

CANADA / JUDGMENT

Yen Estate v. Chan

2013 BCCA 423

COURT

British Columbia Court of Appeal

DECIDED

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2013 BCCA 423 Yen Estate v. Chan

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Yen Estate v. Chan,

2013 BCCA 423

Date: 20131002

Docket: CA040424

Between:

Barbara Hsia, Executrix of the Will of Chester Hugh Yen,

also known as Yen Ching Hai, Deceased

Respondent

(Plaintiff)

And

Michael Chan and Christopher Chan

Appellants

(Defendants)

And

Shirley Margaret Yen-Zimmerman, also known as Margaret Chow,

Mary Yen Chang, and Stephen Yan, also known as Wen Yan

Respondents

(Defendants)

Before:

The Honourable Mr. Justice Chiasson

The Honourable Mr. Justice Tysoe

The Honourable Mr. Justice Hinkson

On appeal from: An order of the Supreme Court of British Columbia,

dated October 31, 2012 (Hsia v. Yen-Zimmerman,

2012 BCSC 1620, Docket S103318)

Counsel for the Appellants:

R.A. Kasting

Counsel for the Respondent, Barbara Hsia, Executrix of the Will of Chester Hugh Yen, also known as Yen Ching Hai, Deceased:

H.S. McLellan

Place and Date of Hearing:

Vancouver, British Columbia

September 6, 2013

Place and Date of Judgment:

Vancouver, British Columbia

October 2, 2013

Written Reasons by:

The Honourable Mr. Justice Tysoe

Concurred in by:

The Honourable Mr. Justice Chiasson

The Honourable Mr. Justice Hinkson

Summary:

The appellants filed a caveat requiring the respondent executrix to prove a purported will which appeared, on its face, to comply with the formalities of the Wills Act, R.S.B.C. 1996, c. 489, s. 4. In holding that the respondent successfully proved due execution as well as the testator's knowledge and approval of the document's contents, the trial judge relied on certain evidentiary presumptions embodied in the maxim "*omnia praesumuntur rite esse acta*" (all things are presumed to be done in due form).

Held: appeal dismissed. In the absence of suspicious circumstances or contrary evidence, the trial judge was entitled to rely on the rebuttable presumptions that the execution of the will complied with the requirements of s. 4 of the Wills Act and that the testator was aware of and approved the contents of the will. Thus, the judge did not err in finding that the will had been proven in solemn form.

Reasons for Judgment of the Honourable Mr. Justice Tysoe:

Introduction

- [1] This appeal concerns the validity of the putative will of the deceased, Mr. Yen, who died on February 11, 2010. The putative will was dated August 13, 1973, one year less a day following the death of one of Mr. Yen's daughters, Lily Chan, a psychiatrist who was tragically murdered by one of her patients and who at the time was married with three young children, the surviving two of whom are the appellants in this appeal.
- [2] The putative will was a simple document. It left all of Mr. Yen's estate to his wife. If his wife did not survive him by more than 30 days, the estate was bequeathed to Mr. Yen's three remaining daughters or the survivors of them. It made no provision for the children of his deceased daughter (or for the children of any of his other daughters should they predecease him).
- [3] Mr. Yen's wife predeceased him, and the appellants filed a caveat following Mr. Yen's death, thereby requiring the will to be proved in solemn form. At issue during the trial of the action commenced to prove the will was whether the formalities of execution of the will had been proven, whether Mr. Yen knew and approved of the contents of the will and whether Mr. Yen had testamentary capacity when he signed the will.
- [4] The trial judge held against the appellants on all three issues, and found that the will had been proven in solemn form. This appeal was restricted to the first two issues, and the appellants did not appeal the judge's finding that Mr. Yen had testamentary capacity.
- [5] At the conclusion of the appellants' submissions at the hearing of the appeal, we dismissed the appeal, with reasons to follow. These are my reasons for agreeing to the dismissal of the appeal.

Background

[6] As Mr. Yen's testamentary capacity was not challenged on appeal, the facts relevant to the appeal can be stated very briefly.

[7] The putative will contained the following attestation clause:

SIGNED, PUBLISHED AND DECLARED by the above-named Testator, CHESTER HUGH YEN, as and for his Last Will and Testament, in the presence of us, both present at the same time, who at his request, in his presence, and in the presence of each other have hereunto subscribed our names as witnesses:

It bore a signature purporting to be the signature of Mr. Yen and the signatures of two witnesses with the names Ethel Strachan and Frank G. McGinley.

