Estate of Young, 2015 BCSC 182

In this case, the executors of a will sought directions from the Supreme Court of BC about whether documents formed part of the testatrix's intentions for the disposition of her assets and whether they were effective as if part of her will.

In providing directions to the executors, the Court applied s. 58 of the newly enacted *Wills, Estates and Succession Act*, which applies to wills and estate administration matters in British Columbia.

The testatrix had drafted a will in 2009 that stated the way property should be distributed was based on a memorandum to be left with her will:

> *4. I GIVE all my property wherever situated, including any property over which I may have a general power of appointment, to my Trustee upon the following trusts:*
>
> *(a) TO DISPOSE of the articles of personal, domestic and household use or ornament belonging to me at the date of my death and mentioned in a memorandum which I have signed and shall leave with this my Will, in accordance with the instructions contained in such memorandum. Any articles of personal, domestic and household use or ornament not so disposed of shall be sold (or donated to a local charity if of no value), and the proceeds of any such sale shall be added to the residue of my estate and dealt with as a part thereof.*

Unfortunately, the memorandum referenced in the will could not be located and what the executors did find amounted to two documents: one signed from June 2013 and another unsigned from October 2013.

The June 2013 document had two pages. The first page said:

> *Distribution of furniture, art, antiques, jewelry, sculptures, First Nation masks etc. This is being prepared if I have not sold, given in advance of death.*

On the second page, six people, described as beneficiaries, were named and, under each name, several items of personal property were listed. The final words on the first page are:

> *If items not taken buy any of the beneficiaries provide to sell - Maynards Auction, Consignment shops in West Vancouvers including antiques and designer clothes, mink coat. Maynards would be good resource for items they do not sell for auction.*
>
> *There are items not named that could be the choice of named beneficiaries.*

In June of 2013, the testatrix took a friend out for lunch and provided her a copy of the June 2013 document, though this copy was unsigned. She asked her friend to make sure that, after she died,

the wishes expressed in the June 2013 document were carried out.

In October 2013, the testatrix drafted a second document, which was not signed, naming the friend she took out for lunch in June 2013 as the person responsible for distributing her art, antiques and furniture, stating that two beneficiaries, being the youngest, were to receive the first choice for any unnamed items. The testatrix had not informed her friend of the existence of the October 2013 document.

The Court then turned to the provisions of the Wills, Estates and Succession Act to find a curative measure regarding the June and October documents. The Court held:

> *[16] The WESA came into force in British Columbia on March 31, 2014. Its enactment represents a significant change in wills and estate administration law in this province. Section 58 is one of the WESA's most far-reaching remedial provisions. It marks a departure from the traditional principles of formalism that previously governed the creation, alteration and revocation of wills in British Columbia.*
>
> *[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.*
>
> *[18] Section 58 provides, in relevant part:*
>
> *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.

[19] The court must be satisfied that a document represents the testamentary intentions of the deceased before granting an order that it is fully effective as a will pursuant to s. 58(3) of the WESA . If such an order is made, the testamentary document may be admitted to probate.

[20] Prior to enactment of s. 58 of the WESA, British Columbia was a "strict compliance" jurisdiction with respect to formalities for creating, altering, or revoking a will. Since its enactment, this province has joined the ranks of other Canadian jurisdictions with curative provisions in their wills and estate administration legislation. These include Alberta, Saskatchewan, Manitoba, Quebec, New Brunswick and Prince Edward Island.

[21] In some Canadian jurisdictions, the curative provision in force requires substantial compliance with traditional formalities. Unlike those provisions, however, Section 58 of the WESA does not specify a minimal level of execution or other formal requirement for a testamentary document to be found fully effective. Section 58 is most similar in this respect to Manitoba's current curative provision: s. 23 of the Wills Act, C.C.S.M. c. W150 (the "WA").

[22] Section 23 of the WA provides:

Dispensation power

23 Where, upon application, if the court is satisfied that a document or any writing on a document embodies

(a) the testamentary intentions of a deceased; or

(b) the intention of a deceased to revoke, alter or revive a will of the deceased

or the testamentary intentions of the deceased embodied in a document other than a will;

the court may, notwithstanding that the document or writing was not executed in compliance with any or all of the formal requirements imposed by this Act, order that the document or writing, as the case may be, be fully effective as though it had been executed in compliance with all the formal requirements imposed by this Act as the will of the deceased or as the revocation, alteration or revival of the will of the deceased or of the testamentary intention embodied in that other document, as the case may be.

