

CANADA / JUDGMENT

Morgan v. Cowper-Smith

2025 BCSC 768

COURT

Supreme Court of British Columbia

DECIDED

25 April 2025

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

2025 BCSC 768 Morgan v. Cowper-Smith

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Morgan v. Cowper-Smith,

2025 BCSC 768

Date: 20250425

Docket: 200254

Registry: Victoria

Between:

Gloria Lynn Morgan

Petitioner

And:

Max Wayne Cowper-Smith and Christopher Weinheimer, in His Capacity as the Litigation
Representative for Nathan Cowper-Smith, Deceased

Respondents

Before: The Honourable Mr. Justice A. Saunders

Reasons for Judgment

Counsel for the Petitioner:

P. Harrison

Counsel for the Respondent Max Wayne Cowper-Smith:

Counsel for the Respondent Christopher Weinheimer, in His Capacity as the Litigation Representative for Nathan Cowper-Smith, Deceased:

D. Williams

J. Kawaguchi

D. Redman

M. Adam

Place and Date of Hearing:

Victoria, B.C.

November 1-2, 2023;

August 16, 2024

Place and Date of Judgment:

Victoria, B.C.

April 25, 2025

Table of Contents

Paragraph Range

Introduction

[1] - [9]

The Report

[10] - [11]

Issues

[12] - [65]

Claim for Occupational Rent

[15] - [35]

Background

[15] - [19]

Procedural Issues

[20] - [23]

Application to Re-Open Hearing

[24] - [30]

Discussion

[31] - [35]

Post-February 2011 Maintenance Costs

[36] - [38]

Legal Expense Indemnification and Costs Orders

[39] - [65]

The Recommendations

[39] - [47]

The Parties' Positions

[48] - [53]

Discussion

[54] - [65]

Introduction

- [1] The respondent Christopher Weinheimer, in his capacity as Litigation Representative for Nathan Cowper-Smith, deceased, applies to confirm, with variations, the Report and Recommendation of Master Bouck (now Bouck A.J.), sitting as Registrar (the "Report") concerning the passing of interim accounts of the executor of the Estate of Elizabeth Flora Cowper-Smith (the "Estate"), who is the within petitioner. The petitioner cross-applies.
- [2] As has been the case throughout this proceeding, for the sake of convenience I refer to the parties and principals by their first names, meaning no disrespect.
- [3] And again, meaning no disrespect and only for the sake of clarity, I refer herein to Master Bouck as the "Registrar" when discussing actions taken by her in this proceeding while acting in that role.
- [4] The petitioner, Gloria, is the daughter of the testator Elizabeth, who died August 5, 2010. She and her brothers, Max and Nathan, are the beneficiaries of Elizabeth's estate. Nathan died March 25, 2021, and the respondent Mr. Weinheimer was named Nathan's litigation representative in May, 2021. For the sake of clarity I adopt the convention used by the Registrar of referring to Nathan, rather than to Mr. Weinheimer, as the party affected by the outcome of this petition.

