
CANADA / JUDGMENT

Estate of Palmer

2017 BCSC 1430

COURT

Supreme Court of British Columbia

DECIDED

15 August 2017

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2017 BCSC 1430 Estate of Palmer

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Estate of Palmer,

2017 BCSC 1430

Date: 20170815

Docket: P170419

Registry: Vancouver

In the Matter of the Estate of

Pauline Roselle Palmer, Deceased

Before: The Honourable Mr. Justice Kent

Reasons for Judgment

Counsel for the Applicant, Allen Homeniuk:

Roselle P. Wu

Counsel for Sean Patrick Palmer and Daryl Stephen Palmer:

Peter J. Goodwin

Place and Date of Hearing:

Vancouver, B.C.

July 25, 2017

Place and Date of Judgment:

Vancouver, B.C.

August 15, 2017

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Introduction

- [1] Pauline Palmer died in Abbotsford, British Columbia on June 24, 2016. She left behind an estate worth approximately \$200,000 comprised mostly of financial assets (GICs, bank accounts, et cetera).
- [2] Ms. Palmer never married and had no children. She was survived by neither parents nor siblings. Her closest next of kin were six nieces and nephews, the offspring of her three brothers, Stephen, Vernon and Joseph Palmer.
- [3] Mr. Allen Homeniuk is the adult son of the deceased's first cousin, Annie Homeniuk. He lives in St. Albert, Alberta.
- [4] Ms. Palmer executed a short will on August 18, 1988. By that document, she appointed Montreal Trust and her cousin, Emily Takats, as her executors and trustees. She also named Ms. Takats as the sole residual beneficiary of her estate. Ms. Takats died well before Ms. Palmer.
- [5] Following her death, a copy of Pauline Palmer's 1998 will was discovered bearing various handwritten alterations and initials. Some of the changes are in black ink and some in blue ink. The changes include:
- updating Ms. Palmer's address;
 - deleting Montreal Trust and Emily Takats as executors and trustees and substituting in their place "Alan Homeniuk (sic), 10 English Way, St. Albert, Alberta"; and
 - deleting the name Emily Takats as a residual beneficiary.
- [6] The operative words of the will containing the handwritten changes now read as follows:
- "I nominate, constitute and appoint Alan Homeniuk of 10 English way, St. Albert, Alberta, and my cousin [name deleted], presently of [city deleted] to be the executors and trustees of this my Will";

· "To deliver the rest and residue of my estate unto my said cousin [name deleted] for his [changed from "her"] own use and benefit absolutely."

- [7] Mr. Homeniuk applied for a Grant of Probate in relation to Ms. Palmer's estate. Probate has not been granted because a Notice of Dispute was filed by two of the deceased's nephews, Sean Palmer and Daryl Palmer, who both live in Surrey British Columbia.
- [8] Mr. Homeniuk now applies for orders under the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 ("WESA"), to cure the "deficiencies" in Pauline Palmer's will. In particular, he applies under s. 58 of WESA for a declaration that the handwritten changes on the will represent Ms. Palmer's testamentary intentions and that the amended document should be given effect as the will of Ms. Palmer notwithstanding non-compliance with WESA's requirements for formal validity. As well, Mr. Homeniuk applies under s. 59 of WESA for an order "rectifying" the will so as to expressly name Mr. Homeniuk as the residual beneficiary.
- [9] Notice of Mr. Homeniuk's application was given to Sean and Daryl Palmer as well as their paternal half-sister, Ms. Tina Perret. Ms. Perret advised counsel for Mr. Homeniuk that she "takes no position" on his application. However, Sean and Daryl Palmer oppose the application arguing that the notations on the will were "simply the musings of an aging lady" who was only thinking about making a change but who took no steps to properly implement the changes even though she had considerable experience with estate matters.
- [10] For the reasons that follow, I decline to grant at this time the relief sought by Mr. Homeniuk and instead order a trial of the proceeding with directions for its conduct. I am satisfied that a bona fide triable issue exists respecting Ms. Palmer's testamentary intentions and that the interests of justice require the matter to be resolved by way of a trial rather than a chambers application based on the evidence so far adduced.

