

Date: 2011 August 15
Docket: Hfx No. 339024
Probate Court File No. 58572
Registry: Halifax

IN THE COURT OF PROBATE FOR NOVA SCOTIA

Citation: Komonen v. Fong, 2011 NSSC 315

IN THE ESTATE OF DANNIE WING FONG, Deceased

Between:

SUSAN KOMONEN

Applicant

- and -

**ANGELA FONG, LISA FONG, WENDY JONES
OLSON, KIM JONES MURRAY, ARLENE FONG
SKINNER, SARAH JANE FONG, DIANA FONG
GOODWIN, SUSAN KOMONEN, KAREN ALI
JEFFRY, JENNIFER JULIA FONG, DOW FONG,
GEORGE FONG, JEAN FONG, KAY FONG ALI,
ANN FONG JONES, WAYNE FONG, WILLIAM
FONG, MON FONG, HELEN FONG AND
DALHOUSIE UNIVERSITY**

Respondents

Revised Decision: The text of the original decision has been corrected according to the erratum dated September 6, 2011. The text of the erratum is appended to this decision.

Judge: The Honourable Associate Chief Justice Deborah K. Smith

Heard: June 1, 2011 in Halifax, Nova Scotia

Counsel: Timothy C. Matthews, Q.C. TEP for the Applicant

Blair Mitchell, Esq. for the Respondent, Helen Fong

By the Court:

[1] Dannie Wing Fong, a retired aeronautical engineer, died on May 28th, 2010 at the age of 85 years. At issue is whether a document found in his residence after his death is a testamentary instrument pursuant to s. 8A of the *Wills Act*.

BACKGROUND

[2] On November 12th, 1997, Mr. Fong executed a Will. This document provides for the distribution of his personal effects upon death according to a letter of instructions. The residue of his property is devised and bequeathed to the Trustees of a revocable trust. According to the trust document (also signed by Mr. Fong on November 12th, 1997) the following persons are beneficiaries of the Trust in the following proportions:

Angela Fong	2 %
Lisa Fong	2 %
Wendy Jones Olson	1 ½ %
Kim Jones Murray	1 ½ %
Arlene Fong Skinner	2 ½ %
Sarah Jane Fong	2 ½ %
Diana Fong Goodwin	5 %
Susan Komonen	10 %
Karen Ali Jeffrey	5 %
Jennifer Julia Fong	10 %
Dow Fong	15 %
George Fong	3 %
Jean Fong	2 %

Kay Fong Ali	2 %
Ann Fong Jones	2 %
Wayne Fong	4 %
William Fong	30 %

[3] After Mr. Fong’s death a printed will form was found in his home. I was not given evidence as to where in the home this document was located. The will form begins with the words “**This is the Last Will and Testament** of me, Dannie Wing Fong.....” The words “Dannie Wing Fong” are printed in pencil. Other portions of the document have also been completed in pencil. The first page of the will form includes the following in preprinted type:

1. I REVOKE all former Wills, Codicils, and Testamentary Dispositions previously made by me.

[4] The second page of the document includes the following (reproduced exactly as it appears on the document):

4. I GIVE the following legacies: PROVIDED BY KAM CHUNG
1. CASH FROM SCOTIAMCLEOD ACCOUNT WITH KAM CHUNG
 2. CASH FROM RBC ACCOUNTS WITH JOHN GILLIS
 3. CASH FROM PC FINANCIAL MUTUAL FUND
 4. CASH FROM US INVEST PORTFOLIO BY MARY ALSUP
 5. CASH SALE OF RESIDENCE AT 7121 ELLIOTT ST. HFX

	<u>100 %</u>
TO: JEAN SETO	5 %
DOW FONG	15
MON FONG	6
WILLIAM FONG	15
GEORGE FONG	15
KAY ALI	7
ANNE JONES	7

WAYNE FONG	10
HELEN FONG	
SUSAN KOMONEN	10
JENNIFER FONG TURNER	10 %
DALHOUSIE U. ENDOWMENTS	

[5] On this second page the words “4. I GIVE the following legacies:” is in preprinted type. All other words are hand printed in pencil. As is seen from the above, the name "Helen Fong" does not have a number next to it. In addition, there is no number next to "Dalhousie U. Endowments". If one looks closely at the original of the document, you can see numbers that appear to have been printed in pencil and then erased.

