
CANADA / JUDGMENT

Stewart v. Stewart

2011 BCSC 774

COURT

Supreme Court of British Columbia

DECIDED

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2011 BCSC 774 Stewart v. Stewart

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Stewart v. Stewart,

2011 BCSC 774

Date: 20110614

Docket: S094352

Registry: Vancouver

Between:

Joseph Walker Stewart

Plaintiff

And

Sangeeta Khosla, Executor of the

Estate of Earl Clark Stewart, Deceased

Defendant

Before: The Honourable Mr. Justice Butler

Reasons for Judgment

Counsel for the Plaintiff:

Robert Kasting

Counsel for the Defendant:

Sikander Visram

Place and Date of Hearing:

Vancouver, B.C.

April 12, 2011

Place and Date of Judgment:

Vancouver, B.C.

June 14, 2011

- [1] Joseph Stewart ("Joseph"), is the son of Earl Clark Stewart (the "deceased"), who passed away in British Columbia on December 18, 2008. Joseph is now 34 years old. He was born in and continues to reside in Mississippi. He had an impoverished childhood. The deceased abandoned Joseph and his mother, Jean Stewart, in early 1977 when Joseph was six months old. Ms. Stewart suffered a heart attack, the first of many, shortly after the abandonment. She was not able to work and so she and Joseph lived on government disability payments.
- [2] Ms. Stewart obtained a divorce decree from the Chancery Court of Jackson County, Mississippi on March 23, 1978. Pursuant to the decree, the deceased was required to pay \$150 per month for child support for Joseph. A Child Support, Child Custody and Property Settlement Agreement attached as an exhibit to the court order confirmed the agreed payment of child support in the amount of \$150 per month. The deceased made a few payments pursuant to the order in 1980 and 1981. However, he left Mississippi and made no child support payments after 1981.
- [3] In 1991, Ms. Stewart located him in British Columbia. By that time the child support arrears exceeded \$20,000. She brought proceedings in Mississippi to enforce the arrears and to find the deceased in contempt of court. The deceased retained counsel and entered a limited appearance in the Mississippi proceedings. On September 18, 1992, the court found the deceased in contempt and ordered that he pay \$26,080.62 for arrears which included child support, medical bills and interest (the "1992 Order"). The court found that there was a material change in circumstances and increased the ongoing child support payments to \$135 per week plus any medical and dental expenses. The 1992 Order also contained the following provision:
- The defendant [the deceased] is further required to maintain an insurance policy on his life in the amount of \$100,000 and to name the minor child born of this marriage [Joseph] as sole beneficiary on the policy and to keep the policy unencumbered.
- [4] The deceased continued to ignore his support obligations. He did not satisfy the judgment for arrears nor pay ongoing child support for Joseph. Ms. Stewart made inquiries to try to enforce the 1992 Order in British Columbia but was advised in February 1994 by the Mississippi Department of Human Services that British Columbia was not a reciprocating

jurisdiction for the enforcement of support orders. She was unable to afford private counsel in British Columbia to pursue her case in this province. She took no further steps to enforce the order after that date. As she stated in her affidavit, she abandoned her hopes of obtaining child support payments from the deceased. However, she "held onto the belief, however slight, that ... [the deceased] would abide by that part of the Order of the Chancery Court that required him to keep a life insurance policy for Joseph." Joseph reached the age of majority in Mississippi on August 26, 1997.

- [5] The deceased left a will dated April 4, 2008. A grant of letters probate was made to the executrix, Sangeeta Khosla on April 2, 2009. The deceased's estate (the "Estate") has assets of approximately \$150,000. The deceased's second wife predeceased him. The beneficiaries of the Estate are three children from his second marriage and three stepchildren. As stated in clause 7 of the will, he left nothing to Joseph and another child because:

... they withdrew from me during my life and I have had no contact with them for approximately fifteen (15) to twenty (20) years. Most of my current assets have been obtained during my current marriage and long after last contact with them. I do not believe it is right for them to financially benefit from my death simply as a result of my being their natural parent.

