

CANADA / JUDGMENT

Conner Estate v. Worthing

2020 BCSC 150

COURT

Supreme Court of British Columbia

DECIDED

7 February 2020

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2020 BCSC 150 Conner Estate v. Worthing

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Conner Estate v. Worthing,

2020 BCSC 150

Date: 20200207

Docket: S109690

Registry: Kelowna

Between:

Keith Woodburn Purvin-Good, as Executor of the Will of Jean Ingrid Conner

Plaintiff

And

Denis Worthing, Faron Lee Alexander Black, Tracey Marcella Black

also known as Tracey Reimer, Krislynn Richelle Reimer, Ronald Conner,

Rhonda Carr-Hagar, Glenn Conner, William Conner, William Croy,

Chelsey Conner, Tiffany Conner, Athina Conner, Adriann Conner,

William Conner Jr., Richard Tyler Worthing, Travis Ryan Worthing, and

Kristen Okimaw as Litigation Guardian of Brett David Timm,

Kolby Robert Alexander Bisson and Shayna Rolene Bisson

Defendants

Corrected Judgment: The text of the judgment was corrected at paragraphs [5] and [55] on July 6, 2020.

Before: The Honourable Mr. Justice Wilson

Reasons for Judgment

Counsel for the Plaintiff:

G. White

Counsel for the Defendant, Denis Worthing:

M. Hansen

Counsel for the Defendant, Kristen Okimaw as Litigation Guardian of Brett Timm, Kolby Bisson and Shayna Bisson:

K. Darling

Place and Date of Trial/Hearing:

Kelowna, B.C.

January 22 and 23, 2020

Place and Date of Judgment:

Kelowna, B.C.

February 7, 2020

- [1] The petitioner seeks to prove the will of Jean Ingrid Conner, who died on May 14, 2013, in solemn form and also to rectify certain errors on the face of the document. The will was dated January 25, 2013, less than four months before she died. Ms. Conner knew she was going to die because she had cancer. She was 63 years old.

Overview

- [2] The deceased's will was drafted by a lawyer, Keith Purvin-Good, who was also appointed as the executor. Mr. Purvin-Good had known Ms. Conner since 2000, and had prepared previous wills for her.
- [3] The validity of the will is disputed by Ms. Conner's widower, Denis Worthing. He argues that the will is invalid and should not be admitted into probate for three reasons:
- a) Ms. Conner did not have the requisite capacity to sign a will;
 - b) Ms. Conner was unduly influenced by her sister, Rhonda Hagar; and

- c) the witnesses to the will did not sign it, and thus the will is invalid by operation of s. 4 of the Wills Act, R.S.B.C. 1996, c. 489.
- [4] Ms. Conner and Mr. Worthing had lived together since 2000 and were married in 2002. Ms. Conner had been married twice before her marriage to Mr. Worthing. She had two adult children from a prior relationship, three adult grandchildren and two minor great-grandchildren. She also had a sister and two brothers, in addition to various step-children and step-grandchildren.
- [5] The primary asset in Ms. Conner's estate is her former residence located at 375 Woods Road, Kelowna. The current tax assessment for the home indicates a value of \$592,000. There are other assets in the estate too, but they have an aggregate value of less than \$5,000. The deceased had other assets at the time of her death that passed outside her will, including RRSPs and TFSAs worth slightly over \$100,000 plus one or more life insurance policies, the value of which is unknown. The assets that passed outside of the estate went to Mr. Worthing.
- [6] Ms. Conner was diagnosed with cancer in March 2012, approximately 14 months before her death on May 14, 2013. It is important to note that because Ms. Conner died before the Wills, Estates and Succession Act, S.B.C. 2009, c. 13, [WESA] became law in British Columbia, this matter is governed by the law that was in place prior to its enactment.

