COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Hix v. Ewachniuk,*
2010 BCCA 317

Date: 20100624
Docket: CA036304

Between:

Neeva Gayle Hix and
Mary Anne Runnalls

Respondents/
Appellants on Cross Appeal
(Plaintiffs)

And

Alexander Theodore Ewachniuk, Executor of
the Estate of Sophia Ewachniuk, Deceased

Appellant/
Respondent on Cross Appeal
(Defendant)

Before: The Honourable Mr. Justice Lowry
The Honourable Mr. Justice Tysoe
The Honourable Mr. Justice Groberman

On appeal from: Supreme Court of British Columbia, June 23, 2008
(*Hix v. Ewachniuk*, 2008 BCSC 811)

Counsel for the Appellant:	T.R. Berger, Q.C. and H.I.E. Schachter
Counsel for the Respondents:	G.E. Sourisseau
Place and Date of Hearing:	Vancouver, British Columbia June 3, 2010
Place and Date of Judgment:	Vancouver, British Columbia June 24, 2010

Written Reasons by:
The Honourable Mr. Justice Lowry

Concurred in by:
The Honourable Mr. Justice Tysoe
The Honourable Mr. Justice Groberman

Reasons for Judgment of the Honourable Mr. Justice Lowry:

[1] Sophia Ewachniuk died in June 2006 at the age of 90 survived by her son, Theodore Ewachniuk, and

her two daughters, Neeva Gayle Hix and Mary Anne Runnalls. Her last will was executed in January 2004 under highly suspicious circumstances. It was drawn by her son, who once practised law. Under its terms, he has effectively become the sole beneficiary of her two million dollar estate. Ms. Hix and Ms. Runnalls learned of the will only after their mother died. They challenged its validity on various grounds. In reasons for judgment indexed as 2008 BCSC 811, Mr. Justice Hinkson found Ms. Ewachniuk had executed her will as a consequence of undue influence exerted by her son such that it was void. Mr. Ewachniuk appeals contending, in the main, the judge erred in failing to consider whether, on all of the evidence, an equally plausible alternative explanation for the disposition of his mother's estate lay in her having genuinely decided to favour him over her daughters. Ms. Hix and Ms. Runnalls cross-appeal on the basis the will was invalid for other reasons rejected by the judge.

The Will

[2] The provisions of the will offer Ms. Hix and Ms. Runnalls what is stated to be an option pertaining to shares they hold in a family company, Regent Holdings Ltd., which was created for the benefit of the extended Ewachniuk family by Mr. Ewachniuk's grandfather, his father, and his uncle in 1954. The company has over the years acquired various commercial properties. Mr. Ewachniuk is credited with having first saved the company at substantial personal cost when it faced severe tax liabilities in the 1960s, and then making it into what has become a multi-million dollar success. Through inheritance and the sale to him of what was the interest of his father and mother, he holds 63% of the shares; his sisters hold 19% each.

[3] The judge quoted the relevant provisions of the will at length but, in short, it provides for Mr. Ewachniuk and each of his sisters to receive one-third of the estate (consisting mainly of their mother's home) on the condition Ms. Hix and Ms. Runnalls both give all of their shares in Regent to their brother within 90 days of receiving notice of what is stated to be "this absolute requirement". Failing their doing so, they receive none of the estate, save, in any event, for an amount of $5,000 each, and all of the estate is to pass to Mr. Ewachniuk. The balance of the provision consists of a long dissertation on why Ms. Ewachniuk's daughters "ought to accept this direction without any question" given her son's role in developing Regent, which facilitated support for his parents for many years. It purports to be a justification for Ms. Ewachniuk favouring her son over her daughters.

[4] There is, as Mr. Ewachniuk testified and as Ms. Ewachniuk understood, no question the value of the shares held by each of Ms. Ewachniuk's daughters is worth "remarkably more" than the value of the entire estate. There could then have been no expectation the "option" would be exercised. The will Mr. Ewachniuk drew for his mother to execute would appear to have been simply a means of depriving her daughters of any share in her substantial estate and passing the whole of it to him.

