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Docket: PR 16-01-04482
(Winnipeg Centre)
Indexed as: Re Estate of Daniel George Nadoryk; Nadoryk et al. v. Wiebe
Cited as: 2017 MBQB 120

COURT OF QUEEN'S BENCH OF MANITOBA

IN THE MATTER OF: The Estate of Daniel George Nadoryk, of the City of Winnipeg, in the Province of Manitoba, Deceased.

B E T W E E N:

FRANK G. NADORYK and HELEN NADORYK,	)	Counsel:
	)	GAVIN M. WOOD and
applicants,	)	LEE KELLIE-McMILLAN, Articling
	)	Student-at-Law, for the applicants
- and -	)	
CAROL WIEBE,	)	CAROL WIEBE, in person
respondent.	)	
	)	ARIADNA I. DLUGOSH,
	)	on a watching brief for
	)	Danielle David-Nadoryk
	)	
	)	JUDGMENT DELIVERED:
	)	JUNE 26, 2017

CHARTIER J.

[1] The issues on this application for advice and directions are whether ss. 25 and 25.1 of ***The Wills Act***, C.C.S.M. c. W150 (the "***Act***"), apply to a bequest in a will to a beneficiary who has predeceased the testator.

[2] By way of background, letters of administration for this estate were initially issued on June 23, 2016, but were subsequently vacated and revoked by order of Simonsen J. on November 29, 2016. This occurred as a result of Helen Nadoryk finding a holograph will on October 18, 2016. Simonsen J. also ordered that the applicants could proceed to obtain a grant of probate of the estate of the deceased for the holograph will which has since occurred. She also adjourned the application for advice and directions regarding the bequest in the will to Frank Nadoryk, Sr., deceased, and further ordered that no distribution of the estate funds occur pending that determination. It is this application which is before this court for determination.

[3] Daniel George Nadoryk's holograph will has one bequest leaving all of the testator's assets and possessions to his father, his mother and his brother Frank G. Nadoryk.

[4] The entire holograph will states as follows:

> I, Dan Nadoryk, do hereby leave all my assets and possessions to Frank, Helen Nadoryk and Frank G. Nadoryk, my parents and brother, respectively. Executors will be Helen and Frank G. Nadoryk.

[5] The testator died on April 15, 2016. He was never married but lived for a time with Jillian David with whom he had a child, Danielle David-Nadoryk, born March 18, 1998. His three siblings, Frank G. Nadoryk, Carol Wiebe and June Wagner, and both his parents, Helen Nadoryk and Frank Nadoryk, Sr. were all living at the time of the making of his holograph will on April 15, 1995. However, his father, Frank Nadoryk, Sr. subsequently passed away in 1997.

[6] The applicants Frank G. Nadoryk and Helen Nadoryk, the executors under the will, make this application for advice and directions "as to whether the bequest in the Will to Frank Nadoryk Senior, deceased, lapsed upon his death." The other parties who were present on this application were Carol Wiebe, a sister of the deceased, and Danielle David-Nadoryk, the deceased's daughter.

[7] The applicants take the position that the bequest to the father Frank Nadoryk, Sr. lapsed. They argue that it follows that the bequest to Frank Nadoryk, Sr. should be divided evenly among the two other beneficiaries in the will, Helen Nadoryk and Frank G. Nadoryk. They say s. 25 of the ***Act*** governs in this case. Counsel for Danielle David-Nadoryk, representing her on a watching brief, advised that her client took the same position as the applicants. Counsel for the applicants and counsel for Danielle David-Nadoryk advised that the parties are on friendly terms and that certain arrangements were being made between them. The respondent Carol Wiebe took the position that s. 25.1 is applicable and as she is a daughter of the deceased Frank Nadoryk, Sr. she is entitled to a share of his bequest pursuant to that statutory provision.

ISSUES

[8] The issues are as follows:

1. Does s. 25.1 of the ***Act*** apply in the circumstances of this case?
2. Does s. 25 of the ***Act*** apply to the bequest in the will to Frank Nadoryk, Sr., who predeceased the testator?

[9] For reasons that follow, I find that the bequest in the will to Frank Nadoryk, Sr. lapsed with the result that there is an intestacy with respect to the share of this beneficiary.

[10] Sections 25 of the ***Act*** reads as follows:

> **Lapsed and void devises**
> 25 Subject to sections 25.1 and 25.2 and except when a contrary intention appears by the will, real or personal property or an interest therein that is comprised, or intended to be comprised, in a devise or bequest that fails or becomes void by reason of the death of the devisee or donee in the lifetime of the testator, or by reason of the devise or bequest being contrary to law or otherwise incapable of taking effect, is included in the residuary devise or bequest, if any, contained, in the will.

Does s. 25.1 of the *Act* apply in this case?

[11] Section 25.1[1] is not applicable on the facts of this case. The terms of the will do not leave, nor do they create "an estate tail" or "in quasi entail". The words used in the will are simply "all my assets and possessions". While the assets of the estate included real property, the bequest contains no words of limitation, and consequently the devise passes the fee simple estate in the real property (see s. 28 of the ***Act***).

