

CANADA / JUDGMENT

Dunn v. Baird Estate

2023 BCCA 216

COURT

British Columbia Court of Appeal

DECIDED

27 April 2023

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2023 BCCA 216 Dunn v. Baird Estate

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Dunn v. Baird Estate,

2023 BCCA 216

Date: 20230427

Docket: CA48238

Between:

Rhonda Gay Dunn and Vandy Maureen Noble

Appellants

(Plaintiffs)

And

The Estate of Leona Jean Baird, Barbara Lynn Moraitis in her personal
capacity and as Executor of the Estate of Leona Jean Baird,

Anastasia Lee Savji, Evelyn Goodbrandson, Magdalayna Laura Moriatis,

Tina Heerwagen and Leora Dunn

Respondents

(Defendants)

Before:

The Honourable Mr. Justice Harris

The Honourable Madam Justice Stromberg-Stein

The Honourable Mr. Justice Hunter

On appeal from: An order of the Supreme Court of British Columbia, dated
March 28, 2022 (Dunn v. Baird Estate, 2022 BCSC 498, Duncan Docket 20425).

Oral Reasons for Judgment

Counsel for the Appellants:

A.G. LaCroix

Counsel for the Respondents, Barbara Lynn Moraitis, in her personal capacity and as Executrix of the Estate of Leona Jean Baird, Anastasia Lee Savji and Farouk Savji:

G.T. Rhone

Place and Date of Hearing:

Victoria, British Columbia

April 26, 2023

Place and Date of Judgment:

Victoria, British Columbia

April 27, 2023

Summary:

The appellants seek an order pursuant to s. 151 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 for leave to commence proceedings against their sister in her capacity as executor of their late mother's estate. The appellants allege that funds were wrongfully taken from their mother during her life, and that a transfer of \$200,000 from their mother to the respondent is held in trust for the estate. The chambers judge held that the claim that funds had been wrongfully taken was based solely on suspicion and conjecture, and that the respondent had rebut the presumption of resulting trust in relation to the \$200,000 transfer. The appellants appeal in relation to both findings.

Held: Appeal allowed in part. The test for leave is whether there is an arguable case to be tried. The chambers judge may engage in a limited weighing of the evidence, but it is not the role of the leave judge to resolve the dispute. Here, the chambers judge reviewed the evidence and concluded that the respondent had shown that the transfer was intended to be a gift. This conclusion went beyond the proper role of a leave judge. There was an arguable case that the transfer raised a presumption of resulting trust. It was for the trial judge to determine whether the presumption had been rebutted. However, the judge's conclusion that there was no arguable case of improper withdrawals was supported by the record. Leave was granted in relation to the

\$200,000 transfer only.

- [1] HUNTER J.A.: Rhonda Dunn and Vandy Noble, the appellants, and Barbara Moraitis, the principal respondent, are sisters. Their late mother, Leona Baird, passed away in 2020. Ms. Moraitis is the executor of her late mother's estate. A dispute has arisen among the sisters concerning their mother's estate, and on January 13, 2021, Ms. Dunn and Ms. Noble commenced proceedings for various relief relating to the estate (the "Estate Action").
- [2] Among the relief sought in the Estate Action is an order pursuant to s. 151 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA] for leave to commence proceedings against Ms. Moraitis and her daughter Anastasia Savji to recover funds said to have been wrongfully taken from Ms. Baird during her life, and to recover funds which the appellants say Ms. Moraitis holds in trust for the estate.
- [3] The appellants' application for leave was heard by a Supreme Court chambers judge and dismissed. The chambers judge concluded that the appellants had not made out an arguable case for leave, and also were not proceeding in good faith. The appellants appeal.

