
CANADA / JUDGMENT

Moore v. Drummond

2013 BCSC 1762

COURT

Supreme Court of British Columbia

DECIDED

25 September 2013

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2013 BCSC 1762 Moore v. Drummond

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Moore v. Drummond,

2013 BCSC 1762

Date: 20130925

Docket: 16344

Registry: Smithers

Between:

Kenneth Clifford Moore and Clara Moore

Plaintiffs

And

Bruce Drummond

Defendant

Before: The Honourable Mr. Justice N. Smith

Reasons for Judgment

Counsel for Plaintiffs:

T. R. Buri, QC

Counsel for Defendant:

M.J. Schuster

Place and Date of Trial/Hearing:

Smithers, B.C.

June 24 -26, 2013

Place and Date of Judgment:

Smithers, B.C.

September 25, 2013

- [1] Dorothy Adell ("Dee") Drummond died at the age of 98 on January 27, 2011. A year before her death, she made a new will naming her neighbors as the executors and sole beneficiaries of her estate, to the exclusion of her son, who had been the sole beneficiary under an earlier will.
- [2] In reasons for judgment dated November 15, 2012, *Moore v. Drummond*, 2012 BCSC 1702, I found that Dee Drummond had the requisite testamentary capacity to make the new will, which was accordingly valid and admitted to probate. The trial then resumed to deal with Bruce Drummond's alternate claim to share in the estate pursuant to the Wills Variation Act, R.S.B.C. 1996, c. 490 [Act]. (As in the previous reasons, I will frequently refer to Dee Drummond and Bruce Drummond by their first names only, in order to avoid confusion and repetition.)
- [3] Kenneth Clifford ("Casey") Moore and Clara Moore are the executors and beneficiaries under the new will. They lived next door to Dee in Smithers, B.C. for about 40 years. The estate is a modest one, consisting of a house with an assessed value, as of the time of Dee's death, of \$110,700. She also had bank accounts totalling about \$55,000. The estate has since received some rental income, but the cash was depleted by the cost of the probate litigation and now stands at about \$20,000.
- [4] The new will, dated January 18, 2010, said :
7. My reasons for providing for my neighbours, CASEY MOORE and CLARA MOORE are because they have been a lot of help to me and have become my good friends over many years.
8. I have not given any part of my estate to my son, Bruce Drummond, because he does not visit me and he does not need anything from me. Bruce is retired and I believe he made good money as a logger.
- [5] In my previous reasons, I found the statement about Bruce not visiting to be incorrect in that he did visit from time to time. However, Dee had previously expressed hostility to him in speaking to others. In his evidence at the resumed trial, Bruce confirmed that, throughout his life, his mother was bitter about the fact that her pregnancy with him had forced her into an unhappy marriage. She frequently referred to him as a "bastard." As a child, Bruce was

raised primarily by his grandmother and great-grandmother and did not live full-time with his parents until age 12.

- [6] Bruce is now 77. He retired as a contract logger in 2007 and has pension income totalling about \$20,000 a year. He lives in Quesnel, where he has owned a mobile home for 27 years. The home has an assessed value of \$43,500 and sits on a pad that is rented for \$220 a month. He has no significant savings or investments.
- [7] Bruce testified that after his mother moved to Smithers in the 1960s, he generally visited once a year and provided small amounts of financial assistance from time to time. However, during the last two years of her life, she asked him not to visit because she was self-conscious about her condition. He last saw her in the spring of 2009, although they remained in telephone contact until February 2010.
- [8] Although Dee stated in her will that she believed Bruce had made good money as a logger, he testified that they never specifically discussed his income. He said he made average wages for a logger, working 8 or 9 months a year.
- [9] Bruce also testified that he did not learn of the new will until after Dee's death and that he was surprised and shocked.
- [10] Section 2 of the Wills Variation Act provides that if, in the court's opinion, a will fails to make adequate provision for the proper maintenance and support of the testator's spouse or children, the court may vary the will to make the provision it considers adequate, just and equitable in the circumstances. In the leading case of *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807, 116 D.L.R. (4th) 193 [Tataryn], the Supreme Court of Canada said the purpose of that section is to enforce the testator's legal and moral obligations, but that a testator's freedom to dispose of his or her property should be interfered with only in so far as the statute requires. At para. 17, the Court said:
- [17] The Act did not remove the right of the legal owner of property to dispose of it upon death. Rather, it limited that right. The absolute testamentary autonomy of the 19th century was required to yield to the interests of spouses and children to the extent, and only to the extent, that this was necessary to provide the latter with what was "adequate, just and equitable in the circumstances." And if that testamentary autonomy must yield to what is "adequate, just and equitable", then the ultimate question is, what is "adequate, just and equitable" in the circumstances judged by contemporary standards. Once that is established, it cannot be cut down on the ground that the testator did not want to provide what is "adequate, just and equitable".

