

CANADA / JUDGMENT

Kolic Estate (Re)

2022 BCSC 1527

COURT

Supreme Court of British Columbia

DECIDED

1 September 2022

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2022 BCSC 1527 Kolic Estate (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kolic Estate (Re),

2022 BCSC 1527

Date: 20220901

Docket: S221109

Registry: Victoria

Re the Estate of Violet Kolic, also known as Ljubica Kolic, Deceased

Before: The Honourable Mr. Justice Punnnett

Reasons for Judgment

In Chambers

Counsel for the Petitioner, Sitka Law Corporation (via MS Teams):

E. Wagner

Counsel for the Respondent, Mary Kolic:

A. Lewis

Counsel for the Respondent, Angela Kolic

(via MS Teams):

S. Klinger

Counsel for the Respondent, Joseph Kolic

(via MS Teams):

P. Newman

Place and Date of Hearing:

Victoria, B.C.

July 8, 2022

Place and Date of Judgment:

Victoria, B.C.

September 1, 2022

Introduction

- [1] The petitioner applies under s. 86 of the Trustee Act, [RSBC 1996] Chapter 464 for directions and orders relating to vacant possession of real property including a writ of possession, removal and disposal of the respondent Mary Kolic's possessions, and liberty to apply for their enforcement and costs.

Background

- [2] Violet Kolic ("Violet"), late of 157 Sims Avenue, Victoria, British Columbia ("the Property"), died at Victoria, on February 10, 2013, leaving a will dated August 31, 1998 ("the Will").
- [3] The deceased appointed her daughter, Mary Kolic, as executor of the Will. However, this Court ordered that Mary Kolic be removed as executor on July 14, 2016 (Kolic Estate (Re), 2016 BCSC 1312). Stephanie Sieber was appointed in Mary Kolic's stead, but died before she could completely administer the estate. On February 24, 2021, this Court appointed the petitioner Sitka Law Corporation administrator (the "Administrator") of the estate.
- [4] Charles Kolic, the now deceased brother of Joseph, Angela and Mary Kolic commenced an action to vary the Will on December 18, 2014. On July 26, 2021, that action was dismissed.
- [5] On June 14, 2018, Joseph and Angela Kolic commenced a counter-claim against their sister Mary Kolic seeking a declaration of resulting trust or judgment against her for taking funds from Violet's estate before and after her death. Judgment was granted in their favour on August 29, 2019 for \$235,794.42 plus interest and \$10,000 in punitive damages (Kolic v. Kolic, 2019 BCSC 1463). I awarded special costs against Mary Kolic on August 22, 2022 (Kolic v. Kolic, 2022 BCSC 1448) further adding to the funds owed by Mary Kolic to the estate.
- [6] The gross value of the estate at the date of Violet's death is set out in the Statement of Assets, Liabilities, and Distribution filed in support of the application for a grant of probate. They totalled \$408,988.30 consisting of \$13,988.30 cash, personal effects of \$3,000, and the real property in issue on this application, 157 Sims Avenue, Victoria, B.C., then valued at \$391,900.00 (the "Property"). At her death the deceased also held a property at 139 Battleford

Avenue, Victoria, British Columbia in joint tenancy with Angela and Mary Kolic. As this property passed by survivorship, it was not part of Violet's estate.

- [7] In the Will, Violet specifically bequeathed the Property to three of her children as follows:
 - a) 1/6 to Mary Kolic;
 - b) 1/6 to Angela Kolic; and
 - c) 4/6 to Joseph Kolic
- [8] The Property is registered in the name of the Administrator.
- [9] Joseph Kolic and Angela Kolic have informed the Administrator they do not wish to receive an interest in the Property in specie and ask that the Administrator sell the Property.
- [10] The Administrator submits it cannot transfer the Property to Joseph Kolic and Angela Kolic in specie without their agreement and their signatures on the Property Transfer Tax and Land Ownership Transparency Registry forms. Mary Kolic disputes this submission.
- [11] Mary Kolic, who continues in occupation of the Property, at least for storing belongings there, does not want the Property sold.
- [12] At the time of Violet's death, Mary Kolic and her brother, Charles Kolic, both resided in, and had possession of, the Property. Charles Kolic continued in occupation of the Property until he died in December 2019.
- [13] Mary Kolic has occupied the Property since Violet's death in 2013. She may no longer reside in the home as there is evidence she resides elsewhere. This occupation results from her being in possession of the house at the time of her mother's death and not under any agreement with the Administrator.
- [14] While the litigation was ongoing, the Administrator chose not to enforce its right to possession of the Property and warned Mary Kolic that the estate would expect her to pay "occupation rent" from her share of the estate once the litigation was complete.
- [15] The right to occupational rent is grounded in Mary Kolic's occupation of the Property without the permission of the estate. The matter of occupational rent was discussed in the Trial Management Conference held on January 24, 2019. Mary Kolic informed the Court at the Trial Management Conference that she was holding \$8,000 on account of rent for the Property.
- [16] On March 8, 2019, Mary Kolic delivered to the Administrator by mail a cheque for \$10,255.88, an undisclosed portion of which she stated was for "rent".

