

CANADA / JUDGMENT

Wright Estate (Re)

2012 BCSC 119

COURT

Supreme Court of British Columbia

DECIDED

26 January 2012

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2012 BCSC 119 Wright Estate (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wright Estate (Re),

2012 BCSC 119

Date: 20120126

Docket: S106369

Registry: Vancouver

Between:

Linda Phyllis Kayne, Executrix of the Estate of

Donald Kinglsey Wright, deceased

Plaintiff

And

Nancy Victoria Wright, deceased

Shirley Ann Dunning, also known as Shirley Ann Reeves

Nicholas Jonathan Pope,

Jeannette Victoria Belo

John Doe #1, John Doe #2, Jane Doe #1, Jane Doe #2

Defendants

Before: The Honourable Mr. Justice Greyell

Reasons for Judgment

Counsel for the Plaintiff:

John W. Bilawich

Counsel for the Defendants:

Peter J. Fominoff

Place and Date of Hearing:

Vancouver, B.C.

November 29, 2011

Place and Date of Judgment:

Vancouver, B.C.

January 26, 2012

- [1] This is a summary trial application pursuant to Rule 9-7(2)(a) of the Rules of Court by Linda Kayne, the executrix of the estate of Donald Kingsley Wright, deceased. I will refer to Ms. Kayne as "Linda" or "the executrix" in these reasons.
- [2] The executrix, Donald's daughter, seeks to enforce an agreement (the "Agreement") she alleges was made between Donald and his second wife, Nancy Victoria Wright ("Vickie"), when they made their wills in or about August 2001.
- [3] The Agreement alleged by the executrix is that Donald agreed to give Vickie a life interest in the condominium in White Rock (the "condominium"), make provisions in his will giving her a life interest in other property he might own at his death, and transfer to her his registered retirement income funds ("RRIFs"). In exchange, Vickie agreed to use the condominium for her maintenance and support during her lifetime and to make a will which provided for an irrevocable gift of the remainder of her estate to Donald's estate after a gift of \$30,000 was paid to each of her children, Shirley Dunning (now Shirley Reeves) and Nicholas Pope.
- [4] The executrix says the Agreement was made when Donald executed a codicil to his will and Vickie executed her will on or about August 1, 2001. Consideration for the Agreement was given by the making of the codicil and the will and by Donald's perfecting of his promises shortly thereafter.
- [5] The executrix says that following Vickie's death in 2010, her executors have acted in breach of trust by failing to honour the Agreement.
- [6] The defendants Shirley and Nicholas are Vickie's children from a previous marriage.
- [7] The defendant Jeanette Belo is Shirley's daughter and Vickie's granddaughter.

- [8] The defendants say that an executed copy of Vickie's will (upon which the executrix relies) has never been produced and accordingly there is no evidence she actually signed such a will. The defendants say they are not aware of any will which Vickie may have signed in 2001 or of any funds transferred into Vickie's name by Donald. Further, the defendants say there was no agreement between Donald and Vickie which placed any restriction on Vickie's ability to use the funds and assets she received from Donald's estate as she saw fit. Accordingly, the defendants say the plaintiff is not entitled to an accounting of funds from the executors of Vickie's estate.
- [9] As stated, this application was heard by summary trial pursuant to Rule 9-7(2)(a). The application was originally filed October 4, 2011. The defendants' application response was filed November 25, 2011. The matter was heard, following one adjournment, on November 29, 2011. The court had affidavits before it from the executrix and from D. Blake Scott, the solicitor who had attended to Donald's and Vickie's affairs in 2001. The defendants filed affidavits from Shirley and Nicholas.
- [10] There is an issue to which I must refer before I discuss the background to this matter. The defendants argued that this matter was not properly heard on a summary trial application and should proceed to trial. During the course of argument, Mr. Fominoff, counsel for the defendants, challenged the content of Mr. Scott's affidavit. He challenged the notes Mr. Scott made of the discussions he deposed he had with Donald and Vickie at the time he met with them and when Vickie's will and Donald's codicil were executed. Mr. Scott's evidence is important to these proceedings. He was the architect of the Agreement alleged by the plaintiff. In my view, his evidence is critical to the outcome.
- [11] A party to a summary trial application must take appropriate steps to put themselves in the best position to advance their case and to put before the court all facts which assist in making a just determination: see *Everest Canadian Properties Ltd. v. Mallmann*, 2008 BCCA 275 at para. 34 and 40:
- [34] It is trite law that where an application for summary determination under Rule 18A is set down, the parties are obliged to take every reasonable step to put themselves in the best position possible. As this court noted in *Anglo Canadian Shipping Co. v. Pulp, Paper & Woodworkers of Canada, Local 8* (1988)[,] 27 B.C.L.R. (2d) 378 at 382, a party cannot, by failing to take such steps, frustrate the benefits of the summary trial process. Where the application is brought by a plaintiff, the defendant may not simply insist on a full trial in hopes that with the benefit of viva voce evidence, 'something might turn up': see *Hamilton v. Sutherland* (1992)[,] 68 B.C.L.R. (2d) 115, [1992] 5 W.W.R. 151 (B.C.C.A.) at paras. 66-7. The same is true of a plaintiff where the defence has brought the R.18A [now Rule 9-7] motion. In this instance, it was not realistic for Everest to hope that the Court at the summary trial would of its own volition decline to proceed because it was being asked to determine issues of dishonesty, or because the possibility of certain viva voce evidence had been discussed in a different context.

