

CANADA / JUDGMENT

Fleming Estate (Re)

2003 BCSC 126

COURT

Supreme Court of British Columbia

DECIDED

23 January 2003

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2003BCSC0126

Citation: Estate of Ward Thomas Fleming

Date: 20030123
2003 BCSC 126

Docket: P2630
Registry: Duncan
IN THE SUPREME COURT OF BRITISH COLUMBIA
RE: THE ESTATE OF WARD THOMAS FLEMING

REASONS FOR JUDGMENT

of

MASTER MCCALLUM

Counsel for Applicant

Mary Lynn Bancroft

Date and Place of Hearing:

January 15th, 2003

Duncan, B. C.

- [1] This is an application for Letters Probate in circumstances where there is doubt about the value of estate and hence doubt about the appropriate amount of fees to be charged pursuant to the Probate Fee Act. The Probate Fee Act provides for the charging of fees based on the value of the estate which is defined as:

"value of the estate" means the gross value, as deposed to in a Statement of Assets, Liabilities and Distribution exhibited to the affidavit leading to a grant or to a resealing, as the case may be, of the real and personal property of the deceased situated in British Columbia that passes to the personal representative at the date of death.

[2] The Registrar referred the matter of the fee calculation to the court following her review of the probate application. She and the applicant did not agree on the value of the estate given the evidence of the executor. The Province of British Columbia is the recipient of the fees and ought to have had notice of the application. I give these reasons in the absence of submissions from the Province in order to avoid further delay but it is entitled to apply to have the matter reheard if it wishes to do so.

[3] The facts are not in dispute. The testator married in 1962 and separated from his wife in 1998. His wife commenced a proceeding under the Family Relations Act (the "FRA") in 1998 and an order was made on August 4th, 1998 declaring that there was no reasonable possibility of their reconciliation pursuant to the provisions of the FRA. The testator made a will in September 1998 and lived separate and apart from his wife until his death in March 2002. His executor made an agreement with the testator's wife in November 2002 dividing the family assets. The application for probate is based on the post agreement division of assets.

[4] The issue is whether the assets disclosed are those which passed on death. The applicant says the executor should only pay fees on those assets which did not go to the testator's wife because the FRA declaration in 1998 established the wife's ultimate interest in the assets. That does not appear to be a correct statement of the law.

[5] The FRA declaration is a triggering event for the purposes of the division of assets between spouses. Esson, J. held in *Mills v. Mills* (1980), 20 R.F.L.(2d)197:

"That is the date upon which the interest arises under s. 43, that interest being in the words of s. 43(2) 'an undivided half interest in the family asset as a tenant in common'. That interest continues to exist until, in one way or another, it is terminated "

[6] On that basis, the testator and his wife each had an undivided half interest in the family assets at the date of death and that was the interest that passed to the executor on death. The executor ought to have disclosed as property of the testator, passing on death, his own property and his half interest in the family assets. From that disclosure the appropriate calculation of fees can be made.

[7] I direct that these reasons be provided forthwith to the Province of British Columbia. The Province is at liberty to apply to have this matter reconsidered within 30 days of delivery of the reasons. If no such application is made within 30 days of delivery the applicant may proceed with the application on the basis set out herein.

"Master William McCallum"

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