IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Sexsmith v. The Public Guardian and Trustee of British Columbia,* 2024 BCSC 120

Date: 20240125
Docket: S245945
Registry: New Westminster

Between:

Peggy Sexsmith, in her capacity as Executor of the Estate of Idar Henry Uhlving, deceased

Plaintiff

And

The Public Guardian and Trustee of British Columbia as Committee of Idar Henry Uhlving

Defendants

Before: The Honourable Justice Douglas

Reasons for Judgment

Counsel for Plaintiff:	H. Song
Counsel for Defendants:	M.G. Underhill, K.C.
Place and Date of Hearing:	New Westminster, B.C. December 7, 2023
Place and Date of Judgment:	New Westminster, B.C. January 25, 2024

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I. OVERVIEW

[1] The plaintiff, Peggy Sexsmith, in her capacity as executor of the estate of her late father, Idar Henry Uhlving (the "Deceased"), commenced this negligence action against the Public Guardian and Trustee of British Columbia (the "PGT") by notice of civil claim filed September 20, 2022. She asserts that the PGT, as committee of the Deceased, an incapable adult, breached the requisite standard of care by failing to bring a claim to vary the will of his late spouse, Lorraine Linda Wright, for the benefit of the Deceased and his family (i.e., Ms. Sexsmith and her two adult siblings). Ms. Sexsmith submits that, at a minimum, the Deceased was entitled to receive on Ms. Wright's death what he would have obtained on a notional separation immediately before her death, rather than simply an amount held in trust for him by third parties (which is what he actually received).

[2] The PGT brings this summary trial application pursuant to R. 9-7 of the *Supreme Court Civil Rules* [*SCCR*] for judgment in its favour, dismissing this claim in its entirety.

[3] For the reasons that follow, I conclude that this action is suitable for summary disposition and that the PGT did not breach the standard of care required of a committee by deciding not to pursue a will variation claim on the Deceased's behalf. In the result, this action is dismissed.

II. FACTUAL BACKGROUND

[4] The material facts are not contentious.

[5] The PGT is a corporation established under the *Public Guardian and Trustee Act*, R.S.B.C. 1996, c. 383 [*PGT Act*]. Pursuant to s. 5 of the *PGT Act*, the PGT has the powers, duties, and functions given to it by enactment and regulation, and must exercise those powers and perform those duties and functions in accordance with the principles or purposes set out in those enactments and regulations.

[6] Ms. Wright died on January 13, 2018, leaving a will dated March 10, 2010 (the "Will"). On Ms. Sexsmith's evidence, the Deceased married Ms. Wright in 1983

and they remained married for 35 years until his death on July 8, 2020, about two and a half years after Ms. Wright's death. After Ms. Wright died, the Deceased became the sole executor and trustee of her estate (the "Wright Estate").

[7] Ms. Sexsmith is the executor of the Deceased's estate (the "Uhlving Estate"). She is not Ms. Wright's daughter; Ms. Wright and the Deceased had no children together. According to Ms. Sexsmith, the Deceased developed signs of dementia in 2014, eventually became unable to care for himself or his affairs, and began living in a special care facility in 2017. Ms. Sexsmith deposes that she and the Deceased reconnected in the spring of 2018, after having been estranged for several decades.

[8] On September 18, 2018, the PGT obtained a Certificate of Incapability for the Deceased and was appointed committee of the Uhlving Estate.

[9] Given the Deceased's incapacity, the PGT brought an application to court for a grant of administration of the Wright Estate pursuant to s. 164(2)(b) of the *Wills, Estates and Succession Act,* S.B.C. 2009, c. 13 [*WESA*]. The PGT obtained the grant on January 9, 2019. On February 12, 2019, the PGT's Grant Application Review Services department received notice of the grant application.

III. THE WILL

[10] The gross value of the Wright Estate at the time of Ms. Wright's death was $702,273; its current net value is $461,522.

[11] The Will provided that the Deceased would receive all of Ms. Wright's household and personal effects if he survived her for more than 30 days and the income from investments made from the residue of the Wright Estate. The Will also expressly provided that the trustees had the ability to encroach upon the capital of the residue of the Wright Estate for the Deceased's benefit during his lifetime.