[6] The first page of the document has the date 24 June 2009 printed in pencil. The back page of the document is dated July 2009 (a specific date is not given). The word “July” and the number “09” are printed in pencil. The document is signed (in pencil) “Dannie Wing Fong”. The signature is not witnessed and the section of the document for the witnesses to complete (including their names, addresses and occupations) has not been filled out. The back of the document says “**Will** of Dannie Wing Fong”. A copy of this document is attached as Schedule “A”.

[7] As can be seen from the above, certain people that are listed as beneficiaries in the Trust document are not listed as beneficiaries in the will form. In addition, many of those that are referred to in both documents have been granted a different percentage of the deceased’s estate in each document.

[8] A further document entitled “Will and Power of Attorney Planning Document” was also found in Mr. Fong’s home after his death. It, too, has been partially completed. Someone has filled in the date “August 27th, 2009” on this document (which is after the date of the pencilled will form referred to above.)

[9] In addition, a chapter (from a book) entitled “Signing Your Will” was found in Mr. Fong’s home. This document includes the following paragraphs:

After you have successfully had your Will typed in the proper form, you are ready to sign it. DO NOT sign your Will until you have read this chapter and have all of the necessary witnesses and Notary Public present. The legal requirements of this chapter regarding the proper execution (signing) of your Will are extremely

important and must not be deviated from in any manner for your Will to be legally valid. These requirements are not at all difficult to follow, but they must be followed precisely. It is these formal requirements that transform your Will from a mere piece of paper outlining your wishes to a legal document which grants the power to dispose of your property under court order after your death.

The reasons for the formality of these requirements are two-fold: first, by requiring a ceremonial-type signing of the document, it is hoped that the testator is made fully aware of the importance of what he or she is doing; and second, by requiring a formal signing witnessed by other adults, it is hoped that any instances of forgery, fraud, and coercion will be avoided, or at least lessened.

Again, these legal formalities must be observed strictly. DO NOT deviate from these instructions in any way. It is the formal execution or signing of your Will that makes it legally valid and failure to properly sign your Last Will and Testament will render it invalid.....

[10] Finally, a completely blank printed will form was also found in Mr. Fong's residence.

[11] On November 5th, 2010 the Applicant filed an Application "for an Order pursuant to s. 8A of the Wills Act to determine the validity of a certain writing signed by the deceased and dated June 24, 2009 as a testamentary instrument....." The Application was served on all of the other persons interested in the estate in accordance with the *Probate Court Practice, Procedure and Forms Regulations*, N.S. Reg. 119/2001.

[12] On December 9th, 2010 one of the Respondents, Helen Fong, filed a Notice of Objection to the Application. None of the other Respondents filed a Notice of Objection or appeared before the Court to make representations in relation to this matter.

[13] Various affidavits were filed in relation to this Application. None of the deponents were cross examined on their affidavits.

[14] According to the affidavit of the Applicant, Susan Komonen, she recognizes the signature on the will form in question to be that of her uncle, Dannie Wing Fong. She does not say whether she recognizes the other printing on the form to be that of her uncle. She states "The blanks in the Writing are filled in pencil. There are indications that percentages have been changed or erased in the Writing, but I do not know if

these changes were made by the deceased or by anyone else before or after he signed the Writing.” At the hearing of the motion, both counsel advised the Court that they acknowledge that the printing on this document was done by Mr. Fong.

[15] I am satisfied that the signature on the document in question is that of the deceased Dannie Wing Fong. I will assume, for the purpose of this motion, that the printing on this document in pencil was also done by Mr. Fong.

[16] The evidence that has been filed with the Court indicates that for many years Mr. Fong kept a diary. The evidence also establishes that prior to his death, Mr. Fong was diagnosed with “ALS”. Apparently, in time he found it increasingly difficult to speak. Accordingly, he used computer word processing programs (typing) and writing to communicate with other people. These writings were saved and excerpts from these documents form part of the record for this proceeding. In addition, I have been provided with copies of emails sent by Mr. Fong. These writings, which have been admitted by consent, have proven to be extremely valuable in determining this matter and will be referred to in greater detail later in this decision.

LAW AND ANALYSIS

[17] Section 6 of the *Wills Act*, R.S.N.S. 1989, c. 505 provides as follows:

Formalities of execution

6 (1) No will is valid unless it is in writing and executed in manner hereinafter mentioned:

(a) it shall be signed at the end or foot thereof by the testator or by some other person in the testator’s presence and by the testator’s direction;

(b) such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and

(c) such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation is necessary.

