

CANADA / JUDGMENT

Hayes v. Pearce

2022 BCSC 1658

COURT

Supreme Court of British Columbia

DECIDED

21 April 2022

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2022 BCSC 1658 Hayes v. Pearce

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hayes v. Pearce,

2022 BCSC 1658

Date: 20220421

Docket: S223362

Registry: New Westminster

Between:

Tara Carmel Hayes

Plaintiff

And

Norma Katherine Pearce

Defendant

Before: The Honourable Madam Justice Sharma

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

J. Wingson, Q.C.

S.B. Weber

Counsel for the Defendant, appearing by videoconference:

J.D. Keeley

Place and Date of Trial/Hearing:

Vancouver, B.C.

April 21, 2022

Place and Date of Judgment:

Vancouver, B.C.

April 21, 2022

- [1] THE COURT: This is an application by the plaintiff for the production of documents.
- [2] The underlying litigation is a dispute about the plaintiff's entitlement to a portion of the proceeds of sale of a property that the defendant sold.
- [3] The plaintiff is the defendant's daughter. The plaintiff's position is that in 2012, her mother (the defendant) promised to give her one half of the property. The property was sold in 2020, and the plaintiff did not receive any sales proceeds from the defendant, which gave rise to the notice of civil claim.
- [4] A central document in the litigation is a letter of direction that the defendant signed in December 2012. It stated, in part, that her daughter (the plaintiff) use the power of attorney if the defendant became incapacitated sell her principal residence.
- [5] It also stated that the plaintiff "deposit the net sale proceeds form the sale of my principal resident to a joint account that I have with her. I hereby specifically gift one half (1/2) of the net sale proceeds to my daughter and confirm that the joint bank account shall be with right of survivorship and all funds with in the joint bank account shall to [the plaintiff]".
- [6] At the same time, the defendant engaged in estate planning with the assistance of a lawyer. The plaintiff submits that lawyer's file is relevant and should be disclosed in the litigation. The defendant has refused to disclose it. Her position is that the file contains no documents that are relevant to any issue in the pleadings. She also says that the plaintiff's application is nothing more than a fishing expedition.
- [7] The plaintiff is one of the defendant's four children. The defendant was a registered owner of property in Langley, and as indicated, she sold it in 2020. About a week later, the plaintiff filed her notice of civil of claim.
- [8] The original notice of civil of claim sought a declaration that the defendant held half of the property in trust for the plaintiff, and that the proceeds of sale ought to be divided equally between the two of them. A certificate of pending litigation ("CPL") was placed on the property.

- [9] The facts cited in the notice of civil claim refer to and rely on the letter of direction from which I quoted.
- [10] The defendant filed a notice of application in February 2020 to strike the notice of civil claim. That was heard and decided by Justice Gomery, who delivered reasons for judgment on February 26, 2022. He granted the application and struck the claim, with leave to amend.
- [11] At para. 7 of his judgment, Justice Gomery refers to the established law on gifts. At para. 8, he noted that there has to be delivery, that is, a physical transfer of the thing being gifted. At para. 9, after noting that the plaintiff's claim was the gift of the property or proceeds of sale of the property, and at the time that the letter of direction was drafted, there were no proceeds in existence, there was no valid gift. In other words, it was not legally enforceable. Therefore, the plaintiff had not demonstrated an interest in land and the CPL was removed, and the claim struck. However, she was given leave to amend her notice of civil claim.
- [12] The claim was amended twice: first in February 2020, and then in February 2022. Despite those amendments, the notice of civil claim can be characterized as still relying on the letter of direction, although not exclusively. The claim now says that letter is part of a set of documents that indicate either an irrevocable gift of the beneficial half interest in the property, or an immediate gift of the half interest in the property.
- [13] However, two things are constant in all iterations of the notice of civil claim: (i) the assertion of a right to the property, whether the right is to the proceeds of sale, or to the property itself, and (ii) reliance, whether exclusive or not, on the letter of direction that was the subject of Justice Gomery's comments.
- [14] The plaintiff's argument focused on whether the "wills exception" applies to the file for which production is sought or, in the alternative, whether there has been either an express or implicit waiver of solicitor-client privilege. The defendant says the first issue that must be addressed is whether the documents sought to be produced are relevant, and her position is that they are not.
- [15] Although the notice of application refers to Rule 7-1(18) of the Supreme Court Civil Rules, there is no dispute that, in fact, this is an application under Rule 7-1. When the application was filed, the plaintiff understood that the solicitor's firm may still have those documents. However, it is my understanding that the documents are now in the possession of the defendant's current solicitors. I took it that there was no objection that relief is not being sought under Rule 7-1(18) as indicated in the notice of application.
- [16] In any event, the principle underlying whether the documents have to be produced are the same under both rules. The controlling issue is whether the documents sought to be produced could be used by either party at trial to prove or disprove a material fact. As the plaintiff emphasized, the question is not asked only in terms of the party possessing the documents, but whether either party can prove or disprove a material fact. This leads one to look at the pleadings as a whole.

