

CANADA / JUDGMENT

Lewis v. Jack

2025 BCSC 343

COURT

Supreme Court of British Columbia

DECIDED

28 February 2025

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2025 BCSC 343 Lewis v. Jack

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lewis v. Jack,

2025 BCSC 343

Date: 20250228

Docket: P18146

Registry: Kamloops

Between:

Cecelia Miller Lewis as the Administrator of the Estate of

Jason Tyler Jack, Deceased

Applicant

And

Travis McLean Jack in his Capacity as Executor of the

Estate of Kenneth Douglas Jack, Deceased, and

The Estate of Kenneth Douglas Jack

Respondents

Before: The Honourable Justice B. Smith

Reasons for Judgment

Counsel for the Applicant:

B. Tancock

Counsel for the Respondent, Travis Jack:

M.J. Ford

Place and Date of Hearing:

Kamloops, B.C.

November 28, 2023

and May 31, 2024

Place and Date of Judgment:

Kamloops, B.C.

February 28, 2025

Introduction

- [1] This case raises the issue of the proper construction of a will. Specifically, I must determine whether the deceased's children within the meaning of his will means his children alive as of the date of his death, or those alive at the time of distribution of his estate.

Background

- [2] Kenneth Douglas Jack ("Kenneth") died on October 19, 2018, with a will dated September 29, 2006 (the "Will"). Kenneth's main asset at the time of his death was a ranch property on the outskirts of Kamloops (the "Ranch"). Kenneth was survived by two adult sons: Travis McLean Jack ("Travis") 43 years old, born March 21, 1975; and Jason Tyler Jack ("Jason") 40 years old, born April 7, 1978. Travis and Jason were named beneficiaries in the Will. At the date of the Will, Travis was 31 years old, and Jason was 28 years old.
- [3] Kenneth and Cecelia Miller Lewis ("Cecilia") were married in 1974. Cecilia is Travis' and Jason's mother. Kenneth and Cecilia were divorced in 1992. After their divorce, Kenneth and Cecilia continued to live at the Ranch. In April 1993, Cecilia moved off the Ranch and started living elsewhere.
- [4] Before Kenneth was deceased, Travis and Jason lived at the Ranch, and they continued to do so after Kenneth was deceased.
- [5] Travis was the named executor of Kenneth's estate.
- [6] On May 6, 2019, Travis executed a statement of assets, liabilities and distribution, which estimated the gross value of Kenneth's estate at \$1,852,919.52. the greatest assets of Kenneth's estate were, and remain, the Ranch and a recreational property on Savary Island.

- [7] On May 13, 2019, Travis was granted probate of Kenneth's estate. On July 4, 2023, Travis was granted administration of Kenneth's estate. To date there has been no distribution of Kenneth's estate.
- [8] On February 24, 2023, Jason died, without a will, and without any children.
- [9] On July 4, 2023, Cecelia was granted letters of administration of Jason's estate.
- [10] Cecelia brings this application in her capacity as administrator of Jason's estate. Cecilia was appointed administrator of Jason's estate at the request of Raylene Donald ("Raylene"), whom Cecelia asserts was Jason's spouse at the time of his death. Travis disputes that characterization of the relationship between Jason and Raylene.
- [11] The biggest asset of Jason's estate is its interest in Kenneth's estate. Jason's estate is otherwise minimal and consists mostly of personal property.
- [12] Cecelia seeks a declaration that on the proper construction of the Will, the residue of Kenneth's estate vested immediately upon his death, not after; that it vested in equal shares in his two children alive at the date of his death, Travis and Jason; and that there was no subsequent divestiture by reason of the later death of one of those children, Jason.
- [13] Cecilia also seeks an order that Travis, as administrator of Kenneth's estate, shall pass the accounts of Kenneth's estate, for the period of October 19, 2018 to September 30, 2023.
- [14] For the reasons that follow, Cecelia's application is dismissed.

