*Re Albert Lee Estate*, 2006 NWTSC 13

Date: 2006 03 13
Docket: S-001-ES 2001000014

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

IN THE MATTER of the Estate of ALBERT OWEN LEE, late of the City of Yellowknife, in the Northwest Territories, deceased

And, IN THE MATTER of the *Dependant's Relief Act,* and the *Public Trustee Act*

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Application under the *Dependants Relief Act* for an Order that provision be made for maintenance and support of an adult child of the testator.

Heard at Yellowknife, NT: February 1, 2006

Reasons filed: March 13, 2006

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REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.E. RICHARD

Counsel for the Applicant, Michael Lee: William Rouse
Counsel for the Respondent Residual Beneficiary: Roderick Onoferychuck
Larry Pontus, Public Trustee

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## REASONS FOR JUDGMENT

[1] This is an application under the *Dependants Relief Act* by a 67 year claimant for an Order that provision be made for his maintenance and support out of his father's estate.

[2] It is necessary to provide the background within which this application is made. The deceased Albert Lee was born on January 27, 1908. Apparently he was married twice, and his second wife passed away in the early 1970's. He was living in British Columbia at that time. His son Michael Lee (the applicant) was working temporarily in Yellowknife and in 1972 Albert Lee, then 64 years of age, came to Yellowknife to visit his son Michael Lee. Less than a year later, in 1973, the son Michael Lee was transferred by his employer back to Edmonton, Alberta. The father Albert Lee decided to stay in Yellowknife, as he had found a place to live, had secured part-time employment, and had made new friends here. In particular he became friends with Melba Mogenson. Affidavit evidence filed on the hearing of this application indicates that Albert Lee and Melba Mogenson, although not living together in the same residence, maintained a close and caring relationship, and shared each other's company and companionship, in the 20 years or so prior to Albert Lee's death. In 1980 Albert Lee would have been 72 years of age and Melba Mogenson would have been 65.

[3] Albert Lee died on October 12, 2000 at the age of 92. He had two surviving children - his son Michael Lee (the applicant), presently 67 years of age, and his daughter Marion Spencer, presently 66.

[4] On October 30, 1980, Albert Lee executed his Last Will and Testament. In that Will he named "my friend Melba Mogenson" as sole executrix of his Will, and, in the alternative, his son Michael Lee. He made the following bequests:

(1) $3,000.00 to "my son Michael Lee".
(2) $3,000.00 to "my daughter Marion Spencer".
(3) two pieces of jewellery to "my friend Melba Mogenson".
(4) the residue of the estate to "my friend Melba Mogenson".

[5] In 1995 Albert Lee was living at the Aven Seniors Centre in Yellowknife. He was suffering from Alzheimer's disease, was unable to care for himself, and was incapable of managing his financial affairs. The Public Trustee made application to be appointed as committee of Albert Lee's estate (Court file # CV 05627) and on February 8, 1995 the Court issued an order appointing the Public Trustee to be the committee of the estate of Albert Lee. On that application the Public Trustee indicated that Albert Lee had a son and daughter who did not reside in Yellowknife, and that Albert Lee's daughter had requested that the Public Trustee make the application. The "competency assessment report" completed by the staff at Aven Seniors Centre and filed in support of the Public Trustee's application indicated, *inter alia*, that Albert Lee had contact, while at Avens, from his daughter in British Columbia and his "close friend" in Yellowknife (presumably Melba Mogenson). On the application the Public Trustee also disclosed that he was in possession of Albert Lee's Will in which he named his friend Melba Mogenson as executrix and residual beneficiary.

[6] In 1998 there was a similar, and succeeding, Court application and Court Order appointing the Public Guardian to be the guardian of Albert Lee (Court file # CV 07600) under a new statute, the *Guardianship and Trustee Act*. (In 1997 the *Guardianship and Trustee Act* was enacted, replacing, *inter alia*, the provisions of the *Public Trustee Act* under which the Public Trustee had received his appointment as committee of Albert Lee's estate in 1995). Notice of this 1998 application by the Public Guardian was given to Albert Lee's son and daughter, both living in British Columbia. Both his son Michael Lee and his daughter Marion Spencer provided written consent to the appointment of the Public Guardian as guardian of Albert Lee. In the assessment report completed by the caregivers at Aven Manor and filed in support of the 1998 application, there are several references to "has a lady friend who visits regularly" (again, presumably Melba Mogenson).