Background

- [4] The dispute among the sisters appears to have begun following a family meeting in 2014 or 2015. The chambers judge discussed the evidence of this meeting in some detail, but for purposes of this appeal, it is sufficient to note that there was what the judge described as a "family rupture" at this meeting, following which the deceased changed her will to the benefit of Ms. Moraitis, with the appellants' share being reduced. In her will, the deceased specified the reason for the reduction to the appellants as "each of them has not treated me with the proper respect during the past year as a daughter should treat her mother". All the parties agree that the deceased was competent and of sound mind when she made the changes to her will.
- [5] In mid-January 2016, the deceased sold her home on Lagoon Road and moved into Ms. Moraitis' house on Blackwood. From the sale of her Lagoon Road property the deceased transferred the sum of \$200,000 to Ms. Moraitis. A month later, Ms. Moraitis sold her Blackwood house and purchased a property on Marwood Drive ("Marwood") in Victoria, using the \$200,000 and the proceeds of the sale of her Blackwood home.
- [6] At the time of the purchase, the deceased executed a letter addressed to the bank that was providing the mortgage financing for the purchase of Marwood, stating:

This is to confirm that a financial gift in the amount of \$200,000 has been made to Barbara Moraitis to assist in the purchase of a home. These funds are being provided as a gift and will never have to be repaid.

- [7] The Marwood property was registered in Ms. Moraitis' name. The deceased lived in Marwood with Ms. Moraitis until she moved to a care facility in 2019. Ms. Baird passed away on October 27, 2020.
- [8] The issues the appellants wish to pursue can be summarized as follows:
1. whether the sum of \$200,000 transferred by the deceased to Ms. Moraitis is held in trust by Ms. Moraitis for the benefit of the estate, either directly or through an interest in the property at Marwood, currently registered in the sole name of Ms. Moraitis; and
 2. whether Ms. Moraitis misused the power of attorney granted to her by the deceased and took funds from the estate.

Legal Framework

- [9] Section 151 of WESA created a procedure for persons referred to as "specified persons" to bring proceedings when the personal representative of a deceased person has declined to do so. The definition of "specified person" includes beneficiaries of the estate. The appellants are beneficiaries of their mother's estate and accordingly are specified persons for purposes of s. 151.
- [10] The operative provision of s. 151 is sub-section (1), which reads as follows:
- 151(1) a specified person may, with leave of the court, commence proceedings in the name of the specified person and on behalf of the estate of the deceased person
- (a) to recover property or to enforce a right, duty or obligation owed to the deceased person that could be recovered or enforced by the personal representative, or
 - (b) to obtain damages for breach of a right, duty or obligation owed to the deceased person.
- [11] Leave may be granted in the following circumstances:
- (3) The court may grant leave under this section if
 - (a) the court determines the specified person seeking leave
 - (i) has made reasonable efforts to cause the personal representative to commence or defend the proceeding,
 - (ii) has given notice of the application for leave to
 - (A) the personal representative,
 - (B) any other specified persons, and
 - (C) any additional person the court directs that notice is to be given, and
 - (iii) is acting in good faith, and

- (b) it appears to the court that it is necessary or expedient for the protection of the estate or the interests of a specified person for the proceeding to be brought or defended.
- [12] It is common ground that in addition to the statutory requirements, an applicant for leave must show that there is an arguable case on the merits.
- [13] On the application below, the respondents conceded that the appellants met the requirements under ss. 151(3)(a)(i) and (ii). The only issues were whether they had demonstrated an arguable case, and whether they had shown that they were proceeding in good faith.

The Chambers Judgment

- [14] The chambers judge began her analysis by stating a number of propositions said to apply to a s. 151 leave application:
- [6] As is indicated by the word "may" emphasised above in s. 151(3), the decision to grant leave is discretionary and serves a gate-keeping function pursuant to the court's supervisory role in administering estates. In exercising its discretion, the court will consider both if a claim is "necessary" and "expedient". Claims may be necessary if the personal representative of the estate is unable or unwilling to advance a claim which is in the best interests of the estate: *Bunn v. Bunn Estate*, 2016 BCSC 2146 at para. 50.
- [7] An expedient claim is a claim which is in the best interests of the estate: *Bunn* at para. 50-51. A claim must have sufficient merit to be considered within the best interests of the estate, having regard to the attendant inconvenience and expense of pursuing a claim. Unsubstantiated claims based on conjecture and suspicion do not merit the court's discretion to grant leave. *Fry v. Fry*, 2018 BCSC 1018 at paras. 84-90.
- [8] While the court must not decide the merits of the case or issues of credibility, a limited weighing of the evidence is necessary to test the strength of the proposed claim. The costs of proceeding and a potential costs award against the estate if it fails must also be considered, as well as the presence of a workable litigation plan: *Bunn* at paras. 47 and 51; *Fry* at para. 89.
- [15] I note at the outset that I do not consider the legal propositions set out in these paragraphs to be entirely accurate. I will return to these statements later in this judgment.
- [16] After reviewing the background to the dispute, the chambers judge then addressed the two issues raised by the appellants, as well as the good faith requirement.
- [17] On the \$200,000 transfer to Ms. Moraitis, the chambers judge referred to the appellants' position that the transfer raised a presumption of resulting trust which the transferee Ms. Moraitis would be required to rebut. She noted, however, that the presumption was only used "to 'tip the scales' in favour of the transferor, if the court is 'unable to reach a conclusion about the transferor's actual intention': at para. 36.

