

CANADA / JUDGMENT

Wright v. Schlesiger

2020 BCCA 73

COURT

British Columbia Court of Appeal

DECIDED

20 February 2020

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2020 BCCA 73 Wright v. Schlesiger

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Wright v. Schlesiger,

2020 BCCA 73

Date: 20200220

Docket: CA45722

Between:

Krista Edith Wright

Respondent

(Plaintiff)

And

Gerald Werner Schlesiger

Appellant

(Defendant)

And

The Public Guardian and Trustee of British Columbia as Trustee for

Luzie Maria Bouwman and Tony Bouwman, and

Glenna Grace Schlesiger

Respondents

(Defendants)

Before:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Harris

The Honourable Mr. Justice Grauer

On appeal from: An order of the Supreme Court of British Columbia, dated

October 17, 2018 (Wright v. Schlesiger, 2018 BCSC 2161,

Vancouver Docket S080112).

Oral Reasons for Judgment

The Appellant, appearing in person:

G.W. Schlesiger

Counsel for the Respondent,

Krista Edith Wright:

D.D. Stewart

D.W. Barber

Place and Date of Hearing:

Vancouver, British Columbia

February 18, 2020

Place and Date of Judgment:

Vancouver, British Columbia

February 20, 2020

Summary:

The appeal is from an order directing certain monies held in court pursuant to a previous court order to be released to the respondent, and a smaller sum to be retained. The monies paid into court were the subject of a settlement agreement reached in litigation concerning the administration of the parties' mother's estate. Funds were said to have been co-mingled, and while some of the monies paid into court were undisputedly estate assets, the genesis of the balance of monies was not determined in court proceedings. Held: Appeal dismissed. No basis was established to interfere with the order appealed.

- [1] SAUNDERS J.A.: Mr. Schlesiger appeals from two orders made by Madam Justice Horsman on October 17, 2018. Mr. Schlesiger is the executor of the estate of Luzie Schlesiger who died in August 1990. Luzie Schlesiger was his mother and the mother of his two sisters. The respondent Krista Wright is one of his sisters. The other sister bears the mother's given name of Luzie. Mr. Schlesiger and Ms. Wright have been engaged in a difference over release of monies for a very long time.
- [2] In the course of Mr. Schlesiger's administration of the estate, Ms. Wright commenced legal proceedings against him for, amongst other things, an accounting. By then two properties in the family had been sold and monies from them were held in trust. There appears to be no dispute that one of the properties was an asset of the estate but the proper characterization of the second property as an asset of the estate has never been expressly litigated, or determined by court order. That underlies one of Mr. Schlesiger's concerns as to the reasons leading to the orders appealed, as I will explain, because Mr. Schlesiger takes the position that the second property was not part of the estate. This seems to matter from the point of view of tax liability.
- [3] The litigation started by Ms. Wright was settled through mediation in September 2011. Mr. Schlesiger was represented by counsel. The terms of settlement set out in an e-mail from Mr. Schlesiger's then counsel to Ms. Wright's then counsel provide:
- (1) From the funds held in trust, using the original number of 836,000 (or 611,000 after taking out Luzie's settlement amount), Gerald would receive \$363,500 and Krista would receive \$247,500.
 - (2) The interest earned on the \$836,000 to the time of payout will be divided equally between Gerald and Krista.
 - (3) The mediator's fees will be paid equally by Gerald and Krista.
 - (4) Gerald and Krista will refile their respective 2009 tax returns to show Gerald is receiving one-third of the capital gains on the 10604 property and Krista one-third of the capital gains on the 10604 property.
 - (5) Counsel will hold back an agreed-upon amount from the funds payable to Gerald and Krista and each of Gerald and Krista will pay one-third of the required amount to the CRA in order to obtain the tax clearance certificate for the estate.
 - (6) Each of Gerald and Krista will enter into a mutual release of all claims up to date and Krista will waive the requirement of Gerald to passing the accounts.
 - (7) Krista will cause a consent dismissal order to be entered in the action as though determined on the merits and without cost to any party. Additionally, she will cause the CPL filed under Number BB621797 to be discharged from title on all properties.

