

CANADA / JUDGMENT

The Estate of Kask v. Welsh

2000 BCSC 791

COURT

Supreme Court of British Columbia

DECIDED

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2000 BCSC 791

Citation:	The Estate of Kask v. Welsh 2000 BCSC 791
Date:	20000518 Docket No.: C982734 Registry: Vancouver IN THE SUPREME COURT OF BRITISH COLUMBIA
BETWEEN:	THE ESTATE OF JOHN ALEXANDER KASK, BY HIS EXECUTRIX, JOAN AGNES KING PLAINTIFF
AND:	BEVERLEY ANN WELSH, PATRICK WELSH AND JOHN WELSH DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE LOWRY

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Counsel for the Defendant,

John Welsh:

D.R. Martin

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Date and Place of Trial:

April 17-20, 25 and 26, 2000

Vancouver, BC

- [1] John Kask was a banker. He died in April 1997 at the age of 86. His will provides for the equal distribution of his estate between his only two children, Beverley Welsh and Joan King, and, in order to reconcile the disparity in amounts of money received by each from him during his lifetime, it specifies that such be considered as debts payable to his estate. He could have left his daughters a considerable sum of money, but during the last three years of his life, when his health was declining, his assets were completely depleted. During that time, Ms. Welsh, the elder of the two, had charge of his financial affairs and she and her husband, Patrick Welsh, were caring for Mr. Kask in their home near Vancouver.
- [2] Ms. King brings this action as executrix to recover monies she claims were wrongly appropriated by her sister for herself and her family while Mr. Kask was in their care, and for a declaration that the money Ms. Welsh received from their father before then constitutes a debt to his estate.
- [3] Mr. Kask had a pension and investment income in the range of \$50,000 a year. All of that was spent, and more than \$225,000 in securities and term deposits was exhausted in a period of 30 months commencing in August 1994. Only some of what was spent can now be accounted for, and only some of that was spent on his care. For the most part, the balance appears to have been used by Mr. and Ms. Welsh in various ways that included mortgage debt reduction, utility payments, home improvements, property taxes, car payments, their children's education, and short vacations taken with and without Mr. Kask. In the summer of 1994, they spent over \$15,000 of the money to purchase an air conditioned car to enable them to transport Mr. Kask in greater comfort. And the evidence suggests that Ms. Welsh used more than \$15,000 of her father's money to fund her political campaign as a candidate for the Reform Party in the 1996 federal election. Mr. Kask did require some home nursing care which was expensive and there were expenditures associated with renovating space, constructing facilities, and buying equipment to meet his needs. But it is not suggested that the actual cost of caring for him was greater than his income and it appears that it may have been significantly less.

- [4] As pleaded, Mr. and Ms. Welsh take the position that, regardless of how the money was spent, Mr. Kask's accounts were accessed only upon his specific direction and request. Their son, John Welsh, is acknowledged to have stolen the sum of \$4,541 from his grandfather by forging cheques, but otherwise they say Mr. Kask approved of all that was spent. They deny any wrongdoing in the use of the money and maintain that, while, as of 1993, Ms. Welsh had received at least \$37,740 more than Ms. King from Mr. Kask, she is in no way indebted to his estate. They then counterclaim for compensation for the sacrifices they made in caring for him and contend such can be set against any liability they may have to the estate.
- [5] Ms. King contests her father's ability to have had the involvement in the depletion of his assets that is now attributed to him. She contends that his health had declined to the point where he was not mentally competent to give any knowledgeable direction and she maintains that, to the extent that his money was spent other than as required for his care, there is liability to the estate for breach of a fiduciary duty and the exertion of undue influence. She does not, however, take her case beyond the value of the securities and term deposits that were dissipated. She says that the counterclaim is without merit because Mr. and Ms. Welsh had no expectation of being compensated for caring for Mr. Kask.
- [6] The questions then are whether Mr. Kask was mentally competent and gave direction that his assets be depleted, whether Ms. Welsh is indebted to his estate for the money she received before she took charge of his financial affairs, and whether she and her husband are entitled to the compensation they claim for the care they provided.

