

CANADA / JUDGMENT

Craig Estate (Re)

2024 BCSC 1495

COURT

Supreme Court of British Columbia

DECIDED

15 August 2024

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2024 BCSC 1495 Craig Estate (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Craig Estate (Re),

2024 BCSC 1495

Date: 20240815

Docket: P232372

Registry: Vancouver

In the Matter of the Estate of Heather Doris Craig, Deceased

Before: Associate Judge Robinson

Reasons for Judgment

Counsel for the Applicants:

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Counsel for the Respondent:

K. Smith

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Place and Date of hearing:

Vancouver, B.C.

July 23 and August 2, 2024

Place and Date of Judgment:

Vancouver, B.C.

August 15, 2024

BACKGROUND

- [1] This application arises in the context of an ongoing estate matter. The Applicants are all siblings of the deceased, Heather Doris Craig, who died on April 13, 2023, leaving a Last Will and Testament dated March 29, 2023 (the "2023 Will"). In other words, the 2023 Will was dated and executed by the Deceased roughly two weeks prior to her death.
- [2] The Application Respondent is Joyce Lee, K.C. in her capacity as the Executor of the Deceased's estate.
- [3] The 2023 Will replaced a previous Will made on September 26, 2018 (the "Prior Will"). In the Prior Will, the Deceased left the residue of her estate to her various nieces and nephews - the children of the Applicants - in equal shares. However, the 2023 Will proposes to leave the entirety of the Deceased's estate to her long-time friend.
- [4] The Applicants question whether the Deceased had the testamentary capacity at the time of executing the 2023 Will. One of the Applicants, identified as the deceased's sister, Nancy Ruth Williams, filed a Notice of Dispute on June 22, 2023, wherein she contends that the 2023 Will is invalid because:
 - a) the deceased lacked testamentary capacity at the time of making the 2023 Will;
 - b) there were suspicious circumstances surrounding the making of the 2023 Will; and
 - c) because the Deceased did not know or approve of the contents of the 2023 Will.

PRESENT APPLICATION

- [5] As originally constituted, the application sought an array of orders. However, much of the relief sought in the Notice of Application was adjourned prior to the hearing such that the present application was concerned primarily with the production of documents. In this regard, the Applicants seek an order that, within 21 days, the Application Respondent provide copies of:
 - a) One certified copy of all documents within the Application Respondent's possession or control, of the records of UBC Hospital, Vancouver General Hospital, St. Paul's Hospital, and Dr. Lim for the period beginning January 1, 2022 and ending April 13, 2023, with respect to the Deceased (the "Medical Records");
 - b) One certified copy of all documents within the Application Respondent's possession or control of the Vancouver Police Department for the period beginning December 1, 2022 and ending January 31, 2023, with respect to the Deceased (the "Police Records"); and

- c) Any and all documents in the possession or control of the Application Respondent related to the Deceased, including all correspondence, emails, text messages, notes, memoranda, reports, assessments, electronically stored data and records related to the Deceased's health, disability claim, assets and estate for the period beginning January 1, 2022 and ending April 13, 2023 (the "Respondent's Records").
- [6] The Applicants also seek the Medical Records and Police Records from the various non-party record holders, none of whom appeared or take any position in respect of this application.

