

CANADA / JUDGMENT

Rhodes v. Myers

2024 BCCA 165

COURT

British Columbia Court of Appeal

DECIDED

30 April 2024

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2024 BCCA 165 Rhodes v. Myers

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Rhodes v. Myers,

2024 BCCA 165

Date: 20240430

Docket: CA47900

Between:

Patti Fern Rhodes, in her personal capacity and as
co-executor of the Will and co-trustee of the Estate of
Elizabeth Jane Myers, Deceased

Appellant

(Petitioner)

And

Donald Ray Myers, in his personal capacity and as
co-executor of the Will and co-trustee of the Estate of
Elizabeth Jane Myers, Deceased

Respondent

(Respondent)

Before:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Willcock

The Honourable Mr. Justice Hunter

On appeal from: An order of the Supreme Court of British Columbia, dated
October 20, 2021 (Rhodes v. Myers, 2021 BCSC 2043, Rossland Docket S14921).

Counsel for the Appellant:

B.G. Pastro

T. Stone

Counsel for the Respondent:

J. Lalonde

Place and Date of Hearing:

Vancouver, British Columbia

December 14, 2023

Place and Date of Judgment:

Vancouver, British Columbia

April 30, 2024

Written Reasons by:

The Honourable Mr. Justice Hunter

Concurred in by:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Willcock

Summary:

The appellant and respondent are siblings who were appointed joint executors in their mother's will. A dispute arose concerning the disposition of a bolt ring that belonged to their mother. The appellant claimed the ring was gifted to her by their mother prior to her death. The respondent claimed that the ring was intended to go to a third sibling. A fourth sibling removed funds from an estate bank account to pressure the appellant to relinquish her claim to the ring. The appellant brought petition proceedings to remove the respondent as executor and for other relief in relation to the administration of the estate, including an order that the funds removed by the fourth sibling be returned. The respondent consented to the order provided that the appellant agreed to give the bolt ring to the third sibling. A chambers judge directed that the bolt ring be

given to the third sibling, granted the order sought by the appellant and ordered the parties to bear their own costs. The appellant appeals the judge's order with respect to the bolt ring and on costs.

Held: Appeal allowed in part. The chambers judge did not err in making a direction concerning the bolt ring; nor did the judge err in her costs disposition on the basis of the materials before her. However, the fresh evidence adduced by the appellant indicates that the estate funds removed by the fourth sibling were largely spent at the time the order was made. The appropriate disposition is to remit the costs issue to the chambers judge for determination in light of the fresh evidence.

Reasons for Judgment of the Honourable Mr. Justice Hunter:

- [1] This appeal arises as a result of an unfortunate dispute among family members concerning the administration of their late mother's estate. Two siblings were appointed joint executors and trustees in their mother's will. Disputes arose and the appellant brought petition proceedings to remove the respondent as co-trustee and co-executor and for other relief in relation to the administration of the estate. The respondent was prepared to consent to the order sought, provided that the appellant agreed that a bolt ring formerly belonging to their mother be given to a third sibling in accordance with what the respondent asserted to be their mother's wishes.
- [2] The appellant took the position that the ring had been gifted to her by her mother shortly before her death and the dispute proceeded to a hearing. The chambers judge concluded that the parties' mother had not been competent to make a gift of the ring, and directed the ring be provided to the third sibling. The judge then granted the order sought by the appellant. She also ordered that each party pay their own costs of the proceeding.
- [3] The appellant appeals on two grounds. She submits that the judge erred in making an order concerning the disposition of the ring without a formal application for such an order. She also submits that the judge erred in her costs disposition. As a further and alternative basis for her costs appeal, she seeks leave of the Court to introduce fresh evidence.
- [4] In my opinion, the judge was entitled to make a decision concerning the bolt ring and I can see no error in her consideration of the relevant issues. I would dismiss the appeal concerning that part of the order.
- [5] I am also of the view that on the record before her, the judge made no reversible error in her consideration of the costs of the proceeding, and would not give effect to that ground of the appeal based on the material and positions taken before the chambers judge. However, the fresh evidence changes the landscape somewhat. I would admit the fresh evidence, allow the appeal on costs and remit the question of costs to the chambers judge for her consideration as to whether the fresh evidence affects her decision on costs.

