

CANADA / JUDGMENT

Derco Estate (Re)

2022 BCSC 2393

COURT

Supreme Court of British Columbia

DECIDED

5 December 2022

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2022 BCSC 2393 Derco Estate (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Derco Estate (Re),

2022 BCSC 2393

Date: 20221205

Docket: P24463

Registry: New Westminster

Between:

In the matter of the Estate of Olive Mary Jane Derco, deceased

Applicant

And

Holly Mae Derco and John Barry Derco

Respondents

Before: Master Nielsen

Oral Reasons for Judgment

In Chambers

The Applicants, appearing on their own behalf, representing the Estate of Olive Derco:

M. Derco

J. Derco

Counsel for the Respondents:

N. Massah and J. Kennedy, Articling Student

Place and Date of Hearing:

New Westminster, B.C.

June 5 and December 5, 2022

Place and Date of Judgment:

New Westminster, B.C.

December 5, 2022

- [1] THE COURT: This is a passing of accounts in relation to the estate of the late Ms. Olive Derco who died August 6, 2019, and left a will dated May 31, 2012. There are three surviving siblings: Holly, Barry, and Miles. There was a fourth sibling, Danielle, who died in 2012 from cancer.
- [2] A prior proceeding took place before Madam Justice Winteringham in December of 2020, wherein Barry and Holly sought to have Miles removed as executor, and Miles sought to have Holly and Barry likewise removed: see *Derco v. Derco*, 2020 BCSC 2199. Madam Justice Winteringham provides an extensive and complete background to the proceedings at paras. 14 through 44.
- [3] As a result of Madam Justice Winteringham's decision, Barry was removed as executor, leaving Holly and Miles as co-executors. This application for a passing of accounts is brought by Miles.
- [4] The value of the estate is not in dispute. Rather, at the heart of the matter are allegations of pre-taking of monies and assets of the estate, and the amounts, if any, which must be repaid to the estate by Barry and Holly. The estate consists of \$1,041,850 in cash as of December 5, 2022. Miles claims that the value of the estate is even greater given that debts are owed to the estate by both Barry and Holly totalling a further \$206,241.68, bringing the estate's value to \$1,248,092.18.
- [5] The debts allegedly owed by Barry and Holly to the estate are \$78,452.35 for Barry and \$127,789.33 by Holly.
- [6] The \$78,552.35 debt allegedly owed by Barry consists of a \$50,000 debt specifically enumerated in the will, an overcharge of committee's expenses in the amount of \$13,452.35, which has been consented to, \$5,000 for a 2001 Sebring convertible, \$5,000 for 3,000 pounds' worth of furniture from the deceased's condo, and \$5,000 worth of jewellery, being half of the value of the jewellery that Miles alleges has a \$10,000 value. The latter three values are ascribed by the executor Miles.

- [7] Barry concedes the \$13,452.35 in committee payments are owed to the estate, but disputes the remaining amounts.
- [8] The \$127,789.33 alleged to be owed by Holly consists of; pre-taken cheques in the amount of \$48,598.59, \$39,178 in pre-taken cash, \$26,412.74 in pre-taken visa payments, \$5,000 for pre-taken jewellery, and \$8,600 for a pre-taken piano.
- [9] Holly concedes \$14,000 must be repaid to the estate by her, consisting of \$10,000 in insurance money which covered renovations she double billed for, and \$4,000 for a granite countertop that was part of a renovation on her own property, not her late mother's. Otherwise, she disputes Miles' allegations concerning money allegedly owed to the estate by her.
- [10] At this point, I pause to note the comments of Madam Justice Winteringham where she states at paras. 9 through 11:
- [9] I also note that some of the allegations brought are serious. The parties each raise allegations as against the others about honesty or more accurately, dishonesty. Those allegations include misappropriation of funds from their mother, and the parties have sworn evidence against the others, to that effect.
- [10] Each disputes the allegations brought against them.
- [11] As I have said, this is very much a disputed record. I will spend some time on this issue later in my reasons. However, at this stage I make the following comment about the state of the record. I do so because the parties wanted a determination of the petitions as presented. It is simply not possible without cross-examination or referring this case to the trial list to make the determinations that both sides seek. For example, Miles wants the court to conclude, in the face of Holly's denial, that she misappropriated money from her mother. In my view, that requires an assessment of credibility because I am invited to make findings based on a record that is very much disputed by Holly.
- [11] That is very much the situation here. Neither Barry nor Holly has provided oral evidence, nor have they been cross-examined on their often-contradictory affidavits. Regarding the allegations against Barry, he has conceded \$13,452.35 in overtaken committee monies must be repaid, but otherwise denies the remaining claims.
- [12] With respect to the alleged \$50,000 loan to be deducted from his share of the estate, as enumerated in the will, he alleges this amount was repaid. In this regard, I note the comments of Madam Justice Winteringham at paras. 41 and 58 through 60, where Her Ladyship states:
- [41] Regarding Miles' allegation of conflict of interest against Barry, Miles submits principally that Barry owes \$50,000 to the estate and that is recognized in and accounted for by Ms. Derco in the Will. Barry takes the position that this amount was paid back in full. Holly has included a statement in her affidavit stating that she believes Ms. Derco included the

