

CANADA / JUDGMENT

Malkin Estate (Re)

2025 BCSC 1357

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Supreme Court of British Columbia

DECIDED

16 July 2025

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2025 BCSC 1357 Malkin Estate (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Malkin Estate (Re),

2025 BCSC 1357

Date: 20250716

Docket: P111540

Registry: Vancouver

In the Matter of the Estate of Margaret Leslie Malkin, Deceased

Before: The Honourable Justice Tucker

Reasons for Judgment

In Chambers

Counsel for the Applicants, James (Hamis) Malkin, Peter Malkin and William Malkin:

J.W. Zaitsoff

Counsel for the Respondent, Andrew Jukes:

S.N. Baldwin

Place and Date of Hearing:

Vancouver, B.C.

June 16, 2025

Place and Date of Judgment:

Vancouver, B.C.

July 16, 2025

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I. INTRODUCTION

- [1] Before the Court is a May 22, 2025, notice of application filed in a probate proceeding initiated in June 2011. The application seeks orders relating to the estate ("Estate") of Margaret Malkin ("Deceased").
- [2] The Deceased died on October 17, 2010. She was predeceased by her spouse, James Malkin ("James"), and survived by four adult children:
- a) James (Hamish) Malkin ("Hamish");
 - b) David Malkin ("David");
 - c) Peter Malkin ("Peter"); and
 - d) William (Bill) Malkin ("Bill").
- [3] The Deceased made a will dated February 16, 2009 ("Will"). As it applied following James' death, the Will:
- a) Appointed Andrew Jukes to act as executor and trustee;
 - b) If Mr. Jukes could or did not act, appointed Donald Wood to act;
 - c) Provided for the Estate to be divided equally between the four children ("Beneficiaries").
- [4] Mr. Jukes and Mr. Wood both work at Investax Management Inc. ("Investax"). On his affidavit, Mr. Jukes identifies his profession as "investment manager". On correspondence in evidence, Mr. Wood identifies himself as an accountant.
- [5] The terms of the Will permit any trustee engaged in a profession or business to charge and be paid all usual professional fee or other charges for work and business done and time expended in the administration of the trust.

- [6] Mr. Jukes obtained a grant of probate on April 4, 2011. The statement of assets, liabilities and distribution sworn in support of the grant application reports the Estate had a \$8,160,341.04 gross value as of time of death. The vast majority of the Estate has been distributed. Remaining in the Estate as of the hearing before me were cash holdings of about \$180,000 and shares in a company with assets of about \$20,000.
- [7] The applicants under the notice of application are Hamish, Peter and Bill. The applicants ask the Court to remove Mr. Jukes as executor and trustee, substitute Hamish and Bill, and order Mr. Jukes to pass his Estate accounts forthwith. They also seek a reference to the registrar for an accounting of those accounts.
- [8] The fourth Beneficiary, David, is not an applicant nor did he file a response to the application. He has, however, written counsel for the applicants stating that he supports the appointment of Hamish and Bill.
- [9] Mr. Jukes opposes the application for removal. He does not contest an order requiring him to pass his accounts for the Estate, seeks a deadline of August 31, 2025, for producing the accounts to the Beneficiaries for review.

II. BACKGROUND FACTS

- [10] Nothing suggests that there was any opposition to Mr. Jukes' obtaining a grant of probate. Nor is there any evidence of any disputes arising with respect to the distribution of the Estate, either as between Mr. Jukes and any of the Beneficiaries or as between the Beneficiaries themselves.
- [11] On February 24, 2021, Mr. Jukes disclosed the fact that there had been an error on the Deceased's terminal tax return. In particular, there was a non-disclosure of capital gains that had been triggered by a deemed disposition of shares ("Unreported Assets"), and a failure to pay associated taxes. The shares in question constituted a very substantial portion of the Estate's total value.
- [12] Following the February 24, 2021, disclosure by Mr. Jukes, the Beneficiaries received legal advice to the effect that it was now too late to engage in any tax planning that might have minimized the tax payable regarding the triggered capital gains ("Tax Planning Omission").
- [13] By letter dated October 15, 2021, the Beneficiaries, through their counsel (also counsel for the Applicants) wrote Mr. Jukes setting out concerns about the administration of the Estate, including the financial consequences of the Unreported Assets and the Tax Planning Omission (collectively, the "Tax Issues"). Counsel also noted that Mr. Jukes had asked the Beneficiaries to sign a release and indemnity document as part of the Estate distribution, and advised that the Beneficiaries were unwilling to provide a release from liability with respect to Tax Issues.