[8] The trial judge was satisfied that the putative will had been signed by Mr. Yen because one of his daughters identified his signature and there was evidence that Mr. Yen wrote a letter dated August 13, 1973 to one of his other daughters advising her that he had his will prepared and put in his safety deposit box. The trial judge was also satisfied that the signature of Frank G. McGinley was proven. Mr. McGinley was a lawyer who died in 2006, but the plaintiff was able to prove his signature by way of a certificate from the Law Society.

[9] There was no direct evidence at the trial with respect to the signature of Ethel Strachan, whose identity was unknown. There was also no direct evidence as to whether the witnesses were present together and saw Mr. Yen sign the document, nor any direct evidence that Mr. Yen was aware of and approved the contents of the document.

Discussion

[10] It is common ground that in order to prove a will, the propounder must prove, in addition to testamentary capacity, that the will was properly executed and the testator knew and approved the contents of the will: see *Maliwat v. Gagné*, 2009 BCSC 1447 at para. 106, *aff'd* 2010 BCCA 323.

[11] Section 4 of the Wills Act, R.S.B.C. 1996, c. 489, sets out the requirements of execution. In summary, there are three requirements: (a) the will must be signed at its end by the testator; (b) the testator must sign or acknowledge his or her signature in the presence of two witnesses who are present at the same time; and (c) the two witnesses must sign in the presence of the testator.

[12] In holding that the plaintiff had proven due execution and knowledge and approval of the will's contents, the trial judge relied on presumptions that were discussed in the decisions of *Re Laxer*, [1963] 1 O.R. 343, 37 D.L.R. (2d) 192 (C.A.), and *Guardhouse v. Blackburn* (1866), L.R. 1 P. & D. 109. In my view, the judge did not err in relying on these presumptions in the absence of any suspicious circumstances in connection with the execution of Mr. Yen's will.

[13] In *Laxer*, the issue was whether a codicil had been properly executed. The attesting witnesses testified that they had signed a blank piece of paper and, therefore, had not witnessed the signing of the codicil. The trial judge discredited the testimony of the witnesses and employed the presumption that the codicil had been duly executed.

[14] The Ontario Court of Appeal upheld the use of the presumption by the trial judge. The Court adopted the interpretation of the Latin maxim of the presumption from the reasons of Lord Justice Lindley in *Harris v. Knight* (1890), 15 P.D. 170 (C.A.) at 179-80:

The maxim, "Omnia praesumuntur rite esse acta," is an expression, in a short form, of a reasonable probability, and of the propriety in point of law of acting on such probability. The maxim expresses an inference which may reasonably be drawn when an intention to do some formal act is established; when the evidence is consistent with that intention having been carried into effect in a proper way; but when the actual observance of all due formalities can only be inferred as a matter of probability. The maxim is not wanted where such observance is proved, nor has it any place where such observance is disproved. The maxim only comes into operation where there is no proof one way or the other; but where it is more probable that what was intended to be done was done as it ought to have been done to render it valid; rather than that it was done in some other manner which would defeat the intention proved to exist, and would render what is proved to have been done of no effect.

The circumstances in *Harris v. Knight* were similar to the present case - both of the subscribing witnesses were dead and there was no direct evidence with respect to the signing of the will by one of the witnesses. The majority of the English Court of Appeal upheld the use of the presumption that the will had been duly executed.

[15] Although the presumption has been relied upon by the Supreme Court of British Columbia (see *Dalziel v. Bradford* (1985), 62 B.C.L.R. 215, 18 E.T.R. 261 (S.C.); *Beniston Estate v. Shepherd* (1996), 16 E.T.R. (2d) 71 (B.C.S.C.); and *Beaudoin Estate v. Taylor* (1999), 27 E.T.R. (2d) 208 (B.C.S.C.)), its use has never been approved by this Court, and the appellants submit this Court should not follow the Ontario Court of Appeal's adoption of *Harris v. Knight*. In that regard, the appellants urge us to follow the "strong dissent" of Lord Justice Cotton in *Harris v. Knight*. However, as pointed out by my colleague, Mr. Justice Chiasson, during the hearing of the appeal, the reluctance of Lord Justice Cotton to rely on the presumption was based on the absence of an attestation clause (at 178):

If there had been an attestation clause, there being the handwriting of two persons as witnesses, which I will assume to be genuine, I should consider that the formalities had been complied with, for I should think that no one would have signed his name to the statement contained in such clause unless it were true.

In the present case, there was an attestation clause.