[12] Section 4.4 of the Will directed the trustees as follows:

> 4.4 to deal with the residue of my Estate then remaining (the "Residue", which expression shall include the part thereof remaining from time to time) as follows:

> (a) if Idar survives me, to invest the Residue and keep it invested and to pay the net income derived therefrom to Idar during his lifetime. I authorize my Trustees to encroach upon the capital of the Residue for Idar's benefit as my Trustees may consider advisable. In exercising such power of encroachment, my Trustees may deplete the capital of the Residue for Idar's benefit without regard to the interests that any other person may have in the Residue;
>
> (b) at Idar's death or my death, whichever occurs later, to distribute the Residue in equal shares to the following registered charities:
>
> (i) CANADIAN DIABETES ASSOCIATION, VICTORIA & DISTRICT BRANCH, currently located at #276 - 2950 Douglas Street, Victoria, British Columbia, VST 4N4; and
>
> (ii) THE KIDNEY FOUNDATION OF CANADA, BRITISH COLUMBIA BRANCH, currently located at #200 - 4940 Canada Way, Burnaby, British Columbia, VSG 4K6.

IV. WILLS VARIATION CLAIM POLICY

[13] On the PGT's uncontroverted evidence, it follows its own written policies once served with a notice pursuant to s. 121(1) of *WESA*, to determine whether or not to pursue a will variation claim. Specifically, the PGT conducts a review of the notice in accordance with PGT Policy 3703 to determine whether such a claim is viable.

[14] In this case, the PGT decided not to commence a claim to vary the Will since the entire residue of the Wright Estate was given to the Deceased in trust. The PGT concluded that doing so would have provided no benefit to the Deceased during his lifetime but would have resulted in the assets available for his benefit being reduced (even if the claim was successful).

[15] Deputy PGT, Dan Orsetti, deposes as follows in his Affidavit #1, affirmed July 7, 2023, at para. 13:

> a. the threshold question in any will variation consideration is whether the testator made adequate provision for the person in question. In this case, the entire [Wright Estate] was held in trust for Mr. Uhlving, and the trustee was authorized to pay all of the income and capital for the benefit of Mr. Uhlving during his lifetime. Mr. Uhlving would have had no greater provision made for him personally if all of the [Wright Estate] had been paid to him outright. In this circumstance, there was a significant risk that there would be no finding that the testator failed to make adequate provision for Mr. Uhlving; and

> b. the risk of loss to Mr. Uhlving was considered significant since the beneficiaries of the remainder of the trust on Mr. Uhlving's death would have had a real possibility of having all of their costs paid from the [Wright Estate] if the claim to vary the [W]ill was unsuccessful. Legal costs to bring the claim and the negative result of having to pay the costs of successful defendants would have significantly reduced the assets available to Mr. Uhlving during his lifetime. In the result, bringing a will variation claim created a very real prospect of significantly reducing the benefits available to Mr. Uhlving, but carried with it no prospect of improving the assets available for his care.

[16] Mr. Orsetti deposes further in his Affidavit #1 at paragraph 15 that because of the significant risk of a negative outcome for the Deceased and the lack of prospect of improving his situation by bringing the claim, he would not in any circumstance agree to pursue such a claim as it would be contrary to the mandate of the PGT to protect the interests of the Deceased. He notes that the PGT has no statutory mandate to pursue a claim for the benefit of the heirs of a person for whom it is committee.

V. PROCEDURAL HISTORY

[17] On September 17, 2021, after obtaining a copy of the Will, Ms. Sexsmith filed a notice of civil claim seeking to vary the Will on behalf of the Uhlving Estate. On May 3, 2023, on the application of the two charities named in the Will as residual beneficiaries of the Wright Estate, Justice Elwood dismissed this claim as statute-barred.

