roy) and another friend, Gloria Johnston (Gloria).

[48] Roy worked with Henry for about thirty years at Canada Wire & Cable and they became good friends. Roy and Evelyne socialized with the Smalls and suggested they should move into the same condominium building. The Smalls then purchased a condominium unit in the same building on the same floor right next to Roy and Evelyne. They frequently socialized with the Smalls and continued to see Helen after Henry passed away.

[49] Their affidavits provide details about Helen, her character, knowledge and intellectual ability. As well, they provide evidence about Helen's relationship with Ralph and his role as the primary caregiver for Helen.

Legal Principles

[50] The trial judge referenced the leading authority of *Vout v Hay*, [1995] 2 SCR 876, 1995 CanLII 105 (SCC) [*Vout*], as applicable to his determinations regarding Helen's knowledge and approval of the Rentz will and the Arthur codicil.

[51] After considering prior authorities regarding when suspicious circumstances may be raised, Sopinka J in *Vout* at paras 25-27 stated:

> The suspicious circumstances may be raised by (1) circumstances surrounding the preparation of the will, (2) circumstances tending to call into question the capacity of the testator, or (3) circumstances tending to show that the free will of the testator was overborne by acts of coercion or fraud. Since the suspicious circumstances may relate to various issues, in order to properly assess what effect the obligation to dispel the suspicion has on the burden of proof, it is appropriate to ask the question "suspicion of what?" See Wright, *supra*, and *Macdonell, Sheard and Hull on Probate Practice* (3rd ed. 1981), at p. 33.

> Suspicious circumstances in any of the three categories to which I refer above will affect the burden of proof with respect to knowledge and approval. The burden with respect to testamentary capacity will be affected as well if the circumstances reflect on the mental capacity of the testator to make a will. Although the propounder of the will has the legal burden with respect to due execution, knowledge and approval, and testamentary capacity, the propounder is aided by a rebuttable presumption. Upon proof that the will was duly executed with the requisite formalities, after having been read over to or by a testator who appeared to understand it, it will generally be presumed that the testator knew and approved of the contents and had the necessary testamentary capacity.
>
> Where suspicious circumstances are present, then the presumption is spent and the propounder of the will reassumes the legal burden of proving knowledge and approval. In addition, if the suspicious circumstances relate to mental capacity, the propounder of the will reassumes the legal burden of establishing testamentary capacity. Both of these issues must be proved in accordance with the civil standard. There is nothing mysterious about the role of suspicious circumstances in this respect. The presumption simply casts an evidentiary burden on those attacking the will. This burden can be satisfied by adducing or pointing to some evidence which, if accepted, would tend to negative knowledge and approval or testamentary capacity. In this event, the legal burden reverts to the propounder.

[52] Recently, this Court in *Drewniak v Smith*, 2024 MBCA 86 at para 35 [*Drewniak*], addressed the burdens of proof to determine the validity of a will and summarized the law as follows:

> To summarize, the persuasive legal burden to prove the validity of a Will never shifts from the propounder in either a common or solemn form proceeding. However, upon the attacker satisfying their evidential burden to raise a question regarding the Will's validity, the propounder can no longer meet their persuasive legal burden by simply relying on the evidentiary presumption arising from due execution. The propounder must lead evidence to satisfy the trier of fact of due execution, capacity and knowledge and approval on a balance of probabilities. A person seeking to attack

> a Will based on fraud or undue influence has the persuasive legal burden to prove those allegations. The respective persuasive legal burdens of proof do not change. An evidentiary presumption of undue influence does not arise in probate proceedings (see *Vout* at para 28; Hull at 43).

See also *Henderson Estate (Re)*, 2024 MBCA 95 at para 29.

[53] The propounder of a will has the persuasive legal burden to prove due execution, knowledge and approval, and testamentary capacity. Typically, that legal burden is discharged by the propounder of the will filing affidavit evidence to establish that the will was read over by the testator, who appeared to understand the will, and that it was executed with the requisite legal formalities. Affidavits of execution of a will contain common language that the "testator was of sound mind, memory, and understanding at the time of execution of the [w]ill."

[54] Once proven, this creates a presumption that the testator had testamentary capacity, and knowledge and approval (see *Vout* at para 26). In *Drewniak*, this Court identified that rebuttable presumption as an evidentiary presumption arising from due execution (see para 28).

[55] However, this presumption can become spent if a challenger of the will raises suspicious circumstances surrounding its creation. The challenger has the evidential burden to point to some evidence that, if accepted, would establish that the testator lacked knowledge and approval of the will's contents. If the challenger is successful in discharging the evidential burden, the propounder can no longer rely on the evidentiary presumption arising from due execution to satisfy their persuasive legal burden and must then lead

sufficient evidence to prove knowledge and approval on a balance of probabilities.

[56] In *Vout*, Sopinka J emphasized that since the suspicious circumstances may relate to various issues, in order to properly assess what effect the obligation to dispel the suspicion has on the burden of proof, it is appropriate to ask the question, "suspicion of what?" (at para 25).

[57] The evidentiary burden on the challenger is to point to some evidence, if proven, that may show the testator lacked knowledge and approval.

[58] In John ES Poyser, *Capacity and Undue Influence*, 2nd ed (Toronto: Thomson Reuters Canada, 2019), Poyser refers to the core concept of knowledge and approval "as being no more than a traditional phrase for the requirement that a will 'did truly represent the testator's testamentary intentions'" (at 256). In Prof Albert H Oosterhoff et al, *Oosterhoff on Wills,* 9th ed (Toronto: Thomson Reuters Canada, 2021), Oosterhoff et al describe it as the requirement that a testator "know and understand [the will's] contents" (at 208).

[59] Authorities draw a distinction between testamentary capacity, on the one hand, and knowledge and approval, on the other. Testamentary capacity refers to the testator's ability to make choices, whereas knowledge and approval requires no more than the ability to understand and approve choices that have already been made (see Poyser at 255, citing *Hoff v Atherton*, [2003] EWCA Civ 1554 (BAILII) at para 62; see also *Halliday v Halliday Estate*, 2019 BCSC 554 at para 178).

