IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Souch v. Johnson,*
2014 BCSC 1889

Date: 20141008
Docket: S131464
Registry: Vancouver

In the Matter of the *Trustee Act*,
R.S.B.C. 1996, c. 464 and Amendments Thereto

And In the Matter of the R.P. Johnson Family Trust

Between:

Donald Souch and 683757 B.C. Ltd., in their capacity as Trustees of the R.P. Johnson Family Trust

Petitioners

And

Lance Johnson, Carter Johnson, Douglas Johnson, Trina Johnson, Warren Johnson, Nicholas Johnson-Belanger, a minor, Amber Johnson-Belanger, a minor and The Public Guardian and Trustee of British Columbia

Respondents

Before: The Honourable Mr. Justice Steeves

Reasons for Judgment

Counsel for the Petitioners:	H.H. Low
Counsel for Respondents, Lance Johnson, Carter Johnson, Douglas Johnson, Trina Johnson, Warren Johnson:	C. Cho
Counsel for Respondents, Amber Johnson-Belanger, Nicholas Johnson-Belanger, the Public Guardian and Trustee of British Columbia:	P. A. Mazzone
Place and Date of Hearing:	Vancouver, B.C. May 20, 2014
Place and Date of Judgment:	Vancouver, B.C. October 8, 2014

A. Introduction

[1] The petitioners apply under s. 86 of the *Trustee Act,* RSBC 1996, c 464 for an interpretation of the R.P. Johnson Family Trust (the "Trust"). Specifically, they seek directions as to the names of the beneficiaries of the Trust.

[2] The settlor of the Trust is Reginald Johnson. The petitioners are the trustees of the Trust. The original trustees included Roy Johnson, the son of Reginald Johnson. Roy Johnson had seven children by two marriages. They are the respondents, with the Public Guardian and Trustee of British Columbia.

[3] The petitioners do not take a position on the issues in this application. Instead, the dispute here is between the respondents Lance Johnson, Carter Johnson, Douglas Johnson, Trina Johnson and Warren Johnson, on the one hand (the "Johnson-Denton Children"), and, on the other hand, Nicholas Johnson-Belanger and Amber Johnson-Belanger (the "Johnson-Belanger Children"). The latter two respondents are minors and they are represented by the Public Guardian and Trustee of British Columbia.

[4] At issue is whether the beneficiaries of the Trust are only the Johnson-Denton Children or whether the group of beneficiaries includes these five plus the two Johnson-Belanger Children by a later marriage of Roy Johnson.

B. Background

[5] On May 14, 1999 Reginald Johnson settled the Trust. Most of the wealth in the Trust came from shares in his construction company. The original trustees included Roy Johnson, the son of Reginald Johnson, and he was one of the beneficiaries.

[6] Roy Johnson was married three times. The five Johnson-Denton Children were from a first marriage with Diane Denton. The two Johnson-Belanger Children were from the third marriage with Francine Belanger. Some of the evidence uses the terms "Adult Children" to refer to the Johnson-Denton Children and "Minor Children"

to refer to the Johnson-Belanger Children. There were no children from Roy Johnson's second marriage.

[7] There is no dispute that the Johnson-Denton Children are beneficiaries under the Trust. The question is whether the Johnson-Belanger Children are also beneficiaries.

[8] When the Trust was settled in May 1999 Francine was pregnant with the first of her children, Nicholas, who was born in June 1999. According to the Johnson-Denton Children, Reginald Johnson did not like Francine and he did not wish her to benefit from the Trust. On the other hand, according to Francine's affidavit evidence, Reginald Johnson knew about the pregnancy and she and Roy Johnson lived with him a short time when after Nicholas was born in May 1999. The second of the Johnson-Belanger Children, Amber, was born in August 2001, before the death of Reginald Johnson in December 2003.

[9] In August 2004 Roy Johnson was the remaining trustee and he appointed 683757 B.C. Ltd. as a trustee. Ultimately (in December 2003) the Johnson-Denton Children received 24 shares each in 683757 B.C. Ltd. and all five children were appointed directors.

