IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *Best v. Hendry*, 2021 NLCA 43
Date: July 8, 2021
Docket Number: 201901H0017

BETWEEN:

CATHY BEST	APPELLANT
AND:	
MARIE HENDRY	FIRST REPONDENT
AND:	
JAMES E. G. VAVASOUR	SECOND RESPONDENT
AND:	
MARIE HENDRY	THIRD PARTY

Coram: Hoegg, O'Brien and Butler JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador, General Division 201301G4452 (2018 NLSC 214)

Appeal Heard: November 19 and 20, 2020
Judgment Rendered: July 8, 2021

Reasons for Judgment by: Hoegg J.A.
Concurred in by: O'Brien J.A.
Concurring Reasons by: Butler J.A.

Counsel for the Appellant: Sarah J. Clarke
Counsel for the First Respondent/Third Party: Cletus E. Flaherty
Counsel for the Second Respondent: R. Barry Learmonth Q.C.

Authorities Cited:

CASES CITED:

Hoegg J.A.:
Valard Construction Ltd. v. Bird Construction Co., 2018 SCC 8, [2018] 1 S.C.R. 224; *Fales v. Canada Permanent Trust Co.*, [1977] 2 S.C.R. 302 (S.C.C.); *Downton v. Royal Trust Co.* (1977), 18 Nfld. & P.E.I.R. 512 (Nfld. S.C. (T.D.)); *O'Dea Estate (Re)*, 2019 NLSC 178; *Quirico v. Pepper Estate*, [1999] B.C.J. No. 2229, 91 A.C.W.S. (3d) 690 (B.C. S.C.); *INA Life Insurance Co. v. Stoyles Insurance* (1987), 65 Nfld. & P.E.I.R. 116 (Nfld. S.C. (T.D.)); *McDougall Estate, Re*, 2011 ONSC 4189; *National Trust Co. v. Fleury*, [1965] S.C.R. 817 (S.C.C.); *Cowper-Smith v. Morgan*, 2017 SCC 61, [2017] 2 S.C.R. 754; *Sinnott v. Sinnott Estate*, 2015 NLCA 41, 371 Nfld. & P.E.I.R. 18; *Dunn Estate, Re* (1990), 81 Nfld. & P.E.I.R. 170 (Nfld. C.A.); *Jayaraman v. DeHart*, 2007 NLCA 32, 266 Nfld. & P.E.I.R. 195; *Henley Estate (Re)*, 2019 NLSC 54; *Lyttle Estate, Re*,, 2013 NLTD(G) 182, 345 Nfld. & P.E.I.R. 129; *Re Wilson Estate*, [1989] B.C.J. No. 1628, 34 E.T.R. 121 (B.C. S.C.); *Re Thornton Estate*, [1990] S.J. No. 233, 85 Sask. R. 34 (Sask. Surr. Ct.); *Wood (Estate), Re*, 2004 BCCA 556; *Re Rodd Estate* (1981), 40 Nfld. & P.E.I.R. 239, 10 A.C.W.S. (2d) 282 (P.E.I. S.C.); *Re Stevens Estate*, [1946] 4 D.L.R. 322, 19 M.P.R. 49 (N.S. C.A.); *Doyle v. Doyle Estate*, [1995] O.J. No. 3498, 9 E.T.R. (2d) 162 (Ont. Gen. Div.); *Edwards Estate (Re)*, 2021 NLSC 48; *Mountain v. Mountain* (1937), 12 M.P.R. 87 (P.E.I. Ch.); *Bank of British Columbia Pension Plan v. Kaiser*, 2000 BCCA 291; *Gastle v. Gastle*, 2017 ONSC 7797; *Central Trust Co. v. Flynn* (1987), 25 E.T.R. 302, 1987 CarswellNB 62 (N.B. C.A.); *Cronan Estate v. Hughes* (2000), 101 A.C.W.S. (3d) 655, 37 E.T.R. (2d) 27 (Ont. S.C.J.); *CIBC Trust Corp. v. Bayly*, 2005 BCSC 133; *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia*, 2009 SCC 15, [2009] 1 S.C.R. 504; *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161 (S.C.C.); *Moore v. Sweet*, 2018 SCC 52, [2018] 3 S.C.R. 303; *Shoal Investments Ltd. v. Murphy*, 2019 NLCA 78; *R. v. Salitoro*, [1991] 3 S.C.R. 654 (S.C.C.); *Bow Valley Huskey v. Saint John Shipbuilding*, [1997] 3 S.C.R. 1210 (S.C.C.); *Stacey v. Anglican Churches of Canada* (1999), 182 Nfld. & P.E.I.R. 1 (Nfld. C.A.).

Butler J.A. (concurring):
Forbes v. Millard Estate, 2017 BCSC 361; *Doyle v. Doyle Estate*, [1995] O.J. No. 3498, 9 E.T.R. (2d) 162 (Ont. Gen. Div.); *Sinnott v. Sinnott Estate*, 2015 NLCA 41, 371 Nfld. & P.E.I.R. 18; *Wood (Estate), Re*, 2004 BCCA 556; *Re Wilson Estate*, [1989] B.C.J. No. 1628, 34 E.T.R. 121 (B.C. S.C.); *Stacey v. Anglican Churches of Canada* (1999), 182 Nfld. & P.E.I.R. 1 (Nfld. C.A.).

STATUTES CONSIDERED:

Hoegg J.A.:
Trustee Act, R.S.N.L. 1990, c. T-10, sections 2, 9, 17, 25, 31, 32, 50; *Wills Act*, R.S.N.L. 1990, c. W-10, section 15; *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13; *Substitute Decisions Act*, 1992, S.O. 1992, c. 30.

Butler J.A. (concurring):
Wills, Estates and Succession Act, S.B.C. 2009, c. 13, sections 48(2), 48(3).

RULES CONSIDERED:

Hoegg J.A.:
Rules of the Supreme Court, 1986, S.N.L. 1986, c. 42, Schedule D, rule 56.33.

TEXTS CONSIDERED:

Hoegg J.A.:
Widdifield on Executors and Trustees, 6th ed. (Toronto: Thomson Canada Limited, 2002); *Waters' Law of Trusts in Canada*, 5th ed. (Toronto: Thomson Reuters Canada, 2021); *Feeney's Canadian Law of Wills*, 3rd ed., Vol. 2 (Toronto: Butterworths, 1987); *Oosterhoff on Wills*, 8th ed. (Toronto: Carswell, 2016); *Feeney's Canadian Law of Wills*, 4th Ed. (Toronto: Butterworths, 2000); *Theobald on Wills*, 8th ed. (London: Stevens, 1927); *Chitty on Contracts*, Vol. 1 (London: Sweet and Maxwell Ltd., 1994).

Butler J.A. (concurring):
Feeney's Canadian Law of Wills, 3rd ed., Vol. 2 (Toronto: Butterworths, 1987); *Feeney's Canadian Law of Wills*, 4th ed. (Toronto: Butterworths, 2000).

Hoegg J.A.:

INTRODUCTION

[1] This appeal concerns the distribution of an estate where property that was the subject of a testator's specific bequest was not in the testator's estate at her death. This circumstance engages the doctrine of ademption.

BACKGROUND

[2] In 1981, Pearl Marie Penney executed a will in which she named her two nieces, sisters Marie Hendry and Kathy Best, as beneficiaries. Ms. Hendry was bequeathed Ms. Penney's home and contents and Ms. Best was bequeathed the residue of the estate. The will was prepared by Ms. Penney's solicitor, James E.G. Vavasour, whom she appointed executor.

[3] In 2007, Ms. Penney was diagnosed with dementia. In September of that year, she moved from her own home to a care home where she lived until she passed away in 2011. In 2008, Ms. Best applied for Letters of Guardianship of Ms. Penney's estate and effects. Ms. Best's application was supported by an Acknowledgment and Consent filed by Ms. Hendry, and Letters of Guardianship were granted to Ms. Best on September 8, 2008. The sisters prepared their aunt's home for sale and Ms. Best sold it in December 2008. The proceeds were deposited into Ms. Penney's bank account.

[4] Ms. Penney passed away in August 2011. In September 2011, Mr. Vavasour met with Ms. Best respecting the details of Ms. Penney's estate and on September 23, 2011, Mr. Vavasour, as executor, was granted Letters of Probate. The estate was composed of cash held in a bank account.

[5] Mr. Vavasour met with Ms. Hendry and Ms. Best on September 18, 2012 to discuss distribution of the estate. He told the sisters that he believed that it was Ms. Penney's intention to leave the bulk of her estate to Ms. Hendry. He testified as follows:

> Well, basically I said to them that because Marie – sorry, because Ms. Penney had not made a disposition of her own property and that was made by a guardian and I think I said who stand to gain from the disposition of Mrs. Penney's home, that my – and because I could identify the funds that were left over and because I had looked at the bank statement when she went into either, I can't remember if it is the Hoyles home or Agnes Pratt. I know she went to the Hoyles home first and then Agnes Pratt. When I look at her bank account and I could really see no need for the sale of her home because she had at that time approximately $66,000 in her bank account, and I said my

> proposal was to, because I could identify the funds, my proposal was to pay Marie Hendry the 145,780.40 which was the testator's intention and I would pay Kathy Best the residue which was around 30,238.77.
>
> …
>
> When I said, after I explained all what my proposal was, I said now, ladies, go away, seek independent legal advice or talk to whoever you want to but when you come back in two weeks' time I want to know that you're satisfied with this proposition and you're going to have to sign a release which I basically told them what the release was going to say. And off they went.
>
> (Transcript, February 15, 2018, at 31-33)

Later in his testimony Mr. Vavasour elaborated:

> Well, what I said to them was that it was Ms. Penney's intention that Ms. Hendry get the bulk of the estate and that Kathy Best get the residue.
>
> (Transcript, February 15, 2018, at 49)

[6] In short, Mr. Vavasour proposed that Ms. Hendry receive cash equal to the sale proceeds from the house ($145,780.40) and Ms. Best receive the cash balance, which, after Mr. Vavasour's fees had been deducted, was $30,238.77.

[7] The sisters discussed Mr. Vavasour's proposal immediately on leaving his office. Ms. Best expressed dissatisfaction with it. Ms. Hendry discouraged Ms. Best from seeking independent legal advice and offered to give Ms. Best $40,000.00 from the $145,780.40 Mr. Vavasour proposed she receive, which added to Ms. Best's bequest would give Ms. Best approximately $70,000.00 and leave Ms. Hendry with approximately $105,000.00. There was no suggestion in the evidence, and the Judge did not find, that Ms. Hendry's purpose in discouraging Ms. Best from getting independent legal advice was to thwart a finding of ademption. The evidence was that their private arrangement would avoid the expense and delay involved with obtaining independent legal advice. Ms. Best agreed to the arrangement.

[8] When the sisters presented to Mr. Vavasour's office two weeks later, they told him they were content with his proposal. They did not mention their private arrangement for Ms. Hendry to give $40,000.00 to Ms. Best. Mr. Vavasour then presented the sisters with a release for them to jointly execute. It read:

N THE ESTATE of Pearl Penney, late of St. John's, in the Province of Newfoundland and Labrador.

RELEASE

We, Marie Hendry and Kathy Best, beneficiaries of the Estate of the late Pearl Penney, hereby release and discharge the Executor, James E. G. Vavasour, from any further obligation, liability or claim by us or on our behalf.

DATED at St. John's, in the Province of Newfoundland and Labrador, this 2nd day of October, 2012.

