CITATION: Zarrin-Mehr v. Shokrai, 2024 ONSC 1754
COURT FILES NO.: CV-23-00694490-00ES
DATE: 20240327

ONTARIO
SUPERIOR COURT OF JUSTICE – ONTARIO
(Estates List)

IN THE ESTATE OF SADOLLAH ZARRINMEHR, deceased

BETWEEN: MEHDI ZARRIN-MEHR

Applicant

AND:

SORAYA SHOKRAI, personally and in her capacity as estate trustee of the Estate of Sadollah Zarrinmehr

Respondent

BEFORE: Justice Sanfilippo

COUNSEL: *Esmaeil Mehrabi and Alexandra Thomas*, for the Applicant, Mehdi Zarrin-Mehr
Jonathan Kulathungam and Nipuni Panamaldeniya, for the Respondent, Soraya Shokrai

HEARD: January 23, 2024

ENDORSEMENT

Overview

[1] Sadollah Zarrinmehr died on November 15, 2020 (the "Deceased"). He was a retired professor who held graduate degrees in law. The Deceased was survived by his wife of almost 40 years, Soraya Shokrai, and his two children: Mehdi Zarrin-Mehr (the "Applicant"), who is the Deceased's son from a previous marriage; and Maral Zarrin-Mehr, who is the daughter of the Deceased and Soraya.[1]

[1] For brevity and clarity, I will refer to the parties by their first names, respectfully, in the same manner as was done by their lawyers in their written materials and oral submissions.

[2] Soraya has propounded a will alleged to have been executed by the Deceased on September 30, 1999 (the "1999 Will"). In this application, Mehdi seeks broad relief against Soraya and challenges the validity of the 1999 Will.

[3] Each party brought a motion:

(a) A motion by Soraya under Rule 75.06 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, for a declaration that the Applicant has failed to meet the minimal evidentiary threshold to call into question the validity of the 1999 Will, an order that this Application be dismissed or, alternatively, an order directing that this Application be heard as a summary trial ("Soraya's Rule 75.06 Motion").

(b) A motion by Mehdi for three remedies: an order granting leave for the issuance of a certificate of pending litigation for registration against title to real properties owned by the Deceased or in which the Deceased held an interest (the "CPL Issue"); an order preserving assets held by the Estate (the "Preservation Issue"); and an order removing Soraya as estate trustee and appointing an estate trustee during litigation (the "ETDL Issue") (collectively, "Mehdi's Motion").

[4] I directed that Soraya's Rule 75.06 Motion be determined first and that Mehdi's Motion would then be scheduled for hearing. On the basis of the reasons set out herein, I order that Soraya's Rule 75.06 Motion is dismissed.

I. PROCEDURAL BACKGROUND

[5] On June 18, 2021, Soraya filed an application in Newmarket, probate file 2021-01272 (the "2021 Probate Application"), for a Certificate of Appointment of Estate Trustee without a Will of the estate of Sadollah Zarrinmehr (the "Estate"). Soraya submitted that no will had been located for the Deceased. Soraya, Mehdi and Maral were listed in the 2021 Probate Application as "Persons Entitled to Share in the Estate", which was stated to have a value of $1,214,425.00. By Consent executed on June 18, 2021, Mehdi agreed to Soraya's appointment as Estate Trustee, as did Maral. On November 16, 2021, a Certificate of Appointment of Estate Trustee without a Will ("CAET Without a Will") was issued to Soraya.

[6] By letter dated April 6, 2022, the lawyer for Mehdi wrote to Soraya's probate lawyer, Azadeh Nourbakhsh Lavictoire, and raised two inquiries: first, whether the Deceased may, in fact, have executed a will; and second, whether all steps had been completed to investigate and locate any such will. Ms. Nourbakhsh Lavictoire responded with details of the searches had been made to locate a will for the Deceased, without result.

[7] The parties then commenced competing applications.

[8] On November 16, 2022, Soraya issued, with the assistance of new counsel, Lisbeth Hollman and Earl S. Heiber, an application in Newmarket court file number CV-22-00003784-0000 (the "2022 Soraya Application") for orders revoking the CAET Without a Will and issuing

a Certificate of Appointment of Estate Trustee with a Will ("CAET With a Will"). Soraya set out to propound the 1999 Will.

