

CANADA / JUDGMENT

Woike v. Woike

2025 BCSC 1460

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Supreme Court of British Columbia

DECIDED

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2025 BCSC 1460 Woike v. Woike

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Woike v. Woike,

2025 BCSC 1460

Date: 20250730

Docket: 259551

Registry: Victoria

Between:

Ian Bruce Woike

Plaintiff

And:

Benno Woike and Running W Egg Farm Ltd.

Defendants

Before: The Honourable Justice LeBlanc

Reasons for Judgment

Counsel for the Plaintiff:

L. Bevan

L. McLeod

Counsel for Defendant, Benno Woike:

R. Ashmead

A. Yen

Place and Date Hearing:

Victoria, B.C.

July 3, 11, 2025

Place and Date of Judgment:

Victoria, B.C.

July 30, 2025

Introduction

- [1] The plaintiff seeks in this action to have his father, Benno Woike ("Ben"), transfer his shares in Running W Egg Farm Ltd. to the plaintiff on Ben's retirement or death based on a verbal promise the plaintiff alleges to have had with his father. Ben has denied making the promise.
- [2] This application concerns the appointment of a litigation guardian for Ben. The parties agree that a litigation guardian is required, however, do not agree on who should be appointed in that role. The application was filed by counsel for Ben seeking to have Ben's step-daughter, Sonja Keserich, appointed as Ben's litigation guardian. The plaintiff opposes the appointment of Ms. Keserich on the basis that she has a personal interest in the litigation and instead proposes the Public Guardian and Trustee.

Background

The family

- [3] Ben and his first spouse, Gail Woike had three children together: the plaintiff (born in 1969), Alan Gregory Woike ("Greg") (born in 1971) and Fraser Woike ("Fraser") (born in 1973). Gail Woike passed away in 1974 and Ben independently raised the three boys for seven years until 1981 when Patricia Keserich ("Patricia") and her daughter, Sonja Keserich ("Sonja"), moved in with Ben. Sonja was 12 at the time.
- [4] Ben and Patricia married on April 22, 1989 and remain married today.

Running W Egg Farm Ltd.

- [5] In or around 1969, Ben purchased property in Duncan, B.C. for a farm. Between 1969 and 1989, Ben expanded the farm and on June 19, 1989, Ben incorporated Running W Egg Farm Ltd. ("Running W") to hold the assets of Farmer Ben's Eggs. The Duncan property and assets were rolled into Running W, including the egg quota.

- [6] In 1989, when the plaintiff was 18, Ben issued common shares to him. Ben and the plaintiff ended up holding equal common shares in Running W with Ben holding an additional 393 preferred shares.
- [7] In October 1991, the plaintiff was added as a director of Running W around the time he became more involved in the operations of Running W.
- [8] Running W has an approximate value of \$36 million.
- [9] Two other companies were incorporated by Ben. Rice Springs Farm Ltd. was incorporated on May 2, 1991 with Ben gifting 50% of the shares in that company to Greg. Running W Ranch Ltd. was incorporated on May 19, 2004 with Ben gifting 50% of the shares in that company to Fraser.

The action

- [10] As I understand in or around 2010, the plaintiff and Ben began to disagree over management of Running W. Tensions increased and the plaintiff demanded that Ben transfer all of his shares in Running W to the plaintiff based on an oral promise the plaintiff alleges the parties entered into when the plaintiff came to work at Running W. Ben refused to transfer the shares and offered to sell the shares to the plaintiff for a sum.
- [11] The plaintiff filed the notice of civil claim on February 6, 2025 and Ben filed a response to civil claim on March 6, 2025.

Ben's estate planning

Power of Attorney

- [12] On September 4, 2024, Ben appointed Ms. Keserich his power of attorney with the following express powers:

Deal with Land

- (a) to transfer or deal with any real property in which I may have an interest including the power to buy and sell, to give a receipt and discharge for any purchase funds and to execute all documents and instruments in relation thereto and this Power of Attorney excludes s. 56 of the Land Title Act.

