

COURT OF APPEAL FOR ONTARIO

CITATION: Kentros v. Kentros, 2026 ONCA 546

DATE: 20260728

DOCKET: COA-25-CV-1142

Sossin, Gomery and Osborne JJ.A.

IN THE MATTER OF the Estate of Eftychia Kentros, deceased

BETWEEN

Konstantinos Kentros, personally,
and as representative of his unborn issue

Applicants (Appellant/Respondent by way of cross-appeal)

and

Manthos Kentros, personally, in his capacity as Estate Trustee of the
Estate of Eftychia Kentros, deceased and in his capacity as Trustee of
The Kentros Alter Ego Trust*, Aleka Kentros, in her capacity as
Trustee for Kentros Alter Ego Trust*, and The Children's
Lawyer, litigation guardian for the minor children Sofia Kentros
Maceirinha** and Matteo Kentros Maceirinha**

Respondents (Respondents/Appellants by way of cross-appeal*/
Respondents/Respondents by way of cross-appeal**)

Lionel Tupman, Arie Bloom and Nicole Fung, for the appellant/respondent by
way of cross-appeal

David N. Delagran and Genevieve Madill, for the respondents/appellants by way
of cross-appeal, Manthos Kentros personally, in his capacity as Estate Trustee of
the Estate of Eftychia Kentros, deceased and in his capacity as Trustee of The
Kentros Alter Ego Trust, and Aleka Kentros, in her capacity as Trustee for Kentros
Alter Ego Trust

Susan J. Stamm and Jillian Evans, for the respondent/respondent by way of cross-
appeal, the Office of the Children's Lawyer, litigation guardian for the minor child
Sofia Kentros Maceirinha

Matteo Kentros Maceirinha, acting in person¹

Heard: March 13, 2026

On appeal from the judgment of Justice Mario D. Faieta of the Superior Court of Justice dated August 5, 2025, with reasons reported at 2025 ONSC 4520, and from the costs order dated October 1, 2025.

S. Gomery J.A.:

[1] This appeal concerns a will that the drafting solicitor acknowledged did not reflect the testator's wishes. The will was missing a remainderman clause. The bequests section gave the testator's husband a life interest in two properties that the testator owned and provided that their two grandchildren should inherit the properties if her husband did not survive her for 30 days. The will did not, however, say who should get the properties at the expiry of the husband's life interest should he survive the testator for more than 30 days.

[2] Sitting as a court of construction, the application judge concluded that the testator intended to give the properties to her grandchildren whenever her husband died. He ordered that language be inserted into the will to have this effect.

[3] The appellant contends that the application judge exceeded his limited powers as a court of construction and misapplied evidentiary rules. The appellants by cross-appeal agree that the testator intended to gift the properties to her

¹ The style of cause reflects that, on the application, the Office of the Children's Lawyer acted as litigation guardian for both Sofia Kentros Maceirinha and Matteo Kentros Maceirinha. By the time this appeal was heard, however, Matteo was no longer a minor, as such, he made submissions on his own behalf.

grandchildren but argue that the application judge should have imposed a different remedy than rectification.

[4] For the reasons that follow, I would dismiss the appeal and the cross-appeal.

[5] This case reflects ongoing uncertainty in Ontario law regarding rectification after a will has been probated. The terms of the application judge's order arguably exceeded his purely interpretive role as a court of construction. Properly construed in accordance with the testator's wishes, however, the will gifts the two properties at issue to the testator's grandchildren at the termination of her surviving spouse's life interest, whenever that may be. Since the application judge's order achieves this result, there is no reason to set it aside.

[6] With respect to the evidentiary issues, the application judge did not misapply s. 13 of the *Evidence Act*, R.S.O. 1990, c. E.23, by excluding uncorroborated evidence adduced to support the appellant's and cross-appellants' claims against the testator's estate. He likewise did not err in relying on admissions against interest by would-be beneficiaries in ascertaining the testator's intentions regarding the missing remainderman clause. In the circumstances of this case, such reliance does not offend any principled rationale for the general rule against a court of construction relying on extrinsic evidence. It is furthermore not in the interests of justice to permit an appeal based on objections to evidence that the appellant either himself adduced or did not object to at first instance.

[7] The cross-appellants have not identified an error justifying this court's intervention. They recognize that the testator intended to gift the properties to her grandchildren. The alternative remedy they propose would not protect the grandchildren's interests. The application judge's costs award was based on sound principles, and there is no basis to grant leave to appeal it.

Background

[8] Eftychia ("Effie") Kentros passed away in March 2017. She was survived by her husband, Manthos Kentros, and their two children, Konstantinos ("Dino") Kentros and Aleka Kentros. Aleka has two children: Matteo Kentros Maceirinha and Sofia Kentros Maceirinha.² Dino has no children.

[9] Effie and Manthos married in 1977. In 2007, Manthos became the sole owner of a pizza restaurant that he had jointly owned for over 20 years. By that time, Dino was working at and assisting with the operation of the restaurant. In 2014, all shares of the business were transferred to him through a share purchase agreement.

[10] Effie was diagnosed with cancer in 2012. Shortly thereafter, she and Manthos signed mirror wills designating each other as their sole executor, trustee and residual beneficiary. If either Effie or Manthos did not survive at least 30 days after the other's death, the residue of the estate was to be divided equally between

² For simplicity's sake I will refer to Effie and her family members by their first names.

their children, Aleka and Dino. Effie's 2012 will did not include any specific bequests. Both 2012 wills were drafted by a solicitor, David Hurren.

[11] Effie's health declined in 2016. In early January 2017, she met with Mr. Hurren and instructed him to prepare revised wills for her and Manthos. Mr. Hurren was assisted by a law clerk, Ashley Mariage. Effie and Manthos signed their respective 2017 wills on January 13, 2017. Effie died on March 25, 2017.

[12] When she died, Effie owned two properties in Fort Erie, one on Madison Avenue and the other on Concession Road. Her 2017 will included the following provision:

BEQUESTS

I INSTRUCT MY TRUSTEE to make the following bequests and gifts:

1. To convey to my spouse, **MANTHOS KENTROS**, a life interest in my properties located 947 Concession Road and 35 Madison Avenue, in Fort Erie.
2. In the event my spouse, **MANTHOS KENTROS**, should not survive me for a period of thirty days, then to convey my properties as follows, subject to the infant trust provisions hereinbefore contained:

My property located at 35 Madison Avenue, in Fort Erie, to my grandson, **MATTEO KENTROS MAGEIRINHA**.

My property located at 947 Concession Road, in Fort Erie, to my granddaughter, **SOFIA KENTROS MAGEIRINHA**.