- [18] The judge then reviewed the evidence filed on the application, including the letter to Ms. Moraitis' bank stating that the \$200,000 transfer was a gift, and concluded that the \$200,000 transfer had been intended as a gift to Ms. Moraitis. In commenting on some of the evidence that suggested otherwise, the judge said this:
- [43] I agree with the defendants. I take the signed gift letter to be the best evidence of the deceased's intent with regard to the \$200,000. The fact that Ms. Moraitis cared for her mother, and offered a contingency plan should the arrangement not work out, in my view, does not negate the deceased's intent to make a gift to her daughter. That donors cannot retract a gift does not mean that recipients cannot give a gift back. Further, the applicants' evidence that the deceased told them that she could get her money back from Ms. Moraitis at anytime does not in my view, cast doubt on the gift letter or reflect a change in intention. Even if the applicants' assertions that the deceased said this were accepted, there is no evidence that the deceased ever took any steps to withdraw her gift. In my view, this evidence alone does not cast sufficient doubt upon the deceased's written intent to justify the estate's inconvenience and expense of litigation.
- [19] Her conclusion on the first issue was that the appellants had failed to show that the deceased did not gift the money to Ms. Moraitis:
- [47] The onus is on the applicants to demonstrate that some evidence exists or might exist to support the claim that the deceased's estate has an interest in Marwood, capable of rebutting the presumption of indefeasible title, such that their claim has sufficient merit to justify litigation. The focus is on the deceased's intention regarding the \$200,000. In order to justify this claim, the applicants must show some evidence that the deceased did not gift the money to Ms. Moraitis. In my view they have failed to do so. The state of the legal title, the gift letter, and the evidence of Ms. Moraitis all show that the deceased intended to gift the money to Ms. Moraitis. There is no evidence to the contrary- just the applicants' bald assertions which are rooted in their mistrust of Ms. Moraitis and the Savjis. There simply is no evidence to support the estate's interest in Marwood.
- [Emphasis added.]
- [20] As a result, the judge concluded that the appellants did not have an arguable case on the \$200,000 transfer, and denied leave to bring proceedings in relation to it.
- [21] The judge then turned to the second issue, whether there was an arguable case that Ms. Moraitis had misused her power of attorney over her mother's assets to enrich herself. The appellants based their assertions on the evidence that:
1. Ms. Moraitis had new clothes, shoes and purse;
 2. Ms. Moraitis bought new furniture;
 3. Ms. Moraitis bought a new car;