Chambers Judgment

- [6] The appellant, Patti Fern Rhodes, and the respondent, Donald Ray Myers, were appointed co-executors and co-trustees by their late mother, Elizabeth Jane Myers, under her Last Will and Testament (the "Will"). The appellant and respondent are sister and brother, and have two other brothers, Allan James Myers and Gayle Bernard Myers. As the brothers have the same last names I will refer to them by their first names in this judgment. For clarity, and without meaning any disrespect to anyone in the family, I will also refer to the appellant by her first name.
- [7] Disputes arose between Patti and her brothers concerning the administration of the estate. Two issues are of consequence to this appeal. The first concerned the disposition of a ring that had been made for Mrs. Myers by her deceased husband out of a metal bolt, referred to by the family as the bolt ring. The bolt ring had considerable sentimental (but not monetary) value to all of the siblings. Another issue concerned the proper disposition of funds totalling \$60,000 that Gayle removed from a bank account belonging to their late mother and placed in his own name.
- [8] Patti brought her petition pursuant to Rule 25-14(1.1) (a)-(c) of the Supreme Court Civil Rules, B.C. Reg. 168/2009, which reads as follows:
- (1.1) If there has been no application for estate grant, a person may, with notice, apply by petition to the court for an order
- (a) passing over an executor,
 - (b) appointing an administrator of the estate under section 132 of the Wills, Estates and Succession Act, [and]
 - (c) respecting production, delivery or filing of a testamentary document
- [9] Her petition sought the following orders:
1. An Order that Donald Ray Myers be removed as the Trustee of the Estate of Elizabeth Jane Myers, deceased, as of the date of this Petition;
 2. A further Order that Donald Ray Myers be removed as the Executor of the Will of Elizabeth Jane Myers, deceased, as of the date of this Petition;
 3. In the alternative, a declaration that Donald Ray Myers be passed over as the Trustee of the Estate of Elizabeth Jane Myers, deceased, as of the date of this Petition;
 4. In the alternative, a declaration that Donald Ray Myers be passed over as the Executor of the Will of Elizabeth Jane Myers, deceased, as of the date of this Petition;
 5. An order that Patti Fern Rhodes be appointed as sole administrator of the Estate of Elizabeth Jane Myers, deceased, as of the date of this Petition;

6. A declaration that the contents of the safety deposit box at the Kootenay Savings Credit Union located in Trail, British Columbia ("KSCU"), registered to Elizabeth Jane Myers, deceased, and Donald Ray Myers, forms part of the estate of Elizabeth Jane Myers;
7. An order vesting all assets, real and personal, of the Estate of Elizabeth Jane Myers in Patti Fern Rhodes;
8. An order that Donald Ray Myers facilitate the transfer of property and documents, including the approximate \$60,000.00 held in trust with the law firm of MZA Law in Cranbrook, British Columbia and the keys to the safety deposit box at Kootenay Savings Credit Union registered to Elizabeth Jane Myers, deceased, to Patti Fern Rhodes within 30 days of being removed as executor and trustee;
9. An order that the RIF Contract 124107785 currently held under the Deceased's KSCU member account no. 515684 be closed out and distributed to the named beneficiaries in equal shares;
10. An order for all necessary consequential accounts, directions, and inquiries;
11. An order that Donald Ray Myers indemnify the Estate of Elizabeth Jane Myers for the actual legal costs of the Petitioner in connection with and incidental to this Petition;
12. In the alternative, an order for the Petitioner's reasonable costs of and incidental to her Petition be paid from the Estate of Elizabeth Jane Myers on a solicitor-client basis; and
13. Such further and other relief as this Court may deem just.

[Emphasis added.]

[10] I have emphasized certain parts of the order sought that are relevant to the issues on this appeal.

[11] In his response to the petition, Donald consented to all of the orders sought except the costs indemnification order in para. 11, on the following conditions:

1. That the court orders that the Elizabeth Jane Myers' bolt ring, made for her by her late husband and currently in the possession of Patti Fern Rhodes be given to Allan James Myers in accordance with the wishes of the Deceased.
2. Alternatively, that the court direct Patti Fern Rhodes to distribute the bolt ring of Elizabeth Jane Myers, made for her by her late husband and currently in the possession of Patti Fern Rhodes, to Allan James Myers upon the distribution of the Estate in accordance with the wishes of the Deceased.

[12] When the petition was heard, most of the argument concerned the disposition of the bolt ring and whether that should be dealt with on the hearing of Patti's petition.

