

CANADA / JUDGMENT

Rempel Estate v. Dudley

2020 BCSC 1766

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Supreme Court of British Columbia

DECIDED

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2020 BCSC 1766 Rempel Estate v. Dudley

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Rempel Estate v. Dudley,

2020 BCSC 1766

Date: 20201119

Docket: P200202

Registry: Vancouver

Between:

The Canada Trust Company, Administrator of the Estate of

Gregory Allan Rempel, deceased

Petitioner

And

Susan Dudley, Matthew Genereux,

Saskatoon MCC Mennonite Central Committee and

Vancouver SPCA

Respondents

Before: The Honourable Mr. Justice Jenkins

Reasons for Judgment in Chambers

Counsel for the Petitioner:

J.W. Bilawich

Counsel for the Respondent, Saskatoon MCC Mennonite Central Committee:

C.L. Anderson

Place and Date of Hearing:

New Westminster, B.C.

September 30, 2020

Place and Date of Judgment:

Vancouver, B.C.

November 19, 2020

Introduction

- [1] The Canada Trust Company ("Canada Trust"), as administrator of the estate of Mr. Gregory Allan Rempel, has petitioned the Court for an order under s. 58 of the Wills, Estate and Succession Act, S.B.C. 2009, c. 13 [WESA] that certain documents in digital form represent the testamentary intentions of the deceased, Mr. Rempel. As well, the petitioner seeks an order that "deficiencies in any of the said documents which are found to be testamentary be cured".
- [2] The documents in issue are contained on two memory sticks, the first of which contains recordings, including a voice memorandum created by Mr. Rempel and recordings of several telephone conversations between Mr. Rempel and a notary public. The second memory stick contains file folders and sub-folders created by Mr. Rempel that hold electronic drafts of documents which potentially express Mr. Rempel's testamentary intentions in the event he died without a will. More specifically, the latter documents include will instruction client questionnaire forms, i.e., drafts of information then sought by a notary public, presumably with the eventual intent to prepare a will.
- [3] On March 2, 2015, Mr. Rempel, late of a residence in Burnaby, British Columbia, died in Saskatoon, Saskatchewan.
- [4] On December 23, 2015, Canada Trust was appointed executor of the estate of Ms. Susan Rempel, Mr. Rempel's mother, by the Saskatchewan Court of Queen's Bench at Saskatoon.
- [5] As administrator of Mr. Rempel's estate, Canada Trust found, to the best of its knowledge, the following circumstances respecting Mr. Rempel and his family, specifically, that Mr. Rempel:
- a) was not survived by a spouse,
 - b) did not have children,

- c) was predeceased by his father,
 - d) was predeceased by his only sibling, Gary, and
 - e) was survived by his mother, Ms. Susan Rempel of Saskatoon who died 18 days after Mr. Rempel's death, on March 20, 2015, at 97 years of age.
- [6] A wills search for Mr. Rempel in the records of the BC Vital Statistics Agency failed to identify any will recorded for Mr. Rempel.
- [7] A search of Mr. Rempel's personal records and computer devices located in his home at the time of death failed to locate a formal will. The search did locate several paper and electronic documents which indicated Mr. Rempel had been actively working towards completion of a formal will, however, the evidence indicates he did not execute a formal will.
- [8] The search of Mr. Rempel's personal property following his passing encountered a voluminous amount of personal property, including documents which were located in his residence in his home in Burnaby, BC at the time of his passing, as well as personal property found in four storage units located in a storage business which had been stored following the sale of his previous home in Vancouver. The extent of Mr. Rempel's possessions, including documents located in his home and in the storage facility, required a search which has continued for several years since his passing.
- [9] Mr. Fong, an officer representing Canada Trust, has deposed that his search of all of the records did not reveal a formal will, but did reveal personal records which were testamentary in nature, however, were not signed or witnessed. The potential testamentary documents were stored in electronic format in two memory sticks received by Canada Trust from a cousin of Mr. Rempel who resides in Saskatchewan.
- [10] The memory sticks had been located in Mr. Rempel's computer found in his Burnaby residence by his cousin following Mr. Rempel's death. Mr. Fong has deposed that he was told the information on the memory sticks was located by Mr. Rempel's cousin and taken from Mr. Rempel's computer, and "I have no reason to doubt this to be true".
- [11] I will now summarize the evidence contained on the memory sticks.
- [12] The first memory stick contains recordings, including a voice memorandum created by Mr. Rempel of telephone conversations between him and a notary public named Mr. Hassan El Masri and dated back to 2013 and 2014. The recordings had file names as follows:
- a) 13 07-30-13 MY WILL.amr -This recording of Mr. Rempel lists the assets comprising his estate at the time.
 - b) 14 01-21-14 GAR to HASAN MASRI re Will.amr - is a recording of a telephone conversation between Mr. Rempel and Mr. Masri respecting his desire to have a new will prepared. The recording reflects that Mr. Rempel was in the hospital at the time of the recording.