Support Family

- (b) to make payments for the care and financial support of my spouse and any other person who is cared for and supported by me at the time of my mental infirmity;

Reorganize Affairs

- (c) to reorganize my assets and affairs for the benefit of me, my estate or my family members, including but not limited to:

- (i) the creation and settling of corporations and trusts for the benefit of me, my estate or my family members and the transfer of my assets to such corporations and trusts;
- (ii) the reorganization of any corporations in which I have an interest to complete an estate freeze or otherwise benefit me, my estate or my family members; and
- (iii) the implementation of any other measures designed to achieve tax efficiencies for me, my estate or my family members.

Ben's Wills

- [13] On July 12, 2010, Ben executed a will (the "2010 Will"), in which he directed that his remaining shares in Running W would be gifted to Patricia and if Patricia did not survive him, to the plaintiff. The 2010 Will further left the residue of Ben's estate to Patricia and if she did not survive him, equally among the plaintiff, Greg, Fraser, Sonja and Tanis (Patricia's other daughter). Patricia was named the executor and trustee with Ben's sister and Alan being named as alternative co-executors.
- [14] On March 29, 2019, Ben revoked the 2010 Will and executed a new will (the "2019 Will"), in which he directed that his shares in Running W would be gifted to Patricia and if Patricia did not survive him, to the plaintiff. The 2019 Will further left the residue of Ben's estate to Patricia and if she did not survive him, equally among Fraser, Sonja and Tanis. Patricia was named the executor and trustee with Ben's sister and Alan being named as alternative co-executors.
- [15] On May 19, 2021, Ben revoked the 2019 Will and executed a new will (the "2021 Will"), in which he directed that his shares in Running W would be gifted to Patricia and if Patricia did not survive him, equally to Fraser and Sonja. The 2021 Will further left the residue of Ben's estate to Patricia and if Patricia did not survive Ben, equally among Sonja and Tanis. Patricia was named the executor and trustee with Linda Davis being named an alternative. A codicil to the 2021 Will was executed by Ben on June 12, 2023 whereby he changed the alternate executor from Linda Davis to Sonja and his sister, as co-executors.
- [16] On June 12, 2023, Ben also prepared a statement (the "2023 Statement for Wills Variation Claims") explaining why he was not leaving a part of his estate to the plaintiff and Greg. Ben explains in the statement that the plaintiff and Greg were adequately provided for over Ben's lifetime; that the plaintiff demonstrated a lack of appreciation for what he has been given; and that Fraser has not received the same benefits as the plaintiff and Greg, as RW Ranch did not do as well as the other two companies.
- [17] On May 3, 2024, Ben revoked the 2021 Will and executed a new will (the "2024 Will"), in which he directed that the shares of Running W would be gifted to Patricia and if Patricia did not survive him, to Fraser and Sonja. A similar statement explaining his estate planning was included with the 2024 Will (the "2024 Statement for Wills Variation Claims").

Ben's relationship with Ms. Keserich

- [18] Ben expressed in his 2023 Statement for Wills Variation Claims and 2024 Statement for Wills Variation Claims that he views Sonja as his daughter.
- [19] Sonja explains that her mother's health has deteriorated over the past three years so she travels from White Rock to Duncan approximately three times per month to assist her mother and Ben. She speaks with her mother over the phone daily and sometimes multiple times throughout the day. Prior to her mother's health declining, Sonja would see her mother and Ben once a month with her travelling to Duncan or them travelling to White Rock.
- [20] Sonja deposes that she is willing to act as Ben's litigation guardian and that she has no interest in the action adverse to Ben and that she will diligently act in his best interests if appointed.
- [21] Patricia, Fraser and Alan consent to the appointment of Sonja as Ben's litigation guardian.