- [5] As noted in the Report, administration of the Estate has been seriously delayed by litigation (the "Litigation") between the siblings, culminating in *Cowper-Smith v. Morgan*, 2017 SCC 61, wherein the Supreme Court of Canada ("SCC") found that Gloria had acted in bad faith in having reneged on a promise to sell her one-third share of the family home (the "Property") to Max upon Elizabeth's death. I will not recite the background to the Litigation in any more detail. It is summarized in the Report, at paras. 12-32; see also the trial judgment of Madam Justice Brown, indexed at 2015 BCSC 1170; and the Court of Appeal's decisions on the merits and on costs, at 2016 BCCA 200 and 2016 BCCA 509, respectively.
- [6] Justice Brown held that a declaration of trust executed by Elizabeth, under which Gloria would be entitled to the Property, absolutely, upon Elizabeth's death, had been obtained through undue influence. Justice Brown declared that the Property was an asset of the Estate and was to be distributed as per the will. On the basis of proprietary estoppel, she ordered that Max be entitled to purchase Gloria's one-third interest. Justice Brown further ordered Gloria to provide an accounting of her use of the Property and investments held by the Estate. Gloria pursued an appeal of the proprietary estoppel finding, and initially succeeded in the Court of Appeal. By way of its judgment dated December 14, 2017, the SCC allowed Max's claim of proprietary estoppel, restoring the trial judgment of Madam Justice Brown, and ordered Gloria to divide the property forthwith into equal one-third interests, to deliver those interests to herself, Max, and Nathan, as beneficiaries of the Estate, and to take all necessary steps to enable Max to purchase her one-third interest for an amount that reflected its value as of February 2, 2011, plus an amount equal to post-judgment interest on that sum from that date. It was further ordered that upon his acquisition of Gloria's interest in the property, Max was to account to the Estate for the amount of any expenses incurred by the Estate in maintaining the Property since February 2, 2011.
- [7] The within petition was filed January 21, 2020. In it, Gloria seeks an order for the passing of accounts by way of reference to and certification by the Registrar, and certain ancillary orders related to Max's entitlement to purchase Gloria's one-third interest, including an order for Max to purchase the property within a certain timeframe.
- [8] Max and Nathan, in their responses to petition filed February 25 and 26, 2020, respectively, consented to a referral to the Registrar, including cross-examination of Gloria on the passing of accounts, and submitted that Gloria should be removed as executor.
- [9] The petition was scheduled to be heard January 28, 2021. On that day, counsel appeared in Master's chambers before Master Bouck, who ordered (the "Referral") that the passing of accounts should be referred to the Registrar for a report and recommendations. By consent, the balance of the relief sought in the petition was adjourned generally. Master Bouck declined to order that the accounting previously ordered by Justice Brown be included within the passing of accounts, but noted that it might be open to the respondents to pursue that accounting within the passing of accounts arising out of the petition. She ordered:

1. That the accounts of Gloria as Executor in respect of her administration of the estate from August 5, 2010 to January 28, 2021 be passed before the Registrar;
2. That the Registrar provide a report and recommendation to the Court, including as to Gloria's remuneration;
3. That at the same time, the Registrar conduct a review of Gloria's legal bills, pursuant to s. 70 of the Legal Profession Act;
4. That the Registrar make a recommendation as to costs for the passing of accounts;
5. That the parties schedule and attend pre-hearing conferences, but have leave to schedule the reference prior to any pre-hearing conference being held.

The Report

- [10] The review of Gloria's legal bills did not proceed. The passing of accounts was, after a number of pre-hearing conferences and adjournments, heard by Master Bouck, as Registrar, on June 27-30, and July 4, 2022. The Report was issued September 8, 2022.
- [11] The Report sets out the following recommendations, which largely followed the submissions of Max and Nathan (or at least as they were perceived); specifically, that the interim accounts of the executor be passed, with the following amendments:
- a) Addition of a capital expense of \$464, and removal of all claims for expenses related to the Property, with Gloria not to be indemnified by the Estate for any payments made after February 2, 2011;
 - b) Removal of a claim by the Estate against Max for occupational rent;
 - c) Removal of a claim by the Estate for advances paid to Max between August 16, 2010 and May 30, 2019, other than the advances for funeral clothing, totalling \$1,000, made on August 16, 2010;
 - d) Provision for Gloria to reimburse the Estate all of the legal expenses paid at her direction but for a sum of \$10,000;
 - e) Gloria to receive no interim remuneration;
 - f) Gloria to be indemnified by the estate for her special costs, to be assessed or agreed upon, for preparation and attendance before the Registrar at all pre-hearing conferences and on the follow dates: November 15, December 9 and 17, 2021, January 17, 2022, and June 27 and 28, 2022.
 - g) Max and Nathan each to be indemnified by the Estate for their respective special costs for preparation and attendance before the Registrar on all dates related to this reference.

