

CITATION: Sherman v. Sherman, 2026 ONSC 3115
COURT FILE NO.: CV-23-00000005-00ES
DATE: 20260527

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
JOSHUA JAMES ORION SHERMAN	)	
	)	Paul Adam, for the Plaintiff
Plaintiff/Responding Party	)	
	)	
– and –	)	
	)	
WILLIAM ALEXANDER GABRIEL	)	
SHERMAN	)	
	)	
Defendant/Moving Party	)	Genevieve Madill, for the Defendant
	)	
	)	HEARD: May 1, 2026

REASONS ON MOTION FOR SUMMARY JUDGMENT

MCCARTHY J.

THE MOTION

- [1] The Defendant moves for summary judgment.
- [2] The Plaintiff and the Defendant are the surviving sons of Sharon Elizabeth Sherman (“the deceased”), who died on July 21, 2018.
- [3] The deceased left a holograph will (the “will”), dated July 11, 2018, which contained the following dispositive instructions:
- My RBC investments have been transferred within this last week to my TD bank account, so I have no remaining investments. As to the funds in my TD bank account, ... my home at 1033 Crawford Road, Bracebridge, Ontario, and all the contents therein, I leave solely and completely to my son William Alexander Gabriel Sherman. I trust him to care in whatever way he sees fit to provide for his brother, Joshua James Orion [sic] Sherman.
- [4] The will has not been probated but has not been challenged.

- [5] No application for the appointment of an estate trustee has been filed.
- [6] The Plaintiff has brought a claim against the Defendant for, *inter alia*:
- 1) a declaration that the will of the deceased creates a testamentary trust in favour of the Plaintiff;
 - 2) damages for breach of trust and breach of fiduciary duty, conversion and unjust enrichment;
 - 3) relief as a dependent under Part V of the *Succession Law Reform Act*, R.S.O. 1990, c. S.26 (the “*SLRA*”); and
 - 4) various other forms of relief including injunctions, tracing orders and a declaration of a constructive trust.
- [7] The Defendant seeks summary judgment and asserts that there are no genuine issues that require a trial for the following reasons:
- a) the will does not create a testamentary trust. It includes a precatory, non-binding clause permitting the Defendant to care for the Plaintiff in whatever way he sees fit;
 - b) the will does not require interpretation. It is not ambiguous. The court need not invoke the “armchair rule” to consider the deceased’s intentions;
 - c) the Plaintiff was not a dependent at the time of the death of the deceased;
 - d) the action is statute-barred pursuant to s. 38 of the *Trustee Act*, R.S.O. 1990, c. T.23, which sets forth a two-year limitation period for bringing an action against a trustee; and
 - e) the six-month “Limitation Period” in s. 61 of the *SLRA* should apply and bar the Plaintiff from pursuing the dependency claim.
- [8] The Plaintiff opposes the motion, asserting:
- a) that neither limitation period applies because the Plaintiff’s claim is not a claim for injury to the person or the property under the *Trustee Act* and, since no grant of probate has been obtained, the six-month limitation period described in s. 61 of the *SLRA* has not commenced;
 - b) the question of whether the Plaintiff was a dependent of the deceased is a triable issue;
 - c) the will creates a trust in favour of the Plaintiff; and
 - d) interpretation of the will is required to give effect to the true wishes of the testator.

RULE 20.04

- [9] Rules 20.04(2)–(2.2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, provide as follows:

Disposition of Motion

General

20.04 (2) The court shall grant summary judgment if,

- (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or
- (b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.

Powers

(2.1) In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.
2. Evaluating the credibility of a deponent.
3. Drawing any reasonable inference from the evidence.

Oral Evidence (Mini-Trial)

(2.2) A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

- [10] The approach to be taken by Canadian courts on a summary judgment motion was set forth by the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 49:

There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

- [11] The Supreme Court went on, at para. 66, to describe the steps that should be taken by judges hearing summary judgement motions:

On a motion for summary judgment under Rule 20.04, the judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, *without* using the new fact-finding powers. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under Rule 20.04(2)(a). If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

- [12] It has long been a required component of a summary judgment motion that an opposing respondent put his or her “best foot forward.” It is not enough to say that new or better evidence will be available at trial. It is not enough to simply rely on the allegations or denials in a pleading, nor is it enough to baldly repeat the elements of the defence in an affidavit.

