

SUPREME COURT OF NOVA SCOTIA

Citation: *Gillis Estate (Re)*, 2017 NSSC 6

Date: 20170110

Docket: Hfx No. 454614 (H-62920)

Registry: Halifax

**IN THE MATTER OF the Estate of Ethel Marie Gillis
AND IN THE MATTER OF an Application pursuant to Section 61(1) of the
Probate Act for an Order Removing Philip Charles Walker as
Personal Representative of the Estate of Ethel Marie Gillis**

Judge: The Honourable Justice Ann E. Smith

Heard: December 8, 2016, in Halifax, Nova Scotia

Written Decision: January 10, 2017

Counsel: Kevin Gillis, Self-represented Applicant
Allen Fownes, for the Respondent Philip Charles Walker

By the Court:

Introduction

[1] The applicant, Kevin Gregory Gillis seeks an order removing the personal representative, Philip Charles Walker, pursuant to s. 61(1) of the *Probate Act*, S.N.S. 2000, c. 31 (the “*Act*”). The personal representative is the son-in-law of the testator, Ethel Marie Gillis, and was designated as the sole executor (referred to in this decision as “personal representative”) in her will executed on May 30, 2008. Mrs. Gillis named no alternate personal representative.

[2] Mrs. Gillis died on December 21, 2015. Probate was granted on February 12, 2016 and on May 10, 2016 the inventory of the Estate was filed. The gross value of the Estate was set at \$431,716.09.

[3] Mrs. Gillis bequeathed all of her real and personal property to her personal representative in trust, to realize in his discretion, and to divide the residue of her Estate to her children. The children are not mentioned by name in her will, but it is uncontested that those children are Mr. Kevin Gillis, Mrs. Kendra Walker (the wife of the personal representative, Philip Walker) and Ms. Karen Gillis.

[4] On August 17, 2016 Mr. Gillis applied to the Registrar of the Probate Court of Nova Scotia for an order to remove Philip Walker from the role of personal representative. He asks that the Court appoint another person in his stead.

Issues

[5] The issues on this application are as follows:

- a) Should Philip Walker be removed as the personal representative of the Gillis Estate?
- b) If Mr. Walker is removed, who shall act as the personal representative of the Estate?

[6] The Proctor of the Estate, Ms. Erin O’Brien Edmonds, Q.C. filed a Notice of Objection to the Application on September 20, 2016.

[7] The matter was heard on December 8, 2016.

Position of the Parties

[8] Mr. Gillis says that Mr. Walker must be removed as the personal representative of the Estate. He says that the personal representative has failed to:

1. Provide a List of Inventory to him;
2. Provide a current and fair real property value of the cottage in Queensland (the “cottage property”), Nova Scotia;
3. Disclose all assets of the Estate;
4. Meet his fiduciary responsibilities to treat all beneficiaries equally;
5. Maximize income from the cottage property.

[9] Mr. Gillis also alleges that Mr. Walker has “taken” Estate property, specifically a flatware set, a wedding band and an engagement ring. Mr. Gillis also claims that Mr. Walker sold his mother-in-law’s walker and failed to account for the proceeds of that sale. Mr. Gillis further claims Mr. Walker is in a conflict of interest in circumstances where his wife is a beneficiary of the Estate.

[10] Mr. Walker opposes the application for his removal. He says that his mother-in-law appointed him as personal representative some eight years prior to her death, with no alternate appointment. He says it is not appropriate to replace him, given Mrs. Gillis’ wishes. Mr. Walker argues that he has dealt with his duties as personal representative in a professional and timely fashion and that he will provide a full accounting under the *Act* and *Regulations* at the end of his role as personal representative. He says that he had not taken Estate property and has dealt in an even-handed manner in relation to the beneficiaries of the Estate. He denies that acting in the capacity of personal representative places him in a position of conflict of interest.

[11] For the reasons set forth below, I decline to exercise my discretion to remove Philip Walker as personal representative of Mrs. Gillis’ estate.

Law

[12] Section 61 of the *Act* sets out the basis upon which a personal representative can be removed from his or her position. The portions relevant to the applicant's position are as follows:

REMOVAL OR DISCHARGE
OF PERSONAL REPRESENTATIVES
Power of court and effect of removal

61 (1) On the application of any person, the court may remove a personal representative where the court is satisfied that removal of the personal representative would be in the best interests of those persons interested in the estate and, without limiting the generality of the foregoing, if the court is satisfied that

(a) ...

