CITATION: Dagg v. Cameron Estate, 2016 ONSC 1892
DIVISIONAL COURT FILE NO.: 881/15
DATE: 20160331

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

ASTON, SWINTON AND PATTILLO JJ.

BETWEEN:	
LAQUITA K. EVANGELINE DAGG and JAMES STEPHEN CAMERON, by his Litigation Guardian, Laquita K. Evangeline Dagg Applicants/Respondents in Appeal	*C. David Freedman*, for the Applicants/ Respondents in Appeal
– and –	
ANDREW FELKER, in his capacity as Litigation Administrator for the ESTATE OF STEPHEN DOUGLAS CAMERON, KIMBERLEY ANASTASIA CAMERON, DEREK ALEXANDER HOLLINGER CAMERON, by his Litigation Guardian Kimberley Anastasia Cameron, and MEAGHEN ELIZABETH HOLLINGER CAMERON, by her Litigation Guardian, Kimberley Anastasia Cameron Respondents/Appellants in Appeal	*Aaron Franks, Michael H. Tweyman*, and *Tori O'Dwyer,* for the Respondents/ Appellants in Appeal
	HEARD at Toronto: March 15, 2016

THE COURT

OVERVIEW

[1] This is an appeal from the order of Douglas J. dated October 2, 2015, following a trial arising from an application under the *Succession Law Reform Act*, R.S.O. 1990, c. S.26 (the "SLRA"). While the order determined several issues, the ultimate issue on the appeal is the correctness of the trial judge's determination that the proceeds of a Canada Life Insurance policy with a $1 million death benefit (the "Policy") are included in the estate of Stephen Cameron ("Stephen") and available for the satisfaction of dependent claims under the SLRA.

[2] For the reasons that follow, we would dismiss the appeal.

BACKGROUND

[3] The appellant Anastasia Cameron ("Anastasia") married Stephen in September 2003. They had two children, who were born in March 2005 and March 2007. In 2010, Stephen took out the Policy. Anastasia was listed as the beneficiary.

[4] Anastasia and Stephen separated in January 2012. She has custody of the children, and they reside with her in Ontario. Stephen moved to British Columbia after the separation and established a new relationship with the respondent Evangeline Dagg ("Evangeline").

[5] Anastasia commenced matrimonial proceedings in Ontario in September 2012. At a first case conference, Rowsell J. made a temporary consent order on February 27, 2013 which provided that "Stephen shall maintain Anastasia as irrevocable beneficiary on any life insurance policy" (the "Rowsell Order").

[6] At a further case conference on July 5, 2013, McCarthy J. made a further temporary consent order for support and access. A section of the order headed "final" specifically provided that all other terms of the Rowsell Order were to remain in full force and effect (the "McCarthy Order"). By the time of the McCarthy Order, Evangeline had told Stephen that she was pregnant.

[7] Stephen was hospitalized in early November 2013, and he was diagnosed with cancer. On November 11, 2013, he executed a Last Will and Testament and a Canada Life Title form, each amending the beneficiary designations on the Policy to divide the proceeds between Anastasia, his two living children and Evangeline. On a motion brought by Anastasia on November 20, 2013, Nelson J. ordered that the designation of Anastasia as beneficiary under the Policy be restored and that Stephen continue the Policy.

[8] Stephen died on November 23, 2013. His son J was born in February 2014. The matrimonial litigation remains outstanding between his estate and Anastasia.

[9] The parties to the present proceeding agreed that the three children and Anastasia are dependants of the estate, and that adequate provision had not been made by Stephen for the proper support of these dependants at his death.

THE DECISION UNDER APPEAL

[10] Evangeline brought an application under the SLRA, which required determinations as to whether she was a dependant and whether the Policy proceeds were deemed to be part of the estate. In determining whether the Policy proceeds were deemed part of the estate, the trial judge had to interpret and apply ss. 72(1)(f) and 72(7) of the SLRA, which read:

> 72. (1) Subject to section 71, for the purpose of this Part, the capital value of the following transactions effected by a deceased before his or her death, whether benefitting his or her dependant or any other person, shall be included as testamentary dispositions as of the date of the death of the deceased and shall be deemed to be part of his or her net estate for purposes of ascertaining the value of his or her estate, and being available to be charged for payment by an order under clause 63(2)(f),
>
> …
>
> (f) any amount payable under a policy of insurance effected on the life of the deceased and owned by him or her;
>
> …
>
> (7) This section does not affect the rights of creditors of the deceased in any transaction with respect to which a creditor has rights.

[11] In coming to his ultimate conclusion, the trial judge decided three discrete issues, identified by the parties as issues for trial. He determined that:

(i) The Policy was "owned" by Stephen notwithstanding the consent orders requiring him to irrevocably designate Anastasia as the beneficiary.

