

CANADA / JUDGMENT

McCrone v. Henry Estate

2025 BCSC 1076

COURT

Supreme Court of British Columbia

DECIDED

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2025 BCSC 1076 McCrone v. Henry Estate

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McCrone v. Henry Estate,

2025 BCSC 1076

Date: 20250612

Docket: S220131

Registry: Vancouver

Between:

Jillian Sutherland McCrone and

Ross Sutherland McCrone

Plaintiffs

And

Mario Montagano the named Executor of the

Estate of Janet Colville Sutherland Henry, deceased,

Carol Walkinshaw, Anita McCrone, Maryanne Litzenberger and Simon Garstin

Defendants

Before: The Honourable Justice G.P. Weatherill

Reasons for Judgment

Counsel for the Plaintiffs:

E.F. Macaulay

Counsel for the Defendant,

Mario Montagano:

S.N. Baldwin

Appearing on her own behalf:

M. Litzenberger

Counsel for the Defendant,

S. Garstin:

B.R.S. Henderson

Counsel for the Proposed Defendant

P. Beug

Place and Date of Hearing:

Vernon, B.C.

May 28 - 29, 2025

Place and Date of Judgment:

Vernon, B.C.

June 12, 2025

Introduction

- [1] There are two applications before me in this estate matter. The first is brought by the sole residual beneficiary of a will seeking to have this action summarily dismissed ("Application #1"). The second is brought by the sole residual beneficiary of an earlier will seeking to be added as a party to this action ("Application #2").
- [2] Janet Henry ("Deceased") died on November 16, 2021, at the age of 84. Her husband predeceased her by 17 years in December 2004. The couple had no children. The Deceased executed her Last Will and Testament on August 16, 2021 ("August 2021 Will"), leaving the bulk of her estate valued at approximately \$1 million ("Residual Estate") to the defendant Simon Garstin ("Mr. Garstin"). The Deceased's prior will, dated February 18, 2021 ("February 2021 Will"), is identical to the August 2021 Will save that it left the Residual Estate to Mr. Douglas Wilson ("Mr. Wilson"), who had been the Deceased's friend since they met in 2009.

- [3] The Deceased's brother Sinclair McCrone ("Sinclair") also predeceased her on June 25, 2020, leaving two children, Jillian McCrone and Ross McCrone, who are the plaintiffs in this action, both of whom reside in Australia ("Plaintiffs"). The Plaintiffs are the Deceased's closest living relatives. The August 2021 Will provides that the Plaintiffs are the contingent beneficiaries of the Residual Estate should Mr. Garstin predecease the Deceased.
- [4] The defendant Mario Montagano ("Mr. Montagano") had been the Deceased's accountant for 15 years prior to her death and is named as executor of the Deceased's estate in her last four wills, including both the August 2021 Will and the February 2021 Will.
- [5] On December 2, 2021, pursuant to Rule 25-10 and relying on s. 52 of the Wills, Estates and Succession Act, S.B.C. 2009 c. 13 [WESA], the Plaintiffs filed a notice of dispute, under Vancouver Registry #V-210101, disputing the validity of the August 2021 Will, stating that the Deceased:
- a) Lacked the requisite testamentary capacity to understand the nature and effect of the August 2021 Will;
 - b) Did not receive any independent advice in respect of the August 2021 Will; and
 - c) Was unduly influenced by Mr. Garstin in the preparation of the August 2021 Will and that he was in a position of control and dominance over the Deceased.
- [6] The Plaintiffs commenced this action on January 11, 2022, by way of notice of civil claim ("NOCC"). Besides Messrs. Montagano and Garstin, the other defendants, Carol Walkinshaw, Anita McCrone and Mary Litzenberger were gifted various personal items under both the August 2021 Will and February 2021 Will. Ms. Litzenberger is the only other defendant who has appeared in the action. The NOCC seeks a declaration pursuant to s. 52 of WESA that the gift of the Residual Estate to Mr. Garstin is null and void due to undue influence and seeks to have the Residual Estate distributed to the Plaintiffs. In the alternative, the NOCC seeks a declaration that the Deceased lacked the capacity to execute the August 2021 Will, and it is accordingly invalid.
- [7] On May 24, 2022, Mr. Montagano was appointed Administrator Pending Legal Proceedings, and he has been administering the Deceased's estate since then. Mr. Montagano has taken no steps to date to apply to have the August 2021 Will proven in solemn form in accordance with Rule 25 of the Supreme Court Civil Rules [Rules].
- [8] The trial of this action is currently set for 14 days to commence on June 30, 2025. The trial was originally set in April 2024 but was adjourned at the trial management conference because insufficient time had been reserved for the trial. Mr. Montagano says he intends to apply at the trial to have the August 2021 Will proven in solemn form.
- [9] In advance of the trial, Mr. Garstin brings Application #1 pursuant to Rule 25-14(4) or alternatively Rule 9-5, or in the further alternative Rule 9-6 to have the NOCC summarily dismissed.

