

CANADA / JUDGMENT

Mortimer v. Bender

2020 BCSC 483

COURT

Supreme Court of British Columbia

DECIDED

31 March 2020

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2020 BCSC 483 Mortimer v. Bender

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Mortimer v. Bender,

2020 BCSC 483

Date: 20200331

Docket: S196469

Registry: Vancouver

Between:

Rita Mortimer

Plaintiff

And

Maria Bender, in her personal capacity and as the named Executor of the Will and Trustee of the Estate of Antonia Reale, deceased (the "Deceased") and Mickey Reale

Defendants

- and -

Docket: V180065

Registry: Vancouver

In the Matter of the Estate of Antonia Reale, Deceased

Corrected Judgment: The text of the judgment was corrected on the front page,

Table of Contents and at paragraphs 44, 45 and 118 on May 4, 2020.

Before: The Honourable Madam Justice Tucker

Reasons for Judgment

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Place and Date of Hearing:

Vancouver, B.C.

September 12, 2019

Written Submissions of the Plaintiff:

November 5, 2019

Written Submissions of the Defendants:

November 5, 2019

Place and Date of Judgment:

Vancouver, B.C.

March 31, 2020

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I. Introduction

- [1] This case concerns a dispute amongst siblings following their mother's death. For clarity, I will refer to the parties by their first names in these reasons. No disrespect is intended thereby.
- [2] Antonia Reale, the deceased, was a widow with three surviving adult children: Maria Bender, born August 25, 1960; Rita Mortimer, born April 15, 1968; and Mickey Reale, born March 27, 1969.
- [3] In 1994, Antonia began to suffer short-term memory loss. By March of 1997, her memory had worsened and she had a probable diagnosis of Alzheimer's disease. On August 7, 1997, she executed an enduring power of attorney ("POA"), appointing Maria as her sole attorney ("Attorney").
- [4] In September of 1997, Antonia moved from her own home into Maria's family home. In 2001, she moved to a care home. By or during 2002, Antonia progressed to end-stage dementia. She was moved to a medical facility, where she stayed until her death on July 26, 2018.

- [5] Antonia left a last will and testament dated October 11, 1988 ("Will"). The Will names Maria as sole executor ("Executor") and provides for the estate ("Estate") to be divided equally among the three children. The Estate ostensibly consists of a vacant development lot in Burnaby, most recently assessed at about \$1,280,000, and a bank account with a date of death value of about \$230,000.
- [6] The validity of the Will is not contested.
- [7] On or about September 27, 2018, Maria applied for a grant of probate under Part 25 of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [Rules].
- [8] On October 15, 2018, Rita filed a notice of dispute under R. 25-10 ("Notice of Dispute"), opposing Maria's application for probate.
- [9] This decision involves notices of applications brought in two separate proceedings. The first proceeding was initiated by Maria's application for probate ("Estate Proceeding"). The second proceeding was initiated by Rita's June 6, 2019 Notice of Civil Claim ("Claim") against Maria, both personally and as Executor, and Mickey as defendants ("Civil Action").
- [10] Three notices of application are before me: two in the Estate Proceeding, and one in the Civil Action.

II. background

- [11] The following background facts are uncontroversial except as noted.
- [12] Between 1994 and 1999, a number of transactions involving Antonia's assets occurred ("Transactions"). Some of the Transactions took place before the POA, and some after. Broadly speaking, the Transactions involved mortgaging, subdividing, selling or transferring real property and investing or loaning monies.
- [13] A number of the Transactions benefitted Maria and Mickey. At least one, a very substantial cash gift in 1996, benefitted solely Rita.
- [14] Maria says that despite progressing memory problems, up until 2000, Antonia understood the nature and extent of her assets and continued to direct how they were dealt with. Maria says that prior to late 2000, she used her Attorney powers rarely, in limited circumstances, and only as directed by Antonia.
- [15] Rita alleges Antonia lost the capacity to deal with her assets well prior to 2000. She questions the propriety of the Transactions done under the POA and alleges Maria has failed to properly account for her dealings with Antonia's assets in her capacity as Attorney. These allegations underlie both the Notice of Dispute and the Claim.

A. The Notice of Dispute

- [16] The Notice of Dispute alleges that:

- 1) Maria has failed to account as Attorney;
 - 2) Maria's personal interests are in conflict with the Estate's interests due to the allegations of misconduct against her as Attorney; and
 - 3) the conflict of interest makes Maria an inappropriate person to be granted probate.
- [17] The Notice of Dispute states that Rita "is seeking" to have Maria passed over as executor, and for Rita herself to be granted administration so she can:

investigate Maria's conduct as attorney, to require an accounting, and if necessary, to bring a claim on behalf of the WILL-MAKER's estate as MARIA has not acted in the best interests of the WILL-MAKER's estate, and that such action is necessary and expedient to protect the interests of the beneficiaries of the estate.

- [18] The Notice of Dispute is valid for one year and thus was set to expire October 15, 2019 (i.e., shortly after the hearing of these applications).

B. The Notice of Civil Claim

[19] The Claim seeks the following relief:

1. An Order removing or passing over Maria as the Executor of the Will and Trustee of the Estate;
2. An Order appointing a professional independent trust company as Administrator with Will Annexed to the Deceased's estate and the issuance of a grant of administration to the said Administrator to be appointed by the court ("Administrator");
3. An Order requiring Maria to account for her actions taken as attorney for the deceased from the date of appointment to date of the Deceased's death, including accounting for the proceeds incurred and withdrawn [in specified Transactions];
4. A declaration that Maria holds funds, proceeds, and property improperly received by her directly or indirectly from the Deceased, in her capacity as attorney for the Deceased, in trust for the Deceased's estate;
5. A declaration that Mickey holds funds, proceeds, and property improperly received by him directly or indirectly from the Deceased, as a result of Maria's improper actions as attorney for the Deceased, in trust for the Deceased's estate;
6. Judgement against Maria for damages for breach of fiduciary duty and trust[.]

[20] The following bases for relief are set out in the Claim:

- 1) The existence of a resulting trust in favour of the Estate over any of assets transferred by Maria as Attorney to Maria or Mickey;
- 2) Undue influence by Maria in relation to the POA;

- 3) Removal or passing over of Maria as Executor (pursuant to Trustee Act, R.S.B.C. 1996, c. 464, s. 31) by reason of her:
- a) conflict of interest, actual or perceived, in that she cannot be relied upon to hold herself to account as Attorney, investigate her conduct as Attorney or sue herself for breach of fiduciary duty as Attorney;
 - b) want of capacity to exercise the duties of executor such that the proper administration of the Estate is threatened; or
 - c) animus against a beneficiary (i.e., Rita);
- 4) Breach of fiduciary duty as Attorney, which allegation is detailed in the Claim as follows:

31 An attorney acting under a power of attorney granted to him or her by the Deceased cannot take any benefit or remuneration for himself or herself unless such benefit was expressly set out in the Power of Attorney document.

32 Therefore, either as Executor, trustee or attorney, Maria owes a fiduciary duty to the Deceased and the beneficiaries of the Deceased's Estate, inter alia, to account for any use of the Deceased's funds or assets: Egli v. Egli, 2004 BCSC 529.

33 Maria has breached her fiduciary duty, the breaches of which include but are not limited to: using the Deceased's power of attorney during the Deceased's lifetime to conduct transactions that benefit herself, her brother Mickey, and potentially others who are not the Deceased or the Deceased's dependents.

[Emphasis added.]

5. Failure to account as Attorney, which allegation is detailed in the Claim as follows:

35 Beneficiaries have limited right to an accounting from attorney after the donor's death. Where the attorney and the executor are one and the same person, there is an obvious conflict as there cannot be a true accounting as between the attorney and the estate trustee: De Zorzi Estate v. Read, [2008] O.J. No. 944 (Ont. SCJ).

37 In this case, Maria has used the power of attorney for the Deceased during her lifetime and has failed to provide any formal accounting to the beneficiaries of the Deceased's estate. She has failed to disclose information and make satisfactory accounting regarding the transactions relating to the Deceased's funds and assets.

[Emphasis added.]

- [21] In argument, Rita's counsel advised the Claim would be, if necessary, amended to further allege that Maria owed a common law fiduciary duty to Antonia prior to the execution of the POA, and add allegations of breaches of duty in relation to Maria's conduct during that period paralleling those already set out in the Claim.

III. the instant applications

- [22] On May 30, 2019, Maria filed an application in the Estate Proceeding seeking an order removing the Notice of Dispute. The application is brought under Rule 25-10(10) and (11) of the Rules on the basis that removal is in the best interests of the Estate. Given the expiry date, a corresponding request for an order renewing the Notice of Dispute under R. 25-10(6) was included in Rita's response to the application.
- [23] On June 6, 2019, Rita filed an application in the Estate Proceeding seeking an order appointing an administrator pending litigation ("APL") pursuant to the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA], s. 103(1)(b):

Administration pending legal proceedings

103 (1) The court may appoint a person as the administrator of the estate of a deceased person pending a proceeding

- (a) in which the validity of the will of the deceased person is in issue, or
- (b) to obtain or revoke a representation grant.

[24] The APL application seeks to have Maria passed over as the Estate's personal representative in favour of the interim appointment of an independent trust company as administrator. The appointment is sought on the basis that Maria should not administer the Estate as the allegations against her as Attorney put her personal interests in conflict with the Estate's interests. The APL application also seeks orders directing Maria to pass accounts, both as Attorney (for the period of August 7, 1997 through July 26, 2018) and as Executor (for the period after July 26, 2018).

