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**MacGrotty v. Anderson**

JEANNE MacGROTTY and MARIA ANDREWS v. DALE ANDERSON and BONNIE BALL (a.k.a. BONNIE SYLVIA BALL)

Citation: 1995 CarswellBC 825, 9 E.T.R. (2d) 179

Court: British Columbia Supreme Court

Judge: Josephson J.

Heard: June 26–28, 1995

Judgment: August 23, 1995

Year: 1995

Docket: Doc. New Westminster SO-8599

Counsel: *R. Trevor Todd*, for plaintiffs.  
*Peter J. Keighley*, for defendants.

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**Subject:**

Estates and Trusts

**Estates — Testamentary capacity and undue influence — Testamentary capacity.**

Testamentary capacity and undue influence — Testamentary capacity — Deceased granting daughter power of attorney so that she could manage his finances — Daughter transferring entire estate to herself thereby excluding daughters of deceased sister — Even if deceased having mental capacity required to understand power of attorney, deceased lacking capacity necessary to make absolute gift of entire estate to daughter — Granddaughters' action allowed.

In a will executed in 1984, the deceased divided his estate into three equal portions, one to go to each of his two surviving daughters and one to be shared between the two daughters of a daughter who predeceased him. When the deceased died in 1991, the 1984 will could not be found and, as a result, he died intestate. The granddaughters were appointed administrators of the estate by court order.

The deceased had been extremely dependent upon his wife until her death in 1989. At that time, a power of attorney was executed naming one of the daughters, BB, as attorney. In 1990, BB sold the deceased's residence and transferred the proceeds to herself. She later transferred half of the proceeds to her sister.

The granddaughters brought an action for their third of the estate, alleging that the deceased lacked sufficient mental capacity to execute the power of attorney or to effect an absolute gift of his assets to BB. In the alternative, they claimed that BB acted in breach of her fiduciary duty

under the power of attorney.

**Held:**

The action was allowed.

While the evidence showed that the deceased had no interest in money or how it was dealt with, he had cared enough in 1984 to execute a will dividing his estate equally among his two surviving daughters and the children of his deceased daughter. Even though that will had been lost, the same result would be achieved under the *Estate Administration Act* (B.C.). The interests of the granddaughters were entirely foreclosed when BB used her authority under the power of attorney to transfer all of the deceased's assets to herself.

The purpose of the power of attorney was to enable BB to administer the deceased's affairs on his behalf because he had neither the inclination nor ability to do so himself. Neither the family physician from whom BB obtained a letter of mental competence before being granted the power of attorney, nor the lawyer who prepared the power of attorney was given the impression that the purpose of the power of attorney was to grant BB the power to transfer the entire estate to herself. BB's evidence and that of her former husband did not clearly or convincingly establish that the deceased intended BB to have an absolute gift of his entire estate. The evidence indicated that the deceased's mental capacity was diminished. Even if he had the relatively low mental capacity required to understand the implications of the power of attorney, he did not possess the required capacity to effect an absolute gift of the entire estate to BB.

**Cases considered:**

*Beaney, Re*, [1978] 1 W.L.R. 770, [1978] 2 All E.R. 595 (Ch.D.) — referred to  
*Dobson v. Dobson* (1981), 26 R.F.L. (2d) 49 (Sask. Q.B.) — referred to  
*Kibsey Estate v. Stutsky*, [1990] 2 W.W.R. 632, 63 Man. R. (2d) 34 (C.A.) — referred to  
*Lynch Estate v. Lynch Estate* (1993), 8 Alta. L.R. (3d) 291, 138 A.R. 41 (Q.B.) — referred to  
*Rotvold v. Rotvold Estate* (November 27, 1991), Doc. Cranbrook 120901, Melnick J. (B.C. S.C.), [1992] B.C.W.L.D. 271 [additional reasons at (November 13, 1992), Doc. Cranbrook 120901, Melnick J. (B.C. S.C.), [1993] B.C.W.L.D. 099] — referred to

**Statutes considered:**

Estate Administration Act, R.S.B.C. 1979, c. 114.

