

CANADA / JUDGMENT

Re Estate of Redmond

2024 BCSC 705

COURT

Supreme Court of British Columbia

DECIDED

15 March 2024

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2024 BCSC 705 Re Estate of Redmond

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Re Estate of Redmond,

2024 BCSC 705

Date: 20240315

Docket: P192110

Registry: Vancouver

In the Matter of the Estate of Donald Wharton Redmond, Deceased

Before: The Honourable Justice Wilkinson

Oral Reasons for Judgment

In Chambers

Appearing as Agent of Counsel for the Applicant Executor John Lott:

C. Alikashani

Appearing as Counsel for the Respondents Brentley Redmond and Bradley Redmond:

S. Gomez

A. Beddoes

Place and Date of Hearing:

Vancouver, B.C.

March 15, 2024

Place and Date of Judgment:

Vancouver, B.C.

March 15, 2024

- [1] THE COURT: I will provide my reasons on the application now. Given the age of this estate, it is my opinion that this decision needs to be rendered today so that the outstanding passing of accounts can proceed.
- [2] The Application is brought by John Murray Lott, Executor of the estate of Donald Wharton Redmond (the "Deceased").
- [3] The Applicant seeks two forms of relief:
 - a) A declaration and order under s. 58 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA] that the document entitled "Last Will and Testament" and dated May 6, 2019 (the "Proposed Will"), be fully effective as a testamentary instrument and
 - b) A declaration and order under s. 43 of WESA that the gift made to the Executor, by way of permitting professional fees, is not void and is to take effect.
- [4] In response, two of the Deceased's three children, Brentley and Bradley Redmond (the "Respondents"), take no position regarding the relief under s. 58 of WESA, but oppose the relief sought under s. 43 of WESA. The Deceased's third child, Bruce Redmond, was provided with the application materials but has not filed any material.

Background

- [5] The Deceased was admitted to Delta Hospital on or around May 4, 2019.
- [6] Murray Lott, a lawyer at Delta Law Office, received a telephone call from Bruce on May 4, 2019, during which Mr. Lott was advised that the Deceased wished to revisit his existing will, particularly with respect to the named executor.
- [7] On May 5, 2019, Mr. Lott met with the Deceased in the hospital to discuss preparing some estate documents, including a new will and a fee agreement. Mr. Lott and the Deceased discussed the Deceased's estate planning objectives. Later that day, Bruce confirmed with Mr. Lott that the Deceased wanted to proceed with preparing new estate documents. After receiving the confirmation from Bruce, the Proposed Will, enduring power of attorney, Rep 9 agreement, and an executor fee agreement (the "Fee Agreement") were prepared.
- [8] On May 6, 2019, Mr. Lott returned to Delta Hospital and reviewed the estate documents, including the Fee Agreement, with the Deceased. The Deceased told Mr. Lott that he was satisfied with the documents.

- [9] At some later point on May 6, 2019, Graham Buchanan, associate lawyer at Delta Law Office, met with Mr. Lott and the Deceased at the hospital. Mr. Lott left the Deceased's bedside (but not the room) while Mr. Buchanan reviewed the documents with the Deceased and witnessed his signature on the Proposed Will and the Fee Agreement. Mr. Lott then rejoined the Deceased at this bedside and saw that both Mr. Buchanan and the Deceased had signed the Proposed Will and the Fee Agreement. To the best of his recollection, Mr. Lott signed the Fee Agreement at that time, in the presence of the Deceased and Mr. Buchanan, as is his usual practice.
- [10] There was no second witness to the Proposed Will. This is apparently because hospital staff are usually not permitted to witness a will and no other office staff from Delta Law was available. Mr. Lott and Mr. Buchanan left the hospital with the signed Fee Agreement and Proposed Will (with one witness signature). Mr. Lott planned to have Mr. Buchanan return with another staff member from Delta Law the next day to re-affirm and witness the Proposed Will and an appointment was booked.
- [11] However, on May 7, 2019, the Deceased was moved from Delta Hospital to White Rock Hospital. The intended appointment to provide a second witness did not happen before the Deceased died on May 22, 2019.
- [12] Upon learning of the Deceased's death, Mr. Lott signed the Proposed Will as the second witness because, he deposes, he had been present in the same room and had seen the Proposed Will immediately after it was signed by the Deceased and Mr. Buchanan at the hospital.
- [13] Under the terms of the Proposed Will:
- a) Mr. Lott is appointed as the executor and trustee of the Will;
 - b) The Fee Agreement is incorporated by reference with respect to a charging clause, in which Mr. Lott is entitled to charge legal fees for professional services and remuneration for acting as executor and trustee of the Will (the "Charging Clause");
 - c) Brentley is granted a life estate to reside in the Deceased's property located in Delta, BC (the "Property"), subject to certain limitations, until no later than June 30, 2021; and
 - d) The residue of the estate is divided equally among the deceased's children subject to some adjustments for amounts owing by Brentley.
- [14] As the named executor under the Proposed Will, Mr. Lott applied for a grant of probate, which was granted on August 30, 2019. Despite being a lawyer with many years experience in the area of wills and estates, Mr. Lott in his probate application materials submitted to this Court deposed that he knew of no issue that would call into question the validity of the contents of the Proposed Will.

