

CANADA / JUDGMENT

Re Finsant Estate

2024 BCSC 217

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Supreme Court of British Columbia

DECIDED

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2024 BCSC 217 Re Finsant Estate

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Re Finsant Estate,

2024 BCSC 217

Date: 20240103

Docket: P220349

Registry: Victoria

In the Matter of the Estate of Rosemary Finsant, Deceased

Before: The Honourable Justice Morley

Oral Reasons for Judgment

(In Chambers)

Applicant appearing on her own behalf by videoconference:

M. Beggs

Counsel for the Respondent Rhonda Schicchi appearing by videoconference:

M. H. Martin

Place and Dates of Trial/Hearing:

Victoria, B.C.

December 19 and 21, 2023

and January 3, 2024

Place and Date of Judgment:

Victoria, B.C.

January 3, 2024

- [1] THE COURT: These are edited oral reasons for judgment.
- [2] Rosemary Finsant died on October 22, 2021 at the age of 81. She lived alone in her home on Quadra Island. Searches of the home did not reveal a will. However, we know she executed one almost 20 years earlier. That 2001 will named her grandniece, Megan Beggs, as the sole beneficiary of the residue of her estate. We also know that the original 2001 will was given to Ms. Finsant and she is the last person known to have possession of it. She either intentionally destroyed it - presumably after changing her mind about how her estate was to be allocated - or it was lost, stolen or accidentally destroyed.
- [3] The contest in this application is between Ms. Beggs - who asks me to give effect ("pronounce the force and validity of") the 2001 will - and Ms. Finsant's niece and Ms. Beggs' aunt, Rhonda Schicchi - who is administrator of Ms. Finsant's estate, and would have been executor under the will, and asks me to confirm that Ms. Finsant died intestate.
- [4] Everyone agrees that Ms. Finsant made the will in December 2001, that she had the testamentary capacity to do so, and that the formalities under the Wills, Estate and Succession Act, S.B.C. 2009, c. 13 [WESA] were probably observed. It follows that unless she deliberately revoked it afterwards, it should be given effect.
- [5] Everyone also agrees that since Ms. Finsant was the last one to be in possession of the original, and it could not be found after she died in 2021, the "presumption of destruction" arises. This doctrine holds that a will traced to the possession of the deceased and that cannot be found after a reasonable search was most likely deliberately destroyed. This doctrine is not an absolute rule - it is a rebuttable presumption that applies unless there is good reason to find that the will was more likely lost, stolen or inadvertently destroyed.
- [6] Finally, everyone agrees that I have the jurisdiction to make the orders Ms. Beggs seeks and should do so if, but only if, she succeeds in rebutting the presumption of destruction.
- [7] For reasons I will explain in more detail, I find that the presumption of destruction has not been rebutted in this case and therefore Ms. Finsant must be presumed to have died intestate. I acknowledge that the evidence is uncertain and we will likely never really know what happened to the 2001 will. But the point of presumptions is to provide legal certainty when factual certainty is not available. I therefore dismiss the application.
- [8] In the circumstances, I order that costs of the application shall be paid out of the estate to both the applicant and the respondent on a full indemnity ("special costs") basis.

