
CANADA / JUDGMENT

Poulk Estate

2018 BCSC 1321

COURT

Supreme Court of British Columbia

DECIDED

10 August 2018

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2018 BCSC 1321 Poulk Estate

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Poulk Estate,

2018 BCSC 1321

Date: 20180810

Docket: P1752872

Registry: Prince George

In the Matter of the Estate of Mark Allan Poulk, Deceased

Before: The Honourable Madam Justice Church

Reasons for Judgment

In Chambers

Counsel for the Applicant:

J.L. Trudel

The Respondent, appearing in person:

L.L. Poulk

Place and Date of Hearing:

Prince George, B.C.

July 9, 2018

Place and Date of Judgment:

Prince George, B.C.

August 10, 2018

Introduction

- [1] By way of a notice of application filed December 27, 2017, the applicant, Alisha Kaycee Poulk seeks orders under s. 58 of the Willis, Estates and Succession Act, SBC 2009, c. 13 ("WESA"). She seeks a determination of whether the document titled "This is the Last Will and Testament of me, Mark Allen Poulk" ("the Will") represents the intention of Mark Allan Poulk, the deceased.
- [2] The applicant, Alisha Poulk is the only child of the deceased. The respondent, Lisa Layne Poulk is a sister of the deceased. The deceased did not have a spouse at the time of his death.
- [3] On or about June 17, 2017, the deceased was admitted to the University Hospital of Northern British Columbia. He underwent surgery for a bowel obstruction, during which doctors discovered that he had metastatic bowel cancer. He died in the early hours of the morning of June 25, 2017.
- [4] Following his surgery, the Will was drafted. It purported to leave the estate of the deceased to his four siblings in equal shares. The Will was not drafted by the deceased and it was not signed by him prior to his death.
- [5] At the time of his death, the deceased and the applicant, Alisha Poulk had little contact with each other. The deceased had distanced himself from the applicant after separating from her mother when she was less than a year old. The applicant had attempted to re-establish contact with the deceased when she was 16 years of age but their relationship did not develop. The deceased had long standing difficulties with alcoholism, which the applicant contends interfered with her attempts to have a relationship with her father. The applicant had not talked to her father for approximately 2 years prior to his death.
- [6] Some time after the death of the deceased, his brother, Robert Poulk Jr. gave the Will to the applicant. The applicant applied for a Grant of Administration without Will Annexed in relation to the estate of the deceased and the Will was attached as an exhibit to the grant application. The grant application was rejected by the Prince Rupert court registry on the basis that an application to the court was required to determine whether the Will represents the testamentary intentions of the deceased.

The Applicant's Position

- [7] The applicant submits that the Will is invalid because it does not comply with the requirements of s. 37 of WESA. It is not signed at the end by the deceased in the presence of two or more witnesses and it is not signed by two witnesses in the presence of the deceased. The applicant further submits that the Will is not a deliberate or fixed and final expression of the intention of the deceased.
- [8] The applicant submits that the Will is a "fill in the blanks" will form that is not in the handwriting of the deceased and the information in the form was completed by one of the beneficiaries. She submits that there are no markings of the deceased on the Will and no evidence that the completed form was seen or read by the deceased. The applicant submits that there is no evidence that the Will is authentic, in the sense that there is nothing on the face of the Will to indicate that it was adopted by the deceased.
- [9] The applicant further submits that the Will does not represent the testamentary intentions of the deceased and, at best, it may demonstrate notes as to how the deceased would like his property to be disposed of after death.
- [10] The applicant submits that in this case, the Will departs from the requirements for a valid will, as set out in s. 37 of WESA, to such a significant extent that it will be difficult for this court to be satisfied that the Will is authentic and represents the testamentary intentions of the deceased.
- [11] In the alternative, the applicant submits that the Will is not valid because there is evidence of undue influence and incapacity. She submits that the medical evidence indicates that the deceased was in a weak and vulnerable position and was taken advantage of by his siblings, the purported beneficiaries. At the time of the preparation of the Will, the deceased was being administered opioid pain medication for his bowel cancer, which affected his capacity. Counsel for Alisha Poulk referred to excerpts from the records of the University Hospital of Northern British Columbia with respect to the deceased from the time of his admission on June 17, 2017 to the date of his death which were attached as Exhibit "A" to the 2nd affidavit of Veronica Henkel.
- [12] Counsel for the applicant noted that the deceased arrived at the hospital on June 16, 2017 after having been found by a neighbor and being unconscious for as long as five days. He was assessed in the emergency department and admitted to hospital on June 17, 2017. The deceased was able to sign a consent for surgery on June 17, 2017 and underwent surgery for a suspected bowel obstruction later that same day. The post-operative diagnosis for the deceased was widespread metastatic bowel cancer. The sister and brother-in-law of the deceased, Karen and Gary Bohnet, arrived at the hospital on June 19, 2018.

