

CANADA / JUDGMENT

Gawdun v. Lord

2020 BCSC 266

COURT

Supreme Court of British Columbia

DECIDED

27 February 2020

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

2020 BCSC 266 Gawdun v. Lord

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gawdun v. Lord,

2020 BCSC 266

Date: 20200227

Docket: S119951

Registry: Kelowna

Between:

Nicole Verna Gawdun, Sandra Marie Pellegrini,

Daniel Dale Pellegrini, Tracey Ann Pellegrini,

and Deborah Lynn Neilsen

Plaintiffs

And

Denise Lord and Norma Ida Dierk in their capacity

as Executors of the Last Will and Testament of Albert Michele Pellegrini

also known as Albert Michael Pellegrini, Denise Lord in her

personal capacity, Norma Ida Dierk in her personal capacity,

Garry Lord, Deborah Jane Dippel, Landis Louise Pellegrini,

and Brayden Arthur Ray Pellegrini

Defendants

Before: The Honourable Madam Justice E. McDonald

(In Chambers)

Reasons for Judgment

Counsel for the Plaintiffs:

D. Frenette

Counsel for the Defendants, Norma Dierk and Denise Lord:

S. Rule,

T. Fitzpatrick

Counsel for the Defendants, Deborah Dippel and Garry Lord:

M. Sinclair

Place and Date of Hearing:

Kelowna, B.C.

October 17 & 18, 2019

Place and Date of Judgment:

Kelowna, B.C.

February 27, 2020

Table of Contents

INTRODUCTION.. 3

BACKGROUND.. 3

ANALYSIS. 4

Pass Over Application. 4

Poor Relationship & Hostility. 9

The Step Children. 11

Relationship with Norma Dierk. 12

Self-Dealing. 12

Interference with Estate Planning. 14

Proof in Solemn Form Application. 15

COSTS. 17

INTRODUCTION

- [1] This matter concerns the estate of Mr. Albert Pellegrini (the "Estate"). Mr. Pellegrini passed away on May 21, 2017. At the time of his death, the deceased and the defendant, Denise Lord, had been living together as common-law spouses since approximately 1985.
- [2] Prior to his relationship with Ms. Lord, the deceased had been married to Verna Pellegrini. The Pellegrinis had five children together and divorced in 1988. Their five children are the plaintiffs in this proceeding.
- [3] Ms. Lord also had children from a previous relationship. Ms. Lord's children, Garry Lord and Deborah Dippel (also known as Deborah Stabbler), are also defendants in this proceeding.
- [4] On June 14, 2011, the deceased prepared a Last Will and Testament (the "Will"). The Will appoints Ms. Lord and Norma Dierk as executors. Ms. Dierk is the deceased's sister. Ms. Dierk was appointed as administrator of the Estate with the consent of the parties.
- [5] On August 4, 2017, the plaintiffs filed a notice of civil claim alleging, amongst other things, undue influence and breach of fiduciary duty by Ms. Lord, and seeking a variation of the Will. Following examinations for discovery, the plaintiffs filed an amended notice of civil claim on March 12, 2019. The amendments eliminated all of the previous claims except for the wills variation claim.

BACKGROUND

- [6] On October 17, 2019, two applications came on for hearing before me. On July 30, 2019, the defendants, Ms. Lord and Ms. Dierk, filed the first application seeking the following relief:
 - a) an order pronouncing the force and validity of the Will;
 - b) an order for grant of probate;
 - c) an award of full indemnity special costs reimbursing Ms. Lord and Ms. Dierk for their reasonable costs; and
 - d) an award of special costs against any party opposing this application or alternatively, party and party costs payable to the Estate.

I will refer to this as the "Proof in Solemn Form Application".

- [7] Except with respect to the issues of costs and the grant of probate to Ms. Lord, the parties consent to the Proof in Solemn Form Application, or they take no position. The plaintiffs oppose the relief sought with respect to costs and the grant of probate to Ms. Lord.

- [8] On September 18, 2019, the plaintiffs filed the second application seeking an order that Ms. Lord be passed over as an executor of the Estate. In other words, the plaintiffs are seeking an order granting only Ms. Dierk an order of probate of the Will. I will refer to this application as the "Pass Over Application". The Pass Over Application is opposed by the defendants.

