THE CONTINUING LEGAL EDUCATION SOCIETY OF BRITISH COLUMBIA CLE BC

ESTATE LITIGATION BASICS 2018
PAPER 3.1

Evidentiary Issues in Estate Litigation

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EVIDENTIARY ISSUES IN ESTATE LITIGATION

I. Introduction

We will deal with some selected evidentiary topics in this paper, which fall into two categories. In the first section, we discuss evidence of what a deceased person said or wrote. When is the evidence admissible and for what purpose? In the second section, we discuss the use of clinical records and expert evidence in estate litigation. For what purpose may the clinical records be admitted? How can you use medical and psychological experts to assist your client's case?

II. Admissibility of the Deceased's Statements

A. Introduction

In disputes concerning the estate of a deceased person, evidence of what the deceased said, wrote or did is often tendered at trial, and, indeed, may be fundamental to the outcome. The types of

disputes and issues for which such evidence may be tendered include disputes over the validity of a will, whether the deceased had made a valid *inter vivos* gift, whether the deceased was in a marriage-like relationship with another, wills variation claims, rectification of a will or trust, and the deceased's domicile at death.

The deceased's statements may be subject to the hearsay danger of unreliability. The deceased may have been untruthful, forgetful or, for some other reason, inaccurate. The reliability of the deceased's statement cannot be tested by cross-examination.

Yet evidence of written or oral statements made by the deceased are admitted so frequently in estate litigation, often without objection by counsel, that it is tempting to think that the hearsay exclusionary rules are somehow different or relaxed in estate litigation when compared to other civil claims. We argue that such is not the case. In most cases, the same rules of evidence in respect of hearsay apply, and questions of admissibility should be understood in accordance with the general rules.

Should the deceased's statements be admissible, or rejected as hearsay? The answer is nuanced. Is the evidence tendered for a hearsay purpose or a non-hearsay purpose? Does it fall within the principled exception to the exclusion of hearsay? Does it fall within one of the traditional exceptions?

This is not to say that there are no special rules related to estate litigation. There is a statutory provision in the *Wills, Estates and Succession Act* (the "*WESA*"), section 62, which section expressly permits evidence of the will-maker's statements of her reasons for making the provisions she did in her will in a wills variation claim. There are also some unique rules in proceedings to interpret a will.

In this section of our paper, we will look at the hearsay rules and their application to evidence of the deceased's written and oral statements in estate litigation. We will also briefly look at some evidentiary rules unique to estate litigation.

B. What is Hearsay?

The authors of Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, 4th Edition[1] ("*The Law of Evidence in Canada*") offer the following working definition at page 237:

Written or oral statements, or communicative conduct made by persons otherwise than in testimony at the proceeding in which it is offered, are inadmissible, if such statements or conduct are tendered either as proof of their truth or as proof of assertions implicit therein.

This definition implies that not all evidence of out of court statements is hearsay. For what purpose are the statements tendered? If they are offered "as proof of their truth or as proof of assertions implicit therein," then the evidence is hearsay. But it may be that the fact that the declarant made the statement is relevant, and, if tendered for the purpose of showing that the declarant made the statement only — and not for the proof of the assertion — then the evidence may be admitted on the basis that it is not hearsay at all. As we shall see, sometimes evidence of what the deceased said or wrote is admitted for a non-hearsay purpose; but, excluded as evidence to prove the truth of the declarant's assertion.

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1 Sidney N. Lederman, Alan W. Bryant, Michelle K. Fuerst, *Sopinka, Lederman & Bryant, The Law of Evidence in Canada*. Markham, Ont.: Lexis Nexis Canada, 2014.

C. Hearsay Exceptions

The common law has developed a number of specific exceptions to the exclusionary rule for hearsay. The authors of *The Law of Evidence in Canada* discuss these traditional exceptions in the following categories:

1. Declarations against interest;
2. Declarations made in the course of a business duty (business records);
3. Hearsay that has stood the test of time;
4. *Res Gestae*;
5. Dying declarations;
6. Testimony in former proceedings;
7. Admissions of a party; and
8. Statements of others who have a relationship to the party.

Three of these categories that often come into play in estate litigation are: declarations by the deceased against interest; business records (which we will discuss in the context of clinical records); and *res gestae* (things done). As set out in *The Law of Evidence in Canada*, at pages 312-13, the *res gestae* exception encompasses:

1. Declarations of bodily and mental findings and conditions;
2. Declarations accompanying and explaining relevant acts; and
3. Spontaneous exclamations.

Beginning with the decision in *R. v Khan*, [1990] 2 S.C.R. 531, the Supreme Court of Canada has articulated a framework to rationalize the hearsay exceptions under the principled exception, in which the court considers the necessity of receiving the evidence, and whether there are sufficient indicia of reliability. Madam Justice Charron summarized the principle in *R. v. Khelawon*, 2006 SCC 57, as follows

> 2 As a general principle, all relevant evidence is admissible. The rule excluding hearsay is a well-established exception to this general principle. While no single rationale underlies its historical development, the central reason for the presumptive exclusion of hearsay statements is the general inability to test their reliability. Without the maker of the statement in court, it may be impossible to inquire into that person's perception, memory, narration or sincerity. The statement itself may not be accurately recorded. Mistakes, exaggerations or deliberate falsehoods may go undetected and lead to unjust verdicts. Hence, the rule against hearsay is intended to enhance the accuracy of the court's findings of fact, not impede its truth-seeking function. However, the extent to which hearsay evidence will present difficulties in assessing its worth obviously varies with the context. In some circumstances, the evidence presents minimal dangers and its *exclusion*, rather than its admission, would impede accurate fact finding. Hence, over time a number of exceptions to the rule were created by the courts. Just as traditional exceptions to the exclusionary rule were largely crafted around those circumstances where the dangers of receiving the evidence were sufficiently alleviated, so too must be founded the overarching principled exception to hearsay. When it is necessary to resort to evidence in this form, a hearsay statement may be admitted if, because of the way in which it came about, its contents are trustworthy, or if circumstances permit the ultimate trier of fact to sufficiently assess its worth. If the proponent of the evidence cannot meet the twin criteria of necessity and reliability, the general exclusionary rule prevails. The trial judge acts

> as a gate-keeper in making this preliminary assessment of the "threshold reliability" of the hearsay statement and leaves the ultimate determination of its worth to the fact finder.

Although admissibility is ultimately determined on the basis of necessity and threshold reliability, the traditional exceptions remain relevant to the analysis. As set out by Chief Justice McLaughlin, in *R. v. Mapara*, 2005 SCC 23:

> 15 The principled approach to the admission of hearsay evidence which has emerged in this Court over the past two decades attempts to introduce a measure of flexibility into the hearsay rule to avoid these negative outcomes. Based on the *Starr* decision, the following framework emerges for considering the admissibility of hearsay evidence:
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> a. Hearsay evidence is presumptively inadmissible unless it falls under an exception to the hearsay rule. The traditional exceptions to the hearsay rule remain presumptively in place.
>
> b. A hearsay exception can be challenged to determine whether it is supported by indicia of necessity and reliability, required by the principled approach. The exception can be modified as necessary to bring it into compliance.
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> c. In "rare cases", evidence falling within an existing exception may be excluded because the indicia of necessity and reliability are lacking in the particular circumstances of the case.
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> d. If hearsay evidence does not fall under a hearsay exception, it may still be admitted if indicia of reliability and necessity are established on a voir dire.

D. Estate Litigation

If the declarant is deceased, the necessity of the evidence almost invariably follows. The admissibility of the deceased's statement will turn on whether the statement meets the threshold of reliability. In the context of hearsay, reliability refers to the trustworthiness of the declarant's statements. The court will also need to consider the reliability of the testimony of the witness who is giving evidence of the deceased declarant's statements, but this is not really a hearsay problem: the witness is available for cross-examination to test the veracity of her evidence. It the judge does not believe the witness, then the hearsay evidence of the deceased declarant will not be considered.

In *Gutierrez v. Gutierrez*, 2015 BCSC 185, a resulting trust case, Mr. Justice Voith summarized some of the considerations in determining whether hearsay evidence meets the threshold reliability for admissibility:

> [34] A number of factors can be considered when assessing the threshold reliability of a hearsay statement, including:
>
> 1) the presence or absence of a motive to lie (*Blackman* at para. 42; *Khelawon* at para. 67);
>
> 2) independent corroborative evidence that "goes to the trustworthiness of the statement" (*Blackman* at para. 55; *Khelawon* at para. 67; *R. v. Couture*, 2007 SCC 28 at para. 83);
>
> 3) timing of the statement relevant to the event, contemporaneity (*Khelawon* at para. 67);
>
> 4) the declarant's mental capacity at the time of making the statement (*Khelawon* at para. 107);

> 5) solemnity of the occasion and whether the declarant's statement was made "in circumstances that could arguably be akin to the taking of an oath where the importance of telling the truth and the consequences of making a false statement were properly emphasized" (*Couture* at para. 89; *Khelawon* at para. 86).