Issues

- [12] The parties accept certain of the recommendations made by the Registrar, and have settled one other aspect of her Report that was initially contentious. The matters left for determination by the Court relate, broadly, to two sets of issues: the executor's claim against Max for occupational rent, and the related issue of his liability for ongoing maintenance expenses; and, liability for costs.
- [13] The majority reasons of the SCC, issued in December 2017, were silent as to how the transfer of interests in the Estate was to be effected under British Columbia law. Since that judgment was handed down, the parties have been at odds as to its interpretation and now are at odds as to who bears responsibility for any delays in its implementation. The evidence before me - a title search print dated November 2, 2023, submitted in the course of the Confirmation hearing - is that title remains in the names of the deceased Elizabeth, and Gloria, as joint tenants, despite Brown J., in her trial judgment, having declared that the Property is an asset belonging to Elizabeth's estate, and the Court of Appeal having confirmed that Gloria holds the Property in trust for the Estate - findings which Gloria did not appeal. Further, there is no evidence of Gloria having taken steps towards registering herself, as executor, as trustee of the Estate, so that she can register the transfers of interest called for in the will.
- [14] As regards that dispute, the petitioner now submits that incorrect and incomplete information was provided to the Registrar, and to me at the Confirmation hearing, as to what steps have been taken to comply with the SCC's judgment. This, the petitioner contends, became apparent when certain emails exchanged between counsel in 2020 and 2021 came to light, following the hearing. The petitioner applies for an order that the Confirmation hearing be re-opened to allow for those emails to be considered by the Court and for the parties to tender such further evidence and make submissions as may be deemed just.

Claim for Occupational Rent

Background

- [15] Schedule G to the Accounting made provision for adding to the residue of the Estate occupational rent to be paid to the Estate by Max, in the amount of \$204,750 (net of a purported write-off in the amount of \$68,250). The factual basis for the claim, as alleged and set out in Gloria's cross-application, may be summarized as follows:
- a) Max has resided in the Property rent-free since Elizabeth's death in August 2010;
 - b) Max took steps to delay the Registrar's passing of accounts;
 - c) While the Estate has been at all times prepared to convey Gloria's one-third share, Max has not recorded any intention to exercise his right to purchase it;

- d) The practice in British Columbia is that the purchaser's solicitor prepares the conveyancing documents including completion of Property Purchase Tax forms. Max has not delivered those documents and withheld the personal information needed to complete those forms;
 - e) There is no evidence that Max has the means to purchase Gloria's interest;
 - f) To the extent the law requires there to have been an ouster, that took place in August 2012 when Gloria and her husband were assaulted by Max at the Property.
- [16] At the Confirmation hearing, these points were supplemented by Gloria's submission that while the Court of Appeal noted in *Volosek v. Boisvenu Alter-ego Trust #1*, 2021 BCCA 179 that claims for occupational rent usually arise in matrimonial cases, *Reagh Estate (Re)*, 2021 BCSC 1807 is authority for the proposition that the remedy may be available in a civil context where there has been unjust enrichment. Gloria submits that Max's continuing benefit of living rent-free in the Property, and his ability to have rented out rooms in the Property to students or others for further income, make this a case of unjust enrichment.
- [17] Max and Nathan both oppose the occupational rent claim.
- [18] The Registrar did not find in favour of this claim. She noted that the SCC had only found Max liable to account to the Estate, after he acquires Gloria's interest, for upkeep expenses since February 2011; this, she concluded, implied that had Gloria fulfilled her promise to Max and properly performed her role as executor, the Estate would no longer be the owner, and would have no basis for claiming rent. The Registrar further noted that Nathan, who as a beneficiary of the Estate would stand to benefit from rent being paid, did not support the occupational rent claim.
- [19] Broadly, I agree with the Registrar's analysis. I make the following additional comments in respect of this issue.

Procedural Issues

- [20] First, in the course of the Confirmation hearing I raised the question of whether the occupational rent claim would be barred by the doctrine of issue estoppel, it not having been advanced in the Litigation. On further review of the pleadings and proceedings in the Litigation, I have determined that not to be the case. Although Gloria was named as a defendant in the Litigation in her capacity as executor, she was also named in her personal capacity, and the remedies sought, while of consequence to the executor, were effectively made as against Gloria personally. A counterclaim for rent by Gloria in her capacity as executor was not sufficiently connected with the subject matter of the Litigation that it was one that ought to have been brought.

- [21] Second, Max and Nathan both submit that no claim for rent was brought in the petition. While this is the case, it is a factor that if anything only goes to the equities of the parties' respective positions. It is appropriate, and consistent with British Columbia practice, for a rent claim against a beneficiary to be addressed through the accounting process; there is no requirement for it to be specified as a remedy being sought in any underlying pleading.
- [22] For those two reasons, there is no procedural bar to the occupational rent claim being considered on the merits.
- [23] Turning to the merits, I first will address the application to re-open the Confirmation hearing.