3. The rest and residue of my estate shall be conveyed to my spouse, **MANTHOS KENTROS** to be his absolutely.
4. In the event my spouse, **MANTHOS KENTROS**, should not survive me for a period of thirty days, then the rest and residue of my estate to the children of my daughter, **ALEKA KENTROS**, and my son, **KONSTANTINOS KENTROS**, also known as **DINO KENTROS**, in equal shares, to share and share alike, to be theirs absolutely, subject to the infant trust provisions hereinbefore contained.

[13] Effie's 2017 will unambiguously provides Manthos with a life interest in the Fort Erie properties. It clearly states that, if Manthos did not survive Effie's death for 30 days, the Madison Avenue property would be conveyed to their grandson Matteo and the Concession Road property would be conveyed to their granddaughter Sofia. In that case, the residue of her estate would be shared by Aleka's children and either Dino or his children (depending on how the phrase "to the children of my daughter, **ALEKA KENTROS**, and my son, **KONSTANTINOS KENTROS**, also known as **DINO KENTROS**, in equal shares" in paragraph 4 is interpreted).

[14] On its face, Effie's 2017 will does not, however, address who would inherit the Fort Erie properties if Manthos survived Effie for at least 30 days. In that event,

it apparently gives Manthos a life interest in the properties, while also directing that the “rest and residue” of Effie’s estate would be his “absolutely”.

[15] In Manthos’ January 2017 will, he left his entire estate to Effie if she survived him. If she did not survive him for 30 days, he left the Madison Avenue property to Matteo and the Concession Road property to Sofia (even though, when Manthos executed the will, these properties belonged not to him but to Effie). He conveyed the rest and residue of his estate to Aleka’s children and to either Dino or Dino’s children in equal shares (again, depending on how the words of that bequest are interpreted).

[16] After Effie died, Manthos seems to have taken no immediate steps to probate her will. Dino understood that he had inherited nothing under the terms of his mother’s will. He and Mr. Hurren’s law clerk, Ms. Mariage, began to date and eventually married. She left her job with Mr. Hurren in 2019.

[17] In March 2019, Dino and his numbered company started an action against Effie’s estate and Manthos to recover money Dino had allegedly loaned to Effie as well as money allegedly stolen from the restaurant business and from Dino personally.

[18] A short time later, on May 7, 2019, Manthos probated Effie’s 2017 will by obtaining a Certificate of Appointment of Estate Trustee with a Will. Taking the position that he was the sole residual beneficiary of Effie’s estate, he purported to

exercise his right under the rule in *Saunders v. Vautier* (1841), 41 E.R. 482 (Eng. Ch. Div.) to collapse the spousal trust of the two life interests in the Fort Erie properties and become their sole owner. In August 2019, he transferred the two Fort Erie properties to a trust he established, the Kentros Alter Ego Trust.

[19] The trustees of the Kentros Alter Ego Trust are Manthos and Aleka. Under the Trust's terms, the Fort Erie properties are to be conveyed to Matteo and Sofia on Manthos' death. The Trust is, however, revocable, and Manthos retains the power to remove Aleka as a trustee, rescind any and all provisions of the Trust, and to encumber or sell the Fort Erie properties.

[20] In June 2022, Dino applied for directions with respect to Effie's 2017 will and the Kentros Alter Ego Trust. Among other relief, he sought an order rectifying Effie's 2017 will "such that a missing dispositive clause be inserted". He said that this clause should provide that, should Manthos survive Effie for more than 30 days, the Madison Avenue property would be conveyed to Aleka's issue in equal shares, and the Concession Road property would be conveyed to Dino, or, if he had issue, to his issue in equal shares. In the alternative, he took the position that the Fort Erie properties should be subject to the laws of intestacy.

[21] A case management judge determined that 14 discrete issues arose from Dino's 2019 unjust enrichment action and his 2022 application for directions as

well as claims by Manthos in his pleadings. He directed that these issues should be heard together by the application judge.

The application

The parties' positions on the issues

[22] The focus of the application was the rectification issue and the legality of the transfer of the Fort Erie properties to the Kentros Alter Ego Trust, although the application judge also adjudicated the other outstanding issues.

[23] Dino's claims were opposed by Manthos, in his personal capacity, as the trustee of Effie's estate, and as a trustee of the Kentros Alter Ego Trust; by Aleka, in her capacity as a trustee of the Kentros Alter Ego Trust; and by the Children's Lawyer appointed as litigation guardian to Aleka's minor children Sofia and Matteo.

[24] With respect to the rectification issue, Manthos and Aleka took the position that Effie's 2017 will did not need to be rectified because, having survived Effie by more than 30 days, Manthos was the sole residual beneficiary of her entire estate, including the Fort Erie properties. They argued that Dino was not entitled to any relief for unjust enrichment or any relief in connection with the transfer of the properties to the Alter Ego Trust. The Children's Lawyer took the position that Effie's 2017 will should be rectified to include a term that Matteo and Sofia would each inherit one of the Fort Erie properties on Manthos' death, consistent with

Effie's bequest of the properties to them had Manthos died within 30 days of Effie's death.

[25] No party took the position that Effie's 2017 will was invalid or sought to set aside the Certificate of Appointment of Estate Trustee with a Will that Manthos obtained in 2019.

[26] Dino and the Children's Lawyer argued that Manthos' transfer of the Fort Erie properties to the Kentros Alter Ego Trust was unlawful and that he had no interest in the properties beyond a life interest.

The application judge's decision

[27] The application judge relied on this court's guidance in *Ihnatowych Estate v. Ihnatowych*, 2024 ONCA 142, 493 D.L.R. (4th) 184, which endorsed the principles set out by Justice Belobaba in *Re Estate of Blanca Esther Robinson*, 2010 ONSC 3484 ("*Robinson ONSC*"), at paras. 24-25, aff'd 2011 ONCA 493, 106 O.R. (3d) 321 ("*Robinson ONCA*"), leave to appeal denied, [2011] S.C.C.A. No. 536. The application judge instructed himself that, to correct an error in a will, he must be satisfied that the "words of the will reveal the testator's intention so strongly that no other contrary intention can be supposed": *Isard Estate v. Gunn*, 2025 ONCA 139, at para. 10, citing *Lipson v. Lipson* (2009), 52 E.T.R. (3d) 44 (Ont. S.C.), at para. 42. Relying on *Lipson*, at para. 41, he concluded that he should consider both Effie's 2017 will and evidence of surrounding circumstances, such

as “the making of the will; the testator’s property at the time of the will; the testator’s use of property; the testator’s relationship to named and potential beneficiaries; and prior wills”.

[28] The application judge determined that Effie’s 2017 will should be rectified because the evidence indicated that Effie intended to bequeath the Fort Erie properties separate from the residue of her estate, yet her will did not indicate who would inherit them if Manthos survived her for more than 30 days. He found that there was “clear, convincing and cogent evidence” that Effie “did not want the remainderman to pass to Manthos absolutely.”