In many cases, the deceased's statements are admissible under the traditional exception as evidence of the deceased's state of mind. There is some debate as to whether such statements are really hearsay at all, or original evidence. In practice it makes little, if any, difference whether the evidence is admitted on the basis that it is not hearsay, or as an exception.[2]

E. Presumption of Resulting Trust

As set out by Mr. Justice Rothstein in *Pecore v. Pecore*, 2007 SCC 17 at paragraph 24,

> 24 The presumption of resulting trust is a rebuttable presumption of law and general rule that applies to gratuitous transfers. When a transfer is challenged, the presumption allocates the legal burden of proof. Thus, where a transfer is made for no consideration, the onus is placed on the transferee to demonstrate that a gift was intended [citations omitted].

The presumption also applies when one person pays the purchase price of an asset, the title to which is held in another's name. When the presumption of resulting trust applies, [3] the judge tries to determine whether the transferor intended to make a gift.

In many of the resulting trust cases, a claim is brought by a beneficiary of the deceased's estate — or a wills variation applicant who hopes to become a beneficiary — in respect of a gratuitous transfer from the now deceased person. The plaintiff claims that the transferee of the transferred asset holds the asset on a resulting trust for the deceased's estate. The transferee asserts that the deceased intended to make a gift.

A logical place to look for evidence of whether the deceased intended to make a gift is what the deceased wrote or said she intended.

In admitting evidence of the deceased's statements of his intentions when he transferred real property into a joint tenancy with his son, Madam Justice Dardi, in *Harshenin v. Khadikin*, 2015 BCSC 1213, set out a thorough summary of the rules in respect of the hearsay evidence. The deceased, Walter Khadikin, had transferred his home into a joint tenancy with his son. Two grandchildren challenged both the deceased's will (successfully, with the result that they were intestate heirs) and the transfer of property. The solicitor who acted for the deceased in the property transfer provided evidence of the deceased's instructions to him, which lent support to the view that the deceased intended a gift.

With respect to the admissibility of the deceased's statements, Madam Justice Dardi wrote:

> 28 The evidence led at trial included a significant focus on various statements allegedly made by the Deceased. During the trial, I expressed concern about the admissibility of some of these statements, given their hearsay nature. I determined that I would permit the witnesses to relay these statements in their testimony and

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2 *The Law of Evidence in Canada* at pp. 338-39.

3 The presumption of advancement applies to some transfers such as from a parent to a minor child, and in British Columbia a transfer between married spouses.

that I would reserve my ruling as to the admissibility of, and corresponding use, that could be made of those statements.

29 The essential issue is whether the Deceased's declarations, as tendered through the various witnesses, are properly admissible.

30 Hearsay evidence relied on for the truth of its contents is presumptively inadmissible. In some instances, the statements attributed to the Deceased are not relied on for the truth of their contents. In other cases, statements are admissible as an established exception to the hearsay rule which permits evidence to be given of statements made by deceased persons as to their state of mind or emotional state: *Modonese v. Delac Estate*, 2011 BCSC 82 (B.C. S.C.) at paras. 82-85. In *R. v. P. (R.)* (1990), 58 C.C.C. (3d) 334 (Ont. H.C.), Doherty J. explained this principle as follows, at 341:

> Assuming relevance, evidence of utterances made by a deceased (although the rule is not limited to deceased persons) which evidence her state of mind are admissible. If the statements are explicit statements of a state of mind, they are admitted as exceptions to the hearsay rule. If those statements permit an inference as to the speaker's state of mind, they are regarded as original testimonial evidence and admitted as circumstantial evidence from which a state of mind can be inferred.

31 The authorities establish that in order to benefit from this "traditional" exception to the rule against hearsay, the evidence must have some measure of trustworthiness: *R. v. Panghali*, 2010 BCSC 1114 (B.C. S.C.) at paras. 18-21.

32 Statements attributed to the deceased sometimes require consideration of the "principled approach" to hearsay. Four decisions of the Supreme Court of Canada guide the court's inquiry regarding the principled approach: *R. v. Khan*, [1990] 2 S.C.R. 531 (S.C.C.); *R. v. Smith*, [1992] 2 S.C.R. 915 (S.C.C.); *R. v. Starr*, 2000 SCC 40 (S.C.C.); and *R. v. Khelawon*, 2006 SCC 57 (S.C.C.). The admissibility of hearsay under the principled approach is summarized in *Khelawon* at para. 2:

> When it is necessary to resort to evidence in this form, a hearsay statement may be admitted if, because of the way in which it came about, its contents are trustworthy, or if circumstances permit the ultimate trier of fact to sufficiently assess its worth. If the proponent of the evidence cannot meet the twin criteria of necessity and reliability, the general exclusionary rule prevails.

33 The onus is on the party tendering the hearsay evidence to establish the necessity and reliability on a balance of probabilities. The court in this case must assess both the threshold reliability of the statement at issue and the statement's ultimate reliability having regard to the entirety of the evidence: *Khelawon* at para. 2.

34 In this case, because the declarant is deceased, necessity is clearly established. That leaves for determination the issue of the reliability of the various statements attributed to the Deceased.

35 A court is required to assess the reliability of a statement sought to be adduced by way of hearsay evidence by examining the circumstances under which that statement was made. A circumstantial guarantee of trustworthiness is established if the statement was made in circumstances which "substantially negate" the possibility that the declarant was untruthful or mistaken: *Smith* at 933.

36 As a preliminary threshold issue, the court must first find on a balance of probabilities that the statement was made by the Deceased before it goes on to determine the treatment and weight of such evidence: *Creutz v. Winther Estate*, 2007 BCSC 1463 (B.C. S.C.) at para. 99. In essence, this assessment turns on the credibility of the various witnesses: *Halfpenny v. Holien* (1997), 37 B.C.L.R. (3d) 186 (B.C. S.C.).

> 37 In my view, there is a real question in this case about whether certain of the statements were made by the Deceased.

She admitted the evidence of the statements Walter Khadikin made to his solicitor, Mr. Layfield, as well as statements he made to other witnesses. With respect to the solicitor's evidence, Madam Justice Dardi wrote:

> 62 I have considered the admissibility of Mr. Layfield's testimony regarding statements made by the Deceased with respect to the transfer of the Property. First, I accept that the statements were made. Additionally, I find them sufficiently reliable to meet the admissibility threshold under the principled approach. There is no basis to suggest that the Deceased had any reason to be untruthful or to make any misrepresentations to Mr. Layfield when they met regarding the transfer of the Property. In my view, the Deceased's statements made to a disinterested professional possess a circumstantial guarantee of trustworthiness. I conclude that the admission of these statements is justified under the principled approach.

In one of the cases cited by Madam Justice Dardi, *Halfpenny v. Holien*, 1997 CarswellBC 1476 (SC), Mr. Justice Bauman also admitted statements of the deceased of her intentions in making a gratuitous transfer; but, did so on the basis that the evidence of the statements was original evidence rather than hearsay.

In *Halfpenny*, the deceased had transferred most of her wealth into a joint account with one of her sisters, Mrs. Holien, to the exclusion of her other sister. The issue was whether Mrs. Holien, as the surviving joint account holder, rebutted the presumption of resulting trust. Mrs. Holien and her husband testified that the deceased told them in the car while driving to the bank that the deceased wanted Mrs. Holien to receive the funds when she died, and she didn't want her other sister to receive the funds.

Mr. Justice Bauman (as he then was) wrote in respect of the admissibility of the deceased's statements:

> 23 As will appear, it is important to the defendant's case that she lead compelling evidence rebutting the presumption that she received the windfall of the monies in the joint accounts on a resulting trust. In discharging that burden Mrs. Hall's statements, and in particular those made during the car trip to the bank on August 26, 1992, are of considerable assistance to Mrs. Holien.
>
> 24 During argument I asked counsel to provide full submissions on the admissibility of statements attributed to Mrs. Hall and confirming her desire to favour the defendant with funds in the joint accounts. At that time I identified these as hearsay statements made by the deceased.
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> 25 Counsel have helpfully provided submissions on the issue of hearsay. Upon reflection, however, I believe that I was in error in so construing the evidence. It is of course clear that evidence of a statement made to a witness by another person may or may not be hearsay. As Munroe J. put it in *Grant, Re*, [1971] 1 W.W.R. 555 (B.C. S.C.) at 556:
>
> > It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of a statement, but the fact that it was made.
>
> 26 The fact that a statement was made is frequently relevant. When evidence is tendered to prove a verbal act, that is the fact that a statement was made, it is not tendered for a hearsay purpose.