The Asset Depletion

- [7] Mr. Kask began living in his daughter's home in the spring of 1993 following the death of his second wife. Mr. Welsh had retired from a teaching career. Ms. Welsh worked full time as a hospital palliative care nurse. They have three sons and all of them were living in the home.
- [8] It is evident that Mr. Kask's health steadily declined. It appears that he suffered some minor strokes. He began having difficulty walking and in time he was confined to a wheelchair and unable to function without assistance. He became incontinent both of urine and bowel. He required hospitalization on several occasions.
- [9] Mr. Kask executed an enduring power of attorney in favour of Ms. Welsh in April 1994. She then had control of all of his financial affairs. She had been authorized to operate his securities trading account in May 1993, and, in August 1994, it was converted into a joint account for the limited purpose of permitting Ms. Welsh to have access to it. It was then that the depletion of the securities and term deposits began.

- [10] Ms. King contends that her father suffered from dementia, the onset of which was manifest as early as 1992 when he began to show signs of a loss of memory. It is said that Mr. Kask declined mentally as well as physically such that by April 1994, if not before, he was unable to give any meaningful direction to his financial affairs. Ms. Welsh maintains that Mr. Kask did not suffer from dementia - at least not to any significant degree - and that his mental faculties remained substantially intact until shortly before he died.
- [11] The medical evidence clearly supports Ms. King. Mr. Kask's mental state was assessed by three doctors. All are of the opinion that he suffered from a degree of dementia that rendered him incapable of managing his financial affairs.
- [12] Dr. Akbar Javer is a general practitioner who treated Mr. Kask from March 1993 until April 1994. In May 1993, he administered what is known as a "Folstein Test" which by assessing, among other things, awareness and memory affords a good indication of the presence of dementia. Mr. Kask did poorly. For example, he did not know the year, the month, or the day and could not recall three objects he had been asked to remember a few minutes earlier. Dr. Kevin Merth was the general practitioner who treated Mr. Kask from April 1994 until his death. He confirmed Dr. Javer's diagnosis of dementia in May 1994 and referred Mr. Kask to Dr. Kerry Sadowski, a neurologist, because he was anxious to determine whether the cause of the dementia was one that could be treated. Dr. Sadowski administered a Folstein Test and found the results to be much the same as Dr. Javer had a year earlier. He concluded that Mr. Kask was suffering from dementia due to multiple cerebral infarcts and that there was no correctable cause. He says he considered it clear that Mr. Kask's dementia was significant and such that he was unable to handle his own affairs or make financial decisions.
- [13] Dr. Martin Illing, a geriatric psychiatrist called by the defence, points out that the Folstein Test cannot be relied upon alone to determine the existence or degree of dementia and more particularly to assess competency. A complete history of the patient is required, and input from those who know and interact with him on a regular basis is very important to any diagnosis. His evidence is tendered unchallenged to undermine the opinions of the three doctors who assessed Mr. Kask, but I find nothing in what he says that impairs the weight to be attached to their evidence. They do not suggest that their opinions were based only on the Folstein tests administered. Ms. Welsh attended with her father on each occasion he was examined and indeed was the one who initiated assessing his loss of memory. She was perhaps the best source of information about him.
- [14] Strangely, Mr. and Ms. Welsh say that none of the three doctors who assessed Mr. Kask told them that he was suffering from dementia. That was, however, not put to the doctors directly, and I find what Mr. and Ms. Welsh say difficult to accept. It was the doctors' responsibility to make sure that those caring for Mr. Kask were well aware of his mental condition. There can be no reason why all three would have failed in this regard. And what Mr. and Ms. Welsh say is at odds with the information Ms. Welsh gave to a care manager who assessed Mr. Kask for assistance in May 1994. Sharon Crooks says that Ms. Welsh told her that Mr. Kask was suffering from "Alzheimer's", a disease which is well-known to cause

dementia. Ms. Welsh denies what Ms. Crooks says, but Ms. Crooks' notes of the conversation leave little room for doubt.

