

CANADA / JUDGMENT

Hollander v. Mooney

2017 BCCA 238

COURT

British Columbia Court of Appeal

DECIDED

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2017 BCCA 238 Hollander v. Mooney

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Hollander v. Mooney,

2017 BCCA 238

Date: 20170622

Docket: CA40586; CA41095

Docket: CA40586

Between:

Gina Marie Hollander and

Joy Evelyn Mooney, Executor of

the will of Mark Anthony Mooney, Deceased

Appellants/

Respondents on Cross Appeal

(Plaintiffs)

And

Eldon Bernard Mooney, also known as

Elden Bernard Mooney, Deceased

(Defendant)

And

Gail Anita Nelson and Sasha-Marie Shannon Wise

Respondents/

Appellants on Cross Appeal

(Defendants)

And

Public Guardian and Trustee of British Columbia

Respondent

And

Joy Evelyn Mooney

Respondent/

Respondent on Cross Appeal

- and -

Docket: CA41095

Between:

Gina Marie Hollander and Joy Evelyn Mooney, Executor of
the Will of Mark Anthony Mooney, Deceased

Respondents

(Plaintiffs)

And

Eldon Bernard Mooney, also known as Elden Bernard Mooney,

Gail Anita Nelson and Sasha-Marie Shannon Wise

Respondents

(Defendants)

And

Janice Gilchrist, as litigation guardian for Kendall Mooney, a minor

Appellant

(Applicant/Third Party)

Before:

The Honourable Madam Justice Bennett

The Honourable Madam Justice MacKenzie

The Honourable Mr. Justice Hunter

On appeal from: Orders of the Supreme Court of British Columbia,
dated December 28, 2012, and July 23, 2013 (Hollander v. Mooney,
2012 BCSC 1972, Vancouver Docket S090935); and on cross appeal from
orders of the Supreme Court of British Columbia, dated September 19, 2013,
June 16, 2015 and July 16, 2015 (Hollander v. Mooney, 2016 BCSC 25,
Vancouver Docket S090935).

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Joy Evelyn Mooney:

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Mooney, a minor:

L.A.E. Blake

Place and Date of Hearing:

Vancouver, British Columbia

May 16 and 17, 2017

Place and Date of Judgment:

Vancouver, British Columbia

June 22, 2017

Written Reasons by:

The Honourable Madam Justice MacKenzie

Concurred in by:

The Honourable Madam Justice Bennett

The Honourable Mr. Justice Hunter

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Summary:

The two substantive appeals were abandoned, leaving only the cross appeal from various costs orders made in this estate litigation. The appellants on cross appeal had made repeated applications for reimbursement of their legal costs on various bases, all of which were dismissed by the chambers judge, including applications for special costs against the respondents on cross appeal for reprehensible conduct in proceedings to enforce a settlement agreement the judge later approved, having found it enforceable (the judge awarded only party and party costs at Scale B); reimbursement of legal costs incurred while acting as the deceased's representatives under the Representation Agreement Act, R.S.B.C. 1996, c. 405 (the judge concluded their role as representatives ended on the representee's death); "reasonable expenses" incurred under the Act, including their legal fees, disbursements and taxes incurred in preparing their accounts and attending a court hearing to review those accounts (the judge exercised his discretion respecting these expenses as provided under the terms of the settlement agreement); and as litigants who created or preserved a fund to the benefit of the respondents on cross appeal (the judge determined they acted in their own interests and the "fund" cases did not apply). Other issues included whether it was an abuse of process to seek costs in this Court against a non-party and what costs should be ordered for the abandoned appeals where the respective appellants in the abandoned appeals appropriately agreed to pay ordinary costs, but not special or increased costs. Held: Cross appeal dismissed, except for an award of special costs against the appellants on cross appeal for the application in this Court for an award of costs against a non-party. That application was an abuse of process as it was, in effect, a collateral attack on the chambers judge's order refusing the application to add the non-party as a party in the proceedings below. Costs of the abandoned appeals are awarded to the appellants on cross appeal as ordinary costs.

Reasons for Judgment of the Honourable Madam Justice MacKenzie:

Introduction

[1] This litigation began in 2009 as a dispute among family members about a committee's application concerning Eldon Bernard Mooney. The litigation evolved into disputes about Eldon's estate planning. The two substantive appeals have been abandoned, leaving only the issues on cross appeal before us. The cross appeal is from various costs orders made in this litigation.

- [2] The chambers judge, Mr. Justice Leask, concluded the parties had reached an agreement January 10, 2011, in a settlement conference before him. After Eldon's death on January 29, 2011, conflict arose as to whether the settlement agreement was enforceable. The judge found it to be valid and enforceable, settled its terms, and approved the agreement on behalf of Eldon (the "Settlement Agreement"). The Settlement Agreement placed Eldon's assets in a trust (the "Trust Fund" or "Eldon's Property") and specified its distribution upon his death. The judge heard many costs applications and made the three orders from which this appeal is taken.
- [3] I will first describe the relationship of the participants to Eldon. For clarity, I will refer to them in these reasons by their first names, with the exception noted below as to Joy Mooney:
- Gail Anita Nelson is Eldon's daughter; her siblings are Gina and Mark (deceased). She is Sasha's mother.
 - Gina Marie Hollander is also Eldon's daughter; her siblings are Gail and Mark (deceased).
 - Mark Anthony Mooney is now deceased. He was Eldon's son, Joy's husband, and Kendall's father.
 - Joy Evelyn Mooney is Eldon's daughter-in-law. She was Mark's wife and acted as his executor. She is Kendall's mother. Joy is brought into these proceedings in her capacity as executor of Mark's estate and, on this appeal, in her personal capacity. When referring to Joy in her personal capacity, I will call her "Joy". When referring to Joy in her capacity as Mark's executor, I will refer to her as "Mark".
 - Sasha-Marie Shannon Wise is Eldon's granddaughter. She is Gail's daughter.
 - Kendall Mooney is Eldon's granddaughter. She is the daughter of Joy and Mark and is represented in this litigation by her litigation guardian, Janice Gilchrist.
- [4] In short, this litigation is largely between siblings who are Eldon's children. Kendall was not a party to the litigation but was granted standing in the proceedings related to court approval of the Settlement Agreement because her interests were affected by the agreement. Joy was a party to the litigation only in her capacity as Mark's executor.
- [5] The main appeal, CA40586 (the "First Appeal"), was brought by Gina and Mark from the judge's order that the Settlement Agreement was enforceable. A related appeal, CA41095 (the "Second Appeal"), was commenced on behalf of Kendall from the judge's order approving the Settlement Agreement on Eldon's behalf. On October 11, 2013, Mr. Justice Hinkson (as he then was) ordered the appeals be heard together. In August 2015, both the First Appeal and the Second Appeal were abandoned.

- [6] This cross appeal challenging the orders made by the chambers judge on September 19, 2013, June 16, 2015, and July 16, 2015, is brought by Gail and Sasha who were appointed Eldon's representatives pursuant to a representation agreement made October 14, 2008, under the Representation Agreement Act, R.S.B.C. 1996, c. 405 [RAA]. I will refer to the cross appeal as the appeal or the costs appeal.
- [7] On this costs appeal, Gail and Sasha contend the judge made various errors of principle in dismissing their multiple applications for further reimbursement of their legal fees. They claim, in addition to legal costs and expenses already received:
1. an award of special costs against Gina and Mark, for the period January 30, 2011 to September 19, 2013;
 2. reimbursement as Eldon's representatives for reasonable expenses associated with an "account passing", from the Trust Fund pursuant to s. 26(2) of the RAA, for the period January 30, 2011, to September 19, 2013;
 3. reimbursement from either the Trust Fund or from Gina and Joy (who receive shares in the Trust Fund) personally of their proportionate share of two-thirds of Gail and Sasha's reasonable expenses in relation to the proceedings in the court below, for the period January 30, 2011, to the conclusion of the proceedings; and
 4. a stay of proceedings in the court below.

They also seek costs of the First Appeal from Gina and Mark; costs of the Second Appeal assessed as special or increased costs; and their appeal costs out of the Trust Fund.

- [8] Gina and Mark agree that Gail and Sasha are entitled to costs at Scale 1 in accordance with Appendix B of the Court of Appeal Rules for the First Appeal that was abandoned before any substantive steps had been taken, but not to any additional appeal costs.
- [9] For the Second Appeal, also abandoned before any substantive steps were taken, Kendall agrees Gail and Sasha are entitled to costs at Scale 1 in accordance with Appendix B, but says there is no basis for increased or special costs against her in the circumstances.
- [10] For the reasons that follow, I would dismiss this appeal, except to the extent of awarding Gail and Sasha ordinary costs of the abandoned First Appeal and Second Appeal against Gina and Mark, and Kendall, respectively. I would award Joy special costs against Gail and Sasha for this appeal. Otherwise, the costs of the appeal follow the usual course.

