

CANADA / JUDGMENT

Gregoire v. Cordani

2020 BCSC 276

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Supreme Court of British Columbia

DECIDED

28 February 2020

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2020 BCSC 276 Gregoire v. Cordani

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gregoire v. Cordani,

2020 BCSC 276

Date: 20200228

Docket: 208359

Registry: New Westminster

Between:

Jean-Claude Gregoire

Petitioner

And

Michael Cordani and Catherina Natelina Cordani

Respondents

In the Matter of the Estate of Nicola Maria Cordani, Deceased

Before: The Honourable Madam Justice Norell

Reasons for Judgment

Counsel for Petitioner:

J.S. Dyer

Counsel for Respondent Michael Cordani:

S.F. Ross

Place and Dates of Hearing:

New Westminster, B.C.

April 16 and December 13, 2019

Place and Date of Judgment:

New Westminster, B.C.

February 28, 2020

[1]

Introduction

- [1] The petitioner Jean-Claude Gregoire applies pursuant to s. 58 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA] for an order that a handwritten note (the "Note") signed by the deceased Nicola Maria Cordani ("Ms. Cordani") on September 13, 2018 is a record that represents the testamentary intentions of Ms. Cordani, and is fully effective as the will of Ms. Cordani. Other orders sought by Mr. Gregoire in the petition were adjourned generally. At the time of Ms. Cordani's death on September 14, 2018, Mr. Gregoire lived with Ms. Cordani.
- [2] The respondent Michael Cordani ("Mr. Cordani") is the brother of Ms. Cordani. He consents to the limited orders now sought by Mr. Gregoire. In his response to petition, he had sought alternative orders but those were also adjourned.
- [3] I will comment on two procedural issues in connection with the petition and response to petition at the end of these reasons.
- [4] The respondent Catherina Natelina Cordani is the mother of Ms. Cordani. She was personally served with the petition but did not file a response to petition. Despite this, counsel for the petitioner advised Ms. Catherina Cordani by letter of the hearing date and location of the hearing on April 16, 2019. Counsel for Mr. Cordani was in contact with Ms. Catherina Cordani by telephone that day and she indicated she was aware of the hearing and was not attending. Ms. Catherina Cordani was also given notice of the further affidavits filed, orders made, and HSBC records that were produced between the first and second hearing dates, as well as notice by mail of the second date of the hearing of the petition, but again did not attend the hearing.

Mr. Gregoire's evidence

- [5] Mr. Gregoire states he is the common law spouse of Ms. Cordani. I note here that whether Mr. Gregoire meets the definition of spouse in s. 2 of WESA may become an issue at some point in the estate proceedings, but is not an issue in this petition, and I make no finding as to whether he is a spouse.
- [6] Mr. Gregoire and Ms. Cordani met in 1999 while they were both employed at Canada Post. They became romantically involved in 2000. Their relationship ended in 2009 due to Ms. Cordani's health challenges with anxiety and depression. Despite their break-up they continued their friendship.
- [7] In April 2015, Ms. Cordani attempted to take her life. She reached out to Mr. Gregoire when she was in hospital and he visited her every other day. She told him she had previously attempted to take her life in 2013. She said she needed someone to help her. Ms. Cordani was in hospital one month. After Ms. Cordani left hospital, Mr. Gregoire visited her once or twice a week. He then changed his shift at work so he could be with her more. For most of 2015 he visited Ms. Cordani every other day. Over time their relationship grew.
- [8] As of early 2016, Mr. Gregoire was staying full time at Ms. Cordani's apartment. In early 2016, Ms. Cordani commenced a gradual return to work, but suffered a relapse of anxiety and went on disability. In mid-2016 Mr. Gregoire and Ms. Cordani agreed he should move into her apartment permanently. Mr. Gregoire kept his own rental apartment until the end of the year mainly for storage, as Ms. Cordani's apartment was short on space. Ms. Cordani still suffered from some level of depression, but for the most part appeared to be managing her condition.
- [9] In the early fall of 2017 Ms. Cordani's condition appeared to get worse. She told Mr. Gregoire of her decision to "cut out" her mother and two of her brothers, Steven Cordani and Adam Cordani, from her life. She stopped communicating with them. She told Mr. Gregoire she felt they did not support her in the way she needed. She remained close with her brother Michael Cordani.
- [10] In February 2018 Ms. Cordani became manic and delusional. With Michael Cordani's assistance, Mr. Gregoire had Ms. Cordani admitted to hospital for two weeks. Following her stay at hospital Ms. Cordani improved.
- [11] After this hospitalization Mr. Gregoire and Ms. Cordani discussed executing wills and designating each other as the beneficiary of their Canada Post pensions, but they never had the opportunity to do so before Ms. Cordani passed away.
- [12] In May 2018 Ms. Cordani reached the limit of her disability leave and it was possible her employment would be terminated unless she returned to work. In mid-2018 Ms. Cordani returned to work and was able to work up to 30 hours per week.

