

CANADA / JUDGMENT

Derco v. Derco

2020 BCSC 2199

COURT

Supreme Court of British Columbia

DECIDED

18 December 2020

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

2020 BCSC 2199 Derco v. Derco

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Derco v. Derco,

2020 BCSC 2199

Date: 20201218

Docket: S206238

Registry: Vancouver

Between:

MILES JEFFERY DERCO

Petitioner

And

HOLLY MAE DERCO and JOHN BARRY DERCO

Respondents

- and -

Docket: P21349

Registry: Nelson

Between:

HOLLY MAE DERCO and JOHN BARRY DERCO

Petitioners

And

MILES JEFFERY DERCO

Respondent

Before: The Honourable Justice Winteringham

Oral Reasons for Judgment

In Chambers

(Hearing proceeded via teleconference)

Counsel for the Petitioner:

D. Hunter

Counsel for the Respondents:

M.D. Scheffelmaier

Place and Date of Hearing:

Vancouver, B.C.

September 24, November 13 and December 17, 2020

Place and Date of Judgment:

Vancouver, B.C.

December 18, 2020

[1] THE COURT: These Reasons for Judgment were delivered as oral reasons. They have since been edited for publication.

I. OVERVIEW

[2] This is the hearing of two petitions seeking similar relief.

[3] The first petition was brought in the Nelson Registry by Holly Mae Derco and her brother, John Barry Derco, against their sibling, Miles Jeffery Derco. In the Nelson petition, Holly Derco and Barry Derco seek an order removing their brother from his position as co-executor and co-trustee of their mother's estate.

[4] In the second petition, brought in Vancouver, Miles Derco (as petitioner), seeks similar relief, although articulates the relief sought somewhat differently. Among other orders, principally, Miles Derco seeks:

- a) An order pursuant to s. 31 of the Trustee Act, R.S.B.C. 1996, c. 464, and s. 115 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 19 ("WESA");

- b) An order pursuant to the inherent jurisdiction of the court that Holly Mae Derco and Barry Derco be passed over (or removed) as executors of the last will and testament of their mother, Olive Mary Jane Derco, dated May 31, 2012, and as trustees of her estate; and
 - c) An order that Miles Derco alone be authorized to apply for a grant of probate as the sole personal representative of Olive Mary Jane Derco's estate.
- [5] Throughout these reasons, I will refer to the parties by their first names. I mean no disrespect in so doing. As siblings, the parties share their last name and using their first names will remove confusion.
- [6] The petitions were scheduled for hearing for one day on September 24, 2020. The hearing did not complete, and two additional partial days were required over the following months. To avoid any further delay, I determined it would best to provide the parties with an oral decision.
- [7] In so doing, counsel should be aware that I have had an opportunity to review the affidavits presented, including the somewhat voluminous financial records tendered to advance and dispute each other's positions on various issues. Though I may not refer to all of the financial issues raised and corresponding records, counsel should know that I have considered the evidentiary record.
- [8] Further, both counsel referred me to considerable email correspondence between the parties and between each of their counsel. Similarly, I will not address that correspondence in detail, but I have considered it where relevant to a determination of the issues raised. In short, I have considered the evidentiary record, the submissions of counsel and authorities in determining these petitions.
- [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.

- [12] Similarly, Holly and Barry bring allegations against Miles that he is disqualified from acting because of what were submitted to be convictions for tax-related offences and rely on s. 158(3)(e) of WESA. To prove the conviction, Holly and Barry rely (in part) on newspaper clippings about Miles. Findings of dishonesty such as those sought here require the court to base its findings on admissible evidence. The newspaper clippings are not. I have examined the record in such a way as to consider the admissibility of the evidence tendered in order to base this decision. I will deal more with these evidentiary issues as I move through the reasons.
- [13] I have organized these reasons as follows. I will first set out very briefly some of the background relating to the Petitions. I will then set out the positions of the parties and briefly set out the evidence presented on the Petitions. I will then set out the governing legal principles. I will next provide an analysis taking into account the principles that govern, my findings where necessary regarding the evidentiary record and the resolution of the issues. Finally, I will set out the orders granted (or not) as sought in the Nelson and Vancouver Petitions.