FACTS

- [7] As a preliminary matter, I am compelled to address the evidence that was proffered on this application. In particular, the Applicants place primary reliance on an affidavit sworn on June 17, 2024, by Carol Lynn Craig, the sister-in-law of the Deceased and the spouse of the Applicant, Robert Lawson Craig. Ms. Craig's affidavit is problematic in several respects and I find that significant portions are inadmissible for any purpose. In this regard, Ms. Craig purports to offer expert opinion evidence on matters where her qualifications are not specified. I have disregarded that evidence, as set out in paras. 4-9, inclusive of Ms. Craig's affidavit, in its entirety. The balance of her affidavit is largely comprised of hearsay evidence and while I would be reluctant to ascribe much weight to that evidence in most cases, I note that Ms. Craig's affidavit has been augmented by a subsequent affidavit sworn by Nancy Ruth Williams. In many respects, Ms. Williams has first-hand knowledge of the matters to which Ms. Craig has deposed and she has generally adopted and agreed with the contents of Ms. Craig's affidavit. This has operated to allay my concerns, to some extent.
- [8] That said, not all of the evidence is contentious and this application is capable of being decided largely with reference to undisputed facts or with reference to the affidavit of the Application Respondent who, as noted is named as the Executor in the 2023 Will. Ms. Lee deposes that she visited the Deceased in March 2022, and learned that the Deceased was "struggling to stay on top of everyday tasks such as bill payments, reviewing her mail and changing her cat litter". Consequently, Ms. Lee agreed to visit the Deceased regularly and provide assistance.
- [9] In addition to assisting the Deceased, Ms. Lee also acted as a conduit of information between the Deceased and members of the Deceased's family. The communications between Ms. Lee and members of the Deceased's family are salient on this application. They include text messages as well as on-line discussions among a group comprised of Ms. Lee others using "WhatsApp". From this correspondence, it can be discerned that:
 - a) On December 1, 2022, the Deceased spoke with Isabel Romeral, the solicitor who would eventually draft the 2023 Will and provided preliminary instructions as to her testamentary wishes;

- b) The Deceased was admitted to UBC Hospital in December 2022, at the request of her family physician, Dr. Lim;
 - c) The Deceased sustained an injury when she fell in January 2023, and required a CT scan;
 - d) On January 19, 2023, police forcibly entered the Deceased's home and transported her to Vancouver General Hospital;
 - e) In "early February", Ms. Romeral provided a draft of the 2023 Will to Ms. Lee on the understanding that Ms. Lee would share with the Deceased;
 - f) The Deceased was admitted to hospital on February 19, 2023, after sustaining a fall;
 - g) On March 21, 2023, roughly one week before executing the 2023 Will, the Deceased was certified under the Mental Health Act, R.S.B.C. 1996, c. 288, and on that same day was described as "very confused";
 - h) On March 22, 2023, the Deceased was described as "not really herself" and "confused" with "some moments of clarity but not too much";
 - i) On March 23, 2023, the Mental Health Act certification was lifted, although the Deceased remained hospitalized thereafter;
 - j) On March 24, 2023, while still in hospital in Vancouver, the Deceased was unaware of her surroundings. When asked to specify her location, she initially said Toronto, then Montreal. On that same day, Ms. Lee described the Deceased as "not really coherent";
 - k) During a visit with the Deceased on March 25, 26 and 27, 2023, Ms. Williams observed that the Deceased was confused and incoherent;
 - l) On March 29, 2023, the Deceased executed the 2023 Will; and
 - m) On March 31, 2023, two days after executing the 2023 Will, Ms. Lee regarded the Deceased as "a bit forgetful".
- [8] The foregoing sequence of events have informed my decision. I have not given any consideration to the obviously inadmissible portions of Ms. Craig's affidavit. The sequence of events as outlined is a sufficient basis on which to dispose of the present application.

LAW

- [10] The present application has arisen in the context of a pending application by the Application Respondent for an order proving the 2023 Will in solemn form pursuant to R. 25-14 of the Supreme Court Civil Rules, B.C. Reg. 168/2009, the Applicants' rights, if any, arise pursuant to the exercise of the Court's discretion under R. 25-14(8)(g) which provides:

Without limiting any other power of the court under this or any other Part of these Supreme Court Civil Rules, the court may, on its own motion or on application, give directions concerning the procedure to be followed in any matter under this Part and, without limiting this, may give directions respecting any of the following:

(g) examinations for discovery and discovery of documents;

[11] The Application Respondent does not dispute that the Court has discretion to grant the Orders sought. Rather, the Application Respondent contends that the Court should decline to exercise its discretion in this context.

[12] In resolving this issue, I am of the view that the exercise of my discretion ought to be guided by the principles governing document production under R. 7-1. Document disclosure obligations under R. 7-1 are not limited to documents which may prove a material fact, but include documents that may assist in proving or disproving a material fact: *Biehl v. Strang*, 2010 BCSC 1391. In this context, even if the records sought by the Applicants will not, in themselves, prove or disprove the Deceased's testamentary capacity as of March 29, 2023, they ought to be produced if they may assist the trier of fact in that regard.

