
CANADA / JUDGMENT

Kobzos v. Kobzos Estate

2019 BCSC 2254

COURT

Supreme Court of British Columbia

DECIDED

27 December 2019

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2019 BCSC 2254 Kobzos v. Kobzos Estate

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kobzos v. Kobzos Estate,

2019 BCSC 2254

Date: 20191227

Docket: S176107

Registry: Vancouver

Between:

Ashton Morgan Kobzos

Plaintiff

And

Shelley Diane McKibbon, as Executrix of the Estate of

Robert Titus Kobzos, Deceased, Joseph Deimuth,

Patricia Evans and Shelley Diane McKibbon

Defendants

Before: Master Elwood

Reasons for Judgment

Counsel for the Plaintiff:

K. Ducey

Counsel for the Defendants Shelley Diane McKibbon, as Executrix of the Estate of Robert Titus Kobzos, Deceased, and Shelley Diane McKibbon in her personal capacity:

E.F. Macaulay

J.K. Fraser

Place and Date of Hearing:

Vancouver, B.C.

November 26, 2019

Place and Date of Judgment:

Vancouver, B.C.

December 27, 2019

I. INTRODUCTION

- [1] This is an application by the plaintiff in an estate action for production of documents. The primary issue is whether legal advice privilege precludes an order requiring a lawyer to produce documents relating to estate planning for the deceased and the transfer of a real estate property owned by the deceased.
- [2] For the reasons that follow, I have concluded that some of the documents sought by the plaintiff fall within the rationale for the "wills exception" to legal advice privilege, and must be produced. I have also resolved a disagreement over the amount of conduct money for a defendant to attend an examination for discovery in Vancouver.

II. BACKGROUND

- [3] Robert Titus Kobzos passed away on November 16, 2015, at the age of 85. He was survived by four adult children: Shelley McKinnon, Ashton Kobzos, Joseph Deimuth, and Patricia Evans. A fifth child, Kim Kobzos, predeceased him. He did not have a spouse at the time of his death.
- [4] The last will and testament of Robert Kobzos is dated September 27, 2011, and it provides that Aston, Joseph, and Patricia will each receive a bequest of \$50,000, with the residue of the estate going to Shelley (the "2011 Will"). Shelley is the executor of the 2011 Will.
- [5] The 2011 Will revoked a will dated April 13, 2004, which provided a specific bequest to Kim of \$2,000, with the remainder of the estate to be divided equally between the four children who survived the deceased (the "2004 Will").
- [6] The 2004 Will and the 2011 Will were both prepared by a lawyer named Mary-Jane Wilson.

- [7] On the date of his death, the deceased's assets included a real estate property in Delta (the "Delta Property"), a savings account, a non-registered investment account, and a tax free savings account ("TSFA"). Shelley was a joint account holder with the deceased on the savings and investment accounts, and the named beneficiary of the TSFA.
- [8] On the same day he made the 2011 Will, the deceased executed a Form A Freehold Transfer to transfer title to the Delta Property into Shelley's name. Ms. Wilson held the executed transfer document until the deceased passed away, and registered it in the Land Title Office following his death. On December 2, 2015, Shelley became the registered owner of the Delta Property. On March 26, 2016, she sold the property for \$761,000.
- [9] The estate has no assets of any value.
- [10] Ashton commenced this action on June 28, 2017, naming Shelley in her capacity as executor and in her personal capacity, Joseph, and Patricia as defendants. The notice of civil claim alleges that the deceased provided all of the funds in the savings and investment accounts and for the Delta Property, and intended that those assets be held in trust for his estate, and that the deceased failed to make adequate provision for Ashton. The relief sought includes a declaration that Shelley holds the savings and investment accounts and proceeds of the sale of the Delta Property in trust for the estate, and an order under the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA] varying the 2011 Will.
- [11] Ashton demanded, and then applied for, production of a number of categories of documents. Through counsel, Shelley consented, during the hearing, to an order with respect to a number of those categories. What remains to be decided is Ashton's application for production of documents from the files of Ms. Wilson, the lawyer, including: documents relating to estate planning for the deceased in 2004, 2005, 2006, and 2011; documents relating to the execution of the transfer document on the Delta Property in 2011; and documents relating to the sale of the Delta Property in 2016.
- [12] Ashton also applied for an order that Shelley, who lives in Ontario, attend in Vancouver for an examination for discovery. Shelley agrees to attend the examination, provided that appropriate conduct money is tendered. Ashton has offered \$1,400. Shelley seeks \$1,878.62.

III. ANALYSIS

A. The Lawyer's File

- [13] Ashton takes the position in this action that Shelley holds the savings and investment accounts and the proceeds of the sale of the Delta Property in trust for the estate. He argues, based on *Pecore v. Pecore*, 2007 SCC 17, that a gratuitous transfer of an asset from an aging parent to an adult child creates a rebuttable presumption that the property is held in trust for the parent.

