



Date: 19970206
Docket: S021710
Registry: New Westminster

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

DONALD FREDERICK HICKS
and
DONALD FREDERICK HICKS,
as Executor of the Estate of
ELIZABETH BELLA HICKS,
Deceased

PLAINTIFF

AND:

EDWARD RONALD HICKS

DEFENDANT

REASONS FOR JUDGMENT
OF THE
HONOURABLE MR. JUSTICE SHAW

Counsel for the Plaintiff:

R. Trevor Todd

Counsel for the Defendant:

Patrick G. Guy

Place and Dates of Trial:

New Westminster, B.C.
January 20-24 and 27-30, 1997

[1] Elizabeth Bella Hicks died on August 31, 1994 at the age of 97. She left three sons, Donald, Henry and Edward, and numerous grandchildren and great grandchildren.

[2] Mrs. Hicks owned one asset of substance, her apartment at Bartlett Court in Burnaby, British Columbia.

[3] For the last five years of Mrs. Hicks' life, her son Edward lived with her. During that time, Mrs. Hicks signed a codicil to her will leaving her apartment to Edward, signed a document purporting to forgive a \$10,000 debt owed by Edward to her, and signed a transfer of the apartment to Edward.

[4] The plaintiff, Donald Hicks, seeks to have those transactions declared void. He alleges: (1) that Edward exercised undue influence on Mrs. Hicks; and (2) that she lacked the mental capacity required by law for the transactions.

[5] There is a counterclaim by Edward. He seeks compensation from his mother's estate for providing care to her.

[6] I have concluded that the claim of the plaintiff, Donald Hicks, must succeed on the undue influence issue. I have also reached the conclusion that Edward's counterclaim must fail. My findings of fact and analysis are as follows.

FACTS

[7] In 1964, Mrs. Hicks executed a will which divided her estate equally between her three sons and named Donald as her executor.

[8] In 1983, Mrs. Hicks executed another will to the same effect with the exception that a specific bequest of \$8,000 was made to Muriel Irene Hicks, a former wife of Edward. The residue was still to be divided equally amongst her three sons and Donald remained as the executor. The reason for the bequest to Edward's former wife was that, apart from one payment of \$50, Edward had never paid her any support for their children.

[9] Edward lived with his mother in her apartment from 1989 until her death in 1994. He stayed there rent-free and lived off his mother's pension cheques and social welfare. He used the apartment as his "office" but he did not earn money. He also had friends stay in the apartment, sometimes for periods of months.

[10] When Edward moved into the apartment in 1989, his then-wife came with him. She left, however, in the spring of 1990, after Mrs. Hicks accused her of stealing a ring. The accusation was incorrect to the knowledge of Edward, but Mrs. Hicks firmly believed it to be true. Edward did not go with his then-wife when she left. They were divorced in 1992.

[11] As a result of the ring-stealing accusation by Mrs. Hicks, Donald and Edward took her to her family doctor, Dr. Carol Pfefferkorn, for an assessment. Dr. Pfefferkorn saw Mrs. Hicks, Donald and Edward on June 3, 1990 and diagnosed Mrs. Hicks as having senile dementia and paranoia.

[12] Prior to Edward moving in with his mother, Donald looked after her financial affairs. Thereafter, Edward handled his mother's affairs and generally refused access to Donald to her financial documents.

[13] On July 10, 1989, Edward obtained from his mother a power of attorney to draw and sign cheques on her account at the Bank of Montreal. This was done without Donald's knowledge.

[14] On August 2, 1989, Edward obtained, from his mother, a typed document purporting to be a power of attorney over all her affairs. This, also, was done without Donald's knowledge. The document reads:

TO WHOM IT MAY CONCERN.
THIS IS TO CONFIRM THAT MY SON EDWARD R. HICKS HAS
POWER OF ATTORNEY OVER MY AFFAIRS.

[15] On January 29, 1990, Edward borrowed \$10,000 from his mother. The loan was evidenced by a promissory note, drawn by Donald, in which Edward promised to repay Mrs. Hicks or her estate the amount of the loan plus interest at 12% per annum commencing March 1, 1990.

[16] On July 13, 1991, Edward had his mother sign a typed document stating her wish to give the apartment to him. The text reads:

TO WHOM IT MAY CONCERN,
IT IS MY WISH TO GIVE TO MY SON EDWARD, THIS APT, AS
A PART OF MY ESTATE ON MY DEMISE, HE HAS CARED FOR ME
IN MY FINAL YEARS AND THIS IS SHARE.

