

CANADA / JUDGMENT

## Brewis v. Brewis

2018 BCSC 371

### COURT

Supreme Court of British Columbia

### DECIDED

9 March 2018

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2018 BCSC 371 Brewis v. Brewis

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Brewis v. Brewis,

2018 BCSC 371

Date: 20180309

Docket: 54597

Registry: Vernon

Between:

Robert Keith Brewis

Petitioner

And

Keith Alexander Brewis, Joan Marjorie Brewis

and Shirley Ann Larsson

Respondents

Before: The Honourable Mr. Justice G.P. Weatherill

Reasons for Judgment

Counsel for the Petitioner:

A.A. Powell

Counsel for the Respondents:

E.J. Woolley

Place and Date of Hearing:

Vernon, B.C.

March 5, 2018

Place and Date of Judgment:

Vernon, B.C.

March 9, 2018

## Introduction

- [1] The respondents apply for an order setting aside a without notice injunction issued by Smith J. on December 18, 2017 ("Smith Order") prohibiting the sale of two adjoining properties on Shuswap Lake ("Properties"). The respondents want the sale to proceed and seek further orders that a contract of purchase and sale dated December 8, 2017, selling the Properties for \$1,180,000 ("Contract") can complete with the net sale proceeds divided equally between the respondent sisters, Shirley Ann Larson ("Shirley") and Joan Marjorie Brewis ("Joan").

## Background

- [2] The Properties are legally described as:

PID: 011-065-460

Lot 38 Section 5 Township 22 Range 8 West of the 6th Meridian

Kamloops Division Yale District Plan 2143

And

PID: 011-065-486

Lot 39 Section 5 Township 22 Range 8 West of the 6th Meridian

## Kamloops Division Yale District, Plan 2143

- [3] The petitioner Robert Keith Brewis ("Robert") is one of three children of the respondents Keith Alexander Brewis ("Keith") and Joan. Keith is 86 years of age and Joan is 83 years of age. Joan is currently residing at a residential care facility, is bedridden, and due to mental infirmity is no longer able to communicate.
- [4] On November 9, 2001, Joan prepared a will ("Joan's Will") stating in part that her trustee was to transfer to her children, Robert, Jeffrey and Beverly, as tenants in common, any interest she had in the Properties. Two days after Joan's Will was prepared, Joan signed two powers of attorney; one in favour of her son Jeffrey, and the other in favor of her husband Keith

("Keith's Power of Attorney"). Both powers of attorney authorized either Jeffrey or Keith to sell or deal with any real estate or lands and premises that were owned by her without restriction.

- [5] As a result of Joan's recent health issues, Keith has been managing her legal and financial affairs.

### Robert's Evidence

- [6] Robert states that the Properties were acquired by his grandparents a number of years ago. He states his grandparents were very close to their children and grandchildren and that his grandparents had advised him many times that it was their intention to have the Properties remain in their family. He points to an unexecuted back page of a deed of land undated and unsigned, naming the children and grandchildren as transferees. That transfer never took place.
- [7] He also points to Joan's Will stating her intention to transfer her interest in the Properties to her children. He says that Joan began to suffer from various age-related ailments starting in about 2014, and that she is not expected to live much longer. He states he only learned of the purported sale of the Properties on or about December 1, 2017, when Keith asked him to help relocate some trailers on the Properties as part of the conditions of sale.
- [8] In order to block the sale, Robert filed a petition on December 18, 2017, commencing this action. A without notice application was made in front of Smith J. on December 18, 2017 and the Smith Order was granted with liberty to the respondents to apply to set it aside on two clear days notice.

### Shirley's Evidence

- [9] Shirley says that the Properties were originally owned by Joan and Shirley's parents. In 1978, Shirley, Joan and a third sister Evelyn Green ("Evelyn") were added to the Properties' titles together with their mother. The Properties passed to Joan, Shirley and Evelyn in 1998 when their mother passed away. They were registered on title as tenants in common with each sister owning a one-third interest in the Properties.
- [10] Shirley says that at no time was there any stated request or direction from her parents that they were to keep the Properties in the family.
- [11] In May 2015, Shirley, Joan and Evelyn met at the Heron Grove Residential Care facility in Vernon and agreed that the Properties should be sold.
- [12] They agreed that with the number children between them, it did not make sense to keep splitting title and it would create an undue burden on their heirs, most of whom would not be able to derive any benefit from the ownership of the Properties and who had little or no interest in owning the Properties.