reference to the \$50,000 in error and that she believes that the debt was repaid. I cannot find anything in the evidence that supports this bald assertion about her belief that Ms. Derco made a mistake or that Barry has repaid the debt. I am not persuaded by Holly's evidence on this point or that it can be used to corroborate Barry's assertion that he has repaid the debt in full.

..

- [58] I turn to the allegations relating to Barry and the repayment of the \$50,000 loan to his mother. Based on the evidence tendered and my review of Barry's affidavit, I have concerns about the state of the record and whether the evidence presented sufficiently removes the perception of the conflict.
- [59] First, I have placed virtually no weight on Holly's attempt to corroborate her brother. She makes a bald assertion and provides the court with no basis to assess that assertion. What is clear to me is that in Ms. Derco's Will made in 2012, she expressly includes the \$50,000 debt. It is that issue that for me lingers, and I must say it lingers unanswered, even taking into account the evidence presented by Barry.
- [60] I have reviewed the ledger that was presented on behalf of Barry and the other invoices identified in his affidavit and during the course of submissions. It seems that this document is something that was generated by Barry, and I am unable to reconcile the ledger with what was stated by Ms. Derco to be a debt, one of the few specifics that she included in the Will. This will be a matter that may need to be dealt with at the passing of the accounts. Nevertheless, I am not satisfied by my review of the evidence tendered on this point and by the submissions made that answers Miles' allegation about an ongoing, unremedied conflict requiring the passing over of Barry.
- [13] The record has not changed substantially since Madam Justice Winteringham's decision. The evidence of alleged repayment is wholly deficient. The cancelled cheques offered as evidence of repayment predate the 2012 will by as much as a decade, with some payments, and there are none after the 2012 will. There is an email from Barry to Miles dated August 21, 2021, where he states in part:
- That means once all the accounting is done and you have a total amount to split three ways, I get 50,000 less and you and Holly get 25,000 more. I am not going to contest this so as not to hold up the settlement any longer. I believe we have all wasted enough time arguing with each other and making lawyers and the courts richer.
- [14] This appears to essentially be an admission that the \$50,000 remains owing.

- [15] Given the totality of the evidence, the repayment of the \$50,000 stated in the will has not been proven and must be repaid to the estate in full from Barry's share. However, with respect to the car, furniture, and jewellery, I am not prepared to ascribe any value that must be repaid. There is no certain value that can be ascribed to any of these chattels and, at best, the court would be pulling a random number out of a hat. I do have a lovely photo of Ms. Olive Derco in her finery and amongst her furniture in her apartment.
- [16] Barry attests that he paid \$1,500 for the car; however, I am not prepared to ascribe a value beyond that. The furniture had to be removed from the condo to facilitate its sale, and Barry removed it and transported it to his residence in the interior. Miles resides in Manitoba. Taking the furniture simply is not practical, and Holly was content to let Barry have it; at least it stays in the family.
- [17] In total, therefore, Barry must credit the estate a total of \$63,452.35 consisting of the \$50,000 ascribed in the will and the agreed sum of \$13,452.35 for the committee fee overcharge.
- [18] Regarding the allegations against Holly, she denies any wrongdoing, but agrees she double charged for the \$10,000 reno cost for which there was full insurance proceeds. Therefore, \$10,000 must be reimbursed to the estate. She also agrees that the \$4,000 cost of the granite countertop was for her condo and not her mother's and therefore that also must be reimbursed.
- [19] Otherwise, she attests that all payments and transactions by her were appropriate and authorized. And again, in this regard, I have the findings of Madam Justice Winteringham where she states at paras. 54 through 57:
- [54] I have reviewed the evidence presented by Miles. I have considered his characterization of the transactions as suspicious. Additionally, I have also reviewed Holly's response.
- [55] Holly was involved in the management of her mother's affairs, financial and otherwise, for many years. That is clear, and no one has disputed that she was the one primarily responsible for providing care to her mother in the years of her declining health.
- [56] It seems clear from the evidence that Ms. Derco required assistance to maintain her life outside of an assisted living facility, and Holly was the one who was able to provide that support at the time. She maintained her commitment made to her mother that she reside in her home. She helped her mother address some of the issues relating to her mother's abstention from alcohol in those early years after the dementia diagnosis. She helped her mother manage during these early years of her mental decline. Holly answered some of the allegations in her October 2018 affidavit, and further allegations were addressed in her most recent affidavit.
- [57] I agree with Holly's counsel that there is evidence demonstrating that some of the bank withdrawals impugned by Miles were withdrawals made at the behest of or for Ms. Derco, including for repairs and upkeep to the White Rock condo. Holly indicates that she was unable to produce all the receipts for each and every transaction, but she did produce some