[60] As to the nature of evidence tending to call knowledge and approval into issue, Poyser at 235 states:

> While the presumption of knowledge and approval is easily triggered, it is also easily brushed away. The challenger need only adduce some evidence tending to call knowledge and approval into issue. That might be that the will-maker was blind, or English was a second language, or that the will-maker may have lacked capacity. Further, it might be evidence that the will was procured and put before the will-maker for signature by someone taking an advantage under it. The ease with which the presumption is brushed away justifies the ease with which it can be invoked. The challenger, in essence, responds to the propounder by saying that while the mere fact of execution might, in the normal course, support the conclusion of probable knowledge and approval, it does not make sense to draw that conclusion in the case at hand — the situation is different in some way.

[61] There is an old line of cases that stand for the proposition that the participation of the beneficiary in the creation of a will is inherently suspicious (see *Barry v Butlin* (1838), 11 Moo PC 480, 12 ER 1089; Oosterhoff; Halsbury's Laws of Canada (online), *Wills and Estates*, "Wills: Contesting a Will: Knowledge and Approval of Contents: Burden of Proof" (I.8(3)(a)(ii)) at HWE-184 "Suspicious Circumstances" (2024 Reissue).

[62] The Supreme Court of Canada's decision in *Vout* clarified the law respecting suspicious circumstances and when it may be raised. Participation of a beneficiary in the creation of a will is one of the circumstances depending on the particular facts. The burdens of proof were further clarified by this Court in *Drewniak*.

[63] A testator's freedom to distribute their property as they choose is a deeply entrenched legal principle and the Supreme Court has recognized the

importance of testamentary autonomy, holding that it should not be interfered with lightly (see *Spence v BMO Trust Company*, 2016 ONCA 196 at paras 30-31 [*Spence*]; *Tataryn v Tataryn Estate*, [1994] 2 SCR 807 at 824, 1994 CanLII 51 (SCC) [*Tataryn*]).

[64] With these legal principles in mind, I now turn to the trial judge's decision.

The Trial Judge's Decision

[65] The applicants did not raise the issues of undue influence and testamentary capacity at trial. The only issue before the trial judge was whether the evidence satisfied the burden of proof that Helen had knowledge and approval of the contents of the Rentz will and the Arthur codicil.

[66] The trial judge correctly cited *Vout* at para 25 as the leading authority respecting the burden of proof seeking to validate a will (see *trial decision* at paras 31-35).

[67] The trial judge also cited with approval Poyser dealing with the presumption of knowledge and approval as well as the nature of evidence that may suffice in negating the presumption (see *trial decision* at paras 37-38).

[68] After reviewing the legal principles, the trial judge concluded (*ibid* at para 40):

> Although all of the evidence before me suggests that Ralph was acting honourably throughout the time that the Rentz [w]ill and the Arthur [c]odicil were being drafted and he had Helen's best interests at heart, I am satisfied that this finding does not preclude a finding of suspicious circumstances as that term has come to be defined in the case law.

[69] The trial judge found that the applicants had established suspicious circumstances and identified the most significant factors as (*ibid* at para 43):

> a) Ralph, was not a member of Helen's family and stood to benefit as a beneficiary under the will and was involved in the process of arranging the meetings with the lawyers;
>
> b) Ralph was named as a beneficiary of Helen's life insurance policy and was set to receive the lion's share of Helen's estate under the Rentz [w]ill;
>
> c) The Rentz [w]ill represented a significant departure from the distribution scheme under the Restall [w]ill as it overwhelmingly benefitted Ralph at the expense of immediate family members who stood to inherit Helen's entire estate under the Restall [w]ill; and
>
> d) The Burial Plot Fund would at a minimum amount to $100,000 or arguably significantly more than that, to cover expenses for a burial plot that was virtually maintenance free and meant to honour a woman who was not only content with a modest lifestyle, but frugal to the point that she reused a plastic flower wreath to mark her husband's grave site every year.

[70] The trial judge concluded that "the gravity of the suspicious circumstances raised by the [a]pplicants [were] at the high end of the range" (*ibid* at para 44) and, as a result, the burden of proof remained with Ralph to prove knowledge and approval of the contents of the Rentz will and the Arthur codicil. The trial judge stated "that Ralph's opinions alone as to Helen's knowledge and approval [could not] carry the day [there] as he [stood] to benefit from the Rentz [w]ill in a significant way" (*ibid*).

[71] The trial judge was critical of the steps taken by the lawyers and stated (*ibid* at para 45):

> The record is clear that the lawyers can offer no evidence to assist Ralph in proving knowledge and approval because they failed to ask the kinds of questions that might have shed some light on what Helen knew about the value of her assets and how the net proceeds would be distributed amongst her various beneficiaries after payment of all taxes and expenses.

[72] The trial judge referenced the decision of this Court in *Slobodianik v Podlasiewicz*, 2003 MBCA 74, which is a case that dealt with testamentary capacity and specifically addressed the duty of a lawyer taking instructions from a client. The trial judge concluded that the principles in that case applied equally to the facts of this case (see *trial decision* at para 49).

[73] The trial judge referenced Ralph as being in a legal predicament. He stated (*ibid* at para 54):

> Ralph is in a legal predicament when it comes to proving knowledge and approval, because he can do nothing more than delve into speculation of the "if wishes were horses" variety given the total absence of evidence from [Rentz] or [Arthur] as to what Helen may have known about the value of her assets and the nature of the assets in her investment portfolio.

[74] The trial judge was not satisfied that the fact that Helen opened and filed her investment statements in chronological order in a shoebox amounted to proof that she understood the value of her investments. Further, he found that although she meticulously balanced her chequebook every month, that was also not persuasive. Nor did he accept that Helen was a savvy business person because she held a diversified portfolio of investments (see *ibid* at paras 55-56).

