

CANADA / JUDGMENT

McLachlan v. Ast Estate

2015 BCSC 2361

COURT

Supreme Court of British Columbia

DECIDED

15 December 2015

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2015 BCSC 2361 McLachlan v. Ast Estate

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McLachlan v. Ast Estate,

2015 BCSC 2361

Date: 20151215

Docket: S167133

Registry: New Westminster

Between:

Tammy Lynne McLachlan

Petitioner

And

Gregory Reginald Ast, in his personal capacity,

and as Executor of the Estate of Wayne Stanley Ast, Deceased,

Reginald Jacob Ast, Patricia Lynne Kettle, Gerald Duane Ast,

Darryl James Kettle, April-Lee Ann Erickson

also known as April-Lee Ann Elliot, Brian Stuart Ast, Catherine Schaefer, Brenda Mackirdy

Respondents

Before: The Honourable Mr. Justice Truscott

Reasons for Judgment

Counsel for Petitioner:

M. Misner

Counsel for Respondents:

C.J. Stenerson

Counsel for the Estate of Wayne Stanley Ast:

G.J. May

Place and Date of Hearing:

New Westminster, B.C.

December 8, 2015

Place and Date of Judgment:

New Westminster, B.C.

December 15, 2015

- [1] The petitioner seeks the following declarations of the following issues based upon the true construction of the last will of Wayne Stanley Ast, deceased, executed on March 29, 2000:
- (a) What real property located at 1090 McKenzie Road, Abbotsford, BC did Wayne Stanley Ast own at the time of his death on March 27, 2014?
 - (b) Is the petitioner entitled to any portion of that real property located at 1090 McKenzie Road?
 - (c) If the petitioner is entitled to any portion of that real property located at 1090 McKenzie Road, how big is the portion to which she is entitled?
- [2] This proceeding is brought by way of Petition on the authority of Rule 2-1 of the Supreme Court Civil Rules, B.C. Reg. 168/2009 that requires a proceeding to be brought by a Petition under ss. 2 where (c): "the sole or principal question at issue is alleged to be one of construction of an enactment, will, deed, oral or written contract or other document".
- [3] This Petition could also be considered to concern Rule 2-1(2)(g) where a Petition is authorized if:
- (g) the relief sought relates to land and is for:
 - (i) a declaration of a beneficial interest in or a charge on land and of the character and extent of the interest or charge,
 - (ii) a declaration that settles the priority between interests or charges,
 - (iii) an order that cancels a certificate of title or making a title subject to an interest or charge, or

(iv) an order of partition or sale.

[4] The relevant evidence in this proceeding consists of the following facts:

1. In 1990, Jacob Ast executed a will that gave to his son Wayne Stanley Ast:
4. "The two acres located in the District of Abbotsford, and being part of Lot "B" of Lot 2 of the South East Quarter of Section 10 Twp. 16 Plan 5439, N.W.D.; on which his house is situated

And,

- (a) In the event the said two acres cannot be subdivided from Lot "B" then such property to be held until the said subdivision can take place and my son Wayne Stanley Ast shall be allowed to remain in his house until such time as the two acres are subdivided
- [5] Under this will the entire residue of the estate was given to his children Gerald Ast, Reginald Ast, Wayne Ast and Patricia Kettle in equal shares.
- [6] In 1992, son Wayne Stanley Ast executed a will giving "house to Tammy McLachlan at 1090 McKenzie Road on two acres".
- [7] In January 1997, Jacob Ast passed away and his estate was probated in March of 1997.
- [8] In July 1997, Lot "B" and "D" were transferred to Patricia Lynne Kettle as executrix of the will of Jacob Ast.
- [9] In that same year, Lots B and D were transferred by Patricia Kettle to Gerald Ast, Reginald Ast, Wayne Ast and Patricia Kettle in two separate transfers, one for Lot B and one for Lot D.
- [10] In the year 2000, Wayne Stanley Ast revoked all former wills of his and in a new will said "to my niece Tammy McLachlan I give my real property located at 1090 McKenzie Road " with the residue of his estate to be divided equally amongst a number of family members.
- [11] In 2004, a subdivision plan was prepared of Lots B and D and a survey plan of Lots 1 and 2 Section 10, Twp. 6, Plan 5439, N.W.D. and Lot 1 and 2 were registered in the names of Gerald Ast, Reginald Ast, Wayne Ast and Patricia Kettle. Lot 1 became address 1090 McKenzie Road, Lot 2 became address 1048 McKenzie Road.
- [12] Patricia Kettle, the executrix of the estate of Jacob Ast, deposes that because the smallest size that would be accepted by the Agricultural Land Commission was 2.51 acres, the four of them being Gerald, Reginald, Wayne and her, all agreed that all four would be registered on title to Lot 1 being 1090 McKenzie Road.
- [13] She also says that all siblings were in agreement that Wayne was entitled to two acres and house at 1090. However, this is refuted by Reginald who deposes that at the time of the 1997 transfers there was no agreement amongst all the siblings to hold a 2 acre parcel of 1090 aside in trust for Wayne.

