

Citation: Milthorp v. Milthorp et al

Date: 20000425

2000 BCSC 662

Docket No.: S056373

Registry: New Westminster

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

LILLIAN MILTHORP

PETITIONER

AND:

LILLIAN MILTHORP, GEORGE BAYLEY, JEAN CHRISTIE,
 ELIZABETH HYLAND, ROSS ANDREWS, BONNITA ELLEN VILLENEUVE, LISA MARY JANE
 HEWITT, SUSAN LEAH, KAREN SEGINOWICH
 PUBLIC TRUSTEE, MATHEW LEO RAE VILLENEUVE,
 NICHOLAS ADRIAN CLARK VILLENEUVE, SHELBEY LYNN HEWITT,
 RAY DONALD HEWITT, BENJAMIN ANDREW LEAH,
 CATHERINE ELIZABETH LEAH, CAMERON DAVID LEAH,
 MEGHAN ANN SEGINOWICH AND RYAN GORDON SEGINOWICH

RESPONDENTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE D. SMITH

Counsel for the
Petitioner/Executor:

B. Marshall

Counsel for Lillian Milthorp
and George Bayley:
Petitioner/Executor:

T. Todd

Counsel for Jean Christie,
Elizabeth Hyland and Ross
Andrews:

D. Linge

Date and Place of Trial:

March 29, 2000
New Westminster, BC

[1] This application involves a dispute between residual beneficiaries of an estate and the interpretation of the residuary clause of a will. Pursuant to Rule 10 of the *Supreme Court Rules*, the executor of the estate of Agnes May Andrews ("the Testatrix"), seeks an order of this court regarding the interpretation of the following provision in the Testatrix's will:

IN THE EVENT that my said husband should predecease me, or die within thirty days of my decease or under circumstances making it uncertain which of us survived the other or simultaneously with me, then I GIVE, DEVISE AND BEQUEATH all my Estate, both real and personal, of every nature and kind and wheresoever situate to my said daughter, LILLIAN MILTHORP and to my said son GEORGE BAYLEY, and to my husband's children, JEAN CHRISTIE,

RICHARD ANDREWS, ELIZABETH HYLAND, RAE ANDREWS, ROSS ANDREWS, and GORDON ANDREWS in equal shares *per stirpes*.

BACKGROUND

[2] Agnes May Andrews and Richard Andrews were married on April 8, 1967. The Testatrix executed a will on September 10, 1970 ("the will"). She died on March 22, 1999 leaving an estate with a value of about \$250,000. Her husband predeceased her on December 22, 1986.

[3] At the time of their marriage, both the Testatrix and Mr. Andrews had children from previous marriages, all of whom were adults. Two of the residual beneficiaries, Lillian Milthorp and George Bayley, are the Testatrix's children from her previous marriage. The remaining residual beneficiaries are Mr. Andrews' surviving children, and the issue of his deceased children, all from his previous marriage.

[4] Mr. Andrews had six children - two daughters and four sons. One son, his namesake, Richard Andrews ("Richard") predeceased his father on May 12, 1983. Richard had no children. Two of Mr. Andrews' remaining three sons predeceased the Testatrix on September 30, 1990 and February 7, 1999 respectively. Those two sons had children and grandchildren all of whom are named Respondents in this petition. The grandchildren are minors. The Public Trustee has been notified of this application in respect to the interests of the minor children and takes no position on the application.

[5] For clarification, attached to these Reasons is a diagram of the beneficiaries' family tree.

ISSUE

[6] As a result of Richard's death, a dispute has arisen between the Testatrix's children, and Mr. Andrews' children and their issue, over the interpretation of the residuary clause of the Testatrix's will. The Court has been asked to answer the following question:

Does the share of the residue of the estate which Richard Andrews would have received had he survived the testatrix, fall into and form part of the residue of the estate to be divided among the persons entitled to receive the residue?

[7] If a gift to an individual or *persona designata* fails, as a general rule the gift lapses and devolves on an intestacy pursuant to the *Estate Administration Act*, R.S.B.C. 1996, c. 122. If a gift to a member of a group of persons or a class fails, then that gift does not lapse but is shared by the remaining members of the class who survive the testatrix. At issue in this case is the proper disposition of the bequest of the residue made to Richard.

[8] Counsel for Mr. Andrews' children and their issue submits the Testatrix's intention is clear if, based on the admitted facts before the court, the words in the clause are given their natural and ordinary meaning. As the couple's children were all adults when the Testatrix and Mr. Andrews married, and when the Testatrix executed the will, the clause must bequeath all of the Testatrix's estate to all of the children of both her and her husband equally, *per stirpes*. Such a gift, he submits, is a gift to a class. As a class gift, Richard's share of the residue would be shared equally by the surviving children and issue, notwithstanding the naming of each of the couple's children. This interpretation, he submits, complies with the presumption against intestacy in the event of a lapsed gift.

