The Pleasures and Perils of Holograph Wills
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Case considered: *Lubberts Estate*, 2012 ABQB 506

This Court of Queen's Bench decision interprets a provision in a holograph will. The case is an example of the not-uncommon human tendency to try to use property to control family members' behaviour, both before death by way of gift and after death by way of inheritance. Like many such efforts, this deceased's handwritten codicils to her lawyer-drawn will and her subsequent holograph will did not do what she wanted them to do. Instead of the deceased determining who would inherit her property and on what conditions, her family members inherited under generic, unconditional intestate laws. It is ironic; the more control the deceased tried to exert over what happened to her property on her death, the less say she had in the disposition of her property in the end.

Holographic wills — informal documents entirely in handwriting of the testator or testatrix and signed by him or her without witnesses to the signature — are surprisingly common. They appear to be more common than the emergency situations often cited to justify their recognition, situations when the testator is alone, trapped, and near death. Despite the rarity of such emergency situations, a continuing need for these informal handwritten wills was recently confirmed by section 16 of the *Wills and Succession Act*, SA 2010, c W-12.2 which took effect February 1, 2012. The Alberta Law Reform Institute (ALRI) had considered whether it was time to abolish holograph wills in its 2009 Final Report on The Creation of Wills and recommended that any new statute "should continue to expressly allow holograph wills, which are an easy and inexpensive way for people to make wills, especially in an emergency situation."

A. Facts

The deceased in this case was Johanna Frederika Lubberts. She died in 2009 at the age of 84 and owned a house in Edmonton, a quarter-section of land near Whitecourt, and one or more bank accounts at the time of her death. She was survived by her four children: Johanna Lubberts, Marijke Mercredi, Paul Lubberts and Irene Hanson. (From this point forward I will refer to the deceased as the testatrix because it was her wills and codicils which were in issue and thus her role as their creator which was most relevant to this case. I will refer to her children by their first names for simplicity's sake and for consistency with the decision of Madam Justice June Ross.

The testatrix had a 2002 will drawn by a lawyer that appointed her daughter Irene to be her executrix and trustee. Specific bequests gave $4,000 to each of her grandchildren if they survived her. The residue of her estate was divided equally among her four children. She specified that any of her children could buy her house at fair market value.

The testatrix prepared holograph codicils to the 2002 Will in 2004, 2005, and 2007. The 2004 holograph codicil disinherited one grandchild for unspecified reasons, providing, in part, as follows:

> I, Johanna F. Lubberts of . . . Edmonton, Alberta, declare hereby that the following changes must be made to my will & testament and I trust that the executrix of my will, my youngest daughter, Irene . . . will act accordingly.
>
> 2. My grandson, Anthony . . . , will not benefit in any way from my will. [emphasis in the original].

The 2005 holograph codicil confirmed the one grandchild's disinheritance and sought to convey the testatrix's disappointment with one son's choice of significant other, providing, in part, as follows:

> . . . I, Johanna Frederika Lubberts-Loos, want to make certain changes to my will, a copy of which is attached, while the original is held by my solicitor . . .
>
> 4. C). #4 One of my grandchildren, to wit, Anthony . . . , will not be paid the sum of four thousand dollars at my death. Nor will he inherit any other items from my estate.
>
> P. 7, #9 - Special Declaration Re House. While I had hoped that my son, Paul . . . would live in my house after my death and leave it to his son eventually, I see myself forced to change these expectations. Under no condition will I want to allow Paul's "girlfriend", Laurie . . . to live in my house or to allow her to obtain any interest in my house, whether she and Paul are or get married or not. In a letter, addressed to my four children, I will explain the reasons for my decision. The above-mentioned "Laurie" has been and still is a disruptive influence in our family relations.

The 2007 holograph codicil sought to control where the one son lived and with whom, but in a slightly different way, providing in part as follows:

> Codicil to my last will & testament . . .
>
> Changes to be made - - no cash amount will go to my grandchildren ($4000.00 per grandchild was left to each of my grandchildren, since I have on the birthdays of my grandchildren given each of them amounts of money) and no cash money to be left to any other persons mentioned in the will, since these gifts have been carried out already in the last number of years)
>
> My house . . . will become the property of my son, Paul J. Lubberts and my daughter, Irene Lubberts-Hanson, my son to live in the house and take care of it - he can not rent or sell the house to non-family members. He may - - with Irene's consent sub-let part of the house (e.g. the basement suite) but only to members of the immediate family

