

Citation: Grigg v. Berg and others
2000 BCSC 36

Date: 20000111
Docket: A982136
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

DOROTHY GRIGG

PLAINTIFF

AND:

DAVID EMIL BERG, EXECUTOR OF THE LAST WILL AND
TESTAMENT OF GEORGE IRVING BERG, DAVID EMIL BERG,
JIM ROBERT STOKES, KATHLEEN MARY STOKES, SUSAN
DIANE DUNCAN AND MARIANNE TERESA STOKES

DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE SCARTH

(IN CHAMBERS)

Counsel for the Plaintiff:

James G. Carphin
and Gillian M. Calder

Counsel for the Defendant,
David Emil Berg, Executor of the
Last Will and Testament of George
Irving Berg:

Rhys Davies, Q.C.
and Julia Lawn

Place and Date of Hearing:

Vancouver, B.C.
June 16, 1999

Further Written Submissions Filed:

September 9 and
October 1, 1999

[1] The question before the Court is whether s. 2 of the Wills
Variation Act, R.S.B.C. 1996, c. 490, infringes the right to

equality under s. 15(1) of the Canadian Charter of Rights and Freedoms because it gives the right to seek relief under the Act to a testator's wife, husband or child but does not give the same right to a person who was in a "marriage-like relationship" with the testator .

[2] Section 2 of the Wills Variation Act provides as follows:

2. Despite any law or statute to the contrary, if a testator dies leaving a will that does not, in the court's opinion, make adequate provision for the proper maintenance and support of the testator's wife, husband or children, the court may, in its discretion, in an action by or on behalf of the wife, husband or children, order that the provision that it thinks adequate, just and equitable in the circumstances be made out of the testator's estate for the wife, husband or children.

[3] Section 1 and subsection 15(1) of the Charter provide:

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[4] The plaintiff Dorothy Grigg ("Mrs. Grigg") seeks declarations that s. 2 of the Wills Variation Act violates s. 15(1) of the Charter on the ground of marital status and cannot be saved by s. 1 of the Charter, and that the appropriate remedy under s. 24(1) of the Charter is to read into s. 2 of the Wills Variation Act a definition of spouse that includes persons living in "marriage-like relationships".

[5] Subsection 24(1) of the Charter provides:

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

[6] In her affidavit filed in support of the application Mrs. Grigg deposes that she is 65 years of age. Following her divorce in 1982 she met the late George Irving Berg ("Mr. Berg") in the summer of 1983. They began living together in October, 1984 in a home on East 20th Avenue in Vancouver which was owned by Mr. Berg. According to Mrs. Grigg she and Mr. Berg shared equally in making small purchases for the house.

[7] Mr. Berg sold the house in 1992 and deposited the sale proceeds into his bank account. From May, 1992 until October, 1992 they lived in a house owned by Mrs. Grigg. On October 10,

1992 Mr. Berg purchased an apartment on Burlington Avenue in Burnaby, using the proceeds of sale from his house. The apartment is registered in Mr. Berg's name. She and Mr. Berg moved into the apartment in October, 1992. According to Mrs. Grigg she shared with Mr. Berg the expense of acquiring new furniture, a new TV, a VCR and a sofa for the apartment. She contributed to the expense of running the household and shared equally in the purchase of food and insurance. Mr. Berg paid for all the utilities.

[8] Mrs. Grigg deposes that she and Mr. Berg lived together in the apartment until January 13, 1995. During that time she did all the ironing, shopping, cleaning, laundry and other activities associated with running the household. Mr. Berg did some yard work and gardening.

[9] According to Mrs. Grigg Mr. Berg's health began to deteriorate in 1991. He developed respiratory problems and suffered from emphysema and bronchitis. In 1993 he was also diagnosed with diabetes. He began to use a wheelchair. He required oxygen. From 1991 until 1995 Mrs. Grigg cared for and nursed him. She prepared meals, did his laundry, bathed him, gave him medical care in connection with his diabetes, cared for his oxygen equipment, took him to his doctors and helped him with his personal affairs.

[10] On January 13, 1995 Mr. Berg moved to an extended care facility on Sussex Avenue in Burnaby. He never returned to live in the apartment. He died on March 6, 1998 at the age of 71.

[11] Whilst Mr. Berg was in the care facility Mrs. Grigg visited him daily and was frequently in touch by telephone.

