COPY

IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20060314
Docket: L042337
Registry: Vancouver

Between:

Shelley-Mae Boyd Reeves

Plaintiff

And:

Christina Elam, Helen Meadows, Jean Sinkinson, Lilace Francis, Darrol Pedden, Eva Tomkinson, Gordon Pedden, Alan Warner and David Warner, Executors of the Estate of Ethel Warner, Deceased, Emily Curlew, Betsy Rees, Martha Rees and Amanda Inwood

Defendants

Before: The Honourable Mr. Justice Rice

Oral Reasons for Judgment

In Chambers
March 14, 2006

Counsel for Plaintiff	R.T. Todd
Counsel for Defendants	G.C. Baldwin
Place of Hearing:	Vancouver, B.C.

[1] **THE COURT:** This is an application under Rule 18A for an order that an unsigned form of will allegedly of the late Elizabeth Isabella Bothwell, ("deceased"), be pronounced in solemn form and for a grant of letters of administration with this will attached to be ordered in favour of the plaintiff.

[2] The plaintiff is a dental assistant, who lives in New Westminster. She knew and was close to the deceased practically all of her life.

[3] The deceased died at the age of 77 on October 26, 2002. She was a widow with no children and her next of kin were distant relatives not close to her.

[4] The deceased had signed a previous will at some time - I believe in about 1956 - but there is no issue about that.

[5] What is at issue is the form of will apparently drawn around the 16th of February, 1984. In that form of will, there are purported gifts of chattels to a cousin of the deceased, Lilace Francis; her home to Mischa and Diana Sanderson, (she still owned the house at the time of her death); and, in any event, the residue to the plaintiff, whom she described as her goddaughter.

[6] There is a presumption of law when a lost will is traced to the possession of the testator that the will was disposed of with the intent to destroy it, and the onus is on the claimant to rebut that presumption on a balance of probabilities. To succeed, a plaintiff has the burden of proving: due execution, the tracing of the will to the possession of the testator, rebuttal of the presumption of revocation, and proof of the contents of the will.

[7] The ***Wills Act*** requires certain formalities to be followed in the execution of a will. The evidence of the execution of the deceased's 1984 will comes in the form of a wills book from the law office of Douglas Hunter who acted as solicitor for the testator in 1984 and before that. According to Mr. Hunter's son, who was also a lawyer and who was then working with his father, his father's wills practice followed a set formality. In an affidavit dated December 1, 2005, he says:

> 6. My father's usual practice was to take wills instructions from his clients and prepare a draft will. Time permitting my father would then forward a draft copy of the will to the client for review and then consult the client to see if any changes were required before the client came back in to execute the will or to take instruction or to take the will elsewhere.
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> 7. My father had a well established practice with respect to the execution of wills and for the record keeping of records -- and for the keeping of records for each will executed in our office. This record was contained in the wills book and the wills folders. In the wills book my father kept a record of the preparation and execution of each will and recorded the sequentially numbered wills folder where the copy of the will as executed would be filed for record keeping. It was my father's standard practice to note these matters for each client's will in the wills book and to keep a copy of each will executed in our office in the wills folder. He or his secretary at the time of execution would also record in the wills book next to the date of execution of the will the number of the relevant wills folder.
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> 9. My father's standard practice for wills to be executed outside of our office was to note in the wills book that the original was mailed to the client and to record the date of mailing.
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> 10. For each will prepared by my father to be executed at our office he or his secretary would record in our wills book the name of the testator, the date of the execution, the disposition of the original will -- of the original of the will and the number of any relevant wills folder. If the client wished our firm to retain the original will, a notation would be made to the effect that the original was on file. If after execution the client took the will, the notation in the book would read "orig taken," and an unsigned copy of the executed will would be placed in the numbered wills

folder with the relevant folder number recorded in the wills book entered for the client. As a matter of standard practice a copy of the will which my father placed or had placed in the relevant wills folder was an unsigned copy of the executed will.