Application to Re-Open Hearing

- [24] The new evidence that Gloria seeks to tender consists of two sets of email messages. The evidence is said to provide further contextual information as to the steps taken to transfer ownership of the Property or to impede that transfer. It is said this evidence would potentially be relevant specifically to the purported basis for the occupational rent claim, and more generally to the parties' submissions as to the time and cost the Litigation has consumed.
- [25] The factors to be considered on a re-opening application were helpfully summarized by Justice Wolfe in her recent decision, *B.F.W. v. F.P.*, 2025 BCSC 589:
- [42] Turning to the legal framework for re-opening, there is no dispute the Court has wide discretion to re-open a matter and hear new evidence before a decision has been rendered or a final order has been entered in order to prevent a miscarriage of justice: *Grewal v. Grewal*, 2016 BCCA 237 at para. 70, citing *Clayton v. British American Securities Ltd.* (1934), 49 B.C.R. 28, 1934 CanLII 229 (C.A.). It is also well-settled that the Court's discretion to re-open should be "exercised with restraint" and care to prevent fraud and abuse of the court's process, and that the purpose of re-opening is not to permit a party to re-argue or re-cast its case: *Mong v. Giang*, 2022 BCSC 1732 at para. 12, *aff'd* 2024 BCCA 136 at paras. 24-28; *Moradkhan v. Mofidi*, 2013 BCCA 132 at para. 31. The party seeking to re-open must show that a miscarriage of justice would probably occur if the matter is not re-opened and that any new evidence would probably change the result. That said, new evidence is not a prerequisite to re-opening; applications to re-open will always depend on the individual circumstances and "the overarching concern of the interests of justice": *Grewal* at para. 71.
- [26] The *Grewal* decision of our Court of Appeal cited in that decision concerned re-opening a trial, but the same principles govern the re-opening of an application: *Chan-Henry v. Liu*, 2017 BCSC 134, at para. 9.

- [27] One of the emails Gloria seeks to tender on reopening dates from November 2020. It is said to set out an explanation as to how the proposed transfer of a one-third interest to each of the beneficiaries could be carried out; the other set of emails, dating from February 2021, is said to be an exchange between counsel as to the timing of the transfer of the one-third interests.
- [28] However, Gloria submitted, on the Confirmation hearing, that what was conceived on the advice of the Estate's solicitor was that rather than two separate sets of transfers - one-third interests being transferred to each of the children, and then a conveyance of Gloria's interest to Max, both of which would attract property transfer tax - it would minimize the tax payable if there was only one set of transfers: a one-third interest to Nathan and two-thirds to Max. The emails as described to me do not appear to contemplate such a scheme. At best, therefore, the emails would only provide a snapshot, at one point in time, of the parties communicating as to a different scenario, without any evidence of the context.
- [29] I note, parenthetically, that it is not apparent to me why property transfer tax would apply to the transfer of the one-third interests from a trustee to each of the beneficiaries, given the exemption provisions of s. 14 of the Property Transfer Tax Act, R.S.B.C. 1996, c. 378.
- [30] I am not persuaded that the new evidence has any great weight, nor that its admission would probably change the result or avoid a miscarriage of justice. I decline to re-open the hearing.

Discussion

- [31] I am, as indicated, broadly in agreement with the Registrar's analysis of the implications of the SCC's order as respect's Max's liability for occupational rent. Gloria submits that this analysis did not place sufficient weight on the distinction between an actual transfer, and a right to purchase, the latter being what, Gloria submits, the SCC ordered. Gloria says that with Max not having yet exercised that right, occupational rent could still be owing. As a matter of logic that is no doubt true; but I view it as implicit in the SCC's decision that the equities lie in Max's favour.
- [32] If what was granted Max by the SCC's judgment were best described as a right to purchase, he has still not been afforded the opportunity to exercise that right. Gloria was ordered, in 2017, to take all necessary steps to enable Max to purchase her share. All parties have understood - and Gloria has acknowledged - that Max would only have the ability to purchase Gloria's interest out of his share of the Estate. The SCC's majority decision notes that the original understanding between Gloria and Max, on which his proprietary estoppel claim was founded, was that he would have the ability to purchase her interest "once the estate had been administered" (para. 52). The decision then goes on to state:
- [53] Neither Max nor Gloria could reasonably have expected to wait the better part of a decade to exchange Max's cash for Gloria's interest in the property.

Gloria also submitted at the Confirmation hearing that the Estate's solicitor believed it appropriate that the funds necessary to purchase Gloria's interest would remain in the Estate, that the property would be transferred, and the payment taken out of the Estate.

