

Connie Zinn and Walter Ingold (applicants) v. Louise Bergren, Donna Peers, Allan Vevang, Shauna Vevang, Canadian Abortion Rights Action League, Moose Jaw Animal Clinic, Five Hills Home Care, Eyebrow United Church and Tyson Will (respondents)
(2011 Q.B.S. No. 115; 2012 SKQB 214)

Indexed As: Nyberg Estate, Re

Saskatchewan Court of Queen's Bench
Judicial Centre of Moose Jaw
Schwann, J.
May 24, 2012.

Summary:

The executors of Nyberg's estate sought to probate a typed will executed in 2003 and a handwritten codicil dated April 19, 2011. A number of issues arose surrounding the documents.

The Saskatchewan Court of Queen's Bench determined the issues accordingly.

Wills - Topic 23

Testamentary instruments - Codicils - Testamentary intention - The testator executed a typewritten will in 2003 and a handwritten codicil dated April 19, 2011 - The codicil had the testator's signature at the top of the document - Some portions of the codicil were seemingly illegible - The Saskatchewan Court of Queen's Bench was satisfied that the testator intended to give effect to the codicil by affixing his signature at the top - Specific reference to the prior will by characterization and date, along with his comments concerning revocation of parts, drew a clear and cogent connection between the codicil and the will - Further the illegible handwriting was not fatal, where the will had been transcribed with the assistance of a person well acquainted with the testator and his handwriting - The court was satisfied that the holograph codicil was testamentary in nature and was executed in compliance with the Wills Act - See paragraphs 13 to 23.

Wills - Topic 28

Testamentary instruments - Codicils - Holograph codicils - [See **Wills - Topic 23**].

Wills - Topic 63

Testamentary instruments - Holograph wills - Validity of - [See **Wills - Topic 23**].

Wills - Topic 1534

Preparation and execution - Signature - Place of signature - [See **Wills - Topic 23**].

Wills - Topic 5012

Construction - General - General principles - Effect of codicil - The testator executed a typewritten will in 2003 and a handwritten codicil dated April 19, 2011 - Certain dispositions in the codicil appeared inconsistent with the will - The Saskatchewan Court of Queen's Bench held that both documents could stand together and dealt with the

inconsistencies accordingly - As to the residue, the court found that the prior disposition of the residue under the will was revoked and the terms of the codicil were to be given effect - However, because the terms of the codicil failed to address the disposition of the entire residue, the court directed the executors to pay out certain amounts and ruled that the balance of the residue would fall into intestacy to be dealt with by the court at a later date - See paragraphs 24 to 57.

Wills - Topic 7349

Construction - Quantity of interest taken - Trusts - Maintenance and care of animals - A testator's will and codicil purported to create a trust from the estate residue to look after the testator's cats - The Saskatchewan Court of Queen's Bench found that the documents gave rise to a valid trust and directed the executors to retain \$10,000 dedicated to the exclusive purpose of care, maintenance and health needs of the testator's cats - The court ruled that upon the death of the last of the testator's four cats, the balance of the fund was to be distributed as residue - See paragraphs 58 to 60.

Cases Noticed:

Bellamy Estate, Re, [2001] 9 W.W.R. 538; 374 Sask.R. 175; 2011 SKQB 200, reld to. [para. 16].

Oh v. Robinson - see Bellamy Estate, Re.

Fitzsimmons, Re, [1939] 2 D.L.R. 50 (N.S.S.C.), reld to. [para. 31].

Studer Estate v. Studer et al. (2009), 341 Sask.R. 267; 2009 SKQB 366, reld to. [para. 51].

Boy Scouts of Canada, Provincial Council of Newfoundland v. Doyle et al. (1997), 151 Nfld. & P.E.I.R. 91; 471 A.P.R. 91; 149 D.L.R.(4th) 22 (Nfld. C.A.), reld to. [para. 52].

Authors and Works Noticed:

Canadian Encyclopedic Digest (Western) (4th Ed. 2012) (Looseleaf), vol. 55, Title 184-Wills, para. 300 [para. 37].

Feeney, Thomas G., The Canadian Law of Wills (4th Ed. 2000), pp. 5-1 [para. 27]; 5-10.4 [paras. 28, 30]; 5-12.1 [para. 29]; 10-7 [para. 26]; 13-14 to 13-17 [para. 50].

Halsbury's Laws of England (1st Ed.), Wills and Estates, p. 281 [para. 55].

Parker, D.B., and Mellows, A.R., The Modern Law of Trusts (9th Ed. 2008), pp. 82, 83 [para. 60].

Counsel:

Kenneth M. Cornea, for the applicants;

No one appearing for the respondents.

This application was heard before Schwann, J., of the Saskatchewan Court of Queen's Bench, Judicial Centre of Moose Jaw, who delivered the following judgment on May 24, 2012.

Order accordingly.

Editor: Elizabeth M.A. Turgeon