- c) 14 02-05-14 GAR to HASAN re Will.amr - is another recording of a telephone discussion between Mr. Rempel and Mr. Masri regarding his new will and indicates Mr. Rempel remained in the hospital.
 - d) 14 02-08-14 GAR to Hasan re Will.amr - this conversation between Mr. Rempel and Mr. Masri included discussion of "aspects of his intended new will and that Mr. Rempel was still in the hospital.
- [13] Mr. Fong has deposed that he spoke with Mr. El Masri who advised that Mr. Rempel ultimately did not carry through with making a will with him and broke off contact.
- [14] The second memory stick contained the following file folders and sub-folders dating back as far as 1998 through to June 2014. I quote from para. 21 of the affidavit of Mr. Fong:
- a) File folder entitled "00 02 01 GAR - GARs WILL"
 - i. File Sub-Folder "OLD COPIES"
 - 1. "WILL-AUG 1998.wps"
 - 2. "WILL-DEC 2009.wps"
 - 3. "GARs WILL - MAY 2013 w.4.0.wps"
 - 4. "GARs WILL - MARCH 2014 w4.0.wps"
 - ii. File Sub-Folder "MY WILL - as of 06-15-14 - NOTARY PACKAGE"
 - 1. "GAR WILL - AS OF 06-15-14 - RICHMOND NOTARY PACKAGE.doc: - "20/06/2014 8:44 PM"
 - 2. "GAR WILL - AS OF 06-15-14 - BLANKED OUT with RICHMOND.doc: - "20/06/2014 8:53 PM"
 - 3. "GAR WILL - AS OF 06-15-14 - BLANKED OUT withOUT RICHMOND.doc: - "20/06/2014 8:58 PM"
 - 4. "OTHER INFORMATION FOR MY EXECUTOR.doc: - "16/06/14 1:50 PM"
- [15] In the "OLD COPIES" sub-folder, each of the further sub-folders appear to be electronic drafts of documents which express Mr. Rempel's testamentary intentions in the event he died without a proper will. They all start with his address and the opening line states "In the event of something happening to me, and having no other proper will, this is how I wish my estate to be handled." The documents end with the statement "These are my wishes" and there is a space for a signature, below which Mr. Rempel printed his full name, month and year of the document.
- [16] The earliest version of these documents made in 1998 (as marked in the affidavit of Mr. Fong as Exhibit "H") and is the most complete of the four versions; it is quite detailed, dividing his property into five parts and naming several beneficiaries of the five different portions of his estate.

