

CANADA / JUDGMENT

Rhodes v. Myers

2021 BCSC 2043

COURT

Supreme Court of British Columbia

DECIDED

20 October 2021

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2021 BCSC 2043 Rhodes v. Myers

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Rhodes v. Myers,

2021 BCSC 2043

Date: 20211020

Docket: S14921

Registry: Rossland

Between:

Patti Fern Rhodes, in her personal capacity and as co-executor of the Will and co-trustee of the Estate of Elizabeth Jane Myers, deceased

Petitioner

And

Donald Ray Myers, in his personal capacity and as co-executor of the Will and co-trustee of the Estate of Elizabeth Jane Myers, deceased

Respondent

Before: The Honourable Madam Justice Lyster

Reasons for Judgment

Counsel for the Petitioner:

K. Henry

Counsel for the Respondent:

T. Nesdoly, Articled Student

Place and Date of Trial/Hearing:

Rossland, B.C.

September 28, 2021

Place and Date of Judgment:

Rossland, B.C.

October 20, 2021

- [1] This petition arises in the context of an unfortunate dispute among the four adult children of Elizabeth Jane Myers. Mrs. Myers passed away on April 17, 2020, leaving a will. The petitioner, Patti Rhodes, and the respondent, Donald Myers, who are two of Mrs. Myers' children, were named co-executors of the will and co-trustees of the estate. Mrs. Myers' other two children are Allan Myers and Gayle Myers. The estate was to be divided into four equal shares, each share to be given to one of the four children. I will refer to the four children by their first names.
- [2] Mrs. Myers was 95 years of age at the time of her death. In June 2019, she had been moved, with the agreement of all of the children, from the home she had lived in in Warfield for 65 years, into an assisted living facility. While living there, she fell and broke her hip in late 2019. Patti took her mother to live with her in Alberta in February 2020, where she remained until her death in April. There is evidence, which I shall return to, that in the months and years before her death, Mrs. Myers was experiencing some cognitive decline.
- [3] Even before Mrs. Myers died, there were disputes and disagreements between the children. These disputes and disagreements only increased after their mother died, ultimately leading to this petition.
- [4] In this petition, Patti seeks a number of orders, as follows:
1. An Order that Donald Ray Meyers be removed as the Trustee of the Estate of Elizabeth Jane Myers, deceased, as of the date of this Petition;
 2. A further Order that Donald Ray Myers be removed as the Executor of the Will of Elizabeth Jane Myers, deceased, as of the date of this Petition;
 3. In the alternative, a declaration that Donald Ray Myers be passed over as the Trustee of the Estate of Elizabeth Jane Myers, deceased, as of the date of this Petition;
 4. In the alternative, a declaration that Donald Ray Myers be passed over as the Executor of the Will of Elizabeth Jane Myers, deceased, as of the date of this Petition;
 5. An order that Patti Fern Rhodes be appointed as sole administrator of the Estate of Elizabeth Jane Myers, deceased, as of the date of this Petition;

6. A declaration that the contents of the safety deposit box at the Kootenay Savings Credit Union located in Trail, British Columbia ("KSCU"), registered to Elizabeth Jane Myers, deceased, and Donald Ray Myers, forms part of the estate of Elizabeth Jane Myers;
 7. An order vesting all assets, real and personal, of the Estate of Elizabeth Jane Myers in Patti Fern Rhodes;
 8. An order that Donald Ray Myers facilitate the transfer of property and documents, including the approximate \$60,000.00 held in trust with the law firm of MZA Law in Cranbrook, British Columbia and the keys to the safety deposit box at Kootenay Savings Credit Union registered to Elizabeth Jane Myers, deceased, to Patti Fern Rhodes within 30 days of being removed as executor and trustee;
 9. An order that the RIF Contract [ending in 85] currently held under the Deceased's KSCU member account no. [ending in 84] be closed out and distributed to the named beneficiaries in equal shares;
 10. An order for all necessary consequential account, directions, and inquiries;
 11. An order that Donald Ray Myers indemnify the Estate of Elizabeth Jane Myers for the actual legal costs of the Petitioner in connection with and incidental to this Petition;
 12. In the alternative, an order for the Petitioner's reasonable costs of and incidental to her Petition be paid from the Estate of Elizabeth Jane Myers on a solicitor-client basis; and
 13. Such further and other relief as this Court may deem just.
- [5] In submissions, Patti also sought an order requiring Kootenay Savings Credit Union ("KSCU") to produce account statements for an account into which Gayle transferred \$60,000.00 out of Mrs. Myers' KSCU account number ending in 40.
- [6] In his response, Donald consented to all of the orders sought, with the exception of the order that he indemnify the estate for the actual legal costs incurred by Patti in connection with this petition. Donald's consent was conditional on the following:
- A. That the court orders that the Elizabeth Jane Myers' bolt ring, made for her by her late husband and currently in the possession of Patti Fern Rhodes be given to Allan James Myers in accordance with the wishes of the Deceased.
- B. Alternatively, that the court direct Patti Fern Rhodes to distribute the bolt ring of Elizabeth Jane Myers, made for her by her late husband and currently in the possession of Patti Fern Rhodes, to Allan James Myers upon the distribution of the Estate in accordance with the wishes of the Deceased.