[25] On September 12, 2019, Maria filed a notice of application in the Civil Action seeking to have the Claim struck or dismissed, in whole or in part, under R. 9-5(1)(d) of the Rules and/or for lack of standing ("Application to Strike").

[26] Mickey supports Maria's position throughout.

IV. THE application to strike

[27] The Application to Strike categorizes the various claims under the Claim by reference to the related relief sought:

The Claim seeks four main categories of relief:

1. An order passing over [Maria] and appointing an independent trust company as administrator (the "Estate Relief");
2. An order requiring [Maria] to account for acts done pursuant to the Power of Attorney (the "Accounting Relief");

3. Orders declaring that [Maria] and [Mickey] hold certain property in trust for the Estate (the "Proprietary Relief"); and
4. Damages against [Maria] for breach of fiduciary duty and breach of trust (the "Damages Relief").

[28] These categories were adopted by all parties for purposes of argument at the hearing. I will continue to use them for purposes of this decision. As appropriate, I will refer to the corresponding substantive claims as the "Estate Claim", the "Accounting Claim", the "Proprietary Claim" and the "Damages Claim".

A. Relevant Legislation

[29] WESA came into effect on March 31, 2014. The sections relevant to the standing issue are ss. 1, 136, 142 and 151.

[30] Section 136, read in combination with the statutory definition of "representation grant" under s. 1, confers the exclusive authority to administer an estate on a person granted probate:

"representation grant" means

- (a) the grant of probate of a will in British Columbia, whether made for general, special or limited purposes,

Effect of representation grant

136 A representation grant, whether or not power is reserved to another person to apply for a subsequent representation grant, gives to the personal representative exclusive authority to administer the estate or that part of the estate to which the representation grant applies in accordance with its terms.

[31] The authority to administer an estate includes the right to commence or defend a proceeding the deceased would be able to commence or defend if still alive:

142(1) A personal representative has the same authority over the estate in respect of which the personal representative is appointed as the deceased person would have if living, subject to

- (a) a contrary intention appearing in the will of the deceased person, and
- (b) this or any other enactment.

[32] Section 151 gives the court a discretionary power to grant leave to someone who is not a personal representative to commence or defend proceedings on behalf of an estate notwithstanding s. 136.

[33] As of the date of the hearing before me, only estate beneficiaries and intestate successors were eligible to apply for leave under s. 151, which at the time read as follows:

Beneficiary or intestate successor may sue with leave of court

151 (1) Despite section 136 [effect of representation grant], a beneficiary or an intestate successor may, with leave of the court, commence proceedings in the name and on behalf of the personal representative of the deceased person

- (a) to recover property or to enforce a right, duty or obligation owed to the deceased person that could be recovered or enforced by the personal representative, or
- (b) to obtain damages for breach of a right, duty or obligation owed to the deceased person.
- (2) A beneficiary or an intestate successor may, with leave of the court, defend in the name and on behalf of the personal representative of a deceased person, a proceeding brought against the deceased person or the personal representative.
- (3) The court may grant leave under this section if
 - (a) the court determines the beneficiary or intestate successor seeking leave
 - (i) has made reasonable efforts to cause the personal representative to commence or defend the proceeding,
 - (ii) has given notice of the application for leave to
 - A. the personal representative,
 - B. any other beneficiaries or intestate successors, and
 - C. any additional person the court directs that notice is to be given, and
 - (iii) is acting in good faith, and
 - (b) it appears to the court that it is necessary or expedient for the protection of the estate or the interests of a beneficiary or an intestate successor for the proceeding to be brought or defended.
- (4) On application by a beneficiary, an intestate successor or a personal representative, the court may authorize a person to control the conduct of a proceeding under this section or may give other directions for the conduct of the proceeding.

[34] Effective September 16, 2019, s. 151 of WESA was amended to permit wills variation claimants to apply for leave as well. The pertinent amended provisions read:

Who may sue with leave of court

151 (0.1) In this section, "specified person" means a beneficiary, an intestate successor or a person who may commence a proceeding claiming the benefit of Division 6 [Variation of Wills] of Part 4 [Wills].

- (1) Despite section 136 [effect of representation grant], a specified person may, with leave of the court, commence proceedings in the name of the specified person and on behalf of the estate of the deceased person
 - (a) to recover property or to enforce a right, duty or obligation owed to the deceased person that could be recovered or enforced by the personal representative, or
 - (b) to obtain damages for breach of a right, duty or obligation owed to the deceased person.
- (1.1) A specified person may apply for leave of the court under subsection (1) in the proceedings described in that subsection.

[35] Finally, in some of the cases discussed below, the relevant legislation is the former Estate Administration Act, R.S.B.C. 1996, c. 122 [EAA]. Prior to the repeal of the EAA in 2014, it included the following provisions:

Representation for deceased person in legal proceedings

9 (1) If, in an action or other proceeding before the court, it appears to the court that a deceased person who was interested in the matters in question has no legal personal representative, the court may either

- (a) proceed in the absence of a representative, or
 - (b) appoint a person to represent the estate for the purposes of the action or proceeding, on the notice to the persons the court thinks fit, either specially or generally, by public advertisement or otherwise.
- (2) An order made by the court as referred to in subsection (1) and every order consequent on it, binds the estate of the deceased person in the same manner as if the deceased's legal personal representative had been a party to the action or proceeding and had appeared and submitted the deceased person's interests to the protection of the court.

Exclusive authority of administrator

14 After a grant of administration until the grant has been revoked, no person other than the person to whom administration is granted may institute an action or otherwise act as executor of the deceased, as to the estate comprised in or affected by the grant.

Power to bring or defend actions

58 An executor and administrator has the same powers to prosecute and defend an action in the nature of the common law action or writ of account as the testator or the deceased intestate would have if living.

- [36] Notably, the EAA did not permit the court to grant leave to a person to act in place of the personal representative on behalf of an estate, but rather to appoint a person to represent the estate in proceedings in the interregnum preceding a grant of administration. Rule 5(19) of the previous rules of court, B.C. Reg. 221/90, was to the same material effect as s. 9 of the EAA.
- [37] The interregnum period addressed by s. 9 of the EAA and former Rule 5(19), is addressed by Rule 20-6 of the current Rules (litigation representative).

B. Parties' Positions

- [38] Maria submits Rita has no standing to bring the Accounting, Proprietary and Damages Claims. She argues that the rights and duties that found these claims now belong to the Estate and proceedings based on those rights and duties can only be brought on behalf of the Estate, and thus only by the Estate's personal representative or a person with leave under s. 151 of WESA. As Rita lacks standing, Maria says the claims disclose no reasonable cause of action and should be struck.
- [39] Rita's response position is multifold. First, it is asserted that Maria (as Attorney) owes duties to Rita herself (as Estate beneficiary). Second, Rita asserts she has standing to act in the interests of the Estate under an established common law exception to the exclusivity ostensibly conferred by s. 136 of WESA.
- [40] Alternatively, Rita says that if s. 151 leave is required for the Accounting, Proprietary or Damages Claims, she should be permitted to seek leave prior to striking her pleadings. In supplemental submissions, Rita asserts that the new s. 151(1.1) permits her to seek leave in the Civil Action.

C. Whether Maria (as Attorney) Owes Duties to Rita (as Estate Beneficiary)

- [41] Paragraphs 32 and 35 of the Claim are reproduced above. In them, Rita asserts that an attorney owes fiduciary duties, including a duty to account, to the beneficiaries of her deceased donor's estate, citing *Egli v. Egli*, 2004 BCSC 529, *aff'd* 2005 BCCA 627, and *De Zorzi Estate v. Read* (2008), 38 E.T.R. (3d) 318 (Ont. S. Ct. J).
- [42] In *Egli*, the plaintiff was "Hans Egli by his Committee". The committee was the Public Guardian and Trustee under a certificate of incompetency. The action challenged transfers made by Hans' son (David) while acting as his attorney. It was alleged that Hans was incompetent when he executed the power of attorney and also that certain transfers had improperly benefitted David. The power of attorney was found to be valid, but one of the transfers was set aside for breach of fiduciary duty (para. 88), obliging David to reverse that transfer. As Hans was both the donor of the power and the plaintiff (albeit by committee), the *Egli* case does not support Rita's position.

[43] In *De Zorzi Estate*, the order to account was made under s. 42(1) of the Substitute Decisions Act, 1992, S.O. 1992, c. 30, which reads:

The court may, on application, order that all or a specified part of the accounts of an attorney or guardian be passed.

[44] Those with standing to apply under s. 42(1) are expressly identified, but a further subsection (s. 42(4)) permits "any other person, with leave of the court" to apply. In *De Zorzi Estate*, a beneficiary of a deceased donor's estate obtained leave under s. 42(4) (paras. 12 and 15), and was then granted an order under s. 42(1) requiring the deceased's attorney to account. Nothing in *De Zorzi Estate* suggests an attorney owes any common law fiduciary duties to her deceased donor's beneficiaries.

[45] At the hearing, Rita also relied on *McEwen v. Jenkins and Bradley*, [1958] S.C.R. 719, a case referenced by Justice Voith as follows in *Sull v. Pengelley*, 2019 BCSC 575:

[114] The Supreme Court of Canada, as early as 1958, has determined that a power of attorney gives rise to an obligation to account. In *McEwen v. Jenkins Estate*, [1958] S.C.R. 719, one of the defendants purported to act under a power of attorney. The Court, at 731, said:

The administration of property on behalf of another party involves the obligation to account.

