# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bennison v. Bennison,*
2024 BCSC 1142

Date: 20240614
Docket: S137573
Registry: Kelowna



Between:

**Erich Berkeley Adam Bennison, in his personal capacity and in his capacity as the Personal Representative for Brian Robert Bennison, Deceased and Renee Colette Bennison, Deceased**

Plaintiff

And

**Kyle Stacey Bennison, in his personal capacity and in his capacity as the Personal Representative of the Estate of Robert Berkley Bennison, Deceased, Kelli Lyn Jamieson, Deanna Marie Jamieson, and James Brent Jamieson**

Defendants

Before: The Honourable Justice Hardwick

## Oral Reasons for Judgment

In Chambers

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|---|---|
| Appearing on his own behalf: | E.B.A. Bennison |
| Counsel for the Defendant K.S. Bennison: | S. Aidun |
| Counsel for Defendants K.L. Jamieson, D.M. Jamieson, and J.B. Jamieson, appearing by videoconference: | T. McNeil-Hay |
| Place and Date of Trial/Hearing: | Kelowna, B.C.<br>March 26, 2024 |
| Place and Date of Judgment: | Kelowna, B.C.<br>June 14, 2024 |

[1] **THE COURT:** These are my oral reasons for judgment in respect of two cross-applications brought before me in the above-noted action. The relief sought arises from the passing of one Robert Berkley Bennison, whom I shall hereinafter refer to as “the Deceased”.

[2] This is an unfortunate dispute which has quite obviously driven a strong wedge into a large extended family unit that had already experienced some quite significant challenges. The original proceeding was commenced on June 19, 2023. The amended notice of civil claim was filed on October 20, 2023. There were responses to civil claim filed respectively on September 21, 2023 and December 5, 2023. The plaintiff, Erich Berkeley Adam Bennison, who I will refer to as “Erich”, with no disrespect, but for practical purposes, given the shared last name of at least certain parties, filed a notice of application on October 23, 2023, seeking the following relief:

> 1. An order from this Honourable Court for interpretation/clarity as to the validity of the Robert Berkley Bennison will; if it should be upheld or invalidated partially or invalidated entirely, if possible, at this time.
>
>    a. if the will is invalidated entirely how the beneficiaries should be treated and their benefit,
>
>    b. if partially invalidated what the next course of action should be for the estate proceedings and what if any changes, that should [be made]; preliminarily to the beneficiaries and their respective benefit, if possible, at this time.
>
> 2. An order for clarity from this Honourable Court as to whether or not; Brian Renee and/or Erich; have standing to move forward in the Notice of Civil Claim against the Robert estate.
>
>    If any one person can’t be included in such an order due to circumstance at this time; that the order be altered, as the Court deems appropriate.
>
> 3. An order from this Honourable Court to vary/remedy/rectify the Robert Will as such to include Brian (and/or all his surviving children: Erich, Jonathan, Bradley), Renee, and Ronald; as beneficiaries under the Robert estate of which the benefit could be ascertained after further proceedings or make judgement on what benefit/proportionality should be; if able at this time.
>
>    If any one person can’t be included in such an order due to circumstance at this time; that the order be altered, as the Court deems appropriate.

4. An Order from this Honourable Court as to how Brian's share of the estate is to be distributed to all his children; Erich, Jonathan, and Bradley.
5. Costs of this action; and

the basket relief clause of:

6. Such further and other relief as this Honourable Court may deem fit.

[3] The defendant, Kyle Stacey Bennison, whom I will refer to as "Kyle", for the same reason as I articulated above, with no disrespect, filed his notice of application on November 2, 2023. It seeks the following relief:

1. to dismiss the amended Notice of Civil Claim filed on October 20, 2023;
2. for all his reasonable costs of and incidental to his application be paid out of the Deceased's estate on a special costs basis, and for Erich to compensate the estate for the special costs payable from the estate;
3. alternatively, if special costs are not ordered to be paid from the estate to compensate the applicant, for Erich to pay ordinary costs directly to Kyle; and
4. for such other relief as to this court may seem appropriate.

## Factual Basis

[4] The facts upon which this application is based are: Robert Berkley Bennison, whom I have already defined as the Deceased, passed away on August 31, 2022, leaving two surviving children, Kyle and Ronald Patrick Bennison (hereinafter "Ronald").

[5] I glean from the evidence that the Deceased passed away from a form of brain cancer or complications arising therefrom. There is no proper formal expert evidence which suggests that he lacked capacity at the material time. Kyle's evidence is directly to the contrary. Specifically, Kyle said that he actually visited his father in July of 2019 and did not notice any cognitive impairment. I accept this to be true, as that is not contradicted by anything but conjecture from Erich.

