

In the Court of Appeal of Alberta

Citation: Silva Estate (Re), 2026 ABCA 325

Date: 20261015
Docket: 2501-0302AC
Registry: Calgary

Between:

Sandra Gaspar Deer

Appellant

- and -

Annabelle Silva

Respondent

The Court:

**The Honourable Justice Michelle Crighton
The Honourable Justice Alice Woolley
The Honourable Justice Karan M. Shaner**

Memorandum of Judgment

Appeal from the Order by
The Honourable Justice K.A. McLeod
Dated the 25th day of September, 2025
Filed on the 22nd day of October, 2025
(2025 ABKB 555, Docket: ES10 25218)

Memorandum of Judgment

Introduction

[1] The appellant, Sandra Gaspar Deer, appeals an order directing her to repay monies to her mother's estate and removing her as the personal representative. The order followed a chambers judge's finding that when acting as a power of attorney, Sandra failed to provide a proper accounting of expenditures made on behalf of her mother: *Silva Estate (Re)*, 2025 ABKB 555 (the "Decision").

[2] In our view, there is no merit to the appellant's arguments on appeal that the chambers judge lacked jurisdiction to impose remedial orders; however, the chambers judge went too far in directing that the difference between the value of the home to be built and the amount spent must be deducted from Sandra's share of the Estate when it is distributed.

[3] Accordingly, the appeal is allowed in part.

Background

[4] Guilhermina De Jesus Silva (the "deceased" or the "mother"), has two daughters, the appellant and the respondent, Annabelle Silva. She resided near Annabelle in Ontario until 2020 when, after visiting Sandra in Alberta, she did not return to Ontario. Prior to her relocation to Alberta, the deceased lived in Ontario for more than 50 years after immigrating from Portugal with her husband who pre-deceased her. Shortly after moving to Alberta, the deceased made a new will naming Sandra as her personal representative and, as alternate, Sandra's husband, Tedrick. The new will provides that "the house being built for me on Sandra Gaspar Deer's land will remain the property of her and her husband, Tedrick Deer or the survivor of her". She also named Sandra her attorney under an enduring power of attorney.

[5] Annabelle was unaware of these documents until later, after learning from a neighbour that Sandra had assisted the deceased to sell her Ontario home and to move or sell her personal possessions. After the sale, Sandra intermingled the sale proceeds with her own funds in an account to which she added the deceased's name.

[6] Within one week of executing the new will, Sandra informed Annabelle that their mother wished to have no further contact with her. Despite Annabelle's efforts, she did not speak with her mother more than a few times in the 22 months her mother lived with Sandra in Alberta.

[7] On August 20, 2020, Sandra began acting as her mother's power of attorney following the second of three strokes her mother would suffer. The mother died on December 22, 2021, after suffering a third stroke. Thereafter, Sandra acted as her personal representative.

[8] Annabelle became aware that funds were being removed from her mother's bank account and, on four separate occasions, requested financial information from Sandra. Sandra did not reply.

[9] Finally, on March 23, 2023, Annabelle commenced a surrogate action by filing a C9 notice of objection restraining Sandra from acting as the mother's personal representative and requiring Sandra to pass accounts as her attorney. On March 29, 2023, Annabelle filed an application for advice and direction in which she requested the Court:

- direct Sandra to file an accounting application,
- appoint a limited administrator for the estate,
- suspend Sandra's powers as personal representative,
- require Sandra to account for the deceased's Canadian and international assets, and
- declare Sandra is required to personally repay inappropriately distributed assets to the deceased's estate.

[10] On April 16, 2023, the Court directed Sandra's accounting application to a special chambers hearing and set procedural timelines.

[11] On May 26, 2023, a consent order was granted referencing the application Annabelle filed on March 29, 2023. The order set filing deadlines for Sandra's accounting application and her proof of will application. In addition, it restrained Sandra from exercising any powers relating to the estate and directed her to account for the estate assets.