- [13] On September 13, 2018 Mr. Gregoire returned home from work and Ms. Cordani was not home. He had last seen her at 6:45 am that morning when he went to work. Mr. Gregoire filed a missing person's report with the New Westminster Police. He later learned from the police that Ms. Cordani did not go to work that day, but had booked the day off in advance.
- [14] On September 16, 2018 the New Westminster Police informed Mr. Gregoire that Ms. Cordani's body had been found on the banks of the Fraser River in Ridge Meadows and that an apparent suicide note had been found in her vehicle. This is the Note that Mr. Gregoire seeks to have declared as her will.
- [15] The police have told Mr. Gregoire they are unable to release the original Note, but provided him with a certified copy of the Note. This was filed at the hearing. Counsel for Mr. Gregoire also filed an affidavit confirming the advice she received from the police that they would not release the original Note.
- [16] Mr. Gregoire has made a diligent search of Ms. Cordani's personal belongings and papers and has not located any testamentary document other than the Note. A Wills Notice Search showed that no will was filed with the Vital Statistics Agency.
- [17] Mr. Gregoire states the Note is in Ms. Cordani's handwriting and bears her signature. He did not see the Note until a copy of it was provided to him by the police. In a second affidavit, Mr. Gregoire appended a copy of the signature page of Ms. Cordani's passport, and her personal address book with her handwriting. The signature on the Note appears similar to the signature in the passport and the handwriting in the Note appears similar to the handwriting in the address book. Similar materials were in excerpts of the police file that was produced.
- [18] A Coroner's report is not yet available, but Mr. Gregoire believes Ms. Cordani took her own life. Her certificate of death states her death was on September 14, 2018.
- [19] Mr. Gregoire has continued to reside at Ms. Cordani's apartment since her death. He believes that Ms. Cordani's estate consists of her apartment, bank accounts and RRSP at HSBC, her vehicle, and her pension with Canada Post.
- [20] Mr. Gregoire intends to apply for a Grant of Administration with Will Annexed should the court determine the Note is effective as the last will of Ms. Cordani.

Mr. Cordani's evidence

- [21] Mr. Cordani is the brother of Ms. Cordani. He states that Mr. Gregoire and Ms. Cordani lived together, at times on an intermittent basis, at Ms. Cordani's home.
- [22] Ms. Cordani had no children. Aside from Mr. Gregoire and Mr. Cordani, she is survived by her mother Catherina Natelina Cordani and her two other brothers Steven Cordani and Adam Cordani.

- [23] Mr. Cordani gives similar evidence to that of Mr. Gregoire regarding the circumstances of death and the assets in Ms. Cordani's estate. He is familiar with Ms. Cordani's handwriting and the Note appears to be entirely in her own handwriting.
- [24] Although not specifying specific proportions, he and Ms. Cordani had discussed leaving their respective estates to each other. He does not state when this discussion took place, or provide any further detail of the discussion.
- [25] Much of Mr. Cordani's affidavit is not factual, but instead his opinion on matters the court will have to decide, and is not admissible.

HSBC records

- [26] Following the adjournment of the hearing of this petition after the first hearing date, counsel for Mr. Gregoire obtained a court order for the production of the HSBC Bank records which identify the designated beneficiary of the RRSP account. The bank responded to counsel with the following letter:

We are writing in response to your letter dated on August 15, 2019 with regards to the Late Ms Cordani's RRSP Account and her designated beneficiary.

