

CANADA / JUDGMENT

Collett Estate

2017 BCSC 473

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Supreme Court of British Columbia

DECIDED

24 March 2017

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2017 BCSC 473 Collett Estate

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Collett Estate,

2017 BCSC 473

Date: 20170324

Docket: P110494

Registry: Vancouver

RE: The Estate of John Allan Collett also known as John Collett

also known as John A. Collett, Deceased

Before: The Honourable Mr. Justice Macintosh

Corrected Judgment: These reasons for judgment were corrected at
para. 6 on March 29, 2017.

Reasons for Judgment

Counsel for the Executor, Mr. Baird:

Hugh S. McLellan

Appearing on her own behalf:

Paula Collett

Place and Dates of Hearing:

Vancouver, B.C.

March 9 and 10, 2017

Place and Date of Judgment:

Vancouver, B.C.

March 24, 2017

[1] Robert Baird is the executor and trustee of John Collett's estate. These reasons address Mr. Baird's remuneration and expenses in that role. They also address two claims by John Collett's daughter, Paula Collett, who was named as a beneficiary in Mr. Collett's will. She seeks an amount as an advance on her inheritance equal to the amount another named beneficiary has already received, and costs.

[2] John Collett made his last will in 2006. He died on November 17, 2008. He named Mr. Baird as his sole executor and trustee. Clause 6, paragraphs A and B of the will provide:

6. I GIVE, DEMISE AND BEQUEATH all my property of every nature and kind whatsoever and wheresoever situate, including any property over which I may have a general power of appointment to my said Trustee upon the following trusts:

A. I HEREBY AUTHORIZE AND DIRECT that my Trustee may in his absolute discretion sell, call in and convert into money any assets of my estate at such time or times and in such manner and upon such terms and either for cash or credit or for part cash and part credit as my Trustee may in his discretion decide.

B. My Trustee may retain any portion of my estate in the form in which it may be at my death (even though it may not in the form of an investment authorized under the Trustee Act, R.S.B.C. 1996, Chapter 464, and amendments thereto) for such length of time as [my] Trustee may in his/her discretion deem advisable, and my Trustee shall not be held responsible for any loss as a result of such action. It is my firm wish that my Trustee distributes my estate within twenty four months of my demise, save and except the trust for my minor child as contemplated by this My Will.

[Emphasis added.]

[3] The will divided the residue of the estate into three equal shares for each of Mr. Collett's three surviving children, his three daughters, Paula Collett, Pamela Thiele (now Pamela Ferman) and Katrina Loquino. Ms. Collett and Ms. Ferman are adults. Ms. Collett lives in Alberta and Ms. Ferman lives in British Columbia. Katrina is about 12 years old. She lives in the Philippines with her mother, Maricel Loquino.

- [4] Mr. Baird's executorship of John Collett's estate presents a sad story. Mr. Baird has not been as active as he should have been as the executor. He gave evidence to explain his slowness, including that, as the executor for John Collett, he inherited John Collett's executor responsibilities for other estates in the Collett family. Nonetheless, in accepting this appointment, as the executor for the estate of his friend, John Collett, Mr. Baird acquired fiduciary responsibilities.
- [5] Recently however, in this estate, assets are being sold, or have been sold, and whatever final distributions are to be made will likely take place about a year from now. The evidence does not show that assets of the estate have diminished in value from Mr. Baird's delays, but I am satisfied that the substantial legal expenses he has incurred in his executorship would have been smaller had he moved more promptly in getting the assets liquidated.
- [6] The delays in the executorship incurred the wrath of Paula Collett, who legitimately complained about nothing being done. In turn, the solicitors Mr. Baird retained have consumed considerable time, and therefore money from the estate, in dealing with Ms. Collett and her court applications.
- [7] In *Dirnberger Estate*, 2016 BCSC 439, this Court wrote as follows in deciding to remove an executor as a result of his delays:
- [13] The duty of an executor is to settle the affairs of the deceased and to distribute the estate in accordance with the terms of the will in a timely manner. Mr. Chase has failed to do this.
- [14] I have concluded that Mr. Chase must be removed as trustee. I have reached this conclusion for two reasons. His actions demonstrate that he lacks the necessary capacity to act as trustee. ... There is as well a want of reasonable fidelity.
- [15] With regards to the first reason, this is a simple estate that has not been distributed more than four years after probate.
- [16] In *Levi-Bandel v. McKeen*, 2011 BCSC 247, Justice Butler stated at paras. 21 and 23:
- [21] it is not only an act of misconduct that can be grounds for removal of a trustee. A failure to act can amount to grounds for removal .
- [23] I have little difficulty in concluding that [the executor's] inaction and her intransigence caused unnecessary delay. Her refusal or reluctance to proceed with the administration of the estate amounts to a want of reasonable fidelity and a failure to carry out her duties.
- Ms. Collett has not brought an application to remove Mr. Baird as trustee, but the observations about delay expressed in *Dirnberger Estate* will have application in my consideration of the executor's fees Mr. Baird seeks.
- [8] This matter first came before me in a chambers application brought by Ms. Collett on July 25, 2014. None of the estate's six main assets had been sold by then, and no real steps had been taken for selling them. Mr. Baird, however, had already obtained the passing of his