[9] In her affidavit sworn October 28, 2022 in support of the 2022 Soraya Application, Soraya swore as follows: "Subsequent to obtaining the Certificate of Appointment of Estate Trustee without a Will, I located my husband's original Law (*sic*) Will and Testament dated September 30, 1999." Ms. Nourbakhsh Lavictoire swore, in an affidavit in support of the 2022 Soraya Application, that Mr. Heiber's office notified her that after the issuance of the CAET Without a Will, Soraya "had located the deceased's original Law (*sic*) Will and Testament dated September 30, 1999." The 1999 Will was exhibited to the affidavits of Soraya and Ms. Nourbakhsh Lavictoire. The affidavits of subscribing witnesses to the 1999 Will were not signed contemporaneous with the execution of the 1999 Will, but were executed by the witnesses, Amir Homayoun Hashemi and Assadollah Zarrinmehr some 23 years later, on August 3, 2022, through the offices of Mr. Heiber.

[10] The Notice of Application in the 2022 Soraya Application stated, erroneously, that the Deceased "left behind no children".

[11] There is no dispute that Soraya did not provide Mehdi with the 1999 Will and the Amended Notice of Application in the 2022 Soraya Application until February 28, 2023. Ms. Hollman deposed that on this day, the litigation lawyer for Soraya told her that the Notice of Application erroneously stated that the Deceased "left behind no children", and that they discussed that the 2022 Soraya Application had to be served on Medhi and Maral. Soraya's counsel then set out to amend the 2022 Soraya Application.

[12] In the meantime, on February 9, 2023, without knowledge that Soraya had located a will, Mehdi initiated this application against Soraya in court file number CV-23-00694490-00ES ("this Application"), seeking orders or directions that include the following:

(a) In paragraphs 1(a)-(c), orders requiring Soraya to account as estate trustee, and to disclose all assets belonging to the Estate.

(b) In paragraphs 1(e) and (f), an order removing Soraya as Estate Trustee and appointing an estate trustee during litigation ("ETDL") (the "Claim for an ETDL").

(c) In paragraphs 1(g) and (h), orders requiring the production of legal, financial, and other documents relating to the Deceased and the Estate (the "Claim for Production").

(d) In paragraphs 1(d) and (k), a declaration of constructive trust or resulting trust regarding four properties and shares owned by the Deceased, or in which the Deceased is alleged to have had an interest (the "Claim in Resulting Trust").

(e) In paragraph 1(j), an order granting leave for the issue of a Certificate of Pending Litigation ("CPL") against title to certain properties owned by the Deceased, or in which the Deceased is alleged to have had an interest (the "Claim for a CPL").

(f) In paragraph 1(i): "If required, the Court's opinion, advice, and direction as to the validity and contents of a purported Will of the Deceased that has been lost or destroyed and an Order proving the validity and contents of the Deceased's Will that has been lost or destroyed."

[13] As the Applicant was not aware at the time of issuance of this Application that Soraya was propounding the 1999 Will, this Application, in its original Notice of Application, did not challenge the 1999 Will. Mehdi could not challenge a will that was not known to him. After Mehdi was notified by Soraya of the 1999 Will on February 28, 2023, Mehdi amended his Notice of Application on March 24, 2023 to plead the following:

(a) Paragraph 1(i) was amended as follows: "If required, the Court's opinion, advice, and direction as to the validity and contents including interpretation of any purported Will of the Deceased, including any Will that has been lost or destroyed and an Order proving the validity and contents of any of the Deceased's Wills, including any Will that has been lost or destroyed".

(b) Paragraph 1(h) was amended as follows: "An Order that Earl S. Heiber and Harry Greenberg make such disclosure as the Court deems appropriate of ~~his~~ all their file materials and recollections relating to the Deceased and attend for examinations".

(c) The following grounds were added:

> "On February 28, 2023, counsel for Soraya notified the Applicant that a purported testamentary instrument of the Deceased had been located, dated September 30, 1999, and that Soraya had issued an Amended Notice of Application for Certificate of Appointment of Estate Trustee with a Will on November 16, 2022. A copy of the purported testamentary instrument was sent to the Applicant's counsel; however, the document is missing pages and contains inconsistencies in the paragraph numbering which call into question the validity of the purported September 30, 1999 Will.
>
> In light of the above, the Applicant has reason to believe that the document being put forward by Soraya as the purported last Will of the Deceased is not a genuine document and its content has been modified. Additionally, the terms of the purported September 30, 1999 Will, are inconsistent regarding how the Estate is to be divided and therefore void due to ambiguity in the terms."

[14] On March 3, 2023, three days after Soraya notified Mehdi of the 2022 Soraya Application, before Soraya amended her 2022 Application to correct the omission of Mehdi and Maral as children of the Deceased, and before Mehdi filed a Notice of Objection to Soraya's 2022 Application, Justice Sutherland ordered that a Certificate of Appointment of Estate Trustee with a

Will be issued to Soraya on the basis that the Applicant had filed an affidavit of execution of the 1999 Will and that "there are no other beneficiaries". The 2023 Certificate of Appointment of an Estate Trustee with a Will (the "2023 CAET With a Will") was issued on the 2022 Soraya Application that incorrectly stated that Soraya was the only beneficiary of the Estate.

