

**CITATION:** Reardon v. Reardon, 2024 ONSC 1851  
**COURT FILE NO.:** CV-21-00085772-0000  
**DATE:** 2024/04/02

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Gay Clarey Reardon, in her capacity as the Estate Trustee of the Estate of Christopher Michael Reardon, deceased, Plaintiff/Moving Party

**AND**

Francis Damien Reardon, personally and in his capacity as the Succeeding Estate Trustee of the Estate of Margaret MacKay Reardon, deceased, and in his capacity as Power of Attorney for Property of Margaret MacKay Reardon, and Mark Leo Reardon, personally and in his capacity as the Succeeding Estate Trustee of the Estate of Margaret MacKay Reardon, deceased, Defendants/Responding Parties

**BEFORE:** Justice R. Ryan Bell

**COUNSEL:** Christopher Shorey, for the Plaintiff/Moving Party

Christopher P. Morris and Blake Bochinski, for the Defendants/Responding Parties

**HEARD:** March 20, 2024

**ENDORSEMENT**

**Overview**

[1] This is a motion by the plaintiff, Gay Reardon, for an order for disclosure of documents contained in the solicitor's file for the estate of Margaret Reardon or, in the alternative, production to the court for inspection to determine the validity of the claim of privilege. The defendants, Mark and Francis Reardon, have produced three of the documents sought by Gay<sup>1</sup> but they maintain that the remaining documents are covered by solicitor-client and/or litigation privilege. Mark and Francis say that the privileged nature of the remaining documents is readily apparent from the surrounding circumstances but if the court concludes otherwise, the documents ought to be produced for inspection by the court.

[2] For the following reasons, I order that certain documents are to be produced to the court for inspection in order to determine the validity of the claim of privilege. The balance of the motion is dismissed.

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<sup>1</sup> I have used first names in this endorsement for clarity.

## Background facts

[3] Margaret had five children: Christopher, Mark, Francis, Peter, and Moninna. Gay was Christopher's wife.

[4] Margaret died on June 28, 1992. Christopher was appointed as the trustee of her estate. Under the terms of Margaret's will, each of her children was to share equally in her estate.

[5] Christopher died on February 12, 2015. When Gay was appointed estate trustee of Christopher's estate, she learned that Christopher had not completed the administration of Margaret's estate. In May 2015, Gay retained Nicol & Lazier LLP to assist her with the administration of Christopher and Margaret's estates.

[6] In August 2015, Gay consented to Mark and Peter taking over as succeeding estate trustees of Margaret's estate and she agreed to Nicol & Lazier representing Mark and Peter going forward. On August 18, 2015, Gay sent a letter to Mark, Francis, Peter, and Moninna, detailing Christopher's administration of the estate and providing the documents she had located. In September 2015, the siblings consented to Francis becoming a succeeding estate trustee of Margaret's estate instead of Peter. Mark and Francis were appointed succeeding estate trustees of Margaret's estate in October 2015.

[7] As the estate trustees, Mark and Francis continued to be represented by Nicol & Lazier until June 2018 when they retained Perley-Robertson, Hill & McDougall LLP.

[8] On January 26, 2019, Mark wrote to the other beneficiaries proposing a distribution of 50 per cent of the residue of the estate in one-fifth equal shares. The next day, Gay wrote to Mark advising that he should account for the past distributions to the other beneficiaries before concluding that a distribution of equal one-fifth shares would result in an equal distribution in accordance with Margaret's wishes.

[9] On February 27, 2019, Mark and Francis wrote to Gay to advise that based on their review, there had been almost \$260,000 in "unaccounted for" withdrawals and cash transactions between 1992 to 2000. Mark and Francis asked Gay if she had copies of Christopher's personal bank records for this period of time to see whether any "estate business" had been conducted through these personal records. Gay responded that she had no such records.

[10] On May 27, 2019, Mark and Francis wrote to the other beneficiaries, including Christopher's estate, regarding their distribution of the residue of Margaret's estate. In their letter, they stated:

- there had been \$259,961.86 in "unaccounted for" debits and withdrawals made by Christopher over the years 1992 to 2000;
- after reducing the "unaccounted for" debits and withdrawals to account for funeral expenses, undocumented distributions, and an executor fee, they considered the current value of "unaccounted for" withdrawals credited to Christopher to be \$97,025.60;

- Margaret's estate would "forgive" Christopher this amount;
- they had distributed \$1,142,996.48 in equal shares to themselves, Peter, and Moninna; and
- no distribution would be made to Christopher's estate.

