

Date: 20011015  
Docket: Probate No. 50348

IN THE SUPREME COURT OF NOVA SCOTIA  
[Cite as: Winter Estate (Re), 2001 NSSC 121]

IN THE MATTER OF:

The Estate of Hilda Winter

- and -

An application pursuant to Section 31 (2) of the *Probate Act*  
for an Order Removing Ivo Winter as Executor of the Estate  
of Hilda Winter and Appointing an Administrator

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**D E C I S I O N**

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HEARD: Before the Honourable Justice Suzanne M. Hood at  
Halifax, Nova Scotia on April 25, 27 and 30, 2001

ORAL DECISION: May 25, 2001

WRITTEN RELEASE  
OF ORAL: October 15, 2001

COUNSEL: **David P.S. Farrar** for the Estate of Hilda Winter  
**Thomas M. Macdonald** for Itta Winter  
**Kevin A. MacDonald** for Igor Winter  
**Peter M.S. Bryson, Q.C.** for Ivo Winter, Respondent

HOOD, J. (Orally):

- [1] Hilda Winter died in April 1999. She had four children: Joachim, Igor, Itta and Ivo. Her will appointed Ivo as her executor. The estate is worth approximately \$5,000,000.00. There is controversy surrounding the execution, just before her death, of Hilda Winter's will. It will be resolved by proof in solemn form. Ivo Winter is also her executor in the 1992 will. Joachim Winter asks the court to remove Ivo Winter as executor and appoint an administrator of Hilda Winter's estate. The issue is then should the executor, Ivo Winter, be removed.
- [2] Hilda Winter went into hospital in late March 1999. Approximately one week later, the family was told she was dying. There is a dispute on the facts about the execution of her will dated April 2, 1999, two days before her death. That will was drafted by Ivo Winter. Its validity will be dealt with by proof in solemn form. No date has yet been set for that hearing. There is also a dispute about what assets belong to the estate. Chief among these is Mrs. Winter's residence at 1784 Connaught Avenue, Halifax which is valued at between \$750,000.00 and perhaps as much as \$1,000,000.00. Mrs. Winter resided there, until her death, with her daughter, Dr. Itta Winter, and Itta's husband. Approximately one year after Mrs. Winter's death, in July 2000, Igor Winter recorded a 1992 deed to that property to himself and his mother in joint tenancy. Thereafter, he gave Itta notice to vacate the property which she did. Ivo Winter, as executor, arranged for the removal and storage of the contents of the home.
- [3] There is dispute with respect to the removal of the assets and also about the ownership of some of these assets, including appliances and the location of a valuable set of sterling silver flatware. Also in dispute is property at Chester Basin to which Itta Winter has had a Deed for approximately ten years. It is included in the estate inventory nonetheless.
- [4] Ivo Winter personally says he believes it belongs to Itta Winter. As executor, he filed a caveat against that property which is vacant land. Although Ivo Winter has a deed to land in Richmond County, Cape Breton, as executor, he included that property in the estate inventory as well. The Connaught Avenue property is included in the estate inventory. A caveat has been filed against it and Ivo Winter, as executor, has commenced an action against Igor Winter with respect to it and also with respect to a joint bank account of Igor and Hilda Winter and the contents of a safety deposit

box. A prior will of Hilda Winter was found after the 1999 will was admitted to probate. Joachim Winter says that the circumstances of its discovery are suspicious.