[10] Roy Johnson died on November 26, 2009.

C. Analysis

[11] I begin by setting out the applicable provisions of the May 1999 Trust:

> **ARTICLE III**
>
> ***Definitions***
>
> …
>
> (b) "Children" shall mean Lance Johnson, Carter Johnson, Douglas Johnson, Trina Johnson, and Warren Johnson.
>
> (c) "Beneficiaries" shall mean the following persons:

(i) Roy Reginald Johnson

(ii) the children of Roy Reginald Johnson

(iii) Mary Johnson

[12] The fine point in this application is whether the beneficiaries of the Trust are *only* the Johnson-Denton Children, as in Article III(b) above? That is, are the beneficiaries only the "Children" of Roy Johnson and Carole Denton? Alternately, under Article III(c)(ii), are the beneficiaries all the "children" of Roy Johnson including the Johnson-Denton Children *and* the Johnson-Belanger Children? Put very simply, do the beneficiaries number five or seven? It is agreed that the settlor, Reginald Johnson, was entitled to name only five beneficiaries if that, in fact, was his intention.

[13] Previous decisions have set out the general principles to determine the intention of a settlor of a trust (or the intention of a testator). Madam Justice Dardi provides a helpful summary in *Thiemer Estate v Schlappner*, 2012 BCSC 629 (repeated except for para. 50 in her judgment in *Ali Estate (Re),* 2014 BCSC 340, at para. 16):

> In construing a will, the objective of the court is to ascertain the intention of the testator as expressed in his or her will when it is read as a whole in light of any properly admissible extrinsic evidence: *Rondel v Robinson Estate*, 2011 ONCA 493, at paras. 23-24; *Theobald on Wills*, 15th ed. (London: Sweet and Maxwell, 1993) at 199. It is a cardinal principle of interpretation that the testator's intention is to be gathered from the will as a whole and not solely from those provisions which have given rise to the controversy: *Perrin v. Morgan*, [1943] A.C. 399 at 406 (H.L.); *Re: Burke* (1960), 20 D.L.R. (2d) 396 at 398-399 (Ont. CA) .
>
> Another fundamental tenet affirmed by an established line of authorities is that the court is to ascertain the expressed intention of the testator – the meaning of the written words used in the particular case – as opposed to what the testator may have meant to do when he or she made the will: *Perrin* at 406.
>
> Earlier lines of authority endorsed an objective approach to will interpretation. However, modern jurisprudence recognizes that a strict literal approach can defeat the intention of the testator, thereby leading to unjust results: Law Reform Commission of British Columbia, *Report on Interpretation of Wills*,

> LRC 58 (Victoria, MAG, 1982) at 6. The liberal interpretive approach finds its roots in the seminal decision of the House of Lords in *Perrin*.
>
> In keeping with contemporary judicial thinking, the courts of this province have favoured the subjective approach to interpreting wills, wherein the objective is to ascertain the actual meaning the testator ascribed to the words he or she used in the will. In determining the testator's intention the courts have endorsed the analytical approach commonly described as the "armchair rule". The rule requires that the court put itself in the position of the testator at the point in time when he or she made the will, and from that vantage point construe the language in the will in light of the surrounding facts and circumstances known to the testator.
>
> In *Re: Burke*, the Ontario Court of Appeal articulated the guiding principles which were cited with approval by our Court of Appeal in *Davis Estate v Thomas,* (1990) 40 E.T.R. 107 (B.C.C.A.) and *Smith v. Smith Estate (Trustee of)*, 2010 BCCA 106, at paras. 18 and 28 respectively:
>
> > …Each Judge must endeavour to place himself in the position of the testator at the time when the last will and testament was made. He should concentrate his thoughts on the circumstances which then existed and which might reasonably be expected to influence the testator in the disposition of his property. He must give due weight to those circumstances in so far as they bear on the intention of the testator. He should then study the whole contents of the will and, after full consideration of all the provisions and language used therein, try to find what intention was in the mind of the testator. When an opinion has been formed as to that intention, the Court should strive to give effect to it and should do so unless there is some rule or principle of law that prohibits it from doing so.
> >
> > Since the meaning of words in wills can differ so much according to the context and circumstances in which they are used, previously decided cases are of limited assistance except in so far as they may express general principles of construction. This notion has repeatedly been embraced by Canadian courts: *Kaptyn Estate (Re)* at para. 32; *Perrin* at 406; *Re: Burke* at 398.