- [13] After reaching this agreement but before being able to sell the Properties, Evelyn passed away on September 23, 2015. Her estate needed to be settled prior to the sale of Properties. This took several months. Evelyn's interest in the Properties passed to Shirley and Joan in equal shares because Evelyn had no other heirs. While the exact date is unclear, at some point after Evelyn's death, Joan became mentally incompetent and was no longer capable of handling her affairs. Keith began looking after her affairs for her.
- [14] Shirley and Keith determined that a sale of the Properties should be carried out. They obtained a market valuation from a realtor and approached several neighbours who had previously expressed an interest in purchasing the Properties.
- [15] On December 8, 2017, Shirley and Keith signed a contract of purchase and sale with a Mr. Ken Zandee ("Mr. Zandee") for a purchase price of \$1,180,000. The sale was to close on December 22, 2017. Keith signed the Contract on Joan's behalf through Keith's Power of Attorney.
- [16] Shirley wants to have the Properties sold and asserts that she is entitled to do so because of s. 6 of the Partition of Property Act, R.S.B.C. 1996, c. 347, which reads
- 6 In a proceeding for partition where, if this Act not been passed, an order for partition might have been made, and if the party or parties interested, individually or collectively, to the extent of 1/2 or upwards in the property involved request the court to direct a sale of the property and a distribution of the proceeds instead of a division of the property, the court must, unless it sees good reason to the contrary, order a sale of the property and may give directions.
- [17] Shirley has not commenced a Partition of Property Act proceeding but instead seeks an order that the Properties be sold under that Act in this action in any event should she be unsuccessful with this application.
- [18] Shirley challenges Robert's statements in his affidavit that he only heard about the purported sale in December 2017. She says that he was well aware that Joan and Shirley intended on selling the Properties because he had been present for and involved in discussions of this plan on several occasions since 2015. She states that she told Robert in October and November 2017, that the Properties were being sold and that she had been having discussions with potential purchasers of the Properties.
- [19] Shirley asserts that the sale of the Properties is consistent with Joan's wishes. She states that Mr. Zandee is still willing to complete the sale in accordance with the Contract and has extended the completion date to on or before March 29, 2018. Shirley deposes that because the Contract is binding on her, she is concerned that if the Properties are not transferred to Mr. Zandee she could be exposed to a lawsuit.

## Keith's Evidence

- [20] As Joan's husband, Keith supports the sale of the Properties to Mr. Zandee. He confirms that Joan is no longer competent to look after her own affairs. Keith was present during the May 2015 meeting where Shirley, Joan and Evelyn mutually agreed that the Properties should be sold. The sale was delayed due to Evelyn's death in September 2015, and the requirement to probate her estate. By the time they were ready to proceed with the sale, Joan was no longer competent or capable of handling her affairs so Keith began looking after her affairs for her in accordance with Keith's Power of Attorney.
- [21] Keith is satisfied that the proposed sale price of \$1.18 million is fair market value for the Properties.
- [22] On December 12, 2017, Keith was at the office of Rhoda Chapman, Notary Public, to sign the conveyance documents to transfer the Properties to Mr. Zandee, when Robert burst in and took several documents without permission. These documents included a copy of Joan's Will and documents related to the sale of the Properties. The RCMP were informed of Robert's actions. Similar to Shirley's evidence, Keith disputes Robert's suggestion that he only learned of the purported sale in December 2017. He states that Robert was well aware that Joan wished to sell the Properties and that he had been present for and involved in discussions of this plan on several occasions since 2015. He says that Robert indicated his agreement with Joan and Keith that it was a good idea to sell the Properties. It is Keith's belief that Joan would want to have the Properties sold.

## Robert's Position

- [23] Robert relies on s. 19 of the Power of Attorney Act, R.S.B.C. 1996, c. 370 ("Act"), the relevant portions of which read as follows:

### 19 (1) An attorney must

- (a) act honestly and in good faith,
  - (b) exercise the care, diligence and skill of a reasonably prudent person,
  - (c) act within the authority given in the enduring power of attorney and under any enactment, and
  - (d) keep prescribed records and produce the prescribed records for inspection and copying at the request of the adult.
- (2) When managing and making decisions about the adult's financial affairs, an attorney must act in the adult's best interests, taking into account the adult's current wishes, known beliefs and values, and any directions to the attorney set out in the enduring power of attorney.
- (3) An attorney must do all of the following:

- (a) to the extent reasonable, give priority when managing the adult's financial affairs to meeting the personal care and health care needs of the adult;
  - (b) unless the enduring power of attorney states otherwise, invest the adult's property only in accordance with the Trustee Act;
  - (c) to the extent reasonable, foster the independence of the adult and encourage the adult's involvement in any decision-making that affects the adult;
  - (d) not dispose of property that the attorney knows is subject to a specific testamentary gift in the adult's will, except if the disposition is necessary to comply with the attorney's duties;
  - (e) to the extent reasonable, keep the adult's personal effects at the disposal of the adult.
- [24] In particular, he relies on s. 19(3)(d) which he submits prohibits Keith from selling the Properties because Joan's Will provides for her interest in the Properties to be transferred to her three children. Despite Joan's Will being executed over sixteen years ago, he says it is entitled to deference. He submits that the foundation of the Act is that the attorney does not have the ability to dispose of property when a specific direction is made in a will and it would be an affront to s. 19(3)(d) to allow Keith to dispose of Joan's interest in the Properties in the face of Joan's Will despite Shirley and Keith's evidence that Joan agreed to sell the Properties in 2015.
- [25] He argues that keeping the Properties in the family is consistent with his understanding of Joan's wishes.

