THE CONTINUING LEGAL EDUCATION SOCIETY OF BRITISH COLUMBIA
CLE BC

ESTATE LITIGATION—2014 UPDATE
PAPER 6.1

Reining in the Rogue Trustee/Executor

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REINING IN THE ROGUE TRUSTEE/EXECUTOR

I. Introduction

The problems a beneficiary may encounter in dealing with an executor, administrator or trustee range from inactivity or unreasonable delay in estate or trust administration, conflict of interest, negligence, hostility or outright dishonesty and fraud. The term "rogue" is admittedly a bit strong in describing an executor who takes too long, but from the beneficiary's perspective dealing with an executor who won't act may be as frustrating as dealing with one who may truly be described as a rogue. For this reason this paper is broader than its title may imply.

The focus of this paper will be on both the procedure and substantive law applicable to some of the more common problems that your clients may encounter as beneficiaries when the personal representative or trustee either cannot or will not do a proper job.

In this paper, "personal representative" will refer to an executor of a will, or administrator of an estate and if the personal representative is also a trustee of part or all of an estate, includes the

personal representative and trustee. This definition, while perhaps cumbersome, corresponds with the definition in s. 29 of the *Interpretation Act*. "Trustee" will refer to a trustee of a trust, whether the trust is an *inter vivos* or testamentary trust. The functions are similar, but as discussed below, the differences between personal representatives and those trustees who do not fall within the definition of a personal representative have practical procedural implications. (See Waters, Gillen and Smith, *Waters' Law of Trusts in Canada, 4th Ed*, 2012 Thomson Reuters Canada Limited, at 47 -56 for an in depth discussion of the similarities and differences between executors or administrators and trustees.)

Part 1 of this paper will deal primarily with procedures available to a beneficiary seeking to remedy a number of specific problems, usually caused by the personal representative or trustee's delay or inactivity. With the implementation of the *Wills, Estates and Succession Act* ("*WESA*"), significant changes have also been made to the probate rules, most of which are set out in the new Part 25 of the Supreme Court Civil Rules (the "Rules"). These changes will have a significant impact on the procedure available in dealing with personal representatives of estates (and trustees of testamentary trusts appointed by will), although the changes will not likely affect the procedure for dealing with trustees of *inter vivos* trusts.

Under Part 1, the following will be considered:

A. citing an executor of a will who does not move forward diligently with an application for an estate grant;

B. compelling a personal representative to pass accounts;

C. compelling a trustee of an *inter vivos* trust to pass accounts;

D. suing or defending a claim if a personal representative will not;

E. suing if the trustee of an *inter vivos* trust will not;

F. compelling a personal representative or trustee to distribute.

Part 2 will deal with the procedure and substantive law on passing over or removing a personal representative or trustee, including the legislation, the principles set out in leading authorities, and some of the grounds on which the courts have done so.

II. Part I

A. Failure of Executor to Apply for Probate

Although citations are not new, the changes to the probate rules have enhanced the procedure for compelling an executor to move forward with an application for probate or forfeit his or her right to do so.

If you are acting for a beneficiary, and the executor is not diligent in making the application for an estate grant, you may arrange to personally serve a citation in Form P32 on the named executor.

The citation must refer to a "testamentary document" which is defined in Rule 25-1(1) to include a will or any document that "makes or purports to make a testamentary disposition" other than a designation under Part 5 of *WESA* (for example, an RRSP) or under Part 3 or Part 4 of the *Insurance Act*, and it includes a document that "appoints or purports to appoint an executor." The definition is broad enough to include non-compliant documents that may be given effect under s. 58 of *WESA*.

Rule 25-11(4) provides that the person served must do one of the following within 14 days:

(a) If she has received a grant, serve by ordinary service a copy on the citor.

(b) If she has applied for a grant, serve by ordinary service a copy of the filed application materials for the grant on the citor.

(c) If she has not applied for a grant, serve by ordinary service an answer in Form P33 on the citor.

In Form P33, the person cited may elect to check off one of the following boxes:

> [ ] I will apply for a grant of probate and will obtain that grant within 6 months after the date on which the citation was served or within any longer period that the court may allow.
>
> [ ] I refuse to apply for a grant of probate in respect of the document referred to in the citation and understand that, by this refusal, I am deemed to have renounced executorship.

If the person cited does not respond within 14 days, refuses to apply for a grant, or does not apply for and obtain a grant within 6 months (or a longer period allowed by the court), then the person cited is deemed to have renounced executorship.

If the executor has renounced, then the citor may cite the alternate executor.

If all of the executors and alternate executors are deemed to have renounced, or if your client is the alternate entitled to apply on the renunciation of the executor, then your client may apply for one of the following under Rule 25-11(6):

(a) a grant of probate or a grant of administration with will annexed in relation to the testamentary document or another testamentary document;
(b) an order under section 58 of the *Wills, Estates and Succession Act* curing any deficiencies in the testamentary document;
(c) an order that the testamentary document is a will proved in solemn form;
(d) if the testamentary document is in the possession of a cited person, the issuance of a subpoena under Rule 25-12 to require the cited person to file the testamentary document.