...

- [40] Ms. Rost also submitted on behalf of Everest that the other more general factors relevant to the question of suitability should, when taken together, have led the summary trial judge to conclude that the case required a full trial. Whether the applicable standard of review is as stated in *Orangeville Raceway Ltd. v. Wood Gundy Inc.* (1995)[,] 6 B.C.L.R. (3d) 391 (C.A.) at 398, or as described in *Housen v. Nikolaisen*[,] 2002 SCC 33, [2001] 2 S.C.R. ... I am of the view that the summary trial judge has not been shown to have been in error. She reviewed each of these factors and concluded that the orderly administration of justice would be enhanced by proceeding with the application under Rule 18A and that it would not be unjust to do so. Although questions of dishonesty will usually lead a court to prefer a full trial, the Court found, correctly in my view, that there was no conflict on the evidence in this case. The onus was on Everest to adduce evidence that would support its allegations and it failed to do so. Nor was any fresh evidence sought to be adduced in this court that would have cast the summary trial judge's conclusions into doubt. I would dismiss this ground of appeal.
- [12] In this case, the defendants proceeded without cross-examining Mr. Scott on his affidavit (or applying to do so) or otherwise taking steps available to them under the Rules to attempt to impeach his credibility. Further, there is no other evidence in this case which impeaches or challenges the credibility of either the executrix or Mr. Scott. Based on the evidence before me, I conclude it is appropriate to proceed and resolve the issues under Rule 9-7(2)(a) of the Rules.

BACKGROUND

- [13] I will take many of the facts from the virtually uncontroverted evidence set out in the affidavits of Linda and Mr. Scott.
- [14] Donald was married to his first wife, Phyllis, for 50 years. They had two children, Linda and Wendy. During their marriage they accumulated a significant estate.
- [15] On October 19, 1990, Phyllis died.
- [16] On June 10, 1993, Donald married Vickie. This was his second marriage and Vickie's fourth marriage or common-law relationship.
- [17] Vickie had two living adult children from previous relationships, Shirley and Nicholas.
- [18] At the time of their marriage, Donald had an estate valued at approximately \$800,000. Vickie's estate was valued at approximately \$30,000. After marriage, they kept the majority of their assets separate. Donald paid their living expenses and gave Vickie a monthly allowance of about \$1,000.
- [19] In October 1993, Donald made a will (the "1993 Will") which gave Vickie, among other things, a life estate in his property, including any real property he owned, and left the residue of his estate to his two daughters.

