

CANADA / JUDGMENT

Noel Estate (Re)

2023 BCSC 2473

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Supreme Court of British Columbia

DECIDED

15 December 2023

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2023 BCSC 2473 Noel Estate (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Noel Estate (Re),

2023 BCSC 2473

Date: 20231215

Docket: S235309

Registry: Vancouver

Re: The Estate of Joyce Valerie Noel, Deceased

Before: The Honourable Justice Whately

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner Clare Kuhn:

R.D. Chew

Counsel for the Respondents Estate of Wendy Noel, Francis Jacquet, Nicholas Jacquet, Alexandra Kalt, Alison Noel, Kevin Noel, and Valerie Rinehart:

J. Parmar

C. Perry, Articled Student

Place and Date of Hearing:

Vancouver, B.C.

December 14, 2023

Place and Date of Judgment:

Vancouver, B.C.

December 15, 2023

- [1] THE COURT: This is my ruling on the petition of Clare Valerie Kuhn regarding the estate of Joyce Valerie Noel, action number 235309, which came on for hearing before me in Vancouver on Thursday, December 14, 2023. I note that in the event a transcript is ordered, I reserve the right to make corrections for grammar, clarity, organization, and to include proper citations or corrected definitions or references where appropriate. The substantive decision will remain the same.
- [2] The petitioner, who I will refer to as "the petitioner" or "Ms. Kuhn," is the executor of the estate of Joyce Valerie Noel. The petitioner is also the daughter of the deceased. The petitioner seeks a determination from this Court as to whether a letter dated August 3, 2022 (the "August Letter"), purportedly signed by her mother, Joyce Valerie Noel, replaces or alters her last will and testament dated January 7, 2021. She also seeks an order and declaration setting out the results and giving effect to the court's determination of the validity and testamentary effect of the August Letter, and costs.
- [3] In support of her petition, Ms. Kuhn relies on her own affidavits as well as an affidavit in support provided by her sister and another of the deceased's children, a Ms. Valerie Rinehart. The petition is opposed by three other of the deceased's children, Alexandra Kalt, Francis Jacquet, and Nicholas Jacquet, who rely on affidavits sworn by Francis and Nicholas. I pause to note here that if I refer to anyone by their first name, I do so only for clarity's sake, and I mean no disrespect by doing so.
- [4] The respondents oppose the petition and say that the August Letter should not be considered authentic or indicative of their mother's wishes, and therefore it ought not to replace or alter her last will and testament. They also raise questions about their mother's capacity to make such an alteration to her will.
- [5] With respect to my understanding and recitation of the background facts and parties, I refer to paragraphs 1 to 8 of the petition, insofar as these facts and parties do not appear to be disputed by the parties:
1. Joyce Valerie Noel (the "Deceased") had five biological children: Nicholas Jacquet, Alexandra Kalt, Francis Jacquet, Valerie Rinehart and Clare Valerie Kuhn (the "Biological Children").
 2. The Deceased met Gerry Noel ("Gerry") in 1976. They married in 1979. Both Gerry and the Deceased purchased a home together in 1978 (the "Home"). Gerry had three biological children of his own: Kevin Noel, Alison Noel, and Wendy Noel (the "Noel Children"). Wendy Noel passed away on January 27, 2023.