- [14] On this application, Ashton argues that Ms. Wilson's file is relevant to the true intentions of the deceased with respect to the assets he transferred to Shelley. Ashton acknowledges that communications between the deceased and Ms. Wilson for estate planning purposes are subject to legal advice privilege that survived his death. He relies on the "wills exception" to that privilege.
- [15] In *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353, the Supreme Court of Canada recognized that legal advice privilege is displaced on public policy grounds: (a) to determine whether a testator was subject to undue influence; (b) to determine the true intentions of the testator; and (c) to determine whether the testator possessed testamentary capacity. The Court found that this exception is not limited to cases concerning the validity of a will. In *Geffen*, the Court applied the exception to the making of a trust agreement, reasoning that, in common with the wills cases, the interests of the deceased client were furthered by admitting evidence to ascertain his true intentions (para. 50, 64).
- [16] In *Armstrong v. Kotanko*, 2019 BCSC 1519, Master Harper applied the wills exception to the circumstances surrounding the transfer of a property owned by the deceased into a joint tenancy during his lifetime:

54 The wills exception is not limited to the will itself but can apply to a broader range of estate planning activities. For instance, in *Geffen*, the court extended the wills exception to an inter vivos trust. There is no principled reason in the present case not to extend the wills exception to the creation of the joint tenancy.

55 In my view, the wills exception applies to the conveyance because it was noted in Mr. Holm's notes when he took instructions from Ms. Almgren about the 2013 will. The conveyance was not so distant in the past that it can be construed as disconnected from her estate planning.

- [17] Shelley argues that the notice of civil claim in this case is inadequate to put the intentions of the deceased in issue. She argues that the case as pleaded is, in reality, a wills variation action, and estate planning files remain subject to legal advice privilege in wills variation actions.
- [18] There is support for the latter proposition. In *Gordon v. Gilroy* (1994), 5 E.T.R. (2d) 289 (B.C.S.C.), Master Joyce found that the rationale of the wills exception as explained in *Geffen* did not justify disclosure in a wills variation action. The issue in *Gordon*, Master Joyce found, was not the true intentions of the testator. The intent of the testator was clear: he intended to leave his estate to a common law spouse and disinherit his children. The purpose in seeking disclosure of solicitor-client communications was not to ascertain the intentions of the deceased, which were fully stated in the will itself, but rather to defeat those intentions. Accordingly, the wills exception did not apply.

- [19] In *Brown v. Terins*, 2015 BCSC 775, the issue was the validity of a cohabitation agreement and a will that left the entire estate of the deceased to his children to the exclusion of his spouse. Madam Justice Fisher, then a judge of this Court, agreed with the reasoning of Master Joyce in *Gordon* and found that the wills exception did not apply when the purpose of the disclosure sought was not to determine the testator's true intentions, but rather to challenge the grounds on which he excluded his spouse from his estate.
- [20] Shelley also argues that there is no inter vivos trust or conveyance at issue in this case. The deceased in this case instructed his lawyer to complete a Form A Transfer, but not register the document until he died. The Delta Property, therefore, remained in the name of the deceased, and no conveyance occurred during his lifetime. Accordingly, Shelley submits, there can be no presumption of a resulting trust in this case.
- [21] I do not think the pleadings or the evidence can be interpreted this narrowly.
- [22] First, in my view, the pleadings put the true intentions of the deceased in issue. Ashton alleges that the deceased intended the savings and investment accounts and the Delta Property to be held in trust for the estate. In the legal basis of the claim, Ashton pleads a resulting or constructive trust over these assets. Ashton's position is supported by Joseph and Patricia, who share an interest in the trust claim. Shelley pleads in response in her personal capacity that the deceased understood the nature and effect of the transactions at issue and intended to transfer the assets to her on his death.
- [23] Ashton also advances a wills variation claim under WESA in his own name; however, that claim makes no sense in the absence of the trust claim. Without a resulting or constructive trust, there are no assets in the estate to satisfy any provision for Ashton's benefit. In other words, a central issue in this case, regardless of the wills variation claim, is whether the deceased intended to gift all of his assets of any value to Shelley and effectively disinherit his other children.
- [24] Second, although title to the Delta Property did not transfer to Shelley until Ms. Wilson filed the Form A Transfer, I see no reason in principle why the transaction should be regarded differently for the present purposes from the conveyance at issue in *Armstrong*. Like the joint tenancy at issue in *Armstrong*, the transfer of title in this case was set up by the deceased at the time he made his last will and testament, as part of his estate planning. The litigation puts in issue whether the transfer reflects his true testamentary intent.
- [25] Third, Shelley has produced a number of documents relating to the instructions of the deceased at or about the time he made the 2011 Will, which are not entirely consistent as to what his true intentions were:
- a) A handwritten note dated September 27, 2011, and apparently signed by the deceased, which states:

It is my intention that my joint account held with my daughter Shelley McKibbon be given to her on my death. It is also my intention that [the Delta Property] be given to her by right of survivorship on my death.

b) An undated file note of Ms. Wilson which states:

to protect the estate from a potential law suit

consider

transfer of

½ of the ppty into

joint tenants with Shelley

on death Shelley gets to distribute pursuant to wil (sic)

We can do a trust agreement that says Shelley can only do what Bob says.

c) An unregistered copy of the Form A Transfer on the Delta Property with undated handwriting which states, "Original held at offices of Wilson Rasmussen to be registered on death of Robert Kobzos".

