CASE TRANSLATION: NORWAY

CASE CITATION:
LB-2006-27667

NAME AND LEVEL OF COURT:
Borgarting appellate court – judgement

DATE OF DECISION: **20 August 2007**

MEMBERS OF THE COURT:
Presiding Judge Jan Martin Flod, Temporary Appeal Court Justice Harald Venger and Magistrate Stein Arne Vedde

LAWYER FOR A:
AdvokatBorgarHøgetveit Berg

LAWYER FOR B:
AdvokatBorgarHøgetveit Berg

LAWYER FOR C:
Advokat Christian Fredrik Galtung

Succession law. Lost testament.

The probate court and the appellate court found that a successor by testament should succeed according to a lost testament according to Lov om arv m.m., LOV 1972-03-03 nr 05 (short title: Arvelova) (succession act) section 69.[1] It was not clear how the testament had been lost, but a number of electronic copies were stored on a personal computer and also sent as an attachment to an e-mail. Several circumstances supported the proposition that the testament expressed the last will of the deceased, and there was no doubt as to the contents. The required forms were fulfilled when the testament was made. Statement on the standards for proof.

Oslo Town Clerk Office TOBYF-2005-120940 – Borgarting Applleate Court LB-2006-27667. Appeal to the Supreme Court denied HR-2007-1859-U.

The full judgment in Norwegian is available from lovdata.no (subscribers only).

(Note by Professor Jon Bing: The decision is from the Appellate Court. Norway has fiveAppellate Courts – Borgaring is for the region near Oslo. The decisions are classified in accordance with the provisions of the civil procedure act, and this is a decision in substance. The publication numbers refer to the assigned identifiers in Lovdata, the national legal information service. The keywords and abstract are editorial. The procedural history indicates that the Supreme Court refused to hear the case. The decision of the Supreme Court is not available, but the Supreme Court will not hear cases which mainly rest on evidence. The titles of the judges may appear to be confusing, but the appeal was heard with a mix of judges including judges of lower levels.)

D died on 24 February 2005 at Cs cottage in X. He had known her in a period during the 1980s, and from 2000 a lover's relationship had developed between them. They moved to live together in 2003, though Ds business in Oslo had the effect that they only lived together for periods. They were engaged in 2004 and intended to marry during Easter 2005. D left a testament in favour of C, and in the event she died before him, to the Salvation Army. The testament included provisions on the accommodation and contributions towards the support of his parents. The testament also contains a passage indicating that his sister E and her heirs should not benefit under any circumstances.

D's mother, B, owned a manor, Y farm in Z, and 16 apartments and office suites in two buildings in ...street in Oslo.

In 1991 B transferred Y farm to her daughter E, and in 2003 she transferred the flats and office suites in ...street to her son D. A conflict arose in the family, because the daughter thought she was the subject of an unfair share of the property, and that her mother had been pressured to make the transfer. The mother denied she was pressured, and the daughter replied by asking to have her mother declared incapacitated. In the decision by Oslo first instance court of 18 June 2004, the request was not granted. The decision was appealed to Borgarting appellate court, but the appeal was withdrawn some weeks before the appellate procedures, after her brother's death.

From what has appeared during the proceedings, the appellate court find that E's protests relating to the transfer of property to her brother, her action against her mother, and the appeal of the decision of the first instance court created difficult internal relations in the family, where she and her spouse confronted the rest of the family, as well as the parents. E may have disputed during the appellate procedures that there were any

[1] *'Kan eit testament ikkje finnast når testator er død, skal det likevel gjelde når innhaldet kan klårleggjast, med mindre ein må gå ut frå at testamentet er kalla tilbake eller at det har vore ugyldig.' ('If a testament cannot be found when the testator has died, it shall nevertheless be valid, unless there is reason to believe that is has been revoked or has become invalid.') (The translations were provided for the Foreign Office. Note that the Norwegian version is in 'nynorsk', the second variation of the written language.)*

distinct conflicts within the family, but the witnesses in the case and the content of the disputed testament clearly shows that there was an irreconcilable conflict between her and her brother. It does appear obvious that the relation between the siblings became difficult because of the conflict relating to the legal action taken by the sister. D and his mother had a close and warm relationship, and he must have, on her behalf as well as his own, have felt somewhat frustrated when his sister challenged the property transactions to have them declared invalid by having his mother declared incapacitated. The decision of the first instance court did not satisfy her, because she appealed the decision, and this must have contributed to maintain the level of conflict.

