IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Goritsas Estate (Re),* 2025 BCSC 1817

Date: 20250917
Docket: S237088
Registry: Vancouver

In the Matter of the Estate of Vasilios Basile Goritsas, Deceased

Before: The Honourable Justice Lawn

Reasons for Judgment

Counsel for the petitioner, Georgia Goritsas:	K. Vimalesen H. Solmon
Counsel for Georgia Goritsas and Georgia Pappas, in their capacities as the executors of the will of Anna Goritsas:	L. Jones
Former counsel for Anna Goritsas and acting for himself:	J. Richter
Place and Date of Hearing:	Vancouver, B.C. April 16, 2025
Place and Date of Judgment:	Vancouver, B.C. September 17, 2025

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Introduction

[1] This is a petition brought under Rule 2-1(2) and the court's inherent jurisdiction, for release from a lawyer's undertaking given by K. Vimalesen to J. Richter on May 23, 2023 (the "Undertaking"). Mr. Vimalesen gave the Undertaking in relation to the proceeds of sale of a home which was the principal asset of the estate of Vasilios Basile Goritsas. Mr. Richter is former counsel for Anna Goritsas, who was Vasilios's daughter and a beneficiary under his will.

Background

[2] It is necessary for a full understanding of the Undertaking to review in detail the circumstances in which it was made.

[3] Vasilios had three children: the petitioner Georgia Goritsas, her sister Anna Gortisas, and their brother Ioannis "Johnny" Goritsas. At the time of his death, Vasilios had no spouse. I will generally refer to the Goritsas family members by their first names, meaning no disrespect.

[4] Under a 1997 BC will, Vasilios left his property to his children in equal shares, with Anna's share to be held in a discretionary trust administered by Georgia as trustee. Georgia and Johnny were named in the will as executors, with either one able to act alone if the other could not or would not act. Upon Anna's death, the balance of Anna's trust would go to her children, and if she had no children, to Georgia and Johnny. Anna had no children. The evidence before me was that Johnny has not been heard from in over 25 years. If living, he is believed to have joined a monastic order in a remote and inaccessible Greek mountain community. To further complicate matters, Vasilios executed another will in Greece in 2010 (the "Greek Will").

[5] Vasilios died on January 31, 2020. As Johnny still could not be found, Georgia assumed the role of sole executor.

[6] Vasilios's main asset was a house at 977 West 20th Avenue in Vancouver (the "Vancouver Property"), which in 2015 he put into joint tenancy with Georgia.

[7] Anna became concerned that she was not receiving all the information about her father's assets. In the summer of 2020, in the wake of her father's January death, she approached Mr. Richter's firm.

[8] The details of the firm's retainer are fully described in the reasons of Associate Judge Robinson, sitting as Registrar, in *John M. Richter Law Corporation v. Goritsas*, 2024 BCSC 2222 paras 14-17. In a reporting letter on August 31, 2020, Mr. Richter's former colleague Ms. James discussed the prospect of seeking a resulting trust in respect of the Vancouver Property; the possibility of a wills variation claim to collapse the trust that kept Anna from owning her portion of the estate outright; and the implication of Johnny's status as "missing". Anna entered into an hourly rate retainer with the law firm, under which Ms. James performed some tasks.

[9] On September 2, 2020, Anna entered into a contingency fee retainer under which the law firm was to receive 35% of Anna's share of the assets the firm recovered. As Robinson AJ noted at para 15, this agreement was entered into at a time when Anna's entitlement to a share of the Vancouver Property was somewhat uncertain. The house had been held by Vasilios in joint tenancy with Georgia since 2015. Ms. James had already taken steps to ascertain Georgia's position as to whether she was holding the Vancouver Property in trust for her father's estate. Ms. James drafted a letter to Georgia on August 31, 2020, though she did not send it until September 11, 2020, wherein she required Georgia to confirm that the Vancouver Property would be listed as an asset of the estate.

[10] In a phone call with Ms. James on September 29, 2020, Georgia's then counsel confirmed that Georgia did not dispute that the Vancouver Property was an asset of the estate. This was confirmed in writing on October 2, 2020.

[11] Thus, one element of the uncertainty surrounding Vasilios's estate fell away: there was no longer any need to pursue a resulting trust claim, nor was there significant doubt about the value of Anna's claim.

[12] Uncertainty remained, however, with regard to the Greek Will. The parties remained in limbo as they awaited the process of unsealing and reading it. Neither law firm took steps to bring an application to have Johnny declared dead under the *Presumption of Death Act*, R.S.B.C. 1996 c. 444. Mr. Richter's firm did not register a certificate of pending litigation against the Vancouver Property.

[13] At the end of 2021, Ms. James left the firm and Mr. Richter assumed conduct of Anna's file. There were further delays in opening the Greek Will extending through 2022 and into 2023, due at least in part to the COVID-19 pandemic. In the meantime, Georgia had been living in the Vancouver Property. In January 2022 Mr. Richter wrote to Mr. Vimalesen who was by this time acting for Georgia. Mr. Richter suggested an application under the *Presumption of Death Act* in regard to Johnny, as well as a step that might be taken to notify Johnny of his father's death: writing to each of the 20 monasteries in Mount Athos asking if they knew of him. Mr. Richter advanced the position that given the delays, his client was entitled to a monthly allowance from the estate; and that Georgia was obliged to account for occupational rent. Mr. Richter also put forward the position that Georgia was required to proceed with an application for probate or provide reasons why she was not prepared to take that step.