[33] The "necessary steps" directed by the SCC must, perforce, have included taking effective steps towards winding up the Estate. Whatever the reasons are for that not having been accomplished, I am not persuaded that blame lies at the feet of Max, so as to render him liable to pay occupational rent.

[34] Gloria further submits that as an alternative to occupational rent, she as executor may apply, to Max's share of the Estate, the rule in *Cherry v. Boulton* (1839), 4 My. & Cr. 442, 41 E.R. 171. That equitable rule allows an executor to retain such part of a legacy given a creditor by a debtor as is required to extinguish the debt. The rule, however, has application only to debts or liabilities that have been proven. It does not create liabilities. Max owes no occupational rent, and the rule does not apply.

[35] I confirm the Registrar's recommendation that the claim for occupational rent against Max be removed from the accounting.

Post-February 2011 Maintenance Costs

[36] Gloria seeks an order that payments made by the Estate to Max for maintenance of the Property totalling \$61,424 be deducted from Max's share of the Estate.

[37] This issue has already been determined by the SCC's decision in the Litigation. The judgment therein provides:

The respondent, in her capacity as executor, is ordered to take all necessary steps to enable the appellant to purchase the respondent beneficiary's one-third interest in the property for \$223,333.33, plus an amount equal to the post-judgment interest that would be payable on a judgment in that amount issued on February 2, 2011, once the respondent beneficiary has received that interest from the estate. Upon his acquisition of the respondent beneficiary's interest in the property, the appellant is ordered to account to the estate for the amount of any expenses incurred by the estate in maintaining the property since February 2, 2011.

[Emphasis added.]

[38] Max's liability to the Estate has been determined not to arise unless and until he acquires Gloria's one-third interest. There is no basis for varying this order.

Legal Expense Indemnification and Costs Orders

The Recommendations

[39] The Registrar recommended that Gloria reimburse the Estate for all legal expenses incurred in defence of the Litigation, but for the amount of \$10,000. This recommendation is not contested by any of the parties, and I confirm that aspect of the Report.

- [40] With regard to the costs orders made in the Litigation, which were paid by the Estate, the Registrar evidently misapprehended Max and Nathan's position, understanding them to have conceded the Estate should be fully liable, despite Gloria having been a defendant in that action both in her capacity as executor, and personally. The parties have agreed that Gloria will reimburse the Estate for all of the court costs awards, except for the sum of \$2,500. That will form a term of the Order flowing from these Reasons.
- [41] The final set of issues concern the costs of this interim passing of accounts process. There is substantial disagreement, both as to (a) whether and to what extent the parties should be indemnified against their own legal expenses by the Estate by way of special costs, or obliged to bear their own costs; and (b) whether, as an alternative to indemnification by the Estate, there are any expenses incurred by Max and Nathan that they ought to be personally indemnified against by Gloria.
- [42] The Registrar made the following comments on Gloria's conduct:
- [79] I have recommended a number of amendments or revisions to the Accounting accounts based on the executor asserting claims that are inconsistent with court orders and meritless for other reasons. The court may consider such claims "outrageous". There has been a judicial finding that Gloria has acted in bad faith towards her brothers. If the accounts had been drawn without those claims, the accounting exercise might well have been unnecessary but that outcome is highly speculative. Given the history of these parties' interactions, it seems unlikely that Max and Nathan would have accepted Gloria's accounting without some contest and judicial oversight. Any claim by Gloria for executor's remuneration would in all likelihood require judicial determination. But certainly, had the passing of accounts been limited to a determination of executor's remuneration and perhaps a more limited audit, less time before the registrar would have been necessary. Based on my experience as a registrar, I suggest that the passing of less controversial accounts would have occupied two days of evidence and submissions.
- [43] This criticism of Gloria's conduct within the accounting process echoes the Registrar's earlier comment, in recommending Gloria be deprived of interim executor's remuneration, that "Gloria's actions during the interim period were almost exclusively driven by self-interest and unnecessarily prolonged the administration of the Estate" (para. 76).
- [44] The Registrar's recommendations relate strictly to the cost of the reference. She recommended as follows:
- a) That Gloria be indemnified by the Estate by way of special costs for the attendance at pre-hearing conferences and for appearance on November 15, and December 9 and 15, 2021;^[i] and, January 17, and June 27 and 28, 2022;
 - b) That Max and Nathan be indemnified by the Estate by way of special costs for their respective preparations for and attendances at all appearances before the registrar.