In April 2008 the testatrix prepared a holograph will that purported to revoke her 2002 will and all of her holograph codicils to that will. The 2008 holograph will, with the disputed disposition underlined, provided as follows:

> I, Johanna Frederika Lubberts, neé Loos, being of sound mind and presently in good health, revoke all previously made wills and especially so the [2002] will. That Will has outlived its purpose which I hoped would inspire my grandchildren to save at an early age and develop the habit to add to their savings regularly so that they would be independent financially throughout their lives. To assist them I started giving every grandchild as well as my children financial presents on their birthdays. Some of them, knowing that the money came out of a not-so-large pension income, refused accepting it and started saving on their own; others "demanded" it. I started my own savings account in "Ing" [sic]. This present will names as my executrix my youngest daughter, Irene Lubberts Hanson. A second account in "Ing" was started in joint names: my name and Irene's [sic]. Every month I deposit in that account $500.00. Irene can access that money at my death to pay for her personal expenses, as for instance to replenish her salary if it is

> necessary for her to take time off from her job to be able to look after my interests, - medical care and disposal of my body etc - described in another letter.
>
> My entire estate - cash, my house . . ., and my quarter section of land at Whitecourt, Alberta, if it is then still in my possession, I leave to my son, Paul Johan Lubberts and to my youngest daughter, Irene Lubberts Hanson, to jointly manage it and use it for their own benefit as salary for instance, or for the benefit of one of their siblings or of one of my grandchildren - as for instance for medical expenses. Irene and Paul will make all those decisions together and without yielding to any pressure applied by possible recipients.

B. Issue

The issue was how to interpret the underlined paragraph in the 2008 holograph will that purported to dispose of the testatrix's estate. Although not explicitly discussed, the 2008 holograph will was treated as having effectively revoked the 2002 lawyer-drawn will and its holograph codicils. Thus, the question was whether, in leaving her entire estate to Paul and Irene "to jointly manage it and use it for their own benefit as salary for instance, or for the benefit of one of their siblings or of one of my grandchildren" the testatrix had intended to make an unconditional gift to Paul and Irene, to appoint Paul and Irene as trustees, or to give Paul and Irene a power of appointment. Those were the three choices.

There was no question that the 2008 holograph will was a valid will. The statutory requirements for making a valid holograph will are minimal; such a will must be written wholly in the testatrix's own handwriting and signed by her as required by section 7 of the *Wills Act*, RSA 2000, c W-12 (see section 8 of the *Wills and Succession Act*). And because the *Wills Act* defines "will" to include a codicil, a codicil which is wholly in the testatrix's own handwriting and signed by her is valid and effective to add or change provisions in a previous will, whether drawn by a lawyer or a holograph will: *Pears v. Pears*, 2001 ABQB 657; *In Re: Cottrell Estate, Cottrell v. Wolfe* [1951] 2 WWR (NS) 247 (Alta SC); *In re Richardson Estate*, [1949] 1 WWR 1075. The common law does add one more requirement for a valid holograph will: "donative intent." A holographic document is not testamentary in character unless it contains what the Supreme Court of Canada has referred to as a "deliberate, fixed and final expression of intention regarding the disposition of property upon death": *Re Gray Estate*, [1958] S.C.R. 392 and *Canada Permanent Trust Co. v. Bowman*, [1962] S.C.R. 711.

C. Decision

There was no question about the relevant rules for interpreting the disputed provision. The primary rule when interpreting wills is that the Court should strive to give effect to the testator's intentions. More specifically, the disputed provision had to be interpreted in light of the 2008 holograph will as a whole and the 2002 lawyer-drawn will and its three holograph codicils could be used as interpretive aids because the 2002 lawyer-drawn will was expressly referenced in the 2008 holograph will. In addition, extrinsic evidence was admissible to help determine the testatrix's intention because the meaning of the 2008 holograph will was unclear: *Tottrup v Patterson et al*, [1970] SCR 318..

1) Gift?

