COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Fuller (Estate) v. Fuller,***
2004 BCCA 218

Date: 20040420

Docket: CA030367

Between:

Gerald Flurry, in his capacity as
Executor of the Estate of Stanley Fuller

Appellant
(Respondent on Cross-Appeal)
(Plaintiff)

And

Douglas Shane Fuller, Brian Patrick Fuller,
Rosemary Jean Beier, and the Philadelphia Church of God,
Beneficiaries of the Estate of Stanley Fuller

Respondents
(Appellants on Cross-Appeal)
(Defendants)

Before: The Honourable Madam Justice Prowse
The Honourable Madam Justice Newbury
The Honourable Madam Justice Levine

R.M. Stewart — Counsel for the Appellant

G.A. Wright — Counsel for the Respondents

Place and Date of Hearing: Vancouver, British Columbia
March 31, 2004

Place and Date of Judgment: Vancouver, British Columbia
April 20, 2004

Written Reasons by:
The Honourable Madam Justice Prowse

Concurred in by:
The Honourable Madam Justice Newbury
The Honourable Madam Justice Levine

Reasons for Judgment of the Honourable Madam Justice Prowse:

INTRODUCTION

[1] This is an appeal from the order of a trial judge, made November 8, 2002, declaring that the Will of the late Stanley Fuller, executed April 7, 1997, is invalid, "having been executed by the said testator at a time when he lacked the requisite mental capacity".

[2] There is also a cross-appeal with respect to costs, which were dealt with in supplemental reasons pronounced December 6, 2002.

[3] The appellant, Mr. Flurry, is the executor of the Will, and also the head of the Philadelphia Church of God (the "Church"), the primary beneficiary under the Will. The other beneficiaries are Mr. Fuller's three adult children, Rosemary, Shane and Brian (collectively, "the children").

GROUNDS OF APPEAL

[4] Counsel for Mr. Flurry submits that the trial judge erred:

> (1) in placing too much weight on the evidence of Dr. Schokking in relation to the issue of testamentary capacity;
>
> (2) in failing to appreciate the evidence of Dr. Johnston, Ms. Ongman and certain lay witnesses with respect to the question of whether Mr. Fuller suffered from delusional thinking which affected his testamentary capacity at the time the Will was executed;
>
> (3) in finding that it was not inconsistent with a diagnosis of Alzheimer's disease that Mr. Fuller did not discuss his delusions with church members;
>
> (4) in finding that $200,000 gifts given to each of the children in 1995 were not intended to exhaust their entitlement to a share in Mr. Fuller's estate, and in assuming that Mr. Fuller would likely have taken steps earlier to change a Will he executed in 1993 if he had intended the $200,000 gifts to each child to be exhaustive.

[5] On the cross-appeal, the children submit that the trial judge erred in awarding Mr. Flurry and the Church costs out of the estate.

BACKGROUND

[6] The background giving rise to these proceedings is fully set out in the judgment of the trial judge, reported at 47 E.T.R. (2d) 228, 2002 BCSC 1571.

[7] Mr. Fuller died in Vanderhoof, B.C. in July 2000 at the age of 84. He was survived by his three children, who were in their mid-forties at the time of trial.

[8] Mr. Fuller was a religious man who had been a devout member of the Church and its predecessor, the Worldwide Church of God, since the 1960s.

[9] Mr. Fuller made a Will in 1993 which appointed Rosemary as executor and which divided 80 percent of his estate equally between the children and gave the remaining 20 percent to the Church. The 1993 Will was not in issue in these proceedings, although the children have raised it as a relevant factor in relation to the cross-appeal on costs.

[10] In 1995, Mr. Fuller sold his property near Vanderhoof for $2.5 million, which, after payment of capital gains tax, left him with approximately $1.8 million in cash. Shortly thereafter, Shane asked to borrow $140,000 as bridge financing in relation to his move from Vanderhoof to New Hazelton. Mr. Fuller discussed this loan request with Rosemary, who suggested that he might wish to give this amount to Shane as an advance on his inheritance. This suggestion ultimately led to Mr. Fuller deciding to give each of his children a gift of $200,000.

