

CANADA / JUDGMENT

Hodgson v. Downs

2024 BCSC 31

COURT

Supreme Court of British Columbia

DECIDED

9 January 2024

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2024 BCSC 31 Hodgson v. Downs

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hodgson v. Downs,

2024 BCSC 31

Date: 20240109

Docket: 19308

Registry: Kamloops

In the Matter of the Estate of Marie Louise Friedel, Deceased

Between:

Gwen Hazel Hodgson and Gail Lynn Glass

Applicants

And

Yvonne Johanne Downs and Alan Charles Friedel

in their capacity as executors of the

Estate of Marie Louise Friedel, Deceased

Application Respondents

Before: The Honourable Justice B. Smith

Reasons for Judgment

Counsel for Applicants:

K. Thorsteinson

Counsel for the Application Respondents:

D. Oliver

Counsel for Timothy Friedel:

J. Drayton

Place and Date of Hearing:

Kamloops, B.C.

December 18, 2023

Place and Date of Judgment:

Kamloops, B.C.

January 9, 2024

INTRODUCTION

[1] For ease of reference I refer to certain persons by their first names. No disrespect is intended.

[2] Marie Louise Friedel (the "Deceased") was married to Arthur Martin Friedel ("Arthur"). The Deceased had seven biological children:

- Gwen Hodgson ("Gwen");
- Gail Glass ("Gail");
- Yvonne Downs ("Yvonne");
- Alan Friedel ("Alan");
- Tracy Friedel ("Tracy");
- Timothy Friedel ("Timothy"); and
- Anita Friedel ("Anita").

[3] The Deceased had a Last Will and Testament dated March 25, 2009 (the "Will"). In the Will the Deceased left her estate to Arthur and, if he predeceased her, it was to be equally divided among her surviving children.

[4] Arthur and Anita predeceased the Deceased.

[5] Gwen and Gail are the applicants (the "Applicants"). Yvonne and Alan are the respondents in their capacity as executors of the Deceased's estate (the "Executors").

- [6] The Applicants seek leave to commence an action on behalf of the Deceased's estate, pursuant to s. 151 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA]. The proposed defendants are the Executors and Timothy.
- [7] The Applicants also seek an order that they be granted authority to obtain the Deceased's medical records for the almost seven-year period from January 1, 2015 until her death on March 1, 2022.
- [8] The application record includes affidavits from the Applicants, the Executors, Timothy and Tracy.
- [9] The Executors take no position on the application and their counsel made no submissions concerning the orders sought.
- [10] Timothy is not a respondent to the application, but he has an obvious interest in the outcome. Neither the Applicants nor the Executors objected to counsel for Timothy being heard on the application. Timothy opposes the application and his counsel made submissions opposing an order allowing the Applicants to commence the intended action.
- [11] Tracy's affidavit supports Timothy's position.
- [12] For the reasons that follow, I grant the application in part. I grant the Applicants leave to commence the intended action. I decline to make an order that the Applicants be granted authority to obtain the Deceased's medical records and adjourn this aspect of the application generally.

FACTUAL BACKGROUND

- [13] In the Will, Arthur was named as the primary executor. Yvonne and Alan were named as joint alternate executors.
- [14] Arthur died in 2009. Anita died in 2016. The beneficiaries under the Will are the Applicants, the Executors, Tracy and Timothy.
- [15] Before Arthur's death, he complained to Gail on several occasions about having a tough time with the Deceased and that she was "losing it".
- [16] After Arthur's death, the Deceased became the sole owner of a residential condominium in Kamloops (the "Condo"). The Condo was the largest asset owned by the Deceased before her death.
- [17] In January 2016, Gwen received a letter from the office of the Public Guardian and Trustee of British Columbia, stating they had information indicating there may be concerns about the management of the Deceased's financial and legal affairs.
- [18] At the time, Interior Credit Union (the "Credit Union") held a mortgage on the Condo.

