

CANADA / JUDGMENT

Clark v. Matossian Estate

2025 BCCA 274

COURT

British Columbia Court of Appeal

DECIDED

31 July 2025

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2025 BCCA 274 Clark v. Matossian Estate

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Clark v. Matossian Estate,

2025 BCCA 274

Date: 20250731

Docket: CA50348

Between:

David Clark

Applicant/Appellant

(Defendant)

And

Marcus von Albrecht in his capacity as Executor

of the Estate of Dikran Matheos Matossian, Deceased

Respondent

(Plaintiff)

And

David Westall Clark in his capacity as Administrator

of the Estate of Sharon Patricia Clark, Deceased

Respondent

(Defendant)

Before:

The Honourable Justice Gomery

(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated
December 6, 2024 (Matossian Estate v. Clark Estate, 2024 BCSC 2214,
Vancouver Docket S214877).

Counsel for the Applicant/Appellant:

J.W. Zaitsoff

Counsel for the Respondent,

Marcus von Albrecht:

J.M. Richter

Place and Date of Hearing:

Vancouver, British Columbia

July 24, 2025

Place and Date of Judgment:

Vancouver, British Columbia

July 31, 2025

Summary:

The respondent applies for security for trial costs, and the appellant applies for an extension of time to file the transcript and his factum.

Held: application for security for trial costs dismissed. Security for trial costs will not usually be ordered before the costs are assessed and certified by the registrar in the Court below. This is for two reasons: assessment reduces uncertainty as to the amount of security required; and makes it easier to tell, as a practical matter, whether collection of the trial costs is a real issue and, if so, why. Proof of prejudice is not essential to justify an order for security for trial costs, but it is a factor in assessing whether security is necessary in the interests of justice, and it is usually hard to justify requiring an appellant to post security as a condition of being permitted to proceed with an appeal for the avoidance of prejudice to the respondent that has nothing to do with the appeal. In this case, there is at least some merit to the appeal and there is nothing exceptional to make it appropriate that security for trial costs be ordered before the costs are assessed. The appeal is not prejudicing the respondent's ability to claim the trial costs.

Held: application for extensions of time is granted. The interests of justice favour granting the extensions sought.

Reasons for Judgment of the Honourable Justice Gomery:

Overview

- [1] This is litigation over entitlement to the estate of Sharon Clark. It features a single issue as to whether the relationship between Dikran Matossian, himself now also deceased, and Ms. Clark was akin to a marriage. The trial judge held that it was, so that all of Ms. Clark's estate goes to Mr. Matossian's heirs and successors. The respondent is Mr. Matossian's personal representative.
- [2] The appellant is Ms. Clark's brother. But for the finding of a marriage-like relationship between Ms. Clark and Mr. Matossian, he would inherit. Ms. Clark's estate is worth approximately \$3 million.
- [3] The respondent applies for security for costs of the proceedings in the Court below. This is the second such application. The first was dismissed by Horsman J.A. with liberty to reapply after the trial judge had determined the issue of entitlement to costs. The trial judge subsequently awarded the respondent double costs for all steps taken after July 7, 2023, based on an offer to settle delivered in June 2023.
- [4] While the costs claimed by the respondent have not yet been assessed, the respondent says that his bill of costs exceeds \$119,000. He asks for security for costs in the amount of \$108,000.
- [5] The appellant opposes the application. Justice Horsman ordered him to post \$7,000 as security for costs of the appeal and he has done so. He says that it is not in the interests of justice that further security be ordered.
- [6] By cross-application, the appellant seeks an extension of time to file the transcript and his factum. The transcript was due on March 3, 2025 but due to the appellant's delay in ordering, it was not ready for filing until March 26. The respondent has had it since then but refuses to consent to an extension of the time to file. The more substantive issue concerns the delay sought by the appellant to prepare his factum. He seeks an extension until August 29. The respondent objects that the proposed extension is unwarranted.
- [7] At the conclusion of the hearing of this application, I allowed the cross-application for extensions of time, for reasons to follow. In these reasons, I explain that decision and dismiss the application for security for costs.

