
CANADA / JUDGMENT

Houston v. Fowler

2014 BCSC 489

COURT

Supreme Court of British Columbia

DECIDED

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2014 BCSC 489 Houston v. Fowler

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Houston v. Fowler,

2014 BCSC 489

Date: 20140324

Docket: 09-4524

Registry: Victoria

Between:

James Gregg Houston, Diana Margaret Shirling,

Anthony George William Houston and Shelagh Frances Russell

Plaintiffs

And:

Louise Fowler, Executrix of the Will of

George Frederick Houston, Deceased, and

Louise Fowler, Executrix of the Will of

Angela Mary Comber Houston, Deceased

Defendants

Before: The Honourable Mr. Justice Macaulay

Reasons for Judgment

(In Chambers)

Counsel for the Plaintiffs:

S.L. Klinger

Counsel for the Defendants:

M.S. Kerwin

Place and Date of Hearing:

Victoria, B.C.

February 26 and 27, 2014

Place and Date of Judgment:

Victoria, B.C.

March 24, 2014

- [1] The plaintiffs are the adult children, now ranging in age between 57 and 64, of George Frederick Houston, known as "Bob", who died in 2009. They seek a variation of their father's will pursuant to s. 2 of the Wills Variation Act, R.S.B.C. 1996, c. 490 ("WVA"). None of the plaintiffs claim that their father owed them any legal obligation; instead, all the claims stem from alleged moral obligations. For ease of reference in these reasons, and with no disrespect intended, I will, for the most part, refer to the parties by their first names.
- [2] The plaintiffs are all children of Bob's first marriage. The first marriage ended in a divorce and, in 1975, Bob married Angela Mary Comber Houston. This second marriage endured until Bob's death. At that time, Angela was 88. She and Bob were happily married for 34 years.
- [3] Angela died in February 2013. There were no children of her marriage to Bob, although Angela has two adult children from a previous marriage, one of which is Louise Fowler. Louise is the executrix of both Angela and Bob's estates.
- [4] The plaintiffs seek summary judgment pursuant to Supreme Court Civil Rule 9-7. While there are some disputes over evidence, they are, in my view, relatively minor and can be resolved based on other evidence that tends to confirm the accuracy of one side over the other. In the result, there is no injustice in deciding the issues of fact and law on the affidavit material. I conclude that the matter is suitable for summary trial.
- [5] I also note that the parties sensibly waited to take this step until after they concluded examinations for discovery. Finally, given the relatively modest size of the estate, a regular trial would be disproportionately expensive.

[6] There is no dispute respecting the analytical framework to be applied to claims under s. 2 of the WVA. Section 2 reads:

if a testator dies leaving a will that does not, in the court's opinion, make adequate provision for the proper maintenance and support of the testator's spouse or children, the court may, in its discretion order that the provision that it thinks adequate, just and equitable in the circumstances be made out of the testator's estate for the spouse and children.

[7] The leading authority on the WVA is the Supreme Court of Canada decision in *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807. The principles set out in *Tataryn* may be summarized, as follows:

- The main objective of the WVA is the adequate, just and equitable provision for the spouse and children of testators. The WVA also protects testamentary autonomy; where the testator's choice falls within the range of appropriate options, the court will not interfere. However, where the testator has not made adequate provision for the survivors, testamentary authority must yield, and the court will vary the provisions of the will.
 - In determining what is "adequate, just and equitable," the court is to consider both legal obligations and moral obligations.
 - Legal obligations are those which the law would impose on a person during his or her life were the question of provision for the claimant to arise.
 - Moral obligations are found in "society's reasonable expectations of what a judicious person would do in the circumstances, by reference to community standards."
 - Legal obligations must be satisfied first, and moral claims must be satisfied in order of priority.
 - The moral claim of independent children is more tenuous than the moral claim of spouses or dependent children. However, if the size of the estate permits, and in the absence of circumstances which negate the existence of such an obligation, some provision should be made for adult independent children.
 - The Act confers a broad discretion on the court, which permits the court to make orders which are just in the specific circumstances and in light of contemporary standards.
- [8] Determining claims under the WVA is a two-stage process, as set out in *Landy v. Landy Estate* (1991), 60 B.C.L.R. (2d) 282 (C.A.). First, I must determine whether the will makes adequate provision for the plaintiffs, when considered in the context of all the testator's legal and moral obligations. If the answer is "no," I must then determine what provision would be adequate, just and equitable in the circumstances.

