

CANADA / JUDGMENT

Ferguson v. McCormick Estate

2023 BCSC 2041

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Supreme Court of British Columbia

DECIDED

21 September 2023

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2023 BCSC 2041 Ferguson v. McCormick Estate

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ferguson v. McCormick Estate,

2023 BCSC 2041

Date: 20230921

Docket: S232813

Registry: Vancouver

Between:

Perry Ferguson and Keri Ferguson

Plaintiffs

And

The Canada Trust Company as Executor of the Estate of Clarence McCormick, Samuel William McCormick, and British Columbia/Yukon Command of the Royal Canadian Legion Foundation aka BC/Yukon Command Poppy Trust Fund aka the Royal Canadian Legion BC/Yukon Command

Defendants

- and -

Docket: S234377

Registry: Vancouver

In the Matter of the Estate of Clarence Leslie McCormick, Deceased

Before: The Honourable Madam Justice Sharma

Oral Reasons for Judgment

In Chambers

Counsel for Perry Ferguson and Keri Ferguson:

M. Lott

Counsel for The Canada Trust Company as Executor of the Estate of Clarence McCormick:

R. Wu

Counsel for Samuel William McCormick:

J.J. Locke

Place and Date of Trial/Hearing:

Vancouver, B.C.

September 20, 2023

Place and Date of Judgment:

Vancouver, B.C.

September 21, 2023

- [1] THE COURT: This judgment addresses two matters: the hearing of a petition (the "Petition") and an application in a separate, but related, civil action (the "Application"). Counsel agree that the result in the Petition, which I will address first, will be determinative of the Application in the civil action.
- [2] The Canada Trust Company ("Canada Trust" or the "Trustee"), the executor and trustee of an estate, filed the Petition. Canada Trust seeks directions regarding the administration of the estate.
- [3] Canada Trust also brings the Application in a separate civil action commenced by the Petition respondents, Perry Ferguson and Keri Ferguson (collectively, the "Fergusons"). In the Application, Canada Trust seeks the removal of a certificate of pending litigation that the Fergusons placed on certain property (the "CPL").
- [4] Both matters concern the will of Clarence McCormick, who passed away on June 13, 2017 (the "Deceased"). He was predeceased by his wife, but survived by his adult son, Samuel McCormick. The Deceased executed a will in September 2013, appointing Canada Trust as executor (the "Will"). Canada Trust received a Grant of Probate in January 2018.

Facts

- [5] At the time of his death, the Deceased owned two properties which the parties refer to as the "Rental" (a residence in White Rock) and the "Family Home" (a residence in Vancouver).
- [6] The Rental was assessed at \$1.2 million in 2017, and at \$1.4 million in 2023. It has no encumbrances. The Petition respondents, the Fergusons, are long-term tenants of the Rental. They pay \$500 per month in rent and have resided there for over 30 years.
- [7] The Family Home was assessed in 2017 at \$2.3 million, and the 2023 assessment was slightly lower at \$2.2 million. It, too, is unencumbered.
- [8] There are no liquid assets remaining in the estate. At the time of death, the estate had just over \$1 million in liquid assets, but those funds were depleted in 2020. Since then, the estate account has run into overdraft--currently in the amount of just over \$850,000.
- [9] Mr. McCormick continues to live in the Family Home as he did when the Deceased was alive. He is 67 years old and has cerebral palsy that affects his mobility and his ability to communicate. He currently receives 24-hour in-home care in the Family Home, paid for by the estate.
- [10] Canada Trust has determined it needs to sell the Rental in order to pay estate expenses, including for the care of Mr. McCormick. The Fergusons oppose the decision to sell the Rental. To that end, in April 2023, they filed a notice of civil claim and they placed a CPL on the Rental. They seek relief based on claims of constructive trust, restitution, breach of trust, breach of fiduciary duty, and unjust enrichment.
- [11] It is in that action that Canada Trust filed the Application to remove the CPL.
- [12] Certain other facts are relevant:
 - a) The monthly expenses for Mr. McCormick include:
 - i. 24-hour in-home care currently at \$19,500 per month;
 - ii. physiotherapy currently at \$2,000 per month;
 - iii. food and prescription currently at \$1,500 per month;
 - iv. tax and insurance on the Family Home at \$1,000 per month; and
 - v. utilities at \$500 per month.
 - b) In December 2022, these expenses totalled \$21,500 per month, and the annual cost was approximately \$258,000. The cost of the in-home care and physiotherapy had risen from December 2022 by about \$3,000 per month, and Canada Trust says it is now setting aside \$1,500 per month for home maintenance. As a result, the monthly expenses for the care of Mr. McCormick and upkeep of the Family Home is \$26,000, for an annual cost of \$312,000. This does not include estate administration costs or expenses.