II. BACKGROUND

- [14] The Petitions relate to the estate of Olive Mary Jane Derco. She died on August 6, 2019, in Langley, BC, and left a will and testament dated May 31, 2012 (the "Will"). I will refer to Olive Derco as "Ms. Derco" throughout these reasons.
- [15] The parties are Ms. Derco's children and were named the co-executors in her will. There was a fourth sibling, Danielle Derco, who died in 2012 from cancer.
- [16] The Will, which forms part of the evidentiary record, provides as follows:

- a) Dated May 31, 2012, Ms. Derco stated:

I NOMINATE CONSTITUTE AND APPOINT my daughter, Holly, my son, Barry, and my son, Miles, to act jointly or the survivor of them as the Executors and Trustees of this my Last Will and Testament

- b) After making provision for any debts of the estate and granting William Draper permission to reside for six months in Ms. Derco's residence, she stated this:

To divide all the rest, remainder and residue of my estate into three equal shares and to pay, give and transfer:

- (i) One such share to my son Barry for his own use absolutely. Before my son Barry takes any share in the residue of my estate, he is to bring account and hotchpot, without interest, the sum of \$50,000 which I advanced to him;

(ii) One such share to my daughter Holly

(iii) One remaining share to my son Miles, for his own use absolutely.

- [17] In short, the Will divides the residue of Ms. Derco's estate equally among the surviving children: Barry, Holly and Miles, but required Barry to account for \$50,000 that Ms. Derco advanced to him during her lifetime.
- [18] Based on the submissions of counsel, I accept that the estate consists of the following assets:
- a) A condo located at 102 - 15025 Victoria Avenue, White Rock, BC with an approximate value of \$800,000;
 - b) Heritage Credit Union account of approximately \$35,000 - \$39,000;
 - c) RBC account of approximately \$95,000; and
 - d) CIBC investment account of approximately \$135,000.
- [19] In terms of the family background, Ms. Derco and the parties' father started their family in Winnipeg, Manitoba. Holly and Barry are seven and six years older than Miles. Mr. Derco died in 1990. Barry left Manitoba in his 20s. Holly left home when she was 18. Ms. Derco moved to White Rock in 1992, shortly after her husband's death. Holly and Danielle moved shortly thereafter.
- [20] The parties each described a close relationship to their parents. Miles stated that he and his spouse and children spent every summer weekend at the lake with his parents until the family cottage was sold in 1989. Miles stated that he had a reasonably good relationship with both Holly and Barry until RBC froze Ms. Derco's account in 2017. Based on the affidavits tendered, it seems that the sibling relationship has been strained for some time, even before the 2017 bank event. This is evident in the tone of the communications tendered during the hearing.
- [21] There were a few events that I wish to touch on, because they came up several times during the hearing.
- [22] The first is when Danielle died in 2012. This is obviously a sad event for this family. Indeed, Ms. Derco's will was written after Danielle's death. Miles states that he came out to BC six times during 2011 and 2012 to visit his mother and his dying sister. Miles says that he noticed his mother appeared increasingly forgetful during these visits.
- [23] Danielle's death, in my view, is relevant to the extent that Holly contends some of the expenditures that Miles has framed as "misappropriation" relate to Holly incurring expenses associated to Danielle and to her death.
- [24] The second event I wish to touch on is Ms. Derco's decline in health. On August 16, 2012, Ms. Derco signed an enduring power of attorney (the "EPOA"). However, the EPOA was held by lawyers until 2017. In his affidavit, Miles alleges that his siblings failed to keep him apprised of their mother's deterioration and declining mental function. It appears there was a diagnosis of moderate dementia in 2013 and then a diagnosis in 2014 of marked dementia. Miles says he did not become aware of those diagnoses until 2018.