- [13] Donald took the position that the bolt ring was an asset of the estate and the Court had jurisdiction to make the order he sought concerning its proper disposition. He submitted that it was well-known in the family that their mother wanted Allan to have the bolt ring.
- [14] Patti took the position that while the Court would have jurisdiction to deal with the bolt ring at some point during the administration of the estate, it should not do so in the context of the petition. Patti asserted that their mother had gifted the ring to her shortly before her death. Donald's response was that their mother lacked the capacity to gift the ring to Patti at that time.
- [15] In reasons indexed at 2021 BCSC 2043, the chambers judge concluded that she had jurisdiction to deal with the bolt ring, and that to do so would assist the parties to move forward and conclude the estate without further litigation. It is not disputed that the Myers estate is not a large one. The judge also pointed to the object of the Supreme Court Civil Rules of securing the just, speedy and inexpensive determination of every proceeding on its merits. She then considered the evidence filed relating to the bolt ring.
- [16] The central question was whether Mrs. Myers had the capacity to gift the ring to Patti a few months before her death in April 2020. Evidence was filed indicating that Mrs. Myers was diagnosed with dementia in May 2018. Both Donald and Gayle gave evidence that their mother intended that the bolt ring go to Allan, and that their mother was not competent after 2018 to make a gift of it to Patti. Patti took the position that she had been gifted the bolt ring, but did not engage in the issue of their mother's capacity to make such a gift. Her position was that the issue should not be dealt with in the petition proceeding.
- [17] The chambers judge concluded that the evidence was sufficient to fairly deal with the bolt ring. She found that Mrs. Myers had intended the bolt ring to go to Allan after her death and that this fact was well-known to all four siblings. She also found that Mrs. Myers lacked the capacity to make a gift of the ring at the time Patti asserted the gift had been made. She cited a physician's geriatric consultation assessment as support for that conclusion. She accordingly directed Patti, as the executor of the estate, to distribute the bolt ring to Allan upon the distribution of the estate in accordance with the wishes of Mrs. Myers.
- [18] A second factual issue referred to by the judge concerned the order sought by Patti that Donald "facilitate the transfer of property and documents, including the approximate \$60,000.00 held in trust with the law firm of MZA Law in Cranbrook, British Columbia". The judge commented on the circumstances relating to the \$60,000 in this way:
- [22] On July 27, 2020, Gayle had sent his siblings a truly extraordinary email, advising them he had removed \$60,000.00 from KSCU account number ending in 40, and had opened his own account with these funds. He wrote that his purpose in doing so:

is to prevent further depletion of these funds due to the inability of the two executors to come to a cooperative solution towards administration of those items previously and currently being discussed. Bluntly put, I am done with the BULLSHIT that has occurred over the past year by one of the individuals receiving this email, and it is time to bring it to an end.

- [23] Gayle went on to write that he would continue to hold the \$60,000.00 until the issues the family was dealing with were concluded. At his discretion, he would gift each sibling their share, likely once all issues were concluded. He would deduct money from the share of anyone who took measures he deemed detrimental to the estate. In particular, he wrote that he would deduct \$500.00 per month from Patti's share until she gave the bolt ring to Allan.
- [19] The judge ultimately made the order sought by Patti, requiring Donald to facilitate return of the \$60,000 to the estate.
- [20] Patti's application to adduce fresh evidence establishes that, unknown to the chambers judge or the appellant, the \$60,000 fund had already been largely dissipated by the payment of Donald's legal fees relating to the petition. I will discuss the implications of this when I address the costs appeal.
- [21] On the question of costs, the chambers judge held that each party should pay their own costs.
- [22] The order entered tracked the language of the petition, other than for costs, and included the following direction:

THE COURT DIRECTS THAT:

11. Patti Fern Rhodes, as sole Executor of the Last Will and Testament of Elizabeth Jane Myers, deceased, to distribute the bolt ring to Allan James Myers upon the distribution of the Estate in accordance with the wishes of Elizabeth Jane Myers.
- [23] Patti appeals both the order concerning the bolt ring and the costs order. She also seeks to introduce fresh evidence relevant to the costs issue.

