CANADA / JUDGMENT

Ross Estate (Re)

2024 BCSC 1739

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2024 BCSC 1739 Ross Estate (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ross Estate (Re),

2024 BCSC 1739

Date: 20240919

Docket: S31329

Registry: Cranbrook

In the Matter of the Estate of Douglas Stewart Ross, Deceased

Before: The Honourable Madam Justice Lyster

Reasons for Judgment

Counsel for applicants, Lee Ann Hebert and Ashley Hebert:

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J. Lalonde

Place and Date of Hearing:

Cranbrook, B.C.

July 18, 2024

Place and Date of Judgment:

Cranbrook, B.C.

September 19, 2024

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Introduction

[1] This is an application brought by Lee Ann Hebert and her daughter, Ashley Hebert, for the court to decline jurisdiction over a petition brought by the application respondent, Francine Ross. In the petition, Ms. Ross seeks a number of orders related to the will of Douglas Stewart Ross, dated June 9, 2003 (the "Will"), including an order pronouncing the force and validity of the Will and an order confirming her appointment as the executor of the Will.

[2] In their original notice of application, filed December 21, 2022, the Heberts ask this court to decline to exercise jurisdiction over the petition in deference to the Alberta courts and stay the petition. In their amended notice of application, filed July 8, 2024, they sought further relief in the form of an order preserving property owned by Dashley Enterprises Ltd. ("Dashley") and reversing a transfer of shares in Dashley allegedly made by Ms. Ross. As discussed at the hearing of this application, that order is adjourned generally.

Factual background

[3] In order to put the present application in context some factual background is necessary. Mr. Ross died in Vancouver, British Columbia on April 8, 2022. His death was the result of injuries suffered in a car accident on his way to work in Chetwynd, British Columbia.

[4] At the time of his death, Mr. Ross was legally married to Ms. Ross. The crucial underlying facts in dispute between the parties are whether Mr. and Ms. Ross had separated prior to his death, and whether Mr. Ross and Ms. Hebert were living in a marriage-like relationship at the time of his death.

[5] The Heberts say that Mr. and Ms. Ross separated on June 3, 2017, and never reconciled. They say that Mr. Ross and Lee Ann Hebert began a romantic relationship at about that time and that at the time of Mr. Ross' death he and Lee Ann Hebert were in a common-law relationship, living together in Alberta. For her part, Ms. Ross says that she and Mr. Ross worked apart and had some difficulties in their relationship, but that they remained together until Mr. Ross' death. I make no findings about these issues in this decision, which is concerned solely with whether this court should decline jurisdiction over this dispute.

[6] Mr. Ross incorporated Dashley Oilfield Hauling Ltd. on November 4, 1992.

[7] In November 1996, Mr. Ross and Ms. Ross began dating. They moved to Wasa, British Columbia together in or about October 1997. They were married in Skookumchuk, British Columbia on May 13, 2000.

[8] On January 1, 2004, Dashley amalgamated with Dashley Oilfield Hauling Ltd. Ms. Ross became the Vice President/Secretary Treasurer and a director of Dashley. Dashley is incorporated in Alberta, registered extra-provincially in British Columbia, and operates throughout western Canada. Due to the nature of his work, Mr. Ross often worked "away" at remote sites. Dashley is the major asset of the estate; Lee Ann Hebert estimates that its value at the time of Mr. Ross' death was $2.5 million.

[9] In 2009, the Rosses moved from Wasa to Skookumchuk. At the time of Mr. Ross' death, they owned a home in Skookumchuk as joint tenants. Ms. Hebert estimates its value at the time of his death at $800,000.

[10] Before the disputed events regarding Mr. Ross' alleged separation from Ms. Ross and Mr. Ross entering into a relationship with Ms. Hebert, Mr. Ross and Ms. Hebert had been friends for many years, and he was very close to her daughter, Ashley.

[11] Under the Will, made June 8, 2003, Ms. Ross is named as sole executrix. $25,000 was to be held in trust for Ashley in furtherance of her education or to be released to her at the age of 25. All assets of Dashley and Dashley Oilfield Hauling Ltd. were left to Ms. Ross. The family pet "Tucker" would go to Ms. Ross. The Will was handwritten on a will form. It was witnessed by Ms. Ross and one other person.

[12] In or about February 2020, Mr. Ross amended the Will in handwriting, changing the bequest to Ashley to $200,000. The amendment was not witnessed.