Justice Ross first considered whether the disputed provision amounted to an unconditional gift of the estate to Paul and Irene. After all, the provision did "leave" the residue to Paul and Irene "to . . . use it for their own benefit." However, Justice Ross decided (at para 22) that the testatrix did not intend to make an unconditional gift to Paul and Irene. While the residue was left to the two of them, there was no indication it was to be for their exclusive benefit. It was clear they could benefit from the residue but the only form of benefit expressly mentioned was salary; they were told they could use the residue "for their own benefit as salary for instance." This suggested a right to compensation for duties performed in connection with the estate, not ownership. In addition, Paul and Irene were also directed to jointly manage the estate, not to receive it. Finally (at para 23), Paul and Irene were required to "make all those decisions together"; they were not assigned an equal share or other percentages in the estate which they normally would have be if an outright gift was intended.

To bolster their unconditional gift argument, Paul and Irene had maintained that the language in the disputed provision about their use of the residue for the benefit of siblings and grandchildren — "to . . . use it . . . for the benefit of one of their siblings or of one of my grandchildren" — was precatory language, i.e., the expression of a wish or hope that they would use the residue gifted to them to assist their siblings and the grandchildren. Precatory words impose moral obligations, not legally enforceable obligations: *Waters' Law of Trusts in Canada*, 3rd ed (Toronto: Thompson, 2005) 136. However, Justice Ross found (at para 27) that none of the words in the disputed provisions were precatory words or mere entreaties, requests or recommendations. Instead of the expression of a wish or hope there was a direction to jointly manage the estate and use it as described.

2) Trust or Power of Appointment?

Having determined that the testatrix intended that Paul and Irene act as a "conduit" for the distribution of the estate rather than receive it outright, Justice Ross turned to the question of whether the testatrix intended to create a trust or a power of appointment. A trust is defined in *Waters' Law of Trusts in Canada* at 3-4 as:

> [A] relationship which arises whenever a person (called the trustee) is compelled in equity to hold property . . . for the benefit of some persons (of whom he may be one, and who are termed beneficiaries) or for some object permitted by law, in such a way that the real benefit of the property accrues, not to the trustees, but to the beneficiaries or other objects of the trust.

A power of appointment, on the other hand, is a type of dispositive power:

> This is an authority, normally conferred by will, by which the donee of the power may determine who are to be the recipients of specified property owned by the donor of the power, normally the testator. Traditionally powers of appointment are said to be of two kinds, general and special. A general power enables the donee to appoint the property to anyone, including himself, and is therefore tantamount to ownership. On the other hand a power is special when the persons

> who may be appointed are marked out, for example, the children of the donee of the power. . . *Waters' Law of Trusts in Canada* at 91- 92.

It can be difficult to tell a trust apart from a power of appointment because a trustee may also be given a power of choice, i.e., to decide which beneficiaries are to receive trust property and how much. But if a trustee is given a power of choice, the trustee must make that choice: *Waters' Law of Trusts in Canada* at 95. A power of appointment merely enables the holder of the power to act. The trustee must act: the holder of the power of appointment may act: *Waters' Law of Trusts in Canada* at 92. If trustees fail to act, a court will act in their place. If the holder of a power of appointment fails to act, then the property goes where the donor directed it go in default of a choice being made or reverts to the donor or his estate: *Waters' Law of Trusts in Canada* at 1117.

The question thus became whether the testatrix intended to impose a duty on Paul and Irene or intended to enable them to act as they saw fit. Did they have a duty or did they have a liberty? Justice Ross decided (at para 40) that the language used by the testatrix indicated that she intended to impose a duty on Paul and Irene. The testatrix directed them to jointly manage the estate, to "use it" to benefit themselves, their siblings or the grandchildren, and demanded "Irene and Paul will make all those decisions together and without yielding to any pressure applied by possible recipients." That was the language of obligation, not empowerment.

Having determined the testatrix intended to create a trust, Justice Ross quickly concluded (at para 41) that the intended trust failed. The parties had agreed that if a trust was what the testatrix intended to create, it failed due to the uncertainty of the objects of the trust: "only non-exclusive examples of the intended benefits (salary and medical expenses) are provided."

As the trust failed, the testatrix's estate passed by intestacy. Her 2002 will and all four of its codicils had been revoked by the 2008 holograph will and the disposition of the estate in the 2008 holograph will was invalid. The result in law was just as though the testatrix had never turned her mind to what would happen to her house, quarter-section and money after her death.

