

CANADA / JUDGMENT

Ness-Provencal v. Strickland

2025 BCSC 418

COURT

Supreme Court of British Columbia

DECIDED

11 March 2025

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2025 BCSC 418 Ness-Provencal v. Strickland IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Ness-Provencal v. Strickland, 2025 BCSC 418 Date: 20250311 Docket: S244503 Registry:

Vancouver Between: Melanie May Ness-Provencal Petitioner And Joseph Mark Strickland

Respondent Before: The Honourable Mr. Justice Milman Reasons for Judgment Re Costs Counsel for the Petitioner: A. Moore Counsel for the Respondent: L.J. Perry Place and Dates of Written Submissions Received: Vancouver, B.C. January 28, February 12 and 25, 2025 Place and Date of Judgment: Vancouver, B.C. March 11, 2025 I. Introduction

[1] In this estate litigation, commenced by way of petition, the petitioner, Melanie May Ness-Provencal, sought the following relief:

- a) an order passing over the respondent, Joseph Mark Strickland, as trustee and executor of the estate of Ian Robert Lennie (who was the father of Ms. Ness-Provencal and father-in-law of Mr. Strickland), and appointing her in Mr. Strickland's stead; and
- b) an accounting.

[2] The petition initially came on for hearing before me on November 12, 2024. After hearing the parties' submissions, I concluded that the matter was not yet ripe for determination and directed them to exchange further materials and to set the matter down for continuation once they had done so. That second hearing occurred before me on January 15, 2025. After hearing the supplemental submissions of the parties on that date, I delivered my decision orally, allowing the petition in part.

[3] In summary, I refused to grant an order replacing Mr. Strickland as executor, on the grounds that there would be no utility to such an order, in view of the fact that the administration of the estate was essentially concluded. I saw no need for a further accounting, in view of the fact that Mr. Strickland had already provided an adequate accounting through the exchange of materials during the litigation. However, I agreed with Ms. Ness-Provencal that Mr. Strickland had unilaterally paid himself an excessive administration fee from the estate. I therefore ordered him to repay that fee in part, although I did not order as large a repayment as Ms. Ness-Provencal had been seeking. Finally, I found that Ms. Ness-Provencal had been largely successful in this litigation and, on that basis, ordered Mr. Strickland to pay

her costs at the ordinary tariff, without reimbursement from the estate.

- [4] After hearing my oral judgment, Mr. Strickland asked for the opportunity to deliver further written submissions on costs, with a view to having me reconsider that aspect of my order. I agreed to receive supplemental written submissions from the parties on that issue, which they have now delivered. The following is my final ruling on costs. II. The Parties' Supplemental Submissions on Costs
- [5] Ms. Ness-Provencal seeks an award of special costs against Mr. Strickland, payable by him personally rather than from the estate, on the basis that:
- a) she was substantially successful in this litigation (citing *Loft v. Nat*, 2014 BCCA 108; *Webber v. Sullivan*, 2019 BCSC 1784; and *Gagne v. British Columbia (Director, Environmental Management Act)*, 2015 BCSC 154);
 - b) although an executor is ordinarily entitled to be reimbursed from the estate for litigation costs reasonably incurred (*Nassim v. Healey*, 2022 BCSC 728), this was a case in which an exception applied, because the litigation was made necessary and then prolonged by Mr. Strickland's failure to provide the beneficiaries with a proper and timely accounting, citing *Young v. Veselic*, 2023 BCSC 721; and
 - c) that failure also justifies an award of special costs (citing *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914 and *Forsyth v. Pender Harbour Golf Club Society*, 2006 BCSC 1108).
- [6] Mr. Strickland seeks an award of costs, payable as special costs, either in his favour or in favour of the estate, on the basis that he was substantially successful in defeating Ms. Ness-Provencal's request for an order:
- a) replacing him as executor; and
 - b) limiting the size of his fee to 3%.
- [7] In addition, he says, this litigation was unnecessary, and once commenced, was prolonged unnecessarily, because Ms. Ness-Provencal:
- a) should have contacted him directly to obtain the accounting records she was seeking, rather than make those requests through counsel;
 - b) refused, without justification, to approve his accounting as presented, conduct that was found to attract a costs sanction in *Smith Estate (Re)*, 2021 BCSC 1753; and
 - c) made unreasonable, duplicative and disproportionate demands for records.
- [8] In any event, he says, he should have his out-of-pocket costs as executor paid from the estate, citing *Conner Estate v. Worthing*, 2021 BCCA 231; *Nassim*, and *Fleury Estate (Re)*, 2025 BCSC 22. He notes that those costs exceed the amount of money that is now left in the estate (namely, the overpayment of the administration fee that I ordered him to return to the estate). III. Discussion A. Was either of the parties substantially successful in the litigation?

