

CANADA / JUDGMENT

Hsu v. Hsu

2020 BCSC 185

COURT

Supreme Court of British Columbia

DECIDED

14 February 2020

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2020 BCSC 185 Hsu v. Hsu

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hsu v. Hsu,

2020 BCSC 185

Date: 20200214

Docket: S145456

Registry: Vancouver

Between:

A-Tui Hsu also known as A-Tui Hsieh Hsu

Plaintiff

And

Henry Yan-Yong Hsu, Lih Wen Hsu, Mo Wei Tsang,

Sutton West Coast Realty, Anne A. Adrian, and

Adrian & Company Barristers and Solicitors

Defendants

Before: The Honourable Madam Justice Forth

Reasons for Judgment

Counsel for the Applicant,

Chun-Yen Hsu:

Helen H. Low, Q.C.

J. Kendal Paul

Counsel for the Defendants,

Anne A. Adrian and

Adrian & Company Barristers and Solicitors:

Michael G. Armstrong, Q.C.

Counsel for the Defendants,

Henry Yan-Yong Hsu and

Lih Wen Hsu:

David Sue-A-Quan

Counsel for the Defendants,

Mo Wei Tsang and

Sutton West Coast Realty:

Scott G. Cordell

Counsel for Te-Yung Hsu:

Kimberley A. Kuntz

Place and Date of Hearing:

Vancouver, B.C.

August 20, 2019

Place and Date of Judgment:

Vancouver, B.C.

February 14, 2020

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Introduction

- [1] The plaintiff, A-Tui Hsu, commenced this action on July 14, 2014 to set aside a purported transfer of residential property located on 5662 McMaster Road, Vancouver (the "McMaster Property") from her sole name into the names of her son, Henry Yan-Yong Hsu, and grandson, Lih Wen Hsu (the "Action"). The plaintiff died on September 19, 2016.
- [2] The plaintiff was the mother of seven children, being:
- a. Chien-Ming Hsu - son who resides in Taiwan;
 - b. Chien-Shun Hsu - deceased son;
 - c. Henry Yan-Yong Hsu ("Henry") - son and defendant who is married to Chui Chu Pearl Chang ("Pearl"). Henry and Pearl have one child, Lih Wen Hsu ("Lih"), who is also a defendant. All three reside in Vancouver;
 - d. Hsueh-O Hsu aka Cher-O Hsu Lin - deceased daughter who had two children, Yi-Chun Lin ("Angela") and Yi-Hsiang Lin ("Teddy"), both of whom reside in Vancouver;
 - e. Hsueh-Mei Hsu - daughter who resides in Taiwan;
 - f. Chun-Yen Hsu - daughter and applicant who resides in Taiwan and is married to Ten-Seng Jen; and
 - g. Te-Yung Hsu - son who resides in Taiwan.
- [3] The plaintiff left two wills, one dated October 10, 1999, executed in British Columbia (the "BC Will"), and one dated August 14, 2013, executed in Taiwan (the "Taiwan Will"). The beneficiaries under the two wills are different.

- [4] The BC Will gave Henry and Pearl each a 50% interest in the McMaster Property and transferred the residue of the estate to Henry and to the plaintiff's eldest daughter, Hsueh-O Hsu (now deceased), to donate to whichever society they deemed appropriate. The executor of the BC Will is Henry and the alternative executor is Pearl. There was no provision made for any of the other children.
- [5] The Taiwan Will revoked the BC Will. The beneficiaries under this will are: Te-Yung Hsu, son; Hsueh-Mei Hsu, daughter; Chun-Yen Hsu, daughter and applicant; the two children of Hsueh-O Hsu, being Angela and Teddy; and the Tzu Chi Foundation. The executor of the Taiwan Will is Te-Yung Hsu and the alternative executor is Ten-Seng Jen. There was no provision made for Henry and the Will provided that if the McMaster Property was recovered, the executors were given full power and right to decide on and deal with its recovery and distribution.