[18] On September 20, 2022, Ms. Sexsmith, in her capacity as executor of the Uhlving Estate, commenced the within action against the PGT. The basis for her claim in negligence is set out in paragraphs 17–18 of the notice of civil claim as follows:

> 17. The PGT negligently exercised their powers as committee of the Deceased by failing to bring a Wills Variation Claim on his behalf when it would have been apparent to a person of ordinary prudence that such a claim ought to be brought.
>
> 18. As a result of the PGT's negligence in failing to bring a Wills Variation Claim, the Deceased suffered loss, damage and expense, including the loss of his full legal entitlement to the Wright Estate.

[19] On May 3, 2023, Elwood J. dismissed the PGT's application pursuant to *SCCR*, R. 9-5 to strike this claim as disclosing no reasonable cause of action, with costs payable to the plaintiff in the cause. The PGT submits that the factual matrix necessary to dismiss this claim is now before the court on this application.

VI. ISSUES

[20] The following issues arise on this summary trial application:

a) Is this action suitable for summary trial?

b) What was the PGT's statutory role as committee of the Deceased?

c) What standard of care applies to the PGT in its capacity as committee?

d) Did the PGT breach this standard of care?

VII. LAW AND ANALYSIS

A. Is this action suitable for summary trial?

[21] *SCCR,* R. 9-7(15)(a) provides that the court may grant judgment on a summary trial application unless: (1) the court is unable to find the facts necessary to decide the issues of fact or law on the whole of the evidence before it; or (2) the court finds that it would otherwise be unjust to decide the issues on the application.

[22] The parties agree that this claim is suitable for summary trial. I concur. There are no material conflicts in the evidence and no corresponding credibility issues that must be resolved. The central issue before the court on this application is a narrow legal one: namely, whether the PGT breached the applicable standard of care by deciding, in its capacity as committee of the Deceased, not to pursue an action on his behalf to vary the Will. Deciding this issue summarily would be determinative and potentially avoid the significant expense of a conventional trial.

B. What was the PGT's statutory role as committee of the Deceased?

[23] Section 15 of the *Patients Property Act*, R.S.B.C. 1996, c. 349 [*PPA*], provides that the committee of a patient pursuant to a statutory property

guardianship under Part 2.1 of the *Adult Guardianship Act,* R.S.B.C. 1996, c. 6, has all the rights, powers, and privileges respecting the patient's estate that the patient would have if they were of full age and of sound and disposing mind.

[24] Section 17 of the *PPA* provides that such rights, powers, and privileges include those that would be exercisable by the patient as a trustee or personal representative if they were of full age and of sound and disposing mind.

[25] Section 22 of the *PPA* provides that only the committee of a patient may bring an action or commence litigation on the patient's behalf.

C. What standard of care applies to the PGT?

[26] The standard of care applicable to the PGT, in its capacity as committee of the Deceased, is not in dispute. The PGT admits it is subject to the same standard of care that applies to all committees: namely, to act as a person of ordinary prudence would act, citing *Wood v. Public Trustee* (1986), 25 D.L.R. (4th) 356, 1986 CanLII 903 (B.C.C.A.) [*Wood*].

[27] Section 18(1) of the *PPA* provides that "[a] committee must exercise the committee's powers for the benefit of the patient and the patient's family, having regard to the nature and value of the property of the patient and the circumstances and needs of the patient and the patient's family."

[28] Ms. Sexsmith submits that section 18(1) of the *PPA* imposes the same standard of care on committees exercising their powers as is expected of trustees in general. She argues that this means the PGT must exercise their powers over the legal and financial affairs of the patient for the benefit of the patient and the patient's family, commensurate with the actions of a reasonable and ordinarily prudent person, citing *Wood* and *Callender v. Callender* (1999), 178 D.L.R. (4th) 269 at paras. 62–66, 1999 CanLII 2915 (B.C.S.C.). The PGT says that Ms. Sexsmith is attempting to breathe more life into the phrase "and the patient's family" than is intended by s. 18(1) of the *PPA*.