- [9] Although Ms. Ness-Provencal did not succeed in obtaining the primary relief she was seeking (namely, to substitute herself as executor), that is only because the business of the estate was finally completed through this litigation, leaving little, if anything, to be done for the estate going forward.
- [10] That was not the case when the petition was filed. The litigation was necessary in order to elicit the kind of accounting that the beneficiaries should have received as a matter of course. Mr. Strickland says that he "believes he arranged for bank statements to be provided to the beneficiaries after the Deceased's death" and therefore that he had, by that means, fulfilled his duty to account. I disagree. Even if some bank statements were provided early on as Mr. Strickland attests, the duty to account required more. It was only through this litigation that an adequate accounting was finally provided.
- [11] Ms. Ness-Provencal was successful in her secondary claim for such an accounting, relief which I granted in part through my interim order. As I stated in my ruling on the merits of the petition, Ms. Ness-Provencal was entitled to seek an accounting and production of supporting records through counsel. Although Mr. Strickland claims that he was never made aware until the filing of the petition that such a request remained outstanding, that is an issue between him and his counsel and cannot excuse his failure to respond. In any event, he was required, as a matter of law, to provide the beneficiaries with a proper and timely accounting, regardless of whether one was specifically requested or not.
- [12] The main issue in dispute by the time the petition came on for hearing before me was the size of the fee that Mr. Strickland had paid himself, unilaterally and without properly informing the beneficiaries. That payment was only disclosed to Ms. Ness-Provencal as a result of the litigation, through Mr. Strickland's belated production of banking records shortly before the initial hearing.
- [13] In addressing that issue, I agreed with Ms. Ness-Provencal that Mr. Strickland had no right to charge a 5% fee on the value of the estate as if it included the deceased's former home. To reiterate, I found that the home had passed directly to the beneficiaries during the deceased's lifetime by way of inter vivos transfer, in order to avoid probate fees, and therefore outside the estate.
- [14] I appreciate that Mr. Strickland was successful in sustaining a 5% fee on the remainder of the estate, as provided for in the will, rather than the 3% that Ms. Ness-Provencal was urging, but the amount in issue in that regard was dwarfed by the dispute over the inclusion of the home in the calculation.
- [15] For those reasons, I remain of the view that Ms. Ness-Provencal was substantially successful in this litigation. B. Is Mr. Strickland entitled to be indemnified from the estate?

- [16] I also agree with Ms. Ness-Provencal that this case is similar to Young, in the sense that the litigation was made necessary because of Mr. Strickland's failure to fulfill his duty as executor to provide the beneficiaries with a proper and timely accounting. Moreover, the main issue in dispute by the time the matter came on for hearing before me was the size of the fee he had unilaterally charged for his own personal benefit, at the expense of the estate.
- [17] I therefore remain of the view that Mr. Strickland cannot look to the estate for reimbursement of his legal fees or his obligation to pay litigation costs to Ms. Ness-Provencal. C. Is an award of special costs called for?
- [18] On the other hand, I am not persuaded that Mr. Strickland's misconduct rises to a level justifying an award of special costs. Rather, I am satisfied that his errors in the management of the estate were either inadvertent or ill-considered, rather than malicious. Further, I agree with him that some of Ms. Ness-Provencal's requests for records and information were excessive, unnecessary and disproportionate.
- [19] Accordingly, my order will be that Mr. Strickland is to pay Ms. Ness-Provencal's litigation costs at the ordinary tariff. IV. Summary and Conclusion
- [20] In summary, I am ordering that Mr. Strickland pay Ms. Ness-Provencal's costs for this litigation at the ordinary tariff, without recourse to estate funds. "Milman J."

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