

CANADA / JUDGMENT

Woodward v. Weinstein

2020 BCSC 1667

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Supreme Court of British Columbia

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2020 BCSC 1667 Woodward v. Weinstein

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Woodward v. Weinstein,

2020 BCSC 1667

Date: 20201105

Docket: S1813330

Registry: Vancouver

In the Matter of the Estate of Karen Dawn Joy Weinstein, Deceased

Between:

Russell Phillip Charles Woodward

Petitioner

And

Ronald Leroy Weinstein, David Woodward, Zachary Woodward,

April Woodward and Tara Walker

Respondents

Corrected Judgment: The text of the judgment was corrected at paras. 23, 88, 102, and 109 on November 11, 2020.

Before: The Honourable Madam Justice Tucker

Reasons for Judgment

In Chambers

Counsel for the Petitioner (Respondent):

A.A. Curley

J. Locke

Counsel for the Respondent (Applicant), Ronald Leroy Weinstein:

J.J. Wingson, Q.C.

A. Bajcetic

A. Van Noort, Articled Student

No other appearances

Place and Dates of Hearing:

Vancouver, B.C.

September 24, 2019 and

March 12, 2020

Place and Date of Judgment:

Vancouver, B.C.

November 5, 2020

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I. Introduction

- [1] Karen Dawn Joy Weinstein (Karen or "the deceased") died intestate on April 21, 2013.
- [2] She was survived by her second husband, Ronald Weinstein, and five children from her earlier marriage: Russell Woodward, Tara Walker, David Woodward, Zachary Woodward, and April Woodward.
- [3] As four of the five children have the same last name, Woodward, I will refer to them collectively as "the children", and individually by their first names. As several members of the Weinstein family are involved in the narrative, I will also refer to them by their first names. This is solely for purposes of clarity, and no disrespect is intended.
- [4] On December 12, 2018, Russell filed a petition under s. 132 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA], seeking to be appointed as the administrator of the deceased's estate ("Karen's Estate").
- [5] On August 27, 2019, Ronald filed a notice of application in the petition proceeding seeking, among other things, to have Bruce Martin appointed the administrator of the Karen's Estate under Rule 25-14 of the Supreme Court Civil Rules [SCCR] and ss. 130(1)(a) and 132 of WESA.
- [6] These matters were argued at two different chambers hearings. The parties' filings and argument at the initial hearing applied WESA as the governing law, notwithstanding that the deceased died before the statute came into force in 2014. The error was subsequently noted by the Court and brought to the parties' attention by memorandum. As the parties conceded that WESA did not apply, they were directed to schedule a second hearing for argument under the Estate Administration Act, R.S.B.C. 1996, c. 122 [EAA] as the governing legislation. The relevant provisions of the EAA and the WESA are materially and significantly different from one another.

II. Background Facts

- [7] Karen and Ronald married on July 12, 2003.
- [8] From 2001 through to Karen's death, she and Ronald resided together on a property located on 35th Avenue, Surrey, B.C. ("Spousal Home"). There is a mortgage in favour of Prospera Credit Union ("Prospera") registered against the title to the Spousal Home.
- [9] As noted, Karen died intestate on April 21, 2013.
- [10] Ronald and the children are the only intestate heirs to Karen's Estate.

- [11] Karen's Estate essentially consists of:
- a) her interest in the Spousal Home, and
 - b) personal property with an approximate value of \$9,000.
- [12] With regard to the Spousal Home, at the time of Karen's death:
- a) Karen was the registered owner of an undivided 98/100 interest,
 - b) Ronald was the registered owner of an undivided 1/100 interest, and
 - c) Ralph Weinstein (Ronald's father) was the registered owner of an undivided 1/100 interest.
- [13] After Karen's death, Ronald continued to reside in the Spousal Home and to pay the expenses relating to it. The mortgage payments continued to be automatically paid by pre-authorized deduction from Ronald's bank account, an arrangement that pre-dated Karen's death.
- [14] Ralph died testate on November 6, 2013.
- [15] Ralph's daughter (and Ronald's sister), Betty Strauch is the executor of Ralph's estate ("Ralph's Estate").
- [16] Betty and Ronald are beneficiaries under Ralph's will.
- [17] Ronald attests that he is not a residuary beneficiary under Ralph's will, but only a legatee of personal property.
- [18] Ronald says in or about August 2013, he attended a family reunion (presumably of Karen's family) and attempted to speak with the children while there, but they "shunned" him.
- [19] On November 27, 2013, Ralph's Estate filed a notice of civil claim against Karen's Estate. The claim alleges Karen misappropriated \$250,000 from a bank account she had access to in order to pay Ralph's bills on his behalf ("Theft Action").
- [20] Russell and the other children vehemently deny that Karen misappropriated any funds.
- [21] On or about June 7, 2016, Ronald, through his lawyers, delivered a notice of proposed application to the children, notifying them of his intention to apply for a grant of administration for Karen's Estate ("proposed grant application").
- [22] On July 5, 2016, Russell filed a notice of dispute under Rule 25-10 of the SCCR in relation to the proposed grant application. The notice of dispute alleged that Ronald could not be relied upon to act in the best interests of Karen's Estate and thus was not a proper person for a grant of administration.
- [23] Under Rule 25-10, a notice of dispute--unless renewed by successful application to the court--expires one year after it is filed. A grant of administration cannot be issued while a notice of dispute is filed and in effect.

