Recent Estate Cases

THE D'AMICO FAMILY WEALTH MANAGEMENT GROUP PRESENTS MURRAY SKLAR
AFFILIATED WITH STARNINO MOSTAVIC SENC, LAWYERS

ANGELO D'AMICO
FCSI, CIM, CPA, CMA, CGA, CSWP
VICE-PRESIDENT, PORTFOLIO MANAGER
514-282-5927
ANGELO.DAMICO@NBPCD.COM

GABRIELLE LEFEBVRE
INVESTMENT REPRESENTATIVE
514-282-5928
GABRIELLE.LEFEBVRE@NBPCD.COM

ELSA SANTOS
INVESTMENT REPRESENTATIVE
514-871-7049
ELSA.SANTOS@NBPCD.COM

DANIEL MARRO
MARKETING ASSISTANT
DANIEL,.MARRO@NBPCD.COM

BMO Wealth Management
BMO Nesbitt Burns

D'AMICO
FAMILY WEALTH MANAGEMENT GROUP

Will Power

September 2018
Number 285

Recent Cases

LexisNexis

KARAM C. SUCCESSION YARED REVISITED

Murray Sklar, LLL, LLB, affiliated with Stamino Mostovac, Senc. © *LexisNexis Canada Inc.*

Readers of the May 2017 edition of *Will Power* entitled "*Can a Trust Shelter Assets from the Family Patrimony Rules*" will be aware of the case of *Yared (Succession de)*, [2016] J.Q. no 16001, 2016 QCCS 5581, a decision of Mr. Justice Gaudet of the Quebec Superior Court rendered on November 15, 2016.

Facts (taken from the May 2017 article)

The Plaintiffs Ramy and Rody Yared were the liquidators of their sister Taky Yared's ("TY") estate. The Defendant, Roger Karam ("Karam") was TY's husband. Karam and TY were married in Lebanon in 1998. They had four children: Cali (born in 2001), Nicolas (born in 2004), Raphael (born in 2007), and Aliz (born in 2010). In August 2011, TY learned that she had cancer and the family moved to Montreal. In October 2011, a family trust was created and referred to as the *[translation]:* Roger Karam Trust (herein the "Trust").

Karam stated that the purpose of the Trust was to protect assets (e.g., the residence) for his children, especially due to the serious illness of their mother TY. Karam also stated that the idea came from TY's brothers and at the time the Trust was created he had no knowledge of the Family Patrimony rules ("FP") of Quebec.

The settlor of the Trust was the wife of Ramy Yared, the trustees were Karam and his mother, and the beneficiaries were TY and the four children.

In addition to being a co-trustee with his mother, Karam was also an *[translation]* "elector" who had extended powers to choose new beneficiaries or to remove beneficiaries. The elector could also determine how the revenues or the capital of the Trust would be distributed among the beneficiaries. Essentially, the elector Karam could impose his will on the trustees (composed of himself and his mother).

In 2012 the Trust acquired a residence for $2,350,000 in Montreal (on Doctor Penfield Avenue) to where the family moved. No formal lease or right of habitation was entered into between the trust as legal owner of the property and any of the 5 beneficiaries of the trust (the 4 children and TY, wife of Karam) or Karam himself. Normally trust beneficiaries would, *ipso facto*, have the use and enjoyment of the trust assets consisting in this case of the home. Although Karam, as co-trustee would not normally have a right of use of the home based strictly on his quality as trustee, he would normally enjoy the use of the family home as husband to TY and as father to the 4 children. In addition, the powers he enjoyed as "elector" apparently gave him the right to enjoy the use of the home (see infra). In June 2014 TY left the residence and instituted divorce proceedings against Karam. Karam and the children continued to live in the residence.

In August 2014 TY made a will leaving everything in equal parts to four trusts for each of her four children. Nothing was left in TY'S will for Karam.

On April 6, 2015 TY died while still legally married to Karam (as the divorce was not yet finalized).

In March 2016 Karam instituted proceedings seeking to annul TY's will.

In July 2016, Karam renounced his right under the Trust to choose or remove beneficiaries. In the same month, the liquidators of the Estate of the late TY instituted legal proceedings seeking a declaratory judgment that the family residence was part of the FP in spite of the fact that it was held by the Trust.

The Superior Court Judge's Analysis (*taken from the May 2017 article*)

The FP rules are of public order. If the family residence had been owned by one or the other of the spouses it would have formed part of and be subject to the FP. Should the fact that the Trust owned the residence change the result?

Jurisprudence has established that one cannot avoid the FP rules by the interposition of a corporation controlled by one of the spouses. *(See D.L. c. L.G., 2006 QCCA 1125,)* where the family residence was owned by a corporation, the shares of which were controlled by one of the spouses. The Court stated that the shareholding (by one of the spouses) of the corporation *[translation]* "constituted a sufficient right or authority to confer to that spouse the usage and enjoyment of a family residence."

The judge also recited article 317 of the Civil Code of Quebec (CCQ):

> The juridical personality of a legal person may not be invoked against a person in good faith so as to dissemble fraud, abuse of right or contravention of a rule of public order.

Since the transfer of a home to a corporation may be viewed as an attempt to contravene the FP rules, or at least the consequences of the transfer may result in the contravention of the FP rules, such a transfer may be disregarded.

The Court felt that the same reasoning should apply to a transfer of a home to the Trust. A Trust, even with a distinct and separate patrimony (like a corporation) cannot be used to contravene the FP rules, which are of public order. The lifting of a Trust's veil should be treated similarly to the lifting of the corporate veil.

The judge cited the case of *Droit de la Famille – 3511, 2000 R.D.F. 93 (CS),* where Mr. Justice Gendreau also lifted the Trust veil to include a residence in the FP. The judge also cited the Quebec Court of Appeal case of *Droit de la Famille – 13681, 2013 QCCA 501,* wherein the Court stated:

> [Translation]: "The constitution of a Trust cannot have as a consequence the avoidance of the application of rules of public order such as the family patrimony." [underlining added]

In addition, as the beneficiaries of a Trust, which holds a residence, usually have rights which confer the usage and enjoyment of the residence that fact alone should also apply to include the Trust assets in the FP.

The fact that Karam, as co-Trustee and more importantly as an Elector could effectively control the Trust, add beneficiaries (including himself and directors of corporations controlled by him) and remove beneficiaries (and decide who will get the revenue and capital of the Trust) gave him effective control of the Trust, as if he were owning the asset himself.

In the judge's view, although the residence was legally owned by the Trust, it was *de facto* owned by Karam. In any event, the trustee/elector's powers under the trust gave him the right to enjoy the use of the residence and this brought the residence squarely under the FP rules.

Conclusion of the Superior Court

The judge stated that the value of the residence must be included in the FP. Even if Karam's intention in setting up the Trust was to shelter or protect the assets – i.e., the residence from creditors, the consequence of transferring the home to the Trust was to attempt to avoid the public order rules of the FP. Thus 50% of the value of the residence belonged to the estate of TY, and Karam, directly or indirectly as trustee of the trust, would have to remit 50% of the value of the residence to the estate of TY, consisting of the trusts for the four children. Karam could still challenge the will of TY but that would have to be decided in another court proceeding.

As Karam was not satisfied with the decision, he appealed to the Quebec Court of Appeal.

Quebec Court of Appeal ("QCA")

The QCA analyzed four arguments raised by Karam in his appeal:

1. Superior Court Judge erroneously extended the concept of "lifting the corporate veil" to that of "lifting the trust veil."
2. Even if the concept of "lifting the trust veil" could be used, the Judge erred in his application of the pertinent criteria.
3. The Superior Court Judge mistakenly disregarded the "good faith" of Karam in establishing the trust.
4. The Superior Court Judge erroneously valued "the rights which conferred the usage" of the home owned by the trust to be equal to the value of the home itself . This valuation issue was not even part of the original action and should not have been adjudicated upon by the Judge.

(1) Lifting the Trust Veil

The QCA felt the Superior Court Judge erred both in his interpretation of the facts and circumstances of the case as well as in his interpretation of the existing jurisprudence and doctrine.