> 27 *Grant, Re* is authority for the submission that evidence of statements made by a testatrix is admissible to prove the fact that those statements were made and to throw light on the mind of the testatrix.
>
> 28 Munroe J. quoted with approval this statement by Buckley J. in *Blanch, Re*, [1967] 2 All E.R. 468 (Eng. Ch.), at 471:
>
> > In certain cases there are likely to be respects in which the state of the deceased's mind may properly be regarded as relevant and material. For instance, the state of the deceased's mind may be very material to the weight to be attributed to any reasons which he may have given in his life time for failing to make provision for a dependant or for making such provision as he did for such a dependant.
>
> 29 In my opinion the evidence as to the statements made by Mrs. Hall on her testamentary intentions in this case is admissible on the same footing.

Mr. Justice Bauman also considered whether the statements would be admissible pursuant to the principled exception if they were hearsay, and found the statements met the necessity and reliability criteria.

The main question was whether the deceased had made the statements. Mr. Justice Bauman accepted the evidence of Mrs. Holien and her husband. In the result, the court held that the deceased intended to make a gift.

The court may consider statements made by the transferor before, during and after the transaction, but the statements must relate to the transferor's intentions at the time of the transfer. Before the Supreme Court of Canada's decision in *Pecore,* the weight of authorities was that statements made by the transferor before or contemporaneously with the transfer were admissible, but statements made after the transfer were only admissible if against the transferor's interest. In other words, statements by the transferor made subsequent to the transfer that she did not intend to make a gift were inadmissible. This was known as the rule in *Shephard v. Cartwright*, [1955] A.C. 431 (H.L.). However, Mr. Justice Rothstein rejected this restrictive rule. Subsequent statements that the transferor did not intend a gift may, however, be given less weight.

F. Undue Influence

Madam Justice Southin described undue influence as "influence which overbears the will of the person influenced so that in truth what she does is not his or her own act."[4]

State of mind is central to undue influence cases. Is the person who has made a will or transferred property acting out of fear, or is she acting voluntarily? The court will often rely on statements the deceased had made to understand her state of mind.

Mr. Justice Grove's decision in *Modonese v. Delac Estate*, 2011 BCSC 82, appeal dismissed 2011 BCCA 501, further reasons 2012 BCCA 21, and 2012 BCCA 74, provides an analysis of the evidentiary rules in the context of allegations of undue influence.

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4 *Longmuir v. Holland*, 2000 BCCA 538 at para. 71. In some circumstances there is a presumption of undue influence based on the nature of the relationship between the person alleged to have exercised undue influence and the person so influenced. This arises from a relationship of dependency or the potential for domination. See *Goodman Estate v, Geffen*, [1991] 2 S.C.R. 353, and s. 52 of the *WESA*.

Regina Delac died on August 20, 2005. She had two children: a son, Marko Delac, and a daughter, Helena Modonese. With the exception of a three-year period beginning in 1989, Marko Delac lived with his mother in her home on Royal Oak Avenue in Burnaby.

A couple of years before she died, Regina Delac signed a transfer form, transferring her house into a joint tenancy with her son. She signed the transfer in front of a notary public, whom her son had contacted, while sitting in Marko Delac's car. Mr. Delac was either in the car or standing nearby when she signed the transfer. On Regina Delac's death, title to the house at Royal Oak Avenue passed to her son by right of survivorship. Her only other financially valuable asset was her bank account which held about $35,000.

In her will, Regina Delac said that her estate was to be divided equally between her son and daughter.

Helena Modonese challenged the transfer of her mother's house into a joint tenancy with her brother on the grounds of undue influence and resulting trust.

Ms. Modonese relied on statements her mother made to her, and to Regina Delac's sister Helen Uzelak, to challenge the transfer of the house into a joint tenancy with her brother. For example, Regina Delac told her sister that Marko Delac had slapped and choked her in 1989 or 1990. After this incident the police came, and Marko Delac and his family moved out of the home for three years.

Mr. Justice Groves summarized the evidence objected as hearsay at paragraphs 73 and 74:

> [73] In their written submissions, the parties highlight a number of statements made by the deceased, which the defendant asserts are inadmissible hearsay. The most important of these for the present purposes appear to be:
>
> > (a) A statement to Linda Modonese regarding a physical altercation between Marko and Regina;
> >
> > (b) A statement to Helena and Linda Modonese to the effect that it was Regina's intention for Helena and Marko to share equally in the estate and more specifically in the house;
> >
> > (c) A statement to Helen and Helena wherein Regina told them that she was afraid of upsetting Marko;
> >
> > (d) A statement to Helen and Helena wherein Regina told them that she was afraid of Marko;
> >
> > (e) Most importantly, Helen's evidence that prior to her death, Regina told her that she had signed something and that she did not know what she signed. The defendant had told her to sign. She did not like this. She wondered how the defendant's name was on the municipal tax notice.
>
> [74] An out of court statement tendered for the truth of its contents is presumptively inadmissible. The hearsay rule has been traditionally regarded as an absolute rule, and acts as an exception to the general principle that all relevant evidence is admissible.

Mr. Justice Groves considered whether the evidence fell within a traditional category of hearsay exceptions, and he also considered the principled exception.

Regina Delac's statements that she intended for her children to share her house and bank accounts equally, that she was afraid of her son and afraid of upsetting him, were admissible, falling within the traditional hearsay exceptions for statements made to prove a person's intention, mental or emotional state.

Mr. Justice Groves also admitted Regina Delac's statements of physical violence, and that she signed something her son told her to sign but did not know what she signed under the principled exception. These were admissible as proof of the matters asserted.

Because Regina Delac was deceased, the evidence of her statements was necessary. With respect to reliability, Mr. Justice Groves reasoned:

> [94] Regina had no motive to fabricate the two statements attributed to her. They were not self-serving. The statements at issue were made in the context of everyday intimate conversations between close relatives and friends, which is an accepted indicator of reliability: *R. v. Pasqualino*, 2008 ONCA 554 at para. 43, 233 C.C.C. (3d) 319. The defendant has pointed to no evidence that would contradict these statements. Accordingly, the statements possess sufficient hallmarks of threshold reliability to justify admission under the principled exception.

Mr. Justice Groves found the witnesses who gave evidence of the statements were credible and found that Regina Delac did make the statements attributed to her.

The evidence was crucial in this case in establishing that there was a potential for domination in the relationship between Marko Delac and Regina Delac such that the equitable presumption of undue influence applied to the transfer of the house. Mr. Justice Groves considered at paragraph 113:

> 1. Regina's statements that she feared Marko and did not want to upset him;
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> 2. Marko's physical abuse of his mother;
>
> 3. Regina's statement to Helen that she signed documents at Marko's direction and that she did not appreciate the nature and consequences of these documents;
>
> 4. Marko was granted an enduring power of attorney, which he used over the plaintiff's assets, granting him control over her affairs and subjecting him to fiduciary obligations (On the fiduciary relationship between an attorney and donor, see Egli v. Egli, 2004 BCSC 529 at paras. 76-79, 28 B.C.L.R. (4th) 375, aff'd 2005 BCCA 627, 48 B.C.L.R. (4th) 90.);
>
> 5. Marko's attempts to prevent his mother from having contact with the plaintiff, isolating her from other family members;
>
> 6. Regina's reliance upon Marko for companionship, help around her home, and in dealing with her general affairs.

Marko Delac failed to rebut the presumptions of undue influence and resulting trust, with the result that the house fell into Regina Delac's estate.

G. Mental Capacity

It is also necessary to admit statements made by a now deceased person to assess his or her testamentary capacity or capacity to make an *inter vivos* gift if a will or transfer is challenged. The statements may tend to lend support to capacity or may be tendered as evidence of incapacity.

Chief Justice Finch, dismissing an appeal against a finding that the deceased had made a valid will in *Gilmour Estate v. Parchomchuk*, 2011 BCCA 207, rejected the appellant's argument that the chambers judge admitted inadmissible statements made by the deceased. The Chief Justice wrote:

> 23 As to the hearsay submission, it is important to recall that not all out of court statements amount to hearsay. It is only those out of court statements that are relied on for the truth of their contents. Statements of the testatrix can raise an inference of mental capacity without being relied on for their truth. Such statements are not inadmissible as hearsay. They are merely evidence that such a statement was made.

> 24 Even so, declarations of a testator's state of mind or intentions have been admitted in more wide ranging circumstances than other forms of hearsay, including cases involving testamentary capacity and undue influence: see Bryant, Lederman and Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 3d ed. (Markham, Ont.: LexisNexis, 2009) at 337-39.