[12] She states that during their thirteen year relationship she and Mr. Berg were rarely separated. They became engaged in March, 1994 when he asked her to marry him and gave her an engagement ring. Mrs. Grigg deposes:

We held ourselves out publicly as husband and wife.
Our relationship was one of permanence and
interdependence.

[13] Mr. Davies, Q.C., on behalf of the executor of the late Mr. Berg's estate, told the Court that the plaintiff's recitation of facts is in dispute. The executor leads no contradictory evidence, however. For the purpose of deciding the Charter issue raised on this application I accept that Mrs. Grigg and Mr. Berg had a relationship analogous to marriage from October, 1984 until Mr. Berg's death in March, 1998.

[14] Mr. Carphin, on behalf of Mrs. Grigg, told the Court that under Mr. Berg's will Mrs. Grigg is to receive \$10,000, the contents of the apartment and the right to reside in the apartment for the three year period following Mr. Berg's death. According to Mr. Carphin's Outline dated February 26, 1999 the gross value of Mr. Berg's estate was disclosed by the executor as being \$499,425. Mrs. Grigg's net worth is approximately \$220,000. Her total annual income is approximately \$12,000.

[15] Mrs. Grigg claims that Mr. Berg's will does not make adequate provision for her proper maintenance and support. She wishes to apply for relief under s. 2 of the Wills Variation Act but is unable to do so because she is not the testator's "wife, husband or child". So she seeks a remedy under s. 24(1) of the Charter which will have the effect of enabling her to bring an action for relief under s. 2 of the Wills Variation Act by virtue of the "marriage-like relationship" she had with the late Mr. Berg.

[16] The real issue between the parties is whether s. 2 of the Wills Variation Act violates s. 15(1) of the Charter.

[17] On the hearing of the application Mr. Carphin told the Court that both the provincial Attorney-General and the federal Attorney General were duly served with notice under the Constitutional Question Act, R.S.B.C. 1996, c. 68, and advised that they would not be appearing in this matter. Mr. Davies told the Court that if s. 2 of the Wills Variation Act violates s. 15(1) of the Charter the executor takes no position on whether s. 2 is saved by s. 1 of the Charter. Thus, no submissions were made with respect to s. 1 of the Charter although much argument was directed toward the question of what remedy was available to the plaintiff. Nonetheless, the Court must, if it finds that s. 2 of the Wills Variation Act violates s. 15(1) of the Charter, address the question of whether s. 2 is "demonstrably justified in a free and democratic society" before it can declare the section unconstitutional. As Madam Justice McLachlin (now C.J.C.), in delivering the judgment of herself, Sopinka, Cory and Iacobucci JJ. in *Miron v. Trudel*, [1995] 2 S.C.R. 418, wrote at p.502:

A finding of denial of equal benefit of protection of the law on a discriminatory ground under s. 15(1) does not mean that the law is unconstitutional. The Court must go on to examine whether, notwithstanding its discriminatory character, the law or government action in question is "demonstrably justified in a free and democratic society". The complainant bears the burden of showing discrimination under s. 15(1). This established, the burden shifts to the state or the party seeking to uphold the law to justify the discrimination.

[18] Subsequently to the hearing of the application the Legislature, on July 14, 1999, passed Bill 100 - 1999, the Definition of Spouse Amendment Act, 1999. Royal Assent was given on July 15, 1999. This Bill amends s. 1 of the Wills Variation Act by adding a definition of "spouse", and as well amends, amongst other sections, s. 2 of the Wills Variation Act by striking out "wife, husband" wherever it appears and substituting "spouse". Up to the present time the Definition of Spouse Amendment Act, 1999 has not come into force.

[19] In his written submissions dated September 29, 1999 and filed on October 1st, Mr. Davies states that if the Court concludes there is a violation of s. 15 of the Charter it is appropriate for the Court to declare that the definition of "spouse" contained in the Definition of Spouse Amendment Act,

1999, S.B.C. 1999, c. 29 be read into the Wills Variation Act.
That definition is as follows:

"spouse" includes a common law spouse as defined in
the Estate Administration Act.

"common law spouse" means either

- (a) a person who is united to another person by
a marriage that, although not a legal
marriage, is valid by common law, or
- (b) a person who has lived and cohabited with
another person, for a period of at least 2
years immediately before the other person's
death, in a marriage-like relationship,
including a marriage-like relationship
between persons of the same gender.