4. Ms. Moraitis has gone on trips; and
 5. There were cash withdrawals from the deceased's bank account that the appellants regarded as suspicious.
- [22] The chambers judge reviewed the evidence from Ms. Moraitis responding to these concerns and concluded as follows:
- [54] Even by the applicants' own admission, their accusations are based on nothing more than conjecture, suspicion and mistrust of Ms. Moraitis. Again, the onus rests on the applicants to demonstrate litigation is justified. They have not. Ms. Moraitis' evidence answers the applicants' "questions". The cash withdrawals from the deceased's bank account are not out of line with what Ms. Moraitis said she withdrew the cash for. The one questionable payment to BMW for approximately \$600 that was drawn to my attention is neither enough to raise an arguable case nor put the estate to the inconvenience and expense of the proposed action.
- [55] On a limited weighing of the evidence I am not satisfied that the applicants have raised an arguable case that Ms. Moraitis misused the power of attorney and took funds from the deceased's bank account for her own use, let alone ground a claim with sufficient merit to justify litigation within the best interests of the estate.
- [23] Finally, the judge considered briefly the statutory requirement that the appellants demonstrate that they were acting in good faith, and concluded that they had not met that onus:
- [57] Even by their own admission the applicants' claims are based on conjecture and suspicion. The allegations are rooted in their deep mistrust of Ms. Moraitis and are completely unsubstantiated. In addition to targeting Ms. Moraitis, the applicants made reckless unsubstantiated claims against Farouk and Anastasia Savji, which they withdrew at this hearing.
- [58] Accordingly, I am not satisfied that the applicants are pursuing the litigation in good faith.
- [24] The chambers judge awarded special costs to Ms. Moraitis on the basis that the allegations of wrongful conduct had been made "recklessly, based solely on suspicion and conjecture": at para. 64. The judge also awarded special costs in relation to allegations made against Anastasia Savji and her husband on the basis of allegations in the pleadings that were not pursued during the application.

Issues

- [25] The appellants submit that the chambers judge erred by:
- a. Misapplying the correct legal test under s. 151(3) of WESA in the following ways:

- i. Engaging in extensive weighing of evidence in finding that the appellants do not have an "arguable" case;
 - ii. Finding that claims must be necessary and expedient and finding that claims must be expedient for the estate, rather than for the specified persons;
 - iii. Finding that the costs of litigation would be imposed on the estate; and
 - iv. Finding that the appellants did not bring their claims in good faith, despite having a legitimate financial interest in the claims.
- b. Making an award of special costs.

Analysis

Legal Framework

[26] Prior to 2019, the operative portion of s. 151(1) of WESA provided that

151 (1) a beneficiary may, with leave of the court, commence proceedings in the name and on behalf of the personal representative of the deceased person

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

[Emphasis added.]

[27] In 2019, by S.B.C. 2019 c. 4, s. 151 was amended by introducing the concept of a "specified person" (which includes a beneficiary) and changing the operative language to:

a specified person may, with leave of the court, commence proceedings in the name of the specified person and on behalf of the estate of the deceased person

[Emphasis added.]

[28] The chambers judge appears to have been considering the pre-amendment statute, as indicated by para. 3 of the chambers judgment, which led her to focus on whether the claim was in the best interests of the estate to pursue, rather than the interests of the specified persons, here the appellants.

[29] The proper approach to be taken in considering a leave application under s. 151 of WESA was explained by this Court in *Hoggan v. Silvey*, 2022 BCCA 176 [Hoggan]. Hoggan was decided after the judgment under appeal was released, so the chambers judge did not have the benefit of this Court's judgment when considering the case at bar.

- [30] Hoggan was also a case in which two sisters alleged financial wrongdoing against a third sister and her husband, who was executor of the estate. The basis for the allegation was a series of cheques written by the defendant sister to herself from the joint account she maintained with the deceased. Eleven cheques were identified totalling more than \$153,000. The two plaintiff sisters sought leave to commence an action under s. 151 to recover these amounts for the estate and ultimately for their benefit. The leave application was dismissed in chambers, but this Court reversed the chambers order and permitted the claim to proceed.
- [31] The chambers judge in Hoggan held that in order to satisfy the court that it should exercise its discretion to grant leave to commence proceedings on behalf of the estate, the petitioners must show that there is an arguable case, the potential relief outweighs the inconvenience caused to the estate by the litigation, and the proceeding is in the best interests of the estate. This Court held that an arguable case was required, but the other two factors were not necessarily required factors when considering whether leave should be granted pursuant to s. 151: at para. 43.
- [32] Justice Bennett summarized the relevant considerations in this way:
- [44] Section 151(3)(a) permits the court to grant leave if the person seeking leave has made reasonable efforts to cause the personal representative to commence or defend the proceeding, given notice of the application for leave to specified persons, and is acting in good faith. In addition, s. 151(3)(b) requires that:
- it appears to the court that it is necessary or expedient for the protection of the estate or the interests of a specified person for the proceeding to be brought or defended.
- [45] The disjunctive "or" is used, which means that the factors are separate, not cumulative. (See Bunn at para. 40).
- [46] The words of s. 151(3)(b) WESA should, in my view, be read as follows:
- (b) it appears to the court that it is necessary or expedient for the protection of the estate
- or
- that it is necessary or expedient for the protection of the interests of a specified person for the proceeding to be brought or defended.
- [47] Read in that manner, the best interests of the estate may be considered, but that is not necessarily a factor when the interests of a specified person are raised.
- [Emphasis in original.]
- [33] Justice Bennett went on to review the approach taken by the chambers judge in Hoggan, and concluded that the judge had gone beyond the "limited weighing" of the evidence in concluding there was no arguable case:

[51] The judge came to this conclusion as a result of what she referred to as a "limited weighing" of the evidence. When the above passages are considered, however, it is apparent that the judge did not perform a limited weighing exercise. the judge seemed to place no weight on the affidavit evidence of the appellants, while accepting the affidavit evidence of the Silveys, even as she noted that she was not to decide issues of credibility: para. 24. She went beyond what she was permitted to do at this juncture.

[Emphasis in original.]

[34] Justice Bennett then stated that "the judge placed too much emphasis on the best interests of the Estate when she failed to consider that the application was being brought to protect the interests of a specified person, not those of the Estate": at para. 54.

[35] Finally, Justice Bennett observed that the cost of the proposed litigation would not necessarily be the obligation of the estate:

[56] In addition, the judge considered that the value of the Estate was small, and that the costs of the litigation would consume it. She failed to recognize that costs are not necessarily ordered against the Estate. Those bringing the litigation, or those defending the litigation, may be responsible for costs.

[36] The comments of Justice Bennett are relevant and applicable in the case at bar.

[37] The legal propositions relied on by the chambers judge in paras. 6 to 8 of the judgment focus exclusively on the best interests of the estate, contrary to the principle explained at para. 54 in Hoggan. While the chambers judge stated that the court will consider both if a claim is necessary and expedient, with an expedient claim being defined as one that is in the best interests of the estate (at paras. 6-7), Justice Bennett explained that the terms were disjunctive, not conjunctive, and that it is sufficient if the applicants show that it is necessary or expedient for the proceeding to be brought for the protection of the interests of a specified person. In this respect, there were essentially four possible ways to meet the standard set out in s. 151(3)(b).

[38] As well, the chambers judge considered that the costs of proceeding and a potential costs award against the estate must be considered (at para. 8), but as Justice Bennett pointed out, the specified persons bringing the litigation may be responsible for costs.

[39] In my respectful opinion, this erroneous focus on the best interests of the estate, together with an extensive weighing of the evidence, affected the judge's consideration of the significance of the \$200,000 transfer, to which I will now turn.

The \$200,000 Transfer

[40] The appellants' theory is that the transfer of \$200,000 by the deceased to Ms. Moraitis is held by Ms. Moraitis in trust for the estate. They rely on the presumption of resulting trust, which applies to gratuitous transfers. The effect of the presumption of resulting trust is to place the

onus on the transferee to show that a gift was intended, thereby rebutting the presumption that the funds transferred are held in trust: *Pecore v. Pecore*, 2007 SCC 17 at paras. 24-25 [Pecore]. As Ms. Moraitis was and is an independent adult, no presumption of advancement applies: *Pecore* at para. 36.

- [41] To rebut the presumption of resulting trust, the transferee must show on a balance of probabilities that the transfer was intended as a gift. The trial judge must weigh all of the evidence in an attempt to determine the transferor's actual intention: *Pecore* at paras. 43-44.
- [42] The issue before the chambers judge was whether the appellants had raised an arguable case that the \$200,000, or the property interest purchased with the \$200,000, was held in trust for the estate. It was not to weigh the evidence and come to a conclusion as to whether Ms. Moraitis had rebutted the presumption of resulting trust. That assessment of the evidence is for the trial judge. But that is effectively what the chambers judge did.
- [43] The judge reviewed the evidence that had been filed and concluded that the deceased had intended to make a gift to Ms. Moraitis, primarily on the basis of the letter to the bank, which she characterized as the "best evidence" of the deceased's intent. To adopt the language of Hoggan, the judge went beyond what she was permitted to do at this stage of the proceedings.
- [44] In my opinion, the chambers judge erred in principle by weighing the evidence at the leave stage and reaching a conclusion on the central issue to be determined, whether Ms. Moraitis had satisfied the onus on her to prove on a balance of probabilities that the \$200,000 transfer was intended to be a gift.
- [45] Furthermore, in her concluding remarks, the judge said this (at para. 47):

In order to justify this claim, the applicants must show some evidence that the deceased did not gift the money to Ms. Moraitis. In my view they have failed to do so.