B. Compelling a Personal Representative to Pass Accounts

The requirement that a personal representative pass accounts is set out in s. 99 of the *Trustee Act*, which provides:

> 9(1) Unless his or her accounts are approved and consented to in writing by all beneficiaries, or the court otherwise orders, an executor, administrator, trustee under a will and judicial trustee must, within 2 years from the date of the grant of probate or grant of administration or within 2 years from the date of his or her appointment, and every other trustee may at any time obtain from the court an order for passing his or her first accounts, and he or she must pass his or her subsequent accounts at the times the court directs.
>
> (2) Despite subsection (1), an executor, administrator and trustee, including a judicial trustee, if so required by notice served on him or her at the instance of a person beneficially interested in the property covered by the trust, must pass his or her accounts annually within one month from the anniversary of the grant of probate or the grant of administration or of his or her appointment, but the court

> may on application make an order it considers proper as to the time and manner of passing the accounts.
>
> (3) If an executor, administrator or trustee fails to pass any accounts under this section, or if his or her accounts are incomplete or inaccurate, he or she may be required to attend before the court to show cause why the account has not been passed or a proper proceeding in connection with it taken and proper directions may be given at chambers or by adjournment into court, including the removal of a trustee and appointment of another, and payment of costs.

The new Rule 25-13(1) provides that a personal representative or a "person interested in an estate administered by a personal representative," may apply for either or both an order for the passing of the personal representative's accounts or an order to fix and approve the personal representative's remuneration.

This section allows a residual beneficiary or other interested person, such as a creditor, to bring an application that the personal representative pass accounts. Under the former practice, if the personal representative did not initiate a passing of accounts by notice of application, a beneficiary seeking to compel a passing of accounts brought a petition requiring the personal representative to show cause why his or her accounts should not be passed. The new rule should streamline the process and reduce expense to a beneficiary seeking a passing.

The application will usually be brought by notice of application in the probate file, but if there is no probate file, pursuant to Rule 25-14(1)(o), it could be brought by requisition.

If the only contentious issue is the personal representative's remuneration, that issue may be dealt with as a discrete application, rather than as part of a passing of accounts.

Rule 25-13(2) provides that the application to pass accounts or fix remuneration may be made in conjunction with certain other applications including removing or substituting a personal representative, discharging a personal representative, or passing over an executor.

C. Compelling a Trustee of an Inter Vivos Trust to Pass Accounts

Because Part 25 of the Rules does not apply to an *inter vivos* trust, and the trustee will not fall within the definition of a "personal representative," if you act for a beneficiary of an *inter vivos* trust, it will still be necessary to bring a petition requiring the trustee to show cause why his or her accounts should not be passed if the trustee will not pass his or her accounts before the court.

D. Suing or Defending a Claim if the Personal Representative Will Not

The starting point is that it is the personal representative, and only the personal representative, who has authority to bring and defend claims in respect of the estate.

But what can a beneficiary do if the personal representative refuses to pursue a claim that, if successful, will add property to the estate? The personal representative's refusal may be a result of indifference or of conflict of interest. On the other hand, the personal representative may decide that it is not in the best interests of the estate to pursue the claim, given the risks and costs.

Similarly, what can a beneficiary do if the personal representative does not defend a claim against the estate?

Section 151 of *WESA* allows a beneficiary or intestate successor to apply to court to commence proceedings in the name of and on behalf of the personal representative.

> 151(1) Despite section 136 [effect of representation grant], a beneficiary or an intestate successor may, with leave of the court, commence proceedings in the name and on behalf of the personal representative of the deceased person
>
> (a) to recover property or to enforce a right, duty or obligation owed to the deceased person that could be recovered or enforced by the personal representative, or
>
> (b) to obtain damages for breach of a right, duty or obligation owed to the deceased person.
>
> (2) A beneficiary or an intestate successor may, with leave of the court, defend in the name and on behalf of the personal representative of a deceased person, a proceeding brought against the deceased person or the personal representative.
>
> (3) The court may grant leave under this section if
>
> (a) the court determines the beneficiary or intestate successor seeking leave
>
> (i) has made reasonable efforts to cause the personal representative to commence or defend the proceeding,
>
> (ii) has given notice of the application for leave to
>
> (A) the personal representative,
>
> (B) any other beneficiaries or intestate successors, and
>
> (C) any additional person the court directs that notice is to be given, and
>
> (iii) is acting in good faith, and
>
> (b) it appears to the court that it is necessary or expedient for the protection of the estate or the interests of a beneficiary or an intestate successor for the proceeding to be brought or defended.
>
> (4) On application by a beneficiary, an intestate successor or a personal representative, the court may authorize a person to control the conduct of a proceeding under this section or may give other directions for the conduct of the proceeding.

