

CANADA / JUDGMENT

Kellogg Estate (Re)

2014 BCSC 1556

COURT

Supreme Court of British Columbia

DECIDED

15 August 2014

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2014 BCSC 1556 Kellogg Estate (Re) IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Kellogg Estate (Re), 2014 BCSC 1556 Date: 20140815 Docket: 13-1491 Registry: Victoria Re The Estate of Robert Payne Kellogg, also known as Robert P. Kellogg, Deceased Between: Inga Kellogg Rouches, Executrix of the Will of Robert Payne Kellogg, also known as Robert P. Kellogg, and Inga Kellogg Rouches, Successor Trustee of the Kellogg Family Trust Petitioner And Vivian Payne Kellogg, Susanna Mitchell Kellogg and Inga Kellogg Rouches, both in her personal capacity and in her capacity as Executrix of the Will of Lisa E. Kellogg Respondents Corrected Judgment: The text of the judgment was corrected at paragraph 23 and 24 on October 31, 2014 Also see supplementary reasons and corrigendum to these reasons for judgment dated October 31, 2014 (2014 BCSC 2056) Before: The Honourable Madam Justice Gray Supplementary Reasons for Judgment on Costs and Order Counsel for the Petitioner: H. D. Fisher The Respondent, Susanna Kellogg: In Person The Respondent, Vivian Kellogg: In Person The Respondent, Inga Rouches, both in her personal capacity and in her capacity as Executrix of the Will of Lisa E. Kellogg: No Submissions Place and Date of Trial/Hearing: Victoria, B.C. August 21, 2013 Date of Written Submissions: January 15, 16, 28, and 30 and February 4, 2014 Place and Date of Judgment: Victoria, B.C. August 15, 2014

INTRODUCTION

- [1] The reasons for judgment on the Petition were released on December 12, 2013. They are indexed at 2013 BCSC 2292. The style of cause and some references to the parties' positions and the effect of an intestacy were corrected in reasons for judgment released on August 14, 2014 which is indexed at 2014 BCSC 1541. The parties were given liberty to make written submissions on the issue of costs.
- [2] Ms. Fisher, counsel for the Petitioner, provided written submissions received January 15 and 28 and February 4, 2014. Ms. Vivian Kellogg provided written submissions received January 16 and 30 and February 4, 2014. No one else provided submissions regarding costs.
- [3] The Petitioner seeks costs and an order permitting the order to be entered in the court records without the signature of Ms. Vivian Kellogg. Ms. Vivian Kellogg opposes those orders, but does not seek costs herself.

FACTS

- [4] This Petition concerned the Will of Robert Payne Kellogg ("RPK") and a trust referred to in the reasons for judgment as the "KF Trust". It also concerned property on Saltspring Island, B.C., referred to as the "Musgrave Farm Interest". RPK was survived by his wife, Lisa E. Kellogg ("LEK"), and his three children, who are referred to in the reasons for judgment by their first names, Inga, Vivian, and Susanna. LEK passed away prior to the hearing of the Petition.
- [5] There were two issues. The first was interpretation of the RPK Will. The second was whether the court should declare that the trustee was entitled to sell or mortgage or agree to the partition of the Musgrave Farm Interest, which was registered in the name of RPK.
- [6] The case raised a question of how the court should deal with the clause in RPK's will sometimes termed a "pour-over" clause, purporting to make a gift to an existing trust, being the KF Trust. The issue was complicated by the fact that the terms of the KF Trust were amended after the date the Will was executed.
- [7] As stated in paragraph 73 of the reasons for judgment, the pour-over clause was held to be invalid. This led to the question of the effect of the clause in the RPK Will referred to as the "Incorporation by Reference Clause".
- [8] The conclusion is set out in paragraph 82, as follows:
- [82] As a result, the Incorporation by Reference Clause incorporates the terms of the KF Trust Indenture, which governed the trustee on the date that RPK executed the Will. The gift of the Musgrave Farm Interest essentially passes to a testamentary trust which is on the terms of the KF Trust as at the date RPK signed the Will, being the terms set out in the KF Trust Indenture without amendment.
- [9] The issue of the right to deal with the Musgrave Farm Interest was discussed in paragraphs 84 through 88. As set out in paragraph 85, Inga is the trustee of the testamentary trust, and has the powers set out in the KF Trust Indenture, including the power to deal with the Musgrave Farm Interest.
- [10] The order was summarized in paragraph 89, as amended, as follows:
- [89] In summary:
- a) the Pour-Over Clause is invalid;
 - b) the effect of the Incorporation by Reference Clause is that the Musgrave Farm Interest is to be held on a testamentary trust which is on the same terms as set out in the KF Trust Indenture dated March 23, 1994, without amendment, and with the result that Inga, Vivian, and Susanna have an equal share in the Musgrave Farm Interest; and

- c) c) Inga, as trustee of the testamentary trust, is entitled to sell or mortgage or agree to partition the Musgrave Farm Interest, subject to either a) court approval on notice to Susanna and Vivian; or b) written agreement by Susanna and Vivian.

