

CANADA / JUDGMENT

Zaleschuk (Re)

2022 BCSC 943

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DECIDED

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2022 BCSC 943 Zaleschuk (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Zaleschuk (Re),

2022 BCSC 943

Date: 20220607

Docket: S215952

Registry: Vancouver

Re: In the Matter of the Kenneth Donald Zaleschuk/Kenneth Jr. Trust

Before: The Honourable Justice A. Ross

Reasons for Judgment

Counsel for the Petitioner:

J. Zaitsoff

Counsel for the Respondents:

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A. Bajcetic

Place and Date of Trial/Hearing:

Vancouver, B.C.

February 7-8 and 16, 2022

Place and Date of Judgment:

Vancouver, B.C.

June 7, 2022

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- [1] Kenneth Zaleschuk Jr. ("Kenneth Jr.") is the son of Kenneth Zaleschuk Sr. ("Kenneth Sr.") and Marina Yordana Zaleschuk. He is 36 years old. All parties concede that he has a learning disability. Kenneth Jr.'s parents divorced in 1999 after long and bitter litigation.
- [2] This proceeding revolves around the Kenneth Donald Zaleschuk/Kenneth Jr. Trust (the "Trust"). The Trust was established for the benefit of Kenneth Jr. by his father.
- [3] In 2014 Kenneth Sr. learned that he had terminal pancreatic cancer. Soon after learning of his diagnosis and prognosis, he met with his financial advisor and a lawyer to prepare and settle the Trust that is the subject of this petition. Kenneth Sr. appointed his two sisters, Cindy Lynn Jones ("Cindy") and Laurie Jane Zaleschuk ("Laurie") as the trustees (collectively, the "Trustees"). The Trustees are the respondents in this petition.
- [4] Kenneth Sr. passed away on April 7, 2015.

- [5] In this proceeding, Kenneth Jr. seeks an order removing his two aunts as the trustees of the Trust and appointing his mother, Marina, in their stead. He argues that the Trustees have delayed and refused to act in his best interests. As discussed below, in bringing this petition, Marina acts on Kenneth Jr's behalf via a Power of Attorney.
- [6] In their response to this petition, the Trustees argue that they have been administering the Trust in accordance with its provisions. Their alternative position is that, if the court sees fit to remove them as trustees, then a professional trustee should be appointed. They oppose the appointment of Marina on the basis that such an appointment would go against Kenneth Sr.'s specific wishes. The respondents further submit that further evidence is required, and they seek an order allowing cross-examination on affidavits.
- [7] For the reasons set out below, I dismiss the petition. It will be evident from my reasons that I do not believe that further evidence or cross-examination is required.
- [8] In these reasons, I refer to the members of the Zaleschuk family by their first names, and I distinguish between father and son by using the "Jr." and "Sr." descriptors. I mean no disrespect by doing so.

Preliminary Issue

- [9] On a preliminary point, the respondents take issue with the positions taken by Kenneth Jr. in this proceeding. They submit that this litigation is driven by Marina, and not Kenneth Jr.
- [10] The respondents' position arises from the fact that the Trust was established because Kenneth Jr. has a learning disability. It is common ground that he cannot live independently and will require care for the rest of his life.
- [11] In this proceeding, Kenneth Jr. does not act through a litigation guardian. No committee has ever been appointed over his person or his finances.
- [12] The twist in this case is that Kenneth Jr. executed a Power of Attorney on October 2, 2015, appointing his mother as his attorney. Although Kenneth Jr. swore an affidavit in support of this application, the Trustees submit that it is evident that the person pressing the litigation is Marina. As discussed below, there is significant animosity between Marina and the members of Kenneth Sr.'s family, including the Trustees.
- [13] The respondents note the dichotomy created by the fact that the Trust was established because of Kenneth Jr.'s intellectual challenges, whereas the petition purports to put forward his wishes as a basis for removing the Trustees. The respondents also question the validity of the Power of Attorney document wherein Kenneth Jr. appointed his mother as his attorney. In that respect, the respondents applied to tender a medical report from another proceeding that discusses Kenneth Jr.'s mental capacity. In my opinion, that report is not properly before the court in this proceeding. I decline to consider it as evidence of Kenneth Jr.'s capacity.

