IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Kelly v. Bell,*
2012 BCSC 841

Date: 20120606
Docket: S092063
Registry: Vancouver

Between:

Valerie Evelyn Kelly

Plaintiff

And

Irving Oliphant Bell, as Executor and Trustee
of the Last Will and Testament of Olive Patricia Bell, Deceased,
and Irving Oliphant Bell in his personal capacity

Defendants

Before: The Honourable Madam Justice Kloegman

Reasons for Judgment

Counsel for the Plaintiff:	A.E. Thiele J. Fung
Counsel for the Defendants:	R.A. Kasting
Place and Date of Trial:	Vancouver, B.C. May 7-10, 2012
Place and Date of Judgment:	Vancouver, B.C. June 6, 2012

[1] The plaintiff, Valerie Kelly and the defendant, Irving Bell are brother and sister. Their mother, Olive Bell, died on November 2, 2008. She left a Will, appointing the defendant as her executor. She made a specific bequest to the defendant of her house and contents in West Vancouver, and left the residue of her estate to the plaintiff and the defendant in equal shares.

[2] At the time of Mrs. Bell's death, the house had an assessed value of $2,058,000 and the contents were appraised at $23,200. The parties agreed at trial that the residue of the estate at death, before the costs of administration, should be valued at $694,897.32. Thus the execution of the terms of the Will would result in the defendant receiving assets worth about $2.4 million and the plaintiff receiving less than

$350,000.

[3] The plaintiff sues under s. 2 of the *Wills Variation Act*, R.S.B.C. 1996, c. 490, for an order that adequate, just and equitable provision be made for her out of Mrs. Bell's estate. The defendant defends the action on the basis that the bequest of Mrs. Bell of one half of the estate, minus the house, is within the range of bequests that a judicious parent would make to satisfy her moral obligation to a disappointed, but not disinherited, plaintiff.

[4] Many of the relevant facts which I am required to find in order to resolve this litigation were not in dispute. Conversely, much of the evidence that was in dispute was not relevant to the outcome of the case. For example, the parties disagreed about the date when the joint accounts between the defendant and Mrs. Bell were created, but this is now irrelevant because the defendant agrees that the joint accounts all properly form part of Mrs. Bell's estate at the time of her death. Similarly, the defendants' conduct in failing to disclose the joint accounts on the probate disclosure statement, or at all prior to the litigation, has no relevance to the present state of proceedings, although such conduct might well be relevant in any further determination of who should pay the costs of this litigation.

[5] I find the following facts to be relevant considerations in the task before me of balancing the principle of testamentary autonomy with the principle of adequate, just and equitable provision for adult independent children of testators (*Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807):

1. The plaintiff is 66 years old. She graduated from the University of British Columbia with a Bachelor of Education degree in 1968, but did not pursue a teaching career until 1989, when she began work as a special education assistant. She retired from this occupation in 2009. She has been married since November 1967 and she and her husband have two grown sons in their thirties.

2. The defendant is 62 years old. He graduated from Capilano College in 1972 with an audio-visual diploma. He worked at a number of different jobs. He was fired from some and became disillusioned with others. He lived at home with Mr. and Mrs. Bell, rent free, until 1982. He returned to the home after his divorce in 1994 to live with Mrs. Bell. He still resides there with one of his two adult daughters.

3. The plaintiff and her husband own an unencumbered house in North Vancouver assessed at $868,600. Until the plaintiff's retirement, their combined income was over $100,000; now it is around $94,000. They have RRSPs of approximately $390,000 and the expectation of an inheritance from the plaintiff's father-in-law of about $300,000 to $400,000.

4. The defendant has operated his own gardening business since 2001 but his income has decreased as a result of Mrs. Bell's health decline and her need for greater care, and his own physical ailments. He has earned in the range of $19,000 to $30,000 per year in his gardening business. He has no RRSP, private pension or other assets besides his vehicles which are worth, in total, about $220,000. He values his personal effects at about $18,700.

5. The plaintiff's relationship with her parents was strained in earlier years. Mrs. Bell blamed the plaintiff for refusing to participate in a débutante ball, and more significantly, for excluding her parents from her wedding plans and refusing to allow them to attend her wedding ceremony. Most significantly, Mrs. Bell was critical of the plaintiff for not visiting her father in hospital before he died, although the plaintiff says Mrs. Bell advised her to stay away because the plaintiff was pregnant.

6. Mrs. Bell's calendar showed that after an initial period of about 18 months, she had contact with the plaintiff more than once a month in those early years of the plaintiff's marriage. In later years, the plaintiff phoned Mrs. Bell regularly and they celebrated holidays and birthdays together.

7. The defendant appears to have had an excellent relationship with Mrs. Bell. The evidence of himself and others, including the plaintiff, establishes that he not only cared for Mrs. Bell physically and emotionally, but they were friends and enjoyed each other's company. In his youth, the defendant had suffered from a learning disability at school and was unable to attend university. Mrs. Bell worried that his employment opportunities were limited.