This obligation also rests upon a person whose authority to act, derives from an instrument which is found to be void for lack of mental capacity. The obvious conclusion is that [J] must also account for his administration under the power of attorney. The heirs have the absolute right to know what has become of the assets of the estate

[46] Justice Voith cited *McEwen* for the proposition that an attorney is obliged to account to her donor, not for the proposition that an attorney is obliged to account to her deceased donor's heirs. Notably, *Sull* was a case in which the plaintiff, Mr. Sull, obtained leave under s. 151 to act on behalf of his mother's estate (para. 117). Legally, Mr. Sull stood in the shoes of his donor mother in calling her attorney to account. The question of whether Mr. Sull had standing to call for an accounting qua estate beneficiary was not before Voith J.

[47] The *McEwen* quote set out in para. 114 of *Sull* references the right of heirs to know what became of the estate's assets. It is important to consider those words in the context of the facts of the *McEwen* case and the passage the quote is taken from.

[48] In *McEwen*, the deceased suffered a serious stroke on January 20, 1948. On January 30, 1948, he signed a power of attorney appointing one of the defendants, Jenkins. In February of 1949, the deceased signed a will appointing Jenkins and another defendant, Bradley, as executors, and then promptly died. Ms. *McEwen*, the plaintiff in *McEwen*, was an intestate heir if the 1949 will was invalid. She asserted the stroke had irrecoverably incapacitated the deceased, and the Supreme Court of Canada agreed with her.

[49] The quote from *McEwen* reproduced in *Sull* is excised from the following passages:

Jenkins and Bradley purported to act as executors of a will which is null and void, and Jenkins furthermore acted under a power of attorney which I find invalid. It necessarily follows that Jenkins and Bradley, having assumed the role of executors, and having administered the estate de facto, must account to the heirs-at-law, as well as Jenkins who acted under the power of attorney. The administration of property on behalf of another party, whether as trustee, mandatory, tutor, curator, testamentary executor, or negotiorum gestor, involves the obligation to account.

This obligation also rests upon a person whose authority to act, derives from an instrument which is found to be void for lack of mental capacity. The obvious conclusion is that Jenkins and Bradley must account to the heirs-at-law for the administration of the estate under the will, and the former must also account for his administration under the power of attorney. The heirs have the absolute right to know what has become of the assets of the estate, and under the Code of Civil Procedure (art. 566), a time limit must be determined. I believe that a delay of four months from the date of the pronouncement of this judgment would be fair and reasonable. If the respondents fail to do so, then the appellant must avail herself of the dispositions of art. 578 of the Code of Civil Procedure.

It has been argued on behalf of the respondents, and the cross-appellants, that this action cannot succeed, because it has not been shown that all the heirs-at-law were mis-en-cause. I entirely disagree with this proposition. When the estate is finally settled, all the heirs will of course have to be legally called, and if any have not been mis-en-cause in the present instance, a suggestion which I doubt very much, their rights may always be safeguarded. ...

[Emphasis added.]

- [50] In *McEwen*, the power of attorney and the will were simultaneously declared invalid following a finding that was inescapably determinative of both. *McEwen* is not a case in which a beneficiary was held to have standing to call upon the deceased's attorney to account directly to her qua beneficiary, but rather one in which the factual and legal basis for finding an intestacy also made it inevitable that the de facto attorney would have to account. The court did not say the deceased's attorney was required to account to the heirs, only that he was obviously required to account. As indicated by the underlined words in the last paragraph, the court contemplated the interposition of "someone" to settle the estate (which would include the accountings) and deal with the heirs - presumably, the person appointed as estate administrator.
- [51] I reject the assertion that *McEwen* held that an attorney has a duty to account directly to the beneficiaries of a deceased donor's estate. Further, even if *McEwen* could be read as carving out an exceptional situation in which the imposition of such a duty was warranted (which is rejected), there are no comparable facts here: the Will is uncontested.
- [52] Maria also cites *Sull*, but as authority for the proposition that she is not, in her capacity as Attorney, accountable directly to Rita:

[115] Recently, in *Brown v. Brown*, 2011 BCSC 649 Justice Brown addressed the duty to account that rests with an attorney and said:

114. In *Harris v. Rudolph (Attorney for)* [2004] O.J. No. 2754, Valin J. at para. 33 summarized the attorney's duty to account as follows:

Following the grant of a power of attorney, the attorney has a duty to account for all transactions which he under takes for the grantor. The attorney is the one who has the information. An estate trustee stands in the shoes of the grantor for the enforcement of the duty owed by the attorney as agent to the deceased as principal. There is a duty on the attorney to keep accounts and to be ready upon request to produce those accounts. It is an ongoing obligation and should not be considered an imposition on the attorney if he has failed in that duty over a long period of time. *Roger Estate v. Leung* [2001] O.J. No. 2171 (S.C.J.) at para. 10.

115. At para. 43, Valin J. emphasized that only the grantor (or the grantor's estate) has the power to compel an accounting while the grantor is competent:

However, counsel for Rob and Bruce argued that there is no authority to suggest that his clients, as Barbara's agents, have a duty to account to anyone other than Barbara. I agree with that submission. As agents, the duty of Rob and Bruce to account is restricted to accounting to their principal, Barbara.

[116] Thus, only the donor/grantor of the authority, or their estate, may apply to have the attorney provide a full accounting of their activities as attorney. By contrast, any person interested in an estate administered by an executor may apply for an order for the executor to pass their accounts: R. 25-13(1)(a) of the Supreme Court Civil Rules.

[117] In this case, the Plaintiff properly applied to bring this action on behalf of his mother's estate and he is able to seek a full accounting by Mrs. Pengelly of her activities as attorney.

[53] I agree. Maria, as Attorney, was obliged to account only to Antonia while Antonia was alive and competent. As Antonia is now dead, Maria, as Attorney, is obliged to account only to the Estate. It is not necessary, on the facts of this case, to consider standing during the period when Antonia was alive but incompetent.

[54] I also agree that it is the right (and duty) of a personal representative to shepherd estate property and commence any appropriate claims against any third parties in possession of estate property: *Engel v. Engel*, 2005 BCSC 33; *Lloyd v. Bloomingdale*, 2005 BCSC 1806.

[55] In *Lloyd*, Master Hyslop, following the decision of Justice Garson (as she then was) in *Engel*, held a beneficiary lacked standing to allege breach of fiduciary duty by the deceased's attorney or seek a declaration of resulting trust in favour of the estate:

- [8] The plaintiff, in her statement of claim, makes a claim under the Wills Variation Act, [RSBC 1996] c. 490, and alleges that the deceased lacked the mental capacity to make a Will and the subsequent declaration, as a result of disease. The plaintiff alleges that the various transactions prior to the deceased's death were invalid, alleging that Mrs. Bloomington breached her fiduciary duty with respect of the use she put to the deceased's Power of Attorney.
- [9] These allegations are denied in the defendant's statement of defence. The defendant, in the statement of defence, claims that the plaintiff has no standing to pursue these allegations as they relate to the Power of Attorney.
- [10] Counsel for the defendant conceded that the plaintiff can bring a claim under the Wills Variation Act, and have the Will, proved, in solemn form.
- [11] Counsel for the defendant argued that the estate may only sue for these alleged wrongs as they relate to the Power of Attorney. To support the defendant's position, counsel for the defendant referred to a number of cases, one of which was *Engel v. Engel*, [2005] B.C.J. No. 69. The facts in *Engel* are similar to those before me.
- [12] In *Engel*, the plaintiff alleged that the deceased, Mrs. Engel, was incapacitated and unduly influenced by the defendants to make gifts to them of assets she owned prior to her death.
- [13] In *Engel*, the parties to the action were three siblings. Mrs. Engel died leaving five children. The statement of claim alleged that Mrs. Engel was not mentally competent to enter into contractual arrangements, alleging undue influence by the defendants, breach of trust and breach of fiduciary duty. Two of the siblings of the late Mrs. Engel were not parties to the action. Madam Justice Garson concludes at p. 6, ¶26:
- ¶ 26 It is instructive to examine the prayer for relief. Paragraph (a) of the prayer for relief seeks a declaration that Mitchell and Leslie hold the property and other assets in trust for Barbara Engel's estate. Bradford Engel is not entitled to benefit personally from challenging the transactions described in the Statement of Claim. The aggrieved party, if there is an aggrieved party, is the estate of Barbara Engel. Only the estate has standing to complain of wrongs done to it (see: Estate Administration Act, R.S.B.C. 1996, c. 122, s. 58.) No application pursuant to Rule 5(19) has been made in this proceeding.
- [14] Madam Justice Garson refers to Rule 5(19) of the Rules of Court. Section 9 of the Estate Administration Act, [RSBC 1996] c. 122 is similarly worded. Madam Justice Garson disposes of the matter by granting an order staying the action and states at ¶28:
- the estate cannot be added as a plaintiff unless the appropriate court orders are obtained permitting the estate to be joined. The defendants are at liberty to make a further application for an order dismissing the action on the grounds that it discloses no cause of action.
- [15] The plaintiff has not obtained the appropriate court orders.

[16] I find, that the allegations of breach of fiduciary duty or abuse of Power of Attorney in any allegations of claims to set aside any transfer of the deceased's assets prior to the death of the deceased, and in particular paragraphs 12, 13, 14 and 23 of the statement of claim and the relief sought at paragraph (a) and (b) with respect to the Power of Attorney, (c) and (d) with respect to the Power of Attorney, and (f) with respect to the providing of an accounting, discloses no reasonable claim. I strike them from the plaintiff's statement of claim.

[Emphasis added.]

