

CANADA / JUDGMENT

Walker Estate (Re)

2024 BCSC 250

COURT

Supreme Court of British Columbia

DECIDED

14 February 2024

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2024 BCSC 250 Walker Estate (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Walker Estate (Re),

2024 BCSC 250

Date: 20240214

Docket: S223500

Registry: Victoria

Between:

Colin Nicholas Walker and Thomas Michael Walker

Plaintiffs

And

Catherine Lynn Walker, executrix of the Estate of Alice Elizabeth Walker

Defendant

Before: The Honourable Mr. Justice Tindale

Reasons for Judgment

In Chambers

(Appearing by videoconference)

Counsel for plaintiffs:

P.B. Newman

Counsel for defendant:

M. Selly

Place and Date of Hearing:

Victoria, B.C.

October 17, 2023

Place and Date of Judgment:

Victoria, B.C.

February 14, 2024

- [1] The plaintiffs, Colin Nicholas Walker and Thomas Michael Walker, seek leave to proceed with the within action as well as other relief pursuant to a notice of application filed April 27, 2023.
- [2] The defendant Catherine Lynn Walker is opposed to the relief sought.

Background

- [3] On December 13, 2020 Alice Elizabeth Walker (the "Deceased") died leaving a will dated July 8, 2015 (the "Will").
- [4] The Will appoints the defendant as the sole executor of the Deceased's estate (the "Estate"). The Will provides that the residue of the Deceased's Estate be divided into four equal shares with two shares being paid to the defendant and one share being paid to each of the plaintiffs.
- [5] The Deceased appointed her daughter, the defendant, and her son, Barry Walker, as her attorneys under a power of attorney in October 2000.
- [6] In 2010 the Deceased moved into an assisted living residence.
- [7] Barry Walker died on May 1, 2015.
- [8] The plaintiffs are the children of Barry Walker and Cathy Cook. Cathy Cook is the widow of Barry Walker.
- [9] On February 25, 2016, the Deceased signed a codicil (the "Codicil") which bequeathed \$50,000 to the defendant and Cathy Cook. The Codicil also appointed Cathy Cook as trustee of the plaintiffs' shares of the Deceased's Estate (the "Trustee") and named Cathy Cook as an alternate executor.
- [10] On July 7, 2016 the Deceased is purported to have written a note (the "Note") which revokes the Codicil.

- [11] On October 13, 2021 the defendant filed a petition in the Victoria Registry under Action No. 213134 (the "Petition") to determine the Deceased's wishes with regard to her Estate.
- [12] A notice of hearing to have the Petition heard was filed on October 19, 2022.
- [13] On November 9, 2022 the plaintiffs filed a notice of civil claim in the within action.
- [14] The hearing of the Petition was adjourned after the notice of civil claim was filed by the plaintiffs.
- [15] On May 16, 2023 Madam Justice Jackson stayed the notice of civil claim until the determination of this notice of application filed April 27, 2023.

Position of the Parties

Plaintiffs

- [16] The plaintiffs seek orders that the defendant in her personal capacity be added as a defendant in the within action, that she be passed over as executrix of the Will and that the Court appoint an administrator. The plaintiffs also seek orders relating to amending the style of cause and service of the amended notice of civil claim.
- [17] The plaintiffs are concerned that the value of the Deceased's Estate is less than they believed it should be.
- [18] The plaintiffs say that the Deceased had substantial income which exceeded her living expenses. The plaintiffs rely on Cathy Cook's Affidavit #1 made on April 27, 2023 where she attaches the 2014 Tax Return Summary of the Deceased showing a total income of \$125,311.39.
- [19] The plaintiffs note that para. 12 of the Petition reads:

The estate of the Deceased consists of:

- a) personal belongings of no commercial value.
 - a) Investment account and RIF account located at Solguard Financial, Victoria, British Columbia, having a total balance of approximately \$1,329,400 at the date of the Deceased's death.
 - b) chequing and savings accounts located at 2 branches of Coast Capital Savings in Victoria, British Columbia, having a total balance of approximately \$67,500 at the date of the Deceased's death.
- [20] The plaintiffs say that after they received the Petition they then received further information about the Deceased's Estate showing a different value for the Estate. For example, the plaintiffs received the statement of accounts from the Coastal Community Credit Union which they were not previously aware of.

