IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20240830
Docket: P133421
Registry: Kelowna

In the Matter of the Estate of Jason Oliver Lyne, Deceased

Before: The Honourable Madam Justice Hardwick

Oral Reasons for Judgment

In Chambers

Counsel for the Applicant, Tabin:	S. Aidun S. Farsai
Counsel for the Respondents, Smalley and Daniel:	K.K. Cheung
Place and Date of Trial/Hearing:	Kelowna, B.C. August 26, 2024
Place and Date of Judgment:	Kelowna, B.C. August 30, 2024

[1] **THE COURT:** These are my oral reasons for judgment dated August 30, 2024.

Introduction

[2] The applicant, Ms. Tabin, initially brought this application on April 12, 2024, to remove the respondents, Ms. Smalley and Mr. Daniel, as the administrators of the estate of Jason Oliver Lyne, the deceased, and to issue a new grant of administration to her (the “Application”).

[3] The respondents filed an application response on July 9, 2024, where they consented to stepping down and certain other relief sought in the amended version of the Application filed June 2, 2024, on behalf of Ms. Tabin.

[4] The primary outstanding issue that needs to be resolved between the parties is that of costs. There are also certain ancillary orders (the "Ancillary Orders”). Only a portion of the Ancillary Orders remain opposed and counsel at my direction submitted a draft form of order through Supreme Court Scheduling setting out the terms which are going by consent. I am satisfied that the proposed terms are appropriate and so I have been able to abbreviate my oral reasons accordingly. I will simply read in the ancillary terms, which are going by consent, at the end of my reasons.

Background

[5] The deceased passed away on October 5, 2021, in a motor vehicle accident, without a will. The deceased was survived by his four minor children who were the following ages at the time of their father's death: Liam, age two, currently age five; Lukas, age six, currently nine years old; Jayden, age 15, currently 18 years old; and Joshua, age 14, currently 17 years old.

[6] The biological mother of Liam and Lukas is the applicant, Ms. Tabin, who currently resides in or around Calgary, Alberta. The biological mother of Jayden and Joshua is Amy Marie Lyne who also currently resides in Alberta, namely Wanham, Alberta. Ms. Lyne had indicated her support of the herein Application and was

present via MS Teams for the hearing on Monday. I am hereinafter referring to all four minor children as "the Children". There are certain special needs involved, I accept, in respect of the Children of the applicant, although the evidence is not particularized, specifically the scope of those special needs.

[7] Ms. Smalley is the deceased's mother and Mr. Daniel is her long-time common law spouse. They reside in Dawson Creek, British Columbia. I will hereinafter refer to them collectively as "the Respondents". There is no evidence to support a particularly close relationship between Ms. Smalley and Mr. Daniel with the Children even prior to the deceased's passing. This is not to say that the Respondents do not care about the Children or have intentionally done anything harmful to their interests, but it was not, I find, on the evidence a close paternal grandparent-grandchild relationship in the years leading up to and following the deceased's passing.

[8] The deceased was also survived by his brother, James Robert Smalley, also known at Jamie Lyne Nix, who resides in West Kelowna. I will refer to him hereafter as Mr. Nix.

[9] There are assertions in the materials that Mr. Nix has a criminal record and that his involvement in administering the deceased's estate has been inappropriate. I am going to take this issue off the table at the outset by saying that Mr. Nix's conduct following the deceased's passing has been unhelpful at times, the most obvious being his involvement in a strange scenario which I will return to wherein the Respondents obtained birth certificates for the Children from Vital Statistics in Alberta, something that legally can only be done by a guardian and ultimately resulted in police involvement and criminal charges being laid against Ms. Smalley. The elements of the offence have not been proven, but nonetheless reached the level of charge approval from the Crown in Alberta. Mr. Nix also made what I find to be inappropriate statements to the deceased's former employer who had been with him earlier in the day on the night preceding his passing and whose truck the deceased was driving when he was involved in the fatal motor vehicle accident.

However, as unhelpful as Mr. Nix's conduct was, I have concluded it is not material to the limited issues that I am left to decide.