Discussion

Rule 20-2(1) - appointment of litigation guardian

- [22] Rule 20-2(1) of the Supreme Court Civil Rules provides that if a party to a proceeding becomes a mentally incompetent person, the court must appoint a litigation guardian for the party unless a committee has been appointed for the party or the party has a litigation guardian under s. 35(1) of the Representation Agreement Act.
- [23] As the Rules do not define the phrase "persons under disability", courts have found a person to be under disability if they are an infant or "mentally incompetent": *Karrington v. Morrison*, 2023 BCSC 570 and *E.M.E. v. D.A.W.*, 2003 BCSC 1878 at para. 16.
- [24] The Interpretation Act, R.S.B.C. 1996, c. 238 defines a "mentally incompetent person" as a person with a mental disorder as defined under s. 1 of the Mental Health Act, RSBC 1996, c. 288. Under the Mental Health Act, a mental disorder is a disorder of the mind that requires treatment and seriously impairs a person's ability to (a) react appropriately to the person's environment, or (b) associate with others.
- [25] The overarching test is whether a person is significantly impaired in their ability to conduct their affairs in the broader environment of their community, and that one factor to consider is whether the person is capable of instructing counsel and exercising judgment in relation to the claims at issue: *Karrington* at para. 32.
- [26] Although there is no dispute that Ben is a mentally incompetent person, I will briefly review the evidence to support a finding pursuant to Rule 20-2(1).

- [27] Ben met with Dr. Budlovsky on May 13, 2025. Dr. Budlovsky is a duly qualified physician and licensed member of the College of the Physicians and Surgeons of Canada and is carrying on the practice of geriatrician within the Vancouver Island Health Authority. Dr. Budlovsky spent 90 minutes with Ben and made the following conclusions with respect to Ben's capacity to instruct counsel and conduct civil litigation:
19. Given his cognitive decline, it is my opinion that Benno Woike does not have the cognitive ability or capacity to conduct civil litigation. In coming to my conclusion I have reviewed the British Columbia Law Institute Report on Common Law Tests of Capacity which was published in September 2013. While a single test or set of standards does not appear to be in common usage regarding the capacity to conduct civil litigation, there are a few approaches recommended. One approach formulates the test capacity as: "(w)hether the person in question is capable, aside from any disability established by law, such as infancy, to instruct Counsel and to exercise judgement in relation to the claims in issue and the possible settlement, as a reasonable person would be expected to do".
 20. Another test of capacity proposes the following:
"1. The client should understand that the person she or he is dealing with is a lawyer; 2. The client should understand generally the advice given; 3. The client should understand that the lawyer will act on the instructions of the client and as agent bind her or him (the agency portion of the relationship); 4. The client must understand that she or he is responsible for the solicitor's professional fees (the contractual portion of the relationship)."
 21. Finally, courts identified that [for capacity to conduct civil litigation]: "the test should be "comparable to that established in other similar enactments," which focus attention on "the larger community of which the person was a part, and not just the environment of the court system of process". Under this approach a person must be "significantly impaired in the ability to conduct his affairs generally" or "seriously impaired in [the person's] ability to act appropriately to a minimal standard that would enable her to function in the broader environment of her community" to be found incapable of conducting civil litigation"
 22. With the aforementioned in mind I do not find Benno capable of conducting civil litigation. Ben was unable to identify that he was currently involved in litigation, nor was he able to identify his lawyer or law firm. He could not identify the names of the company(ies) that he currently has a stake in and thus would not have the requisite knowledge to conduct litigation. Furthermore, as was notable during stressful parts of the interview (such as formal cognitive testing) Ben gets easily overwhelmed and has difficulty comprehending instructions and information. Given this, I find that Ben is not able to conduct an examination for discovery without causing undue psychological harm.
 23. One of the recommended tests determining whether an individual can conduct civil litigation is whether they have the "ability to act appropriately to a minimal standard that would enable (her) to function in the broader environment of her community". By this standard, I do not find Ben capable of conducting civil litigation. Ben has already lost his

driver's license due to cognitive decline. He is unable to manage his finances and has been deemed incapable of directing his medical care. His wife manages the day-to-day activities of the house such as grocery shopping, cooking, cleaning and laundry. Ben would be unable to function independently without significant support either by his wife, family or paid caregivers.

- [28] It is clear on the evidence before me that Ben is a mentally incompetent person as contemplated in Rule 20(2)-1 and a litigation guardian ought to be appointed.

Who should be the litigation guardian?

