September 9, 2020

Exercising the Discretion to Allow Late Family Maintenance and Support Applications

By: Jonnette Watson Hamilton

Case Commented On: *Lamont Estate*, 2020 ABQB 449 (CanLII)

A family member has a limited amount of time in which to apply to the Court of Queen's Bench of Alberta when seeking a greater share of a deceased person's estate than the share given to them in that person's will or on intestacy. Under section 89(1) of the *Wills and Succession Act*, SA 2010, c W-12.2 (WSA), the family member must apply within six months after the grant of probate or administration. Nevertheless, a court may allow a late application for a greater share of any part of the estate not yet distributed: section 89(2). This decision of Justice Nicholas Devlin appears to be the first time that a court has looked at what factors it should consider when exercising its discretion to allow or disallow a late application.

Background

The deceased in this case, Dorothy May Lamont, died in June 2017 at the age of 98. Her will, made in 2010 and probated in November 2017, left her estate to her three children: Janice, John and Murray Lamont. The will provided that four-sixths of the estate was to be held in trust for the daughter, Janice, in order to provide her with a suitable place to live. The two sons – John, who was named as the personal representative in his mother's will, and Murray – each received one-sixth of their mother's estate.

The estate's only significant asset was the deceased's house. The primary value of the house lay in the location of the lot on which it was situated, which was in the sought-after Marda Loop area of Calgary. In November 2018, a developer who wanted to tear down the house and build new housing had offered to purchase it for $700,000. However, because the daughter had filed a caveat claiming a beneficial interest in the house, the sale did not go through (at para 15). The house was estimated to be worth approximately $600,000 now (at para 68).

The will gave the daughter two-thirds of her mother's estate because the daughter suffered from a number of physical disabilities, including severe environmental allergies. The daughter, who held a law degree, had been unable to earn a living due to her physical disabilities for many years. She had been living rent-free in her parents' home since 1990 and had been receiving Alberta's Assured Income for the Severely Handicapped (AISH) since the early 1990s, until she reached the age of 65 four years ago and began receiving Old Age Security and Canada Pension benefits totaling approximately $1,800 per month instead (at para 56).

The deceased had moved into a care facility in December 2010 and had secured a line of credit against the house in order to meet her own expenses. The daughter had continued to live in the house rent-free after her mother moved out and after her mother died in 2017. The estate had been paying the taxes, utilities, insurance and maintenance expenses for the house and had accumulated approximately $150,000 in debts, primarily due to the upkeep of the house and legal fees.

The daughter did not want to move out of her mother's house. She claimed that it was necessary for her to continue to live in the house because of the modifications made to it for the sake of her health, and that she required all of her mother's estate in order to do so. She argued that the house had been customized to meet her needs and was the only place that she felt safe. She also argued that she could not find suitable alternate housing within her means that did not involve "shared air" (at para 10).

The daughter therefore brought an application for family maintenance and support under WSA section 88(1) in April 2019. That section states that if a person dies with a will that does not make adequate provision for the proper maintenance and support of a family member, the family member can apply to the court and the court may order that "any provision the court considers adequate be made out of the deceased's estate for the proper maintenance and support of the family member."

In Alberta, the list of "family members" who are eligible to apply to the court for a greater share of an estate does not include independent adult children. However, it does include adult children who are "unable to earn a livelihood by reason of mental or physical disability": WSA section 72(b)(iv). There was no dispute that the daughter met that definition and qualified as a "family member" (at para 42). However, the daughter produced virtually no medical evidence about her health and its impact on what she needed in a home (at paras 49-52), and the medical evidence that was produced was more than 25 years old (at para 53).

The daughter's application was resisted by the personal representative for several reasons. First, the daughter's application for family maintenance and support was said to be a collateral attack on two previous court orders. In February 2019 Justice Phillips had ordered the daughter to vacate the house within 30 days – an order that was not enforced – and in March 2019 Justice Kirker dismissed the daughter's application for a preservation order. Second, the daughter's application was not brought within the six months provided for in section 89(1) of the WSA. Third, the daughter had failed to prove that the will did not make adequate provision for her proper maintenance and support because she had failed to produce the necessary financial information.

The Exercise of Discretion to Allow Late Applications

Section 89 of the WSA provides:

> 89(1) Subject to subsection (2), an application must be commenced within 6 months after the grant of probate or administration is issued.

