
CANADA / JUDGMENT

Wang v. Halliday

2014 BCSC 1574

COURT

Supreme Court of British Columbia

DECIDED

19 August 2014

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2014 BCSC 1574 Wang v. Halliday

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wang v. Halliday,

2014 BCSC 1574

Date: 20140819

Docket: 13-2590

Registry: Victoria

Between:

Jia Xi Wang

Plaintiff

And:

Robert Lawrence Halliday, As Executor of the

Estate of Leonard Christie, Michael Raitt

and Jason Beadnell

Defendants

Before: The Honourable Mr. Justice Johnston

On Appeal from a Master of the Supreme Court of British Columbia,
of an Order dated May 7, 2014

Reasons for Judgment

Counsel for the Plaintiff:

M.G.A. McFetridge

Counsel for the Defendant,

Robert Lawrence Halliday:

R.A. Reimer

Counsel for the Defendants:

Michael Raitt and Jason Beadnell

F.D. Corbett

Place and Date of Hearing:

Victoria, B.C.

June 27, 2014

Place and Date of Judgment:

Victoria, B.C.

August 19, 2014

- [1] This is an appeal from an order of Master Bouck dismissing the plaintiff's application for an order requiring the defendant executor to file and deliver a list of documents pursuant to Rule 7-1.
- [2] The action was brought by Notice of Civil Claim July 23, 2013, in which the plaintiff alleges that he was the spouse of the deceased Leonard Christie, who died October 31, 2012, and that the deceased's will did not make adequate provision for the plaintiff's maintenance and support, invoking the jurisdiction of the court under the Wills Variation Act, R.S.B.C. 1996, c. 490.
- [3] The executor, who was required to be named as a defendant by Rule 21-6(2)(a)(iii), filed and delivered a Response to Civil Claim in September 2013.
- [4] On November 20, 2013, Master Bouck made a case plan order which required the plaintiff to deliver his list of documents under Rule 7-1 by December 16, 2013, and the defendants Raitt, Longhurst and Beadnell ("beneficiary defendants") to deliver their document lists by the same date. This order was silent as to document disclosure by the executor, although it did provide that any examination for discovery by the executor be completed by July 31, 2014.

- [5] It appears that the plaintiff had in his possession a computer belonging to the deceased, and that the plaintiff delivered this computer to the executor following the case planning conference. The plaintiff has pleaded in para. 37(b) of his Notice of Civil Claim that the deceased's will provided that "all the Deceased's computers and related materials and equipment are to be given to the defendant Jason Beadnell."
- [6] Plaintiff's counsel has said in argument that the computer was used jointly by the plaintiff and the deceased while the latter was still alive, and that the plaintiff has reason to believe that the computer contains documents relevant to the issues raised in this action. While that is not in evidence, I will assume it to be true for the purposes of this appeal.
- [7] On January 23, 2014, plaintiff's counsel sent an email to counsel for the executor asking when she might receive the executor's list of documents, and requesting specific documents relating to an immigration spousal sponsorship application.
- [8] On January 28, 2014, counsel for the executor replied that he did not intend to prepare a list of documents, and in that reply asserted that the deceased's solicitor-client privilege passed to the executor on death. On April 8, 2014, plaintiff's counsel repeated her demand for a list of documents, and specified what she was looking for. On that same date, counsel for the executor replied that he would disclose only the documents filed in support of the application for probate, but offered to make the computer available if the plaintiff and the defendant beneficiaries could agree on a process to review its contents. Counsel for the executor refused to inventory the computer's contents and advised that the executor would not waive privilege.
- [9] That led to the application which gives rise to this appeal.
- [10] During argument, the Master posed this question:

Now here's a question: I've always understood it, an executor has to be named in these kinds of proceedings or maybe doesn't have to, but is named but is expected to take a neutral role and therefore is not a party adverse in interest, and if he's not a party adverse in interest, then what's the obligation? Is there some common law authorities that you can show me?

- [11] The parties reconvened after a brief adjournment, and counsel argued the effect of the decisions in *Ketcham v. Walton*, 2012 BCSC 175, and *Quirico v. Pepper Estate*, [1999] B.C.J. No. 2229, 1999 CanLII 5628 (B.C.S.C.). Counsel for the applicant also cited Rule 7-1, but focused most of her argument on the reasons the estate documents were needed in the litigation. Counsel for the executor acknowledged that the Rules required that the executor be named as a party, but argued that this was merely procedural, not substantive, and that "the rules are not legislation." Counsel for the beneficiary defendants indicated that his clients also wished to see what documents might be on the computer in question, but acknowledged that the process was cloudy, and the clouds might be heavier because of solicitor-client privilege issues.

[12] The Master's decision is briefly stated:

Well, Ms. McFetridge, you may create new law, but it won't be at this level. So I adopt entirely the submissions of Mr. Reimer in that the executor need not be involved in processes under the rules. I'm not going to restate the analysis that Mr. Reimer gave, but I agree with it,

[13] The application to compel a list of documents, and for other relief, was dismissed.

[14] The plaintiff argues here, as on the application to the Master, that the executor is a party of record in this proceeding and that Rule 7-1 compels a list of documents in these terms:

Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,

- (a) prepare a list of documents in Form 22 that lists
 - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party of record at trial to prove or disprove a material fact, and
 - (ii) all other documents to which the party intends to refer at trial, and
- (b) serve the list on all parties of record.

