

CITATION: Estate of Lascelles George Burnett v Heakes Housley,
Barristers & Solicitors 2026 ONSC 520
COURT FILE NO.: CV-24-00715540
MOTION HEARD: 20260123

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Estate of Lascelles George Burnett, Plaintiff

AND:

Heakes, Housley, Barristers & Solicitors and Michael K. Housley, Defendants

BEFORE: Associate Justice Jolley

COUNSEL: Jennifer Siemon, counsel for the moving party defendants

Ralfina Burnett, executor of the plaintiff estate, responding party

HEARD: 23 January 2026

REASONS FOR DECISION

Overview

- [1] The defendants seek an order requiring the plaintiff (the “estate”) to post security for costs in the amount of \$80,000, to be deposited in tranches corresponding with various stages of the litigation.
- [2] In this action, the estate alleges that the defendant Mr. Housley advised its power of attorney Ralfina Burnett (“Ralfina”) that the estate would be receiving certain proceeds from the sale of the home of Mr. Housley’s client. According to the statement of claim, Mr. Housley then told Ralfina that he had been misled about the matter and the estate would, in fact, not receive any funds. The estate now seeks an order that Mr. Housley make good on his statement, and personally pay the estate damages equal to half the proceeds of sale of his client’s property.
- [3] I have used the parties’ first names as the key players share the last name of Burnett. Lascelles Burnett (“Lascelles”) was married to Hortense Burnett (“Hortense”) from some time in the 1970s until some time in the 1980s and again from 2001 until his death in March 2022. In between his marriages to Hortense, Lascelles married Ralfina (“Ralfina”) in 1989 and they divorced in 1994. Ralfina was Lascelles’ power of attorney for property and now his executor.
- [4] As a preliminary issue, I advised both parties that it was likely that Ralfina was acting in a representative capacity as the executor of the estate, and that the estate likely fell under rule 15.01(1) and had to be represented by a lawyer. Both parties advised that the estate

had had a lawyer during the related FLA proceedings where these same issues were raised and that Ralfina was aware of all the relevant issues for this hearing. The estate also had a lawyer in this action until 14 January 2025, when Ralfina filed a notice of intention to act in person. She had prepared a responding motion record, supplementary affidavit (and was appearing on her own affidavit) and a factum. She advised that she was comfortable proceeding today and wished to do so.

- [5] In order not to prejudice the defendants, I agreed to proceed, but advised Ralfina that the estate either needed to appoint a lawyer or obtain advice that a lawyer was not needed.

Background and FLA Proceeding

- [6] Some background is required. When Hortense and Lascelles married in April 2001, they moved into a condominium that Hortense purchased in 1998 and which always remained in her name. Hortense moved into a long term care facility in late 2021 and her sister, as her power of attorney, put the condominium up for sale.

- [7] As part of the closing documents, Lascelles was required to sign an acknowledgement and direction. He was set to sign the documents on 24 February 2022 for the 1 March 2022 closing but, unfortunately, he fell on 23 February 2022 and lapsed into a coma from which he never recovered. Ralfina, as his power of attorney, attended at Mr. Housley's office and signed the acknowledgement on behalf of Lascelles. The acknowledgement stated:

“I, Lascelles Burnett, am the spouse of Hortense Burnett, the (Transferor/Chargor), and hereby consent to the transaction described in the Acknowledgement and Direction. I authorize you to indicate my consent on all the Documents for which it is required.”

- [8] Ralfina and Lascelles' sons complained to Mr. Housley after the closing that Lascelles should have received half of the sale proceeds. Once Mr. Housley became aware of their complaint, he decides to pay out half the proceeds to his client, Hortense, and hold the other half in trust for two weeks, in the event Lascelles commenced a claim. He did not and Mr. Housley paid out the second half of the proceeds to Hortense.
- [9] The estate commenced an FLA proceeding seeking half the proceeds of Hortense's condominium. In the course of that proceeding, the court ordered Hortense's estate to pay the disputed proceeds into court, pending the outcome of the action and her estate did so. By then, Hortense and Lascelles had both died at ages 90 and 86, respectively, and their estates litigated this issue.
- [10] The court held a Focused Hearing in May and June 2024 on the issue of whether Hortense and Lascelles were separated in March 2022. The state of their marriage is significant because, if they were married, the proceeds of sale would belong exclusively to Hortense. If they were separated, Lascelles would have a claim for half the proceeds.
- [11] Despite signing the acknowledgement on behalf of Lascelles representing that he and Hortense were spouses, Ralfina took the position during the hearing that Hortense and Lascelles were in fact separated. She explained away signing the acknowledgement on the

basis that her lawyer, a Mr. Weir, told her to sign the document but to tell Mr. Housley that Lascelles and Hortense were in fact separated. Mr. Weir did not testify at the Focused Hearing, as he had passed away. The evidence of his law clerk, Ms. Hoy, that Lascelles told Mr. Weir in a meeting in April 2021 that he and Hortense were separated was found to be “incredible” by the presiding judge, Stewart, J.

