

CANADA / JUDGMENT

Briggs Estate

2020 BCSC 2114

COURT

Supreme Court of British Columbia

DECIDED

10 March 2020

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2020 BCSC 2114 Briggs Estate

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Briggs Estate,

2020 BCSC 2114

Date: 20200310

Docket: P50996

Registry: Vernon

Re: The Estate of Percy Charles Sydney Briggs

also known as Percy S. Briggs

also known as Percy Briggs, Deceased

Before: The Honourable Mr. Justice Betton

Oral Reasons for Judgment

Counsel for the Applicants Tracy Leah Briggs, Lisa Gayle Briggs and Barry Warren Briggs:

R.J. Enns

Counsel for the Respondent Executrix Vanessa Hoggarth:

R.P. Barton

Appearing on behalf of the Respondent Executrix Glenna Hoggarth, now deceased:

G.W. White

Place and Date of Trial/Hearing:

Kelowna, B.C.

January 29 and February 5, 2020

Place and Date of Judgment:

Vernon, B.C.

March 10, 2020

- [1] THE COURT: The applicants are beneficiaries under their deceased father Percy Briggs' will. Prior to and after his death on April 17, 2013, they took issue with the conduct of their sister Glenna Hoggarth's actions. She was named executrix, but did not obtain probate. She held a power of attorney prior to Percy's death. Before and after the alternative executrix Vanessa Hoggarth assumed her role, the applicants demanded disclosure of financial records of the deceased for a period of time prior to his death. Both Glenna and Vanessa Hoggarth resisted at least some of those demands and legal fees were incurred in the process. The applicants seek various orders arising from those actions.
- [2] The deceased Percy Briggs had four children, the applicants and Glenna Hoggarth. Ms. Glenna Hoggarth is now deceased. She passed after this application was initially brought before me in December of 2018. Vanessa Hoggarth is Glenna Hoggarth's daughter. The deceased had been in a long-time relationship with a Ms. Calder that ended in or about October of 2011. His marriage to the applicant's and Glenna Hoggarth's mother Phyllis had ended many years prior. Phyllis passed away in 1993. After his relationship with Ms. Calder ended, Percy was then without a residence and began living with Glenna Hoggarth. Glenna Hoggarth has indicated in affidavit evidence that Ms. Calder kicked Percy out and that she, that is Glenna Hoggarth, was the only one of the children willing to assist. Percy remained at Glenna Hoggarth's residence until he went into a seniors' care facility in or about December of 2012.
- [3] In February of 2012, Percy granted a power of attorney to Glenna Hoggarth. The applicants indicated that they had reduced contact with Percy after he moved in with Glenna Hoggarth. Percy was diagnosed with Parkinson's disease in 2011. His health had deteriorated in the later stages of his cohabitation with Ms. Calder, but had improved, at least initially, in his time with Glenna Hoggarth.
- [4] On April 16, 2013, \$4,000 was withdrawn by Glenna Hoggarth from Percy's account. The materials reveal very different characterizations of that process. I intend to refer to those. In Ms. Hoggarth's affidavit number 1 she says this:
20. On April 16, 2013, on my father's specific instructions I withdrew the amount of \$4,000 from the Vantage One Credit Union account, to reimburse me for a number of expenses I had incurred on his behalf. Attached hereto and marked as Exhibit "G" to this my Affidavit are copies of statements related to these expenses

She then proceeds to summarize the statements. They total just under \$3,000 and goes on at para. 20 to say:

Unfortunately, I do not have receipts or statements relating to the entire \$4,000. As I recall, my father also wanted to reimburse me for mileage for driving him around, but I do not remember the specific details.