[56] Justice Young implicitly reached the same conclusion in a recent, post-WESA case, *Rodgers v. Rodgers Estate*, 2017 BCSC 518, in holding that s. 151 leave was required for such proceedings:

[56] The plaintiff alleges that Norma Rodgers owed a fiduciary duty to the Deceased and to the trustee both prior to the Deceased's death by virtue of holding the power of attorney. Some of this breach of trust claim relates to the \$23,000 which is now conceded. Some of the breach of trust claim relates to the receipt of the caregiver fee which was court approved or approved by the PGT. Some of the breach of trust claim deals with allegations of improper personal care of the Deceased.

[57] The plaintiff can only bring these actions if she receives leave of the court [under s. 151]

[57] Like the Accounting Claim, the Proprietary and Damages Claims are premised on fiduciary duties owed to Antonia alone by her Attorney. Finally, assuming Rita's proposed amendments were made, any pre-POA fiduciary duties owed by Maria would similarly be owed to Antonia, not to Rita as her beneficiary.

[58] Maria, as Attorney, owes no fiduciary duties to Rita, and Rita has no standing to bring the Accounting, Proprietary and Damages Claims in her own right.

D. The Asserted Common Law Exception to Exclusivity

[59] Rita argues there is a long-standing common law exception to a personal representative's ostensibly exclusive statutory authority to commence proceedings on behalf of an estate. The exception is said to apply where the would-be defendant is the personal representative.

[60] She says that an established common law exception can only be eliminated by express statutory language, and that the language of s. 136 of WESA, being materially the same as the former s. 14 of the EAA, is insufficient for the purpose. She says the Accounting, Proprietary and Damages Claims are within the asserted exception. She asserts that leave under s. 151 is not required, as the common law exception is itself an exception to s. 136.

[61] Her counsel put the argument as follows in his written submissions:

[Maria's] main argument is that [Rita] does not have standing to bring a claim against [Maria] requiring [Maria] to account for her handling of [Antonia's] affairs during Antonia's lifetime to recover estate assets.

[Maria's] argument fails to recognize the distinction between a claim brought by a beneficiary of an estate that is grounded on the personal representative's own conduct and in which the personal representative is named as a defendant, and a claim brought by a beneficiary in respect of a third party's conduct. Although the general rule under both the WESA, and its predecessor legislation the Estate Administration Act, R.S.B.C. 1996, c. 122, is that it is only the deceased's personal representatives who may bring a claim against third parties to recover assets on behalf of the estate, the courts have long recognized an exception when the claim is to recover assets from the deceased's personal representative or relates to the personal representative's own conduct, in which case a beneficiary has standing to pursue a claim.

The underlying principles are well summarized in the case of *Beningfield v. Baxter*, [1896] UKPC 49, in which the Earl of Selbourne, on behalf of the Privy Council, on appeal from the Supreme Court of Natal, wrote at pp. 178-89:

The first question that arises is, whether the plaintiff not being executrix, and not having any specific interest in the Equeefa estate, could sue to set aside that purchase. Their Lordships have no doubt that she could. When an executor cannot sue because his own acts and conduct, with reference to the testator's estate, are impeached, relief, which (as against a stranger) could be sought by the executor alone, may be obtained at the suit of a party beneficially interested in proper performance of his duty: *Travis v. Milne*.

[Emphasis added.]

1. Beningfield

[62] I do not accept *Beningfield v. Baxter*, [1896] UKPC 49, as authority for the proposition advanced by Rita.

[63] In *Beningfield*, the plaintiff, Mrs. Baxter, was sole beneficiary under her husband's will. Mr. Baxter had been a partner in the firm Black, Baxter, and Beath ("BBB"). A sugar plantation, known as the Equeefa estate, was the partnership property of BBB. BBB was insolvent when Mr. Baxter died. However, Mr. Baxter had also been in the "Durban partnership". The Durban partnership was BBB's sole creditor. If the Equeefa plantation was sold at a good price on behalf of BBB, the Durban partnership would be fully paid out as creditor. If BBB failed to pay its debt to the Durban partnership, the Durban partnership would be insolvent itself, rendering the Baxter estate of no value.

[64] Beningfield was the executor of the Baxter estate. In breach of their multiple respective fiduciary duties, BBB's selling agent and Beningfield contrived to allow Beningfield to purchase Equeefa at a very low price. In the result, BBB was unable to pay its debt and the Durban partnership went insolvent.

[65] Mrs. Baxter brought an action against Benningfield. On appeal to the Privy Council, she was held to have standing to seek an accounting of her husband's estate and a declaration regarding the validity of the Equeefa purchase contract, but to lack standing for the various other remedies sought.

[66] The paragraph cited upon by Rita should be read in light of the one that precedes it:

Under these circumstances, it was the duty of the Defendant, as Baxter's executor, to take the proper measures for getting in the assets, and liquidating the debts, of both the firms in which the testator had been a partner; and it was the Plaintiff's right (her only right) to have that duty properly performed by him, so as to realize as much as possible for her husband's estate; and in the case of there being any ultimate residue, to have that residue paid over to her. Her complaint in the suit is (in effect) that, instead of properly performing that duty, he dealt with the Equeefa estate as if he had been a stranger, and assumed to purchase it for his own benefit, upon terms which left nothing to her as legatee; and the substantial object of this suit is to set aside that purchase.

The first question which arises is, whether the Plaintiff, not being executrix, and not having any specific interest in the Equeefa estate, could sue to set aside that purchase. Their Lordships have no doubt that she could. When an executor cannot sue, because his own acts, and conduct, with reference to the testator's estate are impeached, relief which (as against a stranger) could be sought by the executor alone, may be obtained at the suit of a party beneficially interested in the proper performance of his duty.

[Emphasis added.]

[67] The Privy Council also commented on the limits of Mrs. Baxter's standing:

Has the Plaintiff then sued in proper form? Their Lordships think so; although in those conclusions of her writ of summons and declaration which seek to have the Equeefa estate, and all its proceeds, transferred to or declared to be held in trust for herself, she has asked what she is not entitled to. Her prayer is wide enough to cover whatever she is really entitled to. She asks for a general account of her late husband's estate; for a particular account of the Defendant's dealings with the Equeefa estate; that the Defendant's purchase for his own benefit be set aside; that the Equeefa estate may be sold; "and, generally, for such "other relief as to the Court shall seem fit."

Upon the merits, their Lordships agree, without hesitation, in the opinion of the Court below, that the sale was either voidable or void in equity. Unless the Plaintiff was estopped by some personal exception, she had a clear right to a decree for the usual accounts of her husband's estate, and to a declaration that, in respect of the transfer of the Equeefa estate to him, the Defendant was accountable for that estate and his dealings with it to all parties interested in its due and proper administration.

[Emphasis added.]

[68] In Beningfield, the estate beneficiary was held to have standing to seek: an accounting from Beningfield as executor; a declaration Beningfield had breached his fiduciary duties as executor, and a declaration that the contract he entered into in breach of his executor duties was void. She was held to lack standing to the extent her claim purported to seek relief unrelated to Beningfield's conduct as executor.

[69] Rita can call for Maria to account for her conduct as executor of the Estate, but that is not what the Claim seeks.

2. Other Cases Relied Upon for Exception

[70] Rita also relies on a number of other cases as illustrations of her asserted common law exception: *Doucette v. McInnis et al*, 2007 BCSC 289; *Kuo v. Kuo*, 2014 BCSC 519; *Sharma v. Sharma*, 2018 BCSC 1262; *Burkett v. Burkett Estate*, 2018 BCSC 320; and *Ching Estate (Re)*, 2016 BCSC 1111 [Ching]. I will briefly discuss each of these cases. In doing so, I will also outline how the cases fall into two categories.

a) First Category (e.g., *Neufeld and Cooke*)

[71] The first category comprises cases in which the testator and executor held property jointly at the time of death. On death, the property is in the executor's name alone by survivorship. The moving party is a person entitled to an accounting of the estate and who asserts the joint property was not intended as a gift to the executor and must be accounted for as estate property. A declaration of the true legal status of the disputed property is necessary to enable the accounting to take place.

[72] This category was identified by Justice Dorgan in *Doucette*:

[17] The appellant's counsel referred to *Neufeld v. Neufeld*, 2004 BCSC 25, and *Cooke v. Miller*, 2005 BCCA 263. In both of these cases, the plaintiffs were beneficiaries, but not executors, under the respective wills. Both plaintiffs applied to the court for a declaration that bank accounts jointly held by the testator and executor at the testator's death were resulting trusts rather than inter vivos gifts. The plaintiff in *Neufeld* was successful; the plaintiff [in] *Cooke* was not. Regardless of the outcomes, the important point is simply that the court in both instances allowed such challenges to be heard.

[18] In both *Neufeld* and *Cooke*, the plaintiffs were residuary beneficiaries rather than legatees, as is *Wayne Doucette*. This distinction is important, because the plaintiffs in *Cooke* applied for an accounting of all assets, as well as a declaration that the jointures were held in trust. Boyd J. did not consider the question of whether the plaintiffs had standing, presumably because the plaintiffs based their claim on the defendant executor's duty to account to them. As the plaintiffs were residuary beneficiaries, this duty to account included an accounting for the size of the estate. Although it is unclear whether the plaintiff in *Neufeld* also applied for an accounting of all assets, he would have been entitled to make such a claim as a residuary beneficiary.

[Emphasis added.]

[73] The standing of the moving party in first category cases is based on having a form of beneficiary status that entitles them to call upon the executor to account for the estate property.

b) Second Category (e.g., Doucette and Mordo)

[74] The second category comprises cases that fall outside the first category, but in which the moving party has independent standing to bring a claim against the estate and the true size of the estate is material to the claim. For example, where a wills variation claimant is a mere legatee (Doucette at paras. 11, 19 and 21) or a person entirely excluded from the will (Mordo v. Nitting, 2006 BCSC 1761).