- [6] Ms. Khosla cleaned up, repainted and recarpeted the deceased's house to make it ready for sale. In the course of that work, she cleaned out all of his old papers. When Joseph learned that his father had died, he contacted Ms. Khosla to determine if the deceased had purchased a life insurance policy as required by the 1992 Order. Ms. Khosla was unable to locate any policy and is unable to determine if the deceased purchased such a policy. Joseph and Ms. Stewart made further inquiries to attempt to locate a life insurance policy naming Joseph as a beneficiary. They found nothing to suggest that the deceased ever purchased such a policy.
- [7] In light of the deceased's apparent breach of the 1992 Order, Joseph brought these proceedings by petition for a declaration that he is a creditor of the Estate "in the full value of the obligation of the deceased to fund life insurance to the benefit of [Joseph], being \$100,000 plus interest from the date of death." He also seeks judgment against the Estate for that sum.
- [8] Following an order that the proceeding be set for trial, counsel for Joseph conducted examinations for discovery. The parties then agreed that the case is suitable for determination by way of a summary trial pursuant to R. 9-7. I agree that the case is appropriate for adjudication by way of summary trial.

Joseph's Position

- [9] Joseph argues that a fiduciary obligation arises when a person is obligated to maintain an individual as a beneficiary of a life insurance policy, whether by court order or agreement. As a result of the 1992 Order, Joseph says the deceased had a fiduciary obligation to purchase and maintain a policy naming him as beneficiary. The deceased breached that obligation

and, as a result, Joseph has suffered damages in the amount of the policy that should have been available to him. He argues that the law in British Columbia is settled regarding his right as a beneficiary to enforce his claim against the Estate.

- [10] Joseph further argues that the obligation to maintain the insurance policy was not extinguished when Joseph reached the age of majority. He says it was an independent obligation that continued after the deceased's obligation to pay child support ceased. For that proposition he relies on the decisions in *Adams v. Adams Estate*, 2001 ABQB 173 and *Turner v. DiDonato*, 2009 ONCA 235.
- [11] Joseph further argues that the fiduciary obligation created by the 1992 Order is a lifelong obligation that followed the deceased wherever he lived. Accordingly, the enforceability of his breach of the fiduciary obligation is to be determined according to the law of British Columbia and not the law of Mississippi. In the alternative, he says that it is not clear under Mississippi law whether the insurance policy was required to be maintained only as security for the child support obligation, or whether there was an independent ongoing obligation.
- [12] Finally, Joseph says that the claim is not statute barred because the claim could not be brought until all of the elements of the cause of action came into existence. Here, those elements include the death of the deceased. Accordingly, the action could not be brought until after December 18, 2008. The action was commenced in June 2009, well within any limitation period.

The Estate's Position

- [13] The Estate says that Joseph's claim cannot be maintained for a number of reasons. First, it is not properly brought as a claim for breach of fiduciary duty. What the claim really amounts to is a claim to enforce the 1992 Order; however, that order cannot be enforced in British Columbia. While Ms. Stewart could have taken steps to enforce the order, she never did so and it is now too late to do so. The proceeding is statute barred under both Mississippi law and British Columbia law.
- [14] Second, the Estate says that the 1992 Order did not create a fiduciary obligation that continued after Joseph reached the age of majority. It argues that pursuant to Mississippi law, the obligation to maintain a policy of life insurance in support of a child support order is a time limited obligation; the policy is intended to provide security for the child support obligation and once the obligation to pay child support is finished, there is no further obligation to maintain the insurance policy.
- [15] In addition, the Estate notes that the cases relied on by Joseph involve very different situations. In most of the cases the claims were based on an allegation of constructive trust in relation to an existing asset. Here, there was no asset in existence and no basis for Joseph to advance a constructive trust claim.