- [10] At the same time, Mr. Wilson brings Application #2 to be added as a party to the action.
- [11] On May 29, 2025, shortly after the conclusion of the hearing of Application #1 and Application #2 and because of the impending trial date, I gave the parties my oral decision with written reasons to follow. I dismissed Application #1 with Scale B costs to the Plaintiffs and allowed Application #2. These are my written reasons.

Background

- [12] The Deceased's two wills prior to the February 2021 Will were dated March 22, 2012 ("March 2012 Will") and March 26, 2014 ("March 2014 Will"), respectively. The March 2012 Will named Sinclair (the Plaintiffs' father) as the sole residual beneficiary, with the Plaintiffs as contingent residual beneficiaries if Sinclair predeceased her. The March 2014 Will named the Plaintiff Ross McCrone's children as the sole residual beneficiaries. The Plaintiffs are named as contingent residual beneficiaries in the February 2021 Will if Mr. Wilson predeceased the Deceased.
- [13] Following her husband's death, the Deceased apparently enjoyed retaining and paying for the services of various male escorts for the purpose of companionship and sexual services.
- [14] Mr. Garstin, who is presently in his early thirties, is a professional companion and male escort who, in exchange for money, provides companionship and sexual services to women. He advertises his services through various internet portals and a website. He is unrelated to the Deceased.
- [15] In January 2021, the Deceased became aware of Mr. Garstin through his online presence, contacted him via email on January 13, 2021, and expressed interest in hiring him as a male escort and companion. They met via Skype on February 20, 2021, and fees for Mr. Garstin's services were discussed and apparently agreed to.
- [16] The two met in person for the first time on April 9, 2021, when Mr. Garstin came to the Deceased's home for an overnight visit. That visit was followed by another overnight visit on May 21, 2021 and a May 31, 2021 visit when Mr. Garstin came to the Deceased's home to drop off some food for her and to store some luggage. He next visited her for two nights on June 6 and 7, 2021 and left the morning of June 8, 2021. They next met on July 10, 2021, when the Deceased picked Mr. Garstin up at the ferry terminal and drove him directly to the Vancouver airport. Their last face-to-face meeting was for three nights, October 3 through 6, 2021, when Mr. Garstin again stayed at the Deceased's home. The sexual and companionship services Mr. Garstin provided were paid for by the Deceased at agreed upon prices which were not insignificant.
- [17] The NOCC seeks to set aside the August 2021 Will on the basis that:
- a) Due to COVID-19 restrictions, the Deceased was isolated, lonely and depressed thus making her vulnerable to the influence of others;

- b) Mr. Garstin visited the Deceased to provide male companionship and escort services which were paid for by the Deceased; and
- c) Due to the nature of his relationship with the Deceased, Mr. Garstin was in a position of dominance and control over the Deceased which raises the presumption of undue influence as that term is meant in s. 52 of WESA.

