IN RE KRUSHEL ESTATE (WILL CASE)

In the Matter of Peter Krushel,

also known as Peter Kruszelnicki, deceased

Indexed as: Krushel Estate (Re)

(Gen. Div.)

1 O.R. (3d) 552

[1990] O.J. No. 2591

Action no. 121/90 Surr. Crt.

ONTARIO

Ontario Court (General Division)

Huneault J.

October 2, 1990*

*Received February 11, 1991.

Wills and estates — Wills — Formalities — Holograph will — Validity — Deceased writing "I want to leave my house and my money to (beneficiary)" — Document constituting valid holograph will.

Wills and estates — Wills — Revocation — Beneficiary of will tearing it up in presence of testator but not by his direction — Will not revoked by that act — Testator throwing pieces away — Revocation requiring destruction of will by testator or other person by his direction — Will not revoked by being thrown away.

The deceased, who was elderly and in frail health, repeatedly expressed a wish that his friend J have the deceased's house. On one occasion he wrote on a piece of paper: "I want to leave my house and my money to (J)". Concerned that the deceased was contemplating suicide, J tore up the paper in his presence. Several days later, the deceased killed himself. The torn-up paper was discovered in a garbage bag. J applied to have the "will" admitted to administration.

Held, the application should be allowed.

The piece of paper satisfied the statutory requirements for a holograph will. It was testamentary in nature as it contained a deliberate or fixed and final expression of intention as to the disposal of the deceased's property upon his death. It was a valid holograph will.

The tearing up of the will by J was not done by the direction of the deceased and did not, therefore, revoke the will. The deceased did not revoke the will by throwing it out. The

effective revocation of a will requires an act of destruction ejusdem generis with burning it or tearing it up.

Re Booth; Booth v. Booth, [1926] P. 118, [1926] All E.R. Rep. 594, 95 L.J.P. 64; Gill v. Gill, [1909] P. 157, 78 L.J.P. 60, 100 L.T. 861; Mills v. Millward (1889), 15 P.D. 20, 59 L.J.P. 23, 61 L.T. 651, *consd*

Other cases referred to

Bennett v. Toronto General Trusts Corp., [1958] S.C.R. 392, 14 D.L.R. (2d) 1; Canada Permanent Trust Co. v. Bowman, [1962] S.C.R. 711, 34 D.L.R. (2d) 106; Re Savage (1870), L.R. 2 P. & D. 78, 39 L.J.P. & M. 25, 17 W.R. 766; Re Turner (1872), L.R. 2 P. & D. 403, 27 L.T. 322, 21 W.R. 38

Statutes referred to

Succession Law Reform Act, R.S.O. 1980, c. 488, ss. 6, 15, 15(a) to (c), (d)

Authorities referred to

Webster's Dictionary, "leave"

APPLICATION for the admission of a will to administration.

D.

Peter Best, for Edwin Hugh Jones, applicant.

Jackie E.M. McGaughey-Ward, for Public Trustee, respondent.

James G. Murphy, for unascertained next-of-kin of Peter Krushel, respondent.

HUNEAULT J.:— The applicant is the named beneficiary in an alleged holograph will purported to have been made by the deceased Krushel on December 23, 1989.

The Public Trustee appears because of the possibility that the deceased had no next-of-kin.

Counsel appears on behalf of alleged next-of-kin in Poland, a fact as yet unascertained.

Facts

Peter Krushel died of a self-inflicted shotgun wound on December 25, 1989. He was then believed to be 86 years old and in frail health. He had immigrated to Canada in 1928, settled in the City of Sudbury and earned his living as a barber. He was believed to have two older sisters and a brother who lived in the Ukraine with whom he had little or no contact. There is a possibility that either a sister or a niece has survived him

in Poland but that is a fact which remains to be ascertained. Krushel himself never married and had no children.

Approximately 40 years ago Mr. Krushel and Mr. Jones became friends. They often hunted together. During the last ten years of his life the only close friend Krushel had was the applicant Jones. From about July 1988, Mr. Krushel's health rapidly deteriorated and his mobility was limited as he required the use of a cane or crutches. From the summer of 1988 to the time of death Mr. Jones visited his friend on a daily basis to see to his needs, such as shopping, payment of bills, housekeeping, visits to the doctor or the hospital.

On December 22, 1989 at approximately 1:30 a.m. Krushel called Jones and told him he was sick. Jones attended his home, then took him to the hospital. Krushel was released following an examination and returned to his home. The next morning Jones picked up medication which had been prescribed at the hospital and then attended upon Krushel to give him his medication which was in the form of pills. To ensure that his friend would take the pills as prescribed, Mr. Jones retained possession of the pills and on December 22 went to Krushel's home three times to give him his pills. He did the same on Saturday, December 23.

