

CANADA / JUDGMENT

Chalmers v. Uzelac

2004 BCCA 533

COURT

British Columbia Court of Appeal

DECIDED

13 October 2004

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2004 BCCA 533 Chalmers v. Uzelac

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Chalmers v. Uzelac,

2004 BCCA 533

Date: 20041013

Docket: CA031206

Between:

Sonnett Chalmers

Appellant

(Plaintiff)

And

Roy Morgan Uzelac,

Erin West and Steve West

Respondents

(Defendants)

Before:

The Honourable Madam Justice Southin

The Honourable Mr. Justice Donald

The Honourable Mr. Justice Hall

D. S. Orsetti

Counsel for the Appellant

No one

Appearing for the Respondents

Place and Date of Hearing:

Vancouver, British Columbia

29th April, 2004

Place and Date of Judgment:

Vancouver, British Columbia

13th October, 2004

Written Reasons by:

The Honourable Madam Justice Southin

Written Reasons by:

The Honourable Mr. Justice Hall (P. 29, para. 53)

Concurred in by:

The Honourable Mr. Justice Donald

Reasons for Judgment of the Honourable Madam Justice Southin:

- [1] Every solicitor who, as part of his or her practice, draws wills should read, mark and inwardly digest at least once each year the judgment of Sir John Alexander Boyd, C. in *Murphy v. Lamphier* (1914), 31 O.L.R. 287, the Canadian locus classicus on a solicitor's duty in taking instructions, especially at pages 318-321.
- [2] That duty is owed not only to those who might, or ought to be, objects of the testator's bounty but also to the testator, for only the solicitor can be the testator's voice from the grave; the solicitor discharges that duty by making proper inquiries of the testator at the time of the making of the will and by taking and preserving proper notes of the responses and of any observations relevant both to capacity and to knowledge and approval of the contents of the will. The reason for the latter obligation ought to be obvious but, lest it is not, I state it: How can a judge put confidence in the testimony of a solicitor who says, years (here 9) after taking instructions, but keeping no notes of those instructions, that the testator said this or that as the reason for changing an earlier will?

- [3] Unhappily, as I understand the present state of the law, no one has any right of action against the solicitor who fails, as did the solicitor in this case, in that duty. I doubt that it is possible to extend, because of the issue of proof of causation, the groundbreaking judgment of the late John Aikins J., later J.A., in *Whittingham v. Crease & Co.* (1978), 88 D.L.R. (3d) 353 (B.C.S.C.) (interestingly, both leading counsel for the plaintiff, J.J. Gow, and counsel for the defendant, Peter van der Hoop, were later judges of the Supreme Court of British Columbia), to a failure of the sort I have set out.
- [4] That being so, one can only hope that, in drawing wills, members of the legal profession generally do their duty as a matter of professional pride, rather than out of fear of financial consequences.
- [5] This appeal is from the judgment of the Honourable Mr. Justice R. D. Wilson pronounced the 26th August, 2003, upon a trial under Rule 18A:

THIS COURT PRONOUNCES for the force and validity of the last will of Jeanne Marie Marthe Louise Morgan also known as Jeannie Marie Morgan, dated October 6, 1993, a copy of which is attached as Schedule A to this Order, in solemn form of law;

THIS COURT FURTHER ORDERS that:

1. the claim of the Plaintiff be dismissed;
2. the counterclaim of the Defendant, Roy Morgan Uzelac, be allowed;
3. the Plaintiff pay costs to the Defendant, Roy Morgan Uzelac, on a party and party basis at Scale 3.

- [6] These are the pertinent terms of the will attached to the order as Schedule A:

REVOCATION

1. I Revoke all wills and codicils made by me before this date. I do not revoke any testamentary disposition that I have made other than by a will or codicil.

EXECUTOR AND TRUSTEE

2. I appoint my nephew, ROY MORGAN UZELAC, of Maple Ridge, B.C., to be the Executor and Trustee of this Will.

Meanings

- (a) In this Will "Trustees" means and includes the Executor and Trustee or Executors and Trustees, as the case may be, for the time being whether original or substituted; and "discretion" means sole and uncontrolled discretion.

FUNERAL DIRECTIONS

3. I desire that at my death a funeral be carried out in accordance with the arrangements that I have made during my lifetime.

IN TRUST TO THE TRUSTEE

4. I give all of my property of every nature and kind and wherever situate, including any property over which I may have a general power of appointment, to my Trustees, upon the following trusts:

Administrative Trusts

- (a) To call in and deal with my property and assets and to pay out debts and testamentary and other expenses as set forth in this Will under the section head "Administrative Trusts".

SPECIFIC BEQUESTS

- (b) I give, devise and bequeath the sum of TEN THOUSAND (\$10,000.00) DOLLARS to each of my grandchildren, ERIN WEST and STEVE WEST, being the children of Harriet and Emile West, for their own use absolutely.

Provided however that if either Erin West or Steve West should predecease me or die within thirty days after my death, then the share which Erin West or Steve West would have taken had she or he survived me shall be paid to my nephew, ROY MORGAN UZELAC, for his own use absolutely.

Residue

- (c) To pay and transfer the residue of my estate to my nephew, ROY MORGAN UZELAC, for his own use absolutely.

* * *

SURVIVORSHIP REQUIREMENT

5. Should any beneficiary of mine survive me but die within a period of thirty days immediately following my death, such beneficiary shall for all purposes of this Will, be considered to have died before me.

[This will contains no gift over in the event Mr. Uzelac predeceased the testatrix. Had he done so, she would have died intestate as to the residue.]

* * *

POWERS OF THE TRUSTEE

7. Subject to the trusts of this Will, my Trustees shall have the following enabling powers which my Trustees in their sole discretion may invoke if it is in the best interests of my estate. Their powers are in addition to those powers conferred by law or by other sections of this Will, in relation to all or any of my estate property:

* * *

Solicitors for the Estate

- (e) It is my wish to appoint Gary M. Cohen of Cohen Frost Buchan Edwards as the lawyer to assist my Trustee with all matters in relation to my Estate, provided that I am a resident of the Province of British Columbia at the date of my death. In the event that the aforesaid Gary M. Cohen predecease me, I wish to appoint any partner of Cohen Frost Buchan Edwards or any partner of the successor firm to Cohen Frost Buchan Edwards.
- [7] The will contains a number of other provisions which in light of the dispositive terms of the will have, as far as I can see, no useful purpose whatever.
- [8] The legal import of sub-clause (e) is not before us. Whether, if this executor had chosen to retain another solicitor in the administration of the estate (he did not), Mr. Cohen could have insisted on the clause, I need not address.
- [9] I make mention of the provision because, when I was a practising solicitor, I considered that to insert such a provision, unless the client expressly raised the question, was unethical as being dangerously close to a gift to oneself. There is nothing in Mr. Cohen's notes, as I read them, to indicate the testatrix specifically asked that he be solicitor for her estate.
- [10] In making these comments, I am well aware that the ultimate guardians of the ethics of the legal profession are the benchers of the Law Society. Whether they have considered this point in the last 20 years, I am unable to say.
- [11] But I will comment that solicitors who are putting provisions in wills from which they benefit are well advised to read the judgment of the House of Lords in *Wintle v. Nye*, [1959] 1 All E.R. 552.
- [12] The appellant seeks in this Court, as she did below, to have the Court pronounce on the footing of lack of testamentary capacity against the force and validity of the will of 6th October, 1993, and to pronounce for the force and validity of a will dated 16th March, 1992, under which, apart from minor bequests to her grandchildren, the testatrix bequeathed her estate to the appellant (her niece) and the respondent (her great-nephew and son of the appellant) in equal shares. [As the grandchildren took no part in the proceedings below, when I say the respondent, I mean the respondent, Roy Morgan Uzelac.]