- [14] I further note that, although the respondents question whether Kenneth Jr. intends to take the positions that he expresses in his affidavit, they also take the (well-founded) position that the wishes of the beneficiary should play no part in the court's determination on this application.
- [15] Having considered the current Trustees' submissions, I make no finding on the validity of the Power of Attorney. While there may be some underlying basis for the concerns raised by the respondents regarding that document, I find that any such arguments raised by the respondents are not relevant or necessary for my considerations in this application.

Background Facts

- [16] From the recitation of the facts below, it is evident that there is significant animosity between Marina and the remainder of Kenneth Sr.'s family. That animosity is relevant to the issues of the proper administration of the Trust and the choice of trustee.
- [17] Kenneth Sr. and Marina were married in 1983. They had two children, Kenneth Jr. (now 36 years old) and Marie (now 32 years old). The couple separated in 1993. It is common ground that Kenneth Sr. and Marina engaged in years of litigation prior to their ultimate divorce in 1999. Even following the divorce, the relationship between Kenneth Sr. and Marina remained difficult.
- [18] Kenneth Sr. paid monthly child support payments for Kenneth Jr. pursuant to a 2014 court order. The support payments were ordered despite the fact that Kenneth Jr. was an adult.
- [19] Kenneth Sr. was not independently wealthy. He had been a part-owner of a pub with his siblings and father. However, his primary employment was as a custodian. He was an astute investor.
- [20] In the fall of 2014, Kenneth Sr. learned that he had terminal pancreatic cancer. Following that diagnosis, he took a number of steps to ensure, among other things, that he would provide for Kenneth Jr. for the rest of his life. He consulted with his financial advisor, Mr. Ian Tasker, and a lawyer, Mr. Christopher Boulton, to undertake his estate planning.
- [21] Ultimately, he settled the Kenneth Donald Zaleschuk/Kenneth Jr. Trust by way of Trust Deed dated December 19, 2014 (the "Trust Deed").
- [22] The respondents say that Kenneth Sr.'s planning included making provision that his ex-wife, Marina, would not be able to access, control, or use any of the funds set aside for Kenneth Jr.
- [23] The Trust Deed, of course, speaks for itself in respect of Kenneth Sr.'s wishes and intentions. In addition, the respondents tendered significant collateral evidence regarding the settlor's wishes including affidavits of:
- a) the two Trustees, Laurie and Cindy (the respondents);
 - b) Mr. Tasker, the financial advisor;

- c) Mr. Boulton, the solicitor; and
- d) the former couple's daughter, Marie.

[24] In short, all of the collateral evidence tendered by the respondents indicates that Kenneth Sr.'s primary motivation was to ensure that provision was made for his son for the duration of the latter's life. A large part of Kenneth Sr.'s concern emanated from his desire to ensure that Marina did not get control over the trust funds. That motivation, the respondents submit, was based on Kenneth Sr.'s concern that if his ex-wife had control over the funds, then the funds (and Kenneth Jr.'s financial security) would be at risk. This evidence is disputed by Marina.

[25] Mr. Tasker's affidavit states:

- 5. In planning for Kenneth [Jr.], one of Ken's greatest concerns was protecting the money he would set aside for Kenneth [Jr.] and ensuring that Marina had no control of or access to it.
- 9. Ken had experienced Marina's relentless pursuit of his money and his constant fear was that if he left his money directly to Kenneth [Jr.], Marina would obtain access to and also use the funds for her own benefit.
- 12. The primary reasons for setting up the Trust were to ensure that Ken's fund were protected from Marina and to ensure that Kenneth [Jr.] had enough funds to last him throughout his entire lifetime.