First, Karam created the trust in good faith, under no compulsion and without ulterior motives; the main goal of setting up the trust to hold the building and home was to protect his children and dying wife, as well as for a long-term investment strategy for his family of the commercial part of the building.

Moreover, unlike many of the cases cited by the lower court judge, the building was initially acquired by the trust rather than being transferred from a spouse or close relative (parent, brother, sister) to the trust.

The QCA emphasized that Karam, his wife and children lived together in the residential part of the building without any contractual agreement setting out or limiting their occupancy rights, at least until TY moved out of the residence in June 2014 and instituted divorce proceedings against Karam. In other words, Karam and his family had a verbal but legally binding "right of use" agreement with the trust to occupy the residential part of the building for their personal use.

The establishment of the trust was in complete conformity with all legal requirements There was no proof of any attempt or goal by Karam to avoid the FP provisions.

The Court referred to the case of *Droit de la famille – 3511*, [1999] J.Q. no 5850, [2000] R.D.F. 93 (C.S.) wherein Mr. Justice Gendreau dealt with a trust owning a principal residence and in which he lifted the "trust veil" and held that it should be included in the family patrimony. However, in that case there was an initial transfer from the husband to the trust and the judge was of the view that the transfer was initiated by the husband in an attempt to avoid having the house being subject to the F.P.

The Court also analyzed article 317 (*supra*) and distinguished the case of a trust: first, a trust is not a legal person unlike a corporation, and in the case under the appeal there was no evidence of any fraudulent purpose, abuse of right or a contravention of a rule of public order. The Court felt that using article 317 C.C.Q. in the context of a trust "raises many difficulties." A trust, unlike a corporation, is not a "monolithic organization" – there is a settlor, a trustee(s), beneficiaries and occasionally an "elector," who may have conflicting or discretionary interests, unlike a corporation where the directors and officers have to act exclusively in the best interests of the corporation. It is true, in a trust, that the trustee has to act in the best interests of the beneficiaries, but often a trustee has a discretion to choose which beneficiaries will receive income and/or capital as well as determine the time and amount to pay any such beneficiary.

The Court then addressed one of their earlier decisions: *Droit de la famille – 13681*, [2013] J.Q. no 2429, 2013 QCCA 501 in which they stated at paragraph 31:

> [translation] The constitution of a trust cannot have as a consequence the evasion of the application of the public order dispositions of the family patrimony (underlining added).

The judgment was referred to by the Superior Court Judge (supra). The QCA felt the Superior Court Judge erred in his interpretation of the meaning of "consequence" in the above citation to justify the lifting of the trust veil. The Court interpreted its earlier statement dealing with a "consequence" to mean that an objective or goal to avoid the F.P. rules was "unacceptable" and nothing more than that. In essence, with all due respect, it appears to this writer that the QCA now was either limiting, restricting or adding a precondition to the expression "consequence."

To interpret the word "consequence" to mean that the "result" or "effect" of putting a home in a trust was to avoid the F.P. rules, was a wrong or overly-broad interpretation, according to the QCA.

A trust can be the owner of a family residence separate from a husband and wife which may, as a result, exclude the residence from the F.P. rules provided the trust was not constituted "with a goal of evading the public order provisions of the F.P."

The phrase, "having as a consequence the evasion..." attaches to the "goal or objective pursued at the moment of the establishment of the trust"

As Karam never had this intention, the provisions of article 317 CCQ (supra) could not apply, as he was always acting in good faith. This application of article 317 CCQ by the Superior Court Judge was thus erroneous.

The Court then addressed article 415 CCQ which incudes in the F.P.: The residence of the family or the rights which confer use of the residences.

Such rights may exist where the residence was previously owned by one of the spouses and then the residence was transferred by one or both spouses into a trust. But this was not the case here where the trust purchased the property at the outset. In any event, even if such rights did exist for the beneficiaries of the trust (including the children and T.Y.), Karam as husband, father and co-trustee had lived together in the residence with his wife and children (until T.Y. left the residence) and so both Karam and T.Y. had shared equal rights that set-off each other in the calculation of the F.P. In any event, T.Y., as beneficiary of the trust had more legal rights to enjoy the property than Karam had as a trustee of the trust, but subject to his rights as an "elector" of the trust while he had such rights.

The Court felt that the provisions of the F.P. could protect spouses: article 421 CCQ can provide for a compensation payment if a residence was transferred (by one of the spouses) in the year preceding the death of one of the spouses or the year preceding the institution of legal proceedings for divorce etc...; in addition, article 421 CCQ extends beyond the one year period indefinitely if the transfer was done "for the purpose of decreasing the share of the spouse who would have benefitted from the inclusion of the property in the family patrimony." (E.g. if a husband were the owner of the F.P. residence and he transferred the home to a trust with the goal of decreasing or eliminating the share of his wife to 50% of the value of the residence, that would be in violation of article 421 CCQ. The Court felt that these articles were sufficient to address most of the problems dealing with the F.P. assets.

Another error made by the Superior Court Judge was a practical and financial issue. If Karam had to compensate his wife's estate for 50% of the value of the building, was there not an impoverishment of Karam and an enrichment of the estate (consisting of the four children of the marriage)? Karam was not a beneficiary of the trust and so he had no entitlement to claim an interest in the building. The four children were both the beneficiaries of the estate and of the trust: as trust beneficiaries they would ultimately get the ownership of the building and, in addition, as estate beneficiaries would be entitled to 50% of the value of the building if the F.P. provisions applied against Karam and in favour of the estate. Was this not double-counting in favour of the children and penalizing Karam who never had any financial interest in the building owned by the trust?

Finally, the Court felt that the renunciation by Karam to being an elector only demonstrated his good faith so as not to have any ultimate control over the choice of beneficiary of the trust. As such he gave up any "de facto" control of the trust and this supported his "good faith" efforts to respect the entitlement of the named beneficiaries of the trust – his four children.

Conclusion

The QCA reversed the decision of the Superior Court and ordered that the building in which the residence was situated should not be included in the F.P. nor should any rights of usage or habitation that Karam and T.Y. had in the residence be included as well in the F.P. provisions.

Will Power

January 2018
Number 277

Recent Cases

PROFESSIONAL SECRECY IN TESTAMENTARY MATTERS IS LIMITED

Murray Sklar, LLL, LLB, affiliated with Starnino Mostovac, senc.

Introduction

It is common knowledge that lawyers and notaries are required to keep any information they have regarding their clients in strictest confidence, including any wills they draft. This is backed up by several statutes including the *Bar Act*, the *Notarial Act*, the *Professional Code*, the Code of Ethics to which lawyers and notaries are subject, as well as abundant jurisprudence.

What is not well known are the numerous exceptions to this rule. These exceptions were highlighted in the case of *Spector v. Tanzer (Estate of)*, 2016 QCCS 3623, a decision of Mr. Justice Riordan of the Quebec Superior Court rendered on August 1, 2016, which decision was maintained by the Court of Appeal on July 12, 2017, subject to one change, and cited as *Tanzer c. Spector*, 2017 QCCA 1090.

Facts

Doreen Spector, ("Spector") the Plaintiff in the Superior Court proceeding was the surviving spouse of Issie Tanzer ("Tanzer") who died on September 2, 2014. Spector and Tanzer were married in 1995. Tanzer had been married previously and had three children from this earlier marriage. Tanzer's previous wife died in 1994.

After Tanzer's death Spector took an action against the liquidators of Tanzer's estate, being the three children of Tanzer, alleging that the Tanzer's latest will dated October 2013 and executed before notary Alain (the "Alain will") should be declared null and void as having been made under the undue influence of the three children who were the beneficiaries of this will. Spector was obviously excluded under the Alain will.

Early in April 2013, Tanzer had executed a will before notary Dolman (the "Dolman will") wherein Spector received a bequest of $100,000 and a usufruct of the condo residence where she had lived with Tanzer for almost 20 years. Obviously, the Dolman will was superseded by the more recent Alain will, *provided* that the Alain will was held legally valid and enforceable. Spector's obvious strategy was to attack the validity of the Alain will with the result that the Dolman will would then be held to be the last will of Tanzer.