- [24] On June 6, 2017, a substantially identical notice of dispute regarding the proposed grant application was filed by Tara.
- [25] On June 4, 2018, a substantially identical notice of dispute regarding the proposed grant application was filed by April.
- [26] On November 29, 2018, Ronald filed a notice of civil claim against Karen's Estate, alleging beneficial ownership of Karen's interest in the Spousal Home and claiming that Karen's interest in the Spousal Home is held by Karen's Estate on a resulting trust for his benefit ("Trust Action").
- [27] On or about November 29, 2018, Prospera unilaterally stopped accepting pre-authorized payments from Ronald's account as payment on the mortgage and refused to allow Ronald to make any further mortgage payments.
- [28] On December 7, 2018, Ronald received a letter from Prospera advising that the mortgage on the Spousal Home was in default.
- [29] On December 12, 2018, Russell filed his current petition seeking to be appointed the administrator of Karen's Estate.
- [30] On or about March 12, 2019, Prospera commenced foreclosure proceedings under its mortgage on the Spousal Home.
- [31] On May 28, 2019, a substantially identical notice of dispute regarding the proposed grant application was filed by Zachary.
- [32] All of the notices of dispute were filed through the law firm representing Russell on his petition.
- [33] Ronald has abandoned the proposed grant application. He concedes that the Trust Action puts him in a conflict of interest and no longer seeks to be appointed.
- [34] Neither the Theft Action nor the Trust Action have proceeded given the lack of an administrator for Karen's Estate.
- [35] After discussions, Prospera agreed to hold its foreclosure proceedings in abeyance pending this decision.
- [36] Ronald attests that he has the funds to put the mortgage back in good standing, and is willing do so provided it is without prejudice to his ability, depending on the outcome of all of the related litigation, to make a claim in respect of same against Karen's Estate.
- [37] Russell asserts that Ronald has already given away some of Karen's personal property. Ronald does not deny that some personal property has been given away, but says the vast majority went to the children and that the children not only accepted the property, they chose the pieces they wanted. He attests that the only other gifts made involved two of Karen's necklaces, which he gave to Karen's best friend and the friend's daughter as

mementos. He notes that those two necklaces were selected from the remaining jewelry after the children had taken what they wanted for themselves. Ronald agrees he gave Karen's clothing to a number of charities, but says he did so only after asking the children if they wanted any of it. He denies having given any of Karen's personal property away prior to Karen's death.

- [38] Ronald and the children have attempted to resolve issues relating to the administration and valuation of Karen's Estate, as well as issues relating to the Theft and Trust Actions. The parties agree that the period of these settlement discussions included the period from January 29 to July 3, 2019.

A. Settlement Privilege Ruling

- [39] One of Russell's affidavits referenced and attached correspondence exchanged in the course of those settlement attempts, and an objection based on settlement privilege was raised by Ronald.
- [40] Russell's counsel argued that settlement privilege only applies to documents that set out proposed terms of settlement. She further argued, in the alternative, that the correspondence in question was required in order to explain what would otherwise appear as a period of inactivity on Russell's part, and thus should be admitted by exception.
- [41] I ruled that paragraphs 41-45 and Exhibits M-P of Russell's affidavit #2, sworn September 12, 2019, were inadmissible. Settlement privilege is not limited in scope to exchanges of proposed settlement terms. To the contrary, it applies broadly to include a course of dialogue directed at persuading the other party that a compromise resolution is preferable to litigation in the circumstances: *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37 at paras. 12-17. Thus the privilege covers, for example, correspondence in which one party provides its assessment of the weaknesses in the other's position or itemizes the downsides of continued litigation for the purpose of persuading the other side that settlement is a preferable means of resolution, regardless of whether specific terms of settlement are proposed.
- [42] As Ronald's counsel agreed to stipulate the parties were in settlement discussions during the period covered by the correspondence attached as Exhibits M-P (i.e., January 29 to July 3, 2019), there is no basis for Russell's argument that an exception to the privilege is warranted.

III. Statutory Provisions

- [43] The parties variously rely upon the EAA, the Trustee Act, R.S.B.C. 1996, c. 464 and the court's inherent jurisdiction.