[26] Mr. Boulton's affidavit states:

- 6. Ken wanted to provide for his two children, Kenneth [Jr.] and Marie after he was gone. He expressed to me that he wanted to ensure privacy and discretion when he died, and to achieve that I concluded that his estate was to be planned so as to not have to be probated. A primary concern for doing this was to protect and safeguard money left for Kenneth [Jr.]'s benefit and ensure that no Will Variation challenges could be made on his behalf. Ken wanted the funds that were to go to Kenneth [Jr.] to be held for his benefit, due to his mental disability.
- 7. I understood that Ken had concerns regarding his ex-wife Marina Zaleschuk ("Marina") about her having any access to his funds and I came later to further understand that his concerns were based on his history with Marina that culminated in a lengthy and difficult divorce battle between them. I did not at that time have any detailed knowledge of the divorce situation.
- 11. The main reason for setting up the Trust as a discretionary inter vivos type of trust was to provide structured management of the Trust's Funds, for reason of Kenneth [Jr.]'s disability. Ken wanted to ensure that Kenneth [Jr.] had enough funds to last him throughout his entire life. Due to Kenneth [Jr.]'s disability, he could require ongoing lifetime support and Ken wanted to ensure that Kenneth [Jr.] would have access to the funds for the duration of his life, particularly given Kenneth [Jr.]'s young age. Ken was additionally concerned that the

funds for Kenneth [Jr.] not be depleted by Marina. Ken's reasoning was that if Marina died before Kenneth [Jr.], Kenneth [Jr.] probably would have an increased need for funds to live more independently.

- [27] Until his death, Kenneth Sr. was the sole trustee, and, upon his death, his two sisters (the respondents) were appointed. I interpret those appointments as a patent indication of Kenneth Sr.'s wishes. It is evident that he reposed his trust in the respondents because he trusted them to carry out his wishes.
- [28] At the time the trust was settled, Kenneth Jr. was 29 years old. Seven years have passed.
- [29] Kenneth Jr. lives with his mother, Marina, and her husband. He receives a monthly disability benefit payment from the provincial government as well as some other government benefits. He is not required to pay rent, and his day-to-day expenses are covered by his disability benefit.

Trust Deed

The Provisions of the Trust

- [30] Kenneth Sr. settled the Trust by way of Trust Deed dated December 19, 2014.
- [31] The Trust was irrevocable. Upon Kenneth Jr.'s death, the remainder goes to his sister Marie.
- [32] Kenneth Sr. structured the Trust as a discretionary inter vivos type trust. He gave full discretion to the Trustees regarding the expenditures out of the Trust. The term "discretion" is defined as the "absolute and uncontrolled discretion to the extent enabled by law".
- [33] The purposes of the Trust were set out in Schedule "B". That schedule directs the Trustees to hold the Trust fund for Kenneth Jr. and to:
- (a) pay so much of the income and capital of Kenneth's Fund as the Trustee decides is advisable for the care, maintenance, education, well-being and benefit of Kenneth during his lifetime;
 - (b) to purchase any items, services or products as the Trustee decides are necessary or advisable for the care, maintenance, education, well-being and benefit of Kenneth;
 - (c) add any income not paid in any year to the capital
 - (d) on the date of the death of Kenneth give what remains to my daughter Marie

- [34] The Trust Deed further provides, under the heading "Powers and Authorities of the Trustee":

4.1 Without limiting or derogating from the powers, authorities, discretions and immunities otherwise available to the Trustee, whether under any statute or at law or otherwise, the Trustee hereunder shall have and be invested with the following powers, authorities, discretions and immunities, as to which his judgment shall be final and conclusive upon all interested parties, and no person dealing with him shall be charged with any duty to enquire into the propriety of his actions

[35] The powers are then listed in paragraphs (a) to (q). The following paragraphs are relevant:

- (e) to deal in any way with any and all of the assets in the same manner as he might personally do if he were the beneficial owner of the assets comprising the Trust Fund;
- (i) to employ and compensate agents, accountants, solicitors, brokers, investment advisors
- (q) It is my wish that the Trustees retain the services of Ian Tasker of TD Waterhouse Private Investment Advice (or similar services provided by a corporation or advisor affiliated with The Canada Trust Company) if such services are being used by me at the time of the death of Kenneth Donald Zaleschuk.

[36] In paragraph 5.5, the Trust Deed provides that the Trustees may adopt any rules and regulations to govern their procedures.

[37] The Trust Deed further provides that the Trustees have the power to appoint additional trustees.