ANALYSIS

(i) *Testamentary Trust*

- [13] There is no genuine issue for trial as to whether the will creates a testamentary trust.
- [14] For a trust to be created, the following three characteristics must exist: 1) the language of the settlor must be imperative; 2) the subject matter of the trust property must be certain; and 3) the objects of the trust must be certain: see *Knight v. Knight* (1840), 49 E.R. 58 (Eng. Ch.); Donovan Waters, Mark Gillen & Lionel Smith, ed, *Waters’ Law of Trusts in Canada*, 4th ed. (Toronto: Carswell, 2012), at p. 140.
- [15] This three-pronged conjunctive test has long been referred to as “the three certainties.”
- [16] Language in a document or an instrument which falls short of showing an intention for the recipient to hold the property in trust is insufficient to satisfy the first prong of the three certainties test. That is the case here. The language employed is precatory. At its highest, the will’s language amounts to a wish or a request that the Defendant take care of the Plaintiff in whatever way he sees fit. The use of the words, “I trust”, do not create a binding obligation on the Defendant. The will gives the entirety of the estate to the Defendant “solely and completely”. The law is clear that “[n]o trust exists if the recipient is to take absolutely, but he is merely put under a moral obligation as to what is to be done with the property”: see Waters, at p. 140.

- [17] More than 110 years ago, in *Johnson v. Farney* (1913), 29 O.L.R. 223 (C.A.), at p. 225, the Court of Appeal for Ontario made it abundantly clear that the mere expressions of a testator's wishes should not be viewed as mandatory. The court adopted the following guidance from *In re Atkinson*, 80 L.J. Ch. 370, at p. 373:

The Court ought to be very careful not to make words mandatory which are a mere indication of a wish or a request. The whole will must be looked at, and the Court must come to a conclusion as best it can in construing, not one particular word, but the will as a whole, as to whether the alleged beneficiary is or is not a mere trustee or whether he takes beneficially with a mere superadded expression of a desire or a wish that he will do something in favour of a particular object, but without imposing any legal obligation.

- [18] The language here is similar to that used by the testator in the seminal case of *Smith v. Patterson* (1912), 4 D.L.R. 89 (Ont. H.C.J.), where a testator devised all his property to his spouse, but added that it was “to be disposed of by her as she may deem just and prudent in the interest of my family.” The Court of Appeal determined that no trust had been established in these circumstances.
- [19] In *Re Miles* (1917), 11 O.W.N. 292 (H.C.), the court found that, where property was devised to the executors, “to be by them disposed of in such manner as may in their discretion seem best”, such a gift was absolute and the language employed in the testamentary document did not create a trust.
- [20] These cases support the legal maxim that precatory language in a testamentary document, like the language used in the will in the case at bar, does not create a trust.
- [21] The Plaintiff suggests that the court should invoke the armchair rule to give effect to the true intention of the testator. In cases of ambiguity, “[t]he court puts itself in the position of the testator at the point when he or she made his or her will, and, from that vantage point, reads the will, and construes it, in the light of the surrounding facts and circumstances”: see Ian Hull & Suzana Popovic-Montag, *Feeney's Canadian Law of Wills*, 4th ed. (Toronto: LexisNexis, 2020) at §10.46.
- [22] In the case at bar, I am not persuaded that the deceased's will is ambiguous. It requires no interpretation. The testator's direction and instructions are clear. The will employs precatory but plain language. That language does not result in an ambiguity. Nor does that language create a trust. Historically, the court has resorted to the armchair rule to interpret a will only when the testator's intention cannot be ascertained from the plain meaning of the will's language: *Dice v. Dice Estate*, 2012 ONCA 468, 111 O.R. (3d) 407, at para. 37.
- [23] While the Court of Appeal for Ontario acknowledged in *Ross v. Canada Trust Company*, 2021 ONCA 161, 458 D.L.R. (4th) 39, at para. 41, that there has been a recent departure from this traditional approach in some jurisdictions, I do not read the *Ross* decision as a

mandate from the Court of Appeal to have recourse to the armchair rule in cases where the testator's intentions can be clearly ascertained.