The appeal court finds it appropriate to mention that it is a matter of fact that the mother, during the first period after the death of her son, had no objections to his testament in favour of his mistress C. It also implies that she does not contest the validity of the transfer of the apartments and suites in ...street to her son. That she – and her spouse –initiated legal proceedings at a later date relating to the testament and, in addition, proceedings relating to the property transfers themselves, is therefore an indication of a change of her earlier opinion. That the daughter has gradually improved her relation with her parents should be considered when assessing the evidence in this respect. The appellate court noted that the parents lost the dispute with respect to the property transfers in the Oslo first instance court, but the case has been appealed.

In spite of an intense search, which only started some days after the funeral, the original testament signed by D has not been found. However, it is an accepted fact that he had created a document calling itself a testament in the presence of two witnesses. He also sent this as an attachment to an e-mail dated 7 November 2003 to C. As the appellate court will return to below, there is no doubt that the document sent to her is a copy of the testament D created and signed on 7 November 2001. The e-mail is found on a backup list for C's personal computer which D established. The e-mail itself reads: 'I love you.'

In addition, several other copies of the document were found in different places. For instance, three different back-ups were found on a hard drive in D's safe in ...street, and also on a hard drive in his safe deposit box at his bank.

In the dispute regarding the estate, Oslo Probate Court and Town Clerk Office reached the following decision on12 December 2005:

1. The testament dated 7 November 2004 shall be the basis for the distribution of the estate after D born ** 1955.
2. Within 2 (two) weeks after the announcement of this decision B and A pay in solidum[2] to C the costs of the proceedings amounting to 106 425 (onehundredandsixthousandfourhundredandtwentyfive) kroner to which is added value added tax of 102 200 kroner and with 9 (nine) per cent annual interest from due date to the date payment is made.

B and A have submitted an appeal within time to Borgarting second instance court and made the following final claim:

1. A draft document not signed by D, dated 7 November 2003, shall not be qualified as testament in the distribution of the estate after the death of D.
2. C pays the costs to B and A regarding the Probate Court and the appellate court with the addition of interest according to the act on interest for delayed payments section 3(1) from due date to the date payment is made.

C has responded, and made the following final claim:

1. The decision by Oslo first instance court and Oslo Probate Court are confirmed.
2. C is paid the costs of the appellate court in addition to the interest for delayed payment according to the law from due date to the date payment is made.

The appellate proceedings were conducted 28 June 2007 in Oslo. The parties appealing the decision were not present, but they were represented by the daughter E, who was also a witness in the case. C was present and made a statement. Each party was represented by legal counsel. Six witnesses were heard.

B and A have argued during the appellate proceedings in general:

[2] *'In solidum' means that the full amount can be collected from either A or B, while they, in respect to each other, are only liable for half the amount. If one pays the full amount, then there will be a secondary claim to the other for half this amount. In solidum is therefore a security with respect to the creditor.*

There is no testament to be found after the death of D. No valid testament has been created, and if a testament was created, the contents cannot be determined. In any event one cannot exclude the possibility that the testament has not been withdrawn. The beneficiary of the testament has the burden of proof.

The question of whether, at a certain moment in time, there exists a valid testament is a matter of proof, and the requirements are strict, cf Rt-1994-1256.[3] There is no doubt there does not exist a copy of the original testament, neither as a conventional copy, confirmed or not confirmed, and no scanned copy. It should therefore be clear that there is no basis for determining that a valid testament has been created. The instrument necessary to determine an act by the testator to adopt the testament is lacking, and there is no justification to consider the provisions of section 69 of the succession act.

Only a draft of the testament has been presented in the case, necessarily produced before it was signed, and this draft cannot therefore indicate with any degree of certainty what may have been signed. A subsidiary argument submitted is that even if a valid testament has been created, which has been lost at a later stage, it is not possible to determine its contents. Only the deceased saw the contents, and it is not possible to establish what the deceased knew. The task of the court is not to determine the contents of the draft to the testament, but the testament itself. Consequently succession cannot follow in accordance with the provision of section 69 of the succession act.