[75] The trial judge concluded that Ralph did not offer positive proof with regard to knowledge and approval, and stated (*ibid* at para 61):

> The disproportionately large benefit to Ralph of over half of the estate under the Rentz [w]ill in contrast to the provisions of the Restall [w]ill, which left everything to immediate family members, clearly speaks to an absence of positive proof. The absurdity of a Burial Plot Fund worth well over $100,000 for a maintenance-free grave site also speaks clearly to a lack of positive proof as to knowledge and approval. I am also of the view that Helen did not have knowledge as to the rule of ademption, which meant that her decision to sell the condominium prior to her death resulted in that gift failing and leaving nothing to the three beneficiaries of the potential sale proceeds.

[76] As a result, he concluded that the Rentz will and the Arthur codicil were invalid due to lack of knowledge and approval.

[77] The trial judge dismissed the application seeking rectification of the Rentz will and the Arthur codicil. Applying the principle of ademption, he found that the gift of the net sale proceeds of the condominium failed as the condominium was sold prior to Helen's death.

Issues

[78] This appeal raises the following issues:

1) Did the trial judge err in concluding that suspicious circumstances were present to rebut the presumption of knowledge and approval?

2) Did the trial judge err in concluding that Ralph failed to prove Helen's knowledge and approval of the Rentz will and the Arthur codicil?

3) Did the trial judge err in law in concluding the bequest of the net sale proceeds from the sale of Helen's condominium adeemed?

Standard of Review

[79] The parties agree, as do I, that the applicable standard of review is set out in *Housen v Nikolaisen*, 2002 SCC 33 [*Housen*]; see also *Zindler v The Salvation Army*, 2015 MBCA 33 at para 10 [*Zindler*]; *Hoffman v Heinrichs*, 2013 MBCA 63 at paras 14-15).

[80] Questions of fact and mixed fact and law are reviewed on the standard of palpable and overriding error, unless there is an extricable point of law. Questions of law are reviewed on the standard of correctness (see *Housen* at paras 8, 10, 37; *Zindler* at para 10).

[81] Issues one, two and three are questions of mixed fact and law and are therefore subject to review on the standard of palpable and overriding error.

[82] The standard of palpable and overriding error is one that "is 'plainly seen', 'plainly identified', or 'obvious'" (*R v Kruk*, 2024 SCC 7 at para 97, citing *Housen* at paras 5-6) and "it must be overriding, in that it must go to the core of the outcome of the case, such that it affected the result" (*6165347 Manitoba Inc v Robinson*, 2025 MBCA 33 at para 155; *R v Perswain*, 2023 MBCA 33 at para 12; see also *Benhaim v St-Germain*, 2016 SCC 48 at para 38, quoting *Canada v South Yukon Forest Corporation*, 2012 FCA 165 at para 46; *R v Clark*, 2005 SCC 2 at para 9).

[83] In my view, issue three raises an extricable question of law relating to the law of ademption. If the trial judge's reasoning and application of the test demonstrate that he failed to properly apprehend the law, he will have erred in law, which is reviewed on the standard of correctness (see *R v Barca*, 2022 MBCA 80; see also *R v Chung*, 2020 SCC 8 at paras 13-18; *R v McBride*, 2018 ONCA 323 at para 53; *R v AA*, 2015 ONCA 558 at para 77; *R v MacKenzie*, 2013 SCC 50 at para 61; *R v Bear (CW)*, 2013 MBCA 96 at paras 6, 24-25; *R v DAI*, 2012 SCC 5 at paras 87-89; *Housen* at paras 26-33).

Issue 1: Did the Trial Judge Err in Concluding That Suspicious Circumstances Were Present to Rebut the Presumption of Knowledge and Approval?

[84] Ralph submits that the four significant factors identified by the trial judge are incapable of supporting suspicious circumstances at law. As to each of the four circumstances, Ralph submits:

1) The fact that Ralph arranged the meetings with the lawyers at Helen's direction is benign and not a suspicious circumstance. Ralph did not know he was a beneficiary until after Helen passed away. This circumstance also does not logically support any suspicion related to whether Helen knew and approved of how her estate was to be distributed.

2) Helen chose to benefit Ralph, who the trial judge found "was acting honourably throughout the time that the Rentz [w]ill and the Arthur [c]odicil were being drafted and he had Helen's best interests at heart" (*trial decision* at para 40). It is not logical to conclude that because Ralph was to receive a lion's share of

Helen's estate, she did not know and approve of her bequest to him.

3) The Rentz will represented a departure from the Restall will. Ralph submits that this supports the finding that Helen changed her mind and is not proof of suspicion. Further, the applicants are not named as direct beneficiaries in the Restall will. The Restall wills were standard mirror wills where each spouse left everything to the other. The applicants were contingent beneficiaries. Henry and Margaret, had both passed away since the Restall will. It is not suspicious that Helen would therefore wish to draft a new will to record her testamentary intentions.

4) As to the burial plot fund, the trial judge found that bequest to be an absurdity and therefore proof that Helen lacked knowledge and approval. Ralph submits that this conclusion is inconsistent with the principle of respecting the testator's intention and ignores the fact that it was never intended that the entire sum would be used to maintain the burial plot. Payments were restricted to be made from the income or at the trustee's discretion and the burial fund was to be maintained for twenty years with the residue bequeathed to Ralph.

[85] The applicants submit that the trial judge was entitled to find suspicious circumstances on the evidence. There is no palpable or overriding error in his review of the facts and in applying the law to the facts. Because of the suspicious circumstances, the onus was upon Ralph to show that Helen knew the size of her estate and understood to some reasonable extent how

much of her estate would be allocated to the different beneficiaries. There is no positive evidence that at the time she made her will, she had a grasp of the totality of her assets.

[86] The applicants also submit that without any evidence from the lawyers who received her instructions and without any first-hand evidence from Ralph, the Court is left to draw inferences and to build knowledge and approval from mere speculation.