[12] Sandra filed her proof of will application on July 20, 2023, and her attorney accounting application on August 14 and 15, 2023 which, among other things, disclosed Sandra's post death expenditures from the deceased's estate. All applications and orders were filed in the surrogate action that Annabelle commenced in March 2023.

[13] Annabelle objected to Sandra's proof of will and contests the will's validity. That application has not yet been heard.

[14] Following the hearing on Sandra's application to pass accounts as attorney, the chambers judge issued clear and cogent reasons in which she found that Sandra failed to provide an accounting that met the standards governing an attorney for the period of August 2, 2020, to December 22, 2021. She directed Sandra to repay an unproven gift of CA\$506,000 that Sandra claimed her mother gave her in July of 2020 and further directed Sandra to repay US\$500,693 in funds transferred from her mother's Costa Rican property without any accounting. She also ordered Sandra to repay \$59,025 in unexplained expenditures.

[15] The chambers judge also found that Sandra had not explained CA\$518,595 she expended towards the new house being built on her land and directed that amount be “deducted or offset from Sandra’s share of the residue of the Estate at the time the Estate is distributed”.

[16] Finally, Sandra and her husband, Tedrick were further ordered removed as the deceased’s personal representative and alternate representative, respectively.

Grounds of appeal and standard of review

[17] Sandra argues the chambers judge exceeded her jurisdiction by granting relief not pleaded in the application before her and more properly considered as part of the proof of will application. More specifically, Sandra argues that Annabelle did not plead restitution and therefore repayment should not have been ordered. Sandra also submits the chambers judge could not remove her as personal representative of the estate in the context of an application to pass accounts as attorney.

[18] The standard of review on questions of jurisdiction is correctness: *Tallcree First Nation v Rath & Company*, 2025 ABCA 360 at para 18.

Passing of accounts and the restitution remedy

[19] Section 10(4) of the *Powers of Attorney Act*, RSA 2000, c P-20 provides that when hearing an application to pass accounts, “the Court may grant whatever order for accounting it considers appropriate in the circumstances”. “This a broad grant of discretion to permit the court to tailor the remedy to fit the circumstances of the case before it”: *Prevatt v Prevatt*, 2024 ABKB 31 at para 164. The circumstances here included that Sandra claimed an unproven gift in the amount CA\$506,000, and that US\$500,693 from the Costa Rican property as well as \$59,025 in withdrawals from the mother’s Registered Retirement Income Fund (“RIF”) were unaccounted for without a reasonable explanation.

[20] While Sandra relies on *Norris v Norris*, 2024 ABKB 21 [*Norris*] to argue the chambers judge did not have jurisdiction to order restitution for these unproven or unaccounted for amounts because Annabelle did not plead restitution, *Norris* does not assist. First, even if the relief was not expressly pleaded, s 8 of the *Judicature Act*, RSA 2000, c J-2 [*Act*] and r 1.3(2) of the *Alberta Rules of Court*, Alta Reg 124/2010 [*Rules*], gave the chambers judge the jurisdiction to order Sandra to repay “any and all transactions [that were not properly] entered into in pursuance of the enduring power of attorney” (s 10(1) of the *Powers of Attorney Act*). As this Court found in *Knelsen Sand & Gravel Ltd v Harco Enterprises Ltd*, 2021 ABCA 385 at para 104: “Courts do have a discretionary power to grant remedies that are not claimed or sought in the pleadings if it is fair and just to do so”, citing s 8 of the *Judicature Act*, and r 1.3(2).

[21] Second, the record demonstrates that Sandra was neither surprised nor prejudiced by the requested relief. Annabelle expressly argued she wanted the Court to order Sandra to repay amounts for which she could not properly account.