- [5] Allegations are also made that Ivo Winter, as executor, has disposed of assets such as Mrs. Winter's 1974 Mercedes Benz motor vehicle and a sailboat to Itta's husband without consulting with the other beneficiaries and/or for less than their fair value. It is alleged that Ivo Winter, as executor, agreed to keep the beneficiaries (his two brothers and his sister) informed and to consult with them with respect to the sale or disposition of estate assets. It is not disputed that he has not done so, at least recently.
- [6] It is alleged that Ivo, as executor, is favouring Itta Winter over Joachim and Igor Winter by reason of these acts referred to above, including the commencement of a law suit with respect to Connaught Avenue and none with respect to the Chester Basin property.
- [7] Joachim Winter also says that Ivo, as executor, did not agree to proof in solemn form until the last minute and has failed to investigate a possible property in Salzburg, Austria. He also alleges delay by Ivo Winter with respect to the administration of the estate. Joachim Winter alleges that the hostility between the beneficiaries and Ivo, as executor, coupled with conflicts of interest and/or bias on the part of Ivo Winter, serious misconduct in administering the estate, including the failure to consult and keep the other beneficiaries informed, should satisfy the court that there is good reason to remove Ivo Winter as executor. He says Ivo Winter cannot carry out his duties as executor of the estate under these circumstances. Before this court date, mediation had been proposed as was case management, however, nothing has come from either of these initiatives.
- [8] Section 31 of the *Nova Scotia Probate Act*, R.S.N.S. 1989, c. 359, provides:

31 (1) The court of probate, upon the summary application of anyone interested in the estate, if it is proved to the satisfaction of the court that an executor is wasting the estate, may order the executor to give security for the performance of his duty.

(2) If it is proved to the satisfaction of the court that he has not obeyed such order, or if in any case it is proved that an executor is residing beyond the jurisdiction of the court, and is neglecting to settle or administer the estate, or if it is proved that an executor has failed to comply with an order to pay into a chartered bank any money of an estate remaining in his hands made under this Act, the court may remove such executor from his office and appoint another

person in his place, who shall have the powers and perform the duties of an administrator with the will annexed.

- [9] This gives little authority to the court to remove an executor, however, the courts have, in a number of decisions, expanded upon this. In *Re MacCulloch Estate*, Haliburton, C.C.J. (as he then was) said at paras. 34 and 35:

The statutory authority for the removal of an executor is very narrow indeed.

The cases appear to give a broader authority to the Court in discharging executors than would appear from the reading of this section.

- [10] He continued at para. 35 and referred to MacDonell, Sheard and Hull, **Probate Practice** (3rd Ed. 1981). The authors review the case law and principles to be applied. The authors cite the case *Letterstedt v. Broers* (1984), 9 App. Cas. 371 for the following propositions:

... But in cases of positive misconduct, Courts of Equity have no difficulty interposing to remove trustees who have abused their trust; it is not indeed every mistake or neglect of duty, or inaccuracy of conduct of trustees, which will induce Courts of Equity to adopt such a course. But the acts or omissions must be such as to endanger the trust property or to show a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity.

- [11] As the author of **Probate Practice** says at p. 133:

Although Lord Blackburn's remarks have been repeatedly referred to, the basic principles he enunciated have been neither enlarged nor qualified, and subsequent cases simply illustrate the application of those principles to various sets of circumstances. In each case those asking for the removal of the trustee must convince the Court that his continuance in office would be likely to prevent the trust being properly executed.

- [12] Justice Haliburton then concluded at para. 43 of his decision:

In summary, it appears that an executor whose administration is motivated by an unlawful or criminal intent will be removed. Similarly, if it is established that the executor is, for some reason, not competent or capable of the exercise of sound and fair judgment in relation to the affairs of the estate, or if he has exhibited bad faith in relation to decisions made in the course of his administration, such an executor will be removed.

[13] In *Re Martin*, competence was determined to have a broader meaning than just legal or mental capacity. The court at p. 518 referred to an old English case, *Re Meatyard*, [1903]. In that case, it was said at p. 130:

‘Competent’ not being, in my view, limited to the case of personal competence ...  
[14] *Re Martin* also refers to words and phrases legally defined and I quote:

‘Competent’... is not to be restricted to legally competent, and ... something less than being of unsound mind or a minor is sufficient to render and executor incompetent ... Misconduct in relation to the estate will render an executor incompetent, and entitle the Court to pass him over.

The case reference is to a New Zealand case, *Hunter v. Hunter*, [1932] N.Z.L.R. 911 (C.A.). In Jenkins and Scott, **Duties of Estate Trustees, Guardians and Attorneys**, the authors say at p. 101:

A review of the case law reveals that the courts are reluctant to remove an estate trustee. This reflects an intention to give priority to the testator’s discretion in making that choice.

