

CANADA / JUDGMENT

Almeida Estate (Re)

2023 BCSC 2135

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 2135 Almeida Estate (Re) IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Almeida Estate (Re), 2023 BCSC 2135 Date: 20231206 Docket: P20774 Registry: Duncan In the Matter of the Estate of Carlos Luis Batista Almeida, Deceased Before: Master Harper (As Registrar) Reasons for Decision Counsel for the Applicant, Jeanine Almeida: O. Grant Counsel for the Attendee, Dalila Reimer: L. Jamieson Places and Dates of Hearing: Victoria, B.C. September 25 and November 6, 2023 Place and Date of Decision: Duncan, B.C. December 6, 2023 TABLE OF CONTENTS Introduction.. 3 The Reference.. 3 The Format of the Hearing.. 4 Legal Framework.. 4 Issues for Determination.. 5

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Introduction

- [1] These reasons address the passing of accounts of the executor, Jeanine Almeida, regarding the estate of her father Carlos Luis Batista Almeida (the "testator"). The testator died April 8, 2021. His will named his five children as beneficiaries, namely, Jeanine, Almerinda, Linda, Dalila, and Carlos.
- [2] The total amount of the estate assets is \$242,503.71 consisting of an account at a credit union, a vehicle, and jewellery. In addition, the testator held a joint account with Jeanine at the time of death in the amount of \$701,000 representing proceeds of sale of real property. Because the funds are held in a joint account, the funds do not form part of the estate assets. Jeanine and the beneficiaries all agreed that the funds held in the joint account were for the benefit of all the beneficiaries and should be divided among them equally as if they formed part of the testator's estate.

- [3] Jeanine prepared informal accounts in June, 2022, and she (as beneficiary), Carlos, and Linda approved the accounts, but Almerinda and Dalila did not. The Reference
- [4] The order of Master Muir made January 4, 2023 directed a reference to the registrar to: pass the accounts covering the period April 8, 2021 to November 21, 2022; recommend a fair and reasonable allowance to Jeanine with respect to her administration of the estate for the same period for her care, pains, troubles and time expended in and about the administration; certify their findings with the result that the registrar's certificate will be binding on the beneficiaries without further order of the court.
- [5] Only one beneficiary, Dalila, objected to the accounts. Almerinda did not approve the accounts in writing, but did not present any evidence, nor did she appear at the hearing to object. The Format of the Hearing
- [6] The evidence on the reference consisted of affidavits of Jeanine, Linda, and a legal assistant at the law firm of counsel for Jeanine. Jeanine gave oral evidence at the hearing and was cross-examined by counsel for Dalila. Dalila did not tender any evidence, either by affidavit or orally.
- [7] In oral submissions at the close of the hearing, counsel for Dalila submitted that I should decline to pass the accounts. I queried the utility of such an outcome given that the beneficiaries would surely wish to have the estate wrapped up and their gifts paid out to them. I directed Dalila to submit written submissions and granted leave to Jeanine to submit reply submissions.

Legal Framework

- [8] On a passing of accounts, the function of the registrar is to determine whether the executor has exercised their duties under the will properly and in accordance with the law: RE: Estate of Fanny Cleverley, 2000 BCSC 1454 at para. 25.
- [9] There is an inherent conflict of interest between the trustee and the trustee as beneficiary. A prudent trustee manages this inherent conflict by not placing themselves in a position where their duty and their own self-interest collide: *Phipps v. Boardman*, [1967] 2 A.C. 46 (U.K.H.L.) at para. 23.
- [10] With respect to executor's remuneration and charges for legal services, the legal principles are set out in *Bernhard v. Wist*, 2011 BCSC 101:
- [100] Section 88 of the Trustee Act, [R.S.B.C. 1996, c. 464] governs executor's remuneration. The executor is entitled to:
- a) a maximum of 5 per cent of the gross [aggregate] value of the estate;
 - b) a maximum of 5 per cent of the income earned during the administration of the estate; and
 - c) an annual "care and management fee" of 0.4% of the average market value of the assets.