Factual Background

- [11] Given the lengthy and complex procedural history, it is useful to set it out in some detail. It is derived largely from the two judgments of the chambers judge indexed respectively as 2012 BCSC 1972 and 2016 BCSC 25, as conveniently summarized by Gina and Mark in their factum:

C. The original litigation

3. Proceedings in the court below involved a difference regarding the personal care/financial representation and various estate planning that Eldon Bernard Mooney, deceased ("Eldon"), had undertaken, between Eldon's:
 - A. daughter, Gina Marie Hollander ("Gina"), and son, Mark Anthony Mooney, deceased ("Mark"), on one hand; and
 - B. daughter, Gail Anita Nelson ("Gail"), and Gail's daughter, Sasha-Marie Shannon Wise ("Sasha"), on the other.
4. Circumstances giving rise to the dispute are set out at 2012 BCSC 1972, paras. 2-15.
5. In 2008, Eldon executed a will and certain documents that resulted in most of his property being transferred into joint tenancy to himself, Gina and Mark. Mark died in 2009 and his estate was thereafter represented in these proceedings by his executor, Joy Evelyn Mooney ("Joy"). The effect of this estate planning by Eldon was that on Eldon's death, most of his property would vest in Gina and Mark. The exception was a RRIF from which Gail was to receive \$200,000.
6. Later in 2008, Eldon was hospitalized as the result of a head injury. Thereafter, Eldon appointed Gail and Sasha as his representatives pursuant to the Representation Agreement Act, R.S.B.C. 1996, c. 405 ("RAA").
7. In January 2009, Gina and Mark commenced committee proceedings by petition, seeking the appointment of a professional trust company as committee over Eldon's person and estate in place of Gail and Sasha as representatives.
8. In February of 2009, after appointing Gail and Sasha as his representatives, Eldon executed a new will leaving one third of the residue of his estate to Gail, one third to Mark, or if Mark predeceased him, to Mark's daughter Kendall, and one third to be shared by Gina's adult children, with nothing to Gina.
9. In October of 2010, Eldon, Gail and Sasha filed a counterclaim in the proceeding, putting into issue Eldon's mental capacity to have made transfers and other inter vivos gifts to Gina and Mark done prior to the 2009 Will.

D. The Settlement Agreement and appeals

10. At the invitation of the chambers judge, the parties participated in two judicial settlement conferences held in November of 2010 and January of 2011. Numerous draft agreements were exchanged but no formal signed agreement was concluded before Eldon died on January 29, 2011. Gina and Mark claimed that no agreement had been reached and Gail and Sasha brought an application to enforce a settlement.

Reasons, 2012 BCSC 1972, paras. 16, 20

11. One of the issues was whether the parties had reached consensus on a key term, namely, the date up to which the parties' legal bills would be paid from Eldon's assets ("Eldon's Property"). Counsel for Gail and Sasha had presented draft agreements that provided for legal fees to be paid to "Order date", which was defined as the date on which the court would ultimately approve the settlement. The chambers judge decided that the parties had agreed that legal fees would be paid only to January 10, 2011, being the date of the settlement conference. In the result, one of the terms of the Settlement Agreement (later confirmed by order of May 7, 2015) was that all of the parties' reasonable legal costs would be paid from Eldon's Property to January 10, 2011.

Reasons, 2012 BCSC 1972, paras. 24, 42, 45

12. Another issue in the enforcement proceedings was whether Gail and Sasha, as Eldon's representatives, had the power to enter into a contract to create an inter vivos trust that would alter the testamentary disposition of Eldon's assets from the arrangements that he had made (in both 2008 and 2009). The Public Guardian and Trustee supported Gina and Mark's position that Eldon's representatives did not have the power to create the inter vivos trust necessary to implement the agreement allegedly reached at the settlement conference.

Reasons, 2012 BCSC 1971, paras. 35, 46, 48-49, 53, 57

13. In his judgment of December 28, 2012 (2012 BCSC 1972), the chambers judge concluded that on January 10, 2011 the parties had entered into an agreement concerning, inter alia, the distribution of Eldon's estate after his death (the "Settlement Agreement"). The chambers judge decided that: the parties had entered into a contract to create an inter vivos trust for Eldon; that Gail and Sasha had the power to enter into the Settlement Agreement for Eldon; and that the Settlement Agreement was valid despite the fact that Eldon died on January 29, 2011, before a formal agreement was executed.

Reasons, 2012 BCSC 1972, paras. 34, 47, 54-61, 72

14. Because Eldon was under a disability the settlement had to be approved by the court as being in Eldon's best interests pursuant to Supreme Court Civil Rule 20-2(17). The chambers judge found that such approval under Rule 20-2(17) was still to be a subject of another hearing

Reasons, 2012 BCSC 1972, para. 74

15. Further, the terms of the settlement had potential implications for Eldon's granddaughter, Kendall, who was a beneficiary under his 2009 Will and an intestate heir. She was a minor and not a party to the action nor attended the settlement conference. Under the terms of the Settlement Agreement, Kendall would not receive the gift given to her under the 2009 Will. The chambers judge granted standing to Kendall's litigation guardian to participate in the

proceedings relating to the approval of the settlement (as described at 2016 BCSC 25, paras. 4-8).

16. On January 24, 2013, after the chamber judge's first ruling, Gina and Mark commenced the First Appeal from the December 28, 2012 order (CA40586). Gina and Mark took the position that the appeal should proceed before a hearing to approve the settlement because, if successful, it could result in a final determination of the action. Following cross-applications by the parties, D. Smith J.A. ruled that the First Appeal should be held in abeyance pending the conclusion of all proceedings in the Supreme Court (2013 BCCA 83).
17. As noted above, [Gina] and Mark had argued that the Settlement Agreement was invalid because Eldon's representatives did not have the authority to create an inter vivos trust that contained post-death distribution provisions that did not conform with any of Eldon's prior estate plans. While the appeal was pending, this Court rendered its decision in *Easingwood v. Cockcroft*, 2013 BCCA 182 (2012 BCSC 1972 at para. 35; 2016 BCSC 25, paras. 9-11, 17) that permitted an attorney to create an inter vivos trust for the incapable adult that would contain post-death distribution provisions.
18. On July 23, 2013, the chambers judge concluded that the Settlement Agreement was in the best interests of Eldon and approved the settlement. His Lordship's reasons are summarized in the judgment reported at 2016 BCSC 25, paras. 9-18.
19. On July 29, 2013, Kendall appealed from the order approving the Settlement Agreement (CA41095, the "Second Appeal"). On October 11, 2013 Hinkson J.A. (as he then was) dismissed an application by Gail and Sasha to quash Kendall's appeal for lack of standing, concluding that the issue of standing would have to be determined by a division of the Court. Hinkson J.A. ordered that Kendall's appeal be joined with First Appeal and that the costs of all applications before him be left to the division hearing the two appeals (2013 BCCA 439).
20. On December 23, 2014, Gail and Sasha filed a notice of application to add Joy personally to the action in the court below. Joy retained counsel in her personal capacity and opposed the application. The chambers judge dismissed the application as his Lordship "had always understood that Joy was participating in the proceeding as executor of her husband's [Mark] estate" and "was completely unpersuaded that there was any good reason to" add her as a party in her personal capacity.

Reasons, 2016 BCSC 25, paras. 62-70

21. On May 7, 2015, following numerous additional hearings and rulings concerning the appropriate form of order and costs, the chambers judge approved the form of the Settlement Agreement...
22. Gina and Mark abandoned the First Appeal on August 28, 2015. As of that date no substantive steps had been taken in the appeal.

23. Kendall abandoned the Second Appeal on August 31, 2015. Again, no substantive steps had been taken in that appeal.
24. On August 31, 2015 Gail and Sasha were granted leave to file a notice of cross appeal within the First Appeal in order to challenge certain of the chambers judge's costs rulings. Garson J.A. also ordered that costs of the abandoned First and Second Appeals be determined by the division hearing the costs appeals. Gail and Sasha filed their notice of cross appeal on September 1, 2015 ...

E. Gail and Sasha were paid their pre-settlement legal costs

25. In accordance with the Settlement Agreement the parties were to be reimbursed for reasonable legal costs up to January 10, 2011 out of Eldon's Property as defined in the Settlement Agreement. The parties agreed to the amounts payable to Gina and Mark. Following a hearing on February 17, [2014], the chambers judge resolved a dispute about the amounts payable to Gail and Sasha, ordering that they be paid \$233,718.13. This amount was later modified by Order dated August 12, 2014 to allow an additional account in the amount of \$26,473.31, to cover the period from the date of the Settlement Agreement to the date of Eldon's death on January 29, 2011. Gail and Sasha did not appeal the August 12, 2014 order and abandoned their appeal of the February 17, 2014 order in their Amended Notice of Cross Appeal filed on January 12, 2017.

Reasons, 2016 BCSC 25, paras. 19-21, 60-61

[Appeal book references omitted.]

- [12] In addition to the amounts referred to above ordered to be paid to Gail and Sasha for legal accounts out of Eldon's Property, amounts of \$64,518.29 and \$10,290.91 were paid prior to Eldon's death, and party and party costs were allowed in the amount of \$50,946.65 at Scale B, payable by Gina and Mark with respect to the proceedings to determine the enforceability of the Settlement Agreement. It is therefore common ground that Gail and Sasha have already received a total of at least \$385,000 as reimbursement for their legal costs incurred from the start of the proceedings to Eldon's death on January 29, 2011 (paid from Eldon's Property pursuant to Article 7 of the Settlement Agreement) and party and party costs (payable from Gina and Mark personally) for the period from January 29, 2011 to September 19, 2013.
- [13] In his 2012 reasons (at para. 3), the judge noted various declarations had valued Eldon's Property at approximately \$1.5 million; before us, counsel for Gail and Sasha understood the current value to be approximately \$2.2 million.

Reasons of the Chambers Judge

- [14] Gina and Mark's factum also sets out the salient parts of the judge's reasons for each of the three costs orders under appeal. Given the number of costs applications brought by Gail and Sasha, this summary is most useful:

F. Costs rulings that are under appeal

26. After the court's ruling on the terms of the Settlement Agreement as it related to the payment of legal fees, Gail and Sasha then embarked on a series of applications before the chambers judge seeking additional indemnification for costs (i.e. legal fees) incurred in various stages of the litigation. Those rulings are summarized in the judgment reported at 2016 BCSC 25 and are the subject of Gail and Sasha's cross appeal from the orders of the chambers judge pronounced September 19, 2013, June 16, 2015 and July 16, 2015.
- (b) September 19, 2013 ruling: Gail and Sasha awarded party and party costs for the period from January 10, 2011 to September 19, 2013
27. After the July 23, 2013 ruling approving the Settlement Agreement, the parties made further submissions to the chambers judge concerning their entitlement to costs of the proceedings (beyond what they agreed to receive up to January 10, [2011] under the Settlement Agreement). Gail and Sasha sought an order that their reasonable costs and expenses, including legal fees, since January 10, 2011 (the date of the Settlement Agreement) be paid by Gina and Mark or, in the alternative, out of Eldon's Property. Gail and Sasha ultimately received full reimbursement of their legal costs up to January 29, 2011 from Eldon's Property.