(b) the personal representative

(i) is neglecting to administer or settle the estate,

(ii) is wasting the estate,

(iii) ...

(iv) ...

(v) ...

(vi) has, within five years of the application, been convicted of theft, criminal breach of trust, destroying documents of title, fraudulent concealment, theft related to improper use of a credit card, possession of property obtained by crime, obtaining anything by false pretences or fraud under the *Criminal Code* (Canada), or

(vii) ...

[13] The burden of proof is on the applicant to establish that the relief sought should be granted.

[14] Justice Duncan in *Lougheed Estate (Re)*, 2013 NSSC 236, at para. 40 noted, "Removal of a personal representative should not be done lightly or without good reason based on evidence." In *Widdifield on Executors and Trustees* (6th ed.) (Carswell, 2013), the author states at p.15-12:

A court will be reluctant to interfere with a testator's exercise of testamentary freedom, and will therefore be generally reluctant to interfere with a testator's choice of estate trustee. Such interference must not only be justified, but amount to a clear case of necessity (*Weil, Re*, [1961] O.R. 888 at 889 (Ont. C.A.)) and should occur only "on the clearest evidence that there is no other course to

follow” (*Crawford v. Jardine*, [1997] O.J. No. 5041 (Ont. Ct. (Gen. Div.) at para. 18)).

[15] The question before the Court is whether Mr. Walker must be removed for failure to administer the Estate in the manner required by law. In considering this question, I note that the applicant must establish, on the balance of probabilities, that the removal is clearly necessary.

[16] The duties of the personal representative are set forth in the *Act*. Additional duties are derived from the common law.

[17] Sections 44-46 of the *Act* provide for the vesting of real property in the personal representative. Additional powers granted by the *Act* include the sale of real property (s. 50), division of real property (s. 51) and a general duty to deal with property as necessary to pay down debt and distribute proceeds to the beneficiaries of an estate (s. 69).

[18] Other responsibilities imposed on the personal representative by the *Act* include the duty to file an inventory of the assets of the deceased (s. 57(1)), a duty to file a further inventory in the event new property is discovered (s. 58), and a duty to account for the administration of the estate (s. 69).

[19] The personal representative must act diligently and not delay the settlement of an estate. *Halsbury’s Laws of Canada* at HWE-266, contains the following direction:

The executor must not unreasonably delay in getting in the assets and settling the affairs of the estate... There is no hard and fast rule as to what constitutes undue or unreasonable delay, but it is the practice to speak of the executor’s or administrator’s year... Therefore, all investments that are not proper to retain should be realized within 1 year of the testator’s death... Normally, too, other residuary property should be liquidated and distribution made within the year.

[20] The case-law provides that it is not necessary for a personal representative to continuously update the beneficiaries (*Winter Estate (Re)*, 2001 NSSC 121), affirmed at 2002 NSCA 23.

[21] While hostility between the personal representative and beneficiaries is not, in and of itself, grounds for removal (*Re Winter Estate*, para. 22), a conflict of interest between the personal interests of the personal representative and the beneficiaries is a ground for removal. In *Loughead Estate (Re)*, *supra*, the personal representative was removed based upon evidence that he was advancing

loans to himself from the estate and taking pre-commission for his administration. These acts were determined by Duncan, J. to be inconsistent with the duty to act in the best interests of the beneficiaries and the duty of utmost good faith owed by a fiduciary to a beneficiary (para. 16).

Discussion

[22] I reviewed the affidavit of Kevin Gillis (Form 46) sworn on August 17, 2016, the affidavit of Philip Walker, sworn on September 23, 2016 and written pre-hearing submissions filed by both parties. Both Mr. Gillis and Mr. Walker were cross-examined on their affidavits.

[23] I note that in his brief, the applicant set forth the content of certain alleged conversations with his mother-in-law, Mrs. Gillis, where he attributes various statements to her. These alleged statements are not relevant to the issues before the Court on this application and are, in any event, inadmissible hearsay.

