Wills and Succession 1995–1996

CAMERON HARVEY, Q.C.*

THERE WERE TWELVE REPORTED CASES during 1995–1997. Nine of them were unremarkable.[1] In the last review[2] I dealt with whether the proceeds of a non-insurance retirement savings plan (R.S.P.) containing a valid beneficiary designation are payable directly to the designated beneficiary or to the designated beneficiary through the deceased's estate. I referred to the cases decided prior to the 1992 re-enactment of *The Retirement Plan Beneficiaries Act*[3] and to the unreported trial decision in *Copet* v. *Clark*, which dealt with the issue in terms of the re-enacted *R.P.B. Act*. I expressed some doubt about the correctness of Justice Mykle's decision that the re-enacted *R.P.B. Act* provides for the payment of such proceeds to be made directly to a designated beneficiary, not through the deceased's estate. Justice Mykle's decision has been affirmed by the Court of Appeal.[4]

The case had to do with the funeral expenses of the deceased. Her executor paid them out of his pocket. He recovered part of them from the estate, leaving the estate insolvent. He sued the deceased's widower for the balance. The widower's defence was that the estate was not insolvent because the deceased had

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1 *Re Scott Estate* (1995), 101 Man. R. (2d) 94 (Q.B.) unexecuted alteration not likely curable by s. 23, *The Wills Act*, R.S.M. 1987, c.W150, even if it were applicable; *Re Abrahamson Estate* (1995), 102 Man. R. (2d) 233 (C.A.), mental capacity; *Mulligan Estate* v. *Minaker* (1995), 102 Man. R. (2d) 283 (C.A.), construction; *Re Berger Estate* (1995) 103 Man. R. (2d) 202 (Q.B.), gift by description and typographical mistake; *Arksey* v. *Arksey* (1995) 105 Man. R. (2d) 211 (Q.B.), missing will; *Re Funk Estate* (1995), 107 Man. R. (2d) 111 (C.A.), ademption, s. 24, *The Wills Act*; *Re Charlesworth Estate*, (1996) 108 Man. R. (2d) 228 (Q.B.) class gift, cy-pres, variation of a trust, s. 59, *The Trustee Act*, R.S.M. 1987, c. T160; *Re Shorrock Estate* (1996) 109 Man. R. (2d) 104 (Q.B.), only one witness, s. 23 *The Wills Act*, class gift; and *Toomer* v. *Canada Trust Co.* (1997), 117 Man. R. (2d) 135 (Q.B.) lay evidence of mental capacity and discovery of medical records.

2 (1996) 24 Man. L.J. 455.

3 R.S.M. 1987, c. M45 [hereinafter the *R.P.B. Act*].

4 *Sub nom. Clark Estate* v. *Clark* (1997), 115 Man. R. (2d) 48 (C.A.).

an R.S.P. which should form part of the estate available to pay the funeral expenses. The designated beneficiaries of the R.S.P. in the event of the deceased's death were her children. The decision of the trial judge, confirmed by the Court of Appeal, is that the R.S.P. proceeds were payable directly to the Public Trustee as trustee for the deceased's minor children, not through the estate. However, the Court of Appeal added,

> [I]t does not necessarily follow that those moneys are immune from the claims of creditors of the estate ... [because] when the [R.P.B.] Act was amended the legislature did not include a provision comparable to s. 173(1) of *The Insurance Act* ... which insulates the proceeds of an insurance policy from claims of the deceased's creditors ... . The defendant [the deceased's widower] remains liable as a judgment debtor. But having paid that judgment, he is entitled to embark upon his own separate action as a creditor of the insolvent estate to claim part of the funds in their reinvested form in the hands of the Public Trustee.[5]

Is there a lesson in connection with an application pursuant to *The Dependants Relief Act*? Section 16(1) of the Act provides:

> An order or direction made under this Act may be enforced against the estate of the deceased in the same way and by the same means as any other judgment or order of the court against the estate may be enforced.6