ANALYSIS

Pass Over Application

- [9] The plaintiffs seek an order that Ms. Lord be passed over as an executor of the Estate. The plaintiffs are concerned that she will fail to discharge her duties in the best interests of the Estate.
- [10] It must be recognized at the outset that Mr. Pellegrini chose Ms. Lord as one of his executors. The deceased's right to nominate his executors is not to be lightly interfered with: *Re Wolfe* (1957), 7 D.L.R. (2d) 215 at 219 (B.C.C.A.).
- [11] The Wills, Estates and Succession Act, SBC 2009, c. 13 [WESA], provides for an application to remove or pass over a personal representative. The relevant parts of s. 158 of WESA state as follows:
- (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,
 - .
 - (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,

[12] The principles that I should consider in guiding my decision on whether to pass over Ms. Lord as an executor include:

- a) Recognizing that the testator's choice of estate trustee should not be lightly entertained;
- b) Requiring clear evidence of necessity;
- c) Focussing on the main consideration of the welfare of the beneficiaries; and
- d) Requiring proof that the executor's acts or omissions are of such a nature as to endanger the administration of the estate: *Parker v. Thompson (Trustee)*, 2014 BCSC 1916 at para. 37.

[13] Actual dishonesty, lack of proper capacity to execute duties, or lack of reasonable fidelity may form a basis to remove a trustee, although lesser grounds such as the trustee's inability to act impartially may suffice: *Parker* at para. 39.

[14] In *Radford v. Wilkins* (2008), 43 E.T.R. (3d) 74 (Ont. S.C.J.), Quinn J. identified a number of other considerations that apply when considering an application to remove a trustee (at paras. 102-107):

removal must be the only course to follow

102 Removal of an estate trustee should only occur "on the clearest of evidence that there is no other course to follow": see *Crawford v. Jardine*, [1997] O.J. No. 5041 (Ont. Ct. (Gen. Div.)) at para. 18, citing *Re Tempest* (1866), L.R. 1 Ch. 485 and *Re Owen* (1989), 33 E.T.R. 213 at 215 (B.C.S.C.)

removal to be guided by welfare of beneficiaries

103 In deciding whether to remove an estate trustee, "the court's main guide should be the welfare of the beneficiaries": see *Crawford v. Jardine*, *ibid*, citing *Letterstedt v. Broers* (1884), 9 App. Cas. 371 at 385-387 and *Re Anderson* (1928), 35 O.W.N. 7 at 8 (H.C.J.).

non-removal must likely prevent proper execution of trust

104 "It is not every mistake or neglect of duty on the part of the trustees which will lead to their removal. It must be shown by the applicant that the non-removal of the trustee will likely prevent the trust from being properly executed": see *Crawford v. Jardine*, *ibid*.

105 "[I]t is not indeed every mistake or neglect of duty, or inaccuracy of conduct of trustees, which will induce Courts of Equity to [remove trustees]. But the acts or omissions must be such as to endanger the trust property or to shew a want of honesty or a want of proper capacity to execute the duties, or a want of reasonable fidelity": see *Letterstedt v. Broers*, *ibid*, quoting s. 1289 of *Story's Equity Jurisprudence*.

removal not intended to punish past misconduct

106 "The authorities are, I believe, consistent in placing the emphasis on the future administration of the estate, and the risks to which it will be exposed if the trustee remains in office. The question is whether the trust estate is likely to be administered properly in accordance

with the fiduciary duties of the trustee and with due regard to the interests and welfare of the beneficiaries. The sanction of removal is intended not to punish trustees for past misconduct but rather to protect the assets of the trust and the interests of the beneficiaries": see *St. Joseph's Health Centre v. Dzwiekowski*, supra, at para. 28 [[2007] O.J. No. 4641 (S.C.J.)].

107 But, "past misconduct that is likely to continue will often be sufficient to justify removal . . .": see *St. Joseph's Health Centre v. Dzwiekowski*, at para. 29.

[15] In *Dirnberger Estate*, 2016 BCSC 439, Kelleher J. considered an application for removal and replacement of an executor. In *Dirnberger*, the named executor had retained numerous professionals to assist but eventually dismissed each one due to his inability to maintain a professional relationship. Some four years after probate, the estate remained undistributed.

