

CANADA / JUDGMENT

Jung v. HSBC Trust Company (Canada)

2007 BCSC 1740

COURT

Supreme Court of British Columbia

DECIDED

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2007 BCSC 1740 Jung v. HSBC Trust Company (Canada)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Jung v. HSBC Trust Company (Canada),

2007 BCSC 1740

Date: 20071130

Docket: S050247

Registry: Vancouver

Between:

Estelle Lee Jung, Judy Mar Hadeen, in her capacity as

Executrix of the Last Will and Testament of Elsie Mar, and

JoAnne Leo Naganawa, in her capacity as Executrix of the

Last Will and Testament of Effie Leo

Plaintiffs

And:

HSBC Trust Company (Canada), in its capacity as

Administrator of the Estate of Horace Lee, also known as

Horace Ping Tung Lee, and Ping Tung Lee, and others

Defendants

And:

Estelle Lee Jung

Third Party

Before: The Honourable Mr. Justice Silverman

Reasons for Judgment

Counsel for the Plaintiffs

Roger D. Lee

Counsel for the Defendants, HSBC Trust Company (Canada) and Horace Lee

E. Jane Milton

Counsel for various other Defendants

Kevin Moore

Counsel for the Defendants, Joyce Toyshan Mar and Carole Ping Rantfors

John L. Leathley, Q.C.

Date and Place of Trial:

July 11 and 12, 2007

Vancouver, B.C.

INTRODUCTION

[1] This is an action concerning competing wills:

1. A 1977 will which was properly drafted and executed and which was admitted to probate in 1987, but which no longer contained the testamentary wishes of the testator at the time of his death in 1985.
2. A 1985 will which did contain the testamentary wishes of the testator at the time of his death, but which is subject to challenge as the result of concerns about its drafting and execution.

[2] Both wills were store-bought forms with blanks to be filled in, and which were completed in handwriting.

[3] In essence, this is an action to prove the last will and testament of Hubert Bing Lee ("Hubert"), dated March 3, 1985 (the "1985 will"), in solemn form. That will generally purports (in the will's handwritten "bequest provisions") to distribute the assets of Hubert's estate as follows:

1. To his brother Horace Lee ("Horace") -

- (a) his shares in the business which Hubert and Horace jointly owned and operated;
 - (b) a piece of specified real property;
 - (c) 35% of "cash and bonds";
 - (d) the residue of the estate.
2. To his sister Estelle Lee Jung ("Estelle") - 35% of "cash and bonds".
 3. To Hubert's other siblings - 30% of "cash and bonds" divided evenly between them.
- [4] Hubert also executed a prior will, dated November 15, 1977 (the "1977 will"), which was admitted to probate in 1987. That will left to Horace a great deal more than he would receive under the 1985 will. It left him Hubert's entire estate.
- [5] At the time the 1977 will was admitted to probate, the Court was not advised of the existence of the 1985 will.
- [6] The primary concern about the drafting and execution of the 1985 will is whether it was fully completed before execution - whether the bequest provisions were filled in before or after the will was executed.
- [7] There is no issue with respect to undue influence or the capacity of the testator in 1977 or 1985.
- [8] The plaintiffs claim the following:
1. A declaration that the grant of probate of the 1977 will is null and void.
 2. Revocation of the grant of probate of the 1977 will.
 3. A declaration pronouncing the force and validity of the true last will and testament of the deceased, Hubert, dated March 3, 1985.
 4. A declaration that the total of the plaintiffs' and other beneficiaries' respective shares of Hubert's estate, namely 65% of the cash and bonds in his estate, including term deposits, is in the amount of \$393,336.60, plus interest since the date of probate.
 5. A declaration that Horace's estate holds the plaintiffs' entitlements (from Hubert's estate) in trust for the plaintiffs and other beneficiaries of the 1985 will.
 6. An order that the trustee transfer and convey to the plaintiffs and other beneficiaries of the 1985 will their proper entitlements.
- [9] This is the second trial of this matter, ordered after the Court of Appeal overturned the result of the first trial. That trial involved two actions which were consolidated. The parties in this matter have agreed that, while this trial deals technically with only one of the actions, the result will also determine the outcome of the other action, and will affect the parties of both actions.

- [10] All of the claims relate to the estates of Horace and Hubert, both of whom died without issue. They all involve members of the extended Lee family (the other siblings of Horace and Hubert, or their personal representatives, or their children). All of those siblings, with the exception of Estelle, are now deceased. They all had children with the exception of Horace, Hubert, and Estelle.
- [11] The remaining defendant, HSBC Trust Company (Canada) ("HSBC"), is the administrator of the estate of Horace and has no personal knowledge of any of the facts at issue with respect to the validity of either the 1977 or 1985 will. Understandably, it seeks direction with respect to the issues raised by the plaintiffs in order to ensure the proper distribution of Horace's estate.
- [12] HSBC does not generally favour the claim of any of the competing parties against any of the others. Where I have noted that "the defendants" have taken a certain position with respect to such claims, I have not, for the purpose of efficiency, always expressly excluded HSBC. Generally, I note that HSBC seeks direction and does not take sides except to articulate its position with respect to principles of law.
- [13] Many facts have been agreed upon, however, as shown by the evidence of the various witnesses, there is disagreement over what happened, what was said, and what was done in relation to Hubert's estate in 1985 and 1986. This disagreement is compounded by the fact that approximately 20 years have passed, and some of the parties involved in those events are now deceased.

