

CANADA / JUDGMENT

Zaste v. Simpson

2022 BCCA 303

COURT

British Columbia Court of Appeal

DECIDED

8 September 2022

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2022 BCCA 303 Zaste v. Simpson COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Zaste v. Simpson, 2022 BCCA 303 Date: 20220908 Docket: CA47686 Between: Ingrid Helga Zaste personally and in her capacity as Executrix of the Estate of John Thomas Simpson Appellant (Defendant) And Christopher Mark Simpson and Kirsten Anne Simpson Respondents (Plaintiffs) Before: The Honourable Mr. Justice Willcock The Honourable Justice Griffin The Honourable Mr. Justice Grauer Supplementary Reasons to Simpson v. Zaste, 2022 BCCA 208, Vancouver Docket CA47686. Counsel for the Appellant (via videoconference): D. Hobbs Counsel for the Respondents: J.M. Richter A.M. James Place and Date of Hearing: Vancouver, British Columbia January 21, 2022 Place and Date of Judgment: Vancouver, British Columbia June 14, 2022 Written Submissions on Costs Received: August 11, 29, and 30, 2022 Place and Date of Supplementary Judgment: Vancouver, British Columbia September 8, 2022 Supplementary Reasons of the Court Summary: The appellant seeks costs following her appeal from an order granting the respondents leave to apply for rectification of the will, and rectifying the will. The appellant was unsuccessful in relation to the leave order, but succeeded on the substantive appeal concerning the rectification of the will. The respondents maintain that success was divided. Held: The appellant enjoyed substantial success and is entitled to her costs of the appeal. Supplementary Reasons for Judgment of the Court:

- [1] The appellant applies for an order awarding her the costs of her appeal. The respondents oppose. They say that success was divided, and the parties should accordingly bear their own costs.
- [2] By section 44(1) of the Court of Appeal Act, SBC 2021, c 6 (formerly section 29 of the Court of Appeal Act, RSBC 1996, c 77): "Unless the court or a justice orders otherwise, a party who is successful on an appeal is entitled to costs of the appeal ". It is trite law that being "successful on an appeal" does not require a party to have succeeded on every issue. The question is whether the party seeking costs, here the appellant, enjoyed substantial success: see, for instance, Stein v Stein, 2007 BCCA 187 at para 8.

- [3] In the proceedings below, the respondents applied under section 59(1)(a) of the Wills, Estates and Succession Act, SBC 2009, c 13, for an order rectifying the will of their father, the appellant's deceased spouse. They were obliged to seek leave to do so because their application was brought beyond the time limited in section 59(3). The chambers judge granted leave and made the order for rectification that the respondents sought, and from which the appellant appealed.
- [4] On appeal, in reasons for judgment indexed at 2022 BCCA 208, a majority of this Court dismissed the appeal from the granting of leave, but allowed the appeal from the order for rectification that the judge made, directing that the clause in question be rectified in a different manner, considerably more advantageous to the appellant. Hence the question of whether success was divided.
- [5] In the respondents' submission, success must be considered to have been at best divided because the appellant lost on her appeal from the granting of leave, and although she succeeded on the rectification aspect, this Court still rectified the will, albeit in a different manner.
- [6] Notwithstanding these submissions, it is our view that the appellant enjoyed substantial success. An appeal is from an order, and the judge's order for rectification was set aside on the basis that the judge erred in assessing the will-maker's intention. That was the substantive issue on the appeal. The leave aspect was argued as a secondary issue, and, indeed, as the majority reasons indicate, the result turned largely on the outcome of the substantive issue.
- [7] Accordingly, we award the appellant her costs of the appeal. "The Honourable Mr. Justice Willcock" "The Honourable Justice Griffin" "The Honourable Mr. Justice Grauer"

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