

CANADA / JUDGMENT

Rawji Estate (Re)

2025 BCSC 409

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2025 BCSC 409 Rawji Estate (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Rawji Estate (Re),

2025 BCSC 409

Date: 20250310

Docket: P23735

Registry: Chilliwack

In the Matter of the Estate of Zarina Nizarali Karmali Rawji, deceased

Before: The Honourable Mr. Justice Gibb-Carsley

Reasons for Judgment re Costs

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Place and Date of Hearing:

New Westminster, B.C.

August 12, 13, November 6, 2024

Place and Date of Judgment:

New Westminster, B.C.

March 10, 2025

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I. Introduction

- [1] On September 20, 2023, I issued written reasons for judgment in this estate matter regarding the estate (the "Estate") of Zarina Nizarali Karmali Rawji (the "Deceased"). The reasons were indexed as Rawji Estate (Re), 2023 BCSC 1652 (the "Reasons").
- [2] The parties in this proceeding are Amman Rawji and Ghalib Rawji, the sons of the Deceased, Farheen Rawji, the daughter of the Deceased, and Nizarali (Nizar) Rawji, the husband of the Deceased. Given that the parties share the same surnames, I will refer to them by their first names, meaning no disrespect.
- [3] The parties return to Court to argue the issue of costs of that application.
- [4] The underlying estate application to remove Amman as executor of the Estate and find a replacement administrator was brought by Ghalib and supported by Nizar. It was a contentious application and was argued over several days. Ultimately, I ordered that Amman be removed as the Estate's executor and that a professional trustee Heritage Trust ("Heritage") be appointed as the administrator.

- [5] In the Reasons, I granted the parties leave to make submissions on costs, with the hope that it would not be necessary and the parties would be able to come to some independent agreement: at para. 101, 102:
- [102] The parties have leave to make arrangements to appear before me for the issue of costs. However, I note that there has been significant time, money and energy spent on this matter already. Based on the evidence and materials before me already and the fact that I have appointed a professional trustee, which in my view should have been proposed earlier, the parties may wish to avoid spending future time and expense litigating the cost issue, and instead focus on the task at hand: administering the Estate.
- [6] The parties were not able to come to an agreement and so returned before me to argue the issue. Just as the resolution of the Estate is contentious, so is the issue of costs. The parties take different positions on costs for the application which I will now describe.
- [7] Ghalib seeks to be indemnified by the Estate, payable forthwith, for his reasonable legal fees and disbursements in relation to the application to remove Amman as the executor of the Estate. Ghalib seeks that his costs be paid from Amman and Farheen's shares of the Estate jointly and that Amman and Farheen bear their own costs. In the alternative, Ghalib seeks that his costs be paid by Amman and Farheen jointly as special costs. Ghalib seeks his costs for the following steps in the litigation:
1. The application by Ghalib for alternative service, granted January 20, 2023;
 2. The initial February 6, 2023 appearance;
 3. The application by Amman Rawji ("Amman") to adjourn the Application, dismissed April 5, 2023;
 4. The hearing of the Application on April 14, June 29-30, July 13-14, 2023, and August 25, 2023;
 5. The application by Ghalib to dispense with Amman's signature, granted November 14, 2023; and
 6. The application by Farheen Rawji ("Farheen") to vary the Order, dismissed December 14, 2023.
- [8] Nizar generally supports Ghalib's application and seeks indemnity for his costs payable from Amman and Farheen's share of the Estate, or in the alternative, that his costs be paid by Farheen and Amman, personally.
- [9] Amman contends that he should be entitled to recover his costs from the Estate. He argues that he did not evade service. He also asserts that, in terms of how the litigation has unfolded, and in particular the conflict between Amman and Ghalib, that Ghalib prevented him from selling estate properties and has not paid any rent while living in a home that should be considered an Estate asset. Further, he asserts that Ghalib has been manipulating their father Nizar who, soon after I issued my judgment, has been admitted to hospital

suffering from dementia. I note that I have no evidence of these assertions and it is based only on Amman's submissions. Put simply, Amman contends that he is not a lawyer and did his best in administering the Estate and should be indemnified by the Estate for his costs related to this litigation and he did so for the benefit of the Estate.