- [13] In the court below, the appellant also pleaded undue influence. That plea is not put forward in this Court.
- [14] Whether the appellant and the respondent were estranged before the testatrix died does not appear in the evidence, but I think I can fairly infer that if they were not then estranged, they are now, and thus this testatrix has left, whether intentionally or not, a legacy of bitterness.
- [15] In *National Westminster Bank Plc. v. Morgan*, [1985] 1 A.C. 686 (H.L.), a case of alleged undue influence, Lord Scarman spoke at p. 709 (in a passage referred to by Wilson J. in *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353 at 381) of the importance in such cases of a meticulous examination of the facts. In my opinion, such an examination is of equal importance when the issue is the testamentary capacity of an aged testator, it being a well-known fact that it is rare for someone in his or her 90's to have the same acuity of intellect as he or she had at, say, 60. By so saying, I am not suggesting that there is any rule of law or evidence presuming against the testamentary capacity of a person of great age. In matters of this kind, expressions of legal burdens of proof and evidentiary burdens are essentially bootless. What one must seek is truth.
- [16] The testatrix was born the 2nd December, 1902, and was therefore almost 91 when she made the will in issue. She died on the 8th September, 2000. She had married, presumably in her youth, Howell Ross Morgan, the precise date of whose death no one bothered to provide. All we have in the affidavits is "in the early 1990's" although, upon the cross-examination of the respondent, the date of April 1992, that is just after the 1992 will was executed, was suggested. Of that marriage, there was, one infers, at least one offspring, the parent of the grandchildren named in the will.
- [17] When that offspring died is not in the evidence.
- [18] The appellant is now in her early 60's. Although the age of the respondent is not in the record, I infer he is in his mid-40's.
- [19] She says:
2. ... I began to live with my Aunt in 1955 when I was 14 years old and continued to live with her throughout my teenage years, eventually moving out when I became an adult.
- [20] The respondent says:
3. ... I lived with her [the testatrix] at the Residence from after my birth until I was about five years of age, at which time the Plaintiff married and I moved away.
- [21] In 1984, the testatrix made a will, a copy of which is not in evidence, but which is described by the solicitor in this case, Mr. G. M. Cohen, who apparently saw it when, in 1992, he took instructions for a will from the testatrix:

6. The Deceased had a prior Will dated November 28, 1984 (the "1984 Will"), which was witnessed by another solicitor, and which did not involve our law firm in any way. The 1984 Will provided that the Deceased's great-nephew, Roy Morgan Uzelac, was to be one of the Executors of the Will, and was to be the beneficiary of the house and real property at 7040 No. 5 Road, Richmond, British Columbia together with 35% of the residue. The 1984 Will provided that the grandchildren, Erin West and Steve West, would each receive 15% of the residue of the estate and the Deceased's husband, Howell Ross Morgan, would be the other Executor and receive 35% of the residue of the estate.

[22] There is no evidence at all of the value known to the testatrix of her property at the time she made the 1984 will.

[23] In early 1992, the testatrix consulted Mr. Cohen concerning the making of a new will. The solicitor's notes of his instructions leading to the will of 16th March, 1992, which were preserved, fortunately, are, in part:

Mr. & Mrs. Chalmers =

niece

Mrs. Morgan

7040 #5 Road

V6Y 2V2

278-2956

Feb. 17/92

(1) 3 1/3 acres

(2) Blueberry farm

(3) How to protect beneficiary's interest to keep away from wife

a) Trust in will - 10 years vested

- residence now

- farm land later

b) Marriage Agreement

(4) Inheritance remains the separate property of beneficiary unless property commingled [?]

(5) Roy to move onto farm: rent?

Roy to have benefit of income flow

(6) Cash in bank only for Erin & Steve, exclude Howell

Howie has own accounts : will cover own needs

* * *

Jeanne Marie Louise Marthe Morgan

Feb. 21/92

* * *

Moved to BC 1926

Roy is our favourite; we (husband & I raised Roy)

Concerned about relationship between Roy & his wife

[24] There is no evidence as to what the testatrix then understood to be the value of the real estate, the size of her bank account or the value of her other assets, if any.

[25] The only note relating to the will of 1993 is this:

[26] There is not a shred of evidence as to whether the testatrix, in October 1993, appreciated the nature and extent of her property. That she knew what it was, one might infer, but as to its value, one can draw no inference at all as to her understanding. There is no evidence as to whether, upon her husband's death, she inherited anything from him.

[27] The statement of assets of 6th December, 2000, prepared in support of the application for probate in common form, contains these entries:

PART I

REAL PROPERTY (INCLUDING MORTGAGES AND VENDORS AND PURCHASERS INTERESTS IN AGREEMENT FOR SALE)

WITHIN OR WITHOUT B.C.

VALUE AT DEATH

7040 No. 5 Road, Richmond, BC

PID Number 004-502-787

Lot 2 except: Firstly: Parcel R (Bylaw Plan LMP12615), Secondly: Part on SRW Plan 21735 Section 18 Block 4

North Range 5 West NWD Plan 7287

Within

Registered Owner: Jeannie Marie Morgan

2000 Assessed Value

\$15,300.00

PART II

PERSONAL PROPERTY (ALL ASSETS EXCEPT REAL PROPERTY)

WITHIN OR WITHOUT B.C.

VALUE AT DEATH

CIBC, 6011 No. 3 Road, Richmond, BC

Within

Account #00900/1628038

Balance @ date of death (interest included)

\$6,207.94

Account #00900/5024234

Balance @ date of death - \$171,810.35

Interest accrued to date of death - \$134.21

Total:

\$171,944.56

TOTAL VALUE:

\$193,452.50

PART III

DEBTS AND LIABILITIES

PAID OR UNPAID

AMOUNT

City of Richmond - property taxes

City of Richmond - utilities charge

Simon Fraser Health Region - extended care co-insurance

unpaid

unpaid

unpaid

\$764.91

\$351.72

\$8,857.30

[28] No evidence was adduced before the learned trial judge as to the actual value at the time of the death of the testatrix of the property on No. 5 Road in Richmond, but, being of the view that it is no part of a judge's duty not to know what he or she does know, it is now known because of events which have happened since the hearing of this appeal that the Richmond property, at least in the year 2004, was sold for some \$780,000. From the respondent's cross-examination, it is fair to infer that he has known for some time that it was worth at least \$700,000 and that the declared value was only its assessed value as agricultural land, agricultural land being assessed in a way very different from non-agricultural land.

