

CANADA / JUDGMENT

TimberWest Forest Corp. (Trustee of) v. Schmidt

2002 BCSC 831

COURT

Supreme Court of British Columbia

DECIDED

2 July 2002

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Source record

2002BCSC0831

Citation: TIMBERWEST v. SCHMIDT

Date: 20020702
2002 BCSC 831Docket: S34212
Registry: Nanaimo
IN THE SUPREME COURT OF BRITISH COLUMBIABETWEEN: THE TRUSTEE OF THE TIMBERWEST FOREST CORP. RETIREMENT PLAN FOR
SALARIED EMPLOYEES AND TIMBERWEST FOREST CORP.,
IN ITS CAPACITY AS ADMINISTRATOR OF THE TIMBERWEST
FOREST CORP. RETIREMENT PLAN FOR SALARIED EMPLOYEES
PETITIONERSAND: CHERYL ANN SCHMIDT
MURIEL JOYCE SCHMIDT
DEIRDRE SCHMIDT AND
MURRAY SCHMIDT
RESPONDENTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE HALFYARD

Counsel for the Petitioners

S.J. Gregory

Counsel for the Respondents Cheryl Ann Schmidt, Deirdre Schmidt and Murray Schmidt

R. Hornquist

Agent representing the Respondent Muriel Joyce Schmidt

Ms. Donna Shingera

Date and Place of Hearing:

June 19, 2002

Nanaimo, B.C.

- [1] The petitioner (which I will refer to as TimberWest) applies for interpleader relief pursuant to Rule 48(1). TimberWest seeks the direction of the court as to who should receive the death benefit it holds for Gordon Edward Schmidt ("Mr. Schmidt") pursuant to a pension plan. Mr. Schmidt died on November 11, 2000, at the age of 61, after working for many years as a supervisor of logging operations for TimberWest and its predecessor, and before receiving any pension payments. The value of the death benefit is approximately \$400,000.
- [2] Rule 48 has been properly invoked, because TimberWest controls the death benefit, but claims no beneficial interest in the money, and expects to be sued by two people who are making adverse claims to the money.
- [3] The respondent Cheryl Ann Schmidt ("Cheryl Schmidt") was married to Mr. Schmidt from March 9, 1963, to June 22, 1988, and is the mother of four children of that marriage. She is now 58.
- [4] The respondent Muriel Joyce Schmidt ("Joyce Schmidt") was married to Mr. Schmidt from December 23, 1989 until he died on November 11, 2000. At the time of their marriage, he was 49 and she was 59. She is now 71 years of age.
- [5] The respondents Deirdre Schmidt and Murray Schmidt are two of the four children of Mr. Schmidt and Cheryl Schmidt, and they are the executors of their father's estate.
- [6] This petition was brought after TimberWest was unable to obtain the consent of Joyce Schmidt to pay 80% of Mr. Schmidt's death benefit to Cheryl Schmidt, and 20% to Joyce Schmidt. The other three respondents did consent to that proposal.
- [7] The position taken on behalf of Joyce Schmidt is that she is entitled to receive 100% of Mr. Schmidt's death benefit, because:
- (a) She was the "spouse" of Mr. Schmidt within the meaning of s. 1 of the Pension Benefits Standards Act ("PBSA") at the time of his death;
 - (b) Mr. Schmidt died before pension commencement; and
 - (c) S. 34(1)(a) of the PBSA therefore applies, so as to make the death benefit payable to her as the surviving spouse of Mr. Schmidt.