Procedural History

[13] After Mr. Ross' death, there was a dispute between Ms. Hebert and Ms. Ross about funeral arrangements for Mr. Ross. For the purposes of this decision, it is not necessary to recount the details of that dispute. Counsel for Ms. Hebert applied for a Limited Grant of Administration ("Limited Grant") in Alberta to deal with funeral arrangements and the preservation of property on May 9, 2022. Counsel for Ms. Ross was copied on the letter applying for the Limited Grant. The Alberta Court of King's Bench made the Limited Grant on May 10, 2022.

[14] On May 20, 2022, counsel for Ms. Ross filed the petition in this court, seeking, among other things, to have the Will proven in solemn form and Ms. Ross' appointment as executor confirmed. The Heberts were provided notice of the petition. The petition correctly notes that the Will does not comply with s. 37 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA], and asks the court to cure the Will under s. 58 of WESA.

[15] On May 30, 2022, Ms. Ross' counsel's Alberta agent filed an application, with supporting affidavits, to set aside, stay or revoke the Limited Grant in Alberta. Ms. Ross obtained a caveat on Mr. Ross' estate in Alberta at the same time. The caveat expired on October 21, 2022, and Ms. Ross has not applied to extend or renew it. I am told that the application to set aside the Limited Grant was adjourned generally by Ms. Ross' Alberta counsel.

[16] On July 13 and 19, 2022, Ms. Ross was questioned on her affidavit in the Alberta proceeding. On September 9, 2022, Ms. Hebert was questioned on her affidavit in the Alberta proceedings. I am told that this can be done as of right in Alberta. Transcripts of both examinations are included in the materials before the court on the present application.

[17] On August 2, 2022, the Heberts filed jurisdictional responses in this court, indicating that they disputed this court's jurisdiction over them and submitted that this court ought not to exercise its jurisdiction over them.

[18] On November 9, 2022, Ms. Hebert applied for a Grant of Administration of the estate in Alberta.

[19] On November 30, 2022, the petition was scheduled to be heard by Justice Tammen of this court. Justice Tammen made a number of orders, including that the petition be converted into an action, with the parties to schedule a two-day hearing to determine if the Will is authentic and represents the testamentary intentions of Mr. Ross. A case planning conference ("CPC") was to be presided over by Tammen J. He ordered that, by attending at the CPC and filing petition response materials, the Heberts were not abdicating their right to argue the court's jurisdiction and they are not attorning to this court's jurisdiction. The Heberts were required to file their response to petition by December 21, 2022.

[20] On December 21, 2022, the Heberts filed their response to petition and the present notice of application, asking this court to decline to exercise its jurisdiction and to stay the petition proceeding.

[21] On January 20, 2023, Tammen J. conducted the CPC, and made directions about the hearing of the Heberts' application.

Analysis

[22] The Heberts apply pursuant to Rule 21-8(2) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 to stay this proceeding on the basis that Alberta is the proper forum to hear this dispute.

[23] As stated in Magid Estate v. Bristol-Myers Squibb Canada Co., 2021 BCSC 632 [Magid] at para. 12, there are two distinct aspects to jurisdiction: territorial competence and forum non conveniens. Those two aspects were distinguished as follows by Justice Iyer, as she then was, in Douez v Facebook, Inc, 2022 BCSC 914:

[19] At the outset, it is important to distinguish between the primary question of whether a court has jurisdiction from the secondary question of whether it ought to exercise the jurisdiction it has. The concepts of territorial jurisdiction (or jurisdiction simpliciter) and subject matter jurisdiction relate to the first question. The concept of forum non conveniens relates to the second. Keeping these two concepts separate is crucial: Club Resorts Ltd. v. Van Breda, 2012 SCC 17 at para. 101 [Van Breda].

[24] Both aspects are in issue in the present case.

Territorial competence

[25] Territorial competence is established when one of the requirements set out in the relevant section of the Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28 [CJPTA] is satisfied. In this case, s. 4 of the CJPTA applies, as this is a proceeding that is not brought against a named person. Section 4 provides:

Proceedings with no named defendant

4 A court has territorial competence in a proceeding that is not brought against a person or a vessel if there is a real and substantial connection between British Columbia and the facts upon which the proceeding is based.