Use of this section might not be appropriate where the claim is against the person who is the personal representative if it is commenced in the name of the personal representative.

Although the cases have not always been consistent, cases decided before *WESA* have permitted a beneficiary or *Wills Variation Act* claimant to include claims to property that the personal representative has received from the deceased, including through jointures. See, for example, *Doucette v. McInnes*, 2007 BCSC 289. This reasoning should still apply where the claim is in respect of property that the personal representative has received or is claiming outside of the estate.

Alternatively, as discussed in Part 2, the beneficiary may apply to pass over or remove the personal representative if he or she is in a conflict of interest.

E. Suing if the Trustee of an Inter Vivos Trust Will Not

There is no comparable legislation to s. 151 of *WESA* allowing a beneficiary to apply to commence or defend proceedings on behalf of a trust, if the trustee will not do so.

Despite the absence of legislation, a beneficiary may be permitted to sue if a trustee unreasonably refuses to. The beneficiary should join the trustee as a defendant to the proceedings. See Waters et al., *Waters Law of Trusts in Canada, 4th ed.*, at 1265-67.

In *Mayer v. Mayer*, 2013 BCSC 1958, Mr. Justice Grauer refused to grant leave to one of two deadlocked trustees to sue *as a trustee* on behalf of the trust, but held that he could proceed with his claims, at his own risk and expense, as a beneficiary against third parties.

If the trustee is not defending against a claim to the trust assets, it may be necessary to apply to remove and replace the trustee.

F. Compelling a Personal Representative or Trustee to Distribute

Wills and trusts usually provide personal representatives and trustees with broad discretion concerning the timing of realizing the assets and distributing the estate or trust. The courts will not interfere if the personal representative or trustee exercises discretion "honestly, reasonably, intelligently and in good faith." (*Hriczu v. Mackey Estate*, 2011 BCSC 454, a case in which the court refused to give a beneficiary conduct of sale, or remove the executor, although the executor had not sold the real property of an estate 11 years after the will-maker's death.)

But as set out in *Resnik v. Matty*, 2013 BCSC 1346, the Supreme Court of BC may order a distribution under its general jurisdiction.

The will-maker, Phillip Matty, died on December 30, 2000. In his will he appointed one of his children as executor and provided that the residue of his estate be divided equally among his four children. The executor had made an interim distribution, but had not yet completed administration of the estate, the main asset being shares in a company that owned three lots on Passage Island.

The three other children brought an application for a further interim distribution from the cash in the estate. The executor argued that the court had no jurisdiction to order an interim distribution, its jurisdiction being limited to removing the executor.

Mr. Justice Funt, after reviewing authorities going back to the 17th century, held that a superior court's general jurisdiction gave the court all powers necessary to adjudicate civil disputes, except to the extent that legislation has limited that power, and that the court's general jurisdiction included the jurisdiction to order an interim distribution.

The executor pointed out that the will gave him broad powers to retain assets "for such length of time as my Trustee shall deem advisable," but Mr. Justice Funt held that the clause in the will did not displace the executor's overriding duty to settle the estate and distribute.

The court ordered the executor to make interim distributions to the four residual beneficiaries of their father's will of $10,000 each. This amount would leave sufficient cash to meet any further expenses, and the executor would not be prejudiced by the distribution in the circumstances.

III. Part 2—Passing Over or Removing Personal Representatives and Trustees

A. Introduction

Although the principles are likely to be similar in each case, there are three distinct applications:

(1) Passing over an executor or person who has priority in applying for letters of administration before the court issues an estate grant;

(2) Removing a personal representative after the court has issued an estate grant;

(3) Removing a trustee of a trust.

With the passage of *WESA*, and amendments to the probate rules, the distinctions have become more important.

Prior to *WESA*, there was a limited power to pass over a personal representative in the *Estate Administration Act*, but legislation specifically governing the removal of a personal representative

was sparse. The courts generally relied on either s. 31 of the *Trustee Act*, or the inherent jurisdiction of the court, but it should be noted that there is authority that s. 31 of the *Trustee Act* did not confer jurisdiction to remove an executor *qua* executor (*MacKay v. Martin*, 1986 CarswellBC 3273).

Although the relevant sections of the *Trustee Act*, such as s. 31, which gives the power to the court to appoint a new trustee and s. 97, which allows the court to appoint a judicial trustee, apply to trustees of estates, *WESA* does not apply to *inter vivos* trusts.

WESA very clearly sets out both the jurisdiction of the court to pass over or remove a personal representative and sets out non-exhaustive grounds on which he or she may be passed over or removed. The grounds may be somewhat broader than those applied by the courts prior to *WESA*, but the principles articulated in the previous authorities remain relevant, and will likely be applied to applications under *WESA*.

It should be noted that in some cases it may be necessary to apply under both the provisions of *WESA* cited below and the *Trustee Act*, where the personal representative is also appointed as a trustee of a testamentary trust.

B. Legislation

Sections 158 and 159 of *WESA* govern passing over and removing a personal representative and appointing a substitute.