[22] Counsel for Sandra responded at the chambers hearing primarily by justifying Sandra's expenditures on the home after her mother lost capacity and because of her mother's intention to make sizable gifts to her. Her counsel did not dispute the Court's jurisdiction to order repayment. Rather, he argued that if the Court found that Sandra acted honestly, even if negligently or carelessly, s 41 of the *Trustee Act*, RSA 2000, c T-8, empowered the Court to excuse Sandra's failure to deal with trust property appropriately.

[23] The chambers judge correctly stated the law applicable to the Court's accounting authority included the jurisdiction to order repayment. The chambers judge found Sandra failed to discharge her onus to prove that her mother intended to gift her CA\$506,000, and that her inability to explain her failure to account for significant property held internationally was "disingenuous" and "not credible": Decision at paras 69, 87-88. These findings are owed deference, and Sandra does not challenge the law, the findings of fact, or the chambers judge's determination that she breached her fiduciary duty as attorney.

[24] A natural "effect or implication of the accounting remedy is a restitutionary remedy." The Court's jurisdiction in this respect is explained in *Norris* at paragraphs 165-167, citing *Taubner Estate (Re)*, 2010 ABQB 60 at 234, and *Richter v Chemerinski*, 2020 ABQB 307 at para 404. Accounting "concerns both the duty to keep accounts on behalf of a donor and a remedy to require production of accounts on application" for evaluation as to "whether [the] accounting provided is sufficient. But the remedy has a further aspect": *Norris* at para 165. Where an accounting is found to be deficient (ie some expenditures are not accounted for at all, expenditures were made for improper purposes or were not shown to have been made for proper purposes), "the expenditures would not (properly) form part of the account and should be re-paid to the donor. An effect or implication of the accounting remedy is a restitutionary remedy, the requirement to repay what was improperly spent. If the donor is deceased, the amounts must be repaid to the donor's estate": *Norris* at para 165.

[25] The decision not to order repayment in *Norris* is distinguishable from the undisputed facts in this case. In *Norris*, the respondent was found not to have been obstructive in his duties as personal representative. Here, the chambers judge specifically found Sandra's conduct to be disingenuous and her explanations not credible. The evidentiary record permitted the chambers judge to quantify the amounts to be repaid. Given the chambers judge's findings in relation to Sandra's conduct, and the record before her, she had a sufficient basis from which to order the repayment relief sought in Annabelle's application.

[26] In summary, where an accounting is sought, the Court is empowered to direct the attorney to return unaccounted-for funds or, if not segregated in the attorney's possession, to give judgment in favor of the estate. We emphasize Annabelle's specific request that Sandra be directed to repay the misappropriated funds to the estate.

[27] Sandra has not demonstrated the chambers judge committed a jurisdictional error in requiring her to repay to the estate the unproven gift of CA\$506,000, the unaccounted transfers

associated with the Costa Rica property of US\$500,693, and the unexplained withdrawals from the RIF of \$59,025, and for those amounts to be held in trust with the respondent's lawyer.

The new house

[28] The chambers judge did not order Sandra to repay \$518,595, being the difference between the \$400,000 estimated cost of the house being built as of August 2, 2020, and the \$918,595 that Sandra spent to construct the house by the date of the forensic accounting report dated October 2, 2024. Rather, the chambers judge directed that \$518,595 be deducted or offset from Sandra's share of the residue of the estate when the estate is distributed.

[29] We understand Sandra's argument against this relief to be that it predetermines her entitlement under the will before the proof of will application has been heard. We agree.

[30] The record permitted the chambers judge to assess the value of the home the deceased agreed to build on Sandra and Tedrick's land. The record also permitted the chambers judge to find that Sandra spent \$918,595 on the home. The estimated value of the home and the expenditures in relation to it form part of the accounting application in as much as the expenditures occurred both while Sandra was acting as attorney before her mother's death and as her mother's personal representative after her death. The chambers judge understood the will still needed to be validated and interpreted. She also recognized that, regardless of which will is found to be valid, Sandra is entitled to half the residue at least. We infer that for this reason, the chambers judge did not direct Sandra to repay those amounts but nevertheless intended to preserve the beneficiaries' entitlement to the amount spent exceeding the value of the home to be built.

