CANADA / JUDGMENT

Blitz v. Blitz

2002 BCSC 633

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2002 BCSC 633

Citation:	Blitz v. Blitz
Date:	20020426 2002 BCSC 633
Docket:	D090585 Registry: Vancouver IN THE SUPREME COURT OF BRITISH COLUMBIA
BETWEEN:	MAUD BLITZ PETITIONER
AND:	ANDRE BLITZ RESPONENT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE KIRKPATRICK

(IN CHAMBERS)

Counsel for the Petitioner:

F.E. Maxwell, Q.C.

T.H. Hopman

Counsel for the Estate of the Respondent:

R.L. Basham, Q.C.

B. Cabott

Date and Place of Hearing:

April 5, 2002

Vancouver, B.C.

[1] This is a divorce proceeding which has a long, complex, and highly acrimonious history. Lamentably, it is necessary to review some of that history.

[2] The almost 24 year marriage of Mr. and Mrs. Blitz effectively ended in about July, 1993 when they separated. They were divorced in January, 1996. Between November 5, 1997 and June 27, 1998, Mr. Justice Drost heard 21 days of trial. The principal issues concerned the determination of family assets, both in Canada and in Europe, and child support. Judgment was reserved to August 17, 1998.

[3] Certain issues were unresolved by the judgment. There was a further two day hearing before Mr. Justice Drost on March 8 and 9, 1999. Judgment was reserved to August 10, 1999.

[4] In the meantime, Mr. Blitz died while in Holland on vacation. By his will dated October 6, 1995, Mr. Blitz appointed his friends Anita Gans, Jane Shadley and Susan Hilton as co-executors of his will. Under the terms of the will, Mr. Blitz's son, Maurice, is an income and capital beneficiary of a $100,000 fund set aside for his medical education. Ms. Gans was granted the use of Mr. Blitz's primary residence for her lifetime together with the sum of $300 per week adjusted according to the Cost of Living Index. The residue of the estate was directed to be set aside for the benefit and maintenance of Mr. Blitz's son, Marcell, who suffers from a disability.

[5] On July 28, 1999, shortly after Mr. Blitz's death, counsel for Mrs. Blitz obtained an ex parte order from Associate Chief Justice Dohm which granted leave to re-open the trial as well as an order appointing Steven Barnes, C.A., a licensed trustee in bankruptcy, as the person to take possession and hold in trust all of the assets in which Mr. Blitz had an interest. By the same order, the estate of Mr. Blitz was enjoined from dealing with any family assets or any other property at issue in the matrimonial action. Furthermore, Ms. Gans was restrained from transferring or disposing of any assets at issue in the matrimonial proceedings.

[6] On December 4, 2000, Mr. Justice Drost ordered that the re-opened trial would be heard peremptorily on January 18, and 19, 2001. By the same order, Mr. Justice Drost made numerous directions and orders relating to the disclosure of documents and correspondence by Ms. Gans as executrix. The court ordered again that Ms. Gans be restrained from dealing with any assets that might be in issue. She was granted leave to apply for payment out of any monies held by the Receiver, Mr. Barnes.

[7] On December 5, 2000, probate of Mr. Blitz's will was granted to Ms. Gans, Ms. Shadley and Ms. Hilton having renounced their right to act as co-executors. An application by Maurice Blitz for administration of the estate with will annexed was dismissed by the court some time before December 5, 2000.

[8] On January 3, 2001, Ms. Basham, who was counsel for Mr. Blitz at trial, advised the court by letter that she had been asked to continue to represent the estate with respect to this action. She was prepared to do so, but only if she were paid. That would require a variation of the restraining orders then in place. She asked the court to provide some direction as she was aware of the impending hearing set for January 18 and 19 and the necessity, in her submission, that the estate be represented.

[9] On January 18, 2001, Ms. Basham and her associate Ms. Thompson appeared before Mr. Justice Drost as friends of the court to advise that the estate, by reason of the orders restraining any dealing with any assets in the matrimonial proceeding, was unable to retain and pay counsel. Mr. Justice Drost in his reasons rejecting any further delay in the hearing of the re-opened trial, noted that there had been a number of applications and opportunities for Ms. Gans to comply with the disclosure orders made. Almost 18 months had passed since the order of Associate Chief Justice Dohm re-opening the trial. Mr. Justice Drost was not prepared to adjourn the matter. Accordingly, Ms. Basham and Ms. Thompson withdrew. Mr. Justice Drost proceeded to hear the re-opened trial in the absence of counsel representing the estate of Mr. Blitz.

