

IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Koch, et al v. Koch (Estate of)*, 2004 YKSC 11

Date: 20040129
Docket No.: S.C. No. 01-A0158
Registry: Whitehorse

Between:

GEORGE KOCH and NORINE KOCH
by their Guardian ad litem **KAREN MACDERMOTT**

Petitioners

And:

ESTATE OF HELMUT KOCH, DECEASED

Respondent

Appearances:

Mr. James Tucker

Ms. Carolee Bateson-Koch

For the Petitioners

For the Respondent

Before:

Mr. Justice R.S. Veale

REASONS FOR JUDGMENT

INTRODUCTION

[1] The petitioners have applied for a decision on a point of law pursuant to Rule 34.

The question to be determined is whether the assets listed in s. 20(1) of the

Dependant's Relief Act, R.S.Y. 2002, c. 56 (the Act) are to be included and deemed part

of the net estate of a deceased person for the purpose of making an order under s. 2 of

the Act. This is not an application to determine which specific assets in this action will be

included under s. 20(1) and s. 2 of the Act.

DECISION

[2] The relevant sections of the Act are as follows:

Order for support

2 If a deceased has not made adequate provision for the proper maintenance and support of the deceased's dependants or any of them, the Supreme Court, on application by or on behalf of the dependants or any of them, may order that any provision it considers adequate be made out of the estate of the deceased for the proper maintenance and support of the dependants or any of them.

Transactions before death

20(1) Subject to section 15, for the purpose of this Act, the capital value of the following transactions effected by a deceased before their death, whether benefiting their dependant or any other person, shall be included as testamentary dispositions as of the date of the death of the deceased and shall be considered to be part of the deceased's net estate for purposes of determining the value of the deceased's estate:

- (a) gifts *mortis causa*;
- (b) money deposited, together with interest thereon, in an account in the name of the deceased in trust for another or others with any chartered bank, savings office or trust company, and remaining on deposit at the date of the death of the deceased;
- (c) money deposited, together with interest thereon, in an account in the name of the deceased and another person or persons and payable on death pursuant to the terms of the deposit or by operation of law to the survivor or survivors of those persons with any chartered bank, savings office or trust company, and remaining on deposit at the date of the death of the deceased;
- (d) any disposition of property made by a deceased whereby property is held at the date of death by the deceased and another as joint tenants with right of survivorship or as tenants by the entirety;
- (e) any disposition of property made by the deceased in trust or otherwise, to the extent that the deceased at the date of death retained, either alone or in conjunction with another person or persons by the express provisions of

the disposing instrument, a power to revoke the disposition, or a power to consume, invoke or dispose of the principal thereof, but the provisions of this paragraph do not affect the right of any income beneficiary to the income accrued and undistributed at the date of the death of the deceased;

(f) any amount payable under a policy of insurance effected on the life of the deceased and owned by him.

(2) The capital value of the transactions referred to in paragraphs (1)(b), (c) and (d) shall be considered to be included in the net estate of the deceased to the extent that the funds on deposit were the property of the deceased immediately before the deposit or the consideration for the property held as joint tenants or as tenants by the entireties was furnished by the deceased.

(3) Dependants claiming under this Act have the burden of establishing that the funds or property, or any portion thereof, belonged to the deceased.

(4) If the other party to a transaction described in paragraphs (1)(c) or (d) is a dependant, such a dependant shall have the burden of establishing the amount of their contribution, if any.

(5) This section does not prohibit any corporation or person from paying or transferring any funds or property, or any portion thereof, to any person otherwise entitled thereto unless there has been personally served on the corporation or person a certified copy of a suspensory order made under section 3 enjoining the payment or transfer.

(6) Personal service on the corporation or person holding any such fund or property of a certified copy of the suspensory order is a defence to any action or proceeding brought against the corporation or person with respect to the fund or property during the period the order is in force and effect.

(7) This section does not affect the rights of creditors of the deceased in any transaction with respect to which a creditor has rights.

[3] On its face, s. 20(1) sets out that certain transactions shall be included as part of the deceased's net estate for purposes of determining the value of the deceased's estate.

[4] The first submission to be considered is based upon an interpretation given in correspondence by the former solicitor of Ms. Bateson-Koch. He submits that s. 20(1) must be interpreted in light of s. 20(2) to determine what will be included in "the net estate of the deceased".

[5] I have no disagreement with this submission so long as it is understood that "the net estate of the deceased" is available for distribution under s. 2 of the Act. Clearly, the items referred to in s. 20(1)(b), (c) and (d) must meet the condition of s. 20(2) to be included in the net estate.

[6] However, the specific determination of whether the matrimonial home, the bank account and the various vehicles come within s. 20(1) and (2) remains to be determined on the specific facts of this case. No doubt the purpose of s. 20 is to catch as part of the deceased's net estate, deposits and dispositions where the funds on deposit were the property of the deceased before deposit or the consideration for disposition as joint tenants was furnished by the deceased.

[7] I note in passing that s. 20 of the Act does not contain the words "and being available". The result is that assets which may have been jointly owned and then subsequently spent or disposed of by the joint tenants are still to be considered as part of the net estate of the deceased for the purposes of evaluation of the estate. I also point out that s. 9 of the Act stays the distribution of the estate from the date that the petition is

served. The Act also provides in s. 10 that any portion of the estate may be charged with an order for support of a dependant.

[8] Ms. Bateson-Koch made a second submission that gifts of the deceased were covered by s. 21 and not s. 20 of the Act. Thus, in her submission, only gifts made within one year before the death of the deceased would be included in the net value of the estate of the deceased. In my view, ss. 20 and 21 are quite distinct as s. 21 refers specifically to *inter vivos* gifts (i.e. gifts made while the deceased was alive) and “unreasonably large dispositions of real or personal property” the value of which exceeded the consideration received by the deceased. These are quite distinct from gifts *mortis causa* (i.e. gifts to take effect upon death) and deposits and dispositions set out in s. 20 of the Act. I can go no further than this in interpreting s. 20 and s. 21 of the Act until specific assets are raised and a determination will be made as to the applicable section of the Act before concluding that a particular asset is included in the net value of the deceased’s estate.

[9] The costs of this application shall be in the cause.

VEALE J.