

CANADA / JUDGMENT

Wolk v. Wolk

2021 BCSC 1881

COURT

Supreme Court of British Columbia

DECIDED

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2021 BCSC 1881 Wolk v. Wolk IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Wolk v. Wolk, 2021 BCSC 1881 Date: 20210927 Docket: P171953 Registry: Vancouver Re: The Estate of Dawson Robert Wolk, Deceased Before: The Honourable Madam Justice Tucker Reasons for Judgment Counsel for the Applicant Michael Wolk: A. Mihailovic Counsel for Wanda Nilsson: D. Klassen Place and Date of Hearing: Vancouver, B.C. August 5, 2021 Place and Date of Judgment: Vancouver, B.C. September 27, 2021 I. Introduction

- [1] As is not uncommon in wills and estates matters, several people here have the same surname. For reasons of clarity only, I will refer to them using given names. As the decision involves a minor, she will be identified only by initials.
- [2] Dawson Robert Wolk ("Dawson") died on July 14, 2017.
- [3] On September 12, 2016, Dawson signed a document (the "Document") leaving his estate to Michael Dawson Wolk ("Michael") and Lynda Ruth Wolk ("Lynda"). Dawson's execution of the Document was overseen by three signing witnesses, two of whom were Michael and Lynda.
- [4] This is Michael's application for orders declaring the Document to be a valid will under s. 37(1) and/or s. 58 of the Wills Estates and Succession Act, SBC 2009, c. 13 [WESA], and declaring the gifts to Michael and Lynda valid and effective under WESA, s. 43(4). II. Facts A. The Document
- [5] Michael is Dawson's father and the named executor under the Document. Lynda is Dawson's mother and Michael's wife. She is the alternative executor under the Document.
- [6] At the time of his death, Dawson had no spouse, but had two daughters: Jessica Berens ("Jessica") and E.H. ("E."). Jessica is now an adult. E. was born in 2013.
- [7] Dawson was a qualified red seal ironworker and generally worked on major construction projects. At some point, he developed substance abuse issues.

- [8] Dawson entered a recovery program at some point prior to 2015. In 2015, Dawson began living with Michael and Lynda in their home whenever he was not working on an out-of-town project. Living with Michael and Lynda gave Dawson the stability and support he needed to stay in recovery. During this period, Michael and Lynda also helped Dawson financially by paying debts he owed to third parties.
- [9] On February 17, 2016, the Provincial Court of British Columbia made an order under s. 60 of the Child and Family Community Service Act, RSBC 1996, c. 46, giving Dawson sole custody of E.
- [10] As Dawson continued to work out-of-town projects, following the custody order E. resided full-time with Michael and Lynda. Lynda and Michael took on the role of E.'s primary caretakers, looking after her needs and education and bearing much of the expense of her upbringing.
- [11] In or about August 2016, Dawson told Michael and Lynda how much he loved them and appreciated their emotional and financial support, and that he wanted them to have his assets if anything happened to him. He said he intended to make a will leaving his estate to them. Dawson subsequently drafted a will. He read a draft of it to Michael and Lynda and confirmed that he intended to leave them his estate.
- [12] Dawson subsequently produced the Document. The Document is entitled "Last Will and Testament of Dawson Robert Wolk". It revokes all former wills, names Michael (and Lynda in the alternative) as guardians to Dawson's children and executor of the will, declares his insurance and pension proceeds to form part of his estate, directs the payment of debts and provides a list of assets.
- [13] The Document sets out the following gift provisions: I leave to my parents, Michael Dawson Wolk and/or Lynda Ruth Wolk should they survive me all monies and properties of my estate with the proviso that they in turn provide a portion of the estate to my daughters, Jessica Berens and [E.H.] either in trust or in a protected format such that they will in turn receive a stipend when they reach the age of twenty-five (25) should they also survive me. This includes the repayment of monies to my parents for loans and assistance given me over the years including the overseeing of my daughter [E.H.]. My parents can decide if the money goes to education payments, RRSPs, or a similar portfolio to protect my daughters for later in life.
- [14] Jessica's surname as typed in the Document reads "Hett". The surname "Hett" is then crossed out by hand and the surname "Berens" is inserted by hand above the strike-out (the "Alteration").
- [15] The initials "DRW" are handwritten beside the Alteration. The signing witnesses did not initial the Alteration.