[16] Finally, the Estate says that no claim has been made to enforce the 1992 Order or to claim retroactive support. Such claims are either statute barred or not available under British Columbia law. It would be anomalous if Joseph could indirectly claim that which he cannot claim directly. Further, Joseph has not brought a claim pursuant to the Wills Variation Act, R.S.B.C. 1996, c. 490. He could have brought such a claim but elected not to do so. Once again, it would be anomalous if he could defeat the claims of the other beneficiaries of the Estate without bringing an application under the Wills Variation Act.

Issues

[17] Given the decision I have arrived at I need only deal with two of the issues raised by these unfortunate circumstances:

1. What was the nature and extent of the deceased's obligation to maintain an insurance policy for the "minor child" pursuant to the 1992 Order?
2. Did the deceased's breach of the 1992 Order amount to a breach of fiduciary duty actionable in British Columbia?

Analysis

Issue 1. What was the nature and extent of the deceased's obligation to maintain an insurance policy for the "minor child" pursuant to the 1992 Order?

- [18] Joseph's arguments are based on Canadian jurisprudence dealing with situations that have some similarity to the circumstances of this case. He relies on four Canadian decisions in support of the proposition that the 1992 Order requiring the deceased to name him as a beneficiary of an insurance policy creates a fiduciary duty, the breach of which entitles him to claim for damages in British Columbia. He refers to Adams and Turner in support of the argument that the language of the order or agreement creating the obligation to maintain an insurance policy must be examined in order to determine if the obligation was intended to be an independent obligation that does not lapse when the support obligation is at an end.
- [19] Joseph's argument appears to begin from the assumption that the 1992 Order is not a child support order. However, the application was brought to resolve child support issues. The purpose of the 1992 Order was to establish entitlement to and determine the amount of past and future child support. The 1992 Order sets the amount of arrears to be paid for child support for Joseph and establishes the amount of the ongoing child support for him.
- [20] The first problem with Joseph's arguments is that they bypass the question as to whether Mississippi law or British Columbia law should be applied to determine the extent of the obligation established by the 1992 Order. Joseph says the law to be applied should be the law of British Columbia. Such a position flies in the face of logic; it is also contrary to authority regarding applicable law in relation to child support proceedings.

- [21] British Columbia law should not determine the extent of the obligation established by a Mississippi court order. In this case, the law of the jurisdiction that made the order should be the law applied to determine the obligations created by the order. Further, under the principles of conflicts law, the applicable law governing child support obligations is the law of the jurisdiction to which the child and the custodial parent are substantially connected: *G.R.K. v. J.W.* (2001), 15 R.F.L. (5th) 96 (N.L.S.C.) and *G.B. v. C.S.* (2001), 24 R.F.L. (5th) 270 (Ont. C.J.). In *G.B. v. C.S.*, the Ontario Court of Justice had to deal with a child support order made by a court in Georgia. The court in Ontario was asked whether the child was entitled to support and, if so, how much. It stated at para. 20 that it was "common ground that the law to be applied to establish [the child's] entitlement to financial support from his father was the child support law of the State of Georgia." [1]
- [22] The question posed here can be described in two ways: a) whether British Columbia or Mississippi law should be applied to interpret the 1992 Order or b) whether British Columbia or Mississippi law should be applied to determine the extent of the deceased's child support obligations in 1992. No matter which way the question is asked, the answer is that Mississippi law must be applied to determine the issue in this case.
- [23] Even though Joseph did not bring an application to enforce the 1992 Order in British Columbia, the nature and extent of the obligation arising from the 1992 Order must be determined in accordance with the law of Mississippi. Both Ms. Stewart and Joseph were habitually resident in Mississippi. The parties were married and divorced in Mississippi. They entered into a separation agreement in Mississippi and consented to an initial order that dealt with all child support and custody issues. When Ms. Stewart brought the application in 1992 in Mississippi, the deceased retained counsel to contest it. The Mississippi court clearly had jurisdiction over the child custody and support issues; the obligations arising from the 1992 Order cannot be obligations implied or determined according to foreign law. The law of Mississippi must therefore be applied to determine the nature and extent of the obligation created by the 1992 Order.
- [24] The Estate presented opinion evidence from James Farrior, an attorney practising in Mississippi. While the opinion was not provided in accordance with the requirements of the new Rules either as to timing or form, Joseph did not object to its entry in evidence. No contrary opinion was presented. Mr. Farrior opines that the obligation under a child support order to maintain life insurance in Mississippi is a form of child support. Further, he says the obligation ends when the child reaches the age of majority:

Firstly, with respect to the obligation to maintain life insurance as stated in the Order of the Chancery Court of Mississippi, the obligation to maintain life insurance in Mississippi was to ensure that in the event of the death of the obligor for child support the child has a means of support. The requirement to maintain life insurance is accordingly a form of support. In Mississippi, the obligation to pay child support and consequently to maintain life insurance ends when the child is emancipated or turns 21.

[25] In support of that proposition, Mr. Farrior refers to the decision of the Supreme Court of Mississippi in *Arthur v. Arthur*, 691 So.2d 997 (1997), where the court states as follows:

Insurance coverage for the benefit of children in divorce cases is an issue of child support.... A parent's obligation to pay child support lasts only until that child reaches the age of majority, which age in Mississippi is twenty-one for child support purposes.... It follows that a parent who has been ordered to maintain life insurance for the benefit of a minor child may be required to do so only until that child reaches the age of majority. In the absence of other compelling reasons, such as the mental or physical incapacitation of the child, we hold that life insurance benefits for a minor child may be ordered only until the child reaches the age of majority....

[Citations omitted]

[26] Mr. Farrior also states that the decision in *Arthur* remains good law in Mississippi today. The decision was rendered in 1997 but is based on a number of decisions dating back to 1987.

[27] I accept the opinion evidence of Mr. Farrior. In Mississippi a court can require a parent to maintain life insurance benefits for a minor child as part of a child support order only until the child reaches the age of majority. The only qualification on the statement of the law as set out in *Arthur* is that the obligation to maintain a policy of insurance may extend beyond the age of majority where there are compelling reasons to extend the order such as the mental or physical incapacity of the child.

[28] There is no evidence, compelling or otherwise, that would take the circumstances of this case outside of the settled law as described in *Arthur*. There is nothing in the court order to suggest the obligation was other than for Joseph's benefit as a minor. I note that Joseph is now a machinist. I must infer from his present status and the absence of evidence to the contrary that he was not incapacitated in any way once he attained the age of majority. As a result, I conclude that the obligation of the deceased to maintain a life insurance policy with Joseph named as a beneficiary as set out in the 1992 Order was a form of child support. Further, according to the law of Mississippi, the deceased's obligation to maintain that policy did not extend beyond August 26, 1997.

[29] My decision on this issue is based principally on my conclusion as to the nature and extent of the obligation arising from the 1992 Order according to Mississippi law. However, I have also considered the authorities relied upon by Joseph. Both are distinguishable and do not assist his position.

[30] In *Turner*, the deceased husband was required by the terms of a separation agreement to maintain a policy of life insurance in the amount of \$100,000 for his first wife until she was 65. At the time of his death, the policy which named the first wife as a beneficiary had a face amount of only \$43,507.15. It appears that this was the present value at the date of his death of his continuing support obligation. As the Court of Appeal noted, the decision rested entirely on the interpretation of the separation agreement; in particular, as noted at para. 1, the court examined the separation agreement to determine if the obligation was mere security for the deceased husband's obligation to pay continuing spousal support or whether

it constituted an independent obligation. The conclusion of the court is stated at para. 35:

I further note that the language of paragraph 12 [of the separation agreement] is inconsistent with Ms. Turner's contention that the life insurance policy was merely intended to be security for Mr. DiDonato's diminishing spousal support obligations at the time of his death. As is apparent from the various components of paragraph 12, the Agreement specifically precludes Mr. DiDonato from adjusting the amount of insurance designated in favour of Ms. DiDonato to account for diminishing future support obligations or for any other reason. If the parties intended the insurance policy merely as security for the support payments, and nothing more, it would be unreasonable to preclude Mr. DiDonato from adjusting the face value of the policy as the total value of his outstanding support obligations declined.