Analysis—Issue 1

[87] This case is primarily concerned with suspicious circumstances and when they may be raised (see *Vout* at para 25). Justice Sopinka made it clear that suspicious circumstances may be raised in any one of three categories. The one applicable in this case is category number one: "circumstances surrounding the preparation of the will" (*ibid*). As I will explain, the trial judge failed to apply the correct legal test by applying the wrong legal principles, despite having set out the legal test correctly earlier in his reasons. In my view, he erred by so misdirecting himself. He raised what he referenced as suspicious circumstances surrounding the preparation of the Rentz will and the Arthur codicil, but the circumstances raised were not suspicious.

[88] The trial judge relied on four significant factors noted above at paragraph 69. The first three factors raised by the trial judge were relied upon by him as suspicious circumstances surrounding the preparation of the Rentz will. The first factor considered suspicious was that Ralph was not a member of Helen's family, stood to benefit as a beneficiary and arranged the meetings with the lawyers. While it is undisputed that Ralph contacted Arthur Law, he did so based on instructions from Helen. He had no prior knowledge of the

law firm or Arthur. Ralph's involvement in arranging the meetings with the lawyers was limited to making the initial contact and introducing the lawyers to Helen.

[89] Further, and more importantly, Ralph was not involved at all in providing instructions, attending meetings with the lawyers or dealing with lawyers, other than calling and introducing them to Helen. How then is this factor a suspicious circumstance surrounding the preparation of the Rentz will or the Arthur codicil? I agree with Ralph that his involvement was benign and not a suspicious circumstance on the facts of this case.

[90] The second factor found by the trial judge to be a suspicious circumstance is that Ralph was named as a beneficiary of Helen's life insurance policy and was named to receive "the lion's share of Helen's estate under the Rentz [w]ill" (*ibid* at para 43(b)). It is difficult to reconcile how this factor is suspicious in light of the finding of the trial judge that Ralph was acting honourably throughout the time that the Rentz will and the Arthur codicil were being drafted and that he had Helen's best interests at heart. There was no evidence Ralph had anything to do with encouraging, persuading or influencing Helen to make any bequests to him. The uncontested evidence was that he had no knowledge of the bequests until after Helen passed away. As previously indicated, no allegation of undue influence was made.

[91] Further, it is not suspicious nor surprising that Ralph, who was described by Helen and other witnesses as Helen's friend and primary caregiver and who assisted her for several years, would be named as a significant beneficiary. Henry had passed away, and Henry and Helen had no children. The niece and nephews visited from time to time, but the uncontested

evidence was that Ralph was Helen's primary caregiver and assisted her in shopping, taking her to appointments, arranging to get her hair done, moving her to Tuxedo Villa and Riverview, assisting to sell her condominium and being by her bedside in the hospital.

[92] The uncontested evidence is that Helen trusted Ralph. She told Roy and Evelyne that "she thought very highly of Ralph" and that "[s]he depended on him and could not have managed without him." Arthur stated in his evidence that "she made it clear to [him] she had a lot of faith and trust in Ralph."

[93] The third factor relied on by the trial judge was that "[t]he Rentz [w]ill represented a significant departure from the distribution scheme under the Restall [w]ill" (*ibid* at para 43(c)). I agree with the position advanced by Ralph. The Restall will was prepared when Henry and Helen were both alive. As described earlier, they were mutual wills and the niece and nephews, as well as Margaret, were named as contingent beneficiaries. The true intention of the Restall wills was to leave each spouse their entire estate. The applicants and Margaret were not direct beneficiaries.

[94] In my view, it is not suspicious that once Henry and Margaret passed away, Helen would be interested in drafting a new will. Further, Ralph was not involved with Helen's instructions or with the dispositions she wished to make. He had no discussions with Helen about her wills and financial affairs after he ceased being the Smalls' financial planner in 2000.

[95] Lawyers prepared the Rentz will and the Arthur codicil on instructions directly from Helen, not from Ralph or another beneficiary, which is one example that may raise a suspicious circumstance. Although the

lawyers ought to have done a better job documenting the instructions they received as well as the circumstances surrounding the execution of the Rentz will and the Arthur codicil, their evidence was that the Rentz will and the Arthur codicil were explained to Helen and that they directly reflected her detailed instructions. The Rentz will was explained by Rentz and then was reviewed with Helen by Arthur twice: once when the Arthur codicil was executed and again when Helen was considering changes to her will in 2018.

[96] The fact that Helen chose to benefit Ralph in a significant way is not suspicious on the facts of this case and, in my view, it was a palpable and overriding error for the trial judge to conclude that it was.

[97] The final factor the trial judge found to be a suspicious circumstance is the bequest of the burial plot fund. He found the bequest of at least $100,000 to cover expenses for a burial plot that he described as maintenance free was suspicious because it was inconsistent with her frugal lifestyle and her reusing a plastic flower wreath to mark Henry's gravesite in the past (see *ibid* at para 43(d)). The trial judge described the burial plot fund as an "absurdity" and proof of Helen's lack of knowledge and approval (*ibid* at para 61).

[98] First of all, the trial judge did not reference the evidence that Helen had made expenditures to honour Henry and their parents by publications and at the mausoleum at the cemetery. Ralph's affidavit provides details regarding her annual memoriam to Henry placed in the Winnipeg Free Press, placing flowers and wreaths at the mausoleum, and purchasing an angel statue as well as a bronze plaque at the cemetery—expenses of $13,250 and $1,647, respectively. As well, Helen spent $3,000 to have her parents' and Henry's parents' grave markers raised, levelled and polished.

[99] Even if I agree that the bequest is absurd, it does not necessarily follow that an unusual or absurd bequest gives rise to a suspicion that a testator lacked knowledge and approval of the contents of their will. In my view, the trial judge's conclusion is inconsistent with the legal principle that a testator has the freedom to distribute their property as they choose. As noted earlier, the Supreme Court has recognized the importance of testamentary autonomy, holding that it should not be interfered with lightly (see *Spence* at paras 30-31; *Tataryn* at 824).

