

CANADA / JUDGMENT

Berger v. Clark

2002 BCCA 316

COURT

British Columbia Court of Appeal

DECIDED

14 May 2002

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Berger v. Clark et al

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COURT OF APPEAL FOR BRITISH COLUMBIA

ORAL REASONS FOR JUDGMENT

Before:

The Honourable Madam Justice Newbury

May 14, 2002

The Honourable Mr. Justice Mackenzie

The Honourable Mr. Justice Hollinrake

Vancouver, B.C.

BETWEEN:

VERNA BERGER

APPELLANT

(PLAINTIFF)

AND:

SHEILA CLARK and PUBLIC TRUSTEE OF BRITISH COLUMBIA

RESPONDENTS

(DEFENDANTS)

J. Fairburn

appearing for the Appellant

D.J. Kennedy

appearing for the Respondents

- [1] MACKENZIE, J.A.: This is an appeal from a trial judgment dismissing the appellant's claim of entitlement to her late father's estate under s. 2 of the Wills Variation Act, R.S.B.C. 1996. c 490.
- [2] The appellant Verna Berger is the only surviving child of Harry Edstrom who died at the age of 90 on 6 October 1997. Mr. Edstrom left a small estate of approximately \$35,000 held on deposit with the Public Trustee who had conduct of his affairs pursuant to a certificate of incapacity issued on 21 September 1992. Mr. Edstrom's last will was dated 14 April 1992. In it he disinherited his daughter, Mrs. Berger, and left his estate to the respondent Sheila Clark.
- [3] Mrs. Berger's action initially claimed to set aside the will on grounds of testamentary incapacity and undue influence by Ms. Clark. Those claims were abandoned before trial. The validity of the will therefore was not an issue, and the action was confined to Mrs. Berger's claim under the Wills Variation Act.
- [4] Before 1992, Mrs. Berger and her father had a close relationship, visiting and speaking to each other frequently. After the death of Mr. Edstrom's wife, Hilda, in 1987 Mrs. Berger and her family invited Mr. Edstrom to move to Portland, Oregon where they resided. Mr. Edstrom chose to continue to live in his villa apartment in New Westminster. He lived independently but after some time he required homecare assistance. This was arranged in 1991. After the death of her mother, Mrs. Berger helped her father with financial matters, and two term deposits were placed in their joint names.
- [5] Ms. Clark provided homecare for Mr. Edstrom in 1991. She also helped him in ways that were beyond the scope of her homecare position. A friendship developed but there was never an intimate relationship. Mr. Edstrom was 83 and Ms. Clark was 47.

- [6] Mrs. Berger felt that her father was becoming emotionally attached to Ms. Clark and she was suspicious of Ms. Clark's motives. In March 1992, Mrs. Berger initiated steps that had Ms. Clark removed as her father's homecare worker. Mr. Edstrom was furious with Mrs. Berger and asked her not to meddle. Mrs. Berger persisted, however, and Ms. Clark was removed from Mr. Edstrom's case. Mr. Edstrom subsequently refused the assistance of the replacement worker.
- [7] In March 1992 Mr. Edstrom saw his family physician, Dr. Walter Rebeyka about the situation with Ms. Clark. Dr. Rebeyka described Mr. Edstrom as being quite upset that his daughter had caused Ms. Clark's removal. Mr. Edstrom wanted Dr. Rebeyka to make some calls including one to Ms. Clark. He did so and asked her if Mr. Edstrom had given her money. Mr. Edstrom became angry when he learned of Dr. Rebeyka's query of Ms. Clark and he dismissed Dr. Rebeyka as his physician. Dr. Rebeyka was surprised at Mr. Edstrom's level of hostility but he was of the opinion that Mr. Edstrom was thinking "clear and straight" and was not suffering from any mental disorder or incapacity.
- [8] About 1 April 1992, Mrs. Berger unilaterally and without telling her father removed the term deposits from the joint account and put the funds in her own name in the same bank. Mr. Edstrom apparently learned of this through a notice from the bank. Some time in April 1992, Mrs. Berger received a phone call from her father in which he told her that he did not ever want to speak to her or see her again, and if she came he would not open the door. He then hung up on her.
- [9] On 14 April 1992, Mr. Edstrom saw Fred Philps, a notary public, with many years experience in drafting wills. Mr. Philps advised Mr. Edstrom of his obligations to his daughter under the Wills Variation Act. Mr. Philps said that Mr. Edstrom was adamant in wanting to exclude his daughter and unyielding in not telling him why. On 21 April 1992, Mr. Edstrom saw a lawyer, Edward Macaulay with respect to the term deposits and gave him instructions to get the money back into his name.
- [10] In May 1992, Mr. Edstrom moved out of his residence in New Westminster and into a room in a boarding house operated by Ms. Clark. Mr. Edstrom suffered a stroke in late July 1992 while he was living at the boarding house. He was taken to Burnaby General Hospital where he remained until February 1993. He was then moved to Willingdon Hospital where he remained until his death in October 1997.
- [11] The Public Trustee was appointed committee for Mr. Edstrom on 21 September 1992 pursuant to a certificate of incapacity. Mrs. Berger continued to resist return of the term deposit funds after the Public Trustee was appointed committee. The Public Trustee commenced legal proceedings to recover the funds in February 1993 and obtained a default judgment in July 1993. Mrs. Berger filed an application to set aside the default judgment but the matter was not pursued. Mrs. Berger agreed that the money should be used for Mr. Edstrom's care but she wanted the right of survivorship.