Reasons: 2016 BCSC 25, paras. 22-26

Orders, August 12, 2014, May 7, 2015

28. In his September 19, 2013 ruling the chambers judge ordered that Gina and Mark pay Gail and Sasha their costs from January 11, 2011 to September 19, 2013 as party and party costs at scale B.

Reasons, 2016 BCSC 25, paras. 36-40, 44

Order, September [19], 2013

29. The chambers judge rejected Gail and Sasha's application for special costs, finding special costs were not appropriate in the circumstances and particularly since Gina and Mark's position in the enforcement application had been supported by the Public Guardian and Trustee. The chambers judge further rejected Gail and Sasha's application for:

A. costs at Scale C from Gina and Mark from January 11, 2011 to September 19, 2013;

B. increased costs from Gina and Mark from January 11, 2011 to September 19, 2013; and

C. Gina and Mark to pay them the balance of their reasonable legal fees, disbursements and taxes from January 11, 2011 to September 19, 2013 that are not otherwise recovered by Gail and Sasha.

Reasons, 2016 BCSC 25, paras. 27-31

Order of September 19, 2013

30. Counsel for Gail and Sasha made the alternative submission that his clients were entitled to their reasonable costs and disbursements, including reasonable legal fees, from Eldon's Property as Eldon's representatives pursuant to the RAA. The chambers judge rejected this argument, finding among other things that "post-death litigation has provided no obvious benefit to Eldon and does seem to consist primarily of a fight between the two sisters, Gail and Gina". His Lordship noted that counsel for Gail and Sasha had rejected a proposal from Gina and Mark that all parties have their costs paid from Eldon's Property.

Reasons, 2016 BCSC 25, paras. 36-40

- (c) February 18, 2014 ruling: Gail and Sasha's reconsideration application dismissed
31. Gail and Sasha then applied to the chambers judge to reconsider his ruling of September 19, 2013, seeking to challenge the order that they were only entitled to party and party costs on Scale B for the period from January 10, 2011 to September 19, 2013. The reconsideration application was heard on February 18, 2014.
32. The chambers judge dismissed the application from the bench, saying he would not reconsider and even if he did he would not accept the arguments advanced by counsel for Gail and Sasha. The chambers judge elaborated in written reasons at 2016 BCSC 25, paras. 44-59.
34. On the merits of the application, the chambers judge noted that counsel for Gail and Sasha was advancing three arguments in support of a claim for full reimbursement of legal fees: (a) a claim for special costs; (b) a claim to entitlement to reimbursement as Eldon's representatives; and (c) a claim to entitlement because Gail and Sasha had "protected" a fund for the benefit of Gina and Joy. On the last theory, Gail and Sasha argued that Gina and Joy should pay 2/3 of Gail and Sasha's legal bills less the party and party costs already awarded to them payable by Gina and Mark.
35. The chambers judge rejected Gail and Sasha's arguments. His Lordship concluded (2016 BCSC 25 at para. 59):
- [59] This is not a case where the legal actions taken by the defendants created a new fund which benefited the plaintiffs. The fund consisted of Eldon's Property. The dispute concerned how it was to be divided. The defendants won that dispute and were awarded party and party costs as a result of that victory. This case is not parallel to the "fund" cases cited by counsel for the defendant.
- (d) June 16, 2015 Ruling: Gail and Sasha's application for reimbursement for reasonable expenses (including legal fees) as Eldon's representatives after September 20, 2013 dismissed

36. Counsel for Gail and Sasha brought another application for reimbursement for legal fees for the period after September 20, 2013 until the "conclusion of proceedings". This application was heard after the May 7, 2015 ruling of the chambers judge settling the form of the Settlement Agreement, including the term providing for payment of the parties' costs to January 10, 2011.
37. Gail and Sasha again argued that they were entitled to reasonable expenses including legal fees as Eldon's Representatives pursuant to the RAA. Counsel for Gail and Sasha argued that s. 19 of the RAA permitted them to make agreements or engage in undertakings even after Eldon's death. Section 19 provides that an agreement by a representative is binding on the adult even after the representative no longer has authority. The chambers judge rejected the submission that s. 19 allowed Gail and Sasha to make agreements or engage in undertakings after Eldon's death. The chambers judge also rejected the submission that because the Settlement Agreement made no provision for post-settlement costs, Gail and Sasha were free to claim full indemnity from Eldon's Property after that date.

Reasons, 2016 BCSC 25, paras. 71-76

38. The chambers judge ordered that Gail and Sasha personally pay Gina and Mark their costs on a party and party basis at Scale B for this costs application.
- (e) July 16, 2015 Ruling: Gail and Sasha's application for reimbursement for 2/3 of the balance of their reasonable costs and expenses (including legal fees) either from the trust fund or from Gina and Mark from July 28, 2008 to conclusion of the proceeding dismissed
39. Gail and Sasha continued their application for reimbursement from Eldon's Property for expenses including legal fees for protecting a "fund". Gail and [Sasha] had made similar arguments at the September 18 and 19, 2013 costs hearing. For the reasons given previously, the chambers judge "had little difficulty" dismissing this application and awarding Gina and Mark their costs for this application on a party and party basis at Scale B.

Reasons, 2016 BCSC 25, paras. 81-82

[Appeal book references omitted.]

- [15] Additionally, in the July 16, 2015 ruling, Leask J. dismissed Gina and Sasha's application for a stay of proceedings (referred to in the order as "the relief sought at para. 8 of the amended notice of application filed May 28, 2015"). He did not give reasons for that ruling.

The Issues on Appeal

- [16] To avoid repetition, I have organized the issues as follows:

1. Did the chambers judge err in exercising his discretion to decline to order Gina and Mark to pay Gail and Sasha special costs for the enforcement proceedings to September 19, 2013?

2. Did the chambers judge err in declining to award Gail and Sasha "the balance of" their reasonable legal costs or reimbursement on any other basis for the period January 29, 2011 to September 19, 2013, and for the period after September 20, 2013 to the conclusion of proceedings, as Eldon's representatives? This includes the question of whether this Court has jurisdiction to make a costs or reimbursement order against Joy, a non-party.
3. Did the chambers judge err in declining to award Gail and Sasha "the balance of" their reasonable legal costs or reimbursement on any other basis for the period January 29, 2011 to September 19, 2013, and for the period after September 20, 2013 to the conclusion of proceedings, as litigants who created or protected a fund, including:
 - a. whether the chambers judge erred in finding the "fund" cases inapplicable; and
 - b. whether this Court has jurisdiction to make a costs or reimbursement order against Joy, a non-party.
4. Is it an abuse of process for Gail and Sasha to seek a reimbursement order against Joy personally in this Court? If so, should Joy be awarded special costs in this Court, payable by Gail and Sasha?
5. What costs should Gail and Sasha be awarded for the two abandoned appeals?
6. Should Gail and Sasha be awarded their costs of this appeal from the Trust Fund?
7. Did the judge err in refusing the stay the proceedings as of July 16, 2015?

Issue 1: Did the judge err in declining to award Gail and Sasha special costs for the enforcement proceedings to September 19, 2013?

Argument

- [17] Before Leask J., Gail and Sasha unsuccessfully applied for special costs for the enforcement proceedings up to September 19, 2013. Their essential argument was that Gina and Mark's submissions as to the validity of the Settlement Agreement constituted conduct deserving of rebuke. In brief oral reasons given September 19, 2013, Leask J. dismissed the application. He instead awarded Gail and Sasha party and party costs on Scale B (see 2016 BCSC 25 at paras. 29-31).
- [18] Before this Court, Gail and Sasha say the chambers judge erred in principle or was clearly wrong in not awarding them special costs for the enforcement proceedings to September 19, 2013. They rely on numerous cases for the proposition that breaching a settlement agreement may attract special costs: *Ring Contracting Ltd. v. B & G Logging Ltd.* (1998), 119 B.C.A.C. 166 at paras. 20-21; *Ring Contracting Ltd. v. PCL Constructors Canada Inc.*, 2003 BCCA 684 at para. 23; *Hartjes v. Hiethrink*, 2005 BCSC 1572 at paras. 2-3; *United Pacific Capital v. Piché*, 2005 BCSC 671 at para. 52; and *Chemainus First Nation v. Bullock Baur Associates Ltd.*, 2012 BCSC 479 at paras. 69-73.

