

CANADA / JUDGMENT

Bellinger v. Fayers

2003 BCSC 563

COURT

Supreme Court of British Columbia

DECIDED

14 April 2003

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2003BCSC0563

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bellinger v. Fayers, Nuytten et al,

2003 BCSC 563

Date: 20030414

Docket: A971813

Registry: Vancouver

Between:

Roy Bellinger

Plaintiff

And

Kevin Fayers, Executor Of The Will Of

Dorothy May Nuytten, Also Known As

Dorothy Nuytten, Deceased,

Theophil Rene Nuytten, Beverly Porter,

Paula Porter AKA Paula Church, St. Pauls

United Church, Todd Bellinger,

Lori Bellinger AKA Lori Nichols, Virginia Nuytten

Defendants

Before: The Honourable Mr. Justice Hood

Reasons for Judgment

Counsel for Plaintiff

R. T. Todd

Counsel for Defendants:

Beverly Porter and Paula Porter AKA Paula Church

J. P. Hamilton

Counsel for Defendant:

Theophil Rene Nuytten

L.C. Waterman

Counsel for the Estate:

B. Legge

Date and Place of Trial/Hearing:

December 18, 2002

Vancouver, B.C.

[1] On June 11, 2002, Reasons for Judgment were handed down in this matter. The Plaintiff Roy Bellinger and the Defendant Theophil Rene Nuytten, who were referred to as the "Plaintiffs" at trial and in the Judgment, now move for an order declaring that Clause 7 of the Last Will and Testament of Dorothy May Nuytten, Deceased, is void.

[2] The Clause contains a condition which is annexed to gifts in the Will, and provides as follows:

7. IT IS MY FURTHER DESIRE, because of an expressed intention of one of the legatees to contest the terms of this my Will, that should any person do so then he or she shall forfeit any legacy he or she may be otherwise entitled to.

[3] At Paragraph 58 of my Reasons, I had this to say about this Clause:

[58] Counsel did not make any submission as to the effect, if any, of this Clause. However, Roy's Counsel asked him whether he was the person referred to. He had first said that he did not tell Dorothy that he would dispute her Will. He later said that it was not necessarily in reference to him. I am satisfied, on the evidence, that it is highly likely that the Clause came about as a result of Roy indicating to Dorothy his intention to contest the terms of her Will pertaining to the Pine Street property being transferred to Beverly. Additionally, there is some evidence of Roy attempting to have Dorothy change her Will.

- [4] I will refer to the parties as Roy (Bellinger), Phil (Nuytten) and Beverly (Porter) and the Deceased as Dorothy, as was done at the trial. Mr. Hamilton, for Beverly and Paula Porter was the first to argue. He commenced by referring to the following summary of facts:
1. Roy and Phil contested the distribution under the Will under the following Common Law grounds:
 - (a) The Will violated an agreement that Dorothy allegedly entered to devise her Estate equally among Roy, Phil and Beverly;
 - (b) Beverly and Dorothy, the Deceased, worked together to defraud Roy and Phil by transferring Dorothy's house to Beverly prior to the passing of Dorothy, under a sham agreement for sale;
 - (c) In the alternative, Beverly forged the signature of Dorothy on receipts showing that Beverly had paid in full for the transfer of the house under the agreement for sale;
 - (d) In the alternative, the Will was the result of undue influence exercised by Beverly over Dorothy;
 - (e) Beverly wrongfully directed assets of Dorothy to herself prior to Dorothy's passing;
 - (f) In addition, Roy contested the Will on the ground that the Will did not adequately provide for him as required by the Wills Variation Act, R.S.B.C. 1996, c. 490. Roy also alleged that Dorothy lied during previous proceedings in which Beverly contested her father's Will, although the Court found the Deceased to be credible in those proceedings.
 - [5] Mr. Hamilton noted that under the Will Roy was to receive a \$40,000.00 gift, and Phil was to receive the income from an agreement for sale of property located at 5515 - 5513 Victoria Drive, Vancouver, BC, which was valued at death at \$15,580.00. And finally, that under the Will Roy, Phil and Beverly shared equally in the Residue. He also noted that in the end I dismissed all claims brought by Roy and Phil; that with regard to Roy's claim under the Act, I found that \$40,000.00 was more than adequate, just and equitable in the circumstances.
 - [6] Mr. Hamilton said that in these circumstances, given the provisions of Clause 7, Roy forfeited his gift under the Will in the amount of \$40,000.00 and Phil forfeited his gift under the Will in the amount of \$15,580.00; that the forfeited gifts fall into the Residue of the Estate to be distributed to Beverly exclusively, although under the Will, Roy, Phil and Beverly were to share equally in the Residue.
 - [7] To this point then I have set out briefly Mr. Hamilton's characterization of the facts and of the issues which he says his friends must meet. It will be seen that I am unable to agree with his submissions in that they are not in accordance with the law.

