

CANADA / JUDGMENT

Chappell v. Chappell

2024 BCSC 268

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Supreme Court of British Columbia

DECIDED

16 February 2024

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2024 BCSC 268 Chappell v. Chappell

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Chappell v. Chappell,

2024 BCSC 268

Date: 20240216

Docket: S39245

Registry: Chilliwack

Between:

Gerald Allan Chappell

Plaintiff

And

Brenda Lynn Chappell and

Brenda Lynn Chappell in her capacity as named

personal representative of the Estate of Allan Robert Chappell

Defendants

Before: The Honourable Justice Verhoeven

Reasons for Judgment

Counsel for the Plaintiff:

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Place and Date of Hearing:

Chilliwack, B.C.

January 11, 2024

Place and Date of Judgment:

Chilliwack, B.C.

February 16, 2024

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I. Introduction

- [1] The plaintiff, and applicant, Gerald Allan Chappell ("Gerald"), applies for leave to commence proceedings in the name of Allan Robert Chappell (the "deceased" or "Allan") and on behalf of the deceased's estate, pursuant to s. 151 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA].
- [2] For the reasons that follow, leave is granted.

II. Background

- [3] Allan died January 31, 2021, at the age of 87. He was predeceased by his wife Arlene Georgina Chappell ("Arlene"), who died October 22, 2015. He left a will executed January 5, 2011, which left his estate to Arlene, but if she predeceased him, his estate was left equally to his three children. Arlene was appointed as sole executor and trustee, but in the event that Arlene predeceased him, he appointed, in sequence, his brother-in-law Gerald W. Townley, or his wife's cousin, George Smillie, or his three children, Laurie Ann Chappell ("Laurie"), Brenda Lynn Chappell ("Brenda"), and Gerald, jointly.

- [4] The second alternate executor and trustee, George Smillie, renounced his appointment. There is no evidence as to the first alternate executor and trustee, Gerald Townley. I infer that he must have predeceased Allan. The result is that the three adult children are named as joint executors and trustees, and are equal beneficiaries of the estate.
- [5] There is no disagreement about the validity of Allan's January 5, 2011 will, or that under that will the three children are joint executors and trustees, and equal beneficiaries.
- [6] As noted, for convenience, I will refer to the three adult children of the deceased as Laurie, Brenda, and Gerald. This sequence coincides with their birth order. As can be seen from the style of proceedings, Brenda is the defendant in the action, and in the proposed action. Laurie is not a party to the action, or the proposed action, or the application. She has sworn an affidavit stating that she opposes the application.
- [7] On July 23, 2021, Gerald received a letter from counsel for Brenda, advising him that Brenda intended to apply for executorship of the estate, and that the value of the assets in the estate was approximately \$10,000. Gerald was also advised that there were assets passing outside the estate, consisting of:
1. real estate (a residence) located at 223 Seven Oaks Place, Nanaimo, owned by the deceased and Brenda, as joint tenants;
 2. a TD bank account held jointly by the deceased and Brenda, holding approximately \$170,000; and
 3. three registered retirement income funds (RRIFs) with a combined value of about \$165,000, as to which Brenda had been designated as the beneficiary.
- [8] These are the assets in dispute.
- [9] The Nanaimo property was registered in joint tenancy between the deceased and Brenda on June 28, 2017, when it was purchased. According to the Notice of Civil Claim ("NOCC"), Brenda disposed of the Nanaimo property shortly after the deceased's death, and has retained the sale proceeds. The sale price of the Nanaimo property is not in evidence. However, it was purchased by Allan and Brenda for \$580,500 in 2017. So in view of the general increase in real estate values since 2017, I expect that the sale price of the property probably exceeded that amount, significantly.
- [10] On February 18, 2022, the plaintiff commenced these proceedings against Brenda claiming, among other things:
1. The Nanaimo property, the bank account, and the RRIFs are held on a resulting trust for the benefit of the estate;
 2. Allan and Arlene had made an agreement for mutual wills, which included an express or implied term that the survivor would distribute all of their assets equally among the three children;

