

CANADA / JUDGMENT

Park v. Mitchell

2020 BCSC 1147

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1147 Park v. Mitchell

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Park v. Mitchell,

2020 BCSC 1147

Date: 20200804

Docket: 150584

Registry: Victoria

IN THE MATTER OF THE ESTATE OF ROBERT JAMES PARK, DECEASED

Between:

James Robert Park

Applicant

And:

Stacy Lynn Mitchell, Executor of the Estate

of Robert James Park, Deceased

Respondent

Before: The Honourable Judge Johnston

Reasons for Judgment

Counsel for Applicant:

P. Newman

Counsel for Respondent:

M. Mark

Place and Date of Trial/Hearing:

Victoria, B.C.

February 5, 6 & 7, and

May 20 & 21, 2020

Place and Date of Judgment:

Victoria, B.C.

August 04, 2020

BACKGROUND

- [1] Robert James Park (the "deceased") died January 1, 2015, leaving three surviving children: James Robert Park, Stacy Lynn Mitchell, and another son who has taken no part in these proceedings.
- [2] The deceased left a will in which he appointed Mr. Park and Ms. Mitchell to be his co-executors and trustees. The will directed that the residue of the deceased's estate be divided 40% to Mr. Park, and 40% to Ms. Mitchell, with the remaining 20% to be divided equally among the deceased's five grandchildren if they survived him.
- [3] When he died, the deceased owned property at Christina Lake in British Columbia, on which he had a travel trailer, a smaller utility trailer, various tools and pieces of small equipment commonly associated with recreational property ownership.
- [4] The deceased also had an investment account at the Bank of Montreal and a tax-free savings account at the same bank.
- [5] Mr. Park and Ms. Mitchell applied for probate by way of a Submission for Estate Grant, in Form P2, pursuant to Rule 25-3(2) of the Supreme Court Civil Rules, B.C. Reg. 168/2009. That led to the creation of a court file in which subsequent proceedings, including the applications now before the court, have been brought.
- [6] Ms. Mitchell swore the affidavit of Assets and Liabilities in support of the Submission for Estate Grant, in which she stated the value of the Christina Lake property to be \$380,000, the travel trailer value to be \$18,000, and the bank accounts, tax-free savings account and investment accounts together to be \$391,970.29. Mr. Park has sworn that the land was overvalued in the probate application; Ms. Mitchell has sworn that Mr. Park agreed with that value when the probate application was submitted.

- [7] This court granted probate of the estate to Mr. Park and Ms. Mitchell, as co-executors, on November 27, 2015. Not much has happened since to advance the administration of the estate, for which each of Ms. Mitchell and Mr. Park blame the other. Friction between the co-executors resulted in Ms. Mitchell taking on most of the work entailed in dealing with the estate assets.
- [8] A major source of disagreement between the co-executors has been the property at Christina Lake. Mr. Park has sworn that in early 2016 he began to press for the sale of the property. Ms. Mitchell has sworn that she wished to sell the land in 2015, but Mr. Park delayed the application for probate in 2015 so he could enjoy the use of the property. It appears that by 2016 Ms. Mitchell had hired a lawyer, Mr. MacDonald, Q.C., who in February 2016, demanded that Mr. Park find a realtor to list the property. Mr. Park swears that he canvassed three realtors and settled on a realtor who recommended that the property be listed at \$259,000. Mr. Park swears that Ms. Mitchell was not satisfied with the proposed listing price of \$259,000, delayed signing a listing agreement at that price, altered the sale price to \$395,000, and then signed the listing agreement without consulting him. Mr. Park swears that one offer was received at \$150,000. He does not say when.
- [9] Ms. Mitchell has sworn that Mr. Park agreed to list the property at \$395,000 in 2016. Ms. Mitchell swears that in October 2016, someone offered to buy the Christina Lake property for \$150,000, but the offer had expired by the time the listing realtor received it. She says Mr. Park suggested the estate counter-offer at \$170,000, and that she then offered to buy the Christina Lake property, the travel trailer and the utility trailer from the estate for \$200,000, to be paid from her share of the proceeds of the estate. Ms. Mitchell swears that Mr. Park would not agree to sell the land and trailers to her.
- [10] Ms. Mitchell swears that Mr. Park indicated, through his lawyer, that he was interested in buying the Christina Lake property in early 2017, but rejected her lawyer's suggestion that she and Mr. Park submit bids on the property. In 2017 Ms. Mitchell applied for an order or directions approving her purchase of the Christina Lake property for \$200,000.
- [11] This application was adjourned on September 15, 2017, when the court ordered that Ms. Mitchell and Mr. Park could cross-examine each other on their affidavits. After some adjournments, Ms. Mitchell's application was re-set but did not proceed because Ms. Mitchell and Mr. Park had reached a settlement that was put in writing and signed by each of them effective August 8, 2018.
- [12] This settlement agreement refers in the recitals to an action that Mr. Park commenced in February 2017 in which he sought the removal of Ms. Mitchell as co-executor, as well as the application brought by Ms. Mitchell in the estate proceedings by which she sought court approval of her purchase of the Christina Lake property and trailers for \$200,000.