[14] Mr. Vimalesen replied on February 14, 2022, with further information about the steps being taken to locate Johnny and open the Greek Will. In his view, evidence that Johnny was still alive precluded an application under the *Presumption of Death Act*, but an application for a curator under the *Estates of Missing Persons Act,* R.S.B.C. 1996, c. 123, was contemplated. There would be no allowance, because there were no liquid assets and Georgia was constrained by s. 155 of the *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13 [WESA].

[15] Through 2022 there was some correspondence between the lawyers about the delays over the Greek Will; Anna's further request for a monthly stipend (denied); and an offer of a loan to Anna from Georgia (declined).

[16] On August 15, 2022, Mr. Vimalesen informed Mr. Richter that Georgia wished to sell the house. Mr. Richter responded on August 28, 2022, in part:

> 5. Security. Our client has no security with respect to the house or the proceeds from any sale. Will your client sign that she holds the 100% interest in the house in trust for the Estate of Vasilios Goritsas, deceased? And we will need to make arrangements over the proceeds of sale.

[17] In a letter dated September 21, 2022, Mr. Vimalesen replied to Mr. Richter using corresponding paragraph numbers, stating:

> 5. My client has confirmed twice through counsel that she holds the property in trust for the Estate. If you require that she sign a particular document, please provide a draft for my review.

[18] On December 14, 2022, Mr. Richter emailed Mr. Vimalesen with a draft statutory declaration, stating:

> Dear Ken, I added the District Lot and Land District to the statutory declaration. Kindly provide us a fully executed original for our records.
>
> Further to our conversation about the funds to be held in trust, kindly confirm the full name and contact information for the notary. We suggest that you forward correspondence to the notary with the statutory declaration wherein your client in her capacity as one of the named executors and trustee irrevocably directs the net sale proceeds to be transferred to your office, there to be held on your undertaking to our office that they will not be released absent court order or written agreement of you, Georgia Goritsas in her personal capacity and myself. We would be copied with this letter.

[19] In the statutory declaration mentioned in this email, Georgia confirmed she held the entire beneficial interest in the Vancouver Property on a resulting trust for the Estate.

[20] In February 2023 Anna was hospitalized for a psychological condition. On March 22, 2023, Mr. Richter spoke to her by telephone.

[21] The Greek Will, dated November 2, 2010, was finally opened and Georgia's solicitors sent Mr. Richter a copy on April 5, 2023. The cover letter stated, in part:

> The Greek will has been opened and copy with translation is enclosed. As you will see, the Greek will was made on November 2 2010 (the "2010 Will"). As the 2010 Will appears to comply with section 37 of the *Wills, Estates, and Succession Act* ("WESA"), it would appear that section 55(1)(a) of WESA

> revokes the earlier will, dated May 27 1997. Our client will make a proposal to resolve this issue by a separate without prejudice letter.

[22] The Greek Will made Georgia the sole beneficiary of Vasilios's estate: neither Anna nor Johnny were named. In the same letter, Mr. Vimalesen confirmed there was a subject-free agreement for the sale of the Vancouver Property, attaching a copy of the Contract of Purchase and Sale showing the selling price to be $2,750,000. Net proceeds were later confirmed to be $2,395,387.92.

The Undertaking

[23] Under separate cover on April 5, 2023, Georgia by her counsel proposed a without prejudice settlement to Anna, under which they would set aside one third of the net proceeds arising from the sale of the Vancouver Property. From that amount, an unspecified lump sum payment to Anna would be made and the balance placed into a trust, with any portion unused at her death to go to Georgia and Johnny equally (see the reasons for judgment of Robinson A.J. at para 27). The preamble to that letter stated:

> Although the will dated November 2, 2010 (the "2020 Will") is later in time than the will dated May 27, 1997 (the "1997 Will"), our client wishes to ensure that your client receives a fair share of the Estate. Our client believes it will be in her sister's best interest for the funds to be managed by another person given her sister's medical issues.
>
> Accordingly, she proposes to resolve all issues, including your clients claim to vary either the 2010 Will or 1997 Will on the following terms…

[24] Mr. Richter did not acknowledge receiving the settlement offer until later in April and his time sheets reveal no work done on the file between March 22 and April 26, 2023. On April 26, 2023, he reviewed it and arranged for a meeting with Anna and her doctor. In the meantime, on April 24, 2023, Mr. Vimalesen wrote to Mr. Richter's assistant stating that he would "appreciate receiving his proposed undertakings to deal with the sale proceeds of the property."

[25] On May 1, 2023, Mr. Richter provided draft undertakings in an email to Mr. Vimalesen, which also dealt with the process by which the conveyancing lawyer or notary would transmit funds. That email included the following draft undertaking:

> 3. Upon receipt, you will hold the net sale proceeds received from the conveyancing lawyer / notary in a separate interest-bearing account, not to be released absent court order or written agreement of you and the lawyer for Anna Goritsas.

