
CANADA / JUDGMENT

Lane Estate

2015 BCSC 2162

COURT

Supreme Court of British Columbia

DECIDED

25 November 2015

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2015 BCSC 2162 Lane Estate

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lane Estate,

2015 BCSC 2162

Date: 20151125

Docket: 51912

Registry: Kamloops

In the Matter of the Estate of Elda Lane, Deceased

Before: The Honourable Mr. Justice Pearlman

Reasons for Judgment

Counsel for the Petitioner:

Tyson McNeil-Hay

The Respondent:

No one appeared

Place and Date of Hearing:

Kamloops, B.C.

November 16, 2015

Place and Date of Judgment:

Kamloops, B.C.

November 25, 2015

INTRODUCTION

- [1] The petitioner, Warwick Edward Ricky Lane, applies as executor of the estate of Elda Lane, (the "deceased"), for a determination pursuant to s. 58 of the Wills Estates and Succession Act, S.B.C. 2009 c. 13 [WESA] of whether any or all of seven handwritten notes made between April 14, 2012 and January 9, 2015 represent the intention of the deceased to alter her Last Will and Testament dated July 12, 1994 (the "Will"). The petitioner also seeks an order and declaration setting out the results, and giving effect to the Court's determination.
- [2] The petitioner and his sister, the respondent Deborah Alsop, are the residual beneficiaries under the Will. Although duly served, Ms. Alsop did not file a response to the petition and did not participate in the hearing of this matter.
- [3] If the notes, or any of them, represent the deliberate and final intention of the deceased to alter her Will and are found to be effective, they would alter the distribution of the estate in the petitioner's favour. On the hearing of this application, the petitioner, as executor, took no position on whether the Court should find that the notes are effective to alter the Will. Counsel for the petitioner, Mr. McNeil-Hay, assisted the Court by making careful submissions on factors both for and against a determination that the notes are effective to alter the Will.
- [4] Because the notes are potentially testamentary documents made after the Will, the executor is unable to apply for a grant of probate until this matter is determined by the Court.

Issue

- [5] The question for determination on this application is whether the notes, or any of them, represent the testamentary intention of the deceased to alter her Will as provided in the notes, so as to permit the Court to find that the notes, or any of them, are fully effective as an alteration of the Will under s. 58 of WESA.

Facts

- [6] By her Will made on July 12, 1994, the deceased made a specific bequest to Ms. Alsop of her jewelry and a tea set. She left the residue of her estate to the petitioner and Ms. Alsop in equal shares.
- [7] The deceased died on April 14, 2015.
- [8] The estate consists of the deceased's home and her Scotiabank account. The executor estimates the total value of the estate at just under \$400,000.

- [9] On several occasions prior to her death, the deceased told the petitioner that she wanted him to have her house after she died and that she had left a note in her house to that effect. When the petitioner informed the deceased that if she wanted to change her Will she should see a lawyer so that it was done properly, the deceased responded by stating she considered the note she had left to be "good enough".
- [10] Following her death, the petitioner, as executor of the estate, found seven notes in the deceased's home in various locations. One note was with the Will. The petitioner found others in the living room, on the deceased's nightstand in her bedroom, in the bathroom and in the kitchen.
- [11] The petitioner has sworn that all of the notes appear to be in the deceased's handwriting.
- [12] All of the notes, if effective, would change the distribution of the estate from that set out in the Will, although the wording varies from note to note.
- [13] The April 14, 2012 note was signed by the deceased and states:

I, Elda Lane, of 1379 Columbia Street, am leaving my house to my son Warwick Edward Ricky Lane and in charge of my bank account no. 2***22 with Scotia Bank.

- [14] The October 21, 2012 note, which the deceased also signed, states:

I Elda Lane of 1379 Columbia Street leave to my son Warwick Edward Ricky Lane all my possessions my house at 1379 Columbia St Kamloops BC + property. My bank acct at Scotia Bank. If any outstanding acct to be paid.

The executor found that note with the Will.

- [15] The next note, dated July 2013 and signed by the deceased, states:

I Elda Lane leave my house + money's to my son Warwick Edward Rick Lane.

- [16] Another note, dated May 3, 2014, provides:

I Elda Lane mother of Warwick Edward Ricky Lane leave all I have to my son, my house, bank account, etc. and he will see to everything that needs doing.

- [17] The deceased wrote her name at the top of the May 3, 2014 note, but signed it "Mom" rather than with her name. The May 3, 2012 note concludes:

Many thanks for everything you have done for me. Take good care of yourself. Lots of love, mom
xx oo

- [18] The next note, dated November 3, 2014, states:

I Elda Lane leave my house + everything to my son Warwick Edward Ricky Lane upon my passing (death).

