

CANADA / JUDGMENT

Dela Cruz Estate (Re)

2023 BCSC 843

COURT

Supreme Court of British Columbia

DECIDED

24 March 2023

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2023 BCSC 843 Dela Cruz Estate (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Dela Cruz Estate (Re),

2023 BCSC 843

Date: 20230324

Docket: P212120

Registry: Vancouver

In the Matter of the Estate of

Zenaida Dela Cruz, deceased

Before: The Honourable Madam Justice Wilkinson

Oral Reasons for Judgment

(In Chambers)

Counsel for the Applicants:

C. Hartnett, appearing as agent

for J. Bednard

Counsel for the Application Respondents:

L. Nambiar

Place and Date of Hearing:

Vancouver, B.C.

March 6, 2022

Place and Date of Judgment:

Vancouver, B.C.

March 24, 2022

[1] THE COURT: These are my reasons for judgment on the application.

Introduction

- [2] The applicants seek orders setting aside the grant of administration of the Estate of Zenaida Dela Cruz (the "Deceased") to her son Jerry Borlongan Dela Cruz, and a determination under s. 58 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA] as to whether the handwritten document created by the Deceased and dated February 5, 2015 (the "Handwritten Document") represents the testamentary intentions of the Deceased and should be admitted to probate as a valid testamentary document.
- [3] Essentially, the question before me is whether this Handwritten Document represents a deliberate or fixed and final testamentary intention at the material times for the disposition of the Deceased's estate.

Statutory Framework

- [4] Section 37 of the WESA sets out the formal validity requirements on how to make a valid will:

How to make a valid will

37 (1) To be valid, a will must be

- (a) in writing,
 - (b) signed at its end by the will-maker, or the signature at the end must be acknowledged by the will-maker as the will-maker's signature, in the presence of 2 or more witnesses present at the same time, and
 - (c) signed by 2 or more of the witnesses in the presence of the will-maker.
- (2) A will that does not comply with subsection (1) is invalid unless
- (a) the court orders it to be effective as a will under section 58 [court order curing deficiencies],
 - (b) it is a will recognized as valid under section 80 [validity of wills made in accordance with other laws], or
 - (c) it is valid under another provision of this Act.

[]

[5] Sections 58(1) through (3) of the WESA provide:

- (1) In this section, "record" includes data that
 - (a) is recorded or stored electronically,
 - (b) can be read by a person, and
 - (c) is capable of reproduction in a visible form.
- (2) On application, the court may make an order under subsection (3) if the court determines that a record, document or writing or marking on a will or document represents
 - (a) the testamentary intentions of a Deceased person,
 - (b) the intention of a Deceased person to revoke, alter or revive a will or testamentary disposition of the Deceased person, or
 - (c) the intention of a Deceased person to revoke, alter or revive a testamentary disposition contained in a document other than a will.
- (3) Even though the making, revocation, alteration or revival of a will does not comply with this Act, the court may, as the circumstances require, order that a record or document or writing or marking on a will or document be fully effective as though it had been made
 - (a) as the will or part of the will of the Deceased person,
 - (b) as a revocation, alteration or revival of a will of the Deceased person, or
 - (c) as the testamentary intention of the Deceased person.

Background

- [6] The applicant Imelda Mark is the sister of the Deceased and Virgilio Reyes is her brother. The applicants Isabelita C. Reyes, Daniel Mark, Donna Lee Nahanee, Nelson C. Reyes and Joel C. Reyes are the nieces and nephews of the Deceased. Victoria B. Reyes is a niece-in-law of the Deceased. The applicants Jocelyn Reyes, Quentin Nahanee and Marcus Nahanee are the great-niece and great-nephews of the Deceased.
- [7] The application respondent Jerry Borlongan Dela Cruz is a biological nephew and adopted son of the Deceased and the administrator of the estate.
- [8] The application respondent Johnny Dela Cruz is also a biological nephew and adopted son of the Deceased. The other application respondents are siblings, nieces, nephews, and great-nieces and great-nephews of the Deceased. These additional respondents did not appear on the application.
- [9] Where the parties have the same last name, I refer to them by their first name, meaning no disrespect.