Errors in the will

- [7] There are three errors on the face of the will. The first two errors are drafting errors and are set out below:
- 3. I GIVE, DEVISE AND BEQUEATH all my property of every nature and kind and wheresoever situate, including any property over which I may have a general power of appointment to my said Trustee upon the following trusts, namely:
 - ...
 - c. to liquidate my residence at 375 Woods Road, Kelowna, British Columbia and to pay the net proceeds therefrom as directed herein;
 - ...
 - f. to transfer and deliver to my husband, Denis Worthing, for his own use absolutely:
 - i. one-half of the net proceeds of the liquidation of the my residence at 375 Woods Road, Kelowna, British Columbia;
 - ii. my stocks Firesteel Resources Inc. and Northern Tiger Resources;
 - iii. my Registered Retirement Savings Plan held at Prospera Credit Union;
 - iv. my Tax Free Savings Account, presently with TD Canada Trust;

- v. the net proceeds of my Manulife Registered Retirement Savings Plan after payment of all taxes payable thereon;
 - vi. the rest and residue of my estate.
 - g. to transfer and deliver in equal shares to my granddaughter Krislynn Richelle Reimer, my grandson Kolby Robert Alexander Bisson and my granddaughter Shayna Rolene Bisson, for their own use absolutely 20% each of
 - i. the net proceeds of the liquidation of the my residence at 375 Woods Road, Kelowna, British Columbia;
 - . . .
 - m. to transfer and deliver in equal shares to my son, Faron Lee Alexander Black, and my daughter, Tracey Marcella Black, for their own use absolutely:
 - i. 20% each of the net proceeds of the liquidation of the my residence at 375 Woods Road, Kelowna, British Columbia;
 - ii. 20% each of the burial plot I own at Lakeview Cemetery;
 - iii. the proceeds of my Sun Life Insurance Policy Number 56682 through Kelowna Flightcraft;
 - iv. 20% each of the proceeds of my Transamerica Life Insurance policy;
 - v. the rest and residue of my estate.
- [8] A review of the underlined portions above shows that Mr. Worthing was to receive one-half of the net proceeds from the house and that Ms. Conner's three grandchildren and two children all receive 20% each. As such, the will provides for distribution of 150% of the sale proceeds.
- [9] A review of the italicized portions shows the second error: the residue has been given twice, once to Mr. Worthing and once jointly to her two children.
- [10] The third error on the face of the will is that there are words missing. After paragraph four are found the words, "discharge to my said Trustee notwithstanding that the parent or guardian may be one and the same person". This is then followed by paragraph six. It is apparent that one or more lines of what was intended to be paragraph five have been omitted from the printed copy. According to Mr. Purvin-Good, who drafted the will, an unsigned draft that is presumably in his computer reveals three lines of text that permits the trustee to make payments to anyone under the age of 25 to a parent or guardian.
- [11] While each of the errors might hypothetically create problems, giving 150% of the proceeds from the sale of the residence is the most significant from a practical perspective because the residence is the main asset.

The law - the Court's dual role

- [12] Historically, the court of probate was concerned with whether a will was valid, whereas the court of construction was responsible for interpreting the will once proven. Although the Supreme Court of British Columbia has the authority to sit as both a court of probate and a court of construction, the distinction between the two functions is significant because the rules of evidence differ between the two functions. An instructive summary of the court's dual roles is set out in Justice Dardi's decision in *Ali Estate (Re)*, 2011 BCSC 537 at paras. 21-27:
- [21] The Supreme Court has jurisdiction to sit both as a court of probate and as a court of construction. Notwithstanding that the single court is empowered with dual jurisdictions, historically the court has exercised its probate function and its interpretation or construction function in separate proceedings. In broad terms, when ruling upon the validity of a will, the court sits as a court of probate, and when interpreting a will, it sits as a court of construction. The divided jurisdiction is significant because the powers available to the court depend on which jurisdiction it assumes: Law Reform Commission of British Columbia, *Report on Interpretation of Wills*, LRC 58 (Victoria, 1982) at 1.
- [22] The jurisdiction exercised by a court of probate relates to whether the testamentary instrument submitted for probate represents the true last will and testament of a deceased and whether the named personal representative is entitled to administer the estate. In essence, a court of probate focuses on what constitutes the testamentary instrument of the testator and its validity. The inquiry pertaining to the validity of the testamentary document encompasses the issues of the capacity and the volition of the testator and whether the testator duly executed the testamentary document with knowledge and approval of its contents.
- [23] On the other hand, in exercising jurisdiction as a court of construction, the court is concerned with ascertaining the meaning of the testamentary documents that have been approved by the court in the exercise of its probate jurisdiction. It is axiomatic that court must interpret or construe a will in the form in which it has been admitted to probate.
- [24] In probate hearings, the court, in determining whether or not the document before it is truly the testator's will, is permitted to consider extrinsic evidence, including direct evidence as to the testator's intentions. That evidence may include copies of earlier wills and codicils, prior drafts of the will, and the notes of the solicitor who prepared the will. In contrast, the scope of admissible evidence is generally more constrained in a construction hearing. In that instance, a court may only consider the words of the will and if, applying the subjective approach, the evidence of the surrounding circumstances known to the testator at the time the will was made. Except in very restricted circumstances (such as equivocation), the court is not permitted to review direct evidence of the testator's intentions on a construction application: British Columbia Law Institute, "Wills, Estates and Succession: A Modern Legal Framework," in B.C.L.I. Report No. 45 (B.C., 2006) at 37.