- [13] I note that it appears that the costs for the care of Mr. McCormick and maintenance of the Family Home has risen 20 percent in the last year.
- [14] Keri Ferguson filed an affidavit deposing, among other things:
- a) She and her husband were very close to the McCormicks and their family. Their families frequently spent holidays together. She deposed the Deceased was like a father to her.
 - b) The Deceased and his family visited her family at least once a month for about 30 years, until the Deceased's health started to deteriorate and he could not drive. At that point, the Fergusons then visited the Deceased and his family at the Family Home.
 - c) She deposed that after the Deceased's wife died, the Deceased asked her to look after Mr. McCormick as he had no other family or friends. She claimed she kept in touch with Mr. McCormick after his father died and saw him about once a month. However, those visits were disrupted by the COVID-19 pandemic and, more recently, by her own health issues.
 - d) She claimed that Mr. McCormick has "serious physical and cognitive impairments" with the following characteristics:
 - i. he cannot write or speak clearly;
 - ii. he cannot form full sentences;
 - iii. he has an inability to manoeuvre his hands because they are held in fists;
 - iv. he cannot bathe or groom himself;
 - v. he has no concept of finances;
 - vi. his legs are often covered with wounds, possibly from falling; and
 - vii. he cannot use current technology.
- [15] There is no dispute that she had conversations with the representative of Canada Trust handling the file in 2019, Don Woods. While there is a minor dispute over their recollection of certain details of their conversation, it appears they discussed the topic of Mr. McCormick moving to a care home. At that point, Ms. Ferguson did not feel the move was the best option, although she deposed that she now regrets that decision.
- [16] The next contact was when Canada Trust sent a letter in the Fall of 2022 raising for the first time its intention to sell the Rental, in order to use the funds generated to pay for Mr. McCormick's care and other estate expenses. Again, there is some dispute between the affidavits as to who brought up the issue, but they did discuss the topic of Mr. McCormick moving into care.
- [17] The Fergusons went to the Family Home in November 2022 and noticed that the house was in disrepair. Specifically, she deposed that there was mould on the outside, the interior was very cluttered and, in her view, the home was not suitable for someone with mobility issues.

- [18] She deposed that Mr. McCormick sleeps in the living room and that the top and bottom floors are unused. It appears that in a statement attached to a letter to Canada Trust, the Fergusons noted that the nurse sleeps in the bedroom.
- [19] She related that in December 2022, Mr. McCormick fell in the snow and apparently was alone for four hours. She said that, in her view, Mr. McCormick's physical and cognitive function has been in decline, as has his memory. She raised questions about some of the expenses in the accounting that she received from Canada Trust. For instance, she could not understand why there were real estate fees being paid. She related an example of the Deceased expressing concern about Mr. McCormick spending money--apparently Mr. McCormick spent over \$900 at a convenience store in one transaction.
- [20] Canada Trust raises the issue that some of that evidence from Ms. Ferguson may be inadmissible because it is unattributed hearsay. That point is valid. However, the same flaw applies to some of the evidence relied on by Canada Trust. Specifically, Mr. Woods apparently retired, and the file was transferred to someone else. However, just before leaving, he sent an e-mail to Ms. Ferguson stating:

We have previously been in contact with the social worker and [RN] case manager at Vancouver Coastal Health who have an open file for Sam. They have confirmed Sam's desire to remain in the family home. At this time, we will act on their advice following their independent assessment. His wishes are to stay in the home.

