# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Nykoryak v. Anderson,*
2017 BCSC 1800

Date: 20170915
Docket: S158331
Registry: Vancouver

Between:

**Mariya Nykoryak and Bill Hlynsky**

Plaintiffs

And

**Natalie Anderson, personally and in her capacity as executor appointed in the will of Ivan Hlynsky dated January 13th, 2015 and Stephan Hlynski also known as Stephan Hlynsky**

Defendants

Before: The Honourable Mr. Justice G.C. Weatherill

## Oral Reasons for Judgment

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|---|---|
| Counsel for the Plaintiffs: | I. Giroday |
| Counsel for the Defendants: | K.D. Rule |
| Place and Date of Hearing: | Vancouver, B.C.<br>September 15, 2017 |
| Place and Date of Judgment: | Vancouver, B.C.<br>September 15, 2017 |

[1] **THE COURT:** This is an application by the defendants, by way of summary trial, for an order declaring that the last will and testament of the deceased, Ivan Hlynsky, dated January 13, 2015 is valid. Ancillary orders are also sought which I will address later.

## BACKGROUND

[2] Ivan Hlynsky had three children. His first child is one of the two plaintiffs, Bill Hlynsky. Bill was born out of wedlock in the Ukraine in the 1940s after Ivan had moved away from the Ukraine. Bill has remained in the Ukraine where he still lives. Ivan married Katherine Ferenc while living in England. They had two children, Natalie Anderson and Stephan Hlynski also known as Stephan Hlynsky, the defendants. Katherine Ferenc died in 1972 when Natalie was 13 years old.

[3] The other plaintiff, Mariya Nykoryak, is Bill's daughter and Ivan's granddaughter. She resides in Toronto or at least in the Toronto area.

[4] In a previous will dated February 17, 2006, Ivan provided that the residue of his estate be divided between Stephan and Mariya.

[5] Bill and Natalie were not named in the will.

[6] In 1999, at the age of 77, Ivan moved to Vernon, British Columbia, where Natalie and Stephan were living. Thereafter, Natalie provided care to Ivan.

[7] On January 9, 2015, Ivan who was then 93, attended upon a lawyer in Vernon, Mr. Dirk Sigalet, Q.C., and provided instructions for the preparation of a new will. Ivan did so as a result of a concern on the part of his long-time solicitor, Mr. David Helm, that Ivan required independent legal advice because Natalie had been providing for his care and he intended to include Natalie in his new will.

[8] Mr. Sigalet met with Ivan on January 9 and again on January 13, 2015. Mr. Sigalet deposed, *inter alia*, by way of an affidavit sworn July 19, 2017, as follows:

3. Mr. Helm then explained to me in the above telephone call the basis for his determination. Mr. Hlynsky, then aged 92, had a significant hearing impairment in his right ear. Two of Mr. Hlynsky's three adult children, Steve, Natalie, had been present for some of the time during Mr. Helm's interview with Mr. Hlynsky. Their purpose was to assist Mr. Hlynsky but this, said Mr. Helm, developed into a discussion between the children and Mr. Hlynsky as to who should receive what portion of his Estate. At that time Mr. Hlynsky proposed giving all of the estate to one of his adult children, Steve, because:

(a) Steve was broke;

(b) Natalie had received financial gifts from her father; and

(c) Bill deserved nothing.

But Mr. Helm said this help could be perceived as undue influence. So, he, Mr. Helm, was referring Mr. Hlynsky to me for independent legal advice.

4. Mr. Helm told me the following background particulars:

- His opinion was that Mr. Hlynsky was mentally competent and therefore had testamentary capacity.
- Mr. Hlynsky's personal background with respect to his previous marriages (all spouses had predeceased) and that all his children were alive:
  - (a) Stephan Hlynsky of Vernon, BC;
  - (b) Natalie Anderson of Vernon, BC; and
  - (c) Bill Hlynsky of the Ukraine.
- Mr. Hlynsky understood the need for independent legal advice and would make an appointment to see me.

...