- [46] It was an error in principle to place the onus on the appellants to show that the transfer was not a gift. As explained in *Pecore*, the onus will be on Ms. Moraitis to show that the transfer was intended to be a gift. But whether that onus has been met is a matter for an assessment of all of the evidence at trial, not on a leave application.
- [47] In concluding that the onus remained on the appellants, the chambers judge referred to the fact that title to the property has always been registered in the sole name of Ms. Moraitis, raising in the judge's view a presumption of indefeasible title to be rebutted by the appellants. But where a person advances a contribution to the purchase price of property without taking legal title, the presumption of a purchase money resulting trust arises: *Nishi v. Rascal Trucking Ltd.*, 2013 SCC 33 at para. 21 [Nishi]. The presumption of a purchase money resulting trust, as a species of gratuitous transfer resulting trust, is also rebuttable by the transferee showing that the purchase money was intended as a gift: *Nishi* at para. 30.

- [48] The appellants have raised an arguable case that the \$200,000 is held in trust for the estate, whether in the amount transferred or as an interest in the Marwood property. It will be for Ms. Moraitis to rebut the presumption of resulting trust at trial.

The Allegation of Misuse of the Power of Attorney

- [49] The allegation by the appellants that Ms. Moraitis misused her power of attorney from her mother to enrich herself stands on a somewhat different footing. In this case, the judge did not have to weigh the evidence to determine whether an evidentiary burden had been met. Here there was simply no probative evidence to support the claim.
- [50] In this case, the onus was on the appellants to demonstrate that there was a reasonable prospect that the claim would be established at trial. The evidence of the appellants that Ms. Moraitis had new clothes, shoes and a purse, that she bought new furniture and a new car and had gone on trips does not raise any reasonable inference that she was misusing the power of attorney from her mother.
- [51] The evidence that there were withdrawals from the account of the deceased does not support an arguable case of wrongful conduct. None of the withdrawals are unusually large, and there is nothing in the bank records or the application record to indicate that the withdrawals were not made by the deceased herself. This evidence may be contrasted with the evidence in Hoggan, where a number of large cheques were written directly to the defendants, raising issues that required some answer.
- [52] The chambers judge concluded that the appellants' accusations were based on "nothing more than conjecture, suspicion and mistrust of Ms. Moraitis": at para. 54. That conclusion is well supported by the record before the judge.
- [53] In my opinion, the chambers judge did not err in concluding that the appellants had not shown an arguable case that Ms. Moraitis had abused her position under her mother's power of attorney. I would not disturb the judge's conclusion on this issue.

The Good Faith Issue

- [54] Section 151 also requires that applicants show they are acting in good faith in order to obtain leave to bring proceedings under that section. The chambers judge dealt with this issue briefly, stating that:
- [57] Even by their own admission the applicants' claims are based on conjecture and suspicion. The allegations are rooted in their deep mistrust of Ms. Moraitis and are completely unsubstantiated. In addition to targeting Ms. Moraitis, the applicants made reckless unsubstantiated claims against Farouk and Anastasia Savji, which they withdrew at this hearing.
- [58] Accordingly, I am not satisfied that the applicants are pursuing the litigation in good faith.

