

CANADA / JUDGMENT

Estate of John Allan Collett

2000 BCSC 1570

COURT

Supreme Court of British Columbia

DECIDED

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2000 BCSC 1570

Citation: Estate of John Allan Collett Date:20001025

2000 BCSC 1570 Docket:

21592

Registry: Kamloops

IN THE SUPREME COURT OF BRITISH COLUMBIA

RE: THE ESTATE OF JOHN ALLAN COLLETT AND SECTION 88 OF THE TRUSTEE ACT, R.S.B.C.
1979 C.414

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE POWERS

Counsel for Executors of the Estate: K.R. Dolder

Counsel for Office of the Public Trustee: R.W. McDiarmid, Q.C.

Date and Place of Hearing: October 18, 2000

Kamloops, BC

- [1] This decision follows issues presented to the court by way of a special case pursuant to Rule 33 of the Rules of Court. The notice of motion was originally filed July 6, 2000, and an amended schedule specifying the issues for the court was filed July 12, 2000. The facts relied upon by the parties are those contained in the further amended agreed statement of facts of October 17, 2000.

BACKGROUND

[2] Mr. John Allan Collett (the Testator) passed away February 9, 1992. He was survived by the following people:

- (1) His wife Gloria Edith Collett ("Gloria")

Their two children :

- (2) Caroline Pound ("Caroline")
- (3) John Collett Jr. ("John")

Caroline's two children:

- (4) Teresa Pound ("Teresa")
- (5) Anne Pound ("Anne")

John's three children :

- (6) Paula Collett ("Paula")
- (7) Michael Collett ("Michael")
- (8) Johnny Collett ("Johnny")

Johnny's two children:

- (9) David Lloyd Collins, born June 25, 1991 ("David")
- (10) Jennifer Rose Collins, born September 17, 1988, ("Jennifer")

[3] The Testator left a will dated October 9, 1991, which was admitted to probate September 1, 1992. The executors that received probate were Gloria, Caroline, and William Henry Grayson, an accountant.

[4] John brought a wills variation action and the will was varied by the order of Mr. Justice Hunter made February 15, 1993. The order does not say that it was made by consent, but it was clearly unopposed and the parties assume that the variation was made by consent. This variation occurred in Kamloops Registry, file no. 19639. John was the plaintiff and the defendants included Gloria, Caroline, and William Henry Grayson as executors, and Gloria and Caroline in their personal capacity. The other defendants were Teresa, Anne, Paula, Johnny and Michael. The will, as varied by the order, provided that a portion of the estate be held in trust for Gloria during her lifetime. Paragraph 3(g) of the will provides:

- (g) To pay the net income from the said trust to my wife during her lifetime with power and authority to my Trustees to pay to or use for the benefit of my wife, such part or parts of the capital of the said trust as in their absolute discretion my Trustees consider advisable.

[5] Paragraph 3(j) was varied by the court order to read as follows:

- (j) to divide the residue of my estate then remaining into two (2) equal shares and:
- (a) to divide one such share equally between my daughter CAROLINE GLORIA POUND, and my son, JOHN COLLETT Junior, or, subject to the following proviso, to pay or transfer all of the said share to the survivor if only one of them is living at the death of the survivor of me and my wife, GLORIA EDITH COLLETT, PROVIDED that if either of my said children shall have predeceased the survivor of me and my said wife and if any issue of such deceased child shall be living at the death of the survivor of me and my said wife such issue shall take in equal shares per stirpes the portion of the said share to which such deceased child of mine would have been entitled if then living.
- (b) To divide the other such share in equal shares per capita among such of my grandchildren, namely, TERESA POUND, ANNE POUND, PAULA COLLETT, JOHNNY COLLETT and MICHAEL COLLETT, as shall be living at the death of the survivor of me and my said wife, PROVIDED that if any of my said grandchildren shall have predeceased the survivor of me and my said wife and if any issue of such deceased grandchild are living at the death of the survivor of me and my said wife, such issue shall take in equal shares per stirpes the share of the residue of my estate to which such deceased grandchild would have been entitled if then living.
- [6] I am told that the value of the estate was approximately \$3 million. Part of the assets of the estate were sold in April 1993. This resulted in a significant amount of money being available.
- [7] Based on the agreed statement of facts, John suggested to the executors and other beneficiaries that a capital distribution of \$1 million be made.
- [8] In April 1993 Gloria requested a capital distribution in the sum of \$1 million, and in accordance with her request the executors exercised their discretion to encroach on the capital of the estate and monies were distributed as follows:
- \$250,000 to John;
 - \$250,000 to Caroline;
 - \$100,000 each to Paula, Michael, Johnny, Teresa and Anne.