- [20] Between June and August 2001, Donald and Vickie consulted Mr. Scott for the purpose of modifying their wills and estate plans. According to notes made by Mr. Scott, he first met with Donald and Vickie on July 3, 2001. At that time, Vickie already had an executed will dated May 24, 1994 ("Vickie's 1994 Will") which provided that the gift of RRIFs she received from Donald through his 1993 Will would go back to his daughters on her death. Vickie's 1994 Will was not before the court.
- [21] According to Mr. Scott, he reviewed their circumstances and discussed what they wanted to accomplish in the drafting of a new estate plan. He assisted to put together a plan reflecting an agreement they had reached by drafting a new will for Vickie and a codicil for Donald's 1993 Will. Mr. Scott deposed that Vickie's new will and the codicil were part of the Agreement the two had reached. He states that he reviewed and explained the documents to them in his office and witnessed the execution of Donald's codicil and Vickie's new will. I will review Mr. Scott's notes of his meeting with Donald and Vickie shortly.
- [22] On August 1, 2001, Donald executed the codicil ("2001 Codicil") to his 1993 Will. The 2001 Codicil provided for an irrevocable gift of a life estate for Vickie in the White Rock condominium, in any other property he might own at his death and in all other respects confirming his 1993 Will. The 2001 Codicil provides:

THIS IS THE FIRST CODICIL to the Last Will and Testament of me, DONALD KINGSLEY WRIGHT, presently of 402, 15466 North Bluff Road, in the City of White Rock, in the Province of British Columbia.

2. WHEREAS I am providing my wife NANCY VICTORIA WRIGHT ("Vicki[e]") with a life estate on title to my property at 402, 15466 North Bluff Road, White Rock, Province of British Columbia, but it is possible that we may be living at some other residence at my death;

AND WHEREAS I will be transferring certain funds into joint names with Vicki[e], on the understanding that she is changing her will to return some of those funds to my estate on my death;

THEREFORE I make the following change to paragraph 3.(c) of my will dated October 1, 1993:

To add to the said will, at the end of paragraph 3.(c), the following words:

"and it is understood that this paragraph of my will shall be irrevocable, this life estate being granted to my wife Vicki[e] in consideration of the term in her will providing for the remainder of her estate, after a gift of \$30,000.00 paid to each of her children, to fall into my estate;"

4. IN ALL OTHER RESPECTS I confirm my Last Will and Testament dated the 7th day of October, A.D. 1993.

[Emphasis added.]

- [23] Mr. Scott deposed in his affidavit that on August 1, 2001, Vickie executed a will ("Vickie's 2001 Will") which contained the following terms:

THIS IS THE LAST WILL AND TESTAMENT of me, NANCY VICTORIA WRIGHT, presently of 402, 15466 North Bluff Road, City of White Rock, in the Province of British Columbia, V4B 3G1.

1. I REVOKE all former wills and other testamentary dispositions made by me at any time and DECLARE this only to be my last Will and Testament.
2. I APPOINT my daughter, SHIRLEY ANN DUNNING ("Shirley"), presently of 104, 2530 154th Street, Surrey, BC, to be the executor and trustee of my will but if Shirley is unable or unwilling to act as Trustee of my will, I appoint my son, NICHOLAS JOHNATHON POPE ("Nicholas"), presently of 597 Lydia Street, Newmarket, Ontario L3Y 1M4, to act as Trustee of my will in place of Shirley. I DECLARE that the expression "my Trustee" wherever used in my will and or any codicil means, where the context permits, the executor and trustee for the time being and from time to time of my will.
3. I GIVE, DEVISE AND BEQUEATH all of my property whatever and wherever, save as hereafter provided, including any property over which I may have a general power of appointment, to my Trustee in the following manner:
 - (a) to realize my estate, subject to paragraph 5.;
 - (b) to pay my just debts, subject to paragraph 6.;
 - (d) to deliver my jewellery and personal effect to Shirley;
 - (e) to pay or transfer the sum of \$30,000.00 to Shirley, for her own use absolutely, or to her estate if she has predeceased me;
 - (f) to pay or transfer the sum of \$30,000.00 to Nicholas, for his own use absolutely, or to his estate if he has predeceased me;
 - (g) to pay or transfer the residue of my estate to my husband, DONALD KINGSLEY WRIGHT ("Don"), or to his estate if he shall not survive me, and it is understood that this paragraph 3. (g) of my will shall be irrevocable, it being made in favour of Don, in consideration of:
 - (i) the transfer of certain R.R.I.F.'s into joint names with myself;
 - (ii) the transfer of a life interest in his condominium at 402, 15466 North Bluff Road, White Rock, British Columbia to myself and Don, jointly, and
 - (iii) the term in his will providing for a life estate for myself in any other property that he might own at his death.