The Legal Test for Removal of Trustees

[38] The authority to remove and replace trustees is found in the Trustee Act, R.S.B.C. 1996, c, 464, ss. 30-31 and 99. In addition, this Court has the inherent jurisdiction to remove trustees.

[39] The parties agree on the factors for the court to consider in an application to remove trustees. Both parties cite the considerations set out in *Miles v. Vince*, 2014 BCCA 289:

[84] What circumstances justify the removal of a trustee? In *Letterstedt v. Broers* (1884), L.R. App. Cas. 371 (J.C.P.C.), the court established guidelines justifying the removal of a trustee (at 385-389):

1. If the Court is satisfied that the continuance of the trustee would prevent the trusts being properly executed, the trustee might be removed. It must always be borne in mind that trustees exist for the benefit of those to whom the creator of the trust has given the trust estate.
2. The acts or omissions must be such as to endanger the trust property or to show a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity.
3. In exercising the delicate jurisdiction of removing trustees, the Court's main guide must be the welfare of the beneficiaries. It is not possible to lay down any more definite rule in a matter that is so "essentially dependent on details often of great nicety." The Court must proceed to look carefully into the circumstances of the case.

4. Where a trustee is asked to resign, and if it appears clear that the continuance of the trustee would be detrimental to the execution of the trusts, even if for no other reason than that human infirmity would prevent those beneficially interested, or those who act for them, from working in harmony with the trustee, and if there is no reason to the contrary from the intentions of the framer of the trust to give this trustee a benefit or otherwise, the trustee is always advised by his own counsel to resign.
 5. The lack of jurisprudence in respect of the removal of a trustee reflects that a trustee when asked to do so, will resign.
 6. If, without any reasonable ground, the trustee refuses to do so the court might think it proper to remove him.
 7. Friction or hostility between trustees and the beneficiary is not of itself a reason for the removal of the trustees. But where the hostility is grounded on the mode in which the trust has been administered, where it has been caused wholly or partially by substantial overcharges against the trust estate, it is not to be disregarded.
- [40] In addition to these factors, the petitioner points to the element of "unaccountable hostility" as applying in this case, relying on *Dirnberger Estate*, 2016 BCSC 439 at para. 9. I noted above that the respondents question the Power of Attorney appointing Marina. It will be evident, from my discussion below, that to the extent the petitioner submits that there is hostility, that enmity exists between Marina and the current Trustees. Further, it appears to be mutual. It is important for my reasons below, however, that I make a specific finding that there is no evidence of any hostility between Kenneth Jr. and any other person. To the contrary, the evidence establishes that Kenneth Jr. is well-loved by everyone in the family. It follows that there is no hostility from the Trustees toward Kenneth Jr.
- [41] It is evident throughout the cases that the underlying principle for the court to consider is the welfare of the beneficiaries.
- [42] The petitioner submits that the factors outlined above support a removal of the current trustees and the appointment of Marina.
- [43] In response, the Trustees accept that the considerations set out in *Miles* should guide the court's assessment in this application. They submit that any application of those considerations to the facts of this case should lead to a dismissal of the petition. They further submit that the court should not lightly interfere with the settlor's right to nominate the trustees, citing *Gawdun v. Lord*, 2020 BCSC 266 at para. 10. They deny any misdeeds and say that all of their decisions have been in Kenneth Jr.'s long-term best interests.

The Administration of the Trust and the Criticisms of the Trustees

- [44] The petitioner submits that the Trustees have failed to administer the Trust. The criticisms fall into the following areas:

- a) The Trustees did not inform Kenneth Jr. of the existence of the Trust upon Kenneth Sr.'s death. Instead, the Trustees relied on Marie (not a trustee) to inform Kenneth Jr. about the existence of the Trust.
 - b) When asked, the Trustees refused to provide an accounting or any financial information about the Trust.
 - c) The Trustees have refused to make any distributions from the Trust directly to Kenneth Jr. or his mother. The Trustees have rejected the following claims and expenses by Kenneth Jr.:
 - i. the purchase of a motorized scooter (\$2,900);
 - ii. new eyeglasses;
 - iii. medical expenses, including massage and acupuncture treatments;
 - iv. a new cellular phone and a laptop computer;
 - v. travel expenses for a trip to Europe to visit family; and
 - vi. a new mattress and headboard.
- [45] In addition, the petitioner criticizes the Trustees for making a number of payments through Marie, related to Kenneth Jr.'s travel expenses incurred while the siblings were travelling together.
- [46] In addition, the petitioner criticizes the Trustees for purporting to pass resolutions (on September 12, 2019). The petitioner argues that those resolutions, which introduced procedures for submitting expenses, constitute evidence of the Trustees' animosity and hostility toward Marina. The petitioner submits that Marina is not able to comply with the new procedures.
- [47] In my opinion, the last two criticisms tend to illuminate the positional divide between the beneficiary, his mother, and the current Trustees. On the face of the petition, Kenneth Jr. complains that the Trustees paid for his long vacations with his sister, while refusing to pay for other vacations with his mother. Further, Marie supports the procedures instituted by the Trustees. She has followed the procedures and received funding for Kenneth Jr.'s expenses. Two points flow from these complaints:
- a) A neutral observer of these two criticisms may wonder why this is Kenneth Jr.'s complaint, and not his mother's complaint. He received funds for his vacations with Marie. He did not receive funds for vacations with his mother.
 - b) Conversely, a neutral observer may wonder why the Trustees discerned that Marie's vacations with Kenneth Jr. fell within the provisions of the Trust, but Marina's vacations did not.

[48] The Trustees answer each of the petitioner's criticisms. At the outset, they note that the affidavit material provided by the petitioner, on its face, tends to mislead the reader. They note that Kenneth Jr.'s affidavit makes the following statements:

- 24. In the period of over six years since my father's death, the Trustees have only made one distribution from the Trust to me.
- 33. The Trustees never contact me and appear to be completely unconcerned with my well-being and needs.
- 44. In over six years since my father's death, I have only received \$150.00 from the Trust.

[49] The Trustees note that these statements are carefully crafted to suggest that Kenneth Jr. has received extremely little benefit from the Trust. The inference is that the Trustees have ignored him.

[50] In fact, the Trustees have released over \$26,000 from the Trust to allow Kenneth Jr. to travel to Europe with his sister in each of 2016, 2017, and 2018. In addition, they released funds for a trip he took with his mother to Mexico in 2018. Hence, the Trustees submit that the wording of Kenneth Jr.'s affidavit is, at best, misleading.

[51] With respect to allegation that they did not communicate regarding the existence of the Trust:

- a) the Trustees note that Marina's Affidavit #1 was carefully worded to create a complaint about a situation that had no actual effect on Kenneth Jr.;
- b) Marina's Affidavit #1 states that the Trustees did not "communicate with Kenneth or me about the existence of the Trust Fund, or how Kenneth was to access it or obtain benefit from it";
- c) in response, the Trustees point to Affidavit #1 of Marie, which states that, shortly after Kenneth Sr.'s death, with the Trustees' approval, Marie explained the existence of the Trust and the process for reimbursement to Kenneth Jr. and Marina;
- d) the fact that Marina was aware of the Trust is not in issue. Kenneth Sr. died on April 7, 2015. Marina emailed the Trustees on May 18, 2015. In addition to making other demands on the Trustees, Marina wrote:

Since there is a Trust Fund for [Kenneth Jr.], and you are in complete charge of it, I advise you to submit the ongoing monthly payments of \$1,318.00 as of May 1, 2015

- e) in this email, Marina was seeking to have the Trust continue to pay the child support amounts that Kenneth Sr. had been paying for Kenneth Jr. during the former's lifetime. There was no legal basis for that demand.