6. On or about January 13, 2015, Mr. Hlynsky and I again met. I reviewed a draft will with him, made some minor changes and then attended proper execution.

7. Throughout both meetings, Mr. Hlynsky demonstrated that he had the knowledge and understanding of the following:

(a) that a Will gave directions to a trusted person to deal with the assets he, Mr. Hlynsky, owned at his death and to whom those assets should be given;

(b) he knew what assets he owned and that he had no debts;

(c) his ability to give his assets was governed by the need to recognize that his children needed to receive a portion of his estate, and, more particularly, we discussed the varied nature of equality as between children - arithmetic, differing needs, recognition of family ties - and Mr. Hlynsky concluded he would exclude Bill entirely. Mr. Hlynsky declined to provide a written Memorandum of his reasons; and,

(d) his house would be sold and the sale proceeds, together with his bank account, would be divided and transferred as he directed.

8. The nature of my interviews was to ask open ended questions of Mr. Hlynsky and then, for confirmation of his answers, refer to my file notes of my conversation with Mr. Helm wherein he had told me of Mr. Hlynsky's assets and family. I did, however, ask leading questions when affirming administrative information such as: a civic address; bank location; his medication (only needed sleeping pills); and, if there were any other assets such as a car. His instructions and answers were consistent in both interviews. At all material times, there was no one else present during the interviews.

[9] The new will left the residue of Ivan's estate to Natalie and Stephan.

[10] Ivan died on March 24, 2015.

[11] Ivan's long-time physician, Dr. S.R. Long, has provided an opinion in the form of an expert report dated April 25, 2017 that, although Ivan had some underlying cognitive issues at the time he executed his January 13, 2015 will, including some short-term memory loss and occasional confusion, he was nevertheless probably aware of what he was doing at the time. Dr. Long opined, in part, as follows:

> Mr. Hlynsky was seen in the offence January 16, 2015, just a few days after he had signed his most current will dated January 13, 2015. Interestingly at that time, a Mini-Mental status examination was done and he scored poorly on this with a score of 20/30 indicating fairly advanced dementive illness. However this can be somewhat misleading given issues with regard to education, hearing, anxiety and language barriers, all of which Mr. Hlynsky had. In the time that I have known Mr. Hlynsky he has always been somewhat vague. He was also very easily frustrated, and had a temper. There is no question that this gentleman had some decreased short-term memory and was uncertain of the year and date. As is my custom in the office I had examined Mr. Hlynsky both individually and later together with his daughter who frequently brought him to the office. There was no evidence of any coercion on the part of his daughter to influence him, and his relationship with his daughter always seemed to be a positive one. Although this man had decreased short-term memory issues my feeling was that he had no delusions on January 16, 2015, and that he probably had a reasonably good understanding of his assets, the people who would benefit from his will, and the nature of a will. Screening was not done formally however and so this is my expert opinion of the situation at the time.
>
> I do note that just the previous day on January 15 he was seen by a social worker at home and I received a letter from that social worker January 20, 2015 at which time she was wondering about his capacity of managing legal and financial affairs. However she left no opinion as to this herself.

> Mr. Hlynsky was seen relatively infrequently in the office. He had been seen prior to the visit of January 16, 2015 on October 30, 2014, and at that time was living on his own with help primarily of his daughter. He had episodes of confusion, and for example on that day in the office, he thought that he would be going home to tend to his beloved fruit trees, though his daughter was saying that he was not doing that anymore.
>
> I note that in the discharge summary from his hospitalization at Vernon Jubilee hospital on April 3, 2014 - April 14, 2014 (where he was recuperating from hip surgery having fallen and broken his hip) that he has some in-hospital delirium. This is an acute escalation of confusion which can be seen, especially with patients who have had surgery, or medical illness, and are experiencing potentially some degree of underlying confusion as well.
>
> So this gentleman had an underlying cognitive impairment which preceded his last will dated January 13, 2015. This included short-term memory loss, occasional confusion, some paranoia. Despite this I am reasonably confident in stating that I think that he probably was aware of the nature and effect of a will, the general extent of his assets, the nature of a will regarding who would benefit from his will, and was for the most part free of thought disturbance that would affect his judgment in this regard.