- [7] In view of Donald's consent to the orders sought by Patti, including his removal as trustee and executor, conditional on the bolt ring being given to Allan, it makes sense to consider further the circumstances relating to this ring. It was made for Mrs. Myers by her deceased husband out of a bolt. She never took it off. It clearly has tremendous sentimental value to the children, but no monetary value. Sadly, the bolt ring has been the sticking point in the children being able to resolve the issues related to their mother's estate.
- [8] Donald submits that the court has jurisdiction to make the orders he seeks regarding the bolt ring. He submits it is an asset of the estate. In support of the court's jurisdiction to make orders relating to the bolt ring, Donald points to the fact that Patti has sought an order vesting all assets, real and personal, of the estate in Patti, an order for all necessary consequential accounts, directions and inquiries, and such further relief as this court may deem just. The bolt ring is an asset of the estate, and the court can make orders relating to it. He submits that it is in the estate's best interest to deal with the bolt ring now, in the hope that it will enable the parties to finally resolve all issues related to the estate, without the expenditure of more resources. It is Donald's position that Mrs. Myers always intended Allan to have the bolt ring, and that she lacked the capacity to give it to Patti when Patti says she did so.
- [9] Patti accepts that the court has jurisdiction to deal with the bolt ring, but submits that it ought not to in the context of this petition. Patti's position is that her mother gave her the ring some time in the last months of her life. In order to make orders relating to the ring, the court will have to consider Mrs. Myers' capacity to make a gift, and Patti submits it would be inappropriate to do so on the evidence now before the court. She submits cross-examination will be necessary in order to make the findings necessary. She submits that given the history to date, it is inevitable the parties will be before the court again, and the bolt ring can be dealt with then.
- [10] In my view, the court clearly has jurisdiction to deal with the bolt ring. It is an asset of the estate. Dealing with it now may enable the parties to move forward with concluding the estate without further litigation. Doing so is consistent with the object of the Supreme Court Rules set out in Rule 1-3(1) of securing the just, speedy and inexpensive determination of every proceeding on its merits. Addressing the bolt ring, which has no monetary value, now is proportionate to the amounts involved in this proceeding, the importance of the issues in dispute and the complexity of this proceeding.
- [11] I turn to a consideration of the evidence related to the bolt ring and Mrs. Myers' capacity to give it to Patti in the months preceding her death.
- [12] In his June 30, 2021 affidavit, Donald discusses their father making the bolt ring for their mother, and says she never took it off her finger. He says that their mother told the children many times that she wanted the bolt ring to go to Allan when she died. He says this was such well-known knowledge within the family that he cannot remember when it first came up.