[29] The application judge also found that the presumption against intestacy supported rectification: *Re MacDonnell* (1982), 35 O.R. (2d) 578 (C.A.), at p. 582. In her 2017 will, Effie purported to “give, devise and bequeath ‘her entire estate’” and that there were no words in her will suggesting that she intended to leave some part of her property undisposed.

[30] The application judge concluded that the evidence showed Effie’s intention to gift the Fort Erie properties to her grandchildren and an absence of evidence that she intended to give them to anyone else at the expiry of Manthos’ life interest:

[T]he language in gift over clause of [the] Will that gifts Sofia and Matteo is a strong indication that Effie intended that Sofia and Matteo were the intended beneficiaries of the remainderman. Finally, the evidence regarding Effie’s intentions for the Fort Erie Properties, particularly as admitted by Dino, is very strong evidence that Effie

wanted Sofia and Matteo to inherit the remainderman of the Fort Erie Properties. I find that no other contrary intention can be supposed. I find that the remainderman clause proposed by the Children's Lawyer would give effect to Effie's intentions as determined by a reading of her Will and in light of the surrounding circumstances.

[31] As a result, he ordered that Effie's will was to be rectified by adding a new paragraph 2 in the bequests clause:

In the event that my spouse, MANTHOS KENTROS should survive me for a period of thirty days then, upon the termination of his life interest, to convey the properties as follows subject to the infant trust provisions hereinbefore contained:

My property located at 35 Madison Avenue, in Fort Erie to my Grandson, MATTEO KENTROS MACEIRINHA.

My property located at 947 Concession Road, in Fort Erie to my Granddaughter, SOFIA KENTROS MACEIRINHA.

[32] In effect, the application judge's order added a remainderman clause into Effie's 2017 will, making Aleka's children the beneficiaries of the Fort Erie properties upon the termination of Manthos' life interest.

[33] Unsurprisingly, given his conclusion on the rectification issue, the application judge held that Manthos had not been entitled to take ownership of the properties and transfer them to the Kentros Alter Ego Trust:

Manthos knew the Will had a drafting error in that it did not provide for the properties to be gifted to Sofia and Matteo after his death. ... Given that he is Effie's Estate Trustee, and thus a fiduciary, Manthos should not have

taken advantage of this drafting error by taking ownership of the Fort Erie Properties relying on the rule in *Saunders v. Vautier*.

[34] The application judge declared the transfer of the Fort Erie properties to the Alter Ego Trust to be void *ab initio* and ordered that they be returned to Effie's estate to be held in accordance with her 2017 will as rectified. In doing so, he rejected Manthos' argument that his life interest in the Fort Erie properties and the "rest and residue" clause should be merged.

[35] The application judge dismissed all other claims and defences advanced by the parties. He rejected Manthos' argument that Dino's claim for rectification was barred either due to the passage of time or because Effie's estate had been fully administered. He found that Dino's claims for unjust enrichment and proprietary estoppel were time-barred and in any event not made out. He rejected Manthos' claim that he had retained a beneficial interest in 50% of the Fort Erie properties when he transferred them to Effie in 2007. None of these determinations is contested in this appeal and cross-appeal.

[36] In a subsequent endorsement, the application judge found that Dino's reasonable legal costs were \$120,000. He ordered the Estate to pay \$40,000.00 of these costs and ordered Manthos and Aleka to jointly pay \$10,000.00. He found that Aleka and Manthos' reasonable costs were also \$120,000. He ordered the Estate to compensate them for \$60,000 but declined to order Dino to pay any costs to them. He found that the Children's Lawyer was entitled to recovery of its costs

of approximately \$30,000. He ordered the estate and Dino to each contribute \$14,000 to these costs.

The parties' positions on the appeal and cross-appeal

[37] Although Dino's factum identifies four issues on appeal, he effectively makes three broad submissions:

- (i) The application judge exceeded the scope of the court's power of rectification by adding a remainderman clause in favour of Matteo and Sofia;
- (ii) The application judge misconstrued or misapplied s. 13 of the *Evidence Act* in ruling that some evidence was inadmissible;
- (iii) The application judge improperly relied on direct extrinsic evidence in ascertaining Effie's intentions with respect to the Fort Erie properties.

[38] If Dino's appeal is granted, he asks this court to set aside the application judge's rectification order and substitute an order adding a remainderman clause in favour of Dino and Aleka on the basis of a partial intestacy that excludes Manthos. In the alternative, Dino proposes a remainderman clause in favour of any children of Dino and Aleka when Manthos dies or, if there are no children alive, then to Dino and Aleka. In the further alternative, he seeks a new hearing.

[39] In their cross-appeal, Manthos and Aleka concede that the application judge was correct in finding that Effie intended for Sofia and Matteo to receive the

Fort Erie properties on Manthos' death. They argue, however, that the application judge ordered the wrong remedy. He should have refused rectification and instead acknowledged that the Kentros Alter Ego Trust both respects Effie's intentions and better protects Matteo and Sofia's interest in the properties. They also contend that the application judge, in exercising his discretion to order costs, relied on wrong principles and gave insufficient weight to the offers to settle made by Manthos and Aleka.

[40] In his oral submissions, Matteo said that his grandmother's 2017 will should not be altered. Although he did not say so explicitly, I understood that he supports the position taken by his grandfather Manthos and his mother Aleka.

[41] The Children's Lawyer, who now acts solely on behalf of Sofia, contends that both the appeal and cross-appeal should be dismissed, but supports Manthos and Aleka's submission that the Estate should not have been ordered to pay costs.

The nature of the application court's role

[42] Before turning to the grounds of appeal and cross-appeal, it is important to underline that the application judge was sitting as a court of construction, as opposed to a probate court. This is an important point, as it informs both what the application judge could do and what evidence he could rely on for the purpose of interpreting Effie's 2017 will.

[43] In Ontario, probate is effected through the issuance of a certificate of estate trustee: *Elizabeth Casey Cooke Family Trust v. Dioguardi*, 2026 ONCA 85, at para. 15; *Neuberger Estate v. York*, 2016 ONCA 191, 129 OR (3d) 721, at para. 69, leave to appeal refused, [2016] S.C.C.A. No. 207. Although the Ontario Superior Court of Justice now sits as both the court of probate and the court of construction, these two jurisdictions are distinct: they have separate origins, exercise different functions and are subject to different evidentiary rules: *Neuberger Estate*, at para. 67, citing *Otis v. Otis* (2004), 7 E.T.R. (3d) 221 (Ont. S.C.), at para. 22; *Panda Estate (Re)*, 2018 ONSC 6734, 42 E.T.R. (4th) 139, at para. 17; *Nordlander v. Nordlander Estate*, [1998] O.J. No. 4039 (Gen. Div.), at paras. 17-22; see also, *Ali Estate (Re)*, 2011 BCSC 537, 69 E.T.R. (3d) 203, at paras. 21-24, discussing the Law Reform Commission of British Columbia's *Report on Interpretation of Wills*, LRC 58 (Victoria, 1982) at p. 1.

