

CANADA / JUDGMENT

Barbieri Estate v. White

2024 BCSC 1357

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Barbieri Estate v. White,

2024 BCSC 1357

Date: 20240729

Docket: S04978

Registry: Abbotsford

Between:

Ricardo Joseph Barbieri, on behalf of the Estate of Lily Diane Barbieri

Plaintiff

And

Teresa Diane White

Defendant

Before: The Honourable Justice Tammen

Reasons for Judgment

Counsel for the Plaintiff:

J. Maryniuk

Counsel for the Defendant:

M. Misner

Counsel for Steven Barbieri:

D. Hepburn

Place and Date of Hearing:

New Westminster, B.C.

April 11-12, 2024

Place and Date of Judgment:

Abbotsford, B.C.

July 29, 2024

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Introduction and Overview

- [1] The applicant, Teresa Diane White, applies to have her brother, Ricardo Joseph Barbieri removed as executor and trustee of the estate of Lily Diane Barbieri, who is the deceased mother of both parties. Lily died on November 7, 2018. She was predeceased by her husband and survived by Teresa, Rick, and their brother, Steven Barbieri. Meaning no disrespect, since the parties share similar last names, I will refer to them by their first name for ease of reference.
- [2] Lily left a Will executed on December 14, 2007, in which she directed that Rick and Teresa were to act jointly as executors (the "Will").
- [3] The most important terms of the Will were these:
- a) Steven was granted a life estate for a property on which he ran a business, unless he decided to discontinue business operations, at which time the property devolved to the estate; and
 - b) The residue of the estate was to be divided equally among Ricardo (who I will refer to as "Rick"), Steven and Teresa.
- [4] On May 1, 2019, probate of the estate was granted to Rick and Teresa.

- [5] On July 11, 2019, Rick filed a notice of application in the probate proceedings, seeking, among other things, an order that Teresa be removed as executor and trustee of the estate, and that he become the sole executor. The factual basis for Rick's application related to transfers of money and real property Teresa had made to herself after the grant of probate. Those transfers apparently included funds from accounts held jointly by Teresa and her mother at the time of Lily's death. Of central importance from Rick's perspective was a property at 24467 54 Avenue, Langley, BC (the "54 Avenue Property"), which was held in joint tenancy by Teresa and Lily when Lily died. Teresa subsequently took steps to have title registered solely in her name.
- [6] Rick's application to remove Teresa as executor was resolved by consent order, pronounced September 10, 2019. The result of that order was that Rick became the sole executor of Lily's estate. The consent order included a term which required Rick to provide the other beneficiaries (Teresa and Steven) with an up-to-date accounting of the estate on the 15th day of every second month, commencing October 15, 2019.
- [7] On September 27, 2019, Rick, in his capacity as executor, commenced an action seeking a declaration that the estate owns 75% of the 54 Avenue Property, and various ancillary orders in aid of that declaratory relief, including that the property be partitioned and sold.
- [8] As part of that litigation, Rick caused a certificate of pending litigation ("CPL") to be registered against the 54 Avenue Property. It appears from Teresa's affidavits that, although the property was originally purchased as an investment property, to be rented to third parties, Teresa now resides there.

Summary of Litigation History

- [9] Since the filing of Rick's action, Rick and Teresa have been embroiled in extremely acrimonious litigation on several fronts, with hearings spread throughout Lower Mainland Supreme Court locations, and one trip to the Court of Appeal so far.
- [10] The actions of Rick which led to the present application are also the subject of a separate civil action brought by Teresa against Rick. Those actions involve Rick's transfer of estate property to himself and Steven on two occasions, in February 2020 and March 2021.
- [11] Teresa commenced that action in July 2022, and it is scheduled for trial in September 2024.
- [12] In the course of providing the court-ordered estate accounting to Teresa, Rick disclosed documents over which he later asserted privilege. Rick then brought an application seeking a declaration that various documents be returned and that Mr. Misner be disqualified. Justice Blake heard that application over several days and dismissed the majority of the application: *Barbieri Estate v. White*, 2023 BCSC 1176. Rick's appeal to the Court of Appeal was largely dismissed: *Barbieri v. White*, 2024 BCCA 225.

