

CANADA / JUDGMENT

Sutherland v. Dorland

2010 BCSC 89

COURT

Supreme Court of British Columbia

DECIDED

22 January 2010

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2010 BCSC 89 Sutherland v. Dorland IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Sutherland v. Dorland, 2010 BCSC 89 Date: 20100122 Docket: S70328 Registry: Kelowna Between: Julie Sutherland, Committee of the Person and Estate of Eileen Olive Fountain Plaintiff And Marilyn Ann Dorland and Donald Wayne Rendall Defendants Before: The Honourable Mr. Justice Barrow Reasons for Judgment Counsel for the Plaintiff: S.T. Rule Counsel for the Defendant, M.A. Dorland: J.W. Munson Appearing on his own behalf: D.W. Rendall Place and Date of Trial/Hearing: Kelowna, B.C. January 15, 16, May 11 and June 19, 2009 Place and Date of Judgment: Kelowna, B.C. January 22, 2010

- [1] The plaintiff, Julie Sutherland, has applied for judgment under Rule 18A. The defendant, Marilyn Dorland, takes the position that the matter is unsuitable for resolution under that Rule. The defendant, Donald Rendall, who has represented himself to this point, took no position on this issue. For the reasons that follow, I agree that this matter is unsuitable for resolution under Rule 18A. I am of the view that the trial can and should be expedited through directions under Rule 18A(13). Before giving those directions I will hear from the parties.
- [2] The plaintiff was appointed committee of her mother, Eileen Fountain's, person and estate on September 12, 2005, and it is in that capacity that she brings this action. Mrs. Fountain died on November 29, 2005. She was 90 years old. She had two daughters, the plaintiff and the defendant, Marilyn Dorland, each of whom had two children. Donald Rendall is the defendant, Marilyn Dorland's son.
- [3] Between February 1999 and October 2003, Mrs. Fountain wrote at least 34 cheques to or to the benefit of Marilyn Dorland. The cheques ranged in amount from \$500 to \$25,000. In total, they amount to just over \$152,000. Between February 1999 and April 2002, she wrote 14 cheques to or to the benefit of Mr. Rendall. Those cheques total just over \$29,000. Individually, they range in amount from \$500 to \$7,000.

- [4] The plaintiff argues that there was no consideration for any of the cheques given to the defendants. As a result, the monies are impressed in a resulting trust in favour of Mrs. Fountain's estate. The defendants have the onus of rebutting that presumption. They seek to do that by asserting that the monies were gifts. As to that proposition, the plaintiff argues: first, that Mrs. Fountain did not have the capacity to make gifts during the period in question; and second, even if she did, the defendants have not proven she exercised it.
- [5] Ms. Dorland argues that some, perhaps two or three, of the cheques she received were given to her so she could do Christmas and birthday shopping on her mother's behalf. Those cheques did not benefit her. As to the remaining cheques, she argues that her mother had the requisite mental capacity to make gifts and that is precisely what she did. Mr. Rendall argues that several of the cheques he received were payment for services he rendered and materials he supplied doing various odd jobs for his grandmother at her request. As to the other cheques, he argues that they were gifts freely given by Mrs. Fountain for her own good reasons.
- [6] Ms. Dorland takes the position that her mother had the capacity to make gifts and that she exercised it. She points to various aspects of her life that explain why her mother did that. Mr. Rendall argues that some of the money he received was not a gift but rather payment for services he provided to his grandmother. As to the other money he received, he argues that it was a gift. Like his mother, he argues that his grandmother had the requisite capacity to make gifts and she exercised it for her own good reasons.
- [7] Thus there are two issues. First, did Mrs. Fountain have the capacity to make gifts during the period in question? If so, have the defendants proven that the monies paid to them were in fact gifts?
- [8] Many of the facts underpinning this dispute are not in issue. I will set out those matters because an appreciation of them is necessary to understand why that which is in dispute cannot be resolved on the basis of affidavit evidence alone. The Undisputed Facts
- [9] Mrs. Fountain's husband died in January 1993. Following his death, and until two months before her own death, she lived alone and quite independently in her home in Kelowna. Her estate consisted of her home, which she owned free and clear, and money she had in two bank accounts she kept at the Royal Bank. In one account, she kept a small balance, and in the other, she kept the majority of her savings. In May of 2000, after approximately \$35,000 had been transferred to one or the other of the defendants, the balance in her savings account was just under \$244,000. Her income consisted of Old Age Security and Canada Pension, which totalled approximately \$1,000 per month, and the interest she earned on her savings. As of May 2000, that interest was just under \$1,000 per month.
- [10] The particulars of the cheques that form the basis of this dispute are as follows: Date Amount Payee February 21, 1999 \$ 750.00 Ms. Dorland February 22, 1999 \$ 1,000.00 Cori McGuire in trust February 23, 1999 \$ 1,000.00 Mr. Rendall March 1, 1999 \$ 2,300.00 Mr. Rendall March 18, 1999 \$ 1,400.00 Mr. Rendall April 7, 1999 \$ 5,700.00 Mr. Rendall May 14,

