

# COPY

## IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Austin v. Les*  
2006 BCSC 2100

Date: 20060327  
Docket: L042662  
Registry: Vancouver

Between:

**Margaret Ann Austin**

Plaintiff

And

**Kathleen Michal Les and Debora Helen Dyck  
as Executors of the Last Will and Testament of  
Daphne Eileen Janzen, Deceased, and the  
said Kathleen Michal Les and Debora Helen Dyck**

Defendants

Before: The Honourable Madam Justice Stromberg-Stein

### **Oral Reasons for Judgment**

Counsel for the Plaintiff:

R.T. Todd  
J. Milliken, Q.C.

Counsel for the Defendants:

W.K. Briscoe

Place and Date of Hearing:

Vancouver, B.C.  
March 27, 2006

Place and Date of Judgment:

Vancouver, B.C.  
March 27, 2006

[1] THE COURT: This is an application by the plaintiff, Margaret Ann Austin, for a declaration that the last will and testament of Daphne Eileen Janzen, dated June 5, 2002, and the codicil dated August 20, 2003, do not make adequate, just and equitable provision for the plaintiff. Secondly, the plaintiff applies for an order pursuant to the provisions of the *Wills Variation Act*, R.S.B.C. 1996, c. 490 [Act] and amendments thereto, or such provision as this court thinks adequate, just, and equitable in the circumstances, for the proper maintenance and support of the plaintiff out of the estate of the deceased. Third, the plaintiff asks for liberty to apply for an accounting, and for costs of this action.

[2] This matter is brought pursuant to Rule 18A. No party has raised any issue with respect to the matter properly proceeding by means of Rule 18 A. I would say, at the outset, that I do not see that there really are any issues in that regard.

[3] In terms of the factual background, the plaintiff is the 62-year-old natural daughter of the deceased. The defendant, 43-year-old Kathleen Michal Les, is the executrix of the estate of Daphne Eileen Janzen and is her adopted daughter. The defendant, 47-year-old Debora Helen Dyck, also the adopted daughter of the deceased, wishes to take no part in these proceedings and has indicated she will be bound by this court's decision.

[4] The deceased died May 24, 2004, leaving her last will and testament dated June 5, 2002, with a codicil dated August 20, 2003. According to the will, the deceased's estate is to be distributed as follows: \$100 to the plaintiff, one-half of the residue to the defendant Debora Helen Dyck, and one half of the residue to the defendant Kathleen Michal Les.

[5] In the codicil the deceased gave this reason for leaving \$100 to the plaintiff:

Unto Margaret Ann Bennett I bequeath the sum of \$100 because she has failed to keep in contact with me during my lifetime for her own use absolutely.

[6] The gross value of the estate is \$391,930.02. The probate documents were submitted to the probate registry in Chilliwack, British Columbia, on February 23, 2006. A grant of probate has not yet issued.

[7] The defendants -- I will call them Kathleen and Debora -- were adopted by the deceased and her husband, John Janzen, shortly after their birth and were raised by the deceased and her husband. The plaintiff, Margaret, was the deceased's natural, but illegitimate, daughter.

[8] Margaret claims that her mother abandoned her and neglected her, leaving her to live unloved in the home of an abusive woman of the Jehovah Witness faith. Although contacted by her mother by telephone, which she believes was when she was around age 9, but she was likely a bit older, to come and live with her mother and her new husband, Mr. Janzen, the plaintiff refused to go because she alleges that her mother requested that she lie about her illegitimate birth. There was no further contact between mother and her daughter. The deceased paid monthly support of \$20 to the family where Margaret lived as a child and family allowance cheques also went to that family.

[9] Margaret grew up in the lower mainland. She lived in Burnaby for most of her adult life. She had contact with her grandmother, the deceased's mother. The deceased and John Janzen moved from Manitoba to Chilliwack in approximately 1994. Margaret knew of this fact; however, she never attempted to contact the deceased as an adult because she felt that her mother had rejected her so many times in the past. She denies ever being invited to any family events.

[10] There is no evidence that the deceased knew of Margaret's whereabouts. In particular, she did not know Margaret's name. The codicil in 2003 refers to her as Margaret Bennett. Following the deceased's death, Kathleen and Debora attempted to contact Margaret and required the assistance of the RCMP to locate her.

[11] The estate of the deceased in a large part is derived from her husband, John Janzen.

[12] The evidence is that Kathleen owes \$170,000 to the estate. These were investment loans secured by promissory notes which Kathleen and her husband, Larry Les, had attempted to pay off on numerous occasions prior to the deceased's death, but the deceased preferred to receive a monthly interest income rather than having the debt repaid. In 2001 the deceased sold the matrimonial home, in which she and Mr. Janzen lived for approximately \$144,000. Shortly after this sale the deceased gifted \$70,000 to each of her daughters, Kathleen and Debora.

