CANADA / JUDGMENT

Kasper v. Collins

2025 BCSC 654

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2025 BCSC 654 Kasper v. Collins

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kasper v. Collins,

2025 BCSC 654

Date: 20250408

Docket: S39311

Registry: Chilliwack

Between:

Derrick Allan Kasper

Plaintiff

And

Ronald Spencer Collins and Ronald Spencer Collins in his capacity

as named personal representative of the Estate of Franklin John Collins

Defendants

Before: The Honourable Mr. Justice Milman

Reasons for Judgment

Counsel for the Plaintiff:

T.J. Mueller

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Place and Date of Hearing:

Chilliwack, B.C.

March 27, 2025

Place and Date of Judgment:

Chilliwack, B.C.

April 8, 2025

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I. Introduction

[1] This action concerns the estate of the late Franklin John Collins (the "Deceased"), who died on October 5, 2020. On November 23, 2022, the defendant, Ronald Spencer Collins, one of the Deceased's three biological sons, obtained an order of this court in separate proceedings granting probate of a will dated June 19, 2019.

[2] The plaintiff, Derrick Allan Kasper, a stepson of the Deceased, applies in this action for relief under s. 58 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA]. He seeks, in essence, to have that probate order set aside and replaced with an order to recognise and give effect to a draft will dated October 5, 2020, that the Deceased never signed but that was, the plaintiff says, prepared by a lawyer on the Deceased's instructions just before he died.

[3] The defendant opposes the application, arguing that the plaintiff has, for various reasons, failed to demonstrate that such relief should be granted.

[4] For the reasons that follow, I have concluded that the application should be dismissed.

II. Background Facts

A. The Deceased's Relationships

[5] Over the course of his lifetime, the Deceased was in at least three long-term spousal relationships.

[6] He had three children from his first marriage, namely, Ronald Collins (the defendant), Keith Collins and Douglas Collins (the latter died on January 12, 2021).

[7] In the mid-1970s, the Deceased married his second wife, Marjorie Collins. Ms. Collins came to the marriage with three children of her own from a previous relationship, namely, Derrick Kasper (the plaintiff), Rodney Kasper and Denyse Kenneson.

[8] The Deceased and Ms. Collins remained married for approximately 40 years until Ms. Collins' death on April 11, 2016. They raised the six children together as one family.

[9] After Ms. Collins died, the Deceased entered into a relationship with his third partner, Roslyn Mari-Clair Gagne, but they separated shortly before he died.

B. The 2016 Will

[10] Following Ms. Collins' death, her assets passed to the Deceased. About five weeks after that, on May 17, 2016, the Deceased executed a will (the "2016 Will"), which, among other things:

a) appointed his daughter-in-law, Marta Anne Kasper (who was, at the time, married to the plaintiff), as his executor but stipulated that if she was unable to fulfill that role, the alternate executor was to be the plaintiff, or failing him, Rodney Kasper; and

b) distributed his estate in equal measure to each of the six children.

[11] The final provision of the 2016 Will contained the following paragraph:

In this Will I have made equal provisions for my children and stepchildren. I have done this because we are a close family, and my children and stepchildren deserve to be treated equally.

[12] At the same time, the Deceased executed:

a) an enduring power of attorney; and

b) a representation agreement,

in favour of Ms. Kasper, or if she was unable to fulfill that role, the plaintiff, and, if both of them were unable to do so, Rodney Kasper.

[13] The relationship between Ms. Kasper and the plaintiff ended just over a year later, in June 2017, but they have, Ms. Kasper says, remained in contact because they have children together. Despite the breakdown of that relationship, Ms. Kasper appears to have remained close to the Deceased until his death.