[44] Probate is “the court procedure by which a will is proved to be valid or invalid”, it also refers to “the court order certifying that particular writings constitute a deceased’s will and that those persons named as estate trustees have the authority to act in relation to the testator’s estate”: *Neuberger Estate*, at para. 66. The court of construction interprets the contents of a will as probated: Albert H. Oosterhoff et al., *Oosterhoff on Wills*, 9th ed. (Toronto: Thomson Reuters, 2021), at pp. 480-81.

[45] Justice Brown succinctly summarized the two distinct questions that a probate court and a court of construction must answer in sequence: “(i) [w]hat document constitutes the will of which the testatrix knew and approved? (ii) [w]hat does the language of the will mean?”: *Balaz Estate v. Balaz*, [2009] O.J. No. 1573 (Ont. S.C.), para. 10.

[46] Manthos obtained a Certificate of Appointment of Estate Trustee with a Will on May 7, 2019. Dino filed his application for directions over three years later, in June 2022. In his original notice of application, he sought an order revoking Manthos’ certificate of appointment as estate trustee or setting aside the grant of probate. He later amended his notice of application, however, to eliminate the request for this relief. No party to the application took the position that Effie’s 2017 will was invalid or sought to set aside the Certificate of Appointment of Estate Trustee with a Will that Manthos obtained in 2019.

[47] Since a certificate of appointment of estate trustee had been issued at the time of the application, and the court was not asked to revoke or return the certificate, the application judge could only have been acting as a court of construction.

The application judge’s interpretation of Effie’s 2017 will was available to him in the exercise of his role as a court of construction

[48] Dino contends that the application judge exceeded the proper scope of the court’s power by adding a remainderman clause to Effie’s 2017 will. He does not

take issue with the application judge's summary of the relevant legal principles in *Ihnatowych, Robinson, Lipson and Isard Estate*. He argues, however, that the application judge departed from these principles by speculating about Effie's intentions and that he effectively rewrote her 2017 will.

[49] Absent an extricable error of law, the interpretation of a will in light of its surrounding circumstances is subject to review only for palpable and overriding error: *Trezzi v. Trezzi*, 2019 ONCA 978, 150 O.R. (3d) 663, at para. 15. I do not find any such error here.

Relevant legal principles

[50] When asked to interpret a will, a judge's task is to determine the testator's actual or subjective intention regarding the disposition of their property: *Trezzi*, at para. 13; *Ross v. Canada Trust Company*, 2021 ONCA 161, 458 D.L.R. (4th) 39, at para. 36. The court, sitting in the place of the testator, "assumes the same knowledge the testator had, at the time of making the will, in regard to the nature and extent of her assets, the makeup of her family, and her relationship to its members": *Ross*, at para. 39. This "armchair rule" is the "over-arching framework within which a judge applies the various tools for will construction": *Ross*, at para. 41.

[51] In appropriate circumstances, a court will rectify a will to prevent the defeat of a testator's intentions, in particular, in the face of errors or omissions by the will's

drafter: *Ihnatowych*, at para. 7, citing *Robinson ONSC*, at paras. 24-25. Evidence of surrounding circumstances should be taken into account before a court reaches any final determination of the meaning of words used in the will, “even if the words, themselves, do not appear to be ambiguous or unclear”: *Zindler v. The Salvation Army et al.*, 2015 MBCA 33, 319 Man.R. (2d), at para. 14, cited approvingly by this court in *Ross*, at para. 41.

[52] A court of construction will interpret a will with a presumption against intestacy: if a will is “capable of two interpretation[s], one resulting in some or all of the property being incompletely disposed of and the other completely disposing of all of the testator’s property, it is presumed that the testator intended to dispose of [her] entire estate and did not intend to die intestate in respect of the whole or any part of the estate”: Oosterhoff, at p. 486. This presumption is especially strong if the testator purported to dispose of all of her property, for example, through a general residuary clause: Oosterhoff, at p. 486; Ian Hull and Suzana Popovic-Montag, *Feeney’s Canadian Law of Wills*, 4th ed. (Toronto: LexisNexis, 2000), at §10.75.

[53] However, “[t]he court will not give an unnatural or forced meaning to words in order to avoid an intestacy”: Oosterhoff, at p. 487. A court must find “as a matter of necessary implication that there was an omission and what the omission was”: *Kilby v. Harmer Estate*, [1965] S.C.R. 24, at p. 32, *per* Spence J. (dissenting).

[54] In Ontario, there is lingering uncertainty regarding the scope of the court of construction's remedial powers.³ It is settled law that a court of construction may disregard certain words that do not accord with the testator's intention or read in certain words as part of an interpretive exercise via incorporation so that the will does accord with the testator's intention: *Oosterhoff*, p. 264. In doing so, the court does not change the physical text of the will but rather interprets the probated will and declares its meaning: *Oosterhoff*, pp. 264, 539.

[55] Some caselaw suggests that a court of construction in Ontario may go further by ordering the insertion or subtraction of words from a probated will, as the application judge ordered here. *Lipson*, a construction case, is a notable example. Justice Pattillo stated at para. 32 that "[i]t has been long been established in Ontario that the court has the power to delete or add words to a will by necessary implication" and set out the criteria to do so. This approach in *Lipson* was cited approvingly by this court in *Ihnatowych* at para. 44, and relied on by the application judge in this case. *Lipson* was also cited by this court in *Isard Estate*.

[56] But both *Ihnatowych* and *Isard Estate* were probate cases. As already mentioned, this court affirmed in *Neuberger Estate* that the function of and evidentiary rules applicable to a court sitting in probate are distinct from those of a

³ Statutes governing wills and successions in British Columbia and Alberta explicitly permit a court, whether sitting in probate or construction, to rectify a will in certain circumstances, and to rely on extrinsic evidence to determine whether such a circumstance applies: see *Wills and Succession Act*, S.A. 2010, c. W-12.2, at ss. 26, 39; *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13, at s. 59. There is no equivalent provision in Ontario law.

court of construction. Neither this principle nor *Neuberger Estate* is mentioned in *Ihnatowych* or *Isard Estate*.

[57] None of the parties to this appeal took issue with the principles articulated in *Lipson* and *Ihnatowych*, although Dino took issue with how the application judge had applied them in this case. Ontario's jurisprudence has been criticized both in the academic literature and by the Manitoba Court of Appeal, however, for its failure to provide clear guidance on the court's powers in construction as well as the role of extrinsic evidence.⁴ In my view, either a five-judge panel of this court or legislative reform are needed to clarify the law in Ontario on these issues. Fortunately, for reasons explained below, this appeal can be resolved without such clarification.