[20] The threshold question to be addressed then is whether s. 2 of the Wills Variation Act as it presently stands, that is, prior to the coming into force of the Definition of Spouse Amendment Act, 1999, infringes on s. 15(1) of the Canadian Charter of Rights and Freedoms on the ground that it discriminates against unmarried partners by denying to them a benefit of the law which it makes available to married partners. In my opinion it does.

[21] The approach to the analysis is set out by McLachlin J. in *Miron v. Trudel*, supra, at p. 485 as follows:

The analysis under s. 15(1) involves two steps. First, the claimant must show a denial of "equal protection" or "equal benefit" of the law, as compared with some other person. Second, the claimant must show that the denial constitutes discrimination. At this second stage, in order for discrimination to be made out, the claimant must show that the denial rests on one of the grounds enumerated in s. 15(1) or an analogous ground and that the unequal treatment is based on the stereotypical application of presumed group or personal characteristics. If the claimant meets the onus under this analysis, violation of s. 15(1) is established. The onus then shifts to the party seeking to uphold the law, usually the state, to justify the discrimination as "demonstrably justified in a free and democratic society" under s. 1 of the Charter.

[22] Based on the decision of the Supreme Court of Canada in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, Mr. Justice Iacobucci, writing for the Court in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at p. 520, identified the three key elements to a discrimination claim under s. 15(1) of the Charter as being: differential treatment, an enumerated or analogous ground, and discrimination in a substantive sense involving factors such as prejudice, stereotyping and disadvantage.

[23] The approach to a s. 15(1) analysis adopted by the Supreme Court of Canada in *Andrews, Miron and Law* has been applied by the Court in other cases, such as *Egan v. Canada*, [1995] 2 S.C.R. 513, and *Vriend v. Alberta*, [1998] 1 S.C.R. 493 and *M. v. H.*, [1999] 2 S.C.R. 3, and is the approach which must be adopted in the case at bar.

[24] In *Law*, at p. 548, Iacobucci J. wrote:

The approach adopted and regularly applied by this Court to the interpretation of s. 15(1) focuses upon three central issues:

- (A) whether a law imposes differential treatment between the claimant and others, in purpose or effect;
- (B) whether one or more enumerated or analogous grounds of discrimination are the basis for the differential treatment; and
- (C) whether the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee.

[25] Mr. Davies concedes, correctly in my judgment, that the first two of these "central issues" are "satisfied" by the plaintiff, that is, the impugned law imposes differential treatment between the claimant and others, in effect; and an analogous ground of discrimination, marital status, is the basis for the differential treatment.

[26] Plainly, s. 2 of the *Wills Variation Act*, by permitting only the wife, husband or children of a testator to bring an action against his or her estate for maintenance and support, draws a clear distinction between a person in a married relationship with a testator and a person, like Mrs. Grigg, in a "marriage-like", albeit an unmarried, relationship with a testator.

[27] The basis for the differential treatment is marital status. Marital status is an analogous ground of discrimination under s. 15(1) of the Charter: *Miron v. Trudel*, supra, at p. 502 (per McLachlin J.). At p. 497 of *Miron McLachlin J.* stated:

... The question is whether the characteristic of being unmarried – of not having contracted a marriage in a manner recognized by the state – constitutes a ground of discrimination within the ambit of s. 15(1). In my view, it does.

[28] On the other hand Mr. Davies submits that the plaintiff has not "satisfied" the third "central issue" identified by Iacobucci J. in *Law*, that is, she has not demonstrated that s. 2 of the *Wills Variation Act* has a purpose or effect that is discriminatory within the meaning of the equality guarantee contained in s. 15(1) of the Charter. In short, the differential treatment does not discriminate.

[29] Mr. Davies refers to the third of the three broad inquiries required to be made by the Court in determining a discrimination claim under s. 15(1) enunciated in *Law, supra*, at p. 549, and argues that s. 2 does not withhold a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration.

[30] As put by Madam Justice McLachlin and Mr. Justice Bastarache for the majority in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at p. 221:

Having concluded that the distinction made by the impugned law is made on an analogous ground, we come to the final step of the s. 15(1) analysis: whether the distinction at issue in this case in fact constitutes discrimination. In plain words, does the distinction undermine the presumption upon which the guarantee of equality is based – that each individual is deemed to be of equal worth regardless of the group to which he or she belongs?

[31] Mr. Davies submits the answer to that question is "No".

