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Docket: PR 22-01-28235
(Brandon Centre)
Indexed as: Yaremchuk, et al. v. Yaremchuk
Cited as: 2025 MBKB 48

COURT OF KING'S BENCH OF MANITOBA
(GENERAL DIVISION)

**IN THE MATTER OF:
THE ESTATE OF WILLIAM YAREMCHUK, THE DECEASED**

B E T W E E N:

| | | |
|-----------------------------|---|-----------------------------------------|
| TIMOTHY NICHOLAS YAREMCHUK, |) | |
| JEREMY YAREMCHUK |) | |
| |) | |
| |) | applicants,) <u>Derek D. Cullen</u> |
| |) | for the applicants |
| - and - |) | |
| |) | |
| |) | |
| HALEY LYDIA YAREMCHUK, |) | |
| |) | |
| |) | respondent.) <u>Amelia M. Peterson</u> |
| |) | for the respondent |
| |) | |
| |) | |
| |) | Judgment delivered: |
| |) | April 7, 2025 |

ABEL J.

INTRODUCTION AND BACKGROUND

[1] The Applicants seek an Order allowing the Last Will and Testament of William Yaremchuk (William) originally dated September 6, 2000 (the Will), inclusive of delineations and revisions dated August 25, 2020, to be admitted for

Probate pursuant to s. 23 of ***The Wills Act***, CCSM c W150 (the ***Act***). William died on December 8, 2022.

[2] William was predeceased by his wife Linda Yaremchuk (Linda).

[3] William and Linda had two children, Timothy Yaremchuk (Tim), who is one of the Applicants, and William Terry Yaremchuk (Terry). Terry died in 2005 after the Will was executed.

[4] Tim's son Jeremy Yaremchuk (Jeremy) is the other Applicant. Terry's daughter Haley Yaremchuk (Haley) is the Respondent.

[5] The Will was originally drafted by a lawyer. It was properly witnessed and there is an affidavit of execution. The Will as originally drafted contained the following relevant provisions:

- a) Linda was the Executrix but should she predecease William, Tim and Terry were to be the Executors;
- b) The residue was to be paid or transferred to Linda;
- c) Should Linda predecease William, the residue was to be transferred as follows:
 - i. Certain personal belongings were to be transferred to Terry, Tim and Jeremy, in equal shares;
 - ii. Certain farmland was to be transferred to Terry, Tim and Jeremy as joint tenants;
 - iii. The rest and residue was to be transferred to Terry and Tim in equal shares;

- iv. In the event Terry predeceased William, his share of the estate was to be paid or transferred to Haley; and
- v. In the event Tim predeceased William, his share of the estate was to be paid or transferred to his surviving children in equal shares, which would have included Jeremy.

[6] There is no dispute as to the validity of the Will. This litigation relates to handwritten alterations made to the Will, presumably dated August 25, 2020. The handwritten alterations were done directly on the Will. For the purpose of these reasons, I will refer to the document with the handwritten alterations on it as the Document. The alleged relevant alterations to the Will on the Document include the following:

- a) The executors were changed to be Tim and Jeremy, Terry's name having been crossed out and Jeremy's name having been added;
- b) Certain personal belongings were to be transferred to Tim and Jeremy, in equal shares, Terry's name having been crossed out;
- c) Certain farmland was to be transferred to Tim and Jeremy as joint tenants, Terry's name having been crossed out;
- d) The rest and residue was to be transferred to Tim and Jeremy, Terry's name having been crossed out and Jeremy's name having been added;
- e) The paragraph in reference to Terry's share, should he predecease William was crossed out; and

f) The paragraph in reference to Tim's share, should he predecease William was crossed out;

(collectively referred to as the Changes)

[7] It is Tim's belief that the Changes were made by Linda, as the handwriting is consistent with her handwriting. At the top of the first page of the Will, the date of August 25, 2020 was written, it again being Tim's belief that this was in Linda's handwriting.

[8] On the signatory page of the Will, the original date of September 6, 2020 was crossed out and the date of August 25, 2020 was written in, it again being Tim's belief that this was in Linda's handwriting. Above the signature of William on the signatory page of the Will is a new signature, purported to be that of William.

[9] Linda had also made changes to her original will. Linda's will was originally dated September 6, 2000, as was the Will of William, and the date of August 25, 2020 was also written in on Linda's will, as was the Will of William. The changes made to the will of Linda, regarding beneficiaries and the removal of any reference to Terry and Haley, mirror the Changes made in the Will of William.

[10] Terry had died by the time that the Changes were alleged to have been made to the Will. By deleting any reference to Terry in the Will, Haley would no longer be a beneficiary of the estate, as the surviving issue of Terry.

[11] The Applicants seek an order to have the Document, with the Changes, admitted to Probate.

