

CANADA / JUDGMENT

Watson v. Watson and Yelich

2004 BCSC 1724

COURT

Supreme Court of British Columbia

DECIDED

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2004 BCSC 1724 Watson v. Watson and Yelich

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Watson v. Watson and Yelich,

2004 BCSC 1724

Date: 20041224

Docket: 13120

Registry: Smithers

Re: The Estate of Steve Yelich

also known as Stephen Yelich

Between:

Frederick Anthony Watson

Plaintiff

And:

Mary Watson, Gerry Watson, Glen Watson,

Mary Yelich and Art Yelich

Defendants

Before: The Honourable Mr. Justice R. D. Wilson

Reasons for Judgment

Counsel for the Plaintiff:

T. R. Buri, Q.C.

Counsel for the Defendants Watson:

G. E. Greene

The Defendants Yelich:

No Appearance

Dates and Place of Trial/Hearing:

December 7 and 8, 2004

Smithers, B.C.

I.

- [1] In this probate action, the plaintiff seeks to prove a will in solemn form.
- [2] This lawsuit is a family affair. The defendant Mary Watson is the plaintiff's mother. The defendants Jerry and Glen Watson are two of the plaintiff's brothers. The defendants Art and Mary Yelich are the plaintiff's cousins. Mr. Art Yelich passed away after these proceedings were commenced.
- [3] The will in question was made by the late Steve Yelich, on 13 April 1993. In his lifetime, Mr. Yelich did not marry. He had no children.
- [4] Mr. Yelich was one of four children. He had two brothers and one sister. One of his brothers predeceased him, leaving no children surviving. The other brother predeceased Mr. Yelich, but left the two Yelich defendants surviving him.
- [5] His sister, the defendant Mary Watson, survived Mr. Yelich and has six sons.
- [6] By his will, Mr. Yelich appointed the defendant Mary Watson as executor and trustee. Legacies of \$10,000 each were made to the defendants Mary, Jerry and Glen Watson. The residue of the estate, including a farm and all farm equipment, was left to the plaintiff.
- [7] Steve Yelich died at Smithers, British Columbia on 2 October 2002.
- [8] On 17 July 2003, Mary Watson renounced all her right and title to the probate and execution of the will. As well, on that date, Ms. Watson lodged a caveat in Action No. 13066, Smithers Registry, and filed an affidavit. In that affidavit, Ms. Watson deposed:
 - 6. That I wish this alleged will to be proved in solemn form pursuant to the Rules of Court of the Supreme Court of British Columbia as I have concerns about whether or not the deceased was of sound mind when he made the alleged will and I have concerns that he was unduly influenced by my son, Fredrick Anthony Watson, named in the will. ...
- [9] The plaintiff was named as the alternate executor in the will. In response to Ms. Watson's citation, he commenced this action.

[10] In their statement of defence, the defendants plead, among other things:

4. The document referred to in paragraph 2 of the Statement of Claim is not a true and valid will for the following reasons:
 - (a) The Defendant's [sic] believe Stephen Yelich was not of sound disposing mind and lacked testamentary capacity at the time he provided instructions for the preparation of the alleged will and at the execution;
 - (b) Stephen Yelich did not know of and approve the contents of the alleged will; and
 - (c) The Defendants do not know whether or not the alleged will was duly executed in accordance with the provisions of the Wills Act;
4. There are suspicious circumstances surrounding the preparation and execution of the alleged will in that the Defendants believe the Plaintiff was instrumental in procuring the preparation and execution of the document, under which he takes a benefit.
5. Further, or in the alternative, the alleged will was procured through the undue influence of the Plaintiff on Stephen Yelich. The Plaintiff's influence overbore the will of Stephen Yelich, who did not wish to make the dispositions contained in the will. Particulars of the undue influence of the plaintiff on Stephen Yelich are as follows:
 - (a) Badgering, coercing, persuading and advising the deceased to leave the bulk of his estate to the Plaintiff as opposed to the Defendant Mary Watson.
 - (b) Isolating the deceased from the rest of his family including the Defendant Mary Watson when the Plaintiff knew or ought to have known the deceased was medically unfit.
 - (c) By persuading [sic] the deceased that if the Plaintiff was given the farm and estate of the deceased, the Plaintiff would continue to operate the farm portion of the estate of the deceased as a family farm.
 - (d) By convincing the deceased that the Plaintiff Mary Watson was "too old" to take responsibility for the gift of the estate of the deceased.

