

CANADA / JUDGMENT

Hoggan v. Silvey

2022 BCCA 176

COURT

British Columbia Court of Appeal

DECIDED

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2022 BCCA 176 Hoggan v. Silvey

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Hoggan v. Silvey,

2022 BCCA 176

Date: 20220524

Docket: CA47533

Between:

Louise Elizabeth Hoggan and Lynda Ann Spowart

Appellants

(Petitioners)

And

Ray William Silvey and Lorna Marie Silvey

Respondents

(Respondents)

Corrected Judgment: The text of the judgment was corrected at paragraphs 3, 13, 19 and 62 on November 21, 2024.

Before:

The Honourable Madam Justice Bennett

The Honourable Mr. Justice Goepel

The Honourable Mr. Justice Grauer

On appeal from: An order of the Supreme Court of British Columbia, dated

May 20, 2021 (Hoggan v. Silvey, 2021 BCSC 971, Terrace Docket 21020).

Counsel for the Appellants:

G.L. Crampton

Counsel for the Respondents

(via videoconference):

S.H. Grant

Place and Date of Hearing:

Vancouver, British Columbia

April 4, 2022

Place and Date of Judgment:

Vancouver, British Columbia

May 24, 2022

Written Reasons by:

The Honourable Madam Justice Bennett

Concurred in by:

The Honourable Mr. Justice Goepel

The Honourable Mr. Justice Grauer

Summary:

Appeal from a chambers judge's refusal to remove an executor of an estate and denial of leave to bring an action. Held: Appeal allowed in part, leave granted to bring action. The appellants are daughters (and beneficiaries) of the deceased, and seek to bring an action against their sister (the third beneficiary) and brother-in-law (the estate administrator). Cheques for substantial amounts had been made from the deceased to the respondents prior to the deceased's death when the respondents had some control over the deceased's finances. The judge erred in finding that there was no arguable case. The application for leave under section 151(3) of the Wills, Estates and Succession Act does not always require that the proposed action be in the best interests of the estate. Leave may also be granted if the action is necessary or expedient to protect the interests of a specified person, as the language in section 151(3)(b) is disjunctive.

Reasons for Judgment of the Honourable Madam Justice Bennett:

- [1] In her will, Marjory Hoggan divided her estate equally among her three daughters, Lorna Silvey, Louise Hoggan and Lynda Spowart. The daughters are the parties to this litigation relating to their mother's estate (the "Estate"). Marjory Hoggan left the administration of the Estate to her son-in-law, Ray Silvey, who is the fourth party to the litigation.
- [2] I will use the parties' first names to avoid confusion, and intend no disrespect. The appellants, Louise and Lynda, applied to remove Ray as the executor of the Estate, and they sought leave to commence an action against Ray and Lorna. The chambers judge refused both orders in reasons indexed at 2021 BCSC 971. The appeal is from that order.
- [3] I would allow the appeal to the extent that I would permit Louise and Lynda to commence an action against the Silveys. I would not remove Ray as executor at this stage in the proceedings.

Background

- [4] As mentioned, Louise, Lynda, and Lorna are sisters. Ray, the executor of the Estate, is Lorna's husband. The sisters' father, Alexander, passed away in 2009 and their mother, Marjory, passed away in 2018, leaving an Estate comprising approximately \$367,000, which includes the sale proceeds from the family home and \$60,000 said to have been invested on behalf of Marjory by Ray. Pursuant to a consent order, those funds are currently held in trust, and Ray will take no further steps relating to the Estate until this petition is resolved by court order or agreement of the parties.
- [5] Marjory appointed Ray as executor and Lorna as alternate executor. Her will provides that the Estate be distributed in equal shares among Lorna, Louise and Lynda.
- [6] Louise and Lynda alleged serious wrongdoing by Ray and Lorna in their management of the Estate, including misappropriation of funds both before and after Marjory's death. They sought an order removing Ray as executor and appointing Louise in his place, or leave to commence proceedings for a variety of relief. They also took issue with Ray's petition for 5% of the gross value of the Estate as his remuneration pursuant to the Trustee Act, R.S.B.C. 1996, c. 464.
- [7] The nature of the action is set out in para. 1 of the chambers judge's reasons:

The petitioners, Louise Hoggan and Lynda Spowart, seek an order removing the respondent, Ray Silvey, as executor of the will and estate of Marjory Hoggan ("the Estate"), deceased, and appointing Louise Hoggan in his place. Alternatively, the petitioners seek an order granting them leave, as beneficiaries of the Estate, to commence proceedings against the respondents for an accounting of monies had and received, a tracing order, recovery of the personal property and funds transferred or paid to them and their sons, a declaration of resulting trust relating to the personal property and funds in favour of the Estate, damages for conversion, and other relief as may be disclosed through discovery and disclosure, pursuant to s. 151 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 (WESA).

- [8] The sisters grew up in Cumberland on Vancouver Island. Louise and Lynda had moved away from Vancouver Island in 1970, while Lorna continued to live near her parents and continued to see them throughout their lifetime on a nearly daily basis.
- [9] Louise and Lynda allege that in the early 2000s, their parents' health began to deteriorate. Their father lived with progressive dementia. Their mother experienced a heart attack and fainting spells, hitting her head at least once as a result.
- [10] In 2005, Marjory and her husband appointed Lorna as their power of attorney. Shortly after her husband's death in 2009, Marjory added Lorna as a joint account holder on her bank account.
- [11] In 2008, Marjory and her husband transferred a travel trailer to Lorna and Ray, and a boat to Lorna and Ray's son. A \$30,000 cheque was made out from Marjory to Ray, which the Silveys say was part of a \$60,000 transfer in trust for them to invest on behalf of Marjory and her husband. Louise and Lynda say that no records have been produced of either for the \$60,000 transfer or any investment of those funds. Louise and Lynda also identified two cheques prepared by Lorna from Marjory's account to herself, prior to her being made a joint account holder.
- [12] In 2010, the family home in which Marjory lived was transferred to herself and the Silveys as joint tenants, with Marjory retaining the beneficial interest.
- [13] Over the next several years until Marjory's death, various cheques were made out to Lorna by herself from her and Marjory's joint account. The parties disagree whether these cheques were gifts from Marjory, but they agree that the following cheques were made:
- January 3, 2009: \$30,000 to Ray (allegedly in trust for him to invest)
 - April 14, 2009: \$1,000 to Lorna
 - August 17, 2009: \$2,000 to Lorna
 - January 29, 2010: \$10,000 to Ray (allegedly in recognition of his help in respect of Alexander's estate)
 - January 22, 2011: \$25,000 to Lorna
 - February 8, 2012: \$15,000 to Lorna
 - January 22, 2015: \$15,000 to Lorna
 - February 9, 2016: \$15,000 to Lorna
 - August 17, 2016: \$15,000 to Lorna
 - July 13, 2018: \$20,000 to Lorna
 - December 7, 2018: \$5,000 to Lorna

- [14] In other words, the parties agree that at least \$153,000 was transferred from Marjory to the Silveys. As mentioned, the Silveys say that there was an additional \$30,000 transferred in trust for them to invest on behalf of Marjory and Alexander. Meanwhile, Louise and Lynda say that there was a cheque in the amount of \$18,000 to Lorna, dated November 29, 2012, which was not produced or accounted for, despite Lorna being a joint account holder by this point. They also say Lorna withdrew \$2,200 in cash from the account on January 4, 2019, shortly after Marjory's death.
- [15] Following Marjory's death, the Silveys sold the family home for \$325,000 in 2019. From 2020 to 2021, Louise and Lynda unsuccessfully sought an accounting of the Estate's funds and property from Ray, and for Ray to commence proceedings against himself and Lorna. On February 2, 2021, Ray commenced a petition for the passing of estate accounts and seeking the maximum remuneration under the Trustee Act.