During Mr. Jones' first visit on December 23, Mr. Krushel told him to see a lawyer because he wanted to have his house placed in Mr. Jones' name, stating that he would continue to live in it but Mr. Jones would own it. Jones replied that he

didn't want his house. Jones then left to do some shopping for Krushel and on his return Krushel again indicated his desire to transfer the house to him, saying "don't fool around too long, I'm liable to kick off any time". He then told Jones to call John Ryan, a Sudbury lawyer, to make the arrangements. Mr. Jones called Mr. Ryan and arranged for an appointment on Wednesday, December 27.

Mr. Jones attended the Krushel residence a third time on December 23. During this visit Krushel handed him a small piece of paper with his handwriting which, it is agreed, complies in form with the requirements for a holograph will. As he gave this piece of paper to Jones, Krushel said to him: "Take this, I could kick off any time". The body of the writing reads as follows:

I WANT TO LEAVE MY HOUSE AND MY MONEY TO ED JONES.

Mr. Jones placed the piece of paper in his pocket and went home. He was bothered by Krushel's conversations of that day and for a fourth time on December 23, he returned to the Krushel residence. Mr. Jones states: "I was worried that Peter might do something, such as attempt to commit suicide". Once in the residence and in the presence of Mr. Krushel, Jones removed the "will" from his pocket, tore it up and left the pieces on the kitchen table. He then told Krushel that he could tell lawyer Ryan what he wanted when he saw him on the following

Wednesday. There was no reaction or comment from Krushel and Jones left the premises.

Mr. Jones returned to the Krushel residence twice on December 24. There was no further discussion about the “will” nor did he see the remains of it.

On December 25, Mr. Jones returned to the residence at 1:00 p.m. to deliver Krushel’s Christmas dinner as pre-arranged but Krushel did not answer the door. Jones made a number of phone calls to the residence during that afternoon but did not get an answer. He returned to the residence at 6:00 p.m. and looking through a window of the premises he saw Krushel lying on the floor. Jones broke into the premises and found Krushel lying in a pool of blood with a .20 gauge shotgun lying beside him. He had died of a self-inflicted shotgun wound.

On December 29, Mr. Jones re-attended the Krushel residence and set out to look for the “will pieces”. He found them in a shopping bag hanging on the door knob inside the kitchen. Also in this bag were some pieces of chicken skin and bone.

The above are the undisputed facts which I have reviewed in detail because of their obvious importance in determining the issues of: firstly, whether the “piece of paper” was a valid holograph will and, secondly, whether or not it was revoked.

The law re a holographic paper

Section 6 of the Succession Law Reform Act, R.S.O. 1980, c. 488, sets out the following:

> 6. A testator may make a valid will wholly by his own handwriting and signature, without formality, and without the presence, attestation or signature of a witness.

As previously stated it is agreed by all that the piece of paper and its written content satisfies the statutory requirements for a holograph will.

The important question to resolve, therefore, is whether or not this handwritten note on Krushel's part is testamentary in nature.

The authorities clearly establish that in order to be testamentary, a holographic paper must contain "a deliberate or fixed and final expression of intention as to the disposal of property upon death, and that it is incumbent upon the party setting up the paper as testamentary to show, by the contents of the paper itself or by extrinsic evidence, that the paper is of that character and nature". The law as such is confirmed in Bennett v. Toronto General Trusts Corp., [1958] S.C.R. 392,

D.L.R. (2d) 1, at p. 396 S.C.R., and followed in Canada Permanent Trust Co. v. Bowman, [1962] S.C.R. 711, 34 D.L.R. (2d) 106.

First conclusion

In my opinion the circumstances surrounding the writing of this paper leave no doubt that Mr. Krushel when he wrote the paper had a “deliberate or fixed and final expression of intention as to the disposal of property upon death”. The evidence reveals that when he first spoke to Mr. Jones about transferring his house to him his intention was to make a gift inter vivos subject to his right to continue to reside in the premises. However, as the hours passed on December 23, and when one looks at the sad event of December 25, it appears quite clear that Mr. Krushel was already planning his demise at his own hand and he was not prepared to wait another four or five days to see a lawyer. He therefore resolved to ensure that, following his death, his house and his “money” would go to his friend, Ed Jones. To do so he exercised his only immediately available means, a holograph will. It is not at all surprising that he would choose Mr. Jones as the beneficiary since Mr. Jones had been a friend of 40 years who devoted much of his time to Mr. Krushel’s welfare. There was really no one else whom Mr. Krushel cared for. He had had no contact with his two sisters since he had left them behind in the Ukraine in 1928, and he had also heard of his only brother’s demise.

