

CANADA / JUDGMENT

Gee v. Gee

2024 BCSC 1693

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Supreme Court of British Columbia

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2024 BCSC 1693 Gee v. Gee

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gee v. Gee,

2024 BCSC 1693

Date: 20240912

Docket: S1910488

Registry: Vancouver

Between:

Winston Fee Wing Gee, Deceased, and Kevin Wah Gee, and Melinda Hager

Plaintiffs

And

Lai Ying also known as Lily Gee, Selina Gee, and Ronald John Argue as Administrator of the Estate of Winston Fee Wing Gee and Brian Gan Keung

Gee

Defendants

Before: The Honourable Justice Bantourakis

Reasons for Judgment

Counsel for the Plaintiffs K. Gee and M. Hager:

A.M. James

Counsel for the Defendants L. Ying, B. Gee and S. Gee:

M. Gulyas

No other appearances

Place and Date of Hearing:

New Westminster, B.C.

May 28, 2024

Place and Date of Judgment:

Vancouver, B.C.

September 12, 2024

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INTRODUCTION

[1] Winston Gee ("Winston") passed away without a will. His estate is to be distributed according to the rules governing intestacy. His intestate successors include the children of his first marriage, the children of his second marriage, and his second wife - though the children of Winston's first marriage now allege that Winston and his second wife had separated by the time of his passing.

[2] As matters currently stand, the estate is essentially comprised of a single property located at 1920 Charles St. in Vancouver that was sold in 2020 for \$1,050,000. The applicants, Kevin Wah Gee ("Kevin") and Melinda Hager ("Melinda"), are among the children of Winston's first marriage. They say that additional assets ought to be included in the estate. However, they cannot advance that claim unless they are granted leave to do so pursuant to s. 151(1) of the

Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA]. On this application, they ask that leave be granted and that they be the persons authorized to control the conduct of those claims pursuant to s. 151(4) of WESA.

- [3] The respondents are the deceased's second wife, Lai Ying ("Lily"), the children of that second marriage Selina Gee ("Selina") and Brian Gan Keung Gee ("Brian") and the administrator of the estate, Ronald Argue. The administrator takes no position on this application or the litigation more broadly. However, Lily, Selina and Brian oppose it.
- [4] The assets in issue are a property located at 530 East 10th Avenue in Vancouver (the "East 10th Property") that passed outside of the estate, rental income and occupational rent from the East 10th Property, money Winston allegedly advanced to Brian as a loan for medical school (the "Medical School Funds"), funds held in BMO accounts held jointly by Winston, Lily, Brian and Selina, including withdrawals from those accounts while Winston was incapacitated (the "BMO Accounts"), and three vehicles.
- [5] Of these, the claim to the East 10th Property is by far the most substantial. That property's value was assessed at \$2,163,000 for 2022 and is clear title. The Medical School Funds claim, at \$634,000, is also substantial. The remaining claims are relatively modest in comparison.

BACKGROUND

- [6] Winston arrived in Canada in 1949 and thereafter worked a variety of jobs including in restaurant operations, as a cab driver, and as a delivery driver. He bought several investment properties over the years, including the Charles Street property that currently forms the major part of his estate. He retired in May 1982, at the age of 51. From that point at least, it appears he relied on rental income, savings, and living frugally to get by.
- [7] Winston and his first wife separated around 1973. He married Lily in June of 1974. They remained married until his passing in 2017.
- [8] By all accounts, Winston's relationship with his children was sometimes fraught. When he separated from his first wife in the early 1970s, he left the children of that marriage, Kevin, Melinda and their sister Karen (who is not a party to these proceedings) with their maternal grandparents and did not contribute to their upbringing. They remained in contact to some degree over the years, but the relationship was not close. Kevin, at least, appears to have become more involved with his father in his later years.
- [9] Winston's relationship with Selina and Brian does not appear to have been easy either. Without getting into the details of the affidavit evidence and any contradictions between the evidence of the applicants and respondents on this front, it is fair to say that while Winston contributed to their upbringing and appears to have been proud of Brian's accomplishment in becoming a doctor, there were periods of conflict and estrangement with the children of his second marriage.

