

CANADA / JUDGMENT

Holmes v. Holmes

2024 BCSC 510

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 510 Holmes v. Holmes

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Holmes v. Holmes,

2024 BCSC 510

Date: 20240327

Docket: S04128

Registry: Abbotsford

Between:

Cheryl Anne Holmes

Petitioner

And:

Andrea Stephanie Holmes, Executor and Trustee under the Restricted Last Will and Testament of Mary Anna Holmes, also known as Mary Anne Holmes, deceased, Stephen Douglas Holmes in his personal capacity, Stephen Douglas Holmes as Executor of the General Will of the Estate of Mary Anna Holmes, also known as Mary Anne Holmes, deceased, and J. Holmes Holdings Ltd.

Respondents

Before: The Honourable Justice K. Loo

Reasons for Judgment

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M.A. Misner

Counsel for Cheryl Anne Holmes in her capacity as Executor of the General Estate of Mary Anne Holmes, Deceased:

E.F. Macaulay

Counsel for Stephen D. Holmes and J. Holmes Holdings Ltd.:

M.S. Kerwin

Counsel for Andrea Holmes and Stephen Holmes in their capacities as Executors of the Restricted Estate and General Estate of Mary Anne Holmes, Deceased:

R.D. Lee

Place and Date of Hearing:

Vancouver, B.C.

March 4-5, 2024

Place and Date of Judgment:

Abbotsford, B.C.

March 27, 2024

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Introduction

- [1] In this petition, the petitioner Cheryl Anne Holmes ("Cheryl") seeks a declaration that the assets and liabilities of the estate of her deceased mother, Mary Anna Holmes (the "Deceased") are "assets of a single estate for the purposes of determining the rights and obligations of the Estate's executors, beneficiaries, and contingent beneficiaries".
- [2] Cheryl also seeks "the opinion, advice, and direction of the court" as to the following questions concerning the administration of the Estate:
- a) In relation to documents and information related to the administration of the assets under the General Will and Restricted Will dated March 4, 2019, does a solicitor-client relationship exist between the estate solicitors DLA Piper and Cheryl Holmes?
 - b) If a solicitor-client relationship does exist as between the solicitors at DLA Piper and Cheryl Holmes, does that privilege extend to documents related to the administration of the Estate including the financial administration of the Estate?
 - c) Is the petitioner Cheryl Holmes entitled to disclosure of documents and information with respect to the assets governed by the General Will and Restricted Will dated March 4, 2019?
- [3] Further, Cheryl seeks an order that "DLA Piper provide the petitioner with all necessary consequential accounts including Estate documents and information".

Background

- [4] The Deceased died on February 7, 2021. The Deceased is survived by her two adult children, Cheryl and the Deceased's son Stephen Douglas Holmes ("Stephen").
- [5] The Deceased left a General Will and Restricted Will both dated March 4, 2019. Although somewhat unusual, the use of multiple wills has been accepted by Canadian courts. For example, in *Re Kaptyn Estate*, 2010 ONSC 4293, the Court held:

Multiple wills are very flexible documents which a testator can use to establish a variety of regimes to govern the disposition of his property on his death. A testator can draft multiple wills to create distinct pools of assets administered by different sets of executors.

The General Will

- [6] Cheryl and Stephen are named joint executors and trustees under the General Will. The General Will provides as follows:

To pay and transfer \$2,000 to Stephen Frederick Green and Catherine Green;

To transfer the land and buildings at 4694 Udy Road, Abbotsford, B.C. to the plaintiff Cheryl Holmes; and

To divide the residue of the "General Estate" equally between the plaintiff Cheryl Holmes and the defendant Stephen Holmes.

[7] The "General Estate" is defined in the General Will and the Restricted Will as:

all property wherever situate and excluding my Restricted Estate, but including any motor vehicle owned by me at the date of my death, and including any amounts owing to me by J. Holmes Holdings Ltd., and including any monies which may be owing to me on the date of my death by J. Holmes Holdings Ltd., all as evidenced by any promissory note, loan agreement or book entry, and including any assets held in trust for me by J. Holmes Holdings Ltd. or by any other corporation as described herein.

The Restricted Will

[8] The Deceased appointed her granddaughter (Stephen's daughter), Andrea Stephanie Holmes ("Andrea"), to be executor of the Restricted Will. The Restricted Will provides as follows:

To pay and transfer the residue of the Restricted Estate to the defendant Stephen Holmes.