- [13] Teresa remains unsatisfied about the state of the accounting provided by Rick, and more particularly, his failure to pass accounts. Teresa applied for an order that Rick pass his accounts, but was unsuccessful. In dismissing that application, on March 15, 2022, Associate Judge Bilawich noted that there were other proceedings, which in his view should be completed prior to a formal passing of accounts. Importantly, Bilawich A.J. also found that Teresa was receiving detailed accounting from Rick pursuant to the earlier consent order.
- [14] In the subsequent proceedings before Blake J., she noted that Rick led no evidence that he had retained separate counsel to act for him in his different capacities (i.e. beneficiary versus executor) and that he was then claiming blanket privilege over the entirety of the estate legal file.
- [15] In the proceedings before me, Mr. Maryniuk took the position that Bilawich A.J.'s order precludes Teresa from successfully applying for further accounting information from Rick, and from compelling the passing of accounts.
- [16] I note the foregoing simply to flag what in my view are good reasons for Teresa to remain unsatisfied about the extent to which Rick has thus far accounted for his work as executor on behalf of the estate. I also note parenthetically that Rick appears to have utilized the services of in-house bookkeeping personnel at his privately held company to provide accounting services, as opposed to retaining an arm's length accounting firm.
- [17] With respect to the present application, it has a rather tortuous history. Initially, Mr. Maryniuk took the position that the application to have Rick removed should not be heard on its merits for two related reasons:
- a) the application should not have been brought within the probate proceedings, but rather should have been brought by way of petition; and
 - b) the application was an abuse of process, since it sought the same relief which, at least in part, is sought in Teresa's civil action.
- [18] However, at the hearing before me, Mr. Maryniuk consented to my deciding the discrete application regarding removal, as framed by Teresa in her notice of application ("NoA").
- [19] The other issue which arose at the hearing was Teresa's belated reliance on s. 155(2)(c) of the Wills Estates and Succession Act, S.B.C. 2009, c. 13 [WESA], as a basis on which to have Rick removed. That section was not pleaded in the NoA, and Mr. Maryniuk sought and obtained leave to make separate written submissions on it. That led to the exchange and filing of two additional written submissions by each counsel. The reason for the second round was the release of Justice Loo's decision in *Holmes v. Holmes*, 2024 BCSC 737, in which Loo J. interpreted s. 155(2)(c) of the WESA.
- [20] I received written submissions from counsel on April 23, May 3, 15 and 16, 2024.

Merits of the Present Application

- [21] The crux of the matter before me is the manner in which Rick, as sole executor, dealt with two real properties that formed part of the estate. One of those properties is at 23615 Old Yale Road, Langley, BC (the "Old Yale Property"), the other at 3223 240 Street, Langley, BC (the "240 Street Property").
- [22] In late February 2020, Rick incorporated a numbered company, of which he is sole director, and transferred the Old Yale Property to the numbered company for a sale price of \$1,293,500. At no time, either before or after that transaction, did Rick advise Teresa of the sale. Teresa discovered the transfer of ownership sometime later, when she conducted a title search.
- [23] In early March 2021, Rick caused the 240 Street Property to be transferred to Steven, for a sale price of \$2,118,000. This transfer was also done without notice to Teresa.
- [24] Teresa claims that both properties were sold for less than fair market value. Rick's position is that the 240 Street Property was sold at approximately fair market value. As for the Old Yale Property, Rick's position is more nuanced. He claims that it was sold for a price which was based on appraisals he had at the time of transfer. He has subsequently obtained an appraisal with a different value, \$1,743,000. Rick agrees to that higher valuation, but disputes an appraisal obtained by Teresa, which values the property at over \$4 million.
- [25] With respect to both property valuations/transfers, Rick's alternative position is that it is within his sole discretion as executor, pursuant to the terms of the Will, to assign values to all assets, and allocate those assets to any beneficiary, and he was entitled to do so in respect of both properties.
- [26] In the concluding portion of her NoA, Teresa summarizes the basis for her removal application. She submits that Rick has put himself in a conflict of interest with Teresa as "former executor and Estate beneficiary" because he, as executor has:
- (a) transferred the Old Yale Property to his own company resulting in a significant financial benefit to the Executor personally and a corresponding loss to Teresa White as beneficiary of the Estate;
 - (b) engaged in self-dealing or contracting with the Estate for personal financial benefit;
 - (c) intermingled his own assets with Estate assets for personal financial benefit;
 - (d) has demonstrated preference for some beneficiaries (himself and Steven Barbieri) over others (Teresa White);
 - (e) has not acted with honesty and fidelity required of a fiduciary;
 - (f) has demonstrated that he will continue to administer the Estate in a manner that maximises his personal benefit at the expense of Teresa White's interest in the Estate; and