- [12] Mr. Housley also gave evidence by affidavit during the Focused Hearing. He deposed that he was never informed that Hortense was separated and that he had satisfied himself that she and Lascelles were married. This was contrary to Ralfina’s evidence that Mr. Housley told her that Lascelles would receive half the proceeds because he and Hortense were separated.
- [13] After hearing all the evidence, Stewart, J. found that Lascelles and Hortense were not separated. In fact, there was no evidence that Lascelles intended to live separate and apart from Hortense, to whom he had been married for twenty years.
- [14] Once the court determined that Lascelles and Hortense were not separated, it followed that Lascelles had no claim to half the sale proceeds and the money was paid back out to Hortense’s estate.
- [15] Before the hearing concluded, Ralfina, as executor, commenced this action against Mr. Housley seeking the funds from him personally.

Security for costs

- [16] The defendants move under rule 56.01(1)(b), (d) and (e), arguing that the estate:
- (i) has another proceeding pending for the same relief (56.01(1)(b));
 - (ii) is a nominal plaintiff and there is good reason to believe it has insufficient assets in Ontario to pay the defendants’ costs (56.01(1)(d)); and
 - (iii) that there is good reason to believe that the action is frivolous and vexatious and that the estate has insufficient assets in Ontario to pay the defendants’ costs (56.01(1)(e)).
- [17] If the defendants establish that the matter falls within any of these categories, the onus then shifts to the estate to establish that:
- (a) it has sufficient assets in Ontario to satisfy any costs order made in the litigation;
 - (b) it is impecunious and the action is not plainly devoid of merit; or
 - (c) it does not have sufficient assets to meet a costs order, but its claim has a good chance of success on the merits.

The moving party's onus

(a) Is there another proceeding pending for the same relief?

[18] It is not clear whether the FLA action continues. Stewart, J. held the Focused Hearing anticipating that the determination of the status of Lascelles' and Hortense's marriage would be determinative of the entire case. She ordered the parties to request a case conference should any other issues remain. No case conference was booked but the action was not formally dismissed. Nonetheless, I am satisfied that there is no other proceeding pending for the same relief. The basis for payment of half of the condominium proceeds to Lascelles has been rejected.

(b) Is there good reason to believe that the nominal plaintiff has insufficient assets in Ontario to pay the defendants' costs?

[19] The estate does not argue that it has sufficient assets in Ontario to pay the defendants' costs. Ralfina did not directly address the estate assets in her first affidavit sworn 1 December 2025 except to state that there is a "lack of liquid assets" and described the claim on the proceeds of the sale of Hortense's property as the "estate's primary asset".

[20] After receiving the defendants' factum setting out the test to establish impecuniosity, Ralfina filed a subsequent affidavit sworn 7 January 2026. In that supplementary affidavit, Ralfina deposed that the estate has no income or assets and that she and Lascelles' sons paid for his funeral "because the estate had no money".

[21] There is already one unpaid costs award against the estate. Stewart, J. ordered the Lascelles estate to pay the Hortense estate \$60,000 in costs and those remain entirely unpaid. Evidence of an unpaid costs award has been found to be sufficient evidence that a plaintiff has insufficient assets to pay another costs award (see *Parravano v. St. Paul Fire and Marine Insurance* 2023 ONSC 3480).

[22] Given the estate's admission that it does not have assets, and given the unpaid costs award, I am satisfied that the defendants have met their onus to establish that there is good reason to believe that the plaintiff has insufficient assets in Ontario to satisfy any costs award made in their favour.

The responding party's onus

[23] The estate argues that it is impecunious and the action is not plainly devoid of merit, or, alternatively, that it does not have sufficient assets to meet a costs order, but its claim has a good chance of success on the merits.

[24] The estate has not provided disclosure to the level required to prove impecuniosity. There is no statement about Lascelles' income during his lifetime, his pension, if any, any life insurance policies, expenses, or liabilities, or the estate's borrowing abilities. There is also no evidence about what assets Lascelles had on the date just prior to his passing or whether there have been any disbursements from the estate.