[15] On March 10, 2023, Mehdi filed a Notice of Objection in the 2022 Soraya Application. The Notice of Objection was rejected by the Court in Newmarket on the basis that it was filed late. The Court had already issued the 2023 CAET With a Will.

II. COURT ORDERS

A. Orders at Case Conferences

[16] On March 7, 2023, the parties attended a Scheduling Appointment in this Application. Justice Gilmore directed that "the Applicant will file a Notice of Objection in the Newmarket Application [the 2022 Soraya Application] which will have the effect of staying that Application. The matter will then move forward on the within Application issued in Toronto." Justice Gilmore directed that the parties discuss the timetabling of their Motions and return to a Case Conference on March 23, 2023. In the interim, Justice Gilmore ordered that "there shall be no dealings with any of the [real properties in which the Deceased is alleged to have had an interest]" and that "the issue of a further no dealings/preservation Order may be revisited on March 23, 2023".

[17] On March 23, 2023, Justice Gilmore suggested that the parties prepare a draft Order for the dismissal of the 2022 Soraya Application. The parties did not do so but agreed to treat the 2022 Soraya Application as stayed. Justice Gilmore granted an Order prohibiting dealings regarding five of the six properties that are in dispute in this Application (referenced by their identification in a Chart filed by the parties) as follows (the "No Dealings Order"):

> 1. Properties 1 [29 Pleasant Avenue, Toronto, PIN 10139-0175(LT)] and 4 [10303 Yonge Street, Richmond Hill, PIN 03172-0116(LT)] will continue to be subject to the no dealings Order until the motions are disposed of.
>
> 2. The Respondent will give 60-days' notice of any intention to deal with Property 3 [921-7805 Bayview Avenue, Thornhill, PIN 293314-0211(LT)].
>
> 3. The parties agree that Property 2 [PH 10-275 Yorkland Road, Toronto, PIN 76400-0443(LT)] is no longer subject to the no dealings Order.
>
> 4. Property 6 [3809-2015 Sheppard Avenue East, Toronto, PIN 76345-0427(LT)] has been sold. The funds in the Estate account will remain subject to the no dealings order except as required for legal and accounting fees with respect to the ongoing litigation related to

> Property 1. Counsel for the Respondent to provide an accounting of legal and accounting fees.
>
> 5. Property 5 [1120-7905 Bayview Avenue, Thornhill, PIN 29328-0252(LT)] has been sold. Any remaining proceeds are subject to the no dealings Order.

[18] On October 23, 2023, Justice Dietrich ordered that the No Dealings Order be extended to January 23, 2024.

B. The Continuation of the No Dealings Order

[19] At the hearing on January 23, 2024, the parties consented to the continuation of the No Dealings Order until the conclusion of Soraya's Motion and Mehdi's Motion with modification to Soraya's authority to deal with Property 4 and Property 5, as follows (the "Restated No Dealings Order"):

> 1. Properties 1 [29 Pleasant Avenue, Toronto, PIN 10139-0175(LT)] and 4 [10303 Yonge Street, Richmond Hill, PIN 03172-0116(LT)] will continue to be subject to the no dealings Order until the motions are disposed of. Regarding Property 4, if there are any shareholder distributions, the Respondent will hold 25% in the Estate account as an Estate asset but may release the 25% owned by the Respondent.
>
> …
>
> 5. Property 5 [1120-7905 Bayview Avenue, Thornhill, PIN 29328-0252(LT)] has been sold. Any remaining proceeds are subject to the no dealings Order except that the Respondent is permitted to use funds for daily expenses.

[20] On the consent of the parties, an Order shall issue for the implementation of the Restated No Dealings Order until the determination of Soraya's Motion and Mehdi's Motion.

III. THIS MOTION

A. Principles Applicable to Soraya's Motion

[21] Rule 75 governs contentious proceedings in estates. Rule 75.01 provides that an estate trustee or an "interested person" may bring an application to have a testamentary instrument proved "in such manner as the court directs", as follows:

> 75.01 An estate trustee or any person appearing to have a financial interest in an estate may make an application under rule 75.06 to have a

> testamentary instrument that is being put forward as the last will of the deceased proved in such manner as the court directs.

[22] Rule 75.06(1) provides an interested person with the right to apply or move for directions.