- [15] Beyond the medical evidence, Ms. King relies on what she says she saw her father's condition to be and what her children and her former husband say about him. She lives in Calgary and saw her father only a few times after 1993. She says she was shocked at the extent of his deterioration between January and August 1994. He was confused, withdrawn, and did not participate in normal conversation. She says that by June of the following year he did not know who she was. Her daughter, Brenda Morton, says that when she visited her grandfather in the spring of 1995 and again a year later, he did not act like he knew who she was and was largely unable to converse. Sarah King was with Mr. Kask in 1994 and lived in her aunt's home with him for some time in June 1995. She considers him to have been unable to give instruction or direction in August 1994 and she had to be introduced to him when she returned the next year. William King, who was very friendly with Mr. Kask for many years, saw him over the course of a few days in August 1995. He says that the conversations they were able to have were such that he does not consider Mr. Kask really knew who he was.
- [16] To support their assertion with respect to Mr. Kask's mental ability, Mr. and Ms. Welsh rely on the testimony of two of the nurses who attended him from the latter part of 1994 onwards as well as on that of the solicitor and the broker before whom he executed the documentation that enabled Ms. Welsh to take conduct of his affairs.
- [17] John Goodwin drew the power of attorney and Mr. Kask executed it before him in April 1994 as indicated. He says nothing he observed on that occasion caused him any concern about Mr. Kask's understanding of what he was signing. John Vaccaro says much the same about Mr. Kask's attending before him briefly to sign the document creating the joint trading account in August 1994. But I find the contact these two men had with Mr. Kask was so limited that their observations are of little assistance in determining whether he was competent to handle his financial affairs from the time of their dealings with him.
- [18] Emmanuel Oyeskiu began providing home care assistance for Mr. Kask in November 1994. He knew nothing of him before then but says that he was at that time able to converse with him with no problem. Mr. Oyeskiu saw Mr. Kask once or twice a month for the first six months and then more frequently after that. He says there was a marked decline in his mental ability but that it did not occur until the early part of 1996 as recorded in the reports he maintained. Tien Huyn served as a relief nurse on occasion when Mr. Oyeskiu was not available. He says that he first met Mr. Kask in 1994 and that there were no major changes in his mental ability over the whole time that he knew him until he last saw him in September 1996. While what Mr. Oyeskiu and Mr. Huyn say suggests that Mr. Kask was more alert and mentally able than others observed him to be during 1995 in particular, they are at odds with each other, and certainly neither purports to have made any medical assessment of Mr. Kask's mental competency in any event.

- [19] All three of Mr. and Ms. Welsh's sons would have been involved with Mr. Kask to some extent on a daily basis throughout. It is, in my view, particularly significant that none were called to testify to his state of mind and no explanation for the absence of this evidence has been given. I infer that had they been called, their testimony would not have supported Mr. and Ms. Welsh in their contention that Mr. Kask was mentally able until shortly before his death.
- [20] I find that, certainly by August 1994 when the depletion of assets began, if not before, Mr. Kask was not competent to manage his financial affairs. I also find that his inability to do so was apparent to Mr. and Ms. Welsh.
- [21] In support of the contention that Mr. Kask's accounts were accessed only upon his specific direction and request, Ms. Welsh says only that she never did anything that was contrary to his wishes. Mr. Welsh says they would discuss expenditures with Mr. Kask and he would make it possible for them to meet such needs as arose. But these are, in my view, hollow assertions. There is no evidence that there was any discussion with Mr. Kask about spending his capital or that he ever gave any direction that his holdings in securities and term deposits be dissipated. There is no evidence that he had any appreciation of what was happening in that regard. Indeed, his desire that his estate be equally divided between his daughters, and that what they had received from him during his lifetime be equalized, is completely at odds with his approving of Ms. Welsh disposing of his assets for the benefit of herself and her family.
- [22] The evidence suggests that soon after he executed the power of attorney, Mr. Kask lost all interest in his financial affairs. That is when he ceased writing cheques such that all subsequent cheques, of which there were many, were for the most part written by Ms. Welsh. Over the next two years there were 272 cash withdrawals from Mr. Kask's account and 97 retail purchases made with his bank card. The state of his mental health was such that he could not have had any meaningful involvement in those expenditures. He has been shown to have lacked sufficient competence to appreciate either the way his money was being spent or the impact the expenditures had on the erosion of his assets. Any broad agreement he might have leant to the spending of his money, or any concurrence with spending to meet needs as they arose, cannot be said to have amounted to a direction or request that any of his securities or term deposits be dissipated, much less all of them.
- [23] I find that Mr. Kask did not direct or request that Ms. Welsh access his accounts for the purpose of using any monies derived from his securities account or his term deposits for the benefit of herself or her family.
- [24] In that Ms. Welsh held her father's power of attorney, she owed to him a fiduciary duty: *Fraser (Guardian ad litem of) v. Fraser*, 2000 BCSC 211 and *Lau v. Lee* (27 July 1994), Vancouver C925761 (B.C.S.C.). It was her duty not to prefer her interest or that of her family over his in the handling of his money which he had entrusted to her. I do not consider that Ms. Welsh determined she would deplete all of what would be her father's estate once she held his power of attorney and had the opportunity to spend his money. Rather, it seems