David, could you please confirm whether Krista will also accept the settlement, and, if so, we can write these terms up more formally.

[4] Ms. Wright's counsel responded as follows:

Our client agrees with the settlement proposal. We thought we had relayed that information to you and apologize if there was a misunderstanding.

[5] The amount of the holdback for tax referred to in para. 5 of the settlement could not be agreed. In September 2012, Mr. Justice Davies, on the application of the Public Guardian and Trustee, who was holding monies to be dispersed on this agreement, ordered the monies paid into court. His order provided:

[Counsel for the PGT must] Pay into court the balance of the funds held in trust, being \$587,400.67, to the credit of this action, pending further order of the court as to its final disbursement as between the Plaintiff and the Defendant Gerald Werner Schlesiger. However, this amount will not be paid out until the issues concerning a tax clearance certificate have been resolved among the parties;

[6] As can be seen, the order contemplated obtaining a tax clearance certificate. That has not been obtained for reasons that are disputed, and which are beyond the reach of this appeal.

[7] That brings us to the applications before Justice Horsman. Ms. Wright applied for payment out of monies to her, with a small amount held back for payment of taxes. Mr. Schlesiger applied (1) to dismiss certain of Ms. Wright's allegations as being out of time pursuant to the Limitation Act, S.B.C. 2012, c. 13; (2) to release funds to him held by the court for the estate; (3) for an order directing Ms. Wright to pay her portion of the estate's income tax assessment and related amounts; (4) for an order permitting him to seize any or all of Ms. Wright's assets and convert them to cash for the purpose of covering her portion of the estate's income tax assessment and related amounts; and (5) for an order directing Ms. Wright to pay him and the estate costs and damages.

[8] Justice Horsman ordered payment out of court to Ms. Wright of \$228,700 pursuant to the settlement agreement, and retention in court of \$7,000 pending further application of the parties, and she dismissed Mr. Schlesiger's application.

[9] As I understand the dispute, Mr. Schlesiger contends that Ms. Wright must refile her 2009 tax return, thereby to take advantage of a deduction which is not available if all the monies are considered estate monies. Mr. Schlesiger expressed the concern that absent Ms. Wright taking the step, the estate's tax bill may be large and may be payable by him as executor. Whether this is so is not before us.

[10] I have described the order made by the judge, and I will return to the formal grounds, as I understand them, advanced in Mr. Schlesiger's factum, but first I will deal with his submission to us in the hearing. Mr. Schlesiger expressed concern that the judge had referred to all the monies paid into court as monies that came from the estate. He referred

us to the statement in the judge's reasons at para. 10 that "Ms. Wright has not received her share of the proceeds of her mother's estate" and the statement in para. 13 describing his position advanced before the judge that "Ms. Wright is not entitled to any proceeds from the sale of the 10604 property because it is not estate property".

- [11] For clarity, neither of those references to estate monies or estate property determine the genesis of all of the money paid into court. The source of the monies was not the issue before the court but it does appear plain to me that at least some of the monies paid into court derived from sale of the property of the deceased, and thus the statement in para. 10 is correct - Ms. Wright has not received any money from the estate. That statement does not mean, however, that all of the money paid into court was estate money, and this ambiguity of the source of the monies was one of the advantages gained by the settlement - after it was reached it was not necessary to determine just what money was in the estate and what was not. The second statement in para. 13 is just a recitation of Mr. Schlesiger's position before the judge - it is not a finding by her.
- [12] As to the \$7,000 retained in court by the order of Justice Horsman, that appeared to be referable to an estate liability for tax on sale of the one property that undisputedly was an estate asset, and its holdback appears consistent with the terms of the settlement agreement.
- [13] Justice Horsman observed that the threshold issue before her was enforceability of the settlement agreement:
- [14] Mr. Schlesiger filed voluminous material on this application going to the merits of his view of Ms. Wright's entitlement to the proceeds of the 10604 property. Such material is only relevant if the settlement agreement reached by the parties has been revoked or is otherwise unenforceable, as Mr. Schlesiger alleges. The enforceability of the September 2011 settlement is therefore the threshold issue that must be resolved on these applications.