[26] There was some back and forth between the lawyers on two questions: first, whether the funds would reside in Mr. Richter's trust account, or Mr. Vimalesen's; and second, a related question, who would pay the expenses associated with maintaining the trust account. Mr. Vimalesen originally suggested that if Mr. Richter's client did not agree to pay those expenses, he (Mr. Richter) should be the one to receive the funds and give the undertaking.

[27] In the end Georgia preferred the funds to be held by Mr. Vimalesen, and she agreed to cover the costs associated with setting up the trust account. Therefore, it would be Mr. Vimalesen giving the undertaking.

[28] On May 23, 2023, Mr. Vimalesen gave the following undertaking to Mr. Richter via email:

> Ken Vimalesan provides an undertaking to John Richter that he will hold the net sale proceeds of 977 West 20th Avenue in a separate interest-bearing account, not to be released absent court order or written agreement of Ken Vimalesan and the lawyer for Anna Goritsas, John M. Richter.
>
> [Emphasis in original.]

[29] I infer that the first words are underlined because in a previous draft, it was to have been John Richter giving the Undertaking, as per the back-and-forth referenced above.

[30] On May 29, 2023, the Vancouver Property was sold, and the funds were placed in a separate interest-bearing trust account as per the Undertaking. They remain there today.

Events Following the Undertaking

[31] On July 12, 2023, Anna took steps to call Mr. Richter, apparently with the intention of terminating his retainer. On July 17 she met with and retained Zachary Murphy-Rogers of Clark Wilson LLP to help her prepare legal documents for

substitute decision-making regarding financial and health matters. His evidence was that he attended her at Vancouver General Hospital on July 17, 2023, and satisfied himself of her capacity.

[32] On July 26, 2023, Ms. Pappas sent Mr. Richter an email which stated, in part:

> Anna Goritsas terminated your services and dropped the law suit with her sister on July 12 via phone call. Followed up by an email from her social worker Patience as to how to contact Anna. They where told you where [sic: were] away for a few days and you would get in contact. It is now July 26 and no contact has been made. I am Anna's POA and will be dealing with her fathers Estate matters. Kindly forward to me a copy of her contract she had with you ASAP as enough time has passed.

[33] Robinson A.J. found that Anna's retainer with Mr. Richter ended on July 26, 2023, but that a fair fee based on hourly rates should be assessed up to July 27 to account for "tying up loose ends" which were necessary and reasonable. Robinson A.J. held at para. 96 that the amount owing to Mr. Richter's firm, was $15,909.73.

[34] Anna executed an Enduring Power of Attorney on July 17, 2023 (the "POA") naming Georgia and a cousin, Georgia Pappas, as her attorneys. Georgia and Ms. Pappas signed it on July 20, 2023. The POA permitted Georgia and Ms. Pappas to act separately or together. The POA expressly prohibited Georgia from performing any role for Anna with respect to their late father's estate: it would fall to Ms. Pappas to deal with those issues.

[35] Also in July of 2023, Ms. Pappas, acting in her capacity as Anna's attorney, retained Andrew Beesley of Munro & Crawford MDP to represent Anna's interests with respect to Vasilios' estate. In an affidavit, Mr. Beesley stated that he learned from Ms. Pappas that the main points of a settlement between Anna and Georgia had been discussed in July prior to his involvement.

[36] On August 29, 2023, Mr. Richter wrote to the Public Guardian and Trustee with concerns that steps were being taken that were not in Anna's best interests.

The September Agreement and its Aftermath

[37] In September 2023, Anna and Georgia finalized the terms of a settlement of all matters relating to Vasilios's estate by an agreement which provided Anna with one-third of the net sale proceeds of the Vancouver Property (the "September Agreement"). Mr. Beesley's evidence was that in representing Anna's interests, he ensured that full disclosure of estate assets and liabilities had been made; that the September agreement protected Anna from any claims by her brother; and that her "Persons with a Disability" government benefits would not be lost as a result of the September Agreement, through the use of a disability trust commonly known as a Henson trust.

[38] On September 18, 2023, Mr. Beesley met with Anna at her care facility to review and sign the September Agreement. His evidence was that he anticipated that she might want to make a new will, and brought his laptop, printer, and an assistant to facilitate this. He met with medical personnel and with Anna privately and assured himself that she understood and entered into these matters voluntarily and from her own free will.

[39] Meanwhile on September 7 2023, Mr. Richter emailed Mr. Vimalesen copying Sarah Watson of the Public Guardian and Trustee, whom he had consulted, to confirm that the proceeds of sale were being held in trust by Mr. Vimalesen's firm and requesting an accounting of the sale of the Vancouver Property, as well as confirmation that Georgia would be filing an amended terminal tax return or applying for probate in BC. Mr. Vimalesen replied the same day, with a copy of the trust cheque received on account of the sale proceeds and stating:

> As you know, my client has been clear throughout that she held the funds in trust for the Estate. Even after the Greek will was "opened" in accordance with the estate administration procedures there and it appeared as if my client had a claim to the entire estate, she still made the attached settlement offer without any prompting. We received no substantive response to this offer from you.
>
> What is the rationale for amending the terminal tax return?
>
> As you know, probate is not required in every case. We are still considering whether an application for probate is necessary.

