

CANADA / JUDGMENT

Finsant Estate (Re)

2023 BCSC 842

COURT

Supreme Court of British Columbia

DECIDED

17 May 2023

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2023 BCSC 842 Finsant Estate (Re) IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Finsant Estate (Re), 2023 BCSC 842 Date: 20230517 Docket: P220349 Registry: Victoria In the Matter of the Estate of Rosemary Finsant, Deceased Corrected Judgment: The text of the judgment was corrected at paragraphs 3 and 10 on February 15, 2024. Before: The Honourable Justice Thompson Reasons for Judgment In Chambers The Applicant, Megan Beggs, appearing in person: M. Beggs The Respondent, Rhonda Schicchi, in her personal capacity, appearing in person: R. Schicchi Counsel for Rhonda Schicchi, in her capacity as applicant for an estate grant: M. Martin Place and Date of Hearing: Victoria, B.C. May 11, 2023 Place and Date of Judgment: Victoria, B.C. May 17, 2023

- [1] This probate proceeding was commenced by an application for a grant of administration without will annexed, filed in April 2022. The deceased, Rosemary Finsant, was a resident of Heriot Bay on Quadra Island. She died on 22 October 2021 at age 81. The deceased's closest surviving relatives are a niece and a nephew: the grant applicant Rhonda Schicchi and her brother Fred Beggs. In the event of an intestacy, they would be entitled to an equal share of the estate. A great niece, Megan Beggs, brings the motion presently before the Court for a curative order in relation to a document prepared in 2001 that named her as sole beneficiary of Rosemary Finsant's estate: The applicant seeks an order under section 58 of the Wills, Estates and Succession Act (WESA) to rectify the deficiencies in the will of Rosemary Finsant. The deficiencies relate to the lack of signatures of the deceased and witnesses. The applicant requests that the court rectify the will to reflect the true intentions of the deceased as if it had been executed in accordance with the requirements for execution of a valid will under section 37 of WESA. Specifically, the applicant seeks an order to add the signatures of the deceased Rosemary Finsant and two witnesses Karen Ann Lakberg and Lyndsay Scow to the will in the presence of each other, and in accordance with section 37 of WESA.
- [2] In her affidavit filed in support of a grant, Ms. Schicchi deposed to her efforts to locate a will. Ms. Schicchi attended at her aunt's property a week after the death, and collected all of the paperwork in the house; she sorted through it, but did not find a will. There were many further clean-up visits to the property after the death by Ms. Schicchi and others, and no will has turned up there. Email messages were sent to all law firms and notaries in nearby Campbell River inquiring if they had prepared a will for Rosemary Finsant; all responses

received were in the negative. However, a November 2021 search for a wills notice found a match. Karen Lakberg, a Campbell River notary, filed a wills notice with Vital Statistics, dated 17 December 2001. The notice states that Ms. Finsant executed a will and/or codicil bearing the date of 14 December 2001, and that the will and/or codicil is situated in a safe deposit box at a specified Royal Bank branch in Campbell River. Contact was made with the Royal Bank, and on the basis of information received the parties agree that the safe deposit box referred to in the wills notice does not exist and has never existed.

- [3] Ms. Lakberg is now retired. Certain of her file materials are in the chambers record, including: (1) an eight-page will information sheet evidently completed by Rosemary Finsant together with a cover page indicating it was received by the notary's office on 3 December 2001; (2) an undated and unexecuted copy of a will drawn in terms consistent with the will instructions contained on the information sheet; (3) a confirmation of the filing of a wills notice with Vital Statistics on 17 December 2021; and (4) an undated statement of account with particulars that include, inter alia, "drafting, typing, perusal and execution of your Will." In the course of an exchange of messages about the unsigned copy of the will, Ms. Lakberg said this: I can certainly attest that I never kept a signed copy of a Will in my files. The client was always given the original and I filed a Wills Notice according to the [client's] instructions. If I wrote the Will then I kept an unsigned copy in file.
- [4] In the will information sheet, Rosemary Finsant indicated her marital status as divorced, and that there are other names that she was known by: "Rose (Last names) Loughheed - Forsyth - Larsson - Aucterlonie." Her instructions, reflected in the file copy, named her sister Dorothy Beggs (since deceased) as trustee, and Rhonda Schicchi as alternative trustee. The sole residual beneficiary referred to in the will instructions and the file copy of the will is Megan Beggs.
- [5] On 10 May 2022, a deputy district registrar issued a memorandum to the solicitor who submitted Ms. Schicchi's application for an estate grant. He advised that the review of the application for administration without will annexed was suspended because of the unsigned copy of the will and the wills notice: As the aforementioned wills notice appears to have been filed by someone at Karen Ann Lakberg's Notary Public office, it is quite likely that a will or codicil dated December 14, 2001 was in fact executed and registered at Vital Statistics even if the location or codicil was incorrectly indicated in the wills notice. I will have to refer this issue to the court for further consideration to see if the application can proceed as submitted or if anything further is required, possibly an application/order etc. I suggest you provide further information for the court to consider this application. Did you contact Karen Ann Lakberg to see if she or someone from her office filed the aforementioned wills notice and did they inadvertently indicate the wrong location where the will or codicil was being kept? Also, did you contact Karen Ann Lakberg/her office to see if they may have a copy of the executed will or codicil that may be sufficient for an application for an estate grant? Can you provide any other information that may assist the court in determining how this application can proceed? One of my concerns with this application is that the applicant,

people entitled under an intestacy appears to be different from the executory named in the will and the sole beneficiary named in the will.