[11] On July 26, 2019, Gay's counsel sent a demand letter to Mark and Francis' counsel seeking an immediate distribution to Christopher's estate of the amount previously distributed to the other beneficiaries.

[12] Gay's statement of claim was issued on February 10, 2021.<sup>2</sup> In her capacity as estate trustee of Christopher's estate, Gay seeks an order that all property and assets forming part of Margaret's estate be vested pending final resolution of the litigation, an order that Mark and Francis pass their accounts as estate trustees from September 16, 2015 to date, a declaration that they have breached their fiduciary duties, damages for breach of trust, and payment of the amount found to be due to her on taking the accounts.

[13] Mark and Francis delivered their statement of defence and counterclaim on April 6, 2021.<sup>3</sup> In their counterclaim, Mark and Francis as estate trustees for Margaret's estate, claim against Gay in her personal capacity and as estate trustee for Christopher's estate, an order for equitable tracing and production of all of Margaret, Christopher, and Gay's banking and financial records for the period June 28, 1992 to September 18, 2015, and damages for negligence, breach of trust, breach of fiduciary duty, and unjust enrichment in respect of Christopher and Gay's actions in the administration of Margaret's estate.

### **The disputed documents**

[14] With three exceptions, the defendants maintain that the documents listed in Schedule B to their affidavit of documents are protected by solicitor-client privilege and litigation privilege. The defendants have produced document nos. 171, 172, and 179 of Schedule B to their affidavit of documents. Each of these documents is from the Nicol & Lazier file. Document nos. 171 and 172 are solicitor's notes of two phone calls received from Gay in May 2015 regarding some potential estate work. Document no. 179 is an email from Matthew Reardon (Mark's son who, at the time, was a lawyer at Nicol & Lazier and later moved to Perley-Robertson) to all the beneficiaries of Margaret's estate.

[15] The disputed documents fall into two broad categories: (i) those that Gay says are from the time period when she was the client of Nicol & Lazier (document nos. 173-177); and (ii) document nos. 1-170 and 178-205 in respect of which Gay says the defendants "have not differentiated between those documents pertaining to the administration of Margaret's estate and those pertaining to the litigation involving Margaret's estate."

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<sup>2</sup> Amended on November 26, 2021.

<sup>3</sup> Amended on February 15, 2022.



## Applicable legal principles

[16] The applicable legal principles are not in dispute.

### *Solicitor-client privilege*

[17] Solicitor-client privilege attaches to communications between a lawyer and their client for the purpose of seeking or giving legal advice which is intended to be confidential: *Sky Solar (Canada) Ltd. v. Economical Mutual Insurance Co.*, at para. 78.<sup>4</sup> Solicitor-client privilege is fundamental to the proper functioning of the legal system and should only be set aside when absolutely necessary: *Alberta (Information and Privacy Commissioner) v. University of Calgary*, at paras. 26 and 34.<sup>5</sup> The party asserting the privilege bears the onus of establishing an evidentiary basis for the claim of privilege on a balance of probabilities: *Sky Solar*, at para. 73.

[18] A trustee cannot claim solicitor-client privilege as against a beneficiary over any documents related to advice sought and obtained with respect to the administration of the trust: *Ballard Estate (Re)*,<sup>6</sup> cited in *Whitell v. Whitell*, at para. 19.<sup>7</sup> This is because a trustee and a beneficiary have a joint interest in the administration of the trust and the legal advice sought by the trustee furthers the interest of the beneficiary: *Ballard Estate*. As Lederman J. explained in *Ballard Estate*:

Thus, there is no need to protect the solicitor-client communication from disclosure to those very persons who are claiming under the estate. The communications remain privileged as against third parties who are strangers or are in conflict with the estate but as was stated in *Stewart v. Walker*, *supra*, not those who are claiming under the estate. And that is because the trustee and beneficiary have a joint interest in the advice as Phipson has suggested:

No privilege attaches to communications between solicitor and client as against persons having a joint interest with the client in the subject matter of the communication, e.g. as between ... trustee and cestui que trust. (Phipson on Evidence, 14<sup>th</sup> ed. (London: Sweet & Maxwell, 1990)).

[19] However, a beneficiary's entitlement to obtain communications between a trustee and the trustee's counsel is not unlimited: *Whitell*, at para. 20. The court will not allow the production of any documents related to "a separate and distinct estate matter in which the parties [are] adverse": *Whitell*, at para. 20, citing *Wells (Estate) v. The Society for Pastoral Counselling Research*, at

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<sup>4</sup> 2015 ONSC 4714.

<sup>5</sup> 2016 SCC 53.

<sup>6</sup> (1994), 20 O.R. (3d) 50 (Gen. Div.).