_____ Marie Hendry

Witness

_____ Kathy Best

Witness

Ms. Hendry and Ms. Best signed the release as presented, and Mr. Vavasour issued cheques to them in accordance with his proposal.

[9] Ms. Hendry never did pay Ms. Best the additional $40,000.00. The evidence from both sisters was that this amount was subsequently renegotiated to $30,000.00, but Ms. Hendry did not pay that amount to Ms. Best either. The relationship between the sisters deteriorated.

[10] Ms. Best subsequently sought legal advice, and in September 2013, she filed a Statement of Claim naming Marie Hendry as the First Defendant and James E.G. Vavasour as the Second Defendant. Ms. Best claimed that Ms. Hendry owed Ms. Best the monies given to her by Mr. Vavasour from Ms. Penney's estate. Ms. Best also claimed that Mr. Vavasour owed her a duty of care and that he was negligent in carrying out his duties, both as the lawyer for Ms. Penney's estate and as the executor, and that his negligence caused her loss. Ms. Best claimed damages from both defendants.

[11] Ms. Hendry defended Ms. Best's claim on the basis that Ms. Best had agreed to the proposal put forward by Mr. Vavasour. Mr. Vavasour defended Ms. Best's claim by denying that he was negligent but pleading that if he were, Ms. Best was contributorily negligent because he relied on her consent to distribute the estate as he had. Mr. Vavasour also filed a third party action

claiming contribution and indemnity from Ms. Hendry for any and all amounts he may have to pay to Ms. Best if he were to be found liable to her.

[12] An issue arose at trial respecting whether Ms. Best's claim against Ms. Hendry regarding the additional $40,000.00 could be advanced in the litigation because Ms. Best did not specifically plead breach of contract. Ms. Best argued that the wording in her Statement of Claim was sufficiently broad to include a claim in contract against Ms. Hendry. Alternatively, she requested permission to amend her Statement of Claim so as to particularize her claim against Ms. Hendry.

[13] Although the Judge stated during the proceedings that the pleadings could be read broadly enough to include a contractual claim by Ms. Best against Ms. Hendry, she ultimately dismissed Ms. Best's argument in this regard, finding that Ms. Best had not alleged any factual basis for breach of a contract with Ms. Hendry. The Judge also refused to permit Ms. Best to amend her pleadings to particularize a contractual claim against Ms. Hendry, saying that an amendment at that stage of the proceedings would prejudice Ms. Hendry in her ability to fully defend the action. The Judge dismissed Ms. Best's claim against Ms. Hendry without prejudice to any right Ms. Best may have to bring a separate action against Ms. Hendry.

[14] The Judge also dismissed Ms. Best's claim against Mr. Vavasour, saying:

> [44] There is no evidence from which I can conclude that in his capacity as Executor for the estate, or as solicitor for the estate, Vavasour's actions fell below the standard expected of an executor or solicitor.

And determining that:

> [46] Vavasour's proposal [for distribution of the estate] was reasonable in the circumstances and accepted by Best and Hendry after having been provided an opportunity to obtain independent legal advice. …

The Judge added:

> [47] In any event, the release signed by Best provides a full defence to any claim by Best against Vavasour in his capacity as Executor.

[15] In her reasons for decision, the Judge considered whether the law of ademption applied to Ms. Best's suit. The law of ademption provides that if property which is the subject of a specific bequest in a will does not exist in a testator's estate at the time of the testator's death, the bequest adeems, or fails,

and the intended beneficiary receives nothing in respect of that bequest. The Judge found it appropriate in "the unique circumstances of the case… to carve out a narrow exception to the strict application of the doctrine of ademption" (para. 40), saying it should not apply where:

> 1. The intended beneficiary of the estate would be deprived of any benefit under the estate if the doctrine were applied strictly;
>
> 2. The specific gift was disposed of, not by the testator or with the knowledge or consent of the testator, but by another beneficiary of the estate who would benefit from the gift adeeming; and
>
> 3. The proceeds, or a portion thereof, of the disposition of the specific gift may still be found in the estate and available for distribution.

[16] However, the Judge ultimately decided that it was not necessary to decide whether ademption applied because she was "satisfied that the parties agreed to put aside their respective claims to entitlement under the will, whatever those entitlements may have been, and to accept the distribution agreement as proposed by Vavasour" (para. 41).

[17] Ms. Best appeals the Judge's dismissals of her claims against both Ms. Hendry and Mr. Vavasour.

ISSUES

[18] Ms. Best asserts several grounds of appeal. Consolidated, they amount to whether the judge erred:

1. in failing to find Mr. Vavasour negligent. This issue requires consideration of the doctrine of ademption;

2. in finding that the release signed by Ms. Best and Ms. Hendry provided a full defence to Ms. Best's claim against Mr. Vavasour;

3. in ruling that Ms. Best's statement of claim was not broad enough to include a contractual claim against Ms. Hendry; and

4. in failing to allow Ms. Best to amend her statement of claim so as to provide particulars of Ms. Hendry's breach of contract.

If this Court allows Ms. Best's appeal and determines that Mr. Vavasour was negligent and should not absolved of liability, then his claim that Ms. Best was

contributorily negligent and his third party claim against Ms. Hendry must be determined.

ANALYSIS

[19] I begin with the issue respecting Ms. Best's allegation that Mr. Vavasour negligently carried out his duties as executor of Pearl Marie Penney's will, and that his negligence caused Ms. Best loss.

The Law

[20] Executors are trustees, as stipulated in section 2 of the *Trustee Act*, R.S.N.L. 1990, c. T-10 (the *Act*):

> 2. In this *Act*
>
> …
>
> (n) "trustee" includes executor or administrator and a trustee whose trust arises by construction or implication of law, as well as an express trustee.

[21] Section 25 of the *Act* addresses the ability of an executor to apply to the court for assistance with the administration of an estate:

> 25.(1) A trustee, an executor or administrator may, without the institution of an action, apply to the court or a judge of the court on a question respecting the management or administration of the trust, property or assets of a testator or intestate.
>
> (2) A notice of an application shall be served on persons interested in the application, or on whom the court or judge directs.
>
> (3) The trustee, executor or administrator acting upon the opinion, advice or direction given by the court or judge shall be considered, so far as regards his or her own responsibility, to have discharged his or her duty as the trustee, executor or administrator in the subject matter of the application.
>
> (4) This section does not indemnify a trustee, executor or administrator in respect of an act done in accordance with an opinion, advice or direction obtained under this section, where the trustee, executor or administrator is guilty of a fraud, or willful concealment, or misrepresentation in obtaining the opinion, advice or direction.

[22] Several sections of the *Act* contemplate breach of trust (ss. 9, 17, 31, 32 and 50).

[23] Also pertinent is section 32 of the *Act*, which provides for limitations on the liability of a trustee who has been found in breach of trust:

> 32. Where it appears to the court that a trustee, whether appointed by this *Act* or not, is or may be personally liable for a breach of trust, but has acted honestly and reasonably and ought fairly to be excused for the breach of trust, and for omitting to obtain the directions of the court in the matter in which he or she committed that breach, then the court may relieve the trustee either wholly or partly from personal liability for it.

[24] The Supreme Court of Canada recently described the concept of trust in *Valard Construction Ltd. v. Bird Construction Co.*, 2018 SCC 8, [2018] 1 S.C.R. 224:

> [16] As to that general law, first principles are instructive. At its core, a "trust" refers to:
>
> > … the relationship which arises whenever a person (called the trustee) is compelled in equity to hold property…for the benefit of some persons…or for some object permitted by law, in such a way that the real benefit of the property accrues, not to the truste[e], but to the beneficiaries or other objects of the trust.

[25] The canons of trusteeship were set out in *Widdifield on Executors and Trustees*, 6th ed. (Toronto: Thomson Canada Limited, 2002) at 10-1:

> 1. The trustee shall obey the directions of the settlement or trust instrument unless the Court authorizes changes or the beneficiaries consent to them…
>
> 2. The trustee shall act impartially between beneficiaries…
>
> 3. The trustee must exercise ordinary care and prudence…
>
> 4. The trustee shall be loyal to her trust by not trafficking with her trust and shall not profit by her administration or permit her interest to conflict with that of the trust…
>
> 5. The trustee shall be ready with her accounts…

[26] It is established law that an executor/trustee owes a duty of care to the beneficiaries of an estate whose property the executor/trustee is holding in trust pursuant to a will that the executor is administering, and that a beneficiary can sue such an executor for breaching that trust (*Fales v. Canada Permanent Trust Co.*, [1977] 2 S.C.R. 302 (S.C.C.)).

[27] In *Fales*, a trust company and the testator's widow were named co-executors of the estate. Beneficiaries of the estate, who were the testator's children, sued the corporate executor for breach of trust related to its negligent handling of a significant investment within the estate. The corporate executor

third-partied the testator's widow, who counter claimed for her losses respecting her interests in the estate.

[28] The Supreme Court of Canada held that the corporate executor was liable for the beneficiaries' losses saying it had been negligent "by sitting idly by and allowing the shares to progressively decline in worth until they became valueless", and did not relieve it from personal liability because, in all of the circumstances, its actions or inactions were not reasonable. The Court also held that the widow had been negligent in her capacity as co-executor and denied her counter claim, albeit without costs. However, the Court relieved the widow from personal liability for the beneficiaries' losses because she had acted honestly and reasonably given the nature of her experience and the knowledge she possessed at the time.

[29] *Fales* addressed the standard of care and diligence required of a trustee, saying that the standard of care is that of a person of ordinary prudence in managing their own affairs (at 315-316) and the standard is to be carried out with "vigilance, prudence and sagacity" (at 318).

[30] The duties of an executor are summarized in the oath an executor takes before Letters of Probate are granted. In pertinent part, the executor swears:

> … to well and faithfully administer the estate and effects of the testator *by paying… the legacies contained in his will so far as the same shall thereto extend and the law bind it and by distributing the residue (if any) of the said estate and effects according to law*.
>
> (Emphasis added.)
>
> (Form 56.33B pursuant to rule 56.33 of the *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Schedule D.)

See also *Downton v. Royal Trust Co.* (1977), 18 Nfld. & P.E.I.R. 512, at para. 10 (Nfld. S.C. (T.D.)).

[31] In *O'Dea Estate (Re)*, 2019 NLSC 178, Orsborn J., considered the duties of an executor in the context of deciding competing applications for appointment as executor of an estate. He stated "an executor is a trustee upon whom the law imposes serious obligations" (para. 24), and described an executor's duties and obligations by quoting with approval from *Cartwright v. Havens Estate*, 2010 ABQB 91:

> [17] An executor holds a position of trust toward the beneficiaries of the estate. The duties of an executor include *a duty to act impartially and in the best interests of beneficiaries* and to observe the wishes of the testator in carrying out the administration of the estate.
>
> (Emphasis added.)

[32] An executor's duty to act impartially is often expressed as the even hand principle. If an estate involves two or more beneficiaries, an executor must keep an even hand among them by ensuring that each beneficiary receives what the terms of the trust (in this case the will) confer.

[33] In *Downton*, the executor was found negligent, for among other reasons, not keeping an even hand between the rights of competing parties under the will (para. 15) and not taking reasonable steps to protect the estate for the benefit of all creditors, claimants and beneficiaries (para. 16).

