
CANADA / JUDGMENT

X.R. Trust (Re)

2014 BCSC 1803

COURT

Supreme Court of British Columbia

DECIDED

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2014 BCSC 1803 X.R. Trust (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

X.R. Trust (Re),

2014 BCSC 1803

Date: 20140926

Docket: S138213

Registry: Vancouver

In the matter of the Trustee Act,

R.S.B.C. 1996, C. 464 and amendments thereto

and in the matter of the X.R. Trust

Before: The Honourable Mr. Justice Kelleher

Reasons for Judgment

Counsel for the Petitioner, Bank of Nova Scotia Trust Company:

H. H. Low

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A. Thiele

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The respondents, Zenow Renaerts, Yeshi Renaerts, Kuhleila Renaerts, Tariku Renaerts, Elshvah Renaerts, Kinzy Renaerts, Zehara Renaerts, Isabet Renaerts, Bashara Renaerts, Tova Renaerts, Kadija Renaerts, Rasheda Renaerts, Soraya Renaerts, Djorn Renaerts, Shakara Renaerts, Tybris Renaerts, Dabria Renaerts, all minors

No Appearance

Place and Date of Hearing:

Vancouver, B.C.

September 2, 2014

Place and Date of Judgment:

Vancouver, B.C.

September 26, 2014

Introduction

[1] This is a petition pursuant to s. 86 of the Trustee Act, R.S.B.C. 1996, c. 464. The Bank of Nova Scotia Trust Company ("Scotiabank") is the trustee of the X.R. Trust (the "Trust") which was established on March 10, 1999. It seeks the direction of the Court on a question respecting the administration of trust property.

[2] Section 86 of the Trustee Act provides:

86(1) A trustee, executor or administrator may, without commencing any other proceeding, apply by petition to the court, or by summons on a written statement to a Supreme Court judge in chambers, for the opinion, advice or direction of the court on a question respecting the management or administration of the trust property or the assets of a will-maker or intestate.

(2) The application under subsection (1) must be served on, or the hearing attended by all persons interested in the application, or by those that the court thinks expedient.

(3) The costs of an application under subsection (1) are in the discretion of the court.

Background

[3] Ximena Renaerts was born on December 17, 1985 and suffered severe injuries at the time of her birth. The injuries resulted in severe physical and mental limitations. She was adopted by Margaret Renaerts (now Houweling) and Bert Renaerts.

- [4] In the mid-1990s, Ximena through her Guardian ad litem, Margaret Renaerts, commenced a legal action for damages suffered by Ximena at the time of her birth.
- [5] The matter was settled. Under the terms of the settlement, Montreal Trust Company of Canada (the predecessor of the petitioner) was appointed trustee of a trust established for a certain amount of settlement funds to be held in the X.R. Trust for the benefit of Ximena.
- [6] Ximena remains profoundly disabled and will not marry or have issue or be capable of making a will.
- [7] After Ximena reached the age of majority, Margaret Renaerts was appointed sole Committee of the Person and Estate of Ximena by this Court. The order was dated May 17, 2007.
- [8] On August 27, 2010, Ximena's adult sister, Nicole Morison (nee Renaerts) was appointed co-Committee of the Person and Estate of Ximena by this Court. Under the terms of the order, the survivor of Nicole Morison and Margaret Renaerts is to act alone.
- [9] Scotiatrust (or its predecessor) has acted as trustee of the X.R. Trust since it was settled. The value of the properly held in the X.R. Trust as at September 30, 2013 was \$2,890,257.69.
- [10] The Respondents to the petition are all persons, known to date, who may have an interest in Ximena's estate as intestate heirs.
- [11] Both of Ximena's parents, Margaret and Bert, are surviving. They separated in 2008 and were divorced on December 17, 2009.
- [12] At present, Ximena has a number of surviving siblings. These include:
- (a) the natural children of Bert whose mother is not Margaret, being: Bernadine Renaerts and Berkley Renaerts (both of whom are sui juris);
 - (b) the natural children of Margaret and Bert, being Micahel Renaerts, Shane Renaerts and Nicole Morison (all of whom are sui juris);
 - (c) the adopted children of Margaret, being Karsten Renaerts, Chilot Renaerts, Etagegne Renaerts, Meekaylae Renaerts, Zenow Renaerts, Eskedar Renaerts, Yeshe Renaerts, Kuhleila Renaerts, Toriku Renaerts, Zehara Renaerts, Ilsabet Renaerts, Bashara Renaerts, Soraya Renaerts, Kadija Renaerts, Rasheda Renaerts, Djorn Renaerts, Shakara Renaerts, Tybris Renaerts, Tova Renaerts and Dabria Renaerts (all of whom are sui juris); and
 - (d) the adopted children of Margaret being Elshvah Renaerts, Kinzy Renaerts, and Princess Renaerts (none of whom is sui juris).