- [25] Holly described her efforts to take care of her mother during the decline in her condition. Holly stated that she was able to care for her mother in her home pursuant to her mother's wishes during at least the initial years following the dementia diagnosis. Holly swore in her affidavit that she did not agree to move their mother into a care home because her mother did not want to go. Additionally, Holly swore that based on her observations, her mother was still able to manage her financial affairs. As such, she did not seek to rely on the EPOA signed years earlier. As I indicated at the outset, each of the three siblings accuse one another of seeking to interfere with their mother's financial affairs and taking advantage of her. I will say more about this momentarily.
- [26] In terms of the chronology, I simply note that Holly deposes that she believes Miles was seeking to gain access to their mother's finances long before it was required. Again, there are cross-accusations about financial control, and I will set that out in more detail momentarily when I set out the parties' positions.
- [27] Committeeship proceedings were commenced in July 2018. Justice Iyer on October 24, 2018, made a committeeship order appointing Holly as committee of Ms. Derco's person and Barry as committee of her estate (the "Committeeship"):
1. The Respondent, Olive Mary Jane Derco ("Olive Derco"), is by reason of mental infirmity arising from disease, age or otherwise, incapable of managing herself and her affairs;
 2. The Petitioner, Holly Derco, is appointed committee of the person of Olive Derco;
 3. The Petitioner, John Barry Derco, is appointed committee of the estate of Olive Derco;
 4. The committee of estate, John Barry Derco, may post a bond with a corporate surety in the amount of \$1,100,000. The bond, if any, must be in the name of the Public Guardian and Trustee, approved by the Registrar of the Supreme Court and filed with the Public Guardian and Trustee in accordance with s. 10(l)(c) of the Patients Property Act,
- 5, The amount of the bond may be reduced by further order of this court or with the written agreement of the Public Guardian and Trustee;
6. Until such time as the committee of estate has posted the bond described in paragraph 4 of this Order, the committee of estate's powers with respect to the assets of Olive Derco shall be restricted as follows:
 - a. The committee of estate shall not dispose of or encumber the real property specified in the Schedule to the Affidavit of Kindred and Fortune and described below, without further order on notice to the Public Guardian and Trustee, or without the prior written consent of the Public Guardian and Trustee.

Legal Description: PID: 005-346-100 Strata Lot 26, Plan NWS2477 Part SE1/4, Section 10, Township 1 New Westminster Land District

Civic Address: 102 - 15025 Victoria Avenue, White Rock, BC

- b. If the committee of estate sells the said real property, the net sale proceeds shall be transferred from the conveyancing lawyer's trust account to a financial institution where an investment has been established by the committee of estate in compliance with the Trustee Act. The committee of estate shall have no access to the capital of the investment, other than for reinvestment purposes, without the prior written consent of the Public Guardian and Trustee. The financial institution and any other successor institutions shall be served with a copy of the order and proof of service of the order shall be provided to the Public Guardian and Trustee forthwith;
- c. The committee of estate shall have no access to the capital of the funds of Olive Derco held in the following accounts:

RBC Calculator Plus Sixty-Plus Account No.: 08580-5055124

CIBC Wood Gundy Inv Account No.: 830-06723

or any successor accounts, other than for reinvestment purposes, without the prior written permission of the Public Guardian and Trustee. The financial institutions, and any successor institutions, shall each be served with a copy of the order and proof of service of the order shall be provided to the Public Guardian and Trustee forthwith; and

- d. The committee of estate shall not redeem the funds specified in the Affidavit of Kindred and Fortune held with CIBC Wood Gundy in RRIF number 553-50070 other than as required by the applicable legislation, without the prior written consent of the Public Guardian and Trustee. CIBC Wood Gundy, and any successor institutions, shall be served with a copy of the order and proof of service of the order shall be provided to the Public Guardian and Trustee forthwith.
7. Further, the committee of estate shall:
- a. consult with each child of Olive Derco if the committee wishes to sell the patient's real property;
 - b. give each child of Olive Derco irrevocable authority for access to all information from all financial institutions holding funds belonging to Olive Derco;
 - c. consult with each child of Olive Derco if the committee wishes to change financial institutions;
 - d. deliver to each child of Olive Derco, at the address provided by him or her from time to time, a copy of each committee accounting concurrently with his submitting it to the Public Guardian and Trustee; and
 - e. upon written request by a child of Olive Derco, deliver copies of receipts and records supporting the committee accounting to that child without charge.

