

# ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.



## Black-Donaldson et al. v. The Estate of Helen Small, 2024 MBKB 56

Court of King's Bench of Manitoba, Rempel J, 8 April 2024

Whether a will and codicil were made with the full knowledge and approval of the will maker.

**Key words:** Will, Manitoba, Canada, Probate, Suspicious Circumstances, Knowledge and Consent, Solicitor's Duty

1. The deceased, Helen Small, died in 2019, with her nearest relatives being nieces and nephews and their children.
2. The first will in contention in this case was made in 2006 by a solicitor. It provided for:
  - 35 per cent to her nephew Todd;
  - 25 per cent to her niece Tracy;
  - 25 per cent to her sister, Margaret (since deceased); and
  - 15 per cent to her nephew Jan.
3. The second will in contention was made in 2014. It was prepared by a different solicitor. It named a friend, Ralph, as executor and the deceased's nephew, Todd, as the alternate. The distribution scheme under this will was:
  - a) A bequest of all of Helen's common shares and mutual funds was made to Ralph.
  - b) From the net sale proceeds of her home, the executor was to make the following further bequests as follows:
    - \$100,000 to Bradley, who is Todd's son, and incorrectly described in the will as a nephew, rather than a grandnephew;
    - \$100,000 to the Re-Fit Foundation, which is a charitable health foundation in Winnipeg;
    - 30 per cent of the sale proceeds to the Winnipeg Jets True North Foundation (TNF), which is a charity supporting disadvantaged youth in Manitoba; and
    - Any surplus net proceeds were to fall to the residue of her estate.
  - c) The residue of her estate was then to be divided into four unequal shares as follows:
    - 25 per cent to Todd;
    - 25 per cent to Tracy (incorrectly named Tracey and described in the will as a nephew rather than a niece)
    - 15 per cent to Jan; and

- 35 per cent in trust for the maintenance of Helen's "Burial Plot Fund" for a period of 20 years to cover costs pertaining to "flowers and wreaths, and headstone and/or plaque cleaning." After the 20-year period expired, any balance remaining in the Burial Plot Fund was to be paid to Ralph.
4. A subsequent codicil made by a different solicitor in 2016 changed the bequest to Bradley to \$75,000 and raised the TNF bequest to 35% of the proceeds of the sale of the deceased's home.
  5. Upon probate, the deceased's investments in common shares and mutual funds were found to be worth \$2,156,192.65. This was bequest (a) above. In addition, it was found that the deceased's home had been sold some time before, so that there was nothing to distribute under bequest (b) above.
  6. The applicants sought a declaration that the second will and the codicil were invalid due to the absence of the deceased's knowledge and approval of their contents. The applicants also sought an order that the probate should be revoked, which in effect would make the first will from 2006 the deceased's last will and testament.
  7. The Court granted the applicants the relief sought because the second will was prepared by a junior solicitor who did not make enquiries such as might have been expected as to the dispositions to be made in the new will. This included whether there would be enough funds to provide for the two charitable gifts listed.
  8. In addition, neither the solicitor preparing the second will, or the solicitor preparing the 2016 codicil had made any other relevant enquiries. As to these, the Court noted :
    - Ralph was Helen's former financial planner;
    - Ralph was not listed as a beneficiary in the first will and only immediate family members were intended to benefit under that will;
    - Ralph was named as the beneficiary under her life insurance policy, which would result any tax-free payment to him of \$220,000 outside of the estate upon her death;
    - The burial plot where Helen had her husband's remains interred, and where she intended to be laid to rest, was maintenance free and had no receptacle or vases for flowers;
    - Why Helen, who was content to place the same plastic flower wreath beside her late husband's grave marker year after year, would want to have a sum in excess of \$100,000 set aside in a trust fund for flowers and wreaths for a pre-paid burial plot that was essentially maintenance-free for 20 years;
    - How Helen would react to the knowledge that there would be ongoing legal expenses, accounting fees, and tax payments for the Burial Plot Fund over 20 years;
    - How taxes and expenses would have different impacts on Ralph compared to the residual beneficiaries;
    - Overall Ralph stood to inherit \$1,361,000 on a tax-free basis, and the residual beneficiaries would share about \$611,351 after assuming the entire burden of probate fees, funeral expenses, professional fees, taxes and other costs; and
    - The risk of the gift representing the sale of the condominium might fail (adeem) if Helen or her power of attorney sold the condominium prior to death.
  9. These matters were sufficient to give rise to suspicious circumstances (at [43]).
  10. As to knowledge and approval by the deceased, Ralph was not able to discharge the burden of proof that the deceased had the requisite knowledge of the value of her estate, or had approved the effect of the distribution in the second will and the codicil.
  11. The two charities did not take part in the litigation. Since the first will did not contain the two gifts to charity that were in the second will, these gifts were not made.

## COMMENT



Even if the second will had been valid, the two gifts to charity could not have been made because they were to have been made had been from the proceeds of a home which sold before the deceased's death. This meant that the gift had adeemed. Ademption concerns the loss or destruction of the subject matter of a testamentary gift, in this case by physical dealing by the testator during her lifetime.

As the Court said at [1]:

This case should serve as a cautionary tale to lawyers who treat the will drafting process like a fill-in-the-blank exercise. Offering legal advice to a client who wants a will prepared requires lawyers to do more than satisfy themselves that the client has the requisite mental capacity to give instructions and that the client can do so freely without undue influence. Lawyers are also under an obligation to explain to the client in clear terms how their assets will be distributed after death when the terms of the will are implemented and how the distribution scheme proposed by the client might impact their beneficiaries. Without taking this vital step, lawyers run the risk of having a client sign a will in the absence of knowledge and approval.

## VIEW THE CASE



This case may be viewed at: <https://www.canlii.org/en/mb/mbkb/doc/2024/2024mbkb56/2024mbkb56.html>

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