accounts, on December 20, 2013, for the period from John Collett's death, on November 17, 2008, to September 16, 2012. He was awarded \$9,416.91 as his remuneration. He by then already owed \$21,410.90 to the solicitors he had retained for the estate work. (The solicitors' further work and disbursements to date, although not yet rendered in an account, are valued by them at \$67,961.18, and they anticipate further fees of \$10,000 to the conclusion of their work. That would result in total legal fees on this small estate of approximately \$100,000. The same solicitors have additional claims against the estate of John Collett totalling approximately \$54,000 for their work on the estate of John Collett's father, Allan, and John's mother, Gloria.)

- [9] In obtaining the passing of his accounts in December 2013, Mr. Baird represented that the value of the estate's assets totalled \$151,000 at the time of Mr. Collett's death, with estate liabilities of \$182,000. As at September 16, 2012, he said that assets were valued at \$124,000 and liabilities at \$77,000.
- [10] I seized myself of the case on July 25, 2014. I gave directions and made orders from time to time after that to move matters along. There were further appearances before me on November 5, 2014, December 19, 2014, April 7, 2015, May 7, 2015, July 16, 2015 and August 15, 2016.
- [11] In the December 19, 2014 application, I ordered in part that the executor sell, by September 30, 2015, the four parcels of real property belonging to the estate. I also ordered that the executor take from the estate no further fees, or payments for the solicitors, until further order. At the time of that order, December 2014, the executor still had not been paid \$2,806.74 of the \$9,416.91 allowed for his fees in the first passing of his accounts, and the solicitors had not been paid any of their accounts totalling \$21,410.90. (Those solicitors' accounts are before me for consideration in this hearing, as seen below.)
- [12] In my reasons on August 15, 2016, I said in paras. 2-4:
- [2] When the Philippine court has granted Mr. Baird, or one of the two Philippine lawyers, the right to obtain the funds at the Banco de Oro, I ask Mr. McLellan to set down a two-day hearing before me. The purpose of that hearing will be to address all outstanding matters in order to achieve final resolution. If the Philippine court has not given the required authorization to Mr. Baird or one of the Philippine lawyers within 70 days of today, I ask Mr. McLellan to notify me of that delay.
- [3] Most of the relief Ms. Collett sought in the August 15 hearing will need to be addressed in the two-day hearing. I will set out below her requests so that there is a record of them for the two-day hearing.
- [4] Ms. Collett asked that her costs up to July 2015 be paid now. She presented those costs at tab 28 of her binder. They totalled \$7,335.48. Mr. McLellan points out that a determination of Ms. Collett's costs claim needs to await the final adjudication at the two-day hearing, given that certain obligations of the estate may have priority. Mr. McLellan also submits that Ms.

Collett's claim for costs needs to contain more detail. If Ms. Collett can provide further detail at the two-day hearing, so much the better. I am not concluding in these reasons, however, that more detail will be essential before any costs award can be made to her. Ms. Collett is unrepresented and working hard in this protracted matter to marshal her position and, at the same time, educate herself in the legal requirements for her presentation. I will not hold her to the highest standards when she is setting out her claims.