- (g) has failed to provide an adequate accounting of the Estate's assets.
- [27] Rick vigorously opposes the application to have him removed as executor. In that regard, he makes the following submissions:
- (a) The will accords him, as executor, a very broad discretion to retain or convert assets, and to assign valuations to them. He points to the language contained in paras. 9-11, in particular para. 11, which empowers the executor to "allocate any assets that forms part of my estate to any share or interest in my estate. Whatever value my Trustee places on that asset will be final and will bind everyone interested in my estate";
 - (b) The right of the deceased to choose her executor should not be lightly interfered with, and a court should only remove an executor with that choice if there is a very good reason to do so: *Re Wolfe* (1957), 7 D.L.R. (2d) 215 (B.C.C.A.);
 - (c) Removal of Rick is not in the best interests of the beneficiaries. Although it may be what Teresa desires, she is only one of three beneficiaries;
 - (d) On the facts present, any conflict of interest relates solely to past actions of Rick, and does not imperil the assets of the estate;
 - (e) The two property transfers were in specie transfers to two beneficiaries of part of their share of the estate. Rick submits that the broad language of the will empowered him to make such in specie transfers prior to final distribution;
 - (f) An executor should only be removed if they have acted in bad faith or unfairly, and Rick has not done so;
 - (g) There is no necessity to remove Rick as executor because there are adequate assets in the estate to adjust and reapportion entitlement among the beneficiaries if the values placed on the two properties at time of transfer were less than appraised value;
 - (h) The allegation of failure to provide adequate accounting is without merit, in particular because of the order of Associate Judge Bilawich; and
 - (i) Substitution of an alternate trustee is not possible, because there is no evidence that the proposed alternate trustee, Solus Trust Company Limited, consents to act as trustee.
- [28] Steven did not file an application response. However, counsel appeared on his behalf and made brief submissions in support of Rick's position. Counsel for Steven said he had no concerns about Rick's impartiality and ability to continue to administer the estate. Moreover, he was concerned about the additional cost of a third-party executor, such as Solus Trust Company Limited ("Solus Trust").
- [29] The last of Rick's arguments is easily dispensed with. Teresa filed late in the day affidavit material which satisfies me that Solus Trust is willing to act as trustee, if so ordered by the Court.

- [30] As for the various submissions made about adequacy of accounting, and failure to pass accounts, I say this: I do not intend to consider any failure to account by Rick as a basis for his removal. However, I note that one potential salutary effect of an order of removal, if that is what I decide is appropriate, would be the removal of all impediments to Rick passing his accounts. In my view, it is appropriate that Rick do so in a reasonably timely way. It is in the interests of all that the current shroud of secrecy that envelops Rick's expenditures be removed, and some light shone on the accounting of the estate.
- [31] I will address the balance of Rick's submissions when I consider the merits of the application. I accept without reservation that I should not lightly interfere with Lily's choice of executor, and should only order Rick's removal if it is legally necessary to do so: *Klassen v. Cornies*, 2023 BCCA 420 at paras. 98-100. In that regard, I must be guided by what is in the best interests of all the beneficiaries: *Dunsdon v. Dunsdon*, 2012 BCSC 1274 at para. 203.
- [32] As for the reasons advanced by Teresa for removal of Rick, items (a), (b), (d) and (f) listed at para. 26 above are most in need of consideration, and the outcome of this application will likely turn on my assessment of those submissions: *Kyle Estate v. Kyle*, 2016 BCSC 855 at paras. 87-90.

Section 155(2)(c) of the WESA

- [33] However, before I turn to those submissions, I should address s. 155(2)(c) of the WESA:

Distribution of estate

The personal representative of a deceased person must not distribute the estate of the deceased person after the period referred to in subsection (1) without consent of the court if

other proceedings have been commenced which may affect the distribution of the estate.

- [34] As noted, Teresa's NoA did not mention s. 155(2)(c). However, both in written submissions presented at the time of hearing, and in oral submissions, Mr. Misner relied heavily on the subsection. Because of the importance Teresa placed on s. 155(2)(c), I acceded to the request of Mr. Maryniuk that I permit him to make further written submissions on the subsection, and its potential applicability to this motion.
- [35] Mr. Maryniuk delivered his written submissions on April 23, 2024. With them, he included additional evidence, a new affidavit from Rick, and a partial discovery transcript of Teresa. I decline to receive and consider that evidence.
- [36] Mr. Misner delivered his reply submissions on May 3, 2024. In his submissions, Mr. Misner referenced Loo J.'s decision in *Holmes*, in which Mr. Misner was counsel for the unsuccessful party, the plaintiff/respondent. Mr. Misner properly included the *Holmes* decision in his materials. He also included some additional material, an excerpt from *Waters' Law of Trusts*, which, if it were important, should have been presented at the hearing.