- [5] From the applicants' perspective they comment on that in the notice of application, simply, as follows:
14. On April 16, 2013, Glenna withdrew \$4000 from Percy's account at VantageOne Credit Union while Percy was in a coma on the day before his death.
- [6] In October of 2013 Glenna Hoggarth purchased a headstone, and again the materials reveal very different characterizations of how that came about and the appropriateness of it. From the applicants' perspective they say this in the notice of application:
20. In early 2014 a headstone was purchased by Glenna on behalf of the Estate and placed on the gravesite of Percy and on the grave site of the Applicants' mother without the prior consent of Barry, the Executor for his mother's estate. The headstone was entirely inappropriate in that Percy and the Applicants' mother had separated on unhappy terms and Percy had been living common-law with two other women for 30 years after their separation. The headstone caused great distress for the Applicants. At the request of Barry, Vernon Cemetery removed the headstone.
- [7] For her part, Glenna Hoggarth says this in her third affidavit:
12. As the "personal representative named in the will of ["] Percy, I had the responsibility of directing his funeral services. As such, I had the immediate duty to make all funeral and internment arrangements for the Deceased. As part of these duties, I ordered a headstone for the plot where Percy was interred. This plot was shared with Percy's former spouse, who predeceased him, Phyllis Briggs ("Phyllis").
13. This plot was purchased by the applicant, Barry Warren Briggs ("Barry"), after the death of Phyllis in 1993. Barry was the executor of Phyllis' Will. No party has objected to the [sic] Percy being interred in the joint plot.
- [8] Although Glenna Hoggarth was named as executrix, she had not obtained probate by October of that year. The applicants requested information regarding Percy's financial affairs. On October 25, 2013 Glenna Hoggarth was served with a citation to accept probate. She did not proceed and Vanessa Hoggarth ultimately applied for probate on January 13, 2014. Vanessa Hoggarth has assumed the role of executrix since that time.
- [9] The applicants were persistent in their demands for information. A significant portion of the affidavit evidence before me is made up of the letters back and forth regarding the applicants' demands and the responses by either Glenna Hoggarth or Vanessa Hoggarth, all through counsel and all obviously with related legal fees. Some of the requested information

was provided in the process, but not to the satisfaction of the applicants. That led to the applicants moving toward an application to compel Vanessa Hoggarth to provide records. The application did not proceed, as Vanessa Hoggarth relented and produced the information, which had not, to that point in time, been provided.

- [10] There were, as I indicated, other demands related to inventories, valuation and disposition of Percy's personal property.
- [11] As noted, Glenna Hoggarth and Vanessa Hoggarth had each retained counsel in their capacities on behalf of the estate and significant legal fees have been incurred. As of January 29, 2020 those were said to be \$46,184.54. A portion of those were incurred in addressing the demands of the applicants.
- [12] Following Percy's death, his general practitioner prepared a letter summarizing that doctor's observations and opinions of Percy's health leading up to his demise. It reveals ebbs and flows in Percy's cognitive function apparently related to depression and other issues. It confirms all of the children were aware of the general practitioner's thoughts leading up to Percy's death regarding his competency. It is somewhat unclear on the face of that letter what source or sources of information were relied upon by the physician for the underlying factual assumptions. The applicants acknowledge they saw little of Percy in the late stages of his life. The observations of both Glenna Hoggarth and Vanessa Hoggarth were that Percy was competent at the material times.
- [13] In light of that background the applicants seek various orders. This application has had somewhat of a strained and lengthy history and each of the parties seeks to attach some blame to the others for that having occurred. The application seeks eight different orders.
- [14] The first is an order that Vanessa Hoggarth pass the accounts for the estate. That has been resolved by consensus and an application had been scheduled, but was adjourned as a result of this outstanding application not concluding.
- [15] Next, the application seeks a disclosure of tax returns. I am informed that tax returns have been filed and disclosed.
- [16] Next, the application seeks that the remuneration of Vanessa Hoggarth, as executrix, be fixed at zero percent. During the course of submissions counsel acknowledge, without necessarily agreeing, that this may be an issue to be left to a later date when the estate administration is complete and all of the conduct and issues have been dealt with.
- [17] Next, the applicants seek an order that Glenna Hoggarth return the \$4,000 withdrawn from the account of Percy on April 16, 2013.
- [18] Further, they seek an order that Glenna Hoggarth compensate the estate for the costs associated with the headstone.