- [11] There is no suggestion that Dee owed any legal obligation to her adult son. The question is one of moral obligation. The Court in *Tataryn* said at para. 28 that such obligations are based on "society's reasonable expectations of what a judicious person would do in the circumstances, by reference to contemporary community standards." While such obligations clearly exist in relation to spouses and dependent children, the Court also added at para. 31:
- [31] While the moral claim of independent adult children may be more tenuous, a large body of case law exists suggesting that, if the size of the estate permits and in the absence of circumstances which negate the existence of such an obligation, some provision for such children should be made.
- [12] In *McBride v. McBride Estate*, 2010 BCSC 443 [McBride], at paras. 129-135, Ballance J. identified a number of factors for consideration in determining the existence or strength of a testator's moral duty. The ones possibly relevant to this case are:
- Contributions by the claimant to the accumulation of a testator's assets or the provision of other types of contribution or care;
 - Conduct of the testator that created a bona fide expectation of a benefit;
 - The role played by the testator in any estrangement or breakdown of the relationship between the testator and the claimant; and,
 - Whether the testator's reasons purporting to explain a disinheritance are valid and rational.
- [13] Although there is as some evidence of financial contributions by Bruce over the years, these appear to have been modest and infrequent. All the evidence about Dee's personality indicates that she was fiercely independent and unlikely to either ask for or accept any significant financial support.
- [14] Bruce was aware of Dee's previous will, in which he was the sole beneficiary. While that could be said to have created an expectation of benefit, it cannot in itself, be the determining factor. Testamentary autonomy, which *Tataryn* says must still be protected, includes the right to change a will.
- [15] The significant issues in this case are the nature of the mother-son relationship and the stated reasons for disinheritance.
- [16] Although this was not a case of complete estrangement, it is clear that the relationship between Dee and Bruce had always been a distant one, with a strong undertone of hostility and resentment. That hostility and resentment arose entirely with Dee (although Bruce may have responded in kind). She held him responsible for matters over which he had no control -- the circumstances and consequences of his birth. In *McBride*, Ballance J. said at para 132:

- [132] In the early development of the caselaw, a long period of separation, abandonment or estrangement between a child and testator was frequently, though not invariably, taken to militate against finding a moral duty to an adult child. The modern judicial trend indicates that the court will enquire into the role played by the testator in the estrangement or relationship breakdown, and where it is seen to be largely the fault of or at the insistence of a testator, it will likely not negate a testator's moral duty, and may even enhance it. The weight of the authorities also indicates that the court may discern a moral duty as a means of rectifying the testator's childhood neglect of the children: *Gray v. Gray Estate*, 2002 BCCA 94, 98 B.C.L.R. (3d) 389, *Doucette v. Clarke*, 2007 BCSC 1021, 35 E.T.R. (3d) 98 [Doucette]; *Tomlyn v. Kennedy*, 2008 BCSC 331, 38 E.T.R. (3d) 289; *Wilson v. Watson*, 2006 BCSC 53, 21 E.T.R. (3d) 285; *P.S.G. v G.G. Estate*, 2005 BCSC 1855; *Ryan*.
- [17] As to the testator's stated reasons for disinheritance, the Court of Appeal said in *Kelly v. Baker* (1996), 15 E.T.R. (2d) 219, [1996] B.C.J. No. 3050 (C.A.), that the testator's moral obligation can be negated by "valid and rational" reasons:
- [58] The law does not require that the reason expressed by the testator in her will, or elsewhere, for disinheriting the appellant be justifiable. It is sufficient if there were valid and rational reasons at the time of her death - valid in the sense of being based on fact; rational in the sense that there is a logical connection between the reasons and the act of disinheritance.
- [18] In *McBride*, Ballance J. pointed out that this approach may be difficult to reconcile with the objective test based on society's reasonable expectations mandated by *Tataryn*. However, she said at para. 142:
- [142] I would respectfully observe that there appears to be a growing trend in the authorities decided in the aftermath of *Kelly* to favour rejection of objectively insufficient reasons on the pretence that they are simply not rational.
- [19] However one interprets the test to be applied, I am bound to find on the basis of the authorities that the reasons stated in the will were insufficient to displace the moral obligation. The statement that Bruce never visited was factually incorrect. The statement that he did not need anything from her was based on an assumption unsupported by any specific knowledge. Dee knew nothing about Bruce's income, other than the fact he had worked as a logger, and knew nothing about his financial circumstances in retirement. Bruce testified that they never discussed these matters and I find that, given her attitude toward him, Dee was unlikely to have been interested.
- [20] *Tataryn* and other case law makes clear that "society's reasonable expectations" require a testator to consider adult independent children. Although a testator may in some circumstances reasonably exclude such a child based on the child's financial circumstances and absence of need, the reasonable expectation is that a prudent testator would only do so on the basis of actual knowledge rather than speculation.

- [21] For these reasons, I find that Dee's will failed to meet her moral obligations and therefore fell short of the "adequate provision" required by s. 2(1) of the Act.
- [22] The will should be varied in a way that "achieves the justice the testator failed to achieve," while interfering with testamentary freedom "only in so far as the statute requires" (Tataryn, at para. 33). That requires the court to weigh the competing claims. The Supreme Court of Canada in Tataryn said at para. 32:
- [32] How are conflicting claims to be balanced against each other? Where the estate permits, all should be met. Where priorities must be considered, it seems to me that claims which would have been recognized during the testator's life -- i.e., claims based upon not only moral obligation but legal obligations -- should generally take precedence over moral claims. As between moral claims, some may be stronger than others. It falls to the court to weigh the strength of each claim and assign to each its proper priority. Any moral duty should be assessed in the light of the deceased's legitimate concerns which, where the assets of the estate permit, may go beyond providing for the surviving spouse and children.
- [23] Like Bruce's claim, that of Mr. and Mrs. Moore is a purely moral one. Dee clearly felt gratitude for their day to day assistance and friendship. Her relationship with them, although not based on any family connection, was closer than her relationship with her son. This was partly her choice, but was also a simple product of physical proximity.
- [24] Counsel for Bruce suggests that the will be varied to give him the real property, which now accounts for about 85 per cent of the estate. In my view, that would vary the will beyond what the statute requires and would give insufficient weight to testamentary freedom. Balancing the competing claims and the competing interests protected by the Act, I find that the estate should be divided equally, with one half going to Bruce and the other to Mr. and Mrs. Moore. In the circumstances, the parties will each bear their own costs.

"N. Smith J."

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