

CANADA / JUDGMENT

Lopushinsky Estate

2007 BCSC 1019

COURT

Supreme Court of British Columbia

DECIDED

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2007 BCSC 1019 Lopushinsky Estate

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lopushinsky Estate,

2007 BCSC 1019

Date: 20070711

Docket: 06 5477

Registry: Victoria

Re Estate of Richard Allan Lopushinsky

also known as Richard Lopushinsky, Deceased

Before: The Honourable Mr. Justice Truscott

Reasons for Judgment

Counsel for the Administrator/Applicant

Mark Horne

F. Hunter

Counsel for the Respondent

Dawna Alvena McGregor

J. E. Milton

Counsel for the Respondent,

Crystal Masters, by her Litigation Guardian

Debora Schartner

D.J. Herbert

Date and Place of Hearing:

June 25, 2007

Vancouver, B.C.

- [1] The Administrator of the Estate of Richard Allan Lopushinsky applies by petition to the Court for its opinion, advice and direction as to certain questions concerning the administration and distribution of Mr. Lopushinsky's estate. The Administrator also seeks liberty to distribute the residue of the estate depending upon the Court's responses to the questions.
- [2] The authority of the Court to grant the relief as sought is found in s. 86 of the Trustee Act, R.S.B.C. 1996, c. 464. This provision authorizes the Administrator to seek the Court's opinion, advice or direction on any question concerning the management or the administration of an estate.
- [3] Section 39 of the Trustee Act authorizes the Administrator to seek orders from the Court for liberty to distribute the proceeds of the estate.
- [4] The opinions, advice and directions of the Court that are sought are with respect to the following questions:
 - 1. Was Dawna Alvena McGregor the common law spouse of the deceased, Richard Lopushinsky (the "Deceased") at the date of his death, within the meaning of the Estate Administration Act, R.S.B.C. 1996, Chapter 122
 - 2. If Dawna Alvena McGregor was the common law spouse of the Deceased at the date of his death, was the spousal home of the parties 125 Horel Road, Salt Spring Island, British Columbia or 2621 Fulford Road, Ganges, Salt Spring Island, British Columbia?
 - 3. If Dawna Alvena McGregor was the common law spouse of the Deceased at the date of his death, and 125 Horel Road, Salt Spring Island, British Columbia is determined to be the spousal home of the parties, should an adjustment be made with respect to her spousal share in the estate of the Deceased?
 - 4. Was Sean Christopher Quilty a child of the Deceased?
- [5] The petition also raises two other questions dealing with the liability of Dawna McGregor for a mortgage to the deceased, but the Administrator withdrew those questions for consideration by the Court, before the hearing.
- [6] Mr. Lopushinsky died intestate on March 4, 2003 at Bathurst, New Brunswick.

- [7] Letters of Administration of his estate were granted on October 7, 2003 to the Administrator, Mark Horne, Barrister and Solicitor.
- [8] Claimants on the deceased's estate are his alleged common law wife, Dawna McGregor, and their child Crystal Masters, as well as his proven children by other relationships, Christina Hall, Joseph Hall, Lisa-Anne Hall, Malena Curbelho and Donna Ross.
- [9] The Administrator raises the question whether Sean Quilty was also a child of the deceased. Mr. Quilty died after the deceased on or about April 11, 2003. It is alleged he left a minor son, Justin Greek, born November 6, 1993. There is no Administrator appointed for the estate of Sean Quilty.
- [10] Counsel for the Administrator advised the Court that all proven children of the deceased were served with the petition and supporting material, but all have declined to attend Court. Some have filed affidavits in previous probate proceedings and their affidavits are put before the Court by the Administrator with their concurrence.
- [11] The mother of Sean Quilty, Donna Mussell, was also served with the petition material but she has indicated that she is not interested in participating in any way with the process involving the estate of the deceased and has no intentions of submitting any information, birth certificates, DNA or otherwise to anyone for any purpose related to that. She also says that there was no blood relationship between her son, Sean, and Justin Greek.
- [12] Informally, the mother of Justin Greek, being Trina Greek, was also given notice. Justin Greek has no entitlement to any of the estate of the deceased, unless through his alleged father, Sean Quilty. Trina Greek says that her son is the son of Sean Quilty.
- [13] The Administrator has had the DNA of Justin Greek compared to the DNA of the deceased and it has been determined that Justin is not patrilineal related to the deceased, although the test is apparently not conclusive.
- [14] The only persons represented at the hearing were the Administrator, the Guardian of Crystal Masters and Dawna McGregor.
- [15] At the hearing, counsel for the Guardian of Crystal Masters indicated she was taking no position with respect to the relief sought in the petition and asked to be excused from further proceedings, with costs against the estate. At the hearing, I excused counsel and reserved on the issue of costs.
- [16] The Administrator cites as his authorities Rule 10(1)(d), s. 39 and 86 of the Trustee Act, as well as s. 2, 3 and 7 of the Partition of Property Act, R.S.B.C. 1996 c. 347.
- [17] Rule 10(1)(d) authorizes an originating application to the Court where:

- (d) the relief, advice or direction sought relates to a question arising in the administration of an estate of a deceased person or the execution of a trust, or the performance of any act by a person in the person's capacity as executor, administrator or trustee, or the determination of the persons entitled as creditors or otherwise to the estate or trust property.

[18] It has been held that Rule 10(1)(d) does not confer an independent legal jurisdiction on the Court but is merely procedural in nature. Such authority for the Court to give relief, advice or direction must be found to lie in statutory form or in the inherent jurisdiction of the court. (*Brotherhood of Railway, Airline and Steamship Clerks v. Canadian Pacific Airlines Ltd.* (1984), 55 B.C.L.R. 18 (BCCA); *Hall Estate v. Anderson Estate (Public Trustee of)*, 1996 B.C.J. 940.

[19] Section 86 of the Trustee Act states as follows:

1. A trustee, executor or administrator may, without commencing any other proceeding, apply by petition to the court, or by summons on a written statement to a Supreme Court Judge in Chambers, for the opinion, advice or direction of the Court on a question respecting the management or administration of the trust property or the assets of a testator or intestate.
2. The application under ss. 1 must be served on, or the hearing attended by all persons interested in the application, or by those that the Court thinks expedient.
3. The costs of an application under ss. 1 are in the discretion of the Court.

[20] Section 39 of the Trustee Act states as follows:

1. A trustee, executor or administrator may, without commencing any other proceeding, apply by petition to the Court for an order that
 - (a) the trustee, executor or administrator be at liberty to distribute the proceeds of the estate he or she is administering among the parties entitled to them, having regard only to the claims of the persons the trustee, executor or administrator has been able to ascertain to be entitled and whose residence or address he or she has been able to find out, and
 - (b) the trustee, executor or administrator is not liable for the proceeds of the estate or assets, or any of them, so distributed to persons of whose claim and residence or address the trustee did not have notice at the time of distribution.
2. On an application made under ss. 1 the Court may give directions with regard to the time for distribution and the notice that must be given to bring the fact of distribution to the notice of persons who may possibly be interested in the distribution.
3. This section does not prejudice the right of any creditor or claimant to follow the proceeds of the trust estate or assets, as the case may be or any part of them, in to the hands of the person or persons who may have received them.