- [21] The e-mail intimates some kind of independent assessment was done, but it is not clear to what end. In any event, all the e-mail does is to convey unattributed views from third parties. Moreover, it does not speak to anything other than Mr. McCormick's views that he wants to stay in the home, which is established in other evidence.

The Will

- [22] With regard to the Will, the following paraphrased clauses are relevant:

- a) Clause 4(d) directs the Trustee to hold the residue of the estate on the following trusts:
 - i. Clause 4(d)(i): Until the last of the Deceased's wife and son die, which is defined as the "material date", to hold the residue to pay as much as the Trustee decides is "necessary or advisable" for the care, maintenance, education or other benefit of Mr. McCormick;
 - ii. Clause 4(d)(iii): To provide all necessary support to Mr. McCormick, "so long as reasonably possible", to allow him to live in the Family Home after the Deceased's death, if that is where they were living at the time of the death;
 - iii. Clause 4(d)(iv)(a): At the material date, which for all purposes now is the date of Mr. McCormick's death, if the Fergusons are still renting the Rental, to transfer any interest the Deceased had in the Rental or any sale proceeds to the Fergusons; and
 - iv. Clause 4(d)(iv)(b): To pay the remainder of the residue to the Legion.

- b) Clause 5(a) expresses the Deceased's wish that the Trustee be generous in exercising the discretion under the clause respecting the care, maintenance, education, and benefit of Mr. McCormick, and that the Trustee holds Mr. McCormick's needs paramount to those of any ultimate beneficiaries. The clause also states that the Trustee will not be liable for any consequences arising from the depletion or even exhaustion of the residue before the material date as a result of that generosity.
- c) Clause 5(b) states that the Deceased wishes for the Trustee to try, if it is in Mr. McCormick's best interests, to exercise the discretion in a manner to maximize benefits from other sources, even if that were to limit payments by the Trustee to or for Mr. McCormick.
- d) Clause 5(c) specifically directs the Trustee to consider paying for education and training for Mr. McCormick, buying a replacement home, paying for caregiver services relating to his disability, maintaining or renovating the residence, buying devices and paying for vacations.
- e) Clause 5(d) directs the Trustee to consider paying for the services from an advocacy group, such as Planned Lifetime Advocacy Network, who can see if services are available in the community for Mr. McCormick.
- f) Clause 14 is a protection clause for the Trustee in exercising their discretion, which allows that the exercise of discretion would be deemed to be in the best interests of the beneficiaries, even if there was not an even hand in the sense that one beneficiary has an advantage over another.

The Petition

- [23] The Petition is brought pursuant to s. 86 of the Trustee Act, R.S.B.C. 1996, c. 464, and the inherent jurisdiction of the court.
- [24] In the Petition, Canada Trust seeks the court's advice and direction on two questions:
 - a) If the Rental is sold, how will the rules of abatement be applied following a date in the future (defined in the Will as the "material date")?
 - b) Can Canada Trust sell the Rental and use the proceeds of sale to pay for estate expenses, estate liabilities, and the care, maintenance, education, and other benefit of Mr. McCormick?
- [25] If the answer to the second inquiry is affirmative, Canada Trust seeks an order for the sale of the Rental.
- [26] Section 86 allows a trustee to seek the opinion, advice, or direction of the court respecting the management or administration of the estate. The court is not meant, under that section, to exercise powers of the trustee, but rather to provide advice on a legal issue.