- [21] The defendant deposed in her affidavit made on May 10, 2023 that the estimated value of the Deceased's Estate was \$2,090,879. The plaintiffs argue that this is a significant contradiction from the estimate of the Deceased's Estate in the Petition.
- [22] The plaintiffs argue that even though the defendant adjusted the value of the Deceased's Estate upwards, it is still far less than it should be and the defendant has not explained or provided evidence for this depletion.
- [23] The plaintiffs argue that the defendant is the only one to have access to the Deceased's Estate since the death of Barry Walker.
- [24] The plaintiffs argue that the defendant's evidence regarding her management of the Deceased's Estate is inconsistent.
- [25] The defendant made an affidavit in the Petition proceeding on September 30, 2021 in which she deposed to the following:
- i. "After my brother's death in 2015, I was her only attorney and I manage her financial affairs": para. 17.
 - ii. "By the time my mother signed the Codicil in 2016, she could barely see and she had great difficulty with her hearing. She had become very adept at covering up her difficulties, however": para. 19.
- [26] The defendant made another affidavit in the Petition proceeding on March 7, 2022 in which she deposed to the following:
- i. "After Barry died, I took over all of the handling of my mother's affairs. In the spring of 2016, she asked me to direct her mail to my address in Sointula as she believed that papers had disappeared from her suite": para. 15.
 - ii. "When she could not provide any details about what she was worried about, I thought she was confused. As she had recently updated her Will and could not remember doing that, I took her statements about changes to her Will as another indication of her difficulties with her short-term memory": para. 18.
 - iii. "my mother had some short-term memory loss in the last few years of her life. At some times she was less mentally competent than at other times in the last few years of her life. I was aware of this and because I was aware of this, I discounted my mother's concerns when she talked about having made changes to her Will": para. 20.
- [27] The plaintiffs argue that the evidence the defendant swore in the Petition excerpted above contradicts the following examples of the Deceased managing her own affairs, which can be found in the defendant's affidavit made on May 10, 2023 in the within proceeding:
- i. "the Deceased had access to her own accounts all her life. She talked to Solguard over some years after Barry's death and made her own financial decisions with their help": para. 17.

- ii. "In 2016 the Deceased organized a trip to Yellow Point Lodge. She made all the arrangements herself, only asking me if I was available on certain dates.": para. 21.
 - iii. " the Deceased was never in a dementia ward at Comox Valley Senior's Village. She was classified as Complex Care. The Deceased simply had age-related short-term memory loss. Her long-term memory was fine.": para. 27.
 - iv. "In July 2014 is the Deceased came to stay with my son and I in Duncan. She took an inter-city bus on her own.": para. 34.
 - v. "I did not influence the Deceased's Will (the "Will") of July 2015 in any way. This was done only by the Deceased and her lawyer of many decades, Terry Swan. My only involvement was to bring the Deceased to Victoria to sign her updated Will.": para. 40.
- [28] The plaintiffs argue that the defendant has only provided the financial statements of the Deceased's actions several years prior to her death.
- [29] The plaintiffs argue that after a review of the documents found in Kyle O'Connor's Affidavit #1 on April 20, 2023 and the defendant's Affidavit #1 made on 2023, there is approximately \$385,000 not accounted for from the Deceased's Estate.
- [30] The plaintiffs argue that the defendant has not provided them with meaningful disclosure regarding the Deceased's finances.
- [31] The plaintiffs argue that given the facts of this case their claim is not bound to fail.
- [32] The plaintiffs argue that the defendant has misappropriated funds and they should be given leave to proceed with the within action pursuant to s. 151 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA].
- [33] The plaintiffs argue that the piecemeal disclosure they received from the defendant created more questions than it answered. For example, it is not clear why the defendant opened an account to hold in trust funds from the Deceased's Estate.
- [34] The plaintiffs request that their application for the production of records be adjourned generally.

Defendant

- [35] The defendant says that the Petition was commenced to determine the authenticity of the Note. The defendant notes that the plaintiffs' argument is that they have not received a full accounting of the Deceased's Estate. However, the defendant submits that that she has not done an accounting of the Deceased's Estate because she has not been granted probate yet. The defendant argues that probate will not be granted until the Will is determined which was the purpose of the Petition.

- [36] The defendant argues that it is difficult to understand the plaintiffs' concerns when her estimate of the Deceased's Estate is over \$2,000,000.
- [37] The defendant argues that the plaintiffs' contention that money is missing from the Deceased's Estate is not made out in the evidence. In any event those concerns could have been addressed in the Petition without having a multiplicity of proceedings.
- [38] The defendant argues that the within action is not being brought in good faith. Rather, the defendant submits it is influenced by Cathy Cook who stands to lose \$50,000 if the Note is found to have been written by the Deceased.
- [39] The defendant argues that that the within proceeding is an abuse of process.
- [40] The defendant argues that the Deceased's Estate will be accounted for and there is no actual evidence of any misconduct on her part. The defendant notes that the purpose of the Petition was to determine the Will and she only gave an estimate of the Estate in that proceeding because the value of the Estate was not an issue.
- [41] The defendant argues that that the within proceeding should be dismissed or at least adjourned until a proper accounting can be made.
- [42] In her affidavit made on May 10, 2023 in the within proceeding the defendant deposed to the Deceased's expenses at para. 35:

In response to paragraph 11 of Cathy Cook's Affidavit, the Deceased's 2014 tax return shows a net income of \$118,521. Approximately \$40,000 of this income was dividends and interest which remained invested. As well, the Deceased paid \$33,511 in taxes. This leaves a cash flow of about \$45,010. Berwick's basic costs were about \$38,484 a year in 2014. This leaves \$6,526 out of which the Deceased had medical expenses of \$7,766 leaving her a negative balance of -\$1,240. The Deceased needed to purchase her own clothes and toiletries.

- [43] The defendant argues that any determination of the Petition would not change her position with regard to the Deceased's Estate. However the defendant submits that if the Note is determined to be authentic, Cathy Cook would lose \$50,000.
- [44] The defendant argues that she has made disclosure showing \$2,000,000 in the Deceased's Estate. She had no duty to produce bank accounts from 2014 to the present day.
- [45] The defendant argues that there was no evidence that the Deceased was incompetent and there is nothing inconsistent with the Deceased making her own decisions when the defendant had a power of attorney. The defendant notes that she had a power of attorney since 2000.
- [46] The defendant says that she has disclosed the account that she has held in trust for the Deceased's Estate to the plaintiffs.

[47] The defendant argues that s. 151 of WESA requires that the within proceeding be necessary or expedient for the protection of the estate or specified persons.

[48] The defendant argues that there is no evidence that she should be passed over as the executrix of the Deceased's Estate.

[49] The defendant seeks special costs against the plaintiffs and Cathy Cook.

Decision

Legal Framework

[50] The relevant sections of WESA for this application read:

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

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

(2) The administrator of an estate

- a) has all the rights, powers and duties of a personal representative, other than the right to distribute the estate,
- b) is subject to the control of the court and must act under its direction, and
- c) is entitled to reasonable compensation under the Trustee Act or as otherwise determined by the court.

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

(1) Despite section 136 [effect of representation grant], a specified person, may with leave of the court, commence proceedings in the name of the specified person and on behalf of the estate of the deceased person

- a) to recover property or to enforce a right, duty or obligation owed to the deceased person that could be recovered or enforced by the personal representative, or
- b) to obtain damages for breach of a right, duty or obligation owed to the deceased person.

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

(2) Despite section 136, a specified person may, with leave of the court, defend in the name of the specified person and on behalf of the estate of a deceased person, a proceeding brought against the deceased person or the personal representative.

(2.1) A specified person may apply for leave of the court under subsection (2) in the proceeding described in that subsection.

(3) The court may grant leave under this section if

· the court determines the specified person seeking leave

i. has made reasonable efforts to cause the personal representative to commence or defend the proceeding,

ii. has given notice of the application for leave to

a. the personal representative,

b. any other specified persons, and

c. any additional person the court directs that notice if to be given, and

iii. is acting in good faith, and

· it appears to the court that it is necessary or expedient for the protection of the estate or the interest of a specified person for the proceeding to be brought or defended.

(4) On application by a specified person or a personal representative, the court may authorize a person to control the conduct of a proceeding under this section or may give other directions for the conduct of the proceeding.

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

(2) A person having an interest in an estate may apply to the court to remove or pass over a person otherwise entitled to be or to become a personal representative.

(3) Subject to the terms of will, if any, and to subsection (3.1), the court, by order, may remove or pass over a person otherwise entitled to be or to become a personal representative if the court considers that the personal representative or person entitled to become the personal representative should not continue in office or be granted probate or administration, including, without limitation, if the personal representative or person entitled to become the personal representative, as the case may be,

a) refuses to accept the office of or to act as personal representative without renouncing the office,

b) is incapable of managing his or her own affairs,

(4) An order of the court removing a personal representative does not remove that person as a trustee.

- [51] The defendant argues that the plaintiffs' notice of application is deficient because they have not provided a proper legal basis as to why the order should be granted. Upon a review of the notice of application I am satisfied that a proper factual basis as well as the appropriate legal principles have been plead.
- [52] The defendant argues that the plaintiffs are "straw men" in this litigation. The defendant says the litigation is an abuse of process and seeks special costs against Cathy Cook who the defendant says is the promoter of and has a direct interest in the litigation: *AM Gold Inc. v. Kaizen Discovery Inc.*, 2022 BCCA 284 at para. 62.
- [53] In my view there is no evidence on this application sufficient to establish that Cathy Cook is the promoter of or has a direct interest in this litigation. There is no evidence that the notice of civil claim was brought for an improper purpose and constitutes an abuse of process.

