

CANADA / JUDGMENT

Re: Peckover Estate

2025 BCSC 1240

COURT

Supreme Court of British Columbia

DECIDED

11 June 2025

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2025 BCSC 1240 Re: Peckover Estate

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Re: Peckover Estate,

2025 BCSC 1240

Date: 20250611

Docket: S247213

Registry: Vancouver

Re: The Estate of Patricia Peckover, deceased

Before: The Honourable Justice Giltrow

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner, Krista Wall:

K. Vimalasan

H.R. Solmon

Counsel for the Respondent, Charles Peckover:

M.S. Kerwin

L.D. Honywill

Place and Date of Hearing:

Vancouver, B.C.

June 5, 2025

Place and Date of Judgment:

Vancouver, B.C.

June 11, 2025

[1] THE COURT: Before me is a petition to rectify the will of Patricia Peckover pursuant to s. 59 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA]. The rectification sought is to modify paras. 2(e) and 5(c) of the will, as set out at para. 1 of part 1 of the petition:

2(e) "Saskatchewan Property" means the surface rights associated with the property owned by me in Saskatchewan being approximately 320 acres located at the South East and South West Quarters of Section 23, Township 5, Range 6, -3- 2. Costs. Part 2: 1. West of the Second Meridian in all or any part thereof owned by me at the time of my death including excluding any interest owned by me in all mines and minerals within, upon or under the property, and any other interest in real property located in Saskatchewan owned by me at my death;

5(c) I give devise and bequeath all beneficial and legal right, title and interest which I have at the time of my death in and to the surface rights associated with the Saskatchewan Property, including excluding sub-surface real property of the Saskatchewan Property, to my brother, CHARLES D. PECKOVER, for his own use absolutely, if he is alive on the Distribution Day.

[2] The parties agree that the test for rectification to be applied is as stated by the B.C. Court of Appeal in *Simpson v. Zaste*, 2022 BCCA 208 at para. 78:

- a) First, what were the testator's intentions with regard to the issue for which rectification is sought?
- b) Second, does the Will as written fail to carry out those intentions?
- c) Third, is that failure a consequence of one of the reasons specified in ss. 59(1)(a)-(c)?

[3] Sections 59(1) and (2) of WESA state:

59(1) On application for rectification of a will, the court, sitting as a court of construction or as a court of probate, may order that the will be rectified if the court determines that the will fails to carry out the will-maker's intentions because of

- (a) an error arising from an accidental slip or omission,
 - (b) a misunderstanding of the will-maker's instructions, or
 - (c) a failure to carry out the will-maker's instructions.
- (2) Extrinsic evidence, including evidence of the will-maker's intent, is admissible to prove the existence of a circumstance described in subsection (1).

- [4] The petitioner advanced the case under subsection (c), a failure to carry out the will maker's instructions. In my view, as I will explain, the gravamen of the dispute in this case is whether the first factor of the three-part test is met.
- [5] The parties agree that the testator's intent was not to bequeath the subsurface rights, also referred to as the mineral rights, in the Saskatchewan property to the respondent. A corollary to this is that the testator intended to give only the surface rights associated with the Saskatchewan property to the respondent. This is well supported by the evidence. The affidavit of Suzanne Grant, the solicitor who drafted the will, confirms this. Ms. Grant deposes as para. 12 of her affidavit:

The testator distinguished between the mineral rights and the land rights in discussing the Saskatchewan property.