- [16] The final text line of the Document reads: This is as given by me on this 9th day of September 2016.
- [17] There are four signatures at the bottom of the Document. Each signature is hand-dated September 12, 2016, with each date in writing that appears to match the respective signature. The typed text beneath the signature lines reads "Dawson Robert Wolk", "Witness", "Michael Dawson Wolk" and "Lynda Ruth Wolk". The signature over the signature line with "Witness" reads "Robert Krall".
- [18] Michael and Lynda have provided affidavit evidence regarding the execution of the Document. The Document was signed by Dawson, Michael, Lynda and Robert Krall, all on September 12, 2016, and all in the presence of one another (and also in the presence of Mr. Krall's wife). The Alteration was made by Dawson, made at the same time he signed the Document and made in the presence of the signing witnesses.
- [19] On February 11, 2017, Dawson completed and signed a beneficiary designation change form under his health and welfare (i.e., insurance coverage) and pension plans, making Michael the sole beneficiary under both plans, and Lynda the contingent beneficiary should Michael predecease Dawson.
- [20] As already noted, Dawson died on July 14, 2017. B. Events After Dawson's Death
- [21] A search of the wills registry and Dawson's possessions was done and disclosed no other will or testamentary document.
- [22] Michael and Lynda continued as E.'s caretakers after Dawson's death.
- [23] On December 26, 2020, the Provincial Court of British Columbia made a parenting order respecting E. under the Family Law Act, SBC 2011, c. 25, appointing guardians and allocating parental responsibilities and parenting time. Three guardians were appointed: Michael, Lynda and Wanda Nilsson. Ms. Nilsson is E.'s maternal grandmother. E.'s primary residence is with Michael and Lynda and they have primary parental responsibility for her. C. The Probate Proceeding
- [24] On October 25, 2017, Lynda renounced her appointment as alternative executor under the Document.
- [25] On November 30, 2017, Michael filed a submission for an estate grant ("Probate Application") under the Document.
- [26] The Probate Application was delivered to Jessica, Lynda (including in her capacity as E.'s guardian) and the Public Guardian and Trustee ("PGT").
- [27] The Probate Application was rejected, resulting in the filing of the present application within the probate proceeding (see *Mortimer v. Bender*, 2020 BCSC 483 at para. 120). D. The Present Application

- [28] The present application was served on Ms. Berens, Ms. Nilsson and the PGT. No application responses were filed.
- [29] Counsel for the PGT wrote requesting that the court be advised that the PGT did not oppose the relief sought.
- [30] Although no response to application was filed, Ms. Nilsson filed an affidavit sworn July 31, 2020, and counsel appeared on her behalf at the hearing. Ms. Nilsson submits that the orders sought are prejudicial to E. III. Validity Issues
- [31] The formal requirements for a will are set out in s. 37 of WESA: How to make a valid will
- 37(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.
- (2) A will that does not comply with subsection (1) is invalid unless
- (a) the court orders it to be effective as a will under section 58,
 - (b) it is a will recognized as valid under section 80, or
 - (c) it is valid under another provision of this Act.
- [32] A will, once made, can only be altered in manner that accords with WESA: How to alter will
- 54 (1) To make a valid alteration to a will the alteration must be made in the same way that a valid will is made under section 37 [how to make a valid will].
- (2) Subject to subsection (4), an alteration to a will is valid if the signature of the will-maker to the alteration, and the witnesses to that signature of the will-maker, are made
- (a) in the margin or in some other part of the will opposite to or near to the alteration, or
 - (b) at the end of or opposite to a memorandum referring to the alteration and written in some part of the will.
- (3) An alteration to a will that is not made by the will-maker in accordance with this section is ineffective
- (a) except to invalidate a word or provision that the alteration makes illegible, unless the court reinstates the original word or provision under section 58 (4) [court order curing deficiencies], or
 - (b) unless the court orders the alteration to be effective under section 58.
- (4) An alteration to a will that does not comply with subsection (2) is valid if

- (a) the alteration
 - (i) does not substantively alter the effect of the will, and (ii) is in respect of form, style or numbering or is a typographical error, or
 - (b) there is evidence to establish that the alteration was made before the will was executed, if the alteration substantively alters the effect of the will.
- [33] Under s. 58 of WESA, the court may order a document that does not comply with s. 37(1) to be fully effective as if it did: Court order curing deficiencies 58
- (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. ...
- [34] I find the Document does comply with the formalities of WESA. The evidence establishes that Dawson signed the Document in the presence of four witnesses, all of whom were all present at the same time and three of whom then signed the Document in Dawson's and one another's presence.
- [35] Under s. 40 of WESA, the fact that a signing witness is given a gift under the will does not affect the capacity to serve as a witness: Witnesses to wills 40
- (2) A person may witness a will even though he or she may receive a gift under it, but the gift may be void under section 43 [gifts to witnesses].
- [36] I am satisfied that the September 9, 2016 date in the Document text is simply an error that went unnoticed at the actual signing on September 12, 2016. Each of the signatures, including Dawson's, are individually dated in a manner consistent with the affidavit evidence.

