

CANADA / JUDGMENT

Walker v. Walker

2025 BCCA 64

COURT

British Columbia Court of Appeal

DECIDED

7 March 2025

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2025 BCCA 64 Walker v. Walker

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Walker v. Walker,

2025 BCCA 64

Date: 20250307

Docket: CA49747

Between:

Colin Nicholas Walker and Thomas Michael Walker

Appellants

(Plaintiffs)

And

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

Respondent

(Defendant)

Before:

The Honourable Mr. Justice Harris

The Honourable Madam Justice DeWitt-Van Oosten

The Honourable Justice Donegan

On appeal from: An order of the Supreme Court of British Columbia, dated

February 14, 2024 (Walker Estate (Re), 2024 BCSC 250, Victoria Docket S223500).

Counsel for the Appellants:

P.B. Newman

Counsel for the Respondent:

M.D. Selly

B. Scott

Place and Date of Hearing:

Victoria, British Columbia

February 11, 2025

Place and Date of Judgment:

Vancouver, British Columbia

March 7, 2025

Written Reasons by:

The Honourable Mr. Justice Harris

Concurred in by:

The Honourable Madam Justice DeWitt-Van Oosten

The Honourable Justice Donegan

Summary:

This appeal arises from a dispute over the execution of the will and estate of the respondent's mother, also the appellants' grandmother. The chambers judge refused the appellants' application for leave to proceed with an action against the respondent pursuant to s. 151 of the Wills, Estates and Succession Act [WESA] and their application to pass over the respondent and remove her as executrix. The appellants challenge the order on the basis the chambers judge misapplied the WESA, went beyond a limited weighing of the evidence, and misapprehended the evidence. They also apply to adduce fresh evidence. Held: Appeal dismissed. The chambers judge did not go beyond what was required at the leave stage or misapprehend the evidence. He also did not err in his interpretation or application of the WESA. The application to adduce fresh evidence is also refused. The evidence could have been obtained and placed before the chambers judge through due diligence and would not reasonably have affected the result.

Reasons for Judgment of the Honourable Mr. Justice Harris:

Introduction

- [1] This is an appeal from an order refusing the appellants leave to proceed with an action pursuant to s. 151 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA] and dismissing an application to have the respondent removed as executrix of the deceased's estate.
- [2] The chambers judge refused leave principally because he concluded that there was no evidence beyond speculation that the respondent had breached any fiduciary duties or influenced the deceased to transfer assets to her. The judge found it was neither necessary nor expedient to grant leave to the appellants to proceed with the action either for the protection of the estate or their interests as specified persons. The application to remove the respondent as executrix was dismissed because there was no sufficient evidence to support the appellants' allegation that the respondent had endangered the trust property, suffered from a want of honesty, was not impartial nor had the capacity to execute her duties in relationship to the will.
- [3] The appellants contend that the judge erred by going beyond a limited weighing of the evidence and applied an erroneous legal test to the exercise of his discretion to grant leave to commence an action pursuant to s. 151 of the WESA. They say if we accede to their argument on leave, then their appeal of the order refusing to remove the respondent as executrix should also be allowed. They also invite us to elaborate on and arguably modify the test on leave by incorporating principles drawn from the law governing the test for granting or refusing summary judgment.
- [4] For the reasons that follow, I would dismiss the appeal.

Background

- [5] Much of the background is not contentious. For clarity, and meaning no disrespect, I refer to the parties and the deceased using their first names.
- [6] On December 13, 2020, Alice Elizabeth Walker died leaving a will dated July 8, 2015.
- [7] Alice had two children, Catherine and Barry. Barry married Cathy Cook and had two children, Colin and Thomas, the plaintiffs and appellants in this Court.
- [8] Originally, Catherine and Barry were appointed as Alice's attorneys under a power of attorney in October 2000. Barry died on May 1, 2015.
- [9] Catherine continued as Alice's attorney under the power of attorney after Barry's death. She was also appointed the sole executor of Alice's will which provided that the residue of her estate be divided into four equal shares with two shares being paid to Catherine and one share being paid to each of Colin and Thomas.

- [10] On February 25, 2016, Alice signed a codicil which bequeathed \$50,000 to Catherine and Cathy Cook, appointed Cathy Cook as trustee of Colin and Thomas' shares of Alice's estate, and named her as an alternate executor.
- [11] On July 7, 2016, Alice apparently wrote a note revoking the codicil ("Note").
- [12] Catherine filed a petition on October 13, 2021 to determine whether the codicil was authentic and Alice's wishes for her estate. That petition had not been heard at the time this application was heard, but it was subsequently decided that the revocation was authentic and the will as originally written governs.
- [13] The current action was started on November 9, 2022, seeking the following relief:
1. 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;
 2. 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;
 3. 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;
 4. Damages for breach of trust;
 5. Tracing and accounting;
 6. Disgorgement of profits and equitable compensation; and
 7. Special costs.