Application of the relevant legal principles in this case

[58] The application judge found that Effie's 2017 will should be rectified.

[59] The drafting solicitor, Mr. Hurren, admitted that he accidentally failed to include a remainderman clause addressing what would happen with the Fort Erie properties if Manthos survived Effie for more than 30 days:

⁴ See Maurice Cullity, "Rectification of Wills - A Comment on the Robinson Case" (2012) 31:2 E.T.R. 127; Albert H. Oosterhoff, "The Discrete Functions of Courts of Probate and Construction" (2017) 46:3 Adv. Q. 316. See also Justice Pfuetzner's *obiter* comments in a concurring decision warning the Manitoba bar against relying on Ontario jurisprudence following *Robinson ONCA: Henderson Estate (Re)*, 2024 MBCA 95, at paras. 67-72.

The drafting solicitor, Mr. Hurren, states that he accidentally failed to include a remainderman clause in the Will. He states:

The draft Will inadvertently omitted any clause directing how the remainder interest in the two real properties would be distributed after Manthos' death. I acknowledge that I am responsible for that omission.

[60] The application judge moreover found it clear, on the language of the other terms in the bequests clause, that Effie intended to gift the Fort Erie properties separately from the rest and residue of her estate:

It makes little sense that Effie would have provided directions for a gift over clause for the Fort Erie Properties in the event that Manthos died within 30 days of her death (which was unlikely event given her terminal illness) but would not have provided direction for the gifting of her properties in the more likely event that Manthos survived her by more than 30 days. Further the residue clause is broad as it refers to "the rest and residue" of Effie's estate which suggests that the Fort Erie Properties were not to be distributed under the residue clause.

[61] He held that "Effie intended for her Will to completely deal with her entire estate" and that "[t]here is nothing in the words used in her Will that suggest that she intended to leave some part of her property undisposed and that such property would pass in accordance with the laws of intestacy."

[62] The application judge concluded that this was an appropriate circumstance for rectification "as the failure to include a remainderman for the Fort Erie

Properties is a clear mistake with the result that the Will does not completely express [Effie's] testamentary intentions.”

[63] There is no basis for appellate intervention with respect to this determination. The application judge's reasoning is sound. The omission of a remainderman clause disposing of the Fort Erie properties on Manthos' death (assuming he survived Effie for 30 days), in combination with the words of her will indicating her intention to not die intestate, gives rise to an obvious ambiguity. Even if it did not, the drafting solicitor admitted that he made a mistake in not including a remainderman clause.

[64] Having found that Effie's 2017 will contained an omission, the application judge next considered how Effie intended to dispose of the Fort Erie properties. He concluded that she intended to give them to Matteo and Sofia at Manthos' death. He reasoned as follows:

First, it was clearly Effie's intention that Manthos would not inherit ownership of the Fort Erie Properties given that: (a) the Will only provides Manthos with a life interest; (b) the Will is departure from the 2012 Will which would have given Manthos ownership of Effie's assets, including the Fort Erie Properties, on her death, (c) she changed her initial instructions to Mr. Hurren on January 10, 2017 so that Manthos would only inherit a life interest in the Fort Erie Properties; (d) she told Mr. Hurren that she did not want a future romantic partner of Manthos to benefit from the Fort Erie Properties which she worked for.

Second, Effie's will makes a specific bequest of the Fort Erie Properties to Aleka's children. The gift over clause provides that 947 Concession goes to Sofia and 35 Madison goes to Matteo in the event that Manthos does not survive Effie for a period of thirty days after her death. Dino is only mentioned in the "rest and residue" clause.

Third, Mr. Hurren's notes shown above make no specific reference to either of the Fort Erie Properties being left to Dino or his future children. It makes little sense that [sic]

Fourth, Dino admitted that Effie told him in November 2016 and about a week before she died in March 2017 that he would not be inheriting the Fort Erie Properties. It makes no sense that she would have provided instructions to the contrary in January 2017 particularly as Mr. Hurren confirmed that they specifically reviewed the beneficiary provisions.

Fifth, Manthos in his affidavit, at paras. 55 and 60, states that he and Effie agreed, after discussing it with Aleka in December 2016, that they would both like to leave the Fort Erie Properties to Matteo and Sofia because Dino had already been given ownership of the restaurant.

Sixth, Dino states that he was told by his maternal uncle, Chris Daicos, sometime after Effie's Will was executed and before her death, that the Fort Erie Properties would be given to Aleka's children.

[65] Subject to determining whether the application judge erred in relying on some of the evidence he cites in reaching his conclusion, a question I will explore later in these reasons, I see no error in his findings with respect to Effie's intentions. The evidence that the application judge accepted, together with the terms of the 2017 will, necessarily implied that Effie did not intend to give the Fort Erie properties to anyone other than Sofia and Matteo upon the termination of Manthos'

life interest. His reasoning and conclusion are consistent with the longstanding rule in *Jones v. Westcomb* (1711), Prec.Ch. 316, explained in *Re Fox's Estate*, [1937] 4 All E.R. 664 (C.A.), at pp. 664 (in the editorial note) that: "[I]f an ultimate gift is made to take effect upon the failure of a particular gift in a particular manner, then it may take effect upon the failure of that gift in another manner provided the courts is of opinion that the meaning of the testator was to include failure in that manner."

[66] Dino contends that the application judge overstepped his jurisdiction because none of the authorities he cited involved the insertion of an entirely new disposition into a will to remedy an omission, as opposed to an incomplete or ambiguous provision.

[67] I need not resolve whether *Ihnatowych*, by citing *Lipson*, endorsed that a construction court could order that words be added to a will. Although the application judge's order inserts a new paragraph in the bequests clause, he could have achieved the same result by construing Effie's will to reflect her intention without ordering any alteration of the will.

[68] Recall that paragraph 2 of the bequests provision in Effie's 2017 will states that:

In the event my spouse, **MANTHOS KENTROS**, should not survive me for a period of thirty days, then to convey my properties as follows, subject to the infant trust provisions hereinbefore contained:

My property located at 35 Madison Avenue, in Fort Erie, to my grandson, **MATTEO KENTROS MAGEIRINHA**.

My property located at 947 Concession Road, in Fort Erie, to my granddaughter, **SOFIA KENTROS MAGEIRINHA**.

[69] Without adding any words to the will, the application judge could have construed this section to apply to all scenarios where Manthos died after Effie. That would be both the scenario that is written in the will (Manthos not surviving Effie's death for a period of thirty days), and Manthos passing away at any date after Effie. This interpretation achieves Effie's clear intention to gift the Fort Erie properties to Matteo and Sofia upon the expiry of Manthos' life interest in them.

[70] The Supreme Court of Canada endorsed construing a will in this way in *Kilby*. In *Kilby*, a woman's will had a provision for her predeceasing her husband and for their simultaneous death. The will did not, however, contain a provision for her husband predeceasing her, which is what happened. Without adding words to the will, the Court construed the will to allow the simultaneous death provision to apply if the testator's husband predeceased her.

