

CANADA / JUDGMENT

Andersson v. Khan et al

2006 BCSC 521

COURT

Supreme Court of British Columbia

DECIDED

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2006 BCSC 521 Andersson v. Khan et al

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Andersson v. Khan et al,

2006 BCSC 521

Date: 20060331

Docket: SO24448

Registry: New Westminster

Between:

Sari Andersson

Plaintiff

And

Sharaf Khan and Insha Khan as Executors of the Estate of Latif Ahmed Khan,

Sharaf Khan, Insha Khan, Matloob Khan, and Saquib Khan and Ayeeda Khan

Defendants

Before: The Honourable Mr. Justice Williams

Reasons for Judgment

Counsel for the Plaintiff:

N. Davies

Counsel for the Executors of the Estate of Latif Ahmed Khan:

D. Creighton

Defendants appearing in person on their own behalf:

Sharaf Khan, Insha Khan,

Matloob Khan, Saquib Khan,

and Ayeeda Khan

Dates and Place of Trial:

December 13, 14, 15 and 16, 2004

February 4, 2005

September 9, 2005 -

Oral Submissions

New Westminster, B.C.

Background

- [1] This litigation arises out of the estate of the late Dr. Latif Ahmed Khan. The plaintiff, Sari Andersson, is his youngest daughter; the defendants are his two youngest sons, acting as executors of his estate and in their personal capacity, as well as three other siblings.
- [2] Mr. Creighton represented the estate of the deceased and the executors in their capacity as executors. None of the individual defendants were represented at trial although each testified. None of the individual defendants made submissions.
- [3] In addition to the dates of trial, written submissions were made and counsel appeared for the purpose of oral submissions on September 9, 2005.
- [4] As the background circumstances are somewhat complicated, I will attempt to provide a brief summary in order that the discussion of the issues can be more readily understood.
- [5] Dr. Khan and his wife originated in Pakistan. They moved to Hong Kong in approximately 1957 and subsequently came to Canada in October 1969. There are a total of six children of the marriage, each of whom is a party to this proceeding.
- [6] Dr. Khan was an ophthalmologist.
- [7] Upon coming to Canada, the family settled in Burnaby, B.C. A family home was acquired on Burnlake Drive in Burnaby. Initially, the property was in the name of one of the children. It was subsequently transferred to Mrs. Khan, and then transferred to Mrs. Khan and Dr. Khan in joint tenancy. In 1982, they transferred the title to themselves and their youngest son Sharaf, as joint tenants. Sharaf lived at home and apparently had a close relationship with his parents, providing them with help and assistance.

- [8] In 1982, both Dr. and Mrs. Khan were hospitalized. Although Dr. Khan had made a will previously, he gave instructions for the preparation of new wills for both himself and his wife. These instructions were provided to Sharaf who attended upon a lawyer and requested that the appropriate wills be drawn. Upon that being done, Sharaf delivered the wills back to his father and mother at the hospital and those wills were executed by the two parties respectively; each indicates June 22, 1982 as the date of execution. Dr. Khan's will (the "1982 Will") was identical to Mrs. Khan's will. Each will provided for the surviving spouse to receive the entire estate. In the event that the other spouse was not alive to take the estate, they provided for Sharaf to receive any motor vehicle that Dr. Khan should own at the date of his death, the lands and premises at Burnlake Drive and the contents of the home. The residue of the estate was to pass to another of their sons, Insha. The 1982 Will provided for Sharaf and Insha to act as executors. No provision was made for any of the other issue.
- [9] A Wills Notice was filed in June 1982 indicating that the 1982 Will was kept at Dr. Khan's bank.
- [10] Mrs. Khan died in 1983, leaving Dr. Khan and Sharaf as joint tenants on the Burnlake property title.
- [11] Following his wife's death, and until 1987, Dr. Khan spent a substantial time in Pakistan, returning to Canada from time to time.
- [12] On all the evidence, it can fairly be said that Dr. Khan was a difficult personality. He had a tendency to make unreasonable demands upon his children and was given to conflict and confrontation with them, in that he could be controlling and unpleasant. From time to time he prepared wills that reflected his particular disposition at the time, although there is no specific evidence of any of those before this Court, nor is there evidence that any of them were ever executed. In his latter years, he appears to have spent an substantial amount of his time engaged in correspondence and discussions with various of his children, some to a greater degree, others much less so. At least one of the children testified that he often played "head games" with people and could be quite difficult and quarrelsome. It also appears to me that he presented differently to his children in different ways. While his letters seem to be rambling, often "testing" and assessing them, finding fault with them, it may be that his actual disposition toward them as presented in telephone conversations was less acrimonious. The relationship was certainly complex. It can however be safely stated that he spent considerable time and energy in his dealings with them.
- [13] From 1987 until 1990, Sharaf lived in the Burnlake residence. In 1991, his wife's employment necessitated a relocation and he moved to Ontario. That same year, the plaintiff, her spouse and their son, moved into the property. Evidently, no rent was paid and there was some arrangement between the plaintiff and Dr. Khan, although the details are not clear.
- [14] While residing at that property, the plaintiff and her son undertook very significant renovations, both with respect to the interior of the home as well as the exterior (construction of a large garage) and significant structural changes to the topography of the

yard. There was substantial disagreement between the plaintiff and Sharaf as to the wisdom, practicality or necessity of these changes. As well, the evidence indicates that there were a number of occasions upon which the municipal authorities made known to the plaintiff their concern that the work was not properly completed.

[15] From 1987 until his death in December 1994, Dr. Khan resided in Pakistan.