- [101] However, the percentages stipulated in s. 88 are not necessarily to be applied in every calculation of remuneration. The percentages provide a rough guide to assist in appropriate computation of the executor's remuneration: *Re Turley Estate* (1955), 16 W.W.R. 72 (B.C.S.C.). In the end, the court must be satisfied that the compensation claimed "bears some reasonable relationship to the work and responsibility involved": *Re La Chance*, [1955] 15 W.W.R. 141 (B.C.S.C.).
- [102] Various factors are to be considered when determining the appropriate executor's fee. Those factors include the magnitude of the estate, the care and responsibility involved, the time occupied in the administration, the skill and ability displayed and the success (or lack thereof) achieved in the administration: *Re McColl Estate* (1967), 65 W.W.R. 110 (B.C.S.C.). Similar, but not the same, types of considerations apply with respect to a care and management fee: *Re Pedlar* (1982), 34 B.C.L.R. 185 (S.C.).
- [103] In terms of calculating the capital fee, the gross aggregate value of the estate is the realized value of the original assets of the estate.
- [104] If the estate suffers any losses as a result of an executor's actions (or inaction), the executor is obliged to repay the estate, with interest. The interest is calculated pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79, unless there is a finding that the executor has used estate monies for his or her own benefit. In that circumstance, the executor may be required to pay compound interest (see *Waters, D.W.M., Waters' Law of Trusts in Canada*, 3rd edition at pp.1228-1229).
- [105] An adverse inference may be drawn against an executor's reliability if he or she fails to produce relevant documents as requested by the beneficiaries or ordered by the court: *Booty v. Hutton*, [1996] B.C.J. No. 2286 (S.C.).
- [106] The executor is entitled to be reimbursed from the estate for a solicitor's bill for legal services rendered provided that those legal costs have been reasonably and properly incurred and do not relate to work that could have been performed by the executor. Fees paid for any services that could have been performed by the executor should be deducted from the executor's remuneration: *Re Lloyd Estate* (1954), 12 W.W.R. (N.S.) 445.
- [107] Furthermore, an executor is not entitled to employ a solicitor to do work that the executor could do, such as ordinary letters, attendances, paying insurance premiums and the like, attending to banking matters and other ordinary duties that do not require the skill or expertise of a solicitor: *Sharp v. Lush* (1879), 10 Ch. 468 applied in *Re Smith*, [1972] 2 O.R. 256 (Surr. Ct). Issues for Determination
- [11] Dalila has put the following matters at issue:
- 1) The repayment of the loan from Jeanine to the testator;
 - 2) The claim for executor's remuneration;

- 3) Money transferred from the estate for expenses relating to real property owned by the testator in Portugal (specifically, in the Azores);
- 4) Legal fees incurred by Jeanine as executor.

[12] I pause here to comment on the principles of proportionality that permeate the Supreme Court Civil Rules, including Rule 25-13 (remuneration and passing of accounts). The object of the Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits: Rule 1-3(1). Securing this result includes conducting the proceeding in ways that are proportionate to the amount involved, the importance of the issues in dispute, and the complexity of the proceeding: Rule 1-3(2). Although it is true that Dalila had the right to put Jeanine to the test of proving the loan amount and justifying her remuneration, the total amount involved in the dispute, by my estimation, and after hearing all the evidence and considering the arguments is no more than about \$8,000. By standing on her rights and mistrusting Jeanine, Dalila has caused unnecessary expense to the estate.

1) The Loan

[13] In 2005, Jeanine and her husband borrowed \$100,000 from the testator and the testator's wife (the testator's wife predeceased the testator). The loan is evidenced by a promissory note that provides for the payment of interest at the Bank of Canada prime interest rate, calculated monthly not in advance. The promissory note further provides that the loan will be repaid in monthly instalments "every 1st of the month which will include the interest of the current balance owing plus a portion of the principle [sic]".

[14] Jeanine made payments of principal and interest up to August 2018, by which date the balance outstanding was \$56,528.55. Jeanine made no further payments of principal or interest until the full amount outstanding of \$56,528.55 (by her calculation) was paid in March 2021.

[15] Dalila had power of attorney over the testator's finances for some years (the evidence is unclear as to how many years) up to and into 2016. Jeanine then had power of attorney up until the testator's death. During the time that Dalila had power of attorney, she would know how the loan payments were being made, including whether interest was being paid correctly, and if she had any complaint on behalf of the testator, she could have told Jeanine. Dalila chose not to give evidence at the hearing. There was no evidence that Dalila objected to the loan payment calculations before the testator's death. There was no evidence about why the testator changed his attorney from Dalila to Jeanine, nor whether that change makes any difference to the issues for determination before me.

[16] In any event, granting Jeanine a power of attorney was a strong indication that the testator trusted her with his money.

