

CANADA / JUDGMENT

Jacobson Estate (Re)

2020 BCSC 1280

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1280 Jacobson Estate (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Jacobson Estate (Re),

2020 BCSC 1280

Date: 20200828

Docket: P190476

Registry: Victoria

In the Matter of the Estate of Helga Eileen Jacobson, Deceased

Corrected Judgment: The text of the judgment was corrected at paragraphs 31 and 37 on September 16, 2020.

Before: The Honourable Madam Justice Tucker

In Chambers

Reasons for Judgment

Counsel for the Applicant, Joan MacIntyre, in her capacity as Executor of the Will and Trustee of the Estate of Helga Eileen Jacobson, appearing via teleconference:

K. Vimalasan

Place and Date of Hearing:

Victoria, B.C.

July 17, 2020

Place and Date of Judgment:

Victoria, B.C.

August 28, 2020

I. Introduction

- [1] Helga Eileen Jacobson (the "deceased") died in Victoria, British Columbia on March 19, 2019. She left a will dated November 7, 2014 (the "Will").
- [2] The deceased and Naida Hyde were in a marriage-like relationship for over 30 years. The deceased had no children.
- [3] The Will provides that if Ms. Hyde survives the deceased, Ms. Hyde is to receive the deceased's personal property as well as the residue of her estate.
- [4] On or about June 1, 2017, the deceased and Ms. Hyde separated.
- [5] Section 56(2) of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA] automatically revokes a testamentary gift to the spouse of a will-maker if and when they cease to be spouses.
- [6] Joan MacIntyre, in her capacity as executor of the Will and trustee of the estate (the "applicant"), seeks an order under s. 58(2)(b) of the WESA, reviving the clauses of the Will that gave property to Ms. Hyde.

II. Facts

- [7] On August 17, 2017, the deceased consulted a lawyer, Samantha de Wit, about the issues arising from her separation, a new power of attorney and representation agreement, and possibly making a new will. Ms. de Wit acted for the deceased between August 2017 and May 2018, assisting her with these issues.
- [8] The deceased brought a friend, Mr. Beauchamp, with her to her initial meeting with Ms. de Wit. During the meeting, Mr. Beauchamp encouraged the deceased to revise the Will and leave her estate to charities. After a group discussion, Ms. de Wit met with the deceased separately. The deceased instructed her to draw up a new power of attorney, a new representation agreement, and a new will.
- [9] Ms. de Wit says she was of the opinion that the deceased was capable of making estate planning decisions. The deceased asked intelligent questions, understood her assets, was able to advise what terms she was seeking in relation to the separation. She could maintain a conversation and read and understand documents on review. She was able to tell Ms. de Wit fond stories about her work as an anthropologist and professor. The deceased had difficulty with details, such as bank balances and secondary accounts, but Ms. de Wit did not consider these concerning. Ms. de Wit's observations are reflected in her August 21, 2017, memo to file, and in her meeting file notes.

[10] On August 18, 2017, the deceased executed a power of attorney in favour of Mr. Beauchamp and, on August 29, 2017, a representation agreement. Ms. de Wit left the will until last because she was concerned that the push for a new will was coming from Mr. Beauchamp, and the deceased seemed unsure. In speaking with Ms. Hyde's family lawyer in mid-September, Ms. de Wit was advised the deceased had expressed reservations about appointing Mr. Beauchamp.

[11] On September 30, 2017, Ms. de Wit met with the deceased to discuss separation matters and to inquire about Mr. Beauchamp. The deceased confirmed that she regretted her choice of Mr. Beauchamp, and instructed Ms. de Wit to revoke his appointments. The deceased also advised Ms. de Wit that she wanted Ms. Hyde to inherit notwithstanding their separation. Ms. de Wit says the deceased said that she had "always" wanted Ms. Hyde as her beneficiary. Ms. de Wit made a notation on the "Instructions from Client" sheet she was using at the meeting. Her dated instruction sheet reads:

* find old will

* would still like Naida

to benefit under will - don't

want to cancel previous

[12] At each following meeting with the deceased, Ms. de Wit asked the deceased whether her instructions on the point had changed, and on each occasion the deceased confirmed her continuing wish to benefit Ms. Hyde.

[13] On October 31, 2017, the deceased called Ms. de Wit twice. In the first call, she asked for a copy of the revocation of the Beauchamp power of attorney and advised that she wanted her friend, Darborah Honeyman, to be appointed as her new power of attorney. In the second call, the deceased asked Ms. De Wit to confirm that the Will had not been changed and that Ms. Hyde was still her beneficiary.

[14] On November 18, 2017, the deceased executed a power of attorney in favour of Ms. Honeyman ("Honeyman POA"). Ms. de Wit assessed the deceased's capacity again at that time, and again concluded she was capable of making decisions about estate-planning and providing instructions.