[16] On December 14, 1994, Dr. Khan lost his life in a motor vehicle accident in Islamabad, Pakistan. There was some difference of opinion between the plaintiff and her siblings as to what ought to be done with their father's remains. The plaintiff travelled to Pakistan and took charge of matters. She arranged for the body to be embalmed and transported to Canada for a memorial service and burial in Canada. This was contrary to the wishes of the others.

[17] Some time after the death of Dr. Khan, the plaintiff came forth with a will which appears to have been made and executed by Dr. Khan in Pakistan on October 14, 1993 (the "Pakistan Will"). In that will, he revokes all former wills and codicils and leaves all of his estate to her, that is, the plaintiff Inkasari Andersson. In the Pakistan Will he states as well the basis of the exclusion of all of his other children, setting out a number of grievances with their conduct.

[18] There is no evidence that Dr. Khan made any will after the Pakistan Will.

Issues

[19] This case presents the following issues for determination:

1. Is the 1993 Pakistan Will valid and enforceable? If not, is the 1982 Will of Dr. Khan valid?
2. Does the plaintiff have a right to be compensated for repairs and renovations made to the Burnlake property?

[20] If the Pakistan Will is a valid and subsisting will, then it will supersede any prior will, including the 1982 Will. In the event it is determined that the Pakistan Will is not valid, then it will be necessary to consider the validity of the 1982 will. In the event neither will is found to be valid, then presumably there would be an application of the intestacy rules. It would then be necessary to consider the defendants' submission that this Court should vary the disposition to exclude the plaintiff from taking any benefit from the estate.

[21] At one point, it had been contended that the defendant Sharaf Khan was not entitled to the one-half interest in the Burnlake property, but rather that he held it in trust. That issue was litigated before this Court and the decision of Lowry J. (as he then was), released September 13, 2000, resolved the matter. He held there that the one-half interest was vested absolutely in Sharaf Khan.

Positions of the Parties

The Plaintiff:

- [22] The plaintiff says that the Pakistan Will is proper and should be found by the Court to be valid, subsisting and enforceable. She says that an examination of the correspondence between herself and her father is significantly supportive of the proposition that the testator had become most displeased with the other children and relied more and more upon her. She says that the correspondence indicates a clear intention that she would be his executor and sole beneficiary. In her submission, the evidence that has been adduced concerning the actual making of that will should satisfy the onus of proof that she must meet as a propounder of the will. She rejects the allegation of the defendants that the will is a forgery or that the circumstances of its making are irregular or dubious.
- [23] With respect to the 1982 Will, she says that it is presumptively revoked and since it was executed under suspicious circumstances, the defendants have the onus of proving its enforceability, which they have not proven.
- [24] With respect to the repairs and rent claim for the Burnlake Drive property, it is her position that the repairs were authorized by her father and that the estate is obliged to compensate her for the value of the repairs and improvements that she performed, in the event that the Pakistan Will is not upheld.

The Defendants:

- [25] The defendants say that the evidence at trial proves that the Pakistan Will was a fake and is of no force or effect.
- [26] With respect to the 1982 Will, they say that, although the original has not been located, a copy was found in the solicitor's office. They say that the original copy of the will should be found to be the last Will and Testament of Dr. Khan and it should be given effect by this Court, although it should be varied according to the Wills Variation Act, R.S.B.C. 1996, c. 490. Specifically, they submit that the conduct of the plaintiff has been so outrageous and offensive that she should be disentitled to any share of the estate. In their submission, if the 1982 Will is not upheld, the estate should be shared equally among the other five children.
- [27] They also submit that the plaintiff is not entitled to any compensation for the repairs to the Burnlake Drive property as they were unauthorized, unnecessary and substantially decreased the value of the property. They note as well that the plaintiff lived there for a considerable time without having paid rent.

Analysis and Findings

Jurisdiction:

[28] Although Dr. Khan spent the last number of his years in Pakistan and probably did not return to Canada for the last five years of his life, all parties to this action agree that the proper forum for the resolution of these claims is this Court. Dr. Khan was a Canadian citizen and the evidence indicates that it was his intention to return. Canada remained his domicile for the purpose of this litigation. The property that comprises the vast bulk of the estate remains in Canada and all of the litigants are residents of Canada.

Requirements of a Valid Will:

[29] A valid will must comply with the formalities set out in the Wills Act, R.S.B.C. 1996, c.489, which requires that:

- (1) The will be in writing (s.3).
 - (2) The will be signed at its end:
 - (a) by the testator; or
 - (b) by another person in the name of the testator, in his or her presence, and by his or her direction (s.4(a)).
 - (3) The signature be made or acknowledged by the testator in the presence of two or more witnesses who are present at the same time (s.4(b)).
 - (4) Two or more attesting witnesses subscribe the will in the presence of the testator (s.4(c)).
 - (5) The testator be at least 19 years of age (s.7).
- [30] If a will is made outside of British Columbia, pertaining to movable property within British Columbia, s.40 of the Wills Act provides that it will only be admitted to probate if, at the time it was made, it would have been valid in the place where the will was made; where the testator was domiciled when the will was made; or where the testator had his or her domicile or origin.
- [31] In addition to the above requirements, the testator must have testamentary capacity at the time the will is made: *Dacyshyn v. Dacyshyn Estate*, [1996] B.C.W.L.D. 1179, [1996] W.D.F.L. 841 at ¶31; *Benekritis v. Gilbert Estate*, [1998] B.C.J. No.171 (Q.L.) at ¶40. The test often applied for determining testamentary capacity was set out in *Re Sample*, [1955] 3 D.L.R. 199, 15 W.W.R. 193, at 208 as follows:

It is necessary for the validity of a will that the testator should be of sound mind, memory and understanding, and has sufficient capacity to appreciate the various dispositions of property to which he is about to attach his signature. In order to constitute a sound disposing mind, a testator must understand that he is giving his property to one or more objects of his regard and must also have the capacity to comprehend the extent of his property and the nature of the claims of others to whom he is giving nothing under the terms of the will. While, generally speaking, the law presumes sanity, when the will is impeached, the burden of proof is on those, who propound the will, to establish that the testator was of sound mind at the time of its

execution: *Banks v. Goodfellow* (1870), 39 L.J.Q.B. 237 at p. 240; *Tyrrell v. Painton*, [1894] P. 151.

[32] The court in *Re Sample*, went on to apply the principles set out by Viscount Dunedin in *Robins v. Nat'l Trust Co.*, [1927] 2 D.L.R. 97, A.C. 515 at 99-100 wherein he stated:

Those who propound a will must show that the will of which probate is sought is the will of the testator, and that the testator was a person of testamentary capacity. In ordinary cases if there is no suggestion to the contrary any man who is shown to have executed a will in ordinary form will be presumed to have testamentary capacity, but the moment the capacity is called in question then at once the onus lies on those propounding the will to affirm positively the testamentary capacity

[33] A testator is therefore presumed to have testamentary capacity until that capacity is called into question, at which point, the onus shifts to those propounding the will to establish the validity of the will which includes testamentary capacity.

[34] In the absence of suspicious circumstances, a presumption is created that the testator knew and approved of the contents of the will: *Benekritis v. Gilbert Estate*, supra at ¶45. This is sometimes referred to as the "doctrine of suspicious circumstances," which was set out by the Supreme Court of Canada in *Re McWilliams*, [1931] 3 D.L.R. 455 (S.C.C.) at 456:

When it has been established that a will has been duly executed by a testator having testamentary capacity, and also established that it was read by, or read over to, the testator before execution, there arises ordinarily, in the absence of suspicious circumstances, a strong presumption that he knew and approved of its contents, but there is no inflexible rule on the subject. If, however, there are circumstances which arouse the suspicions of the Court -- as, for example, if the will was prepared by a person who takes a benefit under it -- the party propounding the will must remove the suspicion by proving that the testator knew and approved of the contents of the document, and it is only when this has been done that the onus of proving fraud or undue influence is thrown on the opponents of the will.

[35] The conduct of a solicitor in drafting the will may be examined to determine whether the circumstances support the capacity of the testator in making the will. In *Friesen v. Friesen Estate* (1985), 33 Man. R. (2d) 98, 24 E.T.R. 191 at ¶88, the court noted that the "duty upon a solicitor taking instructions for a will is always a heavy one," when it comes to confirming the capacity and intentions of the testator.

Revocation of a Will:

[36] Pursuant to s.14 of the Wills Act, a will may only be revoked in whole or in part, by one of the following circumstances:

- (a) a marriage of the testator, subject to s.15;
- (b) another will made in accordance with the Wills Act;

- (c) a writing declaring an intention to revoke and made in accordance with the provisions of the Wills Act governing the making of a will;
 - (d) the burning, tearing or destruction of it in some other manner by the testator, or by some other person in the testator's presence and by the testator's direction, with the intention of revoking it.
- [37] In addition to the above circumstances of revocation, a will may be presumptively revoked if the party propounding the will cannot provide the original will and fails to prove that the will was merely lost and not destroyed. In *Sigurdson v. Sigurdson*, [1935] 4 D.L.R. 529 (S.C.C.) at ¶4, Lamont J. cited this principle as follows:

Where a will duly executed, traced to the testator's possession and last seen there, is not forthcoming on his death, the presumption is that it was destroyed by himself. To rebut it there must be sufficient evidence that it was not destroyed by the testator *animo revocandi*.

- [38] This principle was later applied in *Kumar v. Kumari*, [1993] B.C.J. No. 108 (Q.L.), in which the original of the deceased's last Will and Testament could not be found. The plaintiff sought to have an original copy of the will admitted into probate. The court stated at ¶8:

The plaintiff is faced with rebutting the presumption of revocation. This principle of law provides that where a will is shown to have been in the custody of a testator, and is not found on his death, the presumption arises that the will has been destroyed by the testator for the purpose of revoking it.

- [39] The court went on to stipulate at ¶9, that the person propounding the will has a burden of proof that persists throughout the whole trial to satisfy the court at conclusion of the evidence that the will is in fact lost and was not destroyed by the testator with the intention of putting an end to it.
- [40] Finally, where the presumption of revocation applies to presume that the testator destroyed the will, evidence of the testator's actions following the making of the will may be adduced to show a continued intention to adhere or not to adhere to the dispositions made in the will: *Kumari*, supra at ¶16; *Re Matt Estate* (1954), 11 W.W.R. (N.S.) 28 (Man. C.A.).

The Pakistan Will:

- [41] Shortly after Dr. Khan's death, following the plaintiff having made the arrangements to return his remains to British Columbia, all of the siblings were together on the occasion of a funeral celebration. The consensus among them, with the exception of the plaintiff, was that the most fair and reasonable method of dealing with his estate was to divide it equally among them all. Apparently they believed that the 1982 Will was the most recent and was therefore the will which would govern the distribution of the estate. This was not acceptable to the plaintiff and matters became unpleasant. At some point in that meeting, she told the others, or at least intimated, that there would be another will coming from Pakistan, but provided no other details. The event ended quite acrimoniously, with the plaintiff calling the

police in order to have the others removed from the property.