[24] The personal representative pursuant to Clause 3.c(h) of Mrs. Gillis' will has the authority to:

sell and convey any real estate of which my estate may consist, either for cash or cash and mortgage, as he in his absolute discretion deems advisable and to give such deeds of conveyance, transfer and assurance as he in his absolute discretion deems necessary therefor.

[25] A central argument advanced by the applicant is that Mr. Walker pressured him as to his wishes concerning the disposition of the cottage property, and the use of the cottage by his sisters and their families since Mrs. Gillis' death. Mr. Gillis refers to a letter he received from the Proctor of the Estate dated July 25, 2016 (Exhibit 2). This letter was sent to him by regular post on August 10, 2016 by Mr. Walker. The letter requested a decision from him and his sisters, Kendra Walker and Karen Gillis, as to the cottage property. Each beneficiary was advised that their mother's will provided that any real property could be sold or transferred by her personal representative without the consent of the beneficiaries and that the cottage needed to be transferred to one, two, or all the beneficiaries or sold to allow for equal distribution of the assets. The beneficiaries were asked to advise the Estate Proctor by August 22, 2016 whether they wanted to be deeded their share of the property, or, alternatively, wished to have their share paid out upon completion of the Estate affairs.

[26] Mr. Gillis did not respond to this letter. During the hearing of this application he gave evidence that he would like to purchase the cottage property for the sum of \$115,000, the appraised value determined by Alderney Real Estate Appraisals Ltd. in its report of April 29, 2016. I note that the value of \$115,000 was the value assigned to the cottage property in the May, 2016 Inventory.

[27] Mr. Gillis denied receiving a similar letter to that of the July 25, 2016 letter, supposedly mailed to him by Mr. Walker in June, 2016. While unfortunate that Mr. Gillis felt pressured to make such an important decision within the ten-day or so period (after receipt of the letter) stipulated by Mr. Walker in his July 25, 2016 correspondence, I do not find that this evidences any misconduct or bad faith dealing on the part of Mr. Walker. Rather, I find that he was attempting in his July correspondence to ascertain Mr. Gillis' wishes relative to the disposition of the cottage property. It was reasonable for Mr. Walker to do so. In any event, Mr. Gillis clearly felt that the "deadline" imposed was his to disregard, which he did.

[28] Now that Mr. Gillis' wishes are known, I expect that Mr. Walker will take the necessary steps to either reach agreement with the three beneficiaries as to the ownership of the cottage, or sell it in accordance with Mrs. Gillis' will.

[29] Another issue which was central to Mr. Gillis' argument that Mr. Walker should be removed as personal representative was that the items of personal property detailed on the Inventory were vastly fewer in number than items of personal property which were recently appraised by Crowther & Brayley Ltd. in November, 2016. The latter appraisers prepared a report which was attached to the respondent's brief. Neither party requested that this report be entered into evidence although each acknowledged that the appraisal had been completed and appraised the value of more items of personal property than did the Inventory.

[30] Mr. Gillis submitted that the Crowther & Brayley appraisal was prompted by his filing the within application, and that various items of personal property of Mrs. Gillis "mysteriously appeared" for appraisal by Crowther & Brayley which had not been listed in the Estate Inventory. Mr. Gillis expressed his view that such personal property had been concealed by Mr. Walker.

[31] I am satisfied that the personal representative gathered in Estate property as he learned of its existence, whether by reason of Mr. Gillis' filing the within application and referring to specific items, or by virtue of discovering his mother-in-law's personal property as his search for same progressed. I attribute no

misconduct or shirking of his duties in this regard. I do note that it would be in order for Mr. Walker to file an updated Inventory in accordance with the *Act*.

[32] Mr. Gillis alleged that Mr. Walker “took” his mother’s flatware as well as an engagement and wedding ring at some point after her death. Mr. Walker testified that he had not located any such items. I am satisfied that if such items exist, and are located, that Mr. Walker will account for them. Mr. Gillis has simply asserted that these items were “taken.” He has not proven these allegations on a balance of probabilities.

[33] Mr. Gillis makes a number of serious allegations concerning “theft” of assets by Mr. Walker prior to Mrs. Gillis’ death, and transfer of items of her personal property to the Walker family. None of these matters relate to Mr. Walker’s administration of the Estate and are irrelevant to my disposition of this application.

