IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Schell Estate (Re),*
2019 BCSC 2168

Date: 20191216
Docket: P124101
Registry: Kelowna

In the Matter of the Estate of
Mathias Anthonia Schell, Deceased

- and -

Docket: S122896
Registry: Kelowna

Between:

Wayne Mathew Schell

Plaintiff

And

Lisa Marie Schell, as Executrix of the Estate of Mathias Anthonia Schell, and Lisa Marie Schell, in her personal capacity

Defendants

Before: The Honourable Madam Justice Norell

Reasons for Judgment

Counsel for L.M. Schell, as Executrix of the Estate of Mathias Anthonia Schell and in her personal capacity:	T. Fitzpatrick
Counsel for M.A. Schell:	J. Metherell
Place and Date of Hearing:	Kelowna, B.C. November 28, 2019
Place and Date of Judgment:	Kelowna, B.C. December 16, 2019

[1] On November 28, 2019 I gave oral reasons on an application in proceeding No. 124101, Kelowna Registry (the "Probate Proceeding") and on an application in action No. 122896, Kelowna Registry (the "Wills Variation Action"). These reasons address the issue of costs of those applications.

[2] The deceased died on April 28, 2018 and left a will dated February 24, 2018. He was predeceased by his wife in late December 2017. He had two children, Lisa Schell and Wayne Schell. The deceased made Lisa Schell the executrix and sole beneficiary of his estate. A clause in the will addresses the different financial circumstances of his children.

[3] The deceased's estate consists almost entirely of his home which is worth approximately $525,000. There is a mortgage in favour of a bank of about $40,000 and the home is currently under foreclosure. There is an order nisi with a redemption period which will expire in January 2020. The estate is property rich and cash poor. The estate does not have the cash to pay the estate's expenses.

[4] Lisa Schell lived with and cared for her father after her mother passed away. She also lived with her parents prior to that time and assisted her mother with the care of her father. Lisa Schell wishes to stay in the home that has been bequeathed to her, and to increase the mortgage to pay estate expenses. She has asked the bank to allow her to only bring the arrears up to date, but the bank has refused. She has made arrangements to refinance with another lender, however her brother has filed a Certificate of Pending Litigation (the "CPL") which prevents her from doing so.

[5] The deceased had been ill and in hospital for a period of time in the months leading up to his death. He made his last will approximately 10 days after his discharge from hospital in February 2018.

[6] The Probate Proceeding was filed in June 2019. On October 31, 2019, Lisa Schell filed the application heard November 28, 2019, seeking proof of the will in solemn form after Wayne Schell filed a Notice of Dispute in the Kelowna Registry challenging the validity of the will. The Notice of Dispute was filed May 15, 2018 and

renewed April 12, 2019, prior to Lisa Schell obtaining a grant of probate. Wayne Schell alleged that the deceased lacked capacity or was under undue influence at the time of making his will.

[7] The parties undertook investigations of Wayne Schell's allegations, which included obtaining evidence from the solicitor who took instructions from the deceased and attended upon the execution of the will, receipt of hospital and physician records, and an expert report from the deceased's family physician. The last of these was received two weeks prior to the hearing of the November 28, 2019 application. Upon receipt of the last of the information and documents requested, Wayne Schell withdrew his allegations and consented to the proof of will in solemn form. On the basis of the evidence filed, which included the evidence from the deceased's solicitor and family physician, I found the will was proved in solemn form and the Notice of Dispute of no force and effect. I ordered that Lisa Schell is entitled to the special costs for proving the will in solemn form, payable forthwith. This costs order was also consented to by Wayne Schell.

[8] The Wills Variation Action was filed in March 2019. In the notice of civil claim, Wayne Schell seeks to vary the will under the *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13, but also claims the will is invalid because the deceased lacked capacity or was under undue influence. At the end of April 2019 Lisa Schell filed a response to civil claim specifically raising that the latter claims are improper in a wills variation action, and citing the authority for this. Pursuant to Rule 25-14(4) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 (*Rules*), the validity of a will may be determined in an existing proceeding where it is appropriate to do so, or, if there is no such proceeding, must be brought by petition under Rule 16-1. It is generally improper to include both a wills variation claim and an action for proof of will in solemn form in the same proceeding because a valid will is a condition precedent to a variation proceeding: *The Public Guardian and Trustee of British Columbia v. Johnston*, 2016 BCSC 1388 at para. 84 aff'd 2017 BCCA 59, citing *Clark v. Nash*, [1986] B.C.J. No. 1655 aff'd [1987] B.C.J. No. 304; and *Naideu v. Yankanna*, 2018 BCSC 878 at paras. 18-20.