[26] Subsections 10(b) and (c) of the CJPTA apply to the determination of what constitutes a real and substantial connection between British Columbia and the facts on which this proceeding is based, because this proceeding concerns the administration of an estate and a will. They provide:

Real and substantial connection

10 Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between British Columbia and the facts on which a proceeding is based, a real and substantial connection between British Columbia and those facts is presumed to exist if the proceeding

[ ]

(b) concerns the administration of the estate of a deceased person in relation to

(I) immovable property in British Columbia of the deceased person, or

(ii) movable property anywhere of the deceased person if at the time of death the person was ordinarily resident in British Columbia,

(c) is brought to interpret, rectify, set aside or enforce any deed, will, contract or other instrument in relation to

(i) property in British Columbia that is immovable or movable property, or

(ii) movable property anywhere of a deceased person who at the time of death was ordinarily resident in British Columbia,

[27] The Heberts concede that this court has territorial competence with respect to Mr. Ross' immovable property in British Columbia, that is the Skookumchuk property. But they submit that this court lacks territorial competence over Mr. Ross' moveable property, in particular the shares in Dashley, because Mr. Ross was not ordinarily resident in British Columbia at the time of his death. They also submit that Alberta has territorial competence over all aspects of the dispute because Ms. Ross attorned to Alberta jurisdiction by applying to set aside the Limited Grant. They acknowledge that attorning to Alberta jurisdiction would not prevent Ms. Ross from arguing forum non conveniens, citing Magid at paras. 13-14.

[28] I will address that last submission first. Assuming without deciding that Ms. Ross has attorned to Alberta jurisdiction, and that if so that would mean that Alberta has territorial competence, I have been provided with no authority which would suggest that both Alberta and British Columbia could not have territorial competence at the same time. In other words, if Alberta has territorial competence due to Ms. Ross attorning to its jurisdiction, I am not aware of any reason why that would mean British Columbia could not also have territorial competence over this dispute. Indeed, the Heberts concede British Columbia does have territorial competence over Mr. Ross' immoveable assets in this province. I, therefore, need not consider this submission further,

[29] In Stanway v. Wyeth Pharmaceuticals Inc., 2009 BCCA 592 at para. 22, the Court of Appeal explained that:

[22] The presumption of a real and substantial connection in s. 10 is a mandatory presumption with basic facts. The basic facts are those set out in s. 10(a) through (l), which are taken to be proven if they are pleaded. While the presumption is rebuttable, it is likely to be determinative in almost all cases.

[30] Thus, the court must look first to the facts pleaded by Ms. Ross in the petition to determine if the presumption of a real and substantial connection has been established. In the factual basis of the petition, Ms. Ross pleads that Mr. Ross died in Vancouver on April 8, 2022, that she was his surviving spouse, and that they were married on May 13, 2000. She pleads the terms of the Will, signed on June 8, 2003, and altered to increase the bequest to Ashley Hebert in or about 2019/20.

[31] In the legal basis, Ms. Ross pleads that the Will does not comply with s. 37 of WESA, and that in order to have testamentary effect it must therefore be validated by the court pursuant to s. 58 of WESA. In support of her submission that the Will should be validated as expressing Mr. Ross' testamentary intentions, she pleads a number of facts, including: the contents of the Will; the fact the Will was signed by two witnesses; the contents of the Will being consistent with Mr. Ross' statements about his intentions and the estate planning steps he had taken since 2003; the fact he kept the Will in his safe in the family home; and the alteration of the bequest to Ashley Hebert.

[32] This proceeding concerns the administration of Mr. Ross' estate, and the interpretation, rectification or enforcement of his Will. Insofar as Mr. Ross' immovable property in British Columbia is concerned, this court is presumed to have territorial competence. Insofar as Mr. Ross' moveable property is concerned, the petition pleads only limited facts with respect to whether Mr. Ross was ordinarily resident in British Columbia at the time of his death, specifically, that he died in Vancouver, British Columbia. Standing alone, this is not sufficient to establish that Mr. Ross was ordinarily resident in British Columbia at the time of his death, and thus to establish the presumption of territorial competence with respect to his moveable property. It is necessary to turn to the evidence introduced by the parties on this issue.

[33] Before doing so, I note that central issues to be determined in the underlying legal proceeding are whether Mr. Ross and Ms. Ross continued to be a married couple or were separated at the time of his death, and relatedly, whether Mr. Ross was in a marriage-like relationship with Ms. Hebert at that time. For example, if Mr. and Ms. Ross separated in June 2017, then the Heberts submit that pursuant to s. 81 of the Family Law Act, S.B.C. 2011, c. 25, the joint tenancy in the Skookumchuk house was severed, and each of the Rosses had a right to an undivided half interest in it. For her part, Ms. Ross denies that they separated, and takes the position that the Skookumchuk house passed to her as the surviving joint tenant. The question of whether Mr. and Ms. Ross ceased to be spouses is also crucial to whether the gifts to Ms. Ross under Mr. Ross' Will and her appointment as executor are revoked under s. 56 of WESA. There is also the possibility that both Ms. Ross and Ms. Hebert were spouses of Mr. Ross at the time of his death, bringing into play the potential operation of s. 22 of WESA.