[10] On January 19, 2001, Mr. Justice Drost made four orders which, in material respects, altered the trial order by, among other things, vesting assets in Mrs. Blitz's name.

[11] In February 2001, probate counsel for the estate notified counsel for Mrs. Blitz, as well as Mr. Barnes and Ms. Gans that $880,000 U.S. dollars had been located in a bank account in Mr. Blitz's name at Bank Hapoalim in Israel.

[12] On May 16, 2001, counsel for the parties and Mr. Barnes appeared before me on what was essentially a continuation of a hearing initially heard in March, at the conclusion of which counsel advised that they hoped that they might work out a solution to the issues before the court, which included the issue of the estate's ability to retain counsel. At the conclusion of the hearing on May 16, I made the following orders:

1. That the prior Orders of this Court restraining the disposition of assets be varied to permit Anita Gans, the Executrix of the estate of Andre Blitz, to retain counsel to represent the estate, both in this Court and in any appeals from this Court, and to permit Anita Gans to pay those fees from the Estate of Andre Blitz, in accordance with the following terms of this Order.

2. Pending further Order and receipt of the sum of approximately $800,000.00 US from Israel, the solicitor for the Estate shall provide monthly accounts for legal fees to the Court, particularized as to the work done and time spent, and provide to the solicitor for the Petitioner a general description of the work done and fees charged, with as much particularity as is possible without breaching any applicable solicitor client privilege, and the Petitioner may advise the Court of any objections to those accounts.

3. That the application for payment of outstanding accounts and unbilled services and disbursements incurred from the date of death of Mr. Blitz is adjourned to a future date.

4. This Order is effective from March 15, 2001 and the fees are recoverable from that date.

That order was settled by Master Scarth on January 14, 2002.

[13] I am advised that the estate of Mr. Blitz has filed notices of appeal in respect of the orders of Mr. Justice Drost at trial and on the re-opened trial. Counsel advise that the cost of the appeal books will be in the range of $20,000 - $50,000 and that no money is available in the estate at this time to fund the appeal. I note, however, that the Court of Appeal Rules now provide, as of March 22, 2002, for a more streamlined process which, it appears, is intended to reduce the volume of material filed and the attendant cost. (See for example Rule 27 of the Court of Appeal Rules.)

THE APPLICATION

[14] Mrs. Blitz applies for the following orders as set out in her Notice of Motion:

...

2. an order that the accounts currently held at the Deutsche Bank, Account No. 305634860 and ABN Amsterdam Account No. 45.96.47.954 to the credit of the Respondent be conveyed and vested absolutely in the Petitioner free and clear of any other claims of the Estate of the Respondent and that the Registrar of this Honourable court be empowered to execute any necessary transfer documents in the place and stead of the Executrix of the Estate of Andre Blitz, Deceased;

3. a declaration that the Petitioner is owed $1,159,068.50 plus post judgment interest under the trial judgments of Mr. Justice Drost pronounced August 17, 1998, August 10, 1999 and January 19, 2001;

4. a direction that when monies currently held to the credit of Andre Blitz, Deceased, at Bank Hapoalim in Israel, Account No. in the approximate amount of $880,000 (USD) [the "Israeli Funds"], being the sum to be paid into Court and held by the court appointed Trustees to the credit of the Andre Blitz, Deceased and his Estate pursuant to the Orders of Mr. Justice Drost pronounced January 19, 2001 and December 4, 2000 in the within action, that the Deceased Respondent and his Estate stand charged with the payment of that amount for which a Judgment together with post-judgment interest to the date of payment at Registrar's rates;

5. a direction that when the Israeli Funds are delivered to Canada, the Trustee, Barnes Kissack Henfrey & George be directed to deliver fifty-percent thereof for the Petitioner's sole use and that portion of the remainder be paid to her as a credit toward judgments made in her favour in this proceeding;

6. a declaration that the Israeli funds are family assets to which the Plaintiff is entitled to 50% plus a compensatory sum for non-use of her share of those monies;

7. that the Order of the Honourable Madam Justice Kirkpatrick made May 16, 2002 (sic) be varied to provide that the payment of fees to Basham, Thompson & Liu will not be in priority to the judgment of the Petitioner and will not be recoverable from assets of the Estate which are assets that were preserved by the Petitioner or are charged with the Petitioner's judgments; and

8. costs of this application.