- [19] Further, they seek an order that solicitors for the estate bill the estate up to date. I am informed that that has in fact occurred prior to the conclusion of this application.
- [20] Further, the applicants seek an order that the legal fees of those solicitors be capped at \$7,500. The underlying proposition behind that portion of the application is that at least portions of the legal expense were not appropriately incurred by Vanessa Hoggarth or Glenna Hoggarth in resisting the demands for financial information or in respect of Percy's personal property.
- [21] Finally, all of the parties seek orders for special costs.
- [22] I accept that the applicants had a significant skepticism about their sister Glenna Hoggarth's actions relating to their father leading up to Percy's death and following. They simply did not trust her. I also accept that Percy's health was such that his competency would have been a legitimate concern in the late stages of his life. I cannot determine on the evidence before me, however, when specifically or whether he was not competent at any particular point in time. In saying this I make no finding as to whether the lack of trust in Glenna Hoggarth by the applicants was well founded. I have no doubt that the lack of trust was exacerbated by Glenna Hoggarth's resistance to their demands. It is clear that all of Percy's children were aware that he had cognitive issues in the time leading up to his death, whether or not they agree as to the severity or effect at any specific point in time.
- [23] All of that provides an interesting insight into what motivated the applicants to make their demands and ultimately pursue this application. It is, however, of limited assistance in resolving the issues raised.
- [24] I will deal first with the issues related directly to Glenna Hoggarth. The \$4,000 that was withdrawn from Percy's account by Glenna prior to his death was, according to Glenna Hoggarth, on the specific instructions of Percy and therefore not an exercise of the power of attorney. The applicants say that Percy was not competent at that time. As indicated, I cannot, and in my view I need not, resolve that issue on the evidence before me. What is critical is that that occurred at a time prior to Percy's death.
- [25] The applicants' efforts to cast the issue as something connected with Glenna Hoggarth's duties to the estate as a personal representative of the estate prior to Vanessa becoming the executor are, in my view, without merit. I agree with Mr. White that if the issue is to be pursued it is for the estate to do so either by Vanessa Hoggarth, or alternatively by the applicants employing the process under s. 151 of the Wills, Estates and Succession Act. The applicants have no standing to seek this relief. This part of the application is dismissed.
- [26] I turn next to the expenditure for the headstone. This expense was incurred while Glenna Hoggarth was the personal representative of the estate, but prior to the grant of probate. Glenna Hoggarth had the authority to do as she did as the personal representative. The question is whether she acted properly in so doing and whether this application is the appropriate mechanism by which to resolve the issues. The parties agree that the standard

of conduct is as set out by the Supreme Court of Canada in *Fales v. Canada Permanent Trust Co.*, [1977] 2 S.C.R. 302, that is, by the standard of a person of ordinary prudence in managing their own affairs. The applicants seek a passing of accounts by Vanessa from the date of Percy's death, and that has been scheduled or will be scheduled following the conclusion of these reasons. That expenditure will logically be part of that process.

[27] The specific foundation for the remedy sought by the applicants remains somewhat unclear to me. The notice of application seeks an order that Glenna Hoggarth fully compensate the estate for the purchase and placement of the inappropriate headstone of Percy Charles Sydney Briggs, deceased. In the initial written argument provided to me by the applicants say this, in part, at page 2:

We are asking the Court to make rulings today that will help the Registrar in making determinations to set the Executrix's fees and to make determinations about how various parties should bear the costs of the Administration of the Estate.

[28] Further in those initial written submissions, at page 16, the applicants say this:

Claiming relief against Glenna was a difficult problem to sort out. There is the cost of starting a separate action and the difficulty of adding a party to a Probate application. Either one involves substantially more steps and it is our position that Rule 25-14(8) is ultimately the authority for the Court to include Glenna as a party.

Both specific claims related to Glenna are as to her role as a personal representative of Percy or his Estate. In the first case she should be accounting for money she took from the Estate and if she cannot justify it while acting as an Attorney even if only for a short period of time, it should be returned. It is the Applicant[s]' position that the Court has the legal authority to make a ruling against Glenna with regard to her conduct as an Executrix and as a prior attorney.