They continue on that page:

Whether intervention is expressed in terms of whether the trustee’s acts or omissions are ‘likely to prevent the trust from being properly executed’ or will ‘endanger the trust property’, or whether ‘the best interests of the estate may be in jeopardy’, the primary consideration remains the best interests of the beneficiaries. This principle was first established in the leading case of *Letterstedt v. Broers*.

[15] In **Law of Trusts in Canada** by Waters, the author says at p. 683:

... it is clear that much will turn on the facts of the particular case ...

or, as Lord Blackburn himself said in *Letterstedt v. Broers* at p. 387:

In exercising so delicate a jurisdiction as that of removing trustees, their Lordships do not venture to lay down any general rule beyond the very broad principle above enunciated, that their main guide must be the welfare of the beneficiaries. Probably it is not possible to lay down any more definite rule in a matter so essentially dependent on details often of great nicety. But they proceed to look carefully into the circumstances of the case.

- [16] I would therefore look carefully at the circumstances of this case, bearing in mind the broad principle that the welfare of the beneficiaries is the court's main guide. It is not the interests of a particular beneficiary that are to be considered but the beneficiaries as a group. In *Conroy v. Stokes*, [1952] 4 D.L.R. at p. 128, Bird, J.A. said:

In the circumstances I find nothing in the evidence to support a conclusion that the 'welfare of the beneficiaries', and that phrase I think must be taken to mean the 'benefit of the beneficiaries collectively', has been impaired by any act or omission of the trustees.

- [17] I also refer to the case of *Falk v. Dick*, [1994] M.J. No. 748 (Man. Q.B.) where Justice De Graves said at para. 15:

The court should not interfere with the solemn decision of the testator in the appointment of executors unless the appointment does affect and impair the due and faithful administration of the estate: that there is a friction or hostility between the beneficiaries and executors of and in itself does not constitute grounds to remove an executor.

- [18] Also in *Re Weil* [1961] O.R. 888, 30 D.L.R. (2d) 91, the Ontario Court of Appeal said:

The Court should not lightly interfere with the discretion exercised by a person in choosing the person or persons to act as his executors and trustees. ... There can be no doubt that the Court has power to remove a personal representative of the estate of a deceased person for cause, but the effect of the order now in appeal is to remove one of the executors before letters probate have been granted to him. ... In substance the Court has declared that he should not be permitted to be a party to the administration of the estate, notwithstanding he was the choice of the testator. It seems to me that such an interference with the discretion and choice of a person in preparing his last will and testament must be not only well justified but, as has been said before, must amount to a case of clear necessity.

- [19] In the cases which have applied to Lord Blackburn's principle, an executor has been removed in some and not in others. It is clear that animosity between executor and beneficiaries is not sufficient on its own to warrant removal of an executor. Lord Blackburn said at p. 389:

It is quite true that friction or hostility between trustees and the immediate possessor of the trust estate is not of itself a reason for the removal of the trustees. But where the hostility is grounded on the mode in which the trust has been administered, where it has been caused wholly or partially by substantial overcharges against the trust estate, it is certainly not to be disregarded.

He concluded:

Looking therefore at the whole circumstances of this very peculiar case, the complete change of position, the unfortunate hostility that has arisen, and the difficult and delicate duties that may yet have to be performed, their Lordships can come to no other conclusion than that it is necessary, for the welfare of the beneficiaries, that the Board should no longer be trustees.

[20] Hostility between executor and beneficiaries coupled with other factors may, I conclude, in some cases be sufficient to cause the removal of the executor. Are those other factors here of sufficient weight for me to be satisfied that removal is necessary? In my view, if there is a conflict of interest between the interests of the executor personally and the interests of the estate, that would be sufficient to warrant the executor's removal.

[21] In Jenkins and Scott, **Duties of Estate Trustees, Guardians and Attorneys**, the text deals with a conflict of interest by an executor. The author says at p. 104:

Because a trustee owes a duty of utmost good faith to ensure that the interests of the beneficiaries of a trust are paramount, the courts will not permit a trustee's personal interests to conflict with the interests of the beneficiaries.