[18] In his response to civil claim, Mr. Garstin:

- a) States that the Deceased initiated and requested all meetings;
- b) Denies that he was ever in a position of dominance or control over the Deceased;
- c) States that the Deceased was not vulnerable to undue influence by anyone;
- d) States that the Deceased was an independent single woman who enjoyed his company on her terms;
- e) States that the Deceased paid him for his time and companionship;
- f) States that his financial security, at times, was dependent on the Deceased's payment, meaning that the Deceased was in a position of dominance over him and not the other way around; and
- g) States that he was out of the country when the August 2021 Will was executed.

[19] It wasn't until February 2024, that Mr. Wilson first became aware of any legal proceedings relating to the Deceased's estate or of the February 2021 Will. He was surprised to learn that he was named as the sole residual beneficiary under it. He seeks to be added as a party to this action because if the August 2021 Will is set aside, the Residual Estate would be disposed of in accordance with the February 2021 Will.

Issues

[20] Respecting Application #1, the issues are:

- a) Should the action be struck because it should have been commenced by petition rather than by NOCC?
- b) Should the action be dismissed under Rule 9-5?
- c) Should the action be dismissed under Rule 9-6?
- d) Should the NOCC be struck for the Plaintiffs' failure to provide particulars of alleged undue influence as required by the Rules?

[21] Respecting Application #2, the issue is whether Mr. Wilson should be added as a party to the action.

[22] I shall deal with Application #1 first and Application #2 second.

Discussion

- i. Should the action be struck because it should have been commenced by Petition rather than a NOCC?
- [23] No.
- [24] In support of his position that the NOCC was improperly brought and should be struck, Mr. Garstin relies on Rule 25-14(4) which reads in reference to proving a will in solemn form:
- (4) To apply to the court for an order proving a will in solemn form, a person:
- (a) may, if there is an existing proceeding within which, under these Supreme Court Civil Rules, it is appropriate to seek that order, apply for that order no notice of application in that proceeding, or
 - (b) must, if there is no existing proceeding within which it is appropriate to seek that order, start a proceeding by petition under Rule 16-1 and seek the order within that proceeding.
- [25] He asserts that Rule 25-14(4)(b) is clear and, because there was no existing proceeding respecting the August 2021 Will, the Plaintiffs were required to commence this action by petition rather than the NOCC. In support, he relies heavily on the outcome in *Naidu v. Yankanna (Estate)*, 2018 BCSC 878, which dismissed an action brought by notice of civil claim in similar circumstances. He argues the Plaintiffs' allegations of lack of testamentary capacity and undue influence are issues that must be decided in a proof of solemn form proceeding, and that such a proceeding must be commenced by an application in a probated proceeding brought by petition pursuant to Rule 25-14(4) of the Rules. In *Naidu*, Justice Jenkins stated at para. 20 referring to that rule:
- [20] As there was no existing proceeding prior to the filing of the notice of civil claim, the applicant is correct that the plaintiffs were required to proceed by petition under R. 16-1. They did not. As such, I strike para. 3 of Part Two (wherein a declaration was sought that the testator's will was invalid and that the testator lacked the requisite testamentary capacity at the time it was made). If the plaintiffs wish to contest the validity of the will they must proceed in accordance with the Rules.
- [26] In response, the Plaintiffs point out that nowhere does it say that where a will is being challenged, it is necessary to commence an action by petition under Rule 25. In support, they point to s. 52 of WESA that reads:
52. In a proceeding, if a person claims that a will or any provision of it resulted from another person
- (a) being in a position where the potential for dependence or domination of the will-maker was present, and

- (b) using that position to unduly influence the will-maker to make the will or the provision of it that is challenged,

and establishes that the other person was in a position where the potential for dependence or domination of the will-maker was present, the party seeking to defend the will or the provision of it that is challenged or to uphold the gift has the onus of establishing that the person in the position where the potential for dependence or domination of the will-maker was present did not exercise undue influence over the will-maker with respect to the will or the provision of it that is challenged.

[Emphasis added]

[27] I agree with the Plaintiffs' position.