[11] At a dinner party on March 30, 1995, Mr. Fuller presented each of his children with a bank draft for $200,000. After the presentation, Mr. Fuller asked Rosemary to draw up a receipt for the funds which was signed by each of the children. The receipt provided as follows:

> MARCH 30, 1995
>
> TO WHOM IT MAY CONCERN:
>
> CONCERNING WILL OF STANELY FULLER OF VANDERHOOF, B.C.
>
> THIS WILL IS REGISTERED IN VICTORIA AT THIS TIME.
>
> ON THIS DATE MARCH 30, 1995 THE SUM OF $200,000.00 TWO HUNDRED THOUSAND DOLLARS HAS BEEN GIVEN TO <u>EACH</u> OF THE FOLLING CHILDREN:
>
> DOUGLAS SHANE FULLER, "D. Shane Fuller"
>
> BRIAN PATRICK FULLER, "Brian Fuller"
>
> ROSEMARY JEAN BEIER "Mrs. R. Beier"
>
> THIS HAS BEEN GIVEN AS A GIFT PRIOR TO THE NECESSITY OF THE LAST WILL.
>
> THIS IS NOTED BY THE ABOVE SAID PERSONS AND SIGNED.

[12] In 1995, Mr. Fuller also gave $260,000 to the Church by way of tithe.

[13] Mr. Fuller also made Rosemary a joint owner of his bank accounts and investment certificates in 1995. This was consistent with his practice of consulting Rosemary about financial matters, including how his money should be invested.

[14] Following a church meeting in the fall of 1996, Mr. Fuller told Rosemary that he did not want his money locked into inflexible and non-liquid investments because, based on Church doctrine, he might have to retreat with his money to a "place of safety" on only two weeks' notice. Rosemary suggested that this decision was not wise from an investment perspective, and she went on to question the *bona fides* of the Church. She went so far as to suggest that the Church was after his money and that he might come to a tragic end like the church followers in Jonestown (an obvious reference to the "Jonestown massacre" of the followers of the Reverend Jim Jones in Guyana in 1978).

[15] Rosemary's remarks greatly angered Mr. Fuller and led to a serious strain in their relationship. The strain was exacerbated by another incident in 1996 when he implied that Rosemary may have stolen some money from his home, only to discover later that the money was where he had hidden it.

[16] In November 1996 Rosemary's husband asked Mr. Fuller to lend them $55,000 at a rate of interest which was higher than Mr. Fuller was receiving on his investments, but lower than the rate Rosemary and her husband would have to pay the bank. Mr. Fuller declined to make the loan.

[17] On March 24, 1997, Mr. Fuller attended at the office of a lawyer, Ms. Ongman, for the purpose of changing his 1993 Will and revoking the power of attorney he had previously given to Rosemary. He told Ms. Ongman that the $200,000 gifts he had given the children in 1995 were their inheritance; that he wished to provide them with only a further $1,000 each; and that he wanted the remainder of his estate to go to the Church. Ms. Ongman believed that Mr. Fuller was competent to change his Will, but, out of an abundance of caution, she suggested that he should have a doctor certify his mental state.

[18] On the same day, Mr. Fuller went to see Dr. Johnston, who administered two tests designed to assess his mental state. On the basis of those tests, Dr. Johnston concluded that Mr. Fuller was capable of making a Will, and he faxed a note to that effect to Ms. Ongman on March 24, 1997.

[19] On April 7, 1997, Mr. Fuller executed a new Will which Ms. Ongman had drafted in accordance with his earlier instructions.

[20] In September 1998, Dr. Schokking, a geriatric specialist, saw Mr. Fuller at the request of Rosemary and Shane. They were concerned about Mr. Fuller's mental state and his ability to live on his own. Dr. Schokking performed a detailed assessment and concluded that Mr. Fuller was suffering from an atypical case of Alzheimer's disease which had produced disabling delusions, but which had left his social functions largely intact.

[21] Dr. Schokking had Mr. Fuller admitted to Prince George Regional Hospital for a more complete assessment in October 1998. There, Mr. Fuller was seen by a neurologist, a psychiatrist and a psychologist. They confirmed Dr. Schokking's opinion that Mr. Fuller was paranoid and delusional as a result of Alzheimer's disease.

[22] On October 8, 1998, Mr. Fuller was formally declared mentally incompetent. His disease progressed and, after living with 24-hour care for approximately a year and a half, he died on July 13, 2000.