[14] The above quotation from *Re Burke* is often used to describe what is called the "armchair rule."

[15] The weight of the authorities demonstrates that the modern judicial approach to interpreting a will is to admit all the evidence regarding the surrounding circumstances at the start of the hearing and then to construe the will in the light of those surrounding circumstances. Ambiguities in the will may only become apparent in the light of the surrounding circumstances: *Rondel* at paras. 23 - 24.

[16] At my request counsel provided submissions on the issue of whether there is a difference between the test for determining the intention of a testator in a will (as in *Thiemer Estate*) and the intention of a settlor in an *inter vivos* trust (as in the subject in this case). While no conclusive statement of the point was found they are agreed that the authorities suggest the test is the same. The following were relied on: *Colantonio v Don Park L.P.*, 2013 ONSC 1059, para. 24; *McCormack Estate (Re)*, [1985] OJ 481, paras. 13-14; *Martin v Banting* (2001), 37 ETR (2d) 270 (Ont. SCJ), para. 29; *Ackland Trust (Re),* [1944] 2 WWR 56 (Man. CA), para. 4; and Kessler & Hunter, *Drafting Trusts & Will Trusts in Canada*, 3rd edition, LexisNexis 2011, page 39, para. 3.14.

(a) The language of the Trust

[17] Returning to the language of the Trust, I am urged by all parties to find that there is no ambiguity in this language.

[18] For example, it is submitted on behalf of the Johnson-Belanger Children that the settlor Reginald Johnson defined "Children" and then used a different description of "children" in defining "Beneficiaries." Since the Trust was drafted by a lawyer who would know how to define a term and how to use it, the Trust document reflects an intention by the settlor to name different subjects as beneficiaries than under the definition of "Children." On this view, the beneficiaries number seven, the Johnson-Denton Children and the Johnson-Belanger Children.

[19] On the other hand, it is submitted on behalf of the Johnson-Denton Children that the phrase "the children of Roy Reginald Johnson" should be interpreted to have the same meaning as the defined term "Children." The reasoning for this position includes submissions that it accords with the words used by the settlor in the Trust, it gives meaning to all the provisions in the Trust, it reflects the settlor's intention to have a closed class of beneficiaries and Article III(b) and Article III(c)(ii) are not inconsistent. Further, the absence of a capitalized "children" in Article III(c)(ii) reflects a typographical error and evidence is presented that reflects other errors made by

the same person in other documents. On this view, only the Johnson-Denton Children are beneficiaries.

[20] Looking at the Trust as a whole, it uses the word children in one other unrelated place and I can find no assistance there on the issues in this application.

[21] There is evidence that the drafter made other errors. Some of these were in emails and I am not persuaded that those are of great significance in the context of the general culture of emails. Of more significance in my view are errors in other legal documents. There are two examples in the Trust where there are apparent errors of capitalization in defined terms (for example, "Net annual income" instead of "Net Annual Income"). There is logic in also concluding that "children" in Article III(c)(ii) should also be considered an error and read as "Children."

[22] It is true that adding "of Roy Reginald Johnson" would be superfluous on this reading but it also does not raise a conflict in the language. As for the submission that the different references to "Children" and "children" reflect the settlor's intention to say different things; that is, of course, a possible interpretation. However, it is an interpretation that does not explain why "Children" was defined with some specificity in Article III(b). Finally, it is also true that the settlor knew that there was another child on the way (Francine was pregnant with Nicholas) when the trust was settled but that can also mean that the intention of Reginald was *to exclude* children born after settlement.

[23] I conclude that there was an error in the Trust and Article III(c)(ii) should be read as "the Children of Roy Reginald Johnson."

