

CANADA / JUDGMENT

Simard v. Simard Estate

2022 BCSC 2137

COURT

Supreme Court of British Columbia

DECIDED

24 February 2022

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2022 BCSC 2137 Simard v. Simard Estate

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Simard v. Simard Estate,

2022 BCSC 2137

Date: 20220224

Docket: S18364

Registry: Duncan

Between:

Anthony Charles Simard, Karen Lee Simard and Kathleen Ann Simard

Plaintiffs

And

Julie Marie Hall, Personally and as

Executrix of the Estate of Verna Marie Simard, Deceased

Defendant

Before: The Honourable Justice Fleming

Oral Reasons for Judgment

Re: Costs

(In Chambers)

Counsel for the Plaintiffs

appearing via videoconference:

R.B. McDaniel

Counsel for the Defendant

appearing via videoconference:

A. Berns

Place and Date of Trial:

Victoria, B.C.

December 3, 2021; and

February 24, 2022

Place and Date of Judgment:

Victoria, B.C.

February 24, 2022

- [1] THE COURT: On September 21, 2021, I issued reasons for judgment in this action indexed as 2021 BCSC 1836.
- [2] The parties are the children of Verna Simard, who died in February 2018.
- [3] Taking the position they were substantially successful, the plaintiffs apply for an order that the defendant, Julie Hall, in her personal capacity pay their costs assessed at Scale C or more than ordinary difficulty. Ms. Hall disputes their assertion of substantial success and argues that her costs and theirs should be paid by the estate, suggesting the litigation was at least partially due to Verna's failure to document her intention.
- [4] The primary issue in the case itself was whether Ms. Hall held some or all of the assets she received from Verna before and after her death on a resulting trust for the estate. The plaintiffs also claimed undue influence.
- [5] Ultimately, I concluded that Ms. Hall had failed to rebut the presumption of resulting trust in relation to the most valuable of Verna's assets, three real properties referred to as the Shawnigan Lake Properties, as well as some bank accounts and two Registered Retirement Investment Funds ("RRIFs").
- [6] With respect to Verna's other valuable asset, her investment account, I was satisfied by the evidence of her investment broker that Verna intended to gift the account to Ms. Hall.
- [7] Ms. Hall's credibility was a significant contested issue. For several reasons I found her and some of her witnesses, including Karly Dyke, the current executor of Verna's estate, not credible. My concerns about Ms. Hall's credibility, discussed at paras. 19 to 24 of my reasons, were particularly serious.

Legal Framework

- [8] Rule 14-1(9) of the Supreme Court Civil Rules [Rules] requires that costs be awarded to the successful party unless the Court orders otherwise.
- [9] Success in this context means substantial success. In *Fotheringham v. Fotheringham*, 2001 BCSC 1321, Justice Bouck describes substantial success as 75% or better:
- [45] Gold now seems to say that substantial success in an action should be decided by the trial judge looking at the various matters in dispute and weighing their relative importance. The words "substantial success" are not defined. For want of a better measure, since success, a passing grade, is around 50% or better, substantial success is about 75% or better. That does not mean a court must descend into a meticulous mathematical examination of the matters in dispute and assign a percentage to each matter. Rather, it is meant to serve as a rough and ready guide when looked at all the disputed matters globally.
- [10] Justice Bouck also prescribed a four-step inquiry for determining whether one party was substantially successful, and if so, whether costs should be awarded at para. 46:

Based on the above interpretation of Rules 57(9), 57(15) and Gold, a decision to award or not award costs after a trial might follow a four step inquiry.

1. First, by focusing on the "matters in dispute" at the trial. These may or may not include "issues" explicitly mentioned in the pleadings.
 2. Second, by assessing the weight or importance of those "matters" to the parties.
 3. Third, by doing a global determination with respect to all the matters in dispute and determining which party "substantially succeeded," overall and therefore won the event.
 4. Fourth, where one party "substantially succeeded," a consideration of whether there are reasons to "otherwise order" that the winning party be deprived of his or her costs and each side then bear their own costs.
- [11] *Gold v. Gold*, [1993] B.C.J. No. 1792 (C.A.) at para. 20, identified other factors to be considered at the fourth stage including "hardship, earning capacity, the purpose of the particular award, the conduct of the parties in the litigation, and the importance of not upsetting the balance achieved by the award".
- [12] If a court order is made under s. 2(1) of Appendix B to the Rules, the Court may fix the scale under which costs will be assessed. Section 3 identifies the factors to consider in fixing the appropriate scale, which include:
- (3) In fixing the appropriate scale under which costs will be assessed, the court may take into account the following:
 - (a) whether a difficult issue of law, fact or construction is involved;

- (b) whether an issue is of importance to a class or body of persons, or is of general interest;
- (c) whether the result of the proceeding effectively determines the rights and obligations as between the parties beyond the relief that was actually granted or denied.