- [6] Ms. Grant's affidavit also attests to her notes (which are attached as an exhibit to the affidavit) of the solicitor's meeting at which she received instructions from the testator and from which it was clear that the testator instructed that only the land rights be transferred to the respondent, as Ms. Grant attests at para. 13.
- [7] The notes also reflect that the testator thought that the mineral rights would escheat or automatically transfer to Crown upon her death. I will return to this, but at this stage I note only that this belief does not affect the finding that the testator intended to only grant the land rights to the respondent.
- [8] The petitioner's evidence before the Court of the testator's intent also supports the conclusion that the testator intended to grant only the surface rights to the respondent. For example, the petitioner's evidence of the testator's description of the nature and value of the interest being bequeathed to the respondent supports this. At para. 51 of Ms. Wall's affidavit, she confirms that in 2023, after the instructions were given to the solicitor, the testator told Ms. Wall that the value of the interest being bequeathed to the respondent was roughly \$60,000 for the land and with a revenue of approximately \$15,000. This revenue is inconsistent with the value of the revenue of the subsurface rights, which in recent years had ranged much higher than that, in 2021 to over \$800,000; and in 2022 to approximately \$1.37 million, which the Court can infer was known to the testator based upon her tax returns, which are in evidence.
- [9] There is no question that the will fails to carry out the intention of giving only the surface rights to the respondent, as it expressly includes the subsurface rights. However, the respondent argues that it is not sufficient to determine that the testator intended not to bequeath him the subsurface rights for the requested rectification to flow, but that because the effect of the rectification is that the mineral rights would fall to the residue of the estate and thus to the petitioner, the Court must go further and determine that the testator intended to bequeath them to the petitioner before the rectification may be considered. As I understand the respondent's argument, he effectively says that the petitioner does not get past stage 1 of the three-part test set out in Simpson.

- [10] The difficulty with the respondent's argument is that it goes beyond the rectification that is being sought. The rectification sought, that is, the express changes to the wording of the will that the Court is asked to make, only removes the subsurface rights associated with the Saskatchewan property, leaving only a gift to the respondent of the surface rights to the land. This incontrovertibly represents the intent of the testator. No further rectification is sought, including no changes to the will to positively dispose of or deal with the mineral rights. What happens to the mineral rights is left to operation of law, whether by statute or by the other terms of the will. The structure of the will is that there is only one carve out of Ms. Peckover's estate, and that is the Saskatchewan property, which is left to the respondent. The residue of the estate is left to Ms. Peckover's spouse, the petitioner.
- [11] The evidence does show that the testator appears to have believed that the mineral rights would escheat to the Crown upon her death. In my view, this belief is not relevant to the petition before me. Given that the testator's intent to give only the surface rights to the respondent is known and that that is the extent of the rectification being sought, there is no need for the Court to go further to determine why the testator intended to bequeath only the surface rights to the respondent or whether she would have wanted her spouse to receive the mineral rights if she knew that they would not escheat to the Crown upon her death.
- [12] In my view, it is not even necessary for the Court's analysis to determine that the testator's understanding that the mineral rights would escheat was wrong, (which is nevertheless uncontroverted between the parties and is established on the evidence of Saskatchewan counsel submitted by the affidavit for the petitioner). This mistake is not a mistake by the testator about the will's legal effect but rather about the legal effect of an instrument external to the will. Thus, as in *Simpson* at para. 144, this is not the sort of mistake that is excluded from the Court's rectification power under s. 59 (as discussed at para. 71 of *Simpson*, where the Court discusses the B.C. Law Institute report around the WESA changes).
- [13] Moreover, unlike in *Simpson*, this mistake does not affect or require rectification of any provision of the will. The three things we know about the testator's intention are: one, she intended to give the surface rights of the Saskatchewan property to the respondent; two, she intended not to give the subsurface rights of the Saskatchewan property to the respondent; and three, she intended to give the residue of her estate to the petitioner. No rectification is sought with respect to the language of the provision bequeathing the residue to the petitioner.
- [14] The respondent says that the testator did not form a specific intent with respect to the mineral rights because she mistakenly thought the mineral rights would escheat to the Crown. However, in my view, searching for this intent goes beyond what the law requires under s. 59. In *Simpson* the object at issue, the shares, was the subject of a specific bequest in the will. In this case, the only specific bequest at issue is to the respondent, and with respect to that specific bequest, we know the intent of the testator: not to give the mineral rights as part of that specific request.

