

CANADA / JUDGMENT

Bergler v. Odenthal

2020 BCSC 117

COURT

Supreme Court of British Columbia

DECIDED

31 January 2020

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2020 BCSC 117 Bergler v. Odenthal IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Bergler v. Odenthal, 2020 BCSC 117 Date: 20200131 Docket: S151763 Registry: Vancouver Between: Susanne Maria Bergler and Anja Elisabeth Bergler Plaintiffs And Bernd Odenthal Defendant Before: The Honourable Madam Justice W.A. Baker Reasons for Judgment Counsel for the Plaintiffs: J.W. Zaitsoff Appearing on own behalf: B. Odenthal Place and Date of Written Submissions: Vancouver, B.C. January 22, 2020 Place and Date of Judgment: Vancouver, B.C. January 31, 2020

- [1] Following a two day trial, judgment in this case was rendered on November 4, 2019. The plaintiff Susanne Bergler established at trial that her deceased aunt had created a secret trust, the defendant was the trustee of the trust, Ms. Bergler was the beneficiary of the trust, and the subject of the trust included a number of assets.
- [2] The defendant applied to have me reconsider the subject matter of the secret trust. Specifically, he submits that no portion of, or value ascribed to, a property located in the United States, described as the Winthrop Property, should form part of the trust assets. He submits that because the Winthrop Property was held in joint tenancy with a right of survivorship, it could not form part of the deceased's estate and, therefore, could not form part of the trust assets.
- [3] Ms. Bergler submits that the statutory deed in relation to the Winthrop Property was part of the court record, and that the defendant made admissions at trial to the effect that the value of the deceased's estate at the time of her death included her share of the Winthrop Property. Ms. Bergler submits there is no basis upon which to disturb the findings made in my earlier Reasons, indexed at 2019 BCSC 1882.
- [4] A trial judge has authority to vary an order before it has been entered where the judge is satisfied that new evidence should be considered or where "because of the argument of one of the parties, or on the basis of his own reconsideration of the record, that the original judgment was in error because it overlooked or misconstrued material evidence, or misapplied the law": Sykes v. Sykes (1995), 6 B.C.L.R. (3d) 296 at para. 10.

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- [5] However, as stated in *Kemp v. Wittenberg*, [1999] B.C.J. No. 810 (B.C.S.C.) at para. 5: It is clear from the authorities that the court has a broad discretion to reconsider a decision before it has been entered as a formal judgment. That discretion, however, is to be used sparingly. At its heart the discretion has as its purpose the correction of what would otherwise be a miscarriage of justice. It is not, on my understanding of the cases, intended to be an alternative method of appeal.
- [6] The defendant submits that a miscarriage of justice would occur if the value of the deceased's interest in the Winthrop Property at the time of her death is included in the trust assets because the whole of the property passed to the defendant by virtue of the survivorship provision in the statutory deed.
- [7] I have considered the submissions of the parties. There is no new evidence before me on this application. The statutory deed and the admissions of the defendant were before me at trial. In my Reasons I determined the subject of the trust on the evidence before me.
- [8] I adopt the statement made by the trial judge in *Kemp*, supra, at para. 12: While I do not consider the findings that have been made to be contrary to the weight of the evidence, in all the circumstances of this case these are matters that, in my view, are more appropriate for the Court of Appeal to consider.
- [9] I dismiss the defendant's application for reconsideration. "Baker J."
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Prepared on 28 October 2026 · Esheria