[32] The restricting of access to the Wills Variation Act to widows and widowers withholds a benefit from the surviving member of a "common law relationship", but that is not because of stereotypical attitudes to such relationships, it is said. Such relationships are not held in the disregard that they may have been 30 years ago. Mr. Davies submits that common law relationships are becoming more and more prevalent and are no longer considered inferior to a marriage entered into under the various marriage acts. This is shown, it is said, by the adoption in common usage over the past years of the word "partner" in place of the word "husband" or "wife", and by the statistical evidence considered by the Alberta Court of Appeal in *Taylor v. Rossu* (1998), 161 D.L.R. (4th) 266, at p. 277-78. As the Court observed at p. 277:

... it is clear that common law unions are becoming more prevalent.

[33] Thus, Mr. Davies submits, the legislative distinction in issue does not violate the plaintiff's human dignity. The Wills Variation Act has not struck at the dignity of people by not extending marital status to common law relationships. The distinction is not discriminatory.

[34] In my judgment this issue has been determined by the Supreme Court of Canada in *Miron v. Trudel*.

[35] In *Miron* the Court dealt with a policy of automobile insurance which extended accident benefits to the "spouse" of the policy holder. The effect was to deny coverage to unmarried couples living in a common law relationship. The majority of the Supreme Court of Canada held that the policy

terms which were prescribed by the Insurance Act, R.S.O. 1980, c. 218, discriminated against the claimant, who was the unmarried common law spouse of the policy holder, because they excluded unmarried partners from accident benefits available to married partners.

[36] At p. 497 of Miron Madam Justice McLachlin identifies the issue in these words:

What then of the analogous ground proposed in this case – marital status? The question is whether the characteristic of being married – of not having contracted a marriage in a manner recognized by the state – constitutes a ground of discrimination within the ambit of s. 15(1). In my view, it does.

[37] Her Ladyship's reasons for this conclusion are set out at p. 497 et. seq. as follows:

First, discrimination on the basis of marital status touches the essential dignity and worth of the individual in the same way as other recognized grounds of discrimination violative of fundamental human rights norms. Specifically, it touches the individual's freedom to live life with the mate of one's choice in the fashion of one's choice. This is a matter of defining importance to individuals. It is not a matter which should be excluded from Charter consideration on the ground that its recognition would trivialize the equality guarantee.

Second, marital status possesses characteristics often associated with recognized grounds of discrimination under s. 15(1) of the Charter. Persons involved in an unmarried relationship constitute an historically disadvantaged group. There is ample evidence that unmarried partners have often suffered social disadvantage and prejudice. Historically in our society, the unmarried partner has been regarded as less worthy than the married partner. The disadvantages inflicted on the unmarried partner have ranged from social ostracism through denial of status and benefits. In recent years, the disadvantage experienced by persons living in illegitimate relationships has greatly diminished. Those living together out of wedlock no longer are made to carry the scarlet letter. Nevertheless, the historical disadvantage associated with this group cannot be denied.

A third characteristic sometimes associated with analogous grounds – distinctions founded on personal, immutable characteristics – is present, albeit in attenuated form. In theory, the individual is free to choose whether to marry or not to marry. In practice, however, the reality may be otherwise. The sanction of the union by the state through civil marriage cannot always be obtained. The law; the reluctance of one's partner to marry; financial, religious or social constraints – these factors and

others commonly function to prevent partners who otherwise operate as a family unit from formally marrying. In short, marital status often lies beyond the individual's effective control. In this respect, marital status is not unlike citizenship, recognized as an analogous ground in *Andrews*: the individual exercises limited but not exclusive control over the designation.

Comparing discrimination on the basis of marital status with the grounds enumerated in s. 15(1), discrimination on the ground of marital status may be seen as akin to discrimination on the ground of religion, to the extent that it finds its roots and expression in moral disapproval of all sexual unions except those sanctioned by the church and state.

Of late, legislators and jurists throughout our country have recognized that distinguishing between cohabiting couples on the basis of whether they are legally married or not fails to accord with current social values or realities. As the *amicus curiae* has pointed out, 63 Ontario statutes currently make no distinction between married partners and unmarried partners who have cohabited in a conjugal relationship. For example, the right to spousal maintenance is not conditioned on marriage: see Part III, Family Law Act, R.S.O. 1990, c. F.3, which establishes a right to spousal support for those who have cohabited continuously for a period of not less than three years or who have cohabited in a relationship of some permanence and who have a child. Other provinces have adopted similar benefit thresholds. In the judicial domain, judges have recognized the right of unmarried spouses to share in family property through the doctrine of unjust enrichment: *Pettkus v. Becker*, [1980] 2 S.C.R. 834; *Peter v. Beblow*, [1993] 1 S.C.R. 980. All this suggests recognition of the fact it is often wrong to deny equal benefit of the law because a person is not married.