- [10] Lily, for her part, deposes that Winston was verbally and physically abusive to her on countless occasions throughout their marriage.
- [11] Winston lived at the East 10th Property, portions of which he also rented out to one or more tenants. It was purchased in 1994, twenty years into his marriage with Lily. At the time of purchase and to the time of his passing, he held title to an undivided half interest in that property jointly with Lily. The other half, which had originally been held by two of Lily's family members (the "Wongs"), eventually ended up in Selina's name through a series of gratuitous transfers. The two halves were held by way of tenancy in common.
- [12] Starting in the early 2000s, Brian went to a private medical school abroad. Around that time, Winston obtained a mortgage for \$210,000 against the East 10th Property, which had been mortgage-free since 1998, and also sold his interest in a property he co-owned in White Rock for \$424,000. Kevin and Melinda say that Brian received those funds as a loan to pay for his medical studies, but never paid them back. Brian does not dispute that he received money for medical school, but says it did not approach \$634,000 and, in any event, that whatever amounts he received were gifted to him.
- [13] Kevin and Melinda say that Lily and Winston separated in October of 2013 when she left the East 10th Property to move in with Brian and never returned. While Lily does not deny that she and Winston were physically separated for periods of time, she denies that either of them formed an intention to separate. She maintains that she left the East 10th Property at times to stay with Brian, for example when his wife died, or when Selina was out of town. However, she says she always returned and there was no intention to separate. Selina, likewise, says that she and her mother lived at the East 10th Property during this time, though she acknowledges she was sometimes out of town and also stayed with Brian from time to time.
- [14] On August 26, 2015, Winston was admitted to Vancouver General Hospital. He never returned home. He was diagnosed with dementia and, upon discharge, lived in a series of care facilities until his death just over two years later. Lily and Selina did not visit him during those years, and they did not attend his funeral.
- [15] After the August 2015 hospital admission, Kevin was appointed his father's health representative. The evidence suggests that Brian and Selina were unwilling to fulfill that role and that Lily was either unwilling or unable to. Then, on March 21, 2016, having been deemed incapable of managing his financial affairs, the Public Guardian and Trustee was appointed Winston's committee, as no family member was willing.
- [16] Winston held the BMO accounts that are in issue in these proceedings jointly with Lily, Selina and Brian. Kevin and Melinda say he was the sole contributor to those accounts. Following Winston's hospital admission, during periods in which he was institutionalized and/or during the committee's tenure, about \$69,000 was withdrawn from them, often in cash and including several larger transactions.

- [17] Winston passed without a will on September 17, 2017. On August 9, 2019, a grant of administration was issued to Mr. Argue, a lawyer. As noted above, the estate consisted essentially of the Charles Street property, the remainder of any assets of note having passed outside of the estate. This included Winston's interest in the East 10th Property, which was transferred to Lily in June 2018, apparently as the surviving joint tenant on their half-interest. The BMO Accounts also passed to Lily, Selina and Brian as the surviving joint account holders, though by that point they totalled less than \$10,000.
- [18] Kevin and Melinda filed a Notice of Civil Claim just over a month after the grant of administration, on September 16, 2019. At that point, they sought relief in respect of the East 10th Property only. In their claim, they alleged that the Wongs and all subsequent transferees of their 50% interest in the East 10th Property (ending with Selina) had received their half-interest in title gratuitously and that Winston and Lily retained beneficial title to the East 10th Property in its entirety. They also alleged that Winston and Lily had separated before his passing and that their joint tenancy in the East 10th Property had been severed and converted to a tenancy in common. On this claim, if successful, Lily would retain a 50% interest in the East 10th Property, with the remaining 50% accruing to the benefit of Winston's estate.
- [19] Kevin and Melinda say that over the ensuing period they began to locate documents in support of their claim. They also allege that the respondents intentionally destroyed or disposed of relevant documents. However, Kevin and Melinda received the Public Guardian and Trustee's relevant records in 2020 and between 2021 and 2022, at their request, the Administrator contacted financial and healthcare institutions to obtain additional records. They say that in reviewing the documents they received, they determined there were additional claims available, including for the Medical School Funds, the BMO Accounts, and certain vehicles. They also formed the view that Winston alone held beneficial title to the East 10th Property.
- [20] On May 30, 2023, Associate Judge Nielsen granted Kevin and Melinda leave to add Brian as a party and to amend their pleadings to include these new claims, without prejudice to the defendants' ability to raise any limitations defences or seek remedies with respect to any withdrawals of admissions in the amended pleadings.
- [21] The Amended Notice of Civil Claim ("ANOC") now pleads that not only the Wongs, but also Lily, received their interests in the East 10th Property gratuitously from Winston and held legal title on a resulting or constructive trust for his benefit. It also maintains the allegation that Winston and Lily had separated before his passing and that any joint tenancy in the East 10th Property was severed: see e.g. ANOC, Part 3, para. 7. It also advances new claims to the Medical School Funds, BMO Accounts and vehicles, as well as to rent and occupational rent in relation to the East 10th Property.
- [22] To date, Kevin and Melinda have financed the litigation with their own funds and say they will personally finance the litigation moving forward.