[29] The appellant gave this evidence by affidavit:

5. In the Fall of 1991, my Aunt and I had a discussion about her need to change her living arrangements. At that time, my Aunt was approaching her 89th birthday and had just started living on her own as her husband had just gone into a care home. My Aunt and I decided that she would come and live with me if I could find a house that was more suitable for that purpose. My Aunt told me that she wanted to help me out financially because I was going to so much trouble for her. However, she never mentioned how or to what extent she would do so, and I did not think it was necessary to discuss it.

* * *

7. In January 1992, I made an offer on a home which was more suitable to accommodate my Aunt with my husband and I [sic]. Attached as Exhibit SC2 is a true copy of the Contract of Purchase and Sale for the home I eventually bought.
8. I took possession of the new home on May 2, 1992, and shortly thereafter my Aunt moved in with my husband and me. However, my Aunt did continue to maintain her own home in Richmond, and, on occasion she would return to her home and spend a day [or] two and sometime[s] up to a week there and then come back to my house.
9. Early one evening about the end of July 1992, my Aunt asked me to drive her to her house in Richmond so she could pick up a few personal items. One of the items she wanted to pick up was a handgun, which had been hers for many years. The handgun originally belonged to her mother who had passed it along to my aunt.
10. We returned home that evening having retrieved the personal items she wanted, including the handgun. After some discussion, which occurred over the next few days, my Aunt decided that she wanted to give the handgun to my husband, Roy Chalmers, so that he could eventually pass it on to my son, Roy Uzelac. At that time, my son, Roy Uzelac, did not have the necessary permits to allow him to acquire a handgun, however, my husband, Roy Chalmers, did have the necessary permits.

11. At my aunt's request, my husband went to the local RCMP office and had the handgun transferred into his name. Attached as Exhibit SC3 is a true copy of the Registration of the handgun into the name of my husband. The date of the transfer is August 5, 1992, and the transferee is my aunt, named in Exhibit SC3 as Jeanne West.
12. One evening in about early or mid August 1993, my Aunt began to tell me about her mother's death. My Aunt told me that she had actually caused her mother's death by turning on and leaving on a gas stove in her mother's house. Because her mother was, at that time, grossly overweight, had diabetes, could hardly walk, and was nearly blind, she was not able to turn the gas off, and as a result, died. My Aunt said to me that she had in fact killed her mother. Although my Aunt did not say it was deliberate, it was clear she considered herself responsible for her mother's death.
13. It was only a few days after telling me that she had killed her mother that my Aunt came to me one morning and told me that her mother had come to her in a dream that previous night and told her to take the handgun back from my husband. At that time, my Aunt was very insistent that the handgun be returned to her because of what her mother had said to her in the dream.
14. As a result of my aunt's request, both my husband I made inquiries of the RCMP to see if the handgun could be returned to my aunt. My husband and I were both given the same information, namely that the gun could not be transferred back to my Aunt because she did not have the necessary permits to allow her to reacquire the handgun. It was not possible to simply cancel the transfer and have the handgun registered in my aunt's name. My Aunt would have had to obtain the necessary permits to allow her to acquire a handgun, and then she could have reacquired the gun in question. The RCMP also said that they wondered why a 90 year old woman needed a gun anyway.
15. My husband and I tried to explain to my Aunt what the RCMP had told us. We explained in detail what we had been told about her needing the proper permit before the handgun could be transferred back into her name. My Aunt simply could not understand why we were not just transferring the gun back to her name. Neither could she understand why we did not simply give her back the handgun.
16. In about August or September, 1993, within only a week or two of my attempting to explain to my Aunt why she could not have the handgun back, she phoned my son, Roy Uzelac, and asked him to come and pick her up and take her back to her home in Richmond. My Aunt did not come back to our house again.
17. After my Aunt returned to her home in Richmond, I had a couple of conversations with her on the telephone during which she remained very angry with me. She did not talk to me again.

18. I was very upset that my Aunt was letting this handgun issue put an end to our very long term relationship. It did not seem reasonable to me, and I was concerned for my Aunt because her concern arose out of her strong desire to do what her dead mother had told her to in a dream. However, I was also aware that my son, Roy Uzelac, was in contact with her and helping her with her needs. I felt somewhat helpless in not being able to communicate with my Aunt to make her understand what had happened with the handgun, and I was sad that she was refusing to talk to me. However, I felt it was likely in her best interest not to aggravate her further.
19. My Aunt never got over that incident, and never spoke with me again. My Aunt specifically blamed me for not giving her back her handgun despite all of my efforts to explain that the law prohibited it.
- [30] The learned trial judge did not say that he disbelieved this evidence. Therefore, I must proceed upon the footing that he accepted it.
- [31] The respondent said this about his relationship with his great-aunt:
2. Jeanne was my great-aunt, being the aunt of my mother, the Plaintiff, Sonnett Chalmers. Because of the relationship I had with Jeanne, I have always referred to her as my "Grandma". Jeanne lived on the property located at 7040 No. 5 Road, Richmond, British Columbia (the "Residence") since the late 1950's, along with her husband, Howell Ross Morgan, until his death in the early 1990's.
 3. My relationship with Jeanne was always good. I lived with her at the Residence from after my birth until I was about five years of age, at which time the Plaintiff married and I moved away. Since that time, I have always been in close and regular contact with Jeanne, and we had a very close relationship which we treated as grandmother and grandson. After Jeanne's husband died, I took on the role as her primary caregiver as she was living alone in the Residence up to the date of her death with the exception of a period of approximately two to three months at which time Jeanne was residing with the Plaintiff.
 4. Jeanne made me aware of provisions in her Will made in 1984 (the "1984 Will") concerning the intended disposition of the Residence to me upon her death, subject to a life interest in favour of her husband, as well as an entitlement to a portion of the residue of her estate. The Residence had been purchased with her funds, and her husband had no other relatives other than siblings. Jeanne told me that she wanted to ensure that the Residence, being the substantial asset of her estate, passed to me rather than being subject to any claim of relatives of her husband.
 5. I married in or about December of 1991. Prior to marriage, my fiancée had met Jeanne on a number of occasions. Jeanne indicated to me, prior to my marriage, that she was concerned about the fact my fiancée already had a child, and that my marriage might not be stable. She did not appear to be particularly concerned that I was becoming married, but her concerns appeared to relate to the possibility of my fiancée, someone with whom Jeanne had only

limited contact up to that time, possibly taking a good portion of Jeanne's estate in the event that both Jeanne and I were to die. This was also a time of heightened emotion as far as Jeanne was concerned, since her husband had just recently passed away.

