

CANADA / JUDGMENT

Ketcham v. Walton

2012 BCSC 175

COURT

Supreme Court of British Columbia

DECIDED

3 February 2012

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2012 BCSC 175 Ketcham v. Walton IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Ketcham v. Walton, 2012 BCSC 175 Date: 20120203 Docket: 103458 Registry: Victoria Between: Charlotte Ketcham, Elaine Boudreault and Wayne Clay Plaintiffs And Fredrick Kenneth Walton, in his capacity as Executor and Trustee of the Estate of Eric Worthy Clay, Sooke Region Historical Society, Metchosin School Museum Society, Bonnie Josephson, David Josephson, Linda Jenner, Candy Johnson, Bobbi Jamieson, Ron Jamieson, Ivan Brown, Shelly Brown, Randy McKay, Anna McKay, Jan Razon, Richard Razon, The Dominion Command of the Royal Canadian Legion, and the Cowichan Foundation and/or the Kinsol Trestle Capital Campaign, or Jane or John Doe or a Society or Corporation or Local Government as chosen by the Trustee Defendants Before: The Honourable Mr. Justice Wong Reasons for Judgment Counsel for the Plaintiffs: James R. Fowler Counsel for the Defendant Executor Fredrick Kenneth Walton: David S. Mulroney Counsel for the Defendants, Bonnie Josephson, David Josephson, and Candy Johnson: Jonathan M. Aiyadurai Place and Date of Hearing: Victoria, B.C. December 13, 2011 Place and Date of Judgment: Vancouver, B.C. February 3, 2012

Introduction

- [1] Pursuant to s. 86 of the Trustee Act, RSBC 1006 c. 464, the Executor of the Eric Worthy Clay estate, Fredrick Kenneth Walton, sought from the Court:
- 1) Direction for an order that based on the provisions in the Last Will and Testament of Eric Worthy Clay, as modified by the Last Codicil, and as proven in this Honourable Court by probate of said Will and Codicil, the Executor, Fredrick Kenneth Walton, shall be at liberty, should he deem it advisable, to take a position on the merits of the Wills Variation Action to defend the Will and the gifts contained therein against the claims made in the Wills Variation Action; and

- 2) Direction for an order that the Executor, Fredrick Kenneth Walton, shall be at liberty to, in accordance with the powers contained in the Will, remove funds from the estate from time to time in order to pay his lawyer's accounts and decide whether his lawyer's accounts are fair and reasonable and pay those accounts from the estate without requiring or undergoing the expense of taxing those accounts provided however, this shall in no way release him of the obligation to pass his accounts as Executor.
- [2] Mr. Clay died and left a Will that disinherits his adult independent children and instead grants his estate to several friends and charities.
- [3] It also includes a peculiar clause explaining his rationale for doing so, and instructs his Executor to take an active role in defending the Will if any of these children brings a Wills Variation action. The Will goes on to say that the Executor is authorized to deplete the Estate, if necessary, to defend against a WVA action, taking as many appeals as necessary to ensure that the Testator's intentions are carried out.
- [4] The children have brought the contemplated WVA action and the Executor now seeks directions from the Court.
- [5] Specifically, the Court must interpret a clause in the Will which purports to instruct the Executor to take an active role in the WVA action to defend the Will.
- [6] I conclude that it is proper in this case for the Court to give direction under the Trustee Act, since the Executor is asking for the proper interpretation of the Will and how he should govern himself in the face of the Plaintiffs' WVA claim. The issue is also not hypothetical or academic, since the very thing the Will contemplated has come to pass and the Executor needs to know how to proceed.
- [7] Should the Executor take an active role in defending the Will?
- [8] The answer is no; but if there is no party ultimately to represent the Testator's position, the Executor perhaps should act in a non-adversarial role as an amicus to assist the Court in determining the merits of the WVA claim.
- [9] Counsel have been unable to find any previous case authority on point and this case is essentially one of first impression and consideration of basic principles. The Background
- 1) This proceeding is a Wills Variation action arising out of the last Will and Testament of Eric Worthy Clay, which was duly executed in the City of Victoria, B.C. on December 20, 2007.
- 2) The Testator died on November 15, 2009.
- 3) The Will appoints the defendant Fredrick Kenneth Walton Q.C. as Executor and Trustee.
- 4) The Testator had three children and alleges by the terms of his Will that he was estranged from those children, a fact which is confirmed by the allegations in the claim of the children in this action.