[11] The pleadings in this action define the following issues for determination:

1. Are there suspicious circumstances surrounding the preparation of the will, or the capacity of Mr. Yelich to make the will; or are there suspicious circumstances tending to show that the free will of Mr. Yelich was overborne by acts of coercion or fraud by the plaintiff;
2. Was the will duly executed with the requisite formalities after having been read over by, or to, with an apparent understanding, Mr. Yelich;
3. Did Mr. Yelich have testamentary capacity; and,
4. Did the plaintiff exercise overbearing influence on Mr. Yelich.

[12] The plaintiff moved for a summary determination of the action, pursuant to R. 18A of the Rules of Court. The defendants oppose a summary determination. They say this case is not suitable for a summary trial.

II.

[13] The evidence tendered by the plaintiff on this application is contained in his affidavit; the affidavit of John Perry, the solicitor taking the initial instructions; the affidavit of Laurence Perry, the solicitor who prepared the will and attended upon execution; and, the affidavit of Karen Baker, a legal secretary, the other witness to the testator's making of the will.

[14] The defendants' evidence on this application is contained in the affidavits of the defendants Mary, Jerry and Glen Watson, and the affidavit of Jim Watson.

[15] The pleadings were closed 16 December 2003. Document discovery has been completed. The lifetime medical records of Mr. Yelich have been produced by the Bulkley Valley District Hospital, pursuant to R. 26(11). No oral examinations for discovery have been conducted of any party. No cross-examination on affidavits has been requested by any party.

[16] The defendants contend that the plaintiff has brought this application for a summary trial simply to avoid exposing himself to cross-examination. They say that a cross-examination of the plaintiff would lead to the conclusion that the plaintiff exercised undue influence upon the late Mr. Yelich. The defendants also say that there are contradictions between the affidavits about Ms. Watson's presence at the time the instructions were given; and what she said, or did not say, about a "waiver" of her entitlement as a beneficiary.

[17] The defendants also say that the evidence is contradictory about Mr. Yelich's competence.

[18] Furthermore, say the defendants, it would be unjust to decide this case summarily, in the face of the absence of any medical information in the solicitor's file; the absence of any evidence from the treating doctor; and the absence of any evidence about any financial decisions made by Mr. Yelich, about land or tax matters or investments, during his lifetime.

III.

[19] The following principles govern the determination of the question of whether or not a matter is suitable for summary disposition.

[20] First, from *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.*: [1]

The test for Rule 18A, ... is the same as on a trial. Upon the facts being found the chamber judge must apply the law and all appropriate legal principles. If then satisfied that the claim or defence has been established according to the appropriate onus of proof he must give judgment according to law unless he has the opinion that it will be unjust to give such judgment.

[21] And:

... judgment should not be given under subrule 18A(3) without asking these two questions: Has any party been denied an opportunity to produce relevant testimony? Is there a conflict in the evidence, which the judge can not readily resolve, on a point of fact which could affect the result? If the answer is "Yes" to either question then the case is probably not ready for judgment. And the steps that must be taken to answer those questions "No" will indicate whether the best course is to manage the case to judgment under subrules 18A(5) and (3) or to send the case to the trial list.

[22] Second, from *Mattu v. Mattu*: [2]

... If a party holds the view that a summary trial cannot fairly proceed in the absence of further evidence, then that position should be taken before trial or at the commencement of the Rule 18A hearing, and be clearly articulated to the court. If an adjournment for the purpose of cross-examination is sought that remedy should be clearly expressed in a timely way.

[23] Third, from *Anglo Canadian Shipping Co. v. P.P.W., Local 8*: [3]

... if adequate notice is given to an opposing party that a summary trial application is going to be brought on, there then falls on that party an obligation to take every reasonable step to complete as much of the pre-trial procedures as is necessary to put him into the best mastery of the facts that is reasonably possible before the summary trial proceedings are heard. He cannot, by failing to take those pre-trial procedures frustrate the benefits of the summary trial rule.

IV.

[24] It is not essential on a summary trial, or on a conventional trial, that all conceivable conflicts and inconsistencies be resolved. Rather, the court's concern is with the evidence which is probative of material facts in issue. If there is conflict about a material fact, in the affidavit material, which cannot be resolved by other evidence available, then the matter is not suitable for summary determination.

[25] The contradictions and inconsistencies referred to by the defendants, in their argument, over the affidavit material are not related to any material fact put in issue by the pleadings in this action.