[45] With respect to each related set of hearings, the Recommendations can be broken down as follows:

Dates

Hearing

Recommendation

April 6, May 4, June 9, 2021

Pre-Hearing Conferences

All parties to be indemnified by Estate on a special costs basis

December 9 and 15, 2021

Max's Application for Document Production

Gloria to be indemnified by Estate on a special costs basis

November 15, 2021; January 17, 2022

Partial Hearing Days and Adjournments

All parties to be indemnified by Estate on a special costs basis

June 27-28, 2022

Passing of Accounts, Hearing Days 1 and 2

All parties to be indemnified by Estate on a special costs basis

June 29-30, July 4, 2022

Passing of Accounts, Hearing Days 3, 4, and 5

Gloria's own costs to be borne by her personally without indemnification; Max and Nathan to be indemnified by Estate on a special costs basis

[46] Parenthetically I note what appears to be an anomaly in the Report, in that the November 16, 2021 hearing day is not addressed. The Report does address a partial hearing day on November 15, 2021, which was when the passing of accounts before the Registrar commenced. It appears from the record that one or both of the respondents then applied for an adjournment, on the basis of alleged inadequacies in the petitioner's document disclosure. That adjournment was not granted, however the hearing then had to be adjourned for the rest of the day due to flooding in the courthouse. The proceedings continued the next day, November 16. Counsel renewed their request for an adjournment, supplementing the previous day's submissions with a copy of an order made by Master Harper on June 9, 2021. This time the adjournment was granted. The Registrar's reasons for judgment, indexed as 2021 BCSC 2543, noted that the adjournment was being granted "with a

great deal of reluctance". She adopted the concern expressed by Gloria's counsel, that this document discovery process is unrelated to the hearing that is before me. The order of Madam Justice Brown is made in a separate proceeding.

The Registrar did, however, note the possibility that allowing the pursuit of further document discovery could allow for better evidence on the accounting, and on that basis adjourned the hearing over to January 17, 2022, with directions concerning scheduling of any applications related to document discovery or examination for discovery under Rules 7-1 or 7-2, as contemplated by Master Harper's June 9 order. The Registrar ordered that the costs of the November 16, 2021 hearing date were to be the subject of a recommendation made in the passing of accounts Report. However, the costs for that hearing appear to have been overlooked in the Report. Nathan and Max did not address that hearing date in their submissions before me.

[47] It appears that the hearing was again adjourned on January 17, 2022, primarily, if I understand correctly, due to the strictures imposed by COVID, and the parties' desire for an in-person hearing.

The Parties' Positions

[48] Compendiously, the parties' positions on the costs and indemnification Recommendations are as follows. Nathan says that that in respect of partial hearing days in November and December 2021 and January 2022, all parties should be indemnified by the Estate; and that in respect of all other matters, Nathan and Max should be indemnified by Gloria, and Gloria should bear her own costs, by reason of her continuing misconduct in the administration of the Estate, in the accounting process and in the passing of accounts hearing.

[49] Max's primary position is that by reason of said misconduct, all orders as to costs arising out of the passing of accounts ought to be dealt with comprehensively in the final determination of the costs of the within petition. Alternatively, Max adopts Nathan's submissions, with the exception that costs related to the December 9 and 15 hearing dates be determined at the conclusion of the petition. The significance of those hearing dates is described further below.

[50] Gloria accepts the Recommendation that she be deprived of any indemnification in respect of the third through fifth days of the passing of accounts hearings. Otherwise, as to Max and Nathan's positions on her costs liability, she submits that her conduct in the Litigation is irrelevant to the passing of accounts. In this current process, she relied throughout on the advice of counsel, and she is not to be punished, either through depriving her of indemnification from the Estate, or being ordered to indemnify Max and Nathan by way of special costs. She therefore agrees with the Registrar that all parties should be indemnified from the Estate with respect to the prehearing conferences.

