

CANADA / JUDGMENT

Glendale v. Walker

2024 BCSC 1947

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Supreme Court of British Columbia

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2024 BCSC 1947 Glendale v. Walker

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Glendale v. Walker,

2024 BCSC 1947

Date: 20241023

Docket: S05092

Registry: Abbotsford

In the Matter of the Estate of Alan Peter Matewish, Deceased

Between:

Samara Valerie Glendale

Petitioner

And

Christopher Alan Walker, Executor of the Estate of Alan Peter Matewish, Deceased, and Dean Matewish

Respondents

Before: The Honourable Justice Shergill

Reasons for Judgment

Counsel for Petitioner, Samara Valerie Glendale:

M. Badwal

Counsel for Respondent, Dean Matewish:

TJ Garcha

J. Patrao

Counsel for Respondent, Christopher Alan Walker:

T.J. Mueller

Place and Dates of Hearing:

New Westminster, B.C.

April 3, 2024

June 26, 2024

September 27, 2024

Place and Date of Judgment:

Abbotsford, B.C.

October 23, 2024

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I. Overview

- [1] This Petition is for the appointment of an interim third-party administrator over the Estate of Alan Peter Matewish (the "Estate"), Deceased, pending litigation to challenge the validity of the Deceased's Will dated February 5, 2019. The Petition is brought under s. 103 of the Wills, Estates, and Succession Act, S.B.C. 2009, c. 13 [WESA] or alternatively, s. 132 of WESA.

- [2] The Petitioner - Ms. Glendale - asserts that she is a daughter of the Deceased. The Deceased had two other children - Dean Matewish and Christopher Walker. They are ostensibly half brothers to Ms. Glendale and are respondents to the Petition.
- [3] By the terms of his Will, the Deceased appointed Mr. Walker as the sole executor and beneficiary of his estate. The Will has not been probated, and no application has been made for proof in solemn form. The Matewish Estate is valued in excess of \$2.4 million. By way of a Notice of Dispute, Ms. Glendale indicates an intention to challenge the validity of the Will on the grounds that the Deceased did not have the necessary legal capacity to execute the Will, or the Will was made under undue influence of Mr. Walker.
- [4] Ms. Glendale argues that Mr. Walker cannot be neutral in the anticipated litigation to vary the Will and is thus in a disabling conflict of interest. Further, she submits that the Matewish Estate is at risk of diminishing in value or being dissipated if it falls under Mr. Walker's control. It is her contention that Mr. Walker has been using the Estate for his own personal benefit rather than preserving it. Consequently, she submits that the appropriate recourse is for this Court to appoint an interim administrator who is neutral and unrelated to the parties, pending litigation to determine the validity of the Will.
- [5] Dean Matewish supports the application; Christopher Walker opposes it. Mr. Walker submits that the requirements to bring an application under s. 103 or s. 132 of WESA have not been met. Consequently, the relief sought by Ms. Glendale cannot be granted. Alternatively, he submits that the Petitioner's case is based on speculation and there is no evidentiary basis to support that he is compromised in his ability to administer the estate to the best interests of all the claimants.
- [6] For the reasons that follow, I conclude that Marvin Lithwick should be appointed as an administrator pending litigation.

II. Issues

- [7] The following issues are raised by the parties:
- a) Is the Notice of Dispute a proceeding within the meaning of s. 103 of WESA?
 - b) If so, what is the appropriate test to permit an application under s. 103, and has that test been met?
 - c) Does s. 132 permit the Petitioner to bring this application where there is a valid Will?
 - d) What orders should be made?

III. Background

- [8] The following background facts are uncontroverted.
- [9] Alan Peter Matewish[1] was born in 1950.