- [13] Mr. McLellan set down this hearing (March 9-10, 2017) in accordance with para. 2 in my August 15, 2016 reasons, quoted above.
- [14] Mr. McLellan is Mr. Baird's solicitor for the estate work as well as his counsel in the hearings before me. In the March 9 and 10, 2017 hearing, he advised that the laws of the Philippines require a 12-month notice period to expire before there can be payment to the estate of the approximately \$50,000 in John Collett's bank accounts there. The 12-month notice period will end in February 2018.
- [15] The Philippine bank accounts are one of what I spoke of earlier as the six main assets of the estate. Another was shares held in Sun Life Financial, worth about \$29,000. The other four were the four parcels of land, which are in Merritt, British Columbia, referred to above at paragraph [11] of these reasons.
- [16] Within a year or two after John Collett died, Mr. Baird travelled to the Philippines three times, at his own expense. While there, he spoke to employees at the banks where Mr. Collett had accounts, but he made no progress in getting any money out of those accounts.
- [17] Perhaps that is because he had not yet obtained a grant of probate. He only obtained probate on May 27, 2011. His evidence for the delay in probating the will was meagre. He obtained a copy of John Collett's will within two or three weeks of Mr. Collett's death, in 2008, but he only located the original while digging in papers some years later at the ranch of a relative or friend of John Collett.
- [18] Nothing was really done in the Philippines until April 2015, 6 1/2 years after John Collett died, when Mr. Baird retained a Philippine lawyer whom he had initially contacted about 14 months earlier.
- [19] The laws of the Philippines for a foreign executor obtaining the money from a deceased's bank account were described to me as being complex indeed. As noted earlier in these reasons, the process for obtaining that money is now underway, and is expected to conclude next February.
- [20] Mr. Baird eventually sold Mr. Collett's shares in Sun Life Financial. He did so only because he needed money to retain the lawyer in the Philippines.

- [21] The four parcels of land in Merritt were described at length by Mr. Baird in the course of his testimony. Three of them are together on an island in the Nicola River and have poor access. The fourth, referred to as Lot 29, stands alone. It is just under an acre, zoned R (Residential) 1 but it is in the agricultural land reserve and the floodplain, which diminish its market value.
- [22] The Colletts have lived in or near Merritt for generations. John Collett's father was a long-serving mayor. (Mr. Baird himself, who is now 77, also served as mayor and as a councillor in Merritt.)
- [23] Mr. Baird owns some undeveloped land of his own near Lot 29, which is also zoned R1. Paula Collett alleged, or at least insinuated, that Mr. Baird was in a conflict of interest in having to sell Lot 29 because that would reveal a low-market value for his own land which is nearby. Mr. Baird was exceedingly slow in getting Lot 29 sold. He denied being in a conflict of interest. He said his land and Lot 29 were entirely separate in his mind. Ms. Collett did not press the point hard. It petered out.
- [24] Mr. Baird has an insider's knowledge of land values and the property market generally in the Merritt area. Paula Collett was in no position to marshal expert evidence of property values, and I am unable to conclude either that Mr. Baird got less than market value for the four Collett parcels or that his delays in selling them resulted in less money coming to the estate.
- [25] Overall, I am left with the same conclusion regarding all of the six main assets of the estate. That is that Mr. Baird has been too slow and casual in his work as executor, but that his conduct has not resulted in the estate having less money than it would if he had been more prompt and conscientious in his efforts.
- [26] The efforts of Paula Collett have been essential to getting anything achieved for this estate. But for her, I am confident no steps would have yet been taken toward obtaining money in the Philippines, selling any of the four parcels in Merritt or selling the Sun Life Financial shares. Had Mr. Baird dealt with the estate promptly, as John Collett had requested in the will, and had he dealt more often with Ms. Collett directly, the solicitors' accounts and pending accounts would have been a great deal lower.
- [27] The criteria for determining an executor's remuneration are well established. They include the size of the estate, the care and responsibility required, the time occupied in administering the estate, the skill and ability displayed, and the success achieved. See *Re Toronto General Trust Corp. v. Central Ontario Railway Company* (1905), 6 O.W.R. 350 at 354 (Ont.H.C.). See also, *Re McColl Estate* (1967), 65 W.W.R. 110 (B.C.S.C.) at p. 185; and *Re Pedlar* (1982), 34 B.C.L.R. 185 (S.C.) at p. 189.
- [28] Section 88 of the Trustee Act, R.S.B.C. 1996, c. 464, speaks of an executor's, "care, pains and trouble and his or her time spent" as criteria to employ for assessing an executor's compensation.