All of these parties approved that distribution. The distribution payments were made directly to those individuals and not to Gloria.

- [9] Tab 3 of the Book of Documents are the letters from Mr. Grayson, the executor, dealing with this distribution. The letter states in part:

...The will of the Late John Allan Collett provides in paragraph 3(g) for an encroachment by the life beneficiary, Mrs. Gloria Edith Collett, on the capital of the estate.

Mrs. Collett has now asked that the sum of one million (\$1,000,000) dollars be distributed to her as provided in par. 3(g) of the Will. Mrs. Pound and I as co-trustees of the Will agree to the distribution...

The consents which were sought on each of those letters provides that the person:

"...agree to the trustees of the estate of John Allan Collett distributing to Mrs. Gloria E. Collett the sum of one million (\$1,000,000) dollars out of the capital of the company.

I note that on the consent signed by John the word "company" is crossed out and the word "estate" is written in hand.

[10] In January 1994 the estate made loans to some of the beneficiaries as follows:

Caroline - \$150,000;

Michael, Teresa and Paula - \$60,000 each.

Each signed a loan agreement, an example of which is contained at Tab 6. John and Johnny did not apply for loans. John did not apply because he objected to the loan procedure.

[11] Tab 6 of the Book of Documents deals with the loan agreement signed by Michael. It states in part:

WHEREAS:

A. The Borrower is a residual beneficiary of the Estate of Allan J. Collett and is expected to ultimately inherit a sum in excess of One Hundred and Fifty Thousand (\$150,000.00) Dollars.

[12] The amount of loan was \$60,000 with interest at 7% compounded annually. Repayment was allowed at anytime without notice or penalty, but otherwise the agreement did not provide for the date of repayment except the following in paragraph 5:

5. The full amount of principal and interest will become a charge against the Borrower's remainder interest in the Estate of Allan J. Collett and shall be deducted from any distribution made by the Estate to the remainder beneficiaries.

[13] The second document at Tab 6 is the letter from Michael to Mr. Grayson making the following request:

I would like to receive 60,000 (sixty-thousand) as an advance on my share of my grandfather's estate.

This document appears to have been signed by Caroline and Gloria. On the strength of these documents, the monies were paid to Michael.

[14] Johnny passed away February 16, 1994, and Michael passed away November 5, 1994. Michael's daughter, Paige Arduini, was born May 26, 1995.

[15] Gloria passed away June 25, 1998. Gloria's life interest terminated and the residue was to be divided into two shares, one share to be divided between Caroline and John, who both survived their mother, the beneficiaries entitled to the second share were Teresa, Anne, Paula, Johnny's children David and Jennifer, and Michael's child Paige. Teresa, Anne and Paula are each entitled to one-fifth of this second share. The share of Paige and the share of David and Jennifer is defined in the order which varied the will:

...if any issue of such deceased grandchild are living at the death of the survivor of me and my said wife, such issue shall take in equal shares per stirpes the share of the residue of my estate to which such deceased grandchild would have been entitled if then living.

[16] There is a dispute between the parties as to the meaning of this phrase.

[17] These proceedings were commenced July 26, 1994, by the executor, Mr. Grayson. The initial difficulties involved the management or administration of assets of the estate by John. John had dealt with the sale of some of the cattle and the parties could not agree on the accounting for that sale.

[18] March 13, 1995 the court ordered a trial of the issue dealing with the disposition of assets. This order was by consent of Mr. Grayson, Gloria, John, and the Public Trustee representing the minors Jennifer and David. Paige was not born until May 26, 1995.

[19] The matter was again before the court on August 30, 1999, and a consent order was made on that date. Most of the issues regarding disposition of assets by John were resolved and orders made by consent. The order also dealt with some payment of executor's fees and accounts and provided:

...save and except as specifically varied by this Order and subject to the right of the PUBLIC TRUSTEE to review any and all payments made or to be made to CAROLINE POUND pursuant to paragraphs 9 and 17 of the Minutes of Settlement, the annual estate accounts prepared by the executors up to and including the accounts of January 2, 1999 are approved.

[20] The order also provided for a partial distribution of the estate and referred to distributions being made to the estate of Michael Collett and the estate of Johnny Collett, although these estates were not beneficiaries. The order also left open the issue of the amount of bookkeeping services and executor's fees of Caroline Pound (para. 17).