[6] In reaching that conclusion, I do, however, accept Erich's evidence that there are a number of neurodiverse individuals in the extended family unit. However, while

I accept this evidence as credible, it is not material to the relatively discrete issues before me. I also take judicial notice that there is a very wide spectrum of neurodiversity, and there is a paucity of evidence before me as to where any of the identified neurodiverse individuals fall on that spectrum.

[7] Returning to the core facts, the Deceased did not leave a surviving spouse. He had been married three times, and was predeceased by his third wife, Margaret.

[8] The applicant Erich is a grandchild of the Deceased.

[9] Erich's father, the Deceased's son, Brian Bennison (hereinafter "Brian"), again using his first name for simplicity and without disrespect, predeceased the Deceased. Brian passed away in unfortunate circumstances, after making some what would appear to be poor life decisions. I will not repeat them for the purposes of these reasons, as it is not contested as to the date of Brian's death. The circumstances of Brian's death do, however, appear to have had a significant role in the lack of a positive relationship between Erich and the Deceased, even though Erich had no contributing role in Brian's poor life decisions that resulted in his passing.

[10] The Deceased also had a fourth biological child, Renee Colette Bennison (hereinafter "Renee"), who also predeceased him. Renee died on January 1, 2012.

[11] The Deceased left two other surviving grandchildren, Jonathan Robert Bennison, and Bradley Scott Harbord.

[12] The Deceased also left three surviving stepchildren, namely the defendants Kelli Lyn Jamieson (hereinafter "Kelli"), Deanna Marie Jamieson (hereinafter "Deanna") and James Brent Jamieson (hereinafter "James").

[13] Probate was granted to the executor, Kyle, in the Kelowna registry, on December 21, 2022, with respect to the Deceased's last will and testament, dated July 12, 2019 (hereinafter "the Will").

[14] I note the timing, again, for the record, as Kyle deposed that he met with the Deceased that month, whereas Erich did not have the same firsthand knowledge or benefit of the evidence, from a third-party professional or otherwise, as to the Deceased's circumstances, as a result of their unfortunately not-productive relationship.

[15] Pursuant to s. 7 of the Will, 50 percent of the residue of the Deceased's estate is allocated to Kyle. The remaining 50 percent is to be divided in three ways. One share is allocated to Kelli, who as noted is the Deceased's stepdaughter. One share is allocated to Deanna, who as noted is the Deceased's stepdaughter. One share is allocated to the Deceased's stepson, James. Ronald, the Deceased's second biological child, was disinherited under the Will. The Deceased stated his reasons for same at s. 22 of the Will, with respect to why he was disinheriting Ronald.

[16] Ronald has filed a notice of civil claim in the British Columbia Supreme Court, in the Vancouver Registry, seeking a variation of the Will, pursuant to the *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13 [*WESA*]. Ronald is not a named party in Erich's amended notice of civil claim. As this other litigation is ongoing, as I understand, and Ronald did not participate in the applications before me, my above comment regarding the "disinheritance" is provided for only the purposes of the overall context, but not to its merits, as I am clearly not in a position to address same. Further, Ronald has, as a biological child of the Deceased, the *prima facie* right to advance his *WESA* claims.

## Legal Basis

[17] Erich is self-represented. As such, the pleadings are not necessarily ideal, but it is very apparent to me that what Erich is seeking to pursue in the amended notice of civil claim is what can be colloquially referred to as a "wills variation action" under *WESA*.

[18] Returning to the ground level, the pleadings are the foundation of any proceeding. It is trite law that the pleadings must define the issues and then set out

the material fact which is alleged to support the cause of action or, if applicable, causes of action. Pleadings are not to contain evidence, but there must be material facts pled that can survive the scrutiny of the court. Bald assertions or conclusions of law are not material facts.

[19] It is appropriately identified that there are various problems with Erich's claim. Firstly, and most importantly, is the issue of whether Erich has standing to vary the Will personally or as the personal representative of Brian and Renee. In bringing what I have described as a wills variation claim, s. 60 of *WESA* provides standing only to the will-maker's spouse or children, either biological or legally adopted, when deciding whether adequate provision for their proper maintenance and support was made by the will-maker.

[20] Erich, as the grandchild of the Deceased, it is asserted, does not have legal standing to vary the Will of the Deceased (see *Tomlyn v. Kennedy*, 2008 BCSC 331, specifically para. 35). *Tomlyn*, a decision of the late Justice Brooke of this Court, was decided under the former legislation, namely the *Wills Variation Act*, but the core principle is that the grandchildren of the testatrix or testator have no status to bring a wills variation claim, nor do they have any moral claim to the estate.

[21] Moreover, the right to make a claim for a wills variation action under s. 60 of *WESA* vests at the date of death. Accordingly, because Brian and Renee predeceased the Deceased, such right was never vested in Brian and Renee. Therefore, unlike Ronald, Brian and Renee do not have legal standing to vary the Will of the Deceased (see *Currie Estate v. Bowen*, 1989 CarswellBC 27, specifically at para. 29).

