

CANADA / JUDGMENT

Hunt v. Kazmer

2005 BCSC 1815

COURT

Supreme Court of British Columbia

DECIDED

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2005 BCSC 1815 Hunt v. Kazmer

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hunt v. Kazmer,

2005 BCSC 1815

Date: 20051230

Docket: 14702

Registry: Cranbrook

Between:

Maria Jane Hunt

Plaintiff

And

John Carl Kazmer, personally and,

John Carl Kazmer in his capacity as executor of

the will of Olga Whiting, Deceased

Defendants

Before: The Honourable Mr. Justice Melnick

Reasons for Judgment

Counsel for plaintiff

W.G. Sheard

Counsel for defendants

S.H.M. Smaill, Q.C.

Date and Place of Trial:

December 13, 14 and 16, 2005

Cranbrook, B.C.

- [1] Maria Jane Hunt ("Ms. Hunt") claims she had a contract with her late great-aunt, Olga Whiting ("Ms. Whiting"), to provide services to Ms. Whiting prior to Ms. Whiting's death. In the alternative, Ms. Hunt claims against the estate of Ms. Whiting in quantum meruit or, in the further alternative, for a declaration that she has a trust interest in the estate of Ms. Whiting by reason of Ms. Whiting being unjustly enriched by the services she provided to Ms. Whiting. Ms. Hunt advances her claim against her cousin, John Carl Kazmer ("Mr. Kazmer") in his capacity as executor of the will of Ms. Whiting as well as personally because, she claims, he stands to be unjustly enriched by her services to Ms. Whiting because he is the sole residuary beneficiary of Ms. Whiting's estate.

I. BACKGROUND

- [2] Ms. Whiting died on March 29, 2004, at the age of 84. Her husband, James Whiting ("Mr. Whiting") had died in November 1998. They had no children.
- [3] Ms. Whiting was Ms. Hunt's great-aunt. Ms. Hunt and her husband, Robert Hunt ("Mr. Hunt"), lived for many years approximately two blocks from Ms. Whiting in the Meadowbrook area of Kimberley.
- [4] Ms. Whiting had suffered a heart attack in 1997. That does not appear to have slowed her down appreciably. However, according to Ms. Hunt, by 2001 Ms. Whiting had a number of health issues including cataracts, molecular degeneration, an arthritic knee and gout.
- [5] Ms. Hunt claims that, prior to 2001, she and Mr. Hunt visited with Ms. Whiting frequently and they both assisted her with various chores on her rural property and, in particular, Ms. Hunt assisted by driving Ms. Whiting for the purpose of shopping and other errands. According to Ms. Hunt, by 2001, Ms. Whiting recognized that she needed home care but, despite making numerous inquiries, was unable to obtain it. Thus, claims Ms. Hunt, Ms. Whiting contracted to pay her \$35 a day for each day that she provided various services to Ms. Whiting. According to Ms. Hunt, those services varied depending on the state of health of Ms. Whiting from: driving her on errands to assisting her with housework; meal preparation; cleaning up after her when she was incontinent with an impacted bowel in October 2002; cleaning a commode that Ms. Whiting was obliged to use for a period of time after breaking her leg in 2003; and generally providing her with companionship on many evenings.