Orders Being Sought

- [6] The only application heard on August 20, 2019 was the application of Chun-Yen Hsu filed January 8, 2019 (the "Appointment Application"). She seeks the following orders:
- (a) to be appointed the litigation representative of the deceased plaintiff in the Action and be substituted as a party in place of the deceased plaintiff, pursuant to R. 20-6 of the Supreme Court Civil Rules, B.C. Reg. 168/2009;
 - (b) that any assets or funds recovered in the Action by her shall be held by her in trust for the deceased's estate and delivered up to the personal representative for the deceased upon the issuance of a grant of probate of the deceased's will(s) or, alternatively, a grant of administration of the deceased's estate or further order of the court;
 - (c) alternatively, that she be appointed as Administrator Pending Litigation under s. 103 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 ("WESA") for the deceased's British Columbia estate if any assets or funds are recovered in the Action for the deceased and no estate grant has been issued by that date; and
 - (d) permission to apply to seek indemnification from the deceased's estate for her legal costs and disbursements for this application and the prosecution of the Action from any assets recovered to the deceased's estate from within the proceeding.
- [7] Notice of the application was given to all persons who may have an interest in the ultimate estate of the plaintiff.

Background Facts

- [8] The McMaster Property was purchased on May 15, 1997 with the plaintiff as the sole owner. Henry claims that an agreement was reached with the plaintiff that the Property was owned by both in equal shares. He further claims that the plaintiff paid approximately \$400,000 to the purchase price and he contributed the balance. The purchase price was \$857,500.
- [9] The plaintiff lived in the McMaster Property from 1997 to 2013. Henry claims that he and his family lived with the plaintiff.
- [10] The plaintiff did not read or speak English.
- [11] On or about May 21, 2009, transfer documents were signed by the plaintiff transferring her interest in the McMaster Property to Henry and Lih. The documents consisted of, as described at para. 16 of the application response of Henry and Lih:
- a. a Bare Trust Agreement dated as of May 17, 1997 in which A-Tui acknowledged she and Henry had each been the beneficial owner of one-half interest in the McMaster Property since its purchase in 1997;
 - b. a Deed of Gift in which A-Tui gifted her one-half beneficial interest in the McMaster Property to Henry, and Henry accepted the gift;
 - c. a Direction under which Henry, as sole beneficial owner of the property, directed A-Tui to transfer title to the McMaster Property into the names of Lih Wen and Henry as joint tenants;
 - d. a Form A Transfer under which A-Tui, in accordance with the Direction, transferred legal title to the McMaster Property to Lih Wen and Henry as joint tenants; and
 - e. a Bare Trust Agreement in which Lih Wen acknowledged that Henry was the sole beneficial owner of the McMaster Property and agreed that, upon Henry's death, Lih would deal with the property in accordance with the provisions for the distribution of the residue of Henry's estate as set out in his last will.
- (the "Transfer Documents").
- [12] The Transfer Documents were executed in the presence of Mo Wei Tsang, a realtor, and Anne A. Adrian, a lawyer, who are both defendants in the Action. The defendants allege that Angela was present when the Transfer Documents were signed and that she provided the translations.
- [13] On April 17, 2012, the plaintiff executed an enduring Power of Attorney in which she appointed Henry, and Pearl as alternative, as her attorneys-in-fact. On the same day, she executed a Representation Agreement under which Henry was appointed her first representative, and Pearl as her alternative, to make or help her make decisions about her health and personal care.

