

SHERIFFDOM OF GLASGOW AND STRATHKELVIN

[2022] SC GLW 2

GLW-A531-21

NOTE BY SHERIFF A M CUBIE

in the Action of proving the tenor

RW

Pursuer

against

JW

Defender

Glasgow 12 January 2022

Note

[1] I was presented with an application for decree in an action of proving the tenor. The document which was said to be missing was a will. A copy of the principal will, was provided by the executor to the agents and lodged as production, along with an affidavit from the principal solicitor involved.

[2] This is a relatively new jurisdiction for the sheriff court. The jurisdiction of the sheriff was extended to include actions of proving the tenor by the Courts Reform (Scotland) Act 2014. Chapter 53 was added to the Ordinary Cause Rules to regulate the procedure; the rules are similar to the equivalent Court of Session Rules at chapter 52.

[3] The pursuer applied by minute for decree in Form 53.4. Evidence is to be given by affidavit unless the sheriff otherwise directs. The sheriff may, on consideration of that minute, together with supporting documentary evidence and affidavits, grant decree in terms of the minute, or alternatively remit the cause for further procedure including proof by parole evidence.

[4] The solicitor's affidavit appeared to indicate that the agent had sought a copy of the will before the principal will had gone missing. I appointed a hearing and as a result of submissions made, I continued the case for provision of a supplementary affidavit. Two further affidavits were lodged. Having considered the material lodged, I now grant decree in the terms craved. I set out my reasons below

Proving the tenor

Procedure

[5] An action for proving the tenor is appropriate where a deed has been lost as a means of reviving that deed with the same force and effect as the original deed. The crave of the initial writ should so far as possible (as has been done in this case), reproduce in its entirety the document to be proved, rather than by incorporation *brevitatis causa*. That is good practice, avoiding any lack of clarity in the decree or extract. See *Comm: Breaking New Toys* Civ PB 2019, 150, 2-6 for an alternative view of incorporation *brevitatis causa* but *Begbie v Fell* (1822) 1 S 391 remains authority for the proposition that the terms of the deed should be incorporated in the crave; any suggestion that incorporation in full would involve needlessly repeating the terms of a deed overlooks the fact that the decree and subsequent extract, which takes the place of the deed, will require to be a stand-alone document which *in gremio* narrates the tenor of the deed.

[6] The practice of copying or scanning documents makes the proof of tenor more straightforward in modern practice but the court can consider deeds which have been lost but not copied (*Leckie v Leckie* 1884 11R 1088; *McLernan v Ash* 6 March 2001 Court of Session (Lord Eassie) unreported).

[7] The pursuer must call as a defender every person who (so far as known to the pursuer) has an interest in the document to be proved Rule 53.2(1). This should, in applications dealing with missing wills, include not only potential beneficiaries but also those who may lose out, whether beneficiaries under an earlier will or in intestacy. Where only the pursuer has such an interest, the pursuer must call the Lord Advocate as a defender, as representing the public interest Rule 53.2(2).

[8] When lodging an initial writ, the pursuer must lodge in process supporting documentary evidence of the tenor of the document to be proved, so far as in the possession or control of the pursuer. (Rule 53.3)

Legal test

[9] Three matters require to be established before the action can succeed; the terms (or tenor) of the document; the execution of the document; and the circumstances of the loss (the “casus amissionis”).

[10] There is plain evidence in relation to the first two elements, provided by the copy will showing the tenor and the execution

The circumstances of the loss

[11] The circumstances of the loss were less straightforward in relation to the material originally submitted. The affidavit said that the principal will went missing “in or around

the first fortnight in December 2020” during a transfer between offices of the solicitor involved. A package sent from one office to the other arrived short of the principal will.

[12] But the email from the executor sending a copy of the principal was sent on 30 November 2020; the email or other contact which elicited this response was not clear, but on one view it looked as if by that stage the principal will had gone missing. The email said:

“Please find attached scanned copy.

Initially you were quite specific that you needed the original signed version of the will. Does this mean there will be problems moving forward?”

[13] That begged a number of questions; I appointed a hearing. It was explained that the documents were sent to a branch office from a city centre office; they were not then easily accessible because of lockdown. The office there was to all intents and purposes closed. On that basis the principal solicitor sought a copy from the beneficiary; this was sent by the email of 30 November 2020 to which reference is made. That could not immediately be reconciled with the timescale described in the original affidavit.

[14] I continued the hearing for a further affidavit. The supplementary affidavit of the solicitor clarified matters; the solicitor concerned emailed the executor on 29 November 2020 asking if there was a will. By that time there a suspicion that the principal will had indeed been sent to the solicitors and misplaced, but that suspicion did not crystallise into knowledge until the executor, in sending the scanned copy of the will, confirmed that the principal had been sent to the solicitors. A search failed to find the principal will.

[15] The authorities recognise that loss in a solicitor’s office is a legitimate and credible reason for loss; (see *Walker v Brock* (1852) 1 D 362 where a disposition was lost during removals by a solicitor) but the writ must address accurately and fully the circumstances which give rise to the loss of the document.

[16] The solicitor seeking to prove the tenor should explain the context in which the scanned copy was sought. The court does not “rubber stamp” an assertion made by the pursuer; such an action is not a formality nor of limited consequence. The court is entitled to be satisfied about the loss which remains an essential component of the procedure, notwithstanding the ease of copying or reproducing the missing document electronically. There must be an intelligible explanation for the loss justifying the grant of a decree declaring the terms of the missing deed.

[17] Having considered the additional material I am satisfied that a decree should be granted.