- [25] It is in the context of these general principles that I next address the petitioner's application for rectification.
- [26] At the outset, it is important to observe that the equitable remedy of rectification, as developed to permit a court to correct errors in contracts or other written documents, does not apply to wills: British Columbia Law Institute, "Wills, Estates and Succession: A Modern Legal Framework" at 36. I also note parenthetically that in British Columbia there is currently no legislation in force which confers powers on the court to rectify a will.
- [27] However, the court, in exercising its probate jurisdiction, does have a limited power to rectify a mistake in a will where the language of the will fails to express the testator's actual intentions. A will is only valid to the extent a testator knew and approved of its contents. As a constituent element of establishing the validity of a will, the court must be satisfied that the testator knew and approved of its contents. It is well established on the authorities that before a will is admitted to probate, the court may, in the exercise of its probate jurisdiction, delete words from a will that have been included without the testator's requisite knowledge and approval: *Alexander Estate v. Adams* (1998), 51 B.C.L.R. (3d) 333, 20 E.T.R. (2d) 294 (S.C.) [Alexander Estate]; and *Clark v. Nash* (1987), 61 D.L.R. (4th) 409, 34 E.T.R. 174 (B.C.C.A.) [Clark].
- [13] Historically, matters before the court of probate and those before the court of construction were heard at separate proceedings, and it is only because the Supreme Court of British Columbia has jurisdiction for both that the possibility of a combined hearing arises. Indeed, in *(Re) Ali, Dardi J.* only dealt with the court of probate matter in the decision I have cited above. Her decision on the interpretation of the will that had been proven is reported at 2014 BCSC 340.
- [14] In this case, none of the parties seek to bifurcate the hearing and each wishes for the matter to be determined summarily. I conclude that I am able to do so based upon the evidence and the arguments before me.

Is the will valid?

[15] The defendant argues that the will is invalid for three reasons:

- a) Ms. Conner did not have the requisite capacity to sign a will;
- b) Ms. Conner was unduly influenced by her sister, Rhonda Hagar; and
- c) because the witnesses to the will did not sign it, the will is invalid by operation of s. 4 of the Wills Act.

[16] I will address each of these arguments in turn.

Did Ms. Conner have the requisite capacity to sign a will?