- [17] Later versions, dated Dec 2009 (Exhibit "I"), May 2013 (Exhibit "J"), and March 2014 (Exhibit "K") leave numerous spaces (marked with "XXXX") where some beneficiaries are supposed to be identified. Mr. Fong was unable to locate a hard copy of any of these four documents among Mr. Rempel's personal records.
- [18] In the sub-folder called 'MY WILL - as of 06-15-14 - NOTARY PACKAGE', three of the four further sub-folders (Exhibits "L", "M", and "N" to Mr. Fong's affidavit) were created on June 15, 2014 and are will instruction questionnaire forms which Mr. Rempel received in March 2014 from Ms. Allison O'Sullivan, described as a bookkeeper and board member of the Richmond Animal Protection Society ("RAPS") and also as a notarial assistant with a notary public in Richmond named Ms. Nancy Schick-Skinner.
- [19] In those questionnaires Mr. Rempel included detailed instructions regarding the appointment of his executor and alternate executor, his funeral, cremation and burial arrangements, assets included in his estate and several beneficiaries, an answer of "NO" to the question "Would you like us to register your will with Vital Statistics?", and a statement that his original will be located in "A filing cabinet in my home, filed alphabetically under "Will". No such will was located. Later versions of the document, i.e., Exhibits "M", and "N", include deletions of some beneficiaries' names in Exhibit "L".
- [20] Exhibit "O" contains other information for his executor relating to insurance and pension. Exhibit "P" is the unaltered questionnaire form.
- [21] Mr. Fong deposed that he had spoken to Ms. Schick-Skinner who informed Mr. Fong that Mr. Rempel "did not carry through with making a will with her and eventually broke off contact".
- [22] Also respecting the documents found on Mr. Rempel's computer, Mr. Fong referred to copies of email exchanges with Ms. O'Sullivan and sample clauses for bequests to RAPS and Saskatoon MCC Mennonite Central Committee.
- [23] Finally, Mr. Fong deposed that his agent informed him of locating a "hard copy of the modified Will Instruction Client Questionnaire form" in Mr. Rempel's home with handwritten date June 15, 2014 on top, and other notes and modifications, but not executed by Mr. Rempel. This document was attached to Mr. Fong's affidavit (Exhibit "Q").
- [24] A response to petition has been filed by Saskatoon MCC Mennonite Central Committee opposing the orders sought by the petitioner regarding the determination of the potential testamentary documents and the curing of any deficiencies in those documents. The petition respondent was named as a possible beneficiary in some of the drafts prepared by Mr. Rempel referred to above and is the beneficiary of the estate of Mr. Rempel's mother, Ms. Rempel, who survived Mr. Rempel for 18 days and would be the beneficiary on a finding of intestacy on the part of Mr. Rempel.

[25] None of the documents put forward as possibly reflecting the final intent of Mr. Rempel were signed in his hand, although Exhibits "H" through "K" of Mr. Fong's affidavit close with the words "These are my wishes" followed by typewritten "Gregory Allan Rempel" and the dates those documents were prepared.

The Law

[26] Firstly, it is to be noted that included in the affidavit of Mr. Fong are several hearsay statements and statements of Mr. Rempel taken from the several documents referred to above.

[27] Evidence of statements made by the deceased are admissible. I quote from *Pasko v. Pasko*, 2002 BCSC 435 at para. 10:

10 There is another exception to the hearsay rule which permits evidence to be given of statements made by deceased persons as to their present state of mind (including intention), which statements need not be against interest, provided that the deceased person's state of mind is relevant to an issue in the case. See *R. v. Smith* (1992) 75 C.C.C. 3d 257.

[28] In *Modonese v. Delac Estate*, 2011 BCSC 82 at para. 84 following reference to *Pasko*, the Court stated:

84 Following *Pasko*, if I am wrong in concluding that the statements concerning Regina's intention to divide her assets equally are not admissible pursuant to s. 5 of the WVA, they ought to be admitted pursuant to this exception to the hearsay rule.

[The WVA was a reference to the Wills Variation Act, RSBC 1996, c.490, as repealed by WESA]

[29] In the case at bar, the hearsay statements attributed to Mr. Rempel are reliable in that they are repeated in many of the documents prepared by Mr. Rempel over a considerable period of time and, as such, are reliable as to his intentions regarding the disposition of his estate. The issue for me to decide is whether any of the documents referred to above constitute Mr. Rempel's testamentary intentions and may be cured under the WESA which came into effect on March 31, 2014.

[30] There is no evidence before the Court that Mr. Rempel was ever not of sound mind.

[31] Section 58 of WESA permits this Court to cure deficiencies in wills and cure non-compliant documents that constitute a deceased's testamentary intentions and states:

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.

[32] The introduction of s. 58 represented a departure from the formalities for execution which had been required under the Wills Variation Act, RSBC 1996, c.490, as repealed by WESA, which was discussed by Dardi J. in *British Columbia (Public Guardian and Trustee) v. Shaeffer*, 2015 BCSC 1306 at para. 26:

26 The formalities for execution have been incorporated into s. 37 of the WESA. However, the WESA has introduced a remedial provision in s. 58 that gives the court a broad authority to "cure" a purported will, an alteration to a will, or the revocation of a will that does not satisfy the signing and witnessing requirements prescribed by s. 37. S. 58 constitutes a key component of the modernization of the law of wills and succession in British Columbia because it empowers the court to uphold the will-maker's true intentions even where the will, a gift under the will or a purported alteration or revocation of the will is invalid pursuant to other provisions of the WESA.