C. The 2019 Will

[14] In June 2019, the Deceased retained a lawyer, Rebecca Domovitch, with a view to changing his will. Ms. Domovitch has deposed that the Deceased told her at that time that he had decided to disinherit four of the children, for the following reasons:

a) Keith Collins (one of the Deceased's biological children), because he was, in the Deceased's view, a drug addict whose lifestyle the Deceased did not want to support (Ms. Domovitch adds that the Deceased also believed that adequate provision had, in any event, been made for Keith Collins by other means); and

b) his three step-children, because the Deceased was of the view that they had taken items of personal property from his apartment and therefore had already received their inheritance.

[15] Accordingly, on June 19, 2019, while he was admitted as a patient at the Campbell River Hospital ("CRH"), the Deceased executed another will (the "2019 Will") before Ms. Domovitch and another individual. Among other things, the 2019 Will:

a) appointed the defendant as executor, but stipulated that if the defendant was unable to fulfill that role, the alternate executor was to be Ms. Kasper;

b) made a number of specific bequests of individual items of personal property to a number of individuals and charitable organisations;

c) granted Ms. Gagne a qualified life estate in the condominium where she and the Deceased were then cohabiting; and

d) stipulated that the remainder of the estate was to pass to two of his biological sons, Ronald Collins (the defendant) and Douglas Collins.

[16] According to Ms. Domovitch, she never saw, communicated with or took any instructions from the Deceased after June 19, 2019.

D. The Draft Will

[17] In August 2020, just over a year after executing the 2019 Will, the Deceased was diagnosed with cancer and admitted into the intensive care unit at CRH.

[18] Ms. Kasper has deposed that on September 12, 2020, the Deceased told her that he wanted to change his will once again, this time to revert to an equal distribution among all six children. According to Ms. Kasper, the Deceased was "awake, alert, and oriented" when he expressed that desire.

[19] In the days that followed, Ms. Kasper contacted Ms. Domovitch to obtain her assistance in that regard. To that end, Ms. Kasper sent Ms. Domovitch an email on September 12, 2020, which began as follows:

I had a great conversation with frank this morning ,just the two of us I started with " we should talk a little about business" he is in full agreement that the condo be sold

[20] After some comments concerning the recent breakdown of the relationship between the Deceased and Ms. Gagne, the email described a discussion between her and the Deceased about making a new will:

I also stated that there was 2 lawyers that believe that your last couple of wills were not really what he wanted but were results of him being a " people pleaser " to which he laughed ,I said that I believed the first will he made with Derrick and I (the one with equal division) between all of his kids , would be closer to the truth ,to which he said "yes" ,. I said that you would be willing to come and change it back to that if he truly wished that and he said "it would make me feel better" he asked if I could be with him ., an[d] I Said "absolutely" to which he replied "I knew you would take care of me" [happy face emoji]. I told him not to worry about anything," that's my job" .. at that time Rodney Kasper showed up to visit and we concluded that conversation . Before I left about 5 minutes later he said "see ya Monday" [happy face emoji] he is completely alert and oriented.

[21] On September 16, 2020, the Deceased moved from CRH to the Golden Grove Care Home in Campbell River.

[22] On September 18, 2020, Ms. Domovitch sent an email to Ms. Kasper, asking for the opportunity to speak with the Deceased. Ms. Kasper responded with an email on September 30, 2020, stating as follows:

frank says he hasn't seen a lawyer yet and the care home supervisor said he is having more bad days then [sic] good now I'm not sure if he wants to change anything but we should give him the option he's very remorseful about Roslyn so I just want to make sure his final wishes are his [happy face emoji].

[23] On October 1, 2020, Ms. Domovitch went to the care home in an effort to meet in person with the Deceased, to assess his capacity, to discuss with him whether he wanted to make a new will and, if he did, to take his instructions in that regard. She was unable to do so because he was sleeping when she arrived.

[24] In her email to Ms. Kasper later that day reporting on the visit, Ms. Domovitch stated as follows:

I went by the care home today, but Frank was sleeping and not up for visitors. I left him a photocopy of the two versions of his will along with our will planning form and a note saying that I'd stopped by to talk about his condo and will with him and to give me a call if he feels up to it.