- [10] Farheen seeks an order that she and Ghalib are entitled to their costs at Scale B payable by the Estate. In the alternative, she seeks an order that both she and Ghalib are entitled to be indemnified by the Estate, payable forthwith, for their reasonable legal fees and disbursements in relation to the removal application. In respect of the source of those funds, Farheen contends that any costs to which she and Ghalib are entitled shall be paid from the residue of the Estate, and not from any particular beneficiary's share of the Estate. In the further alternative, she asserts that any costs to which Ghalib and Farheen are entitled shall be paid from Amman's share of the Estate.
- [11] Heritage appeared before me on this costs application, not to seek costs, as it was not a party to the application for which costs are now in issue, but instead to provide input as the Estate administrator. Specifically, Heritage's submissions focused upon how different forms and timing of cost awards could impact the Estate.
- [12] I will now turn to my discussion and analysis.

II. Discussion

- [13] As a starting point, I find that the positions taken by Amman and Farheen in opposing the application for Amman's removal were not well-founded. In my view, it was clear that Amman could not continue to act as the executor of the Estate. Further, I am satisfied that the vast majority of the Application, which took six days (April 14, June 29-30, July 13-14, and August 25, 2023), was spent on the issue of whether Amman should be removed as executor, not on suitable replacements.
- [14] The fact that so much of the time was spent in justifying whether Amman should remain the executor and allegations of impropriety raised against Ghalib is particularly important to this costs application. I say this because, generally, Farheen and Amman based their argument of mixed success in the application on their position that because I did not accept the replacement administrator proposed by Ghalib, the parties were equally unsuccessful before the Court and so on similar footing.
- [15] I disagree with Farheen's characterization of how the application transpired. In my view, her primary position was to support Amman as continuing as an executor and to provide her submissions as to her allegations that Ghalib had mistreated her parents' assets in the past. While her alternative position was to suggest that either of two substitute administrators be appointed, I found that her candidates for administrators (Mr. Michael Williamson and Mr. Firoz Kassam) were inappropriate and not serious contenders for appointment. Having made her decision to approach the application to align herself so strongly with Amman in my view, means that she must have the same general costs outcome as Amman, although

with some nuance which I will describe later in these reasons.

- [16] The general rule is that the successful party is entitled to costs and that costs follow the event: Rule 14-1 Supreme Court Civil Rules. I am satisfied that Ghalib has been successful in this application. The focus of the application was to remove Amman as administrator. While each of Ghalib, Amman, and Farheen proposed alternative administrators, which I ultimately rejected, I conclude that had the focus of the application been only on the issue of the replacement administrators it would have been significantly more efficient and taken less court time.
- [17] Further, I am satisfied that prior to the application, Ghalib had taken some steps, although unsuccessful, to obtain an independent third party to act as administrator in advance. I reference this, and acknowledge that Farheen had also apparently attempted to get a professional trustee in advance because, in my view, as I just stated, had Amman and Farheen not contested the removal of Amman so vigorously and extensively, the parties could have worked together and focused upon finding a professional trustee. This would have significantly reduced the time and expense of the applications and the steps leading to the hearings.
- [18] Ghalib seeks indemnification for his reasonable legal fees from Amman and Farheen's share of the Estate. He argues that in disputes involving estates, the costs of the parties are often paid out of the estate as special costs, instead of by the unsuccessful party. In *Singh Estate (Re)*, 2019 BCSC 1114 at paras. 11-14 the Court summarized the law as follows:
- [11] Traditionally, costs of all parties involved in an estate dispute were ordered to be paid out of the estate. The estate would bear the costs of settling disputes in estate proceedings unless the losing party's position was obviously unwarranted. The public policy behind the traditional approach is that where a will is ambiguous, and subsequent litigation ensues which is partially or largely cause by the testator, his or her estate ought to bear the costs of the litigation: *Gard*, and *British Columbia (Public Guardian and Trustee) v. Sheaffer*, 2015 BCSC 1306. *Gard* was cited with approval by Justice N. Smith in *Moore v. Drummond*, 2012 BCSC 1702.
- [19] While the estate paying the costs has been the traditional approach, that approach has been gradually displaced by the modern approach to cost awards where costs follow the event in estate matters. Courts retain discretion and have deviated from this trend and followed the traditional approach where justified. This often occurs where the deceased is wholly or partially the cause of the need for an inquiry. Justice Silverman helpfully explained the more modern approach in *Jung v. HSBC Trust Company (Canada)*, 2007 BCSC 1740 at para. 106:
1. The costs of and incidental to a proceeding will follow the event unless the court otherwise orders.

