

CANADA / JUDGMENT

Chippett v. Seguin

2024 BCSC 1651

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Supreme Court of British Columbia

DECIDED

5 September 2024

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2024 BCSC 1651 Chippett v. Seguin

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Chippett v. Seguin,

2024 BCSC 1651

Date: 20240905

Docket: S49519

Registry: Penticton

Between:

Michelle Chippett

Petitioner

And

Garry Donald Seguin and Richard Joseph Seguin

Respondents

Before: The Honourable Madam Justice W.A. Baker

Reasons for Judgment

Counsel for Petitioner:

D. Horvath

Counsel for Garry Seguin:

P. Varga

Place and Date of Hearing:

Penticton, B.C.

August 30, 2024

Place and Date of Judgment:

Penticton, B.C.

September 5, 2024

- [1] This is a petition to prove the will of Donna Marie Wright, who passed away on November 23, 2022. Ms. Wright's final will is dated August 15, 2022, and it is this will which is disputed by one of her sons, Mr. Garry Seguin, a respondent to this petition. A second son, Mr. Richard Seguin, filed a notice of dispute with respect to the will, but did not respond to this petition. As such, when I refer to the respondent I am referring to Garry Seguin.
- [2] The Petitioner seeks the following orders:
- a) That the Court pronounce for the force and validity of the will of Donna Marie Wright, dated August 15, 2022 in solemn form of law;
 - b) Pursuant to s. 129 of the Wills, Estates and Succession Act, SBC 2009, c. 13 [WESA] a grant of probate of the will be issued to the petitioner, Michelle Chippett;
 - c) That the petitioner, Michelle Chippett, is entitled to recover costs of and incidental to this application, to be assessed as special costs and ought to be borne by the Respondent, Garry, personally or alternatively to be paid out of the estate of Donna Marie Wright, forthwith.
- [3] The respondent challenges the will on two bases. First, he submits that Ms. Wright did not have testamentary capacity at the time the will was made. Second, he submits that the petitioner exercised undue influence over Ms. Wright, such that Ms. Wright could not exercise her own independent mind in making the will.

Background facts

- [4] Ms. Wright had 5 biological sons, namely:
- a) Garry Donald Seguin;
 - b) Richard Joseph Seguin;
 - c) Byron Seguin;
 - d) Paul Seguin; and
 - e) Michael Seguin.
- [5] Both Paul and Michael Seguin are deceased.

- [6] The Petitioner is the daughter of Michael Seguin, and the granddaughter of Donna Marie Wright.
- [7] During her lifetime, Ms. Wright signed three different wills. The first on September 21, 2011, the second on January 27, 2022, and the final will on August 15, 2022.
- [8] In the original will, Ms. Wright divided the residue of her estate equally between her children.
- [9] Ms. Wright appointed the Petitioner as joint attorney with Richard Seguin on February 12, 2020. In January 2022, Ms. Wright revised her power of attorney to include Mr. Richard Seguin, the petitioner, and the petitioner's brother, William Seguin, as her attorneys. On August 11, 2022, Ms. Wright re-appointed the Petitioner as her attorney, along with her brother William Seguin. Richard Seguin was not re-appointed as her attorney at that time.
- [10] Ms. McLeod, the lawyer who drafted the January 2022 and August 2022 wills, first received instructions regarding a change to the 2011 will in December 2021.
- [11] In the January will, Ms. Wright reduced the respondent's share to \$2, and added a section explaining why this was done, indicating she understood the impact of her decision in the context of WESA. She also made the petitioner and her brother residual beneficiaries, and created specific bequests for a number of grandchildren and a daughter in law.
- [12] In the August will, Ms. Wright created a trust to hold the share of her estate to be received by Richard Seguin, with his share being distributed to him in monthly amounts, with the residue on his death to go to his children. Ms. Wright also added an additional grandchild to receive a specific bequest. No changes were made to any bequests to the petitioner.
- [13] Ms. Wright lived on her own in Osoyoos, British Columbia until August 2022 when she moved to a care facility.

Issues

- [14] The following issues are to be determined on this application:
- Was the January 2022 will executed in accordance with Section 37 of WESA?
 - Did Ms. Wright have testamentary capacity to make the Will?
 - Has the respondent rebutted the presumption of testamentary capacity?
 - Is the Will invalid as a result of undue influence?
 - What is the appropriate costs order in this case?

