

CANADA / JUDGMENT

Borkovic v. Borkovich

2023 BCSC 2050

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Supreme Court of British Columbia

DECIDED

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2023 BCSC 2050 Borkovic v. Borkovich

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Borkovic v. Borkovich,

2023 BCSC 2050

Date: 20231122

Docket: P143302

Registry: Vancouver

In the Matter of the Estate of Emma Kathleen Borkovich, Deceased

Before: Registrar Gaily

Reasons for Decision

Counsel for Ivan Borkovic, Executor of the Estate of Emma Kathleen Borkovich, Deceased:

H.S. McLellan

Counsel for the Respondents, Dragutin Borkovich and Zvonko Borkovich:

R. Davidson

Place and Date of Hearing:

Vancouver, B.C.

October 11-13, 2023

Place and Date of Decision:

Vancouver, B.C.

November 22, 2023

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Introduction and History of Proceedings

- [1] This is the passing of the accounts of Ivan Borkovic (also known as Ivan Borkovich), in his capacity as attorney and as executor of the estate of Emma Kathleen Borkovich (the "Deceased" or "Emma"), who died on January 7, 2013. The Deceased was married to Valent Borkovich, who had three grandsons, Ivan and his brothers, Dragutin and Zvonko Borkovich. Ivan is the eldest brother. Because several of the parties to this estate matter share the same surname, although Ivan now spells it differently, I will refer to them by their first names, intending no disrespect. Where appropriate, I will refer to Dragutin and Zvonko together as the "Objecting Beneficiaries".
- [2] In 1958, Valent and Emma sponsored Valent's child and their family to emigrate to Canada from what is now Croatia; the family moved in with Valent and Emma in New Westminster, but all except Ivan returned to the former Yugoslavia after a few months. Ivan remained in B.C., where he was raised by Valent and Emma. Ivan joined the RCMP in 1971 and after his training in Regina, he was posted to Alberta, where he has lived since. Ivan is now retired and lives just outside of Edmonton with his wife, Judy Haughian (who I will refer to as "Judy", intending no disrespect). Dragutin and Zvonko returned to Canada separately in the late 1960s, moving in with Valent, Emma, and Ivan before he joined the RCMP. Zvonko and Dragutin both reside in the Lower Mainland.
- [3] Emma granted Ivan power of attorney through an enduring power of attorney dated March 17, 2000. Emma suffered from progressive dementia and in a letter dated September 25, 2000, a doctor confirmed Emma was no longer capable of managing her affairs. At that time, Ivan began acting as her attorney. In October 2000, she moved into Royal City Manor ("Royal City"), a care facility in New Westminster. In June 2002, Emma moved to the Allen Gray Continuing Care facility in St. Albert, Alberta ("Allen Gray"), where she passed away in 2013.
- [4] Under the will dated March 16, 2000 (the "Will"), the Deceased appointed Ivan to be her executor and the trustee of her estate, and directed that the residue of the estate be divided equally between the three brothers.
- [5] The Deceased owned two homes in New Westminster, located at 704 and 710 Third Avenue (referred to by all the parties as "704" and "710", respectively). 710 was a rental property. Emma lived in 704 until she moved to Royal City, when 704 was also rented out. Another rental property located at 831 6th Street in New Westminster ("831") was also discussed in these proceedings.
- [6] Probate was granted to Ivan on March 31, 2015. On November 2, 2015, Ivan sold 704 for \$813,000; on December 3, 2015, he sold 710 for \$785,500. The proceeds of these sales are held in the trust account of Dwight Ross, the solicitor who had assisted Emma prepare the power of attorney and the Will, and who Ivan retained to assist him with the administration of the Deceased's estate. Mr. Ross has been managing the funds since 2015 and they have not been distributed.

- [7] On October 12, 2017, Master Baker heard and dismissed an application brought by the Objecting Beneficiaries in oral reasons released the same day (the "Oral Reasons"). The Oral Reasons confirm that the parties had agreed on the terms of the order regarding the passing of Ivan's accounts as attorney and as executor, up to November 1, 2017 (para. 55). The relevant terms of Master Baker's order, pronounced on October 12, 2017 (the "Order") are:
1. The accounts of Ivan Borkovic, as Power of Attorney for Emma Kathleen Borkovich, for the period from March 17, 2000 through January 7, 2013, be audited, taken and passed before a Registrar of this Honourable Court in Vancouver, British Columbia and the Registrar certify the result, by consent.
 2. The accounts of Ivan Borkovic, Executor of the Estate of Emma Kathleen Borkovich, for the period from January 7, 2013 through November 1, 2017, be audited, taken, and passed before a Registrar of this Honourable Court in Vancouver, British Columbia and the Registrar certify the result, by consent.
 3. That the Registrar determine a fair and reasonable remuneration for the Executor for his care, pain, trouble, and time expended in and about the estate in administering, disposing of, arranging, and settling the affairs of the estate from January 7, 2013 to November 1, 2017, by consent.
 4. The balance of the application be dismissed without costs to any party.
- [8] Ivan's statement of accounts as attorney for the period from September 25, 2000 to January 6, 2013, which he made on February 28, 2018, was filed on March 1, 2018 (the "Attorney Accounts"). Ivan's statement of accounts as executor was filed in two tranches: the statement of accounts for the period from January 7, 2013 to August 31, 2016, which he made on May 3, 2017, was filed May 4, 2017; the statement of accounts for the period from September 1, 2016 to November 1, 2017, which he made on February 18, 2018, was filed March 1, 2018 (together, the "Executor Accounts"). Given the terms of the Order, a final accounting of Ivan's executor accounts since November 1, 2017, will be required at a future date.
- [9] At the pre-hearing conference on June 29, 2023, Master Vos ordered counsel for the Objecting Beneficiaries to provide a written outline of the expenses that they intended to challenge at the passing of the accounts by August 15, 2023. The parties were also ordered to exchange witness lists.
- [10] The passing of the Attorney Accounts and Executor Accounts was heard over three days. Although the parties had anticipated calling several witnesses, only Ivan, Judy and Dragutin gave viva voce evidence. At the beginning of the hearing, Ivan's counsel provided a two-volume book of documents (Ex. 14) (the "Documents Binder"); over the course of the hearing, the witnesses identified the documents. Counsel for the Objecting Beneficiaries also provided an "Issues with Accounting" binder (the "Issues Binder"), which included their list of issues with the Accounts, together with copies of handwritten notes and copies of documents.