- [13] Donald says that the children had a meeting on September 15, 2018 as a result of Mrs. Myers' declining health. Amongst other things, they talked about what was to be done with her possessions. He says their decisions were influenced both by what each child wanted, and how they knew their parents had wanted possessions to be divided. According to Donald, all of the children knew and agreed during this meeting that their mother wanted the bolt ring to go to Allan when she died.
- [14] Mrs. Myers was wearing the bolt ring when she died at Patti's home. Donald says Patti initially ignored his requests concerning the bolt ring and other items. In the fall of 2019, Patti started repeatedly telling him their mother had given her the bolt ring.
- [15] In his affidavit, Donald stated his willingness to step down as executor and trustee so that the remaining estate issues could be resolved without further struggles between him and Patti. He concluded by stating:
31. Even though I am stepping down, I still want to see that the Bolt Ring is given to Al. The ring is not worth any money, and giving it to Al offers me no benefit, but it is important to me that Mom's wishes are fulfilled.
- [16] Turning to Mrs. Myers' capacity to give the ring to Patti, Donald says in his affidavit that Mrs. Myers was first diagnosed with dementia in May 2018. He recounts a number of incidents between Easter 2019 and February 2020 in which he believes Mrs. Myers' cognitive capacity was adversely affected. For example, he says that in January 2020, after Mrs. Myers broke her hip, Allan and he visited her in hospital, and she did not recognize either of them, repeatedly telling them that her sons were coming later.
- [17] Donald attaches to his affidavit a geriatric consultation report provided by Dr. Leslie Paul. Dr. Paul assessed Mrs. Myers on January 21, 2020, while she was in hospital following her fall. Dr. Paul noted that Mrs. Myers had documented dementia. In terms of her mental status, Dr. Paul wrote that Mrs. Myers was not oriented to time at all and could not tell him she was in a hospital. Under the heading "Assessment", Dr. Paul wrote:
- Elizabeth Myers is a 95-year-old female, currently residing at KBRH following a fall and hip fracture requiring surgery. She has got moderate to advanced dementia, likely a mixed Alzheimer's vascular-type of dementia and is frail and is failing medically. I do not feel she is competent at this point to make her own medical decisions or financial decisions. She could not tell me anything about her financial management. She defers to her children. She maintains that she still lives in Warfield and has no real knowledge of moving to Rosewood. In fact, she does not have any memory of her hip fracture or her subsequent surgery. She keeps repeating that I am 95 years old and I cannot possibly remember this.
- [18] Gayle discusses his views of Mrs. Myers' dementia in his June 30, 2021 affidavit. He agrees Mrs. Meyers was initially diagnosed with dementia in May 2018. He recalls an incident, also discussed by Donald, at Easter 2019, in which Mrs. Myers let some strangers into her house who claimed to be there to fix the furnace at her sons' request, which was not true. When the

RCMP looked into it, Mrs. Myers told the RCMP these men were her sons, which was also not true. Gayle agrees this was a disturbing event, and that it prompted the family to get further medical assessments done.

- [19] In Gayle's view, Mrs. Myers was not aware enough to give an opinion about moving to Alberta when it was discussed in October 2019.
- [20] Gayle attaches to his affidavit an email he wrote to his siblings on September 15, 2018 outlining the results of the meeting held that day. Included are a list of items to be given to each sibling. Among the items Allan was to receive was "Mom ring that Dad build\t for her while overseas", which I understand to be a reference to the bolt ring.
- [21] Patti swore a reply affidavit on July 14, 2021. She did not give any evidence about the bolt ring or her mother's capacity to give it to her. She said, "I do not believe that the within court case is the appropriate proceeding to address the allegations of undue influence and exploitation of an elderly person that have been made against me by the respondent and Gayle". She did attach two notes from Mrs. Myers' family physician, Dr. Miles Smith, dated December 30, 2019 and January 29, 2020. Dr. Smith was supportive of Mrs. Myers living closer to her family with regular family visits, and stated that Mrs. Myers had indicated a preference for same.
- [22] On July 27, 2020, Gayle had sent his siblings a truly extraordinary email, advising them he had removed \$60,000.00 from KSCU account number ending in 40, and had opened his own account with these funds. He wrote that his purpose in doing so:

is to prevent further depletion of these funds due to the inability of the two executors to come to a cooperative solution towards administration of those items previously and currently being discussed. Bluntly put, I am done with the BULLSHIT that has occurred over the past year by one of the individuals receiving this email, and it is time to bring it to an end.

- [23] Gayle went on to write that he would continue to hold the \$60,000.00 until the issues the family was dealing with were concluded. At his discretion, he would gift each sibling their share, likely once all issues were concluded. He would deduct money from the share of anyone who took measures he deemed detrimental to the estate. In particular, he wrote that he would deduct \$500.00 per month from Patti's share until she gave the bolt ring to Allan.
- [24] There were further communications among the siblings in response to Gayle's email. Patti emailed Donald on July 28, 2020, suggesting that they sell Mrs. Myers' house as the estate could no longer afford to maintain it. Donald replied that same day. Amongst other things, he asked her to "supply the information that I have requested, and now for the items which Gayle is now requesting to be given to the rightful person As Gayle has stated if you supply the things asked By his deadline you will receive your share".