- [17] The most frequently quoted test for testamentary capacity is the English decision *Banks v. Goodfellow* (1870) L.R.5 Q.B. 549 at 567:
- [567] . . . [The testator] ought to be capable of making his will with an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, of the persons who are the objects of his bounty, and the manner in which it is to be distributed between them. It is not necessary that he should view his will with the eye of a lawyer, and comprehend its provisions in their legal form. It is sufficient if he has such a mind and memory as will enable him to understand the elements of which it is composed, and the disposition of his property in its simple forms.
- [18] Although the party seeking to propound the will has the burden of proving capacity, capacity may be presumed. The presumption may be rebutted by evidence of what is referred to in the cases as "suspicious circumstances", in which case the burden reverts to the propounder on the balance of probabilities: *Vout v. Hay* [1995] 2 S.C.R 876.
- [19] The defendant alleges a number of circumstances as suspicious. Do those circumstances rise to the level of being suspicious circumstances here that would tend to suggest that Ms. Conner lacked testamentary capacity? I conclude they do not.
- [20] The defendant refers to the fact that Ms. Conner was driven to the appointment with Mr. Purvin-Good by her sister Rhonda Hagar coupled with the fact that Ms. Hagar was named as a beneficiary in the will as a consideration. He also points to the fact that Mr. Purvin-Good was not prepared to have Ms. Conner sign the will when he took it to her house and instead gave her verbal instructions on executing it elsewhere. The defendant refers to the obvious errors on the face of the will.
- [21] The fact that Ms. Conner had her sister drive her to her appointment with Mr. Purvin-Good is of no moment. The allegation of undue influence is addressed later, but getting a ride does not speak to capacity at all.
- [22] It was no doubt sensible for Mr. Purvin-Good to have declined to have Ms. Conner execute the will at the time of his visit to her residence. Mr. Worthing was home. The will Mr. Purvin-Good had prepared reduced Mr. Worthing's share of the estate as her previous wills had left substantially all of her estate to him. Ms. Conner had told Mr. Purvin-Good that she would have divorced Mr. Worthing if she had not been terminally ill.
- [23] As to the errors on the face of the will, those matters are readily apparent now, but those surely reflect on the drafter as opposed to Ms. Conner. There is nothing inherently suspicious about a client relying on her solicitor's drafting skills to prepare a will that accords with her instructions. Ms. Conner did not finish high school and completed only grade seven or eight. She did not have legal training.

- [24] Mr. Purvin-Good conducted a routine capacity test when he met with Ms. Conner in his office and had no concerns. Although her family doctor did not see her after October 2012, he had no concerns about her capacity; neither did her doctor at the Cancer Clinic who saw her approximately two weeks before the will was executed.
- [25] Approximately one month after the will was executed, Ms. Conner changed certain life insurance beneficiary designations, designating Mr. Worthing as the beneficiary. Her capacity to change those designations does not appear to have ever been in issue.
- [26] Although Ms. Conner had cancer, there is nothing in the evidence that would give rise to any suspicion that her capacity had diminished.

Was Ms. Conner unduly influenced by her sister, Rhonda Hagar?

- [27] The burden to prove undue influence lies with the party asserting it. Undue influence has been described as follows:

Undue influence will not be found simply because the alleged influencer persuaded or influenced the will-maker. The degree of influence required for it to be found "undue" must amount to force and coercion, destroying the will-maker's free agency.

(Dacyshyn v. Dacyshyn Estate [1996] B.C.W.L.D. 1179 at para. 26, citing Freeman v. Freeman (1988), 19 O.R. 141 at 155).

- [28] There is no evidence that suggests that Ms. Conner was influenced at all, let alone influenced unduly as the law would require. The extent of the evidence is that Ms. Conner's sister, Rhonda Hagar, drove her to Mr. Purvin-Good's office for her appointment and that Ms. Hagar received 20% of a life insurance policy under the will, having never been a beneficiary under any prior will.
- [29] However, Ms. Conner subsequently changed the beneficiary again to provide the policy to Mr. Worthing. Ms. Hagar was not in the room when Mr. Purvin-Good met with Ms. Conner to take her instructions. Mr. Purvin-Good asked Ms. Conner whether she had spoken to anyone about her will and she told him she had not.

- [30] This claim fails.

Is the will invalid by operation of s. 4 of the Wills Act because the witnesses to the will did not sign it?