[21] Paragraph 21 of the order at p.4 specifically provides:

The issue of whether the estate of MICHAEL COLLETT has been underpaid will be determined by the Court or by agreement between the parties.

[22] The issues presented to the court pursuant to Rule 33 are as follows:

1. Whether the issue of Michael Collett and Johnny Collett, deceased grandchildren of the testator, have been underpaid and in particular:

- (a) Was the distribution of \$1 million made in April 1993 valid or ought the estate to account to the issue of the deceased grandchildren for that distribution and, if so, how much ought the issue to receive?
- (b) Was the loan made to Michael Collett in January 1994 valid or ought the estate to account to Paige Arduini (the sole surviving issue of Michael Collett) for that loan and, if so, how much should Paige Arduini receive?
- [23] Mr. Dolder, counsel for the estate and the two surviving executors, William Grayson and Caroline, argued that the consent order of August 30, 1999, approved the accounts as specified and therefore any issues raised in this special case which have been determined by that order are *res judicata*. In particular, the issue of the distribution of the \$1 million. I expressed my concern that whether the matter was *res judicata* could not be determined on the agreed statement of facts. The parties did wish a decision on the issues as stated in the special case and therefore I have proceeded without any consideration as to whether or not an argument might be made that the order of August 30, 1999, makes those issues *res judicata*. That is an issue which the parties may have to seek instructions on and depending on those instructions decide whether to pursue it further. I note the order does provide:

...any party shall be at liberty to apply for directions with regard to the form or content of this order.

- [24] It may be necessary for the parties to consider an application before the judge that made that order. They may wish to argue the issue of *res judicata* at that time as well. It may even be argued that the decision *Re: Potter*, 2000 B.C.S.C. 628, makes it clear that the court does not have jurisdiction to retroactively approve investments that are contrary to the Trustee Act. (p.6, para. 15)

THE APRIL 1993 ADVANCE OF \$1 MILLION

- [25] The infant beneficiaries argue that this advance was not made pursuant to the authority the executors had to encroach on capital contained in paragraph 3(g) of the will. The will granted the executors a power and authority:

...to pay to or use for the benefit of my wife, such part or parts of the capital of the said trust as in their absolute discretion my Trustees consider advisable.

- [26] The infants say that the advance was not for the use or benefit of the wife and although the executors had an absolute discretion to make an advance for that purpose, in this case they did not exercise that discretion or make any determination whether it would be advisable.
- [27] The facts agreed to are that Gloria requested a capital distribution in the sum of \$1 million and that the advance was pursuant to that request. The facts state that the executors exercised their discretion to encroach on the capital of the estate.

- [28] Certainly the documents at Tab 3 refer to an encroachment by the life beneficiary as provided for in paragraph 3(g) and says that Gloria has asked that the sum of \$1 million be distributed to her. The agreed statement of facts also states that John suggested to the executors and the other beneficiaries that there be a capital distribution of \$1 million.
- [29] The facts agreed to in paragraph 14 of the further amended statement of facts is somewhat contradictory. It is not clear whether it is a capital distribution or an encroachment on capital pursuant to paragraph 3(g) and it says that the executors exercised their discretion to encroach, although the infants' argument before me is the fact that the executors did not exercise their discretion or make any determination as to whether or not the encroachment or advance was a payment to or for the benefit of Gloria.
- [30] They argue that the executors failed to consider who were the real potential contingent beneficiaries of the estate, and in fact in their letter indicate that they want the approval of all remainder beneficiaries. However, those beneficiaries could not be determined until the termination of the life estate. It appears the executors simply assumed that the five grandchildren would survive their grandmother and therefore be the beneficiaries of one-half of the residue. Unfortunately that did not occur and as events proceeded, the grandchild Michael predeceased Gloria, being survived by his child Paige who was alive at the date of Gloria's death. The grandchild Johnny also failed to survive his grandmother and his children, Jennifer and David, were alive at the date of Gloria's death and therefore became beneficiaries.
- [31] When the advance of \$1 million was made, Caroline, John, and the five grandchildren were merely contingent beneficiaries. In order to share in the Testator's estate, they had to survive Gloria.
- [32] Gloria had a life interest in the residue of the estate and the trustees were entitled to encroach on capital for her use and benefit, but she was not the beneficial owner of the residue of the estate other than her entitlement to the net income.
- [33] The infants argue that the trustee may not delegate his office, benefit or profit personally from dealings with the trust property with the beneficiaries or as a trustee, and that a trustee must act honestly and with the level of skill and prudence which would be expected of a reasonable man of business administering his own affairs. (Law of Trust in Canada, second edition D.W.M. Waters, p.690)
- [34] The infants argue that in exercising a power to encroach the trustees are still bound by these duties and where they are disposing of assets must take particular care to determine who the beneficiaries are and consider their obligations to all of the beneficiaries. (Waters, p.690-91)
- [35] Even if the executors had given consideration as to whether this encroachment was for the use and benefit of Gloria in determining and exercising their discretion, they would have to consider all of the potential beneficiaries and the impact of the distribution upon them. It is