[10] Returning to the chronology following the deceased's passing, grant of administration without will annexed was issued to the Respondents on April 5, 2022. In their grant application, Ms. Smalley swore an affidavit of assets and liabilities that stated that the deceased's estate had no readily ascertainable value except for a "receivable from settlement of wrongful dismissal claim against Pacific Leisure Products Inc. operating as 'Canopy West' with a value to be determined" (hereinafter, "the Lawsuit"). The applicant did not object to the Respondents' grant application. Issues have arisen thereafter, however, most significantly with respect to decisions made by the Respondents vis-à-vis the prosecution or lack thereof of the Lawsuit.

Summary of Position on Costs

[11] The applicant asserts that the Respondents' alleged misconduct and breach of their fiduciary duties in their role as administrators warrants this honourable Court's intervention with a special costs order against them personally. Specifically, it was asserted that, if it was not for the applicant bringing the Application, the only asset of the estate, namely, the Lawsuit, would have been irretrievably lost. In the applicant's submission, the Respondents endangered the only estate asset in direct breach of their fiduciary duty owed to the Children. As a corollary to this, the applicant maintains that the Respondents relied on and repeated wholly speculative allegations of impropriety, including theft of inventory and money by the deceased and the applicant, as their proof for why they did not think the Lawsuit would be successful if pursued. The applicant further asserts that the Respondents were not cooperative upon being asked to step down from their role including being at least less than cooperative, if not evasive, of service of court materials resulting in an order for substitutional service and a costs order in relation thereto ultimately.

[12] In summary, and with an acknowledged generalization for the benefit of timely oral reasons, the applicant seeks special costs payable by the Respondents on the following grounds:

a) failure to pursue the Lawsuit;

b) failure to account, provide information, and obstructive behaviour; and

c) improper allegations of fraud and impropriety without foundation.

Chronology Relevant to the Lawsuit

[13] The applicant and the deceased were together in a common law relationship from 2011 to 2019. The applicant and the deceased worked together in building a business commencing in around 2016 with a partner named Al Lakhmer Klar. I accept in conjunction thereto the deceased entered into a business contract with Mr. Klar and his company, Pacific Leisure Products Inc. operating as Canopy West ("Canopy West"). By the summer of 2018, the deceased alleged that Mr. Klar repudiated this agreement and thereafter wrongfully dismissed the deceased.

[14] The deceased, in due course, retained Philip Prowse of Prowse Chowne LLP in Edmonton, Alberta. Mr. Prowse decided to take on the Lawsuit on a contingency fee basis. The deceased signed a contingency agreement (the "Contingency Fee Agreement") that Mr. Prowse sent to him confirming same. As is common in contingency fee arrangements, Mr. Prowse was required under the Contingency Fee Agreement to be paid for out-of-pocket expenses and disbursements, but not paid for legal fees/legal services unless there was a settlement reached or judgment pronounced or there was a termination of the Contingency Fee Agreement.

[15] Shortly after the deceased entered in the Contingency Fee Agreement, the deceased and the applicant separated. On September 8th of 2020, Mr. Prowse's office filed an amended statement of claim in what is now the Alberta Court of King's Bench and a statement of defence was filed by the defendants on January 19, 2021. I accept document disclosure was provided to Mr. Prowse prior to the deceased's

passing and that the applicant participated in it notwithstanding the acrimonious separation between the parties. Nonetheless, the Lawsuit never got substantially off the ground beyond the pleadings phase as there were no discoveries conducted, no interlocutory applications scheduled or brought, and no trial date set. The deceased then, as noted, passed away in the motor vehicle accident on October 15, 2021.

[16] On July 18, 2022, the applicant inquired via email about the status of the Lawsuit. The response accurately acknowledged that the deceased's passing made the Lawsuit more difficult to pursue. It was otherwise, however, quite vague and unduly critical of Mr. Prowse. The applicant responded promptly and encouraged that the Lawsuit be continued "since all of his children have a financial interest in the case." No one, neither Mr. Nix nor the Respondents, further replied to the applicant or updated the applicant about the Lawsuit. The Respondents, for various reasons which do appear to change somewhat over time based on the evidentiary record, simply did not take steps to pursue the Lawsuit. I am expressly not going to deal with those explanations in detail as I frankly think doing so might be unhelpful to any chance that the applicant has to potentially pursue the Lawsuit for the benefit of the Children.