14. Exhibit A includes an entry which appears to refer to the will of Ms. Bothwell. It reads:

    Bothwell: Elizabeth Isabella (orig taken) Feb 16/84 (54)

    According to my father's wills practice, the meaning of this entry in our wills book is unmistakable. It means that Ms. Bothwell executed her original will at our office on February 16, 1984, and she took the original away with her and my father or his secretary placed a duplicate unsigned copy of the will in our wills folder number 54.

18. To my knowledge there has never been an entry made in our wills book indicating that the original will was taken unless the document had already been signed and witnessed in accordance with the requirements of the ***Wills Act***. Indeed, since 1996, I appropriated at least 50 estates involving wills prepared by my father and note it in the wills book with the notation "orig taken." With the exception of Ms. Bothwell, in every one of those 50 cases the original wills were located and produced to me by the testator's representative so that letters probate could be obtained.

[8] The plaintiff herself lays out a credible account of herself. She says that she and the defendant were close. The defendant had no other close relatives.

[9] The deceased told the plaintiff that she was leaving a gift for her in her will and discussions in this regard are recorded in the affidavit of the plaintiff. This is the affidavit of the plaintiff sworn the 16th of May, 2005. She says at paragraph 3:

3. Four days before she died, Betty, that is, the deceased, described to me where her will was located. Following her instructions, I found an unexecuted copy of a will in the location she described. According to that unexecuted copy of Betty's will, dated February 16, 1984, I am the sole surviving beneficiary named in that will. Unfortunately, however, the original cannot be located.

4. I believe that Betty never revoked the original will, but rather lost it. She may either have misplaced or inadvertently destroyed the original will. From what Betty told me four days before her death, it appears she believed that the copy of the will was actually the originally signed will. Up until a week before her death Betty was a busy active woman with her full mental faculties. She was very engaged in life and in her church community. She was extremely sociable and personable, and thus, had a broad social network. She lived alone, drove her own car and was the president of our church altar guild. At the time of her death, Betty was a childless widow who was 77 years of age. She had no siblings and to the best of my knowledge no blood relatives with whom she was very close. Until her death, Betty Bothwell and I remained extremely close sharing a surrogate mother/daughter relationship.

10. As well as being close neighbours, our families soon became good friends. Betty's husband, Frank Bothwell, and my father both belonged to the Zenith Masonic Lodge, which was another catalyst for our close family friendship.

[10] I am moving to paragraph 32:

32. In the summer of 2002, a couple of months before her death, Betty had talked to me about her funeral arrangements. She gave me specific instructions as to which funeral director I should deal with, where she wished to be buried and the fact that she already owned the prepaid plot next to her husband's grave. During that discussion we did not discuss her will.

33. When I visited Betty on Wednesday evening before her death, I raised the topic of her will and asked her where it was. She told me it was in the bedroom in a folder and she gestured to describe the type of folder. She made gestures to show that the folder covers closed over each other. I checked later that evening and found a copy of Betty's will in her bedroom in a folder which matched the description she had given through her words and gestures.

39. I did not raise with Betty the question of where the original will was located because I assumed it was either in a safety deposit box or with her lawyer and I did not know that Betty's death was imminent.

40. On Wednesday evening when Betty directed me to the folder containing her will, Betty made no mention of destroying or revoking her will. During that discussion she clearly appeared to believe that the life insurance folder contained her will, whether it be the original will or a copy of the original will.

41. I knew from what Betty had told me over the years that the named executors were dead, and I, thus, took care of Betty's funeral arrangements following her wishes as expressed to me during the previous summer. I personally paid Betty's funeral expenses in the amount of $6,700.

43. Although Betty was a wonderful person, housekeeping was not her strength. Betty was a hoarder who hated to throw things away and unfortunately did not seem interested in organizing her belonging. As a result, both of her homes were extremely chaotic. Both were cluttered with memorabilia and all kinds of documents, everything from obituaries and other newspaper clippings, to recipes, knitting and sewing patterns, to large numbers of Women's Weekly magazines.

44. In 1991, Betty decided to downsize and move to a condominium. Over the years she accumulated a lifetime of possessions and also inherited those previously accumulated by her parents. As a result, there was an overwhelming amount of personal possessions to be sorted through and culled.