Action by granddaughters of deceased alleging that deceased lacked mental capacity to effect absolute gift of entire estate to daughter.

**Josephson J.:**

1 Eighty-year-old Mr. Teather died on September 13, 1991. This is a contest over his assets, between his two surviving daughters (the defendants) and the two children of another daughter

who predeceased him (the plaintiffs). The plaintiffs would have received a 1/3 interest in the assets of some \$178,000 had it not been for the defendant Ms. Ball transferring those assets to herself, utilizing a power of attorney executed by Mr. Teather in her favour. Ms. Ball then transferred half those assets to her co-defendant sister, Ms. Anderson.

2 While the plaintiffs claim that Mr. Teather lacked sufficient mental capability to execute the power of attorney, their primary submission is that he lacked the necessary capacity to effect an absolute gift of his assets to Ms. Ball. Alternatively, the plaintiffs claim that Ms. Ball acted in breach of a fiduciary duty to Mr. Teather arising under the Power of Attorney.

## Background

3 A will of Mr. Teather, executed in 1984, purported to divide his estate in three portions, with each of the two defendants to receive one portion, and the two plaintiffs to share the third. As the original of that will could not be located, the deceased died intestate. However, application of the *Estate Administration Act*, R.S.B.C. 1979, c. 114 results in an identical distribution of the estate. The plaintiffs were appointed administrators of the estate of the deceased by order of this court dated November 17, 1992.

4 Mr. Teather had been extremely dependent upon his wife until her death on December 5, 1989. The power of attorney was executed December 14, 1989. Utilizing that authority, his residence was sold and the proceeds transferred to Ms. Ball in April 1990.

5 Mr. Teather visited his next door neighbours almost daily for some two weeks after the death of his wife. On each visit, he enquired as to the whereabouts of his wife and expected her imminent return. They also had noticed odd behaviour on his part for some time before his wife's death, such as walking his dog down the back lane way while dressed in his undershorts or while wearing socks without shoes.

6 Both plaintiffs described a close relationship with their grandparents. They noticed a gradual deterioration in Mr. Teather's mental health through the 1980s. Towards the end of that period, he was unable to recognize individuals well known to him. Mr. Teather was confused and disoriented at times to the point that he became lost on short walks over familiar territory.

7 Ms. Ball testified that Mr. Teather refused to become involved in the handling of his wife's estate, insisting this be done by her. He had difficulty understanding that she could not act on his behalf without his signing a power of attorney. She testified that "he just wanted me to take his money and look after him."

8 The defendants, Mr. Ball (now divorced husband of Ms. Ball), Belinda Ellis (daughter of Mr. and Ms. Ball) and Mr. Pritchett (lifelong friend of the deceased), all testified to the effect that while the deceased had eccentricities, he was mentally competent to the end. Two exceptions were his inability or reluctance for a period of time to accept that his wife had died and his inability to recognize some individuals he had not seen for some time.

9 Because government cheques were payable to Mr. Teather, Ms. Ball realized that she required a power of attorney to process them. She attended upon a lawyer who advised that she

get a letter of mental competence from his family physician. At that medical attendance, the doctor asked the deceased if he knew his wife had died. The deceased cried and said that he did. According to Ms. Ball, the doctor told Mr. Teather that his daughter wanted to look after him and “you have to give her a Power of Attorney” for her to do so. The doctor asked if he understood, and he replied that he did. The doctor noted in clinical records that the deceased “seemed to agree,” and then underlined the word “seemed” three times.

10 The plaintiffs read in portions of the examination for discovery of Ms. Ball where she testified at Q. 317 as follows:

Q And there's a notation that your father seems to agree and the word “seems” is underlined three times. Your father didn't know what he was doing, did he?

