
CANADA / JUDGMENT

Berkner (Estate)

2017 BCSC 619

COURT

Supreme Court of British Columbia

DECIDED

13 April 2017

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2017 BCSC 619 Berkner (Estate)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Berkner (Estate),

2017 BCSC 619

Date: 20170413

Docket: 110983

Registry: Kelowna

Re: The Estate of Norman Frank Berkner, Deceased

Before: Master Wilson

Reasons for Judgment

Counsel for the Applicant:

G. White

Place and Date of Hearing:

Kelowna, B.C.

April 5, 2017

Place and Date of Judgment:

Kelowna, B.C.

April 13, 2017

- [1] Norman Frank Berkner (the "Deceased") died on February 24, 2016. He was predeceased by his spouse and left one child, the applicant, Shelley Dorothea Berkner.
- [2] The Deceased's estate plan utilized two wills, both dated January 28, 2016. The applicant is the executor under what is referred to as the Primary Will, but is not the executor under the Secondary Will as she renounced her executorship. The executor under the Secondary Will is an accountant, Mr. Robert L. Gruber.
- [3] This application is for a grant of probate of the Primary Will only.
- [4] The Secondary Will identifies those assets that comprise the Secondary Estate at paragraph 4(g) which provides as follows:

Definitions

4. In this Will:

(g) "Secondary Estate" means collectively:

(i) all Private Businesses;

(ii) any assets held in trust for me by the Private Businesses;

(iii) any beneficial interests I may have in any trust for which a Grant is not required for a transfer or realization;

(iv) any interest I may have in any real property for which a Grant is not required for the transfer or realization;

(v) all articles of personal household and domestic use or ornament belonging to me at my death for which a Grant is not required for a transfer or realization;

(vi) any amounts owing to me from my children; and

(vii) any other assets for which my Secondary Trustee determines a Grant is not required for a transfer or realization;

but excludes my property comprising my Primary Estate; provided that my Secondary Trustee may exclude an asset from being part of the Secondary Estate, in which case it shall become part of the Primary Estate;

(h) "Private Businesses" means and includes all securities of private companies or partnerships (which, without limiting the generality of the foregoing, shall include shares, bonds, debentures, notes, receivables, book entries, amounts owing to me, investments in and all other interests in private companies) I may own legally or beneficially at the time of my death and "private companies" for the purposes hereof including, but not limited to, the following:

- Berkner Egg Farms Ltd.;

(the "Company"), and any company which is a successor to the Company, or has amalgamated or as a result of any reorganization become a part thereof, and does not include any shares or other interest I may own of a publicly traded company;

[5] I understand the deceased's interest in Berkner Egg Farms Ltd. to have significant value.

[6] All of the deceased's assets that do not form a part of the Secondary Estate fall under the Primary Will. Although this application is for probate of the Primary Will, no application has been brought, and I infer no application is contemplated, for probate of the Secondary Will. The applicant applied for probate of the Primary Will by way of desk order in the ordinary course, but the Registry required that the matter be spoken to, a process contemplated by Rule 25-4(6)(b) of the Supreme Court Civil Rules.

[7] The applicant submits that she should be granted probate of the Primary Will because:

- a) a will maker is permitted to make more than one valid will;
- b) a personal representative is not required to probate a will;
- c) in the absence of any rules or legislation that prevents multiple wills or requires that all wills be probated, she is entitled to the order sought.

[8] For the reasons set out below, the applicant is granted probate of the Primary Will.

Issue 1: Is a will maker permitted to make more than one valid will?

[9] The applicant submits that a person is entitled to have more than one valid will. As an example, multiple wills may be used when a will maker has assets in multiple jurisdictions. Rather than preparing a single will and then seeking a resealing in all other jurisdictions where the deceased holds property, multiple wills may be utilized. The Canadian Estate Planning Guide (Toronto: Wolters Kluwer, 1995) (loose-leaf revision 233), ch. 10, at p. 216 states:

In a world in which individuals frequently maintain assets in different jurisdictions, the convenience of using multiple wills has long been recognized. The testator simply prepares an original will for each jurisdiction in which he or she has assets. The principal advantage is that each will can be submitted to the proper court or put into effect without any dependence on the other will(s). Where there are assets in several jurisdictions, there is no need to limit oneself to two wills. But in each case, care should be taken to ensure that the will satisfies the formalities of execution of the relevant jurisdiction. Likewise, it is necessary to ensure that one will does not accidentally deal with assets that are also dealt with under another will and thereby create a situation of conflict, presumably resulting in the provisions of the later-dated will having priority with respect to the disposition of such assets.

[10] There is no evidence that the deceased prepared two wills to address jurisdictional issues. A more likely motivation for the two wills is found in the following paragraph from the Canadian Estate Planning Guide:

Multiple wills are also used in some provinces as a means of reducing probate tax. Simply put, the basic strategy is to sequester assets that do not require probate in one will, while dealing with the remaining assets that do require probate in a second will. Of course, only the second will is probated, thereby saving probate tax on the assets covered by the primary will.

[11] The estate planning strategy of preparing two wills but only applying for probate of one of them was permitted in two Ontario cases, *Granovsky Estate v. Ontario*, 1998 CanLII 14912, 156 DLR (4th) 557, which I will refer to later, and also in *Kaptyn v. Kaptyn* (2010), 2010 ONSC 4293.

