SUPREME COURT OF YUKON

Citation: *Fitzgerald v AADWP,* 2025 YKSC 23

Date: 20250417
S.C. No. 25-A0028
Registry: Whitehorse

BETWEEN

Philip Fitzgerald, proposed Executor of the Estate of J.D.A.M.

PLAINTIFF

AND

A.A.D.W.P.,
K.M.

DEFENDANTS

Before Chief Justice S.M. Duncan

Counsel for the Plaintiff — Arthur Mauro

Counsel for the Defendant K.M. — Grant Macdonald

No one appearing for the Defendant A.A.D.P.

This decision was delivered in the form of Oral Reasons on April 17, 2025. The Reasons have since been edited for publication without changing the substance.

REASONS FOR DECISION

[1] DUNCAN C.J. (Oral): The Yukon Legislature recently, in 2020, amended the Yukon *Wills Act*, RSY 2002, c 230, to include sections that allow a court to validate or rectify a will that does not comply with the legal formalities set out in the statute. The law is rightly concerned about ensuring a person's final wishes as expressed in their will are

identified, respected, and acted upon. The legal formalities in the statutes of requiring wills to be in writing, signed, and witnessed were put in place to help determine the fixed and final intention of the deceased person. The formalities also act as safeguards to protect those intentions from being fulfilled for reasons of fraud or coercion. Modern wills legislation, however, also recognizes human fallibility: that mistakes can be made, and that oversights or carelessness can occur.

[2] The question in many cases — and the one raised in this case — is: how far can a court go in validating or rectifying a will that does not meet the legal formalities? Can the intention of the testator be determined where their signature and the signatures of witnesses on the will are absent? How should the balance be struck between the importance of these safeguards in determining testamentary intention and the examination of other circumstances that shed light on the testator's fixed and final wishes?

[3] In this case, the applicant, Philip Fitzgerald, a friend of the deceased, [J.D.A.M.], and the accountant for his various companies and proposed executor, seeks rectification to add the deceased's signature to the writing created on August 15, 2024, pursuant to s. 32(2) of the *Wills Act*. He also seeks validation of the same writing as the last will and testament of the deceased, even in the absence of witness signatures under s. 30 of the *Wills Act*. He seeks an order granting him leave to file the probate application in writing, and he seeks costs from the estate.

[4] The application is unopposed. Counsel for the sister of Mr. [M.], [K.M.], who is a beneficiary under the proposed will, was present in court to express support for the application.

Procedure

[5] First, on a procedural matter, no statement of claim has been filed, and this matter came to court by way of an application under Rule 47 of the Yukon *Rules of Court*. This is an appropriate process in the circumstances. This is not a contentious matter requiring the commencement of a probate action by a statement of claim under Rule 65. It is a non-contentious application.

[6] Rule 64, the rule for non-contentious estate applications, does not assist, however, as it contains no provisions for a general application. Section 30, the validation provision, and s. 32, the rectification provision of the *Wills Act*, provide for the determination of validation and rectification by application. Therefore, Rule 47, the general rule on applications, is the appropriate approach; and if successful, the applicant must still apply for probate. This application does not result in a grant of probate.

Facts

[7] Turning to the facts.

[8] The deceased was described by his lawyer, who submitted an affidavit, as “an intelligent and capable individual who was logical, methodical in his thinking and business oriented.” His lawyer and the applicant, his accountant, assisted him for several years in his many business ventures.

[9] In or around September 2020, the deceased asked his lawyer’s firm to begin drafting a last will and testament. An initial draft was provided to the deceased by the firm for his review that same month.

[10] Over the next several years, from 2021 to 2024, continued drafting occurred at a slow pace. His lawyer, who assisted him with his will from January 2021 to his death in

August 2024, deposed that, "[m]uch of the will drafting process would occur in a piecemeal fashion where after meeting on corporate and commercial matters quick comments would be exchanged with respect to the draft will."

[11] On February 7, 2024, the deceased became re-engaged in the will-drafting process. He requested and was provided with a copy of the draft of his will, in Word, for his consideration, comment, and mark-up.