BACKGROUND

- [14] This is a brief chronology of relevant dates:

November 15, 1977

Hubert executes the 1977 will leaving his entire estate to Horace, and naming him as executor.

March 3, 1985

Hubert executes the 1985 will leaving 65% of "cash and bonds" in varying amounts to siblings other than Horace. He appoints Horace and Estelle as executors.

July 1, 1985

Hubert dies.

After July 1, 1985

Horace approaches the law firm of Joe, Chong, Chen and Barbour ("Barbour & Co.") to assist him in probating Hubert's will.

1985 or 1986

Mr. Barbour has a telephone conversation with Mr. Graham, one of the witnesses to both wills.

1985 or 1986

Mr. Barbour advises Horace that the court should be advised of the existence of both wills.

1986

Horace removes Hubert's probate file from Barbour & Co.

February, 1987

Horace submits the 1977 will for probate using a new lawyer. The 1985 will is not presented to the Court. (There is no evidence suggesting that the new lawyer was aware of its existence).

March 27, 1987

A grant of letters probate for the 1977 will is issued to Horace.

December 31, 2001

Horace dies intestate.

July 3, 2003

HSBC obtains an order for a grant of letters of administration in respect of Horace's estate and notifies all potential beneficiaries.

[15] There are credibility and reliability issues to be determined with respect to the evidence of the two witnesses (Mr. and Ms. Graham) to the 1985 will, and with respect to the lawyer, Mr. Barbour.

[16] The credibility and reliability issues relate to the question of whether or not the bequest provisions in the 1985 will were already written, and completed, before the will was signed by Hubert, and witnessed by the Grahams. More specifically:

1. Mr. and Ms. Graham both testified that the will was completed before execution.
2. Mr. Barbour testified that he had a telephone conversation with Mr. Graham, sometime in 1986, during which Mr. Graham told him that the sections containing the bequest provisions of the will were blank at the time that it was signed and witnessed.
3. Mr. Graham testified that he did not recall telling Mr. Barbour that the bequest provisions were blank.
4. The British Columbia Court of Appeal has ruled (after the first trial in this matter) that if the foregoing is found to be a prior inconsistent statement by Mr. Graham, then it can only be used to assist in the assessment of Mr. Graham's credibility. It cannot be used as evidence of the truth of the prior inconsistent statement.

[17] In addition to the foregoing, I have made the following findings of fact:

1. Any files still in the possession of the law firm of Barbour & Co. relating to Hubert's estate were destroyed prior to the commencement of this action.
 2. All of the beneficiaries listed in the 1985 will survived Hubert. All of the beneficiaries listed in the 1985 will predeceased Horace, save for Edythe, who survived Horace but passed away subsequently, and Estelle, who is still alive.
 3. None of the siblings of Hubert, except Horace and Estelle, was aware of the existence of 1985 will until after Horace's death.
 4. None of the parties have direct knowledge of the financial aspects of Hubert's estate. They have agreed, for the purposes of trial, to rely upon evidence taken from the probate documents with respect to the 1977 will.
 5. Because of the passage of time and the intermingling of Hubert's assets with Horace's, it is impossible to quantify precisely the value of Hubert's estate. For the purposes of this trial, the parties have agreed that, and are proceeding on the basis that, the value of the assets currently held by HSBC for the estate of Horace is approximately \$2,600,000.00. This includes what remains of Hubert's estate.
- [18] If the 1985 will is valid, and the 1977 probate is revoked, one of my tasks will be to determine what portion of Horace's estate is derived from Hubert's 1977 will, and therefore should not have been received by Horace's estate. If the 1985 will is invalid, and the 1977 will and probate remains in force, then Horace's estate will remain as it is now. In either case, the assets of Horace's estate, which properly belong in that estate, will be distributed on an intestacy evenly between those siblings who survived him (or their estates, or their children).
- [19] I have made additional findings of fact that bear on the issue of whether or not the plaintiffs' claims are time-barred. I refer to those findings later in this judgment.

THE CONSEQUENCES OF VARIOUS POTENTIAL FINDINGS

- [20] There are three potential findings, depending upon the evidence, with respect to the 1985 will. These are as follows:
1. The 1985 will is entirely valid.
 2. The 1985 will is valid, but incomplete.
 3. The 1985 will is invalid.

If The 1985 Will Is Entirely Valid

- [21] The plaintiffs argue that, if the 1985 will is entirely valid, then in ordinary circumstances the probate of the 1977 will should be revoked, and the 1985 will admitted to probate ("revocation and probate"). In the circumstances of this case, the parties agree that a more practical yet legally justifiable remedy is more appropriate. It has been referred to as

"modified tracing" ("tracing") - permitting the plaintiffs to "trace" the funds directly into Horace's estate, thereby obviating the need for the more cumbersome method of an order for "revocation and probate".