[75] In Drummond v. Moore, 2012 BCSC 496, the court described Mordo and Doucette as developments specific to the wills variation context and observed that it remained unclear whether a wills variation claimant's ability to seek clarification of the estate went beyond challenging survivorship transfers (para. 41).

c) Kuo

[76] Kuo is a second category case, albeit a complicated one. In Kuo, one of the deceased's children, John, sought to have a 1995 will leaving him the entire estate pronounced in solemn form. John's siblings, in turn, sought to have a 2004 will treating the children equally pronounced in solemn form. At the time of death, much of the father's property was either held jointly with John or in John's name alone.

[77] In response to John's claim, the siblings counterclaimed seeking to have the will varied and asserted that various properties presently in John's name were estate property (paras. 3 and 249). The siblings also counterclaimed for damages against John, alleging breach of fiduciary duty and unjust enrichment (para. 5). Finally, the siblings, in a separate pleading, sought orders transferring the disputed properties back to the estate and an accounting in relation to the joint bank accounts. The court deferred the other aspects of the litigation pending findings on the validity of the wills and the scope of the estate (para. 249). In the Kuo decision, Justice Bracken concluded the 2004 will was invalid (para. 160), the 1995 will was valid (para. 201), and the disputed properties and bank accounts were estate property (para. 244).

[78] The properties held in John's name alone prior to the father's death were found to have been put in his name under an established common understanding whereby the father often put properties in the children's names, but was understood to retain the beneficial interest and the right to direct further transfers ("common understanding properties"). Justice Bracken held that none of the common understanding properties, survivorship properties, or survivorship bank accounts were intended as gifts and John was obliged to account for them as estate property. The applicable will and the scope of the estate having been determined, the court indicated that the wills variation claim would proceed next.

- [79] The common understanding properties were held in trust by John during the father's lifetime in accordance with the father's wishes, and not by reason of any wrong-doing or misconduct giving rise to a resulting trust during the father's lifetime. John was called to account for the common understanding trust properties as estate property as of the father's death, and in his capacity as executor. The ability to challenge the status of the common understanding properties in Kuo might arguably be considered an extension specific to estate clarification in the wills variation context as contemplated in Drummond. However, in my view, it is more accurately characterized as a challenge to John's conduct qua executor in failing to account for estate property obtained through express trust. Either way, Kuo is not a case in which a beneficiary successfully commenced an action against an executor for alleged wrongdoing during the testator's lifetime.
- [80] Notably, the siblings' breach of fiduciary duty and unjust enrichment claims against John were dismissed by Bracken J. without reasons (paras. 5 and 248). The siblings subsequently entered a comprehensive settlement and none of the remaining matters were adjudicated: *Kuo v. Kuo*, 2017 BCCA 245.
- d) Sharma
- [81] Sharma is a second category case. Ms. Sharma was entirely excluded from her mother's will, which left her estate to Ms. Sharma's two sisters, one of whom was the executor. The mother's house had been jointly held with the two defendant sisters and transferred to them by survivorship. Ms. Sharma asserted the house was not intended as a gift and sought, in her wills variation claim, a declaration that it was estate property.
- [82] What distinguished Sharma from earlier second category cases was the enactment of WESA. The defendant sisters argued: (1) the declaration sought amounted to asserting a resulting trust on behalf of the estate; (2) WESA was an exhaustive code with regard to claims on behalf of estates; and, (3) since WESA, s. 151 (as originally enacted) permits only beneficiaries and intestate successors to seek leave, the request for the declaration should be struck. Essentially, the sisters took the position that WESA had abolished the form of standing recognized in *Doucette* and *Mordo*.
- [83] Ms. Sharma argued that she was not advancing a claim to recover property on behalf of the estate, but only seeking, in her personal capacity, a declaration of property status for purposes of her claim against the estate (para. 31). The court agreed with her, noting that s. 60 of WESA was the basis for Ms. Sharma's standing to seek the declaration (paras. 34-36). While Ms. Sharma could not seek leave under s. 151 (paras. 17 and 28), s. 151 neither broadened nor narrowed Ms. Sharma's standing to seek a declaration as a wills variation claimant.
- [84] Under the 2019 amendments, a wills variation claimant can now seek s. 151 leave. Where obtained, that leave would allow the claimant to actually recover estate property on behalf of the estate and bring the estate into conformity with any declaration made.

e) Burkett

- [85] Burkett falls within the first category, but in combination with an application to pass over the executor for appointment as personal representative. The plaintiffs were residuary beneficiaries who asserted that property held in the executor's name by survivorship was not gifted to him by the deceased, but rather was estate property. The deceased's son, Barry, was named executor and also a beneficiary. He had held and dealt with the estate property as executor for three years without applying for probate.
- [86] The deceased's house was jointly held with Barry at the time of her death. The plaintiffs sought a declaration that the house was estate property on the basis that it was not a gift, and in the alternative, on the basis that Barry had unduly influenced his mother to transfer it into joint ownership. It was alleged that Barry had failed to honour his trust obligations regarding her accounts, both under a power of attorney while she was alive and as executor after her death. The plaintiffs also sought damages for breach of trust based on the allegations that Barry had unduly influenced the deceased.
- [87] In the three years following his mother's death, Barry occupied the house rent-free and made estate distributions as executor, but only to himself. The plaintiffs sought to have another family member appointed as the estate's personal representative.
- [88] The mother was found to have had only mild dementia in 2011 when she signed the transfer form for joint ownership (para. 145), but Young J. was unable to determine on the evidence before her whether the mother had signed it intending a gift or merely to avoid probate fees (paras. 176-78). The mother was found to have lost capacity by the time the signed form was registered in 2013 (paras. 182 and 183). Justice Young held the presumption of resulting trust was not rebutted in the circumstances (paras. 184 and 186). She held that the presumption of undue influence also applied to the circumstances of the house transfer (paras. 191 and 200), and that it was also unrebutted (paras. 214-217). The two failures to rebut provided alternative bases for her rejection of the assertion the house was a gift.
- [89] Justice Young agreed Barry should be passed over for personal representative. She found he had breached his duties as trustee both before and after death in his handling of the mother's funds (para. 243) and had committed multiple breaches of duty as executor and estate trustee (paras. 242 and 244-47):
- [242] A personal representative should act impartially on behalf of all beneficiaries. Barry distributed advances primarily to himself and never made an advance to the survivors of Don. He was clearly acting in breach of his duties as a trustee.
- [243] Barry used Estate funds in a manner unauthorized by the Trustee Act, R.S.B.C. 1996, c. 464, both during Rhoda's lifetime and after her death. A trustee is required to exercise the care, skill, diligence, and judgment of a prudent investor. At no time did Barry treat the investments in his Raymond James account as trust assets but he considered them his personal assets.

- [244] Barry has not applied for a grant of probate for three years. In *Oldfield v. Hewson* (2005), 14 E.T.R.(3d) 290 (Ont. S.C.J.), the Ontario Supreme Court dealt with a similar situation where the executor had care and control of estate assets for seven years and never applied for probate. The court removed him as executor.
- [245] Barry's executor duties have been in conflict with his personal interests and Estate assets have been endangered by his conduct. He has benefitted at the expense of the Estate similar to the cases of: *Hall v. Hall* (1983), 45 B.C.L.R. 154 (S.C.) and *Veitch Estate*, 2007 BCSC 952.
- [246] Barry should be passed over as executor and disentitled to apply for probate on the basis of his misconduct acting in a manner that endangers the Estate and for acting without reasonable fidelity: *Dunsdon v. Dunsdon*, 2012 BCSC 1274 at para. 202:
- [202] Put broadly, a trustee may be removed where his or her acts or omissions endanger the trust property or demonstrate a want of honesty, of reasonable fidelity, or of the proper capacity to execute the duties of office: *Conroy v. Stokes* [1952] 4 D.L.R. 124 (B.C.C.A.). The existence of friction between the trustee and one or more beneficiaries is usually not sufficient, of itself, to justify removal of the trustee: *Erlichman v. Erlichman*, 2000 BCSC 173; *Re Blitz Estate*, 2000 BCSC 1596. However, where there is dissension among the trustees themselves by which the trust administration grinds to a standstill or otherwise hampers the proper administration, the courts tend to remove one or more of them. In those instances, misconduct per se is not an essential prerequisite: *Re Consiglio Trusts* (No. 1) (1973), 36 D.L.R. (3d) 658 (Ont. C.A.); *Wilson v. Heathcote*, 2009 BCSC 554.
- [247] A personal representative should not deal with the assets or otherwise intermeddle in the estate until he or she has decided to act as the personal representative. Barry breached this rule by advancing Estate money to himself and paying himself executor fees without ever assuming the responsibility of personal representative.
- [90] Justice Young considered Barry's breach of trust in dealing with funds during the mother's lifetime, however, earlier facts revealing of character (e.g., a criminal conviction) are relevant to an application to pass over, so that is unremarkable. Similarly, it is unremarkable that a case involving passing over a named executor for misconduct would include an accounting with regard to the period of time spent as executor (paras. 232-240).
- [91] However, it is noteworthy that in calculating the monies owing by Barry, the court addressed some of Barry's conduct during the mother's lifetime (paras. 232-235). The reasons do not indicate whether the parties asked the court address these matters given that the evidence was before it, but clearly no objection was made. In any event, that mere fact that the court made such findings in this case falls far short of demonstrating the existence of an "established common law exception" of the kind asserted by Rita.

