

CANADA / JUDGMENT

Barnes Estate v. Barnes

2011 BCSC 1449

COURT

Supreme Court of British Columbia

DECIDED

28 October 2011

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2011 BCSC 1449 Barnes Estate v. Barners

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Barnes Estate v. Barnes,

2011 BCSC 1449

Date: 20111028

Docket: 10 4510

Registry: Victoria

Re: The Estate of Maymie Irene Barnes, Deceased

Between:

Jaymie Michelle Barnes, as Administrator of the Estate of

Maymie Irene Barnes and Diana Irene Barnes, as Administrator of the

Estate of Maymie Irene Barnes

Petitioners

And:

Eric David Barnes

Respondent

Before: Master Bouck

Reasons for Judgment

Counsel for Respondent (Applicant):

P. B. Newman

Counsel for J. Barnes, in her capacity as a beneficiary to the Estate:

J. M. Hutchison, Q.C.

Place and Date of Hearing:

Written Submissions Received:

Victoria, B.C.

September 27, 2011

October 7, 2011

Place and Date of Judgment:

Victoria, B.C.

October 28, 2011

INTRODUCTION

- [1] This application arises in the context of a petition seeking the court's opinion on the construction of Maymie Barnes' Last Will and Testament (the "Will").
- [2] All of the parties involved in this application carry the surname Barnes. For ease of reference, some of the parties will be referred to in these reasons by their first names only. In doing so, no disrespect towards these individuals is intended.
- [3] The petition is brought by the administrators (the "Administrators") of the deceased's estate (the "Estate"). Those Administrators are Diana and Jaymie Barnes.
- [4] The Will leaves the Estate to Maymie's sons, Kenneth and Ernest Barnes, in equal shares. Kenneth and Ernest are also named as executors in the Will. Kenneth and Ernest predeceased their mother, but both left children (the "Grandchildren").
- [5] The administration of the Estate has been complicated by disagreements over the status of two of the four Grandchildren. Eric and Diana Barnes are the children of Ernest, while Jaymie and Steven Barnes are Kenneth's children.
- [6] This application is brought by Eric Barnes. Eric alleges that Kenneth is not the biological father of either Steven or Jaymie. Accordingly, under a proper construction of the Will, neither Jaymie nor Steven is a lineal descendant or issue that can stand to inherit the estate: Estate Administration Act, R.S.B.C. 1996, c. 122, Black's Law Dictionary, 6th Ed., p. 445.
- [7] Importantly, the petition itself raises the question of Jaymie and Steven Barnes' paternity as one of the opinions sought from the court.

THE APPLICATION

- [8] Eric Barnes seeks a variety of relief in his notice of application filed June 9, 2011.
- [9] Primarily, Eric seeks an order that both Steven and Jaymie Barnes submit to DNA testing in order to determine their paternity. The DNA testing is proposed to be conducted by Orchid Cellmark Inc. ("Orchid"), an agency operating in New Westminster, B.C. According to the information in the court file, Steven resides in Kitimat, B.C., while Jaymie is a resident of Sarnia, Ontario. The proposed order contemplates Steven and Jaymie "making arrangements" with the agency to perform the DNA testing.
- [10] Eric hopes that the testing will support his theory that these cousins are not blood relatives. Such evidence may support a declaration by the court that neither Jaymie nor Steven are beneficiaries under the Will. Although this latter relief is sought in the notice of application, Eric acknowledges that a Master has no jurisdiction to make such a declaration.
- [11] Similarly, I query whether a Master has jurisdiction to make the proposed order that the results of the DNA testing "shall be binding upon the" Estate.
- [12] Eric also seeks an order that a hospital in Terrace B.C. or any other facility within British Columbia provide all medical records in its possession relating to bodily tissues or blood samples of Kenneth Barnes. Neither the hospital nor any other medical facility was given proper notice of this application.
- [13] Eric suggests that the medical records might be obtained from a solicitor formerly involved in this litigation. No relief is sought against the solicitor in the notice of application.
- [14] Jaymie and Steven Barnes resist all aspects of this application. Only Jaymie had counsel speak to the matter. Mr. Hutchison argues that there is neither the factual nor legal basis for the orders sought.
- [15] The Administrators are represented by another counsel and take no position on this application.
- [16] The hearing of the application consumed more than the initial time estimate, primarily due to Jaymie's argument over the admissibility of certain evidence. The focus of the submissions was the inadmissibility of an affidavit Dr. B. Piercy, urologist. There was insufficient court time to hear the applicant's reply to that argument. Hence, the applicant was given leave to provide written submissions on that narrow issue. Those submissions were received on October 7th.