The hearsay issues may be quite nuanced. Madam Justice Griffin, in *Devore-Thompson v. Poulain*, 2017 BCSC 1289 ("*Devore-Thompson*"), considered the admissibility of evidence from witnesses testifying about what they saw or heard the deceased do or say, and evidence of witnesses who reported what others told them the deceased did or said. The latter were hearsay and admitted for very limited purposes. She also recognized that statements made by the deceased while admissible for her state of mind, may not be reliable for the truth of the matters the deceased asserted, particularly after the deceased was diagnosed with dementia. Madam Justice Griffin wrote:

> 60 One of the matters I must consider is the admissibility of out-of-court statements as to things that Ms. Walker said or did.
>
> 61 Evidence of things that Ms. Walker did, as seen by a witness who testified at trial, is admissible as evidence of her actions.
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> 62 Evidence of things that Ms. Walker did, as described by someone who did not testify at trial to someone who did testify, is hearsay evidence. This evidence was not admissible for the truth of the fact that Ms. Walker did these things. To the extent it was admitted, it was evidence informing the state of mind or actions of the trial witness, which in turn may have been in issue because of challenges to the credibility and or motivations of that witness, or challenges to the reliability of expert opinions.
>
> 63 The more complicated issue has to do with out-of-court statements made by Ms. Walker to (a) witnesses who did testify at trial; and (b) people who did not testify at trial but who reported these things to trial witnesses.
>
> 64 In some instances, evidence of things said by a deceased person to a witness who testifies at trial is admissible for the truth of the contents, under the principled approach to admissibility of hearsay evidence. This is where calling the evidence this way is both necessary and there is threshold reliability to the evidence, a point I reviewed in the case of *Sharma v. Sharma Estate*, 2016 BCSC 1397 (B.C. S.C.) at paras. 27-29; see also *Pasko v. Pasko*, 2002 BCSC 435 (B.C. S.C.); *Modonese v. Delac Estate*, 2011 BCSC 82 (B.C. S.C.), aff'd 2011 BCCA 501 (B.C. C.A.) at para. 82.
>
> 65 The necessity arm of the principled exception to hearsay evidence is met here, given that Ms. Walker is deceased and there is no way of calling her as a witness. However, things that Ms. Walker said after she was diagnosed with Alzheimer's disease have to be treated cautiously and it would be dangerous to give much weight to them as true. This is because there is a danger that what she said was not reliable, due to the distortions in her mental perceptions caused by her disease.
>
> 66 Regardless, for the most part, evidence regarding what Ms. Walker said to witnesses who testified at trial was admitted to illustrate Ms. Walker's state of mind at the time she said it, whether her state of mind was based on fact, confusion, delusion or manipulation. Evidence regarding what Ms. Walker said to people who did not testify, but who reported it to trial witnesses, was admitted for a non-hearsay purpose: to put into context evidence of the trial witness's state of mind and subsequent actions after hearing or learning of these things reportedly said by Ms. Walker.

In some cases, the deceased's statements may be tendered not for the purpose of proving the truth of the matters asserted by the deceased, but for the opposite: as evidence that the deceased was delusional. If the court finds that the will-maker was suffering from delusions when she made her

will, and if those delusions had a sufficient connection to the provisions she made (or didn't make) in the will, then the court may pronounce against the will on the grounds that she did not have testamentary capacity.[5]

H. Spousal Relationship

The courts often rely on evidence of what the deceased said or wrote to determine whether a party and the deceased met the legal criteria for common law spouses, or, alternatively, whether a marriage or spousal relationship was terminated. This will be significant for determining whether a party has succession rights on an intestacy, or whether a party has standing to make a wills variation claim pursuant to section 60 of the *WESA*. In these cases, the law requires a consideration of the subjective intentions of the deceased.

In considering the admissibility of evidence of oral statements made by the deceased as well as documents, Mr. Justice Verhoeven wrote in *Souraya v. Kinch*, 2012 BCSC 1252:

> 63 Given that the Court is, in the first instance at least, engaged in assessing the subjective intentions of a deceased person, admission of such evidence is practically inevitable. It would be difficult if not impossible for the parties to provide full evidence concerning the intentions of the deceased and the objective factors that can be considered as indicative of a marriage-like relationship, as referred to in *Molodowich* [*v. Penttinen* (1980), 1980 CarswellOnt 274, 17 R.F.L. (2d) 376 (Ont. Dist. Ct.)] and other authorities, while avoiding all reference to the deceased's express or implied statements. An obvious example is the question of whether the parties referred to themselves as husband and wife, or some equivalent that recognized a long term commitment when talking to others: *Gostlin* [*v. Kergin*, 1986 CarswellBC 137 (CA)].

I. Domicile

State of mind is also central to determining domicile at a particular time. For example, in *Sato v. Sato*, 2017 BCSC 1394, Mr. Justice Funt was asked to determine whether the deceased had been domiciled in Luxembourg or British Columbia when he was married. This point was significant because, at the time of his marriage, in British Columbia a marriage revoked a prior will unless the will was made in contemplation of marriage.[6] In contrast, pursuant to the law of Luxembourg, marriage did not revoke a prior will. For an individual to change domicile, he must change physical residence and must also intend to make the new residence his permanent home. Mr. Justice Funt ruled on the admissibility of a number of paragraphs in the affidavits before him. He noted the state of mind exception:

> [97] Each counsel recognized that declarations indicating the mental state of the declarant may come within the traditional exception to hearsay for such. As Sopinka, Lederman and Bryant, *Law of Evidence in Canada*, 4th ed. (Markham, Ontario: LexisNexis Canada, 2014) states at 337:
>
> > **§6.313** If the mental state of the declarant is directly in issue at trial, then statements of his or her mental state are generally admissible in proof of the fact. Examples in which declarations

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5 For definitions of delusions, see Mr. Justice Cullity's decision in *Banton v. Banton*, 1998 CanLII 14926 (ON SC) at paras 61-63. See also Madam Justice Ballance's discussion of the law of testamentary capacity and the relevance of delusions in *Laszlo v. Lawton*, 2013 BCSC 305, paras. 185-229.

6 Marriages occurring on or after the *WESA* came into effect on March 31, 2014, no longer revoke prior wills.

> have been admitted to establish the declarant's state of mind include statements of intention to make a particular country one's home in proof of domicile, and the statements of a physician to a patient about his or her mental health as evidence of the latter's belief that it would be unsafe to resume cohabitation with one's spouse as justification for living separate and apart.
>
> **§6.314** The reception of these statements into evidence has been justified by the fact that, in the absence of any evidence of the individual's conduct, these statements may be the only means by which the court can determine the declarant's state of mind. Moreover, by requiring that the statement be made contemporaneously with the existence of the state of mind, there is some guarantee of reliability and sincerity on the part of the declarant.

J. Interpretation of a Will

Until now, we have focused on whether evidence of statements made by the deceased are inadmissible as hearsay or are admissible either as original evidence or as a hearsay exception. There is another consideration at play when evidence of what the deceased will-maker said is offered to show what the deceased intended the words in her will to mean. Evidence of what the will-maker said she intended is, with limited exceptions, not admissible. Arguably such evidence would allow the will-maker to amend her will orally in a manner that does not comply with the writing and witnessing requirements for a formally valid will.

This rule is not derived from the concerns about the fallibility of hearsay evidence. The drafting solicitor's evidence about what the deceased said she intended to do in her will may be the best evidence of intent, and easily meets the necessity and reliability criteria for admissibility; but, will often still be inadmissible. Evidence from the same solicitor of what the deceased said may be admissible if it is circumstantial rather than direct evidence of the will-maker's intent.

The law is summarized in Madam Justice Dardi's reasons in *Re: Ali Estate*, 2014 BCSC 340:

> 17 On this application Mr. Ali sought to rely on evidence of the solicitor who drew the Will. The solicitor deposed as to the circumstances relating to the preparation of the Will including the instructions she received from the Deceased. Ms. Ali objects to the admissibility of paragraphs 7 to 20 of the solicitor's affidavit. I reserved my ruling on this evidentiary issue and indicated I would rule on the admissibility of the impugned evidence in these reasons.
>
> 18 Although the primary source of evidence is the "four corners" of the will, the armchair rule entitles the court to look to extrinsic evidence (evidence other than the contents of the will) to identify the surrounding circumstances known to the will-maker at the time the will was made, which might reasonably be expected to have influenced the will-maker in the disposition of his or her property. The extrinsic facts and circumstances that a court may consider include the occupation of the will-maker, the state of his or her property, and the general relationships of the will-maker to his or her immediate family and other relatives: *Kaptyn Estate*, Re, 2010 ONSC 4293 (Ont. S.C.J.) at para. 38. This indirect extrinsic evidence is generally admissible when construing a will.
>
> 19 However, as I noted in the Rectification Decision, except in very restricted circumstances such as equivocation, on an interpretation application, the court is not permitted to review direct extrinsic evidence of a will-maker's intentions: British Columbia Law Institute, "Wills, Estates and Succession: A Modern Legal Framework," in B.C.L.I. Report No. 45 (B.C. 2006) at 37. The underlying rationale for its exclusion is that the will constitutes the evidence of a will-maker's

> intention and therefore direct extrinsic evidence of what the testator intended to write is not admissible to identify an ambiguity or to interpret an ambiguity that is apparent on the face of the will. This rule applies in particular to the will-maker's instructions provided to the solicitor who drew the will: *Sarkin v. Sarkin Estate* (1989), 36 E.T.R. 139 (B.C. S.C.).
>
> 20 The authorities establish that in cases where a court finds an "equivocation", direct extrinsic evidence of a will-maker's dispositive intent, as opposed to indirect extrinsic evidence of surrounding circumstances, may be admitted as an aid to interpretation. An equivocation arises when words appear clear and unambiguous on the face of the will but an ambiguity emerges upon reference to extrinsic circumstances, for example where the words used to describe a gift are equally applicable to two or more donees or assets. To illustrate, if a testator made "a gift to my niece Jill" and the testator actually had two nieces named Jill, extrinsic evidence tending to show that the testator intended to benefit one and not the other niece is properly admitted to resolve the equivocation*: Murray Estate, Re*, 2007 BCSC 1035, [2007] B.C.L.I. No. 45 (B.C. S.C.), at pp. 40 and 41.