They then refer to four cases: *Stadelmier v. Hoffman* (1986), 25 E.T.R. 174 (Ont. Surr. Ct.); *Re Owen* (1989), 33 E.T.R. 213 (B.C.S.C.) and *Re Walter W. Shaw Co.*, [1922] 3 W.W.R. 119 (Sask. K.B.), at p. 120. **(ONLY 3 cases mentioned)** In *Stadelmier v. Hoffman*, the court was asked to pass over the designation of Mr. Hoffman as executor. In that case, Justice Kovacs, a surrogate court judge in Ontario, said at para. 8:

On the facts of this application it is clear that the applicant will be in a conflict of interest position. A conflict of interest in itself is not always sufficient to pass over a nominee as executor. In the *Weil* case, supra, it was not sufficient. In the *Weil* case the conflict of interest was perceived to be between the executor and a close relative of the executor who was a beneficiary. The *potential* conflict perceived in that case was that the executor might not deal even-handedly among the beneficiaries. In the case at Bar the perceived conflict of interest is between the executor and his interest in his personal capacity. If the action is instituted by the applicants it would be against the respondent. It is self-evident that the respondent, in his capacity as executor, cannot conscientiously (as a plaintiff) attack the gift and transfers of securities to himself while at the same time

maintaining in his personal capacity that the gifts and transfers were proper. That will not be a potential conflict; it will be actual. In making such a finding I in no way prejudice the case. I simply find the respondent cannot conscientiously act as a plaintiff (in his capacity as executor) in a case in which he will be the defendant.

- [22] The *Stadelmier* case also referred to the decision in *Re Bowerman* (1978), 20 O.R. (2d) 374, 87 D.L.R. (3d) 597, another decision of the Ontario Surrogate Court. Justice Kovacs said at para. 11:

In *Re Bowerman* ... the court passed over an executor whom he found to have a conflict of interest with a beneficiary.

- [23] Justice Kovacs concluded in *Stadelmier* in para. 13:

In considering the fitness of the respondent to act as an executor I have considered also the duties of an executor in a general way. One duty of an executor is to bring in the estate for distribution among the beneficiaries. If it is perceived, on good grounds, that that important duty is compromised by a personal conflict of interest because the executor will be asked to sue himself to recover what may be a large part of the estate property, he must be passed over.

- [24] In *Re Owen*, a co-trustee was removed. His company owed a substantial sum to the trust, which sum had not been paid in full. In **Duties of Estate Trustees, Guardians and Attorneys**, Jenkins and Scott say at p. 104:

... the court found that no reasons were put forward justifying the failure to satisfy the entire debt. It therefore concluded that the trust was in danger.

- [25] In *Orenstein v. Feldman* (1978), 2 E.T.R. 133 (Ont. H.C.J.), a trustee was removed because of a conflict of interest in a situation where there was also hostility between the trustee and the principal beneficiary. The court said at p. 137:

These two conflicting interests, in my opinion, render it impossible for the respondent trustees to properly discharge their functions. The trustees have a duty to look at the interests of all beneficiaries, and not those of any particular beneficiary. Here the personal interests of the respondent [trustee] place him in the position where he must inevitably weigh his interest against the interests of other beneficiaries, particularly [the applicant beneficiary], and no trustee should ever be in that position.

- [26] In *Re Walter W. Shaw Co.*, Justice Griffiths put it thus at p. 137:

The question is whether it would be difficult for the trustee to act with impartiality, not whether, in fact, it would or would not do so.



