Straith & Company

Analysis of
***Rose v. Bloomfield*, 2010 BCSC 315**

By Laurel Dietz

Synopsis

Recently the BC Supreme Court released a decision by Justice Cohen that indicates the direction *Wills Variation Act (WVA)* claims are likely to head in the future. Justice Cohen's judgement in ***Rose v. Bloomfield*** follows on the heels of a BC Court of Appeal decision: ***Picketts v. Hall Estate****,* 2009 BCCA 329, leave to appeal dismissed: [2009] S.C.C.A. No. 389.

Rose is the latest case in a saga of *WVA* claims cases that spells out the obligations to which a testator is subject in distributing his or her estate through a will. The court held in *Rose* that acceptable guides in determining moral obligations are the intestacy provisions in the *Estate Administration Act*.

In an area of law that has been plagued by the different legal obligations for common law spouses versus married spouses, the differences can be greatly reduced through a consideration of moral obligations. Now, the amount of an award on a successful claim may no longer be as greatly affected by whether or not the claimant was a common law spouse or a married spouse (depending on what a married spouse would have been entitled to legally on a break down of the marriage).

The following is a run down of the *Estate Administration* Act intestacy provisions that may now guide the courts in making a variation of a will:

- if the estate is less than $65,000, the estate is to go to the spouse;

- if the estate is over $65,000 and the testator has left only one child, the spouse is entitled to the first $65,000 of the estate and half of the residue (or remaining portion of the estate); or

- if the estate is over $65,000 and the testator has more than one child, then the spouse is entitled to the first $65,000 of the estate and 1/3 of the residue.

MUCH LONGER ANALYSIS OF ROSE V. BLOOMFIELD

FACTS

Deceased's will was made in 2003; she left $6,000 to her common-law spouse of 21 years; the residue of the estate went to her niece, nephew, grandnephews and a church.

At the commencement of the relationship, the plaintiff (common-law husband) was divorced with a child from the previous marriage. The deceased was separated with no children.

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When the deceased was employed, both plaintiff and deceased split the common living expenses.

The couple lived in the plaintiff's house; the plaintiff covered the house and car expenses. The plaintiff was also responsible for many of the household chores.

The plaintiff's son considered the deceased a stepmother and the plaintiff also had a close relationship with the deceased's mother.

When the deceased's mother died, the deceased inherited some money and was able to contribute more to the living expenses.

The plaintiff's house was valued at over $1 million. During the height of his career, he was earning over a $100,000 annually.

The plaintiff suffered an accident that left him with a walking disability; he had earmarked the settlement funds for alterations to the home that would allow better mobility.

Before the *WVA* claim, the plaintiff had $150,000 in investments, though this was significantly decreased by the law suit.

The deceased owned a condo with her mother valued at $230,000 and a term deposit of $69,000.

The deceased and the plaintiff entered into an agreement with respect to renovations of the condo. The plaintiff was to pay for the renovations, the condo would be sold and the plaintiff would keep the proceeds of the sale over and above the value of the condo before the renovations. The condo sold for $260,000. The plaintiff earned about $20,000 net. He used the profits to support him and the deceased.

When the plaintiff and the deceased started living together, the plaintiff told the deceased he intended for his son to inherit the house. There was a provision in his will, however, that allowed for the deceased to live in the house for 6 months after his death. Subsequent to the commencement of their relationship, the plaintiff went through a bout of liver cancer and the deceased nursed him through this time.

Because of this, the agreement between the plaintiff and deceased was that the deceased could stay in the house as long as she liked in the event of the plaintiff's death.

In 2005, the deceased was diagnosed with multiple myeloma. In 2007 she came down with gastro enteritis and her health rapidly declined until her death.

The beneficiaries under the 1993 will of the deceased were not dependent on the deceased. They are the defendants of this action.

Immediately prior to her death, the deceased indicated an intention to change her will to favour her spouse. Due to a series of mishaps, miscommunications and health problems, the will was never changed.

