

CANADA / JUDGMENT

Erlichman (Estate)

2003 BCSC 20

COURT

Supreme Court of British Columbia

DECIDED

7 January 2003

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2003BCSC0020

Citation: Re The Estate of Abraham Erlichman, Deceased

Date: 20030107
2003 BCSC 20

Docket: 223984
Registry: Vancouver
IN THE SUPREME COURT OF BRITISH COLUMBIA
RE THE ESTATE OF ABRAHAM ERLICHMAN, DECEASED

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE LOWRY

Counsel for the Applicant:

D.S. Parlow

T.L. Auton

Counsel for the Respondent:

E.F. Macaulay

Date and Place of Hearing:

December 18, 2002

Vancouver, BC

- [1] A declaration is sought with respect to the remuneration to be received by the executor of the \$2 million estate of Abraham Erlichman who died in 1998. The estate is largely liquid assets (treasury bills). It has been the subject of wills variation litigation that is now concluded and the executor's accounts are to be passed before the Registrar shortly. There are two beneficiaries. The will provides that the residue of the estate is to be divided equally between the testator's son by his first wife, Harry Erlichman, and the testator's second wife, Rose Erlichman, to whom he was married for 54 years. Both are named as executors, but Ms. Erlichman had to withdraw because she sued the estate to have the will varied. Harry Erlichman has continued as the sole executor and now he seeks about \$500,000 in remuneration. The question is whether he is entitled to remuneration and, if so, on what basis.
- [2] Under s. 88(1) of the Trustee Act, R.S.B.C. 1996, c. 464, the executor of an estate is entitled to a fair and reasonable allowance, not exceeding 5% of the gross aggregate value of the estate, for his or her care, pains, trouble, and time spent in the administration of the estate. However, the testator's will contains a charging clause as follows:

Any trustee of my Will being a Chartered Accountant or Solicitor or engaged in any other profession or business may make and be paid all usual professional and other charges for work done by him or his firm or any partner of his in relation to the probate of this Will or Codicil hereto or the trusts thereof, or either, in the same manner in all respects as if he were not Trustee hereof, and also his reasonable charges in addition to disbursements for all work and business done and all time spent by him or his firm or any partner of his in connection with matters arising in the premises, including any matters which might or should have been attended to in person by a trustee not being a Chartered Accountant or Solicitor, or other professional person, but which matters be reasonably required to be done by a Chartered Accountant or Solicitor or other professional person.

- [3] Harry Erlichman is a businessman. Together, he and his father built houses and later, apartment buildings. He says that the words "any other profession or business" are clear and unequivocal: the testator's intention was that he should be remunerated for work he did in connection with the estate over and above any remuneration he might otherwise receive as an executor.
- [4] Rose Erlichman maintains that Harry Erlichman is entitled to no remuneration for a number of reasons. First, she says it was the testator's intention he receive no remuneration as evidenced by the provisions of the will. Second, his conduct in respect of the administration of the estate disqualifies him from any consideration of remuneration, and third, he is not entitled because of the testator's obligations to her as determined in the wills variation litigation. Finally, she says that, in any event, the charging clause has no application to Harry Erlichman and any remuneration he might be allowed is limited to 5% of the estate.

- [5] I do not consider the provisions of the will to establish that the testator had no intention that his executors should receive any remuneration even though they would have been remunerated out of their own inheritance. Their work in the administration of the estate may well, and indeed has been, entirely disproportionate. On the limited authority to which I have been referred, it appears that a testator may be presumed to have intended that an executor who is a beneficiary under his will receive no remuneration. However, this presumption is rebuttable and arises only where the beneficiary is to inherit a specific legacy, not, as here, where he is to share in the residue of the estate: *Boys Home of Hamilton v. Lewis* (1883), 4 O.R. 18 at 25 (Ch.) and *Re Greenway*, [1954] 3 D.L.R. 657 (Man. Surr. Ct.).
- [6] I also do not consider that any determination should be made prior to the passing of accounts as to whether Harry Erlichman's conduct in the administration of the estate has been so egregious that he is not entitled to any remuneration. He claims to have spent over 4,000 hours working on the estate and, on some undisclosed basis, he considers his time to be worth \$85 per hour. He maintains that his three children have also spent many hours working on matters related to the estate and that they should be compensated at \$50 per hour. Among other things, however, it is contended that Mr. Erlichman has conducted the affairs of the estate largely to enhance his entitlement to remuneration while disadvantaging Rose Erlichman in her ultimate inheritance. While there may well be merit in her complaints, the matter is, at this stage, properly left to the Registrar to assess on conducting a hearing.
- [7] Finally, I do not consider there to be any real merit in the suggestion that anything that has been decided in the wills variation litigation bears on Harry Erlichman's entitlement to remuneration. As I understand it, Rose Erlichman maintains that because the will was varied so that her share of the estate is to be taken absolutely rather than as the life estate for which the will provides, it can be said Mr. Erlichman has been disentitled to remuneration because the outcome in the wills variation litigation was predicated on a recognition that, as the testator's wife, Rose Erlichman had an entitlement to an undivided one half interest in the assets of the estate before her husband died and that gave her a strong claim to at least one half of the assets. However, in my view, that has little to do with any entitlement Mr. Erlichman has to remuneration as an executor.
- [8] I do, however, consider that the charging clause in the will has no application to Harry Erlichman. The wording of the clause does not describe either of the two named executors. It does not refer to "the" trustees of the testator's will, but rather, to "any" trustees of the will and it is worded to include individuals as well as their firms and partners. The clause appears to have been inserted in the will in contemplation of a change of executors to provide remuneration for professional or other similar services rendered by a professional who may have become an executor. It provides for the remuneration of services, in addition to the work of an executor, that are professional in nature, like those rendered by solicitors and chartered accountants.

- [9] Harry Erlichman has no special skill or experience derived from his activities as a businessman that has been required to administer the assets of this estate. Had he not been an executor, he could not have been engaged as solicitors and accountants have been to render a necessary service. His entitlement to remuneration, if any, lies solely in his administration of the estate as its executor. For his service as an executor, the court may allow a "fair and reasonable" allowance not to exceed 5% of the estate. The charging clause in the will does not serve to enhance his entitlement.
- [10] There will be an order accordingly. The parties' costs will be payable out of the estate as special costs.

"P.D. Lowry, J."

The Honourable Mr. Justice P.D. Lowry

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Prepared on 29 October 2026 · Esheria