- [52] Hence, it is evident that, within six weeks after Kenneth Sr.'s death, Kenneth Jr. and Marina knew of the Trust's existence, the names and contact information of the Trustees, and the fact that the Trustees were in "complete charge of it."
- [53] With respect to the allegation that the Trustees have failed to provide an accounting or any financial information:
- a) the Trustees concede that, when Marina first asked about the finances of the Trust in 2015, they did not provide an answer. They say that they did not believe that Marina had any authority to request the information. When they were first approached, Marina was not Kenneth Jr.'s attorney. There was no Power of Attorney;
 - b) once they received legal advice (primarily in response to this litigation), the Trustees note that they provided Marina with the annual financial statements that were prepared yearly by a chartered accounting firm. To be clear on this point, the Trustees had retained an accountant to prepare the financial statements, and those statements had been prepared yearly from 2015 onward. The only complaint is that the Trustees did not forward those statements to Kenneth Jr. when Marina asked for them.
- [54] The Trustees concede that they initially failed to respond to the request for an accounting, but they had assiduously accounted for the funds held in the Trust. The Trustees also note that there is a significant gap in time between Marina's 2015 request for financial information, and the later requests that came from counsel. There is no evidence of any further request for information in the four years between Marina's initial request in 2015 and the commencement of this proceeding in 2019.
- [55] The Trustees also submit that the financial statements indicate that they are overseeing the Trust properly in their capacity as fiduciaries. The Trustees note the following:
- a) The financial statements disclose that the original corpus of the fund was \$750,000 in 2015. That capital has been invested by Mr. Ian Tasker. As of October 2021, the fund was valued at \$951,658.
 - b) The Trustees have disclosed to Kenneth Jr. (via Marina) the amounts that they have distributed to Kenneth Jr. totalling approximately \$26,000 for travel, eyeglasses, and a helmet. The Trust has also expended approximately \$1,800 to the two Trustees for travel expenses to attend court proceedings relating to this matter and a prior Small Claims action wherein Marina sued the Trustees for payment of certain expenses. (That Small Claims action was dismissed.)
 - c) Finally, the Trustees note that, in the course of this litigation, they have disclosed a significant number of documents in a broad range of categories, including the banking records and the investments statements of the Trust. The Trustees submit that the documents they have disclosed would allow any person to determine exactly what has happened to all the funds held in the Trust.

- [56] The Trustees submit that, despite their document production, the petitioner is not satisfied and continues to push for a passing of the Trustees' accounts. They submit that their disclosure should satisfy the petitioner.
- [57] On that basis, the Trustees say that they have fully accounted for all funds in the Trust.
- [58] With respect to the claims for reimbursement made by Marina and Kenneth Jr., the Trustees say that they considered each request in line with their complete discretion provided by the Trust Deed. Addressing the specific items of reimbursement claimed by the petitioner:
- a) the purchase of a motorized scooter: The Trustees considered the benefits and dangers associated with Kenneth Jr. driving a motorized scooter. They were concerned that he might injure himself, so they declined to contribute toward its purchase. However, they purchased a helmet for him in the amount of \$150;
 - b) new eyeglasses: The Trustees indicate that they paid \$895.41 for Kenneth Jr.'s eyeglasses on July 23, 2018. This payment was made through Marie;
 - c) medical expenses including massage and acupuncture treatments: The Trustees say that they considered, but rejected, these expenses (which were in the hundreds of dollars). Their rejection of these claims was based on their understanding that Kenneth Jr. is entitled to reimbursement of these expenses (or a portion of them) from the provincial government. This issue is not resolved. However, the Trustees submit that the request was considered and rejected. If further information is provided, they will consider the reimbursement of the amounts;
 - d) a new cellular phone and a laptop computer: On this issue, the Trustees rely on the affidavit of Marie. They asked Marie to speak to Kenneth Jr. When Marie spoke to him, he advised that he did not need a new phone or a laptop;
 - e) travel expenses for a trip to Europe to visit family: The Trustees note that they have authorized the travel expenditures for Kenneth Jr. including three long trips to Europe (with Marie) in 2016, 2017, and 2018, and a trip to Mexico with Marina in 2018. They say that those expenses were properly approved according to the procedures they put in place at the time. The other travel was not submitted in accordance with the procedures instituted by the Trustees and was rejected on that basis;
 - f) a new mattress and headboard: The Trustees considered this to be a normal living expense that should be covered by Kenneth Jr.'s monthly disability benefit from the Province.
- [59] In response to the allegation that they instituted the claims procedures (in their September 12, 2019 resolutions) in order to thwart Kenneth Jr.'s ability to seek payments from the Trust, the Trustees say that that was not their intent. They say that Marina was able to communicate with them through email, but refused to comply with the procedures by obtaining pre-approval. They note that they agreed to reimburse Marie because Marie followed their procedures.