[13] In estate proceedings, traditionally the approach was to order the costs of all parties paid out of the estate unless the losing party's position was obviously unwarranted.

[14] This approach has been displaced by the application of the general rule that costs follow the event. The Court retains a discretion, however, to follow the traditional approach, which typically occurs where the conduct of the testator has forced the parties into litigation.

[15] In *Jung v. HSBC Trust Company (Canada)*, 2007 BCSC 1740, Justice Silverman explained the current approach at para. 106:

[106] The case law in estate proceedings supports the following general approach:

1. The costs of and incidental to a proceeding will follow the event unless the court otherwise orders.
2. If the cause of the litigation originated from the conduct or errors of the testator (i.e., unclear wording or validity of the will), then the costs of all parties will generally be paid from the estate on a full indemnity basis.
3. If there were circumstances which provided reasonable and sufficient grounds to have brought the action relating to questions of capacity or allege undue influence or fraud, the court will not normally make an order for costs against the unsuccessful party.
4. In an action under dependent relief legislation (i.e., where the proceedings are adversarial in nature and are not brought about by the actions of the testator), costs follow the event.
5. All costs awards are subject to the court's discretion and an overriding test of reasonableness.

[16] As the plaintiffs point out, defendants have been ordered to pay costs personally in a number of resulting trust cases where the plaintiff has been successful.

Discussion

[17] My first task is to determine whether the plaintiffs were the substantially successful party with reference to the four-step inquiry established in *Fotheringham*.

[18] Addressing steps one through three, the main substantive matter in dispute was Verna's intention when she transferred various assets to Ms. Hall, and related to this, whether Ms. Hall had rebutted the presumption of resulting trust.

[19] The plaintiffs readily acknowledged their estrangement from Verna and Ms. Hall and consequently, their lack of awareness of the circumstances surrounding the impugned transfers and even the transfers themselves.

- [20] Again, as I have indicated, credibility was also a significant issue. My serious concerns about Ms. Hall's evidence arose from many different aspects of her testimony in the context of the evidence as a whole.
- [21] Although less material and not contested, in contrast I found the evidence of the plaintiffs and their witnesses to be credible.
- [22] With respect to the assets other than Verna's investment account, Ms. Hall relied on a number of vague and poorly identified hearsay "statements" made by Verna to her and several others in an attempt to establish Verna's intention to gift the assets to her, without addressing the application of the principled exception.
- [23] With respect to the transfer of the Shawnigan Lake Properties, Ms. Hall and another witness provided evidence about a written agreement or document. At para. 219 of my reasons, I expressed being highly suspicious of Ms. Hall's testimony that she had been unable to find the document, and concern about the significant discrepancy between her evidence and the evidence of the other witness regarding the circumstances in which that witness was apparently asked to witness the signatures of Ms. Hall and Verna. Ms. Hall also provided irreconcilable accounts regarding the nature of the transfer itself as between her original pleadings, her discovery evidence, and her evidence at trial.
- [24] Again, Ms. Hall was successful in establishing that Verna gifted her the investment account, the second most valuable of Verna's assets, based largely on the evidence of her investment broker.
- [25] As indicated, the plaintiffs also claimed the transfers were a result of undue influence. During their testimony they described Ms. Hall as essentially omnipresent whenever they saw or attempted to have contact with Verna before and during the onset of the estrangement.
- [26] There was a great deal of evidence adduced about family history and the parties' relationships with Maurice Simard, Verna, and each other before and after he died.
- [27] The evidence also included medical and hospital records about significant health issues for Verna and their impact on her cognitive function starting in 2018. Another of my concerns about Ms. Hall's evidence arose from contradictions between those records and her testimony about Verna's cognitive capacity during that period.
- [28] In closing submissions, the plaintiffs confined their claim of undue influence to asset transfers that occurred after Verna's health deteriorated in 2018. Ms. Hall argues that she was required to spend significant time addressing their original claim in cross-examination of the plaintiffs and direct examination of her witnesses. I disagree. Each of the plaintiffs and the defence witnesses were asked some but not many rather pro forma questions relevant to undue influence.