- [15] By contrast to Simpson, where the object at issue was the subject of a specific bequest, here, having determined the testator's intent not to include the object in the specific bequest, the object, the mineral rights, is then not the object of a specific bequest. If it does not escheat, as I accept it will not, it falls to the residue of the estate. I have been pointed to no authority for the proposition that there is a requirement relevant to this petition that the testator had to have a complete and correct understanding of the contents of the residue of her estate for the gift of it to her spouse to be valid. Nor do I understand the respondent to have advanced that position.
- [16] By requiring the Court to seek intention beyond the specific rectification being sought, or the testator's knowledge of the residue of her estate, the respondent's approach unnecessarily creates a gap in the understanding of the testator's intent and compels the sort of speculation that is forbidden in such cases, citing to Simpson. This is not necessary and would lead to the absurd result that the Court could not rectify the one thing all parties agree the testator did not intend, which was to give the subsurface rights to the respondent.
- [17] In my view, this result is not supported by an interpretation of the words of the statute in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the act, the object of the act, and the intention of parliament: *Weaver Estate v. Weaver*, 2022 BCCA 79, at para. 21. Nor does it accord with the remedial nature of s. 59. In my view, the intent that is relevant to the specific rectification sought is readily established on the evidence: the testator intended to give only the surface rights and not the subsurface rights to the respondent. That is sufficient to meet the first part of the test set out in Simpson.
- [18] The second part of the test in Simpson is also met. The will fails to carry out that instruction, as it expressly includes subsurface rights in the gift to the respondent.
- [19] The third part of the test requires the Court to determine whether the reason the will fails to carry out the intent of the respondent is "a failure to carry out the will maker's instructions," as this is the ground under s. 59(1) upon which the petitioner relies.
- [20] I am satisfied that this arises from a failure on the solicitor's part to carry out the will maker's instructions. Unlike in the case before Justice Riley, as he then was of this Court, in the *Estate of Joyce Schulz v. Locke*, 2024 BCSC 293, in this case the drafting solicitor attests that she did not carry out the intent of the testator in drafting the will. The solicitor explained in her affidavit that her instructions were that only the land rights be transferred to the respondent. It is not substantively contested that this refers to the surface rights, as the testator clearly drew a distinction between subsurface mineral rights and land rights, which I accept intended to refer to surface rights.
- [21] The solicitor deposes that she sent a draft will that included the mineral rights in the definition of the Saskatchewan property. The evidence is that the testator does not appear to have read the draft will. The petitioner attests that she opened the testator's email after she died and saw that she had not opened the email with the draft will from the solicitor. The

solicitor explained in her evidence that she reviewed the will with the testator but did not read it word for word to her and importantly, explained to her that it was drafted based upon her instructions. The solicitor attests that she did not have any further discussions with the testator regarding the mineral rights associated with the Saskatchewan property, beyond the discussion I have already explained and that was reflected in her notes, and that the solicitor explained to the testator, that the land rights with respect to the Saskatchewan land would go to the respondent and the rest to the petitioner (see paras. 20, 21 of the solicitor's affidavit).

[22] Finally, and I will read the entirety of para. 28 of the solicitor's affidavit, where she says:

Pat's [the testator] instructions were to transfer only the land rights to Charles [the respondent]. She did not ask me to draft the will in a manner that would result in the mineral rights being transferred to Charles. It was my decision to draft the will more broadly, and I did not discuss this point with Pat. I also did not have a chance to report to her, which would have identified this broader definition, because Pat died only two days after the 2023 will was executed.

[23] In my view, the evidence readily establishes that the failure to carry out the will maker's instructions arises under s. 59(c) of WESA. Accordingly, rectification as set out at para. 1 of the order sought in the petition is granted.

[24] I turn now to costs. As the Court of Appeal confirmed in *Sato v. Sato*, 2018 BCCA 287, to which the respondent referred the Court, the modern approach to estate litigation is that the normal cost rules generally apply, but the Court should consider whether "the difficulties or ambiguities that [gave] rise to the litigation [were] caused, in whole or in part, by the testator," at paras. 56, 57.

[25] Without at all finding fault, particularly given the very difficult circumstances of her rapidly declining health, I do find that the difficulty at issue in this litigation arose in part because of the testator not having read the draft will sent to her by her solicitor. In these particular circumstances, while I order costs in favour of the petitioner, I would order costs be paid by the estate, indemnifying the respondent for those costs.

"Giltrow J."

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