* * *

7. I had nothing whatsoever to do with either the 1984 Will or the 1992 Will, either by way of suggesting anything to Jeanne concerning their provisions or in assisting her with attending at the office of a solicitor. I believe Jeanne went to Cohen Buchan Edwards in 1992 as a result of the Plaintiff having previously dealt with them on other matters.
8. I previously knew, from conversations with Jeanne, that she was planning to change the provisions for me in her estate planning because of my marriage. I was not particularly concerned about the intended changes, although I was somewhat concerned about Jeanne's reasons for making the changes. However, my personal view concerning Jeanne's estate planning was that she could make whatever decision she wanted to make concerning her assets, and that there was nothing much that I was able to do about it, or should be able to do about it, in any event.

* * *

10. My wife and I had our first child together in August of 1992. Jeanne was very happy with the new addition to our family, and by that time had developed a much better relationship with my wife. At the same time, after Jeanne returned to the Residence, her relationship with my mother deteriorated. I am aware, from conversations with Jeanne, that she did not talk with my mother for a number of years after her return to the Residence.
11. In the time between the birth of my child at the end of August of 1992 and the making of the 1993 Will on October 6, 1993, Jeanne raised the issue of her estate planning with me. I had not raised the topic with her in any way. She said that she then felt that what she had done in the 1992 Will was not appropriate, that she now trusted my wife, and that she did not feel the same as she had previously thought about the stability of my marriage. She indicated that she was planning to change her Will to go back to what had been provided in the past, which I took to mean that she was planning to make provisions for me with respect to the Residence and to the residue of her estate.

* * *

16. On December 16, 1998, Jeanne had a fall in her house. When I made my regular call that morning, she did not answer, and I immediately telephoned 911. The RCMP later told me that they entered the house and found her on the floor, and that she had been there for about six hours by the time they found her. The Plaintiff was notified by me on the same day. Jeanne was hospitalized and eventually went into a care facility, where she remained until her death.

17. Jeanne's mental capacity was quite satisfactory until the time she passed away, although at the very end of her life she was beginning to be a bit forgetful about names. She did not have Alzheimer's or any other illness which reduced her mental capacity....

[32] Other evidence before the learned judge was as follows:

Dr. Roy A. Brown, in an affidavit dated the 10th August, 2001, deposed -

4. It is my opinion that Jeanne was mentally capable to provide instructions to a solicitor concerning the preparation of a Will, and to understand the contents of a Will in October of 1993. At that time, she was a person of sound and disposing mind, and exhibited no physical or mental disabilities which would prohibit her from understanding the nature of what she was doing concerning her testamentary dispositions and providing instructions to a solicitor. Jeanne showed no signs of suffering from any psychotic delusions, and did not suffer from any mental infirmity at the time.

Upon cross-examination, he said that, at the relevant period, the condition for which he was treating her was chronic obstructive pulmonary disease, although, in 1992 and perhaps earlier, she had from time to time been given antidepressants.

Rene Theodore, who was the former wife of a nephew of the testatrix, said that, upon encountering the testatrix in March 1993, the testatrix did not recognize her. She further testified:

16. My mother, who lived in Edmonton, died on April 1, 1993. I became involved in her estate. During this time, around May 1993, I finally went out to Sonnett's place to visit Aunt Jeanne and Sonnett. At that time the news of my mother's death seemed to go over Aunt Jeanne's head, like she was in a daze or foggy. She could not even reminisce about my parents with me anymore although she had known them very well.

THE JUDGMENT BELOW

[33] The learned judge explained the proceedings before him thus [(2003), 2 E.T.R. (3d) 22, 2003 BCSC 1320]:

- [4] A grant of probate of the 1993 will issued to the defendant on 18 January 2001. The plaintiff commenced this action 9 February 2001. She seeks orders revoking the grant of 16 January 2001; and admitting the 1992 will to probate.

- [5] The defendant counterclaims for orders dismissing the plaintiff's action; and pronouncing for the validity of the 1993 will in solemn form.

- [6] The defendant applied for a summary disposition of the plaintiff's claim and his counterclaim, pursuant to Rule 18A, of the Rules of Court, by a motion dated 16 April 2003. The plaintiff contends that summary disposition of these matters is not suitable, because, in that procedure:

... She does not have the opportunity to appear in front of the court to have her genuineness, sincerity and honesty evaluated by the court.

However, if the matter is considered suitable for summary disposition, then the plaintiff seeks the relief claimed in her statement of claim.

[34] As to the question of whether the matter was suitable for a trial under Rule 18A, the learned judge quoted, at paragraph 34, a passage from *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.) at 219:

... judgment should not be given under R. 18A(3) without asking these two questions: Has any party been denied an opportunity to produce relevant testimony? Is there a conflict in the evidence, which the judge cannot readily resolve, on a point of fact which could affect the result?

[35] The learned judge then said:

[35] On this application, the answers to both questions are "No". All of the issues presented by the parties on this application are suitable for a summary trial disposition.

[36] Having referred to the judgment of the Supreme Court of Canada in *Vout v. Hay*, [1995] 2 S.C.R. 876, and a number of other authorities quoted in a footnote, the learned judge said:

[39] The evidentiary burden on those attacking a will is to point to evidence of circumstances which are suspicious. The suspicion must be "well grounded"; "... not circumstances that create a general miasma of suspicion that something unsavoury may have occurred, but rather circumstances which create a specific and focussed suspicion that the testator may not have known and approved of the contents of the will".

[40] In none of the previous decisions referred to by the plaintiff has the evidence, of what are said to be "suspicious circumstances", been analyzed in isolation from the other evidence.

[41] On all of the evidence in this case, the plaintiff's suspicions, are not "well grounded". Her arguments are a clear example of post-hoc ergo propter hoc reasoning. At the time of its occurrence, from the plaintiff's perspective, there was nothing remarkable about the handgun incident. The plaintiff took no steps to caution the defendant, or anybody else, about Ms. Morgan's fragile mental state. There is no evidence that Ms. Morgan ever raised the handgun incident with the defendant, her medical doctor or her solicitor.

[42] In result, the formalities of due execution having been proved, the defendant is entitled to the evidentiary presumption of validity of the will.

[43] Accordingly, the plaintiff's claim is dismissed. The validity of the 1993 will is confirmed.

[44] If I am wrong in concluding that the plaintiff's suspicions are not well grounded, then I find that it is more probable than not that Ms. Morgan did have testamentary capacity when she made the 1993 will.

[45] At no time did Ms. Morgan manifest any behaviours to precipitate a further mental exam by Dr. Brown; nor any further inquiry by Mr. Cohen or the defendant. Ms. Morgan's estate had not changed between 1984, 1992 and 1993. There was a rational explanation for the change of beneficiary in 1993.

[Emphasis added; footnotes omitted.]

[37] I am unable to find on the evidence any support for the passage I have emphasized.

[38] The learned judge then awarded the costs of the trial to the respondent.