- [17] On May 3, 2019, Mary Kolic commenced making unilateral payments to the Administrator of \$1,000 per month. These were not requested by the Administrator but were deposited to the credit of the estate. Mary Kolic provided no information or explanation to the Administrator as to the purpose of these payments. The Administrator has never accepted the payment as an agreed month-to-month rent for the Property. There has been no discussion between Mary Kolic and the Administrator about the \$1,000 monthly payments.
- [18] The market rent of the Property is between \$1,800 - \$2,000 per month.
- [19] There is no tenancy agreement, no security deposit and no agreement as to appropriate rent to be paid by Mary Kolic for her occupation of the Property. There is no written tenancy agreement, because there is no agreement on the terms necessary to create a tenancy. As a result, Mary Kolic's possession of the Property is not subject to the Residential Tenancy Act, SBC 2002, c. 78, ss. 6 or 13.
- [20] On November 8, 2021, following the dismissal of Charles Kolic's will variation action, the Administrator gave Mary Kolic written notice to vacate the Property by January 31, 2022. She did not respond to this notice. The Property continues to be filled with her considerable possessions which block at least two of its doors, fill the garage and make it impossible to move freely through the house.

Position of the petitioner

- [21] The petitioner submits the Property will be difficult to sell as is and will sell at a significant discount unless it is cleared out and cleaned. The Administrator has a duty to obtain the best price for the Property and requires vacant possession so this part of the estate may be properly administered, and the Property prepared for sale. The Administrator also requires the sale of the Property to realize Mary Kolic's share of the funds she owes to the estate. The Administrator states there is evidence that Mary does not reside at the Property given she has been found sleeping at another property.

Position of the respondent Mary Kolic

- [22] The respondent Mary Kolic submits the Property can be transferred to each of the specific legatees under the Will without the transferees completing the information required in a Property Transfer Tax Return by providing explanatory information. She also submits that the relief sought by the Administrator is not merely for directions, but for orders that exceed the jurisdiction of the Court in a s. 86 application or under its inherent supervisory jurisdiction over trusts. She says the application should have been brought as an action, not a petition.

[23] The respondent also submits that the Administrator is not seeking direction on how to administer the estate in the face of ambiguity or a legal dilemma. Rather, in her view, the Administrator seeks permission from the court to disregard the express bequest made in the Will at the behest of the majority of the legatees of the Property.

Law

[24] The petition is brought pursuant to Rule 2-1(d) of the Supreme Court Civil Rules, BC Reg. 168/2009:

2-1(2) To start a proceeding in the following circumstances, a person must file a petition, or, if Rule 17-1 applies, a requisition:

(d) the relief, advice or direction sought relates to a question arising in the execution of a trust, or the performance of an act by a person in the person's capacity as trustee, or the determination of the persons entitled as creditors or otherwise to the trust property.

[25] Section 86 of the Trustee Act states:

86 (1) A trustee, executor or administrator may, without commencing any other proceeding, apply by petition to the court, or by summons on a written statement to a Supreme Court judge in chambers, for the opinion, advice or direction of the court on a question respecting the management or administration of the trust property or the assets of a will-maker or intestate.

(2) The application under subsection (1) must be served on, or the hearing attended by all persons interested in the application, or by those that the court thinks expedient.

(3) The costs of an application under subsection (1) are in the discretion of the court.

[26] The petitioner also relies on the wording of the Will and the inherent jurisdiction of the Court.

Discussion

[27] The application falls within Rule 2-1(d) as it is that of a trustee seeking "relief, advice or direction arising with respect to trust and trust property". Similar relief was sought and granted in *Watson v. Strong*, 2014 BCSC 754 (aff'd 2017 BCCA 331).

[28] Section 86 is not to be used for answers to simple matters that a solicitor could advise the trustee on, nor for the Court to exercise a trustee's discretion for him or her. However the courts have, relying on s. 86, given advice and direction relating to legal issues: *Waters' Law of Trusts in Canada*, 5th ed. (Carswell, 2021) 20.11, pp. 5-7. Such is the case here.

[29] The Will provides in para. 4 that the Trustee is given all property of the deceased upon these trusts:

4. I give all my property, including any property over which I may have a general power of appointment, to my Trustee upon the following trusts:

(a) To administer such property in accordance with the provisions (the "Administration Provisions") set forth below as to sale, conversion, postponement and retention and as to payment of debts and testamentary and other expenses;

(b) to give the following bequests:

...