[29] Later, in reply submissions, at page 8, the applicants said this:

Mr. White [referring to counsel for Glenna Hoggarth and later for her estate] correctly pointed out that there are two options for the Applicants seeking relief. Mr. White has argued that section 151 of the Wills[,] Estate[s] and Succession Act should have been utilized by the Applicants as the proper procedure to make a claim against Glenna by first applying for leave of the Court to bring an action against her through the estate.

[30] Is that someone's phone?

[31] UNIDENTIFIED SPEAKER: Sorry, My Lord.

[32] THE COURT: That should be powered off completely.

[33] Carrying on with that same paragraph:

The Applicants considered and rejected using s. 151 and s. 158 of the Wills[, Estate[s] and Succession Act because it would bog down the process and because Glenna was an executor and acted as such.

The Applicants have chosen the first option to hold the executrices accountable in the passing of accounts, because in this Application we are not suing a third party. Glenna was an executor.

- [34] The application, however, is for Vanessa to pass the accounts for the entire period of time since Percy's death. Passing of accounts by Vanessa will necessarily include the costs of the headstone. Vanessa's accountability for that process will obviously be considered in the context of the fact that the expenditure had been incurred before she had any control or responsibility for the estate. If there had been a passing of accounts required of Glenna, then she would presumably be accountable in the context of the period of time for which she was responsible and in her particular circumstances. It is not appropriate for me to bind the discretion of the registrar in considering what Vanessa has done in this respect. The applicants, in my view, have no standing to seek the order that Glenna compensate the estate for the costs of the headstone. This part of the application is also dismissed.
- [35] The next issue relates to the accounts of counsel for the executor and a personal representative, that is, Vanessa and Glenna Hoggarth. The essence of the application is to in some form restrict the legal expenses incurred in resisting the applicants' efforts for disclosure of the predeath financial records and issues associated with Percy's personal property. To be clear, this is not effectively a taxation of the legal accounts to determine the reasonableness of the fees for the services rendered by the law firm, it is a request that this court restrict the fees charged to the estate on the basis that Vanessa Hoggarth and/or Glenna Hoggarth should not have instructed the law firm to take the positions that it did. The notice of application requests that those be fixed at \$7,500.
- [36] I made clear during the colloquy with counsel that I did not view such an order as appropriate. Even if I agree with the applicants' underlying argument, I have no ability to quantify how much of the fees billed relate to the particular tasks at issue. Accordingly, I am proceeding on the basis of determining whether I should rule that certain categories of the work billed should not be paid by the estate or somehow be limited.
- [37] A substantial volume of evidence was placed before me. Vanessa Hoggarth's position is summarized at length in her written arguments with reference to those extensive materials. Distilled, and perhaps oversimplified, Vanessa says the process was long and unnecessary, punctuated by significant delays by the applicants. The applicants, on the other hand, say that their concerns were well founded and simply providing the information would have avoided all of this. There remain suspicions on their part about the dealings with Percy's personal property.
- [38] I will reference briefly, by way of example, some of the content of the submissions provided to me in this regard. From Vanessa Hoggarth's written submissions:

51. After all the information set out in the affidavit of Glenna Hoggarth #1 was provided, on February 18, 2016, counsel for the Executrix provided the Applicants with executor's accounts to review, and invited the Applicants to provide their comments with respect to the accounting.

[Materials Referenced omitted]

52. When no response was received from counsel for the Applicants, Mr. Hawes wrote follow up letters to counsel for the Applicants on July 10, 2016 and again on September 22, 2016. It was not until March 17, 2017, more than a year after the accounts had been provided, that counsel for the Applicants finally wrote back on March 17, 2017, advising that the Applicants were not prepared to accept the accounts as presented, and demanding further information, some of which had already been provided.