3. Amongst other assets, Gerry left behind his portion of the Home and 50% of a property located in Galiano Island (the "Galiano Property"). The other 50% of the Galliano Property was owned by Gerry's ex-wife. The Deceased and the Noel Children agreed that the Noel Children would take Gerry's share of the Galliano Property and the Deceased would have the Home.
4. After Gerry's estate was settled, there was no farther contact between the Deceased and the Noel Children.
5. On January 7, 2021, the Deceased prepared a Will (the "2021 Will").
6. The 2021 Will:
 - a. names the Petitioner Clare Kuhn as executor; and
 - b. divides the residue of the estate equally amongst the Biological Children.
7. In or around 2021, the Deceased added the Petitioner as a joint account holder to her bank account (the "Joint Account").
8. In December 2021, the Deceased fell and broke her T3 vertebra. From December 2021 to August 2022, she tried to rehabilitate her injuries which included taking hydromorphone and strong painkillers.
- [6] Now we arrive at the events leading up to the end of Joyce's life that form the subject matter of this petition. Some of these facts are in dispute as between the petitioner and the respondents.
- [7] In October of 2021, Joyce gave all but one of her children a gift of \$50,000. Some evidence was provided in the petitioner's second affidavit that gave context for leaving one of the siblings out, but as this was a gift made prior to Joyce's death and outside the administration of the estate, this fact is not directly relevant to the matter before me.
- [8] As stated in the petition, in December of 2021, Joyce suffered a serious injury to her back, requiring strong pain medication to manage her pain. Her health seriously declined in the weeks and months following this accident, which appeared to have led to further contemplations regarding her estate.
- [9] In July 2022, Joyce recounted to one or more of her children that she had a dream in which her former spouse, Jerry, told her that he would be disappointed with her if she did not leave part of her estate to his children. At some other point during the months following her accident, Joyce also expressed to her son Nicholas that she was considering bequeathing her entire estate to a foundation for birds.
- [10] Unlike the musings regarding the bird foundation, Joyce's dream about Jerry's disappointment moved from an idle thought to a plan of action. Joyce asked the petitioner to assist her in having her 2021 will changed to add the Noel children as beneficiaries.

- [11] Joyce provided further explanation for this decision that went beyond the impetus of the dream. She explained that her estate was made up of investments she made from the proceeds of the sale of the house she purchased with Jerry and as such, she thought Jerry would be disappointed that the proceeds of that home would only go to her children and not to his.
- [12] On or about July 15, 2022, Joyce and the petitioner phoned the lawyer who drafted the 2021 will. The lawyer advised that rather than changing the will, Joyce should draw up a letter to clarify her wishes pertaining to a joint account held by herself and the petitioner. The petitioner prepared that letter (the "July Letter").
- [13] On or about July 22, 2022, Joyce emailed the lawyer asking her to add the Noel children to her list of beneficiaries. The lawyer again advised that rather than changing the will, it would be easier to prepare a letter to indicate her intentions rather than drafting a whole new will.
- [14] Shortly after, Joyce had a discussion with her son, Nicholas, during which she discussed certain details regarding her plans for changes to her will. It is common ground that during this discussion, Joyce suggested having an arrangement whereby funds would be set aside for a yearly dinner for the siblings on Joyce's birthday. Joyce and Nicholas decided that \$20,000 could be set aside for this purpose.
- [15] There is a dispute about whether, during this conversation, Joyce also discussed her lawyer's advice regarding her intention to evenly divide the estate with all of the siblings instead of just the biological ones. The petitioner states that at this meeting Nicholas was fully apprised of the other, arguably more significant proposed change. Nicholas says that he was not.
- [16] On August 3, 2022, Joyce asked the petitioner to prepare the August Letter that is the subject of this petition. The August Letter was to state her wishes that:
- a) That \$20,000 be set aside for a yearly dinner; and
 - b) That her assets be distributed equally between both her biological children and Jerry's children.
- [17] Joyce was admitted to Lion's Gate Hospital on August 17, 2022, and advised medical staff that she wished to end her life. Joyce was referred to the Medical Assistance in Dying program, where she underwent two medical evaluations to ensure she was competent to make that decision. She was ultimately granted permission under the program following those evaluations.
- [18] The August Letter was drafted or typed by the petitioner. Both the July Letter and the August Letter were signed by Joyce at Lion's Gate Hospital in the presence of the petitioner and her sister Valerie on or about August 17, 2022.
- [19] Joyce died on August 23, 2022, using Medical Assistance in Dying.