[23] In *Neuberger Estate v. York*, 2016 ONCA 191, 129 O.R. (3d) 721, at para. 77, the Court of Appeal explained that to prove a will in solemn form, the person propounding the will must prove, in open court upon notice to all interest persons, "that the will was duly executed, the testator had testamentary capacity and that the testator had knowledge and approval of the contents of the will." The person propounding the will has "the legal burden of proof with respect to due execution, knowledge and approval and testamentary capacity", after which there is a rebuttable presumption of validity: *Neuberger*, at para. 78, referring to *Vout v. Hay*, [1995] 2 S.C.R. 876, at paras. 26-27.

[24] The Court of Appeal considered in *Neuberger* whether an interested person has an "automatic right" to have a will proved in solemn form. The Court of Appeal accepted, at para. 82, that "as a general principle, before probate issues an interested person has the right to request formal proof of the testamentary instrument" … but the Court of Appeal did "not accept that this general principle means that the interested person is entitled, as of right, to require that the testamentary instrument be proved in solemn form." Rather, the Court of Appeal explained, at para. 88, that an interested person must meet some minimal evidentiary threshold before a court will require that a will be proven in solemn form:

> In my view, an interested person must meet some minimal evidentiary threshold before a court will accede to a request that a testamentary instrument be proved. In the absence of some minimal evidentiary threshold, estates would necessarily be exposed to needless expense and litigation. In the case of small estates, this could conceivably deplete the estate. Furthermore, it would be unfair to require an estate trustee to defend a testamentary instrument simply because a disgruntled relative or other potential beneficiary makes a request for proof in solemn form.

[25] To meet this burden, the party requesting that the testamentary instrument be proved, must point to some evidence that would call into question the validity of the testamentary instrument being propounded, as explained at para. 89 of *Neuberger*, as follows:

> Based on the above analysis, in my view, an applicant or moving party under rule 75.06 must adduce, or point to, some evidence which, if accepted, would call into question the validity of the testamentary instrument that is being propounded. If the applicant or moving party fails in that regard or if the propounder of the testamentary instrument successfully answers the challenge, then the application or motion should be dismissed. If, on the other hand, the applicant or moving party adduces or points to evidence that calls into question the validity of the testamentary instrument which the propounder does not successfully

> answer, the court would generally order that the testamentary instrument be proved.

[26] The "minimal evidentiary threshold" standard for applications for wills to be proved in solemn form was applied by Justice Myers in *Seepa v. Seepa*, 2017 ONSC 5368, by the Court of Appeal in *Johnson v. Johnson*, 2022 ONCA 682, 81 E.T.R. (4th) 7 and then by Justice Myers in three decisions in 2023: *Giann v. Giannopoulos*, 2023 ONSC 5412; *Carinci v. Carinci*, 2023 ONSC 6094; and *Dinally v. Dinally*, 2023 ONSC 6178. In argument, the moving party relied on *Gilbert v. Girouard*, 2023 ONSC 4445, *Dimakarakos v. Alimena*, 2022 ONSC 4386 and *Young v. Prychitko*, 2021 ONSC 3150. From a survey of this jurisprudence, the following principles emerge regarding the application of the minimal evidentiary threshold:

(a) The burden is on the Applicant to adduce some evidence which, if accepted, would call into question the validity of the will: *Neuberger*, at para. 89; *Johnson*, at paras. 8 and 12; *Giann*, at para. 18.

(b) The evidence adduced by the Applicant does not need to be proved at the time of establishing the minimal evidentiary threshold. The evidence must support the claim if accepted at a dispositive hearing, but "the preliminary vetting process is not to be confused with making findings of fact at trial": *Giann*, at paras. 18 and 25.

(c) The evidentiary threshold is low, and proof of the case on the merits or meeting the standard of a genuine issue requiring a trial is not required: *Johnson*, at para. 17; *Seepa*, at para. 35; *Gilbert*, at para. 29, citing *Morrish v. Katona*. 2021 ONSC 3805; *Martin v. Martin*, 2018 ONSC 1840, at para. 35.

(d) If the Applicant establishes evidence supporting the request for the will challenge, the responding party has an opportunity to answer the evidence and, if the responding party does so successfully, the will challenge is dismissed: *Neuberger*, at para. 89; *Johnson*, at para. 8; *Giann*, at para. 17.

(e) Bald or conclusory assertions of wrongdoing alleged by the party challenging the will, and bare allegations and mere suspicions are insufficient to satisfy the minimal evidentiary threshold: *Giann*, at para. 108; *Dimakarakos*, at para. 19; *Gilbert*, at para. 27; *Dinally*, at para. 39.