- [17] The evidence supports a finding that the loan plus interest was paid up to August 2018. Jeanine says that the testator waived any further interest payments. Dalila says there is no proof of this agreement.
- [18] Dalila objects to Jeanine's calculation of the interest. Dalila has not provided any evidence as to what the correct calculation of interest should be. In written submissions, counsel for Dalila submits that interest should be paid for the period August 2018 to March 2021. During the hearing, I asked counsel for Dalila how much money was at issue on the interest calculation dispute. He replied that it was about "a couple of thousand dollars".
- [19] Although there is no written agreement between Jeanine and the testator as to the waiver of interest from March, 2018, nor any written acknowledgement of the testator that the loan had been repaid in full as of March, 2021, I am satisfied on the basis of Jeanine's evidence that the testator waived further interest from March 1, 2018. The lack of formality is typical of the father-daughter financial arrangements and typical of the informal loan arrangements between other beneficiaries and the testator. It is significant that only Dalila disputes the loan amount calculation. The other beneficiaries either actively approved the calculation by approving the informal accounts, or took no position by not actively opposing the passing of accounts.
- 2) Executor's Remuneration
- [20] Jeanine claims \$12,125 representing 5% of the value of the estate (\$242,503.71) as her remuneration. She is not seeking a care and management fee.
- [21] She seeks to justify the full amount available under the Trustee Act, R.S.B.C. 1996, c. 464, ss. 88 and 89 by referencing the amount of the joint account that she considers forms part of the estate assets.
- [22] Jeanine further justifies the fee by arguing that Dalila has unnecessarily prolonged the proceedings.
- [23] Dalila's position is that the fee should be no more than 2½ percent, amounting to \$6,000. The Magnitude of the Trust
- [24] This was a small estate consisting of a credit union account, some jewellery and a vehicle. I was not provided with any case authority that addresses whether assets of a testator that held jointly with another person should, or should not, be included in calculating the magnitude of the trust. It is common ground that the joint account was to be considered part of the testator's estate. From the evidence, it appears that the account was held jointly to avoid having to include it in the estate assets for probate purposes, thus, avoiding additional probate fees. By my calculation, if the \$701,000 had been included in the statement of assets and liabilities, the additional probate fee would have been approximately \$9,200. If the joint account were included in calculating the magnitude of the trust, the 5% claim for remuneration would be a maximum of \$47,175.19 $[(\$242,503.71 + \$701,000) \times 5\%]$. In my view, Dalila cannot have it both ways. She benefitted from the joint account not being

included in the statement of assets and liabilities because that reduced the probate fees. She cannot now argue that the \$701,000 should be excluded from consideration in determining the magnitude of the trust. The Care and Responsibility Involved

- [25] I am satisfied based on the written and oral evidence adduced on the reference that Jeanine exercised due care and responsibility. The Time Occupied in the Administration
- [26] Jeanine was required to spend a lot of time on the administration. She did not keep time records contemporaneously, but retrospectively estimated she has spent 280 hours on administration (Jeanine's affidavit #5 sworn September 19, 2023, para. 24). Jeanine was not cross-examined at the hearing on the hours she claims she spent.
- [27] Linda attests to the "many hours" Jeanine has spent in her role as executor. The Skill and Ability Involved
- [28] Jeanine exercised appropriate skill and ability. The Success Achieved in the Final Result
- [29] This is an interim passing of accounts and therefore the final result is not known. However, it is not difficult to predict the final result as the estate assets are ready to be distributed. Therefore, I conclude there has been success thus far. Conclusion on Remuneration
- [30] The remuneration claimed is reasonable. Jeanine performed her role as the executor capably and was required to respond to the continual requests for information from Dalila. Dalila's incessant demands for information required Jeanine to spend more time than she otherwise needed to spend on administering this modest estate ("modest" only if the joint account is excluded; "moderate" if the joint account is included). I assess Jeanine's remuneration at \$12,125.
- 3) Money Transferred from the Estate for Expenses relating to the Azores Property
- [31] The testator dealt with the Azores property by a separate testamentary document in Portugal. Although no evidence was given on how the Azores property was to be divided amongst the testator's beneficiaries, I was advised through the written submissions that Jeanine would get 36.66% and the four other children would get 15.83% each.
- [32] The Azores property has required infusions of cash for its upkeep and repairs and maintenance. Jeanine's evidence is that the testator wanted her to maintain the Azores property. There was extensive damage done to the Azores property that needed to be repaired. All the beneficiaries knew about this from correspondence from the lawyer in Portugal handling the Portuguese will (email from Portuguese lawyer to all beneficiaries and Dalila's counsel April 30, 2022). All of the beneficiaries have an interest in the Azores property and would surely want the Azores property to be adequately maintained.
- [33] Jeanine has paid approximately \$36,620 up to and including November 2022 (the end date for this reference) for the upkeep of the Azores property. I am advised that a further \$20,000 has been spent on the Azores property since November 2022.