- [23] A trial is currently set for 15 days commencing January 15, 2025. The dates were set without prejudice to the respondents' opposition to Kevin and Melinda being given leave to pursue the matter.

ANALYSIS

- [24] Kevin and Melinda's application turns on s. 151 of WESA, which provides among other things that a specified person may seek leave to proceed with an action in their name and in the name of a deceased's estate to recover property, enforce a right, duty or obligation owed to the deceased person that could be recovered or enforced by the personal representative.
- [25] To grant leave under this provision, the court must be satisfied (a) that the party seeking leave is a "specified person" within the meaning of s. 151(0.1) of WESA; (b) that they have made reasonable efforts to cause the personal representative, or executor, to commence or defend the action; (c) that they have given notice of their application as required; (d) that they are acting in good faith; and (e) that it appears 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: WESA, s. 151(3).
- [26] There is no dispute here that the applicants are specified persons within the meaning of s. 151 of WESA, as they are among the deceased's intestate successors: WESA, s. 151(0.1). There is also no dispute that they have given the notice required by s. 151(3)(a)(ii).
- [27] Further, while the respondents did not concede that the applicants had made reasonable efforts to cause Mr. Argue to commence the action as required by s. 151(3)(a)(i), they did not strongly contest it either. Kevin and Melinda's counsel wrote to Mr. Argue requesting that he pursue the claim (with specific reference to the pleadings) failing which they would seek leave to do so pursuant to s. 151 of WESA. He responded that they should proceed.
- [28] This, in my view, is sufficient considering the administrator was given notice of the request, details of the nature of the claim the applicants wanted him to pursue and can be taken by his response to have said that they should proceed with seeking leave instead: *Fry v. Fry*, 2018 BCSC 1018 at para. 51; *Jiang v. Piccolo*, 2020 BCSC 1584 at paras. 64-65.
- [29] Accordingly, the application turns on the remaining requirements for a grant of leave under s. 151. Namely, (1) whether the applicants are acting in good faith, and (2) whether it is necessary or expedient for the protection of the estate or the interests of a specified person for the proceeding to be brought.

A. ARE THE APPLICANTS ACTING IN GOOD FAITH?

- [30] The respondents say that the applicants are not acting in good faith. They say that the applicants' claims are rooted in speculation, have no merit and seek to disentitle Winston's spouse of over 40 years. They point to the difficult family history in this case and say the applicants are not pursuing legitimate interests but rather acting out of resentment and spite towards Winston's second family. They say these feelings are understandable

considering Winston effectively abandoned them, but do not offer a legitimate basis upon which to proceed.

- [31] In *Dunn v. Baird Estate*, 2023 BCCA 216 at para. 57, the Court of Appeal endorsed Justice Verhoeven's approach to the good faith requirement as set out in *Jiang v. Piccolo*:
- [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.
- [32] That is, the question is whether the claim is being brought for legitimate purposes or for ulterior purposes: *Dunn* at para. 56. Here, I conclude that Kevin and Melinda bring this claim in order to increase the value of the estate and, by extension, their respective entitlements as intestate successors. If they were to succeed, the value of the estate would increase and, considering the estimated value of even a portion of the East 10th Property and the amounts they allege were loaned to Brian, it could increase by a substantial amount. These are legitimate interests on the legal principles set out above and "good faith is not measured by the strength of the case": *Dunn* at paras. 56, 58.
- [33] While the relationship between Winston's first and second families may well be fraught, as appear to have been his own relationships with those families, I do not accept that the applicants are acting out of spite or for some other ulterior purpose. Their legitimate financial interests and those of the estate are engaged. Good faith is a question of fact to be determined on all the evidence: *Jiang* at paras. 71, 72. I find that the applicants are acting in good faith in advancing each of the claims in issue.