3. The transactions transferring the disputed assets to Brenda were in contravention of the wills agreement;
 4. Allan's mental and physical capacity deteriorated significantly in the last few years of his life. He lacked capacity to enter into the transactions;
 5. Allan acted under the undue influence of Brenda in relation to the transactions;
 6. The disputed assets were held by Brenda on a resulting trust for the benefit of Allan and of his estate;
 7. Brenda has been unjustly enriched by her receipt of the disputed assets.
- [11] The parties have exchanged lists of documents. No examinations for discovery have been conducted.
- [12] There is no medical legal opinion evidence. Gerald relies on Nanaimo Hospital records and PharmaNet prescription records to indicate that the deceased was suffering from psychotic conditions and dementia from not later than March 2020.
- [13] According to Gerald, Brenda informed him on March 25, 2020 that Allan was taking medication for Lewy body dementia.
- [14] There is some evidence that Allan was having cognitive difficulties prior to March 2020. A CT scan conducted December 29, 2019 states that the reason for the study was "decreased memory occasional visual hallucinations". The report notes moderate diffuse cortical atrophy, worsened slightly as compared with a study conducted February 10, 2017.
- [15] On August 2, 2020, Allan executed a deed of gift with respect to the Nanaimo property, in favour of Brenda, indicating that his interest in the Nanaimo property was being gifted to Brenda. The deed of gift was prepared by a Notary Public, Dale Roberts. The deed of gift states that the property is given out of love and affection for Brenda. It also says that the gift is in recognition of Brenda's contribution to the purchase and maintenance of the property.

III. Legal Principles

- [16] The relevant parts of s. 151 of WESA are as follows:

Who may sue with leave of court

151 (0.1) In this section, "specified person" means a beneficiary, an intestate successor or a person who may commence a proceeding claiming the benefit of Division 6 [Variation of Wills] of Part 4 [Wills].

- (1) Despite section 136 [effect of representation grant], a specified person may, with leave of the court, commence proceedings in the name of the specified person and on behalf of the estate of the deceased person

- (a) to recover property or to enforce a right, duty or obligation owed to the deceased person that could be recovered or enforced by the personal representative, or
- (b) to obtain damages for breach of a right, duty or obligation owed to the deceased person.

(1.1) A specified person may apply for leave of the court under subsection (1) in the proceedings described in that subsection.

(3) The court may grant leave under this section if

- (a) the court determines the specified person seeking leave
 - (i) has made reasonable efforts to cause the personal representative to commence or defend the proceeding,

- (ii) has given notice of the application for leave to

- (A) the personal representative,

- (B) any other specified persons, and

- (C) any additional person the court directs that notice is to be given, and

- (iii) is acting in good faith, and

- (b) it appears to the court that it is necessary or expedient for the protection of the estate or the interests of a specified person for the proceeding to be brought or defended.

(4) On application by a specified person or a personal representative, the court may authorize a person to control the conduct of a proceeding under this section or may give other directions for the conduct of the proceeding.

[17] The leading authority with respect to the interpretation of s. 151 of WESA is *Hoggan v. Silvey*, 2022 BCCA 176.

[18] In *Chung v. Chung*, 2022 BCSC 1396, Justice Majawa summarized *Hoggan* as follows:

[46] In *Hoggan*, the Court of Appeal agreed that a petitioner must establish an arguable case but held that it is not always necessary to consider whether the potential relief justifies the cost and inconvenience to the estate or whether the proposed action is in the best interests of the estate. The Court came to this conclusion based on its interpretation of s. 151(3)(b) which requires the following for leave to be granted:

- (b) it appears to the court that it is necessary or expedient for the protection of the estate or the interests of a specified person for the proceeding to be brought or defended.

[47] At paras. 45 and 46 of *Hoggan*, the Court emphasises that the use of "or" in this provision is disjunctive and that the section should be read as follows:

it appears to the court that it is necessary or expedient for the protection of the estate

or

that it is necessary or expedient for the protection of the interests of a specified person for the proceeding to be brought or defended.

[48] Consequently, the Court concluded that while the best interests of the estate may be considered, it does not necessarily need to be considered when a specified person's interests are raised: Hoggan at para. 47. The relevant factors may vary and are dependent upon the nature of the application before the court: Hoggan at para. 58.

[49] The Court summarized the applicable factors of s. 151 of WESA at para. 58 of Hoggan. I agree with the applicants that the Court's summary can be fairly restated as follows. Leave may be granted if the court determines that the party seeking leave:

- a) has standing as a "specified person";
- b) has made reasonable efforts to cause the personal representative, or executor, to commence or defend the action;
- c) has given the necessary notice;
- d) is acting in good faith in bringing the action; and
- e) has an arguable case, the pursuit of which:
 - i. may be necessary to protect the interests of the estate; or
 - ii. may be expedient to protect the interests of the estate; or
 - iii. may be necessary to protect the interests of the specified person; or
 - iv. may be expedient to protect the interests of the specified person.