- [10] Alan had two biological sons - Dean Matewish and Christopher Walker.
- [11] Samara Glendale asserts that she is also a biological child of the Deceased. Her parentage and biological relationship to Alan is disputed by Christopher. It is not possible for me to resolve this factual dispute on the material before me, nor is it necessary for this application. To the extent that I refer to Samara in these Reasons, I do so on the basis of her claim, and without any intention of making a finding of fact as to whether or not she is Alan's biological daughter.
- [12] In January 2019, Alan was admitted to Abbotsford Regional Hospital.
- [13] On February 5, 2019, the Deceased executed his Will naming Christopher as the personal representative and trustee, and sole beneficiary of his estate. Alan also granted an enduring power of attorney to Christopher at this time.
- [14] The Estate is valued in excess of \$2.4 million. The primary asset is a residential property in Mission, B.C. which has an approximate fair market value of \$2.2 million (the "Property"). The Deceased also owned approximately 20 vehicles in various conditions, and a bank account containing cash in excess of \$100,000.
- [15] The Deceased purchased the property around 2016. He lived in it until his death. Christopher lived at the Property for some periods of time prior to Alan's death.
- [16] Alan died in Mission on December 10, 2022, at the age of 72.
- [17] On January 18, 2023, Samara filed a Notice of Dispute challenging the validity of the Will on the grounds that Alan did not have the legal capacity to execute the Will, or that it was made under undue influence. The Notice of Dispute was renewed by consent on January 17, 2024, for eight months. Consequently, it was to expire on September 17, 2024.
- [18] The Petitioner filed this Petition on March 6, 2024. It seeks an order appointing Marvin Lithwick as an administrator pending litigation ("APL"). Mr. Lithwick is a lawyer who has previous experience acting as an APL. He is not connected to the Estate or the parties, and he is prepared to accept the appointment should the order be made.
- [19] On June 26, 2024, the parties appeared before me to finalize the terms of a consent order. Amongst other things, the Consent Order set out the process to be followed for a formal inspection of the Property. It also required that Christopher do certain things to preserve the assets of the Estate, such as:
- a) obtain insurance for the Property inclusive of all chattel and personal property;
 - b) protect all personal property of the deceased from damage;
 - c) stop using the Estate Account;
 - d) provide an accounting for the Estate Account;

- e) provide an accounting for all rents collected from rent of the Property; and
- f) not permit any illegal activity to occur on the Property.

[20] Pursuant to the Consent Order, the Notice of Dispute was renewed for an additional eight months. It now expires on May 17, 2024.

IV. Appointment of Administrator under Section 103

[21] Section 103 of WESA provides the court with discretionary authority to appoint an APL if the validity of the will is in issue:

Administration pending legal proceedings

103 (1) The court may appoint a person as the administrator of the estate of a deceased person pending a proceeding

- (a) in which the validity of the will of the deceased person is in issue, or
 - (b) to obtain or revoke a representation grant.
- (2) The administrator of an estate
- (a) has all the rights, powers and duties of a personal representative, other than the right to distribute the estate,
 - (b) is subject to the control of the court and must act under its direction, and
 - (c) is entitled to reasonable compensation under the Trustee Act or as otherwise determined by the court.

[22] The parties disagree about whether the APL order sought can and should be granted under s. 103.

A. Can the Petitioner Rely on S. 103?

[23] The first aspect of their dispute centers around the meaning of the word "proceeding". The Petitioner submits that the Notice of Dispute constitutes a "proceeding" within the meaning of s. 103. Consequently, this Court is empowered by virtue of s. 103 of WESA to appoint an administrator pending the determination of the dispute regarding the validity of the Will.

[24] In contrast, Christopher takes the position that the Notice of Dispute does not rise to the level of a proceeding. Rather, s. 103 requires the existence of an active probate proceeding or filing of an action in which the validity of the Will is in issue.

[25] The parties agree that there is no specific authority which holds that a notice of dispute can constitute a "proceeding" for the purposes of s. 103 of WESA.

[26] In *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, Justice Iacobucci discussed the appropriate approach to statutory interpretation. At para. 26, he quoted the following "definitive" formulation from Elmer Driedger's book, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[27] The purpose of appointing an APL is to ensure that the estate is managed and maintained to the benefit of all interested parties while the validity of the will is being challenged. In my view, the requirement that an action must be commenced in order to trigger an application under s. 103 is too narrow. It also goes against the intention of the legislature, particularly when one considers the meaning of the word "proceeding".