- [8] Mr. Hamilton drew my attention to the ancient English Law on the subject of conditions not to dispute a Will annexed to gifts in the Will and the doctrine of in terrorem; referring to Volume 1 of Williams on Wills, 7th ed. (London: Butterworths, 1995) at p. 366; *Cooke v. Turner* (1846), 153 E.R. 1044 and *Evanturel v. Evanturel* (1874), L.R. 6 P.C. 1., for the proposition:

that a Testamentary gift given on the condition that the Recipient not dispute the Will is not void for uncertainty, nor as being contrary to good morals or public policy, nor prohibited by any positive law, .

- [9] A perusal of these and other authorities makes it clear to me that there should be no dispute as to the law in the area applicable to the case at bar. While it is as stated in the above passage, the passage does not go far enough for present purposes. The gift must be accompanied by an effective gift over which vests in the recipient on the condition being breached. If there is no gift over, then the condition will be treated as merely in terrorem, that is a mere threat, and will be found to be void. And nothing short of a positive direction of a gift over, of vesting in another, even in the case where the forfeited legacy falls in the Residue, will suffice. There must be an express disposition made of what is to be forfeited. See for example *Theobald on Wills*, 15th ed. (London: Sweet and Maxwell, 1993) at p. 656, *Wheeler v. Bingham*, [1746] 26 E.R. 1010 at p. 1012 and *Lloyd v. Branton* (1817), 36 E.R. 42 particularly at p. 46. Thus the application of the general rule that a failed gift falls into Residue is insufficient for the purpose of the rule.
- [10] There seems to be a difference of opinion as to the basis of the rule, whether it is a rule of law or a rule of construction, whether it is founded on the intention of the Testator or on public policy, and as to whether evidence outside the Will itself is admissible for its operation; see in this regard the judgment of the Privy Council, delivered by Lord Radcliffe in *Leong v. Lim Beng Chye*, [1955] A.C. 648.
- [11] In *Feeney's Canadian Law of Wills*, loose leaf 4th ed. (Toronto: Butterworths, 2000), the author states that it seems much more sensible to consider the rule as a rule of construction, and that such outside evidence is admissible. It is stated about the rule in para. 16.63:

unless there is a gift over, the Court will consider the condition as being in terrorem, and void, although normally, the condition would not be void if there is a gift over. The reason for the rule is that the Court considers an express gift over to someone else sufficient prima facie evidence that the gift was not in terrorem; the presence of the gift over tending to show that the condition was inserted not simply to coerce the original donee, but also to fix a possible benefit to another.

The cases cited are *Re: Haythornthwaite*, [1930] 3 D.L.R. 235 (Alta. S.C.) and *Kent v. McKay* (1982), 139 D.L.R. (3d) 318 (B.C.S.C.), a case which is binding on me, and on which Counsel for Roy and Phil rely.

[12] The author goes on to say that even in the case of a gift over, other admissible evidence may show that there was an intention to coerce the legatee, and that in such a case the condition would be void as being in *terrorem*, even though it is otherwise valid. And dicta in *Re: Hanlon*, [1933] Ch. 254, a decision of Eve J., is relied upon.

[13] I will conclude my reference to the law by referring to the decision of Lander J., in *Kent*, which is consistent with the English authorities, and is determinative of the case at bar. The limiting clause in *Kent* provided in part:

that if any person who may be entitled to any benefit under this my Will shall institute or cause to be commenced any litigation in connection to any of the provisions of this my Will other than for any necessary judicial interpretation thereof or for the direction of the Court in the course of administration all benefits to which such person would have been entitled shall thereupon cease [the] said benefits so revoked shall fall into and form part of the Residue of my estate to be distributed as directed in this my Will

(My emphasis)

The Petitioners had brought action for relief under the Wills Variation Act, R.S.B.C. 1979, c. 435. His Lordship described the Petition as brought out of an abundance of caution and prudence in order to ascertain two primary questions; whether an application under the Act constitutes "litigation" under the limiting clause, and whether the clause itself was void as contrary to public policy.

[14] His Lordship found that the application under the Act was "litigation", and that if the clause was valid the application would result in revocation of the benefits which the Petitioners might receive under the Will. He then turned to the issue of whether the clause was valid, including a consideration of whether it was imposed in *terrorem* and therefore invalid at Common Law. In dealing with this issue His Lordship stated at pp. 321 - 22:

(III) The "threat" must be "idle", that is the condition must be imposed solely to prevent the donee from undertaking that which the condition forbids. Therefore a provision which provides only for a bare forfeiture of the gift on breach of the condition, is bad. (My emphasis)

However, if the donor indicates that he intended not only to threaten the donee but also to make a different disposition of the property to fix a benefit on another in the event of a breach of the condition, the "threat" is not "idle" and the condition is valid: *Feeney*, *Canadian Law Wills Construction* (Volume 2), 2nd Ed. (1982) pp. 200 - 1.