8. The committee of person shall:
 - a. promptly inform each child of Olive Derco, in the manner requested by that child from time to time, of any significant changes in Olive Derco's health;
 - b. consult with each child of Olive Derco before changing the location of Olive Derco's residence, and shall inform each child promptly regarding any change to Olive Derco's location of residence; and
 - c. not restrict the opportunity of any child of Olive Derco to visit her or take her on outings, without a further order of the Court on notice to each child of Olive Derco.
 9. The Petitioners' legal costs of this application as assessed by a registrar as special costs be paid out of the estate of the patient without the requirement of approval by the Public Guardian and Trustee.
- [28] I also note that Holly and Barry had initially taken the position that some of the issues raised by Miles are res judicata because they were determined by Iyer J. That submission was abandoned during the hearing.
- [29] I have also been told about issues regarding a \$70,000 pay-out that was made to each of the siblings before Ms. Derco's death and after Danielle's death. I have not made any findings about this distribution of funds, nor in my view is it necessary to do so on the issues raised in the petition.
- [30] In addition, I was also advised that RBC froze Ms. Derco's accounts in 2017, raising a concern about authorization for Holly to be accessing Ms. Derco's account.
- [31] Ms. Derco died on August 6, 2019. There is a dispute about whether Miles was informed about the death in a timely manner, and again, I do not make such a finding one way or another.
- [32] In short, the parties have been engaged in a lengthy dispute for at least four years prior to Ms. Derco's death. The tone of the emails and correspondence tendered at the hearing reflect the ongoing animosity between the siblings. When Miles tried to air some of his complaints about financial management to Holly and Barry, it seemed Barry may have initially agreed with his concerns. However, at the hearing of the Petitions it was clear that Holly and Barry were very aligned in their presentation, and Miles was on the outside of this brother/sister alliance.

III. THE POSITIONS OF THE PARTIES

- [33] The parties raise a number of complaints about the conduct of the other. I set out those issues relevant to my determination of the petitions. Yesterday I invited counsel to make submissions about whether they sought credibility findings about the disputed record. Both agreed that there were conflicts in the evidence that could not be resolved based on the evidence presented, but both maintain their position that the evidence is sufficient to

ground the orders they seek. Neither wants this matter to be delayed or for additional costs to be incurred by a referral to the trial list or for cross-examination on affidavits. In the circumstances, that is sensible approach.

- [34] In his written submission, Miles says that he seeks the order passing over (or remove) Holly and Barry as executors for two reasons: (1) Holly and Barry are in a conflict of interest, and (2) there is compelling evidence suggesting that both parties owe money to the estate.
- [35] Regarding the allegation that Holly is in a conflict of interest, Miles submits as follows.
- [36] First, that in June and July 2020, Miles received copies of the bank statements to 2015 with respect to their mother. In his initial review of the ten-month period leading up to July 2017, Miles said he discovered about \$40,000 in unexplained cash advances. Later, Miles claimed irregularities in the amount of \$73,000 in transactions, which included \$41,000 in the unaccounted-for cash advances. On this issue there was considerable back and forth between the parties, and lawyers became involved in writing some of the correspondence.
- [37] Second, an issue arose about Ms. Derco's grand piano. There is evidence before me, from Holly, that this was a gift to a granddaughter.
- [38] Third, in October 2017, Miles identified additional transactions totalling \$19,384 from 2015 and early 2016, of which were made out to cash and indicated to be for strata fees, strata or condo repairs. Miles identified nine cheques, eight of which were made out to cash, totalling \$42,699 that were deposited into Holly's bank account. Lengthy itemized lists were produced at the hearing of the petition, and one of those lists included some 51 items in an effort to explain the expenditures.
- [39] Holly's response to this submission directed at her is that all of the expenses were incurred for or on behalf of her mother or a partial repayment of moneys that Holly incurred for Danielle.
- [40] Holly presented some evidence in an attempt to answer Miles' allegations of suspicious transactions. She says she does not have all of the documents that support each and every transaction. Holly has delivered two affidavits addressing the allegations of misappropriation, one filed with her Vancouver petition and one filed in the Committee proceedings. In short, Holly takes the position that she was dealing with her mother's day-to-day living needs and was spending money at the direction of her mother and with input from her mother. I refer in particular to paragraph 27 of Holly's second affidavit sworn September 23, 2020:

I explained the spending which Miles viewed as suspicious in the email attached as Exhibit I to the Petitioner's Affidavit. In that email, I expressed that the majority of the expenses that he was concerned about were incurred at Olive's direction, while she was still managing her own affairs, and that the others were incurred at Olive's direction after the power of attorney was activated. I explained that I was not prepared to prevent Olive from incurring expenses that she wanted to incur given that it was her money in the account, I also acknowledged that Olive did buy me gifts

from time to time when we went shopping together but this was not unusual given how close we were and given that I was providing Olive with company and care.

- [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.
- [42] The second reason why Miles says that Holly and Barry should be passed over is because he says Holly and Barry have demonstrated that they are unsuitable for the role of executor. In particular, Miles submits that Holly has a demonstrated history of mismanaging Ms. Derco's assets and is inappropriately accessing them to her own benefit. At a minimum, Miles submits her actions have shown a want of reasonable fidelity. At most they have shown a lack of honesty. Miles says that Holly has failed to account for tens of thousands of dollars of their mother's money that was deposited into her account.
- [43] Miles also submits that Holly and Barry have refused to cooperate with Miles with respect to the management of their mother's affairs and have treated him with hostility. He says that that has occurred in the context of him asking legitimate questions about expenditures and otherwise, and the email correspondence are but one example reflecting this hostility. Miles puts his submission this way at paragraph 13 of his written submission:

Given the allegations and the evidence supporting those allegations against Barry and Holly, it is impossible for them to discharge their duty to bring assets into the estate for distribution among the beneficiaries. This combined with their repeated failure to appreciate or respect the need to act in the best interests of Olive and her estate and their dealings with her assets and their hostility to the petitioner in the face of his legitimate attempts to perform the due diligence required of him as a personal representative mandate their removal as executors.

- [44] With respect to the Nelson petition and Holly and Barry's response to the Vancouver petition, they allege that Miles should be passed over (or removed) mainly because he has a conviction for an offence that disqualifies him under WESA. Second, they say Miles should be removed because the siblings are unable to get along, their differences are irreconcilable, and he is the source of the conflict. Miles admits that there was an issue involving Revenue Canada and that he negotiated a resolution regarding the complaint in that regard. He has tendered an affidavit confirming that he does not have a criminal conviction.

IV. LEGAL PRINCIPLES

[45] The petitions can be determined in accordance with s. 31 of the Trustee Act and s. 158 of WESA and the inherent jurisdiction of the court:

TRUSTEE ACT

Power of court to appoint new trustees

31. If it is expedient to appoint a new trustee and it is found inexpedient, difficult or impracticable to do so without the assistance of the court, it is lawful for the court to make an order appointing a new trustee or trustees, whether there is an existing trustee or not at the time of making the order, and either in substitution for or in addition to any existing trustees.

WESA

Application to remove or pass over personal representative

158(1) In this section, "pass over" means to grant probate or administration to a person who has less priority than another person to become a personal representative.

