IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Levesque Estate (Re),*
2019 BCSC 927

Date: 20190605
Docket: P122261
Registry: Kelowna

In the Matter of the Estate of Beverley May Levesque, deceased

Oral Reasons for Judgment

In Chambers

Counsel for John Graves and Twila Graves, executors of the Estate of Beverley May Levesque, deceased:	K. Sabey
Appearing in person:	Mary Leung-Levesque
Place and Date of Hearing:	Kelowna, B.C. June 3, 2019
Place and Date of Judgment:	Kelowna, B.C. June 5, 2019

Introduction

[1] This matter comes before the Court on an application to resolve a dispute among the beneficiaries of the Estate of Beverley May Levesque. Intending no disrespect, I will refer to Ms. Levesque as "the Deceased". She died on August 17, 2018 leaving a will made on May 21, 2009 (the "Will"). A portion of the Will is obscured with white-out. The dispute is whether the words that are obscured by white-out are deleted from the Will, or still form part of the Will.

[2] For convenience, I will refer to the obscuring of the words by white-out as the "Alteration". The issue, then, is whether the Alteration is legally effective.

[3] If it is effective, the Alteration removes the Deceased's granddaughter, Kara Nixon, from a list of "Beneficiaries" under clause 3.6 of the Will. Without Ms. Nixon, there are six Beneficiaries. With Ms. Nixon, there are seven.

[4] The application is brought by the executors appointed under the Will. In their notice of application, they seek either an order that the Alteration is effective, or an order that it is not. Their counsel, Mr. Sabey, submitted that the better view is that the Alteration is effective, although he told me that the executors are really stuck in the middle of a family dispute and would prefer not to take sides.

[5] The following interested persons take the position that the Alteration is not legally effective: Ms. Nixon, Mary Leung-Levesque, and Wayne Levesque. Wayne Levesque is a Beneficiary and Mary Leung-Levesque is married to a Beneficiary. I note that both are taking positions that appear to be contrary to their own financial self-interest, which speaks to the sincerity of their opposition to the Alteration. Ms. Leung-Levesque, who is not a lawyer, spoke for all three at the hearing.

[6] To determine whether the Alteration is legally effective, I must address three questions:

i. How and when was the Alteration made?

ii. If the Alteration was made after the Will was executed by the Deceased, is it legally effective apart from s. 58 of the *Wills, Estates and Succession Act,* S.B.C. 2009, c. 13 [*WESA*]?

iii. If not, should the Court order that the Alteration be given legal effect pursuant to s. 58 of the *WESA*?

1. How and when was the Alteration made?

[7] The Deceased was born in 1942. In 2009, she was 57 years old. In that year, she had a health scare and was admitted to the hospital. She wanted to make a will but did not want to incur legal expenses. She asked Ms. Leung-Levesque for help. Ms. Leung-Levesque had experience as a legal assistant and was willing to help her mother-in-law.

[8] Ms. Leung-Levesque met with the Deceased, took instructions, and drafted the Will. The instructions were that the Estate was to be divided into seven equal parts and distributed among the Deceased's six children and her eldest grandchild, Ms. Nixon. The Deceased explained that she wanted to provide for Ms. Nixon because Ms. Nixon's parents were not present in her life, while all her other grandchildren were supported by their parents. Consistently with those instructions, the draft will prepared by Ms. Leung-Levesque listed seven Beneficiaries.

[9] The Deceased executed the Will in the presence of two witnesses, Ruth Mamalick and Pansey Kitch, on May 21, 2009. At this point, the Alteration had not yet been made.

[10] The Deceased kept the Will in an envelope in a drawer in a nightstand in her bedroom until June 2018. There was a note on the envelope that it contained the Will. The Deceased lived alone. While family visited her from time to time, it is highly unlikely that anyone other than the Deceased would have had access to the Will to make changes in this period.