[Emphasis added.]

[24] On June 28, 2004, Donald died. He was survived by Vickie, Linda and Wendy.

[25] In 2004 Vickie was diagnosed as suffering from Alzheimer's dementia.

- [26] The executrix deposes that on or about August 1, 2004, Shirley told her she was angry that her mother had not shown her the 2001 Will "a long time ago" and that had she, Shirley would have told her mother "not to agree to it." Shirley "wanted to change" the will.
- [27] On August 13, 2004, Shirley told Linda that she and her mother had gone to see a notary public to discuss Vickie's 2001 Will and her mother had given her a power of attorney. According to Linda, Shirley told her the granting of the life estate in the White Rock property meant Vickie "could live there for free" and "have ... [Donald's] estate pay taxes and strata fees."
- [28] Vickie, with Shirley's assistance and then, apparently, with Nicholas's assistance, executed two new wills in 2004.
- [29] On August 13, 2004, she executed a will ("August 2004 Will") appointing Shirley as her executrix. After leaving a number of specific bequests to Shirley, including any registered retirement savings plans and registered income funds, she directed the residue be divided equally between Shirley and Nicholas.
- [30] On October 24, 2004, she made a further will ("October 2004 Will"). In the October 2004 Will she appointed both Shirley and Nicholas as co-executors. She changed the direction concerning registered retirement savings plans and registered income funds to provide that they were to form part of the residue of her estate and then directed, after giving a number of personal items to Shirley, that the residue was to be divided equally between Nicholas and Shirley. Neither the August nor the October 2004 Wills included any mention of the irrevocable gift or made any reference to Donald's estate or to his residual beneficiaries.
- [31] I note that in August 2004 Shirley was given power of attorney by Vickie and was managing her financial affairs.
- [32] I also note that on October 22, 2004, two days before the October 2004 Will was executed by Vickie, Mr. Scott received a telephone call from Nicholas. According to Mr. Scott, Nicholas contacted him because he had a copy of Vickie's 2001 Will that Mr. Scott had drafted. Nicholas advised Mr. Scott he had come from Ontario to "assist his mother in her affairs." Nicholas told him his mother had made a will giving everything to his sister, Shirley. He said that Shirley was "angry as can be because he has uncovered ... [her] plot." Mr. Scott's notes go on to state that "he [Nicholas] thinks that the will that I drew up is OK, he doubts the validity of the August [2004] will." Mr. Scott advised Nicholas he acted for his mother and his duty was to her. He wrote: "Also I do not want and I will not be drawn into this "[hornet's] nest" (his words)."
- [33] In August 2007 a court declared Vickie incapable of managing her own financial affairs. In the affidavit of kindred and fortune filed by her son, Nicholas, and her granddaughter, Jeanette Belo, in support of the committee application, Vickie's assets were listed as including her being the holder of the life estate in the White Rock property. She was described as being a "tenant for life." There was no value attributed to this interest, but the

capital balance of her estate, including various accounts and an interest in a manufactured home in Surrey amounted to \$247,000.

[34] Nicholas and Jeanette were appointed committee of Vickie's estate on August 23, 2007.

[35] On February 21, 2010, Vickie Wright died.

[36] In essence, the executrix says Vickie's 2001 Will confirmed the terms of Donald's and Vickie's Agreement. It made provision for an irrevocable gift to Donald's estate upon Vickie's death, which Vickie's executors were bound to follow.

[37] The evidence establishes that Donald performed all his obligations to Vickie under the Agreement. In particular:

- a. Donald registered a joint life estate in favour of himself and Vickie on title to the White Rock condominium;
- b. Donald transferred his RRIFs to Vickie and she received all his RRIFs investments when he died and had the use of them until her death; and
- c. Donald's 1993 Will (clause 3.(c)) and his 2001 Codicil (clause 2.) provided for an irrevocable life estate for Vickie in any other property that he might own at his death.

