Unger Estate (Re), 2022 BCSC 189

Supreme Court of British Columbia, Jenkins J, 7 February 2022

Application by executors of a will with a gift over to charities where the will maker was murdered by a beneficiary.

Key words: Will, Canada, British Columbia, Murder, Disentitlement

1. Ms Unger was a widow at the time of her death, leaving a will with an estate value of $860,000. She also had some personal retirement savings and benefits valued at just over $80,000 to which the will did not apply.

2. Ms Unger had two sons, Logan and Clayton.

3. Clayton was convicted of murdering Ms Unger. As a matter of public policy, Clayton was excluded from taking any benefit because of his criminal act. Further, Clayton disclaimed his entitlement to any portion of the estate in a letter prior to these proceedings.

4. Clayton had a daughter (Adeline), as proved by DNA tests, born 11 days after Ms Ungar's death.

5. The will, in the first instance, left the estate to be divided between the two sons, and if either predeceased, then to their issue, and failing that to two charities, Ruth & Naomi's Mission and BC Teen Challenge, in equal shares.

6. The executors sought direction from the Court as to:

    - Whether Clayton was disentitled from receiving a share of the estate;
    - If Clayton was disentitled from receiving a share of the estate, whether his respective share passed to Logan, or alternatively, to his biological child, or in the further alternative, Ruth & Naomi's Mission and BC Teen Challenge in equal shares;
    - Whether Clayton was entitled to receive his respective share of the personal retirement savings plan accounts as a designated beneficiary.

7. The executors, Logan and the Public Guardian and Trustee (PGT), made submissions to the Court. They agreed that public policy disentitled Clayton, as well as acknowledging that he had disclaimed his share.

8. The parties then argued over two lines of case authorities with similar fact patterns about whether Logan took his brother's share, or whether it went to Clayton's issue. In both cases, the testator was murdered by a named family beneficiary and intended, if the named beneficiary was not to receive the estate, for the estate to pass to alternate beneficiaries.

9. The Court found that:

   - Under the rule of public policy, Clayton was not entitled to what would have been his portion of Ms. Unger's estate;
   - The clear intent in the will was that should either of Ms. Unger's children predecease her, any children of her children who were alive at her death or were en ventre sa mere should receive the deceased child's share;
   - Under the Wills, Estate and Succession Act S.B.C. 2009 c.13 in relation to benefit plans, the share of Clayton would be paid to Logan;
   - Indemnity special costs were awarded to be paid from Clayton's portion of the estate.

10. Therefore, the charities obtained no benefit from the will.

IMPLICATIONS

The Court did not disclose reasons for exactly why it decided that the public policy rule did not extend to those who claim through the criminal's estate. Perhaps Clayton's actual disclaiming of any entitlement was a factor.

The same public policy principle applies in Australia. A beneficiary forfeits a bequest under a will where it would be unjust and unconscionable to benefit by his or her crime. This remains a common law principle in most jurisdictions in Australia, but legislation has been enacted in New South Wales and the Australian Capital Territory: see the Forfeiture Act (NSW) and the Forfeiture Act 1991 (ACT). Legislation has also been canvassed, but not enacted, by the Victorian Law Reform Commission and the South Australian Law Reform Institute.

It is clear from the case law that the forfeiture rule in Australia can be modified, even in the absence of a relevant statute. This is particularly so where a killer is young and arguably vulnerable.[1] But the need for flexibility in the application of the forfeiture rule has also been raised, though less successfully, in the context of the killing of abusive partners by women, and in the case of a verdict of not guilty of murder because of mental illness.[2]

The reviews in Victoria and South Australia also considered the issue that abuse (physical, emotional or financial) of an elderly testator should invoke the forfeiture rule. This would mean that an abusive beneficiary's bequest would be set aside by the court. Since this is an extension of the current common law or legislative rule relating to forfeiture, legislation would be required to implement it.

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[1] See R v R (unreported, 14 November 1997, Supreme Court of New South Wales) where a 13 year old killed his mother and sister, but was granted his share of his mother's estate because of the surrounding circumstances of abuse by his father; and Leneghan-Britton v Taylor [1998] NSWSC 218 where the plaintiff killed her grandmother, but could still inherit her share of the grandmother's estate because of her previous care and support of her grandmother.

[2] See Public Trustee v Fitter [2005] NSWSC 1188; Guler v NSW Trustee and Guardian [2012] NSWSC 1369; Hill v Hill [2013] NSWSC 524; and Estate of Raul Novosadek [2016] NSWSC 554.

Whatever the case to be made for flexibility of the forfeiture rule in Australia, in the leading case of Troja v Troja (1994) 33 NSWLR 269 per Meagher JA it was held that there was no room for allowing a killer to benefit. This has continued to be the public policy principle applied: see Batey v Potts at [21]:

> The public policy against benefiting from one's crime is not limited to fixed categories. Nor does it focus upon the manner in which the felony results in benefit to the perpetrator. As Meagher JA pointed out in *Troja* … its principle is founded in public abhorrence of homicide. In *Troja,* the Court of Appeal held that the rule applied irrespective of the motive of the perpetrator, was absolute in its operation and there was no scope for its discretionary application.

VIEW THE CASE

This case may be viewed at https://www.canlii.org/en/bc/bcsc/doc/2022/2022bcsc189/2022bcsc189.html

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Date of creation: March 2022

Number of case: 2022-35

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