- [9] The defendants here say that the size of the estate does not permit recognition of the plaintiffs' moral claims, particularly as none of them are in any financial need. The plaintiffs say that Angela's legal claims are satisfied and that the remaining funds are sufficient to recognize both Angela and the children's moral claims.
- [10] The relevant facts are as follows. At the time of his death, Bob and Angela had mirror wills by which they each bequeathed the entire residue of their estate to the other, provided the other survived for 30 days. If the other did not survive for 30 days, the entire residue was divisible into two equal parts, one to be shared by Bob's four children and the other by Angela's two children.
- [11] As Angela survived Bob for more than 30 days, she received the entirety of his estate, which consisted of his half interest, as a tenant in common, in the matrimonial home, a condominium. The condominium was worth \$770,000 at the time of Bob's death. Eventually, in July 2011, Angela sold the condominium and the estate's share of the net proceeds, \$375,968.13, have been held in trust in an interest bearing GIC, pending the outcome of this proceeding.
- [12] On Bob's death Angela also received his half interest in a joint investment account, worth about \$95,000, by the right of survivorship. She also retained her own half interest, as tenant in common, in the condominium. The condominium and the investment account were Bob and Angela's only major assets.
- [13] In May 2009, Angela made a new will. By the terms of her will, she left some personal items to the plaintiffs, \$5,000 to her adult son and the residue of her estate to Louise. Although Angela's reasons for making a new will are not particularly germane, she may have done so because James, acting under his father's power of attorney, had severed the joint tenancy in the condominium, shortly before his father's death.
- [14] The severance effectively resulted in half the value of the residence falling into Bob's estate, thus making it available in the event of a successful WVA claim. Without the severance, the entire value of the condominium would have passed to Angela outside the estate. The plaintiffs commenced this proceeding in October 2009.
- [15] James took the steps to sever the joint tenancy because he and his siblings had become concerned that Louise was interfering unnecessarily in Bob and Angela's financial affairs. According to James, he spoke to his father a number of times in late 2008 and early 2009. He deposed that his father wished to ensure that James and his siblings received some of his estate and instructed James to seek legal advice about protecting the estate. Accordingly, after receiving legal advice, James took the steps to sever the joint tenancy as set out above. Bob died about three weeks later.

- [16] I suspect that Bob's wishes were not as straightforward as James described. It is apparent that Bob and Angela received clear legal advice respecting their estate plan during the year or so before Bob died and, as a result, Bob would have known that other steps were necessary if he wanted to ensure that James and his siblings received some of his estate.
- [17] For example, in March 2008, the solicitor, who had prepared the mirror wills, wrote to Bob and Angela. The couple had apparently approached her to make some minor changes by codicil to their wills that are not of importance here. What is important are the following extracts in her reporting letter:

In taking your instructions, and as part of our office's ongoing review of our clients' wills, we spoke with you noting our concerns regarding the risk that the present scheme for distribution, as described above, could be altered by the one of you who survives the other spouse. As noted in our conversation, there is no agreement in place to prevent this.

Similarly, we again took the opportunity to advise you regarding the ramifications of the Wills Variation Act, and the risk that claims could be made by your respective children against your estates.

Pursuant to our discussion today, however, you have confirmed your advice to us that you do not wish us to make any changes to your current wills other than the changes in today's codicils; that you do not wish to have a form of agreement in place not to change your wills; and that notwithstanding our advice of the risks associated with proceeding in the manner described above, you have confirmed your instructions as originally stated to us in 2005.