[33] The petitioner in this case is neutral as to the outcome and seeks a determination of the Court as to whether any of the documents referred to above are testamentary in nature.

[34] Counsel for Canada Trust has provided the Court with a very helpful summary of the cases decided under s. 58 of WESA, many of which take direction from decisions from the courts of Manitoba where s. 23 of The Wills Act is very similar to the provisions of s. 58 of WESA.

[35] In one of the earliest decisions interpreting s. 58, *Estate of Young*, 2015 BCSC 182, Dickson J. (as she then was) referred to the leading authority in Manitoba, *George v. Daily*, (1997), 143 D.L.R. (4th) 273 (Man. C.A.), stating at paras. 34-37:

- [34] As is apparent from the foregoing, a determination of whether to exercise the court's curative power with respect to a non-compliant document is inevitably and intensely fact sensitive. Two principal issues for consideration emerge from the post-1995 Manitoba authorities. The first is an obvious threshold issue: is the document authentic? The second, and core, issue is whether the non-compliant document represents the deceased's testamentary intentions, as that concept was explained in *George*.
- [35] In *George* the court confirmed that testamentary intention means much more than the expression of how a person would like his or her property to be disposed of after death. 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.
- [36] The burden of proof that a non-compliant document embodies the deceased's testamentary intentions is a balance of probabilities. A wide range of factors may be relevant to establishing their existence in a particular case. Although context specific, these factors may include the presence of previous wills, funeral arrangements, specific bequests and the title of the documents: *Sawatzky* at para. 21; *Kuszek* at para. 7; *Martneau* at para. 21.
- [37] While imperfect or even non-compliance with formal testamentary requirements may be overcome by application of a sufficiently broad curative provision, the further the document departs from the formal requirements the harder it may be for the court to find it embodies the deceased's testamentary intention: *George* at para. 81.

[Emphasis added]

- [36] Counsel have also referred me to other Manitoba and British Columbia cases which I have reviewed and have been of assistance. The decisions turn to a large degree on the facts of each case as would be expected. Those cases include the following: *Kuszek v. Smoley*, [1986] MJ 670, 1 ACWS (3d) 402 (QB); *McNeil v. Snidor Estate*, 2008 MBQB 187; *Sawatzky v. Sawatzky*, 2009 MBQB 222; *Re Yaremekewich Estate*, 2015 BCSC 1124; *Re Akins Estate*, 2019 BCSC 738; *Re Levesque Estate*, 2019 BCSC 927; *Re Smith Estate*, 2016 BCSC 350; *Re Litke Estate*, 2017 BCSC 1079; and *Re Lane Estate*, 2015 BCSC 2162.

Analysis

- [37] In order to be a testamentary document capable of being "cured" under s. 58, the document "must record a deliberate or fixed and final expression of the deceased's intention regarding disposal of his property on death": *Re Smith Estate* at para. 23.