[100] Secondly, the trial judge's conclusion is inconsistent with the plain reading of the operative clause in the Rentz will. The clause states:

> Thirty-five percent (35%) of the residue of my estate [is] to be held in trust and invested . . . and to use the income or capital or so much thereof as my Trustee considers advisable for expenses relating to the maintenance and care of my burial plot.

[101] A plain reading of the Rentz will establishes that Helen never intended that the entire sum held in trust would be used to maintain the burial plot. The clause is entirely discretionary, as the trustee can use the income *or* capital *or* so much thereof as the trustee considers advisable for expenses. The fund was to be held in trust on the condition that Ralph, as the executor/trustee, maintain her burial site for twenty years.

[102] The trust fund also contemplated that some of the income may not be required and, if so, directed the trustee to reinvest the income in the trust. At the end of the twenty years, the remaining fund was bequeathed to Ralph.

[103] In my view, the trial judge failed to consider all of the evidence and injected his subjective assessment of the reasonableness of the bequest to

make his determination. This was contrary to the deeply entrenched legal principle of the importance of testamentary autonomy mentioned above (see *Spence* at paras 30-31; *Tataryn* at 824).

[104] To conclude on Issue 1, the trial judge cited the important statement of law in *Vout* but misapplied the legal principles and failed to ask the appropriate question, "suspicion of what?" (at para 25).

[105] Had the trial judge asked that question and applied it to the facts of this case, I am satisfied he would have concluded the facts did not raise suspicious circumstances surrounding the preparation of the Rentz will and the Arthur codicil.

[106] The presumption of knowledge and approval can be rebutted by some evidence tending to call into question knowledge and approval of the content of the will. The examples referenced in Poyser at 235, such as the testator was blind, English was a second language, the testator may have lacked capacity, or the will was procured and put before the testator for signature by someone taking advantage under it, are not present on the facts of this case. While that is not an exhaustive list of circumstances that may be suspicious, the circumstances must be surrounding the preparation of the will to rebut the presumption raised by due execution of the will.

[107] After a careful review of all of the evidence, I am satisfied the trial judge was plainly wrong when he concluded that "the suspicious circumstances raised by the [a]pplicants are at the high end of the range" (*trial decision* at para 44). That finding was also overriding in that it meant Ralph could no longer rely on the evidentiary presumption arising from due execution to satisfy the legal burden. He was required to lead sufficient

evidence to prove knowledge and approval on a balance of probabilities and, as I will explain under Issue 2, the trial judge failed to consider all of the evidence and placed too high a burden on Ralph to establish that Helen had the required knowledge and approval.

Issue 2: Did the Trial Judge Err in Concluding that Ralph Failed to Prove Helen's Knowledge and Approval of the Rentz Will and the Arthur Codicil?

[108] In my view, the conclusion on Issue 1 is sufficient to dispose of the appeal. If no suspicious circumstances were in fact raised, Ralph was entitled to rely on the evidentiary presumption to establish knowledge and approval and did not need to lead affirmatory evidence. However, significant evidence was led and for completeness, I propose to address Issue 2.

[109] Ralph submits that the trial judge made numerous errors in concluding that knowledge and approval were not established. While he considered some of the evidence, he failed to address the evidence establishing Helen understood her assets and knew what she wanted to do with her estate. Ralph points to the following evidence:

> a. [Restall's] notes from the 2006 meeting with the Smalls confirm the value of their estate was in or around $1.5 million in 2006.
>
> b. Helen was Henry's executor and inherited their entire estate after his passing in 2006.
>
> c. Helen managed the family finances, banking and dealt with their income taxes both before and after Henry died.
>
> d. Helen managed her own investments.
>
> e. Helen repeatedly asked for, opened, retained and filed away the financial statements of her investments chronologically.

> f. Helen knew that she owned common-shares and mutual funds, and specifically described them as such in [the Rentz will].
>
> g. Helen knew that she owned a condominium and knew the value of the condominium, and that the value was sufficient to establish the gifts she provided [for in the Rentz will].
>
> [emphasis in original; footnotes omitted]

[110] Further, Ralph submits that there is absolutely no evidence to suggest that Helen was confused or did not know the value of her estate. The trial judge found that Helen's instructions "were dutifully transcribed, word for word, in the Rentz [w]ill and the Arthur [c]odicil" (*ibid* at para 61) and they were duly executed and confirmed.

[111] Ralph also submits that the trial judge misapplied the rule of ademption, which had no application to the Rentz will or the Arthur codicil. The trial judge erroneously relied on it as a factor to conclude Helen lacked knowledge and approval.

[112] Finally, Ralph submits that the trial judge conflated the law respecting testamentary capacity with knowledge and approval of the contents of the Rentz will and the Arthur codicil.

[113] The applicants submit the onus was upon Ralph to prove, on a balance of probabilities, that Helen knew and approved of the operative effects of the Rentz will and the Arthur codicil. The trial judge was entitled to conclude that she did not have knowledge and approval. Ralph failed to show that she understood, to some reasonable extent, how much her will allocated to different beneficiaries. The trial judge simply did not have enough evidence

to safely find Helen knew how her will disposed of her assets. Because the lawyers failed in their duty, the applicants submit that Ralph was unable to do anything more than delve into speculation because there was no direct or compelling evidence of what Helen knew of the size of her assets apart from a collection of investment statements.

[114] The applicants submit that the burial plot fund is evidence that she did not know and approve of the disposition because of the sizable amount she was setting aside for the burial fund.

[115] Finally, the applicants submit that the trial judge's findings of fact are owed deference and he made no error rising to the level of palpable and overriding. He was correct in finding that the Rentz will and the Arthur codicil were invalid.