- [17] The defendant says regardless of any waiver of solicitor-client privilege or application of the wills exception, the plaintiff cannot pass the basic hurdle of relevance.
- [18] The plaintiff says that the defendant's own evidence puts the issue directly before the court. In particular, she says there are inherent contradictions within documents that were probably drafted at the same time, and those may be in the solicitor's file.
- [19] I will refer to the pertinent facts, and some are being repeated.
- [20] The plaintiff is the daughter of the defendant. The defendant has four children, three of whom were from her second marriage. The plaintiff was from her third marriage. Sadly, one of her children died in 2010. That was the plaintiff's half-brother.
- [21] There appears to be no dispute that in 2012, the defendant engaged in some estate planning and attended upon the office of the solicitor, Steven Burton. The decision to attend estate planning arose after her son died. At that time, the defendant and the plaintiff enjoyed a close relationship, and it appears that the plaintiff may have taken the defendant to some of the meetings with Mr. Burton.
- [22] In or about December 2012, the defendant signed a power of attorney in favour of the plaintiff, a will, and the letter of direction. My understanding is that the solicitor gave the plaintiff a copy of that letter. Also, the defendant gave the plaintiff a set of keys to the property in question.
- [23] As I already noted, the defendant sold the property in January 2020 and did not give any of the proceeds from that sale to the plaintiff.
- [24] The plaintiff's argument is that the solicitor's file should be produced because the steps that the defendant took and her intention in the 2012 meeting with Mr. Burton are material to the lawsuit.
- [25] She relies, in part, on statements in the defendant's affidavit made February 12, 2020. The affidavit was not filed for this application; it was filed in relation to the application that was heard by Justice Gomery. In any event, the plaintiff refers to a number of statements from that affidavit, only some of which I will reference here. Specifically, the plaintiff relies on:
- a) Para. 10 - the defendant recalled meeting with Mr. Burton for the purpose of estate planning.
 - b) Para. 11 - the plaintiff places particular emphasis on the phrasing of this paragraph. The whole paragraph states, "My instructions, as I recall them to Mr. Burton, was that I wanted to leave Tara half of my house when I died."
 - c) Para. 12 - included an explanation of why the defendant wanted to give the plaintiff half of the house, which was to equalize things between her other children who had inherited money from her second husband when he died.

- d) Para. 13 - the defendant stated that she understood the letter of direction to be part of her estate planning documents.
- e) Para. 17 - the defendant deposed that she understood the letter of direction was part of her will and that the plaintiff would get half the house when she died.

[26] I also find the following paragraphs of the affidavit relevant:

- a) Para. 18 - the defendant deposed that if she had intended to give half of the property to the plaintiff in 2012, she would have asked the lawyer to add the plaintiff to the title but she did not give those instructions.
- b) Para. 27 - the defendant stated that when she executed a new power of attorney and new will in 2014, she understood those revoked her previous estate plan, and everything contained in the 2012 estate documents, including the letter of direction.

[27] The plaintiff points out that the so-called "letter of disinheritance" was not included in that affidavit nor revealed or disclosed to her until recently. It was appended to her solicitor's affidavit in response to this application. It seems it was prepared at the same time as the other document prepared by Mr. Burton.