- [13] The agreement provides that Ms. Mitchell is to purchase the Christina Lake property, as well as the travel trailer and the utility trailer on the property, for \$200,000 all-inclusive, to be paid from Ms. Mitchell's share of the estate. Another term requires that Mr. Park discontinue the separate action he had brought for the removal of Ms. Mitchell as co-executor, without costs.
- [14] The settlement agreement provided that the property would be transferred from the name of the deceased into the names of Ms. Mitchell and Mr. Park as co-executors, with the costs of that transfer paid by the estate. It went on to provide that Ms. Mitchell would provide a named accountant all documents necessary to submit a final estate tax return and seek a clearance certificate, and that once the clearance certificate was received from Canada Revenue Agency, she and Mr. Park, as co-executors, would sign documents required to transfer the Christina Lake property, the travel trailer and the utility trailer to Ms. Mitchell. The agreement provided further that Ms. Mitchell would pay \$600 toward the fees required to effect her purchase of the estate assets, and the estate would pay \$500. These amounts were based on an estimate of \$1,100 in fees. If the fees exceeded that, the excess would be shared between Ms. Mitchell and the estate in the same proportion as the estimate. The distribution of estate proceeds to beneficiaries would occur at the same time as the transfer of the land and trailers from the estate to Ms. Mitchell. The agreement contained a mediation clause in the event there were disagreements over its implementation.
- [15] There were disagreements between Ms. Mitchell and Mr. Park over the implementation of the settlement agreement and in November 2018 they attended a mediation as called for in the agreement. The mediation resulted in a handwritten memorandum setting out terms of settlement which was signed by each party and their counsel. Ms. Mitchell soon took the position that the mediated agreement was incomplete, and through her lawyer requested additional terms. Ms. Mitchell now says she repudiated this agreement within days, and Mr. Park has accepted this repudiation. Mr. Park now agrees that both he and Ms. Mitchell terminated the agreement between the parties.
- [16] The August 2018 settlement agreement also provided that Ms. Mitchell would prepare and distribute to the beneficiaries, a full accounting by October 1, 2018, and that the beneficiaries would have 20 business days to either consent or object to the accounts.
- [17] Ms. Mitchell provided an accounting to all beneficiaries in September 2018. Mr. Park has sworn that all beneficiaries, except for Ms. Mitchell's two sons, objected to those accounts.
- [18] A second source of friction concerns the liquidation of the deceased's securities. Ms. Mitchell swears that she wished to convert shares into cash in November 2016, but Mr. Park would not cooperate until June 2018, by which time the investments had lost some \$9,687.74 in value, for which loss she claims Mr. Park should compensate the estate.
- [19] In May 2019 Mr. Park sought orders that Ms. Mitchell pass the estate accounts, and that she pay special costs of the application. Ms. Mitchell did not deliver a response to Mr. Park's Notice of Application, nor did she appear on the application. Ms. Mitchell argues that she

did not appear on the application, because her lawyer, based in Calgary, Alberta, was unable to attend in person in Victoria chambers. Ms. Mitchell argues her counsel sought agreement to adjourn, and when that was refused, asked Mr. Park's lawyer to provide the court with an email and draft affidavit prepared by him and to notify the court that he was standing by available to appear by telephone. According to Ms. Mitchell, the court did not receive these documents nor was her counsel contacted by telephone and the application went ahead unopposed.

[20] On June 26, 2019, a Master of this court granted the following orders:

1. The executor, Stacy Lynn Mitchell, shall provide to the beneficiaries under the will of Robert James Park with an accounting of the estate in a form stipulated by Rule 25-13 no later than 29/Jul/2019;
2. The executor, Stacy Lynn Mitchell, shall pass her accounts as the executor of the estate of Robert James Park covering the period from the date of death through to 30/Jun/2019, before the Registrar by no later than 30/Sep/2019 or the earliest mutually convenient date thereafter subject to the availability of a Presider, unless the accounts are approved by each of the beneficiaries prior to that date;
3. The executor shall pass her accounts for the period of the date of death by no later than 30/Sep/2019;
4. The Registrar will certify her findings and, when filed, the Registrar's certification will be binding on the beneficiaries without further order of the court; and
5. The issue of costs shall be determined by the Registrar at the passing of accounts.