[17] In any event, the lack of further communication about the Lawsuit with the applicant resulted in the applicant's counsel writing the Respondents on February 8, 2024, to ask for, among other things, confirmation as to whether the Respondents would pursue the Lawsuit. A series of correspondence followed. That correspondence is only admissible for proof of the fact that it was sent and is not proof of its contents save and except for the fact it confirms that a request was made for the Respondents to voluntarily step down as administrators which they declined to do then, but have ultimately now agreed to.

[18] Returning to the Lawsuit's status, Mr. Prowse confirmed to the applicant's counsel in an April 4, 2024 email that he remains counsel of record in the Lawsuit. Mr. Prowse also confirmed in a July 2, 2024 email that the terms of the retainer had not changed since the deceased's passing and stated, "… you apparently have a

copy of the contingency fee agreement. The terms of our retainer are set out therein." Mr. Prowse's brief response makes sense when one appreciates that counsel for the applicant is treading in the waters of solicitor-client privilege between Mr. Prowse and the deceased's estate when, at the time of the inquiries, the applicant had no standing in those waters. Adding a further wrinkle beyond the passage of time and the lack of substantive steps taken in the Lawsuit prior to the deceased's passing or since his passing, I accept that, according to the *Alberta Rules of Court*, it appears that, by reason of the deceased's death, the Lawsuit is actually stayed until an order to continue the action by the administrator is brought. Specifically, I was referred to Rule 4.34(1) which provides as follows:

> **Stay of proceedings on transfer or transmission of interest**
>
> **4.34(1)** If at any time in an action prior to judgment the interest or liability of a party is transferred or transmitted to another person by assignment, bankruptcy, death or other means, the action is stayed until an order to continue the action by or against the other person has been obtained.

[19] Turning to the issue of the allegations of a failure to account, provide information, and otherwise obstructive behaviour, the Respondents, I accept, swore an affidavit in their grant application that they would "administer according to the law all of the deceased's estate", "prepare an accounting" as to how the estate was administered, and acknowledged that, in doing so, they would be "subject to the legal responsibility of personal representatives." The Respondents did not provide such an accounting until after the applicant filed the Application and even thereafter, the applicant says it is rudimentary in nature.

[20] Balanced against this, the Respondents say there were no assets beyond the Lawsuit which, as discussed above, they acknowledge they rightly or wrongly decided not to pursue. More significantly, I accept that the Respondents learned as early as July 2022 that the Children qualified for ICBC benefits given the fact that the deceased passed in a motor vehicle accident. However, for reasons that are not explained, the respondents failed to inform the applicant or Ms. Lyne, the acknowledged surviving guardians of the Children, about these benefits. On the

fortuitous advice of a friend, the applicant independently inquired of ICBC to determine whether her children had any benefit claims in January of 2023. This led to the revelation that ICBC had in their files that the Respondents were the legal guardians of the Children and the correspondence from ICBC about the Children's claims had thus gone to the Respondents. Both the applicant and Ms. Lyne had to prove to ICBC their guardianship status to remedy this what I will generously describe as a misunderstanding.

[21] This comes back to my earlier point about the birth certificates. In the course of these dealings, the applicant learned that somehow the Respondent, Ms. Smalley, had secured the reissuance of the Children's birth certificates from Vital Statistics in Alberta and later these birth certificates were given to ICBC by the deceased's brother, Mr. Nix. Clearly, there was a significant error here on behalf of Alberta's Vital Statistics as the birth certificates should not have been reissued to any individual who was not a guardian and who did not have the relevant documentation to prove guardian status. In any event, it happened. Interestingly, the Office of the Public Guardian and Trustee also apparently listed the Respondents as guardians of the Children in accordance with these same improperly issued birth certificates. However, with the assistance of the applicant and the cooperation of Ms. Lyne, the birth certificate issue was resolved.

[22] With the birth certificate issue resolved, the funds that represent the ICBC benefit for the Children are now held in trust by the Office of the Public Guardian and Trustee (the “PGT”). There were additional benefits for the applicant's sons because they both have disabilities as noted. The applicant, to her credit, successfully obtained those benefits and they are also held in trust with the PGT for the benefit of the applicant's children.