[19] On this application, Brenda does not contest items a), b) and c) (standing, reasonable efforts, and notice). She argues that: (1) Gerald is not acting in good faith in seeking to bring the action; and (2) Gerald has not shown an arguable case, the pursuit of which may be necessary or expedient. She argues that Gerald has failed to meet the onus upon him to prove these criteria.

[20] Brenda also argues that even if Gerald has established an arguable case and that he is bringing the action in good faith, the court should exercise its residual discretion to deny leave, because Gerald has not provided a litigation plan, and because the application is opposed by the other sibling, Laurie.

IV. Analysis

[21] As noted, the requirements of standing as a specified person, reasonable efforts to cause the personal representative to commence or defend the proceeding, and notice, are not in issue.

A. Arguable Case

- [22] The arguable case requirement is not a high bar. Tests such as "reasonable prospect of success" or "not bound to fail" are appropriate: Hoggan at para. 43; Chung at para. 65. In assessing this question, the court engages in a "limited weighing" of the evidence: Hoggan at para. 51; Chung at paras. 65, 75, 77, 80, 98, 108, 116.
- [23] I am satisfied that Gerald has established that the case he wishes to bring has a "reasonable prospect of success," or conversely, is not "bound to fail".
- [24] Brenda argues that the evidence contrary to Gerald's intended action is "overwhelming". In my view, reaching that conclusion would require much more than the "limited weighing of the evidence" that is required or appropriate on this application.
- [25] It is not necessary that I review the evidence in detail.
- [26] The "mutual wills" argument is plausible. It may be argued that the wills executed by Allan and Arlene in January 2011 indicate a mutual intention to benefit all three children equally, in relation to the entirety of the property of both Allan and Arlene. Arlene died in October 2015. The assets in issue were acquired by Brenda after the wills were executed, and after Arlene passed away. There is almost nothing left in the estate. Although there is practically no evidence about this on this application, other than the terms of Allan's will, it is plausible that this result would be contrary to Arlene's expectations, and an express or implied agreement between Allan and Arlene.
- [27] Brenda contends that after Arlene passed away, Allan asked her to move in with him at his residence in Union Bay, on Vancouver Island. She moved there on November 1, 2015. In 2016, she and the deceased decided to move to White Rock. They jointly purchased a condominium in White Rock in December 2016, which was held in joint tenancy. She contends that she contributed approximately \$175,000 to the down payment of the White Rock condominium. She says that she and her father did not enjoy living in White Rock, so after a few months, they decided to move back to Vancouver Island, and so they acquired the Nanaimo property on June 28, 2017, after selling the White Rock condominium. The Nanaimo property was financed in part from the sale of the White Rock condominium.
- [28] While at trial Brenda may establish that she acquired an interest in the Nanaimo property for valuable consideration, in part at least, the question remains as to Allan's intentions with respect to his interest in the property at the time it was purchased or later. *Prima facie*, his interest in the property would be subject to a resulting trust. Where a parent gratuitously transfers property to an adult child, the law presumes that the child holds the property in trust for the transferor. The presumption is rebuttable. The onus is on the transferee to establish, on a balance of probabilities, that a gift was intended. The presumption will only determine the result where there is insufficient evidence to rebut it on a balance of probabilities: *Pecore v. Pecore*, 2007 SCC 17 at paras. 20, 24, 43, 44; Chung at para. 66.