- 5) The Testator's Will contains provisions which specifically authorize and require that the Executor take an active role in defending the Will against any Wills Variation claims raised, such as those raised in this action.
- 6) The Will by its terms authorizes the Trustee to take funds from the estate, pay the trustee's lawyer from time to time and to decide whether his lawyer's accounts are fair and reasonable and to pay those accounts from the estate without need for taxation.
- 7) The plaintiffs have, by their claim, challenged the validity of some or all of the provisions of the Will and the Executor and Trustee therefore comes to the Court to seek direction as to whether he has a right and duty to defend Mr. Clay's Will and to remove funds from the estate to pay the legal bills from time to time as specifically authorized by the provisions of the Will.
- 8) This action was commenced by Notice of Civil claim on August 20, 2010.
- 9) A Response to the Notice of Civil Claim was filed by the defendant Fredrick Kenneth Walton on December 24, 2010.
- 10) The Responses to the Notice of Civil Claim in this proceeding have been filed by the following parties on the following dates:
 - a. Fredrick Kenneth Walton on December 24, 2010;
 - b. Sooke Region Historical Society on April 21, 2011;
 - c. Randolph Gerald McKay and Bertha McKay on April 26, 2011;
 - d. Metchosin School Museum Society on May 4, 2011;
 - e. Bonnie Josephson and David Josephson on May 31, 2011;
 - f. Candy Johnson on June 22, 2011; and
 - g. Linda Jenner on July 6, 2011.
- 11) The remaining parties were served on the following dates and have not responded:
 - a. Bobbi Jamieson and Ron Jamieson on April 7, 2011;
 - b. Anna McKay and Randy McKay on April 8, 2011;
 - c. Jan and Richard Razon on April 8, 2011;
 - d. Cowichan Foundation on April 8, 2011;
 - e. The Dominion Command of the Royal Canadian Legion on April 14, 2011; and
 - f. Shelley Brown and Ivan Brown on June 20, 2011.
- 12) Funds remaining in the estate at November 7, 2011 are \$792,394.15.

- 13) If no Wills Variation Action claims were advanced the distribution which would take place in accordance with the Will would likely be as follows:
- a. \$20,000.00 to find a suitable place to erect a cairn memorial to Alexander Dawson Donaldson;
 - b. \$200,000.00 to the Sooke Region Historical Society;
 - c. \$200,000.00 to the Metchosin School Museum Society;
 - d. \$50,000.00 to Bonnie and David Josephson;
 - e. \$5,000.00 to Linda Jenner;
 - f. \$10,000.00 to Candy Johnson;
 - g. \$5,000.00 to Bobbi and Ron Jamieson;
 - h. \$10,000.00 to Ivan and Shelly Brown;
 - i. \$10,000.00 to Randy and Anna McKay; and
 - j. \$5,000.00 to Jan and Richard Razon.
- 14) All of the above gifts total \$515,000.00, which subtracted from the current balance would leave a residue of \$277,394.15. This is of course disregarding the Wills Variation claim and any further expenses of the estate.
- 15) The residue of the trust is to be paid at the Trustee's judgment and discretion to a person, corporation, society, local government or regional district or combination of them on assurances that the money will be used for the restoration and rebuilding process of the Kinsol Trestle. Failing that there is a gift over of the residue to the Dominion Command of the Royal Canadian Legion. The Law and Analysis
- [10] The basic principle of an Executor's duty to specified and potential beneficiaries of the Will is neutrality.
- [11] Mr. Justice Bouck stated in *Quirico v. Pepper Estate* (1999), 22 B.C.T.C. 32 at paras. 15-17: 15 The primary duty of an executor is to preserve the assets of the estate, pay the debts and distribute the balance to the beneficiaries entitled under the will or, in accordance with any order made under the Wills Variation Act. An executor should not pick sides between the beneficiaries and use estate funds to finance litigation on their behalf under the Wills Variation Act. It is a matter of indifference to the executor as to how the estate should be divided. He or she need only comply with the terms of the will or any variation of it made by a court. 16 For all these reasons, the law anticipates the executor will remain impartial between the opposing beneficiaries. Where proceedings are taken under the Act, all the executor need do is appear at the trial if required, and deliver to the court the Letters Probate and financial documents showing the value of the estate. Even this may be unnecessary if the parties agree to admit copies of those documents into evidence without

the attendance of the executor. 17 It follows that the only purpose of Mr. MacKay appearing at the trial as solicitor for the executor was to deliver up the Letters Probate and the Estate Inventory. He could not act in an adversarial capacity against the plaintiff.