So, a successful applicant becomes a creditor of the estate and as such should be able to proceed against the recipient of R.S.P. proceeds. But with an insolvent estate there is a problem. The Act in s. 2(1) provides for a relief order to "be made out of the estate of the deceased" and, unlike the comparable Acts of some other provinces, *The Dependants Relief Act* of Manitoba does not contain a section comparable to s. 35(1) of *The Marital Property Act*[7] extending the assets of the estate to include various transactions, including R.S.P.s. If the estate, being insolvent, has no assets, the court, even if otherwise disposed to make a relief order, will have to dismiss the application. I wonder if this result would be overcome by making the recipient of R.S.P. proceeds a respondent of the application along with the estate? This solution requires persuading the Manitoba courts that the wording of s. 2(1) does not implicitly restrict the respondent of an application to the estate of the deceased. The Act does not explicitly stipulate whom the respondent shall be.

An issue arose in *Mathers* v. *Murnane*[8] as to whether on a partial intestacy a clause in a will, "clearly and deliberately" disentitling the testatrix's sons, is ef-

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5 *Supra* note 4 at paras. 25 and 33.

6 *The Dependant's Relief Act*, S.M. 1989–90, c. 43.

7 R.S.M. 1987, c. M45.

8 (1996), 116 Man. R.(2d) 247, paras. 16–23 (Q.B.).

fective to bar the sons from inheriting pursuant to *The Intestate Succession Act*.[9] Justice Cartwright, in a majority decision of the Supreme Court of Canada, referred to *Re Gage*[10] and adopted a statement of Mr. Justice Roach:

> No legislation will be construed as thwarting the intention of a testator as expressed in his will, unless the language clearly and unmistakably indicates that the Legislature so intended and has effectively brought about that result.

In *Mathers* v. *Murnane* the court decided that the sons were barred. I think that the court was wrong as its view is contrary to several English decisions which were reflected in *Re Snider;*[11] quoting one of these cases,

> The general rule of law, which is beyond all question is so consistent with common sense that it cannot possibly be doubted. A testator cannot deprive those who are by law entitled to his estate by words of exclusion only. He can only do that by giving the estate to somebody else.

In my opinion, the court applied *Re Gage* out of its context. It had to do with a testamentary provision for the "child or children" of a daughter of the testator. There was no doubt that the testator did not intend to include adopted children. The question for the Court was whether legislation enacted subsequent to the execution of the will, equating adopted children to natural children, overrode testamentary intention. It was in that context that Mr. Justice Roach said what the *Mathers* court quoted. To my mind this is a different context to the one with which the court was dealing.

In the last review I dealt with the trial decision in *George* v. *Daily*,[12] the first case decided pursuant to the current wording of s. 23. The section was amended in reaction to *Langseth Estate* v. *Gardiner*,[13] in which the Court of Appeal construed s. 23 to be based upon, *inter alia*, "some compliance, some attempt to comply with the formal requirements." Section 23, as amended, reads:

> Where, upon application, if the court is satisfied that a document or any writing on a document embodies
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> *(a)* the testamentary intentions of a deceased; or
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> *(b)* the intention of a 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;

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9 S.M. 1989–90, c. 43.

10 [1962] S.C.R. 241.

11 (1974), 46 D.L.R. (2d) 161 (Ont. H.C.).

12 (1996), 108 Man. R. (2d) 266 (Q.B.).

13 (1990), 68 Man. R. (2d) 289 (C.A.), treated in the last review.

> the court may, notwithstanding that the document or writing was not executed in compliance with *any or all of* the formal requirements imposed by this Act, order that the document or writing, as the case may be, be fully effective as though it had been executed in compliance with all the formal requirements imposed by this Act as the will of the deceased or as the revocation, alteration or revival of the will of the deceased or of the testamentary intention embodied in that other document, as the case may be. [Italics indicating words added by S.M. 1995, c. 12.]