[31] The chambers judge did not err in requiring the \$518,595 to be held in trust pending the final distribution of the Estate. However, she could not properly direct that \$518,595 be deducted from Sandra's residual share in the accounting application.

Removal of the personal representatives

[32] Finally, Sandra argues that the chambers judge had no jurisdiction to remove her as personal representative of her mother's estate. She does not dispute the law the chambers judge relied on to remove Sandra, or her husband Tedrick, nor does she dispute the facts the chambers judge found in relation to unexplained expenditures and unaccounted-for monies. Rather, Sandra argues that Annabelle should have applied for this relief in the application to prove the will, not in relation to Sandra's accounting application as attorney. Sandra further submits that even if the chambers judge had jurisdiction to remove Sandra, there was no jurisdiction to remove Sandra's husband as the alternate personal representative. These arguments are without merit.

[33] The *Estate Administration Act*, SA 2014, c E-12.5, Part 1, sets out extensive provisions related to "The Role of a Personal Representative". The relevant provisions are as follows, and include that if the Court, on application, "is satisfied that a personal representative has refused or

failed. . . to perform a duty or core task for which the personal representative is responsible” it may “remove the personal representative” (s 8(c)):

General duties of a personal representative

5(1) A personal representative must

- (a) perform the role of personal representative
 - (i) honestly and in good faith,
 - (ii) in accordance with the testator’s intentions and with the will, if a valid will exists, and,
 - (iii) with the care, diligence and skill that a person of ordinary prudence would exercise in comparable circumstances where a fiduciary relationship exists,

and

- (b) distribute the estate as soon as practicable.

(2) Despite section 5 of the *Trustee Act*, sections 33, 35, 36, 51 to 56 and 84 of the *Trustee Act* apply, subject to subsection (2.1), to a personal representative acting in the person’s capacity as a personal representative. . .

. . .

Core tasks

7(1) The core tasks of a personal representative when administering an estate are

- (a) to identify the estate assets and liabilities,
- (b) to administer and manage the estate,
- (c) to satisfy the debts and obligations of the estate, and
- (d) to distribute and account for the administration of the estate.

. . .

Failure to provide notice or the non-performance of duty or core task

If, on application, the Court is satisfied that a personal representative has refused or failed to provide the notice required under Part 2 or to perform a duty or core task for which the personal representative is responsible, the Court may

- (a) order the personal representative to provide the notice or to perform the duty or core task;
- (b) impose conditions on the personal representative;
- (c) remove the personal representative;
- (d) revoke a grant;
- (e) make any other order that the Court considers appropriate.

[Emphasis added]

[34] These provisions are a statutory reflection of the principles of equity that have long permitted the removal of a trustee as an ordinary remedy when that trustee has abused their trust, and particularly where they have failed to perform their fiduciary duty. *Letterstedt v Broers*, [1881-5] All ER Rep 882 at 886-887, 9 App Cas 371 (UK PC), recognized a trustee might be removed if the trustee's continuance would prevent trusts from being properly executed; the "main guide must be the welfare of the beneficiaries". As this Court said more recently in *Wood's Homes Society v Selock*, 2021 ABCA 431 at paras 13-15, s 8 of the *Estate Administration Act* "authorizes the court to remove the personal representative of an estate who has refused or failed to perform a duty or core task for which the personal representative is responsible".

The core tasks of a personal representative when administering an estate are to: identify the estate assets and liabilities; administer and manage the estate; satisfy the estate debts and obligations; and distribute and account for the administration of the estate (s 7). The personal representative is required to perform the role honestly and in good faith, in accordance with the testator's intention and with the will, and with the care, diligence and skill that a person of ordinary prudence would exercise in comparable circumstances where a fiduciary relationship exists, and to distribute the estate as soon as practicable (s 5).