[7] As stated, Albert Lee died October 12, 2000 in Yellowknife at 92 years of age. Probate of Albert Lee's Will was sought by the Public Trustee, as each of the named executrix Melba Mogenson and the named alternate executor Michael Lee renounced all

right and title to probate of the Will. Letters of Administration with Will annexed were granted to the Public Trustee by Court Order on May 1, 2001.

[8] On October 25, 2001 Michael Lee filed the within application under the *Dependants Relief Act*. Michael Lee was cross-examined on his affidavit material by counsel on behalf of the residual beneficiary Melba Mogenson in 2002. It was only in February 2006 that this application was brought before the Court for adjudication.

[9] The application is made pursuant to s.2(1) of the Act which states:

> 2. (1) Where a person
>
> > (a) dies testate without making in his or her will adequate provision for the proper maintenance and support of his or her dependants or any of them, or
> >
> > (b) dies intestate as to all or part of his or her estate and the share under the Intestate Succession Act of his or her dependants or any of them in the estate is inadequate for their proper maintenance and support,
>
> a judge, on application by or on behalf of the dependants or any of them, may, notwithstanding the provisions of the will or the Intestate Succession Act, order that the provision that the judge considers adequate be made out of the estate of the deceased for the proper maintenance and support of the dependants or any of them.

[10] In the definition section of the Act, "dependant" is defined as follows:

> "dependant" means
>
> (a) the surviving spouse of the deceased,
>
> (b) a child of the deceased who is under the age of 19 years at the time of the death of the deceased,
>
> (c) a child of the deceased who has attained the age of 19 years at the time of the death of the deceased and unable by reason of mental or physical disability to earn a livelihood,

(d) a person who cohabited with the deceased for one year immediately before the time of the death of the deceased and was dependent on the deceased for maintenance and support,

(e) a person who at the time of the death of the deceased was cohabiting with the deceased and between whom one or more children were born, or

(f) a person who at the time of the death of the deceased was acting as a foster parent of the children of the deceased in the same household and who was dependent on the deceased for maintenance and support;

[11] The affidavit material filed by the applicant Michael Lee of Terrace, British Columbia indicates that he is an insurance adjuster by occupation, but that he has been unable to work since 1993 due to poor health. At the time of filing the within application in 2001, the applicant was in receipt of a permanent disability pension through his employer's insurer. This disability pension continued until his 65th birthday in April 2003. As I understand his affidavit evidence, since his 65th birthday and currently, his monthly income is Canada Pension Plan benefits of approximately $800.00, Old Age Security benefits of approximately $500.00 and sporadic, minimal employment (since discontinued) income as a Canadian Ranger. Copies of his 2003 and 2004 tax returns filed on this application show his total annual income as $15,217.00 and $16,008.00 respectively. He owns his own home, free and clear, in Terrace, British Columbia, a home which has an insured value of $92,000.00. He owns a vehicle which has a value of $7,000.00. He owns no other assets.

[12] The applicant filed a number of documents including medical reports, detailing his health problems since 1993. He suffers from hereditary coronary heart disease and Diabetes Mellitus Type II. He has also been diagnosed with clinical depression.

[13] The most recent of his medical reports, dated in 1998 and 2001, indicate that his then existing health problems place severe limitations on his ability to maintain employment as an insurance adjuster. The doctors' statements include the following:

> "Physical restrictions would include not even moderate manual labour and he certainly is capable of no more than sedentary activity".
>
> ". . . would prevent his working at a job involving high emotion".

> ". . . it is doubtful that he would function well in his previous job as an insurance claims adjuster in a high stress, confrontational environment".
>
> "He is unemployable with respect to his past occupations . . .".