[22] The defendants argue that, even if the 1985 will is entirely valid, it does not automatically follow that:

1. The grant of probate of the 1977 will should be revoked; and/or
2. The plaintiffs' trust claims should be allowed.

[23] In support of this position, the defendants argue that the claim of Estelle is barred by expired limitation periods and/or by equitable principles, with respect to one or both of the:

1. suit with respect to trust claims against Horace's estate; and.
2. application for revocation of probate of the 1977 will;

[24] If the 1985 will was complete and valid and there is no bar to the claims, it is necessary to determine:

1. Who are the beneficiaries of the will?
2. Is Edythe also a beneficiary of the 1985 will, having regard to the fact that her name is handwritten into the will as an interlineation?
3. Which assets constitute "cash and bonds"?
4. What interest rate applies to the "cash and bonds" from 1985 to the present?
5. Should an order for "tracing" directly into Horace's estate be made, rather than an order for "revocation and probate"?

If The 1985 Will Is Valid, But Incomplete

[25] If the 1985 will is valid, but its bequest provisions were incomplete, those provisions will be invalid. The question then becomes one of deciding whether or not the remainder of the will is valid. I must consider if:

1. Those clauses which were complete at the time of execution (the revocation clause and the clause appointing executors) were valid and effective, such that the 1977 will is revoked, thereby creating an intestacy in Hubert's estate; or
2. The 1977 will remains valid despite the existence of the revocation clause in the 1985 will, due to the principle of dependant relative revocation.

[26] A person may revoke a will by subsequent instrument, will or otherwise. The document need not be one making any disposition of the property and will be effective to revoke the original will, wholly or in part, according to its terms, so long as it is executed according to the formalities required for a will or codicil.

[27] However, in *McCarthy et al. v. Fawcett et al.*, the British Columbia Court of Appeal said this:

A subsequent testamentary paper containing a revocation clause does not necessarily revoke a former will. It is clear that "probate of a paper may be granted of a date prior to a will with a revocatory clause, provided the Court is satisfied that it was not the deceased's intention to revoke that particular legacy or benefit" - see *Gladstone v. Tempest and others*, (1840) 2 Curt. 650, at pp. 653-4. As is said in *Halsbury's Laws of England*, 2nd Ed., Vol. 34, p. 88:

Revocation by destruction, or obliteration, or by subsequent will or codicil, may be conditional, and if the condition in question is unfulfilled revocation fails and the will, as made before such revocation, remains operative.

McCarthy et al. v. Fawcett et al., 61 B.C.R. 59 at 65-66, [1945] 1 D.L.R. 545 (C.A.).

[28] The defendants argue that if the bequest provisions of the 1985 will are found to be invalid, but that it otherwise is a valid and subsisting will, (consisting only of a valid revocation clause and a valid clause appointing executors), then the doctrine of dependent relative revocation applies and the 1977 will remains a valid and subsisting will.

If The 1985 Will Is Invalid

[29] If the 1985 will has not been proven on a balance of probabilities, such that there is insufficient evidence to confirm that it was completed before execution and validly executed, then the plaintiffs' action fails and Horace's estate properly received Hubert's assets pursuant to the 1977 will.

THE VALIDITY OF THE 1985 WILL

General

[30] The original 1985 will cannot be found. Presumably it was destroyed by Horace. A copy of a will may be probated providing it can be shown that the original existed after the death of the deceased; otherwise there is a presumption of revocation: see, e.g., James MacKenzie, *Feeney's Canadian Law of Wills*, 4th ed. (Markham, Ont.: LexisNexis, 2000) at paras. 5.19-5.23.

[31] I accept Mr. Barbour's evidence that the original 1985 will was in his possession after Hubert died.

[32] On the basis of the evidence, I am satisfied that the original will existed after the death of Hubert. Therefore, there is no presumption of revocation. I am satisfied that the unavailability of the original is not a bar to this lawsuit.

[33] To be valid, the 1985 will must have been properly signed by Hubert, and properly witnessed. The requirements are set out in the Wills Act, R.S.B.C. 1996, c. 489.

- [34] The name "Edythe" appears to be inserted without any initials or signature nearby. The evidence of the witnesses to the will, Mr. and Ms. Graham, clearly and without ambiguity indicates that the name was already in the handwritten text before execution by Hubert and signing by them as witnesses. I am satisfied based on the evidence that this is the case, and that the insertion therefore forms a valid part of the will and need not be initialled. It follows that Edythe is entitled to benefit from the will to the same extent as if her name had appeared in the same form as those of the other beneficiaries.
- [35] The primary dispute between the parties deals with the circumstances surrounding the execution of the 1985 will. There are two areas of argument in this regard:
1. The attestation clause.
 2. Was the will complete when executed?