- [8] The position taken on behalf of Cheryl Schmidt is that:
- (a) Joyce Schmidt was not the spouse of Mr. Schmidt at the time of his death;
 - (b) On October 22, 2000, Mr. Schmidt made Cheryl Schmidt his designated beneficiary of 80% of his death benefit, and made Joyce Schmidt his designated beneficiary of 20% of his death benefit; and
 - (c) Therefore s. 34(1)(b)(i) of the PBSA applies, and 80% of the death benefit is payable to Cheryl Schmidt and 20% is payable to Joyce Schmidt.
- [9] By way of reply, Joyce Schmidt alleges that, even if the court is not satisfied that she was the spouse of Mr. Schmidt at the time of his death, the designation of beneficiaries alleged by Cheryl Schmidt was not actually made by Mr. Schmidt, or if made, was invalid, and therefore the death benefit should be paid to the estate of Mr. Schmidt, as dictated by s. 34(1)(b)(ii) of the PBSA.
- [10] I have mentioned that Mr. Schmidt was still married to Joyce Schmidt at the time he died. It is also undisputed that, on August 3, 1999, Mr. Schmidt executed a will, directing that, upon his death, his Canada Pension Plan death benefit and his TimberWest death benefit was to be paid to his wife Joyce Schmidt, and that the residue of his estate (present value approximately \$25,800) would be paid to his ex-wife Cheryl Schmidt. It is also common ground that Mr. Schmidt died "before pension commencement", so that s. 34(1) of the PBSA is the law that governs this application. S. 34(1) of the PBSA states as follows:
- "34(1) If a member or former member dies before pension commencement, benefits are payable,
- (a) subject to this section and section 40(1) and (2), by way of a pension to the surviving spouse, or
 - (b) if there is no surviving spouse, or if the administrator receives from the surviving spouse a statement in the prescribed form that waives the spousal entitlement under paragraph (a), by way of a lump sum payment to
 - (i) the designated beneficiary, or
 - (ii) the personal representative of the estate in his or her representative capacity if there is no valid designation of beneficiary."

[11] The pension plan itself contains clause 1.5.1 which states as follows:

"A Member shall designate, in writing, a Beneficiary to receive any benefits that are payable under the Plan to a Beneficiary upon the death of such Member and may change such designation from time to time. ...Benefits payable as a result of the death of the Member shall be paid in accordance with the most recent designation filed by the Member with the Company [i.e. TimberWest] and, in the absence of an effective designation of a Beneficiary, the Company shall instruct the Funding Agency to make payment of any death benefits under the Plan to the estate of the Member and such payment shall complete discharge all liability with respect to the

amount paid."

[12] It is apparent that the first issue to be determined in this litigation is whether Joyce Schmidt was the spouse of Mr. Schmidt, at the time of his death on November 11, 2000. S. 1(1) of the PBSA defines "spouse" as follows:

"(a) a person who at the relevant time was married to that other person, and who, if living separate and apart from that other person at the relevant time, did not live separate and apart from that other person for longer than the 2 year period immediately preceding the relevant time, or..."

"1(2) For the purposes of paragraph (a) of the definition of "spouse" in subsection (1), persons are living separate and apart

(a) if they are living apart and either of those persons has the intention to live separate and apart from the other, or

(b) if, before the relevant time,

(i) they had lived separate and apart for any period, and

(ii) that period was interrupted or terminated only because either person became incapable of continuing to live separate and apart or of forming or having the intention to continue to live separate and apart of that person's own volition,

and the separation would probably have continued if that person had not become incapable."

[13] The evidence on this issue is conflicting. The evidence indicates that, during the period from about June 1996 until the time of his death, Mr. Schmidt and Joyce Schmidt lived at different residence for all, or almost all, of that time. Joyce Schmidt alleges that she and Mr. Schmidt were not "living separate and apart from" each other during that time, because neither she nor Mr. Schmidt had "the intention to live separate and apart from the other." She says that she and Mr. Schmidt had been maintaining their same marital relationship, and the only difference was that they lived in separate residences, due to Mr. Schmidt's desire not to burden his wife with his physical and mental health problems. Joyce Schmidt says that they were planning to live in the same residence together again, when Mr. Schmidt's condition worsened in or about the summer and fall of 2000.

[14] On behalf of Cheryl Schmidt, it is alleged that Mr. Schmidt had been living separate and apart from Joyce Schmidt from June 1996 until he died on November 11, 2000, and that he not only intended to do so, but he also intended that their separation should be permanent.