[34] The even hand principle was also considered in *Quirico v. Pepper Estate*, [1999] B.C.J. No. 2229, 91 A.C.W.S. (3d) 690 (B.C. S.C.), wherein the Court stated that it is not the place of an executor to favour one beneficiary over another:

> [15] The primary duty of an executor is to preserve the assets of the estate, pay the debts and distribute the balance to the beneficiaries entitled under the will or, in accordance with any order made under the *Wills Variation Act*. *An executor should not pick sides between the beneficiaries* and use estate funds to finance litigation on their behalf under the *Wills Variation Act*. *It is a matter of indifference to the executor as to how the estate should be divided. He or she need only comply with the terms of the will or any variation of it made by a court.*
>
> (Emphasis added.)

See also *Waters' Law of Trusts in Canada*, 5th ed. (Toronto: Thomson Reuters Canada, 2021) at 1090-1093.

[35] Breaches of trust take many forms, but in the case of an executor and a beneficiary, the alleged breach of trust generally rests on a beneficiary's allegation that the trustee failed to carry out, or negligently carried out, the trustee's obligations respecting the beneficiary's interest as set out in the trust document, and that loss ensued to the beneficiary.

[36] In *INA Life Insurance Co. v. Stoyles Insurance* (1987), 65 Nfld. & P.E.I.R. 116 (Nfld. S.C. (T.D.)), Steele J. described how a breach of trust occurs:

> [27] A breach of trust occurs if a trustee does any act which he ought not to do, or fails to do any act which he ought to do with regard to the administration of the trust or with regard to the beneficial interests arising under the trust: Parker and Mellows, *The Modern Law of Trust* (5th ed., 1983), p. 443. A breach of trust occurs whenever a trustee fails to carry out his obligations under the terms of the trust, the rules of equity, or statute. The failure may take the form of doing something contrary to those obligations, or of neglecting to do something which he ought to have done: Waters, *Law of Trust in Canada* (2nd ed., 1984), p. 987. Where there is a breach of trust, trustees are jointly and severally liable…

[37] See also *McDougall Estate, Re*, 2011 ONSC 4189, where an executor was found in breach of trust for making an unauthorized donation to a charity.

[38] The trust document in this case is a will. Long-standing law requires that a will is to be interpreted "by giving the natural and ordinary meaning to the words" used in the will (*National Trust Co. v. Fleury*, [1965] S.C.R. 817, at 829 (S.C.C.)). More recently, in *Cowper-Smith v. Morgan*, 2017 SCC 61, [2017] 2 S.C.R. 754, Coté J. reinforced this principle, and explained why it is important:

> [76] "[T]he golden rule in interpreting wills is to give effect to the testator's intention as ascertained from the language which he has used" (*Browne v. Moody*, [1936] 4 D.L.R. 1 (P.C.), at pp. 4-5; see also *National Trust Co. v. Fleury*, [1965] S.C.R. 817, at pp. 828-29; *Feeney's Canadian Law of Wills* (4th ed. (loose-leaf)), by J. MacKenzie, at § 10.1). The importance of testamentary autonomy is firmly rooted in our law. As McLachlin J. (as she then was) previously noted, a will "is the exercise by the testator of his freedom to dispose of his property and is [not] to be interfered with ... lightly" (*Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807, at p. 824) (see also *Burke, Re* (1959), 20 D.L.R. (2d) 396 (Ont. C.A.), at p. 398: "... the Court should strive to give effect to [the testator's intention] and should do so unless there is some rule or principle of law that prohibits it from doing so").

[39] That law has been applied in this Court several times. In *Sinnott v. Sinnott Estate*, 2015 NLCA 41, 371 Nfld. & P.E.I.R. 18, at para. 17, White J.A. described the general rule that "a court must rely exclusively on the four corners of a will to determine a testator's intention", and went on to uphold the trial judge's interpretation of the will in question on the basis of the words within it.

[40] In *Dunn Estate, Re* (1990), 81 Nfld. & P.E.I.R. 170 (Nfld. C.A.), the issue was whether the sole bequest to the son of the testatrix of a house and contents included the surrounding land.

[41] Gushue J.A. summarized the proper approach to its determination saying:

> [12]…the overriding principle to be followed by a court in the interpretation of a will is to ascertain the intention of the testator or testatrix. The meaning must firstly be

> sought in the language of the will itself. If such is not possible, then the surrounding circumstances may be considered…

and clarified that the surrounding circumstances are circumstances that pertained when the will was executed (paras. 14-15).

[42] See also *Jayaraman v. DeHart*, 2007 NLCA 32, 266 Nfld. & P.E.I.R. 195, and for further discussion, *Feeney's Canadian Law of Wills*, 3rd ed., Vol. 2 (Toronto: Butterworths, 1987) at 7-12.

[43] In summary, as stated by Orsborn J. in *Henley Estate (Re)*, 2019 NLSC 54, at para. 161:

> A court faced with ascertaining the intentions of a testator will look to the proven testamentary documents–the "four corners of the will" and of any probated codicil. Only if the testator's intention cannot be determined from those documents may surrounding circumstances be looked at in order to resolve an ambiguity in the will (see *Sinnott v. Sinnott Estate*, 2015 NLCA 41; *McCarthy Estate, Re*, 2016 NLTD(G) 200). But it is only the proven testamentary documents that are actually interpreted as the expression of the testator's intentions.

[44] As indicated, this appeal engages the doctrine of ademption, which provides that if property which is the subject of a specific bequest in a will does not exist in a testator's estate at the time of the testator's death, the bequest adeems, or fails.

[45] A more fulsome explanation of ademption is provided in *Oosterhoff on Wills*, 8th ed. (Toronto: Carswell, 2016) at 538:

> … ademption occurs when the property which is the subject matter of a specific gift, although in existence at the date of the will, is not in the testator's estate at his death. It may have been sold or given away by the testator, or it may have been lost, stolen, or destroyed. In the absence of statutory provisions to the contrary, if a specific gift has adeemed, the beneficiary receives nothing. This is true, again in the absence of statutory provisions to the contrary, even if the testator retains other property into which the property that was the subject matter of the gift has been converted.
>
> The testator may, of course, avoid this result by stating his intention to be that that beneficiary shall receive either the specific property or any property that replaces it.
>
> …

[46] The doctrine of ademption was applied by the Supreme Court of Newfoundland and Labrador, General Division in *Lyttle Estate, Re,*, 2013 NLTD(G) 182, 345 Nfld. & P.E.I.R. 129. In *Lyttle*, the testatrix bequeathed a

Jaguar car to a beneficiary. However, shortly before the testatrix died, she directed the beneficiary to sell the car to a different person. The beneficiary did so, and after the testatrix's death, argued that he was entitled to the proceeds of sale on the basis of a contractual agreement he had with the testatrix.

[47] The Court found that the specific bequest of the Jaguar had adeemed, but accepted that the beneficiary had made a separate agreement with the testatrix, and concluded that the proceeds should be divided as had been agreed.

[48] *Re Wilson Estate*, [1989] B.C.J. No. 1628, 34 E.T.R. 121 (B.C. S.C.) also involved the doctrine of ademption. In *Re Wilson Estate*, the testatrix bequeathed specific real property to a beneficiary, but sold the property a few months before she died. Because the property was the subject of a specific bequest that was no longer in her estate when she died, the bequest was held to have adeemed. In so ruling, the Court referenced with approval the assumptions underlying ademption from a Law Reform Commission of British Columbia report entitled "Wills and Changed Circumstances, 1989":

> If, at the testator' death, a particular item or property is not found among his assets, a gift of it fails. The technical term for a failure of a gift in these circumstances is ademption. The gift is said to adeem.
>
> This rule is based on two assumptions. First, it is assumed that a testator who makes a gift of a particular item of property does not intend to confer general economic benefit on the beneficiary. Second, it is assumed that when property cannot be found in the testator's estate after his death, he intended to revoke the gift of it in his will.

[49] Likewise in *Re Thornton Estate*, [1990] S.J. No. 233, 85 Sask. R. 34 (Sask. Surr. Ct.), the testator specifically bequeathed farmland and other property which was held by a corporation of which the testator was the proprietor but not held by him personally when he died. The Court held that the bequest of the property had adeemed. In so ruling, the Court stated:

> [5] It is difficult and hard, but nevertheless the truth of the matter is that in this circumstance these gifts of land have adeemed and by reason thereof fall to be distributed as residue of the estate.

[50] In this case the Judge noted that sometimes the application of the doctrine of ademption appears to have a harsh result. However, such occasional harsh results accord with the law respecting the interpretation of wills and the common sense principle that a testator cannot bequeath what the testator does not have. If a specific gift is no longer in the estate at death, the gift adeems. The testator can avoid such a result by making arrangements in the will to address this

possibility by providing for a substitute gift, as *Oosterhoff* points out. If the testator does not make arrangements for a substitute gift, it is assumed that no substitute gift was intended, or as noted in *Re Wilson Estate*, at para. 6, that the testator intended to revoke the gift upon its ademption.

[51] The doctrine of ademption is well-established, and its application prevents the difficulty involved in substituting other assets within an estate in order to remedy the beneficial loss of an adeemed gift. Substituting gifts of property within an estate invariably contradicts the ordinary and plain meaning of the words in a will by altering the testator's wishes respecting the specific gift which has adeemed as well as the testator's wishes respecting other gifts. Application of the doctrine enables the rest of the estate to remain intact for distribution according to the terms of the will as instructed by the testator.

[52] The difficulty of substituting other estate assets for specific gifts of property in a will is described as the "second and more compelling reason" for ademption. The reasoning is that it cannot be inferred that the testator would have wanted the named beneficiary to have received some other chattel or a cash sum in lieu thereof if the specific gift is not owned by the testator at death unless the will itself contains words indicating some such intention (*Feeney's Canadian Law of Wills*, 4th ed. (Toronto: Butterworths, 2000) at 15.2).

[53] Ademption provides certainty in the law of wills. It goes hand in hand with the principle of interpreting a will within its four corners, and is in accordance with the "golden rule [of giving] effect to the testator's intention as ascertained from the language which the testator has used" (*Cowper-Smith*, at para. 76).

[54] There are many reasons why property which is the subject of a specific bequest may not exist in a testator's estate upon death. Perhaps the bequest was never in the testator's estate, or perhaps it was lost, stolen, or sold before the testator's death. However, the means by which the property does not exist in the estate upon a testator's death is not material to application of the doctrine of ademption, absent fraud or other dishonest conduct, and absent legislative provision to the contrary. In this jurisdiction, there are no legislative provisions to the contrary.

[55] On occasion, a specific gift described in a will may not appear to be in a testator's estate when the testator dies, but may in fact still be there by a different name or in a different form. If the gift has changed in name or form only, it may be able to be traced within the estate and saved from ademption.

[56] Tracing within the doctrine of ademption was considered in *Wood (Estate), Re*, 2004 BCCA 556, *Re Rodd Estate* (1981), 40 Nfld. & P.E.I.R. 239, 10 A.C.W.S. (2d) 282 (P.E.I. S.C.), and *Re Stevens Estate*, [1946] 4 D.L.R. 322, 19 M.P.R. 49 (N.S. C.A.). In *Wood Estate*, the testator had bequeathed investments he held in his RBC investment account to a beneficiary. Shortly before he died, the testator transferred the investments from RBC to another brokerage house, where they were deposited into an account with other investments. Accordingly, when he died there was nothing in his RBC account and therefore nothing meeting the description of the specific bequest in his will; the bequest had for all apparent intents and purposes adeemed.