The Attorney Accounts

Legal Principles

- [11] Ivan's appointment as Emma's attorney is governed by the common law and the provisions of the Power of Attorney Act, R.S.B.C. 1996, c. 370 [PAA], which were in force and remain unchanged by the current PAA, which came into effect in 2011, after Emma had executed the enduring power of attorney.
- [12] An attorney acting under a power of attorney is bound by the duties set out in the instrument: *Sommerville v. Sommerville*, 2014 BCSC 1848, para. 32 [Sommerville]. Emma's power of attorney is an enduring power of attorney because in it she declared that it "may be exercised during any subsequent mental infirmity on my part" (Documents Binder, Tab 1). The common law establishes that the relationship between an attorney and the donor is a fiduciary one (*Sommerville*, para. 33). If an attorney has breached their fiduciary duty to the donor by using the donor's funds for the attorney's own benefit, the attorney can be ordered to repay the funds to the estate.
- [13] Although s. 19 of the PAA was not in effect until September 1, 2011 (after Ivan became Emma's attorney), it codifies the common law duties imposed on an attorney and provides guidance. Section 19(2) provides that when managing and making decisions about the donor's (defined as "adult" in the PAA) financial affairs, "an attorney must act in the adult's best interests, taking into account the adult's current wishes, known beliefs and values, and any directions to the attorney set out in the enduring power of attorney". Among the duties set out in s. 19 is the duty to "keep the adult's property separate from the attorney's own property" (s. 19(4)).
- [14] An attorney is entitled to be reimbursed for expenses "properly incurred in acting as the adult's attorney", but must not be compensated for acting as an attorney, unless the enduring power of attorney expressly authorizes the compensation and sets the amount or rate (PAA, s. 24).
- [15] In *Sull v. Pengelly*, 2019 BCSC 575, at paras. 114-119 [Sull], Justice Voith (as he then was) reviewed the jurisprudence regarding an attorney's duty to account, noting that the authorities establish that "an attorney has the obligation to account for their activities while exercising the power of attorney [but] simply providing bank and credit card statements is not sufficient for an accounting. The attorney must provide an explanation, with satisfactory evidence, that the funds expended were for the benefit of the grantor" (para. 119).
- [16] With respect to an attorney's accounts, s. 19(1)(d) of the PAA provides that an attorney must "keep prescribed records and produce the prescribed records for inspection and copying at the request of the adult." The Power of Attorney Regulation, B.C. Reg. 20/2011 [PAR] imposes what the Court has described as "fairly robust record keeping obligations on those acting under an enduring power of attorney" (*Sarzynick v. Skwarchuk*, 2021 BCSC 443, at para. 181). Like s. 19 of the PAA, the PAR came into effect on September 1, 2011, but it provides

guidance. Section 2(2) of the PAR provides that an attorney acting under an enduring power of attorney must keep the following records in relation to the period for which they are acting as attorney: a current list of the adult's property and liabilities; accounts and other records respecting the exercise of the attorney's authority under the enduring power of attorney; and all invoices, bank statements and other records necessary to create full accounts respecting the receipt or disbursement, on behalf of the adult, of capital or income.

- [17] With respect to the attorney's accounts, under s. 19(1)(d) of the PAA, only the donor or grantor of the authority, or their estate, may apply to have the attorney provide a full accounting of their activities as attorney. This contrasts with Rule 25-13(1)(a) of the Supreme Court Civil Rules, B.C. Reg. 2008/169 [SCCR], which permits "any person interested in an estate administered by an executor" to apply for an order for the executor to pass their accounts (see Sull, para. 116). Section 33 of the PAA expressly imposes the obligation on an attorney not to disclose information or records obtained in the exercise of their authority, except in the enumerated circumstances, which includes compliance with a court order.

The Accounts

- [18] In the affidavit Ivan made to support the application to pass the Accounts on February 28, 2018 (the "Accounts Affidavit"), Ivan attested that he began to act as Emma's attorney on September 25, 2000, and that he retained a bookkeeper, Chantelle Brimmage, to help prepare the Attorney Accounts (paras. 1 and 2).
- [19] As set out in the Attorney Accounts, at September 25, 2000, the value of Emma's assets was \$1,410,400.11. The estate assets were the properties at 710 and 704, as well as funds in a bank account at Westminster Savings Credit Union ("Westminster Savings Account"), and investments with HSBC. There were no liabilities. The Westminster Savings Account was closed when Emma moved to Alberta in 2002 and Ivan opened chequing and savings accounts for her at Capital City Savings Credit Union (now known as Servus Credit Union, but I will refer to it as "Capital City") and he also transferred her investments from HSBC to Capital City. As at January 6, 2013 (the day before her death), the value of Emma's assets was \$1,670,285.85. The assets included 704 and 710, funds in the Capital City chequing and savings accounts, and the investments (shares and a GIC) held at Capital City. There were no liabilities.
- [20] The capital transactions set out in the Accounts total \$820,197.81 for the period from March 17, 2000 to January 6, 2013 (with details of transactions by account provided in an attached schedule A to the Attorney Accounts), as follows:

Bank Interest and Charges

\$93.72

Care Home Rent

\$287,399.95

Comforts

\$73,411.68

Gifts

\$4,893.84

Income Taxes

\$66,132.14

Insurance

\$40,952.80

Land Taxes

\$100,133.99

Legal Fees

\$333.84

Medical

\$43,882.80

Moving

\$320.00

Power of Attorney Expenses

\$30,212.11

Prepaid Alberta Funeral Expense

\$3,339.00

Repairs & Maintenance - Rental properties

\$108,160.42

Utilities - Rental

\$48,306.52

Zvonko Borkovic #704 Property Management

\$12,635.00

Total

\$820,197.81[1]

[21] The income transactions for the period from March 17, 2000 to January 6, 2013 are as follows (with details in the schedule A attached to the Attorney's Accounts):

Canada Pension Plan - Old Age Income

\$123,126.43

Government rebate

\$535.65

Interest income

\$136,523.35

Investment Transfer

\$366,041.21

Patronage Payment

\$5,385.56

Rental Income

\$515,028.80

Total

\$1,146,641.09[2]

[22] Ivan did not retain a bookkeeper to help him administer Emma's estate, and he admits that he did not maintain a ledger for her estate when he became her attorney. He testified that he kept track of the expenses, retaining copies of relevant receipts, as he went along. He said that he did the best he could to administer the estate for Emma's benefit. When Emma passed away, Ivan became her executor. He testified that at that point (early 2013), his focus shifted from the day-to-day administration of Emma's estate, to his duties as executor, such as obtaining the grant of probate.

