

CANADA / JUDGMENT

Grace (Re)

2022 BCSC 653

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2022 BCSC 653 Grace (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Grace (Re),

2022 BCSC 653

Date: 20220426

Docket: 21950

Registry: Nelson

RE the Estate of Michelle Leela Grace

Before: The Honourable Madam Justice Lyster

Reasons for Judgment

Counsel for Clarence Wayne Barabonoff, Applicant:

A. Burch

Counsel for Liane Paff, Application Respondent:

J. Gelber

Place and Date of Hearing:

Nelson, B.C.

March 28, 2022

Place and Date of Judgment:

Nelson, B.C.

April 26, 2022

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Introduction

- [1] This is an application to the court to prove the last will and testament of Michelle Leela Grace, dated April 30, 2021, in solemn form. The application is filed by Clarence Barabonoff, who is named as the executor in the will. Mr. Barabonoff is Ms. Grace's father. Mr. Barabonoff submitted an application for grant of probate on November 2, 2021.
- [2] On November 10, 2021, Liane Paff filed a notice of dispute, challenging the validity of the will. Ms. Paff is Ms. Grace's mother.
- [3] Ms. Grace died on May 16, 2021. She was 37 years of age. Mr. Barabonoff and Ms. Paff were previously married, and Ms. Grace was one of their three children, all girls. One sister, Tracy Barabonoff, predeceased Ms. Grace in 2016. The sole surviving sister is Carrie Lynn Bryant.
- [4] At the time of her death, Ms. Grace did not have any children or a spouse. Tracy Barabonoff also died without any children. Ms. Bryant has two children, ages 10 and 7. They are Ms. Paff's and Mr. Barabonoff's only grandchildren.
- [5] In the will, the circumstances surrounding which I will return to shortly, Ms. Grace appointed Mr. Barabonoff as her executor. She left the entirety of her estate to Ms. Bryant.

- [6] Ms. Paff disputes the will on several bases. She submits that Ms. Grace did not read or know its contents prior to signing it. She submits that Ms. Grace signed the will under suspicious circumstances in that she was presented with a document that had been prepared by Mr. Barabonoff, and told to sign it. She says that Ms. Grace may have lacked capacity at the time she signed the will. Finally, Ms. Paff submits that the application should be referred to the trial list for proof in solemn form.
- [7] Mr. Barabonoff disagrees with all of those submissions. He submits that the will reflects Ms. Grace's wishes. It is his position that Ms. Paff is disputing the will in a bad faith attempt to force the named beneficiary, Ms. Bryant, to choose between incurring the legal expenses necessary to prove the will and paying Ms. Paff money, when in fact Ms. Grace was adamant that she did not want her mother to get any of her money.
- [8] This is a modest estate. According to the statement of assets, liabilities and distribution filed as an exhibit to Mr. Barabonoff's affidavit of assets and liabilities, the net value of the estate is \$59,299.07.

Evidence

- [9] The parties filed a number of affidavits concerning the circumstances surrounding the creation and execution of the will. In this section, I summarize the salient parts of them.

Clarence Barabonoff Fourth Affidavit

- [10] Mr. Barabonoff swore his fourth affidavit on February 16, 2022. He identifies the family members and their relationships that I have already mentioned.
- [11] He indicates that Ms. Grace was first diagnosed with cancer in 2012. She underwent a barrage of treatments, and several times it seemed like she recovered, but the cancer kept coming back. The cancer returned for the last time in 2019, at which time Ms. Grace decided to move back to the Kootenays to be near her family.
- [12] Starting in December 2019, Ms. Grace lived for six months in a basement suite owned by her aunt and uncle. Her aunt, Natalie Barabonoff, swore an affidavit that I will return to later. Ms. Grace bought a mobile home (the major estate asset) which she moved into in June 2020, and lived in it across the road from Mr. Barabonoff until her death.
- [13] Mr. Barabonoff swears that he saw Ms. Grace almost every day until she died after she moved across the road from him. He says that she had full mental capacity until her death, although her physical condition deteriorated greatly in the last few months.