The branch is unable to locate the beneficiary designation form signed by the Late Ms Cordani when the plan was set up originally. However, our system records show that Ms Cathy Cordani, the mother of the deceased client, is the designated beneficiary of the registered RRSP Account since the opening of the RRSP account.

I am enclosing a copy of our system records for your reference.

- [27] Attached is what appears to be a one-page computer printout showing details of the account. It was opened on March 4, 2008. The beneficiary is stated to be Ms. Cordani's mother Catherina Cordani. It is not clear whether this is a revocable or irrevocable beneficiary designation. The value of the RRSP is approximately \$113,000.

New Westminster Police file

- [28] Following the adjournment of the hearing of this petition after the first hearing date, counsel for Mr. Gregoire obtained a court order for the production of the police investigative file. Portions of this file were in evidence on the petition. Ms. Cordani's body was found on the bank of the river, approximately 500 metres upstream from where her vehicle was parked. An HSBC bank statement was found in Ms. Cordani's vehicle, along with a driver's licence and bank cards, and other personal effects. Photographs of these are in the file. The bank statement shows three accounts, and two of these are referenced in the Note. The signatures on the bank cards appear to match the signature of the Note. An envelope was found in the vehicle with the names of Mr. Gregoire and Mr. Cordani and telephone numbers beside their names, but it is not clear if the Note was in this envelope.

The Note

[29] The Note is as follows:

Thu 09/13

Please understand

I can't deal with the depression and anxiety. It never lets up its been years 30 yrs. Sorry, you will be better off with out me.

Claude Gregoire and [Michael]

Cordani. [small area of scratched out writing] This is my will please respect my wishes.

Claude Gregoire common law husband

gets my apartment and all its

contents. 101-[] 7th Ave New West

V3M [] And

[small area of scratched out writing] HSBC [BANK] Account number

700-[] 26,282.06

700-[] 7,700.00

Michael Cordani brother

Get ALL the rest RRSP account

At HSBC

Steven + Adam Cordani get nothing.

[small area of scratched out writing] I have tried different Pills

therapy. Nobody, no doctors, is to

Blame. Please be happy for me.

Antoney Bordain, Kate Spade

Robin Williams they understand

about long term depression.

Nicole Cordani [Social Insurance Number]

[signature] N Cordani

[30] I have indicated in square brackets any scribble in the Note, and my edits deleting the street address, bank account numbers, and the social insurance number.

Law

[31] Section 37 of WESA sets out the formal requirements for validity of a 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 his or hers, 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.

[32] Section 58 of WESA is a curative provision and provides the court with discretion to order that a record that does not conform with s. 37 is fully effective as a will. Section 58 states in part:

58 (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.
- (4) If an alteration to a will makes a word or provision illegible and the court is satisfied that the alteration was not made in accordance with this Act, the court may reinstate the original word or provision if there is evidence to establish what the original word or provision was.
- [33] The court must be satisfied on a balance of probabilities, first that the document is authentic, and second that the document records the deceased's deliberate or fixed and final expression of intention as to disposal of his or her property on death. The court in *Hadley Estate (Re)*, 2017 BCCA 311 stated:
- [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 is 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; *Kuszek* at para. 7; *Martineau* at para. 21.

