

CANADA / JUDGMENT

McKee Estate

2003 BCSC 466

COURT

Supreme Court of British Columbia

DECIDED

26 February 2003

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2003BCSC0466

Citation:

Re The Estate of Karen Elaine McKee

Date:

20030226

2003 BCSC 466

Docket:

235387

Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Reasons for Judgment

The Honourable Mr. Justice Cullen

As Pronounced in Chambers

February 26, 2003

RE THE ESTATE OF KAREN ELAINE MCKEE aka KAREN ELAINE SALISBURY aka KAREN MCKEE, DECEASED

Counsel for Applicant,

Caroline Maria Mydske

L.C. Waterman

Counsel for Respondent,

Brent McKee

K.D. Sheppard

- [1] THE COURT: This application is brought on behalf of Caroline Mydske to withdraw the renunciation which she executed on January 31st, 2002, in connection with her appointment as an executor under the will of the deceased, Karen Elaine McKee, dated September 21st, 1999.
- [2] The applicant was appointed joint executor with the respondent, Brent James McKee, the husband of the deceased. An alternate executor, Wendy Wealick, was appointed to act in the event either one of the joint executors was unable or unwilling to act. Ms. Wealick, too, executed a renunciation on January 27, 2002, and, thus, the respondent remains as the sole executor and trustee of the estate. He opposes this application.
- [3] The deceased died on December 14, 2001, leaving, in addition to her husband, two children, Scott and Kelly ("the boys"), who are ten and seven years old, respectively. The respondent applied for a grant of probate on February 27th, 2002, and was granted probate on March 28, 2002, as sole executor and trustee under his wife's will, having obtained and filed the renunciations of Ms. Mydske and Ms. Wealick. Both the applicant and the respondent have filed affidavits attesting to their respective recollections of the discussions they had prior to and after the deceased's death, leading up to the applicant's execution of the renunciation on January 31st.
- [4] There is disagreement between the parties as to when and why the issue of the applicant's renunciation was first raised. There is also disagreement on whether the applicant was aware that the alternate executor had executed a renunciation, when she executed hers, and as to when she became aware of that fact that the respondent was the sole executor and trustee under the will.
- [5] In summary, it is the applicant's evidence that she did not recall speaking with the respondent about renouncing her role until January 17th, 2002, after she was injured in a car accident on January 2nd. According to her affidavit, her injuries prevented her from involving herself in the deceased's estate, and after the respondent phoned her, on January 17th, expressing some frustration and concerns, she agreed to renounce as executor, and did so several weeks later.
- [6] It was her evidence that she was not then aware that Ms. Wealick signed a renunciation as well, and did not become aware of that fact until May 3rd of 2002, in a conversation with another person.
- [7] As the applicant was the beneficiary of the deceased's will, she received, and recalled receiving, notice of the respondent's application for probate under section 112 of the Estate Administration Act. That application shows him applying as sole executor and trustee, but the applicant deposed that she did not understand or appreciate "the legal significance of the notice". The respondent attested that he had several conversations with the applicant, both before and after the death of the deceased, in which they discussed the prospect of him

assuming the role of sole executor and trustee to render the administration of the estate more efficient and "streamlined". The respondent attested that he informed the applicant that Ms. Wealick had renounced her role as executor and trustee, and he understood that she was aware it was his intention to act as sole executor and trustee.