[12] Authority for permitting two wills can be found in *Astor, In the Goods of*, [1876] P.D. 150, at p. 152:

The question of incorporation in the probate of separate documents has frequently been a subject of consideration, and, I may say, a troublesome matter both to myself and my predecessors, in carrying out the jurisdiction I have now to exercise. I endeavoured to lay down the principles which should guide me in these cases In the Goods of Lord Howden (4), in which I held that where an English will ratifies and confirms a foreign will, it is right that the latter should be incorporated in the probate. In the present case, however, the testator has carefully used the clearest and strongest language to indicate his intention of keeping the English property separate from the American, and for that purpose has made the English will, which does not purport to ratify or confirm the American will, but merely expresses his desire that, if the two cannot be kept totally distinct, the English will shall be treated as a codicil to the American one. I have come to the conclusion that his wishes need not be disappointed, and that there is no reason why I should insist on the incorporation of the American will in the English probate.

[13] The *Astor* case was referred to by the Ontario Court in each of *Granovsky Estate* and *Kaptyn*, and I am satisfied that it remains good law in the absence of any rule or legislation to the contrary.

Issue 2: Is a personal representative required to probate a will?

[14] The applicant says that a grant of probate is not required as to the Secondary Will in this case. She says a grant of probate is simply confirmation by the court as to the validity of a will and confirms to third parties the authority of the executor to act on behalf of the estate, even though the authority of the executor is derived from the will itself and not the order for probate (*Romans Estate v. Tassone*, 2009 BCSC 194 at para. 30). The court held in *Romans Estate* that it was reasonable in the circumstances of that case for third parties to require that an executor obtain probate, but this is not a concern here.

- [15] The applicant refers me to s. 188 of the Business Corporations Act, S.B.C. 2002, c. 57, which she says confirms that a grant of probate is not necessarily required in order to effect a transfer of shares in a privately held company in British Columbia, and that a declaration of transmission, an original share certificate and the will are sufficient authority. This is not a matter I need to consider on this application, however.
- [16] The decision in *Astor* supports the applicant's contention that multiple wills are permitted and that probate can be granted with regard to only one of them. The Ontario Court concluded there was no requirement to apply for probate of all wills in *Granovsky*.
- [17] I have not been directed to any statute or rule that requires an application be made for a grant of probate of a will, or that would require Mr. Gruber as the executor of the Secondary Will in this case to apply for probate as a pre-condition of Ms. Berkner's application for probate of the Primary Will.

Issue 3: In the absence of any rules or legislation that prevents multiple wills or requires that all wills be probated, is the applicant entitled to the order sought?

- [18] The applicant says that since multiple wills are permitted at common law and there is no obligation on the part of Mr. Gruber to apply for probate of the Secondary Will, the applicant is entitled to the order granting her probate of the Primary Will.
- [19] In *Granovsky*, the dispute was between the administrator of the primary will and the Province of Ontario on the question of whether probate fees were payable on the entire estate. At paras. 23 and 26 of *Granovsky*, the court considered the legislative scheme in Ontario and concluded that multiple wills are permitted in Ontario, that limited grants of probate are available and there was no need to probate the second will:
23. The estate planning of having multiple Wills in the form of a Primary Will and a Secondary Will which take effect on death is, in my view, simply another example of how a careful testator plans to have her or his estate pay the least possible probate fees on death. There is no legal obligation to obtain probate and, as I have noted above, limited grants are permissible. If the directors of the private companies in which the deceased owns shares or has an interest at death do not require the formal grant from the Court to deal with the transmission of the assets and are prepared to deal with the estate trustees named in the Secondary Will, why then should the estate have to pay probate fees on those assets?
26. In my view, there is no legislative prohibition against asking the Court for a limited grant of the deceased's Primary Will and I find that there is no requirement for the Estate Trustees to submit the deceased's Secondary Will to probate or to pay probate fees on the value of the assets governed by it.
- [20] The question of probate fees is not before me on this application, and no notice of this application was provided to the Province of British Columbia.

[21] Turning to the legislation of this province, I find support for the applicant's position that she be entitled to a grant of probate over what amounts to only a portion of the deceased's estate can be found in s. 136 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13, which states:

136 A representation grant, whether or not power is reserved to another person to apply for a subsequent representation grant, gives to the personal representative exclusive authority to administer the estate or that part of the estate to which the representation grant applies in accordance with its terms.

[Emphasis added]

[22] In my view, this section contemplates that a grant may be issued for something less than the entirety of the deceased's estate.

[23] I am aware of Hanssen J.'s decision in *Pollock v. Manitoba*, 2004 MBQB 188, a case that considered *Granovsky* and concluded that a limited grant of probate of over only some of the assets that were subject to the testator's only will should not be allowed solely for the purpose of avoiding probate fees. However, I do not need to decide whether a limited grant might be appropriate here because the applicant is not seeking a limited grant but rather seeks probate over all of the assets covered in the Primary Will.

[24] It follows that Shelley Dorothea Berkner is entitled to a grant of probate of the Primary Will of Norman Frank Berkner made January 28, 2016.

"Master Wilson"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/17/06/2017BCSC0619.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/berkner-estate-2017>

Prepared on 29 October 2026 · Esheria