In December 2008, a different solicitor wrote to them. Extracts from his letter state:

Before, however, I get into discussing the two Wills I wish to clarify that the main two assets of both of you are the condominium held in joint tenancy and the securities portfolio, also held in joint tenancy. What joint tenancy means is that when the first of you pass away the survivor ends up with the entire interest in the condominium and the securities portfolio. This sort of "registration of assets" can cause problems in second marriage situations and this wasn't properly addressed when your Wills were prepared.

If Dr. Houston died first, these two assets would pass to Mrs. Houston as the surviving joint tenant. I gather that she might move to Vancouver to be near Louise. She would take with her all of the condominium sale proceeds which would obviously be sold, and probably transfer the securities portfolio to Vancouver which would, in any event, be registered solely in her name. This raises the following possible concerns.

- a) Would Mrs. Houston's Will remain the same as it [is] now such that on her death one half of her estate passes to her children and one half [passes] to the children of Dr. Houston? Probably. It is, however, certainly conceivable that as the years passed and she lost touch with Dr. Houston's children she might decide to change her Will and leave everything solely to her two children. If that happened, the Houston children would get nothing from her Will and, of course, would have received nothing from the Will of Dr. Houston (because, of

course, everything would have gone to Mrs. Houston).

The solicitor went on to recommend severing the joint tenancies in both the condominium and the securities account so that each half interest would then be available as bequests in new wills to be prepared for each of Bob and Angela to sign concurrently with the severances.

- [18] Bob never executed a new will, so it is apparent that, even if he accepted the advice from the last solicitor, he never followed through on it. I have reviewed these facts at some length in spite of it being unnecessary to do so. The only will that matters is the mirror will that Bob made in 2005. Hopefully, however, the plaintiffs understand that their father may have decided that his will adequately reflected his wishes in spite of the solicitors' clear warnings.
- [19] During the last years of their marriage, Bob was receiving investment and pension income of \$1,772.51 per month. Angela was receiving slightly more investment and pension income, totaling \$3,058.26 per month. Their monthly expenses totaled \$3,435, including a \$700 deposit into the joint investment account, leaving a monthly surplus of almost \$1,400.
- [20] I am satisfied that Bob and Angela accumulated their assets as a result of their joint efforts. The plaintiffs do not suggest that any of Bob's estate is attributable to the efforts or wealth of another person, such as his first wife.
- [21] In May 2002, Bob and Angela sold their home they were living in to James for \$340,000. Louise deposed, as a result of statements that she attributes to Angela, that James benefited from a reduced price. Assuming that evidence is admissible under the principled exception to the hearsay rule, I am satisfied that it is an inaccurate characterization. I accept the evidence of James that the price on the private sale was the average of two appraisals, one obtained by James and his wife, the other by Bob and Angela. According to the B.C. Assessment Authority, the assessed value of the property in 2002 was \$299,700.
- [22] In the result, Bob and Angela did not have to pay any real estate commission on the sale and realized about \$334,000 on the private sale. Bob and Angela then bought the condominium that they lived together in until Bob's death. It is reasonable to infer that the sale proceeds from the first home provided the bulk of the purchase price of the condominium.
- [23] None of the plaintiffs are in financial need. Each has made his or her way through life independently and did not receive any significant financial assistance from their father during their adult years. Each had a loving, ongoing relationship with their father. None suggest that their father owed them anything other than a moral obligation when he executed his will.
- [24] James, like his father, is a medical doctor. They practised together for five years. James continues to practise medicine. He and his wife live in a valuable home.
- [25] Diana and her husband live in Australia. They are very well off. Diana is the only sibling that does not live in Victoria. While her father was alive, Diana typically visited with him and Angela in Victoria twice a year.