- [60] In response to the allegation that there is a dysfunctional relationship between the Trustees and Kenneth Jr., the respondents say:
- a) they love their nephew;
 - b) their relationship with Kenneth Jr. is not dysfunctional;
 - c) they are administering the Trust in a manner that will ensure that the fund will provide for Kenneth Jr. for the rest of his life;
 - d) to the extent that everyday expenses can be handled by his monthly disability benefits, they believe that it is important to avoid payment out of the capital of the Trust for those types of expenses.
- [61] The Trustees concede that there is a difficult relationship with Marina. They place the blame for that dysfunction squarely on Marina's shoulders. In this respect the Trustees point to several vitriolic emails sent by Marina accusing them of a number of improprieties. As examples, they point to emails wherein Marina alleges that they:
- a) are "grossly unsuitable and incompetent";
 - b) are "demonstrating financial abuse, greed, negligence, and general incompetence"; and
 - c) stole Kenneth Sr.'s assets after his death.
- [62] On the issue of the nature of the relationship, I pause to note a piece of evidence that is only tangentially relevant, but, in my opinion, telling. In one email, Marina accused Laurie of abusing the B.C. Medical Services Plan ("MSP") by receiving the benefit of that plan while she was living in Montana, USA. Laurie has a vacation property in Montana.
- [63] Perhaps mysteriously (but perhaps not), Laurie's place of residency was later investigated or audited by MSP. Laurie had to prove to MSP that she spent more than half of her time in B.C. and did not reside in Montana. Laurie was able to satisfy MSP of her residency.
- [64] The Trustees allege that, out of spite, Marina reported Laurie to MSP. In her second affidavit, Marina denies reporting Laurie to MSP. However, in a responsive affidavit, Marie says that she confronted Marina on the issue and "My mother proudly confirmed that she did."
- [65] It is not possible for me to make a finding of fact in the face of Marina's denial. However, this episode speaks to magnitude of the distrust flowing in both directions.
- [66] However, having reviewed the vitriolic emails from Marina to the Trustees, I view Marina's allegations regarding the breakdown of the relationship with a relatively jaundiced eye. Put another way, I find good reason for the relationship to be difficult. I do not visit the origin of that difficulty on the Trustees.

[67] However, placing the hostility in the context of this litigation, Marina is not the beneficiary of the Trust. She is Kenneth Jr.'s attorney.

Analysis

[68] I set out above the guidelines to be applied in an application to remove and replace trustees. I address each element in order.

Endangerment of Trust Property

[69] As noted above, the Trust property has not been endangered. The value of the funds invested has increased by more than \$200,000 since the Trust was settled. I find no basis, nor any evidence, to support an allegation that the Trustees have done anything to endanger the Trust property.

Want of Honesty

[70] The petitioner does not argue that the Trustees have exhibited a want of honesty.

[71] The petitioner does point to the fact that it "took six years" to obtain the financial information from the Trustees. While that statement is technically correct, as noted above, the evidence discloses an initial email from Marina in 2015, and no further communication until this litigation commenced.

Want of Proper Capacity

[72] The petitioner does not argue that the Trustees lack legal capacity but submits that they have demonstrated an inability to perform their duties under the provisions of the Trust.

[73] I find that the Trustees have performed their duties and currently have capacity to continue in the role.

Want of Reasonable Fidelity

[74] The petitioner argues that the Trustees have failed or refused to act or proceed with the administration of the Trust and their inaction amounts to a want of reasonable fidelity. In response, the Trustees say that all of their decisions have been in Kenneth Jr.'s long-term best interests.

[75] In addition to the considerations discussed above, the petitioner submits that Trustees can be removed when there is "unaccountable hostility" which, they submit, exists in this case. As noted above, the hostility is between Marina and the Trustees.