(ii) Anastasia does not have "creditor rights" within the meaning of s. 72(7) of the SLRA notwithstanding Stephen's obligation to pay child and spousal support and the beneficiary designation, as ordered on consent.

(iii) The "consents" underlying the orders in the *Family Law Act* / *Divorce Act* proceeding between Anastasia and Stephen do not entitle Anastasia to judgment for damages in an amount equal to the death benefit under the law of contract.

THE ISSUES ON APPEAL

[12] The appellant argues that the trial judge erred in each of the above findings. The appellant does not take issue with the finding that Evangeline is a spouse.

[13] As the errors alleged are errors of law turning on questions of statutory interpretation, the standard of review is correctness.

[14] The issues of statutory interpretation require the Court to consider the words of the Act in context, having regard to the scheme of the Act, its object and the intention of the legislature (*Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at para. 21).

THE OWNERSHIP ISSUE

[15] Section 72(1)(f) of the SLRA captures "any amount payable under a policy of insurance effected on the life of the deceased and owned by him or her" as part of the estate. Ownership is not defined in the SLRA.

[16] Section 72 was added to the SLRA in order to prevent the depletion of an estate through direct transfers of assets outside a will. Its purpose was described in *Moores v. Hughes* (1981), 74 O.R. (2d) 42 (H.C.):

> That section makes a significant change in the law as it stood before the enactment of the *Succession Law Reform Act*. Certain specified transactions effected by a deceased before his death are now to be included as testamentary dispositions as of the date of death and deemed part of his net estate for the purposes of ascertaining its value and being available for the support of a dependant. Manifestly, the section was intended to ensure that the maintenance of a dependant is not jeopardized by arrangements made, intentionally or otherwise, by a person obligated to provide support in the eventuality of his death. It is designed to alleviate the hardship that can be visited on a dependant by causing money or property to pass directly to a beneficiary (donee or joint tenant) and not as part of the estate.

[17] In the present case, the Policy identifies Stephen as the owner. The irrevocable designation of a beneficiary, by itself, does not change the ownership of the Policy, as the appellant concedes in her factum at para. 71.

[18] This is not a case like *Madore-Ogilvie (Litigation Guardian of) v. Ogilvie Estate*, 2008 ONCA 39. In that case, the deceased and his wife jointly owned an insurance policy that insured both their lives and was payable to the survivor. The Court of Appeal held that s. 72(1)(f) was not meant to capture jointly owned insurance policies (at para. 33).

[19] There is no evidence in this case of any intention to change the ownership of the Policy. Spouses who wish to exclude life insurance proceeds from the reach of the SLRA can do so by transferring ownership to the dependent spouse or to a trustee. They can also transfer the ownership into their joint names with a right of survivorship. On the death of one of them, the ownership would then either revert to the life insured or vest in the survivor beneficiary. In the latter circumstance, the policy proceeds would be excluded from SLRA claims because the policy would be owned by the beneficiary, not the deceased (see *Madore-Ogilvie*, above).

[20] The appellant submits that the consent orders created a trust in which Stephen was a bare trustee, and Anastasia is the beneficial owner of the Policy. She submits that Stephen was

effectively stripped of any meaningful incident of ownership and that he relinquished any control over the Policy or the proceeds payable under the Policy. For example, the order of Nelson J. reversed the beneficiary change made by Stephen in November 2013. The appellant submits that if Stephen wished to increase the coverage, he could only do so for Anastasia's added benefit.

[21] We do not agree. There is no indication here that the parties intended to create a trust. The provision respecting the irrevocable beneficiary designation is found in orders dealing with support. Whether made under s. 34 of the *Family Law Act* or s. 15.2 of the *Divorce Act*, and whether temporary or final, the orders could be varied or terminated based on changed circumstances. Nor would the consents underlying the orders have deprived Stephen of the ability to subsequently seek a variation or termination of the orders. We agree with the trial judge that the interpretation of "ownership", in context, must be broad and flexible to reflect the purpose of Part V of the SLRA. The incidents of control retained by Stephen are not insignificant.

[22] The trial judge correctly determined that Stephen owned the Policy before and after the irrevocable beneficiary designation was ordered.

THE CREDITOR'S RIGHTS ISSUE

[23] Having determined that s.72(1)(f) captures the insurance proceeds because the deceased owned the Policy, the next issue is whether Anastasia can claim some or all of those proceeds as a creditor. Section 72(7) of the SLRA provides that "this section does not affect the rights of creditors of the deceased in any transaction with respect to which a creditor has rights." Thus, it is necessary to determine whether Anastasia has rights in a "transaction" as a creditor, as a result of the consent orders, that would have been affected by the operation of the section - that is, by deeming the insurance policy to be part of Stephen's estate.