[26] The defendants say there is a conflict about Mr. Yelich's testamentary capacity.

[27] The affidavits of the Perrys reflect that Mr. Yelich was a person known to both of them for some time.

[28] John Perry deposed that Mr. Yelich seemed able to come to his own decisions about things apart from Mr. Perry's influence; Mr. Yelich was aware of the nature and extent of his assets and knew how he wanted to dispose of those assets; knew, with reasonable precision, what amounts were on deposit in financial institutions; was aware of all of his family relations when deciding who would be the beneficiaries; and was a person who lived independently and always handled his own finances.

[29] Mr. Laurence Perry deposed that Mr. Yelich "knew what he was doing" in that, he knew who his family and likely beneficiaries were; what property and assets were in his estate; and had a settled intent. Mr. Laurence Perry said, "I didn't expect Steve would ever be unduly influenced either. He was not that type of guy."

[30] Ms. Mary Watson's affidavit is replete with argument, speculation and inadmissible evidence. On the material facts, which the defendants assert is probative of Mr. Yelich's testamentary capacity, Ms. Watson deposed:

4. ... My brother was always an isolated, uneducated, lonely man living completely by himself on the old family farm for nearly half a century before he made the will that is the subject of this lawsuit. He was always an extremely "rough character" living as a sort of "hermit", raising sheep on an old farm. ... It was unbelievable how dirty he was. ...

I do not say that Steve was "mentally challenged" or something like that -- ... The "character" of my brother was made by living alone in that isolated fashion still very close to the Town of Smithers.

...

8. My brother became very ill in 1989. He had a stroke and it left him paralyzed on his left side. Although he had always been isolated and strange, increasingly after his stroke, he became helpless.

...

11. ... Steve had just spent two recent sessions in the hospital and had just been released on March 4, 1993 and had his driver's licence removed then. ... Steve wasn't even discharged from the hospital until March 30th, 1993 -- the week before John Perry says he met with Steve.

[31] In his affidavit, Glen Watson deposed:

4. I have reviewed the affidavit of my mother and her descriptions of my uncle both before and after his stroke are true. He was a good and tough old man but he certainly was not literate or very clear about what he had. ...

[32] In his affidavit, Jerry Watson deposed:

5. I have reviewed the affidavit of my mother. Her descriptions of Uncle Steve are pretty mild. Steve was an extremely rough character and a very simple man. It is quite difficult to describe what it was like to go into his home with food rotting in every corner, some of it left out for months, people used to give him cats to be able to control the rodents in the home, and the cats would be leaving food and droppings all over the home, the smell was often overpowering.

[33] In his affidavit, Jim Watson deposed:

3. I have reviewed the affidavit of my mother in draft form and swear that the information contained in her affidavit about my Uncle Steve is true. He was not the sort of person that you would meet every day on the street -- and of course especially after he was crippled by the stroke, he rarely came into town unless one of us brought him. ...

[34] Reference is also made in those affidavits to various extracts from the medical records, confirming the defendants' observations of Mr. Yelich's living conditions. The medical records are not disputed.

[35] The issue, however, is not Mr. Yelich's hygiene, it is rather, his testamentary capacity.

[36] A determination of testamentary capacity is a question of fact. Smith J., in *Kolacz v. Burdeinei*[4] identified the following four-part test, which I adopt:

(i) the testator must understand the nature of the act and its effect;

(ii) the testator must understand the extent of the property of which he/she is disposing;

(iii) the testator must be able to comprehend and appreciate the claims to which he or she ought to give effect;

(iv) the testator must not be suffering from a disorder of the mind or an insane delusion which would influence his or her Will in disposing of his or her property and bring about a disposal, which, if the mind had been sound, would not have been made.

[37] The defendants have argued that Mr. Yelich lacked testamentary capacity. However, they point to no conflicting evidence on the material on the record, which is probative of the elements in the four-part test.

[38] Similarly, the defendants have arguments on the evidence on the record concerning undue influence. However, they point to no conflicting evidence on that topic.

[39] In response to the questions posed in *Inspiration Management Ltd.*, above:

(a) no party has been denied an opportunity to produce relevant testimony; and

(b) there is not a conflict in the evidence which cannot readily be resolved, on a point of fact which could affect the result.

[40] Accordingly, the preliminary objection is dismissed. I find that this matter is suitable for disposition by summary trial under R. 18A.

V.

