

SUPREME COURT OF YUKON

Citation: *Estate of Carey (Re)*, 2019 YKSC 33

Date: 20190628
S.C. No. 05-P0085
Registry: Whitehorse

RE: THE ESTATE OF BARTON MYLES CAREY, DECEASED

Before Madam Justice S.M. Duncan

Appearances:

Mark E. Wallace

Counsel for the applicants, Randal Carey and
Wendel Carey

Cindy Carey

Self-representing respondent

Darrell Carey

Self-representing respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] This case is about whether or not there should be a court order for the sale of the property described as Lot 1321, Quad 105 D/14, Plan No. 95-75, at km 1446 Alaska Highway (the “Property”) that was owned by Barton Carey, who died in 2005. The decision requires an interpretation of the testamentary intention of Barton Carey; the duties of the executrix, his sister Cindy Carey; and the role of the court in authorizing a sale.

[2] Barton Carey had four siblings. Two of his siblings, Randal and Wendel, wish to sell the Property; while the other two, Darrell and the executrix Cindy, do not want to sell. Cindy currently lives on the Property and Darrell helped Barton with the land clearing, farming, building and maintenance on the Property as a partner. He also

helped with maintenance after Barton died. A proposal made by Cindy to buy out Randal and Wendel was rejected. The parties disagree fundamentally on the value of the Property. There have been two real estate appraisals that value the Property between \$333,900 and \$420,000. Cindy and Darrell accept the range of the appraisals, while Randy and Wendel believe the property is worth more. This is the main source of the dispute.

ISSUES

- [3] What is the testamentary intention of Barton Carey with respect to the Property?
- [4] What are the duties of the executrix in this situation?
- [5] What is the Court's authority with respect to a sale of the Property?

i) Testamentary intention

- [6] The Court in *Herron Estate v. Herron*, 2000 ABQB 417, explained the determination of the intention of the testator as follows:

11 ...it is clear that the purpose of construing a will is to give effect to the intention of the testator as expressed in the wording of the will. Such intention must be determined from reading the whole will. Effect is given to the testator's intention as ascertained from the express language used in the will.

- [7] In addition, as set out in *Surminsky (Litigation Guardian of) v. Ulmer Estate*, 2000 SKQB 209, quoted in *Tomochko Estate v. Wilchuk*, 2017 SKQB 381 ("Tomochko Estate") at para. 17, the testator's choice of executor should be considered in determining intention. The Court wrote: "Presumably the testator has appointed those in whom he has confidence to give effect to his wishes and a court should interfere only where it is clear that the confidence was misplaced. ..."

[8] Barton Myles Carey passed away on October 15, 2005. His last will and testament was dated August 29, 2005. The will appointed Cindy Carey as the executrix of Barton's estate. The beneficiaries are Randal, Wendel, Darrell and Cindy, Barton's four siblings. On April 27, 2006, probate of the estate was granted.

[9] The estate includes the Property. It is approximately 160 acres and is zoned agricultural. At the time of Barton's death approximately 80 acres had been cleared and crops were being grown. There is a residence in the form of a trailer on the Property.

[10] On July 25, 2006, Cindy in her role as executrix of the estate transferred title to the Property into her name with the consent of Wendel and Randal to prevent it from being seized as a result of Wendel's debt. This transfer was on the understanding that ultimately all four siblings would benefit equally from the Property. Title remains in Cindy's name despite attempts by Randal and Wendel to have it transferred into their names over the last 12 years.

[11] Barton's will provides that the assets are to be distributed as follows:

Sell property and equipment and give Darrell Carey approx. \$30,000.00 to pay for loan (if property is not sold before my death). Pay all bills that are outstanding. Sell the computer, sell or use the bed, boat dingie, the Truck and Antique dishes goes to Cindy and divide up or sell the Kitchen Dishes.