[23] In the following discussion, I only address the transactions to which the Objecting Beneficiaries took issue (raised objections).

[24] The overarching objection made by the Objecting Beneficiaries was that the Attorney Accounts were not transparent. They repeatedly asserted that they could not reconcile the Accounts and that they lacked the relevant supporting information to do so, attributing their inability to articulate their objections to the manner in which the Accounts were presented and provided to them. I understand that the Accounts and supporting documents were provided to their counsel on a USB stick, and then the documents were printed filling several large binders. As a result, the documents were not necessarily in chronological

order, and copies of cancelled cheques were not attached to the related invoices.

- [25] Another overarching issue raised by the Objecting Beneficiaries was that Ivan delayed in presenting the Accounts, asserting they did not receive the Attorney Accounts until 2019, after the Order (they also raised delay as an issue with respect to the Executor Accounts). Ivan's counsel put the Attorney Accounts to Dragutin during cross-examination. The Attorney Accounts had been exhibited to an affidavit of Ivan's filed in the 2017 application before Master Baker, but Dragutin denied having seen the affidavit, or the Attorney Accounts, maintaining that he had no information from Ivan until 2019 and the Accounts were "a mess".
- [26] Counsel for the Objecting Beneficiaries submits that I should consider Ivan's delay in passing the Attorney Accounts with respect to the remuneration Ivan seeks as executor. Ivan's counsel submits that as attorney, Ivan had no duty at common law or under the PAA to provide the Attorney Accounts to the Objecting Beneficiaries within a certain period, noting that there is no provision in the PAA analogous to s. 99(1) of the Trustee Act, R.S.B.C. 1996, c. 464 [Trustee Act], which requires an executor to pass their accounts within two years from the date of the grant of probate. Further, he notes that Ivan consented to the passing of the Attorney Accounts, together with the Executor Accounts, as reflected in the Order.
- [27] *Sommerville* is the only case involving an attorney (as opposed to an executor) provided to me at the hearing, and it was included in Ivan's brief of authorities. *Sommerville* did not involve an alleged delay in passing the attorney's accounts. Counsel for the Objecting Beneficiaries did not refer me to any authorities in which the court considered delay in passing an attorney's accounts, who was also an executor, a factor relevant to the executor's remuneration. Based on the evidence before me at the hearing, I find that Ivan did not breach his legal duties as attorney in preparing the Attorney Accounts.

Transactions Related to the Rental Properties

- [28] The Attorney Accounts show that a total of \$108,160.42 was paid for "repairs & maintenance - rental properties", as well as \$48,306.52 on "utilities - rentals". The Objecting Beneficiaries do not object to the amounts claimed for these expenses in the Accounts, but submit that Ivan mismanaged the real estate assets because he failed to increase the rent of 704 and 710 during the relevant period. As a result of Ivan's testimony and the evidence at the hearing, counsel for the Objecting Beneficiaries confirmed this was no longer in issue; however, because of the time at the hearing spent on the management and disposition of the estate's real property assets, I have summarized the evidence and my findings.
- [29] When he became Emma's attorney, Ivan arranged for ACD Realty Ltd. ("ACD"), a property management company, to manage 710, pursuant to a management agreement between Emma and ACD dated September 28, 2000, which was effective October 1, 2000 (the "ACD 710 Contract") (Documents Binder, Tab 18).[3] Under the ACD 710 Contract, among other things, as Emma's attorney, Ivan authorized ACD to enter into leases of 710 with tenants, to collect

rent, and to perform emergency repairs under \$500; he also agreed that ACD would be paid \$95 per month for its services. Ivan's evidence is that Bill Malkin was his primary contact at ACD throughout the relevant period; Mr. Malkin was on the witness list, but was not called to testify.

- [30] The Documents Binder contains copies of the monthly statements ACD provided to Ivan from November 2000 through January 2016 (the month after 710 was sold) (Tabs 23-33). The ACD statements show that the monthly rent for 710 was \$1250 for the first few years (2000 to 2004), and was then subject to the following rent increases: to \$1300 in July 2004; to \$1350 in August 2007; to \$1393 in September 2010; to \$1450 in August 2012; and to \$1480 in July 2014.
- [31] The witnesses all confirmed that when Emma moved into Royal City in 2000, 704 was very dirty and in poor condition because she had not maintained it (or herself), as her dementia had progressed. Ivan did not hire professional cleaners. Ivan and Judy testified that they disposed of Emma's belongings (other than those taken by family members, which is not in issue) and removed a lot of garbage from the house and thoroughly cleaned it before it was marketable as a rental property. Both Ivan and Judy confirmed that a cheque dated October 31, 2000 for \$1175.00 payable to Ivan for "clean up labour" was for Judy's work cleaning up 704 at \$15 per hour (Documents Binder, Tab 38). There was no objection to this expenditure and I find that the amount paid to Judy for this service was for Emma's benefit and benefitted the estate and the amount was reasonable.
- [32] Ivan paid Zvonko \$95 per month to take care of the physical management of 704 until 2012; the Accounts reflect that Zvonko received \$12,635 for this service. In January 2012, as Emma's attorney, Ivan retained ACD to manage 704, pursuant to an agreement between Emma and ACD dated February 8, 2012, which was effective February 1, 2012 (the "ACD 704 Contract") (Documents Binder, Tab 3).[4] Like the ACD 710 Contract, the ACD 704 Contract indicates that ACD was paid to manage the property (\$150/month), and was authorized to perform emergency repairs (under \$750), and to enter into leases with tenants and collect the rent.
- [33] Ivan testified that when ACD took over management of 704, Mr. Malkin advised him that it needed repairs and a "refresh" before it could be rented and he authorized approximately \$29,000 for ACD to perform the repairs and refresh. ACD did not rent 704 until July 2012 (when the refresh was finished); ACD remitted the rent, less authorized expenses, to Ivan. The Documents Binder contains copies of the statements ACD provided to Ivan for 704, for the years 2012 through 2015 (Tab 16), showing the rent paid and the expenses incurred by ACD (including the \$29,000 to refresh and repair the property). The ACD statements show that the monthly rent for 704 was \$1,895, and it did not increase during the time ACD managed it and it was tenanted (July 2012 to November 2015).