- [29] In any event, I view the claim of undue influence as reasonably brought given the transfers, the timing of the estrangement, Ms. Hall's divisive and frankly manipulative behaviour before and during that period, my concerns about her evidence generally and specifically regarding Verna's cognitive abilities from 2018 onward, as well as the steps Ms. Hall took after Verna's death including, for example, failing to contact or notify the plaintiffs about her memorial service or her Catholic burial.
- [30] Assessing the weight and importance of the matters in dispute, and engaging in a global determination in deciding whether the plaintiffs were substantially successful, I am satisfied they were.
- [31] Turning to the fourth consideration, that is, whether there are reasons to otherwise order that the plaintiffs should be deprived of their costs and each side should bear their own costs, I note that none were proposed by Ms. Hall. In any event, I can see no reason that would justify depriving the plaintiffs of their costs.
- [32] As I have indicated, Ms. Hall has also argued the parties' costs should be paid out of the estate based on the suggestion that the cause of the litigation was Verna's failure to make her intentions clear. I return to the fact that it was both Verna and Ms. Hall who severed ties with the plaintiffs. In my reasons, I concluded that Ms. Hall's divisiveness played a role, if not a significant role, in the estrangement which occurred at a time when Verna was vulnerable to her negative influence.
- [33] I would also highlight that Verna may well have documented her intention with respect to the transfer of the Shawnigan Lake Properties, bearing in mind my doubts about Ms. Hall's failure to locate a written agreement or document prepared for this purpose.
- [34] The other important explanation for any lack of documentation is Verna's trust and faith in Ms. Hall to act in accordance with her wishes. In these circumstances, it is my view it would be wholly unreasonable to effectively deprive the plaintiff of the benefit of their substantial success by exercising my discretion to order costs payable from the estate.
- [35] Turning to the final question of whether the plaintiffs' party and party costs should be assessed at Scale C, based on the factors identified in s. 3, I am not satisfied this was a matter of more than ordinary difficulty and therefore order the plaintiffs' costs to be assessed at Scale B.
- [36] Those are my reasons.
- [37] CNSL A. BERNES: My Lady, I understand my friend has uploaded a draft order from this morning. Him and I are in agreement on those terms and just have it there for your review in case anything arises. And sorry, I should have said Madam Justice.
- [38] THE COURT: That's okay. It's a hard transition for everybody. Okay. I just have to find the file.

- [39] CNSL R. B. McDANIEL: It was uploaded to the FTS server at about 3:30. It's already been received by Martine, the clerk.
- [40] THE COURT: Okay. I must confess I am not an FTS expert. So I am just -- for some reason my directory is not showing me that option.
- [41] CNSL R. B. McDANIEL: I'm wondering if using old-fashioned technology Martine could email you what we emailed her?
- [42] THE CLERK: I was just going to suggest that. I am going to forward it to you right now, Madam Justice.
- [43] THE COURT: Thank you.
- [44] THE CLERK: I have just forwarded it, Madam Justice. I haven't made any comments. I have just forwarded the email itself with the attachment.
- [45] THE COURT: Yes, okay. Here we are.
- [46] CNSL A. BERNS: And just by way of background a bit, my friend and I only had to have discussions on item, para. 5. We were fully in agreement just by exchange of emails on 4, and we arrived at that awarding for para. 5.
- [47] THE COURT: Yes, that looks fine to me. Thank you.
- [48] CNSL R. B. McDANIEL: So we are agreed on this. We will endorse it, forward it to the registry for entry.
- [49] THE CLERK: And Madam Justice, I will attach that draft order as minutes to enter into the system for the registry to compare?
- [50] THE COURT: Very good. Thank you. All right. Thank you, Counsel. Thank you, Madam Clerk.
- [51] CNSL A. BERNS: Thank you, Madam Justice.
- [52] CNSL R. B. McDANIEL: Thank you, Madam Justice.
- [53] THE CLERK: Order in Court.

"Fleming J."

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