[12] Ivan's main asset was his home and it has since been sold. The net sale proceeds together with the remaining assets of the estate, totalling approximately $275,000, are currently in Mr. Sigalet's trust account, pending the outcome of this proceeding.

[13] This action was commenced by Bill and Mariya on October 7, 2015, seeking an order that the January 13, 2015 will is invalid and, alternatively, if it is valid, an order that it be varied.

[14] Very few steps have been taken by the plaintiffs to prosecute this claim until recently, after the defendants brought on this application.

[15] Counsel for the defendants concedes that there is evidence of Ivan having cognitive deficiencies at the time he executed his January 13, 2015 will, but submits that there is nevertheless sufficient evidence before the court to permit a finding that Ivan had testamentary capacity at the time and that the order sought should go.

[16] Counsel for the plaintiffs seeks an adjournment of this summary trial for several months to enable him an opportunity to obtain additional medical records on the basis that they may disclose further evidence relating to Ivan's testamentary

capacity at the time he signed the January 13, 2015 will. In particular, he wishes to obtain additional hospital records from Ivan's admissions relating to a broken hip in April of 2014 and another admission relating to him having had pneumonia. Counsel for the plaintiffs also wishes an opportunity to cross-examine Mr. Sigalet and Dr. Long on their respective evidence.

## LAW

[17] The test for testamentary capacity was recently commented upon by this court in *Bull Estate v. Bull*, 2015 BCSC 136, at paras. 114 to 117:

> [114] The test for testamentary capacity is not overly onerous. Sufficient mental capacity to make a will may exist despite the presence of cognitive deterioration, and the testator may have sufficient mental capacity even if his/her ability to manage other aspects of his/her affairs is impaired.
>
> [115] Simply having an imperfect or impaired memory does not in of itself absent testamentary capacity unless it is so great as to leave no disposing memory: *Banks v. Goodfellow* (1870), L.R. 5 Q.B. 549. A disposing mind and memory is "one able to comprehend, of its own initiative and volition, the essential elements of will making, property, objects, just claims to consideration, revoking of existing dispositions and the like ..." (*Moore v. Drummond*, 2012 BCSC 1702 at para. 34).
>
> [116] The testator should have an appreciation of the claims of the persons who are natural objects of his/her estate and the extent of his/her property of which he/she is disposing: *Allart Estate v. Allart*, 2014 BCSC 2211 at para. 30; *Leung* at para. 27 and *Laszlo v. Lawton*, 2013 BCSC 305 at para. 158.
>
> [117] Because testamentary capacity is a legal question and not a medical question, a medical opinion, although valuable and relevant, is not determinative of testamentary capacity: *Leung* at para. 62 and *Laszlo* at para. 190.

[18] The Ontario courts agree. In the very recent case of *Birtzu v. McCron*, 2017 ONSC 1420, Justice Bloom, at the beginning of para. 40, said:

> [40] Justice Corbett in *Johnson v. Huchkewich*, [2010] O.J. No. 4586 (Sup Ct) at paras. 34, 35, and 46 elaborated on the effect of mental disorder on testamentary capacity:
>
> > [34] The applicant notes that testamentary capacity is not the same thing as the capacity to manage one's property or the capacity to confer a power of attorney. I agree. This does not mean the test is "higher" for testamentary capacity; rather, it is different. Should this point need illustration, none better can be found than Justice Stach's thoughtful discussion in *Palahnuk v. Palahnuk Estate*, [2006] O.J.

No. 5304. Justice Stach upheld a will made by an 80 year old testator who had been found incapable of caring for her own person or for her own property. The testator was cared for by a niece, under an agreement with the Public Guardian and Trustee. In coming to this conclusion, Justice Stach found:

> The requirements for a testator to have a "sound disposing mind" in order to make a valid will include the following:
>
> - The testator must understand the nature and effect of a will;
> - The testator must recollect the nature and extent of her property;
> - The testator must understand the extent of what she is giving under the will;
> - The testator must remember the persons she might be expected to benefit under her will;
> - The testator, where applicable, must understand the nature of the claims that may be made by a person she is excluding from the will.

