

**CITATION:** Marsden v. Hunt et al., 2024 ONSC 1711  
**COURT FILE NO.:** CV-23-00710351-00ES  
**DATE:** 20240321

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** MARTIN MARSDEN, Applicant

**AND:**

THOMAS HUNT and SARAH WOOD, Respondent

**BEFORE:** M.D. Faieta J.

**COUNSEL:** *Shael Eisen*, for the Applicant

No one appearing for the Respondents

**HEARD:** March 21, 2024

**ENDORSEMENT**

[1] The Last Will and Testament of Janice Kay Hunt (“the Deceased”) was executed on July 5, 2019. The Deceased’s signature was witnessed by two people. The Will is missing a signature of one of the two witnesses. The missing signature was that of a former law clerk at the law firm that drafted the Will. The law clerk has sworn an affidavit that the Deceased signed the Will and that she witnessed the execution of the Will.

[2] The Deceased died in 2023. The Will left the residue of her Estate to her son, the Applicant. In her Will, the Deceased also appoints the Applicant as her Executor. The Applicant acknowledges that the Will is not valid given that it does not satisfy the requirement found in s. 4(2)(c) of the *Succession Law Reform Act*, R.S.O. 1990, c. S.26, (“SLRA”) that “... two or more of the attesting witnesses subscribe the will in the presence of the testator”. In all other respects, the Will appears duly executed pursuant to sections 3 and 4 of the SLRA.

[3] The Applicant seeks an Order declaring that the Will is validated pursuant to s. 21.1 of the SLRA and shall be admitted to probate as the Last Will and Testament of the Deceased. The Applicant also seeks an Order that he be appointed Estate Trustee with a Will of the Deceased’s Estate.

[4] Subsection 21.1(1) of the SLRA states:

If the Superior Court of Justice is satisfied that a document or writing that was not properly executed or made under this Act sets out the testamentary intentions of a deceased or an intention of a deceased to revoke, alter or revive a will of the deceased, the Court may, on application, order that the document or writing is as valid and fully effective as the will of

the deceased, or as the revocation, alteration or revival of the will of the deceased, as if it had been properly executed or made.

[5] Subsection 21.1(1) does not apply to electronic documents, nor does it apply where the deceased died before January 1, 2022: See SLRA, ss. 21.1(2), (3).

[6] A two-part test governs the application of s. 21.1 of the SLRA:

- 1) First, is the document authentic? In this respect, “absent any concerns about the validity of her signature, the document can be accepted as authentic, and even the complete absence of witnesses can be overlooked”: *McCarthy Estate (Re)*, 2021 ABCA 403, para. 14.
- 2) Second, does the document set out the “testamentary intentions” of the deceased? In *George v. Daily*, [1997] 3 W.W.R. 379, [1997] M.J. No. 51, paras. 62-65, the Manitoba Court of Appeal stated that for a document to set out the testamentary intentions of the deceased, the document must reflect a “fixed and final intention” as to the disposal of their property on death. Philip, J.A. stated:

62 Not every expression made by a person, whether made orally or in writing, respecting the disposition of his/her property on death embodies his/her testamentary intentions. The law reports are filled with cases in which probate of holographic instruments has been refused because they did not show a present intention to dispose of property on death. *Bennett v. Toronto General Trusts Corp.*, [1958] S.C.R. 392, was such a case.

63 In *Bennett*, the deceased's letter to her lawyer, a holographic document, contained details of "how [she] would like [her] will to be made out." Thereafter, until her death three and one-half years later, she met her lawyer on many occasions, both professionally and socially, but a formal will was never prepared. The court concluded that the letter was not written *animo testandi*; that it did not "record a deliberate or fixed and final expression of intention as to the disposal of property on death." The court's conclusion was supported by its findings that the deceased "did not want that letter to operate as a will;" and that "by her letter, she is committing to [her lawyer] both the finality of her decisions, if not of her deliberations, and that of the form in which they should eventually be expressed in a regular will, the preparation of which is entrusted to [her lawyer] himself."

64 In my view, in a similar fact situation today, the result would be the same, notwithstanding the enactment of s. 23. While the deceased's letter to her lawyer detailed the way in which she would like her will to be made out, the letter did not embody her testamentary intentions. Section 23 cannot be invoked to overcome the absence of that essential requirement of a valid will.

65 The term "testamentary intention" means 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: *Bennett; Molinary v. Winfrey* (1960), [1961] S.C.R. 91; and *Canada Permanent Trust Co. v. Bowman*, [1962] S.C.R. 711. [Emphasis added]

[7] The Applicant must satisfy the two-part test under s.21.1 of the SLRA on a balance of probabilities: *Cruz v. Public Guardian and Trustee*, 2023 ONSC 3629, para. 6.

[8] Turning to the evidence before me, I find that the document is authentic. There is unchallenged sworn evidence from one witness who states that they witnessed the Deceased sign the Will. There is no suggestion that the signature shown on the Will is not the Deceased's signature.

[9] In respect of whether the document reflected the testamentary intentions of the Deceased, I note that the title of the document states "THIS IS THE LAST WILL AND TESTAMENT OF ME, JANICE KAY HUNT ...". The document revoked previous Wills. It was signed by the Deceased. I find that the document sets out the testamentary intentions of the Deceased.

[10] Application granted.

Mr. Justice M.D. Faieta

**Date:** March 21, 2024