Analysis—Issue 2

[116] I start my review by examining the specific findings made by the trial judge to determine whether Ralph proved on a balance of probabilities that Helen had knowledge and approval. The trial judge found (*ibid* at paras 44-45, 54, 61):

> Ralph's opinions alone as to Helen's knowledge and approval cannot carry the day here as he stands to benefit from the Rentz [w]ill in a significant way.
>
> [T]he lawyers can offer no evidence to assist Ralph in proving knowledge and approval because they failed to ask the kinds of questions that might have shed some light on what Helen knew about the value of her assets and how the net proceeds would be distributed amongst her various beneficiaries after payment of all taxes and expenses.

> Ralph is in a legal predicament when it comes to proving knowledge and approval, because he can do nothing more than delve into speculation of the "if wishes were horses" variety given the total absence of evidence from [Rentz] or [Arthur] as to what Helen may have known about the value of her assets.
>
> Ralph has not offered positive proof with regard to knowledge and approval, which in this case would be that Helen probably knew or approved of the choices that she made about the distribution of her assets that she expressed verbally to [Rentz] and [Arthur] and which were dutifully transcribed, word for word, in the Rentz [w]ill and the Arthur [c]odicil. The disproportionately large benefit to Ralph of over half of the estate under the Rentz [w]ill in contrast to the provisions of the Restall [w]ill, which left everything to immediate family members, clearly speaks to an absence of positive proof. The absurdity of a Burial Plot Fund worth well over $100,000 for a maintenance-free grave site also speaks clearly to a lack of positive proof as to knowledge and approval. I am also of the view that Helen did not have knowledge as to the rule of ademption, which meant that her decision to sell the condominium prior to her death resulted in that gift failing and leaving nothing to the three beneficiaries of the potential sale proceeds.

[117] I will deal with each of these findings. First, the trial judge appears to have discounted or minimized the evidence provided by Ralph because he stood to benefit from the Rentz will in a significant way. The trial judge's role is to assess all of the evidence, including the evidence provided by a significant beneficiary, to determine whether the proponent has proven, on a balance of probabilities, that the testator had testamentary capacity, and knowledge and approval.

[118] Most of Ralph's evidence was not challenged by the applicants and therefore the trial judge was required to assess his evidence or provide reasons as to why he gave it less weight. Being a significant beneficiary does not necessarily mean his evidence carries less weight, particularly given the trial

judge's finding that Ralph acted honourably and in Helen's best interests. Ralph did give significant evidence supporting that Helen had knowledge of her assets and was able to approve of her dispositions. He saw her the most often and was probably one of the witnesses who was in the best position to assess her ability to understand and appreciate the value of her assets.

[119] The trial judge focused too much on Helen's knowledge and approval of her assets and the relative value of the gifts to Ralph and the applicants, as opposed to determining whether the Rentz will and the Arthur codicil reflected her true testamentary intentions and she knew and understood what they said.

[120] Second, the trial judge also focused unduly on the failure of the lawyers to ask the kinds of questions that may have shed light on the issue of Helen's knowledge and understanding of the value of her assets and the tax consequences of the various gifts under the Rentz will and the Arthur codicil and to make notes of those questions and answers from Helen. While it is unfortunate that Rentz and Arthur did not make the kinds of notes that would have shed light on Helen's awareness of these matters, that evidence does not prove that Helen lacked knowledge and approval of the contents of the Rentz will. It just means the trial judge was required to examine other evidence to determine whether Ralph had discharged the onus of proving Helen had knowledge and approval of the terms of the Rentz will and the Arthur codicil.

[121] Third, the trial judge, incorrectly in my view, compared the bequests made in the Restall will with the Rentz will. As discussed above, the circumstances at the time of making the Restall will had changed significantly because both Henry and Margaret had passed away. The applicants were

contingent beneficiaries under the Restall will and were made beneficiaries under the Rentz will. The trial judge focused on what he described as a "disproportionately large benefit to Ralph" over the applicants (*ibid* at para 61). He also focused on what he referred to as the "absurdity" of the burial plot fund (*ibid*). The trial judge's description of the gift to Ralph as disproportionate is unfounded and appears to reflect the trial judge's personal views of what was appropriate.

[122] There was evidence that Helen knew the value of her estate. Ralph relied upon a number of facts outlined above in paragraph 109. I agree those facts support that Helen knew the value of her estate and support that she knew and approved of the dispositions in the Rentz will.

[123] In addition to those facts and, contrary to the trial judge's finding that Rentz and Arthur could provide no evidence to support Ralph that Helen had knowledge and approval, the lawyers did give evidence that supported a finding that Helen had knowledge and approval of the terms of the Rentz will and the Arthur codicil.

[124] Rentz testified that Helen "was really confident in all of her instructions" and she gave a breakdown of what she wanted, including the name of the charity she wanted to name, Winnipeg Jets True North Foundation. Helen told Rentz that she wanted to bequeath her "common shares and mutual funds to her friend, [Ralph]." Rentz did not suggest Helen use those terms. Those terms were used in her financial statements, which she received, reviewed and stored chronologically in a shoebox. Helen told her that Ralph was a family friend and was very helpful to her, taking her grocery shopping and to doctors' appointments.

[125] After the Rentz will was signed, Rentz completed and signed the affidavit of execution indicating Helen "was of sound mind, memory and understanding". She testified that she had no concerns about Helen's testamentary capacity. Further, she stated that no one unduly influenced her. She was strong-willed and confident.

[126] Arthur testified that Helen was very demanding and knew what she wanted. He stated: "She [was] fairly aggressive in terms of her directing me to do what she wanted and not to question her choice in terms of what she wanted to do."

[127] The trial judge did not reference that he reviewed or assessed this evidence or the evidence of other witnesses that supported a finding that Helen knew of the value of her assets and who corroborated Ralph's evidence. This evidence included the evidence of Helen's friends, Roy and Evelyne, Gloria and Boreskie.

The Evidence of Roy and Evelyne

[128] Roy and Evelyne described Helen as taking responsibility for payment of bills, looking after finances, banking and income taxes after Henry suffered a stroke in 1996. They described her as a strong-willed woman who knew her own mind and was very sharp with an extremely good memory.