[16] In *Dirnberger* at para. 11, Kelleher J., citing *Conroy v. Stokes*, [1952] 4 D.L.R. 124 (B.C.C.A.), set out the four categories of conduct on the part of an executor that warrant removal:

- 1) endangerment of the trust property;
- 2) want of honesty;
- 3) want of property capacity to execute duties; and
- 4) want of reasonable fidelity.

[17] Kelleher J. concluded that the trustee lacked the necessary capacity to act as trustee due to: (1) the trustee's inability to discharge his duties after four years and to maintain relationships with professionals; and (2) the trustee's unaccountable hostility towards his sister, who was a beneficiary and an alternate executor under the will. The trustee in *Dirnberger* was therefore removed and replaced.

[18] With these principles in mind, I turn now to consider the evidence of the parties.

[19] The plaintiffs submit that Ms. Lord should be passed over for the following reasons:

- a) The plaintiffs doubt that Ms. Lord will maintain an even hand between her own children and the plaintiffs', all of whom are residuary beneficiaries;
- b) The plaintiffs allege that Ms. Lord has continually demonstrated hostility and animosity towards Ms. Dierk and the plaintiffs;
- c) The plaintiffs alleges that Ms. Lord was involved in the deceased's estate planning in 2010 and 2011, which resulted in the execution of the Will providing the majority of the Estate to Ms. Lord and her children, which conduct is at issue in the underlying wills variation application;
- d) The plaintiffs allege that Ms. Lord offered to pay Ms. Dierk \$50,000 from the Estate during the course of the action which the plaintiffs find suspicious;

- e) Foreclosure proceedings have been initiated to recover funds owing to the Estate, which is being funded entirely by the plaintiffs, and Ms. Lord has refused to assist in collecting the debt owing; and
 - f) The plaintiffs allege Ms. Lord entered into a share exchange agreement dated December 8, 2012 as attorney for the deceased. The terms of the share exchange agreement are alleged to have conferred an improper benefit on Ms. Lord.
- [20] The plaintiffs rely on *Veitch Estate*, 2007 BCSC 952, involving an application to remove and replace an executor. In *Veitch*, the will appointed the deceased's son as executor. The deceased's other son applied for the removal and replacement of his brother as executor alleging various grounds, including that the trustee was in a conflict of interest, that he had taken personal advantage, and that he had failed to act with honesty and fidelity.
- [21] Kelleher J. noted in *Veitch* (at para. 22) that the main guide in exercising the court's discretion was welfare of the beneficiaries. Despite conflicting evidence on many of the allegations, Kelleher J. found (at para. 36) there was sufficient proof that the executor was in a conflict of interest and that he had gained personally from decisions he made by altering the company's compensation structure to favour himself and his wife at the expense of the estate and beneficiaries. As the trustee's decisions lacked a "defensible rationale", he was removed as executor and trustee.
- [22] The defendants point out that in the present case, there is no evidence that Ms. Lord engaged in any misconduct in her role as executor. They submit the plaintiffs' complaints relate to Ms. Lord's past conduct, which they deny amounts to misconduct in any event. They further submit that the plaintiffs' complaints trace back to old grievances associated with the breakup of Mr. and Mrs. Pellegrini's marriage and their general resentment towards Ms. Lord for the role that they believe she played in that breakup.
- [23] Each plaintiff prepared an affidavit in which he or she sets out the reasons for believing that Ms. Lord will not maintain an even hand. The affidavits include examples of Ms. Lord's alleged animosity towards the plaintiffs.
- [24] For example, Deborah Neilson provided an affidavit sworn September 7, 2019. Ms. Neilson described the impact of her parents' breakup on the Pellegrini family, as well as the eventual reconciliation between herself, her siblings and Mr. Pellegrini. She sets out her knowledge of Mr. Pellegrini's wills and his illnesses. She says that after Mr. Pellegrini suffered a stroke in 2010, it left him operating with a deficit. Following his stroke, Mr. Pellegrini made another will on June 14, 2011, that was much less favourable to his children than his earlier will from 1992.
- [25] Ms. Neilson explained that while she and her siblings are no longer challenging the validity of the Will, they believe there are a number of suspicious circumstances surrounding its execution and she set out the reasons why they seek to have Ms. Lord passed over as an executor.

- [26] As each of the plaintiffs adopt Ms. Neilson's evidence, I will deal with each concern raised by Ms. Neilson regarding Ms. Lord acting as an executor as they appear in her affidavit.