- [27] However, in *Toigo Estate (Re)*, 2018 BCSC 936, the court held that where there is a momentous decision to be made, the court has the ability, pursuant to its inherent jurisdiction, to approve a proposed decision.
- [28] I do not understand there to be a disagreement amongst the parties as to the legal principles discussed regarding the rules of abatement, which are set out in s. 50 of Wills, Estates and Succession Act, S.B.C. 2009, c. 13. Canada Trust helpfully referred to some cases at pages 8 to 10 of the Petition: *Von Hopffgarten Estate v. Rommel*, 2012 BCSC 393; *Baxevanidis Estate (Re)*, 2007 BCSC 1657; and *Re Patry (Estate of)*, 2003 ABQB 707.
- [29] However, it is not clear to me that first question concerning abatement needs to be answered in order to answer the second question, which is the more relevant question, because Canada Trust is, in fact, seeking an order that I approve of the sale.

Parties' Positions

- [30] I will review the positions of the parties.

Canada Trust

- [31] Canada Trust's position, supported by Mr. McCormick, is that it clearly has the power and authority to sell the Rental in order to pay for the care and maintenance of Mr. McCormick. Their position is based on:
- 1) Clause 4(d)(i) of the Will, stating that the Trustee can apply income or capital of the residue as necessary and advisable for the care and maintenance of Mr. McCormick;
 - 2) Clause 4(d)(iii) of the Will, stating that the Deceased wanted the Trustee to provide all necessary support so that Mr. McCormick could live in the Family Home as long as reasonably possible; and
 - 3) Clause 5(a), that in fulfilling the above, the Trustee was to be generous to Mr. McCormick, and to hold his needs paramount to any ultimate beneficiary. Additionally, the Trustee bore no liability for making a decision that depleted or even exhausted the residue.
- [32] Canada Trust also says that Mr. McCormick has consistently and emotionally expressed a desire to stay in the Family Home, and that the lack of a proposal by the Fergusons to assume the estate debts means that selling the Rental is the only option.

Mr. McCormick

- [33] Mr. McCormick was represented by a lawyer. His affidavit makes it clear that he does not want to move into a care home at this time. He also says that the Adult Guardianship Act, R.S.B.C. 1996, c. 6, requires that I presume he has capacity, even if he has communication challenges.

- [34] He made submissions only on the sale of the Rental, not on the rules of abatement, which he said was not his issue.
- [35] He addressed the ability of the Trustee to sell the Rental, and, among others, he relies on *Celantano v. Ross*, 2014 BCSC 27 at para. 18. His position is that there is no language in the Will suggesting that the Deceased intended to, or did, set aside the Rental. Therefore, the Rental ought to fall into the residue.
- [36] His submission is that whether it should sell is a separate issue. He agrees with Canada Trust in that he wants to continue to live in the Family Home. He relies on Clause 4(d)(iii) of the Will that says the Trustee should act such that he can live in the Family Home as long as reasonably possible. He says that the Deceased's wish has to be viewed in the context of the time the Will was made when Mr. McCormick was living in the house with the Deceased. He submits that the court must presume that the Deceased was aware of Mr. McCormick's disability because he was a primary caregiver and he wanted him to live there as long as possible to the extent that he wished to prioritize him over the needs or wants of others.
- [37] Mr. McCormick submits that there is no evidence before the court that the Family Home is unsafe or that Mr. McCormick cannot live there.
- [38] He relies on a letter from a doctor that says he can live independently. I do note, however, with respect, that there is evidence from the Fergusons that questions the suitability of his living situation. Therefore, it is incorrect to say there is no evidence on the matter.
- [39] He says that the court should not be concerned with granting the order sought because the sale of the Rental would allow the Trustee to maintain the status quo that has been in place for the last six years. That is not clear to me. It is not clear to me at what point Mr. McCormick started requiring the estate to pay for 24-hour live-in care, although there is some suggestion that has only been in the last year or two. The doctor who provided the letter has only been his doctor since 2019. As such, I am uncertain on the status quo prior to that time.
- [40] Mr. McCormick emphasized in his affidavit that he has little contact with the Fergusons, and therefore they are not in a position to comment on his best interests. However, he does not seem to dispute that they were very close to his family for over 30 years, which is consistent with the Deceased's gift in the Will to them, even if it is a contingent gift. The closeness of the families is also consistent with the fact that the Fergusons pay rent that is very likely a very below-market rate.