- [34] Although they did not pursue the issue at the hearing, I find that there was no evidence before me to establish that Ivan had mismanaged the real property assets (704 and 710) while he was Emma's attorney. I find that the expenditures to maintain the properties, including the \$29,000 to "refresh" 704 in 2012, were properly incurred for the benefit of Emma's estate and were reasonable in the circumstances.

The 831 Property

- [35] In 2017, the Objecting Beneficiaries brought an application under s. 151(4) of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA], seeking leave to commence proceedings in the name of the estate claiming a trust against Ivan in respect of the 831 property. Master Baker dismissed their application and although an appeal was commenced, it has not been pursued. On September 22, 2023, Master Bilawich heard and dismissed the Objecting Beneficiaries' application seeking orders that Mr. Ross make his files pertaining to the Deceased's will and estate available to them, and awarded Ivan his costs of the application in any event of the cause.
- [36] The Objecting Beneficiaries submit that if 831 is Ivan's property, he has breached his fiduciary duty (now codified in s. 19(4)) because he did not keep the 831 rental income and its expenses separate from Emma's property. They point to the evidence in the Attorney Accounts that rental income from 831 was deposited into Emma's bank accounts, and expenses associated with 831 were also paid from Emma's bank accounts (Ex. 4, 5 and 7).
- [37] Ivan's explanation is that because Emma helped him purchase 831 by loaning him funds, they had agreed that he would gift her the net income from 831 during her lifetime. He admits that he and Emma never formalized this agreement in writing. Ivan testified he never lived in 831, that it has always been a rental property and that he retained ACD to manage it. Ivan tendered in evidence a copy of the ACD management agreement for 831, which he had entered into with ACD effective October 1, 2000, which he had provided to the Objecting Beneficiaries in 2019 (Ex. 10).
- [38] Ivan admits that the rent from 831 was included with the rent from 710 in the ACD cheques directly deposited into Emma's bank accounts, as reflected in the sample of statements for the Westminster Savings Account and the Capital City accounts put to him by counsel for the Objecting Beneficiaries (Ex. 4). Ivan also admits that he paid expenses incurred when 831 was used as a grow-op in 2003 from Emma's accounts. These expenses included a cheque for \$7,000 to ACD with the notation "831 6th St", which Ivan identified as the costs associated with both the eviction of the tenant responsible for the grow-op and repairs to the property (Objections Binder, Tab 1, p. 16), as well as payment of the \$1,733.40 invoice from the City of New Westminster for the inspection, reconnection of utilities, and occupancy permit for 831 (Ex. 5).

- [39] In *MacLean v. MacLean*, 2009 BCSC 292 at para. 54 [MacLean], District Registrar Bouck (as she then was) concluded that the co-mingling of estate funds in an executor's personal account was not ideal, but the evidence satisfied her that the executor in that case had properly accounted for the estate monies and not derived any benefit from holding those monies in the executor's account.
- [40] It has not been determined that Ivan holds 831 in trust for the Deceased's estate; as such, the evidence before me establishes that the co-mingling of Ivan's property with the Deceased's is a breach of his duty as an attorney. However, I accept Ivan's explanation that he had gifted the net income from 831 to Emma during her lifetime because she had helped him with its purchase when he was a young man, just starting his RCMP career. Ivan was forthright about the co-mingling of the rental income from 831 with the rent from 710, and the payment of expenses associated with 831 from Emma's account. There was no evidence before me of the total net income from 831, which Ivan gifted to Emma during her lifetime, but based on the rents charged for 704 and 710, I find it would have exceeded the amount Ivan spent to improve 831 when it was used as a grow-op (\$8,733.40).
- [41] I find that, in the circumstances of this case, it is not appropriate to order Ivan to repay the estate the \$8,733.40 he withdrew from Emma's account to restore 831 when it was used as a grow-op.

Comforts

- [42] The capital transactions include \$73,411.68 for "Comforts", which is the total amount that Ivan testified he paid to Judy to reimburse her for regular purchases for Emma's day-to-day needs, as well as the amount he paid Judy for the therapy services she provided to Emma between 2002 and 2013.
- [43] Judy identified in the Documents Binder the handwritten invoices as her records of the purchases she made for Emma, together with various receipts, which she had provided to Ivan during the relevant time. The Objecting Beneficiaries do not object to Ivan reimbursing Judy for the purchases she made for Emma, which are documented in the Accounts.
- [44] The Objecting Beneficiaries did not allege that Judy did not provide any services to Emma, but they questioned the nature of the therapy she provided and the necessity for it while Emma lived in care (for example, they questioned whether the physicians caring for Emma at Allen Gray had recommended or approved it). They point to the evidence that Ivan did not regularly pay Judy, that no cheques were issued to her between 2005 and 2009, and that most of the cheques made out to her are dated from 2009. They submit that because she is Ivan's spouse, it was a conflict of interest for Ivan to pay Judy for her services, and that the fees paid to Judy should be deducted from Ivan's share of the Deceased's estate.
- [45] Ivan testified that when Emma moved to Allen Gray, a public facility funded by Alberta Health, the same level of private care and physiotherapy services she had at Royal City, a private facility where she paid to have a private care aide, was not available. Judy confirmed

she is a registered psychiatric nurse; she retired from practice in 2020, but is still registered as non-practising. She testified that her experience includes running an avocational program for persons with severe physical and mental disabilities, as well as working as an assessor for home care, which included assessing the needs of people suffering from dementia.