more probable that she simply found his money to be a ready resource and, instead of preserving it as apart from the costs of maintaining him she was duty bound to do, she spent it. It bears repeating here that Mr. and Ms. Welsh do not say that Mr. Kask's income, which ranged from \$54,485 in 1993 down to \$41,382 in 1996, was not sufficient to meet all his needs while he was living in their home. But not only was all of that spent, assets totalling more than \$225,000 were dissipated as well.

- [25] Ms. Welsh does not appear to have had any real appreciation of how much of the money was being spent. For example, some \$61,545 from the sale of securities is shown to have been transferred to her personal account directly as opposed to her father's account into which most of the money was transferred. All of it was apparently spent and none is accounted for. Even now Ms. Welsh is surprised at the amount that was transferred in that way and cannot say where it went.
- [26] However, having concluded that Mr. Kask was not competent to give direction with respect to his financial affairs by April 1994, it follows that Ms. Welsh was in breach of the fiduciary duty she owed to her father and liable to his estate.
- [27] In August 1994, the current balance in the securities account was \$125,457 and Mr. Kask's term deposits totaled \$100,000. While some of that money remains (\$19,000) the debts of the estate attributable to expenditures made by Ms. Welsh exceed it. She is accordingly liable to reimburse the estate for \$220,916 being the amount in the accounts in August 1994 less \$4,541 that John Welsh stole. Patrick Welsh has been shown to have received \$9,020 of the money paid to him personally such that he is jointly liable for that amount. No submission is made as to the further extent to which he benefited. John Welsh is liable for the sum of \$4,541.
- [28] A lien on the Welsh home is sought because some of the money was spent on improvements. But how much was spent on improvements has not been established, and in the absence of such I do not consider there to be any entitlement to a lien.

Ms. Welsh's Debt to the Estate

- [29] As indicated, Ms. Welsh had received significantly more money from her father than had Ms. King during the course of his life. Mr. Kask kept a ledger of all that each of his daughters had received. The ledger was last seen in Ms. Welsh's home during the time her father was living there, but it is now said to be missing. Copies of it made in 1987 show that as of August of that year Ms. Welsh had received \$55,640 and Ms. King had received \$6,700 apart from amounts that each had repaid. There is no record of entries for Ms. Welsh after 1987 available, but a copy of the entries for Ms. King as of August 1993 shows the amount she had received had risen to \$17,900.

[30] It was Mr. Kask's expressed wish that, in the end, his two daughters were to benefit equally. He told them that he wanted the disparity in what they had received reconciled in the otherwise equal distribution of his estate. To this end he provided in his will that:

I WISH TO SPECIFY that all loans made by me to my children during my lifetime and not yet repaid shall be considered as debts payable to my estate by them.