[17] Donald was not told of the foregoing document, nor that his mother wished to give the apartment to Edward.

[18] The third brother, Henry, was not told of any of the documents Edward had their mother sign. Henry lived and lives in Likely, B.C., and played little part in the various events.

[19] Within at most a few days after Edward had his mother sign the document of July 13, 1991, Edward saw a lawyer and asked him to draw a codicil to his mother's will. The codicil was to make him (Edward) the sole beneficiary of the apartment.

[20] The lawyer who prepared the codicil never met or spoke with Mrs. Hicks. He did not ascertain her capacity or her understanding of the implications of what she was doing.

[21] Edward had his mother sign the codicil. He had it witnessed by a home support aide, Ms. Kathy Nisbet, and a friend of Edward's, Mr. Lawrence Mousseau.

[22] Nobody told Donald or Henry of the codicil.

[23] Donald became concerned, however, because Edward started to act as if the apartment was his. This concern led Donald to take the precaution of searching the Land Titles Office. He found that the apartment was still in Mrs. Hicks' name.

[24] Tension grew between Donald and Edward. In order to settle their differences, Donald drafted an agreement with Edward. The draft agreement (dated October, 1991) recited that the estate of Mrs. Hicks consisted primarily of the apartment and reiterated Edward's \$10,000 debt. The draft provided for a reduction of Edward's debt by \$400 per month in return for Edward assisting in the care of Mrs. Hicks. It also allowed Donald access to his mother's documents.

[25] Donald presented the draft agreement to Edward. He refused to sign it. He said that he was caring for his mother out of love and affection, not for money.

[26] Donald then re-drafted the agreement, deleting the \$400 per month compensation provision. The re-draft, dated October 20, 1991, was presented to Edward. He refused to sign it and did not give reasons for his refusal.

[27] Despite the fact the draft agreements made it clear that the estate consisted primarily of the apartment, Edward did not disclose that a codicil left the apartment to him.

[28] As for the \$10,000 debt, on November 15, 1991, Edward had his mother sign a typed document acknowledging payment in full. The text of the document reads:

RE: \$10,000 I.O.U. NOTE
E.R. HICKS TO E.B. HICKS
DATED 1990, (4 copies) signed
THIS NOTE IS NOW PAID IN FULL,
WITH INTEREST.
FOR YOUR BIRTHDAY.....
YES, YOU SHOULD BE PAID FOR
YOUR SERVICES.
YOUR MOTHER

[29] In fact Edward made no payment on the note. Nobody told Donald or Henry of the forgiveness of the note.

[30] None of the foregoing documents were prepared by Mrs. Hicks. She could not type. All were prepared by or on behalf of Edward.

[31] In December 1993, Mrs. Hicks fell seriously ill with stomach cancer. It was clear that her illness was terminal. Mrs. Hicks wanted to die at home in her apartment and she stayed there for most of the final months of her life.

[32] In early April 1994, Edward went back to the same firm of lawyers that drafted the codicil. He met with another lawyer

in the firm and asked him to prepare a transfer of his mother's apartment to himself. Edward told the lawyer that the purpose of the transfer was that his mother was planning to sell the apartment and wished to effect the sale through Edward.

[33] The lawyer telephoned Mrs. Hicks and asked her if she wanted the transfer to proceed and she said yes.

[34] On April 11, 1994, the lawyer came to Mrs. Hicks' apartment to have her sign the transfer. He was met by Ms. Kathy Nisbet, a care worker who was looking after Mrs. Hicks. Ms. Nisbet took the lawyer to Mrs. Hicks. Edward happened to be in his bedroom at the time.

[35] The lawyer asked Mrs. Hicks whether she was the owner of the apartment and she said that she was. He then asked her if she wanted to transfer the apartment to Edward and she indicated that she did. At about this time, an exchange took place between Mrs. Hicks and Ms. Nisbet. Mrs. Hicks said that she hoped her other sons would not be angry about what she was doing. Ms. Nisbet replied that the other sons had already received property from her. Mrs. Hicks signed the transfer form.

[36] The lawyer asked the aide to call Edward so he could sign the real property transfer tax and the citizenship forms. Edward came and did so.

[37] The lawyer then handed his account to Edward, and Edward looked through his mother's purse for cash to pay the account. As there was not enough money in his mother's purse, Edward wrote and signed a cheque on his mother's bank account and gave the cheque to the lawyer.

[38] There was no payment by Edward to his mother for the apartment.