[14] For purposes of this application, I am satisfied that in the year 2000, at the time of his father's death, Michael Lee was "unable by reason of mental or physical disability" to maintain full-time or regular employment. However, I note that, because he had been gainfully employed throughout his adult life and earning a livelihood, he was in receipt of earned disability benefits which enabled him to sustain himself. Also, because he had been gainfully employed throughout his adult life, he was able to acquire assets such as a home and a vehicle, thus building up his own nest egg. He has lived, in recent years, on a disability pension, and now on a general public pension, without looking to his retired father for support.

[15] There is no "age cap" for applicants seeking relief under the *Dependants Relief Act*. (In the corresponding statute in some jurisdictions e.g. Manitoba and Ontario, the age of the child applicant is a statutory factor which must be considered by the Court). As a child of any age may make application under the Act, it becomes difficult to apply the terminology of the statute — "unable to earn a livelihood" — to persons like the present applicant who are at an age when our society does not expect them to "earn a livelihood" in the usual sense of that term. A person who has been gainfully employed throughout his/her adult life and who has reasonably or prudently provided for his/her retirement years by accumulating assets and/or paying into a pension plan has, one could say, already earned his/her livelihood for those later years.

[16] On the hearing of this application the applicant's counsel conceded that during his lifetime Albert Lee had no legal obligation to support his adult son Michael Lee.

[17] Although the *Dependants Relief Act*, by its title and its provisions generally, is clearly intended to provide for the maintenance and support of persons whom the testator was bound to maintain and support, there is, oddly, no specific requirement or prerequisite that the applicant had been in fact dependant upon the testator.

[18] As stated, Albert Lee made his Will in 1980. At that time he was 72 years of age, retired and living in a one bedroom apartment in Yellowknife. He was living on his pension income. He had two adult children (including the applicant) living in British Columbia, both of whom were independently supporting themselves. And he had a close

friend, Melba Mogenson, who was then 65 years of age. There is no direct evidence of the size of Albert Lee's personal estate in 1980 when he made his Will.

[19] However, the Public Trustee did provide evidence, at the hearing of this application, of Albert Lee's personal financial worth in 1995. At that time Albert Lee was living in Aven Seniors Centre. He had approximately $30,000.00 in his bank account. He was receiving approximately $3,000.00 monthly in pensions and other monies. His monthly expenses for care and shelter at Aven Seniors Centre were less than $1,000.00. This was the state of Albert Lee's finances when the Public Trustee took responsibility for those finances in 1995.

[20] Presumably, Albert Lee's personal worth in 1980 at the time of making his Will was equally modest, or perhaps even lower. That is the context in which Albert Lee made his Will in which he bequeathed $3,000.00 to each of his independent adult children, and the balance if any, to his close friend Melba Mogenson. In that context the provisions Albert Lee made in his Will are reasonable. It cannot be said that it is an unjust Will.

[21] The Public Trustee and the Public Guardian continued to manage Albert Lee's personal finances from 1995 until Albert Lee's death in 2000. Because the expenditures for Albert Lee's care were less than $1,000.00 monthly, funds accumulated in his bank account such that his estate has a net value of approximately $143,000.00.

[22] The power granted to the Court in s.2(1) of the Act is discretionary. It allows the Court in a proper case to satisfy a claim upon the deceased's estate, a claim which the deceased himself either ignored or failed to recognize. *Re Kinloch*, [1972] 2W.W.R. 445 (Alta Q.B.), at paras 9-14.

[23] In the present case I have some difficulty in finding that the applicant is a "dependant" within the statutory definition. He worked throughout the normal working years of his adult life and accumulated a modest nest egg (e.g. a pension and a home), and hence has earned a means of support or subsistence for himself. In my respectful view it would be incorrect to term him a "dependant" in the ordinary meaning of the word.