[27] These principles inform my analysis of Soraya's Rule 75.06 Motion.

B. Analysis

(a) Proof of the Validity of the Will

[28] Soraya did not dispute, in my view correctly, that Mehdi is an interested person in his father's estate. Mehdi is an "interested person" in the Estate because he is the Deceased's son and has a financial interest in the Estate in the case of an intestacy: *Neuberger*, at para. 74. Mehdi

contends that there is the potential that he also has a financial interest in the Estate through a will that has not been located, notwithstanding that Soraya affirms the 1999 Will is valid.

[29] The parties also did not disagree on the principles that are summarized above applicable to the determination to Soraya's Rule 75.06(1) Motion. The parties' disagreement was in the application of these principles to this motion.

[30] The Respondent submitted that an order should issue dismissing this Application on the basis that Mehdi did not meet the minimal evidentiary threshold to call into question the validity of the 1999 Will. I do not accept this submission. I will explain why.

[31] The Court's jurisdiction in probate is inquisitorial: *Neuberger*, at para. 68. In carrying out its inquiry into the validity of the will, the Court has a special responsibility to the testator who cannot be present to be heard: *Neuberger*, at para. 118: "…the court has a responsibility to ensure that only wills that meet the hallmarks of validity are probated. It owes that duty to the testators whose death precludes them from protecting their own interests, to those with a legitimate interest in the estate, and to the public at large."

[32] The inquiry into the validity of the Will begins with the propounder of the Will, in this case Soraya, discharging her burden to prove that the Will was duly signed, that the testator had capacity when the will was executed and that the testator understood and approved the content of the will: *Neuberger*, at para. 77, applying *Vout*, at p. 737. If the objector to the will establishes suspicious circumstances, the burden to prove the will reverts to the propounder to prove the testator's knowledge, approval and capacity in execution of the will, but the objector bears throughout the burden of establishing any allegation of undue influence: *Neuberger*, at para. 78.

[33] This is where this case differs from those referred to earlier. The will challenges in *Neuberger*, *Seepa, Johnson, Giann, Carinci, Dinally*, and *Gilbert* were not based on whether the testator had executed the will, or whether the will was properly witnessed and was genuine. The dispute in those cases was whether the will should be proved in solemn form by reason of alleged incapacity on the part of the testator, undue influence, or suspicious circumstances apart from considerations pertaining to the form and execution of the will.

[34] Here, Mehdi does not allege that his father was incapable or under undue influence in 1999 as the basis for requiring that the 1999 Will be proved by Soraya. Mehdi alleges that Soraya, as propounder of the 1999 Will, has not discharged her burden of proving that the will was validly executed and that the 1999 Will is the valid will of the Deceased. Mehdi alleges, further, that a basic reading of anomalies contained in the 1999 Will supported by the admissible evidence surrounding the execution of the Will is sufficient to establish suspicious circumstances to meet the minimal evidentiary threshold. Mehdi submitted that these suspicious circumstances were not rebutted by Soraya, who tendered the affidavit of subscribing witnesses to the 1999 Will to establish the witnessing of the will but declined to cross-examine these witnesses and sought to exclude their evidence on the circumstances surrounding their witnessing of the will.

[35] A plain reading of the 1999 Will shows that it is less than perfect in form and execution. Some examples of anomalies in the 1999 Will are as follows:

(a) The 1999 Will is missing sub-paragraphs III(c)-(f). Rather the 1999 Will contains sub-paragraphs III(a) and (b) and then sub-paragraphs III(g)-(j).

(b) The 1999 Will contains a second paragraph numbered III(g) and a second paragraph numbered III(h).

(c) The 1999 Will is missing sub-paragraphs IV(b), IV(c) and IV(d). Rather, the 1999 Will contains sub-paragraph IV(a) and then sub-paragraph IV(e)-(f).

(d) The pages of the 1999 Will do not contain page numbers. Soraya submitted that the non-paginated 1999 Will consists of five pages in total, assembled in sequence by following the order of the parts of the 1999 Will.

(e) On the execution page of the 1999 Will, the testator is said to declare that he has "to this my last Will and Testament, written upon this *and seven preceding pages of paper*, subscribed my name this 30th day of September, 1999" [emphasis added]. The 1999 Will does not contain seven preceding pages of paper. It contains four preceding pages.

[36] The Respondent minimized these anomalies as mere, innocuous typographical errors, that are easily reconciled. The Respondent submitted that when the entirety of the 1999 Will is interpreted in a "commercially reasonable" manner, its contents are clear. Furthermore, the Respondent proffers in evidence her own will, which has similar and, in some respects, identical content to the 1999 Will and shares certain anomalies. Like the 1999 Will, Soraya's will is unpaginated and declares that the will contains seven pages when it has only four. As an additional anomaly, Soraya's will is undated.