- [8] When the respondent came to Ms. Mydske's home on January 31st, 2003, for the purpose of having her sign the renunciation, he brought Karen Kidd, a notary public, whom he had retained to assist in dealing with the estate. Ms. Mydske deposed that she was not advised of her option to seek legal advice before renouncing her role, nor was she advised of the option of reserving her right to apply for a grant of probate rather than renouncing.
- [9] Ms. Wealick also provided an affidavit in which she described the circumstances of her renunciation. She deposed that she met with the respondent in Sechelt on January 27th, 2003, and went with him to the office of Karen Kidd where she was told by Ms. Kidd, among other things, of some problems with the will which required a court application to resolve, and that it would be more effective to proceed with one executor and trustee.
- [10] Both Ms. Wealick and Ms. Mydske attested to conversations which they had with the deceased concerning her desire to have one of them act as co-executor of her will, along with her husband.
- [11] The Notice of Motion giving rise to this application was filed November 14, 2002, some nine and a half months after Ms. Mydske renounced her role, and some six and a half months after she became aware that Ms. Wealick, too, had renounced her role, and that the respondent was the sole executor and trustee. What it appears has precipitated this application is not simply Ms. Mydske's realization that her renunciation left the respondent as the sole executor and trustee under the deceased's will, contrary to her intention and that of the deceased, but rather her view of certain steps taken by the respondent in furtherance of probate. The deceased's will provides for a trust for the boys. The provision reads as follows:
6. I give the following legacies:
- (c) to my children, Scott Archer McKee and Kelly Michael McKee, any property which forms or form the estate of Dorothy Esther Salisbury to be held in trust until the eldest reaches the age of 25.
- [12] Dorothy Salisbury was an aunt of the deceased who died in 1998 with an estate valued at approximately \$1.14 million. By her will, she left the deceased real property in Sechelt, then valued at approximately \$240,000, and the residue of her estate upon the death of the survivor of her brother and sister-in-law who were entitled to income of \$1,500 per month generated from the investment of that residue. Before Dorothy died, however, she transferred title to the Sechelt property into a joint tenancy with the deceased and, thus, when Dorothy died, the deceased took the property in her name by right of survivorship.

- [13] It appears that before the death of the deceased, she became entitled to the residue of her aunt's estate but had not, by the time of her death, completed transfer of all of the property into her name. Thus, in the statement of assets, liabilities and distribution of the deceased's estate, filed by the respondent in support of his application for grant of probate, on February 27th, the Sechelt property, therein valued at \$250,000, shows as registered in the name of the deceased, while certain accounts are in the name of Dorothy Salisbury, or the estate of Dorothy Salisbury, including an investment account with \$55,766.66; another investor's account worth \$55,443.67, and a number of other accounts totalling approximately \$131,000, for a total of approximately \$243,000. The total value of the deceased's estate, revealed by the statement of assets, liabilities and distribution, is \$854,611.58.
- [14] After probate was granted, the deceased's two sons, acting through their guardian ad litem, Steven McKee, who is the respondent's brother, commenced the Wills Variation Act proceeding on June 18th, 2002. The relief sought in the Wills Variation Act proceeding includes an interpretation of the meaning of paragraph 6(c) of the deceased's will, a declaration that the will does not make adequate provision for the proper maintenance and support of the boys, and further order that such provision made out of the estate for the boys as to the court may seem adequate, just and equitable in the circumstances.
- [15] The cause of this application and the reasons for the respondent's opposition to it can be inferred from several paragraphs extracted from the applicant's and respondent's affidavit.
- [16] In an affidavit sworn November 12, 2002, the applicant deposed as follows at paragraph 13:
- After the grant of probate issued, I had discussions with McKee about the estate of Dorothy Salisbury, Karen's aunt, and the trust created for the infant children pursuant to Karen's will. These discussions led me to be concerned about the determinations that were being made by him as the sole executor and trustee of Karen's will as to what property was to form part of the children's trust and what property would fall into residue and pass that right to McKee.
- [17] In a responding affidavit, sworn November 20th, 2002, the respondent deposed as follows in paragraphs 12 to 16 inclusive:
12. Among the relief sought by my sons in the Wills Variation Act proceeding is an interpretation of subparagraph 6(c) of the will, the objective of which is to have the court determine what assets are subject to the trust for my sons.
 13. I did not assist Karen with the administration of her late Aunt Dorothy's estate during Karen's lifetime. Accordingly, in identifying assets which form, or formed, Dorothy Salisbury's estate for the purpose of preparing a disclosure statement, I relied upon the documentation and information I could then find among Karen's papers which identified assets as being in the name of Dorothy Salisbury's estate.