Was the January 2022 will executed in accordance with Section 37 of WESA?

[15] No challenge was taken by the respondent as to the requirements of s. 37 of WESA. The will was in writing, was signed by Ms. Wright in the presence of two witnesses, and two witnesses signed the will in the presence of Ms. Wright.

[16] I find that the formal requirements for a valid will have been met with respect to the will of August 15, 2022.

Did Ms. Wright have testamentary capacity to make the Will?

[17] In *Halliday v Halliday Estate*, 2019 BCSC 554, Chief Justice Hinkson confirmed that for a will to be valid, the formal requirements must be met, and testamentary capacity must be proven.

[18] The petitioner has established that the will was executed with the requisite formalities.

[19] The test to determine testamentary capacity is set out in *Schwartz v Schwartz*, (1970), 10 DLR (3d) 15 (Ont.CA), relied on and accepted by the court in *Halliday* at para 27, as follows:

The testator must be sufficiently clear in his understanding and memory to know, on his own, and in a general way (1) the nature and extent of his property, (2) the persons who are the natural objects of his bounty and (3) the testamentary provisions he is making; and he must, moreover, be capable of (4) appreciating these factors in relation to each other, and (5) forming an orderly desire as to the disposition of his property...

[20] In this case, the petitioner has advanced the following evidence in support of Ms. Wright's testamentary capacity:

- a) Ms. McLeod represented Ms. Wright in ongoing litigation involving other parties. In notes in December 2021 it appears that Ms. McLeod was engaged in a conference call with Ms. Wright, Richard Seguin and the petitioner and one other person - possibly her partner Cary Schneiderat. The first part of the notes appear to relate to the ongoing litigation. Later in the notes there is a reference to "changes to will - Gary \$2; wants to change - don't want him to get anything". There is a notation in this section of the notes that reads "Dr. Note - send letter?"
- b) On December 10, 2021, Ms. McLeod had a meeting with Ms. Wright. Her notes of this meeting disclose a concern Ms. Wright had that Garry and his wife took money from her RBC account, that Garry and his wife wanted her power of attorney, that CIBC had opened an investigation, and various other matters relating to concerns with her banking situation.
- c) On December 21, 2021, Dr. Tarr, Ms. Wright's family doctor, prepared an opinion on competency stating:

The patient is alert and orientated to time, place and person. She was able to describe in detail issues in regards her finances and the dilemma she finds herself in at present. A modified MMSE was done using the parts that one is able to telephonically not doing the more visual and manual aspects of the MMSE. The patient scored 21/21 for those parts that we were able to do telephonically indicating competency. I would be more than happy to complete the last parts of the MMSE but I don't think this will add anything further to her level of competency.

- d) On January 5, 2022 Ms. McLeod met with Ms. Wright. Her file notes state that Ms. Wright wants a new will with the petitioner and her brother as executors, setting out the various bequests to the grandchildren and daughter in law, and the \$2 for Garry. There is an arrow beside the notation regarding Garry which states "took money from account". The notes also include the addition of William (the petitioner's brother) to the power of attorney, along with the petitioner and Richard Seguin, and the creation of a representation agreement between Ms. Wright, Richard Seguin, the petitioner and William Seguin.
- e) The will was executed on January 27, 2022, along with the representation agreement, and the new power of attorney.
- f) Ms. McLeod in her affidavit stated her practice was to meet alone with clients, review the documents with them explaining each clause, and then bring in a witness. She swore that Ms. Wright was very clear as to her wishes, and she documented the wishes in her file. She swore that William Seguin brought Ms. Wright to her appointment, but he was not present when Ms. McLeod met with Ms. Wright. Ms. McLeod swore that she had no doubts as to Ms. Wright's testamentary capacity, and Ms. Wright clearly explained why she made changes to her will when she gave instructions.
- g) The file notes of Ms. McLeod between January and August 2022 reveal numerous conversations between Ms. McLeod and Ms. Wright to discuss the power of attorney and Ms. Wright's will. In July 2022, her notes reveal a period of time where Ms. Wright felt the petitioner was creating lies about Richard Seguin and his drug use, and a desire to remove the petitioner and William Seguin from the will and power of attorney.
- h) By the end of July 2022 Ms. McLeod's file notes reveal a conversation with Ms. Wright where she wanted to make changes to documents to reflect the fact that Richard Seguin can no longer have contact with Ms. Wright and that he tried to take her GIC out of the bank. The notes appear to reflect an instruction to send copies of the documents to the petitioner the following week. Ms. Wright would like the power of attorney, the representation agreement and the will updated to reflect just the petitioner and William acting together. She notes some concerns with Richard Seguin taking her car, which she wanted returned to her. She notes Ms. Wright's statement that "Gary called this morning - hollered @ her -> hung up on him". She notes Ms. Wright still wished to be cremated and be with Michael. The notes record "Gary/Richard -> \$2 or just excluded?" Finally, the notes record the instruction to send the draft to the petitioner.