- [6] Ms. Hunt says that, pursuant to this agreement, she provided services to Ms. Whiting for: 365 days in 2001; 360 days in 2002; 333 in 2003; and 35 days in 2004 for a total claim of \$39,060. It is Ms. Hunt's position that no part of this obligation was ever paid by Ms. Whiting nor did she press Ms. Whiting for payment. However, Ms. Hunt says that in 2002 she had a conversation with Mr. Kazmer at which time he agreed that she should be paid for what she was doing for Ms. Whiting because, otherwise, Ms. Whiting would have to pay someone else to do it.
- [7] Mr. Kazmer agrees that he had such a conversation with Ms. Hunt in December 2002, but takes the position that there was no agreement to pay \$35 a day. He also says that the first time he learned of the \$35 a day claim was from a bill he received as executor of the estate after the death of Ms. Whiting. It is his position, from information he says he received from Ms. Whiting during her lifetime and from reviewing informal journals she kept of various household expenditures, that Ms. Hunt was paid for her services, but in small amounts of money like \$5 or \$10 for specific tasks such as driving Ms. Whiting to shop in Kimberley or Cranbrook.
- [8] At one point after the death of Mr. Whiting, Ms. Hunt arranged to have her name placed on the joint account that Ms. Whiting and her late husband had had at the credit union in Kimberley. However, that arrangement was apparently not to the liking of Ms. Whiting who was apparently quite independent-minded and she soon had the account changed to be in her name only. At one point, said Mr. Kazmer, Ms. Whiting asked that he take her will to his home in Nanaimo for safe-keeping because, he claims, Ms. Whiting was concerned that it may not be found after her death. The implication was that Ms. Hunt would be responsible if the will disappeared.
- [9] Ms. Hunt put forward evidence from Valerie Carey ("Ms. Carey"), a physiotherapist, who described the assistance provided by Ms. Hunt on December 19, 2002, just prior to Ms. Whiting's discharge from hospital where she had been treated for a fractured right ankle. Ms. Carey arranged for short-term personal care for Ms. Whiting from December 20, 2002, through January 17, 2003. When the period of short-term home care was coming to a close on January 16, 2003, Ms. Carey says that she called Ms. Hunt to see if Ms. Whiting would require ongoing long-term care. Ms. Carey indicated that she was told by Ms. Hunt that she would engage a firm known as "Neighbourhood Nursing" on behalf of Ms. Whiting for such tasks as bathing Ms. Whiting, changing her dressings, transferring her from bed to a wheelchair and so on. This service was apparently available only for one hour a day which included travel time for a net service time of only about 45 minutes. Ms. Carey said that she spoke to Ms. Whiting who said that Ms. Hunt would do her housework for her. It was her observation that, during the short time she had contact with Ms. Whiting, Ms. Whiting appeared not to be using good judgment and had memory problems.
- [10] Wendy Glasier ("Ms. Glasier") was the individual who provided the neighbourhood nursing. She is apparently a long-time friend of Ms. Hunt. Ms. Glasier indicated in evidence that, to her knowledge, Ms. Hunt had done numerous things to assist Ms. Whiting at the time of her

illness. Interestingly, she added in cross-examination that Ms. Whiting had told her that Ms. Hunt had done things for her for nothing, that she hadn't paid her, and that eventually she would pay her for all the things that Ms. Hunt had done for her. Ms. Glasier said that no amount was mentioned.

- [11] A neighbour, Donald Fabro ("Mr. Fabro"), said that he observed Ms. Hunt to be at Ms. Whiting's house sometimes six to seven times a day. Mr. Fabro said he saw Ms. Hunt to be frequently at Ms. Whiting's residence in the morning and many times during the day and at night. He also saw them together at the grocery store in town.
- [12] Mr. Hunt also did various things for Ms. Whiting from time to time although, he indicated, he did not expect to be paid for doing so. He did say that he saw his wife, Ms. Hunt, do Ms. Whiting's laundry, house work and shopping. He said that, on average, after January 2001, Ms. Hunt visited Ms. Whiting three times a day, and sometimes as many as five times a day, totalling six to seven hours each day.
- [13] Mr. Hunt said that, from January 2001 until her death in 2004, Ms. Whiting's condition deteriorated steadily. It was his evidence that Ms. Whiting said to him on two or three occasions that she would pay Ms. Hunt for doing for her what she could not do for herself and indicated that she did not know what she would do without Ms. Hunt. He added that Ms. Whiting would say this every time that he went to have tea with her. Interestingly, in his direct evidence, Mr. Hunt made no mention of being told by Ms. Whiting that she had agreed to pay Ms. Hunt \$35 day for services, although in cross-examination he did say that Ms. Hunt told him that it would be \$35 and that he never thought any more of it.
- [14] In her last will and testament which has been admitted to probate, Ms. Whiting left Mr. Hunt a one-third share (with Mr. Kazmer and his wife, Lorraine Kazmer ("Ms. Kazmer")) in certain recreational property at Munroe Lake near Cranbrook and a joint gift with Ms. Hunt of \$5,000. However, they have refused to negotiate the cheque sent to them by the estate solicitor, said Mr. Hunt, because they did not want to prejudice Ms. Hunt's claim against the estate.
- [15] Patricia Bently ("Ms. Bently") was called to give evidence on behalf of the defence. She is another resident of Meadowbrook. For some years, Ms. Whiting allowed Ms. Bently to keep lamas on Ms. Whiting's property. Consequently, Ms. Bently would visit Ms. Whiting from time to time, about once a month at most. They occasionally went out for lunch. According to her conversations with Ms. Whiting, she understood that Ms. Whiting paid Ms. Hunt \$5 for a shopping trip to Kimberley, \$20 for a trip to Cranbrook and another sum for Ms. Hunt to do Ms. Whiting's hair. She said that Ms. Whiting told her that, on one occasion, she paid Ms. Hunt \$100 to stay overnight with her. On one occasion she said that she saw Ms. Whiting give \$5 to Ms. Hunt for having taken her into town.