D. Did the PGT breach the applicable standard of care?

1. Parties' Positions

[29] Ms. Sexsmith submits that s. 18(1) of the *PPA* requires committees to exercise their powers for the benefit of the patient and the patient's family and that this includes more than simply ensuring the patient's needs are met. She argues that s. 18(1) requires a broader consideration of the best interests of the patient and the patient's family in managing the patient's legal and financial affairs, citing *O'Hagan v. O'Hagan,* 2000 BCCA 79 at para. 22 [*O'Hagan*]:

> Section 18 refers not only to the "needs" of the patient and his family but also to their "circumstances", a very general and inclusive term. It states that a committee must exercise his or her powers for the "benefit" of the patient and the patient's family — not simply to supply their needs.

[30] Ms. Sexsmith asserts that, in assessing whether a committee's decisions accord with the requisite standard of care, a court will consider whether those decisions would be viewed by a reasonable and ordinarily prudent person as beneficial for the patient and the patient's family, given the circumstances known to them at the time and the possibilities that may arise in the future, including the possibility that the patient's condition improves: *O'Hagan* at paras. 24–25. She asserts that assessing the Deceased's future interests must also include a consideration of his testamentary wishes, as set out in his last will and testament dated July 14, 1987 (leaving his entire estate to Ms. Wright if she survived him and to his three children if she did not) and codicil dated March 10, 2010.

[31] The damage that Ms. Sexsmith says the Deceased suffered in this case was his loss of full legal entitlement to the Wright Estate. The PGT submits that this result would have followed only if the will variation claim succeeded, noting that bringing such a claim would only have resulted in expense for the Deceased, regardless of its outcome. The PGT argues that success in any potential will variation claim would benefit only Ms. Sexsmith, who is neither a child nor a spouse of Ms. Wright, and who has no standing to bring such a claim under s. 60 of *WESA*.

[32] The PGT denies that s. 18(1) of the *PPA* has ever been interpreted to suggest that a committee has any duty to pursue such a claim and notes that Ms. Sexsmith has provided no authority to support this proposition. However, even assuming that such a duty exists at law, the PGT denies there is a viable will variation claim in this case.

[33] Section 60 of *WESA* provides as follows:

> Despite any law or enactment to the contrary, if a will-maker dies leaving a will that does not, in the court's opinion, make adequate provision for the proper maintenance and support of the will-maker's spouse or children, the court may, in a proceeding by or on behalf of the spouse or children, order that the provision that it thinks adequate, just and equitable in the circumstances be made out of the will-maker's estate for the spouse or children.
>
> [Emphasis added.]

[34] The PGT denies that s. 60 of *WESA* allows this Court to alter a will for the sole benefit of the will-maker's stepchild. The PGT submits that Ms. Sexsmith has no standing to bring a s. 60 will variation claim and that the substance of her claim is that the Deceased ought to have been entitled to an undivided interest in the entire Wright Estate so that she would benefit on his death. In other words, the PGT says that Ms. Sexsmith asserts it had an obligation to bring a claim to vary the Will, not for the Deceased's benefit, but for her own benefit. The PGT cites *Lawrence v. McGavin* (9 March 1992), Vancouver A920114, 1992 CanLII 2080 (B.C.S.C.) [*Lawrence*] and *Graham v. Chalmers,* 2010 BCCA 13 as authority for the proposition that a court will not vary a will for the benefit of someone who has no standing to bring such a claim and to whom the testator owed no duty.

[35] The PGT submits that it acted in a manner that was consistent with its own internal policy. PGT Policy 3703 outlines the following factors that the PGT considers when determining whether or not to bring a will variation claim:

a) Whether adequate, just, and equitable provision has been made under the will for the proper maintenance and support of the minor or incapable adult;

b) Whether the potential variation justifies the risk and/or cost of litigation; and

c) Whether any variation would be likely to benefit only the intestate successors of the minor or adult, and not the minor or adult directly during his or her lifetime.

[36] The PGT submits that these factors weigh against bringing a will variation claim in this case. It denies there is any evidence that the PGT breached the standard of care it owed to the Deceased, assuming the PGT, in its capacity as committee, had a duty to bring a will variation action (which it denies).