When property is sold and equipment divide into 4 equal parts:- Darrell, Randy, Wendel and Cindy. Cindy will also give the appropriate fee to the Cancer Society. The 4 siblings will get together and decide what to do with the property. (as written)

[12] Randal and Wendel say the intention of the will is clear: Barton intended the Property be sold and all four siblings would benefit equally, once Darrell has been paid the \$30,000.

[13] Cindy does not disagree that the Property belongs to all four siblings equally. She says however, that Barton wished that the Property be kept in the family if possible. She relies on the part of the will that says “the 4 siblings will get together and decide what to do with the property.” She notes that Barton’s ashes and their father’s ashes are spread there.

[14] Darrell also wishes the Property to remain in the family. He notes he worked hard and provided funds to help farm and maintain the Property when Barton was alive and to maintain the trailer and improve the Property after his death.

[15] Cindy and Darrell agree they can work out an arrangement for sharing the Property between them and they seek to buy out the other two siblings. Randal and Wendel have rejected Cindy’s offer, which is based on a valuation of the Property at \$390,000, minus \$7,500 each, representing their share of the \$30,000 that is to go to Darrell. They believe the Property is worth more than the valuations and they are not willing to wait for up to 18 months to receive the second half of the payments from Cindy, one of the conditions of Cindy’s offer.

[16] The case of *Tomochko Estate* is helpful to consider for the issue of testamentary intention because of its factual similarities. In that case, there were four children, all of whom were executors and beneficiaries. The Court concluded that the testator mother desired common decisions where at all possible; each child to have a voice; and a solution which met each of her children’s needs and interests, if possible (para. 41).

Further, at para. 47, the Court held:

It is no stretch of logic to conclude that a parent’s wishes for their family after they have passed is for them to get along and have peace. Disagreement over the estate is anathema to their desires and intentions. Helen [the testator mother]

went to considerable length to equip her children as executors and beneficiaries with equal say to achieve peace amongst themselves.

[17] There is some evidence (although not as much as in Tomochko Estate) of Barton's desire to have the siblings get along and make decisions together through the wording "the 4 siblings will get together and decide what to do with the property." His choice of Cindy as the executor and Darrell as the default executor, provides some additional insight into his intent, given their stronger connections to the Property. This choice suggests that his preference was to keep the Property in the family if possible. On the other hand, the words "sell property" and "when property is sold" appear expressly in the will and, on their own, do not leave much doubt about their meaning. The express words in the will ("when property is sold and equipment divide into 4 equal parts:- Darrell, Randy, Wendel and Cindy") make it clear that Barton wanted each of his siblings to benefit equally from the Property, with the exception of Darrell to whom he bequeathed an additional \$30,000 in recognition of his contributions to the Property. Effecting the testamentary intention must balance these two factors. I will set out my finding on intention below after consideration of the other two issues.

ii) Duties of the executrix

[18] The duties of the executrix include ensuring the testator's intention is fulfilled. Sections 36 and 37 of the *Trustee Act*, R.S.Y. 2002, c. 233, allow for the executor to sell real property in an estate and s. 39 of that *Act* provides that where no specific person is appointed in a will to conduct the sale, the executor may do so. There are no provisions in the *Trustee Act* or the *Estate Administration Act*, R.S.Y. 2002, c. 77, that set out conditions on the authority to sell provided to the executor.

iii) Court Authority to Order a Sale

[19] Section 34 of the *Judicature Act*, R.S.Y. 2002, c. 125, allows the Court to order a sale of real estate in any matter relating to real estate where it appears necessary or expedient that the real estate be sold.

Court order for sale of real estate

34 When in any cause or matter relating to real estate or any interest therein it appears necessary or expedient that the real estate or interest or any part thereof should be sold, the Court may order it to be sold and any party bound by the order and in possession of the estate or interest, or in receipt of the rents or profits thereof, shall deliver up the possession or receipt to the purchaser or any other person thereby directed.

[20] Rule 46 of the *Rules of the Supreme Court of Yukon* has very similar wording to the *Judicature Act* and provides:

Where in a proceeding it appears necessary or expedient that property be sold, the court may order the sale and may order a person in possession of the property or in receipt of the rents, profits or income from it to join in the sale and transfer of the property and deliver up the possession or receipt to the purchaser or person designated by the court.