[Materials Referenced omitted]

[39] Further, at para. 79:

79. In summary, although the Applicants complain about delay in the administration of the Estate, it is clear from all the facts that the delay and related expense is attributable to the actions of the Applicants themselves, and their counsel, as follows:
- a. By pursuit of a "fishing expedition" in an attempt to find malfeasance on the part of Glenna, which was not there.
 - b. By leaving long delays before responding after having been provided with information which had been requested, including and most egregiously, by failing to respond to the Executor's Accounts until March 17, 2017, after they had been provided on February 18, 2016, and with other significant delays between the periods of July 9, 2014 and December 8, 2014; and January 14, 2015 and June 12, 2015, as outlined above.
 - c. By wasting time with correspondence demanding an itemized list of Percy's personal effects.
 - d. By bringing this Application, and then failing to pursue it with diligence.

[40] The applicants, for their part in their written submissions, essentially say that the applicants were concerned about the prior dealings with Percy's financial affairs, some information was provided, but that it was incomplete. They say at paras. 27 through 29:

27. Tracy, Lisa and Barry were concerned about the prior dealings with Percy's financial affairs before his death and as beneficiaries of the Estate they expected that financial information about Percy's Estate prior to his death should be provided. The Applicants retained Robert M. Moffat to make application to the Court for production of the missing financial information and after communications between Mr. Moffat and Mr. Hawes, Mr. Hawes sent a letter dated July 3, 2014 [Materials Referenced omitted]. The documents did include RRIF information for VantageOne but did not, in spite of what was said, include chequing account information for VantageOne nor any RBC Dominion Securities information prior to Percy's

death.

28. On December 8, 2014 Mr. Moffat wrote to Mr. Hawes with a formal demand for information and a detailed list of questions about the Estate finances [Materials Referenced omitted].
29. On January 14, 2015 Mr. Hawes wrote to Mr. Moffat, [not Mr. Enns] enclosing the tax returns for 2011, 2012 and 2013 saying that all information had been provided and that no information would be provided for the period of time prior to the death of Percy. [Materials Referenced omitted]. The question is why some and not all of the information?
- [41] The applicants say that their concerns were well founded and simply providing the information would have avoided all of this. It must be made clear that the issues regarding Glenna Hoggarth's conduct as power of attorney, as I have previously alluded to, are not properly part of what the applicants can pursue in this context. In that respect, as I have also referenced, they have s. 151 available to them. In addition, reference has been made and is applicable to s. 19 of the Power of Attorney Act that governs records and Glenna Hoggarth's duties being to Percy in that respect.
- [42] The typical process available to the applicants to scrutinize the management of the estate and whether Vanessa Hoggarth has met her obligations is the passing of the accounts. The task for the executrix is to fulfil the role to the standard set out in Fales. This is a situation where the applicants were suspicious, but had no specific evidence of wrongdoing. That was articulated by them in their letter through counsel on February 24, 2014, attached as Exhibit "L" to affidavit number 1 of Barry Briggs, which reads as follows:

Please be advised that at this time there is no allegations being made of any unsavoury activity with the affairs of Mr. Briggs. Our clients are merely seeking the information they are entitled to have as beneficiaries and the children of Mr. Briggs. Glenna Hoggarth has chosen to withhold almost all information from our clients in relation to her activities relating to the financial affairs of Mr. Briggs. If, as suggested in your letter of February 5, 2014 there is any desire of your clients to calm the feelings that are "running strong in this family" it would be best for all if everyone simply provided full and forthright information to each other.

- [43] They were seeking to prove that their suspicions were wrong, or alternatively to secure evidence of such wrongdoing. That, however, is not, in my view, sufficient to establish a positive obligation on Vanessa Hoggarth to search out or disclose predeath documents. In my view, she was entitled to decline to do so. On all of this I conclude that the applicants could make the request or demand for the documents and provide their foundation and unless Vanessa Hoggarth has shown to have failed to meet the duties placed upon her in accordance with the standards of Fales it ends there. Looking at the information with the benefit of hindsight is an imperfect method, but what the records actually disclose is at least relevant. According to the information before me there is no evidence of wrongdoing. I have made my comments with regard to the withdrawal of the \$4,000 immediately prior to Percy's death.