[12] On August 15, 2024, the deceased emailed his lawyer a copy of the will with a covering email stating, "I've made all the desired changes to the will that i [as written] wish to put in place. Is it possible to go in and sign this week or next?" His lawyer scheduled a meeting with the deceased at the lawyer's office on August 27, 2024, to sign the will.

[13] Sadly, the deceased died by his own hand on August 17, 2024. He was 38 years old.

[14] Both the applicant and the lawyer describe the effects of the deceased's concussion resulting from a fall approximately a year or so before his death. The symptoms affected his processing times, gave him migraine headaches and light sensitivity, and made it more difficult for him to work through information necessary to operate his businesses, which, according to the applicant, contributed to his depression. He was also experiencing immense pressure from his various business endeavors.

[15] His lawyer deposed that he had no concerns about the deceased's mental capacity despite his slower processing time. He was logical and thoughtful and able to provide instructions at all times.

Legal framework

[16] Turning to the legal framework.

[17] Before 2020, and unlike most other jurisdictions in Canada, the Yukon had no validation or rectification sections in the *Wills Act*. As a result, unless a will satisfied all of the formalities in the statute, it was considered not valid. The Court had no ability to determine the testator's intentions in spite of the absence of formalities.

[18] Section 30 now provides that the Supreme Court may order a writing is valid even if not made in accordance with the *Wills Act* if the Supreme Court is satisfied on clear and convincing evidence that the writing sets out the testamentary intentions of the testator and was intended by the testator to be their will or a revocation of the will.

[19] Sections 32(1) and (2) — and I am paraphrasing — provides that the Supreme Court may order that a will be rectified by adding or deleting characters, words, or provisions specified by the Court if the Court is satisfied on clear and convincing evidence that the testator intended to sign the writing but omitted to do so by pure mistake or inadvertence, and intended to give effect to the writing as the testator's will.

[20] To date, there have been no Reasons for Decision issued in this Court interpreting these new provisions. The most helpful jurisprudence comes from Alberta, whose statute contains validation (also called "curative" or "dispensing" provisions) and rectification provisions almost identical to those in the Yukon *Wills Act*. Both the Yukon and Alberta statutes specify that rectification to address the absence of a testator's signature on the will can occur only on certain conditions: that is, if the omission was by pure mistake or inadvertence. The validation provisions in s. 30 apply to the absence of witness signatures on attestations and writings, and do not contain those same conditions. Inclusion of a testator's signature as another formality in the validation provision has been done in other jurisdictions and was considered during the policy development stage of the Alberta legislation but ultimately rejected as an approach.

[21] As a result, in the Yukon, as in Alberta, the validation provisions in s. 30 cannot be used to address the omission of a testator's signature because s. 32(2) specifically addresses this. To rely on s. 30 for this purpose would render s. 32(2) without meaning or function, and the Supreme Court of Canada has said that no section of a statute can be rendered pointless (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27).

[22] The purpose of rectification is to permit a testator's signature to be added in certain circumstances when other evidence of intention is present. The addition of the requirement that the omission be by pure mistake or inadvertence is a clear limitation of the broad dispensing provision in s. 30, which is applicable to all the other formalities.

[23] Inadvertence has been described as arising from accidental oversight. Pure mistake can be understood as the person thinking that they are doing one thing but in fact does something else (*Edmunds Estate*, 2017 ABQB 754 at paras. 54-55).

[24] Similarly, the goal of the validation provision, s. 30, is to recognize and enable the implementation of the testamentary intent of the deceased despite the lack of formalities, as long as there are adequate safeguards of authenticity. Both sections are designed to be remedial provisions.

[25] Clear and convincing evidence does not change the standard of proof, which remains the civil standard of balance of probabilities.

[26] Testamentary or testator's intention has been described as:

> [65] … 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. … [citations omitted]

(*George v Daily* (1997), 143 DLR (4th) 273 (MBCA))

Application of the law to the facts of this case

[27] Applying the law to the facts of this situation.