- [37] I am also satisfied on the evidence that Dawson made the Alteration, and that he made it the same time he signed the Document, in the presence of the signing witnesses and prior to the witnesses signing the Document. Although the witnesses did not sign or note the Alteration in accordance with s. 54(2), the Alteration meets the requirements under WESA, s. 54(4)(b).
- [38] The Document was executed and witnessed on September 12, 2016 and in accordance with s. 37(1). The Alteration accords with s. 54(4)(b). There is no need to have recourse to s. 58 in the circumstances.
- [39] The Document is a valid will under WESA, s. 37. IV. Whether Gifts To Be Valid
- [40] A gift to a signatory witness is automatically void by statute, but the court may declare such a gift valid on application. The present application seeks a declaration that the gift of the estate to Michael and Lynda take effect.
- [41] Section 43 of WESA includes the following:
- (1) Unless a court otherwise declares under subsection (4), a gift in a will is void if it is to
 - (a) a witness to the will-maker's signature or to the spouse of that witness, . . .
 - (3) If a gift is void under subsection (1), the remainder of the will is not affected.
 - (4) On application, the court may declare that a gift to a person referred to in subsection (1) is not void and is to take effect, if the court is satisfied that the will-maker intended to make the gift to the person even though the person or his or her spouse was a witness to the will.
 - (5) Extrinsic evidence is admissible for the purposes of establishing the will-maker's intention under subsection (4).
- [42] Absent a declaration of validity under s. 43(4), there will be a partial intestacy under s. 25 of WESA. Here, a partial intestacy would lead to Dawson's entire estate being distributed in accordance with s. 23 of WESA. Section 23 governs distribution where a deceased dies intestate and without a spouse, but with a "descendant" as defined by WESA.
- [43] Section 43(4) is centrally concerned with testamentary intent: *Bach Estate*, 2017 BCSC 548 at para. 54. What did Dawson actually intend? In my opinion, it is readily apparent that Dawson intended for Michael and Lynda to receive his estate notwithstanding that they signed as witnesses.
- [44] Dawson expressly articulated the basis for the gift as gratitude for their emotional and financial support during difficult periods of his life. The evidence discloses a close and loving family relationship. He had also relied on Michael and Lynda to take care of E., a role he clearly contemplated they would continue under his guardianship appointment in the Document.

- [45] Finally, approximately five months after signing the Document, Dawson changed his beneficiary designations to bring them into accord with the Document. Notably, the insurance and pension benefits so directed constitute the majority of his estate.
- [46] I am satisfied that the gifts to Michael and Lynda were made with considered testamentary intent. I declare the gifts to be valid. V. Ms. Nilsson's Position
- [47] Counsel for the applicant noted Ms. Nilsson's failure to comply with the Supreme Court Civil Rules, but did not object to her counsel addressing the court. Counsel essentially reiterated the argument improperly advanced in Ms. Nilsson's affidavit as Ms. Nilsson's legal position at the hearing.
- [48] Ms. Nilsson asserts that Dawson was legally obliged to provide for E. in his will by virtue of the 2016 custody order under the Child and Family Community Service Act. Her affidavit goes on to argue that:
4. Given [the Document contains] only a vague request money be used for the benefit of his daughters, the fact that Dawson Wolk did not appear to have received independent legal advice to explain his obligations and that the Wolk's witnessed the will, there is prejudice to [E.] if the will is probated as there is no legal recourse to compel the Wolk's to use the money for her benefit and no mechanism for oversight of how the funds are used for her benefit.
- [49] Ms. Nilsson's position is misconceived. Whether an intestacy would be preferable from the perspective of any beneficiary or potential beneficiary is irrelevant to whether a will is valid under WESA, s. 37(1) and irrelevant to the question of whether a gift represents testamentary intent under s. 43(4). The issue of whether a will adequately provides for a child can only be considered after validity had been determined and, moreover, can only be considered under WESA, s. 60 [maintenance from estate].
- [50] Further, Ms. Nilsson's assertion of prejudice assumes that an intestacy would be to E.'s advantage. On the evidence, E. is neither Dawson's biological child nor was she adopted by Dawson. It is not at all apparent that E. would be a "descendant" in the event of an intestate distribution: see, *Atrill Estate*, 2018 BCSC 350 at paras. 13 and 14; *Clayton v. Markolefas*, 2002 BCCA 435 at paras. 8-11; *McCrea v. Barrett*, 2004 BCSC 208. VI. Disposition
- [51] The Document executed and witnessed on September 12, 2016 is declared to be a valid will under WESA, s. 37(1).
- [52] The gifts made to Michael and Lynda under the Document are declared to be valid and effective under WESA, s. 43(4).
- [53] The costs of this application will be paid out of the estate on a full indemnity basis. "Tucker, J."

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