

CANADA / JUDGMENT

Ninke v. Ho

2020 BCSC 1669

COURT

Supreme Court of British Columbia

DECIDED

23 September 2020

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2020 BCSC 1669 Ninke v. Ho IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Ninke v. Ho, 2020 BCSC 1669 Date: 20200923 Docket: S36836 Registry: Chilliwack Between: Hunter George Paul Ninke Petitioner And Edward Ho and Christopher John Apps, Executors and Trustees of the Will of Harold Holger Ninke, also known as Harold Ninke, Deceased, and Hedy Ninke Respondents Before: The Honourable Mr. Justice Milman (via teleconference) Oral Reasons for Judgment Counsel for the Petitioner: B. Vickers S. Gillman Counsel for the Respondents, Edward Ho and Christopher John Apps: M. Lithwick Counsel for the Respondent, Hedy Ninke: E. Clough Z. Rogers Place and Date of Hearing: New Westminster, B.C. September 23, 2020 Place and Date of Judgment: New Westminster, B.C. September 23, 2020

- [1] THE COURT: This is a petition seeking to collapse a testamentary trust and ancillary relief, including:
- a) removal of the current trustees;
 - b) a direction that they pass their accounts; and
 - c) an order appointing the petitioner as the new executor of the estate.
- [2] Because the parties have the same last name, I will refer to them in the discussion that follows by their first names, as counsel did in argument. I mean no disrespect in doing so.
- [3] The petitioner, Hunter, claims to be the sole beneficiary of the estate and is now an adult. He seeks the relief referred to earlier relying on the rule in *Saunders v. Vautier* (1841), 41 ER 482 (Ch.). The current trustees take no position. The petition is opposed, however, by Hunter's aunt, Hedy.
- [4] The facts are simply stated. The testator, Harold, was Hunter's father and Hedy's brother. He died on January 4, 2018. His will dated December 19, 2012 left most of his estate to Hunter, provided that Hunter survived Harold, as indeed he has. What gives rise to the issue before me today are certain residual bequests that are to be held in trust for Hunter until he reaches the age of 31.

- [5] Hedy argues that the rule in *Saunders v. Vautier* is not available to Hunter because she has what she describes as a contingent interest in the estate. She argues that if Hunter were not to survive until he reaches the age of 31, then the estate would revert to an intestacy, in which case she would be the principal beneficiary of the trust, rather than the estate of Hunter.
- [6] The parties agree that the outcome turns, ultimately, on the interpretation of the will. Hedy argues, among other things, that Hunter should have applied to clarify the terms of the will before making this application.
- [7] I disagree with that submission. There is authority in this province that the court can properly rule on an application seeking relief under the rule in *Saunders v. Vautier* by interpreting the will, and I am referring in that regard to *Ward v. Roberts*, 2017 BCSC 1768 and *Fargey v. Fargey Estate*, 2015 BCSC 721.
- [8] Here, I find that the provisions of the will are clear enough. I find it was Harold's intention to vest the residual interest in his estate absolutely in Hunter, as long as Hunter survived him, as he has. That interest was made subject, I find, only to postponement of Hunter's enjoyment of the residual interest. That result is similar to the findings in the *Ward* and *Fargey* cases that I have just referred to.
- [9] This is not, as argued by Hedy, a case in which the vesting of that residual bequest is subject to a condition precedent that he first reach that age or a condition subsequent that would revoke the gift in the event that he did not. I say that for a number of reasons.
- [10] First, I find that it is significant that there is no gift over in the event that Hunter does not reach the age of 31. In that regard, I note that Hedy relies, in particular, on a passage in *Waters' Law of Trusts*, 4th ed. (Toronto: Carswell, 2012). The chapter on the rule in *Saunders v. Vautier* begins at page 1235, but at 1240 there is a heading about postponements to a certain age, where the learned authors say this: In this bracket fall a large number of cases, relative to the five other brackets. The ages most popular with testators range between twenty-three and thirty years of age, and all the cases in Canada concern testamentary gifts. However, only a minority of the reported cases resulted in a successful *Saunders v. Vautier* claim. Simplicity was the key note in each of those cases. Then there are some examples cited, which I will not read out. The authors continue as follows, after setting out those examples: In each of these cases, A had a vested and indefeasible interest; none of the interests taken was expressly made defeasible, and there was not enough evidence to show an intention that the gift or devise be contingent on the attainment of the desired age. Had the testator provided for interim maintenance out of an independent fund, or made no provision at all for maintenance, it might have been possible for the court to construe the age requirement as a personal attribute in A which had to exist before he took anything. The most effective method of avoiding a *Saunders v. Vautier* termination is for the instrument to create a gift over on the death of A under the required age. This has the effect of making it clear that A has not acquired the whole beneficial interest. In other words, whether A's

interest is vested but subject to defeasance (by a condition subsequent), or whether it is not vested but only contingent, it is clear that A's interest is not the only one. It follows that, in a controversy as to whether A's interest is vested or contingent, the court can safely give effect to the presumption in favour of early vesting. [Emphasis added.]

- [11] I will stop the quote there and note that it is that presumption that is urged upon me here by Hunter.
- [12] A second reason I find in favour of Hunter on this point is that the will itself provided that if Hunter had not survived Harold, then Hedy would have inherited the residual interest instead. I find that it would run counter to Harold's manifest intention to read his will as providing that if Hunter does not survive to the age of 31 then the residual interest would revert to Hedy through an intestacy, when his intention was clearly that Hedy would only receive that interest in the event that Hunter did not survive Harold.
- [13] Finally, I also agree with Hunter's submission that, to the extent there is an ambiguity in the will, Hunter benefits from the presumptions of early vesting and against an intestacy: *Re: The Estate of Lorne A. Campbell*, 2005 BCSC 1561.
- [14] For those reasons, I conclude that the will is not capable of being interpreted as urged by Hedy. I am therefore allowing the petition and granting the order on the terms sought, subject to the proviso that was urged upon me that the current trustees will have the option to have their accounts approved by Hunter rather than formally passed.
- [15] With respect to costs, Hedy argues that because the issue arose from an ambiguity in the will, the costs of the proceeding ought to be paid from the estate. I have concluded that the will is not ambiguous, in the sense that it clearly vests the residual interest subject only to a postponement of the right of enjoyment, and that right was vested absolutely and indefeasibly. But, it is, I have to say, not clear why Harold chose to delay the winding up of the trust until Hunter's 31st birthday. That is a delay that will not be given effect as a result of my order. Given the potential for that provision to raise the misunderstanding that it has, I am ordering costs to Hunter, to be payable from the estate.
- [16] All right. Is there anything else that I need to address today?
- [17] MS. CLOUGH: Just to note the words you just said, is that it was costs to Hunter be payable from the estate? And is there any order regarding costs of Hedy?
- [18] THE COURT: No.
- [19] MR. VICKERS: Nothing from the petitioner, My Lord. Thank you.
- [20] THE COURT: All right. That concludes the matter and we are adjourned. "Milman J."

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