<sup>7</sup> 2020 ONSC 2310.

paras. 15-16;<sup>8</sup> *Chang v. Lai Estate*, at para. 17.<sup>9</sup> This is because where the beneficiary and the trustee are adverse in interest, there is no joint interest that compels the disclosure of communications that would normally be protected by solicitor-client privilege: *Ballard Estate; Chang*, at para. 17.

[20] A second exception to a beneficiary's entitlement to obtain communications between a trustee and the trustee's counsel was identified by Lederman J. in *Ballard Estate*: where trustees are given discretionary trusts which involve a decision on matters between beneficiaries. The parties agree that this exception has no application to this case.

[21] A further qualification, relied upon by Gay, was identified by Lederman J. in *Ballard Estate*:

Moreover the cases have stated that, whatever approach to the claim of privilege is taken, in actions where the beneficiary is alleging lack of good faith or breach of fiduciary duty, this information is to be made available to him or her. In *Froese v. Montreal Trust Co. of Canada* ... the Master put it this way at para. 27:

I am of the opinion that in the context of litigation in which the plaintiff alleges breach of duty in the administration of a trust and the documents which are sought to be examined are relevant to that issue the plaintiff may succeed on the basis of proprietary right if he makes out a prima facie case that he is a beneficiary of the trust and establishes that the documents are documents prepared by the trustee in the administration of the trust and in the course of the trustee carrying out his duties as trustee.

[22] Gay alleges that the defendants' decision on May 5, 2019 to distribute \$1,142,496.48 to themselves, Peter, and Moninna, but not to Christopher's estate, was a breach of trust.

### *Litigation privilege*

[23] The defendants also claim litigation privilege over the disputed documents. A party asserting litigation privilege over a document must establish that litigation was contemplated at the time the document was created and the document for which privilege is claimed was created for the dominant purpose of the litigation: *Sky Solar*, at para. 80.<sup>10</sup>

### **Application of the legal principles to the disputed documents**

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<sup>8</sup> 2014 ONSC 347.

<sup>9</sup> 2014 BCSC 128.

<sup>10</sup> 2015 ONSC 4714.

[24] I have considered the disputed documents in the following order: (i) document nos. 1-148; (ii) document nos. 150-170; (iii) document nos. 173-177; (iv) document nos. 149, 178, and 180-200; and (v) document nos. 201-205.

*Document nos. 1-148*

[25] Document nos. 1-148 of Schedule B to the defendants' affidavit of documents consist of emails and correspondence between Perley-Robertson and the defendants from September 20, 2019 to October 6, 2023. Gay says that solicitor-client privilege does not apply based on the principles discussed in *Ballard Estate* and there is no "separate and distinct matter" so as to engage the adverse in interest exception.

[26] Gay acknowledges that these documents "may" be covered by litigation privilege but says that based on the descriptions in Schedule B, "it is impossible to tell." Gay says that these documents should be produced to the court for inspection to determine the validity of the claim for privilege.

[27] There is no need for the court to inspect these documents for privilege. I am satisfied that they relate to a matter, separate and distinct from the administration of the estate in general, in which the parties are adverse in interest. In her written submissions, Gay acknowledges that on February 27, 2019, the defendants alleged there were unaccounted for withdrawals from Margaret's estate. In July 2019, Gay's counsel sent a letter demanding an immediate distribution to Christopher's estate. As the defendants put it, this is the very "crux" of the litigation between the parties – the litigation stems from Gay's dispute with respect to the distribution of the estate. The parties were clearly adverse in interest as at the date of these documents. There is no joint interest in the documents.

[28] These documents have been differentiated from those relating to the general administration of the estate. This is evident from a review of Schedule A to the defendants' affidavit of documents. For example, Schedule A includes the May 2, 2019 clearance certificate and the May 24, 2019 "Transaction Record of CRA Rebate.pdf", documents that, on their face relate to the general administration of the estate.

[29] I conclude that document nos. 1-148 are protected by solicitor-client privilege.

*Document nos. 150-170*

[30] Document nos. 150-170 of Schedule B to the defendants' affidavit of documents consist of emails and correspondence between Perley-Robertson and the defendants, and notes to file from May 8, 2019 to November 28, 2019. For the same reasons as for documents nos. 1-148, I conclude that document nos. 150-170 are protected by solicitor-client privilege.