[28] A "proceeding" is not defined in WESA. However, this term is defined in Rule 1-1(1) of the Supreme Court Civil Rules [SCCR], as follows:

"proceeding" means an action, a petition proceeding and a requisition proceeding, and includes any other suit, cause, matter, stated case under Rule 18-2 or appeal;

[29] This definition, combined with the Estate provisions in Part 25 of the SCCR and the process established for filing a notice of dispute at the Registry, lead me to conclude that the legislature intended a notice of dispute to be treated as a "proceeding".

[30] Rule 25-2(2) requires that a person intending to apply for an estate grant give notice to various persons, including: a person whose right to make an application for an estate grant in relation to the deceased is prior to or equal to the intended applicant's right to make that application (see subrule 25-2(2)(a)(i)(B)); and a person who would have been an intestate successor if the deceased did not leave a will (see subrule 25-2(2)(a)(iii)(A)). Based on their claims of parentage, both Samara and Dean would fall into one or both of these categories.

[31] Rule 25-10(1) entitles a person to whom documents are to be delivered under Rule 25-2(2) (i.e. Samara and Dean), to oppose the issuance of an estate grant by filing a notice of dispute. Rule 25-10(3) requires that the notice of dispute contain certain information and be in proscribed form (i.e. Form P29). It is uncontroverted that the Notice of Dispute filed in this case meets the requirements of Rule 25-10(3).

[32] In addition to stipulating the information that must be contained in the notice of dispute, Rule 25-10 also sets out the procedure for amendment and renewal of the notice of dispute. By operation of Rule 25-10(12) a notice of dispute is good for one year after the date on which it was filed, subject to any renewal period that applies.

[33] The amendment procedure under Rule 25-10(5) and the renewal procedure under Rule 25-10(6), are similar to the procedures for a notice of civil claim.

- [34] As with a notice of civil claim, the notice of dispute expires after one year, and can only be renewed by court order.
- [35] Further, Rule 25-10(4) permits one "free" amendment without leave of the Court, after which leave must be sought. This is similar to Rule 6-1 of the SCCR which requires a court order or consent by the other party. Indeed, Rule 25-10(5) specifically incorporates the procedure for amendment of pleadings which is found at Rule 6-1 of the SCCR, as follows:

Amendment of notice of dispute

- (5) Rule 6-1 (2) and (3) applies to an amendment of a notice of dispute without leave of the court and, for that purpose, a reference in that rule to a pleading is deemed to be a reference to the notice of dispute.
- [36] It is important to note here that Rule 6-1 is found under Part 6 of the SCCR, which is entitled "Amendment of Pleadings and Change of Parties". Rule 6-1 itself is given the heading "Amendment of Pleadings". The fact that the legislature specifically referenced Rule 6-1 for amendment of pleadings when considering amendments to a notice of dispute supports a finding that the notice of dispute was intended to be treated as a proceeding.
- [37] I am also supported in this conclusion when I consider the predecessor legislation to WESA. WESA was enacted in 2009. It replaced the Estate Administration Act, R.S.B.C. 1996, c.122, [ESA].
- [38] Section 8 of ESA provided for the appointment of what was then known as an "administrator pendente lite":

Administration while legal proceedings pending

- 8 (1) Pending an action touching the validity of a will, or for obtaining, recalling or revoking a probate or a grant of administration, the court may appoint an administrator of the estate of the deceased person.
- (2) An administrator appointed under subsection (1)
- (a) has all the rights and powers of a general administrator, other than the right of distributing the estate, and
- (b) is subject to the control of the court, and must act under its direction.
- [39] In *Marshall Estate*, 2003 BCSC 751, Master Baker considered an application for appointment of an administrator under s. 8. He concluded that the language of s. 8 of ESA required the commencement of an action, as follows:

- [7] I am persuaded that Mr. Levis' proposal is the correct one. Simply put, the court cannot grant administration endent elite unless a proceeding to challenge or modify the will "is pending or has been commenced". "Pending" is variously defined as referring to something begun but not yet completed, or, in the litigation context, between the points of inception and final judgment. Either way, the action must have been started. No such action has been commenced in these proceedings, so endent elite proceedings do not apply.
- [40] Counsel for Christopher relies on Marshall Estate to argue that an action must be commenced in order to ground an application under s. 103. However, whereas s. 8 of ESA requires the existing of a pending "action", s. 103 of WESA refers to a pending "proceeding". In my view, this indicates a clear expression of intent by the legislature that the narrower requirement for an action be replaced with a broader construct of a "proceeding".
- [41] Although Master Baker appears to have used the word "proceeding" interchangeably with "action", those words in fact have different meanings. As indicated by Rule 1-1, which includes an "action" within the definition of "proceeding", a "proceeding" has broader connotations. While an action is a type of proceeding, a proceeding is not restricted only to an action.
- [42] Thus, while I accept that previous authorities which considered s. 8 of the ESA may have required that the APL could only be appointed after an action was commenced, the different wording in s. 103 makes them distinguishable from the facts of this case.
- [43] While the notice of dispute is not strictly an action or suit, it is a "cause" or "matter". This is further evidenced by how the document was treated when it was filed in the Abbotsford Registry. In addition to applying the Court seal to this document, the Registry filing officer gave the Notice of Dispute "Action No. V03376". This conduct is consistent with considering the Notice of Dispute a proceeding.
- [44] I agree with the Petitioner that the Notice of Dispute filed by her is a proceeding within the meaning of s. 103 of WESA and is therefore sufficient to trigger an application for an APL under s. 103.
- [45] I turn then to whether the other requirements of s. 103 are met.

B. Should an Order be Made Under s. 103?

- [46] Counsel for Christopher submits that the legal test for appointment under s. 103 should be expanded to "incorporate the considerations germane to an application to remove or 'pass over' of a named executor, which is a remedy available under s. 158 of WESA." [2] I find no legal basis or justification for doing so. In my view, the test as articulated in the below authorities is sufficient to address the concerns and considerations contemplated in s. 103.
- [47] The Petitioner relies on Perrotta (Re), 2023 BCSC 2262 at para. 4, for the proposition that the test to be applied when considering appointing an APL under s. 103, is "whether the appointment would be expeditious in the circumstances".

- [48] In considering "expediency" Justice Thomas was of the view that the proposed APL should be a neutral party. He explained this as follows:
- [7] In my view, when two parties are litigating over the right to an estate, it is both prudent and expeditious that the estate be managed by a neutral party. Though it is true that all the steps could be managed in the regular course of litigation, in my view, they would be more expeditiously managed by a neutral party. In addition, having a neutral party in charge of the estate would help eliminate the spectre of mistrust between the parties and further facilitate this matter moving forward expeditiously.
- [49] The requirement for neutrality was also emphasized by the court in *Estate of John Walter Novak (Re)*, 2018 BCSC 2154. At para. 10, Justice Macintosh held that the court should consider:
- a) Who is best able to be the APL?
 - b) Is that person adequately neutral toward the estate?
 - c) What are any related special circumstances?
- [50] Indeed, in *Weisstock v. Weisstock*, 2019 BCSC 517, Justice Milman noted that an executor may be prohibited from acting as an administrator due to a conflict of interest: at para. 43. Such conflict may arise if the executor has or may have a claim against the estate. Further, an appointment of an APL may be appropriate if the named executor cannot be neutral in the anticipated litigation: *Weisstock* at paras. 43 and 46.
- [51] In this case, Christopher is the sole named beneficiary of the estate. I find that he cannot be neutral toward the estate during litigation that will challenge the validity of the Will under which his gift was made. On this basis alone, I find that he is not able to act as an administrator due to a conflict of interest.
- [52] However, the events since the filing of the Notice of Dispute further affirm for me that Christopher is not suited for the role of APL. For example, there is evidence that Christopher has delayed in fulfilling the basic duties of an administrator, such as providing timely disclosure of the Deceased's medical records. These were not produced until approximately eight months after the request was made. Christopher also failed to provide an estate accounting until almost one year after the Notice of Dispute was filed. He also appears to have omitted estate assets from the draft affidavit of assets and liabilities, and failed to account for other assets. These delays or omissions are not adequately explained in his affidavits.
- [53] It was not until June 2024, that Christopher agreed to the Consent Order which permitted an inspection of the Property by the Petitioner and the attendance of an independent inspector. Even then, the issue of an appraisal of the Vehicles remained outstanding. It is notable that when the parties attended before me in September 2024 to conclude submissions on this hearing, Christopher had not taken any steps to have the vehicles voluntarily appraised. This