The Affidavit Evidence

- [11] Mr. Homeniuk provided evidence in support of his application by way of an affidavit sworn March 13, 2017. He states that he has "personal knowledge of the matters and facts herein deposed to save and except where the same are stated to be made upon information and belief".
- [12] Mr. Homeniuk describes the various relationships in the Palmer family. His mother was Pauline Palmer's first cousin and the two "had a close relationship and spoke regularly by telephone". He is a retired police officer who was stationed in Vancouver in the 1990s, at which time "I had regular contact with the deceased". He provides no details respecting that "regular contact".
- [13] In 1999, some 17 years before Ms. Palmer's death, Mr. Homeniuk retired and moved to Alberta and his contact with Ms. Palmer "became more sporadic". Again, no details are provided.

- [14] Mr. Homeniuk then says that "in or about 2014", a year before her death, Ms. Palmer began telephoning him and they "reconnected and regularly spoke by telephone". In these telephone conversations, "on multiple occasions" Ms. Palmer "requested that I assist with her affairs", telling him that "she did not want her nephews to be beneficiaries of her estate" and that she "wished to give me the residue of her estate". It is unlikely that this testimony represents the actual words used by Ms. Palmer but rather is Mr. Homeniuk's "gist" or summary of whatever conversations occurred.
- [15] Paragraphs 6 and 7 of Mr. Homeniuk's affidavit purport to describe the relationship between the deceased and various of the Palmer family members. The source of this information is not stated.
- [16] Mr. Homeniuk says that "on multiple occasions I offered to travel to Abbotsford to assist [Ms. Palmer] with arranging her affairs" however "she told me that was not required and she had everything prepared". No explanation is provided why Ms. Palmer kept raising the matter of her estate "on multiple occasions". I also note that one of the blue pen annotations on the will (beside Mr. Homeniuk's name as executor) is the signature of Ms. Palmer with a date "8/2015". No explanation is provided for Ms. Palmer's ongoing concern with her estate in the 10-month period following the date she placed her signature on the amended will.
- [17] Mr. Homeniuk's affidavit describes being contacted by the hospital at the time of Ms. Palmer's death. He provides hearsay evidence about how Ms. Palmer had admitted herself to the hospital "because she was not feeling well and she then had a heart attack and died". No evidence is provided as to her mental or physical health in the year or so preceding her death.
- [18] It appears from his affidavit that Mr. Homeniuk's only contact with Ms. Palmer was by way of telephone and he did not actually visit her in British Columbia. This may be the reason why he is unable to comment on her health but evidence on such matters could have been provided through medical or hospital records and/or any health professionals who might have looked after Ms. Palmer in the years before her death.
- [19] I wish to make it perfectly clear that my critique of the Homeniuk affidavit is not meant to be a negative reflection of Mr. Homeniuk's credibility or the truthfulness of his evidence. The difficulty arises only because of the affidavit testimony of Sean and Daryl Palmer who each in their own way cast aspersions on the credibility and reliability of Mr. Homeniuk's evidence.
- [20] Among other things, Daryl Palmer states:
- unlike his other immediate family members, he had a "very positive relationship with Aunt Pauline" and was in contact with her throughout her life;

- even though his aunt told him that she would be leaving nothing to his brother Sean (who had a fractious relationship with his aunt), "Pauline stated many times that I was going to be her executor and beneficiary", something she kept saying to him right up until 2014;
- beginning in 2010 "a decline in Aunt Pauline's cognitive function and capacity" started to manifest itself. She became "reclusive" and "evasive" and was occasionally "agitated and irrational"; and
- "at no time did Aunt Pauline mention or discuss Allen Homeniuk with me I had no knowledge of his existence until he contacted me after Aunt Pauline's death".