- [51] As to the November 15 and 16, 2021 hearing dates, Gloria submits that as the only substantial matter dealt with on November 15 was Max's unsuccessful adjournment application, that she alone should have her costs. Further, she says that while his renewed adjournment application did succeed the following day, the delay in the application having been brought worked an unfairness on all parties, and that to lessen the burden on the Estate it would be appropriate for all parties to bear their own costs for November 16.
- [52] Gloria submits that while the Registrar addressed the matter of costs for the December 9 and 15, 2021 document production hearings, awarding Gloria her costs, the Registrar appears to have overlooked the costs relating to Max's appeal - later abandoned - of the December 17, 2021 order dismissing Max's application. She seeks indemnification by the Estate against her costs on that appeal.
- [53] Finally, Gloria submits that each party's costs of the January 28, 2021 hearing that resulted in the reference to the Registrar be borne by them without indemnification. That point was not specifically addressed in the Report.

Discussion

- [54] Turning to the substance of the Report, Nathan - and, to the extent he adopts Nathan's submissions, Max - appears from his written submissions on this Confirmation hearing to interpret the Report as recommending that all parties be indemnified from the Estate with respect to the December 9 and 15, 2021 hearing days. On those days Master Bouck, in Chambers, heard Max's application for an order that Gloria produce certain banking records, covering the time period June 2001 to August 2010. Nathan's summary of the Recommendations includes the statement that Master Bouck recommended all parties be indemnified from the Estate for "Partial hearing days in November and December, 2021 and January, 2022"; the December 9 and 15 appearances were the only hearing days on this passing of accounts petition in the month of December. However, as noted above, the Registrar's recommendation for the Estate to indemnify Nathan and Max on a special costs basis was only in respect of preparation and attendances before the Registrar. The December 9 and 15 hearings were before Master Bouck sitting as Master, not as Registrar. Accordingly, I take the Report to make no recommendation as respects indemnification by the Estate of Max and Nathan in respect of their legal expenses for those December hearing dates.
- [55] This interpretation is consistent with Master Bouck's disposition of Max's application heard on those dates. In her reasons issued December 17, 2021, indexed at 2021 BCSC 2460, Master Bouck accepted Gloria's submission that the application conflated Gloria's obligations to account under the Litigation trial order, with the obligations she owed to Nathan and Max as beneficiaries. Clearly, Master Bouck viewed the application as having been improperly brought within the petition.

[56] However, following receipt of written submissions, Master Bouck issued a further order on January 14, 2022, with reasons indexed at 2022 BCSC 55, on the issue of the costs of Max's application. Max had appealed from the Master's December 17, 2021 order, and submitted that the costs award be determined following the appeal. Gloria submitted that Max should pay party and party costs to her at Scale B, and that the shortfall between those costs and full indemnity costs be paid by the Estate. Gloria's written submission noted,

Rule 14-1(16) provides that if any costs "are to be paid out of an estate or property, the court may direct out of what portion of the estate or property the costs are to be paid". There is a possibility that Max Cowper-Smith's share of the cash value of the estate will be a negative value. As a result, the Rule should not be applied.

[57] Master Bouck declined to make any costs order, leaving the door open to the issues of costs and indemnification in connection with the application being determined in a later proceeding:

[6] The petitioner's submissions address the payment of costs from the estate, but that remedy has not been pled in the petition. It may be that the judge hearing the petition will be persuaded that such relief is available to one or more of the parties under the Supreme Court Civil Rules or otherwise.

[7] In the circumstances of this proceeding, I order that the costs related to the application filed November 26, 2021 be determined when the court adjudicates the final order as to costs in the petition.

[Emphasis added.]

[58] The Report comments on the potential costs consequences of both Max's attempt to obtain document production under R. 7-1, and his later examination for discovery of Gloria under R. 7-2:

[82] I am unable to discern from the evidence as to whether the parties use of SCCR 7-1 or 7-2 processes was necessary for the proper conduct of the passing of accounts. That issue may be the subject matter of further submissions before the court. However, I will note that Max and/or Nathan may have used those processes at least in part to gather information for the enforcement of the SCC Judgment rather than being strictly related to the terms of the reference.

