IN THE COURT OF PROBATE OF NOVA SCOTIA
Citation: *Peters Estate (Re),* 2015 NSSC 292

Date: 2015-09-29
Docket: HFX 442105
Registry: Halifax

Between:

In The Estate of Marian Elizabeth Peters, Deceased

DECISION

Judge: The Honourable Justice Patrick J. Duncan

Heard: September 29, 2015, in Halifax, Nova Scotia

Written Decision: October 13, 2015
(Edited for grammar and to include omitted citations and references; Oral decision September 29, 2015)

Counsel: Joseph S. Roza, for the Applicants

[1] This is a matter of an Application brought to determine if five handwritten memoranda or notes of Marian Elizabeth Peters, now deceased, are admissible to Probate. The Application has been brought by Ruby Theriault and Mary Katherine Hammond who are the co-personal representatives of the estate of Ms. Peters.

[2] A brief background is in order. On the 20th of July of 2013 a Will was executed by Ms. Peters. The Will is 16 pages and it contains seven paragraphs. In particular, paragraph five includes many clauses, accounting for the overall length of the document. It is detailed, it is formal, and clear in its intent. On the 14th of August of 2014, Ms. Peters passed away. On the 8th of September of 2014, the Will executed by Ms. Peters in July 2013 was submitted for Probate and a Grant of Probate was issued. Ms. Theriault and Ms. Hammond, who I note are both present today, were friends of the deceased and appointed as co-personal representatives of the estate.

[3] During their search of Ms. Peters' personal effects, they found the five handwritten documents - which I will sometimes refer to as notes or memoranda - that they have testified in their affidavits to being in Ms. Peters' own handwriting. I accept that evidence; it is uncontested but also it is easy to understand that they would be in a position to make that observation.

[4] Having regard to the contents of those notes, they were then submitted to the Registrar of Probate to determine whether or not the notes were testamentary dispositions admissible to Probate and so forming part of the Will of Ms. Peters. After some exchange of information as between the Registrar of Probate and counsel, it was determined that the matter would be presented to this Court, sitting in Probate, for determination.

[5] The relevant law stems from three sources: the **Probate Act** S.N.S. 2000, c.31 as amended, the **Wills Act** 1989 c.505 as amended, and the common law.

[6] Dealing first with the provisions of the **Probate Act** that apply in this situation: Section 8 (1)(c) of the **Probate Act** provides this Court with jurisdiction to *"...determine all questions, matters and things in relation to"*... the administration of the estate.

[7] Regulation 64(3) made pursuant to the **Probate Act** gives jurisdiction to hear applications to resolve what are characterized as "contentious matters". Regulation 63(1) defines "interested persons", and for the purposes of this proceeding, includes the personal representatives, who I have affidavit evidence from, and who are personally present; or persons listed in Regulation 52(1). In looking at that Regulation, "interested persons" include the residual beneficiary and unpaid non-residual beneficiaries. These provisions are relevant to the issue of

who should be given notice and on what terms they would be given notice of today's proceedings.

[8] There are other types of "interested persons" described in Regulation 52(1). I have concluded that they do not have any application in this particular matter.

[9] Service is provided for by Regulation 65; and here is why we are concerned about who is an "interested person" because 30 days' notice must be given to such persons in the case of an application, such as we have here today.

[10] Regulation 67 sets out the procedures and powers on the hearing.

[11] Mr. Roza has presented affidavit evidence in this application. I have reviewed that. I have a copy of the original Will; I have the amended Notice of Application dated August 25, 2015. I also have, and have reviewed, the affidavit of Mr. Roza with respect to service on "interested persons". I have Mr. Armsworthy's affidavit - he is present today as well. There has been no *viva voce* evidence. It is not necessary and certainly, in these circumstances, it would not have added anything to the matter that I have to consider.

