IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20150316
Docket: 105960
Registry: Kelowna

In the Matter of the Estate of Brian Douglas Minchin, deceased and s. 58 of the *Wills, Estates, and Succession Act*, S.B.C. 2009, c. 13

Before: The Honourable Madam Justice Ross

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner Marissa Minchin:	K.A. Sabey
For the Respondents:	No Appearance
Place and Date of Trial/Hearing:	Kelowna, B.C. March 16, 2015
Place and Date of Judgment:	Kelowna, B.C. March 16, 2015

[1] **THE COURT:** This is an application brought for an order pursuant to s. 58 of the *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13. The petitioner seeks an order that the unwitnessed document executed by the deceased, Brian Douglas Minchin, on December 18, 2010, and described by the deceased as his will and testament represents the testamentary disposition of the deceased as fully effective and as though it had been made as the last will and testament of the deceased person, and that the petitioner's legal costs in relation to this application be paid out of the estate of Brian Minchin on a special costs basis.

[2] By way of factual background, Mr. Minchin died at Kelowna on April 3, 2014. He had no spouse at the time of his death, but left two children, Sean Douglas Minchin and Marissa Mae Sheilagh Minchin. The deceased was involved in a romantic relationship with one Gloria McSorley at the time of his passing. By written instrument dated December 18, 2010, and referred to by the deceased as his will and testament, he provides for a disposition of his estate primarily to his children, but with a specific bequest to his friend, Gloria McSorley. He names an executor and alternate executor. It is a document that is in his handwriting. He had executed a prior will in March of 2001 which named a different executor, but made a similar disposition with respect to his estate.

[3] There was a previous will executed in February 1981, for which a diligent search has been made, but which appears to be lost. At that time, the deceased was married to Sheila Minchin, now Sheila Schweigert, who is the mother of Sean and the petitioner. They were divorced many years ago. The handwriting of the deceased was identified by Ms. Schweigert. Her affidavit indicates that the 1981 will was, essentially, a mutual will prepared during the course of their marriage that left estates to the surviving spouse and, in the alternative, to their child – their only child at the time, Sean.

[4] The test under s. 58 has been discussed in the decision of Madam Justice Dickson in *Estate of Young*, 2015 BCSC 182. She notes at paragraph 34 of that decision that the question is intensely fact-sensitive, that there are two principal

issues: the first, an obvious threshold, 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 v. Daily* (1997), 143 D.L.R. (4th) 273 (Man. C.A.). In *George*, the court confirmed "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 intent as to the disposition of the deceased's property on death. Dickson J. notes at paragraph 36 that the burden of proof is on the balance of probabilities and a wide range of factors may be relevant including the presence of signature, the handwriting, witness signatures, revocation of previous wills, funeral arrangements, specific bequests, and the title of the document.

[5] In the present case, I am satisfied that the document is authentic and I am satisfied further that the document embodies the testamentary intentions of the deceased in that it was a deliberate, fixed, and final expression of his intention with respect to the disposal of his estate. I note, in particular, that the document is referred to as a will and testament, that the document was signed, that it was dated, that it appoints an executor and alternate executor. I note that both the petitioner and Ms. Schweigert have identified the handwriting and signature as that of the deceased and, finally, that the will and testament document is consistent with what someone in the deceased's situation would be expected to do. In the circumstances, I am granting the orders sought in the petition.

[6] MR. SABEY: And, My Lady, I had maybe one other thought, and I think this might be academic because I think that when you make the order that it automatically would revoke previous wills. That appears to be the language of s. 55, but it may be prudent, to avoid any misunderstanding, if there was also an order that this instrument revokes any previous wills made by the deceased.

[7] THE COURT: Yes, I think that is prudent --

[8] MR. SABEY: Okay.

[9] THE COURT: -- in the circumstances.

[10] MR. SABEY: Thank you, My Lady.

Ross J.