- [29] Mr. McLellan pointed out that Mr. Baird's delays to be taken into account are only those after the first passing of accounts, which addressed the period ending September 16, 2012. The point there is that the Court assessed the executor's conduct as a whole, including delays, up to September 16, 2012, when it passed the first accounts in December of 2013.
- [30] In the result, I am ordering that Mr. Baird can now be paid the \$2,806.74 that is the unpaid portion of his fees from the first accounting.
- [31] Mr. Baird has now applied for a second and a third passing of accounts. The second accounting is for the period ending September 16, 2014. He seeks executor's fees of \$1,047.61 for that period. For the third accounting, from September 17, 2014 to January 31, 2017, he seeks executor's fees in the amount of \$1,276.92. Both of those claims for fees are modest, at least when compared with the fees Mr. Baird obtained from the first accounting. However, I am reducing the requested fee of \$1,047.61 by \$500 and the requested fee of \$1,276.92 by \$600. I am making those reductions because of the delays which have occurred since September 16, 2012. In my view, none of the assets would have yet been sold were it not for Ms. Collett's and this Court's continual proddings. I do not propose to undertake here an elaboration of the principles for executor remuneration set out in the statute and authorities quoted above. It is enough to say that they do not contemplate or countenance an executor receiving all the fees he has claimed in the face of his ongoing delays throughout the executorship.
- [32] Turning to the executor's expenses, Mr. McLellan quoted this Court in *Jackson et al v. King et al*, 2003 BCSC 328 at para. 12:

As Executors, the Respondents are entitled to be indemnified out of the Estate for all proper expenses incurred in relation to the Estate and this right of indemnity is a first charge upon the capital and the income of the Estate: Halsbury's Laws of England, vol.17, 4th ed. (London: Butterworths, 1976) at 612, paragraph. 1190. The Respondents are also entitled to be indemnified for all costs including legal costs which are reasonably incurred: *Geffen v. Goodman* (1991), 81 D.L.R. (4th) 211 (S.C.C.). As well, the Respondents are entitled to full indemnity for all costs and expenses properly incurred in the due administration of the Estate: *Thompson v. Lamport* [1945] S.C.R. 343.

See also *Re Ladner Estate*, 2001 BCSC 943 at para. 9:

The cases and texts to which I have referred above indicate: (1) that executorship expenses, testamentary expenses and administration expenses are in essence synonymous terms which relate to the proper performance of the duties of the executor of the estate; (2) such expenses include the costs incurred in obtaining the advice of solicitors or counsel with respect to ascertaining the debts and liabilities due from the estate, the payment of such debts and liabilities, and the legal and proper distribution of the estate among the persons entitled.

- [33] In light of those authorities, I am accepting that the solicitors are now entitled to receive payment of their accounts totalling \$21,410.90, for their work from November 16, 2008 to May 31, 2013. Subject to my reductions, above, for the executor's fees claimed in the second and third accounting periods, I am accepting and passing the accounts for the second and third accounting periods. The accounts for the second period, September 17, 2012 - September 16, 2014, are summarized at tab 4 of Exhibit 1. The accounts for the third period, September 17, 2014 - January 31, 2017, are summarized at tab 7 of Exhibit 1.
- [34] Paula Collett is to receive two payments out of the estate. She is to receive forthwith as an advance the same amount Katrina Loquino has already received, \$3,830, less \$1,500, which Ms. Collett accepts as representing the value of the Honda car she received already from the estate through Mr. Baird. The advance I have ordered for Ms. Collett cannot later be revoked.
- [35] Second, Paula Collett is to receive forthwith further costs in the amount of \$5,500, in addition to the \$1,200 in costs she has received already pursuant to an earlier order I made. There can be little question that but for Ms. Collett's efforts, none of the steps to realize John Collett's estate would have been undertaken.
- [36] Other claims by Ms. Collett are dismissed, except of course that she will be entitled to one-third of the estate in accordance with her father's will.
- [37] Where Mr. Baird obtains the money from the estate to pay the two payments to Ms. Collett ordered above I leave to him. I have not purported to review or tax the further accounts anticipated from the solicitors, in the estimated amount of approximately \$78,000. Those anticipated accounts are not before me at present. It could be that such accounts would be viewed as too large given the relatively small size of the estate and given what the solicitors have already received. It then may need to be determined whether the anticipated accounts are reduced. Also for future determination may be the question of whether such accounts are to be paid by the estate exclusively, or by the estate and Mr. Baird personally in some combination.
- [38] Mr. Baird's remaining duties as executor include obtaining money from the Philippine bank accounts, finalizing any tax obligations of the estate and preparing the final accounts and distribution.
- [39] I will remain seized of this matter.

"MACINTOSH J."

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