- [10] The Deceased was born in the Philippines, the second eldest of her siblings. She was particularly close with her older sister Eva. The Deceased immigrated to Canada in 1968 and settled in Winnipeg, Manitoba. After her arrival, she was able to sponsor her sister Imelda to immigrate as well, and Imelda immigrated in 1969.
- [11] Over time, the Deceased sponsored or otherwise assisted her sister Elisa and two of her brothers to immigrate as well. She was not able to sponsor or assist Eva, who was married with children. The Deceased was able to assist some of Eva's children. The Deceased assisted Eva's daughters Marilyn and Isabelita to immigrate. After that, in 1993, she adopted Jerry and Johnny, allowing them to come to Canada as well. Johnny was severely ill and at danger of going blind. He could not receive the medical treatment he needed in the Philippines. Jerry was closest in age to Johnny. They were 11 and 13 years old at the time they were adopted. Johnny received treatment in Canada and did not entirely lose his sight.
- [12] The Deceased was not able to assist the rest of Eva's children, Nelson, Joel and Daniel, in immigrating. She did send money and supplies to the Philippines to support them and their families.
- [13] In 1980, the Deceased moved to Vancouver. She encouraged Imelda to move to Vancouver also, and Imelda did so.
- [14] The Deceased purchased a house on Oxford Street in North Vancouver. She invited a number of her family members to live with her, either full-time or for part of the week, including Jerry, Johnny, Jocelyn and Marilyn, as their work commitments allowed.
- [15] Eventually, Marilyn, Jocelyn and Johnny moved to Winnipeg. Johnny did not return to Vancouver, eventually moving to Ontario.
- [16] By all accounts the Deceased was very frugal and expected other family members to be frugal. She also had high expectations for her family members. This occasionally caused tension within the family.
- [17] In the documentary evidence, including in the Handwritten Document and correspondence with Johnny and Jerry, the Deceased referred to Johnny and Jerry as her sons and they referred to her as their mother.
- [18] Some alleged acrimonious history with one or both of Johnny and Jerry was raised by the applicants; however, this was not seriously argued before me. I find the circumstances, and subsequent return to close relations as explained by the respondents, did not likely impact the intentions of the Deceased.

The Handwritten Document

- [19] The Handwritten Document is dated February 5, 2015 and entitled "My Will". It is written on what appears to be a balance sheet and consists of two sequential pages from a blank lined accounting or balance sheet book. The front of each page contains the writing, and the back of each is left blank. The pages are ripped out of the balance sheet book.
- [20] The terms of the Handwritten Document are as follows:
- a) The Deceased's sister, Elisa, and her niece, Isabelita, are named as executors, and Leonora Francisco is named as a co-executor;
 - b) 15 of the Deceased's family members are to receive specific bequests ranging from \$15,000 to \$40,000;
 - c) The Deceased's nieces Marilyn and Isabelita are to act as trustees for their brother, and \$30,000 is designated for each of four beneficiaries to be sent in monthly amounts for their children's school matriculation fees;
 - d) The Deceased's accounts at Scotiabank are to be divided equally between Isabelita, Marilyn, Jerry, Johnny, the Deceased's brother Jimmy, and Jocelyn; and
 - e) \$50 a month is to go to the Deceased's brother Ismael dela Cruz, for his comfort fund at his nursing home.
- [21] The gifts are listed in dollar figures. As well, there is as reference to division of her bank accounts. There is no reference to her real property or other specific property.
- [22] There is no residue clause.
- [23] The Handwritten Document is mostly written in pencil, and on inspection some parts of the first and second page appear to have been erased and re-written. It is agreed that the handwriting on these two pages is that of the Deceased, perhaps apart from one sentence at the bottom of page two. The second half of page two, starting with "To: Julia Comer ... to divide equally", appears to be a direction to the Deceased's financial advisor at Scotiabank. That handwriting appears to be different from the rest of the page. The last two sentences on page two are written in black-ink pen and appear to be a direction to Isabelita.
- [24] There are percentages calculated and written on the right-hand side of the first page and in three areas of the second page next to names listed and dollar amounts. These percentages are written in black-ink pen. Some percentages are circled, many are not. The percentages do not add up to 100%.
- [25] The Handwritten Document was found in a pink folder inside a clear plastic box in the home of the Deceased, and I note that the document is not signed. The folder contained additional documents as follows:

- a) From the 1990s: An envelope titled "Last Will and Testament ... of ... ____" containing a form that can be filled out to create a will which was printed prior to the year 2000. It contains instructions on the requirements for the making of a valid will.
- b) From 2012: A 2012-printed (3rd Edition) information booklet from the People's Law School titled "Writing Your Will". This also contains information on the requirements for making a valid will, as well as information about the consequences of dying intestate.
- c) Handwritten notes on the back of an envelope post-stamped November 30, 2012 setting out a distribution scheme for the Deceased's estate,
- d) From 2013: Single-sided green-coloured paper dated February 9, 2013 with the note "Important paper to call Feb 11/13 Susan Tong 604-689-8248." Susan Tong is a notary.
- e) From 2014: Spring 2014 edition of "The Scrivener" published by the Notaries Public of British Columbia:
 - i. an article titled "Wills Variation and the Family Law Act", that relates to the validity of a will in British Columbia, and
 - ii. an article titled "Meet the Director of the Society of Notaries - Susan Tong".
- f) From 2015: Four single-sided pages of notes, torn out of a green, lined, notebook with the page numbers 17, 20, 27 and 29, of which pages 27 and 29 have been defined in the application filed September 23, 2022 as the "Handwritten Document", and is dated February 5, 2015.
- g) Pages 17 and 20 do not have any date indicated. They appear to come from the same book but not necessarily from the book from which the Handwritten Document was made.
- i. Page 17 has a sentence at the top regarding beneficiaries to the Scotiabank account and lists six relatives, including Jerry and Johnny. Afterward is a statement, "pay all of debt then divided equally rest of the money."
- ii. Page 20 has staple marks which line up perfectly with both pages of the Handwritten Document. Page 20 has the following statement at the top which is not in the handwriting of the Deceased: "Put in will that Estate can only sell home to the developer. House has not to be sold to private sale. Discuss time frame." Then a list of five relatives numbered one through five as follows: Isabelita, Marilyn, Jocelyn, Jerry and Johnny. After that a line is drawn across the page. The list appears to be in the handwriting of the Deceased.
- h) From 2018: Two pages of notes on different sheets of paper, stapled together, which are both dated July 23, 2018. Page one reads: "July 23, 2018 appointment with Susan Tong at 11:00 AM." Page two is titled "July 23, 2018 Ask Question to Lawyer".
- i) From 2020: Two single-sided pages of handwritten notes on yellow paper, which start with, "Changes executor 1) Isabelita C Reyes niece" and sets out her social insurance number.

j) The following undated documents:

- i. Single page of notes "re: cost of Will, P.O.A, and representation agreement".
- ii. Single page of notes that read: "1) Executor Jerry Borlongan dela Cruz, Isabelita C. Reyes, Daniel George Mark".
- iii. Single page of notes that set out a proposed distribution of the Deceased's estate.
- iv. Small loose-leaf page of notes that set out a different proposed distribution of the Deceased's estate.

[26] The book from which the Handwritten Document was torn was not found in the Deceased's possessions.

[27] At one point, likely in 2013, the Deceased visited a notary to discuss estate planning. She did not retain the notary to write a will for her, it appears.

[28] The Deceased became ill in March 2021. At the hospital, it was discovered that she had stomach cancer. Initially, the Deceased appeared to believe that she would recover from the cancer, as she had recovered from breast cancer in the 1990s without any further issues. However, the Deceased became more ill and was in and out of the hospital. Eventually, it became clear that the Deceased was not going to survive this new cancer.

[29] At one point, a number of months before her death, the Deceased had a conversation with her friend Estrella about her estate planning. She told Estrella that she had something written down already, but she wanted to change her will so that Isabelita would benefit more. Estrella advised Zenaida to go to a lawyer because there were certain requirements for a will and Zenaida needed to make sure that she fulfilled the requirements. Zenaida said that she would go to a lawyer.

[30] In January 2021, Jerry had a conversation with the Deceased inquiring about her health. He asked if she had prepared a will and she told him, "I will do it later." Jerry inquired about how she would do that and she replied she would drive or have a friend take her to a lawyer.

[31] Around the time of her admission to the hospital, the Deceased told Isabelita that she had not finished her will. At the time, Isabelita did not know that the Deceased had terminal cancer and encouraged her to finalize her will after she got out of the hospital.

[32] The Deceased expressed to Isabelita and Jocelyn that she wanted to give her condo to Isabelita to ensure that she and her daughter had a place to live as Isabelita's health had recently worsened and she could not work.

[33] After the Deceased was admitted to the hospital, in the last few days before she died, Isabelita, Marilyn and Jocelyn went to the Deceased's home to look for a will. They checked her computer table, her living room, and under her bed.

- [34] They found a plastic box under the Deceased's bed containing the Handwritten Document and the other documents described above, as well as insurance documents, mortgage documents and other important papers.
- [35] Close to the time of the Deceased's death, she was no longer able to speak. Isabelita asked the Deceased what she wanted to do with her estate planning. In particular, Isabelita asked the Deceased if she would like them to follow what was on paper. The Deceased nodded her head. However, Isabelita did not reference a specific document or show the Deceased any of the documents.
- [36] I note that at the time of hospitalization strict COVID-19 protocols were in place, both in hospitals and on airline travel. This limited access by family and friends to see the Deceased.