[9] The "Restricted Estate" is defined as:

any interest (direct or indirect) I have at the date of my death in J. Holmes Holdings Ltd., or in any company formed upon its rearrangement, reconstruction, reorganization or amalgamation, but specifically excluding any amounts owing to me by J. Holmes Holdings Ltd., and excluding any monies which may be owing to me by J. Holmes Holdings Ltd., and excluding any monies which may be owing to me on the date of my death by J. Holmes Holdings Ltd., all as evidenced by any promissory note, loan agreement or book entry, and excluding any assets held in trust for me by J. Holmes Holdings Ltd. or by any other corporation as described herein; and 'Restricted Estate' does not include any other assets.

The Action

[10] Cheryl has advanced a separate action in the Abbotsford registry of the Supreme Court, no. 00487 (the "Action"), for a declaration that Stephen holds the shares in J. Holmes Holdings Ltd. and the real property owned by that company in trust for Cheryl and Stephen. Cheryl appears to allege an agreement between her and Stephen to this effect.

Analysis

[11] In the context of the foregoing, Cheryl seeks the orders described above. The respondents contest the appropriateness of most of the relief sought.

Declaratory Relief

[12] The first prayer for relief in the petition seeks a declaration that the assets and liabilities of the Deceased's estate are "assets of a single estate".

- [13] In *Pereira v. British Columbia (Workers' Compensation Board)*, 2023 BCCA 195, the Court of Appeal held:
- [14] Superior courts have an inherent power to grant declarations
- [16] A declaration, however, is not a mere observation or comment by the court on how it views a situation. Rather, it is a binding statement by the court establishing a right, power, duty or status. A declaration is a discretionary remedy. Even if a person establishes the existence of a right, power, duty or status, a court will generally not grant the remedy unless it considers that it will have practical effect and resolve an extant legal dispute.
- [14] In my view, the order sought in the first prayer for relief runs afoul of the principles set out in *Pereira*. It is unclear what practical effect such a declaration would have or what extant legal dispute it might resolve. Further, there could be rights and obligations far beyond the ambit of this application that are impacted by the broad declaration sought.
- [15] For these reasons, I decline to exercise this Court's discretion to grant the declaration sought.

Opinion, Advice and Direction under s. 86 of the Trustee Act

- [16] Section 86(1) of the Trustee Act, R.S.B.C. 1996, c. 464, provides as follows:

A trustee, executor or administrator may, without commencing any other proceeding, apply by petition to the court, or by summons on a written statement to a Supreme Court judge in chambers, for the opinion, advice or direction of the court on a question respecting the management or administration of the trust property or the assets of a will-maker or intestate.

- [17] Pursuant to this section, Cheryl advances two questions regarding solicitor-client privilege between DLA Piper, the law firm that represents Stephen in his capacity as executor of the General Will and Andrea in her capacity as executor of the Restricted Will. She also asks whether Cheryl is entitled to disclosure of documents and information with respect to the assets governed by the two wills.
- [18] The respondents take the position that the relief sought by Cheryl is not appropriate on an application for advice and directions under s. 86.
- [19] First, the respondents point out that Cheryl is an executor only of the General Will. She has no standing under s. 86 to seek any opinions, advice or directions regarding the management or administration of the Restricted Estate.
- [20] Second, the respondents submit that s. 86 is not intended to resolve a conflict regarding the assets of an estate. In *Tomlinson Estate (Re)*, 2016 BCSC 1223, cited with approval in *Toigo Estate (Re)*, 2018 BCSC 936, Justice Dorgan quoted with approval from *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Carswell, 2012) at 1164 as follows:

The issue of "management or administration as a limitation upon the Trustee Act power of the court to give its opinion, advice, or direction has been more particularly raised in connection with motions which turn out to involve a conflict as to ownership of the assets. The courts refuse to give such assistance when there is essentially a conflict between interested parties, and this is not merely because the court has not the necessary evidence before it, but because it is felt that a 'fight', whether or not it is patent, is not a matter of management or administration.

[21] Justice Dorgan went on to say:

The focus of the section is for the court to help the trustees administer the trust by giving advice not in respect of conflicting parties, but advice regarding the obligations of a trustee.

[22] The fact there is a conflict regarding the Deceased's estate, at least between Cheryl and Stephen, is evident from the positions taken on this petition as well as the pleadings in the Action.