[21] Ms. Mitchell did not seek to vary, set aside, or appeal that order. She has prepared and provided, to the beneficiaries, her accounts as required by the order. Parts of the 2019 accounting concerned claims Ms. Mitchell had against Mr. Park. Some of these claims were for items she says he took from the deceased's effects, but the largest in terms of money value were for legal fees and expenses she claims to have paid to her lawyer to deal with Mr. Park.

[22] Ms. Mitchell's accounts state that she has sold some estate property and used some of the proceeds to reimburse herself for expenses she incurred on behalf of the estate.

[23] Ms. Mitchell has not taken steps to comply with the order by passing her accounts before the Registrar. Instead, she brought this application by Notice of Application, dated August 30, 2019, and argues that it raises questions of law that require answers from the court before her accounts can be passed. She seeks the following:

1. A declaration that Mr. Park has breached his fiduciary duties as co-executor of the estate;
2. A declaration that Mr. Park has been negligent in discharge of his duties as co-executor of the estate;

3. An order that Mr. Park compensate the estate for any and all expenses, costs or damage resulting from his breaches, including but not limited to compensation for the following:
 - a. The value of estate assets he wrongfully removed from the Christina Lake property, for himself and his children;
 - b. Loss of value of estate assets caused by his conduct, including to the investment account; and
 - c. Expenses incurred by the estate as a result of Mr. Park's conduct.
4. An order that Mr. Park compensate Ms. Mitchell for any and all expenses she incurred as a result of his wrongful conduct including:
 - a. Out-of-pocket expenses including legal fees;
 - b. Expenses related to upkeep of the Christina Lake property since October 2016; and
 - c. Expenses of purchasing insurance for the Christina Lake property.
5. An order that the estate reimburse Ms. Mitchell for expenses of managing the estate, including upkeep of the Christina Lake property, from January 2015 to October 2016;
6. An order that Mr. Park promptly sign any documentation necessary to transfer the Christina Lake property to Ms. Mitchell as agreed between Mr. Park and Ms. Mitchell on August 8, 2018;
7. An order that Mr. Park promptly sign documents necessary to convey a travel trailer and a utility trailer located on the Christina Lake property to Ms. Mitchell;
8. An order that Mr. Park pay punitive and exemplary damages to the estate and to Ms. Mitchell, as applicable;
9. An order that interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79, shall be assessed against Mr. Park for all amounts determined to be payable by him to the estate or Ms. Mitchell; and
10. An order that Mr. Park pay Ms. Mitchell special costs, or in the alternative ordinary costs, of this application forthwith.

[24] An eleventh claim was abandoned at the hearing.

LEGAL BASIS OF RELIEF

[25] At first blush, none of the relief sought in Ms. Mitchell's Notice of Application raises a question of law that should excuse her from complying with the order that she pass the estate accounts before the Registrar.

[26] The Legal Basis asserted in Part 3 of the Notice of Application includes Rules 25-13(3) and 14-1 and the inherent jurisdiction of the court.

[27] Rule 25-13(3) provides:

Directions and referrals

- (3) In an application under subrule (1), the court may do one or more of the following:
- (a) hear and decide any matter relating to the accounts or the remuneration of the personal representative;
 - (b) direct the registrar to conduct an inquiry, assessment or accounting in relation to any matter relating to the accounts or the remuneration of the personal representative;
 - (c) make any other order or give any direction that the court considers appropriate in the circumstances.

[28] Rule 25-13(3), relied on in the Notice of Application, does not assist Ms. Mitchell. It refers to orders that might have been made as a result of the application made by Mr. Park under subrule (1), which resulted in the order that Ms. Mitchell pass her accounts. The language of Rule 25-13(3) makes that clear: "In an application under subrule (1), the court may do one or more of the following" (emphasis added). Subrule (1) allows for an order for passing of accounts and fixing and approving the personal representative's remuneration. The time for considering orders under subrules (a) to (c) of Rule 25-13(3) ended when the Master's order of June 26, 2019, was entered.

[29] Even if Rule 25-13(3) did assist Ms. Mitchell, much of what Ms. Mitchell seeks in her Notice of Application goes beyond any matter relating to the accounts or the remuneration referred to in subrules (a) or (b), by seeking findings of negligence and breach of fiduciary duty, by seeking an order compelling the conveyance of estate property to herself, by claiming punitive and exemplary damages payable to herself and the estate "as applicable," by seeking "compensation," which I take to mean damages, payable by Mr. Park to herself, or payable by Mr. Park to the estate. Most of the relief sought by Ms. Mitchell is very loosely connected, if it is connected at all, to her estate accounts or her remuneration as executor for managing the estate.

[30] In argument, counsel for each of Ms. Mitchell and Mr. Park asked that the other be removed as executor, although neither had sought such order in their respective Notices of Application. When this was pointed out, Mr. Park's counsel sought to amend his Notice of Application so as to seek this relief. Ms. Mitchell objected through counsel, and the amendment was denied.