[11] In 2018, the Deceased was in declining health. She moved in with her daughter, Darlia Young. Shortly after she moved, she asked her daughter, Leanna Ismail, to retrieve the nightstand. She told Ms. Ismail that it contained important papers, including her Will.

[12] Ms. Ismail collected the nightstand, removed the envelope, and gave it to Ms. Young. Ms. Young stored the envelope in a desk drawer in her home. She kept it there until the death of the Deceased. At that point, she provided the envelope to her sister, Ms. Graves. Ms. Graves noted that the envelope was sealed, opened it, and read the Will. She saw that it included the Alteration.

[13] Ms. Young and Ms. Ismail have sworn affidavits stating that they did not open the envelope containing the Will or review the Will while it was in their possession. I accept their evidence and the evidence of Ms. Graves. I find that the Alteration was not made by Ms. Ismail, Ms. Young or Ms. Graves.

[14] It is highly unlikely that the Alteration was made by a third party while it was in the possession of Ms. Young, Ms. Ismail or Ms. Graves. Someone made it. The most likely candidate, by a considerable margin, is the Deceased.

[15] There is some evidence that could tend to explain a change in the Deceased's intention to benefit Ms. Nixon after she made the Will in 2009. In January 2018, Ms. Nixon married her boyfriend while they were on a trip together in Thailand. Ms. Ismail states that she learned of the wedding from a Facebook post and mentioned it to the Deceased who looked surprised, said she couldn't believe that Ms. Nixon would not have told her about this, and started to cry. This was only the second time Ms. Ismail had seen her mother cry. Ms. Graves says that the Deceased told her that she was hurt that Ms. Nixon had eloped and married in Thailand without telling her. The Deceased was upset and sad, and it was unusual for her to express emotion in front of Ms. Graves. Ms. Kitch, who is not a family member, recalls that the Deceased told her that Ms. Nixon got married by eloping to another country, and that she had found out about it after the fact. If the Deceased was upset with Ms. Nixon for eloping to Thailand and marrying without telling her in

advance, that could explain a decision to disinherit Ms. Nixon by altering the Will to remove her as a Beneficiary.

[16] There is further evidence that sheds another light on this possible explanation. Ms. Nixon states that she told the Deceased she would be marrying her boyfriend before they left for Thailand and the Deceased was happy for her. On her return, the Deceased gave her money as a wedding gift – she does not say how much – and told her that she was happy that Ms. Nixon had eloped, and that big weddings were a waste of money. Ms. Nixon states that her loving relationship with the Deceased continued and they shared happy conversations in July 2018.

[17] Wayne Levesque says that he spoke with the Deceased about Ms. Nixon's wedding in Thailand and she told him that she was happy Ms. Nixon had not spent a lot of money on the wedding, and had married a hard-working young man.

[18] This further evidence suggests that, if the Deceased was upset about the marriage, either the upset didn't last or she quickly decided to conceal it. It does not directly establish that the Deceased was not upset at first, as recounted by Ms. Ismail and Ms. Graves.

[19] All the affidavits are carefully and soberly drafted. None of the evidence is implausible on its face. No one applied to cross-examine any of the affiants. Ms. Kitch's evidence carries particular weight because she is a wholly independent witness. She confirms that the Deceased described Ms. Nixon as having eloped to another country – the phrase connotes an escape from or abandonment of social convention – and confirms that the Deceased reported that she was not told of the marriage in advance.

[20] In her affidavit, Ms. Leung-Levesque says that she told the Deceased what steps she would have to take to change the Will when it was made in 2009, and the Deceased knew that an updated will would be required. The Deceased never discussed the Will with her again.

[21] In argument, Ms. Leung-Levesque asked me to infer that the Deceased would not have attempted to alter her will with white-out, when she knew she could call on Ms. Leung-Levesque to prepare an amended will for her. So far as the evidence discloses, the Deceased was not discussing her testamentary intentions with anyone else. She further argued that no one really knows how the Alteration was made, and I should not conclude that it was made by the Deceased.