- [19] As they did in the court below, Gail and Sasha submit that Gina and Mark repudiated or resiled from the Settlement Agreement, unnecessarily litigating about the essential terms of the Settlement Agreement, and that Gina and Mark "proffered the agreement on the basis that Gail and Sasha had the requisite authority", yet did not confine their arguments opposing the Settlement Agreement to validity as related to Gail and Sasha's authority as representatives to alter Eldon's testamentary disposition. Gail and Sasha characterize this conduct as reprehensible and deserving of rebuke.
- [20] Gina and Mark oppose an order against them of special costs for the enforcement proceedings to September 19, 2013, emphasizing the discretionary nature of Leask J.'s order. As Gina and Mark submit, while special costs may be awarded where the parties' conduct is reprehensible and deserving of rebuke, assessing the nature of a parties' conduct and the necessity of any sanction is "particularly within the purview of the judge who heard the matter". Special costs are not warranted where a party takes a legitimate position, even if it is ultimately unsuccessful: *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 119 D.L.R. (4th) 740, 9 B.C.L.R. (3d) 242 at paras. 11-17 (C.A.); *Tomic v. Tough*, 2013 BCCA 355 at para. 35; *Animal Welfare International Inc. v. W3 International Media Ltd.*, 2016 BCCA 372 at para. 51. The judge did not find Gina and Mark repudiated or breached the Settlement Agreement. The Public Guardian and Trustee supported their position as to the validity and enforceability of the Settlement Agreement. It was Gail and Sasha who rejected Gina and Mark's alternative proposal that all parties' costs be paid from Eldon's Property.
- [21] In oral argument, Gina and Mark emphasized the judge's recognition that the issues as to the validity and enforceability of the Settlement Agreement were "complicated" (2016 BCSC 25 at para. 34).

Analysis

- [22] This Court summarized the principles governing appellate review of costs orders in *Giles v. Westminster Savings Credit Union*, 2010 BCCA 282:
- [72] Before considering the various challenges to the trial judge's costs orders, I note that such orders are discretionary and appellate review is limited in scope. As Arbour J. stated in *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303, "[a] court should set aside a costs award on appeal only if the trial judge has made an error in principle or if the costs award is plainly wrong": para. 27. More recently, in *Victoria (City) v. Adams*, 2009 BCCA 563, 313 D.L.R. (4th) 29, this Court said:
- [180] The general rule with respect to costs is that they follow the event and are assessed on a party and party basis unless the court otherwise orders: Rules 57(9) and 57(1) of the Rules of Court. Courts retain the discretion to depart from the general rule where the circumstances justify a different approach: *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371 at para. 22. It is a broad discretion, and this Court will only interfere "if there is misdirection or the decision is so clearly wrong

as to amount to an injustice": *Agar v. Morgan*, 2005 BCCA 579 at para. 26.

Misdirection may include making an error as to the facts, taking into consideration irrelevant factors, or failing to take into account relevant factors, all of which would amount to an error in principle: *Sutherland v. Canada (Attorney General)*, 2008 BCCA 27, 77 B.C.L.R. (4th) 142 at para. 24.

[73] However, the discretion with respect to costs is not wholly unencumbered. As Mr. Justice Seaton stated in *Royal Trust Corp. of Canada v. Clarke* (1989), 35 B.C.L.R. (2d) 82 at 88 (C.A.):

Costs are in the discretion of the court, but it does not follow that the judge is to do whatever pleases him at the moment. Rules and decisions offer guidance that should ensure that different judges in similar cases make similar decisions.

[74] The purposes for which costs rules exist must be kept in mind in determining whether appellate intervention is warranted. In addition to indemnifying a successful litigant, those purposes have been described as follows by this Court:

- "[D]eterring frivolous actions or defences": *Houweling Nurseries Ltd. v. Fisons Western Corp.* (1988), 37 B.C.L.R. (2d) 2 at 25 (C.A.), leave ref'd, [1988] 1 S.C.R. ix;
- "[T]o encourage conduct that reduces the duration and expense of litigation and to discourage conduct that has the opposite effect": *Skidmore v. Blackmore* (1995), 2 B.C.L.R. (3d) 201 at para. 28 (C.A.);
- "[E]ncouraging litigants to settle whenever possible, thus freeing up judicial resources for other cases: *Bedwell v. McGill*, 2008 BCCA 526, 86 B.C.L.R. (4th) 343 at para. 33;
- "[T]o have a winnowing function in the litigation process" by "requir[ing] litigants to make a careful assessment of the strength or lack thereof of their cases at the commencement and throughout the course of the litigation", and by "discourag[ing] the continuance of doubtful cases or defences": *Catalyst Paper Corporation v. Companhia de Navegação Norsul*, 2009 BCCA 16, 88 B.C.L.R. (4th) 17 at para. 16.

[75] Lastly, it must be also remembered that "the person who seeks to displace the usual rule [as to costs] has the burden of persuading the judge that the rule should be displaced": *Grassi v. WIC Radio Ltd.*, 2001 BCCA 376, 89 B.C.L.R. (3d) 198 at para. 24.

[23] The deferential standard of review for costs awards applies equally to the decision whether to award special costs, in particular due to the fact-driven nature of the analysis preceding a costs award: *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 at paras. 26-27. The leading case on the standard for awarding special costs is *Garcia*, where Lambert J.A. said:

17 it is my opinion that the single standard for the awarding of special costs is that the conduct in question properly be categorized as "reprehensible". As Chief Justice Esson said in *Leung v. Leung*, the word reprehensible is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or

rebuke. Accordingly, the standard represented by the word reprehensible, taken in that sense, must represent a general and all-encompassing expression of the applicable standard for the award of special costs.

* * *

23 However, the fact that an action or an appeal "has little merit" is not in itself a reason for awarding special costs. See the reasons for [sic] Madam Justice McLachlin, for the majority in the Supreme Court of Canada on the question of costs, in *Young v. Young* at p. 28. Something more is required, such as improper allegations of fraud, or an improper motive for bringing the proceedings, or improper conduct of the proceedings themselves, before the conduct becomes sufficiently reprehensible to require an award of special costs.

Garcia was applied in *Tomic* at para. 35 and in *Animal Welfare* at para. 51.

[24] In the context of proceedings to enforce a settlement agreement, the first question in considering special costs is whether there was a specific finding that a settlement agreement had been reached. The law on this question (and several of the cases relied on by the parties on this appeal) was concisely summarized by Mr. Justice Romilly in *Chemainus First Nations*:

[50] CFN refers to *Ring Contracting Ltd. v. B & G Logging Ltd.* (1998), 119 B.C.A.C. 166, for the proposition that, where a settlement agreement has been validly reached between the parties, a plaintiff may apply to have its terms enforced, including the enforcement of a release and a dismissal of any claims put forth by a party that were supposed to be released by the settlement. Secondly, CFN relies on *Ring* for its position that a plaintiff should be indemnified for its efforts in having a settlement agreement enforced by an award of special costs.

[51] In *Ring*, multiple parties had entered into a settlement agreement which included a release of all claims in the action. After signing the settlement, *Ring* initiated a much larger claim against B & G than was first included in the settlement release. As McEachern C.J.B.C. states at para. 1 of *Ring*, the first question is whether a settlement has been reached. After agreeing with the trial judge's finding that a settlement of all of *Ring*'s claims had been reached by the parties (para. 13), McEachern C.J.B.C. goes on to uphold the trial judge's dismissal of *Ring*'s claim as well as the order for special costs, stating at paras. 21-23:

21 Notwithstanding these might-have-beens, on the facts as we now understand them, I see no reason to disagree with the decision of Taylor J. to order special costs because of *Ring*'s unreasonable and reprehensible refusal to complete the settlement which is an integral part of the litigation.

- [52] A key finding in *Ring* was that the claim that *Ring* initiated subsequent to the settlement agreement was based on the same cause of action accepted by the parties to have been settled in the settlement agreement. As such, for pursuing substantially the same claim it agreed to settle, McEachern C.J.B.C. finds *Ring*'s behaviour to have been reprehensible and unreasonable and awards special costs.
- [53] In *Clare v. I.J. Manufacturing Ltd.*, 2003 BCSC 1235, Edwards J. distinguishes that case from *Ring* on the basis that in *Ring*, "there was a specific finding that a settlement agreement had been reached. There is no basis for such a finding here." (at para. 9). In *Hartjes v. Hietbrink*, 2005 BCSC 1572 (B.C. S.C.), Cole J. found that a settlement had been reached and granted judgment in favour of the plaintiff, including an award for special costs.
- [54] Cole J. stated the following in *Hartjes*:
- [2] I am satisfied that the terms of the settlement agreement have always been clear, the plaintiffs had negotiated in good faith. The position taken by the defendant was without merit and her refusal was unreasonable and reprehensible when she failed to complete the agreement as the terms were clear and not ambiguous.
- [Emphasis added.]
- [25] Mr. Justice Romilly also noted that in *Ring* Contracting a party to the settlement contract initiated a new claim based on the same cause of action underlying the settlement. He said, at para. 72: "It does not matter whether such pursuit is via a new claim based on the same cause of action or by pursuing the very claim a party agreed to settle."
- [26] The cases *Gail* and *Sasha* rely on each share the same fundamental distinction from the case at bar: they involved a situation where one side continued to litigate after it was determined a binding settlement had been reached.
- [27] For instance, *Gail* and *Sasha* rely on *United Pacific Capital*, where the parties had entered into a settlement agreement in the course of litigation over a corporate purchase transaction. The defendants subsequently disputed the enforceability of the agreement. *United Pacific* successfully applied before Groberman J. (as he then was) for a determination the parties had reached a binding settlement. The defendant did not appeal that order, but refused to comply with the terms of the settlement and disputed the existence of a settlement as to the terms of certain shareholder agreements. The plaintiffs then applied for specific performance. Mr. Justice Groberman granted the plaintiff's application in part and ordered special costs payable by the defendants (at para. 52). The special costs order flowed from the defendants having continued to dispute the settlement after Groberman J. found it was binding.
- [28] In the present case, Leask J. determined on December 28, 2012 that a valid and enforceable settlement agreement had been reached January 10, 2011 (2012 BCSC 1972 at para. 72). However, because it was entered into by Eldon's representatives, the agreement required court approval (2012 BCSC 1972 at paras. 73-74), which approval was not obtained until July

23, 2013 (see 2016 BCSC 25 at paras. 9-18). United Pacific Capital is thus distinguishable from the case at bar, as Gina and Mark did not continue litigating after the judicial determination that the parties had reached a valid and enforceable settlement agreement. The other cases Gail and Sasha relied upon are no different in this respect.