- [14] In February 2013, the plaintiff returned to Taiwan and remained there until she died on September 19, 2016. Henry alleges that Te-Yung Hsu prevented him from seeing the plaintiff from approximately July 5, 2013 until her death.
- [15] On December 12, 2013, the plaintiff executed an Enduring Power of Attorney appointing Te-Yung Hsu as her attorney for all affairs, including the conduct of her legal affairs.
- [16] Henry claims that in approximately 1986, after his graduation from university, his family purchased an apartment for him on Hanjhou South Road, Taipei City, Taiwan (the "Hanjhou Property"). The Hanjhou Property was sold and Henry says he transferred the sum of approximately \$815,000 CAN to a bank account registered under the plaintiff's name in Taipei. He says the purpose of the transfer was to provide money to care for the plaintiff. At the time of the plaintiff's death, the balance in the bank account was approximately \$123.00 CAN.
- [17] A clause in the Taiwan Will includes [translation]:
- The house located at 3F, No. 107, Sec. 1, Hanjhou South Road, Daan District, Taipei City, Taiwan, R.O.C. was purchased by me in the name of my son HENRY YAN-YONG HSU, and it was sold, with the proceeds shared by my first son CHIEN-MING HSU and third son HENRY YAN-YONG HSU. Each of them shared about NT\$26,000,000.00, which should be deemed as the sufficient compulsory portion for each of them is entitled according to laws. Therefore, they shall have no right to claim for distribution of the other properties.
- [18] Henry further claims that there was an account at the RBC Dominion Securities Inc. into which the plaintiff transferred money in approximately 1999 (the "RBC Account"). The RBC account was opened in the name of Ten-Seng Jen. When the RBC Account was opened, the plaintiff, Henry, and Ten-Seng Jen had signing authority. Henry recalls that at the time of the plaintiff's return to Taiwan in 2013, there was approximately \$650,000 CAN in the RBC Account. At the time of the plaintiff's death, the RBC Account had approximately \$260,000 CAN.
- [19] The plaintiff commenced the Action after returning to Taiwan and executing the Taiwan Will. The defendants claim that the plaintiff lacked capacity at the time the Action was commenced.
- [20] In February 2016, a proceeding was commenced in Taiwan respecting the plaintiff's capacity. It is alleged that on February 2, 2016 there was a Taiwan court order requiring the plaintiff's capacity to be evaluated. It is further alleged that the evaluation of her capacity did not take place due to a failure of Te-Yung Hsu to cooperate.
- Litigation steps in the Action
- [21] The following steps and significant correspondence were taken in the Action prior to the plaintiff's death:

- a. July 14, 2014 - the notice of civil claim was filed against Henry and Lih, Anne A. Adrian and Adrian & Company (the "Adrian defendants") and Mo Wei Tsang and Sutton West Coast Realty (the "Realtor defendants") (collectively, the "Professional Defendants"). In it, the plaintiff claims that she did not understand the nature of the Transfer Documents;
- b. August 14 and October 2, 2014 - counsel for the Adrian defendants gave notice that the Action had to be commenced by a litigation guardian since the plaintiff was under a legal disability and made a demand for particulars;
- c. August 22, 2014 - a certificate of pending litigation was filed against the McMaster Property by the plaintiff;
- d. October 29, 2014 - a response to civil claim was filed by the defendants Henry and Lih;
- e. February 2, 2015 - the plaintiff served a list of documents;
- f. February 17, 2015 - Henry and Lih served their list of documents;
- g. June 3, 2015 - an amended notice of civil claim was filed, amending para. 27 to remove the reference to the plaintiff's mental health having deteriorated significantly;
- h. June 5, 2015 - the plaintiff's counsel responded to the Adrian defendants' allegations of a lack of mental capacity on behalf of the plaintiff and provided a response to the particulars;
- i. June 8, 2015 - counsel for the Adrian defendants noted the amendment to para. 27 appeared to be a withdrawal of an admission related to capacity and, as such, needed a court order or the consent of all parties;
- j. June 8, 2015 - the Realtor defendants sought particulars of the claims against them;
- k. June 16, 2015 - the plaintiff's counsel responded to the assertion that the amendment to the notice of civil claim was a withdrawal of an admission and advised that the particulars of what was said rested solely with the defendants;
- l. June 23, 2015 - a response to amended civil claim was filed by the Realtor defendants under protest and without prejudice, alleging that the plaintiff did not have the capacity to commence the Action;
- m. December 24, 2015 - the plaintiff filed a notice of application seeking default judgment against the Adrian defendants. This application was not heard;
- n. December 29, 2015 - a response to civil claim was filed by the Adrian defendants under protest and without prejudice, alleging that the notice of civil claim was a nullity;
- o. March 1, 2016 - the plaintiff served an amended list of documents, which did not include any medical records or documents relating to the plaintiff's capacity;