1999 \$ 620.00 Mr. Rendall May 19, 1999 \$ 3,000.00 Mr. Rendall June 9, 1999 \$ 550.00 Ms. Dorland June 24, 1999 \$ 600.00 Ms. Dorland July 10, 1999 \$ 1,000.00 Ms. Dorland July 25, 1999 \$ 1,000.00 Ms. Dorland July 29, 1999 \$ 650.00 Mr. Rendall August 6, 1999 \$ 1,500.00 Ms. Dorland August 17, 1999 \$ 600.00 Mr. Rendall September 6, 1999 \$ 2,000.00 Ms. Dorland September 27, 1999 \$ 700.00 Mr. Rendall October 27, 1999 \$ 820.00 Ms. Dorland November 3, 1999 \$ 2,000.00 Mr. Rendall November 20, 1999 \$ 2,000.00 Ms. Dorland January 18, 2000 \$ 525.00 Mr. Rendall March 30, 2000 \$ 1,250.00 Ms. Dorland May 11, 2000 \$ 2,205.00 Ms. Dorland May 15, 2000 \$ 800.00 Mr. Rendall June 23, 2000 \$ 521.25 Ms. Dorland October 25, 2000 \$ 20,000.00 Ms. Dorland December 5, 2000 \$ 750.00 Ms. Dorland March 30, 2001 \$ 900.00 Ms. Dorland April 2, 2001 \$ 7,000.00 Mr. Rendall August 4, 2001 \$ 5,000.00 Ms. Dorland October 25, 2001 \$ 25,000.00 Ms. Dorland April 9, 2002 \$ 3,000.00 Mr. Rendall July 12, 2002 \$ 2,500.00 Ms. Dorland "re Don" July 14, 2002 \$ 8,762.00 Ms. Dorland September 25, 2002 \$ 754.64 Ms. Dorland September 26, 2002 \$ 1,240.00 Ms. Dorland October 11, 2002 \$ 16,130.00 Ms. Dorland October 21, 2002 \$ 2,057.89 Dr. Satow January 27, 2003 \$ 25,000.00 Ms. Dorland February 13, 2003 \$ 3,000.00 Ms. Dorland May 6, 2003 \$ 3,000.00 Ms. Dorland May 23, 2003 \$ 1,000.00 Ms. Dorland June 6, 2003 \$ 2,000.00 Ms. Dorland July 21, 2003 \$ 500.00 Ms. Dorland August 12, 2003 \$ 2,000.00 Ms. Dorland August 26, 2003 \$ 1,600.00 Ms. Dorland September 12, 2003 \$ 13,637.55 Herbert Holler (bank draft) October 1, 2003 \$ 2,000.00 Ms. Dorland "re Don" October 4, 2003 \$ 500.00 Ms. Dorland Cori McGuire is a Kelowna lawyer. She acted for Mr. Rendall in his divorce. The cheque payable to her was to cover some of Mr. Rendall's legal expenses. Dr. Satow is Ms. Dorland's dentist, and the cheque payable to her was to cover some of Ms. Dorland's dental expenses. Herbert Holler held a mortgage on Ms. Dorland's mobile home. Mrs. Fountain purchased the draft in his favour to pay it off. Aside from the few cheques on which the notation "re Don" appears, the cheques have no particulars on them.

[11] By October 2003, when the last of these cheques had cleared Mrs. Fountain's account, her balance stood at just over \$110,000. The materials do not reveal what her monthly interest was but it was likely less than \$400.

[12] Mrs. Fountain was 88 years old in the fall of 2003.