Poor Relationship & Hostility

- [27] Ms. Neilson says that the history of her father's infidelity with Ms. Lord and her hostility towards the plaintiffs are reasons why Ms. Lord ought to be passed over as an executor. As I have already stated, the establishment of Mr. Pellegrini and Ms. Lord's relationship dates back to the early 1980s. These events have cast a long and painful shadow in the lives of the plaintiffs.
- [28] I am not convinced that the plaintiffs' concerns under this ground are capable of supporting a decision to pass over Ms. Lord as an executor. There is insufficient evidence to establish hostile conduct by Ms. Lord. Ms. Neilson describes that "there has always been tension and hard feelings" between Ms. Lord and the Pellegrini children, which she attributes to her father's extra-marital affair with Ms. Lord.
- [29] Ms. Neilson says she "often felt like" Ms. Lord did not welcome her into the home she shared with Mr. Pellegrini. She says her phone calls were not answered and that she often felt hostility from Ms. Lord. However, besides general statements about her feelings, Ms. Neilson gives no specific examples of hostile behavior by Ms. Lord.
- [30] According to Ms. Lord, she had limited contact with the plaintiffs during her 32-year relationship with Mr. Pellegrini. She says she did not have any hostility towards the plaintiffs nor did she try to exclude them. Ms. Lord says that she saw Ms. Neilson, Tracey Pellegrini and Daniel Pellegrini most frequently over the years.
- [31] After Mr. Pellegrini's stroke, Mr. Pellegrini and Ms. Lord moved into their basement because of his mobility issues. Ms. Lord answered the upstairs doorbell and the telephone whenever she heard it and was home. She denies ever deliberately avoiding calls or home visits from the plaintiffs. She also denies that she stayed by Mr. Pellegrini's side during the plaintiffs' visits to interfere, but rather says that she did so to help him and out of habit.
- [32] Ms. Lord believed she had a good relationship with Ms. Neilson. She and Mr. Pellegrini took trips with Ms. Neilson and her husband. Ms. Lord assisted Ms. Neilson, including by caring for her children for two weeks when she was ill.
- [33] Ms. Lord also provides specific examples of efforts she made to assist and support the plaintiffs in their relationships with Mr. Pellegrini, including by agreeing at various times to let the plaintiffs and/or their children live at her home, hosting social events and visits with the plaintiffs in her home, and helping the plaintiffs with chores and babysitting when asked.

- [34] Mr. Lord and Ms. Stabblar, who are Ms. Lord's children, state in their affidavits that they never saw their mother speak poorly of the plaintiffs. They also describe their interactions with the plaintiffs as relatively infrequent but cordial. For example, Ms. Stabblar describes lending her graduation dress to Tracey Pellegrini. Mr. Lord recalls attending a family Christmas gathering at his mother's home in 2010 with Tracey Pellegrini and her children in attendance.
- [35] I am also not convinced that Ms. Lord is or has been hostile to the plaintiffs. The plaintiffs have described their hurt feelings concerning the breakup of the Pellegrini family as they knew it. It is not my role to question the basis for the plaintiffs' feelings nor their reactions to past events.
- [36] However, I do not find evidence demonstrating misconduct by Ms. Lord that is capable of supporting a decision to pass over her as an executor. Even if I accepted that there is misconduct as alleged, it is past misconduct and it was not done in Ms. Lord's capacity as executor.

The Step Children

- [37] The plaintiffs believe that Ms. Lord will be unable to maintain an even hand and that she will seek to advance the interests of her own children ahead of the plaintiffs. Ms. Neilsen states that the basis for this belief is "family history" and the "hard feelings" between the plaintiffs and Ms. Lord.
- [38] Ms. Lord says that she encouraged Mr. Pellegrini to include his children in the Will and to treat them equally. This is corroborated by the evidence of Ms. Metherell, the solicitor who prepared the Will. Ms. Lord also says that the bequests to the plaintiffs and to her own children have been specifically defined and that she must follow the Will.
- [39] It should also be noted that the Will does not provide Ms. Lord with the kind of wide discretion, for example, with respect to the distribution of income or capital, that could make the question of hostility towards the plaintiffs in their capacities as beneficiaries significant: *Oates v. Baker Estate*, [1993] B.C.J. No. 1293 at para. 17 (S.C.).
- [40] I see no basis on the evidence to conclude that there is a risk that Ms. Lord might fail to carry out her duties in an even-handed and fair manner. On the contrary, there is evidence of Ms. Lord speaking up, in the presence of the solicitor, to discourage Mr. Pellegrini from eliminating the plaintiffs from the Will.