> **Application to remove or pass over personal representative**
>
> 158(1) In this section, "pass over" means to grant probate or administration to a person who has less priority than another person to become a personal representative.
>
> (2) A person having an interest in an estate may apply to the court to remove or pass over a person otherwise entitled to be or to become a personal representative.
>
> (3) Subject to the terms of a will, if any, and to subsection (3.1), the court, by order, may remove or pass over a person otherwise entitled to be or to become a personal representative if the court considers that the personal representative or person entitled to become the personal representative should not continue in office or be granted probate or administration, including, without limitation, if the personal representative or person entitled to become the personal representative, as the case may be,
>
> (a) refuses to accept the office of or to act as personal representative without renouncing the office,
>
> (b) is incapable of managing his or her own affairs,
>
> (c) purports to resign from the office of personal representative,
>
> (d) being a corporation, is dissolved or is in liquidation other than a voluntary dissolution or liquidation for the purpose of amalgamation or reorganization,
>
> (e) has been convicted of an offence involving dishonesty,
>
> (e.1) is an undischarged bankrupt,
>
> (f) is
>
> (i) unable to make the decisions necessary to discharge the office of personal representative,
>
> (ii) not responsive, or
>
> (iii) otherwise unwilling or unable to or unreasonably refuses to carry out the duties of a personal representative, to an extent that the conduct of the personal representative hampers the efficient administration of the estate, or
>
> (g) a person granted power over financial affairs under the *Patients Property Act*.

(3.1) A creditor may make an application for an order under subsection (3)(e) or (e.1) only if the creditor has a claim for more than a prescribed amount.

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

Appointment of substitute personal representative

159(1) If the court discharges or removes a personal representative, the court

(a) must appoint another person who consents to act as the substitute personal representative, unless
  (i) the administration of the estate is complete, or
  (ii) the court does not consider a new appointment necessary, and

(b) may, if the personal representative has resigned or is removed as a trustee, concurrently appoint the person referred to in paragraph (a) as trustee under the *Trustee Act* in place of the trustee being discharged or removed.

(2) The court may require a substitute personal representative under subsection (1) to provide security if security is required by the Supreme Court Civil Rules.

(3) A substitute personal representative appointed under subsection (1)

(a) has the same authority that the former personal representative had in respect of the estate,

(b) must perform the same duties and is subject to the same obligations as were imposed by law on the former personal representative, and

(c) on application without notice, is entitled to receive a grant of probate or administration, as the case may be, without the return of the previous grant if the court is satisfied that the return of the previous grant would be impossible or impractical.

(4) A grant of probate or administration to a former personal representative is revoked on the appointment of a substitute personal representative.

Although it does not explicitly refer to the removal of a trustee, the courts have usually cited s. 31 of the *Trustee Act* for authority to remove a trustee. It says:

> 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.

Section 30 provides that the court may remove a court-appointed trustee or receiver, while, as noted above, s. 97 of the *Trustee Act* provides authority for the appointment of a judicial trustee and s. 97 expressly applies to an administrator or executor.

C. Inherent Jurisdiction

Apart from legislation, a Supreme Court of BC judge also has the inherent jurisdiction to remove a trustee (*Mardesic v. Vukovich Estate*, 1988 CarswellBC 320 at para. 17 citing Donovan Waters, *Law of Trusts in Canada*, 2nd ed. (1984)).

D. Principles

Two competing principles produce a tension in the cases. On the one hand, the will-maker or settlor has the right to choose an executor or trustee. For this reason, the courts have been reticent to remove an executor or trustee even when his or her performance has been less than optimal. This is less likely to be a factor when the court is asked to remove an administrator.

On the other hand, the courts have an overriding supervisory role in seeing to the proper administration of an estate or trust, and will intervene to remove a personal representative or trustee to protect the assets or the interests of beneficiaries.

The courts have said that conflict between a beneficiary and the personal representative or trustee is not a sufficient reason for removal, but where the personal representative or trustee has endangered the trust property or acted in a manner detrimental to the welfare of the beneficiaries, then the court will remove him or her.

Let's begin with a Privy Council decision on appeal from the Supreme Court of the colony of the Cape of Good Hope. In *Letterstedt v. Broers* (1884), 8 App. Cas. 371, the appellant Letterstedt was a beneficiary of a trust created in her father's will. Among the relief she sought included the removal of the Board of Executors of Cape Town as trustee. There were originally three trustees as named in the will, but two died without replacements being appointed. Although the Privy Council found that many of the appellant's allegations were unwarranted, the Board of Executors of Cape Town had charged excessive fees. In his judgment, in which he concluded that the trustee should be removed, Lord Blackburn for the court set out the principles.