[21] Rule 46 also allows the Court to provide directions it thinks just for the purpose of effecting a sale, including appointing the person who is to have conduct of the sale, fixing a reserve or minimum price, and authorizing a person to enter upon any land or building for the purpose of the sale.

CONCLUSION

[22] The testator's intent in this case is for all four siblings to benefit equally from the Property. This can only happen if the Property is sold, or, if not sold, those beneficiaries who do not live on the Property or benefit from it, are paid their share of its value. I

agree with Randal and Wendel that there has been an inordinate delay between the date of probate and this application.

[23] I find that the intention of the testator is to sell the Property but in a way that preserves the relationship among the siblings to the extent possible.

[24] Looking at the express language of the will, reading the whole of it, and considering the choice of executor and default executor, I find that Cindy, and Darrell, if he wishes, should have an opportunity to buy out their brothers.

[25] The disagreement among the siblings is the value of the Property. Randal and Wendel believe that the best value will be obtained by putting the Property on the market for sale, while Cindy and Darrell are willing to accept the appraisal amounts and have offered a buy-out amount that is towards the high end of the appraised values.

[26] I order that for the buy-out purpose the Property be valued at \$377,850 (which is the median between the lowest appraisal amount and the highest appraisal amount) and Cindy (and Darrell if he wishes) be provided with a time-limited opportunity to make an offer to buy out the others at that price. In other words, Cindy (and Darrell if he wishes) shall be given until August 31, 2019 to offer to buy out Randal's and Wendel's share of the purchase price of the Property at the amount of the valuation noted above. The amount of the buy-out shall be reduced by their share of the \$30,000 that is to go to Darrell – i.e. \$7,500 each. If Cindy is unable to make the offer, or complete the purchase within 60 days of the offer, then the Property will be put on the market for sale.

[27] The following additional terms taken from the draft order provided at the hearing of this application shall be part of the order for sale if the buy-out does not occur:

- i. If no offer to purchase Randal's and Wendel's shares of the Property is made by August 31, 2019, or such offer is made and accepted but not completed within 60 days of August 31, by Cindy and/or Darrell Carey, Randal Carey has exclusive conduct of the sale and is at liberty to list the Property for sale until such further order of the Court, and to do all things incidental thereto, including to list the same with one or more duly licensed real estate agents or firms, to post signs on the Property indicating that the Property is offered for sale, to accept any offer to purchase, subject to the approval of the Court and to pay such real estate agent or firm who may arrange a sale of the Property on this Court's approval of said sale, earned commission based on the gross selling price, such commission to be at a rate not exceeding six percent of the first \$150,000 and three percent on the balance of the gross selling price.
- ii. Any person or persons in possession of the Property, do permit, on reasonable notice, any duly authorized agent on behalf of Randal Carey thereafter, to post signs on the Property indicating that the Property is for sale, to inspect and appraise the Property and its interior and to show the Property and its interior to any prospective purchaser or purchasers, or any duly authorized real estate agents or other parties deemed necessary by Randal Carey, to aid in the marketing process, between 9 a.m. and 8 p.m. on any day of the week.
- iii. Any sale shall be subject to the approval of this court, unless agreed to by all parties.

iv. In the event that the Property is vacant or becomes vacant at any time during the course of this proceeding, Randal Carey or any duly authorized agent shall be entitled to enter onto the Property and into the buildings on the Property and to change the locks in order to preserve and secure the Property and to do all things reasonably incidental thereto. Randal Carey shall not be deemed to be a mortgagee in possession by virtue thereof.

[28] I recognize that s. 39 of the *Trustee Act* authorizes the executor to conduct the sale of real estate that is part of the estate. However, in this case, given the executrix's stated preference to retain and continue to live on the property, it is not appropriate for her to be responsible for the sale.

[29] Costs may be spoken to if necessary.

DUNCAN J.