- [25] On October 4, 2020, Donald emailed Patti, copied to their siblings. He wrote that if she sent the bolt ring to Allan (and gave a blanket that was then also in dispute to another person), he would agree to set up an estate account. He said that the bolt ring had been promised to Allan many years ago. Patti replied that same day. She wrote, "As for the ring, she gave that to me along a few other possessions you left her with."
- [26] The parties included in their materials a number of with prejudice communications related to their counsels' attempts to resolve the estate issues. In a letter dated May 21, 2021, Donald's counsel asked Patti's counsel if she had the bolt ring, and said that it was Donald's understanding Mrs. Myers intended to have it given to a certain individual. Patti's counsel replied to Donald's counsel that Patti had the bolt ring, and that Mrs. Myers gifted it to her inter vivos.
- [27] In a letter dated June 29, 2021, Patti's counsel wrote that Patti maintained that the bolt ring was given to her inter vivos. She wrote that when the three brothers cleaned out Mrs. Myers' home, Patti received very few items. Mrs. Myers knew this, and chose to give the bolt ring to Patti. Patti was prepared to revisit this issue once she received an inventory of the safe deposit box and had an opportunity to review the account statements relating to the account Gayle put the \$60,000.00 in.
- [28] In a letter dated July 23, 2021, counsel for Donald reiterated his request that the bolt ring go to Allan.
- [29] I find that the evidence before me is sufficient for me to fairly deal with the bolt ring. While it is true that Patti did not to address these issues in her affidavit, that was her choice. She was clearly put on notice of Donald's and Gayle's evidence, and chose not to respond to it.
- [30] I find that Mrs. Myers intended the bolt ring to go to Allan after her death and that this fact was well-known by all four siblings. After Mrs. Myers' death, Patti kept the bolt ring, taking the position that her mother gave it to her. I do not have evidence of what might have been said or done by Mrs. Myers in that connection.
- [31] Regardless of what Mrs. Myers might have said or done in connection with the bolt ring in the last months of her life, I find that she lacked the capacity to make a gift of it. I find the geriatric consultation assessment of Dr. Paul compelling evidence on this point. Dr. Paul's opinion was that Mrs. Myers lacked the capacity to make medical or financial decisions. She was not oriented as to time or place. She simply lacked the capacity to choose to gift the bolt ring, whether as an inter vivos transfer or a testamentary gift.
- [32] In making this finding I wish to emphasize that I am making no finding that Patti behaved improperly towards her mother, and in particular I am not making a finding that she engaged in undue influence or exploitation of her mother. I simply find that her mother was not capable of giving the bolt ring to her at that time.

- [33] The bolt ring, therefore, is an asset of the estate. In order to bring final resolution to this issue, in the hope that further litigation can thereby be prevented, I consider it appropriate to direct Patti, as the executor of the estate, to distribute the bolt ring to Allan upon the distribution of the estate, in accordance with the wishes of Mrs. Myers.
- [34] With the exception of the order related to costs, all of the orders sought by Patti were consented to by Donald, and on my review of the evidence, they are appropriate and should be made.
- [35] In submissions, counsel clarified the order sought regarding closing out the RIF Contract ending in 85 and distributing it to the named beneficiaries in equal shares. Specifically, counsel requested that 75% of the funds be paid to counsel for Donald, in trust, to distribute in equal shares to Donald, Gayle and Allan, and 25% of the funds be paid to counsel for Patti, to distribute to Patti. I consider that clarification of how the funds are to be paid out appropriate, and so order.
- [36] The only order Donald did not consent to was an order that he indemnify the estate for Patti's actual legal costs in connection with and incidental to this petition. He submitted that this petition was entirely unnecessary, and that Patti should bear the costs.
- [37] In *Hollander v. Mooney*, 2017 BCCA 238, the Court of Appeal referred, with approval, to the "modern approach" to costs awards in estate litigation, stating:
- [112] In conclusion, I would emphasize the wisdom of the modern approach to awarding costs in estate litigation, described by Gillese J.A. in *McDougald Estate* at para. 85, that recognizes the need to "restrict unwarranted litigation and protect estates from being depleted by litigation".
- [38] In *McDougald Estate v. Gooderham*, 255 D.L.R. (4th) 435, 2005 CanLII 21091 (Ont. C.A.), referred to by our Court of Appeal, the Ontario Court of Appeal had explained the difference between the traditional and modern approaches as follows:
- [78] The practice of the English courts, in estate litigation, is to order the costs of all parties to be paid out of the estate where the litigation arose as a result of the actions of the testator, or those with an interest in the residue of the estate, or where the litigation was reasonably necessary to ensure the proper administration of the estate. See *Mitchell v. Gard* (1863), 3 Sw. & Tr. 275, 164 E.R. 1280 and *Spiers v. English*, [1907] P. 122. Public policy considerations underlie this approach: it is important that courts give effect to valid wills that reflect the intention of competent testators. Where the difficulties or ambiguities that give rise to the litigation are caused, in whole or in part, by the testator, it seems appropriate that the testator, through his or her estate, bear the costs of their resolution. If there are reasonable grounds upon which to question the execution of the will or the testator's capacity in making the will, it is again in the public interest that such questions be resolved without cost to those questioning the will's validity.