A. Distribution of Intestate Estate under the EAA

- [44] Section 85 of the EAA provides as follows:

Intestate leaving spouse and issue

85 (1) In this section, "net value" means the value of an estate wherever located, both in and out of British Columbia, after payment of the charges on it and the debts, funeral expenses, expenses of administration and probate fees.

- (2) This section applies if an intestate dies leaving a spouse and issue.
- (3) If the net value of the person's estate is not greater than \$65 000, the estate goes to the spouse.
- (4) If the net value of the person's estate is greater than \$65 000, the spouse is entitled to \$65 000, and has a charge on the estate for that sum.
- (5) After payment of the sum of \$65 000, the residue of the estate goes as follows:
 - (a) if the intestate dies leaving a spouse and one child, 1/2 goes to the spouse;
 - (b) if the intestate dies leaving a spouse and children, 1/3 goes to the spouse.

[45] Under s. 96(2) of the EEA, in an intestacy, a surviving spouse is also entitled to a life estate in the spousal home:

Spousal home and household furnishings to spouse

96 (1) In this section and section 97:

"household furnishings" means chattels usually associated with the enjoyment by the spouses of the spousal home;

"spousal home" means

- (a) a parcel of land that is
 - (i) shown as a separate taxable parcel on a taxation roll for the current year prepared under the Taxation (Rural Area) Act or on an assessment roll used for the levying of taxes in a municipality, and
 - (ii) has as improvements situated on it a building assessed and taxed in the current year as an improvement, in which the deceased and his or her spouse were ordinarily resident, owned or jointly owned by the deceased, and not leased to another person[.]
- (2) Despite section 95, and in addition to any other provision in this Part, but subject to section 98, in an intestacy,

- (a) except where it would otherwise go under this Part to a surviving spouse, the spousal home devolves to and becomes vested in those persons by law beneficially entitled to it and, subject to the liability of the land comprising the spousal home for foreclosure or the payments of debts, those persons must hold the spousal home in trust for an estate for the life of the surviving spouse, or so long as the surviving spouse wishes to retain the estate for life, and
- (b) the household furnishings go to the surviving spouse.
- (3) This section applies to the estate of a person who dies on or after April 1, 1972.

[46] Thus, under the EAA, Karen's Estate is to be distributed as follows:

- a) As the surviving spouse, Ronald is entitled to the first \$65,000 from Karen's Estate; all household furnishings in the Spousal Home; a life estate in the Spousal Home; and 1/3 of the estate's residue.
- b) The five children are entitled to the remaining 2/3 of the estate's residue in equal shares (i.e., about 13.2% per child).

B. Grant of Administration under the EAA

[47] The EAA confers a broad discretion on the court in choosing an administrator from the persons listed under s. 6, as well as the discretion under s. 7 to appoint some other person in "special circumstances":

Persons to whom administration may be granted

6 (1) If a person dies intestate the court may grant the administration of the estate of the deceased person

- (a) to the surviving spouse of the deceased person,
 - (b) to one or more of the next of kin, or
 - (c) to the surviving spouse of the deceased person jointly with one or more of the next of kin,
- as to the court seems expedient.

(2) If a person dies possessed of real estate,

- (a) in granting letters of administration or letters of administration with the will annexed, the court must have regard to the rights and interests of persons interested in the real estate, and
- (b) the heirs at law and devisees of the real estate, if not of the next of kin, are equally entitled to the grant with the next of kin.

Discretionary power in appointment of administrator

7 (1) This section applies if

- (a) a person dies intestate,
- (b) a person leaves a will, but without having appointed an executor willing and competent to take probate, or
- (c) the executor at the time of the death of the person resides out of British Columbia

and it appears to the court to be necessary or convenient by reason of the insolvency of the estate of the deceased or of other special circumstances to appoint some person to be the administrator of the estate of the deceased, or part of it, other than the person who, but for this section, would have been entitled to a grant of administration.

- (2) In the circumstances referred to in subsection (1), the court may, in its discretion, appoint a person it thinks fit to be the administrator, on the person giving security the court must direct.
- (3) An administration under subsection (2) may be limited or on condition or otherwise, as the court thinks fit.

[48] Under s. 3 the EAA, Karen's Estate is currently vested in the court:

Personal estate of intestate vests in court until grant

3 From the death of a person dying intestate until administration is granted in respect of the person's estate and effects, the personal estate and effects of the deceased person are vested in the court, subject only to the power of a court of competent jurisdiction to grant administration in respect of them.

[49] The estate of an intestate deceased is vested in the court pending a grant of administration, however, the court is not an administrator. Should administration be required prior to a grant of administration, the court can appoint an administrator ad colligenda bona to collect or protect the estate, or an administrator pending litigation under s. 8 of the EAA.

C. The Trustee Act

[50] Ronald also cites ss. 31 and 97 of the Trustee Act.