In contrast to the prohibition of direct evidence of intention in most circumstances when the court is interpreting a will, the court of probate could admit direct evidence of the will-maker's intention to delete (but not add) words when the will is probated if the court is satisfied that the will maker did not know and approve of those words.[7]

K. Rectification

The WESA now allows the court to rectify a will, and, for that purpose, direct evidence of the will-maker's intention is admissible. Furthermore, no distinction is made in a rectification application between the court's probate and construction jurisdictions. Words can either be added or deleted. Section 59 (1) and (2) say:

> (1) On application for rectification of a will, the court, sitting as a court of construction or as a court of probate, may order that the will be rectified if the court determines that the will fails to carry out the will-maker's intentions because of
>
> (a) an error arising from an accidental slip or omission,
>
> (b) a misunderstanding of the will-maker's instructions, or
>
> (c) a failure to carry out the will-maker's instructions.
>
> (2) Extrinsic evidence, including evidence of the will-maker's intent, is admissible to prove the existence of a circumstance described in subsection (1).

L. Section 58

Section 58 of the *WESA* allows the court to cure deficiencies in the execution of a testamentary record that does not meet the formal requirements of a valid will, and to give effect to a record as a will or revocation, alteration or revival of a will.

The British Columbia Court of Appeal confirmed in *Re Hadley Estate*, 2017 BCCA 311, that the court may consider extrinsic evidence of the deceased's intention. Madam Justice Dickson wrote:

> 40 Sitting as a court of probate, the court's task on a s. 58 inquiry is to determine, on a balance of probabilities, whether a non-compliant document

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7 See Madam Justice Dardi's reasons in *Re: Ali Estate*, 2011 BCSC 537 at paras. 21-37 for a discussion of the differences between the court of probate and court of construction.

> embodies the deceased's testamentary intentions at whatever time is material. The task is inherently challenging because the person best able to speak to these intentions — the deceased — is not available to testify. In addition, by their nature, the sorts of documents being assessed will likely not have been created with legal assistance. Given this context and subject to the ordinary rules of evidence, the court will benefit from learning as much as possible about all that could illuminate the deceased's state of mind, understanding and intention regarding the document. Accordingly, extrinsic evidence of testamentary intent is admissible on the inquiry: *Langseth Estate v. Gardiner* (1990), 75 D.L.R. (4th) 25 (Man. C.A.) at 33; *Yaremkewich Estate, Re* [2015 BCSC 1124] at para. 32; *George* [*v. Daily* (1997), 143 D.L.R. (4th) 273 (Man. C.A.)]. As is apparent from the case authorities, this may well include extrinsic evidence of events that occurred before, when and after the document was created: see, for example, *Bennett* [*v. Toronto General Trusts Corporation*, [1958] S.C.R. 392]; *George*; *Estate of Young*; *MacLennan Estate, Re* (1986), 22 E.T.R. 22 (Ont. Surr. Ct.) at 33; *Caule v. Brophy* (1993), 50 E.T.R. 122 (Nfld. T.D.) at paras. 37 — 44.

In *Hadley*, the Court of Appeal upheld the trial judge's decision that notes made by the deceased in her journal ought not be given effect as a will. The trial judge, Madam Justice Adair, considered the fact that the deceased did not mention to anyone that she had made the journal entries, and did not mention them when, subsequent to making them, she spoke of planning to change her earlier will. The Court of Appeal rejected the appellant's argument that the trial judge was in error in admitting this evidence.

M. Rebutting a Presumption of Revocation of a Lost Will

There is a presumption that, if a will that was in the possession of the will-maker is lost, the will-maker revoked the will. The presumption is rebuttable, and, if the court finds that the will-maker did not intend to revoke the will, a copy may be probated, or the contents may be proven by some other means.

Statements made by the will-maker that show that the will-maker either did or did not intend to revoke the will are admissible to determine her intentions.[8]

N. Wills Variation Claims

In applications to vary a will under section 60 of the *WESA*, there is a statutory provision allowing testimony of the will-maker's reasons for making the provisions (or not making provisions) she did in the will. Section 62 of the WESA reads as follows:

> **62** (1) In a proceeding under section 60, the court may accept the evidence it considers proper respecting the will-maker's reasons, so far as may be determined,
>
> (a) for making the gifts made in the will, or
>
> (b) for not making adequate provision for the will-maker's spouse or children,
>
> including any written statement signed by the will-maker.
>
> (2) In estimating the weight to be given to a statement referred to in subsection (1), the court must have regard to all the circumstances from which an inference may reasonably be drawn about the accuracy or otherwise of the statement.

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8 See for example *Holst Estate v. Holst*, 2001 BCSC 1123.

This provision has been interpreted broadly enough to allow hearsay evidence of persons other than the will-maker if the evidence has a nexus to the will-maker's reasons. In *Kelly v Baker*, 1996 CarswellBC 2156 (CA), Mr. Justice Finch (as he then was) held that the trial judge did not err in allowing correspondence from the plaintiff's former wife, and from the plaintiff's father, in an application to vary the plaintiff's mother's will. Mr. Justice Finch (referring to the former provision, section 2(3) of the *Wills Variation Act*) wrote:

> 32. The plaintiff contends that these cases all concern statements made by the testator, whereas in this case the letters were written by the testator's daughter-in-law and the testator's husband. I think it is clear, from the language of s. 2(3) however, that the court's discretion is not limited to receiving statements of the testator. The language of the section is broad and inclusive, and permits the court to receive as evidence material which, but for the subsection, would be legally inadmissible.
>
> 33. In my view, the trial judge did not err in the exercise of his discretion in receiving the two letters into evidence. Nor does it appear that he gave to the letters any more weight than they deserved. The plaintiff admitted in his evidence he told his wife Patty that he wanted nothing to do with his parents. The letters confirm that attitude, and they help to explain how the testator may have been made aware of it.

Section 62 of the *WESA* does not expressly say whether evidence of the will-maker's reasons is admissible only for the purpose of proving the will-maker's subjective reasons, in which case, evidence of what the will-maker said or wrote would likely be admissible for the will-maker's state of mind in any event, or, if it is also admissible as evidence to prove the truth of underlying facts upon which the reasons are based. We suggest that it is implicit in section 62(2) that it is admissible as proof of the underlying facts.

The Court of Appeal has held that the onus is on the person applying to vary a will to demonstrate that the will-maker's reasons are false or unwarranted. For example, in *Hall v. Hall Estate*, 2011 BCCA 354, Madam Justice Neilson, wrote:

> [43] Jean gave three reasons for disinheriting Tony. The first was his lengthy estrangement from her. The second was her view that he was capable of being financially independent. The third was the comparative love and support she had received from Paul and his family, whom she viewed as her "only family". To succeed in his challenge to her will, Tony must establish these reasons were false or unwarranted: *Bell v. Roy Estate* (1993), 75 B.C.L.R. (2d) 213 (C.A.) at para. 36. In considering that proposition, it is not necessary to find the reasons were justifiable. It is enough if they were factually valid, and rational in the sense of having a logical connection to the act of disinheritance: *Kelly v. Baker* (1996), 82 B.C.A.C.150 at para. 58.[9]

The effect results in evidence of the will-maker's reasons is admitted as proof of the underlying facts and is also treated as presumptively true. The court may, of course, give the reasons little weight, and may prefer other evidence, finding that the reasons are not factually valid.

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9 The formulation that "it is not necessary to find the reasons were justifiable," is open to criticism on the basis that it is inconsistent with the objective standard mandated by the Supreme Court of Canada in *Tataryn v. Tataryn Estate*, 1994 CarswellBC 283. See *McBride v. McBride Estate*, 2010 BCSC 443, at paras 135

It is important to keep in mind the limitations of this section. First, it does not open the door to all hearsay, but rather hearsay related to the will-maker's reasons. Second, the court may reject a witness's evidence of the will-maker's evidence.