49. In my discussion with Betty on the Wednesday evening before her death, she clearly believed she had a valid will. She made no mention of losing or revoking her will. Instead, she directed me to a precise location where I found an unsigned copy of the will.

50. In Betty's purse, which I retrieved from the hospital, was a keychain with several keys including one that appears to be to a safety deposit box. I have, however, been unable to locate any safety deposit box.

52. I believe Betty's last will was simply inadvertently lost and that Betty never intended to destroy or revoke that will.

53. The original will may be in a safety deposit box somewhere, may have been inadvertently discarded when Betty moved in 1991, or may have been otherwise inadvertently destroyed or lost in the mass of disorganized papers Betty kept.

[11] These sworn statements by the plaintiff are consistent with similar statements from a number of other affiants beginning Gertrude Mazure. At paragraph 6 of her affidavit, she said:

> 6. I observed over the years that Betty and Shelley were extremely fond of each other and were very close and remained close until Betty's death. I also observed Betty and Shelley spend a lot of time together.
>
> 7. Over the years Betty told me that when she passed on Shelley was going to be well looked after. This statement clearly implied to me that Betty's plan was to leave her entire estate to Shelley. In addition, she also told me about certain items that she wanted Shelley to have on her death, such as her silver tea service.
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> 9. I believe Betty's wishes to leave her estate to Shelley had not changed prior to her death and that at her death her wishes remained just the same as they had throughout the years.

[12] There is the affidavit of Mary Hanley at paragraph 5:

> 5. I am aware that Betty did not have any family outside of distant cousins. Betty never spoke to me about the relatives to my knowledge.

[13] Incidentally, Ms. Mazure is a lifelong friend of the deceased.

[14] Mary Hanley was a long term friend, and at paragraph 7 of her affidavit she says:

> 7. I am also aware that Betty had a very close and loving relationship with Shelley that remained close and loving until Betty's death.
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> 9. During the years that Betty, Shelley and I resided in Burnaby I recall Shelley and Betty were together all the time. I recall Betty and Shelley spent holidays together as well as attended the same church and shared other activities as well.

> 11. Over the years on more than one occasion Betty openly told me in passing that upon her death she wanted to leave everything she owned to Shelley. I recall that her exact words were, "I will leave things to Shelley." This direct statement implied to me that Betty's wishes were for Shelley to become the sole beneficiary of her estate upon her death.
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> 12. It is my belief that Betty intended to leave her entire estate to Shelley. Betty never once spoke to me about any alternative plan or plan she had with respect to disposition of her estate. The only plan Betty every spoke of was to leave her estate to Shelley.

[15] Then there is Dorothy Vorquette at paragraph 6 of her affidavit had known the deceased since they were both nine or 10 years old, they had gone to Sunday school together and remained close friends their entire life. At paragraph 6, she swears that Betty and Shelley were very close to each other and Betty referred to Shelley as her goddaughter:

> 8. In the course of our friendship Betty conveyed to me that it was her intention to leave her estate to Shelley. Betty's words to me were "Shelley will get whatever is mine."
>
> 11. Approximately one week prior to Betty's death Betty mentioned to me that Shelley was very faithful to her and visited her often in the hospital.
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> 12. During the course of Betty's life she never at any time made any other comments to me about what she intended to leave her estate -- about who she intended to leave her estate to other than the stated to me that Shelley was going to get whatever she had.

[16] There are other affidavits from Jeanette Stieger, a retired parish priest, in the same vein. Similarly from Olive Hall, a friend of 50 years, and others: Phyllis Francis; Eva Tomkinson; and David Tashvon, another retired parish priest.

[17] David Tashvon in his affidavit said at paragraph 10:

> 10. On many occasions over the years Betty told me that Shelley-Mae would be the recipient of her estate after her death. Betty clearly stated to me that Shelley-Mae was to be her only heir. This stated intention seemed both natural and obvious given the mother/daughter-type relationship that I observed between them. The last time Betty confirmed to me that Shelley-Mae was to be her sole heir was during the last year of her life, although I do not recall precisely when during that year Betty last made such a statement. The very close bond between the two women endured until the time of Betty's death.