[31] Mr. Park has responded to Ms. Mitchell's application and as well delivered his own Notice of Application, which he framed as a cross-application, in which he seeks:

1. A declaration that Ms. Mitchell has breached her fiduciary duty as co-executor;
2. A declaration that Ms. Mitchell has acted in a high-handed, vexatious manner in the discharge of her duties as co-executor of the estate;

3. An order that Ms. Mitchell indemnify Mr. Park for all expenses incurred or to be incurred by him in responding to unilateral actions Ms. Mitchell has taken during administration of the estate;
 4. A declaration that Ms. Mitchell is personally responsible for expenses related to the Christina Lake property while she had exclusive use of it;
 5. Interest pursuant to the Court Order Interest Act; and
 6. Special, or alternatively, ordinary costs.
- [32] As with Ms. Mitchell's application, none of the relief sought by Mr. Park appears to raise a question of law that requires answer before the estate accounts are passed, as ordered a year ago.
- [33] The legal basis asserted for Mr. Park's application echoes Ms. Mitchell's reference to Rules 25-13(3) and 14-1, as well as the court's inherent jurisdiction.
- [34] The earlier observations relating to Ms. Mitchell's applications apply with equal force to Mr. Park's applications. I will not repeat them here.
- [35] Mr. Park's Notice of Application adds arguments, supported by authorities, which deal with the standard of care expected of a trustee, the necessity of a connection between damages sought and a breach of fiduciary duty, several and joint liabilities of co-trustees, relief from personal liability if a trustee has acted honestly and reasonably in breaching a trust and ought to be excused for the breach of trust, and the law governing indemnity for an executor's legal fees. Much of this is also found in Mr. Park's Response to Ms. Mitchell's Notice of Application. None of this appears related to, or connected however loosely with, the estate accounts or the executor's remuneration under Rule 25-13(3).
- [36] Neither Notice of Application seeks an order to fix and approve a personal representative's remuneration under Rule 25-13(1)(b). Mr. Park did not apply for such an order in his 2019 application that resulted in the June 26, 2019 order that Ms. Mitchell pass her executor's accounts. That order is silent on the matter of executor's remuneration.

PROCEDURAL ISSUES

- [37] I will first deal with the way in which these applications come before the court.
- [38] Neither is stated to be applications for the opinion, advice or direction of the court on a question respecting the management or administration of the assets of the deceased, as contemplated in s. 86 of the Trustee Act, R.S.B.C. 1996, c. 464, which provides:

Application for directions

- (1) A trustee, executor or administrator may, without commencing any other proceeding, apply by petition to the court, or by summons on a written statement to a Supreme Court judge in chambers, for the opinion, advice or direction of the court on a question respecting the management or administration of the trust property or the assets of a will-maker or intestate.
- (2) The application under subsection (1) must be served on, or the hearing attended by all persons interested in the application, or by those that the court thinks expedient.
- (3) The costs of an application under subsection (1) are in the discretion of the court.
- [39] Both applications are brought by Notice of Application in what is commonly called the probate action which was created when the executors applied for probate by way of Submission for Estate Grant as set out above.
- [40] Unfortunately, to call a probate matter an "action" tends to mask the significant differences between a probate matter and an action, whether brought by Notice of Civil Claim or petition, in which one party pursues claims against another. A probate matter is a vehicle by which personal representatives assume and carry out their obligations to an estate under the supervision of the court. Matters brought by Notice of Civil Claim or petition, on the other hand, are vehicles by which disputes can be presented by way of pleadings, and adjudicated on the evidence relevant to those pleadings.
- [41] A question arises whether either Notice of Application is the proper vehicle by which to seek the relief claimed.
- [42] Rule 25-14(1) sets out a list of matters that can be subject to applications relating to estate grants. None of them appear to encompass the relief sought in either application before the court. The Rule provides:

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
 - (a) Repealed. [B.C. Reg. 115/2019, s. 8 (b).]
 - (b) granting administration with or without will annexed in circumstances in which the right to be appointed as the administrator is contested,
 - (c) revoking an authorization to obtain estate information or estate grant or an authorization to obtain resealing information or the resealing of a foreign grant,
 - (d) subject to subrule (1.2), removing or substituting a personal representative or, if different, the holder of an authorization to obtain estate information or the holder of an authorization to obtain resealing information,

