Discovery of the Reasons in Wills Variation Claims

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Outside courtroom 40 at the Vancouver law courts, the lawyer who prepared a 2010 will waits with his file and his lawyer. The plaintiff's lawyer in this wills variation claim had subpoenaed him to give evidence even though he had asserted privilege over the file during discovery. The executrices sitting in court had not waived it. He wonders how things will go, how far they will be allowed to go. What happens is set out later in this paper.

A wills variation claim under section 60 of the *Wills, Estates and Succession Act* (WESA) is based on whether a will, "…make[s] adequate provision for the proper maintenance and support of the will-maker's spouse or children…." If it does not, the court may, "…order that the provision that it thinks adequate, just and equitable in the circumstances, be made out of the will-maker's estate for the spouse or children." Every wills variation claim addresses 2 issues: who are the heirs and what do they get?

In estate claims, to challenge the validity of a will based on capacity, formalities or undue influence, the lawyer's will file is not protected by solicitor-client privilege. It must be disclosed pursuant to the so-called "wills case" exception first set out in the 1851 English decision *Russell v. Jackson*.

In wills variation claims where the validity of the will is not challenged, the lawyer's file is protected by solicitor-client privilege and is not disclosed unless the executor chooses to waive privilege. This is based on the 1994 British Columbia decision of Master Joyce (as he then was) in *Gordon v. Gilroy* which held the wills case exception does not apply to wills variation claims.

This paper argues that the wills case exception should apply to wills variation claims. The key to its principled application are the words "claim under." Determining who are the heirs and what they get, is a claim under the testator. Until that is determined, there is no privilege to waive. For the most part, British Columbia courts have not applied the broader principles from *Russell*, but rather one specific instance of it, that being determining the testator's "true intentions."

In wills variation claims, section 62 of WESA says, "…the court may accept the evidence it considers proper respecting the will-maker's reasons, so far as may be determined, for making the gifts made in the will or for not making adequate provision for the will-maker's spouse or children…."

The reasons for the dispositions, the reasons for not making adequate provision, and the absence of proper legal advice about legal and moral obligations in a wills variation context have all been considered by the court in applying the wills variation test, and in some cases the evidence has been dispositive of the claim. To the extent those reasons and circumstances are found in the lawyer's file, the executor controls the disclosure even when there is a conflict of interest.

The conflict of interest arises when the beneficiary defending the claim is also the executor in control of solicitor-client privilege. On a wills variation claim, the executor's job is to act impartially as between the claimant and the named beneficiaries. The beneficiary's job is to defend the claim on the basis that every dollar that goes to the claimant comes out of the pocket of the beneficiaries. When the beneficiary is also the executor, the beneficiary defending the claim controls the best evidence of the reasons for the dispositions and for not making adequate provision.

RUSSELL V. JACKSON

In the 1851 decision *Russell v. Jackson*, the next of kin disputed a will-maker's testamentary dispositions to beneficiaries who were also the executors. The dispute was whether the beneficiaries received the residue on a secret trust to found a school. The executors asserted solicitor client privilege over the nature of the trust, the instructions for the will, the mode in which it was prepared and the solicitor's communications with the will-maker and executors. Vice Chancellor Sir George James Turner held the evidence must be received.

The Vice-Chancellor distinguished solicitor-client privilege in two situations, those being where there is a conflict between the rights and interests of the client and parties claiming under him and third parties, and testamentary dispositions. The Vice-Chancellor confirmed that privilege does not in all cases terminate with the death of the party, and that it belongs equally to parties claiming under the client as against parties claiming adversely to him. However, the Vice-Chancellor did not find that it belonged to the executors as against the next of kin for three reasons set out at the top of page 561.

1. The real question is, "…**to which of two parties claiming under the client the property in equity belongs**…." The court distinguished this case where parties were claiming under the client from cases where parties were claiming against the client.
2. Privilege follows the legal interest and is subject to the incidents to which the legal interest is subject. If the legal interest is subject to a claim, the privilege relating to the legal interest is subject to it also.
3. To permit the defendants as executors to use privilege would be to permit them to exclude the very question before the court, that being whether they were trustees or not.

At page 560, Vice-Chancellor Turner acknowledges, "… no greater difficulty than presents itself in all cases where the Courts have to ascertain the views and intentions and objects and purposes for which dispositions have been made."