[15] It seems clear that in early September 2000, it became apparent that Mr. Schmidt was terminally ill with cancer, and that his time was limited. He ceased working at or soon after that time. It is alleged by Cheryl Schmidt (but contested by Joyce Schmidt) that on October 22, 2000, Mr. Schmidt validly designated the beneficiaries of his death benefit to be Cheryl Schmidt as to 80% of its value, and Joyce Schmidt as to 20% of its value, in the event that he

died before his pension payments commenced. It is further alleged by Cheryl Schmidt (and disputed by Joyce Schmidt) that on November 7 and November 9, 2000, Mr. Schmidt signed additional pension plan documents in which

- (a) he applied to commence his retirement on December 1, 2000;
- (b) he elected a particular 15 year plan for payment of his pension benefits;
- (c) he named his beneficiary as being Cheryl Schmidt; and
- (d) on November 9, 2000 he declared that he did not have a "spouse", but described Cheryl Schmidt as being his "ex-spouse" (after declaring on November 7th that he had a spouse, and her name was Cheryl Schmidt).

[16] Cheryl Schmidt also alleges that, in September or early October 2000, Mr. Schmidt executed a document which gave her power of attorney over certain of his affairs, and gave her oral instructions expressing an intention to change his will in relation to his TimberWest pension, and explaining the reasons for the change. The instructions written out by Cheryl Schmidt, and purportedly signed by Mr. Schmidt, explained that he wanted "to recognize the first marriage of 24 years, as well as the second marriage", and stated that he and his wife had been living in separate residences since June 1996. Joyce Schmidt challenges that evidence.

[17] Joyce Schmidt has requested that I determine the issues summarily. Cheryl Schmidt submits that the affidavit evidence is conflicting in significant respects, that determination of the issues will require an assessment of credibility, and that this cannot be done without an examination of the witnesses in court, in a trial.

[18] There is evidence before me which, if accepted, could (and likely would) lead to a finding that Joyce Schmidt was the spouse of Mr. Schmidt at the time of his death. There is evidence indicating that, in the last four years or so of his life, Mr. Schmidt paid rent for Joyce Schmidt and assisted her financially in other ways, that he attended church services with her on a fairly frequent basis, that Mr. Schmidt communicated with Joyce Schmidt by telephone when he was unable to visit with her, and that they continued to go on trips together, including a trip to Hawaii in January of 1999. There is evidence that they maintained a sexual relationship up until early 2000. Joyce Schmidt has sworn two affidavits deposing to these and other matters, and her evidence is supported to some extent by the affidavit evidence of Susan Gueulette, Marilynn Mark, William Purdy and The Venerable Gordon Payne.

[19] There is also evidence before me which conflicts with the evidence presented by and on behalf of Joyce Schmidt, and which supports the allegation of Cheryl Schmidt that I have outlined. If accepted, this evidence could (and likely would) lead to the conclusion that Joyce Schmidt was not Mr. Schmidt's spouse during the several years before his death. That evidence has been given by Cheryl Schmidt, and Mr. Schmidt's brother, Lyle Arthur Schmidt. Also, the income tax returns of Mr. Schmidt for 1996, 1998 and 1999 have been put in

evidence, in which he describes his marital status as "separated", and his place of residence as being other than the residence of Joyce Schmidt.

- [20] I have already mentioned the alternate position that has been advanced on behalf of Joyce Schmidt. She says that, if the court is not satisfied that she was the spouse of Mr. Schmidt at the relevant time, then the death benefit should be paid to Mr. Schmidt's estate, and not according to the designations purportedly made by Mr. Schmidt in the pension plan documents dated October 22, November 7 or November 9, 2000. This position entails a denial of the assertion that Mr. Schmidt signed those documents. And it is suggested in the further alternative that, even if Mr. Schmidt did sign those documents, he either lacked the mental capacity required by law, or he was improperly influenced into signing them. Joyce Schmidt also challenges the allegation that Mr. Schmidt gave instructions for changing his will to Cheryl Schmidt, and the claim that he signed the instructions written by her.
- [21] There is no evidence before me which directly supports any of these alternate contentions of Joyce Schmidt. But there are other witnesses (including medical experts) available who could give material evidence as to the state of Mr. Schmidt's physical and mental health in the last few years of his life. And I have no doubt that the present affiants can give further, more detailed testimony on these issues.
- [22] In my opinion, an assessment of credibility must be made, before these issues can be determined. Moreover, such assessment cannot be done, on the conflicting affidavit evidence that has been presented.
- [23] The credibility issue will also include challenges by each side, as to whether Mr. Schmidt made certain statements that have been attributed to him by the two claimants. Once those questions are determined, a consideration of "the principled approach" to the admissibility of hearsay evidence to prove the truth of Mr. Schmidt's statements, will likely be necessary.
- [24] In the event that Joyce Schmidt fails to establish that she was Mr. Schmidt's spouse, and if Cheryl Schmidt establishes that Mr. Schmidt did sign the pension plan documents and that he possessed sufficient mental capacity and was not unduly influenced when he signed them, an issue of law will arise. The question then would be whether the October 22, 2000 or the November 7 and 9, 2000 documents constitute Mr. Schmidt's designation of beneficiaries. Of course, Cheryl Schmidt relies on the October 22 documents, and not on the November documents, but the issue will be whether the November documents had the effect of revoking the October 22nd designation.
- [25] Questions of law may arise as to who bears the onus of proof on particular issues, such as whether Mr. Schmidt had (or did not have) sufficient mental capacity to validly designate a beneficiary, and whether undue influence was (or was not) exerted on Mr. Schmidt to change his will or to designate a new beneficiary.