[13] It is not disputed that the deceased was intubated from June 17, 2018 until the afternoon of June 22, 2017 and during his intubation, he was unable to speak. The hospital records indicate that he was administered various opioids for pain management, including morphine and dilaudid. On June 22, 2017 the deceased reported to nursing staff that he was seeing rabbits. He was observed to be oriented to person and place and told nursing staff that he knew that they were not real.

[14] The hospital records also indicate the concern of medical staff that the deceased did not appear to fully appreciate the severity of his situation and continued to express that his goal was to return home once he was strong enough. He refused to consider transfer to hospice care, despite the urging of medical staff and his family.

[15] At p. 280 of the hospital records attached as Exhibit "A" to the affidavit of Veronica Henkel, the nursing notes for June 21, 2017 contain the following entry by a social worker:

Pt's family is very focused on doing a Will. Pt has requested that this not be the focus right now and he wants some time to think. Writer will honour this request by the Pt as a will is not his priority right now. Will continue to follow up daily.

[16] There are no further notes by the social worker regarding a will. The next notation by a social worker in the nursing notes is on June 24, 2017, which says the following:

Met with Karen and Mark. Mark is mostly out of it but could provide one word answers. Explained TSDM to Karen. Additional siblings are on their way. Supportive care provided.

[17] Counsel for the applicant submitted that attempts were made by the family of the deceased to have the Will executed on the evening of June 24, 2017. The nursing notes for that time indicate that a report was received that "documents needed to be signed prior to analgesia administration" and that the deceased's sister had answered "yes" in error when asked if the documents had been signed. The nursing note indicates that the deceased was in a great amount of pain and morphine was administered to him prior to the nurse learning that the document had not been signed.

[18] The deceased died approximately 7 hours later.

The Respondent's Position

[19] Lisa Layne Poulk filed an application response on her own behalf and she made submissions on behalf of herself and her siblings.

[20] She submitted that the Will represented her brother's testamentary intentions, even though it was not signed. She relied on the affidavit evidence of Gary Bohnet, her brother-in-law and the husband of her sister, Karen Bohnet, both of whom were present at the hospital with the deceased from June 19, 2017 until his death. Mr. Bohnet deposed that the deceased was asked and confirmed that he did not have a Will and that he wanted to put one in place. Mr. Bohnet deposed that the deceased dictated his wishes to Karen Bohnet and Mr. Bohnet made notes of those wishes, which are attached to the affidavit.