[40] Counsel then exchanged letters relating to the Undertaking. In a letter dated October 3, 2023, Mr. Richter informed Mr. Vimalesen that Anna had terminated his retainer, without specifying the date. Mr. Richter set out his view that "this undertaking remains in place and that the money cannot be released absent court order."

[41] Mr. Vimalesen followed up by email on October 10, 2023, asking Mr. Richter if he was of the view that Anna herself, or her new lawyer, could release the Undertaking. Receiving no response, Georgia started this petition on October 18, 2023, naming Anna as a respondent and seeking an order that Mr. Vimalesen be released from the Undertaking.

[42] On November 7 2023, Mr. Richter wrote to Mr. Vimalesen confirming that he acted for Anna and has unpaid fees and disbursements and asserting a solicitor's lien against any monies to be paid by the Estate of Vasilios, to Anna, as a result of the estate or its settlement. He added:

> If funds are payable or may be payable to Anna Goritsas in the future, we would ask that you advise the writer so arrangements can be made to pay the account of Richter Trial Lawyers pursuant to this lien.

[43] Sadly, Anna passed away on November 8, 2023, with the matter of her inheritance from her father still unresolved.

The Parties' Positions

[44] In written submissions the petitioner described the narrow issue as:

> …whether a lawyer, following the termination of his engagement, can continue to enforce an undertaking given for the benefit of his former client despite the wishes of the former client and her subsequent legal representatives.

[45] The petitioner submits that where an undertaking is given for the benefit of the client, it can be released by the client following the termination of the lawyers' retainer, relying on *Kutilin v. Auerbach*, 1988 CanLII 3227 (BC CA) at paras 17-18.

[46] The petitioner also points to paragraph 22 of *Kutilin*, and the principle that an undertaking ought to be construed by reference to the intention of the parties, to be deduced from the writing itself and the circumstances in which it was given. In this case, the purpose of the Undertaking was to protect Anna's interests: evidenced by the fact that only the consent of counsel for Georgia and Anna was required to release the Undertaking. Mr. Richter himself had no interest in the funds at the time the Undertaking was given, nor does he today.

[47] The petitioner argues that the requirement that Mr. Richter consent to the release of the Undertaking made sense when Mr. Richter was acting for Anna. When he ceased to act for her, the petitioner argues that the Undertaking can be released by Anna herself, or by her new legal representatives. At best Mr. Richter is entitled only to notice that the funds are to be paid out, and this notice has been given.

[48] In their position as Anna's legal representatives, the respondents Georgia and Ms. Pappas consent to the release of the Undertaking.

[49] These respondents rely on the judgment of Voith J. (as he then was) in *Deutschmann (Guardian ad litem of) v. Fallis*, 2010 BCSC 952, which also sets out the principle that undertakings are to be construed by reference to the intention of the parties deduced from the writing itself and the circumstances in which it was given. In this case, say these respondents, those circumstances were to protect the proceeds of sale until Georgia and Anna settled their dispute regarding distribution. This dispute was settled in 2023.

[50] These respondents also take issue with two main points in Mr. Richter's response:

a) Mr. Richter objects to releasing the undertaking out of a general concern that there are "potential claims against Anna's estate" by parties including Anna's former spouse; Anna's brother; or her personal representatives (i.e. the respondents themselves). These respondents argue that Mr.

Richter does not represent any of these parties and in any event, these are potential claims against Anna's estate, not her father's.

b) Mr. Richter also points to his legal bill. These respondents argue this is also not relevant to the distribution of Anna's father's estate. The undertaking was given to protect Anna's interests, not legal fees. The debt owed to Mr. Richter falls to be determined in other proceedings (which have now concluded and an amount of $15,909.73 found to be owing, as noted above).

[51] Mr. Richter, in his memorandum of argument, suggested that Georgia brought this petition as a trustee to avoid probate fees and capital gains taxes. He asserted that she has made no application for probate of either the Greek or BC wills, nor evinced any intention to do so. He also points to the court's *parens patriae* jurisdiction to protect those who cannot help themselves – namely Johnny – and to the BC Code of Professional Conduct for lawyers, specifically:

> 2.1-1 To the state
>
> (a) A lawyer owes a duty to the state, to maintain its integrity and its law. A lawyer should not aid, counsel or assist any person to act in any way contrary to the law.

[52] Mr. Richter argues that the proper course of action given the lawyer's duty as set out above and the court's *parens patriae* jurisdiction to protect Johnny, is that:

> 8. … Georgia Goritsas should apply for probate of the Greek will, address the other two beneficiaries' rights under Greek forced inheritance law, address her missing brother or his estate under Greek and BC law, likely reseal the probate in British Columbia, pay British Columbia probate fees, Canadian capital gains tax and possibly Greek inheritance tax.
>
> 9. Once Georgia Goritsas takes these steps under BC law through the courts, the undertaking must be released because the personal representative is responsible for addressing all of the obligations and rights related to the estate.