- [26] There is one more potential issue that could arise in this somewhat complicated case. If the decisions on all issues go against Joyce Schmidt, in the sense that the 80-20 split of the death benefit is upheld, then, as I understand it, Joyce Schmidt intends to submit:
- (a) That the death benefit is a "family asset" within s. 58 of the Family Relations Act;
 - (b) That the court has a discretion under s. 75.1 of the Family Relations Act to override the result dictated by s. 34 of the PBSA;
 - (c) That the court should exercise its discretion in her favour; and
 - (d) That the court should award her at least 50% of the death benefit.
- [27] Another potential issue was touched on by Joyce Schmidt, concerning whether she might make a claim under the Wills Variation Act. I was unable to understand that potential claim, because if the result is that the death benefit must be paid to Mr. Schmidt's estate, then his will provides that Joyce Schmidt would receive all of it.
- [28] For the reasons I have stated, it is my opinion that the issues between the respondents cannot be determined by summary trial on affidavit evidence. TimberWest takes no position, on the issues between Joyce Schmidt and Cheryl Schmidt. They seek only a determination of the issues by the court, and an order declaring that its liability to the respondents will be extinguished, upon payment of the death benefit in accordance with the order of the court.
- [29] I therefore make the following orders:
- (a) There will be a trial of the following issues between the respondents:
 - (1) Whether Muriel Joyce Schmidt was the "spouse" of Gordon Edward Schmidt on November 11, 2000, within the meaning of s. 1 of the Pension Benefits Standards Act.
 - (2) If not, then whether the death benefit payable in respect of Mr. Schmidt should be paid in accordance with the designation of beneficiary and declaration of marital status contained in pension plan documents dated October 22, 2000.
 - (3) If not, then whether the said death benefit should be paid to the estate of Mr. Schmidt.
 - (4) If the answer to (1) is no, and the answer to (2) is yes, then whether Joyce Schmidt should be paid at least one-half of Mr. Schmidt's death benefit, pursuant to the provisions of the Family Relations Act.
 - (b) The respondent Joyce Schmidt shall be the plaintiff, and the respondents Cheryl Schmidt, Deirdre Schmidt and Murray Schmidt shall be defendants (the latter two persons, in their capacity as executors of Mr. Schmidt's estate).

- (c) The plaintiff shall file and deliver a statement of claim, and the defendants shall file and deliver a statement of defence and counterclaim, and the plaintiff shall file and deliver a reply and defence to counterclaim, in accordance with Rules 19, 20, 21 and 23 of the Rules of Court.
- (d) The Supreme Court Rules relating to discovery in actions commenced by writ of summons shall apply to this proceeding, including Rules 26, 27 and 28.
- (e) The petitioners shall continue to hold the death benefit payable in respect of Mr. Schmidt, pending the trial of this proceeding.
- (f) The costs of the present application will be in the discretion of the trial judge.

"D.A. Halfyard, J."

The Honourable Mr. Justice D.A. Halfyard

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Prepared on 28 October 2026 · Esheria