- [20] Section 37 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13, or WESA, provides that a will must be in writing, signed by the will maker in the presence of two more witnesses, and signed by two or more witnesses in the presence of the will maker. Section 58 of WESA authorizes the court to order that a document which does not comply with the requirements of WESA to be fully effective as though it had been made in compliance with those requirements.
- [21] On application, a court may make an order under subsection (3) if it determines that the document represents the testament intentions of the deceased person, the intentions of a deceased person to revoke, alter, or revive a will or disposition. Subsection (3) allows the court to give effect to a document as though it had been made as the will or part of the will of the deceased person or as an alteration or as the testamentary intention.
- [22] Both counsel brought me to the leading cases with respect to how a court satisfies itself that a document represents the documentary intent of a deceased person. I am informed by the list of relevant factors in *Estate of Young*, 2015 BCSC 182, and the requirement required in *Hadley Estate (Re)*, 2017 BCCA 311, that the document be a deliberate or fixed and final expression of intention. *Hadley Estate* also refers to the use of extrinsic evidence to help determine the testamentary intentions. *Jakonen Estate (Re)*, 2022 BCSC 2261, discusses documents made when there is a serious health issue or terminal illness and how this may support a finding of testamentary intentions.
- [23] The petitioner states several factors that I should consider in support of the petition, and I refer to paragraph 12 of Part 3 of the petition:
12. Relevant factors to be considered include:
- a. Prior to her death, the Deceased advised the Petitioner, Valerie Rinehart, and Nicholas Jacquet of her intention to divide her assets equally amongst the Biological Children and the Noel Children;
 - b. The Deceased notified her lawyer who prepared the 2021 Will of her intention;
 - c. The Deceased instructed the Petitioner to prepare the August Letter on the advice of her lawyer;
 - d. The August Letter was signed in the presence of both the Petitioner and Ms. Rinehart;
 - e. The Deceased left the August Letter with the Petitioner, who is named as executor in the 2021 Will;
 - f. The Respondent Nicholas Jacquet acknowledges in an email dated September 20, 2022 the Deceased's intentions to add the Noel Children to her will and to set aside money for the Biological Children to have a meal once a year;

- g. The Deceased provided a rationale to the Petitioner for changing the distribution of her assets - she had a dream that Gerry was disappointed that she was leaving nothing to the Noel Children, and the money she used for her investments had come from the sale of the Home she and Gerry had purchased jointly; and
- h. The August Letter was prepared after the Deceased suffered a significant injury . and advised her lawyer she felt she was "very close to departure", and the August Letter was signed after the Deceased admitted herself to the LGH MA[I]D program.
- [24] The respondents state that several of these factors are either not sufficiently compelling or should be questioned. Mr. Perry, counsel for the respondents, pointed in particular to the signature on the will, and on the August Letter. He says that, at least to his "untrained eye", the signatures do not appear to be similar. Mr. Perry did not make clear what I was to make of his personal view of the signatures.
- [25] The respondents also recounted how they noticed behavioural changes in Joyce in the weeks and months before her death, and articulated the following areas of concern:
- Joyce would sometimes slur her words and become forgetful;
 - Joyce expressed strange wishes about how to distribute her estate, namely to the foundation for birds;
 - the impetus for changing the will was a dream; and
 - the so-called rational explanation about redistributing the proceeds of the house was in fact not rational in light of the settlement made many years prior with respect to Jerry's children, and the fact that the deceased had no relationship with those children after that.
- [26] The respondent says there is also a discrepancy in the petitioner's evidence as to whether the August Letter was witnessed by the two sisters or not witnessed at all. In sum, the respondents challenge both the validity of the August Letter and Joyce's capacity to execute it.
- [27] I reviewed all the affidavits filed in this matter and all attached exhibits. I am satisfied that the evidence shows that the August Letter, regardless of the fact that it may have been sparked by a dream, was the result of a considered decision by Joyce.
- [28] Joyce did not simply announce her wishes once following a dream. She explained the reason why the dream impacted her and took several steps over the course of weeks to implement her decision. She contacted her executor, her daughter and the petitioner. She talked to at least two, perhaps three, of her children about her wishes.
- [29] I acknowledge that there is a dispute about what Nicholas knew about the extent of Joyce's intentions with respect to adding the Noel children as beneficiaries. The petitioner in her affidavit describes a visit with Nicholas where the intention to add the Noel children was discussed, during which time the idea about the annual dinner came up.