[31] All of the money Ms. Welsh and Ms. King received from their father over the years has not been shown to have been loaned to them in the sense that it was money advanced on the basis that it be repaid. And I do not consider that money which was given as a gift can be said to have been a loan even if that were to accord with the explanation Mr. Kask gave his daughters with respect to his testamentary scheme. No attempt has been made to ascertain the basis on which each sum of money Ms. Welsh received was given to her.

[32] However, in an affidavit filed in this action, Ms. Welsh stated that when he died she owed her father \$55,640. She also stated that he forgave the debt but that she was prepared to pay what she owed to resolve the dispute with her sister. In opening the defence, counsel stated the case to be one of forgiveness, but he adduced no evidence of forgiveness at all. In argument he returned to the pleaded case, maintaining that no debt had been proven. The affidavit has been put to Ms. Welsh in the course of cross-examination and she volunteers that her father was very ill when he is said to have forgiven her debt.

[33] In my view, Ms. Welsh has sworn that she owed the money when her father died and it is not open to her to contend otherwise. There is no need for Ms. King to prove that any particular amount Ms. Welsh received was a loan because of the sworn statement she made. Ms. Welsh has accepted that she owed \$55,640. It may be she could have proven that the debt was forgiven, but no evidence was adduced on which it could be concluded that Mr. Kask decided to forgive the debt one of his daughters would have to the estate but not the debt owed by the other. Given his expressed wish that their ultimate benefit would be equal, I consider that most improbable. Ms. Welsh must now accept that her entitlement as a beneficiary of her father's estate is to be affected by the amount she has sworn she owed when he died. Ms. King is entitled to the declaration she seeks.

Compensation for Care

[34] Where a person has devoted time and energy to care for another with the expectation of being compensated from the proceeds of an estate, the law recognizes the legitimacy of a quantum meruit claim against the estate in some circumstances: *Procter v. Procter Estate* (12 July 1984), Vancouver (A830420) (B.C.C.A.) and *Clarkson v. McCrossen Estate* (1995), 3 B.C.L.R. (3d) 80 (C.A.). But no such claim can be made where there has been no expectation or, for that matter, where the person rendering the service has in fact been given a share of an estate commensurate with what they expected to receive.

- [35] Mr. and Ms. Welsh claim to be entitled to be compensated out of Mr. Kask's estate for the sacrifices they made in caring for him from the spring of 1993 until his death in 1997.
- [36] There is certainly no question that Mr. Kask had the very best of care. He did not want to go to a nursing home and Ms. Welsh honoured his wish. She and her husband devoted themselves to ensuring that he was as comfortable as the circumstances would allow. The sacrifice they made was enormous. Mr. Kask required a great deal of care and attention throughout the time he was in their home and the enjoyment of their lives was substantially compromised in the result.
- [37] But they do not plead and they do not testify that they ever expected to be compensated out of his estate to any greater extent than what his will provided their beneficial interest in his estate would be. They cared for Mr. Kask as they did out of the love and affection they had for him and, as Mr. Welsh says, because he had always been very good to them.
- [38] No case of an expectation that did not materialize has been made out and the Welshs' counterclaim cannot succeed.
- [39] I would, however, wish to add that I well recognize that the consequences of this judgment for Mr. and Ms. Welsh will be very considerable indeed. Their having frittered away Mr. Kask's entire estate is something that certainly may not be easily forgiven, but they are people of modest means who now face retirement with the prospect of losing their home which, on the evidence, is substantially all that they have. It remains for Ms. King to consider whether pursuing her sister to exact the whole of the harsh remedy the law would allow is consistent with what in the circumstances is either necessary or desirable.

Disposition

- [40] There will be judgment against Ms. Welsh for \$211,896. There will as well be judgment against Mr. and Ms. Welsh for \$9,020. There will also be judgment against John Welsh for \$4,541.
- [41] There will be pre-judgment interest on the judgments at registrars' rates from September 1, 1994.
- [42] There will be a declaration that Ms. Welsh is indebted to Mr. Kask's estate in the amount of \$55,640.
- [43] The counterclaim will be dismissed.
- [44] Costs will follow the event.

"P.D. Lowry, J."

The Honourable Mr. Justice P.D. Lowry

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