- [27] Do the allegations in this case satisfy me that Ivo Winter has a conflicting interest such that he should be removed? I turn now to what I conclude are the allegations of conflict of interest against him. In this regard, it is important to note that Ivo Winter is a one-quarter beneficiary under the will. The April 1999 will divides all Hilda Winter's estate equally among her four children. As was argued by the applicant and agreed to in testimony by Ivo Winter, this means that the greater the estate, the greater Ivo Winter's share. If disputed property (and there is much disputed property in this case) forms part of the estate, then Ivo Winter's share is larger. Does his personal interest conflict with the duty as an executor? One of the chief duties of an executor is to gather in all the estate assets. That is what Ivo Winter, as executor, has done. It is argued by his brothers, Joachim and Igor, that he has gathered in too many assets. More accurately, he has **tried** to gather them in. He has filed caveats against two properties, the Connaught Avenue property which Igor Winter claims and the Chester Basin property to which Itta Winter has a deed. He has done this with respect to the Chester property notwithstanding his personal belief that Itta Winter is entitled to the property. He has commenced action against Igor Winter with respect to a joint bank account and the contents to the safety deposit box which Igor Winter has under his control. In addition, although Ivo Winter personally has a deed to land in Richmond County, which he recorded after his mother's death, he has included that land and other land in Cape Breton in the estate inventory. Joachim Winter says he did this only because its value is far less than the Connaught Avenue property and the tradeoff is to his advantage. However, one can imagine the cries of foul had he done otherwise.
- [28] Under these circumstances, I cannot conclude that there is a conflict between Ivo Winter's duties as executor and his personal interests in this regard. If he were not to gather in all the estate assets, he would be failing in one of his duties as executor. The criticism that has been levelled against him is that he has failed to investigate property in Salzburg, Austria. Another criticism is that he has not included a set of sterling silver in the inventory. The person or persons to whom the benefit of the Connaught Avenue property will accrue will be determined by the courts as a result of an action commenced by Ivo Winter as executor of the estate. If Itta Winter wishes to make a claim for the Chester Basin property other than for her undivided one-quarter share in it, she can do so but has not done so to date.

- [29] If Ivo Winter personally wishes to advance a claim for the property to which he has a deed (and he has not done so yet) then it is clear to me that he would then have to step down as executor. As the cases make clear, he cannot instruct counsel to both sue and defend in the same case. Again, one can only imagine the outcry had the Cape Breton property not been included in the estate inventory.
- [30] I cannot conclude from this that there is a conflict between Ivo Winter's duty as executor and his personal interest. He will not have to weigh his interests against those of the other beneficiaries. He does not owe a debt to the estate, property to which he has a deed has been included in the estate inventory, and he does not have to sue himself to bring in all the estate assets.
- [31] It is also said that Ivo Winter has a conflict of interest with respect to the testimony he will have to give about his mother's intent to deed the Connaught Avenue property to Itta. That intent is not reflected in the 1999 will nor in the deed Ivo Winter prepared in 1992 to convey the property jointly to Igor Winter and his mother but which deed he did not believe was ever delivered by his mother to Igor.
- [32] I conclude that if Ivo Winter, as executor, does not have a conflict of interest with respect to whether the Connaught Avenue property should have been brought into the estate then having to testify about that does not create a conflict of interest.
- [33] In the same vein, it is alleged that Ivo Winter will benefit personally if more assets are included in the estate because his executor's fees will thereby be greater. It is alleged that this, too, creates a conflict of interest. If so, that same conflict of interest exists for any executor. However, I see it instead as an interest that is the same for Ivo Winter both as executor and personally. The interests correspond. The executor has a duty to bring in all the estate assets and the executor personally may benefit from the resulted increase in the value of the estate. Furthermore, it must not be forgotten that executor's fees are not simply taken by the executor, they must be approved when the estate is closed. It is also alleged that trying to manage the affairs of the estate to avoid a claim by the father, Dr. John Winter, who was separated from Hilda Winter for many years, creates a conflict of interest for Ivo Winter as executor. However, he is executor of Ivo Winter's will and, as such, is to carry out her intent as expressed in that will. The will makes no bequest to John Winter nor, incidentally, does the 1992 will. If Ivo Winter were to invite a claim which would affect everyone's interest in the estate, that might be cause for concern. But to do otherwise, that is to try to avoid a

claim, is not against the interests of the estate. It also coincides with the personal interests of Ivo Winter, not to mention those of Joachim, Igor and Itta Winter.