Relationship with Norma Dierk

- [41] The plaintiffs wish to see Ms. Dierk carry on as the sole executor as they trust her and they believe she has managed well as the administrator. The plaintiffs are suspicious of the fact that Ms. Lord offered to pay Ms. Dierk \$50,000. They view this promise as an attempt by Ms. Lord to sway Ms. Dierk in the wills variation application brought by the plaintiffs.

- [42] Ms. Lord says that she offered to pay Ms. Dierk \$50,000 after she learned that Mr. Pellegrini owed Ms. Dierk that sum. She denies the offer is an improper attempt to influence Ms. Dierk. Ms. Dierk confirms that she told Ms. Nielsen and Tracey Pellegrini that Mr. Pellegrini owed her \$50,000. She also confirms that Ms. Lord offered to repay the debt before Mr. Pellegrini passed away.
- [43] Ms. Dierk and Ms. Lord say that they have a good relationship and that they are confident that they can work well together as executors. I am unable to conclude that Ms. Lord's offer to pay Ms. Dierk \$50,000, or Ms. Dierk's trusted and preferred status with the plaintiffs provides sufficient grounds to pass over Ms. Lord as an executor.

Self-Dealing

- [44] The plaintiffs are concerned that Ms. Lord has engaged in self-dealing that has benefitted her at their expense. The allegations of self-dealing relate to an estate freeze transaction carried out on behalf of Mr. Pellegrini following his first stroke in 2010. Ms. Nielsen refers to this as the "White Stag Transaction". The White Stag Transaction was carried out by Ms. Lord and Ms. Dierk in their capacities as Mr. Pellegrini's attorneys.
- [45] Mr. Pellegrini and his business partner owned White Stag Enterprises Ltd. ("White Stag") which operated an auto body business. Mr. Pellegrini and Ms. Lord incorporated Den-Al Ranch Ltd. ("Den-Al") in 2001 to operate a ranching business. In 2001, Den-Al entered into an agreement to acquire ranch lands owned by Mr. Pellegrini. Den-Al was also indebted to White Stag. Under the Will, Mr. Pellegrini left his interest in Den-Al to Ms. Lord.
- [46] The plaintiffs are unhappy that under the White Stag Transaction, payments due to Mr. Pellegrini for White Stag share redemptions were applied to first retire Den-Al's debt to White Stag. They say this arrangement ultimately benefitted Ms. Lord at the expense of the Estate.
- [47] Ms. Nielsen says that for reasons unknown to her, White Stag has refused to pay the money that it owes the Estate pursuant to the White Stag Transaction. The plaintiffs have undertaken, at their own expense, proceedings to collect the debt owing to the Estate without assistance from Ms. Lord or her children. If the debt proceeding is not fruitful, it may ultimately reduce the residue available for distribution to the plaintiffs.
- [48] Ms. Dierk says that when she told Ms. Lord the plaintiffs had concerns about Ms. Lord having Mr. Pellegrini's sole power of attorney, Ms. Lord immediately agreed to add Ms. Dierk. Ms. Dierk says that she signed the White Stag Transaction documents upon the advice of counsel that the transaction would protect Mr. Pellegrini's interest in White Stag. She said any discussions with counsel she observed focussed on protecting Mr. Pellegrini and there was no discussion about the White Stag Transaction benefitting Ms. Lord.

- [49] Ms. Lord says the White Stag Transaction was conceived and carried out as a result of professional tax planning advice received while Mr. Pellegrini was alive. She followed the legal and accounting advice she received in order to protect Mr. Pellegrini. In my view, and based on the evidence before me in this application it cannot be said that the White Stag Transaction amounts to endangerment of the trust property or lack of reasonable fidelity on Ms. Lord's part.
- [50] I am unable to conclude that the estate freeze undertaken through the White Stag Transaction lacks a defensible rationale, as was the case in *Veitch*. Both Ms. Lord and Mr. Dierk attest to relying on professional advice to undertake the White Stag Transaction for the specific purpose of protecting Mr. Pellegrini.
- [51] This accounting advice to undertake an estate freeze and to protect Mr. Pellegrini's interest provides a defensible rationale for the White Stag Transaction. I am unpersuaded that Ms. Lord should be passed over as an executor because of her role, alongside Ms. Dierk, in entering into the White Stag Transaction.