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- [19] In February 2016, the Credit Union petitioned the Court for foreclosure on the Condo. The Applicants assisted the Deceased in defending against the foreclosure proceedings.
- [20] On April 14, 2016, the Deceased gave the Applicants an enduring power of attorney regarding her financial affairs.
- [21] At some later date, Timothy applied to the Credit Union for financing to potentially purchase the Condo.
- [22] In May 2016, Gail began working with staff at the Credit Union to help manage the Deceased's finances and ensure she had enough money to pay her bills and eat properly. For example, Gail requested the Credit Union to cancel the Deceased's bank card after it was discovered that she had given it to a homeless person.
- [23] By July 2016, the Deceased had failed to pay a strata corporation special levy and was in arrears for strata management fees, which resulted in the strata corporation placing a lien against the Condo.
- [24] In early July 2016, Gail received an email from the manager of the Credit Union, who advised that the Deceased "seemed confused" and that he wanted to help her.
- [25] In late July 2016, the manager of the Credit Union informed Gail that Timothy's application for financing to potentially purchase the Condo was unsuccessful, and they suggested the Deceased consider a reverse mortgage.
- [26] In November 2016, with the Applicants' assistance, the Deceased obtained a reverse mortgage from the Credit Union, and continued living in the Condo.
- [27] On April 6, 2017, Gwen received a letter signed by the Deceased revoking the Applicants' power of attorney. The letter appeared to be handwritten by Timothy. The letter was signed by Timothy as the sole witness.
- [28] On April 28, 2017, the Deceased gave Timothy power of attorney.
- [29] Sometime around April 2017, Timothy began living in the Condo with the Deceased.
- [30] At times during the ensuing four-year period that Timothy lived in the Condo with the Deceased, she spoke negatively to both Gwen and Gail about him, and how she claimed he was treating her poorly.
- [31] In April, 2021, Tracy went to the Condo and found the Deceased on the floor in need of medical attention, as a result of which she was hospitalized.
- [32] In July 2021, the Deceased was transferred from hospital to the Overlander Residential Care Facility in Kamloops ("Overlander"), where she was cared for until her death.
- [33] Meanwhile, Timothy continued to live in the Condo.

- [34] Gwen worked at Overlander as a food support worker. After the Deceased's admission to Overlander, Gwen saw her nearly every day.
- [35] While the Deceased lived at Overlander, she suffered from dementia and various other health issues. She could not walk and needed assistance with basic hygiene and mobility. Although the Deceased was able to associate with her daughters, she was often unable to recognize their spouses, children, and other people she had known for many years.
- [36] The Deceased repeatedly expressed upset about being in a care home. She frequently remarked to Gail that she was angry with Timothy for putting her in Overlander, that she wanted to go home, that he took her debit card and that he was spending her money.
- [37] At some point Gwen witnessed the Executors and Timothy leaving Overlander after speaking with the Deceased. When Gwen asked the Deceased what was going on, the Deceased responded that they had visited her and had gotten her to "sign something". The Deceased did not explain what the "something" was, and Gwen stopped questioning her about it when she became agitated.
- [38] On December 10, 2021, four months before the Deceased's death, she signed a Contract of Purchase and Sale, and a freehold transfer form (the "Form A"), transferring her entire interest in the Condo to Timothy (the "Transfer").
- [39] The signatures of the Deceased and Timothy on the Contract of Purchase and Sale were witnessed by the Executors. The Form A was witnessed by a lawyer at a law office in Kamloops (the "Lawyer"). The Deceased did not drive and would have required assistance to get to the Lawyer's law office as she was by then unable to walk. It is not known who took the Deceased to the Lawyer's law office.
- [40] The Seller's Statement of Adjustments for the sale of the Condo indicates the consideration for the Transfer was \$140,000. The Order to Pay indicates that \$99,466.94 of the \$140,000 was used to pay the outstanding amount on the reverse mortgage held by the Credit Union.
- [41] The 2022 B.C. Assessment value for the Condo as of July 1, 2021 was \$332,900; and as of July 1, 2022, was \$389,000.
- [42] In the conveyance of the Condo from the Deceased to Timothy, the Lawyer acted for the Deceased and another lawyer from a different law firm acted for Timothy.
- [43] On March 1, 2022, the Deceased died due to complications from COVID-19. She was 87 years old. Approximately one month later, Yvonne told Gwen that the Condo did not form part of the Deceased's estate. Until then, Gwen knew nothing of either the Transfer or the sale of the Condo to Timothy.
- [44] Before moving in to the Condo with the Deceased, Timothy spent about \$12,000 of his own money on material to renovate it. Timothy did the renovation work himself. After moving in, Timothy made interest-only payments on the reverse mortgage, initially \$463 per month, then \$401 per month, starting in November 2018. The Deceased made no payments on the

reverse mortgage. Timothy paid all the property taxes on the Condo, except for one payment. There is no evidence before the Court about whether Timothy paid the Deceased rent or contributed to household expenses.