B. IS THE PROCEEDING NECESSARY OR EXPEDIENT?

- [34] The requirement in s. 151(3)(b) of WESA that it be necessary or expedient for the proceeding to be brought requires that the party seeking leave have an arguable case the pursuit of which may be necessary or expedient to protect the interests of the estate or of a specified person: *Hoggan v. Silvey*, 2022 BCCA 176 at paras. 45-46; *Chung v. Chung*, 2022 BCSC 1396 at para. 49.
- [35] In *Hoggan*, the Court of Appeal emphasized that while the statutory factors in s. 151 of WESA will always apply, there must also be an arguable case "as a meritless case would be neither necessary nor expedient to protect the interests of the estate or the specified person": *Hoggan* at para. 58. The arguable case standard, sometimes framed as requiring a "reasonable prospect of success" or a case that is "not bound to fail", does not pose a high bar: *Hoggan* at para. 42.

- [36] In assessing whether the case is arguable, the court will consider the strength of the proposed claim based on a "limited weighing" of the evidence: Hoggan at paras. 41, 51. The court must not weigh the evidence so as to reach a conclusion on a central issue: Dunn at paras. 44, 46.
- [37] Assuming the case is arguable, the court must still be satisfied that it meets the "necessary or expedient" standard more broadly. To that end, the considerations in s. 151(3)(b) of WESA are to be read disjunctively, such that there are four possible ways the "necessary or expedient" standard can be met: it may be necessary to protect the interests of the estate; it may be expedient to protect the interests of the estate; it may be necessary to protect the interests of a specified person; or it may be expedient to protect the interests of a specified person: Hoggan at para. 58.
- [38] With these basic principles in mind, I turn to a consideration of the claims Kevin and Melinda seek leave to pursue. Because I have concluded that leave should be granted, I intend to say the minimum necessary to explain my conclusions; I do not wish to be taken as having made any findings that would hamper the trial judge, who will be in a position to make key credibility findings and will have the benefit of a much fuller evidentiary record and more developed submissions.
- 1) The East 10th Property Claims
- [39] The applicants' claim to recover the East 10th Property is based largely on the presumption of resulting trust and, alternatively, constructive trust. In addition, they allege that Winston and Lily separated some years before his passing and that this too means that at least some portion of the East 10th Property should properly form part of Winston's estate.
- [40] A resulting trust operates to return property to a person who gave it and is entitled to own it beneficially, from someone else who has legal title to it: Kerr v. Baranow, 2011 SCC 20 at para. 16. There is a rebuttable evidentiary presumption at law that property given or transferred gratuitously is not intended as a gift, but is instead held by the transferee in trust for the transferor. This presumption of resulting trust may arise where an individual gave no value for their interest or where an interest is transferred gratuitously: Pecore v. Pecore, 2007 SCC 17 at para. 24.
- [41] Beneficial ownership is determined with reference to the intention of the donor. The effect of the presumption of resulting trust is to place the onus on a gratuitous transferee to show on a balance of probabilities that a gift was intended: Pecore at paras. 24-25. If it is determined that the donor intended to gift the interest, then the presumption is rebutted. However, in the absence of satisfactory evidence to that effect, a resulting trust will be presumed: Pecore at paras. 43-44; Dunn at paras. 40-41. That is, the presumption will apply where the evidence of donor's intention is unclear or equivocal: V.J.F. v. S.K.W., 2016 BCCA 186 at para. 50.

- [42] The applicants argue that the presumption of resulting trust arises in two ways here. First, they point to records from the relevant time which they say show that Winston paid the deposit for the East 10th Property, was the sole purchaser on the contract and made all payments for the property from what they say are his own funds until the time he discharged the mortgage in 1998, four years after purchase.
- [43] They say that documents they have obtained, and evidence relating to Lily and the Wongs' finances, show that the funds for the purchase of the East 10th Property belonged solely to Winston and that neither Lily nor the Wongs gave any consideration for title. As a consequence, they say that they have an arguable case that title as a whole was impressed with a resulting trust in Winston's favour.
- [44] Second, the applicants say that they have an arguable case that Lily and Winston separated in 2013. They submitted before me that if separation did occur, Lily and Winston's half-interest in the East 10th Property as joint tenants would have been severed and converted into undivided half interests as tenants in common by operation of s. 81 of the Family Law Act, S.B.C. 2011, c. 25 [FLA]: see *Sushnyk v. Meyer*, 2023 BCSC 275 at paras. 32-34.
- [45] If the joint tenancy was severed, there would have been no right of survivorship entitling Lily to transfer title to the half-interest she shared with Winston into her name alone, and she would hold a quarter interest in trust for the estate. It is trite that the right of survivorship is inherent in the creation of a joint tenancy, but not a tenancy in common: *Fuller v. Harper*, 2010 BCCA 421 at paras. 51-53.
- [46] On this scenario, the applicants remain of the view that Selina's interest in its entirety would be subject to a resulting trust in the estate's favour, on the premise that the Wongs received title gratuitously and all subsequent transfers of their interest were gratuitous. The respondents dispute this, but say that even if the applicants are correct that Winston was the sole beneficial owner of the East 10th Property and that he and Lily were separated, Lily would nonetheless be entitled to 50% of whatever interest was held by Winston at the date of separation, again by virtue of s. 81 of the FLA. That is, they too rely on s. 81 of the FLA, albeit in the alternative.