[92] Notably, while the introduction to the decision notes that a claim for damages against Barry for breach of trust in relation to undue influence was made, no cause of action as such is addressed in the decision and undue influence is addressed only in terms of the presumption with regard to a transfer of property.

f) Ching

[93] Little needs to be said about this case. The defendants filed a response to civil claim that asserted s. 151 leave was required, but expressly consenting to a grant of leave. Presumably, Justice Affleck was of the opinion the defendant's concession was appropriate in the circumstances.

3. Conclusion regarding Asserted Common Law Exception

[94] There is no authority for the asserted common law exception. It does not exist. Cases within the first and second categories exist and continue to be entitled to proceed, but that is of no assistance to Rita.

[95] The Accounting, Proprietary and Damages Claims can only be brought on behalf of the Estate, and thus by the estate's personal representative or someone with leave under s. 151.

V. Application for leave under s. 151 of the WESA

[96] As part of the 2019 amendments, the form of leave under s. 151(1) of WESA was changed. Section 151(1) originally provided for leave to commence proceedings "in the name of and on behalf of the personal representative of the deceased". The amended version provides for leave to commence proceedings "in the name of the specified person and on behalf of the estate of the deceased person" (emphasis added).

[97] The 2019 amendments also added the following subsection:

151 (1.1) A specified person may apply for leave of the court under subsection (1) in the proceedings described in that subsection.

[98] Rita asserts s. 151(1.1) is a purely procedural amendment and, accordingly, of immediate application. I agree: *R. v. Subramaniam*, 2019 BCSC 1601, para. 11; *R. v. Dineley*, 2012 SCC 58, paras. 52-74.

[99] That said, seeking leave to commence a proceeding by commencing a proceeding and then seeking leave within it seems a circular proposition. Where the proceedings in question are under s. 60 of WESA, the claim can proceed regardless of whether s. 151(1) leave is granted. However, s. 151(1.1) does not reference proceedings under s. 151(0.1), but rather under s. 151(1).

- [100] I do not purport to address the proper interpretation of s. 151(1.1). Neither Maria's nor Mickey's counsel made argument on the point and neither opposed Rita's assertion that it applied in the circumstances of this case. Here, the Claim was filed on a legal theory whereby leave was not required at all. Without comment as to how and when s. 151(1) leave should generally be sought, I agree that Rita can seek leave in the Civil Action.
- [101] Rita may apply for s. 151(1) leave to bring the Accounting, Proprietary and Damages Claims on behalf of the Estate. These aspects of the Claim are stayed pending determination of the leave application.

VI. Leave Related ISSUES

- [102] Rita submits she should be permitted to review Maria's Attorney documentation prior to filing any s. 151 leave application.
- [103] As a Notice of Dispute was filed, I am satisfied that I have the authority to order disclosure of the kind requested under WESA, s. 123(1)(b) and Rule 25-14(1)(q)(iii) and (8)(g) of the Rules.
- [104] The evidence indicates Maria has already provided Rita with substantial information relating to her conduct as Attorney, and has offered to make whatever additional documentation she has in her possession available for review at her counsel's office. Rita has taken the position that Maria should be required to provide information and documentation in a form appropriate for a formal passing of her accounts as Attorney.
- [105] Maria's proposal provides reasonable and proportionate disclosure for purposes of ascertaining whether to pursue an application for leave. An order requiring the preparation of formal accounts would not only involve considerable expense, it would amount to granting part of the relief Rita needs s. 151 leave in order to seek.
- [106] I direct Maria to make the documentation she possesses in relation to her conduct as Attorney available for inspection by Rita and/or her counsel through to the end of April or such later date as may be agreed upon between parties. The review dates are to be arranged as between counsel.
- [107] Rita may request that photocopies of the documents reviewed be provided to her, but must pay the reasonable costs incurred by Maria in relation to the photocopying.
- [108] Any application for s. 151 leave is to be filed as soon as practicable given the court hearing restrictions presently in place.

VII. The Estate Relief

- [109] The Claim and the APL application were both filed on June 6, 2019.

[110] Maria asserts the Estate Relief seeks essentially the same relief sought under the APL application. She submits the APL application is the appropriate proceeding for relief of such nature, and that the duplication is an abuse of process. She seeks an order striking the Estate Claim and Estate Relief under Rule 9-5(1)(d) of the Rules.

[111] Rita asserts the Estate Relief and the relief sought under the APL application are not duplicative, noting that the latter seeks only interim relief.

[112] Rule 2-1(2.1) reads:

Estate proceedings

(2.1) Without limiting any other provision of this Rule, a proceeding to which Part 25 applies may be started by

(a) the filing of a submission for estate grant under Rule 25-3(2),

...

[113] Rule 25-14(1) includes the following:

How to apply for most applications

- (1) If there has been an application for estate grant, a person may apply in accordance with Part 8 for an order
 - (b) granting administration with or without will annexed in circumstances in which the right to be appointed as the administrator is contested,
 - (f) passing over an executor,
 - (q) subject to subrule (2) [spousal home and will deficiencies orders], respecting any other matter concerning
- (iii) a grant of probate

Court may give directions as to procedure

- (8) Without limiting any other power of the court under this or any other Part of these Supreme Court Civil Rules, the court may, on its own motion or on application, give directions concerning the procedure to be followed in any matter under this Part and, without limiting this, may give directions respecting any of the following:
 - (a) the issues to be decided;
 - (b) who the parties will be, including directions for the addition or substitution of a party;
 - (c) how evidence may or must be presented;
 - (d) summary disposition of any or all issues in the matter;

- (e) the trial of any or all of the issues in the matter;
- (f) pleadings;
- (g) examinations for discovery and discovery of documents;
- (h) service or delivery of a notice, process, order or document on any person;
- (i) dispensing with service or delivery;
- (j) representation of any person or interest.

[114] Section 158 of WESA permits a person with an interest in an estate to apply to have a named executor passed over by the court in favour of another as personal representative:

158 (1) In this section, "pass over" means to grant probate or administration to a person who has less priority than another person to become a personal representative.

- (2) A person having an interest in an estate may apply to the court to remove or pass over a person otherwise entitled to be or to become a personal representative.
- (3) Subject to the terms of a will, if any, and to subsection (3.1) [when creditor may apply], the court, by order, may remove or pass over a person otherwise entitled to be or to become a personal representative if the court considers that the personal representative or person entitled to become the personal representative should not continue in office or be granted probate or administration, including, without limitation, if the personal representative or person entitled to become the personal representative, as the case may be,
 - (a) refuses to accept the office of or to act as personal representative without renouncing the office,
 - (b) is incapable of managing his or her own affairs,
 - (c) purports to resign from the office of personal representative,
 - (d) being a corporation, is dissolved or is in liquidation other than a voluntary dissolution or liquidation for the purpose of amalgamation or reorganization,
 - (e) has been convicted of an offence involving dishonesty,
 - (e.1) is an undischarged bankrupt,
 - (f) is
 - (i) unable to make the decisions necessary to discharge the office of personal representative,
 - (ii) not responsive, or
 - (iii) otherwise unwilling or unable to or unreasonably refuses to carry out the duties of a personal representative,

to an extent that the conduct of the personal representative hampers the efficient administration of the estate, or

(g) a person granted power over financial affairs under the Patients Property Act.

[115] Rule 25-14(1) of the Rules provides that where an application for an estate grant has been made (as here), a person may apply under Part 8 to have an executor passed over. Rule 25-14(8) gives the court broad discretion to determine how such an application will be heard, including the degree to which a trial-like process is warranted.

[116] In 2010, the British Columbia Law Institute ("BCLI") authored a report, Report on New Probate Rules (BCLI Report no. 57, October 2010) proposing modernized probate rules. The Executive Summary of the BCLI report states:

The Project Committee's approach to reform of the probate rules was fourfold. First, there would be an attempt to design an optimal procedure instead of simply improving on the existing one. Second, aspects of probate procedure that have outlived their usefulness would no longer be retained simply for historical reasons. Third, in recognition of the fact that unrepresented persons initiate much probate business, procedures would be simplified where possible. The revised probate rules would provide more explicit guidance than Rules 61 and 62 now do. Fourth, differences between procedures in probate matters and general civil procedure as remodeled under the new Civil Rules would be harmonized to the extent possible.

Part One of the report explains the background to the procedural reforms that the new probate rules intended to replace Rules 21-4 and 21-5 would introduce. Part Two contains the recommended new probate rules and commentary on them. Following the general format of the Civil Rules, the new probate rules take the form of subrules grouped under one principal rule. The numbering of that principal rule is left to the decision of the Supreme Court Rules Revision Committee. As the new rules abandon the present contentious / non-contentious classification of probate business, division of the subrules between two principal rules of court was not seen as necessary.

The new probate rules in Part Two are intended to accommodate a system in which a single court file for the estate would be opened when the first filing (typically an application for a common form grant) is made. Subsequent proceedings that currently must be pursued in separate actions with different court files and file numbers, such as probate in solemn form and revocation, would be initiated instead by interlocutory application within the same estate file. The relatively rare cases in which a proceeding for probate in solemn form is begun before any other step has been taken in the estate, such as an application for a common form grant, would be exceptions. In those cases, the proceeding would commence by petition. The procedure in contested matters would be only as elaborate as necessary to resolve the particular matter, ranging from an ordinary chambers argument to summary trial on affidavits to a regular civil trial with oral evidence. This is seen as serving the principle of proportionality embraced by the Civil Rules.

[Emphasis added.]

[117] At page 15 (Part One) of the BCLI report, the authors further state:

The historical division of probate matters into non-contentious and contentious business is somewhat confusing and not entirely functional, because both categories of matters deal with the same subject-matter, namely the validity of wills and judicial recognition or confirmation of the right to represent and administer an estate. .