- [37] In *Holmes*, Loo J. interpreted s. 155(2)(c) in the context of an application by an executor to be permitted to make an interim distribution from an estate. Justice Loo received full supplemental written submissions on the issue, and ultimately accepted the interpretation of the subsection advocated by counsel for the executor. That interpretation was that the word "distribution" refers to "how the estate is apportioned or divided between the parties": *Holmes* at paras. 36 and 41.
- [38] In his written submissions, Mr. Misner sought to distinguish *Holmes* on the facts. Mr. Maryniuk then sought and obtained leave to file a brief further written submission, addressing the *Holmes* case. That submission was delivered on May 15, 2024.
- [39] Mr. Misner then filed a response submission on May 16, 2024. In that submission, Mr. Misner expanded the basis on which he said *Holmes* was distinguishable, and also submitted that I should not follow *Holmes* under the principle of horizontal stare decisis.
- [40] I cannot accept Mr. Misner's position on this issue. The basic principle of judicial comity requires that I follow a decision of a judge of this Court unless there is a compelling reason not to do so. Such might include: a "palpably wrong" decision; an unconsidered oral decision; failure to consider a binding authority; or, subsequent decisions that have affected the validity of the impugned judgment: *Hansard Spruce Mills Limited (Re)*, [1954] 4 D.L.R. 590, 1954 CanLII 253 (B.C.S.C.); *R. v. Sullivan*, 2022 SCC 19 at para. 75. None of those reasons applies here.
- [41] As noted, Loo J. received full written submissions on the proper interpretation of s. 155(2)(c), and reached a considered decision, which he released as written Reasons for Judgment. Counsel there, as here, were aware of no other decision that had interpreted this section of the WESA.
- [42] I accept and follow the reasoning in *Holmes*, which at its core, is this: "Read as a whole, s. 155 is intended to forestall the paying out of money from an estate if there is an ongoing dispute about who is entitled to what under the will at issue": para. 41.
- [43] I also accept the submission of Mr. Maryniuk that, based on that interpretation of s. 155, Rick was not precluded from making the distributions at issue here. There was no issue as to who was entitled to what under the clear terms of the Will. Subject to the life estate to Steven, the estate was to be divided in equal parts among Rick, Steven and Teresa.
- [44] Rick's action against Teresa would not affect the distribution of the estate. It might affect the value of the estate, depending on the outcome. In any event, that litigation could only increase the value, depending on what percentage, if any, of the 54 Avenue Property is found to form part of the estate. Rick claims, and Teresa does not appear to dispute, that Teresa now concedes that one half of that property is owned by the estate.
- [45] That brings me to the heart of this application, and the reasons advanced by Teresa in her NoA for Rick's removal as executor.

Self-Dealing or Interim Distributions?

[46] The application is brought pursuant to the court's inherent jurisdiction to remove a trustee, and more specifically, the authority of R. 25-14(1)(d) of the Supreme Court Civil Rules:

Rule 25-14 - Applications Relating to Grants

- (1) If there has been an application for estate grant, a person may apply in accordance with Part 8 for an order
- (d) subject to subrule (1.2), removing or substituting a personal representative or, if different, the holder of an authorization to obtain estate information or the holder of an authorization to obtain resealing information

[47] The applicant also relies on ss. 158-159 of the WESA, which read as follows:

Application to remove or pass over personal representative

158(1) In this section, "pass over" means to grant probate or administration to a person who has less priority than another person to become a personal representative.