- p. March 2, 2016 - the defence counsel raised the issue of the lack of production of the plaintiff's medical records, the court order from Taiwan, and the need to stay the Action pending a determination of the competency proceedings in Taiwan;
- q. May 4, 2016 - the plaintiff filed a notice of application compelling the defendants to provide their list of documents. This application was not heard;
- r. June 7, 2016 - the Realtor defendants served an unfiled notice of application seeking a stay of the Action, a severance, and the posting of security. This application was not heard;
- s. June 27, 2016 - the Adrian defendants filed a response to the plaintiff's application compelling a list of documents; and
- t. July 12, 2016 - the Realtor defendants filed a response to the plaintiff's application compelling a list of documents.

[22] Since the plaintiff died on September 19, 2016, there have been no steps taken in the Action. On October 1, 2018, a notice of change of solicitor was filed appointing Fasken Martineau DuMoulin LLP as the lawyer for the plaintiff in place of Betty Lin.

[23] There are a number of other applications that have been filed in the Action:

- a. Application of the defendants, Henry and Lih, to stay the Action pending the trial of the Amended Petition, discussed below, and for the sum deposited in the petition proceeding to be held as security for costs in the Action, filed on April 18, 2019;
- b. Application of the Realtor defendants seeking the posting of security for costs, a stay of the Action, or a stay as against the Realtor defendants, filed on May 2, 2019; and
- c. Application by the Adrian defendants seeking security for costs, a stay of the Action, or a stay of the Action as against the Adrian defendants, filed on May 9, 2019.

(collectively, the "Pending Applications").

Proof of Taiwan Will in Solemn Form

[24] On May 26, 2017, Te-Yung Hsu filed a petition in the Vancouver Supreme Court (Reg. No. P170653) seeking an order that he be appointed as administrator of the plaintiff's estate:

- 1. to instruct the plaintiff's counsel with respect to the Action;
- 2. to negotiate with any or all of the defendants regarding the Action; and
- 3. to receive funds on behalf of the plaintiff's estate arising from the settlement of satisfaction of the Action (the "Petition").

[25] The following individuals have consented to the orders sought in the Petition:

- a. Ten-Seng Jen - the alternative executor under the Taiwan Will;

- b. Angela;
- c. Teddy;
- d. Hsueh-Mei Hsu; and
- e. Chun-Yen Hsu.

[26] On September 28, 2017, Henry and Lih filed a response to petition opposing all relief sought.

[27] On November 23, 2017, Henry and Lih filed a notice of application requiring Te-Yung Hsu prove the Taiwan Will in solemn form.

[28] On January 11, 2018, Justice Groves made the following orders ("Groves Order"):

1. the Petitioner be at liberty to amend the Petition to seek an order proving the will dated August 14, 2013 [the Taiwan Will] in solemn form, on the condition that such amendment is made within 14 days;
2. if the Petitioner elects to so amend the Petition, that:
 - a. there be a trial of the issue of the validity of the [Taiwan Will];
 - b. all pre-trial procedures be available to the parties;
 - c. within 30 days of this order, the Petitioner make available for inspection by the Respondents the originals of:
 - i. the [Taiwan Will]; and
 - ii. the Power of Attorney apparently signed by the Deceased on December 12, 2013;
 - d. within 30 days of this order the Petitioner shall deposit in the Supreme Court of British Columbia the sum of \$80,000 to be held for the benefit of the applicants as security for costs in this proceeding;
3. the Petitioner's application is adjourned generally pending proof of the [Taiwan Will] in solemn form; and
4. the Respondents are entitled to costs on Scale B in any event of the cause.

[29] On January 25, 2018, Te-Yung Hsu filed an amended petition seeking to have the Taiwan Will proved in solemn form (the "Amended Petition") and posted the \$80,000 security required by the Groves Order.