- (2) A person having an interest in an estate may apply to the court to remove or pass over a person otherwise entitled to be or to become a personal representative.
- (3) Subject to the terms of a will, if any, and to subsection (3.1), the court, by order, may remove or pass over a person otherwise entitled to be or to become a personal representative if the court considers that the personal representative or person entitled to become the personal representative should not continue in office or be granted probate or administration, including, without limitation, if the personal representative or person entitled to become the personal representative, as the case may be,
- (a) refuses to accept the office of or to act as personal representative without renouncing the office,
 - (b) is incapable of managing his or her own affairs,
 - (c) purports to resign from the office of personal representative,
 - (d) being a corporation, is dissolved or is in liquidation other than a voluntary dissolution or liquidation for the purpose of amalgamation or reorganization,
 - (e) has been convicted of an offence involving dishonesty,
 - (e.1) is an undischarged bankrupt,
 - (f) is
 - (i) unable to make the decisions necessary to discharge the office of personal representative,

(ii) not responsive, or

(iii) otherwise unwilling or unable to or unreasonably refuses to carry out the duties of a personal representative,

to an extent that the conduct of the personal representative hampers the efficient administration of the estate, or

(g) a person granted power over financial affairs under the Patients Property Act.

(3.1) A creditor may make an application for an order under subsection (3) (e) or (e.1) only if the creditor has a claim for more than a prescribed amount.

(4) An order of the court removing a personal representative does not remove that person as a trustee.

[46] I have considered Ching Estate (Re), 2016 BCSC 1111. I have been guided by Justice Affleck's decision and the authorities he cites therein. In particular, I have considered paras. 21-27. I highlight a few points raised in Ching Estate.

[47] Regarding the testator's choice of executor, Justice Affleck states at para. 21, citing Justice Gerow's decision in Thomasson Estate (Re), 2011 BCSC 481, that courts are reluctant to interfere with the testator's choice of executor. With respect to a perceived conflict of interest, at para. 22 of Ching Estate, Affleck J. writes:

The authorities indicate that even a "perceived" conflict of interest between an executor's personal interests and her obligation to administer the trusts in the will in the interests of the beneficiaries may cause this court to intervene to appoint a new executor or an administrator to avoid even the appearance of conflict. . . .

[48] I have considered Affleck J.'s statement found at para. 23 of Ching Estate where he states:

. . . In Morelli v. Morelli, 2014 BCSC 106 at para. 41, Harvey J. commented that it is no answer to an application to pass over an executor to say, as Gini must, that litigation, similar to that brought by Pamela against Gini, is not likely to succeed.

[49] At para. 25 of Ching Estate, Affleck J. states:

Secondly, she submits the testator's choice of executor ought to be respected. I accept that is a compelling factor and this court has often expressed its reluctance to remove an executor when a conflict of interest is alleged.

[50] Referring to the jurisprudence[1], Justice Affleck includes a helpful summary of the principles to be considered when the court is exercising a discretion about whether to remove estate trustees, including:

(1) the court will not lightly interfere with the testator's choice of estate trustee;

(2) clear evidence of necessity is required;

- (3) the court's main consideration is the welfare of the beneficiaries; and
- (4) the estate trustee's acts or omissions must be of such a nature as to endanger the administration of the trust.

[51] Finally, at para. 27 of Ching Estate, Affleck J. reminds the court that:

The outcome of each application for the removal of an estate trustee will depend on its own facts. . . .

[52] I am not going to refer to all of the other authorities that were presented on the application, but I have been guided by the leading cases on this point, and I am guided in particular by the four principles that I just read out referenced in Hinkson C.J.S.C.'s decision.

V. ANALYSIS

[53] I deal first with the allegations against Holly and the suggestion that she should be removed.

[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.

- [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.
- [61] In the Nelson petition, the only ground raised against Miles is that of a conviction for tax related offences. I have also considered the secondary submission that was made during the hearing and in response to the Vancouver petition that his conduct has rendered him inappropriate to continue serving. As I review s. 158(3)(e) of WESA, I note that the Act requires a conviction of an offence for dishonesty. I do not rely on the newspaper articles. The extent of the evidence before me on this point is that Miles does not have any criminal convictions.
- [62] I have also been referred to *Bartel v. Bartel*, 2006 MBCA 139, for the proposition that the dishonesty required to warrant removal of an executor must be related to the administration of the estate. Although that is a Manitoba decision, counsel have advised that there are not any authorities interpreting the breadth of s. 153(3)(e) in BC.
- [63] Here after considering *Schwab Estate (Re)*, 2019 BCSC 1478, which is a decision from Justice Gomery, resolved on a different issue, Gomery J. nevertheless accepted that the executor with a fraud conviction was the most appropriate candidate. On this record and based on Miles' affidavit regarding the circumstances of the tax issue, I am not satisfied that he is automatically disqualified because of a "conviction for an offence of dishonesty."