[41] On the admissible evidence on the record before me, I make the following findings of fact.

[42] Mr. Yelich was born in 1922. He was raised in a family of four children, on farmlands assembled by his parents.

- [43] In the 1940's, Mr. Yelich succeeded to the farmlands, and the proceeds of a life insurance policy, paid on the death of one of his brothers.
- [44] Mr. Yelich lived alone in a cabin built in the 1920's. The cabin was without electricity or running water. He raised sheep and occasionally cattle on the lands.
- [45] In October 1989, Mr. Yelich suffered a stroke. He was admitted to the Bulkley Valley District Hospital and later transferred to the Prince George Regional Hospital for rehabilitation. Further admissions to the Bulkley Valley District Hospital followed, throughout the years, for heart-related complaints. His last admission, prior to his giving instructions for the preparation of his will, was 4 March 1993. He was discharged 30 March 1993. The case summary from that admission reads as follows:

This patient was admitted to hospital with angina and a history of aortic stenosis and hypertension. He has been in hospital many times before and this time was largely unchanged from the last time he was in. His course in hospital was uneventful. He felt well the second or third day he was in and then put off going home for many days, stating that he had a flu or wasn't feeling up to it, etc., etc. We suggested that he may be better off at Bulkley Lodge considering his hemiparesis and his visual problems, etc., but the patient was adamant that he preferred going back to his place and then may be considering going there when the weather got cold again this fall. I suggested to him that it was [sic] advisable for him to drive a car and I notified Motor Vehicle Branch regarding this. The patient seemed quite upset about this and wanted me to change my mind. I guessed that without being able to be self mobile in a vehicle, it makes it very difficult for him to live out on the farm. Unfortunately I am not prepared to take the responsibility for his driving as medicolegally I would have to. I therefore called up Motor Vehicle Branch and explained the situation to him and they were quite adamant that he should not be driving and wrote him a letter to that effect. In any case his course in hospital was as expected, totally uneventful. He was his old cheery self, organizing and talking to everybody and finally when it came close to the fact that he might have to start paying for his stay, he decided to go home.

FINAL DIAGNOSIS: CVA, aortic stenosis and hypertension

"Dr. M. Kawerninski"

- [46] In early 1993, Mr. Yelich told the plaintiff of his intention to make a will. He wanted to know if the plaintiff wanted the farm. Mr. Yelich said he had considered leaving the farm to the other family members, including the defendants Yelich, but wanted to leave it to the plaintiff because he liked the plaintiff, and felt that the plaintiff would "keep the place more like how he wanted it".
- [47] On 6 April 1993, Mr. Yelich attended the offices of Mr. John Perry, a solicitor practising under the firm name of Perry & Perry in Smithers. On this attendance, Mr. Yelich produced the British Columbia Assessment Authority assessed value for the farmlands. He told Mr. John Perry of two bank accounts. The first at the Royal Bank of Canada, with a balance of

\$217,000. The second, an account at the Bank of Montreal, with a balance of \$28,000. To this latter account, he said, his Old Age Pension of \$500 each month was deposited. He told Mr. Perry that he had a truck. He said he had no debt.

- [48] Mr. John Perry calculated the estate value at approximately \$672,000. Mr. John Perry advised Mr. Yelich, among other things, on the consequences of an intestacy. Mr. Yelich did not want the Yelich defendants to receive any portion of his estate. This was due to a falling out which he had had with those defendants sometime in the past. He said he would like to leave his estate to his sister, the defendant Mary Watson.
- [49] At the close of the attendance, Mr. Yelich said that he would return in one week to discuss the matter further.
- [50] Mr. Perry directed Ms. Baker, a legal assistant in his office, to prepare a draft of a will, appointing Ms. Watson as executor and sole beneficiary. Ms. Baker prepared that draft.
- [51] Mr. Yelich returned to the offices of Perry & Perry on 13 April 1993. He was driven to the office by the plaintiff. On that attendance, Mr. Yelich told Mr. John Perry that he had decided to leave the farm to the plaintiff. After further discussion, Mr. Yelich instructed Mr. John Perry to provide in the will, cash legacies for Ms. Watson and her two sons Jerry Watson and Glen Watson. He instructed Mr. Perry that no legacies were to be left to Ms. Watson's other sons because two of them were well off. Mr. Yelich said the bulk of the money on deposit should be preserved for the plaintiff so that he could make the necessary improvements and develop the farm.
- [52] Mr. Perry suggested conditions to be imposed on the plaintiff to ensure that Mr. Yelich's expectations for the farm be honoured. Mr. Yelich instructed Mr. Perry that he thought the plaintiff would spend the money improving the farm; and would need the money for that purpose.
- [53] Mr. Yelich left the office of Mr. John Perry and consulted Mr. Laurence Perry.
- [54] The material involved in Mr. Yelich's consultations with Mr. John Perry on 6 April and 13 April 1993, were before Mr. Laurence Perry.
- [55] Mr. Yelich instructed Mr. Laurence Perry that his major concern in making the will was to leave the farm to someone who would care for it the way he did; and that the plaintiff was the most likely member of the families who would do that.
- [56] Mr. Laurence Perry redrafted the will, designating the plaintiff as residual beneficiary. Mr. Yelich "signed, published and declared" that document as his last will and testament, in the presence of Mr. Laurence Perry and Ms. Karen Baker, who served as witnesses.
- [57] Upon leaving the Perry & Perry offices, Mr. Yelich told the plaintiff, who was waiting for him in a truck outside, that, "the young lawyer had not got it right the way he wanted it and he had to see an older lawyer".