is particularly concerning since the Estate has approximately 20 vehicles, some of which may have significant value. I note also the evidence from Dean that when he drove by the Property in March 2024, the Deceased's camper, tractor and bobcat were missing.

Christopher denies disposing of any of the deceased assets "apart from two scrap cars", for which he says he received about \$1,800. In an affidavit, Christopher states that he is currently storing the proceeds from selling the cars at the Property. While that may be the case, the concern is that Christopher has taken it upon himself to dispose of Estate assets, without following the usual protocols that would give some confidence that he was acting in the best interests of the Estate.

- [54] I am also concerned that there has been significant police activity at the Property since Alan's death, and indication of illegal activity. A General Occurrence Report was tendered into evidence to show that the police attended at the Property with a search warrant in December 2023. The police seized 70 grams of suspected fentanyl at trafficking levels, and a stolen bicycle. The police report indicates that Christopher has "turned the residence into a quasi rooming house and stated he was unaware of the activities that [a tenant] was partaking in".
- [55] Christopher disputes that he is himself involved in any illegal activity, and argues that the police files are inadmissible as business records. I do not agree. I find that the police records are admissible under the business record exemption under s. 42 of the Evidence Act, R.S.B.C., c. 124 and Schwab Estate v. Warriner, 2023 BCSC 220 at paras. 215-216. I note that Christopher has not provided any affidavit to contradict the information contained in the police records, such as the fact of the police attendance and that they found the drugs and stolen bicycle
- [56] In the circumstances, I am satisfied that Christopher is in a conflict of interest, and otherwise unsuitable to be appointed as APL.
- [57] I am also satisfied that Marvin Lithwick is an appropriate choice for APL. Mr. Lithwick is well suited for this role. Mr. Lithwick is professionally qualified and has experience in this area. He does not have any personal connection to the Estate. He is also supported by a majority of the potential beneficiaries of the estate, as both Samara and Dean have agreed to his appointment.
- [58] Given the value of the estate and the concerns raised with respect to Christopher, I am satisfied that it is necessary and expedient to appoint Mr. Lithwick as interim administrator pending determination of the validity of the Will. He is best suited to preserve the assets during this time.

- [59] Although the Petitioner has sought Mr. Lithwick's appointment even beyond the conclusion of the litigation challenging the validity of the Will, I am not satisfied that such a broad order should be made. Section 103 only provides authority for this court to make the order for an APL during the life of the litigation. It does not contemplate that the appointment continue beyond resolution of the litigation.
- [60] If a party wishes to seek the continuation of Mr. Lithwick as administrator of the estate beyond the conclusion of the litigation, then they will need to bring a separate application once that litigation is resolved.

C. Should an Administrator be Appointed Under Section 132

- [61] Given my findings in relation to the application under s. 103, it is not necessary for me to address whether the Petitioner has also made out her case for an appointment under s. 132 of WESA.

V. Order Made

- [62] I therefore order as follows:

1. Marvin Lithwick be and is hereby appointed as the administrator pending litigation of the estate (the "Estate") which by law devolves to and vests in the personal representative of Alan Peter Matewish, (the "Deceased"), late of Mission, British Columbia, who died on December 10th, 2022, leaving a will dated February 5, 2019, pursuant to s. 103 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13.
2. For greater certainty, Marvin Lithwick (the "Administrator") shall continue to act as the administrator pending litigation as contemplated by this order until the proceeding contemplated by the Notice of Dispute dated January 18, 2023, and filed by Samara Glendale, is either judicially determined or settled by the parties.
3. All property and assets of the Deceased's Estate be vested in the Administrator from the date of this Order and the Administrator shall be entitled to immediate possession of the property and assets of the Estate.
4. The Administrator has all the rights, powers, and duties of a personal representative, other than the right to distribute the Deceased's estate. Without limiting the generality of the foregoing, the Administrator has the following rights and powers:
 - (a) to collect, realize and sell all assets of the Deceased's Estate of any kind whatsoever and transfer any such assets into the name of the Administrator as administrator of the Deceased's Estate including, without limitation, any real property of the Deceased's Estate;