The Attestation Clause

- [36] Hubert's signature on the 1985 will does not appear in the usual place for the testator's signature, but appears within the attestation clause in the area reserved for the identification of the testator.
- [37] In *Cook v. Province of Nova Scotia* (1982), 53 N.S.R. (2d) 87, 109 A.P.R. 87 (T.D.), the testator failed to sign the will in the proper place, but inserted her name only in the attestation clause. The court held that so long as the intention to give effect to the will was shown on the face of the instrument, the fact that the testator's name only appeared in the attestation clause was not fatal to the validity of the will. In British Columbia, this approach is codified in s. 6 of the Wills Act:
- 6(1) A will is deemed to be signed at its end if the signature of the testator, made either by the testator or the person signing for the testator, is placed at or after or following or under or beside or opposite to the end of the will so that it is apparent on the face of the will that the testator intended to give effect by the signature to the writing signed as his or her will.
- (2) A will is not rendered invalid in any of the following circumstances:
- (c) the signature is placed among the words of a testimonium clause or of an attestation clause or follows or is after or under an attestation clause either with or without a blank space intervening, or follows or is after or under or beside the name of a subscribing witness.
- [38] The Grahams both gave evidence that Hubert asked them to witness the execution of the 1985 will and that they did, in fact, witness his signature, which he wrote in the attestation clause. They both have a distinct recollection that Hubert signed, and that they both signed after Hubert, and while all three of them were present.

[39] On the basis of this evidence, I am satisfied that the 1985 will was validly executed. Clearly Hubert had the intention to make his will; the Grahams were asked to be there that evening for that very purpose.

[40] I am satisfied that the signature of Hubert in the wrong place within the attestation clause does not invalidate the will.

Was The 1985 Will Completed Before Execution?

[41] The most contentious aspect of this case is whether or not the bequest provisions of the 1985 will were completed (in the sense of having been written on the paper) before it was executed.

[42] If those portions of the will were blank when Hubert and the witnesses signed, then those portions are fatally flawed.

[43] Both witnesses to the will, Mr. and Ms. Graham, testified that they recollect that the bequest provisions of the 1985 will were fully filled out before Hubert signed.

[44] Mr. Barbour testified that, in preparation for seeking probate of the 1985 will, he telephoned and spoke with Mr. Graham. He testified that Mr. Graham told him in that telephone conversation that the sections of the will where the bequest provisions appear were blank when Hubert and the witnesses signed. Mr. Graham is unclear about the details of such a phone call, however I am satisfied that he is certain that he would not have told Mr. Barbour that the will was blank before execution, because he has a vivid recollection that it was not blank.

[45] Mr. Barbour did not have a similar telephone conversation with the other witness, Ms. Graham.

[46] When probating wills, the court proceeds on the presumption that the will was properly executed, if it appears to be properly executed when it is presented to the court. This is a rebuttable presumption that may be defeated if, after considering all the evidence and relevant circumstances, it is probable that all the formalities of execution were not met. The presumption of valid execution can be stronger or weaker depending on any material facts connected with the case: *Re Laxer*, [1963] 1 O.R. 343, 37 D.L.R. (2d) 192 (C.A.).

[47] The person propounding a will has the onus of proof. However, there are articulated principles which may help to discharge that burden.

[48] In *Re Laxer*, the court said at 353:

The Courts have shown a decided tendency to lean towards an effectuation of the expressed wishes of persons if satisfied that they really are their testamentary wishes, and when a testamentary document appears to be regular on its face and apparently duly executed, the evidence as to some defect in execution must be clear, positive and reliable

- [49] The plaintiffs argue that there is nothing on the face of the will to suggest it was not properly completed, and therefore it must be presumed to have been properly executed.
- [50] The defendants argue that the evidence is not sufficient to satisfy me on a balance of probabilities that the will was complete before execution. They further argue as follows:
1. The Grahams are honest people who had a strong and loving relationship with Hubert. However, their evidence must be considered extremely suspect.
 2. Mr. Graham swore an earlier affidavit that is inconsistent, in a material particular, with what he said in court.
 3. On all the evidence, I should find as a fact that during the disputed phone call, Mr. Graham told Mr. Barbour that the 1985 will was completely blank when signed. While that prior inconsistent statement cannot be admitted for the truth of its contents, it can be admitted to assist in evaluating the credibility of Mr. Graham. The result must be to cast significant doubt on all aspects of Mr. Graham's evidence regarding the 1985 will.
 4. Mr. Barbour's evidence with respect to the making of the prior inconsistent statement is consistent, strong and, in all the circumstances, makes sense. In particular:
 - (a) Mr. Barbour was very surprised by Mr. Graham's comments and questioned him closely. Mr. Graham was adamant that the bequest provisions of the 1985 will were blank when it was signed. Mr. Barbour recalls that Mr. Graham spoke very assertively and bluntly;
 - (b) Mr. Barbour recalls that he advised an associate of his conversation with Mr. Graham and they had some discussion about the next steps to be taken;
 - (c) Mr. Barbour remembers the conversation with Mr. Graham distinctly, since the information he provided was so unusual and unexpected that he had remembered it and thought about it from time to time over the years;
 - (d) if he had been told by Mr. Graham that the 1985 will was completely filled in when executed, he simply would have proceeded to probate the 1985 will. He did not proceed with the probate of the 1985 will, and this fact is consistent with his recollection that he was given information by Mr. Graham which led him to the conclusion that the 1985 will could not be probated;
 - (e) Mr. Graham cannot recall his conversation with Mr. Barbour, although he does not deny that he may have spoken with him.
 5. The defendants argue that, if I conclude that Mr. Graham made the prior inconsistent statement, then his credibility is affected to the extent that his evidence is neutralized. I would then go on to consider the evidence of Ms. Graham. Her evidence is not sufficient to convince me on a balance of probabilities because of the fact that 20 years have passed, memories naturally fade, and she has been contaminated by numerous discussions about this matter, especially with her husband, but with others as well.