Background

- [8] Ms. Clark died without a will. Following her death in 2020, the estate was claimed by Mr. Matossian on the basis that he was her spouse as defined in s. 2(1)(b) of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13. The precise question is whether Ms. Clark and Mr. Matossian "had lived with each other in a marriage-like relationship for at least 2 years" prior to her death.
- [9] While the relationship between Ms. Clark and Mr. Matossian lasted 38 years, compared to most marriage-like relationships it was at least unconventional. They did not raise a family together. They did not share the same residence. Each of them was financially self-sufficient. They maintained no joint bank accounts, owned no joint assets, and did not name each other as beneficiaries on their investments.
- [10] Mr. Matossian died before trial. The claim was prosecuted by the respondent on behalf of his estate. The judge was confronted with the challenge of assessing the relationship in the absence of testimony from either Ms. Matossian or Ms. Clark. The judge was nevertheless satisfied that the relationship was marriage-like and Mr. Matossian's claim therefore succeeded in the Court below.
- [11] The appellant is David Clark. In the Court below, Mr. Matossian sued Mr. Clark in his personal capacity and in a representative capacity as the administrator of Ms. Clark's estate. Mr. Clark brings this appeal only in his personal capacity.

The application for security for costs of the trial proceeding

Legal framework

- [12] A single justice may order an appellant to pay into court security for the costs of proceedings in the court appealed from: Court of Appeal Act, S.B.C. 2021, c. 6, s. 34(1)(b). Security must be in the amount and form determined by the justice: s. 34(2). It should be noted that the statutory basis for an order for security for costs was modified in some respects with the reformation of the Court of Appeal Act in 2021. Older authorities must be read with this in mind.
- [13] The order is discretionary. The onus is on the applicant to show that posting security is required in the interests of justice: *Focken v. Fraser Health Authority*, 2023 BCCA 81 at para. 27 (Chambers). Consideration should be given to the merits of the appeal, the effect of such an order on the ability of the appellant to continue the appeal, and the prejudice to either party if the order is made or refused. The merits threshold is low. In *Focken* at para. 29, Frankel J.A. reviewed various expressions of this low threshold in the authorities and stated that "what an appellant must demonstrate is that the appeal 'has some possibility of success', is not 'virtually hopeless', 'appears to have some merit', or is not 'bound to fail'".

- [14] A line of authority suggests that, in practice, security for trial costs will not usually be ordered before they are assessed: *Eisler Estate v. GWR Resources Inc.*, 2020 BCCA 111 at para. 44 (Chambers); *E.B. v. British Columbia (Child, Family and Community Services)*, 2020 BCCA 263 at paras. 27-28 (Chambers); *England Securities Ltd. v. Ulmer*, 2023 BCCA 11 at paras. 38-40 (Chambers).
- [15] The respondent submits that this line of authority should not be taken as requiring anything more than a determination of entitlement to costs. In the present case, entitlement to double costs is determined, but the costs have not been assessed, and are not likely to be assessed before the appeal is heard.
- [16] The appellant submits that references in the authorities to "assessment" can be taken at face value. Costs are assessed in the ordinary course by the registrar, and until assessment has occurred, the amount payable by the appellant is uncertain.
- [17] I agree with the appellant's statement of the practice articulated by the authorities and do not think it is affected by the legislative changes in 2021. The respondent's version would reduce the stated practice virtually to irrelevance, because a successful party's entitlement to costs in the Court below is seldom in doubt. Costs follow the event unless the court otherwise orders: *Supreme Court Civil Rules*, B.C. Reg. 168/2009, R. 14-1(9); *Supreme Court Family Rules*, B.C. Reg. 169/2009, R. 16-1(7).
- [18] It is helpful to consider why the court may be more reluctant to order security for trial costs than security for appeal costs. Trial costs are already incurred. Appeal costs are prospective. While the respondent runs the risk of being unable to collect either, if the appellant turns out to be judgment proof, in the case of trial costs, the prejudice has already been suffered. Moreover, absent a stay of execution, there is nothing to stop the respondent from pursuing assessment and collection of the trial costs to which it is entitled under the trial judgment. The respondent is not prejudiced by the existence of an appeal in this regard. It is prejudiced by the need to incur additional appeal expenses to preserve its position on appeal.
- [19] In this light, the court's established reluctance to order security for trial costs before they are assessed has two justifications. One is that assessment reduces uncertainty as to the amount of security required. The other is that, once costs are assessed, it is easier to tell whether, as a practical matter, collection is a real issue, and if so, why. This bears on the court's ability to determine whether there is prejudice to the respondent resulting from the appellant's pursuit of an appeal. It is usually hard to justify requiring an appellant to post security as a condition of being permitted to proceed with an appeal for the avoidance of prejudice to the respondent that has nothing to do with the appeal. Proof of prejudice is not essential to justify an order for security for trial costs, but it is a factor in assessing whether security is necessary in the interests of justice: *England Securities* at para. 33.