[30] On April 6, 2018, Henry and Lih filed a response to the Amended Petition.

[31] On April 9, 2018, counsel for Henry and Lih requested that the original Taiwan Will and the 2013 Power of Attorney be produced for examination by an expert document examiner.

[32] On May 15, 2018, a list of documents of the petitioner was delivered.

- [33] On August 29 and September 13, 2018, counsel for Henry and Lih made requests to the petitioner for the production of certain documents relating to the health of the plaintiff (the "Document Request").
- [34] On October 1, 2018, a notice of change of lawyer was filed appointing Fasken Martineau DuMoulin LLP as lawyer for the petitioner in place of Betty Lin.
- [35] On October 17 and December 5, 2018, counsel for the defendants wrote to the petitioner's counsel following up on the Document Request.
- [36] On December 17, 2018, a notice of change of lawyer was filed appointing Kimberly A. Kuntz as lawyer for the petitioner in place of Helen H. Low, Q.C., of Fasken Martineau DuMoulin LLP.
- [37] On December 20, 2018, counsel for the petitioner produced some translated hospital records for the plaintiff and two Enduring Powers of Attorney of the plaintiff granted to Te-Yung Hsu on December 12, 2013.
- [38] On December 20, 2018, counsel for Henry and Lih requested the production of further documents.
- [39] On January 24, 2019, counsel for the petitioner responded to the Document Request.
- [40] No trial date has been set for the hearing of the Amended Petition as of the date of the hearing of the Appointment Application.

Legal Principles

- [41] Rule 20-6(1) to (8) provides:

Definition

- (1) In this rule, "litigation representative", in relation to the estate of a deceased, means a person referred to in subrule (3)(a) who is starting, conducting or defending a proceeding referred to in subrule (2) on behalf of the deceased's estate.

Application of rule

- (2) This rule applies if

- (a) a person who has or may have a cause of action dies before starting a proceeding in relation to that cause of action,
- (b) a person against whom a cause of action may be asserted dies before a proceeding is started in relation to that cause of action,
- (c) a person who has started a proceeding dies before judgment is pronounced in that proceeding, or

- (d) a person against whom a proceeding has been started dies before judgment is pronounced in that proceeding,

and the cause of action, in relation to which the proceeding may be or has been started, survives.

Starting, conducting or defending a proceeding on behalf of deceased's estate

- (3) If there is no personal representative for a deceased's estate, the court may,
 - (a) on application brought in accordance with subrule (5), appoint a person as a litigation representative to start, conduct or defend a proceeding referred to in subrule (2) on behalf of the deceased's estate, or
 - (b) on application or otherwise, order that the matter proceed in the absence of a person representing the deceased's estate.

Notice of application required

- (4) Before making an order under subrule (3), the court may require notice of the application to be given to a person having an interest in the deceased's estate.

Procedure for application

- (5) An application under subrule (3) may be brought without notice under Rule 8-4 or, if there is no existing proceeding within which it is appropriate to bring that application, under Rule 17-1.

No authorization to distribute proceeds

- (6) Nothing in this rule authorizes a person who is not the personal representative of the deceased to distribute proceeds of a proceeding that belong to the deceased's estate to anyone other than the personal representative.

Substitution required

- (7) A litigation representative conducting or defending a proceeding referred to in subrule (2) (c) or (d) must, under Rule 6-2, be substituted for the deceased as a party in the proceeding.

When personal representative is appointed

- (8) If
 - (a) a person becomes a personal representative for a deceased's estate after a litigation representative is appointed, and
 - (b) a proceeding referred to in subrule (2) has been started in relation to the deceased,the personal representative must, on application under Rule 6-2,

- (c) be substituted for the deceased as a party in the proceeding, or
- (d) if a litigation representative is conducting or defending the proceeding, be substituted for the litigation representative as a party in the proceeding,

unless an order is made in respect of the proceeding under section 151 of the Wills, Estates and Succession Act.