...

MRS. BLITZ'S POSITION

[15] The foundation of Mrs. Blitz's application is her assertion that the executrix of the estate has failed to comply with the orders of Mr. Justice Drost made on December 4, 2000, regarding the production of documents and providing proof of enquiries made by her to locate and bring in assets of the estate. Mrs. Blitz contends that the only steps that have been taken by Ms. Gans are those aimed at protecting her interests under the estate and no others.

[16] Mrs. Blitz is understandably frustrated by the further legal entanglements created by Mr. Blitz's death and the delay that has imposed on her realization of her share of the family assets. It is abundantly clear that Mrs. Blitz is profoundly mistrustful of Ms. Gans. She perceives Ms. Gans as having stepped into the shoes of Mr. Blitz, whom Mr. Justice Drost defined in his reasons for judgment as "an unmitigated liar" who would "do anything to defeat the petitioner's rightful claim to an equal share of all of their assets..."

[17] Mrs. Blitz accordingly asserts that it should be obvious that Mr. Blitz perpetrated a fraud on the court by his failure to disclose assets and by his deliberate efforts to hide assets. Mrs. Blitz contends that Ms. Gans' alleged failure to comply with court orders concerning the disclosure of estate assets means that the fraud continues after Mr. Blitz's death. From that submission, it appears that Mrs. Blitz asks the court to conclude that by reason of the alleged failure by Ms. Gans to disclose information, all assets in Mr. Blitz's name should vest in the name of Mrs. Blitz.

[18] Mrs. Blitz further submits that the legal efforts that have been charged back by fees to the estate are as a result of a gross conflict of interest between the interests of the estate and the interests of the executrix because the residual beneficiaries of the estate are Mr. Blitz's sons.

[19] I have some difficulty following that particular submission. I think it means that any legal fees charged to the estate thereby reduce the value of the estate, to the ultimate detriment of Mr. (and Mrs.) Blitz's sons. However, that, it seems to me, is properly the subject of an application in the estate proceedings. It is not the subject of an application before me at this time. If Ms. Gans has acted improperly as executrix, then the proper course is for a person with a legal or beneficial interest in the estate to bring proceedings for her removal as executrix.

THE ESTATE'S POSITION

[20] Ms. Basham, for the estate, argues that Mrs. Blitz's application is fundamentally flawed. The estate contends that some of the relief claim by Mrs. Blitz is the subject of matters under appeal; some relate to matters on which the court is functus officio; and other of the relief claimed is unfounded and without merit.

[21] It is most convenient to address the estate's position, and my decision, by following the orders sought in Mrs. Blitz's Notice of Motion:

A. Deutsche Bank Account No. 305634860 and ABN Amsterdam Account No. 45.96.47.954

[22] Mrs. Blitz seeks an order that these bank accounts in the name of Mr. Blitz be conveyed and vested absolutely in Mrs. Blitz's name.

[23] So far as I am able to determine, these accounts have not been the subject of a specific determination by the trial judge, Mr. Justice Drost. In his oral reasons for judgment of January 19, 2001, Mr. Justice Drost alluded to substantial sums of money in Europe which had been concealed by Mr. Blitz, at para.78-79:

[78] ...At the outset of my remarks, some time ago, I spoke about the fraud that had been perpetrated on this court, and that fraud has resulted in Mr. Blitz, and now his estate, having sole access to, and the sole benefit of, a substantial sum of money in Europe, apparently approximating two million dollars in total, or maybe more; I don't know.

[79] I have concluded that the appropriate way in which to calculate what would be appropriate compensation for the purpose of adjusting the final division of assets in dispute in this litigation is to award Mrs. Blitz interest on her presumed -- on her one-half share of what today would appear to be assets in the -- having a value in the vicinity of two million dollars.