- (2) A person having an interest in an estate may apply to the court to remove or pass over a person otherwise entitled to be or to become a personal representative.
- (3) Subject to the terms of a will, if any, and to subsection (3.1), the court, by order, may remove or pass over a person otherwise entitled to be or to become a personal representative if the court considers that the personal representative or person entitled to become the personal representative should not continue in office or be granted probate or administration, including, without limitation, if the personal representative or person entitled to become the personal representative, as the case may be,
 - (a) refuses to accept the office of or to act as personal representative without renouncing the office,
 - (b) is incapable of managing the personal representative's or person's own affairs,
 - (c) purports to resign from the office of personal representative,
 - (d) being a corporation, is dissolved or is in liquidation other than a voluntary dissolution or liquidation for the purpose of amalgamation or reorganization,
 - (e) has been convicted of an offence involving dishonesty,
 - (e.1) is an undischarged bankrupt,
 - (f) is
 - (i) unable to make the decisions necessary to discharge the office of personal representative,
 - (ii) not responsive, or

(iii) otherwise unwilling or unable to or unreasonably refuses to carry out the duties of a personal representative,

to an extent that the conduct of the personal representative hampers the efficient administration of the estate, or

(g) a person granted power over financial affairs under the Patients Property Act.

(3.1) A creditor may make an application for an order under subsection (3) (e) or (e.1) only if the creditor has a claim for more than a prescribed amount.

(4) An order of the court removing a personal representative does not remove that person as a trustee.

Appointment of substitute personal representative

159(1) If the court discharges or removes a personal representative, the court

(a) must appoint another person who consents to act as the substitute personal representative, unless

(i) the administration of the estate is complete, or

(ii) the court does not consider a new appointment necessary, and

(b) may, if the personal representative has resigned or is removed as a trustee, concurrently appoint the person referred to in paragraph (a) as trustee under the Trustee Act in place of the trustee being discharged or removed.

(2) The court may require a substitute personal representative under subsection (1) to provide security if security is required by the Supreme Court Civil Rules.

(3) A substitute personal representative appointed under subsection (1)

(a) has the same authority that the former personal representative had in respect of the estate,

(b) must perform the same duties and is subject to the same obligations as were imposed by law on the former personal representative, and

(c) on application without notice, is entitled to receive a grant of probate or administration, as the case may be, without the return of the previous grant if the court is satisfied that the return of the previous grant would be impossible or impractical.

(4) A grant of probate or administration to a former personal representative is revoked on the appointment of a substitute personal representative.

[48] Of overarching importance to the outcome of this application will be the characterization of Rick's transfer of the two properties to himself and Steven, in particular the transfer of the Old Yale Property. That transfer arguably amounts to impermissible self-dealing by a trustee. If I find that to be so, such a finding would be strong plank in Teresa's submission that Rick should be removed. Alternatively, if I accede to Rick's argument that both transfers

were in specie interim distributions, permitted by the terms of the Will, that would weigh heavily in his favour.

[49] The proscription against self-dealing was recently considered by Justice Kirchner in *Dallas Estate (Re)*, 2024 BCSC 213. In that case, the executor of an estate brought an application for court approval to purchase estate property at a price to be determined via independent appraisal. At paras. 9-10, Kirchner J. said this about the central issue:

As I see it, this application comes down to this question: can the Court authorize a trustee who is also a beneficiary of the trust to buy trust property at an independently appraised value without exposing the property to sale on the open market and over the objection of the only other beneficiary? In my view, the answer is clearly no.

It is well settled as a general rule that a trustee, who owes a fiduciary duty of loyalty to the beneficiaries, cannot purchase trust property as doing so would put the trustee in a conflict of interest: *Dewberry Estate (Re)*, 2023 BCSC 1325 at para. 8. An exception may be made to this general rule where all beneficiaries of full capacity give their informed consent to the proposed transaction but that is not present in this case since Dean opposes the proposed sale.

[50] *Dewberry Estate* is a decision of Justice Thompson, also involving an application by an executor to "self-deal", by purchasing property from the estate. At para. 8, Thompson J. noted the general rule that inasmuch as an estate administrator owes a fiduciary duty to all beneficiaries of the estate, the use of the fiduciary power to dispose of property to the trustee is "an obvious conflict of interest." Justice Thompson then cited authority for that proposition, including *Waters' Law of Trusts*.

[51] Justice Thompson also noted at para. 10 of *Dewberry Estate* that the onus is on the trustee to satisfy the Court that the self-dealing is in the best interests of the beneficiaries, and that the burden is "substantial." In the case of a proposed sale below market value, absent consent of all beneficiaries, the application would almost certainly fail.

[52] Here, there is no issue that Rick transferred the Old Yale Property to himself without first obtaining Teresa's consent. Equally, Rick now concedes that the price he paid was less than the appraised value. At no time did Rick seek court approval for the sale.