- [46] Ivan testified that when Emma moved to Allen Gray, Judy proposed helping in her professional capacity and Judy set this out in a written proposal in late 2002 (Documents Binder, Tab 159) (the "Therapy Proposal"). Both Ivan and Judy identified the document as the Therapy Proposal. In the Therapy Proposal, Judy was to provide Emma between 2-4 hours per week of "individual cognitive, physical and social interventions to foster independence and skills as her progressive dementia unfolds". She proposed a fee of \$50 per week, which would include all supplies, meals and transportation, and she would provide Ivan with a year-end report. Judy testified that she based the fee on the amounts charged by Royal City, which was \$25 for an outing such as a walk, plus \$15 for the staff escort. She said this was less than the hourly rate of \$43, which is what her rate was as a registered psychiatric nurse at the time. She did not increase the fee for her services.
- [47] Judy testified that her work schedule at the time permitted her to spend a morning per week with Emma (separate from social visits) when she and Emma would do cognitive therapy activities together, such as memory games and puzzles, as well as physical activities (such as using therapy bands for arm exercises), and social activities, such as going to the mall. Judy admits that she did not seek specific approval of the therapy services she provided from Emma's physician at Allen Gray, but testified that she discussed what she was doing with the Allen Gray staff and had the permission of the CEO to provide the services to Emma at Allen Gray. There was no evidence before me that the services Judy provided to Emma were also available to Emma as part of her regular care at Allen Gray.
- [48] Ivan testified that Judy would invoice him for the therapy services on a quarterly basis, and she would include in the invoice the incidental purchases she made for Emma, rounding up or down to \$850. He testified that he paid Judy \$3,400 per year in combined therapy fees and reimbursement for purchases, of which \$2,600 was for the therapy. Ivan testified that for several years, he and Judy agreed he would defer paying her because he was concerned about the liquidity of Emma's bank accounts. When counsel for the Opposing Beneficiaries put the Capital One statements to him showing that Emma's investments would have covered the fees for Judy's services during the deferral period, Ivan explained that he did not want to access Emma's investments or use all of the funds in her bank accounts because he was concerned about meeting Emma's other regular expenses. Ivan confirmed that he issued three further cheques of \$850 each to Judy from the Capital One account after Emma's death, which was part of the deferred compensation to her.
- [49] Judy identified the yearly reports she provided to Ivan for 2003 through 2012 (Documents Binder, Tab 161). Judy confirmed that she subsequently wrote the numbers of the cheques Ivan issued to her to pay her for the therapy services on the yearly reports, identifying her

handwritten notes on each report. She testified that she had agreed with Ivan to defer her payment several times because they were concerned about the funds in Emma's bank accounts. Judy testified that she rounded up or down so that the amount she invoiced Ivan totalled \$850 per quarter, although the last invoices included more expensive purchases (such as for medical equipment), and the amount on the last three reports was for \$950.

- [50] Counsel for the Objecting Beneficiaries provided Judy with a copy of 5 pages of his handwritten notes tallying up the cheques issued to Judy over the course of Ivan's administration, which he estimates total approximately \$58,000. The calculation included cheques reimbursing Judy for expenditures prior to Emma's move to Alberta (including the payment for cleaning out 704) and for medical equipment Judy had purchased. In response, Ivan's counsel prepared a spreadsheet showing the invoices Judy provided to Ivan for the period from September 23, 2002 (when Emma moved to Alberta), together with the cheques issued to her to reimburse her, and the corresponding tab numbers in the Document Binder (although two cheques are missing) (Ex. 13) (the "Exhibit 13 Spreadsheet"). Based on the Exhibit 13 Spreadsheet, the amount paid to Judy for the therapy fees is \$35,150.00. I find that the evidence in the Exhibit 13 Spreadsheet is more accurate than the estimates prepared by counsel for the Objecting Beneficiaries.
- [51] The Objecting Beneficiaries did not provide any authorities in which a court has found that it is a prima facie conflict of interest for an attorney to pay their spouse or family member for services to a donor, and on that basis alone ordered the attorney to repay the estate the amount in issue. The Objecting Beneficiaries did not allege that Judy did not provide the services to Emma as reported, or challenge Judy's qualifications to provide the services, only that she should not have been paid because she is Ivan's spouse. Further, they did not allege that Emma did not benefit from the therapy activities for which Judy was compensated. The Objecting Beneficiaries did not lead evidence of the amount that it would have cost Ivan to retain a private care aide to provide the same or similar services to Emma, and did not challenge Judy's evidence of the amount charged at Royal City.
- [52] Based on the evidence before me, I find that the therapy services Judy provided were of benefit to Emma while she lived at Allen Gray, and that the amount Ivan paid Judy (\$35,150.00) was reasonable in the circumstances.

Power of Attorney Expenses

- [53] The capital transactions include a total of \$30,212.11 for "power of attorney expenses", which Ivan testified was the amount he spent on the administration of Emma's estate.
- [54] The Objecting Beneficiaries tendered in evidence copies of Ivan's expense sheets for the months of November 2000 through April 2002 (Ex. 9) (which are also reproduced in the Documents Binder, Tabs 40-43, 45, 47-55, and 57). On these expense sheets, Ivan has claimed an amount for long distance and postage, as well as an additional amount of \$100 per month for "administration". In the Documents Binder, copies of Ivan's telephone bills are attached

to the expense sheets. The Objecting Beneficiaries point out that from May 2002 to December 2012, Ivan did not prepare accounting records, but continued to issue cheques to himself to reimburse himself for the "administration fee". In the written objections, the Objecting Beneficiaries had calculated the total of the reimbursement for the generic "administration" is \$16,000.00. They submit that this was not reimbursement for expenses, but that Ivan withdrew these funds as his compensation for acting as Emma's attorney, in breach of s. 24(1) of the PAA, and that he should be ordered to reimburse this to the estate or it should be deducted from his share.

- [55] Ivan maintained that the monthly administration expense was not compensation, but was the amount required to reimburse himself for the expenses he estimated he regularly incurred in administering Emma's estate. Ivan testified that he estimated he spent about \$100 per month on incidentals related to the administration of Emma's estate, such as stationery, postage and long-distance telephone charges. He testified that with the early expense sheets (such as those in Ex. 9), he tracked postage and telephone expenses separately, in addition to the \$100 he spent on administration, and the Documents Binder contains copies of his telephone bills to support the charges for which he sought reimbursement. He admits that over the course of the administration, he reimbursed himself \$125 per month for all these expenses, which was his estimate.
- [56] Together with the expense sheets noted above, the Documents Binder contains copies of cheques Ivan issued to himself from November 2000 through December 2012 (Tabs 40-57, and 59-73). Starting in 2004, Ivan increased the monthly amount for administration fees to \$125 (as indicated on Capital City cheque #125 at Tab 59 of the Documents Binder). However, as the Objecting Beneficiaries point out, there are no expense sheets after April 2002 and, more importantly, there is no evidence to support that Ivan's estimate of the monthly expenses he incurred for administering Emma's estate is accurate.
- [57] The law establishes that, unlike an executor under a will, an attorney is not entitled to any compensation, and this is expressed in s. 24(1) of the PAA. Section 24(2) of the PAA permits an authority to reimbursement of expenses "properly incurred in acting as the adult's attorney", but as Voith J. reiterated in Sull, in their accounts, the attorney must provide an explanation, "with satisfactory evidence", that the funds expended were for the grantor's benefit.
- [58] It is problematic that, other than the telephone bills attached to the early expense sheets, Ivan did not keep any records, such as invoices or receipts, to confirm these attorney expenses. I acknowledge that Ivan would have incurred some regular costs to administer the estate (such as postage and long-distance phone charges), but without any evidence of these ongoing costs, I cannot determine that the monthly administration expenses (\$100 and \$125) were properly incurred in acting as Emma's attorney and I find that it is more likely than not that the monthly administration expenses Ivan claims amount to compensation.