Merits of the appeal

- [20] The fundamental issue on appeal is whether the trial judge erred in concluding that the Mr. Matossian and Ms. Clark were parties to a marriage-like relationship. In substantial and careful reasons indexed at 2024 BCSC 2214, the judge outlined the legal framework established by the authorities and applied that framework to the evidence. The appellant does not dispute the judge's analysis of the authorities, and in particular, her statement that the approach to the evidence must be contextual and holistic and recognize the diversity that exists among relationships, citing *Coad v. Lariviere*, 2022 BCCA 222 at paras. 130 and 144 and *Jones v. Davidson*, 2022 BCCA 31 at para. 21.
- [21] The challenge for the appellant is to identify an extricable error of law or an overriding and palpable error of fact. The respondent submits that "[t]he merit of this appeal falls at the low end of the spectrum".
- [22] Justice Horsman's reasons on the earlier application for security for costs are unpublished. She viewed the issues raised by the appellant as arguable but, "based on the limited record available at this time", characterized them as weak and the appeal as "challenging for the appellant, given the heavily factual nature of the trial judge's analysis": at para. 23.
- [23] The appellant maintains that he has identified a legal error in the trial judge's analysis that was not advanced in his submission to Horsman J.A. The argument is that the trial judge identified the parties' intentions as a key consideration in determining whether a marriage-like relationship exists (at para. 59) but focused his analysis on Mr. Matossian's intentions, not Ms. Clark's (at paras. 72-82). The appellant submits that there was evidence of Ms. Clark's intentions inconsistent with an intention, on her part, to engage in a marriage-like relation, but the judge overlooked or gave it no weight.
- [24] In my view, the appellant's argument satisfies the merits threshold.

Effect of an order on the appellant's ability to pursue the appeal

- [25] The appellant does not contend that requiring him to post security for the costs in the trial court would prevent him from pursuing the appeal. The appellant is a pensioner. He owns a house in joint tenancy with his wife. There is a mortgage on title, but he affirms that there is equity sufficient to satisfy any award of costs. Based on the 2025 notice of assessment, the equity exceeds \$1.3 million.

Prejudice to the respondent if the order is refused

- [26] The respondent maintains that Mr. Matossian's estate is at risk of being unable to collect the trial costs or being put to a great deal of time and trouble to collect the trial costs. The risk of an inability to collect is that the appellant may die and the house may pass to his wife by right of survivorship. There is evidence that the appellant is 78 years old and immunocompromised. The risk of inconvenience is that the process of enforcing a judgment against real property is complicated and time-consuming.
- [27] I do not view as significant the potential inconvenience involved in executing against an exigible asset held in joint tenancy. It is an ordinary incident of litigation. In *Cressey Construction Corporation v. Parolin*, 2025 BCCA 255 at paras. 15-16 (Chambers), Harris J.A. held that the potential inconvenience of being required to execute against real property held in joint tenancy with a spouse to recover money paid to a hitherto successful plaintiff/respondent following a successful appeal does not give rise to a material risk of irreparable harm justifying a stay of execution of the money judgment.
- [28] The potential prejudice associated with the possibility that the appellant will die before the trial costs are assessed and certified is real but unconnected to the appeal. The risk would be unaffected if the appellant were to abandon the appeal. The respondent would still have to have its entitlement to costs assessed before he would be in a position to demand payment. Mr. Matossian's estate would still be at risk (to the extent that it is at risk) if the appellant were to die, leaving his house to pass to his wife by right of survivorship before a certificate of costs could be registered as a judgment against title. The estate would still be faced with the possible expense and inconvenience of enforcement proceedings, if the costs were not paid willingly.