[23] Cheryl submits that there are circumstances in which a court will intervene to break a "deadlock". In *Mayer v. Mayer*, 2013 BCSC 1958 at para. 24, the Court held:

The court clearly has the discretionary jurisdiction under s. 86 to intervene to break a deadlock between trustees, and "in effect to give the casting vote" in order to ensure that trustees exercise their discretionary powers properly in the interests of the beneficiaries

[24] The Court of Appeal also discussed the circumstances in which the court will intervene to break a deadlock in *Kordyban (Trust Settlement) v. Kordyban*, 2003 BCCA 216. At para. 60, Justice Levine stated:

From my review of the authorities, I conclude that the court has the equitable jurisdiction, statutory and inherent, to intervene to break a deadlock of trustees where necessary to carry out the terms of the trust in the interests of the beneficiaries (see *Re Haasz*). To determine whether the court should intervene, it must first determine what the intentions of the testator are. Where trustees fail to exercise a discretionary power and do not act one way or the other, the question is whether that failure, or its consequence, is consistent with or frustrates the testator's intentions. If the failure of the trustees to act frustrates the testator's intention, the court must then determine, considering the interests of the beneficiaries, on whose side to intervene (that is, whether to grant the relief sought on the application).

[25] However, in this case, in my view, there is no deadlock with respect to whether or not the executors should exercise a particular discretion granted to them under the Will. Rather, there is a dispute between Cheryl and Stephen, two executors of the General Will, with respect to Cheryl's rights as against Stephen. Further, there is a dispute between Stephen, the beneficiary of the Restricted Will, and Cheryl, who is neither an executor nor a beneficiary of the Restricted Will but has a claim against the estate governed by the Restricted Will.

- [26] It is my view that Cheryl's claims for relief under s. 86 on this petition are misconceived. The purpose of s. 86 is to permit a trustee or executor to seek the opinion, advice, or direction of the court on legal issues when the trustee or executor is unsure how to proceed regarding the management or administration of an estate. As stated in Tomlinson, the courts refuse to give assistance under s. 86 when there is essentially a conflict between interested parties, as a "fight" is not a matter of management or administration.
- [27] As a result of the foregoing, I decline to answer the three questions posed in paragraph 2 of Part I of Cheryl's Notice of Application.

Order for production of Estate Documents and information

- [28] As noted above, Cheryl seeks an order that "DLA Piper provide the petitioner with all necessary consequential accounts including Estate documents and information".
- [29] Stephen and Andrea, in their capacity as executor of the General Will and executor of the Restricted Will, respectively, are represented by DLA Piper. However, DLA Piper is not a party to this action and it is not appropriate to seek an order against that firm without proper notice being given. Additionally, the prayer for relief is problematic as it is unclear what documents from what estates are being sought and on what basis. That said, I will make some general observations regarding Cheryl's rights to the disclosure of documents and information.

General Will

- [30] In support of her argument that she is entitled to disclosure of documents and information with respect to the estate governed by the General Will, the petitioner submits that as a named executor under the General Will, Stephen and his counsel at DLA Piper are required to consult with her regarding the administration of the Estate and the assets governed by the General Will.
- [31] As I understand it, this general principle is not contested. The respondents say that they have attempted to consult with Cheryl but she has failed to respond in a timely way or to engage with them.
- [32] They say that Stephen has provided Cheryl with information with respect to the administration of the General Estate in accordance with his common law duty. To the extent that there are specific documents which Cheryl submits have not been provided to her with respect to the General Will, they have not been applied for.
- [33] Although it is not disputed that Cheryl is entitled to information with respect to the administration of the General Estate, I am not prepared to make any order in this regard, as it is not clear from Cheryl's submissions what is alleged to be missing, if anything, from the information so far provided.

Restricted Will

- [34] In support of her plea that she is entitled to disclosure of documents and information with respect to the assets governed by the Restricted Will, Cheryl advances a number of arguments.
- [35] First, she submits that "as executor under the General Will, Cheryl Holmes is entitled to all documents and information of assets governed by the restricted Will which directly impact the governance of the assets that pass from the Restricted Will to the General Will."
- [36] In my view, this submission must be assessed by considering the words of the two wills. At paragraph 58 of *Kaptyn v. Kaptyn*, 2010 ONSC 4293 the Court held:

In my view, it is unnecessary to wade into debates about the existential effects of multiple wills. I think the answer is a more simple one -- the extent to which the assets governed by each multiple will are to be administered together or separately will depend upon the intention of the testator as expressed in the ...multiple wills. The use of multiple wills does not give rise to questions of asset ownership -- the "primary assets" and "secondary assets" are both those of the testator -- but may give rise to issues about how the two sets of assets are to be administered. So, then, it is open to a testator to use multiple wills to create separate silos of assets, divided by an impenetrable wall and administered completely separately, if that be his wish. The appropriate drafting language can be used to achieve that result. On the other hand, a testator may wish to minimize probate fees by splitting his assets into two pools, but draft his multiple wills in such a way that a degree of interdependence exists in the administration of the two pools of assets. In sum, the degree of relatedness or separateness of assets governed by multiple wills turns on the intention of the testator as expressed in the language of his wills.