- [12] In his submissions, the Executor attempted to circumvent the general thrust of these paragraphs by saying that he is attempting to "comply with the terms of the will" by defending the Will against the WVA claim. However, I read Bouck J.'s words as referring to the distribution provisions of the Will and not the Will as a whole. The general proposition that "it is a matter of indifference to the executor as to how the estate should be divided" makes the most sense. No Party to Advance Position
- [13] The Executor says that if it does not intervene to "defend the Will", there is no other party with sufficient interest in the litigation to oppose the WVA claim. Indeed, according to the proposed distribution, there is a \$277,000 residuary to this estate. This means that before any of the specific legacies are affected, an amount in excess of \$277,000 would need to be reapportioned to the children under the WVA. Therefore, the real conflict in the WVA claim may actually be between the children-plaintiffs and the residuary beneficiaries (in this case, the Cowichan Foundation and the Dominion Command of the Royal Canadian Legion).
- [14] The Executor points out that neither of these organizations have filed responses to the civil claim in this matter and are therefore not taking an active role in defending the residuary. However, this does not seem sufficient to alter the essential character of an executor as neutral between beneficiaries and potential beneficiaries. Even if the WVA claim goes undefended, the matter will still be in the discretion of the court, weighing the evidence propounded by the plaintiffs against a statement of intention in s.8 of Eric Clay's Will.
- [15] In *Doucette v. Doucette Estate*, 2008 BCSC 506 at para. 16, Metzger J. wrote: ... The law requires an executor to remain neutral. Counsel for the executors did not cite any authority, with the arguable exception of the last paragraph of *Erlichman* discussed above, that would permit an executor to enter the fray of a WVA proceeding at the cost of the estate with the explanation that it was to defend the testatrix's intentions.
- [16] Again, the executor attempts to distinguish this case on the grounds that it did not involve a will that specifically directed the executor to take an active role in the litigation. However, in my view, this is not a relevant distinction, since the characteristic of neutrality is fundamental to the role of executor on WVA applications. Absent any authority to the contrary, these precedents that require the executor to remain neutral must stand.
- [17] The executor points to examples of executors being given express authority to not maintain an even hand between beneficiaries when discretionary trusts or powers of appointment are involved. With respect, the "non neutrality" of the even-hand principle has nothing to do with the neutrality required of the executor in WVA actions. In *Terrorem* and Public Policy

- [18] The plaintiffs point to the few cases decided on in *terrorem* clauses, which attempt to divest a party of their inheritance if they try to challenge the distribution under the WVA. These clauses have been held to be void as against public policy.
- [19] The clause in question does not obviously prevent the children from an inheritance if they bring a WVA claim, but that possibility clearly lurks within it. The executor is instructed to resist their claim, even if it depletes the entirety of the estate to the detriment of the named beneficiaries. The executor is also granted the authority to incur whatever legal costs he feels are necessary and not have the legal bills taxed. It is easy to see how this clause, if given full effect, could be used to erase the \$800,000 in the estate.
- [20] If the clause is not repugnant for directing the executor to take an active role in the litigation, then I would find it void as amounting to an *in terrorem* clause. Alternatively, it should also be void as contrary to public policy as it purports to deny Eric Clay's children their recourse to the courts. The clause does not directly divest the children of an inheritance, but it does have the potential to deny them the fruits of a victory. Since they have a statutory right to challenge the will under the WVA, any clause that attempts to deny them this right (or, by extension, any effective remedy under this right), should offend public policy and be void.
- [21] This is the outcome that was reached in *Bellinger v. Nuytten Estate*, 2003 BCSC 563 at para. 22 and it should apply here.
- [22] The executor attempts to distinguish the results in the *Bellinger* line of cases, since he claims he is only defending the testator's intentions. However, this cannot be the case with a clause worded so broadly as to raise the spectre of depleting the entirety of the estate. *Amicus?*
- [23] If the children in the WVA action seek an amount in their claim larger than the aggregate amount of \$515,000 specified for stated beneficiaries, no doubt counsel for the major stated beneficiaries will vigorously defend against the plaintiffs' claim. The executor can and should remain neutral, as there is a party to defend the testator's intention in his Will.
- [24] However, should the specified beneficiaries effect a settlement with the plaintiffs such that the plaintiffs are only pursuing the residual interest amount of \$277,000 in the Will, there is then no party to defend.
- [25] In order to assist the Court in determining the merits of the plaintiffs' WVA claim in a balanced and non adversarial role, the Executor might then retain counsel as *Amicus* for the Court with respect to questioning the plaintiffs' claim for assistance of the Court.
- [26] Item 2 of the direction request to pay incurred legal expenses by the Executor subject to the neutrality principles I stated previously is permissible at law and I would so endorse.

Conclusion

- [27] The active defence clause instruction by the Testator to the Executor towards any WVA claims with potential to deplete the entirety of the estate, if necessary, should be regarded as void at law.
- [28] Liberty of the Executor to withdraw funds to pay his legal expenses without taxation, provided he pass his accounts as Executor is permissible.
- [29] If required, counsel may speak on costs of this application. "Wong J."
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