[28] On first blush, Naidu may seem dispositive of the issue. However, the plaintiffs in that case were seeking to have the entire will declared invalid on the basis that the testator lacked testamentary capacity and were making a wills variation claim relying on s. 60 of WESA (dealing with making inadequate provision for the testator's spouse or children) and were not relying on s. 52 of WESA. Here, the Plaintiffs are seeking only to have the gift to Mr. Garstin set aside, not the entire will.

[29] In any event, although Rule 25 deals with estate matters, it is not, in my view, a complete code. WESA also deals with estate matters and where there may be a conflict between the two, WESA must take precedence. Further Rule 25-1(2) specifically refers to WESA, stating that the definitions and interpretation sections of WESA apply to Rule 25 unless the context otherwise requires.

[30] Rule 25-1(5) provides that a will is proven in solemn form when, after a trial or hearing, the court pronounces for the force and validity of the will in solemn form of law. The Plaintiffs are not seeking to have the August 2021 Will proven in solemn form and in my view, Rule 25-14(4) does not apply. Instead, that rule is there simply to authorize a party (such as an executor named under a will) to apply to have a will proven in solemn form. It does not mandate every proceeding where a will is challenged to be commenced by petition.

[31] As was stated in *Park v. Mitchell*, 2020 BCSC 1147 at paras. 40 and 43, with which I agree, Rule 25-14(4) deals with applications that need to be brought within an estate matter and is simply a vehicle by which personal representatives assume and carry out their obligations to an estate under the court's supervision. This is much different than an action brought by notice of civil claim, such as an action brought under s. 52 of WESA, which is intended to adjudicate matters based on evidence.

[32] To repeat, the Plaintiffs are seeking to have the residual gift to Mr. Garstin declared invalid based on undue influence because they say he was in a position where there was a potential for dependence or domination on the Deceased.

- [33] In my view, Mr. Garstin's submissions are misguided. A petition filed under Rule 25 is not a prerequisite to commencing an action under s. 52 of WESA. In any event, given the contested issues that will require factual findings and credibility assessments, this matter is destined to be resolved at a trial: *Toporowski v. MacLennan*, 2024 BCSC 1671 at paras. 29-31, 38-39, 42 and 44.
- [34] I note further that Rule 22-7, which deals with non-compliance with the Rules, saves the NOCC from being struck and is a complete answer to Application #1 as it relates to Rule 25-14(4). That rule generally requires that, unless the court otherwise orders, non-compliance with the rules is to be treated as an irregularity and does not nullify a proceeding or a step taken in a proceeding. Indeed, Rule 22-7(3) provides that the court must not wholly set aside a proceeding on the ground that it was required to be started by an originating pleading other than the one employed.
- [35] Where the validity of a will has been called into question, or if there is any doubt as to the validity of a will, or if there is any apprehension that there may be opposition to it, it is the duty of the executor to take steps to prove the will in solemn form: *Romans Estate v. Tassone*, 2009 BCCA 421 at para. 12.
- [36] In this case, neither Mr. Montagano nor anyone else has taken any steps to date to prove the August 2021 Will in solemn form. Had anyone done so, given the voluminous evidence filed respecting Application #1, it is likely the matter would have been converted to an action in any event, with orders for the parties to exchange documents and conduct examinations for discovery. If I were to strike the NOCC, as Mr. Garstin suggests, the parties would be no further ahead because there would be no action before the court. Mr. Montagano, as executor, would have to file a petition to prove the August 2021 Will in solemn form. Objections would then be made by the Plaintiffs and Mr. Wilson which would doubtless mandate that the matter be referred to the trial list to be determined on its merits.
- [37] Mr. Garstin's application to strike the NOCC on the basis that it should have been commenced by petition fails.

ii. Should the action be dismissed under Rule 9-5?

[38] No.