A further subsidiary argument submitted is that a possible testament was withdrawn by the deceased. The fact that neither the original testament, nor any copies have been found, provides a presumption for a withdrawal of the testament. There is reason to presume that a testator would preserve the original document, and scan or make some other copy of the testament. Where none of these are found, the testament must have been withdrawn, and according to the current law the burden of proof rests with he who claims heritage based on testament, cf Lødrup *Nordisk arverett* page 280.[4]

C has, during the appellate proceedings in general, argued:

The testament of 7 November 2003 should be the basis for the distribution of the estate.

The succession act section 69 on lost wills is the natural point of departure for the arguments of the court. As the provision presumes that a valid testament is created according to the rules of section 49 of the succession act,[5] it is of little consequence whether section 69 is applied when deciding whether a valid testament has been created.

The text of the testament dated 7 November 2003 complies with the law, and two witnesses were simultaneously present with testator, they saw him sign, and signed themselves as witnesses to the testament. There a valid testament was created in accordance with the provisions of section 49 of the succession act.

It is not appropriate to characterise, as does the other party, the testament of 7 November 2003 as 'a draft' to the testament. Electronic metadata shows that the document has not been amended after 7 November 2003 at 12:04, and it is a printout of this document that was signed later the same day. Neither the original or a photocopy of the signed paper version of the testament has been found. The provision of section 69 of the succession act governs this situation. The testament shall apply when the content is determined. It is admitted that the criteria for permitting this are strict, but in this case are the conditions, based on a general assessment of the

[3] *The original was lost. A photocopy was produced, which was claimed to be a copy of the original. This was not accepted.*

[4] *The major Norwegian text book on succession law.*

[5] *'Når ikkje anna er fastsett i dette kapitlet, skal testament gjerast skriftleg med to vitner som testator har godtatt og som er til stades saman og veit at dokumentet skal vere testament. Testator skal, medan dei er til stades, skrive under dokumentet eller vedkjenne seg underskrifta. Vitna skal skrive namna sine på dokumentet medan testator er til stades og etter hans ønske.*
Har vitna gitt testamentet påskrift om at reglane i første ledd er følgde, er dette prov nok, når ikkje særlege tilhøve gir grunn til å tvile på innhaldet i påskrifta.
Loven er ikkje til hinder for at fleire personar gjer felles testament. Heller ikkje er loven til hinder for at fleire personar gjer testament til føremon for kvarandre (gjensidig testament).'
('Unless otherwise provided in this Chapter, a testament shall be drawn up in writing with two witnesses who have been approved by the testator and who are simultaneously present and know that the document is a testament. The testator shall in their presence sign the document or confirm his signature. The witness shall sign their names on the document while the testator is present and it his wish.
If the witnesses declare in writing on the document containing the testament that the rules of the preceeding paragraph have been observed, such declaration shall be deemed to be sufficient evidence, unless special circumstances give reason to doubt its correctness.
This Act does not prevent two or more persons from drawing up a joint testament. Nor does the Act prevent two or more persons from drawing up a testament in favour of one another (reciprocal testament)').

facts, are clearly satisfied.

After the deceased passed away, no other testaments or documents relevant in this respect including electronic media have been found, only the document dated 7 November 2003.

Identical copies of the document of 7 November 2003 are found on several electronic storage media by the deceased, such as special disks, stored in a safe and a deposit box, and the testament was also attached an e-mail to C sent on the same day at 16:57. D had given this e-mail the description 'TESTAMENT F.E.dok.'[6] The document was later communicated to legal counsel Øystein Rød some two weeks before D died. It is not realistic that he would have sent a copy other than the correct one to his fiancé and the family lawyer with the intent to mislead them.

The contents of the testament have a logic to them. The deceased had a close relation with his fiancé and partner C, and they were to be married in the near future. It was also important for him to provide for the financial security of his parents, something he had discussed with his fiancé previously. At the same time, the relation with his sister and her spouse was bad, and became worse in the period after the testament was executed and up to his death. There is no reason to suggest that the testament had been recalled.

The conditions that provide the motivation for the testament, the love for his fiancé and the mistrust of his sister, increased. He was to marry a few weeks after his death, and there was no pretext or reason for recalling the testament. If he wanted to recall the testament, he would in any event have made sure to do so in a way that was easily recognisable. He knew it was stored electronically, and it is accepted that if he intended to withdraw the testament, he would have told his fiancé.