[38] The executrix has demanded that the defendants produce the original August 2001 will executed by Vickie. The defendants say they do not have either the original or a copy of the will and are not aware of its contents.

ISSUES

[39] The issues to be determined are:

1. Did Donald and Vickie make the Agreement as alleged?
2. Did Vickie execute the August 2001 Will?
3. If Donald and Vickie did make the Agreement, did Donald perform his obligations under the Agreement?
4. If Donald did perform his obligations under the Agreement, what is the effect of such Agreement on Vickie's estate, her representatives and beneficiaries?

THE LAW AND ANALYSIS

[40] The doctrine of mutual wills and the obligations flowing from them was discussed by Mr. Justice Cullity in *Edell v. Sitzer* (2001), 55 O.R. (3d) 198 (Ont. Sup. Ct. J.). He stated at paras. 57-58:

- [57] The doctrine of mutual wills has traditionally been applied in cases where individuals have made separate wills pursuant to an agreement with respect to their terms. Most commonly, they have agreed that each will obtain a benefit under the other's will and that other specified individuals will receive the property of each of them on the death of the survivor. In some cases of this sort, the benefit obtained by the survivor under the other's will has been a life interest; in other cases, it has taken the form of an outright gift. Where the requirements for the application of the doctrine are satisfied, the survivor will not be permitted to defeat the agreement by revoking his or her will after the death of the other. This result is achieved by the imposition of a constructive trust on the survivor's estate for the benefit of those who were intended to benefit under the agreement.
- [58] The most fundamental prerequisite for an application of the doctrine is that there be an agreement between the individuals who made the wills. It has been repeatedly insisted in the cases that: (a) the agreement must satisfy the requirements for a binding contract and not be "just some loose understanding or sense of moral obligation" (*Re Goodchild (Deceased)*, [1996] 1 All E.R. 670 (Ch. D.), at p. 681); ... [b] It must be proven by clear and satisfactory evidence; and (c) it must include an agreement not to revoke the wills.

This doctrine was also discussed extensively by Madam Justice Southin for the Court of Appeal in *Brynelsen Estate (Administrator of) v. Verdeck and O'Hara*, 2002 BCCA 187 at paras. 14-29.

- [41] The main question in this case is whether the parties made the Agreement which provided that in consideration for Donald doing certain things during his lifetime, upon his death Vickie agreed she would not revoke or alter her 2001 Will. In order to answer this question it is necessary, to the extent I have not already done so, to examine the facts closely as such agreement must be proven by "clear and unequivocal" evidence: *Dolby v. DeSantis Estate*, [1989] B.C.J. No. 297 (QL) (B.C.S.C.).
- [42] A significant background fact is that Donald and his first wife, Phyllis, were married for some 50 years. They married in 1940, when Donald was almost 23 years of age. Over the course of their marriage both parties worked hard at building their estate. By the time they stopped working and retired they had managed to build up a reasonably significant amount of assets, as well as pension income. Donald and Phyllis had two daughters, the plaintiff and her sister Wendy. There is no evidence before me as to any will made by Donald before Phyllis passed away.
- [43] After Phyllis died in 1990, Donald met Vickie and the two were married in June 1993. It is relevant that Donald brought some \$800,000 into the marriage, while Vickie brought considerably less.
- [44] In October 1993 Donald instructed a lawyer, Grace Morin, to draft his 1993 Will. It is unclear from the evidence whether Vickie also made a will at that time.

[45] In his 1993 Will Donald revoked any former wills he had made, appointed his daughter Linda as executrix and trustee, made certain gifts of personal, domestic and household articles to Vickie and provided that his executrix was "to hold whatever property I may own and be using as a home at the time of my death ... as a home for my wife during her lifetime." He provided that upon the vacancy of the property by Vickie or upon her death "any property then held for my wife" was to fall into the residue of his estate. Such residue was then to be divided equally between Linda and Wendy.