- [29] The presumption of resulting trust also applies to joint accounts: Pecore at para. 53.
- [30] Brenda argues that Allan continued to maintain a high level of independence even into his mid 80s. She argues that Gerald's argument that Allan did not have capacity to execute the deed of gift is without merit. She notes that Gerald has adduced no medical legal opinion as to Allan's capacity, but relies only on medical records.
- [31] In my view a medical opinion is not required at this stage. The medical evidence, while limited, raises arguable questions concerning Allan's mental capacity at the time he executed the deed of gift, and perhaps well before that.
- [32] Brenda relies on the evidence of the notary public, Dale Roberts. Mr. Roberts provided notarial services to Brenda and Allan with respect to the purchase of the White Rock condominium, the Nanaimo property, and the deed of gift. Mr. Roberts states that whenever his clients purchase real property jointly, he explains the implications of joint tenancy and the right of survivorship to them, and confirms the manner in which his clients wish to hold the property.
- [33] His affidavit was sworn December 4, 2023. He has no notes of his meetings with Allan and Brenda. He states that when he met with them in relation to the purchase of the White Rock condominium on December 14, 2016, seven years earlier, he explained the difference between joint tenancy and tenants in common, and specifically recalls Allan saying that if he died, he wanted Brenda to receive the property.
- [34] He states that when he met with Allan and Brenda on June 21, 2017 to sign the documents for the purchase of the Nanaimo property, he again confirmed Allan's intention with respect to joint tenancy, and states that he specifically recalls Allan stating that he intended the Nanaimo property to go to Brenda after his death.
- [35] Brenda also relies on Mr. Roberts' evidence in connection with the deed of gift executed August 2, 2020. In that respect, Mr. Roberts states that although he was aware that Allan suffered from Lewy body dementia, he assessed his condition, and was satisfied that Allan understood the nature of the transaction, and had capacity to execute the deed of gift.
- [36] Gerald argues that the credibility and reliability of the evidence of Mr. Roberts is open to question. He notes that Mr. Roberts states that his wills and estates practice comprises about 10% of his practice, and that he does approximately 10 wills each month. The other 90% of his practice is conveyancing. Thus, it is argued, Mr. Roberts has probably engaged in thousands of transactions since meeting with the deceased and Brenda on June 21, 2017 in connection with the Nanaimo property.
- [37] As noted, Mr. Roberts has no notes of his interactions with Allan. He did not document the capacity assessment he asserts he made in relation to the deed of gift.

- [38] Brenda also relies on an affidavit from George Smillie, a retired chartered accountant, and Arlene's cousin. Mr. Smillie says that he and his wife were close friends with Allan and Arlene for decades prior to their deaths. He says that he had a conversation with Allan in September 2019, in which he confirmed that Allan understood that the Nanaimo property was held in joint tenancy and so would pass to Brenda on his death. He states that in the spring of 2020, he spoke with Allan over the telephone, and urged him to prepare a deed of gift for the Nanaimo property. On the basis of his telephone conversation, he had no concerns about Allan's capacity.
- [39] Brenda also relies on her own evidence regarding her relationship with her father and the transactions in question.
- [40] Brenda also relies on the evidence of Laurie, who says that at some point between July 2017 and July 2018, her father told her that he wanted Brenda to have the Nanaimo property fully after he died.
- [41] Brenda argues that Laurie's evidence is even more persuasive than that of George Smillie. She argues that Laurie's evidence is credible because it is against her own interests, in that if the plaintiff succeeds, the estate, and Laurie's share of it, would be enlarged.
- [42] On the basis of the affidavit evidence, it appears that Gerald's claims may face some daunting obstacles. In particular, if the deed of gift is ruled valid, then the claims relating to the Nanaimo property would fail. However, the court's findings will depend upon the court's views as to the credibility and reliability of the witnesses, together with any available documentary evidence. In my view it goes beyond my function at this stage to make firm conclusions regarding the credibility and reliability of the evidence of the witnesses Brenda relies on. That will be the function of the trial judge, in the context of the full record at trial, including cross-examination of the witnesses. As Gerald argues, there appear to be grounds to question the credibility or reliability of the evidence of the witnesses.
- [43] Brenda argues that the presumption of resulting trust does not apply to beneficiary designations, although she acknowledges that some British Columbia cases have applied it: *Neufeld v. Neufeld*, 2004 BCSC 25; *Stade Estate (Re)*, 2017 BCSC 2354. She argues that these decisions have not considered s. 95 of WESA, which is as follows:

A benefit payable to a designated beneficiary or to a trustee appointed under section 92 under a benefit plan on the death of a participant does not form part of the participant's estate and is not subject to the claims of the participant's creditors.

- [44] She argues that a beneficiary designation is not an inter vivos transfer, subject to the presumption of resulting trust. She contends that the designated beneficiary receives no interest in property during the life of the account holder, and so a beneficiary designation is more akin to a testamentary disposition, to which the presumption of resulting trust does not apply. She argues that Gerald has not adduced evidence or made arguments as to why the RRIFs should form part of the estate.