- [16] According to Ms. Bently, during the last year of her life, Ms. Whiting was more dependent but, even after she broke her ankle, she was still able to make her own bed. Until the last year of her life, said Ms. Bently, she went with Ms. Whiting to purchase her bedding plants and she put them into the garden for her. She had the impression from speaking with Ms. Whiting that Ms. Whiting would take Mr. and Ms. Hunt to restaurants for meals to show her appreciation for them.
- [17] Ms. Hunt described her relationship with Ms. Whiting as a close, loving one. This was denied by Ms. Bently who said that Ms. Whiting could be as "tough as nails" and "as mean as could be". According to Ms. Bently, Ms. Whiting did not even like Ms. Hunt and there were few people that she did like. She suggested that this must have been difficult for Ms. Hunt.
- [18] According to Ms. Bently, it was she who indicated to Ms. Whiting that she did not have to have Ms. Hunt or anyone else as a joint signatory on her account at the credit union. Ms. Bently indicated that at that point in time Ms. Whiting was feeling very controlled and manipulated by Ms. Hunt. Ms. Bentley was apparently also involved in discussions with Ms. Whiting at a time when she had changed her original will by a codicil to make a provision for Ms. Hunt but then desired to revoke that change to reinstate the provisions of her original will. She apparently did so and, according to Ms. Bently, was content that she had.
- [19] Both Mr. and Ms. Kazmer live in Nanaimo although, according to Mr. Kazmer, he spoke to Ms. Whiting daily and, according to Ms. Kazmer, she spoke to Ms. Whiting twice a week. They visited once or twice a year, with increasing frequency as Ms. Whiting's health declined. Ms. Whiting spent the last 2 ½ weeks of her life at their home in Nanaimo. On one occasion when they were visiting Ms. Whiting, Ms. Kazmer said she was asked by Ms. Whiting to place \$10 on her nightstand for Ms. Hunt who had arrived with groceries for her. She said that on another occasion she saw Ms. Whiting slip \$10 to Ms. Hunt for trimming her hair.
- [20] Finally, it was the evidence of Mr. Kazmer that a payment to Ms. Hunt of \$35 a day would have represented a substantial portion of Ms. Whiting's annual income; the implication being that it would have been out of character for Ms. Whiting to have committed to such a substantial ongoing payment and would have been inconsistent with the apparent record of small payments of money by Ms. Whiting to Ms. Hunt from time to time.

II. DISCUSSION

1. The Contract

- [21] In 1976, a section of the then Evidence Act, R.S.B.C. 1960, c. 134, which required corroboration of the evidence of a person such as Ms. Hunt having a claim against the estate of a deceased for such an alleged contract, was repealed. Mr. Justice Bouck of this court commented on that in *Miller v. Miller Estate* (1987), 26 E.T.R. 243, 14 B.C.L.R. (2d) 42 at 50-51 (S.C.) as follows:

Despite the repeal, it seems reasonable that a court should require a high standard of proof from a person who claims he is owed a sum of money by way of a debt due him from a deceased individual. This is because the deceased cannot, of course, appear in court and present his or her side of the argument. The only evidence that can be introduced in most instances is the evidence of the survivor. Support for the idea that a court must view this kind of evidence with care comes from a decision of Rae J. in *Kong v. Kong*, 14 B.C.L.R. 357, [1979] 6 W.W.R. 673, 5 E.T.R. 67 (S.C.). He describes the requirement of adequate proof as a rule of practice which a court should follow as a consequence of the repeal of s. 11 of the Evidence Act. At pp. 361-62 His Lordship said this:

In the absence of the statutory provision, one must at least examine the evidence with the most careful scrutiny and indeed, at the outset, with some suspicion: see *Re Garnett: Gandy v. Macaulay* (1885), 31 Ch. D. 1 (C.A.). One should also give consideration to whether corroborative evidence of a material nature exists and, if it does not, then whether in the particular circumstances it is necessary in order to render the other evidence believable. Under the rule of practice referred to, it was not invariably necessary to have corroboration of the nature indicated before the evidence could be acted upon: *Re Garnett*, supra; and *Re Hodgson*; *Beckett v. Ramsale* (1885), 31 Ch. D. 177 (C.A.), as cited in *Bayley v. Trusts & Guar. Co. Ltd.*, 66 O.L.R. 254, [1931] 1 D.L.R. 500 at 504, per Middleton J.A.

More recent authority argues that the common law rule of practice demanding corroboration was not revived by the repeal of s. 11 of the Evidence Act in 1976: *McLeod v. MacLeod*; *McLeod v. Deighton* (1980), 22 B.C.L.R. 51 at 55 (Cowan L.J.S.C.):

In light of the decisions above referred to and the provisions of s. 30 of the Interpretation Act, I hold that the repeal of s. 11 of the Evidence Act did not have the effect of reviving the former common law rule regarding corroboration in cases involving claims by or against a deceased person in respect of matters occurring before the death of the deceased.

This reasoning was approved in *Shiell v. Coach House Hotel Ltd.* (1982), 37 B.C.L.R. 254 at 259, 27 C.P.C. 78, 136 D.L.R. (3d) 470 (C.A.).

Therefore, while corroboration is no longer necessary, it still seems to me the evidence of a claimant in these types of situations should be examined with "the most careful scrutiny and indeed at the outset with some suspicion".

[22] I have reviewed the evidence provided in this trial with the most careful scrutiny. I have come to the conclusion that it is improbable that Ms. Whiting agreed to the terms of the contract alleged by Ms. Hunt. I conclude that it would have been inconsistent for a woman as independent-minded as I accept Ms. Whiting to have been, and as careful with her money as I accept that she was, to have entered into such an arrangement, involving such a substantial percentage of her annual income, without having either reduced it to writing or having made mention of it to persons other than Mr. or Ms. Hunt. For that matter, I do not accept that she made the statement to Mr. Hunt that he alleges; specifically that she had an arrangement with Ms. Hunt to pay her \$35 a day.

[23] Undoubtedly, there were discussions from time to time between Ms. Whiting and Ms. Hunt about Ms. Hunt being paid for doing things for Ms. Whiting. It may well be that Ms. Whiting's view of what was appropriate for the service she was provided was quite different from that of Ms. Hunt. However, as modest as they were, the small gifts of money from time to time (and I'm satisfied there were frequently gifts of money, not always for compensation for gasoline or specific purchases) are inconsistent with the arrangement alleged by Ms. Hunt. Even more inconsistent is the fact that at no time until after the death of Ms. Whiting did Ms. Hunt present an account. That action is more consistent with an expectation on the part of Ms. Hunt that she would be compensated in some way in the will of Ms. Whiting than with there being a specific contract for the payment for services in a fixed amount per day. I do not accept that there was a contract as alleged by Ms. Hunt.

2. Quantum Meruit

[24] There was much conflict in the evidence as to the extent of the services provided by Ms. Hunt to Ms. Whiting. The image presented by the evidence on behalf of Ms. Hunt was that Ms. Whiting was a very dependent invalid who relied increasingly heavily upon Ms. Hunt to do virtually everything for her from shopping to meal preparation to house work to personal health care. On the other hand, the defence presents a very different image of Ms. Whiting, describing her as a fiercely independent woman who accepted help only when she absolutely had to due to illness and as a person who, for the most part, paid for that help when she received it. I conclude that Ms. Whiting was more like the woman described by the defence than by the evidence presented by Ms. Hunt. In saying that, I observe that the evidence of Ms. Carey, properly the only truly independent and totally disinterested witness from whom I heard, is not inconsistent with the evidence of the defence.