- [31] The defendant says that the formal requirements of s. 4 of the Wills Act have not been met. Section 4 provides the following:

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.
- [32] The defendant says that because the two witnesses did not affix their signatures but instead only printed their names, the witnesses did not "subscribe the will" as required by the subsection. I do not agree.
- [33] The parties agree that the law in British Columbia prior to WESA includes no "substantial compliance" provision and that the will is either valid or it is not: *Bolton v. Tartaglia*, 2000 BCSC 576.
- [34] In this case, Ms. Conner took her unsigned will to the funeral home where she was making arrangements in anticipation of her death. She asked two of the employees to witness her will, and each did so and printed their name, address and telephone number in the space indicated. Although it was undoubtedly the intention of the drafter that each of the witnesses sign on the line above where each printed their names, there is nothing printed on the will that identifies it as a signature line.
- [35] In *Bolton v. Tartaglia*, Hood J. addressed the requirements of a subscription as required under section 4(c) of the Wills Act. The facts in *Bolton* were that the testator's will was prepared for execution at the office of the notary who had prepared it. The notary and his assistant were to be the witnesses. The testator signed the will and initialled each page. The witnesses each initialled and then placed their stamps on the signing page. The notary signed his name by his stamp, but the assistant failed to do so.
- [36] Hood J. concluded it was clear that the witness had intended to place her signature on the document but forgot to do so. He found in the result that the will had only one subscribing witness, leading him to what he described as an unpleasant conclusion that that the will was invalid. Hood J. referred to an old English authority on the requirements of subscription, *Hindmarsh v. Charlton* (1861) 11 E.R. 388 (U.K. H.L.). At para. 13 of his decision, Hood J. quoted from *Hindmarsh*, where the Lord Chancellor noted as follows:

To make a valid subscription and attestation of a will there must be either the name of the witness or some mark intended to represent it. [Emphasis added by Hood J. in *Bolton*]

- [37] In *Bolton*, Hood J. allowed at para. 10 that a stamp could suffice in some circumstances, depending on the intention, even though it was not the case in the matter before him:
- [10] Even if she intended the stamp to be her signature, her mark, which I find is not the case, there is authority for the proposition that in the circumstances the use of the particular stamp, since it is not a facsimile of the witness' handwriting, would not constitute a signing or subscribing of the Will within s.4(c) of the Act; since it would not carry with it the same clear authenticity or warrant of responsibility as a signature written in the more ordinary way. On the other hand, it would seem that in a particular case involving the attestation of a

Will, such a stamp might be accepted as a mark, in place of a signature, if that was the expressed intention, because there is the guarantee of some authenticity since the other witness is present at the time of its affixing. But that is not the case here. [emphasis added]

- [38] The intention of the witness is therefore of significance in determining whether a mark other than a signature can constitute a subscription.
- [39] In the recent English case of *Payne v. Payne*, [2018] EWCA Civ 985, the court held that a will was valid even though the witnesses had only printed their names as opposed to signing. The court stated the following at paras. 26 and 27:
26. . . . When asked to explain in his own words what had happened in May 1998, he said that he had received a telephone call from Mrs Payne asking him to pop down to their house (they lived in the same road) and that he had then done so. The persons present were the Deceased, Mrs Payne, and a friend of theirs who was unknown to Mr Gordon. They all sat around a table, for the purpose of executing the 1998 Will. The Deceased signed it first, and the two witnesses then filled in their names, addresses and occupations in the appropriate places on the form, each using his own pen to do so. When the process was complete, they had a cup of tea together and the witnesses then left the house.
27. . . . The two witnesses were each present when the Deceased signed the will, and by separately filling in their details in the specified places on the will form the natural inference to draw is that they thereby intended to write their names as witnesses of the Deceased's signature. That was why they had been asked to come to the Deceased's home, and there can be no sensible reason to doubt that they were doing precisely what the printed attestation clause said they were doing, namely subscribing their names as witnesses . . . The absence of a conventional signature is hardly surprising, given that the form provided no separate place for their signatures to be appended.
- [40] The court concluded that the will had been validly subscribed by the witnesses who had printed their names in their own hand even though there was no signature in the sense that the term is generally used.
- [41] The facts in *Payne* are very similar to those in this case. The witnesses were only in the presence of the testator at the time for the purpose of executing the will. There was no obvious place on the will for the witnesses to sign.
- [42] The defendant argues that there is no evidence here that the witnesses intended to subscribe the will. However, In (Re)-Benjamin (1934), 150 L.T. 417, the witness was not aware the document was a will. The court concluded that it was sufficient that the witness' attesting signature was in the proper position and she was aware that she was witnessing a signature on a document. In this case, the witnesses were aware that they were witnessing Ms. Conner sign her will.