[22] Secondly, a personal representative derives his or her authority either as a named executor in a will or by appointment by the court (see *Novak v. Seemann*, 2023 BCSC 1784, specifically at paras. 43, 46, and 47).

[23] Erich has stated that he is the personal representative of Brian and Renee. However, he has not pled any material fact where he derives his authority from this

with respect to either Brian or Renee's estates. This runs afoul of s. 151 of *WESA* (see *Mortimer v. Bender*, 2020 BCSC 483).

[24] Erich also, as noted above, has not named the Deceased's child Ronald, who is a proper party to a wills variation claim, and had filed his own claim. This is required, pursuant to R. 21-6 of the *Supreme Court Civil Rules* [*Rules*].

[25] It is also noted by Kyle that the amendments to the pleading by Erich were not done in strict accordance with the *Rules*. In my view, having regard to the stage of the proceeding, this is something that could be retroactively cured, without any genuine prejudice. There are much more significant legal issues in play that I have addressed above, and I am not going to render any further analysis on this point.

[26] Pursuant to R. 9-5(1)(a) of the *Rules*, at any stage of the proceeding the court may order to be struck out or amended the whole or any part of a pleading, on the ground that it discloses no reasonable claim or defence, as the claim may be and the court may pronounce judgment or order the proceeding be stayed or dismissed.

[27] Pursuant to R. 9-5(2), no evidence is admissible on an application under subrule (1)(a).

[28] I summarized the law in this area in *Tosen v. Gumtree Catering*, 2023 BCSC 121. I am going to repeat my comments from that decision, as they are equally apt, in my view:

> **Striking of Pleadings**
>
> [15] Rule 9-5(1) of the *Rules* provides as follows:
>
> **Scandalous, frivolous or vexatious matters**
>
> (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence, as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
>
> (d) it is otherwise an abuse of the process of the court,

> and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[16] There is a high standard for the applicant to meet in arguing that the pleadings do not disclose a reasonable cause of action under R. 9-5(1)(a). A pleading should only be struck on the ground that it discloses no reasonable cause of action when it is "certain to fail" and the case is "perfectly clear": *FORCOMP Forestry Consulting Ltd. v. British Columbia*, 2021 BCCA 465 at para. 21, citing *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980, 1990 CanLII 90 and *McNaughton v. Baker* (1988), 25 B.C.L.R. (2d) 17 (C.A.) at 25, 1988 CanLII 3036.

[17] In considering an application to strike a statement of claim for disclosing no reasonable cause of action, the court must read the statement of claim generously and to accommodate inadequacies in form that are merely the result of drafting deficiencies: *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 at para. 143.

[18] If the pleadings are deficient, the court may choose to either dismiss the matter entirely or give leave to amend the pleadings to rectify the deficiency. This decision involves an exercise of discretion. In *Kindylides v. Does*, 2020 BCCA 330, the Court of Appeal described this discretion:

> [22] It is nonetheless clear that the decision to refuse leave to amend pleadings following a successful application to strike involves an exercise of discretion. As was explained in *Watchel*:
>
> > [29] A judge's decision whether to permit an amendment rather than striking the claim is an exercise of discretion: *Jones v. Bank of Nova Scotia*, 2018 BCCA 381 at para. 35. Similarly, a judge's decision whether to reopen a hearing where a final order has been pronounced but not entered is also an exercise of discretion: *Grewal v. Grewal*, 2016 BCCA 237 at para. 70. A discretionary decision of a lower court is only reversible if the court misdirected itself or if the decision is so clearly wrong that it amounts to an injustice: *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 at para. 27.
>
> [23] Justice Willcock elaborated on this point in *Jones v. Bank of Nova Scotia*, 2018 BCCA 381 [*Jones*]:
>
> > [35] Determining whether to permit an amendment is … preferable to dismissal of inadequate pleadings requires the exercise of a discretion by a trial judge. The exercise of that discretion may require consideration, including the degree to which the pleadings are deficient, of the extent to which the deficiencies may be addressed by an obvious or straightforward amendment, the apparent merit of the claim that may be made out with amendment and the prejudice that may be incurred by dismissing the claim. The exercise of that discretion requires consideration of the factors set out in Rule 1-3:

> (1) The object of these Supreme Court Civil Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits.
>
> (2) Securing the just, speedy and inexpensive determination of a proceeding on its merits includes, so far as is practicable, conducting the proceeding in ways that are proportionate to
>
> (a) the amount involved in the proceeding,
>
> (b) the importance of the issues in dispute, and
>
> (c) the complexity of the proceeding.