(My emphasis)

[15] His Lordship then went on to find that the specific direction in the clause, which I underscored earlier, that on the benefits being revoked they should fall into and form part of the Residue of the Estate, created a sufficient gift over for the purpose of meeting the *in terrorem* doctrine, and therefore the clause was valid. I observe that the finding is consistent with the English Law to which I referred earlier. I also observe that unlike in *Kent*, in the

case at bar there is no suggestion of any gift over in Clause 7 and therefore the Clause is bad as against Roy and Phil.

- [16] His Lordship then went on to deal with the final issue, whether the clause was contrary to public policy. He concluded that it was, following the reasoning in an Australian case, *Re: Gaynor*, [1960] V.R. 640 (S.C.) wherein a similar clause was found by Mr. Justice O'Bryan to be void because it was imposed in *terrorem* and also because it was opposed to public policy. In this regard I need only quote the following passage from Mr. Justice Lander's decision at p. 323:

It cannot be denied with respect that the intent of the Legislature in creating the Wills Variation Act, is to ensure adequate maintenance and support for specified individuals. It is a matter of public policy that support and maintenance be provided for those defined individuals and it would be contrary to such policy to allow a Testator to circumvent the provisions of the Wills Variation Act by the creation of such as para. 9.

- [17] I return to Mr. Hamilton's submissions. They were fairly detailed and somewhat extensive. However, I am not persuaded by his submission in which he attempts to distinguish Kent, seemingly a fundamental step in his submission, that Kent does not apply, where, as in the case of Phil, a Common Law challenge to the Will is made alone and, as in the case of Roy, in addition to a Common Law claim one is advanced under the Act. Nor am I persuaded by his perhaps circular argument that while the Act renders Clause 7 of the Will inoperative to the extent that it calls for a forfeiture against Roy for bringing a without merit Wills Variation Act claim, Roy is at the same time not immune from the operation of Clause 7 which flows from his failed Common Law claims. The law does not favour his submissions on behalf of Beverly.
- [18] I need not deal extensively with the submissions of Mr. Todd, for Roy, as supported by Ms. Waterman, for Phil. Mr. Todd commenced by stating that the motion was a complete surprise to him and to Ms. Waterman. He said that the issue was not pleaded, was not raised or even mentioned at trial; and Mr. Hamilton concedes that this was the case. When asked whether his position was that the motion cannot proceed in law, he said that he could find no authority on the point, and nothing further was said about it. I need not consider it further, particularly in light of my conclusion that Beverly cannot succeed on the motion.
- [19] Mr. Todd, supported by Ms. Waterman, submitted that the only claim that attacked the Will was Roy's claim under the Act. The Common Law claims of Roy and Phil did not violate Clause 7. Their primary claims were under an alleged agreement between Dorothy and her late husband, Mr. Nuytten, pertaining to the disposition of their respective Estates, and under a secret trust, matters "outside the Will". And in fact, the Court found that Beverly acquired the Pine Street property outside the Will, that is pursuant to agreements Beverly made with Dorothy, and that Dorothy held the property as Trustee for Beverly.

- [20] In my view the submission, although not devoid of all merit, should not succeed. The Clause was put in the Will by Dorothy specifically to protect Beverly from attack by Roy, and Phil, if he went along with it, and he did so. And that was really the only purpose of Roy's claim and of Phil's counterclaim, that is to defeat Beverly's entitlement to the Pine Street property whether in or out of the Will, and to have it fall into Residue. I am unable to conclude that the claims by the two men did not contest the terms of Dorothy's Will. In any event, and assuming that I am correct, it will be seen that in my view, Beverly still cannot succeed on the motion.
- [21] I do agree with Mr. Todd's submission that Clause 7 is invalid at Common Law, and cannot be enforced by the Court, because of the lack of a provision for a gift over of the benefits in the event of their being forfeited as a result of a breach of the Clause; that the Clause is void as well with regards to Roy's Wills Variation Act claim in that it is against public policy. And in the circumstances I need not deal specifically with Ms. Waterman's submissions.
- [22] In summary, Beverly cannot succeed on the motion. While I am satisfied that Dorothy's intention by Clause 7 was to coerce Roy because of his threat to challenge the Will as regards Beverly's entitlement to the Pine Street property, I am not satisfied in the circumstances that she intended to do more than threaten him, using the terminology of the cases. And my view with regard to Phil is the same. And the lack of the slightest suggestion of any gift over supports my conclusion. Clause 7 then being in in terrorem is clearly void at Common Law as against both men. It is also void with regard to Roy's application under the Wills Variation Act, as being contrary to public policy.
- [23] The motion is granted. It is declared that Clause 7 of the Last Will and Testament of Dorothy May Nuytten is void. Roy and Phil are entitled to their costs.

"S.W. Hood, J."

The Honourable Mr. Justice S.W. Hood

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