Between the execution of the Dolman will and the Alain will Tanzer had visited another notary in July 2013—notary Malus who was very ill at that time. Notary Malus had a long professional relationship with Tanzer but no notarial will was executed by Malus for Tanzer.

Spector had a list of questions to ask notary Malus but the three adult children, being the liquidators under the Alain will, objected to the questions on the grounds of confidentiality between Malus as notary and Tanzer as the client. The seven questions were the following:

LexisNexis

1. During the time period between April 2013 and October 2013 how many times were you consulted by Issie Tanzer regarding the preparation of a new notarial will?
2. Was a new will prepared further to this/these instructions?
3. Did you witness Issie Tanzer receiving instructions from any other person during any of the aforementioned consultations?
4. What instructions did Issie Tanzer receive from any other persons pertaining to the modification of the Dolman Will?
5. Did you at any time refuse to complete the mandate for the preparation and signing of a new notarial Will?
6. What did you witness that led you to decline to perform the mandate for signing a new Will?
7. Who terminated the mandate for the preparation of a new Will and why?

Superior Court

An application was made to submit the anticipated objections to a judge of the Superior Court. Essentially Spector wanted to "examine notary Malus on the circumstances leading to his not executing the mandate for a new will." She submitted the 7 questions (supra) for a judge to decide if notary Malus should answer them.

The judge first stated that an exception to confidentiality applies after the death of the testator, where a notary actually executed the will of the testator. The judge cited the case of *Beauchamp v. Berthold-Beauchamp*, 2006 QCCS 5746 wherein it was stated:

> [Translation] In permitting the testimony of a lawyer (after the death of the testator) or notary, the Supreme Court in the decision of Geffen (*Geffen v. Goodman Estate*, 1991 2 [S.C.R.] 353) felt the right to secrecy was protected. The divulging (by the notary) does not impact any right or interest of the client. On the contrary, it serves his interests. What justifies the confidentiality are the interests of the testator. The admission of the (notary's) testimony has the specific purpose to establish the true intentions of the deceased testator. The Supreme Court said it was in the interest of the (administration of) justice to allow the notary's testimony (about the testator's true intentions). [parentheses added]

A fortiori, the same exception, after the death of a testator, should apply to a notary who met with a testator but who did not execute a will for the testator.

In essence while a testator is alive, confidentiality applies without exception in favor of the testator (unless he/she renounces to it).

However, after the testator's death, his right to confidentiality, which was a personal and an extra-patrimonial right, essentially becomes subservient to the administration of justice: while the notary cannot reveal anything told to him by the testator to third parties, he may be compelled, in the interests of justice, to tell a judge about the circumstances relating to any will executed before him by the testator, especially if other potential heirs have a reasonable right to challenge the validity of the will executed by the testator. In addition, a notary can be examined about the mental condition of the testator or whether the testator was subject to any undue pressure to execute a will. Although a notary is not a medical doctor or specialist his observations may carry some weight, to be determined by the judge, about the competency of the testator, based on questions asked by the notary to the testator, including whether the testator knows what assets he owns, where they are located, who takes care of his finances etc. ... As well, if a close relative, e.g., a spouse or child, was present when the will is being executed, the notary can be examined about what influence or pressure, if any, the relatives imposed on the testator.

These are all observations of a notary that are *not* subject to confidentiality or privacy and for which the notary can be compelled to give evidence.

The Superior Court judge in his judgment did not limit the examination of notary Malus to the seven questions that Spector identified and which "would suffice for his needs."

The judge felt that there was no reason to limit the (notary's) testimony to "written questions and answers." He felt that "all parties (plaintiff and defendants) should be free to put to the notary any questions that are relevant to the will" (parentheses added).

As a result the judge ordered notary Malus to be "allowed to answer all questions related directly or indirectly to Mr. Tanzer's will." Notary Malus, who was very ill at that time, was unable to be examined but was able to make a declaration under oath in August 2016, which declaration was filed in a sealed envelope with the Superior Court. Unfortunately, notary Malus died in September 2016.

Quebec Court of Appeal

The Quebec Court of Appeal essentially agreed with the Superior Court except that it decided to limit the questions to be asked (in theory only, given the death of notary Malus) to the seven questions initially raised by Spector. (Presumably the sealed answers of notary Malus would be analyzed and weighed by a Superior Court judge who would eventually hear the case brought by Spector challenging the Alain will as being illegal based on her allegations of undue influence or pressure posed by the three adult children on their father in his re-doing his will with notary Alain).

The Court then reviewed the extent of the professional secretary of a notary who is consulted by a person who is considering executing a will.

The first observation was that if a potential testator is accompanied by someone else when a notary is visited (e.g., by a child, children, spouse, or friend), the other persons present with the client and notary are not subject to nor bound by the notary's obligations of confidentiality. The case of *Beaulieu (Succession de)*, 2010 QCCS 3979 was mentioned wherein the *common law* spouse of a deceased testator Beaulieu, was present when the testator met the notary to draft his will. At that meeting Beaulieu told the notary, in the presence of his spouse, that he wanted the house he owned to be divided equally among his spouse and three children. The notary failed to execute the will which would have resulted in an intestacy with the common law spouse getting nothing. The spouse instituted an action to reconstitute a will, based on the expressed wishes of Beaulieu but the notary refused to provide testimony as to the meeting he had with Beaulieu. The judge in that case ordered the notary to give evidence and to produce a copy of his file to the Court and to the spouse who was present at the meeting that Beaulieu had with the notary.

As Michel Jetté stated in "*le secret professional et la politique notariale*" in Cours de perfectionnement du notariat 1989, no. 1 at paragraph 73 :

> [Translation] It may happen, during a discussion with several people that information is provided, questions asked, declarations made and opinions selected and given. In such a situation, all communications remain secret vis à vis third parties but they are not confidential for those who attended the meeting. If a witness to an exchange breaks the silence surrounding the discussions, the notary can be forced to reveal their contents.

In this case it would have been the three children of Tanzer who were present when their father met notary Malus who could have invoked the renunciation to the privilege claimed by the notary. They obviously had no such intention to revoke this principle.

However, as the Court stated:

> [Translation] After the death of a testator his will stops being a secret document and its release in justice can be demanded if it constitutes a pertinent document to a legal suit. With respect to the client – notary communications, relating to the drafting of a will in Quebec courts...have followed the Geffen decision of the Supreme Court according to when it is permissible to lift the professional secrecy, to permit the notary (who executed the will) to give evidence on the wishes of the testator. [parentheses added]

As the post-mortem exception applies to a notary who executed the will of a testator, it should apply likewise to a notary who met with a testator but who did not execute a will for the testator.

Moreover, as the Court stated:

> [Translation] It is permitted for a notary to give evidence on all the facts which he witnessed or was aware of in the course of his drafting and executing a will including what he observed at the meeting with the testator, whether alone or also in the presence of any other third parties.

In this particular case, the three children of the testator did not share the same interest as their deceased father to oppose the questioning of notary Malus or the release of his signed declaration because they were directly implicated in allegations of undue influence or pressure on their deceased father by Spector. The harmful effect of undue pressure, if proven, affects the very testamentary intentions of their deceased father. His testamentary intentions and their alleged undue influence are in conflict with each other.

Conclusion

The Court ordered that notary Malus be authorized to answer the seven questions posed by Spector, which questions were answered in a sealed declaration by Malus shortly before his death and which declaration would be subject to the judge's approval when the main action by Spector was heard by the Superior Court.