[13] Mrs. Sutherland's involvement in this matter began in October 2003, when while visiting her mother, she saw a note indicating her mother had given Ms. Dorland \$500. When she mentioned this to her niece, Jean Fountain, she became concerned about her mother's finances. She made inquiries with the bank, and learned that Mrs. Fountain's balance had been significantly reduced. When her mother was unable to explain the drop in her savings, Mrs. Sutherland approached Mr. Nitti, a financial advisor with the bank, to assist her. In the course of doing that, he met with Mrs. Sutherland and Mrs. Fountain on October 31, 2003. During that meeting, Mrs. Fountain told him that she could not remember writing cheques that would have depleted her account. Neither Mrs. Sutherland nor Mr. Nitti knew, as of their October 31, 2003 meeting, that Ms. Dorland and Mr. Rendall were the beneficiaries of the cheques written on Mrs. Fountain's account.

- [14] Shortly after the meeting with Mr. Nitti, Mrs. Sutherland arranged to have Mr. Tonsoo, a lawyer in Kelowna, prepare a Will and a power of attorney for Mrs. Fountain. Mr. Tonsoo did that and Mrs. Fountain signed those documents on December 9, 2003. Mrs. Fountain gave Mrs. Sutherland power of attorney over her affairs. By the Will, she left her estate to her daughters equally and appointed both of them executrixes and trustees.
- [15] In early 2004, the bank retrieved copies of the cheques written on Mrs. Fountain's account and gave them to Mrs. Sutherland. My sense is that relations between the sisters had been less than cordial for years prior to 2004. With the discovery of the cheques, their relations became openly hostile.
- [16] Having learned of the cheques, Mrs. Sutherland arranged to have Mr. Tonsoo prepare a new Will for her mother. He did that and Mrs. Fountain signed it on April 19, 2004. In it, Mrs. Fountain named Julie Sutherland as her sole executrix and trustee. By it, she left a cash bequest to Mrs. Sutherland of \$100,000 and directed that the residue of her estate be divided equally between her daughters. Mr. Tonsoo has not provided an affidavit in this matter.
- [17] By August or September 2004, according to Marilyn Dorland, Mrs. Fountain had become concerned that the plaintiff might try to sell her house, using the power of attorney that Mrs. Fountain had signed in April. Mrs. Fountain came to hold this view, at least in part, because Ms. Dorland told her that she had heard as much from Jean Fountain who, I gather, claimed to have heard it from Mrs. Sutherland's husband. In any event, according to Ms. Dorland, Mrs. Fountain became concerned and wanted a new Will and wanted to structure her affairs so that Mrs. Sutherland would be unable to sell her house without her consent. As a result, and for the third time in roughly nine months, Mrs. Fountain was taken to a lawyer, this time to Mr. Darmohray. He prepared a new Will, a new power of attorney, and a representation agreement. Mrs. Fountain signed all of these documents at his office on September 27, 2004. By this Will, Mrs. Fountain sought to leave her estate to her daughters equally. She designated Ms. Dorland as her executrix and trustee. She gave to Ms. Dorland power of attorney over her affairs and revoked the power of attorney she had previously given to Mrs. Sutherland.
- [18] The day after these documents were signed, Mr. Tonsoo learned of it and called Mr. Darmohray to explain that there were concerns about Mrs. Fountain's capacity to make a Will. As a result, Mr. Darmohray arranged to meet with Mrs. Fountain again, this time for the purpose of more comprehensively assessing her capacity. He did that on September 29, 2004. In addition, he met with Mrs. Fountain on October 15, 2004, when she signed a deed of gift which provides in part as follows: I, Eileen Olive Fountain, hereby confirm that any and all sums of money and/or other tangible or intangible items which I may have given to either of my daughters, Marilyn and/or Julie, or to any of my other grandchildren, including my grandson, Donald Rendall, during my lifetime, and in particular during the past 5 years, have been made as absolute gifts, with no expectation of repayment or reimbursement whatsoever, and I declare that it is and always has been my intention that my daughters and/or grandchildren should have received such gifts for their own use absolutely, with no

claims of set off, repayment or reimbursement by me or my Estate.