[37] The PGT denies there is any legal authority to support the proposition that it is required, in its capacity as committee, to act for the benefit of a patient's heir, if doing so would be detrimental to the patient. The PGT submits that bringing a will variation claim in this case would have been contrary to both its duty of care and fiduciary obligations to the Deceased and arguably negligent. The PGT denies the Deceased suffered any loss or damages. It maintains that the only way to maximize the funds available for the Deceased's care during his lifetime was not to bring a will variation claim.

[38] Ms. Sexsmith replies that it either was, or ought to have been, apparent to the PGT, acting as committee of the Deceased, that the Will failed to make adequate provision for the proper maintenance and support of the Deceased because it failed to provide him with what she asserts was his minimum entitlement as a spouse: namely, what he would have been entitled to receive on a notional separation immediately before Ms. Wright's death. She argues that, as committee for the Deceased, the PGT had the power to apply on his behalf for an order varying the Will to provide him with at least this minimum acceptable entitlement, citing *Boyd v. Shears*, 2018 BCSC 194 at paras. 12–13.

[39] Ms. Sexsmith submits that the court must consider whether any additional entitlement is warranted to ensure that the total entitlement is commensurate with

what a judicious spouse would have provided for their surviving spouse, having regard to contemporary community standards, citing *Tataryn v. Tataryn Estate,* [1994] 2 S.C.R. 807, 1994 CanLII 51 [*Tataryn*] and *Gibbons v. Livingston,* 2018 BCCA 443 at paras. 19–22. She relies on *Klotz v. Funk,* 2019 BCSC 817 as a statement of the correct approach to spousal applications in will variation claims:

> [48] The deceased's Will must honour the deceased's legal and moral obligations to the plaintiff. If it does not, the Court may order the provision for the plaintiff that it thinks "adequate, just, and equitable in the circumstances" from the deceased's estate. […]
>
> [49] To determine if the deceased's Will has honoured the deceased's legal obligations to the plaintiff, the Court looks to what the plaintiff's interest in the property would have been at notional separation under the relevant family law property regime. The Court asks if the Will respects the deceased's obligations on death by considering what her obligations would have been if she and the plaintiff had separated. [...]
>
> [50] Generally, each spouse is entitled to an equal share of family property. Family property may be divided unequally if equal division would be significantly unfair. Spouses' unequal financial contributions do not usually constitute significant unfairness, and therefore do not constitute grounds for unequal division of family property. In sum, the spouses' respective percentages of pecuniary contribution to family property are not usually determinative of their proportionate shares.
>
> [51] To determine if the deceased's Will has honoured the deceased's moral obligations to the plaintiff, the Court looks to contemporary community standards. The Court asks how would society expect a judicious spouse to have provided for the plaintiff in the circumstances.

[40] Ms. Sexsmith submits that spouses, at a minimum, are entitled on separation to an undivided one-half interest in all family property as tenants in common pursuant to the *Family Law Act,* S.B.C. 2011, c. 25 [*FLA*]. Family property is defined in the *FLA* as any property acquired during the parties' relationship and owned by at least one spouse on the date of separation: *FLA,* ss. 81 and 84–85.

[41] Ms. Sexsmith argues that, in addition to this minimum acceptable entitlement, it is well established that spouses in lengthy committed marriages spanning many decades owe each other substantial moral obligations in their wills when they die, particularly if the surviving spouse was a dependant spouse: *Tataryn* at 822; *Bridger v. Bridger & Others,* 2005 BCSC 269, aff'd 2006 BCCA 230.

[42] Ms. Sexsmith denies that leaving a surviving spouse what effectively amounts to a life estate, rather than an undivided one-half interest in their property, meets the testator's legal obligation to their surviving spouse following a long and committed marriage, citing *Erlichman v. Erlichman Estate,* 2002 BCCA 160 at para. 49.

2. Discussion and Conclusion

[43] The central issue in dispute is whether the PGT breached the applicable standard of care in its capacity as committee of the Deceased by not commencing a claim to vary the Will.

