IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ciarniello v. James,*
2015 BCSC 2148

Date: 20151124
Docket: S146155
Registry: Vancouver

Between:

Marianna Ciarniello

Plaintiff

And

Maria Louise James and David F. Sky as executors of the will of Dominic Ciarniello, deceased, Maria Louise James, Marco Carnello, Lana Ciarniello, Sonja Ciarniello, and Nicholas Ciarniello

Defendants

Before: The Honourable Mr. Justice J. Sigurdson

Reasons for Judgment

Counsel for the Plaintiff:	Amy D. Francis
Counsel for the Defendants Maria Louise James, Marco Carnello and Lana Ciarniello:	Wesley Mussio Anthony J. Eden
Counsel for the Defendants Sonja Ciarniello and Nicholas Ciarniello:	Kimberly-Anne M. Kuntz
Place and Dates of Hearing:	Vancouver, B.C. September 16 and 17, 2015
Place and Date of Judgment:	Vancouver, B.C. November 24, 2015

[1] The plaintiff, the wife of the deceased testator Dr. Dominic Ciarniello, seeks a variation of her husband's will of May 3, 2012 ("Will") under the *Wills Variation Act,* R.S.B.C 1996, c. 490. The testator died on April 28, 2013.

[2] This wills variation claim is set for trial in November 2016. However the plaintiff now applies for relief by way of summary trial.

[3] The plaintiff is the second wife of the deceased. Their relationship spanned 39 years. They were married for 28 years and spent the 11 years prior in a marriage-like relationship. They had two children. The deceased had three children by his first marriage. All five children are adults.

[4] The Will provided that, after specific gifts, the residue of the estate was to be divided equally among the five children of the deceased (three from the first marriage and two from the second marriage). The Will provided that the plaintiff was to be given any interest that the testator may have in the family home on Selkirk Street in Vancouver.

[5] The plaintiff's position is that under *Tataryn v. Tataryn* [1994] 2 S.C.R. 807 a variation of her husband's will is justified based on her legal and moral claim arising from a 39-year relationship, supported by her entitlement to spousal support, and considered in light of her claim for unjust enrichment. The unjust enrichment claim is not advanced as an independent claim on the summary trial. She says that a just and equitable provision for her would be a lump sum payment from the estate of $3,500,000. The plaintiff's counsel asserts that this amounts to about 1/3 of the husband's estate and represents what the plaintiff would have received on intestacy.

[6] The plaintiff says that her assets, at the date of her husband's death, were about $5.9 million made up of the family home's net value on survivorship, RRSPs, and her 90% interest in a holding company owning two properties.

[7] The plaintiff asserts the value of the testator's assets at the date of his death was $11,807,000.

[8] The value of the estate and the net worth of the plaintiff at the date of the testator's death are obviously relevant issues in this case.

[9] The plaintiff's position that she should receive a payment from the estate of $3.5 million is supported by her two children provided the residue of the estate is in fact divided equally among the five children.

[10] The plaintiff's claim is opposed by the three children from the first marriage on the ground that the value of the plaintiff's assets at the date of her husband's death is far greater than she asserts and the value of the deceased's estate is much smaller than the plaintiff asserts. The three children from the first marriage say that the proposed payment sought by the plaintiff, rather than equalizing the plaintiff's estate and the estate of the testator at death, would bankrupt the estate.

[11] The three children of the first marriage say the estate (Dr. Ciarniello's assets at death) is in the range of about $4.1 million, not $11,807,000, and the value of the plaintiff's assets is about $9.1 million, not $5.9 million as she asserts.

[12] The three children say that the deceased's estate plan was to provide adequately for the plaintiff and leave a fair inheritance to each of his children, which they say it did.

[13] All parties acknowledge that a crucial issue in the summary trial is the value of the deceased's estate and the plaintiff's estate at the time of Dr. Ciarniello's death.

[14] An initial question is whether this case is suitable for summary trial.

[15] I must determine whether I am able to find the facts necessary to decide the issues in this case or whether it would be unjust to give judgment. *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.*, [1989] B.C.J. No. 1003 (C.A.) is the leading decision on the appropriateness of summary trial. Chief Justice McEachern stated the relevant factors for consideration in deciding if it is unjust to give judgment on a summary trial:

> [49] In deciding whether it will be unjust to give judgment the chambers judge is entitled to consider, inter alia, the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question.

[16] Both parties took the position I could find the facts sufficient to determine the issues in this case, but they have quite different views on the findings that I should make.

[17] The importance of finding the facts to determine the issues of the value of the plaintiff's assets and the value of the testator's estate is obvious. While the plaintiff says the evidence allows the facts to be found to allow the claim in the amount she seeks, the three children say the values that I should find show that the claim must be dismissed.

[18] I have concluded that I am unable on the whole of the evidence before me to determine the facts necessary for me to decide this case on a summary trial basis.

[19] Some of the specific issues, on which I am unable to find the facts to justly determine now, may be described this way:

(a) The evidence shows that the estate had a tax liability on the testator's death of about $3.6 million which liability has apparently been paid; the evidence is unclear precisely how that liability arose and whether it can be avoided. The plaintiff says that if the testator left his assets to her then his assets would flow to her on a tax-deferred basis and that the $3.6 million paid by the estate is the direct result of her being "disinherited by the deceased". It was suggested by the plaintiff that steps could have been or might still be taken to further defer that tax. However, the plaintiff suggests that is irrelevant in any event because the relevant time for valuation is just before the date of testator's death and a tax liability that arises subsequently is irrelevant.

However, I find that the question of how this liability arose and whether it can be deferred is significant. The three children from the first marriage submit that there is no evidence that a successful award for the plaintiff in this case will lessen, defer or eliminate the tax liability and importantly that there is no expert evidence to that effect. I agree with that submission.

(b) One of the plaintiff's assets is a 90% interest in a company called Nicoson Investments Corp. ("Nicoson"). A question that arises on the evidence that I find I cannot presently resolve on this summary trial is the effect of a long-term debt of $1,267,697 apparently owing by Nicoson, significantly to whom it is owed, and whether and how it should be taken into account in determining the value of the plaintiff's interest in Nicoson at the date of the testator's death.

(c) The three children from the first marriage also say the market value of the plaintiff's property on Selkirk Street at the date of death is the relevant date for valuation but there is no evidence of the market value at that time.

[20] Those issues are significant, cannot presently be resolved on the evidence before me, and in my view need to be resolved to determine this case.

[21] There are some other issues that relate to the valuation of assets concerning which I may well be able to find the facts to determine in this case. They include the valuation of the RRSPs and whether they should be included in the deceased's estate or not, the proper treatment of the debt on the Hudson Street property (owned by the two children from the second marriage), and the question of whether legal, executor and accounting fees should be taken into consideration in determining the value of the estate and how a reasonable amount for those fees should be determined.

[22] For these reasons however I have concluded that I am unable to find the facts necessary to determine the issues of valuation required to decide this case by way of summary trial. I also find, upon the state of the evidence, that it would be unjust to decide the issues, particularly the valuation issues, on this application. It is however my tentative view that with directions and further evidence this case may be suitable to be determined by way of summary trial.

[23] I therefore invite counsel to appear again before me to make submissions on the appropriate manner, whether by cross-examination, additional lay or expert evidence or perhaps evidence from a joint expert, that further evidence can be introduced that will allow the facts relevant to the valuation issues to be determined so that this case may be determined by summary trial.

[24] Counsel may make arrangements through the registry to appear before me to make further submissions.

[25] Costs of this application will be in the cause.

"The Honourable Mr. Justice J. Sigurdson"