- [29] The applicant submits that Ms. Kesperich is the most appropriate person to act as litigation guardian as she has enjoyed a close, father/daughter relationship with Ben over the years and Ben trusts her, having appointed her as his enduring power of attorney in 2024. The applicant further submits that Ms. Kesperich does not have a conflict of interests vis-à-vis the interest of Ben and is the most appropriate person to be acting. Ms. Kesperich denies having a personal interest in the outcome of the litigation and submits that as litigation guardian she would be defending the litigation, as per Ben's wishes, and maintaining the status quo.
- [30] The plaintiff submits that Ms. Kesperich is not the appropriate person to appoint as she has a personal interest in the outcome of the litigation and that the litigation guardian should be more neutral. The plaintiff also submits that there is a high level of conflict between him and Sonja.
- [31] The parties referred me to the decision of Chamberlist J. (as he then was) in *Lodge (guardian ad litem of) v. Lodge*, [2003] B.C.J. No. 1833 which considered the Supreme Court decision of *Gronnerud (Litigation Guardian of) v. Gronnerud Estate*, [2002] 2 S.C.R. 417, 2002 S.C.C. 38 for the applicable criteria in appointing a litigation guardian:
- [16] In the more recent decision of *Gronnerud (Litigation Guardian of) v. Gronnerud Estate*, 2002 SCC 38, the Supreme Court of Canada had an opportunity to comment on the Court's duty and obligations when faced with a similar application. In that case the trial court had appointed two adult children as litigation guardians of their mother. As in this action, the litigation guardians commenced matrimonial proceedings on behalf of their mother against the estate of her husband seeking equal division of matrimonial property, etc. The Saskatchewan Court of Appeal removed the two adult children as litigation guardians, and replaced them with the Public Trustee. On further appeal by the two adult children, the Supreme Court of Canada considered the applicable criteria in deciding whether to remove a litigation guardian. The applicable provision of the Queens Bench Rules of Saskatchewan was set out by the Supreme Court of Canada at para. 14 of its decision. That Rule provides as follows:

49(1) Where, at any time, it appears to the court that a litigation guardian is not acting in the best interests of the person under disability, the court may appoint and substitute another person as litigation guardian on such terms and conditions as may seem just.

[17] The Supreme Court of Canada, in its reasons at para. 3 and following, reviewed the history of the litigation and then reviewed the criteria for removing the litigation guardian. In so doing, the Court concluded that under the Saskatchewan Rule the test to remove a litigation guardian turned on the "best interests of the dependent adult". The Court set out criteria that it found from leading Saskatchewan authorities, which criteria I find would also be required on the appointment under our Rules of Court. These criteria set out in para. 19 by the Supreme Court of Canada are as follows:

1. the evidence must establish that the incompetent is unable to act for himself or herself;
2. evidence should be verified under oath as to the incompetent's mental condition and his or her inability to act as plaintiff;
3. evidence must demonstrate that the litigation guardian is both qualified and prepared to act, and in addition is indifferent as to the outcome of the proceedings;
4. the applicant should provide some evidence to support the claim being made;
5. the applicant should obtain the consents of the next-of-kin or explain their absence;
6. if the applicant has a personal representative or power of attorney whose status is not being challenged in the proceedings, some explanation should be offered as to why the attorney or representative has not been invited to bring the claim.

(my emphasis added)

[18] Major, J. speaking for the majority said this at para. 20:

The third criterion, that of "indifference" to the result of the legal proceedings, essentially means that the litigation guardian cannot possess a conflict of interest, vis-a-vis the interests of the disabled person. Indifference by a litigation guardian requires that the guardian be capable of providing a neutral, unbiased assessment of the legal situation of the dependent adult and offering an unclouded opinion as to the appropriate course of action. In essence the requirement of indifference on the part of a litigation guardian is a prerequisite for ensuring the protection of the best interests of the dependent adult. A litigation guardian who does not have a personal interest in the outcome of the litigation will be able to keep the best interests of the dependent adult front and centre, while making decisions on his or her behalf. Given the primacy of protecting the best interests of disabled persons, it is appropriate to require such disinterest on the part of a litigation guardian. (my emphasis added).

...