[15] Ms. Honeyman says that shortly after the deceased asked her to act as her power of attorney (i.e., November 2017), the deceased told her that she wanted her property to go to Ms. Hyde notwithstanding the separation. Ms. Honeyman attests that she responded by asking the deceased if she was making a will to that effect, and that the deceased replied that it was unnecessary, as Ms. Hyde was the beneficiary under her existing will. Ms. Honeyman says the deceased remained adamant that Ms. Hyde was to be her beneficiary throughout the separation agreement negotiations.

- [16] In very late 2017, the deceased was hospitalized several times after falling. Ms. de Wit arranged for the deceased to consult a rehabilitation expert, Barbara Phillips, about her living arrangements and needs. On January 18, 2018, after meeting with the deceased, Ms. Phillips told Ms. de Wit she thought the deceased was showing signs of early stage of dementia and recommended a capacity test be done by a physician.
- [17] During February 2018, Ms. de Wit had a number of phone conversations with the deceased regarding separation issues. Ms. de Wit says the deceased participated meaningfully in their discussions and was able to provide her with clear and consistent client instructions.
- [18] On February 26, 2018, Ms. de Wit met in person with the deceased to complete documents for the sale of the family residence. She says that notwithstanding Ms. Phillips' observations, and her own observation that the deceased had some additional deterioration of her memory, she was satisfied the deceased had the capacity to execute the documents.
- [19] By March 11, 2018, Ms. de Wit was sufficiently concerned about possible further deterioration that she took steps to involve Ms. Honeyman in concluding the separation agreement.
- [20] On April 11, 2018, a geriatric medical specialist examined the deceased and concluded she was no longer capable of managing her financial or legal affairs.
- [21] On April 16, 2018, Ms. de Wit sent Ms. Honeyman a draft separation agreement and a letter explaining its terms, asking Ms. Honeyman to review the draft with the deceased and then provide her with instructions under Honeyman POA.
- [22] On April 23, 2018, Ms. Honeyman instructed Ms. de Wit to delete a clause from the separation agreement that prohibited the parties from seeking a share of the other's estate, because the deceased specifically intended for her estate to go to Ms. Hyde. Ms. Honeyman says that instruction was a product of her discussions with the deceased about the draft, and that during those discussions the deceased had again confirmed that she wanted Ms. Hyde to inherit her estate.
- [23] The deceased died in March 2019, leaving the Will as her most recent testamentary document.

III. RELEVANT WESA Provisions

- [24] The WESA includes the following provisions:

Revocation of gifts

56 (2) If a will-maker

- (a) makes a gift to a person who was or becomes the spouse of the will-maker,

,

and after the will is made and before the will-maker's death the will-maker and his or her spouse cease to be spouses under section 2 (2), the gift is revoked and the gift must be distributed as if the spouse had died before the will-maker.

Revival of will

57 (4) A part of a will that has been revoked may not be revived except

- (a) by an order of the court under section 58 if the court is satisfied that the will-maker intended to give effect to the will or part of the will that was revoked; or
- (b) in accordance with any other provision of this Act that recognizes the revival of a will.

Court order curing deficiencies

58 (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.

IV. THE Application

[25] Ms. de Wit was unaware of s. 56(2) of the WESA. Had she known of it, she would have either prepared new will or drawn a codicil to the Will to ensure the gifts to Ms. Hyde were effective: ss. 57(1), (3) and (4)(b) of the WESA. However, no such steps were taken during the deceased's lifetime.

[26] Accordingly, the applicant seeks an order under the WESA s. 58(2)(b) reviving the following clauses of the Will (the "Hyde clauses"):

- a) Clause III. A. - a gift to Ms. Hyde of all personal property, and
- b) Clause III. E. - a gift to Ms. Hyde of the residue of the estate.

- [27] The applicant submits the central inquiry under s. 58 of the WESA is whether there is an authentic document that "records a deliberate or fixed and final expression of intention" regarding the deceased's property: *Estate of Young*, 2015 BCSC 182 at paras. 34-36.
- [28] The applicant says the evidence demonstrates that the Will was intended as a record of the deceased's testamentary intentions, and that the deceased expressed, post-separation, testamentary intent by affirming the Hyde clauses.