2. If the cause of the litigation originated from the conduct or errors of the testator (i.e., unclear wording or validity of the will), then the costs of all parties will generally be paid from the estate on a full indemnity basis.
3. If there were circumstances which provided reasonable and sufficient grounds to have brought the action relating to questions of capacity or allege undue influence or fraud, the court will not normally make an order for costs against the unsuccessful party.
4. In an action under dependent relief legislation (i.e., where the proceedings are adversarial in nature and are not brought about by the actions of the testator), costs follow the event.
5. All costs awards are subject to the court's discretion and an overriding test of reasonableness.

[20] In my opinion, it should have been clear to Amman and Farheen that Amman should not continue to act as the executor and so his application opposing his removal was unwarranted. In the Reasons I described the various arguments raised by Ghalib and Nizar as to why Amman must be removed as the executor as follows at para. 43:

1. There is a high degree of conflict between Amman on the one hand, and Ghalib and Nizar on the other hand, which has impaired Amman's ability to act in the best interests of the Estate;
2. Amman has conspired with Farheen to deprive the Estate of certain assets. In this regard, Ghalib contends that Amman and Farheen together have agreed that 205 Street should not be part of the Estate;
3. Amman entered into contracts to sell Estate assets at below fair market value to undisclosed buyers. In this regard, Ghalib contends that Amman's attempted sale of these properties at under their value jeopardized the value of the Estate;
4. As executor, Amman has been obstructive, secretive, abusive, and confrontational in his administration of the Estate. Ghalib argues that generally, Amman has taken steps without consulting with the beneficiaries; and
5. Amman is in a conflict of interest because he is a debtor to the Estate, specifically, that he owes the Estate \$30,000.

[21] In general, I concluded that the positions were well-founded and Amman could not continue to act as executor. Indeed, the position taken by Amman and Farheen in opposing Amman's removal had little merit. In my view, the proper approach to awarding costs in this application is that the successful parties, being Ghalib and Nizar, should be entitled to their costs of the application. In this regard, I find that the primary focus of the application which was whether Amman could remain as executor did not have sufficient grounds to be realistically opposed. Accordingly, the approach that costs should follow the event and not that all parties be indemnified by the Estate is appropriate.

[22] In summary, Ghalib and Nizar have been substantially successful in this litigation and are entitled to some form of costs. I will now turn to the level of costs, and from what source and when those costs should be payable for each of Ghalib and Nizar. I will begin by addressing Ghalib's alternate submission in which he seeks special costs.

A. Special Costs

[23] In the alternative, Ghalib seeks special costs to be paid jointly by Amman and Farheen. I will briefly address that submission now. The threshold for awarding special costs is set out in *Garcia v. Crestbrook Forest Industries Ltd.*, [1994] B.C.J. No. 2486, 1994 CanLII 2570 (C.A.), in which our Court of Appeal held at para. 17:

it is my opinion that the single standard for the awarding of special costs is that the conduct in question properly be categorized as "reprehensible". As Chief Justice Esson said in *Leung v. Leung*, the word reprehensible is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke.

[24] In *SHH Holdings Limited v. Philip*, 2021 BCSC 1232, Justice Basran set out a variety of circumstances in which special costs may be ordered, including misleading or deceiving the court, giving false evidence under oath, or bringing a proceeding for an improper motive. Further articulation of circumstances in which special costs may be ordered was provided in *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914 at para. 11 in which the Court held that special costs may be ordered in situations that include:

- (a) Where a party pursues a meritless claim and is reckless with regard to the truth;
- (d) Where a party makes the resolution of an issue far more difficult than it should have been; and
- (i) Where a party pursues claims frivolously or without foundation.

[25] I do not find that the conduct of Amman and Farheen warrants an award of special costs in this application. While they took positions in opposing Amman's removal that had little merit or chance of success, I do not find that the conduct rises to the level that justifies special costs. Indeed, as I have described, this is a contentious proceeding, and it appears that there is a long history of mistrust between the siblings that has resulted in acrimony and complicated the litigation.

[26] Further, it may be that the claims of Farheen and Amman against Ghalib and his alleged conduct that wasted assets of his parents before and after the death of the Deceased is taken up by Heritage on behalf of the Estate and could be successful. This is yet to be determined, but I acknowledge that it was the basis for the opposition raised by Farheen and Amman to Ghalib's involvement in administering the Estate.

[27] In summary, on the issue of special costs, I find that this is not a case where special costs are warranted. I now turn to my conclusions as to the appropriate award of costs in the circumstances of this case.

B. Ghalib's Costs

[28] I will use my discretion to craft a cost order in an attempt to reflect the nature of the parties' participation and positions taken in the application. Specifically, the fact that this is an estate matter that involves positions taken by Amman and Farheen that, while generally united, also had some differences. The primary difference being Farheen's alternate position that her proposed administrators should be appointed to replace Amman if I found Amman needed to be removed as executor.