Conclusions

[51] After consideration of all of the foregoing, I conclude as follows:

1. Mr. Graham did make the prior inconsistent statement which Mr. Barbour has testified about. In this regard, I reject the evidence of Mr. Graham. It is not necessary for me to conclude that he has deliberately misled me, and I do not do so. I am satisfied that his memory has evolved over time as a result of numerous discussions and an understandable desire to see the will of his friend upheld as valid.
2. I am also satisfied that Mr. Barbour is the person who would be in the best position to remember the event. He has no motive whatsoever to mislead the Court. The reason he would be in a better position to recall the event is because he would have understood, while the conversation was going on, the importance of whether or not the will was blank at the time it was signed.
3. I use the prior inconsistent statement of Mr. Graham to assist me in assessing his credibility and I have determined that I am unable to rely upon his evidence for this important issue. It is clear that the prior inconsistent statement to Mr. Barbour is not evidence for the truth of what was said and I do not consider it as such. I consider it only to assist me in assessing Mr. Graham's credibility. While it does not cause me to automatically reject the entirety of his evidence on all topics, it does cause me to reject his evidence on this particular point.
4. While I accept Mr. Barbour's evidence on this point, it is important to remember that it is no evidence at all that the will was blank. Nor is it evidence which has any effect at all on the credibility of Ms. Graham.
5. Ms. Graham's evidence remains as credible evidence on this point. I have no reason whatsoever to disbelieve her. I do believe her and accept her evidence. She has a distinct recollection of the will being completed when Hubert signed and when the two witnesses signed. Her evidence is not tainted in any way by her husband's prior inconsistent statement.
6. On its face, there are two aspects of the will which are problematic, that do not relate to this particular issue. One is the signature in the attestation clause to which I have already referred, the other is the interlineations of the word "Edythe" to which I have also already referred. I have already determined that neither of those is fatal to the will.
7. There is no "clear, positive and reliable" evidence from which I can conclude that there was any defect in the execution of the will: *Re Laxer*.
8. The plaintiffs are entitled to rely upon the presumption of valid execution even without the need of relying upon the evidence of Mr. Graham. The will appears valid on its face.

9. However, if I am wrong about this and there is no presumption of valid execution, then I am satisfied on the evidence that the will was completed before execution, and that it has been proven by the evidence of Ms. Graham, without regard to the evidence of Mr. Graham.
- [52] I am satisfied that the will has been proven on a balance of probabilities. It follows that the revocation clause is also valid and the 1977 will is revoked by it. The concept of dependent relative revocation is not applicable.
- [53] However, that is not the end of the matter despite the fact that the will is valid and proven. The plaintiffs must still address the limitation defences which have been raised with respect to:
1. The trust claims of the plaintiffs; and
 2. The revocation of the probate of the 1977 will.
- [54] To the extent that any of the limitation defences may be successful for the defendants against one or more plaintiffs, then those plaintiffs will find no consolation at all in the knowledge that the 1985 will has been found by me to be valid and proven on a balance of probabilities.

ARE THE PLAINTIFFS' CLAIMS TIME-BARRED?

General

- [55] Except for Estelle, the parties agree that none of the claimants' claims are time-barred.
- [56] The only party about whom there is disagreement is Estelle. The other claimants argue that her claim is barred by the Limitation Act, R.S.B.C. 1996, c. 266, the Estate Administration Act, R.S.B.C. 1996, c. 122, and/or the equitable principles of laches and acquiescence.
- [57] It is agreed that Estelle knew of the existence of the 1985 will shortly after Hubert's death and before the probate of the 1977 will, yet she took no steps with respect to the 1985 will until after Horace's death in 2001.
- [58] With respect to the other siblings, it is conceded that none of them knew of the existence of the 1985 will until after Horace's death. Therefore, their claims (and those of their representatives and descendants) were all commenced in a timely way.
- [59] With respect to Estelle, it is argued that her claims are time-barred whether viewed as a trust claim, or as an application for revocation of probate.
- [60] I have made the following findings of fact, and drawn the following inferences, from the evidence:
1. Estelle had been very kind to Hubert during his life; as a result of which he intended that she receive a larger portion of his estate than the other siblings (except for Horace, who was his partner in business). In this regard, I accept the evidence of Mr. and Ms. Graham.