I. Factual Background

- [9] For decades prior to her death, Ms. Finsant lived alone in Heriot Bay on Quadra Island. She was unmarried, having divorced in the 1980s, and had no children or surviving siblings. Her closest living relatives were her niece, the respondent Rhonda Schicchi, Ms. Schicchi's children, a nephew, Fred Beggs, who does not have children, and the children of a predeceased nephew, Kenneth Beggs, namely the applicant, Megan Beggs and her two siblings, Minique and Sebastian Beggs.
- [10] Megan Beggs, who I will refer to - hopefully without creating any confusion - as Ms. Beggs, has one child. I do not know whether Minique or Sebastian Beggs or any of Ms. Schicchi's children do.
- [11] Ms. Schicchi, and her two younger sons Giovanni and Armando, live in Victoria as does Minique Beggs, who like her siblings grew up in Alberta. The rest of the family lives elsewhere in Canada.
- [12] Ms. Finsant's contact with her extended family was relatively limited, seeing them occasionally. She does not appear to have ever discussed her intentions with respect to her property after her death with any member of her family.
- [13] Ms. Finsant had physical limitations, but does not appear to have suffered any significant cognitive decline up to her death. I have a journal entry she made at the end of 2020 which shows someone who was lucid and self-reflective.
- [14] In mid-October 2021, Ms. Finsant was hospitalized for pneumonia. On October 21, Ms. Schicchi received a call from a nurse who told her that her aunt had taken a turn for the worse and was dying. The phone was put by Ms. Finsant's ear. She passed away while Ms. Schicchi was talking to her.
- [15] On October 30, Ms. Schicchi and her husband attended the property on Quadra Island. Mr. Finsant's dog and two cats had been left alone in the home since she was hospitalized weeks earlier. The Schicchis found a filing cabinet upstairs. It contained bills, insurance forms, tax documents, mortgage statements and documents, tenancy dispute documents and other important records. One of the contents was for prepaid funeral services with Suttons Campbell River Funeral Home.
- [16] The filing cabinet did not include a will.
- [17] There was also a table upstairs on which there were flyers and newspapers, cards and letters from Ms. Schicchi to Ms. Finsant, photo albums and a will kit. Ms. Schicchi took the documents found during the first trip home and sorted through them.
- [18] No will was found among these documents either.

- [19] On November 18, Ms. Schicchi submitted a Search for Wills Notice to find out if a will had been registered with the Vital Statistics Agency. It turned out that indeed Ms. Finsant had registered a will executed on December 14, 2001. The Wills Notice said it was located in a safety deposit box at the Royal Bank at 1290 Shoppers Row in Campbell River, but it turned out that no such safety deposit box in fact existed. However, the Wills Notice identified Karen Lakberg as the notary public who drafted the will, thereby ultimately permitting Ms. Schicchi to determine what its content was.
- [20] Before this occurred, Ms. Schicchi returned to Quadra Island on December 4-5, 2021 with her husband, her son Armando and his girlfriend Aislinn Hollenbeck and with Minique Beggs and her partner, Charles McCahon. The purpose of the visit was both to search for the will and other important documents and to begin the clearing out of the home with a view for a sale.
- [21] I have affidavits from all the participants in this search. There are differences in emphasis in the accounts of Minique Beggs and Mr. McCahon, on the one hand, who are more aligned with Ms. Beggs, and the other participants in the December 2021 search, who are more aligned with Ms. Schicchi. However, the following is common ground:
- a) Ms. Schicchi made clear to all the participants in the search and cleanup that a critical goal was to try to find a will. She said to look underneath furniture, drawers, and to be thorough. She specifically instructed those involved to look through books and magazines.
 - b) The house was in some degree of disorder, although the extent is disputed.
 - c) Ms. Hollenbeck found a cardboard box tucked in a closet underneath some clothing. It contained an examination-for-discovery transcript and other documents related to Ms. Finsant's divorce from the 1980s.
 - d) Minique Beggs found papers and envelopes in books near Ms. Finsant's bed which included blueprints of the home from the 1970s and an "outline" of her divorce.
 - e) Ms. Finsant had a large number of books and magazines in addition to the ones Minique Beggs found. It was decided it was necessary to burn these because of the lack of garbage or recycling facilities on the island. Ms. Hollenbeck deposes that she went through the books and magazines, shaking them to see if there were any documents in them, before throwing them over the balcony to be burnt. Minique and her partner, Mr. McCahon, by contrast, say that it was clear to them that not every book was flipped through.
 - f) Nobody found a will.
- [22] Ms. Schicchi and her husband returned to the property six or seven more times before it was sold, sometimes with family members. No will was found on any of those occasions either.