[31] Gay argues that document nos. 150-155 (from the time period May 8 to May 22, 2019) likely relate to the defendants' decision to distribute funds in respect of which Gay has pleaded

breach of trust and should be produced for this reason. I disagree. In *Blanks v. Roberts*,<sup>11</sup> Lemay J. distinguished *Whitell* from the case before him, explaining,

74. *Whitell* stands for the proposition that, where a party in an estate proceeding is alleging bad faith, the documents relating to that allegation must be produced.

75. However, *Whitell* is a decision in which there may actually have been some basis for the claims of bad faith. *Whitell* is distinguishable from this case because, in this case, there is no basis on the record before me for any of Ms. Roberts' claims of bad faith or fraud on the part of Mr. Blanks. In addition, unlike in *Whitell*, Ms. Roberts is one of the Trustees as well as a beneficiary. She had access to all of the estate documentation throughout this case.

[32] While Gay advances a claim for breach of fiduciary duty and breach of trust, there is no basis in the limited record before me on this motion to support Gay's claims against either of the defendants. Document nos. 150-170 are protected by solicitor-client privilege and need not be produced.

*Document nos. 173-177*

[33] Document nos. 173-177 of Schedule B to the defendants' affidavit of documents are from the Nicol & Lazier file. Document nos. 173-175 and 177 are notes to file dated June 9, August 4, August 7, and August 14, 2015. Document no. 176 is described as a "memo from D. Lazier to Matt Reardon regarding client call." To place these notes and memo in context, on July 15, 2015, after she had retained Nicol & Lazier to assist her in the administration of Margaret's estate, Gay wrote to the other beneficiaries advising them what she had learned about the administration of the estate. Then, on August 9, 2015, Gay agreed that Mark and Peter could take over as estate trustees.

[34] Gay maintains that these documents are not privileged and should be produced. The defendants say that these documents are protected by both solicitor-client privilege and litigation privilege.

[35] The claim for litigation privilege in these documents strikes me as dubious given that Gay's demand letter was not sent until July 2019. The claim of solicitor-client privilege, including a determination of whether the parties were adverse in interest in relation to a matter distinct from the general administration of the estate, cannot be properly assessed based only on the date and brief description of the documents set out in Schedule B. I also note that three of the documents pre-date Gay's consent to Mark and Peter taking over as estate trustees and that document nos. 171 and 172 (from May 2015) have already been produced.

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<sup>11</sup> 2020 ONSC 7133.



[36] In these circumstances, document nos. 173-177 are to be produced to the court for inspection in order to determine the validity of the claim of privilege.

*Document nos. 149, 178, and 180-200*

[37] Document no. 149 is from Matt Reardon's Perley-Robertson file and consists of emails between Mark, Francis, D. Ho-Faloon, and Matt Reardon dated from September 28 to October 1, 2018. Given the dates of these emails, document no. 149 is to be produced to the court for inspection in order to determine the validity of the claim of privilege.

[38] Document nos. 178 and 180-200 are from the Nicol & Lazier file. These documents include emails, notes to file, and letter correspondence and are dated from August 18, 2015 to June 8, 2018. Given the dates of these documents, they are to be produced to the court for inspection in order to determine the validity of the claim of privilege.

*Document nos. 201-205*

[39] Document nos. 201-205 of Schedule B to the defendants' affidavit of documents are litigation counsel's notes to file, a memo to file re telephone conference, and litigation counsel's dictation. The documents are dated from September 16, 2019 to October 5, 2023. They post-date Gay's demand letter in the summer of 2019 and document nos. 203-205 post-date the commencement of the action in February 2021. The parties were adverse in interest at the time these documents were created; there is no joint interest in the documents. They are protected by solicitor-client privilege. Litigation privilege is also properly claimed for these documents given that litigation was clearly contemplated (or underway) when these documents were created and the involvement of litigation counsel makes plain that they were created for the dominant purpose of litigation.

**Conclusion**

[40] Document nos. 149, 173-177, 178, and 180-200 are to be produced to the court for inspection in order to determine the validity of the claim of privilege. The balance of the motion is dismissed.

[41] Following my determination of the validity of the claim of privilege, the parties may provide me with their submissions on costs of the motion.

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Justice Ryan Bell

**Date:** April 2, 2024

**CITATION:** Reardon v. Reardon, 2024 ONSC 1851  
**COURT FILE NO.:** CV-21-00085772-0000  
**DATE:** 2024/04/02

2024 ONSC 1851 (CanLII)

**ONTARIO**  
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Defendants/Responding Parties

**BEFORE:** Justice Ryan Bell

**COUNSEL:** Christopher Shorey, for the  
Plaintiff/Moving Party

Christopher P. Morris and Blake  
Bochinski, for the  
Defendants/Responding Parties

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**ENDORSEMENT**

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Ryan Bell J.