(2) The Court may allow an application to be made at any time respecting any part of the estate that is not distributed at the date of the application. (emphasis added)

In other words, although a family member must apply within six months, a court may, but need not, allow their family maintenance and support application to be made late. Even if a late application is allowed, it will only affect any property still in the estate as of the date of the late application. In this case, the estate's principal asset, the house, remained unsold and undistributed, but the daughter's application had been brought more than 16 months after the grant of probate. Justice Devlin denied the daughter permission to file late, and what follows is a discussion of the factors he considered in his decision.

Justice Devlin began by noting that section 89 of the WSA should be interpreted and applied purposively and remedially because the WSA's family and support provisions codified the moral obligations of deceased persons towards their closest family members who may well have limited financial and personal resources (at para 25, citing *Rizzo & Rizzo Shoes Ltd (Re)*, 1998 CanLII 837 (SCC), [1998] 1 SCR 27; the *Interpretation Act*, RSA 2000 c I-8, s 10, and *Tataryn v Tataryn Estate*, 1994 CanLII 51 (SCC), [1994] 2 SCR 807 at paras 28-31). Nevertheless, he recognized that the six month limitation period in section 89 was a considered legislated balance between "open and honest dealing by those making claims against an estate, and efficient and proportional litigation, and finality" (at para 26).

Justice Devlin also recognized that those with limited means or knowledge should receive a more generous response to their requests for extensions of the limitation period (at para 25). He noted that family members who, because of their disabilities, are unable to move matters forward or to contribute to finding solutions to their needs should not be penalized for delays in bringing their applications (at para 31).

However, he found that there was "no satisfactory explanation for the delay" in the case before him (at para 27). The daughter was knowledgeable and she had demonstrated her ability to respond to and commence other court applications concerning the house since her mother's death. The fact that the daughter was a lawyer by training contributed to Justice Devlin's finding that she knew of the issues in the family and support application and knew what she needed to do in order to keep the house for over a year before she finally filed her application (at para 28). During that year she had filed a caveat against the house and brought an application for its preservation. Indeed, Justice Devlin found that the daughter "delayed, obstructed, and undermined efficient administration" of the estate, going so far as to obstruct the sale of the house for an attractive price (at para 29).

He concluded that family members seeking maintenance and support should not obstruct or damage the estate and that a "determined lack of cooperation" would be held against any party who sought an extension of time (at para 30).

Justice Devlin also noted problems with the daughter's evidence. For example, the air filtration technology in the house, which was the daughter's stated reason for needing to remain in that particular house, was about 25 years old. The daughter had not gathered evidence about the

furnace and filtration system in the house, or what other contemporary alternatives are available (at para 31). The only evidence she produced indicated that, in 1992, she needed a home "as free as possible from aromatic hydrocarbons and other types of irritants" (at para 49) and, in 1992 and 1994, that she would benefit greatly from a HEPA quality air filter, which was installed in the house in the mid-1990s (at paras 50-51). That lack of evidence called into question the daughter's willingness to even consider alternative accommodation (at para 32).

Finally, the daughter's family support and maintenance application appeared to be akin to a collateral attack on the two prior court orders, a fact which also weighed against an extension of time (at para 33). This was the daughter's third claim to maintain the status quo (at para 40).

In the end, Justice Devlin found that there was only one reason for the daughter's delay in bringing the family maintenance and support application. She did so in order to put off for as long as possible the consequences of her losing each of her applications so that she could continue to live in her mother's home rent-free as she had for the past 30 years (at para 28).

Conclusion

After analysing whether the deceased's 2010 will made adequate provision for the daughter and concluding that it did (at paras 41-78), Justice Devlin in effect upheld the will by refusing to exercise his discretion to allow the daughter's late application. In so doing, he noted that if the house sells for what it is said to be worth today and if the personal representative uses the four-sixths of the residue held in trust for the daughter to purchase an annuity for her, then the daughter would have additional income of approximately $1,670 per month. Added to her pension income of $1,800 per month (at para 71), this would result in a monthly income of $3,470, which was said to be sufficient to "live the modest lifestyle of an elderly single person" (at para 72). This result was also what her mother, with whom she had lived for 20 years as an adult, had provided for her in her will.

As the WSA only came into force in 2012, new precedents interpreting its provisions are welcome. The facts in this case are somewhat unusual, and it might be questionable how broadly the factors Justice Devlin considered can be applied in other cases. However, the points that he made about family members who could not advance their claim in a timely fashion because of disability, and about those who refuse to produce required evidence or who act to obstruct or damage the estate are more broadly applicable.

This post may be cited as: Jonnette Watson Hamilton, "Exercising the Discretion to Allow Late Family Maintenance and Support Applications" (September 9, 2020), online: ABlawg, http://ablawg.ca/wp-content/uploads/2020/09/Blog_JWH_Lamont_Estate.pdf