[53] To do otherwise, argues Mr. Richter, is to circumvent legal obligations out of convenience.

[54] In reply, the petitioner argues that the *parens patriae* jurisdiction is very narrow, citing *Re Sandhu*, 2022 BCSC 2027 at para 45. There must be evidence of incompetence and a compelling need for protection. The petitioner argues that probate is not necessary in every case: executors take their authority not from the grant of probate but from the will itself. Section 155 of WESA allows a personal representative to distribute an estate without a grant of probate subject to conditions. There is therefore more than one option to deal with the proceeds of sale, including applying for a presumption of death order; applying for a curator under the *Estates of Missing Persons Act*, RSBC 1996 c. 123; or distributing the funds pursuant to s. 155 of WESA. All of these are concurrent with the law.

Decision

Interpretation of the Undertaking

[55] Many of the cases dealing with undertakings are cases where a solicitor is alleged to have breached an undertaking. In this case, Mr. Vimalesen is not alleged to be in breach. Indeed, he is clearly upholding the Undertaking but petitioning the court for an order that he ought to be relieved from it.

[56] The first question, however, is the correct interpretation of the Undertaking. That is made clear by the caselaw.

[57] In *Deutschmann (Guardian ad litem of) v. Fallis*, 2010 BCSC 952, Justice Voith (as he then was) set out a concise summary of the legal principles pertaining to undertakings, beginning at para 16.

> [16] An undertaking is a promise or commitment made by a solicitor to another person, whereby the solicitor assumes a personal obligation to act, or refrain from acting, in a particular way. An undertaking is not, however, a contractual obligation. Accordingly, no consideration is necessary for an undertaking to be enforceable: *Hammond v. Law Society of British Columbia*, 2004 BCCA 560 at para. 57, 34 B.C.L.R. (4th) 73.
>
> [17] In *Kutilin v. Auerbach* (1988), 1988 CanLII 3227 (BC CA), 34 B.C.L.R. (2d) 23, 54 D.L.R. (4th) 552 (C.A.), Esson J.A., for the court, said at 28:
>
> > ... I adopt as a concise statement of the nature of an undertaking this language in The Professional Conduct of Solicitors (1986), The Law Society, London:

> 15.01 Definition
>
> An undertaking is any unequivocal declaration of intention addressed to someone who reasonably places reliance on it and made by:
>
> a) a solicitor in the course of his practice, either personally or by a member of his staff: or
>
> b) a solicitor as 'solicitor', but not in the course of his practice;
>
> whereby the solicitor (or in the case of a member of his staff, his employer) becomes personally bound.

[18] The commitment made in an undertaking has a very significant professional component. That professional component informs both the requirements of an undertaking and the weight or significance with which such obligations are regarded.

[19] Both these matters are addressed in Chapter 11 of the Professional Conduct Handbook of the Law Society of British Columbia:

> Undertakings and trust conditions
>
> 7. A lawyer must
>
> (a) not give an undertaking that cannot be fulfilled,
>
> (b) fulfil every undertaking given, and
>
> (c) scrupulously honour any trust condition once accepted.
>
> 7.1 Undertakings and trust conditions should be
>
> (a) written, or confirmed in writing, and
>
> (b) unambiguous in their terms.

[20] Though an undertaking is not contractual in nature, the fact that it represents a professional commitment is central to its enforceability. In *Valleyfield Construction Ltd. v. Argo Construction Ltd.* (1978), 1978 CanLII 1436 (ON SC), 20 O.R. (2d) 245 (H.C.), at 246-247 the court said:

> ... The word of a solicitor is viewed by another solicitor as virtually sacred. The solicitor can rely on it because it will be kept ... Lawyers generally have always done what they have said they would do in undertakings ... When a solicitor undertakes to do something, he must do it unless, of course, there is an express direction to him that he need no longer comply. There is an assumption, well founded, that solicitors' undertakings will be met and the Courts should do whatever is necessary to continue this practice.

[21] Similarly, in *Hammond*, Prowse J.A., for the court, said:

> [55] ... These undertakings are regarded as solemn, if not sacred, promises made by lawyers, not only to one another, but also to members of the public with whom they communicate in the context of legal matters. These undertakings are integral to the practice of law

> and play a particularly important role in the area of real estate transactions as a means of expediting and simplifying those transactions.
>
> [56] When a lawyer's undertaking is breached, it reflects not only on the integrity of that member, but also on the integrity of the profession as a whole. For that reason, the importance of undertakings is also stressed by the Canadian Bar Association in its *Code of Professional Conduct* (Ottawa: C.B.A., 1996) at Chapter 16.

[22] Though an undertaking is ideally intended to be clear and unambiguous, it is sometimes necessary to interpret the language of an undertaking. In such circumstances, the guidance provided in *Re Solicitors* (1916), 1916 CanLII 408 (BC CA), 32 D.L.R. 387, [1917] 1 W.W.R. 529 (C.A.) at 388, directs the interpretive exercise:

> An undertaking of this sort is to be construed by reference to the intention of the parties to be deduced from the writing itself and the circumstances in which it was given.