- [26] Shelagh and her husband both have incomes; her husband also earns a pension. She is reasonably well off. Shelagh visited regularly with her father and stepmother.
- [27] Anthony, or Tony as he is known, is a self-employed builder and is also reasonably well off. He also spent time regularly with his father and stepmother.
- [28] The alternate residual gift in Bob's will demonstrates that he reciprocated the love and affection that his four children felt for him. In that regard, he did not appear to differentiate between the children in any way as each was to share equally in one-half of his estate if Angela failed to survive him for 30 days.
- [29] I observe that there is some evidence as to Louise's financial circumstances. Counsel for the defendants did not refer to it during submissions. In my view, Louise's financial circumstances are completely irrelevant. What is at issue is whether Bob made adequate provision for Angela's proper maintenance and support in his will.
- [30] In determining whether Bob made adequate provision for Angela, the first step is to determine his minimum legal obligations. For a spouse, the legal obligations are measured by a notional division of family property under the Family Relations Act, R.S.B.C. 1996, c. 128, and a notional determination of Angela's right to support under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), immediately before Bob's death. See *Glanville v. Glanville* (1998), 58 B.C.L.R. (3d) 240 (C.A.) at paras. 14-15.
- [31] Immediately before Bob's death, the family assets were the condominium worth \$770,000 and the joint investment account worth \$95,000, along with other personalty of unknown value. Bob and Angela were debt free. Accordingly, at a minimum, Angela was entitled to an undivided one-half interest in assets having a total value of \$865,000. Calculated in that fashion, her entitlement was \$432,500.
- [32] Measured against Angela's entitlement is the value of what she received immediately upon Bob's death, namely half the value of the condominium and all of the joint investment account. Those assets came to Angela outside the will and had a total value of \$480,000. They amounted to 55.5 per cent of the family assets and accordingly exceeded her notional minimum entitlement on a property division.
- [33] As Angela's pension income exceeded Bob's before his death, and there is no evidence to suggest that did not continue after Bob's death, Angela was not notionally entitled to spousal support in addition to her share of the family assets. In the circumstances, I am satisfied that Bob met his minimum legal obligations to his spouse and the only remaining consideration in regard to Angela is her moral claim.
- [34] Notwithstanding the lack of financial need on the part of any of the plaintiffs, the courts have recognized circumstances in which a testator has a moral duty to recognize the claims of adult children in his will. In *Clucas v. Clucas Estate*, [1999] B.C.J. No. 436 (S.C.), at para. 12, the court offered a summary of such circumstances, including:

an assured expectation on the part of an adult child, or an implied expectation on the part of an adult child, arising from the abundance of the estate or from the adult child's treatment during the testator's life time; [or] the size of the estate

I find that each of the plaintiffs had such an assured or implied expectation here arising from the mutual loving, supportive relationships that each had with their father, the alternate residual bequest to them in his will and the apparent size of the estate.

[35] The defendants contend that the present circumstances are very similar to those in *MacKinlay v. MacKinlay Estate*, 2008 BCSC 994. In *MacKinlay*, the court denied the claims of the independent adult children and upheld the testator's will which named the testator's wife as the sole beneficiary.

[36] There are some parallels. The testator and his second wife in *MacKinlay* had lived together 35 years and been married for 33 of those years. The estate was about \$284,000, and accordingly, as here, relatively modest.

[37] In denying the moral claims of the plaintiffs, the judge stated, at para. 39:

When the legal obligations of the Testator are considered in the context of the financial circumstances in which the Testator leaves his spouse, the size of the estate would not permit effect to be given the moral claim.

The judge went on to observe that an award to the plaintiffs "would represent a windfall to them, at the expense of jeopardizing the financial security of the defendant" (para. 40).

[38] The basis for that conclusion demonstrates significant differences from the present case. In *MacKinlay*, the second wife was age 66 at the time of trial. Although she owned the former matrimonial home outright, she was ill with cancer, and her expenses exceeded her income by \$400 per month. The judge concluded that she "must access savings to fund her current level of expenses or to pay for any extraordinary expenses" (para. 24).