[28] The plaintiff submits the letter of disinheritance explains some of the reasons that the defendant wanted to leave everything to her. She submits together with the paragraphs from the defendant's affidavit upon which she relies, all of the documents are intertwined and they constitute a new estate plan that Mr. Burton assisted her with in November 2012. She says they should all be disclosed, and seeks production of his entire file.

Wills Exception

[29] The first ground that the plaintiff relies on is the wills exception. It states that estate planning documents may be subject to special consideration to displace solicitor-client privilege in certain situations as set out in some cases, including *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353; and *Gordon v. Gilroy* (1994), 5 E.T.R. (2d) 289 (B.C.S.C.). Both parties also referred to *Kobzos v. Kobzos Estate*, 2019 BCSC 2254, which also articulated that rule.

[30] However, I agree with the defendant that the wills exception to legal advice privilege is generally only applicable in circumstances involving a testator, that is, when someone has died.

[31] In *Geffen*, three examples are given when the exception can be invoked: (i) if it is needed to determine whether a testator was subject to undue influence; (ii) to determine the true intentions of a testator, and; (iii) to determine whether the testator possessed capacity. All three elements refer to a testator, i.e., someone that has died. There is no testator here.

- [32] The plaintiff's position is that the rule is not so restricted, and that it may apply to inter vivos gifts. Her position is that this case is similar to *York v. Gilligan*, 1996 CanLII 823 (B.C.S.C.). I find that case to be distinguishable. In that case the plaintiff purported to rely specifically on two of three wills she drafted while not disclosing the third one. The factual circumstances are different than what is before me.
- [33] Also, in *York* the underlying facts involved a dispute between the plaintiff and her daughter and son-in-law. The plaintiff's husband had a terminal illness, so they did some estate planning. The plaintiff was suggesting that property in which her daughter and son-in-law lived was being held for the plaintiff's benefit. That suggestion implicated the estate planning she had done with her husband. I find those circumstances also make the case distinguishable.
- [34] I need not answer the more general question of whether the wills exception can ever apply if there is no testator. I am satisfied that it does not apply on the facts and circumstances before me.

Waiver of Solicitor-Client Privilege

- [35] The plaintiff also contends that there has been waiver of solicitor-client privilege. She says it has been explicitly waived because of some statements in the defendant's affidavit (some of which I have already reviewed) that reveal the plaintiff's meetings and discussions with her lawyer at the time. The plaintiff also alleges the defendant has injected her own state of mind into the litigation, resulting in an implicit waiver of solicitor-client privilege.
- [36] The fundamental principles of solicitor-client privilege are not in dispute, and they are set out in, among others, *Solosky v. The Queen* (1979), [1980] 1 S.C.R. 821. There must be a communication, the content of which must be the seeking or receiving of legal advice, and it must be something that the parties intended would be confidential.
- [37] The parties do not dispute the guiding principles with respect to the test for waiver. Both parties referred to *Do Process LP v. Infokey Software Inc.*, 2015 BCCA 52 as a leading case on the test for waiver:
- [22] I turn, then, to whether the chambers judge applied the correct "test"- or in Mr. Griffin's words, whether the judge asked the correct question. For this purpose, I refer again to *S. & K. Processors*, where McLachlin J., then a trial judge, stated:

Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege: (1) knows of the existence of the privilege; and (2) voluntarily evinces an intention to waive that privilege. However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require. Thus waiver of privilege as to part of a communication will be held to be waiver as to the entire communication. [At 220; emphasis added.]

In a similar vein, Sopinka, Lederman and Bryant in *The Law of Evidence in Canada* (2d ed., 1999) quote the following passage from *Wigmore on Evidence* (McNaughton Rev., 1961, Vol. 8) regarding deemed waiver of privilege:

Judicial decision gives no clear answer to this question. In deciding it, regard must be had to the double elements that are predicated in every waiver, i.e., not only the element of implied intention, but also the element of fairness and consistency. A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point his election must remain final. [At 635-6; emphasis added.]

(See also *Mann v. Carnell* (1999) 201 C.L.R. 1 (H.C. Aust) at 13, quoted in Linda S. Abrams and Kevin P. McGuinness, *Canadian Civil Procedure Law* (2008) at §2.230.)