[21] Applying these decisions from Ontario and Saskatchewan to Rule 6(8) and 6(10) of the Rules of Court establishes in my mind the following principles with respect to a litigation guardian in British Columbia, namely:

- (a) a litigation guardian will be found to have an "interest in the proceedings" adverse to the person under disability where there is a "high level of conflict", between the proposed litigation guardian and a party in the proceeding;
 - (b) a litigation guardian will also have an "interest adverse to the person under disability" in those cases where the litigation guardian stands to benefit, either directly or indirectly by the litigation, even if that benefit has not vested at the time of the appointment. It is sufficient that the potential benefit, realistically assessed, is present.
- [32] I find that Sonja is qualified and prepared to act. The issues on this application are: whether there is a degree of conflict that would render Sonja inappropriate to act; and whether Sonja stands to benefit directly or indirectly from the litigation.
- [33] Considering the criteria above, I do not find that there is a high level of conflict between the plaintiff and Sonja. The plaintiff's evidence in this regard concerns historical events where he deposes that Sonja received better gifts than him when they were children. While there may be a conflict of legal positions pertaining to this litigation, I do not have evidence before me that Sonja has created a hostile or antagonistic environment that would rise to the level required to be disqualified from acting as a litigation guardian.
- [34] The next question is whether Sonja stands to benefit directly or indirectly from the litigation.
- [35] In *Re Poon* (Patients Property Act), 2005 BCSC 254, the petitioner's husband, relying on *Gronnerud*, sought to remove the disabled wife's daughter as her committee on the basis of her status as a beneficiary of her mother's estate. The court acknowledged that there was technically a lack of pure indifference, but was not satisfied that the potential interest was sufficiently direct that it should be inferred that the daughter's objectivity would be affected to the extent that it would be difficult for her to act impartially. The court in *Poon* also distinguished *Gronnerud* and *Lodge* on their facts:
- [32] The petitioner seeks to bring this case within the facts of *Gronnerud* (*supra*) and *Lodge v. Lodge*, [2003] B.C.J. No. 183 (B.C.S.C.), which applied *Gronnerud*. In both of those cases the litigation guardians were removed, and in the former, a property guardian was also removed, on the basis that the guardians were in a conflict of interest toward the dependent adult. In these cases there was either an added element of acrimony or a "high level of conflict" between the guardians and the opposite parties in the litigation which was found to amount to a conflict of interest.

...

- [36] The evidence before me on this petition does not establish "a particularly acrimonious and long-standing dispute" as present in Gronnerud or a "high level of conflict" as present in Lodge. I take "high level of conflict" to mean something more than conflict of legal positions and to pertain to acrimony, hostility or entrenched antagonism that precludes objectively pursuing the best interests of the patient. The evidence in this case does not amount to that.
- [36] In Morrison v. Greenwood, 2020 BCSC 1356, the court concluded that without more, the possibility that success in the litigation may indirectly benefit the litigation guardian through inheritance was found not to be disqualifying:
- [52] I do not agree with Ms. Morrison's submissions. I concur with the judge's conclusion in Owen v. Owen, 2010 ONSC 2852. There, the court interpreted the third criterion from Gronnerud -- indifference as to result -- as requiring that the litigation guardian not be in a conflict of interest vis-à-vis the interests of the disabled person.
- [53] In Owen, the court determined that where there was no established conflict in the action by the daughter, the litigation guardian, and the mother, the daughter was an appropriate litigation guardian despite the fact that she might inherit the mother's estate at one point.
- [37] I find the facts as they present them similar to those in Poon and Morrison. Sonja, as litigation guardian, would be defending the action commenced by the petitioner and requiring the petitioner to prove his allegations. By doing so she is acting to preserve Ben's alleged ownership status in the Running W shares.
- [38] On the evidence before me, I find that Sonja is best suited to keep the interests of Ben front and centre.

Orders Made

- [39] I make the following orders:
- a) A declaration that Ben is a person under a disability who needs to be represented by a litigation guardian in this action pursuant to Rule 20-2(10).
 - b) An order appointing Sonja as Ben's litigation guardian in this action.
 - c) An order amending the style of cause to reflect Sonja's appointment as Ben's litigation guardian.
 - d) Costs of this application shall be in the cause.

"Justice LeBlanc"

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