### Respondents' Position

- [26] Notwithstanding Joan's Will, it is clear that in May 2015, Shirley, Joan and Evelyn mutually agreed to sell the Properties and would have done so had, firstly, Evelyn not died and, secondly, had Joan been able to manage her affairs.
- [27] The respondents concede that, read in isolation, s. 19(3)(d) of the Act provides that an attorney cannot deal with property that would frustrate a will. However, they say, s. 19(3)(d) must be read in context of the purpose behind s. 19 including s. 19(2) which directs that Keith must take into account Joan's current wishes and known beliefs and values when managing and making decisions about her estate.
- [28] The unchallenged evidence about Joan's "current wishes" is that in May 2015, some 14 years after Joan's Will was prepared, Joan agreed with Shirley and Evelyn that the Properties should be sold.

[29] In any event, if the Smith Order is not set aside, the respondents say that Shirley will bring an action under the Partition of Property Act seeking an order that the Properties be sold. Under s. 6 of that Act, the court must order the sale of the Properties unless it sees good reason to the contrary. On the basis of the evidence before this Court there is no good reason shown to the contrary and therefore, as a matter of expediency, the Smith Order should be vacated.

## Issues

[30] The respondents' application to set aside the Smith Order to allow the sale of the Properties to proceed raises these two issues:

- a) Does Robert have standing to bring this action?
- b) What is the relationship between s. 19(2) and s. 19(3)(d) of the Act in the circumstances of this case?

## Discussion

Issue #1 - Does Robert have standing to bring this Action?

[31] Yes.

[32] Robert's siblings, Jeffrey and Beverly, take no position on this application. The matter essentially boils down to a dispute between Robert on the one hand, and his father Keith and aunt Shirley on the other.

[33] The general rule is that a will or testamentary document has no effect until the testator's death. Until such death and the testator's will "speaks", a named beneficiary, has no interest in any property in the testator's estate. In other words, a will is merely a declaration of the testator's intention at the time the will was prepared and the testator can dispose of his or her property as he or she pleases during his or her lifetime: *Wolfson Estate v. Wolfson*, [2005] O.J. No. 6083 (S.C.J.), para. 30.

[34] There are exceptions to this general rule in the case of a testator who has become infirm after his or her will is prepared. In *Weinstein v. Weinstein (Litigation Guardian of)* (1997), 35 O.R. (3d) 229 (Ont. Gen. Div.), the Court stated the following at para. 12:

Here, however, the fact that Betty Weinstein did not have the mental competence to change her will meant that the second (and last) codicil to her will, in which she divided the residue among her five grandchildren, in practical terms conferred on them what amounted to a vested interest. The grandchildren's entitlement was not a mere hope of succession. The result of Betty becoming afflicted by Alzheimer's disease was that the entitlement of her grandchildren was the same as if they were entitled to a remainder interest after life interests.

[35] Similarly, in *B.R.A. (Trustees of) v. M.S.*, 2005 ABQB 549, the Court stated at para. 36:

Despite the clarity of the law on the status of a will during a testator's lifetime, if there were evidence before a court that the dependent adult who executed a will would absolutely never be able to validly execute another will, and if there were a risk that those who had a contingent duty to prove the will would lose available evidence, a court might be persuaded to have a hearing into the validity of a piece of paper that might escape the designation "waste paper". However, that type of call upon the court's jurisdiction in equity cannot be made by the respondents in the situation here because the remaining portions of the statement of claim, that is the portions that will be litigated, will raise the same issues as would be raised in litigation over the will.

- [36] In *Kidd v. Canada Life Assurance Co.*, 2010 ONSC 1097 at paras. 48-49, the Court referenced with approval the principle from *Nystrom v. Nystrom* (2006), 25 E.T.R. (3d) 297 (Ont. S.C.J.), stating that before a last testament becomes operational, the interests of the beneficiary are a *spes successionis* or an expectancy, but a potential beneficiary under a living person's will does have an interest before the testator's death where the testator, although still alive, no longer has the mental competence to change his or her will.
- [37] In *Kostrub v. Stuparyk*, 2015 ABQB 175, the defendants brought an action to strike out the plaintiffs' claim on the basis that the plaintiffs had no standing to bring the action. The plaintiffs started the action while the testator was still alive. The Court reviewed the law regarding the extent to which a beneficiary has an interest in property belonging to the testator while the testator is still alive but has lost capacity. The Court cited *Weinstein* and concluded that loss of capacity of the testator is an exception to the general rule that a person named in a will takes no interest until the death of the testator. However, in that case, the Court concluded that there was no evidence of capacity or incapacity brought by either side and therefore it could not rule on the application.
- [38] The evidence before me is that Joan's Will provided that her interest in the Properties would be transferred to her children on her death. Although Joan has not yet passed, the evidence is clear that she lacks capacity, is "non-communicative" and will not be able to change her will.
- [39] In these circumstances and following the above noted line of authorities, Robert has standing to bring this action as a beneficiary of Joan's estate.