[35] Isolated memory or other cognitive deficits do not establish lack of testamentary capacity:

> Such things as imperfect memory, inability to recollect names and even extreme imbecility, do not necessarily deprive a person of testamentary capacity. The real question is whether the testator's mind and memory are sufficiently sound to enable him or her to appreciate the nature of the property he was bequeathing, the manner of distributing it and the objects of his or her bounty.

...

[46] Care must be taken in reading the physicians' clinical notes or in interpreting their diagnoses. Diagnosing someone as having "dementia" does not mean the person is "demented". Diagnosing someone as having Alzheimer's does not mean the person lacks capacity (though it may foretell a loss of capacity if the disease progresses as expected). To leap from an initial diagnosis to a conclusion of legal incapacity is unwarranted and very dangerous reasoning. I reject this line of argument.

## DISCUSSION – ORDERS SOUGHT

### Validity of the January 13, 2015 will

[19] The law is clear that the issue to be decided is not whether the deceased suffered from cognitive impairment when the will was executed, but rather, whether, despite the cognitive impairment, the deceased was able to:

- understand the nature and effect of a will;
- understand the nature of effect of the deceased's property;
- understand the extent of what was being bequeathed under the will;
- remember the persons who might be expected to benefit under the will; and
- understand the nature of the claims that may be made by a person who is excluded from the will.

[20] I agree with counsel for the defendants that Ivan could not have had the conversation and discussion he had with Mr. Sigalet that Mr. Sigalet deposed took place if he did not meet the foregoing criteria. In my view, it is very unlikely that any further medical records which may provide further evidence of cognitive impairment will diminish the effect of Mr. Sigalet's evidence.

[21] I accept that plaintiffs' counsel has not yet conducted a cross-examination of Mr. Sigalet on his affidavit, but he has had that affidavit since August 1, 2017, and took no steps to conduct such a cross-examination. Moreover, plaintiffs' counsel has not pointed out any inconsistency or other basis upon which it could be suggested that Mr. Sigalet's evidence is potentially unreliable. In my view, the evidence before the court is sufficient, indeed, it is uncontroverted, that a finding of Ivan's testamentary capacity can be made.

[22] Accordingly, I find that at the time Ivan executed his will on January 13, 2015, he had the testamentary capacity to do so. The defendants are entitled to an order that the January 13, 2015 will is valid.

**Interim distribution of trust funds**

[23] The defendants also seek an order that there be an interim distribution of the trust fund currently in Mr. Sigalet's trust account in accordance with s. 155 of the *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13, pending a determination of the *Wills Variation* portion of this action.

[24] It should be noted that, given my determination that the January 13, 2015 will is valid, the plaintiff, Mariya Nykoryak, as Ivan's granddaughter, has no standing under the *Wills Variation Act*, R.S.B.C. 1996, c. 490. Accordingly, the only person who could possibly be adversely affected by an interim distribution order is the other plaintiff, Bill Hlynsky.

[25] In *Davis v. Burns Estate*, 2016 BCSC 1982, Justice Greyell held at para. 31 that the following criteria govern whether an interim distribution should be made in circumstances such as these:

> a. the amount of the benefits sought to be distributed as compared to the value of the estate;
> b. the claim of the beneficiaries on the testator;
> c. the need of beneficiaries for money; and
> d. the consent of the residuary beneficiary to the proposed [distribution].

[26] Each of the defendants has provided evidence of their respective financial need and hardship. I find it is significant. In my view, it is appropriate in the circumstances to make an order for interim distribution in this case. I am ordering that the sum of $50,000 be distributed to each of the personal defendants from the estate's trust fund for a total of $100,000.

