
CANADA / JUDGMENT

Bhalla Estate

2017 BCSC 1867

COURT

Supreme Court of British Columbia

DECIDED

19 October 2017

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2017 BCSC 1867 Bhalla Estate

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bhalla Estate,

2017 BCSC 1867

Date: 20171019

Docket: 105441

Registry: Kelowna

Re: The Estate of Amar Kaur Bhalla, Deceased

Before: The Honourable Mr. Justice Betton

Reasons for Judgment

Counsel for the Applicant:

G. Alfonso

Counsel for the Respondent,

M.K. Bhalla:

C. Wendell

Counsel for the Respondent,

S. Kaloty:

T. McCaffrey

Place and Date of Hearing:

Kelowna, B.C.

August 21 and September 29, 2017

Place and Date of Judgment:

Kelowna, B.C.

October 19, 2017

Introduction

- [1] The applicant seeks an order that the will of the deceased be pronounced in solemn form and a grant of probate of the will to her as executrix.

Background

- [2] The deceased executed the will on July 21, 2008. It was prepared by a solicitor, Robert Bassett. Mr. Bassett had known the deceased and her family since 1996 and had provided legal services to her over that period of time. Although the specifics and extent of those services are not precisely clear from the evidence, their first dealings were in or about 1995 and later included dealing with her in respect of her deceased husband's estate. Her husband Pritam Singh Bhalla died in 1996. Since then, Mr. Bassett assisted with at least two real estate transactions and in relation to powers of attorney.
- [3] The deceased did not speak English and was not able to read or write in any language. In all her dealings with Mr. Bassett, the deceased used an interpreter in the form of a family member or close friend.
- [4] The deceased died on May 23, 2013. As noted, she was predeceased by her husband Pritam Singh Bhalla in 1996. She has three daughters, the applicant Gurdev Kaur Pabla, Malkit Kaur Bhalla, and the youngest, Surjit Kaur Kaloty. In addition, the deceased has several grandchildren. Gurdev Pabla has one child, Gurinder Pabla. Malkit Bhalla has two children. Surjit Kaloty has four children. Gurinder Pabla lived with his grandmother from the time he was approximately one year old until she passed away.
- [5] The will appoints Gurdev Pabla as executrix and leaves the entirety of the deceased's Canadian estate to Gurinder Pabla.
- [6] Mr. Bassett took instructions from the deceased for the preparation of the will on July 10, 2008. He has very limited notes from that meeting. The will was executed on July 21, 2008, by the deceased and witnessed by Mr. Bassett and his legal assistant Stacie Spring. There are no notes of substance in respect of that meeting.
- [7] The evidence on this application does not establish who provided interpretation services on July 10 or July 21, 2008. It was not someone that Mr. Bassett arranged for. There is direct evidence from Malkit Bhalla who says she did not provide that assistance. Similarly, there is direct evidence from Surjit Kaloty that she did not provide that assistance. There is no

evidence presented on this application from Gurdev Pabla. Her son Gurinder Pabla said in his affidavit that he " had no knowledge that [sic] of the terms of the Will and never had any discussions with [the deceased] about the proposed content of the Will". He went on to say in his affidavit that "when the Deceased made the Will, my mother Gurdev Kaur Pabla was living in Las Vegas, Nevada and had limited contact with the deceased".

[8] Mr. Bassett swore an affidavit which contained the following in respect of the interpretation:

6. To the best of my recollection I recall that the person in attendance with the Deceased that day was Malkit Kaur Bhalla. If it was not Malkit Kaur Bhalla who translated the Will, it likely would have to have been Malkit's husband, Pritpal Singh who translated for the Deceased. Malkit's son, Balbinder could also possibly have been present.
7. I have been unable to locate a written record of the identity of the person, or persons, who provided translation services to the Deceased when she gave instructions and later executed the Will on July 21, 2008. I am, however, absolutely certain that there was someone with the Deceased who translated our discussion as I took and confirmed the Deceased's instructions, and later executed the Will.
8. On or about August 15, 2016, I contacted Stacie Spring, a legal secretary in my office at the time the Deceased executed the Will. Ms. Spring witnessed the Deceased's execution of the Will. I asked Ms. Spring if she could recall if anyone was present with the Deceased when the Deceased executed the Will. Ms. Spring advised me that she thought someone was with the Deceased but she could not recall who that person was.

