

IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20041214
Docket: L030198
Registry: Vancouver

COPY

Between:

Dail Ann Hesse

Plaintiff

And:

**Howard Kenneth Davies, as Executor of
the Estate of Gwynneth Eleanor Farley, Deceased,
Howard Kenneth Davies, Wendy Breaks, Bill Davies,
Pat Clifford, Keri Joint, Jim Farley, Lisa Farley, David Farley,
Rick Heard, Ted Heard, Judy Davis, Joan Gibsons, Carol Sieb,
Merle Gogal, Terry Roberts, Sharon Ward, Pauline Ward,
Jewel Middlemeass, Glenda Read Eleanor Kormos,
Greg Roberts and David Roberts**

Defendants

Before: The Honourable Mr. Justice Fraser

Oral Reasons for Judgment

In Chambers
December 14, 2004

Counsel for the Plaintiff

R. Trevor Todd

Counsel for Howard Kenneth Davies, as Executor
of the Estate of Gwynneth Farley, Deceased, and
Howard Kenneth Davies

Christopher R. Bacon

Wendy Breaks

Appeared on her own behalf

Pat Clifford

Appeared on her own behalf

No other appearances

Date and Place of Hearing:

December 14, 2004
Vancouver, B.C.

[1] **THE COURT:** This is an application by the plaintiff, Dail Ann Hesse, for a declaration that the Last Will and Testament of Gwynneth Eleanor Farley, her mother, dated the 6th of June, 2000, did not make adequate, just and equitable provision for her in all the circumstances.

[2] Because I am satisfied as to the proper result, I am going to give my Ruling today. Those present will appreciate that the virtue of pronouncing decisions promptly carries with it the disadvantage that the choice of words is sometimes less felicitous than if the matter is postponed and the Judgment handed down sometime later. So I will state that I do reserve the right to amend these Reasons should they be transcribed into written form. It is my practice when I do that to indicate any significant amendment by the use of square brackets, so that the Reasons as transcribed will clearly indicate on the face of the document what has been added.

[3] Mrs. Hesse is the only child of her mother. Her mother died on the 18th of October, 2002. Her Last Will and Testament is in evidence. It is what is sometimes referred to as a "stationer's Will," that is, a preprinted form with blanks to be filled in. The Will evidently was prepared by the plaintiff's aunt, Thelma Davies, sometimes known as Terry Davies. It has the familiar inadequacies of a will prepared by amateurs.

[4] The estate is sizable, having a present value of almost \$700,000 after payments from the estate in excess of \$100,000. Having a will prepared by an amateur for an estate of this size is certainly an instance of penny wise and pound foolish.

[5] The plaintiff is 46 years old. She has cerebral palsy, which leaves her with significant disabilities. She is unable to walk without the aid of crutches. Even with crutches, her balance is poor and it is often very painful to walk. She suffers from arthritic pain and other painful conditions such as palsy seizures. There have been other physical difficulties.

[6] The plaintiff is married to Bruce Hesse. They married about 10 years ago. When they married, Mrs. Hesse forfeited her disability pension because Mr. Hesse was an income earner. This seems to me an important indication that the marriage was based on love and loyalty as opposed to greed or expectations of money. Mr. Hesse is employed and earns approximately \$42,000 per year, gross. He has disabilities of his own, although they are minor in comparison to those of Mrs. Hesse. Apart from some payments from the estate since the death of Mrs. Hesse's mother, Mr. Hesse has been the sole support of himself and his wife.

[7] The scheme of the Will is that Mrs. Hesse is to be paid the monthly sum of \$1,000 per month from the estate until she becomes 60 years old, at which time she will inherit the residue. The executor was given the power to pay off the mortgage against the townhouse that Mr. and Mrs. Hesse already owned, and he has done so. The balance due on the mortgage as at September of this year was approximately \$105,000 and that mortgage has been cleared off. At the same time, the executor paid to Mrs. Hesse the arrears of the \$1,000 per month payments, which at that time totalled approximately \$23,000.