The leave application

- [14] I propose first to focus on the judge's analysis of the leave application. The controlling provision is s. 151 of the WESA:

151 (0.1) In this section, "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

(a) 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 is to be given, and

iii. is acting in good faith, and

(b) 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.

[15] The judge undertook a detailed analysis of the positions of the parties and the evidence they presented. I do not propose to summarize that evidence in detail. Suffice it to say that much of the concern expressed by the appellants was rooted in their view that the value of the estate was less than it should have been given their understanding of Alice's income and expenses. They also pointed to what they said were contradictions or inconsistencies in Catherine's estimates of the value of the estate which started at a value of about \$1.3M in the petition and then was revised upwards to over \$2M in response to specific concerns raised by them. The appellants complained that, even though the value estimated had been raised, there remained unanswered questions, including their suggestion that \$385,000 was missing and not accounted for in the estate. Moreover, the appellants contended that there were other contradictions in the evidence, especially in relation to whether Alice was capable of managing her affairs and the extent that she did so.

- [16] Catherine for her part provided significant evidence responding to the detailed questions raised in the appellants' notice of application. More particularly, she said the petition was intended to determine the authenticity of the Note in order to get a grant of probate and that she had not done an accounting of the estate because she has not been granted probate yet. She argued that the evidence did not make out a case that any money was missing and there was no evidence of any misconduct by her. She also contended there was no evidence that Alice was incompetent and there was nothing inconsistent with Alice making her own decisions when Catherine had a power of attorney.
- [17] The judge began his legal analysis by quoting the test for granting leave to commence proceedings on behalf of an estate set out in *Hoggan v. Silvey*, 2022 BCCA 176 at paras. 42-46. I will set out the test later, but in summary the test requires an applicant to demonstrate an arguable case, prohibits a judge from going beyond a limited weighing of the evidence, and calls for a determination that leave is required because it is necessary or expedient to protect the interests of the estate or specified persons acting in good faith.
- [18] The judge accepted that the pleadings, standing alone, pleaded both a proper factual and legal basis for the claim. He rejected the suggestion that the action was an abuse of process or was brought for some other improper purpose.
- [19] The judge rejected the argument that Catherine had made contradictory statements in her materials filed in the petition and response to the leave application regarding Alice's physical and mental state as well as her management of Alice's assets. It is worthwhile to quote the following:
- [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.

- [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.
- [20] As I read the judgment, the judge concluded that the issues raised by the appellants amounted to no more than speculation, that they had not provided any evidence of a breach of duty or obligation by Catherine, and that he accepted that a full accounting of the assets of the estate had not yet been undertaken because it was necessary to resolve the validity of the apparent revocation of the codicil by the handwritten Note. These conclusions, taken as a whole, underly the judge's conclusion that notwithstanding the low threshold to be granted leave, it was neither necessary nor expedient to grant leave to protect the estate or the appellants' interests as specified persons.

Alleged errors and analysis

- [21] At times during argument I found it difficult to identify with precision the alleged errors in judgment. As I understand it, the appellants say that the judge misapplied the test for an arguable case principally by engaging in too robust an analysis of the evidence. They claim he went beyond a limited weighing of the evidence and trespassed into the role of the trial judge by determining issues reserved to the ultimate finder of fact. As well, they argue he gave undue weight to Catherine's evidence at the expense of a proper appreciation of the concerns raised by the appellants and made a palpable and overriding error of fact in his assessment of whether Alice's income was fully used. It is contended that he placed too high a burden on the appellants to establish an evidentiary foundation for their allegation of wrongdoing. Finally, we are invited to refine the test for granting leave by importing consideration derived from the jurisprudence involving granting summary judgment. I will return to this latter point to explain the argument in due course.
- [22] This Court has had two opportunities to consider the application of s. 151 to applications for leave: Hoggan, cited by the judge and Dunn v. Baird Estate, 2023 BCCA 216. The analysis of how s. 151 applied to the facts in those cases is helpful in determining whether the judge went beyond a limited weighing of the evidence in dismissing the application.
- [23] In Hoggan, this Court allowed an appeal from a refusal to grant leave on two grounds, first, that the judge went beyond a limited weighing of the evidence and made findings of fact that trespassed on the role of the trial judge, and, second, that the judge focused only on the interests of the estate and failed to consider the interests of specified persons as set out in the section. In the course of the analysis, Justice Bennett set out the applicable test, as follows:

[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.]

[24] Hoggan involved a case in which two sisters alleged financial wrongdoing against a third sister and her husband, who was executor of the estate. The basis for the allegation was a series of cheques written by the defendant sister to herself from the joint account she maintained with the deceased. Eleven cheques were identified totalling more than \$153,000. The two plaintiff sisters sought leave to commence an action under s. 151 to recover these amounts for the estate and ultimately for their benefit.