[44] The Will provided that the entire residue of the Wright Estate be made available for the support and maintenance of the Deceased during his lifetime, and that the executors be permitted to encroach on the capital of the Wright Estate as necessary for that purpose. Ms. Sexsmith concedes that the Will made adequate provision for the Deceased during his lifetime. In my view, there is no viable argument to the contrary. It follows that any claim to vary the Will would be associated with a substantial risk of failure. I agree that such a claim would have reduced the value of the Wright Estate while providing no benefit to the Deceased, an incapable adult whose needs were being fully met.

[45] I accept that the PGT's overriding concern was the provision of adequate care and maintenance to the Deceased during his lifetime. Notably, Ms. Sexsmith is not Ms. Wright's child and Ms. Wright owed her no legal, moral, or statutory duty. Ms. Sexsmith has no standing to bring a claim to vary the Will under s. 60 of *WESA*.

[46] I accept that the PGT had no duty to bring a claim to vary the Will for Ms. Sexsmith's benefit. I do not agree that s. 18 of the *PPA* authorizes the PGT, in its capacity as committee of an incapable patient, to commence a will variation action for the sole benefit of that patient's heirs (who have no standing to bring such a claim themselves) and in circumstances when doing so could only be detrimental to the patient. Accordingly, I conclude that s. 18(1) of the *PPA* does not assist Ms. Sexsmith.

[47] In my view, the comments of Justice Spencer at page 4 in *Lawrence* are instructive:

> The present circumstance that must affect this case is that Shirley McGavin died forty days after her husband. Any variation of his Will must be governed so that it does not simply contribute to the corpus of her estate for the benefit of her heirs whom the testator had no intent to advance and to who he owed no duty. Under the circumstances of this case I am of the view that a life interest in the whole of the residue with a discretion to the executor to advance from capital as the wife might require would have provided proper maintenance and support for her. But since Shirley McGavin is now dead such an order would be academic.
>
> Under all the circumstances justice will be served by dismissing the plaintiff's claim.

[48] Ms. Sexsmith submits that because the Wright Estate is substantial, the PGT could easily have pursued a claim to vary the Will without concern that doing so would deplete the assets of the Wright Estate. Notably, this submission is made in retrospect, after the Deceased's death. A different hypothetical scenario could easily be envisioned: namely, one where the Deceased's care needs were more acute and he had a longer life expectancy. I conclude that the PGT would potentially be exposed to a legitimate claim in negligence if it pursued a claim on the Deceased's behalf to vary the Will, thereby depleting the Wright Estate to the point where insufficient assets remained to ensure the adequate ongoing care and maintenance of the Deceased during his lifetime.

[49] In my view, this hypothetical scenario underscores a fundamental distinction between this case (involving an incapable adult patient) and the authorities on which Ms. Sexsmith relies (and with which the PGT takes no issue) involving capable adult spouses.

[50] The charities named in the Will as residual beneficiaries of the Wright Estate after the Deceased's death, have been actively involved in this litigation to date. They successfully applied to strike Ms. Sexsmith's claim to vary the Will as statute-barred. I therefore conclude that they would likely have contested any attempt by the PGT to pursue such a claim, and opposed any attempt by the PGT to transfer all of

the assets in the Wright Estate to the Deceased outright (as Ms. Sexsmith submits the PGT could have done in this case).

[51] As noted by the PGT, it does not fund litigation and any and all litigation costs, regardless of the outcome of any claim to vary the Will, would have been funded by the Wright Estate. I accept that this, together with legitimate concerns about the likely success of any such claim, factored prominently in the PGT's decision about whether or not a will variation claim would have benefited the Deceased, or his heirs to whom Ms. Wright owed no legal or moral duty. I find no fault in this approach.

[52] In my view, Ms. Sexsmith has not established that the PGT breached the standard of care it was required to meet in its capacity as committee of the Deceased by not bringing a claim to vary the Will. It follows that her claim in negligence against the PGT must be dismissed.

VIII. DISPOSITION

[53] I grant judgment in favour of the PGT, dismissing this claim in its entirety.

[54] Absent information of which I am unaware that might alter this view, the PGT is entitled to its costs.

"Douglas J."