

CANADA / JUDGMENT

Plouffe v. Benneke Estate

2002 BCSC 532

COURT

Supreme Court of British Columbia

DECIDED

10 April 2002

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Citation: Clara Plouffe v. Bastiaan Martin Kastelein

Date: 20020410
2002 BCSC 532

Docket: S061860
Registry: New Westminster
IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN: CLARA PLOUFFE
PLAINTIFF

AND: BASTIAAN MARTIN KASTELEIN,
EXECUTOR OF THE ESTATE OF
ERNEST ALBERT BENNEKE, DECEASED
DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE JOYCE

Counsel for the plaintiff

J.S.M. MacLeod

Counsel for the defendant

R.C. Campbell

Date and Place of Hearing/Trial:

October 18-19, 2001;

March 27, 2002

New Westminster and Chilliwack, BC

INTRODUCTION

- [1] Clara Plouffe is an 85 year old retired person. The deceased, Mr. Benneke, was Clara Plouffe's youngest brother. Clara Plouffe played a large part in raising her brother. They maintained a close and loving relationship. They helped one another and, from time to time, lent money to one another.
- [2] On May 28, 1992 Clara Plouffe advanced \$85,000 to her brother. Ms. Plouffe says it was a loan, of which \$75,000 remained unpaid at the time of Mr. Benneke's death on September 11, 1999. She sues the estate for repayment of the \$75,000.
- [3] The defendant takes the position the plaintiff gave Mr. Benneke \$85,000. Alternatively, he takes the position \$75,000 of the advance was a gift and \$10,000 was a loan that was repaid in 1997.

FACTS

- [4] Clara Plouffe was the eldest of four siblings. She looked after the younger children when they were small. Ms. Plouffe had a particularly close relationship with Mr. Benneke. He resided with the plaintiff and her husband for a time before he enlisted in the services and went to war. When he returned from the war Mr. Benneke lived with the plaintiff and her husband for about a year before he married and established his own home.
- [5] When Clara Plouffe's husband died, in about 1964, she went to work, first in a motel and then as a Canadian Tire Store manager, a position she held for 17 years before retiring.
- [6] Clara Plouffe testified that on occasion she lent money to her brother when he needed it. They never documented the loans. The loans were of relatively modest amounts and were repaid promptly. Ms. Plouffe never charged interest.
- [7] In March 1992, after his wife's death, Mr. Benneke sold his house. As he was going to be out of the city he gave his sister a power of attorney. Clara Plouffe negotiated the final sale on his behalf. On March 30, 1992 Mr. Benneke received \$213,017.58 in connection with the sale of his house.
- [8] On May 1, 1992 Mr. Benneke agreed to purchase a condominium for a price of \$180,000.00. The transaction completed on June 1, 1992. The total amount paid by Mr. Benneke was \$182,501.02.

- [9] On May 28, 1992 Ms. Plouffe gave her brother a cheque in the amount of \$85,000.00. She testified she had intended to lend him \$75,000 to assist with the purchase of his condominium and new furniture. She said he then asked for an additional \$10,000.00 so that he could buy a new truck. Clara Plouffe's evidence was that her brother told her, anytime she needed anything she should let him know and he would help her out. There are no documents evidencing the transaction, apart from the \$85,000 cheque.
- [10] In late April 1992, prior to the transaction concerning the \$85,000, both Clara Plouffe and Mr. Benneke made a financial investment through Ms. Sandra Larose, a financial advisor. Mr. Benneke invested \$60,000 and Ms. Plouffe invested \$50,000. Originally Ms. Plouffe had intended to invest \$25,000 and had written a cheque for that amount. She then decided to invest an additional \$25,000. As she did not have another cheque with her, Mr. Benneke wrote a cheque on his account for the balance. The plaintiff testified she subsequently repaid her brother the \$25,000. She said these transactions had nothing to do with the loan of \$85,000.
- [11] Ms. Larose testified as follows. She met with Mr. Benneke and Clara Plouffe on the last Saturday in April 1992. Mr. Benneke introduced his sister to Ms. Larose for the purpose of making a financial investment. At some time before this meeting Ms. Larose had asked Mr. Benneke whether he would need money in connection with the purchase of his new home. He told her he was going to get money from another source. When she met Clara Plouffe she learned that Ms. Plouffe was that source. Clara Plouffe told her she was loaning her brother some money to reduce her income tax. Clara Plouffe told Ms. Larose her brother would give her back money if she needed it but that she was older and he would probably outlive her and he would get it anyway.
- [12] In cross-examination Ms. Larose said she had reviewed notes of the discussion in order to refresh her memory. The note was a single line that reads"
- "28 04 92 \$60,000 - SWP for \$750/mo."
- "SWP" is an abbreviation for Systematic Withdrawal Plan".
- [13] Ms. Larose admitted she has become a friend of the plaintiff, just as she has a friendly relationship with a number of her clients.
- [14] The plaintiff testified there was only one occasion when she, her brother and Ms. Larose met together. It was April 30, 1992, the day she wrote the cheque for \$25,000. She said she never had a discussion with Ms. Larose about lending money to reduce income tax. She testified she and her brother did not discuss their financial affairs or investments with one another.
- [15] In November 1997 Clara Plouffe was in the process of purchasing a new residence. She required \$10,000.00 to complete the transaction. On November 4, 1997 Mr. Benneke gave Ms. Plouffe a cheque for \$10,000.00.