THE LAW

[12] Section 23 of the **Act** allows the Court where it is satisfied that a document, or any writing on a document, embodies either the testamentary intentions of a deceased, or the intention of a deceased to alter a will, to Order that the document or writing be fully effective as though it had been executed in compliance with all the formal requirements imposed by the **Act**.

[13] Section 23 of the **Act** was considered by the Manitoba Court of Appeal in **George v. Daily**, 1997 CanLII 17825 (MB CA) (**George**). One of the main purposes or functions of the formality requirements of the **Act** are the evidentiary and cautionary functions which among other things, provides the court with reliable evidence of testamentary intent and of the terms of the will (see **George** at paragraph 21).

[14] The evidentiary and cautionary functions are particularly relevant to the determination of whether a document embodies the testamentary intentions of a deceased. In discussing the cautionary functions that the formal requirements provide, the Court of Appeal writes:

...People are often careless in conversation and in informal writings. ... Casual language, whether oral or written, is not intended to be legally operative, however appropriate its purely verbal content may be for that purpose. Dispositive effect should not be given to statements which were not intended to have that effect... (see **George** at paragraph 25)

[15] The formalities of transfer therefore generally require the performance of some ceremonial for the purpose of impressing the transferor with the significance of their statements and thus justifying the Court in reaching the conclusion, if the

ceremonial is performed, that they were deliberately intended to be operative (see ***George*** at paragraph 25).

[16] While noting that caution ought to be exercised in determining a testator's testamentary intent, in giving effect and meaning to s. 23 of the ***Act***, the purpose of s. 23 is to allow a testator's intentions, when imperfectly expressed in the eyes of the ***Act***, to prevail.

[17] Testamentary intention means more than musings, questions or wonderings. Not every expression made by a person, whether made orally or in writing, respecting the disposition of their property on death embodies their testamentary intentions (see ***George*** at paragraph 61). Testamentary intention means much more than a person's expression of how they would like their 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 their property on death (see ***George*** at paragraph 64).

[18] The phrase "testamentary intention" and the essential quality of that term means that the deceased intended that the document was a testamentary document to be admitted to probate when the time came, not just that it disclosed the deceased's distributive wishes at the time (see ***Timm v Rudolph***, 2016 MBQB 123 [***Timm***] at paragraph 29).

Standard of proof and onus

[19] The standard of proof for an application under s. 23 of the ***Act*** is the ordinary standard of proof on a balance of probabilities (***George*** at paragraph 20).

In this case, the onus is on the Applicants to establish that the Document embodies William's testamentary intentions (**George** at paragraph 86). The onus is a significant one, which will only be satisfied by the presentation of substantial, complete and clear evidence relating to the deceased's testamentary intentions to the document in question (**George** at paragraph 98).

[20] I am reminded of the caution provided in **George**, that the greater the departure from the requirement of formal validity, the harder it may be for the court to reach the required state of satisfaction (at paragraph 81).

[21] The concerns regarding discerning testamentary intent is heightened when the purported document is created by a third-party. A third-party document would have to be one that had been made at the request of the deceased, or with their knowledge and, in any event, with their awareness that the document recorded the deliberate and final expression of their wishes as to the disposition of their property on death (see **George** at paragraph 67).

[22] However, there is a distinction between isolating the statutory formalities that are missing and weighing the evidence needed to overcome those deficiencies (see **McCarthy Estate (Re)**, 2021 ABCA 403 at paragraph 24). The analysis in determining testamentary intent is a question of evidence rather than of substantive law (see **George** at paragraph 67).

Extrinsic evidence

[23] I can consider extrinsic evidence in an effort to determine whether the Document embodies William's fixed and final testamentary intentions. The

Applicants bear the burden of proof to demonstrate, by the contents of the Document itself, or by extrinsic evidence, that the Document disclosed a fixed and final testamentary intention.

[24] **George** was considered by the British Columbia (BC) Court of Appeal in ***Hadley Estate (Re)***, 2017 BCCA 311 (***Hadley***). In ***Hadley***, the BC Court of Appeal was considering an application pursuant to s. 58 of the ***Wills, Estates and Succession Act***, SBC 2009, c. 13, which is similar in wording and intent to that of s. 23 of the ***Act***. Specifically, at paragraph 40, the BC Court of Appeal writes:

Sitting as a court of probate, the court's task on a s. 58 inquiry is to determine, on a balance of probabilities, whether a non-compliant document embodies the deceased's testamentary intentions at whatever time is material. The task is inherently challenging because the person best able to speak to these intentions — the deceased — is not available to testify. In addition, by their nature, the sorts of documents being assessed will likely not have been created with legal assistance. Given this context and subject to the ordinary rules of evidence, the court will benefit from learning as much as possible about all that could illuminate the deceased's state of mind, understanding and intention regarding the document. Accordingly, extrinsic evidence of testamentary intent is admissible on the inquiry...