Leave Application

- [54] The test for granting leave to commence proceedings on behalf of an estate was discussed by the Court of Appeal in *Hoggan v. Silvey*, 2022 BCCA 176:
- [42] There is no quarrel over the question of whether a petitioner applying under s. 151 of WESA has to establish an arguable case in order to obtain leave. That factor is present in most, if not all, leave applications. While sometimes worded differently, such as "has a reasonable prospect of success" or "not bound to fail", the test itself does not have a high threshold.
- [44] Section 151 (3) (a) permits the court to grant leave if the person seeking leave has made reasonable efforts to cause the personal representative to commence or defend the proceeding, given notice of the application for leave to specified persons, and is acting in good faith. In addition, s. 151 (3) (b) requires that:

it appears to the court that it is necessary or expedient for the protection of the estate or the interests of a specified person for the proceeding to be brought or defended.

- [45] The disjunctive "or" is used, which means that the factors are separate, not cumulative. (See *Bunn* at para. 40).

- [46] The words of s. 151 (3) (b) WESA should, in my view, be read as follows:

(b) it appears to the court that it is necessary or expedient for the protection of the estate
or

that it is necessary or expedient for the protection of the interests of a specified person for the proceeding to be brought or defended.

[Emphasis in original.]

- [55] The relief sought in the notice of civil claim is:

- a) A declaration that the Defendant breached the fiduciary duty that she owed to the Deceased while acting in her capacity as her attorney, under a Power of Attorney Agreement;
- b) A declaration that the Defendant unduly influenced the Deceased to transfer assets to the Defendant, at a time when the Deceased was vulnerable and/or lacked the capacity to appreciate the consequences of said transfer;
- c) A declaration that all monies that the Defendant received from the Deceased from the date that she was appointed attorney to present is held in trust for the Deceased's estate;
- d) Damages for breach of trust;
- e) Tracing and accounting;
- f) Disgorgement of profits and equitable compensation; and
- g) Special costs.

[56] The plaintiffs argue that the defendant has made contradictory statements in her materials filed in the Petition and the within action relating to the Deceased's physical and mental state as well as the defendant's management of the Deceased's assets.

[57] In my view it is not a contradiction for the defendant to depose that she has managed the finances of the Deceased and that the Deceased was still active in making some of her own financial decisions. These two general categories of statements can coexist together.

[58] The defendant had power of attorney along with Barry Walker from the year 2000. The Deceased still managed some of her financial affairs after 2000.

[59] The plaintiffs say that money is missing or has not been accounted for and have provided evidence that the defendant opened an account and transferred the approximate amount of \$363,250 from the Deceased Estate to this account. At para. 12 in her affidavit made on May 10, 2023 the defendant deposed to the following with regard to this account:

I have a trust account, with money given to me by the Deceased, with holdings of \$364,000 including interest that I hold for her estate. Attached as Exhibit "O" is a copy of the screenshot showing the monies held in trust.

[60] The defendant in her affidavit made on May 10, 2023 estimates the value of the Deceased's Estate and explains why certain monies were placed in different accounts.

[61] The Deceased clearly had a significant income however the defendant has provided evidence relating to tax liabilities, costs for the Deceased's residential care and medical expenses showing that the Deceased used all of her income in 2014.

[62] The defendant argues that because of the dispute regarding the Note and the fact that the Petition has not been heard, she has not been in a position to apply for probate. It is for this reason that the defendant has not provided a formal accounting of the Deceased's Estate.

- [63] The plaintiffs have also provided evidence that they say establishes that approximately \$384,000 of the Deceased's Estate has not been accounted for. However, the plaintiffs have not provided any evidence that the defendant has breached any duty or obligation owed to the Deceased's Estate.
- [64] There has not been a full accounting done by the defendant of the Deceased's Estate. The lack of a full accounting is due to the fact the defendant has not been granted probate. In turn, probate has not been granted because of the ambiguity the Note caused in relation to the Deceased's intention.
- [65] The plaintiffs' concerns based on the evidence on this application are little more than speculation.
- [66] There also appears to be significant mistrust between the defendant, the plaintiffs and Cathy Cook.
- [67] The plaintiffs are beneficiaries under the Will and, therefore, specified persons pursuant to the provisions of WESA.
- [68] The protection of the plaintiffs' interest in the Deceased's Estate is one of the purposes of the notice of civil claim. However in my view despite the relatively low bar that the plaintiffs have to establish to be granted leave, there is no evidence beyond speculation that the defendant has breached any fiduciary duties or influenced the Deceased to transfer assets to her. It is neither necessary nor expedient to grant leave to the plaintiffs to proceed with the within action either for the protection of the Estate or their interests as specified persons.
- [69] The plaintiffs' application for leave is dismissed.