- [42] In May 1995, the plaintiff engaged the services of a lawyer in Islamabad for the purpose of attempting to locate a will. That resulted in a notice being published in a newspaper, seeking information about the late Dr. Khan, his will or estate. The plaintiff was advised by her Pakistan lawyer that a notary in Lahore, Pakistan, had responded and a will was subsequently produced. The Pakistan Will purports to have been made in Lahore on October 14, 1993, and names the plaintiff as the sole executrix and beneficiary. It sets out a number of reasons for which the testator had cause to be displeased with the behaviour and attitude of the other children, thereby justifying his decision that they would not share in his estate. It also makes positive reference to the plaintiff and the help she has been to him.
- [43] The Pakistan Will bears a signature purporting to be that of Dr. Khan. There are also signatures of two named witnesses on the document. It was sworn before a notary public, Yasim Ali Mizra.
- [44] The authenticity of the Pakistan Will was a hotly contested issue at trial. In particular, the defendants dispute that it is a genuine document and say that it is surrounded by circumstances that strongly suggest a forgery and a fraud.
- [45] The defendants called Mr. Arnold Blueshke as a witness. He is an experienced document examiner and former member of the R.C.M. P. In the course of qualifying him to tender expert opinion evidence, his credentials were canvassed. I found that he was properly qualified and permitted him to testify as an expert. He testified about his examination of the signature that appears on the Pakistan Will, his examination of other known samples of the testator's handwritten signature and his comparison of these writings, using visual and microscopic examination techniques and utilizing oblique light. In his opinion, the signature on the will is significantly and materially different than the known samples of Dr. Khan's signature. He testified that he was unable to find any evidence to indicate that the writer of the known specimen handwriting samples and signatures, wrote the questioned signature on the Pakistan Will. He found significant differences in pressure, line quality, and areas of heavy, slow, deliberate and tremulous overwriting. He also suggested that more than one writing instrument was used. He testified that he found features of the questioned signature that are indicative of an attempt by the writer to simulate the genuine signature of Dr. Khan. He explained his reasons for this conclusion in the course of his examination and cross-examination.
- [46] The plaintiff called Khawja Tariq Sohail, an advocate who carries on a practice in Lahore. He testified that he had drawn the Pakistan Will.
- [47] Mr. Sohail explained the details of practice in his jurisdiction and the actual physical layout. Specifically, he explained that he maintains an office in a large legal complex adjacent to the District Court in Lahore and that he and many other individual advocates are located there. He also described how there are many notaries who gather outside the building in a sort of courtyard. He said that in that jurisdiction wills and other types of documents and deeds

must be made on a certain type of paper that can be obtained from a notary or similar person upon payment of a fee. The actual document is typically drawn or drafted by the advocate but the swearing of the document is done before the notary, not the advocate.

- [48] With respect to the transaction at bar, he testified that he was in his office on October 14, 1993 when a man identifying himself as Dr. Khan arrived in company with two others. Dr. Khan had a blank will deed in his possession, which had apparently been obtained from one of the notaries on the plaza outside. Mr. Sohail said that he took instructions from Dr. Khan and in accordance with those instructions, prepared the Pakistan Will. He said that, because he had no prior knowledge of the testator, he asked for and was shown an official photo identification which satisfied him that the identity was genuine. He recalled Dr. Khan as being seemingly competent and knowledgeable about the process and what he wanted to accomplish. After the Pakistan Will had been drawn and a draft prepared, one of the witnesses with Dr. Khan left and returned with a notary, Mr. Mizra. The notary reviewed the document and proposed two changes, one stating that the will was not required to be registered in Pakistan but rather in British Columbia, and the other acknowledging the execution. Mr. Mizra then took the signature of Dr. Khan and the two witnesses. That concluded Mr. Sohail's involvement in the matter until November 2004, when he was contacted by Mr. Mizra.
- [49] It was explained to him that the original plan was for Mr. Mizra to attend at the trial in British Columbia. However, there was apparently a last minute change of plans. Because Mr. Mizra was going to Mecca, he asked Mr. Sohail to appear instead.
- [50] The defendants strenuously contest the reliability of the evidence dealing with the making of the Pakistan Will. They sought to lead evidence that appears to quite strikingly bring into question the integrity of the notary Mr. Mizra. Specifically, their cousin Muhammad Khan testified that he and Sharaf went to Lahore in 1996 and sought out Mr. Mizra. The evidence is that he was approached and asked to prepare an obviously false and fraudulent document, it being clearly indicated that it was for use in a judicial proceeding, and that he agreed and in fact provided the document in exchange for being paid the equivalent of one thousand Canadian dollars. They also sought to tender as an exhibit in this trial a document that, on its face, is an affidavit of Mr. Mizra; in which he appears to attest that the Pakistan Will is irregular and invalid.
- [51] Muhammad Khan testified as well that they had made efforts to locate the two persons whose names appear as witnesses to the Pakistan Will. He says that they were unable to locate either, and it appears that the address provided for one of the witnesses is non-existent and was a fabrication.
- [52] The plaintiff takes strenuous issue with this evidence, contending that the evidence concerning the alleged false affidavit sworn by Mr. Mizra should not be received by this Court because it was created in a manner that was unlawful and intended to place fraudulent evidence before a judicial proceeding. She also argues that the second affidavit is

manifestly improper since there are no means of confronting the maker. Finally, with respect to the evidence concerning the unsuccessful attempts to locate the witnesses, the plaintiff says it is of highly questionable reliability.