- (b) to control all bank accounts, investments, and other financial assets, of the Deceased's Estate, including the right to cash in or withdraw funds, to transfer them into a separate account, to invest them as allowed by law, and to spend them on expenses of the Deceased's Estate;
 - (c) to obtain an appraisal of any assets of the Deceased's Estate;
 - (d) to sell any real property of the Deceased's Estate property of any kind whatsoever;
 - (e) to enter contracts on behalf of the Deceased's Estate, including without limitation for the purposes of insuring or renting any real property of the Deceased's Estate;
 - (f) to commence, continue, or defend legal proceedings on behalf of the Deceased's Estate;
 - (g) to engage the services of one or more agents, including any accountants, appraisers, counsel, and such other persons from time to time and on whatever basis to assist with the exercise of the Administrator's powers and duties as conferred by this order, and to pay the expenses incurred in the engagement of such persons from the Deceased's Estate and, without limiting the generality of the forgoing, the Administrator, or his firm, may be employed by the Deceased's Estate to act in their professional capacity;
 - (h) to receive and collect all monies and accounts now owed or hereafter owing to the Deceased's Estate;
 - (i) to pay, settle or compromise any indebtedness owing by the Deceased's Estate, including but not limited to final expenses, debts, income taxes, estate administration expenses and professional fees, and reimburse any amounts previously paid on behalf of the Deceased's Estate; and
 - (j) to prepare and file or cause to be prepared and filed any tax returns or tax filings required to be filed for the Deceased or the Deceased's Estate, and to pay any and all taxes, interest and penalties arising therefrom out of the assets of the Deceased's Estate as the Administrator deems advisable.
5. Upon filing at the Vancouver/New Westminster Land Title Office a certified copy of this Order, together with a letter from Kahn Zack Ehrlich Lithwick to the Registrar of Titles at such Land Title Office authorizing the registration of the Order in such Land Title Office, all the right, title and interest of Deceased's Estate, in the lands and premises located at 34072 Ferndale Avenue, Mission, BC, and more particularly described as:

PID: 005-371-074

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(the "Property")

shall be transferred to and vested indefeasibly in "Marvin Lithwick, as Administrator of the Estate of Alan Peter Matewish".

6. A direction is hereby made to the Registrar of Land Titles that, upon the filing at the Vancouver/New Westminster Land Title Office of a certified copy of this Order, together with a letter from Kahn Zack Ehrlich Lithwick to the Registrar of Titles at such Land Title Office, authorizing the registration of the Order in such Land Title Office to register indefeasible title to the Property in the name of "Marvin Lithwick, as Administrator of the Estate of Alan Peter Matewish".
7. The Administrator be and is hereby authorized to demand and obtain information relating to the Deceased's Estate from any third party, including information regarding the nature and value of any assets of the Deceased's Estate.
8. Christopher Alan Walker shall deliver to the Administrator:
 - (a) all assets comprising the Deceased's Estate, and any records, and documents relating to the Deceased's Estate and its administration; and
 - (b) a sworn statement of account affidavit in Form P40 for the period of his administration, within 30 days of the date of this order.
9. The Administrator shall receive out of the assets of the Deceased's Estate the compensation calculated on the basis of a fee schedule as agreed to by the parties or further Court order. Such compensation shall be payable on a monthly basis or such other frequency as the Administrator considers reasonable without further consent or approval by the Court or any other person, but subject to the Administrator's passing of its accounts or approval of same by the beneficiaries of the Deceased's Estate, from the beginning of the administration of the Deceased's Estate by the Administrator.
10. The Administrator shall be at liberty to apply to the court for advice and directions as the Administrator may deem necessary.