- (e) discharging a personal representative or, if different, the holder of an authorization to obtain estate information or the holder of an authorization to obtain resealing information,
- (f) passing over an executor,
- (g) Repealed. [B.C. Reg. 103/2015, s. 7 (a) (iii).]
- (h) removing or renewing a notice of dispute,
- (i) that a foreign grant of probate or administration not be resealed,
- (j) requiring security for the administration of an estate,
- (k) varying or substituting security for the administration of an estate,
- (l) directing that security be assigned to a person named in the order,
- (m) respecting production, delivery or filing of
 - (i) a testamentary document,
 - (ii) a certified or notarial copy of an authorization to obtain estate information,
 - (iii) an estate grant,
 - (iv) an authorization to obtain resealing information, or
 - (v) a resealed foreign grant,
- (n) Repealed. [B.C. Reg. 44/2014, Sch. 1, s. 12 (c).]
- (o) for the passing of accounts,
- (p) fixing and approving the remuneration of a personal representative,
- (q) subject to subrule (2), respecting any other matter concerning
 - (i) an authorization to obtain estate information,
 - (ii) an authorization to obtain resealing information,
 - (iii) a grant of probate,
 - (iv) a grant of administration with or without will annexed,
 - (v) an ancillary grant,
 - (vi) a resealing, or
 - (vii) the office of personal representative,
- other than a question or matter covered by Rule 2-1 (2) (c) or (d), or
- (r) appointing a trustee to hold and administer a minor's interest in an estate until the minor reaches 19 years of age.

- [43] It is apparent from reading this Rule in its context, which includes that it appears in Part 25 of the Rules, that the matters on which applications are contemplated are administrative in nature; they have to do with the day-to-day administration of estates, and that they do not include what may be termed substantive claims, such as breach of fiduciary duty, or negligence such as claimed by Ms. Mitchell's Notice of Application. Nor do they contemplate applications that could lead to a finding that an executor has acted in a "high-handed, vexatious manner" as claimed by Mr. Park in his Notice of Application.
- [44] Additionally, Rule 25-14(1) specifically excludes "a question or matter covered by Rule 2-1 (2) (c) or (d)." Of those, subrule (c) has no apparent application, as neither Ms. Mitchell nor Mr. Park seek construction of the will. Subrule 2-1(2)(d), however, provides:

Commencing proceedings by petition or requisition

- (2) To start a proceeding in the following circumstances, a person must file a petition or, if Rule 17-1 applies, a requisition:
- (d) the relief, advice or direction sought relates to a question arising in the execution of a trust, or the performance of an act by a person in the person's capacity as trustee, or the determination of the persons entitled as creditors or otherwise to the trust property.
- [45] There has been no suggestion that Rule 17-1 applies.
- [46] It is difficult to see that either executor is seeking relief, advice or direction relating to the execution of a trust. While it appears clear that each executor challenges the performance by the other in their capacity as executors, and seeks the court's agreement with their position, neither truly seeks advice or direction. Instead, Ms. Mitchell seeks relief arising from Mr. Park's performance as executor, by way of damages she calls compensation, payable to the estate for loss of value of assets and investments, or to herself for her legal fees and other expenses, while Mr. Park seeks relief in the form of indemnity for past and future expenses he says he has incurred arising from what he calls Ms. Mitchell's unilateral actions.
- [47] The quandary relating to the interaction between the various Rules can perhaps be seen from the responses obtained when counsel were asked to address the following questions by supplemental written argument:
1. Can damages for negligence be ordered in a matter brought by submission in Form P-2?
 2. Can either executor act alone to bring a claim on behalf of the estate, or must both executors act together in such a matter?
 3. Are Ms. Mitchell's claims that Mr. Park compensate for expenses, costs or damage brought on behalf of the estate, and if so, can she do so alone, or are executors required to act together in such claims?

4. Can either executor claim compensation for their own expenses, legal fees or other claimed losses in this probate proceeding, or must those claims be brought in the executor's own name by Notice of Civil Claim in the ordinary way?
5. Can Ms. Mitchell seek to enforce a settlement agreement in this probate proceeding or is she obliged to sue on the settlement in the ordinary way?
6. Is Ms. Mitchell entitled as a matter of law to seek costs payable to herself, whether special or ordinary, against Mr. Park in this probate proceeding?
7. Are the two notices of application irregular under Rule 22-7? If so, can they be converted to or treated as a petition, and if that is the case, does either raise a bona fide triable issue that should be sent to the trial list, with proper pleadings ordered?

[48] Ms. Mitchell responded, as I have summarized:

1. Can damages for negligence be ordered in a matter brought by submission in Form P-2?

A. Ms. Mitchell does not seek damages for negligence, instead she seeks declarations of breach of fiduciary duties and negligence of Mr. Park as they relate to the passing of accounts.

[49] With respect, this answer is inconsistent with the relief sought in paragraphs 3 (b), 3(c) and 4 of Ms. Mitchell's Notice of Application, as well as paragraph 8. In a general sense, seeking a declaration that someone is negligent, without considering whether there has been damage caused by an alleged breach of duty is a nonsense.

2. Can either executor act alone to bring a claim on behalf of the estate, or must both executors act together in such a matter?