[29] Given these considerations, I order that Amman and Farheen shall be personally responsible for Ghalib's costs of the application and related steps which I will reiterate in a moment at Scale B. Specifically, Amman shall be responsible for 60% of those costs and Farheen responsible for 40%. Setting a proportionate difference is my attempt to account for the difference in the nature of the applications and the involvement and responsibility in the various applications between Amman and Farheen and an attempt to somewhat simplify Ghalib's costs award.

[30] The steps that Amman and Farheen will be responsible for in their proportionate shares of the main application heard before me also include the following:

- a) The application by Ghalib for alternative service, granted January 20, 2023;
- b) The initial February 6, 2023 appearance;
- c) The application by Amman Rawji ("Amman") to adjourn the Application, dismissed April 5, 2023;
- d) The hearing of the Application on April 14, June 29-30, July 13-14, 2023, and August 25, 2023;
- e) The application by Ghalib to dispense with Amman's signature, granted November 14, 2023; and
- f) The application by Farheen Rawji ("Farheen") to vary the Order, dismissed December 14, 2023.

[31] Any remaining reasonable legal costs for Ghalib after the Scale B amounts are deducted will be paid out to Ghalib from Amman and Farheen's share of the residual of the Estate in the same proportion, being 60% from Amman's share and 40% from Farheen's share. For clarity, the approach I am taking is that Ghalib is to be made whole for the legal fees of this application, however, the funds will come from two sources. The first, from Amman and Farheen personally (at Scale B). The remaining amount will be from Amman and Farheen's share from the residual of the Estate, if any.

- [32] The reason for approaching the payment of Ghalib's costs in this manner is that if, ultimately, there are no assets remaining in the residual of the Estate, I want to ensure that Ghalib has some recourse to recover at least his Scale B costs from Amman and Farheen personally for the steps in this litigation.

C. Nizar's Costs

- [33] Nizar seeks indemnity for his costs payable from Amman and Farheen's share of the Estate or in the alternative to be paid by Farheen and Amman, personally.
- [34] Nizar asserts that the tenor of his submissions was different than those of Ghalib, and focused largely on how Amman's baseline duty to a wills variation claimant as the Executor was not being fulfilled. Amman's clear inability to separate his own positions from that of a neutral estate representative is something that was emphasized in Nizar's pleadings and submissions.
- [35] In respect of Nizar's claim for costs, I find that while his presence in the application added context, it was not necessary for my determination. Indeed, the same impact could have been made if Nizar had provided affidavit evidence as opposed to participating as a party to the application. That said, I find that he was successful in his opposition to the positions advanced by Amman and Farheen.
- [36] To reflect that he has enjoyed success, but that his participation was not essential to the outcome, I will order that Nizar will have his costs related to the applications paid to him from the residual of the Estate at Scale B from Farheen and Amman's share of the Estate, again in the proportion of 60% from Amman's share and 40% from Farheen's share. For clarity, Nizar, unlike Ghalib, is not entitled to full indemnity of his costs for the application and related steps. I make this order on the basis that Nizar's participation, while of assistance, in my view, was entirely secondary and supportive to the position taken by Ghalib.

D. Amman and Farheen's Costs

- [37] I now turn to whether either Amman and Farheen should have their costs of the application paid from the Estate.
- [38] An unsuccessful respondent on a removal application may also recover their reasonable legal fees from the Estate provided they were acting in good faith and did not engage in misconduct.
- [39] In *Fitzgerald v Hill*, 2022 BCSC 968 multiple beneficiaries applied to remove the executor and replace him with a professional trustee. At paras. 93-94 the Court held that although the removal application was dismissed, the applicants were acting in good faith and therefore both the unsuccessful applicants and the successful respondents were entitled to indemnification of their properly and reasonably incurred costs from the estate. See also: *Ching Estate (Re)*, 2016 BCSC 1111 at para. 31. However, if the basis of the removal is

improper conduct by the executor, the executor is not entitled to recover their costs: see Pangalia Estate, 2021 BCSC 1070 at paras. 83 and 84.