Is there an arguable claim to Selina's half interest in the East 10th Property?

- [47] Though there is conflicting affidavit evidence on this point, the purchase and financial documents the applicants have included in the evidentiary record on this application could support a viable argument that the Wongs did not contribute funds to the purchase and payment for the East 10th Property but instead received their interest in that property gratuitously. In the absence of sufficient evidence that the intention was to gift the Wongs their interest, a presumption would apply that they did not receive beneficial title, and instead held legal title on a resulting trust. The Wong's half interest, of course, is now held by Selina following a series of subsequent transfers that were all gratuitous.

- [48] On this application, the respondents do not appear to allege that Winston intended to gift the Wongs their interest. Instead, they say that the record shows the Wongs gave consideration even if they did not contribute to the purchase, because they were liable under the mortgage. They rely on *Petrick v. Petrick*, 2019 BCSC 1319 at paras. 61 and 66 for the proposition that pledging credit constitutes consideration such that the presumption of resulting trust will not arise on an otherwise gratuitous transfer.
- [49] Whether pledging credit alone will constitute consideration depends on the facts. Where, for example, the risk incurred by pledging credit is purely nominal, and the consequent consideration that can be said to have flowed in exchange for an interest in title is correspondingly nominal, or the co-borrowing did not assist in the purchase at all, a presumption of resulting trust may still arise: see e.g. *Kennedy v. Smith*, 2022 BCSC 1622 at para. 76; *Freeland v. Farrell*, 2022 BCCA 99 at para. 64.
- [50] On a limited weighing of the evidence, I find that it is arguable that the Wongs received title gratuitously. As noted, there is evidence that could support the view that they did not contribute toward the purchase and mortgage for the East 10th Property. Further, given the evidence that has been tendered of the Wongs' financial situation at the time, the argument that any credit they pledged was insufficient to constitute consideration is not necessarily bound to fail: *Chung* at para. 65.
- [51] That being so, the applicants have raised an arguable case that the Wongs received title gratuitously and that their half interest in the East 10th Property was impressed with a resulting trust which survived the successive gratuitous transfers that resulted in Selina holding title to that half interest.

Is there an arguable claim to Lily's half interest in the East 10th Property?

- [52] Lily says that the presumption of resulting trust should not arise in respect of her interest in the East 10th Property, emphasizing her position that she did not receive title gratuitously. She says she and Winston contributed. Among other things, she says she contributed to purchasing the Charles St. property from which Winston drew funds to purchase the East 10th Property. She also says she deposited income into certain joint bank accounts and that mortgage payments were made from those accounts. However, certain of the accounts she refers to in her affidavit were only made joint after the mortgage on the East 10th Property was repaid and discharged.
- [53] Leaving aside whether Lily received her interest in the East 10th Property gratuitously and whether, if she did, the presumption of resulting trust would apply considering that Winston and Lily were married (*Pecore* at paras. 27-28; *V.J.F.* at para. 50), I have concluded that there is an arguable case that Lily and Winston separated before his death. That being so, there is also an arguable case that the joint tenancy by which Winston and Lily shared their half-interest was severed and converted to a tenancy in common by operation of s. 81 of the FLA on the reasoning in *Sushnyk*: *Sushnyk* at paras 32 - 34; see also: *Weaver Estate v. Weaver*, 2022 BCCA 79 at paras. 57 - 60. In that event, Winston's interest could not have passed to Lily

outside of the estate by right of survivorship.