V. ANALYSIS

- [29] I am satisfied the Will is an authentic document. On August 17, 2017, the deceased told Ms. de Wit she had a will dated November 7, 2014, that left her estate to Ms. Hyde. At some point, she provided Ms. de Wit with a copy. The terms of the Will also correspond to those described to Ms. Honeyman by the deceased in their November 2017 conversation regarding wills.
- [30] The Will was patently intended as a formal record of testamentary intention at the time of its making. It meets all of the WESA requirements and carries traditional indicators (e.g., makes bequests).
- [31] I also find that the deceased repeatedly and unequivocally stated to Ms. de Wit and Ms. Honeyman at various times between October 2017 and December 2017, that she wanted (and expected) her estate to go to Ms. Hyde despite the June 2017 separation. I am satisfied the deceased had testamentary capacity throughout the October-December 2017 period. Further, while the deceased's capacity waned markedly in 2018, the deceased never wavered in her intention between January 2018 and the time she lost capacity. In fact, short of actually executing an effective document, it is hard to imagine how the deceased's testamentary intention could be established more clearly than it is on the evidence before me.
- [32] The more difficult issue is whether the order sought here is one within the court's power to make pursuant to ss. 57(4) and 58.
- [33] As discussed in *Hadley Estate*, 2017 BCCA 311 at paras. 33-35, enactment of the WESA marked British Columbia's move from a "strict compliance" jurisdiction to one with a legislative focus on testamentary intention. Section 58 plays a key role in that new approach:
- [34] 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:
- [34] Section 58 confers a curative power.

- [35] The Will complies with the WESA. While the Will now includes, on its face, clauses that are ineffective by virtue of s. 56(2), that does not bear on Will's validity. Nor is there any another document that is said to be testamentary - there is only the Will.
- [36] The factual findings above demonstrate that the Will, in its present form, will not have a legal effect that corresponds with the deceased's actual wishes. However, the lack of correspondence is due to a failure to take any action under the WESA to revive the Hyde clauses and bring it back into conformity, not to an attempt rendered ineffective by formal non-compliance.
- [37] The deceased was unaware of the s. 56(2) revocation. There was no intent to revive the Hyde clauses during the deceased's lifetime. Thus, there is no intent to revive to give effect to nor any attempt at revival to cure. In my opinion, the Hyde clauses cannot be revived under ss. 57(4) and 58.
- [38] Here, because the deceased was unaware of the revocation, her post-separation statements and conduct should be considered from her perspective. To the deceased, all of the terms on the face of the Will constituted the terms of her intended testamentary document. Post-separation, the deceased was aware of the specific terms set out on the face of the Will, and she regarded those terms as existing in fact (i.e., irrespective of their legal effect). She unequivocally, repeatedly and consistently affirmed the terms appearing on the face of the Will as an accurate representation of her testamentary intentions both after separation and while of capacity. I am left without doubt that the terms on the face of the Will - including the Hyde clauses - represent the deceased's true testamentary intention.
- [39] The Will, inclusive of the Hyde clauses, is patently a "document". A document can be given effect "as a will" even where no formal WESA requirements have been complied with.
- [40] The WESA was enacted following a report by the British Columbia Law Institute, "Wills, Estates and Succession: A Modern Legal Framework" (2006) ("BCLI Report"). The BCLI Report suggested the following curative provision:

Dispensing power

46(1) If, upon application, the court determines that a document or any writing or other marking on a document embodies

- (a) the testamentary intentions of a deceased; or
- (b) the intention of a deceased to revoke, alter or revive a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a will,

the court may, notwithstanding that the document or writing was not executed in compliance with any or all of the formal requirements imposed by this Act, order that the document or writing, as the case may be, be fully effective as though it had been executed in compliance with all the formal requirements imposed by this Act as the will of the deceased or as the revocation, alteration or revival of the will of the deceased or of the testamentary intention embodied in that other document, as the case may be.

[Emphasis added]

[41] Part of the accompanying commentary BCLI Report reads (p. 152):

Subsection (1) does not require a minimum level of compliance with formalities in order for a document to be given effect as a will. An early curative enactment in Queensland, which required an element of "substantial compliance" with formalities, failed to achieve its purpose because the court found it could not classify formalities into essential and non-essential categories. "Substantial compliance" became elevated into a new kind of formality in itself. ...

See also, Hadley, para. 35.

[42] The material time for determining testamentary intention need not be the date of creation of the document: Hadley, para. 37. Here, I am satisfied that the Will (inclusive of the Hyde clauses) accurately reflects the deceased's fixed testamentary intentions as manifested from September 30, 2017, through to her death.

[43] The WESA would have enabled the deceased to achieve her post-separation intentions in accordance with its provisions by undertaking certain formalities: e.g., re-executing the Will or executing a codicil: s. 57(1). The deceased did not comply with any of those formalities, but she did unequivocally manifest her intentions repeatedly in statements to her solicitor and power of attorney. The purpose of s. 58 is to ensure that discernible testamentary intentions are not thwarted "for no good reason" by a failure to comply with statutory requirements. Declaring the terms set out in the Will, in their entirety, effective as the deceased's will as at the time of her death accomplishes exactly that.

VI. ORDER

[44] Pursuant to ss. 58(2)(a) and (3)(a) of the WESA, I declare the that terms set out on face of the Will, inclusive of the Hyde clauses, are fully effective as the deceased's will at the time of her death, and the Will may be admitted to probate on that basis.

"Tucker J."

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