- [34] As to what is the material time, the court in *Hadley Estate (Re)* stated:
- [37] In many cases, as here, the material time for determining testamentary intentions on a s. 58 application is the time when the document in question was created. However, as noted in *Estate of Young*, depending on the circumstances, the material time may vary on this key issue. For example, after creating a document, a will-maker may, by words or actions, manifest a fixed and final intention that it expresses how his or her property is to be disposed of on death and thus that it operates as a will. In other words, a document may acquire a testamentary character by subsequent and sufficient manifestation of the will-maker's intention: *Bennett et al. v. Toronto General Trusts Corporation*, [1958] S.C.R. 392 at 397. Nevertheless, in most cases, the focus of inquiry will be the will-maker's intention when the document was prepared and executed: see, for example, *Sweeney Cunningham Estate v. Sweeney*, 2013 NSSC 299 at para. 29; *Komonen v. Fong*, 2011 NSSC 315 at para. 23.
- [35] Extrinsic evidence of testamentary intent is admissible on a s. 58 inquiry, so long as it meets the ordinary rules of evidence. In *Hadley Estate (Re)*, the court stated:
- [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: *Langseth Estate v. Gardiner* (1990), 75 D.L.R. (4th) 25 at 33 (Man. C.A.); *Yaremkewich Estate (Re)* at para. 32; *George*. As is apparent from the case authorities, this may well include extrinsic evidence of events that occurred before, when and after the document was created: see, for example, *Bennett*; *George*; *Estate of Young*; *Re MacLennan Estate* (1986), 22 E.T.R. 22 at 33 (Ont. Surr. Ct.); *Caule v. Brophy* (1993), 50 E.T.R. 122 at paras. 37-44 (Nfld. S.C.).

Analysis

- [36] I am satisfied there is no other will or testamentary document in existence. Mr. Gregoire, who lived with Ms. Cordani, has not found such a document, and a wills search shows there is no will registered with the Vital Statistics Agency. Further, Ms. Cordani did not refer to another will in the Note. As a result, if the Note is not found to be effective as a will, Ms. Cordani died intestate. In that case, the only persons who could inherit her estate are: Mr. Gregoire, if he meets the definition of spouse within s. 2 of WESA (s. 20 of WESA); or Ms. Cordani's mother, if Mr. Gregoire is not a spouse (s. 23(2)(b) of WESA). None of Ms. Cordani's three brothers would inherit on an intestacy. I am satisfied notice was not required to be given to Ms. Cordani's brothers, other than Michael Cordani, who is named in the Note, and

that all persons who are entitled to notice have been given notice of the petition.

- [37] The Note does not meet the requirements for formal validity of a will in s. 37 of WESA. There are no witnesses.
- [38] I find the Note is a record within the meaning of s. 58(1) of WESA and is authentic. Although the original was not available for filing with the court as it has been retained by the New Westminster Police, I am satisfied a true copy of the will was filed in evidence. Both Mr. Gregoire and Mr. Cordani have identified the deceased's handwriting and signature, and the handwriting and signature appears similar to the handwriting and signature on other documents of Ms. Cordani's.
- [39] As to whether the Note represents the fixed and final testamentary intention of Ms. Cordani as to the disposal of her property on death, I have considered the following factors:
- a) Ms. Cordani calls the document her will and states her intention that the Note be treated as a will. The Note states "This is my will please respect my wishes".
 - b) The Note does not appoint an executor, but specifically addresses Mr. Gregoire and Mr. Cordani and tells them to "please respect my wishes". In my view, this is a direction to Mr. Gregoire and Mr. Cordani to act on her behalf.
 - c) The Note is in Ms. Cordani's handwriting and is signed by her, signaling her approval of the content of the Note.
 - d) The Note is not witnessed. However, the Note refers to Ms. Cordani's depression and appears to be written in contemplation of taking her own life. In the circumstances, I find this is likely why the Note was not witnessed, and that the lack of witnesses does not evince an intention that this was not to be treated as her will.
 - e) The Note was found in Ms. Cordani's locked car by the police, near where her body was found, indicating an intention by Ms. Cordani that it be found.
 - f) The Note is dated "Thu 09/13" which corresponds with Thursday September 13, 2018, the date which Ms. Cordani went missing. It was therefore made very close to the time of her death.
 - g) Ms. Cordani makes specific bequests of major assets of her estate. She specifically refers to her apartment and two bank accounts which are given to Mr. Gregoire. The bank statement found in Ms. Cordani's vehicle shows that the amounts recorded in the Note are the exact amounts in those two bank accounts at that time. Ms. Cordani did not mention a third bank account at HSBC but I do not consider this significant as the bank account had less than five dollars in it. Ms. Cordani specifically refers to her RRSP and gives it to her brother Mr. Cordani. The Note does not refer to Ms. Cordani's vehicle and Canada Post pension. I discuss the Canada Post pension further below.