[42] Since the plaintiff died prior to judgment being pronounced in the Action, this rule applies: R. 20-6(2)(c). Subrule 20-6(3) allows the court to appoint a litigation representative to conduct the proceeding if there is no personal representative for the deceased's estate.

Issues

[43] The application materials and submissions raise the following issues:

1. Does the Groves Order require the Amended Petition to proceed before the Action?
2. Is this application a collateral attack on the Groves Order or an abuse of process?
3. Should a litigation representative be appointed in the Action?
4. If so, is the applicant the appropriate legal representative to be appointed?
5. If so, should the applicant post some form of security for costs since she resides in Taiwan and has no assets within the jurisdiction?

Position of the Parties

Position of the Applicant

- [44] The applicant submits that no other party has sought to be appointed as the litigation representative, and she meets all the technical requirements for appointment under R. 20-6 (which, she submits, are not the same requirements as for the appointment of a litigation guardian). There is no personal representative for the plaintiff's estate to serve as the plaintiff's litigation representative in the Action as the determination of which Will is valid is in dispute and has not yet been resolved.
- [45] She submits that she is a suitable litigation representative because she is independent in that she was not involved in the initiation of the Action, had no role in making the Taiwan Will, and had no involvement in her mother's bank account in BC. She is willing to post reasonable security for costs if ordered.
- [46] The applicant submits that her appointment will not vary or nullify the Groves Order. The Groves Order did not require that the Amended Petition be heard and decided before the Action could proceed, nor did it stay the Action. Furthermore, if the Action is unsuccessful, the issue of which Will governs will no longer be of consequence because the main asset of the plaintiff's estate is the McMaster Property.

- [47] The applicant submits that the matters that are the subject of the Action took place from 2009 to 2013, and any further delay in prosecuting the Action and securing evidence could be detrimental to the plaintiff's case. The appointment of a litigation representative will allow the Action to be expeditiously decided and it is not an abuse of process.
- [48] Finally, the applicant submits that she is not a "straw-man" for her brother Te-Yung Hsu, as the defendants claim. Rather, she has a valid interest in having the Action resolved so that a determination can be made about whether the McMaster Property comprises part of the plaintiff's estate. Her interest arises from being a beneficiary under the Taiwan Will, a variation applicant under the BC Will, or an intestate heir if it is found the plaintiff died without a valid Will.
- [49] Te-Yung Hsu, the executor under the Taiwan Will, consents to the relief sought.

Position of the Defendants

- [50] The defendants submit that the applicant is not qualified, independent, or financially suitable to be appointed and does not meet the test for the appointment of a litigation guardian. They assert that the same factors should be considered for the appointment of a litigation representative as for a litigation guardian.
- [51] They further submit that the application is a collateral attack on the Groves Order and is generally an abuse of process. They argue that this is an attempt to circumvent the Groves Order, which required that the validity of the Taiwan Will be determined before the relief sought in the Petition be considered. As the relief sought in the Petition included appointing Te-Yung Hsu as personal representative of the estate for the purpose of instructing counsel in the Action, the Groves Order effectively ordered that if Te-Yung Hsu wished to proceed with the Action, he must first prove the Taiwan Will in solemn form.
- [52] The defendants argue that the Action should be stayed until the Taiwan Will is proved and, if proved, then Te-Yung Hsu should be the litigation representative for the plaintiff in the Action. They submit that the timing of the Appointment Application strongly suggests that the applicant has been put up by Te-Yung Hsu as a "straw-man" to pursue relief that he cannot pursue directly.
- [53] The Realtor defendants also argue that the Appointment Application is deficient in that it seeks an order appointing the applicant as litigation representative, but does not seek, as required by R. 20-6(7), an order that the litigation representative, if appointed, be substituted for the deceased as plaintiff. This is fundamental to make the litigation representative responsible for the costs.

Analysis

Does the Groves Order require the Amended Petition to proceed prior to the Action?

[54] In my view, the Groves Order does not require the Amended Petition to proceed first. I see nothing in the reasons for judgment of Justice Groves that requires this. I do not agree with the submissions of the defendants that it is "implicit" in the reasons for judgment that this take place.