[51] With regard to s. 31, following statutory provisions are relevant here:

1. In this Act,

"trust" includes

- (a) implied and constructive trusts,
- (b) cases where the trustee has some beneficial estate or interest in the subject of the trust, and
- (c) the duties incident to the office of personal representative of a deceased person

but does not include the duties incident to an estate conveyed by way of mortgage;

Power of court to appoint new trustees

31 If it is expedient to appoint a new trustee and it is found inexpedient, difficult or impracticable to do so without the assistance of the court, it is lawful for the court to make an order appointing a new trustee or trustees, whether there is an existing trustee or not at the time of making the order, and either in substitution for or in addition to any existing trustees.

[52] Section 31 empowers the appointment of a new trustee. While the section makes it clear that there does not have to be a "present" trustee to make an order, it implicitly requires there to have been an "old" trustee at some prior point.

[53] On the facts, there has never been an executor, a personal representative, nor any form of administrator for Karen's Estate. Further, assuming (without deciding) that a trustee de son tort might suffice as an "old" trustee for purposes of s. 31, there is no allegation that Ronald is such.

[54] Russell does assert that Ronald has given away some of Karen's personal property. Russell's evidence is that this was done with the children's express or implied consent (i.e., by agreement of all beneficiaries). I am not in a position to decide the propriety of the gifts made on the evidence before me, and there is no evidence Ronald has otherwise taken it upon himself to administrate Karen's Estate. Accordingly, on the evidence before me, I am not satisfied Ronald acted as a trustee de son tort.

[55] Ronald also relies on s. 97 of the Trustee Act:

Appointment and remuneration of judicial trustees

97 (1) If an application is made to the court by or on behalf of a trustee or beneficiary, the court may, in its discretion, appoint a judicial trustee to be a trustee of that trust, either jointly with any other person or as sole trustee, and, if sufficient cause is shown, in place of all existing trustees.

(2) The administration of the property of a deceased person, whether a will-maker or intestate, is a trust, and the executor or administrator a trustee, within the meaning of this section and sections 96 and 98.

[56] In *Re Wolfe* (1957), 7 D.L.R. (2d) 215 (B.C.C.A.), the majority of our Court of Appeal held that s. 92(1) and (2) of the then Trustee Act (ss. 97(1) and (2) of the present Trustee Act) permit a judicial trustee to be appointed prior to any grant of administration.

[57] The relevant paragraphs of *Re Wolfe* read as follows:

- [9] An executor derives his office from the will and the estate vests in him from death; because of that he may do many things in the due course of administration before proving the will: Williams on Executors, 13th ed., pp. 57, 281. Likewise a person not an executor may meddle with an estate whether or not he is entitled to a grant of administration, and become accountable as an executor de son tort: Williams on Executors, 13th ed., pp. 27, 33.
- [10] It is obvious from this that the intervention of equity may be required before grant to protect an estate and the interests of persons entitled to it. Among the remedies commonly invoked in such circumstances is the appointment of a receiver: Williams on Executors, 13th ed., p. 1156. While I have difficulty in envisaging circumstances in which the interim appointment of a receiver would not be a sufficient remedy, I am unable to say that a situation might not arise in which the appointment of a judicial trustee before grant would be desirable. Consequently it cannot be said that the Legislature could not have intended to authorize the appointment of a judicial trustee before grant; therefore there seems to be no reason for not giving effect to the literal meaning of the section. Accordingly, in my opinion, a judicial trustee, as a matter of judicial discretion, may be appointed before grant in place of an executor or a person entitled to administration.
- [11] But I cannot agree with counsel for the respondent that an order appointing a judicial trustee before grant is a substitute for a grant of letters probate or letters of administration. A testamentary trust for which a judicial trustee may be appointed is constituted by the will, but the will can only be granted full legal recognition and effect after it has been proved in a Court of Probate and authenticated by a grant of letters probate: Williams on Executors, 13th ed., pp. 59-61, 254. As far as an intestate is concerned s. 5 of the Administration Act, R.S.B.C. 1948, c. 6, provides that the estate of an intestate is vested in the Court until grant of administration: vide Williams on Executors, 13th ed., p. 284. So a judicial trustee appointed before a grant must obtain letters probate or letters of administration in order to fully clothe himself with authority over the trust premises.
- [12] In such an order it would be proper, if not essential, to make the appointment of a judicial trustee conditional upon obtaining a grant within a stipulated time. In the analogous case of *Re Moore*, [1892] P. 145, a grant was made to a receiver of an estate appointed before probate to act until probate upon condition that he should obtain an order in Chancery continuing his appointment after probate.
- [Emphasis added.]
- [58] Thus, while our Court of Appeal found a judicial appointment could be made in such circumstances, it suggested it will rarely be appropriate and that, where done, ought to be made conditional on obtaining a grant.