[25] On the following day, October 2, 2020, Ms. Kasper responded as follows:

Hi I'm going there today at approx. noon hopefully he can call you then., he's been not so good the last couple of days, not sure how much longer he has we will try and call you. As far as the condo goes, frank wants it sold but Laurie was using it as some sort of pawn (not sure what her end game is) We can list it, Frank has enough money in his account for 2 more months at the home but at the rate of his physical deterioration I don't suspect he will make it to his birthday (October 13)

[26] Ms. Domovitch received a telephone call from Ms. Kasper later that day. Their respective accounts of the discussion are not entirely consistent. According to Ms. Kasper, "the Deceased and I spoke to [Ms. Domovitch] via telephone, at which time the Deceased confirmed his testamentary intentions" to Ms. Domovitch.

[27] Ms. Domovitch disputes this. According to her:

a) she spoke only with Ms. Kasper on the telephone that day;

b) Ms. Kasper advised her that the Deceased was in the room with her but that he was unable to come to the telephone because he was eating; and

c) Ms. Domovitch had no idea if the Deceased was in fact present during the telephone call because she could not hear him in the background.

[28] Ms. Domovitch specifically denies that she spoke to the Deceased on the telephone or that he confirmed his testamentary intentions to her at that time.

[29] Ms. Domovitch's contemporaneous notes of that conversation suggest that the telephone call was with Ms. Kasper alone - the Deceased is not identified in the notes as a participant. In any event, it appears that Ms. Kasper advised Ms. Domovitch during the call that the Deceased wanted to make a new will and provided her with instructions as to the terms it should contain. One of the notations suggests that the new will was to provide for the "six kids divided equally." Following the call, Ms. Domovitch prepared a draft will (the "Draft Will") based on those instructions.

[30] Among other things, the Draft Will would have:

a) appointed Ms. Kasper as executor, but stipulated that if she was unable to fulfill that role, the alternate executor was to be the defendant;

b) made the same specific bequests of individual items of personal property as were stipulated in the 2019 Will; and

c) distributed the residue of his estate in equal measure to each of the six children.

[31] On October 5, 2020, Ms. Domovitch emailed the Draft Will to Ms. Kasper, in anticipation of attending at the care home to finalise it with the Deceased. The cover email stated as follows:

Hi Marta

I've attached the will that I'll be bringing with me to sign with Frank at 11:00 today. IF you think there are any revisions, let me know. It won't be a big deal to make corrections on the fly, though.

[32] Later that morning, Ms. Domovitch gathered her laptop and portable printer and went to the care home with a view to meeting with the Deceased and going through the Draft Will with him. By the time she arrived, however, the Deceased had already died.

E. Litigation History

[33] The plaintiff commenced this action on March 15, 2022. On November 23, 2022, the defendant obtained an order granting probate in respect of the 2019 Will.

III. Applicable Legal Principles

[34] The formal requirements of a valid will are set out in s. 37 of WESA. Those requirements include the need for the will-maker's signature, authenticated by the signatures of two witnesses. If one or more of those requirements are not met, then, pursuant to s. 37(2), the will cannot be considered valid unless the court makes an order curing the deficiencies under s. 58.

[35] That provision states as follows:

Court order curing deficiencies

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.

[36] The principles to be applied on an application under that provision were discussed in Hadley Estate (Re), 2017 BCCA 311, and helpfully summarised in Hubschi Estate (Re), 2019 BCSC 2040, in which Armstrong J. stated as follows:

[29] The Court of Appeal described the underlying purposes of s. 58 in Hadley Estate (Re), 2017 BCCA 311 [Hadley Estate]:

[1] On March 31, 2014, the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 came into force in British Columbia. Known as the WESA, it represents a significant reform of this province's wills and estate administration law. One of its most far-reaching provisions is s. 58, which confers a broad discretion on the court to relieve against the consequences of non-compliance with testamentary formalities. The new curative power is a marked departure from the traditional principles of formalism that previously governed the creation, alteration and revocation of wills in British Columbia.