- [14] Mr. Barabonoff swears that in early April 2021 he told Ms. Grace that she really needed to get a will done. She agreed, and he said he would go on the internet and draft one up for her. He asked her who she wanted to leave her things to. She asked him what he wanted, and he told he didn't want anything. Ms. Grace told him she wanted everything to go to Ms. Bryant's two children. He suggested that, given their young age, she instead leave her estate to Ms. Bryant, who could distribute it to her children as she saw fit. Ms. Grace agreed.
- [15] Mr. Barabonoff found a will on the internet, and completed it according to Ms. Grace's wishes. He gave it to her to read in mid April. After she told him the will was good, Mr. Barabonoff arranged for their neighbour, Jason Tait, and Ms. Grace's cousin, Bob Essaunce, to come to her home on April 30, 2021 to witness it. Both Mr. Tait and Mr. Essaunce have sworn affidavits I will return to later.
- [16] Mr. Barabonoff swears that on April 30, Ms. Paff came over to visit Ms. Grace, not knowing he had made arrangements for the will to be signed that day. When he arrived, he told Ms. Paff about the arrangements. Ms. Paff did not ask any questions and did not ask to see the will. Ms. Paff did not express any concerns regarding Ms. Grace's mental condition. He says that Ms. Grace was alert, clearly understood what was going on, and wanted to sign the will.
- [17] The two witnesses arrived, Mr. Barabonoff filled in the date on the will, and Ms. Grace signed it, followed by the two witnesses. While this was happening, Ms. Paff sat in the background and did not voice any concerns.
- [18] Mr. Barabonoff goes on to state that, "this attempt by Liane to go against Michelle's wishes and take her inheritance from our only surviving daughter and our only grandchildren is disappointing, but not surprising." He asserts that Ms. Paff is obsessed with money and alleges that she was criminally convicted of fraud in relation to false statement to the government to obtain social assistance benefits.

Bob Essaunce

- [19] Mr. Essaunce is Ms. Grace's cousin. He witnessed the will.
- [20] Mr. Essaunce says that Mr. Barabonoff phoned him in mid-April to ask if he would witness the will, and contacted him a few days before April 30 to arrange the day and time.
- [21] Mr. Essaunce swears that, at the time of signing, Ms. Grace appeared alert and understood what she was doing.
- [22] He says that Ms. Paff, his aunt, was already at Ms. Grace's home when he and Mr. Tait arrived. She sat in the background and watched everything. He does not recall Ms. Paff saying anything or giving any indication she was at all concerned. He says that if his aunt was at all concerned, she would definitely have spoken up. She did not.

Jason Tait

- [23] Mr. Tait was the other witness to the will. He has known Ms. Grace since about 2010 when he moved and became Mr. Barabonoff's next door neighbour. Like Mr. Essaunce, Mr. Tait recounts how he was asked to and attended to witness the will.
- [24] Mr. Tait says that Ms. Grace was alert and understood what she was doing. He swears that Mr. Barabonoff put the will out for Ms. Grace to sign, at which time he heard him ask her "are these your wishes my dear?", to which she replied "yes". She then reached for the pen Mr. Barabonoff was holding and signed the will.
- [25] Mr. Tait says that he was an RCMP officer and is a paramedic. He states on the basis of his experience and relationship with Ms. Grace that he is confident that at the time she signed the will she was able to make choices of her own free will and to exercise her personal judgment. He says she was a very forthright person who had no issues expressing her thoughts or views.
- [26] Mr. Tait confirms Mr. Essaunce's evidence that Ms. Paff was present and did not say anything or indicate she was concerned about what was going on.

Caroline Kaarlela

- [27] Caroline Kaarlela was Ms. Grace's step-sister. They met when she was 12 years old and Ms. Grace was eight months younger than her. They lived together with Ms. Kaarlela's mother and Ms. Grace's father from 1995 to 1999. Ms. Kaarlela saw Ms. Grace regularly after she moved across the road from Mr. Barabonoff.
- [28] Ms. Kaarlela swears that on the weekend of April 16, she spent most of the two days with Ms. Grace while Mr. Barabonoff was tending to his garage sale. Ms. Grace told her that, when she passed away, Ms. Kaarlela and the rest of her family, could go through her personal belongings and take what they wanted. Everything else was going to her nephews. At the time of these discussions, Ms. Grace was wide awake, alert and confident in her wishes and intentions. Ms. Kaarlela says that she knew Ms. Grace well, and knew she was close with her sister and fond of her nephews, so it did not surprise her that she wanted everything to go to them.
- [29] Ms. Kaarlela says that she visited Ms. Grace almost every day in the week leading up to the signing of the will and the following two weeks until she died. She says that Ms. Grace would fall asleep quite easily but when she was awake she had full mental capacity and understood what was going on.