He must check and make sure all bills or debts are paid if any at my house.

The deceased did not sign the November 3, 2014 note, but wrote her name at the top of the note.

[19] The deceased also left a note dated December 15, 2014, which provides:

I Elda Lane mother to Ricky, Warwick Edward Lane leave everything to my son. If something should happen to me. I do not feel well to-nite

[20] On the reverse side of the December 15, 2014 note, there is a notation, apparently made on January 15, 2015, which states:

This is for you Rick take good care of yourself, Lots of love, Mom.

[21] The deceased's name appears at the top of the December 15, 2014 note, which is signed "Mom" rather than with the deceased's name.

[22] Finally, the January 9, 2015 note states:

If I should pass or die in my sleep, I leave my house and everything to my son, Warwick Edward Ricky Lane, lots of love

Mom

[23] The deceased signed her name at the top of the January 9, 2015 note and wrote "Mom" at the bottom of that note.

[24] Until she passed away, the deceased lived on her own, managed her medications and medical appointments and cooked for herself without any assistance. Approximately 18 months before her death, the deceased suffered a fall. At that time, a representative of the Interior Health Authority came to her home to assess her for assisted living care. The deceased did not qualify for in-home assistance because she was able to function on her own.

[25] The evidence concerning the deceased's mental capacity is limited to the petitioner's observations and impressions of his elderly mother in her later years. The petitioner has deposed that he spoke with his mother by phone on a daily basis, and saw her, on average, once or twice a week. While he observed that his mother was at times forgetful, he did not consider her level of forgetfulness to be unusual for a person of her age. As far as the executor is aware, the deceased was never diagnosed with dementia or any other condition causing an impairment of her cognitive or mental capacity.

[26] The petitioner was only able to provide limited information concerning the relationship between his sister, Ms. Alsop, and the deceased. Mr. Lane understood that during the last several years his sister, who resides in Dawson Creek, British Columbia, and his mother, spoke by telephone a few times a year, primarily on birthdays and at Christmas. The petitioner recollects that Ms. Alsop visited the deceased two or three times in the last 20 years. Mr. Lane is aware that for many years Ms. Alsop and his mother corresponded by letter, although that correspondence seems to have ceased about 10 years ago. The petitioner found several letters from Ms. Alsop in his mother's home after her death, the

most recent of which was dated from roughly 10 years ago. According to Mr. Lane, when Ms. Alsop and the deceased spoke with each other, they frequently argued. Mr. Lane has deposed that the deceased sometimes complained to him that Ms. Alsop was impatient with her. The petitioner also thought that the deceased sometimes gave his sister unsolicited advice, which tended to annoy and frustrate her.

- [27] I infer from the infrequent communications between Ms. Alsop and the deceased that relations between the deceased and her adult daughter were strained. However, on the evidence adduced on this application, I am not persuaded the deceased and Ms. Alsop were estranged. According to the petitioner, they continued to communicate with each other by telephone on birthdays and other special occasions. The fact that the deceased retained letters she had received from her daughter also suggests she had some continuing bond with Ms. Alsop. Further, if the deceased intended to disinherit her daughter, she left no explanation of any rational basis for doing so.

The Applicable Law

- [28] WESA came into force on March 31, 2014. Section 58 permits the court to cure technical deficiencies in wills and to order that a record or document represents a deceased's testamentary intentions. Before WESA, documents that failed to strictly comply with the formal requirements of the Wills Act, R.S.B.C. 1996, c.489 regarding the making, signing and witnessing of a will were invalid. The relevant provisions of s. 58 of WESA are 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.

[29] Before granting an order that a document is fully effective as a will, or as an alteration to a will pursuant to s. 58(3) of WESA, the court must be satisfied that the document represents the testamentary intention of the deceased: *Estate of Young*, 2015 BCSC 182 at para. 19. As Dickson J. (as she then was) observed in *Estate of Young* at para. 17:

Section 58 of the WESA is a curative provision. It confers a discretion on the court to relieve against the consequences of non-compliance with testamentary formalities in a "record, document or writing or marking on a will or document". In prescribed circumstances, s. 58 permits the court to address and cure issues of formal invalidity in such documents. It cannot, however, be used to uphold a will that is invalid for substantive reasons such as testamentary incapacity or undue influence.