[39] In this Court, the appellant does not complain of the learned judge's determination that this case was suitable for summary trial. She does complain that the learned judge's conclusion on the testamentary capacity of the testatrix was unreasonable and objects to the learned judge's award of costs.

[40] I have some difficulty with paragraph 44 of the learned judge's reasons which appears to be lumping together issues of undue influence with issues of testamentary capacity.

[41] But whether that be so or not, a question of testamentary capacity does not turn on the presence or absence of suspicious circumstances.

[42] In *Murphy v. Lamphier*, supra, Boyd C. placed great reliance on the wisdom of Sir John Nicholl and, for the principle applicable to this case, I turn to Sir John Nicholl's judgment in *Dew v. Clark* (1826), 3 ADD. 79, 162 E.R. 410. The evidence in that case is far removed from the evidence in this case. In it, Sir John Nicholl accepted that the testator, for no good reason, harboured animosity towards his daughter to such an extent that he essentially disinherited her.

[43] The nub of the judgment is in this passage, at 454 (E.R.):

At the same time, the contents of this will, to a great extent, are independent of the daughter's case, though referred to as above by the Court in aid of and by way of explaining that case. By this I mean that the contents of the will in this case are not by any means the substantive ground of the Court's judgment. For the contents of the will in this case are clearly not of a nature, substantively taken, to found a sentence pronouncing that will to be invalid. Accordingly, the Court is referring to them for no such purpose: in other words, it is neither concluding that the deceased in this cause was insane as to his daughter, because he disinherited his daughter; nor anything of the kind. But having concluded the deceased insane as to his daughter, generally speaking (a conclusion at which it has arrived by other means), what the Court has been doing is this. It has been referring, as I apprehend that it was at perfect liberty, and even bound, to refer to the contents of the will, in order, if possible, to ascertain by these whether such insanity was present to the mind of the deceased, and in actual operation, as charged by the daughter, at the time of making his will. And finding it to have been so present - finding it to have been so in operation - the contents of the will plainly bespeaking all this - the conclusion is, I think, inevitable that the deceased was of unsound mind at the time when he made this will. Had the

contents of the will furnished a contrary inference - had the will, so far as respects the daughter, been, in all parts of it, an officious will, the conclusion upon this head, and so upon the whole case, might have been different; the very contents of the will would in that case have inferred that however partially insane (insane on the subject of his daughter) the deceased might have been, generally speaking, still that such partial insanity was not present to his mind; was not in actual operation at the time of his making the will, in which event the will might have been valid. It is clear, however, that in respect of a will not inofficious as to the daughter, no such question as the present in its whole complexion could by possibility have arisen.

In a word, the will propounded in this cause, a will virtually disinheriting the daughter, being (plainly so to be inferred) the direct unqualified offspring of that morbid delusion, proved, I may now say without any qualification or restriction, to have been ever present to the mind of the deceased, as to the character and conduct of his daughter - being, if I may so term it, the very creature of that morbid delusion put into act and energy - I, at least, can arrive at no other conclusion than that the deceased was insane at the time of his making the will propounded in this cause; and consequently that that will itself is null and void in law.

[Footnotes omitted.]

[44] Earlier, by way of illustration (p. 416), Sir John Nicholl spoke of a case in which a man otherwise recovered from general insanity nonetheless continued to believe erroneously that his brother, his only next-of-kin, had tried to poison him.

[45] Thus, a delusion affecting the subject matter of a will and operating at the time of its making may be a foundation for a determination that the deceased lacked testamentary capacity even if the deceased is perfectly competent to conduct all other business.

[46] Here, the events which are said to have constituted a morbid delusion of the sort which would determine a testatrix was incapable of making the will which she did make took place in August 1993, a mere two months before the making of the will in issue. She took umbrage against the appellant for not doing what the Criminal Code forbade, namely, transferring the gun to someone not lawfully entitled to possess it.

[47] If that was the only explanation for the change in the will, it might be right to allow this appeal.

[48] But there is, in both the 1984 will and in the instructions for the 1992 will, a rational explanation for the will in issue. The appellant was not a beneficiary under the 1984 will; the respondent was. The appellant was a beneficiary of the 1992 will because the testatrix was chary of the respondent's new wife. By the fall of 1993, however, she no longer was.

[49] A testatrix cannot be found not of testamentary capacity simply because she chooses to leave her estate in a manner that may be thought unkind.

- [50] Mr. Orsetti has said all that could be said to advance the appellant's case, but, in the end, I am not persuaded that the learned judge below erred. On the issue of the validity of the 1993 will, the appeal fails.
- [51] The remaining question is the order for costs in the court below. Had the respondent's solicitor taken full instructions in 1993 and kept a proper record of those instructions, this case might well not have been brought. I would set aside the order for costs in the court below.
- [52] As the respondent took no part in the appeal, he is not of course entitled to costs in this Court.

"The Honourable Madam Justice Southin"

Reasons for Judgment of the Honourable Mr. Justice Hall:

- [53] This is an appeal from the judgment of the Honourable Mr. Justice R.D. Wilson dated 26 August 2003 which upheld the validity of a will dated 6 October 1993. The testatrix, Mrs. Jeanne Morgan, was born in Ontario in 1902 but lived in British Columbia for the last 75 years of her life. She died on 8 September 2000, three months short of her 98th birthday. Between 1984 and 1993, she made three wills, one dated 28 November 1984, one dated 16 March 1992, and the will at issue here.
- [54] Mrs. Morgan and her deceased husband Howell Morgan were long-time residents of Richmond. During the time period when these wills were drawn and indeed up until shortly before her death, she owned a blueberry farm upwards of three acres in Richmond where she resided until she went into a care home in 1998. While the farm may have been of modest value when she acquired it, it became more valuable with the passage of time and the increase in population of the Lower Mainland. I understand that the property has been sold recently for upwards of three quarters of a million dollars.
- [55] One is put in mind of the case of *Murphy v. Lamphier*, a 1914 Ontario case referred to in the reasons of my colleague Madam Justice Southin, a case I will have more to say about later in these reasons. In that case, the testatrix, Mrs. Lamphier, owned a 200-acre farm near Burnhamthorpe as well as a hotel at Erindale when she died in September 1913. The farm was then worth about \$40,000, but the hotel had virtually no value. At the present time, some 90 years later, that property would be worth a king's ransom since it is all now part of metropolitan Toronto.
- [56] But to return to the present case, when Mrs. Morgan made her 1984 will, she left modest monetary bequests to her two grandchildren, Ms. West and Mr. West; directed that her husband Howell Morgan should have a life estate in the farm and further directed that upon his death the residue of the estate should go to her great-nephew Roy Morgan Uzelac, the respondent in this case. Howell Morgan became ill and had to be hospitalized in the latter part of 1991; he died in 1992. It appears from the medical evidence that following her husband's illness and death, Mrs. Morgan, the testatrix, became depressed and was in 1992

somewhat undecided about where she should live. She had some discussions on the subject with her niece, the appellant, Sonnett Chalmers. She decided that she would move in with Ms. Chalmers and her husband although she planned to keep the blueberry farm and perhaps reside there for part of the time. Ms. Chalmers and her husband purchased a larger house in early 1992 so that the testatrix could move in with them.