[57] However, the intended beneficiary argued that the shares described in the will as being in the RBC account could be traced to the account at the new brokerage house, and that ademption could therefore be avoided. The British Columbia Court of Appeal held that because the shares in the former RBC account could possibly be traced to the account at the new brokerage house, the beneficiary ought to be given the opportunity to do so. However, the Court ruled that any cash that had been transferred from RBC had been comingled in the account with other investments at the new brokerage house, and thereby had lost its nature and character as the bequest described in the will, and accordingly had adeemed.

[58] In *Re Rodd Estate*, the specific bequest was the proceeds from the sale of a home which had been deposited into a new bank account with no other monies. $30,000.00 of the sale proceeds was used to purchase a debenture, leaving a balance of $5,305.57 in the account to which other monies were subsequently added. At a later point in time the total monies in that account were transferred to an estate account, out of which funeral expenses were paid.

[59] The Court was satisfied that $30,000.00 of the specific bequest of the proceeds of sale was traceable to the $30,000.00 debenture, but that the remaining sale proceeds of $5,305.57 had lost their identity as house sale proceeds because they had been comingled with other monies in an account which was drawn from without distinguishing between the sources of monies. Accordingly, the $5,305.57 was held to have adeemed.

[60] A commentary on *Re Rodd Estate*, written by Professor T.G. Youden in the Estates and Trusts Reports ((1981) 10 E.T.R. 117) and referred to in *Wood Estate* at para. 20, illustrates co-mingling as a change in the nature and character, or substance, of a specific bequest:

> … the change that occurs when proceeds of sale are mixed with other property of like description, for example when proceeds of sale are placed to the credit of a bank account into which other payments have been, or are subsequently made, is a change of substance that, unless it could be characterized as being *de minimis*, will ordinarily cause ademption. [at 123]

[61] In *Re Stevens Estate*, the testatrix's specific bequest of the proceeds from the sale of a home, which she had sold before she died, was held to have adeemed. The proceeds had been deposited into a bank account with other monies, which account had been deposited to and drawn from over time. Ademption obtained because the sale proceeds had been comingled in an account with other monies and used for a period of time by the testatrix without differentiation from the other monies in the account, thereby losing their form, substance, and identity as the bequest described in the will.

[62] See also *Doyle v. Doyle Estate*, [1995] O.J. No. 3498, 9 E.T.R. (2d) 162 (Ont. Gen. Div.), for application of the tracing principle in the doctrine of ademption.

[63] A critical distinction between the specific bequests in *Re Rodd Estate* and *Re Stevens Estate*, and the bequests in *Re Wilson Estate* and this case, is that the specific bequests in *Re Rodd Estate* and *Re Stevens Estate* were proceeds of sale, in other words money, whereas the specific bequests in *Re Stevens Estate* and this case were specifically-described real property.

This Case

[64] Ms. Penny wrote her will in 1981. It had been prepared on her instructions by Mr. Vavasour, whom she named executor. In it she bequeathed her home and contents at 20 St. Michael's Avenue in St. John's to Ms. Hendry, and the residue of her estate to Ms. Best. There is no question that the house and contents were a specific bequest to Ms. Hendry identified by description and address, and that the residue was a general bequest. The words of Ms. Penney's will clearly state the bequests, and no ambiguity is suggested or apparent.

[65] Distribution of Ms. Penney's estate would appear to have been a straightforward task but for the fact that the specific bequest to Ms. Hendry of Ms. Penney's home at 20 St. Michael's Avenue no longer existed in her estate when she died. There is no question that there was nothing in Ms. Penney's estate when she died that matched the bequest of the house and contents at 20 St. Michael's Avenue as described in her will. The property in Ms. Penney's estate when she died consisted of cash only. As her will is to take effect as if it had

been executed immediately before her death, and Ms. Penney's house did not exist in her estate immediately before her death, she could not bequeath it (*Wills Act*, R.S.N.L. 1990, c. W-10, s. 15). She cannot bequeath something she does not have.

[66] There was no provision in Ms. Penney's will addressing the possibility that her house at 20 St. Michael's Avenue may not exist in her estate when she died. Having made no provision in her will for a substitute gift in the event she did not own her house when she died, the gift adeemed. Ms. Penney's will was not ambiguous, and Mr. Vavasour's evidence respecting his bare belief about Ms. Penney's intention to leave the bulk of her estate to Ms. Hendry is not admissible extrinsic evidence. It is irrelevant to whether ademption occurred. The specific bequest of Ms. Penney's house to Ms. Hendry adeemed, unless it can be traced to an existing asset.

[67] Mr. Vavasour's evidence respecting that the proceeds of sale of the house ($145,780.40) could be found within Ms. Penney's bank account purports to be a tracing argument. Ms. Penney's estate at the time of her death was composed entirely of cash, and because the bank account held more than the amount of the sale proceeds when Ms. Penney died, Mr. Vavasour said he could disburse monies equivalent to the amount of the sale proceeds from the bank account to Ms. Hendry and the residue to Ms. Best to give effect to what he said were Ms. Penney's intentions.

[68] The proceeds of sale of the house deposited into Ms. Penney's bank account three years before she died was not Ms. Penney's bequest to Ms. Hendry. Ms. Penney's bequest to Ms. Hendry was a house and contents, not cash proceeds of its sale. Moreover, when the cash proceeds from the sale of Ms. Penney's house were deposited into her bank account three years prior to her death, they were co-mingled with other monies, all of which were added to and subtracted from over time. $145,780.40 from the total of these monies in Ms. Penney's bank account at her death is not a house and contents by another name (*Re Rodd Estate*, at para. 8, and *Re Stevens Estate*, at para. 41). In this regard, I am left to wonder if Ms. Penney's bank account contained less than $145,780.40 when she died whether the entire amount would have been distributed to Ms. Hendry. Again, when Ms. Penney died, there was nothing in her estate of the nature and character, or matching the description, of her specific bequest to Ms. Hendry. The situation admits of no other conclusion but that Ms. Penney's bequest to Ms. Hendry adeemed.

[69] The Judge's failure to apply the doctrine of ademption to the specific bequest in Ms. Penney's will was an error.

Did Mr. Vavasour breach the duty of trust he held for Ms. Best as a beneficiary of Ms. Penney's estate?

[70] Mr. Vavasour, as executor of Ms. Penney's will and trustee of her estate, held property in trust for Ms. Best as a beneficiary of the will. His duty as executor and trustee was to disburse the legacies expressed in Ms. Penney's will according to law. Given that the specific bequest to Ms. Hendry had adeemed, Mr. Vavasour's duty was to disburse the cash residue of Ms. Penney's estate to Ms. Best, as the law required.

[71] Ms. Best alleges that Mr. Vavasour was negligent in carrying out his duty as executor in that he did not disburse the estate according to law, which resulted in a loss to her. Mr. Vavasour's alleged negligent conduct could also be characterized as a breach of the trust he held for Ms. Best as a beneficiary of Ms. Penney's estate.

[72] Accordingly, the issue for this Court's determination is whether the Judge erred in failing to find that Mr. Vavasour had breached his duty of trust to Ms. Best by negligently carrying out his duty as executor of Ms. Penney's will.

Ms. Best's Position

[73] Ms. Best argues that Mr. Vavasour's distribution of Ms. Penney's estate was contrary to law in that it was not in accordance with Ms. Penney's will as written, and in particular, not in accordance with the bequest to Ms. Hendry having adeemed. Ms. Best argues that Mr. Vavasour ought to have, at the very least, informed her, as a beneficiary of the estate, of the law of ademption and how that would affect the disbursement of Ms. Penney's estate, so that she could make a fully informed decision respecting his proposal for disbursement. She says he not only did not inform her of the law, but he provided incomplete information and her consent to his proposal was based on this incomplete information. In essence, Ms. Best argues that Mr. Vavasour, by his actions, breached the trust he held for her.

[74] Upon learning that Ms. Penney's house was not in her estate when she died, Mr. Vavasour found himself in difficult circumstances. The language in Ms. Penney's will required a distribution that did not accord with his view of Ms. Penney's desire that Ms. Hendry was to receive the bulk of Ms. Penney's estate. Regardless, as executor, Mr. Vavasour was charged with disbursing Ms.

Penney's estate in accordance with her will and the law, and, as both solicitor for the estate and executor, he was required to advise both beneficiaries respecting the doctrine of ademption.

[75] As a lawyer, Mr. Vavasour would have been familiar with his ability under section 25 of the *Act* to petition the Court for judicial consideration of his concerns respecting the applicability of the doctrine of ademption. This would have been the proper course of action (*Fales*, at 319). (For a recent example of an executor applying to the Court for instructions respecting the interpretation of her mother's will, see *Edwards Estate (Re)*, 2021 NLSC 48. See also *Re Thorton Estate*.)

[76] In any event, Mr. Vavasour's obligation as executor and trustee was to administer Ms. Penney's estate in accordance with the words of her will and the law. His proposal to Ms. Best and his distribution of Ms. Penney's estate were not in accordance with either. Moreover, his proposal favoured Ms. Hendry over Ms. Best, in breach of his duty "to act impartially and in the best interests of beneficiaries" (*O'Dea Estate*, at para. 24), of whom Ms. Best was one. (See again *Waters' Law of Trusts* at 1090-1093.)

[77] The Judge found that Mr. Vavasour's proposal was reasonable in the circumstances, and said that she saw nothing in his actions that fell below the standard expected of an executor. She concluded that he was not negligent and that he did not breach his duty to Ms. Best. In so concluding, the Judge did not conduct an analysis of the responsibilities an executor owes to a beneficiary, or address whether Mr. Vavasour's disbursement of Ms. Penney's estate was in accordance with Ms. Penney's will and the law.

[78] The Judge's decision in this regard appears to have been based on her acceptance of Mr. Vavasour's reasons for doing what he did, and that ademption need not be considered because she accepted Mr. Vavasour's belief that Ms. Penney intended to leave the bulk of her estate to Ms. Hendry. Mr. Vavasour's personal belief respecting Ms. Penney's intention was irrelevant to Ms. Penney's intention expressed in her will. It ought not to have been taken into account by the Judge in her consideration of Mr. Vavasour's actions (*Sinnott Estate*, at para. 17; *Dunn Estate*, at paras. 14-15; and *Doyle Estate*, at para. 29). The Judge erred in doing so.

[79] In summary, the outcome of Ms. Best's suit against Mr. Vavasour depended on the words in Ms. Penney's will, application of the doctrine of ademption, and determining whether Mr. Vavasour's actions breached his duty

to Ms. Best. The clear and unequivocal words in Ms. Penney's will and application of the doctrine of ademption provided complete and lawful disposition of the property in Ms. Penney's estate. Mr. Vavasour's incomplete advice to Ms. Best and his distribution of Ms. Penney's estate were in breach of his duty to protect Ms. Best's property under the will. His actions fell below the standard expected of a reasonable executor.

[80] By relying on extrinsic evidence of Mr. Vavasour's belief, by failing to apply the doctrine of ademption, and by failing to appreciate the trust relationship Mr. Vavasour had with Ms. Best, the Judge erred in determining that his actions did not fall below the standard expected of an executor of Ms. Penney's estate.

Should Mr. Vavasour be relieved wholly or partially from liability?

[81] The next question is whether Mr. Vavasour's liability for the breach is relieved in any way by the provisions of section 32 of the *Act*. What must be considered is whether Mr. Vavasour's actions were honest and reasonable, and whether relieving Mr. Vavasour of liability would be fair in the circumstances (*Trustee Act*, s. 32). The factors of honesty, reasonableness and fairness are the factors that were considered by the Supreme Court of Canada when it determined whether the executors in *Fales* ought to be excused from liability, as noted in paragraph 28 above.