- [59] As a result of Prospera's agreement with counsel, foreclosure does not pose a present danger to Karen's Estate. Nothing here demands the immediate intervention of equity in the form of a judicial trustee in order to protect the estate. Nor is an interim appointment appropriate here; the deceased has been dead for seven years, what is needed at this point is a full grant of administration.
- [60] Ronald also cites *Weisstock v. Weisstock*, 2019 BCSC 517. In *Weisstock*, there were two named co-executors, each of whom wanted the other disqualified so the remaining one could be sole executor. The court was referred to ss. 30, 31, and 97 of the Trustee Act by one party, to ss. 158 and 159 of the WESA by the other, and noted as well its inherent jurisdiction to remove an executor (paras. 39-41). Ultimately, the court removed both of the co-executors and appointed a third person as the sole personal representative, but without specifically referencing the source of jurisdiction for the ordered removal. No judicial trustee was appointed.
- [61] If *Weisstock* removed the named executors based on s. 31 of Trustee Act, the named executors were "old" trustees and thus the case is distinguishable and of no assistance here. While Justice Milman did not specify the jurisdiction relied upon to appoint the third person, s. 139 of WESA expressly provides for a substitution appointment, his silence on the point suggests the order was made under that provision.
- [62] Ronald's arguments based on the Trustee Act are rejected.

D. Issues under the EAA

- [63] The question of who should be given a grant of administration for Karen's Estate falls to be determined under ss. 6 and 7 of the EAA.
- [64] Section 6 creates no priorities among those listed as possible appointees. However, Russell is the sole person listed in s. 6 seeking to be appointed.
- [65] Ronald says Russell's animosity towards him and Russell's past conduct contrary to the best interests of the estate comprise "special circumstances" within the meaning of s. 7 of the EAA. He asks that Russell be passed over as a s. 6 appointee, in favour of Mr. Martin as s. 7 appointee.

IV. Positions of the Parties

A. Russell

- [66] Russell says Ronald's assertion that Russell would not be even-handed and neutral is speculative and without any evidentiary basis.
- [67] Russell attests that his siblings support his appointment as the administrator, and that he is willing and capable of defending the Theft Action, the Trust Action, and the foreclosure proceedings.

- [68] Russell says he was not aware Prospera had threatened to foreclose and only learned there were foreclosure proceedings through Ronald's filed materials in these matters. Russell expresses concern that the children were not promptly informed that there were issues with making payments on the mortgage.
- [69] Russell attests that the children have opposed Ronald as administrator because they do not trust Ronald to deal with the Theft Action, given that the opposing side is his family and because settling or conceding the claim could be in Ronald's personal interest as a beneficiary of Ralph's Estate. They also assert that Ronald failed to tell them about the Theft Action, instead leaving them to find out from other persons.
- [70] With regard to Mr. Martin, Russell says the children do not know Mr. Martin. He submits the fact that Mr. Martin was friends with the children's father at some point in time does not make him a neutral person. At bottom, Mr. Martin is Ronald's personal friend.

B. Ronald

- [71] In terms of evidence of hostility, Ronald points to his assertion that the children "shunned" him at the family reunion in 2013.
- [72] Ronald also asserts that the notices of dispute filed by the children were abusive and prevented any grant of administration from being made between July 5, 2016 (filing of the first) and May 28, 2020 (expiry of the most recent), resulting in a lengthy delay. He says these filings left Karen's Estate unprotected and unpreserved.
- [73] In particular, Ronald says the notices of dispute were filed contrary to the best interests of Karen's Estate and ultimately put the estate's primary asset (the Spousal Home) at risk. There was no administrator to deal with Prospera, renew the mortgage, or respond to the foreclosure. There has been no response to the Theft or Trust Actions. There has been no administrator to deal with estate tax matters.
- [74] He notes that the children have left it to him to take care of the financial and practical upkeep of the Spousal Home. He describes the children as having shown "no interest" in Karen's Estate. He denies that he hid the Trust Action from the children, and notes that Ralph's Estate provided their counsel with a copy of it immediately after it was requested.
- [75] Ronald attests that he does not trust Russell to deal with the Spousal Home, payments related to the Spousal Home or the foreclosure proceedings, as ending Ronald's life estate prematurely would be in the children's immediate financial interest.
- [76] Ronald does not think Russell will act impartially. He says Russell's affidavits in the matter do not address or alleviate his concern that Russell lacks impartiality, noting that Russell has not attested that he will administer the estate in accordance with the law.
- [77] Ronald also notes that none of the other children filed a response consenting to Russell's petition and that there is no written evidence of their consent or wishes.

