

CANADA / JUDGMENT

Hynds (Re)

2024 BCSC 1311

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Supreme Court of British Columbia

DECIDED

22 July 2024

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2024 BCSC 1311 Hynds (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hynds (Re),

2024 BCSC 1311

Date: 20240722

Docket: P110137

Registry: Victoria

In the Matter of the Estate of Joan Grace Hynds, Deceased

- and -

Docket: P120039

Registry: Victoria

In the Matter of the Estate of Herbert Moffatt Hynds, Deceased

Before: Registrar Gaily

Reasons for Decision

Counsel for the Applicant, Ronald Paul Durante, Executor and Trustee of the Estate of Joan Grace Hynds, Deceased, and Executor and Trustee of the Estate of Herbert Moffatt Hynds:

H. Plecko

Counsel for Nina Gouin aka Nina Durante Gouin and Marco Durante, in their capacities as attorneys of Beverley Durante:

J.N. Harrigan

Place and Date of Hearing:

New Westminster, B.C.

May 1, 2024

Further written submissions of the attorneys and of the executor/trustee:

June 12 and 21, 2024

Place and date of Decision:

Victoria, B.C.

July 22, 2024

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Introduction and Background

- [1] This is the passing of the accounts of Ronald Paul Durante, in his capacity as executor and trustee of the estates of his grandparents, Joan Grace Hynds and Herbert Moffatt Hynds. As the parties agreed at the hearing, I will refer to Mr. and Mrs. Hynds by their first names to avoid confusion, intending no disrespect. Beverley Durante is Joan and Herbert's daughter; she was formerly married to Dionisio Durante, who died in 2023. Beverley and Dionisio had three children, Ronald Paul Durante (who goes by Paul), Nina Gouin and Marco Durante. Because most of these parties share the same surname, to avoid confusion, intending no disrespect, I will refer to them by their first names.
- [2] Joan predeceased Herbert when she died on July 28, 2010, in Victoria, B.C., leaving a will dated January 11, 2008 and a codicil dated January 9, 2009 (together, "Joan's Will"). Herbert died on October 23, 2011, leaving a will dated April 22, 2004 ("Herbert's Will"). Beverley has had mental health issues throughout her life and cannot manage her own affairs. Recognizing this, both Joan's Will and Herbert's Will created separate testamentary trusts for Beverley for her "care, maintenance, education and benefit" (Joan's Will) and her "benefit, care, comfort and wellbeing" (Herbert's Will) until Beverley's death. In Herbert's Will, unlike Joan's Will, he also specifically relieved his trustee of the "duty to maintain an even hand between Beverley and any beneficiary who may under the terms of my Will be entitled to whatever remains of the residue on the death of Beverley, it being my intention that my Trustee should have access to the entire income and capital of the residue for payments on behalf of Beverley".
- [3] Joan's Will provided that on her death, Paul was to receive a \$3,000 gift, and her personal belongings were to be delivered to Herbert, who was also to hold the residue of her estate until his death. Paul was the contingent beneficiary of Joan's estate on Beverley's death (and if Paul predeceased Beverley, the remaining residue was to be divided equally among Paul's children). Joan's Will did not leave anything to her other two grandchildren, Nina and Marco. Under Herbert's Will, all three of the Durante children, Paul, Nina and Marco, are the contingent beneficiaries, receiving equal shares of the remainder of the residue of his estate on Beverley's death.
- [4] Both Joan's Will and Herbert's Will appointed the HSBC Trust Company (Canada) ("HSBC") as executor and trustee of the respective estates. However, after Joan's death (but before Herbert's), on September 21, 2010, HSBC renounced its appointments as executor and trustee under both Joan's Will and Herbert's Will.

- [5] Although Paul did not live in BC at the time (he had moved to the United States before Joan's death), Paul's evidence is that Joan's lawyers recommended that he became the executor and trustee of both estates. On July 18, 2011, the Court granted Paul letters of administration with will annexed (Victoria file number P110137); on July 28, 2011, Paul was granted probate and assumed the role of executor and trustee of Joan's estate. There is no dispute that as at February 11, 2011 (the date of Paul's affidavit in support of the grant application), the gross value of Joan's estate was \$319,688.11, consisting of funds held in an investment account at Macquarie Private Wealth ("Macquarie") (which closed all of its Canadian offices in 2013). After Herbert's death, on March 12, 2012, Paul was granted letters of administration with will annexed of Herbert's estate; he was also granted probate that same day. There is no dispute that as at January 11, 2012 (the date of Paul's affidavit in support of the grant application), the gross value of Herbert's estate was \$645,000.00, consisting primarily of a house on Dalhousie Street in Victoria, BC (the "House"), valued at \$575,000, and \$70,000 in a savings account. As executor and trustee, Paul was responsible for administering the estates and, more importantly, administering the testamentary trusts for Beverley.
- [6] There is no dispute that the relationship among the Durante siblings is acrimonious; Paul and Nina have been estranged for many years, and Paul and Marco are also now estranged. It is also clear that Paul's relationship with Beverley has broken down in the past few years.

History of Passing of Accounts Proceedings

- [7] In 2016, under a power of attorney, Beverley appointed Nina as her sole attorney. On May 11, 2023, through a further power of attorney, Beverley appointed Nina and Marco together as her attorneys.
- [8] Section 99(1) of the Trustee Act, RSBC 1996, c 464 [Trustee Act], stipulates that unless the accounts of an executor or trustee are approved and consented to in writing by all of the beneficiaries, or the court otherwise orders, within two years from the date of the grant of probate or the grant of administration or the date of their appointment, an executor or a trustee under a will must pass their accounts.
- [9] The Wills, Estates and Succession Act, SBC 2009, c. 13 [WESA] addresses the administration of estates in BC. As set out in WESA, applications for a grant of probate or administration must comply with the Supreme Court Civil Rules, BC Reg. 168/2009 [SCCR]. Rule 25 of the SCCR governs estate proceedings, together with the probate forms, which are numbered P1 through P46. Rule 25-13 of the SCCR addresses the passing of accounts.
- [10] As noted above, Paul was granted probate of Joan's estate on July 28, 2011, and he was granted probate of Herbert's estate on March 12, 2012. He admits he did not present either executor's or trustee's accounts to the beneficiaries as required under the Trustee Act and only prepared accounts once these proceedings commenced. His evidence is that at the time of his appointment, he did not really understand his obligations and no one clearly explained them to him. He testified that he thought he would wait to prepare the accounts

until after Beverley died.