I further find that the document itself is of a testamentary character. He uses the expression “I want to leave” The word “leave” is commonly used in the context of a bequest. It is

in fact one of the meanings stated in Webster's Dictionary: "to bequeath; to give by will".

I therefore find that the paper in question was a valid holograph will.

Law re revocation of a will

Section 15 of the Succession Law Reform Act sets out the only means by which a will can be revoked. Subsections (a) to (c) inclusive are irrelevant to this case. The relevant parts of s. 15 provide as follows:

> 15. A will or part of a will is revoked only by,
> (d) burning, tearing or otherwise destroying it by the testator or by some person in his presence and by his direction with the intention of revoking it.

For well over 100 years it has been the law that a will can only be revoked by one of the modes indicated by statute: Re Turner (1872), L.R. 2 P. & D. 403, 27 L.T. 322, 21 W.R. 38; Re Savage (1870), L.R. 2 P. & D. 78, 39 L.J.P. & M. 25, 17 W.R. 766. If not so revoked, the will remains in force.

The case of Mills v. Millward (1889), 15 P.D. 20, 59 L.J.P. 23, 61 L.T. 651, was a case similar to the one at bar. In that case, Mrs. Millward was the sister-in-law of the testatrix. Not happy with the fact that neither she nor her husband were to

share in the estate, Mrs. Millward, in the presence of the testatrix, tore up the will and threw the fragments into the fire. Although advised to do so Mrs. Mills refused to make another will stating, “No, I shall never make another will, let it remain as it is” and also “I shall not make another, I never could bring my mind to it”.

In obiter dicta, Butt J. raised the question whether, where a will has been destroyed in the circumstances described, any subsequent ratification of the act of destruction will make it a revocation within the then s. 20 of the Wills Act, the relevant wording of which was identical to that found in our s. 15(d) of the Succession Law Reform Act. Since it was not necessary for him to decide the point, he merely expressed a strong doubt that such acquiescence or ratification by the testatrix was tantamount to a destruction by the testatrix and by her authority.

Butt J.’s obiter in the Mills case was referred to with approval in the case of Gill v. Gill, [1909] P. 157, 78 L.J.P. 60, 100 L.T. 861. Bargreave Deane J. said the following at p. 160 P.:

If it was not done with the testator’s authority at that time (tearing up of the will), no amount of authority afterwards can be brought into play so as to ratify it. If a testator under such circumstances desired that the act of

destruction, performed without his authority at that time, should prevail he had it in his power to effectually revoke his will in accordance with the provisions of the Wills Act. He could either execute a document expressly revoking his will, or he could make a fresh will dealing with his property in any way he chose.

The Gill case was referred to with approval in the case of Re Booth; Booth v. Booth, [1926] P. 118, [1926] All E.R. Rep. 594, 95 L.J.P. 64, at p. 601 All E.R. Rep., p. 132 P. To the best of my knowledge, this remains good law.

Conclusions on the issue of revocation

On the facts before me as previously reviewed, I find that the tearing up of the Krushel will by Jones was not done by the direction of the testator and, therefore, that act of tearing up did not revoke the will.

Does the fact that the will was found in a shopping bag which also contained what can't be described as anything other than garbage constitute destruction with the necessary element of animus revocandi? Since on the facts it appears that the only person visiting Krushel during his last days on this earth was Mr. Jones, and since he had left the torn pieces on the kitchen table, the only reasonable inference which can be drawn is that Mr. Krushel is the one who placed the pieces of his will or, if

one prefers, the one who threw it in the shopping bag with some other garbage. The act of throwing the will in with some garbage is equivocal. It could very well have been done accidentally or it could have been done by the testator, not because he wanted to revoke his will, but simply because he thought it was no longer valid since Mr. Jones had torn it up. In any event I find that the will was not in law revoked by disposing of it in the manner which Krushel did. I am of the opinion that to effectively revoke a will, the Succession Law Reform Act requires an act of destruction ejusdem generis with burning and tearing. The word “destroy” used in s. 15(d) connotes an act of physical violence which ruins or renders useless the target of destruction. In my opinion the throwing away of what I have found to be a valid will, notwithstanding the fact that it had been previously torn up, does not constitute revocation as required by s. 15(d) and the will remains in full force and effect.

I accordingly order that the will of Peter Krushel be admitted to administration.

All parties are to have their costs as assessed on a solicitor-and-client basis, and payable out of the estate.

Application allowed.