[55] There was no application for a stay of the Action before Justice Groves, and no stay was granted. The issue of whether there should be a stay of the Action until the Amended Petition is heard remains an issue to be addressed. That issue is not before me; it is the subject matter of the Pending Applications filed by the defendants.

Is the application a collateral attack on the Groves Order or an abuse of process?

[56] The law on what constitutes a collateral attack was set out by the Court of Appeal in *Burnaby (City) v. Trans Mountain Pipeline ULC*, 2014 BCCA 465 at para. 30:

[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.

[57] The fundamental policy behind the rule against collateral attack is to "maintain the rule of law and to preserve the repute of the administration of justice": *R. v. Litchfield*, [1993] 4 S.C.R. 333 at 349. The doctrine is intended to prevent a party from circumventing the effect of a decision rendered against it: *Krist v. British Columbia*, 2017 BCCA 78 at para. 46.

[58] Since I have found that the Groves Order did not make any order that prohibited the Action from proceeding, I disagree with the submission that the Appointment Application is a collateral attack. The Appointment Application does not seek to vary, set aside, or nullify the Groves Order. The Groves Order mandated what would happen in a different proceeding if the petitioner amended the Petition. Since the petitioner did amend the Petition, the Order requires that there be a trial of the issue of the validity of the Taiwan Will. The other relief sought by the petitioner was adjourned pending the determination of the validity of the Taiwan Will.

[59] If Te-Yung Hsu had applied to be the legal representative in the Action, an argument could be made that it was a collateral attack on the Groves Order, since the Order specifically adjourned the relief sought for Te-Yung Hsu to be appointed as the administrator pending the proof of the Taiwan Will.

- [60] Unless I find that the applicant is effectively acting as the agent for Te-Yung Hsu, I do not see the Appointment Application as a collateral attack on the Groves Order. The nature of the application is different. Te-Yung Hsu was seeking to be appointed as the administrator based on his status under the Taiwan Will. The legal basis for his application was not R. 20-6, but s. 132 of WESA.
- [61] Of significance is that counsel for the defendants, Henry and Lih, and the Realtor defendants, conceded that if it was a different individual (other than Te-Yung Hsu or the applicant) seeking to be appointed the litigation representative, the Groves Order would not prevent such an appointment. This supports that the Appointment Application is not a collateral attack on the Groves Order.
- [62] The doctrine of abuse of process is a flexible doctrine that allows the court to prevent a claim from proceeding where to do so would violate principles of judicial economy, consistency, and the integrity of the justice system. A collateral attack is a type of abuse of process.
- [63] In light of my finding that the Appointment Application is not a collateral attack on the Groves Order, I do not find that the Appointment Application is an abuse of process.

Should a litigation representative be appointed in the Action?

- [64] In order for this Action to move forward, a litigation representative must be appointed. Without a litigation representative, the Action is simply sitting in abeyance with no individual representing the plaintiff. It is not in the interests of justice to have an action sitting without anyone representing the deceased plaintiff, especially considering the fact that it was started over five years ago and no steps have been taken for over three years.
- [65] If no litigation representative is appointed then this Action is, in effect, stayed since the deceased plaintiff has no ability to continue the Action. As I have already noted, the merits of whether the Action should be stayed, or stayed against the Professional Defendants, pending a decision on the validity of the Taiwan Will is the subject of the Pending Applications and is not for me to decide on this Appointment Application.
- [66] In an application to stay the Action, the plaintiff should be represented and all arguments objecting to the stay should be made by an individual appointed to act on behalf of the plaintiff. Without a litigation representative, it is not clear how counsel for the plaintiff is in a position to take appropriate instructions to act and deal with the Pending Applications.

Is the applicant the appropriate legal representative to be appointed?