The *Compact Oxford English Dictionary* defines a *view* as an attitude or opinion, an *intention* as an aim or plan, an *object* as a thing to which an action is directed, a goal or purpose, and a *purpose* as the reason for which something is done. These definitions are important because they make clear the principle later adopted as the wills case exception is not limited to ascertaining intentions, but also reasons.

One formulation of the *Russell* principle is that in claims under the will-maker, when the real heirs or to whom the property really belongs is at issue, there is no solicitor-client privilege.

The wills case exception or principle is not limited to wills, as will be seen by its later application to trusts and committeeships. The principle is not limited to the validity of a will because the validity of the will was not at issue in *Russell*. The principle is not limited to intention because the intention was clear, the disclosure was to get at the reasons for the dispositions. The principle is broader than wills, the validity of a will and a will-maker's intentions.

GEFFEN V. GOODMAN ESTATE

In the Supreme Court of Canada case *Geffen v. Goodman Estate*, the next of kin contested the validity of a trust which was opposed by the trust beneficiary who was also the executrix of the will. The beneficiary in her capacity as executrix asserted solicitor-client privilege.

In *Geffen*, Madam Justice Wilson described the lawyer's evidence as "crucial" for 2 reasons, ascertaining the precise circumstances surrounding the deceased's entry into the trust agreement and determining whether Mrs. Goodman received independent advice.

Madam Justice Wilson discussed the differing rationales for the wills case principle, including those of Professors Wigmore and Phipson. With respect to Professor Phipson she says: "In his opinion, any time claimants have a *joint interest* with the client in the subject matter of the communication, whether dealing with wills or some other matter, no privilege attaches. Hence, he states that as between *joint claimants under a testator* as to communications between the latter and his solicitor, the privilege does not apply…."

Madam Justice Wilson then says, "And the principle of extending the privilege to the heirs or successors in title of the deceased is promoted by focusing the inquiry on who those heirs or successors properly are." And then, "I prefer to base my decision on the footing that in circumstances such as these, there is no privilege to waive until the true intentions of the settlor are ascertained, which in turn requires the testimony of the solicitor to be received."

The first quotation restates the Vice-Chancellor's first reason, the second restates the second. Both implicitly confirm the trigger for the application of the principle is a "claim under", that is a claim that puts the real heirs or real owners of the property at issue, and a claim under the client as opposed to a third-party claim against the client or the client's heirs. It is also important to note that Madam Justice Wilson's two reasons for describing the lawyer's evidence as crucial, the circumstances and legal advice, are by statute and case authority important considerations in wills variation claims.

Madam Justice Wilson approves *Russell* as the correct statement of Canadian law on the wills case exception. Madam Justice Wilson goes out of her way to draw attention to the fact that the "wills case exception" is a principle and not a "pigeon hole" exception, much like the relationship between the principled

approach to hearsay and the historical exceptions. A principled application should include both the reasons for the dispositions and the intentions.

RE KATHLEEN PALAMAREK

In a *Patient's Property Act* committeeship proceeding, Mr. Justice Harris, then sitting as a trial judge, reviewed and relied upon *Russell* and *Geffen* to obtain the patient's preferences, intentions, wishes or desires about where she should live and who should care for her, notwithstanding the existence of solicitor-client privilege. While distinguishing the patient's case from a wills case, Mr. Justice Harris identified at paragraph 44 the trigger for the wills case exception.

> "In wills cases, determining the testator's intent is necessary and fundamental in deciding what interest successors or heirs to the estate take. The rights of heirs or successors are determined by that intent. That is what is meant by saying that the heirs "**claim under**" the testator."

The trigger is that it be a claim under the testator or in this case incapable person as opposed to a claim against him or her. Mr. Justice Harris was of the view that the prerequisite was met. At paragraph 53, Mr. Justice Harris echoes the same factor as did Vice-Chancellor Turner.

> "In my view, the case before me does not raise the issue of conflicts with third parties in the same way that is typically the case when solicitor-client communications are being protected and, to adopt the words from *Russell*, 'the foundation of the principle is found wanting.'"

Just as *Geffen* was an extension of the wills case principle to trusts, *Palamerek* is an extension to committeeships. In each case, there was a claim under the client about the very issue over which legal advice privilege was asserted. And neither the deceased nor the incapable person was able to give evidence.

GORDON V. GILROY

In this 1994 decision, Master Joyce (as he then was) held that the "wills case" exception did not apply to a wills variation claim. It does not appear from the reasons that Master Joyce had the benefit of reviewing *Russell* where the principle is more clearly set out. In a lengthy excerpt from *Geffen*, Master Joyce underlined two excerpts, each of which included the words "true intentions."