- [55] The good faith requirement must be met in relation to the \$200,000 transfer, as I have concluded that the appellants have raised an arguable case on that claim.
- [56] While the judge's comments about conjecture and suspicion are justified in relation to the allegation of misuse of the power of attorney, they have less relevance to the claim in relation to the \$200,000 transfer, which is based on a legal proposition that applies in the absence of proof to the contrary. More to the point, good faith is not measured by the strength of the case, but by whether the claim is being brought for legitimate purposes of self-interest, or for ulterior purposes.
- [57] I would adopt the approach to the good faith requirement set out by Justice Verhoeven in *Jiang v Piccolo*, 2020 BCSC 1584:
- [69] The concept of "good faith" is informed by the other aspects of s. 151. Section 151(1) refers to commencing proceedings to "recover property or to enforce a right, duty or obligation owed to the deceased person", or to "obtain damages for breach of a right, duty or obligation owed to the deceased person". Section 151(3)(b) refers of the question of whether it appears to the court that the proceedings are necessary or expedient "for the protection of the estate or the interests of a specified person". Therefore, a person genuinely pursuing these objects for the benefit of the estate or out of her own self interest is acting in good faith, within the meaning of s. 151.
- [58] In this case, it is apparent that the appellants are acting out of their own self-interest in advancing the claim for the \$200,000 transfer. They have met the good faith requirement.

Costs

- [59] The chambers judge ordered the appellants to pay special costs of the application to Ms. Moraitis and to her daughter, Anastasia Savji and her daughter's husband, Farouk Savji.
- [60] An allegation is made in the Notice of Civil Claim that either or both of Mr. Savji and Ms. Moraitis "used the power of attorney for the deceased's estate improperly to advance their own interests and in breach of their fiduciary duty to the deceased". The Notice of Civil Claim seeks an accounting of amounts that either Ms. Moraitis or Mr. Savji spent "in breach of their fiduciary obligations to the Deceased". However, the appellants discontinued their action against Mr. Savji before the s. 151 application was heard, and Mr. Savji was not an application respondent on the application before the chambers judge.
- [61] The question of costs before the chambers judge related to the costs of the s. 151 application, not costs at large. As Mr. Savji was not a party to the s. 151 application, it was an error in principle to award costs of the application to him. I would set that order aside.
- [62] Anastasia Savji was, however, an application respondent. The relief sought in the Notice of Civil Claim included an order under s. 151 of WESA permitting the appellants to commence proceedings to recover funds "wrongfully taken from the deceased during her life by Anastasia and/or [Ms. Moraitis]". The notice of application before the chambers judge was

for leave to commence proceedings against Ms. Moraitis and Anastasia Savji "to recover amounts owed by those defendants to the deceased's estate as set out in the Notice of Civil Claim".

[63] There was no evidence in the s. 151 application that Anastasia Savji wrongfully took funds from the Deceased, and no effort was made to assert a claim against her. The chambers judge referred to these claims as having been made "recklessly, based solely on suspicion and conjecture": at para. 64.

[64] The appellants have submitted that when they determined that Anastasia Savji had not wrongfully taken funds from the deceased, they discontinued the claim against her early in the hearing of the application. That will presumably reduce the costs payable to her, but does not affect the assessment of the chambers judge of the impropriety of the allegations that were made against her. I would not disturb the order for special costs against the appellants for their claims against Anastasia Savji.

[65] As one of the claims against Ms. Moraitis will be proceeding to trial, I would set aside the award of special costs against Ms. Moraitis and reserve to the trial judge in the Estate Action the determination of costs on the s. 151 application.

[66] Success on this appeal has been divided. Each party will bear their own costs of the appeal.

Conclusion

[67] For the foregoing reasons, I would allow the appeal in part, set aside the order of the chambers judge, and order as follows:

- (i) Leave to file proceedings against Ms. Moraitis in relation to the \$200,000 transfer from her mother is granted;
- (ii) Leave to file proceedings in relation to the allegations of misuse of the power of attorney is denied;
- (iii) The order for special costs for Farouk Savji is set aside;
- (iv) The order for special costs for Anastasia Savji is confirmed;
- (v) Costs of the s. 151 application before the chambers judge as between the appellants and Ms. Moraitis are reserved to the trial judge in the Estate Action; and
- (vi) Each party will bear their own costs of the appeal.

[68] HARRIS J.A.: I agree.

[69] STROMBERG-STEIN J.A.: I agree.

[70] HARRIS J.A.: The appeal is allowed in part on the terms set out in the judgment of Justice Hunter.

"The Honourable Mr. Justice Hunter"

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