[24] From those general remarks, it appears that Mr. Justice Drost was inclined to the view that Mrs. Blitz is entitled to one-half of the undisclosed European money. He later adopted Mrs. Blitz's counsel's calculation of interest of $472,000 and ordered that interest be paid to Mrs. Blitz in that amount in compensation for her having been deprived of her right to interest in those funds for eight years. However, no specific order as to the entitlement of the principal sum appears to have been made.

[25] If the order that Mrs. Blitz seeks is to be made, it should be made by the trial judge who heard the evidence and who has already made many related findings of fact. The evidence supplied on this application does not, from my limited perspective, support such an order. The justification for the order may be amply apparent to Mr. Justice Drost, and it is to him that the application should be made.

B. Declaration that Mrs. Blitz is owed $1,159,068.50 by Mr. Blitz

[26] Mr. Maxwell advised the court that there has been no court order entered in respect of a portion of the above amount claimed by Mrs. Blitz . That portion concerns $480,000 held in the name of Mr. Blitz at the Banque Generale du Luxembourg. Mr. Maxwell advised the court that he intends to draw an order and submit it to Mr. Justice Drost for signature.

[27] The estate contends that no such order is needed because, except for the funds in the Banque Generale du Luxembourg, there are already court orders in place which reflect the amounts owed to Mrs. Blitz. The estate further argues that those orders are now under appeal. As to the latter point, I do not see that an impending appeal poses an impediment to the order sought. At most, it would be the subject of an application to stay execution on the judgment pending the hearing of the appeal.

[28] I substantially agree with the underlying intent of the order Mrs. Blitz seeks; namely to confirm in one order the monetary judgment to which she is entitled and, presumably, to permit her to ultimately execute upon her judgment. Because of the manner in which this litigation has proceeded, the orders have been made in a piecemeal fashion and have been, in material respects, later reversed by the trial judge. The ensuing orders are therefore in a state of some confusion.

[29] However, I think it would only add to the confusion if I were to grant the order Mrs. Blitz seeks in the absence of an order in respect of the funds in the Banque Generale du Luxembourg as well as those in the Deutsche Bank and ABN Amsterdam bank. What is needed is a comprehensive order which specifically states the amounts to which Mrs. Blitz has been granted judgment; the judge who granted judgment; the date of the order (with reference to written or oral reasons for judgment); and the amount of interest which attaches to the monetary judgment, if any, with a detailed schedule of interest calculation attached.

[30] In the meantime, it is obviously important that Mr. Barnes, as Receiver of the estate's assets, take possession of those assets as originally requested by Mrs. Blitz and ordered to do by Associate Chief Justice Dohm on July 28, 1999. The underlying intent of that order was to preserve Mr. Blitz's assets from dissipation or misappropriation. Assuming that to be the case, any interest of Mrs. Blitz in those assets is presumably protected.

C. $880,000 US dollars at Bank Hapoalim, Israel

[31] Although the wording of the motion is not entirely clear, it appears that Mrs. Blitz seeks an order that when the money held in Israel is paid into court in the name of the court appointed Receiver, Mr. Barnes, the estate shall stand charged with payment of the amount paid in, plus interest, to Mrs. Blitz.

[32] The estate argues that the effect of such an order would be to pre-determine the distribution of an asset which has not yet been determined to be a family asset, and to give Mrs. Blitz priority over the funds in issue.

[33] Once again, I consider that Mrs. Blitz's application is premature. There has not yet been a judicial determination in respect of the $880,000 (USD) in the Bank Hapoalim (the "Israeli funds"). Nor could there have been since the existence of the funds was only confirmed in February 2001. Mrs. Blitz's claim to the funds may be very strong, but it needs to be judicially determined by the trial judge. As well, the estate and Mr. Barnes may have legitimate arguments to advance as to the proportion of the Israeli funds to which Mrs. Blitz is entitled and any priority she should enjoy in respect of those funds.