- i) On August 10, 2022 Ms. McLeod's notes record another conversation with Ms. Wright. The notes record that Ms. Wright no longer thinks Richard took a GIC. The notes also record various proposed changes to the will, including changes to exclude various grandchildren, give the residue to Richard, give \$2000 to the daughter in law, change the executor to Debbie Seguin and Stephanie Seguin, or to Stephanie and Philip Seguin, and a comment that there is no notation regarding the exclusion of Byron.
- j) On August 11, 2022 Ms. McLeod had another telephone conversation with Ms. Wright. In these notes it appears the petitioner and William Seguin are added to the call. Ms. McLeod notes Ms. Wright wants her power of attorney and representation agreement changed to the petitioner and William Seguin. She notes that Ms. Wright wants William to move her.
- k) On August 11, 2022 Ms. McLeod met in person with Ms. Wright. Ms. McLeod notes they "discussed significant changes between convos", which I understand to mean that Ms. McLeod raised with Ms. Wright the different changes Ms. Wright suggested with each phone call in July and August 2022. I understand these notes to reflect a concern on the part of Ms. McLeod to ensure that she fully understood Ms. Wright's instructions.

Ms. McLeod notes that Ms. Wright told her she had a pleasant meeting with Richard Seguin but his girlfriend used drugs. The notes reflect a question "what changed" and the answer he "has not been looking after her the way he used to; level of one not what wanted". With respect to the petitioner, the notes reflect Ms. Wright's comments that the petitioner had been good to her "gets cigarettes, gets Donna [Ms. Wright] the things she needs. She is doing a good job".

- l) On August 11, 2022 Ms. Wright changed the power of attorney to the petitioner and William Seguin, changed the representation agreement to include just the petitioner and William Seguin, and changed her will to create the trust regarding Richard Seguin's share, and to add a specific bequest for Stephanie Seguin. All other clauses of the will remained the same as the January will.
 - m) As with respect to the January will, Ms. McLeod in her affidavit stated her practice was to meet alone with clients, review the documents with them explaining each clause, and then bring in a witness. She swore that Ms. Wright was very clear as to her wishes, and she documented the wishes in her file. She swore that the petitioner brought Ms. Wright to her appointment, but she was not present when Ms. McLeod met with Ms. Wright. Ms. McLeod swore that she had no doubts as to Ms. Wright's testamentary capacity, and Ms. Wright clearly explained why she made changes to her will when she gave instructions.
- [21] I am satisfied that the petitioner has established that at the time Ms. Wright gave instructions for the preparation of the August 2022 will, and at the time the August 2022 will was executed, Ms. Wright understood the nature and extent of her property, the beneficiaries of her estate, the testamentary provisions she was making, and she was capable of appreciating these factors in relation to each other. In addition, I am satisfied that Ms. Wright was capable of forming an orderly desire as to the disposition of her property.