[53] It thus becomes necessary to address Rick's submission that the transfers were in specie interim distributions to two of the three beneficiaries.

[54] Before turning to the heart of that issue, I wish to comment on Rick's submissions concerning the broad discretion afforded him as trustee under the terms of the Will. In the main, I agree with those submissions. For example:

- The Will defines "discretion" as "sole and uncontrolled discretion to the extent permitted by law";

- The language in respect of converting or retaining assets is permissive (using the word "may"), as opposed to mandatory;
- Paragraph 9 states that when the trustee administers the estate, the trustee "may convert my estate or any part of my estate into money, and decide how, when, and on what terms"; and
- Paragraph 11 confers the trustee with broad discretion to allocate and value assets, as previously noted.

[55] Despite that broad language and seemingly vast discretion vested in the executor, unless I am persuaded that the transfer to himself was an in specie interim distribution, Rick cannot be relieved from his obligation as executor not to purchase estate property. Such self-dealing would not be "permitted by law". I also think it is worth noting that what Lily clearly envisaged when she drafted the Will was co-trustees, both Rick and Teresa. There was thus a built-in check and balance to Lily's testamentary wishes.

[56] I do not accept that Rick's purchase of the Old Yale Property was an in specie interim distribution. Rather, I find that his submission is an ex post facto attempt to justify his actions. My reasons for that conclusion follow.

[57] The main affidavit in which Rick addresses the matter is his 4th affidavit, sworn on January 29, 2021. That affidavit says nothing about in specie interim distributions. Rather, Rick consistently speaks of purchasing the Old Yale Property. It is only Rick's application response, filed September 6, 2023, which speaks of an in specie distribution.

[58] At paras. 17-21 of the 4th affidavit, under the heading "Three Sentimental Properties", Rick gives reasons why one of those properties was important to each of the siblings, and the reasons each wished to possess that property. He says Lily supported that notion prior to her death. Obviously, the Will is silent on this score, with the exception of the life estate provision in respect of Steven's property.

[59] Paragraphs 132-151 of the 4th affidavit speak about the Old Yale Property purchase. Specifically, para. 132 states:

After Teresa had stepped down as co-executor, I told our probate lawyer, Clint Harcourt, that I would like to buy the Old Yale Property to one of my companies.

[60] Rick recounts how he transferred the purchase funds to Mr. Harcourt's trust account, and that they were later returned to him.

[61] Paragraphs 145-147 address Rick's failure to advise Teresa that he intended to "purchase" the property, and note that Teresa did not advise Rick and Steven about her transfer of the 54 Avenue Property to herself.

[62] Paragraph 148 refers to legal advice Rick received from Mr. Harcourt at the time of the transfer, and although Rick clearly waives privilege, he says little about the substantive advice. He mainly refers to things he was "not" advised to do or not do.

- [63] At para. 149, Rick deposes: "I have always intended to pay a fair value for the Old Yale property."
- [64] From the totality of Rick's evidence on the critical issue there can be no doubt that he was engaged in self-dealing, acting in his dual capacity of executor and beneficiary, purchasing estate property. He did so without obtaining consent from the other beneficiaries, indeed in the case of Teresa, without notifying her about the property transfer. Rick now concedes that he did not pay fair market value for the property, and in my view that would have been apparent to him at the time. Importantly, Rick acknowledges that his plan to purchase estate property began to take shape after Teresa was removed as co-trustee.
- [65] Apart from his affidavit evidence, Rick's overall course of conduct speaks volumes about his intentions. If he were actually making interim distributions from the estate to the beneficiaries, there would have been no reason to keep that secret from Teresa. The two transfers could, and likely should, have been done simultaneously. Instead, the transfer to Steven occurred more than one year after Rick purchased the Old Yale Property.
- [66] Any in specie interim distributions would, certainly should, have been memorialized in a more formal fashion than was done here. That would have necessitated notice to all beneficiaries about what was being done; proper and final valuations being assigned to the properties; and, some robust interim accounting to clearly show the remaining entitlement of the beneficiaries to estate assets. Rick did none of those things, but rather effected the transfers absent Teresa's knowledge or consent.
- [67] Finally, Rick's affidavit evidence about the three sentimental properties does not fully align with his conduct, when considered against the backdrop of his submissions on interim distribution. The net effect of Rick's actions is that both he and Steven now own the property which, according to Rick, was important to each of them. They enjoy clear title, and can do with the property what any fee simple owner could do. Not so for Teresa.
- [68] Rick has caused a CPL to be placed on the 54 Avenue Property. He maintains his position that it should be partitioned and sold. If his intentions were truly to ensure that each of the three siblings could possess the property that was important to them, he would have behaved very differently in relation to Teresa and the 54 Avenue Property. There would be no principled reason that the CPL could not be removed, and his pleadings amended to omit the reference to partition and sale. Even on Rick's primary position, Teresa owns a quarter interest in that property. At most, the remaining 75% of the appraised value would need to be designated as part of Teresa's inheritance.
- [69] In sum, I find that Rick has engaged in impermissible self-dealing, by purchasing estate property, for less than market value, and without notifying at least one of the beneficiaries.