[38] I find there has been no explicit waiver of solicitor-client privilege. The defendant did not reveal the content of communications she had with the lawyer or the legal advice that she sought or obtained. Rather, she simply refers to the fact that she went to a lawyer and that she spoke with a lawyer. That surely cannot be sufficient to amount to implied waiver; otherwise, we would have very little solicitor-client privilege that continues to be protected.

[39] I do not find the fact that the defendant mentioned her state of mind in the affidavit insufficient. I do not find that invokes "state of mind" as that phrase is used in the cases on implied waiver.

[40] It is important to keep in mind that the privilege is sacrosanct and near absolute. Given that, it could not be so easily displaced by someone saying that they went and met with a lawyer to talk about a particular issue. I hold that view, even though at the beginning of one of the paragraphs in her affidavit, the defendant stated that her intention at that time was to leave something to the plaintiff. Although that goes a bit beyond identifying a meeting and speaking with a lawyer, it is insufficient to displace solicitor-client privilege.

[41] The cases on implied waiver also note situations where a party voluntarily injects their legal advice into the litigation. The plaintiff submits that happens where there is a nexus between the legal advice and the issues in the pleading. The plaintiff says the confluence in the case comes from the letter of direction and the estate planning.

[42] With respect, I do not agree. There is no such link. Among other things, the fact that in 2014 the defendant created new estate planning documents and a new will obviates the possible relevance of any of the 2012 estate planning documents to any issue in any litigation.

- [43] The plaintiff also relies on the paragraphs that I cited earlier from the affidavit as the defendant's putting her state of mind in issue. I do not agree those paragraphs do so. The following comments from *Soprema Inc. v. Wolrige Mahon LLP*, 2016 BCCA 471, are apt:
- [52] This point is reinforced when one recalls the nature of the cause of action. Negligent misrepresentation will always put in issue a party's "state of mind" because reliance in fact and reasonable reliance are necessary elements of the claim. Other causes of action may well raise the same issue. Where a party has received legal advice on the subject of the transaction, its understanding of the law will always be relevant. Relevance will, it seems, inevitably drive waiver. This is not consistent with the law of privilege articulated by the Supreme Court.
- [53] Where legal advice may have influenced a party's "state of mind" on a material issue, it is inevitable that upholding the privilege will confer a litigation advantage on the party claiming it because the other would be denied access to relevant information about the opposing party's state of mind. One might think that this is an inevitable result of recognizing and upholding claims of solicitor-client privilege because part of the point of privilege is to protect from disclosure communications which are otherwise material and relevant. But it does not follow from this that that litigation advantage is "unfair". I do not think one can properly describe a litigation advantage "unfair" when it results from the recognition and protection of a fundamentally important principle in the legal system. Furthermore, protecting privilege in these circumstances does not raise an issue of inconsistency because the party asserting the privilege is not relying on the advice it received to justify its conduct at the same time as it shields that advice from disclosure.
- [44] The defendant has not relied on legal advice or seeking of advice in her pleadings. Only if a person does so could the concept of one voluntarily injecting legal advice into the litigation arise, and that simply has not happened here.

Other Reasons to Order Disclosure

- [45] The plaintiff also says that there are other reasons that wholly, or as part of her position I have already addressed, support her position.
- [46] She points out that it is manifestly unfair that the defendant has disclosed some of the documents from the file and not others.
- [47] With respect, that puts the cart before the horse. The analysis does not start with an examination of fairness to determine whether there has been an implied waiver. You must first find the conditions that amount to implied waiver exist, and engage in a fairness assessment. This may apply where a party is trying to "cherry-pick" by relying on certain documents, but not others, which creates an imbalance in the litigation. I do not find the defendant has done that; she does not say that her reliance on legal advice is relevant. Therefore, there can be no implied waiver, and the fairness analysis does not arise.