A. No claim is brought on behalf of the estate; the nature of the application is the passing of the executor's accounts, which one executor may bring under Rule 25-13(1).

[50] This answer ignores the clear claim for compensation to the estate in paragraph 3 of the Notice of Application, as well as in paragraph 8. It also ignores the fact that the court has already ordered Ms. Mitchell to pass her executor's accounts in June, 2019 after an application made by Mr. Park under Rule 25-13(1).

3. Are Ms. Mitchell's claims that Mr. Park compensate for expenses, costs or damage brought on behalf of the estate, and if so, can she do so alone, or are executors required to act together in such claims.

A. Ms. Mitchell does not claim against Mr. Park on behalf of the estate; rather, she seeks approval of her accounting, "which includes her legal expenses incurred as a consequence of Mr. Park's breach of his duties as executor."

[51] This answer is difficult to reconcile with the claim for relief advanced in paragraph 3 of her Notice of Application. It also makes little sense if it is intended to mean that Ms. Mitchell, by this application, seeks approval of her accounts before she passes them before the Registrar as she has been ordered to do.

4. Can either executor claim compensation for their own expenses, legal fees or other claimed losses in this probate proceeding, or must those claims be brought in the executor's own name by Notice of Civil Claim in the ordinary way?

A. An executor properly claims her expenses incurred on behalf of the estate at the passing of accounts, and Ms. Mitchell incurred extraordinary legal expenses due to obstructive behaviour of Mr. Park.

[52] By this response, Ms. Mitchell appears to attempt to pre-empt the passing of her accounts before the Registrar. Ms. Mitchell asserts that she has substantial expenses, the bulk of which were legal fees she incurred to deal with Mr. Park's alleged delay, obstruction or breach of duty. She argues that if the court finds that Mr. Park breached fiduciary duties leading to expenses or losses, these should be recovered from his interest in the estate. How this fits with her earlier answer that she does not claim on behalf of the estate against Mr. Park is unclear.

5. Can Ms. Mitchell seek to enforce a settlement agreement in this probate proceeding or is she obliged to sue on the settlement in the ordinary way?

A. Ms. Mitchell is not seeking to enforce a settlement agreement in this application.

[53] This answer seems to contradict the claim for relief in paragraph 6 of Ms. Mitchell's Notice of Application, where she seeks an order that Mr. Park "promptly sign any documentation necessary to convey the Property to Ms. Mitchell in accordance with the agreement between the parties, dated August 8, 2018" (emphasis added).

6. Is Ms. Mitchell entitled as a matter of law to seek costs payable to herself, whether special or ordinary, against Mr. Park in this probate proceeding?

A. Ms. Mitchell is entitled to her costs assessed as special costs unless the court orders otherwise as provided in Rule 25-13(7).

[54] This answer does not address whether Ms. Mitchell is entitled to costs from Mr. Park as opposed to being indemnified from the estate.

7. Are the two notices of application irregular under Rule 22-7? If so, can they be converted to or treated as a petition, and if that is the case, does either raise a bona fide triable issue that should be sent to the trial list, with proper pleadings ordered?

A. There is no irregularity in the applications before the court. Rule 25-13 permits a personal representative or other person interested in an estate to apply for an order for the passing of accounts. The Notice of Application and Response to Application contain the same essential information as would be found in a pleading such as a Notice of Civil Claim or petition. The material before the court is "analogous to that presented in a summary trial."

[55] Ms. Mitchell was ordered to pass her accounts a year ago. Instead she brought this application. The material presented in both these applications is not nearly analogous to that presented in a summary trial, as it contains correspondence, hearsay and argument that would not be admissible on a trial.

[56] Mr. Park's responses to the questions posed are summarized as follows:

1. Can damages for negligence be ordered in a matter brought by submission in Form P-2?

A. The court may find facts related to the executors' actions, but may not make declarations with respect to negligence and/or breaches of trust. Ms. Mitchell's application seeks declarations in negligence, without seeking compensatory relief.

[57] This response does not attempt to argue why a court would find facts amounting to the existence of a duty of care and its breach (two of the requirements for negligence) without finding the third and fourth requirements for negligence: that being there was some loss or damage to the party and it was caused by the breach found.

2. Can either executor act alone to bring a claim on behalf of the estate, or must both executors act together in such a matter?

A. Either executor may act alone in bringing a claim on behalf of the estate.

3. Are Ms. Mitchell's claims that Mr. Park compensate for expenses, costs or damage brought on behalf of the estate, and if so, can she do so alone, or are executors required to act together in such claims?

A. Ms. Mitchell claims personal compensation from Mr. Park in Part 1 paragraph 4 of her Notice of Application. Otherwise, claims made on behalf of the estate may be brought by Ms. Mitchell acting alone.