The Trust

- [13] Section 2.1(a) of the X.R. Trust Declaration defines the beneficiary as Ximena Jessica Nicole Renaerts.
- [14] "Guardians" is defined in s. 2(1)(b) of the X.R. Trust Declaration:

The legal guardians of the Beneficiary or one of them if the other is mentally incompetent or deceased; and it means Alternate Guardian if both of the legal guardians of the Beneficiary are either deceased or mentally incompetent.

[15] "Alternate Guardian" is defined in the X.R. Trust Declaration as "Nicole Renaerts".

[16] Section 3.1(g) deals with "Ultimate Distribution of Capital".

[17] Subsections 3.1(g)(i) and 3.1(g)(ii) deal with Ximena reaching the age of majority and exercising her right to terminate the trust if she is then mentally capable or at some subsequent date if she is then mentally capable. Also, if Ximena were capable, she could make an appointment of the trust property, save to her estate or her creditors.

[18] It is common ground that by reason of Ximena's mental capacity, these provisions will never operate.

[19] Subsection 3.1(g)(iii) addresses the circumstance where there remains undistributed Trust property at the time of Ximena's death and Ximena has not terminated the trust. In light of Ximena's mental capacity status, this will be the most likely circumstance on her death. Subsection 3.1(g)(iii) provides as follows:

(iii) If the Beneficiary dies before receiving the whole of the Trust Property, the trustee shall pay or transfer the Trust Property remaining at the date of death of the beneficiary:

A. in accordance with any deed of appointment made by the beneficiary during her lifetime and at a time when she was mentally competent provided that such appointments shall not be exercisable in favour of a beneficiary's estate, the beneficiary's creditors or creditors of the beneficiary's estate;

B. failing the exercise of the beneficiary of her power of appointment pursuant to subparagraph 3.1(g)(iii)(A), in accordance with any deed of appointment made by the guardians during their joint lives or, by the surviving guardian alone after the death or incapacity of the other guardian, provided that such appointment shall not be exercisable in favour of their estate, their creditors or the creditors of their estate;

C. failing the exercise by the Guardians pursuant to subparagraph 3.1(g)(iii)(B), in accordance with, but not forming part of the estate of the last to die of the Guardians.

[20] Subsection 3.1(g)(iii)(A) will not apply. Ximena will not be mentally competent during her lifetime.

[21] The ultimate distribution of the Trust property remaining at Ximena's death will be made under sub-section 3.1(g)(iii)(B) or (C).

[22] To date, no appointment has been made of the remaining Trust property after Ximena's death under the X.R. Trust by any person purporting to be the "Guardians".

- [23] Ximena ceased to have a legal guardian at law when she reached the age of majority and after the appointment of Committee(s) of Estate for Ximena.
- [24] The question is who are the "Guardians" under the X.R. Trust, and entitled to make an appointment of the remaining Trust property upon Ximena's death.
- [25] The petitioner seeks the Court's direction on the proper interpretation of certain provisions of the trust. Its questions are as follows:
- (a) Does "Guardian" under sub-paragraph 3.1(g)(iii)(B) of the Trust Deed for the X.R. Trust mean, after Ximena Jessica Nicole Renaerts ("Ximena") reaches the age of majority, Ximena's committee(s) of affairs, as may be appointed by the Court, from time to time;
 - (b) In the alternative, does "Guardian" under subparagraph 3.1(g)(iii)(B) of the Trust Deed for the X.R. Trust mean, after Ximena reaches the age of majority, Ximena's adopted parents, being Margaret Houweling and Bert Renaerts;
 - (c) If the answer to (a) or (b) above is no, who is the current "Guardian" under subparagraph 3.1(g)(iii)(B) of the Trust Deed;
 - (d) Can the Guardian exercise the power of appointment under subparagraph 3.1(g)(iii)(B) of the X.R. Trust Deed:
 - (i) in favour of herself/themselves or their estate(s);
 - (ii) if the answer to (d)(i) is no, in favour of a new trust that is settled for the purposes of being the beneficiary of the exercise of appointment by the "Guardian" under the X.R. Trust ("New Trust");
 - A. if the answer to (d)(ii) is yes, can the "Guardian" be the sole or a Trustee of the New Trust;
 - B. if the answer to (d)(ii) is yes, can the "Guardian" be the sole or a Beneficiary of the New Trust;
 - C. if the answer to (d)(ii) is no, who can be appointed the beneficiaries of the New Trust;
 - (e) If there is no appointment made by the "Guardian" under sub-paragraph 3.1(g)(iii)(b) of the X.R. Trust Deed during Ximena's lifetime, what is the proper disposition of the remaining trust property on Ximena's death;
 - (f) If there is no "Guardian" under subparagraph 3.1(g)(iii)(B) of the X.R. Trust Deed during Ximena's lifetime, what is the proper disposition of the remaining trust property on Ximena's death; and
 - (g) Does the power of appointment remain valid after Ximena's death but prior to the death of the last surviving Guardian?
- [26] The parties have reached consensus on a number of issues. The question I need to decide is the identity of the guardians. The question is whether it means Ximena's adoptive parents, Margaret Houweling and Bert Renaerts, or whether it means the Committee(s), who are currently Margaret Houweling and Nicole Morison.