[71] I would also observe that Dino's position has changed diametrically over the course of this litigation. Before the application judge, Dino took the position that the will should be rectified to include a remainderman clause in favour of himself or his issue, if he has any, and to Aleka's issue. This is completely at odds with the

position he now takes that the rectification order exceeds the permitted scope of the application judge's authority.

[72] I conclude that this ground of appeal has no merit.

The application judge did not misconstrue or misapply the corroboration requirement in s. 13 of the *Evidence Act*

[73] Dino contends that the application judge erred in rejecting his evidence that Effie told him in 2015 that she wanted him and his children to inherit the Concession Road property. The application judge's finding on this point is as follows:

Dino states that in the Fall of 2015, Effie told Dino that she did not want Manthos' girlfriends to have any interest in the properties and that she wanted Aleka's children to receive 35 Madison and that she wanted Dino and his children to have 947 Concession for the time, effort and finances that Dino had spent while caring for her. This evidence is inadmissible under section 13 of the *Evidence Act*, R.S.O. 1990, c. E.23, as there is no independent evidence that corroborates this evidence: See *Fodazi v. Koukia*, 2023 ONSC 6260, at paras. 96-98.⁵

[74] Dino takes the position that his evidence about Effie's statements in 2015 was corroborated by Mr. Hurren's evidence as well as the evidence of his former law clerk, Ms. Mariage. The application judge said that he gave Mr. Hurren and

⁵ The application judge later rejects this same evidence, for the same reasons, in the context of his dismissal of Dino's claim for proprietary estoppel. He also found that the claim would fail even if this evidence were admissible.

Ms. Mariage's evidence little weight but did not completely reject it. Dino argues that, in light of this, the application judge ought to have weighed the corroborating elements of this evidence to determine the admissibility of Dino's evidence under s. 13 of the *Evidence Act*.

[75] I do not agree that the application judge erred in his approach to s. 13 of the *Evidence Act*. It provides that:

In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment or decision on his or her own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.

[76] As has been observed, s. 13 "addresses the obvious disadvantage faced by the dead: they cannot tell their side of the story or respond to the living's version of events": *Burns Estate v. Mellon* (2000), 48 O.R. (3d) 641 (C.A.), at para. 5. Justice Vermette summarized the nature of the corroboration required under s. 13 in *Fodazi v. Koukia*, 2023 ONSC 6260, 91 E.T.R. (4th) 84, at para. 98:

The corroboration required under section 13 should be such as to enhance the probability of truth of the witness' evidence upon a substantive part of the case raised by the pleadings... . The corroboration must be evidence independent of the evidence of the opposite or interested party, which shows that the opposite or interested party's evidence on a material issue is true. The corroborating evidence can be either direct or circumstantial. It can consist of a single piece of evidence or several pieces considered cumulatively. [Citations omitted.]

[77] The application judge found Mr. Hurren's evidence generally unreliable because it was vague and inconsistent:

I place little weight on Mr. Hurren's evidence regarding Effie's intentions. His evidence was internally inconsistent. On cross-examination, he states that he "thought Madison went to Matteo and Concession went to the granddaughter after Matt's [Manthos'] life interest was terminated" but goes on to state that "it" was going to Dino's grandchildren and if he didn't have grandchildren, then to Dino. Aside from being inconsistent, this evidence is also vague and suggests Mr. Hurren's certainty regarding his recollection of Effie's instructions may be far less than 100%. It is also inconsistent with his evidence and the evidence of others that Effie wanted the Fort Erie Properties to "skip a generation".

[78] The application judge nevertheless accepted Mr. Hurren's admission that he accidentally failed to include a remainderman clause in Effie's 2017 will and his evidence that Effie did not want Manthos to inherit the Fort Erie properties. The application judge also referred to the absence of any specific reference in Mr. Hurren's notes to either of the Fort Erie Properties being left to Dino or his future children; for reasons discussed later, it is unclear whether he relied on this evidence.

[79] It was open to the application judge to accept Mr. Hurren's evidence on some points while rejecting the balance of his evidence. The evidence accepted by the application judge does not assist Dino in his s. 13 argument. Neither Mr. Hurren's admission nor his contemporaneous notes corroborate Dino's

evidence that Effie told him in 2015 that she wished for him and his children to inherit the Concession Road property.

[80] Although the application judge charitably stated that he placed “little weight” on Ms. Mariage’s evidence, his findings about her evidence show that he found it wholly unreliable and rejected it outright:

I also place little weight on Ms. Mariage’s evidence. First, she is Dino’s spouse and can be viewed as favouring Dino for that reason. Her recollection that Dino was to be given 947 Concession or his children is entirely inconsistent with Effie’s repeated statements to the contrary made to Dino shortly before and shortly after the Will was made. This approach is also inconsistent with Effie’s intention for the ownership of the properties to skip a generation. It is also questionable how Ms. Mariage had any recollection of these details when she only learned of the lack of a remainder clause in October 2021 and was not asked to recount her recollection of the instructions given by Effie until June 2022.

[81] Dino submits that s. 13 does not operate to bar evidence but rather requires the court to weigh it in light of corroborating evidence. Although a single piece of independent evidence may not meet the corroboration requirement, multiple pieces of evidence viewed cumulatively may do so: *Brisco Estate v. Canadian Premier Life Insurance Company*, 2012 ONCA 854, 113 O.R. (3d) 161, at para. 65, citing *Sands Estate v. Sonnwald* (1986), 9 C.P.C. (2d) 100 (Ont. H.C.), at p. 119. As a result, Dino argues, the application judge was obliged to weigh the

cumulative potential corroborative value of Mr. Hurren and Ms. Mariage's evidence.

[82] The application judge instructed himself correctly on s. 13. He was aware that the corroboration requirement can be met through cumulative pieces of independent evidence, as this is mentioned in the passage in *Fodazi* that he cited. I therefore presume that he considered the cumulative weight of any evidence that arguably could have corroborated Dino's allegations of Effie's statements in 2015.

[83] Given the application judge's findings with respect to Mr. Hurren and Ms. Mariage's evidence, it is not surprising that he nevertheless concluded that Dino's evidence was not independently corroborated. The application judge simply did not find Mr. Hurren's and Ms. Mariage's evidence about Effie's intentions reliable, unless it was supported by some extrinsic evidence, such as Mr. Hurren's contemporaneous notes. This is a finding to which this court must defer.