- [78] Ronald submits that Mr. Martin should be appointed in the circumstances. He notes that Russell has made no suggestions in terms of a neutral appointment.
- [79] Finally, Ronald seeks to have the four filed notices of dispute removed. He argues that they are contrary to Rule 25-10(2) of the SCCR and amount to an abuse of process. He notes that all of the notices were filed by the law firm acting for Russell in these matters, and that no active legal steps were taken pursuant to the filed notices prior to Russell's December 12, 2019 petition.

V. Decision

A. Law - Special Circumstances

- [80] Russell submits that Ronald has failed to establish the existence of any special circumstances for purposes of EAA s. 7. Citing *Bank of Montreal v. Prescott*, [1996] B.C.J. No. 1713 (S.C.), Russell argues the case law is clear that the court's discretion under s. 7 is narrow and is to be "sparingly exercised" (para. 12).
- [81] In *Bank of Montreal*, the deceased had named her two children as co-executors. The daughter renounced her executorship. A petition was filed by the Bank, a creditor, asserting that the son, Mr. Cashman, had misconducted himself as executor and should be passed over for a grant of administration in favour of a third party.
- [82] At the time, s. 7 of the EAA read as follows:
- [7] Where a person dies intestate, or leaves a will, but without having appointed an executor willing and competent to take probate, or where the executor at the time of the death of the person resides out of the Province, and it appears to the court to be necessary or convenient by reason of the insolvency of the estate of the deceased or of other special circumstances to appoint some person to be the administrator of the estate of the deceased, or part of it, other than the person who but for this section would have been entitled to a grant of administration, the court may, in its discretion, appoint a person it thinks fit to be the administrator, on his giving security the court shall direct. Every such administration may be limited or on condition or otherwise, as the court thinks fit.
- [83] The issue in *Bank of Montreal* was when the court should consider a named executor disqualified for purposes of the opening portion of s. 7. This is made clear at para. 9 of the decision:
- [9] The principal issue is whether, in the words of s. 7, Mrs. Cashman left a will "... without having appointed an executor willing and competent to take probate". Mr. Cashman has not resided out of the province at any relevant time. It is clear that he is willing to take probate. The issue then reduces itself to whether he is competent to do so. I agree with Mr. Sandilands that, as a simple matter of construction, the discretion conferred by s. 7 in the passage starting "and it appears to the court" arises only if one of the conditions set out in the preceding passage are satisfied.

[Emphasis added.]

- [84] Mr. Cashman was found to be competent, and thus the Bank's petition was dismissed without making a determination under the second part of s. 7. While the court did not make a finding, it did comment on special circumstances:
- [15] For the sake of completeness, I will note that Mr. Sandilands also submits that the petitioner has not met the second test posed by s. 7, i.e. that it "be necessary or convenient by reason of the insolvency of the estate ... or of other special circumstances" to appoint a different person. That question comes down to the meaning to be given to special circumstances in that context. In *Re Taylor*, [1950] 2 All E.R. 446, Willmer, J. said he was attracted to the view that those words could relate only to special circumstances "... in connection with the estate itself or the administration of the estate". That may well be right but the facts of the case do not give much assistance in defining what might be covered by "the administration of the estate". In this case, if the first hurdle could be got over, there might be stronger grounds than there were in that case for suggesting that the complaints against the executor are in connection with the administration of the estate. Whether or not those complaints, if established, would amount to special circumstances within the meaning of the section is a question I need not decide.

[Emphasis added.]

- [85] Section 7 of the EAA was subsequently revised to read as it does now, with each of the preconditions in the opening portion constituting a separate subparagraph. As the revised version makes amply clear, if a deceased dies intestate, s. 7(a) is satisfied and the analysis moves on to the second--"and it appears to the court"--stage of s. 7.
- [86] The court has not held that special circumstances are to be narrowly interpreted and rarely found. The test cited by Ronald applies to s. 7(b) and (c), which both involve passing over named executors, and not to special circumstances for purposes of the second portion of s. 7.
- [87] As noted, the meaning of special circumstances was discussed in obiter in *Bank of Montreal*. There, the court did not disagree (nor actually agree) with an English case suggesting that special circumstances must be "in connection with the estate itself or the administration of the estate". While I accept that qualification as consistent with the purposes of the provision, it does not narrow things much.
- [88] Passing over a person listed under s. 6 of the EAA in favour of a third party is not the equivalent of removing or passing over a named executor. A named executor is someone who, flaws and all, was specifically selected for the position by the deceased. Section 6 does not deal with individuals, but rather with categories. The included groups do not reflect the wishes of a deceased, but rather the Legislature's broad and generic assumptions about family structure.

