

CANADA / JUDGMENT

McLelland v. The Canada Trust Company

2024 BCSC 2452

COURT

Supreme Court of British Columbia

DECIDED

12 December 2024

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2024 BCSC 2452 McLelland v. The Canada Trust Company IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: McLelland v. The Canada Trust Company, 2024 BCSC 2452 Date: 20241212 Docket: S175172 Registry: Vancouver Between: Shannon Leigh McLelland Plaintiff And The Canada Trust Company formerly known as TD Trust Company, Administrators of the Estate of Brian Alexander McLelland, Deceased, Colleen Anne McLelland and Brian Michael McLelland Defendants Before: The Honourable Justice G.C. Weatherill Oral Reasons for Judgment In Chambers Counsel for the Plaintiff: E.P. Good Appearing as agent for R.T.V. Louis The Defendant, Colleen Anne McLelland, appearing in person: C.A. McLelland No other appearances Place and Date of Hearing: Vancouver, B.C. December 12, 2024 Place and Date of Judgment: Vancouver, B.C. December 12, 2024

- [1] THE COURT: The defendant, Colleen McLelland, applies for an order pursuant to Rule 22-7(7) of the Supreme Court Civil Rules, dismissing this wills variation action for want of prosecution. The defendant, Brian McLelland, supports the application. The defendant, The Canada Trust Company ("Canada Trust"), takes no position. The plaintiff, Shannon McLelland, opposes the application. For the purpose of clarity, and intending no disrespect, I will refer to the parties by their first names because they all share the same surname.

Background

- [2] The background to this proceeding is as follows. Brian Alexander McLelland (the "deceased") died in Abbotsford Hospital on August 31, 2016 at the age of 82. He had three children: Shannon, Brian, and Colleen. The deceased executed a will dated September 28, 1993. He subsequently executed two codicils to the will dated January 30, 1995 and August 11, 2000. Those testamentary documents provide that the residue of the deceased's estate is to be divided equally amongst Shannon, Brian, and Colleen.
- [3] On August 26, 2016, five days before his death, the deceased was admitted to Abbotsford Hospital. While there, he executed three deeds of gift and transfers, transferring ownership of three investment condominiums he owned in Calgary, Alberta ("the Alberta Condos"). Two of them were transferred to Colleen, the third was transferred to Brian. The transfers were registered in the Alberta Land Title Office on September 15, 2016.

- [4] On December 15, 2016, probate of the deceased's estate was issued in British Columbia, granting the administration of the estate to Canada Trust.
- [5] On June 1, 2017, Shannon commenced this action, seeking redistribution of the estate under s. 60 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13.
- [6] The transfers of the Alberta Condos were mentioned in Shannon's notice of civil claim filed June 1, 2017 as examples of the alleged inequitable distribution of the estate.
- [7] Under Part 1, Statement of Facts, Shannon's claim alleges that she "did not receive anything as a result of or in consideration for the transfer of the [Alberta Condos] to Colleen and Brian". She claims that the Alberta Condos had a collective assessed value of \$550,000.
- [8] Under Part 2, Relief Sought, Shannon seeks:
1. A Declaration that the Last Will and Testament of the Deceased does not make adequate, just or equitable provisions out of the Estate of the said Deceased for the support and maintenance of the Plaintiff.
 2. An Order for such provision as the Court thinks adequate, just and equitable in the circumstances be made out of the Estate of the Deceased for the Plaintiff.
- [9] Nowhere in the notice of civil claim does Shannon allege that the deceased did not have the mental capacity to execute the transfer documents of the Alberta Condos when he did.
- [10] On August 10, 2017, Colleen filed her response to civil claim. Neither Brian nor Canada Trust has responded to the claim.
- [11] Shannon has taken no further steps to prosecute her British Columbia action. Instead, on August 23, 2018, she commenced an action in Alberta, seeking remedies for undue influence, lack of testator capacity, resulting or constructive trust and unjust enrichment, and an order requiring the transfer of the Alberta Condos back to the deceased's estate. Also, as part of the Alberta action, Shannon sought to be appointed as the administrator of the deceased's estate.
- [12] An Alberta case management judge named Shannon as the administrator ad litem to continue the carriage of the Alberta action. Colleen appealed that decision. The Alberta Court of Appeal's reasons for judgment, indexed at 2021 ABCA 102, allowed Colleen's appeal and dismissed Shannon's Alberta claim in its entirety as an abuse of process. The Alberta Court of Appeal held that the courts of British Columbia have jurisdiction and that British Columbia is the appropriate forum to address Shannon's claims regarding the deceased's will.
- [13] On June 14, 2021, Shannon applied for a rehearing in the Alberta Court of Appeal. The Court of Appeal denied her rehearing application on June 28, 2021.