[39] Rule 9-5 is a challenge on the pleadings. It provides that a court may strike a pleading in whole or in part at any stage of a proceeding. Specifically, it states:

9-5(1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that

- (a) it discloses no reasonable claim or defence, as the case may be,
- (b) it is unnecessary, scandalous, frivolous or vexatious,
- (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or

(d) it is otherwise an abuse of the process of the court,

and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[40] Mr. Garstin's main argument is that the NOCC should be struck because it discloses no reasonable claim. Subrule 9-5(2) provides that no evidence is admissible on an application under subrule (1)(a). The test on an application to dismiss an action under Rule 9-5(1)(a) is whether it is plain and obvious that the claim cannot succeed. It requires a conclusion that, assuming the facts as stated in the NOCC are true, those facts disclose no cause of action, and the pleadings disclose no arguable issue. If there is a chance the action may succeed, then it should be allowed to proceed: *Sahyoun v. Ho*, 2015 BCSC 392 at para. 57; *Willow v. Chong*, 2013 BCSC 1083 at para. 18.

[41] In short, actions should not be struck out under Rule 9-5(1)(a) if the alleged facts disclose a cause of action: *Carhoun & Sons Enterprises Ltd. v. Canada (Attorney General)*, 2015 BCCA 163 at para. 133.

[42] Mr. Garstin also contends that, through abuse of process and improper conduct, the Plaintiffs have:

- a) Improperly circumvented Rule 25 by filing the NOCC instead of a petition as required;
- b) Improperly obtained evidence through discovery of documents and examinations for discovery, which are restricted to actions and not petitions;
- c) Have failed to show suspicious circumstances were present when the August 2021 Will was signed;
- d) Have failed to show any relationship of dominance or a presumption of undue influence by him over the Deceased; and
- e) Have failed to provide particulars of his alleged undue influence in their pleadings which is mandated by Rule 3-7(18).

[43] Again, Mr. Garstin's application is misguided. I have already dealt with Mr. Garstin's complaints regarding Rule 25. They are without merit. The NOCC was properly filed. As an action, document discovery and examinations for discovery were properly conducted. I will deal with his complaint about the Plaintiffs' failure to provide particulars of his alleged undue influence later in these reasons.

[44] As it stands, the NOCC discloses a reasonable claim. It is neither unnecessary, scandalous, frivolous nor vexatious. Nor is it an abuse of the process of the court.

[45] Mr. Garstin also contends that even if the Plaintiffs are successful in setting aside the August 2021 Will, their claim to the Residual Estate is bound to fail because Mr. Wilson would be entitled to the Residual Estate to their exclusion.

- [46] This argument fails to recognize that the Plaintiffs' primary claim is to set aside the August 2021 Will as it relates to the gift to Mr. Garstin only. Whether such a claim can be made at law is unclear and will be the subject of fulsome arguments at trial.
- [47] Mr. Garstin's application under Rule 9-5(1) fails.
- iii. Should the action be dismissed under Rule 9-6?
- [48] No.
- [49] Rule 9-6 is a challenge on a limited review of the evidence. It is the summary judgment rule that provides, in sub-rule (5) that the court:
- (a) if satisfied that there is no genuine issue for trial with respect to a claim or defence, must pronounce judgment or dismiss the claim accordingly,
 - (b) if satisfied that the only genuine issue is the amount to which the claiming party is entitled, may order a trial of that issue or pronounce judgment with a reference or an accounting to determine the amount,
 - (c) if satisfied that the only genuine issue is a question of law, may determine the question and pronounce judgment accordingly, and
 - (d) may make any other order it considers will further the object of these Supreme Court Civil Rules.
- [50] The test to be applied under Rule 9-6(5) is whether there is a bona fide triable issue. Put another way, the test is whether the claim is bound to fail: *Serup v. Board of Trustees of School District #57*, (1989) 54 B.C.L.R. (2d) 258, 1989 CanLII 5192 (BC CA) at paras. 3-4.
- [51] If the judge hearing the application is left in doubt as to whether there is a triable issue, the application should be dismissed: *Progressive Construction Ltd. v. Newton* (1980), 25 B.C.L.R. 330, 1980 CanLII 493 (BC SC) at para. 14.
- [52] The thrust of the Plaintiffs' claim is that the Deceased was subjected to undue influence by Mr. Garstin in the preparation of the August 2021 Will. A presumption of undue influence is established when the nature of the relationship between the parties demonstrates the potential for domination. To rebut the presumption, the testator must be shown to have prepared his or her will of his or her own "full, free and informed thought": *Cowper-Smith v. Morgan*, 2016 BCCA 200 at paras. 49-50.
- [53] It is not surprising that when the NOCC was filed, the Plaintiffs could do no more than make allegations of undue influence because they had no first-hand knowledge of what went on between the Deceased and Mr. Garstin leading up to the August 2021 Will. The Plaintiffs now have the benefit of document disclosure (including numerous text messages) and Mr. Garstin's discovery evidence which they say assist in establishing undue influence. If the Plaintiffs can show that the Deceased was in a relationship of dependency with Mr. Garstin, s. 52 of WESA shifts the onus of proof to Mr. Garstin as the defender of the August 2021 Will