- [22] I make these findings notwithstanding the fact that at various points in time Ms. Wright's views as to the beneficiaries and the gifts changed. A testator is entitled to explore different options, and to change her mind, at any time prior to her death. What matters is her state of mind at the time the final will instructions were given and the final will was executed.
- [23] I am satisfied on the material before me, including the numerous discussions held between Ms. Wright and Ms. McLeod from December 2021 to August 2022 as reflected in Ms. McLeod's file notes, the affidavit of Ms. McLeod with respect to her opinion on Ms. Wright's capacity at the relevant times, and the opinion of Dr. Tarr in December 2021, that the petitioner has established Ms. Wright had testamentary capacity when she made the August 15, 2022 will.
- [24] Because the petitioner has established both that the formal requirements of the will have been met and that Ms. Wright had testamentary capacity at the relevant times, a rebuttable presumption arises that Mr. Wright knew and approved the contents of the will and had the necessary testamentary capacity: *Vout v Hay*, [1995] 2 S.C.R. 876:
- [26] Although the propounder of the will has the legal burden with respect to due execution, knowledge and approval, and testamentary capacity, the propounder is aided by a rebuttable presumption. Upon proof that the will was duly executed with the requisite formalities, after having been read over to or by a testator who appeared to understand it, it will generally be presumed that the testator knew and approved of the contents and had the necessary testamentary capacity.
- Has the respondent rebutted the presumption of testamentary capacity?
- [25] Has the respondent established suspicious circumstances in the making of the August will sufficient to rebut the presumption that Ms. Wright knew and approved of the contents and had the necessary testamentary capacity?
- [26] If the respondent can establish that suspicious circumstances surrounded the making of the will, the presumption will have been rebutted and the onus shifts to the petitioner to prove on a balance of probabilities that Ms. Wright did have testamentary capacity at the time the will was made.
- [27] In this respect, I note that a general suspicion on the part of the respondent is not sufficient to establish suspicious circumstances in the making of a will. The suspicious circumstances must be established by evidence which tends to negative knowledge and approval or testamentary capacity: *Laszlo v Lawton*, 2013 BCSC 305 at para 206-207.
- [28] The respondent points to the following which he says establishes suspicious circumstances:

- a) On August 22, 2022, medical records indicate that the petitioner sought an opinion from a physician that Ms. Wright was not competent. No such opinion was obtained, but the doctor's notes do indicate that "it is not clear from speaking to Donna that she is mentally incompetent." These notes were made after the August will was made, and do not support a finding that Ms. Wright was incompetent at the time she made the August will.
- b) Various notes in Ms. McLeod's file show that the petitioner communicated with Ms. McLeod directly at times, or participated in conversations with Ms. Wright and Ms. McLeod at times. While the notes do show such interactions, I am satisfied that the notes also record many interactions between Ms. McLeod and Ms. Wright alone, where Ms. McLeod confirms and records Ms. Wright's instructions. The notes also record interactions between the respondent and Ms. McLeod, and interactions which involved Richard Seguin and Ms. Wright along with Ms. McLeod. Ms. McLeod was not cross examined on her affidavit where she confirmed her capacity assessment of Ms. Wright, and I am not satisfied that the fact that notes record interactions with the petitioner is sufficient to undermine the sworn testimony of Ms. McLeod, or is sufficient to establish suspicious circumstances.
- c) The petitioner had a power of attorney in respect of Ms. Wright. There is no evidence that the petitioner used the power of attorney in any way to benefit herself. The respondent submits that the fact of the power of attorney gives rise to the potential for domination of the petitioner over Ms. Wright. There is no evidence that the petitioner used the power of attorney to override the instructions given by Ms. Wright directly to Ms. McLeod. The fact that the petitioner held a power of attorney does not alone create suspicious circumstances.
- d) On some unspecified date, a text from "Michelle" was sent to Ms. McLeod setting out the names of the grandchildren and their specific bequests, and the bequest of \$2 to the respondent. These amounts, and the spelling of the names, appear in the January 2022 will. The respondent points out that his name and the name of his brother Byron are misspelled in both the text message and the will. While there is no evidence as to who the Michelle was who sent the text, I am prepared to accept that it was the petitioner.

I do not accept that this text message gives rise to a suspicious circumstance. The same names and amounts were confirmed by Ms. McLeod in conversation with Ms. Wright, as recorded in notes taken by Ms. McLeod on January 5, 2022. Without more, this text message could simply be a communication to the lawyer made at the request of Ms. Wright, who may not have access to a computer or cell phone texting app herself. The fact of this text message alone is not sufficient to overcome the sworn, unchallenged evidence of Ms. McLeod as to the competency of Ms. Wright and Ms. Wright's ability to give her specific instructions on her will.

- [29] I am not satisfied that the respondent has established any suspicious circumstances which would rebut the presumption that Ms. Wright had testamentary capacity and knew and approved the contents of the August will when she gave instructions for its creation or when she executed it.

Is the Will invalid as a result of undue influence?