[25] Justice Bennett concluded that the judge had gone beyond the "limited weighing" of the evidence in concluding there was no arguable case:

[51] The judge came to this conclusion as a result of what she referred to as a "limited weighing" of the evidence. When the above passages are considered, however, it is apparent that the judge did not perform a limited weighing exercise. the judge seemed to place no weight on the affidavit evidence of the appellants, while accepting the affidavit evidence of the Silveys, even as she noted that she was not to decide issues of credibility: para. 24. She went beyond what she was permitted to do at this juncture.

[Emphasis in original.]

- [26] The judge in Dunn fell into the same errors as the judge had in Hoggan, namely, focusing exclusively on the interests of the estate and not the interests of specified persons, as well as going beyond a limited weighing of the evidence. Dunn is instructive, however, in demonstrating circumstances in which a judge may properly conclude on the evidence that a claim is merely speculative and rooted in suspicion and mistrust, so that an arguable case is not made out.
- [27] In Dunn, the evidence established that the deceased had transferred \$200,000 to the defendant. The plaintiffs' theory of the case was that the defendant held that money in trust, relying on the presumption of resulting trust. The presumption places the onus on the transferee to show that a gift was intended, thereby rebutting the presumption that the funds transferred are held in trust: *Pecore v. Pecore*, 2007 SCC 17 at paras. 24-25. As the defendant was an independent adult, no presumption of advancement applies: *Pecore* at para. 36. A determination of whether the presumption had been rebutted called for a weighing of the evidence. This is what the chambers judge had done. As Justice Hunter explained:
- [42] The issue before the chambers judge was whether the appellants had raised an arguable case that the \$200,000, or the property interest purchased with the \$200,000, was held in trust for the estate. It was not to weigh the evidence and come to a conclusion as to whether Ms. Moraitis had rebutted the presumption of resulting trust. That assessment of the evidence is for the trial judge. But that is effectively what the chambers judge did.
- [43] The judge reviewed the evidence that had been filed and concluded that the deceased had intended to make a gift to Ms. Moraitis, primarily on the basis of the letter to the bank, which she characterized as the "best evidence" of the deceased's intent. To adopt the language of Hoggan, the judge went beyond what she was permitted to do at this stage of the proceedings.
- [44] In my opinion, the chambers judge erred in principle by weighing the evidence at the leave stage and reaching a conclusion on the central issue to be determined, whether Ms. Moraitis had satisfied the onus on her to prove on a balance of probabilities that the \$200,000 transfer was intended to be a gift.
- [45] Furthermore, in her concluding remarks, the judge said this (at para. 47):
- In order to justify this claim, the applicants must show some evidence that the deceased did not gift the money to Ms. Moraitis. In my view they have failed to do so.
- [46] It was an error in principle to place the onus on the appellants to show that the transfer was not a gift. As explained in *Pecore*, the onus will be on Ms. Moraitis to show that the transfer was intended to be a gift. But whether that onus has been met is a matter for an assessment of all of the evidence at trial, not on a leave application.

[Emphasis in original.]

- [28] In summary, the evidence of the transfer engaged the presumption of resulting trust. This was sufficient to establish an arguable case.
- [29] This situation was contrasted with other allegations. The plaintiffs in Dunn alleged that the defendant had misused her power of attorney from her mother to enrich herself. The appellants based their assertions on the evidence that:
1. Ms. Moraitis had new clothes, shoes and purse;
 2. Ms. Moraitis bought new furniture;
 3. Ms. Moraitis bought a new car;
 4. Ms. Moraitis [had] gone on trips; and
 5. There were cash withdrawals from the deceased's bank account that the appellants regarded as suspicious.
- [30] Justice Hunter concluded that the judge did not have to weigh the evidence to determine whether an evidentiary burden had been met because the evidence was not probative of the claim. He reasoned:
- [50] In this case, the onus was on the appellants to demonstrate that there was a reasonable prospect that the claim would be established at trial. The evidence of the appellants that Ms. Moraitis had new clothes, shoes and a purse, that she bought new furniture and a new car and had gone on trips does not raise any reasonable inference that she was misusing the power of attorney from her mother.
- [51] The evidence that there were withdrawals from the account of the deceased does not support an arguable case of wrongful conduct. None of the withdrawals are unusually large, and there is nothing in the bank records or the application record to indicate that the withdrawals were not made by the deceased herself. This evidence may be contrasted with the evidence in Hoggan, where a number of large cheques were written directly to the defendants, raising issues that required some answer.
- [52] The chambers judge concluded that the appellants' accusations were based on "nothing more than conjecture, suspicion and mistrust of Ms. Moraitis": at para. 54. That conclusion is well supported by the record before the judge.
- [53] In my opinion, the chambers judge did not err in concluding that the appellants had not shown an arguable case that Ms. Moraitis had abused her position under her mother's power of attorney. I would not disturb the judge's conclusion on this issue.
- [31] In my view, this analysis is applicable to the case at bar. Although the judge paid some attention to the explanation why an accounting had not yet been completed, he did not have to go beyond examining the appellants' evidence to determine, in effect, that they had not made out an arguable case because there was no evidence probative of breaching duties or wrongdoing, hence the claim did not rise above speculation. To reach this conclusion he did