- [45] In relation to this question, I agree with the approach taken by Majawa J. in *Chung*. There, after quoting s. 95, Majawa J. stated:
- [73] Based upon this Court's jurisprudence, it is, in my view, arguable that the presumption of resulting trust arises in respect of the TD Registered Accounts for which Ken was named as the designated beneficiary here in British Columbia and it is therefore appropriate to grant leave. Whether or not the presumption applies in this case will be an issue for the trial judge to determine.
- [46] Brenda argues that Gerald has not adduced evidence or identified arguments as to why the joint account should form part of the estate. She notes that she was added to the joint account in April 2016, four years before the deceased was hospitalized with Lewy body dementia.
- [47] It is certainly the case that the evidence with respect to the joint account and the RRIFs is far from well-developed. For example, there is no evidence on this application regarding the establishment of the joint account, such as bank documents, or evidence as to the source of deposits to the account, or how the account was used over time. Brenda's affidavit states only that, "In April 2016, Dad added me to his Scotiabank chequing account."
- [48] The NOCC claims undue influence with respect to all the transactions in question, and argues that all of them were contrary to the wills agreement. These appear to be arguable points. The Nanaimo property and the bank account, at least, are subject to the presumption of resulting trust.
- [49] I conclude that the applicant has established an arguable case.
- [50] The proceeding is necessary in order to advance the interests of Gerald, as a specified person, in order to enlarge the value of the estate.
- [51] Brenda argues that the court has a residual discretion to deny leave, even if the statutory preconditions are fully met, since the statute states that the court "may" grant leave. She argues that the court should not grant leave, because:
1. Gerald has not provided a workable litigation plan;
 2. Laurie, as a "neutral beneficiary", opposes Gerald's application.
- [52] She relies on, among other cases, *Bunn v. Bunn Estate*, 2016 BCSC 2146, and *Fry v. Fry*, 2018 BCSC 1018.
- [53] *Bunn* was largely overruled in *Hoggan*. *Fry* relied on *Bunn*, and is a pre-*Hoggan* decision. *Fry* relied on the applicant's plan to fund the litigation from the estate. However, as noted in *Hoggan* at para. 56, costs are not necessarily ordered against the estate. The usual costs rule may apply: those bringing the litigation, or those defending the litigation, may be responsible for costs. In *British Columbia (Public Guardian and Trustee) v. Sheaffer*, 2015 BCSC 1306, Justice Dardi summarized the applicable principles as follows:

[49] The costs analysis in certain types of estate litigation is informed by specific principles unique to estate litigation: *Mawdsley v. Meshen*, 2011 BCSC 923. For example, if the litigation was brought about or sprung from the will-maker's own conduct - such as ambiguous wording in the will requiring an application to construe the will - the general judicial approach has been that all parties should be awarded their costs out of the estate: *Lee v. Lee Estate* (1993), 1993 CanLII 2368 (BC SC), 84 B.C.L.R. (2d) 341 (S.C.); *Vielbig v. Waterland Estate* (1995), 1995 CanLII 2544 (BC CA), 1 B.C.L.R. (3d) 76 (C.A.). Otherwise, the usual rule is that costs follow the event, so that the successful litigant is entitled to recover costs from the unsuccessful opposing party. The court, however, retains the discretion to order otherwise if the circumstances warrant it. Any discretionary exceptions to the usual costs rules must be made judicially: *Bailey v. Victory* (1995), 4 B.C.L.R. (3d) 389 (C.A.) at 393.

(See, also, *Singh Estate (Re)*, 2019 BCSC 1114 at paras. 11-17.)

[54] Moreover, the evidence indicates that the value of the estate, leaving aside the disputed items, would be approximately \$10,000. Accordingly, unless Gerald's claims are successful, there is practically nothing in the estate with which to pay costs. Therefore, in the circumstances of this case, if Gerald's claims fail, the estate will not be depleted. Laurie has practically no financial interest at stake. Laurie will not suffer financially if Gerald's claims are unsuccessful.

[55] The court's discretion must be exercised judicially. This means that the court's discretion must be exercised in accordance with correct legal principles, while being mindful of relevant matters, and disregarding irrelevant matters: *Dahlseide v. Dahlseide*, 2009 ABCA 375, at para. 15; *Simpson v. Zaste*, 2022 BCCA 208, at para. 33; *R. v. M.B.*, 2016 BCCA 476, at para. 48.