- [23] When Ms. Schicchi tracked down Ms. Lakberg, she gave her a copy of the December 2001 will. Ms. Lakberg's practice, as a notary public, was to keep an unsigned copy of executed wills in her file, while providing the original to the client. Her records showed she gave Ms. Finsant's the original on December 14, 2001.
- [24] The will instructions and the will copy both indicate that Ms. Finsant had named her (now-deceased) sister Dorothy May Beggs as her executor, with Ms. Schicchi as the alternate, and had made Ms. Beggs and, if Ms. Beggs predeceased her, Ms. Beggs' children, the sole beneficiary of the residue of the estate.
- [25] Ms. Beggs is named as the beneficiary of Ms. Finsant's Registered Retirement Income Fund (RRIF).
- [26] Ms. Schicchi advised Ms. Beggs of the existence and content of the will, but proceeded on the basis that Ms. Finsant had died intestate.
- [27] The issues between the parties to this application first came to Mr. Justice Thompson by way of an application by Ms. Beggs under s. 58 of WESA. However, he held that he did not have jurisdiction under that section to resolve the issue of whether the will was destroyed: *Re Finsant Estate*, 2023 BCSC 842 (unreported).

II. Has Ms. Beggs Rebutted the Presumption of Destruction?

- [28] The ultimate issue is what is most likely to have happened to the will in the 20 years between when Ms. Lakberg gave the original to Ms. Finsant and Ms. Finsant's death. There is no direct evidence on point, nor did Ms. Finsant share with anyone her intentions or what she did with the will.
- [29] The presumption of destruction was set out in *Welch v. Phillips* (1836), 1 Moo PC 299 at p. 302, and remains the law in British Columbia: *Haider v. Kalugin*, 2008 BCSC 930, at para. 11. If, as here, a will is traced to the possession of the deceased and last seen there and is not forthcoming on death, it is presumed to have been destroyed by the deceased, a presumption that holds unless there is "good and sufficient reason to repel it." The result of this application turns therefore on whether Ms. Beggs has shown that good and sufficient reason.
- [30] This burden has been described as "very heavy" (*McBurnie v. Patriquin*, [1975] N.S.J. No. 447 at para. 10, referred to in *Haider* at para. 12) and as requiring "clear and convincing evidence" (*Sigurdson v. Sigurdson*, [1935] 2 D.L.R. 445 (S.C.C.), also referred to in *Haider* at para. 10). But it should not be understood as a special rule of law for such cases. Rather, at least as currently applied, it is an application of general rules of civil evidence in this specific situation.

[31] In modern Canadian civil law, there is only one standard of proof in civil cases regardless of the nature of the allegation, namely, proof on a balance of probabilities: *F.H. v. McDougall*, 2008 SCC 53, at para. 40. But the quality of the evidence necessary to make a finding on that standard will depend on the inherent probabilities or improbabilities: *McDougall; Canada v. Fairmont Hotels Inc.*, 2016 SCC 56, at para. 36.

[32] As Justice Ehrcke explained in *Thierman Estate v. Thurman*, 2013 BCSC 503 at para. 43:

The presumption [of destruction] recognizes that the burden of proof is on the party attempting to rely on a non-original copy of a will. Thus, the presumption of destruction of a will that had been in the testator's possession but cannot be found on his death may be rebutted by evidence establishing on a balance of probabilities that the will was inadvertently lost or misplaced.

[33] The ultimate issue is whether, on a balance of probabilities, the will was more likely to have been deliberately destroyed because the testator had a change of heart or was more likely lost, stolen or accidentally destroyed. The legal onus is on the applicant - in this case Ms. Beggs - as the person trying to rely on a non-original copy. What the presumption adds is the common-sense point that we would expect a person who wants a will to be executed to keep it where it can be found when they die. In the absence of a contrary reason, this is the more inherent probability. The application of the legal standard and burden of proof will take this into account.

[34] In other words, if a will in the deceased's possession cannot be found after a reasonable search, the quality of evidence necessary to support the inference that it was destroyed intentionally is less than that required to support the inference that it was lost or inadvertently destroyed.

[35] At para. 13 of *Haider*, Justice A.F. Wilson set out the factors typically looked at in deciding whether the presumption of destruction has been rebutted as follows:

- whether the terms of the will itself were reasonable;
- whether the testator continued to have good relationships with the beneficiaries in the copy of the will up to the date of death;
- where personal effects of the deceased were destroyed prior to the search for the will being carried out;
- the nature and character of the deceased in taking care of personal effects;
- whether there were any dispositions of property that support or contradict the terms of the copy sought to be probated;
- statements made by the testator which confirm or contradict the terms of distribution set out in the will;

- whether the testator was of the character to store valuable papers, and whether the testator had a safe place to store the papers;
- whether there is evidence that the testator understood the consequences of not having a will, and the effects of intestacy;
- whether the testator made statements to the effect that he had a will;

[36] The parties organized their submissions around these Haider factors and I will follow them.