[5] At trial, Mr. Ewachniuk testified the will executed by his mother in January 2004 was entirely her idea. She had made a will sometime after 1998, which he also drew, in which she had provided that the whole of her estate was to be divided among her three children in equal shares. Mr. Ewachniuk said that in the fall of 2003 some dispute (which he did not explain) arose between him and his sisters that a friend of his mother

had offered to mediate, although the friend testified she knew nothing about having offered to mediate any dispute. He said his mother had advised against the mediation and subsequently decided to change her will. He maintained he tried to dissuade her, but she was insistent. He said he did not engage a solicitor to advise his mother or to prepare a new will because of the cost. He explained his mother wanted the will kept secret because she wanted no trouble within the family while she was alive. With respect to the execution of the will, he testified he read it over several times to his mother and explained the contents. She asked him to arrange to have a man she had met only once 30 years earlier, but who she had recently heard on a radio talk show and who Mr. Ewachniuk knew professionally, witness the will along with one of her old friends. The first of the two testified the execution of the will was essentially unremarkable; the second was unable to testify. The first will, executed around 1998, may have been destroyed. Mr. Ewachniuk admitted in his pleadings he had destroyed it, but at trial said he had not.

[6] Throughout, Mr. Ewachniuk maintained he at no time sought to influence his mother with respect to making the will she executed in January 2004 except to persuade her against it.

The Judgment

[7] After reviewing the authority governing proof of undue influence, the judge said:

> [90] Because no one but Ted Ewachniuk knew of the preparation and terms of the will signed January 11, 2004 prior to the death of Sophia Ewachniuk, the only evidence from which to assess the presence or absence of coercion is his.
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> [91] It must be clear that this does not suggest that the onus lies upon Ted Ewachniuk to disprove coercion, as clearly it does not. However, the reality of the situation that he created is such that I must assess that the allegation of coercion by testing his evidence against "the preponderance of probabilities that rationally emerge out of all the evidence in the case": see *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 359, 4 W.W.R. 171 (B.C.C.A.).

[8] The judge rejected much of what Mr. Ewachniuk said, item by item. It appears clear he was unwilling to accept anything Mr. Ewachniuk said about what caused his mother to decide to make a new will or its preparation and execution. The judge said this about his evidence:

> [92] Ted Ewachniuk was a very poor witness. He was argumentative and non-responsive to questions asked by both his own lawyer and counsel for the plaintiffs. I am satisfied that when he was challenged in cross-examination, he said whatever he felt would assist his case regardless of whether it was true or not.

[9] The judge then found as follows:

> [100] To his credit, Ted Ewachniuk was very caring of his mother by all accounts. He and his wife filled in for her caregivers on weekends. Ted Ewachniuk would sleep at his mother's home on weekends when her caregivers did not.
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> [101] Her groceries and medications were purchased for her by her son or his wife. Any outings that she enjoyed, such as attending church, depended upon being taken by her son. Even her attendances to the Douglas Park seniors program could not reliably depend on the HandyDART system, and thus she was reliant on her son and his wife to attend the program with any regularity.
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> [102] By January 2004, Sophia Ewachniuk was, as she told Dr. Pilar, a lonely woman, and from the

> evidence of the plaintiffs and Ted Ewachniuk, a woman who was beginning to experience some confusion. By this time she was very vulnerable and had become virtually dependant on her son and his wife for all aspects of her existence. She could be easily and improperly influenced by Ted Ewachniuk.
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> [103] I have concluded that Ted Ewachniuk has an aggressive and domineering personality both in general, and in particular, in his desire for the absolute ownership of the shares in Regent Holdings. I have no doubt that by late 2003, and certainly by January of 2004, Ted Ewachniuk knew that his mother was vulnerable and considerably dependant upon him, and that he was well able to profoundly influence her decisions.
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> [104] Sophia Ewachniuk received no advice independent from Ted Ewachniuk about the preparation of her will and the manner in which the will addressed the distribution of her estate.
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> [105] I reject Ted Ewachniuk's protestations that he was not actively seeking ownership of his sisters' shares in Regent Holdings long before the execution of his mother's will. I reject his evidence that others, such as the unnamed banker he referred to in his cross-examination commented that he should have all the shares in the company.