- [21] Paragraph 39 of Daryl Palmer's affidavit is inadmissible argument and not testimony as to facts. In that paragraph he purports to "note several inconsistencies" in the amendments to the will, inconsistencies which do in fact exist and which need to be addressed in any determination of Ms. Palmer's testamentary intentions.
- [22] The affidavit of Sean Palmer focuses mostly on his difficult relationship with the deceased and her failure to properly probate and distribute the estate of his uncle, Vernon Palmer.
- [23] Sean Palmer and the deceased had both been named co-executors of Vernon Palmer's estate. The latter died in July 2005 leaving approximately \$100,000 in cash as part of his estate. Sean Palmer expresses the view that the deceased simply appropriated the estate and "intermingled Uncle Vernon's assets with her own". This is something that will have to be ironed out before Ms. Palmer's estate can be fully distributed.
- [24] Sean Palmer obtained a copy of the file of the probate lawyer for Vernon Palmer's estate and attached it to his affidavit. The file cites numerous typewritten and handwritten memos from Pauline Palmer addressing Sean's involvement in the handling of Vernon Palmer's estate. He swears in his affidavit he "did not receive any of the memos written by my Aunt Pauline".
- [25] In paragraph 62 of his affidavit, Sean Palmer states, "Having reviewed the contents of Mr. Graves' file, I think it is suspicious that my Aunt Pauline, a woman who would draft formal typewritten memos, would make inconsistent, handwritten changes to her will". Again, this is inadmissible argument and not testimony as to facts, however it is a thinly disguised implication of incompetency on the part of the deceased or perhaps undue influence by Mr. Homeniuk.
- [26] It should be noted that Daryl Palmer attaches to his affidavit an email string between himself and Mr. Homeniuk in November 2016. Mr. Homeniuk initiated the email introducing himself and stating, "I sent you an email some time ago trying to connect and assist with Vern's estate on behalf of Pauline" who "has since passed in June". Mr. Homeniuk makes no reference in his affidavit to this attempted contact or to any discussions he may have had with the deceased respecting Vernon Palmer's estate. Daryl Palmer swears in his affidavit that he did not receive any prior email from Mr. Homeniuk on the matter.

WESA and the Determination of Testamentary Intentions

[27] The recent case of *Estate of Young*, 2015 BCSC 182, describes the legal framework applicable to s. 58 of WESA and the curing of "deficiencies" related to the making or alteration of a will. The history and intent of the legislation, including the case law in other jurisdictions addressing similar provisions, is set out in paras. 16-33 of that decision and will not be repeated here. The law is summarized in paras. 34-37 of the decision and can be paraphrased as follows:

- the courts' curative power with respect to non-compliant testamentary documents is inevitably and intensely fact-sensitive;
- the first threshold issue is whether the document in question is authentic;
- the second, and core, issue is whether the non-compliant document represents the deceased's testamentary intentions;
- a testamentary intention means much more than the expression of how a person would like his or her property to be disposed of after death. Rather, the document must record a deliberate or fixed and final expression of intention as to the disposal of the deceased's property on death;
- the burden of proof that a non-compliant document embodies the deceased's testamentary intentions is the balance of probabilities;
- factors relevant to establishing the existence of a fixed and final testamentary intention 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; and
- generally speaking, the further a document departs from the formal validity requirements of the legislation, the harder it may be for the court to find that it embodies the deceased's testamentary intention.

[28] Both s. 58 and 59 of WESA provide for an "application" to court to determine whether a certain document represents the testamentary intentions of a deceased person and/or rectification is warranted because the will fails to implement the deceased's intent.