- [19] Mr. Darmohray has provided an affidavit and has been cross examined on it. He is of the opinion that, on all three occasions in the fall of 2004 that he met with Mrs. Fountain, she had the necessary legal capacity to validly execute a Will, the power of attorney, and the deed of gift.
- [20] In early January 2005, Mrs. Sutherland arranged to have her mother participate in a day program at the Cottonwoods Day Hospital in Kelowna. As part of that program, Mrs. Fountain was assessed by a multi-disciplinary team of healthcare providers led by Dr. Raja Moreau. Dr. Moreau has been a family physician since 1985. Following medical school and her internship, she completed 18 months of psychiatric training. Since 1995, she has worked primarily as part of the elder service program operated out of the Cottonwoods Day Hospital. Throughout that time, she has prepared competency assessments in relation to geriatric patients.
- [21] As a result of Mrs. Fountain's attendance at the Cottonwoods Day Hospital and based both on her own clinical assessment and the assessment of the diagnostic team, Dr. Moreau formed the opinion that Mrs. Fountain had dementia, likely of the Alzheimer type. She concluded that Mrs. Fountain had significant memory impairment was not capable of managing her legal and financial affairs.
- [22] On February 2, 2005, Mr. Darmohray again met with Mrs. Fountain and Ms. Dorland. He again turned his mind to the issue of her capacity and to the question of whether she may be subject to undue influence. He formed the opinion that she had the necessary capacity and was not being improperly influenced. On March 3, 2005, Dr. Moreau called Mr. Darmohray and expressed her view that Mrs. Fountain lacked the capacity to manage herself and her financial affairs. As a result of that telephone conversation, Mr. Darmohray arranged to meet with Mrs. Fountain yet again, this time on March 8, 2005. Ms. Dorland brought Mrs. Fountain to that meeting, as she had to all of the previous meetings with Mr. Darmohray. Mr. Darmohray arranged to have another lawyer, Mr. McCardell, attend the meeting. Mr. McCardell has not provided an affidavit, but his notes of the meeting with Mrs. Fountain are exhibited to Mr. Darmohray's affidavit. They indicate that Mr. McCardell was of the opinion that Mrs. Fountain had the requisite capacity to execute a Will and related documentation. Mr. Darmohray was of the same view.
- [23] On March 8, 2005, Mrs. Fountain met with Mr. Darmohray for the fifth and final time. She signed a codicil to her Will and an affidavit. The codicil provides that any joint accounts she may have at the time of her death are to form part of the residue of her estate and not to pass by right of survivorship to the surviving joint owner. When that codicil was signed, Mrs. Fountain's account at the Royal Bank was held jointly with her daughter, Mrs. Sutherland. In the affidavit, Mrs. Fountain confirmed her intention to give gifts to her daughter, Marilyn Dorland, and her grandson, Donald Rendall, in almost the same terms as the deed of gift. In addition she deposed:

7. I confirm that I am fully aware of the nature and extent of the cash gifts made to my daughter, Marilyn, totaling sums of up to \$200,000.00 more or less, and confirm that these gifts were made in order to assist Marilyn after the loss of her home due to fire, and also to assist her with her daily living needs.
8. I confirm that I am fully aware of the nature and extent of the gifts made by me to my daughter, Julie, including sums of up to \$40,000.00 more or less, together with my aunt's ring containing two 3 Carat Diamonds and my vase (both of which have considerable value), and confirm that these gifts were made in order to assist Julie during her life, and also to pass along extremely valuable family keepsakes. Finally, she deposed that Mrs. Sutherland was financially self sufficient whereas Ms. Dorland had experienced "certain hardships" in life and required Mrs. Fountain's assistance.
- [24] In July 2005, Mrs. Fountain was diagnosed with liver cancer. On August 3, 2005, she turned 90. On September 12, 2005, Mrs. Sutherland was appointed committee of Mrs. Fountain's person and her estate. Mrs. Fountain continued to live alone in her own home, albeit with increasing amounts of assistance, until October 5, 2005, when she was moved into Jean Fountain's house. She remained there until November 11, 2005, when she moved in with Mrs. Sutherland and her husband. She died just over two weeks later. Mrs. Fountain's house was sold on December 15, 2005, for \$275,000. The proceeds of the sale remain on trust.
- Discussion
- [25] As noted, there are two issues in this proceeding: the first is whether Mrs. Fountain had the requisite capacity to make gifts to her daughter, Marilyn, and her grandson, Donald, between 1999 and October 2003; the second is whether, if she had the requisite capacity, she exercised it. To the extent the cheques were given without consideration, and that appears to be the case in relation to most of the cheques, there is a presumption that they were not gifts. The onus is on the defendants to rebut the presumption, and to do that, they must establish both capacity to gift and the exercise of that capacity.
- [26] There are at least six witnesses who had reasonably significant dealings with Mrs. Fountain during the time she was writing cheques. Three of those witnesses are the parties; the other three are Charles Hardy, Lise Proulx-Shore and Jean Fountain.
- [27] The thrust of Ms. Dorland's affidavit and discovery evidence is that her mother was perfectly capable of deciding what she wished to do with her money, and she decided to assist her daughter when and as she could. Further, she has deposed that her mother expressed concern that if Mrs. Sutherland found out that gifts were being made in other than an equal way, Mrs. Sutherland would be upset. Ms. Dorland has deposed that her mother was anxious to avoid the unpleasantness that would necessarily accompany such a disclosure. She has deposed that her life has not been easy by any measure and certainly not when compared to that of her sister. Ms. Dorland's second child is Kimberley. In 1984, when she was 15 years old, she was viciously assaulted. As a result, she was rendered a quadriplegic and has required 24-hour-a-day care ever since. Ms. Dorland and her common-law spouse moved to