[45] Commencing in June 2022, counsel for the Applicants sent several letters to counsel for the Executors, informing them of the Applicants' concerns about the validity of the Transfer and Timothy's actions while having power of attorney. The Applicants specifically expressed their concerns about the Deceased's capacity and susceptibility to undue influence. The Applicants requested the Executors seek further details about the Transfer, including the Lawyer's notes, and a passing of accounts from Timothy.

[46] The Applicants' purpose in seeking the Lawyer's notes was to determine whether the Deceased received adequate independent legal advice to rebut or protect against undue influence. The Applicants' purpose for requesting a passing of accounts from Timothy was due to their concerns about his actions while having power of attorney.

[47] The Executors were initially reluctant to seek out any of the requested information, but eventually agreed to investigate the matter following the grant of probate, which was issued on January 10, 2023.

[48] Subsequently, the Executors:

- provided the Form A, the Order to Pay, and the Seller's Statement of Adjustments;
- did not deem it necessary for a passing of accounts from Timothy;
- did not confirm whether there was a deed of gift or any other documentary evidence confirming the Deceased's intention to give excess equity in the Condo to Timothy;
- did not provide confirmation of the Deceased's capacity to transfer her interest in the Condo to Timothy; and
- counsel for the Executors advised they inquired with the Lawyer concerning notes of the Lawyer's meeting with the Deceased about the Transfer, and that the Lawyer responded there were no notes because it was a "straightforward transaction".

[49] On June 19, 2023, counsel for the Applicants advised counsel for the Executors by letter that they would be making an application to the Court, pursuant to s. 151 of the WESA, if the Executors declined to take any further steps with respect to the Transfer, or Timothy's actions while having power of attorney. Subsequently, counsel for the Executors confirmed the Executors' position remained as previously indicated.

LAW

[50] Section 151 of the WESA allows a beneficiary to apply for leave of the court to start an action in the name of the estate to recover property, enforce a right, or obtain damages.

- [51] The British Columbia Court of Appeal summarized the applicable factors of s. 151 of the WESA in *Hoggan v. Silvey*, 2022 BCCA 176 [Hoggan] at para. 58:
- [58] In summary, the factors that are relevant in an application pursuant to s. 151 may vary depending on the nature of the application. The statutory factors will always apply, so the petitioner must have standing as a specified person, must have made reasonable efforts to cause the personal representative to commence or defend the action, must have given the necessary notice, and must be acting in good faith. There must be an arguable case, as a meritless case would be neither necessary nor expedient to protect the interests of the estate or the specified person. However, it will not always be necessary to consider whether the potential relief outweighs the inconvenience to the estate and whether the litigation is in the best interests of the estate. Rather, as mentioned, s. 151(3)(b) is to be read disjunctively, such that there are four possible ways the standard may be met: it may be necessary to protect the interests of the estate; it may be expedient to protect the interests of the estate; it may be necessary to protect the interests of a specified person; or it may be expedient to protect the interests of a specified person.
- [52] Section 151(4) of the WESA provides that on application by a specified person the Court may give directions for the conduct of the proceeding.