[37] I do not accept Soraya's submission that Mehdi failed to establish that the 1999 Will requires no further inquiry to establish its validity, for the following reasons. First, the numerous anomalies in the 1999 Will call into question the integrity and validity of the Will. I am not persuaded that Mehdi's request to investigate the validity of the 1999 Will is answered by Soraya's submission that the 1999 Will is propped up by similarities in her will.

[38] Second, Mehdi discharged his burden of showing, through the anomalies in the 1999 Will and the evidence of the subscribing witnesses, sufficient evidence to meet the minimal evidentiary threshold for this Will to be proved. I will explain why.

[39] The subscribing witnesses to the 1999 Will are Amir Homayoun Hashemi, who is related to the Deceased through marriage, and Assadollah Zarrinmehr ("Mr. Zarrinmehr"), who is the brother of the deceased and thereby Mehdi's uncle. The 1999 Will is not supported by a contemporaneous affidavit of subscribing witness. Soraya tendered an affidavit of subscribing witness executed by Mr. Hashemi on August 3, 2022, by which Mr. Hashemi swore that the

Deceased executed the 1999 Will in his presence and in the presence of Mr. Zarrinmehr on September 30, 1999 (the "August 2022 Hashemi Affidavit"). The August 2022 Hashemi Affidavit was tendered by Soraya in furtherance of her burden to establish the validity of execution of the 1999 Will.

[40] In responding to Soraya's Rule 75.06 Motion, Mehdi tendered an affidavit sworn by Mr. Hashemi on April 12, 2023 (the "April 2023 Hashemi Affidavit") and an affidavit sworn by Mr. Zarrinmehr the same day (the "April 2023 Zarrinmehr Affidavit"). Mr. Hashemi and Mr. Zarrinmehr deposed that they witnessed the execution by the Deceased of a will on September 30, 1999, but they did not read the contents of the will at that time. They swore to their understanding of the Deceased's intention in making his will based on statements made by the Deceased at the moment of execution of the will. The evidence of these subscribing witnesses of the Deceased's intention in making his will is not reflected in the 1999 Will.

[41] Soraya relied on the August 2022 Hashemi Affidavit to establish due execution by the Deceased of the 1999 Will, but objected to the admissibility of the evidence in the April 2023 Hashemi Affidavit and the April 2023 Zarrinmehr Affidavit on the basis that extrinsic evidence of the testator's intentions is inadmissible in will interpretation, relying on the principles set out in *Rondel v. Robinson Estate*, 2011 ONCA 493, 106 O.R. (3d) 321, at para. 17, and *John Kaptyn Estate (Re)*, 2010 ONSC 4293, 102 O.R. (3d) 1, at para. 36.

[42] I do not accept the Respondent's submission that I should rely on Mr. Hashemi's August 2022 Affidavit to find that the 1999 Will was validly witnessed by Mr. Hashemi and Mr. Zarrinmehr but that I should exclude these witnesses from being heard on the circumstances that they perceived at the time that they witnessed the execution of the will. Soraya's objection to the admissibility of the evidence of Mr. Hashemi and Mr. Zarrinmehr was misplaced considering the purpose for which the evidence was tendered.

[43] The evidence of Mr. Hashemi and Mr. Zarrinmehr was not tendered in aid of interpretation or rectification of the 1999 Will. Their evidence was tendered in support of Mehdi's submission that there are suspicious circumstances surrounding the execution of the 1999 Will, including that the four pages attached to the execution page witnessed by Mr. Hashemi and Mr. Zarrinmehr might not be the same as the "preceding seven pages" declared by the testator to constitute his will. Put simply, their evidence was tendered in support of Mehdi's position that the 1999 Will is not genuine and that the Deceased might have executed another will.

[44] This evidence does not have to be proved for the purpose of this Rule 75.06 motion, but rather need only be evidence that supports the claim if proven at trial. The evidence of Mr. Hashemi and Mr. Zarrinmehr of the surrounding circumstances in the Deceased's execution of the 1999 Will supports that Applicant's claim of suspicious circumstances. In reference to principles of admissibility of evidence for will interpretation and rectification, evidence of surrounding circumstances at the time of the making of a will is admissible: *Robinson Estate*, at para. 27; *Ihnatowych Estate v. Ihnatowych*, 2024 ONCA 142, at para. 37; *Trezzi v. Trezzi*, 2019 ONCA 978, at para. 13; *Ross v. Canada Trust Company*, 2021 ONCA 161, at paras. 37-38.