- [34] It is also alleged that Ivo Winter has a conflict of interest with respect to the execution of the April 2, 1999 will. He prepared the will and was present at its execution. Its validity will be determined as a result of the proof in solemn form hearing. Ivo Winter will be a witness at that hearing, although he was not an attesting witness to the will.
- [35] It is submitted that he benefits more from the 1999 will than he does from the 1992 will which will be admitted to probate if the 1999 will is declared invalid.
- [36] The significant difference between the two wills is four specific bequests in the 1992 will which do not appear in the 1999 will. Those bequests are unequal. That is, Joachim and Igor receive \$250,000.00 each and Itta and Ivo receive \$100,000.00 each. The residue is then divided equally among the four children. The specific request totals \$700,000.00 and unequal division would give Joachim and Igor \$75,000.00 more and Itta and Ivo \$75,000.00 less.
- [37] This begins to look like a conflict of interest for Ivo Winter in his two capacities except for two things.
1. It is not his decision whether or not the 1992 will is determined to be valid. As executor, he must put the will forward at the proof in solemn form. This coincides with his personal interest, it does not conflict with it. He will testify at proof in solemn form about the circumstances of the drafting and execution of the will as will the attesting witnesses and others.
  2. In any event, he has said that he will honour the bequests in the 1992 will.
- [38] Furthermore, if the 1999 will is declared invalid and the 1992 will proved in its place, Ivo Winter is executor under the 1992 will as well. He will then have to carry out Hilda Winter's wishes as expressed in the 1992 will including the unequal bequests.
- [39] It is not for me to make any comments about credibility or about the likely result of the proof in solemn form. That is for another judge on another day.
- [40] It has also been suggested that Ivo Winter has a conflict of interest as executor of the 1999 will because of his professional role in drafting it. If the will is declared invalid because of a lack of competency on the part of Hilda Winter at its execution, it is true that this may be professionally embarrassing for Ivo Winter. However, this means that, in addition to his

role in propounding the will and carrying out its intent and his personal interest in its more favourable terms which he says he will not insist upon in any event, he also has a corresponding interest as a lawyer in having it upheld. These are not conflicts of interest.

- [41] Furthermore, I find no merit in the submission that it is a breach of a lawyer's ethical duties for Ivo Winter to have drafted a will for his mother which named him beneficiary. I cannot conclude that that is the intent of chapter 7 of the **Ethics Handbook** of the Nova Scotia Barristers' Society. Where a will makes equal provision for a testator's four children, of whom the lawyer drafting the will is one, that is not in my view in breach of a lawyer's ethical obligations.
- [42] I conclude that the other allegations against Ivo Winter, as executor, are not allegations of conflict of interest because they are not alleged to affect the personal interests of Ivo Winter. They are more in the nature of allegations of personal conflict between the executor and the beneficiaries.
- [43] As I have said, it is not my role on a chambers application such as this to make findings of credibility. It is clear to me from the evidence that there are disputes on the facts. Mr. Bryson, on behalf of Ivo Winter, says there are no conflicts of interest only conflicts on the facts. I agree. I must consider, however, whether those disputes are such as to cause me to remove Ivo Winter as executor.
- [44] It is alleged that Ivo Winter, as executor, is favouring Itta winter. Allegations of this favouritism include the sale of Hilda Winter's car to Itta's husband, giving a sailboat to him, failing to commence action against Itta Winter with respect to the Chester Basin property and the location of a set of valuable silver. In response, Ivo Winter says the car was sold for more than its appraised value. He says that the sailboat was an *inter vivos* gift by his mother and that it was worth only \$100.00 to \$200.00 in any event. He also said it has not been moved from its usual location and that it was a fibreglass punt (an open boat) 16 to 17 feet long which is twenty-five to thirty years old. Ivo Winter says that, if only one silver set was listed in the inventory, the other may have been a gift to Itta but was not given to her by him. He said that, if Itta Winter has it, she took it.
- [45] With respect to the Chester Basin property, Ivo Winter testified that there are significant differences between it and the Connaught Avenue property which, in his view, warrant special treatment for the latter. Firstly, he says that Itta Winter has had a deed for the Chester Basin property for approximately ten years before her mother's death. The deed for Connaught