and pointed to the documents to explain the expenditures, including photographs of some of the work performed. In addition, Barry has confirmed some of the repair work expenditures to be an accurate accounting. Though Holly's bookkeeping is less than ideal, I am not satisfied that the evidentiary record before me constitutes clear evidence of misappropriation or theft in the manner contemplated by the authorities when considering whether she should be passed over as executor or trustee.

- [20] With respect to the chattels, including the jewellery and piano, as with Barry, I am not prepared to ascribe any value to it for the purpose of dividing the estate. Madam Justice Winteringham has noted the piano went to a granddaughter at para. 37 of her reasons and seemed content with that, although during the course of this hearing some question was cast on whether or not Holly actually had a grandchild.
- [21] Holly attests that the jewellery was costume jewellery, and I have no evidence beyond that. In the present case, I have very much the same evidence and circumstances as what was before Madam Justice Winteringham, an array of affidavit material, some contradictory, but otherwise not challenged on cross-examination.
- [22] I find that Holly must credit the estate a total of \$14,000, consisting of the agreed insurance money of \$10,000, and the cost of the countertop, being \$4,000.
- [23] Now I am going to turn to executor fees.
- [24] A personal representative or administrator is entitled to remuneration to a maximum of five percent of the gross aggregate value, including capital and income, on all the assets of the estate: see s. 88 of the Trustee Act. The criteria to be considered in determining the appropriate amount of remuneration are set out in a number of cases, the leading of which is *Re Toronto General Trusts Corporation v. Central Ontario Railway Company* (1905), 6 O.W.R. 350 at p. 354 (Ontario H.C.).
- [25] The criteria are the magnitude of the trust, the care and responsibility involved, the time occupied in administering the trust, the skill and ability displayed, and finally the success achieved in the result.
- [26] Remuneration does not need to be fixed as a percentage of the gross aggregate value of the estate. It can be calculated as a lump sum, provided it does not exceed five percent of the total value of the estate: see *Turley Estate (Re)*, (1955), 16 W.W.R. 72 (B.C.S.C.).
- [27] Here the estate is not sizeable by contemporary standards. It consists of the value of a condominium, an investment account, and a banking account. The value is just over a million dollars.
- [28] A great deal of care, responsibility, and time was invested by Miles in the administration of the estate. If not for his diligence in pursuing this matter, I have serious doubt that it would have made it as far as it has. He has displayed skill and ability and has brought the matter to a certain measure of finality.

- [29] In terms of the success achieved, in my view, what success we have to date is essentially thanks to him.
- [30] Although I find the bulk of the work having been done by Miles, Holly did participate in the administration of the estate, although she is responsible for late disclosure of financial information, indeed with financial information dribbling in on today's date, the final date of the passing of accounts. There was some obstruction on her part in terms of access to the financial records. Overall, the heavy lifting during the course of the estate was done by Miles.
- [31] Taking the approach from Turley Estate (Re), I am going to award lump sum remuneration. Remuneration is awarded for the total amount of \$45,000; \$40,000 of which will go to Miles, and \$5,000 to Holly.
- [32] Both Miles and Holly are entitled to their reasonable fees for a two-day passing of accounts to be paid by the estate on a special costs' basis, the amount to be agreed or assessed. Because Miles is self-represented, and the accounts will have to be amended based on my reasons, both parties have the right to reappear in the event you cannot agree on the form of the order.
- [33] We are adjourned.

"Master Nielsen"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/22/23/2022BCSC2393.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/derco-estate-re-2022>

Prepared on 26 October 2026 · Esheria