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[1] Devise of estate tail
25.1 Except when a contrary intention appears by the will, where a person to whom real property is devised for what would have been, under the law of England, an estate tail or in quasi entail, (a) dies (i) in the lifetime of the testator, or (ii) at the same time as the testator, or (iii) in circumstances rendering it uncertain whether that person or the testator survived the other; and (b) leaves issue who would inherit under the entail if that estate existed; if any such issue are living at the time of the death of the testator the devise does not lapse but creates an estate in fee simple in possession. [Emphasis added]

Does s. 25 of *Act* apply to the bequest in the will to Frank Nadoryk, Sr., who has predeceased the testator?

[12] Section 25 states that it is subject to ss. 25.1 and 25.2. I have already found that s. 25.1 is inapplicable. It is common ground between the parties that s. 25.2 is inapplicable on the facts of this case. Section 25.2[2] applies when the person who predeceases the testator is a child or other issue of the testator, or a brother or sister of the testator. When s. 25.2 applies, the bequest does not lapse, but takes effect as if made directly to the surviving issue. It clearly does not apply where, as here, the person who has died is the father of the testator.

[13] There is no dispute that the bequest to Frank Nadoryk, Sr. is a specific bequest. In this instance, by the terms of s. 25, the bequest to Frank Nadoryk, Sr. fails by reason of his death and is therefore to be "included in the residuary devise or bequest, if any, contained, in the will". There is no residuary bequest in this holograph will. Counsel for the applicants says that it follows that the lapsed bequest to Frank Nadoryk, Sr. should be divided evenly among the surviving beneficiaries, Helen Nadoryk and Frank G. Nadoryk. However, he cited

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[2] When issue predecease testator
25.2 Except when a contrary intention appears by the will, where a person dies in the lifetime of a testator, either before or after the testator makes the will, and that person (a) is a child or other issue or a brother or sister of the testator to whom, either as an individual or as a member of a class, is devised or bequeathed an estate or interest in real or personal property not determinable at or before the death of the child or other issue or the brother or sister, as the case may be; and (b) leaves issue any of whom is living at the time of the death of the testator; the devise or bequest does not lapse, but takes effect as if it had been made directly to the persons among whom, and in the shares in which, the estate of that person would have been divisible if that person had died intestate without leaving a spouse or common-law partner and without debts immediately after the death of the testator. [Emphasis added]

no authority in support of this proposition. I was provided with the decision of ***Sparks Estate v. Wenham*** (1994), 116 D.L.R. (4th) 308 (Man. C.A.). I have also reviewed ***Pawlukevich (Paul) Estate v. Pawlukevich (Peter) Estate et al.*** (1986), 41 Man.R. (2d) 62 (Man. Q.B.), and ***Re Stuart Estate***, [1964] 47 W.W.R. 500 (B.C.S.C.). While none of these cases are directly on point, as they involve a lapsed residuary bequest and not a lapsed specific bequest as we have here, the latter two cases make reference to authorities that set out the governing law in this instance.

[14] The facts in ***Pawlukevich*** are similar to the facts in the ***Sparks Estate*** case, although, as I indicated, they are somewhat different than the facts here. In ***Sparks Estate*** (para. 14), the Manitoba Court of Appeal found that s. 25 "does not refer to or include a residuary devise or bequest that lapses by virtue of the fact that the beneficiary has predeceased the testator. It refers only to specific gifts." Counsel for the applicants agreed that the result in that case was a partial intestacy relating to the bequest, although the decision does not say so explicitly.

[15] As previously stated, there is no residuary bequest in this case. In ***Re Stuart Estate***, Nemetz J. of the British Columbia Supreme Court referred to the fact that the English ***Wills Act***, 1837 had substantially the same provision as the British Columbia ***Wills Act***. The same holds true for ***The Wills Act*** of Manitoba. He found, therefore, that the English decisions relating to lapsed devises are relevant in considering the interpretation of the British Columbia ***Wills Act***. He

quoted from ***Halsbury's Laws of England***, Vol. 39, 3rd ed., at p. 946, which states:

> ... If there is no residuary devise or bequest, or if the gift which lapses or fails is of a share or interest in the general residue, the gift passes to those entitled on an intestacy. [Footnote deleted]
>
> [Emphasis added]

[16] He also cites the author of ***Jarman on Wills***, 8th ed., which states, at page 469:

> If an ordinary specific devise lapses, the property passes under the residuary devise. [Footnote deleted] If there is no residuary devise, the beneficial interest passes to the heir. ...

[17] In the ***Pawlukevich*** case, Morse J. makes reference to the same passage cited above from ***Jarman on Wills***. He also makes reference to the text of Thomas G. Feeney, ***The Canadian Law of Wills: Construction***, at page 131-32:

> Today when the devisee or legatee dies before the testator the usual result is that the failed gift, be it land or personal property, [Footnote deleted] falls into the residue of the testator's estate. The matter is now governed by statute. [Footnote deleted] The rule of the section can have no application if there is no residuary clause, nor can it apply when the gift is a residuary one that fails in whole or in part. In such cases, the lapsed gift usually passes on an intestacy. [Footnote deleted]
>
> [Emphasis added]

[18] It is clear, on the basis of these authorities, that the specific lapsed bequest to Frank Nadoryk, Sr. fails, and because there is no residuary clause in the will, s. 25 is inapplicable and the beneficial interest passes on an intestacy.

[19] The issue of costs can be spoken to if the parties either cannot agree, or require further direction.

_____ J.