[39] The next day after Mrs. Hicks signed the transfer she saw her son Donald at the apartment and told him that she had given the apartment to Edward. As explanation for what she had done, she told Donald that he lives with Claudette and Henry lives with Rose, but Edward has no place to go. Donald asked her how she gave Edward the apartment and she replied that she did not know. He asked her about her will and she said she did not remember her will.

[40] The following day, Donald telephoned Edward and related what their mother had told him. He asked Edward whether she had given him the apartment. Edward replied that she had not done so and said that she must be dreaming. He said that there was nothing to the story and that the apartment had not been transferred. Edward's answer was a deliberate lie.

[41] About two weeks later, a conversation between Edward and Henry raised Henry's suspicions. Henry reported his concerns

to Donald who again took the precaution of searching the Land Titles Office. He found that the apartment had been transferred to Edward.

[42] On May 5, 1994, Donald instituted court proceedings against Edward and his mother to challenge the validity of the transfer. That action has since been superceded by the present proceedings which are against Edward alone.

[43] Mrs. Hicks died on August 31, 1994.

[44] By agreement between Donald, Henry and Edward, the apartment has since been sold and the net proceeds placed in a trust account pending the outcome of this action.

[45] In making the foregoing findings of facts, I have preferred the evidence of Donald over that of Edward. I found Edward Hicks to be badly lacking in credibility. He practised deliberate deception on his brothers and others. Examples include: telling Donald that his mother had not given him the apartment when in fact she had; telling the lawyer who handled the transfer that his mother wished to sell the apartment through him when the apartment was to be for himself; telling various persons that his mother had provided homes for Donald and Henry when this was a distortion of the truth. In addition, Edward's memory was highly selective. He conveniently forgot matters that appeared to be against him but

had good recollection of matters seen by him to be in his favour. His surreptitious conduct in respect of the codicil, the forgiveness of the debt and the transfer further reduce his credibility. His demeanor in court in giving his evidence was that of a man who is facile with the truth.

UNDUE INFLUENCE

[46] Were the instruments executed as a result of undue influence exercised on Mrs. Hicks by Edward Hicks?

[47] I approach this issue on the basis that: (1) the onus of proof to establish undue influence rests on the plaintiff Donald Hicks; and (2) the required level of proof is on a balance of probabilities: *Vout v. Hay* [1995] 2 S.C.R. 876 at 887-88; (1995) 7 E.T.R. 209 at 222 (S.C.C.).

[48] In *Vout v. Hay*, supra, Sopinka J. for the court said at p.891 (S.C.R.), p.224 (E.T.R.):

A person may well appreciate what he or she is doing but be doing it as a result of coercion or fraud.

[49] In *Oliver v. Clements* (9 July 1993) Courtenay Registry No.

S2069 (B.C.S.C.) Ryan J. (as she then was) said at p.16:

The question is not whether the donor knew what she was doing, had done, or proposed to do, but how the intention was produced.

[50] On all the evidence, I infer that Edward caused his mother to believe that she had provided homes for Donald and Henry and that he (Edward) deserved to be treated the same way. I also infer that Edward prevailed upon his mother's aged mind to bring her to believe that what he told her was true and to act upon that belief in signing the codicil, the forgiveness of the debt and the transfer of the apartment.

[51] There is considerable evidence from which the foregoing inferences are drawn. It will be remembered that Mrs. Hicks was over 90 years of age when Edward moved into her apartment. He became her constant companion and he took over the running of her financial affairs. In causing her to sign the codicil, the forgiveness of his debt and the transfer of the apartment, he acted surreptitiously, not telling Donald or Henry of any of these transactions. Edward lied to the lawyer who prepared the transfer, telling him that his mother wished to sell the apartment through him. He lied to Donald, telling him that his mother had not transferred the apartment to him and that she must have been dreaming when she told Donald otherwise.

[52] While the foregoing evidence indicates a guilty mind, there are specific items of evidence which shed light on the precise ruse used by Edward to justify his mother giving him the apartment.

[53] As noted earlier, when Mrs. Hicks signed the transfer in the presence of the aide Kathy Nisbet, Ms. Nisbet told Mrs. Hicks that her other sons had already received property from her. In a written statement given by Ms. Nisbet on June 1, 1994, she said Mrs. Hicks' reasoning in giving the apartment to Edward was "the fact the other two sons Donald and Henry Hicks have received homes of their own due only to their mother Elizabeth Hicks' love and generosity." I have no doubt that Ms. Nisbet's source of information was Edward.