Madam Justice Griffin wrote, in *Sharma v. Sharma Estate*, 2016 BCSC 1397:

> 30 In my view the parties were too lax in their calling of evidence, calling hearsay evidence which was not necessary at all, such as a party calling a witness to give evidence as to what that witness learned from that very party. Since the parties were able to testify, I did not consider hearsay evidence in the nature of oath-helping to be of any assistance to the factual issues nor was it entitled to any weight, unless there was a suggestion of recent fabrication.
>
> 31 Some hearsay evidence was admitted not for the truth of it, but as going to the state of mind of the witness. If, for example, one plaintiff was told by another witness that Victor had made a threat, this evidence could be admitted for the state of mind of the recipient, as it could explain in part the recipient's reluctance to engage with Victor.
>
> 32 I have been very cautious about giving much weight to the evidence of the parties or of witnesses closely allied with the parties, such as family or friends, as to what the Testatrix told them about the reasons for her dispositions in the 2007 Will. This is because:
>
> > a) Each of the parties was self-serving in their recollections as to what the Testatrix told them.
> >
> > b) The Testatrix may have had reasons to tell different things to her children, or their friends, or other family members, seeking to align with or against one or the other for any variety of possible reasons, including emotional reasons that had little to do with the truth. The Testatrix may also have been mistaken about her understanding of the facts.
> >
> > c) There is better evidence of the Testatrix's intentions when she wrote her 2007 Will than evidence of the people now making competing claims under it and their allies. The best evidence is the language of the 2007 Will and the evidence of the Testatrix's instructions to the lawyer who prepared the 2007 Will, Mr. Jussa, who testified at trial. This evidence is internally consistent and the solemnity of the occasion and independent and neutral role of the lawyer are circumstances which provide more objective indicators of reliability.

III. Medical and Psychological Evidence

A. Introduction

The courts will often consider medical and psychological evidence in cases where the capacity of the deceased to make a will or transfer property is in dispute. Such evidence is also helpful if there are allegations of undue influence if it is alleged that the deceased was physically, emotionally or mentally vulnerable.

It is important to keep the limitations of such evidence in mind. Ultimately, determinations of capacity are made by the court after applying the law to all of the evidence both expert and lay. The

court may prefer the evidence of lay witnesses to experts.[10] The determination of capacity cannot and should not be delegated to experts.

Medical and psychological evidence is often sourced from:

1. Clinical records of the deceased from hospitals, doctors, psychiatrists, nurses and other health care providers; and
2. Expert opinions.

B. Clinical Records

Clinical records may include notes of statements made by the deceased, statements made by others about the deceased, observations of the deceased, test results, prescriptions, diagnosis and prognosis. They are made by health care providers contemporaneously with the matter recorded.

Clinical records are hearsay, but admissible under the business records exception, both at common law, and pursuant to section 42 of the B.C. *Evidence Act*, RSBC 1996, c 124 (the "*BC Evidence Act*").

The authors of *The Law of Evidence in Canada* set out at page 295 the common law exception as follows:

> At common law, statements made by a person under a duty to another person to do an act and record it in the ordinary practice of the declarant's business or calling are admissible in evidence, provided they were made contemporaneously with the facts stated and without motive or interest to misrepresent the facts.

The leading case considering the application of the common law business records exception to clinical records is the Supreme Court of Canada decision in *Ares v. Venner*, 1970 CarswellAlta 80, which is a medical negligence case, in which the court held that nurses' notes setting out their observations of the plaintiff, including references to "blue toes" of the plaintiff, were admissible.

Mr. Justice Hall wrote for the court:

> [19] The issue as to the admissibility of the nurses' notes in this appeal is not as decisive as it might be by virtue of the objection taken by counsel for [the defendant] at the trial. The position taken was as follows:
>
> > Mr. Major: My Lord, our position briefly taken is that it's difficult for Your Lordship, I think, not having the record in front of him, the nurse's records understand perhaps what I'm trying to say. We don't object to the records going in insofar as they show that the nurses attended the patient, insofar as they show anything that is objective in its nature, insofar as being evidence in this case is concerned. But you will note in reading the record and in just picking something at random they say:
> >
> > > "Quiet evening, complained of discomfort, relieved by sedation, numbness in toes, toes now swollen and blue."
> >
> > Insofar as that type of description is used it's an expression of opinion by the nurse on what she observed the time that she was there and I think it would be unfair to accept it as prima facie proof of that which is purported to have happened without the nurse who made those notes being present today to say that when she says blue she means what all of us understand by blue. Insofar

10 See, for example, *O'Neil v. Royal Trust Co*, 1946 CarswellBC 127 (SCC).

> as her expressions of opinion, the [defendant], I don't think, should be put in a position of having these admitted. He is prejudiced insofar as the authorities quoted by my learned friend, seems that the very exception stated in Wigmore, the bona fide dispute that Wigmore refers to is precisely the position that I think we are in in this particular matter insofar as the expressions of opinion may be concerned.
>
> . . .
>
> [21] However, despite this, I think it desirable that the Court should deal with the issue as a matter of law and settle the practice in respect of hospital records and nurses' notes as being either admissible and prima facie evidence of the truth of the statements made therein or not admissible as being excluded by the hearsay rule.
>
> . . .
>
> [26] Hospital records, including nurses' notes, made contemporaneously by someone having a personal knowledge of the matters then being recorded and under a duty to make the entry or record should be received in evidence as prima facie proof of the facts stated therein. This should, in no way, preclude a party wishing to challenge the accuracy of the records or entries from doing so. Had the respondent here wanted to challenge the accuracy of the nurses' notes, the nurses were present in court and available to be called as witnesses if the respondent had so wished.

Section 42 of the *BC Evidence Act* provides:

> Admissibility of business records
>
> 42 (1) In this section:
>
> "business" includes every kind of business, profession, occupation, calling, operation or activity, whether carried on for profit or otherwise;
>
> "document" includes any device by means of which information is recorded or stored;
>
> "statement" includes any representation of fact, whether made in words or otherwise.
>
> (2) In proceedings in which direct oral evidence of a fact would be admissible, a statement of a fact in a document is admissible as evidence of the fact if
>
> (a) the document was made or kept in the usual and ordinary course of business, and
>
> (b) it was in the usual and ordinary course of the business to record in that document a statement of the fact at the time it occurred or within a reasonable time after that.
>
> (3) Subject to subsection (4), the circumstances of the making of the statement, including lack of personal knowledge by the person who made the statement, may be shown to affect the statement's weight but not its admissibility.
>
> (4) Nothing in this section makes admissible as evidence a statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to a fact that the statement might tend to establish.
>
> (5) For the purpose of any rule of law or practice requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated, a statement rendered admissible by this section must not be treated as corroboration of evidence given by the maker of the statement.

It is not necessary for the person who made the records to give evidence, even if that person is available to testify. In *Ares*, several of the nurses who made the notes were present at trial. But, evidence of a health care provider who gives live testimony, is able to elaborate on the information in the records, and is subject to cross-examination, may very well be given more weight than if only the records are admitted.

Although the records are admissible, there are limitations on the use of those records. There is a distinction between observations such as the colour of the patient's toes, and a diagnosis such as Alzheimer's, which diagnosis requires expertise and the formulation of an opinion based on other evidence. Although a note in a clinical record that the patient was diagnosed with Alzheimer's may be admissible as proof that the diagnosis was made (if the fact that the diagnosis was made is somehow relevant), it is not admissible to prove that the patient in fact suffered from Alzheimer's.

Madam Justice Garson considered whether opinions contained in the clinical records of the Penticton Mental Health Centre were admissible to prove the truth of the opinions asserted in the records in *Egli v Egli*, 2003 BCSC 1716. The Public Guardian and Trustee of British Columbia (the "PGT") was seeking to have certain transactions made by the patient, Hans Egli, set aside on the basis that the patient did not have the capacity to make the transactions. The PGT tendered the records and sought to rely on opinions contained in the records bearing on the patient's capacity. Madam Justice Garson admitted the records "for the purpose of proving the factual record of the various communications and contacts the Penticton Mental Health Centre had concerning Hans Egli,"[11] but declined to admit them for the purpose of proving the truth of the opinions.