- [43] In determining whether something less than a signature constitutes a subscription, it is important to review s. 4 of the Wills Act as a whole. Section 4(a) requires signature by the testator (or by someone on the testator's behalf, with direction and in the presence of the testator) for a will to be valid. Section 4(c) requires witnesses to subscribe the will. If the legislature intended the same signature requirements to apply to the witnesses, the word "sign" could have been included in paragraph 4(c) as well. By using the term "subscription" instead, the legislature presumably intended something different.
- [44] I conclude that something less than a signature of each witness will suffice as a subscription under s. 4(c) of the Wills Act.
- [45] In this case the two witnesses initialed each page and printed their names in their own hand at the appropriate location on the document. They knew they were witnessing Ms. Conner's will. I conclude that they subscribed the will as required by s. 4 of the Wills Act.

Rectification

- [46] As stated earlier, this Court as a court of probate has the ability to rectify the will, but the powers of rectification are limited to deleting words. When interpreting a will as a court of construction, the court has a greater latitude and may add words; however, the court may not consider the testator's instructions to the drafter of the will when sitting as a court of construction, but may do so when sitting as a court of probate.
- [47] An application for rectification of a will at the court of probate stage may take into account the instructions the testator provided to her solicitor, whereas rectification at the court of construction stage of the analysis may not. This is of significance in this case because Ms. Conner's intentions with regard to the house are apparent based on two pieces of evidence:
- a) Mr. Purvin-Good's notes of his telephone conversation with Ms. Conner on January 21, 2013; and
 - b) Ms. Conner typed a letter of instruction to Mr. Purvin-Good dated January 22, 2013, being the day she went to his office to meet with him.

- [48] Ms. Conner's letter to Mr. Purvin-Good reads as follows:

Dear Keith

I writing this letter asking you to be my executor of my will.

The house at 375 Woods Road will be sold and proceeds go to ½ of the money to Denis Earl Worthing . . .

The rest divided between

Faron Lee Alexander Black . . .

Tracey Marcella Black . . .

Krislynn Richelle Reimer . . .

Kolby Robert Alex Bisson - To go into a trust fund until Kolby is 25 years old . . .

Shayna Rolene Bisson - go into a trust fund until Shayna is 25 years old . . .

Paula Wiebe will be the trustee of Kolby Bisson and Shayna Bisson and Brett David Timm

Canada Savings Bond About \$1,700. Goes to Brett David Timm into a trust fund until he's 25 years old. . .

All the Stocks will go to Denis Worthing

Stocks are - Firesteel Resources and Northern Tiger Resources.

My RRSP with Prospera Credit Union Worth about \$34,000 to Denis

Tax saving plan with TD Canada Trust \$20,000 to Denis

Denis to get Widows Pension

To Krislynn - All Roxan Cherry wood Furniture. All the Dogwood Royal Albert dinner ware. All the crystal and dishes that are in the Roxan cabinet. The Gold plate silverware and nugget serving forks and spoon sets. All the records and cabinets that there in.

I have a 100,000 Life Insurance Policy with Trans America

Ron Conner \$20,000 (step son) . . .

Faron Black \$20,000 (my son) . . .

Tracey Black \$20,000 (my daughter) . . .

Rhonda Carr-Haggar \$20,000 (my sister) . . .

William (Bill) Croy \$20,000 (Brother) . . .

Please take Travis and Tyler Worthing off of my will and Ron Conner, Glenn Conner, William Conner Sr., Athina Conner, Adriann Conner, Chelsey Conner, Tiffany Conner, William Conner JR. I will give them cash while I'm alive.

My Funeral is all paid for except Obituary in paper, flowers for the casket, food.