[23] The foregoing proposition has more recently been applied in each of *Kutilin* and in *Hammond* at para. 66.

[58] The "foregoing proposition" cited from *Re Solicitors* by Voith J. at para 23, is directly at issue in this case. The BC Court of Appeal stressed in *Kutilin* that "all depends on the specific terms of undertakings" and "all decisions relating to liability on undertakings must be based very much on the particular facts and circumstances of the case": at para. 22.

[59] The facts of *Kutilin* are instructive. The petitioner summarized them in her written submissions:

a) Mr. Kutilin [the husband in matrimonial proceedings] was represented by Mr. Levine.

b) Ms. Auerbach was the council for Mr. Kutilin's former spouse.

c) Mr. Kutilin's interest in the family home was an issue to be determined.

d) Prior to the determination of this issue, Miss Auerbach gave an undertaking to Mr. Levine to pay Mr. Kutilin's share of the proceeds of the sale to Mr. Levine once the court determined Mr. Kutilin 's interest in the sale proceeds.

e) Mr. Kutilin discharged Mr. Levine as his lawyer prior to the conclusion of the family law proceeding.

f) Following Mr. Levine's discharge, the court determined Mr. Kutilin 's interest in the sale proceeds.

> g) Ms. Auerbach sent Mr. Kutilin 's share of the proceeds to Mr. Levine, relying on the undertaking she had given Mr. Levine.

[60] In the end, the court found that the undertaking in question was given to the client Mr. Kutilin, with a subsidiary term that the payment would be made to his lawyer Mr. Levine. When Mr. Levine ceased to act, that subsidiary term ceased to have any effect. To pay the funds to Mr. Levine in those circumstances, was to place Ms. Auerbach in breach of her undertaking.

[61] Paragraph 18 of *Kutilin* mandates an examination of the "essence of the arrangement." Esson JA for the panel stated:

> **18** The essence of the arrangement was to hold the fund in trust until determination by the court of the parties' respective entitlement, and then to remit Mr. Kutilin's share. The subsidiary term providing that the funds would be remitted to Mr. Levine was, when made, a reasonable one because Mr. Levine was acting, and payment to the solicitor is the normal and usual manner in which to carry out such a transaction. Had the funds been available for disbursement while Mr. Levine was still acting, the defendant could have discharged her obligation to Mr. Kutilin by paying the monies in trust to Mr. Levine. Once Mr. Levine ceased to act, the defendant continued to be trustee for Mr. Kutilin, but it was no longer open to her to discharge her trust obligation in respect of Mr. Kutilin's share by paying it to Mr. Levine. That is particularly so in right of the language of the order settled and entered on October 4 which, without any reference to Mr. Levine, directed the defendant to disburse the balance to Mr. Kutilin. There was a continuing undertaking to pay the balance of the proceeds which, after the discharge of Mr. Levine, was an undertaking only to Mr. Kutilin.

[62] The court went on to state that it would have been appropriate for Ms. Auerbach to give notice to Mr. Levine, since she would have known that there was a sizeable account outstanding; and that it might also have been appropriate to draw this matter to the attention of the trial judge (at para 19).

[63] Esson J.A. concluded:

> **22** My conclusion, for the reasons I have given, is that the defendant did not give Mr. Levine an undertaking which the latter could have enforced after ceasing to act for the plaintiff. That conclusion is based, as all decisions relating to liability on undertakings must be based, very much on the particular facts and circumstances of the case. In different circumstances, a lawyer in the position of the defendant might well be bound to pay a fund to the former lawyer of the adverse party, or might be bound by an undertaking

> to not pay out to the client without notice to the former lawyer. Failure to honour an undertaking of the latter kind was the basis of liability in *John Fox v. Bannister, King & Rigbeys* (1987) 3 W.L.R. 480 (C.A.), [1987] 1 All E.R. 737. In these matters, all depends on the specific terms of undertakings which, all too often, are expressed in casual and indefinite language. Even where the undertaking is in writing, it must be construed, as Macdonald C.J.A. said in *Re Killam & Beck*, supra at p. 388 "by reference to the intention of the parties to be deduced from the writing itself and the circumstances in which it was given".

[64] I have set out the circumstances leading up to the Undertaking in this case at length, given that *Kutilin* requires that the first step is to discover the essence of the undertaking, and that every case turns on its particular facts.

[65] At the time the Undertaking was given, Anna and Georgia were in the throes of a dispute over their father's estate. There was also uncertainty as to Johnny's whereabouts; the Greek Will had just been unsealed leaving the entire estate to Georgia; and Mr. Richter was acting for Anna Goritsas, who was in hospital.

[66] In that context, Mr. Vimalesen's client was in the midst of listing and selling the Vancouver Property, a house that she had repeatedly confirmed she held in trust for her father's estate. To move forward with that sale, Georgia agreed with Anna, through their lawyers, to enter into an agreement to protect the proceeds of the sale of the Vancouver Property.

[67] Mr. Vimalesen agreed not to pay out the proceeds of this sale "absent court order or written agreement of Ken Vimalesan and the lawyer for Anna Goritsas, John M. Richter". In the first draft of the Undertaking, Mr. Richter was not mentioned by name. But in the final draft, his name was added.