**Leave to serve the plaintiff, Bill Hlynsky, with interrogatories**

[27] The defendants also seek an order that they be granted leave to serve the plaintiff, Bill Hlynsky, with interrogatories pursuant to Rule 7-3(1) of the *Supreme Court Civil Rules*. I am making that order without conditions with the exception that I am ordering that Mr. Hlynsky provide his responses to the interrogatories by October 31, 2017.

**Dismissal for want of prosecution**

[28] The defendants also seek an order that the action be dismissed for want of prosecution. I am not prepared to grant this order at this time given the delays by all of the parties.

**Change of venue**

[29] Finally, the defendants are seeking that there be a change of venue of this action from Vancouver to Kelowna.

[30] Having considered the submissions of counsel, I am of the view that this is an appropriate case for a change of venue to the Kelowna Registry. With the exception of the plaintiff, Bill Hlynsky, who lives in the Ukraine, all of the witnesses, both lay and expert, reside in the Okanagan. Defendants' counsel is located in Kelowna. The only connection this action has to Vancouver is plaintiffs' counsel who resides here. In my view, the interests of justice cry out for a change of venue in this case. So there will be an order to that effect.

[31] Now, Mr. Giroday.

[32] MR. GIRODAY: Two issues, My Lord. One is the timing for the $50,000 to be distributed, because I will have to take instructions on an appeal. I do not anticipate one will be taken, but if one is taken, then there will be an issue and, of course, there would have to be a stay application, presumably. Well, perhaps not, it would be a final order -- no, it would not be a final order. I am not sure if -- they have messed around with that -- what is final and not final in the last few years, but that is one issue, and then the other issue is I am not sure what -- the answers to interrogators, we did not discuss that this morning -- well, Ms. -- Ms. --

[33] THE COURT: We did and that you advised me that the unsigned interrogatories were provided and the unsworn answers were provided.

[34] MR. GIRODAY: Provided, as well. Right.

[35] THE COURT: Unsworn answers are not answers.

[36] MR. GIRODAY: And nor is an unsigned --

[37] THE COURT: Exactly --

[38] MR. GIRODAY: -- issuance of interrogatories.

[39] THE COURT: -- but in order to even issue the interrogatories, there has to be either consent or a court order. She now has a court order. So now she can sign them and get them to you.

[40] MR. GIRODAY: Right. My concern only is the drop-dead date before I have even received the interrogatories to answer.

[41] THE COURT: Well --

[42] MR. GIRODAY: Now if it is the same interrogatories, I am sure that can be arranged, but --

[43] THE COURT: Well, I assume that they would be --

[44] MS. RULE: Yes.

[45] THE COURT: -- and it has been confirmed. So there should not be any difficulty.

[46] MR. GIRODAY: Right. So it is really just a question of getting him to swear the answers that have already been provided.

[47] THE COURT: It is amazing what can be done when there is a deadline, Mr. Giroday.

[48] MR. GIRODAY: Right.

[49] THE COURT: Now, in terms of the timing of the distribution, I see no basis for staying the order I have just made pending instructions that you may or may not get on an appeal.

[50] MR. GIRODAY: Well, right, you have not given a time for the payment and I am just suggesting --

[51] THE COURT: Well, the payment -- from -- I have made the order that there will be a distribution. I do not know if I have to specify a particular time.

[52] MR. GIRODAY: Thank you.

[53] THE COURT: The order speaks from when it is pronounced. Now, if you are of the view that -- or your client is of the view that, for whatever reason, wishes a stay of this order, then you know what to do. But you know, the order will have to be prepared, signed, and entered, I presume. So it is going to take some days, but in this day and age, communication between here and the Ukraine should not be a problem. So I do not anticipate any issue there.

[54] MR. GIRODAY: Just my Ukrainian is not very good, My Lord, but I can arrange that.

[55] THE COURT: All right. Now, is there anything else? I think that the costs should follow the event.

[56] MS. RULE: Thank you, My Lord. Costs should follow the event?

[57] THE COURT: There is no reason why it should not.

[58] All right. Well, thank you both, and I want to thank you once again Mr. Giroday for your candor and that is very much appreciated. And for your submissions. They were both very helpful. Thank you.

"G.C. Weatherill J."