Natalie Barabonoff

- [30] Natalie Barabonoff was Ms. Grace's aunt by marriage, her husband being Mr. Barabonoff's brother. She knew Ms. Grace her whole life.

- [31] Ms. Barabonoff describes how Ms. Grace lived in the basement suite of her home after she moved back to the Kootenays in December 2019. She lived there six months. Ms. Barabonoff says that in that time Ms. Paff only visited Ms. Grace two or three times. According to Ms. Barabonoff, after these visits, Ms. Grace would come upstairs in tears or nearly so. She was saddened and frustrated by her relationship with her mother.
- [32] After Ms. Grace moved in June 2020, Ms. Barabonoff visited her regularly. By the time the will was signed, she was visiting Ms. Grace a couple of times a week. During their visits in April 2021, Ms. Barabonoff swears that Ms. Grace was alert and had full mental capacity. Ms. Grace never discussed making a will with Ms. Barabonoff. She knew, however, that Ms. Grace was close to her sister and loved her nephews, so it did not surprise her that she would want to leave everything to them.

Carrie Bryant

- [33] Carrie Bryant is Ms. Grace's sister. She is four years older than Ms. Grace. She lives in Frisco, Texas with her two children.
- [34] Ms. Bryant says that in the two years before Ms. Grace's death they spoke regularly on the telephone and she visited her when she could, including in October and December 2020. Ms. Bryant says that several times Ms. Grace told her that when she died she wanted everything to go to "you and your family". She also told her that she did not want their mother to have any of her money. Ms. Grace did not elaborate on her reasons, but Ms. Bryant knew how disappointed Ms. Grace was in the lack of help and support she provided during her battle with cancer.
- [35] Ms. Bryant says that she and Ms. Grace were close, especially in the last couple of years, and she is confident that if either Mr. Barabonoff or Ms. Paff were pressuring her to make a will in a way she did not want, Ms. Grace would have told her.
- [36] Ms. Bryant says that after Ms. Grace died and she found out that Ms. Paff was threatening legal action, she called her to ask why. Ms. Bryant told her that if she wanted the money and it was that important to her, she should talk to her. Ms. Paff responded to the effect "No, you would have told me I don't deserve it".

- [37] Ms. Bryant says that if the will is ruled valid, most of the money will go to her sons.

Liane Paff

- [38] Ms. Paff swore her first affidavit on March 11, 2022, after all those I have already reviewed.
- [39] Ms. Paff refers to Ms. Grace undergoing chemotherapy from September to December 2020. She says that "at that time" she went on leave from her job as a first aid attendant in order to care for Ms. Grace. She attended her home almost every day to help with personal care, household tasks and to provide company and support. She says Mr. Barabonoff was also present on a near daily basis.

- [40] Ms. Paff says that Ms. Grace was hospitalized for nine or ten days in January 2021 and that her health deteriorated greatly after undergoing chemotherapy. She says that after Ms. Grace was discharged on January 19, 2021, she continued to visit her on a near daily basis.
- [41] Ms. Paff says that she first spoke to Ms. Grace about her estate planning in early February 2021. Ms. Grace raised the subject, and said she intended to make a specific gift to her in her will of the \$5,500 down payment Ms. Paff gifted to her in May 2020 for the purchase of her manufactured home. Ms. Grace intended to leave the residue of her estate to Ms. Bryant and her two children.
- [42] Ms. Paff swears that the next time the subject came up was April 30, 2021. She went to Ms. Grace's residence and saw a document on the bed that said "Last Will and Testament of Michelle Leela Grace" on the front page. She only saw the front page. According to Ms. Paff, she asked Ms. Grace if she had read the document, to which Ms. Grace said no. Within one minute, Mr. Barabonoff came into the room and picked up the will. The two witnesses then entered. Mr. Barabonoff filled in the date on two places on the last page, and handed the will and a pen to Ms. Grace, telling her "you sign here". Ms. Grace signed. Nobody read the will to Ms. Grace while Ms. Paff was present.
- [43] Ms. Paff says that she does not believe Ms. Grace ever read the will.
- [44] Ms. Paff says that she has treated patients during emergencies and in palliative settings through her work as a medic. She also worked as a care aide for many years. On April 30, Ms. Grace was using prescription medicines to treat her symptoms. Ms. Paff says that that day, Ms. Grace was lacking focus, very drowsy, her eyes were glassy, and her speech was slow and quiet. Her attention appeared to wander. Ms. Paff had told Ms. Grace the day before that she was coming back the next day, but Ms. Grace appeared surprised when she came over. She knows Ms. Grace was taking intravenous hydromorphone and is unsure what other medications she was taking.
- [45] Ms. Paff says that she is concerned because Ms. Grace trusted her father and would have signed any document he asked her to. When she reviewed the will, it appeared to her that it had been altered, referring in particular to the reference to a testamentary trust for minor beneficiaries, given that no minors were named in the will. She also refers to some minor typographical issues.
- [46] Ms. Paff discussed the phone call with Ms. Bryant. Ms. Paff says that she told Ms. Bryant she was surprised Mr. Barabonoff drafted the will. She told Ms. Bryant about Ms. Grace's wish that she be repaid the down payment. Ms. Bryant hung up on her.
- [47] Ms. Paff swears that she is not challenging the will because she wants half of Ms. Grace's estate. Any financial interest she has is limited to the down payment. . But she is suspicious that Mr. Barabonoff may have altered the will and presented it to Ms. Grace without her having knowledge of its actual contents.