[12] I should say that I did consider whether or not service should have been effected on Paulette Doucette, Angela Rizcallah, Marcie Asseff or James Ryan - persons named in Exhibit 3, but who were not served. In looking at who is an

"interested person", they would only become an interested person within the meaning of Regulation 63 if a determination is made that they are in fact beneficiaries. That determination has not been made and so I am satisfied that service on them was not required.

[13] I do have before me, and I should have this marked too as an exhibit, the letter from Stephen Cameron, counsel on behalf of the Aplastic Anemia & Myelodysplasia Association of Canada, one of the named beneficiaries, actually a residual beneficiary, in which they have acknowledged service and take no opposition to the proposed disposition.

[14] The **Wills Act** defines a "will" in Section 2(f). Section 6(1) sets out the formalities of a will. I will say at this point that none of the five notes that I have been presented with meet the requirements of the formalities set out in 6(1). For example, the notes are not witnessed.

[15] Section 6(2) permits non-conforming testamentary instruments to be admitted to Probate in Nova Scotia under certain circumstances. It allows that: *"...Notwithstanding subsection (1), a will is valid if it is wholly in the testator's own handwriting and it is signed by the testator*". In this case these notes, according to the evidence, are in the handwriting of the deceased, Ms. Peters. Some are signed and some are not.

[16] I am required to go further though and consider the provisions of Section 8A of the **Wills Act** which permits the Court to declare the writings valid and fully effective, although they were not executed in compliance with the formalities of the **Act**. That section reads:

> 8A Where a court of competent jurisdiction is satisfied that a writing embodies
>
> (a) the testamentary intentions of the deceased; or
>
> (b) the intention of the deceased to revoke, alter or revive a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a will,
>
> the court may, notwithstanding that the writing was not executed in compliance with the formal requirements imposed by this Act, order that the writing is valid and fully effective as if it had been executed in compliance with the formal requirements imposed by this Act.

As I have said, these notes are not compliant with the formalities of the **Act** and hence, section 8A comes into play.

[17] My determination must also be made with an eye toward the common law requirements as to what constitutes evidence that would be sufficient to meet the burden of showing that a document embodies the testamentary intentions of the deceased; or that the intention of the deceased was to revoke, alter or revive a Will. So the final source of applicable law that I must consider is found in the common law.

[18] The question to be posed is taken from the well-known case of *(Re) Gray Estate* [1958] S.C.R. 392, at page 396 and that is whether the note contains (and this is the operative language) *"a deliberate or fixed and final expression of intention as to the disposal of property upon death."* An alternate way of saying this is: does the note demonstrate testamentary intention or *animus testandi*? Evidence can be extrinsic evidence and/or found in the contents of the paper itself.

[19] In looking at the cases that deal with determining the intent, a number of factors have been looked at, and these are not intended to be an all-inclusive list, but these are some of the things that one sees in looking at other cases where judges have had to consider these questions:

- What is the degree of the formality of the language in the document?
- Is it dated?
- Is it signed?
- Has it been sealed?
- Was it delivered to a person, a specific person, with or without instructions as to what to do with it?

- Were there are any statements made by the testatrix, either at the time of delivery, or in the document itself that speak to the anticipation of death; that the document was intended to reflect a disposition after death?

- Is there any indicia of when it was expected that the document would read?

- The certainty of the bequests set out in the document.

- Whether there are reasons offered for gifting as set out in the document.

- Whether there is a reference to an existing Will that might tie it back to a Will.

- How permanent was the document intended to be - was it written in ink, or in pencil? i.e., Was this just a penciled thought for erasing later or not? (You have heard me in my preliminary comments about looking at the originals today and noting that there are some deletions in Note 3 that I will speak to a little bit later. Having the original document here allows me to better assess that type of issue.)

- Whether the document was on a form or is it entirely, as in these notes, in the handwriting of the testatrix.

So these are but a few factors the courts have looked at. I will consider as well what I see in the individual documents.