[30] Section 58 of WESA was first considered by this Court in *Estate of Young*. Because s. 58 is most similar to s. 23 of the Manitoba Wills Act, C.C.S.M. c. W150, Madam Justice Dickson reviewed the Manitoba authorities, including the leading case of *George v. Daily*, [1997] M.J. No. 51 (C.A.). In *George*, the Manitoba Court of Appeal overturned the decision of the chambers judge who had held that a letter written by the deceased's accountant to the deceased's solicitor containing proposed revisions to the deceased's will should be admitted to probate. The accountant had prepared the letter after receiving instructions from the deceased to change his will to leave most of his estate to various charities rather than to his children. When the deceased later met with his solicitor and confirmed the alterations to the will contained in his accountant's letter, the solicitor requested the deceased obtain a certificate from his doctor confirming that he had the capacity to execute the will. The deceased died two months later without having obtained the medical certificate. The solicitor had not spoken with the deceased in the interim, nor had he prepared a new will.

[31] In *George*, the Court stated the following principles:

- (a) The standard of proof on an application under the curative provision is proof on a balance of probabilities (para. 20).
- (b) The greater the departure from the requirements of formal validity, the harder it may be for the court to be satisfied that the document represents the deceased's testamentary intention (para. 19).
- (c) The requirements for formal validity of a will serve several purposes or functions, including:
 - i. an evidentiary function by providing the court with reliable and permanent evidence of testamentary intention and the terms of the will; and

ii. a cautionary function by impressing upon the testator the solemnity, finality, and importance of his actions in making his "last will and testament" (at paras. 21-26).

- (d) The evidentiary and cautionary functions are particularly relevant to the determination of whether or not a writing or document embodies the testamentary intentions of a deceased (para. 22).
- (e) Not every expression made by a person, whether orally in writing, concerning the disposition of his or her property on death embodies his or her testamentary intentions (para. 62).
- (f) The court held at para. 65:

The term "testamentary intention" means much more than a person's expression of how he would like his/her property to be disposed of after death. The essential quality of the term is that there must be a deliberate or fixed and final expression of intention as to the disposal of his/her property on death: *Bennett; Molinary v. Winfrey* (1960), [1961] S.C.R. 91; and *Canada Permanent Trust Co. v. Bowman*, [1962] S.C.R. 711.

[Emphasis added.]

[32] In *Estate of Young* at para. 35, Madam Justice Dickson, after citing *George*, held that on an application under s. 58 of WESA:

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.

[33] The factors relevant to the determination of whether a document that does not comply with testamentary formalities embodies the deceased's testamentary intention are context specific. They 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: *Estate of Young* at para. 36.

[34] In *Estate of Young*, the deceased left two documents on her dining table. The first was dated June 17, 2013, was signed on its first page by the deceased, and included a list of items of personal property for distribution to various beneficiaries. The deceased left an unsigned copy of this document with her neighbour, who she asked to assist with the distribution of the items listed.

[35] The second document, dated October 15, 2013 referred to the earlier document and set out a plan for the distribution of items not described in the earlier list.

- [36] The court found that the June 17, 2013 document recorded a "deliberate expression of the deceased's wishes as to the disposal of the listed property upon her death". At paras. 38 to 40, Madam Justice Dickson took into account the following factors:
- (a) the document contemplated distribution of the listed property to specific beneficiaries on the event of death and was expressed in language that conveyed an air of finality;
 - (b) the document was generally consistent with other provisions of the will;
 - (c) by signing the document the will-maker signalled her knowledge and approval of its contents;
 - (d) shortly before she died, Ms. Young left the signed document on her dining room table where it could be found by others; and
 - (e) Ms. Young provided a copy of the document to her neighbour when seeking her assistance to carry out her final wishes.
- [37] All of these factors satisfied the court that the document was both final and authentic.
- [38] Conversely, in finding that the October 15 document had no testamentary effect, the court noted that it was merely "an expression of Ms. Young's non-binding wishes related to some of her earlier dispositions". Further, the document was unsigned. Nor had the deceased provided a copy to her neighbour.
- [39] In *Beck Estate (Re)*, 2015 BCSC 676, Master Young (as she then was) considered a handwritten document in letter form, which the deceased dated and signed. The court found that the words "Codicil to my Last Will" and instructions that the document was to be read out by her lawyer suggested a deliberate or fixed and final expression of intention regarding the disposal of the deceased's property upon her death. The deceased had also given the document to her executor for safekeeping one week before her death, and had told him that she thought the unwitnessed Codicil was valid.
- [40] The handwritten document expressed the deceased's wishes that:
- (a) her trustee would see that \$10,000 "goes to my dead Grandsons [sic] son Adam Minshull";
 - (b) that the deceased's daughter, Arlene, would be "left alone on the land and live there for the rest of her life", and that Arlene would then leave the land to her daughter Wendy; and
 - (c) "any money left in Estate should help repair my run-down property. This will be in Ricks [sic] capable hands".
- [41] Master Young found that the gift to Adam Minshull was a deliberate expression of the deceased's testamentary intention, and exercised the curative power under s. 58 to order that portion of the document was fully effective. However, Master Young concluded that the provision respecting the deceased's daughter's use and disposition of property left to her under the will was no more than an expression of the deceased's wishes or

recommendations. Similarly, the clause relating to the use of any money left in the estate to repair the deceased's run-down property did not constitute a deliberate expression of testamentary intention to vary the residue clause of the will, which provided for the equal division of the residue between the deceased's two adult children.