[25] In determining the intention of William, the Court should have regard to extrinsic evidence of testamentary intent, including evidence of events that occurred before, when and after the Document was created.

ANALYSIS AND DECISION

[26] With respect to the creation of the Document, I find as follows:

- a) the Changes were made by Linda, not William. The affidavit of Tim confirms that upon his review of the Document, the handwriting relating to the Changes is that of Linda;
- b) the signature at the end of the Document is that of William. Again, the affidavit of Tim confirms that upon his review of the Document, the signature is that of William. While the Respondent raises some concerns regarding the authenticity of the signature, given the evidence presented by Tim, I am satisfied that William signed the Document;
- c) Linda made the same changes to her will, as she did to the Will of William. Given the exact same changes having been made to the Will and the will of Linda, I find that the alterations in the Will and the will of Linda were done at the same time;
- d) the Changes were not initialed by William;
- e) there is no evidence as to when William signed the Document, whether before or after the Changes were made by Linda in the Document; and
- f) the date of August 25, 2020 written on the Document was added by Linda, consistent with the evidence of Tim.

[27] In determining whether the Document is reflective of the testamentary intention of William, there are several factors to consider, those factors considered in light of the comments made in ***George*** and ***Timm***. It is a consideration of the

totality of the facts and circumstances as I find them to determine whether the Document reflects the testamentary intentions of William.

[28] The Document is a third-party document. It was not prepared by William. Any changes or alterations were done by Linda. The Document needed to be made with the knowledge of William, and with his awareness that it recorded the deliberate and final expression of his wishes. The issue is whether the evidence provided on behalf of the Applicants meets that onus, knowing that there is a heightened significance when the document is a third-party one. The onus is significant, only being satisfied with substantial, complete and clear evidence relating to William's testamentary intentions.

[29] There are several concerns regarding the Document, and whether it ought to be admitted to Probate, as an expression of William's testamentary intentions. Those concerns include the following:

- a) The Changes in the Document are not in the handwriting of William;
- b) There is little to no evidence that the Changes were made at the direction of William;
- c) The Changes are not initialled by William;
- d) The Document is not witnessed by anyone; and
- e) There is no evidence as to whether William signed the Document before or after the Changes were made.

[30] However, there is evidence to suggest that the Document is reflective of William's testamentary intentions, including the following:

- a) The Changes were made on the Will. William would have understood the Will to be reflective of his testamentary intentions;
- b) The Document is dispositive, as it provides for the distribution of his property, including the residue of his estate; and
- c) The Document provides for a rational distribution of William's property. The Changes delete any reference to Terry, who had predeceased William and Linda. The Document deletes any reference to Haley, the daughter of Terry, but still provides for a distribution of property to Tim and Jeremy, who were the surviving issue of William, other than Haley.

[31] Although the Document is signed by William, there is no other formal compliance with the **Act**. This represents a significant departure from the formal requirements of the **Act**, which according to **George**, must decrease the likelihood that the Document should be admitted to probate.

[32] The Document is consistent with other evidence of William's intentions. While extrinsic evidence is permitted to be used in an effort to determine whether a document reflects the testamentary intentions of a testator, that evidence must still be admissible.

[33] Statements of a testator's intent after their death is hearsay and presumptively inadmissible. It is an out of court statement, tendered for the truth of its content. To be admissible, the evidence must qualify as an exception to the hearsay rules of evidence.

[34] The “state of mind” exception to the hearsay rule allows for admission of a deceased declarant’s utterances as to a contemporaneous intention or state of mind to prove the declarant’s state of mind, but not for the truth of any underlying factual assertions (see **Rawlins v Rawlins**, 2023 BCSC 466 at paragraph 95, citing **R. v. Smith**, 1992 CanLII 79 (SCC), [1992] 2 SCR 915, **R. v. Evans**, 2002 BCSC 1674 at paragraph 35 and **Pasko v. Pasko**, 2002 BCSC 435).

[35] There are three potential sources of extrinsic evidence for the Court to consider, in relation to the testamentary intentions of William.

[36] I have the evidence of Tim. Tim affirmed two affidavits in these proceedings, the first dated January 10, 2024 and the second dated December 17, 2024 (Tim’s Affidavits). Tim does not aver in either affidavit about conversations he had with William, regarding William’s intentions.

[37] Tim does aver at paragraph 13 of his first affidavit that he discussed these matters with relatives, friends and neighbours, including Linda Dooley (Dooley) and Robert Yaremchuk (Robert).