The draft rules in this consultation paper abandon the historical distinction and treat the probate process as a continuum in which the contested matters may arise within what is essentially a single proceeding under the name of the estate.

There is a need, however, to reach a balance between speed and simplicity on one hand with an adequate degree of procedural protection for legitimate, competing interests surrounding an estate on the other. The door to contest the appointment of a particular administrator, to challenge the validity of a will, to pass over an executor in favour of an alternate, or to have a grant revoked must be left open without expanding opportunities to harass and impede a properly appointed personal representative who is fulfilling the obligation of the office in a diligent manner.

One illustration of how the draft rules in Part Two attempt to achieve this needed balance between simplicity and adequate protection relates to estate caveats.

The right to apply to have an estate caveat removed will force the validity of the caveator's objection to the grant to be tested. There will be a ruling to let the estate caveat stand or for its removal, and in either case directions may be given for determination of the issues in dispute that stand in the way of the due administration of the estate. A caveator will not be able to produce a complete stalemate for the entire period the estate caveat is in effect, in contrast to the present.

[Emphasis added.]

[118] While Part 25 of the Rules does not slavishly track the BCLI report's draft rules, it is abundantly clear on a comparison of the two sets of rules that the overall approach and framework of the BCLI report are the foundation of Part 25, including the twin goals of consolidating related matters into a single proceeding and enabling the court to deal with those matters as efficiently as possible. As indicated in the BCLI report, these aims are not unrelated to the decision to continue the estate caveat (as a "notice of dispute").

[119] Thus, it is not merely the duplication between the APL application in the Estate Proceeding and the Estate Relief in the Civil Action that is problematic, but the fact that by seeking Estate Relief in the Claim, Rita has circumvented Rule 25-14(8), and has done so notwithstanding having filed the Notice of Dispute.

- [120] The filing of a notice of dispute effectively pauses any advancement of the administration of the estate: Rule 25-10(1) and (8). The court has been given broad discretionary power to deal with the issues underlying a notice of dispute efficiently and to make related orders that will prevent notices from unduly inhibiting administration. The proper place to seek the Estate Relief was by a Part 8 application in the Estate Proceeding. Rita did not have the option of seeking that relief by way of the Civil Action instead, let alone as well.
- [121] The Estate Claim and corresponding Estate Relief are struck. The relief sought therein should be sought in the Estate Proceeding as a Part 8 application following upon the Notice of Dispute.

VIII. Application to Remove Notice of Dispute

- [122] On May 30, 2019, Maria filed a notice of application in the Estate Proceeding seeking an order removing the Notice of Dispute ("Removal Application").

- [123] Rule 25-10 includes the following:

Notice of dispute

- (1) To oppose the issuance of an estate grant a person to whom documents have been or are to be delivered under Rule 25-2 (2) or a person who claims an interest under a prior or subsequent will must file a notice of dispute that accords with subrule (3) of this rule before the earlier of
- (b) the issuance of an estate grant or the resealing of a foreign grant.

...

Contents of notice of dispute

- (3) A notice of dispute referred to in subrule (1) must be in Form P29, must provide an address for service of the disputant, which address for service must be an accessible address that complies with Rule 4-1 (1), and must disclose
 - (a) that the disputant is a person to whom documents have been or are to be delivered under Rule 25-2 (2) or a person who claims an interest under a prior or subsequent will, and
 - (b) the grounds on which the notice of dispute is filed.

Application to remove notice of dispute

- (10) A person who is interested in an estate in relation to which a notice of dispute has been filed, including, without limitation, an applicant for an estate grant or for the resealing of a foreign grant, may apply on notice to the disputant for an order removing the notice of dispute.

Grounds on which notice of dispute may be removed

- (11) On an application under subrule (10), the court may, by order in Form P31, remove a notice of dispute if the court determines that the filing is not in the best interests of the estate.

When notice of dispute ceases to be in effect

- (12) A notice of dispute in relation to an estate ceases to be in effect as follows:
- (a) subject to paragraph (b), on the date that is one year after the date on which the notice of dispute was filed;
 - (b) if the notice of dispute has been renewed under subrule (6), at the end of the renewal period;
 - (c) if the notice of dispute is withdrawn by the disputant under subrule (9);
 - (d) if the will in relation to which the notice of dispute relates is proved in solemn form;
 - (e) if the court orders, under subrule (11) or otherwise, that the notice of dispute is removed.

[Emphasis added.]

[124] Maria's first position is that the Notice of Dispute should be removed as not properly filed. She says a notice of dispute must raise an issue relating to the validity of a will, noting that if a will is proven in solemn form, a notice of dispute ceases to have effect: Rule 25-10(12) (d). She argues that a notice of dispute cannot be intended to protect interests beyond the validity of a will, if establishing validity defeats a notice. She says the assertion that Maria is not an appropriate person to be granted probate is not a proper basis for a notice of dispute, and thus allowing the Notice of Dispute to remain cannot be in the interest of the Estate.

[125] Maria also argues that to the extent the Notice of Dispute asserts Maria ought not to have been named executor by Antonia, it involves an attempt to vary the Will. She also asserts that an application to remove Maria can be brought after probate has been granted, and that holding up the administration of an estate pending an application to remove is not warranted. Finally, she asserts that the Notice of Dispute should be removed simply because it is not in the interest of the Estate to hold up administration given the circumstances of this case. She argues the Estate requires active administration, even if distribution is made subject to further orders.

A. Propriety of the Notice of Dispute

- [126] Rita says nothing in Rule 25-10 restricts notices of dispute to validity disputes, noting the Rule sets out the broad purpose of opposing "the issuance of an estate grant". She says a notice of dispute under the current Rules is intended to serve the same function as an estate caveat under the previous rules, and that caveats were not so limited, citing *Hetherington v. McLeod*, 1991 BCSC 1.
- [127] In *Hetherington*, Master Wilson found a caveat filed on the ground that the caveator intended to bring a wills variation claim was valid:
- [8] It seems to me that paragraph 3, recited above, is an oxymoron, and paragraph 4 does not take into consideration the decision of *Re: O'Connell* (1980), 1979 CanLII 2523 (NS SC), 109 D.L.R. (3d) 584 (N.S.S.C.) [whether a common law wife has standing to bring a wills variation action]. In the event, however, those observations are of no moment, because no limitation is imposed on the grounds for filing a caveat. Seemingly, provided the caveator declares the nature of the interest claimed in the property of the deceased, and states generally the grounds upon which the caveat is entered, the document may be filed -- Rule 61(36).
- [Emphasis added.]
- [128] *Hetherington* has been criticized by the authors of the *British Columbia Probate and Estate Administration Practice Manual*, vol. 2, 2d ed. (Vancouver CLE BC, 2007) (the "CLE authors") at s.4.II.B.2, as based on the wording of the prescribed form without due consideration for the specific purpose of the form - opposition to issuance of a grant. In support of their comment, the CLE authors refer to *Latimer v. Garnons-Williams* (1995), 11 C.P.C. (4th) 301 (B.C.S.C.).
- [129] In *Latimer*, the caveat raised the status of property transferred by survivorship and whether it was properly estate property. The executor sought to have the caveat struck so probate could proceed. Justice Saunders (as she then was) struck the caveat, but also commented as follows on its propriety:
- [7] It is significant in my decision today that the caveat did not attack the validity of the will but attacked the title of the property which did not go into the estate because of the joint tenancy which was created between the deceased and two children.
- [12] The caveat is filed under a very particular rule, that is Rule 61, which provides for the filing of a caveat but does not give the court very much instruction as to how the caveat should be handled. That is likely because most caveats filed in probate proceedings deal with the validity of the will and the matter is soon sent to court to deal with a decision as to whether the will is valid or not. In my view, the caveat process in Rule 61 is not really intended to deal with claims on the title of real estate and it is not well suited. Be that as it may, the caveat has been filed and has been in existence for some time. The question is whether it should continue to exist.

- [130] The CLE authors also refer to *Chang Estate v. Chang*, 2010 BCCA 111, in which the caveat challenged a will on the basis that it was not the product of free will. Frankel J.A. (for the majority of the court) stated:
- [62] The last comment I wish to make concerns the chambers judge's reliance on *Latimer v. Garnons-Williams* (1995), 11 C.P.C. (4th) 301 (B.C.S.C.). This was the only authority she cited in finding the caveats to be an abuse of process. That case, however, is distinguishable. Critical to the decision in *Latimer v. Garnons-Williams* was that the caveat in issue had not been filed in connection with a challenge to a will. Rather, the caveator sought to challenge the title to real property that had not become part of an estate by reason of a joint tenancy between the deceased and her two children. That property had already been sold under a partition action. It was because the caveat served no purpose other than to stand in the way of the proper administration of the estate that Madam Justice Saunders, as she then was, concluded that its continued existence would be an abuse of process: para. 14. This reasoning has no application in the present case, where Mr. Chang legitimately, although clumsily, seeks to challenge a will.
- [131] *Latimer* and *Chang* do not address the question presently before the court. The Notice of Dispute does not challenge the Will, but neither does it support a wills variation claim nor assert that survivorship property is properly estate property. The Notice of Dispute states that the applicant should be passed over for appointment as the personal representative, and thus the application should not be granted.
- [132] The relevant question is not whether the Notice of Dispute challenges the Will, but whether it opposes the issuance of a representation grant within the meaning of s. 106 of WESA and Rule 25-10(1)(b) of the Rules, which respectively allow a person to "oppose the issue of a representation grant" by filing a notice opposing the "issuance of an estate grant".
- [133] Under WESA, s. 158, a person with an interest in an estate can seek to have a person otherwise entitled to be personal representative passed over in favour of someone else. Under s. 158(3), the court's power to pass over is expressly "without limitation", and the non-exhaustive list set out includes grounds relating to incapability and unsuitability.
- [134] Rule 25-14(1)(f) addresses passing over an executor who has applied for probate in favour of another. While it is true that a personal representative can be removed after a grant of probate, the Rules expressly contemplate passing over someone who is not yet a personal representative. As noted by Justice Casullo of the Ontario Supreme Court in *Ford v. Mazman*, 2019 ONSC 542:
- [18] An executor is "passed over" before a certificate of appointment is issued. An executor is "removed" after she has received a certificate of appointment. However, the grounds for both are the same: see *Windsor v. Mako*, 2008 CanLII 55146 (Ont. S.C.).