Chambers Judge's reasons

Removal as executor

- [16] The judge set out her statutory authority to remove a trustee and appoint a replacement under both the Trustee Act and the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA]: para. 14. She noted that this was a discretionary decision based on the principles set out in *Parker v. Thompson (Trustee)*, 2014 BCSC 1916, and *Burke v. Burke*, 2019 BCSC 383.
- [17] She reviewed the evidence, finding that there was no undue influence. Rather, she concluded that Ray and Lorna had a close relationship with Marjory and her husband. The Silveys' children spent significant amounts of time with Marjory; the Silveys helped with errands; and Lorna was made Marjory's power of attorney and added as a joint bank account holder.
- [18] The judge found that Marjory had a close and trusting relationship with both Ray and Lorna:
- [17] It is clear from the evidence that Lorna and Ray enjoyed a close relationship with Marjory and Alexander. Lorna and Ray and their children saw Marjory and Alexander five to six times per week. They helped them with whatever they needed help with, including but not limited to taking them to appointments and to run errands, building a shed, performing maintenance around their house and yard, and rebuilding a porch. They included them in their childrens' [sic] activities. In 2005, Marjory and Alexander made Lorna their power of attorney and in 2010, following Alexander's death, Marjory added Lorna as joint account holder on her bank account so she could assist if required. In contrast, both of the petitioners moved away from Vancouver Island sometime in 1970. While they visited their parents, they were not involved in their parents' lives to the extent of Lorna and Ray and their children. On the material before me I see no evidence that Ray or Lorna exerted undue influence on Marjory to take advantage of her financially, as alleged by the petitioners.

- [19] In contrast, Louise and Lynda had moved away decades earlier. The judge declined to remove Ray as executor given Marjory's close and trusting relationship with him, her wish that he be executor, the fact that the Estate funds were held in trust, and the fact that the allegations of mismanagement prior to Marjory's death were made against Lorna, not Ray.

Leave to commence proceedings

- [20] The judge then turned to the alternative argument: that leave should be granted under s. 151 of WESA for Louise and Lynda to commence proceedings against Ray and Lorna. The judge set out the applicable law, before turning to the parties' arguments.
- [21] Turning to the factors set out in s. 151(3) of WESA, the judge found that the criteria of making reasonable efforts to cause Ray to commence proceedings and giving notice of the application were met: para. 28. She also found that the application was brought in good faith, as Louise and Lynda had a genuine belief that the Estate was being mismanaged, based on Lynda's affidavit evidence: para. 31.
- [22] However, the application for leave failed at s. 151(3)(b) of WESA, which required that the proceedings be necessary or expedient for the protection of the estate. Relying on *Bunn v. Bunn Estate*, 2016 BCSC 2146, the judge held that three elements had to be satisfied: (1) that there was an arguable case; (2) that the potential relief outweighed the inconvenience caused to the estate; and (3) that the proceeding was in the best interests of the estate.
- [23] The judge found that the application failed at the first stage, concluding that there was no arguable case, but she nonetheless went on to consider the second and third stages. At the first stage, the judge held that there was no evidence of undue influence; rather, there were only "mere allegations and suspicion": para. 33. In contrast, the Silveys had adduced evidence in response. On what the judge characterized as a limited weighing of the evidence, she found there was no arguable case: paras. 34-35. At the second stage, the judge noted the limited value of the Estate, especially after lawyers' fees if the litigation were to proceed, and the cost and delay that would be incurred: paras. 36-39. Finally, she concluded that given the substantial cost of the litigation and the weak *prima facie* case, it would not be in the Estate's best interests to grant leave to commence proceedings: para. 40.

The Issues

- [24] Louise and Lynda allege the following errors:
1. The chambers judge erred in refusing to remove Ray as executor when he had a conflict of interest;
 2. The decision in *Bunn*, relied on by the chambers judge was wrongly decided. Section 151 of WESA should be given a fair, large and liberal interpretation, as it is, in part, aimed at preventing elder financial abuse. Louise and Lynda seek to adduce fresh evidence to support their argument that the decision in *Bunn* was wrongly decided; and

3. If Bunn was correctly decided, the chambers judge failed to correctly apply Bunn.

Discussion

The legislative framework

[25] The Court has the statutory authority to remove and replace an executor pursuant to both WESA and the Trustee Act. Sections 158 and 159 of WESA provide:

158(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, or
- (4) An order of the court removing a personal representative does not remove that person as a trustee.