- [11] On July 19, 2023, Nina and Marco (in their capacity as Beverley's joint attorneys), requested that as executor and trustee of their grandparents' estates, Paul provide an accounting to them. The beneficiaries sent a second demand to Paul on August 8, 2023. On August 29, 2023, they sent notices to pass the accounts to the Montreal counsel Paul had retained.
- [12] On October 20, 2023, Nina and Marco filed applications in the Victoria Registry, seeking an order for a reference to the registrar for the passing of Paul's accounts for both estates, to be heard together, as well as other relief, including an order that the registrar is to assess costs "pursuant to Rule 14-1(3)" (that is, R. 14-1(3) of the SCCR, which addresses special costs).
- [13] Paul retained BC counsel and on November 1, 2023, he consented to the relief sought in the application, agreeing, in particular, that he would provide an accounting of both estates to the beneficiaries (Beverley, Nina and Marco) by November 15, 2023. He also agreed that unless the beneficiaries approved of the accounts, the registrar would hear a reference to pass his accounts no later than February 16, 2024. The consent order was entered on December 5, 2023.
- [14] On November 17, 2023, Paul provided an accounting to the beneficiaries (the "First Accounting"). The beneficiaries advised Paul that they did not consent to his accounts and that the accounts would have to be passed before the registrar. They noted that in the First Accounting, Paul listed the beginning balance of Herbert's estate as \$274,259.26, which did not accord with the information in the January 11, 2012 affidavit filed in support of the grant application, indicating the gross value of Herbert's estate was approximately \$600,000. The First Accounting did not make any reference to the House or its sale for Herbert's estate. They also noted that in the First Accounting, Paul listed the beginning balance of Joan's estate as \$593,947.37, which exceeded the value of her estate when Paul obtained letters of administration. The First Accounting also listed a loan to Paul from Joan's estate of \$537,100.25 and a loan to Dionisio for \$63,000 owing to Herbert's estate.
- [15] On January 26, 2024, Paul filed an appointment setting the passing of his accounts for two hours on February 15, 2024, in Victoria. On January 31, 2024, Paul provided a second accounting to the beneficiaries (the "Second Accounting").
- [16] On February 1, 2024, Paul filed his P38s for each estate (affidavit in support of application to pass accounts), as well as his P40 affidavits for each estate (statement of account affidavit pursuant to R. 25-13(6)) (respectively, the "Joan Estate P40" and the "Herbert Estate P40"). The beneficiaries did not consent to these accounts and provided Paul with their objections on February 8, 2024. In the objections, they noted that Paul had now listed the sale of the House in the Herbert P40, and that the beginning balance of his estate had been revised up to \$645,000, and the beginning balance of Joan's estate had been revised down to \$319,688.11. Further, Paul had now separated the loan to himself he had attributed entirely to Joan's estate in the First Accounting, into two loans to himself from each estate. He also attributed the \$63,000 loan owing to Herbert's estate to Marco (not to Dionisio).

- [17] On February 12, 2024, the parties appeared before Associate Judge Scarth for a pre-hearing conference ("PHC"). At the PHC, Scarth A.J. ordered that the February 15 passing of accounts be adjourned to a date agreed to by the parties, to be scheduled for one day and to occur no later than May 31, 2024. She also ordered that the parties were to schedule and attend a further PHC prior to the passing of accounts, and that both the subsequent PHC and the passing of accounts were to be heard at a venue in the Vancouver or New Westminster judicial district. Finally, she ordered that Paul was to file and serve any further supporting materials on the beneficiaries' counsel at least 21 days in advance of the passing of accounts.
- [18] On February 16, the parties set the passing of accounts hearing for May 1, 2024 in New Westminster, and on February 21, they set a second PHC for April 8. Associate Judge Hughes heard the second PHC, at which she ordered the parties were to attend in person at the passing of accounts, and that any further supporting materials to be relied on by the beneficiaries at the passing of accounts were to be filed and served on Paul no later than April 19, 2024.
- [19] On April 11, 2024, Paul filed two affidavits he had made on April 10, 2024, speaking to his administration of the testamentary trusts (the "Joan Trust Affidavit" and the "Herbert Trust Affidavit", respectively).
- [20] On April 19, 2024, Nina and Marco filed an application for an order to remove Paul as the executor and trustee of the estates of Joan and Herbert, and appoint Nina as executor/ trustee, or alternatively, Nina and Marco, as joint executors/ trustees of the estates. At the passing of accounts, I was advised that the removal application was scheduled for May 14; however, in their written closing submissions, the parties confirmed that on May 21, Paul consented to be removed and that Nina and Marco are now the joint trustees of both estates.
- [21] At the hearing before me, Paul tendered the P38s and the two P40s, as well as the two Trust Affidavits. The beneficiaries tendered the affidavits Beverley made on September 26, 2023 and April 17, 2024 ("Beverley Affidavit #1" and "Beverley Affidavit #2", respectively), the affidavits Marco made on April 11 and April 18, 2024 ("Marco Affidavit #1" and "Marco Affidavit #2" respectively), and the affidavit Nina made on April 16, 2024 (the "Nina Affidavit"). Of these five affidavits tendered by the beneficiaries, three were made in support of the removal application (Marco Affidavit #1, Nina Affidavit, and Beverley Affidavit #2).
- [22] Paul spoke to his affidavits and his administration of the estates and the trusts and was cross-examined by the beneficiaries' counsel. Marco also spoke to his affidavits and was cross-examined by Paul's counsel. Although the hearing was scheduled for a full-day, the parties were unable to make their final submissions in the time allotted, and the hearing was to continue on June 5, 2024. Unfortunately, Paul's counsel was ill and unable to attend the continuation scheduled for June 5, 2024, and I ordered the parties to file written closing submissions on or before June 21, which they did.