In reaching her decision, Madam Justice Garson noted the problems with admitting the records as proof of the opinions, including the paucity of the facts and tests underlying the opinions, and of the expert qualifications of the persons making the entries. The effect of allowing the opinions to be entered under the business records exception would be to circumvent the requirements of the *Supreme Court Civil Rules* (the "*SCCR*") for the admission of expert opinion evidence. She wrote:

> [23] If evidence is found to be admissible under the *Ares v. Venner* exception, then it is treated as fact and its admissibility is not governed by the opinion evidence rules contained in Rule 40A [now Rule 11]. However, but clearly the *Ares v Venner* exception cannot be used to circumvent the provisions of Rule 40A.
>
> ....
>
> [25] Nothing in *Ares v. Venner* detracts from the usual rule that Rule 40A must be complied with if the statement sought to be admitted is found to be an expert opinion. *Ares v. Venner* permits in limited circumstances the introduction of certain types of opinions as proof of a fact. In my view it is only limited types of opinions, more in the nature of observations, which fall into the *Ares v Venner* exception, and outside the ambit of Rule 40A.
>
> [26] In the case at bar the opinions sought to be admitted for the purpose of proving the truth of the opinions are not straightforward or mechanical observation. The opinions are psychiatric in nature. They are steeped in the expert skills of a geriatric mental health worker. They are not akin to observations such as "blue toes" in *Ares v. Venner.* The opinions as to Hans Egli's "global assessment of functioning," his scores on the various mini mental status exams, and the diagnoses of his cognitive functioning are subjective opinions, requiring review of information, interviews, and deliberation of the author of the opinions. I have heard no evidence concerning the qualifications of the individuals who made the diagnoses and cannot therefore assess the degree of reliability that should be ascribed to the opinions. The diagnoses and opinions are central to the very issues

11 At para. 1.

> upon which this case will be decided. The opinions which the plaintiff wishes to rely upon are not so numerous that they ought to be admitted for practical and necessary reasons. Furthermore the diagnoses made in the records, such as the diagnostic criteria from the psychiatric manual DSM IV, contain technical language that requires explanation. I therefore conclude that the opinions must be tendered under Rule 40A and the appropriate notices given.
>
> [27] Subsection 7 of Rule 40A, gives the Court discretion to order that a statement be admitted, even where it does not conform to the requirements listed under subsection 5. This is not an appropriate case to exercise such discretion. The opinions tendered are central to the issues in this case and the defendants are entitled to require the authors of those opinions to be produced for cross-examination. Fairness dictates that the defendants be permitted the opportunity to cross-examine on the opinions and that the issue of admissibility not be ignored in favour of an argument based solely on the weight to be attributed to the PMHC records.

C. Other Uses of Clinical Records

The clinical records may also contain entries that are relevant to other issues.

A recent example is the case of *Lamperstorfer v Plett*, 2018 BCSC 89, which considered the admissibility of the statements made by the deceased as set out in the clinical records in a wills variation claim.

At issue in *Plett* was whether the deceased had rational and valid reasons for giving his two sons each 25% of his estate and not more. There was no dispute as to the validity of the will. However, the plaintiffs wanted the clinical records admitted as they provided "important context of one of the central issues in this case – whether their father had valid and rational reasons, logically connected to the dispositions made in his will."[12]

Madam Justice Donegan held that the clinical records were admissible pursuant to section 5 of the *Wills Variation Act*. She noted:

> [10] I agree that the information and opinions contained within the records tendered is relevant for this purpose. As these reasons unfold, it will become clear to the reader that some of the information contained within the records does indeed help provide important context for some of [the deceased's] views, choices and behaviour, as well as important context for certain choices made by his family members.
>
> ….
>
> [13] In the result, I find the medical records tendered admissible for the purpose for which they have been adduced. It may be that little to no weight will be given to some of the information and opinions contained within the records, but the records contain information which may be helpful to the court in its search to ascertain, if it can, what [the deceased's] reasons were for making the testamentary dispositions he did.

Some of the specific statements contained in the clinical records included:

> [62] In October 2006, [the deceased] told hospital staff that he was being physically "poisoned" by his sons. This was clearly a false belief since [the deceased] had not seen Richard for at least a year and not seen Robert for approximately five years at this point.

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12 At para. 9.

> . . .
>
> [67] During his October/November 2006 hospital stay, staff noted at various times that [the deceased] was "confused", "dizzy", held "unusual suspicious beliefs| and had a recent occurrence of "paranoid/delusions" behaviour. . .

In varying the will to provide 40% of the residue to each of the will-maker's children Madam Justice Donegan wrote:

> Unfortunately, Peter suffered from a complicated medical and mental health history that included bouts of paranoia, delusions and feelings of persecution, not just in regard to his immediate family, but in regard to doctors and medical staff who were trying to help him. These beliefs led to his misplaced anger against his sons, which underpinned his decision to first leave them nothing and then to leave them each 25% of his estate.

D. Expert Opinions

Opinion evidence is generally excluded evidence in court, as the trier of fact is responsible to draw inference from the proven facts. However, expert opinion evidence is one exception to the general rule against opinion evidence in court. As set in *The Law of Evidence in Canada* at page 769:

> A qualified expert witness, however, may provide the trier of fact with a "ready-made inference" which the jury is unable to draw due to the technical nature of the subject matter.

Experts are permitted to give opinion evidence as the experts contain specialized knowledge, skill or experience and, therefore, do not need firsthand knowledge of the facts on which they base their opinion.[13]

The role of an expert was described in *R. v Abbey*, [1982] 2 SCR 24, by Justice Dickson as:

> With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. "An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can formulate their own conclusions without help, then the opinion of the expert is unnecessary": [R v] Turner (1974), 60 Cr. App. R. 80 at p. 83, per Lawton L.J.

However, for expert evidence to be admissible, the criteria set out in R. v Mohan, [1994] 2 SCR 9, and later expanded by subsequent decisions, must be met:

1. The evidence is relevant to some issue in the case;
2. The evidence is necessary to assist the trier of fact;
3. The evidence does not contravene an excclusionary rule;
4. The witness is a properly qualified expert;
5. The evidence is reliable; and
6. The probative value of the evidence outweighs is prejudicial effect.[14]

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13 R v D (D) 2000 SCC 43.

14 For a detailed discussion on the above criteria, see Chapter 12 of *The Law of Evidence of Canada*.

The *SCCR* provide the procedure required for expert evidence to be admissible in BC. Part 11 of the *SCCR* deals with expert evidence: Rule 11-2 outlines the duty of expert witnesses; 11-3 provides for the appointment of joint experts; 11-4 permits each party to retain their own expert; 11-5 permits the court to appoint its own expert; 11-6 provides the requirements for expert reports; and 11-7 outlines the procedure for expert opinion evidence at trial.

To rely on an expert report, Rule 11-6(3) requires the expert report to be served on all parties at least 84 days before trial. The responding party must then serve their responding expert report at least 42 days before trial. These timelines cannot be abbreviated without leave of the court. Failure to comply with these rules may prevent the expert report and testimony from being considered at trial or may delay the trial.

The expert's report must include:

> Requirements for report
>
> 11-6 (1) An expert's report that is to be tendered as evidence at the trial must be signed by the expert, must include the certification required under Rule 11-2 (2) and must set out the following:
>
> > (a) the expert's name, address and area of expertise;
> >
> > (b) the expert's qualifications and employment and educational experience in his or her area of expertise;
> >
> > (c) the instructions provided to the expert in relation to the proceeding;
> >
> > (d) the nature of the opinion being sought and the issues in the proceeding to which the opinion relates;
> >
> > (e) the expert's opinion respecting those issues;
> >
> > (f) the expert's reasons for his or her opinion, including
> >
> > > (i) a description of the factual assumptions on which the opinion is based,
> > >
> > > (ii) a description of any research conducted by the expert that led him or her to form the opinion, and
> > >
> > > (iii) a list of every document, if any, relied on by the expert in forming the opinion.
>
> [am. B.C. Reg. 119/2010, Sch. A, s. 24.]

The responding party is at liberty to demand production of the supporting documents for the report (Rule 11-6(8)).

When retaining an expert, it is important to clearly set out in a letter any facts or assumptions you would like the expert to consider. Usually, the expert will be given the available clinical records, and she should describe any specific excerpts upon which she relies. Sometimes, specific excerpts from the examination for discovery may be given or quoted to the expert. If the expert was a physician who examined the now deceased person, she may rely on her own observations, but these should be expressly stated in the report.

You may also set out certain things that you wish the expert to rely upon in your letter requesting the opinion. For example, you might tell the expert to assume that, four days before she made her will, the will-maker, whose capacity is in question, told staff at her assisted living care facility that

her daughter was trying to kill her by causing the walls to move in on her in her bedroom.[15] The expert will then set out that assumption in her report. You will then need to independently prove the assumptions. To the extent that the judge does not find the facts underpinning the expert's opinion to be accurate, the weight of the opinion will be lessened, perhaps to the point that the opinion will be given no weight.

Also, in the letter to the expert, set out the relevant legal criteria and frame specific questions with those criteria in mind. For example, if the capacity of the donor of an enduring power of attorney to make the power of attorney is in dispute, you may set out the criteria in section 12 of the *Power of Attorney Act*, [RSBC 1996] Chapter 370. If the will-maker's capacity to make the will is in dispute, you may summarize the criteria set out in *Banks v. Goodfellow*, (1870), LR 5 QB 549. John E.S. Posyer, in chapter 12 of his textbook, *Capacity and Undue Influence*[16] has precedent letters requesting opinions from medical and psychological experts on capacity. The letters are written from the perspective of a solicitor seeking an opinion before the will or other document is executed or the contemplated transaction completed, but the precedents may be adapted when seeking an opinion for litigation.[17]

Rule 11-2 (1) provides:

> (1) In giving an opinion to the court, an expert appointed under this Part by one or more parties or by the court has a duty to assist the court and is not to be an advocate for any party.

