IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Flores v. Mendez,*
2014 BCSC 951

Date: 20140530
Docket: S137488
Registry: Vancouver

Between:

Rosa Fanny Perez Flores

Plaintiff

And

Angela Natalie Mendez, Javier Arturo Hull and Danny Orlando Hull

Defendants

Before: The Honourable Mr. Justice Voith

Reasons for Judgment

Counsel for the Plaintiff:	Wesley Mussio
The Defendant Angela Natalie Mendez appearing on her own behalf and on behalf of all Defendants:	Angela Natalie Mendez
Place and Date of Hearing:	Vancouver, B.C. February 26, 2014
Place and Date of Judgment:	Vancouver, B.C. May 30, 2014

[1] The plaintiff, Ms. Flores, asserts that she is the spouse or common law spouse of Mr. Duwayne Hull who died in Peru on December 9, 2012. The notice of application filed by Ms. Flores seeks various forms of relief, the following of which are, for present purposes, relevant:

> (a) a declaration that the plaintiff is a spouse or common law spouse of Duwayne Jay Hull, deceased, under the *Estate Administration Act*, R.S.B.C. 1996, c. 122 (the "*Act*"); and
>
> (b) the plaintiff be granted Letters of Administration over the Estate of Mr. Hull.

[2] The present application is brought under Rule 9-7 and the now repealed Rule 21-4, and will be decided under the *Act* despite its repeal, pursuant to s. 186 of the new *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13, as Mr. Hull died before the coming into force of this new estate administration regime. This application raises numerous questions of fact and law – none of which can be decided on the materials before me.

[3] The following facts appear to be uncontested. Mr. Hull was initially married to Zenaida Hull on December 16, 1978. They had three children. Those children are the named defendants in this action; Ms. Mendez is the daughter of the deceased and Danny and Javier Hull are his sons.

[4] Mr. and Mrs. Hull separated in 1992.

[5] On June 27, 2002, Mr. Hull and Ms. Flores participated in a ceremony that, on its face, purported to cause them to be married. At the time, however, Mr. Hull was still married to Mrs. Hull.

[6] Mr. Hull and Ms. Flores moved to Canada and lived together in Dawson Creek. It seems clear that they did, for many years, live in a "marriage-like relationship".

[7] The plaintiff filed a notice of civil claim on October 9, 2013. In that pleading the plaintiff asserts, *inter alia*, that Mr. Hull and she lived in a marriage-like relationship, that they were not estranged, that they did not intend to separate and that Mr. Hull died intestate. In that pleading, as in this application, the plaintiff seeks the grant of letters of administration.

[8] The defendants filed a response to civil claim in which they assert both that the plaintiff and Mr. Hull were estranged at the time of his death and that he left a will which named Ms. Mendez as his executrix. The defendants also filed a counterclaim alleging that Ms. Flores owes the estate of Mr. Hull monies on account of various debts.

[9] Finally, the defendants sought probate of what they said was Mr. Hull's will in the Dawson Creek Registry. Ms. Flores thereafter filed a caveat in that Registry.

[10] It is common ground that the estate of Mr. Hull has a value of approximately $100,000 and consists of various assets including two trailers.

The Relevant Statutory Provisions

[11] The following provisions of the *Act* are relevant:

> **1** In this Act:
>
> …
>
> **"common law spouse"** means either
>
> (a) a person who is united to another person by a marriage that, although not a legal marriage, is valid by common law, or
>
> (b) a person who has lived and cohabited with another person in a marriage-like relationship, for a period of at least 2 years immediately before the other person's death;
>
> …
>
> **"spouse"** includes a common law spouse;
>
> **6**
>
> (1) If a person dies intestate, or if the executor named in a will refuses to prove the will, the court may grant the administration of the estate of the deceased person
>
> (a) to the surviving spouse of the deceased person,
>
> (b) to one or more of the next of kin, or

(c) to the surviving spouse of the deceased person jointly with one or more of the next of kin,

as to the court seems expedient.

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(1) This section applies if

(a) a person dies intestate,

(b) a person leaves a will, but without having appointed an executor willing and competent to take probate, or

(c) the executor at the time of the death of the person resides out of British Columbia

and it appears to the court to be necessary or convenient by reason of the insolvency of the estate of the deceased or of other special circumstances to appoint some person to be the administrator of the estate of the deceased, or part of it, other than the person who, but for this section, would have been entitled to a grant of administration.