[26] The handwritten note signed by the deceased evidences an intention to provide Shelley with a right of survivorship to the Delta Property. Ms. Wilson's note to file suggests that the deceased considered transferring an interest in the Delta Property to Shelley so as to protect the estate, and intended that the Delta Property be held under a trust and distributed in accordance with the 2011 Will. The handwriting on the Form A Transfer evidences instructions from the deceased to transfer title to Shelley after his death, with no joint tenancy (i.e., not by a right of survivorship) or any trust agreement.

[27] Unlike in *Gordon and Brown*, the intentions of the deceased are unclear in this case. It is unclear why the deceased made a will leaving \$50,000 to each of Aston, Joseph, and Patricia while, at the same time, taking steps to transfer all of his assets of any value to Shelley, thus frustrating the bequests under the will.

[28] In common with *Geffen* and the wills cases, the interests of the now deceased client of Ms. Wilson would be furthered, in my view, by disclosure of evidence to ascertain his true intentions. I find that this case falls within the rationale for the exception to legal advice privilege.

[29] Shelley submits that the order sought in the notice of application is too broad because it includes documents relating to estate planning in 2004, 2005, 2006, and 2011. The request for documents from 2004 relates to the 2004 Will, and the request for documents from 2005 relates to the date on which the deceased named Shelley as a joint account holder on the investment account. It appears that the request for documents from 2006 is related to a letter from the deceased's previous lawyer about estate planning.

- [30] In my view, documents from 2004, 2005, and 2006 are too distant from the 2011 Will and the Form A Transfer to be relevant to the true intentions of the deceased when he executed those documents. They do not fall within the rationale for the exception to legal advice privilege.
- [31] It is also unclear how documents relating to the sale of the Delta Property in 2016 are relevant to the intentions of the deceased prior to his death in 2015.
- [32] Accordingly, the order for production of documents by Ms. Wilson will be limited to documents relating to estate planning in 2011 and documents relating to the execution and registration of the transfer document for the Delta Property.

B. Conduct Money for Shelley's Examination

- [33] Pursuant to Rule 7-2(13(b)(ii) of the Supreme Court Civil Rules, Ashton must pay Shelley a witness fee to attend her examination for discovery. Witness fees are prescribed in Schedule 3 of Appendix C.
- [34] Shelley lives in Toronto, Ontario. She has requested conduct money for economy class airfare, airport transfers, three nights' accommodation at a mid-range hotel, and three days of meals and expenses.
- [35] Ashton is prepared to pay for travel and two nights' accommodation and meals, so that Shelley can attend a one-day examination for discovery. Ashton agrees that Shelley should not be expected to return to Toronto on the same day as her examination, but objects to paying for a third day and night so that she can attend his examination as well.
- [36] Section 3(3) of Schedule 3 requires:
- 3 For any witness, a reasonable allowance for meal expenses made necessary by the witness' attendance, and if the witness resides elsewhere than the place of examination, hearing or trial and is required to remain overnight, a reasonable allowance for overnight accommodation.
- [37] I agree with Ashton that three nights' accommodation is more than what is reasonably required for a one-day examination. An additional night for Shelley to attend at Ashton's examination, if it is reasonably required, is better claimed as a disbursement in a bill of costs.
- [38] However, I would require Ashton to provide Shelley with three days' meal expenses. Shelley is 65 years old. I would not ask her to fly early or late in the day, or to rush her connections. The return trip from Vancouver to Toronto alone can consume an entire day. Three days and two nights is a reasonable allowance in this case.
- [39] Based on the budget Shelley has prepared, which I accept, Aston must tender \$1,572.35 in advance of the examination for discovery.

IV. CONCLUSION

- [40] There will be an order that Ms. Wilson produce documents relating to estate planning for the deceased in 2011 and the execution and registration of the transfer of the Delta Property from the deceased to Shelley. The order will include the terms set out in paras. 5-7 of the notice of application.
- [41] There will also be an order that Shelley attend an examination for discovery on a date mutually agreed by the parties, following payment of witness fees in the amount of \$1,572.35.
- [42] By consent, there will be an order that Shelley use her best efforts to obtain account statements for the savings, investment, and TFSA accounts, as set out in para. 2 of the notice of application. Also by consent, there will be an order that Shelley produce any further documents, in her possession, power, or control, relating to estate planning for the deceased, the value of his assets, the transfers during his lifetime, and the sale of the Delta Property in 2016, as set out in para. 3 of the notice of application.
- [43] Ashton was substantially successful on this application. He is entitled to costs in the cause payable by Shelley.

"Master Elwood"

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