[38] Tim was cross-examined on his affidavits on January 15, 2025. During the cross-examination, Tim stated that he had conversations with William and Linda where they sat him down and went through what their last wishes were, and any other changes that they had and that he also had a conversation with his father after his mother passed about the changes they had made.

[39] In response to the suggestion that he was just adding this evidence now, even though he had the opportunity to do so in his affidavits, Tim's response was that he did not know it was relevant at the time of preparing his affidavits.

[40] Tim's answer regarding his lack of knowledge of the relevance of those conversations is not consistent with his other evidence.

[41] He specifically referred to conversations he had with Dooley and Robert in his affidavit of January 10, 2024. In support of his application, he provided affidavits from Dooley affirmed September 23, 2024 and Robert affirmed September 5, 2024, where both confirm their conversations with William in relation to his Will.

[42] Tim was aware of the evidentiary relevance of conversations William had with others, regarding William's testamentary intentions. It is therefore not credible for Tim to say that he did not think his own conversations with William were relevant for the purpose of discerning the testamentary intention of William.

[43] Accordingly, I will not rely on Tim's evidence, in relation to his conversations with William.

[44] Although I am not relying on Tim's evidence regarding conversations he had with William, I do have the evidence of Robert and Dooley who are not beneficiaries of the estate of William, under the Will or the Document. They have no financial interest in the outcome of this application.

[45] Relevant to this matter, Robert avers that:

- a) in many conversations with William over the last years of his life, he expressed that his plan was to leave everything to Tim and Jeremy and was appreciative of their help with the farm; and
- b) he had a specific conversation with William regarding the importance of having a will, and from that conversation, Robert understood that they had reviewed and updated both of their wills not long before Linda died and that everything was going to Tim and Jeremy.

[46] Relevant to this matter, Dooley avers that:

- a) when Linda was sick, William and Linda mentioned that they had recently changed their wills and had everything in order;
- b) William and Linda made it clear that they were excluding Haley from the will; and
- c) in all of her dealings with William and Linda in their last couple of years, from their conversations, Dooley understood that they had changed their wills to exclude Haley.

[47] Both Robert and Dooley reference for example, that William was upset or disappointed that Haley made little or no effort to stay in contact with them. I am not relying on the evidence of Robert or Dooley to determine whether Haley did in fact stay in contact with William based on the statements of William, as I am not permitted to rely on that hearsay evidence as part of the state of mind exception. To do so would be relying on hearsay evidence to determine the truth of an underlying factual assertion.

[48] There are concerns regarding whether the Document was made at either the direction of William, or with his knowledge. The evidence of Dooley and Robert assists in alleviating those concerns. The Document has the date of August 25, 2020 written on it. Linda died in 2021, the specific date not being provided. Robert provides evidence that he had a specific conversation with William regarding the importance of having a will, and from that conversation, Robert understood that William and Linda had updated both of their wills not long before Linda died and that everything was going to Tim and Jeremy. The evidence of Robert regarding how the property of William was to be distributed, and to who, is consistent with the Changes made in the Document.

[49] Similarly, the evidence of Dooley concerning her conversations with William regarding their having recently changed their wills when Linda was sick, and that Haley was to be excluded from the Will, is again consistent with the Changes made in the Document

[50] The extrinsic evidence of both Robert and Dooley, in that Haley was to be excluded from the Will of William, is consistent with the Changes. The evidence of Robert and Dooley, from their conversations with William, is consistent with the Document demonstrating the testamentary intentions of William.

[51] While there are concerns regarding the Document, and its significant departure from the formal requirements of the ***Act***, I am satisfied that the Document reflects the true testamentary intentions of William.

[52] The Document is entitled William's Last Will and Testament, and it is signed by him. The Document is dispositive of all of his property, there being a finality to the Document. The evidence of Robert and Dooley is consistent with the Document being a Will, and William's intentions to exclude Haley.

[53] Given the totality of the circumstances, I am satisfied that the Applicants have met their onus. Had it not been for the evidence of Robert and Dooley, I would have had greater concerns regarding the Document, and its reflection of the testamentary intentions of Robert. However, I have a sufficient level of comfort and satisfaction through the evidence of Robert and Dooley, that the Document reflects the true testamentary intentions of William.

[54] The evidence of Robert and Dooley, using the language from *Timm*, satisfies me that William intended that the Document be admitted to probate when the time came. Both Robert and Dooley refer to William having changed and updated his Will, which I find to mean the Document.

[55] Accordingly, there will be an Order that the Will of William, originally dated September 6, 2000, inclusive of delineations and revisions dated August 5, 2020, be admitted for Probate, without the requirement for an Affidavit of Condition or Affidavit of Execution as to the revisions.

[56] Should counsel not be able to agree on costs, they may be spoken to.

_____.J.