[24] Both parties stated that there is no jurisprudence applying this section. The respondent also submits that the words "creditor", "transaction" and "right" are not defined in the SLRA, and general dictionary definitions do not assist.

[25] The appellant argues that Anastasia is a creditor of Stephen because she was legally entitled to receive child and spousal support from him. She also argues that she is a secured creditor because of the designation that she was the irrevocable beneficiary of the Policy.

[26] The respondent concedes that Anastasia is a general unsecured creditor of the estate because of her right to support. However, the respondent argues that she is not a secured creditor, and she is not entitled to claim the protection of s. 72(7).

[27] Anastasia is a creditor of the estate in the sense that she has a claim for future child and spousal support. However, her claim in that regard has no priority over the claims of other dependents, unless she is a secured creditor with a right to realize on her security. If Anastasia is to receive any or all of the insurance proceeds as a creditor, the onus is on her to prove that the

irrevocable beneficiary designation created a security interest in the Policy. That onus has not been satisfied.

[28] An order to designate a support recipient as a beneficiary for the purpose of providing security for the support can be made under s. 34(1)(i) or (k) of the *Family Law Act* or under s. 15.2 of the *Divorce Act*. Contrary to the submission of the appellant, the trial judge did not go so far as to say that an order for security can only be made under s. 34(1)(k).

[29] The trial judge did observe that in this case, the parties did not identify any statutory provision, nor did they use the word "security" in relation to the Policy. He concluded that the jurisdiction for the court to make the order probably stemmed from s. 34(1)(i), as it was an order in relation to an existing policy. Section 34(1)(i) provides that in determining an application for support, the court may require a spouse who has an insurance policy to designate the other spouse or a child as an irrevocable beneficiary. Though orders under s. 34(1)(i) are commonly made for the specific purpose of securing future support, such orders are not necessarily an order for security. An order under s. 34(1)(i) can be a freestanding form of support order, providing that the life insurance proceeds are payable on the death of the insured in lieu of other post-mortem support.

[30] If the parties had intended the beneficiary designation to be a form of security for post-mortem support, they could have said so. Without any reference to "security", the consents and court orders are ambiguous. They could mean that future child and spousal support was to be fixed and satisfied by insurance proceeds of $1 million.

[31] That interpretation would be consistent with the fact that this insurance was put into effect when Stephen and Anastasia were still together. It is also consistent with the fact that there is no provision for a variation of the amount of insurance coverage, as the present value of the future support obligation diminishes (see *Katz v. Katz* 2014 ONCA 606 at para. 74 on the considerations when a court orders security in a life insurance policy).

[32] The trial judge did not err in concluding that the irrevocable beneficiary designation did not give Anastasia "creditor rights" in a transaction within the meaning of s.72(7) of the SLRA notwithstanding the consent orders.

THE CONTRACT CLAIM

[33] The final issue is whether Anastasia is entitled to damages for breach of contract based on the handwritten consents that are the foundation of the orders requiring the beneficiary designation.

[34] In *Turner v. DiDonato* (2009), 95 O.R. (3d) 147 (Ont. C.A.) the spouses entered into a separation agreement with a provision that the husband maintain the wife as the sole beneficiary of a $100,000 life insurance policy. The agreement did not specify that it was security for his time-limited spousal support obligation. He later remarried and changed the beneficiary designation in the policy, adding his second wife as the beneficiary for about half the $100,000. The first wife successfully sued for damages for breach of contract. Her success was predicated on the

fundamental finding that on the language of the agreement the insurance was not intended, and should not be presumed to be, security for the diminishing spousal support obligation. Ms. DiDonato was found entitled to the full $100,000 "even if that sum exceeded the present value of the outstanding support obligations". The case was decided under principles of contract law, in particular a determination of the intention of the parties.

[35] In this case, Anastasia asserts a common intention that the beneficiary designation was to provide her with security. That assertion is fatal to a claim for damages. A claim for damages would depend on a common intention she was to receive the full amount even if there was no ongoing support obligation. She does not allege that common intention. Therefore, the trial judge was correct in finding that the consents underlying the court orders do not support a claim in damages for breach of contract on the facts of this case.

CONCLUSION

[36] The appeal is therefore dismissed, with costs fixed at $7,500, all inclusive, an amount agreed upon by the parties.

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ASTON J.

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SWINTON J.

_____

PATTILLO J.

Released: March 31, 2016

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Respondents/Appellants in Appeal

REASONS FOR JUDGMENT

By The Court

Released: March 31, 2016