- [54] There need not be a meeting of the minds to find separation - all that is required is an intention of one spouse to separate and action consistent with that intention. The court is to assess the totality of the evidence on whether one spouse had a settled intention to separate and communicated that intention through conduct. Living separate and apart merely because of enforced long term residential medical care is not conclusive of an intention to end the matrimonial relationship, nor of an intention to separate permanently: *Malecek v. Leiren*, 2021 BCSC 1052 at para. 47.
- [55] The applicants have put forward evidence that is not speculative and that could support a finding that there was an intention to separate and action consistent with that intention. For example, there is affidavit evidence that Lily left the East 10th Property in October of 2013 and did not return until after Winston began residing in care facilities over two years later. There is also affidavit evidence that once Winston was in care facilities, she said he should never return to the East 10th Property. The weight such evidence is entitled to will ultimately turn on credibility, among other things. For current purposes, however, it is some evidence in support of the claim.
- [56] Additionally, Winston's 2015 tax return filed by the Public Guardian and Trustee lists his marital status as "separated". There are also notes from health professionals who interacted with Winston at relevant times stating that he is separated and/or living alone. When Winston was admitted to hospital in August of 2015, Lily did not act as his personal health representative. Lily also agrees that she never visited Winston during the years he was in care, and did not attend his funeral.
- [57] The respondents say this does not raise an arguable case that Winston and Lily were separated. Lily has sworn an affidavit stating that she never intended to separate from Winston and that she did not permanently move out of the East 10th Property. She says she could not act as Winston's personal health representative because her own language and health issues prevented her from doing so. She says she wanted to visit Winston and to go to his funeral, but Selina refused to take her and she did not feel comfortable going alone. The respondents also say that those who noted Winston's marital status as "separated" in the years before his death may have been receiving that information from Kevin.
- [58] When the matter is tried, the trial judge will have to decide this issue based on the totality of the evidence and necessary assessments of credibility. However, at this stage, I would have to engage in more than a limited weighing of the evidence to accede to the respondents' arguments. This is not a case like *Malecek*, for example, where the allegation of separation was speculative and unfounded and there was overwhelming evidence against it.

- [59] On a limited weighing, which is all I am permitted to do, there is enough in the way of evidence, including some of the documents referred to above, to conclude that there is a reasonable prospect that the applicants could succeed in their claim that Winston and Lily were separated and that at least a portion of the East 10th Property should therefore accrue to the benefit of the estate.
- [60] As the respondents point out, the pleadings in their current form raise certain complexities vis-à-vis the intersection of estate and family law. They say that if the applicants wished to rely on the alleged separation, they should have sought leave to bring a family law claim for division of family property. After a determination of the family law claim, and assuming separation was found to have occurred, Winston's share of family property would form the assets of the estate, to be distributed among his intestate beneficiaries. They say that Kevin and Melinda's failure to seek leave to bring a family law claim should be fatal to this application. Lily has not brought such a claim either, because she denies that she and Winston had separated.
- [61] The ANOCC does, among other things, include a pleading that the East 10th Property is excluded property as defined in s. 85 of the FLA. It is not necessarily apparent that such a claim can be advanced without bringing a family law claim: Supreme Court Family Rules, B.C. Reg. 169/2009, Rules 1-1(1), 3-1(1). This issue was only superficially addressed before me. Nor did the parties meaningfully address the implications of Lily's spousal status at the time of the alleged gratuitous transfers for the presumption of resulting trust and the presumption of advancement. While Kevin and Melinda's claim that the entirety of the East 10th Property should accrue to the benefit of the estate seems to rest to some significant degree on the above points, these will be issues for the trial judge to determine.
- [62] That is, I am not persuaded that this means that Kevin and Melinda's claim to the East 10th Property fails to meet the arguable case standard for the purpose of a grant of leave under s. 151 of WESA. The claim to Selina's half-interest in the East 10th Property, for example, can clearly be advanced regardless of whether Winston and Lily were separated. Further, it appears that the alleged severance of Winston and Lily's joint tenancy in the East 10th Property by operation of s. 81 of the FLA can be litigated in the absence of a family law claim: Sushnyk at paras. 32-34.
- [63] If Kevin and Melinda succeeded in one or both of these claims at least some portion of the East 10th Property would accrue to the benefit of the estate and considering that their claim is arguable, their ability to pursue their claims to this property should not be foreclosed at this early stage. In so saying, however, I should not be taken as having made any findings that would limit the trial judge in their assessment of the implications, if any, of the applicants' decision not to seek leave to bring a family claim, nor indeed of Lily's apparent decision not to pursue a family claim either.

Are the claims to the East 10th Property otherwise necessary and expedient?