- [12] Mrs. Berger and her family visited Mr. Edstrom during his time in hospital. Ms. Clark also visited Mr. Edstrom until Mrs. Berger directed that Ms. Clark be barred from visiting him.
- [13] The trial judge concluded that Mr. Edstrom had disinherited his daughter because she interfered with his happiness by arranging for the termination of Ms. Clark's services and because she unilaterally removed the term deposits from the joint account. The trial judge concluded that these reasons were valid and rational at the time the will was made. Mrs. Berger did not retract her position with respect to Ms. Clark by the time of Mr. Edstrom's death, and she reduced the size of the estate by defending the action for the return of the term deposits.
- [14] The trial judge recognized that the moral obligation of a judicious parent under the Wills Variation Act extended to making provision for an independent adult child where the size of the estate permits, and in the absence of circumstances which would negate the existence of such an obligation. She cited the leading case of *Tataryn v. Tataryn* [1994] 2 S.C.R. 807. She concluded that the valid and rational reasons of this testator for disinheriting his daughter were sufficient to negate any moral obligation to her in the circumstances. She dismissed the action accordingly.
- [15] The appellant submits that the learned trial judge erred in finding that Mr. Edstrom knew about the term deposits when he executed his last will on 14 April 1992, and that his reasons for disinheriting Mrs. Berger were objectively unreasonable and irrational.
- [16] Mr. Edstrom declined to tell Mr. Philips why he was disinheriting his daughter when he saw Mr. Philips on April 14. Mrs. Berger withdrew the term deposits on April 1 and the bank sent a notice apparently so advising Mr. Edstrom. On 21 April 1992, Mr. Edstrom gave Mr. Macaulay instructions to get the money back. While there is no direct evidence that the withdrawal of the term deposits influenced the will, the timing of the events reasonably supports that inference and, in my opinion, it was open to the trial judge to make it. There is no palpable and overriding error that would permit this Court to interfere with her conclusion. Nor can it be said that the withdrawal of the term deposits by Mrs. Berger and her interference with Mr. Edstrom's relationship with Ms. Clark were unreasonable or irrational reasons for disinheriting his daughter. The reasons were solidly based on the facts established to the satisfaction of the trial judge and there are no grounds to question her conclusions.
- [17] It is an unusual feature of wills variation jurisprudence that an appellate court is in the same position as the trial judge and is not required to defer to the trial judge's discretion, see *Tataryn* at para. 11. The question then is whether the valid and rational reasons of the testator for disinheriting Mrs. Berger were sufficient to discharge any moral duty to make provision for her otherwise.
- [18] This was a small estate. There is no evidence that either Mrs. Berger or Ms. Clark was in need. Ms. Clark provided companionship and comfort to a bereaved and lonely man. It was entirely appropriate that he should wish to recognize her support through a testamentary

gift. Mrs. Berger may have been motivated by good intentions towards her father, although her attitude toward return of the money suggests that her motivation was tinged with self-interest. In any event, her persistent interference with Mr. Edstrom's relationship with Ms. Clark was misguided and harmful. He was powerless to resist. It deprived him of the assistance and support of a valued friend in his last years. In my view, he was entitled to express his resentment of this interference in the terms of his will.

[19] Having regard to the small size of the estate, disinheriting Mrs. Berger entirely was not disproportionate to her offence and well within the discretion of a judicious parent in the circumstances.

[20] I would dismiss the appeal with costs payable by the appellant.

[21] NEWBURY, J.A.: I agree.

[22] HOLLINRAKE, J.A.: I agree.

"The Honourable Mr. Justice Mackenzie"

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