RECENT CASES

Son's WVA Claim Not Statute Barred

British Columbia Supreme Court, May 18, 2017

The deceased had two sons, "Jacob" and "Ewen". Jacob never knew his father as the deceased was not interested in being a parent to him. Subsequently, the deceased had a relationship with "Heather" and she gave birth to their son, Ewen, in 1996. The deceased had visitation rights and agreed to provide child support for Ewen. In his will, the deceased left his estate equally to Ewen and to the deceased's sister, who was the executrix of his estate. The gross value of the estate was estimated at approximately $600,000. Letters probate were granted to the executrix on August 30, 2011. Ewen, through Heather, acting as *guardian ad litem*, commenced proceedings under the *Wills Variation Act* ("WVA") seeking a larger distribution of the deceased's estate. Ewen suffered from a kidney disease and related issues and required a kidney transplant. The executrix and Heather settled the claim by agreeing that Ewen should received 80% of the deceased's estate and the executrix should received 20%. On February 6, 2013 the Court approved the variation to the deceased's will. In late 2012, the executrix heard through a distant cousin that the deceased might have had another child. In November 2013, counsel for the deceased's estate sent a letter to Jacob asking him to sign an agreement waiving his interest in the deceased's estate. The executrix gave the deceased's truck, which had a value of $2,500, to Jacob. Ewen passed away intestate in October 2014 when he was 18 years old. The executrix brought this application seeking a declaration that Jacob had adequate notice of the probate of the estate and that the executrix be permitted to distribute the estate as varied by an order of the court. Jacob subsequently brought a wills variation application to vary the deceased's will. The executrix argued that Jacob's will variation claim was well beyond the limitation period for such an action.

The application of the executrix was dismissed. Jacob's action was well outside the six-month limitation period from the date of the issue of pro-bate set out in s. 3(1) of the WVA. However, under s. 4(1), Jacob's claim was not statute barred by reason of the action brought by Heather on behalf of Ewen. Jacob was a person who "might" have applied had he had particulars of the deceased's estate at the time probate was granted and had full particulars of the deceased's estate at the time Heather applied to vary the provisions of the deceased's will in Ewen's favour. Due to the lack of information regarding the value of the deceased's estate given to Jacob, the executrix was not entitled to rely on the equitable principle of estoppel to defeat Jacob's potential entitlement to participate in the deceased's estate.

Re Strom Estate, 2018 CEAC ¶ 32,135

Clause in Will Creating Moral Not Legal Duty

British Columbia Supreme Court, February 2, 2017

The testator, who died in Florida, had no children and was predeceased by his wife. His estate was valued at approximately $13 million US. The petitioner and the respondent in this matter were two of the testator's nephews who resided in British

Will Power

July 2018
Number 283

Recent Cases

A TRUST BY ANY OTHER NAME IS STILL A TRUST

Murray Sklar, LLL, LLB, affiliated with Starnino Mostovac, senc.

Introduction

Testators often draft ambiguous provisions in their wills that require a court to interpret and apply. Making a bequest of ownership of property on the one hand, and then restricting or limiting the rights to the benefits of ownership, on the other hand, may require court intervention to interpret and then apply the unclear provisions.

An illustration of this principle is the recent case of *Estate of Troster Markus*, [2018] Q.J. No. 282, 2018 QCCS 166, a decision of Madam Justice Cohen of the Quebec Superior Court rendered on January 22, 2018.[1]

Facts

The late Frances Troster Markus (herein "Frances"), who died in May 2015, executed a notarial will in August 2014 before notary Earl Merling. She had a daughter Barbra, a son David and many grandchildren and two great-grandchildren.

One ambiguous Clause in the will (Clause 4) dealt with a particular bequest:

> *I hereby bequeath to my daughter Barbra the...ownership of my apartment #1801. She must retain ownership of the apartment for at least one year from the date of my death; if after the one year delay she decides to sell the apartment...the net proceeds derived from the said sale must be invested with Scotia McLeod under the direction of my Liquidator and Trustee...and Barbra shall only have access to the proceeds of investment annually with the right to encroach upon the capital at the sole discretion of my Liquidator and Trustee.*

(Frances owned the apartment unit # 1801 in the form of shares in a corporation that owned the apartment building).

A second ambiguous Clause (Clause 5) dealt with a residual bequest:

> *As to the rest of my Estate...I hereby bequeath the whole in two (2) equal proportions to my two (2) children David and Barbara to be dealt with as follows:*
>
> *a) The share apportioned to my son David shall be turned over to him in absolute ownership, as soon as possible after my death.*

[1] The author would like to thank Me. Antonio Iacovelli, attorney at Miller Thomson in Montreal for his valuable input to this article. Any errors remain exclusively those of the author.

b) Barbra's share...shall be invested by my Liquidator and Trustee...and the income derived from such investments shall be remitted to my daughter weekly, monthly, yearly or otherwise, at the sole discretion of my Liquidator and Trustee, with the right to encroach upon the capital thereof in the sole discretion of my Liquidator and Trustee...

c) [...]

d) Upon the death of Barbara her share of the capital... shall accrue to my grandson, Richard Yaffe (Barbra's son), and my great-grandchildren Sofia Lombardi and Olivia Lombardi (the two children of Robin Yaffe who was Barbra's daughter), for each of them, (Sofia and Olivia) to receive their respective share upon attaining the full age of twenty-five (25) years and until such time the same shall be invested by my Liquidator and Trustee on behalf of Sofia and Olivia with the revenue derived therefrom being apportioned to each of them in the sole discretion of my Liquidator and Trustee hereinafter named and with the right to encroach upon the capital...at the sole discretion of my said Liquidator and Trustee. (parentheses added)

Clause 12 of the will stated:

I hereby declare that it is not my intention to create any substitution...under the terms of my Will...

Shortly after Frances' death, David found a sealed letter dated December 29, 2014 signed by Frances which stated:

Dear David

I have an investment which you do not know about that I want you to administer.

(It turned out these investments were "offshore" investments held in Switzerland).

These offshore funds were to be divided as follows: in equal portions among her grandchildren and great-grandchildren: David's four children were to get their share outright. Richard's share was to be invested in an annuity. Robin's share was to go to her two daughters, Sofia and Olivia, to be invested on their behalf until they turned 25 years old.

This document was written entirely in the hand of Frances and was dated after the notarial will. As such, it would constitute a holographic codicil to the notarial will and would have to be probated.

The Bank of Nova Scotia Trust Company, appointed by notarial deed after the initial liquidator and trustee resigned, felt that Clause 4 of the will (supra) created a trust, to protect Barbra whereas Barbra felt that the will gave her outright ownership of the apartment.

Many handwritten letters, which had been written by Frances in 2013 and 2014 (before the signing of the notarial will), were found by Barbra in her mother's papers. According to the liquidator these letters confirmed that Frances wanted to create a trust with respect to the apartment building so as to protect Barbra who, Frances felt, could not handle money or investments well.

As the liquidator and Barbra could not agree as to the interpretation to give Clauses 4 & 5 of the will, namely whether Barbra's entitlement to the apartment and her half-interest in the residue of the estate (excluding what the subsequent codicil stipulated for the Swiss accounts) was her absolute property or subject to a trust to protect Barbra's interests (given her mother's concerns about her ability to handle money & investments, as confirmed in the handwritten notes (supra)), the liquidator submitted an Application for a Declaratory Judgment to the Court.

The Issues

(1) Was there ambiguity in the will and if so, how should it be resolved?

(2) If so, were trusts created by the will? How many, for whose benefit and who should be the trustee of each trust?

(3) Was the apartment left to Barbra in outright ownership or to a trust for Barbra's benefit and protection?

(4) Did Clause 5 also create a trust for Barbra or was Barbra entitled to 50% of the residue outright?

The Judge's Analysis

The Judge first had to determine if Clauses 4 & 5 of the will were ambiguous. Clause 4 starts by saying that Barbra gets the "ownership" of the apartment; however later on it says that any future sale proceeds of the apartment "must be invested with Scotia McLeod under the direction of the Liquidator/Trustee and that Barbra only has "access to the proceeds of investments annually." In other words, Clause 4 is a bequest of the apartment but with restricted access to the capital proceeds in any future sale.

Likewise Clause 5, which starts with an equal division of the residue of the estate between David and Barbra, restricts Barbra's access to this 50% division by not allowing it to be remitted to her outright (unlike David who gets immediate access to his 50% share of the residue) but rather requiring it to be invested by the Liquidator/Trustee on behalf of Barbra and only the income from the investments would be remitted to her, with a right to encroach on capital at the sole discretion of the Liquidator/Trustee. Moreover, upon Barbra's death her share of the capital remaining is to be divided between Richard (Frances' grandson) and her two great-grandchildren Sofia and Olivia Lombardi.