Whether the terms of the will were "reasonable"

[37] The "reasonableness" of the terms of the will matters on the assumption that a testator is more likely to rethink unusual terms than standard ones. Ms. Schicchi did not go so far as to say that making Ms. Beggs the sole beneficiary was unreasonable. But referring also to the second factor, namely, the factor about continued good relationships with the beneficiaries, Ms. Martin, arguing on her behalf, made the point that Ms. Finsant and Ms. Beggs had very little contact in the intervening two decades, and asked for the inference that the disposition in the 2001 will was one she had some reason to revise.

[38] Ms. Beggs deposed that she had a visit with Ms. Finsant in the summer of 2000, in which she told Ms. Finsant about her subsequently attained ambitions to pursue advanced education. Although neither Ms. Beggs nor anyone else knows why Ms. Finsant decided to make her the sole beneficiary of the estate, she points to this meeting and Ms. Finsant's affection for her as a child as making the will "reasonable".

[39] I cannot give much weight to this factor one way or the other. We know so little about Ms. Finsant's motivations and values that it would be speculative. It is certainly possible that she rethought giving all of her estate to Ms. Beggs, but the content of the will does not add much to the rationale for the general presumption.

Whether the testator continued to have good relationships with the beneficiaries in the copy of the will up to the date of death

[40] On the evidence before me, Ms. Finsant remained on good terms with Ms. Beggs up until her death, although they had only sporadic contact. I cannot give much weight to this factor either.

Whether personal effects of the deceased were destroyed prior to the search for the will being carried out

[41] Justice Wilson's reference to the "destruction of the effects of the deceased prior to the search" is attributed to *Pigeon Estate v. Major*, [1930] S.C.R. 252, a case in which the decisive evidence involved the burning of the testator's clothing and bedding before the search for the will, leading to a reasonable inference in the circumstances that the will was unintentionally destroyed.

- [42] There is no evidence of inadvertent destruction of other effects of Ms. Finsant prior to the December 2021 search. The real issue here, though, is whether the will may have been in a book or magazine that was burned without prior inspection during the search, and what degree of probability I should place on this possibility.
- [43] Ms. Finsant did keep some important records in books as revealed by the fact that Minique Beggs found an outline of Ms. Finsant's divorce and some blueprints in books by her bed. Both Minique Beggs and Mr. McCahon make statements about how not all the books or magazines could have been searched. However, Minique Beggs does not say that she failed to search the books on the floor that she was responsible for and Ms. Hollenbeck says she looked through each one before it was burnt.
- [44] I accept that it is impossible to rule out the possibility that the will was in a book that was burned during the search. However, the bulk of the formal divorce documents were kept in a box, not in books. Moreover, more recent documents, including the funeral insurance documents, were in the filing cabinet, consistent with where a person who had a reasonable plan for their being found after her death would put them.
- [45] While I cannot rule out the possibility that Ms. Finsant put her will in a book that was subsequently destroyed, it is more consistent with the common law's presumption that testators intend wills that they want enforced to be found that she would have put it in the filing cabinet or somewhere else relatively easily accessible by people looking after her death. Moreover, if she put it in a book, on the evidence before me it would probably, although not certainly, have been found anyway.

Nature and character of the deceased in taking care of personal effects

- [46] The "nature and character of the deceased in taking care of personal effects" was a major source of the argument before me with Ms. Beggs asking for me to find that Ms. Finsant was a "hoarder", while Ms. Schicchi argued that she was a basically tidy and orderly person up until her hospitalization, who simply had a lot of magazines.
- [47] I am inclined more to the latter characterization based on the pictures I have seen. There was disorder but it was primarily outside of the house on the property or result of her lack of mobility to access the upstairs or, finally, the result of pets being left in the home for weeks after Ms. Finsant was hospitalized. She seems like a person of ordinary conscientiousness about mess and organization.