[29] I see no reason to interfere with the judge's exercise of discretion based on his conclusion that there was nothing reprehensible in the arguments Gina and Mark pursued as to the validity and enforceability of the Settlement Agreement. In my opinion, it makes no difference that they did not confine those arguments to whether Gail and Sasha as representatives had authority to enter the Settlement Agreement. The mechanism by which the Settlement Agreement was to be implemented had yet to be resolved. The other arguments also raised serious issues, for example, as to Kendall's expectations as a beneficiary under the 2009 Will. As described by Leask J., in 2016 BCSC 25:

[34] As to the offers of settlement, this case was a complicated one and the issues were not clearly understood by the parties and their counsel in the period between March and June 2011. I heard detailed submissions from both counsel on this issue and concluded that it was not unreasonable for the defendants not to accept the offers made by letters from counsel for the plaintiff dated March 24, 2011 and June 29, 2011.

[Emphasis added.]

[30] Finally, it is telling that counsel for Gail and Sasha was unable to refer us to any case where this Court had set aside a costs order and replaced it with an order for special costs on the basis that the judge below erred in not awarding special costs. There is no basis in the circumstances to interfere with the judge's exercise of discretion, which is entitled to great deference. This chambers judge was particularly well placed to exercise the discretion involved in considering special costs given the long history of costs and other applications over which he had presided since October 2010.

[31] It follows that I would not accede to this ground of appeal.

Issue 2: Should Gail and Sasha receive their reasonable legal costs as Eldon's Representatives?

[32] I will first address this issue as it is in the parties' factums. Then I will discuss the issue on which Gail and Sasha focussed at the oral hearing, which concerned the costs of accounting for their non-legal expenses incurred as Eldon's representatives and the legal fees for court approval of the accounting. Counsel for Gail and Sasha called this the "passing of accounts."

Argument

- [33] In the court below, Gail and Sasha advanced alternative bases for reimbursement. The first was that they were acting as Eldon's representatives and were entitled to recover their expenses in relation to executing that role. They advanced arguments based on this premise at three separate hearings (the September 19, 2013 costs hearing; February 18, 2014 reconsideration application; and June 16, 2015 reimbursement application).
- [34] In this Court, Gail and Sasha rely on authorities to the effect that persons fulfilling the duties of a representative under the RAA are entitled to recover all expenses properly incurred as representatives: s. 26(2); citing *Royal Trust Corp. of Canada v. Clarke* (1989), 35 B.C.L.R. (2d) 82 at 86-87 (C.A.); *Goldman v. Kanee Estate* (1991), 4 B.C.A.C. 287 at paras. 8-9; *Kanee Estate (Re)* (1991), 41 E.T.R. 263 (S.C.); *Re McDougald Estate* (sub nom *McDougald Estate v. Gooderham*) (2005), 255 D.L.R. (4th) 435, 199 O.A.C. 203 at paras. 77-85 (C.A.); and A.H. Oosterhoff, "Indemnity of Estate Trustees as Applied in Recent Cases" (2013), 41 *Advocates' Q.* 123 at 125-128.
- [35] Gail and Sasha's claim in their factum relates to two separate periods: January 30, 2011 to September 19, 2013; and September 20, 2013 to the conclusion of the proceedings. For the first period, they submit that, "Representatives should not be 'penalized' for completing the very work undertaken on behalf of the adult", and that Leask J. found the Settlement Agreement to be in Eldon's best interests. They say their costs and expenses after his death in these proceedings were incurred "in order to discharge their obligations as Eldon's representatives". For the second period, they similarly say they were completing their duties and obligations to Eldon as his representatives, and that "not only the parties but society as a whole has a direct, vested interest" in seeing agreements such as the Settlement Agreement enforced.
- [36] At the oral hearing, Gail and Sasha did not resile from the arguments in their factum. However, they focussed their argument on the claim the judge erred in his June 16, 2015 order by refusing their application for reimbursement from Eldon's Property. They sought and seek reimbursement for their reasonable expenses, including their reasonable legal fees, disbursements and taxes incurred in preparing their accounts and attending the court hearing to review those accounts (namely, the period September 19, 2013 to October 16, 2014), pursuant to s. 26(2) of the RAA.
- [37] Gina and Mark oppose reimbursing Gail and Sasha as Eldon's Representatives on four main bases:
- the ultimate result of Gail and Sasha being paid from Eldon's Property would be to have Gina and Mark pay 2/3 of Gail and Sasha's actual legal fees, as they all share equally in Eldon's Property by way of the Settlement Agreement;
 - Gail and Sasha's authority as Eldon's representatives expired on his death, and they could not act as his representatives thereafter;

- Gail and Sasha's efforts to enforce the Settlement Agreement and obtain their legal costs did not benefit Eldon; and
- the Settlement Agreement did not provide for or contemplate Gail and Sasha being reimbursed for their legal costs either after its date or after the date of Eldon's death, or the legal costs of trying to obtain their legal costs.

The last point was the focus of Gina and Mark's oral submissions.

- [38] Gina and Mark say the authorities relied upon by Gail and Sasha only support the uncontentious proposition that trustees or committees are generally indemnified for their reasonable expenses incurred in discharging their roles. Those authorities do not support the further proposition that representatives can claim continued indemnity for expenses incurred after their authority ends, and for their own benefit, rather than for the benefit of the adult they represented.

Analysis

- [39] In McDougald Estate, Madam Justice Gillese reviewed the development of the costs principles applicable to estate litigation, saying:
- [78] The practice of the English courts, in estate litigation, is to order the costs of all parties to be paid out of the estate where the litigation arose as a result of the actions of the testator, or those with an interest in the residue of the estate, or where the litigation was reasonably necessary to ensure the proper administration of the estate. See *Mitchell v. Gard* (1863), 3 Sw. & Tr. 275, 164 E.R. 1280, and *Spiers v. English*, [1907] P. 122. Public policy considerations underlie this approach: it is important that courts give effect to valid wills that reflect the intention of competent testators. Where the difficulties or ambiguities that give rise to the litigation are caused, in whole or in part, by the testator, it seems appropriate that the testator, through his or her estate, bear the costs of their resolution. If there are reasonable grounds upon which to question the execution of the will or the testator's capacity in making the will, it is again in the public interest that such questions be resolved without cost to those questioning the will's validity.
- [79] Traditionally, Canadian courts of first instance have followed the approach of the English courts. While the principle was that costs of all parties were ordered payable out of the estate if the dispute arose from an ambiguity or omission in the testator's will or other conduct of the testator, or there were reasonable grounds upon which to question the will's validity, such cost awards became virtually automatic.
- [80] However, the traditional approach has been - in my view, correctly - displaced. The modern approach to fixing costs in estate litigation is to carefully scrutinize the litigation and, unless the court finds that one or more of the public policy considerations set out above applies, to follow the costs rules that apply in civil litigation.

[85] The modern approach to awarding costs, at first instance, in estate litigation recognises the important role that courts play in ensuring that only valid wills executed by competent testators are propounded. It also recognises the need to restrict unwarranted litigation and protect estates from being depleted by litigation. Gone are the days when the costs of all parties are so routinely ordered payable out of the estate that people perceive there is nothing to be lost in pursuing estate litigation.

[Emphasis added.]

[40] Mr. Justice Leask's order of September 19, 2013 that Gina and Mark pay party and party costs to Gail and Sasha reflects this "modern approach" of applying the usual costs rules for civil litigation.

[41] However, where the litigant is a trustee, an executor, a committee, or a representative, the situation is distinct and subject to different principles than interparty costs. They are generally indemnified against all reasonable costs and expenses incurred in fulfilling their role, including litigation costs: *Royal Trust Corp. of Canada v. Clarke* at 85-86, 89 (decided under the *Patients Property Act*, R.S.B.C. 1979, c. 313); *Elliot v. Canadian Credit Men's Trust Assn.* (1934), [1935] S.C.R. 1, [1935] 1 D.L.R. 353; RAA, s. 26(2).

[42] The critical issues are: first, whether or not Gail and Sasha were acting as Eldon's representatives during the two periods in question, and second, whether the RAA applies in light of the terms of the Settlement Agreement.

[43] I turn now to address whether Gail and Sasha were acting as Eldon's representatives in pursuing this estate litigation after his death.

[44] Section 29(1) of the RAA sets out the circumstances that automatically terminate a representation agreement, including "(a) on the death of the adult who made the agreement". There can be no dispute the representation agreement ended as of January 29, 2011, the date Eldon died.

[45] That is not the end of the matter, however, as Gail and Sasha rely on s. 19 of the RAA as their authority for continued acts as representatives after Eldon's death. Section 19 provides:

19 An agreement made, or anything undertaken, by a representative on behalf of an adult is binding on the adult, even after the representative no longer has authority under the representation agreement.

[46] I agree with Leask J.'s conclusion in 2016 BCSC 25 at paras. 37-40, that s. 19 of the RAA does not assist Gail and Sasha. The plain meaning of s. 19 is that where a representative has made an agreement or undertaking while acting pursuant to a subsisting representation agreement, that agreement or undertaking continues to bind the adult after the representative no longer has authority. It provides for the continued effect of actions taken by a representative while acting as a representative. Nothing in the language of s. 19 supports the extension advanced by Gail and Sasha that s. 19 applies to actions taken after

the termination of a representation agreement.

[47] The purpose and scheme of the RAA reinforce this conclusion. The purpose of the RAA is set out in s. 2:

2 The purpose of this Act is to provide a mechanism

- (a) to allow adults to arrange in advance how, when and by whom, decisions about their health care or personal care, the routine management of their financial affairs, or other matters will be made if they become incapable of making decisions independently, and
- (b) to avoid the need for the court to appoint someone to help adults make decisions, or someone to make decisions for adults, when they are incapable of making decisions independently.