[33] British Columbia was a "strict compliance" jurisdiction prior to passage of the WESA. Under s. 4 of the Wills Act, R.S.B.C. 1996, c. 489, testators were obliged to comply strictly with execution and attestation formalities for creating a will for it to be valid. The same was true for revoking, altering or reviving a will: Wills Act, ss. 14, 17, 18. These formal requirements sometimes led to a will-maker's testamentary intentions being defeated for no good reason. As a result, the British Columbia Law Institute recommended the introduction of a dispensing power to relieve against the consequences of non-compliance with testamentary formalities as part of a general reform of wills and estate administration law: BCLI, Wills, Estates and Succession: A Modern Legal Framework (BCLI Report No. 45, June 2006) at xiv.

[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

[30] Under s. 58, there is no "minimum level of execution or other formality for a testamentary document to be found fully effective" (Hadley Estate at para. 35). If a court grants an order under s. 58(3) a document may be admitted to probate regardless of its form (at para. 35).

[31] The party seeking an order under s. 58(3) must demonstrate, on a balance of probabilities, that: (1) the testamentary document is authentic; and (2) the testamentary document contains the full, final and fixed intention of the will-maker.

[32] Hadley Estate states:

[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; 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.

[Emphasis added.]

[33] The Court of Appeal addressed the issue of determining the material time for assessment of the deceased's testamentary intentions:

[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.

[34] The ordinary rules of evidence and admissibility apply to the inquiry: see Hadley Estate at para. 38. The court must explore all of the surrounding circumstances to form an opinion about the deceased's state of mind. The Court of Appeal said:

[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.).

[37] Other considerations that may inform the analysis were set out by Wilkinson J. in Jakonen Estate (Re), 2022 BCSC 2261, as follows:

[44] While the analysis is necessarily context specific, there are a number of factors that the courts have considered in other cases that are relevant to the analysis of the documents and records in issue here. These include:

a) Was the document or record made by the Deceased or by a third party? A document made by the Deceased is more likely to be given effect than a document made by a third party, including a lawyer's draft: George v. Daily (1997), 143 D.L.R. (4th) 273 (Man. C.A.).

b) Where was the document or record found? If the Deceased left the document or record in a prominent place where it was likely to be found, or with other testamentary documents, the document or record is more likely to be given effect: Skopyk Estate, 2017 BCSC 2335 at para. 22

c) Is the document or record signed, or is there any other compliance of the formal requirements for a valid will? The greater the degree of compliance with the formal requirements, particularly if the document is signed, the greater the likelihood that the document or record will be given effect: Estate of Young, 2015 BCSC 182 at para. 39

d) Is there a title on the document or record? If a document or record is given the title "will" or "codicil" or a similar notation, it is more likely to be given effect: Smith Estate (Re), 2016 BCSC 350 at para. 23.

e) Is the language of the document or record dispositive, and does it have an air of finality? If so, it is more likely to be given effect: Smith Estate at para. 23.

f) Does the document or record provide for a rational distribution? If so, it is more likely to be given effect: Skopyk Estate at para. 27

g) Is the document or record consistent with other evidence of the Deceased's intentions? If so, it is more likely to be given effect: Estate of Young at para. 38

IV. Discussion

[38] The plaintiff argues that Ms. Kasper's affidavit demonstrates, to the requisite standard, that the Draft Will, although unsigned, embodied the Deceased's settled testamentary intentions, so as to justify the relief he seeks under s. 58.