[13] In reaching the conclusion, I am mindful of the authority in *Jung v. Jung Estate*, 2022 BCSC 1298, where Justice Blake identified suspicious circumstances in the making of a will. In doing so, the Court held that when the formal validity of a will is established, it gives rise to a rebuttable presumption that the will-maker possessed the requisite knowledge and approval, and testamentary capacity:

[38] However, if suspicious circumstances are shown to be present either in respect of testamentary capacity then this evidentiary presumption is said to be spent, meaning it has no application. If so, the burden reverts to the propounder of the Will to prove both testamentary capacity and knowledge and approval on a balance of probabilities, which necessarily entails dispelling the suspicious circumstances raised: *Vout* at para. 27; *Laszlo* at para. 204; *Lantzus Estate*, 2015 BCSC 935 at para. 64 [*Lantzus Estate*]; *Halliday* at para. 32.

[39] The standard of proof is a balance of probabilities; however the case law makes clear that the evidence is to be scrutinized in accordance with the gravity of the suspicions raised: *Vout* at para. 24; *Lantzus Estate* at para. 64; *Laszlo* at para. 205; *Leung v. Chang*, 2013 BCSC 976 at para. 31, *aff'd* 2014 BCCA 28, leave to appeal *ref'd* [2014] S.C.C.A. No. 261 [*Leung*]; *Allart Estate v. Allart*, 2014 BCSC 2211 at para. 33 [*Allart Estate*].

[40] Suspicious circumstances must raise what has been described as a "specific and focused suspicion"; a "general miasma of suspicion that something unsavoury may have occurred" is not sufficient: *Leung* at para. 32; citing *Clark v. Nash* (1989), 1989 CanLII 2923 (BC CA), 61 D.L.R. (4th) 409 at 425 (B.C.C.A.). Such suspicions must be "well grounded" and will generally relate to circumstances (1) surrounding the preparation and execution of the will, (2) calling into question the capacity of the will-maker, or (3) tending to show that the free will of the will-maker was overborne by acts of coercion or fraud: *Vout* at para. 25; *Allart Estate* at para.

32. There is no checklist of suspicious circumstances, but one commonly occurring theme is where a beneficiary is instrumental in the preparation of the will (especially where they stand in a fiduciary position to the testator): Laszlo at para. 207.

- [14] This Court, in *Laszlo v. Lawton*, 2013 BCSC 305 dealt specifically with an issue of testamentary capacity, and held that a valid will depended on the testator having a baseline level of mental acuity sufficient to appreciate judicially delineated components of the nature and effect of the testamentary act at para. 185.
- [189] Timing is key. In general, the first relevant time that testators must have testamentary capacity is when they give will instructions; the second is when the will is executed. In recognition of the fact that faltering mental capacity is prone to fluctuate, the authorities permit variation of the degree of capacity required at these pivotal times. For example, the will of a testator who is competent to give instructions, but has lost capacity when the will is executed, may be valid so long as, at the time of execution, the testator was capable of comprehending that she was executing a will drawn in accordance with her previous instructions: *Parker v. Felgate* (1883), 8 P.D. 171; *Brownhill Estate* (1986), 1986 CanLII 6925 (NS SC), 72 N.S.R. (2d) 181 (Co. Ct).
- [190] The diminishment of mental capacity, particularly in the elderly, will frequently emerge and worsen over time. In light of that, evidence of symptoms exhibited by a testatrix both before and after the making of the will may support an inference relevant to the determination of the presence or absence of testamentary capacity at the material time: see generally, *Smith v. Tebbett* (1867), L.R. 1 P. & D. 354 at 398; *Kri v. Patterson*, [1989] O.J. No. 1817 (Surr. Ct.); *Fawson Estate (Re)*, 2012 NSSC 55; *Moore v. Drummond*, 2012 BCSC 170 at para. 47 [Moore]; *Coleman v. Coleman*, 2008 NSSC 396 [Coleman].

DISCUSSION

- [15] The foregoing authorities leave no doubt that when faced with an application for document disclosure, the most important consideration is relevancy. They also leave no doubt that medical records may be relevant to an assessment of a testator's testamentary capacity. While the records, in themselves may not establish testamentary capacity, they may assist the Court in the ultimate resolution of that issue.
- [16] In this case, the Application Respondent does not dispute the potential relevance of the Medical Records. Indeed, the Application Respondent's submissions were premised largely on demonstrating that the Deceased had testamentary capacity at all material times. That may ultimately be proven to be the case. However, this is not the issue that was before me on the present application and indeed, I make no findings with respect to the Deceased's testamentary capacity. That issue will be addressed in the context of the application to prove the 2023 Will in solemn form.