Legal Principles

- [23] In Paul's closing submissions, he submits that the trustee's duty to account and keep detailed records are well established in the jurisprudence, as are the remedies where trustees fall short of those obligations (that is, removal of the trustee and/or compensation to the trust), and that they do not need to be revisited.
- [24] In my view, given the circumstances of this case, the established principles regarding a trustee's duties bear repeating. In their closing submissions, the beneficiaries reproduced the following summary of these principles, which Associate Judge Harper (sitting as Registrar) set out in *Quiason Estate (Re)* (19 January 2024), Vancouver P227787 (B.C.S.C.) [*Re Quiason*]. At paras. 29-32 of *Re Quiason*, Harper A.J. noted the following established principles:
- [29] An executor has a duty to account to the beneficiaries of the estate. Executors are required to keep proper accounts and explain their expenditures, with receipts: *Sarzynick v. Skwarchuk*, 2021 BCSC 443 at para. 214.
- [30] An executor must not use the estate for their own benefit: *Sarzynick* at para. 215.
- [31] An executor is entitled to be indemnified from the estate only for expenses reasonably and properly incurred in the due administration of the estate. If an executor cannot account for or explain disbursements or expenses charged against the estate, the executor is personally liable for them: *Re Dirnberger Estate*, 2016 BCSC 1381 at para. 20.
- [32] One of the functions of the registrar on the passing of accounts is to make findings of fact: *Re Durakovic Estate*, 2011 BCCA 66 at para. 32.
- [25] In discussing the executor's duty to maintain records in *Re Quiason*, Harper A.J. stated the following (part of which is also reproduced in the beneficiaries' submissions):
- [43] [The executor] has a duty to account. If he cannot account for or adequately explain disbursements or expenses charged against the Estate, he should be personally liable for them.
- [44] In the *British Columbia Probate & Estate Administration Practice Manual*, 2nd ed. (Vancouver: The Continuing Legal Education Society of British Columbia, 2007) (Loose-leaf updated 2023) at 15.11, the authors observe as follows:

To prepare a proper set of accounts, it is necessary to maintain detailed records of all transactions. The personal representative must be able to produce proper vouchers for all receipts and payments and to provide full explanations for the administration of the estate assets. A failure to account for or explain disbursements may lead to personal liability (*Re Dirnberger Estate*, 2016 BCSC 1381 (Master); *Pomozon v. Beausoleil*, 2020 BCSC 2084 at para.145; *Zimmerman v. McMichael Estate*, 2010 ONSC 2947 at paras. 43 and 44, supplementary reasons on costs 2010 ONSC 3855; see also the discussion about expenses at "Expenses of Personal Representative" in chapter 16) ... The failure to maintain complete and accurate records may lead to an adverse

inference being drawn against the personal representative by the court (Re Lowe Estate, 2002 BCSC 813; Bernhard v. Wist, 2011 BCSC 101 (Master) at para. 105).

[Emphasis in original.]

[26] In Park v. Mitchell, 2022 BCSC 2180 [Park v. Mitchell] at paras. 54-56, Master Bouck (sitting as Registrar) reiterated that, as a starting point, "it is long recognized that a trustee's primary duty is the preservation of the trust assets and that [the trustee] still must use ordinary skill and prudence and apply common sense in administering the estate" (citing Fales v. Wohlleben Estate, [1977] 2 S.C.R. 302). She also noted that a trustee/executor "must not place himself in a position where his duty and his own self-interest conflict" (citing Phipps v. Boardman, [1967] 2 A.C. 46 (U.K.H.L.) at para. 23). This was echoed in Harper A.J.'s report in Re Quiason at para. 34, where she stated that "there is an inherent conflict of interest when a person is an executor and also a beneficiary. Estate law accepts such a conflict of interest as long as an executor does not favour their own interests over the interests of the other beneficiaries."

The Estates Accounts

[27] Although there are two estates in issue and Paul filed two P40s, I will summarize both sets of accounts together, noting the discrepancies identified by the beneficiaries between the First and Second Accountings where relevant.

Value of the Estates at Date of Trustee Renunciation/Herbert's Death

[28] As noted above, the parties do not dispute that the gross value of Joan's estate as at September 15, 2010 (the date of the HSBC renunciation) was \$319,688.11 (the funds in the Macquarie investment account). The parties also agree that the gross value of Herbert's estate as at November 28, 2011, was \$645,000.00, made up of the House and the funds in a savings account. This is set out in Part A of both of the respective P40s on the Second Accounting (and I noted above how this differs from the First Accounting).

[29] Paul testified that before he became executor/trustee of Joan and Herbert's estates, his mother, Beverley, used her power of attorney ("PA") over her parents' bank accounts to withdraw all of the funds in Joan's bank accounts, as well as the \$70,000 in Herbert's bank account; Paul estimates that Beverley withdrew a total of \$100,000 from both estates (Joan Trust Affidavit, para. 9). To support the assertion that Beverley withdrew funds from the bank accounts, he relies on the July 8, 2011 invoice of Joan's former lawyer showing an entry on December 16, 2010, "telephone call from BMO advising Beverley Durante had used PA after death of Mrs. Hynds to remove money from Mrs. Hynds' BMO account", and on April 14, 2011, "meeting concerning the withdrawal of \$25,000.00 by Beverley Durante by PA from Canada Western Bank" (Joan Trust Affidavit, Ex. 5, p. 25 and 27).

- [30] In response, Beverley attested that she did not use a PA to withdraw funds from either of her parents' estates after their deaths, stating that during their lives she "made transactions on their behalf relating to their care and finances" (Beverley Affidavit #2, para. 8). Beverley did not attend the hearing and was not cross-examined on her affidavits.
- [31] Based on the evidence in the lawyer's account exhibited to the Joan Trust Affidavit, which is evidence from a third party and pre-dates Paul's appointment as executor/trustee, I find it more likely than not that Beverley (not Paul) withdrew all of the funds from Joan's bank accounts as Paul alleges. Paul has exhibited a copy of a TD Bank statement for the account for Herbert's estate from January 31 to March 30, 2021, which shows deposits of the House sale proceeds and the funds reimbursed from the lawyers, but does not show that \$70,000 was transferred into the account during that time (Herbert Trust Affidavit, Ex. 7, p. 39). Based on this evidence, I find it more likely than not that Beverley had withdrawn the funds from Herbert's account using her PA prior to Paul's administration of Herbert's estate.
- [32] In Part B of the P40s (liabilities of the estate), the Joan Estate P40 indicates the total of liabilities was \$9,348.30 attributable solely to legal fees; the Herbert Estate P40 indicates a total of \$9,002.83 in liabilities, made up of cremation fees, legal fees, and Home Instead fees (the fees owing to the caregivers who looked after Herbert prior to his death). The beneficiaries do not dispute that these expenses were legitimately incurred.