A Yes, he did. He was depressed and he was stressed but he did know that I was going to look after him and this is the way he had to go. He didn't under — he didn't like lawyers and he didn't like to, you know, be bothered with this, but he *didn't quite understand what the Power of Attorney meant per se, but he knew that I was going to look after him.*

(my emphasis)

11 Ms. Ball testified that the deceased had never played any role in family finances and, while he knew he had a house, was unaware that he had no other financial reserves.

12 Her recollection of the visit to the lawyer on December 14, 1989 for execution of the power of attorney is vague, but she recalls him asking Mr. Teather if he knew why he was there. Mr. Teather replied that he did, saying that “I'm giving my daughter all my money to do what she wants and she's going to look after me.”

13 When the family home was sold, Ms. Ball had Mr. Teather add his signature to her own on the transfer form, because she felt it was important for his sense of pride. The proceeds, she believed, were deposited into a joint account in the names of herself and the deceased. The deceased repeated to her, she testified, that it was her money and she could do with it as she pleased. He added that he had no need for the money, that she was looking after him and he required nothing but a roof over his head and cigarettes. As income from government sources paid for his living expenses, Ms. Ball decided to set aside some money “in her head” for the benefit of Mr. Teather, and evenly divide the balance with her sister, Ms. Anderson.

14 When asked why she transferred half the proceeds to her sister, she replied that the deceased didn't know what money was, that he didn't care and that she felt her sister deserved half.

### Medical Evidence

15 The plaintiffs offered the expert opinion evidence of Dr. J.S. Martini, Medical Director of the Geriatric Assessment and Treatment Program at St. Paul's Hospital. She reviewed all relevant medical records, including those of his family physicians and the Valhaven Rest Home, where the deceased resided for a year and a half before his death.

16 This opinion is a medical rather than legal assessment, but is nonetheless of great assistance,

particularly as there is conflicting evidence on the issue from those who knew the deceased.

17 After a thorough review of the records, Dr. Martini concluded that the deceased was suffering from a moderate to severe cognitive impairment in December of 1989 that progressed to a very severe impairment with total dependence by the time of his death in September of 1991. She also noted that the progress of symptoms closely matched the usual course of development of Senile Dementia of the Alzheimer's type. While this is a diagnosis of exclusion, she noted that there was no other apparent cause for the cognitive impairment.

18 Nursing records regarding a July 1989 admission indicate daily confusion and disorientation to time, place and person. Dr. Martini states:

I can guarantee that a significant degree of cognitive impairment must be present in order for patients to do this type of behaviour. (sic)

19 Dr. Martini summarizes her findings as follows:

In summary, based on the information provided, and based on my knowledge of the natural history of Senile Dementia of the Alzheimer's Type, I would conclude that Mr. Teather was suffering from a moderate bordering on severe cognitive impairment in December of 1989. The definition of moderate impairment is: "Independent living is hazardous and some degree of supervision is necessary". The definition of severe impairment is: "Activities of daily living are so impaired that continual supervision is required, e.g., unable to maintain minimal personal hygiene, largely incoherent or mute". The Long Term Care Assessor and his daughters found him to be unable to live independently even with extensive homemaker help because of his degree of cognitive impairment. This would therefore put him in the category of requiring continual supervision. I have never yet seen a patient who required continual supervision in this fashion and yet remained competent for finance. Furthermore, since Mr. Teather had apparently not managed his own finances for many years, it is very unlikely that he was aware of the nature of the authority given to his daughters. He would not have had a clear understanding of his assets or his own financial needs. I therefore conclude that Mr. Teather was not competent to assign [sic] a Power of Attorney in December of 1989.

## The Law

20 There is no disagreement between the parties with respect to the law.

1) An adult child who is granted a power of attorney in respect of a parent's affairs is placed in a fiduciary relationship and bears the burden of disproving an allegation of undue influence when that power of attorney is used to benefit the grantee at the expense of the grantor. *Rotvold v. Rotvold Estate* (27 November 1991), Cranbrook Reg. No. 120901 (B.C. S.C.), Melnick J.