8. In 1980, Mrs. Bell swore a statutory declaration setting out her reasons for the unequal division of her estate between the plaintiff and the defendant. These were:

> THAT I have considered it my duty as a good mother to give the family home and contents thereof to Irving because he has not had the benefit of a university education and because he does not have the employment opportunities that I wish were available to him.
>
> THAT my daughter, Valerie Evelyn, has the economic support provided by her husband as well as the benefit of a university degree.
>
> THAT my daughter, Valerie, has in the past indicated her wish to disassociate herself from our family and has caused great pain and suffering to her father and myself in making these decisions at the time of her marriage and at the time of her father's death.

9. In 2006, Mrs. Bell sought legal advice from Mr. Hetherington, a wills and estates solicitor. Based on information from Mrs. Bell and the defendant that the house was worth about a million dollars and the residue consisted of about $860,000 cash, Mr. Hetherington advised Mrs. Bell that she had probably made adequate provision in the Will for the plaintiff. Mrs. Bell decided to make no changes to her 1980 Will.

10. Later in 2006, Mrs. Bell suffered a stroke. The defendant worked hard to help her rehabilitate and became the equivalent of an at-home caregiver.

11. About six months before her death, the defendant bought a Porsche for $130,000 from an account he held jointly with his mother.

[6] Ordinarily, a contemporary judicious parent would distribute his or her estate equally amongst his or her adult independent children. However, it is open in law for a testator to conclude that a child's conduct may disentitle her to share equally in the distribution of an estate, provided such conclusion is based on

accurate and rational reasons (*Ryan v. Delahaye Estate*, 2003 BCSC 1081; *Peden v. Peden et al*, 2006 BCSC 1713; and *Doucette v. Clarke*, 2007 BCSC 1021).

[7] The law does not require that the reasons of the testator be justifiable, but they must be valid in the sense of being based on fact, and rational in the sense that there is a logical connection between the reasons and the act of disinheritance (*Kelly v. Baker* (1996), 82 B.C.A.C. 150).

[8] In the case at bar, the plaintiff does not argue strenuously that Mrs. Bell's expressed reasons for unequal distribution are invalid or irrational. The plaintiff acknowledges she hurt her parents over the issue of her wedding. She acknowledges her good fortune in being well-supported by her husband and in a stronger financial position than the defendant. She acknowledges that the defendant provided care to both parents that she was not able to provide, given her own domestic responsibilities. She acknowledges the effort the defendant made to be employed successfully and his failure to do so. Contrary to the assertion of the defendant, the plaintiff is not being "grabby," but is only seeking a portion of the estate that more accurately reflects Mrs. Bell's true intention.

[9] In my opinion, the issue in this lawsuit does not centre on the accuracy of Mrs. Bell's reasons for unequal distribution. As the plaintiff concedes, the statutory declaration likely meets the threshold test of unequal distribution.

[10] The real issue here is the effect of the huge increase in value of the asset Mrs. Bell bequeathed specifically to the defendant. At the time of reviewing the adequacy of the provisions of her will in 2006, Mrs. Bell believed her house to be worth around a million dollars and the rest of her estate which she had bequeathed equally to her children to be worth $860,000. Thus the defendant would receive assets worth $1.43 million and the plaintiff would receive assets worth $430,000. On a *pro rata* basis this is approximately 77% to the defendant and 23% to the plaintiff.

[11] A division of 77/23 is probably on the low side, but I would not find it to be outside the range of adequate, just and equitable distribution. However, by the time of Mrs. Bell's death, the value of the house had doubled, and the plaintiff's *pro rata* share of Mrs. Bell's assets at the time of death has now decreased to about 12%. I do not think this bequest is within the range of society's reasonable expectation of a judicious person in the circumstances. This is dangerously close to a disinheritance of the plaintiff and I do not think that was ever the intention of Mrs. Bell.

[12] This is not a case of lengthy estrangement, or condemnable conduct on the part of the plaintiff, or enormous disparity between the means of the plaintiff and the defendant. This is a case of historical friction between Mrs. Bell and the plaintiff, greater contribution by the defendant to the welfare and well-being of Mrs. Bell, and a greater need on the part of the defendant for future financial security. These factors and perhaps other, less significant and less clearly expressed concerns caused Mrs. Bell to weigh distribution more heavily in favour of the defendant, but not to the extent of giving him almost 90% of her estate.

[13] I am satisfied that varying the Will to reflect a 23% share to the plaintiff of the entire estate, including

the house, properly balances the objective of s. 2 of the *Wills Variation Act* and the testamentary intention of Mrs. Bell.

[14] I cannot fix the dollar amount to which the plaintiff is entitled because the residue of the estate is subject to the cost of administration. However, granting an order to the plaintiff that she is entitled to 23% of the value of the entire estate, including the house, should allow the parties to resolve this matter.

[15] The parties are granted leave to make submissions regarding the scale and source of payment of costs of the litigation.

"Kloegman J."