[82] Whether an executor ought to be excused from liability under the provisions of section 32 of the *Act* was also considered in *Downton*, *INA*, and *McDougall Estate*.

[83] In *Downton*, Justice Noel stated that an "executor distributes the estate at his own risk" and is therefore personally liable, but that such personal liability may be mitigated through the provisions of the *Act*. He concluded that the executor in *Downton* should not be relieved from liability, saying:

> [16] … I find that the executor acted honestly and without benefit to itself but that, with the knowledge it had through its officers, it did not take reasonable steps to protect the estate for the benefit of all creditors, claimants and beneficiaries. The delay in realizing the assets was not inadvertent or in order to realize assets to the best advantage but was the result of an unwillingness "to seize the nettle" which resulted in advantage being given to the residuary legatee to the detriment of others interested in the estate… the executor, clearly, took the risk and, having done so, cannot pass that risk to others.

[84] In *INA*, Steele J. excused the executor from liability for negligence, saying the executor's breach of trust was technical. In so doing, the Court left the wronged beneficiary, who did no wrong, to absorb the loss of the corporate executor's actions.

[85] In *McDougall Estate*, the executor, who was a friend of the testator, was found negligent for making an unauthorized charitable gift, but was excused from personal liability on the basis that her lay interpretation of the testator's will was not unreasonable, that she had acted honestly, and that she had derived no personal benefit from making the donation.

[86] In determining whether Mr. Vavasour's actions were honest, reasonable, and whether he ought fairly to be excused from liability, regard must be had to all of the circumstances of the case (*Fales*, at 319).

[87] Mr. Vavasour's evidence was that when he assumed his duties as executor of Ms. Penney's estate and learned that Ms. Penney's home was no longer in her estate, he did his own research on ademption. He learned that some Canadian jurisdictions had made legislative changes respecting the doctrine of ademption but that there had been no such legislative changes in this province.

[88] Mr. Vavasour testified that he believed that the applicability of the law of ademption to the distribution of Ms. Penney's estate was "obscure". He said he based his proposed distribution of the estate on three factors: (1) he believed that Ms. Penney intended to leave the bulk of her estate to Ms. Hendry; (2) he was influenced by the fact that it was Ms. Best, as guardian of Ms. Penney's estate, and not Ms. Penney, who had sold the house; and (3) he said he could find an amount equivalent to the proceeds of sale of the house within the cash in Ms. Penney's bank account.

[89] Mr. Vavasour provided no foundation for his belief that Ms. Penney intended to leave the bulk of her estate to Ms. Hendry. He simply stated that it was his belief. He testified that he was aware that Ms. Hendry was older than Ms. Best and therefore closer in age to Ms. Penney. He said that Ms. Penney was a friend of his mother, but that she had not been a long-standing client of his. He gave no evidence respecting the value of Ms. Penney's home at 20 St. Michael's Avenue, or the nature of Ms. Penney's interest in the matrimonial home (Ms. Penney was married) or how much money was in her estate when the will was drafted in 1981. In short, he gave no evidence respecting the circumstances existing at the time Ms. Penney made her will which could qualify as relevant to the interpretation of her will. In any event, the will was

clear, and Mr. Vavasour's view of the testatrix's intentions was irrelevant to its interpretation.

[90] Mr. Vavasour said his actions were also informed by the fact that it was Ms. Best, and not Ms. Penney, who had sold the house shortly after she was granted Letters of Guardianship of Ms. Penney's estate, and that he saw no need for the house to have been sold at that time.

[91] There was no evidence suggesting that Ms. Best's handling of Ms. Penney's affairs was motivated by any desire to take advantage of the law of ademption or to gain any other advantage as a beneficiary. The Judge addressed this issue and found nothing to suggest that Ms. Best was motivated by personal gain in selling the house. Neither Ms. Best nor her sister was even aware of the doctrine of ademption when the house was sold. The evidence from both sisters was that they had worked together to prepare 20 St. Michael's Avenue for sale following Ms. Penney's move into the care home, and that Ms. Hendry agreed with Ms. Best selling the house which had been vacant for over a year by the time it was sold. Moreover, Ms. Best, as the lawful guardian of Ms. Penney's estate duly appointed by the Supreme Court of Newfoundland and Labrador with Ms. Hendry's consent, had every right to sell the house (see *Mountain v. Mountain* (1937), 12 M.P.R. 87, at 89-90 (P.E.I. Ch.), quoting *Theobald on Wills*, 8th ed. (London: Stevens, 1927)).

[92] Further, the ability to find monies in Ms. Penney's bank account equivalent to the amount of money realized from the sale of the house at 20 St. Michael's Avenue is not tracing, as discussed above. It was irrelevant to the lawful exercise of Mr. Vavasour's responsibility as executor of Ms. Penney's will, and would in any event be a decision for a court to make.

[93] Like the testator's actions in *Downton*, Mr. Vavasour's actions were not inadvertent. Neither were they technical, like in *INA*, or naïve, like in *McDougall Estate*. They were considered actions, informed by Mr. Vavasour's personal opinion respecting Ms. Penney's intention, his belief that Ms. Best had sold the house when it was not necessary for her to have done so, and the availability of sufficient cash in Ms. Penney's estate from which he could take an amount equal to the proceeds from the house sale to give to Ms. Hendry.

[94] It was not suggested that Mr. Vavasour's belief and the reasons for his actions were either dishonest or for his personal gain. However, acting honestly does not equate to acting reasonably. Mr. Vavasour's actions were contrary to the intention expressed in Ms. Penney's will, contrary to the doctrine of

ademption, and in conflict with his duty, as executor, to protect the interests of Ms. Best as a beneficiary of Ms. Penney's will. His actions do not relieve him from liability on the basis that they were honest.

[95] The fairness inquiry involves who should bear the loss in this instance. I see no reason why Ms. Best, as the wronged beneficiary, should have to bear the loss resulting from how the estate was distributed. Mr. Vavasour knowingly took the risk of distributing Ms. Penney's estate in conflict with the words of her will and in breach of his duties as executor and trustee to Ms. Best. In my view, he cannot pass that risk on to the very person whose property he was entrusted to protect.

[96] In finding that Mr. Vavasour's actions were honest and reasonable, the Judge did not conduct an analysis of the factors set out in section 32. She simply relieved him from liability on the basis of a bald conclusion that his actions were reasonable and on the basis of the release. This was an error.

The Release

[97] Ms. Best argues that the Judge erred in accepting that she released Mr. Vavasour from liability by signing the aforementioned release. She maintains that the basis on which she signed the release was not an informed one.

[98] The Judge accepted Mr. Vavasour's position that Ms. Best and Ms. Hendry had agreed "to put aside their respective claims to entitlement under the will, whatever those entitlements may have been, and to accept the distribution agreement as proposed by Vavasour" (para. 41).

[99] The release was jointly executed by Ms. Best and Ms. Hendry. The release has no recitals providing a context for its execution, nor is there any reference to the consideration offered to Ms. Best for the release of her rights respecting Mr. Vavasour's responsibility to her. It does not advert to the important fact that the sisters' interests in Ms. Penney's estate were adverse to each other. In fact, the release appears to be more in the nature of a receipt acknowledging that the sisters received funds disbursed by Mr. Vavasour from Ms. Penney's estate in good order.

[100] In any event, I do not agree with the Judge that Ms. Best agreed to put aside her claim to entitlement as a beneficiary of Ms. Penney's will "whatever her entitlement may have been." She may have agreed to put aside her claim on the basis of the information Mr. Vavasour, as executor of Ms. Penney's will and her trustee, provided to her, but this information was incomplete, legally

irrelevant, and not in accord with Ms. Penney's will. The basis on which Ms. Best signed the release was not an informed one.

[101] In order for a release to be valid it must be executed on an informed basis. In *Bank of British Columbia Pension Plan v. Kaiser*, 2000 BCCA 291, at para. 17, the appellate Court adopted the view expressed in *Chitty on Contracts*, Vol. 1 (London: Sweet and Maxwell Ltd., 1994) at 1074-1075, respecting how the effect of a release is to be determined:

> 1. No particular form of words is necessary to constitute a valid release. Any words which show an evident intention to renounce a claim or discharge the obligation are sufficient.
>
> 2. The normal rules relating to the construction of a written contract also apply to a release, and so, a release in general terms is to be construed according to the particular purpose for which is was made.
>
> 3. The court will construe a release which is general in its terms in the light of the circumstances existing at the time of its execution and with reference to its context and recitals in order to give effect to the intention of the party by whom it was executed.
>
> 4. In particular, it will not be construed as applying to facts of which the party making the release had no knowledge at the time of its execution or to objects which must then have been outside his contemplation.
>
> 5. The construction of any individual release will necessarily depend upon its particular wording and phraseology.

[102] The effect of a release in an estate matter was considered in *Gastle v. Gastle*, 2017 ONSC 7797. In *Gastle*, the testator had specified in his will that the residue of his estate was to be divided equally between his two sons, Calvin and Robert, who were also co-executors.

[103] Prior to his death, the testator opened joint bank accounts with Robert. The will was silent as to the joint bank accounts; Calvin was unaware that they existed and the estate was distributed as if they did not exist. When Calvin learned of their existence, he applied for an order directing that he receive one half the value of them. Robert defended Calvin's application by relying on the release Calvin had signed, whereby Calvin released Robert, the estate, and the lawyers who assisted in its distribution from any liability. Calvin had read the release before signing it, received independent legal advice, and understood that it was a legally binding document.

[104] The Court, satisfied that the joint bank accounts had not been gifted to Robert by the testator, had to decide whether Calvin's action was barred by the release. The Court concluded it was not, saying:

> [54] Robert seeks to rely on the release to protect him from this application. In my view, he cannot do so. *Calvin was clearly not fully informed* as the Certificate upon which he relied when he signed the Release did not disclose the existence of the joint accounts. The applicant's signing of the Release reflected his partially informed intention to be legally bound by what was disclosed in the incomplete and patently false Certificate. Upon discovering the existence of some of the joint accounts, Calvin immediately made inquiries and sought information. Material information was withheld from Calvin. Robert's withholding of such material information and his subsequent delay of its release effectively concealed from Calvin the fact that he may have a claim against Robert.
>
> …
>
> [58] The evidence is clear that Calvin *did not know about the existence* of the joint accounts until after signing the Release, Robert should not be entitled to rely on that Release to defend this application.
>
> (Emphasis added.)

[105] I agree with the Courts' statement in *Kaiser* and ruling in *Gastle*.

[106] Mr. Vavasour's reliance on the release executed by Ms. Best is akin to Robert's reliance on Calvin's release in *Gastle*. Like the Judge in *Gastle*, I am of the view that Mr. Vavasour is not entitled to rely on Ms. Best's execution of the release in defence of her action against him. Ms. Best executed the release on the basis of incomplete and legally irrelevant information respecting the disbursement of Ms. Penney's estate which was provided to her by Mr. Vavasour. Mr. Vavasour cannot be excused from liability on the basis that he gave her the opportunity to seek independent legal advice when the basis on which he suggested she do so was uninformed. As stated in *Kaiser*, a release cannot be construed to apply to facts of which Ms. Best had no knowledge when she signed it. Accordingly, in my view Mr. Vavasour cannot rely on the release to escape liability. The Judge failed to consider the nature and terms, or lack thereof, of the release in concluding that it operated as a full defence for Mr. Vavasour. This was an error.

