

CANADA / JUDGMENT

Rattray Estate (Re)

2019 BCSC 1611

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Supreme Court of British Columbia

DECIDED

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2019 BCSC 1611 Rattray Estate (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Rattray Estate (Re),

2019 BCSC 1611

Date: 20190924

Docket: P28230

Registry: Cranbrook

In the Matter of the Estate of Donald Charles Rattray, Deceased

Before: The Honourable Mr. Justice A. Saunders

Reasons for Judgment

Counsel for the Applicants, M. Rattray and G. Nielsen, Executors of the Estate of Donald Charles Rattray, Deceased:

A. Bird

Counsel for the Application Respondents, C. Rattray and M. Edwards:

R. Miles

The Application Respondent, appearing in person, by telephone:

T. Rattray

Place and Date of Hearing:

Cranbrook, B.C.

June 11, 2019

Place and Date of Judgment:

Cranbrook, B.C.

September 24, 2019

- [1] The applicants, executors of the Estate of Donald Charles Rattray (the "Estate"), who died on December 2, 2017, apply to have this Court discharge them from the office of personal representatives of the Estate, under s. 157 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA], and for an order appointing a substitute personal representative, under WESA s. 159.
- [2] The notice of application as originally filed further sought the applicants' removal as trustees of the Estate, under s. 30 of the Trustee Act, R.S.B.C. 1996, c. 464. However their counsel submitted, and I accept, that they had not yet become trustees, as the debts and liabilities of the Estate have not been cleared: see *Berg Estate (Re)*, (1994), 90 B.C.L.R. (2d) 237 (S.C.).
- [3] The applicants were sisters of the deceased, to whom I will refer by his family name, "Sonny". The application respondent Ms. Edwards is Sonny's surviving former common law spouse. She and Sonny were in a spousal relationship for approximately six years and had a child together, the application respondent Caelen Rattray, now age 19.
- [4] Ms. Edwards proposes to be appointed as substitute personal representative in place of the applicants. Caelen supports her in this.
- [5] Sonny had two sons from a previous relationship, Tanner Rattray and Tyson Rattray. Neither filed a Response to this application. Tanner Rattray filed an affidavit expressing his opposition to the appointment of Ms. Edwards. He appeared by telephone on this application. He expressed an intention to seek legal advice as to his rights.
- [6] For the purposes of this application, it suffices to describe the interests of Ms. Edwards, and Caelen, Tanner and Tyson Rattray, as each being beneficiaries under Sonny's will, to the extent of 25% of the residue, with Ms. Edwards in addition having received a five-year right to occupancy, use, and enjoyment of a residence at 7154 Elwood Drive, Chilliwack, B.C. (the "Residence"). This right of occupancy was subject to her continuing to make payments under a mortgage registered by Sonny against the Residence, in favour of Prospera Credit Union ("Prospera"), and continuing to insure the Residence, pay taxes and water utility charges, and keep it in good repair. Further, the will granted her an option to purchase the Residence, for so long as it was held in trust for her.
- [7] Ms. Edwards' evidence of her living circumstances prior and subsequent to Sonny's death is uncontradicted. Caelen and Ms. Edwards now live in the Residence. Caelen had lived with his mother following her separation from Sonny in 2004, but as of June 2014 Caelen began living primarily with his father. Sonny was diagnosed with ALS in the fall of 2015, and shortly afterwards Ms. Edwards moved in with Sonny to act as his caregiver. When her

employment insurance benefits terminated, Sonny assumed responsibility for the living expenses of Caelen and Ms. Edwards. Ms. Edwards acted full-time in the role of caregiver until Sonny's death in 2017.