ANALYSIS

a) Costs

- [11] The Petitioner seeks an order that she be paid her reasonable costs and expenses of and incidental to the Petition from RPK's estate.
- [12] As I have said, Ms. Vivian Kellogg opposes that order. If I understand her position correctly, her position is that: a) the Petition did not benefit the estate, but only benefitted Ms. Inga Kellogg personally; b) the appropriate question for the court was the determination of RPK's "intent" for the Musgrave Farm Interest, and the Petition did not properly address that question; and c) the Petitioner was not neutral because, for example, the Petitioner presented information to the court about the tax implications of the Musgrave Farm Interest passing on intestacy. If I understood her position correctly, she was also concerned that the Petitioner incurred costs unrelated to the interpretation of the RPK Will, such as in negotiations prior to the hearing of the Petition.
- [13] The usual rule in litigation is that costs follow the event, meaning that a successful party is entitled to costs from an unsuccessful party. This is set out in Rule 14-1 of the Supreme Court Civil Rules.
- [14] However, where an application is made by the trustees of a will or settlement, asking the court to construe the trust instrument for their guidance, the costs of all parties are generally payable from the estate on a full indemnity basis. That is set out in the old English case of *Re Buckton*, [1907] 2 Ch. 406 (Eng. Ch. Div.), and the much more recent Court of Appeal case of *Re Collett Estate*, 2005 BCCA 291, at para 7. As set out in *Re Collett*, the "full indemnity" scale is an award of special costs.
- [15] Almost all the evidence and submissions on the Petition related to construction of the RPK Will, and in particular, the construction of the "pour-over" clause and the "Incorporation By Reference Clause". The question of the power of the trustee over the Musgrave Farm Interest involved very little further evidence and submissions.
- [16] The construction of the RPK Will, and particularly the "pour-over" clause, raised novel and difficult issues. The issues arose because of the unusual terms of the RPK Will. It benefitted the RPK estate to resolve the issue of construction of the RPK Will. The beneficiaries also benefitted by having the construction of the RPK Will clarified. I reject the argument that the Petition was of sole benefit to the Petitioner.
- [17] I also reject the argument that the Petitioner asked the court the wrong question. The Petitioner was entitled to ask the court to construe the difficult provisions of the RPK Will.

- [18] Ms. Fisher, as counsel for the Petitioner, remained neutral at the hearing. She did not take a position on the preferable construction of the RPK Will. While the Petitioner provided evidence regarding some tax issues, that was relevant to the RPK estate's need to pay taxes and its corresponding need to deal with the Musgrave Farm Interest to raise funds. I reject the argument that the Petitioner was not neutral in the court proceedings.
- [19] Ms. Inga Rouches, in her personal capacity, was entitled to engage in negotiations about the issues relating to the RPK estate. Her costs related to such personal negotiations would not qualify as "reasonable costs and expenses of and incidental to the Petition". The question of the reasonableness of the costs and expenses is for the registrar, and the onus to establish reasonableness is on the trustee. See *Carter v. Blaney* (1989), 34 E.T.R. 229 (B.C.C.A.), at 230.
- [20] As a practical matter, a party acting in several capacities, like Ms. Inga Rouches, would ordinarily be required to provide information which can separate costs incurred in different capacities where necessary. Here, the Petitioner ought to separate her costs as Executrix of RPK's Will and Successor Trustee of the KF Trust, from her costs in her personal capacity and as Executrix of LEK's Will, even if the same law firm acted for her in all capacities.
- [21] The Petitioner is entitled to recover, from the RPK estate, her reasonable costs and expenses of and incidental to the Petition in her capacity as Executrix of RPK's Will and Successor Trustee of the KF Trust. She is not entitled to recover, from the RPK estate, her costs and expenses of and incidental to the Petition in her personal capacity or in her capacity as Executrix of LEK's Will. The costs the Petitioner is entitled to recover are to be assessed by the registrar if the parties do not agree in writing on the amount.
- b) Order
- [22] As stated above, the Petitioner seeks an order permitting the order to be entered in the court records without the signature of Ms. Vivian Kellogg. Ms. Vivian Kellogg is opposed.
- [23] In this case, the terms of the order are set out in written reasons for judgment and they are clear. There is no need for Ms. Vivian Kellogg's signature on the Order. SUMMARY
- [24] In summary,
- a) the Petitioner is entitled to recover, from the RPK estate, her reasonable costs and expenses of and incidental to the Petition, in her capacity as Executrix of the RPK Estate and as Successor Trustee of the KF Trust. She is not entitled to recover, from the RPK estate, her costs and expenses of and incidental to the Petition in her personal capacity or in her capacity as Executrix of LEK's Will. The costs the Petitioner is entitled to recover are to be assessed by the registrar if the parties do not agree in writing on the amount; and
- b) there is no need for Ms. Vivian Kellogg's signature on the Order. "Gray J."

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