not have to weigh disputed evidence, make credibility findings or findings of fact that are for a trial judge to make. As I read the evidence and the judge's analysis, the judge did not need to weigh the evidence, let alone engage in a limited weighing, in order to conclude that the appellants' evidence was not probative of wrongdoing. The judge in the material parts of his decision goes no further, in my view, than explaining why alleged contradictions in the evidence were not in fact contradictory.

[32] Unlike Dunn, there was no evidence capable of giving rise to a presumption capable of grounding an arguable case. There was no evidence of transfers to Catherine in her personal capacity or for her benefit. There was little more than speculation that the estate should have been worth more than the estimates that had been provided. That evidence standing alone is not probative of wrongdoing. Moreover, there was no probative evidence of any exercise of undue influence. In my view, the conclusion reached by the judge that the claim was purely speculative was open to him on the evidence put forward by the appellants. They have not identified any error in principle.

[33] The appellants suggest that the judge made a palpable and overriding error in the following paragraph:

[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.

[34] They say that that finding is palpably wrong because in that year a significant portion of Alice's income was reinvested. The evidence about reinvestment came from the tax returns provided to the court which showed, as the judge set out earlier, the following:

[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.

[35] I do not think the judge's comment in para. 61 reflects an error or a misapprehension of the evidence. A comment that all of Alice's income in 2014 was used is not inconsistent with part of it being used by being reinvested. I think the judge is saying no more than an explanation of how Alice's income was used in 2014. The evidence of how it had been used was not probative of any wrongdoing.

- [36] Finally, the appellants invited us to modify the test for leave by importing considerations applicable to applications for summary judgment. As I understood the contention, an onus should be placed on a defendant to demonstrate beyond a reasonable doubt that the plaintiff's claim is bound to fail. I would not accede to this invitation. In my view, the arguable case test to be assessed on a limited weighing of the evidence, as articulated in *Hoggan and Dunn*, is clear and workable. I see no reason to elaborate further on the test.
- [37] Finally, I turn to the application to adduce fresh evidence. The appellants apply to adduce short videos of Alice taken by a companion. The videos are said to demonstrate that Alice clearly lacked capacity and, presumably, was vulnerable to being taken advantage of. This is said to undermine the suggestion in the judgment and in Catherine's evidence that Alice remained competent.
- [38] I would not admit the evidence. The appellants were aware of the companion's relationship with Alice long before the applications were heard. While they may not have known that the companion had taken videos, they must be taken to have known that the companion would have observed Alice's behaviour and had potentially relevant evidence about her capacity. Capacity is presumed and if the appellants wanted to establish an arguable case that Alice lacked capacity and was being subject to undue influence, it was their onus to bring forward that evidence in the court below. The application fails on the due diligence element of the test articulated in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, 1979 CanLII 8.
- [39] The application also fails because, in my view, the evidence would not reasonably have affected the result. The issue of capacity was not the fundamental basis on which leave was refused. That was because no evidence of wrongdoing had been provided. In any case, the videos are short. No adequate context of the circumstances under which they were taken has been provided. I have viewed them, on their face they have little to no probative value. They show Alice lying in bed talking to a stuffed teddy bear or throwing a ball for a dog. In at least one video, Alice appears to be somewhat disoriented and arguably confused, but it is far from clear whether this disorientation or confusion is momentary, passing, or indicative of a more settled and continuing state. I do not think any inference about capacity can be confidently drawn, from them.
- [40] I would not admit the evidence nor accede to this ground of appeal.

Removal of Catherine as executor

- [41] As I understood the appellants' argument, they acknowledge that success on their first ground of appeal is a precondition for success on the second; namely the removal of Catherine as executor.
- [42] The judge set out the principles governing the exercise of a discretion to remove an executor. The judge said:

- [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.
- [43] In light of my conclusion that the judge did not commit a reversible error in refusing leave, and in light of his findings set out above, I do not think that his refusal to remove Catherine as executor is subject to appellate intervention. I would not accede to this ground of appeal.

Conclusion

[44] I would dismiss the appeal.

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Madam Justice DeWitt-Van Oosten"

I AGREE:

"The Honourable Justice Donegan"

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