[34] However, those issues are not before me for decision on this application. Even if they were, I could not make a conclusion about them on the basis of affidavit evidence alone. Nothing in what I say or conclude about where Mr. Ross was ordinarily resident, for the purposes of this application, should be taken as determining whether Mr. Ross was in a marriage-like relationship with either Ms. Ross or Ms. Hebert at the time of his death, a question which will have to be determined at trial. I have attempted to consider only that evidence that goes to where Mr. Ross was ordinarily resident, and in particular to only consider evidence related to his relationship status so far as it is material to the question of where he was ordinarily resident.

[35] Ms. Ross says that Mr. Ross was ordinarily resident in British Columbia at the time of his death. She relies on the following facts in support of this position. Mr. Ross was born in Comox, British Columbia. She and Mr. Ross began dating in 1996, at which time he was living in Sundre, Alberta, and she was living in Olds, Alberta. They moved to Wasa, British Columbia in October 1997, after he sold his Alberta trucking business. They were married in Skookumchuk, British Columbia on May 12, 2000. They lived together in Wasa until 2009 when they moved to Skookumchuk. She describes their home there as Mr. Ross' dream property.

[36] Mr. Ross prepared and executed the Will at his home in British Columbia. It was stored in the safe at the home in Skookumchuk.

[37] Ms. Ross acknowledges that Mr. Ross maintained an Alberta driver's licence and healthcare card, and registered his vehicle in Alberta. She says he did so for tax purposes.

[38] Ms. Ross describes her and Mr. Ross' working lives at Dashley. She acknowledges that Dashley was registered in Alberta, but notes that it was registered extra-provincially in British Columbia. The corporate record search for Dashley indicates that Mr. and Ms. Ross are its directors and voting shareholders, and their addresses are listed as a post office box in Wasa. Ms. Ross says that Dashley operated from Wasa, and that its main mailing address has always been in British Columbia. She lists Dashley's and Mr. Ross' assets, all of which are located in British Columbia. She says that neither Mr. Ross nor Dashley had any assets in Alberta at the time of his death.

[39] Ms. Ross gives the following examples of items Mr. Ross and Dashley received at their home in Skookumchuk: medications, herbal supplements, accounts payable and receivable for Dashley, and personal and business Canada Revenue documents. She says that she and Mr. Ross had a corporate bank account together until his death, and that all their personal and business expenses were run through Dashley's corporate account. They also opened another Dashley account at a bank in Cranbrook in 2021.

[40] Due to the nature of the work, they generally worked apart, with her in Skookumchuk and Mr. Ross working remotely, often in northern British Columbia. She says that the vast majority of Dashley's work took place in British Columbia, and that Mr. Ross worked at the sites Dashley was working. According to Ms. Ross, in the last eight years of his life, Mr. Ross

was typically away from home 90% of each year. She would sometimes travel with him for work. She says that their relationship suffered due to Mr. Ross' increased workload. In her words, their "relationship stayed strong, but not close in the latter years." According to Ms. Ross, he would come home to their home in Skookumchuk when work allowed.

[41] Mr. Ross was injured on his way to work in Chetwynd, British Columbia on March 31, 2022. He was airlifted to Vancouver General Hospital, where he remained on life support until he died on April 8, 2022. Ms. Ross last spoke with Mr. Ross on or about March 30, 2022. She says he was due to return home from work to Skookumchuk at the end of April.

[42] Ms. Ross says that no one ever told her that Mr. Ross was living with Ms. Hebert in Cochrane, Alberta, and she was not aware that they were doing so while Mr. Ross was alive. She says that Mr. Ross continued to have clothes, boots, hunting gear, fishing gear, firearms, camping gear, paperwork, documents and personal hygiene products at their home in Skookumchuk. She specifically says he spent time with her there on several occasions in 2017 and in 2018, and continued to do so until his death. They also travelled together to a variety of locations in Canada and Mexico in 2017-2020.

[43] The Heberts rely on the following evidence in support of their position that Mr. Ross was ordinarily resident in Alberta at the time of his death. Ms. Hebert says that she first met him in 1983 when he was living in Sundre, Alberta, and that he mostly lived there until he moved to Wasa in 1996-1997.

[44] Ms. Hebert says that Mr. Ross lived in various places where he worked after he left the Wasa home in 2017, including Chetwynd and Dawson Creek, British Columbia and places in Manitoba and Saskatchewan, and that he never moved back to Wasa after he left in June 2017.