At 385-86, Lord Blackburn wrote in reference to the removal and appointment of new trustees:

> It is not disputed that there is a jurisdiction 'in cases requiring such a remedy,' as is said in Story's Equity Jurisprudence, s. 1287, but there is very little to be found to guide us in saying what are the cases requiring such a remedy; so little that their Lordships are compelled to have recourse to general principles.
>
> Story says, s. 1289, 'But in cases of positive misconduct, Courts of Equity have no difficulty in interposing to remove trustees who have abused their trust; it is not indeed every mistake or neglect of duty, or inaccuracy of conduct of trustees; which will induce Courts of Equity to adopt such a course. But the acts or omissions must be such as to endanger the trust property or to shew a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity.'
>
> It seems to their Lordships that the jurisdiction which a Court of Equity has no difficulty in exercising under the circumstances indicated by Story is merely ancillary to its principal duty, to see that the trusts are properly executed … 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.

Further at 387,

> In exercising so delicate a jurisdiction as that of removing trustees, their Lordships do not venture to lay down any general rule beyond the very broad principle above enunciated, that their main guide must be the welfare of the beneficiaries. Probably it is not possible to lay down any more definite rule in a matter so essentially dependent on details often of great nicety. But they proceed to look carefully into the circumstances of the case.

Lord Blackburn considered the hostility that arose between the beneficiary and the trustee at 389 as follows:

> It is quite true that friction or hostility between trustees and the immediate possessor of the trust estate 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 certainly not to be disregarded.

> Looking therefore at the whole circumstances of this very peculiar case, the complete change of position, the unfortunate hostility that has arisen, and the difficult and delicate duties that my yet have to be performed, their Lordships can come to no other conclusion than that it is necessary, for the welfare of the beneficiaries, that the Board should no longer be trustees.

The Court of Appeal approved and applied the principles enunciated in *Letterstedt* in *Conroy v. Stokes*, 1952 CarswellBC 51. In that case, there was friction between the will-maker's children and the trustee, as well as between the children and the will-maker's second wife, but the Court of Appeal held that the friction between the trustee and some of the beneficiaries was not in itself sufficient grounds to remove the trustee.

Mr. Justice Bird for the court wrote at para. 10:

> Here the acts or omissions complained of do not, in my opinion, support a conclusion that the conduct of the trustees has endangered the trust property, or show a want of honesty or of proper capacity to execute the duties, or a want of reasonable fidelity. The failure of the trustees to account to the beneficiaries annually and to pass their accounts annually are perhaps matters for criticism on the basis of neglect of duty, but such omissions, as is said by Story, are not such as to induce the court to remove trustees unless persisted in.

He wrote at para. 12:

> In the circumstances I find nothing in the evidence to support a conclusion that the "welfare of the beneficiaries," and that phrase I think must be taken to mean the "benefit of the beneficiaries collectively," has not been impaired by any act or omission of the trustees.

Although most of the cases in which the court orders that a personal representative be passed over or a personal representative or trustee be removed involve either misconduct or conflict of interest, the important point is not so much the conduct of the person who is passed over or removed, but rather whether his or her continued involvement is detrimental to the welfare of the beneficiaries. Proof of misconduct is unnecessary. The point is made in the Ontario Court of Appeal decision *Re Consiglio (No. 1)*, 1973 CarswellOnt 861, by Kelly J.A. at para. 6:

> 6. Counsel for Bari A. Consiglio submitted that there had been no misconduct on his client's part and that, on that account he should not be removed as a trustee. It is our view that misconduct on the part of a trustee is not a necessary requirement for the Court to act and that the Court is justified in interfering, and indeed required, to interfere, when the continued administration of the trust with due regard for the interests of the *cestui que* trust has by virtue of the situation arising between the trustees become impossible or improbable.

E. Successful Applications to Pass Over or Remove Personal Representative or Trustee

There are numerous reported decisions in BC on applications to pass over or remove a personal representative or trustee, each one decided on its own facts. Below is an attempt to categorize, in a non-exhaustive manner, some of the types of circumstances in which beneficiaries have successfully applied to pass over or remove a personal representative or trustee, including cases illustrative of each type.

1. Conflicts of Interest

There are two situations where a court is likely to find that the personal representative or trustee ought not to be permitted to administer or continue to administer an estate or trust. If the personal

representative or trustee pursues a claim on his or her own behalf to the estate or trust assets, then he or she is obviously not acting in the best interest of the beneficiaries. A second situation is where the deceased had transferred title to assets to the personal representative or into a jointure with the person representative, and the personal representative claims to be entitled to the assets absolutely, while others interested in the estate wish to investigate or assert a claim that the assets are properly comprised in the estate.

In either situation, the court may pass over a personal representative before a grant has been issued, even though arguably the personal representative has not acted improperly in administering the estate, or even been given the opportunity.

Such conflicts should be contrasted with the apparent conflict of a trustee, appointed in a will or trust, who is given discretion to make payments of income or capital to him or herself. Although the trustee is in a position to exercise the discretion to his or her own benefit, and to the detriment of other beneficiaries, the discretion is one that was authorized by the will-maker or settlor, and in the writer's view would not be grounds for removal unless the trustee acts in breach of trust.