Discussion

- [76] I have considered all of the criticisms listed above along with the petitioner's submissions and examples of the Trustees' alleged misdeeds. In my opinion, the evidence falls far short of establishing a basis to remove the current Trustees. In that respect, I find that the petitioner has failed to meet the test for removal of the current Trustees.
- [77] First, I note the commentary in the Miles decision (at para. 84(4-6)) indicating that a trustee, when asked to resign, should not refuse to do so unless there are reasonable grounds to stay in the position. I interpret those comments from the Court of Appeal as indicating that, in circumstances where a party raises real concerns about the actions of the trustee(s) or their relationship with the beneficiary, the trustees should consider resigning because that may be the step that is in the best interests of the beneficiaries.
- [78] In this case, the position taken by the current Trustees is that they are willing to resign and appoint a professional trust company, Solus Trust, to act in their place. In my opinion, that response was entirely appropriate and directly meets the language of the Miles decision.
- [79] However, the current Trustees' response does not detract from the petitioner's onus to establish that, on balance, the Trustees should be removed.
- [80] Despite the criticisms leveled by the petitioner, I note that:
- a) the Trustees have released Trust funds to the benefit of Kenneth Jr. for travel and other items;
 - b) they have considered and rejected other expenditures on the basis that they were not in Kenneth Jr.'s best interests (e.g., the motorized scooter) or they were unsure whether the Province may be reimbursing the expense;
 - c) their actions have resulted in the capital increasing by more than \$200,000 since 2015.
- [81] Although complaints have been leveled regarding the decisions of the current Trustees, I accept their submission that the Trust Deed imbues them with the full discretion to decide whether to pay amounts out of the Trust. On that point I accept this overarching submission of the Trustees:

They are exercising their discretion (as provided in the provisions of the Trust Deed) to make sure that there are sufficient funds to care for Kenneth Jr. for the rest of his life. At present, Kenneth Jr. lives with his mother and his regular expenses are covered by his disability benefits paid by the Province. At some point in the future, he will not be able to rely on living with his mother. The Trustees are administering the Trust in a fashion that will best ensure that there are funds available for his care in his later years. The Trustees submit that the Trust Document provides them with the full discretion to make those decisions.

- [82] I further accept the Trustees' submission that the court should not lightly interfere with the settlor's right to nominate the trustees: Gawdun at para.10.

- [83] It is evident that, at some point, the Trustees will have to resign their positions. Time dictates that they will ultimately lose the capacity to remain in their current roles. As noted above, they have the power to appoint new trustees. They are free to appoint Solus Trust if they so choose. However, I will not be making an order in that regard.
- [84] In my opinion, none of the actions of the Trustees raise a concern for the welfare of the beneficiary. I further note that there is no evidence before me of the financial status of Kenneth Jr. There is no evidence that he has gone wanting, apart from the specific items that the Trustees considered and declined to fund. There is no evidence that the current Trustees' actions have endangered the administration of the Trust. It is evident that they have protected and grown the capital. While Marina may criticize the decisions made by the current Trustees, those decisions were fully within the Trustees' discretion. The Trustees' decisions are eminently defensible on the basis that they are preserving funds for Kenneth Jr.'s future.
- [85] The application to remove the current Trustees is dismissed.

Ancillary Orders

- [86] I note that the petitioner also seeks:
- a) a distribution of \$6,000 to the petitioner's counsel for the pursuit of this petition. I understand that the Trustees have agreed to release that amount of funds in order to pursue the passing of accounts (if that step is deemed necessary);
 - b) a reference to the Registrar to pass the accounts of the Trustees for the period December 19, 2014, to the present.
- [87] With respect to the interim distribution from the Trust, I make no order in that regard. Should the Trustees determine that such a payment is in the interests of the beneficiary, they are free to make that decision.
- [88] I dismiss the reference to the Registrar for the passing of the Trustees' accounts. There has been substantial disclosure by the Trustees of the investments and banking records. Those documents, along with the yearly financial statements, should provide the petitioner with sufficient information to determine whether any amounts have been improperly applied.

Costs

- [89] Given that I have dismissed the petition, the respondents would normally be entitled to costs. Since Kenneth Jr. is the beneficiary and petitioner, I will refrain from making any order of costs against him at this time. Counsel for the respondents can make submissions if they seek costs. To be clear, however, the petitioner is not entitled to his costs.

"A. Ross J."

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