Justice Ross did not discuss what happens to the testatrix's property on intestacy, but the relevant rules are to be found in the *Intestate Succession Act*, RSA 2000 c I-10 (see section 70(2) of the Wills and Succession Act). Because the testatrix was not survived by a spouse or adult interdependent partner, the residue of her estate would, under section 4, be divided "*per stirpes* among the issue." Issue "includes all lineal descendants of the ancestor" according to the definition in section 1(b) of that Act. "*Per stirpes*" means each branch of the family receives an equal share. Because all of the testatrix's children survived her, each of her four children would receive one-quarter of her estate and the grandchildren would receive nothing.

D. Comments

I have little to say about the decision of Justice Ross itself. Counsel had narrowed the controversy to one specific issue, an issue dependent on the particular wording of one-of-a-kind document, and Justice Ross gave well-reasoned explanations for her interpretation of that document. There are not many lessons to be learned from the case as a matter of interpretation. Therefore, I want to focus my comments on matters not discussed by the court but illustrated by

the wills and codicils in the case. Despite the narrow controversy, the case is an example of a number of issues that arise repeatedly in situations involving the disposition of property on death. Thus, in this section I will address the notion of "dead hand control" over property, testamentary freedom of disposition of property, and invalid conditions on property dispositions.

1) "Dead hand control"

As I indicated in the introduction, this case illustrates the not-uncommon human tendency to try to use property to influence family members' behavior. These attempts to use property to control others may give a certain amount of grim satisfaction or pleasure to the makers of holograph wills. The manifestation of these attempts to control is referred to as "reaching from the grave" or "dead hand control."

Dead hand control involves imposing a condition of a gift to a beneficiary so that the beneficiary only gets the gift if they meet the condition. Some conditions protect beneficiaries from their own bad behaviour or financial mismanagement. More often conditions are imposed to promote certain lifestyles or to give beneficiaries incentives for work or education.

An infamous case of "reaching from the grave" is just now causing headlines in New York: see "Manhattan businessman's will ordered gay son to marry woman who gave birth to his child" in the August 19, 2012 *New York Post*. The will of the late Frank Mandelbaum stipulated that his son Robert's children would not receive any of the $180,000 trust set aside for the Mandelbaum grandchildren should Robert "not be married to the child's mother within six months of the child's birth." Robert Mandelbaum, a Manhattan Criminal Court Judge, had instead married his longtime partner, Jonathan O'Donnell, just after the birth via surrogate of their 16-month-old son. Robert Mandelbaum has challenged the provision in his father's will as a restraint on marriage and a violation of his equality rights.

The clearest example of dead hand control in the *Lubberts Estate* case involves the revoking of the testatrix's gifts of $4,000 to each of her grandchildren in her 2002 lawyer-drawn 2002 will. In her 2008 holograph will, the testatrix explicitly refers to her reasons for making those bequests:

> That Will has outlived its purpose which I hoped would inspire my grandchildren to save at an early age and develop the habit to add to their savings regularly so that they would be independent financially throughout their lives. To assist them I started giving every grandchild as well as my children financial presents on their birthdays. Some of them, knowing that the money came out of a not-so-large pension income, refused accepting it and started saving on their own; others "demanded" it.

Dead hand control often does not work as intended, especially when the purpose is to try to make the beneficiaries into "better" people. In this case it appears that the testatrix was satisfied that she was at least partially successful in encouraging in some of her grandchildren habits that she approved of with her *inter vivos* gifts. But it has to be noted that the testatrix did not confine herself to words of praise for those who behaved as she wanted; those who acted badly to her way of thinking were condemned for their selfishness. And because two of her codicils referred to letters in which she had stated her reasons for her actions, letters which would be much more

private than her will, I cannot help but think that it must have given her some satisfaction to state her mind in the more public will.

2) Testamentary freedom of disposition, or justifications for dead hand control

Why does the law allow conditional gifts of property on death? Testamentary dispositions were first allowed in the UK *Statute of Wills* of 1540 and the principle of testamentary freedom of disposition is well-recognized. One of the entitlements found in a property owner's usual bundle of entitlements is the right to alienate their property, both in life and on death.