Issues on Appeal

- [24] The issues on appeal may be framed in this way:
- (i) Did the chambers judge err in making an order concerning the disposition of the bolt ring when that issue did not arise in the petition and no cross-application was filed seeking such an order?
- (ii) Did the chambers judge err on the record before her in ordering that each party pay their own costs?
- (iii) If the chambers judge did not err in making her costs order, should the fresh evidence application be admitted and the question of costs remitted to the chambers judge for reconsideration?

Analysis

Consideration of the Bolt Ring

- [25] The decision of the chambers judge was based on her assessment of the evidence. Normally, such a decision would not be subject to appellate intervention unless the decision was based on a palpable and overriding error in the assessment of the evidence, which is not asserted here. Instead, Patti's position is that the question of ownership of the bolt ring should never have been considered at all, as there was no proper application for such an order. Patti asserts that the judge made both procedural and substantive errors in ordering that the bolt ring be distributed to Allan on the petition proceeding.
- [26] Although the appellant has framed the issues as procedural and substantive, I propose to analyse the issues in terms of jurisdiction and discretion. The first question is whether the chambers judge had the jurisdiction to make the order directing Patti to distribute the bolt ring to Allan, having in mind the nature of petition proceedings and the need in this case to make a finding on a contested issue in order to resolve the dispute concerning the ring. If the judge did have the jurisdiction to grant the order she made, the question arises whether she should have made that order, which requires a consideration of any legal constraints on the judge and also whether the order can be upheld as a proper exercise of the Court's discretion.

The Jurisdiction Question

- [27] The central error asserted by Patti is the granting of what she characterizes as an "independent order" not available on the petition pleadings before the Court. She points out that the petition did not request any order concerning the bolt ring and no application was made by Donald by cross-petition or otherwise for an independent order addressing a single claimed asset of the estate. She submits that the process adopted by Donald to obtain an order concerning the bolt ring amounts to more than a mere irregularity, as it is not appropriate for a respondent to seek independent orders in a response to a petition.
- [28] Patti relies on this Court's decision in *Royal Trust Company v. Rattenbury*, [1937] 3 D.L.R. 204, for the proposition that a claim that property falls into a trust must be brought by an action. However, this Court held in *Re Eraut* (1963), 42 D.L.R. (2d) 469, that *Rattenbury* had been impliedly overruled by the Supreme Court of Canada in *Nordstrom v. Baumann*, [1962] S.C.R. 147, in which it was held that an order improperly made under an originating notice was a mere irregularity. The question was one of procedure, not jurisdiction: *Nordstrom* at 151.
- [29] Having said that, I agree with the appellant that it would not generally be appropriate for a respondent to seek an order that was truly independent of the orders sought in a petition without filing an independent application or petition seeking that relief. I do not, however, consider that the independent order characterization is apt for the circumstances at bar.

- [30] The petition sought an order vesting all assets, real and personal, of the estate of Elizabeth Jane Myers in Patti Fern Rhodes and for such further and other relief as the Court may deem just. The petition materials disclosed a live issue as to whether the bolt ring was an asset in the estate. Donald said that it was; Patti said that it was not, because it had been gifted to her. The determination of that issue cannot be said to be independent of the matters raised in the petition. Had the judge not addressed the issue, the order that all assets of the estate of the deceased be vested in the trustee would have left uncertainty as to whether the bolt ring was an asset included in the order. It was open to the judge to resolve that question to clarify the scope of the vesting order and avoid further litigation.
- [31] Furthermore, the trustees were at a stalemate concerning the disposition of the bolt ring. The court has the equitable jurisdiction, statutory and inherent, to intervene to break a deadlock of trustees where necessary to carry out the terms of the trust in the interests of the beneficiaries: *Kordyban (Trust Settlement) v. Kordyban*, 2003 BCCA 216 at para. 60. That is what the judge did in this case. In determining what is just and equitable, the court should be guided by the intentions of the testator and the interests of the beneficiaries: *Kordyban* at paras. 61-65.
- [32] Finally, to the extent that the objection is rooted in the undesirability of deciding contested facts on a petition, this Court has held that the modern approach to civil procedure is to allow courts to tailor trial procedures to a given case, in the interests of proportionality and access to justice, while preserving the court's ability to fairly determine a case on the merits. With that end in mind, it is no longer necessary for a judge hearing a petition proceeding that raises triable issues to refer the matter to trial if the matter can be resolved fairly on the record before the Court: *Cepuran v. Carlton*, 2022 BCCA 76 at paras. 159-166.
- [33] In my view, the chambers judge had the jurisdiction to direct the disposition of the bolt ring on the petition proceeding. The real question is whether it was an appropriate exercise of the court's jurisdiction to do so.