[89] As already noted, s. 6 creates no priorities amongst the listed groups. Persons who fall with the s. 6 groups are entitled to be considered, but the court has the discretion to appoint from among them whomever it considers "expedient". The on-line Merriam-Webster provides the following definition (<https://www.merriam-webster.com/dictionary/expedient>):

expedient adjective

1: suitable for achieving a particular end in a given circumstance

[90] The present case does not involve the discretion to choose among the listed. Russell is the sole listed person seeking appointment. The relevant exercise of discretion here relates to passing over a s. 6 listed person in favour of appointing an unlisted person under s. 7. Thus, in my view, the proper approach to special circumstances requires something more than expediency to justify appointing an unlisted person over a listed person, but also considerably less than the accepted grounds for passing over a named executor.

[91] Assuming that special circumstances must pertain to the estate itself or to administration of the estate, it seems logical that many, if not most, of the recognized grounds for removing or passing over a named executor will have a lesser analogue that might constitute special circumstances. Thus, for example, a listed person might be passed over because of a competing personal interest, even though the interest might not be sharp or direct enough to constitute a conflict of interest for the purpose of removing a named executor.

[92] I accept that significant evidence of animus toward a beneficiary could potentially amount to special circumstances, as might evidence that the listed person is unable, unwilling or reasonably unlikely to put the estate's best interests first. These two grounds appear to capture the nature of the objections raised by Ronald in seeking to have Russell passed over.

B. Findings - Special Circumstances

[93] I am not persuaded that Russell bears any significant animus toward Ronald.

[94] The conflict between Ronald and the children is not of the deeply entrenched kind often seen in family disputes. While the evidence does not provide much of a sense of the relationship between Ronald and the children during Karen's lifetime, there is no indication of historical hostility. While Ronald asserts the children "shunned" him at the reunion, that description is vague and subjective. Further, the evidence indicates that Ronald continued to speak socially with David after the reunion and that April came by the house in 2015.

[95] Russell and the other children have considered Ronald to be in a position of conflict of interest since the Theft Action was filed. It appears that the children considered the appearance compounded by the fact that Ronald did not tell them about the Theft Action himself, and also by his comments on the documents disclosed by Ralph's Estate.

[96] Ronald takes the position that he is not a conflict of interest about the Theft Action because he is not a residuary beneficiary of Ralph's Estate. Ralph's will was not put into evidence before me and, from what is before me, it does not appear to have been provided to the

children for review. However, even if Ronald is a mere legatee, there are still questions about the value of the personal items he was given and what would happen to Ronald's gifts if there is little else of value in Ralph's Estate and its debts are significant. It is also not beyond the pale to wonder whether, should the Theft Action not succeed, either Ralph's will or Ronald's conscience would require a redistribution in favour of Betty.

- [97] As Ronald no longer seeks to be the administrator, the question of whether the Theft Action would put Ronald in a conflict of interest if he were the administrator is not before me, and I am not purporting to decide it. The appearance of possible conflict is, however, relevant to whether anything Russell or the other children have done in opposing Ronald's efforts to be appointed administrator are evidence of hostility or animus toward him. I find that Russell and the other children have been expressing a genuine, and not entirely unfounded, concern about conflict in interest in opposing Ronald's appointment.
- [98] With regard to the successive notices of dispute, the notices are all expired and there is no need to remove them. However, I agree that the manner and circumstances in which the successive notices of dispute were filed in this case constituted an abuse of process.
- [99] The SCCR allow a "person" to file a notice of dispute. However, the evidence here is that the children have been unified in their opposition to Ronald acting as administrator since they learned of the Theft Action. Russell attests in support of his petition that the other children support his petition and appointment. As noted, the notices of dispute filed here were all virtually identical. I am satisfied the children are, in fact, aligned in interest and have been since prior to the filing of the first notice of dispute. I find the successive notices of dispute were specifically filed in order to get around the requirement to apply to renew an existing notice of dispute.
- [100] I am not saying that siblings cannot constitute separate persons for purposes of filing notices of dispute. There may, for example, be cases where different siblings have different objections or different legal theories and it may be appropriate for each of them to file their own notice of dispute. The finding here is made on the facts of this case.
- [101] However, if Ronald was of the view that the notices of dispute were creating undue delay and imperilling the estate, then an application to remove ought to have been brought (SCCR, Rule 25-10):

Application to remove notice of dispute

- (10) A person who is interested in an estate in relation to which a notice of dispute has been filed, including, without limitation, an applicant for an estate grant may apply on notice to the disputant for an order removing the notice of dispute.

Grounds on which notice of dispute may be removed

(11) On an application under subrule (10), the court may, by order in Form P31, remove a notice of dispute if the court determines that the filing is not in the best interests of the estate.

[102] The purpose of these two subrules is to ensure notices of dispute are not permitted to operate contrary to an estate's best interests: *Richardson Estate (Re)*, 2014 BCSC 2162 at paras. 57, 58, and 62.