(2) In the circumstances referred to in subsection (1), the court may, in its discretion, appoint a person it thinks fit to be the administrator, on the person giving security the court must direct.

(3) An administration under subsection (2) may be limited or on condition or otherwise, as the court thinks fit.

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(1) In this section, **"net value"** means the value of an estate wherever located, both in and out of British Columbia, after payment of the charges on it and the debts, funeral expenses, expenses of administration and probate fees.

(2) This section applies if an intestate dies leaving a spouse and issue.

(3) If the net value of the person's estate is not greater than $65 000, the estate goes to the spouse.

(4) If the net value of the person's estate is greater than $65 000, the spouse is entitled to $65 000, and has a charge on the estate for that sum.

(5) After payment of the sum of $65 000, the residue of the estate goes as follows:

(a) if the intestate dies leaving a spouse and one child, 1/2 goes to the spouse;

(b) if the intestate dies leaving a spouse and children. 1/3 goes to the spouse.

(6) If a child has died leaving issue and the issue is alive at the date of the intestate's death, the spouse takes the same share of the estate as if the child had been living at the date.

Analysis

[12] The plaintiff's application turns on two central assertions – neither of which can be established on the record before me:

(i) that she was, at the material time, Mr. Hull's "common-law spouse"; and

(ii) that Mr. Hull died intestate.

i) Ms. Flores and Mr. Hull were Common Law Spouses

[13] Section 1 of the *Act* defines a common law spouse disjunctively. Though Ms. Flores's materials unequivocally assert she satisfies both aspects of the definition, this is not so.

a) "a person who is united to another person by a marriage that, although not a legal marriage, is valid by common law"

[14] There are two separate reasons that Ms. Flores does not fall within the first branch of the definition of "common law spouse" in s. 1 of the *Act.*

[15] The leading case in British Columbia that discusses marriages that do not conform with statutory requirements but may nevertheless be valid marriages at common law is *Keddie v. Currie*, 85 D.L.R. (4th) 342, [1991] B.C.J. No. 2871 (C.A.). In that case the court engaged in a detailed summary of the history of the legal regulation of marriage in England to determine whether common law marriages are still recognized in British Columbia despite the enactment of the *Marriage Act*, R.S.B.C. 1996, c. 282, which outlines the solemnization requirements of a legal marriage in British Columbia. The court concluded that, where there is a statute that specifically sets out the formal requirements of marriage, marriages that do not comply with those formalities can only be considered valid at common law where it was either impossible to conform to the local form of marriage, or where the parties have not submitted to the local law. An explanation of each these categories is provided in Christine Davies, *Family Law in Canada*, 4th ed., (Toronto: Carswell,

1984), and is cited in *Lin (Re)*, 99 D.L.R. (4th) 280 at 286,1992 CanLII 6225 (Alta. Q.B.) as follows:

> (a) *Impossibility of Complying with the Local Law*
>
> The impossibility may arise because there is no local form as, for example, in an unoccupied territory, or because the local machinery for celebrating marriages has broken down as in the course or aftermath of war or because the local form is one with which the parties in question cannot conform for legal or moral reasons. "Impossibility" does not mean "difficulty" and mere difficulty in complying with the local law is not enough.
>
> It is submitted that this exception to the general rule of compliance with the *lex loci celebrationis* is distinct from the exception mentioned below, that of lack of submission to the *lex loci.* Thus it is submitted that where compliance with the *lex loci* is impossible there may be a valid common law marriage albeit that the parties have generally submitted to the local law.
>
> (b) *No Submission to the Local Law*
>
> The general rule that parties to a marriage must comply with the formalities prescribed by the *lex loci celebrationis* is said to be based on the proposition that the parties must be taken to have subjected themselves to the local law. In certain situations, however, it may be that there is no question of submission to the local law and hence no reason why the validity of the marriage should be governed by it.

[16] Neither of the foregoing issues or requirements is addressed in the Plaintiff's materials, nor was I provided any opinion evidence addressing the relevant formal requirements of marriage under Peruvian law.

[17] The second and independent reason that Mr. Hull and Ms. Flores cannot fall within the first branch of the definition of "common law spouse" in the *Act* arises from Mr. Hull's pre-existing and subsisting marriage to Ms. Zenaida Hull.