Kelowna in 1997, in part so they would be able to purchase a home for themselves and a home for their daughter Kimberley. Mrs. Fountain assisted them in the purchase of a mobile home. She also assisted Kimberley, who purchased property and had a home constructed on it. It appears that Mrs. Fountain was repaid for the assistance she gave to Kimberley.

- [28] Ms. Dorland and her common-law spouse have deposed that they have never been particularly wealthy and, at least for the past several years of Mrs. Fountain's life, were attempting to survive on disability pensions. Ms. Dorland deposed that, in July 2003, her mobile home burned to the ground, and because they were underinsured, they lost a great deal. She has deposed that her mother was generally aware of her circumstances and the circumstances of Kimberley and chose to help her in her time of need.
- [29] As to the cheques written to Mr. Rendall, Ms. Dorland has deposed that much of that money was given to him to help him in his time of need. He had gone through an expensive divorce in the late 1990s. In November 2002, he lost his job at the Western Star plant in Kelowna. These events correspond with some of the cheques that were written to him. Mr. Rendall has deposed that many of the cheques were given to him as gifts. With respect to some of the other cheques he received, he has deposed that he did work for his grandmother, fixing her roof, replacing some stairs, and attending to other handyman-type jobs for which his grandmother paid him, sometimes over his objections.
- [30] Mrs. Sutherland has deposed that her mother was careful, if not frugal, with her money throughout her life. She has deposed that she received one significant gift of money in the 1990s, and when she received it, her mother told her that she had made a similar gift to Ms. Dorland. The amount that Mrs. Fountain gave to Mrs. Sutherland was approximately equal to the amount she gave to Ms. Dorland to assist her in the acquisition of her mobile home. Mrs. Sutherland points to this as evidence that her mother treated them equally when she chose to make substantial gifts. In addition, Mrs. Sutherland has deposed that when she learned about the cheques that had been written to her sister and her nephew, she asked her mother about them, and her mother told her that she could not remember writing them.
- [31] Mr. Hardy is a carpenter and handyman. He knew Mrs. Fountain for almost 20 years. For perhaps the last 10 years of her life, he saw her once or twice a month, often simply to share a cup of coffee but sometimes to do chores for her. He has deposed that Mrs. Fountain told him that she was concerned that Ms. Dorland was taking advantage of her. He has deposed that Mrs. Fountain told him that she loaned Ms. Dorland and Mr. Rendall money and that she was concerned that Mr. Rendall was not going to pay her back. She also told Mr. Hardy that she was afraid that Ms. Dorland may not visit her anymore.
- [32] Ms. Proulx-Shore is a rehabilitation counsellor who, since 1997, has worked full-time with Kimberley, Ms. Dorland's daughter. She first met Mrs. Fountain in 1998. Over the next six or seven years, she would, when taking Kimberley on outings, often include both Ms. Dorland and Mrs. Fountain. As a result, she spent time with Mrs. Fountain in a variety of different circumstances. According to Ms. Proulx-Shore, Mrs. Fountain told her that although she

would like to help Kimberley by paying for gasoline consumed on these outings, she was unable to because Mrs. Sutherland would not allow her access to her own money. She also deposed that Mrs. Fountain told her that she knew she had given more money to Ms. Dorland than to Mrs. Sutherland but that she was aware that Ms. Dorland had suffered a great deal in her life and, in effect, had greater need for Mrs. Fountain's money than did Mrs. Sutherland. Finally, Ms. Proulx-Shore deposed that until just a few days before Mrs. Fountain died, she had no qualms about Mrs. Fountain's ability to know and understand that which she was about and what was going on about her.