[39] The defendant disputes this. He says that the Deceased lacked the capacity to make a valid will following his cancer diagnosis in August 2020 and in any event, that he never manifested an intention to adopt the contents of the Draft Will. In particular, the defendant has deposed that he spoke or met with the Deceased every day after that diagnosis and on no occasion did the Deceased mention to him that he wished to change his will. He urges me to reject the evidence of Ms. Kasper, on the basis that it is self-serving and inconsistent with the more reliable account of Ms. Domovitch.

[40] I agree with the defendant that the plaintiff's case is problematic, both in relation to the Deceased's capacity and his adoption of the contents of the Draft Will.

[41] The "material time" when the Deceased is said to have imparted the requisite testamentary instructions is unclear. Ms. Kasper suggests that he first did so during a conversation with her alone at CRH on September 12, 2020. Her email to Ms. Domovitch later that same day reporting on that conversation fails to document a clear statement of intention on the part of the Deceased to make a new will, let alone the one that Ms. Domovitch subsequently drafted.

[42] Rather, the Deceased is said to have agreed with the "2 lawyers" who believed that both the 2016 Will and the 2019 Will "were not really what he wanted" but were rather the product of his being a "people pleaser." He appears to have been keen to please Ms. Kasper on that occasion because he agreed with her next suggestion that the 2016 Will (the one for which

she and the plaintiff were said to be responsible) was "closer to the truth" than the 2019 Will. When Ms. Kasper told the Deceased that Ms. Domovitch "would be willing to come and change it back to that if he truly wished that" his response was that this would make him "feel better" but then immediately asked, incongruously, if Ms. Kasper could be there with him when that occurred.

[43] That Ms. Kasper herself was not convinced that the Deceased had made up his mind to change his will is clear from her subsequent email to Ms. Domovitch of September 30, 2022. On that occasion, she stated that she was "not sure if he wants to change anything" but merely wanted to "give him the option."

[44] When Ms. Domovitch gave him that option by leaving the materials with him and inviting him to call her to provide his instructions if he wanted to make the change, he did not take up the offer, either because he lacked the capacity or the desire to do so.

[45] By then, he was having more "bad days" than "good days", even by Ms. Kasper's account. The care home's treatment records also lend support to the defendant's contention that the Deceased was frequently confused in those last days of his life. Ms. Domovitch has deposed that she was concerned about his testamentary capacity because Ms. Kasper told her that he was "disoriented and believed himself to be in Newfoundland and was concerned about fuel supplies, or something to that effect."

[46] The other "material time" in Ms. Kasper's account is the telephone call with Ms. Domovitch on October 2, 2020. Ms. Domovitch's contemporaneous hand-written notes of that conversation support her assertion that the Deceased did not take part in the discussion in any way. The explanation that Ms. Domovitch says she received for his failure to participate, namely that he was eating at the time, further undermines the strength of the inference that he was the source of those instructions. If he had truly been intent on providing instructions to change his will at that time, then presumably, he would have temporarily interrupted his meal for that purpose, or rescheduled the call.

[47] For all those reasons, I have concluded that the plaintiff has failed to show that the Draft Will embodied the Deceased's settled testamentary intentions at any material time.

V. Summary and Conclusion

[48] Having arrived at that conclusion, I am dismissing the application.

[49] The plaintiff argues that both parties should receive their litigation costs from the estate, payable as special costs, regardless of the outcome. The defendant opposes such an order, arguing that, if I dismiss the application, as I now have, the plaintiff should be required to pay costs as the unsuccessful party, at the ordinary tariff.

[50] The test to be applied on this issue was set out in Hadley Estate as follows:

[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.

[51] Although I have not been persuaded that the Draft Will embodied the Deceased's settled testamentary intentions at any material time, I am satisfied that his remarks to Ms. Kasper in the last weeks of his life gave her, and therefore the plaintiff, reason to believe that the Deceased was inclined to change his will and, had he lived even a short time longer, would have done so unambiguously.

[52] My order will therefore be that both parties' costs are to be payable from the estate as special costs.

"Milman J."

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