- [44] There are, as I indicated, extensive communications in evidence presented in this application. They reveal demands, responses and expressions of dissatisfaction with the responses. Examples are attached to Mr. Briggs' affidavit as Exhibits "M", "N" and "P". It is indeed unfortunate that significant legal fees were incurred in the process. The applicants could have simply pressed for the passing of accounts at a much earlier stage. It may be that the suspicions could have been quelled, if Glenna Hoggarth and/or Vanessa Hoggarth had simply provided the information at an early stage instead of waiting until faced with an application. That, however, does not make Vanessa Hoggarth liable, effectively, for the costs of the legal services. I reference s. 136 of the Wills, Estates and Succession Act, which provides a considerable discretion to Vanessa Hoggarth.
- [45] I decline to cap the legal fees or rule that any particular components of those services should be borne by Vanessa Hoggarth personally. To be clear, I do not intend to limit the discretion of the applicants to challenge the legal fees charged in the context of the passing of the accounts. What I am doing is declining to provide any oversight or constraint on that process by indicating certain categories or portions of the legal fees, however that might have been articulated, should not be permitted.
- [46] Finally, in my view, as was suggested during the course of dialogue with counsel, it is premature to address the question of whether or not and what the fees of the executrix ought to be. That, in fairness to all parties concerned, is something that ought to be assessed or measured once the administration of the estate is complete or nearing completion, so that a full context of the tasks involved, the time spent and the conduct, if you will, of Ms. Hoggarth can be assessed.
- [47] As indicated during the course of submissions, I do not intend at this point in time to make orders with respect to costs. It was left that, upon my reasons being given, the parties would be at liberty to make further submissions as to costs with the benefit of actual outcomes rather than trying to make submissions as to what the costs should be based on different theoretical possible outcomes. And I do not know how counsel wish to proceed with that. I would be content to at least receive some written submissions, but I, at this stage, would not want to proceed only on the basis of written submissions. I can envision a number of questions or concerns that I might have and I will perhaps foreshadow some of that, so that, depending on how counsel choose to proceed, they are at least aware of some of my questions.
- [48] All of the parties are essentially seeking orders for special costs. I have alluded to and made observations that I have some empathy on one level for the applicants saying, "Look, we want this information". It turned into a protracted process and ultimately I found that the application is not well founded, but that background is at least relevant to the assessment, it seems to me, of costs in relation to that portion of the application before me.

[49] The other thought or query I have is, whatever costs orders are made how would those be recovered? Would the parties be saying that it is somehow dealt with in the distribution of the estate to the beneficiaries and what options, if you will, might there be based on my findings, or how that would be dealt with, how it would be paid, who would bear it, with the ultimate objective of having the costs reflect their intention, which is responsibility for the outcome of the application? That is perhaps not very well articulated, but I do have a number of queries on that, and for that reason I would not want to proceed only on the basis of written submissions, because counsel may not and I may not have made it fully clear what my concerns are and counsel may not anticipate those with their submissions.

[SUBMISSIONS RE COSTS AND SCHEDULING]

[50] THE COURT: Let me say this, that to the extent that dates have not been set or there is any uncertainty in that respect, I will direct that an appointment be made for the passing of accounts and that every effort be made to schedule that in whatever form it may take. I am fully appreciating that the only step that may be available to the parties at this time is that initial application for directions as to how and when to proceed, but at least that that occur or that the date be scheduled for that. Not that it occur within a specific time, but there be a date for the hearing scheduled within 30 days.

[51] Any difficulty with that, Mr. White?

[52] MR. WHITE: I do not think so, My Lord. My only comment is that I suspect that we will want a transcription of your reasons to help with that process, but I do not think that would be a problem for us either.

[53] THE COURT: All right. And again, I am not saying that that appearance before the registrar has to happen within 30 days, but that the date for that to occur is identified within 30 days.

[54] MR. ENNS: Thank you, My Lord. I believe that will be the responsibility of Mr. Barton, given that he is representing --

[55] THE COURT: I suspect that is so, and so the point being that I want that process moving forward, that that will require all counsel dealing with trial scheduling to find that time. As I say, I am fully anticipating that that initial appearance is going to be essentially to get directions. I will leave that between the parties and trial scheduling, but that initial appearance, in whatever form it is going to take, be scheduled within 30 days.

"D.A. Betton J."

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