[54] Edward told similar stories to other people. On May 11, 1994, he telephoned Ms. Catherine McLachlan of the Burnaby Home Term Care Program. Ms. McLachlan recorded the following:

Edward states Don has received other property from his mother and probably wants to put her into a nursing home and take this property as well.

[55] Edward was interviewed on July 9, 1994, at the Social Work Services section of St. Mary's Hospital. The following is recorded:

I was able to spend a fair amount of time with son Edward on 94/07/09, who is my source for information Ed & Mrs. Hicks were in business together - property management, real estate - & were very successful amassing a large estate. Ed was in the U.S. for a few years & when he returned found that brothers and families had been given homes, had sold off properties under value & had run down bank accounts to almost nil ...

[56] Edward made similar allegations in his statement of defence and counterclaim and then recanted them when he was

pressed on examination for discovery. I cite the following passages:

Q Well, you say she transferred Quadlyn and Gilby to Don or his family for no money. That is not true, is it?

A No, that is not true. Sorry about that.

.

Q Why in paragraph 25 of your counterclaim would you allege that he stole money from your mother?

A That is a little heavy.

[57] On the evidence, particularly that of Donald Hicks and Henry's wife, Rose Hicks, I find that Donald and Henry were not given homes (in any ordinary sense of those words) by Mrs. Hicks.

[58] Essentially what Edward said to Ms. Nisbet, Ms. McLachlan, the interviewer at St. Mary's Hospital and in his court pleadings was false and self-serving. The inference I draw is that Edward influenced his mother with similar notions and that this led her to sign the instruments in his favour. The totality of Edward's conduct evidences the mind of a man trying to cheat his brothers out of their inheritance.

[59] In summary, I find that Edward Hicks influenced his mother by means of false information to execute the codicil, the forgiveness of the promissory note and the transfer of her apartment. This, I hold, was undue influence. In result, the transactions must be set aside.

CAPACITY

[60] I said earlier that one of the main issues was the capacity of Mrs. Hicks to enter into the transactions. In view of my finding of undue influence, I do not propose to address the capacity issue.

COUNTERCLAIM

[61] Edward counterclaims for compensation for looking after his mother. He relies upon the doctrine of unjust enrichment.

[62] According to Edward's evidence, he looked after his mother out of love and affection and he did not expect to be paid compensation for his efforts. However, as observed earlier, little weight can be placed on anything said by Edward. In fact, it is clear that he hoped to be compensated by doing his brothers out of their inheritance. This judgment has put an end to that method of compensation. Edward has already received some compensation, that being free room and board and office space, as well as partial use of his mother's pension cheques. In all these circumstances, I find that the compensation received by Edward was more than fair and adequate. It follows that there was no unjust enrichment of Mrs. Hicks. The counterclaim is therefore dismissed.

COSTS

[63] Donald Hicks claims full indemnity of solicitor-client costs against Edward. He contends that Edward's conduct was so

reprehensible as to warrant such an order. Alternatively, Donald Hicks asks for special costs.

[64] In my opinion, the surreptitious and dishonest conduct of Edward was so highly reprehensible as to warrant an award of full indemnity, that is, solicitor and own client costs. I make this order under the inherent jurisdiction of the court. In considering the matter of costs, I am indebted to Baker J. in *Pacific Destination Properties Inc. v. Granville West Capital Corp.* [1996] B.C.J. No. 280 for her collection and analysis of authorities on costs.

SUMMARY

[65] 1. The codicil of July 18, 1991 is declared null and void.

[66] 2. The document signed by Mrs. Hicks and dated November 15, 1991, which states that the promissory note of Edward Hicks to Mrs. Hicks of January 29, 1989 and interest thereon is paid in full, is declared null and void.

[67] 3. The promissory note of January 29, 1989 is declared to form part of the estate of Mrs. Hicks.

[68] 4. The transfer of the apartment by Mrs. Hicks to Edward Hicks, made April 11, 1994, is declared null and void.

[69] 5. The funds from the sale of the apartment and accrued interest thereon are declared to form part of the estate of Mrs. Hicks.

[70] 6. The counterclaim of Edward Hicks is dismissed.

[71] 7. The plaintiff, Donald Hicks, on his own behalf and as executor of the estate of Mrs. Hicks, is entitled to full indemnity of solicitor and own client costs from Edward Hicks.

[72] 8. The parties may apply for such further directions or orders as may be needed to accomplish the intent of this judgment.

D. W. Shaw

