

Court of Queen's Bench of Alberta

Citation: Hilstad Estate, 2008 ABQB 570

Date: 20080918
Docket: SES10 15893
Registry: Red Deer

COURT FILE NUMBER	SES10 15893
COURT	Court of Queen's Bench of Alberta (Surrogate Matter)
JUDICIAL DISTRICT	Red Deer
ESTATE NAME	Mary Hilstad, also known as Mary C. Hilstad, also known as maria Hilstad
PROCEDURE	Application for advice and direction pursuant to the <i>Administration of Estates Act</i> , R.S.A. 2000, c. A-2 as amended

**Reasons for Judgment
of the
Honourable Mr. Justice Vital O. Ouellette**

Introduction

[1] The Public Trustee for the Province of Alberta, personal representative of the estate of Mary Hilstad, wishes to distribute the estate to the correct beneficiaries under the *Intestate Succession Act*, R.S.A. 1955, c. 161.

Facts

[2] In 1915, Olaf Christian Hilstad died intestate. At the time of his death he had four living siblings. At the time of his death he owned mines and minerals situated in Alberta. In 1939 one of the siblings, John Hilstad, died intestate, with no spouse or children. In 1940 another sibling, Karl Hilstad, was issued letters of administration of the estate of Olaf Christian Hilstad. In 1944

another sibling, Joanna Hilstad, died intestate, with no spouse or children. In 1948 Karl Hilstad died testate, with the net effect being that his sister Mary Hilstad was the sole beneficiary of his estate. The last of the children, Mary Hilstad, passed away in 1963, intestate, with no spouse or children.

[3] The mines and minerals, standing in the name of Olaf Christian Hilstad, began producing in 1993. The Public Trustee began receiving royalty payments from the mines and minerals on behalf of the estate of Olaf Christian Hilstad in 1996. In 1997 the Public Trustee was issued a grant of administration of unadministered property for the estate of Olaf Christian Hilstad. In 2003, the Public Trustee for the Province of Alberta was issued a grant of administration of the estate of Mary Hilstad.

[4] The administration of the estate has now been completed and the Public Trustee is seeking advice and direction in relation to the distribution of funds they presently hold in trust for the estate of Olaf Christian Hilstad, in the sum of \$912,211.96, as of September 2008. On September 10, 2008 this Court granted an uncontested application directing that the estate of Olaf Christian Hilstad devolve upon the estate of Mary Hilstad.

The Issue

[5] Are the persons entitled to take on the intestacy of Mary Hilstad to be determined at the time of her death in 1963, or in 1996 when the mines and minerals began to pay royalties, or presently, in 2008, when the estate is now to be distributed?

The Position of the Public Trustee for the Province of Alberta

[6] It is the position of the Public Trustee that the correct beneficiaries under the *Intestate Succession Act* are the maternal second cousins of Mary Hilstad alive at her death, who are the next of kin of equal degree of consanguinity to Mary Hilstad pursuant to s. 9 of the *Intestate Succession Act*.

The Position of the Estate of Marie Marit Bruun

[7] It is the position of the estate of Marie Marit Bruun that the estate be distributed to the next of kin of Marie Marit Bruun on the grounds that she was the closest next of kin of Mary Hilstad when she died.

[8] It is not contested that Mary Hilstad's closest relative when she died in 1963 was her paternal first cousin, Marie Marit Bruun, and that Marie Marit Bruun was born out of wedlock. Marie Marit Bruun died in 1964. It is also conceded by counsel for the estate of Marie Marit Bruun that as a result of the law on intestacy, that Marie Marit Bruun would have had no claim to either the estate of Olaf Hilstad in 1915 or the estate of Mary Hilstad in 1963 because she was illegitimate. However, counsel submit that the appropriate date to determine who is entitled to the estate is when it is to be distributed or available for distribution, that is, 1996 or presently. Counsel submit that as a result of the abolition of illegitimacy in Alberta in 1991 (c. 11, S.A.

1991), that as of 1996, that the next of kin entitled pursuant to s. 9 of the *Intestate Succession Act* would be the paternal first cousin of Mary Hilstad, namely, Marie Marit Bruun.

Analysis

[9] The Province of Alberta abolished illegitimacy in 1991. The amendments did not state that the abolishment was to be retroactive. The *Act* was proclaimed in force on November 1st, 1991. The transitional and commencement provisions at s. 4 of the *Family and Domestic Relations Statutes Amendments Act*, c. 11, S.A. 1991, read as follows:

Nothing in this Act affects any interest in property or any right, title or interest in or to property or any other right that has vested before the coming into force of this Act.

[10] I am satisfied that the saving provision of s. 4 is to protect any rights that an illegitimate child may have had prior to the abolishment of illegitimacy but did not give new rights that did not exist prior to 1991. In summary, the amendment to the *Intestate Succession Act* in 1991 was not to be applied retroactively.

[11] As a result, the only issue, therefore, is whether the determination of those persons entitled to take in an intestate situation should be determined at the date of death or at the date of distribution. In support of the position that the appropriate date to determine the correct beneficiaries is the date of distribution, counsel for the estate of Marie Marit Bruun relies on three cases.