- [16] Although we need not decide whether the presumption of due execution should be relied upon in the absence of an attestation clause, I note that, in *Laxer* at 356, Mr. Justice Schroeder expressed the view that the absence of an attestation clause should not be fatal and should simply weaken the force of the presumption.
- [17] In my opinion, the appellants have not pointed to any policy reason why this Court should not accept the use of the presumption of due execution in connection with the execution of wills in British Columbia. It must be remembered that it is a presumption only, and it can be rebutted by direct evidence or suspicious circumstances.
- [18] At para. 23 of his reasons for judgment, the trial judge quoted the following passage from *Laxer* at 357 expressing a policy reason supporting the use of the presumption:
- The authorities supporting the application of the presumption favouring due execution of a testamentary instrument lay down a very sound and salutary principle, since a contrary rule would make the rights of devisees and legatees depend not only upon the honesty, but also upon the frail and slippery memory of witnesses. No man could be sure of dying testate, since the dishonesty or forgetfulness of a witness could frustrate all his precautions to comply with the requirements of the law.
- [19] In addition to dishonest or forgetful witnesses referred to in the above passage, there will also be, as here, witnesses who have died or cannot be found. In the absence of such a presumption, a testator would be required to monitor the availability of the witnesses to his or her will in order to ensure that the will can be proven in solemn form. Testators would be required to re-execute their wills if the witnesses died or their locations became unknown.
- [20] The appellants argue the use of the presumption runs contrary to the requirement that there must be complete compliance with the execution formalities imposed by the Wills Act. They point to two British Columbia cases for the proposition that substantial compliance with those requirements is not sufficient (*Bolton v. Tartaglia*, 2000 BCSC 576, and *Ellis v. Turner* (1997), 43 B.C.L.R. (3d) 283 (C.A.)).
- [21] With respect, this argument misconstrues the nature of the presumption. The use of the presumption does not alleviate the requirement to comply with the provisions of the Wills Act. Rather, the presumption is an evidentiary device that can be used by the propounder of the will to provide the proof required by the Act.
- [22] Although *Bolton v. Tartaglia* and *Ellis v. Turner* do stand for the proposition cited by the appellants, neither decision involved the presumption of due execution. In *Bolton v. Tartaglia*, one of the witnesses failed to sign her name. In *Ellis v. Turner*, the testatrix did not sign her name at the end of the will. The evidence was clear from the face of the will in each case that the requirements of the Act had not been met, and the presumption of due execution was not available.

[23] The appellants also argue that courts in other provinces have rejected *Re Laxer*, citing *Re Vardy*, 2005 NLTD 111. With respect, the judge in *Re Vardy* did not reject *Re Laxer*. Mr. Justice Handrigan cited it as an example of a case where the *omnia praesumuntur maxim* was used to support the validity of the will, but then stated that the maxim cannot be applied to make wills for testators and referred to *Bolton v. Tartaglia*. Similar to *Ellis v. Turner*, the testator in *Re Vardy* had not made a full signature at the end of the will, and Handrigan J. began his reasons for judgment by observing that the will did not, on its face, comply with the formal requirements for execution in the applicable legislation. The presumption of due execution is reserved for those situations where it appears from the face of the document that it has been properly executed.

[24] As they did before the trial judge, the appellants rely on the following passage from the decision of *Vout v. Hay*, [1995] 2 S.C.R. 876, 125 D.L.R. (4th) 431 at para. 26, for their position that the requisite formalities must be proven without the use of the presumption of due execution:

Although the propounder of the will has the legal burden with respect to due execution, knowledge and approval, and testamentary capacity, the propounder is aided by a rebuttable presumption. Upon proof that the will was duly executed with the requisite formalities, after having been read over to or by a testator who appeared to understand it, it will generally be presumed that the testator knew and approved of the contents and had the necessary testamentary capacity.

[25] The trial judge rejected this argument for the following reasons (2012 BCSC 1620):

[27] I am unable to agree that *Vout* does away with the presumptions summarized and explained in *Laxer*. I reach that conclusion for several reasons. First, the case does not say that the presumptions are no longer valid. It says that "upon proof" of due execution and that the will was read over by the testator who appeared to understand it, certain consequences follow. It does not say anything about what the proof may or may not consist of.

[28] Second, the issue of due execution and whether the will was read over by the deceased arose only tangentially in *Vout*. The witnesses to the will both testified at trial. Although their evidence was inconsistent in some respects, they both said that they were present when the deceased signed the will. Given that evidence, there was no need to have recourse to any presumptions and, not surprisingly, they were not mentioned either at trial or in the brief endorsement by the Ontario Court of Appeal, or by the Supreme Court of Canada. As Lindley L.J. put it "[t]he maxim is not wanted where such observance is proved".