[9] Mr. Bassett was cross-examined on his affidavit and at that time indicated that he was aware that Malkit Bhalla disputed the accuracy of his recollection set out in paragraph 6 above and he acknowledged that he could not say she is in error. His testimony included the following response on the subject of who provided the translation:

I think I would remember if it was Surjit that came in or Gurdev. I am just about certain it was not Gurdev. I can't imagine it being Surjit and me not remembering her.

[10] Mr. Bassett's file notes do not shed any light on who provided the interpretation services. He does say further in his affidavit:

9. The Will prepared was not what I would describe as a "simple" Will. The Deceased spoke no English, and I could not have taken instructions for even a simple Will without an interpreter, and certainly could not have dealt with the detailed matters set out below without a competent translator being present.
10. Further, I would not have allowed the Deceased to execute the Will with myself and Ms. Spring, as witnesses, if there was not a translator present to explain what the Will provided and to explain the procedure for executing the Will.

13. I have no doubt that the Deceased understood the contents of the Will and that the Will represented her intentions with respect to her estate as at the date it was executed.
14. I am not aware of any influence exerted by any person on the Deceased's decisions with respect to the making of the Will.

Issues and Position of the Parties

- [11] The applicant says the will was properly executed and witnessed in accordance with s. 4 of the Wills Act, R.S.B.C. 1996, c. 489, and relies on the resulting rebuttable presumption of knowledge and approval of the will and testamentary capacity. The applicant says there are no suspicious circumstances that rebut those presumptions.
- [12] At the heart of each of the respondents' positions is the absence of evidence from the unidentified translator. Ms. Kaloty argues that proper execution has not been established given that we do not know what the translator said to the deceased as to the contents of the will. Further, she argues testamentary capacity is not established.
- [13] Both Ms. Kaloty and Ms. Bhalla argue that there are suspicious circumstances. Again, they point to the absence of identification of or evidence from the translator in combination with the exclusion of the daughters from the estate and the limited notes and recollection of Mr. Bassett. They say, in part, in the application responses:

Most importantly, the Deceased had no ability to communicate independently with the solicitor that drafted her Will and no record exists to demonstrate that the person that provided translation services for both meetings with the solicitor accurately related the advice given or the document drafted.

- [14] They point to the absence of any evidence from the applicant regarding the translation and specifically that there is nothing from her to say she did not perform that role. Ms. Kaloty says that the court should draw an adverse inference based on the absence of that evidence.

Analysis

- [15] There is no question that the deceased and Mr. Bassett relied on a translator. The deceased did not speak or read English and Mr. Bassett could not communicate with the deceased in her language, which I understand to have been Punjabi. At the same time, Mr. Bassett and the deceased were not strangers and had dealt with various legal matters through translators over a period of years. He said this of his interactions with her in his affidavit:
5. Whenever the Deceased attended my offices she always brought a family member or close friend to interpret. The Deceased did not speak or write English, however, she impressed me as an intelligent person who fully understood her legal dealings with me over the years of acting as her counsel. Specifically, I observed that she spoke Punjabi with authority and responded without delay to my questions when put to her in Punjabi. She asked questions of me, and she listened closely when I answered her questions, even though they were in

English, and my answers were then translated.