- [21] As far as I can determine s. 2, 3 and 7 of the Partition of Property Act only have relevance to this petition if the administrator is given liberty to sell the estate's interest in property held as a tenant in common.
1. Was Dawna Alvena McGregor the common law spouse of the deceased, Richard Lopushinsky (the "Deceased") at the date of his death, within the meaning of the Estate Administration Act, R.S.B.C. 1996, Chapter 122.
- [22] "Common law spouse" is defined in s. 1 of the Estate Administration Act, as either:
- (a) a person who is united to another person by a marriage that, although not a legal marriage, is valid by common law, or
 - (b) a person who has lived and cohabited with another person in a marriage-like relationship, including a marriage-like relationship between persons of the same gender, for a period of at least 2 years immediately before the other person's death.
- [23] In the affidavits filed with the petition it appears clear that at one time Dawna McGregor and the deceased lived in a common-law relationship or in a marriage like relationship but there is a serious dispute amongst the affiants as to whether that common-law relationship or that marriage like relationship existed up to the deceased's death or for at least two years immediately prior to his death.
- [24] The administrator says in his affidavit that in light of the conflicting evidence in the affidavits he is unable to conclude whether Dawna McGregor was the common-law spouse of the deceased at the date of his death. I find that I am not able to do any better on my review of the affidavit evidence.
- [25] The witnesses, Donna Ross, Trina Greek and Joe Lopushinsky depose to evidence that Dawna McGregor and the deceased were not living common-law at the time of the deceased's death and for some time before. The evidence of Donna Ross is that she had not only spoken to her father who confirmed that his relationship with Dawna McGregor was over but she had also spoken to Dawna McGregor herself who confirmed prior to the deceased's death that she and the deceased were not together. Trina Greek says that to the best of her knowledge the deceased and Dawna McGregor were not involved in a common-law relationship and had not been for at least two years prior to the deceased's death and she also says she bases this on conversations she had with both prior to the death of the deceased. Joe Lopushinsky, brother of the deceased, says that he had been advised by his brother back in 2001 that he and Dawna had split up and that his brother had moved from Salt Spring Island to Langley.
- [26] Donna Ross is a beneficiary of the estate, being a daughter of the deceased, and might be considered to have a direct interest in the result of the application, but Trina Greek and Joe Lopushinsky are not beneficiaries, so they have no apparent reason to tell other than what they believe to be the absolute truth.

- [27] On the other hand Mr. Frees, described as the best friend of the deceased, says that the deceased was with him at the time of his death and the deceased expressed to him at the time that he and Dawna were very much together and were intending to travel to Greece to get married. Mr. Frees is not a beneficiary of the estate either.
- [28] In addition, two sisters, Angelique and Chrystyanna Queensley both say that they were friends of Dawna McGregor and that they spent Christmas 2002 with Dawna and the deceased, which was only approximately two months before the deceased's death, and at that Christmas gathering Dawna and the deceased asked them to be in their wedding party. They also are not beneficiaries of the estate.
- [29] Dawna McGregor deposes that she and the deceased were always in a common-law relationship right up until his death. The strongest evidence she offers that might be considered independent are some documents in the deceased's handwriting.
- [30] On December 17, 2002, the deceased completed an adult passport application for himself and in that application indicated his permanent address as 125 Horel Road, Salt Spring Island. As a reference, he gave the name of Dawna McGregor and indicated the relationship was "common law wife." He also indicated her address as 125 Horel Road, Salt Spring Island.
- [31] In a 2003 Daily Appointment Diary, he gave the name of Dawna McGregor as a person to notify in case of an emergency and again indicated the relationship as "wife". Her address, as well as his address, was again indicated as 125 Horel Road, Salt Spring Island.
- [32] The deceased made a handwritten will dated February 21, 2003 that did not meet the requirements of the Wills Act, R.S.B.C. 1996, c. 489 and therefore is unenforceable at law. However, it does indicate an intention on his part which may be relevant. In that will, he left everything absolutely to his daughter Crystal and to Dawna McGregor to be shared 50% each and he directed that Dawna McGregor have power of attorney for Crystal and his estate.
- [33] He went on to say that if any person claimed to be his son or daughter, they must prove to Dawna McGregor that they are. He left to Dawna McGregor the discretion to give from his estate any amount of money she wished to her own daughter by her previous relationship, up to \$250,000.
- [34] He said that the only people he considered to be his family were his daughter Crystal, Dawna's own daughter, and Dawna herself, the love of his life, and he would love them forever and ever and would never forget and would always look out for her in this life and the next.
- [35] Finally, he said to Crystal, Dawna and Dawna's daughter, that he would always be with them in this life and be waiting for them in the next.
- [36] However, with the strong affidavit evidence of Donna Ross, Trina Greek and Joe Lopushinsky in opposition to Dawna McGregor's claim to be the common-law spouse, I consider it inappropriate to determine this issue on affidavit evidence only.