- [8] Sonny purchased the Residence in March 2016. Ms. Edwards' evidence is that the Residence was better suited to accommodate the disabilities caused by his illness. I infer that Ms. Edwards resided with Sonny in the Residence continuously until his death, with the exception of periods of respite when she stayed with her mother in Abbotsford, and Sonny was cared for by the applicants.
- [9] Ms. Edwards was the beneficiary of a policy insuring the life of Sonny, which paid her a benefit of, she says, approximately \$100,000. Ms. Edwards' position is that this policy had been taken out to secure Sonny's child support obligations in respect of Caelen, as required by the terms of their 2004 separation agreement. There is no evidence before me either of the specific wording of the separation agreement, nor as to the extent of any unpaid or payable child support amounts. The will provided for Ms. Edwards bringing into account by way of hotchpotch the amount of her life insurance policy benefit, upon the division of the residue of Sonny's estate.
- [10] Ms. Edwards has discharged her obligations in respect of maintenance of the Residence and payment of related expenses. However, on November 14, 2018 Ms. Edwards received notice from Prospera that the death of the mortgagor constituted a default under the mortgage. Prospera filed a foreclosure petition on January 29, 2019.
- [11] Ms. Edwards initially took the position that the executors were required to redeem the mortgage by refinancing, and/or to defend the petition. The executors, however, were unwilling to refinance, and unwilling or unable to defend the foreclosure petition.
- [12] Prospera obtained an order nisi of foreclosure on May 21, 2019, with a six-month redemption period.
- [13] Ms. Edwards now believes she will be able to obtain refinancing if appointed as substitute personal representative. She appends to her affidavit an email to her from a mortgage broker, stating that he foresees no issue with securing appropriate private financing so long as they are able to show that Ms. Edwards is sole executor and can sign for mortgage financing, and that they have removed from title a certificate of pending litigation filed by Caelen.
- [14] By way of explanation for their decision to resign, the applicants cite the circumstances of the foreclosure, and Ms. Edwards' demands. They also cite further factors including alleged animosity or lack of cooperation between them and Ms. Edwards, and a will variation claim filed by Caelen. I do not consider these further factors germane to the present application.
- [15] There is no evidence that any substitute representative would be able to obtain refinancing without providing their personal guarantee of the loan amount.

- [16] There is no evidence of a trust company being willing to fulfill the role of personal representative in the present circumstances.
- [17] Tanner states in his affidavit that he is willing to serve as executor, but not if he is required to loan any money to the Estate, as he has his own mortgage and family to look after. He does not say he is willing to assume a personal liability in the form of a mortgage loan guarantee. Tanner also states the basis of his opposition to Ms. Edwards' appointment:
- I am concerned that if Michelle Edwards, who is not the mother of Tyson or me, becomes the executor, there is nothing to prevent her from selling the house or mortgaging it, and I will no receive any inheritance from my father. In the early 200's, Michelle Edwards borrowed money from my grandmother for a business and never repaid it. I do not have ill-will towards Michelle Edwards, I just have concerns about her being in control of the estate.
- [18] Tanner's allegation of Ms. Edwards' not having repaid a loan to his grandmother is not substantiated, and is denied by Ms. Edwards.
- [19] Correspondence has been exchanged between counsel in which the executors have accused Ms. Edwards of failing to cooperate with them. The accusations have been fully responded to and I can make no finding of any such lack of cooperation.
- [20] I find no basis in the evidence for concern as to the probability of Ms. Edwards fulfilling her obligations as personal representative and trustee according to law, nor that she is unfit to assume this role. Her appointment as substitute representative will enable her to obtain refinancing, which will be the best - and apparently only - means of securing the testamentary intent of providing her with a time-limited right of occupancy.
- [21] I therefore discharge the applicants, and appoint Ms. Edwards in their place.
- [22] The applicants originally sought, in their notice of application, the following additional orders:
6. Directions with respect to the obligations of the personal representative and trustee, whomever it is following this application: as follows:
 - (a) Whether the personal representative and trustee is required to redeem the mortgage in favour of Prospera by lending money to the Estate;
 - (b) Whether the personal representative and trustee is required to defend the foreclosure proceeding brought by Prospera, and whether the lack of estate funds requires the personal representative and trustee to loan money to the estate for that purpose; and,
 - (c) Whether the gift of the five-year tenancy to Edwards abates, and whether the personal representative and trustee has legal authority to sell the real property, due to the Estate's insolvency and inability to pay any expenses until the real property is sold.
- [23] They also seek an order that their costs be paid out of the Estate.

[24] Given the foreclosure, the applicants did not seek (b), but asked for the Courts' directions in respect of (a) and (c). The rationale for these requests is stated in the notice of application as follows:

This is a unique situation where the estate is asset-rich but cash-poor, and the estate lacks the money to fulfil the gift of the five-year tenancy to Edwards, which tenancy expires December 2, 2022.

Edwards has asserted that the executors are required, by their fiduciary obligations, to loan money to the estate to redeem the Prosper mortgage and/or defend the foreclosure petition. The executors are not aware of any authority requiring them to do so. However, to be prudent, and to avoid an allegation of breach of fiduciary duty by Edwards, the executors are seeking directions.