- [21] He further deposed that Gary Debruin and Debbie Jefferson, friends and neighbors of the deceased, came to the hospital on June 24, 2018 to witness the Will of the deceased but the deceased became tired and weak and was unable to sign the Will. Arrangements were made for the witnesses to return the following day but the deceased died a few hours later.
- [22] Mr. Debruin and Ms. Jefferson also swore affidavits, in which they confirmed that they attended the hospital on June 24, 2017 and that the deceased confirmed to them that he wanted them to sign the Will. Both Mr. Debruin and Ms. Jefferson observed that the deceased held the pen to the paper but appeared frustrated that he could not write his name.
- [23] Ms. Lisa Poulk submitted that the deceased communicated his intentions to a credible third party, Mr. Bohnet, and confirmed that intention to Mr. Debruin and Ms. Jefferson when he attempted to sign the Will.
- [24] Ms. Lisa Poulk submitted that the deceased had not previously prepared a Will and this was the first time that he documented his testamentary intentions. She acknowledged that Ms. Bohnet and her husband assisted with the preparation of the Will but submitted that they were acting on the deceased's instructions. She further submitted that those instructions were consistent with her own knowledge and understanding of the relationship between Alisha Poulk and the deceased. She said that the deceased was "in control".
- [25] Ms. Lisa Poulk acknowledged that much of the evidence in her own affidavit regarding what occurred in the days prior to the death of her brother is hearsay, based on information she learned from her sister, Karen Bohnet and her brother-in-law, Gary Bohnet. Ms. Lisa Poulk was not present at the hospital between June 17 and 25, 2017. She was in communication with Karen Bohnet during this time and she admitted that she provided the wording in the Will with respect to the last paragraph which says:

I, Mark Allen Poulk, do not want any of my worldly belongings or any of the residue of my estate to be given to my daughter Alisha Poulk, or any of her current or future heirs.

- [26] Ms. Lisa Poulk submitted that she and Karen Bohnet were simply trying to make sure that the Will represented the deceased's intention.
- [27] Ms. Lisa Poulk concedes that for several days after his surgery, the deceased was intubated and could only communicate by gestures and some writing. He was extubated on the afternoon of June 22, 2017.

Analysis

- [28] It is not disputed that the Will does not meet the requirements of a validly executed Will as set out in s. 37 of WESA. Section 37(1) of WESA provides that:
- (1) To be valid, a will must be
 - (a) in writing,

(b) signed at its end by the will-maker, or the signature at the end must be acknowledged by the will-maker as his or hers, in the presence of 2 or more witnesses present at the same time, and

(c) signed by 2 or more of the witnesses in the presence of the will-maker.

[29] Subsection (2) provides that a Will that does not comply with s.37(1) is invalid unless the court orders it to be effective as a Will under s. 58.

[30] Section 58 provides that:

(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.

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

[32] There are substantial similarities between s. 58 of WESA and s. 23 of the Manitoba Wills Act, C.C.S.M. c. W150 and thus the British Columbia courts have considered some of the Manitoba authorities in the application of s. 58 of WESA. In the leading case of *George v. Daily*, [1997] M.J. No. 51 (C.A.) 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.

[33] In *Re Lane Estate* 2015 BCSC 2162, Mr. Justice Pearlman summarized the applicable principles from *George v. Daily* (supra) as follows:

- (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.]

[34] Pearlman J. went on to say at para. 33 that:

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.

[35] In this case, the Will is a "fill in the blanks" form that was not completed by the deceased. Although there is no direct evidence with respect to who completed the form, I infer from the evidence of Grant Bohnet that the form was completed by the sister of the deceased, Karen Bohnet. At para. 10 of his affidavit, Mr. Bohnet deposed that the deceased had "dictated the details of his wishes to Karen." Mr. Bohnet also deposed that he documented those wishes in a note attached as Exhibit "C" to his affidavit. There is no evidence that Mr. Bohnet completed the will form.

[36] The Will was not signed by the deceased and thus there is nothing on the face of the Will to indicate that the deceased knew and approved of the contents of the Will. The evidence from Gary DeBruin and Debra Jefferson is that they attended at the hospital to see the deceased on June 24, 2017 and that the deceased attempted to sign the last page of the Will but was physically unable to do so. The respondent, Lisa Layne Poulk, invites me to infer from this evidence that the deceased knew and approved the contents of the Will because he attempted to sign it. However, there is also uncontroverted evidence that the middle name of the deceased is spelled incorrectly on the Will. It is reasonable to expect that the deceased would notice and correct such an obvious error, if in fact he had read and approved the Will.