159(1) If the court discharges or removes a personal representative, the court

- (a) must appoint another person who consents to act as the substitute personal representative, unless
 - (i) the administration of the estate is complete, or
 - (ii) the court does not consider a new appointment necessary, and
- (b) may, if the personal representative has resigned or is removed as a trustee, concurrently appoint the person referred to in paragraph (a) as trustee under the Trustee Act in place of the trustee being discharged or removed.

- (2) The court may require a substitute personal representative under subsection (1) to provide security if security is required by the Supreme Court Civil Rules.
 - (3) A substitute personal representative appointed under subsection (1)
 - (a) has the same authority that the former personal representative had in respect of the estate,
 - (b) must perform the same duties and is subject to the same obligations as were imposed by law on the former personal representative, and
 - (c) on application without notice, is entitled to receive a grant of probate or administration, as the case may be, without the return of the previous grant if the court is satisfied that the return of the previous grant would be impossible or impractical.
 - (4) A grant of probate or administration to a former personal representative is revoked on the appointment of a substitute personal representative.
- [26] The removal of a person as a personal representative does not remove them as a trustee: WESA, s. 158(4). The court's power to also remove a person as trustee is set out in ss. 30-32 of the Trustee Act:

30 A trustee or receiver appointed by any court may be removed and a trustee, trustees or receiver substituted in place of him or her, at any time on application to the court by any trust beneficiary who is not under legal disability, with the consent and approval of a majority in interest and number of the trust beneficiaries who are also not under legal disability.

31 If it is expedient to appoint a new trustee and it is found inexpedient, difficult or impracticable to do so without the assistance of the court, it is lawful for the court to make an order appointing a new trustee or trustees, whether there is an existing trustee or not at the time of making the order, and either in substitution for or in addition to any existing trustees.

32 The persons who, on the making of an order under section 31, are trustees have the same rights and powers as they would have had if appointed by a decree or judgment in a proceeding.

[27] If the executor will not commence proceedings on behalf of the estate, a "specified person", with leave of the court, may apply under WESA to commence proceedings on the basis set out below:

151(0.1) In this section, "specified person" means a beneficiary, an intestate successor or a person who may commence a proceeding claiming the benefit of Division 6 [Variation of Wills] of Part 4 [Wills].

- (1) Despite section 136 [effect of representation grant], a specified person may, with leave of the court, commence proceedings in the name of the specified person and on behalf of the estate of the deceased person
 - (a) to recover property or to enforce a right, duty or obligation owed to the deceased person that could be recovered or enforced by the personal representative, or

(b) to obtain damages for breach of a right, duty or obligation owed to the deceased person.

(1.1) A specified person may apply for leave of the court under subsection (1) in the proceedings described in that subsection.

(2) Despite section 136, a specified person may, with leave of the court, defend in the name of the specified person and on behalf of the estate of a deceased person, a proceeding brought against the deceased person or the personal representative.

(2.1) A specified person may apply for leave of the court under subsection (2) in the proceeding described in that subsection.

(3) The court may grant leave under this section if

(a) the court determines the specified person seeking leave

(i) has made reasonable efforts to cause the personal representative to commence or defend the proceeding,

(ii) has given notice of the application for leave to

(A) the personal representative,

(B) any other specified persons, and

(C) any additional person the court directs that notice is to be given, and

(iii) is acting in good faith, and

(b) it appears to the court that 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.

(4) On application by a specified person or a personal representative, the court may authorize a person to control the conduct of a proceeding under this section or may give other directions for the conduct of the proceeding.

Removal of Ray as executor

[28] The chambers judge concluded that there was no need to remove Ray as the executor of the Estate. She noted, at para. 18, that the Estate had been liquidated and the funds are currently held in trust by Ray's counsel. Pursuant to the consent order, Ray has agreed to take no further steps regarding the Estate, and all that remains to be done is the passing of the accounts. Any concern's over Ray's remuneration and/or his conduct as executor can be fully canvassed on the passing of accounts.

[29] In my view, given the circumstances, the chambers judge did not err in the exercise of her discretion not to remove Ray at this juncture.