- [17] Rather, the issue before me on this application is whether the Applicants, who have availed themselves of the legal right to dispute the validity of the 2023 Will, ought to be afforded access to documents which may support or refute their legal position.
- [18] The Application Respondent also expressed concern that the present application, if granted, would give disputants unfettered access to the personal information of a deceased by simply filing a Notice of Dispute. In my view, that concern is unfounded. It is not the filing of a Notice of Dispute which makes the documentation relevant. Rather, it is the undisputed evidence concerning the Deceased's hospitalizations and the observations of persons who visited her in the hospital which renders those records relevant. These factors take the present application outside of the realm of a "general miasma of suspicion" and give rise to a genuine basis for further inquiry. There is no question in my mind that the Medical Records are relevant, and subject to certain limitations ought to be produced.
- [19] In reaching this conclusion, I am also influenced by the relative prejudices that this application involves. If I decline to order the production of the Medical Records, the Applicants will be left in an impossible position of seeking to rebut the Deceased's presumed testamentary capacity with an insufficient evidentiary record. It would render their right to dispute the validity of the 2023 Will largely illusory. On the other hand, the prejudice to the Application Respondent (and by extension the estate of the Deceased) concerns the potential intrusion to the private affairs of the Deceased. While this is not an insignificant concern, it is not a sufficient basis to overcome the rights of litigants to advance and pursue valid claims.
- [20] Although I have found that the Medical Records are subject to production, the same cannot be said in respect of the Police Records or the Respondent's Records,.
- [21] There is no reason to believe that the Police Records or the Respondent's Records will contain or disclose any information which could inform the Deceased's testamentary capacity. Insofar as the Police Records are concerned, the Applicant's presumably want details of the circumstances which led to the forcible entry into the Deceased's home in January 2023, and the observations made by officers at that time. Since the police officers are likely unable to offer any medical opinion, their observations would not be relevant or admissible on the issue of testamentary capacity. In any event, the information sought will be obtainable through the contemporaneous Medical Records. The same can be said of the Respondent's Records. There can be nothing relevant in the Respondent's Records which would not be contained in the Medical Records and to require disclosure of the Respondent's Records would be to expose potentially private communications between friends for no discernible legal purpose.
- [22] Accordingly, the present application is dismissed insofar as it pertains to the Police Records and the Respondent's Records.

[23] The application is allowed in respect of the Medical Records. However, there is no basis on which to order records dating back to January 2022. In assessing testamentary capacity, consideration needs to be given to the time at which the testator gave instructions and the time when the 2023 Will was executed. In this case, the evidence discloses that the Deceased's initial meeting with Ms. Romeral (the drafter of the 2023 Will) occurred on December 1, 2022. That is the date on which the Deceased's testamentary capacity needs to be assessed. Having regard for the fact that the Deceased was subsequently hospitalized thereafter on several occasions, it is sensible to use the date of her death, being April 13, 2023, as the end date.

CONCLUSION

[24] In summary, this application is generally allowed in respect of the Medical Records, and it is ordered that:

- a) The relief sought at paras. 2(a), 3, 4, 5, 6, 8 and 9 of the Notice of Application which related to the Medical Records is granted, subject to the qualification that the records described therein are limited to those records dated between December 1, 2022 and April 13, 2023, inclusive; and
- b) The relief sought at paras. 2(b), 2(c) and 7 of the Notice of application which relate to the Police Records and the Respondent's Records are dismissed.

[25] As an ancillary order, I grant the relief sought at para. 10 of the Notice of Application and order that the Notice of Dispute filed on June 23, 2023, be renewed and to remain in force pending the earlier of

- a) A further Order of this Court removing the Notice of Dispute in this proceeding; or
- b) An Order of this Court regarding the validity of the 2023 Will.

[26] With respect to costs, success on this application was divided, and I order that each party shall bear their own costs.

"Associate Judge Robinson"

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