[56] I am not satisfied that there is any ground to refuse leave, in the circumstances of this case, where the statutory current preconditions are satisfied. In particular, in the circumstances of this case, I am not persuaded that the absence of a litigation plan, or Laurie's opposition to the action are grounds to refuse leave.

[57] Document discovery has already occurred. A seven day trial is scheduled to commence May 27, 2024. The parties scheduled examinations for discovery of Gerald and Brenda to take place February 8 and 9, 2024. The plaintiff's overall plan for the litigation seems fairly obvious. I doubt that a formal litigation plan would add any useful information relevant to the exercise of my discretion.

[58] As noted in *Hoggan*, it is not always necessary to consider whether the potential relief outweighs the inconvenience to the estate, and whether the litigation is in the best interests of the estate.

[59] Laurie may have any number of good reasons to oppose the litigation. In addition to saying that she recalls her father saying that he wanted Brenda to have the Nanaimo property after he died, she is of the view that Brenda deserves to receive the property, because she had

contributed to obtaining it, and gave up her independence to be a companion to their father. In other words, she perceives that her sister's retention of the property is fair. She may have other reasons for opposing the litigation, such as simply wanting to avoid litigation, or favouring one sibling over another. In the circumstances of this case, I am not persuaded that Laurie's wishes should override those of Gerald.

- [60] In summary, I am satisfied that Gerald has presented an arguable case, and has established that it is necessary or expedient for leave to be granted, and that leave should be granted, subject to the remaining issue of good faith.

B. Good Faith

- [61] The statute requires the court to determine that the specified person seeking leave is acting in good faith.
- [62] In *Dunn v. Baird Estate*, 2023 BCCA 216, the Court stated:
- [56] While the judge's comments about conjecture and suspicion are justified in relation to the allegation of misuse of the power of attorney, they have less relevance to the claim in relation to the \$200,000 transfer, which is based on a legal proposition that applies in the absence of proof to the contrary. More to the point, good faith is not measured by the strength of the case, but by whether the claim is being brought for legitimate purposes of self-interest, or for ulterior purposes.
- [57] I would adopt the approach to the good faith requirement set out by Justice Verhoeven in *Jiang v Piccolo*, 2020 BCSC 1584:
- [69] The concept of "good faith" is informed by the other aspects of s. 151. Section 151(1) refers to commencing proceedings to "recover property or to enforce a right, duty or obligation owed to the deceased person", or to "obtain damages for breach of a right, duty or obligation owed to the deceased person". Section 151(3)(b) refers of the question of whether it appears to the court that the proceedings are necessary or expedient "for the protection of the estate or the interests of a specified person". Therefore, a person genuinely pursuing these objects for the benefit of the estate or out of her own self interest is acting in good faith, within the meaning of s. 151.
- [58] In this case, it is apparent that the appellants are acting out of their own self-interest in advancing the claim for the \$200,000 transfer. They have met the good faith requirement.
- [63] Brenda argues that Gerald's desire to bring the action is based only on a personal vendetta against her.
- [64] She relies on email communications from him that began in July 2021, wherein he accused her of committing an illegal act, called her a thief, threatened her, and accused her of taking "his" money, among many other similar statements.

- [65] Gerald's unkind and vitriolic statements all seem to be motivated by anger, hostility and perceived injustice in relation to the very matters at issue. His comments indicate that his motivations are aligned with the purposes of the lawsuit, namely, to set aside the transactions that he claims were wrongful, in one way or another, and by which the estate was denuded of assets. This is not an ulterior motive or lack of "good faith" within the meaning of the statute.
- [66] I am satisfied that Gerald wishes to bring the claims in order to enlarge the value of the estate, and thus to advance his self-interest as a beneficiary. This is a good faith purpose as the term is properly understood in the context of s. 151.

V. Conclusion

- [67] For the reasons indicated, leave is granted.
- [68] The application also seeks an order that the style of cause be amended in order to refer to the plaintiff as: "Gerald Allan Chappell, in the name and on behalf of the estate of Allan Robert Chappell". That order is made.
- [69] In the alternative to his application seeking leave, Gerald brought applications that examination for discovery of Brenda and cross-examination of the other affiants relied upon by Brenda be conducted, and that his application for leave be adjourned pending these examinations. These applications are now moot, and are adjourned, generally.
- [70] Costs of this application will be in the discretion of the trial judge.

"Verhoeven J."

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Prepared on 26 October 2026 · Esheria