- [34] Jeanine is agreeable to adjusting the proportionate share of the funds transferred to Portugal to reflect each beneficiary's proportionate share of the Azores property. Counsel for Jeanine suggests that the accounting be deferred until the Azores property is sold. I do not think much turns on the timing of when the proportionate shares are calculated.
- 4) Legal Fees incurred by Jeanine as Executor
- [35] Jeanine has incurred legal fees of \$10,451.23 as of May 2022. These fees were listed in the statement of assets and liabilities
- [36] Dalila has not provided any objections. Counsel for Dalila, in his written submissions, submits that Jeanine's lawyer's invoice has not been presented and no explanation of the account has been provided. However, the legal fees were brought to the attention of counsel for Dalila on May 31, 2022. Further, counsel for Jeanine requested by email dated January 25, 2023 that Dalila confirm what items from Jeanine's affidavit filed November 22, 2022 she took issue with and Dalila did not identify the legal fees as being at issue. Accordingly, counsel for Jeanine has not provided an affidavit of justification for the legal fees. Counsel for Jeanine submits that the order for the reference does not specifically refer to a review of the legal bills. However, the reference is "to pass the accounts". In my view, the accounts include the legal fees incurred.
- [37] It would be wildly out of proportion to the amount involved in the legal bills to require a further hearing to review the legal bills under the Legal Profession Act, S.B.C. 1998, c. 9.
- [38] The onus was on Dalila to object to the legal fees and she did not.
- [39] The legal fees incurred appear reasonable to me especially given the lengths to which Dalila has insisted Jeanine go to satisfy her demands for more information. However, if Dalila insists on a further review of the legal fees that is what will have to happen. Dalila's Legal Fees
- [40] Jeanine acknowledges that beneficiaries have no duty to approve the executor's accounts. However, beneficiaries who refuse to approve accounts without identifying specific or legitimate issues, or who otherwise unnecessarily delay the process of passing the accounts, risk having costs awarded against them: *Re Chevretils Estate*, 2010 BCSC 753; *Re Curtis Estate*, 2003 BCSC 2073 and *Re Haworth Estate*, 2015 BCSC 1530.
- [41] Linda objects to having to pay any portion of Dalila's legal fees incurred since June 2022 when Linda and Carlos approved the accounts. In Linda's view, Dalila's repeated requests for information and refusal to approve the accounts and executor's remuneration have unnecessarily run up legal costs for the estate. If Dalila's legal fees are paid from the estate, the beneficiaries who approved the accounts will be required to contribute to legal fees that could have, and should have, been avoided. I agree with this position. It should have been apparent to Dalila by no later than June 2022 that the accounts were reasonable. Therefore, my decision is that Dalila will be solely responsible for the legal fees she incurred after June 2022. Dalila will be entitled to be indemnified for the legal fees she incurred as special costs

up to June 2022 from the estate as agreed or as assessed. Costs of the Passing of Accounts

[42] Costs of the passing of accounts will be assessed as special costs paid from the estate. I urge Jeanine and the beneficiaries to reach agreement on the costs of the passing of accounts.
Certification

[43] I certify that the accounts are passed covering the period April 8, 2021 through November 21, 2022 with the following adjustments:

- a) the allocation of the payments made to maintain and repair the Azores property will be 36.66% to Jeanine, and 15.83% to each of the remaining beneficiaries;
- b) the above-noted allocation of payments will be accounted for on the disposition of the Azores property;
- c) the executor's fee is set at \$12,125 for the period April 8, 2021 through November 21, 2022;
- d) Jeanine is entitled to her costs of the passing of accounts on a special costs basis payable from the estate;
- e) Jeanine will be reimbursed for the legal fees she incurred as executor from the estate as agreed or assessed;
- f) Dalila's legal fees up to but not beyond June, 2002 will be assessed as special costs and paid from the estate. "Master Harper"

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