[45] Ms. Hebert says that Mr. Ross took some personal effects with him as he moved around and that the remainder of his effects he left at her home in Cochrane, Alberta. She says that he only left big equipment items behind in Wasa. She says he moved all of his personal journals, his work journals from 2019 onwards, his personal work certificates and some of his personal investment documents to Cochrane. He had a mailing address in Sundre and had some mail come to the house in Cochrane. He used Alberta identification, specifically a driver's licence and healthcare card, and had Alberta licence plates on his vehicles.

[46] Ms. Hebert says that Mr. Ross had a common-law interest in her properties in Cochrane and Brazeau County, Alberta. She had sole legal title, but says that he had an interest in those properties due to their common-law status. She says that he had long term plans to live with her in Cochrane, and they discussed buying a property in Alberta because that is where their families were. She says they talked about putting his name on title on her properties in Alberta, but that they did not see any sense in doing so until after he was divorced from Ms. Ross.

[47] Ms. Hebert says that she and Mr. Ross travelled together to a variety of locations in Canada, the United States and further abroad, starting in 2017. She says that after the Rosses separated in June 2017, he slowly began bringing the rest of his personal possessions to her home in Cochrane, including clothing, hunting, fishing and camping gear, and his hockey equipment. She says that after separation, Mr. Ross only lived with her in Cochrane or in lodgings on work projects and never resided with Ms. Ross again. She says whenever he had more than two days off in a row he would return to Cochrane, and that they spent long weekends and holidays together.

[48] I prefer Ms. Ross' evidence to that of Ms. Hebert with respect to matters such as Dashley's operations, where Mr. Ross worked and lived (at least until June 2017), and the location of Dashley's assets. Ms. Ross married Mr. Ross in 2000, and she lived with him in Wasa or Skookumchuk from 1997 at least until 2017. She has been involved in operating Dashley since about 2000, and she has personal knowledge of these matters, whereas Ms. Hebert's evidence on them must be based mostly, if not entirely, on second-hand information.

[49] Clearly, Mr. Ross was ordinarily resident in British Columbia, living with Ms. Ross in Skookumchuk, at least until June 2017. The real question is where he was ordinarily resident after that date, on which the parties take diametrically opposed positions.

[50] The Heberts refer to Carlson v. Phelan Estate, 2016 BCSC 1256 [Carlson] for the principles applicable for determining where a person is ordinarily resident. At para. 73 of that decision, Mr. Justice Walker referred to the decision of Mr. Justice Smith in Parker v. Mitchell, 2016 BCSC 723, who relied on Thomson v. Minister of National Revenue, [1946] S.C.R. 209 (SCC) [Thomson] at 231 for the proposition that a person is ordinarily resident in British Columbia "where 'in the settled routine of his life he regularly, normally or customarily lives'".

[51] At para. 82 of Carlson, Walker J. quoted from the decision of Madam Justice Fenlon, as she then was, in S.R.L. v. K.J.T., 2014 BCSC 597 at para. 30, for the principles governing the determination of ordinary residence:

[30] I now turn to the principles governing the determination of ordinary residence.

a) Preponderance of time spent at a residence is not determinative: Thomson v. Minister of National Revenue, [1946] S.C.R. 209 at 224;

b) A person may be ordinarily resident without being actually resident: Hardy v. Hardy, [1969] 2 O.R. 875 (H.C.J.) at 876;

c) It is where a person regularly, normally or customarily lives his or her customary mode of life as opposed to a special, occasional, or casual residence: Thomson at 224, 231, Hardy at 876-877;

d) It is where a person intends to make a home for an indefinite period; an intention to reside there permanently is not required: MacPherson v. MacPherson (1976), 70 D.L.R. (3d) 564 (Ont. C.A.) at 570; Mahar v. Mahar (1987), 10 R.F.L. (3d) 276, [1987] B.C.J. No. 925 (N.B.Q.B.).

[52] At para. 83 of Carlson, Walker J. cited the following passage from Thomson for the definition of ordinarily resident:

[83] A useful definition of "ordinarily resident" was described by the Supreme Court of Canada in qualitative as opposed to quantitative terms in the longstanding tax case of Thomson (which, as noted above, was relied on in S.R.L.) at 3:

There is no definition in the Act of "resident" or "ordinarily resident" but they should receive the meaning ascribed to them by common usage. When one is considering a Revenue Act, it is true to state, I think, as it is put in the Standard Dictionary, that the words "reside" and "residence" are somewhat stately and not to be used indiscriminately for "live", "house" or "home". The Shorter Oxford English Dictionary gives the meaning of "reside" as being "To dwell permanently or for a considerable time, to have one's settled or usual abode, to live, in or at a particular place". By the same authority, "ordinarily" means "1. In conformity with rule; as a matter of regular occurrence. 2. In most cases, usually, commonly. 3. To the usual extent. 4. As is normal or usual". On the other hand, the meaning of the word, "sojourn" is given as "to make a temporary stay in a place; to remain or reside for a time".