In *Mardesic v. Vukovich Estate*, 1988 CarswellBC 320, the Supreme Court of BC removed Jack Volrich, who had been appointed by the will-maker as her executor and trustee of her estate on the grounds that he put himself in a conflict of interest by filing a counterclaim in which he claimed compensation out of the estate for acting as the will-maker's "attorney in fact" during her life. Mr. Volrich had also exercised a power to appoint beneficiaries that he had been given in the will, and then purported to exercise it again in a different manner.

In *Weinstein v. Weinstein*, 1996 CarswellBC 2073, after admitting fresh evidence, the Court of Appeal removed the will-maker's husband as executor, on an application by one of their two sons. The will gave the husband a life estate, with the remainder to the two sons. The court removed the executor on the basis of allegations that the executor did not disclose loans allegedly made to the other son, that he failed to list items of substantial value in estate documents, that he had a conflict of interest with respect to the settlement and payment by the estate of a substantial Revenue Canada claim against both the executor and his wife's estate, that he failed to give information to the applicant son and he failed to carry out his duties in a timely fashion.

In setting out the criteria for removing an executor, Mr. Justice Hollinrake quoted the chambers judge as follows:

> [4] The parties do not take issue with the law as enunciated by the chambers judge. This is how she expressed the guiding principles in a case such as this:
>
> > To succeed, the petitioner must first establish that removal of the present trustee is necessary and expedient to protect the interests of the beneficiaries as continuation of the trustee jeopardizes the proper and efficient administration of the trust.
> >
> > A beneficiary is entitled to protection of his interests by the trustee's faithful performance of his duties. Actual misconduct usually will be cause to remove a trustee. However, not every neglect of duty or mistake will result in removal. The key question is whether there is or has been endangerment of trust property, whether through a lack of honesty, lack of capacity or lack of reasonable fidelity: *Conroy v. Stokes*, [1952] 4 D.L.R. 124 (B.C.C.A.).

Although the Court of Appeal removed the executor, the court refused to appoint the applicant son, finding that he too had a conflict of interest. The court said that a professional trustee should be appointed, and left it to the parties to decide whom.

In *Estate of Maki*, 2007 BCSC 1034, the will-maker appointed her two twin daughters as executors, and made them the residual beneficiaries. The daughters were estranged from one another, and one of them, Karen Maki, had an interest in the title to a condominium where their mother lived. Their four sisters brought an application under the *Wills Variation Act*, and were seeking an order that Karen Maki held her interest in the title to the condominium as well as joint bank accounts for the estate. The other twin sister, Kristy Goldsmith, asked the court to pass over her twin sister as an executor. Master Taylor found that Karen Maki's conflict of interest was sufficient to pass her over.

Similarly in *Re Thomasson Estate*, 2011 BCSC 481, Madam Justice Gerow granted an application by one of the executors of his parents' wills, Brian Thomasson, that his brother, Alex Thomasson, be passed over as co-executor because of a conflict of interest. Their parents had transferred real property to Alex Thomasson and his wife. Brian Thomasson as executor wished to make inquiries into the nature of the transaction. Madam Justice Gerow found that there was a perceived conflict of interest between Alex Thomasson's role as executor and his personal interests, noting that he could not as executor attack the transfer while defending the transfer in his personal capacity.

2. Improvident Investment of Trust Funds

In *Miles v. Vince*, 2014 BCCA 289, the Court of Appeal removed a trustee for improvident investment of trust funds. In that case, the settlor, William Vince settled the William Vince Family Trust (the "Family Trust"), into which he transferred an interest in companies he was using to develop property on Main Street in Vancouver, and the Vince Insurance Trust (the "Insurance Trust"), which he settled after he was diagnosed with cancer. The Insurance Trust received life insurance proceeds on his life. The settlor's children were the discretionary beneficiaries of the Family Trust, while his wife and children were the beneficiaries of the Insurance Trust. After the settlor's death, his sister, Marilynne Vince, as trustee of both trusts lent substantially all of the assets in the Insurance Trust to the Family Trust to assist in financing the real estate development.

William Vince's widow, Cynthia Miles, was unsuccessful in the Supreme Court in her application to remove the trustee, but was successful in her appeal.

Madam Justice Levine found that Ms. Vince, in failing to diversify the investments in the Insurance Trust, had not met the prudent investor standard of care required by the *Trustee Act*, and that the loan was not adequately secured. The trustee had also put herself in a conflict of interest as trustee for both trusts. The loan was now in default, but if Ms. Vince as trustee of the insurance trust demanded payment of the loan, it would put the development in jeopardy. Furthermore, Ms. Vince as trustee had a duty to maintain an even hand between income and capital beneficiaries. The real estate development had potential for significant profit for the capital beneficiaries, but was not generating income for the income beneficiaries.