[58] In 1995, Ms. Watson told Mr. John Perry that Mr. Yelich wanted to "review his will and see where things stood". In response, Mr. John Perry attended Mr. Yelich at his residence on 4 June 1995 to review the content of the will of 13 April 1993. On that attendance, Mr. Yelich confirmed the contents of that will.

[59] "Around the same time", Mr. Yelich also asked the plaintiff to take the will to a lawyer, "to see if it would stand up". The plaintiff consulted a lawyer in Vancouver, and reported to Mr. Yelich the advice received from that lawyer. It was at that time that the plaintiff learned of the content of the will.

[60] Between 1993 and the date of death, Mr. Yelich discussed the future of the farm development, including property boundaries, water supply and site for a new house.

VII.

[61] The defendants' position is set out in the affidavit of Ms. Watson. She argues as follows:

7. ... it simply was accepted that the "family farm" when Steve died, would be left to me ...
8. ... The entire farm has simply gone back to bush. There are still areas of it that are quite beautiful and if it is developed, it will no doubt have great value, partly because it is so close to Smithers, but it will never be a farm, the way it was in the 30s, and the 40s and even the 50s.
9. I do not think John or Lawrence [sic] Perry really understood what a simple and by that time weak man they were dealing with when they were dealing with my brother in 1993. It simply didn't make any sense for my brother to think that leaving the farm to my son Fred would result in the property being "kept as a farm" and "developed as a farm" ... or that it would be taken care of as a farm "in the manner that Steve had" ...

That idea simply makes the least sense of all. In 1993, Fred lived in Vancouver. He had lived there since the mid 1960s ... I don't know about what the Perry's [sic] knew about Fred in 1993, but clearly, the only way Steve would ever have gotten the idea that Fred would operate the property as a farm would be from what Fred told Steve. I understand that Fred now admits that he talked to Steve about that before the will ...

10. In early 1993, Fred was in financial trouble. His wife had just gone bankrupt in Vancouver. ... Contrary to what Fred's affidavit now says, if Fred actually knew what was in Steve's will, Fred was trying to keep it a secret from us. He did that. Fred was trying to keep it a secret from us because he had persuaded this sick old man in the bush to leave Fred this very valuable estate which should have been left to me so that I could divide it amongst all of my sons.

11. ... I certainly know I am not going to operate this property as a farm -- no one is. I simply see myself as being the one who should inherit the family farm and the money that has accumulated for the family through Steve. From the circumstances, it is obvious that Fred talked Steve into leaving Fred the entire estate at a time when Steve was weakened by his age, his loneliness, his sickness and probably his frustration. ...

...

13. I make this affidavit in opposition to the application for Summary Trial so that we may all testify to be able to decide whether or not Fred Watson is lying about what he persuaded my brother to do with the family estate.

[62] Mr. Greene argues that there are suspicious circumstances:

- (a) the testator was elderly;
- (b) the testator did not advise the solicitors of his medical history;
- (c) the testator did not advise the solicitors that he had been prohibited from driving;
- (d) the testator did not advise the solicitors that he had just been discharged from hospital;
- (e) the original instructions define Ms. Watson as the sole beneficiary;
- (f) the testator went away from the solicitors' office for one week;
- (g) it was the plaintiff who transported the testator to the solicitors' office on his return one week later;
- (h) the testator was illiterate;
- (i) the notion that the plaintiff would farm the land is so incredible as to constitute an insane delusion on the part of the testator;
- (j) the plaintiff had recently returned to the Smithers area after residing in Vancouver; and
- (k) the testator was suffering from depression or loneliness.

