

CANADA / JUDGMENT

Bringeland Estate (Re)

2025 BCSC 63

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2025 BCSC 63 Bringeland Estate (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bringeland Estate (Re),

2025 BCSC 63

Date: 20250122

Docket: P22971

Registry: New Westminster

In the Matter of the Estate of Harold Irvin Bringeland, Deceased

Before: The Honourable Justice Stephens

Reasons for Judgment re Costs

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Written Submissions of the Application Respondent Dawne Bringeland, in her capacity as Executor:

October 17, 2024

Written Submissions of the Application Respondent Dawne Bringeland, in her personal capacity:

October 17, 2024

Written Submissions of the Applicant, Hal F. Bringeland:

October 3, 2024

Reply Written Submissions from the Applicant, Hal F. Bringeland:

October 22, 2024

Place and Date of Judgment:

New Westminster, B.C.

January 22, 2025

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Introduction

[1] This is my costs decision following my decision on an application for Executor removal reported at 2024 BCSC 1546 (the "RFJ"). In the RFJ, I found that Dawne should be removed as Executor and replaced by Hal: RFJ at para. 89.

[2] In these Reasons, as in the RFJ, I will use first names, but I mean no disrespect in doing so.

Discussion

Hal's Position on Costs

[3] Hal seeks special costs on a full indemnity basis, or in the alternative partial indemnity basis, payable from the respondent Dawne's share of the Estate with any shortfall be paid by her personally. He submits, among other things, that "[t]he burden of the costs award in Hal's favour should not be borne by his share of the Estate for the successful application he was required to bring". He therefore submits that "the costs award to indemnify Hal should be payable from Dawne's share of the Estate and if insufficient, then any shortfall be paid by

her personally".

- [4] In the alternative, Hal seeks "not only regular costs but also double costs" from January 17, 2024, payable from Dawne's share of the Estate and if insufficient, then any shortfall be paid by her personally. He relies on *Sheppe v. Harlinton*, 2018 BCSC 1460, in which a trustee was removed and ordered to pay costs personally: paras. 42, 47. In *Sheppe*, the Court found that the trustee had "clearly prefer[red] his own interests, fail[ed] to adequately protect those of the Trust, and put the assets of the Trust at risk": para. 37.
- [5] Hal seeks double costs based on a formal offer to settle dated January 17, 2024, and contends that this offer ought reasonably to have been accepted by Dawne.
- [6] Hal further submits that Dawne should bear her own costs of this application. He seeks an order that the Respondent Dawne, in both of her capacities, bear her own costs of the application or that any costs payable to her out of the Estate, if any, be paid out of her share of the Estate.

Dawne (as Executor) Position on Costs

- [7] Dawne's position in respect of costs, "is that, as Executor, the Court found no fault with her administration of the Estate to warrant her removal as executor, and that the Executor successfully defended her actions and decisions as Executor, such that it would not be appropriate to order that, in her capacity as Executor, she should bear any of the costs of the application". She submits she should not be ordered to pay special costs, relying on *Gechman v. Gechman*, 2017 BCSC 416 at paras. 39-40. In *Gechman*, the executor was passed over as being in a conflict of interest, and while the Court found that he had endangered the estate, special costs were not ordered since his conduct was not sufficiently egregious to warrant such an award. She opposes an order for costs, or double costs in Hal's favour.
- [8] Dawne submits that she as Executor is entitled to be reimbursed for her legal fees and disbursements from the Estate; or, in the alternative, that the Executor should not be ordered to pay any of Hal's costs, or the Estate's costs, of this application. She contends it is appropriate for her to be fully indemnified for those legal fees she incurred in dealing with the removal application.

Dawne (in her Personal Capacity) Position on Costs

- [9] Dawne, in her personal capacity, submits that she ought not to pay costs in her personal capacity. She further submits that, "given that Hal's argument set out in his Notice of Application differs from the arguments he made in reply, which ultimately lead to the result, he ought not receive costs of this application." In the alternative, Dawne submits that, "if costs are awarded to Hal, they ought to be at Scale B, payable from the Estate."
- [10] Dawne, in her personal capacity, relies on Justice Hardwick's decision in *Harvey Estate*, 2024 BCSC 1706, including this passage:

- [87] This requires the Court to consider the legal question of whether a party can claim special costs against an executor of an estate personally if the executor is not named in the proceeding in their personal capacity.
- [88] The short answer to this somewhat complicated question is that special costs may be awarded against non-party trustees of estates in their personal capacity in special circumstances. A common situation where this occurs in the context of estates is when the trustee initiates the action in their representative capacity: *Epic Restoration Services Inc. v. Fuller*, 2024 BCSC 1139.
- [89] Otherwise, exceptional circumstances must be found for a court to award costs against a non-party executor where the non-party executor did not initiate the action.
- [90] The most instructive decision in this regard is *Anchorage Management Services Ltd. v. 46504 B.C. Inc.*, 1999 BCCA 771. The Court in *Anchorage* held that special circumstances include situations where the non-party engages in fraudulent conduct, an abuse of process, gross misconduct in the instigation or conduct of litigation, or where the non-party is the "real litigant": *Anchorage* at para. 21 and 25.
- [91] Consistent with this proposition, the Court in *Conner Estate v. Worthing*, 2020 BCSC 1012 reviewed its discretion to make such an order, and declined to do so where the executor's conduct in his capacity as an executor was not reprehensible: *Conner Estate* at paras.15-24.
- [11] Dawne submits that no special circumstances apply and that "Hal cannot obtain his costs from Dawne personally." In reply, Hal submits the *Harvey Estate* case is distinguishable from the case before me.
- [12] Dawne also opposes double costs, submitting "Hal did not provide notice of the crux of his application, such that no consideration of such claim was possible when considering his offer."

Legal Principles re Costs in Estate Litigation

- [13] Justice Brongers summarized costs principles in estate litigation in *Hoyle Estate*, 2022 BCSC 729:
- [12] In its relatively recent decision in *Connor Estate v. Worthing*, 2021 BCCA 231 ("*Connor Estate*"), at paras. 56 to 61, the Court of Appeal confirmed that in estate litigation the "modern approach" to fixing costs applies. That means that costs generally follow the event and are to be assessed on a party and party basis, unless there is an applicable exception.
- [13] One such exception is the principle that an executor, trustee, committee, or representative is generally indemnified through a special costs award in respect of all reasonable litigation costs incurred in the fulfillment of their role: *Hollander v. Mooney*, 2017 BCCA 238 ("*Hollander*") at para. 41.

- [14] In fixing an award of costs in a probate action, the court must examine all of the pertinent factors in the particular case and, in accordance with the animating principles set out in the authorities, make a determination of the appropriate costs award: *Geluch v. Geluch Estate*, 2019 BCSC 2203 at para. 181, quoting *Leung v. Chang*, 2014 BCSC 1243 at para. 37.
- [15] Costs may be paid out of the estate "where the litigation was reasonably necessary to ensure the proper administration of the estate": *Parker v. Thompson*, 2014 BCSC 2311 at para. 10, quoting *Salter v. Salter Estate*, 2009 CanLII 28403 at para. 5, [2009] O.J. No. 2328 (S.C.J.); see also *Conner Estate v. Worthing*, 2021 BCCA 231 at para. 57.
- [16] Parties in estate litigation are "often entitled to special costs", though this remains a matter of the court's discretion, as explained by the Court of Appeal in *Gichuru v. Smith*, 2014 BCCA 414:
- [90] Special costs are typically awarded when there has been some form of reprehensible conduct on the part of one of the parties: *Young v. Young*, [1993] 4 S.C.R. 3 (S.C.C.) at 134-138. Special costs may also be ordered in circumstances where there has been no wrongdoing. Such orders may arise from the terms of a statute, (*Laye v. College of Psychologists of British Columbia* (1998), , 114 B.C.A.C. 201; *Campbell River Woodworkers v. British Columbia (Minister of Transportation and Highways)*, 2004 BCCA 27) or a contract (*Johal v. Viridi*, 2012 BCSC 450). Parties in estate litigation are often entitled to special costs (*Leung v. Chang*, 2014 BCSC 1243), as are those in committee proceedings (*Vieira (Re)*, 2013 BCCA 420). A successful public interest litigant may be entitled to special costs: *Victoria (City) v. Adams*, 2009 BCCA 563.

[Emphasis added.]

See also Rule 14-1(1)(b) of the Supreme Court Civil Rules [Rules].