- [14] In 2013 Patricia Kettle, Gerald Ast, Wayne Ast and Reginald Ast sought approval for the transfer of .5 hectares of 1090 to 1048.
- [15] On March 27, 2014, Wayne Ast passed away while still living at 1090 McKenzie Road and his interests in 1090 and 1048 were transferred into the name of the executor of his estate.
- [16] Catherine Schaefer, a niece of the deceased Wayne Stanley Ast deposes that a subdivision was registered on or about December 15, 2004 of Lot B and Lot D on McKenzie Road in Abbotsford.
- [17] She deposes that one hectare or 2.51 acres was subdivided off Lot B which consisted of approximately 8 acres prior to the subdivision, and the balance of the approximate 8 acres of Lot B was then added to Lot D. The one hectare lot subdivided off Lot B became Lot 1 with the civic address of 1090 McKenzie Road. Lot D with the added remainder of Lot B became Lot 2 having a civic address of 1048 McKenzie Road, Abbotsford.
- [18] Other evidence deposed to by affidavit includes understandings of what Wayne Ast meant in his year 2000 will, what he told others he meant and what they believed he meant.
- [19] I accept the distinction made by Madam Justice Dardi in the case of *Ali Estate (Re)*, 2014 BCSC 340 where she says the governing principles in interpreting a will includes the objective of the court to ascertain the intention of the testator as expressed in his or her will when read as a whole in light of any properly admissible extrinsic evidence.
- [20] She says that a cardinal principle of interpretation is that the testator's intention is to be gathered from the will as a whole and not solely from those provisions which have given rise to the controversy.
- [21] Another fundamental principle is that the court is to ascertain the expressed intention of the testator - the meaning of the written words used in the particular case - as opposed to what the testator may have meant to do when he or she made the will.
- [22] In her previous decision of *Thiemer Estate*, 2012 BCSC 629, Madam Justice Dardi at para. 48 said the following:

In keeping with contemporary judicial thinking, the courts of this province have favoured the subjective approach to interpreting wills, wherein the objective is to ascertain the actual meaning the testator ascribed to the words he or she used in the will. In determining the testator's intention the courts have endorsed the analytical approach commonly described as the "armchair rule". The rule requires that the court put itself in the position of the testator at the point in time when he or she made the will, and from that vantage point construe the language in the will in light of the surrounding facts and circumstances known to the testator.

- [23] In *Ali Estate (Re)*, at paras. 18 and 19 Dardi J. said the following:

- [18] Although the primary source of evidence is the "four corners" of the will, the armchair rule entitles the court to look to extrinsic evidence (evidence other than the contents of the will) to identify the surrounding circumstances known to the will-maker at the time the will was made, which might reasonably be expected to have influenced the will-maker in the disposition of his or her property. The extrinsic facts and circumstances that a court may consider include the occupation of the will-maker, the state of his or her property, and the general relationships of the will-maker to his or her immediate family and other relatives: *Kaptyn Estate (Re)*, 2010 ONSC 4293 at para. 38. This indirect extrinsic evidence is generally admissible when construing a will.
- [19] However, as I noted in the Rectification Decision, except in very restricted circumstances such as equivocation, on an interpretation application, the court is not permitted to review direct extrinsic evidence of a will-maker's intentions: British Columbia Law Institute, "Wills, Estates and Succession: A Modern Legal Framework," in B.C.L.I. Report No. 45 (B.C. 2006) at 37. The underlying rationale for its exclusion is that the will constitutes the evidence of a will-maker's intention and therefore direct extrinsic evidence of what the testator intended to write is not admissible to identify an ambiguity or to interpret an ambiguity that is apparent on the face of the will. This rule applies in particular to the will-maker's instructions provided to the solicitor who drew the will: *Sarkin v. Osipov Estate* (1989), 36 E.T.R. 139.
- [24] The other evidence deposed to by affidavit that sets out understandings of what Wayne Ast meant in his year 2000 will, what he told others he meant, and what they believed he meant, is all inadmissible evidence as constituting direct extrinsic evidence that the court is not permitted to review.

Analysis and decision

- [25] As I am to put myself in the position of Wayne Stanley Ast as the testator at the point in time when he made the year 2000 will, and from that vantage point construe the language in the will in light of the surrounding facts and circumstances known to the testator, then I make the following findings:
1. Wayne Stanley Ast's last will was executed in the year 2000. In that year he "gave to my niece Tammy McLachlan my real property located at 1090 McKenzie Road."
 2. In the year 1997 Wayne Stanley Ast had been the recipient of a quarter interest in Lots B and D by the transfers from Patricia Kettle in 1997 as executrix under the 1992 will of Wayne Stanley Ast of Lots B and D to Gerald Ast, Reginald Ast, Wayne Ast and Patricia Kettle.
 3. When Lots B and D were subdivided in the year 2004 they became Lots 1 and 2 with Lot 1 having a civic address of 1090 McKenzie Road and Lot 2 having a civic address of 1048 McKenzie Road.

The owners of both lots 1 and 2 remained the same as the owners of Lots B and D, being Gerald Ast, Reginald Ast, Wayne Ast and Patricia Kettle.

4. Accordingly at the time of the execution of his year 2000 will Wayne Ast was the owner of a quarter interest in Lot 1 (1090) and a quarter interest in Lot 2 (1048).
5. It is therefore my conclusion that what Wayne Stanley Ast bequeathed to his niece Tammy McLachlan in his year 2000 will, as his real property located at 1090 McKenzie Road, was his quarter interest in the property at 1090 McKenzie Road, which consisted of a total of 2.51 acres. His portion as a quarter interest holder was .6275 of an acre.

[26] I therefore declare in answer to the three issues raised about the true construction of the last will of Stanley Ast executed on March 29, 2000:

1. At the time of his death on March 27, 2014 Wayne Stanley Ast owned a quarter interest in the real property located at 1090 McKenzie Road, Abbotsford, BC.
2. The petitioner is entitled to the quarter interest of Wayne Stanley Ast in the real property located at 1090 McKenzie Road, Abbotsford, BC.
3. The size of the portion of real property located at 1090 McKenzie Road to which the petitioner is entitled is .6275 of an acre.

"The Honourable Mr. Justice Truscott"

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