[24] I remind myself that the statute refers to the word "dependant" in its title, and in its operative section, being s.2. By contrast, see the statute at issue in the Supreme Court of Canada decision in *Tataryn Estate* [1994] 2 S.C.R. 807. That British Columbia statute is entitled *Wills Variation Act* and contains no reference to dependants. Its operative

section, s.2, requires the Court to determine whether the testator has made adequate provision not for dependants but rather for the testator's spouse and children. I find that the words used by the NWT Legislature in enacting the *Dependants Relief Act* are significant. I do not view the NWT statute as merely a vehicle for redistribution of the capital of the testator's estate. The statute is intended to provide for the maintenance and support of persons whom the testator was bound to maintain.

[25] The applicant is not a dependant child but rather an independent adult child. With the greatest of respect, I find that the applicant does not come within the purview or intent of the Act.

[26] If I am wrong and this applicant is a dependant by statutory definition, I must consider whether the testator Albert Lee made adequate provision for the proper support and maintenance of Michael Lee in his 1980 Will and further whether the Court ought to exercise its discretion by ordering that adequate provision be made for Michael Lee's proper maintenance and support out of his father's estate.

[27] As stated earlier in these reasons, it cannot be said that there was anything unreasonable or unjust about the Will *vis-a-vis* the son Michael Lee, at the time the Will was made in 1980.

[28] I acknowledge, however, that s.2 of the Act requires that the Court make these determinations as at the date of the testator's death, i.e. 2000. *Re Protopappas Estate* (1987) 78 A.R. 60 (Alta Q.B.) at paras 56-57; *Malychuk* v. *Malychuk* (1978) 11 A.R. 372 (Alta Q.B.) at paras 37-41.

[29] There is no evidence of any close father-son relationship between the testator and the applicant in the latter 20 years of the testator's life. There was virtually no interaction between the two during that time period. There is no evidence that the son ever has been, during his adult life, dependant on his father. There is no evidence that the son contributed anything to his father's estate. It was the testator himself who build up this modest nest egg, estimated at $30,000.00 in 1995. It appears that the son did not step forward, or make any intervention, in 1995 or 1998 when his father became incapacitated and the state (i.e., the Public Trustee and the Public Guardian) became his father's guardian.

[30] There is evidence of a close and loving relationship between the testator and "my friend Melba Mogenson" in the 15 - 20 years prior to the testator's death, including regular visits by Melba Mogenson to the testator Albert Lee even after he became

incapacitated due to Alzheimer's. (Melba Mogenson herself passed away in August 2002 at the age of 87. Had she predeceased him, Albert Lee provided in his Will that, in that event, his three grandchildren were to receive the residue of his estate).

[31] In all of the circumstances I find that the applicant has failed to establish a legal or moral claim for maintenance and support from his father's estate, as contemplated by s.2 of the Act.

[32] In the particular circumstances of this case, the Court ought to respect the sanctity of the Will of Albert Lee. The Court ought not to interfere with the testamentary autonomy, or the liberty of the testator to bequeath his property as he pleases. It was Albert Lee who built up this modest nest egg and it was he who had freedom to dispose of it as he saw fit. As stated by the Supreme Court of Canada in *Tataryn*, at para 33:

> "Only where the testator has chosen an option which falls below his or her obligations as defined by reference to legal and moral norms, should the Court make an Order which achieves the justice the testator failed to achieve. In the absence of other evidence a Will should be seen as reflecting the means chosen by the testator to meet his legitimate concerns and provide for an ordered administration and distribution of his estate in the best interest of the persons and institutions closest to him. It is the exercise by the testator of his freedom to dispose of his property and is to be interfered with not lightly but only in so far as the statute requires."

[33] For these reasons I dismiss the application made pursuant to s.2 of the Act.

[34] In the circumstances, my inclination is to order that each of the applicant and the respondent residual beneficiary bear their own costs of this application; however, if counsel wish to make submissions with respect to costs, they may do so in writing, to the writer's attention, within 30 days of the filing of these reasons.

J.E. Richard,
J.S.C.

Dated at Yellowknife, NT
this 13 day of March 2006

Counsel for the Applicant, Michael Lee: William Rouse
Counsel for the Respondent Residual Beneficiary: Roderick Onoferychuck
Larry Pontus, Public Trustee

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