As a preliminary conclusion the Judge felt there were ambiguities in the interpretation of Clauses 4 & 5 of the will.

Legal opinions were submitted by both the Liquidator and Barbra supporting their respective positions.

After reviewing both opinions & listening to the testimony the Judge concluded that a trust was established in Clause 4 – an "apartment trust" which met the four required elements for the existence of a trust:

1. The creation of a distinct patrimony (i.e. the shares constituting the ownership of the apartment);
2. The transfer of this distinct patrimony to the original Liquidator/Trustee and his replacement – Bank of Nova Scotia Trust;
3. The acceptance of the transfer of this distinct patrimony by the Liquidator/Trustee who accepts to hold and administer this patrimony;
4. A valid purpose for the creation of the Trust – i.e. the financial protection of Barbra with respect to her place in the residence of the apartment, which constitutes an "appropriation to a particular purpose."

The Court referred to the case of *Todd v. Todd*, [1989] J.Q. no 645 (CA) for support for this position.

Likewise, the Judge stated that Clause 5 "creates a trust for Barbra, with respect to her half of the residual estate which she called the 'Universal Trust.'"

Although the Apartment Trust did not stipulate what happened after Barbra's death (unlike the Universal Trust), the Judge felt that the sections of Clause 5 dealing with the allocation of the capital of 50% of the residue of the Universal Trust should also apply to the Apartment Trust. The Judge took a very broad view of the word "capital" in Clause 5 dealing with the Universal Trust, to have it apply to the Apartment Trust the same conditions and terms as to what happens after Barbra's death.

With respect, this writer questions why the Judge would not create only one trust for Barbra (consisting of both the Apartment Trust and the Universal Trust), especially since she decided that the terms of Clause 5, dealing with what happens after Barbra's death in the Universal Trust, should also apply to the Apartment Trust. One less Trust means one less tax return, one less bank account and possibly one less financial statement.

As the Judge was in effect "creating" a personal trust she would have been aware of article 1271 of the *Civil Code of Quebec (CCQ)* which states:

A personal trust constituted for the benefit of several persons successively may not include more than two ranks of beneficiaries of the fruits and revenues, in addition to that of the beneficiary of the capital; it is without effect with respect to any subsequent ranks it might contemplate...

Frances' daughter Barbra would constitute the 1st rank of beneficiaries of the revenues, Richard and Robin (Barbra's children), would constitute the 2nd rank of beneficiaries (except that as Richard was already over 25 years of age, his share would go to him outright). If Robin's share was denied to her, then the third rank of beneficiaries would be Robin's two children: Sofia and Olivia, and they would 'constitute' the eventual capital beneficiaries, upon reaching the age of 25.

The Judge felt that a third trust (the Sofia/Olivia Trust) was also created for the benefit of Sofia and Olivia Lombardi after Barbra's death based on Clause 5 which stated that upon Barbra's death her share of the capital from the Universal Trust would go in equal *shares* to Richard (Barbra's son) and Barbra's two grandchildren Sofia and Olivia Lombardi. Sofia and Olivia's share would remain in a trust until they turned 25 at which time they would get the capital.

With respect, this writer also questions why a third trust was necessary if one unified trust for Barbra (consisting of both the apartment & her one half of the residue) would continue for the benefit of Sofia and Olivia after Barbra's death and after Richard (presently older than 25) would get his share of the remaining capital in the one unified Barbra trust upon Barbra's death.

Finally, the Judge felt that the handwritten codicil relating to the Swiss assets should constitute another trust, the "Swiss Asset Trust." However, she decided that the Swiss assets should be subsumed by and become part of the Sofia/Olivia Trust as the codicil also provided that their entitlement to the capital was to be remitted only when they became 25 and thus it would be invested until then on their behalf.

The Judge, in the absence of a named Liquidator/Trustee of the Swiss Assets (David refused to act as an ad hoc liquidator) and in the absence of contestation as to naming Scotia Trust as the Liquidator/Trustee of this trust, ordered Scotia Trust to be the Liquidator/Trustee of this trust, which, having already been combined with the Sofia/Olivia Trust, would come into existence or "open" upon the death of Barbra, based on Clause 5 of the will.

It is understandable that the Swiss assets, which were never for the benefit of Barbra, should be in a separate trust for the benefit of Sofia and Olivia since their entitlement thereto was not dependant on Barbra's death, unlike the other trusts: The Apartment Trust, the Universal Trust and the Sofia/Olivia Trust which would "open" at Barbra's death. These last three trusts could, as previously stated in this writer's respectful opinion, have been combined into one trust – the Barbra Trust which would exist independently of the Swiss Asset Trust.

Conclusion

Clarity in wills is a challenge at all times. However, with proper professional advice, ambiguity should be reduced, if not eliminated altogether. When in doubt, consult an expert.

This case has not been appealed.

RECENT CASES

Document was Holograph Codicil

New Brunswick Probate Court, March 2, 2018

The testatrix was survived by her four adult children, one daughter and three sons. The daughter was the applicant in this matter. In 1987, the testatrix executed her will and left her home to her son Gordon, who had been in a serious motor cycle accident in 1980. He was 19 at the time and had cognitive injuries which lasted for some time after the accident. In 1996, the testatrix made a handwritten document and stated that she believed the 1987 will should be changed. She stated that she wished the home to be sold and to be divided into four equal parts and divided equally among the four children or sold to one of the children provided they pay the others their fair share. Gordon had become fully recovered from his accident after the 1987 will was drafted. The applicant brought a motion to have the 1996 document be declared a holograph will that was to be read in conjunction with the 1987 will.

The motion was allowed. The 1996 handwritten letter is a valid holograph codicil to the valid will executed by the testatrix in 1987. Because it did not directly or indirectly revoke the 1987 Will or deal with and confirm or change each and every bequest contained within it, the holograph codicil must be read in conjunction with the 1987 Will and in such a way that it interferes as little as possible with the 1987 Will.

Re Manderville Estate, 2018 CEAG ¶32,165

Will Power

March 2018
Number 279

Recent Cases

PROVISIONAL MEASURES CAN EXPEDITE AN ESTATE SETTLEMENT

Murray Sklar, LLL, LLB, affiliated with Starnino Mostovac, senc.

Introduction

Estates often take a long time to settle. In the interim heirs in need may be prejudiced, if not harmed, by the delays that prevent a speedy liquidation and distribution of estate assets (net of the liabilities).

What happens if one of the liquidators (or the sole liquidator) intentionally or negligently delays the liquidation of the estate? What happens if one of the liquidators/heirs arrogates exclusive use of the estate assets to the detriment of the other heirs?

These were some of the issues raised in the recent case of *Estate of Kert*, a decision of Mr. Justice Gaudet of the Quebec Superior Court rendered on November 30, 2017 and cited as *Estate of Kert*, 2017 QCCS 5683.

Facts

Mr. Monroe Kert ("Kert") died on April 16, 2013. Pursuant to his will his son Simon ("Simon") and daughter Rochelle ("Rochelle") were the two equal, universal legatees. Two co-liquidators were named: Simon and Kert's elderly sister (91 years old) Audrey ("Audrey").

The estate was worth over $850,000 consisting, *inter alia*, of a home, two vehicles, and money. Simon was living alone in the home and he had re-registered the two vehicles in his own name. He had been living with his father in the home for several years prior to Kert's death without paying any rent and he continued living alone in the home without paying any rent after his father's death. The home was entirely filled with "piles of books" varying in number from 5,000 to 30,000 according to Simon and from 100,000 to 300,000 according to Rochelle and Audrey.

The on-going house expenses were being paid by the estate—electricity, taxes, snow removal, and grass-cutting. The home itself was not being maintained by Simon after his father's death, resulting in it being dirty and smelly and, in addition, no attempt had been made to remove or sell the piles of books that had accumulated over the years, with the result that the house was not marketable.

Apparently, the Royal Bank of Canada ("RBC") completed an estate inventory in December of 2013 (excluding the books) but Simon refused to sign the inventory as it did not include a listing of the books. According to the other co-liquidator Audrey, Simon refused to cooperate with her in settling the estate and he was "practically unreachable" as he did not have a phone and he rarely looked at his emails and he did not answer the door.