[22] This is a civil proceeding and my task is to come to conclusions on a balance of probabilities, that is, to decide what most probably occurred. I find that the Alteration was most probably made by the Deceased. She had custody of the Will and it is plausible that she decided to change it because she was upset with Ms. Nixon's decision to elope and get married while she was away in Thailand without telling her in advance. There is no plausible alternative explanation for the Alteration.

2. If the Alteration was made after the Will was executed by the Deceased, is it legally effective apart from s. 58 of the *WESA*?

[23] The *WESA* is the latest in a series of statutes dating back at least to the time of Henry VIII. The purpose of this legislation has always been to enable people to make provision for the disposition of their property on death. The vehicle for the expression of a person's testamentary intentions is a will and the legislation imposes formal requirements for the making of a will. The formal requirements prevent a will from being made or changed by accident or inadvertence, and they are intended to limit disputes over what constitutes a will. Inevitably, disputes instead arise as to whether the formal requirements have been satisfied.

[24] Alterations to a will are addressed in s. 54 of the *WESA*. Essentially, it requires that an alteration made after the will was executed must be signed by the will's maker whose signature must be witnessed by two witnesses, in each other's presence and in the presence of the maker. These requirements may be avoided:

a) Under s. 54(4)(a), if the alteration is not substantive;

b) Under s. 54(3)(a), if the alteration has made a word or provision illegible; or

c) Under s. 54(3)(b), if the alteration is made effective by an order pursuant to s. 58.

[25] The Alteration in this case is substantive and s. 54(4)(a) does not apply.

[26] The exception in s. 54(3)(a) for alterations that make a word or provision illegible dates back to the English *Wills Act, 1837* (1 Vict. c. 26, s. 21). It was determined by the English courts, in reasoning that has been adopted in British Columbia, that the words or provision in question must be impossible to read by ordinary inspection of the document, without chemical or other analysis; *Springay Estate (Re)*, [1991] B.C.J. No. 984 (S.C. Master).

[27] In this case, an affiant has sworn that the provision in question listing Ms. Nixon as a beneficiary can be read under the white-out by holding the Will up to the light. I have inspected the Will and come to the same conclusion. I find that the Alteration has not made the provision illegible within the meaning of s. 54(3)(a).

[28] The Alteration is therefore ineffective unless it is made effective by an order pursuant to s. 58.

3. Should the Court order that the Alteration be given legal effect pursuant to s. 58 of the *WESA*?

[29] Section 58 of the *WESA* provides in part as follows:

Court order curing deficiencies

…

(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

…

(b) the intention of a deceased person to revoke, alter or revive a will or testamentary disposition of the deceased person, …

(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
>
> …
>
> (b) as a revocation, alteration or revival of a will of the deceased person, or
>
> …

[30] The leading decision concerning the matters to be considered in deciding whether to make an order under s. 58(3) is *Estate of Young*, 2015 BCSC 182. The reasoning in *Estate of Young* was approved by the Court of Appeal in *Hadley Estate (Re)*, 2017 BCCA 311, aff'g 2016 BCSC 765. In *Estate of Young*, Madam Justice Dickson identified two issues. The first is whether the document – in this case, the Alteration – is authentic. I have already found that the Alteration was made by the Deceased and the requirement of authenticity is satisfied.

[31] Dickson J. identified the second issue as the core issue. She relied on a decision of the Manitoba Court of Appeal addressing equivalent legislation to the *WESA* in *George v. Daily* (1997), 143 D.L.R. (4th) 273. She stated, at paras. 34-36:

> [34] … 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. …

[32] Accordingly, the question I must address, on a balance of probabilities, is whether the Alteration was a deliberate or fixed and final expression of the Deceased's intention to remove Ms. Nixon from her Will.

[33] Carefully dabbing white-out over the provision in question was undoubtedly a considered and deliberate act on the part of the Deceased. She was applying the white-out to the original Will. It was not a casual act. The only reasonable inference is that her intention was to remove the provision from the Will.