- [31] Given this conclusion on the interpretation of the separation agreement, the court found that the deceased husband breached the agreement when he reduced the amount of the policy. The wife was able to claim the amount by which the policy fell short of \$100,000 as an unsecured creditor of his estate.
- [32] In Adams, the court was also faced with interpretation of a separation agreement. The agreement provided that the deceased husband was required to maintain an insurance policy in the amount of \$200,000, naming the two children as beneficiaries so long as he was obligated to pay child support or spousal support. The purpose of the policy was "... to better secure the child support and spousal support herein agreed to be paid and to better provide for the welfare of the said children, ...". It is not clear if he was still obligated to pay spousal support at the date of his death but he was still obligated to pay child support. He was accordingly found to be in breach of the separation agreement and thus to be liable in damages for the value of the policy which he did not purchase or maintain. The court noted that the obligation to provide for the welfare of the children was an independent continuing obligation pursuant to the language in the agreement.
- [33] Neither of these decisions is of assistance to Joseph's position here. Both concern the interpretation of separation agreements and the rights arising from breaches of those agreements. The present case does not involve interpretation of an agreement under Canadian law. I cannot interpret the language in the 1992 Order without considering Mississippi law.
- [34] I do note however that the language of the 1992 Order is consistent with the decision in Arthur. The deceased's obligation was to "maintain an insurance policy on his life in the amount of \$100,000 and to name the minor child born of this marriage (Joseph) as sole beneficiary..." (emphasis added.). The deceased was obliged to maintain an insurance policy for Joseph, the "minor child". The 1992 Order does not state that the obligation continues after Joseph reaches the age of majority.

- [35] In summary, pursuant to Mississippi law, the deceased's obligation to maintain an insurance policy naming Joseph as a beneficiary ceased when Joseph reached the age of majority. While the deceased was likely in breach of the 1992 Order prior to August 1997, he was not in breach at the date of his death.
- [36] Before leaving this issue, I should note that Joseph's failure to bring an action to enforce the 1992 Order gives rise to another difficulty. The 1992 Order was made by a Mississippi court. It is not enforceable as an order of this court. Mississippi is not now, and has never been, a reciprocating state with British Columbia under the Court Order Enforcement Act, R.S.B.C. 1996, c. 78. To the extent that Joseph's application calls for enforcement of the Mississippi court order, it cannot succeed without a determination that the 1992 Order is properly enforceable in British Columbia. If this action could be considered an action to enforce the 1992 Order, I would have to consider the limitation issues raised by the Estate. Given the decision I have arrived at on the nature and extent of the insurance obligation, I need not consider the limitation issues and so my decision does not rest on Joseph's failure to bring an action to enforce the 1992 Order.

Issue 2. Did the deceased's breach of the 1992 Order amount to a breach of fiduciary duty actionable in British Columbia?

- [37] Joseph's claim is based on the proposition that the deceased was in breach of a continuing fiduciary obligation to maintain the insurance policy. The decision I have reached on the first issue is a complete answer to Joseph's claim. However, I have also concluded that Joseph's characterization of the deceased's obligation as a continuing fiduciary obligation is incorrect and this is an alternate basis for dismissing the claim. Contrary to Joseph's argument, there is no general proposition of law that a party who is required to maintain a policy of insurance, either pursuant to a court order or an agreement, is subject to a continuing fiduciary obligation.
- [38] All of the decisions cited by Joseph in support of this proposition turn upon the particular circumstances under consideration, and are distinguishable from the circumstances of this case.
- [39] In *Fraser v. Fraser* (1995), 16 R.F.L. (4th) 112 (B.C.S.C.), the court considered the provisions of a separation agreement that required the husband to maintain his former wife as a beneficiary of two existing insurance policies, so long as she was alive and he was entitled to participate in the policies. The deceased remarried and prior to his death designated his second wife as beneficiary of both policies. Mr. Justice Melvin had no difficulty in concluding at para. 14, that:

... the provisions of the separation survive the death of [the husband] and are binding upon his estate. Consequently, the covenants relating to payment of pension and maintenance of life insurance are covenants which are enforceable against the estate, and insofar as the deceased took steps during his lifetime which had the effect of breaching the covenants in the separation agreement, the plaintiff is entitled to recover from the estate damages for breach of those covenants.

- [40] He also concluded that in these circumstances the deceased's second wife held the proceeds of the policies as a constructive trustee.
- [41] The decision in *Fraser*, as in *Adams and Turner*, is concerned with the interpretation of a separation agreement. It establishes no general principle about the obligation to maintain insurance that can be applied to the circumstances of the present case.
- [42] In *Steeves v. Steeves* (1995), 168 N.B.R. (2d) 226 (Q.B.), the husband was ordered to pay indefinite spousal support to his wife of 35 years. He was also ordered to redesignate his first wife as beneficiary under his existing life insurance policy. He had recently designated his new partner (whom he subsequently married) as beneficiary. The order provided that his first wife be "named and maintained as beneficiary of the life insurance policy held by [the husband] through his employment." The husband did not designate his former wife as beneficiary and she brought an application to find him in contempt. Before the application was heard, the husband died. The court found that the first wife could succeed with her claim both against the estate and the second wife to whom the insurance proceeds were paid. In arriving at that decision Creaghan J. stated as follows at para. 18:

It follows that a lost benefit directly related to the failure of a deceased to comply with a court order is recoverable as a claim against his estate. "Where an order to secure support is made against a spouse who dies before the property constituting the security has been determined, the order may be enforced against the deceased's estate." *Payne, Payne on Divorce* (3rd Ed. 1993) at p. 134.

- [43] There are two significant distinctions between the present case and *Steeves*. First, the New Brunswick court was enforcing its own order. The case did not involve an attempt to enforce a foreign order. Second, the support obligation for which the policy operated as security still existed. The deceased husband was still employed at the time of his death and so the court concluded the policy should have been maintained for the first wife. It was evident that in those circumstances the breach of the order resulted in the loss of the value of the death benefit. The decision did not depend on the existence of or breach of a fiduciary duty. Rather, the court found a clear breach of the obligation which was still in existence at the date of death. The first wife was able to succeed with her claim against the second wife as she was found to be a constructive trustee of the policy proceeds.
- [44] In *Gregory v. Gregory* (1994), 92 B.C.L.R. (2d) 133 (S.C.), the court found that the deceased husband was in breach of a consent order restraining him from disposing of family assets including an insurance policy provided through his employment. His wife was the

designated beneficiary of the policy. In breach of the order, the deceased named his girlfriend as the beneficiary of the policy. He died shortly after having done so. The court concluded that in the circumstances of the case, the deceased was a trustee of the pension plan pending the outcome of the divorce proceedings and that he did not have the authority to change the designated beneficiary.

- [45] The decision in Gregory was based in part on the court's conclusion that in the circumstances of the case the deceased, as trustee of his pension plan, owed a fiduciary duty to his wife. By changing beneficiaries he breached the court order and was in breach of his duty to preserve the policy pending resolution of the proceedings. The decision in Gregory turned on the particular circumstances and does not establish that any breach of a court order to maintain an insurance policy is also a breach of a fiduciary duty. It is also relevant that the court was interpreting its own order.
- [46] Finally, Joseph relies on the decision in *Kang v. Kang*, 2002 BCCA 696. The circumstances in *Kang* are very different from those in the present situation. The appellant alleged that her husband promised to name her as the designated beneficiary on his life insurance policy if she came with him to Canada. She came with her new husband to Canada but he left his sister as the designated beneficiary of his insurance policy. When he died, the wife brought a claim against the sister, the insurer and its agent. The Court of Appeal upheld the dismissal of the wife's claim. At para. 9, Huddart J.A. acknowledged that courts have imposed constructive trusts to remedy breaches of fiduciary duty owed by a husband to a wife after separation:

As Mr. Christie pointed out in his thorough submissions, trial judges have imposed a constructive trust to remedy a husband's breach of fiduciary duty owed to his wife after separation. That duty has been seen as flowing from a covenant in a separation agreement (*Fraser v. Fraser* [1995] B.C.J. No. 1347 [Q.L.]); and from a court order (*Gregory v. Gregory* (1994), 92 B.C.L.R. (2d) 133 (S.C.); *Steeves v. Steeves* (1995), 10 E.T.R. (2d) 6 (N.B.Q.B.)). There is no such agreement or order here.

- [47] This comment is instructive. Constructive trust remedies have been utilized by our courts where a spouse has breached an order or agreement with regard to family property in existence at the time the order or agreement was made. The reason that courts have granted the constructive trust remedy in the circumstances of those cases is that the spouse's breach resulted in an unjust enrichment and a corresponding deprivation.
- [48] The circumstances of the present case are very different from those in *Fraser*, *Gregory* and *Steeves*. Here, no one has been unjustly enriched by the deceased's breach of the 1992 Order. There was no policy in existence and no one was improperly designated as a beneficiary. No one benefited from the deceased's breach of the 1992 Order - except, of course, the deceased who retained the amount he should have paid in child support and insurance premiums. However, no death benefit or fund was retained by someone who was not entitled to receive it.

- [49] There are two breaches of the 1992 Order; however, it is evident that neither of the deceased's breaches can be characterized as breaches of fiduciary duty. The first breach is that the deceased failed to pay the child support when it was due. The remedy for this breach would have been to bring proceedings to enforce the order and claim arrears. The remedy for the breach, had it been pursued, would have been monetary: an order to pay arrears. Of course, this was the remedy granted by the court in 1992 for the past breaches of the divorce order. The second breach was the failure to maintain insurance until Joseph reached the age of majority. The remedy for that breach, if it had been pursued before Joseph reached the age of majority, would have been for Ms. Stewart to bring an application to enforce the insurance obligation.
- [50] The deceased's breaches were both direct breaches of the 1992 Order that did not raise issues of constructive trust or fiduciary duty. The remedies that could have been granted would not have been based on breaches of fiduciary duties.
- [51] In sum, pursuant to Mississippi law, the deceased's obligation, as per the 1992 Order, to maintain an insurance policy naming Joseph as beneficiary did not extend beyond August 26, 1997. The deceased's breaches of the 1992 Order did not amount to a breach of fiduciary duty actionable in British Columbia. Given the decision I have arrived at, I do not need to consider the arguments regarding limitation periods.
- [52] The deceased's abandonment of Joseph and his failure to provide any support for him was appalling and indefensible. The fact that he continued to deny any obligation to his son up to the date of his death is extremely unfortunate. However, the deceased's breach of the 1992 Order does not give Joseph any right to advance a claim for the amount of the insurance policy against the Estate. Joseph's claim is dismissed. Given the circumstances of this case, the claim is dismissed without costs.

"Butler J."

- [1] In British Columbia the above principle has now been incorporated into legislation. Section 31(1) and (2) of the Interjurisdictional Support Orders Act, S.B.C. 2002, c. 29 provide as follows:
- (1) In determining entitlement to receive or to continue to receive support for a child, the British Columbia court must
 - (a) subject to paragraph (b), apply the law of the jurisdiction in which the child ordinarily resides, and
 - (b) if there is no entitlement to support for the child under paragraph (a), apply the law of British Columbia.
 - (2) In determining the amount of support to be paid for a child, the British Columbia court must apply the law of the jurisdiction in which the person liable to pay the support ordinarily resides.

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