(2) Notwithstanding subsection (1), a will is valid if it is wholly in the testator's own handwriting and it is signed by the testator.

[18] The document in question does not comply with s. 6(1) of the said *Act* as it is not witnessed. In addition, it is not a holographic will pursuant to s. 6(2) of the *Act* due to the printed will form used by the deceased. That, however, does not conclude the matter. Section 8A of the *Wills Act* allows the Court, in certain circumstances, to order that a writing is valid and fully effective even though it was not executed in compliance with the formal requirements imposed by the *Wills Act*. Section 8A provides:

Writing not in compliance with formal requirements

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.

[19] This provision provides the Court with the power to grant relief from the formalities of the *Wills Act* provided that the Court is satisfied that the document in question embodies the testamentary intentions of the individual that is now deceased.

[20] Counsel have referred me to a number of authorities in relation to this matter. In particular, I have been referred to *Robitaille v. Robitaille Estate*, 2011 NSSC 203, in which s. 8A of the *Wills Act* was considered. In addition, I have been referred to *Re Gray; Bennett v. Toronto General Trusts Corp.*, [1958] S.C.R. 392; *Molinari v. Winfrey*, [1961] S.C.R. 91; *Canada Permanent Trust Co. v. Bowman*, [1962] S.C.R. 711; *Langseth Estate v. Gardiner*, [1990] M.J. No. 543 (C.A.); *Estate of Masters (deceased)*; *Hill v. Plummer*, [1994] 33 NSWLR 446 (C.A.); *Hough v. Harris*; *Estate of Graham*, [2004] NSWSC 958 (S.C., Equity Div.); *Lumb Estate*; *McMillan v. Lumb*,

[2005] NSWSC 371 (Supreme Court, Equity Div.); *MacKenzie v. Osburn*, [2005] NSWSC 657 (Supreme Court, Equity Div.); *George v. Daily*, (1997), 115 Man. R. (2d) 27; 139 W.A.C. 27 (C.A.); *Belser v. Fleury*, [1999] M.J. No. 205 (Q.B.); *Prefontaine v. Arbuthnott*, [2001] MBQB 45; (2001), 154 Man. R. (2d) 75 (Q.B.); *Roelofs Estate*, [2004] MBQB 280 (Q.B.) and *Furlotte v. McAllister*, 2005 NBQB 310. I have reviewed and considered all of these authorities in arriving at my decision.

[21] In *George v Daily*, *supra*, Philip J.A. reviewed in detail the history and purpose of s. 23 of the *Manitoba Wills Act*, which is substantially similar to s. 8A of the *Nova Scotia Act*. In arriving at his conclusions, he stated at ¶ 59-61:

[59] It remains a fundamental and universal proposition 'that nothing can receive probate which was not intended to be a testamentary act by the testator': per Lord Selborne, L.C., in **White v. Pollock** (1882), 7 App. Cas. 400, at p. 405. In Bailey, S.J., **The Law of Wills** (7th Ed. 1973, Pitman Publishing) the principle is stated (at pp. 65-66): 'No will is entitled to probate unless the testator executed it with the intention that it should take effect as his will.' (It is not necessary to review cases such as **Milnes v. Foden** (1890), 15 P. 105, in which instruments have been admitted to probate even though the deceased was unaware that he/she had performed a testamentary act. The principle remains the same: the intention that the instrument record the final (but revocable) wishes of the deceased as to the disposal of his/her property after death.)

[60] Section 23 can be invoked to give effect to the testamentary intentions of a deceased in the face of imperfect compliance, even noncompliance, with the formalities of the **Act**. Section 23 cannot, however, make a will out of a document which was never intended by the deceased to have testamentary effect. In **Balfour Estate, Re** (1990), 85 Sask.R. 183 (Q.B.), Gerein, J., explained the principle:

'Yet, it must be kept in mind that the section's [s. 35.1 of the Saskatchewan **Wills Act**] purpose is to overcome non-compliance with formal requirements. It does not empower the court to render a document testamentary in nature when it is otherwise not so. In the instant case, the document does not manifest a true testamentary intention and therefore does not meet the threshold requirement of the section.'