[8] The evidence discloses that Mrs. Hesse has needs which are fairly substantial in terms of cost. In particular, Mrs. Hesse would like to buy a rancher style house with suitable handicap facilities. The estimated cost of such a house, which I take to be somewhat approximate, is \$450,000. Then there are other matters, special devices to assist in her comfort living in the home, such as a reclining chair, an electric bed, a suitable vehicle for transportation and so forth. I see these needs as entirely reasonable.

[9] There are two alternate futures before Mrs. Hesse. One involves another 14 years in their two-story townhouse. The other involves at least the possibility of a house which is more suitably designed for her.

[10] Technically, I suppose, to describe these as "needs" could be seen as overstating the case. On the other hand, I am entirely satisfied that the quality of life of a person with disabilities is enormously enhanced if that person has a proper home and proper aids for more comfortable living.

[11] Those who resist this application, principally Wendy Breaks and Pat Clifford, have told me that they do so on altruistic grounds. They say that their aunt had only the best interests of Mrs. Hesse in mind and that the design of the Will should be respected by me.

[12] It is difficult to know what to do with that contention. The Will itself does not explain why it was designed in that way. In fact, the only evidence as to the ultimate intentions of the testator is a handwritten note, which is Exhibit A to the affidavit of

Dail Hesse sworn on 19 November 2004, the key words of which are, "Everything is bequeathed to my daughter, Dail Ann Farley."

[13] Along the road, some of those persons who were connected with Mrs. Hesse and her parents have convinced themselves that Bruce Hesse is an untrustworthy person who will take advantage of his wife and dissipate the estate, leaving Mrs. Hesse destitute later in life at the time when she will most need money to support herself in comfort.

[14] I am not satisfied on the evidence that these suspicions can be supported. It seems to me the track record of Mr. Hesse speaks louder than the fears of others. In marrying his wife, Mr. Hesse gave up whatever benefit he might have received from the disability pension that Mrs. Hesse was receiving before then, and he has been the sole support of Mrs. Hesse over 10 years of marriage. In addition, there is evidence that he faithfully paid child support to his daughter from an earlier marriage until that daughter became 19.

[15] There is a natural inclination on the part of a parent to protect a child. One interpretation of this Will is that its provisions were conceived as a means of protecting Mrs. Hesse from her own husband. If so, I find that this rationale is not supported by the history.

[16] The people who will be deprived potentially if I vary the Will as asked, that is, to order that the entire estate be given absolutely to Mrs. Hesse, are numerous cousins, approximately 22, who, if Mrs. Hesse dies before the age of 60, will share

the residue of the estate. Under the provisions of the Will, the capital will remain intact, subject only to the payments of \$1,000 per month.

[17] My view is that the moral claims of these cousins pales against the moral obligation that Mrs. Hesse's mother had toward Mrs. Hesse. I can identify no reason why Mrs. Hesse should be kept out of an important sum of money which will enable her to live a more comfortable and more fulfilled life, given the opportunity that better circumstances will give her to use her energy and her physical abilities effectively.

[18] I do conclude that the testator failed her daughter in terms of the moral obligations she had towards her daughter.

[19] I am prepared to think — I am not going so far as to say that I hold — that Gwynneth Farley drew her Will with the best of intentions. It is impossible to know as between Thelma Davies and Gwynneth Farley which of them was the source of the concept or the design of the Will.

[20] Thus, I am satisfied that the order sought by Mrs. Hesse should be granted, and I do declare that the entire residue of the estate be awarded to Mrs. Hesse for her own use absolutely.

(DISCUSSION BETWEEN THE COURT AND COUNSEL RE COSTS
AND APPROVAL AS TO FORM OF ORDER)

[21] THE COURT: Through counsel, Mrs. Hesse has waived her claim for costs against Ms. Breaks and Ms. Clifford, costs to which she at least had a *prima facie* claim to recover. It seems to me unnecessary to award costs of this application to

the executor because it appears to me that he was obliged to respond to the application and did so, and I assume that he will be able to recover his proper costs in the course of passing accounts.

[22] MR. TODD: Yes, that's my point. So, My Lord, Breaks and Clifford do not endorse the order, just by --

[23] THE COURT: No, the order may be entered without approval as to form by Ms. Breaks or Ms. Clifford.



The Honourable Mr. Justice Fraser