(b) The surrounding circumstances

[24] There is considerable affidavit evidence about the surrounding circumstances at the time the settlor made his will as they correspond to the facts and circumstances referred to in the Trust.

[25] The Johnson-Denton Children submit that they are the only beneficiaries to the Trust because they made a contribution to the family businesses and the Johnson-Belanger Children did not. Their participation in the business supports the conclusion that the settlor included them in the affairs of the trust and it is indirect evidence of his intention to name them as beneficiaries. This is evidence of the general relationship of the settlor to his immediate family and is admissible (*Ali*, para. 18*).*

[26] There is other evidence provided by, primarily, the Johnson-Denton Children that is problematic.

[27] For example, there are legal conclusions on the issues I must decide (Douglas Hiller, November 18, 2013, paras. 4, 5 and 6); there is opinion/direct evidence as to the intention of Reginald Johnson (Douglas Johnson, November 18, 2013, para. 9; Warren Johnson, November 25, 2013, para. 17; Carter Johnson, November 25, 2013, para. 6; Trina Johnson, November 25, 2013, para. 10); and there is argument (Lance Johnson, November 25, 2013, para. 15; Trina Johnson, November 25, 2013, para. 12). I give little weight to that evidence.

[28] There is also some evidence that Reginald Johnson "hated" Francine or that she was a "gold-digger" but that is extreme opinion evidence. In addition it is, at least partly, contrary to the evidence that Roy Johnson and Francine lived with Reginald Johnson for a short time as deposed by Francine. And there is evidence that Reginald Johnson generally disapproved of Roy Johnson's romantic life and thought that Roy Johnson was "crazy" for having as many children as he did. The latter comment is obviously inappropriate opinion evidence.

[29] Finally, there is evidence that purports to describe the intention of the settlor at the time the Trust was settled. For example, Douglas Hiller, referenced above, was the accountant to Reginald Johnson and his businesses beginning in 1984. Mr. Hiller describes in his affidavit, sworn November 15, 2013, a meeting that took place "in or around March 1999" and the following transpired:

> 12. At the meeting, I recall Reg [the settlor] stating emphatically that he was unsupportive of Roy having any further children (i.e. that Roy had enough children already), and intended for the Adult Children to be the exhaustive list of Roy's children to benefit from the Trust (and for no further children of Roy's to benefit from the Trust). I knew this meant that Reg did not intend to benefit any children that Roy was going to have with his wife Francine, because at the time, Roy was within a month of having a new child (Nicholas) with Francine, and Reg was well aware of this fact.

[30] Similarly, Carter Johnson, one of the Johnson-Denton Children, deposes in an affidavit sworn November 22, 2013 that there was a "bitter legal dispute … over their family assets" when Diane divorced Roy in 1979. This affected the family "for years" including drawing Reginald Johnson into court proceedings to preserve the family assets. According to Carter Johnson, the divorce action between Roy Johnson and Diane "… greatly impacted Reginald Johnson, and he became adamant that he would never again allow any Johnson family member's romantic relationships to affect the future of the family business by divorce, separation, or lawsuit." Evidence as to the comments of the now deceased drafter of the trust instrument is also relied on by the Johnson-Denton Children.

[31] This is clearly direct evidence of the settlor's intention and it is not admissible. The objective of the court is to ascertain the intentions of the testator as expressed in his will when it is read as a whole with admissible evidence. My role it to focus on the trust document itself from the point of view of an "armchair" view of that intention. Direct evidence of the settlor's intention deflects the inquiry from the trust document and is generally not determinative of that intention (*Ali*, para. 19).

D. Conclusion

[32] The proper interpretation of the Trust is that there is a drafting error in Article III(c)(ii) and it should be read as "the Children of Roy Reginald Johnson." The minor children of Roy Johnson are not beneficiaries.

[33] Subsequent to the hearing of this matter, counsel advised that they are agreed on costs. Costs for the petitioners and the respondents (including the Public

Guardian and Trustee) are payable as special costs on a full indemnity basis from the Trust.

"Steeves J."