POSITION OF THE PARTIES

Position of the Applicants

- [53] The Applicants say the applicable statutory factors are established in this case.
- [54] The Applicants assert that:
- the Deceased lacked capacity when effecting the Transfer;
 - the Deceased was unduly influenced when effecting the Transfer;
 - the Deceased had no or insufficient legal advice to establish that she acted of her own free will when effecting the Transfer;
 - the Transfer is void on the basis of unconscionable procurement because Timothy played an active role in its procurement;
 - the Deceased did not have an adequate understanding of what was happening; and
 - Timothy breached his fiduciary duty to the Deceased when effecting the Transfer to himself.
- [55] In the intended action, the Applicants will seek:
- a passing of accounts from Timothy in his role having power of attorney for the Deceased in the years prior to her death;
 - an order setting aside the transfers of any assets or gifts by the Deceased to Timothy between April 18, 2017 and March 1, 2022;

- a declaration that the Transfer is void, and an order that Timothy's interest in the Condo be vested in the Deceased's estate;
- alternatively, a declaration that Timothy hold any assets which were solely owned by the Deceased on a presumption of resulting trust for the estate; and
- costs from Timothy.

Position of the Respondents

[56] The Executors take no position on the application.

Timothy's Position

- [57] Timothy submits that the Court should accord deference to the Executors' decision not to pursue him in litigation. Timothy says the Deceased entrusted the Executors with the responsibility and good judgment to make such decisions. Timothy says in Tracy's affidavit she describes how the Deceased had wished for there to be peace in the family as amongst the various siblings and that Tracy, for her part, now wishes the same. Timothy submits that it appears there is animosity between the Applicants on the one hand and all of the other children, including himself, on the other, and that this is not the basis for permitting an action to proceed.
- [58] Timothy says that in 2016, the Applicants were prepared to facilitate a sale of the Condo from the Deceased to him for \$140,000.
- [59] Timothy asserts that he acted in reliance upon the hope that he would ultimately purchase the Condo for \$140,000. He says he moved into the Condo, looked after the Deceased, spent money renovating the Condo and did not move away from Kamloops to a higher paying job, although he could have.
- [60] Timothy says that if the action is permitted to proceed and is successful, there is a possibility he would lose the Condo and have no place to live, which is a result the Deceased did not wish to see happen.
- [61] Timothy says the Applicants have not taken a businesslike approach to the application and that this tends to support his assertion that they are motivated by ill will.
- [62] Timothy objects to the use of B.C. Assessment reports as evidence of the value of the Condo.

DISCUSSION

Section 151(0.1): Specified Persons

- [63] The Applicants are specified persons as they are named beneficiaries of the Deceased's estate.

Section 151(3)(a)(i): Reasonable Efforts to Cause the Executors to Act

[64] As evidenced by the letters of May 17, 2022, March 10, 2023 and June 19, 2023, the Applicants made efforts to cause the Executors to act. In the circumstances, I find those efforts were reasonable.

Section 151(3)(a)(ii): Notice to Executors

[65] As evidenced by the letter of June 19, 2023, the Applicants gave notice to the Executors.

Section 151(3)(a)(iii): Good Faith

[66] I am satisfied the Applicants are acting in good faith.

[67] In *Jaing v. Piccolo*, 2020 BCSC 1584 [Jaing] at para. 69, Justice Verhoeven determined that a specified person under s. 151(3)(b) is acting in good faith if they are genuinely pursuing the objectives set out therein, even if doing so out of their own self-interest. In the circumstances, I am satisfied the Applicants are not acting based on suspicion or conjecture, or for an ulterior purpose.

[68] If the Applicants are successful in the intended action, the value of the estate will increase, and consequently so will their share of the estate. That does not preclude a finding that they are acting in good faith. Rather, having regard to the purposes of the WESA, it is demonstrative of a good faith purpose: *Dunn v. Baird Estate*, 2023 BCCA 216 [Dunn] at para. 57, applying *Jaing* at para. 71.

Section 151(3)(b): Necessary or Expedient, and "arguable case"

[69] In addition to the requirement that the intended action be necessary or expedient for the protection of the estate or the interests of a specified person, the analysis under s. 151(3)(b) of the WESA requires the Court to determine whether the applicants have raised an arguable case in respect of the claim they seek to advance on behalf of the estate: *Chung v. Chung*, 2022 BCSC 1396, at para. 42.