- [27] Margaret Houweling and Bert Renaerts entered into a Separation Agreement in November, 2008. In the Agreement, they agreed that Margaret would have sole guardianship of the children.
- [28] They defined "children" as children of the marriage within the meaning of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp). They listed Ximena as a child. Even though she was 23 years old at the time, she clearly met the definition of child of the marriage in the Divorce Act:
- "Child of the marriage" means a child of two spouses or former spouses who, at the material time,
- (a) is under the age of majority and who has not withdrawn from their charge, or
 - (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessities of life.
- [29] There is a further trust, called the Banford Road Trust. This arose from Mr. Justice Williamson's order of September 29, 1998. At that time he ordered the payment of the sum of \$486,850 to Margaret Houweling in trust for Ximena for either house renovation or house purchase.
- [30] Margaret Houweling purchased the Banford Road property using the trust funds and funds of Margaret Houweling and Bert Renaerts. The Banford Road home was registered in the names of Margaret Houweling and Nicole Morison as joint tenants.
- [31] Margaret Houweling as trustee and Ximena as beneficiary and the Public Trustee entered into a Declaration of Trust on October 13, 1998, which was filed against the title to the property.
- [32] The Trust has been amended from time to time. The latest, or fourth amendment shows that Margaret Houweling and Nicole Morison currently hold 79.62% of the Banford Road home in trust for Ximena and 20.38% for their own benefit.

Analysis

- [33] I am satisfied that this Court has jurisdiction to construe the Trust Deed. See Donovan W.M. Waters, Mark R. Gillen and Lionel D. Smith, *Waters' Law of Trusts in Canada*, 4th Ed. (Toronto: Thompson Reuters, 2012) at 1165-66. See also *Engelman v. Engelman* (1986), 23 E.T.R. 30 (B.C.C.A.) at 5.
- [34] When Margaret Houweling and Bert Renaerts separated and divorced, Margaret Houweling became Ximena's sole legal guardian. When Ximena turned 19, she legally became an adult, by operation of law. However, when the court found her to be incapable of managing herself and her affairs, the Committee and then the Co-Committees were appointed.
- [35] Guardians are defined in the X.R. Trust as:

"Guardians" means the legal guardian of the Beneficiary or one of them, if the other is mentally incompetent or deceased; and it means Alternate Guardian if both of the legal guardians of the Beneficiary are either deceased or mentally incompetent.

"Alternate Guardian" means Nicole Renaerts.

[36] When Ximena turned 19, until she was declared incapable pursuant to the Patients Property Act, R.S.B.C. 1996, c. 349, Ximena did not have any "legal guardians". But the effect of the Committeeship in the context of the X.R. Trust is that the Co-Committees are the Guardians of Ximena.

[37] The Guardians of Ximena would appear to be, then, the Co-Committees.

[38] Bert Renaerts argues, however, that the only possible "Guardians" at the time of the creation of the X.R. Trust were Bert Renaerts and Margaret Houweling. He argues that the Trust does not contemplate anyone else serving as Guardians or serving in the capacity of a Guardian upon Ximena reaching the age of 19 years. He argues the X.R. Trust contemplates the Guardians playing a role separate and distinct from the Trustee.

[39] With respect, I disagree. That argument is inconsistent with the fact that Ximena was and is anticipated to have permanent incapacity. It therefore is not sensible that the "Guardians" be specific individuals. A deed that contemplates a lifetime of guardianship for Ximena could not have intended that only named people would occupy that role. Rather, it was necessary to contemplate Ximena would always need a Guardian or Guardians in place, and that the identity of the Guardian or Guardians may, for various reasons, change from time to time.

[40] I conclude that the term "Guardian" should be defined as those who are legally authorized to deal with Ximena's person and her affairs. Currently, Ximena's Guardians are the Co-Committees. Therefore, the answers to the seven questions posed by the petitioner are as follows:

- (a) yes;
- (b) no;
- (c) the current Guardians are Margaret Houweling and Nicole Morison;
- (d) the Guardian may exercise the power of appointment in favour of themselves but not their estate(s). Further, the Committee can be the sole or a Trustee of the New Trust. Further, the Committee can be the sole or a beneficiary of the New Trust. The answer to the question posed in (d)(ii)(C) is not applicable;
- (e)&(f) if there were no appointment made by the "Guardian" during Ximena's lifetime, the proper disposition of the residue of the X.R. Trust would be on an intestate basis;
- (g) the power of appointment does not remain valid after the death of Ximena. Any power of appointment duly executed before her death would remain valid.

[41] Costs will paid out of the X.R. Trust on a full indemnity basis for counsel appearing on this application.

[42] Attached to this decision as the Appendix is the formal order.

"S.F. Kelleher J."

The Honourable Mr. Justice S.F. Kelleher

Appendix

Source & reproduction note

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