[20] The next question I have to look at, when I consider the documents, is whether they are intended to revoke any previous documentation. The revocation can be a revocation of all of the previous document or part of it. But even if it was considered to be a revocation of all or part of a previous document, it would only be effective to revoke that part of the previous document, the Will, to the extent that it is inconsistent with those. So if the Will says something and the subsequent document contradicts that, then maybe that is the only thing that gets changed by the subsequent document. Where the subsequent document, these notes for example, insert entirely new concepts that are not in the Will, then there is no inconsistency and no evidence in that situation to support a conclusion that it was intended to revoke some other specific bequest. In considering these issues, I have looked at cases such as *Ward v. Stevenson* (1910) 21 OLR 289; *(Re) Snow Estate* [1932] 1W.W.R. 473; and *Fitzsimmons Estate* (1939) N.S.J. 4.

[21] Overall, as is indicated in the case law, the question is what is the intention of…can we glean the intention of the deceased person? That is really the sole guide and control for making the determination that I have to make today.

[22] I would also note that I have considered the *Komonen v. Fong (2011 NSSC 315)* decision of Associate Chief Justice Smith which is an example of the application of the test that I referred to in *Gray*. So, again, the question I have to ask in relation to each of these notes is this: "When the notes were prepared, did Ms. Peters believe that her existing Will was being revoked in whole or in part and that her estate would be disposed of according to the note?" As has been pointed out, and is self-evident, it is always a difficult task for a court to glean the intention of a deceased person. We have to look to anything and everything we have available to try to reach a conclusion.

[23] The burden is on the Applicant to satisfy the court, on the balance of probabilities, that the specified document embodies the testamentary intention of Ms. Peters. Again, as I pointed out in the preliminary comments, this is an unusual situation in one respect because although the Application is brought by the co-personal representatives, the Application really is not trying to prove that four out of the five do qualify for admission. One of the reasons that it is important that I give these reasons for decision, we are required to in any event, but in particular because there is no one who has chosen to appear to contest this. Notwithstanding that lack of enthusiasm for the admission of four of the five notes, I still have to

show that I have applied my mind independently to assessing whether the position advanced by Mr. Roza on behalf of the estate is in fact a correct one.

[24] The next point I would say is, looking at the Will - I have previously described it as well-drafted, formal, clear in its language, there is really nothing on the face of it that I could say is problematic. The first paragraph is the revocation clause. That's important, as we will see, as what it means and what it says specifically is that all form of Wills, codicils to Wills and other testamentary dispositions at any time previously made by Ms. Peters are revoked. I am paraphrasing.

[25] The second paragraph is the appointment of the personal representatives and their appointment as the trustees for one of the beneficiaries who as at the time was a minor.

[26] The third is to pay debts.

[27] The fourth paragraph is important to our considerations here. It says:

> *I Direct my Co-Personal Representatives to distribute any items of a <u>personal nature</u>, as I have directed in any written list attached to or with my Will. If I have left no such list then as I have indicated my wishes during my lifetime, failing any such indication, as my Co-Personal Representatives in her/their discretion directs.*

[28] We then move on to paragraph five, which is the creation of the trust of the estate assets and specific directions for distribution of the estate. Paragrpah 5(c) found at page 4 of 16, in essence, echoes what I just read as paragraph 4. So one of the things that I have had to consider is the language. It refers to items of a "personal nature", hence the question I posed to Mr. Roza, what about the cash bequests that are set out in memo number 3 - are they items of a "personal nature"? I think I could say now, I don't think so. But I do not think that it is fatal to the disposition that has been proposed.

[29] The Will requires that the written list be *"attached to or with my Will."* While these notes were not attached to the Will, I cannot say whether they were with the Will, I do not have any information about that. I am satisfied that the intent was that these documents would be seen in conjunction with the Will. It is very clear, I think, especially from number 3 and even, I think it is number 5 that specifically refers to it being a list intended to accompany a will, that these were documents intended to be located by the co-personal representatives to be read in conjunction with a Will. Whether or not they satisfy the provisions of the **Wills Act** is another question, but I am not troubled by the notion that they may not have been strictly speaking attached to a Will, or found with the Will in the same

envelope or the same box. That would have been preferable, we would hope for that, but it is not fatal in my view to the matters before me.