that there was no undue influence: *Kerfoot v. Richter*, 2018 BCCA 238 at paras. 34-36.

[54] Undue influence can be established through circumstantial evidence upon which inferences can be drawn. Inferences can be drawn from such things as the approximate 54-year difference in the ages between Mr. Garstin and the Deceased, and the text messages between them that may suggest Mr. Garstin may have had a significant influence over the Deceased.

[55] In my view, the Plaintiffs have met the threshold of showing that there are triable issues on whether the Deceased was subjected to undue influence prior to preparing the August 2021 Will or whether there was a relationship of dominance by Mr. Garstin over the Deceased. The text messages in evidence arguably suggest that the Deceased and Mr. Garstin had more than a casual sexual relationship and the Deceased may have been influenced by him. Those issues will need to be determined on the merits after fulsome evidence and cross-examination.

[56] Mr. Garstin's application under Rule 9-6 fails.

iv. Should the action be struck for failure to provide particulars of undue influence?

[57] No.

[58] Mr. Garstin's final complaint is that the Plaintiffs failed to provide particulars of the alleged undue influence as mandated by Rule 3-7(18) and the NOCC should be struck accordingly.

[59] Rule 3-7(18) states:

(18) If the party pleading relies on misrepresentation, fraud, breach of trust, wilful default or undue influence, or if particulars may be necessary, full particulars, with dates and items if applicable, must be stated in the pleading.

[Emphasis added]

[60] He says the Plaintiffs' failure to provide particulars of Mr. Garstin's alleged undue influence is fatal to the NOCC.

[61] I disagree.

[62] Rule 3-7(20) states that particulars need only be pleaded to the extent they are known at the date of the pleading, and that further particulars may be served after they become known and in any event within 10 days after a demand is made in writing. Here, at the time the NOCC was filed, particulars of Mr. Garstin's alleged undue influence could not have been known by the Plaintiffs and they would not have been known until after documents were exchanged (in particular, the text messages between Mr. Garstin and the Deceased, and the Deceased and her friends) and until after examinations for discovery were conducted in February 2024.

- [63] Striking a claim for failure to comply with the Rules is "a blunt tool, to be used sparingly" and is not readily granted: *Barrie v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2021 BCCA 322 at para. 103.
- [64] Further, Rule 22-7(4) provides that the court must not set aside a proceeding unless, among other things, the application is made within a reasonable time. Application #1 was not filed until March 24, 2025, over three years after the NOCC was filed and well after document discovery and examinations for discovery were conducted wherein particulars would have been evident. Application #1 was not heard until one month before trial and was not, in my view, made within a reasonable time. Therefore, the relief Mr. Garstin seeks to strike the NOCC for failure to provide particulars cannot be granted.
- [65] Even if the application was brought within a reasonable time, I would have declined to grant the relief sought because I consider that the Plaintiffs' failure to provide particulars in the NOCC is an irregularity only that does not nullify this proceeding.
- [66] Mr. Garstin is by now aware of the allegations of undue influence against him. Nevertheless, when I gave the parties my oral decision on May 29, 2025, I ordered the Plaintiffs provide particulars of those allegations within two weeks.

ii. Should Mr. Wilson be added as a Party to the Action?