Avenue only turned up in 2000, after Hilda Winter's death, although it was executed in 1992. Secondly, Igor Winter proposed the sale of the Connaught Avenue property whereas there is no such indication by Itta with respect to the Chester Basin property. Thirdly, the Connaught Avenue property has a substantial home on it while the Chester Basin property is vacant land. As his affidavit sets out, Ivo Winter says that, since the Connaught Avenue property is unoccupied, there is a risk of vandalism or deterioration to it. As well, there are costs for its upkeep and, without a sale or a tenant, it is his view that "the property remains a wasting asset." Fourthly, Itta Winter has paid the taxes on the Chester Basin property whereas the Connaught Avenue property taxes have not been paid by Igor Winter. Fifthly, Itta Winter and her mother resided at the Connaught Avenue property for twelve years.

- [46] Although there is clearly a dispute between the executor and Igor and Joachim Winter about this, I do not conclude that the existence of that dispute is such as to prevent the proper administration of the estate or that it is against the welfare of the beneficiaries as a group.
- [47] The car appears to have been sold for in excess of its appraised value. The boat and the silver may reasonably have been thought to be gifts or, in the case of the silver, taken without the executor's knowledge. There is an explanation for the difference in treatment of the Chester Basin and Connaught Avenue properties.
- [48] Based upon the disputed evidence, I am not satisfied that the estate property is endangered or that these actions show dishonesty or that they show a lack of reasonable fidelity or that they show that the executor has a lack of capacity in the broadest sense of the word to deal with the estate assets.
- [49] In general, therefore, I do not conclude that the estate is not being properly administered or that the welfare of the beneficiaries is at risk. I am not satisfied on the disputed facts that that is the case.
- [50] It is also alleged that Ivo Winter has breached his duty to keep the beneficiaries informed and to consult with them with respect to the disposition of assets. The fact that this may not be occurring now is, in my view, related to the hostility between the executor and the beneficiaries. In any event, there is no requirement that an executor keep beneficiaries informed or consult with them about estate assets.
- [51] The will of Hilda Winter gives Ivo, as executor, the power of sale. It also says, "I direct that my executor alone shall decide when to sell, the manner of sale and the terms." Ivo Winter, as executor, therefore has the power to

deal with the assets of the estate. Furthermore, the four children of Hilda Winter do not have specific bequests under her will. As such, they have no right to specific property and, accordingly, have no right to be consulted about specific estate assets. As a matter of routine beneficiaries, especially if they are all members of the testator's family, are often consulted but, in law, the failure to do so is not cause for removal of the executor. It is also alleged that Ivo Winter's failure to agree until the eleventh hour to proof in solemn form is a form of misconduct. An executor is not obligated to agree nor is there any misconduct involved in his standing on his legal rights to have a show cause hearing. In my view, this is not misconduct of any sort on the part of the executor although, in the circumstances, it appears to have exacerbated already bad relations.

- [52] It is alleged that Ivo Winter has not made all reasonable efforts to determine if there is property in Salzburg, Austria in which the estate has an interest. In his testimony, he said that it was a touchy issue because of a possible interest by Dr. John Winter if there was any Salzburg property. In my view, this is a reasonable response and is not of such concern that it is reason to conclude that the executor is not carrying out his duties properly.
- [53] It is also alleged that Ivo Winter "stripped" the Connaught Avenue property of its contents. His response is set out in his affidavit in paragraphs 45, 46, 47 and 48. He says in summary that, after Ivo Winter asserted his ownership and gave notice to Itta Winter to vacate, he, as executor, took steps to remove and store the estate assets contained in it. He said he did an inventory of the items as they were packed and removed. Igor Winter claims appliances that were in the house. These were removed and are stored with the rest of the contents. I cannot conclude that these actions, disputed though they are, but explained by Ivo Winter, are such as to warrant his removal as executor.
- [54] It is further alleged that there has been delay in dealing with the estate. This allegation is, in part, supported by the affidavit and testimony of Anthony Kehoe. He says in essence that Ivo Winter told him he would drag the administration of the estate out to the detriment of all, especially Joachim Winter. Ivo Winter denies this.
- [55] It is generally accepted that an executor has approximately one year in which to get in the estate assets and settle the affairs of the estate. The estate was opened on August 23, 1999. Although more than one year has since passed, this is a large estate with a large inventory. I note that the inventory filed in the Probate Court contains an appendix listing more than 450 individual