14. Since the grant of probate issued, I have retained Rolfe Denson, Chartered Accountants, to review, among other things, the accounts of the Dorothy Salisbury estate prepared by Karen, including the tax returns filed, to determine what assets remained in Dorothy Salisbury's estate at Karen's death and to identify, if possible, what assets in Dorothy Salisbury's estate had been distributed at that time. The process of review is not yet complete.
 15. I intend to file a supplemental affidavit to disclose any further assets in Karen's estate, and when Rolfe Denson has completed its review of Dorothy Salisbury's estate, to modify, if appropriate, then that value of assets which form, or formed, Dorothy Salisbury's Estate at Karen's date of death.
 16. Ms. Mydske raised no objections to my acting as sole executor and trustee until after the commencement of my son's Wills Variation Act action. The commencement of the action appears to have triggered Ms. Mydske's concern about my acting as sole executor and trustee. Ms. Mydske told me that she disapproved of any action taken to vary the will, and was critical of my administration of Karen's estate. Ms. Mydske has been quite confrontational and accusatory towards me and critical of my administration of Karen's estate. My relationship with Ms. Mydske has deteriorated to the point that I do not believe we could work effectively together as co-executors.
- [18] In response to that affidavit, the applicant swore a second affidavit on January 13, 2003, in which he deposed as follows in paragraph 6:
6. In reply to paragraph 16 of McKee's affidavit number 1,
 - (a) when I received the materials pertaining to the variation application, I did not understand the necessity or purpose of the variation, and when McKee urged me to sign off on the variation, I refused to do so until I had an opportunity to seek legal advice in the matter.
 - (b) after receiving the variation materials and obtaining some preliminary information from my lawyer, I had a further conversation with McKee about the estate. During that conversation we talked about the children's trust, and he did not deny that the children's trust would have assets worth only about \$250,000. Furthermore, when I asked about the Sechelt property, which had derived originally from Karen's aunt, he told me that that would not pass to the children's trust.
 - (c) I had understood from various discussions I had had with Karen that her late aunt's estate, and the benefits she had received as a result of her aunt's death, had been very significant; in fact, significantly more than \$250,000.
 - (d) it was as a result of that conversation with McKee, coupled with my discovery, early in May, that Wendy had renounced that caused me to be concerned about the administration of the estate, specifically the fact that McKee was proceeding to act alone without a co-executor.
- [19] Finally, in his second affidavit, sworn January 22nd, 2003, the respondent deposed as follows in paragraph 5:

5. In response to paragraph 6(b) of the Mydske affidavit, during the lifetime of Dorothy Salisbury, my late wife's aunt, the Sechelt property was placed in joint tenancy with Karen. Upon Dorothy Salisbury's death, the Sechelt property passed by right of survivorship to Karen as the surviving joint tenant and did not, therefore, pass to Dorothy Salisbury's estate.
- [20] Apparently, what lies at the heart of this application and the issue between the parties is the uncertainty of the scope of paragraph 6(c) of the deceased's will, and of the composition of her estate, and, as well, the potential effect the application to vary the will by providing for the proper maintenance and support of the boys out of the estate for them.
- [21] It is the applicant's submission that by securing her renunciation and Ms. Wealick's, that the respondent has put himself into a position of conflict between his duty to the boys and his self-interest because his interest in the deceased's estate grows in inverse proportion to the boys'. And, similarly, the broader the discretion to encroach upon the trust to provide support and maintenance for the boys, the less he is obliged to provide, from his own resources, to fulfill his duties as parent and guardian.
- [22] In particular, the applicant points to the respondent's position that the Sechelt property does not fall within the scope of paragraph 6(c) because, although it came from Dorothy Salisbury, whose estate the deceased wished to reserve for the boys, it came via her inter vivos transfer into a joint tenancy in right of survivorship rather than through probate.
- [23] It is the applicant's submission that the respondent's position ignores the potential that the Sechelt property could be found to fall within the scope of paragraph 6(c) through application of the law of constructive trust or secret trust, or by a broader analysis of what is meant by "estate" in that paragraph, that is in paragraph 6(c).
- [24] The applicant also points to the apparent disparity between her understanding of the respondent's view of what constitutes the boys' trust and the size of the Salisbury estate left to the deceased, which, even excluding the Sechelt property, would be substantially larger than the \$250,000 cited by the applicant as representing the respondent's assessment of the size of the boys' trust.
- [25] The applicant acknowledges that the boys are represented in the Wills Variation Act proceedings by a litigation guardian, who has no interest in the estate, and by a lawyer who has an obligation to represent their interests, but submits that the litigation guardian's view of his responsibilities and instructions is bound to be conditioned by his relationship to his brother, the respondent, and similarly, both the counsel for the boys and the court hearing of the Wills Variation Act application will be confined to the facts and issues raised in such a context where the respondent's positions are not likely to be challenged.

