

CANADA / JUDGMENT

Webber v. Sullivan

2019 BCSC 1784

COURT

Supreme Court of British Columbia

DECIDED

18 October 2019

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2019 BCSC 1784 Webber v. Sullivan IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Webber v. Sullivan, 2019 BCSC 1784 Date: 20191018 Docket: S165176 Registry: Vancouver Between: Barbara Diane Webber and Valerie Ann Sullivan Plaintiffs And: Bryon Albert John Sullivan, in his personal capacity and in his capacity as Executor of the Estate of Elizabeth Sullivan, deceased, and Keith Sullivan Defendants Before: The Honourable Madam Justice Horsman Reasons for Judgment - Costs Counsel for the Plaintiffs: T. O'Mahony K. Suprynowicz Counsel for the Defendant Bryon Sullivan: R.M. Stewart Counsel for the Defendant Keith Sullivan D.M. Smith Written Submissions: September 24, 30 and October 9, 2019 Place and Date of Judgment: Vancouver, B.C. October 18, 2019

INTRODUCTION

- [1] In reasons released on September 10, 2019 [indexed at 2019 BCSC 1522], I issued judgment in this action. I varied the will in issue pursuant to the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA], but dismissed the plaintiffs' application for a declaration that the inter vivos transfer of certain property by the testator, the parties' mother Elizabeth ("Betty"), was the result of undue influence. I directed that if the parties were not able to reach agreement on an appropriate costs order then they were at liberty to provide brief written submissions on costs. I have now received those submissions.
- [2] As in the main judgment, I will use the parties' first names in these reasons for ease of reference. THE PARTIES' POSITIONS ON COSTS
- [3] The defendant Keith seeks his costs from the plaintiffs as special costs in relation to the dismissal of the plaintiffs' claim of undue influence. The plaintiffs alleged that Keith took advantage of the vulnerability of Betty to effect the inter vivos transfer of an apartment building. Keith says that the claim of undue influence raised very serious allegations of misconduct against him, and was bound to fail. The claim of undue influence was advanced by way of a pleadings amendment that I granted at the outset of trial. Keith says that by this time it should have been apparent to the plaintiff that the claim was without merit.

- [4] Bryon also seeks his special costs of the action from the plaintiffs. Bryon argues that the claim of undue influence was pursued against him as an "accessory" even if the plaintiffs pleading was directed at Keith. Alternatively, Bryon says there should be an apportionment of costs to reflect the fact the defendants were substantially successful on the issues at trial.
- [5] The plaintiffs concede that they are liable for Keith's costs because the undue influence claim did not succeed. However, they say that only ordinary costs should be awarded and not special costs. The plaintiffs say that Bryon should pay their costs in relation to the WESA claim because the plaintiffs were successful in achieving a variation of Betty's will.
- [6] No party argued that any portion of costs should be paid out of the estate. The WESA claim was defended by Bryon in his personal capacity as he is otherwise the sole beneficiary of Betty's estate. There is no reason in the present case to depart from ordinary costs rules, including the rule that costs follow the event: *Mawdsley v. Meshen*, 2011 BCSC 923 at paras. 34-38.

ANALYSIS

Costs as between the plaintiffs and Keith

- [7] There is no dispute that Keith is entitled to his costs in defending the undue influence allegation, which was the only claim advanced against him in this action. Keith is not a beneficiary under Betty's will and he took no position on the variation claim under the WESA. The only question of contention is whether Keith is entitled to special costs as opposed to ordinary costs.
- [8] In *Allart Estate v. Allart*, 2016 BCSC 768, Madam Justice Harris provided a useful summary of the principles that guide Court's jurisdiction to award special costs:
- [15] The court is also empowered to order special costs in exceptional circumstances. In the leading decision of *Garcia v. Crestbrook Forest Industries* (1994), 9 B.C.L.R. (3d) 242 (C.A.), the Court established "reprehensible" as the single standard for the award of special costs (para. 17). In recognition of the broad meaning of the word reprehensible, Lambert J.A. explained that in order for an award of special costs to be justified "something more" is required, such as "improper allegations of fraud, or an improper motive for bringing the proceedings, or improper conduct of the proceedings". An action that "has little merit" is not, without more, a reason for awarding special costs (para. 23).
- [9] The party seeking special costs must demonstrate exceptional circumstances to justify a special costs order. The court should show restraint in awarding special costs: *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352 at para. 73.