[23] Returning to what I will regard to be this birth certificate fiasco, the applicant filed a complaint with Vital Statistics Alberta and a police investigation was initiated. This culminated in warrants being issued for Ms. Smalley's arrest for four counts of fraud. Vital Statistics Alberta sent a demand letter to Ms. Smalley for the return of

the birth certificates in April of 2023. A second demand letter was sent in April of 2024. Vital Statistics Alberta then had to obtain a court order requiring the return of the Children's birth certificates. The birth certificates were only returned recently in June of 2024.

[24] The applicant also takes issue with the fact that the deceased's girlfriend at the time of his passing claimed that she was in a spousal relationship with the deceased and apparently obtained some $288,000 in settlement funds from ICBC. The applicant is currently contesting this matter with ICBC through the Civil Resolution Tribunal with the hope that these funds or at least a portion thereof will be distributed, instead, for the benefit of the Children. This Court does not have jurisdiction to deal with this given it is before the Civil Resolution Tribunal.

[25] Turning to the allegations of fraud and impropriety, the applicant says that the Respondent, Ms. Smalley, continues to make irrelevant accusations and unsavoury attacks on her character which have no bearing to this proceeding. The applicant says they are gratuitous and simply revive past family turmoil between the applicant and the deceased both during the relationship and after separation with no probative value to this proceeding which she says is brought solely for the benefit of the Children collectively which include Ms. Lyne's children. Most concerning, I accept, is the assertion that the applicant would take any funds recovered from the Lawsuit for herself and not deposit the estate's share with the PGT for the benefit of the Children.

Law and Analysis Re Costs

[26] In the recent decision of *Walker Estate*, 2024 BCSC 1213, Justice Tindale adopts a review of the circumstances when special costs may be awarded from *Kim v. Choi*, 2019 BCSC 1792, starting at paragraph 22. I am going to read in that quotation, but omit the citations referred to. If a transcript is ordered, those citations shall be inserted accordingly:

> [22] Special costs may be awarded where the conduct of a party is reprehensible. Reprehensible conduct includes conduct that is scandalous or outrageous, or milder forms of misconduct that are

deserving of reproof or rebuke: *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 1994 CanLII 2570 (BC CA), 119 D.L.R. (4th) 740 at 747 (B.C.C.A.).

[23] In *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914 at para. 11, Walker, J. set out those circumstances that warranted the attraction of special costs:

(a) where a party pursues a meritless claim and is reckless with regard to the truth;

(b) where a party makes improper allegations of fraud, conspiracy, fraudulent misrepresentation, or breach of fiduciary duty;

(c) where a party has displayed "reckless indifference" by not recognizing early on that its claim was manifestly deficient;

(d) where a party made the resolution of an issue far more difficult than it should have been;

(e) where a party who is in a financially superior position to the other brings proceedings, not with the reasonable expectation of a favourable outcome, but in the absence of merit in order to impose a financial burden on the opposing party;

(f) where a party presents a case so weak that it is bound to fail, and continues to pursue its meritless claim after it is drawn to its attention that the claim is without merit;

(g) where a party brings a proceeding for an improper motive;

(h) where a party maintains unfounded allegations of fraud or dishonesty; and

(i) where a party pursues claims frivolously or without foundation.

[24] Special costs are punitive and served to chastise the offending party: *Ip v. Insurance Corp of British Columbia* (1994), 89 B.C.L.R. (2d) 251 at para. 7.

[25] Special costs are the exception. Special costs should not be awarded where the only issue is a party's credibility*: Schwabe v. Dr. Linski*, 2005 BCSC 1284 at para 26; *Grewal v. Sandhu*, 2012 BCCA 26 at paragraph 107, leave to appeal ref'd [2012] S.C.C.A. No. 120. However, a party who lies, falsifies evidence and attempts to deceive the court can be subjected to special costs: *Hoffman v. Percheson*, 2011 BCSC 1175 at paras 19-23.

[26] Special costs may also be awarded where a litigant makes allegations of fraud without foundation. A *prima facie* case must exist before such a serious allegation is made: *Ip* at paras. 7-8.

[27] In *Ip*, at para. 8, the Court outlined the injuries inflicted by fraud allegations and the consequences that flow from baseless claims:

> An allegation of fraud, willful misstatements, or other such claims made against a person casts a serious pall over his or her reputation in the community. Very careful consideration

> must be given by the defendant before making such serious allegations. At the very least, a prima facie case must exist and if it does not then special costs by way of “chastisement” is a reminder to the defendant to exercise better care in the future.