[57] The evidence discloses that when Ms. Chalmers was a young woman, she resided with the Morgans at the farm property. When her son Roy Morgan Uzelac was born, mother and son lived there for about five years. Because of this background, the relationship between Mrs. Morgan and Ms. Chalmers and Mr. Uzelac respectively was more akin to mother-child and grandmother-grandchild than aunt, niece and great-nephew.

[58] In the notes taken in connection with instructions for the March 1992 will, Mr. Cohen, the solicitor who drew both the 1992 and the 1993 wills, we find the following about the respondent; "Roy is our favourite; we (husband and I raised Roy)". In his affidavit, the respondent Uzelac deposed about his relationship with his great-aunt:

3. My relationship with Jeanne was always good. I lived with her at the Residence from after my birth until I was about five years of age, at which time the Plaintiff married and I moved away. Since that time, I have always been in close and regular contact with Jeanne, and we had a very close relationship which we treated as grandmother and grandson. After Jeanne's husband died, I took on the role as her primary caregiver as she was living alone in the Residence up to the date of her death with the exception of a period of approximately two to three months at which time Jeanne was residing with the Plaintiff.
4. Jeanne made me aware of provisions in her Will made in 1984 (the "1984 Will") concerning the intended disposition of the Residence to me upon her death, subject to a life interest in favour of her husband, as well as an entitlement to a portion of the residue of her estate. The Residence had been purchased with her funds, and her husband had no other relatives other than siblings. Jeanne told me that she wanted to ensure that the Residence, being the substantial asset of her estate, passed to me rather than being subject to any claim of relatives of her husband.

...

8. I previously knew, from conversations with Jeanne, that she was planning to change the provisions for me in her estate planning because of my marriage. I was not particularly concerned about the intended changes, although I was somewhat concerned about Jeanne's reasons for making the changes. However, my personal view concerning Jeanne's estate planning was that she could make whatever decision she wanted to make concerning her assets, and that there was nothing much that I was able to do about it, or should be able to do about it, in any event.

...

11. In the time between the birth of my child at the end of August of 1992 and the making of the 1993 Will on October 6, 1993, Jeanne raised the issue of her estate planning with me. I had not raised the topic with her in any way. She said that she then felt that what she had done in the 1992 Will was not appropriate, that she now trusted my wife, and that she did not feel the same as she had previously thought about the stability of my marriage. She indicated that she was planning to change her Will to go back to what had been provided in the past, which I took to mean that she was planning to make provisions for me with respect to the Residence and to the residue of her estate.
 12. I did not coerce, convince, influence or participate with Jeanne in any of the process of planning for the 1993 Will. As with the 1992 Will and the 1984 Will, it was entirely up to Jeanne what she wanted to do with her estate, and my feelings in that regard were consistent with what they had been in the past. Jeanne made her own arrangements to see her lawyer, and I had no discussions at all with that lawyer. I did not take her to see the lawyer, and I believe that she was taken there by her friend, Alix W. Robertson, who was also one of the witnesses to the 1993 Will.
- [59] One of the statements made by Mr. Uzelac at para. 3 of that affidavit is contradicted by the appellant Chalmers, who deposes that Mrs. Morgan resided with her and her husband for upwards of a year at their home near Langley. There is some support for the proposition that the testatrix did live with Ms. Chalmers as late as the summer of 1993 in affidavit material of Ms. Theodore, a relative by marriage, who deposed to seeing Mrs. Morgan at the Chalmers' residence in the summer of 1993. There is also evidence that in April 1993, Mrs. Morgan's physician ordered a prescription by telephone to a London Drugs store located in Langley. This supports the position that Mrs. Morgan resided at the Chalmers' residence at that time. On the other hand, a discharge note from Richmond Hospital indicates that when Mrs. Morgan was discharged from there after a bout of pneumonia at the end of May 1993, her family had been told to ensure that she had proper home care. This could indicate that perhaps she was residing at that time back at the Richmond property. Ultimately, I doubt if much turns on this discrepancy as to times. In the end, all we can glean from the evidence is that for some time between the spring of 1992 and the summer of 1993, Mrs. Morgan did reside with Ms. Chalmers and her husband in Langley but by the fall of 1993 she was again residing at the Richmond property.
- [60] Wilson J. sets out a useful history of the progression between the various wills in his reasons:
- [26] Mr. Cohen was the solicitor who drew both wills. At the time of taking instructions from Ms. Morgan on the 1992 will, he understood that Ms. Morgan had made a will in 1984. Under that will, among other things, the defendant was the beneficiary of Ms. Morgan's Richmond property.
- [27] Mr. Cohen said this about the 1992 will:

6. The deceased had a prior will dated November 28, 1984 (the "1984 Will"), ... The 1984 Will provided that the deceased's great nephew, Roy Morgan Uzelac, was to be one of the executors of the will, and was to be the beneficiary of the house and real property at 7040 No. 5 Road, Richmond, British Columbia ...
 7. The 1992 Will provided that the residual beneficiaries were to be Roy Morgan Uzelac and the plaintiff, Sonnett Chalmers, each as to an equal share of the residue. During her meeting with me where she provided me with instructions, the deceased indicated some concerns she had about the then recent marriage of her great nephew, Roy Morgan Uzelac, which concerns were a motivation for the changes she was making to her will. It was my belief that her concerns related to the possible instability of the marriage, and the possibility that the wife of Roy Morgan Uzelac might eventually obtain part of the deceased's estate in the event that Roy Morgan Uzelac was to die as well.
- [28] Of the 1993 will, Mr. Cohen said:
8. By the time I met with the deceased to obtain instructions concerning the 1993 Will, she had become satisfied with the marriage of Roy Morgan Uzelac, and had decided to again change her will ...
- [61] What seems to me tolerably clear from the trial judge's narrative is that Mrs. Morgan, from at least 1984, had a general wish to confer a substantial bequest upon her great-nephew Roy Uzelac, the respondent. While she was not unfriendly to her niece Ms. Chalmers in the period from 1984-1992, her great-nephew was really the chief object of her bounty. As she told Mr. Cohen when he was receiving instructions from her for the 1992 will, Mrs. Morgan considered that she and her husband had raised Roy Uzelac.
- [62] However, events that occurred in the early 1990s caused the testatrix to consider some changes in her financial affairs. For one thing, her husband Howell Morgan had become seriously ill in 1991 and died in 1992. She was not sure if she wanted to live alone on the Richmond farm. Also, her favoured great-nephew Roy had married a lady who had a child from a previous union. It appears from the evidence that the testatrix had doubts about the suitability of his new wife as well as the long-term prospects of the marriage. Also, since she proposed to live with Ms. Chalmers who had purchased a new home to accommodate this change, Mrs. Morgan doubtless felt some obligation to her niece.
- [63] The upshot of all this is that Mrs. Morgan decided to draw the March 1992 will. Her husband Howell Morgan was either dying or dead by this time and thus had no need of any assistance from the testatrix. There is a further passage in the notes taken around the time the will was made indicating that in any event Howell Morgan had resources of his own. A change was made from the provisions of the 1984 will so that Sonnett Chalmers and Roy Uzelac would each receive 50% of the residue of the estate. Cash bequests remained effective in favour of the West grandchildren.