- [15] Since receipt of the Grant of Probate, Mr. Lott has fully administered the Estate, which included selling the Property.
- [16] Mr. Lott sought to pass his final accounts with respect to administering the estate. Bruce consented to the accounts as presented, whereas Brentley and Bradley declined, which necessitated an application.
- [17] The parties appeared before Associate Judge Hughes, sitting as a registrar, on March 3, 2023.
- [18] Following the hearing, Associate Judge Hughes recognized the problem that Mr. Lott had not disclosed prior--that Mr. Lott signed the Proposed Will which might invalidate the gift of professional fees to Mr. Lott. Mr. Lott then explained the circumstances of the execution of the Proposed Will which raised the issue of the validity of the Proposed Will itself. As a result, Associate Judge Hughes directed Mr. Lott--through independent counsel--to seek to cure the Proposed Will and obtain a decision by a justice of this Court regarding the validity of the will and the charging clause

Validity of the Will: s. 58 of WESA

- [19] The Proposed Will of the Deceased, Mr. Donald Wharton Redmond, is presumptively invalid as on Mr. Lott's own admission, his signature as the second witness was not signed in the presence of the maker of the will at the time of the making of the Proposed Will, WESA, s. 37(1). Mr. Lott clearly understood the reason why he did not sign as the second witness because he was named as a beneficiary of a gift in the form of professional fees payable as executor of the Deceased's estate.
- [20] A will that is not comply with s. 37(1) of WESA is invalid unless the Court orders it to be effective pursuant to s. 58, it is recognized as valid under s. 80, or it is valid under any other provision of WESA. Section 58 of WESA is a curative provision in that it confers a discretion on the court to relieve against the consequences of non-compliance with testamentary formalities in a record or document: *Estate of Young*, 2015 BCSC182 at para. 17 *Hadley Estate (Re)*, 2017 BCCA 311 at para. 34.
- [21] There is no opposition to the application with regards to curing the deficiency under s. 58 of WESA.
- [22] There is no question the document before me is authentic. The focus of my inquiry is whether the document represents the testamentary intentions of the Deceased. The key question is whether there is a deliberate or fixed and final expression of intention as to the disposal of the Deceased's property on death: *Estate of Young* at paras. 34-35.

- [23] The subject line of the Proposed Will states "Last Will and Testament". It was clearly made in the contemplation of death. The first paragraph of the Proposed Will revokes all prior wills and codicils and declares the Proposed Will to be his Last Will and Testament. The Proposed Will appoints an executor. The Proposed Will does not disinherit any expected beneficiaries and the residue of the estate is divided equally between the Deceased's three sons.
- [24] The Deceased met with legal counsel twice at the hospital for the explicit purpose of making a Will before he died. On the first meeting he instructed Mr. Lott as to his wishes, and agreed to permit Mr. Lott to receive his legal fees in administering his estate. The next day the Deceased reviewed the Proposed Will and signed the Proposed Will in the presence of one witness. That witness is a member of the Law Society of British Columbia.
- [25] I find on the record before me that the Proposed Will is a true expression of the testamentary intentions of the Deceased.

The gift to Mr. Lott: s. 43 of WESA

- [26] The Applicant seeks a declaration under s. 43 of WESA that the gift made under the Charging Clause of the Proposed Will is not void. The Respondents oppose this relief.
- [27] The threshold condition for the application of s. 43 is not met. Under s. 43(1)(a), a gift in a will is void if it is to a witness to the will-maker's signature.
- [28] It is not disputed that Mr. Lott was not a witness to the will-maker's signature. As such, the threshold requirement for section 43 is not met.
- [29] Mr. Lott signed the will after the passing of the Deceased. Therefore, despite his signature under the statement "we were both present at the request of Donald Wharton Redmond when he signed this will", he in fact was not.
- [30] Section 43 of WESA therefore does not apply.
- [31] If it is applicable, I find that in the circumstances described above, the gift in the Charging Clause was intended by the Deceased, which is the focus of the Court's consideration under s. 43: *Bach Estate (Re)*, 2017 BCSC 548 at para. 55; *Re Estate of Le Gallais*, 2017 BCSC 1699 at para. 18; *Wolk v. Wolk*, 2021 BCSC 1881 at para. 43.
- [32] While Mr. Lott and the Deceased did not have a relationship prior to preparing the estate documents, it would have been clear to the Deceased that Mr. Lott was a lawyer. The Fee Agreement was specifically discussed and reviewed with the Deceased by another lawyer. The Deceased signed both the Fee Agreement and the Proposed Will at the same time. The Charging Clause states that payment for legal services is in addition to remuneration for acting as executor and trustee. The Fee Agreement sets out how the executor fees will be calculated.

Costs

- [33] The applicant seeks an order for costs to the parties payable out of the Estate as special costs, because the application was requested by Associate Judge Hughes to resolve issues prior to passing the executor's accounts.
- [34] This misconstrues the reasons for the application.
- [35] This application, at this late stage, is necessary because Mr. Lott mislead the Court and the beneficiaries as to the true status of the proposed Will, and the need for a s. 58 application. His witness attestation was false. Even if he had witnessed the proposed Will, he would have had to bring a s. 43 application regarding the gift to him. I find that Mr. Lott, on the evidence and considering he is an experienced wills and estate lawyer in this province, knew about the irregularity before me today.
- [36] Mr. Lott's conduct is reprehensible and worthy of rebuke and denunciation: *Westsea Construction v. 0759553 B.C. Ltd.*, 2013 BCSC 1352 at para. 65. In these exceptional circumstances, the estate and the appearing Respondents are entitled to special costs on the application, to be assessed. Mr. Lott will bear the costs of the application personally such that no costs are payable out of the estate.

"Wilkinson, J."

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