The permitted standard and non-standard provisions of a representation agreement are provided in ss. 7 and 9 of the RAA.

[48] As ss. 7 and 9 demonstrate, the purpose of the RAA is to provide for the appointment of a representative to make certain day-to-day decisions during the adult's lifetime. This accords with the circumstances that bring a representation agreement to an end, which include s. 29(1)(a), the adult's death, or s. 29(1)(h), where the adult becomes a patient by court order under the Patients Property Act, R.S.B.C. 1996, c. 349, s. 19 (unless the court otherwise orders). Gail and Sasha's argument founders by misinterpreting the nature of the representative's role, and by attempting to blend it with the role of an executor or trustee of an estate.

[49] In summary, a critical issue is whether Gail and Sasha were acting as Eldon's representatives. If so, they would be entitled to indemnification for all expenses reasonably incurred in fulfilling that role, which could include litigation. However, they ceased to be Eldon's representatives after his death on January 29, 2011. Thereafter, their participation in the proceedings below was on their own behalf and they were not entitled to reimbursement or indemnification from Eldon's Property. No reading of the RAA bears the interpretation proposed by Gail and Sasha that they could continue as Eldon's representatives for some five years after his death.

[50] I consider the cases relied on by Gail and Sasha to be inapplicable. The trustee and executor cases do not apply because the obligations of a trustee or executor continue, whereas the role of the representative ceases upon the representee's death. Gail and Sasha were indemnified for their expenses up to Eldon's death. They received party and party costs up to September 19, 2013, according to the usual rules in estate litigation. The litigation after September 19, 2013 was related primarily to their attempts to obtain further legal fees from Eldon's property, or from the opposing parties. There is no basis in law to reimburse Gail and Sasha for those actions on the premise they were acting as Eldon's representatives.

[51] I turn now to the second critical issue, namely whether the RAA applies in light of the Settlement Agreement. As noted, Gail and Sasha's oral submissions focused on their claim the judge erred in his June 16, 2015 order refusing their application for reimbursement from Eldon's Property for their reasonable expenses, including those incurred in preparing their accounts and attending the court hearing to review those accounts. Under s. 26(2) of the RAA, a representative is entitled to "reasonable expenses properly incurred in performing the duties or exercising the powers of the adult's representative". Gail and Sasha submit they are entitled to s. 26(2) RAA reasonable expenses for the costs in relation to the accounting review by Leask J.

[52] However, as counsel for Gina and Mark points out, the answer to this submission is found in the terms of the Settlement Agreement itself. Articles 8.1 and 8.2 of the Settlement Agreement provide:

8.1 In the event that any of Gina, Mark, the Representatives, Gail and Sasha notify the other parties to this agreement of any objections to the amounts of the accounts listed in Articles 7.3(a) to (c) of this agreement, then each of Gina, Mark, the Representatives, Gail and Sasha shall have the right to apply to the Court, on seven (7) days' notice to all of the other parties to this agreement, for a review by the Court of the objections to the amounts of the Gina/Mark Legal Accounts, the Eldon/Gail/Sasha/Representatives Legal Accounts, and the Eldon Personal and Health Care Accounts, as the case may be.

8.2 At the conclusion of the review, the Court may:

- (a) approve or disallow, in whole or in part, the objections to any one or more of the Gina/Mark Legal Accounts, the Eldon/Gail/Sasha/Representative Legal Accounts and the Eldon's Personal and Health Care Accounts;
- (b) make directions and orders for the payment or reimbursement of any one or more of the Gina/Mark Legal Accounts, the Eldon/Gail/Sasha/Representative Legal Accounts and the Eldon's Personal and Health Care Accounts from Eldon's Property; and
- (c) make directions and orders for the payment or reimbursement of the costs of the review.

[Emphasis added.]

The court's review of the accounts was brought under the terms of the Settlement Agreement. It is apparent that Leask J. exercised his discretion under Article 8.2 of the Settlement Agreement not to award costs of the review. I see no error in this regard. The RAA does not apply by virtue of these terms of the Settlement Agreement.

[53] Therefore, I would not give effect to this ground of appeal.

Jurisdiction as to Joy, a non-party

- [54] Joy disputes this Court's jurisdiction to make a costs award against her as she is a non-party. I agree that the Court's jurisdiction to order costs against a non-party is limited to special circumstances such as fraudulent conduct, abuse of process, gross misconduct, or circumstances where the non-party is the "real litigant": *Anchorage Management Services Ltd. v. 465404 B.C. Inc.*, 1999 BCCA 771 at para. 21; *Perez v. Galambos*, 2008 BCCA 382 at paras. 17-18; and *Animal Welfare* at paras. 53-58. Joy submits none of those circumstances are engaged here, so the order sought by Gail and Sasha should be refused.
- [55] This Court summarized the jurisdiction to award costs against a non-party in *Perez*, where Madam Justice Rowles said:
- [17] The court does have jurisdiction to order costs against a non-party: *Oasis Hotel Ltd. v. Zurich Insurance Co.* (1981), 28 B.C.L.R. 230 (C.A.). However, an award of costs against a non-party is unusual and exceptional, and should only be made in "special circumstances": *Anchorage Management Services Ltd. v. 465404 B.C. Inc.*, 1999 BCCA 771, 72 B.C.L.R. (3d) 389, at para. 21.
- [18] "Special circumstances" have been held to include situations where the non-party has engaged in fraudulent conduct, an abuse of process, or gross misconduct in the commencement and/or conduct of the litigation, or when the non-party is the "real litigant": *Anchorage*.
- [56] More recently, the Court in *Animal Welfare* applied *Anchorage Management* and *Perez* in setting aside an award of costs against the principal of a litigant company.
- [57] Gail and Sasha applied in December 2014 to join Joy personally as a party to the proceedings below on the basis she was personally a party to the Settlement Agreement. They also relied on an affidavit sworn by Joy in May 2013 opposing the substitution of Kendall for Joy in the Settlement Agreement (2016 BCSC 25 at paras. 63-65). Gail and Sasha further argued it was in Joy's best interests to be added as a party (2016 BCSC 25 at para. 67). Joy's independent legal counsel (obtained at Leask J.'s request) opposed her being added as a party, emphasizing the Settlement Agreement was made on January 10, 2011 (per Leask J.'s December 28, 2012 ruling) and approved by the court without naming Joy in her personal capacity (2016 BCSC 25 at para. 68).
- [58] An order was made June 8, 2015 by Leask J. dismissing the application to add Joy as a party. Although he concluded he likely had a discretion to add a party at such a late stage, he was unpersuaded that he should do so. He reasoned (2016 BCSC 25):
- [70] I had always understood that Joy was participating in the proceeding as executor of her husband's estate. No position taken on her behalf by counsel for the plaintiffs was inconsistent with that with the possible exception of the May 9, 2013 affidavit I do not accept that Joy's affidavit responding to my hypothetical question should be the basis of a finding of fact contrary to the whole course of the proceedings before me. I find as a fact that Joy, in

her personal capacity, was not a party to the Settlement Agreement nor the proceedings before me up to the present application. Furthermore, none of the submissions persuaded me that I should exercise my discretion to join her as a party in 2015.

[59] I see no basis to interfere with Leask J.'s conclusion that Joy took no action during the litigation that went beyond her role as executor of Mark Mooney's estate. Having dealt with this litigation since October 2010, the judge was best positioned to make that assessment. I agree with Joy that none of the exceptional circumstances where costs may be awarded against a non-party are present in this case.

[60] I would not accede to this ground of appeal.

Issue 3: Should Gail and Sasha receive their reasonable legal costs as litigants who created and protected a fund?

Argument

[61] On each of the applications of September 2013 for costs, February 2014 for reconsideration, and July 2015 for reimbursement, Gail and Sasha unsuccessfully argued they should be reimbursed for their expenses, including legal fees, on the basis they were litigants who created or protected a trust fund.

[62] In this Court, Gail and Sasha repeat their argument in the court below. They seek to be awarded their reasonable expenses, including legal costs, for both the periods from January 2011 to September 19, 2013, and from September 20, 2013 to the conclusion of the proceedings. They submit:

72. Where the result of litigation is to create, increase in size or protect a fund in which third parties have an interest, the party carrying the litigation may be able to extract the costs of litigation, either from the fund itself, or, exceptionally, by way of a tariff charged to those parties who elect to derive advantage from the plaintiffs' success. The cost of the litigation may thus be distributed among all of the parties who have benefited from the litigation

[63] Gail and Sasha rely on numerous authorities to support this position. On the facts of the case, Gail and Sasha say the Settlement Agreement avoided further proceedings involving the 2008 and 2009 Wills, and that Joy had limited entitlement under the 2008 Will.

[64] Gina and Mark oppose the "fund" theory. They say: the chambers judge made no error in declining to award the reimbursement sought; Gail and Sasha's actions did not recover additional assets into Eldon's Property, the scope of which was never at issue; rather, their actions resulted in the enforcement of a settlement that personally benefitted Gail; and, enforcing the Settlement Agreement was not in Gina and Mark's interests, but instead decreased their plausible entitlement to Eldon's estate. As a result, Gina and Mark say the authorities relied on by Gail and Sasha do not apply because Gina and Mark were not placed in a better position as a result of the litigation. They add that Gail and Sasha "cannot plausibly assert that they were acting for the benefit of Gina and Mark Gail and Sasha did not

act neutrally for the benefit of all potential beneficiaries, but sought to advance Gail's own position".