Simon also apparently refused to allow any of the estate's cash assets to be distributed to his sister Rochelle, in spite of Rochelle being in dire financial need with the result that Rochelle had to go on welfare.

In summary, for over four-and-a-half years since Kert's death in April 2013, nothing had been done to settle the estate and distribute the estate's assets equally to Rochelle and Simon. Throughout this period Simon lived rent-free in a home owned by the estate and took ownership in his own name of the estate's two vehicles while distributing nothing Rochelle.

At the same time the other co-liquidator Audrey felt that, given her health and advanced age, she could not continue to act as a co-liquidator.

The only recourse was for Rochelle and Audrey to institute legal proceedings against Simon to remove him as co-liquidator and to appoint one provisional or temporary new liquidator, to accept Audrey's resignation as a co-liquidator, and to order Simon to leave the home within seven days of an interim order of the court so as to allow the house to be cleaned and to permit the removal of the piles of books therein so as to put the home up for sale.

Thus, the Plaintiffs Rochelle and Audrey asked the Superior Court on an interim basis, for an interlocutory injunction and a safeguard order and more specifically they asked the court to:

1. Remove Simon as co-liquidator of the estate;
2. Order Simon to leave the home within seven days of the judgment failing which to allow the co-liquidator Audrey to proceed to a judicial expulsion of Simon from the home;
3. Accept Audrey's resignation as a co-liquidator;
4. Appoint Me. Georgia Kalaritis, notary, as liquidator of the estate on an interim basis.

The Court Analysis

(1) The Appointment of Me. Kalaritis as provisional liquidator of the estate

Articles 791 and 792 of the *Quebec Civil Code* ("CCQ") state as follows:

> 791. Any interested person may apply to the court for the replacement of a liquidator who is unable to assume the responsibilities of his office, who neglects his duties or who does not fulfill his obligations. During the proceedings, the liquidator continues to hold office unless the court decides to designate a provisional liquidator.
>
> 792. Where the liquidator is not designated, delays to accept or decline the office or is to be replaced, any interested person may apply to the court to have seals affixed, an inventory made, a provisional liquidator appointed or any other order rendered which is necessary to preserve his rights. These measures benefit all the interested persons but create no preference among them. The costs of inventory and seals are charged to the succession.

The Court referred to the case of *Sofaer (Succession de) c. Mashaal*, 2014 QCCS 3402:

> [Translation] Removal (of a liquidator) is an extreme measure, especially when the liquidator has been appointed by the testator. The will (wishes) of the testator may be set aside, for example, in case of malfeasance, conflict of interest, lack of loyalty and diligence, appropriation of property administered, negligence, incompetence or delegation of office by the liquidator. (Parentheses added.)

The Court also referred to the Quebec Court of Appeal (QCA) decision in *Vachon c. Riopelle*, [2003] J.Q. no. 7616; 2003 CanLII 72171 in which the QCA stated:

> [Translation] We are of the view that the order under appeal (to obtain the replacement of a liquidator during court proceedings) significantly altered the administration of the estate as the testator intended. To do this, the respondents were required to establish:

1. An appearance of right;
2. Serious prejudice;
3. That the balance of inconvenience favored them;
4. The urgency.

(Parentheses added)

That is, to obtain the replacement of a liquidator during court proceedings the same criteria (listed above) to obtain a provisional injunction apply to proceedings to replace a named liquidator.

Based on the evidence the Court felt that the Plaintiffs (Rochelle and Audrey) had discharged their burden to establish a *prima facie* right to obtain the destitution of the Defendant (Simon) as liquidator of the estate during these interim proceedings. During the 54 months during the existence of the estate, Simon used the assets of the estate for his own benefit, he neglected his duties as a liquidator, he refused to cooperate with the other liquidator and he refused to advance any funds to his sister as co-equal residuary beneficiary of the estate, forcing her to go on welfare. The estate liquidation had not even begun after four-and-a-half years since the death of Kert. If that does not establish a *prima facie* appearance of right to replace a negligent and/or incompetent liquidator, what does?

Irreparable harm was caused both to the estate and Rochelle as equal beneficiary thereof: the delay in completing the inventory, including determining what movable property (furnishings, etc.) was in the home had caused unnecessary harm in determining the value of the estate. Rochelle, being without financial resources, was deprived of getting up to $400,000 of value from the estate, forcing her onto welfare.

The balance of hardship favors the issuance of an order to replace Simon as liquidator. Simon will suffer no personal prejudice as he is still a 50% beneficiary of the estate and the liquidation of the estate would be accelerated; by not issuing an order to replace Simon the estate liquidation process will be indefinitely delayed causing prejudice to the estate in general and to Rochelle in particular.

Finally, the issue of urgency is also met. It was over four-and-a-half years since Kert passed away. Nothing was done during this time period to put the home on the market. As Simon is living rent-free at the expense of the estate, the estate has been losing money for over four-and-a-half years by being obliged to pay the taxes and upkeep of the home without any contribution from Simon.

As a result, the Court ordered the appointment of notary Kalaritis as a provisional liquidator during the regular proceedings taking place to remove Simon as a full-time liquidator. As a result of this interim appointment Simon could not continue to act as a liquidator, as per article 791 of the CCQ (*supra*) unless and until a final judgment maintained him as a liquidator of the estate. In the interim notary Kalaritis could act alone to liquidate the estate.

(2) The Order to Vacate the House

First, Simon had no right to occupy the home. He had no lease with his deceased father nor with the estate nor any other agreement to stay in the home. The home is an asset of the estate and although a liquidator (as Simon was for four-and-a-half years after his father's death) has the legal *seisin* or possession of the assets of the estate, the seisin is not for personal gain or usage but rather to allow the liquidator to administer and liquidate the estate. Even as an equal co-heir with his sister, Simon still did not have the right to enjoy the use of the home for his exclusive personal purpose. To add insult to injury the estate had been subsidizing the free usage by Simon of the home by paying for its operating expenses – taxes, electricity, etc.

Moreover, once Simon temporarily lost his status as a co-liquidator of the estate (by virtue of the temporary order appointing as provisional liquidator Me. Kalaritis,) he no longer had any right to occupy the home in any capacity whatsoever.

Simon referred to the case of *Saint-Arnaud c. Champagne - Saint-Arnaud*, 2014 QCCS 2571 wherein a coheir and co-liquidator was not found to be in any conflict of interest by occupying the home of her deceased father. However, in that case, as the judge pointed out, the occupation of the home by the coheir/liquidator was done in good faith as the coheir/liquidator cooperated fully with the real estate agent in an attempt to effect the sale of the home as quickly as possible, even slightly reducing the price and always being available for visits and inspections by potential buyers.

Based on the foregoing, the judge ordered Simon to vacate the home. However, since he had lived there with his father for many years, the judge granted Simon a 30-day delay to vacate the home rather than the seven day delay requested by the Plaintiffs.

Perhaps based on this case, children living with an elderly parent should consider having a formal written lease with their parent to protect their right of habitation after their parent dies.

Conclusion

The judge appointed Me. Kalaritis as provisional liquidator of the estate with the power to act alone. To liquidate the estate, the judge accepted Audrey's resignation as co-liquidator, ordered Simon to vacate the premises within 30 days and to remove any personal property and effects belonging to him. As well, the judge ordered him to remit to the provisional liquidator the keys of the residence upon his departure and he ordered Simon not to keep, donate, sell, or alienate any of the property belonging to the estate.