[29] Rules 2-1(2)(b) and (2.1) of the Supreme Court Civil Rules provide for the initiation of proceedings in estate matters or in respect of any application authorized by statute to be made to the court. It is possible that the manner in which the present application has been brought does not properly comply with those rules but, in any event, there is no doubt that a chambers hearing is ultimately contemplated thereby triggering the application of Rule 22-1, including the following sub-rules:

Evidence on an application

- (4) On a chambers proceeding, evidence must be given by affidavit, but the court may

- (a) order the attendance for cross-examination of the person who swore or affirmed the affidavit, either before the court or before another person as the court directs,
- (b) order the examination of a party or witness, either before the court or before another person as the court directs,
- (c) give directions required for the discovery, inspection or production of a document or copy of that document,
- (d) order an inquiry, assessment or accounting under Rule 18-1, and
- (e) receive other forms of evidence.

...

Power of the court

- (7) Without limiting subrule (4), on the hearing of a chambers proceeding, the court may
 - (a) grant or refuse the relief claimed in whole or in part, or dispose of any question arising on the chambers proceeding,
 - (b) adjourn the chambers proceeding from time to time, either to a particular date or generally, and when the chambers proceeding is adjourned generally a party of record may set it down on 3 days' notice for further hearing,
 - (c) obtain the assistance of one or more experts, in which case Rule 11-5 applies, and
 - (d) order a trial of the chambers proceeding, either generally or on an issue, and order pleadings to be filed and, in that event, give directions for the conduct of the trial and of pre-trial proceedings and for the disposition of the chambers proceeding.
- [30] I have attempted to explain above why the affidavit evidence tendered on this application respecting certain matters is insufficient to do justice to the testamentary intentions of Ms. Palmer. In my view, oral evidence from the three affiants is desirable including cross-examination of those affiants on certain aspects of their testimony. As well, evidence must be adduced respecting Ms. Palmer's physical and mental health and, in particular, her testamentary capacity at the time the changes to her will were made.
- [31] Furthermore, three of the potential beneficiaries under WESA have not been included in the proceedings to date. It appears that Ms. Perret has no interest in actively participating in the present proceeding, however the court is not satisfied that any meaningful effort has been invested by any of the parties in tracing and notifying each of Bradley Palmer, Grant Palmer and Dolores Palmer. Their legal interests are at stake in this proceeding and they cannot simply be ignored.
- [32] Rule 22-1(7)(d) permits the court to order a trial of any chambers proceeding and to give directions respecting the filing of pleadings and the further conduct of the matter. The legal test for converting a chambers proceeding into a trial was recently reviewed by the Court of

Appeal in British Columbia (Milk Marketing Board) v. Saputo Products Canada G.P., 2017 BCCA 247. It is akin to the test applicable for summary judgment under Rule 9-6, i.e., whether a bona fide triable issue arises on the evidence before the court which warrants determination at a trial. The threshold is relatively low in that regard.

Decision and Orders Made

[33] In my view, there is a bona fide triable issue between the parties whether the handwritten amendments to Ms. Palmer's will record a fixed and final expression of intention to make Mr. Homeniuk the sole beneficiary of her estate, an issue which cannot be satisfactorily resolved based solely on the affidavit evidence adduced to date. Accordingly, I make the following orders:

1. the within chambers proceeding will proceed to a trial;
2. since Mr. Homeniuk is the applicant and bears the onus of proof, he will be the plaintiff and within 60 days he will issue a Notice of Civil Claim respecting the matters in dispute;
3. the persons to be named as defendants in and served with the re-framed proceeding will be Ms. Tina Perret and all of Sean, Daryl, Dolores, Bradley and Brent Palmer;
4. diligent efforts must be made to locate and serve the Notice of Civil Claim upon Dolores, Bradley and Brent Palmer before resorting to any form of substitutional service contemplated by Rule 4-4;
5. all of the defendants must also be provided a copy of these reasons for judgment;
6. discovery of documents and any examination for discovery of the parties may proceed in the conventional manner and the matter will thereafter proceed to trial in accordance with the Supreme Court Civil Rules;
7. the conversion of the chambers proceeding in into a trial process will not prevent any of the parties from seeking to have the matters in dispute determined summarily pursuant to Rule 9-7; and
8. costs of the proceedings to date are adjourned to and shall be determined by the court before whom the matter is tried.

"KENT J."

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