[23] Given the similarity between Manitoba and British Columbia's curative provisions and the dearth of case authority interpreting s. 58 of the WESA, it is helpful to consider Manitoba authorities on this application. It should be noted, however, that s. 23 of the WA in its current form was enacted in 1995 to clarify that it conferred a broad judicial dispensation power not contingent on partial compliance with the formalities. Accordingly, those Manitoba authorities decided prior to 1995 are of limited assistance because they interpreted an earlier version of s. 23 which created a substantial compliance regime.

Review of Manitoba Authorities

[24] The leading authority on the court's curative power is George v. Daily (1997), 143 D.L.R. (4th) 273 (Man. C.A.). In George, the trial court found that a letter written by the deceased's accountant was a valid will pursuant to s. 23 of the WA. The deceased had informed his accountant of desired revisions to his existing will and the accountant wrote a letter the next day in relation to these instructions. The letter was sent to the deceased's lawyer, who confirmed the instructions with the deceased less than two weeks later. However, a new will was not promptly executed because the lawyer requested that the deceased first obtain a certificate of medical competency. The deceased died two months later. There was no evidence that a new will was drafted or that the deceased attempted to obtain the requested medical certificate.

[25] The Manitoba Court of Appeal allowed an appeal from the trial judge's order. In doing so, the court found that the accountant's letter did not reflect the deceased's testamentary intentions. While third party documents are not excluded from s. 23 of the WA, at para. 67 Philp J.A. stated the "court must be satisfied that the deceased knew and approved of the contents of the document which is presented for probate". On the facts found at trial, however, it was unclear if the deceased knew of the existence or contents of the accountant's letter and it was clear that he intended for his lawyer to make the new will. The court noted in this regard that testators often change their minds and remarked that, at best, the letter was instructions for the new will's preparation.

[26] Philp J.A. clearly explained the limits placed on the court's curative powers in his reasons for judgment. At paras. 62 and 65, he stated:

Not every expression made by a person, whether made orally or in writing,

respecting the disposition of his/her property on death embodies his/her testamentary intentions…

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 [citations omitted]

[27] In Kuszak v. Smoley, [1986] M.J. No. 670 (Q.B.), a partially-printed and partially-handwritten document signed by the deceased but not witnessed was found to reflect the deceased's testamentary intentions. The court relied on several factors in making this determination, including:

(1) the document was in the deceased handwriting;

(2) the document was signed by the deceased in four places;

(3) the date was in four places;

(4) the printed portion identified the document as a will and was properly filled out; and

(5) there was nothing before the Court refuting the conclusion that the document embodied the deceased's intentions.

In these circumstances, the handwritten document was validated pursuant to s. 23 of the WA.

[28] A document similar to that in Kuszak was considered in McNeil v. Snidor Estate, 2008 MBQB 187 (CanLII). In McNeil, there were several testamentary documents executed prior to the document at issue, which was a will form filled out in the deceased's handwriting. Prior to filling out the form the deceased had his childhood friend witness the blank form. The other witness did not see the deceased sign the completed form.

[29] After referring to the Kuszak factors, the court in McNeil determined that the will form embodied the deceased's testamentary intentions and should be admitted to probate under s. 23 of the WA. This determination was based on the following factors:

(1) the deceased revoked his earlier Last Will and Testament and the specific dispositions therein, expressed his intent in respect of who should not receive the proceeds of his estate and disposed of the residue of his estate;

(2) the document appointed an executor and provided him with instructions for

the management of the estate including funeral and burial arrangements;

(3) the document is entitled "Will" on the top of the first page;

(4) each blank space on the form, with the exception of the final space for the second witness and one space (where the name of the executor appears instead of the name of the testator) was completed properly in the deceased's handwriting;

(5) the deceased signed the second and third page of the Will; and

(6) the deceased had a witness sign the document, albeit at a later date.

[30] In Martineau v. Myers Estate, [1993] M.J. No. 339 (Q.B.), the court considered whether a holograph will written in the deceased's handwriting could be validated under s. 23 of the WA. It determined that the document reflected the deceased's testamentary intentions as the document was titled "Harold Myer's Will", was written entirely in the deceased's handwriting and set out where the deceased's furniture was to go. The court also found that the presence of changes, deletions and a question mark did not indicate an unsettled mind and the name portion of the title at the beginning of the document was a signature because the style matched the deceased's normal signature. In these circumstances, the holograph will was validated under s. 23 of the WA.