The Capital and Income Transactions of the Estate

- [33] In the Joan Estate P40 at Part C, Paul has listed only one capital transaction for the period from September 15, 2010 to January 31, 2024, which is the sale of Joan's investments on October 23, 2011 for \$318,743.14. Explaining the capital transaction, Paul testified that he was advised by Joan's lawyer to set up an estate account for the funds; he said that he set up an account at TD Bank and transferred the funds from Macquarie to the TD Bank account on October 23, 2011 (see Herbert Trust Affidavit, Ex. 7, pp. 39-40).
- [34] In the Herbert Estate P40 at Part C, for the period from November 28, 2011 to January 30, 2024, Paul lists the capital transaction of the sale of the House on March 12, 2012 (which is also the date he was granted probate) for \$575,000, less expenses of \$26,481.49 related to the sale. Paul exhibited documents to the Herbert Trust Affidavit (Ex. 4 and 5), showing the House was sold pursuant to a contract dated December 26, 2011, with the sale completing in a date to be determined in March 2012. The beneficiaries do not dispute the legitimacy of the expenses related to the House sale. The total of the capital transactions for Herbert's estate is \$548,518.51. Paul testified that he set up an account with TD Bank for Herbert's estate and that he transferred the proceeds of the sale of the House into this account (again, see Herbert Trust Affidavit, Ex. 7, pp. 40-41).

- [35] In Part D (income transactions) of the Joan Estate P40 for the period from September 15, 2010 to January 31, 2024, Paul has included probate fees of \$6,114 as a debit to the estate. The beneficiaries do not contest the legitimacy of this debit. Part D of the Herbert Estate P40 indicates that there were no income transactions during the relevant period from November 28, 2011 to January 30, 2024.
- [36] Paul testified that given his non-resident status, he was advised he could not invest the estate funds in Canada and on the advice of a banker at a Citibank in New York (where he lives), he closed the TD Bank estates' accounts and transferred the estates' funds to two trust accounts he opened at a Citibank in New York (see Herbert Trust Affidavit, Ex. 7, pp. 41-44). Paul testified that he understood it would be easier for him to administer the trusts this way from US accounts.
- [37] As detailed below, Paul admits that as at the time of the passing of accounts, no estate funds remain.

Assets and Liabilities of the Estates

- [38] Part E of a P40 affidavit is the section in which the assets of the estate and their values are listed, and Part F of the P40 lists the estate's liabilities.
- [39] In Part E of the Joan Estate P40, Paul has listed as the estate's sole asset a loan receivable from himself in the amount of \$300,280.84. There are no liabilities listed in Part F of the Joan Estate P40.
- [40] In Part E of the Herbert Estate P40, Paul lists as assets of the estate a loan receivable from himself of \$248,925.45, and two loans receivable from Marco of \$19,000 and \$63,000. With respect to the liabilities of Herbert's estate set out in Part F of the P40, Paul lists \$7,773.23 as expense reimbursement claimed by Nina, as well as "unknown" for the ongoing expenses for Beverley. To explain the liabilities for Herbert's estate, Paul said that he has used the funds in Herbert's estate to pay for Beverley's expenses pursuant to the testamentary trust (as indicated in Part F of the Herbert Estate P40), but he has not attributed funds in Joan's estate to Beverley's expenses pursuant to that testamentary trust. Paul does not dispute that the expenses Nina claims are related to Beverley's care.
- [41] As noted above, the beneficiaries object to the loans Paul made to himself from the funds of both estates, as well as the loans he attributes to Marco.

The loans attributed to Paul

- [42] Paul does not deny that he withdrew the funds from the trust account for Joan's estate, as well as the bulk of the funds in the trust account for Herbert's estate, together totalling \$549,206.29. His explanation for his use of the estates' funds was that his business, which ran art galleries on cruise ships, was badly affected by the Covid pandemic, and at the hearing, he testified that he loaned his business funds from the estate accounts to meet ongoing

obligations, but that his business had failed. He also testified that he went through a difficult divorce and that in the course of the family proceedings in the US, one or both of the trust accounts were declared to be family assets and he "was forced to pay \$85,000 USD from the account that was holding Joan's funds to my ex-spouse" (Joan Trust Affidavit, para. 17, Ex. 8).

- [43] Paul does not dispute that he withdrew the funds without the consent of the other beneficiaries. Paul testified that he withdrew the funds from the estates in tranches, but admits that he has no records from the US accounts showing the transactions. He said that he was (or had been) "close to bankruptcy" and that, as a result, the bank had closed all of his accounts and he had no access to the banking records. I find Paul's explanation for the lack of any US banking records for the estates' accounts to lack credibility and note that he proffered no evidence of any attempts he made to obtain historic records from the Citibank where the accounts were held.
- [44] At the passing of accounts, Paul also testified that his evidence that the funds were advanced to himself personally (as set out in the P40s) was not accurate, but that the funds were used for his business and because the beneficiaries' counsel had accused him of self-dealing, he wished to clarify the funds were for his business.
- [45] It is an established principle of estate law that an executor "must not use the estate for their own benefit". Based on the evidence before me, I find that whether he used the funds he withdrew from the estates' accounts to attempt to keep his business running, to meet the obligations to his former spouse under his divorce settlement, or for his own personal use, Paul has used the estates' funds for his own benefit.
- [46] Paul does not dispute that he owes the estates \$549,206.29 (\$300,280.84 to Joan's estate and \$248,925.45 to Herbert's estate) and I determine that he is personally liable to the estates for these amounts.