The correctness of the decision in Bunn

- [30] The chambers judge applied the test set out in Bunn when she considered whether to allow Louise and Lynda to commence proceedings pursuant to s. 151 of WESA. This is the first time that s. 151 has been considered by this Court.
- [31] Louise and Lynda submit that s. 151 should be given a broad interpretation, and they argue that the section is aimed at addressing the serious issue of elder abuse.

Fresh evidence

- [32] Louise and Lynda filed an application to adduce fresh evidence. Their motion for fresh evidence is in relation to their argument that Bunn was wrongly decided. The four exhibits in support of the motion for fresh evidence are all articles on elder financial abuse.
- [33] First, there is a short article published in 2019 by the Chartered Professional Accountants of Canada. This article states that elder financial abuse is a significant but under-reported problem, with two-thirds of abuse being committed by family or loved ones. The next exhibit is "The Invisible Crime: A Report on Seniors Financial Abuse", published by Vancity Bank. As with the first article, this one says that elder financial abuse is a growing and underestimated concern, with 41% of survey respondents experiencing at least one scenario constituting financial abuse. The third article is "Financial Abuse of Seniors: An Overview of Key Legal Issues and Concepts", published in 2013 by the Canadian Center for Elder Law. As with the other exhibits, this article sets out a list of common ways that financial abuse occurs, such as through involuntary monetary gifts, misuse of credit cards or bank cards, and forcing seniors to sign documents they do not understand. It explains that abuse of older people is not monolithic, that financial abuse often occurs in conjunction with other forms of elder abuse, and that there are familial and social dynamics that make intervention difficult. The final exhibit is a brief overview from the World Health Organization, which frames elder abuse as a public health problem. It estimates that one in six people over the age of 60 experience some form of abuse and it summarizes the consequences of abuse, including physical injuries, premature mortality, and depression, among others.
- [34] There is no doubt that elder abuse exists, including financial abuse. Louise and Lynda submitted that the existence of elder financial abuse is one of the main rationales behind the creation of s. 151. In my view, that argument is not supported in either the legislation or in any of the documents or debates that led up to the introduction of WESA. Accordingly, the evidence does not have sufficient relevance to be admitted: *Palmer v. The Queen*, [1980] 1 S.C.R. 759 at 775.
- [35] Elder abuse is a serious problem, and one that a court may find relevant when interpreting or applying sections of WESA. However, the proposed evidence does not assist the Court in giving particular meaning to the provision, and the evidence is thereby inadmissible.

The decision in Bunn

[36] In Bunn, which was the first case in the Supreme Court that considered s. 151 in any depth, the judge was faced with a complex factual matrix. The petitioner was the daughter of the deceased, seeking to bring an action against her brother. The petition was opposed by her cousin (the executor) and her brother, while her sister took no position. The litigation included an action against a company controlled by the petitioner's brother, challenging share transfers by the deceased, the disposal of property in the United States, as well as transfers made by the deceased prior to her death.

[37] In Bunn, the court relied on the symmetry between a claim on behalf of an estate under the WESA and a derivative action in the Business Corporations Act, S.B.C. 2002, c. 57 [BCA]. At para. 42, the judge emphasized portions of the BCA as follows:

Derivative actions

232. (1) In this section and section 233,

"complainant" means, in relation to a company, a shareholder or director of the company;

"shareholder" has the same meaning as in section 1 (1) and includes a beneficial owner of a share of the company and any other person whom the court considers to be an appropriate person to make an application under this section.

- (2) A complainant may, with leave of the court, prosecute a legal proceeding in the name and on behalf of a company
 - (a) to enforce a right, duty or obligation owed to the company that could be enforced by the company itself, or
 - (b) to obtain damages for any breach of a right, duty or obligation referred to in paragraph (a) of this subsection.

Powers of court in relation to derivative actions

233. (1) The court may grant leave under section 232 (2) or (4), on terms it considers appropriate, if

- (a) the complainant has made reasonable efforts to cause the directors of the company to prosecute or defend the legal proceeding,
- (b) notice of the application for leave has been given to the company and to any other person the court may order,
- (c) the complainant is acting in good faith, and
- (d) it appears to the court that it is in the best interests of the company for the legal proceeding to be prosecuted or defended.