In addition to general appeals to testamentary freedom of disposition, there are rationales for dead hand control specifically. Two articles have examined those reasons recently: J.C. Tate, "Conditional Love: Incentive Trusts and the Inflexibility Problem" (2006) 41 Real Property, Probate and Trust Journal 445 and Adam J. Hirsh and William K.S. Wang, "A Qualitative Theory of the Dead Hand" (1992) 68 Indiana Law Journal 1. Six justifications for dead hand control are identified by Hirsh and Wang:

- Because we all have a natural right to leave one's property to persons of one's choosing, a claim associated with philosopher John Locke
- Because it maximizes total wealth by encouraging work and savings during life, i.e., incentives to accumulate property
- Because it rewards beneficiaries for unpaid services rendered during the testatrix's lifetime
- Because the practice would be difficult to curtail in practice
- Because "father knows best", i.e., it permits more intelligent estate planning
- Because it comports with political preferences

Some think these lofty-sounding justifications are just window dressing for motives such as gratifying egos, gaining prestige, and increasing power (Hirsh and Wang at 8-9). Making a will has been called "an exercise of power without responsibility" because deceased persons do not suffer the consequences of their actions (Tate at 484).

An example of testamentary freedom of disposition in the *Lubberts Estate* case can be seen in the testatrix's decision in her 2004 and 2005 holograph codicils to exclude her grandson Anthony, a disinheritance that was perfectly within her power. Donors are at liberty to give their property away but beneficiaries have no right to receive that property — subject to statutory exceptions that require people to support their dependants. In this case, the *Dependants Relief Act*, RSA 2000 c D-10.5, would have been the statute that Anthony would have had to fit himself into in order to receive a share in his grandmother's estate, and there is nothing in the facts to suggest he would qualify. See my previous posts on this topic: "Restraining Disinheritance" and "It's Difficult to Disinherit Some Adult Children."

3) Invalid conditions

In addition to such statutory limitations on testamentary freedom, the common law has a number of rules that limit the types of conditions that testators can impose. Conditional dispositions of

property can be invalid for a number of different reasons including uncertainty, the ground relevant in the *Lubberts Estate* case. Conditions may also be contrary to public policy, void for violating the rule against perpetuities, or repugnant to the grant.

In the holograph codicils to the lawyer-drawn 2002 will in *Lubberts Estate* we see a number of conditions that might have raised the question of whether they were contrary to public policy had those codicils not been revoked by the 2008 holograph will. Courts are loathe to stop people from disposing of their property as they see fit, but there limits. Conditions restraining marriage, conditions stopping someone from taking up public office or joining the armed forces, conditions designed to bring about the separations of married couples, conditions interfering with the discharge of parental duties with respect to education or religion, and conditions designed to secure the performance of an illegal act are the types of conditions that have been found to be contrary to public policy and therefore void.

What of the "Special Declaration Re House" in the testatrix's 2005 codicil? She provided that "While I had hoped that my son, Paul . . . would live in my house after my death and leave it to his son eventually, I see myself forced to change these expectations. Under no condition will I want to allow Paul's "girlfriend", Laurie . . . to live in my house or to allow her to obtain any interest in my house, whether she and Paul are or get married or not." Is this contrary to public policy? In the 2002 lawyer-drawn will to which this 2005 holograph codicil applied, the house was lumped in with all of the testatrix's property and divided equally among all four of her children. The "Special Declaration Re House" does not change that gift. The expressed "hope" that Paul live in the house was just that: precatory language expressing a mere wish and not a legally enforceable obligation. The direction with respect to Laurie, as Justice Ross found (at para 29), "merely placed restrictions on who might live in the testatrix's house." Had the 2005 codicil not been revoked, this condition would likely not have been seen to be contrary to public policy.

The house and Paul are also the subject of another questionable conditional gift in the 2007 holograph codicil. The relevant disposition provides "My house . . . will become the property of my son, Paul J. Lubberts and my daughter, Irene Lubberts-Hanson, my son to live in the house and take care of it - he can not rent or sell the house to non-family members. He may - - with Irene's consent sub-let part of the house (e.g. the basement suite) but only to members of the immediate family". Had the 2007 holograph codicil not been revoked this disposition might have failed for uncertainty. The house appears to be first given to Paul and Irene as their exclusive property. Then Paul is directed to live in the house but told that he cannot sell it or rent it to non-family members. If Paul is the only one with the right (albeit circumscribed) to sell or rent, how can that be reconciled with the Paul and Irene sharing ownership? In addition to uncertainty, this provision also raises the problem of repugnancy. The condition that Paul live in the house and not rent it or sell it to non-family members appears to be a condition subsequent that is repugnant to the grant of the property to Paul and Irene and a serious interference with the right of alienation inherent in the ownership of a house. The class of family members is a very small class and so the interference is significant. Had the 2007 codicil not been revoked, the condition on this gift would likely have been found to be a condition repugnant to the grant.