

CANADA / JUDGMENT

Kellogg Estate v. Kellogg

2015 BCCA 203

COURT

British Columbia Court of Appeal

DECIDED

8 May 2015

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2015 BCCA 203 Kellogg Estate v. Kellogg COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Kellogg Estate v. Kellogg, 2015 BCCA 203 Date: 20150508 Docket: CA041498 Between: Inga Kellogg Rouches, Executrix of the Will of Robert P. Kellogg; and Inga Kellogg Rouches, Successor Trustee of the Kellogg Family Trust Respondents (Petitioners) And Vivian P. Kellogg Appellant (Respondent) And Susanna M. Kellogg; Inga Kellogg Rouches, Executrix of the Will of Lisa E. Kellogg; and Inga Kellogg Rouches Respondents (Respondents) Before: The Honourable Mr. Justice Donald The Honourable Mr. Justice Lowry The Honourable Madam Justice Bennett On appeal from: An order of the Supreme Court of British Columbia, dated December 12, 2013 (Kellogg Estate (Re), 2013 BCSC 2292, Victoria Docket 13-1491). The Appellant appeared in person Counsel for the Respondents, Inga Kellogg Rouches, Executrix of the Will of Robert P. Kellogg; and Inga Kellogg Rouches, Successor Trustee of the Kellogg Family Trust: H. D. Fisher Place and Date of Hearing: Victoria, British Columbia April 22, 2015 Written Submissions: April 27 and April 29, 2015 Place and Date of Judgment: Vancouver, British Columbia May 8, 2015 Written Reasons by: The Honourable Mr. Justice Lowry Concurred in by: The Honourable Mr. Justice Donald The Honourable Madam Justice Bennett Summary: Appeal from an order declaring the entitlement of the beneficiaries of an estate involving consideration of what are referred to as "pour over" and "incorporation by reference" clauses in a will pertaining to the terms of a related family trust. Held: appeal dismissed. The issue raised is of no practical consequence to the distribution of the estate and need not be resolved. Reasons for Judgment of the Honourable Mr. Justice Lowry:

- [1] This appeal raises a question concerning the validity of a clause in a will that purports to incorporate the terms of an inter vivos trust. However, the answer to the question does not appear to alter the distribution of the estate amongst what are three beneficiaries such that the appeal serves no practical purpose and is largely moot. The Estate
- [2] Robert Kellogg died in 1999; his wife, Lisa, died in 2010. They were residents of the state of Washington. There, in March 1994, they assigned all of their personal property to a family trust they created naming their three daughters, Inga Rouches, Susanna Kellogg, and Vivian Kellogg the "primary beneficiaries". For convenience I refer to them by their first names. Under its terms, upon the death of Mr. and Ms. Kellogg, Inga became the "Successor Trustee" of the trust.

- [3] Mr. and Ms. Kellogg also executed wills. Mr. Kellogg's will was not probated before his wife died. Under his will, Inga becomes the "Personal Representative" of the estate. The will provides that the residue of the estate, which consists of a \$1.6 million interest in a piece of real property in this province, is to be given to the trustee of the family trust to be held and distributed on the same terms as the terms of the trust. Two clauses in the will bear on the residue in this regard. The first clause is referred to as a "pour-over" clause, the effect of which is to add the residue of the estate under the will to the trust. The second clause, in the event the first is found to be invalid, is to "incorporate by reference" the terms of the trust into the will. Significantly both clauses make reference to the terms of the trust as they exist at the time the will is executed and as they may thereafter be amended: Residue of Estate [a] I give, devise and bequeath all the rest, residue and remainder of my property of every kind and description (including lapsed legacies and devises), wherever situated and whether acquired before or after the execution of this Will, to the Trustee under that certain Trust executed by me, which is known as [the Family Trust]. The Trustee shall add the property bequeathed and devised by this Item to the corpus of the above described Trust and shall hold, administer and distribute said property in accordance with the provisions of the said Trust, including any amendments thereto made before my death. [b] If for any reason the said Trust shall not be in existence at the time of my death, or if for any reason a court of competent jurisdiction shall declare the foregoing testamentary disposition to the Trustee under said Trust as it exists at the time of my death to be invalid, then I give all of my estate including the residue and remainder thereof to that person who would have been the Trustee under said Trust, as Trustee, and to their substitutes and successors under the Trust, as such trust is described hereinabove. Property held by the designated Trustees shall be held, managed, invested, reinvested and distributed by the Trustees upon the terms, trusts and conditions contained in said Trust pertaining to the period beginning with the date of my death. The terms, trust and conditions shall be those as were constituted in said Trust (giving effect to amendments, if any, hereafter made) immediately prior to its state of non-existence or determination of invalidity, and for that purpose I do hereby incorporate such Trust by reference into this my Will. [Emphasis added.]
- [4] In 1998, four years after the trust was created and the wills were executed, the trust was amended to remove Vivian as a beneficiary. She says her parents did that at her request. The Proceedings
- [5] In 2012, in her capacity as the personal representative of her father's estate, Inga made application to probate his will. Vivian filed a caveat. Inga commenced proceedings to have the will proved in solemn form. Vivian defended and filed a counterclaim. After some months, the matter was disposed of by way of a summary trial: the will was proved in solemn form. Inga then made application and was by court order appointed executrix of the will and probate was granted. Vivian appealed the proof of the will in solemn form. She did not prosecute the appeal in a timely manner and it was dismissed. She applied for a review of the dismissal. It was also dismissed.