RECENT CASES

Court of Appeal Affirming Trial Judge's Decision Not To Propound Will

Ontario Court of Appeal, December 21, 2017

The respondent and the testator had been friends for over 40 years until the testator's death in 2012. In 1999, the testator executed a will naming the respondent as his estate trustee and the sole beneficiary of his estate. The 1999 will was written in the testator's own handwriting and was quite simple. The testator had diabetes and had a psychological history of depression. On March 3, 2012, the police were called to the testator's home and he was involuntarily confined in a psychiatric ward. On March 30, 2012, a psychiatrist in the hospital noted that the testator was delusional but that he was financially competent. He stated that the testator clearly wanted his home to go the respondent. On May 21 2012, the testator executed another will in which he left 70 percent to a friend, 30 percent to another friend, who was the appellant in this matter, and 10 percent of the appraised value of the proceeds of his home to his caregiver. The appellant sought to propound the May 21, 2012 will. The respondent opposed the propounding of the May 21, 2012 will arguing that suspicious circumstances surrounded the making of the May 21, 2012 will and that the appellant had not established that the testator had testamentary capacity when he executed that will. The appellant's application to probate the 2012 will was dismissed. The trial judge held that the degree of suspicion surrounding the making of the May 2012 will was such that it had a serious impact on whether the burden of proof had been met. As for testamentary capacity, the medical records provided substantial evidence that, in the last two years of his life, the testator was quite ill and suffered from delirium, hallucinations, delusions and confused thoughts. The deceased may have been suffering from delusions at the time he executed the May 21, 2012 will. The Court could not say that there was any clear and consistent rationale for the significant change in the testator's May 21, 2012 will. The appellant appealed.

The appeal was dismissed. The evidence strongly supported the trial judge's finding of suspicious circumstances surrounding the 2012 will. Regarding testamentary capacity, the Court of Appeal agreed with the trial judge that the appellant had failed to meet his burden to establish the testator's testamentary capacity. On the evidence, there could be no sustainable suggestion that the testator's testamentary capacity was free from doubt at the time of the execution of the 2012 Will. His clinical symptoms could not realistically be divorced from his mental health. The trial judge was entitled to conclude that his medical condition, including his delusional state and any personality disorder from which he might have suffered, clearly bore on his mental health and on the question of his testamentary capacity. The appellant also failed to satisfy his burden to establish that the testator had knowledge of and approved the contents of the 2012 will.

Stekar v. Wilcox, 2018 CEAG ¶ 32,145

Will Power

November 2017
Number 275

Recent Cases

ERROR MAY ANNUL A WILL: INVASION OF PRIVACY MAY RESULT IN MORAL AND PUNITIVE DAMAGES FOR DEFAMATORY STATEMENTS

Murray Sklar, LL. LLB, affiliated with Stamino Mostovac, senc.

Introduction

Testators often change their wills on their death beds. Provided the testator is mentally competent and under no duress there is no impediment to re-doing a will. However, what happens when the testator's instructions are not followed by the professional charged with re-doing the will?

Will the signed will be considered null and void as not expressing the intentions of the testator? Such is the case of *Ashegh (Succession de)*, 2016 QCCS 6157 a decision of Mr. Justice Journet of the Quebec Superior Court rendered on December 13, 2016.

In addition, this case addressed the right to privacy of the surviving spouse and two children of the deceased testator. When such a right is violated, damages may be claimed against the perpetrator.

Facts

Anita Ashegh ("AA") was married to Missak Ashegh ("MA") in 1996 in a religious ceremony in Montreal. Two daughters, Nathalie and Melanie, were born from this marriage, age 17 and 13 years respectively at the time the proceedings were instituted at first instance.

Roza Ashegh ("RA") was MA's sister. From the time of their marriage, relations between AA and MA were very fragile, apparently due to MA's belief that his wife was not faithful to him and in particular that AA was not a "virgin" on her wedding night. In 2007 MA was diagnosed with cancer. Starting in 2012, rumors began to circulate about AA's unsubstantiated infidelity towards MA.

An apparent reconciliation took place in December 2012 but on August 13, 2013 MA was hospitalized. AA spent the night in the hospital with MA. Subsequently, while MA remained in the hospital, AA had to return to work as a hairdresser and had to stay at home to look after the two daughters. AA continued to visit MA at the hospital when time permitted. During MA's hospital stay, his sister RA and his mother were constantly at his side. Apparently, RA and other family members had continuously denigrated AA in the presence of MA starting back in 2012, accusing her of unsubstantiated "infidelities" towards MA.

As a result, MA decided in 2013 to change his earlier 2012 will (in which he had given everything to AA).

Apparently, the first communication MA had with notary Corbin was by telephone, which was organized by his sister RA who was present with MA during the call. MA told the

notary he wanted to disinherit his wife AA due to her "infidelities" and have his two daughters replace her as universal legatees. The notary confirmed these instructions with RA who acted as a translator for her brother MA.

RA also organized the final meeting with the notary to allow MA to sign his will in August 2013. At this meeting MA apparently instructed the notary to correct the draft will to remove his two daughters as universal beneficiaries and to appoint RA as universal beneficiary, and if RA was incapable, to replace RA with his two other sisters.

However, according to the notary, MA only really wanted RA, or if she were incapable, his two other sisters, to administer his estate for the exclusive benefit of his daughters. He did not want his wife AA to administer or use the moneys from the estate for his two daughters as he feared that she would take advantage of controlling his estate to prevent his daughters from getting their inheritance. The notary stated in Court (translation):

> "He (MA) wanted that his sister (RA) give the money to his children"

RA herself admitted that her brother wanted his estate to go to his two daughters.

The final will, signed before the notary on August 29, 2013, however, showed RA as the sole heir and liquidator without any bequest to MA's two daughters. No explanation was given by the notary as to how the expressed wishes of MA to give everything to his two daughters was changed in the final will to give everything to his sister RA.

MA died in the hospital on September 20, 2013. At the funeral AA and her two daughters felt totally isolated, ignored and excluded by MA's family. At a reception organized by AA at her home, where MA's family was invited together with MA's friends, RA and another brother played a video of a private conversation between AA and MA at the hospital on August 28, 2013. This tape recording was made by RA without the knowledge and consent of AA and it related to the alleged infidelities of AA.

Needless to say, this unexpected viewing of the private conversations between AA and MA, taking place at AA's home with her two daughters and family and friends present created a tremendous scandal, uproar, anger, stress and humiliation. AA and her two daughters suffered severe emotional distress requiring psychological counseling.

Apparently earlier in August 2012 RA had taped another private conversation between her brother MA at the hospital and AA who was at home.

Proceedings

AA undertook one set of proceedings to annul the notarial will based on undue influence ("captation") and error.

In a second set of proceedings AA sued RA for moral and punitive damages, both in her personal capacity and on behalf of her two daughters for fundamental violations of her Quebec Charter rights relating to the basic right to privacy.

The Judge's Analysis

(i) Annulment of August 29, 2013 will

The judge first considered whether MA was subject to the undue influence of his sister RA in amending his earlier 2012 will. RA was at the hospital constantly with her brother. RA organized the notarial visits and brought her brother to the notary. She paid for the notarial will. Her brother was suffering from a terminal illness. These facts could suggest undue influence. However, the evidence of an independent witness, Armen Tsouinian, who was a friend of MA, confirmed that back in June 2013, before his August 2013 hospitalization, MA had confided in him that his wife AA was unfaithful to him and, as a result, he was going to disinherit her by changing his will. Thus, MA's decision to change his will predated the potential undue influence of his sister RA on him in the hospital setting in August of 2013.

Therefore, MA's decision to change his will was not due to the undue influence of his sister RA.

However, the judge analyzed the legal foundation of a will. He cited article 704(1) of the *Civil Code of Quebec*:

> A will is a unilateral and revocable juridical act drawn up in one of the forms provided for by law, by which the testator disposes by liberality of all or part of his property, to take effect only after his death.

The "liberal intention" or "animus testandi" is the fundamental requirement of a valid will. The judge stated, based on the notary's testimony that MA's liberal intention was to transmit his property to his sister subject to and conditional upon her obligation to transmit the property to MA's two daughters. This condition was the "animus testandi" or liberal intention of MA.

The notary failed to reproduce this intention in the will he drafted for MA. As a result, the will drafted by the notary was invalid due to the fundamental drafting error or omission by the notary in not putting into proper legal writing what MA had expressed (through his sister) as his clear intentions. The testator, not fully understanding the will written in French (which was not his mother tongue) did not really understand what he was signing. As a result the will was invalidated or annulled due to the lack of true consent by the testator due to the error in the drafting of the will.