4. Can either executor claim compensation for their own expenses, legal fees or other claimed losses in this probate proceeding, or must those claims be brought in the executor's own name by Notice of Civil Claim in the ordinary way?

A. Any expenses Ms. Mitchell has incurred that are properly estate expenses will be reimbursed by the estate as part of the passing of accounts. The accounts as presented for passing by Ms. Mitchell include claims for indemnity to the estate from Mr. Park for legal fees incurred by Ms. Mitchell. The executors' legal fees are subject to Registrar review on the passing of the accounts and the Registrar can deal with any excess legal fees by reducing an executor's compensation by the amount of any excess. Any excess fees incurred by Ms. Mitchell, including fees paid to

advance her bid to purchase estate property, are her own responsibility.

5. Can Ms. Mitchell seek to enforce a settlement agreement in this probate proceeding or is she obliged to sue on the settlement in the ordinary way?

A. Ms. Mitchell's Notice of Application seeks to enforce the settlement agreement in paragraphs 6 and 7 of Part 1, which is inconsistent with her response to the court's question.

6. Is Ms. Mitchell entitled as a matter of law to seek costs payable to herself, whether special or ordinary, against Mr. Park in this probate proceeding?

A. Ms. Mitchell's response to this question overlooks the language of the Rule 25-13(7) she cites, which permits a person to claim special costs from the estate. There is no authority to award costs from a co-executor to another co-executor under Rule 25-13(7)

7. Are the two notices of application irregular under Rule 22-7? If so, can they be converted to or treated as a petition, and if that is the case, does either raise a bona fide triable issue that should be sent to the trial list, with proper pleadings ordered?

A. The court's jurisdiction in a probate proceeding is, on its face, limited to matters concerning estate accounts and executor remuneration, and does not extend to matters involving negligence or breach of trust, which should have been brought by way of petition under Rule 2-1(2)(d). Mr. Park points to Rule 22-7(1)(a), which provides that a failure to comply with the Rules is to be treated as an irregularity that does not nullify a proceeding, and he agrees with Ms. Mitchell that the parties' positions and relief sought are set out in their applications and responses, the extensive affidavits set out the evidence in detail and it would be burdensome on the parties and the estate to send this matter to trial.

[58] To the extent that either Notice of Application seeks relief, advice or direction relating to the execution of a trust under the will, or the performance of either Ms. Mitchell or Mr. Park as executor, the proper process would be by petition pursuant to Rule 2-1(2)(d), not the Notices of Application presently before the court.

[59] While there are no pleadings as such, there are facts alleged in Ms. Mitchell's Notice of Application, some of which are admitted but most denied by Mr. Park in his Response. Mr. Park adopts the facts set out in his Response in his later Notice of Application. Ms. Mitchell's Response to Mr. Park's Notice of Application goes further, and relies on the facts set out in her affidavits, including her fifth affidavit which had yet to be sworn when her Response was signed and filed. These affidavits are lengthy and argumentative; not a proper basis from which to conclude that there are something equivalent to pleadings that concisely state facts relied on by either party. Nor do either the Notices of Application or affidavits frame the issues at all clearly.

- [60] Each executor seeks declaratory relief: Ms. Mitchell applies for declarations that Mr. Park breached fiduciary duties as executor and has been negligent in the discharge of his duties as co-executor; and Mr. Park applies for declarations that Ms. Mitchell has breached her fiduciary duties as co-executor, that Ms. Mitchell "has acted in a high-handed, vexatious manner" as co-executor, and that she is personally responsible for expenses related to the Christina Lake property while she had exclusive use of it.
- [61] In *Kaiser Resources Ltd. v. Western Canada Beverage Corp.* (1992), 71 B.C.L.R. (2d) 236 (B.C.S.C.) [Kaiser Resources], the court concluded at para. 26 "the application for a declaration by way of an interlocutory motion is open to objection because it is not authorized by any rule of court." The Rules considered in that case have been replaced by substantially similar Rules 8-1, 20-4 and 2-1. Any changes in the language of the Rules have not affected the force of the decision in *Kaiser Resources*.
- [62] In spite of its conclusion, the Court in *Kaiser Resources* considered the merits of the application before it, which was to declare that a firm of lawyers were unable to continue to act for the opposing party because of a disqualifying conflict of interest, and said this at paras 29-32 and 36:
29. A judicial declaration is an unusual legal animal. For example, it is unlike a claim in tort where damages are the usual remedy. Or a claim for breach of contract where specific performance may be the proper remedy. In the first instance, tort is the cause of action and damages the remedy. In the second, breach of contract is the cause of action and specific performance the remedy.
30. But a declaratory order has no similar common law or equitable foundation. Rather, its legal existence is based upon a rule of court: *British Columbia Supreme Court R. 5*(22).
- 31 Once a court grants a declaration, it is binding on those affected. However, unlike a judgment finding a breach of contract and awarding the remedy of specific performance, "the declaratory judgment merely declares and goes no further in providing relief to the applicant than stating his rights": Sarna, *The Law of Declaratory Judgments*, 2nd ed. (Toronto: Carswell, 1988), p. 1. Put another way, a declaration is both a decree that declares an infringement of a right and an order prescribing the remedy.
32. When applying for a declaration, applicants must show the infringement of a right. That right may arise under a statute, the common law or in equity: *Simmonds v. Newport Abercarn Black Vein Steam Coal Co.*, [1921] 1 K.B. 616 (C.A.), at p. 627.
36. Granting declaratory relief is a matter of discretion. A court may refuse to order a declaration even though a case has been made out: [citation omitted].