DECISION AT TRIAL

[23] The trial judge found that, at the time Mr. Fuller executed his Will on April 7, 1997, he "appreciated the nature of the document he was signing, he knew the extent of his estate and he understood who had potential claims upon that estate." The trial judge stated that the only issue before him was "whether Mr. Fuller lacked testamentary capacity due to a disease or illness of his mind that poisoned his affections towards his children and that led to his disinheriting them." (Para. 24.)

[24] After reviewing the evidence at some length, the trial judge expressed his conclusion with respect to testamentary capacity at para. 40 of his decision, as follows:

> In the result, I find that Mr. Fuller's 1997 will was made at a time when his mind was affected by disease such that he was influenced by delusions which poisoned his affections for his children. The will cannot, therefore, stand. It will be for the parties to determine whether the 1993 will can be submitted to probate.

DISCUSSION

A. The Appeal

[25] Counsel for the appellant does not suggest that the trial judge misstated the law with respect to testamentary capacity, or that he misunderstood the nature of the issue before him. Rather, the thrust of the appellant's submission is that the trial judge failed to properly apply the law to the evidence before him. In effect, counsel for Mr. Flurry submits that there was credible evidence that Mr. Fuller was competent when he executed his Will in April 1997 and that the trial judge erred in preferring evidence which tended to show otherwise. In the result, counsel for Mr. Flurry submits that the trial judge's finding that Mr. Fuller lacked testamentary capacity at the time he executed his Will was the product of palpable and overriding errors.

[26] I now turn to each of the alleged errors in the trial judge's treatment of the evidence.

1. Dr. Schokking's Evidence and Supporting Evidence

[27] Counsel for Mr. Flurry submits that the trial judge placed too much weight on Dr. Schokking's evidence in which Dr. Schokking traced the probable course of Mr. Fuller's Alzheimer's disease. He did so by extrapolating from his assessment of Mr. Fuller in September 1998, back to the time Mr. Fuller executed his Will in April 1997.

[28] The trial judge referred to the relevance of Dr. Schokking's evidence at para. 29 of his reasons:

> Dr. Schokking's opinion was helpful in this case not so much for his diagnosis of dementia in September 1998, but rather his interpolation of the progress of the disease during the several preceding years. Dr. Schokking has had a great deal of exposure to Alzheimer's in a large population of patients. He has attended seminars and education conferences concerning the disease. He said, and I accept, that Alzheimer's is a progressive disease that affects the cognitive function of the patient's mind. The disease is not usually diagnosed until it has already been present for 3 to 5 years. Dr. Schokking says that when he saw Mr. Fuller in September 1998 he was in the moderate stage of the disease. Given the gradual progression of the disease, Dr. Schokking said that it is much more likely than not that Mr. Fuller's mind was affected by Alzheimer's in the Spring of 1997, and probably earlier than that.

[29] The trial judge went on to discuss Dr. Schokking's evidence of the paranoia and delusions experienced by many of those suffering from Alzheimer's disease and the fact that these distorted thought processes frequently focus on family and friends.

[30] The trial judge then referred to the evidence of lay witnesses which tended to support Dr. Schokking's conclusion that Mr. Fuller was probably suffering from delusions during the period in which Mr. Fuller executed his Will. The trial judge noted that the most compelling evidence in that regard was the deposition evidence of Mr. Fuller's long-time friend and neighbour, Mr. Johnston. The trial judge quoted some of that evidence which was to the effect that Mr. Fuller told Mr. Johnston that he was changing his Will because his children "were out to rob him."

[31] The trial judge also relied on Shane's evidence that, a few days before Mr. Fuller changed his Will, he said words to the effect that "the 'German' had been over and was trying to steal his money." The reference to the 'German' was a reference to Rosemary's husband, who was of German descent.

[32] There was further evidence that Mr. Fuller suffered from significant delusions which did not relate to his estate or the children.

[33] It is important to emphasize that the trial judge found that the children were not in fact out to rob Mr. Fuller, but that they were concerned about his well-being. The trial judge was satisfied that there was no rational basis for Mr. Fuller's view that he had to protect

himself and his estate against his children. He found that Mr. Fuller's behaviour was consistent with Dr. Schokking's evidence of the manner in which Alzheimer's tends to manifest itself over time.