Analysis

- [65] It is well established that litigants who create or protect a fund may recover their reasonable costs from the fund, or from the other beneficiaries of the fund: see *Re McRea*, *Norden v. McRea* (1886) 32 Ch. D. 613 at 615; *Macdonald v. McCall* (1887), 12 P.R. 9, [1887] O.J. No. 292 at paras. 7-8 (Ont. H.C.J.); *Sprague v. Ticonic National Bank* (1939), 307 U.S. 161 (U.S.S.C.); *Shabinsky v. Horwitz* (1971), [1973] 1 O.R. 745 at 751-752, 32 D.L.R. (3d) 318 (H.C.J.). See also the very helpful discussion in P.D. Maddaugh and J.D. McCamus, *The Law of Restitution*, loose-leaf (updated December 2016) (Aurora, Ont.: Canada Law Book, 2004) vol. 2 at 33-31-33-42, and the cases cited therein.
- [66] The fundamental question on this issue is not whether litigants who establish or protect a fund are entitled to recover their reasonable costs from the other beneficiaries of the fund. Rather, it is whether Gail and Sasha are such litigants. This is largely a factual question. Substantially for the reasons of Leask J., I am of the view Gail and Sasha are not litigants who established or protected a fund.
- [67] As addressed under Issue 2 above, there is no jurisdiction in any event to order costs against Joy, a non-party.
- [68] I would not accede to this ground of appeal.

Issue 4: Is Gail and Sasha's application for reimbursement from Joy personally an abuse of process?

Argument

- [69] Joy submits it is an abuse of process for Gail and Sasha to involve her in her personal capacity on this appeal. Specifically, Joy notes that Leask J. refused to add her as a party to the litigation below (order made June 8, 2015 and entered June 17, 2015). Gail and Sasha did not appeal that order. Because she was a non-party without procedural and substantive protections and because there was no justiciable issue between her in her personal capacity and Gail and Sasha, Joy says seeking relief against her is an abuse of process. She also alleges abuse of process on the basis that involving her on this appeal amounts to a collateral attack on Leask J.'s order.

Analysis

- [70] I will only address the question of abuse of process by way of collateral attack as, in my view, it disposes of this issue.
- [71] This Court succinctly set out the rule against collateral attack in *Burnaby (City) v. Trans Mountain Pipeline ULC*, 2014 BCCA 465:

[30] The rule against collateral attack was articulated by the Supreme Court of Canada in *Wilson v. The Queen*, [1983] 2 S.C.R. 594 at 599, and has been affirmed by that Court more recently in *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at paras. 71-72, and *Canada (Attorney General) v. TeleZone*, 2010 SCC 62 at paras. 60-62. It stipulates that an order made by a court or tribunal is binding and conclusive until it is set aside on appeal or lawfully quashed, and cannot be attacked in proceedings other than those whose specific object is its reversal, variation, or nullification. If a proceeding calls into question the validity of an order made in another independent proceeding, the former proceeding must be struck as an abuse of process.

[Emphasis added.]

[72] In *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, Madam Justice Arbour for the majority observed that where the question relates to an implicit attack on the correctness of the factual basis for the decision rather than the decision's legal force, it is more appropriate to turn to abuse of process than to focus on the narrower rule against collateral attack. She said:

34 Each of these cases concerns the appropriate forum for collateral attacks upon the judgment itself. However, in the case at bar, the union does not seek to overturn the sexual abuse conviction itself, but simply contest, for the purposes of a different claim with different legal consequences, whether the conviction was correct. It is an implicit attack on the correctness of the factual basis of the decision, not a contest about whether that decision has legal force, as clearly it does. Prohibited "collateral attacks" are abuses of the court's process. However, in light of the focus of the collateral attack rule on attacking the order itself and its legal effect, I believe that the better approach here is to go directly to the doctrine of abuse of process. [Emphasis added.]

[73] She described the abuse of process doctrine and its rationales this way:

35 Judges have an inherent and residual discretion to prevent an abuse of the court's process.

37 In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would . . . bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, per Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63)). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:

The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).

One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. [Emphasis of Arbour J.]

As Goudge J.A.'s comments indicate, Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice.

38 It is true that the doctrine of abuse of process has been extended beyond the strict parameters of *res judicata* while borrowing much of its rationales and some of its constraints. It is said to be more of an adjunct doctrine, defined in reaction to the settled rules of issue estoppel and cause of action estoppel, than an independent one (Lange, [Donald J. Lange, *The Doctrine of Res Judicata in Canada* (Markham, Ont.: Butterworths, 2000)], at p. 344). The policy grounds supporting abuse of process by relitigation are the same as the essential policy grounds supporting issue estoppel (Lange, *supra*, at pp. 347-48):

The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.

See also *Gonzales v. Gonzales*, 2016 BCCA 376 at paras. 18-22.

[74] In sum, while a collateral attack is always an abuse of process, conduct that may fall short of the strict definition of collateral attack may nevertheless be an abuse of process.

[75] Late in the proceedings below, Gail and Sasha unsuccessfully sought to add Joy personally as a party. That application was dismissed by Leask J. on the basis that Joy had never conducted herself in any way inconsistent with her role as Mark's executor (2016 BCSC 25 at paras. 62-70). Gail and Sasha did not appeal that order. On this cross appeal, they seek relief against Joy personally on the same bases as they do against Gina and Mark, who were parties to the action. In my opinion, this is parallel to the situation described by Arbour J. in *Toronto v. C.U.P.E.* -- while Gail and Sasha may not be attacking the legal force of Leask J.'s order refusing to add Joy as a party, their claim for reimbursement by Joy of their legal costs amounts to an attack on the factual underpinning of his order. It is therefore an abuse of process.

[76] In light of this conclusion, it is unnecessary to address Joy's alternative argument that the claim is an abuse of process because there is no justiciable issue between her and Gail and Sasha.

Special costs in favour of Joy

- [77] Joy contends she should be awarded special costs against Gail and Sasha in this Court. She says they should never have brought her into this litigation, resulting in continued expense to reply to a meritless appeal that, as against her, is an abuse of process.
- [78] I have already summarized the law on special costs in addressing Gail and Sasha's claim for special costs. The "single standard for the awarding of special costs is that the conduct in question properly be categorized as 'reprehensible': Garcia at para. 17. Something more than mere limited merit is required, "such as improper allegations of fraud, or an improper motive for bringing the proceedings, or improper conduct of the proceedings themselves": Garcia at para. 23.
- [79] In Gonzales at paras. 37-38, Madam Justice Bennett for the Court upheld an order striking pleadings as an abuse of process and awarding special costs against the party who filed those pleadings. Conduct that is an abuse of process is, by its nature, reprehensible and deserving of rebuke. In light of my conclusion that Gail and Sasha's claim in this Court against Joy personally amounts to an abuse of process, I am persuaded an award of special costs against Gail and Sasha is appropriate. I would make that order.

Issue 5: What costs should Gail and Sasha be awarded for the two abandoned appeals?

- [80] Both the First Appeal and the Second Appeal were abandoned before any substantive steps were taken. On August 31, 2015, Madam Justice Garson ordered the costs of the abandoned First and Second Appeals be determined by the division hearing the cross appeal.

The Abandoned First Appeal

- [81] Gina and Mark filed the First Appeal, CA40586, on January 24, 2013 from Leask J.'s ruling of December 28, 2012 declaring that Gail and Sasha, as Eldon's representatives, had the power to enter into the Settlement Agreement. The First Appeal was stayed shortly after it was brought (2013 BCCA 83). It was abandoned on August 28, 2015. No substantive steps had been taken. The parties appeared on one chambers application (before D. Smith J.A.). No appeal record, appeal books, or factums were prepared.
- [82] Gina and Mark agree that Gail and Sasha are entitled to their costs of the abandoned First Appeal to the date of abandonment, pursuant to Scale 1 of Appendix B. Gail and Sasha concede such an order is appropriate.

The Abandoned Second Appeal

- [83] Kendall filed the Second Appeal, CA41095, on July 29, 2013 from Leask J.'s decision of July 23, 2013 that the Settlement Agreement was in Eldon's best interests and approving the settlement (pursuant to R. 20-2(17) of the Supreme Court Civil Rules).

- [84] In October 2013, Hinkson J.A. (as he then was) dismissed Gail and Sasha's application to quash the Second Appeal for lack of standing, determining that issue should be decided by the division hearing the appeal. He also ordered the Second Appeal be joined with the First Appeal, and deferred the issue of the costs of the applications to the division hearing the appeals (2013 BCCA 439).
- [85] The Second Appeal was abandoned on August 31, 2015. No substantive steps had been taken. The parties attended one hearing in chambers (before Hinkson J.A.). No appeal books, appeal record, or factums were prepared.
- [86] Gail and Sasha seek costs of the Second Appeal, to be assessed either as special costs or alternatively, as increased costs. The premise for special or increased costs is Kendall's alleged "misconduct" in the manner of bringing the Second Appeal before this Court. They say Kendall's appeal was brought improperly because she had no standing to bring an appeal.
- [87] Gail and Sasha note that when Kendall gave notice of her intention to appeal, their counsel told her she had no right to do so, and must instead apply to intervene in the First Appeal, after the appellant's factum was filed. Gail and Sasha further say Kendall's notice of appeal was initially rejected by the Registry, and was only accepted after it was edited to identify Kendall as a "Third Party" in the court below. Pursuant to s. 20 of the Court of Appeal Act, Gail and Sasha delivered a notice of preliminary objection to Kendall on August 1, 2013 (two days after Kendall filed the Second Appeal).
- [88] Kendall agrees that Gail and Sasha are entitled to party and party costs at the ordinary scale to the date of abandonment. She opposes the ordering of special or increased costs against her.
- [89] Kendall denies any misconduct. She emphasizes that she was given standing in the court below in the R. 20-2(17) hearing to make representations as to whether the Settlement Agreement was in the best interests of Eldon and the beneficiaries of Eldon's estate. Kendall had a personal legal interest in the ultimate outcome of the litigation as the Settlement Agreement eliminated her interest as a beneficiary in Eldon's estate.
- [90] To the extent the allegation of wrongdoing relates to Kendall's defective notice of appeal, Kendall responds that her counsel promptly applied to correct the notice. At the oral hearing, counsel explained that the "(Third Party)" notation was added by the filing agent after counsel explained by telephone the procedural complexity of Kendall's role in the court below. Mr. Justice Hinkson did not determine whether she had standing in this Court; he only said a single justice in Chambers lacked jurisdiction to rule on standing.
- [91] For their part, Gina and Mark agree that Gail and Sasha are not entitled to special or increased costs of the Second Appeal.