[18] Recently, *Keddie* was cited by the Court of Appeal in *Austin v. Goerz*, 2007 BCCA 586, for the proposition that a common law marriage "is based on an agreement into which parties have the capacity to enter" (para. 39). As such, in that case, without any detailed discussion of what constitutes a common law marriage, the court held that the existing marriage of Mr. Austin to Mrs. Austin meant that he lacked the capacity to enter into a common law marriage with Ms. Goerz. Specifically, the court in *Austin* said:

> [39] It is not necessary to discuss what constitutes a valid common-law marriage other than to say that it is based on an agreement into which both

> parties have the capacity to enter: ***Desjarlais v. Macdonell Estate*** (1988), 23 B.C.L.R. (2d) 195 (C.A.) at 198; ***Keddie*** at paras. 45, 46. As Mr. Austin was not divorced from Mrs. Austin he lacked the capacity to enter into a common-law marriage. Ms. Goerz concedes this in her factum.

[19] The same lack of capacity exists in this case. Accordingly, Mr. Hull and Ms. Flores could not have entered into a valid marriage at common law and do not fall within the definition of common law spouse found in subsection (a) of s. 1 of the *Act*.

b) "a person who has lived and cohabited with another person in a marriage-like relationship, for a period of at least 2 years immediately before the other person's death"

[20] I do not understand Ms. Mendez to challenge the fact that Ms. Flores and Mr. Hull lived in a marriage-like relationship for a period of time. The question is whether this was so for "at least 2 years immediately before" Mr. Hull died.

[21] The recent case of *L.E. v. D.J.*, 2011 BCSC 671, at paras. 290-298, provides support for a strict interpretation of the two year period set by the *Act*. In that case L.E. was found to have entered into a marriage-like relationship with the deceased one year and 355 days before his death, ten days shy of the two-year mark fixed by the *Act*. Despite this minimal shortfall, Justice Russell held that the timing requirements of the provision were clear and mandatory and as such the two year requirement could not be relaxed.

[22] The evidence before me indicates that Mr. Hull traveled to Peru on November 20, 2012. Ms. Flores, in her affidavit made February 7, 2014, deposes that at all times Mr. Hull and she lived in a marriage-like relationship, that they had decided to open a business in Peru and that she was planning to join Mr. Hull in Peru later in 2013.

[23] If the foregoing evidence were true, the fact that Mr. Hull had initially gone to Peru without Ms. Flores or that he was alone in Peru at the time of his death would not foreclose the ongoing applicability of subsection (b) of the definition of common law spouse in s. 1 of the *Act*.

[24] The question, instead, is whether Mr. Hull and Ms. Flores had decided to separate either months, or possibly even years, before November 2012 when Mr. Hull traveled to Peru alone. There are three categories of evidence that suggest this may be so.

[25] First, the conduct of Ms. Flores following the death of Mr. Hull did not comport with what many might expect of a person whose spouse was dying or who had died abroad. Ms. Mendez, in her affidavit of February 20, 2014, made the following uncontradicted statements:

> 15. Rosa Fanny Perez Flores did not fly to Peru when my father was injured on November 30, 2012, nor did she fly down when he was in the hospital for 10 days. She was not there when he died on December 9th, 2012 and not there for his cremation on December 14, 2012. She didn't even come for the funeral on December 20, 2012.
>
> 16. I was not consulted by Rosa Fanny Perez Flores as to what to do with my father's remains, when he was cremated, she did not ask for the ashes. She was not at all part of the decision making process. I made all arrangements and covered all expenses. ...
>
> 17. After my return from Peru in late January 2013, I applied for the Death Benefit as I was named executor and had paid all funeral expenses. I was denied as the Plaintiff; [sic] Rosa Fanny Perez Flores had already applied and received this Benefit.

[26] In addition, it appears that on December 13, 2013, or four days after Mr. Hull's death, Ms. Flores made efforts to finalize the divorce between Mr. Hull and Mrs. Zenaida Hull. The evidence is not consistent on whether those efforts were successful.

[27] Second, there are various pieces of objective evidence that suggest that some change in the relationship between Ms. Flores and Mr. Hull occurred by at least the summer or fall of 2012. Three examples will suffice:

a) it appears that Mr. Hull sold his share of the family home to Ms. Flores on or about September 6, 2012;

b) Mr. Hull prepared a form of will on or about October 5, 2012. I will return to this document momentarily. For present purposes, and leaving aside

the issue of the validity of the document, what is important is that Mr. Hull appears to have left nothing to Ms. Flores and to have made his daughter the sole executrix of his estate; and

c) on November 23, 2012 the named beneficiary under a Canada Life insurance policy held by Mr. Hull was changed from Ms. Flores to Ms. Mendez.