Interference with Estate Planning

- [52] The plaintiffs have concerns that Ms. Lord interfered with Mr. Pellegrini's estate planning by scuttling the choice of Sandra Pellegrini as an alternate attorney and Ms. Neilsen as a co-executor. The plaintiffs are concerned that the evidence of Ms. Lord, Ms. Dierk and Ms. Metherell conflicts on these issues.
- [53] Even if there are variations in the evidence of these individuals on these issues, it still not does not establish that Ms. Lord interfered with Mr. Pellegrini's estate planning activities. Ms. Lord admits she did not want Ms. Neilsen named as a co-executor. She says that is because Ms. Neilsen was not speaking with her at the time and she did not believe she would work well with Ms. Neilsen. She preferred working with Ms. Dierk and she says Mr. Pellegrini agreed. In my view, these are legitimate and practical considerations for a potential executor such as Ms. Lord and for Mr. Pellegrini in undertaking estate planning. I do not believe that these choices are examples of improper interference with Mr. Pellegrini's estate planning.
- [54] Ms. Metherell's evidence makes it clear that she was alive to concerns about whether Ms. Lord was "filling in too much information" for Mr. Pellegrini during her meeting with him. To address these concerns, Ms. Metherell determined she would not take instructions on the day in question. About a month later, she met again with Mr. Pellegrini alone and she found his ability to communicate much improved.
- [55] While Ms. Metherell was alone with him, Mr. Pellegrini advised her that he wanted to include Ms. Lord's children in his will. Ms. Metherell says she never heard Ms. Lord encourage Mr. Pellegrini to include her own children as beneficiaries. However, she did hear Mr. Pellegrini suggest that he should leave nothing to the plaintiffs.

- [56] According to Ms. Metherell, Ms. Lord responded by encouraging Mr. Pellegrini to make a provision for his children in the Will and to treat his children equally. Ms. Lord also assisted in making such a provision by providing Ms. Metherell with the plaintiffs' proper legal names.
- [57] This evidence undermines the plaintiffs' submission that Ms. Lord's children were added as beneficiaries due to Ms. Lord's improper influence. Mr. Lord and Ms. Stabbler say that over the years they developed a close relationship with Mr. Pellegrini. They provided many examples in their affidavits that support the nature of their relationship with Mr. Pellegrini. It appears that Ms. Stabbler, and to a lesser extent Mr. Lord, spent considerable time with their mother and Mr. Pellegrini over the years.
- [58] After considering all of the grounds advanced by the plaintiffs, I have concluded that passing over Ms. Lord is not justified. The Pass Over Application is therefore dismissed.

Proof in Solemn Form Application

- [59] To obtain an order for Proof in Solemn Form, the court must determine the validity of the will. Section 37 of WESA sets out how one makes a valid will:

37 (1) To be valid, a will must be

- (a) in writing,
 - (b) signed at its end by the will-maker, or the signature at the end must be acknowledged by the will-maker as his or hers, in the presence of 2 or more witnesses present at the same time, and
 - (c) signed by 2 or more of the witnesses in the presence of the will-maker.
- (2) A will that does not comply with subsection (1) is invalid unless
- (a) the court orders it to be effective as a will under section 58 [court order curing deficiencies],
 - (b) it is a will recognized as valid under section 80 [validity of wills made in accordance with other laws], or
 - (c) it is valid under another provision of this Act.

- [60] There is also a rebuttable presumption that a testator possesses the requisite knowledge, approval and testamentary capacity where the will has been executed in compliance with the statutory formalities and where the will was read to him and he appeared to understand the will: *Laszlo v. Lawton*, 2013 BCSC 305 at para. 202.

- [61] This rebuttable presumption, together with the evidence of Ms. Metherell, assists the defendants to discharge the burden to prove, on the balance of probabilities, that Mr. Pellegrini had the requisite knowledge, approval and testamentary capacity.