- [67] Yes.
- [68] Mr. Wilson seeks to be added as a party to this action under Rules 6-2(7)(b) and (c) and Rule 22-5(3). He does so on the basis that, because he is the sole residual beneficiary under the February 2021 Will, he ought to have been joined as a party from the outset. Further, he contends that he has a direct interest in the main issue in this case, namely whether the August 2021 Will is valid as it relates to the Residual Estate and further that it is just and convenient for him to be a party in order that the issues can be fairly and finally determined.
- [69] Mr. Garstin is the only party opposing the application and does so solely on the basis that, if he consented to Mr. Wilson being added as a party, he would, by inference, be accepting that the NOCC was properly brought and ought not to be dismissed.

[70] The Rules relevant to Application #2 state:

[Rule 6-2(7)] At any stage of a proceeding, the court, on application by any person, may

- (a) order that a person cease to be party if that person is not, or has ceased to be, a proper or necessary party,
- (b) order that a person be added or substituted as a party if
 - (i) that person ought to have been joined as a party, or

(ii) that person's participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated on, and

(c) order that a person be added as a party if there may exist, between the person and any party to the proceeding, a question or issue relating to or connected with

(i) any relief claimed in the proceeding, or

(ii) the subject matter of the proceeding

that, in the opinion of the court, it would be just and convenient to determine as between the person and that party.

[Rule 22-5(3)] Subject to any enactment or these Supreme Court Civil Rules or unless the court otherwise orders, a plaintiff or petitioner who claims relief to which any other person is jointly entitled must join as parties to the proceeding all persons so entitled, and any of them who do not consent to be joined as a plaintiff or petitioner must be made a defendant or respondent.

[71] Mr. Wilson deposed that he met the Deceased in the summer of 2009, starting out as her trainer. Through that connection, they became good friends and met regularly for coffee, dinners, movies, and to watch football games. He recalls that she had an active dating life.

[72] Mr. Wilson moved to Australia in 2018 to attend law school and continued to stay in touch with the Deceased with phone calls and Facebook.

[73] Although he became aware of the Deceased's death in January 2022, he was not aware of this action until February 2024, when he was contacted by Mr. Macaulay wanting to speak to him about this case which was then set to proceed to trial in April 2024. It wasn't until he spoke to Mr. Macaulay that he first learned the details of the August 2021 Will and the February 2021 Will.

[74] Being surprised to learn that he was the sole residual beneficiary of the Deceased's February 2021 Will, he contacted his lawyer who in turn contacted Mr. Montagano's lawyer, Mr. Baldwin, requesting documents and discovery transcripts. Due to concerns about implied undertakings as to confidentiality, Mr. Baldwin declined to provide any documents.

[75] Mr. Wilson's life then took a turn. He took paternity leave after the birth of his first child, took a new job with a new law firm in another city and opened a new branch office. In short, he says he was not able to devote any attention to this case until January 2025 when his lawyer again requested that litigation documents be provided. Mr. Wilson learned that Mr. Garstin was bringing Application #1 and thought it best to await the outcome before proceeding further.

[76] Upon learning that Application #1 was adjourned to the end of May 2025, and on learning that the trial was set to commence at the end of June 2025, Mr. Wilson set down Application #2 concurrently with Application #1.