[68] I find that as in *Kutilin*, supra, Mr. Vimalesen did not give Mr. Richter an undertaking which Mr. Richter could enforce once he was no longer Anna's solicitor. At best, Mr. Vimalesen might be bound by an undertaking not to pay out without notice to the former solicitor, as the court in *Kutilin* suggested. I did not hear argument on this point, however, and so I make no determination as to whether Mr. Vimalesen was obligated to inform Mr. Richter. That has occurred here in any event:

Mr. Richter received notice of Mr. Vimalesen's intention, and this petition is the result.

[69] As it stands now, Mr. Richter purports to stand in the shoes of persons who were not contemplated at the time the Undertaking was provided, given that its purpose was to secure the proceeds of the sale pending resolution of the dispute between the sisters. A December 14, 2022 email sent by Mr. Richter to Mr. Vimalesen expressly states that the requested undertaking could be released on written agreement of Mr. Vimalesen, Mr. Richter, and "Georgia Goritsas in her personal capacity" [emphasis added]. The communications leading to the Undertaking did not contemplate Johnny's involvement or interest, either personally or through Georgia as executor of her father's estate.

[70] I accept the position of Ms. Pappas and Georgia, as Anna's legal representatives. The Undertaking was provided for Anna's benefit at a time when Mr. Richter was her lawyer. After that time, Mr. Richter was dismissed, Anna was advised by other lawyers as to her rights, and Georgia was advised as to her responsibilities as the trustee of her father's estate. A complicated dispute between Anna and Georgia was resolved. Importantly, there is no evidence here that Georgia is not acting, and will not act, according to her duties as Vasilios' chosen executor.

[71] That is not to be critical of the lawyers' courses of action. Undertakings are generally understood as the personal obligations of the solicitors who give them. Mr. Vimalesen quite rightly refrained from proceeding without Mr. Richter's agreement or a court order, that is, fulfillment of the "subsidiary term" of the Undertaking. Mr. Richter considered himself bound to withhold his consent, relying in part on the Code of Professional Conduct for British Columbia provision in s. 2.1-1(a). Like all lawyers Mr. Richter is an officer of the court. I have no doubt that his genuine concern for the interests of his former client, now deceased, led to his refusing to accede to the agreement sought by Mr. Vimalesen, and his decision to oppose this petition.

[72] The fact remains, however, that after the Undertaking was given, Anna chose different advisors. The evidence from two legal professionals is that Anna intended to settle the dispute with Georgia and appoint Georgia and Ms. Pappas as her attorneys, and that she had the capacity to do so.

[73] In his affidavit evidence, Mr. Murphy-Rogers described the process by which Anna came to execute the Enduring Power of Attorney naming Georgia and Ms. Pappas as her attorneys. He was initially contacted by Georgia, who told him that Anna wished to appoint Georgia and Ms. Pappas as her attorneys and end the estate dispute. On July 17, 2023, Mr. Murphy-Rogers met with Anna and took steps to verify her intentions and capacity. Neither Georgia nor Ms. Pappas were present at the meeting. Mr. Murphy-Rogers explained to Anna what the POA was and tested Anna's capacity by discussing the nature of her assets, her relationship with Georgia and Ms. Pappas, her desire to appoint them as her attorneys, her understanding of the decisions they could make as her attorneys, and her desire to end the estate dispute. Anna then executed the POA. Georgia may not make decisions under the POA in relation to the estate of Anna's father.

[74] After the POA was executed, Ms. Pappas retained Mr. Beesley to represent Anna in matters relating to her father's estate. In his affidavit, Mr. Beesley explained that he took steps to protect Anna's interests in settling the estate dispute, including ensuring that full disclosure of estate assets and liabilities was made, and that Anna was protected against claims by Georgia or Johnny. Prior to meeting with Anna on September 18, 2023, Mr. Beesley met with the manager at the hospital to discuss Anna's capacity. He then met with Ms. Pappas and Anna to discuss the settlement agreement. Ms. Pappas left the room, and Mr. Beesley explained the terms of the settlement agreement to Anna, and satisfied himself that Anna understood these terms and was not being unduly influenced by Georgia or Ms. Pappas. Ms. Pappas then re-entered the room, and Anna executed the September Agreement.

[75] Based on this evidence, I am satisfied that Anna wished to end the dispute related to her father's estate and appoint Georgia and Ms. Pappas as her attorneys, and had the capacity to do so.

[76] In all of these circumstances, the Undertaking must be understood as requiring the consent of Mr. Richter as "the lawyer for Anna Goritsas." That is clearly stated on the face of the Undertaking. With John Richter no longer the lawyer for Anna Goritsas, the subsidiary term requiring his consent could no longer be honoured.

[77] At that point, the Undertaking provided an alternative: a court order would be necessary to release the funds. In this respect the Undertaking differs from the undertaking in *Kutilin*. The Undertaking here provides for recourse to the court as an alternative to the consent of Mr. Richter acting for Anna, a state of affairs which as I have just explained, no longer existed at the time the funds were sought to be disbursed, and therefore a subsidiary term which had "ceased to have any effect" (*Kutilin* at para 17).