- [59] Based on the evidence before me of the cancelled cheques and expense sheets, I calculate that Ivan received \$17,300 from Emma's estate during his administration of it as its attorney, which I find to be improper compensation.

Summary of Attorney Accounts

- [60] I order that the Attorney Accounts are passed as presented, subject to the deduction of \$17,300 from the "Power of Attorney Expenses", which I have found to be improper compensation. Ivan is to reimburse \$17,300 to the estate, which can be done by deducting this amount from Ivan's share of the estate.

The Executor Accounts

Legal Principles

- [61] Section 99(1) of the Trustee Act stipulates that unless the executor's accounts are approved and consented to in writing by all of the beneficiaries, or the court otherwise orders, within 2 years from the date of the grant of probate, an executor must pass their accounts.
- [62] Executors are required to keep adequate and complete accounts and to provide an accounting to the beneficiaries, including receipts, upon request (see *Coyne Estate*, 2017 BCSC 493, para. 49 (Master Wilson)).

The Accounts

- [63] In the Accounts Affidavit, Ivan attested that he retained Graham & Associates, Chartered Professional Accountants ("G&A"), to prepare the Executor Accounts for the period from January 7, 2013 through August 31, 2016 (para. 5). He attests that he retained Ms. Brimmage (the bookkeeper who helped him prepare the Attorney Accounts) to prepare the Executor Accounts for the period from September 1, 2016 through November 1, 2017 (para. 6). His Executor Accounts for the period from November 1, 2017 to date are not before me, given the terms of the Order.
- [64] The Executor Accounts show that as at the Deceased's death (January 7, 2013), the value of the estate's assets was \$1,670,285.85 and there were no liabilities. As at November 1, 2017, the value of the estate's assets had increased to \$1,853,196.77 and there continued to be no liabilities.
- [65] The Objecting Beneficiaries did not consent to the passing of Ivan's Executor Accounts, which as per the Order are interim, objecting primarily to Ivan's claim for remuneration and to the delay in passing the Accounts. The hearing took place some six years after Master Baker's Order, which they submit I should consider a factor when assessing the remuneration to which Ivan is entitled as executor. They also submit that Ivan should have included in the Accounts further information from November 1, 2017 onwards at this hearing.

- [66] On the passing of these accounts, I am bound by the terms of the Order and I have no jurisdiction to address the Executor's Accounts after November 1, 2017. I will address the factor of delay further below with respect to the Executor remuneration Ivan claims.
- [67] The Objecting Beneficiaries also asserted that they had not received any information from Ivan about the estate's taxes (that there was nothing in the Executor Accounts and materials provided to them) and they were concerned that the estate may have incurred penalties if there were capital gains through the sales of 704 and 710. At the hearing, counsel for the Objecting Beneficiaries put copies of the following documents to Ivan: the estate's T3 Trust Income Tax and Information Return for the 2015 tax year, showing the dispositions of 704 and 710; the estate's T3 Adjustment Request; and the Trust Notice of Assessment issued by the Canada Revenue Agency ("CRA") on August 10, 2016 (Exhibits 1-3).
- [68] Ivan testified that with the assistance of G&A, he had filed the estate's T3 and he confirmed that the balance of \$35,440.38 owing on the CRA assessment was paid from the estate. He also testified that he has not applied for a final clearance certificate for the estate to date because he wanted to wait until the Accounts had been passed under the Order.
- [69] Prior to the hearing, the Objecting Beneficiaries had alleged that Ivan mismanaged the sales of 704 and 710 (for example, by failing to consult with them about the sales, or have the properties assessed by three different realtors), but they did not raise this at the passing of accounts.
- [70] Although the hearing occupied three days, the majority of the time was spent on the passing of the Attorney Accounts, and I find that as the Deceased's executor, Ivan has proven the Accounts sought to be passed.

Summary of Executor Accounts

- [71] I order that, with the exception of the executor's remuneration, the Executor Accounts are passed as presented.

The Executor's Remuneration

Legal Principles

- [72] Section 88 of the Trustee Act sets out how the executor's remuneration is to be set, providing that an executor is entitled to, "a fair and reasonable allowance, not exceeding 5% on the gross aggregate value, including capital and income, of all the assets of the estate by way of remuneration for his or her care, pains and trouble and his or her time spent in and about the executorship of the estate and effects vested in him or her under any will, and in administering, disposing of and arranging and settling the same, and generally in arranging and settling the affairs of the estate as the court, or a registrar of the court if so directed by the court thinks proper" (s. 88(1)).

[73] Section 88(3) of the Trustee Act permits an executor to apply annually for "a care and management fee and the court may allow a fee not exceeding 0.4% of the average market value of the assets."

[74] In *Chau Estate (Re)*, 2016 BCSC 2541, at para. 15, Registrar Nielsen (as he then was) summarized the criteria to be considered in determining the appropriate amount of remuneration, as established in the leading case of *Re Toronto General Trust Corp. v. Central Ontario Railway Company*, (1905), 6 O.W.R. 350 at 354 (Ont. HC) [*Re Toronto General Trust Corp.*] (see also *Mikaloff (Re)*, 2018 BCSC 756, at para. 18 [*Mikaloff*]). The criteria are: the magnitude of the trust; the care and responsibility involved; the time occupied in administering the trust; the skill and ability displayed; and finally, the success achieved in the final result.