[25] However, it is clear that the relationship between Ms. Hunt and Ms. Whiting was not simply that of a loving niece assisting her aunt during her times of difficulty. The evidence from both sides makes it clear that there was a monetary component to the relationship. That is, Ms. Hunt did many things for Ms. Whiting but she expected to be paid for them. Ms. Whiting also expected that she would pay for the things that were done for her. While Ms. Whiting provided gifts or "thank you payments" from time to time to Ms. Hunt, I have no doubt that there was an understanding between them that Ms. Hunt would be properly looked after in a monetary sense for the care and services she provided to Ms. Whiting. I also have no doubt that the reason no account for services was ever provided by Ms. Hunt to Ms. Whiting was because she anticipated that Ms. Whiting would provide her with a fair payment at some point either before or after Ms. Whiting's death.

[26] The questions to be answered, then, in the context of a claim in quantum meruit, is what was the extent of the services provided and was the payment made (the small gifts of money from time to time) adequate compensation for the services provided?

- [27] I conclude that Ms. Hunt did many things for Ms. Whiting from the beginning of 2001 through to early 2004. However, I do not accept that she did as many things for Ms. Whiting as she would have me believe. Nonetheless, I do accept that she provided very necessary assistance to Ms. Whiting, particularly during those times when Ms. Whiting had periods of illness or disability. Undoubtedly, there were other times, such as when Ms. Hunt provided companionship to Ms. Whiting during many evenings when she was alone, that Ms. Whiting would surely have regarded as merely social visits for which she was not being expected to compensate Ms. Hunt.
- [28] In my view, it would be unfair to expect Ms. Hunt to have done all that she did for Ms. Whiting in exchange only for the small gifts of money given to her from time to time by Ms. Whiting. On the other hand, it would not be just to quantify those services in the amount claimed by Ms. Hunt pursuant to the alleged contract which I have rejected. In my view, on all of the evidence, a more realistic and just quantification is the sum of \$13,000 over and above the sums she received from Ms. Whiting from time to time.

3. Trust Claim

- [29] Because I have resolved Ms. Hunt's claim on the basis of quantum meruit, it is not necessary for me to determine whether Ms. Hunt is entitled to a remedy in constructive trust or resulting trust. Had I done so, I would probably have concluded that this is a situation best described as a constructive trust and I would have applied the principals in *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38, 29 D.L.R. (4th) 1, to conclude that: Ms. Whiting had been unjustly enriched by the services she received from Ms. Hunt for such small payments; that there had been a corresponding deprivation to Ms. Hunt because of the sacrifice and time that she made to do things for Ms. Whiting which took away from the time she had to spend on personal enjoyment, including time with her husband; and that there was no juristic reason for the enrichment.
- [30] However, as Mr. Justice Shaw determined in *Davidson v. Kuzonski Estate*, (1990), 37 E.T.R. 297, [1990] B.C.J. No. 617 (S.C.), this is a case in which a monetary award is the appropriate remedy, rather than declaring a trust interest in the estate of Ms. Whiting.

4. Action against Mr. Kazmer Personally

- [31] In the circumstances of this case, I find that there is no basis for a claim against Mr. Kazmer personally. He was properly made a defendant in his capacity as executor of the will of Ms. Whiting.

III. CONCLUSION

- [32] Ms. Hunt is entitled to judgment against Mr. Kazmer as executor of the will of Ms. Whiting for the sum of \$13,000. Ms. Hunt's action against Mr. Kazmer personally is dismissed. Unless there is some reason (for example an offer to settle) for counsel to address me concerning costs, I would award Ms. Hunt her costs of this action on Scale 3. As Mr. Kazmer was

represented by the same counsel at trial in both capacities, and as he did not file separate pleadings, I conclude, in the absence of hearing from counsel otherwise, that he does not have any additional costs to those incurred in defending Ms. Hunt's claim against the estate of Ms. Whiting. With respect to that defence, it is reasonable that he be paid his costs of defending the estate on a solicitor and client basis. However, given that he is the residuary beneficiary, that may simply be moving money from one pocket to another.

"T.J. Melnick,, J."

The Honourable Mr. Justice T.J. Melnick

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