The loans attributed to Marco

- [47] As noted, in the Herbert Estate P40, Paul attributes two loans of estate funds to Marco, one for \$19,000 and the other for \$63,000. Marco (and the other beneficiaries) dispute that he owes this money to Herbert's estate on the basis that the \$19,000 was a gift or advance from Herbert's estate on his inheritance, approved by Beverley, and that the \$63,000 was not a loan to Marco, but were funds Paul used to pay Dionisio's rent.
- [48] Marco testified that in or around November 2017, he approached Paul seeking an advance on his inheritance to help him pay off debt and, because he was embarrassed he had accumulated debt, he asked Paul to keep it secret (see also Marco Affidavit #1, para. 41). Paul does not dispute this. Marco said that he and Paul discussed whether the money was a loan or an advance and Marco maintains that Paul agreed the funds would be a gift. Marco testified that Paul wrote him a personal cheque for \$19,000, which Marco deposited to his own account in late December 2017 or early January 2018 (see also Marco Affidavit #1, paras. 42-44). Marco denied that Paul had ever asked him to repay the funds, only characterizing

the money as a loan repayable to the estate when the accounts were demanded. At the hearing, Marco maintained that the money was a gift to him and that his mother had agreed in 2021 or so that it was a gift. Beverley attested that she and Marco had discussed the issue and that she intended for the money to be a gift to Marco (Beverley Affidavit #2, para. 6).

- [49] Paul testified that he gave Marco the funds from his personal account (he does not dispute that the cheque he provided was a personal cheque from him) and in the Joan Trust Affidavit, he attests "I have now assigned those funds to Joan's estate" (para. 14) (although they are listed in the Herbert Estate P40). Paul maintains that he and Marco agreed that the \$19,000 was a loan to Marco, owing back to the estate, and that despite his "ongoing demands for repayment over the years", Marco has not paid it back (see Joan Trust Affidavit, para. 15). Paul exhibited one page showing a text exchange between him and Marco dated November 23, 2017, as well as a text from Marco to him dated January 18, 2018 (Joan Trust Affidavit, para. 14, Ex. 7). Both Paul and Marco identified the two texts. In the text from him to Paul dated November 23, 2017, Marco states, "I'm going to ask about borrowing some cash from mom to pay off my line of credit and a personal credit card we can do a payment plan and pay it back over a few years. Let me know what you think." In the text, sent some six weeks later on January 18, 2018 from Marco to Paul, Marco writes "I deposited one cheque yesterday payable to me for \$19,000 (that's what the RBC person told me to do). She said it would clear by next Wednesday." There are no other texts in evidence about these funds.
- [50] Marco says that he asked Paul for the texts they exchanged between November 23, 2017 and January 18, 2018, to confirm that they had agreed the funds would be a gift, but Paul did not produce any further evidence. Paul's evidence under cross-examination was that he and Marco communicated through text, but also through phone conversations, and he did not have any other texts. He maintained that Marco owed the funds back to the estates (acknowledging that he had attributed the loan to different estates in his P38 and P40 affidavits). Under cross-examination, when asked why he did not tender copies of the text exchanges to support his version of events, Marco's evidence was that he switched cell phone carriers and he no longer has access to his earlier texts.
- [51] Beverley's untested evidence is that she intended Marco to receive the \$19,000 as a gift. Marco denied that Paul had ever demanded he repay the loan and Paul could not produce any evidence that he had made repayment demands of Marco after the loan was made in January 2018. I find that the texts Paul exhibited are not determinative and prefer the evidence of the beneficiaries on this issue. On the evidence before me, I find it more likely than not that the \$19,000 was intended as a gift to Marco (that is, an advance on his inheritance) from Herbert's estate.
- [52] With respect to the \$63,000 loan owing to Herbert's estate (according to the Herbert Estate P40), at the hearing, the parties explained that in 2013, Paul and his son moved back to BC and that Dionisio, who was on a fixed income, moved in with them. Marco's evidence is that Dionisio told him that he paid Paul around \$700 per month as rent from his pension while he lived with Paul and his son (see also Marco Affidavit #1, para. 33). Paul did not challenge

this evidence. There is no dispute that in 2015, Paul moved back to New York and Dionisio moved in to the basement suite in the house in which Marco and his family lived, which was owned by Marco's in-laws. Marco's evidence is that the rent for the basement suite at his in-laws' house was \$1,450, which was made up of \$700 from Dionisio's fixed income, as well as \$750 directly from Paul (Marco Affidavit #1, para. 36). Marco's evidence is that he always understood that Paul was personally paying their father's rent. Paul's evidence is that the money went to Dionisio "for convenience sake", but that Marco knew the funds came from the estate. Marco's unshaken evidence was that Paul would e-transfer money to him every month, and of these funds, Marco would pay some money to Beverley as her allowance, and pay \$750 to his in-laws for Dionisio's rent of their basement suite. (I note that Paul has included in the documents at Ex. 6 to the Joan Trust Affidavit, a page titled "examples - funds Paul sent to Marco for Beverley" showing various e-transfers, but the dates are not legible and the amounts vary). Marco testified that he had no idea the funds were coming from estate funds (he had no idea where Paul was getting the money from) and he maintains that he did not benefit from the funds, that they went to his in-laws.

[53] Marco relies on a redacted email from Paul to him dated August 4, 2017, the subject line of which is "Marco - please help Dad", in which Paul asks Marco for his help because their father's rent was late, stating the following:

Marco - I'm really sorry.

Every month I transfer money to an account to pay mom's bills and dad's rent.

The internet went down on the ship It was too slow to log into the bank account.

I have a business partner I was able to send him a text and he personally sent the money to Dad. I thought it would be easier/faster to send it all to dad's account. [The business partner] sent it via PayPal to Dad. But now Dad says it will take a few days to clear. I'm not sure why. PayPal is instant in the US.

This will never happen again. When I'm able to log into the bank, I'm going to transfer enough to make sure this doesn't happen again.

I feel terribly about this. Please apologize to [Marco's in-laws] for me. Obviously I have never been late with rent before. Please made sure Dad accepted the PayPal properly.

Thanks buddy.