[63] I am not persuaded that the defendants have established suspicious circumstances. Their position seems to be that if Mr. Yelich had willed his estate to the defendant Mary Watson, then he would have manifested testamentary capacity. Conversely, the testator's gifting of virtually his entire estate to the plaintiff, is evidence of a lack of testamentary capacity.

[64] It is not sufficient that circumstances create a general miasma of suspicion that something unsavoury may have occurred. Rather the circumstances must be such as to create a specific and focussed suspicion that the testator may not have known and approved of the contents of the will.[5] The defendants' suspicions are not well grounded. They fail to acknowledge the objective facts.

- [65] The estate was Mr. Yelich's to dispose of as he wished. He was singularly attached to the land. His desire to preserve the land was a rational desire. The plaintiff was a logical choice. Three of Ms. Watson's sons had left the province. The fourth was incapacitated. There was nothing insanely delusional about the plaintiff's appointment as beneficiary, notwithstanding his lack of farming experience.
- [66] The solicitors' inquiries were commensurate with the occasion. Mr. Yelich was a person known to both of the solicitors involved. When Mr. John Perry was asked to review the will with Mr. Yelich in 1995, he knew that Mr. Yelich had been hospitalized. Upon that review, Mr. Yelich confirmed his will.
- [67] In *Chalmers v. Uzelac*,^[6] the court noted that the extent of any investigation and inquiry is dependent upon the circumstances:
- [81] It seems to me that the degree of inquiry that ought to be made by a solicitor drawing a will can vary depending on circumstances. In the situation where an obviously feeble person is brought into a solicitor's office by a beneficiary, and the solicitor has never met the parties, obviously a careful inquiry ought to be made. That is particularly so where the individual bringing the testator before the solicitor will benefit greatly from the disposition of the estate. But in a situation like the case at bar where the solicitor has previously dealt with the testatrix and is generally aware of the affairs of the testatrix, the family relationships and the assets of the estate, obviously less inquiry will be needed.
- [68] Although Mr. Laurence Perry did not depose that Mr. Yelich had read, or had read to him, the content of the will, it is more probable than not that Mr. Yelich did read the will.
- [69] When Mr. Yelich attended on Mr. John Perry on 13 April 1993, he did not accept the draft which had been prepared, nor the advice given by Mr. John Perry. Mr. Yelich left John Perry's office and attended upon Mr. Laurence Perry; and ultimately signed, published and declared his last will in the presence of Mr. Laurence Perry and Ms. Baker. Mr. Yelich told the plaintiff that the young lawyer had "got it wrong" and he had to consult an older lawyer. The logical inference to be drawn is that Mr. Yelich read the draft prepared by Mr. John Perry, was not satisfied; attended upon Mr. Laurence Perry, read the draft prepared by Mr. Laurence Perry, was satisfied, and signed the will.
- [70] In the absence of suspicious circumstances, proof of compliance with the requisite formalities, the reading of the will by Mr. Yelich, and his apparent understanding of the will, results in a presumption that Mr. Yelich knew and approved of the contents of the will and had the necessary testamentary capacity.
- [71] Even if the circumstances outlined by the defendants could be characterized as "suspicious", the burden of proof upon the plaintiff is to a standard of balance of probabilities. On the admissible evidence in this matter, I am satisfied that Mr. Yelich did have the necessary testamentary capacity to draw the will of 13 April 1993.

[72] There is no evidence to support the defendants' plea of undue influence, as particularized in their statement of defence.

[73] In result, the order will go as sought in the notice of motion. Costs will be assessed as ordinary costs on Scale 3.

"R.D. Wilson, J."

The Honourable Mr. Justice R.D. Wilson

[1] (1989), 36 B.C.L.R. (2d) 202 (B.C.C.A.).

[2] 2001 BCCA 140.

[3] (1988), 27 B.C.L.R. (2d) 378 (B.C.C.A.).

[4] (1997) 194 A.R. 321 (Alta. Q.B.) at page 337.

[5] Vout v. Hay, [1995] 2 S.C.R. 876, at paragraph 26.

[6] 2004 BCCA 533.

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