[61] Not every expression made by a person, whether made orally or in writing, respecting the disposition of his/her property on death embodies his/her testamentary

intentions. The law reports are filled with cases in which probate of holographic instruments has been refused because they did not show a present intention to dispose of property on death. **Gray Estate, Re**, [1958] S.C.R. 392, was such a case.

[22] His Lordship continued at ¶ 64-65:

[64] The term ‘testamentary intention’ means much more than a person's expression of how he would like his/her property to be disposed of after death. The essential quality of the term is that there must be a deliberate or fixed and final expression of intention as to the disposal of his/her property on death: **Re Gray; Molinari v. Winfrey**, [1961] S.C.R. 91; and **Canada Permanent Trust Co. v. Bowman**, [1962] S.C.R. 711.

[65] In my opinion, these are the principles which must be applied in the determination under s. 23 as to whether or not a document or writing embodies the testamentary intentions of the deceased. Whether it is the deceased's own instrument or the notes or writing made by a third-party, **the crucial question to be answered is whether the document expresses the ‘animus testandi’ of the deceased - a deliberate or fixed and final expression of intention as to the disposal of his/her property on death.**

[Emphasis added]

[23] LeBlanc J. referred to and relied on this test in *Robitaille v. Robitaille Estate, supra*, when considering s. 8A of the Nova Scotia *Wills Act*. I am satisfied that this is the appropriate test to be used in the case before me. That is: does the will form filled out in pencil represent a deliberate or fixed and final expression of Mr. Fong's intention to dispose of his property on death? Put another way, when this document was prepared and signed, did Mr. Fong believe that his existing Will had been revoked and that his estate would be disposed of according to this document?

[24] Determining a deceased's testamentary intention can be a difficult task. The reason for this is obvious – the person who can best speak to the matter is not available to testify. Helper J.A. dealt with this issue in *George v. Daily, supra*, where, in separate but concurring reasons, she stated at ¶ 97:

[97] While s. 23 is a remedial piece of legislation, empowering the court to give effect to testamentary intention contained in a document not otherwise conforming to the **Act**, the section imposes a significant onus on an applicant. I describe the onus as significant because in disposing of an application under s. 23, the court must be ever mindful that the question for determination is testamentary intention and the person who can best speak to that intention, the deceased, is not present to give

evidence. The onus will only be satisfied by the presentation of substantial, complete and clear evidence relating the deceased's testamentary intentions to the document in question. Oral evidence describing the circumstances surrounding the creation of the document and the deceased's actions and words in relation to the document might well afford an applicant a better opportunity of satisfying the s. 23 onus than affidavit evidence alone.

[25] There are a number of facts in this case that support a conclusion that this document embodies the testamentary intentions of the deceased. These include the fact that: (1) Mr. Fong used a preprinted will form to write on rather than a blank piece of paper; (2) the fact that the document is signed (albeit in pencil); (3) the fact that the document is dated (albeit there are two different dates) and (4) the fact that the document refers to funeral arrangements (cremation before burial.)

[26] On the other hand, there are a number of factors that do not support the conclusion that this document expresses a deliberate or fixed and final expression of intention as to the disposal of Mr. Fong's property upon death. I refer, in particular, to the fact that: (1) the document has been completed in pencil (which, in my view, indicates a lack of finality); (2) the fact that some portions of the document have been left blank and (3) the fact that the document was not witnessed. In relation to this latter point, I note that Mr. Fong would have been aware of the formalities involved in executing a will - having signed such a document in 1997.

[27] In my view, the deceased's diaries and other written communications give valuable insight into the matter. Attached as Schedule "B" are excerpts taken from the deceased's diaries and emails that he sent. Attached as Schedule "C" are excerpts from "Talk.txt" (which was a method of communication used by Mr. Fong prior to his death) as well as a written scribbler used by Mr. Fong towards the end of his life. I have reproduced those excerpts that I have found most salient to the matter before me.

[28] Some of these excerpts support the suggestion that this document embodies the testamentary intention of Mr. Fong. I make particular reference to the scribbler entry made on May 26th, 2010 (two days before Mr. Fong's death) (Schedule "C") which reads "**.....I FEEL SO WEAK AND UNSTABLE NOW THAT I NOT READY YET ALTER MY WILL WHICH WRITTEN ONLY IN PENCIL SO CHANGES CAN BE MADE.....**" [Emphasis added]. This indicates that Mr. Fong viewed this document as his Will.