- [64] By fall 1993, the situation had changed again. Whether there were ill feelings between the testatrix and her niece as a result of the gun incident as narrated in the reasons of my colleague Madam Justice Southin or whether the living arrangements simply did not suit Mrs. Morgan, the fact is that she was now back at the Richmond farm full-time. Thus, whatever obligation she might have thought she would be under to her niece Sonnett Chalmers in the spring of 1992 was no longer extant. It appears from the evidence of Mr. Cohen, the solicitor, that by this time she had become reconciled to the marriage of her great-nephew, she had a better opinion of his spouse, and she now felt the marriage was likely to endure. It appears that for these reasons she proposed to revert to the general scheme of the 1984 disposition of her property; the new will she made in October 1993 reflected this intent. After providing modest cash bequests to the West grandchildren, she reinstated her great-nephew as the sole beneficiary of her estate. In my view, there is a logical explanation as to why she made the various wills she did between 1984 and 1993.
- [65] The solicitor who drew the will, Mr. Cohen, and Dr. Brown, the family physician, who attended Mrs. Morgan from 1989 until the time of her death, filed affidavits in these proceedings in which they expressed the view that Mrs. Morgan was in a perfectly fit mental state to make a will in the fall of 1993. They were cross-examined on their affidavits but I see nothing in the cross-examination transcripts that casts any doubt on what they deposed to in their affidavits concerning the condition of the testatrix. They did not resile under cross-examination from the opinions they had expressed in their affidavits.
- [66] Wilson J. noted in his reasons that as the case was pleaded, it appeared the onus would be on the plaintiff to demonstrate that Mrs. Morgan lacked testamentary capacity when she made her 1993 will, but he noted that the matter seemed to have been argued on the theory that there were "suspicious circumstances" tending to call into question the capacity of Mrs. Morgan and therefore the onus of proving testamentary capacity would be cast upon the defendant. Ultimately, the trial judge concluded that there were neither suspicious circumstances nor any doubt concerning her mental capacity at the time Mrs. Morgan made her last will and he found in favour of the validity of the 1993 will. In my respectful view, he was eminently justified on a consideration of all the evidence in reaching those conclusions. Therefore I agree with my colleague Madam Justice Southin that this appeal ought to be dismissed.
- [67] My colleague, referring to the 1914 Ontario case *Murphy v. Lamphier*, has suggested that the solicitor who drew the 1993 will should have done more around the time of the execution of this will. I am not disposed to think that he was required to take further steps than he did. While it is unfortunate he was not able to find notes relating to this will, it seems to me he had a sufficient general recollection of the circumstances surrounding the making of the 1992 and 1993 wills to demonstrate that the 1993 will was made by a competent testatrix who had appropriate reasons for disposing of her estate as she did.

- [68] The case of *Murphy v. Lamphier* was a very different situation from the case at bar. Mrs. Lamphier, the testatrix in that case, died at the age of 80 years in 1913. The will in question had been made in May 1912, about 16 months before she died. The 200-acre farm she owned at Burnhamthorpe was worth \$30,000 or \$40,000 but on account of the temperance legislation then in force in the province, the Erindale hotel that she owned was said to be not worth very much. However, in today's dollars the value of the farm would amount to some hundreds of thousands and would thus be an asset of substance to heirs and potential heirs.
- [69] The testatrix had made a series of wills commencing in 1903. Mrs. Lamphier had nine children, one of whom was deceased and had left a widow. What the family did when they became adults seems to me a typical pattern of that era. The two older sons emigrated to the U.S. One brother who remained near home had inherited land from his maternal grandmother. The three daughters in the family married but one had a failed marriage and she then returned home to look after her parents. The two younger sons remained at home to help run operations with the parents. The 1903 will was drawn, as a matter of interest, by Mr. William Mulock, C.J.Ex. at the time of the *Lamphier* decision and later C.J.O. This will gave the realty to the younger sons who had remained with the parents and modest monetary sums to one daughter and the two elder sons who had gone to the U.S. The daughter who was at home looking after her parents was released from all debts owing to her mother. The testatrix's 1905 and 1909 wills retained the same disposition of the land and also provided some cash legacies including a bequest of a sum of money for life to her husband. A fourth will drawn in 1911 followed the same general distribution scheme but the testatrix added a clause that provided that anyone who challenged the will would forfeit his or her share.
- [70] The wills prior to the contested will of 25 May 1912 all contained provisions giving certain specific items to various members of the family. As noted by Chancellor Boyd, in marked contrast to all these careful details in these wills was what he termed the "bald and colourless division in general words" of the 1912 will, which provided simply for all property to be divided among all children including the widowed daughter-in-law.
- [71] In *Lamphier*, there was clear evidence that the testatrix had suffered a number of strokes starting in 1907. Thereafter she had a certain amount of paralysis of speech. It seems she may have suffered subsequent strokes in 1909 and 1911. In addition, a doctor who testified spoke about the progressive effect of senility upon her. Two priests who saw her frequently in 1911 and 1912 thought that she was much impaired mentally. One of them, Father Treacy, who had seen her in the month before she made the 1912 will, thought she was then in a state of mental imbecility with her memory gone and he observed, "I could not conscientiously have witnessed her will".
- [72] It is clear that the earlier wills had caused dissension in the family. Several of the children who were not inheriting the valuable land thought the two younger sons were getting too much. Two of the daughters and the widowed daughter-in-law were particularly unhappy. There were family meetings inspired by those the chancellor termed "dissidents", but Mrs.

Lamphier was not persuaded to change the disposition of her estate. The chancellor found that family dissension about the 1911 will had come to the knowledge of the solicitor who drew the contested will of 1912. This solicitor had earlier acted for the husband of one of the dissident daughters in connection with a dispute between him and one of the sons who was to inherit the real property.