[37] The absence of any objective evidence that the deceased knew and approved the contents of the Will is particularly concerning as the Will was drafted by one of the named beneficiaries and is not consistent with the previously expressed intentions of the deceased. The Will purports to leave the estate of the deceased to his four surviving siblings in equal shares. The respondent, Lisa Layne Poulk, suggests that the deceased had a rational basis for disinheriting his only child, namely that they were estranged since 2011 because the applicant was complicit with mother in making false claims for child support.

- [38] There is, however, contrasting evidence of Steven Harrington, a long time friend of the deceased, who deposed that in 2016, the year prior his admission to hospital, the deceased had told him that he was going to will everything to his daughter because he "had no family left here."
- [39] The notations in the hospital records of the deceased are also troubling. The notes of the social worker from June 21, 2017 suggest that it was the family of the deceased who were focused on preparing a Will, rather than the deceased himself and that the deceased wanted some time to think.
- [40] Mr. Bohnet deposes in para. 8 of his affidavit that:
- The attending physician and assigned social worker spoke privately with the deceased. They then advised me they felt the deceased was in control of his own decisions, and Karen could proceed with assisting him in completing a will.
- [41] The affidavit of Mr. Bohnet does not indicate the date on which this occurred. I note that there is nothing in the hospital records to confirm such an interaction between the deceased and his doctor and social worker other than the notation by the social worker on June 21, 2017. There is nothing to indicate any further involvement by the social worker with respect to preparation of a Will or a decision by the accused to proceed with making a Will after his request for "time to think" on June 21, 2017.
- [42] Even if there was sufficient evidence to establish that the deceased knew and approved the contents of the Will, it is far from clear that the Will was a fixed and final expression of the deceased's testamentary intention. It is apparent from the hospital records of the deceased that he may not have appreciated the severity of his illness or the imminence of his death. Up until the day prior to his death, he continued to express a plan to return home once he was better. This is consistent with the evidence that the deceased requested on June 21, 2017 that the Will not be the focus at the time.
- [43] The Will departs from the requirements for validity in s. 37 of WESA to a significant degree. While it is in writing, it does not bear the signature or indeed any handwriting of the deceased or the signatures of two witnesses. The absence of those key requirements for formal validity means that compelling and reliable evidence is required to satisfy this court that the Will represents the testamentary intention of the deceased. In this case, there is no such compelling and reliable evidence and what evidence there is before me falls far short of establishing that the Will is both final and authentic.
- [44] I find on the balance of probabilities that the Will does not represent a deliberate and final expression of the deceased's testamentary intentions. Accordingly, the Will cannot not be remedied under s. 58 of WESA.
- [45] With respect to the issue of costs, the British Columbia Court of Appeal noted in *Re Hadley Estate* 2017 BCCA 311 at paragraph 47 that:

In estate litigation, courts commonly award special costs payable out of the estate to all parties. This practice is based on the principle that where an estate issue must be litigated to remove any doubts, all interested parties must be joined and all are entitled to be heard. In such circumstances, they should not be out of pocket if, in the result, the litigation does not conclude in their favour. The central question as to costs is whether the contested issue arises from the conduct of the deceased or the conduct of another. In the case of the former, an award of special costs from the estate will usually be made: *Milwarde-Yates v. Sipila*, 2009 BCSC 277 at paras. 81-82.

[46] The applicant was compelled to bring this application after her application for a Grant of Administration without Will Annexed was rejected by the court registry. The respondent, Lisa Poulk was drawn into this litigation for the essentially the same reason. The application concerned the validity of a purported Will and although Ms. Lisa Poulk was unsuccessful, her opposition to the application was not unreasonable in the circumstances.

[47] I have concluded that this is an appropriate case to award special costs payable out of the estate to all parties and accordingly, the applicant and the respondent, Lisa Layne Poulk will each have their reasonable solicitor and own client costs and disbursements from the estate.

"The Honourable Madam Justice Church"

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Prepared on 28 October 2026 · Esheria