- [63] Here, Ms. Mitchell seeks a declaration without being clear about whose right has been infringed, hers or the estate's, and she is equivocal about whether a remedy should flow if a right is declared infringed. At minimum, it appears that Ms. Mitchell's applications for findings of breach of fiduciary duty or negligence in the form of declarations are intended to constrain the Registrar's ability to deal with the accounts. If that is not her intent, it would certainly be the result.
- [64] Mr. Park too seeks declarations without being clear about whether his right or the right of the estate has been infringed.
- [65] In *West Moberly First Nations v. British Columbia*, 2020 BCCA 138, the majority said at paras. 308-311:

(308) The granting of declaratory relief is at the court's discretion where four criteria are met. As the majority stated in *S.A. v. Metro Vancouver Housing Corp.*, 2019 SCC 4 at para. 60:

Declaratory relief is granted by the courts on a discretionary basis, and may be appropriate where (a) the court has jurisdiction to hear the issue, (b) the dispute is real and not theoretical, (c) the party raising the issue has a genuine interest in its resolution, and (d) the responding party has an interest in opposing the declaration being sought (*Ewert v. Canada*, 2018 SCC 30, at para. 81; see also *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 S.C.R. 99, at para. 11; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at para. 46).

[Emphasis added.]

As was held in *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at para. 11, this list of factors represents a restatement of the Court's earlier view of declaratory relief, as expressed in *Solosky v. The Queen*, [1980] 1 S.C.R. 821, and *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441.

(309) When these four criteria are present, a declaration "may be appropriate". In other words, these four conditions are generally necessary but not in themselves sufficient for declaratory relief to be inevitably awarded.

(310) Where these factors are met, a court looks at the practical value of the declaration in assessing if it should exercise its discretion to grant such a remedy:

A declaration can only be granted if it will have practical utility, that is, if it will settle a "live controversy" between the parties: see also *Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821; *Borowski v. Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 S.C.R. 342.

Daniels at para. 11; see also *S.A.* at para. 61.

(311) This Court has also phrased the question as "whether a 'useful purpose' would be served by granting the order": *Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc.*, 2014 BCCA 36 at para. 71; see also *Greater Vancouver Regional District v. British Columbia (Attorney General)*, 2011 BCCA 345 at para. 52 [GVRD].

- [66] I decline to exercise my discretion to grant the declaratory relief sought by each of Ms. Mitchell and Mr. Park. In my view no useful purpose would be served by the declarations sought. That is, the declarations would not be useful to the Registrar when the accounts are eventually passed. The declarations would not be useful to the estate or its beneficiaries without having meaningful remedies attached.
- [67] The applications for the two declarations sought by Ms. Mitchell and the three sought by Mr. Park are dismissed.
- [68] In my view, the applications for orders that either Mr. Park or Ms. Mitchell compensate or reimburse the estate or each other for expenses, damages, loss of value or similar are thinly disguised claims for damages, made without proper pleadings or even a valid underlying action. They are dismissed.
- [69] Any of Ms. Mitchell's claims to reimbursement for her own money spent on managing the estate or maintaining estate property can be adequately dealt with in the passing of accounts.
- [70] As to Ms. Mitchell's application to compel Mr. Park to do what is necessary to convey the Christina Lake property, as well the travel and utility trailers to her, I decline to issue such an order.
- [71] Among other reasons, I have no satisfactory evidence of value of the land or chattels, so no basis on which to judge whether the proposed sale is reasonable or provident, particularly in light of differing values advanced by Ms. Mitchell and Mr. Park in the past. The order sought would amount to sanctioning the action of the executors without an evidentiary basis, or, despite Ms. Mitchell's arguments to the contrary, enforcing a settlement agreement without an underlying action on the agreement.
- [72] All applications are dismissed.
- [73] I will hear both executors on costs, particularly on the question whether the estate should bear any of the expenses of either executor with respect to either application.

"The Honourable Mr. Justice Johnston"

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