[31] Sawatzky v. Sawatzky, 2009 MBQB 222 (CanLII), concerned an application for an order under s. 23 of the WA for an unsigned typewritten document drafted by the deceased's lawyer to be fully effective as the deceased's will. The document was entitled "Last Will and Testament" and was dated two days before the deceased passed away. Four other testamentary documents were also located. These included a valid holograph will which would be operative if the document at issue was not admitted to probate.

[32] Following a cancer diagnosis, the deceased brought the holograph will to his lawyer for the purpose of having a formal will prepared in essentially the same terms. The lawyer typed up the will with one change to the form of executorship and brought the typewritten document to deceased, who, at that point, was hospitalized. The deceased informed his lawyer that he wanted to make several changes to the will and the lawyer noted these changes on his copy of the typewritten document. The lawyer returned the next day with the updated document but the deceased had passed away before he could sign it. The updated typewritten document was the document at issue.

[33] The court dismissed the application in Sawatsky and declared the holograph will valid. In doing so, it relied extensively on George. There was no evidence that the deceased reviewed the typewritten document in its updated or earlier form, which was a significant factor for consideration. In addition, although the lawyer testified that the updated typewritten document reflected the deceased's testamentary intentions, his testimony was not determinative and the deceased, who was not facing

imminent death, did not tell his lawyer that his instructions were final or would not be changed. Further, the lawyer had made changes to the executorship portion of the document without instructions, so the document did not reflect the deceased's intentions in at least one aspect.

Summary

[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 in 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 the deceased's signature, the deceased's handwriting, witness signatures, revocation of previous wills, funeral arrangements, specific bequests and the title of the document: Sawatzky at para. 21; Kuszak at para. 7; Martineau 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 a 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.

DISCUSSION

The June 17 Document

[38] I am satisfied on the evidence that the June 17 Document records Ms. Young's deliberate expression of her wishes as to the disposal of the listed property on her death. It contemplates distribution of that property to specific beneficiaries on the event of death and employs language which conveys an air of finality. In addition, the

June 17 Document is generally consistent with other provisions in Ms. Young's Will, although not perfectly so as it was prepared after the Will was executed and not left together with it.

[39] The fact that Ms. Young signed the June 17 Document is particularly telling for present purposes. I find that, in so doing, she signalled her knowledge and approval of its contents. I also infer that, shortly before she died, Ms. Young placed the signed copy on her dining room table so that it would be found by others. This, too, is telling with respect to her intentions.

[40] The signed copy of the June 17 Document is identical to the unsigned copy Ms. Young provided to Ms. Sunderland when she sought her assistance in carrying out her final wishes. In all of the circumstances, I am satisfied, on a balance of probabilities, that it is both final in the sense contemplated by the authorities and authentic.

[41] Given the foregoing, I determine that the June 17 Document represents and embodies Ms. Young's testamentary intentions. Accordingly, I order that the June 17 Document is fully effective as though it had been made as part of the Will.

The October 15 Document

[42] I am not satisfied on the evidence that the October 15 Document records Ms. Young's deliberate expression of her wishes as to the disposal of property on her death. Such disposition is the central purpose of a will. In my view, the October 15 Document merely contains an expression of Ms. Young's non-binding wishes related to some of her earlier dispositions. Standing alone or read with the Will and the June 17 Document, it does not constitute a disposition.

[43] The October 15 Document also differs from the Will and the June 17 Document in other respects of relevance. For example, unlike the Will and the June 17 Document, it is unsigned and no explanation for this difference has been presented. In addition, the October 15 Document is headed more in the style of a letter than a testamentary document. Further, Ms. Young did not provide a copy to Ms. Sunderland or even mention to her its existence.

[44] Given the foregoing, I find the October 15 Document does not have testamentary status. That being so, it is not susceptible to the remedial reach of s. 58 of the WESA.

Law Lesson Learned: The *Wills, Estates and Succession Act* will make attempts to cure defects in estate administration with the intentions of the will maker in mind.

But why put your estate through litigation and involve the courts when careful planning assists in

potentially avoiding the intervention of the Courts?

At Goodwin & Mark LLP, our experienced team can guide you through the estate planning process to keep your intentions in mind, and your mind, at ease.