Evidence from the Deceased

- [37] As I noted, some of the affidavit evidence of the parties involves hearsay statements made by the Deceased; however, this evidence is admissible under the state of mind exception to the hearsay rule or through the application of the principled approach to hearsay evidence: Knelsen Estate, 2020 BCSC 134 at para. 115.
- [38] As set out by the Court of Appeal in Hadley Estate (Re), 2017 BCCA 311 [Hadley]:
- [40] Sitting as a court of probate, the court's task on a s. 58 inquiry is to determine, on a balance of probabilities, whether a non-compliant document embodies the Deceased's testamentary intentions at whatever time is material. The task is inherently challenging because the person best able to speak to these intentions - the Deceased - is not available to testify. In addition, by their nature, the sorts of documents being assessed will likely not have been created with legal assistance. Given this context and subject to the ordinary rules of evidence, the court will benefit from learning as much as possible about all that could illuminate the Deceased's state of mind, understanding and intention regarding the document. Accordingly, extrinsic evidence of testamentary intent is admissible on the inquiry.

[Citations omitted.]

- [39] Presuming the Deceased's statements are admissible, either under the state of mind exception to the hearsay rule or through the principled approach, there is still a threshold issue: the Court must satisfy itself that the statement was in fact made by the Deceased. Here, the statements are not contradictory. Credibility of the affiants was not raised as a concern in submissions of the parties with respect to these statements, as well. I am satisfied that the attributed statements were made by the Deceased. None of those statements took place in January or February 2015, however.

Legal Principles

- [40] The parties agree that the guiding principles to be employed by the court on a s. 58 application were summarized by Hadley. The key guiding principle is that the document must be "a deliberate or fixed and final expression of intention" as to the disposal of property upon death. The following is the Court's discussion:
- [34] Section 58 of the WESA is the legislative response to the BCLI recommendation. Remedial in nature, it confers a broad discretion on the court to order that a "record or document or writing or marking on a will or document" be fully effective, despite non-compliance with the statutory requirements. Although s. 58 cannot be used to uphold a will that is substantively invalid, it permits the court to cure issues of formal invalidity in prescribed circumstances
- [35] For an order to be granted under s. 58 of the WESA, the court must be satisfied that a document represents the testamentary intentions of the Deceased person. However, unlike the curative provisions in some provinces, s. 58 does not require a minimum level of execution or other formality for a testamentary document to be found fully effective. Regardless of its form, if the court grants an order under s. 58(3), the document may be admitted to probate.
- [36] As discussed in *Estate of Young*, s. 58 is very similar to Manitoba's curative provision and thus the leading appellate authority on its meaning is *George v. Daily*. *George* and several other Manitoba authorities are reviewed in *Estate of Young*, which review need not be repeated. Their import is summarized at paras. 34-37:
- [34] As is apparent from the foregoing, a determination of whether to exercise the court's curative power with respect to a non-compliant document is inevitably and intensely fact-sensitive. Two principal issues for consideration emerge from the post-1995 Manitoba authorities. The first in an obvious threshold issue: is the document authentic? The second, and core, issue is whether the non-compliant document represents the Deceased's testamentary intentions, as that concept was explained in *George*.
- [35] In *George* the court confirmed that testamentary intention means much more than the expression of how a person would like his or her property to be disposed of after death. The key question is whether the document records a deliberate or fixed and final expression of intention as to the disposal of the Deceased's property on death. A deliberate or fixed and final intention is not the equivalent of an irrevocable intention, given that a will, by its nature, is revocable until the death of its maker. Rather, the intention must be fixed and final at the material time, which will vary depending on the circumstances.

- [36] The burden of proof that a non-compliant document embodies the Deceased's testamentary intentions is a balance of probabilities. A wide range of factors may be relevant to establishing their existence in a particular case. Although context specific, these factors may include the presence of the Deceased's signature, the Deceased's handwriting, witness signatures, revocation of previous wills, funeral arrangements, specific bequests and the title of the document: Sawatzky at para. 21; Kuszak at para. 7; Martineau at para. 21.
- [37] While imperfect or even non-compliance with formal testamentary requirements may be overcome by application of a sufficiently broad curative provision, the further a document departs from the formal requirements the harder it may be for the court to find it embodies the Deceased's testamentary intention: George at para. 81.
- [41] The material time for determining testamentary intentions on a s. 58 application is the time when the document in question was created and executed. Extrinsic evidence of intention before, during, or after the document was created could all be relevant: Hadley at paras. 37-40.
- [42] None of these factors in isolation is determinative; for example, in *Skopyk Estate*, 2017 BCSC 2335, the Court gave effect to a document that was neither signed nor dated but was found in a prominent place on the deceased's bulletin board and provided for a rational distribution of the deceased's estate.
- [43] If the non-compliant document or record does not expressly revoke a prior will, it may be given effect as a codicil to the will: *Mace Estate (Re)*, 2018 BCSC 1284 at para. 64.