[9] Counsel for the Testatrix's children submits the Testatrix's intention from the wording of the clause is at best ambiguous. He submits that if any intention is to be found from the wording, it is to bequeath the residue of the estate to certain named persons and not to a class. Unless the court finds the wording reflects a clear intention to gift the residue of the estate to a class of persons, then Richard's share of the residue lapses and devolves on an intestacy to the Testatrix's two children. The consequence of that interpretation would provide the Testatrix's children with a greater share of the estate than the remaining beneficiaries.

[10] In order to answer the question posed, the Court must attempt to determine the Testatrix's subjective intention from the will. In particular, it must determine whether the residuary gift to the eight named persons was a class gift, or a gift *persona designata*, to individuals. If it finds that the Testatrix's intention is unclear, or if it concludes that she intended to make a gift of the residue only to certain named individuals, then it must apply the rules of construction developed by the courts to interpret wills: *Re Coughlin* (1982), 36 O.R. (2d) 446 (Ont. H.C.); *Sarkin v. Tupper et al* (1989), 36 E.T.R. 139 (B.C.S.C.).

ANALYSIS

[11] In *Kingsbury v. Walters* (1901), A.C. 187, 70 LT Ch 546, Lord MacNaughten set out the test for class gifts:

When there is a gift to a number of persons who are united or connected by some common tie, and you can see that the testator was looking to the body as a whole rather than to the members constituting the body as individuals, and also you can see that he intended that if one or more of that body died in his lifetime the survivors should take the gift between them, there is nothing to prevent your giving effect to the wishes of the testator.

[12] The definition of a class gift in *Halsbury*, 2nd edition was cited with approval by the Ontario Supreme Court in *Re Brush*, [1943] 1 D.L.R. 74 at paragraph 25:

Prima facie a class gift is a gift to a class of persons included or comprehended under some general description and bearing a certain relation to the testator or another person. Thus, where a testator divides his residue into as many equal shares as he shall have children surviving him, or predeceasing him leaving issue, and gives a share to or in trust for each such child, the gift is to a class.

[13] At page 365 of *Re Brush*, the court referred to the decision of *Bolton v. Bailey* (1879), 26 Gr. 361, in which Proudfoot V.C. quoted with approval Jarman's definition of a class gift:

...a gift to a class as a gift of an aggregate sum to a body of persons, uncertain in number at the time of the gift, to be ascertained at a future time, and who are all to take equally, the share of each being dependent for its amount upon the ultimate number of persons.

[14] *Halsbury* goes on to say, at pp. 144-5:

Gifts to persons described only by relationship are sometimes construed as class gifts, and sometimes as gifts to individuals. A gift may be nonetheless a gift to a class because some of the members are referred to by name, or because a person ... is excluded by name... On the other hand, a gift to an individual and the children of another individual is not regarded as a class gift, unless there is something in the context to show that the testator intended to form a class.

[15] Then at p. 145 the author of *Halsbury* states:

...gifts to several persons designated by name or number or by reference are not class gifts, and are liable to lapse.

[16] A somewhat similar statement is made in *Theobald on Wills*, 9th ed., p. 670:

A gift 'to the five daughters of A.,' or to 'my nine children,' or to 'my said three sisters,' is not a gift to a class.

[17] While the application of this general rule has not always been consistent, a review of the following authorities would seem to suggest that a share of the residue of an estate bequeathed to named persons, will not be considered a class gift. If that share lapses, it passes on intestacy.

[18] In *Re Brush*, the court held that a gift of the residue of an estate "equally among my three daughters Lina, Mabel and Beatrice" was a gift to the daughters as individuals, and not a class gift. Because two of the daughters signed the testator's will as witnesses, they were unable to take their residuary gift and it lapsed. As a result, their share of the lapsed gift passed on intestacy.

[19] In *Maritime Trust Co. v. Griffith*, [1951] 1 D.L.R. 551, a case similar to *Re Brush*, the testatrix left the residue of her estate to be divided into four shares, one to each of her four brothers. Two of the brothers predeceased the testatrix. The court held there was no class gift and the lapsed shares devolved on intestacy. A number of authorities were cited which supported the proposition that when a gift is bequeathed to beneficiaries by name, by number, or both, then the gift is not one that may be described as a class but is a bequest to *persona designata*.

[20] In the case of *Re Stuart Estate*, [1964] 47 W.W.R. 500 (B.C.S.C.), the testator left a pecuniary legacy to a niece who predeceased him. The niece was also a beneficiary under the residuary clause of the will along with 12 others. Nemetz J. held at para. 10:

Having in mind the definitions above stated, I am unable to find any intention on the part of the testator to look "to the body as a whole." To the contrary, I find that he has looked to the members constituting the list as individuals and enumeration of such a list of names, in itself, indicates an intention contrary to the establishment of a class: *Re Midgley; Barclays Bank Ltd. v. Midgley* [1955] ch 576, [1955] 3 W.L.R. 119.