- [64] The assessed value of the East 10th Property, which is clear title, exceeds two million dollars. Were it successfully claimed, the value of the estate would approximately triple as would the amount ultimately received by Winston's intestate successors.
- [65] As noted above, the applicants' claims, if successful, could yield less than a 100% interest in the East 10th Property for the estate. For example, if the applicants are correct in their assertion that Winston and Lily were separated and succeed in arguing that the joint tenancy by which they held their half-interest was severed, but do not succeed in any other aspects of their claim to that property, only 25% of it would accrue to the estate's benefit (i.e. only the portion that allegedly ought not to have passed to Lily by right of survivorship). By way of further example, the respondents suggest that if the applicants succeed in their arguments vis-à-vis the Wongs and in establishing that Winston and Lily were separated, Lily would nevertheless be entitled to 50% of whatever interest Winston held at the date of separation - leaving only 50% of the East 10th Property for the estate.
- [66] However, if only half the East 10th Property accrued to the benefit of the estate, the estate would still double in value. If only a quarter of it did, the estate would increase in value by over five hundred thousand dollars or about 50%. On each of these scenarios, in my view, the necessary or expedient standard would still be met considering the sums in issue.
- [67] Kevin and Melinda, as noted above, propose to fund the litigation themselves. In light of this and the factors set out above, I accept that a claim to the East 10th Property is necessary or expedient within the meaning of s. 151(3)(b) of WESA.
- [68] That being so, the applicants will be granted leave to pursue their claims for rental income and occupational rent as well. These claims go hand in hand with the claim to the East 10th Property itself and rest on the premise that the estate is the beneficial owner of that property. That is, they flow from the arguable claim to the East 10th Property and will not, in my view, add meaningful complication or expense to the litigation.

2) The Medical School Funds Claim

- [69] The parties agree that Brian received money from Winston to help pay for medical school. However, they dispute the amount and terms pursuant to which this occurred.
- [70] In terms of amount, the evidence suggests that around the time Brian went to medical school, in 2003, Winston obtained a mortgage for \$210,000 against the East 10th Property. He was 72 years old and had been retired for many years. The initial mortgage on the property had been paid off in 1998. Then, in 2004, Winston sold his interest in a property he co-owned in White Rock for \$424,000. Kevin and Melinda allege that Brian received the money from both the mortgage and the White Rock sale for medical school.

- [71] Brian, for his part, disputes that he received anything close to that amount, noting that tuition costs for the medical school he attended are currently just over \$215,000 USD and would likely have been lower in the early 2000s. However, despite the amount being in issue, neither he nor Lily say how much he did receive. Brian says that he does not know because his father made payments directly to the university and Lily says she does not remember.
- [72] As for the terms upon which the money was given, Brian and Lily both depose that the moneys paid for Brian's medical school were a gift. Karen, on the other hand, deposes that her father told her he expected to be repaid when Brian started working as a doctor. The applicants also rely on hearsay evidence of comments their grandmother may have made regarding Winston's expectations of repayment, and their own views that a gift would have been out of character for Winston. The respondents raise concerns regarding the admissibility of this evidence and say it should be given no weight in any event.
- [73] The record on this application does suggest that Winston accessed hundreds of thousands of dollars at precisely the time Brian required funds for medical school and acknowledges receiving funds from his father. There is also some evidence from Karen that Winston considered the money he paid for Brian's medical school a loan.
- [74] While I agree with the respondents that opinion and hearsay evidence Kevin and Melinda have proffered, to the extent that it would be inadmissible at trial, does not offer a sound basis for a grant of leave, and I have accorded that evidence no weight in deciding the application, not all of the evidence is so flimsy. There is evidence upon which a trier of fact could find that Winston did not gift Brian money for medical school but instead loaned it to him, including evidence from which inferences could be drawn regarding the likelihood or not of Winston gifting such funds. Further, as the conflicting affidavit evidence on this application makes plain, much will turn on credibility.
- [75] As for the respondents' argument that any claim to the Medical School Funds is statute-barred, the applicants have an arguable case that the estate would at least be entitled to offset the Medical School Funds loan, if indeed a loan is found, from any amount to be paid to Brian. This avenue would be available pursuant to the rule in *Cherry v. Boulton*, (1839), 4 My. & Cr. 442 regardless of whether the debt claim itself is statute-barred: *Johnston Estate (Re)*, 2017 BCSC 272 at paras. 25-37.
- [76] Turning to whether the Medical School Funds claim is otherwise necessary or expedient, I agree with the respondents here that the currently articulated foundation for a claim to the full \$634,000 is somewhat unclear. Kevin and Melinda appear to have simply added the 2003 mortgage and 2004 White Rock property sale amounts together to arrive at this number. Winston discharged the \$210,000 mortgage he had taken out on the East 10th Property shortly after selling his interest in the White Rock Property.