- [14] By letter dated November 5, 2021, Mr. Jukes acknowledged receipt of the October 15, 2021, letter and stated that he intended to seek tax advice.
- [15] On November 9, 2021, the Beneficiaries wrote Mr. Jukes again. They requested a fuller response to the October 15, 2021, letter. They described the earlier letter as setting out potential damages claims, asked to be provided with the name of any insurer. On November 16, 2021, Mr. Jukes acknowledged receipt, advised that he intended to retain counsel for tax advice and advised that he did not "have insurance for this matter".
- [16] On November 22, 2021, the Beneficiaries wrote Mr. Jukes and Mr. Wood asking whether Investax had insurance and asked that Investax to give notice to its insurer of a potential claim. On November 30, 2021, Mr. Jukes wrote stating that Mr. Wood had notified his professional insurance company of a potential claim by the Beneficiaries.
- [17] A voluntary disclosure of the Unreported Assets was made to the CRA in December 2021.
- [18] On February 18, 2022, the Beneficiaries wrote Mr. Jukes and Mr. Wood asking whether counsel had been retained regarding the potential claim in relation to the Estate. They advised that once they had CRA's position with regard to the voluntary disclosure, they expected to be in position to quantify the Estate's losses and proceed with a claim. In closing, the letter stated that the Beneficiaries would be pursuing a claim once CRA's position was known.
- [19] On dated March 13, 2023, counsel for the Beneficiaries wrote to Mr. Jukes and Mr. Wood demanding production of accounts for the Estate. The letter attached a formal notice, under s. 99(2) of the Trustee Act, R.S.B.C. 1996, c. 464, requiring the trustee for the Estate to pass accounts within 30 days.
- [20] By email dated August 8, 2024, counsel for the Beneficiaries followed up asking for the accounting "at your absolutely earliest convenience".
- [21] On August 16, 2024, Bill personally emailed Mr. Jukes asking for "an updated and detailed accounting" for the Estate and up to the present date. In response, on September 6, 2024, Mr. Wood emailed Bill attaching a two-page spreadsheet containing some information about assets and liabilities from the death of the Deceased up to December 31, 2023. Mr. Wood's cover email said: "I think this is the accounting you were looking for".
- [22] Notably, the September 6, 2024 attachment: was not a full accounting, did not cover the period set out in the requests made; and was not in the form prescribed by the Supreme Court Civil Rules [Rules] (i.e., Form P40 (Rule 25-13(6))).
- [23] On January 31, 2025, counsel for the Beneficiaries emailed Mr. Jukes to confirm his understanding that Mr. Jukes would be providing information responsive to the Beneficiaries' demands for an accounting on February 4th. The information was not forthcoming on that date.

- [24] On February 5, 2025, Mr. Jukes and Mr. Woods wrote the Beneficiaries advising that they received a notice of reassessment from CRA consequent to the voluntary disclosure. The notice reassessment suggests that the additional expenses payable as a result of the Unreported Assets may exceed \$200,000.
- [25] On February 18, 2025, counsel for the Beneficiaries wrote Mr. Jukes and Mr. Wood. The letter:
- a) asked Mr. Jukes resign in light of the potential claim in relation to the Tax Issues;
 - b) stated that the failure to provide an accounting was a further reason for Mr. Jukes' removal;
 - c) proposed Hamish and Bill as replacement executors and trustees;
 - d) reiterated the demand for a full accounting;
 - e) clarified that the demand for a full accounting was in any event the requested resignation; and
 - f) sought a response by March 4, 2025.
- [26] No accounting was forthcoming.
- [27] On March 20, 2025, counsel for the Beneficiaries advised Mr. Jukes that he had instructions to apply to the Court to remove Mr. Jukes, and repeated the request that Mr. Jukes voluntarily resign. Counsel stated that the Beneficiaries continued to await their accounting and that he would also seek an order compelling an accounting.
- [28] As of the date of the hearing, Mr. Jukes had yet to provide the requested accounting for the Estate.