[29] On the other hand, there are numerous other entries which lead one to the conclusion that this document was nothing more than an unfinished draft of a possible will that Mr. Fong may have intended to finalize at some point in the future. I refer, in particular, to the August 27th, 2009 entry (Schedule “B”) where he refers to “.....**the sketch of my will.....**”; the January 22nd, 2010 entry (Schedule “B”) where he writes “.....Family members has no meaning to me; **that’s why I have not completed making a Will.....**”; the February 8th, 2010 entry (Schedule “C”) where he writes “.....**I have a living [will?] now written in St Louis** I was told it is no good in Canada I don’t want a living will in Canada **Haven’t made any firm decisions yet.....**”; the February 19th, 2010 entry (Schedule “C”) where he writes “.....I’m still working on it. I have a rough copy already written in pencil **which means it is not finalized.** The document form for the will, does not say anything about having a lawyer.....”; the March 13th, 2010 entry (Schedule “C”) which reads “.....I have the blank documents I bought for making a will I used a pencil the first copy for the will already **I used a pencil, which is not legitimate** because I am thinking that I want the [to?] make changes to the will”; and the March 15th, 2010 entry (Schedule “C”) which reads “.....**That’s why my will is not done** [done?] because I don’t know who should my assets” [Emphasis added throughout this paragraph.]

[30] It is important to note that all of these written or typed comments were made *after* the dates written on the will form in question (June 24th, 2009 and July, 2009.)

[31] There is also a Talk.txt entry (Schedule “C”) made on April 10th, 2010. Mr. Fong was hospitalized at the time and appears to be having a written conversation with another person. Someone states “As soon as you can you should talk to Annette about getting to your house. Tell her about the pencil Will. I am working a different floor tomorrow but I will come visit you on my breaks to see if there is anything I can do. Who [where?] is the pencil Will the Will you have at home **It is in my file cabinet and I hesitate to find someone whom i can trust to bring it here** that’s why you need to go with annette because she has to work on your behalf. It’s the best way.....” This excerpt indicates that Mr. Fong viewed this document with some importance (“..... I hesitate to find someone whom i can trust to bring it here.....”). It is unclear, however, why he was looking to bring the document to the hospital ie: whether he intended to finalize it or was thinking of bringing it in for some other purpose.

[32] I also note that throughout Mr. Fong's entries, he writes about decisions that he needs to make about his estate such as who should be his executor(s) and what should be done with his home. Most of these comments are made after the dates printed on the will form. In my view, all of this supports the suggestion that he had not yet formed a fixed and final intention as to the disposal of his property upon death other than with his 1997 Will.

[33] Counsel for the Applicant has submitted that the fact that Mr. Fong was anticipating making changes to the document in question does not necessarily mean that this writing does not embody his testamentary intentions at the time that it was prepared and signed. If by this, counsel is suggesting that a valid will can subsequently be revoked and changed, then I agree with this submission. However, the document must still express the *animus testandi* of the deceased in order to be found to be a valid will pursuant to s. 8A of the *Act*.

[34] The burden is on the Applicant to satisfy the Court, on a balance of probabilities, that the document in question embodies the testamentary intentions of Mr. Fong. In my view, this burden has not been met in the circumstances of this case. Accordingly, the application will be dismissed.

[35] The Applicant shall have her costs payable out of the Estate on a solicitor and client basis. The Respondent, Helen Fong, seeks her costs on the same basis. In my view, her involvement in this application was valuable and justified.

[36] Counsel requested an opportunity to review my decision before finalizing their position on Ms. Fong's costs. I would ask to receive their positions in writing by September 6th, 2011.

Deborah K. Smith
Associate Chief Justice

Date: 2011 August 15

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**Revised decision: The text of the original decision has been corrected according
to the attached erratum (September 6th, 2011)**

Judge: The Honourable Associate Chief Justice Deborah K. Smith

Written Decision: August 15th, 2011

**Counsel: Timothy C. Matthews, Q.C. TEP for the Applicant
Blair Mitchell, Esq. for the Respondent, Helen Fong**

E R R A T U M

- [1] At paragraphs 34 and 35 – the word “motion” is to be deleted and replaced with the word “Application”.

Deborah K. Smith, Associate Chief Justice