Yours Sincerely

Jean Ingrid Conner

- [49] A review of Ms. Conner's instructions to Mr. Purvin-Good establishes that her intention was to provide Mr. Worthing with half the value of her home with the other half to be divided between her two children and three grandchildren. She referred to "the rest" of the proceeds. Notwithstanding the suggestion that the will as drafted provides for an unresolvable ambiguity, I find that a review of the admissible extrinsic evidence establishes that Ms. Conner's intentions were clear.
- [50] The challenge for the court sitting as a court of probate is that it can delete words but may not add them. The underlying premise of restricting a court of probate to deleting words but not adding words to a will is founded on the proposition that words that were never intended by the testator should be removed. Upon review of a number of the authorities, the courts have gone to great lengths to find ways to delete words from a will in order to give effect to the testator's intentions.
- [51] Despite the general proposition that the court of probate may delete words but not add them, there is what has been described as a sliver of an exception to the court adding words when sitting as a court of probate. In (Re) Moyny Estate, 2001 BCCA 100, the will in issue appears to have been a wills kit that one might find at a stationery store. In the portion of the will intended for bequests, the deceased filled out the name and address of his long-time companion. In the section to dispose of the residue, he wrote "nil". The chambers judge held the following at paragraphs 19 and 20:
- [19] Having read the words added to the printed form by or at the behest of the deceased in this case, in the context in which they appear, it is my view that the conclusion that it was the intention of the deceased that his friend, the claimant, would inherit all his estate is inescapable. It could only be that because of his intention that all the estate should pass to the claimant that he added no other person's name in Clause (3) of the preprinted form, but instead had the word "NIL" placed in that clause.
- [20] To paraphrase what was said by Hutchinson J. in Wagg, supra, at page 313, "the testator misunderstood that he needed to specify what property he wished to give, devise and bequeath to the claimant". Since she was the only named beneficiary, I think it is clear that by necessary implication she is to take the whole estate absolutely.
- [52] Southin J.A. writing for the Court of Appeal agreed with the trial judge and held the following at paras. 16-19:
- [16] As I have said, the critical question here is whether this instrument, which does not say what Mr. Moyny desired to "Give, Devise and Bequeath", is dispositive.
- [17] To make it dispositive, one must read into it words descriptive of property.

- [18] If one starts with the proposition that Mr. Moiny, when he went to the trouble of signing this instrument, was not engaging in a piece of devilry intended to cause consternation and litigation, one is driven to the conclusion that he must have intended it to have a legal consequence. The only legal consequence which makes sense is that he intended Mrs. Scheuerman to have his estate.
- [19] That being so, I am unable to say that the learned judge erred in holding, in effect, that there are cases in which it is legally correct, in order to give an instrument obviously intended by its author to be a testamentary disposition life as such a disposition, to read words into it.
- [20] It follows that I would dismiss the appeal.
- [53] In *Lloyds Bank Ltd. v. Peake* (1969), [1970] All E.R. 1057, the court held that testator's wishes should not fail on account of a mistake of the drafter. The court said the following:

In my judgment, wherever the line is drawn, this case on its facts falls into the category where the court has power to do what it can by omission. The introduction of the words 'Clause 7' instead of 'Clause 7(iv)' was per incuriam. The solicitor's mind was never applied to it, and never adverted to the significance and effect. It was a mere clerical error on his part, a slip. He knew what the testatrix's instructions and intentions were, and what he did was outside the scope of his authority. And he did it, of course, without knowing and approving what he himself was doing. How can one impute to the principal the agent's knowledge and approval which the agent himself has not got? Accordingly, I hold that the testatrix was not bound by this mistake of the draftsman which was never brought to her notice. The discrepancy between her instructions and what was in the codicil was to all intents and purposes total and was never within her cognisance.

- [54] A review of the solicitor's notes to file and of Ms. Conner's letter of instruction lead me to conclude that the numerical references to 20% in clauses 3.g. and 3.m.i. were the drafter's attempt to reflect the equal shares her children and grandchildren would receive from the other half of her property. At no point did she instruct her solicitor with regard to fractions or percentages of the whole, but rather that the five named people were to share equally the half that was not to go to Mr. Worthing.
- [55] Assuming as Southin J.A. did in *Moiny Estate* that the testator intended a legally enforceable document as opposed to creating consternation and litigation, I conclude that Ms. Conner no more intended to give away greater than 100% of her residence than Mr. Moiny intended to give away nothing. While the exception to the prohibition against adding words on an application to rectify a will at the court of probate stage in *Moiny Estate* is extremely narrow, I conclude that the facts in this case fit within that narrow exception. Ms. Conner's stated intentions should not fail simply because her solicitor failed to draft her will in a manner that gave effect to her wishes.
- [56] While the will could perhaps be rectified to give effect to the testator's intentions by deleting words in the manner proposed by the executor as set out below and without adding words to the will, I prefer, relying on the very narrow exception found in *Moiny Estate* to add words