[21] In the case of *Roberts v. Southey et al.* (1984), 17 E.T.R. 60 (B.C.S.C.), the testator left the residue of his estate to five named beneficiaries, those being: Branch No. 52 Royal Canadian Legion; Mrs. Mary Fayers; Cancer Society; Red

Cross Society; Mr. E.A. Southey "to be divided equally". Mr. E.A. Southey predeceased the testator. Houghton L.J.S.C. concluded at para. 13:

It is apparent the residuary gift to the five beneficiaries is not a class gift, that is, a gift to a class consisting of persons who are included and comprehended under some general description and bear a certain relation to the testator. Mr. Gardiner lists three organizations and two individuals and the enumeration of such a list of names in itself indicates an intention contrary to the establishment of a class.

[22] In the case at bar, the residuary bequest is made to the Testatrix's daughter Lillian Milthorpe and son George Bayley, and to her husband's children Jean Christie, Richard Andrews, Elizabeth Hyland, Rae Andrews, Ross Andrews, and Gordon Andrews, in equal shares *per stirpes*. The residual beneficiaries are individually named. The issue to be determined is whether a clear intention has been shown from the wording of the clause to make a class gift to all of the couple's children. Regrettably, I find that it cannot.

[23] The Testatrix specified by name the individuals who were to take upon her death. While at times the line between a class gift and a gift *persona designata* is a fine one, there is nothing in the will or otherwise to provide for a clear contrary intention. Had the Testatrix made a gift of the residue to "all of our children", that wording, in my view, would have shown a clear intention to make a class gift to a group of persons. However, based on the existing wording, I find that I am unable to determine with any degree of certainty the Testatrix's clear intention and thereby avoid the general rule of lapsed gifts passing on intestacy.

[24] This conclusion is further supported by the use of the words "*per stirpes*". In the recent case of *British Columbia (Official Administrator) v. Joseph*, [1999] B.C.J. No. 2340 (B.C.S.C.) (QL), Satanove J. commented on the distinction between the words "*per capita*" and "*per stirpes*" at para. 10:

...*per capita* means "equal sharing by the heads or polls", according to the number of individuals, without reference to their issue or the right of such issue to take the share of an estate which their immediate ancestor would have taken, if living. It is the opposite of *per stirpes*, which means "by the roots or stalks" and expressly refers to dividing the share of an estate of a deceased ancestor amongst the successors of the deceased ancestor.

[25] The Testatrix, by the use of the words "*per stirpes*", intended the residue of the estate to be divided between the named persons in the will and their issue. A gap was created when Richard died leaving no issue. In these circumstances it must be concluded that his share of the residuary estate was not to be redistributed within the "class" but was to pass to his issue. In the absence of Richard having any issue, his share must then pass on intestacy.

[26] Although there is a presumption against intestacy, that alone is not sufficient to avoid the consequences of a lapsed gift. As stated by Mr. Justice Tysoe in *Re: McEwan Estate* [1967] 62 W.W.R. 277 (B.C.C.A.) at p. 283:

...The avoidance of intestacy is not enough to induce the court to give an unnatural meaning to words or to construe plain words otherwise than according to their plain meaning.

[27] More recently, Newbury J.A. has stated in *Howell v. Howell Estate* [1999] B.C.J. No. 1490 (B.C.C.A.) at para. 10:

I agree it is very unlikely the testator in this case intended not to leave his entire estate; however, the fact is that he failed to make provision for his assets (other than personal effects) in the event that his wife predeceased him. It is one thing to try to give effect to a testator's intention where he has used an ambiguous word or phrase; it is entirely another thing to supply a missing bequest out of thin air. No authority was cited for the proposition that the court can do so or that it can ignore perfectly clear language in order to avoid an intestacy....

[28] In my view, these comments are apposite to this case.

[29] I am further of the opinion that s. 21 of the *Wills Act* R.S.B.C. 1996, c. 489 is of no application to the present case. Section 21 states:

21 Unless a contrary intention appears by the will, property or an interest in it that is comprised or intended to be comprised in a devise or bequest that fails or becomes void because of the death of the devisee or donee in the lifetime of the testator, or because the devise or bequest is contrary to law or otherwise incapable of taking effect, is included in the residuary devise or bequest, if any, contained in the will.

[30] This section is restricted to the lapse of a devise or bequest other than a residuary devise or bequest. See *Frame Estate (Re)*, [1998] B.C.J. No. 3205 (B.C.S.C.) (QL) Shabbits J. at para. 11. See also *Re Stuart Estate*, [1964] 47 W.W.R. 500 (B.C.S.C.).

CONCLUSION

[31] The court must answer the question posed in the negative. The residuary bequest in the Testatrix's will is not a class gift but a gift to *persona designata*. Richard predeceased the Testatrix without leaving any issue. Therefore, his share of the residue must lapse. As s. 21 of the *Wills Act* does not apply, his bequest passes on intestacy to the Testatrix's next of kin, Lillian Milthorp and George Bayley.

[32] It is agreed that the special costs of all of the parties to this petition shall be born by the estate.

"D. Smith, J."

The Honourable Madam Justice D. Smith

April 26, 2000 -- Corrigendum issued by Madam Justice Smith advising that the name of Mr. Brian Marshall is to appear as Counsel for the Petitioner.