[Emphasis added.]

- [37] Cheryl points to various overlapping provisions and definitions in the two wills in support of her submission that the two wills were intended to be administered together.
- [38] However, I agree with the respondents' argument that it is clear on the face of the wills that the Deceased intended each will to be administered separately. The Deceased's intention in this regard is demonstrated by the fact that the two wills are administered by different executors, the beneficiaries are different, and there are mutually exclusive collections of assets.
- [39] It is evident that the basic premise of the two wills is that, broadly speaking, Cheryl was intended to receive the Deceased's residential property, Stephen was to receive J. Holmes Holdings Ltd. including the real property owned by it, and the balance of the estate was to be split 50/50.

- [40] There are some connections between the two wills: for example, the Restricted Estate assets are to be made available to the General Estate in the event that the General Estate is not sufficient to pay all amounts that are payable out of the General Estate pursuant to the General Will. However, the evidence appears clear that this has not happened and it is not expected to happen as the assets of the General Estate are more than sufficient to cover all of the obligations of the General Estate.
- [41] The petitioner argues that the Deceased advised her family that the purpose for creating the estate plan set out in the General Will and Restricted Will was to minimize tax and probate fees. In this regard, the petitioner cites evidence of the solicitor who made the will. The respondents object to this evidence on the basis that evidence of the Deceased's intention in these circumstances is inadmissible.
- [42] In my view, the issue of the admissibility of this evidence does not need to be determined, as the evidence of the solicitor offers little support to Cheryl's position in any event. The proposition that the Deceased made multiple wills for the purpose of minimizing tax and probate fees does not, in my view, lead to the conclusion that the wills are to be administered together.
- [43] Cheryl also submits that she is entitled to correspondence between Andrea and her counsel regarding the Restricted Estate by virtue of her being a contingent beneficiary of the Restricted Will. This submission may be correct in theory but Cheryl was a contingent beneficiary only in the sense that she would have been a beneficiary had Stephen pre-deceased his mother, which did not happen.
- [44] Third, Cheryl submits that she agreed to a post-mortem tax plan regarding the Deceased's estate which has now been challenged, and that she may be "on the hook" for liabilities in relation to that failed plan. The respondents concede that Cheryl may "technically" be on the hook if the estate becomes liable to Canada Revenue Agency in this regard, but there are multiple layers of protection which must be overcome before Cheryl would bear any liability.
- [45] First, there is a claim against the solicitor who advised the Estate regarding the tax plan. It is possible that the Lawyers Indemnity Fund will be required or will agree to indemnify the estate for any liabilities owed to CRA, in whole or in part. Alternatively, if that claim fails, the assets in the Restricted Estate would be utilized to pay CRA before the assets in the General Estate would be accessed for this purpose.
- [46] The respondents agree that if the General Estate or Cheryl were to become liable to CRA, she would be entitled to see the relevant documents, but in my view, this is not a reason to disclose documents to her now. In any event, Cheryl has not explained why it is necessary to have access to all of the information and documents regarding the Restricted Estate on the basis of this potential liability.