III. APPLICATION POSITIONS

- [29] As foreshadowed by their correspondence, the applicants seek to have Mr. Jukes removed both for his failure to provide an accounting and due to conflict of interest relating to the potential claim regarding the Tax Issues.
- [30] In a response affidavit sworn June 12, 2025, Mr. Jukes attests that he provided the Beneficiaries with "informal accounts over the years" and last did so in September 2024. The affidavit does not describe whatever is said to have happened in September 2024, and there are no related exhibits to the affidavit, either in respect of September 2024 or any earlier occasion of "informal accounting". Mr. Jukes attests that in response the requests made for an accounting, he began, on January 31, 2025, to "prepare informal accounts". He attests that the informal accounts begun in January 2025 were not yet completed.

- [31] Mr. Jukes attests to having "recently" retained a solicitor to prepare "formal accounts in the proper form", including a "proposed Executor Fee and Care and Management Fees". Finally, he attests that he intends to deliver the formal accounts being prepared by the solicitor to the Beneficiaries on or before August 31, 2025.
- [32] Mr. Jukes affidavit does not offer any explanation for the delay in providing formal accounts in response to the Beneficiaries' formal March 13, 2023, request. Nor does Mr. Jukes outline any facts or circumstances that would make completing an accounting for an Estate an unusually difficult or time-consuming endeavour. Mr. Jukes does attest to having no intention of moving the monies remaining in the Estate into high-risk investments.

IV. Law

- [33] Both parties rely on the summary of principles outlined by Justice McNaughton (then of this Court) in *Chesko v. Chesko Estate*, 2024 BCSC 394:
- [53] The leading authority continues to be *Conroy v. Stokes*, 4 D.L.R. 124, 1952 CanLII 227 (B.C.C.A.). In *Conroy*, the Court considered removal and replacement of a trustee because some of the beneficiaries were dissatisfied with the trustee's handling of the estate. Citing *Letterstedt v. Broers*, 9 App. Cas. 371, [1884] UKPC 1, the Court confirmed that the main consideration is the collective welfare of the beneficiaries: *Conroy* at 126.
- [54] A court will not lightly interfere with a testator's choice of trustee: *Nieweler Estate (Re)*, 2019 BCSC 401 at para. 27 [*Nieweler Estate*], and not every actual or perceived conflict should lead to disqualification of a trustee or an executor: *Conroy* at 126-127; *Burke v. Burke*, 2019 BCSC 383 at para. 43. Mere friction between the trustee and one or more of the beneficiaries is usually insufficient to justify removal of the trustee: *Miles v. Vince*, 2014 BCCA 289 at para. 84.
- [55] Perfection is not expected of an executor or trustee: *Dahle Estate (Re)*, 2021 BCSC 719 at para. 22. The question is whether the trustee's acts or omissions endangered the administration of the trust: *Carpino v. Carpino*, 2022 BCSC 2237 at para. 51, citing *Parker v. Thompson (Trustee)*, 2014 BCSC 1916 at para. 37; see also *Burke* at para. 29.
- [56] To remove an executor or trustee for misconduct, the evidence must show they endangered estate property, acted dishonestly and without proper care, lacked capacity to execute their duties, or acted without reasonable fidelity: *Conroy* at 127; see also *Nieweler Estate* at para. 33.
- [57] Deciding whether to remove an executor or trustee involves considering all the facts, and the context, out of respect for a will-maker's choice of executor, the court should not interfere except for good reason or, as some cases have said, where doing so is "clearly necessary": *Mardesic v. Vukovich Estate*, 30 B.C.L.R. (2d) 170, 1988 CanLII 3125 (S.C.) at paras. 18-19; *Burke* at paras. 29, 31.