Should Rick be Removed as Executor and Trustee?

- [70] The remaining question is whether Rick should be removed as executor based on his conduct. In my view, the answer to that question is "yes."
- [71] I accept that I should attempt to respect the wishes of the testator in her choice of executor. However, in this case, that choice has already been partly negated, with Rick's application to remove Teresa, who agreed to step down in response.
- [72] Although I make no finding of bad faith on the part of Rick, he has clearly favoured certain beneficiaries over others, himself and Steven over Teresa. Rick's overall course of conduct cannot be said to be in the best interests of all the beneficiaries.
- [73] I am satisfied that Rick's actions to date have imperilled estate assets. Although it is difficult to quantify the ongoing risk to estate assets, there is certainly a more than moderate risk that Rick will repeat his conduct in the future. The tone of his affidavits and their overall content give me little confidence in that regard. Portions of Rick's affidavits speak about his interpretation of Lily's wishes and how that interpretation features in his decision making as executor. Rick's animus toward Teresa is apparent, and his overall conduct in this litigation has been extremely adversarial.
- [74] Importantly, apart from the "sentimental value", Rick's affidavits do not give other reasons for his purchase of the Old Yale Property, nor do they say why it was important that he purchase the property at that time.
- [75] For those reasons, and also taking past conduct as a reliable predictor of future conduct, I am satisfied that there is at least a moderate risk to the remaining assets of the estate if Rick remains as executor. That, too, weighs in favour of his removal: Dunsdon at para. 202, citing *Conroy v. Stokes*, [1952] 4 D.L.R. 124, 1952 CanLII 227 (B.C.C.A.).
- [76] I cannot at this juncture accept the submission that irrespective of who is executor, there are sufficient assets in the estate to make all three beneficiaries whole at the end of these proceedings. That is so for various reasons, most of them within Rick's control. First of all, the accounting done at Rick's behest by his staff reveals a broad fluctuation in the value of the estate. There has never been, to my knowledge, any independent third-party accounting done. Moreover, Rick has not passed his accounts, nor provided Teresa with sufficiently detailed and organized accounting data to make an assessment possible. One major variable is the fair market value of the Old Yale Property at time of transfer. Based on one appraisal obtained by Teresa, there remains a possibility that Rick has already received more than one-third of the total value of the estate. All the accounting data relied on by Rick at this hearing was obviously biased, assuming a good deal of success by him in the litigation, and failing to account for other possibilities.
- [77] At a minimum, it is high time, more than five-and-a-half years after Lily's death, that there be a proper accounting done, and that the executor fully gather and value the assets of the estate. I have no confidence of those critical steps occurring if Rick remains as executor.

Conclusion

- [78] For the reasons above, I grant the application to remove Ricardo Joseph Barbieri as executor and trustee under the last will and testament of Lily Diane Barbieri.
- [79] In his place, I appoint Solus Trust as administrator of the estate pending litigation.
- [80] I direct that all of the estate's assets, real and personal, be vested in Solus Trust.
- [81] With respect to costs, Teresa has been successful on this application. She is entitled to her costs of this application at Scale B, in any event of the cause, against Rick personally. I make no order of costs against Steven.
- [82] I exclude from the costs order the events post-April 12, 2024, specifically all steps related to the provision of additional written submissions. I agree with Rick's submissions that the manner in which that discrete issue, related to s. 155 of the WESA, was presented by Teresa disentitles her to costs for that portion of the application. Teresa could have amended her NoA once she decided to rely on s. 155. Equally, she could have alerted Mr. Maryniuk of her reliance on that section well in advance of the oral hearing. Finally, Teresa was wholly unsuccessful in her attempts to persuade me that I should decline to follow the Holmes case.

"Tammen J."

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