2. I am satisfied from the evidence of Estelle, that her brother Horace told her clearly, after Hubert's death, that Hubert had left two wills. Consequently, I am satisfied that she was aware that there was a 1977 will and a 1985 will, she was aware of it shortly after Hubert's death, and in any event, before the grant of probate in March of 1987.
3. When Horace told her about the 1985 will, he gave her a copy. He also told her that it was invalid. He expected her to believe him and she did believe him. I am satisfied that Estelle had an honest belief that the 1985 will was invalid, and did not know that her rights as a beneficiary under that will were about to be violated by Hubert.
4. Consequently, Estelle did not seek a legal opinion with respect to the 1985 will and did not have an understanding that it would have been prudent to do so. She accepted that Horace had done so and she relied on that.
5. The reason that Horace expected Estelle to believe him, and the reason that she did believe him, requires an appreciation of Estelle's background. I accept her evidence that her family traditions as moulded by Chinese culture prevented her from questioning Horace's statement that the 1985 will was invalid. I accept her evidence that she was raised not to question or ask for things from her elders, including her brothers. This upbringing was evidenced when Estelle's father died. Everything was left to the sons, but neither Estelle nor her sisters challenged it. Given that cultural background, her delay in questioning Horace's statement, and in obtaining independent legal advice is understandable and reasonable.
6. I am satisfied that Horace told Estelle that, while the 1985 will was not valid, he would voluntarily distribute the assets of Horace's estate in accordance with the provisions of that will. In fact, he did not so distribute the assets, and for the same reasons as previously expressed, Estelle did not question him about it.
7. Horace wilfully concealed the 1985 will from his other siblings, and wilfully concealed from Estelle his knowledge that the 1985 will may have been valid, and that he had, as a result, changed lawyers. I am satisfied that he wilfully concealed it from the lawyer who ultimately obtained probate of the 1977 will. In so acting, Horace was a trustee of the assets of Hubert's estate. He took those assets for himself. In so doing, he acted fraudulently and in bad faith and converted those assets to his own use.
8. I am satisfied that it was not until after Horace's death in 2001, that Estelle became fully aware that Horace may have lied to her, that the 1985 will may have indeed been valid, and that Horace had fraudulently converted the assets of Hubert's estate to his own use.

The Limitation Act

- [61] The claimants who argue that Estelle's trust claim is time-barred by virtue of the Limitation Act suggest that the applicable limitation period is either six years or ten years:

1. six years for an action to recover property wrongfully taken or detained, or damages for conversion or detention of goods (s. 3(6));
 2. ten years for an action to recover a share of an estate, or for actions against trustees with respect to various kinds of fraudulent activity including conversion of trust property (s. 3(3)).
- [62] They argue that Estelle's time period began to run in 1986 when she became aware of the existence of the 1985 will, or at the very latest in 1987 at the time of the probate of the 1977 will.
- [63] They argue that the limitation period for the claim for revocation of probate of the 1977 will (in 1987) is six years because such a claim is not specifically provided for in the Act (s. 3.(5)).
- [64] Whether it is six years or ten, it is agreed that, if the commencement of the limitation period was in 1987, Estelle would have had to commence her action by no later than 1997, or she would be time-barred.
- [65] She did not commence her action until after Horace died in 2001.
- [66] Estelle argues that the commencement of the limitation period did not begin to run in 1986 or 1987 because she was not fully aware of Horace's fraud and conversion of assets until after Horace's death in 2001. She argues that it was after that, when she learned that the 1985 will might be valid, and that she might have a claim. It was at that time when her limitation period commenced to run.
- [67] In my view, this action is governed by s. 6(1) of the Limitation Act, not s. 6(3). The significance of the difference is two-fold:
1. Under s. 6(1), the limitation period begins when the "beneficiary" is "fully aware of the fraud conversion or other act of the trustee on which the action is based." Under s. 6(1), the more complex and detailed examination of the knowledge of the claimant required by s. 6(4) and 6(5) is not applicable. Those subsections are only engaged when the cause of action is one of those enumerated in s. 6(3), not 6(1);
 2. When dealing with actions under s. 6(1), the burden of proving that time has begun to run is on the trustee s. (6(2)). When dealing with actions enumerated in s. 6(3), the burden of proving that the running of time has been postponed is on the claimant (s. 6(6)).
- [68] In this case, I am satisfied that Estelle was not "fully aware" of those factors set out in s. 6(1) (a) or 6(1)(b) until after Horace died, when she first learned that the 1985 will might be valid. It follows that the limitation period did not commence running until after Horace's death in 2001.
- [69] This finding negates a Limitation Act defence with respect to the in trust claim and with respect to the claim for revocation of the 1987 probate. Estelle is not time-barred by the provisions of the Act.

[70] In addition to the Limitation Act, the competing claimants argue that s. 23 of the Estate Administration Act is a bar to the claimants' proceedings. I reject that argument as being one which is not available to a person (or his estate) such as Horace, who has acted in bad faith.

Equitable Defences

[71] Independent of the Limitation Act, and the Estate Administration Act, the competing claimants argue that Estelle is barred from pursuing her claims by virtue of the equitable principles of laches and acquiescence.

[72] For either of these defences to succeed, one of the following must be found:

1. delay by Estelle despite knowledge that her rights have been violated; or
2. the delay resulting in circumstances where it would be unreasonable to grant Estelle the relief sought.

[73] In *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6 (S.C.C.), the court summarizes the equitable principle of laches as follows:

Thus there are two distinct branches to the laches doctrine, and either will suffice as a defence to a claim in equity. What is immediately obvious from all of the authorities is that mere delay is insufficient to trigger laches under either of its two branches. Rather, the doctrine considers whether the delay of the plaintiff constitutes acquiescence or results in circumstances that make the prosecution of the action unreasonable. Ultimately, laches must be resolved as a matter of justice as between the parties, as is the case with any equitable doctrine.