[12] The first case counsel relies on is from the Saskatchewan Court of Appeal, *Pearce v. Hubic Estate*, [1996] S.J. No. 62. The facts in that case are that the deceased died intestate in 1985 and had a child born out of wedlock in 1936. A dispute arose with 33 nephews and nieces. The Court ordered that there be a trial of an issue as to whether the respondent illegitimate child was a lawful beneficiary of the estate. However, before the issue was determined, the province of Saskatchewan amended the *Children's Law Act*, effectively abolishing illegitimacy. The question was whether the amendments to the *Children's Law Act* applied even though it was passed after the intestacy. After the trial was directed, the Court of Appeal found that the *Act* was intended to apply to all Acts, and was to apply retroactively to intestacies occurring prior to enactment. This was specifically provided for in the *Children's Law Act*. Further, the *Act* also provided, at s. 4, that prior instruments or dispositions of property at the time of coming into force of the *Act*. In that case, there had been no disposition of property or the issuing of letters of administration. *Pearce v. Hubic Estate* is not useful in Alberta as the wording of the amendments in Alberta in 1991 clearly did not make the provisions retroactive, and also did not use language dealing with disposition of property. Therefore, this case is distinguishable and not applicable to this case.

[13] Counsel for the estate of Marie Marit Bruun also relies on a Manitoba Court of Queen's Bench decision *Re Czuby*, 18 D.L.R. (4th) at 443. The question in that case was whether legislation, enacted after the intestate's death but before distribution of an estate, abolishing the status of illegitimacy, entitled the illegitimate person to become the beneficiary if the estate was

not yet distributed at the time of the enactment. That case is also distinguishable because the provisions of the enactment in Manitoba was clearly intended to have limited retrospective effect, and also intended to deal with wording such as disposition or distribution of property. Neither one of those aspects exist in the Alberta legislation.

[14] The third case being relied upon by counsel for the estate of Marie Marit Bruun is *Ogilvie - Five Roses Sales Ltd. v. Hawkins*, [1979] A.J. No. 552 from the Alberta Supreme Court - Trial Division. Counsel states that the case stands for the proposition that a person has no beneficial interest in the assets held in the executor's hands during the course of administration and therefore the persons entitled on intestacy are to be determined at the time that the estate is to be distributed. I do not agree with counsel's interpretation of this decision. It is my opinion that the correct interpretation is that an individual who is entitled on intestacy does not have a vested interest in a specific piece of property being held in the executor's hands during the course of administration, but that they do have a vested interest in the whole of the estate.

[15] The Public Trustee for the Province of Alberta relies on two cases. The first is *Re Jardin Estate*, which is a decision of the Alberta Supreme Court, Appellate Division, 18 W.W.R. 445. That case is very similar to the facts in this case in that the mines and minerals did not come into the estate until approximately 15 years after the death of the intestate. The question before the Court was whether the persons entitled to take on the intestacy was to be determined at the date of death or when the mines and minerals came into the estate at a later date. The Court found that the plain reading of ss. 3 and 9 of the *Intestate Succession Act* indicate that it is the date of death which determines succession. Further, that the fact that mines and minerals only came into the estate after the death of the widow in this case was not a valid reason for changing the plain language of the *Intestate Succession Act*. In the end, the Court found that it is the date of death which determines who is the next of kin entitled to share in the estate.

[16] The principle, as set out in *Re Jardin Estate*, was again adopted by the Alberta Supreme Court, Appellate Division, in the decision of *MacEachern v. Mittlestadt* at 46 W.W.R. 359.

Conclusion

[17] Having regard to the wording of s. 9 of the *Intestate Succession Act* and the two decisions of the Alberta Supreme Court, Appellate Division, I am of the opinion that it is the date of death which is the appropriate date to determine the next of kin. To suggest that the determination as to the next of kin not occur until the distribution of the estate is simply unworkable. It is difficult to imagine that an estate would be disposed of or distributed on the date of death to those persons entitled on the date of death. Invariably, distribution of assets is always delayed, sometimes for short periods and sometimes for long periods. One can only imagine a situation where after the date of death the result could be that, where there is only a partial distribution, that the entitled beneficiaries could change between distributions. This could lead to mischief in attempts to delay distribution, in order to become a beneficiary or getting rid of existing beneficiaries, because of the passage of time.

Decision

[18] The Public Trustee for the Province of Alberta, as personal representative of the Estate of Mary Hilstad, is permitted to distribute the estate to the maternal second cousins of Mary Hilstad alive at her death who are the next of kin of equal degree of consanguinity to Mary Hilstad pursuant to s. 9 of the *Intestate Succession Act*.

Costs

[19] The cost of this application, plus disbursements and G.S.T., shall be paid to the Public Trustee for the Province of Alberta by the estate of Mary Hilstad.

Heard on the 10th day of September, 2008.

Dated at the City of Edmonton, Alberta, this 18th day of September, 2008.

Vital O. Ouellette
J.C.Q.B.A.

Appearances:

Cindy A. Lang
(Public Trustee, AB)
for the Estate of Olaf Christian Hilstad

Jean K. Coutts
(Ackroyd LLP)
for the Friend of the Court

David J. Koski,
(The Estate House by Gorman & Koski, LLP)
for the estate of Marie Marit Bruun