[45] Last, Mehdi's suspicion regarding the Deceased's execution of the 1999 Will is accentuated by consideration of the Deceased's qualifications. At the time of the execution of the 1999 Will, the Deceased was a professor who held a Master's degree in law. He would go on later to obtain a doctorate degree in law. The anomalies in the 1999 Will are patent. The Deceased's advanced legal education, training and experience with written materials supports suspicion on whether the glaring anomalies in the 1999 Will would have gone unnoticed or noticed but countenanced by the Deceased at the time that the 1999 Will was executed.

[46] I find, on the anomalous nature of the 1999 Will and on the evidence of the circumstances of the execution of the Will, including that provided by the subscribing witnesses which I accept for the purposes of this motion, that Mehdi has satisfied the minimal evidentiary threshold necessary to require proof of the 1999 Will. I make this finding without reliance on the affidavit evidence of Mehdi and of the other family members (Azardokht Zarrin Mehr, Behrdad Zarrin Mehr and Nasrollah Zarrin Mehr) on the Deceased's testamentary intentions, as unnecessary to my determination of Soraya's Rule 75.06 Motion. It is thereby unnecessary to rule on the admissibility of this affidavit evidence.

[47] Since the moving party has established evidence supporting the will challenge, the burden shifted to Soraya to answer the evidence. She did not. First, Soraya did not cross-examine Mr. Hashemi and Mr. Zarrinmehr on their affidavit evidence of April 12, 2023. Second, Soraya did not tender any evidence from the lawyer who is alleged to have drafted the Will, Nathan Sritharan, even though that lawyer is available to provide evidence. The Respondent did not show whether the lawyer's file was available or of any steps taken to adduce this evidence. The Respondent did not explain how Mr. Sritharan came to provide the Will to Soraya, and whether there was any investigation or explanation to support its validity considering the anomalies in the 1999 Will.

[48] Lastly, I have considered the scope of the evidence sought by Mehdi in contesting the validity of the 1999 Will. Mehdi seeks evidence from four sources. First, Mehdi seeks production of the will drafting file and evidence from the will drafting lawyer, Nathan Sritharan. Second, Mehdi seeks production of the probate estate file of Ms. Nourbakhsh Lavictoire regarding the investigations that resulted in the conclusion that the Deceased left no will, and the evidence regarding the provenance of the 1999 Will. Third, Mehdi seeks the probate file of Mr. Heiber for similar reasons.

[49] Fourth, Mehdi seeks production from Mr. Harry Greenberg, a lawyer who retired in 2019. Mehdi has produced a Power of Attorney for Property and a Power of Attorney for Personal Care, both dated November 5, 2003, witnessed by people at the address of Mr. Greenberg's former office. Similar documents were prepared for Soraya. These estate planning documents post-date the 1999 Will. Mr. Greenberg wrote in an email of February 9, 2021, that he acted for the Deceased in about 20 real estate transactions between 2017 and the 20 years preceding, and that he reviewed his index of files and "can find no reference to any last wills and testaments … related to Mr. Zarrinmehr." Mr. Greenberg is not agreeable to release of his real estate files but wrote that he was prepared to have Mehdi's counsel "review any file in my presence at a location of my choice and at a cost for my time and file retrieval."

[50] Mehdi is no longer seeking from Mr. Heiber and Mr. Greenberg the scope of production pleaded in paragraph 1(h) of his Notice of Application, as follows: "An Order that Earl S. Heiber and Harry Greenberg make such disclosure as the Court deems appropriate of *all their file materials and recollections* relating to the Deceased and attend for examinations" [emphasis added]. Instead, Mehdi seeks an order that Mr. Greenberg review his records to determine whether there is an estate planning file, or any evidence of advice on estate planning or will preparation subsumed in any non-estate planning file, and to so depose by affidavit. Mehdi stated that he is prepared to pay the costs associated with these searches.

[51] In my view, these four areas of production do not contravene the caution that the court should be reluctant to put "an estate to the needless expense of a fishing expedition", as stated in *Johnson*, at para. 16 and *Seepa*, at para. 49. These areas of production are consistent with the proportionate production of evidence regarding the validity of the 1999 Will and the exhaustion of the search of any other will, through the "use of a scalpel rather than a mallet" as encouraged by the Court in *Seepa*.

