

CANADA / JUDGMENT

Derreth (Re)

2024 BCSC 1033

COURT

Supreme Court of British Columbia

DECIDED

14 June 2024

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2024 BCSC 1033 Derreth (Re) IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Derreth (Re), 2024 BCSC 1033 Date: 20240614 Docket: S242672 Registry: Vancouver In the matter of the Power of Attorney Act, R.S.B.C. 1996, c. 370 and Doreen Derreth And Eugene Derreth Petitioner In Chambers Before: The Honourable Mr. Justice Gomery Reasons for Judgment Counsel for the Petitioner: E.F. Macaulay Place and Date of Hearing: Vancouver, B.C. June 6, 2024 Place and Date of Judgment: Vancouver, B.C. June 14, 2024

Introduction

- [1] When and on what basis should the Court permit the child of an incompetent parent to use a enduring power of attorney to effect a gift of money from the parent to the child?
- [2] The incompetent parent is Doreen Derreth. The child is the petitioner, Eugene Derreth. For readability and intending no disrespect, I will refer to members of the Derreth family by their first names. Eugene is the only child of Doreen and Reinhard, who died in July 2023.
- [3] Doreen made the power of attorney on August 19, 2008. In it, she appointed Eugene "to be my Attorney in accordance with the Power of Attorney Act, R.S.B.C. 1996, c. 370 [PAA], and to do on my behalf anything that I can lawfully do by an attorney". It does not expressly contemplate its use to make a gift or loan, as contemplated by s. 20(2) and (3) of the PAA.
- [4] The power of attorney qualifies as an enduring power of attorney because, in it, Doreen declares her intention that the power of attorney may be exercised during any subsequent mental infirmity on her part, satisfying the requirements of s. 8 of the PAA as it stood in 2008. Those requirements have since changed, but by s. 42(1), compliance with the former s. 8 while it was in force continues to suffice.
- [5] Doreen suffers from dementia and became unable to manage her financial affairs prior to Reinhard's death in 2023. Even before her incapacity, it appears that Reinhard took the lead in managing the couple's money. He devoted considerable thought to planning for their deaths.

- [6] A part of the plan involved the disposition of sale proceeds realised in 2010 from the sale of a family vacation home on Keats Island that had been owned by Reinhard and Doreen. The sale proceeds (the "Keats proceeds") were placed in investment accounts in their joint names. Reinhard and Doreen advised Eugene that, on the death of one of them, the Keats proceeds would pass to the other and he would receive one-half as an immediate gift. He understood that the one-half of the Keats proceeds would amount to approximately \$250,000. Eugene's understanding of this intention is corroborated by a detailed memorandum provided by Reinhard to Eugene and Doreen in 2018.
- [7] Eugene seeks an order authorizing him to transfer \$250,000 of the Keats proceeds to himself, as Reinhard and Doreen had intended. If the order is granted, Doreen will be left with financial assets totalling approximately \$2.7 million, together with the balance of the Keats proceeds amounting to approximately \$356,000. As a practical matter, Doreen is not at risk financially. She resides in a care home and the \$3,500 monthly cost of her care is covered by the interest earned on the \$2.7 million.
- [8] By virtue of the investment arrangements made by Reinhard before his death, the Keats proceeds are held in accounts in the joint names of Doreen and Eugene. In any event, Eugene will receive all of the funds in accounts on Doreen's death. Accordingly, what is in issue is whether Eugene may receive \$250,000 immediately, or must await his mother's passing.
- [9] In short, there are two issues:
1. Is the proposed gift lawful, with the court's approval?
 2. If so, should the court approve the gift?

Analysis

- [10] With some regret, I have concluded that the proposed gift is not lawful because it is foreclosed by s. 20(2) of the PAA. Accordingly, the question of an exercise of the court's discretion does not arise.
- [11] Statutory interpretation requires a reading of the text of a statute in its entire context and in its grammatical and ordinary sense harmoniously with the scheme of the statute, its object, and the intention of the legislature; *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC) at para. 21; *Earthco Soil Mixtures Inc. v. Pine Valley Enterprises Inc.*, 2024 SCC 20 at para.50.
- [12] Broadly speaking, the PAA exists to regulate the exercise of powers of attorney. Powers of attorney are ubiquitous in estate planning. They are both useful and treacherous, because they enable the disposition of property without the consent of its owner. The owner is therefore vulnerable to misuse of the power of attorney. The vulnerability is acute where the owner is no longer legally competent. Subsections 20(1) to (3) of the PAA address this situation. They provide as follows: 20(1) An attorney may make a gift or loan, or charitable gift, from the adult's property if the enduring power of attorney permits the attorney to do

so or if

- (a) the adult will have sufficient property remaining to meet the personal care and health care needs of the adult and the adult's dependants, and to satisfy the adult's other legal obligations, if any,
 - (b) the adult, when capable, made gifts or loans, or charitable gifts, of that nature, and
 - (c) the total value of all gifts, loans and charitable gifts in a year is equal to or less than a prescribed value.
- (2) An attorney may receive a gift or loan under subsection (1) if the enduring power of attorney permits.
- (3) Permissions under subsections (1) and (2)
- (a) must be express, and
 - (b) may be in relation to a specific gift or loan, or charitable gift, or to gifts or loans, or charitable gifts, generally. [Emphasis added.]
- [13] The intention is clear. The sections are concerned with gratuitous transfers - gifts or loans - from the property of an adult person under disability. They establish that such transfers are permissible, but only in specified circumstances.
- [14] Subsection 20(1) deals with gratuitous transfers in general and identifies two cases: (1) where the enduring power permits the transfer (which by subsection (3) means, expressly permits); and (2) alternatively, where the three requirements in subsections (2)(a) to (c) are satisfied.
- [15] Subsection 20(2) deals with the special case of a gratuitous transfer (a gift or loan) to the attorney. Such a transfer is only permitted if the enduring power of attorney expressly permits.
- [16] The language of the enduring power of attorney granted by Doreen is entirely general. The power of attorney does not expressly permit Eugene to effect a \$250,000 gift to himself from Doreen's funds. It makes no difference that Doreen intended the gift, prior to her incapacity. Express permission in the power of attorney is required by s. 20(2), and it is absent.
- [17] I conclude that the proposed gift is not lawful. In the face of the statutory prohibition in s. 20(2), the court cannot authorize it.

Disposition

- [18] For these reasons, the answer to the question posed in paragraph 1 of part 1 of the petition is no.

[19] Eugene seeks costs of this application "on a full indemnification basis in any event". While I am sympathetic to the request, I do not think I should make that order. This is not a case in which Eugene was forced to apply to court for the resolution of an ambiguity in the drafting of the power of attorney or by some conduct on the part of Doreen; *Lee v. Lee Estate*, 1993 CanLII 2368 (B.C.S.C.), 84 B.C.L.R. (2d) 341 at 346. The power of attorney is simple and the statutory language is clear. I do not think that Doreen's estate should have to pay for this application. There will be no order as to costs. "Gomery J."

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Prepared on 25 October 2026 · Esheria