The second excerpt from Geffen says this, "*The interests of the now deceased client are furthered in the sense that the purpose of allowing the evidence to be admitted is precisely to ascertain what her true intentions were. And the principle of extending the privilege to the heirs or successors in title of the deceased is promoted by focusing the inquiry on who those heirs or successors properly are.*"

Master Joyce then says: "In this case, the issue is not 'what were the true intentions of the testator.' There is no issue that he intended to leave his entire estate to Ms. Gilroy and thereby to disinherit his children. The purpose for seeking disclosure of the confidential communications in this case is not for the purpose of determining the testator's true intentions or even the reasons for them, which are fully stated in the will itself, but rather for the purpose of attempting to defeat those intentions." And further, "The plaintiffs seek disclosure of the confidential communications in an attempt to overturn the will and defeat Mr. McKay's testamentary wishes."

With respect, Master Joyce does not apply the *Russell* or *Geffen* principle to this application for disclosure of documents. The issue in *Gordon* was, who were the real heirs in this claim under the testator: the wife alone or the wife and children? If the court had focused its attention on who were the real heirs and what each of them were to receive, the solicitor-client privilege would extend to both the actual and potential heirs. Disclosure of documents should be based on what is put at issue, not on upholding what is set out in the will.

By focusing on the "true intentions" and describing the plaintiff's purpose as attempting to defeat those intentions, Master Joyce implicitly rules in favour of the upholders of the will. However, as Vice-Chancellor Turner said in *Russell*, "In the other case, the question as to which of two parties claiming under the client the property in equity belongs; and it would seem to be a mere **arbitrary rule** to hold that it belongs to one of them rather than to the other."

Second, it is respectfully suggested Master Joyce fails to consider the importance of reasons for the dispositions in a wills variation claim. These section 62 reasons can include otherwise inadmissible reasons and the discussions between the lawyer and testator: *McBride v. Voth* at paragraph 65 and 135 - 142 and *Brown v. Pearce Estate* discussing *Hall v. Hall Estate* at paragraph 134. These reasons are fundamentally important to a wills variation claim, and according to the *Bell v. Roy Estate* and *Kelly v. Baker* line of cases, can even be dispositive of the claim itself. In *Geffen*, Madam Justice Wilson described as "crucial" the lawyer's evidence about the circumstances and legal advice.

In some notable cases such as *McBride v. Voth* and *Brown v. Pearce*, the executrices and beneficiaries were not the same person. The executrices disclosed the lawyer's file and allowed the lawyers to testify. The court clearly relied on the evidence. By way of contrast, in *Gordon* it appears from the style of cause, the counsel appearing and the comments on page 3, that the common-law wife as beneficiary was also the executrix, a situation similar to *Russell* and *Geffen*.

To judge of these cases, in *Russell*, *Geffen* and *Gordon*, the beneficiaries were also executors or executrices and asserted privilege. By contrast, in *McBride* and *Brown*, the executrices were independent and waived privilege. One inference from these decisions is that beneficiaries who are also executrices are more likely to use their position to promote or protect their own interests.

The Vice-Chancellor confirms this in his third reason which was, "…to permit the Defendants to avail themselves of the privilege would be to permit them by the use of the privilege to exclude the question whether they were trustees of it or not."

A summary review of pure wills variation claims in CanLII discloses 95/109 had an executor who was also a beneficiary and

14/109 had an independent executor. Of the 32 cases of joint executors/beneficiaries able to be determined, in five cases the lawyer's file was not disclosed. Of the eight cases of independent executors able to be determined, the file was disclosed in each case. It should also be noted that there is no solicitor-client privilege to assert or waive in wills prepared by notaries.

BROWN V. TERINS

As of this writing, *Brown v. Terins* is a pure wills variation claim under reserve. A husband's will left his estate to his two daughters and disinherited his common-law wife of 10 years. Unlike *Gordon* and even *Tataryn v. Tataryn Estate*, the reasons for the disposition were not set out in the will. The daughters defended the claim as beneficiaries and asserted privilege as executrices. They had separate counsel for each role.

The wife sought disclosure of the will file, but Madam Justice Fisher relying on *Gordon v. Gilroy* dismissed the application. Leave to appeal was denied on the basis that the trial would have to be adjourned. Halfway through the trial, the executrices waived privilege over the lawyer's file and disclosed it during the examination of the wills lawyer.