[74] I am satisfied that Estelle did not know, until after Horace died, that her rights as a beneficiary under the 1985 will had been violated. She had been told by Horace that the will was invalid, and she believed him.

[75] When considering the equitable defences advanced, it is appropriate to consider the findings I have made about the influence of Chinese culture on Estelle's background.

[76] I also consider, in rejecting the equitable defences advanced, that Estelle trusted Horace and accepted his advice on that basis. She was a victim of his fraud, in fact, the first victim. I also consider that she was the sibling to whom Hubert wanted to leave a greater gift than to any of the other siblings, except for Horace.

[77] I am also satisfied that the delay does not result in circumstances where it would be unreasonable to grant the relief sought by Estelle. The evidence is that all of Hubert's assets went to Horace. Horace's estate has sufficient assets to satisfy the claim, and no other creditors would be affected, to rectify the improper distribution of Hubert's estate. It can hardly be said that the other beneficiaries, or their heirs, are prejudiced by not being entitled to keep what Hubert did not intend for them to receive in the first place. Horace did not act in good faith and no one should benefit from his fraudulent behaviour.

[78] Consequently, the defences of laches and acquiescence fail, and accordingly her claims are not time-barred.

WHAT REMEDY SHOULD FOLLOW

[79] The 1977 will was probated as a direct result of Horace's bad faith actions and his wilful concealment of the 1985 will.

[80] I have already determined that the 1985 will is valid in all its aspects.

[81] As a result, the distribution to Horace of the assets pursuant to the 1977 will should not have been made and must be corrected. Those assets should have been distributed in accordance with the provisions of the 1985 will. I conclude that those assets are held in trust by the administrators of Horace's estate.

[82] As noted earlier, the parties are agreed that the appropriate remedy is an order for "tracing", rather than for "revocation and probate". The reasons are these:

1. the amount of time that has passed;
2. the intermingling of Hubert's assets with those of Horace which make it impossible to isolate those that were actually Hubert's;
3. the fact that the administration of Hubert's estate has been the subject of ongoing administration as part of Horace's estate for so many years; and,
4. if orders for "revocation and probate" were made, the effective result would be precisely the same as granting the remedy which the parties advance by agreement.

[83] Such a remedy is permissible pursuant to the reasoning of *Ministry of Health v. Simpson and others*, [1951] A.C. 251 (H.L.), where the court says this:

Have the next of kin a direct claim in equity against the persons to whom it has been wrongfully distributed? I think that the authorities clearly establish that, subject to certain qualifications which I shall state, they have such a claim.

[84] The "certain qualifications" referred to in the previous quotation are issues of limitations, laches and acquiescence. I have already dealt with those issues in this case.

[85] In all the circumstances, I am satisfied that the "tracing" remedy is appropriate. The administrators of Horace's estate will hold such assets from Hubert's estate or the value of such assets, in trust, to be paid out as nearly as can be done in accordance with the terms of the 1985 will.

WHAT ASSETS ARE "CASH AND BONDS"?

[86] Because of the intermingling of Hubert's estate with Horace's assets, it is impossible to determine the precise value of Hubert's estate. HSBC requires the court's assistance to determine what Hubert meant by the bequest in the 1985 will of a percentage of his "cash and bonds" to certain of his siblings.

[87] The will does leave Horace the shares in the family garage, his stocks, his automobiles, and 35% of "cash and bonds". It distributes the remaining 65% of "cash and bonds" as follows - 35% to Estelle, and the remaining 30% evenly divided between the other siblings.

[88] The defendant, HSBC, as trustee of Horace's estate, requires direction from the Court as to which of the assets derived from Hubert constitutes "cash and bonds" and what should be done with the "cash and bonds".

[89] The plaintiffs submit that by saying "cash and bonds", Hubert meant to include bank accounts, term deposits, Canada Savings Bonds, and bearer bonds, which make up \$605,133.24 of his estate.

[90] The plaintiffs submit that the \$605,133.24 is comprised of the following:

Canada Savings Bonds

2,000.00

Cash

97,270.24

Bearer Bonds

15,863.00

Term Deposits

490,000.00

Total

\$605,133.24

[91] The plaintiffs' interpretation is supported by the case law which deals with the interpretation of "cash". While each case must be decided on its own facts, a common theme throughout the following cases is that "cash" generally includes readily available and liquid assets, such as term deposits: *Re Cutten Estate*, [1983] O.J. No. 298 (H.C.J.); *Re Bennett*, [1955] O.W.N. 211 (H.C.J.); *Dooan Estate v. Atlantic Charismatic Center for Renewal and Evangelization*, 150 N.B.R. (2d) 327, 385 A.P.R. 327 (Q.B.).

[92] This is also consistent with the evidence which indicates that Hubert expressed warmth and fondness for his sister, Estelle, which I conclude would have led him to wish to reward her with a share of the term deposits.