The Will

- [15] The Will is not lengthy. It states:

THIS IS THE LAST WILL AND TESTAMENT of me KENNETH DOUGLAS JACK of the City of Kamloops in the Province of British Columbia.

1. I HEREBY REVOKE all Wills and testamentary dispositions of every nature and kind whatsoever by me heretofore made.
2. I NOMINATE CONSTITUTE AND APPOINT TRAVIS McLEAN JACK sole Executor and Trustee of this my Will but if he should predecease me or die within a period of thirty (30) days following my decease or without having proved this my Will then I NOMINATE CONSTITUTE AND APPOINT JASON TYLER JACK to be the Executor and Trustee of this my Will. I hereinafter refer to my Executor and Trustee for the time being as my "Trustee".
3. I GIVE DEVISE AND BEQUEATH all my property of every nature and kind and wheresoever situate including any property over which I may have a general power of appointment to my said Trustee upon the following trusts, namely:
 - a) To use his discretion in the realization of my estate with power to my Trustee to sell call in and convert into money any part of my estate not consisting of money at such time or times in such manner and upon such terms and either for cash or credit or for part cash and part

credit as my said Trustee may in his uncontrolled discretion decide upon or to postpone such conversion of my estate or any part or parts thereof for such length of time as he may think best and I hereby declare that my Trustee may retain any portion of my estate in the form in which it may be at my death (notwithstanding that it may not be in the form of an investment in which trustees are authorized to invest trust funds and whether or not there is a liability attached to any such portion of my estate) for such length of time as my said Trustee may in his discretion deem advisable and my Trustee shall not be held responsible for any loss that may happen to my estate by reason of so doing.

- b) To pay out of and charge to the capital of my general estate my just debts funeral and testamentary expenses all and estate inheritance and succession duties or taxes and probate fees whether imposed by or pursuant to the law of this or any other jurisdiction whatsoever that may be payable in connection with any property passing (or deemed so to pass by any governing law) on my death or in connection with any insurance on my life or any gift or benefit given or conferred by me either during my lifetime or by survivorship or by this my Will or any Codicil thereto and whether such duties or taxes be payable in respect of estate or interests which fall into at my death or at any subsequent time; and I hereby authorize my Trustee to commute or prepay any such taxes or duties. This direction shall not extend to or include any such taxes that may be payable by a purchaser or transferee in connection with any property transferred to or required by such purchaser or transferee upon or after my death pursuant to any agreement with respect to such property.
- c) To divide the contents of my home between my children then alive as they may agree and in default of agreement as my Trustee may decide.
- d) To divide the residue of my estate then remaining into as many equal shares as there shall be children of mine then alive and to give absolutely one (1) such equal share to each child.
- 4. IF ANY PERSON should become entitled to any share in my estate before attaining the age of nineteen (19) years the share of such person shall be held and kept invested by my Trustee and the income and capital or so much thereof as my Trustee in his absolute discretion considers necessary or advisable shall be used for the benefit of such person until he or she attains the age of nineteen (19) years.
- 5. I WILL AND DECLARE that if any beneficiary under any policy of insurance payable upon my death has predeceased me or died in circumstances making it uncertain which of us survived the other the proceeds of such policy payable to such person shall fall into the residue of my estate and be dealt with as part thereof.
- 6. I DESIRE that my body [omitted].

IN TESTIMONY WHEREOF I have to this my Last Will and Testament, written upon this and three (3) preceding pages of paper, subscribed my name this 29th day of September, 2006.

Position of the Parties

- [16] Cecelia says Jason's interest in Kenneth's estate vested on Kenneth's death, and was not contingent on anything. She says that there was no subsequent divestiture by reason of Jason's death.
- [17] Travis says Jason's estate is not a beneficiary of Kenneth's estate. Travis says the Will means that the beneficiary class must be determined at the time of distribution, not on Kenneth's death, and because the residue of Kenneth's estate had not been distributed on Jason's death, Jason's interest in Kenneth's estate was forfeited and nothing goes to his estate.