- [58] The development of the principles for removal was summarized by the Court of Appeal in Miles at paras. 84-86:
- [84] What circumstances justify the removal of a trustee? In Letterstedt, the court established guidelines justifying the removal of a trustee (at 385-389):
1. If the Court is satisfied that the continuance of the trustee would prevent the trusts being properly executed, the trustee might be removed. It must always be borne in mind that trustees exist for the benefit of those to whom the creator of the trust has given the trust estate.
 2. The acts or omissions must be such as to endanger the trust property or to show a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity.
 3. In exercising the delicate jurisdiction of removing trustees, the Court's main guide must be the welfare of the beneficiaries. It is not possible to lay down any more definite rule in a matter that is so "essentially dependent on details often of great nicety." The Court must proceed to look carefully into the circumstances of the case.
 4. Where a trustee is asked to resign, and if it appears clear that the continuance of the trustee would be detrimental to the execution of the trusts, even if for no other reason than that human infirmity would prevent those beneficially interested, or those who act for them, from working in harmony with the trustee, and if there is no reason to the contrary from the intentions of the framer of the trust to give this trustee a benefit or otherwise, the trustee is always advised by his own counsel to resign.
 5. The lack of jurisprudence in respect of the removal of a trustee reflects that a trustee when asked to do so, will resign.
 6. If, without any reasonable ground, the trustee refuses to do so the court might think it proper to remove him.
 7. Friction or hostility between trustees and the beneficiary is not of itself a reason for the removal of the trustees. But where the hostility is grounded on the mode in which the trust has been administered, where it has been caused wholly or partially by substantial overcharges against the trust estate, it is not to be disregarded.
- [34] It is critical to note as well Justice McNaughton's comment in Chesko regarding these general principles. As she correctly stresses, previously decided cases are merely helpful illustrations of the general principles in application. Each case will inevitably turn on its own facts and particular context: Chesko Estate at para. 60.

V. ANALYSIS

- [35] Mr. Jukes notes that he is the Deceased's chosen trustee, and says it has not been shown that he endangered the Estate, acted with dishonesty, acted without proper care, has a lack of capacity, or acted without reasonable fidelity. He submits that the applicants are essentially

seeking to have him removed simply for not passing his accounts. He says any neglect in acting to provide an accounting is minor, as the Beneficiaries acquiesced to informal accounting for years and are now seeking to remove him when he is on the cusp of producing the formal accounting they are seeking. He says it is reasonable for him to have until August 31, 2025, to produce the formal accounts given that the Estate has been in existence for almost 15 years.

- [36] Mr. Jukes points to the observation in *Conroy v. Stokes*, 4 D.L.R. 124, 1952 CanLII 227 (B.C.C.A.) [Conroy], that not every conflict - whether actual or perceived - need result in disqualification. Mr. Jukes notes that there is no extant notice of civil claim and that, in his view, it remains unclear as to who the named parties would be. He submits that even if a conflict arises as a result of the Beneficiaries' saying they may bring a claim regarding the Tax Issues, there is no material concern arising from such an asserted conflict given the size and nature of the assets remaining in the Estate and the amount and type of administration work remaining. He suggests that the real purpose of the removal application is to better the Beneficiaries position in opposing his claim for remuneration.
- [37] I agree that it is appropriate for Mr. Jukes to be removed. In the particular circumstances, his failure to account alone would warrant his removal. That said, I agree that there is an at least perceived conflict of interest here notwithstanding that the practical aspects of the administration of the Estate are near completion.
- [38] As observed at p. 127 in *Conroy*, there is a distinction between a persistent failure to account and an incident of benign neglect in the discharge an administrative duty:

Here the acts or omissions complained of do not, in my opinion, support a conclusion that the conduct of the trustees has endangered the trust property, or show a want of honesty or of proper capacity to execute the duties, or a want of reasonable fidelity. The failure of the trustees to account to the beneficiaries annually or to pass their account annually, are perhaps matters for criticism on the basis of neglect of duty, but such omissions, as is said by Story, are not such as to induce the Court to remove trustees unless persisted in. Moreover, it appears that since the initial complaint in this regard by the applicants, the trustees have remedied the omissions except in respect of moving the Court to confirm the Registrar's report on the passing of the accounts for the years 1950 and 1951, which we are told have been submitted to the beneficiaries, passed by the Registrar, and, but for these proceedings, would have been the subject of an application for confirmation by the Court.