[46] On October 4, 1993, Ms. Morin wrote in a reporting letter to Donald following his execution of the 1993 Will:

Further to our Office conference, we confirm that we had discussed the Wills Variation Act and its potential effect in your given circumstances. Due to the fact that this is a second marriage, we confirm that we advised that you should be taking into consideration your children of the first marriage, at the time of your passing. Pursuant to the Wills Variation Act, there is a duty on you as a parent to provide for your children. If you fail to provide for your children, or fail to treat them fairly, then your children can apply, pursuant to the Wills Variation Act, to have your Will varied.

Despite our advice given, we confirm that you had instructed our firm to draft the Will in its current format.

[47] Donald and Vickie then met with Mr. Scott in 2001. As stated, Mr. Scott's notes of the meetings he held with Donald and Vickie over July and August of that year are significant.

[48] Mr. Scott had acquired Ms. Morin's practice. On June 29, 2001, Donald contacted Mr. Scott advising him he wanted to make changes to his 1993 Will. Mr. Scott met with Donald and Vickie on July 3, 2001. His notes record the discussion that occurred and the wishes of the parties:

The main concern is about the life estate to the house or home to Vicki[e]. She doesn't feel comfortable with her right to occupy the house being written into the will, where the executor under the will is the daughter. She feels like she'd be a tenant. She's OK that her interest in the house should revert to the daughters after her death but she wants to feel like an owner.

Initially they had in mind that she would be a joint owner, and she could change her will to provide that the condo would go to the daughters on her death. I explained that wills can be changed at any time so there's an uncertainty about it.

Discussed the idea of a life tenancy, described the land law involved, how she would be an actual owner during her lifetime and her name would appear on the deed. This appears to meet her concerns. Daughters can go onto title as remaindermen. Don seems OK with this - I made it clear that this is a present gift, right now, of interests in the condo, both to wife and to daughters. Daughters would have to sign on sale and would be entitled to claim a portion of value of property. He's OK with all this.

Instructed me to go ahead with this,.

...

His estate:

Condo \$

233K

RRIF's

200K

Stock

50K

Household \$

10K

Car

20K

...

Discussed: essentially, he wants to care for his wife but leave what is available afterwards for his kids, but he doesn't want to have an endless estate either. I discussed the idea of a life estate in a will but clearly this isn't what they want. Adv. I will give some thought and make some calls and get back in touch, either at their home or set up an appointment at SMSCU since the stairs are hard for [him.]

[49] Mr. Scott's notes reflect subsequent telephone conversations to and from Vickie concerning her estate, which she wished to be divided equally between her children. Mr. Scott discussed his suggestions as to how the parties might address the issue of granting a life interest in the White Rock condominium to her. Mr. Scott recorded on July 16, 2001 he had "decided to set up the transmission so that the property falls back into Don[ald]'s estate rather than to daughters, as this is an unneeded complexity at this time. We can review when they come in."

[50] Mr. Scott's notes record he met with Donald and Vickie again on August 1, 2001:

[Competence]: both of them are clearly competent. The legal concepts being explained are complex and both of them understood well and reasonably quickly, asked sensible questions and came to firm, sensible decisions[.]

Pressure, duress. Vicki[e] has some real concerns about her well-being, she is not wealthy. She is gently interested in seeing to it that her needs are met, and elegantly determined about it. But Don is self-motivated, being concerned out of love of Vicki[e] to meet her needs, while being fair to his kids. He said how the kids have told him to use the money and that they would be happy with whatever was left, and how they are not needy (though Vicki[e]'s children are). I'm satisfied that this is a situation where the parties have interests but there's no pressure or duress[.]

Reviewed the codicil and will carefully, in detail, explained in lay terms, and corrected and reprinted and executed[.]

Reviewed and signed the transfer documents, explained that it's unusual and might bounce at LTO, explained legal nature of the interests transferred and the appearance of the [State of Title Certificate]. Vicki[e] can sell the life interest back to the kids if she's going into a home, there's formulae to calculate price. All understood well, agreed, signed.

[51] As stated, at that meeting Donald signed the 2001 Codicil. At the time of executing the 2001 Codicil, Donald also signed a land registry form transferring a life interest in the condominium to himself and Vickie as joint tenants for the life of Vickie. That application was submitted to the Registrar of Land Titles on August 3, 2001 by Mr. Scott. (The transfer was subsequently amended in September 2001 as the Registrar of Land Titles requested the life interest to be registered as a charge against the title.)