- [16] The propounder of a will must prove the formalities of execution as required by the Wills Act, that the testator knew and approved of the contents of the will and that the testator had testamentary capacity when the will was signed.
- [17] On its face, the will was executed in accordance with s. 4 of the Wills Act. Section 4 provides:
4. Subject to section 5, a will is not valid unless
 - (a) at its end it is signed by the testator or signed in the testator's name by some other person in the testator's presence and by the testator's direction,
 - (b) the testator makes or acknowledges the signature in the presence of 2 or more attesting witnesses present at the same time, and
 - (c) 2 or more of the attesting witnesses subscribe the will in the presence of the testator.
- [18] Where a will is duly executed a rebuttable presumption arises that the testator had knowledge and approved the will. The Supreme Court of Canada put it this way in *Vout v. Hay*, [1995] 2 S.C.R. 876, at paras. 26 and 27:

26 Although the propounder of the will has the legal burden with respect to due execution, knowledge and approval, and testamentary capacity, the propounder is aided by a rebuttable presumption. Upon proof that the will was duly executed with the requisite formalities, after having been read over to or by a testator who appeared to understand it, it will generally be presumed that the testator knew and approved of the contents and had the necessary testamentary capacity.

27 Where suspicious circumstances are present, then the presumption is spent and the propounder of the will reassumes the legal burden of proving knowledge and approval. In addition, if the suspicious circumstances relate to mental capacity, the propounder of the will reassumes the legal burden of establishing testamentary capacity. Both of these issues must be proved in accordance with the civil standard. There is nothing mysterious about the role of suspicious circumstances in this respect. The presumption simply casts an evidentiary burden on those attacking the will. This burden can be satisfied by adducing or pointing to some evidence which, if accepted, would tend to negative knowledge and approval or testamentary capacity. In this event, the legal burden reverts to the propounder.

- [19] The presumptions are also discussed by the Court of Appeal in *Yen Estate v. Chan*, 2013 BCCA 423, at paras. 12-26.
- [20] The respondents' arguments, as noted, all relate to the absence of further information about the interpretation provided for the deceased. They say that despite the apparent satisfaction of the formal requirements of s. 4 of the Wills Act, on its face there is no basis to conclude that the deceased actually knew what she was signing. If, for example, the translator did not provide accurate recitation of the contents of the will, the deceased's signature cannot have

any evidentiary meaning. Further, they say that even if I conclude that the will was properly executed, the absence of the identity of or any evidence from the translator amount to suspicious circumstances that rebut the presumptions referenced above.

- [21] Counsel were unable to provide any authorities dealing with analogous issues surrounding interpretation for a deceased at the time of providing instructions or upon execution of a will. Reference was made to the Ontario Superior Court of Justice decision in *Nguyen-Crawford v. Nguyen*, 2010 ONSC 6836. There the court was considering the validity of the power of attorney in favour of Ms. Nguyen-Crawford who had provided the interpretation between her mother who allegedly granted the power of attorney and the solicitor who prepared the documents. The court concluded at paragraph 101 in part as follows:
- [101] However, in the absence of positive evidence that the documents and advice were independently translated, I am not satisfied that Ms. Nguyen-Crawford has met her burden to prove that Mother knew what she was signing or that the powers of attorney were a clear expression of her wishes, especially having regard to the evidence before me, which satisfies me that Mother was substantially dependent on Ms. Nguyen-Crawford at the time.
- [22] Those, of course, are different circumstances than I am dealing with. Here there is no evidence that Gurdev Pabla provided translation. The evidence of Gurinder Pabla, although not directly on point, suggests that he did not provide those services and at least implies that his mother did not. Further, I have the evidence of the solicitor who had an existing relationship with the deceased regarding his assessment set out in paragraph 13 and 14 of his affidavit referenced above. In addition, there is no evidence of any infirmity of any sort on the part of the deceased. According to Gurinder Pabla, the deceased had made it known that she was going to be completing her will at the time and there is no suggestion that there was anything unusual in her doing so. There is no evidence that she was replacing a prior will.
- [23] As noted in *Allart Estate v. Allart*, 2014 BCSC 2211, at paragraphs 58 and 59, the presence of an attestation clause is of significance. There the court said this:
- [58] More significantly, in this case, the Original Will has an attestation clause, from which it can be presumed that the will was duly executed and witnessed by persons who knew the requirements of the Wills Act. The court will not assume that a person has signed his or her name to the attestation knowing it to be untrue: *Beaudoin* at para. 11; *Yen Estate* at paras. 14-16.
- [59] Given the presence of the attestation clause with the names of the two witnesses below it attesting to the signature of the Deceased [sic], as well as the apparent compliance with the statutory requirements for a will, I conclude that the doctrine of *omnia presumuntur rite esse acta* applies. I must presume that the will was duly executed by the Deceased and witnessed by individuals who knew the requirements of the Act unless evidence to the contrary is proven.