Evidence and Analysis

- [44] There are a number of factors that British Columbia courts have considered when determining whether a document represents the testamentary intentions of the deceased.
- [45] These factors include, but are not limited to, where and how the document was kept, the contents of the document, the context of the creation of the document, whether the deceased was ill, the deceased's relationship with the beneficiaries, and whether the document reflects the provisions of a previous will or codicil: see *Estate of Young*, 2015 BCSC 182 at paras. 38-40; *Yaremkewich Estate (Re)*, 2015 BCSC 1124; *Beck Estate (Re)*, 2015 BCSC 676; and *Smith Estate (Re)*, 2016 BCSC 350.
- [46] Johnny and Jerry believe that the Deceased did not complete the preparing of a will as she loved her family, and could not make up her mind on how to divide her estate. As such, the Handwritten Document and other documents found were working papers, and do not indicate a fixed intention as to how she wished her estate to be divided.
- [47] I agree with the respondents that all of the Deceased's handwritten notes setting out potential divisions of her estate, including the Handwritten Document, are working papers to prepare a will.

- [48] The Deceased was aware of the requirements to make a will as she retained a printed form that could be filled out to create a will, which provided clear instructions on how to prepare a will, and retained the 2012 and 2014 information about the requirements for a will and the implications of dying intestate. She consulted a notary in 2013 and, it appears, also in 2018.
- [49] None of the Deceased's handwritten notes, including the Handwritten Document, are signed. In contrast, the Deceased left typed, printed and signed instructions to Isabelita regarding non-estate bequests dated November 2012, which was also located in the pink folder.
- [50] The notes, with the exception of the Handwritten Document, are undated.
- [51] The Handwritten Document has deficiencies which the Deceased would have been aware of due to her knowledge of the statutory requirements.
- [52] The Deceased's handwritten notes show that she had an appointment to see the notary, Susan Tong, on July 23, 2018 for the purpose of preparing a will.
- [53] It appears that the Deceased originally thought of leaving fixed amounts of money to family members, and that is reflected in the parts of the Handwritten Document written in pencil. However, it also appears that the Deceased started to revise it in black-ink pen to a percentage form, but only for some of the named beneficiaries. This may have been after speaking with the notary, Susan Tong.
- [54] The document on page 20 appears at one point to have been attached to the Handwritten Document. This may be "page 3" of the Handwritten Document. It is not entirely in the handwriting of the Deceased. The Handwritten Document itself is no longer stapled together. Jerry believes it is the writing of the Deceased's realtor as he is familiar with the realtor's writing. However, there was no evidence provided by the realtor. It is not clear when it was attached to the Handwritten Document or whether it was placed in front of or after the two pages of the Handwritten Document.
- [55] Given the specific knowledge of the Deceased about statutory requirements, I find that it is not likely she would have fixed her intentions on February 5, 2015 or as set out in the Handwritten Document. It is more likely than not that at that time she had not yet decided how she wanted her estate to be handled. That was the case in 2018 as well, when she saw a lawyer, yet still no will was drafted. The Handwritten Document was more likely a work in progress together with the other unsigned and undated notations and instructions she collected over the years, never having finalized her intentions with regard to her estate.

Conclusion

- [56] Therefore, I find that the Handwritten Document is an incomplete working document. It does not reflect the testamentary intentions of the Deceased on February 5, 2015.
- [57] The application is dismissed.

- [58] All right, counsel. Anything arising from that before we address the issue of costs?
- [59] CNSL L. NAMBIAR: My friend, Ms. Bednard, is not here today. So I think the discussion we had was that we would perhaps set down a hearing for costs in due course.
- [60] THE COURT: Is that your understanding, counsel?
- [61] CNSL C. HARTNETT: Yes. That is my understanding.
- [62] THE COURT: The parties are at liberty to contact Scheduling to set down an application for costs if they are otherwise unable to agree or at least need court approval of the arrangement that they have reached. Thank you.

"Wilkinson J."

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