[52] The petitioner asserts that at the August 1 meeting, Vickie also signed the 2001 Will. As stated, the defendants dispute she did. I find she did execute the 2001 Will, notwithstanding that neither party to these proceedings has been able to produce an executed copy. I reach this conclusion for several reasons:

1. The draft copy of Vickie's 2001 Will, as annexed to Mr. Scott's affidavit, is a mirror document to the 2001 Codicil signed by Donald. That is, it mirrors the Agreement reached by the parties in accordance with the instructions both parties gave to Mr. Scott;
2. It is unlikely that Donald would have executed his 2001 Codicil without Vickie agreeing in her 2001 Will to the irrevocable gift back to Donald's estate upon her death;
3. Vickie herself was concerned to deal with the residue of her estate by ensuring it went to her children;
4. Mr. Scott recalled the meeting of August 1, 2001 with Donald and Vickie. He deposed at paras. 10(i) - (l) of his affidavit:
 - i. On August 1, 2001 I met with Donald Wright and Vickie Wright. I actually have some recollection of my meeting with them on July 3, 2001 and August 1, 2001. My memory has been "refreshed" by review of my own notes. I remember them both as frail senior citizens, but with all their wits about them. As a result of my conversations with each of them, they both appeared to me to be competent to execute wills. I remember being impressed by the dignity and mutual respect with which they discussed their feelings and objectives. I felt I

had observed their dealings with each other and understood their respective situations sufficiently well to conclude there was no pressure or duress involved;

- j. I reviewed the terms of the codicil with Donald Wright and the terms of the will with Vickie Wright carefully and in detail. I explained the terms of the codicil to Donald Wright and the terms of the will to Vickie Wright in lay terms. Both of them indicated they understood. I made corrections, reprinted the documents and witnessed execution of the codicil by Donald Wright and execution of will by Vickie Wright, as detailed below. ...

...

- l. ... I ran a "paperless" office. In particular, I never kept executed copies of wills. However, I am certain that Vickie Wright executed the will during our August 1, 2001 meeting. My file note says so in clear and simple terms. If she had not, my file note would have said that instead. I would not have billed the Wrights for her will if she had not executed it; and
 - 5. Mr. Scott's documents reporting on the transaction including his account to both parties is captioned "with regards to codicil for Mr. Wright and new will for Mrs. Wright" and includes such particulars as "drafting and preparing the codicil and new will" and "attending to the execution of your execution of the codicil and new will." There was only one new will that was prepared by Mr. Scott for Vickie.
- [53] In her 2001 Will Vickie appointed Shirley as her executrix and trustee. Her executrix was directed to pay \$30,000 to each of Shirley and Nicholas and then to transfer the residue to Donald's estate in consideration of the provisions he made for her during her lifetime. Importantly, Vickie agreed this provision was irrevocable.
- [54] Donald's 2001 Codicil and Vickie's 2001 Will reflected an agreement they had reached whereby Vickie agreed to respect Donald's wish to leave a portion of his estate to his children and Donald agreed to respect Vickie's interest to be maintained during her lifetime and her wish to leave a portion of her estate to her children. The Agreement reached by Donald and Vickie is not an uncommon arrangement reached between parties who, in their later years and in second or subsequent relationships, feel they have a legal or moral responsibility to provide for children or other family members from prior relationships. Indeed, it would be an unusual circumstance, and with some folly, that the parties to a new relationship do not address the handling of their respective estates recognizing the rights of their children.
- [55] Relying on Vickie's promises, I find that Donald took action pursuant to the Agreement to fulfill the bargain. He conveyed the life interest in the condominium to Vickie on August 3, 2001. He named her as a joint owner or designated her as a beneficiary of his RRIFs to which she became entitled on his death on June 28, 2004. Linda assisted Vickie in ensuring she received the RRIFs income and Vickie received such income until her death on February 21, 2010.