The Fergusons

- [41] The Fergusons' position is that their action raises issues that overlap with the issues in the Petition, and the two proceedings should be joined and heard together. Specifically, they allege that if Canada Trust sold the Rental, that would result in a breach of fiduciary duty to the beneficiaries of the estate, including them. They submit the better course would be for Canada Trust to sell the Family Home and place Mr. McCormick in care.
- [42] They point out that there are irreconcilable disputes in the affidavits and that several questions they raised with the Trustee have gone unanswered, such that it would be imprudent to sell the Rental.
- [43] They say the court has evidence worth exploring with respect to possible issues with Mr. McCormick's capacity and questions about certain expenses. They say relief should not be granted without further discovery.
- [44] In any event, they also do not agree with the Trustee's interpretation of the Will. They point to other clauses that they say are relevant, specifically Clause 5(b) and Clause 5(c). In brief, these clauses direct the Trustee to explore other sources of income and consider buying another house or buying equipment for Mr. McCormick.
- [45] They raise the evidence about the condition of the home and Mr. McCormick's ability to live in the home, and question whether it remains "reasonably possible" for him to live there. They question whether it is in the best interests of Mr. McCormick to remain living in the home, and they ask what steps the Trustee has taken to ascertain the answers to those questions, in light of its fiduciary duties.

Analysis

- [46] I have come to the difficult conclusion that I do not have sufficient evidence before me to adequately answer the second question. Therefore, I also decline to answer the related first question.
- [47] This result is based on a number of reasons. First, I agree with Mr. McCormick that I must presume he has legal capacity. No committee has been appointed, and there is no power of attorney. I also accept that he very strongly wishes to remain in the Family Home.
- [48] However, with the greatest of respect, it appears that the Trustee relies on this wish to the exclusion of carefully analyzing whether it is reasonably possible for him to remain in the Family Home. There is a very real sense from Mr. Woods' e-mail to Ms. Ferguson that Canada Trust is relying on Mr. McCormick's desire, as if that dictates under the Will what should happen.

- [49] In response to a question from the bench on whether Canada Trust had come to the view that it was in the best interests of Mr. McCormick to stay in the Family Home, Canada Trust took the position that it is not within its purview--its only task is to draw on the income and realize assets to pay for his care and maintenance.
- [50] I do not agree. The Will does not say that the Trustee shall ensure that Mr. McCormick's wishes are carried out. It does not require that all support be provided for as long as Mr. McCormick wants to live in the Family Home. The Will requires the Trustee to consider whether it is reasonably possible that all support be provided to live in the Family Home.
- [51] Canada Trust is required to turn its mind to that issue. I am not satisfied on the material before me that that has been done. The Trustee appears to simply rely on Mr. McCormick expressing the wish to remain in the Family Home. Regardless of Mr. McCormick's strong desire and his legal capacity, it is important to recognize that the Deceased refers to him as having a disability, and that is in Clause 5(c) of the Will.
- [52] It would be surprising to me if a trustee owing a fiduciary duty to someone with a disability was not required to consider and decide what is in that person's best interests from a holistic perspective, as opposed to simply relying on their wishes.
- [53] However, I do not need to go that far. In my mind, the decisive issue is not about Mr. McCormick's capacity or ability to live independently, although I say those are very clearly important and need to be considered.
- [54] What has been left unanswered in the material before me is the financial viability of him remaining in the Family Home. Apart from anything else, even if Canada Trust is correct that its duty does not require determining what is in the best interests of Mr. McCormick holistically, and I am not sure that is the case, it has a fiduciary duty to be prudent and responsible with the finances of the estate. It is not clear to me that has happened or that will continue to happen in light of the current pace of expenses. I specifically note that the expenses for his in-home care have risen by 20 percent in the last year.
- [55] I am not suggesting anything untoward has been done by the Trustee. I simply have inadequate information.
- [56] For instance, it is not clear to me why the Trustee allowed the estate to overdraw on its account to the tune of \$850,000. The overdraft was already over several hundred thousand dollars before the letter went to the Fergusons that Canada Trust wanted to sell the Rental. What has changed that makes the sale so important now? They carried the debt of several hundred thousand dollars before, and I appreciate the debt now is bigger, but how did it get to that point? I do not have that information.
- [57] I am uncertain on how the Trustee justified incurring that debt, especially in light of its fiduciary duty to all beneficiaries, including the Fergusons. It is not clear to me they turned their mind to that.