[75] In *Mikaloff* at para. 19, Registrar Nielsen also cited *Re Pedlar*, [1982] 34 B.C.L.R. 185 (S.C.) [*Pedlar*], in which the Court set out the following list of factors, which can be considered in determining whether any care and management fee should be allowed and, if allowed, the extent of such fee:

- The value of the estate assets being administered;
- The nature of the estate assets being administered;
- The degree of responsibility imposed upon the trustee by the terms of the will or other instrument, including the length or duration of the trust;
- The time expended by the trustee in the care and management of the estate;
- The degree of ability exhibited by the trustee in the care and management of the estate;
- The success or failure of the trustee in the care and management of the estate; and
- Whether or not some extraordinary service has been rendered by the trustee in the care and management of the estate.

[76] In *Pedlar*, the Court reiterated that each application must be decided upon its own facts and the list of factors is not intended to be exhaustive as there may be other factors deserving consideration depending upon the circumstances (para. 15).

Executor's Remuneration

[77] In his closing written submissions, Ivan submits that the fair executor remuneration is \$98,188.57. In the Executor Accounts, the proposed remuneration for the period ending November 1, 2017, is set out as follows:

For the period ending August 31, 2016:

Capital fee of \$58,145.03 (3% of \$1,938,167.75, the proceeds of disposition of capital assets realized since the commencement date), plus

Income fee of \$6,472.90 (5% of \$129,457.97, the gross income earned by the estate from January 7, 2013 to August 31, 2016); plus

Care and management fees of \$25,731.62 (0.4% of the average market value of the estate assets for the four reporting periods from January 7, 2013 to August 31, 2016)

Total: \$90,349.55

For the period ending November 1, 2017:

Income fee of \$434.88 (5% of \$8,697.61, the gross income earned by the estate for the period from September 1, 2016 to November 1, 2017); and

Care and management fee of \$7,404.13 (0.4% of \$1,851,032.29, which is the average market value of the estate assets for the reporting period from August 31, 2016 to November 1, 2017).

Total: \$7,843.01

- [78] In his closing written submissions, Ivan states that the capital fee for the period from August 31, 2016 to November 1, 2017, which is set out in the Executor Accounts as \$55,334.97 (3% of \$1,844,499.16, the gross aggregate value of capital assets of the estate as at November 1, 2017) "is not being claimed".
- [79] Although the gross aggregate value of the capital assets of the estate as at November 1, 2017 is lower than it was at August 31, 2016 (\$1,844,499.16 as opposed to \$1,938,167.75), given the terms of the Order, in my view it is appropriate to use gross aggregate value of the capital assets of the estate as at November 1, 2017, when calculating the 3% capital fee Ivan claims.
- [80] With respect to the amounts he claims for income fees and care and management fees, I note that Ivan claims the maximum allowed under s. 88 of the Trustee Act (5% for the income fee, and 0.4% for the care and management fee) for the relevant periods.
- [81] The Objecting Beneficiaries submit that in these circumstances, where only the Executor Accounts to November 1, 2017 are before me, it is premature to set his remuneration and I should decline to determine an amount at this point. In my view, given the passage of time since the Deceased's death, as well as the fact that the administration of her estate is nearly complete, it is appropriate to determine the executor's remuneration as directed by para. 3 of the Order.
- [82] The Objecting Beneficiaries submit that if I determine Ivan is entitled to remuneration at this point, a fair and reasonable amount is less than the amount Ivan is seeking for various reasons, which are discussed below in my review of the criteria considered for the executor's remuneration, which are relevant to this case.

Magnitude of the Trust

[83] The Deceased's estate was valued at \$1,853,196.77 as at November 1, 2017. By today's standards, this is a moderate estate (see Mikaloff, para. 21); however, by describing the Deceased's estate as moderate, I do not intend to diminish its value to the beneficiaries.

Care and Responsibility Involved

- [84] At the time of her death, the Deceased's estate consisted of the two rental properties in New Westminster, as well as the accounts and investments held at Capital One. Ivan testified that he retained a realtor in New Westminster who marketed and sold 704 and 710 for him by the end of 2015, within the year of obtaining the grant of probate. As well, Ivan closed all of the Deceased's Capital One accounts (chequing, savings, the GIC, and the shares), and the Accounts show that all of these investment funds were transferred to Mr. Ross's trust account; as at April 11, 2017, the entirety of the Deceased's estate is held in a term deposit at TD Canada Trust, which Ivan testified is managed by Mr. Ross.
- [85] The Objecting Beneficiaries submit that as executor of the Deceased's estate, the level of care and responsibility Ivan exercised was minimal. They acknowledge that he was responsible for paying the property taxes and utilities associated with the rental properties for approximately three years from the Deceased's death to the sale of 704 and 710, but that he had been doing this throughout his administration of the estate as Emma's attorney. They also submit that Ivan's responsibility for the properties was minimal because ACD continued to manage the rental properties until they were sold in late 2015 (the estate accounts include a payment to ACD in January 2016 for garbage removal). They also point to the undisputed evidence that by Spring 2017, it is Mr. Ross, not Ivan, who is managing the estate, which is all in a term deposit.
- [86] I find that in the circumstance of this case, the care and responsibility involved were minimal. The rental properties were managed by ACD, and there was no evidence before me that they required further renovations after the Deceased's death before they were marketed and sold by a realtor. Ivan was responsible for providing relevant information to G&A so that it could prepare and file the estate taxes, and I acknowledge that the CRA made a mistake about the Deceased's accounts which required some time to resolve with G&A's help, but there was no evidence before me that the Deceased's estate required a great deal of care and responsibility and that it was onerous or time-consuming.