Citing *Letterstedt*, *Conroy* and *Weinstein*, Madam Justice Levine found it appropriate to remove Ms. Vince as trustee of the Insurance Trust:

> [87] In this case, the respondent, in her capacity as the trustee of the Insurance Trust, failed to protect the interests of all of the beneficiaries of that trust. By investing all of the trust property in the Loan, she put the trust property at risk, put herself in a conflict of interest, and failed to act with an even hand among the beneficiaries. Her continuation as trustee jeopardizes the proper and efficient administration of the trust.

3. Unreasonable Delay in Completing the Administration of an Estate or Trust

The court may also remove a personal representative or trustee who unreasonably delays in completing the administration of an estate or trust.

Although an executor has a duty to pay taxes owing by the deceased, one of the executors in *Re Seaton Estate*, 2003 BCCA 555, might best be described as overzealous. Following the will-maker's death on April 19, 1996, one of the executors, Donald McKay, discovered that the will-maker had failed to declare some of her income. After providing "five volumes of information" to Canada Customs and Revenue Agency ("CCRA"), the latter reassessed the will-maker going back to 1989, but declined to reassess for earlier years, "due to the immateriality of the income amounts disclosed." Mr. McKay continued to insist that CCRA reassess, and held back over $100,000 in the estate pending resolution of the taxes. In 2003, the Supreme Court of BC granted a petition to remove him. In dismissing the appeal as devoid of merit, Madam Justice Ryan wrote at para. 19:

> In my view the overriding concern is this. The time has come to wind up the distribution of this estate. Mr. McKay's efforts to right what he sees as the historic wrongs of the deceased are impeding the distribution of the assets of the estate and are not in the best interests of the beneficiaries. In my view Mr. Justice Hutchison was right to remove Mr. McKay. In the circumstances of this case, an appeal from that decision is hopeless.

4. Disagreements Among Trustees

Not every disagreement will be sufficient grounds to remove a personal representative or trustee, but if they are deadlocked or their relationship deteriorates to the point where the administration is affected and the welfare of the beneficiaries in jeopardy, the court will remove one or more of the disputants.

In *Wilson v. Heathcote*, 2009 BCSC 554, one co-executor and trustee, Mr. Rick Wilson, applied to remove the other co-executor and trustee, Mr. John Heathcote, and replace him with the alternate executor named in the will-maker's last will. The two executors had disagreed on whether to accept offers on an apartment building before it was appraised or listed, on whether it should be listed, on how offers would be dealt with, and on whether the estate funds should be held in a solicitors trust account. The executors were at odds over meetings with their solicitor and on whether to take his advice on various estate matters.

Mr. Justice Cohen in ordering Mr. Heathcote removed as executor and trustee, and appointing the alternate named in the will found that the relationship had broken down to the point that the proper administration of the estate and interests of the beneficiaries were in jeopardy. He wrote:

> [76] In my view, the parties' arguments clearly disclose three things:
>
> 1. That the relationship of the trustees has deteriorated into a finger pointing exercise over how to handle the administration of the Estate;
>
> 2. While strictly speaking there is not a formal deadlock on the issues that have become contentious between the trustees, nevertheless for all intents and purposes their disagreement is tantamount to deadlock between them on how to handle the administration of the Estate;
>
> 3. That in view of the dysfunctional relationship between the trustees it is necessary for the Court to intervene and ensure that the administration of the Estate can move forward in the welfare of the beneficiaries.

Although both contributed to the disagreements, Mr. Justice Cohen found that Mr. Heathcote was the major contributor, and accordingly removed him.

5. Character

The courts have said that bad character by itself is not sufficient grounds for passing over or removing a personal representative or trustee.

But if the personal representative or trustee has engaged in conduct from which it may reasonably be inferred that his or her appointment poses a significant risk to the estate or trust funds, such as misappropriation of funds in another estate, the courts have exercised their discretion to pass over or remove that person.

For example, in *Re Haggerty Estate*, 1967 CarswellBC 78, Kirke Smith L.J.S.C., on his own motion, refused to grant probate to a Notary Public who had in the previous year been convicted of an offence involving misappropriation of estate funds, and sentenced to imprisonment. In exercising his discretion, Kirke Smith L.J.S.C. reviewed the authorities, and noted at paragraph 4 that the decided cases "make it abundantly clear that the jurisdiction thereby conferred is an unusual one, requiring the exercise of judicial discretion, and that bad character *per se* is not sufficient ground for refusing a grant [citations omitted]."

The fact of a criminal conviction may not be sufficient to disqualify a personal representative or trustee. The question the courts look at is whether the nature of the previous conduct is such as to imply that the person convicted is less likely to fulfill his or her fiduciary obligations.

For example, in *Re. Oughton Estate*, 1991 CarswellBC 640, Master Kirkpatrick found that an executor's conviction and indefinite incarceration for sexual assaults were not sufficient grounds to refuse a grant of probate to him.

As noted above, one of the enumerated grounds for which the Court may pass over or remove a personal representative under s. 158(3) of *WESA* is a conviction for "an offence involving dishonesty."