Clarence Barabonoff Fifth Affidavit

- [48] Mr. Barabonoff swore his fifth affidavit on March 19, 2022. It is responsive to Ms. Paff's affidavit. He says that he discussed the contents of the will a few times with Ms. Grace in April, and on more than one occasion she told him she did not want her mother to get "any of her money", and she did want Ms. Bryant and her sons to get it.
- [49] He explains that he found a will online and drafted it. Initially, he drafted the will to provide, in paragraph 11, that the residue would be divided between Ms. Bryant and her sons. He then got some advice from a notary who recommended that if Ms. Grace trusted her sister, she simply leave everything to Ms. Bryant and avoid setting up trusts, especially as they live in Texas. He then removed the boys' names from the will and delivered the final version to Ms. Grace on April 29. He asked Ms. Grace if she wanted to read the will while he was there, but she told him to put it on the tray and she would read it later.
- [50] Mr. Barabonoff says that he went over to see Ms. Grace about 15 minutes before the designated time on April 30. The will had been moved and was lying on the bed. He says that after the witnesses got there, he asked Ms. Grace if these were her wishes, and she said they were, after which he handed a pen to her and she signed the will. Ms. Paff was there and said nothing.

Analysis

- [51] Mr. Barabonoff seeks to prove Ms. Grace's will in solemn form.
- [52] Ms. Paff challenges the will on the basis that Ms. Grace did not read or know the contents of the will prior to signing it, she signed it under suspicious circumstances in that she was presented with a document and told to sign it, and she may have lacked capacity.
- [53] Section 37 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 (WESA) sets out the statutory formalities that a will must comply with in order to be valid as follows:
- 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.
- [54] There is no question that the will in issue here is in writing, was signed at its end by Ms. Grace, and was signed by two witnesses in her presence. The statutory formalities for a valid will have been complied with.

- [55] Ms. Paff questions Ms. Grace's capacity to make a will, and her knowledge of the will's contents. She submits that the will was executed in suspicious circumstances.
- [56] Mr. Justice Brongers recently provided a very helpful outline of the principles application to such a challenge to the validity of a will in *Nassim v Healey*, 2022 BCSC 402. At para. 44 he summarized the rules regarding the burden of proof relating to testamentary capacity, as stated by the Supreme Court of Canada in *Vout v. Hay*, 1995 CanLII 105, as follows:
- [44] The rules regarding the burden of proof in relation to testamentary capacity were set out by the Supreme Court of Canada in *Vout v. Hay*, 1995 CanLII 105 (SCC), [1995] 2 S.C.R. 876 [Vout]. Essentially, the party who asserts that the will is valid - the "propounder" - benefits from a presumption that the testator had the necessary testamentary capacity so long as the will was prepared in accordance with the applicable statutory formalities, and was read by or to the testator who appeared to understand it. However, that presumption can be rebutted if the opposing party raises "suspicious circumstances" in relation to: (1) the preparation of the will; (2) the will-maker's capacity, or (3) coercion or fraud that overbears the will-makers' free will. Where suspicious circumstances are raised, the burden then shifts to the propounder to prove testamentary capacity.
- [57] In addition to capacity, the testator's knowledge and approval of the contents of the will must be established, with the propounder having the legal burden to prove same. Brongers J. summarized the law on this point, as follows:
- [47] In addition to the will-maker's general testamentary capacity, the Court must also be satisfied that the will-maker knew and approved of the contents of the will. The notion of "knowledge and approval" was explained by Baker J. in *Johnson v. Pelkey* (1997), 1997 CanLII 2935 (BC SC), 36 B.C.L.R. (3d) 40 at paras. 107-109 (S.C.) as follows:

At common law, the party seeking to propound a will has the legal burden to prove the testator's knowledge and approval of the provisions of the will. *Vout v. Hay*, (1995) 1995 CanLII 105 (SCC), 7 E.T.R. (2d) 209, (S.C.C.), *Russell v. Fraser*, (1980), 1980 CanLII 737 (BCCA), 118 D.L.R. (3d) 733, (B.C.C.A.). Any will that does not express the real or true "intention" of the testator will be set aside, even if the testator had testamentary capacity, and was not subject to undue influence.

In *Russell v. Fraser*, cited above, at page 739, the Court of Appeal held that where the person seeking to propound the will prepared the instructions for the will and takes a substantial benefit under the will, the burden of proving that the testator knew and approved the contents of the will is made more onerous.

The interested party must "affirmatively prove that the (testator) did in truth appreciate the effect of what she was doing". *Riach v. Ferris*, 1934 CanLII 13 (SCC), [1935] 1 D.L.R. 118, [1934] S.C.R. 725 at 736.

- [48] Furthermore, as was noted by Madam Justice Francis in *Geluch v. Geluch Estate*, 2019 BCSC 2203 at para. 127, knowledge and approval require the will-maker to be aware of the magnitude of the residue of their estate, and to appreciate the effect of its disposition. Simply knowing the contents of the will is insufficient.
- [49] The rules regarding the burden of proof in relation to knowledge and approval are the same as those that apply in respect of testamentary capacity. There is a presumption that the will-maker who executes a formally valid will knows and approves its contents, but that presumption does not apply if suspicious circumstances are present. In such a case, the burden shifts to the propounder to prove knowledge and approval on a balance of probabilities, with the evidence being scrutinized in accordance with the gravity of the suspicion: *Laszlo* at paras. 201-207.
- [58] Here, there is no question that the will was prepared in accordance with the applicable statutory formalities. The issue arises, however, of whether the evidence before the Court establishes that the will was read by or to Ms. Grace. If the evidence does not establish that the will was read by or to Ms. Grace, the propounder will not have the benefit of the presumption of testamentary capacity, and will have to prove testamentary capacity. Similarly, if there are "suspicious circumstances", the propounder will not have the benefit of the presumption, and will have to prove testamentary capacity and knowledge and approval of the contents of the will.
- [59] In my view, the evidence before the Court is not sufficient to prove that the will was read by or to Ms. Grace. None of the affiants have sworn that they read the will to Ms. Grace or that they saw her read the will or that she told them she had read the will. Mr. Barabonoff swore that he asked Ms. Grace if she wanted to read the will over while he was there, but she asked him to leave it on the tray beside her bed and said she would read it later. The next day, the will had moved and was lying beside Ms. Grace on the bed. He picked up the will and asked her if these were her wishes, to which she replied yes. For her part, Ms. Paff swears that she asked Ms. Grace if she had read the will, and she said no.
- [60] The affidavit evidence is not sufficient to establish that Ms. Grace had read the will or had it read to her. That means that the propounder does not have the benefit of the presumption of testamentary capacity, and must prove both that she had capacity, and knew and approved of the contents of the will.
- [61] Ms. Paff also submitted that there were suspicious circumstances. There is very little that is suspicious in the circumstances surrounding the preparation and execution of the will. In my view, Mr. Barabonoff has, through his affidavit evidence, fully explained how he discussed the will with Ms. Grace, went about preparing the will, and why the will refers to a testamentary trust for minor beneficiaries when there are no minor beneficiaries named. There is no evidence that would tend to suggest that Ms. Grace's free will was overborne by acts of coercion or fraud.

[62] Despite the absence of suspicious circumstances, I conclude that this application must be referred to the trial list for proof in solemn form of the will. That is solely because the propounder has failed, on the evidence before the Court, to prove that Ms. Grace read the will or had the will read to her. In the resulting absence of the benefit of the presumption of testamentary capacity, the propounder must prove on a balance of probabilities that Ms. Grace had testamentary capacity and that she had knowledge of and approved of the contents of the will.

Conclusion

[63] For these reasons, I refer the application to the trial list. In light of the modest size of this estate I urge the parties to take appropriate procedural steps to have this matter finally concluded in the most efficient and cost-effective manner possible.

"Lyster J."

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