[53] I accept Ms. Ross' evidence that Mr. Ross spent the majority of his time working at remote locations in the latter years of his life. Indeed, it is not contradicted by Ms. Hebert. He cannot be said to have been ordinarily resident at such remote work locations, such as Chetwynd or Dawson Creek, British Columbia. Those remote work locations were not Mr. Ross' ordinary residence in the sense referred to in Thomson. Those were places he worked and lived in on a temporary basis due to the exigencies of his work; they were not where he resided or dwelt in permanently or for a considerable time.

[54] Some of the evidence relied upon by both parties is entitled to little weight in determining Mr. Ross' ordinary residence at the time of his death. For example, it does not matter where his passport was issued. Nor does the fact that he had an Alberta driver's licence or healthcare card. Mr. Ross appears to have kept those documents since the 1980s, throughout the years he was clearly ordinarily resident in British Columbia, living in Wasa and Skookumchuk.

[55] Dashley was incorporated in Alberta, but it was registered extra-provincially in British Columbia, and operated out of Wasa until Mr. Ross' death. Dashley's assets were in British Columbia at the time of Mr. Ross' death.

[56] The evidence establishes that Mr. Ross spent some time in both Skookumchuk and Cochrane between June 2017 and his death in April 2022. It is not clear precisely how much time he spent at either location, but it would have been relatively minimal given that he spent the majority of his time working remotely, and a fairly considerable portion of it travelling with Ms. Ross or Ms. Hebert. He kept some personal effects in both homes. He received some mail at both locations.

[57] The evidence establishes that Mr. Ross owned the Skookumchuk property jointly with Ms. Ross at the time of his death.

[58] Ms. Hebert says that she considered him to have a common-law interest in her Alberta properties, but he was not on title. I do not have evidence of the applicable Alberta law, but I think it is safe to say that whether he had a legal interest in those properties would probably depend upon whether he and Ms. Hebert were in a marriage-like relationship at the time of his death.

[59] Ms. Hebert also says that she and Mr. Ross had long term plans to live together and that he had made an offer on a property in Water Valley, Alberta. When questioned on her affidavit in the Alberta proceedings, she said that this was not a legal offer; just an offer to the owner. She also said that this occurred in the summer of 2018, and that they had rented a barn on that property for three months in 2018, at the end of which time he made the offer. Ms. Ross responds to this evidence in her second affidavit. She says that Mr. Ross was the only person listed on the rental agreement, and she exhibits a copy of the rental agreement to her affidavit. It was for the period May 1 - July 31, 2018. Mr. Ross is the sole signatory. She further says that for the first month of the rental period she and Mr. Ross were in Mexico together; for the second month, Mr. Ross was at home in Skookumchuk with her for two weeks; and he returned to work on or around July 1, 2018. She also says that Mr. Ross was working in Manitoba sometime around June 2018, and in support of this she attaches as an exhibit a June 7, 2018 letter from the Manitoba Workers Compensation Board, confirming his personal coverage in that province effective June 7, 2018. The evidence about the rental and offer on the barn does not tend to support that Mr. Ross was ordinarily resident in Alberta.

[60] Both Ms. Ross and Ms. Hebert give evidence that Mr. Ross intended to live with them in the future, had he not passed away. Ms. Hebert says they had long term plans to live together. Ms. Ross says that when she last spoke with Mr. Ross on March 30, 2022, they decided they would not pursue the separation and divorce and that Mr. Ross would be coming home to Skookumchuk at the end of April 2022. She says they planned to take a trip together to Vancouver Island in May to celebrate their anniversary and her birthday.

[61] The evidence is obviously equivocal with respect to Mr. Ross' future plans. It is also entirely subjective, depending entirely on Ms. Ross and Ms. Hebert's evidence about what they understood his plans to be. On the evidence before me, I think it is probable that both Ms. Ross and Ms. Hebert honestly believed that Mr. Ross intended to live with them in the

future, in British Columbia or Alberta as the case may be. He may have been telling each of them what they wanted to hear. It is also entirely possible that Mr. Ross himself did not have a settled intention, at the time of his death, as to where he would live in the future. In the circumstances of this case, given the state of the evidence about Mr. Ross' future plans, I place little weight on either Ms. Ross' or Ms. Hebert's evidence about that issue.