- [17] The principles regarding whether costs should be paid as special costs is set out by Justice Girn in *Thompson (Re)*, 2023 BCSC 1591 [Thompson] at para. 64, quoting *Hadley Estate (Re)*, 2017 BCCA 311:
- [47] In estate litigation, courts commonly award special costs payable out of the estate to all parties. This practice is based on the principle that where an estate issue must be litigated to remove any doubts, all interested parties must be joined and all are entitled to be heard. In such circumstances, they should not be out of pocket if, in the result, the litigation does not conclude in their favour. The central question as to costs is whether the contested issue arises from the conduct of the deceased or the conduct of another. In the case of the former, an award of special costs from the estate will usually be made: *Milwarde-Yates v. Sipila*, 2009 BCSC 277 at paras. 81-82.
- [18] In *Thompson*, Girn J. concluded that since the application was "not necessitated by the actions of" the deceased, costs of the application should be paid at Scale B by the party who was passed over (removed) as executrix: para. 65.

- [19] An application for special costs against an executor may be declined where the executor's conduct in their capacity as an executor is not reprehensible: *Harvey Estate* at paras. 91-92.
- [20] As to Dawne's entitlement to costs, Justice Butler (then of this Court) stated in *Levi-Bandel v. McKeen*, 2011 BCSC 247:
- [34] Trustees are not entitled to be indemnified where the costs are improperly incurred. In addition, where a trustee incurs legal costs defending herself rather than the trust, she is not automatically entitled to be indemnified: *Fenwick v. Zimmerman*, [2008] O.J. No. 3200 (S.C.J.). Further, when a matter proceeds to litigation the general rule is that costs follow the event, which means that the losing party is not entitled to recover her costs.

[Emphasis added.]

- [21] That case was followed in *Pangalia Estate*, 2021 BCSC 1070:
- [83] In *Levi-Bandel*, Mr. Justice Butler addressed the costs of a removed administrator. He explained the general rule that administrators are entitled to be indemnified against all reasonable costs and expenses they incur as trustees, citing *Royal Trust Corp. of Can. v. Clarke* (1989), 35 B.C.L.R. (2d) 82 (C.A.) at 86-87. Mr. Justice Butler noted that an exception to that rule is where costs are improperly incurred. He also explained that if a trustee incurs legal fees defending himself rather than the trust, there is no automatic entitlement to indemnification, citing *Fenwick v. Zimmerman*, [2008] O.J. No. 3200 (S.C.J.). In *Levi-Bandel*, Butler J. held that the removed administrator was not entitled to be indemnified for costs of the petition proceeding by which she was removed as she was defending herself not the estate in that proceeding and because the improper conduct that was the basis for her removal had delayed the administration of the estate.
- [84] I conclude the same result should follow here. Balwinder Pangalia and Sukhdev Pangalia unsuccessfully defended themselves, and their misconduct was the factual basis for their removal. I order that neither may recover their costs of these cross-applications from the estate. I order that they each bear their own costs of these applications.

[Emphasis added.]

- [22] Hal contends that similarly here, "Dawne was defending herself, not the Estate".
- [23] Dawne, as Executor, also relies on *Mawdsley v. Meshen*, 2011 BCSC 923:
- [39] The judicial approach to the costs of fiduciaries reaches back to a fundamental tenet of trust law, namely that executors and trustees are entitled to be indemnified for the costs that they properly and reasonably incur while acting within the ambit of their fiduciary capacity: *Royal Trust Corp. of Canada v. Clarke* (1989), 60 D.L.R. (4th) 257, 35 B.C.L.R. (2d) 82 (C.A.); *Geffen v. Goodman Estate*, [1991] S.C.J. No. 53, [1991] 2 S.C.R. 353; *Jackson v. King*, 2003 BCSC 328, at para. 12. Drawing on that time honoured principle, the legal costs of executors who have acted reasonably and within the course of their fiduciary duties in relation to an action for proof in solemn form, are ordinarily entitled to recoup their legal costs out of the estate,

assessed as special costs, even where the will is found to be invalid. This rule of general application does not preclude the court from ordering that their costs, even extending to special costs, expended in defending a failed undue influence or lack of testamentary capacity claim be paid by the unsuccessful plaintiff.

See also *Fitzgerald v. Hill*, 2022 BCSC 968 at paras. 5, 90, 93, in which, on an unsuccessful application for removal of trustee and executor, the executor was found to be entitled to indemnification from the Estate for costs properly and reasonably incurred for applications, as he was acting within the scope of his office.