Rectification

[28] First, rectification. I will order that the writing sent by the deceased to his lawyer on August 15, 2024, be rectified by adding the testator's signature. The following evidence is clear and convincing that the testator intended to sign this writing and intended it to be his final will:

- He requested and received legal assistance to prepare a will, beginning in September 2020.
- He worked on it with his lawyer on and off over the next almost four years, when his business dealings permitted.
- He made changes to a Word version of the draft will himself between February and August 2024.
- He sent this draft to the lawyer on August 15, 2024, with a clear note stating that it contained all of his desired changes and asking to sign it the following week.
- The will itself is in a form suitable for signature except for the draft stamp and for the dates: there are no blanks; it is called a last will; it is typewritten; it is formatted in a formal way; it contains all of the topics usually covered in a will, including a revocation provision; it is comprehensive; it contains no marks, such as "still thinking about this" or "to be discussed"; there was very little time or reason for the deceased to work on or change the will between August 15 and August 17, the date of his death, and no evidence that he did.

- He was an intelligent, young, sophisticated business person, mentally capable, clear in his instructions, and provided reasons for the changes that he was requesting.
- The will and its changes reflect the observations of the applicant and the deceased's lawyer that in recent years he had been trying to reconnect with his son.
- The signing appointment was scheduled 12 days from the date of his email asking for it to be signed, so no delay, and 10 days after his death.

[29] The testator took his own life before he signed the will. This act can be characterized as inadvertence because his choice to die before signing the will is a kind of accidental oversight. It is distinguishable from the situation in many of the cases where the testator dies unexpectedly or earlier than expected, in an unplanned way, in the midst of a process of preparing or changing a will. For example, in *Hood v South Calgary Community Church*, 2019 ABCA 34, the Alberta Court of Appeal noted that delays in finalizing the will in that case were a conscious and deliberate choice, suggesting that the intentions were not necessarily fixed and final. In these situations, it is harder to provide clear and convincing evidence of a testator's intention without a signature because of the argument that the finalizing of the will was still in progress.

[30] In this case, however, the choice of the deceased to die is in fact a confirmation that this writing reflects his final wishes. He felt that his affairs in this respect were sufficiently in order. To not sign the will was an oversight on his part.

[31] An alternative plausible interpretation is that he made a mistake by taking his own life before signing the draft will and thinking that the unsigned will could still be used to implement his intentions.

[32] Failure to sign in these circumstances cannot negate the strong evidence of the testator's intention that this writing was his final will.

Validation

[33] Turning to validation.

[34] I also find that the test for validation in s. 30 has been met, and I will order that this writing is validated as the last will and testament of the deceased despite the lack of witness signatures. As noted, once the test of the testator's intention is met, there are no further limitations or conditions under s. 30 as there are in s. 32(2).

[35] Examples of key validation factors on the evidence were summarized by the then Alberta Court of Queen's Bench in *Oustouh Estate (Re)*, 2019 ABQB 279 at para. 27, after a review of a number of cases in Alberta. Applying that list to this case, the factors showing intention have been set out above in my consideration of the rectification provision and they are also sufficient to meet the validation provision test.

Conclusion

[36] In conclusion, the amendments to the *Wills Act* at issue in this case were described by the Minister of Justice on October 22, 2020, during the debate of the Committee of the Whole (*Hansard,* October 22, 2020 at 1558) as follows:

> … amendments will be added to allow the court to amend or technically validate wills or gifts that would otherwise fail due to damage, a mistake, or a defect but in which it can still be determined that the testator's intentions are clear …
>
> …
>
> These amendments are consistent with other Canadian legislation and serve to protect testators' wishes while protecting them from fraud or coercion.

[37] This is a case where there is clear and convincing evidence of the testator's intention. The evidence provides a safeguard of authenticity that the formalities absent in these cases are designed to provide.

[38] As a result, I will order:

- that the writing created on August 15, 2024, at the direction of [J. D. A. M.] be rectified to add the deceased's signature pursuant to s. 32(2) of the *Wills Act*;
- that the writing created on August 15, 2024, at the direction of [J. D. A. M.] be validated as his last will and testament despite the lack of witness signatures pursuant to s. 30 of the *Wills Act*;
- that the petitioner/applicant, has leave to file a probate application for the writing; and
- that the estate of Mr. [M.] pay the costs of this application.

[39] Just on that last point. This is an application about the validity of a will. Society has an interest in ensuring that only valid wills are probated, providing the policy reason for the payment of costs by the estate (*McAndrew Estate (Re)*, 2021 ABQB 56).

[DISCUSSIONS]

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DUNCAN C.J.