argued that failing to do so amounts to a failure to exercise the appropriate level of skill and prudence. (Waters, p.692-93) They argue that the advance was not really an advance to Gloria and did not benefit her, but was really an advance to potential beneficiaries at the expense of other potential beneficiaries not yet known, that this was in conflict with the directions in the will and the order varying the will, that the trustees have failed in their duty to preserve the assets or preserve the trust property. (Waters, p.787-89 and 791) The duty of trustees is to act with an even hand as between the beneficiaries, and in particular must act fairly towards beneficiaries who have a successive interest.

- [36] The infants referred to the decision *Nichols v. Wevill Estate*, [1995] B.C.J. No. 2170. This case dealt with a dispute between an executor who had encroached on capital for the benefit of a person holding a life interest in an estate, and the residual beneficiaries. In the *Nichols* case the empowering clause provided the trustee could:

...pay or apply for the maintenance or welfare...

of the person entitled to a life interest. This was the deceased's second wife. The residual beneficiaries were the children of his first marriage.

- [37] The encroachment was for the purposes of providing private nursing services for the wife. The trustee argued that it had a broad discretion subject only the requirement that it act honestly, objectively, and with care. The children argued that the trustee had not met the standard of care required. The trustee encroached in capital to pay arrears of \$30,000 for private care, and \$9,000 a month for six months. Madam Justice Quijano, in para. 26, referred to the decision *Fales et al v. Canada Permanent Trust Co. and Wohllenben v. Canada Permanent Trust Co.* (1976), 70 D.L.R. (3d) 257 (S.C.C.) and quoted from 267-268, in addition to other things, the following:

But however wide the discretionary powers contained in the will, a trustee's primary duty is preservation of the trust assets, and the enlargement of recognized powers does not relieve him of the duty of using ordinary skill and prudence, nor from the application of common sense.

- [38] Justice Quijano held that the trustees have a duty to all the beneficiaries and must act even-handedly citing *Re: Stekel; Lauer v. Stekl and Public Trustee*, [1974] 6 W.W.R. 490 (B.C.C.A.) p. 494, and quoted from p. 788 of *Waters* as follows:

...That duty must be discharged with honesty, objectivity and care, but that is all. Impartiality lies in the presence of an honest and objective evaluation of each named beneficiary's position, and a consequent decision. The same is true when trustees have a power of encroachment over capital in favour of joint life tenants, or even a power of appointment over capital. The duty of impartiality has been breached when honesty, objectivity and care are all present, but the result is one which favours Beneficiary A over Beneficiary B without an express or implied authority from the trust instrument...

Perhaps the principal impact of the rule upon trustees, however, is when they must administer the trust assets in such a way that they provide fairly for the beneficiaries whose interests in the trust property are successive.

[39] In the Nichols case Judge Quijano found that the trustee had breached its duties even though it had a wide discretion because it failed in a timely manner to obtain all the information necessary for it to make a considered decision. She stated at para. 34:

Having determined that the trustee did not act with care in exercising its discretion, the burden shifts to the trustee to establish that some or all of the encroachments were justified in accordance with the provisions of the will....

[40] In the case before me, there is nothing to suggest that the trustees considered all of the potential beneficiaries. In fact, based on the wording of the documents, it appears that they did not appreciate that any beneficiaries were contingent or there was potential for unborn contingent beneficiaries, being the children of the grandchildren.

[41] I find that in fact the advance of \$1 million was not for the use or benefit of Gloria, but was for the use and benefit of the people who actually received those monies. This is so even if some of those beneficiaries may have provided her with assistance of some sort. I also conclude that the executors have an absolute discretion to determine whether the encroachment is advisable. In exercising that discretion they are still bound to exercise that discretion with care, considering the user benefit of the life beneficiary and the interests of the contingent residual beneficiaries. They were not careful in determining who the potential beneficiaries were or might be, nor in considering how this encroachment might affect those contingent beneficiaries. Therefore I conclude that the advancement of \$1 million and the distribution of that money in the manner in which it was distributed was not proper exercise of their absolute discretion provided for in the will.