- [26] It is the respondent's position that he is not acting in a way so as to put his interests ahead of his sons. He submits that the processes which are engaged to determine the scope of paragraph 6(c) to establish a basis for using the boys' trust to provide for their proper maintenance and support, and to assess the assets which "form or formed" the Salisbury estate, are ongoing, in the hands of others and will lead to an objective assessment and determination.
- [27] Counsel for the respondent cited *Re The Estate of David L.S. Gillespie* (13 February 1991) Vancouver A901641 and A903000 (B.C.S.C.) as support for the proposition that acting in a dual role as executor and beneficiary does not equate to a conflict of interest establishing unfitness to act as executor. It is the respondent's position that, similarly, simply serving in a dual role is not, of itself, a ground for concluding that the respondent ought not to act as sole executor, particularly when processes are in place to achieve a determination of the issues, regardless of where his interests lie.
- [28] The respondent further submits that as a consequence of the applicant's attempts to re-involve herself with the estate, after renouncing her role as executor, his relationship with her has deteriorated to the point where he does not believe that they could work together effectively as co-executors. In his affidavit of November 20th, 2002, the respondent describes the applicant as being confrontational and accusatory towards him, and critical of his administration of the estate. It is the respondent's submission that the re-involvement of the applicant as executor would not benefit the estate, and would entail some additional expense to the estate, and, ultimately, would impair the effective or efficient administration of the estate by introducing an unnecessary element of conflict to the processes engaged.
- [29] The law governing a court's discretion to grant leave to withdraw a renunciation from the probate registry is scant and not controversial as between the parties. Both agree that "retraction of a renunciation by an executor is only reluctantly permitted by the court in very exceptional circumstances." [See *Macdonnell Sheard and Hull on Probate Practice*, 4th Edition, Scarborough, Ontario, Carswell 1996 page 183.]
- [30] In *In the Goods of Gill*, [1873] L.R.3 P.M.D. 113, it was held that where the only reason given for the application to retract a renunciation "is that (the applicant) has changed his mind", and it does not appear "that it will be for his benefit or for that of anyone else that he shall be allowed to retract it", leave should not be given.
- [31] In another case *In the Goods of Styles*, [1898] Probate Division 12, the court granted leave to retract and to renouncing an executor when the co-executor absconded after taking probate.
- [32] In my opinion the case at bar falls somewhere between *Gill* and *Styles*. The question is whether it is sufficiently exceptional to grant the leave sought by the applicant. In making that determination, the existence of some positive benefit to the estate must be ascertained.