RELEVANT FACTS

- [17] Maymie Barnes died on December 26, 2008.
- [18] Given that neither of the named executors was then living, the appointment of an administrator for the Estate was required. A contest arose amongst the Grandchildren as to who should take on the role of administrator.

- [19] On July 24, 2009, Boyd J. ordered that the Grant of Letters of Administration be issued to Jaymie and Diana Barnes.
- [20] Eric raised the issue of Jaymie and Steven's paternity at the hearing before Boyd J. The court dismissed Eric's application for an order that both Jaymie and Steven submit to DNA testing, apparently on the basis that proper notice had not been given to the effected parties. The court granted Eric leave to pursue the order on proper notice.
- [21] Boyd J. also dismissed Eric's application for an order for release of Kenneth's medical records as well as any tissue or DNA sample "at the Kitimat Hospital or any other location". Again, Eric was granted leave to pursue the application upon proper notice to the effected parties.
- [22] At the same time, an issue arose with respect to the status of two minor great-grandchildren. The question was whether the great-grandchildren should be considered "issue" under the Will with the result that the Estate be divided into six rather than four equal shares. The Public Guardian and Trustee (the "PGT") became involved, representing the great-grandchildren.
- [23] On November 9, 2010, the Administrators filed their petition seeking the court's opinion on these two issues.
- a. does the use of the word "issue" extend both to all surviving descendants of Ernest Roy Barnes and Kenneth Earle Barnes to any degree alive at the date of Maymie Barnes, including her great grandchildren?
 - b. can the Administrators of the estate of Maymie Irene Barnes include the children of Kenneth Earle Barnes, specifically Jaymie Michelle Barnes and Steven Paul Barnes as members of the class of persons described in the Will as "issue of such deceased son"?
- [24] Next, the PGT brought an application seeking an order that Jaymie and Steven submit to DNA testing.
- [25] The PGT did not seek any order with respect to obtaining Kenneth Barnes' DNA.
- [26] In advance of that application, the PGT's solicitor obtained medical records from Mills Memorial Hospital in Terrace, B.C. pursuant to an authorization from Kenneth's executor (Jaymie and Steven's mother). The executor also authorized the hospital to release any tissue sample to Orchid. There is no evidence before the court that any such sample came into Orchid's possession.
- [27] On May 19, 2011, Myers J. determined that the great-grandchildren were not issue under the terms of the Will. Given this decision, the PGT's application for DNA testing was not determined.
- [28] Myers J. gave Eric Barnes 21 days to bring the application that is now before the court.

- [29] In the meantime, Kenneth's executor purported to revoke the authorizations given to the PGT.
- [30] The evidence relied on by the applicant is contained in the affidavits of Eric Barnes, Celeste Barnes (Eric's wife), K. Norris (solicitor for the PGT), Dr. K. Piercy and the legal assistant to the applicant's counsel. As noted, a great deal of time was spent arguing about the admissibility of Dr. Piercy's affidavit evidence. In addition, Jaymie's counsel objected to the admissibility of various other affidavit material. Eric's counsel had notice of most, but not all, of these objections. The same objections were intended to be raised by Jaymie at the hearing before Myers J.
- [31] The evidence of Dr. Piercy is presented to support an inference, if not a finding, that Kenneth was sterile at the time of both Jaymie and Steven's conception.
- [32] Counsel for the applicant "understands" that Kenneth's DNA may have been retained by a medical facility and thus be available for testing.
- [33] The evidence as to the availability of Kenneth's DNA is found in two pieces of correspondence.
- [34] One of these pieces is a letter from Eric's former solicitor directed to another counsel. The solicitor states that he has been in contact with Mills Memorial Hospital and "it appears that they may have some tissue samples of Kenneth Barnes" (my emphasis). The solicitor further writes:

I am advised that Mills Memorial Hospital will release any information and tissue samples that they have if the administrators of the estate send a letter to them requesting the release of tissue samples and the results of any sterility tests.

- [35] The second piece of correspondence is a letter from the PGT's solicitor to all of the concerned parties in which she advises that Mills Memorial Hospital did release Kenneth's medical records and those records remained in the solicitor's possession. On the advice of the Law Society, the PGT's solicitor intended to retain possession of the records pending any court order.
- [36] The letter makes no reference to any blood or tissue samples being available for testing. Rather, the solicitor states:

With respect to the tissue samples, I will be advising Mills Memorial Hospital that I am no longer involved. Mr. Barnes should seek his own order with respect to the production of the tissue sample on notice to Mills Memorial Hospital.

- [37] Before considering the admissibility of the impugned evidence, it is necessary to review the legal basis for this application.

THE LAW

[38] The application is brought pursuant to Rule 7-6(1) of the Supreme Court Civil Rules (the "SCCR") which provides that:

Rule 7-6 -- Physical Examination and Inspection

Order for medical examination

- (1) If the physical or mental condition of a person is in issue in an action, the court may order that the person submit to examination by a medical practitioner or other qualified person, and if the court makes an order under this subrule, the court may also make
 - (a) an order respecting any expenses connected with the examination, and
 - (b) an order that the result of the examination be put in writing and that copies be made available to interested parties of record.

[39] The applicant also relies on the following authorities:

Bauman v. Kovacs (1986), 10 B.C.L.R. (2d) 218 (C.A.);

J.S.B. v. W.L.V. (1995), 3 B.C.L.R. (3d) 380;

Lansing (Guardian ad litem of) v. Richardson, 2002 BCSC 262;

S. (D.M.) v. C.(J.) Estate (1994), 34 C.P.C. (3d) 117.

[40] These decisions were rendered prior to the introduction of the SCCR and pursuant to Rule 30(1) of the Rules of Court.

[41] Rule 30(1) and Rule 7-6(1) contain similar but not identical language; one of the differences between the two Rules might be determinative of this application. That is, Rule 30(1) applied to a "proceeding" which included a petition brought under the Rules of Court. Rule 7-6(1) is said to apply only to an "action" which is defined under the SCCR as "a proceeding started by a notice of civil claim". Thus, it might be argued that Rule 7-6(1) may not be relied on by the applicant. However, neither party argued this point and perhaps did not see the distinction as an issue which might impact the outcome of the application. In any event, pursuant to Rule 16-1(18), the court has the discretion to apply any SCCR to a petition proceeding.

[42] To put this issue to rest, I exercise my discretion to apply Rule 7-6(1) to this petition proceeding. I do so on the basis that applying Rule 7-6(1) to this proceeding may assist in achieving the objectives set out Rule 1-3 of the SCCR.

[43] The principles to be derived from the above-noted authorities are as follows:

- the composition of a person's blood is a physical condition of a person under [Rule 30(1) or 7-6(1)]. Accordingly, blood testing to determine the DNA of a person on the issue of paternity will be permitted under this Rule: Bauman v. Kovacs (1986), 10 B.C.L.R. (2d) 218 (C.A.) at paras. 15 and 22;

· DNA testing is "highly reliable evidence" and should be ordered where the evidence over an individual's paternity might otherwise consist of "fading recollections coloured by self interest": J.S.B. v. W.L.V. (1995), 3 B.C.L.R. (3d) 380 at para. 26, and Lansing (Guardian ad litem of) v. Richardson, 2002 BCSC 262 at para. 13;

· If establishing paternity "makes no difference" in the proceeding, the DNA or blood testing should not be ordered. The results of such testing must be "relevant to what is 'in issue in the proceeding'": J.S.B. v. W.L.V. at para. 25.