- [6] Further material was provided on behalf of Ms. Schicchi, but another memorandum, dated 13 April 2023, has been issued by a deputy district registrar noting various deficiencies and indicating that a further affidavit and/or an amendment to the application for an estate grant is required. Meanwhile, on 28 February 2023, Megan Beggs filed this application for a s. 58 curative order. The application came on for hearing before Master Bouck on 13 April 2023, but was adjourned on the basis that a master does not have jurisdiction to decide a s. 58 application; the master left the issue of costs to the judge who hears the adjourned application.
- [7] After hearing submissions and reviewing the chambers record, I conclude that this s. 58 application cannot be entertained - at least at this juncture. Ms. Beggs' position appears to reflect the view of the deputy district registrar who authored the 10 May 2022 memo: that it is quite likely that a will or codicil dated 14 December 2001, i.e. the document referred to in the wills notice, was in fact executed. If this document was signed by Rosemary Finsant in the presence of two witnesses, and those witnesses signed in her presence, then the threshold question in this case is whether a will that was valid at the time it was made ought to be admitted to probate notwithstanding that it has not been located. When an original will has been lost, destroyed, or is otherwise not available, an application may be made for an order admitting the will to probate, including by completed draft, a reconstruction, or evidence of its content: *Haider v. Kalugin*, 2008 BCSC 930 at para. 8. For a review of the leading authorities bearing on an application for probate in such circumstances, see *Whitehead Estate*, 2010 BCSC 348 at paras. 20-25. One aspect of the applicable doctrine is the presumption of destruction: if possession of the will is traced to a will maker's possession but has not been found on their death, the will maker is presumed to have destroyed the will; this presumption is, however, rebuttable by clear and convincing evidence. See *Haider v. Kalugin*, at paras. 8-13; *Whitehead Estate*, at para. 29.
- [8] The nature and purpose of s. 58 was summarized by the Court of Appeal in *Hadley Estate (Re)*, 2017 BCCA 311 at paras. 33-34. Before the Wills, Estates and Succession Act came into force on 31 March 2014, strict compliance with execution and attestation formalities was required, and the absence of these formalities sometimes led to the defeat of a will-maker's intentions. The s. 58(3) curative provision confers a remedial discretion to order that a document that represents the testamentary intentions be fully effective notwithstanding non-compliance with statutory formalities: Court order curing deficiencies 58 (2) On application, the court may make an order under subsection (3) if the court determines that a record, document or writing or marking on a will or document represents
- (a) the testamentary intentions of a deceased person,
 - (b) the intention of a deceased person to revoke, alter or revive a will or testamentary disposition of the deceased person, or

- (c) the intention of a deceased person to revoke, alter or revive a testamentary disposition contained in a document other than a will.
- (3) Even though the making, revocation, alteration or revival of a will does not comply with this Act, the court may, as the circumstances require, order that a record or document or writing or marking on a will or document be fully effective as though it had been made
 - (a) as the will or part of the will of the deceased person,
 - (b) as a revocation, alteration or revival of a will of the deceased person, or
 - (c) as the testamentary intention of the deceased person.
- [9] The problem with this s. 58 application is that on the facts asserted and findings sought by Ms. Beggs, this is not a case of curing a document that comes up short of formal requirements. Ms. Beggs asserts that the document in issue was in all likelihood properly executed and attested. That is, she submits that the formal requirements were fulfilled and a valid will was made but it has been lost or misplaced. The grant applicant, Ms. Schicchi, does not concede that the evidence gathered to this point supports a finding that a valid will was made. It is this threshold issue that surely must be resolved before any consideration can be given to an attempt by Ms. Beggs to relieve against defective compliance.
- [10] To be clear, it is conceivable that s. 58 might come into play at some point in the resolution of this estate. For instance, if the Court in due course concludes that the document underlying the wills notice was not executed or attested, or was defectively executed or attested, then a curative application might be properly before the Court with reference to the notary's file copy and/or the deceased's will instructions contained on the information sheet. However, at present there is no such finding, and Ms. Beggs does not seek this finding - quite the contrary.
- [11] The application is dismissed with leave to reapply if circumstances warrant. Ms. Schicchi does not seek an order that Ms. Beggs pay the costs of this application. If the parties to this application agree on an appropriate costs order, it may be inserted into the form of order. If they do not, then a 30-minute telephone or video hearing may be arranged. "Thompson J."

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Prepared on 26 October 2026 · Esheria