[64] Regarding the submissions that Miles has failed to cooperate or work with the other executors, I do not see the level of conflict to have reached the stage that Holly and Barry cannot work together to take the next necessary steps required by the estate. Again, I appreciate that counsel raised many other issues, and as stated yesterday, in my view many of those issues cannot be resolved on this evidentiary record. I have determined that I can rest my decision on the record I do accept.

VI. CONCLUSION

[65] My decision follows.

[66] I have taken into account Ms. Derco's intentions when she drafted her Will. She expressed her decision to name her three surviving children and that they be her executors. I do not lightly interfere with that express intention. When I examined the issues surrounding Holly, I am not satisfied that the evidence clearly indicates the conflict and concerns as advanced by Miles, though perhaps at first glance suspicious. I dismiss the order sought in the Vancouver petition passing her over (or remove) as executor or trustee.

[67] Similarly, as I examine the allegations brought against Miles, I am not satisfied that the evidence clearly indicates the conflict and concerns as advanced by Holly and Barry. I dismiss the Nelson petition in that regard.

[68] Finally, I do not come to the same conclusion regarding Barry. Based on the state of the evidence presented and taking into account Barry's response, I agree that there remains a perceived conflict of interest that cannot be necessarily answered by an accounting when it comes time to pass the accounts. I thus grant the order passing over, and remove, Barry as executor and trustee of the estate. I do so in reliance on the jurisprudence that there is a conflict of interest. At the very at least, there is a perceived conflict between Barry's interest (being whether or not he repaid the \$50,000 loan) and his obligations to administer the trust and the Will in the interests of the beneficiaries. Barry's evidence is insufficient to remove that perception to the extent necessary.

[69] I do not lightly interfere with Ms. Derco's intention. However, in my view this result, considering the years of acrimony, will best preserve what Ms. Derco wanted. That is, two of her children working through together the disposition of her estate as was her wish.

[70] I wish to address the issue regarding a neutral administrator. In my view, this is the very sort of case that could require someone from the outside to take over. The history of the distrust that each has for the other is glaring. I have resisted that resolution for two reasons. First, counsel urged me to come to a decision obviously in favour of their clients, but to one that would not require the estate to incur the high fees of an administrator, particularly in light of the value of the estate. Second, I have tried to take into account Ms. Derco's intentions and respect them. Her children can and should work through this.

[71] In conclusion, based on these reasons and the findings I have made, I grant the following orders:

- a) The Nelson petition is dismissed;
- b) With respect to the Vancouver petition,
 - i. Pursuant to s. 31 of the Trustee Act and s. 158 of the Wills, Estates and Succession Act, the application for an order that John Barry Derco be passed over as executor of the last will and testament of Olive Mary Jane Derco dated May 31, 2012, and as trustee of her estate is granted; and
 - ii. The application for an order that Holly Derco be passed over as executor and trustee is dismissed.

[72] With respect to costs, if counsel wish to make submissions about costs, they must deliver those submissions in writing within 30 days. Otherwise, the parties will bear their own costs.

"Winteringham J."

[1] In *Parker v. Thompson (Trustee)*, 2014 BCSC 1916, Chief Justice Hinkson refers to Justice Levine's decision of *Miles v. Vince*, 2014 BCCA 289 at para. 84, citing *Letterstedt v. Broers* (1884), L.R. App. Cas. 371 (J.C.P.C.) at 385-389.

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/20/21/2020BCSC2199.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/derco-v-derco-2020>

Prepared on 26 October 2026 · Esheria