THE LAW

The court accepts easily that the plaintiff falls within the definition of spouse set out by the *Wills Variation Act (WVA).*

The court also acknowledges the test to be applied is that set out by *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807. *Tataryn* held that the test to determine whether or not a will provided adequately for the maintenance and support of the spouse could be broken down into two parts:

- legal obligations: obligations that the law would impose on the testator during his or her lifetime
  - i.e. What would the testator be responsible for if he/she were to split from his/her spouse the day before he/she died?

- moral obligations: society's expectations of what a judicious person would do in the circumstances
  - clearly moral obligations are less certain and clear than legal obligations.

NB: McLachlin J. notes that there will be many ways in which a testator can satisfy his/her obligations; the testator need only provide for a spouse or a child within an acceptable range of options available to him or her. Nonetheless this range has proven difficult to determine

The ground breaking move in *Rose* is whether or not *Picketts v. Hall Estate,* 2009 BCCA 329 can be interpreted to mean that in determining an acceptable range for moral obligations the court can look to the guidance provided by the *Estate Administration Act (EAA).*

The court considers the defendant's argument that the decision in *Hecht v. Hecht Estate,* [1991] B.C.J. No. 2531, 42 E.T.R. 295 (S.C.) has already determined the issue. There, the trial judge held that the court is NOT to consider the *EAA* as a starting point for determining an adequate, just and equitable distribution of the estate. Hecht was upheld at the Court of Appeal (see *Hecht v. Reid* 1993 (1993), 81 B.C.L.R. (2d) 239, 28 B.C.A.C. 269 (C.A.)) with leave to appeal at the SCC refused (see Hecht v. Reid, [1994] 1 S.C.R. viii).

Justice Cohen in *Rose* rejects this argument as there was no specific discussion of the point at the Court of Appeal level. Further, Cohen J. finds that it is clear in Low J.A.s reasons in *Picketts* that the *EAA* can provide guidance on current social norms of adequate provision for a living spouse by will.

*** BACKGROUND from *Picketts:* Low J.A. considers the fact that the *WVA* and the *EAA* were amended at the same time to include common law spouses in the statutory scheme.

As previously mentioned, under *Tataryn*, the SCC decided that a testator owes legal and moral obligations to their spouse. In determining legal obligations, one must consider what obligations the testator would have had towards their spouse if they were to have split up the day before the death of the testator.

Considering legal obligations from this point of view differentiates between married and unmarried spouses. Married spouses have more protection under the law with respect to division of property on marital break-up. Obligations to common law spouses are much more tenuous. They must resort to the law of unjust enrichment and constructive trust. There will be many common law relationships in which the law of unjust enrichment and constructive trust will not apply. So it may be, that despite the fact that common law spouses have a right to contest a will under the *WVA*, their claim under legal obligations will be quite weak.

On the other hand, *Tataryn* also includes moral obligations as a factor to consider in varying a will. It is on this point that *Picketts* is most interesting. Low J.A. reflects that under the *EAA* a common law spouse will be entitled to the same award as a married spouse. He considers the fact that the *EAA* and *WVA* were amended at the same to include common law spouses. As the amendments "dovetailed" he postulates that the intestacy provisions in the *EAA* are a reflection of current social norms of what is adequate, just and equitable to modern day standards as decided upon by our elected representatives.

Cohen J. in *Rose* picks up on this discussion and decides that in determining the "adequate, just and equitable" range posed by a moral, it is acceptable for the court to refer to the *EAA* intestacy provisions as a guide.

Thus, given that the relation of the plaintiff and deceased was lengthy (21 years), they cared and provided for each other through each other's illnesses, the deceased had no children of her own (and no moral or legal obligations to the defendants of this action), the assets of the plaintiff and the defendant were intermingled through their lives together and the plaintiff's son regarded the deceased as a stepmother, it was held that the plaintiff was entitled to 70% of the deceased's estate.

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