Is security for trial costs required in the interests of justice?

- [29] Taking everything into account, I am unpersuaded that security for costs is required in the interests of justice. There is at least some merit to the appeal. There is nothing exceptional about this appeal to make it appropriate that security for trial costs be ordered before the costs are assessed. The appeal is not prejudicing the respondent's ability to claim the trial costs.

The applications for extensions of time

Legal framework

- [30] These applications are governed by the criteria set out in *Davies v. C.I.B.C.* (1987), 15 B.C.L.R. (2d) 256 at 259-260, 1987 CanLII 2608 (C.A.), namely:
- Was there a bona fide intention to appeal?
 - When was the respondent informed of the intention?

- c) Would the respondent be unduly prejudiced by an extension of time?
- d) Is there merit to the appeal?
- e) Is it in the interests of justice that an extension be granted?

[31] The fifth consideration of the interests of justice is the decisive question, encompassing the first four criteria: *Wu v. Murray*, 2023 BCCA 270 at para. 15 (Chambers).

[32] There is no issue that the appellant formed a genuine intention to appeal and perfected the appeal by serving the respondent within the time limited for service. As already noted, there is merit to the appeal.

Extension of time to file the transcript

[33] The appellant's application to extend the time to file the transcript should obviously succeed. The appellant pursued his intention to appeal by ordering and obtaining the transcript and there is no discernable prejudice to the respondent consequent on the 23-day delay in providing the transcript. It is in the interests of justice that the deadline for filing the transcript be extended to July 31, 2025.

Extension of time to file the appellant's factum

[34] The appellant initially sought the respondent's agreement to extend the time to file his factum until April 26, 2025, on the basis that he needed the transcript to prepare the factum. Now he seeks an extension until August 29. I infer that he has not done anything of substance to prepare the factum since obtaining the transcript at the end of March.

[35] This is regrettable, but I do not think I should infer a lapse in his intention to pursue the appeal. The appellant's counsel says that he was distracted by his involvement in a three-week trial in another matter, the respondent's application for double costs in the Court below, the respondent's first application for security for costs, which was heard and decided on June 17, 2025, and the present application for security for costs, which was filed on July 15. He says that he did not want to attend to preparation of a factum that he might not be permitted to file. While this was not a particularly prudent course of action, I accept counsel's explanation of his thinking.

[36] The respondent does not point to specific prejudice resulting from the appellant's delay in preparing a factum. His argumentative posture is to attack. He asks me to view the delay as the latest episode in what counsel characterizes as a strategy of intentional delay that affected the scheduling of the trial. He accuses the appellant's trial counsel of inflating numbers of witnesses and time estimates at a trial management conference to obtain an adjournment of a scheduled trial date and points to an admission made by the appellant under cross-examination at trial that he took positions with respect to pretrial discovery of documents with a view to the possibility that Mr. Matossian, who was elderly, would die prior to trial.

- [37] To be clear, I reject the inference urged upon me by the respondent that the failure to attend to preparation of the factum was the product of a deliberate policy of delay.
- [38] The accusation directed at trial counsel is unsubstantiated. It is commonplace that counsel change course as to how many witnesses they will require, and how much time they will take up, after a trial brief is prepared. This is particularly the case for defence counsel, who only come to a final decision after the plaintiff's witnesses have testified. An adjournment of the originally scheduled trial date was justified in the result: only eight days had been set aside and the trial eventually took 13 days in all.
- [39] The appellant's admission under cross-examination is more serious, because it acknowledges an inappropriate pre-trial strategy, but there is nothing to connect that strategy to the present circumstance. The appellant's admitted motivation to delay matters ended with Mr. Matossian's death.
- [40] I turn to the ultimate question of the interests of justice. In my view, they favour granting the extensions sought. In the absence of significant and undue prejudice to the respondent, the appellant should not be barred from pursuing an appeal of substance by his delay in filing a transcript and preparing a factum.

Disposition

- [41] On July 24, 2025, I ordered that the time for filing the transcript be extended to July 31, 2025 and the time for filing the appellant's factum and appeal book be extended to August 29, 2025.
- [42] The respondent's application of security for trial costs is dismissed.

"The Honourable Justice Gomery"

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