[93] I conclude that in all the circumstances of this will, the term "cash and bonds" means bank accounts, term deposits, Canada Savings Bonds, and bearer bonds, and totals \$605,133.24.

[94] Part of the relief which the plaintiffs seek is a declaration that the 65% of the "cash and bonds" distributed to Estelle and the other siblings should be based on the figure of \$605,133.24.

WHAT INTEREST RATE APPLIES TO THE "CASH AND BONDS"?

[95] The defendants take no position with respect to the interest rate to be applied to the distributions, but seek the court's guidance in this regard.

[96] HSBC, the Trustee, will calculate the accrued interest payable to the beneficiaries pursuant to the directions of this court.

[97] It is not possible to determine the actual interest and profit obtained by Horace on Hubert's cash and bonds. It would also be inequitable to simply pay the appropriate portion of cash and bonds to the beneficiaries or their estates, without any interest at all.

[98] There are two possible methods for calculating the interest. The question is whether the provisions of the Interest Act, R.S.C. 1985, c. I-15, should apply, or those of the Court Order Interest Act, R.S.B.C. 1996, c. 79.

[99] Section 3 of the federal Interest Act provides that:

Whenever any interest is payable by the agreement of parties or by law, and no rate is fixed by the agreement or by law, the rate of interest shall be five per cent per annum.

[100] In our case, clearly there is no agreement. There is also no interest payable by law; that phrase seems to contemplate a payment pursuant to legislation. Therefore, the Interest Act is not applicable.

[101] Section 1 of the provincial Court Order Interest Act provides:

1(1) Subject to section 2, a court must add to a pecuniary judgment an amount of interest calculated on the amount ordered to be paid at a rate the court considers appropriate in the circumstances from the date on which the cause of action arose to the date of the order.

[102] Use of the rates under the Court Order Interest Act, with its fluctuating rate in accordance with the fluctuations in the economy is a more appropriate method of calculating interest on the amount owed to the beneficiaries of the 1985 will from Horace's estate.

[103] I conclude that interest will be calculated in accordance with the Court Order Interest Act.

[104] Fairness and common sense dictate that it should be calculated from the date when the 1985 will should have been probated. I conclude that date was March 27, 1987, the date when the 1977 will was in fact probated. Interest will be calculated from that date.

CONCLUSIONS

[105] Based on all the foregoing, I make the following orders:

1. A declaration that the grant of probate of the 1977 will, dated March 27, 1987, is null and void.
2. Revocation of the grant of probate of the 1977 will, dated March 27, 1987, granted to Horace Lee.
3. A declaration pronouncing the force and validity of the true last will and testament of the deceased, Hubert Lee, dated March 3, 1985.
4. A declaration that the total of "cash and bonds" in Hubert's estate is \$605,133.24, and the 65% to which the plaintiffs are entitled is \$393,336.60, plus interest pursuant to the Court Order Interest Act since March 27, 1987.
5. A declaration that Horace's estate holds the plaintiffs' entitlements, under Hubert's 1985 will, in trust for the plaintiffs and other beneficiaries.
6. An order that HSBC, in its capacity as administrator of Horace's estate, transfer and convey to the plaintiffs and other beneficiaries of the 1985 will their proper entitlements.

COSTS

[106] The case law in estate proceedings supports the following general approach:

1. The costs of and incidental to a proceeding will follow the event unless the court otherwise orders.
2. If the cause of the litigation originated from the conduct or errors of the testator (i.e., unclear wording or validity of the will), then the costs of all parties will generally be paid from the estate on a full indemnity basis.
3. If there were circumstances which provided reasonable and sufficient grounds to have brought the action relating to questions of capacity or allege undue influence or fraud, the court will not normally make an order for costs against the unsuccessful party.
4. In an action under dependent relief legislation (i.e., where the proceedings are adversarial in nature and are not brought about by the actions of the testator), costs follow the event.
5. All costs awards are subject to the court's discretion and an overriding test of reasonableness.

Vielbig v. Waterland Estate (1995), 1 B.C.L.R. (3d) 76, 6 E.T.R. (2d) 1 (C.A.)

Lee v. Lee Estate (1993), 84 B.C.L.R. (2d) 341, 50 E.T.R. 297

- [107] Underlying the above structure is the acknowledgement that probate actions are unlike other actions. They are meant to discern the true intentions of someone who is deceased, and give effect to them if possible. Such actions occupy a special status: *Atchison v. Inkster* (1983), 47 B.C.L.R. 222, 15 E.T.R. 1 (C.A.).
- [108] The validity of Hubert's 1985 will had to be determined by this Court given the conflicting testimony of Mr. Graham and Mr. Barbour. It was not a question which the parties themselves could resolve, and the necessity of proceeding with a court action was due to the actions of Hubert and Horace. Hubert's contributing action was his honest, but ill-advised decision, to use a store-bought form will without involving a lawyer. Horace's contributing action was his bad faith and fraudulent behaviour.
- [109] Considering the foregoing principles in this case and the issues and positions of the parties, the evidence and the ultimate decision, it is my view that all parties are entitled to receive, and I hereby order that they do receive, special costs on a full indemnity basis from the estate of Horace.

The Honourable Mr. Justice Silverman

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