- [33] Jean Fountain is married to Brian Fountain who is Eileen Fountain's nephew. Jean and Brian Fountain had a long, and from time to time a close, relationship with Eileen Fountain. In August 2004, Eileen Fountain invited them to stay at her home for two weeks while they were between residences. In October 2005, both Ms. Dorland and Mrs. Sutherland were happy that Jean and Brian Fountain agreed to have Eileen Fountain live in their house. On October 22, 2005, Mrs. Sutherland wrote to her mother acknowledging that Jean and Brian Fountain loved her very much and expressing her happiness at the fact that Mrs. Fountain was in a safe, secure and comforting environment.
- [34] Jean Fountain has deposed that she learned from Mrs. Sutherland that Eileen Fountain had given a lot of money to Ms. Dorland. She has deposed that from her discussions with Eileen Fountain, she learned that Eileen Fountain did not think that she had done anything wrong in giving money to Ms. Dorland and that she did not expect repayment. Jean Fountain further deposed that her husband had received \$3,500 as a gift from Eileen Fountain when they moved from Alberta to Kelowna. In her opinion, although Eileen Fountain's memory faded in the last year of her life, her faculties were otherwise intact, and she remained alert and aware of her surroundings and her circumstances until shortly before she died.
- [35] Until the Supreme Court of Canada's decision in *Pecore v. Pecore*, 2007 SCC 17, acts or declarations by a donor subsequent to a gift or transfer were inadmissible to prove the donor's intention at the time of the transfer. Evidence of that kind is now admissible, but it is to be assessed with an eye to its inherent frailties. Evidence of subsequent acts and declarations by Eileen Fountain in this case is, if anything, in greater conflict than the evidence I have just recounted. Leaving aside the substance of that evidence, there is the question of Mrs. Fountain's mental abilities when she is reported to have made the after-the-fact declarations of intention. As noted that Dr. Moreau is of the opinion that as of January 5, 2005, Mrs. Fountain was incapable of managing her legal and financial affairs. She was unable to form an opinion as to Mrs. Fountain's competency prior to January 2005. Dr. Schriemer was Mrs. Fountain's family physician from November 2001 perhaps until her death. In his opinion, Mrs. Fountain suffered from Alzheimer-type dementia. In his May 24, 2007 report he wrote: This would have affected her not being able to understand that she was making a Will on September 27, 2004 and signing of the following documents: Deed of Gift made October 15, 2004, Codicil signed March 8, 2005 and Affidavit sworn March 8, 2005... Because of her dementia, Mrs. Fountain would have been vulnerable to undue

influence and financial abuse during the last few years of her life. What does not appear in Dr. Schriemer's letter or his affidavit is when he saw Mrs. Fountain or what tests or other diagnostic tools he employed in reaching his conclusion. In his letter, he does not indicate when it was he made his diagnosis.

- [36] As against the foregoing, there is the evidence that Mr. Darmohray, who saw Mrs. Fountain not once but six separate times over the course of six months. On at least four of those occasions, the issue of Mrs. Fountain's capacity was front and center in his mind. He formed the opinion that she was legally capable of executing the Wills and the other documents he prepared on her behalf. Returning then to the evidence of after-the-fact declarations of intention by Mrs. Fountain, aside from being remote in time from the period in issue, and in addition to the frailties that such evidence often has, the evidence as to her mental ability conflicts, and dramatically so.
- [37] I set out all of this evidence to illustrate the conflicts in it. It is not simply the fact that there are conflicts that renders this matter unsuitable for resolution by way of summary trial. Perhaps more important is the subject matter of evidence - that is whether an elderly woman, who may or may not have had a reason to treat her daughters differently, and who may or may not have had a reason to keep that secret had the capacity to make gifts, and if so whether it has been proven that she exercised that capacity. The persuasive quality of the evidence touching on that issue depends in no small measure on the quality of the relationship between the witnesses and Mrs. Fountain. Capturing the full dimensions of the quality of such a relationship is difficult to do in an affidavit. Assessing such evidence can be difficult when the evidence is given orally before the court; it can be particularly difficult to do on the basis of affidavits. When there are material conflicts in the evidence and when the peripheral or other evidence that may assist in resolving those conflicts is equally conflicting, a court may be unable to find the necessary facts. That is the situation I find myself in and why I have concluded that the matter is not suitable for resolution under Rule 18A.
- [38] Notwithstanding the foregoing, I am of the view that the trial of this matter can and should be expedited through directions under Rule 18A(13). I will hear from the parties on that question before giving those directions. "G.M. Barrow, J." The Honourable Mr. Justice Barrow

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/SC/10/00/2010BCSC0089.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/sutherland-v-dorland-2010>

Prepared on 29 October 2026 · Esheria