[13] The deceased moved in with Kathleen and her family in 2001 and lived there until her death. Kathleen and her husband incurred significant costs to meet the needs of the deceased, and, in fact, had to buy a property and build a home in order to accommodate the deceased's needs. The deceased only paid rent for the first two months. Her health quickly failed after she moved in and Kathleen was placed in a position of having to care for her mother as her health failed, particularly in the last year of her mother's life. This was physically and emotionally taxing on both Kathleen and her family.

[14] Now dealing with the issues. The moral duty imposed by the *Act* does not require that all family members be treated equally. The plaintiff has no dependents and she has no health problems. Kathleen has three children and she and her husband are financially well off due to their hard work and industry. Debora and her husband are financially comfortable.

[15] The plaintiff, seemingly against all odds, has done relatively well in her life. She has successfully raised two responsible sons. However, her three marriages were dismal failures. She blames this on lack of love, guidance, and general parenting as a child. She had difficulties in her life because of lack of education, achieving only grade 8 education. She suffers from lack of self-esteem, lack of marital stability, and lack of financial stability. She has been steadily employed for a number of years as an ICBC customer collections representative. She is good with people and she has had a successful career. She takes home \$1,106 every two

weeks. She has to retire in three years when she reaches age 65. At that time she will receive a pension of \$510 in addition to her CPP and OAP.

[16] The first issue I have to consider is whether or not the distribution proposed by the deceased has a valid and rational basis, provided by the deceased. If the reasons the deceased had in mind when she left the plaintiff \$100 are in fact valid and rational, then they are valid to support the will.

[17] The burden is on the plaintiff to show that the reasons the deceased acted upon were false or unwarranted.

[18] Counsel for the defendants have referred to the case of *Sawchuk v. MacKenzie Estate*, 2000 BCCA 10, [2000] B.C.J. No. 29 for the proposition that the *Act* is not intended as a means of awarding punitive damages for the treatment of a child. The primary consideration is provision of an appropriate standard of living if the will does not make adequate provision for the proper maintenance and support of a testator's children. Here, the deceased purported to disinherit the plaintiff because the plaintiff failed to keep in touch with the deceased. If the reasons of the deceased are sustained, then they are sufficient to support the will. The burden lies on the plaintiff to show that these reasons cannot be sustained.

[19] The plaintiff's claim is based on her mother's treatment of her during her life and particularly on a claim that lack of contact with the mother was due to unilateral withdrawal by the mother. And in that regard I agree that the weight of the evidence establishes that the deceased did unilaterally withdraw from her relationship with her daughter Margaret when Margaret was a young child. I find on the evidence that the estrangement between mother and daughter was created by this unilateral withdrawal and I will say no more. At the point when the deceased attempted to bring her daughter back into the fold, more than a long distance telephone call to a young child would be required in the circumstances. In my view, there was no moral obligation on the child Margaret to attempt to initiate or revive a relationship with her mother beyond that point.

[20] The second issue I have to consider is whether the deceased made adequate provision for her daughter Margaret, the plaintiff. The bequest of \$100 is inadequate; in fact it is inexplicable. Why such a bequest would even be made is something that I do not understand.

[21] The third issue concerns what moral obligation the deceased owed to her daughter. In that regard, certainly the moral obligation does not entitle Margaret to either the whole or half the claim to the estate. There are two other daughters here; two other daughters to whom the deceased owed a moral obligation.

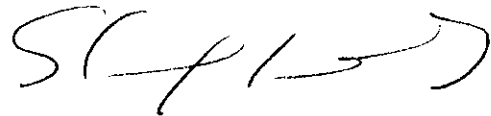
[22] The plaintiff is 62. She is gainfully employed. She has no dependents. She has no health concerns. She is near retirement with minimal debt and minimal assets. Again, the *Act* is not intended as a means to award punitive damages for the treatment of a child. All three daughters here have moral claims and, as between moral claims, as Madam Justice McLachlin stated in *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807, 93 B.C.L.R. (2d) 145, some may be stronger than others. In this case I conclude that the plaintiff's moral claim is not stronger than the claims of the two defendant daughters and notwithstanding that they may previously have been provided financial gifts of \$75,000 each, the Les family looked after the deceased in her last years and made great sacrifices. These gifts in the past should not be factored into the value of the estate for the division as the plaintiff seeks to do. The two adopted daughters have no less of a moral claim against the estate than the plaintiff. In particular, Kathleen Les would have a greater claim were she to advance it given the sacrifices that she and her family made to adhere to her mother's wishes in the last years of her mother's life. She is not advancing that claim.

[23] In the circumstances I make a declaration that the last will and testament of Daphne Eileen Janzen deceased June 5, 2002 and the codicil dated August 20, 2003, did not make adequate, just and equitable provision for the plaintiff. I make an order pursuant to the *Act* for payment to the plaintiff of one-third of the net proceeds of the estate.

[24] I make an order for liberty to apply for an accounting.

[25] I make an order for costs of all parties to be borne out of the estate. With respect to the costs of Kathleen Les, as executrix, the order for costs will be on a solicitor/client basis if necessary.

[26] I would hope there is not going to be a need for accounting and that the matter can be resolved without any further issues.



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The Honourable Madam Justice Stromberg-Stein