[129] Roy stated: "Helen was always a person who knew what she wanted and would speak her mind. She would let you know if there was something she did not like. [She] told us that she thought very highly of Ralph. She depended on him and could not have managed without him."

[130] Evelyne stated:

> After 1996, I saw Ralph as he dropped by regularly to the condo to visit [the Smalls] at their condo next door and more frequently after Henry died. He was a devoted caregiver and did many things for Helen, which involved a lot of time and effort of his part, such as arranging for her move to long term care. He was passionate and conscientious in terms of looking after things that Helen needed.
>
> Ralph did many things that a child would typically do for a parent. For example, he was responsible for moving her to Tuxedo Villa on Corydon, and then into Riverview. He made the arrangements for her funeral. Ralph was a great caregiver for Helen, and she treated him as a very dear person. She often praised him in my presence, and I never heard her say a bad word about him. I believe she loved him like a son.

The Evidence of Gloria

[131] Gloria described Helen as "a strong willed woman who knew what she wanted." She provided details about Helen representing herself in Small Claims Court. She recounted how Helen spoke about Ralph and his wife being wonderful help to her. She described Helen as "well-informed about her financial affairs, kept close track of her money, and tried always [to] be in full control, though there was naturally some deterioration in her mental capacity toward the last days of her life. She was 'with it' until her body gave out." She witnessed Ralph with Helen and described how, during Helen's dying days, he slept at the hospital and stayed with Helen around the clock for many days.

The Evidence of Boreskie

[132] Boreskie described Helen as "manag[ing] her own funds", "bright and astute" and that "[s]he knew what she wanted." Boreskie described the

donations made to the Reh-Fit Centre, which were two specific "stock in kind" donations.

Conclusion on Issue 2

[133] The trial judge reviewed some, but not all, of the evidence to assess whether Helen had knowledge and approval of the terms of the Rentz will and the Arthur codicil and understood how her estate would be distributed. He referred to Helen opening the investment statements and filing them in chronological order, and balancing her chequebook. He found those facts alone were not persuasive that she knew the value of her assets. He did not indicate whether he reviewed or considered the other evidence canvassed above.

[134] In my view, it was incumbent upon the trial judge to review all of the evidence to assess whether Ralph had proven that Helen knew and approved of the contents of the Rentz will and the Arthur codicil.

[135] Had the trial judge conducted that review, including the evidence summarized above, I am satisfied he would have concluded that Ralph met the onus of proof.

[136] For the reasons stated above at paragraphs 98-103, I am also satisfied it was an error to rely on the burial plot fund as a basis for concluding that Helen lacked knowledge and approval.

[137] Ralph submits that the trial judge conflated the law respecting mental capacity with knowledge and approval. It is unnecessary to review that

submission as it does not change the conclusion regarding the errors made by the trial judge.

[138] Finally, as I will explain, the trial judge incorrectly found that the rule of ademption applied to the bequest of the net sale proceeds of the condominium. The trial judge incorrectly relied on Helen's lack of knowledge of the rule of ademption as a factor to conclude that Helen lacked knowledge and approval of the Rentz will and the Arthur codicil. That is an error of law and is addressed further under Issue 3 below.

[139] Overall, I am satisfied that the trial judge made palpable and overriding errors in his findings respecting Helen's knowledge and approval. A review of all the evidence establishes that Ralph satisfied the onus of proving on a balance of probabilities that Helen knew and approved of the contents of the Rentz will and the Arthur codicil and those documents represented Helen's true testamentary intentions.

Issue 3: Did the Trial Judge Err in Law in Concluding the Bequest of the Net Sale Proceeds from the Sale of Helen's Condominium Adeemed?

[140] The Rentz will at paragraph 3(e), directed the executor of Helen's estate:

> (e) To sell my condominium with a civic address of Suite 1022, 885 Wilkes Avenue, Winnipeg, Manitoba R3P 1J3, or whichever residence I may own as at the date of my death, and *to divide the net proceeds of sale as follows*:
>
> (e1) To pay or transfer the sum of one hundred thousand dollars ($100,000.00) to my Nephew, [**Bradley]**, for his own use absolutely;

> (e2) To pay or transfer the sum of one hundred thousand dollars ($100,000.00) to the Reh-Fit Foundation, presently located at 1390 Taylor Avenue, Winnipeg, Manitoba R3M 3V8, to be used for general purposes of the said Foundation, at the sole and absolute discretion of the Board of Directors. A receipt of the comptroller, secretary or other proper officer of the institution shall be a sufficient discharge to my Executor. In the event the said Foundation is no longer in existence, I direct my Trustee to pay or transfer the said share to an organization having similar purpose.
>
> (e3) To pay or transfer thirty percent (30%) of the residue of the net sale proceeds to the Winnipeg Jets True North Foundation, presently located at 345 Graham Avenue, Winnipeg, Manitoba R3C 5S6, to be used for general purposes of the said Foundation, at the sole and absolute discretion of the Board of Directors. A receipt of the comptroller, secretary or other proper officer of the institution shall be a sufficient discharge to my Executor. In the event the said Foundation is no longer in existence, I direct my Trustee to pay or transfer the said share to an organization having similar purpose.
>
> (e4) The remainder of the proceeds of sale shall form part of the residue of my estate.
>
> [emphasis added; bold in original]

[141] The Arthur codicil changed the allocation of the net sale proceeds by reducing the amount to Bradley to $75,000 and increasing the percentage to be paid to the Winnipeg Jets True North Foundation to thirty-five per cent. The operative direction to the executor remained the same.

[142] Prior to signing the Arthur codicil, the sale of the condominium closed and most of the net sale proceeds had been paid to Helen. The net sale proceeds were paid to Helen by way of two cheques from the Restall law firm. One of the cheques was delivered prior to the signing of the Arthur codicil

and the second one was delivered after. The net sale proceeds were used to purchase a GIC, which was held separate from her other assets up to the date of Helen's death.