[70] In *Hoggan*, the Court of Appeal discussed the threshold of an arguable case in the context of s. 151 of the WESA:

[42] There is no quarrel over the question of whether a petitioner applying under s. 151 of WESA has to establish an arguable case in order to obtain leave. That factor is present in most, if not all, leave applications. While it is sometimes worded differently, such as "has a reasonable prospect of success" or "not bound to fail", the test itself does not have a high threshold.

[71] I am satisfied the Applicants have established an arguable case, the pursuit of which may significantly increase the value of the Deceased's estate for all of the beneficiaries. The pursuit of the intended action is necessary and expedient to protect the interests of the estate for the majority of the beneficiaries, including the Applicants.

- [72] One of the material facts the Applicants will have to prove if the matter proceeds to trial is the value of the Condo at the time of the Transfer. As noted above, on this application, the Applicants rely on two B.C. Assessment reports as evidence that the value of the Condo was much greater than \$140,000 at the time of the Transfer. It will be recalled that the 2022 B.C. Assessment value for the Condo as of July 1, 2021 was \$332,900; and as of July 1, 2022, was \$389,000.
- [73] Timothy objects to the use of B.C. Assessment reports as evidence of the value of the Condo.
- [74] In *Dosanjh v. Liang*, 2015 BCCA 18 [Dosanjh], the Court rejected the use of property assessments as evidence to establish market value. The Court found there is no place for using assessments instead of expert opinion, but qualified its comments by adding "in cases such as the present one": *Dosanjh* at para. 63.
- [75] *Dosanjh* was followed in *Cowichan Tribes v. Canada (Attorney General of Canada)*, 2021 BCSC 2520 [Cowichan], which was referred to by counsel for Timothy.
- [76] *Dosanjh* involved a trial, in the context of a collapsed real estate deal. The value of the property was relevant to the quantification of damages.
- [77] *Cowichan* also involved a trial, but in the context of a claim by the plaintiffs for a declaration of title to various properties. The value of the properties was not relevant.
- [78] This is a leave application, not a trial. The context involves a determination of whether the Applicants have established an arguable case, not whether they have proved a material fact on a balance of probabilities. *Dosanjh* and *Cowichan* are therefore distinguishable.
- [79] The impugned assessments are not the only evidence before the Court of the value of the Condo at the time of the Transfer. Timothy's affidavit refers to and appends a freehold transfer form for a different unit in the same strata complex, showing a sale price of \$240,000 on June 3, 2021 for a comparable unit of the same size and condition as the Condo. \$140,000 is only 58% of \$240,000.

The Deceased's medical records

- [80] The Applicants are unable to compel records-holders to produce the Deceased's medical records to them. The Executors have advised they intend to take no further action. I was not provided with any information about whether records-holders, including Overlander, are aware of the application for this order.
- [81] The records sought are likely relevant to the determination of material facts in the intended action. The scope of the records sought covers a period of time in which there is reason to believe the Deceased's physical and mental capacity was compromised, particularly in the period before her death. While an order granting the Applicants authority to obtain the records sought could be within the scope of s. 151(4) of the WESA, as within the power of the Court to give directions for the conduct of the proceedings, I have considered Justice

Thompson's decision in *Werner v. McLean*, 2016 BCSC 1510 [Werner], in which a similar issue arose in an application pursuant to s. 151 of the WESA, albeit in a different context. In my view, some of the issues raised and discussed by Justice Thompson and counsel at paras. 32-37 of *Werner*, are also engaged in this case.

[82] I note too the comments of Justice Verhoeven at para. 90 of *Jaing* in regards to a request for a similar order:

In my view the petitioner, as plaintiff, can make demands or utilize document discovery and production powers including obtaining necessary court orders in the same manner as any other litigant, and therefore the requested order is unnecessary.

[83] In the circumstances, without having the benefit of submissions of counsel on the issues potentially engaged by this aspect of the application, I decline to make the order sought, and adjourn this aspect of the application generally.

CONCLUSION

[84] The Applicants are granted leave to commence an action on behalf of the Deceased's estate, pursuant to s. 151 of the WESA. The application for an order that the Applicants be granted authority to obtain the Deceased's medical records, including records from Overlander, for the period from January 1, 2015 to her death on March 1, 2022, is adjourned generally.

"B. Smith J."

B. SMITH J.

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