[27] Further, special costs may be made against a fiduciary where they have breached their fiduciary duties, see for example *Loftus et al v. Farrell*, 2001 BCSC 1136, or against an executor for failing to properly account to the beneficiaries and a failure to provide information, amongst other things, see *Munroe Estate*, at 1999 CanLII 5536 (BCSC).

[28] As it relates to the Lawsuit, I am not satisfied that the conduct of the Respondents even approaches the high threshold which would merit an order of special costs. The Lawsuit never really got off the ground before the deceased's passing. While there are documents and other witnesses, prosecuting a claim without the plaintiff is challenging. If it were not for the Contingency Fee Agreement, there would be absolutely no chance of pursuing the claim as there are not funds for a private retainer. Further, if the claim is to proceed and be dismissed, there are costs consequences that could follow.

[29] Further, as it relates to the allegations of fraud, I take those in context that they represent part of the reason why there was concern about the viability of the Lawsuit. Again, I am not going to detail those as I do not think that that is in the Children's best interests for this Court to comment on whether or not there is merit to those. I simply assert that those allegations were made not to criticize the applicant and the deceased, I find, but rather as part of the context for the decision the Respondents made not to pursue the Lawsuit. I am going to leave it at that.

[30] At worst regarding the Lawsuit, the Respondents were less than diligent, to put it mildly, in their communications with the applicant and informing her about these decisions so she could respond accordingly. This is unhelpful and not in keeping with their obligations as administrators, but not to the extent, I find, that their conduct is reprehensible.

[31] Some of the other conduct of the Respondents detailed above gives greater pause as to whether it crosses the threshold of meriting an award of special costs. The issue of the birth certificates is, to say it mildly, peculiar. Firstly, it is not explained why there was not a request of the applicant and Ms. Lyne for these to be provided at first instance. As the obvious surviving guardians of the Children, they presumably had them and, if they could not be located for some reason, they would be the ones legally entitled to obtain a replacement. Secondly, after the mistake was made by Alberta Vital Statistics and they were reissued incorrectly, the Respondents were entirely uncooperative with getting them returned for an extended period of time. This resulted in police involvement and a court order being required by Alberta Vital Statistics and then police involvement. Those findings aside, I am still not satisfied that the conduct of the Respondents in their capacity as administrators or any related conduct in the course of this litigation meets the threshold for special costs when once considers the *Walker* factors.

[32] Special costs are truly the exception and this does not reach the necessary threshold.

[33] Notwithstanding my conclusion on special costs, costs are always awardable at the discretion of the court based on the application of Rule 14-1 of the *Supreme Court Civil Rules* [the "*Rules*"] and the governing caselaw. The general principle is that costs are awarded to the successful party. "Success" as it is defined for the purposes of costs means substantial success.

[34] The applicant has clearly, in my conclusion, been substantially successful in this proceeding and had obtained all of the substantive relief to which she was seeking, which she has been pursuing not for her own benefit but for the Children, two of which are not even her children. The applicant is thus entitled to her costs in accordance with the *Rules*.

[35] Further, the Respondents have made the applicant's efforts in this regard unreasonably difficult for no apparent reason. The Respondents have no financial interest in the deceased's estate and, on their own evidence, the estate has no other

assets other than the Lawsuit and they have no entitlement to any of the ICBC funds whether belonging to the Children or to the alleged former partner of the deceased. So, it would appear, the Respondents were being difficult and obstructive just for the sake of being difficult and obstructive.

[36] On this basis, I am satisfied that costs shall be assessed under Appendix B of the *Rules* at Scale C on the basis that this matter was of more than ordinary difficulty upon consideration of the factors set out in Appendix B, s. 2(3). Specifically, for the benefit of the record, I make the order for costs of more than ordinary difficulty pursuant to Appendix B, s. 2(2)(c). This is the more appropriate exercise of my discretion, in my conclusion, than the alternative argument advanced by the applicant of lump-sum costs. While the discretion does exist under the *Rules* to fix costs in a lump sum, that discretion is exercised sparingly under the *Rules* and generally on a more discrete basis to simply avoid the additional costs of a registrar's hearing. I have no basis here to conclude that the $20,000 in lump sum costs that is proposed is appropriate in all of the circumstances.