2. Evidence Tending to Support Testamentary Capacity

[34] Counsel for Mr. Flurry emphasized the evidence of Ms. Ongman and Dr. Johnston, in particular, as supporting a finding that Mr. Fuller was competent to make his Will in April 1997. Counsel also points to evidence of certain members of the Church who visited Mr. Fuller (albeit infrequently) in the spring of 1997 and who did not witness any delusionary behaviour.

[35] The trial judge accepted that Ms. Ongman and Dr. Johnston believed that Mr. Fuller had testamentary capacity at the relevant time. However, it is apparent from their evidence that they did not have any knowledge of the delusionary behaviour exhibited by Mr. Fuller prior to and around the time the Will was executed. In particular, they were not aware that Mr. Fuller had expressed the view that his children were out to rob him. With respect to the issue of capacity, Ms. Ongman deferred to the opinion of Dr. Johnston, and Dr. Johnston testified that he would defer to the opinion of Dr. Schokking.

3. Mr. Fuller's Social Skills

[36] The trial judge accepted Dr. Schokking's evidence that Mr. Fuller would not likely give vent to his delusions unless confronted in some fashion. Otherwise, Mr. Fuller was able to keep up social appearances. Dr. Schokking described Mr. Fuller's ability to maintain social appearances with acquaintances as an atypical presentation of Alzheimer's. In my view, the trial judge was entitled to rely on Dr. Schokking's evidence in that regard.

4. The $200,000 Gifts

[37] The trial judge found that Mr. Fuller did not intend his gifts of $200,000 to each of the children in 1995 to be exhaustive of their entitlement to his estate. In coming to that conclusion, he relied, in part, on the evidence of the children at the time the gifts were given. He also relied on Shane's evidence that his father told him not long after he gave the children the money that the children would be well taken care of in the future.

[38] I agree with counsel for Mr. Flurry that the fact Mr. Fuller did not change his 1993 Will to disinherit the children after providing the monetary gifts in 1995 is of little assistance in determining whether the 1995 gifts were intended to be exhaustive of the children's inheritance. In my view, however, there was evidence which supported the trial judge's conclusion that the $200,000 gifts were not regarded by Mr. Fuller as being the children's full inheritance at the time they were given, and that it was not until he began to suffer from delusions regarding the children that he decided to disinherit them.

5. Conclusion on the Appeal

[39] I am not persuaded that the trial judge made any palpable or overriding error in concluding that Mr. Fuller lacked testamentary capacity at the time he executed his Will in 1997. The trial judge reached his conclusion after a full consideration of the evidence, and he gave detailed reasons for his decision. It is not for this Court to retry the case and to substitute our view of the evidence for that of the trial judge.

[40] In the result, I would dismiss the appeal.

B. The Cross-Appeal

[41] The trial judge ordered that the children should assess one bill of costs, that Mr. Flurry and the Church should assess one bill of costs, and that the two sets of costs should be paid out of the estate as special costs.

[42] Counsel for the children did not strenuously pursue the cross-appeal. In his factum, he suggested that the result of the trial was to revive the 1993 Will which divided the estate 80 percent to the children and 20 percent to the Church. Thus, if the Church were given its costs out of the estate as ordered by the trial judge, the children would bear a disproportionate share of those costs. As I understand counsel's submission, the trial judge should have taken that fact into account and refused to award the Church costs out of the estate.

[43] In my view, there is no basis for interfering with the exercise of the trial judge's discretion with respect to costs. He found that Mr. Flurry, as executor of the estate, properly brought the issue of testamentary capacity before the court for resolution. He dealt with the fact that Mr. Flurry was wearing two hats: one as executor and one as leader of the Church, by awarding only one set of costs covering both the executor and the Church. In my view, that was a tenable order in the circumstances.

[44] I would dismiss the cross-appeal.

RESULT

[45] I would dismiss the appeal and the cross-appeal.

[46] If the parties are unable to agree as to costs of the appeal, they may make written submissions in that regard. The appellant's submissions shall be filed within 10 days of the release of this decision; the respondents' submission shall be filed within 10 days thereafter; and a reply, if any, shall be filed within five days after the respondents' submission.

"The Honourable Madam Justice Prowse"

I Agree:

"The Honourable Madam Justice Newbury"

I Agree:

"The Honourable Madam Justice Levine"