[34] There is no evidence that the Deceased was not of sound mind and lacked testamentary capacity at any point before she gave up custody of the Will in June 2018 or indeed before she died.

[35] The likelihood is that the Deceased applied the white-out after she learned of Ms. Nixon's marriage in January 2018. This was nine years after she had made the Will and it is probable that she had forgotten Ms. Leung-Levesque's advice about altering the Will, or she may not have taken it seriously. The case reports record many cases in which makers of wills attempt to alter them without complying with the formal requirements. This tendency of will makers to ignore the requirements of the statute is one of the reasons s. 58 was added to the legislation with the enactment of the *WESA* in 2009, allowing the Court to approve non-complying alterations and amendments where the will-maker's intentions and continuing capacity to make a will are clear.

[36] If the Deceased applied the white-out in the immediate aftermath of learning of Ms. Nixon's marriage, she took no steps to reinstate or unrevoke the gift to Ms. Nixon after that. She maintained an affectionate relationship with Ms. Nixon, giving her a marriage gift and congratulating her on her marriage to "a good hard-working man". It may be that she no longer felt that Ms. Nixon needed special provision as she had felt nine years earlier. This is speculation. The facts I am left with are that the Deceased made the Alteration deliberately, in the knowledge that she was altering the original Will, with the intended effect that Ms. Nixon was removed as a Beneficiary.

[37] I conclude that the Alteration was a deliberate or fixed and final expression of the Deceased's intention to remove Ms. Nixon from the Will. Giving effect to the

Deceased's expressed intention, it is therefore appropriate to order that the Alteration be made effective pursuant to s. 58(3) of the *WESA*.

Costs

[38] The co-executors seek an order for special costs, payable from the Estate. Ms. Leung-Levesque, Wayne Levesque and Ms. Nixon oppose.

[39] In *Lee v. Lee Estate* (1993), 84 B.C.L.R. (2d) 341, Master Horn discussed costs orders in probate or administration actions such as this. At para. 13 he stated:

> … In such cases where the validity of a will or the capacity of the testator to make a will or the meaning of a will is in issue, it is sometimes the case that the costs of all parties are ordered to be paid out of the estate. This is upon the principle that where such an issue must be litigated to remove all doubts, then all interested parties must be joined and are entitled to be heard and should not be out of pocket if in the result the litigation does not conclude in their favour. The estate must bear the cost of settling disputes as a cost of administration. This is the reasoning which underlies such cases as Re Dingwall (1967) 65 D.L.R. (3d) 43 (Ont. H.C.) and McNamara v. Hyde [1943] 2 W.W.R. 344 (B.C.S.C.) and Re Lotzkar Estate (1965) 51 W.W.R. 99 (B.C.C.A.). The question to be asked in such case is whether the parties were forced into litigation by the conduct of the testator or the conduct of the main beneficiaries.

[40] The Court of Appeal quoted Master Horn's reasoning with approval in *Vielbig v. Waterland Estate* (1995), 1 B.C.L.R. (3d) 76 at paras. 41-45.

[41] In my view, this is a case in which the parties were forced into litigation by the conduct of the Deceased. Her alteration of the Will gave rise to a dispute among the beneficiaries of the Will. It was reasonable for the executors to apply to the Court to resolve the dispute. All parties' costs should be paid from the Estate and the executors' costs should be assessed as special costs; *Mawdsley v. Meshen*, 2011 BCSC 923 at paras. 35-40.

Disposition

[42] To summarize, pursuant to s. 58(3) of the *WESA*, I order that the marking on the Will made with white-out that covers the name of the Deceased's grandchild, Kara Nixon, represents the Deceased's testamentary intention to revoke the bequest

to Kara Nixon and is fully effective as though it were made in compliance with the requirements of s. 54 of the *WESA*.

[43] All parties will be paid their costs from the Estate and the executors' costs should be assessed as special costs.

"Gomery J."
The Honourable Mr. Justice Gomery