Did the judge err in exercising her discretion?

- [34] There are two reasons why, having jurisdiction to deal with the bolt ring, the chambers judge did not in err in the exercise of her jurisdiction to resolve the question of the disposition of the bolt ring. The first is based on the principle expressly relied on by the judge, that "(d)oining so is consistent with the object of the Supreme Court Civil Rules set out in Rule 1-3(1) of securing the just, speedy and inexpensive determination of every proceeding on its merits": *Reasons for Judgment*, at para. 10.
- [35] This principle includes conducting the proceedings in ways that are proportionate to the amount involved in the proceedings, the importance of the issues in dispute, and the complexity of the proceeding: Rule 1-3(2).

- [36] In this case, the amount involved was nominal, the issue was not complex, and the importance of the issue to the administration of the dispute related primarily to the need to resolve the stalemate between the trustees. The judge was satisfied that the record before her was sufficient to permit her to resolve the issue fairly. I agree that having in mind the proportionality principle, it was not an error for the judge to do so, despite Patti's decision not to engage fully in the issue.
- [37] The other reason I consider it to have been appropriate for the judge to address the issue of the bolt ring is the apparent conflict of interest Patti was in concerning the ring if she emerged from the hearing as the sole executor and trustee of the estate.
- [38] On this appeal, Patti relies on the judgment in *Jury v. Rogodzinski*, 2021 BCSC 2441, for the proposition that where a party applies to be appointed trustee of an estate and there is a dispute concerning whether they received certain property as an inter vivos gift from the deceased, the application should be dismissed with leave to renew once the underlying conflict regarding the inter vivos gift is resolved.
- [39] In *Jury*, Justice Kirchner reviewed much of the jurisprudence concerning the effect of conflicts of interest on an application of a party to be the executor and trustee of an estate. The following comment in his judgment illustrates the nature of the problem:
- [52] It has been held in a number of cases that an executor may be removed when involved or potentially involved in litigation against the estate in a personal capacity. In *Weisstock v. Weisstock*, 2019 BCSC 517, Justice Milman said:
- [43] It has repeatedly been held that a conflict of interest may disqualify an executor from acting in that capacity: *Re Becker* (1986), 57 O.R. (2d) 495 (Ont. Surr. Ct.); *Thomasson Estate (Re)*, 2011 BCSC 481; *Stevens v. Whittaker*, 2012 BCSC 1188; *Ching Estate (Re)*, 2016 BCSC 1111. Such a conflict may arise if the executor has or may have a claim against the estate or if the estate has or may have a claim against him or her.
- [53] In particular, courts have exercised the authority to remove or pass over an executor where there was a dispute over an inter vivos gift made by the deceased to the executor before death.
- [54] In *Thomasson Estate (Re)*, 2011 BCSC 481, Justice Gerow ordered that one of the executors named in a will, Alex Thomasson, should be passed over as trustee because he had received an inter vivos transfer of property from the testator, his father. The beneficiaries of the estate, the testator's other children, brought the application to have Alex Thomasson passed over as trustee on the basis the beneficiaries claimed the property he received in the inter vivos transfer belonged to the estate. Justice Gerow noted that courts are hesitant to interfere with the testator's right to nominate an executor but held that the potential for conflict on the part of the proposed executor was sufficiently disabling that he ought to be passed over.