- [48] The plaintiff also points out that there is an inconsistency on the face of some of the documents, which puts her in an unfair position, not in the sense addressed above, but more generally. The plaintiff's position is that the court is then forced to simply take the defendant at her word when she talks about her intention. The plaintiff points out what she says is an inconsistency between the will that divides the estate between the siblings, and the letter of disinheritance. She says this is a blatant demonstration of the defendant trying to cherry-pick, which supports her position that there has been an implied waiver.
- [49] I do not agree. The defendant does not rely on that letter of disinheritance. The plaintiff says it was attached to an affidavit that is used in this application, and I ought to find that is akin to an admission of its relevance. I do not agree. The defendant has not listed the document, and the lawyer on the file has been very clear as to what the basis for relevance on the list of documents is. I am not relying on the lawyer's statement as being correct; I am simply saying that there is confirmation that the lawyers turned their mind to what was at issue and what that affidavit says is consistent with the position that was taken in front of me.
- [50] Moreover, the defendant's position is that letter of disinheritance is not a privileged document. That being the case it cannot be relied upon to demonstrate any cherry picking by the defendant.
- [51] I agree with that analysis. The document does not purport to be confidential. It is addressed to "whom it may concern". It does not purport to be a communication between a lawyer and the defendant. I cannot see in it an intention that it would be kept confidential.
- [52] I appreciate that the disinheritance letter has been witnessed by the lawyer, but not every document witnessed by a lawyer makes the document subject to solicitor-client privilege. That may be a factor in some cases, but, here, the document does not meet the basic elements of a privileged document as set out in Solosky.
- [53] Moreover, that document addressed her intention at a point in time in 2012. We know that she has changed her testamentary intentions because of new estate planning done in 2014.
- [54] To the degree the plaintiff relies upon the letter of disinheritance in support of her position that the defendant intended to gift the property to the plaintiff, I again refer to Justice Gomery's decision. He accurately set out the law. In order for there to be an irrevocable gift, there has to be, among other things, an actual, physical transfer. That did not occur. A letter talking about what the defendant wanted to do in her will cannot amount to a legally enforceable promise in any way, even without considering the important fact that her intentions changed in 2014.
- [55] In any event, I find there is insufficient evidence to raise any questions or engage in second-guessing the lawyer's assessment as to whether there are relevant documents in the file.
- [56] The plaintiff also points out that the defendant did not file an affidavit in response to this application. She submits that leaves a number of things in her affidavit uncontroverted.

- [57] The defendant's response to that is there was nothing to respond to. Her position is that the file is not relevant, so we do not get to the questions of waiver or the wills exception. Her position is that there was nothing to which she had to respond in the affidavit because the plaintiff had failed to demonstrate that the document was relevant to the pleadings.
- [58] For all those reasons, I do not agree that the defendant's affidavit or anything said in it makes her 2012 estate intentions with Mr. Burton relevant to this litigation. As I have already said, among other things, in 2014 she had new estate planning.
- [59] I refer specifically to the notice of civil claim, in its current iteration. This case is not an estate case and her testamentary intentions in 2012 cannot be relevant.
- [60] There is a fundamental problem with the plaintiff's position. The legal basis in the current further amended notice of civil claim refers to the gift, which Justice Gomery addressed. Nothing that I see in the documents attached to the defendant's lawyer's affidavit, or anything else in the record, causes me to think that there is any change to the validity of his conclusion that there is no gift because there was no physical transfer of anything.
- [61] The claim is restricted to the property, either in its own right or the proceeds of sale from the property. It is not a wider claim about the defendant's estate plans; nor could it be because she is still alive.
- [62] Even to the degree that there is a trust claim, it would be restricted to the property. That position depends heavily, although not exclusively, on the letter of direction, which has already been subject of judicial commentary.
- [63] For all those reasons, I dismiss the application.

[SUBMISSIONS ON COSTS]

- [64] THE COURT: The defendant has asked that costs be payable forthwith. The plaintiff submits that they ought to be in the cause because the actual merits of the claim were not in front of me. The defendant asserts that the claim remains weak and that there has been protracted litigation over what the defendant says is a weak claim.
- [65] I am not going to order costs payable forthwith. I think costs should be paid in the cause.
- [66] I do want to thank counsel. I am sure my judgment did not reflect your hard work, but I do appreciate your helpful submissions.

"Sharma J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/22/16/2022BCSC1658.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/hayes-v-pearce-2022>

Prepared on 29 October 2026 · Esheria