[10] In the judge's view, the resolution of whether the execution of Ms. Ewachniuk's will in January 2004 was a consequence of her son having exerted undue influence required the exercise of "common sense" having regard for the circumstantial evidence which the judge saw as raising a number of questions. After identifying each, he concluded:

> [114] I have concluded that even though Sophia Ewachniuk was aware of the terms of the will she signed on January 11, 2004, that she only signed the will as a result of coercion on the part of her son Ted, and his ability to unduly overbear his mother's will. While some of the questions posed in the preceding eight paragraphs may be capable of answers consistent with another conclusion, the totality of those questions and the evidence adduced at trial persuade me that Sophia Ewachniuk's will of January 11, 2004 was procured by the undue influence of her son.
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> [115] Ted Ewachniuk's evidence did nothing to dispel this conclusion. There was no situation presented to him that he did not confidently explain away, no matter how implausible his explanation. I am satisfied that he coveted his sisters' shares in Regent Holdings, that he worked on his mother over an extended period of time prior to January 2004 to so overbear her, that she executed a will that was contrary to what she would have done of her own free will.
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> [116] In weighing the totality of the evidence, I find that the plaintiffs have discharged their burden of proving that the will executed by Sophia Ewachniuk on January 11, 2004, although read and understood by her, was not executed of her own will, but was procured by the undue influence of her son Ted Ewachniuk. As a result, the will is invalid.

The Appeal

[11] Mr. Ewachniuk contends the judge erred in law and advances three grounds on which he maintains the order for judgment should be set aside and the action dismissed.

[12] It is first said the judge erred in stating "the only evidence" from which to assess the presence or absence of coercion was Mr. Ewachniuk's testimony (para. 90) when he was required to determine the presence or absence of coercion by considering the whole of the evidence, including all of the circumstances. But, in my view, it is perfectly clear the judge did not confine his consideration of the evidence to what Mr. Ewachniuk said. Indeed, it is clear from the next paragraph (para. 91) he was

proceeding to assess the allegation of coercion by testing Mr. Ewachniuk's evidence against the preponderance of probabilities that rationally arise out of "all the evidence in the case". It appears to me the judge saw Mr. Ewachniuk's testimony as the only direct evidence of the preparation and the terms of his mother's January 2004 will, which, given the secrecy, it was. His evidence in this regard was rejected, and the judge then actually addressed much of the circumstantial evidence in the questions he posed that led to the conclusion he reached. I see no merit in this ground of appeal.

[13] It is said the judge erred in stating Mr. Ewachniuk "worked on his mother over an extended period of time prior to January 2004" (paras. 115-116) because there is no evidence that he did so, and the judge's finding that Mr. Ewachniuk was caring of his mother (para. 100) is to the contrary. But the evidence that, over a period of time (commencing in the fall of 2003 when Mr. Ewachniuk said his mother first expressed an interest in changing her will), Mr. Ewachniuk worked on or persuaded his mother to execute the new will in January 2004 lies in the circumstantial evidence that led the judge to the conclusion he reached. It was open to be inferred Ms. Ewachniuk executed the will her son drew in secrecy that benefitted him to the effective exclusion of her daughters, because he had exerted undue influence, not by threats or promises, but by working on her over a period of time. She was in that way coerced into doing what she would not otherwise have done. That is a logical explanation for why the will was executed. I see no basis for contending the finding the judge made in this regard was not open to him on the evidence. Further, I see no reason why the judge's finding that Mr. Ewachniuk was caring of his mother is at all inconsistent with his having influenced her unduly in respect of changing her will. Indeed, his caring for her, and her dependence on him, may well have been what enabled him to influence her as the judge found he did. I would not accede to this ground of appeal.

[14] The burden of Mr. Ewachniuk's appeal as argued is his contention the judge erred in failing to consider whether there was a reasonable contrary conclusion as to why Ms. Ewachniuk executed her January 2004 will. Mr. Ewachniuk says the judge failed to consider whether, in the absence of any influence, or undue influence on his part, she could have simply decided to favour him over his sisters. This contrary conclusion is said to have been supportable on the evidence.

Discussion

[15] Mr. Ewachniuk relies on the long-standing proposition stated in *Boyse v. Rossborough* (1857), 6 H.L. Cas. 2 at 51, [1843-60] All E.R. Rep. 610 at 615:

> But in order to set aside the will of a person of sound mind, it is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue influence. It must be shown that they are inconsistent with a contrary hypothesis.

[16] It is, however, accepted that what must be considered is whether there is, on the evidence, any equally plausible explanation to the execution of a will being the product of undue influence and that the standard of proof is one of the balance of probabilities as stated in *Scott v. Cousins* (2001), 37 E.T.R. (2d) 113 (Ont. S.C.J.) to which we are referred.

[17] Mr. Ewachniuk says the judge did not even consider whether his mother may have decided to favour him over his sisters as he swore she had. But it appears to me that is exactly what the judge considered when he asked the first of the several questions he posed in relation to the evidence:

> [106] The resolution of this issue requires the exercise of common sense. Why would a mother who was said to be a fair and generous woman by all who gave evidence and who felt that she herself had not been treated fairly in the distribution of assets to which she had a claim, suddenly, and in her declining years, prefer to favour her son in her will over [his] sisters?