D. Direction that Mr. Barnes deliver all of the Israeli funds to Mrs. Blitz

[34] This part of Mrs. Blitz's application suffers from the same problems noted in part C. above. The outcome is the same: no order directing Mr. Barnes in respect of the Israeli funds can be made until there has been a determination as to the character of the funds as a family asset and the parties' respective entitlement to the funds.

E. Declaration that the Israeli funds are family assets to which Mrs. Blitz is entitled

[35] This application is essentially the legal underpinning which would permit the court to direct Mr. Barnes to deliver all of the Israeli funds to Mrs. Blitz. However, as noted, the issue of the Israeli funds has not been determined by the trial judge. The order sought is therefore premature.

[36] I recognize that Mrs. Blitz has brought her applications under s. 66(1) and (2) of the Family Relations Act, R.S.B.C. 1996, c. 128, which reads:

(1) In proceedings under this Part 6 or on application, the Supreme Court may determine any matter respecting the ownership, right of possession or division of property under this Part, including the vesting of property under section 65, or under Part 6 and may make orders that are necessary, reasonable or ancillary to give effect to the determination.

(2) Without limiting subsection (1), the court may do one or more of the following in an order under this section:

(a) declare the ownership of or right of possession to property;

(b) order that, on a division of property, title to a specified property granted to a spouse be transferred to, or held in trust for, or vested in the spouse either absolutely, for life or for a term of years;

(c) order a spouse to pay compensation to the other spouse if property has been disposed of, or for the purpose of adjusting the division;

(d) order partition or sale of property and payment to be made out of the proceeds of sale to one or both spouses in specified proportions or amounts;

(e) order that property forming all or a part of the share of either or both spouses be transferred to, or in trust for, or vested in a child;

(f) order that a spouse give security for the performance of an obligation imposed by order under this section, including a charge on property and may order that the spouse waive or release in writing any right, benefit or protection given by section 23 of the Chattel Mortgage Act, R.S.B.C. 1979, c. 48, or section 19 of the Sale of Goods on Condition Act, R.S.B.C. 1979, c. 373;

(g) if property is owned by spouses as joint tenants, sever the joint tenancy.

[37] While I have no doubt that the trial judge is empowered by that section to grant the substantive orders that Mrs. Blitz seeks, I do not consider that I have the authority to do so.

[38] As I have noted in my review of the history of this litigation, Mr. Justice Drost heard a 21 day trial, a two day hearing following the trial to resolve certain issues that were not resolved by the trial judgment, and a further hearing on the re-opened trial. He made extensive findings of fact and, importantly, of credibility. Since his last judgment of January 19, 2001, further assets have been discovered. Other assets, the existence of which were known at trial, were not ruled upon and there is, accordingly, a gap in the determination of some of the assets in issue.

[39] In these circumstances, it seems to me that Mr. Justice Drost is seized of this case insofar as it is necessary to make the rulings or directions necessary to determine the character of the assets in issue and the parties' entitlement to them.

[40] There is scant authority on the issue of the court's discretion to be seized or not seized of a matter. The leading case on this issue is W.(R.) v. British Columbia (Superintendent of Family and Child Service), [1991] B.C.J. No. 562 (Q.L.) (S.C.). In that case, Drossos J. considered the criteria relating to being seized of a case in the context of a judicial review of the apprehension of a child by the ministry. The issue in W.(R.) involved interpretation of s. 19(3) of the Family and Child Service Act which specifies the jurisdiction of a second judge to continue with the proceedings should the initial judge become "unable" to hear the matter further (somewhat akin to R. 64(10)). It was held that the initial judge is not "unable" to continue the matter by simple virtue of a scheduling conflict; rather, the Act envisioned some sort of incapacity or conflict of interest. On that finding, Drossos J. held at p. 4 that a second judge has jurisdiction to adjourn the matter until the first judge is available, but not to continue the hearing. Noting the dearth of authority on this issue, Drossos J. at pp. 11-12 gave the following analysis:

...[T]here is a distinction between commencement and being 'seized' such that more than commencement per se is required before a judge becomes seized of a case. The guiding consideration, if not principle, for when a judge is seized of a case in R. v. Hatton [(1978), 39

C.C.C. (2d) 281 (Ont. C.A.)] was that after the trial began a point would be reached where the validity and integrity of a fair and just trial would be compromised, if the same judge did not continue with it to conclusion. In Irvine [indexed as T.J.I. v. British Columbia (Superintendent of Family and Child Services), [1990] B.C.J. No. 2767 (Q.L.) (S.C.)]..., before Catliff, J. it was when the judge entered upon a consideration of the merits of the case, and in [British Columbia (Superintendent of Family and Child Services v. W.V. (1986), 1 R.F.L. (3d) 85 (B.C.S.C.)] before Gibbs J. (as he then was) when sufficient substantive evidence had been heard.