- [53] I have very serious concerns respecting the evidence of the Pakistan Will, its subsequent discovery and the reported conduct of the notary. The evidence of how it was discovered is notably lacking in detail and the discovery itself, as explained, is somewhat strange.
- [54] Dealing first with the manner in which it was discovered, the evidence is sparse. The plaintiff has testified that she arranged for a lawyer in Islamabad to place an advertisement in a newspaper ("The Times") in that city. A copy of the advertisement is in evidence. It is entitled "Public Notice" and is one column wide and four and one half inches in height. It seeks to locate anyone who has information about the late Dr. Latif Ahmed Khan, his will or estate; anyone with such information is asked to contact a named lawyer in Islamabad. The plaintiff further testified that "as a result, a will was located." She said that she received a telephone call from Mr. Mizra (the notary) who was located in Lahore, a city of some five million inhabitants, six hours distant from Islamabad by road. Mr. Mizra told her that he had a will that belonged to her father. That is the total of the evidence concerning the locating and recovery of the Pakistan Will. A copy of the document has been filed as an exhibit.
- [55] By any measure, the information regarding the Pakistan Will and its discovery is skeletal. In the absence of knowing something about how the publishing of this notice would logically lead to the response of the notary, given the controversy that surrounds the matter, a degree of scepticism is understandable.
- [56] The evidence that I have heard with respect to the actual making of the Pakistan Will is also troublesome. Mr. Sohail's testimony is that three strangers walked into his office on October 14, 1993. He took instructions from one of those persons to draft the will. His estimate is that the event took approximately ninety minutes. He did not open or maintain a file. He did not keep a copy of the will. He said nothing about Mr. Mizra having or keeping a copy. He had no further dealing with the matter. Eleven years later, Mr. Mizra came to see him, advising that there was a need for a witness to attend a trial in British Columbia, and asking Mr. Sohail to do that. While he purported to have a reasonably clear memory of the transaction, that simply defies common sense. When pressed in cross-examination, it was apparent that he did not have a clear and reliable recollection of the event. Although I am not prepared to conclude that this witness intentionally misled this Court, I have very real reservations about the reliability of his evidence.

- [57] The matter of the notary, Mr. Mizra, is another concern. I do not assign any evidentiary value to the document which purports to be the notary's affidavit wherein he says the Pakistan Will is somehow tainted. It is certainly curious. If it is true, then it tells powerfully against the Pakistan Will; if it is not true, it is a damning indictment against Mr. Mizra's truthfulness. However, I have concluded that it would be wholly inappropriate for that to stand as evidence of the truth of its assertions and I ascribe it no evidentiary significance.
- [58] The testimony of Muhammed Khan with respect to the dealings with Mr. Mizra and the alleged creation of the false affidavit is of limited significance. If I accept the evidence of the transaction, it provides some basis to have reservations about the truthfulness and reliability of the notary. The objection to this evidence, that it was part of a scheme to create evidence the purpose of which was to effect a fraud upon a Court, is without merit. I accept the testimony of Mr. Khan, there being no reason to reject it, and accordingly I find that there is some reason to conclude that Mr. Mizra has demonstrated a preparedness to put his seal to documents that are less than completely honest. I will not attach significance beyond that. However, it does contribute in a minor way to my conclusion that the circumstances surrounding the Pakistan Will, based on the evidence before this Court, are less than straightforward - they are disconcerting and suspicious.
- [59] The plaintiff took strenuous issue with the reliability of the evidence of Mr. Blueshke. It was argued that his opinion should be substantially discounted because the handwritings that he used as known samples were in part selected by Sharaf Khan, and that should be seen as a basis to doubt the impartiality of the analysis process. As well, in cross-examination, counsel for the plaintiff pressed the proposition that handwriting is notoriously variable from time to time and dependant on the occasion. The witness remained steadfast in his conclusion. No evidence of any other witness was led to contradict or dispute Mr. Blueshke.
- [60] In my view, these suspicious circumstances, taken in conjunction with the evidence of Mr. Blueshke, cause me to doubt the authenticity of the Pakistan Will. This conclusion is further fortified by the fact that it is the plaintiff who propounds the will and she is the sole beneficiary.
- [61] I cannot conclude that the making of the Pakistan Will is in accordance with the requirements in the Wills Act, nor can I make any sort of conclusion regarding the testamentary capacity of Dr. Khan, since I am not even certain it was he who caused the will to be drafted and executed.
- [62] I recognize that the plaintiff filed a number of letters from her father which tend to indicate that, although he appears to have spent considerable time and energy focussing on quite complicated relations with his children and tended to tell different persons different things, he apparently favoured the plaintiff as his ally. Furthermore, although he was evidently capable of having problems with her as well, in my analysis, I have accepted that the correspondence is supportive of him having considered her to be the one he would most likely favour. I also note that he did on at least one occasion state that she would be his

executor and the beneficiary of his estate.

- [63] That being said, upon careful consideration of all the evidence that bears upon this issue, it is my conclusion that I cannot find that this has been proven to be a valid will. Even if the Pakistan Will was proven to meet the requirements in the Wills Act, there are suspicious circumstances which place a burden on the plaintiff, as the propounder of the Pakistan Will, to prove that Dr. Khan knew and approved of the contents of the document. Based on my above consideration of the evidence, she has not met this burden.
- [64] At the same time, it must be made clear that the evidence does not support a conclusive finding that the Pakistan Will is a fraud or a forgery. While suspicions arise on the evidence, the significant standard of proof of that allegation is not satisfied.