- [40] Patti has asserted that she was given an inter vivos gift by the deceased shortly before their mother's death, an assertion that was contested by her siblings. In her petition she sought removal of Donald as executor and trustee of the estate, leaving her as the sole executor and trustee of their mother's estate. The logical application of the result in *Jury* would have been to dismiss Patti's application to remove Donald as executor and trustee, with leave to renew her application once the underlying dispute had been resolved. This would have left two co-executors, one arguing that the ring was not part of the estate and one arguing that it was, which was the situation that led to the petition being filed in the first place. It was open to the chambers judge to resolve that question, which allowed the orders sought by Patti to be made.
- [41] The principal substantive issue raised by Patti against the judge's order is the argument that the chambers judge erred in ordering a distribution of the estate in a manner not provided for in the Will. I do not consider this submission to reflect the nature of the order made by the chambers judge.
- [42] There was no issue relating to the construction of the Will. Mrs. Myers left her estate in equal parts to her four children, without including any specific bequests of her personal property. She authorized her trustees to "decide which assets of my estate to allocate to any share or interest in my estate and the value of each of those assets." Thus, the Will did not indicate who should receive the bolt ring. The only direction was that the trustees should decide. But the trustees were at an effective stalemate.
- [43] Patti takes the position on appeal that she, as trustee, is the person who is empowered under the Will to distribute the assets of the Estate to the beneficiaries. But that is true only if Donald is removed as trustee, which was one of the issues the judge had to consider on the petition. Had the judge removed Donald as trustee without resolving the sole question that divided the two co-trustees, the conflict of interest to which I have referred would have become a disabling conflict, preventing Patti from making the determination that was the focus of the dispute among the family.
- [44] In my view, characterizing this problem as a distinct substantive issue masks the problem the judge faced, namely how to resolve the dispute between the co-trustees as to the disposition of the bolt ring in circumstances where the petitioner who sought sole status as trustee was in a potential conflict of interest if the order sought was made. While the issue could have been addressed on an application for directions, I have already held that the procedure adopted was not invalidating and had the advantage of reducing the need for further litigation over the same issue.
- [45] The final argument raised by Patti is the submission that the judge erred in law by finding that the deceased expressed a testamentary wish to gift the bolt ring to Allan. She relies on ss. 4 and 58 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA].

- [46] Section 4 of WESA addresses the circumstances in which evidence of testamentary intent is admissible to assist in the construction of a testamentary instrument. The construction of the Will was not at issue and accordingly s. 4 has no application to this case.
- [47] Similarly, s. 58 of WESA addresses the circumstances where a record, document or writing or marking on a will or document represents the testamentary intention of the deceased. That circumstance does not exist here.
- [48] In my view, this argument is simply another means of asserting that the disposition of the bolt ring should not have been addressed. I have already explained why it was necessary to do so if the administration of the estate was to move forward. I would not give effect to this ground of appeal.
- [49] For these reasons, I would dismiss the appeal in relation to the disposition of the bolt ring.

Costs

- [50] Costs awards are discretionary and will not be disturbed on appeal unless the judge made an error in principle, or the costs award is clearly wrong: *Conner Estate v. Worthing*, 2021 BCCA 231 at para. 55. The modern approach to the award of costs in estate litigation is to follow the costs rules that apply in civil litigation unless public policy considerations relating to estate litigation apply: *Hollander v. Mooney*, 2017 BCCA 238 at paras. 39-41.
- [51] There are two elements to the appellant's costs appeal. On the record before the chambers judge, Patti submits that she should have been awarded her costs from the estate, with Donald bearing his own costs. If that submission is unsuccessful, she applies to introduce fresh evidence that could be relevant to the determination of the costs of the petition.
- [52] The chambers judge relied on the principles explained in *Hollander* and "considered the conduct of both parties, as well as their siblings, in this matter having come before the court": at para. 39. In this case, the judge concluded that "Donald and Patti each bear some responsibility for this unnecessary petition being heard": at para. 40. The judge explained her conclusion in this way:
- [41] I have concluded that the most appropriate order in these unfortunate circumstances is for Patti and Donald to each to pay their own costs. Donald had substantial success on the petition, which Patti pressed on with unnecessarily. But Donald's behaviour in dealing with the estate, not least in acquiescing in Gayle's conduct in withdrawing the \$60,000.00 and using it to pressure Patti, was a significant factor in forcing Patti to seek his removal as executor and trustee in the first place. While an imperfect solution, I consider it appropriate for them each to bear their own costs of this petition.
- [53] The judge also considered Gayle's role in the dispute and made the following comments at paras. 39-40:

Much of the discord can be laid at the feet of a non-party, Gayle, whose conduct in removing the \$60,000.00 from the joint account, and using it to try to pressure Patti to do what he wanted with the estate was unconscionable. Donald acquiesced in Gayle's conduct. Gayle is not a party, and cannot be ordered to pay costs, despite his significant role in the underlying dispute.

[Emphasis added.]

[54] In her factum, Patti advances three grounds to challenge the chambers judge's order that each party pay their own costs. First, she submits that she had to continue with the petition to obtain the orders relating to the Kootenay Savings Credit Union. Secondly, she submits that she was successful on all of the issues raised in her petition. Finally, she submits that if she is successful in overturning the decision concerning the bolt ring, she will have succeeded in all issues addressed by the Court.