Legal Principles

- [18] The general legal principles concerning the construction of a will are undisputed:
- the court must determine the intention of the testator when they made their will;
 - the "golden rule" in interpreting wills is to give effect to the testator's intention as ascertained from the language that was used;
 - underlying this approach is an attempt to ascertain the testator's intention, having regard to the will as a whole;
 - where the testator's intention cannot be ascertained from the plain meaning of the language that was used, the court may consider the surrounding circumstances known to the testator when they made their will, the so-called "armchair rule";
 - under this rule, the court sits in place of the testator, assumes the same knowledge the testator had of the extent of their assets, the size and makeup of their family, and their relationship to its members, so far as these things can be ascertained from the evidence presented;
 - the purpose of this exercise is to put the court in, as close as possible to, the same position of the testator when they made their will.

See: *Dice v. Dice Estate*, 2012 ONCA 468, at paras. 36-38.

- [19] The usual rule is that the beneficiary class is determined at the testator's death. The legacy vests on that date. Upon the beneficiary dying, the legacy is paid to their estate.

Discussion

- [20] Cecelia says the usual rule applies. On the date of Kenneth's death, the beneficiary class was determined and the legacy vested. On the date Jason died, the legacy was payable to his estate.

- [21] Travis says the usual rule does not apply. He says that, because of the words used in the Will, the beneficiary class is determined and the legacy vests only when the residue is ready to be distributed. A gift to a potential class member who dies before the residue is ready to be distributed is forfeited and nothing goes to their estate.
- [22] The usual rule is recognized in both courts and in treatises: see, e.g., *Leason v. Malcolm*, 2020 SKQB 102, at para. 4, where in a case on all fours concerning this point the Court described it as "standard probate law".
- [23] The usual rule is grounded on various presumptions and preferences:
- a preference for early vesting;
 - a preference to not have a bequest depend upon the act of the executor, be it the diligence or lack thereof in administering the estate, or some deliberate act on their behalf to favour the size of their own gift;
 - a rule of construction that if it is possible to determine the class members at the testator's death it will be done, and a corresponding desire to not leave open for a lengthy period the size of a class.
- [24] While an approach other than the usual rule is possible, it requires an express statement of intention by the testator. In the event of uncertainty, the usual rule applies.
- [25] By operation of s. 4 of the Wills, Estates, and Succession Act, S.B.C. 2009, c. 13 [WESA], extrinsic evidence of testamentary intent, including a statement made by the will-maker, is not admissible to assist in the construction of a testamentary instrument unless an enumerated exception applies. One of those exceptions is if the will is ambiguous, either on its face, or in light of evidence, other than evidence of the will-maker's intention, demonstrating that the language in the testamentary instrument is ambiguous having regard to the surrounding circumstances.
- [26] Cecilia says that on a plain reading of the Will and applying the meaning of the words used, Kenneth intended the beneficiary class to comprise his children alive on the date of his death. Cecelia contends: the Will is not ambiguous; alternatively, any ambiguity is minor; I should not resort to the "armchair rule"; and extrinsic evidence is not admissible.
- [27] Cecelia says paragraph 3 of the Will comprises a dominant clause and four subordinate clauses: 3(a); 3(b); 3(c); and 3(d). Clause 3(a) directs the executor to realize assets; 3(b) directs the executor to pay debts; 3(c) directs the executor to divide household contents; and 3(d) directs the executor to divide residue.
- [28] Cecelia says the use of the word "namely" at the end of the dominant clause is significant, because it suggests that the subordinate clauses are a list, each of which is to be interpreted in conjunction with the dominant clause, rather than by reference to each other.

[29] Cecilia says that the subordinate clauses are independent from each other: 3(a) need not be done first; 3(b) need not be done before 3(a); 3(c) need not be done before 3(a) and 3(b); and 3(d) need not be done before 3(a), 3(b) and 3(c).