The **appellate court** finds:

The appellate court agrees with the decision of the Probate Court, and can in general support its arguments.

By the way of introduction, there is reason to emphasise that the succession act was passed at a time when electronic word processing, document storage, e-mails *etc* did not exist. The terminology of the act, which is strongly bound to paper documents containing the instructions of a testator, and with the formal requirements for the creation of a testament, apply without any change. Therefore, succession by testament can only be claimed on the basis of a formally valid written document. This also holds if a testament is lost. To succeed is necessary to prove – and the criteria for proof are strict – that a valid testament has been created and that the contents can be determined.

Obviously, the development in information technology cannot be without relevance in relation to testaments and succession by testament as proof in accordance with the succession act section 69. However, one should take into consideration the weaknesses of such proof, and the possibility of any misinterpretations that may occur. For instance, amendments in an electronic document will delete what is amended in such a way that the amended document presents itself as an apparently uncorrected copy of the original. Where an electronic testament is first created, it may be retrieved even if the testator has recalled the testament, by both the destruction of the original testament and deletion of the electronic copies from their storage. Deleted documents may be found and reconstructed using relatively simple methods.

To ensure notoriety regarding the last will of the testator, there is therefore reason to firmly apply the strict rules of proof governing lost testaments in accordance with the succession act section 69. The provision is an application of the requirement that the original document must be present, and therefore there must be strict criteria as to the proof for the creation of a valid testament that has not been recalled at a late stage, and the content of the act. He who claims succession by testament has the burden of proof.

In the appeal case, a discussion has taken place between sections 49 and 69 of the succession act. The appellant has, in this respect, argued that there exists a condition for proceeding to the provisions of section 69 of the act, in that it is proved that at a certain time a valid testament existed, that is a document created in accordance with the formal procedure set out in section 49 of the succession act. In this respect, Rt-1994-1256 is cited where it is stated that 'the copy of the testament as such did not represent clear or decisive proof for a corresponding testament having been created'. Neither the original nor a copy of the original document exists in this case. The instrument, the 'entrance key' to section 69 of the act, which is proof of the last will of the deceased, is missing. The respondent has argued that in this case it is not relevant whether the question of validity is governed by section 69 or directly by section

[6] *Probably a misspelling for 'doc'.*

49.

Where a testament has been lost, it is a condition to succeed that the testament was created in a valid manner, that it has not been recalled, and that the content can be determined, in accordance the conditions set out in section 69 of the succession law. The question as to whether these statutory conditions are present relies on a concrete evaluation of the evidence. The assessment of the evidence is free, and it is not required that a copy of the original must be available.

On the other hand, it is obvious that the lack of a copy of a signed original is relevant for the judgement of evidence that has to be made in accordance with the provisions of section 59. That the original has not been found makes it necessary to require strong standards of proof to determine that the deceased had made a valid and formally correct testamentary disposition of the content as claimed. On the other hand, one must not lose sight of the last will of the deceased, which ought to be realised. If fully satisfactory proof can be given for the deceased having created a valid testament, which was recalled at a later date, and where there is no doubt of its contents, his last will should be fulfilled.

According to the assessment of the appellate court, there is no doubt that D created a valid testament. Both witnesses to the testament explained themselves during the appellate proceedings, and they have given evidence that after having been asked by D to be witnesses, they stayed together with him when he signed the testament. They did not see the text itself, which D either had folded over or hidden by another paper, but they were told the document was a testament, and they saw the title of the document before they signed. They also saw the text above the place they signed. The appellate court finds their explanation credible, and the nuances in their explanations are not more than must be expected by witnesses giving independent explanations from memory.

As mentioned above, no copy of the testament itself has been presented. What exists are a number of identical electronic stored copies. As with the Probate Court, the appellate court finds according to a concrete assessment of the evidence, identical to that of the Probate Court, that the identical copies found after the death of D are identical to the valid original testament that is lost.

In the current case, it is not surprising that copies of the original document could not be found. D worked with information technology, and it was therefore natural to him to use electronic document processing, storage and communication, rather than conventional copying.