- [135] In my opinion, seeking to have an executor who has applied for probate passed over in favour of another is opposing the issue of a representation grant within the meaning of WESA, s. 106. It is not necessary to assert that no representation can ever be granted under the Will, only that the grant as applied for should not issue. It would have been easy enough to refer to validity rather than opposition to a grant, if that was what was intended. The terms "valid" and "validity" appear frequently in WESA: see Part 4 and s. 103 in particular.
- [136] Nor does seeking to have Maria passed over for appointment as personal representative equate to varying the Will. Were Rita to succeed in her position, the result would not be to substitute someone for the person named in the Will, but rather the appointment of someone other than the named person as personal representative for purposes of WESA.
- [137] It is evident from the BCLI report (p. 15) that the authors considered opposition to the appointment or confirmation of a particular individual as estate representative a matter within the traditional scope of probate:

The historical division of probate matters into non-contentious and contentious business is somewhat confusing and not entirely functional, because both categories of matters deal with the same subject-matter, namely the validity of wills and judicial recognition or confirmation of the right to represent and administer an estate. .

There is a need, however, to reach a balance between speed and simplicity on one hand with an adequate degree of procedural protection for legitimate, competing interests surrounding an estate on the other. The door to contest the appointment of a particular administrator, to challenge the validity of a will, to pass over an executor in favour of an alternate, or to have a grant revoked must be left open without expanding opportunities to harass and impede a properly appointed personal representative who is fulfilling the obligation of the office in a diligent manner.

[Emphasis added.]

- [138] It is correct that proof of a will in solemn form is a basis for cancelling a notice of dispute: Rule 25-10(12)(d) of the Rules. However, the Rules specifically require an application for solemn grant to be served on anyone who has filed a notice of dispute: Rule 25-14(7). That notice would enable the issue of whether the applicant was a suitable and capable personal representative to be raised and addressed either in the same hearing or as a related matter: *Biely Estate v. CNIB*, 2017 BCSC 788.

B. The Best Interests of the Estate

- [139] Rita submits that *Richardson Estate (Re)*, 2014 BCSC 2162, establishes a three-part test for removing a notice of dispute. I disagree.
- [140] The pertinent paragraphs of *Richardson* read as follows:

- [57] I was directed by the disputant to the approach prior to WESA under the then Rule 19(24). Different language was used and the issue was whether to strike a caveat under the then Rule 19(24). It provided that a caveat could be struck if it "discloses no reasonable claim or defence as the case may be", among other reasons. Before a caveat was struck out it had to be "plain and obvious" that it did not disclose a reasonable claim (or defence). As well, it was to be assumed that the facts plead were true and any doubt was to be resolved in letting the pleading stand (*Chang Estate v. Chang*, 2010 BCCA 111 at para 39; citing *Hunt v. Carey Canada Inc.*, 1990 CanLII 90 (SCC), [1990] 2 SCR 959).
- [58] As can be seen above, the new language in Rule 25-10(11) describes removing a notice of dispute and whether that would be in the "best interests of the estate." In my view this is broad language and with a substantially different objective than the previous Rule. Instead of a focus on the nature of the pleadings under the previous Rule, the focus now is on the estate and what is in its best interest.
- [59] It is submitted on behalf of the disputant that the test to be applied to this new language is a three stage test: does the disputant have standing to challenge the will or appointment of an administrator without a will; is there a reasonable claim or a legitimate issue to be contested; and is the removal of the notice of dispute consistent with protecting the integrity of the probate and administration process? There is considerable overlap between this approach and the approach under the former Rule 19(24) inasmuch as both focus on the merits of the dispute and the process of probate and administration. Those matters may in some circumstances be relevant to determining the best interests of the estate. However, the best interests of the estate is broader language and capable of including other issues.
- [60] Another aspect of the submission of the disputant is to say that it "will always" be in the best interests of the estate to challenge the appointment of an executor or administrator thus making valid any challenge. As a very general proposition I accept that valid disputes should not be discouraged. However, making it a final legal conclusion as a matter of interpreting WESA and the new Rules would, in my view, make Rule 25-10(11) essentially a dead letter because no notice of dispute could be removed.
- [61] There is a previous case which provides some assistance in the interpretation of the phrase "best interests of the estate" (*Re: Estate of Fannie Cleverley*, 2000 BCSC 1454 at paras. 24-26). In that case a beneficiary said that an executor was not protecting the beneficiaries because he was not pursuing litigation on behalf of the estate. The executor, appearing on his own, said that the litigation in question would involve substantial costs for a nominal value to the estate of not more than \$20,000. The executor submitted to the court that it would not be in the best interests of the estate to pursue the litigation. Master Joyce (as he then was) concluded that he was in no better position than the executor with whom he agreed.

[62] Looked at in this light, the best interests of the estate are an economic issue, one requiring the weighing of the value of a decision or issue in dispute with the overall value of the estate. I conclude that this approach has some merit in interpreting Rule 25-10(11) in this case. I hasten to add that non-economic issues can be important to the best interests of the estate such as, for example, situations involving personal items or even real property that has unique value. Those circumstances are not a concern here.

[Emphasis added.]

[141] In Richardson, the disputant proposed a test. Justice Steeves declined to adopt or endorse it. At best, he observed the three suggested considerations "may in some circumstances be relevant to the best interests of the estate" (para. 59). He held that the court should consider anything relevant to the estate's interests in the circumstances, including economic and non-economic issues.

[142] I am of the view that it would be appropriate to order removal of the Notice of Dispute, but for the fact that it expired shortly after the hearing. Correspondingly, Rita's request to renew to the Notice of Dispute is dismissed.

[143] The Estate has a value of approximately \$1.5 million. It comprises monies already held in a lawyer's trust account and a parcel of vacant land. The latter is incurring taxes and generating no income. A professional trustee will involve a considerable cost and provide little of value to such an estate. Maria is capable of doing the Estate's tax filings. She is capable of selling the property and she has every incentive to realize as much as she can for it given that she is the residual beneficiary of one-third of the Estate. The same holds true with regard to the investment of Estate monies.

[144] I am satisfied it is appropriate, in light of the non-renewal of the Notice of Dispute, to grant Maria probate and the right to administer the Estate subject to the following terms and directions:

- a. Maria is entitled to call in the Estate, including the sale of the vacant lot at 7958 Mayfield Street in Burnaby, BC (PID: 024-184-641, Lot A District, Lot 90 Group 1 New Westminster District Plan LMP38350), and to expend usual and reasonable costs in relation thereto;
- b. Maria may arrange for and oversee the investment of Estate funds in accordance with the Trustee Act;
- c. Maria may pay any taxes, utilities or comparable expenses of the Estate on behalf of and out of the Estate;
- d. Maria is required to make the documents related to her conduct as Executor, past and future, available for review by Rita and Mickey or their nominees within a reasonable time following any reasonable request therefor;

- e. Maria is at liberty to apply to the court for such further directions and orders as may be required for the effective administration or management of the Estate; and
- f. Maria is prohibited from distributing any of the Estate without leave of the Court.

IX. The APL Application

[145] Given the result above, it is not necessary for me to make separate findings regarding the appointment of an APL. The issues of safeguarding the Estate, and Rita's entitlement to document disclosure in relation to Maria's conduct as Attorney and as Executor, have been addressed above.

[146] The request for an order requiring Maria to formally pass her accounts as Executor at this point in time is dismissed.

[147] Accordingly, the APL application is dismissed.

X. Summary

[148] In summary:

- a) Maria's application for probate is granted subject to the terms and conditions set out at para. 144 of these reasons;
- b) Rita is at liberty to file a Part 8 application in the Estate Proceeding seeking to have Maria removed as personal representative ("Removal Application");
- c) Rita is at liberty to file an application in the Civil Action seeking leave under WESA, s. 151(1) with respect to the Accounting, Proprietary and Damages Claims ("151 Application").
- d) Should Rita choose to file both a Removal Application and the 151 Application, she is required, following filing and delivery of her materials for both, to schedule a Case Planning Conference seeking directions as to the order and manner in which the applications are to be heard;
- e) The Accounting, Proprietary and Damages Claims are stayed pending determination of the 151 Application;
- f) The Estate Claim and Estate Relief are struck from the Claim;
- g) The application to renew the Notice of Dispute is dismissed;
- h) The APL application is dismissed;
- i) Maria is directed to provide documentary disclosure to Rita and Mickey, or their nominees, in accordance with the terms outlined in the reasons; and
- j) No time limits are imposed, but Rita is required to file and serve any Removal Application and/or 151 Application she intends to file as soon as is reasonably practicable in light of current court scheduling restrictions.

XI. costs

[149] Maria and Mickey were substantially successful on these applications and shall have their costs in any event of the cause.

"Tucker J."

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