Testamentary powers of appointment and gifts Virtute Officii: Royal Trust Corporation of Canada v. The Welfare Institution of the Jews of Athens, 2022 BCSC 1454

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In *Royal Trust Corporation of Canada v. The Welfare Institution of the Jews of Athens*, 2022 BCSC 1454 (23 August 2022, Kent J.), the Supreme Court of British Columbia gave directions to the trustees of a testamentary trust on the ultimate disposition of trust property. This case raises complex issues about the construction of wills, testamentary powers of appointment, and the application of conflict of laws principles.

The underlying dispute involved the last Will of Ms. Georges, who was born in Turkey, lived much of her life in Greece, and then emigrated to Canada in the 1970s. She was a citizen of Canada at the time of her death in Victoria, BC in 1985. The residuary beneficiary named in the Will was Ms. Conrad, the daughter of Ms. Georges, who lived in Switzerland. Ms. Georges also created a testamentary trust in which Ms. Conrad was the income beneficiary. Pursuant to the terms of the Will, Ms. Georges gave her daughter a power of appointment in regards to the ultimate disposition of the Trust property. This was a "special" power of appointment in that Ms. Conrad was limited to gifting the property, through her last will, to "sum [*sic*] reasonable Greek charity". In default of an exercise of this power of appointment, the Trust property would devolve upon Ms. Conrad's death to "the President for the time being" of Estia Konstantinoupoleos (Estia), a Greek charity located in Athens.

Ms. Conrad made a will in Greece in 2017 in which she explicitly exercised the power of appointment in favour of a Greek charity named Restion. The 2017 Will was valid under Greek law, and expressed Ms. Conrad's reasons for choosing this charity. However, when Ms. Conrad returned to Switzerland in early 2018, she made a holographic will in which she revoked all previous testamentary documents. Following Ms. Conrad's death in 2019, the trustees of the Trust sought directions on how the property would be distributed.

The petition filed by Royal Trust Corporation of Canada raised several issues, including whether the 2018 Will effectively revoked the exercise of the power of appointment in the 2017 Will made in Greece. This question raised issues about which system of law governed the issue: British Columbia, Switzerland or Greece? Further, could it be held

that the revocation clause in the 2018 Will did not apply to the prior exercise of the power of appointment, thereby saving the gift to Restion? Such a result was available under British Columbia law: see *Re Buller Estate* (1944), 60 B.C.R. 51 (S.C.), aff'd 61 B.C.R. 59 (C.A.).

Restion, the Greek charity chosen by Ms. Conrad in her 2017 Will, did not participate in the proceeding, and Justice Kent accepted the evidence of a Swiss lawyer that the 2018 Will validly revoked the 2017 Will including the revocation of the power of appointment. There was no evidence that Ms. Conrad intended to preserve the earlier exercise of the power of appointment. The evidence filed in the proceeding suggested that both BC and Swiss law deal with revocation in a similar manner. Anglo-Canadian courts have historically taken a liberal approach to the application of conflict of laws principles to this issue, and would find a revocation of a testamentary power of appointment valid if made in accordance with the laws of either the donor's jurisdiction or the donee's jurisdiction. See cases like *Re Baeder and Canadian Order of Chosen Friends* (1916), 28 D.L.R. 424 (Ont. C.A.) and *Velasco v. Coney,* [1934] 1 P. 143. As Restion did not appear in the proceeding, there were no arguments about the possible application of Greek law in this case.

The main issue for the hearing became whether the power of appointment in the Will was void *ab initio*, which would result in the property devolving to Ms. Conrad's estate. The personal representative of Ms. Conrad's estate, based in Switzerland, argued that the phrase "sum [*sic*] reasonable Greek charity" offended the rule about "certainty of objects" given that it could not be ascertained which charitable organizations could fall within the scope of this wording. It did not matter that the wording was obviously applicable to Estia and Restion. The personal representative of Ms. Conrad's estate made two further arguments that would lead to the result of the property devolving to him: (1) the default gift was actually to the individual who served as President of Estia at the time that the Will was made in 1985, and such a gift lapsed due to that individual's death in 2014; and (2) if it is properly constructed as a gift to the current President of Estia, it would require the finding of a trust relationship between that individual and the charity, and the existence of trusts is not recognized by Greek or Turkish law.

The Court rejected these arguments and held that the property of the Trust devolved to Estia. Justice Kent held that the power of appointment in the Will was valid, and did not offend the principle of "certainty of objects". In addition, he held that the gift to "the President for the time being" of Estia was poorly worded, but should properly be interpreted as a gift to Estia. It was not a personal gift to the president of Estia, either the person who held office in 1985 or the current President. A proper construction of the Will was that this was a gift *virtute officii* to Estia, similar to a gift to a parish priest. Just as the parish priest could not pocket the funds for his personal benefit, but must use them for the benefit of the church, the gift to the "President for the time being" must be used for the benefit of Estia.

The final argument made by the personal representative of Ms. Conrad's estate hinged on the assertion that Ms. Georges remained a Turkish citizen at the time of her death. It was alleged that, under both Greek and Turkish law, a court would recognize a trust only if the "law of nationality" of the settlor recognized trusts. Accordingly, if Ms. Georges was still a Turkish citizen (despite being domiciled in British Columbia), a trust may not be enforceable by Greek courts since Turkish law does not recognize trusts. It was conceded at the hearing that such an argument would not be applicable if Ms. Georges

was no longer a Turkish or Greek citizen at the time of her death. Given that Ms. Georges became a Canadian citizen, as evidenced by her Canadian passport, this argument failed.

The *Georges Estate* decision demonstrates the complexities raised by imprecise language in wills and by the use of testamentary powers of appointment. Further, the case shows how different systems of law, and complex principles relating to the conflict of laws, may have bearing on even the smallest estate or trust.

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