[77] However, the record does raise an arguable case that the Medical School Funds total in the hundreds of thousands of dollars and would materially increase the size of the estate. The claim is also relatively straightforward, and will turn to a significant extent on the evidence of witnesses who would be required at trial in any event in respect of the East 10th Property claims.

[78] That is, the Medical School Funds claim, even if it falls short of the full amount claimed, is still sizeable, will not overly complicate the litigation or unnecessarily burden the estate and, if successful, would substantially benefit certain of Winston's intestate successors. In the circumstances, I am satisfied that this claim is necessary or expedient for the protection of the estate or the interests of a specified person.

3) The BMO Accounts Claim

[79] Regarding the BMO Accounts, the applicants say that though they were joint accounts, Winston was the sole contributor, that the funds in those accounts were held on a resulting trust during his lifetime and that he did not intend to gift Lily, Brian and Selina the right of survivorship. They point to withdrawals totalling close to \$69,000 during the period from the latter half of 2015 to January 2018, many of them in cash and some of them substantial. During this period, Winston was hospitalized, then found incapable of managing his own affairs, and ultimately died.

[80] The respondents, on the other hand, say that Winston was not the sole contributor to these accounts, that they were authorized to make withdrawals, that he intended to gift the right of survivorship, and that the applicants' claims in this regard are, in any event, statute-barred.

[81] Once again, I am satisfied that the applicants have met the low bar necessary to make out an arguable case. The banking documents they rely on provide a basis upon which it could viably be argued that Winston was the sole contributor of funds to these accounts and that the funds were accordingly held on a resulting trust for his benefit. Selina and Lily's evidence to the contrary and as to Winston's alleged intentions that the funds be available for their use and that they be gifted the right of survivorship, again turns largely on credibility, a matter better left for trial.

[82] As for the limitations issue, the respondents say the claim is statute-barred because the Public Guardian and Trustee had access to Winston's banking records from March 2016 onward and was or ought to have been aware of the withdrawals. They also say that the applicants knew of these claims from December of 2018, when the Public Guardian and Trustee sent their counsel a letter confirming the accounts were joint accounts with the right of survivorship.

[83] However, I am not convinced that the respondents' limitation defence is bound to succeed: Chung at para. 65. While the Public Guardian and Trustee may have had access to the accounts, it is less clear that it was aware of the facts underlying the claim in resulting trust and consequent asserted losses: see e.g. Lennox v. Lennox, 2019 BCSC 938 at paras. 45-46. Likewise, on the record before me, there is a basis for the applicants to argue that they did not appreciate this claim until they received certain relevant records in 2020 or later.

[84] Because the limitations defence is not bound to succeed, the BMO Accounts claim remains arguable. Though, this claim is not nearly as sizeable as the East 10th Property and Medical School Funds claims, I am nevertheless persuaded that it meets the necessary or expedient standard. The sums involved, factoring in the withdrawals during the period Winston was incapacitated, are not insignificant and would meaningfully benefit the estate.

4) The Vehicles Claim

[85] I have reached a different conclusion regarding the applicants' claim to the vehicles. Those vehicles are a 1997 Honda Civic, a 1997 Nissan Altima, and a 1973 Plymouth Valiant. The applicants acknowledge that this claim is minor compared to their other claims but submit there is no additional inconvenience to it being advanced alongside the others. They have adduced very little in the way of evidence regarding these vehicles or their value, other than that they were registered to Winston at a certain point. Simply put, the evidence is so sparse that I am unable to conclude there is an arguable claim.

[86] Further, even if the claim was arguable, I would find that it is neither necessary nor expedient for the protection of the estate or the interests of a specified person. The benefit to the estate would be negligible at best and the benefit to intestate successors, given the number of them, is even less apparent. In the circumstances, the time and expense associated with advancing the claim, even if circumscribed, is disproportionate to any potential benefit.

CONCLUSION

[87] In light of all this, the applicants' application pursuant to s. 151 of WESA is granted, except with regard to the claim to the vehicles. Costs of this application will be in the cause of the proposed action and it will be for the judge hearing the action to assess whether the costs going forward should be borne by any of the parties or by the estate: Hoggan at para. 62.

"Bantourakis J."

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