The 1982 Will:

- [65] Having determined that the Pakistan Will is not valid, it is necessary to examine the 1982 Will. As noted above, both Dr. Khan and his wife were experiencing health problems in 1982 and both were in hospital. As I understand, he was ill with a heart condition. Instructions were given to their youngest son Sharaf who then met with a lawyer and had the wills drawn, the specifics of which are set out earlier in these reasons. Sharaf then brought the wills to the hospital and his parents executed them. There was no irregularity on the face of the wills. Following his release from hospital, I conclude that Dr. Khan was in possession of the original of his will and that he deposited it in a safety deposit box at his bank. After that, while there is no reliable way of knowing what was done with it, I find that he had it in his possession. I do know that the original of the 1982 Will has not been located.
- [66] In 1994, following his death, the executors obtained a copy of the will from the office of the solicitor and obtained a grant of probate in common form of an executed photocopy of the 1982 Will.
- [67] That grant of probate is revocable and it is my view that the grant of probate should be revoked as a result of my conclusion that the 1982 Will is also not valid.
- [68] There are two burdens which the defendants must satisfy. One arises out of the suspicious circumstances surrounding the drafting of the 1982 Will. Another arises as a result of the absence of the original will. The defendants must first prove testamentary capacity, specifically, that the testator knew and approved of the contents of the document. If this can be proven, the defendants must then provide an explanation as to why the original of the 1982 Will cannot be located as its absence creates a presumption that it was destroyed with an intention that it should be revoked and there is an onus on the propounder to satisfy me that this is not the case.

- [69] There was some evidence that the original of the 1982 Will was seen by one or more of the defendants at the Burnlake property after the testator had left Canada and gone to Pakistan. If that were so, it would detract substantially from the suggestion that he had revoked it by destroying it. However, I find that evidence to be somewhat uncertain and less than conclusive on the issue. Taking the evidence as a whole, there is very little from which to infer that the 1982 Will was lost and not destroyed.
- [70] Furthermore, there is additional evidence of Dr. Khan's actions following the making of the will, which supports a continuing intention "not to adhere to the dispositions made in the will:" Kumari, *supra* at ¶16.
- [71] The most striking foundation for that determination is found in an examination of the events that transpired between the testator and his son Sharaf in the time following the making of that will. Specifically, the title to the Burnlake property was transferred to the parents and Sharaf Khan as joint tenants. Some time later, and after his wife's death, Dr. Khan requested that the title be transferred him so that he would be the sole titleholder. This request was refused. In 1991, the interest that Mrs. Khan had held in the property was transferred to Dr. Khan and Sharaf Khan. Dr. Khan severed the joint tenancy with the result that each of the men held an undivided one-half interest as tenants in common.
- [72] To my mind, this is compelling evidence that Dr. Khan had changed his mind with respect to the disposition of the most substantial component of his estate. If he had remained of the view that he wished his son Sharaf to have the property when he died, as the will provided, the steps he took to sever the joint tenancy would make no sense. The measures he took to accomplish that purpose, both by making the request and then, upon that not coming about, by unilaterally making the severance, are manifestly inconsistent with the 1982 Will.
- [73] In addition, the tenor of the correspondence that is in evidence suggests that there continued to be a tension between Dr. Khan and his son Sharaf that is at variance with an intention that the terms of the 1982 Will would be implemented.
- [74] Although Dr. Khan did not revoke the 1982 Will according to the strict circumstances in s.14 of the Wills Act, a presumption of revocation arises out of the absence of the original will and is supported by Dr. Khan's actions following its making. That presumption is not displaced in the facts of this case as they are disclosed by the evidence.
- [75] There are clearly suspicious circumstances surrounding the making of the 1982 Will. As noted in *McWilliams*, circumstances which arouse the suspicions of the Court include those where the will is prepared by a person who takes a benefit under it. Here, Sharaf acted as a conduit in the making of the will and is its principal beneficiary. In addition, the 1982 Will was based on instructions given to a solicitor who did not confirm with the testator that he understood the extent of the property of which he was disposing. Further, the solicitor played no part in, and was not present upon the execution of the will. These circumstances combined create a general aura of concern which justifies the burden being placed on the defendants to prove otherwise.

- [76] I am of opinion that the defendants have not removed the suspicion by establishing that Dr. Khan knew and approved of the contents of the 1982 Will. Sharaf's involvement in, and consequent benefit from the 1982 Will is suspect. There is no other evidence regarding the circumstances of the execution of the 1982 Will.
- [77] In the result, I conclude that the defendants have not proven that the 1982 Will should be found valid. There is a presumption of revocation that arises from the absence of the original document, taken in the context of all the circumstances. That presumption has not been overcome by the defendants.
- [78] It is not necessary to determine whether the defendants have not met the burden that is cast upon them by the suspicious circumstances surrounding the creation of the 1982 Will. That being said, I am also of the view that the defendants have failed to meet this onus.
- [79] Thus, having carefully reviewed the evidence dealing with the making of the 1982 Will and particularly the original document, I am not able to conclude that it is valid.