- [37] Accordingly, pursuant to Rule 52(11)(d) of the Rules of Court, I direct a trial of this issue with Dawna McGregor to be the plaintiff and the defendants to be the estate and all other beneficiaries of the estate. There will be the usual pleadings required and pre-trial procedures available as appropriate.
2. If Dawna McGregor was the common-law spouse of the deceased at the date of this death, was the spousal home of the parties 125 Horel Road, Salt Spring Island, British Columbia or 2621 Fulford Road, Ganges, Salt Spring Island, British Columbia.
- [38] I find that I am able to provide my opinion on this question because I need only rely upon the evidence of Dawna McGregor herself.
- [39] In my opinion, if Dawna McGregor was the common law spouse of the deceased according to the Estate Administration Act, the spousal home of the parties was 125 Horel Road, Salt Spring Island, British Columbia and not 2621 Fulford Road, Ganges, Salt Spring Island.
- [40] "Spousal home" is defined by s. 96 (1) of the Estate Administration Act, in its relevant parts, as a parcel of land with a building on it "in which the deceased and his or her spouse were ordinarily resident, owned or jointly owned by the deceased "
- [41] In her own affidavit of January 15, 2004, Dawna McGregor says that in 1992/93 they built their family home on one of the five-acre parcels on Salt Spring Island and in 1996 purchased the Fulford cottage and registered the cottage in both their names as joint tenants.
- [42] Further, she says that when the deceased became heavily involved in his legal work, they decided to use the cottage as a secondary place to accommodate his work as it was located about six minutes from their house on Horel Road. They set up an office space for him in the cottage and he used the cottage as his office so he was not bringing his work into the family home.
- [43] She also says that they used the cottage as a second home, as a get-away, but the main purpose of the cottage remained to allow him to work without bringing that work back into the home.
- [44] She says that, as of December 2002, they planned to put an addition on the Fulford cottage in 2003 and move their family there permanently.
- [45] Finally she says that she considers the Fulford property to be the main spousal home even though she and Richard lived together on both properties to include 125 Horel Road and their intention was to expand the Fulford house and use it as their permanent residence.
- [46] The definition of spousal home requires that the deceased and his or her spouse be ordinarily resident on the property and not simply have an intention in the future to do that. Dawna McGregor and the deceased may have had an intention in the future to move their home to the Fulford property but that intention never turned to fact before his death. If Dawna McGregor was the common law spouse, the spousal home remained the home at 125

Horel Road, Salt Spring Island. In my opinion the administrator is free of this claim of spousal home to sell the estate's interest in the Fulford Road property, if he so chooses.

3. If Dawna McGregor was the common-law spouse of the deceased at the date of his death and 125 Horel Road, Salt Spring Island was determined to be the spousal home of the parties, should an adjustment be made with respect to her spousal share in the estate of the deceased.

[47] Since I am unable to determine whether Dawna McGregor was the common-law spouse and that issue is to be tried, I am not able to offer any opinion, advice, or direction on this question. Any answer must await a determination of the status of Dawna McGregor.

4. Was Sean Christopher Quilty a child of the deceased?

[48] There is no evidence before me that Sean Quilty was a child of the deceased. Sean's mother, Donna Mussell, is not prepared to provide any information for the purpose of Mr. Lopushinsky's estate and no official Administrator has been appointed for Sean Quilty's estate.

[49] The Administrator has been unable to obtain any DNA sample of Sean Quilty to compare to the DNA of the deceased and he is not able to persuade or force Ms. Mussell to provide information as to whether Sean was a son of the deceased.

[50] As far as Justin Greek is concerned, there is no evidence from his DNA that he is any blood relation of the deceased.

[51] Accordingly it is my opinion on the available evidence that Sean Quilty is not a child of the deceased.

[52] All parties who attended the application will have their costs from the estate of the deceased as this application was necessitated by the state of the evidence and the bona fide belief of the administrator that the court's assistance is needed to resolve this issue.

"Truscott J."

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