[18] Now, Mr. Baldwin for the defendant challenges the due execution of the will. In his examination of Mr. Hunter Jr., he found admissions that the office and in particular the wills practice was not well organized. He claimed that Mr. Hunter admitted not knowing how the document was signed. He pointed to the wills book and the entry "orig taken" is in itself an ambiguous statement, and that, in fact, there was no actual witness who could come forward to give evidence of what actually happened. There was no notice sent to the Wills Office.

[19] I have reviewed the transcripts of the examinations on affidavit and the examinations for discovery of those who were examined and I do not agree with Mr. Baldwin's interpretation. Although there are some passages which indicate less certainty, they do not detract from what is stated in the affidavits that I have quoted. Mr. Hunter's description of the practice in no uncertain terms supports the inference that Mr. Hunter Sr. first sent the defendant a draft that was the same as the document in his office except that it had a note "copy" and then handwritten on the front the words "please phone if this is okay," and it was -- the will -- that will itself was undated. It describes Francis Lilace as a friend whereas the one from the office calls Ms. Lilace a cousin and the will is dated, and it seems to me that a natural

inference is that the will located by the plaintiff was the draft sent according to Mr. Hunter's regular practice. The one at Mr. Hunter's office was the final document corrected after some discussion.

[20] The wills book was adequately described and characterized as a journal to enter particulars of duly executed wills invariably, and I find on a balance of probabilities that the original will of 1984 was duly executed. For those reasons, I find that the document, that is, the original will, was most probably taken by or sent to the deceased. I find that the hearsay evidence of the friends of the deceased to the effect that the deceased often talked about leaving all of her estate to the plaintiff is credible, it is necessary, it is reliable, and the remarks of those witnesses in their affidavits were made for good reason. The plaintiff was the closest person to the deceased in the world.

[21] Mr. Baldwin read in discovery transcripts and he just recently passed me, and I thank him very much for it, one more part of a passage to clarify the whole of the series of questions on those pages. Mr. Baldwin's argument is to the effect that when the plaintiff alleged that she was told by the deceased where her will was, it was not actually stated in those terms; they were only hand motions of some kind. I see that as a misreading of the transcript in context. I do not see -- in the questions that the plaintiff was taken directly to in her evidence on affidavit that there is an ambiguity. What is ambiguous is the wording from the transcript. I find, at least in my mind, that her discovery answers do not detract from the clear and certain recollection that the plaintiff had of her communications with the deceased as she has alleged.

[22] Now, Mr. Baldwin further in his thorough dealing with this matter noted one good reason why the deceased may have wanted to destroy the will, and he did not need to remind me that it was not for the defendant to prove that there was such a good reason, it was for the plaintiff to show beyond a reasonable -- or to show beyond -- on a balance of probabilities that there was not another reason. That other reason, says Mr. Baldwin, lies within the will itself.

[23] A major asset of the estate is earmarked for Mr. and Mrs. Sanderson; it was later sold leaving an open question as to what the testator may have wanted done with the proceeds of that sale. I cannot agree that that raises a doubt. The will itself provides for the residue to go to the plaintiff and there is no evidence of any outstanding sentimental choice other than the plaintiff or reason to suspect that there might be.

[24] It is the natural and logical conclusion that as the deceased lay dying she believed that she had a will, which was the will that was found and unsigned, and that that document truly expressed her testamentary wishes and she believed that there was -- that she had the valid will that she had indeed signed before Mr. Hunter on February 16, 1984.

[25] As for the contents of the will, this must be established beyond a reasonable doubt, and it is by virtue of the document before me that I am able to draw that conclusion in this case. It is consistent with all of the testimony of Mr. Hunter and the other witnesses who knew her, and so I do find that the will was validly executed, not destroyed with an intention to revoke it, and I order that that form of will be

pronounced in solemn form and that a grant of letters of administration with will annexed be ordered in favour of the plaintiff.

[26] Is there any submission on costs?

(DISCUSSION BETWEEN THE COURT AND COUNSEL RE COSTS)

[27] THE COURT: Scale 3 party party costs to the defendant.

Rice J.