The other question is whether the gift of the five-year tenancy to Edwards abates due to the estate's insolvency, in which case the executors are authorized to sell the real property.

[25] Ms. Edwards' application response stated her opposition to paragraph 6 of the notice of application but did not set out, under Part 5 - Legal Basis, any answer to the issues set out in paragraph 6, or any legal argument respecting same. To the contrary, Ms. Edwards' stated position as regards costs is that this application was unnecessary, as it will be up to the substitute representative, not the present applicants, to determine what applications to the Court for directions might be necessary.

[26] Rule 25-14 of the Supreme Court Civil Rules empowers the Court to give directions in estate cases involving matters of procedure. The issues that the applicants, in paragraph 6, are asking the Court to opine on are not procedural, but rather are matters of substantive law. They are more akin to declarations than directions. A subtle but important distinction between the subject matter of this request for "directions" and a prayer for declaratory relief is that the issues are framed in the notice of application as open-ended questions rather than as affirmative statements, which is how declaratory relief would be framed.

[27] The Court has inherent jurisdiction to provide declaratory relief, but the power to do so "is limited by judicial discretion to refuse to do so where the circumstances so warrant": *Chambers v. The Attorney General of Canada*, 2004 BCSC 854, at para. 20, per Shaw J., citing *Solosky v. The Queen* (1979), 50 C.C.C. (2d) 495 (S.C.C.). More recently, in *Tele-Mobile Company v. British Columbia*, 2013 BCCA 216, Groberman J.A. describe the factors that constrain the Court in exercising this power:

[11] While it is clear that the Supreme Court has broad powers to make declarations of rights even in the absence of live controversies, the power to grant a declaration is discretionary. In general, there is a strong preference toward deciding actual disputes rather than hypothetical ones. The factual components of such disputes place the legal issues in context, and allow a more thorough evaluation of them. The requirement that there be a genuine dispute ensures that judicial resources are devoted to resolving real controversies rather than speculative ones. Further, the presence of a concrete dispute guards against collusive

attempts to obtain a narrow ruling on a specific legal point.

[28] At present, there is no proceeding underway against the current executors alleging breach of fiduciary duty in respect of any alleged failure on their part to redeem the mortgage or defend the foreclosure proceedings. Nor is there any proceeding underway in which the Court is asked to determine if the estate is insolvent, or which is premised on such a state of insolvency. To the extent the notice of application states an issue or issues, those issues have not been effectively joined by the respondents. Without there being specific allegations before the court, the "directions" sought in the notice of application, while they address actual or alleged facts, are only in respect of, at best, inchoate liability. Moreover, the evidentiary record in the present application is scant, and incapable of supporting a binding determination of either set of issues. What has been asked of the Court, in effect, is to provide an advisory opinion so that the parties might better understand their rights and obligation, and the potential consequences of courses of action. That, with respect, is the function of counsel, not the Court.

[29] For those reasons, I decline to offer the "directions" sought.

[30] I order as follows:

- (1) The resignations of Mary-Ann Rattray and Genevieve Nielsen as executors of the Estate of Donald Charles Rattray, deceased, and they are removed as personal representatives of the Estate;
- (2) Michelle Leigh Edwards is appointed as substitute personal representative of the Estate and shall serve as Trustee, according to law;
- (3) All assets, real and personal, of the Estate shall vest in Michelle Leigh Edwards; and
- (4) Mary-Ann Rattray and Genevieve Nielsen shall provide their accounts, including the remuneration sought, to the beneficiaries within 90 days of the date of this order, and in the absence of the approval of the beneficiaries to the accounts, shall apply to court to pass their accounts and fix their remuneration.

[31] Finally, as to costs, an application was necessary given the applicants' position and Ms. Edwards' desire to obtain approval of her appointment in their place. The dilemma facing the parties arises wholly from circumstances beyond the parties' control. The applicants were unsuccessful in seeking directions, but they cannot be faulted for making the attempt, given the situation they have found themselves in, and the request for directions did not substantively lengthen or complicate the proceedings. I find no basis in fact for Ms. Edwards' contention that the applicants ought to have anticipated the likelihood of Prospera seeking to put the mortgage in default when they consented to act as executors, such that they should now be seen as simply having changed their minds, at the Estate's expense. The costs of the applicants and the application respondents, Ms. Edwards and Caelen Rattray, will therefore be borne by the Estate upon final determination of the Estate's assets and liabilities.

"A. Saunders J."

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