The court has both statutory and inherent jurisdiction to remove an executor. . . . [A]n executor should be removed only in a case of clear necessity and where "the continuance of the trustee would be detrimental to the execution of the trust, jeopardize the assets of the trust, put the welfare of the beneficiaries at risk, or prevent the trust from being properly executed. [Citations omitted] [Emphasis added]

[35] In *Webster v Lappas*, 2022 ABCA 403 at para 13, when assessing disputes “the court ought to consider numerous factors, including the presence of ‘conflict of interest, misconduct, lack of *bona fides*, an inability or unwillingness to carry out the terms of the trust, incapacity, personally benefiting from the trust, acting to the detriment of beneficiaries, or any other ground that shows that the trustee is not fit to control another's property’”, citing *Warren Estate (Re)*, 2015 ABQB 420 at para 22; see Decision at paras 106-107.

[36] The Court’s jurisdiction is not specific to an individual, but rather to the role. Whether or not the Court should have removed either Sandra or her husband as personal representative in the circumstances is a question of mixed fact and law, entitled to deference by this Court.

[37] Annabelle’s pleading specifically requested that she be appointed as the limited administrator of her mother’s estate pending determination of the will’s validity and that Sandra be restrained from exercising any powers pending that determination. Notwithstanding the procedural direction to separate the attorney accounting application from the will validity application, the relief sought was clearly set out. Moreover, the transcript demonstrates that Sandra understood Annabelle was asking the Court to set aside Sandra’s designation as their mother’s personal representative. The chambers judge’s decision would not have surprised Sandra, nor did it prejudice her.

[38] The chambers judge found that Sandra breached her fiduciary duty by failing to account for a significant amount of funds during the attorney period. She further found that Sandra expended \$723,675.06 after her mother’s death, the legitimacy of which is yet to be determined. Only 15% of those expenditures were spent on the new house. Finally, the chambers judge found that Sandra’s continuation as personal representative poses a risk to the remainder of the estate, since she may be personally benefiting from those expenditures and because Sandra lacks *bona fides* relative to the international property: Decision at para 113.

[39] As noted, Sandra’s counsel does not dispute these findings of fact, nor the legal bases upon which the chambers judge removed Sandra as the personal representative. Counsel argues only that it should have been done in a different application. However, the legislation and the *Rules* confer broad powers on the Court to protect those who can no longer speak for themselves, the estate and its beneficiaries.

[40] In our view, the chambers judge made no jurisdictional error in removing Sandra (or her husband) as personal representative of the estate, upon finding that Sandra had breached her fiduciary duty as attorney. On the record, Sandra failed to be forthright in her accounting, spent significant funds after her mother’s death, had a lack of *bona fides* and trustworthiness in presenting the accounts and defending them, and was unwilling and unable to handle her mother’s finances appropriately or fairly.

[41] The chambers judge also recognized a high level of animosity between Sandra and Annabelle and made no jurisdictional error in naming a neutral representative to administer the

estate. The chambers judge's decision represents a reasonable exercise of the Court's inherent jurisdiction over surrogate matters and statutory authority, that is well supported on the evidentiary record.

Conclusion

[42] For all these reasons, the appeal is allowed in part. The chambers judge's order should be amended to reflect that while Sandra is not required to repay the amount of \$518,595 in trust to Kantor LLP, Sandra nevertheless holds that amount in trust.

[43] If the parties are unable to agree on costs within 60 days, the parties can submit their position in writing limited to 5 pages. To be clear, while the appeal is allowed in part, it is allowed on a minor issue. In the panel's view, Annabelle is the successful party on appeal.

Appeal heard on September 9, 2026

Memorandum filed at Calgary, Alberta
this 15th day of October, 2026

Crighton J.A.

Woolley J.A.

Shaner J.A.

Appearances:

I. Bernardo, KC
for the Appellant

B. Turnquist
for the Respondent