(b) Conclusions

[52] The Court of Appeal instructed in *Johnson*, at para. 17, that a Rule 75.06 Motion to dismiss a will challenge for failure to meet minimal evidentiary threshold is "not a motion for summary judgment requiring proof of the case on the merits or meeting the standard of a genuine issue requiring a trial." Rather, adopting Justice Myers's finding in *Seepa*, at para. 35, "[a]t this preliminary stage, the issue is not whether the applicant has proven his or her case but whether he or she ought to be given tools, such as documentary discovery, that are ordinarily available to a litigant before he or she is subjected to a requirement to put a best foot forward on the merits".

[53] Soraya's Rule 75.06 Motion is dismissed on my finding that the Applicant has established the minimal evidentiary threshold to challenge the validity of the 1999 Will, considering that the will challenge is based on anomalies in the 1999 Will and suspicious circumstances that were not rebutted by the moving party.

[54] Considering the dismissal of the Rule 75.06 Motion, the Applicant may now proceed to seek production from the Deceased's former lawyers and the probate lawyers. I am not prepared to grant the production orders sought by the Applicant at this time, as the lawyers from whom production is sought must be provided with notice and an opportunity to speak to the production sought from them. The Applicant may schedule the hearing of this Motion, on notice. I direct that the lawyers for the parties arrange for the scheduling of a Case Conference to be held before me, to address the scheduling of the following: (a) the Applicant's motion for production on notice to the lawyers from whom production is sought; and (b) Mehdi's Motion.

IV. DISPOSITION

[55] I order as follows:

(a) The Motion by the Respondent, Soraya Shokrai, for a declaration that the Applicant has failed to meet the minimal evidentiary threshold to call into question the validity of the 1999 Will and an Order that this Application be dismissed, is dismissed.

(b) The lawyers for the parties shall arrange for a Case Conference to be held, under Rule 50.13, to attend before me to schedule the hearing of the following:

    (i) The Applicant's motion for production from lawyers Azadeh Nourbakhsh Lavictoire, Earl S. Heiber, Nathan Sritharan, and Harry Greenberg, on notice to these non-parties.

    (ii) The Applicant's motion for an order granting leave for the issuance of a Certificate of Pending Litigation for registration against title to real properties owned by the Deceased or in which the Deceased held an interest; an order preserving assets held by the Estate; and an order removing Soraya as estate trustee and appointing an estate trustee during litigation. The Applicant may seek an order under Rules 75.04 and 75.05 to revoke the Certificate of Appointment of Estate Trustee issued in court file number CV-22-00003784-0000 and to cause the Certificate to be returned to the court (the "Applicant's Motion").

(c) On the consent of the parties, the parties shall, until the determination of the Applicant's Motion or further order of the Court, preserve the following properties in dispute in this Application in accordance with the following terms (the "Restated No Dealings Order"):

    (i) Properties 1 [29 Pleasant Avenue, Toronto, PIN 10139-0175(LT)] and 4 [10303 Yonge Street, Richmond Hill, PIN 03172-0116(LT)] will continue to be subject to the no dealings Order until the motions are disposed of. Regarding Property 4, if there are any shareholder distributions, the Respondent will hold 25% in the Estate account as an Estate asset but may release the 25% owned by the Respondent.

    (ii) The Respondent will give 60-days' notice of any intention to deal with Property 3 [921-7805 Bayview Avenue, Thornhill, PIN 293314-0211(LT)].

    (iii) Property 2 [PH 10-275 Yorkland Road, Toronto, PIN 76400-0443(LT)] is no longer subject to the no dealings Order.

    (iv) Property 6 [3809-2015 Sheppard Avenue East, Toronto, PIN 76345-0427(LT)] has been sold. The funds in the Estate account will remain subject to the no dealings order except as required for legal and accounting fees with respect to the ongoing litigation related to Property 1. Counsel for the Respondent to provide an accounting of legal and accounting fees.

(v) Property 5 [1120-7905 Bayview Avenue, Thornhill, PIN 29328-0252(LT)] has been sold. Any remaining proceeds are subject to the no dealings Order except that the Respondent is permitted to use funds for daily expenses.

[56] The parties are encouraged to agree on the issue of costs of this Motion. If the parties cannot agree on the issue of costs of this Motion, any party seeking costs may, at the Case Conference to be scheduled, speak to a process for the determination of the issue of costs. In this event, the parties shall include a term to this effect in their draft Order.

[57] The Applicant may prepare and, after approval as to form and content by the Respondent, file on the CaseLines bundle for this hearing (004) a draft Order consistent with this disposition and may then forward the draft Order by email to the Estates List Trial Coordinator, to be brought to my attention. Any disagreement regarding the form of Order may be spoken to at the Case Conference to be scheduled.

Justice Sanfilippo

Date: March 27, 2024