[62] Considering the evidence relevant to this issue as a whole, I find that Mr. Ross was ordinarily resident in British Columbia at the time of his death. He owned the house in Skookumchuk jointly with Ms. Ross. That house was his usual or settled abode. It was the only residential property to which he had legal title. It is where his business, Dashley, was operated from. It may be that, had he not sadly died in April 2022, he would have changed his ordinary residence to Alberta. But on the evidence before me, I find that he did not have a settled intention to do so. In this regard, I have considered the email correspondence between Ms. Ross and Mr. Ross related to the separation and divorce that were under discussion, and note that it was an open question whether, assuming the separation and divorce were finalized, he would retain ownership of the Skookumchuk property. Ms. Hebert's evidence about their plans to buy property in Alberta or for her to put him on title to her property was speculative: it had not yet come to fruition, and might not ever have done so.

[63] As a result of this conclusion, I find that this court has territorial competence over this proceeding. The court's territorial competence over the immoveable property was properly conceded by the Heberts, and given my finding that Mr. Ross was ordinarily resident in British Columbia at the time of his death, a real and substantial connection between British Columbia and his moveable property is presumed. That presumption has not been rebutted.

Forum non conveniens

[64] Where, as here, the court has determined that it has territorial competence over the proceeding, the second question to be addressed is forum non conveniens. Section 11 of the CJPTA codifies the common law of forum non conveniens in the following terms:

Discretion as to the exercise of territorial competence

11 (1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.

(2) A court, in deciding the question of whether it or a court outside British Columbia is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including

(a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,

(b) the law to be applied to issues in the proceeding,

(c) the desirability of avoiding multiplicity of legal proceedings,

(d) the desirability of avoiding conflicting decisions in different courts,

(e) the enforcement of an eventual judgment, and

(f) the fair and efficient working of the Canadian legal system as a whole.

[65] As stated in Tomelleri v. Trisura Guarantee Insurance, 2018 BCSC 230 at paras. 6-7, once territorial competence has been established, the party seeking the stay must establish that their preferred forum is "clearly more appropriate". At para. 6, Justice Myers cited Van Breda v. Village Resorts Ltd., 2012 SCC 17 [Van Breda] at para. 109 for the proposition that "the normal state of affairs is that jurisdiction should be exercised once it is properly assumed".

[66] I turn to a consideration of the factors set out in s. 11 of the CJPTA to determine if this court should decline to exercise its territorial competence over this proceeding on the basis that Alberta is a clearly more appropriate forum.

(a) Comparative convenience and expense for the parties and their witnesses

[67] The comparative convenience and expense for the parties and their witnesses is a relatively neutral factor in this proceeding. Ms. Ross lives in Skookumchuk, British Columbia, just north of Cranbrook, and Ms. Hebert lives in Cochrane, Alberta, located between Calgary and Banff. The Heberts' counsel are in Calgary and Ms. Ross' counsel is in Cranbrook, where this proceeding was filed. According to Google Maps, it is just over a four-hour drive between Calgary and Cranbrook. Given the size of both provinces, and the distances between cities, that is not a particularly lengthy distance. There are witnesses in both provinces. While the party who does not reside in the forum where this proceeding is eventually heard will be inconvenienced, the inconvenience is not significant, given the relative proximity of the two locations.

[68] In this connection, the Heberts submit that Ms. Ross has attorned to Alberta's jurisdiction by filing the application in the Alberta court to set aside the Limited Grant, and being questioned and questioning Ms. Hebert in that proceeding. This point was not fully argued before me; for example neither party provided any caselaw about the significance of attornment to this analysis. Assuming without deciding that Ms. Ross did attorn to Alberta's jurisdiction by applying to set aside the Limited Grant, I do not find it adds to the comparative inconvenience analysis.

(b) the law to be applied in the proceeding

[69] The question of what law is to be applied will ultimately be very important in this proceeding. There is no dispute that the Will does not comply with s. 37 of WESA in that the amendment increasing the bequest to Ashley was not witnessed. Further, Ms. Ross was one of the two witnesses to the Will, which renders the gifts to her void pursuant to s. 43(1)(a) of WESA unless the court declares it not void pursuant to s. 43(4).

[70] In British Columbia, ss. 58 and 59 of WESA grant the court the power to rectify a will that does not comply. Counsel advised the court that there is no equivalent power under Alberta law, so the amendment could not be rectified if Alberta law is to be applied. Counsel further advised that under Alberta law, the Will would be void because Ms. Ross witnessed it.

[71] If Alberta law is applied, and the Will is therefore invalid, Mr. Ross would have died intestate. The Heberts' counsel advises that under Alberta law, Ms. Hebert would be Mr. Ross' spouse and would then be the administrator of the estate. Counsel further advises that Ms. Ross would still have rights in Alberta as a separated spouse of the deceased, and could apply for maintenance and support and division of property. The Heberts' counsel advises that the law on these issues is very similar in Alberta and British Columbia, but the court was not provided with any applicable Alberta law.