It appears that the dating of the testament was retained as document on the PC of D on 4 November 2003. The document was later opened, but not after 7 November 2003. The appellate court finds that D was working with the text of the testament up to this time, and the original copy was then printed out and signed in the presence of the testamentary witnesses later the same day. They have obviously not been able to indicate the date they witnessed the testament, but there are no indications that this was not 7 November 2003.

This is supported by the fact that the e-mail sent to E was also sent on this date. The testament, dated the same day, was attached to the e-mail. Admittedly, the e-mail was found on a back-up of her Outlook established by D, but this cannot be crucial. C has explained that she clearly remembers receiving the e-mail, and that the attachment was identical to the document present in this case. She has also explained that she never received or saw any other copy. The appellate court finds the explanation of C credible.

The appellate court will further clearly exclude that D would have communicated a document other than the valid document created to his partner. There is obviously the possibility that he communicated the testament to her before it was signed the same day, and that he subsequently amended the document before sending it to her. The appellate court is certain that in such a case, the corrected testament would have been the one communicated to her afterwards. In addition, he had a telephone conversation about the testament with C the same day.

In addition, some 16 months later, a short time before his death, D also communicated the same testament to the family lawyer, Øystein Rød, in connection with the case for incapacitation which the sister had initiated against the mother. The testament is also found as backup files stored on separate hard drives that D stored in a safe and a depository box. In every place, the document is dated 7 November 2003.There is no other document with another date or different contents.

The testament also contained contents that appear quite logical. When the testament was created, D and C were established as lovers. It was a relationship that, according to several witnesses, meant much to him. According to one of the witnesses, he had gained a new and better life than before. The relationship with C

developed further; they got engaged to be married and decided a date for the wedding. His wish for her to succeed him, she had had an infarction and suffered from diabetes, appears well considered, reasonable and clearly in correspondence with the impression the witnesses in the case have given of the deceased. There is no reason to doubt that the testament represent the last will of D.

Also, the provisions in the testament on domicile and support of the parents are in correspondence with the good relationship D, according to witnesses, had with his parents, especially his mother. What is written with respect to the parents further supports the impression of a well considered and reflected testament. He had also discussed with C the implications for her if he should die before her, and should his parents still be alive. This was in practice the possibility he saw for supporting his parents if he should die first. There cannot be any doubt that he saw this as a good solution. He trusted his partner fully, who had a good relationship with his parents, and he trusted that they would be safe.

The appellate court finds that D had a bad relationship with his sister E and her spouse. The situation become more acute with the reaction to her mother's transfer of apartments and suites in ...street some months before the testament was created. The provision that the sister and her family should not succeed him in any way is therefore also a conscious decision.

This is further supported by what emerged through the explanation of the witnesses during the appellate proceedings of what D had said about the testament and its contents. Though the testament witnesses was not shown the text of the testament when it was signed, D did not refrained from talking about the contents, and there is no evidence which throws any measure of doubt over him having created a valid testament with contents that are identical to the electronic copies.

Neither are there any reasons to believe the testament was recalled.

The fact that an original testament has not been retrieved cannot in this case be decisive. There are several possible explanations for losing a testament. The appellate court can, first, not be sure that the original testament exists among the papers he left. Second, reference is made to the fact that the testament relates to objects of great value that were contested, and that there has been disclosed information demonstrating a certain lack of order with respect to securing the estate of D for days after his death.

However, there is little reason to discuss this further, as there is a very solid and certain basis in evidence to find that D only made one testament, and that this was not recalled. He would undoubtedly have communicated this to his fiancé, whom he was to marry in the near future, if he had withdrawn the testament. Otherwise he would have misled her, and their relationship would seem to exclude this possibility. D would also obviously have contacted the family lawyer if the testament he had sent him was no longer valid. D was careful to store the testament on several hard drives which were in turn stored in safe locations, and he would obviously have seen to the deletion of the testament if he recalled it from these locations, or otherwise would have ensured he clearly expressed his recall of the testament. For D, who worked with information technology, the appellate court considers it beyond belief that he would not have left some electronic proof of a withdrawal. Obviously D knew the testament could be found at several locations, and if he wanted to withdraw the testament, he obviously knew he could not let the testament remain with those he has passed it to, or to remain at each of the storage locations.