(iv) to transfer my house located at 157 Sims Street, Victoria, B.C. to my son, JOSEPH KOLIC (as to an undivided 4/6 interest), my daughter, MARY KOLIC (as to an undivided 1/6 interest), and my daughter, ANGELA KOLIC (as to an undivided 1/6 interest);

[30] The Administration Provisions referred to in para. 4 are set out at para. 6:

6. The following are the Administration Provisions previously referred to in this my Will:

(a) my Trustee shall use her discretion in the realization of my estate, with power to my Trustee to sell, call in and convert into money any part of my estate not consisting of money at such time or times, in such manner and upon such terms, and either for cash or credit or for part cash and part credit, as my Trustee may in her discretion decide upon or to postpone such conversion of my estate or any part or parts thereof for such length of time as she may think best, and I hereby declare that my Trustee may retain any portion of my estate in the form in which it may be at my death, (notwithstanding that it may not be in the form of an investment in which Trustees are authorized to invest trust funds and whether or not there is a liability attached to any such portion of my estate) for such length of time as my Trustee may in her discretion deem advisable and my Trustee shall not be held responsible for any loss that may happen to my Estate by reason of her so doing;

[31] Mary Kolic insists the specific bequest transferring the Property to the siblings must be complied with.

[32] The siblings' relationship has broken down and as a result the estate has been tied up in litigation for many years. Mary Kolic submits the specific bequest transferring the Property to the siblings must be honoured, the result being the three siblings holding their respective shares as tenants in common. She notes that once that is effected she will have a right to reside there, and further that if Joseph Kolic and Angela Kolic wish to sell the Property they can do so at that time as the majority owners, presumably by obtaining an order under the Partition of Property Act, RSBC 1996, c. 347.

[33] There is no evidence that Mary Kolic has the means to purchase Joseph and Angela Kolic's interests in the Property. The evidence at trial was that her means were limited.

[34] The petitioner seeks the order for possession and removal of the Property's contents as there is evidence that if sold in its present state the sale price would be discounted by approximately \$110,000, a significant loss to the estate. As of March 2022, the estimated value of the Property if the contents were removed is in the range of \$860,000 to \$950,000.

- [35] The petitioner submits the Will's administration provisions authorize the petitioner to sell the Property despite the specific bequest to Mary Kolic, and in the alternative, if that is not the case, that the Court may exercise its inherent jurisdiction to do so.
- [36] In my view, I need not resolve that interpretive question of the Will's administrative powers. The underlying issue is that Mary Kolic is seeking registration of her 1/6 interest in the Property in her name despite her substantial indebtedness to the estate.
- [37] While Mary Kolic has a specific bequest of 1/6 of the real property to her, given the set-off claimed in reality it is a legal interest only, the beneficial interest being subject to the claim of the estate.
- [38] The equitable principle in *Cherry v. Boulton* (1939), 4 My. & C. 442 (Eng. Ch. Div.) was recently considered by Church J. in *Johnston Estate (Re)*, 2017 BCSC 272, who summarized the law in this area:

28 The applicant relies on what is commonly referred to as the rule in *Cherry v. Boulton* which provides that where a legatee of a share of the residue is a debtor of the estate, he or she is not entitled to receive his or her legacy without bringing his or her debt into account. The rule derives from the case of *Cherry v. Boulton* (1839), 4 My. & Cr. 442. It is an equitable principle designed to ensure fairness. The purpose of the rule was to prevent a beneficiary who owed money to an estate from receiving more than his or her fair share of the estate. In the case of *Re: Akerman, Akerman v. Akerman*, [1891] 3 Ch. 212, Kekewich J. stated:

A person who owes an estate money, that is to say, who is bound to increase the general mass of the estate by contribution of his own, cannot claim an aliquot share given to him out of that mass without first making the contribution which completes it. Nothing is in truth retained by the representative of the estate; nothing is in strict language set off; but the contributor is paid by holding in his own hand a part of the mass, which, if the mass were completed, he would receive back.

29 The rule has been held to apply even where the debt is statute-barred: see *Re: Akerman*.

30 The applicant submits that the rule continues to apply in Canada and relies on the decision of the Supreme Court of Canada in *Canada Trust Company v. Lloyd et al*, [1968] S.C.R. 300. In that case, the Supreme Court applied the rule in *Cherry v. Boulton* in finding that the contribution of three directors who had improperly withdrawn funds from the company some 43 years earlier, had to be taken into account in the distribution of the residue by the receiver. The court noted that the situation was analogous to that of a "legatee who must bring into account even a statute barred debt before he can claim a legacy left to him in the testator's will".

31 The applicant also relies on a more recent decision of the Ontario Court of Appeal, *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 103 D.L.R. (4th) 129, where the court confirmed that the rule in *Cherry v. Boulton* has been accepted in Canadian decisions and, where appropriate, applied.