- [14] No steps have been taken by Shannon to prosecute the British Columbia action since that time. Legal Principles
- [15] It is common ground that in order to succeed on an application to dismiss a claim for want of prosecution, the applicant must satisfy the court that:
- a) the delay is inordinate;
 - b) there is no reasonable excuse for the delay; and
 - c) the interests of justice are such that the action should be dismissed. See: *Giacomini Consulting Canada Inc. v. The Owners, Strata Plan EPS 3173*, 2023 BCCA 473. I will deal with each of these factors in turn.
- a) Has there been an inordinate delay?
- [16] Counsel for Shannon submits that Shannon proceeded bona fide in Alberta on the advice of legal counsel and if that advice was flawed such that there was a delay in the prosecution of the British Columbia action, such delay should not be at Shannon's feet. He submits that, in the circumstances, the delay clock should not be considered to have started to run in this case until June 2021, when the Alberta Court of Appeal dismissed Shannon's application for a rehearing of the appeal. He submits that, in the circumstances, the delay is not inordinate.
- [17] I agree with Colleen, the applicant, that the appropriate time to begin measuring the delay is when the action was commenced: *Ed Bulley Ventures Ltd. v. The Pantry Hospitality Corp.*, 2014 BCCA 52 at para. 38. Eight years have passed since the grant of probate was issued in British Columbia and Seven-and-a-half years have passed since Shannon commenced her British Columbia action. Shannon has not taken any steps to prosecute it since that time. In the words of the Alberta Court of Appeal, at para. 24:
- [24] Rather than pursuing potential remedies in the BC court, Shannon instead sought the assistance of the Alberta courts solely on the grounds the Calgary condominiums in question are located here. In doing so, she is attempting to bypass the supervisory jurisdiction of the BC probate court and, in so doing, she has delayed distribution of the Estate in British Columbia because of the duplicative proceedings. [] As I have already pointed out, the Alberta Court of Appeal found Shannon's tactics to be an abuse of process.
- [18] In my view, the fact that Shannon may have pursued her Alberta action in reliance on flawed legal advice is not of assistance to her. As was stated by the Manitoba Court of Appeal in *Manitoba (Workers Compensation Board) v. Ali*, 2020 MBCA 122, at para. 75:
- [75] [] There is nothing unjust about an action being dismissed for want of prosecution where the delay has been caused by the plaintiff. That is also true where the delay has been caused by the plaintiff's solicitors for whose acts the plaintiff is responsible. [Emphasis added.]

[19] Again, Shannon has not taken any steps to prosecute her action in British Columbia other than to file her notice of civil claim over seven-and-a-half years ago. I find that Colleen has established that there has been an inordinate delay.

b) Is there a reasonable excuse for the delay?

[20] Shannon submits that, regardless of whether there was reasonable excuse for her delay in prosecuting the British Columbia action prior to June 2021--which I find there was not--her impecuniosity and health issues cumulatively amount to reasonable excuse thereafter. She deposes that she remains severely traumatized, distressed, angry, and fearful regarding the situation with the deceased's estate, and that she has not been mentally, physically, or financially capable of prosecuting the British Columbia action. She points to the following:

- a) the \$100,000 interim distribution she received from the estate primarily went to paying her legal fees;
- b) in June 2022, she became homeless for two months and then moved to a shelter until March 2024;
- c) in August 2022, she applied for and since then has received \$635 a month from social assistance;
- d) in March 2024, she was able to move to a 290-square-foot unit and began receiving Person with Persistent Multiple Barriers assistance, and now receives, as I understand it, \$1,100 per month of assistance;
- e) it was only in August 2024 that she was sufficiently recovered and stable enough to begin searching for a new lawyer to represent her in the British Columbia action; and
- f) in October of 2024, she suffered a shingles outbreak.

[21] Shannon's evidence in respect of the foregoing is not supported by any medical or other evidence regarding severity and, in my view, falls far short of establishing a reasonable excuse for the delay. I find that, in the circumstances, there is no reasonable excuse for the delay.

c) Are the Interests of justice such that the action should be dismissed?

[22] An application to dismiss an action for want of prosecution will succeed only if the court is persuaded that the interests of justice justify depriving the plaintiff of her presumptive entitlement to and adjudication of the merits: *Giacomini* at para. 75.

[23] The evidence before me demonstrates that each of Colleen and Brian are suffering hardship as a consequence of the deceased's estate being tied up by this litigation. Brian's financial difficulties are significant and are even more dire than Shannon's. Colleen has health issues that she has struggled with most of her life, including congenital hip dysplasia.

- [24] To date, the estate has incurred approximately \$176,000 in legal fees, more than 12 percent of its net value. In my view, the continued depletion of the estate is not warranted. The interests of justice, in the circumstances of this case, cry out for an end to this languishing litigation.
- [25] SHANNON MCLELLAND: I'm free.
- [26] THE COURT: The main issue advanced by Shannon's counsel on this application was that the deceased did not have the mental capacity to enter into the condo transfers. However, that issue has not been pleaded by Shannon in this action. This --
- [27] SHANNON MCLELLAND: There's no evidence --
- [28] THE COURT: This is not a case -- this is --
- [29] SHANNON MCLELLAND: -- to prove that Brian and Colleen are impoverished.
- [30] THE COURT: This is not a case where a testator failed to provide for a child, or where the will provides --
- [31] SHANNON MCLELLAND: I do agree with that, but there is --
- [32] THE COURT: -- a greater percentage of the residue --
- [33] SHANNON MCLELLAND: -- there is a percentage for --
- [34] THE COURT: Ma'am, I will have you removed --
- [35] SHANNON MCLELLAND: -- [indiscernible/overlapping speakers] --
- [36] THE COURT: Ma'am, I will have you removed if you are not silent.
- [37] SHANNON MCLELLAND: I know what your decision is, Your Honour, so --
- [38] THE COURT: All right.
- [39] SHANNON MCLELLAND: -- I'm outta here.
- [40] THE COURT: Thank you.
- [41] SHANNON MCLELLAND: Thank you. Okay, I'll leave.
- [42] THE COURT: As I was saying, this is not a case where a testator failed to provide for a child or where the will provides a greater percentage of the residue of the estate to one child to the exclusion of another. Here, the residue of the estate is to be divided equally among the deceased's three children. In my view, this case is a classic example of why the right to apply for dismissal of an action for want of prosecution is available in our Supreme Court Civil Rules.
- [43] The application is granted. Costs on Scale B. "G.C. Weatherill J."

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