[39] In my view, the *MacKinlay* decision was based on a finding that the legal claims were likely to exhaust the estate. That is very different from the present case, where Angela's legal claims were satisfied in their entirety.

[40] In the result, the entirety of Bob's estate, \$375,968.13, now held in the interest bearing GIC, is available to satisfy the moral claims. In this regard, the circumstances are similar to those in *Wetmore v. Esaryk*, 1999 CanLII 6552 (B.C.S.C.). I am satisfied that the size of the estate is sufficient to satisfy the moral obligations that Bob owed to both Angela and his adult children.

- [41] In Wetmore, the plaintiffs were the two adult sons of their deceased father's first marriage. Neither son was in financial need. The terms of the deceased's will left the entirety of his estate to his second wife with a proviso that his estate should go in equal shares to his two sons if his wife predeceased him or died within 30 days of his death. The estate consisted largely of the family home, valued at \$270,000.
- [42] The second wife had no children of her own. Her own will had mirrored that of the deceased, but she destroyed her will after the plaintiffs commenced their WVA claim.
- [43] As in the present case, the second wife's pension slightly exceeded that of her husband. After considering the assets, including those that the second wife had before her husband's death, and her continuing sources of income, the judge concluded that the deceased had, in his will, more than satisfied his legal obligations to his wife.
- [44] The judge also expressed the view that the terms of the will which, as in the present case, made an alternate residual bequest to the children, demonstrated that the father felt a moral obligation to his sons. Despite this, he observed that the "effect" of the will was that the moral obligation to his sons "had been completely overlooked" (para. 20). If the whole of the estate transferred to the second wife, the capital and income from the sale of the matrimonial home would exceed her anticipated living costs (para. 29). The judge went on to structure a remedy that entitled the sons to each receive \$45,000, after taking into account that the deceased's one-half interest in the home was worth about \$135,000 (para. 30).
- [45] Unlike the surviving wife in Wetmore, who was still alive at the time of trial, Angela died in 2013. Accordingly, it is not necessary here to consider any future needs.
- [46] Landy addressed a similar situation. There, the deceased left the house to his second wife who also died before the trial. The combined effect of the deceased's will and the second wife's will was that her children, from a different marriage, would "receive by far the major share of [the deceased's] estate" (para. 42). Justice Hinds, for the court, went on to address the effect of the foregoing, at para. 43:

On the basis of the foregoing analysis I have concluded that a substantial change in circumstances of a person entitled to make a claim under the Wills Variation Act, or of a beneficiary, between the date of death of a testator and the date of trial, is a circumstance which may be taken into consideration when a court is determining, under the second stage of the two stage process involved in s. 2(1) of the Act, the provision that should be made for a claimant that is "adequate, just and equitable in the circumstances."

In other words, I may consider the fact that a beneficiary has died before trial in determining what amount should be allocated to each claimant. I intend to follow that approach in the present case.