[Emphasis added.]

- [39] Further, the facts here go beyond a persistent failure. Irrespective of what the practice may have been prior to the Beneficiaries' March 13, 2023, request for an accounting, Mr. Jukes' course of conduct over the period of time following that request amounts to a deliberate refusal to discharge his obligation following formal and reasonable requests to do so.

- [40] Nor does that the fact that Mr. Jukes says he is now within months of producing a formal accounting for the Beneficiaries' review constitute a remedying of his omission.
- [41] On March 20, 2025, counsel for the Beneficiaries wrote advising Mr. Jukes that he had instructions to apply for his removal. The notice of application itself was then filed on May 22, 2025. In his affidavit sworn June 12, 2025, Mr. Jukes says he began preparing an informal accounting on January 31, 2025. This response is both too little (a formal accounting had been specifically requested) and too late (the first formal request was made in March 2023).
- [42] Mr. Jukes affidavit offers no explanation for his delay in responding to the March 2023 (and subsequent) requests, and no explanation for why he only engaged a solicitor to prepare formal accounts after the applicants filed this application. If there was a possible explanation that might have quelled the Court's concerns regarding his persistent failure to act, it has not been provided.
- [43] I am also satisfied that there is a perceived conflict of interest here that would make it inappropriate for Mr. Jukes to continue. The notice of reassessment provides at least some support for the Beneficiaries' assertion of financial harm to the Estate as a result of the Unreported Assets. While the Tax Planning Omission is a more theoretical claim, it is evident the potential claim threatened against Mr. Jukes/ Mr. Woods/ Investax is not frivolous.
- [44] While passing accounts and determining the remuneration for trustee and executor services to the Estate are the bulk of what remains to be done in the administration of the Estate, remuneration will doubtless be contentious. The positions on remuneration are likely to echo positions on the Tax Issues. Any possible settlement of the remuneration issues may impact (and possibly even resolve) potential future litigation on the Tax Issues. Accordingly, the perceived conflict of interest is engaged by the remaining tasks involved in the administration of the Estate.
- [45] I do not accept Mr. Jukes' submission that the Beneficiaries seek to gain an improper advantage by removing him before his remuneration is determined. Mr. Jukes must pass accounts in relation to his period acting as executor and trustee of the Estate and must do so irrespective of being removed. He will, as part of the accounting, be entitled to set out a proposal regarding remuneration. He will be involved in the determination of his remuneration regardless of his being removed.
- [46] Accordingly, pursuant to the Trustee Act, RSBC 1996, c. 464, esp. ss. 30 and 31, the Wills, Estates and Succession Act, SBC 2009, c. 13, esp. ss. 158 and 159, and the inherent of this Court, I order:
- a) Mr. Jukes is removed as executor of the Will and trustee of the Estate;
 - b) Hamish and Bill appointed as executors of the Will and trustees of the Estate in substitution for Mr. Jukes;

- c) All of the assets in the Estate, real and personal, are hereby vested in Hamish and Bill as executors and trustees; and
 - d) Mr. Jukes is to pass his accounts forthwith and in accordance with the prescribed form(s) under the Rules;
 - e) There is to be a reference to the Registrar to pass the accounts of Mr. Jukes in relation to his period as executor of the Will and trustee of the Estate; and
 - f) The parties must schedule a case management conference with the Registrar prior to scheduling the passing of accounts of Mr. Jukes in respect of the Estate.
- [47] As this application was not made necessary by any action of the Deceased or the terms of the Will, I am of the view that the normal costs rule should apply. The Applicants are entitled to costs in respect of the notice of application as against Mr. Jukes in his personal capacity.

"Tucker J."

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