[72] Ms. Ross submits that British Columbia law is to be applied and the Heberts submit that Alberta law is to be applied, at least with respect to the moveables in Mr. Ross' estate. In support of their submission, the Heberts rely on David v. Foote Estate, 2011 ABCA 1. They submit that Mr. Ross had acquired a domicile of choice in Alberta, and that means that Alberta law will govern the administration of his estate. They acknowledge that with respect to immoveables, the applicable law is the law of lex situs, that is British Columbia, but submit that that could be addressed through a Limited Grant of Administration over the Skookumchuk home. Ms. Ross submits that British Columbia law should apply because the Will was made in accordance with the laws of British Columbia, Mr. Ross was residing in British Columbia at the time the Will was made, and Mr. Ross continued to reside in British Columbia until his death. She submits that this position is supported by the Conflict of Laws Rules for Trusts Act, R.S.B.C 1996, c. 65 [CLRTA]. Section 3(3) of the CLRTA provides that if the settlor has not chosen the law to govern the trust, the trust is governed by the laws with which it is most closely connected. The Heberts submit that the CLRTA does not apply, but no authority was provided with respect to the applicability of the CLRTA.

[73] Like Myers J. in Tomelleri at para. 10, I do not consider it necessary or appropriate to decide on this application what the applicable law will be. The issue was not fully developed in submissions, and the resolution of the question of Mr. Ross' domicile requires viva voce evidence. Whatever law is ultimately determined to be applicable, the Alberta court would be able to apply British Columbia law, and the British Columbia court would be able to apply Alberta law.

(c) the desirability of avoiding multiplicity of legal proceedings

(d) the desirability of avoiding conflicting decisions in different courts

[74] In my view, the factors of avoiding a multiplicity of legal proceedings and avoiding conflicting decisions favour this court exercising its jurisdiction. A Limited Grant was obtained in Alberta on May 11, 2022, but it was just that, a Limited Grant, and the Heberts returned it when they subsequently applied for a Grant of Administration. This petition was filed in British Columbia on May 20, 2022. The parties appeared before Tammen J. on

November 30, 2022, at which time the court made a number of orders with respect to how it would proceed. The Heberts filed this application on December 21, 2022. There have been a number of unfortunate delays in this application being heard, with this court finally hearing it only on July 18, 2024.

[75] Meanwhile, Ms. Hebert applied for a Grant of Administration of Mr. Ross' estate in Alberta on November 20, 2022. On June 17, 2024, the Alberta court adjourned that application pending the outcome of this proceeding. If this court decides to exercise its jurisdiction, it would appear likely that the Grant of Administration applied for in Alberta would not proceed, thus avoiding any duplication of proceedings or decisions.

[76] The Heberts submit that there is a danger of conflicting decisions arising out of an application Ms. Hebert filed in the Alberta court with regard to Ms. Ross transferring Mr. Ross' shares in Dashley to herself. I was provided a copy of the originating application, which I am told was served on Ms. Ross on July 27, 2024. The application indicates that Ms. Hebert was seeking a number of orders with respect to the shares, which she says are estate assets, and removing Ms. Ross from any position in Dashley. That application was tentatively set to be heard on July 22, 2024, following the hearing of this matter. I do not know what the outcome was, although I requested counsel for the Heberts to advise the Alberta court of the status of this proceeding. Given the relative status of this proceeding and that application, the potential for any duplication of proceedings and orders arising from it is hypothetical at best.

(e) the enforcement of an eventual judgment

[77] This is not an issue in this case.

(f) the fair and efficient working of the Canadian legal system as a whole

[78] In my view, the fair and efficient working of the Canadian legal system as a whole favours this court exercising its jurisdiction. Mr. Ross passed away in April 2022. This petition was filed shortly thereafter in May 2022. While this proceeding has been unfortunately stalled due to delays in this application being heard, it is further along than Ms. Hebert's application in Alberta, with Tammen J. having made a number of case management orders that will expedite the eventual resolution of this dispute. I do not accept the Heberts' submission that the Alberta proceeding is further along because the Will would be invalid there. The applicable law to be applied has not been determined, regardless of in which forum the case is heard.

[79] As stated in Van Breda at para. 109, the normal state of affairs is that jurisdiction should be exercised once it is properly assumed. The Heberts have not met their burden of showing that Alberta would be a more appropriate forum, let alone the clearly more appropriate forum.

Conclusion

[80] For these reasons, I dismiss the Heberts' application to stay this petition.

"L.M. Lyster J."

LYSTER J.

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