[54] Paul testified that he revised the information in the Herbert P40 because in his opinion, the money was going to Marco and Marco benefited from it. As the beneficiaries point out in their closing submissions, there is no evidence before me of a loan agreement regarding these funds, or any documentary evidence to corroborate Paul's version of events. Under cross-examination, Paul became emotional when asked whether he had ever asked for repayment of these funds from either Marco or Dionisio, admitting that he had not. Paul does not dispute that he was paying his father's rent, but maintained that "everyone knew"

he could not pay it alone and that he intended to "settle up" with his siblings' help after their mother died.

[55] There is no dispute that Dionisio is not a beneficiary under either Joan's Will or Herbert's Will. I find that Paul has not established that Marco kept for his own use the money Paul transferred to him to pay for Dionisio's rent and in the email reproduced above (which Paul does not deny he sent), Paul asks Marco to apologize to his in-laws for the delay in paying Dionisio's rent. On the basis of the evidence before me, I find it more likely than not that Paul advanced the funds from the estate to pay for his father's rent, and that he did this without the consent of his siblings or his mother.

[56] As executor, Paul is not permitted to use the estate funds for his own benefit or for the benefit of his father and I find that Paul is personally liable to the estate for the \$63,000 he used to pay Dionisio's rent.

Distribution and Estimated Residue of the Estates

[57] In the Joan Estate P40, Paul lists the \$3,000 bequest he received (although it is not dated). With respect to the residue of Joan's estate, the market value of the estate assets as at January 31, 2024 is listed as \$300,280.84. Paul has estimated a reserve of \$20,000 for "final income tax, accounting and legal costs and remuneration", leaving a residue of \$280,280.84. Given Beverley's life interest (the testamentary trust), Paul acknowledges that no distribution of the residue is to be made.

[58] In the Herbert Estate P40, Paul has provided an estate accounting (Schedule A to the P40) to explain how the market value of Herbert's estate's assets as at January 30, 2024 is \$330,925.45. Paul lists as the estate's assets \$575,000 (proceeds from the House sale), \$70,000 (funds in the bank account), and \$8,325 (identified as an advance from Paul for probate fees). In Schedule A ("Schedule"), Paul calculates that the total liabilities of Herbert's estate is \$322,399.55, based on the following expenses or debits:

- \$26,481.49 (expenses related to the House sale);
- \$1,788.00 (cremation fee);
- \$2,132.73 (Home Instead fee);
- \$7,860.00 (probate fees paid);
- \$5,082.11 (legal fees for probate);
- \$70,000 (cash withdrawals by Beverley)
- \$156,000 (Beverley monthly care expenses paid from estate)
- \$7,772.23 (expenses for Beverley claimed by Nina)
- \$45,282.99 (special expenses requested by Beverley).

[59] As set out on the Schedule, Paul calculates the net assets of Herbert's estate as at January 30, 2024 to be \$330,925.45. With respect to the residue of the estate, Paul estimates a reserve of \$40,000.00 for final income tax, accounting and legal costs and remuneration, leaving a residue of \$290,925.45. Like the residue of Joan's estate, the residue of Herbert's estate is subject to Beverley's life interest and not available for distribution to the beneficiaries until Beverley's death.

The Trust Accounts

[60] The evidence of Paul's administration of the two testamentary trusts was set out in the Joan Trust Affidavit, at para. 12, in which Paul attested the following:

Since the administration of Joan's estate began, I have been duly fulfilling my duties as an executor and trustee and have been looking after Beverley's best interest, ranging from her medical care, to her living environment, her comforts and needs as well as entertainment and leisure. Beverley received a monthly allotment of funds every month, via cash and or credit cards, without fail until she transitioned to long term care. Attached as Exhibit 6 are lists of expenses that have been paid on account of Beverley's care, living expenses and leisure. Unfortunately, my records are not complete due to the length of time of the administration of the estate and significant changes in my living conditions resulting from the breakdown of my marriage. Most of my records are lost or were destroyed in that process.

[61] In the Herbert Trust Affidavit, Paul attested that the matters he had attested to in the Joan Trust Affidavit regarding Beverley's case "hold true for Herbert's estate as well as they are common and overlapping issues" (para. 4).

[62] In Exhibit 6 of the Joan Trust Affidavit, Paul has exhibited notes he created to account for the expenses he incurred in administering the trusts, supported by copies of some receipts and invoices, many of which are illegible. He testified that he based the trust accounts on the information he maintained on an Excel spreadsheet, which he created for his own use, but which was not tendered in evidence at the passing of accounts. Paul's explanation for failing to produce the Excel spreadsheet for the passing of accounts is that he knew that Nina and Marco would not believe his figures without supporting receipts, and that they would not believe anything he said.

[63] It is not uncommon in contentious estate proceedings for one or more beneficiaries to challenge the accounts presented by an executor or trustee. I find Paul's explanation that he maintained contemporaneous records of his administration of the trusts in a spreadsheet, but chose not to produce it in evidence because his siblings would question it, lacks credibility. I find it more likely than not that Paul's failure to tender the spreadsheet is because it does not exist.

[64] Paul's evidence is that from March 2012 (after he became the trustee of Herbert's estate), to December 2022, "Beverley consistently expended a minimum of \$1,200 per month totaling at least \$156,000 over this ten-year period sourced exclusively from the estate of Herbert

Hynds" (Joan Trust Affidavit, Ex. 6, p. 31). As noted above, in Ex. 6 to the Joan Trust Affidavit, Paul has included copies of e-transfers made to Marco on various dates for his mother's expenses, but the dates are often illegible, as are the amounts, and Paul admits this is only a sample and does not cover the entire administration of the estate.

[65] In Ex. 6 to the Joan Trust Account, Paul also provides a document he created which lists "additional disbursements to Beverley" during the period from March 2012 to February 2023 totalling \$45,282.99, consisting of the following:

- Three cruise holidays (Hawaii, Alaska, Mexico), fare, transport, flights, shore excursions: \$13,504.44
- Eye-glasses: \$3,055.00
- Wedding gift to Marco (ceremony venue & reception hall): \$11,160.00
- Dental: \$1,124.34
- Scooter battery: \$371.00
- Veterinary: \$1,449.10
- Speciality Bed: \$1,479.00
- Recliner chair: \$900
- Lifeline - \$720 per year X 8 years: \$5,760.00; and
- Home Instead (since 2017) - average \$90 per month: \$6,480.00

[66] The beneficiaries concede that of the expenses listed above, the following expenses totalling \$30,695.45 are legitimate (and they do not take issue with them): the eye-glasses, the wedding gift to Marco, the dental work, the scooter battery, the specialty bed, the recliner chair, the expenses for Lifeline and for Home Instead. They dispute the expenses he claims for the cruise holidays.