[56] In July 2004 Linda was in contact with Mr. Scott. She expressed concerns that Vickie was now aged 85 and may have to go into a home. She wondered how she could assist Vickie with her investments and how she could protect her interest in Vickie's life interest in the condominium, if it had to be sold.

[57] Mr. Scott advised her:

Adv. Father's intention was to protect Vicki[e] and provide for her while protecting her interest in his estate. We did this by registered life interest against property and life estate also in the will (they are not the same) with contractual term obliging Vicki[e] to gift the residue of her estate back to Donald's estate after two \$30000 gifts to her kids. Since these terms are contractual Vicki[e] may not validly change her will with respect to the residue of her estate.

He also told her it was not necessary to do anything at that time, but that if the condominium had to be sold she would need to do a probate of her dad's estate and that there were ways to evaluate both the estate's and Vickie's interests in the property.

[58] In *Huculak v. Kallenberger et al.*, 2005 BCSC 239, Mr. Justice Barrow reviewed the authorities for the cases such as the one before me, noting the basis of the remedy sought by an applicant was explained in *University of Manitoba v. Sanderson Estate* (1998), 47 B.C.L.R. (3d) 25 (C.A.). In that case, Rowles J.A. stated at para. 46:

46. The guiding principles to be applied in this case are to be found in *Dufour v. Pereira*, supra, in which the enforcement of an agreement in a joint will was held to be within equity's jurisdiction to prevent fraud. Equity considers it a fraud upon the deceased, who has acted upon and relied upon the mutually binding nature of the agreement, for the survivor to change the will and break the agreement. As the deceased cannot intervene to enforce the obligation, equity will enforce the survivor's obligation, despite the survivor's subsequent intentions.

[59] Justice Barrow concluded in *Hucaluk* that the evidence did not support that the parties had entered into a binding agreement. There was no evidence, oral or written, of an agreement not to revoke: at paras. 18, 24. In this respect, the facts of this case are different from those considered by Mr. Justice Barrow.

[60] In *Dolby*, Madam Justice Huddart (as she then was) discussed the principles applicable to agreements to make irrevocable wills stating:

... If a person agrees to make a will and that she will be bound that will in making a disposition of her estate, then in effect she is agreeing not to revoke her will or to maintain those dispositions in any subsequent will. Indeed, it is precisely that agreement not to revoke that the court is enforcing by way of what is probably best called a constructive trust.

[61] Justice Huddart concluded, however, that as "Evidence of an agreement not to revoke one's will must be clear and unequivocal" the plaintiff had not established such an agreement in that case. In *Dolby*, the court found that because the evidence showed one of the parties did

not understand she was being asked to agree not to revoke her will, the agreement to make mutual wills and not to revoke them had not been proven. She stated "If such an agreement had been made it would have been a simple matter to include a recital to that effect in the will." In the case before me, the parties did just that.

[62] I conclude that the evidence in this case is clear and convincing and establishes Donald and Vickie made an Agreement whereby Donald would leave Vickie a life interest in the White Rock condominium and any other property he might own at his death. In exchange, Vickie agreed that when she died she would comply with the provisions of her 2001 Will she signed in Mr. Scott's office. That is, she would give \$30,000 to each of Shirley and Nicholas and the remainder would revert to Donald's estate. Donald and Vickie went beyond trusting each would do the "right thing" or that each would provide fairly for the other's children. They were much more specific, recording their agreement in Donald's 2001 Codicil and Vickie's 2001 Will. The agreement they reached was not an "engagement of honour", but a binding agreement, the terms of which were certain: Brynelsen Estate, at para. 29.

[63] Accordingly, the plaintiff is entitled to an order that the executors of the estate of Nancy Victoria Wright are bound by the Agreement made between Vickie and Donald of August 1, 2001, whereby Vickie was to use the White Rock condominium for her maintenance and support during her lifetime and was to make an irrevocable gift of the remainder of her estate to Donald Wright's estate after making a gift of \$30,000 to each of Shirley and Nicholas.

[64] The executors of the estate of Nancy Victoria Wright are ordered to account to the plaintiff for any failure to comply with that Agreement.

[65] The parties may apply to me concerning the costs of this application should they be unable to agree.

"GREYELL J."

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