- [38] From my review of the documents referred to above, two of those documents need be considered over the others as to whether they reflect a fixed and final expression of testamentary intent at the time those documents were prepared. Those documents are Exhibits "H" and "L" to the affidavit of Mr. Fong.
- [39] The document at "Exhibit H" made in 1998 is clearly the most comprehensive and includes many factors favouring a declaration as a testamentary document. Counsel has provided a list of factors in favour of that conclusion which he lists as follows:
- a) Located in an electronic folder which is labelled as "00 02 01 GAR - GARs WILL".
 - b) File name uses the word "Will" in it.
 - c) Formal - begins with his address.
 - d) Opens with testamentary declaration - "In the event of something happening to me, and having no other proper will, this is how I wish my estate to be handled."
 - e) Divides property into 5 parts and bequeaths each part.
 - f) Makes provision for feline companions.
 - g) Ends with "These are my wishes" and sets out his name at the end and provides a spot for his signature - but is not signed.
 - h) Month and year at the end.
- [40] Counsel also listed factors which weigh against this document being testamentary in nature which include:
- a) Located in a sub-folder which identifies the contents as "OLD COPIES".
 - b) This is an electronic document only. It has not been signed by the deceased.
 - c) This is the oldest of four documents in the sub-folder.
 - d) It does not appoint an executor/trustee.
- [41] Exhibit "H", dated August 19, 1998, was expressed by Mr. Rempel as "how I wish my estate to be handled", concluding with the statement, "These are my wishes" after dividing his estate into five parts and making specific bequests of those parts of his estate. Those words and specific bequests support a firm and final decision having been made by Mr. Rempel.
- [42] However, the omission of the appointment of an executor or trustee (which could be a simple oversight), the failure to sign or even initial a hard copy of the document, and the lack of evidence indicating he discussed the document with any other person including the beneficiaries lean against Mr. Rempel having made a firm and final decision as to the disposition of his estate. Although Mr. Rempel did not sign a hard copy of the document, he did type his name and the date at the end of Exhibit "H".

- [43] Also, in the sub-folder "OLD COPIES", where Exhibit "H" was located, were other similar documents appearing to be altered versions of Exhibit "H". These documents were noted as Exhibits "I", "J" and "K" dated respectively in 2009, 2013 and 2014. However, these documents indicate "xxxx" where previously there had been specific beneficiaries of the bequests.
- [44] This fact leans toward finding Exhibit "H" as a testamentary document, expressing Mr. Rempel's intent as of 1998, because Exhibits "I", "J" and "K" indicate a desire to update and change his testamentary dispositions.
- [45] The reality is, however, that he never did complete those changes. None of those documents are as complete as Exhibit "H". At any rate, the existence of those 'updated' versions does not take away from the final intent he expressed in 1998.
- [46] Considering the above factors, I find that Exhibit "H" is a firm and final expression of Mr. Rempel's intent in 1998 to bequeath his estate in the manner described.
- [47] It is apparent, however, that after considering the several documents dated post 1998, many of which were dated 2014, those documents reflect a desire to change the terms of his will in that there were changes to his estate and changes in his desired beneficiaries.
- [48] The other document which deserves serious consideration as a testamentary document is Exhibit "L" to Mr. Fong's affidavit. That document, dated June 15, 2014 includes the appointment of an executor and alternate executor, funeral and cremation arrangements, a detailed description of his estate and intended beneficiaries.
- [49] Exhibit "L" is a questionnaire prepared by a notary public and completed by Mr. Rempel. It is clearly not in a final form of will, was not signed and was never finalized with the notary public; Mr. Rempel again cut off contact with the notary public before completion. Subsequent documents, i.e., Exhibits "M" and "N", are the same form having been partially answered by Mr. Rempel with several deletions and are clearly not testamentary documents.
- [50] The intent of the questionnaire would appear to be an expression of intent from which a notary public could then prepare a draft. The notary public would have reviewed the information provided by Mr. Rempel who would then take the information and put it into the form of a will.
- [51] With Exhibit "L" not being signed by Mr. Rempel, and considering the subsequent versions of the questionnaire, I find the evidence would lean towards Mr. Rempel not having firmly committed to the terms of his will. Exhibit "L" was a draft which changed in subsequent versions reflecting uncertainty in the disposition of his estate.
- [52] Exhibit "L" also envisioned a final will which would be placed and filed in a filing cabinet in his home and no will was found in that filing cabinet. Further, it is noted that there was no clause in Exhibit "L" indicating Mr. Rempel was revoking a prior will, although at law the execution of a new will would revoke the prior will.

[53] On a balance of probabilities, I do not find Exhibit "L" amounts to a testamentary document demonstrating a deliberate or fixed and final expression of the Mr. Rempel's intentions regarding disposal of his property on death.

Conclusion

[54] I find that the firm and final wishes of Mr. Rempel regarding his estate and his wishes relating to bequests as expressed in Exhibit "H" represented his wishes as of the date in 1998 when that document was prepared. Exhibit "H" is a testamentary document capable of a "cure" under s. 58 of the WESA.

[55] The petitioner is entitled to special costs payable by the estate. The respondent is also entitled to special costs.

"Jenkins J."

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