[107] In summary, Mr. Vavasour breached his duty of trust to Ms. Best and is liable to her for damages in the amount of $145,780.40. His breach of duty is not relieved by the provisions of section 32 of the *Act* because his actions, while honest, were not reasonable, and it would not be fair to excuse him and have Ms.

Best incur the loss. Neither can Mr. Vavasour rely on the release as a full defence to Ms. Best's claim for the reasons stated above.

[108] This decision makes Ms. Best whole. Given this result, and despite misgivings about the Judge's rulings in regards to the grounds of appeal relating to her decisions respecting Ms. Best's claim against Ms. Hendry, it is not necessary to decide them.

Mr. Vavasour's Contributory Negligence Claim

[109] The basis for Mr. Vavasour's contributory negligence claim against Ms. Best is that she did not inform him of the private arrangement she had with Ms. Hendry that Ms. Hendry would pay her $40,000.00 in order to avoid the cost and delay of getting independent legal advice. In other words, he argues that Ms. Best did not tell him of her reason for accepting his proposal and why she did not get independent legal advice. The evidence from Mr. Vavasour is that he did not inquire. In any event, Ms. Best's acceptance of his proposal and the private arrangement with her sister is distinct from Mr. Vavasour's duties as executor and trustee of Ms. Penney's estate. Mr. Vavasour cannot benefit from the failure of Ms. Best to tell him about the private deal when the basis for Ms. Best accepting his proposal and signing the release was the incomplete and legally irrelevant information that he provided to her.

[110] Accordingly, I would dismiss Mr. Vavasour's contributory negligence claim against Ms. Best.

Mr. Vavasour's Third Party Claim

[111] Given my determination that the Judge erred in failing to find that Mr. Vavasour was in breach of his duty to Ms. Best as executor of Ms. Penney's will, and that he should not be relieved of liability, the next issue is whether Ms. Hendry must indemnify him for his mistaken payment to her.

[112] Mr. Vavasour argues that Ms. Hendry is bound in law and/or equity to indemnify him for the $145,780.40 he paid to her, because he paid the money to her by mistake. He submitted caselaw supporting his position that beneficiaries are required to reimburse monies mistakenly paid to them by an executor.

[113] Ms. Hendry denies any responsibility to indemnify Mr. Vavasour. She argues that she received and spent the money in good faith, and that in any event she is not in a position to reimburse him because the money is gone.

[114] In *Central Trust Co. v. Flynn* (1987), 25 E.T.R. 302, 1987 CarswellNB 62 (N.B. C.A.), the executor, Central Trust Co., paid $10,377.21 to a beneficiary. Approximately a month after doing so, the executor discovered that the payment was in excess of the beneficiary's share of the estate. The executor wrote to the beneficiary advising her of the mistake and requesting return of the money. The beneficiary did not return the money, so the executor sued for reimbursement.

[115] The trial judge dismissed the executor's claim for reimbursement, reasoning that the beneficiary had had no accurate knowledge of the amount of her inheritance, that she had not been given an inventory of the estate and consequently believed that she was the beneficiary of a large amount of money, and that the executor had been negligent in carrying out its duties. The alleged negligence was the executor's failure to avoid tax penalties, delay in obtaining a death certificate, failure to prepare statements and having made advances under the will without reconciliation.

[116] The New Brunswick Court of Appeal reversed the trial judge, saying that the beneficiary had been advised of the overpayment within a reasonable time and that the evidence did not disclose any countervailing equities. The Court ruled that the trial judge's reasons for refusing to order reimbursement were not countervailing equities, and ordered the beneficiary to return the money.

[117] *Cronan Estate v. Hughes* (2000), 101 A.C.W.S. (3d) 655, 37 E.T.R. (2d) 27 (Ont. S.C.J.), involved the distribution of a RRIF, valued at $186,428.70, to beneficiaries by the estate trustee. The trustee was under the impression that the bank had held back income taxes owing on the RRIF by virtue of its deemed disposition on the death of the testator, so he paid out the full amount of the RRIF to the beneficiaries.

[118] Just over a month later, the executor learned that the bank had not held back the required taxes. The trustee advised the beneficiaries of its error, and requested reimbursement of some of the monies. None was forthcoming, so the trustee sued.

[119] At trial, the beneficiaries argued that after receiving the money their positions had changed to their detriment, in that they had spent the money primarily by paying off a mortgage before receiving the demand for reimbursement.

[120] The trial judge did not accept that the position of the beneficiaries had changed to their detriment after receipt of the money. He found that although

their decision to purchase property which they mortgaged was made in anticipation of the inheritance, their payment of the mortgage was not a change of position to their detriment. Rather, it represented an advantage accorded to them from the estate. Accordingly, they could put themselves back into the same position they were in before they received the funds by placing a new mortgage on the house, having lost only the costs of the transactions. In short, their loss in the property investment made in anticipation of the inheritance was not as a result of the erroneous payment by the estate trustee.

[121] The *Cronan Estate* beneficiaries also argued that the conduct of both the executor and the solicitor for the estate constituted a countervailing equity which could relieve them of the requirement to reimburse the money. Both the executor and the solicitor had taken their compensation from the estate prior to its being allowed by the court. The court disagreed, ruling that the conduct of the executor and solicitor was not a countervailing equity which could relieve the beneficiaries from repayment, and ordered them to repay the amount of the income tax liability due on the RRIF.

[122] In *CIBC Trust Corp. v. Bayly*, 2005 BCSC 133, two beneficiaries (a couple) were jointly gifted $20,000.00 from a testator's estate. By mistake, the executor paid each of the two beneficiaries $20,000.00. Just over a month later, the executor wrote to the beneficiaries advising them of the mistake and asking them to return $20,000.00. They did not return the money, so the executor sued.

[123] The beneficiaries argued that they should not have to repay the $20,000 due to a material change in their position since receiving the money. They argued that they had spent the money paying down pre-existing debt (some of which was their son's) and also that receipt of the monies had caused one of them to retire. The trial judge found that payment of debt alone did not constitute a material change in the position of the beneficiaries (para. 49), and also that the decision of one of the beneficiaries to retire was not material because the decision was made after the beneficiaries had received notice of the error. The beneficiaries were ordered to reimburse the $20,000.00.

[124] Generally speaking, the law requires that monies mistakenly paid must be reimbursed (*B.M.P. Global Distribution Inc. v. Bank of Nova Scotia*, 2009 SCC 15, [2009] 1 S.C.R. 504, and *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161 (S.C.C.)). The principle is now encompassed within the law of restitution, which in this case would be based on the concept of unjust enrichment.

[125] Unjust enrichment has three elements:

(1) the defendant has been enriched by the receipt of a benefit;

(2) the enrichment has been at the plaintiff's expense; and

(3) there is an absence of a juristic reason for the enrichment.

(*Moore v. Sweet*, 2018 SCC 52, [2018] 3 S.C.R. 303, at para. 37, and *Shoal Investments Ltd. v. Murphy*, 2019 NLCA 78, at para. 145)

[126] Historically, the nature of the mistake leading to an erroneous payment has been a determining factor in the application of this equitable law. Simply put, if the mistake was a mistake of fact, reimbursement could obtain; if the mistake was one of law, the remedy of reimbursement was not available. This distinction became less important over time, and as a result of the Supreme Court of Canada decision in *Air Canada*, has been effectively abandoned. I note that the executors' negligence in *Flynn* and the alleged wrongdoing in *Cronan Estate* were held to have no effect on the responsibility to reimburse.

[127] In Mr. Vavasour's third party action, Mr. Vavasour, as the effective plaintiff, is alleging that Ms. Hendry, as the effective defendant, was enriched as a result of his mistake, and that the enrichment has been at his expense because he is ordered to pay Ms. Best the money he mistakenly paid to Ms. Hendry.

[128] In my view, Mr. Vavasour's mistake is better characterized as a mistake of law than one of fact. Regardless, it does not preclude him from being reimbursed the money he mistakenly paid to Ms. Hendry from Ms. Penney's estate (*Air Canada*, at 1201).

[129] This brings me to whether there is a juristic reason why Ms. Hendry should not be ordered to reimburse the $145,780.40. Mr. Vavasour maintains that there is no juristic reason for Ms. Hendry to be able to keep the money, so she must reimburse him. Ms. Hendry attempts to rebut his contention, arguing that she accepted the $145,780.40 from Mr. Vavasour in good faith, believing that it was rightfully hers and that she could do with it what she pleased. When she received the money, she had no reason to question the basis for Mr. Vavasour's disbursement of it to her such that it could be said that she had reason to believe the money was not legitimately hers. She maintains that her position has changed to her detriment, in that she has spent the money and she does not have it to pay back. She maintains that in these circumstances, it would not be equitable to require her to pay back the money, especially as she did not receive notice of Mr. Vavasour's claim for indemnification until over a year after she received the money.

[130] Ms. Hendry's inability to reimburse the money because it has been spent could be what is referred to in the caselaw as a countervailing equity, and could constitute a juristic reason for not ordering her to reimburse Mr. Vavasour. However, Mr. Vavasour contends that Ms. Hendry's equitable argument only takes her so far. He argues that Ms. Hendry was served with his third party claim shortly after it was filed on October 28, 2013, and that her receipt of his claim put her on notice that the money had been mistakenly paid to her and that she ought to preserve any monies she had remaining from the $145,780.40 until the matter was resolved.

[131] I agree with Ms. Hendry that her receipt and spending of the money given to her by Mr. Vavasour was in good faith and that spending much of it over a period of a year or so materially changed her position respecting her ability to reimburse it. In this regard, I see her position as different from the defendants in *Central Trust Co.*, *Cronan Estate*, and *CIBC Trust Corp.*, who were alerted to the mistaken payments in just over a month after receiving the funds. I also note that in *Central Trust* and *Cronan Estate*, the executors' failures to take care to avoid tax penalties – imposed by taxing authorities – were the mistakes made. I see this type of mistake as different from Mr. Vavasour's considered distribution of Ms. Penney's estate. The context in which Ms. Hendry received the funds - given to her directly by the executor of Ms. Penney's estate, who was also a lawyer, and who told Ms. Hendry that it was Ms. Penney's wish that she receive the bulk of the estate – gave her no reason to believe that the money was not lawfully hers and that she could spend it as she wished. However, I also agree with Mr. Vavasour's position that Ms. Hendry's argument only goes so far. It loses effect when consideration is given to the fact that she received notice of Mr. Vavasour's third party action while still in possession of some of the $145,780.40 mistakenly paid to her. Accordingly, when Ms. Hendry received notice of Mr. Vavasour's third party claim, she ought to have preserved the remainder of the money until the matter was resolved. I also note that Ms. Hendry had notice of Ms. Best's allegation that Mr. Vavasour had mistakenly paid her the $145,780.40 when she was served with Ms. Best's statement of claim earlier in October 2013, although return of the monies to Mr. Vavasour was not demanded in that suit. In the result, I accept that Mr. Vavasour has established that there is no juristic reason why Ms. Hendry should not be ordered to indemnify him to the extent of monies from the $145,780.40 that she still possessed when she received notice of his third party claim.

[132] The date on which Ms. Hendry was served with the third party claim is not discernable from the record. However, the record does show that an

affidavit of service respecting the third party claim was filed with the Supreme Court, General Division on November 19, 2013. Giving Ms. Hendry the benefit of any time between when the third party claim was served on her and when the affidavit of service was filed with the Court on November 19, 2013, I will use November 19, 2013 as the date from which to calculate the amount of money she had remaining from the $145,780.40.