Distribution of the Estate Where There is No Valid Will:

- [80] Having concluded that neither the Pakistan Will nor the 1982 Will is valid, the Court is required to determine the basis upon which the estate of Dr. Khan must devolve. By virtue of the Estate Administration Act, R.S.B.C. 1996, c.122, where there is no valid will, the deceased is presumed to die intestate. Pursuant to s.84 of the Estate Administration Act, an intestacy with no spouse, shall be devolved equally, or per stirpes, amongst the lineal descendants of the deceased. In the circumstances of this case, that results in an order that the estate of Dr. Khan be shared equally among his six surviving children.
- [81] The defendants have submitted that, in the event the estate is to be distributed on that basis, the plaintiff should be disentitled from receiving a share on the grounds that her conduct in the matter has been so offensive as to preclude her taking any benefit whatsoever. I have given that proposition careful thought and decline to deal with the matter in that way. In my view, the issue is determined according to the statute; I know of no jurisdiction that would enable this Court to make such an order.
- [82] Quite frankly, this entire situation is regrettable. It is most disconcerting to see relationships among siblings, persons who are brothers and sisters, deteriorate to the point that such vicious and destructive disputes result. Bitterness permeates this litigation. The evidence is fraught with conflicts and contradictions that I am unable to resolve. The two main protagonists, the plaintiff and the defendant Sharaf Khan, have each shown themselves to be somewhat argumentative and unreasonable in their testimony. The plaintiff, by her own admission, arranged for a false affidavit to be prepared, sworn and tendered in the course of her own matrimonial litigation. The defendant Sharaf Khan has been criminally convicted of the offence of uttering a forgery. Accordingly, neither of them is without their problems in terms of credibility. In short, this is not a matter where a trier of fact can confidently discern the truth.

The Plaintiff's Claim to Recover the Cost of Improvements:

- [83] The plaintiff moved into the Burnlake property in 1991. Sharaf had been living there but moved to Toronto at that time. She resided there for a number of years. There was a significant dispute over the property, including an unsuccessful attempt to have her removed by application under Residential Tenancies legislation. Eventually there was a court order made to have the property sold. In July 2002, the court approved a sale. The purchaser was the plaintiff, who paid the sum of \$295,000.00.
- [84] The plaintiff claims that she spent a substantial sum of money to make a number of repairs to the house and the yard during the time that she lived there, prior to purchasing the property. She says that those expenditures were necessary because of serious problems with the property. The work included the installation of hardwood flooring, hardwood stairs and stair guard rails, a gas fireplace, flooring in the ensuite bathroom, and a "largely unfinished powder room." Exterior work included demolition of an existing carport and the construction of a new and significantly larger garage, with a deck over top, guard rails and stair. A shed was also constructed. The electrical panel was relocated and a new main panel was installed, including service for the attached garage. Finally, the backyard was terraced and some retaining structures were installed. She has tendered evidence that the value of the work is approximately \$85,000.00, though her actual claim is in the amount of \$81,566.10. It is her position that this work was done because the house was in a much deteriorated condition when she took possession and was therefore necessary. She says as well that it was all done with the approval of her father. In support of that claim, she relies on three documents that appear to constitute his authority for her to proceed with the work.
- [85] In my view, the evidence of the expert witness is of quite limited value in assessing this component of the plaintiff's claim. While it provides a somewhat theoretical means of knowing how much it would likely cost to make those improvements, the present matter is less straightforward because the evidence seems to be that the plaintiff has performed most of the work herself or with her son and friends of his. Accordingly, she does not seek to recover actual out-of-pocket expenses. She does not have receipts which prove that she actually paid to have the work done. She seeks to recover the value of the changes and improvements that she caused to be made, which necessitates a determination of the actual value of those changes.
- [86] A starting point is the condition of the property when she took possession in 1991. There is no certain way of ascertaining the condition with any precision, but I have heard the evidence of the siblings, each of whom has testified as to his or her observations. While this evidence is subject to the concern that each witness has a very real interest in the outcome and none of them are experts in the field, I have come to the conclusion that a very significant amount of the work that was done was unnecessary and done because the plaintiff, for her own reasons, chose to do it. In fact, there is good reason to conclude that the improvements that were made to the interior of the house were unnecessary, ill-advised and badly executed. Some of the work, most notably the construction of an oversized garage

structure with heavy duty capacity, was apparently done specifically in order to provide a facility for the repair or restoration of automotive equipment in a near industrial or commercial format. The structure and its subsequent use detracted markedly from the residential character of the neighbourhood and diminished the property's value.

- [87] Having made those observations, I recognize that there were deficiencies in the condition of the property when the plaintiff took possession, notably settling of the foundation and damage that had been caused by an infestation of carpenter ants. However, those problems do not account for the specific and quite substantial work that that plaintiff caused to be performed.
- [88] My conclusion in respect of this issue is supported by the evidence of the appraised value of this property in April 2002, that obviously takes into account the improvements that the plaintiff had made. It concludes that the value of the property is \$300,000.00 and specifically observes that value is land value as opposed to the value of the house itself, which was found to be effectively worthless.
- [89] It is also relevant that the plaintiff lived in the home for a substantial period of time without paying rent.
- [90] In taking the position that the estate should be responsible for the expenses that she incurred, the plaintiff says that there is evidence that Dr. Khan specifically authorized the expenditure of funds to make the improvements. She relies particularly on the following three documents apparently authored by him:
- a. Special Power of Attorney dated May 1, 1991;
 - b. Letter, To Whom It May Concern, dated June 5, 1992;
 - c. Renovation Agreement, dated December 1, 1994.
- [91] Each of these can be considered to grant a certain authority to the plaintiff. In the first, he states that he is the sole owner of the house and authorizes her to "look after the said house," mention is made of collecting rents and attending to legal actions, but there is no reference to renovations or construction projects. The second document provides permission to "make repairs, necessary alteration of minor nature and also meet small liabilities on the [house] whenever these are required to be undertaken." The final agreement is more extensive, it provides:

I, Dr. Latif Ahmed Khan as sole owner of 7969 Burnlake Drive hereby agree to engage my daughter Inkasari Millie Andersson as a contractor for the purpose of making additions to and renovating my house. I will be responsible for all of the expenses and costs that she has and will incurr (sic) working on my house and yard and hereby promise to repay her in full. I further agree to accept all and any liabilities that may arise from the renovations and addition without exception.