- [30] Nicholas's email of September 20, 2022, wherein he made the case to his siblings for the opposite position that he is now taking, was compelling. At the very least, he was aware of and even participated in the other wish that ended up in the August Letter pertaining to the \$20,000 for the annual dinners. While some ambiguity remains in this email, the content and the tenor of it certainly adds credence to the argument that he did have the more fulsome discussion with Joyce as described by his sister.
- [31] Ultimately, my decision does not rest on whether Nicholas was fully apprised of Joyce's plan during this one discussion. This is because Joyce also emailed her lawyer, received advice, and gave instructions to her lawyer and to her daughter as executor. Those emails are in evidence.
- [32] The August Letter was signed in front of the petitioner and her sister Valerie. I am satisfied that this is the case and that the reference to not being able to get two witnesses was adequately explained in the petitioner's second affidavit. Despite the "untrained eye" of counsel for the respondent and the statements of the respondents, the signature on the August Letter does, at least to me, look quite similar to the signature of the will. However, the evidence before me does not allow me to ascribe any weight to assessments of signature validity.
- [33] Regardless of everyone's "untrained eyes", including mine, there is insufficient evidence before me to counter the clear statements of the two sisters who witnessed their mother signing the August Letter. Further, the August Letter reflects the discussions Joyce had with various people, and the instructions she sent in writing to her lawyer and executor. Given that there is evidence establishing that Joyce signed it, and none proving that she did not, I accept that it was, in fact, signed by her.
- [34] It is significant to me that both the petitioner and Valerie do not stand to gain personally from being dishonest about this fact, as their own bequests will be reduced if the letter is determined valid. I am satisfied that they are telling the truth about witnessing their mother sign the August Letter.
- [35] With respect to capacity, the preponderance of the evidence establishes that the deceased had sufficient capacity to make this decision and to confirm it in the August Letter. She was able to express her wishes on multiple occasions verbally and in writing. She also had her capacity assessed by the Medical Assistance in Dying program. While a MAID assessment may not be determinative in a legal assessment of capacity, it can be of assistance to this Court in the absence of other medical evidence, or other expert evidence regarding capacity.
- [36] Joyce was considered capable of making a fundamentally critical and final decision about ending her life, at or around the same time that she executed the August Letter.
- [37] Again, I also rely on the evidence of the petitioner and Valerie, whose interests in this matter seem primarily focused on the wishes of their mother, even to their own financial detriment. Both the petitioner and Valerie swore in their affidavits that their mother was

capable and able to make decisions. Where the petitioner's evidence conflicts with that of Francis or Nicholas in their affidavits, I prefer that of the petitioner, as it is more specific and detailed and provides examples of her mother's demeanour, decision making ability, and discussions leading up to her death.

- [38] In addition, the petitioner was able to provide reasonable context for some of the bald assertions made by the brothers with respect to their "evidence" of their mother's purported incapacity, such as the statement about the birds, Joyce giving a piece of jewellery to one sister instead of another, and a preference for name brand over-the-counter medication. Regardless, I did not find any of the details provided by the brothers to be compelling in terms of finding Joyce to be incapable.
- [39] The deceased was in pain and making use of pain medications that may even have, from time to time, caused her to be tired, forgetful or slur her words. There is no evidence before the court regarding how often this happened, what time of day, what preceded it, or the duration of any such episodes.
- [40] In light of all the other evidence that demonstrates the deceased's capacity to make decisions and give coherent considered instructions, these isolated occurrences do not establish that this was her constant state in the final months.
- [41] In sum, I am not convinced by the evidence of Nicholas or Francis with respect to their mother's capacity. I find that the deceased had the capacity to express her intentions and did so in the August Letter. I find that she understood the nature of the act, the nature of the property that she wished to dispose of, and she understood the claims to which she ought to give effect. I find that she had no disorder of the mind.
- [42] I find that the August Letter is authentic and reflects the deceased's intentions, which she stated orally and in writing on more than one occasion leading up to the letter, to more than one person. I find that the August Letter records a fixed and final expression of intention, particularly given that the deceased was, somewhat uniquely, in significant control of the imminent timing of her death.
- [43] Pursuant to s. 58 of the act, I therefore grant Ms. Kuhn's petition and determine that the August Letter, by the deceased, Joyce Valerie Noel alters her last will and testament dated January 7, 2021, and grant an order setting out this determination and the effect thereof.
- [44] I also award costs of the application to the petitioner.
- [45] That is my ruling, counsel. Thank you.
- [46] CNSL R. CHEW: Thank you, Justice. Can I just -- just on costs, standard practice is that -- I know you said costs to the petitioner. Standard practice is costs --
- [47] THE COURT: Oh, paid out of the estate?
- [48] CNSL R. CHEW: -- are paid out of the estate on a full indemnity basis.

[49] THE COURT: Yes.

[50] CNSL R. CHEW: I do not know if you feel any reason to depart from the usual practice.

[51] THE COURT: I do not feel any reason to depart from that. Thank you.

[52] Is that everything?

[53] CNSL R. CHEW: Yes.

[54] THE COURT: Thank you so much.

"J. Whately J."

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