- [77] In the circumstances, I accept as reasonable Mr. Wilson's explanation for the timing of Application #2.
- [78] In *Boake v. Blair*, 2019 BCSC 830, Justice Armstrong helpfully discussed the Rule. At paras. 48-52, he stated:
- [48] The test governing addition and substitution of parties under Rule 6-2(7)(b)(i) and (ii) is whether a person ought to have been joined as a party or whose participation in the proceedings is necessary to ensure that all matters in the proceeding are effectually adjudicated. Use of the term "ought" in Rule 6-2(7)(b)(i) encompasses all those cases in which joining the person is a necessity and may even be broader, as noted by Madam Justice Smith in *Lawrence Construction Ltd. v. Fong* (2001), 18 C.P.C. (5th) 377 (B.C.S.C.), to include situations in which joining the person may be more than mere convenience but less than a necessity": see *Kitimat (District) v. Alcan Inc.*, 2006 BCCA 562 at para. 29 [Kitimat].
- [49] A party's participation will be "necessary" within the meaning of Rule 6-2(7)(b)(ii) where it has a direct interest in the precise outcome of the particular action between the certain parties: *Kitimat* at para. 31, citing *Canadian Labour Congress v. Bhindi* (1985), 61 B.C.L.R. 85 at 94. If neither of those conditions are satisfied then there is no discretion to make an order under that subsection: see *Alexis v. Duncan*, 2015 BCCA 135 at para. 15 [Alexis].
- [50] Under Rule 6-2(7)(c) an order adding a party may be made if there is an issue related or connected with the relief claimed or subject matter in the original proceeding and, in the court's opinion, it would be just and convenient to do so. An order made under Rule 6-2(7)(c) is within the discretion of the court because it would be just and convenient in the case: see *Alexis* at para. 17.
- [51] An applicant to add a party must show there is a question or issue between it and the proposed defendant that relates to the relief, remedy or subject of the action. The low threshold is measured on the basis of a possibility that the cause of action is not a frivolous proceeding. There is no weighing of the evidence at this stage; the only question is whether the pleadings or evidence demonstrates an issue between the parties: *The Owners, Strata Plan No. VIS3578 v. John A. Neilson Architects Inc.*, 2010 BCCA 329 [Neilson] at para. 45.
- [52] Consideration of the "just and convenient" basis for adding a party must be exercised judicially in accord with the evidence and the authorities. The court should consider the extent of any delay, the reasons and explanation for delay, prejudice arising from the delay and the degree of connection between the existing action and the new parties.
- [79] In my view, all these considerations apply to Mr. Wilson. Given the issues raised in the NOCC, he has a direct interest in the outcome of this proceeding. If the August 2021 Will is set aside and the February 2021 Will is proven in solemn form, he will be the sole beneficiary of the Residual Estate. As such, Mr. Wilson is entitled to claim the same relief as the Plaintiffs and ought to have been joined as a party defendant to the NOCC when the Plaintiffs became aware of the February 2021 Will. It is just and convenient that he be added

now.

- [80] Mr. Beug advises that his calendar will allow him to attend the trial at the end of June. He will use his best efforts to review the existing documents and discovery transcripts. He states he is hopeful, but cannot guarantee, that no further discoveries of Mr. Garstin will be required.
- [81] Mr. Wilson shall be added as a defendant to this proceeding and the style of cause shall be amended accordingly.
- [82] Given that Mr. Wilson seeks to have the February 2021 Will proven in solemn form should the August 2021 Will be held to be invalid, and in order to avoid a multiplicity of proceedings, he should file and deliver a response and counterclaim: *Powell v. Powell*, 1987 CanLII 2544 (BCSC) at pp. 11-15.

Summary

- [83] Mr. Garstin's application to strike the NOCC is dismissed with Scale B costs to the Plaintiffs.
- [84] As was the case in *Harrison v. Apperloo*, 2016 BCSC 1129, and as I ordered on May 29, 2025, there will be an order that the Plaintiffs provide particulars of the claim of undue influence within two weeks of May 29, 2025.
- [85] Mr. Wilson's application to be added as a party to this action is allowed. I conclude he should be added as a defendant. Mr. Wilson is entitled to receipt of all documents and discovery transcripts exchanged and obtained in the proceeding. In order to save the trial date, he should file a response and counterclaim in a timely manner.

"G.P. Weatherill J."

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