- [58] It is not clear to me if Canada Trust considered whether selling the Rental is merely a stop-gap measure. Taking into account the overdraft of \$850,000 and assuming the Rental sale generates the assessed value around \$1.4 million, the sale would pay for Mr. McCormick to live in the Family Home for only about another two years.
- [59] The Family Home is worth more, but even if it was sold for close to its assessed value, the proceeds would cover expenses at their current pace for possibly a maximum of six years. What will happen to Mr. McCormick after that period, assuming he lives at least another 10 years, which does not seem unreasonable.
- [60] How is allowing Mr. McCormick to remain in the Family Home for six years reasonably possible if the cost of putting him in care--a cost unknown to me because there is no evidence--might possibly allow him to have care in a facility for 10 years. What happens to him after the 10 years? Does he become a ward of the state?
- [61] It is not clear to me whether Canada Trust obtained information about Mr. McCormick's anticipated life expectancy to create a support plan through to the end of his life. I would have thought that type of planning would be necessary to determine whether it is reasonably possible that he remain in the Family Home. This planning is all the more important due to the facts that his parents lived into their nineties and the Trustee was well aware of the costs of Mr. McCormick living in the home.
- [62] I have no information on why the costs of the at-home care and physio increased by almost \$5,000 per month, or \$60,000 per year. Has Canada Trust turned its mind to the likelihood that those costs will continue to increase by 20 percent every year, and, if so, how that impacts the financial plan?
- [63] There is no information as to whether the Trustee ever turned its mind to Clause 5(b) with respect to accessing benefits from other sources of income. The Will specifically says that the Trustee can do so, even if it means the estate ends up paying less. It is difficult to believe that Mr. McCormick would not be eligible to receive some kind of benefits, given the state of his disability, and presumably that would help defray the costs of his care and perhaps prolong how long he could stay in the Family Home. However, it may be that, because he is a beneficiary, he is not eligible. The point is that I have no information on the matter and it is not clear to me that the Trustee turned its mind to this aspect of Clause 5(b).
- [64] I have no information on whether the Trustee considered Clause 5(c) respecting education, training, replacing Mr. McCormick's home, and renovations. Canada Trust seems to agree, at least in part, with the Fergusons about the concerns for the state of the Family Home. After receiving information from the Fergusons, Canada Trust set aside \$1,500 per month for home maintenance. It is legitimate to ask why that amount was not previously set aside.
- [65] There is no information as to whether Canada Trust considered paying for services from Planned Lifetime Advocacy Network, as specifically mentioned in the Will at Clause 5(d).