- [24] The claim for a testamentary trust cannot be made out because the first of the three certainties is not present: the language of the testator is precatory, not imperative or binding. It follows that the Defendant was not a trustee of a trust and, therefore, there is no possibility of finding him liable for a breach of trust.
- [25] There is no genuine issue requiring a trial on this point. I am in as good a position as the trial judge to make that determination.

(ii) *SLRA – Dependency*

- [26] There is no genuine issue for trial regarding the Plaintiff's right to make a dependency claim under Part V of the *SLRA*.
- [27] There is no compelling evidence before the court that the Plaintiff would qualify as a "dependent" as defined in s. 57(1) of the *SLRA*. That section defines a dependent as the spouse, parent, child, or sibling of the deceased "to whom the deceased was providing support or was under a legal obligation to provide support immediately before his or her death".
- [28] There is no evidence that the deceased was under any legal obligation to support the Plaintiff. Indeed, such an obligation is not even pleaded in the Plaintiff's claim.
- [29] In the three-year period prior to the deceased's death, there appears to have been one interact e-transfer from the deceased to the Plaintiff for the paltry amount of \$200 in December 2017. There is evidence of a \$10,000 loan in 2007 from the deceased to the Plaintiff. The Plaintiff attempted to repay this loan, but eventually defaulted on it. Defaulting on a loan obligation does not create a dependency and there is no evidence that the loan obligation was forgiven. On the contrary, there is evidence that the deceased considered this loan to the Plaintiff to be a debt owed to her. On two occasions in 2009, the deceased sent an email to her financial advisor referring to the loan, indicating that the Plaintiff had promised to pay it back, but that he appeared to have reneged on that promise. Moreover, there is evidence that the Plaintiff made a payment on the loan in 2009. Indeed, he suggested at his discovery that he repaid as much as \$4,000 by selling some musical instruments. These transactions and the conduct which surrounded them would hardly constitute providing support, and they certainly do not establish that the deceased was providing support to the Plaintiff immediately before her death.
- [30] Finally, the evidence suggests that the Plaintiff was living independently in British Columbia between 2014 and the deceased's death. It is clear that the Plaintiff had withdrawn from parental supervision and control. Furthermore, there is no evidence before me that suggests that the deceased would have had the financial means to support anyone other than herself anyway. The uncontradicted evidence is that, immediately before her death, the deceased was experiencing financial hardship and was struggling to keep her home.

[31] The Plaintiff's emphasis on his financial means and struggles, his reconciliation with the family, the severity of his disability, the Defendant's payments to him after the death of the deceased, and the factors for calculation of a support claim, are either irrelevant or displaced. Simply put, the Plaintiff cannot establish that the deceased was providing support to him immediately before her death.

[32] The question of whether the Plaintiff was a dependent of the deceased for the purposes of a support claim under Part V of the *SLRA* is not a genuine issue that requires a trial. Again, I am in as good a position as any trial judge to make that determination on the evidentiary record before me.

(iii) Other Forms of Relief

[33] There is no evidentiary basis to ground a finding of conversion, unjust enrichment, breach of fiduciary duty or constructive trust in favour of the Plaintiff. The Plaintiff did not seriously address these allegations in either his factum or oral argument. There was no evidence led by the Plaintiff that could satisfy the recognized legal tests for these various causes of action. The court can only conclude that these allegations were merely gratuitous, speculative and superfluous. Regardless, they are completely unfounded and do not amount to genuine issues for trial.

(iv) Limitation Period

[34] In light of my findings that there are no genuine issues requiring a trial, a discussion of the applicability of the limitation period to the claims advanced is unnecessary.

SUMMARY AND DISPOSITION

[35] For the foregoing reasons, the Defendant's motion is allowed.

[36] The Plaintiff's claim is dismissed in its entirety and there shall be judgment accordingly.

[37] Should the parties be unable to settle the issue of costs or upon the form and content of any order, they may request an appearance before me through the Barrie trial coordinator.

MCCARTHY J.

Released: May 27, 2026