[84] Dino also contends that the application judge's rejection of his evidence about Effie's statements in 2015 is inconsistent with his acceptance of his evidence that Effie told him in November 2016 and again in March 2017 that he would not be inheriting the Fort Erie Properties and that she intended to give them to Matteo and Sofia. Dino says that the application judge made similarly contradictory findings with respect to Manthos' evidence: based on s. 13, he rejected Manthos' evidence that Effie agreed to add his name back on title to the Fort Erie properties

once the mortgages were paid, but relied on Manthos' evidence that he and Effie agreed, after discussing it with Aleka in December 2016, that they would both like to leave the Fort Erie properties to Matteo and Sofia because Dino had already been given ownership of the restaurant.

[85] The application judge's reasons do not reveal any inconsistency.

[86] Dino's evidence about Effie's statements to him in November 2016 and March 2017 were admissions against interest and are therefore not subject to the s. 13 corroboration requirement. Dino admitted, in cross-examination, that Effie told him at the time that the Fort Erie properties "... were to go to Aleka's kids".

[87] Had this evidence been subject to s. 13, it still would have been admissible because it was corroborated. Dino secretly recorded a family conversation about Effie's will in March 2017, days before she died. In the recording, Effie says that "the boy [Dino] takes nothing" and Dino later says, to Aleka, "I don't want to take it; I want your children to have them [the Fort Erie properties]".

[88] Manthos' evidence that he and Effie agreed that the Fort Erie properties should be bequeathed to Matteo and Sofia was likewise an admission against interest, given Manthos' position that Effie's will should not be rectified. It therefore did not need to be corroborated. This contrasts with Manthos' evidence regarding Effie's alleged agreement to add his name back on title of the Fort Erie properties once the mortgages were paid. He adduced this evidence to support his resulting

trust claim against Effie's estate. Under s. 13 of the *Evidence Act*, this evidence could not be admitted absent corroboration.

[89] In my view, the application judge made no error in his applying s. 13 to the evidence. This ground of appeal fails.

The application judge's use of direct or extrinsic evidence does not give rise to a reversible error

[90] The application judge relied on direct extrinsic evidence of Effie's intent to ascertain her intention with respect to the missing remainderman clause. This evidence included the admissions by Dino and Manthos that I have already reviewed, and a further admission by Dino that, after Effie's 2017 will was executed, his maternal uncle confirmed that she had left the Fort Erie properties to Matteo and Sofia. Dino argues that there are no exceptional circumstances in this case that permitted the application judge, as a court of construction, to rely on direct extrinsic evidence from third parties aside from the drafting solicitor.

[91] In the specific circumstances of this case, I find that the application judge did not err in relying on the impugned evidence.

Relevant legal principles

[92] As noted earlier, in exercising the armchair rule, a court may consider both the terms of the will and evidence of the testator's surrounding circumstances at the time the will was made. As a general rule, however, a court of construction

cannot admit direct or extrinsic evidence purporting to prove the testator's intention: *Robinson ONCA*, at paras. 23. The underlying rationale is twofold.

[93] First, the testator's written will must be preserved as the primary evidence of their intention. The will should not be overridden by the direct evidence of third parties purporting to show the testator's intent, adduced after the testator has passed and is no longer available to contradict it.

[94] Second, the court must be wary about the reliability of such evidence. In the absence of the general exclusion of direct extrinsic evidence about a testator's intention, estate litigation would be littered with self-interested evidence from disgruntled beneficiaries claiming that they were supposed to receive certain bequests. As aptly observed by Justice Juriansz in *Robinson ONCA*, at para. 27, there would be "much uncertainty and estate litigation if disappointed beneficiaries ... could challenge a will based on their belief that the testator had different intentions than those manifested in the will."

[95] Exceptions to this general rule have been recognized. For example, extrinsic evidence may be admitted when there is an equivocation or latent ambiguity in the will, that is, the plain meaning of the words applies equally to two or more persons or things: *Robinson ONCA*, at para. 29, citing Feeney, *The Canadian Law of Wills: Volume 2 Construction*, 2d ed. (Toronto: Butterworths, 1982), at p. 56; *Spence v. BMO Trust Company*, 2016 ONCA 196, 129 O.R. (3d) 561, at para. 92, leave to

appeal refused, [2016] S.C.C.A. No. 96 (although the latter was not a wills interpretation case). Another exception arises when the drafting solicitor admits to the error in the will and can testify to the testator's instructions: *Ihnatowych*, at para. 36, citing *Robinson ONSC*, at para. 26.

Application to this case

[96] Notwithstanding the general rule against relying on extrinsic evidence to discern a testator's intention, I am not persuaded that the application judge committed a reviewable error in relying on Dino and Manthos' admissions against interest in the particular circumstances of this case. Even if I were so persuaded, Dino is precluded from advancing this ground of appeal because he either adduced this evidence or failed to object to it.

[97] The application judge noted the caution about extrinsic evidence in interpreting a will expressed by Justice Belobaba in *Robinson ONSC*, at para. 26:

Courts are more comfortable admitting and considering extrinsic evidence of testator intention when it comes from the solicitor who drafted the will, made the error and can swear directly about the testator's instructions. They are much less comfortable relying on affidavits (often self-serving) from putative beneficiaries who purport to know what the testator truly intended.

[98] The policy rationales for rejecting the evidence of a disappointed beneficiary does not apply here, however. Admitting Dino and Manthos' admissions against interest did not override the terms of Effie's written will but rather supported the

inference arising from its terms and surrounding circumstances. The extrinsic evidence was inherently reliable because it contradicted the claims being advanced by the very parties who adduced it, and because it was corroborated by the recording that Dino made of Effie's statements in 2017.

[99] I accordingly see no principled reason preventing the application judge from relying on Dino's admission that Effie told him that he would not be inheriting the Fort Erie properties and that his maternal uncle told him that the properties would be given to Matteo and Sofia. On the contrary, this was strong evidence about Effie's intentions, which confirmed the application judge's inferences based on the wording of her 2017 will.

[100] Even if the application judge erred by relying on this extrinsic evidence, however, I would not allow Dino's appeal on this ground. As Justice Laskin observed in *Marshall v. Watson Wyatt & Co.* (2002), 57 O.R. (3d) 813 (C.A.), at para. 15: "[A] party in a civil case generally should not bring an appeal on the basis of some aspect of the trial proceeding to which it did not object. For example, if no objection is made to the admissibility of evidence in a civil trial, an objection on appeal will usually be unsuccessful" (citation omitted).

[101] This rule has been consistently affirmed: see, for example, *Leader Media Productions Ltd. v. Sentinel Hill Alliance Atlantis Equicap Limited Partnership*, 2008 ONCA 463, 90 O.R. (3d) 561, leave to appeal to refused,

[2008] S.C.C.A. No. 394; *Harris v. Leikin Group Inc.*, 2014 ONCA 479, 120 O.R. (3d) 508, at para. 53; and *Hoang v. Vicentini*, 2016 ONCA 723, 352 O.A.C. 358, at para. 45. This court will relieve against the failure to object only where the interests of justice require it: *Ly Innovative Group Inc. v. Facilitate Settlement Corporation*, 2025 ONCA 194, 511 D.L.R. (4th) 725, at para. 38.