[9] Wayne Schell did not immediately agree to amend his notice of civil claim to delete the allegations concerning capacity and undue influence. As a result, on October 31, 2019 Lisa Schell filed the application heard November 28, 2019 to have those portions of the claim struck. Upon Wayne Schell obtaining the information he sought during the investigation of the Probate Proceeding, he also agreed those claims in the Wills Variation Action should be struck. I therefore made that order.

[10] In the application in the Wills Variation Action, Lisa Schell also applied pursuant to ss. 256-257 of the *Land Title Act*, R.S.B.C. 1996, c. 250 to have the CPL filed by her brother canceled so that she could re-mortgage the property. During the hearing, this was eventually resolved by an agreement between the parties, and I made an order in the terms reached by them.

[11] The only remaining issue, vigorously disputed between the parties, is the potential costs of Wayne Schell in the application in the Probate Proceeding and the parties in the application in the Wills Variation Action.

[12] With respect to the Probate Proceeding, Lisa Schell argues that her brother should pay to the estate the costs at Scale B of Appendix B of the *Rules* for having to prove the will in solemn form. She argues there is no sworn evidence from her brother why he thought the deceased lacked capacity. The deceased was sickly and suffered from several comorbidities but never suffered from dementia and his capacity was never questioned by his medical doctors or his lawyer. She argues the fact that her brother was disinherited is not a sufficient ground to raise suspicions with respect to the validity of the will, although there is no evidence this is why her brother disputed the will. She argues that if Wayne Schell's claim to vary the will is not successful, she will in effect be responsible for 100% of the legal fees of this proceeding. This would create an inequitable result as Wayne Schell would be entirely insulated from his failed allegations.

[13] Wayne Schell argues that he reasonably filed the Notice of Dispute because of the circumstances surrounding the will, that he reasonably made investigations, and once the information was obtained at last, only two weeks prior to the hearing of

the application, he promptly withdrew the allegations. Lisa Schell brought the application when she knew there were outstanding disclosure requests for health records. Wayne Schell needed the evidence to make a determination of whether he would oppose the application in the Probate Proceeding. He also argues that para. 8 of the application in the Probate Proceeding only seeks costs against any party who opposes the application, and once he had the information he required, he did not oppose it.

[14] With respect to costs of the application in the Wills Variation Action, Lisa Schell argues she should have her costs of the application payable forthwith in any event of the cause, or in the alternative costs in any event of the cause. She argues the pleadings should have been voluntarily amended by Wayne Schell when he was put on notice by way of the response to civil claim that those portions of the notice of civil claim were improper. This portion of the application should not have been necessary. With respect to the removal of the CPL, it was necessary when Wayne Schell refused to voluntarily remove the CPL to allow Lisa Schell to redeem the property for the benefit of the estate. She argues the CPL is not an estate expense as it is part of the Wills Variation Action.

[15] Wayne Schell argues it was unnecessary for the application concerning the pleadings in the Wills Variation Action to have been brought because the pleadings would have eventually been amended once it was determined whether the will would be proved in solemn form. He would have had to file a third proceeding, a petition, and there was no harm in waiting to have the pleadings amended. Further, he received the last of the information he needed only two weeks prior to these applications being heard, and as soon as he obtained that information he withdrew the allegations. With respect to the CPL, the removal and replacement of the CPL is for the sole benefit of the estate so there can be refinancing. He offered to remove and then replace the CPL but this was not accepted. The agreement reached will have him in the same position he would have been in originally had he not agreed to remove and replace the CPL. He should not bear this cost.