[29] Third, I am not prepared to conclude that the Supreme Court of Canada cast aside long standing propositions without mentioning them or explaining why they were doing so, particularly when it was unnecessary to resolve the issue before them.

I respectfully agree with the judge's reasoning.

[26] Indeed, the decision in *Vout v. Hay* supports the use of presumptions in proving a will in solemn form. The Supreme Court of Canada endorsed the use of presumptions that the testator knew and approved of the contents of the will and that the testator had the necessary testamentary capacity. It was not necessary for the Court to direct its mind to availability of a presumption to prove due execution of the will because there was direct evidence in that case the will had been properly executed.

[27] The second argument of the appellants is that there was no evidence that the contents of the will were read by, or brought to the attention of, Mr. Yen, or that he appeared to understand the will. Thus, they say, the prerequisites for the presumption that Mr. Yen knew and approved the contents of the will have not been satisfied.

[28] The appellants say the trial judge erred in relying on the following passage from the reasons of Sir Wilde in *Guardhouse v. Blackburn* at 116, as cited with approval by Lord Hanworth, M.R., in *Re Musgrove*, [1927] P. 264 at 278 (C.A.):

First, that before a paper so executed is entitled to probate, the Court must be satisfied that the testator knew and approved of the contents at the time he signed it. Secondly, that except in certain cases, where suspicion attaches to the document, the fact of the testator's execution is sufficient proof that he knew and approved the contents.

The appellants submit *Guardhouse v. Blackburn* is distinguishable because it was really a rectification case and there was evidence in that case the will had been read to the testatrix. They also maintain the trial judge overlooked what was said by Sir Wilde further down in the same paragraph:

Fifthly, the fact that the will has been duly read over to a capable testator on the occasion of its execution, or that its contents have been brought to his notice in any other way, should, when coupled with his execution thereof, be held conclusive evidence that he approved as well as knew the contents thereof.

[29] Although I do not agree with the characterization that *Guardhouse v. Blackburn* was a rectification case, I do not quarrel with the assertion that it is distinguishable from the case at bar. In the passage quoted by the trial judge, I think Sir Wilde was setting out general principles. As authority for the first two propositions, Sir Wilde cited the decision of *Barry v. Butlin* (1838), 2 Moo. P.C. 480 at 484, 12 E.R. 1089, where the following was stated:

The strict meaning of the term *onus probandi* is this, that if no evidence is given by the party on whom the burthen is cast, the issue must be found against him. In all cases the onus is imposed on the party propounding a Will, it is in general discharged by proof of capacity, and the fact of execution, from which the knowledge of and assent to the contents of the instrument are assumed

This authority of the Privy Council has stood for almost two centuries. I am not persuaded there is good reason to cast it aside. I do not believe that the statement at para. 26 of *Vout v. Hay* or a similar statement in *Maddess v. Gidney Estate*, 2009 BCCA 539 at para. 29, were intended to alter this principle because there was affirmative evidence in those cases the contents of the will had been read or explained to the testator.

[30] I do not agree with the appellants that the fifth principle set out by Sir Wilde was intended to qualify or restrict the operation of the second principle. The second principle is dealing with sufficient proof, in the sense that the testator's execution of the will creates a rebuttable presumption that he or she had knowledge of and approved the contents of the will. The fifth principle is dealing with conclusive proof, in the sense that evidence the will was read to the testator or its contents were brought to his or her attention is irrebuttable evidence that he or she had knowledge of and approved the contents of the will.

[31] In the present case, there was evidence that Mr. Yen had signed the will. There were no suspicious circumstances. In my opinion, the trial judge was entitled to rely on the presumption that Mr. Yen was aware of and approved the contents of the will.

[32] As the trial judge was entitled to rely on the presumptions that the execution of the will complied with the requirements of s. 4 of the Wills Act and that Mr. Yen was aware of and approved the contents of the will, and as he found testamentary capacity on the part of Mr. Yen, the judge did not err in finding the will had been proven in solemn form.

Conclusion

[33] It is for these reasons that I agreed to the dismissal of the appeal. I would order that the appellants pay party and party costs of the appeal to Mr. Yen's estate and that the respondent be reimbursed for her reasonable legal fees and disbursements by the estate.

"The Honourable Mr. Justice Tysoe"

I agree:

"The Honourable Mr. Justice Chiasson"

I agree:

"The Honourable Mr. Justice Hinkson"

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