- [73] What led to the signing of the 1912 will is set forth in the judgment. On an afternoon in May when the mother was moving from one place to another, she was invited to go to the home of one of her daughters. Present at that time were the two dissident daughters. The mother remained there for a few days before she went to reside at her new home. During her stay, one of the daughters summoned the solicitor to the house. One daughter then told her mother she had sent for the solicitor to have her own will made. This will was signed in the presence of Mrs. Lamphier. The daughter suggested that Mrs. Lamphier might like to make another will for herself and the mother assented.
- [74] The chancellor found, "[t]he talking was done by the others and the old lady was passive or impassive... she spoke little or seldom, and lacked originating power". The solicitor was apparently able to obtain the names of her children from the testatrix. He said that she had instructed him to provide that her property should be divided between the children equally. One of the included beneficiaries was the widowed daughter-in-law.
- [75] In concluding the 1912 will was invalid, Chancellor Boyd identified these problems with the execution of this will:

What, then, are the things out of the common which invite the inspection and consideration of the Court? In brief outline, these: (a) the will is made during the temporary absence of Mrs. Lamphier from her husband; (b) made without reference to or communication with her natural protectors; (c) made whilst she was in the hands and under the care of two married daughters who were dissatisfied with a former will and had recently sought to have it changed; (d) made by an old lady verging on eighty years of age, suffering under a double process of deterioration from the impairments of senility and the inroads of a progressive disease affecting her brain; (e) made by a solicitor who could not be regarded as an independent adviser and who was not chosen by the testatrix; (f) made on the spur of the moment, where the method of testamentary disposition, originating nine years before and carried through a series of wills down to the one made in 1911, was displaced and superseded by a method of equal distribution desired by Mrs. Brown and Mrs. Hayes and the other dissentients.

These unusual conditions call for clear evidence, satisfactory to the Court, that the testatrix fully comprehended the nature and effect of the act and freely intended and meant it to have such effect.

Before the stroke of 1907, two wills were made by the testatrix which may well be taken as a safe and solid foundation of testamentary intention. Those afterwards made up to 1911 are of the same general tenor, and represent a fixed purpose in the disposal of the land. This last one, of 1912, is a complete reversal of all the others, and so radical in its nature that a satisfactory explanation should be given, having regard to the age and condition and situation of the testatrix.

Chancellor Boyd concluded that the will had been inspired and imposed upon the mentally and physically enfeebled testatrix by her daughters and he found that the solicitor had entirely failed in his duty to assure himself that the will was the voluntary act of a knowledgeable and capable testatrix.

- [76] What happened in *Murphy v. Lamphier* is in marked contrast to the situation in the case at bar. For one thing, so far as we can ascertain from the evidence, the respondent Uzelac had nothing to do with the execution of any of the wills made by Mrs. Morgan between 1984 and 1993. Also, the evidence in this case is that Mrs. Morgan was in good mental health in 1993 and able to run her own financial affairs for several years after she made the will. Her physician, who cared for her over a long period, expressed the firm opinion that she was mentally capable at the relevant time in 1993.
- [77] The solicitor who drew Mrs. Morgan's will spent considerable time with her going over the provisions to be contained in the 1992 will. He learned about her background and her property and her family. He was aware in general terms of the distribution scheme under the 1984 will. There was a logical and sensible reason for her to make the 1992 changes having regard to the circumstance that she then proposed to reside with her niece, Ms. Chalmers. However, when that relationship broke down in 1993, and she went back to her own residence, that distribution made less sense. It was then quite natural for her to revert back to the distribution scheme she had originally provided for in the 1984 will with the exception of her husband's entitlement since he was deceased by that time.
- [78] Unfortunately, the solicitor was not able to locate notes relating to the making of the 1993 will although he recollected having at least one meeting with her relative to the making of this will. He recollected that when he met her in 1992 his impression was that she was very forthright, determined, and clear thinking. He testified that although he had little independent recollection of the circumstances surrounding the making of the 1993 will, he believed that he would have had no concern as to her capacity and the distribution she wished to make of her estate because the testatrix had earlier expressed her affection for her great-nephew to whom she was leaving the bulk of the estate. The solicitor was, as I earlier noted, aware that the scheme of distribution under the 1993 will was consonant with the provisions of the 1984 will.
- [79] While it would have been preferable if he had found the notes so he could consult them if a question arose, in the particular circumstances of this case and having regard to the history of matters, it seems to me that there was nothing here that should have excited suspicion on the part of the solicitor that anything untoward was being done by this testatrix. That she

had apparent capacity to make a will is confirmed by the evidence of her physician. It is not surprising in my view that the solicitor saw nothing out of the ordinary in what was being proposed by the testatrix.

- [80] This case is so very different from the Lamphier case that I find that case of little assistance in the case at bar. I would not be disposed to criticize the conduct of the solicitor here because on the face of matters it seems to me that this was a quite normal and logical transaction being conducted by an individual who seemed quite capable of managing her own affairs. The evidence indicates that she was brought to the solicitor's office, not by any person taking a benefit under the will, but rather by a friend, Alix Robertson.
- [81] It seems to me that the degree of inquiry that ought to be made by a solicitor drawing a will can vary depending on circumstances. In the situation where an obviously feeble person is brought into a solicitor's office by a beneficiary, and the solicitor has never met the parties, obviously a careful inquiry ought to be made. That is particularly so where the individual bringing the testator before the solicitor will benefit greatly from the disposition of the estate. But in a situation like the case at bar where the solicitor has previously dealt with the testatrix and is generally aware of the affairs of the testatrix, the family relationships and the assets of the estate, obviously less inquiry will be needed.
- [82] In my view, the extent of any investigation and inquiry will always depend on the circumstances. Sometimes a great deal of investigation and inquiry will be requisite for the solicitor to satisfy himself or herself that all is proper, but in other cases such as this one much less will be required. Lamphier was a case where a thorough inquiry would have revealed that a gross imposition was being made on a senile and feeble old person. In the case at bar I do not think more inquiry was required because of the previous dealings that had occurred between the solicitor and the testatrix. There was, in my view, nothing at all present to excite any particular apprehension or concern.
- [83] My colleague has concluded that because of the lack of information available from the solicitor about the circumstances leading to the 1993 will, no costs ought to be awarded in the court below or in this Court. I agree with her concerning costs in this Court because the respondent took no part in proceedings before us, but I am not inclined to agree with her about the disposition of costs ordered by Wilson J. in the trial court. Costs in litigation are something of a regulatory device. By that I mean that if a defendant persists in an unmeritorious defence that defendant may find himself or herself facing a bill of costs. The same is, of course, also true of a plaintiff who pursues an unmeritorious case. The possibility of an award of costs is a powerful incentive tending to the proper resolution of cases.
- [84] The trial judge referred to *Sanguinetti v. Korpiel*, [1998] B.C.J. No. 2669 (S.C.) (QL), where Mr. Justice Pitfield observed that although the parties were entitled to inquire into the circumstances giving rise to certain provisions in a will, "it should have been apparent to them by the completion of examinations for discovery that their claim had no basis in fact or law". The trial judge thought that observation applied to this case. I agree. It seems to me

that by the time examinations on affidavits had concluded, it must have been apparent that any likelihood of success in overturning this 1993 will was remote indeed. In the circumstances, I see no error in the disposition of costs ordered by Wilson J. Thus, while I concur with the disposition of costs in this Court as proposed by my colleague, I would not be inclined to disturb the order for costs made by Wilson J. at trial.

"The Honourable Mr. Justice Hall"

I agree:

"The Honourable Mr. Justice Donald"

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