Solicitor's reporting letters validated as list "will" of client: Re McGavin Estate, 2023 BCSC 819

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The recent decision of the Supreme Court of British Columbia in *Re McGavin Estate*, 2023 BCSC 819 (25 April 2023, E. McDonald J. confirms the broad scope of the "validation power" contained in section 58 of British Columbia's *Wills, Estates and Succession Act* (WESA). The Court ordered that copies of two reporting letters sent by solicitors to their client concerning instructions for a new will, with one of the letters annotated with the client's handwritten notes, be declared to be the client's last "will" and admitted to probate.

Facts in *McGavin Estate*

The *McGavin Estate* decision involved the estate of Marian McGavin, who died in North Vancouver in 2022 at the age of 76. She had no children and did not have a spouse at the time of her death. Pursuant to the intestacy rules of the WESA, Marian's estate would have devolved in its entirety to her brother Morris, who resides in Ontario, if she died without a will.

The evidence before the court showed that Marian and her brother Morris had been estranged for many years. However, Marian had a very close relationship with Morris's daughter Lisa Irwin, and Lisa's three children. She was not particularly close to her other niece Tamara, but (as a former schoolteacher) expressed an intention to make provision for Tamara's two children.

In the fall of 2019, Marian met with a lawyer from Miller Thomson LLP at hospital in North Vancouver. The purpose of the meeting was to deal with incapacity planning documents, and Marian executed an enduring power of attorney and a representation agreement in which she appointed her niece Lisa as her attorney and representative. During this meeting, there was also a preliminary discussion about making a new will, as Marian had confirmed that she presently did not have a will. Marian made clear to her lawyer that she did not want to die intestate and that she did not want any part of her estate to pass to her brother.

Marian was later moved to a long-term care facility. She was found to be incapable of managing her financial affairs, but still had testamentary capacity. Between December 2019 and February 2020, Marian met with her lawyers twice in regard to making a new

will, and had several telephone calls. She confirmed again that she did not want to leave any part of her estate to her brother Morris and wanted to make a will that primarily benefited her niece Lisa and Lisa's three children. (Marian had already designated Lisa as the beneficiary of her registered accounts). She also wanted to leave some part of her estate to the children of her other niece Tamara, but that they would receive less than Lisa's children. Marian wanted Lisa to be the executor. She had thoughts of leaving gifts to a variety of charities but accepted the advice of her lawyers that she should first make a will in which she divided the residue of her estate amongst the intended family members, and that she could make a codicil at a later date to make specific bequests to charities.

Marian received a reporting letter sent by Miller Thomson in late January 2020 that included, *inter alia*, a review of her assets. She made notes on a copy of this letter regarding her testamentary intentions, such as writing "no $ for" her brother and niece Tamara, and listing out the names of Lisa, Lisa's children and Tamara's children.

By March 2020, the only outstanding issue concerned the precise way Marian wanted to divide the residue. The COVID-19 pandemic intervened at this point, and Marian's care facility imposed strict "lockdown" measures. Both Lisa and Marian's lawyers at Miller Thomson recognized the urgency to finalize the making of a new will. Following a telephone call with Marian on March 18, the Miller Thomson lawyers sent a reporting letter to Marian which set out the following distribution of the residue of her estate: 60% to Lisa; 30% to be divided equally between Lisa's three children, and 10% to be divided equally between Tamara's two children.

The Miller Thomson lawyers confirmed that Marian received the March letter. There were no further meetings or telephone calls after that point between Marian and her lawyers about her estate plan. Marian did not finalize a new will made in compliance with the WESA. Various factors impacted Marian's ability to deal with her estate planning including the disruption caused by the pandemic, ongoing health issues, concerns about legal costs, and the fact that Marian did not use technology such as iPads. The evidence also indicated that Marian had superstitions that executing a will would hasten her death.

Marian kept these documents in a filed folder labeled "Lawyer's Info re estate" and was careful to bring this folder with her to a new care facility in late 2021. She reviewed the documents in the folder with Lisa during a visit in 2022 and confirmed that the March 2020 letter accurately set out her intentions.

Marian died in July 2022 leaving an estate worth approximately $1.5 million. Lisa applied to the Court for an order pursuant to section 58 of the WESA validating the March 2020 reporting letter from Miller Thomson, along with the annotated copy of the January 2020 reporting letter, as representing Marian's testamentary intentions, and that they be declared to be fully effective as Marian's last will. This proceeding was uncontested, as Marian's brother (who would be the sole intestate heir of the estate pursuant to s. 23(2)(*c*) of the WESA) did not oppose the relief.

Validation of the March 2020 and January 2020 documents

The petition was heard in chambers by Justice Elizabeth McDonald on 25 April 2023. The Court noted that this case was “unusual” in that the documents sought to be validated, and admitted to probate, were not “draft wills or documents formatted along the lines of a typical will”. Further, the final letter in March 2020 invited Marian to adjust the distribution of the residue if she wished and asked her to confirm that a new will should be prepared.

The applicable test under section 58 of the WESA is whether a record, document or writing is “authentic” and whether it represents “the deliberate or fixed and final intention” of a deceased person. A fixed and final intention does not mean an irrevocable intention. Cases are intensely fact-specific and like traditional probate disputes, a wide array of extrinsic evidence is admissible to determine the testamentary intentions of the will-maker.

Justice E. McDonald noted that section 58 has been given a broad and liberal interpretation in cases like *Re Hadley Estate*, 2017 BCCA 311 and *Re Hubschi Estate*, 2019 BCSC 2040. She also held that the New Zealand High Court decision in *Re Feron*, 2012 NZHC 44was helpful in that the broad scope of the New Zealand legislation was similar to section 58 of the WESA, and there were factual similarities. In *Re Feron*, the Court validated the notes of the solicitors, recording the client’s instructions, along with email correspondence between the solicitor and the client, as representing the client’s last will. In that case, the Christchurch earthquake of 2011 had prevented the client from finalizing a will. Nevertheless, the High Court found that the solicitor’s notes and the email chain provided a “skeleton of a will” and could be admitted to probate. The affidavit evidence of the solicitor was helpful in this regard.

Justice E. McDonald held that it was appropriate to exercise her discretion to validate the 2020 documents as Marian’s last will. Several factors were cited by the Court:

- The handwritten annotations made by Marian to the January 2020 letter “aligns with” the content of the later reporting letter in March 2020.
- Marian placed these letters in a folder and was careful to move that folder from one care home to another.
- Marian’s failure to make a will in compliance with the formalities required by the WESA could be explained by the circumstances, including the “lockdown” associated with the COVID-19 pandemic “which made it extremely challenging for [Marian] to move her estate planning along to the point of executing a will”.

There was no evidence that Marian had changed her mind after March 2020. It may be inferred that the Court recognized the implications of refusing to validate the 2020 documents. Marian’s estate would have passed on intestacy to her brother, which is precisely what she wanted to avoid. A primary purpose of section 58 is to ensure that the intentions of a deceased are “not thwarted for no good reason”: *Re Jacobsen Estate*, 2020 BCSC 1280.

Key takeaway

The *McGavin Estate* decision demonstrates that a broad array of documents can be validated by the Court pursuant to section 58 of the WESA despite non-compliance with the formal requirements of will-making. Section 58 is a broad curative provision, and a “large and liberal” approach should be taken to this remedial legislation. Documents

made by third parties, which do not resemble a “typical will”, may be validated and treated as the last will of a deceased if they represent the fixed and final intentions of the deceased.

By

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