[30] Paragraph 5 of the Will sets out a series of personal bequests and it sets out a priority for those individual bequests in preference to the institutional beneficiaries; and then it goes on to list the institutional beneficiaries and sets out a residuary clause.

[31] Turning now to the five notes and my assessment of each of them. Note 1, the operative part of it, there is more that I will speak to it in a moment is, "*Maronite Church of Our Lady of Lebanon, 3844 Joseph Howe Avenue, Hfx The sum of $25,000 for forwarding to orphanage(s) in Lebanon for the aid of orphaned Lebanese children."* The first thing I noticed, as all these notes are, it is entirely in the handwriting of Ms. Peters. It is not dated; it was not witnessed; it appears to reflect what ended up in paragraph 5(k) of the Will which was a similar amount payable to the same beneficiary. There are "random" references to CBC Television and a law firm, I guess "random" is the word I would put on it, in terms of trying to assess testamentary disposition. My reaction to it is that these references are not the type of the things that you would normally see in something that was intended to be a testamentary disposition. But going beyond that, there is no evidence that it was intended to refer specifically to the 2013 Will or to revoke

that Will in any part. It is at best a statement of intention and if it was characterized as a bequest, it would only represent a very small percentage of the value of a large estate. There is no wording though that references, in my view, that it was intended at this stage to be a final, fixed and deliberate expression of intent as to disposal of that money upon her death. Maybe that is what it was, but the evidence has to satisfy me on the balance of probabilities. Typically we would see things like, "I leave to", or "I give to", or even "to:" - none of that is in here. Overall, I am not satisfied that Exhibit #1 should be admitted to Probate and it will not be.

[32] Note 2 is a request to the Trustees to consult with "Mrs. Doucette" in relation to Ms. Peters' wishes with respect to her possessions. Again, it is undated, but in this case it is also unsigned. It is in her handwriting, I am satisfied of that. It refers to a "paragraph 10" but there is no paragraph 10 in the 2013 Will, so it cannot be referring to the 2013 Will. It is not explained in any way that I can draw inferences from. It is in effect a statement of advice, if you will, to whoever reads the document. It is, at best, a call for the trustees to consult with Ms. Doucette in distributing her "possessions". In this sense, it is not, in my view, a document that meets the test in *Gray*. There is nothing in this that speaks to an intention to set out

a deliberate or fixed and final expression of her interest as to the disposal of property upon her death. So it will not be admitted.

[33] Exhibit #3, I am going to return to that one. I am going to move quickly to Exhibit #4 and Exhibit #5.

[34] Exhibit #4 is addressed to "Dear Andre". It is in letter form. It is entirely in the handwriting of Ms. Peters and I am satisfied having regard to the signatures such as they are, being "Auntie" and "Auntie Marian", that it is signed. It is clearly in anticipation of death: *"If you are reading this I'm no longer here. I've made a new Will. It is just as well because it would difficult for you to act an Executor while you live in Ottawa."* And then it goes on to discuss in general the implication that the Will, as of the time of writing, is intended to dispose of her possessions but the note is intended to add that *"you and the girls may have any of the things you want."* The obvious problem with this note is that it is dated July 2008 and it refers presumably to a previous Will as it precedes the 2013 Will. It suffers the same fate as Memorandum Exhibit #5 in that by predating the 2013 Will, they are revoked.

[35] Even if I were to consider them as testamentary instruments that would otherwise be capable of being admitted, the paragraph, and I read it into the record

from the 2013 Will that revokes all other wills, codicils or any other testamentary dispositions seals the fate of Numbers 4 and 5 because of the dating.