[55] The orders relating to the Kootenay Savings Credit Union were not at issue in the petition. Donald consented to all the orders sought, provided the bolt ring went to Allan. Patti was unsuccessful in arguing the only live issue. I cannot agree that she was successful on the application before the chambers judge. I would not interfere with the judge's costs order on the material known to the judge and to the appellant at the time the petition was argued.

[56] However, in this Court, Patti seeks to adduce evidence not available at the time the petition was argued.

[57] One of the orders sought by Patti in her petition was that Donald facilitate the return of the approximately \$60,000 in estate funds taken by Gayle and placed in a solicitor's trust account. Donald consented to this order, subject to the disposition of the bolt ring. The judge made the order sought, based on her decision concerning the bolt ring and Donald's consent to the order.

[58] The fresh evidence tendered by the appellant indicates that four weeks after the decision of the chambers judge, Donald advised Patti that only approximately \$20,000 remained of the \$60,000 in estate funds. The rest had been used to pay legal expenses of Donald and Gayle, who were listed as joint clients on the law firm's accounts. Email correspondence subsequently produced indicated that Gayle had been actively involved in retaining Donald's counsel and instructing them on various matters relating to the estate disputes.

[59] Patti submits that this evidence shows that Gayle was the real litigant, and the underpinning of the order that Patti should bear her own costs was unsound. She argues that Donald's conditional consent to the order sought was empty, at least in respect to the order that he facilitate the return of the \$60,000 fund to the estate, because at the time the petition was heard, he must have been aware that the fund had been depleted. She further argues that Donald acted inappropriately because he delegated core functions as trustee to Gayle.

[60] With respect to Gayle's potential liability for costs, Patti submits that the chambers judge erred in stating that "Gayle is not a party, and cannot be ordered to pay costs, despite his significant role in the underlying dispute". I agree with that submission. The Court does

have jurisdiction to order costs against a non-party, though such an award is unusual and exceptional, and should only be made in special circumstances: see *Lower v. Stasiuk*, 2013 BCCA 389 at paras. 28-33; *Hollander* at para. 54. Whether those circumstances existed within the scope of the authorities would have been a matter for the chambers judge, as the court has authority to order costs against a non-party.

[61] As the Supreme Court of Canada recently affirmed in *Barendregt v. Grebliunas*, 2022 SCC 22, the test set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, applies whenever a party seeks to adduce additional evidence on appeal. That test, as restated in *Barendregt* at para. 29, requires that the following be met:

- (i) the evidence could not, by the exercise of due diligence, have been obtained for the trial [or petition];
- (ii) the evidence is relevant in that it bears upon a decisive or potentially decisive issue;
- (iii) the evidence is credible in the sense that it is reasonably capable of belief; and
- (iv) the evidence is such that, if believed, it could have affected the result at trial [or on the petition].

[62] In my view the fresh evidence meets these requirements. In light of the position taken by Donald on the petition, there would have been no reason to question the existence of the \$60,000 fund, so the due diligence requirement is met. The evidence is credible and potentially relevant to the costs issue. It might reasonably have affected the judge's order for costs. I would admit the fresh evidence for the limited purpose of reconsideration of the costs award.

[63] As to the appropriate remedy, Gayle was not on notice that a costs award might be sought against him in this Court, and the appellant is not seeking an order from this Court that Gayle be responsible for any portion of the costs of the petition. I agree with the appellant that the facts contained in the fresh evidence might have affected the judge's disposition on costs, but that is a question best left to the chambers judge to decide.

[64] In my view, the appropriate remedy is to allow the appeal on costs for the sole purpose of remitting the question of costs to the chambers judge to assess whether the fresh evidence (or any evidence relevant to the fresh evidence that the chambers judge admits) affects the exercise of her discretion on costs.

Disposition

[65] In summary, I would dismiss the appeal relating to the bolt ring but allow the application to admit fresh evidence. I would allow the appeal on costs for the limited purpose of remitting the issue of costs to the chambers judge to consider whether the fresh evidence affects her determination of costs.

[66] As success on this appeal has been divided, I would order that each party bear their own costs of the appeal.

"The Honourable Mr. Justice Hunter"

I AGREE:

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Mr. Justice Willcock"

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