Madam Justice Fisher acknowledged the wills case exception stems from *Russell*, was extended in *Geffen* and further extended in *Palamerek*. After excerpts from *Geffen* and *Gordon*, Fisher J. based her decision on, "The purpose for seeking disclosure of the confidential communications in this case is the same - it is not for the purpose of determining the testator's true intentions but rather for the purpose of attempting to defeat those intentions."

To apply the Vice-Chancellor's three reasons in *Russell*,

1. The real question is: to which of the parties **claiming under** the client does the estate property belong? The real question is whether the estate belongs to the daughters or the daughters *and* the common-law wife. The common-law wife claimed under the testator seeking a share of the estate based on WESA and what Madam Justice McLachlan in *Tataryn* described as uncrystallized legal and moral obligation to a spouse. Until the court determines who are the heirs and what each of them is to receive, there is no legal advice privilege to assert.
2. Privilege follows the legal interests and is subject to the incidents to which the legal interest is subject. The will-maker's privilege over the will file which passed to the executrices is subject to the common-law wife's claim under him.
3. To permit the executrices to use privilege, is to permit them to exclude relevant and material evidence of the very question before the court. The writer was counsel for the common-law wife and considered the evidence in the lawyer's file disclosed during trial relevant and material to the circumstances, the legal advice and the reasons.

To apply Professor Phipson's words, the wife as claimant had a **joint interest** with the successors to the deceased in the subject matter of the communication. As a **joint claimant** under a testator as to communications with the solicitor, privilege does not arise.

To apply what Madam Justice Wilson said in *Geffen*, the principle of extending the privilege to the heirs and successors is promoted by **focusing the inquiry on who those heirs and successors properly are**. Who are the real heirs and successors? Are they the daughters or the daughters and the common-law wife?

CONCLUSION

The so-called wills case exception to legal advice privilege is a principle capable of broad application. The wills case exception applies to those cases where the validity of a will is put at issue, but to date, not to pure wills variation claims. Understanding the origin and three reasons for the principle from the 1851 decision *Russell v. Jackson* help show why it should apply to wills variation claims.

Any time the real heirs or to whom the estate property belongs is at issue in a claim under the testator, there is no solicitor client privilege to waive. Every wills variation claim puts at issue to whom the estate property belongs; some wills variation claims put at issue who are the real heirs by adding a common-law or married spouse, or biological and/or adopted children. The very same principles behind the application of the wills case exception to the validity of a will also apply to the dispositions under it.

The wills case principle should not be limited to ascertaining intention in the narrow sense. It should not exclude those "attacking" the will, which is a misleading way of stating it arising from a failure to recognize the principle. The wording from *Russell* is broad enough to include the intention and the reasons. As can be seen from *Geffen*, the wording "true intentions" includes the circumstances and legal advice. Perhaps the words "true intentions" include the reasons.

The wills variation provisions of WESA include the reasons for the dispositions and the failure to make adequate provision. The *Russell* provisions support this WESA provision. It can safely be said that the lawyer's file and evidence is an important repository of the circumstances, legal advice and all-important reasons in a wills variation claim.

Hopefully in the near future, armed with the principles from *Russell*, the application of the wills case exception to wills variation claims will be brought to the British Columbia Court of Appeal. V

1 *Russell v. Jackson* (1851) 9 Hare 387 (attached to www.richtertriallaw.com)
2 *Gordon v. Gilroy* 1994 CanLII 829 (BCSC)
3 *Geffen v. Goodman Estate* 1991 CanLII 69 (SCC)
4 *Re Kathleen Palamarek* 2010 BCSC 1894 (CanLII)
5 *McBride v. Voth* 2010 BCSC 443 (CanLII)
6 *Brown v. Pearce Estate* 2014 BCSC 1402 (CanLII)
7 *Hall v. Hall Estate* 2011 BCCA 354 (CanLII)
8 *Bell v. Roy Estate* 1993 CanLII 1262 (BCCA)
9 *Kelly v. Baker* 1996 CanLII 5096 (BCCA)
10 *Brown v. Pearce Estate* 2014 BCSC 1402 (CanLII)
11 *Brown v. Terins* 2015 BCSC 775 (CanLII)
12 *Tataryn v. Tataryn Estate* 1994 CanLII 51 (SCC)

John M. Richter of Richter Trial Lawyers has a special interest in wills variation claims