- [10] On a number of occasions, British Columbia courts have awarded special costs in estate cases where the unsuccessful party alleges undue influence in circumstances where the claim is bound to fail or the plaintiff has an ulterior and improper motive for advancing the claim. Keith relies in particular on McLean v. Gonzalez-Calvo, 2007 BCSC 648 and Stewart v. McLean, 2010 BCSC 64.
- [11] In my view, both these cases are distinguishable in terms of the gravity of the plaintiffs' reprehensible conduct in advancing an unsuccessful claim of undue influence. It is true that I found, as Keith emphasizes, that the claim of undue influence in the present case was "tenuous". However, this is different from saying it was bound to fail. The plaintiffs did have reason to question Betty's intent in transferring the apartment to Keith given the statement in her will that she did not intend to create a joint tenancy with Keith. This is not a case in which there was no evidence whatsoever to support of the claim. I also accept that the plaintiffs did not have improper or ulterior motives in advancing it.
- [12] That said, the undue influence claim was, in my view, weak. The plaintiffs ought to have exercised greater caution, particularly in light of the letter they received from Keith's counsel on the eve of trial warning of the possibility of a special costs award if the undue influence claim was pursued. However, bearing in mind the need to exercise restraint in an award of special costs, I do not find that the plaintiffs' conduct in pursuing the claim of undue influence in the circumstances of this case was sufficiently reprehensible to give rise to an award of special costs.
- [13] Keith is therefore entitled to his ordinary costs of defending this action at Scale B. Costs as between the plaintiffs and Bryon
- [14] The plaintiffs seek costs against Bryon on the basis that they were successful in achieving a variation of Betty's will, even if the variation they achieved (15% to the plaintiffs) was not as significant as they had sought (50% to the plaintiffs). The plaintiffs say they were successful on this claim and therefore entitled to ordinary costs from Bryon, the only party who defended the claim.
- [15] Rule 14-1(9) of the SCCR provides that the costs of a proceeding must be awarded to the successful party unless the court otherwise orders. When the litigation concerns multiple causes of action, it is appropriate to apply the "substantial success" test to decide which party has been successful: *The Owners, Strata Plan LMS 3259 v. Sze Hang Holding Inc.*, 2017 BCCA 346 at paras. 91-92. Substantial success is determined by looking at the matters in dispute between the parties, assessing their importance to the parties, and doing a global determination of which party succeeded overall: *Gagne v. Sharp*, 2015 BCSC 154 at para. 22.
- [16] The determination of substantial success does not require a "meticulous mathematical calculation" of the precise amount of court time spent on various issues: *Gagne* at para. 34. Substantial success is measured in broad terms: *Stearman v. Powers*, 2017 BCCA 165 at para. 65.

- [17] In my view, the question of whether the plaintiff achieved substantial success in the present action cannot be determined solely by reference to the outcome of the WESA claim. The plaintiffs also advanced a claim of undue influence, which was unsuccessful. The undue influence claim was a significant focus of the trial. I agree with Bryon that the plaintiffs' arguments necessarily engaged Bryon in a defence of that claim even if he was not the direct target. The plaintiffs' theory, as it appeared to me at trial, was that Bryon was complicit in Keith's mistreatment of Betty and that Bryon actively covered for Keith. Bryon was put to time and effort in defending those allegations.
- [18] Given the plaintiffs' lack of success on the undue influence claim, combined with the relatively modest variation of the will that they achieved, in my view success as between Bryon and the plaintiffs can best be described as divided. I conclude that a fair costs order is that each party bear their own costs of the action.

CONCLUSION

- [19] The plaintiffs shall pay Keith's costs in defending the action as ordinary costs at Scale B.
- [20] The plaintiffs and Bryon shall each bear their own costs of the action. "Horsman J."

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Prepared on 28 October 2026 · Esheria