Decision on Costs

- [24] Hal was successful in the relief sought on this application (RFJ at para. 90) and is entitled to costs of the application.
- [25] Hal's application was reasonably necessary to ensure the proper administration of the Estate, and so his costs should be payable out of the Estate: Parker at para. 10.
- [26] The basis for Dawne's removal in the RFJ was caused due to Dawne's conduct, and so Hal's costs should be paid by her: Thompson at para. 65. I agree with Hal that in these circumstances, where Hal and Dawne are the only two beneficiaries of the Estate, costs should be paid out of Dawne's share of the Estate; if it were otherwise, he would in effect partly pay himself his own costs award made against Dawne.
- [27] On the executor removal application, Dawne had advanced the argument, among others, that "any possible perception of conflict" could "be neutralized or addressed by having the matter of pre-death loans determined in a registrar's hearing": RFJ at para. 65. While Dawne was not successful on this application, I do not find Dawne's conduct to be sufficient reprehensible to merit an award of special costs, or partial indemnity costs: Harvey Estate at paras. 91-92.
- [28] In addition, the basis on which this application was granted was not caused by the conduct of the deceased, and I find that an order of special costs (payable out of the Estate) is not justified on this basis: Thompson at paras. 64-65.
- [29] I find the other cases relied on by Hal for special costs to be distinguishable: *Miles v. Vince*, 2014 BCCA 418 (beneficiary of trust successfully applying to remove trustee, which required the Court, in the first instance, to resolve a question of construction of a trust deed; costs of the litigation were paid out of the trust as special costs); *Kara Estate (Re)*, 2022 BCSC 923 at para. 27 (executor removed due to delay in the context of a perceived conflict, but had taken on role of executor at deceased's request and legitimately sought to fulfil that duty; reasonable costs and expenses incidental to application payable out of the estate for all parties). Additionally, the case of *Mardesic v. Vukovich Estate*, 30 B.C.L.R. (2d) 170, 1988 CanLII 3125 (S.C.) had facts respecting removal of a trustee, a lawyer, which are dissimilar to the case before me.

- [30] Costs should follow the event and in general are to be assessed on a party and party basis: Hoyle Estate at para. 12.
- [31] In assessing whether double costs are appropriate, I must consider the offer to settle, and the factors set out in R. 9-1(6) of the Rules. As to the first of these factors, this Court in *Bollhorn v. Lakehouse Custom Homes Ltd.*, 2023 BCSC 300, explained:
- [11] The legal issue involved when considering the factor specified in R. 9-1(6)(a) is not whether the offer itself was reasonable, but whether it was unreasonable for the other party to refuse it: *Bains v. Antle*, 2019 BCCA 383 at para. 34, citing *Cottrill v. Utopia Day Spas and Salons Ltd.*, 2019 BCCA 26 at para. 30. The court must consider this factor "without the benefit of hindsight" (*Bains*, para 34). The factors in that assessment include: "the timing of the offer; whether it had some relationship to the claim; whether it could easily be evaluated; and whether some rationale for it was provided": *Bains* at para. 35, citing *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 27.
- [32] Hal's offer to settle letter attached a proposed Consent Order and had no rationale set out in it, including no rationale that set out why Dawne was in a disqualifying conflict of interest. I find it was not unreasonable for Dawne to refuse to accept it. Considering this, the basis of the final judgment of the Court, and the other factors in R. 9-1(6), I find that Hal is not entitled to double costs on the basis of the offer to settle.
- [33] While Dawne, in her capacity as Executor, was unsuccessful on the application, several arguments advanced by Hal regarding Dawne's conduct as Executor, that Dawne was required to respond to, were ultimately not accepted by the Court (see, for e.g., RFJ at paras. 27-28). I found, in respect of some of those arguments, that they related to the "disorganized state of the Deceased's affairs" (see, for e.g., RFJ at paras. 28, 34). I do not find Dawne should be entitled to be fully indemnified from the Estate given the result on this application that Dawne was removed as Executor. But, in the circumstances, since Dawne responded as Executor to some of Hal's arguments which were ultimately not successful, and arose in part from the state of the deceased's affairs, I do find that she should be entitled to 25% of her legal fees and disbursements properly and reasonably incurred responding as Executor to the application, payable out of the Estate: *Mawdsley* at para. 39.

Conclusion and Orders

- [34] Examining the pertinent factors in the particular case, I make the following determination of the appropriate costs award and the following costs orders:
1. Dawne, in her capacity as Executor, shall pay Hal costs at Scale B, payable from the respondent Dawne's share of the Estate with any shortfall to be paid by Dawne personally;
 2. Dawne, in her capacity as Executor, shall be entitled to 25% of her legal fees and disbursements properly and reasonably incurred responding as executor to the application, payable out of the Estate; and

3. Other than as required pursuant to order 1, Dawne, in her personal capacity, shall not be liable to pay costs to Hal.

"Stephens J."

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