- [38] The judge in *Bunn* considered the test in *Primex Investments Ltd. v. Northwest Sports Enterprises Ltd.* (1995), 13 B.C.L.R. (3d) 300, aff'd (1996), 26 B.C.L.R. (3d) 357 (C.A.):
- [43] The leading authority on the test for whether or not it is in the best interests of a company to allow a case to proceed on its behalf is *Primex* [citations omitted]. That case considered previous legislation, being the *Company Act*, R.S.B.C. 1979, c. 59 (since repealed) [*Company Act*] at s. 225(3)
- [44] In *Primex*, Mr. Justice Tysoe, then of this Court, explained that the test to be met is the "arguable case" test, and that the potential relief must be sufficient to justify the inconvenience to the company of being involved in the action. He wrote as follows:
- [41] the Court should not attempt to try the case when deciding whether the requirement in s. 225(3)(c) has been satisfied. The Court should determine whether the proposed action has a reasonable prospect of success or is bound to fail. If it is asserted that the proposed defendants in the derivative action have a defence to the claim, the Court must decide whether such a defence is bound to be accepted by a trial judge following the completion of the trial of the derivative action. It is not necessary for the applicant to show that the action will be more likely to succeed than not. As noted in the *Dickerson Report*, the Court should also be satisfied that the potential relief in the proposed action is sufficient to justify the inconvenience to the company of being involved in the action.
- [45] The wording of the section has changed since Tysoe J. enunciated the interests of the company test in *Primex* at para. 41. Section 225(3)(c) of the *Company Act* required that it be "... prima facie in the interests of the company that the action be brought ...". Now, s. 233(1) (d) of the *BCA* requires that "it appears to the court that it is in the best interests of the company for the legal proceeding to be prosecuted ...".
- [46] Even though the statutory test has changed from a consideration of whether the proposed action is prima facie in the interests of the company to a consideration of whether it is in the company's best interests, the discussion in *Primex* continues to be of assistance. See *Carr v. Cheng*, 2005 BCSC 445 at paras. 20-21.
- [39] She then applied that test, which assesses whether it is in the best interests of the company to bring a derivative action, to the question here of whether it is in the best interests of the estate to permit someone other than the executor to bring an action. She concluded:
- [48] Both s. 151 of *WESA* and s. 233 of *BCA* give the court discretion as to whether to make the order sought by using the words that the court "may" grant leave.
- [49] As set out in *Primex*, an applicant for derivative leave must establish not only an arguable case, but also that the potential relief in the proposed action is sufficient to justify the inconvenience to the company of being involved in the action.

- [50] In my view, a proceeding may be "necessary" under s. 151 of WESA if the personal representative is unwilling or unable to proceed. It may be "expedient" if it is in the best interests of the estate.
- [51] In this case, the applicant is a beneficiary of the Estate and seeks the order under s. 151 of WESA on the basis that the claim, if successful, will increase the value of the Estate. In such a case, in my view, to satisfy the court that it should exercise its discretion to grant leave to commence litigation on behalf of the estate, the applicant must show not only that there is an arguable case, but also that the potential relief in the action is sufficient to justify the inconvenience to the estate of being involved in the action, and that proceeding is overall in the best interests of the estate. In my view, that must involve a consideration of the costs of proceeding, including the potential of a costs award against the estate if it fails. Further, in my view, in determining whether the proposed lawsuit appears to be in the best interests of the estate, the court can consider the strength of the proposed claim based on a limited weighing of the evidence.
- [52] I reject the argument made by the Proposed Defendants to the effect that the court should show deference to the views of the executor, and grant leave only if the executor is in a conflict of interest. The views of the executor and the basis of those views are simply a factor for consideration.
- [40] There are indeed similarities between a derivative action and s. 151 of WESA. However, there are also differences. In a derivative action, the company is usually an ongoing entity, so it needs to continue and not be immobilized or even hamstrung by litigation that is not in its best interests. An estate is generally not in a comparable situation.
- [41] The factors in Bunn, as applied by the chambers judge here are:
- [32] Turning now to the second sub-issue, in order to satisfy the court that it should exercise its discretion to grant leave to commence proceedings on behalf of the Estate, the petitioners must show that:
- 1) there is an arguable case;
 - 2) the potential relief outweighs the inconvenience caused to the estate by the litigation; and
 - 3) the proceeding is in the best interests of the estate, which requires a consideration of the costs of the proceeding and may include a consideration of the strength of the proposed claim based on a limited weighing of the evidence.