- [47] I also accept that, in assessing the moral obligations, I may take into account not just the size of the estate itself but the value of Bob's half interest in the joint bank account that passed to Angela under the right of survivorship. Any residue of that interest will have since flowed to Louise under her mother's will. These are all part of the circumstances to be considered here in determining what is adequate, just and equitable. The foregoing is consistent, in my view, with the approach approved in *Inch v. Battie*, 2007 BCSC 1249 at para. 69.
- [48] Finally, with regard to the moral obligation owed to Angela, I agree that the fact she changed her will does not reduce her moral entitlement. See *Bridger v. Bridger Estate*, 2006 BCCA 230, at para. 25. Angela's moral entitlement, as a long time wife, stands in priority to the entitlement of any of the plaintiffs.
- [49] The defendants contend that Bob's moral obligations must be customized as between the individual plaintiffs based on their relative financial needs. It is insufficient, according to counsel, simply to have been a good child with a good relationship with the father. In support, the defendants cite two authorities: *Scott-Polson v. Henley*, 2013 BCSC 247, at para. 88 and *Steernberg v. Steernberg Estate*, 2006 BCSC 1672, at para. 63. In my view, the authorities do not support these arguments.
- [50] In *Scott-Polson*, the testatrix made some provision for each of her adult children arising from two marriages, but divided her estate 75 per cent to one family group and 25 per cent to the other. The practical result was that the three children from one family each received 25 per cent of the estate and the six children in the other group equally shared the remaining 25 per cent. No legal claims were established and the court concluded that the reason the testatrix gave for her distribution scheme was "genuine and valid" (para. 83). The decision does not address the narrow argument that is advanced here.
- [51] Neither does *Steernberg*. In that case, the judge pointed out, and I agree, that the moral claim of independent adult children is more tenuous than the moral claim of spouses. The decision goes on to point out that, "if the size of the estate permits, and in the absence of circumstances negating the existence of such an obligation, some provision for adult independent children should be made" (para. 64). I agree with that as well.
- [52] In *Vielbig v. Waterland Estate* (1995), 1 B.C.L.R. (3d) 76, the Court of Appeal found that a testator who provided for equal distribution between children, who were not disabled or dependent, would demonstrate "on a moral duty basis prima facie compliance with the requirements of the [Wills Variation] Act" (para. 37). I see no reason to treat the individual plaintiffs differently from each other here as need is not a factor in determining their entitlement.
- [53] In conclusion, I find that the estate is adequate to meet the moral obligations that Bob owed to Angela and his four adult children. Due to the relatively modest size of the estate, both counsel invited me to award any damages in specific amounts, rather than express them, as is usually the case, in percentages of the estate residue.

- [54] In my view, society's reasonable expectations of what a judicious person would have done in Bob's circumstances, by reference to community standards, is, as counsel for the plaintiffs contends, to divide his estate with a little more than half to go to Angela and the remainder to be divided equally among his four children.
- [55] Although the net estate proceeds are \$375,968, I do not know what amount needs to be deducted for probate or estate administration fees. Understandably, neither party led evidence on these matters. In my view, this is why the court usually does not vary a will by dividing the residue into specific amounts. Having said that, I appreciate that all parties must be prepared to accept a somewhat rough calculation in order to achieve certainty. Otherwise, counsel would not have invited me to make any awards in specific dollar amounts. Each side, however, must accept any associated risks.
- [56] Counsel for the plaintiffs suggests that it would be appropriate to divide 48 per cent of Bob's net estate among the four children. That approach would yield \$195,500 to Angela's estate, leaving \$180,468 to be divided equally between the four plaintiffs, presumably subject to proportionate adjustment for the interest earned on the GIC. According to counsel, a fair award is \$45,000 for each plaintiff.
- [57] Counsel for the defendants suggests using \$350,000 as a starting point, rather than \$375,968, to reflect the eventual probate and estate administration fees. Using that starting point, and the same rough approach to the division as set out above, would yield \$182,000 to Angela's estate and about \$42,000 for each plaintiff.
- [58] I agree that I should make some allowance for probate fees and estate administration expenses before awarding specific dollar amounts to the plaintiffs. Based on s. 2(3) of the Probate Fee Act, S.B.C. 1996, c. 375, I estimate probate fees of \$4,700.
- [59] Absent any evidence as to likely administration fees, I am necessarily left with a very rough estimate. Accepting the defendants' estimate leaves an allowance of about \$21,300 for that purpose.
- [60] The actual fees, including any costs that Bob's estate may be liable for, may exceed the suggested allowance. Under the circumstances, any excess will have to come out of the residue of the estate after payment of the bequests that I propose to order in favour of the plaintiffs. The plaintiffs will, in effect, bear the risk that the actual fees will be less than the proposed allowance.
- [61] Using \$350,000 as a starting point, I vary Bob's will to provide specific bequests of \$42,000 for each of the four plaintiffs.
- [62] The parties may make submissions as to the costs of this proceeding if they cannot agree.

"M.D. Macaulay, J."

The Honourable Mr. Justice Macaulay

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