[102] Dino himself adduced the evidence of the statements made by Effie in late 2016 and early 2017, and the statement by his maternal uncle after Effie executed her will. He introduced the March 2017 recording into evidence to establish that he did not know he had an interest in the Fort Erie's properties until after Effie died. In his appeal, Dino continues to take the position that some extrinsic evidence (other statements allegedly made by Effie) should have been considered by the application judge.

[103] In the circumstances, I do not find that the interests of justice require this court to reconsider whether it was appropriate for the application judge to rely on some of Dino's own evidence or other evidence to which he did not object.

[104] Dino also argues that, in finding that Effie intended to gift the Fort Erie properties to Matteo and Sofia, the application judge erred in relying on the absence of any reference to gifting the properties to Dino or his future children in Mr. Hurren's notes. He says that this was an error because Mr. Hurren acknowledged that his notes did not reflect all his conversations with Effie.

[105] It is not clear to me that the application judge gave Mr. Hurren's notes any weight. Even if he did, this would not amount to a palpable and overriding error.

[106] The impugned passage in the application judge's reasons is incomplete. It reads: "Third, Mr. Hurren's notes shown above make no specific reference to either of the Fort Erie Properties being left to Dino or his future children. It makes little sense that [*sic*]".

[107] This passage appears after the application judge found Mr. Hurren's evidence largely unreliable. He did not, for example, rely on Mr. Hurren's notes of Effie's instructions on January 10, 2017, which stated that "Houses in Canada to Grandchildren = Sofia – 5, Matteo – 9" and "35 Madison = Matteo" and "947 Concession = Sofia".

[108] Given the application judge's failure to state a conclusion based on the notes, and his rejection of almost all of Mr. Hurren's evidence, I am not convinced that he relied on an inference arising from the notes in ascertaining Effie's intention to give the properties to Matteo and Sofia.

[109] Even if he did, however, I do not think that this amounts to a palpable and overriding error. Mr. Hurren's failure to make notes of every conversation he had with Effie did not foreclose the application judge from drawing an inference based on the notes that he did produce. He furthermore did not need to give the notes any weight in reaching the conclusion that Effie did not intend to give Dino the Fort

Erie properties, given the absence of any other admissible and reliable evidence to support this hypothetical.

[110] I again conclude that this ground of appeal cannot succeed.

The application judge did not err in finding that Manthos' purported transfer of the Fort Erie properties was void *ab initio*

[111] Manthos and Aleka ask that the application judge's order be set aside for two reasons. First, they argue that the order is impossible to fulfill because the Fort Erie properties will necessarily have to be sold to satisfy the application judge's costs endorsement requiring Effie's estate to pay some of the parties' costs. Second, they contend that the application judge should have dismissed the application and permitted the continuation of the Kentros Alter Ego Trust.

[112] No reviewable error has been identified in the application judge's determination that Manthos, as estate trustee, breached his fiduciary duty and took advantage of the drafting error in Effie's will by taking ownership of the Fort Erie properties without notice to the Office of the Children's Lawyer and by transferring the properties to the Kentros Alter Ego Trust.

[113] The application judge found that Effie's will, as rectified, gifted the Fort Erie properties to Matteo and Sofia upon the termination of Manthos' life interest. The Kentros Alter Ego Trust does not protect Matteo and Sofia's interests in the Fort Erie properties. Manthos could revoke the Trust at any time; he could remove

Aleka as a trustee without replacing her; he could rescind any and all provisions of the Trust; and he could encumber or sell the properties.

[114] The costs order does not frustrate the rectification order. The submissions by Manthos and Aleka about the practical issues flowing from the application judge's order are unsupported by any evidence. Paragraph 5 of Effie's 2017 will provides that her estate trustee could lease or encumber the Fort Erie properties:

SO LONG AS ANY REAL ESTATE OR LEASEHOLD PROPERTY forming any part of my estate remains unsold, my trustee may lease it on any terms or conditions he think fit. He may spend money to maintain and repair the property and may generally manage it in his complete discretion. My trustee may renew any mortgage or borrow money by mortgage on any of the property.

[115] The Madison Avenue could also be sold to raise funds, if Matteo consents, under the rule in *Saunders v. Vautier*. The Concession Road property could not be sold absent a successful application under the *Variation of Trusts Act*, R.S.O. 1990, c. V.1, but there is no evidence that this would be problematic. It is not at all uncommon for an estate to have to sell properties to satisfy debts and there is no evidence that Matteo or Sofia have any personal attachment to the Fort Erie properties.

[116] I would dismiss the cross-appeal.

Leave should not be granted to appeal the application judge's costs order

[117] No error of law or principle has been identified in the application judge's discretionary costs order. He correctly identified the principles governing costs awards in civil litigation generally in *Apotex Inc. v. Eli Lilly Canada Inc.*, 2022 ONCA 587, leave to appeal refused, [2022] S.C.C.A. No. 387, and in the specific context of estates litigation in *Westover Estate v. Jolicouer*, 2024 ONCA 81. He did not depart from these principles in making his order.

[118] The Children's Lawyer supports the position taken by Manthos and Aleka that Effie's estate should not be required to pay any costs because any such award will ultimately be paid from the equity of the Fort Erie properties. This will reduce the value of Matteo and Sofia's inheritance from their grandmother, even though they were successful parties on the application.

[119] The depletion of an estate's assets, to the detriment of beneficiaries, is an unfortunate and inevitable by-product of estate litigation. There is no principled reason why the estate should not bear some of the litigation costs where a flaw in the will gave rise to questions of interpretation. Effie executed a will that omitted a remainderman clause. Her estate is responsible for the costs of obtaining the court's directions with respect to the error.

[120] The application judge recognized that the estate should not pay the share of costs incurred as a result of the unreasonable positions taken by the principal parties to the litigation. Dino asked the application court and this court to interpret

Effie's 2017 will to include a remainderman in his favour, a claim that the application judge fairly described as "weak" in his costs endorsement. Manthos breached his fiduciary duty by purporting to transfer the Fort Erie properties to a trust that functionally gives his grandchildren's interest no protection, and he opposed rectification of Effie's 2017 will notwithstanding his acknowledgment in this court that it did not reflect her wishes. Aleka aligned with Manthos.

[121] The application judge's costs award was appropriate, in my view. I would not grant leave to appeal it.

Disposition

[122] I would dismiss the appeal and cross-appeal. If the parties are unable to agree on the costs of the appeal, I would grant them a period of 30 days from the release of this court's decision to each file written costs submissions not exceeding three pages in length, plus a costs outline.

Released: July 28, 2026 "L.S."

"S. Gomery J.A."
"I agree. L. Sossin J.A."
"I agree. Osborne J.A."