[59] Gloria's written submissions to the Registrar on the passing of accounts did not specifically address the December hearing dates, and the Report does not specifically reference Master Bouck's order of January 14, 2022. With respect, I find the Registrar's recommendation that Gloria be indemnified by the Estate in respect of her costs of the December 9 and 15, 2021 hearings to be inconsistent with the January 14, 2022 costs order, when interpreted in light of the reasons for judgment. The Registrar's Recommendations cannot negate or supplant a previous order. The December 9 and 15 hearing dates were plainly, in the words of the costs order, "related to the application filed November 26, 2021". So, too, was the appeal of the

Registrar's December 17, 2021 ruling on that application. And so, too - though less directly - was the November 16, 2021 application to adjourn the petition, because it was that adjournment that allowed for the November 26 application to be made. I find that in respect of

- a) the November 16, December 9 and December 15, 2021 hearing days;
- b) the appeal of the December 17, 2021 order; and,
- c) the written submissions in respect of the costs order pronounced January 14, 2022,

it is more consistent with the January 14, 2022 costs order to defer the issues of whether any parties are to be indemnified against their legal expenses, and if so whether that is to be by way of costs orders, or indemnity by the Estate, and have those issues determined by the Court when it adjudicates the final order as to costs of the within petition.

- [60] As to the Recommendation depriving Gloria of her costs for three of the five hearing days, the Registrar's reasons are set out in para. 79 of the Report, as quoted above; notwithstanding the Registrar's negative comments concerning Gloria's conduct, the Registrar was of the view, given her experience, that a passing of accounts unburdened by meritless positions taken by Gloria still would likely have consumed two days. Nathan and Max attack this conclusion as being entirely speculative, and say that had the executor not complicated the accounts by advancing her own personal interests, the passing of accounts may very well have been limited only to the issue of the executor's remuneration, and could have concluded in less than one full day.
- [61] The standard of review of a Registrar's recommendations is conventionally stated as being that the Confirmation hearing is a review of the accounts de novo; the Court is free to make its own findings, though is usually "reluctant to disturb 'findings of primary fact' made by a registrar, including those relating to credibility": *Narwal v. Narwal*, 2018 BCSC 1561 at para. 24, citing *Morgan v. Edwards*, 2001 BCCA 29 (CanLII). I regard a Registrar's conclusions based on their experience in estate matters as also being worthy of deference. The Associate Judges and Registrars of the Court have far more experience in such matters than the Court's Justices. I see no reason to depart from the Registrar's reasoning, and I view the logic of her conclusion as unassailable.
- [62] It is implicit in the Registrar having granted Gloria, as well as Max and Nathan, indemnity against her Pre-Hearing Conference expenses, that the Registrar considered the number of conferences not to be out of the ordinary, and in particular that those conferences were not unduly multiplied or complicated by Gloria's positions on the accounting.
- [63] I confirm the Registrar's Recommendations with respect to the Pre-Hearing Conferences of April 6, May 4, and June 9, 2021, the partial hearing day on January 17, 2022, and with respect to the June 27-30, 2022 and July 4, 2022.

- [64] All other processes and attendances - save for the January 28, 2021 Referral hearing, and this present Confirmation hearing - appear to have been related either to Max's document production application filed November 26, 2021, which have already been ordered to be determined at the conclusion of the petition; or, more generally to the use of SCCR R. 7-1 and 7-2 processes for purposes not directly related to the passing of accounts, which raises broader considerations. Further, it is appropriate, given the breadth of the allegations concerning Gloria's conduct of the Estate, that all matters of costs and indemnity other than those specified in the previous paragraph be dealt with holistically, and determined when the Court adjudicates on the final awards of costs on the petition.
- [65] Lastly, Gloria submitted on this hearing that there may be a need to increase the holdback amount, and she submitted that she ought to be given the discretion to amend the holdback to \$500,000. Max was not prepared to make submissions on that issue, and Nathan's submission was that any need for an increase could be dealt with in the course of finalizing the Estate. I make no order respecting the holdback.

"A. Saunders J."

[i] The Report refers, at paragraphs 81 and 84, to December 9 and 17, 2021. The parties all agree that these dates should be December 9 and 15, 2021, which were the two partial hearing days on which Max's application for Gloria to produce banking records was heard by Master Bouck. December 17, 2021 was the date on which Master Bouck issued her reasons dismissing the application, indexed as 2021 BCSC 2460. It was also the date on which I, sitting in Chambers, had before me Nathan's application for an interim distribution, and ordered an adjournment with an award to Gloria of costs thrown away. That costs order does not relate to the subject passing of accounts.

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/25/07/2025BCSC0768.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/morgan-v-cowper-smith-2025>

Prepared on 29 October 2026 · Esheria