- [66] I also note there are some problematic aspects of Mr. McCormick's affidavit. He admits to having cognitive impairments, including difficulty speaking, but says he can adequately communicate his needs, wants, and preferences to doctors, caregivers, and executors. Mr. Woods attached a scrawled note where Mr. McCormick wrote, "Dad got in the [W]ill never ever send Sam to care home" as evidence of his ability to communicate. With respect, that note raises more questions than it answers. The Will clearly does not say that Mr. McCormick shall never ever be moved into a care home. If that is Mr. McCormick's understanding, then the Trustee has failed to adequately ensure that Mr. McCormick understands the terms of the Will.
- [67] I also note that in his affidavit, Mr. McCormick says his father was "well aware of the expenses and limitations I have relating to cerebral palsy, as he was one of my primary caregivers": paragraph 11. What is left unanswered is whether the Deceased was paying for 24-hour live-in care when he was alive? I do not have that information. If he was not, then clearly, he was not aware of the cost of looking after Mr. McCormick at the time he made the Will, and that is a material point.
- [68] To be clear, the issue is in the contradiction in the evidence. The fact is that the Fergusons, who are beneficiaries under the Will, have filed a notice of civil claim questioning Canada Trust's exercise of their fiduciary duties. It appears that the Fergusons were not kept up to date about the status of the estate until October 2022. They were presented with the shocking news that the estate carried a debt of, at that time, over \$500,000. They were asked to leave their home of over 30 years, to which they are contingent beneficiaries, to satisfy that debt.
- [69] Again, I asked Canada Trust at the hearing if it was in the best interests of Mr. McCormick to live in the Family Home. The Trustee's view was that that was not its concern, it did not have to make that determination, it merely administers the money of the estate.
- [70] I have already stated why I do not agree, but I emphasize the Trustee is in a fiduciary relationship with Mr. McCormick. There is no evidence drawing into question his capacity. However, based on the evidence, it is difficult for the court to say that he is making a financially sound decision, which has not been shown in the materials.
- [71] Assuming he lives longer than 10 years, it is not clear that it has been explained to him: A) that the estate may run out of money; and B) whether there is a financial plan at that point.
- [72] From a legal point of view, Canada Trust and Mr. McCormick question the ability of the Fergusons to raise questions. They have started a lawsuit and claim to be contingent beneficiaries. They have some standing.
- [73] More importantly, they have filed evidence suggesting a close personal relationship with the Deceased and Mr. McCormick. While Mr. McCormick denies that he has seen them recently, his affidavit does not dispute the prior relationship. At one point it appears the Trustee felt the Fergusons had sufficient knowledge to be consulted about Mr. McCormick's living

arrangement. It is not clear to me why that view has changed. That consultation was consistent with the notion that the Deceased allowed the Fergusons to live in the Rental at an extremely low rate, below market value, and intended that, should property or proceeds of sale remain after the death of Mr. McCormick, they would get that benefit.

- [74] The Fergusons say they bring their case not only because they do not want to sell the Rental, but also out of a concern for Mr. McCormick. I take them at their word. They are beneficiaries, and although they have a financial interest in the Rental, that does not preclude them from also being very genuinely concerned for Mr. McCormick.

Conclusion

- [75] For all those reasons, I decline to answer the questions.
- [76] That leaves counsel in a difficult position. I do not want the parties to have to start again. I propose that I will give leave for the Trustee to file additional evidence, and to bring the Application back without prejudice. However, I would need to hear from all parties' counsel on that, and I appreciate that counsel who argued the case is not here. This result would also allow the other parties to file responding evidence. I am not saying I am going to allow that. On another day, I want the parties to address whether I should order that result.
- [77] I will set a judicial management conference before me at a later date, in order to discuss the next steps. I want the parties to address my proposal.
- [78] I would strongly suggest that the parties convene and discuss how to move forward. The questions that the Fergusons raised, some of which I recounted, are ones that it would be prudent for Canada Trust to turn its mind to answering in a satisfactory manner.
- [79] I do not know if there would still be a need for Canada Trust to go forward with its application.
- [80] Secondly, at the judicial management conference, I would like to have the parties' views on whether they wish me to seize myself of any further hearings on this matter or not.
- [81] Lastly, if they do agree that I am seized and that there be further evidence filed or a tentative hearing date, I would propose that we set down plans for those steps.
- [82] I am going to ask counsel to confer and to come up with three dates that you are all available for what I call a judicial management conference at 9:00 a.m., and you can appear by Teams. Once this is done, I will ask counsel for Canada Trust to file a request to appear online, indicating that I directed that you do so, to get a brief hearing for a judicial management conference before me and to propose those dates.

"Sharma J."

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