Bunn at paras. 50-51.

[42] There is no quarrel over the question of whether a petitioner applying under s. 151 of WESA has to establish an arguable case in order to obtain leave. That factor is present in most, if not all, leave applications. While it is sometimes worded differently, such as "has a reasonable prospect of success" or "not bound to fail", the test itself does not have a high threshold.

[43] However, in my view, neither of the other two factors cited in Bunn, and relied on by the judge here, are necessarily required factors when considering whether leave should be granted pursuant to s. 151.

[44] Section 151(3)(a) permits the court to grant leave if the person seeking leave has made reasonable efforts to cause the personal representative to commence or defend the proceeding, given notice of the application for leave to specified persons, and is acting in good faith. In addition, s. 151(3)(b) requires that:

it appears to the court that 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.

[45] The disjunctive "or" is used, which means that the factors are separate, not cumulative. (See Bunn at para. 40).

[46] The words of s. 151(3)(b) WESA should, in my view, be read as follows:

(b) it appears to the court that it is necessary or expedient for the protection of the estate

or

that it is necessary or expedient for the protection of the interests of a specified person for the proceeding to be brought or defended.

[47] Read in that manner, the best interests of the estate may be considered, but that is not necessarily a factor when the interests of a specified person are raised. As noted, the Bunn decision was based on a complex factual matrix. The considerations applied in the context of that case are not necessarily incorrect, but they are not mandatory factors that must be met in every case. See, for example, the reasoning in *Young v. Veselic*, 2021 BCSC 1106 at paras. 82-84.

The judge's application of the Bunn decision

[48] In my view, the chambers judge erred in several ways in her application of the relevant factors.

[49] First, Louise and Lynda submit that the judge erred in failing to find that they had an arguable case. They say the judge erred in failing to consider the evidence that was properly submitted, that she failed to consider the bank records that showed substantial withdrawals from Marjory's accounts, and that she erred in weighing the evidence.

- [50] In my view, the judge erred when she concluded that there was no arguable case. She reasoned:
- [33] The petitioners have not put forth any evidence to prove that Lorna or Ray exerted undue influence on Marjory. Louise did not swear an affidavit; her information was given on information and belief in Lynda's affidavit. Lynda's affidavit merely references paragraphs in the petition and says that they are true. The petitioners base their case on mere allegations and suspicion. They have not provided any evidence showing that Ray and Lorna exerted undue influence on Marjory.
- [34] The respondents deny Lynda's allegations of ill will and malicious intent and have introduced the following evidence in response:
- 1) Lorna and Ray had a close relationship with Alexander and Marjory;
 - 2) The relationship between the petitioners and Lorna and Ray is strained and has been for a considerable time;
 - 3) Lorna states that she only signed cheques on her mother's instructions;
 - 4) Marjory was competent and capable of managing her affairs up until the time of her death;
 - 5) Marjory gifted Lorna money from time to time. Lorna denies ever exerting pressure on her to do so. Lorna states that while Marjory would tell her that she did not want to give money to the petitioners because of their substance abuse issues, she did give them money. In support of that statement, Lorna appended to her affidavit copies of cheques written by Marjory to the petitioners;
 - 6) Lorna attests that the property in the Estate was distributed as per Marjory's wishes and that the petitioners received items from Marjory's house. The petitioners and Lorna discussed the division of personal property with all beneficiaries being given the opportunity to identify what they wanted;
 - 7) One of Ray and Lorna's sons attests that he cleaned and cleared junk from Marjory's house to prepare it for sale. He was paid \$40 per hour. He further attests that his grandfather, Alexander, gave him his boat over a decade ago and that the petitioners would have seen it in his backyard;
 - 8) Alexander gifted the trailer to Ray, as evidenced by a gift letter signed by Alexander and Marjory in 2008; and
 - 9) Alexander gave Ray a total of \$60,000 with the instruction that Ray distribute it equally between the daughters after his death. Ray has included the \$60,000 in the Estate.