- [16] Clara Plouffe said she never asked for the balance of the money because she did not need the money.
- [17] Mr. Benneke was diagnosed with cancer in February 1999. He was admitted to hospital shortly before he died. Clara Plouffe visited her brother in hospital a number of times before his death. She never requested repayment of the \$75,000 from him.
- [18] On September 10, 1999, the day before her brother's death, Clara Plouffe wrote a letter to Mr. Kastelein, whom she knew would be her brother's executor. It read in part:

In May of 1992 he asked me if he could get some money from me. He knew I had substantial funds at the time. He was moving and was short of funds outside of his investments. Being my baby brother, I was always at his side when he needed me. I told him I could let (sic) him seventy-five thousand and he asked if could get another \$10,000.00 as he wanted to buy his present vehicle. He said if I needed money he would give me some at any time and he'd always look after me and pay me gradually. I only received \$10,000.00.

The question is can I receive any compensation from Ernie's Estate of the money I made a cheque out to him.

- [19] Mr. Benneke died the next day. In his will he left his estate to a number of grandchildren of his long-time friend, neighbour and travelling companion, Aileen Cameron.
- [20] Mr. Edward Bittner gave evidence on behalf of the plaintiff. He was a long-time friend of Mr. Benneke. Mr. Bittner testified that when Mr. Benneke was moving into his condominium he told Mr. Bittner he needed money, asked his sister for money and got it from her. They had no further discussion about the subject.
- [21] Mr. Kastelein is a Notary Public. His evidence was as follows. He acted for Mr. Benneke in connection with the sale of his house and the purchase of his condominium. He prepared wills for Mr. Benneke in January 1996, August 1998 and July 1999. He also prepared wills for Clara Plouffe in May 1995 and April 1998. When taking instructions for Clara Plouffe's wills Mr. Kastelein did not discuss her assets and liabilities and she did not tell him there was a debt owed by Mr. Benneke. If he had been informed of a debt he would have included a hotchpot clause in the will. When he was preparing Mr. Benneke's will in July 1999, Mr. Kastelein specifically asked Mr. Benneke whether he had any debts and was told there were none.
- [22] Mary Holowaychuk was a long-time friend of Mr. Benneke. She testified that on one occasion, at a lunch, Clara Plouffe bragged that she had more money than she knew what to do with and had given her brother \$70,000. The plaintiff denied having the conversation.
- [23] Aileen Cameron testified as follows. Mr. Benneke told her he was not going to leave her or Clara Plouffe anything in his will. She told him she did not want anything. She had a conversation with Clara Plouffe and told her what Mr. Benneke had said. Clara Plouffe was aware she was not a beneficiary. About three weeks before Mr. Benneke died Ms. Cameron

made a point of asking him whether he owed his sister any money because Clara Plouffe had told her about the money. Ms. Cameron said Clara Plouffe was always talking about it. Mr. Benneke told her he did not owe his sister a penny.

LAW

- [24] The parties are in agreement as to the applicable law. The plaintiff has the burden of proving that the transaction was a loan, not a gift. While corroboration of the plaintiff's evidence that it was a loan is not strictly required the evidence of the plaintiff should be examined with "the most careful scrutiny and indeed at the outset with some suspicion" (*Miller v. Miller Estate* (1987) 14 B.C.L.R. (2d) 42 (S.C.)).

ANALYSIS

- [25] Counsel for the plaintiff submits there is evidence to corroborate the testimony of the plaintiff that she lent her brother \$85,000.
- [26] Counsel for the plaintiff says that over the years Clara Plouffe and Mr. Benneke lent money to each other without documenting the transactions, so the absence of documentation is not surprising on this occasion, even though Clara Plouffe is not unsophisticated in business. On the other hand, on those prior occasions, the amounts were relatively small and were repaid promptly.
- [27] Counsel for the plaintiff argues that around the time of the transaction Mr. Benneke was spending a considerable sum of money and needed the funds. However, the expenditures post-date the advance. This evidence, at best, tends to show that Mr. Benneke spent money because he had it. It is not particularly probative of the nature of the transaction.
- [28] Counsel for the plaintiff submits Ms. Larose's evidence supports his client's contention that the transaction was a loan, not a gift. I do not accept her evidence as corroborative. Ms. Larose became involved in this matter after the plaintiff had advanced her claim. She provided some information to the plaintiff's solicitor. By that time Clara Plouffe had been a client of Ms. Larose for some time. Ms. Larose had no doubt had many discussions with her. In my view, it is probable that Ms. Larose's recollection of what she thought was discussed on at the meeting in April 1992 was as a result of what she was told because of her subsequent involvement.
- [29] Whether the meeting was on April 28th (a Tuesday) or April 30 (a Thursday) it took place before any loan had been made. It is possible that Clara Plouffe spoke in terms of what she anticipated doing but Ms. Larose did not speak of the matter in the future tense. She spoke of the transaction as something that had taken place. With respect, I would be surprised if Ms. Larose could remember what was discussed on an occasion nine years earlier. Her cryptic note does not provide any evidence of the advance, let alone the nature of the anticipated transaction.

- [30] Mr. Bittner's evidence is equally consistent with the transaction being a gift as a loan.
- [31] I am not satisfied there was any legal obligation to repay the money. The evidence, apart from the plaintiff's own testimony, does not support the plaintiff's assertion that she loaned the money to her brother. It is at least as consistent with the notion of a gift.
- [32] In my view the plaintiff gave the money to her brother without expecting or obtaining any legally enforceable agreement to repay it but expecting that if she ever needed financial help her brother would be there. It was, I conclude, a gift accompanied by a moral obligation at most. The plaintiff expected she would die first and her brother would inherit her estate. She was making an advance in anticipation of that expected result. When she learned that she was to survive her brother and that he was not going to benefit her in the will she advanced a claim for "compensation" for the money she had advanced.
- [33] Accordingly, I dismiss the plaintiff's claim.

"B.M. Joyce, J."

The Honourable Mr. Justice B.M. Joyce

These Reasons for Judgment were released from the New Westminster Registry on April 12, 2002 and are date stamped accordingly.

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