- [79] Traditionally, Canadian courts of first instance have followed the approach of the English courts. While the principle was that costs of all parties were ordered payable out of the estate if the dispute arose from an ambiguity or omission in the testator's will or other conduct of the testator, or there were reasonable grounds upon which to question the will's validity, such cost awards became virtually automatic.
- [80] However, the traditional approach has been - in my view, correctly - displaced. The modern approach to fixing costs in estate litigation is to carefully scrutinize the litigation and, unless the court finds that one or more of the public policy considerations set out above applies, to follow the costs rules that apply in civil litigation. Four cases usefully illustrate this modern approach.
- [85] The modern approach to awarding costs, at first instance, in estate litigation recognises the important role that courts play in ensuring that only valid wills executed by competent testators are propounded. It also recognises the need to restrict unwarranted litigation and protect estates from being depleted by litigation. Gone are the days when the costs of all parties are so routinely ordered payable out of the estate that people perceive there is nothing to be lost in pursuing estate litigation.
- [39] I have considered the conduct of both parties, as well as their siblings, in this matter having come before the court. Donald has at times dug in his heels and taken sometimes unreasonable positions. Patti has been generally significantly more reasonable in dealing with the estate, but pursued this petition when Donald was prepared to consent to everything she sought, provided the bolt ring go to Allan, which she refused to do. Much of the discord can be laid at the feet of a non-party, Gayle, whose conduct in removing the \$60,000.00 from the joint account, and using it to try to pressure Patti to do what he wanted with the estate was unconscionable. Donald acquiesced in Gayle's conduct.
- [40] The question of what costs order to make in these circumstances is difficult. Gayle is not a party, and cannot be ordered to pay costs, despite his significant role in the underlying dispute. Donald and Patti each bear some responsibility for this unnecessary petition being heard. Allan, on the evidence before me, appears not to have played a leading role. Both parties submit that in these circumstances it would be unfair to the estate for it to incur legal expenses, and each says the other should pay costs.
- [41] I have concluded that the most appropriate order in these unfortunate circumstances is for Patti and Donald to each to pay their own costs. Donald had substantial success on the petition, which Patti pressed on with unnecessarily. But Donald's behaviour in dealing with the estate, not least in acquiescing in Gayle's conduct in withdrawing the \$60,000.00 and using it to pressure Patti, was a significant factor in forcing Patti to seek his removal as executor and trustee in the first place. While an imperfect solution, I consider it appropriate for them each to bear their own costs of this petition.

- [42] Finally, I address the order sought by Patti that KSCU produce account statements for the account ending in 42 that Gayle transferred the \$60,000.00 into in July 2020. Those funds were transferred into Donald's lawyers' trust account sometime on or before March 26, 2021. Patti has asked Gayle and Donald for account statements for the period July 2020 to April 2021, but they have not been provided.
- [43] Although not set out in the petition, Patti sought an order requiring KSCU to produce the statements. KSCU and Gayle were both given notice of the petition, and are clearly aware of this issue, but did not have specific notice this order would be sought.
- [44] In the circumstances, and in the interests of efficiency and cost-effectiveness, I consider it appropriate to make the order sought. Patti must promptly serve a copy of the entered order on KSCU and Gayle. KSCU and Gayle will each have the right to apply to change or set aside the order requiring KSCU to produce the account statements within 10 days of service.

"Lyster J."

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