**Summary Dismissal**

[19] Rule 9-6 of the *Rules* provides, in part, as follows:

> **Application by answering party**
>
> (4) In an action, an answering party may, after serving a responding pleading on a claiming party, apply under this rule for judgment dismissing all or part of a claim in the claiming party's originating pleading.
>
> **Power of court**
>
> (5) On hearing an application under subrule (2) or (4), the court,
>
> (a) if satisfied that there is no genuine issue for trial with respect to a claim or defence, must pronounce judgment or dismiss the claim accordingly,
>
> (b) if satisfied that the only genuine issue is the amount to which the claiming party is entitled, may order a trial of that issue or pronounce judgment with a reference or an accounting to determine the amount,
>
> (c) if satisfied that the only genuine issue is a question of law, may determine the question and pronounce judgment accordingly, and
>
> (d) may make any other order it considers will further the object of these Supreme Court Civil Rules.

[21] An application under R. 9-6 is a challenge based on a limited review of affidavit evidence. The bar on an application for summary judgment is high. If the defendant can convince the court that the plaintiff is bound to lose or the claim has no chance of success, then the defendant will succeed on the R. 9-6 application: *Canada (Attorney General) v. Lameman*, 2008 SCC 14 at paras. 10–11.

[22] While the court may consider evidence on a summary dismissal application, it is not a summary trial. The presiding judge may only weigh evidence to the extent necessary to determine whether it is incontrovertible: *Beach Estate v. Beach*, 2019 BCCA 277 at para. 49.

[29] I further rely upon the somewhat more articulate comments on same from Justice Burnyeat, of this Court, in *Gateway Building Management Limited v. Randhawa*, 2013 BCSC 350, at paras. 16 to 18.

[30] The test to be applied to determine whether an action should be struck out as disclosing no reasonable cause of action requires a conclusion that, assuming that the facts as stated or even amended are true, those facts disclose no cause of action, the pleadings disclose no arguable issue, and it is plain and obvious that the claim cannot proceed. If there is any chance that an action may succeed, then the petition and action should be allowed to proceed. I refer to the seminal authority of *Hunt v. Carey Canada*, as already referred to above.

[31] In *Dempsey v. Envision Credit Union*, 2006 BCSC 750, Justice Garson, as she was then, provided the following summary of the R. 9-6 jurisprudence:

> [17] In summary, a pleading will be struck out if:
>
> (a) the pleadings are unintelligible, confusing and difficult to understand (*Citizens for Foreign aid Reform, supra*);
>
> (b) the pleadings do not establish a cause of action and do not advance a claim known in law (*Citizens for Foreign aid Reform, supra*);
>
> (c) the pleadings are without substance in that they are groundless, fanciful and trifle with the Court's time (*Borsato v. Basra*)
>
> (d) the pleadings are not bona fides, are oppressive and are designed to cause the Defendants anxiety, trouble and expense (*Borsato v. Basra, supra*);
>
> (e) the action is brought for an improper purpose, particularly the harassment and oppression of the Defendants (*Ebrahim v. Ebrahim*, 2002 BCSC 466).

[32] Pursuant to R. 9-5, pleadings that are so prolix and confusing that it is difficult, if not impossible, to understand the case to be met should also be struck out (see *The Owners, Strata Plan LMS3259 v. Sze Hang Holdings Inc.*, 2009 BCSC 473, at para. 36.

[33] I further accept that R. 9-5 is an attack on a pleading, and they stand on the basis that they cannot proceed, as a matter of law. The plaintiff in this case cites

*Moses v. Lower Nicola Indian Band*, 2014 BCSC 643, at paras. 18 and 58. This remains good law.

[34] While I understand the emotion underlying Erich's claim, the reality is that for the reasons I have articulated above it cannot proceed and must be struck in accordance with R. 9-5(1) as failing to disclose a reasonable cause of action. Erich simply does not have standing in his personal capacity as a grandson of the Deceased, and does not have capacity as purported by the undocumented representative of his late father and late aunt. It is clear from the evidence, without further review, that they predeceased him.

[35] This is not a defect in the pleading that can be cured by an amendment.

[36] Accordingly, I dismiss the relief sought by Erich and grant the relief sought at paragraph 1 of Kyle's application, namely the dismissal of the amended notice of civil claim filed by Erich on October 20, 2023. The language, on its face, might sound redundant, but having regard to the fact that there is cross-relief sought, I think that is necessary in the order.

## Costs

[37] As it relates to costs, I do not see there being a basis for special costs, in these particular circumstances. Costs under the *Rules* are awardable at the discretion of the presiding Justice, whether at trial or in chambers. I am exercising that discretion accordingly. The key consideration in any costs order is the determination of substantial success. Kyle was, although not entitled to special costs, substantially successful. Kyle is thus entitled to his costs, in accordance with the tariff set forth under the *Rules* at Scale B, on the basis that this was a matter of ordinary difficulty. Those are my orders.

"Hardwick J."