- [92] In my view, the plaintiff cannot rely on these documents to recover the sum she seeks. With respect to the first and second, it is not reasonable to construe either as providing permission to expend and renovate to the extent she now claims. The clear tenor of the authorizations is for reasonable and necessary measures of a maintenance nature. It cannot sensibly be interpreted to entitle her to recover for large and expensive undertakings. This is particularly so where she must be taken to know that her brother Sharaf was an owner of the property. I find she must be ascribed that knowledge when the correspondence leaves no doubt that she was aware of the disputes between Sharaf and her father over the matter, and when she had assisted her father in having the joint tenancy severed.
- [93] The final document, the Renovation Agreement, purports to act both prospectively and retroactively. Again, it is my conclusion that it is manifestly untenable to conclude that the plaintiff was acting reasonably in relying on this when she was fully aware of the dispute between the owners of the property and when she had been specifically advised by Sharaf by letter dated November 27, 1994, that she was to vacate the property. In that letter, she was clearly reminded of the dispute between the two owners, was admonished for the work that had been done and was advised in no uncertain terms that her authority to perform renovations was denied. In her testimony she acknowledged having received this letter. Follow-up letters were sent to her on December 18, 1994 and on January 31, 1995. The overwhelming conclusion is that she deliberately chose to ignore the true state of affairs.
- [94] Finally, in my view, it is relevant that the plaintiff purchased the property in the judicial sale, paying the sum of \$295,000.00 in July 2002. In the final analysis, given that the sale price reflected the land value, she received the benefit of the improvements that she had brought about in that she acquired the home complete with the improvements that she caused to be made, effectively at no cost.
- [95] In all the circumstances, the plaintiff cannot succeed in her claim.

Conclusion

- [96] In view of the fact that there is no valid and subsisting will, the estate shall be distributed on the basis of an intestacy. Consequently, there arises the need to appoint an administrator of the estate pursuant to s.6 of the Estate Administration Act, which provides for appointment of an administrator from the issue. That should be accomplished by having the beneficiaries attempt to agree as to which of them should be appointed. Given the history of the matter, it would not be sensible to consider either the plaintiff or Sharaf for this appointment. If no agreement can be reached, the issue may be brought back before this Court for a determination and order. Hopefully that would not be necessary.
- [97] Prior to the estate being distributed, it is proper and necessary that there be a passing of accounts by the former executors of the estate, Sharaf and Insha Khan, consistent with the duty of executors to regularly pass accounts. It would be premature to order that the accounts be formally passed although it may be required in the event that approval is not

obtained from all six beneficiaries, in which case an application for a formal hearing may be brought. I note however, that if a beneficiary refuses to approve of the accounts where all the other beneficiaries have otherwise approved them, or unreasonably refuses to accept an offer to settle issues concerning the accounts, the Court may order that the costs of the formal passing of the accounts be paid out of the beneficiary's share of the estate.

- [98] In addition, each party has claimed costs. The defendants urged the Court to find that the conduct of the plaintiff is dishonest, egregious, deserving of censure and warrants the imposition of an award of special costs against her. In part, that position is based on the premise that she has advanced a fake or forged will. I have declined to find that to be the case. While I am of the view that the Pakistan Will is suspicious and cannot be found valid, the evidence does not permit me to make the positive finding that it is a forged document that the plaintiff should be found to have advanced.
- [99] The entire history of this litigation is troubling. The acrimony is extreme and enormously regrettable. Frankly the evidence of both the plaintiff and, to a lesser degree, Sharaf Khan left a great deal to be desired. Each was argumentative; each left me with the view that there was a preparedness to color the truth when it suited the purpose of the cause they sought to advance. In these circumstances, while the events leading up to and at trial did not reflect well on anyone, the more appropriate outcome is to make an order for costs in accordance with the outcome of the trial and hope that this sorry chapter can be put beyond the parties. There are no winners in this matter.

Orders

- [100] In summary and conclusion, I find the following:
- (a) the Pakistan Will dated November 1993 is invalid and of no force or effect;
 - (b) the will dated June 1982 is invalid and of no force or effect; and
 - (c) the Grant of Letters Probate sealed on March 29, 1995 is revoked.
- [101] Dr. Khan is declared to have died intestate and his estate is to be distributed on the basis of an intestacy among his six children.
- [102] The former executors of the estate, Sharaf and Insha Khan, are ordered to pass the accounts of the estate to date, and take all reasonable steps to obtain approval of the accounts from all the present beneficiaries. Failing that, the accounts shall be passed before a Registrar of this Court.
- [103] If the beneficiaries are unable to agree upon the selection of administrators, this Court will hear an application to appoint administrators.
- [104] The plaintiff's claim to recover the costs of improvements to the Burnlake property is dismissed.

[105] The estate is entitled to recover from the plaintiff its costs of this action at Scale 3 including disbursements.

"J. Williams, J."

The Honourable Mr. Justice J. Williams

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