[30] Cecilia says together with the dominant clause, clause 3(c), should be read as:

I GIVE DEVISE AND BEQUEATH all my property of every nature and kind and wheresoever situate including any property over which I may have a general power of appointment to my said Trustee upon the following trusts, namely to divide the contents of my home between my children then alive as they may agree and in default of agreement as my Trustee may decide.

[31] Cecilia says together with the dominant clause, clause 3(d), should be read as:

I GIVE DEVISE AND BEQUEATH all my property of every nature and kind and wheresoever situate including any property over which I may have a general power of appointment to my said Trustee upon the following trusts, namely to divide the residue of my estate then remaining into as many equal shares as there shall be children of mine then alive and to give absolutely one (1) such equal share to each child.

[32] Cecelia says that, read in this way, the phrase "my children then alive" in clause 3(c) and the phrase "children of mine then alive" clearly refer to the dominant clause. The dominant clause pertains to the date at which Kenneth gave, devised and bequeathed all his property to the trustee, namely the date of his death.

[33] Cecilia says that if Travis is correct about the proper interpretation of paragraphs 3(c) and (d), he would have unfettered discretion to delay distribution of Kenneth's estate until such time as he saw fit to close the beneficiary class and permit vesting to occur. Put another way, Travis' interpretation would depend on what has been described as the "temporal accident" of when the Will is probated, and ultimately, distributed: *Prevost v. Prevost*, 2013 NSCA 20, at para. 16. Cecilia says that such an interpretation would improperly permit Travis, as executor, to step into the shoes of Kenneth, as testator.

[34] Cecelia says paragraph 4 assists in ascertaining Kenneth's intentions in that it shows he contemplated that the beneficiary class could include children of his alive at the time of his death who had not yet reached 19 years of age.

[35] Travis says that on a plain reading of the Will and applying the meaning of the words used, Kenneth intended the phrase "children of mine then alive" in paragraph 3(d) to limit those entitled to a share of the residue "then remaining" to his children that "shall be" "then alive". In the alternative, Travis says the Will is ambiguous and, as a result, I should resort to the "armchair rule" and consider extrinsic evidence in the form of seven affidavits from various persons, including the lawyer who drafted the Will.

[36] Travis says that paragraph 3 of the Will should be interpreted as directing the trustee to do things sequentially: first, to realize assets (paragraph 3(a)); second, to pay debts (paragraph 3(b)); third, to divide household contents (paragraph 3(c)); and fourth, to divide and give

residue (paragraph 3(d)), which he contends is synonymous with distribution. He says a sequential interpretation makes sense, because it accords with the reality of what the trustee has to do, and the order in which it has to be done. First comes realization of assets, followed by payment of debts, then division of personal property, then division of remainder and, finally, distribution.

- [37] Travis says paragraph 4 does not assist Cecilia, because Kenneth could have had children under 19 years of age alive not only on the date of his death, but also at the time of distribution.
- [38] It is undisputed that paragraph 3(d) concerns the residue of Kenneth's estate. Black's Law Dictionary defines "residue" as "something that is left over after a part is removed or disposed of; a remainder" and "residuary estate" as "the part of a decedent's estate remaining after payment of all debts, expenses, statutory claims, taxes, and testamentary gifts (special, general, and demonstrative) have been made": Blacks Law Dictionary, 12th Ed. (Toronto: Thomson Reuters).
- [39] I find that paragraph 3 of the Will should be interpreted as directing the trustee to do things sequentially. While I acknowledge Cecilia's submission that the use of the word "namely" at the end of the dominant clause is significant, because it suggests that the subordinate clauses are a list, each of which is to be interpreted in conjunction with the dominant clause, rather than by reference to each other, her position and Travis' position are not mutually exclusive. Paragraph 3 can be interpreted as a list directing the trustee to do things sequentially.
- [40] The parts that will have been "removed or disposed of" before division of the residue are payment of debts and division of personal property. Both will necessarily have occurred only after the date of Kenneth's death.
- [41] Paragraph 3(d) refers to "divide", which is not synonymous with "distribute" or "distribution". However, while paragraph 3(d) contains no reference to "distribute" or "distribution" it also directs the trustee to "give" to each child of Kenneth's "then alive".
- [42] In my view, the correct interpretation of paragraph 3(d), based on the plain meaning of the words used, is that the trustee is directed to divide the residue remaining, after gathering assets, paying debts and dividing personal property, into equal shares based on the number of Kenneth's children then alive, and then to give one share to each of those children. Taken together, the words "divide" followed by "give" clearly denote distribution. In my view, the use of the word "then" grammatically refers to what is to happen at the time of distribution. The act of dividing and giving is in relation to Kenneth's children "then alive".
- [43] In my view, paragraph 3(d) distributes the residue of the estate "then remaining" to the children "then alive". The children "then alive" refers to the children alive at the time of distribution of the estate. The use of "then remaining" in this context is consistent with a sequential interpretation of all of the subordinate clauses, as well as within paragraph 3(d).