[36] Just quickly with respect to Note 5. It is dated in June of 2012 and it is the one that I referred to earlier - that it includes a description as *"a note as I promised to enclosed with the copy of my Will."* It would have been nice if she would have used the same language with some of the other memoranda, but we do not have that luxury. The remainder of Note 5, again I could go through it but at the end of the day, this is determined on the basis of the dates, it has also been revoked.

[37] That brings us to Memorandum #3. What do I make of that? Well, it is not without some challenges. Overall, I am satisfied that it is going to be admitted to Probate and here are my reasons.

[38] It is entirely in Ms. Peters' handwriting; it was not witnessed but there is a degree of formality to its construction that is different than everything else that has been presented, the other four notes. Why do I say that? First of all it is titled, "Memorandum." In the Will, in paragraphs 4 and 5(c) the reference is to a "List". I am satisfied that it did not have to be labeled, "List." But a "Memorandum" is a clear indication that this something, it is an expression of thoughts and intentions. Each page was numbered consecutively and very carefully referring to how many pages there would be so there could not no misinterpretation of how many pages

there were originally, or how many there should be in total. Each was signed, both at the top and the bottom, which would protect it against interlineation, somebody coming in after and trying to insert something where it should not be. The only page where that was not true is page 4 but on that page there was a single bequest, so one signature would accomplish the same purposes, two on the other pages.

[39] Paragraphs 4 and 5(c) refer to a list as I have indicated. Well, that is what this. It is clearly a list and by any other name, it is still a list. Each part of the document begins with "To", showing a clear intention to gift the listed items to the person that is the beneficiary. Each identifies a person who is readily identifiable in their right as having, specifically, these are all individual beneficiaries, except the Jesuit Seminary Association found at page 3.

[40] All of them, with perhaps a couple of exceptions, I think Ms. Rizcallah being one and Ms. Assef being the other, are referenced in the Will for other purposes. So these are in addition to things that are already being bequested to these individuals. There is a nice tie to the thought process that was operating here. The description, for the most part with the two exceptions I will speak to later, are indeed of personal effects, being the language that is used in the Will. So it is consistent with what is described by the language in the Will. I think actually the language in Paragraph 5(c) was, *"items of a personal nature."* When I look at

what is in the list, there is a substantial gifting of personal effects consistent, in my view, with a person who does intend this to be both fixed and final. They are items of personal sentimental value: family jewelry and possessions, collectibles, and personal jewelry. These are things that when somebody is gifting, they are gifting for good. I think it is an inescapable conclusion that this is what was intended by the document.

[41] I have expressed some concern, however, with the bequests of money to Angela Rizcallah on page 3, the sum of the $2,000, and to James Ryan, this at page 4, the sum of $2,000 because these are fixed bequests of cash which, in my view, having regard to the totality of the circumstances would not be thought of typically as personal effects, or items of a personal nature.

[42] So the logic that is employed to the balance of the memorandum, which is to say that this memorandum ties specifically to clauses 4 and 5(c) of the Will, does not apply to those two bequests. The question then becomes are they salvageable as bequests? I have concluded that they are for the reasons that I have outlined to Mr. Roza at the outset in discussing the concern with him. If these were the only two bequests, and providing that the other characteristics of the memorandum were present, it would be seen as a codicil because it is not inconsistent with the Will. It diminishes to some very small extent, relatively, the amounts that would fall to the

residual beneficiaries, one of whom has said that they are content with that anyway, knowing that this is what could happen. But that is not determinative of my view. My view is that these were intended additional bequests, and because they are contained in this list, which is so clearly in my view a testamentary disposition, I am satisfied that they should be treated as being valid testamentary dispositions, that is that they are fixed, final dispositions. That view is supported by the document that they were located in.

[43] In conclusion, I am prepared to admit Exhibit #3 to Probate and it will be treated as part of the Will.

Duncan, J.