

CANADA / JUDGMENT

Jury v. Rogodzinski

2021 BCCA 395

COURT

British Columbia Court of Appeal

DECIDED

8 October 2021

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2021 BCCA 395 Jury v. Rogodzinski COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Jury v. Rogodzinski, 2021 BCCA 395 Date: 20211008 Docket: CA47566 Between: Tammy Darlene Jury, as Executor of the Estate of Glen Phillip Cawthra Respondent (Petitioner) And Brian Benjamin Rogodzinski, Michael Lawrence Rogodzinski, and Earl Bradley Rogodzinski Appellants (Respondents) And Tammy Darlene Jury Respondent (Respondent) Before: The Honourable Madam Justice Fenlon The Honourable Mr. Justice Fitch The Honourable Madam Justice Griffin On appeal from: An order of the Supreme Court of British Columbia, dated June 8, 2021 (Jury v. Rogodzinski, Vancouver Docket S211882). Oral Reasons for Judgment Counsel for the Appellants: T.J.H. Maledy J.D. Maledy No one appearing on behalf of the Respondent Place and Date of Hearing: Vancouver, British Columbia October 8, 2021 Place and Date of Judgment: Vancouver, British Columbia October 8, 2021 Summary: The appellants appeal from the dismissal of an application to cross-examine the respondent on her affidavit. The appellants contend that the chambers judge erred in her application of the test by failing to recognize the relevance of the disputed facts to the credibility of the respondent and her suitability to be appointed executor of the estate. Held: Appeal dismissed. The judge's reasons showed that she was aware of the relevance of the proposed cross-examination. No error on the part of the judge was established.

[1] FENLON J.A.: This is an appeal as of right from the dismissal of an application brought by the appellants to cross-examine the respondent on an affidavit. The affidavit was filed by the respondent in support of her petition to be appointed as executor of the estate of Glen Cawthra, who was the parties' stepfather. The appellants oppose that appointment, arguing in part that the respondent is unsuitable because she allegedly swore an affidavit containing false statements about what took place at a family meeting during which the deceased expressed his testamentary intentions. One of the appellants surreptitiously recorded the meeting and the appellants rely on a transcription to contradict the respondent's version of events.

[2] The appellants acknowledge that the judge identified the correct test to be applied in the opening paragraph of her reasons:

- [1] The parties are in agreement that the authority that governs whether the Court will require someone to attend for cross-examination on their affidavit is *Cowichan Valley (Regional District) v. Cobble Hill Holdings Ltd.*, 2015 BCSC 1995. The factors to be considered include whether there are material facts at issue, whether the desired cross-examination is relevant to an issue that may affect the outcome of the application in respect of the cross-examination order is sought, whether the cross-examination will serve a useful purpose by yielding evidence that would help determine an issue on the application, whether the information sought is available through other means, and whether cross-examination will produce unreasonable delay or generate unreasonable expense, both of which are to be avoided.
- [3] However, the appellants submit that the judge erred in her application of the test, in particular in her assessment of the relevance of the disputed facts as to what happened at the family meeting. They say she found those facts to be irrelevant to the underlying petition proceeding, when they were material to the credibility and trustworthiness of the respondent and her suitability to act as executor of their stepfather's estate--the very issue to be determined on the petition.
- [4] With respect, I do not agree that the judge made the error contended for. Her reasons demonstrate that she was aware the facts the appellants wished to cross-examine on were relevant to the respondent's credibility. The judge addressed the appellants' reasons for seeking cross-examination as follows:
- [2] Although the [appellants] seek to cross-examine the [respondent] on relatively narrow parts of her affidavit, they are seeking to do so on the basis that:
- 1) the date set out in those paragraphs is incorrect and material, although my understanding is that the applicants acknowledge that issue can be addressed through other means without cross-examination;
 - 2) a false affidavit is grounds for disqualifying the [respondent] from acting to administer the estate; and
 - 3) it is relevant to what the deceased said with respect to his intentions.
- [3] However, the [appellants] do not take issue with the validity of the will, and the issue of the deceased's intentions will be governed by his will. I fail to see how the evidence is relevant to an issue in the proceedings in the circumstances as they have been laid out in the response to petition other than the credibility of the [respondent]. [Emphasis added.] The judge went on to consider as well the potential for delay in the petition hearing should cross-examination be allowed, given that the petition was set to be heard within two days and the appellants had delayed in bringing their application.
- [5] In summary, in my view, the appellants have not met the burden of establishing any error on the part of the chambers judge, and I would therefore dismiss the appeal.

[6] FITCH J.A.: I agree.

[7] GRIFFIN J.A.: I agree.

[8] FENLON J.A.: The appeal is dismissed. "The Honourable Madam Justice Fenlon"

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Prepared on 26 October 2026 · Esheria