- [30] The respondent's submissions on undue influence appear to stem from the fact that the petitioner held a power of attorney. For the reasons already expressed, I do not agree that the respondent has established the power of attorney alone is suspicious or supports a finding that the petitioner exerted any undue influence over Ms. Wright in the creation of the August will.
- [31] There is no evidence that the petitioner dominated Ms. Wright in anyway. The petitioner lived in Alberta. Ms. Wright lived independently in B.C. until after the August will was made. The petitioner was not a caregiver of Ms. Wright, and there is no evidence that the petitioner misused any funds or assets belonging to Ms. Wright.
- [32] The respondent points to the notes made by Ms. McLeod in the summer of 2022, where at one point Ms. Wright appears to characterize the petitioner as a liar, and wants her taken out of the will, but later in time the notes record Ms. Wright complimenting the petitioner on taking good care of her, getting what she wants, and buying cigarettes for her. I am unable to agree that the notes taken by Ms. McLeod which record Ms. Wright's satisfaction with the care given by the petitioner, can in any way support a finding of undue influence. The fact that Ms. Wright appeared to be satisfied with the petitioner's care in a general sense does not lead to the inference that the Mr. Wright was dependent on the petitioner, particularly where there is no evidence that the petitioner lived with or near Ms. Wright, or that Ms. Wright was dependent upon the petitioner for her daily needs.
- [33] In the hearing before me, the respondent did not refer to any of the affidavits sworn on his behalf. I suspect this is because those affidavits contain no admissible evidence which would support his position. Almost all of the paragraphs of the affidavits sworn by the respondent, his wife and someone stating she lived with Ms. Wright at some unspecified point in 2022, are inadmissible, containing hearsay, opinion, argument and speculation. I did read the affidavits in their entirety, and they contain no admissible evidence which would support a finding of undue influence.

What is the appropriate costs order in this case?

- [34] The ordinary order for costs in estate litigation is that the court will order special costs to all parties out of the estate: *Hadley Estate (Re)*, 2017 BCCA 311 at para. 47.
- [35] In *Re Charbonneau Estate*, 2021 BCSC 2571 the Court discussed the modern trend in estates litigation, holding:
- [49] Further, the modern trend in estate litigation is to carefully scrutinize the litigation and, unless the court finds there is a public policy consideration, to follow the costs rules that apply in civil litigation, which is ordinarily that the unsuccessful party pays the successful party's costs: see *Connor Estate* at para. 25 and *Hollander v. Mooney*, 2017 BCCA 238 at para. 39. Alain refused to remove the amended notice of dispute, despite having received both Ms. Hanson's file and the medical records from the Executors in October 2020. In those

circumstances, the Executors are entitled to costs from Alain for this petition to be assessed at Scale B of Appendix B to the Supreme Court Civil Rules.

- [36] Before me, the respondent asserted that costs should not be awarded against him because it took, in his view, many months to get the information he sought in order to assess the validity of the will.
- [37] However, this application was filed in January 2024, and the last affidavit in support of the petition was filed in May 2024. While the affidavit from Ms. McLeod was not sworn until May 2024, the affidavit of Ms. Schweitzer, the assistant to counsel for the petitioner, was filed in January 2024 and it included the whole file of Ms. McLeod, including an email which set out content virtually identical to the body of Ms. McLeod's May affidavit. For almost eight months the respondent had everything he needed to assess whether his opposition could be successful.
- [38] If the respondent had conceded his opposition to this petition at any point after receiving the application material, the parties would not have had to proceed to a hearing, and the respondent would not faced with a potential costs award.
- [39] In this case, the challenge by the respondent to the validity of the will was wholly unfounded. If I was to order costs against the respondent, it would be on the scale of ordinary costs. However, it is my view that the petitioner is entitled to be fully indemnified for the costs incurred in bringing this petition, in accordance with the ordinary rule in estate litigation. Therefore, I order costs of this petition on a full indemnity basis to the petitioner, payable out of the estate of Ms. Wright. While I am not prepared to order costs against the respondent personally, the respondent is entitled to no costs of this petition out of the estate.

Disposition

- [40] The force and validity of the will of Donna Marie Wright, dated August 15, 2022 is proven in solemn form of law.
- [41] Pursuant to s. 129 of WESA a grant of probate of the will is issued to the petitioner, Michelle Chippett.
- [42] The petitioner, Michelle Chippett, is entitled to recover costs of and incidental to this application, to be assessed on a full indemnity basis, to be paid out of the estate of Donna Marie Wright, forthwith.
- [43] No order for costs in favour of the respondent is made.

"W.A. Baker J."

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