In my opinion, the resolution and synthesis of the foregoing is that when sufficient substantive evidence is heard by a judge, or sufficient submissions or rulings of substance are made, in brief, when enough has been heard, such that a continuation of the hearing or trial before another judge in substitution would result in the validity and integrity of a fair and just hearing or trial being jeopardized or compromised, the judge is effectively seized of the case. At that point, any substitution of another judge in the absence of covering statutory authority, such as s. 19(3) of the Act, would result in a loss of jurisdiction.

What constitutes sufficient substantive evidence or submissions or rulings would depend in each case upon the nature and extent of the evidence or submissions heard by the Court and rulings made.

Without attempting to close the limit of categories as to when the threshold has been reached, as different situations will no doubt present themselves, it is apparent that it has when witnesses are called, as a judge at the outset enters upon a viewing and consideration of the credibility, correctness and weight to attach to their testimony.... The situation would not be as critical where affidavit, commission or exhibit evidence is presented, but depending on its nature and extent and whether submissions were made concerning the same, a point could be reached where a judge is effectively seized of a matter. Also, technical rulings on non-contentious points, especially where consented to, may not be sufficient to result in a judge being seized of the case, but otherwise, where issues of substance or in contention are ruled upon. As already mentioned, the categories are not closed and whether the threshold has been met will depend in each case on what is then actually before the judge.

[41] Notwithstanding the discrete statutory basis of the decision in W.(R.), the principles noted in that case are of general application. In my view, the court retains a discretion as to when to consider another judge seized of the matter, such discretion to be exercised judicially and upon the above principles. Most significantly, if another judge is seized of the matter, a second judge, absent an order or direction under R. 64(10), lacks jurisdiction to make substantive orders that ought to be made by the judge who heard the evidence and who made findings of fact and credibility.

[42] The problem posed in this case has features analogous to applications to have various related actions tried at the same time. This approach is exemplified in Webster v. Webster (1979), 101 D.L.R. (3d) 248 (B.C.C.A.), where Bull J.A. at p. 251 considered whether:

...the evidence of the relationship, claims and disputes between the parties in both proceedings is so interwoven as to make separate trials at different times before different Judges undesirable and fraught with problems, not to mention expense.

See also ICBC v. Ng, [1999] B.C.J. No. 738 (Q.L.) (S.C.); Murray v. Morgan, [1999] B.C.J. No. 2871 (Q.L.) (S.C.); Merritt v. Imasco Enterprises Inc. (1992), 2 C.P.C. (3d) 275 (B.C.S.C.); Stellar Properties Ltd. v. Botham Holdings Ltd., [1990] B.C.J. No. 1345 (Q.L.) (C.A.).

[43] That authority lends support to my conclusion that the substantive issues which Mrs. Blitz seeks to have decided, and the nexus of those issues to those involved at trial, fall to be decided by the trial judge. Mr. Justice Drost heard all of the evidence and is the person best placed to decide the issues that arise from that evidence and the fresh evidence which is undoubtedly intertwined with the trial evidence.

[44] Even if I accepted that I have jurisdiction to decide these substantive issues, I question whether a court can, on the limited evidence before it, grant the orders sought by Mrs. Blitz. These issues involve considerable sums of money which were dealt with by Mr. Blitz in a manner apparently designed to hide them from Mrs. Blitz's detection. There is some complexity in those dealings which has not yet been unravelled in the evidence. While the determination of the issues might be made summarily, I think it can only be done upon an order re-opening the trial (either conventionally or under Rule 18A) for the purpose of determining these issues.