36 The rule in *Cherry v. Boulton* does not confer on the estate any right to recoup the amount owing but rather operates to ensure fairness in the distribution of an estate, recognizing that the relationship between a testator and his or her beneficiaries is typically not at arm's length. The fundamental purpose of the rule is to ensure that beneficiaries are treated fairly and it embodies the principal [sic] that he who seeks equity must do equity. As the court noted in *Re: Akerman*, nothing is being retained by the representative and nothing is being set off but rather, the contributor is paid by what he is holding in his own hand. The court in *Re: Goy & Co Ltd.* [1900] 2 Ch. 149, also noted that the claimant has in his own hands that which is applicable to the payment and should pay himself out of that. The question of whether the testator or the estate can recover the debt or whether the debt is statute barred is therefore largely irrelevant to the application of the rule. In my view, the change in approach to limitation provisions by the Supreme Court of Canada in *Tolofson* does not affect the application of the rule in *Cherry v. Boulton*.

37 The decision of the Yukon Territory Court of Appeal in *Leeper Estate* makes it clear that the rule in *Cherry v. Boulton* continues to apply in Canada. That conclusion is not, in my view, diminished by the fact that the Court did not address the change in approach to limitation provisions in *Tolofson* because it was unnecessary for them to do so.

[39] In light of that principle, that Mary Kolic's interest in the Property arises by way of a specific bequest is important. While the simple retention of funds by the executor and trustee referred to in *Tillie v. Springer*, [1892] O.J. No. 207 does not apply to a specific bequest, the right of set-off does. In *June Brayford v. Brayford*, 2015 SKQB 336, Zuk J. considered the principle in *Cherry* where "the executors [were] not entitled to claim a right of retainer (a form of set-off) against monies allegedly owing by the beneficiary to the estate where the will makes a specific gift of property to a beneficiary" (para. 1). He found that where the criterion for set-off were met executors could withhold payment of a specific bequest to a beneficiary until the estate's claim against the beneficiary was satisfied.

[40] Justice Zuk noted that a party claiming an equitable right of set-off must show some equitable ground for protection from the opposing party's demands; the equitable ground must go to the very root of the opposing party's claim; and, any cross-claim by the party seeking equitable relief must be so clearly connected to the opposing party's demand that it would be unjust to allow that party to enforce payment or the bequest without taking into consideration the counter-claim (paras. 26 - 34).

[41] In this case, the Administrator's claim is to the equitable set-off of the judgment debt owed by Mary Kolic to Violet's estate against her 1/6 interest in the Property, given the judgment debt goes to the very root of Mary Kolic's demand that the Property be bequeathed in specie to her and her siblings. Further, that the Administrator's claim against Mary Kolic is so connected to her interest in the Property that it would be unjust to allow Mary to receive the bequest without taking the estate's claim against her into consideration.

[42] Mary Kolic's insistence that the Property be registered 1/6 in her name and 5/6 in the names of Joseph and Angela Kolic is consistent with her pattern throughout the litigation of delaying and frustrating the resolution of probate of their late mother's will. There is no evidence that Mary Kolic can buy out the 5/6 shares bequeathed to her siblings. The sale of the Property is inevitable. To transfer the Property into the siblings' names in specie will further the ongoing conflict, serve no useful purpose, further deplete the estate with legal costs, and delay administration of an estate that has already spent nearly a decade in the legal system. It would be unjust to allow Mary Kolic to receive the bequest without taking into account the judgment debt she owes to the estate. The equities clearly lie with the Administrator and are consistent with the Administrator's duty to complete administration of the estate and its distribution. The inevitable should be delayed no further.

[43] The petition is granted.

Orders

[44] The Administrator Sitka Law Corporation may sell the Property at 157 Sims Avenue, Victoria, BC, legally described as: PID 008-194-793 Lot 23, Block 20, Section 14, Victoria District Plan 877, notwithstanding the specific bequest of the Property to three beneficiaries in the Will.

[45] The respondent Mary Kolic shall vacate the Property forthwith and shall remove all of her personal possessions from the Property within 30 days from the date of this order.

[46] A writ of possession shall be issued to the Administrator with its enforcement suspended until seven days after the date of this order or any earlier date by which the respondent Mary Kolic has vacated the Property.

[47] The Administrator may dispose of the respondent Mary Kolic's personal property and belongings that remain on or in the Property more than 30 days after the date of this order. The Administrator may carry out such disposal in such manner as they may determine.

[48] The petitioner's costs shall be payable forthwith by the respondent Mary Kolic as special costs.

"The Honourable Mr. Justice Punnett"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/22/15/2022BCSC1527.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/kolic-estate-re-2022>

Prepared on 26 October 2026 · Esheria