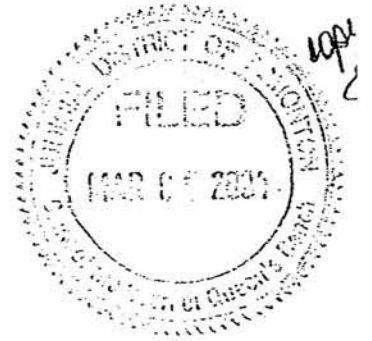


Court of Queen's Bench of Alberta

Citation: Broder v. Broder, 2004 ABQB 175



Date:

Docket: 9703 12949

Registry: Edmonton

Between:

**Earl Broder, George Broder, Richard Broder, Margaret MacPhee, Doris Bibaud,
Luella Adam and Doris Bibaud and George Broder, personal representatives
of the Estate of Edmund Broder, also known as Ed Broder, deceased**

- and -

Don Broder

Plaintiffs

Defendant

**Reasons for Judgment
of the
Honourable Madam Justice M.B. Bielby**

DECISION

[1] The Personal Representatives of the Estate of Ed Broder are entitled to possession of and directed to sell what is said to be the World's Record Non-Typical Mule Deer Trophy. While they took no action to recover the trophy for almost 25 years after their brother removed it without permission, their cause of action did not begin to run until 1997 when it came to their attention, for the first time, that he was claiming the trophy to be his own and thus engaging in an act inconsistent with the estate's right to it.

[2] The Statement of Claim was issued prior to the appointment of the Personal Representatives by some of the beneficiaries of the estate. The Personal Representatives were not appointed until after the expiry of the limitation period then applicable in an action for replevin.

This action is nonetheless not statute-barred, nor a nullity through application of s. 61(1) (b) of the *Limitation of Actions Act*, R.S.A. 1980, c. L-15 ("the *Limitation of Actions Act*") or, alternatively, through application of the principle of "relation back". While the principle of "relation back" is normally available only in regard to actions taken in advance of the granting of letters of probate by parties named by will as executors, it applies in this case to save the action because that action was commenced in advance of the granting of Letters of Administration for the purpose of preserving estate assets.

[3] Laches does not operate to bar the claim notwithstanding the long delay in the absence of any action by the Personal Administrators or any beneficiary amounting to waiver and in the absence of any evidence of reliance on the delay by the Defendant other than in relation to monetary expenditures made by him. Those expenditures are compensated by granting to him the right to recover the first \$21,995 of the net sale proceeds from the trophy.

FACTS

[4] Ed Broder shot a deer in 1926 which yielded what is said to be the World's Record Non-Typical Mule Deer Trophy. Ownership of that trophy forms the subject matter of this litigation.

[5] The parties are his seven children, the Defendant being his eldest son and the Plaintiffs his other sons and daughters. He died in December, 1968, his wife having died the previous year. No formal application for Letters of Administration was sought or obtained for Ed Broder's estate until 2001, well after this litigation had commenced. The Plaintiffs considered that he had died intestate. No suggestion was made of a possible will until the month preceding the commencement of this trial, 6 and one-half years into this litigation when the Defendant produced a purported holograph will pursuant to which he alone was made beneficiary of his father's personal possessions.

[6] Ed Broder left relatively few personal effects. Aside from the trophy which had hung on the wall of the family home since it had been built in the 1940s his estate primarily consisted of an old Model T car, chaps and a saddle, some firearms and miscellaneous small personal effects. The family home had belonged to Mrs. Broder who by will permitted the Plaintiff Richard Broder to purchase the house from the estate which he did.

[7] The parties agree that an informal meeting of all 7 living siblings was held a few months after their father's death, at a date I find to have been in April 1969 when the disposition of his effects was discussed. George Broder was chosen by consensus to be in charge with Don Broder to assist him. Those present agreed that an effort should be made to find a buyer for the trophy and to place an advertisement in *Field & Stream* magazine for that purpose.

[8] A letter was sent, signed by George and Don Broder, requesting each of the siblings to contribute \$40 to the cost of the magazine advertisement relating to the trophy. Each one contributed that sum with the ad being placed and running in the October 1971 issue of *Field &*

An administrator can recover in trespass or trover against a wrongdoer who has seized or converted goods before the grant. The reason for this is that otherwise there would be no remedy for the wrongdoing.

[81] In *McEllistrum v. Etches*, *supra* Laidlaw J.A. stated as well:

The doctrine of 'relation back' does not apply, in my opinion, to every case and is not available 'for all purposes'. It is my considered opinion that it is applicable only in cases where it is necessary to protect the estate in the interval between the death of the intestate and the grant of letters of administration.

See also *In the goods of Elizabeth Pryse*, [1904] P. 301 at 304 where the English Court of Appeal stated that a person who is eventually appointed administrator may bring an action for trespasses committed in the interval and, more recently, *Bellegarde v. Murdock* (1978), 25 N.S.R. (2d) 375 (C.A.) at para. 17.

[82] The Defendant led evidence from his then counsel, Joseph Kueber to the effect that Mr. Kueber wrote to Plaintiff's counsel in April, 1997 advising that he would advance a limitations defence but neither of his letters expressly raised the issue of the Plaintiffs' standing to sue at that time which, in any case, was before the original Statement of Claim was filed. Therefore, those letters create no estoppel which would prevent the application of the principle of relation back.

[83] That the action was brought for the benefit of the estate is not in question. The prayer for relief in both the original and amended Statement of Claim does not suggest any relief inconsistent with this result. Further, the evidence of the Plaintiffs, which I have accepted over that of the Defendant, was that their father repeatedly told a number of them during his lifetime that after his death he wanted the trophy sold and the sale proceeds divided among them, which is consistent with the conclusion the action was brought for the benefit of the estate.

[84] The effect of this action was in part to prevent Don Broder from disposing of the trophy during the course of litigation. I note that the Statement of Claim did request relief which included an interim injunction restraining the sale of the trophy and for an order directing its interim return. It is not clear whether an application for either type of interim relief was actually made but the trophy has clearly remained with Don Broder throughout. The risk of unauthorized disposal potentially increased after March, 1997 when the Plaintiffs demanded the return of the trophy with the result that Don Broder knew for the first time that his siblings challenged his right to call it his own.

[85] While clearly it took a significant period of time for the Plaintiffs to obtain Letters of Administration and they in fact made no efforts in that direction for several years after the action was commenced, I conclude that the Plaintiffs brought this action promptly for the purpose of ensuring the ownership of the trophy was litigated, once it came to their attention that ownership was in dispute. That litigation required that the trophy be preserved through all steps prerequisite to that issue being determined, including the proper appointment of administrators.