Whether there were any dispositions of property that support or contradict the terms of the copy sought to be probated

- [48] Ms. Beggs properly draws attention to the continued designation of herself as the beneficiary of Ms. Finsant's RRIF at the time of death as supporting a continued intention to make her the beneficiary. I accept Ms. Martin's counterpoint that this is not dispositive since it would be perfectly reasonable for Ms. Finsant to want Ms. Beggs to be the beneficiary of the RRIF but not the estate as a whole. But while not dispositive, as indeed none of the evidence is, it does support Ms. Beggs' position.

Statements made by the testator which confirm or contradict the terms of distribution set out in the will

- [49] Ms. Finsant made no statements to either confirm or contradict the terms of the will.

Whether the testator was of the character to store valuable papers, and whether the testator had a safe place to store the papers

- [50] Ms. Finsant had a safe place to store valuable papers, namely, her filing cabinet, and she did store some of those papers there, including ones that would be most useful to be available to surviving kin when she died. While it is true that she was not entirely consistent in this respect, the documents found by Minique Beggs were not of comparable importance to a will.

Whether there is evidence that the testator understood the consequences of not having a will, and the effects of intestacy

- [51] From Ms. Lakberg's evidence, we know Ms. Finsant was aware of the consequences of dying intestate. Typically this would be a factor in favour of assuming the will was lost or destroyed inadvertently on the assumption that persons who make wills and know about intestacy generally want to avoid the latter. However, Ms. Schicchi argues, or speculates, that Ms. Finsant may have wanted the legal consequences of an intestacy. In light of the lack of any direct knowledge of what Ms. Finsant was thinking, I am not inclined to make strong inferences either way on the basis of this factor.

Whether the testator made statements to the effect that he or she had a will

- [52] No statement from Ms. Finsant about the will after she was given it by Ms. Lakberg is in the evidentiary record and so no inference can be made about its continuing existence.

Summary of evidence

- [53] The truth is that we have very little evidence one way or the other about what happened to the will. Ms. Beggs raises the possibility that it was stolen by squatters or tenants. I think this is entirely speculative and has no inherent likelihood. There is no evidence that any of them had access to the house and no reason why they would specifically take the will as opposed to other valuable property.

- [54] The possibility it was inadvertently destroyed in the course of the search and cleanup is more plausible, but still speculative. While the witnesses aligned with Ms. Beggs give me pause, they did not say that they themselves acted imprudently and they did not give any specific instance of an imprudent search on the part of others. In its totality, the evidence suggests a good faith and competently-conducted search for a will that turned up nothing. The most probable inference was that there was no will to be found.
- [55] In the end, we do not have much to go on other than the presumption of destruction. Ms. Finsant was, based on the evidence, a person of sound mind and ordinary conscientiousness about important documents. We do not know why she would have destroyed the will without creating a new one, but then we do not really know why she created it in the first place. She was not a communicative person in this respect. Common law presumptions are not as satisfying a basis for finding facts as actual evidence but they have the merit of providing some baseline for decision-making when certainty is not attainable.
- [56] Taking into account the totality of the limited evidence, I find that Ms. Beggs has not rebutted the presumption of destruction and therefore deny her application.
- [57] Ms. Finsant's estate will be administered on the basis that she died intestate.

III. Costs

- [58] While I have found for Ms. Schicchi, I cannot say it was unreasonable for Ms. Beggs to bring this application. There was clear evidence that Ms. Finsant had executed a will in Ms. Beggs' favour, and the ultimate result turned on lack of direct evidence about what happened to the will.
- [59] I therefore see no reason to depart from the normal principle in estate litigation that costs will be provided on an indemnity basis out of the estate.
- [60] This litigation was perfectly reasonable and possibly inevitable. There was some duplication because Ms. Beggs originally applied under s. 58 of WESA, but she apparently did this on advice of estate practitioners. Ms. Beggs argued the application herself and did so well. It would not be fair to require her to pay costs out of her own pocket in the circumstances.

IV. Order

- [61] I therefore make the following orders:
- (a) the application is dismissed;
 - (b) special costs of the application shall be paid out of the estate to the applicant and respondent.

"J. G. Morley, J."

The Honourable Justice Morley

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