[103] The right to apply to remove was added into the modernized rules in order to prevent administration from being indefinitely hung up. As set out in *Mortimer v. Bender*, 2020 BCSC 483, this intent was acknowledged in the British Columbia Law Institute ("BCLI") report, *Report on New Probate Rules* (BCLI Report no. 57, October 2010):

[117] At page 15 (Part One) of the BCLI report, the authors further state:

One illustration of how the draft rules in Part Two attempt to achieve this needed balance between simplicity and adequate protection relates to estate caveats.

The right to apply to have an estate caveat removed will force the validity of the caveator's objection to the grant to be tested. There will be a ruling to let the estate caveat stand or for its removal, and in either case directions may be given for determination of the issues in dispute that stand in the way of the due administration of the estate. A caveator will not be able to produce a complete stalemate for the entire period the estate caveat is in effect, in contrast to the present.

[Emphasis in the original.]

[118] While Part 25 of the Rules does not slavishly track the BCLI report's draft rules, it is abundantly clear on a comparison of the two sets of rules that the overall approach and framework of the BCLI report are the foundation of Part 25, including the twin goals of consolidating related matters into a single proceeding and enabling the court to deal with those matters as efficiently as possible. As indicated in the BCLI report, these aims are not unrelated to the decision to continue the estate caveat (as a "notice of dispute").

[104] The matter of appointment of an administrator could have been pushed forward by Ronald and his counsel. It was not. While the notices of dispute filed were abusive, I do not think it can be said that the notices imposed undue delay. Rather, the delay was tolerated by Ronald.

[105] With regard to the foreclosure proceedings, it is unclear why Prospera's refusal to accept further mortgage payments was not immediately reported to children or their counsel. Further, the appointment of an administrator *ad colligenda bona* could have been sought to deal with the mortgage payments: *Palanca v. Palanca*, 2005 BCSC 1014 at para. 11; *Lantzius Estate (Re)*, 2015 BCSC 935 at para. 14.

[106] Finally, at least as of December 12, 2018, the date of filing of Russell's petition, an application for interim administrator to caretake the estate by dealing with the mortgage and forestalling the foreclosure proceedings could have been brought under s. 8 of the EAA:

Administration while legal proceedings pending

8 (1) Pending an action touching the validity of a will, or for obtaining, recalling or revoking a probate or a grant of administration, the court may appoint an administrator of the estate of the deceased person.

(2) An administrator appointed under subsection (1)

- (a) has all the rights and powers of a general administrator, other than the right of distributing the estate, and
- (b) is subject to the control of the court, and must act under its direction.

[107] In the circumstances, I do not think it can said that the notices of dispute led to the foreclosure proceedings.

[108] I am satisfied that Russell is capable of being impartial, acting in the best interests of the estate, and fulfilling the legal obligations of acting as administrator. His siblings support his appointment and the children are collectively the beneficiaries of two-thirds of the residue of Karen's Estate.

[109] In dealing with the estate and the Theft and Trust Actions as administrator, Russell is governed by the general law, including all the duties and obligations it imposes on trustees. As stated in *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353, a trustee's claim for indemnification for legal costs is limited to reasonable costs incurred in mounting a reasonable defence:

[74] The courts have long held that trustees are entitled to be indemnified for all costs, including legal costs, which they have reasonably incurred. Reasonable expenses include the costs of an action reasonably defended: see *Re Dingman* (1915), 35 O.L.R. 51. In *Re Dallaway*, [1982] 3 All E.R. 118, Sir Robert Megarry V.C. stated the rule thus at p. 122:

In so far as such person [trustee] does not recover his costs from any other person, he is entitled to take his costs out of the fund held by him unless the court otherwise orders; and the court can otherwise order only on the ground that he has acted unreasonably, or in substance for his own benefit, rather than for the benefit of the fund.

Appointment is far from a blank cheque to run up unreasonable legal costs litigating the Theft and Trust Actions.

[110] In my view, Ronald has failed to establish the existence of any special circumstances for purposes of s. 7 of the EAA.

VI. Disposition

[111] I make the following orders:

- a) Russell is granted administration of Karen's Estate, on the following terms and conditions:
 - i. The Prospera mortgage and property taxes for the Spousal Home are to be brought into good standing immediately by the following means:
 - (1) Ronald is entitled to pay the funds required to bring the mortgage into good standing and bring the property taxes up to date, and to make future mortgage and property tax payments, using his personal funds;
 - (2) arrangements for Ronald to make such payments will be facilitated by Russell to the fullest extent possible;
 - ii. Ronald's payments under paragraph 111 a) are without prejudice to his right to advance a claim in respect of those payments, in whole or part, as against Karen's Estate.

VII. Costs

[112] In light of the fact that the petition, petition response, notice of application, and application response were all erroneously based on WESA, the parties are to bear their own costs in relation to the pleadings and the first chambers hearing.

[113] The costs incurred in relation to the drafting of affidavits and the second chambers hearing are awarded to Russell as the successful party.

"Tucker J."

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