items. In addition, a valuable painting required special efforts to achieve a sale price of almost 1.7 million dollars. Furthermore, the subject litigation, the proof in solemn form and the litigation involving the Connaught Avenue property have been time consuming and have complicated the administration of the estate.

- [56] Under the circumstances, I do not conclude that there has been such delay in the handling of the affairs of the estate that it calls for a removal of Ivo Winter as executor. Nor is there uncontradicted evidence about the conversation between Ivo Winter and Anthony Kehoe. As I have said, it is not my role to make findings of credibility. That issue and others of credibility will ultimately be resolved. Only on proof of conduct which would affect the administration of the estate or the welfare of the beneficiaries may an executor be removed.
- [57] In summary, what has happened with respect to the administration of this estate? There are allegations that the will is invalid. There are suspicions by some that arise from this. These will be resolved by proof in solemn form. There are allegations that property is included in the estate but should not be in the estate. The matter of the Connaught Avenue property will be resolved in the action which has been commenced. This has caused hostility and there are suspicions about the circumstances and the finding and recording of the deed to the property. There are suspicions about the finding of the earlier 1992 will. There are suspicions about the timing of the recording of the deed to Ivo Winter for the Arichat property, which property is now included in the estate inventory, notwithstanding the deed.
- [58] There are suspicions that Itta Winter is being treated more favourably than Igor Winter and Joachim Winter by the executor. These include allegations with respect to the Chester Basin property, the sale of the car, the disposition of the boat and the location of the valuable set of sterling silver flatware.
- [59] There are allegations of delay. A delay occasioned by a desire to disadvantage Joachim Winter. There are allegations of a conflict of interest between the duties of the executor and the personal interests of Ivo Winter. I have determined that there are none.
- [60] The factual disputes cannot be resolved in this application. In my view, there must be stronger evidence to over-rule Hilda Winter's wish to have Ivo Winter be her executor. I also note that he was so appointed in the 1992 will as well.
- [61] To paraphrase Justice Haliburton in the *MacCulloch* decision, I conclude that Ivo Winter has done nothing unlawful. I am not satisfied on the facts,

which are not in dispute, that he is unable to fairly administer the estate nor that he has acted in bad faith. I am not satisfied that assets of the estate are in jeopardy or that the welfare of the beneficiaries as a group is at risk.

[62] Even when I look at the totality of the allegations, I cannot conclude that there is cause now to remove Ivo Winter as executor. There is obvious hostility but I am not satisfied, in all the circumstances which are before me and on which I can rely without making findings of credibility, that there is reason to remove Ivo Winter as executor.

[63] I therefore dismiss the application for removal of Ivo Winter as executor of the estate of Hilda Winter.

[64] However, the beneficiaries of this estate are siblings and I sincerely hope that at some time the hostility and suspicion will be put behind all of you. I hope I will be proven not to have been too optimistic in this regard. This is in spite of the fact that one counsel referred to the hostility and the relations as being beyond repair. For what it may be worth, I point out that there are ways of resolving the outstanding matters among you short of further recourse to the courts. I commend to all of you consideration of those alternative means so that the administration of this estate may be continued and concluded without further acrimony. Ivo Winter as executor may wish to consider whether there is anything he could reasonably do to assist in the lessening of the hostility and suspicion that has marked and marred the administration of this estate.

[65] In consideration of what **all** of you might do in future, I am sure I don't need to remind you to keep in mind your mother's apparent wish not to have those outside her family involved in her personal affairs. I think we all can guess what her reaction would be in having these matters dealt with so publicly.

Hood, J.