to the will in order to have the will make sense and to accord with Ms. Conner's wishes. I would therefore rectify the will to include the words "the other half of" at the beginning of clause 3.g.i. and between the words "of" and "the" in paragraph 3.m.i., such as the clauses as rectified will read as follows:

- f. to transfer and deliver to my husband, Denis Worthing, for his own use absolutely:
- i. one-half of the net proceeds of the liquidation of the my residence at 375 Woods Road, Kelowna, British Columbia;
- ...
- g. to transfer and deliver in equal shares to my granddaughter Krislynn Richelle Reimer, my grandson Kolby Robert Alexander Bisson and my granddaughter Shayna Rolene Bisson, for their own use absolutely 20% each of
- i. the other half of the net proceeds of the liquidation of the my residence at 375 Woods Road, Kelowna, British Columbia;
- ...
- m. to transfer and deliver in equal shares to my son, Faron Lee Alexander Black, and my daughter, Tracey Marcella Black, for their own use absolutely:
- i. 20% each of the other half of the net proceeds of the liquidation of the my residence at 375 Woods Road, Kelowna, British Columbia; . . .

[57] If I am incorrect in concluding that I can rectify the will by adding words relying on the authority in *Re: Moiny*, I would have rectified the will by deleting words as proposed by the executor in his alternative position, which is as follows:

- f. to transfer and deliver to my husband, Denis Worthing, for his own use absolutely:
- i. one-half of the net proceeds of the liquidation of the my residence at 375 Woods Road, Kelowna, British Columbia;
- ...
- g. to transfer and deliver in equal shares to my granddaughter Krislynn Richelle Reimer, my grandson Kolby Robert Alexander Bisson and my granddaughter Shayna Rolene Bisson, for their own use absolutely 20% each of
- i. the net proceeds of the liquidation of the my residence at 375 Woods Road, Kelowna, British Columbia;
- ...
- m. to transfer and deliver in equal shares to my son, Faron Lee Alexander Black, and my daughter, Tracey Marcella Black, for their own use absolutely:

- i. 20% each of the net proceeds of the liquidation of the my residence at 375 Woods Road, Kelowna, British Columbia; . . .
- [58] The error in the drafting of the will that led to the gifting of the residue twice can be rectified more conventionally. Mr. Purvin-Good's notes from his telephone conversation with Ms. Conner on January 21, 2013, indicate that she wished the residue to go to "Faron + Tracey", who were her two children.
- [59] I conclude that paragraph 3.f.vi, which gave the residue to Mr. Worthing should be deleted in its entirety, leaving the residue to be dealt with pursuant to paragraph 3.m.v.
- [60] The defendant did not advance any arguments regarding correction of the will as it relates to the missing words from paragraph 5. According to Mr. Purvin-Good paragraph 5 was intended to read as follows:
5. I AUTHORIZE my Trustee to make payment for any person under the age of 25 years to a parent or guardian or to anyone whom my Trustee in her discretion deems advisable to make such payments to, whose receipt shall be a sufficient discharge to my said Trustee notwithstanding that the parent or guardian may be one and the same person.
- [61] The will as executed contained only those words identified in italics above. I order that the will be rectified to reflect the intended paragraph above in its entirety.

Disposition

- [62] The January 23, 2013 will is proven as the valid last will and testament of Jean Ingrid Conner, and a grant of probate is made to Keith Woodburn Purvin-Good.
- [63] The will is rectified in the manner as set out above in paragraphs 56, 59 and 61.
- [64] The parties indicated a wish to address the issue of costs. The parties should contact Supreme Court Scheduling in Kelowna within 21 days if a further hearing is required.

"Wilson J."

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