THE LOANS

[42] Although loans were made to a number of people, the only loan at issue is that made to Michael Collett, and the question is whether that was valid or ought the estate to account to Paige Arduini for that loan.

[43] Counsel for the estate agrees that this loan was not a loan which would have been authorized by the Trustee Act and do not point to any authority in the will to make investments of that nature. As pointed out in *Re: Potter*, the Trustee Act does not give the court jurisdiction to retroactively grant approval of such investments. The loans to some of the other potential contingent beneficiaries are not an issue because these beneficiaries are in a position to repay those loans as part of their share of the estate. The loan to Michael, however, cannot be paid from any interest he has in the estate because he did not survive Gloria and therefore did not become entitled to any interest in the estate. The loan agreement may have given the estate a charge against Michael's remainder interest in the estate, but because Michael failed to survive Gloria, he has no remainder interest in the

estate.

- [44] Michael's estate has some assets but it is apparent they will be insufficient to meet the liabilities under the loan as they existed in July 1998 which, including interest, is for the sum of \$80,719.50.
- [45] The executors argue that Paige's interest in the estate must be reduced by the amount of the loan owed by Michael to the estate. The reasoning is that the order which amended the will provided that she, being the issue of the deceased grandchild Michael:

...shall take...the share of the residue of my estate to which such deceased grandchild would have been entitled if then living.

In other words, her interest in the estate is subject to any limitations that Michael's interest in the estate might have been, including any charges he may have placed against his potential interest in the estate. The argument essentially is that this distribution clause is not really a distribution clause but should be read as a limiting clause. The difficulty with that argument is that if that were true, it would simply allow any of the grandchildren to have defeated any potential claims by their own children in the event that the grandchildren did not survive Gloria. In fact, Paige's interest cannot be limited by anything done by Michael during his lifetime. Michael did not have any interest in the estate which he could encumber or place a charge against. His interest was merely contingent. When he failed to survive he received no interest. The distribution clause does not limit Paige's interest in the estate as a result of any actions taken by Michael, but simply defines how the estate will be apportioned between those people who actually do become beneficiaries. The executors have simply granted a loan which they were not entitled to do under the Trustee Act. This would not have been a problem for them had Michael survived, because they would then have had a valid charge and would have been able to recover the loan. The executors have merely taken security which is of no benefit to them or the estate. They are not entitled to deduct the balance of the loan from Paige's share of the estate, although they are entitled to pursue Michael's estate to recover any portion of the loan they are able to.

- [46] In sum, the distribution of \$1 million was not a proper exercise of the discretion of the executors and must be accounted for. The executors are entitled to look to the recipients of that distribution to account for the monies they received, including the estate of Michael and the estate of Johnny. The distribution of the estate to the infant children should proceed on the basis that the \$1 million advance had never occurred.
- [47] Paige's entitlement to the estate cannot be reduced by the amount owing on the loan made to Michael. That loan is the responsibility of Michael's estate and is not of charge against Paige's interest in the estate.
- [48] During submissions, counsel and I discussed the concerns about ensuring that there was no double accounting or payment to any of the beneficiaries. Mr. McDiarmid sought an order that Paige receive \$100,000 and that Jennifer and David each receive \$50,000 plus interest which would equalize or adjust for the reduction of their share of the estate as a result of the

\$1 million advance made. He acknowledged that the estates of each of their fathers would have to account to this estate for monies that were improperly advanced to them. He also argued the direction that if Paige received \$80,719.50, the amount which was deducted as a result of the loan to Michael, it would also correct that error. He suggested that Michael's estate would be liable to this estate for that sum of money. He said that there was sufficient monies remaining in the estate to make those adjustments and that any monies left after all other expenses would then simply be apportioned according to the will as varied. He argued that this would include any monies recovered from the estate of Michael or Johnny.

[49] I was concerned that this may still result in a double accounting and I am not be prepared to make an order for those distributions until a proper accounting had been made to ensure that there was no double payment. I would direct that this accounting take place before the Registrar. Perhaps it could be done at the same time as the remaining issues involving the accounts of Caroline Pound for her bookkeeping services and her executor's fees are dealt with by the Registrar.

"R.E. Powers, J."

The Honourable Mr. Justice R.E. Powers

October 26, 2000 -- Corrigendum issued by Mr. Justice Powers advising that it has been pointed out by counsel that page 2, para. 1, second line, Rule 22 should read "Rule 33".

This change has been noted and applied.

There are no other amendments to these Reasons for Judgment.

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