In addition, a further consideration is that the relation between D and his sister and her spouse still was very bad. He was angry that his sister initiated the incapacity proceedings, and this cannot have been eased by the sister, after losing the case in the first instance, by appealing the decision. The appeal trial had been given a date when he died. The conflict was not determined before his death, and that he was in such a state of mind that he would withdraw a testament in which a major provision was to avoid his sister succeeding him after the death of his parents, would seem beyond thought.

In the light of this, the appellate court finds that C has proved to such a degree as follows from the succession act section 69 that D created a valid testament, which has not been withdrawn, and that its contents are documented.

The decision of the Probate Court is confirmed. This also applies to the legal costs, to which the appellate court has no comments.

The appeal has been in vain, and according to civil procedure act sect 180(1), B and A are obliged in sodium to pay the legal costs of the appellate court hearing. The counsel for C has presented a statement for 96 875 kroner including value added tax, of which 77 500 kroner is the fee. The appellate court accepts the statement, cf civil procedure act section 176.

The decision of the appellate court is unanimous.

Decision

1. The decision of the Probate Court is confirmed.
2. B and A are to pay within 2 – two – weeks from the announcement of this decision and in solidum to C legal costs for the appellate court of 98 875 – ninetysixeighthundredandseventyfive – crowns with the addition of interest for delay according to the delayed interest act until payment are made.

Sistoppdatert 25 April 2008

Commentary

Under Norwegian succession law, testaments are exceptional. The issue of the deceased will succeed in two thirds of the estate; this cannot be amended by testament, upholding a tradition of a strong succession right for the family going back to the earliest Norse legislation. Also, the spouse of the deceased will succeed in one quarter of the estate. What is left, may be subject to testament, but is a possibility of which the deceased rarely takes advantage. There are therefore only few typical cases in which testaments are made, the most common being that in which the testator does not have any issue, as in this case.

If a testament is made, it has – as in most jurisdictions - to adhere to a set of formalities. These include the testament to be a paper document signed by two witnesses present at the same time as the testator, each person signing the document. The witnesses also have to know that the document is the last will of the testator, but do not have to know the content of this last will. There are also a few further requirements.

There is, under Norwegian law, no scheme for depositing testaments, although they are often left in care with a lawyer. The typical situation will be that the testament is part of the documents of the deceased, stored with other important documents. Obviously there is a risk of the testament not being found. For this, the rules set out in section 69 of the succession act will apply.

First, it has to be proven that a formally valid testament has been created. As evidence is permitted by the discretion of the court, this may be proven in any way. In this case, the evidence is the oral evidence of the witnesses to the testament. But it could be a note in a diary, correspondence and such like. Both the existence of the testament and compliance with the formal requirement has to be proven.

Second, the contents of the testament must be determined. It will be noted that the forms of the testament would exclude any document relating to the last will which is not formally correct. Therefore, when a testament is lost, it is necessary to prove the contents in some detail. It will typically be a copy of the testament, for instance passed on to a friend for safekeeping.

Third, the testament must not be withdrawn. The testament may be withdrawn at any time, and there are no formalities for withdrawal, typically the testator will just destroy the testament.

As the court remarked, the succession act was adopted in 1972, at which time word processing was not an issue. In case law, providing a copy of a testament has not been accepted as sufficient evidence, the reason for there only being a copy may be the destruction and thereby the withdrawal of the testament.

The importance of this decision is mainly in the significance that the court places in the contextual evidence for the computerised copies (1) to represent the contents of the original testament, and (2) there being no indication of withdrawal. The court determined that a testament has been made in the traditional way, based on the testimony of the witnesses. The court then established the contents of the original testament with reference to the computerised copies and the circumstances in storing and communication the copies. The same circumstances are used for establishing that the original testament has not been withdrawn.

It is interesting to observe that the court would seem to have found the evidence strengthened by the obvious possibility that the reason for the original not having been identified is that it has been removed from the documents of the deceased. Therefore the circumstantial evidence of a technical nature would seem in this decision to have been complimented by knowledge of human nature.

Jon Bing, professor at the Norwegian Research Center for Computers and Law, Faculty of Law, University of Oslo. Dr juris (1984) on a thesis discussing legal information systems. Research interests include intellectual property, data protection and Internet Governance. Dr jur hon (Stockholm and Copenhagen), Visiting Professor, King's College, London 1998-2000.

http://www.jus.uio.no/iri/english/index.html