Time Occupied in Administering the Estate

- [87] The Objecting Beneficiaries submit that I should consider the delay in passing both the Attorney Accounts and the Executor Accounts as a basis for reducing the remuneration Ivan seeks. They submit that Ivan failed to pass the Accounts within the two-year period after the grant of probate required under the Trustee Act, and assert that he is solely responsible for what they consider to be the lengthy delay in passing the Accounts after the Order was pronounced in 2017.
- [88] Ivan testified that after the Deceased's death in January 2013, Mr. Ross filed the application for the grant of probate, but he did so under previous legislation that was no longer in force (the WESA probate provisions came into force in 2014). Ivan submitted that the necessary re-filing of the probate application delayed the grant of probate, which was granted to Ivan in March 2015, two years after the Deceased's death. The Objecting Beneficiaries accept the reasons for the delay in obtaining probate; their focus is on the delay after probate was obtained and the Order was pronounced.
- [89] The New Westminster properties were sold by the end of 2015 and the Deceased's Capital One accounts were all closed in mid-2016. Ivan admits that he did not pass the Executor Accounts by March 2017 (two years after probate). However, Ivan attributes some of the delay to others. As noted, he testified that the CRA mistakenly created two accounts for the Deceased's estate, which took time to resolve to ensure the estate taxes were properly filed. He submits that the primary reason for the delay is because although he prepared and provided the Accounts following the Order, the Objecting Beneficiaries did not communicate their objections to the Accounts without repeated requests. Ivan submits that I should also consider the difficulty in securing hearing dates because for several months in 2022, scheduling did not have dates for Registrar's hearings while the Registrar's position was vacant.
- [90] Ivan also submits that I should consider the time he spent administering Emma's estate as her attorney as contributing to the remuneration he seeks. As set out above, the law does not permit an attorney to be compensated for their time administering an estate and I have found that Ivan improperly compensated himself through the "administration" expenses. The executor's remuneration is only for the time spent as the executor.
- [91] Although there was delay in passing the Executor Accounts after the pronouncement of the Order, the evidence before me does not establish that Ivan was solely responsible for the delay in passing the Accounts and I find that there were other things contributing to the six-year delay between the Order and the hearing.

Skills and Abilities Displayed

- [92] This was not a complicated estate. By the time of her death, Ivan had been administering the Deceased's estate for several years as her attorney, and there was no need for him to locate estate assets. Given the terms of the Deceased's will, there was no need for Ivan to locate beneficiaries and distribute specific bequests.
- [93] Ivan testified that he retained professionals (Mr. Ross and G&A) to assist him with the administration of the Deceased's estate. Although probate took longer to obtain, once it was granted, he retained the realtor who marketed and sold the 704 and 710 properties in less than a year. Ivan closed the Deceased's Capital One accounts, transferring all of the funds to Mr. Ross to be held in trust. There is no dispute that Mr. Ross has been managing all of the estate's assets since late 2016 or early 2017.

Success Achieved

- [94] Although the Objecting Beneficiaries had raised objections about Ivan's handling of the sales of 704 and 710, they did not pursue them at the hearing. The value of the estate increased from the date of probate due to the sale of the properties, and the management of the estate's investments.
- [95] Although there was no evidence before me that the sales of 704 and 710 were improvident, neither was there evidence that the increase in the value of the estate was solely through Ivan's efforts as executor and it was established that Mr. Ross is managing the estate funds.
- [96] Further, the value of the estate in evidence before me was only to November 1, 2017, and there was no evidence of its current value as this is an interim passing of accounts.

The Remuneration

- [97] Like the situation in Mikaloff, Ivan has completed the majority of the work in administering the estate and very little is left to do, although the final Executor Accounts in this case will have to encompass the six years that have passed since the date of these Accounts, as well as the remaining time until final clearance is obtained.
- [98] In this case, Ivan claims a capital fee based on 3% of the gross aggregate value of the capital assets of the estate as at August 31, 2016 (\$1,938,167.75). As I noted above, I find that the capital fee he seeks should properly be based on the gross aggregate value of the capital assets as at November 1, 2017 (\$1,844,499.16). In the circumstances of this case, it is appropriate to order that the capital fee portion of the executor's remuneration for the period to November 1, 2017 is \$55,334.97 (3% of \$1,844,499.16). While Ivan will be entitled to seek further remuneration as executor for the period from November 1, 2017, the amount (if any) he seeks as a capital fee should take into account the amount I have ordered for the capital fee on this interim passing of accounts.

- [99] As the income fee, Ivan claims 5% of the gross income earned by the estate from January 7, 2013 to November 1, 2017, totalling \$6,907.78. In Mikaloff, Registrar Nielsen reiterated that maximum remuneration is not awarded as a matter of routine, but that an executor is entitled "to a level of remuneration that is appropriate, fair and reasonable in the circumstances" (para. 42). In the circumstances of this case where the evidence before me is that the income earned by the estate is the result of Mr. Ross's management of the funds, I find it appropriate to reduce the amount Ivan seeks as his income fee from \$6,907.78 to \$3,453.89, which is 2.5% of the gross income earned by the estate from January 7, 2013 to November 1, 2017. Ivan will be entitled to seek an income fee as his executor remuneration from November 1, 2017 to the date of the final passing of accounts.
- [100] Like the income fee, Ivan has claimed the maximum of 0.4% for the care and management fees portion of his executor remuneration, totalling \$33,135.75. In the circumstances of this case, considering the criteria discussed above where I found that the care and responsibility was minimal, I find it appropriate to reduce the care and management fee from 0.4% to 0.2%. As such, I calculate the total care and management fee to which Ivan is entitled, based on the average market value of the estate assets for the reporting periods set out in the Executor Accounts, to be \$17,782.84.
- [101] I order that the executor remuneration to which Ivan is entitled for the period ending November 1, 2017 is \$76,571.70.

Costs of the Passing of Accounts

- [102] Ivan submits that I should not depart from the usual order regarding costs on this passing of accounts, and award him his costs payable as special costs from the estate. Rule 25-13(7) provides that unless the court on an application otherwise orders, if costs are payable on a passing of accounts under R. 25-13(1), those costs must be assessed as special costs.
- [103] The Objecting Beneficiaries did not make extensive submissions on costs, other than to note the majority of the hearing was occupied by the passing of the Attorney Accounts.
- [104] Although I have reduced the amount Ivan claims as his remuneration, I see no reason not to award Ivan, the executor, his costs for the passing of the accounts payable from the estate as special costs and I so order.

"Registrar Gaily"

- [1] By my calculation, the total should be \$820,207.81, but I have reproduced the original.
- [2] Again, I calculate the total to be \$1,146,641.00, but have reproduced the original.
- [3] Ivan testified that ACD changed the format of its management agreements and he executed a new management agreement for 710 with ACD in August 2012 (Documents Binder, Tab 21).

- [4] When ACD changed the format of its agreements, Ivan executed a second agreement for the management of 704 on August 30, 2012 (Documents Binder, Tab 4).
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