- [24] I am not prepared to draw any adverse inference based on the absence of an affidavit from the applicant. Rule 25-14(8) provides for various avenues for the respondents to have acquired additional evidence beyond their statements in their affidavits referenced above. Specifically, they could have sought to conduct examinations for discovery of the applicant or issued interrogatories to inquire if she had been in attendance and/or provided the interpretation for the deceased in her meetings with Mr. Bassett. None of these were pursued.
- [25] In all the circumstances and based on the authorities provided by counsel, I am satisfied that the will was indeed duly executed in compliance with the Wills Act, and that the presumptions in respect of knowledge and approval and testamentary capacity apply subject to evidence of suspicious circumstances.
- [26] Accordingly, I turn next to the question of whether or not there are suspicious circumstances.
- [27] I agree with the statement made by Mr. Justice Wilson in *Watson v. Watson & Yelich*, 2004 BCSC 1724, at para 64 that "[it] is not sufficient that circumstances create a general miasma of suspicion that something unsavoury may have occurred."
- [28] The basis of the respondents' assertions of suspicious circumstances include the following statements:

Affidavit #1 of Malkit Kaur Bhalla filed June 23, 2016

11. At the time that the Will was executed Gurinder lived with the Deceased. The Deceased may have been unduly influenced by Gurinder and his mother Gurdev, in drafting the Will such that the estate was left to Gurinder and Gurdev was put in the position of executor.

Affidavit #2 of Malkit Kaur Bhalla, filed November 1, 2016

3. In response to paragraph 5, I agree that my mother usually relied on a family member or a close friend to interpret any documentation or discussions with Mr. Bassett regarding legal issues. In this case, my concern is that the person(s) attending with my mother at the time that she executed her Will were the same person(s) that were named in her Will.

Affidavit #1 of Surjit Kaur Kaloty filed August 16, 2017

35. My mother usually relied on a family member or a close friend to interpret any documentation or discussions with, however, I believe the person(s) attending with my mother at the time she executed her Will were the same person(s) that were named in the Will.

- [29] These are speculative statements. They are not supported by any evidence. In my view, they cannot support a conclusion that there are suspicious circumstances. Mr. Bassett's notes are much less detailed than would be desired, which he readily acknowledged. There is nothing suspicious about that however. Similarly, his limited recollection today (no doubt in part a product of the limited notes to refresh that recollection) is unfortunate but also not supportive of suspicion. It is entirely understandable given the passage of time.
- [30] There is no indication on the evidence I do have that the deceased was being subjected to any undue influence, was in a vulnerable state physically or emotionally or that she chose to have her will completed at a time that might excite suspicion. She did exclude her daughters from her Canadian estate. An explanation for that was provided. Whether that decision will or could withstand a claim under Division 6 of the Wills, Estates and Succession Act dealing with variation of wills is a separate issue. There is no evidence as to how she disposed of her assets outside of Canada. Again, I do not find the bequests to be sufficient alone or in combination with the circumstances generally to rise to the level of suspicious circumstances to displace the presumptions.
- [31] Given the evidence of Mr. Bassett and the circumstances generally, the absence of knowledge of the identity of or evidence from the interpreter is not enough to rebut the presumptions.

Conclusion

- [32] In the result, the application is granted and the orders sought in Part 1, paragraphs 1 and 2 follow.
- [33] I have not heard submissions from the parties as to costs. If any party wishes to make submissions they are at liberty to schedule those through trial scheduling. Contact must be made within 14 days of receipt of these reasons, failing which costs will be ordered on the terms set out in Part 1, paragraph 3 of the Notice of Application.

"Betton J."

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