[133] The evidentiary record of Ms. Hendry's bank statements and her related expenditures of the money goes only to November 6, 2013. It shows that on November 6, 2013, the balance in her bank account was $43,429.35. From this amount must be subtracted Ms. Hendry's personal funds, as well as other monies not reimbursable to Mr. Vavasour.

[134] The record shows that Ms. Hendry had $497.53 in her account before she deposited the $145,780.40 cheque on October 2, 2013, and that she received regular monthly deposits to her bank account from Canada Pension Plan in the amounts of $248.94 during 2013 and $244.54 during 2012, and from Manulife in the amount of $163.42 from the time from when she deposited the $145,780.40 until November 6, 2013. (Although Ms. Hendry's bank statements between February 25, 2013 and May 31, 2013 are missing from the evidentiary record, given the consistent history of the Canada Pension and Manulife deposits I would add these same amounts to the total CPP and Manulife deposits for the missing months). I would also add to the total that must be subtracted from Ms. Hendry's bank balance the additional amount of $412.36 for a CPP and a Manulife deposit that may have been made between November 6, 2013 and November 19, 2013, as well as $1,792.11 for any additional expenditures of the money Ms. Hendry may have made between November 6, 2013 and November 19, 2013 for which we do not have records. (This amount is based on four two-week averages of expenditures made in the periods immediately preceding November 6, 2013.) All of these amounts total $8,049.48, which when subtracted from Ms. Hendry's bank balance on November 6, 2013, leaves $35,379.87, which can be said to represent the amount of money Ms. Hendry possessed of the money mistakenly paid to her by Mr. Vavasour when she was notified of his mistake and which she must reimburse. I would therefore allow Mr. Vavasour's third party claim against Ms. Hendry in the amount of $35,379.87.

Judicial or Legislative Reform

[135] I have had the benefit of reading my colleague's concurring decision in which she proposes the Court modify the law respecting application of the

doctrine of ademption in this province. The proposal is that the doctrine would not apply to a specific bequest whose subject property is not in a testator's estate at death "where the asset which is the subject matter of the specific bequest [has been] disposed of by a third party without the testator's knowledge and at a time when the testator lacks capacity to amend her will to make a substitute gift." With respect, I do not agree that the Court ought to do this.

[136] I appreciate that the facts of this case are unique in that they are different from the facts in the cases referenced in this decision. And, I appreciate that the correct legal outcome in this case may be regarded by some as one of those harsh outcomes to which the Judge referred. However, for the reasons that follow, I am of the view that it would not be appropriate for this Court to alter application of the doctrine of ademption as proposed.

[137] I begin by referencing Iacobucci J.'s comments in *R. v. Salitoro*, [1991] 3 S.C.R. 654, at 670 (S.C.C.), to the effect that the judiciary should confine itself to making incremental changes necessary to keep the common law in step with the dynamic and evolving fabric of our society, and McLachlin J.'s comments in *Bow Valley Huskey v. Saint John Shipbuilding*, [1997] 3 S.C.R. 1210 (S.C.C.), that the judiciary should not intervene when proposed changes have "complex and far-reaching effects" and would set "the law in an unknown course whose ramifications cannot be accurately gauged" (para. 93). In my view, the proposed modification is much more than an incremental change to the common law. Rather, I see it as significantly altering the substantive law of wills which could cause serious implications to existing rights and confusion and uncertainty in the future.

[138] Carving out the proposed anti-ademption provision in the context of this case would alter the long-standing principle that a testator's intentions are to be determined from the words within the four corners of a will. The intentions of testators would be altered not only with respect to the specific bequest in issue, but also with respect to other bequests in the estate from which a substitute gift must be found, as explained in paragraphs 51-52 above. Finding a substitute gift within an estate for a beneficiary whose gift no longer exists means taking a property from another beneficiary's bequest within the estate. Avoiding this problem is the principal reason for the doctrine, as explained. As well, finding and taking a substitute gift from other property within a testator's estate raises the issue of prioritizing beneficiaries' interests within an estate, and invites the notion that beneficiaries of specific bequests that otherwise would have adeemed take priority over beneficiaries of bequests of residue, which is a notion heretofore unknown to wills law.

[139] My colleague suggests that extrinsic evidence may be considered respecting whether the testatrix intended a substitute gift regardless of whether such an intention is found in the language of the will. Extrinsic evidence in wills law is only admissible if it relates to circumstances existing at the time the will was made, and even then, only where the language in the will is ambiguous. Use of extrinsic evidence in the circumstances my colleague proposes would be a significant departure from existing law.

[140] I must also comment on one of my colleague's qualifying circumstances for her proposed modification, that being that anti-ademption is justified because a testator cannot alter the will due to incapacity. Testators always have the opportunity to make provision for substitute gifts while enjoying legal capacity, but especially when they make their wills. That is one of the assumptions on which the doctrine of ademption is based (see para. 50 above). In this case, Ms. Penney had the opportunity when she made her will to provide a substitute gift for Ms. Hendry in the event her house were no longer in her estate when she died. A testator knows that there is always a risk that property which is the subject of a specific bequest may not be in a testator's estate at death, just as there is always a risk of incompetency in life, especially in later life.

[141] The facts of this case bring these issues into focus when one considers what Mr. Vavasour would have done if there had been less than $145,780.40 in Ms. Penney's estate when she died. Would he have given all of the money in the estate to Ms. Hendry? What about Ms. Penney's bequest of the residue of her estate to Ms. Best? Would Ms. Best's interest as a beneficiary disappear? What if the residue was worth more than the house when Ms. Penney made her will? Residue is also an intended gift, and can constitute more or less than the value of a specific gift.

[142] More generally, is residue to be treated as "whatever is left over if anything is" and secondary in status to other gifts? What if all gifts in a will are specific and one of them does not exist at the time of death? Does that mean the other specific gifts have to be sold and the proceeds then divided among all beneficiaries? If all of the specific gifts must be sold and the proceeds divided, that would mean that all of the testator's intentions would be thwarted instead of just the one that adeemed. Would the divisions be equal or in proportion to the value of each specific bequest? How can property which no longer exists be evaluated? Would it matter if the property of the specific bequests are family heirlooms of more value to the named beneficiaries than buyers at an estate sale? How would guardians be meant to act regarding the new law? Do they always know the contents of a testator's will? How are they to determine which assets

in an estate are to be sold if funds are required for the care of the testator, or for other good reason? In my view, the proposed modification would leave these issues dangling and replace existing certainty with uncertainty, doubtless fostering litigation respecting the interpretation of wills made on the basis of former law, the intentions of testators, and the interests of beneficiaries named in wills already written.

[143] I am not aware of any authority from a common law jurisdiction which altered application of the doctrine of ademption by way of judicial reform. The law which my colleague cites in support of her proposition is legislative law (*Wills, Estates and Succession Act*, S.B.C. 2009, c. 13, of British Columbia), not judge-made law. British Columbia is one of only two Canadian jurisdictions which have legislated changes to the application of the doctrine of ademption. Ontario is the other. The British Columbia legislation was proclaimed in 2014. It followed the release of a report entitled *Wills, Estates and Succession: A Modern Framework* (BCLI Report No. 45), published by the British Columbia Law Institute in 2006, which addressed anti-ademption. It is apparent that the comprehensive report was the product of considerable work and study.

[144] In 1996, the province of Ontario passed an amendment to the *Substitute Decisions Act*, 1992, S.O. 1992, c. 30, which also included anti-ademption provisions. A cursory review shows that application of its anti-ademption provisions is restricted to certain precise circumstances and also restricted as to where in an estate substitute gifts may be found. While I am unaware of the work and study that informed the passing of the Ontario legislation, the level of detail in the legislation addressing anti-ademption suggests it was considerable.

[145] Both the British Columbia and Ontario legislation include transitional provisions related to how and when application of the anti-ademption provisions work. Transitional provisions respecting when the proposed modification would take effect and whether it would apply prospectively, retroactively or retrospectively, as well as transitional provisions providing guidance for guardians, executors and those exercising powers of attorney, are in my view indicated. Such is not achievable within the context of this decision. This circumstance alone shows that work, study, and appropriate notification to the legal community and members of the public are indicated before any modification is made to the existing law.

[146] It is my view that the thorny questions and other complexities raised by the proposed anti-ademption law must be carefully thought through and a framework for addressing them developed before any modification is made to

the application of the doctrine of ademption. Further, it is my view that this task is the province of the legislature, and not the province of a court which is seeing the issue through the lens of one particular case. The legislature is better positioned to study and consider these issues in a comprehensive way − through its committee system, through its ability to commission reports from legal scholars skilled in estate law, and through its ability to hear from interested parties like lawyers practicing estate law, professional trustees, charities who often are beneficiaries of estates, and ordinary members of the public who intend to bequeath their property on death by will.

[147] I add that I see this Court's modification of the common law respecting occupier's liability in *Stacey v. Anglican Churches of Canada* (1999), 182 Nfld. & P.E.I.R. 1 (Nfld. C.A.), as very different. The modification did not involve complexities, or affect existing rights, and it was only to be applied prospectively. By contrast, the proposed ruling in this case would have substantial impact on the intentions of testators as expressed in their existing wills, the rights of beneficiaries which come into play upon a testator's death, and decisions made by guardians in reliance on the current law. There may even be liability concerns for guardians who have already disposed of an incompetent testator's property in good faith and according to law.

[148] I make a final comment. The proposed modification is posited to be for the purpose of reflecting change in the social, moral and economic fabric of our society, or keeping the common law in step with the dynamic and evolving fabric of our society. I agree that the common law must keep pace with modern society – just as the living tree doctrine in constitutional law provides. However, I see nothing about the social, moral and economic fabric of our society that has evolved such that modification to application of the doctrine of ademption is required. Rather, the proposed modification, as I see it, is for the purpose of remedying its occasional harsh effect. While this may be a laudable objective warranting consideration, that consideration should take place, like it did in the only two Canadian provinces whose legislation has addressed the issue, through the legislative process. However desirable such modifications may be, they should be left to the legislature, as Iaccobucci J. stated in *Salituro*, at 670.

DISPOSITION

[149] In the result, I would allow Ms. Best's appeal against Mr. Vavasour in the amount of $145,780.40 and I would deny Mr. Vavasour's contributory

negligence claim against Ms. Best. I would allow Mr. Vavasour's third party claim against Ms. Hendry in the amount of $35,379.87.

COSTS

[150] I would vacate all costs awards in the Court below. I would award Ms. Best her costs against Mr. Vavasour for one counsel on Column 3 in this Court and in the Court below.

[151] While Ms. Hendry could be said to be successful in defeating Ms. Best's claim in both this Court and the Court below, I do not consider it appropriate to order Ms. Best to pay Ms. Hendry's costs in either Court. Ms. Hendry's success was not as a result of this Court endorsing the Trial Judge's reasoning respecting the dismissal of Ms. Best's claim against Ms. Hendry as indicated in paragraph 106 above. Accordingly, I would make no order that Ms. Hendry receive costs from Ms. Best in this Court or the Court below.

[152] Mr. Vavasour has been successful in establishing liability respecting his third party claim against Ms. Hendry, and partially successful in his claim for damages. I would award him his Column 3 costs respecting his third party claim against Ms. Hendry in this Court and in the Court below.

_____

L. R. Hoegg J.A.

I Concur:_____

F.P. O'Brien J.A.

Concurring Reasons of Butler J.A.:

Introduction

[153] I agree with my colleagues on the disposition of this appeal.