F. Unsuccessful Applications

There are also numerous reported decisions in BC in which beneficiaries have not been successful in applications to pass over or remove a personal representative or to remove a trustee. Below are a handful of cases illustrative of circumstances that the courts have found insufficient grounds.

As noted above, friction and disagreement will often not be enough.

In *Re Wolfe Estates*, 1957 CarswellBC 11, a majority of the Court of Appeal overturned a Supreme Court decision to appoint a trust company as judicial trustee of the estates of a husband and wife, in place of their two children who were appointed as executors by the wife in her will, she having survived her husband. The majority held that neither the friction between the two children nor their inability to agree on one solicitor to act in respect of probate and the estate administration, were sufficient grounds to displace the right of the will-maker to nominate his or her own executors.

The fact that an executor and trustee has the power to encroach on the capital for his or her own benefit may not be in and of itself sufficient grounds to pass over or remove the executor and trustee.

In *De Cotiis v. De Cotiis*, 2008 BCSC 1206, the will-maker appointed his widow and two of his six children as executors. He created a life estate for his widow. She would receive the income, and the trustee had the power to encroach on the capital. He left the remainder to their six children, with two of them receiving 30% each, and the others 10% each. One of the children named as an executor renounced, and the other took the position that he did not wish to act, but was opposed to

his mother acting as executor, claiming that she was "incapable of managing all but the most simple business affairs." Mr. Justice McEwan found that although there was friction in the family, and the widow did not speak or read English well, she was an astute business person and had not done anything inconsistent with her duties as executor and trustee. With respect to power she would have to encroach on the capital for her own benefit, Mr. Justice McEwan said at para. 20:

> [20] The estate is structured such that Mrs. De Cotiis has all of the income from the properties with a large discretion to encroach upon the ultimate estate to the point of its complete diminishment. From what emerged in the evidence, it is very difficult to imagine that to be a genuine threat. Mrs. De Cotiis seems to have been the sort of mother whose joy was in staying home and taking care of the house and the family, including her son, Tony, and who has had a lifelong habit of frugality that is actually somewhat at odds with her means and her ability to improve her circumstances. She appears to have no particular love of luxury or travel, or to be in any way a person who enjoys lavish spending. Rather, she appears to take her pleasure in saving and seeing the estate grow. She has indicated that she does so for the benefit of her family as she sees fit.

It will generally be insufficient for a beneficiary to make a bald allegation that the personal representative or trustee is indebted or liable to the estate or trust, and therefore in a conflict of interest, without some evidentiary basis. For example, in *Regnier v. O'Reilly*, 1995 CarswellBC 1962 (S.C.), one of the grounds upon which the petitioner based his application to pass over the respondent as executor was that the respondent was indebted to the estate for $30,000. Mr. Justice Cowan, in refusing to pass over the respondent, wrote in respect of the alleged conflict of interest:

> 10 Firstly, with respect to the claim that the respondent is indebted to the estate for $30,000.00, the evidence advanced by the petitioner in support of such a claim is based solely on hearsay. The evidence presented by the respondent, based on the evidence of those privy to the transactions giving rise to the claim clearly refutes the hearsay evidence advanced by the petitioner. In any event, should the petitioner seek to advance such a claim in the future, the situation as to the propriety of the respondent continuing to act as trustee under the deceased's will can be assessed but, in my opinion, the possibility of such a claim being advanced is not a ground for passing over the respondent's appointment by the deceased as executrix of his will.

Even if the court finds a personal representative or trustee is in a conflict of interest, the court may decline to remove him or her if the court finds that there would be no benefit in doing so.

For example in *Re Mario Estate*, 1998 CarswellBC 2999, Master Powers dismissed an application by one of the residual beneficiaries of the will-maker's will to remove the executor despite finding that the executor was in a conflict of interest. The executor was claiming funds in joint bank accounts of over $129,000 by right of survivorship, which the applicant alleged were estate funds. Although the conflict would have made it inappropriate for the executor to continue to act if there were further management of the estate required, Master Powers found that all that remained to be done was to determine the ownership of the joint accounts and for the executor to pass accounts. In the circumstances it was not expedient to appoint a new personal representative.

IV. Conclusion

At times it may appear that a beneficiary is at the mercy of a dilatory, incompetent or outright dishonest personal representative or trustee. But there are a number of procedures available in *WESA*, the *Trustee Act*, and the Rules available to deal with the specific problem at hand, including

delay in applying for probate, failing to provide or pass accounts, failing to make or defend against a claim, or unreasonable delay in making a distribution.

Ultimately, a beneficiary may find it necessary to bring an application to pass over the personal representative, or to remove the "rogue" personal representative or trustee. Not every delay, disagreement or error will suffice, but when acting for a beneficiary, if you can persuade the court that it would jeopardize the proper and efficient administration of the estate or trust, or more broadly the welfare of the beneficiaries, for the personal representative or trustee to assume or continue in his or her role, your client will likely be successful.