- [33] The circumstances in the case at bar are somewhat exceptional in that both the meaning of the provision that determines the respective interests of the respondent and his sons is uncertain, as is the property that is potentially subject to whatever meaning it is determined to have. Clearly, it is in the interests of the estate generally to have both of these questions determined with full regard for all the facts and in light of all reasonable potential dispositions. Thus, for example, whether the Sechelt property could be regarded as falling within the scope of paragraph 6(c), and whether the amount facially attributed to the Salisbury estate in the statement of assets and liabilities of the deceased's estate, accurately represents the amounts which should be reserved for the boys, are both questions that must be pursued to a conclusive result to serve the interests of the estate, both in the short term and in the long term.
- [34] The question, it seems to me, is whether granting this application and thereby allowing the applicant to apply for probate, would be a help, a hindrance, or a neutral factor in the task of dissipating the uncertainty which infuses both the will and the composition of this estate. It is clear that it is only if it would help in that process that I may make the order sought.
- [35] In my view, on balance, the application should be granted. Although the respondent has taken steps of engaging an accounting firm to review the Salisbury estate and ensured that his sons are represented by a litigation guardian to bring the Wills Variation Act proceeding, it is not clear, from all the evidence before me, whether the steps taken by the respondent would permit a fundamental review of the facial effect of the will and the composition of the estate, or if it would lead only to resolution on a more limited footing precluding potential dispositions favourable to the boys. Similarly, while the boys are represented by a litigation guardian, it is not clear whether the precepts guiding his hand are similar to, or the same as, those underlying the respondent's position.
- [36] In arriving at this conclusion, I should not be taken as pre-judging the issue of the interpretation of paragraph 6(c), the composition of the deceased's estate, or the validity of the Wills Variation Act application. The current position of the respondent may be correct or, alternatively, the steps he has taken may lead to a correct result. The justification for granting this application does not rest on a premise that the applicant's view of the composition of the estate, and the effect of the will, is necessarily the correct one; rather, it rests on the premise that the best way of achieving a final and conclusive determination of the issues, so as to dispel the uncertainties that exist, is through exploration of the issues which have been raised by the applicant.
- [37] In making this disposition, I have not lost sight of the concerns expressed by the respondent as to the potential for unnecessary and unproductive conflict in the event the applicant is permitted to withdraw her renunciation. That is a concern. However, in my view, if the parties put their minds to the objective of this process, that is, fulfilling the testator's intentions, as expressed through her will, and ensuring that the potential interests of the boys are fully explored and identified, without unnecessary conflict, expense or delay, then the estate and the beneficiaries can only benefit.

[38] As I understand it, the applicant has agreed to waive any executor's fee in the event her application is granted. In my view, that is an appropriate concession to make.

[39] I have made no order as to costs, counsel, because I understand that that is a subject which was to be reserved for speaking to today.

(SUBMISSIONS ON COSTS)

[40] In view of all the facts before me, some of which I am not able to resolve on the affidavit evidence before me, I think it would be unwise to order costs against Ms. Mydske. It would, in my view, deter executors, who had renounced, from listening to their conscience and seeking to withdraw their renunciation if they were, regardless of the outcome, facing potential court costs. On the other hand, this application was made necessary by an action taken by Ms. Mydske, and that is the initial renunciation, and it did not crystallize until some nine months after the renunciation, during which time it may have been possible for this matter to have been brought on and dealt with in an atmosphere of less conflict. I, at this point, am attributing no cause of the conflict to either party. I am simply pointing out that a conflict has arisen which did give rise to this contested issue. It is certainly the hope of the court that the parties will, at this point, be able to work cooperatively towards the ultimate objective of seeing through the testator's will. In all the circumstances, I am simply not going to award costs to either party.

Now, does that dispose of all the outstanding matters, counsel?

[41] MS. WATERMAN: I just want to make sure that we get an order that the registry will act upon, if you could give us some liberty, My Lord, to ensure that the wording is satisfactory to us in terms of what we think the registry will allow.

[42] THE COURT: Oh, yes. If there is any difficulty with that, the parties have liberty to appear before me and settle it, of course. Thank you, counsel.

"A.F. Cullen, J."

The Honourable Mr. Justice A.F. Cullen

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/03/04/2003bcsc0466.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/mckee-estate-2003>

Prepared on 28 October 2026 · Esheria