DISCUSSION AND ANALYSIS

- [42] The petitioner recognizes the handwriting on all of the notes as the deceased's. Accordingly, I find that the notes are authentic. There is no evidence of undue influence. Although the deceased had become forgetful in her last years, she was capable of caring for herself until her death. She does not appear to have lacked testamentary capacity at the times she made the notes.
- [43] The April 14, 2012, October 21, 2012 and July 2013 notes are each signed at their end by the deceased. On the May 3, 2014, November 3, 2014, December 15, 2014 and July 9, 2015 notes, the deceased wrote her name at the top of the note, and either signed "Mom" at the end of the note, or in the case of the November 3, 2014 note, left the end of the note unsigned.
- [44] The factors that might support a finding that the notes represent the testamentary intention of the deceased are:
- (a) the deceased used the formal language of "I, Elda Lane leave ... to my son" in several of the notes;
 - (b) some of the notes are signed at their end by the deceased;
 - (c) the deceased told the petitioner she wanted him to have her house after she died and that she had left a note to that effect;
 - (d) six of the notes contemplate a distribution of the estate by which the petitioner would receive all of the residue of the estate. The October 21, 2012 note identifies the property to be left to the petitioner as including the deceased's principal assets, her house and the Scotiabank account.
- [45] I have excluded the April 14, 2012 note. That note, written on the back of a Safeway receipt, states that the deceased is leaving her house to her son, and that she is leaving her son "in charge of my bank account ... with Scotia Bank." In my view, the latter statement is as consistent with an expression of a wish by the deceased that the petitioner manage her finances as it is with an intention to make a bequest. I find that the April 14, 2012 document is not a deliberate or fixed and final statement of the deceased's testamentary intention.
- [46] The factors that weigh against a finding that one or more of the notes represent the deceased's testamentary intentions are as follows:
- (a) each of the notes is written on the back of a receipt, grocery list, calendar, or other scrap paper, suggesting impermanence and informality rather than a fixed and final intention;

- (b) none of the notes were witnessed. They all lack one of the fundamental hallmarks of formal validity;
 - (c) there is no express revocation of the deceased's Will. This case is distinguishable from Estate of Young where the document admitted to probate was generally consistent with the deceased's will;
 - (d) none of the documents bear a title. In Beck Estate, unlike this case, the deceased described the document in issue as a codicil to her last will. She left instructions for the document to be read out by her lawyer. She also left a copy with her executor. Here, there is no evidence that the deceased either showed or provided copies of her notes to anyone else;
 - (e) the deceased appears to have made the December 15, 2014 and January 9, 2015 notes at times when she thought she might shortly die. By suggesting that the gift was contingent upon her imminent death these notes may not represent an expression of the deceased's fixed and final testamentary intention;
 - (f) some of the documents are in the form of personal notes addressed to the petitioner, a further departure from the formal requirements of a testamentary document.
- [47] In the particular circumstances of this case, I attach little weight to the deceased's apparent belief that her notes were effective to change her Will. None of the notes explicitly state an intention to revoke her gift of one-half of the residue of the estate to Ms. Alsop.

CONCLUSION

- [48] After weighing all of these factors, I find on the balance of probabilities that the notes, whether considered individually or collectively, do not represent a deliberate and final expression of the deceased's testamentary intentions. In making that determination, I give particular weight to the absence of any witnesses, the fact that all of the notes were made on scrap paper, the absence of any express revocation of the Will or the gift of one-half of the residue to Ms. Alsop, the lack of any evidence the deceased had any rational basis for disinheriting Ms. Alsop, and indeed the lack of any evidence that the deceased ever turned her mind to how the wishes she expressed in the notes would affect her earlier testamentary dispositions.
- [49] Accordingly, I find that the notes do not have testamentary status and may not be "cured" under s. 58 of WESA.

Costs

- [50] The petitioner, as executor, was compelled to bring this application after he located the notes. Accordingly, the petitioner will have his reasonable solicitor and own client costs and disbursements from the estate.

"PEARLMAN J."

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