[37] Dealing now with the Ancillary Orders. There are two, on my understanding of the record, contested Ancillary Orders. The first is an order that the applicant indemnify the Respondents in the event a costs order is made against them in the Lawsuit. As I said to counsel in the course of submissions, this is a most unusual order being sought. The Respondents, as I have detailed above, took no steps to pursue the Lawsuit. That may or may not have been a prudent decision and the ball is now proverbially in the applicant's court to proceed as she deems appropriate. However, given the lack of any steps being taken in the Lawsuit during the period of time in which the Respondents were the administrators of the deceased's estate and the fact that the Lawsuit was, it would appear, presumptively stayed upon his passing, there are no costs consequences that could seemingly possibly flow to the Respondents. I reach that conclusion solely on the facts herein and without even needing to muse about what possible legal basis would exist for such an order in a different factual matrix.

[38] The other contested Ancillary Order is an order that accounts need not be passed under the *Trustee Act*. Given the existence of the Children in this case who are minors, neither the PGT nor the guardians of the Children can, I find, consent to or agree to waive the passing of the accounts. This would be prejudicial to the Children. I appreciate that there may be no assets and that this is perfunctory, but that does not excuse the court's jurisdiction that it is not possible, in my view, to waive that requirement. Further, the Respondents are already late in passing their accounts which should have been done two years from the date of the grant of the administration, see *Trustee Act*, s. 99(1)(a).

[39] Accordingly, I find that the Respondents shall pass their accounts within 120 days of this order unless that deadline is extended by written agreement of the parties. If there is any order made for the reimbursement or remuneration in the passing of the accounts, the Respondents will, of course, be indemnified if any recovery is possibly made in the Lawsuit given that it is acknowledged those are the only possible assets available within the estate.

[40] Turning to the Ancillary Orders consented to, they are as follows, and these, as indicated, are by consent:

a) Colleen Anette Smalley and Dean Daniel will be removed as the administrators of the estate of Jason Oliver Lyne, deceased;

b) Lindsay Eileen Tabin shall be appointed as the substitute administrator of the estate of Jason Oliver Lyne, deceased, without bond. Lindsay Eileen Tabin shall have all the rights, powers, and duties of the personal representative in respect of the estate of Jason Oliver Lyne, deceased. All the assets, real and personal, of the estate of Jason Oliver Lyne vest in Lindsay Eileen Tabin;

c) The grant of administration without will annexed dated April 5, 2022, granted to Colleen Anette Smalley and Dean Daniel be revoked and

declared to be null and void from this date to all -- it says "to all." I think it should say, "for all" intents and purposes in law whatsoever;

d) A new grant of administration without will annexed shall be issued to Lindsay Eileen Tabin;

e) The existing original grant of administration and all certified and notarial copies be surrendered by Colleen Anette Smalley and Dean Daniel to the Kelowna Probate Registry within 10 days of this order. If the original grant of administration and all certified and notarial copies are not surrendered within 10 days of this order, then the Kelowna Probate Registry may proceed with the issuance of a new grant of administration to Lindsay Eileen Tabin;

f) Colleen Anette Smalley and Dean Daniel will arrange for the delivery of two urns of the deceased's ashes and the deceased's hockey jersey to the offices of Sabey Rule LLP within 30 days of this order;

g) Colleen Anette Smalley and Dean Daniel shall provide copies of all records pertaining to the estate of Jason Oliver Lyne to the offices of Sabey Rule LLP within 30 days of this order;

h) Lindsay Eileen Tabin shall immediately advise Colleen Anette Smalley and Dean Daniel and the Public Guardian and Trustee of British Columbia if and when an award for damages or settlement is achieved in Court File Number 200311128 in the King's Bench of Alberta, Edmonton, *Jason Oliver Lyne v. Pacific Leisure Products Inc. operating as Canopy West, and Lakhmer Klar*, and the particulars of the award or settlement; and

i) Finally, Colleen Anette Smalley and Dean Daniel are permitted to place a headstone on the cemetery plot of the deceased.

[41] Those are my reasons for judgment and the corresponding orders.

"Hardwick J."