Under the language of paragraph 3(d) the division of the residue into equal shares to the children "then alive" can only occur once there is a residue "then remaining" to be divided. It is apparent that the use of "then" in the context of the residue of the "then remaining" estate to be divided is not referring to the residue at the time of Kenneth's death, because the residue only exists after the payments of debts, expenses, etc. Drawing on the presumption of consistent expression in interpreting the ordinary meaning of the language, "then" in the context of the children "then alive" is referring to the same time as "then" in the context of "then remaining" in the same provision. In other words, it refers to when the residue is divided, not the time of the Kenneth's death.

- [44] Another presumption of interpretation which supports this conclusion is the assumption that the testator selects the words they did because the words conveyed the meaning they wished to communicate: *Hicklin Estate v. Hicklin*, 2019 ABCA 136 at para. 63. This presumption flows from giving words their natural and ordinary meaning. It follows that Kenneth is presumed to have included the words "then alive" in "my children then alive" at paragraph 3(c) and in "children of mine then alive" at paragraph 3(d) for a reason. If the words "then alive" were not included in the Will, the ordinary meaning of the provision would be to divide the residue at the time of the Kenneth's death. If this is what Kenneth had intended, there would have been no reason to include the words "then alive". Therefore, this presumption supports that Kenneth would not have included the words "then alive" in paragraph 3(d) if he did not intend to communicate an intention to divide the residue to children alive at the time the residue was divided, instead of at the time of his death.
- [45] I agree with Travis that paragraph 4 is of no assistance in ascertaining Kenneth's intentions, because it is equally possible that Kenneth could have had children of his alive at the time of distribution who had not yet reached 19 years of age.
- [46] I find no ambiguity in the Will and am persuaded that the usual rule about the time of vesting should not apply.
- [47] While I acknowledge Cecilia's submission about Travis' interpretation depending on what has been described as the "temporal accident" of when the Will is probated and ultimately distributed, I must look at the plain meaning of the language which was used. Further, para. 16 in *Prevost v. Prevost*, 2013 NSCA 20 addresses why I do not need to consider that argument:

A correct interpretation of the Will is evident from the testator's language. Accordingly, it is unnecessary to consider presumptions, rules of construction, surrounding circumstances or other evidence to supply a perceived deficiency in the language of the Will. The Will can be intelligibly interpreted on its face.

[48] I find Kenneth's intention can be determined having regard to the Will as a whole and from the plain meaning of the language which was used. I find the phrase "children of mine then alive" in paragraph 3(d) mean Kenneth's children alive as at the date of distribution, not as at the date of his death. I find Kenneth did not intend the residue of his estate to vest as of the date of his death. Rather, Kenneth intended that a legatee must be alive at the time of distribution for their interest in the estate to vest.

[49] As I have found no ambiguity in the Will, Travis' proposed extrinsic evidence is not necessary.

Conclusion

[50] The application is dismissed and the respondents are entitled to their costs.

"B. Smith J."

B. SMITH J.

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