- [62] The evidence also establishes that:

- a) The Will is in writing;
- b) Mr. Pellegrini signed the Will at its end in the presence of two witnesses present at the same time; and
- c) Two witnesses signed the Will in the presence of Mr. Pellegrini.

It is clear that the formalities required by WESA have been satisfied.

[63] The plaintiffs do not allege that the Will fails to comply with the requirements of s. 37 of WESA or that the Will is incapable of proof in solemn form. Therefore, I have concluded that the defendants have fulfilled their duty to prove the Will in solemn form.

[64] As mentioned at the outset, the plaintiffs oppose the Proof in Solemn Form Application only in respect of the request for the grant of probate in favour of Ms. Lord and the request for costs.

[65] Based on my conclusions with respect the Pass Over Application set out above, I have concluded that Ms. Lord and Ms. Dierk are entitled to a grant of probate.

COSTS

[66] The plaintiffs were unsuccessful on the Pass Over Application.

[67] In *Woodward v. Grant*, 2007 BCSC 1549 at para. 16, Justice Gray reviewed the evolving jurisprudential landscape surrounding costs in estate litigation and concluded that there is a trend towards the general rule that costs follow the event. Justice Gray noted (at para. 21) that as the proceeding "was in substance an adversarial dispute between beneficiaries" as to entitlement under different versions of the will, there was no reason to depart from the general rule that costs follow the event. She awarded the successful defendants their costs at Scale B.

[68] In *Kellogg Estate*, 2018 BCSC 1978, Justice Johnston considered an application for costs in respect of an unsuccessful application to pass over an executor. The successful party, who was the executor, sought special costs or in the alternative ordinary costs with an uplift. The unsuccessful party conceded liability for costs but argued that costs ought to be assessed at Scale B.

[69] Justice Johnston reiterated (at para. 3) that special costs are to be awarded only where it can be said that the payor conducted herself reprehensibly. In *Kellogg*, the party seeking to pass over the executor raised a number of grounds, including allegations of reckless indifference, fraud and dishonesty, which failed to result in the removal of the executor. However, none of the failed allegations met the requirement to establish improper motive or reprehensible conduct meriting rebuke from the court.

- [70] After considering the circumstances and the authorities regarding costs, I have concluded that the ordinary rule that costs should follow the event should apply. While the plaintiffs have not succeeded in their application, I can find no basis, such as reprehensible conduct, upon which to grant special costs payable by the plaintiffs.
- [71] Therefore, I order the plaintiffs to pay the respondents, Ms. Lord and Ms. Dierk, one set of costs at Scale B related to the Pass Over Application and to pay the respondents, Mr. Lord and Ms. Dippel, one set of costs at Scale B related to the Pass Over Application.
- [72] The applicants, Ms. Lord and Ms. Dierk, request two specific orders with respect to costs for the Proof in Solemn Form Application:
- a) an award of full indemnity special costs reimbursing Ms. Lord and Ms. Dierk for their reasonable costs; and
 - b) an award of special costs against any party opposing the Proof in Solemn Form Application or alternatively, party and party costs payable to the Estate.
- [73] Regarding the request for costs, I note that the Proof in Solemn Form Application was required because prior to amending their claim, the plaintiffs alleged the Will was invalid.
- [74] The applicants rely on specific principles that apply to executors acting within the scope of their duties that entitle executors to indemnification for costs properly and reasonably incurred while acting within the scope of their office: *Leung v. Chang*, 2014 BCSC 1243 at para. 83 citing *Royal Trust Corp. of Canada v. Clarke* (1989), 69 D.L.R. (4th) 257 at para. 17 (B.C.C.A.) and *Mawdsley v. Meshen*, 2011 BCSC 923 at para. 39.
- [75] I have concluded that Ms. Lord and Ms. Dierk are entitled to costs payable forthwith to be assessed as special costs out of the Estate in respect of the Proof in Solemn Form Application as reimbursement for their role as executors. All other parties shall bear their own costs.
- [76] I have declined to order the plaintiffs pay the executors' costs associated with proving the Will in solemn form or to pay costs to the Estate. I decline to do so because the plaintiffs amended their claim in a timely fashion and they are also personally funding debt recovery litigation for the benefit of the Estate. Special costs are also not appropriate for the reasons I have stated above.

"E. McDonald J."

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/20/02/2020BCSC0266.htm>

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

Prepared on 26 October 2026 · Esheria