- [25] Even if I were satisfied that the estate met the test of being impecunious, which I am not, it has not established that its claim is not plainly devoid of merit, let alone has a good chance of success on the merits.
- [26] At its highest, the estate's case is that Mr. Housley must honour a statement he made to Ralfina that half of Hortense's sale proceeds would be paid the estate, even if he made that statement in error. If this statement were made, which Mr. Housley denies making, it would have been premised on Hortense and Lascelles being separated. The court has already found that they were not separated and that finding is binding.
- [27] Consequently, any delivery of those funds by Mr. Housley to Lascelles would have been a windfall to which Lascelles was not entitled, given the spouses were not in fact separated.
- [28] The additional problem with the estate's argument is that, had Mr. Housley on his own account decided to pay the funds to Lascelles, it is very likely his own client would have sued to obtain the proceeds rightfully owing to her.
- [29] Similarly, if Ralfina had refused to sign the acknowledgment stating that Lascelles and Hortense were spouses, the matter would also have ended up in court for a determination of their spousal status. Ralfina testified that when she later asked Mr. Housley what would have happened had she not signed the acknowledgement, he told her she would have been sued.
- [30] In either scenario, the estate would have been in a same position it is now, in court, with a finding that Hortense and Lascelles were not separated.
- [31] The fact that the matter unfolded as it did caused the estate no prejudice. The funds in dispute were paid into court by Hortense's estate to await the outcome of the underlying spousal status determination. Had the estate been successful, the funds would have been released to it.
- [32] The finding that Lascelles and Hortense were not separated is fundamental to any argument that Mr. Housley erred in not disbursing the funds to Lascelles. As there is now a judicial finding to that effect, there is little likelihood of success in this action.
- [33] The claim, as drafted, does not make any other claim against Mr. Housley. It does not plead that he owed Ralfina or Lascelles' estate a duty of care or that there was a breach of that duty. (This may be because Ralfina and Lascelles' sons noted that they had spoken to their own independent lawyer.) It simply pleads that Mr. Housley told Ralfina that Lascelles would receive half the proceeds after closing, but then advised them that he had been misled about Hortense's marital status and Lascelles was, in fact, not entitled to the funds.
- [34] For these reasons, I find the claim advanced is highly unlikely to succeed and is devoid of practical merit. These same reasons also support a finding that there is good reason to believe that the claim advanced is frivolous and vexatious, under rule 56.01(1)(e).

An order for security for costs is just in all the circumstances

- [35] In exercising my discretion as to whether an order for security for costs would be just, I have considered the merits of the case, balanced the interests of the parties, and reviewed the disclosure provided by the estate. Considering the overall interests of justice, I find that an order for security is just in all of the circumstances (see *Yaiquaje v. Chevron Corp.*, 2017 ONCA 827).
- [36] There is no evidence that an order requiring the estate to post security would bring this action to an end. Ralfina, on behalf of the estate, retained counsel to bring the FLA matter and the proceed with the Focused Hearing even while the estate apparently had no assets. There is no evidence that the beneficiaries of Lascelles' estate, who stand to benefit from any successful claim, could not post the ordered security.
- [37] As was found in *Painter v Painter Estate*, 2008 CanLII 48649 (ONSC), there is nothing unfair about requiring a party who wishes to continue to litigate an issue that has already been determined to be responsible for the costs associated with doing so, including the posting of security for costs.

Amount to be posted

- [38] The defendants seek \$80,000 to trial, to be posted in tranches.
- [39] The defendants claim the following amounts in their draft bill of costs:
- (a) their actual projected fees to trial - \$51,035;
 - (b) their fees incurred in the Focused Hearing proceeding - \$15,467;
 - (c) their actual fees to date in this action - \$4,788;
 - (d) their incurred disbursements - \$819.08; and
 - (e) their projected disbursements, primarily for the retainer of an expert - \$26,591.93.
- [40] Considering the defendants' bill of costs, I order the estate to post security as follows:
- (a) \$10,819.08, within thirty (30) days of receipt of this decision and related order, as security for the defendants' costs and disbursements to date in this action and up to and including the end of the discovery process, on a partial indemnity basis (based on upon actual fees to date of \$4,788 and projected discovery fees of \$11,800 and incurred disbursements of \$819.08);
 - (b) \$9,000 within ninety (90) days from the date that examinations for discovery are complete, as security for the defendants' costs associated with mediation, on a partial indemnity basis (based upon projected mediation fees of \$7,375 and a mediator's fee of \$5,000); and

(c) \$20,000 within ninety (90) days from the date that mediation is completed, as security for the defendants' costs associated with pretrial and trial, on a partial indemnity basis (based upon projected pretrial fees of \$11,800 and trial fees of \$17,770).

The estate shall also pay applicable HST on these amounts.

- [41] I do not accept that it would be appropriate to award security for costs incurred in the Focused Hearing proceeding, and do not include that amount sought.
- [42] I have also not considered a claim for an expert's report at this time. The statement of claim does not allege a duty of care but is in the nature of an alleged representation relied on by Ralfina, purportedly to her detriment.
- [43] I have also rejected any fees related to a proposed amendment motion by the estate, as that can be dealt with by the motions' judge, should that motion ever be brought. Any request for increased costs related to an expert should be sought at the amendment motion, in the event duty of care is ultimately pleaded.
- [44] The defendants also seek their costs of the motion in the partial indemnity amount of \$11,047.64 and disbursements of \$339, both of which I find fair and reasonable.
- [45] Order to go in terms of the draft order submitted, which I have amended and signed.

Date: 27 January 2026

Associate Justice Jolley