Article 1400(1) of the CCQ states:

> Error vitiates the consent of the parties or of one of them where the error relates to the nature of the contract, to the object of the prestation or to any essential element that determined the consent.

The testator truly believed he was making a universal bequest to his two daughters and this turned out to be a false or incorrect belief due to an error in the drafting of the will.

As a result, the August 2013 will was invalid and the earlier 2012 will (in which AA got everything) became the final valid will of MA.

It was felt there was no need for a special procedure to question or contest the validity of the notarial deed which is considered to be an authentic act. The case of *Lépine c. Khalid*, 2004 CanLII 22206 (QCCA), a decision of the Quebec Court of Appeal rendered on September 8, 2004, confirms that when an error is proven in an authentic act there is no need for a special procedure to be instituted, which under article 223 the old *Code of Civil Procedure* ("CCP") was referred to as an "inscription de faux" or "improbation". As no forgery of the notarial will was alleged there was no need for the new procedure of "Contestation of Authentic Act" under article 258 of the new CCP.

(ii) Claim for Damages

AA claimed $90,000 in damages against RA for defamatory attacks on her honour, dignity, and reputetion as well as for violation of her right to privacy. In addition, she claimed $25,000 for the intentional and illegal publication of defamatory statements obtained from an illegal recording. On behalf of each of her two children she claimed $10,000 for moral damages and $25,000 for punitive damages.

For the judge, it was clear that AA had been defamed by RA by the publication of the private communications between AA and MA. The publication of the illegal tape recording by RA of private and intimate conversations between AA and MA was not only reprehensible but also spiteful and nasty causing great psychological distress and harm to AA and to her two daughters. The judge felt that this unlawful action had to be disallowed by the Court.

Article 3 of the CCQ states:

> Every person is the holder of personality rights, such as the right to life, the right to the inviolability and integrity of his person, and the right to the respect of his name, reputation and privacy.
>
> These rights are inalienable.

Article 35 of the CCQ states:

> Every person has a right to the respect of his reputation and privacy.
>
> The privacy of a person may not be invaded without the consent of the person or without the invasion being authorized by law.

Article 36 of the CCQ states:

> The following acts, in particular, may be considered as invasions of the privacy of a person:
>
> (1) entering or taking anything in his dwelling;

(2) intentionally intercepting or using his private communications;

(3) appropriating or using his image or voice while he is in private premises;

(4) keeping his private life under observation by any means;

(5) using his name, image, likeness or voice for a purpose other than the legitimate information of the public;

(6) using his correspondence, manuscripts or other personal documents.

Article 2858 of the CCQ states:

> The court shall, even of its own motion, reject any evidence obtained under such circumstances that fundamental rights and freedoms are violated and whose use would tend to bring the administration of justice into disrepute.

Article 5 of the Quebec *Charter of Human Rights and Freedoms* ("QCHRF") states:

> Every person has a right to respect for his private life.

Article 49 of the QCHRF states:

> Any unlawful interference with any right or freedom recognized by this Charter entitles the victim to obtain the cessation of such interference and compensation for the moral or material prejudice resulting therefrom.
>
> In case of unlawful and intentional interference, the tribunal may, in addition, condemn the person guilty of it to punitive damages.

The judge felt that he had to exceptionally admit into evidence the unlawful tape recording made by RA of the private and intimate conversations between AA and MK as the source of the damage actions undertaken by AA against RA was the tape recording itself. Thus, its production would not put the administration of justice into disrepute.

The judge quoted from the Supreme Court of Canada decision in *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 SCR 211:

> 119.
>
> ...
>
> [I]t is clear that the purpose of awarding exemplary damages is not to compensate, but is related to the law's role of punishment and deterrence...
>
> ...
>
> 120. Having regard to the case law and the doctrine in Quebec and in the common law on this question and, even more importantly, in accordance with the principles of large and liberal interpretation of legislation concerning human rights and freedoms together with the objective of exemplary remedies (i.e., punishment and deterrence), I believe that a relatively permissive approach should be encouraged in Quebec civil law when effect is to be given to the expression "unlawful and intentional interference" for the purposes of the exemplary damages contemplated in the Charter.
>
> 121. Consequently, there will be unlawful and intentional interference within the meaning of the second paragraph of s. 49 of the Charter when the person who commits the unlawful interference has a state of mind that implies a desire or intent to cause the consequences of his or her wrongful conduct, or when that person acts with full knowledge of the immediate and natural or at least extremely probable consequences that his or her conduct will cause. This test is not as strict as specific intent, but it does go beyond simple negligence. Thus, an individual's recklessness, however wild and foolhardy, as to the consequences of his or her wrongful acts will not in itself satisfy this test.
>
> 122. In addition to being consistent with the wording of s. 49 of the Charter, this interpretation of the concept of "unlawful and intentional interference" is in keeping with the preventive and deterrent role of exemplary damages, which strongly suggests that only conduct the consequences of which could have been avoided, that is, the consequences of which were either intended or known by the person who committed the unlawful

interference, should be punished by an award of such damages: Roy, *Les dommages exemplaires en droit québécois: instrument de revalorisation de la responsibilité civile*, supra, vol. I, at pp. 231-32. I would add that the determination of whether there has been unlawful and intentional interference will depend on the assessment of the evidence in each case and that, even where such interference exists, the award and the quantum of exemplary damages under the second paragraph of s. 49 and under art. 1621 C.C.Q. remain discretionary.

Conclusion

The judge concluded that AA was entitled to damages of $15,000 for violation of her right to privacy and $10,000 for punitive damages. He also awarded to each of the two daughters $5,000 for moral damages and $5,000 for punitive damages.

An appeal to the Quebec Court of Appeal has been filed and a Motion to Dismiss the Appeal has been rejected.

RECENT CASES

Estate Trustee During Litigation Appointed

Ontario Superior Court of Justice, June 6, 2017

The applicant was one of four estate trustees of her father's estate. The three other estate trustees were the applicant's mother, "Ida", and two of her siblings "Morris" and "Sarah". They were respondents in this matter. It was apparent that Ida likely lacked capacity to manage her affairs. It seemed everyone was content with Morris putting cheques before Ida for signature and dealing with her funds as if she was making informed investment and gifting decisions. In 2014, the applicant retained counsel and her counsel sent six letters requesting financial information about the estate and its assets. While some information was provided, it fell short of what was requested and as a result litigation was commenced. The applicant moved to have an estate trustee during litigation appointed to manage her father's estate pending the resolution of this litigation.

The motion was allowed. The Bank of Nova Scotia Trust Company was appointed as the estate trustee during litigation in the place of all of the other estate trustees pending further order of the Court. The respondents had failed to make full disclosure and they had to be forced to make any disclosure after first stalling and then making improper refusals. The Court noted that Morris and Sarah operated with great temerity by removing $1.9 million from their mother's corporate trust account while the pre-hearing motion steps were playing out. The fact that they then took their "shares" of the money while making good on their threat to refuse distributions to the applicant while the litigation was ongoing, established beyond doubt that the trustees were incapable of maintaining even hands during the litigation. They were using their control over their mother's cheque writing and their control over the estate's assets to favour themselves while punishing the applicant for suing them. The purpose of an estate trustee during litigation is to ensure that a level playing field is kept. When dealing with estates and trusts, the Court is primarily concerned with ensuring fairness to the participants. It is a simple inference that a trustee who is in an adversarial position towards a co-trustee or a beneficiary should not normally be left in charge of trust property. Simple prudence calls for the temporary replacement of a trustee who is in an adversarial position with a co-trustee or a beneficiary.

Mayer v. Rubin Estate, 2017 CEAG ¶32,125

Court Ordering Proof of Will in Solemn Form

Saskatchewan Court of Queen's Bench, May 25, 2017

The applicant and respondent were nieces of the testator. In his 2010 will, the testator named the respondent and another niece, "V.T.", as the residual beneficiaries of his estate. In a 2013 codicil, the testator appointed the applicant as his executor in place of the respondent. He then left the residue of his estate to the applicant, the respondent, and V.T. In July 2015, the respondent and the testator met with the lawyer who had drafted the 2013 codicil, with the purpose of