[63] I turn now to the question of costs.

VI. Costs

- [64] The Petitioner seeks an award of special costs to be paid by Christopher personally. Alternatively, the Petitioner asks that her special costs be paid for out of the Estate. She relies on *Levi-Bandel v. McKeen*, 2011 BCSC 247. However, this decision is distinguishable as those costs were awarded to an executor for taking on the "onerous and sometimes dangerous duty" of being a trustee: see para. 33.
- [65] The petitioner also cites *Palmar Properties Inc. v. JEL Investments Ltd.*, 2013 BCSC 1060 at para. 27 of the Legal Basis section of the Petition. I do not believe this case is applicable either. In *Palmar*, Justice Brown rejected the defendant's characterization of the matter as "a dispute between two businessmen" and found, instead, that the case was a "classic breach of trust or fiduciary duty case": at paras. 7-8. She went on to find that breach of fiduciary duty amounted to "reprehensible conduct" and award special costs: at para. 8.

- [66] I do not find any basis for awarding special costs against Christopher personally. There is insufficient evidence of conduct on the part of Christopher that would warrant making such an award. In particular, I am unable to find that Christopher's conduct rises to the level of being reprehensible.
- [67] Regarding ordinary costs, there is some authority that suggests that, under the "modern approach," Samara may be entitled to costs from Christopher personally, rather than the estate. However, the authorities are divided on this issue.
- [68] Justice Kirchner stated in *Jury v. Rogodzinski*, 2021 BCSC 2441 at para. 84: "With regard to how costs should be awarded in this case, the traditional approach is that costs of all parties in an estate dispute were born by the estate itself on a full indemnity basis, but that has evolved into a "modern approach" where costs may follow the event depending on the circumstances: *Singh Estate (Re)*, 2019 BCSC 1114 at paras. 11-17; *Jung v. HSBC Trust Company (Canada)*, 2007 BCSC 1740 at para. 106."
- [69] This modern trend and how it applies to different types of estates cases is discussed in more depth in *Mawdsley v. Meshen*, 2011 BCSC 923 at paras. 34-40 (aff'd 2012 BCCA 91)[3]. The Court noted the following:
- a) The usual rule is that costs follow the event, but some types of estate litigation deviate from the rule.
 - b) Factors to consider when deciding not to apply the usual rule are whether a party is an executor or a trustee, and the nature of the failed allegations.
 - c) It used to be that, in some probate actions, the court would have the estate pay the costs of all parties. The logic underlying this is that the parties should not have to pay for litigation caused by the testator's conduct/lack of clarity.
 - d) However, recent authorities have expressed doubt about having the estate pay costs when there is an accusation that the testator lacked capacity. An action over the validity of a will is often now characterized as an adversarial dispute among the affected parties, as opposed to litigation in some way encouraged by or springing from the testator's conduct. Consequently, the modern approach has been to follow the usual rule that the costs of the parties follow the event: at para. 36
- [70] While this approach suggests costs should not come out of the estate, other decisions under s. 103 have ordered just that. See for example: *Ching Estate (Re)*, 2016 BCSC 1111, and *Stoker v. Young*, 2024 BCSC 637.
- [71] I view this litigation as an adversarial dispute among the affected parties, and as such, awarding costs out of the Estate is not warranted.

[72] With respect to the award of costs, it may be that the Petitioner is ultimately able to establish that the Deceased lacked testamentary capacity or was under undue influence from Mr. Walker. However, this litigation is at its very early stages, and it is far from given that the Petitioner will succeed on this front.

[73] As such, I find it appropriate to award costs of this Petition to Samara Glendale, payable by Christopher Walker, in the cause.

"Shergill J."

[1] As some of the parties share the same last name, to avoid confusion, I will refer to all the parties by their first names. No disrespect is intended.

[2] Response to Amended Petition of Christopher Walker at para. 39, Legal Basis.

[3] Appealed on other grounds.

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