- [67] The further issue is whether the applicant is an appropriate individual to be appointed.
- [68] The arguments made are, in essence, two-fold:
1. that, due to her connection with Te-Yung Hsu and her husband, Ten-Seng Jen, she is "a straw woman" for her brother, and as such, she should not be appointed; and

2. that she has not proven her suitability as a legal representative, and as such, should not be appointed.
- [69] With respect to the first point, the essence of the submission is that the applicant is tainted by the allegations made against the Te-Yung Hsu and her husband such that the Court should exercise its discretion not to appoint her.
- [70] However, these allegations have not been proven and there is no evidence that the applicant participated in any fashion in any misappropriation of funds from her mother's bank accounts, as alleged. There is no evidence to support that she should be "painted with same brush" because of allegations of impropriety levelled against her brother and, to some degree, her husband.
- [71] With respect to the second point, I find that the applicant has proven her suitability as a legal representative. I agree that the technical requirements of R. 20-6 have been met. I also agree with the submissions of the applicant that the test for the appointment of a litigation representative is not the same as that used to appoint a litigation guardian. The issue of whether the plaintiff needed a litigation guardian when she commenced the Action remains a "live" issue and is not being determined on this Appointment Application.
- [72] In the context of this case, the purpose of the litigation representative is to give instructions to move this Action along until the contest with respect to the validity of the Taiwan Will, and therefore the question of who is the proper personal representative of the estate, is decided. Once the personal representative is decided, they will take over conduct of the Action from the litigation representative: R. 20-6(8).
- [73] Although she is not completely neutral or disinterested in the Action, the evidence before me supports that the applicant was not involved in the initiation of the Action, had no role in the making of the Taiwan Will, and had no involvement in the plaintiff's bank account in British Columbia.
- [74] I am not convinced, based on the evidence before me, that this applicant is simply a puppet in the hands of Te-Yung Hsu and, as such, that the Court should reject her as an appropriate candidate. I reject the defendants' submission that she is an inappropriate representative because of her relationship with her brother and husband.
- [75] The concerns raised that the applicant resides outside of the jurisdiction, has no assets in the jurisdiction, and has not disclosed her financial circumstances can all be addressed by the requirement that the applicant post security for costs. In my view, these concerns are not enough to overcome the interests of justice that a litigation representative be appointed to act for the plaintiff.

- [76] The further concern regarding her lack of qualifications to act as a litigation representative is unfounded. The litigation representative has legal counsel acting on her behalf. That legal counsel is experienced. The fact that the applicant is a retired teacher and her experience is not disclosed is of no relevance to her ability to act as a litigation representative.
- [77] I order that Chun-Yen Hsu be appointed the litigation representative of the plaintiff in the Action and that the style of cause be amended to reflect the plaintiff as A-Tui Hsu also known as A-Tui Hsieh Hsu, Deceased, by her litigation representative, Chun-Yen Hsu.
- [78] I also order the following:
- (a) that any assets or funds recovered in the Action by Chun-Yen Hsu be held by her in trust for the deceased's estate and delivered up to the personal representative for the deceased upon the issuance of a grant of probate of the deceased's Will(s); and
 - (b) that Chun-Yen Hsu may apply to seek indemnification from the deceased's estate for her legal costs and disbursements for this application and the prosecution of the Action from any assets recovered to the deceased's Estate from the within proceeding.

Should security for costs be ordered, and in what amount?

- [79] The final issue is whether the applicant should post security for costs. The applicant consents to an order for security for costs since she resides outside of the jurisdiction and has no assets in the jurisdiction.
- [80] The only issue is the amount of security that should be posted. There was not enough time to hear argument on this issue. It is my view that the amount of the security is somewhat dependent on whether the Action is stayed. If the Action is stayed, then the initial amount of security that should be posted will be much less than if the Action is permitted to proceed. This is an issue that should be canvassed when the Pending Applications are heard.
- [81] Due to my upcoming calendar, I will not be able to hear the Pending Applications in a timely manner. I am not seized with hearing the Pending Applications. The parties should contact the registry to have the Pending Applications set down for hearing. The two volumes of the Joint Application Record for the Pending Applications can be picked up at Counter 204 of the Supreme Court Registry.
- [82] The costs of the Appointment Application will be in the cause.

"Forth J."

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