- h) Ms. Cordani provided identifying information such as her social insurance number, the account numbers of her bank accounts, and the address of her apartment.
 - i) The language of the Note conveys an air of finality.
 - j) There are three small scribbled out portions in the Note. With the exception of the word "It" which is scribbled out before the sentence beginning "I have tried different Pills ", the scribbled out portions are illegible. They appear to be scribbles of a word or single letter. Given their brevity and placement at the beginning of sentences, and the text that follows, I am satisfied they are not a wavering of what was intended. The changes are not indicative of draft language, but rather a handwriting mistake or a change in how a sentence begins.
 - k) Ms. Cordani leaves nothing to her two other brothers and mother, which is consistent with the discussions that Mr. Gregoire states he had with Ms. Cordani to the effect that she had decided to "cut out" these people from her life.
 - l) Both Mr. Gregoire and Mr. Cordani state they had discussions with Ms. Cordani regarding her testamentary intentions. Mr. Gregoire states that he and Ms. Cordani had discussed executing wills and designating each other as beneficiaries of their Canada Post pensions, but had not had the opportunity to do this. The Note says nothing specific about the Canada Post pension, so this is inconsistent with their discussion. Mr. Cordani states that he and Ms. Cordani had discussed leaving their respective estates to each other, but there was no discussion of what portion of the estate, so this is not inconsistent with the Note.
 - m) There are no allegations of testamentary incapacity or undue influence.
- [40] Weighing all of the above, I find the Note represents the fixed and final testamentary intentions of Ms. Cordani as to the disposal of her property on death, and that the Note is fully effective as the will of Ms. Cordani, and I so order.
- [41] Nothing in these reasons should be interpreted as a determination of whether: Mr. Gregoire comes within the definition of spouse in s. 2 of WESA; or the proper construction of the phrase "Michael Cordani brother get ALL the rest RRSP account At HSBC". Some of the orders originally sought concerned the meaning of this phrase, and whether there is an intestacy for part of the estate or the phrase grants the residue of the estate to Mr. Cordani, and whether it is effective as a designation of the beneficiary of the RRSP under s. 85 or ss. 97-98 of WESA. Those issues were adjourned. The sole issue before the court was the s. 58 application.
- [42] Although Ms. Catherina Cordani did not file a response to the petition, I direct that counsel for Mr. Gregoire send a copy of these reasons by regular mail to Ms. Catherina Cordani within five days of receipt of these reasons.

Procedural issues

- [43] These proceedings were commenced by petition filed on November 15, 2018. At the time the petition was filed, Rule 25-14(2) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 required that a party seeking an order under s. 58 of WESA apply by requisition in Form P43. Seven months later, Rule 25-14(2) was amended by B.C. Reg. 115/2019 to require that a party seeking an order under s. 58 of WESA file a petition. Neither party appearing raised this procedural issue, nor did Mr. Cordani argue that it was prejudicial to his interests. As the current Rules require the matter to be pursued by petition, pursuant to Rule 22-7(1) and (3), I have treated the petitioner's non-compliance with the former Rule 25-14(2) as an irregularity for which no corresponding order is necessary.
- [44] The second procedural issue is Mr. Cordani's response to petition which seeks independent orders. It is not appropriate to seek independent orders in a response. However, those orders were not pursued at the hearing.

Costs

- [45] In estate litigation, when a court application is reasonably brought as a result of the conduct of the deceased, the parties are usually awarded special costs from the estate. In *Hadley Estate (Re)*, the court stated:
- [47] In estate litigation, courts commonly award special costs payable out of the estate to all parties. This practice is based on the principle that where an estate issue must be litigated to remove any doubts, all interested parties must be joined and all are entitled to be heard. In such circumstances, they should not be out of pocket if, in the result, the litigation does not conclude in their favour. The central question as to costs is whether the contested issue arises from the conduct of the deceased or the conduct of another. In the case of the former, an award of special costs from the estate will usually be made: *Milwarde-Yates v. Sipila*, 2009 BCSC 277 at paras. 81-82.
- [46] In my view, Mr. Gregoire and Mr. Cordani acted reasonably in bringing and responding to this petition, and are entitled their special costs of the petition payable out of the estate.

"Norell J."

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Prepared on 25 October 2026 · Esheria