- [6] Vivian commenced an action to have the granting of probate set aside. Her claim was struck. She appealed; her appeal was dismissed.
- [7] In 2013, Inga applied in her capacity as executrix of her father's will seeking a determination of how the will was to be construed. Questions were posed:
- i. Is the "pour over" clause in the Will a valid gift to the trustee of the [Family] Trust? ii. If not, does the Will validly incorporate by reference the terms of the [Family] Trust, and if so, does it incorporate the terms of the [Family] Trust in existence at the time the Will was executed, or the terms as subsequently amended? [Emphasis added.]
- [8] The answers to the questions are significant in determining whether Vivian is to receive a one-third share of the real property that constitutes the residue under the will. Neither Inga nor Susanna took any position or contended for answers that would preclude Vivian sharing equally in the distribution of the residue. Indeed Inga offered to consent to an order that, if there was to be a three-way distribution, she would not sell, mortgage, or partition the property without her sisters' agreement or court approval. Vivian opposed. She maintained an order to that effect would be premature.
- [9] The judge concluded the pour-over clause was not valid. She considered the provision for amendments of the family trust being made after the will was executed, and the fact that an amendment was made, were "determinative". Such amounts to an amendment to the will that the judge considered would not comply with the governing legislation in this province. The judge did, however, conclude that, despite the reference to the amendment of the terms of the trust in the incorporation by reference clause, it was valid: it incorporated the terms of the trust into the will as they were at the time the will was executed. The judge found support for her conclusion in the decision of the English Court of Appeal in *Re Edwards' Will Trusts*; *Dalglish v. Leighton*, [1948] 1 Ch. 440, [1948] 1 All E.R. 821, and said:
- [82] As a result, the Incorporation by Reference Clause incorporates the terms of the [Family] Trust Indenture, which governed the trustee on the date that [Mr. Kellogg] executed the Will. The gift of the Musgrave Farm Interest essentially passes to a testamentary trust which is on the terms of the [Family] Trust as at the date [Mr. Kellogg] signed the Will, being the terms set out in the [Family] Trust Indenture without amendment.
- [83] As a result, [Mr. Kellogg's] three daughters have an equal interest in the Musgrave Farm Interest.
- [10] The judge then summarized her conclusions and declared that Inga was entitled to sell, mortgage, or partition the property subject to her sisters' written agreement or court approval on notice to them. After receiving written submissions, she awarded Inga costs recoverable from the estate to the extent such were incurred in her capacity as executrix of the estate or trustee of the family trust. The Appeal

- [11] Vivian appeals the order that was entered. She first contends the judge erred in law in determining the incorporation by reference clause was valid. She maintains the real property that constitutes the residue of her father's estate passes to her and her sisters equally under an intestacy.
- [12] In my view, the judge's conclusion that the clause incorporating the terms of the family trust by reference is valid may be questionable. It contains the same provision with respect to the trust being amended that the judge considered determinative of the invalidity of the pour-over clause, given there had in fact been an amendment. But that said, it is not necessary to decide. Mr. Kellogg's will has been proven in solemn form. Inga is the executrix. Probate has been granted. Inga must now do what is required to permit her to distribute what constitutes the residue of her father's estate equally between his three daughters. This is so whether it is distributed as an intestacy or under the terms of the trust. Vivian does not appear to dispute this such that there is no practical purpose to what is the main ground of her appeal.
- [13] In a written submission made after the appeal was heard, Vivian contends Inga's two adult children may have an interest in the residue of the estate under the terms of the family trust they would not have if the real property passes under an intestacy. The submission is based on her interpretation of somewhat complex provisions of the trust that appear to have no application if not acted upon before the deaths of both Mr. Kellogg and his wife. There is nothing to suggest the steps that would have been necessary to make any distribution under the trust to Inga's children were taken such that they now have no interest in their grandfather's estate. Vivian's one-third interest in the residue remains unaffected and her submission would appear to be without merit.
- [14] Vivian continues to maintain it was wrong of the judge to say that Inga was entitled to do what is necessary to permit the distribution of the residue subject to agreement or court order. She maintains this is because the residue has not vested in Inga and will not do so until it is cleared of encumbrances. I see no merit in Vivian's contention in this regard.
- [15] Finally, Vivian challenges the costs award the judge made in favour of Inga. She challenges the neutrality the judge ascribed to the position Inga took on the application. Having regard for the terms of the order for costs the judge made, I see no merit in Vivian's contention in this regard either. The judge was clear in saying Inga was only entitled to such costs as were incurred in her capacity as executrix and trustee. It will be for the registrar before whom her costs are taxed to make the appropriate assessment. Costs of the Appeal
- [16] Inga seeks a lump sum award of costs of the appeal of \$7,800 against Vivian. She seeks as well an order that the estate indemnify her for her reasonable legal expenses that are not recoverable in taxable costs. It is difficult to understand why Vivian has made such a concerted and continuous effort to impede the steps Inga has taken to discharge her responsibilities as executrix of her father's will and trustee of the family trust. This is particularly so in light of Vivian having had her parents remove her from the trust such that

she would not have expected to share in her father's estate and does so only because of the invalidity of the clause that would have had that effect. Vivian's actions have served only to cause unnecessary delay and expense to all concerned. Inga is certainly entitled to the lump sum award of costs and the indemnity she seeks.

Disposition

[17] I would dismiss the appeal and award the costs and the indemnity Inga seeks. "The Honourable Mr. Justice Lowry" I agree: "The Honourable Mr. Justice Donald" I agree: "The Honourable Madam Justice Bennett"

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Prepared on 27 October 2026 · Esheria