- [35] On a limited weighing of the evidence I am not persuaded that the petitioners have established that they have an arguable case with respect to any of the transactions in issue. That ends the analysis, however in case I am wrong, I will continue to consider the remaining factors.
- [51] The judge came to this conclusion as a result of what she referred to as a "limited weighing" of the evidence. When the above passages are considered, however, it is apparent that the judge did not perform a limited weighing exercise. She said there was "no evidence" of the claim, other than mere allegations and suspicions. Remaining in the Estate is approximately \$367,000. An excess of \$150,000--almost another half of what is remaining--was disbursed to the Silveys prior to Marjory's death. That evidence is clear from the bank records. In addition, the judge seemed to place no weight on the affidavit evidence of the appellants, while accepting the affidavit evidence of the Silveys, even as she noted that she was not to decide issues of credibility: para. 24. She went beyond what she was permitted to do at this juncture.
- [52] The judge failed to consider that Louise and Lynda, collectively, were left two-thirds of the Estate, and were willing to risk their majority share in order to discover what had occurred with a significant sum of money. Given that the Estate is now worth \$367,000, and they claim that up to \$173,200 is unaccounted for, that is a sizeable portion of Marjory's estate. In other words, Lorna will have received not only her one-third share of the Estate, but also another \$173,200, for a total of \$295,533. Her siblings, in contrast, would each receive only \$122,333. That is a significant enough sum and a marked enough discrepancy to reach the threshold of an arguable case.
- [53] It follows, in my view, Louise and Lynda have clearly met that threshold.
- [54] Next, the judge placed too much emphasis on the best interests of the Estate when she failed to consider that the application was being brought to protect the interests of a specified person, not those of the Estate.
- [55] As noted, the discrepancy of the disbursement of funds is sufficient to justify an inquiry into the disposal of those funds. Ray, as executor, has refused to make those inquiries (and would likely be in a conflict of interest if he did). Therefore, the only way to protect the interests of a "specified person" (here, Louise and Lynda) is to allow them to commence proceedings pursuant to s. 151.
- [56] In addition, the judge considered that the value of the Estate was small, and that the costs of the litigation would consume it. She failed to recognize that costs are not necessarily ordered against the Estate. Those bringing the litigation, or those defending the litigation, may be responsible for costs. Additionally, Louise and Lynda are the majority beneficiaries, and are prepared to expend the funds in the estate if need be, in order to bring the litigation.
- [57] The serious nature of the allegations against Lorna and Ray are best answered by permitting Louise and Lynda to commence proceedings pursuant to s. 151 of WESA.

[58] In summary, the factors that are relevant in an application pursuant to s. 151 may vary depending on the nature of the application. The statutory factors will always apply, so the petitioner must have standing as a specified person, must have made reasonable efforts to cause the personal representative to commence or defend the action, must have given the necessary notice, and must be acting in good faith. There must 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. However, it will not always be necessary to consider whether the potential relief outweighs the inconvenience to the estate and whether the litigation is in the best interests of the estate. Rather, as mentioned, s. 151(3)(b) is to be read disjunctively, such that there are four possible ways the standard may 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.

Conclusion

[59] In summary, I would not remove Ray as the executor of Marjory's estate, as all that is left is the passing of accounts.

[60] I would dismiss the application to adduce fresh evidence.

[61] I would, however, allow the appeal and permit Louise and Lynda to commence proceedings pursuant to s. 151(3) of WESA.

[62] I would set aside the costs order to Ray and Lorna, and order that costs of the petition will be in the cause of the proposed action. I would grant costs to Louise and Lynda against Ray and Lorna for the appeal. I would leave it to the discretion of the judge hearing the action to assess whether the costs going forward should be born by any of the parties or by the Estate.

"The Honourable Madam Justice Bennett"

I agree:

"The Honourable Mr. Justice Goepel"

I agree:

"The Honourable Mr. Justice Grauer"

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