Removal of the Defendant as Executor

- [70] The plaintiffs also seek to have the defendant removed as executrix of the Deceased's Estate.
- [71] Madam Justice Ahmad reviewed the legal framework for removing an executor in *Nand Estate (Re)*, 2022 BCSC 1718:
- [10] The Court has power, under both s. 30 of the Trustee Act, R.S.B.C. 1996, c. 464 as well as its own inherent jurisdiction, to make an order removing a trustee: *Dirnberger Estate*, 2016 BCSC 439 [*Dirnberger Estate*] at para. 9, citing *Morelli v. Morelli*, 2014 BCSC 106 at para. 29.
- [11] Section 158(3) of the WESA allows the Court to remove a person entitled under a will from being a personal representative in the circumstances enumerated in that section. Subsection 158(3)(f)(iii) allows for removal where the personal representative is:

(iii) otherwise unable to or unreasonably refuses to carry out the duties of a personal representative,

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

- [12] Notwithstanding that jurisdiction, courts are very hesitant to interfere with the discretion of the will-maker to remove an Executor. To do so, good reason must be shown for believing that the interests of a person entitled under the will are in danger: *Re: Estate of Andre Jacques Blitz, Deceased*, 2000 BCSC 1596 at para. 20.
- [13] Indeed, in deciding whether to remove an estate's trustee, the Court's main guide should be "the welfare of the beneficiaries": *Crawford v. Jardine*, 1997 O.J. No. 5041 (Ont. Ct. (Gen. Div.)) at para. 18.
- [14] In *Dirnberger Estate*, at para. 11, the Court set out the four categories of conduct on an Executor's part that will warrant removal as follows:
- a) endangerment of the trust property;
 - b) want of honesty;
 - c) want of proper capacity to execute the duties; and
 - d) want of feasible fidelity.
- [15] In *Parker v. Thompson (Trustee)* 2014 BCSC 1916, at paras. 35 to 43, the Court added "actual dishonesty" and "lesser basis of a trustee's ability to act impartially" as bases for removing a trustee.
- [16] It also reiterated the removal of a trustee "should not be lightly entertained", and citing *Radford v. Radford Estate*, 2008 CarswellOnt 5297, 43 E.T.R. (3d) 74, set out a number of other considerations to apply when considering an application for the removal of a trustee. They are:
- removal must be the only course to follow;
 - non-removal must likely prevent the proper execution of the trust; and
 - removal is not intended to punish for past conduct.
- [17] The existence of friction between a trustee and one or more of the beneficiaries is usually not sufficient, of itself, to justify the removal of the trustee: *Dirnberger Estate* at para. 10, citing *Erlichman v. Erlichman*, 2000 BCSC 173 at para. 8.
- [72] In my view there is not sufficient evidence on this application to support the plaintiffs' allegation that the defendant has endangered the trust property, suffers from a want of honesty, is not impartial or does not have the capacity to execute her duties in relationship to the Will.

- [73] The concerns of the plaintiffs with regard to the defendant's actions are based on an incomplete accounting of the Deceased's Estate. The defendant brought the Petition to determine the authenticity of the Note so that the Deceased's intention with regard to her Estate could be established. The defendant has not yet been granted probate and was not required to provide a full accounting when the notice of civil claim was filed.
- [74] The defendant has provided a number of explanations and estimate of value of the Deceased's Estate. In my view there is nothing in the evidence on this application which would warrant the removal of the defendant as the executrix of the Deceased's Estate.
- [75] The removal of the defendant as executrix should not be lightly entertained. Removal of the defendant is not the only course to follow in the administration of the Deceased's Estate.
- [76] The plaintiffs' application to remove the defendant as executor is dismissed.

Conclusion

- [77] The plaintiffs' application for leave to proceed with the within action is dismissed.
- [78] The plaintiffs' application that the defendant be passed over and removed as the executrix of the Will is dismissed.
- [79] Given the orders that have been made, the other orders sought by the plaintiffs are unnecessary and are dismissed.

Costs

- [80] The defendant has been successful on this application and is entitled to costs however I grant leave to either party to make submissions with regard to the issue of costs including special costs if necessary.

"The Honourable Mr. Justice Tindale"

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