[67] The receipts Paul included in the exhibit to support the expenses of \$13,504.55 for the three cruise holidays do not include any amounts. As the beneficiaries' counsel pointed out to Paul during his cross-examination, as someone who was working on cruise ships at the time the holidays occurred, he was entitled to discounts and vouchers, which he could have used for Beverley's holidays and suggested this explains the lack of invoices showing the amounts he actually paid. Paul did not deny this suggestion, nor did he deny that the receipts he exhibited to the affidavit do not contain any information about the actual cost of the cruise holidays, but he objects to any suggestion of impropriety. I find that Paul's evidence at the hearing and in Exhibit 6 does not support the cruise ship holidays expenses he claims he paid for his mother's travel and I do not allow these expenses.

[68] As set out above, a trustee has a duty to account for expenditures from the trust and to maintain records to support the expenditures. I find that Paul has failed to meet these duties. Paul's explanation throughout the passing of accounts for the lack of records related to his administration of the trusts is that although he kept meticulous records, during a move, the movers threw out a box of records, and that another box of records kept in a friend's storage space has gone missing or was thrown out. I find that Paul's explanation that the records, which he described as very important to him, were thrown away by third parties lacks credibility. I find it more likely than not that Paul simply did not maintain records for the administration of the trusts, and that most of the evidence presented at the hearing was recreated by him after the fact.

The Executor's Remuneration

Legal Principles

- [69] Section 88(1) of the Trustee Act, sets out how the remuneration of a trustee or an executor is to be set, providing that they are entitled to, "a fair and reasonable allowance, not exceeding 5% on the gross aggregate value, including capital and income, of all the assets of the estate by way of remuneration" for their "care, pains and trouble" and their "time spent in and about the executorship of the estate and effects vested" in them under any will and in "administering, disposing of and arranging and settling the same, and generally in arranging and settling the affairs of the estate as the court, or a registrar of the court if so directed by the court thinks proper" .
- [70] Section 88(3) of the Trustee Act permits an executor or trustee to apply annually for "a care and management fee and the court may allow a fee not exceeding 0.4% of the average market value of the assets."
- [71] The parties agree that the criteria to be considered in determining the appropriate amount of remuneration, as set out in the established authorities are: the magnitude of the trust; the care and responsibility involved; the time occupied in administering the trust; the skill and ability displayed; and finally, the success achieved in the final result.

Executor's Claimed Remuneration

- [72] In the Joan Estate P40, Paul claims as his total executor's remuneration \$11,156.00. His claim for remuneration is based on a capital fee of \$11,156.00, calculated as 3.5% of the capital assets of the estate, \$318,743.14. Paul is not claiming an income fee or a care and management fee.
- [73] In the Herbert Estate P40, Paul claims as his total executor's remuneration \$20,125.00. Like the remuneration he claims for Joan's estate, Paul's remuneration is based on a capital fee of 3.5% of the capital assets of Herbert's estate, \$575,000. Paul is not claiming an income fee or a care and management fee.

Magnitude of the Trust

- [74] The value of the estates was less than \$900,000, which is moderate by today's standards. However, through the terms of their respective Wills, both Joan and Herbert intended for their estates to be held in trust to care for their daughter, Beverley, throughout her lifetime. There was no evidence before me of what the value of the estates would be if the funds had been prudently invested, but Paul admits there are no funds left.

Care and Responsibility Involved

- [75] I find that once the estates' assets were liquidated and the funds held in trust accounts, the care and responsibility required to administer the trusts for Beverley's benefit should have been straight-forward, ensuring her regular living expenses were covered and expenditures for her benefit were made.
- [76] Throughout the hearing, Paul was emotional in testifying about his administration of the estates and the trusts, insisting that he had to tell the story about his relationship with his siblings and mother, as well as with their father, and how they had deteriorated to the point that they were vilifying him and do not acknowledge the efforts he made over several years to look after their mother. I do not doubt that the family relationships in this case are fraught and have deteriorated by the time of the passing of accounts. However, I find that the evidence before me (as detailed above) establishes that Paul has not exercised the care required of an executor/trustee in administering the estates, but establish that he has instead used the estate funds for his own benefit.

Time Occupied in Administering the Estate

- [77] Based on the evidence before me, without any contemporaneous records, it is difficult to determine with any precision the amount of time Paul spent administering the estate from 2011 to the present, some thirteen years. I accept that Paul spent some time administering the estates, but I also find that his siblings helped care for his mother, particularly in the recent past few years.

Skills and Abilities Displayed

- [78] Paul testified that he did not know much about being a trustee when he was appointed and attributed his failure to pass the estate and trust accounts earlier to his ignorance (although he was quick to criticize Joan's lawyers who helped him obtain probate of both estates). I find that in the circumstances of this case, Paul has not displayed the skill and abilities expected of a trustee.

Success Achieved

[79] I find that in the circumstances of this case, Paul has been unsuccessful in his administration of the estates and the trusts, which is reflected in the undisputed fact that he has loaned nearly all of the estates' funds to himself.

Conclusion on the Executor's Remuneration

[80] It has been held that an executor (or trustee) is entitled "to a level of remuneration that is appropriate, fair and reasonable in the circumstances": Mikaloff (Re), 2018 BCSC 756 at para. 42.

[81] As noted, Paul claims a total of \$31,281.00 from both estates as his executor's remuneration, based on 3.5% of the capital assets of the estates. I find this amount to be excessive in the circumstances. Based on the factors I discussed above, as well as the evidence before me at the hearing, I find it is appropriate, fair and reasonable that Paul should receive only nominal remuneration for his administration of the estates and trusts, which I find should be \$10,000.

[82] However, this is to be set off against the amount Paul owes to the estates and in the circumstances of this case, I determine that it should be set off against the amount that Paul owes to Joan's estate.