Mr. Daily had a meeting to review his will with his accountant and executor, Mr. George. Upon Mr. Daily's instructions Mr. George crossed out parts of the will and made notes on the will of changes which Mr. Daily wanted to make. The deletions and notes were not executed. Mr. George sent the revised will together with a letter of instructions to Mr. Daily's lawyer. The lawyer met with Mr. Daily, who confirmed the instructions conveyed by Mr. George. Mr. Daily wanted the lawyer to prepare a new will immediately so that he could sign it that same day, but the lawyer advised Mr. Daily to first obtain a medical certificate concerning his mental capacity. Mr. Daily died two months later without ever again communicating with the lawyer. Pursuant to the amended s. 23, the trial judge, Justice De Graves, admitted Mr. George's letter to probate:

> [B]y the amendment of s. 23 ... [t]he previous Manitoba jurisprudence in *Langseth Estate* v. *Gardiner* ... can no longer be considered binding .... The critical assessment must now be directed to a determination of whether the document contains a clearly expressed testamentary intention in writing, not whether there has been "substantial compliance" with the formalities of *The Wills Act*.[14]

Justice De Graves was satisfied that Mr. George's letter expressed testamentary intentions of Mr. Daily; he was not requested to consider whether the revised ill was admissible to probate.

The trial decision was appealed.[15] Lengthy reasons were written by Justice Philp. Justice Helper concurred with Justice Philp's reasoning, adding a comment about the applicant's onus of proof on a s. 23 application[16] and pointing out that the revised will might well be admissible to probate pursuant to s. 23.[17] Chief Justice Scott concurred with the reasons of both Justices Philp and Helper. The Court of Appeal reversed the trial judgment, disagreeing with the trial judge's conclusion that the applicant had satisfactorily proved that Mr. George's letter, of which it was not proved Mr. Daily actually knew, embodied

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[14] Given his reference to *Langseth Estate*, surely Justice De Graves must have meant "minimal compliance," not "substantial compliance."

[15] (1997), 115 Man. R. (2d) 27 (C.A.).

[16] *Ibid.* at paras. 95–97.

[17] *Ibid.* at para. 92.

testamentary intentions of Mr. Daily. In this regard Justice Helper's comments are noteworthy.[18]

George v. *Daily* is a significant case in two other respects. First, the Court of Appeal agrees with Justice De Graves that the discourse in *Langseth* v. *Gardiner* no longer reflects amended s. 23, except insofar as the standard of proof is concerned.[19] Second, in the midst of reasons, which range over the purposes of the formal requirements prescribed by *The Wills Act*, the comparable legislation and case law of several Australian states, and the law governing testamentary intention and when instructions for a will can be admitted to probate, Justice Philp notes that on a s. 23 application "the court must be satisfied that the deceased knew and approved of the contents of the document which is presented for probate."[20] This is a cogent reminder that there are five requirements which must be proved for a document to be admitted to probate: The document expresses testamentary intention of a person, who had testamentary capacity, and who knew and approved of the document, and that the document is in due form and was duly executed. Section 23 has only to do with non-compliance with the execution requirements. While s. 23 in its part (a) makes specific reference only to the requirement of testamentary intention, Justice Philp's statement is a reminder that on a s. 23 application a court must satisfy itself not only respecting testamentary intention, but also that the other testamentary requirements have been proved.

Finally, perhaps there is another lesson to be taken from *George* v. *Daily*. When making notes in taking instructions for a will, a lawyer should have the client declare that the client intends the notes "to be dispository and to operate provisionally until a more formal will ... [is] prepared"[21] and executed, so that if the client dies before the will is executed, the notes can be probated via s. 23 upon the evidence of the lawyer that the client had testamentary capacity and knew and approved of the notes as embodying testamentary intention. Such a practice is important not only for s. 23, but also in regard to *White* v. *Jones*,[22] in which a lawyer was sued successfully because of his procrastination in drafting a will and having it executed.

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18 *Supra* note 17 at paras. 95–97.

19 *George* v. *Daily*, *supra* at paras. 12–20.

20 *Ibid.* at para. 66.

21 *Ibid.* at para. 71, the quotation from *Halsbury's Laws of England*.

22 [1995] W.L.R. 187 (H.L.).