[28] Third, numerous statements in different forms made by numerous individuals have been submitted, all of which address what Mr. Hull told these individuals about ending his relationship with Ms. Flores. Some of these are simply in the form of letters attached to the affidavit of Ms. Mendez. Others are in the form of sworn affidavits from Ms. Mendez and her brothers. Some of these statements suggest that the relationship between Ms. Flores and Mr. Hull ended some years earlier and that the two had, in recent years, simply been roommates living together as a matter of convenience.

[29] I accept that some of these statements raise hearsay and other evidentiary issues and that Ms. Flores has herself filed other materials, both objective in nature as well as letters from third parties, in aid of her assertion that at all material times, including in the period immediately prior to Mr. Hull's death, she was living in a marriage-like relationship with him.

[30] The conflict in these various materials is such that the central proposition advanced by Ms. Flores, that she and Mr. Hull were in a marriage-like relationship in the two-year period prior to his death, cannot be determined and is subject to serious question. This conflict, without more, prevents this aspect of the application from being determined under Rule 9-7; see *Gichuru v. Pallai*, 2013 BCCA 60 at paras. 30 and 31.

ii) Mr. Hull Died Intestate

[31] Mr. Hull prepared a document which, as I have said, Ms. Mendez argues is a valid will. Counsel for Ms. Flores argues that the document is not a proper

testamentary instrument and, in aid of that position, made the following written submissions in the brief he filed:

> 27. The Defendants say that the Alleged Will is a proper testamentary instrument. Clearly it is not.
>
> 28. At the top of the Alleged Will, it is dated October 5, 2012, but it was signed and dated on November 18, 2011. This would clearly illustrate the Alleged Will was added to after the signatures were placed on the Alleged Will. Indeed the Alleged Will references 2012 transactions- sale of the residence to the Plaintiff completed in September 2012 and the sale of Trailer #28 transaction in January 2012 that later fell through (Tab 5, Affidavit of Angela Mendez, Exhibit 1; Tab 6, Affidavit of Angela Mendez #2, Exhibit IIC). The Alleged Will lists one of the Deceased's assets as "$90,000 in bank account of Nova Scotia Bank" but that money came from the Plaintiff after the signing of the will and via the house sale.
>
> 29. The Alleged Will is handwritten and difficult to read. It does not state it is a "will" or "last will and testament". There is no attestation clause. There is no standard clauses one would expect to see in a will.
>
> 30. The Document indicates "Angela will look after this" and "Angie I hope you will do this and split it evenly".
>
> 31. Under the Will Act:
>
> > **4** Subject to section 5, a will is not valid unless
> >
> > > (a) at its end it is signed by the testator or signed in the testator's name by some other person in the testator's presence and by the testator's direction,
> > >
> > > (b) the testator makes or acknowledges the signature in the presence of 2 or more attesting witnesses present at the same time, and
> > >
> > > (c) 2 or more of the attesting witnesses subscribe the will in the presence of the testator.

[Underlining in original.]

[32] The foregoing submissions raise several factual assertions. In light of my earlier conclusions, relating to the nature of the relationship between Mr. Hull and Ms. Flores at the time of his death, I do not consider that this further issue should be addressed on the material before me. My inability to determine Ms. Flores's status as Mr. Hull's common law spouse renders it imprudent and unnecessary for me to make separate findings on other issues. Furthermore, the issues of timing and execution that are raised by counsel for the plaintiff may potentially be explained with additional evidence. Still further, the common law presumption of due execution may also have some relevance or import on a proper evidentiary record.

[33] The various concerns that have been raised, however, prevent me from being able to draw the conclusions in relation to the alleged will that Ms. Mendez urges me to draw. Therefore, for present purposes, I have proceeded as though, without in any way deciding the matter, Mr. Hull died intestate.

The Practical Problem

[34] The estate of Mr. Hull, though relatively modest, has some assets, in particular two trailers, that have to be maintained. It also has various debts that have to be paid.