Paul's Personal Liability to the Estates

[83] In his closing written submissions, Paul submits that he has acted honestly and fairly and that his actions can be reasonably excused because he was doing the best he could. For this reason, he submits that I should relieve him from his liability to the estates, presumably over and above the amount that he admits he owes the estates.

[84] Based on the review of the Accounts above, I calculate the amount owing to the estates by Paul to be \$602,206.29. This figure consists of the \$549,206.29 Paul admits he owes the estates (\$300,280.84 to Joan's estate, and \$248,925.45 to Herbert's estate), which he is liable to repay to each estate. I have also determined that Paul withdrew \$63,000 from Herbert's estate to pay Dionisio's rent, and I find he is liable to repay this amount to Herbert's estate. These amount to \$612,206.29, from which is to be deducted \$10,000 for his remuneration.

[85] In his closing submissions, Paul concedes that a reasonable rate of interest is due on the loans he made to himself. I find that Paul is liable to pay interest on the \$602,206.29 as set out under the Court Order Interest Act, RSBC 1996, c 79 [COIA]. I find that it is appropriate that an executor's withdrawal of estate funds for their own use and benefit should attract pre-judgment interest under the COIA from the date of the withdrawal to the date of this decision, and post-judgment interest under the COIA until the funds are repaid. However, without evidence of when Paul withdrew the funds from the estates as loans to himself, it is impossible to accurately determine the date from which the pre-judgment interest should

accrue.

- [86] Paul admits that he used some of the funds to pay the divorce settlement to his former spouse, and the three-page "judgment of divorce" of the New York Supreme Court confirming he paid \$65,000[1] USD to his former spouse's lawyers, is dated October 7, 2015. He also admits that he used estate funds to maintain his business during the Covid pandemic, but the business was closed by the end of 2020. There was no evidence before me of when all of the funds were withdrawn.
- [87] In the circumstances of this case, I determine that Paul should pay pre-judgment interest under the COIA on the amount of \$65,000 USD from October 7, 2015 to the date of this decision, and on the remainder owing from January 1, 2021 to the date of this decision. Post-judgment interest under the COIA will be owing from the date of this decision.
- [88] In his closing submissions, Paul indicates that he is not in a position to repay the loans he made to himself in full at this time, submitting that he "is in a dire personal financial situation and is rebuilding his life" and is unable to propose a payment plan for the loans, although he wishes to come to an "agreement on a sustainable loan repayment schedule with the beneficiaries, premised mostly on Beverley's needs".
- [89] I decline to order a repayment schedule, but leave it to the parties to work this out between themselves, if they so choose.

The Attribution of Expenses between the two Trusts/Estates

- [90] In their closing written submissions, the beneficiaries concede that monthly payments were made to Beverley from the trusts, although the exact amount cannot be ascertained based on the records. The beneficiaries suggest that \$55,000 is an appropriate amount, which they submit is "well and above the evidence" provided by Paul. I find this amount to be reasonable.
- [91] Paul submits that given the terms of Joan's Will, which excluded his siblings Nina and Marco as beneficiaries, and the terms of Herbert's Will (which waived the even-hand principle), he should not have to attribute trust expenses between the two estates and he was entitled to use all of the funds in Herbert's estate before turning to the funds in Joan's estate to administer Beverley's trust.
- [92] In their closing submissions, the beneficiaries submit that it is appropriate to find that Paul has proven (or they have conceded) that expenses of \$15,462.00 (from Joan's estate), and of \$121,179.77 (from Herbert's estate), have been made by Paul for Beverley's care, as per the terms of the testamentary trust.
- [93] I find that in the circumstances of this case, it is appropriate to attribute the expenses between the two estates as suggested by the beneficiaries.

Costs of the Passing of Accounts

- [94] The beneficiaries submit that they should be granted the costs of the passing of accounts "on a full indemnity basis, payable by Paul personally."
- [95] They also submit that Paul should not be entitled to any costs of the proceeding on account of his failure to administer the estate and keep records, and because of the deficiency of the accounts. The beneficiaries cite the cases of *Zimmerman v. McMichael Estate*, 2010 ONSC 2947 at para. 125 and *Bigras Estate (Re)*, 2011 BCSC 950 at para. 64 as authority that where proceedings are required by reason of the trustee's failure to keep proper accounts, the court may deprive the trustee of their compensation and order the trustee to personally pay some or all of the costs associated with the passing of accounts. They also cite *Re: Estate of Marian Catherine Stead*, 2009 BCSC 821 and *Hautakoski Estate (Re)*, 2009 BCSC 868, for authority that the court will deny costs to the personal representative if the accounts are wholly inadequate.
- [96] Paul submits that he should not be responsible for costs on a "full indemnity basis" because "the high threshold required for such an award is not met here". In the consent order entered on December 5, 2023, the parties agreed that the on the passing of accounts, the registrar would assess costs "pursuant to Rule 14-1(3)", in other words as special costs. The typical order for costs on a passing of accounts (usually made by the court directing the passing of accounts before the registrar) is that the parties' costs are payable from the estate as special costs (see also R. 25-13(7)). This is not a conduct-based determination.
- [97] Paul also submits that he should be granted his costs of the passing of accounts as his accounts "are not fully inadequate" and he has now consented to remove himself as trustee.
- [98] I find it appropriate in the circumstances of this case, which I have detailed in these reasons, to order that Paul personally is to pay the beneficiaries' costs of the passing of accounts, to be assessed as special costs, and that these costs are not to be paid from the estates. I also find it appropriate to order Paul to bear his own costs of the passing of accounts.

"Registrar Gaily"

- [1] I calculate the amount Paul was required to pay in his divorce proceedings to have been \$65,000 USD, not \$85,000 USD, based on my review of the court documents Paul exhibited. The documents indicate that after Paul commenced divorce proceedings against his former spouse, the parties entered into a settlement agreement under which Paul paid her \$65,000 USD (paid to the law firm representing her) and that the judgment of \$20,000 entered against Paul and in favour of his former spouse's lawyers "has been paid and satisfied by the receipt by [his former spouse and her law firm] of the aforesaid payment of \$65,000" by Paul (*Joan Trust Affidavit*, Ex. 8, pp. 43-45).

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