[Emphasis added.]

- [14] Mr. Schlesiger contested the enforceability of the settlement agreement before Justice Horsman, as he does in his factum in this court. Before Justice Horsman, Mr. Schlesiger contended that the settlement is not consistent with his instruction to his counsel and said the settlement was subsequently revoked by Ms. Wright. Justice Horsman rejected both propositions.
- [15] As to Mr. Schlesiger's claim that the agreement was not consistent with the instructions he gave his counsel, she said:

- [17] A solicitor acting for a party in a settlement negotiation is acting as that party's agent. Counsel is presumed to have the authority to bind his or her client to a settlement. There is no obligation on another party to make inquiries as to whether a lawyer agreeing to a settlement has actual authority to do so. See the decision of our Court of Appeal in *Propp v. Fleming*, [1968] B.C.J. No. 163, at paras. 36 and 37.
- [16] It is the law that absent a reservation expressed to the opposing party, which is not alleged in this case, counsel is presumed to have the authority to bind his or her client to a settlement. Justice Horsman made no error on this question.
- [17] As to the issue of Ms. Wright revoking the settlement agreement, the facts found by the judge as to the behaviour and inferences to be drawn from that behaviour are particularly within the purview of the Supreme Court justice; we are not a trial court and we may only interfere in such a question where there is an obvious and material error: *Housen v. Nikolaisen*, 2002 SCC 33. I would not give effect to the grounds of appeal relating to the judge's conclusions on these two issues.
- [18] Mr. Schlesiger, in his factum, also alleges the judge erred in her reference to orders in the Supreme Court of British Columbia, determining facts about the conduct of the Public Guardian and Trustee in relation to his sister Luzie, reserving only \$7,000 as provision for Ms. Wright's tax obligation and not making provision for release of those funds; and failing to recognize outstanding obligations of Ms. Wright and the 2011 agreement.
- [19] I can see no error in the judge's reference to other orders of the court. Those orders were not appealed by Mr. Schlesiger and are there to be used. As to the other errors, on my understanding of the case, those issues are resolved by my earlier comments on the restricted scope of the judge's reasons, which were concerned with enforcement of the settlement agreement and not with the characterization of the source of the monies held by the court.
- [20] For these reasons, I see no basis to interfere with the orders appealed.
- [21] There is one last matter. In support of his appeal, Mr. Schlesiger applies to adduce an affidavit which discusses in some detail the ownership of the properties and includes copies of notes of Ms. Wright from 1994 concerning the disputed property, notes referring to taxes that must be paid, notes said to be in support of a different view of the implications of the settlement agreement, a document from the Public Guardian and Trustee that Mr. Schlesiger says imposes \$240,000 capital gains tax on otherwise settled matters, and new evidence from Ms. Bouwman containing historical evidence. He contends that the new evidence illustrates the error of the court in concluding that the two properties are estate assets, and that the 2011 settlement agreement is valid. He says that the errors he alleges impact a separate agreement made with Ms. Bouwman.

- [22] On the question of admitting new and fresh evidence, our court is bound to apply *Palmer v. The Queen*, [1980] 1 S.C.R. 759, which sets out the four criteria for assessing the admissibility of new or fresh evidence on appeal. In *Korol (Re)*, 2014 BCCA 380, Mr. Justice Goepel explained:
- [35] This test requires the appellant to demonstrate that the evidence was not discoverable by reasonable diligence before the end of the trial; that the evidence is credible; that it would be practically conclusive of an issue before the court; and that if believed, the evidence could have affected the result of the trial.
- [23] In my view, the new and fresh evidence does not meet the Palmer criteria. Most importantly, none of the information contained in the fresh evidence is capable of affecting the result of this appeal and for that reason alone, I would not admit it. I am, further, not satisfied that the evidence was not discoverable upon the exercise of due diligence.
- [24] I would dismiss the appeal.
- [25] HARRIS J.A.: I agree.
- [26] GRAUER J.A.: I agree.
- [27] SAUNDERS J.A.: The appeal is dismissed.

"The Honourable Madam Justice Saunders"

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Prepared on 29 October 2026 · Esheria