[35] Both sections 6 and 7 of the *Act* provide the court with a broad and general discretion to grant letters of administration where there are competing applications from an intestate deceased's family members. In *Muttart Estate, Re*, [1971] 2 W.W.R. 348 at 350, [1971] A.J. No. 54 (Alta. S.C.), the court said:

> In cases where the competing applications are from next-of-kin it is in the discretion of the court to appoint an administrator. In discussing the exercise of this discretion the learned authors of Macdonell and Sheard on Probate Practice say at p. 163:
>
> "The statute leaves it to the discretion of the court to appoint an administrator from among the next of kin; none has a legal preference. The discretion is, however, a judicial one not to be exercised arbitrarily or capriciously but with due regard to the best interests of the estate and of all persons interested in the distribution of the property. The first duty of the Court is, therefore, to place the administration in the hands of that person who is likely best to convert it to the advantage of those who have claims, either in paying the creditors or in making distributions; the primary object is the interest of the property."

[36] The relevant authorities provide some guidance on the factors or indicia that may guide the appointment of an administrator. The dominant factor relied on by Ms. Flores is that she was Mr. Hull's common law spouse and that she is therefore entitled, under s. 85 of the *Act*, to most of Mr. Hull's estate. Thus, for example, in *North West Trust Co. v. Harrison*, 57 D.L.R. 2d 468 at 472, 1966 CarswellBC 193 (C.A.), the court said:

> It is to be noted that both these sections confer a discretion on the Court - in s. 8 to grant administration to other than one of the preferred class, *e.g*., to one or more of the next of kin rather than to the widow. The established principle in the Ecclesiastical Court was that the right to the administration of

> the effects of the intestate, after the claim of the surviving spouse, follows the right to the property in them. Recognition of this principle is expressed in s-s (2) of s. 8 and in practice it has been applied to personal estate as well as real estate. The Court therefore will, in general, unless there are special circumstances, which in the exercise of its judicial discretion cause it to decide otherwise, follow the provisions of ss. 99 to 115 as to intestate succession in granting administration. Where, however, in the case of intestacy and there are special circumstances, such for example as the fact that those entitled to administration are out of the Province, the Court may make an appointment under s. 9.

[37] My earlier comments in relation to the issue of Ms. Flores's status as Mr. Hull's "spouse" do not, however, support this submission on the part of Ms. Flores.

[38] Conversely, the fact that Ms. Flores lives in the jurisdiction where the assets are located is a further relevant practical consideration that supports her application; *Re Edmondson*, 41 D.L.R. (2d) 74 at 78, (*sub nom. Re Edmondson Estate*) [1963] B.C.J. No. 169 (S.C.); *Jacobson v. Huber*, 1982 CarswellBC 609 at para. 15 (S.C.).

[39] Ms. Flores is also older than Ms. Mendez - a factor of modest significance in cases where all other considerations are equal; *Muttart* at para. 42.

[40] Ultimately, the first duty of the court is to place the administration of an estate in the hands of the person who is likely best able or suited to convert it to the advantage of those who have claims against it, either by paying the creditors or by making the appropriate necessary distributions; *North West Trust Co*. at 474; *Muttart* at 350.

[41] In this case I have some disquiet about the ability of Ms. Flores to fulfill the foregoing obligations. That concern stems, in part, from an apprehension that aspects of the affidavit evidence of Ms. Flores have been expressed unequivocally and may not be forthright. While that apprehension may ultimately prove to be unfounded it currently militates against the relief Ms. Flores seeks. A related concern is her strong belief that she is entitled to the preponderance of the estate's assets. That belief is inimical to the role she would have to fulfill while the issues between the parties are being resolved.

[42] Ms. Mendez, in turn, labours under other impediments. She lives in Edmonton. She is self-represented and there is some risk she might, without adequate guidance, inadvertently proceed in a way that gives rise to further difficulty. She too is clearly, and not surprisingly, emotionally invested in this matter in a way that is not consonant with the obligations she would have to assume as administrator.

[43] I am mindful of the fact that the assets of this estate are relatively modest and do not warrant or support excessive litigation. At the same time the object of proportionality cannot serve to displace a principled approach to the present dispute between the parties or support an expedient and imperfect resolution that gives rise to further difficulty.

[44] I have also considered who, on the materials before me, might reasonably address the pressing need of administering Mr. Hull's estate in a proper manner. Apparently Mr. Hull has brothers who live in Dawson Creek, though I know no more about them.

[45] I have considered, and suggest that the parties consider, having the court appoint an administrator pending legal proceedings. With some good faith the parties may be able to agree on an objective third party who could properly fulfill this role.

[46] I am dismissing the present application. I am doing so without ordering any costs to either party. I am not seizing myself of the matter, because my doing so may be inefficient for the parties, but I am prepared to hear further applications if both parties agree that my doing so would be of assistance.

"Voith J."