Analysis

[16] With respect to the application in the Probate Proceeding, the court in *Leung v. Chang*, 2014 BCSC 1243 summarized the principals applicable here:

> [36] In probate actions, if the court finds either the will-maker or the residuary beneficiary was "the cause" of the litigation or the litigation was in some way encouraged by the will-maker's conduct, for example, when there is confusion or uncertainty surrounding his or her testamentary documents, generally the costs of all parties will be paid from the estate. If the court finds the challenge to the will was reasonable, for example because it was precipitated by highly "suspicious circumstances" surrounding the preparation of the will, typically the court will not make an order for costs against the unsuccessful party. With the exception of these prescribed circumstances, an action relating to the validity of a will is properly characterized as an adversarial dispute among the affected parties and the usual rule that costs follow the event will apply. In keeping with this analytical approach, the current judicial trend in this province has been to characterize an action over the validity of a will as an adversarial dispute among the affected parties: *Mawdsley; Woodward v. Grant*, 2007 BCSC 1549 at para. 16.

[17] In addition, Rule 25-15(4) provides:

> (4) A respondent to a petition or application brought under this Part is not liable for costs if
>
> (a) the respondent merely requires that the will be proved in solemn form, and
>
> (b) the respondent only intends to cross-examine the witnesses produced in support of the will,
>
> unless the court determines that there was no reasonable ground for requiring proof in solemn form.

[18] I have also considered *Bull Estate v. Bull*, 2015 BCSC 136, *Moore v. Drummond*, 2012 BCSC 1702, and *Singh Estate (Re)*, 2019 BCSC 1114, cited to me by counsel for Lisa Schell, as examples of when reasonable grounds for challenging a will were or were not found with respect to awarding costs.

[19] There is no evidence from Wayne Schell as to why he alleged the deceased lacked capacity or was under undue influence. For example, there is no affidavit evidence that he visited his father and he observed certain things that made him question his capacity. Counsel pointed to a couple of entries in what I was told were hundreds of pages of medical records, that at one point in hospital the deceased had

delirium. There is no evidence this was an ongoing problem. Although Lisa Schell lived with and cared for her parents, there is no affidavit evidence from Wayne Schell as to why he thought his father may be under undue influence. There is simply the fact that the will made Lisa Schell the sole beneficiary. The will contains a clause referring to Lisa Schell's and Wayne Schell's different financial circumstances.

[20] I recognize that Wayne Schell withdrew his allegations and consented to proof of the will in solemn form very soon after his counsel obtained the information needed to advise him. However, that does not address why the Notice of Dispute was initially filed. On the evidence filed on this application, I find there were not suspicious circumstances as they have been defined in the case authorities, or reasonable grounds, to challenge the deceased's capacity, or to make an allegation of undue influence. I do not find that Wayne Schell was "merely" requiring the will be proved in solemn form within Rule 25-15(4). When there are allegations of lack of testamentary capacity or undue influence, it is the duty of the executor to prove the will in solemn form despite the withdrawal of the allegations: *Trites v. Johnson*, 3 W.W.R. 100 at p. 101. As a result the allegations made by Wayne Schell, Lisa Schell as executor was required to bring the application, and incurred that expense. In my view, she acted reasonably in continuing with the application even after Wayne Schell withdrew his allegations. While Wayne Schell was no longer opposed to the application by the time it was heard, his allegations were the reason the application had to brought. As a result, I order that Wayne Schell pay to the estate the costs of the proving the will in solemn form at Scale B of Appendix B of the *Rules*.

[21] As for the amendments to the pleadings in the Wills Variation Action, there was no affidavit evidence before me of any agreement to put the issue in abeyance until the capacity issue was resolved. Again, I acknowledge Wayne Schell promptly consented to the amendments once the capacity issue was resolved, but that was not the basis upon which the pleading was defective. In the usual course, Lisa Schell would be entitled to the costs of the application against Wayne Schell.

[22] However, with respect to the CPL, I have been persuaded that while the initial CPL is not an estate expense, the application to remove the CPL, and the subsequent agreement eventually reached between the parties to remove and replace the CPL, is for the benefit of the estate to address the foreclosure and the lack of cash within the estate. As such I find it is an estate expense and the cost of the application should be borne by the estate and not by Wayne Schell.

[23] Considering both the amendment to the pleadings and the CPL issues, and that Lisa Schell is presently the sole beneficiary of the estate, in my view both parties should bear their own costs of the application in the Wills Variation Action.

"Norell J."