Issue #2 - What is the relationship between s. 19(2) and s. 19(3)(d) of the Act in the circumstances of this case?

- [40] The injunction granted in the Smith Order was based on s. 19(3)(d) of the Power of Attorney Act, which effectively enjoined Keith from disposing of property that he knows is subject to a specific testamentary gift in Joan's Will. There was no evidence before Smith J. respecting Keith's duties set out in s. 19(2) of the Act.
- [41] Shirley and Keith, however, say that s. 19(2) of the Act requires Keith to take into account Joan's "current wishes" which are to sell the Properties.

- [42] Counsel were unable to refer me to any case law on the interplay between s. 19(2) and s. 19(3)(d) of the Act. Therefore, an analysis of the wording and intent of the Act is required.
- [43] Section 19(2) requires, without exception, the attorney to "act in the adult's best interests, taking into account the adult's current wishes, known beliefs and values". Unlike that unqualified duty, s. 19(3)(d) states that the attorney must not dispose of property that is subject to testamentary gift, "except if the disposition is necessary to comply with the attorney's duties" [emphasis added].
- [44] Based on the plain language of the Act, s. 19(2) must always be complied with by the attorney whereas s. 19(3)(d) can be avoided if it is deemed to be necessary to comply with the attorney's other duties.
- [45] While there do not appear to be any cases directly on point, I have found the Court's comments in *Sommerville v. Sommerville*, 2014 BCSC 1848 and *Sangha, Re*, 2013 BCSC 1965, to be instructive.
- [46] In *Sommerville*, this Court analyzed the meaning of s. 19(2) and the evidentiary standard of proving an "adult's current wishes, known beliefs and values". The Court stated at paras. 45 and 48:
- [45] In my view, s. 19 does not alter the attorney's common law duty to act only for the benefit of the donor. However, the best interests of the donor are not to be considered in a vacuum. His "current wishes, known beliefs and values" may permit the attorney to continue to provide for a spouse or family member if there is clear and convincing evidence of an intention to do so, and it can be done without compromising the donor's interests.
- [48] the requirements under s. 9 of the Evidence Act do not require corroboration of every material fact that must be proven. As held in *Egli* (at para. 85), the requirement is satisfied if sufficient facts are corroborated such as to lead to the conclusion that the evidence put forward by the attorney is true.
- [47] In *Sangha Re*, the Court acknowledged that a power of attorney creates a fiduciary relationship between the person making the POA and the attorney at para. 98:
- [98] It is not disputed that the relationship of a donor and his attorney under an enduring POA is a fiduciary relationship ... As such the attorney in agreeing to the appointment has accepted the obligation to act in the interests of the donor. In *Hospital Products Ltd. v. United States Surgical Corporation*, [1984] H.C.A. 64, 156 C.L.R. 41 (Aust. H.C.), Mason J. stated:
68. ... The fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is, therefore, one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position.

- [48] I am satisfied that there is clear and convincing evidence that, despite Joan's Will providing that her interest in the Properties was to go to her children on her death, she changed her mind in May 2015 during the meeting with Shirley and Evelyn and that her "current wishes" before she became mentally infirm were to sell the Properties because she felt that it was in her "best interests" to do so.
- [49] In my view, the evidence supports the respondents' position that selling the Properties was Joan's wish and that the exception in s. 19 (3)(d) can be invoked by Keith because selling the Properties is necessary to comply with his duty and fiduciary obligation under s. 19(2) to honour Joan's wishes.
- [50] In sum, the evidence demonstrates that Joan agreed with Shirley to sell the Properties before she became mentally infirm, that is her "current wish" and s. 19(2) of the Act imposes a duty on Keith to carry out that wish. Section 19(3)(d) does not override Keith's duty prescribed by s.19(2) nor does it take priority.

## Conclusion

- [51] In the result, the respondents' application is allowed and the injunction in the Smith Order is set aside.
- [52] The sale of the Properties to Mr. Zandee may proceed in accordance with the Contract as amended.
- [53] The respondents are entitled to one set of costs.

"G.P. Weatherill J."

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