[45] In summary, I conclude that I lack both the jurisdiction and the evidentiary basis upon which to make the orders Mrs. Blitz asks the court to make. This is a regrettable state of affairs because it necessarily entails further delay and will undoubtedly cause distress and frustration for Mrs. Blitz. However, I cannot in good conscience proceed in the manner requested. The obstacles to judgment in this case are more than mere formalities. They are grounded in the fairness and integrity of the trial process and must be respected.

F. Variation of the order of May 16, 2001 permitting the fees of Basham, Thompson & Liu not to be in priority to the judgment of Mrs. Blitz

[46] As noted earlier, on May 16, 2001, upon application by the estate, I varied the court orders restraining the disposition of assets to permit Ms. Gans, as executrix, to retain counsel to represent the estate. Because of the concerns expressed by Mr. Maxwell that the estate was being given a carte blanche to pay whatever fees it wanted to Ms. Basham, I directed, with the ready consent of Ms. Basham, that she provide to me on a monthly basis a copy of her account to the estate together with a break-down of the time and disbursements related to the work reflected in the accounts. At the same time, she was ordered to provide counsel for Mrs. Blitz with a general description of the work done and fees charged in a manner which would not breach any solicitor-client privilege. Ms. Basham has complied with that order.

[47] The intent of the order was to permit supervision of the estate's legal expenses pending receipt of the Israeli funds which, in May 2001, were expected to be received in Canada relatively soon. The order was made to salve Mrs. Blitz's extreme mistrust of Ms. Gans and anyone representing her in any capacity. I had assumed, obviously erroneously, that, when received, some portion of the Israeli funds would be available to pay for legal expenses in the estate and that continued court supervision would not be necessary as Ms. Basham's fees would be a matter between the estate and her. As can be seen, Mrs. Blitz now lays claim to all funds in Mr. Blitz's name.

[48] The order was entered on January 14, 2002. So far as I am aware, no appeal has been taken from my order. More importantly, however, there is nothing in my order which grants priority for the payment of legal fees in the estate. The payment of those fees and other expenses of the estate will fall to be determined in the estate, subject to the right of any beneficiary or the executrix to tax Ms. Basham's accounts.

[49] In the circumstances, it is clear that the court is functus officio with respect to the May 16, 2001 order. See: Canada Trust Co. v. Sundist Holdings Ltd. (1981), 29 B.C.L.R. 1 (S.C.). Even if I were not functus, I do not see that the May 16, 2001 order needs to be varied in the manner requested by Mrs. Blitz because priority for Ms. Basham's accounts was never granted. If priority flows to Ms. Basham under estate principles (which I raise but do not decide), then it may be for Mrs. Blitz to make her application for priority of her interests in the estate proceedings. However, that is a matter to be dealt with in the estate proceedings and not in the matrimonial action.

[50] Since the hearing of this application on April 5, 2002, I have received correspondence from Mr. Maxwell, Ms. Basham and Brian Child, counsel for the Receiver, Mr. Barnes. I do not need to review that correspondence. Suffice to say, there was no application by the estate and no order made to vary my order of May 16, 2001. I am not satisfied that the estate's efforts in respect of the Israeli funds have focussed only on the release of funds to permit payment of Ms. Basham's fees. The Israeli solicitor asked for affidavits from Mr. Maxwell and Ms. Basham which were needed to allow the Israeli funds to be transferred to Canada. I have read both those affidavits. Both counsel appear to have responded in an appropriate manner to the specific requests of the Israeli solicitor.

[51] Finally, as I have indicated, the beneficiaries of the estate and the executrix will have an opportunity to review and tax Ms. Basham's accounts in the manner provided by the Legal Profession Act. Whether Mrs. Blitz, who is not a beneficiary under the will, is entitled to review and tax the accounts will be a matter to be decided if she applies in some capacity to do so. It is not a matter before me at this time.

[52] Because of my findings of lack of jurisdiction and evidence to decide the issues posed in Mrs. Blitz's Notice of Motion, I adjourn, but do not dismiss, the applications set out in paragraphs 2 through 6 of the Motion. The applications set out in paragraphs 7 and 8 of the Motion are dismissed.

"P.A. Kirkpatrick, J."

The Honourable Madam Justice P.A. Kirkpatrick

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