[18] Indeed, Ms. Ewachniuk having decided to substantially favour her son over her two daughters was the essence of Mr. Ewachniuk's answer to the case. It began with the long dissertation in the will itself, his own testimony (which was rejected), and various aspects of the circumstantial evidence which he maintained precluded his sisters proving a case of undue influence against him. It cannot be said the judge did not consider whether there was an equally plausible explanation for Ms. Ewachniuk executing her new will in January 2004 without having been subjected to the undue influence of her son. I am unable to see any failing on the judge's part in this regard.

[19] Mr. Ewachniuk points to various aspects of the evidence that the judge did not specifically address, which he maintains establish the reasons for his mother having decided to favour him over her daughters. He emphasizes in particular the fact that while it had been Ms. Ewachniuk's known wish that her children share equally in her estate consistent with her old will, a change of heart can be said to be evident in her forgiving a debt of $750,000 in 2000 owed by Mr. Ewachniuk to his mother (after his father's death) for the sale of his parents' shares in Regent to him some years before. Had it not been forgiven, the debt would have become owed to Ms. Ewachniuk's estate. Mr. Ewachniuk also emphasizes the judge's findings concerning his having made Regent the multi-million dollar enterprise it has become, the absence of any involvement in the company by his sisters, and his mother's displeasure over one of his sisters having commenced an action in 1986 to have Regent liquidated. He suggests the judge's finding that he lived close to his mother in Vancouver and cared for her as he did, while his sisters lived in Toronto, supports his contention his mother had decided to favour him over them.

[20] Even taking these aspects of the evidence at their best, there is, in my view, no sound basis on which it could be said there was an equally plausible explanation that would have defeated the case against Mr. Ewachniuk in any event. His account at trial of one of the things that prompted his mother to want to change her will in the fall of 2003 – the suggestion of mediation of an unidentified dispute – was discounted by the judge. So, apart from Mr. Ewachniuk's rejected assertions, there was no evidence his mother wanted to change her will at that time. Nothing is shown to have happened in the fall of 2003 that would have altered her wishes with respect to her estate. She had a will that provided for her children sharing equally in her estate and they knew that had long been her wish. I consider that, if anything, her having forgiven the $750,000 debt her son owed was reason to expect she would not want to further erode the equality of her children's sharing in her estate.

[21] The new will was drawn by Mr. Ewachniuk. By it, he stood to receive the whole of his mother's estate while his sisters received virtually none, unless they both agreed to give to him shares worth remarkably

more in value than what they would receive from the estate. Ms. Ewachniuk had become vulnerable and depen
certainly have served his interests to do so, and, as the judge found, he has an aggressive and domineering personality. He did not have his mother consult a solicitor as, in the circumstances, he would have known was essential. As between Mr. Ewachniuk and his sisters, only Mr. Ewachniuk knew anything about their mother changing her will. She had never asked her daughters to give up their shares in Regent, but she changed her will to require them to do just that if they were to have any share of her estate, even though there is no reason they could have been expected to exercise the "option" the will affords them in that regard.

[22] Once Mr. Ewachniuk's evidence is put to one side, it appears to me the judge was entitled to conclude the most probable explanation for Ms. Ewachniuk changing her will to effectively leave to her son the whole of her estate is that he must have unduly influenced her to do so. It is said there is no evidence Mr. Ewachniuk ever attempted to take unfair advantage of his mother before and no evidence that she complained to her daughters or anyone else that she was being made to change her will when she did not want to do so. But then the arrangement between Ms. Ewachniuk and her son was that the change was to be kept a secret. In my view, there is little basis in the evidence on which it could be concluded that an equally plausible explanation for Ms. Ewachniuk executing the new will in January 2004 lay in her having decided, apparently without being prompted by anything happening in the later part of 2003 apart from discussions with her son, to favour him over her daughters so much that she changed her will to benefit him and deprive them to the extent to which the will provides.

[23] I do not consider the judge has been shown to have made any error in the conclusion he reached and I would not accede to this ground of appeal.

Disposition

[24] It follows I would dismiss the appeal. It is not necessary to address the cross-appeal.

"The Honourable Mr. Justice Lowry"

I agree:

"The Honourable Mr. Justice Tysoe"

I agree:

"The Honourable Mr. Justice Groberman"