[78] The parties could have framed the Undertaking differently. They could have left out Mr. Richter's name, as in the first draft. If that had been the wording, then new counsel for Anna could have supplied the required consent and fulfilled the subsidiary term. That is not the way the Undertaking was framed, however, and no party suggested that a term should be implied, as may be available in an appropriate case: see e.g. *Hammond v Law Society of British Columbia,* 2004 BCCA 560 at para. 63.

[79] The subsidiary term in this case is that Mr. Vimalesen can release the funds upon agreement by Mr. Richter as Anna's counsel, or court order. Mr. Richter is no longer Anna's counsel, and so this part of the term cannot be fulfilled. Therefore, recourse must be had to a court order, which Mr. Vimalesen has brought forward through this petition.

[80] The question then remains whether this court ought to make this order in these circumstances. The petitioner relies on the court's inherent jurisdiction as the legal basis for the order, citing *Witten, Vogel, Binder & Lyons v. Leung*, 1983 CanLII 1028 (AB KB) at para 15. There, the court discussed the inherent jurisdiction to enforce trust conditions, which it equated with lawyers' undertakings. I did not understand Mr. Richter to take issue with my jurisdiction to make the order sought. His position, as set out in his written argument, was that the undertaking should not be ordered released until "a British Columbia executor is appointed by the Supreme Court."

[81] Mr. Richter invokes the court's *parens patriae* jurisdiction with respect to Johnny. He submits that I ought not to release the undertaking until Georgia has taken various steps including applying for probate of the Greek Will, as set out above.

[82] I will therefore consider whether I ought to exercise that power in these circumstances.

***Parens Patriae* Jurisdiction**

[83] Mr. Richter urged the court to employ the *parens patriae* jurisdiction to make an order requiring probate of Vasilios' will or at least to justify maintaining the Undertaking until such time as this occurred.

[84] The court's *parens patriae* jurisdiction is "founded on necessity, namely the need to act for the protection of those who cannot care for themselves": *Re Eve,* 1986 CanLII 36 (SCC), at para. 73.

[85] *Parens patriae* jurisdiction may only be exercised where there is a legislative gap: see *Re Sandhu*, supra at para 51. As the court in *Temoin v Martin*, 2012 BCCA 250 stated:

> **44** This argument is raised by Mr. Martin. It is common ground that a superior court may only exercise its inherent jurisdiction or *parens patriae* jurisdiction if it can do so without contravening a statutory provision. In other words, there must be a legislative gap to attract this jurisdiction: *W.A.M.*

> *and P.L.M. v. British Columbia (Superintendent of Family and Child Service)* (1985), 65 B.C.L.R. 229 at 232, 47 R.F.L. (2d) 173 (C.A.); *R. v. Caron,* 2011 SCC 5 at para. 32, [2011] 1 S.C.R. 78.

[86] Mr. Richter relied on *Re Binder,* 2022 BCSC 990 which stands for the same proposition. In that case, Justice McDonald did find a legislative gap, because the petitioner could not avail himself of the procedures in the *Patients Property Act*, RSBC 1996 c. 349 [PPA] to have his father declared incapable of managing his affairs. This was because there was no mechanism in the PPA to receive the evidence of foreign medical practitioners, nor was there a mechanism to recognize the petitioner's foreign adult guardianship order. The petitioner wished to sell his father's property in BC, to generate funds to pay for his father's care in Switzerland, where he had resided for several years. The Public Guardian and Trustee had no objection, and in the circumstances, McDonald J. exercised the court's *parens patriae* jurisdiction to grant the order sought.

[87] This case is distinguishable. First, unlike in *Re Binder* there is no evidence that Johnny is unable to care for himself. Rather, the evidence suggests that the parties have been unable to locate Johnny despite efforts to do so. Second, and more importantly, there are at least two statutory mechanisms to resolve Johnny's absence: a presumption of death order, or an application to appoint a curator under the *Estates of Missing Persons Act.* The petitioner also submits that executors obtain their authority from the will, and that probate is not necessary in every case, citing s. 155 of WESA in that regard. Accordingly, there is no legislative gap here which needs to be filled.

[88] I find that the evidence does not support the inference that Mr. Richter suggests I make, that Georgia will not fulfill her duties as an executor of her father's estate, so as to give rise to a "compelling need for protection," as the exercise of the *parens patriae* jurisdiction is explained in *Sandhu* at para 50. As the petitioner has pointed out, Georgia's conduct so far is consistent with her adherence to those duties.

[89] Based on this evidence and the existence of at least two legislative options to address Johnny's absence, I find that there is no basis to exercise the court's *parens patriae* jurisdiction either to refrain from making an order releasing Mr. Vimalesen from the Undertaking, or to order Georgia to obtain probate of her father's will. I grant the petitioner's order that Mr. Vimalesen is relieved from the Undertaking.

Costs

[90] If any party wishes to make submissions on costs, they are at liberty to do so through brief written submissions to be received within 30 days of the date of this judgment, failing which each party is to bear their own costs.

"Lawn J."