Analysis

[92] Section 23 of the Court of Appeal Act provides:

23 Unless the court or a justice otherwise orders, the party who is successful on an appeal is entitled to costs of the appeal including the costs of all applications made in the appeal.

[93] Where an appeal is abandoned, the appellants must pay the costs of the appeal unless there is a compelling reason why they should not: *Newport Realty Ltd. v. Columbia National Investments Ltd.*, 2003 BCCA 253 at para. 2; *Westsea Construction Ltd. v. Veale*, 2014 BCCA 217 at para. 20.

[94] Kendall does not dispute her obligation to pay costs on the ordinary scale. I agree she is so obliged.

[95] However, Gail and Sasha seek special or increased costs against Kendall on the basis of "misconduct" in bringing an appeal on which she lacked standing, and in filing a defective notice of appeal. The question is thus whether Kendall's conduct amounted to misconduct.

[96] Costs ordered payable to a party must be assessed under Appendix B (R. 59(1), Court of Appeal Rules), but may be ordered to be assessed as increased costs (R. 60) or special costs (R. 61). The applicant for an order for increased or special costs bears the onus of proving that order should be made: *Greene v. Greene*, 2012 BCCA 43 at para. 13; *Vukelich v. Mission Institution*, 2005 BCCA 75 at para. 51.

[97] Increased costs are only awarded where ordinary costs would be unjust: *Temple Consulting Group Ltd. v. Abakhan & Associates Inc.*, 2013 BCCA 331 at paras. 19-25 (per Chiasson J.A. in dissent but not on this point). Special costs will not be ordered where the appeal concerned legitimate differences between the parties related to the trial judgment and there was no reprehensible conduct in the bringing or conduct of the appeals: *William v. British Columbia*, 2013 BCCA 1 at para. 15.

[98] I find it unnecessary to address Kendall's standing to appeal. Kendall's procedural missteps clearly do not amount to reprehensible conduct to justify special costs. Nor, in the circumstances, are increased costs appropriate. On that basis, I would not accede to Gail and Sasha's claim for special or increased costs as against Kendall in relation to the abandoned Second Appeal. Simply put, she did not "misconduct" herself as alleged.

[99] I would not give effect to this ground of appeal.

Issue 6: Should Gail and Sasha be awarded their costs of the appeal from the Trust Fund?

[100] My understanding is that Gail and Sasha apply for their costs - reasonable legal fees, disbursements, and taxes - of this appeal to be paid from the Trust Fund, whether or not they are successful. Without explaining the applicability of these authorities to this case, they cite *Macdonald v. McCall* at para. 7, and *McDougald Estate* at para. 91.

- [101] Gina and Mark contend there is no basis for this "extraordinary relief". They submit the cases relied upon by Gail and Sasha are not applicable as they address the reimbursement of representatives for expenses incurred as representatives, or of litigants who created or preserved a trust fund.
- [102] The law reviewed above applies equally to this application. I would not award Gail and Sasha any costs of this appeal on which, in my opinion, they are unsuccessful.
- [103] The cases Gail and Sasha rely upon do not support their position. *Macdonald v. McCall* is a "fund" case and, for the reasons outlined above, is not relevant to the case at bar. *McDougald Estate* is relevant, but does not assist Gail and Sasha. In that case, Gillese J.A. declined to award the appellants their costs from the estate on a substantial indemnity basis irrespective of the outcome. Instead, she ordered the appellants pay costs to the respondents on a partial indemnity basis. She discussed the awarding of costs in the estate context as follows:
- [86] I pass now to the question of what principles govern costs awards in estate litigation at the appellate level. Although the jurisprudence on point is limited, in my view, it is to the effect that at the appellate level, costs are normally ordered against an unsuccessful appellant .
- [91] In ordering the appellants to pay costs, I act on the principle that the same rules that govern costs in civil litigation at the appeal level apply to unsuccessful appellants in estate litigation. I see nothing in the circumstances of the parties to warrant departing from that principle.
- [Emphasis added.]
- [104] In the proceedings below, Gail and Sasha were compensated with an award of party and party costs for the litigation undertaken to enforce the Settlement Agreement. Here, Gail and Sasha seek to recover their costs of this appeal which is the culmination of their other fruitless attempts to obtain reimbursement for their costs after September 2013. The usual rule, as outlined in *McDougald*, is that costs are awarded against the unsuccessful party. Gail and Sasha are the unsuccessful parties on this appeal. The costs of this appeal will follow the usual course and will be assessed on the ordinary scale (except for the special costs to Joy).
- [105] Thus, I would not accede to this ground of appeal.
- Issue 7: Did the judge err in refusing the stay of proceedings as of July 16, 2015?
- [106] Gail and Sasha did not press this particular ground in oral submissions. They said in their factum:
81. The chambers judge dismissed the application for a stay of the proceedings by Gail and Sasha. No reasons were given.

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82. Once a settlement agreement is made and where no ground can be advanced for setting aside the agreement under general contract principles, such as fraud, duress, lack of capacity or mutual mistake, then the court has no alternative but to enforce the agreement. The proper course is to normally grant the stay of proceedings when it is applied for.

Robertson v. Walwyn Stodgell Cochrane Murray Ltd., 1988 CarswellBC 120 (C.A.), Lambert, J.A., para. 2

[107] In response, Gina and Mark say:

62. The chambers judge correctly dismissed Gail and Sasha's application for a stay of the proceedings. A stay of proceeding is a suspension of judicial proceedings by the direction or order of the court. It does not hold the same weight as a dismissal, which is the ultimate termination of the proceeding. The purpose for the settlement was to ultimately end the proceeding and not simply to suspend them. There is no reason that, after all of the issues have been resolved, for a stay of proceeding rather than a dismissal to be ordered. This argument was presented by Gina and Mark to the chambers judge in considering Gail and Sasha's application and the chambers judge dismissed Gail and Sasha's application.

[108] Robertson v. Walwyn Stodgell Cochrane Murray Ltd. (1988), 24 B.C.L.R. (2d) 385 (C.A.), did not determine this issue. In Robertson, the plaintiffs sought to continue the litigation after a settlement had been reached. They conceded the contractual validity of the settlement. Mr. Justice Lambert's comments were made in discussing the scope of the discretion to grant a stay pursuant to s. 8 of the Law and Equity Act, R.S.B.C. 1979, c. 224 (now R.S.B.C. 1996, c. 253). He found that where a valid and binding settlement is reached, the court must enforce the settlement. Enforcement usually involves a stay of proceedings. All Lambert J.A. said (at para. 8) was, "the proper course is normally to grant the stay of proceedings when it is applied for, rather than to defer the inevitable result by refusing the stay and leaving the defence of settlement to be upheld at trial or in collateral proceedings" (emphasis added).

[109] The Settlement Agreement, found to be enforceable and approved by the court, itself provided for releases and that no further steps would be taken (Articles 3.1 and 3.2). By the terms of the Settlement Agreement, a stay of proceedings was unnecessary in this case.

[110] I am unable to give effect to this ground of appeal.

Conclusion

[111] The chambers judge ended his January 8, 2016 reasons with this description of Gail and Sasha's many costs applications and of the litigation itself:

[83] Three years have passed since the Reasons for Judgment in Hollander v. Mooney, 2012 BCSC 1972. In that time the Court has decided that the January 10, 2011 Settlement Agreement was in Eldon's best interest, settled the terms of that Agreement, settled the Pre-Settlement legal

bills of the parties and made a number of rulings dealing with the costs of this litigation and questions concerning the reimbursement of Eldon's Representatives for the legal costs and expenses incurred by them after Eldon's death. That last topic has not necessarily taken the majority of the Court's time on this dispute, but it has been a recurring theme. The defendants, with the assistance of their very competent counsel, have put forward every possible argument to justify reimbursement of their legal expenses. During the first costs hearing I offered them the option of all parties being fully reimbursed (if there were sufficient funds) from Eldon's Property. This was one of the costs options submitted by plaintiffs' counsel. They declined that offer. At each stage of this proceeding I have carefully considered the arguments put forward by their counsel. Each time I was unconvinced. Looking back over the last three years I still see the dispute, after Eldon's death, as being a dispute between two living sisters and the executor for their dead brother over the disposition of Eldon's Property. Nobody has always been right and nobody has always been wrong. Tragically, one of the goals of the settlement process in January 2011 has not been accomplished. The parties didn't avoid litigation and they didn't save the expense and trouble and bad feeling of litigation.

[112] In conclusion, I would emphasize the wisdom of the modern approach to awarding costs in estate litigation, described by Gillese J.A. in *McDougald Estate* at para. 85, that recognizes the need to "restrict unwarranted litigation and protect estates from being depleted by litigation".

[113] In light of the foregoing, I would dismiss this costs appeal. I would grant Joy's application for special costs against Gail and Sasha on this appeal. The costs of this appeal will otherwise follow the usual course.

"The Honourable Madam Justice MacKenzie"

I agree:

"The Honourable Madam Justice Bennett"

I agree:

"The Honourable Mr. Justice Hunter"

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