2) If the effect of the gift was to dispose of the donor's only asset of value and to pre-empt the devolution of his estate under his will or on his intestacy, the degree of understanding required is as high as that required for a will and the donor must understand the claims of all

potential donees and the extent of the property to be disposed of. *Re Beaney*, [1978] 2 All E.R. 595 (Ch.D.), adopted in *Lynch Estate v. Lynch Estate* (1993), 8 Alta. L.R. (3d) 291, 138 A.R. 41 (Q.B.), Picard J.

3) The presumption of advancement that arises on a transfer from husband to wife is rebutted where the circumstances indicate that the transfer was for convenience only. *Dobson v. Dobson* (1981), 26 R.F.L. (2d) 49 (Sask. Q.B.). A fortiori where the transfer, from father to daughter, is effected by the transferee utilizing a power of attorney previously granted as a matter of convenience rather than with an intention of making an absolute gift, the presumption of advancement is rebutted.

4) Where a gift is alleged to have been made by a donor since deceased, the evidence must be examined with care, even with suspicion, though it need not necessarily be corroborated. *Kibsey Estate v. Stutsky*, [1990] 2 W.W.R. 632 (Man. C.A.)

## Conclusion

21 Mr. Teather was highly dependent on his wife and lifelong companion. While concerned with principles of life, religion and politics, he was not concerned with money nor how it was disposed of.

22 However, he did care enough in 1984 to execute a will ensuring that equal portions of his estate went to his two surviving children and the children of his deceased child. As earlier noted, the original of that will having being lost, the same result would have been achieved under the *Estate Administration Act*.

23 Those interests were entirely foreclosed when Ms. Ball, the grantee under a power of attorney, used that authority to transfer all the assets of the grantor to herself for her own sole use and benefit. While she subsequently conveyed half those assets to her co-defendant sister, she was motivated by what she believed to be a moral obligation only.

24 The purpose of the power of attorney, I find, was to enable Ms. Ball to administer Mr. Teather's funds and financial affairs on his behalf because, at best, he had neither the inclination nor ability to do so himself. That was the purpose conveyed to the family physician and the lawyer preparing the power of attorney. That was the explanation offered to Mr. Teather by the family physician. It was not conveyed to either the family physician or to the lawyer that the power of attorney would or might be utilized to transfer all the assets of Mr. Teather to the grantee for her sole use and benefit.

25 The family physician was not called as a witness. The best to be offered on the issue was a notation in his medical records that the deceased "seemed to agree," with the word "seemed" underlined three times. The obvious implication is that the doctor remained unsure.

26 The evidence of Mr. and Ms. Ball is neither clear nor convincing with respect to the intention of Mr. Teather to effect an absolute gift of his assets to Ms. Ball. Nothing was reduced to writing. Their evidence is to the effect that the deceased wanted Ms. Ball to have his money and look after him. Those statements are also consistent with a trust for that purpose, without an

intention of an absolute gift.

27 Ms. Ball testified that the deceased had no use for nor understanding of the nature and size of his assets. Nor was there any discussion of how those assets should be distributed upon his death, let alone to the effect that other family members would be entirely excluded to the benefit of Ms. Ball. There is no evidence that the deceased was informed of the specific transaction constituting the absolute gift in April 1990, let alone that he understood and consented.

28 I accept the evidence of Dr. Martini with respect to the mental capacity of the deceased. Those conclusions are not entirely inconsistent with the evidence of witnesses for the defendants, bearing in mind the nature of the incapacity.

29 Even assuming that Mr. Teather had the relatively low mental capacity required to understand that the Power of Attorney would enable Ms. Ball to handle his financial affairs on his behalf, he fell far short of possessing the required capacity to effect an absolute gift of his entire estate to Ms. Ball. He did not have an understanding of the extent and nature of assets being conveyed, nor did he have an understanding of the interests of other family members that might be affected.

30 I find that Mr. Teather had neither the intention nor the mental capacity to effect the absolute gift.

31 Judgment is granted for the amount claimed, together with interest and costs.

*Action allowed.*