[154] However, I wish to address the Judge's suggestion that it would be appropriate to carve out a narrow exception to the doctrine of ademption in the circumstances of this case.

[155] To explain, the Judge identified the doctrine of ademption and recognized that some jurisdictions had enacted legislation to avoid the potential injustice that can result from its strict application. Specifically, she noted that such legislation could address the issue of someone other than the testator disposing of the testator's property (para. 36). As an example, she cited subsections 48(2) and 48(3) of British Columbia's *Wills, Estates and Succession Act*:

> 48(2) If property that is the subject of a gift in a will is disposed of by a nominee, the beneficiary of the gift is entitled to receive from the will-maker's estate an amount equivalent to the proceeds of the gift as if the Will had contained a specific gift to the beneficiary of that amount.
>
> 48(3) Subsection (2) does not apply if:
>
> (a) The disposition is made to carry out instructions given by the will-maker at the time when the will-maker was legally capable of giving instructions, or
>
> (b) A contrary intention appears in the will.

[156] While it was not referenced in her decision, a review and application of these provisions in circumstances akin to the facts of this case, can be found in *Forbes v. Millard Estate*, 2017 BCSC 361.

[157] In the absence of such legislation in Newfoundland and Labrador, the Judge concluded that the unique circumstances of this case made it appropriate to "carve out a narrow exception to the strict application to the doctrine" because its application would result in the thwarting of the testator's intention (paras. 39-40). However, ultimately the Judge found it unnecessary to rule on the ademption issue because she concluded that the parties agreed to put aside their respective claims to entitlement under the will and to accept the distribution agreement proposed by the Executor (para. 41).

The Common Law Rule of Ademption by Conversion

[158] A will is required to be interpreted within the four corners of the document and without extrinsic evidence of the testator's intent (*Doyle Estate*, at para. 29, citing *Feeney's Canadian Law of Wills*, 3rd ed., Vol. 2 (Toronto: Butterworths, 1987) at 5-6, and *Sinnott Estate,* at para. 17).

[159] There was no ambiguity in the Will; the testator's house and contents were a specific bequest to Marie Hendry and there was no substitute gift

referenced. By the time of the testator's death, the house had been sold. On these facts the doctrine of ademption would apply.

[160] I adopt the description of the doctrine found in *Wood Estate*, at para. 1, where the British Columbia Court of Appeal stated:

> This appeal concerns the doctrine of ademption by conversion — a rule of the law of wills whereby a specific bequest "adeems", or fails, if at the testator's death the specified property is not found among his or her assets — either because the testator has parted with it, or because the property has "ceased to conform to the description of it in the will", or because the property has become wholly or partially destroyed. (J. MacKenzie, ed., *Feeney's Canadian Law of Wills* (4th Ed., loose-leaf 2000), at section 15.2). The doctrine applies as a matter of law, irrespective of the testator's intentions in the matter, although his or hers intentions are clearly relevant to the anterior question of whether the gift in question is a "specific" legacy (and therefore subject to ademption), or a general one (not subject to ademption). The doctrine is also subject to the qualification that even if the gift in question is a specific legacy, it may be saved in some circumstances if the property has changed "in name or form only", and still forms part of the testator's property at the date of death…

[161] In *Re Wilson Estate,* the Court referenced with approval the following assumptions of the common law rule stated in the Law Reform Commission of British Columbia Report entitled "Wills and Changed Circumstances, 1989":

> This rule is based on two assumptions. First, it is assumed that a testator who makes a gift of a particular item of property does not intend to confer a general economic benefit on the beneficiary. Second, it is assumed that when property cannot be found in the testator's estate after his death, he intended to revoke the gift of it in his will.

[162] In other words, the underlying rationale of the common law rule of ademption by conversion is that, if an asset is sold and the testator does not subsequently amend her will to address the sold asset, she is presumed to have intended not to substitute the gift (*Feeney's Canadian Law of Wills*, 4th ed. (Toronto: Butterworths, 2000) at 15.1 and 15.2).

[163] The underlying rationale for the common law rule of ademption does not fit with the facts of this case and it was reasonable for the Judge to consider whether a narrow exception should be carved out. The asset, which was the subject of the specific bequest, was not sold by the testatrix; the testatrix had no knowledge of the sale and she lacked capacity to amend her will once the home was sold by her guardian. The guardian did not have the legal right to amend the testatrix's will.

Should the Common Law Doctrine be Modified?

[164] As noted in *Wood Estate*:

> [16] Predictably, a body of case-law has developed involving situations in which someone other than the testator has caused the change to occur – e.g., where corporate shares have been forcibly exchanged on an amalgamation or statutory re-organization (see in *re Jameson*, *supra*, in *re Slater*, *supra*, in *re Faris* [1911] 1 I.R. 165, in *re Leeming* [1912] 1 Ch. 828, *Re Humphreys* (1915) 60 Sol. Jo. 105, in *re Kuypers* [1925] Ch. 244, and *Re Ogilvy* (1966) 58 D.L.R. (2d) 385 (Ont. H.C.), at 391), or where a bank has closed and the testator's account is involuntarily transferred to another branch or even to a different bank (See *Koski v. Koski Estate* (1994) 3 E.T.R. (2d) 314 (B.C.S.C.).) In most such instances, the gift has been saved on the basis of a finding that the change was one in form only – although one might be forgiven for thinking that the court in each case was also making use of such a finding to prevent the testator's intentions from being frustrated by the act of another. (Cf. *Re Dupont* (1977) 79 D.L.R. (3d) 754 (Man. Q.B.), at 758-59.)

[165] However, none of these cases addressed the facts of this case and counsel were unable to locate any authorities addressing whether (in the absence of statutory provisions applicable) an ademption occurs where an asset of the estate is sold by a guardian of a mentally incompetent testator during the testator's lifetime, without the knowledge or direction or the testator and without the testator's ability to make a substitute gift.

[166] In my view this case represents an opportunity for this Court to readdress the common law doctrine of ademption by conversion in this province.

[167] In *Stacey*, this Court modified the common law in the province on the subject of occupier's liability. At paragraph 24 this Court stated:

> [24] It must be acknowledged that the reticence of trial courts in this province to move along the law of occupiers' liability may well be due to the failure of this Court to do so when given the opportunity. I think I can safely say that the Court has never been invited to carry forward the law on this issue, but in any event there is no question that we have continued to take the traditional approach. (See, e.g., *Thomson v. Newfoundland* (1994), 119 Nfld. & P.E.I.R. 217.) In my view, it is time we seized that opportunity; the question being the extent to which we are permitted to carry the law forward.
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> …
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> [27] In assessing whether this Court can or should take that definition further, one may be guided by the following statement of McLachlin J. in the case of *Bow Valley Husky v. Saint John Shipbuilding*, [1997] 3 S.C.R. 1210, at p. 1262:

> The question is whether the proposed change falls within the test for judicial reform of the law which has been developed by this Court. Courts may change the law by extending existing principles to new areas of the law where the change is clearly necessary to keep the law in step with the "dynamic and evolving fabric of our society" and the ramifications of the change are not incapable of assessment. Conversely, courts will not intervene where the proposed changes will have complex and far-reaching effects, setting the law on an unknown course whose ramifications cannot be accurately gauged: *Watkins v. Olafson*, [1989] 2 S.C.R. 750, and *R. v. Salituro*, [1991] 3 S.C.R. 654. As Iacobucci J. put it in *Salituro* (at p. 670):
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> > These cases reflect the flexible approach that this court has taken to the development of the common law. Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless, there are significant constraints on the power of the judiciary to change the law. As McLachlin J. indicated in *Watkins***,** *supra*, in a constitutional democracy such as ours it is the legislature and not the courts which has the major responsibility for law reform; and for any changes to the law which may have complex ramifications, however necessary or desirable such changes may be, they should be left to the legislature. The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.

[28] One can state in unequivocal terms that the archaic, cumbersome and often unfair nature of the law of occupiers' liability as it presently exists in this Province cries out for reform. The rules in this regard were developed initially for the protection of landowners (and occupiers), which protection is now regarded as being no less important than the protection which should be afforded to visitors to their property. As seen, the attempts to bring about reasonableness and fairness in the process have resulted in a morass of artificiality. In order to keep the law in step with the "dynamic and evolving fabric of our society" and the "changing social, moral and economic fabric of the country" - which obviously is to treat and judge all persons by the same standards - it is necessary to clearly express, in appropriate terms, the changes which have taken place, and continue to take place. To word it somewhat differently, the law of occupiers' liability is judge-made law in any event, being part of the common law, and the Court should not hesitate to make necessary adjustments to such law when it deems it necessary to do so.

[29] Thus, it appears that certain "incremental changes" are not only essential, but available. Therefore, what we would propose as the test for the evaluation of the liability of an occupier is essentially a rewording of the test set out at para. 26 above. It is that:

> An occupier's duty of care to a lawful visitor to his or her premises is to take such care as in all the circumstances is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he or she is invited or permitted by the occupier to be there or is permitted by law to be there.

[168] Relying upon *Stacey*, this Court should take a flexible approach to development of the common law and adapt it to reflect the evolving fabric of our society and changes in the law across the country.

[169] I acknowledge that the legislature has the major responsibility for law reform and changes that may have complex ramifications but what I propose is an incremental change to the law of ademption which is essentially judge – made law in any event.

[170] Further, as recognized in *Stacey*, this sort of development can be undertaken by the courts even if in other jurisdictions the reform has occurred by statute. Statutory reform in other jurisdictions may be an indicator of changing social conditions that justify intervention by the courts as well.

[171] The specific gift was disposed of by the testator's guardian and without the knowledge or consent of the testator. The other significant and related factor present in this case, was the testator's lack of capacity at the time the specific gift was sold and her inability to make a substitute gift. In my view it is the combination of these facts which supports the need to modify the law of ademption by conversion in this Province.

Conclusion on Proposed Modifications to the Doctrine of Ademption by Conversion

[172] I conclude that the doctrine of ademption by conversion in this Province has no application where the asset which is the subject matter of the specific bequest is disposed of by a third party without the testator's knowledge and at a time when the testator lacks capacity to amend her will to make a substitute gift. In such circumstances, it cannot be presumed that the testatrix did not intend a substitute gift.

[173] When this exception applies, extrinsic evidence would then be admissible to address the anterior question of whether the testator would likely have intended a substitute gift if the house was sold.

What is the effect of the Modification Proposed to the Doctrine of Ademption by Conversion?

[174] In this case there was no evidence presented to assist the Judge on the question of the testator's intent for a substitute gift. As my colleagues have noted, the Executor's testimony on his belief that Ms. Hendry was intended to be the "primary beneficiary" had no foundation because there was no evidence of the size and/or composition of the testatrix's estate when the will was prepared. The Executor could say only that when the testator entered a seniors' home in 2007 she had $66,000.00 in her bank account and that when her house sold in 2008, it generated net proceeds of $145,780.40. There was no evidence of either the balance of the account or the value of the home when the will was written in 1981.

[175] As a result, the modification that I endorse to the doctrine of ademption by conversion in this Province would have no effect on the facts of this case. The gift to Ms. Hendry could not benefit from the proposed modification and would fall to the doctrine of ademption.

[176] In these circumstances there is no need to go further and address either:

- The factual question of whether the specific bequest had changed in name or form only;
- The notion of tracing in the context of a gift, *in specie*; or
- Whether the proceeds of sale of the subject matter of the gift had been co-mingled in a manner that is more than *de minimus* or momentary.

(*Wood Estate,* at paras. 15-18).

G. D. Butler J.A.