There have been personal injury cases in which the court has been critical of experts for acting more as advocates for the parties calling the witnesses, than acting as independent witnesses.

Rule 11-2 (2) requires the expert to certify in her report that she is aware of that duty, has made the report in conformity with it, and will act in conformity with it if called to testify. Experts without significant experience in writing reports for litigation, will not be aware of this requirement. Accordingly, it should be in your letter requesting the report.

You may ask a physician or other expert who has examined the person in respect of whom you are seeking the opinion to provide a report, or you may ask an expert who has personally examined the person to provide an opinion. If other factors are equal, the court is likely to give greater weight to an expert who has examined the person. On the other hand, the person's general physician may not have significant training or experience in assessing capacity. You should consider whether the issues are such that it is worthwhile to retain another expert, such as a psychiatrist or neuro psychologist specializing in capacity assessments.

Devore-Thompson, referred to previously, offers an illustration of a case in which the court preferred the evidence of an expert who had examined and treated the deceased over an expert who had not. The plaintiff called expert medical testimony from the doctors who had treated the deceased at the relevant times and produce medical reports for the trial. In *Devore-Thompson*, the deceased had suffered from Alzheimer's disease, and there was a dispute as to whether the deceased

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15 Nice facts (and fictional) if you are representing the disinherited daughter who is alleging incapacity.

16 Toronto: Thomson Reuters 2014.

17 Solicitors sometimes seek a medical opinion concerning capacity in advance, which is a good idea. However, letters that simply ask "Does John Doe have capacity?" may not be as helpful as the solicitor might think if the document or transaction is later challenged. It is better to explain what the client is proposing to do, and to set out the relevant legal criteria. Physicians should not be expected to know the law related to capacity.

had the capacity to enter into a marriage and create a 2009 will, which both occurred after her diagnosis. Throughout her disease, the deceased had been assessed several times by several doctors, who recorded their diagnoses and created reports concurrently with those assessments.

The plaintiff called Dr. Chung to testify, who had treated the deceased for years during her disease and had provided ongoing assessments of the deceased's capabilities. Dr. Chung had completed several mental assessments throughout. In contrast, the defendant produced an expert, Dr. Mendis, who had never met or assessed the deceased in person, but whose opinion relied entirely on his review of the documentary evidence.

The defendant's expert evidence questioned whether the deceased had the capacity to enter into the 2009 will; but, opined that the deceased had the capacity to enter into the marriage with the defendant.

Madam Justice Griffin preferred Dr. Chung's opinion over that of Dr. Mendis, who had acknowledged that a "treating physician would be better qualified than he to comment on [the deceased's] condition." She wrote:

> [332] I find that Dr. Chung's opinions are entitled to more weight than Dr. Mendis' opinions given that she actually met, assessed and treated [the deceased], and I prefer her evidence over that of Dr. Mendis.

Ultimately, the court found that the deceased lacked the capacity to marry and lacked the capacity to make the 2009 will. Further, the court also found that the deceased lacked capacity to make a 2007 will, which was not relief that the plaintiff sought.

While it is the trier of fact's responsibility to make the ultimate assessment of the deceased's capacity, expert medical evidence can assist the court with that determination. Experts are often necessary to assist the court with interpreting clinical records and tests. For example, experts may explain the test results of a Mini Mental State Examination or Montreal Cognitive Assessment.

Woodward v. Grant, 2007 BCSC 1192, offers good insight in how expert evidence may assist the court in understanding the medical evidence, as well as how the expert evidence may fit within the overall framework of a capacity case.

The plaintiffs challenged Mr. Joe Roberts' will dated October 30, 2002. Mr. Roberts had made an earlier will in which he had left most of his estate to one of the plaintiffs, Marilyn Woodward. Although Ms. Woodward was still a beneficiary under the 2002 will, she received a smaller share than she would have if the earlier will were Mr. Roberts' last will. She sought an order from the court declaring that the 2002 will was invalid on the grounds that Mr. Roberts did not have capacity when he made the will.

There was evidence that Mr. Roberts had some memory problems and confusion at around the time he made the 2002 will.

The defendants, in support of their position that Mr. Roberts had capacity, provided evidence from Dr. Les Sheldon, a geriatric psychiatrist. Dr. Sheldon had never examined Mr. Roberts. He reviewed Mr. Roberts' clinical records made by Mr. Roberts' doctors. Dr. Sheldon expressed the opinion that, although Mr. Roberts suffered from some executive dysfunction, Mr. Roberts did not suffer from moderate or severe dementia, or anything that would impair his abilities to make a valid will.

The plaintiffs objected to Dr. Sheldon's evidence, but Madam Justice Gray held that his evidence was admissible. Dr. Sheldon's evidence was relevant. His evidence assisted the court in understanding the technical facts in the clinical records and the significance of observations recorded in the records, including test results. She wrote:

[93] In this case, Dr. Sheldon is a properly qualified expert in the field of geriatric psychiatry. His opinion regarding what the records suggest about Joe's mental capacity is relevant to the issue of Joe's testamentary capacity at the time he executed the 2002 Will.

[94] In *Mohan* at para. 23, the court explained that an opinion must be necessary "in the sense that it provide information which is likely to be outside the experience or knowledge of a judge or a jury". The court explained that the expert evidence must be necessary in order to allow the fact finder either to appreciate the facts due to their technical nature, or to form a correct judgment on a matter if ordinary persons are unlikely to do so without the assistance of persons with special knowledge.

[95] The observations of a lay witness as to testamentary capacity can carry as much authority as those of a doctor. See *Schwartz v. Schwartz* (1970), 10 D.L.R. (3d) 15 at 22 (Ont. C.A.), [1970] 2 O.R. 61, where the Ontario Court of Appeal adopted these words of Laidlaw J.A. in *Spence v. Price* (1945), [1946] 2 D.L.R. 592 (Ont. C.A.) at 595:

> …A judgment may be formed by a person of sound mind and reason, exercising powers of observation and deduction, without the use of any scientific learning whatever. It is a practical question which may be answered by a layman of good sense with as much authority as by a doctor.

[96] However, in this case, the business records include observations which are technical and which it is difficult for the court to assess without assistance.

[97] The court could make a decision without Dr. Sheldon's evidence. However, in light of the observations recorded in the records admitted as business records, Dr. Sheldon's evidence will assist the court to appreciate the technical facts, and to avoid confusion over some of the records. Dr. Sheldon's evidence addresses the significance of observations recorded about Joe, such as how he performed on the cognitive screening exams.

[98] Ms. Hunter argued on behalf of the plaintiffs that some portions of Dr. Sheldon's evidence address the ultimate issue on the hearing as to Joe's testamentary capacity. She suggested if Dr. Sheldon's evidence was admissible, portions of his report should be excised.

[99] Dr. Sheldon does not give an opinion on Joe's testamentary capacity. Rather, his opinion was that the records he reviewed did not provide compelling information that there was a material impairment of abilities related to testamentary capacity.

[100] What Dr. Sheldon considered to be testamentary capacity is not precisely the legal test for testamentary capacity, although it is quite similar.

[101] The question for the court involves consideration of all the admissible evidence, not just what Dr. Sheldon reviewed. In addition, whether the clinical records show that Joe's abilities relating to what Dr. Sheldon considered to be testamentary capacity were materially impaired does not determine whether Joe, in fact, had what the law considers to be testamentary capacity when he gave instructions about and executed the 2002 Will. Although the distinction is a close one, Dr. Sheldon's evidence is simply some evidence relevant to the validity of the 2002 Will. The test for testamentary capacity is ultimately a legal and not a medical one. It is not necessary to excise portions of Dr. Sheldon's report.

Madam Justice Gray found that Mr. Roberts did have capacity to make the 2002 will. She considered, in addition to the medical evidence, the evidence of the lawyer who took the will instructions, as well as other witnesses in arriving at her decision.

IV. Closing Thoughts

We have focused on issues related to admissibility of evidence. When and for what purposes will the deceased's oral or written statements be admitted? For what purposes are clinical records admitted? How do you put expert opinions before the court?

We have, of course, just scratched the surface. These are largely threshold issues. Getting relevant evidence admitted is a pre-condition, but not a sufficient condition, to successful advocacy. The key is to put forward the best evidence available with a view to persuading the court to find the facts in your client's favour. Your client's evidence about what the deceased said her reasons were for excluding a child from her will may be admissible, but will the trial judge believe your client? Is there corroborating evidence? The deceased's clinical records may be admissible as business records if the deceased's capacity to transfer her home is in issue; but, can the records be buttressed by calling some of the makers of the records to testify in person? Who is the best person to call as an expert? What facts should the expert be asked to assume? What questions should you ask the expert?

These are all matters we have to consider on a case-by-case basis. Such is the art of advocacy.