[44] This last principle is echoed somewhat in the recent decision of Jones (Litigation Guardian of) v. Donaghy, 2011 BCCA 6, where the Court of Appeal determined that:

an "issue" under Rule 7-6(1) is a disputed fact the resolution of which will, without more, have legal consequences as between the parties to the dispute.

Para. 9.

[45] In addition to the cases cited by counsel, I take note of the court's decision in Lee v. Lee Estate (1993), 84 B.C.L.R. (2d) 341 (Master), where the disputed heirs voluntarily underwent DNA testing in order to resolve the question of paternity and the issue of inheritance. It is appreciated that the factual basis for the contest over paternity in the Lee case differs from the basis presented here.

[46] Finally, it must also be observed that an order made under Rule 7-6(1) is discretionary. That discretion must be exercised judicially having regard to all of the circumstances of the case: Bauman v. Kovacs, supra, at para. 19.

DISCUSSION

[47] The establishment of Jaymie and Steven's paternity will have legal consequences in this proceeding. The determination goes to the question posed by the Administrators in the petition as to whether Jaymie and Steven can be considered Kenneth's "issue".

[48] Even without considering the impugned evidence, the applicant has established a prima facie case for an order requiring DNA testing. As the authorities provide, the DNA testing is reliable objective evidence.

[49] However, what is missing in this case is some reliable objective evidence that Kenneth's DNA is available for the necessary comparison.

[50] In all of the cases cited by the applicant, some tissue or blood sample from the disputed father was available for such purposes.

[51] The evidence before me is that some tissue or blood appears to be available.

- [52] The applicant asks the court to presume or infer that the tissue or blood sample is available for testing. I am not prepared to make that presumption or draw that inference based on the evidence presented. The necessary evidence is documented corroboration (from Mills Memorial Hospital or some other facility) that such DNA source exists and can be used by Orchid for testing purposes.
- [53] In the absence of any comparative DNA, the taking of tissue, hair or blood samples from Jaymie and Steven serves no purpose whatsoever in the proceeding.
- [54] The application for an order that Mills Memorial hospital provide the sample tissues directly to the DNA tester is not made on proper notice to the hospital. It is possible that such notice will result in information confirming or denying the availability of comparative tissue or blood samples. It is also possible that the applicant can obtain the necessary evidence without the necessity of another court application, although the appropriate process is entirely in the applicant's hands.
- [55] In the result, the application might be dismissed, with liberty to the applicant to re-apply upon bringing further evidence.
- [56] However, in order to comply with the objectives under Rule 1-3 of the SCCR, the application will instead be adjourned generally, but on terms. Those terms are as follows:
1. the applicant will have 45 days from the date of issuance of these reasons to obtain evidence of the existence and availability of Kenneth Barnes' DNA;
 2. upon obtaining such evidence, the applicant shall re-set the application (on proper notice to Jaymie Barnes) for sole purpose of presenting argument on the admissibility and/or reliability of the evidence obtained; and
 3. the applicant will advise the court in writing through the court scheduler's office if this evidence is not available.

(the "Adjourning Order")

- [57] If the evidence is not available, further written reasons on the merits of the application will be issued.
- [58] I will remain seized of any further court appearances arising from the terms of the Adjourning Order but am not seized of any application brought to obtain the further necessary evidence.
- [59] Costs will be determined upon completion of the application.

"C. P. Bouck"

Master C. P. Bouck

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/SC/11/14/2011BCSC1449.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/barnes-estate-v-barnes-2011>

Prepared on 25 October 2026 · Esheria