[143] Ralph filed a notice of application seeking an order of rectification of the Rentz will providing for the distribution of the net sale proceeds of her condominium.

[144] On the issue of rectification and ademption, the trial judge concluded (*trial decision* at para 63):

> Ralph's application to rectify the will must fail. The application is a transparent attempt to avoid the consequences of the principle of ademption as it applies to the condominium sold by Helen prior to her execution of the Arthur [c]odicil. Under the principle of ademption the gift fails because by virtue of the sale of the condominium prior to her death, *Helen is deemed to have manifested an intention that the stated beneficiaries in her will were no longer entitled to receive the title to the condominium or the proceeds of sale that she secured before she died.*
>
> [emphasis added]

[145] The parties agree on the applicable law of ademption. The principle of ademption applies to a specific gift that fails because the testator no longer possesses the subject of the gift at the time of their death. The principle was explained in a concise fashion by the Manitoba Law Reform Commission, *Wills and Succession Legislation*, Report 108 (2003) at 31, online: <manitobalawreform.ca/pubs/pdf/fullreports/108-full_report.pdf>:

> Under the common law, if the subject matter of a specific bequest or devise is no longer an asset of the testator's estate, the gift "is adeemed", i.e. fails. Where property has been disposed of, but the transaction has not yet been completed so that the proceeds of

> disposition remain payable at the testator's death, the disposition is treated like an ademption.
>
> [footnotes omitted]

[146] This general statement of the law of ademption depends upon the interpretation of the Rentz will to determine Helen's true intentions regarding her property.

[147] The law of ademption was considered by the Supreme Court in *In re Hughson/Diocesan Synod of Fredericton v Perrett and Perrett*, 1955 CanLII 51 (SCC) [*Diocesan*], dealing with a provision of a will similar to the wording of the Rentz will relating to the sale of the condominium. The will at issue in the *Diocesan* case devised and bequeathed to the executors "all my property both real and personal for the following purposes" (*ibid* at 499). It directed the executors to sell and convert into money all of the assets of the testator's estate and pay the net proceeds from the sale of his automobile, furniture and real estate as described in the will to the Diocesan Synod of Fredericton, to be invested in a Memorial Fund in his name. Prior to his death, the testator sold his real property. On the question of whether the gift to the *Diocesan* adeemed, the Supreme Court stated (*ibid* at 500-502):

> It will be seen that the gift is not of the property itself; the executors are to pay "the net proceeds". The word "proceeds" here means the net amount of money, not in specie, which the property should bring on its sale, i.e. it was the means of determining the amount of a legacy. The direction is to sell "all" the property belonging to him; the total proceeds so realized were to constitute one mass or fund, on which the legacy was made a first charge. It was, in short, a pecuniary bequest in the amount of the net sum realized from the sale. The property was sold by the testator most likely because he was no longer living in it and because of what he considered a good price: but whatever the reason, it clearly was

> not intended to affect the bequest. Ademption carries the sense of taking from another to one's self: but the circumstances exclude any such purpose or intention.
> . . .
> But here, without that general tendency, the circumstances leave no doubt of what the testator intended. It is indicated in the ademption by payment of the legacy to Miss Fitzgerald. The sale of the property was a mere incident in the administration of his estate by the executors. The predominant purpose was that out of that estate reduced to money these payments should be made, in the case of the Synod, with the preference expressly provided.
> . . .
> In my opinion, it is not arguable but that the gift of the "net proceeds of the sale" in the above paragraph means exactly what it says and does not constitute merely a gift of the enumerated items of property as such. In *Hicks v. McClure*, a testator directed his executors to sell his farm and to divide the "proceeds" in a certain way. The testator had himself sold the farm and taken a mortgage for part of the purchase price and this mortgage formed part of his estate at his death. It was held that the trust declared by the will with respect to the proceeds of the sale of the farm applied to the mortgage. Sir Lyman Duff thus laid down the principle applicable at p. 364:
>
> > Has the testator manifested his intention that his gift is not of the particular property only but of the proceeds of the property so long as the proceeds retain a form by which they can be identified as such?
>
> [footnote omitted]

[148] The answer to the last question raised by the Supreme Court in this case is that Helen manifested an intention that her gift was not the condominium property but a gift of the net sale proceeds of the condominium. Further, the net sale proceeds were specifically invested in a GIC and retain a form by which they can be identified as such.

[149] In my view, Helen's intention regarding the condominium was clear. Although the sale of the condominium was made prior to executing the Arthur codicil, the intent was to divide the net sale proceeds as outlined in the Rentz will and as revised in the Arthur codicil. The sale of the condominium was not intended to affect the gifts she intended. The net sale proceeds were invested separately and are identifiable.

[150] Accordingly, the trial judge misapplied the law of ademption to the facts of this case. The Rentz will directed the executor to sell the condominium and allocate the net sale proceeds. This was not a specific devise of the condominium or whichever residence Helen owned at the date of her death. The intention was to divide the net sale proceeds. Since the net sale proceeds were invested in a GIC and are identifiable, Helen's intention and direction to divide the proceeds must be honoured. On the facts of this case, contrary to the finding by the trial judge, the gift did not adeem or fail.

[151] Ralph did not pursue the appeal of the trial judge's decision to dismiss the order seeking rectification of the Rentz will. It is therefore unnecessary to consider whether a rectification order was required or ought to have been granted.

Conclusion

[152] For all of the foregoing reasons, I would allow the appeal, set aside the judgment below and dismiss the application. The probate order issued on February 7, 2020 is reinstated. The gift of the net sale proceeds of the condominium did not adeem and Ralph is directed to allocate the net sale proceeds in accordance with the Rentz will, as amended by the Arthur codicil.

[153] I would order the applicants to pay costs in this Court and the Court below.

Edmond JA

I agree: Monnin JA

I agree: leMaistre JA