These considerations, taken together, suggest that denial of equality on the basis of marital status constitutes discrimination within the ambit of s. 15(1) of the Charter. If the evil to which s. 15(1) is addressed is the violation of human dignity and freedom by imposing limitations or disadvantages on the basis of the stereotypical application of presumed group characteristics, rather than on the basis of individual capacity, worth or circumstance, then marital status should be considered an analogous ground. The essential elements necessary to engage the overarching purpose of s. 15(1) – violation of dignity and freedom, an historical group disadvantage, and the danger of stereotypical group-based decision-making – are present and discrimination is made out.

[38] Mr. Davies submits that the factual underpinning of the

reasoning in *Miron v. Trudel* does not bind this Court and, accordingly, it is open to this court to reach a conclusion different than that reached by the majority in *Miron*.

[39] I need not decide that question. I conclude that on the material before me, the "constitutional facts" relied upon by McLachlin J. have not been refuted. It is, of course, open to this Court to take judicial notice that in present-day society in Canada common law relationships are more prevalent: *Law*, supra, at p. 558, and thus to infer that the social stigma attaching to such unions is less. But that is a matter recognized by McLachlin J. in her reasons at p. 498: "In recent years, the disadvantage experienced by persons living in illegitimate relationships has greatly diminished". There is in my view no basis on the material before me not to adopt the reasoning of the Court in *Miron*.

[40] I see no essential difference between the denial of accident benefits to a common law spouse under a policy of automobile insurance the terms of which are prescribed by provincial legislation and the denial of relief to a common law spouse under the Wills Variation Act. The denial in both cases is based solely on the analogous ground of marital status.

[41] In my judgment s. 2 of the Wills Variation Act is discriminatory within the meaning of s. 15(1) of the Charter.

[42] It is now necessary to decide whether s. 2 is saved by s. 1 of the Charter. As McLachlin J. noted in the *Miron* case at p. 493.

If a violation of s. 15(1) is established, the burden shifts to the party upholding the denial of equality to justify it under s. 1 of the Charter. Section 15(1) and s. 1 of the Charter must be read together. Neither, in itself, is complete. Together, they provide a comprehensive equality analysis that provides effective remedies against discrimination while preserving the power of the state to deny protections and benefits to individuals where differences between them justify it.

[43] Here, neither the Attorney-General nor the defendant executor has attempted to justify the impugned provision under s. 1 of the Charter. No material has been filed on this application which would enable the Court to make that determination. This is probably sufficient for the conclusion that s. 2 cannot be saved by the application of s. 1 of the Charter: *Re Gruending* (1999), 170 D.L.R. (4th) 541 (Alta. Q.B.), at p. 556.

[44] There is, however, a more compelling reason which leads me to conclude that s. 2 of the Wills Variation Act is not saved by s. 1 of the Charter and that is the passage by the Legislature of the Definition of Spouse Amendment Act, 1999, S.B.C. 1999, c. 29, which, in effect, ameliorates the constitutional discrimination contained in s. 2.

[45] I conclude:

1. Section 2 of the Wills Variation Act infringes the right to equality under s. 15(1) of the Canadian Charter of Rights and Freedoms and is not saved by the application of s. 1 of the Charter. Section 2 is thus unconstitutional.
2. The appropriate remedy is to "read into" the Wills Variation Act the definition of "spouse" contained in the Definition of Spouse Amendment Act, 1999, as follows:

"spouse" includes a common law spouse as defined in the Estate Administration Act,

"common law spouse" means either

- (a) a person who is united to another person by a marriage that, although not a legal marriage, is valid by common law, or
 - (b) a person who has lived and cohabited with another person, for a period of at least 2 years immediately before the other person's death, in a marriage-like relationship, including a marriage-like relationship between persons of the same gender.
3. The declaration that s. 2 of the Wills Variation Act is unconstitutional is suspended for one month to permit the Lieutenant Governor in Counsel to bring the Definition of Spouse Amendment Act, 1999 into force.
 4. The plaintiff Mrs. Grigg is entitled to her costs against the defendant estate on Scale 3.

"Scarth J."