The executor became a party of record when he filed and delivered a Response to Civil Claim according to the definition set out in Rule 1-1.

[15] As earlier indicated, Rule 21-6(2) mandates that an executor be a party to a proceeding brought under s. 2 of the Wills Variation Act.

[16] Rule 21-6(4) provides that "A proceeding under the Wills Variation Act is governed by these Supreme Court Civil Rules."

[17] Rule 7-1(14) allows for an exemption from the requirement to list documents:

On an application under subrule (13) or otherwise, the court may

- (a) order that a party be excused from compliance with subrule (1), (3), (6), (15) or (16) or with a demand under subrule (10) or (11), either generally or in respect of one or more documents or classes of documents [Emphasis added.]
- [18] The beneficiary defendants generally agree that access to any of the deceased's relevant documents in the possession or control of the executor would assist in the conduct of the litigation, but are concerned about the deceased's rights to claim solicitor-client privilege that they agree have passed to the executor.
- [19] The executor points out that the Act merely requires that the executor be served with a copy of a notice of civil claim in the action, and does not require that an executor be a party to the action (s. 3(1)(b)). The executor argues that the requirement in Rule 21-6 that he be made a party is procedural only, and not a requirement of law.

- [20] But this court has held, in *Callender v. Callender Estate* (1999), 178 D.L.R. (4th) 269, that the Rules of Court have the force of statute and legislative effect. It has also held in *Smith v. Knudsen* (2002), 17 C.P.C. (5th) 169 (B.C.S.C.), that the Rules are subordinate legislation, and subject to other provincial statutes in the event of inconsistency.
- [21] I see no inconsistency between the Wills Variation Act requirement that an executor be served with notice of a claim and the Supreme Court Civil Rules requirement that an executor be made a party to an action under the Act.
- [22] The executor relies on *Quirico v. Pepper Estate*, where, in an action under the Wills Variation Act, Bouck J. said at paras. 15 and 16:
15. An executor should not pick sides between the beneficiaries and use estate funds to finance litigation on their behalf under the Wills Variation Act. It is a matter of indifference to the executor as to how the estate should be divided. He or she need only comply with the terms of the will or any variation of it made by a court.
16. For all these reasons, the law anticipates the executor will remain impartial between the opposing beneficiaries. Where proceedings are taken under the Act, all the executor need do is appear at the trial if required, and deliver to the court the Letters Probate and financial documents showing the value of the estate.
- [23] This statement of the law was adopted by Wong J. in *Ketcham v. Walton*, 2012 BCSC 175 at paras. 10 to 12.
- [24] The executor's position is that a requirement to list documents is inconsistent with the impartiality and neutrality required of the position, and places him in the arena with the litigants.
- [25] Further, to impose an obligation to list documents in a variation proceeding will require an executor to inventory the documents of a deceased, an additional burden, or, if delegated to the estate solicitor, additional expense.
- [26] It seems to me that the executor is in a position to control that risk, or avoid the burden simply by not filing and delivering a Response to Civil Claim. That is the step, if taken, that triggers the obligation to list documents under Rule 7-1, because that is the step that converts the executor from being a named party as required by Rule 21-6(2) to a "party of record," as defined in Rule 1-1, and it is as a "party of record," rather than named defendant or mere party, that the obligation to list documents attaches.
- [27] The Master did not have the benefit of the fuller exploration of the Supreme Court Civil Rules, and their relationship with the Wills Variation Act, that was provided to me by counsel.

- [28] That fuller exploration of the rules may have led to the same result, however, as the Master's reasons suggest that she may well have exercised the discretion conferred on her by Rule 7-1(14)(a) to excuse the executor from compliance with subrule (1).
- [29] The executor is willing to make the contents of the computer available to the parties: the parties are properly concerned to avoid infringing upon solicitor-client privilege. No one can know if there is anything in the computer to which the privilege might attach until someone examines its contents. I see no reason why counsel for the interested parties cannot examine the computer contents sufficiently to identify any documents that might contain privileged material and set those aside to be considered by counsel for the executor, who may or may not assert privilege.
- [30] The documents are not inaccessible to the interested parties; they simply have to devise a means of reviewing them with an eye to preservation of any privilege that may attach to an individual document or portion of document: see *Bell v. Smith*, [1968] S.C.R. 664, 68 D.L.R. (2d) 751, for the obligation to protect the privilege: see *No. 151 Cathedral Ventures Ltd. v. Gartrell*, 2002 BCSC 888, for an approach to partial redaction for privilege.
- [31] The Master's interpretation and application of the Rules was in error: the executor having delivered a Response to Civil Claim became subject to the document disclosure obligations imposed on parties of record. The executor also became entitled to seek relief under Rule 7-1(14)(a), and because that was not argued before the Master, nor before me, the appropriate order is to remit the matter to the Master for argument on that point, if it is necessary, given my suggestions as to how to deal with the potential privilege issues that might arise if the interested beneficiaries take up the executor's offer to examine the computer contents.
- [32] The appeal is allowed, and the matter remitted to the Master if needed.
- [33] Costs will be in the cause.

"R.T.C. Johnston, J."

The Honourable Mr. Justice Johnston

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