- [47] Fourth, Cheryl submits that she has repeatedly been required to make accounting decisions in respect of the General Estate without complete information. There is conflicting evidence in this regard, but in my view, the answer to this argument is clear: she should be entitled to the information reasonably required to make those decisions, but this issue does not warrant an order that she have access to all of the information and documents regarding the Restricted Estate.
- [48] Fifth, Cheryl submits that she should have access to all of the information and documents regarding the Restricted Estate because the same solicitor "acts for both estates". However, it is clear from the case law that a lawyer acts for the executor of an estate, not the estate which is not a legal entity. As stated above, DLA Piper acts for Stephen in his capacity as executor of the General Estate and for Andrea in her capacity as executor of the Restricted Estate. I have been provided with no authority which supports the proposition that the beneficiary of one estate is entitled to information and documents in relation to an estate of which she is not a beneficiary simply because the same law firm acts for the executors of both estates. Cheryl also contends that she retained DLA Piper to act for her, but this proposition is denied and she has not proven it on the evidence before the Court.
- [49] Sixth, Cheryl submits that there was an agreement between her and Stephen that the entire estate be divided in a manner inconsistent with the wills. As noted above, that alleged agreement is the subject of a separate Action in this Court.
- [50] In support of her argument that this claim should give Cheryl the right to the disclosure of documents from the Restricted Estate, she refers to the decision in *Ballard Estate (Re)*, (1994) O.R. (3d) 350, for the proposition that there can be no privilege asserted against beneficiaries of a trust. However, in that case, the applicant was a residual legatee who had an absolute right to the residual. The issue was whether the applicant could be denied access to information and documents on the basis that he had received nothing and would receive nothing under the trustee's administration. In this case, Cheryl is not a beneficiary of the Restricted Estate, and indeed has no greater claim to its assets than as a claimant in a legal action.
- [51] I understand that lists of documents have been delivered in the Action. To the extent that documents, not produced, are relevant to the pleadings in the Action she is entitled to seek further production. However, this entitlement does not imply a wholesale right to documents and information in relation to the administration of the Restricted Will.
- [52] For these reasons, I am not prepared to make an order in favour of Cheryl for access to or disclosure of documents and information relating to the estates under the General Will or the Restricted Will, from DLA Piper or otherwise.

Privilege

- [53] I will briefly address the issue of privilege, as counsel addressed it at length in their submissions. It is noted that DLA Piper has refused to produce documents to Cheryl on the basis of privilege. Further, Stephen and Andrea submit that there may be documents and information held by them as executors which are privileged because they relate to adversarial dealings with Cheryl.
- [54] In *Chang v. Lai (Estate)*, 2014 BCSC 128, this Court held:
- [16] It is well established that a beneficiary has a proprietary interest in and a right to production of any document relating to advice sought and obtained by an executrix or trustee in connection with the administration of an estate. The executrix cannot claim solicitor-client privilege over such documents because they have a commonality of interest with the beneficiaries in the administration of the estate. The advice taken by the executrix is for the benefit of all beneficiaries under the will. There is no need to protect solicitor-client communications from disclosure because the beneficiaries and the executrix have a joint interest in the advice: *Re Ballard Estate* at p. 354. The same principle applies to legal opinions the executrix obtains regarding the proper administration of the estate. No solicitor-client privilege applies because the legal opinion sought by the executrix was to further the interests of the beneficiaries under the will: *Re Ballard Estate* at p. 354.
- [17] The beneficiary is not, however, entitled to production of all communications between legal counsel and the executrix. Where there is an adversarial relationship between a trustee and a beneficiary, there is no "joint interest" that compels disclosure of communications that would normally be protected by solicitor-client privilege.
- [55] In my view, in the event that Cheryl is otherwise entitled to the disclosure of additional documents and information in respect of either estate, the principles stated in *Chang* would apply to exclude disclosure of communications between Stephen, Andrea and DLA Piper relating to adversarial dealings between Stephen or Andrea on one hand, and Cheryl on the other.

Conclusions and Costs

- [56] For the reasons stated above, I have declined to grant the declaration or to provide the advice, directions or opinions sought by Cheryl in this petition. Further, I have declined to make any order in her favour in relation to the disclosure of documents and information regarding the General Estate or the Restricted Estate.
- [57] In relation to the issue of costs, the respondents submit that this petition is in the nature of an adversarial dispute, and does not relate to any difficulties that have arisen in the administration of the General Estate.

- [58] In these circumstances, the respondents submit that the Petitioner should not be indemnified for any costs from the General Estate and that this Court should make an award for a "blended costs" - meaning that the successful parties shall receive tariff costs from the unsuccessful party and the successful parties shall recover the balance of their costs from the estate. Such an award was made in *Peterson v. Welwood*, 2019 BCSC 838, for example.
- [59] On this issue, I agree with the respondents. I have found above that this petition is properly characterized as a dispute between Cheryl and Stephen, the two executors of the General Will, in respect of one of the executor's rights against the other, and a dispute between Stephen, the beneficiary of the Restricted Will, and Cheryl, who is neither an executor nor a beneficiary of the Restricted Will but has a claim against the estate governed by the Restricted Will.
- [60] In these circumstances, in my view, a blended costs award is appropriate.
- [61] The respondents are entitled to their costs of the petition from the petitioner at Scale B, and their remaining costs shall be paid from the General Estate.

"The Honourable Justice K. Loo"

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