- [40] As I have set out above, in my view, the position taken by Amman as supported by Farheen opposing Amman's removal as executor was not well-founded. Further, I was troubled by Farheen's conduct of contacting Ms. Alibhai, one of the replacements to Amman proposed by Ghalib, on the night prior to the first scheduled hearing of the application, which I find, even if well-intentioned to inform Ms. Alibhai of the various issues in the estate litigation, was effectively to "chill" Ms. Alibhai's interest in being an executor to favour having Amman continue as executor or delay the proceedings.
- [41] Again, as I set out above, the reasons that Amman should not be the executor were many and included the following factors:
- a. Demonstrating significant animus and hostility towards Ghalib;
 - b. Putting himself in a conflict of interest by commencing a claim to vary the will
 - c. Putting the Estate assets in jeopardy by, among other things:
 - i. Listing and selling Estate properties for below fair market value;
 - ii. Locking tenants out of Estate property, thereby inviting litigation against the Estate; and
 - iii. Refusing to investigate whether 205 Street should be considered an asset of the Estate.
 - d. Failing to recognize the Estate's liability for the BlueShore line of credit, thereby inviting foreclosure proceedings against the Estate; and
 - e. Demonstrating an inability to move the Estate forward.
- [42] In the Reasons at paras. 55-58, I held that even the sole factor that the law is well established that an executor is unable to file a claim for wills variation such that Amman could not act as an executor should have been accepted by Amman and Farheen. On this issue, in my reasons, I held:
- [58] Amman and Farheen take the position that Amman is able to continue his will variation action pending the outcome of this application and if he is not removed as executor, he will discontinue the action. Amman says he commenced the December 2022 Claim that seeks to vary the Will without the assistance of counsel and so was not aware of the conflict. However, since becoming aware he has not discontinued the proceeding. I do not agree with his approach. In my view, having commenced an action to vary the Will, Amman has put himself in a conflict requiring him to be removed as executor.
- [43] Given the foregoing, I conclude that this is not a case where Amman and Farheen should be indemnified by the Estate for their legal expenses of this application or related proceedings leading up to the application. I conclude they must both bear their own costs of the applications and steps therein. Simply put, they adopted an untenable position at the

applications that Amman could remain as executor. Further, I accept the evidence that there was some interference by Farheen at least in the tone of the conversations with the potential replacement administrator, Ms. Alibhai. The timing of that interference as much as the tone of the interference complicated the proceeding and added expense.

[44] In coming to my conclusions in this costs application, I wish to express my view that litigants in Estate litigation should not proceed recklessly into litigation on the belief that the Estate will pay their legal fees. There may be a sense that the litigation is costless because it will be funded by the Estate, thus meaning that even an unsuccessful litigant could be successful in reducing his or her adversaries' ultimate inheritance. In my view, this should be discouraged and parties should make reasonable attempts to take legitimate positions on good faith.

E. The timing of when costs should be paid

[45] As referenced above, Heritage appeared at this application to inform the Court that any costs to be paid from the Estate should not be paid out from the Estate until the other liabilities are distributed. In other words, the costs, if paid out of the Estate, should be paid out of the residual. I accept that any amounts should not be paid out for the difference in Ghalib's legal fees from the Estate until the Estate liabilities are settled.

[46] I come to that conclusion based on my understanding of the various ongoing legal disputes that entangle the Estate as well as Heritage's submissions that given the number of lawsuits and the uncertainty of the state of the Estate's assets, it is unclear as to what amount of assets will remain after all liabilities are paid and lawsuits resolved. Accordingly, I order that the payments of costs will not occur until after the final amounts are available for distribution. In other words, the costs from the Estate will not be paid or payable until after all of the outstanding issues are settled and resolved.

III. Order

[47] In summary, I order:

- a) Amman is personally required to pay, forthwith, 60% of Ghalib's costs assessed at Scale B for the steps outlined above in respect of the application;
- b) Farheen is personally required to pay, forthwith, 40% of Ghalib's costs assessed at Scale B for the steps outlined above in respect of the application;
- c) Ghalib shall be entitled to reimbursement of his reasonable legal costs of the application (less the amounts assessed above payable at Scale B by Amman and Farheen) from Amman and Farheen's share from the residual of the Estate, if any;
- d) For clarity, Farheen and Amman, shall pay their proportionate share of the Scale B costs personally and forthwith;

- e) Nizar is entitled to his costs of the steps in the application at Scale B from Amman and Farheen's share of the residual of the Estate, if any. These costs will be payable in the proportion of Amman 60% and Farheen 40%;
- f) Amman and Farheen are to bear their own costs of the application and related steps; and
- g) For clarity, the costs of this application for costs shall be treated in the same manner as for the other steps in the application.

[48] If there are any issues that arise regarding the assessment of this order for costs, the parties have leave to appear before the Registrar for the purpose of resolving those issues.

[49] I thank the parties for their submissions on this application.

"Gibb-Carsley J."

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