[34] Mr. Gillis introduced into evidence an email message exchange dated December 14, 2010 between him and a third party on Kijiji concerning the possible sale of a 30-piece sterling silver dinnerware set (Exhibit 4). He suggested that this evidence contradicted the affidavit evidence of Mr. Walker which provided that he had been advised that Kendra Walker had been given a six-piece place setting as a gift from Mrs. Gillis. There was insufficient evidence before me as to when the gift of the dinnerware set was allegedly made relative to the timing of the Kijiji ad to ascertain whether these two events were mutually exclusive or not. I cannot conclude that the silver dinnerware set was improperly taken by Ms. Walker or given improperly to her by Mr. Walker.

[35] Finally, Mr. Gillis asked Mr. Walker during cross-examination on his affidavit whether his wife had sold Mrs. Gillis’ walker to a third party. Mr. Walker said that he had not done so, and had no knowledge of his wife having done so. Mr. Gillis requested that the Court grant him an adjournment of the application in order for him to obtain the evidence of a third party on this matter. The Court denied this request. This application was first filed on August 26, 2016. The applicant has had more than ample opportunity to amass the evidence he wished to advance in support of his allegations. In any event, the personal representative has the discretion to sell items of personal property, such as the walker; he denied doing so. If the applicant had evidence to the contrary, he should have been prepared to present the Court with affidavit evidence on the hearing of the application.

Conclusion

[36] I do not conclude that the Estate is being improperly administered. There is no evidence that Mr. Walker has endangered the Estate property or that any of his actions show dishonesty, a lack of reasonable fidelity or that he has concealed Estate assets. The sporadic use of the cottage property by his children or sisters-in-law during the summer months does not give rise to a finding that he is wasting this asset (not paying rent) in the circumstances. There is no evidence that Mr. Gillis could not have similarly used the cottage property.

[37] Looking at the totality of the allegations, I cannot conclude that there is cause to remove Philip Walker as personal representative. There is no need for me to direct an alternate person be named as personal representative.

[38] I therefore dismiss the application.

Costs

[39] Mr. Gillis says that he did not bring this application lightly and was concerned the Estate property was not properly accounted for by Mr. Walker until he filed the within application. He claims filing fees in the amount of \$66.00.

[40] Mr. Fownes, on behalf of the respondent, argues that Mr. Willis should bear his own costs for what he says was an unnecessary and meritless application and should pay costs to the Estate.

[41] Section 92 of the *Act* deals with costs in contested matters and provides as follows:

Costs in contested matters

92 (1) In any contested matter, the court may order the costs of and incidental thereto to be paid by the party against whom the decision is given or out of the estate and if such party is a personal representative order that the costs be paid by the personal representative personally or out of the estate of the deceased.

(2) An order made pursuant to subsection (1) may be reviewed by the Nova Scotia Court of Appeal or any judge thereof in chambers, upon notice given in the prescribed manner and form by the party aggrieved to the opposite party, and such order may be made thereon as the Court or the judge considers just and proper.

(3) An order for the costs of an application may be made personally against a personal representative where the application is made as the result of the personal representative failing to carry out any duty imposed on the personal representative by this Act.

(4) An order for costs in an application may be made personally against a personal representative who has made the application where the application is frivolous or vexatious. 2000, c. 31, s. 9

[42] The *Civil Procedure Rules* set out the normal considerations to be applied in determining the cost consequences of a legal proceeding.

[43] Costs normally are awarded to the successful party. In this case the Estate has been successful.

[44] I agree with the submissions of counsel for the Estate that this application was unnecessary. However, I do not find, as argued by counsel for the Estate, that the application was vexatious. Mr. Gillis had a legitimate expectation to understand how the cottage property would be dealt with. He may have been misguided in not responding to the letter of July 25, 2016 from the Estate Proctor (not received by him until some date after August 10, 2016) requesting that he advise as to his wishes relative to receiving his share of the cottage property by August 23, 2016, but in the circumstances his feeling that he was being pressured into making such an important decision in a ten-day or so time frame, is understandable.

[45] I also note that it is important that the personal representative take steps to deal with the cottage property in accordance with the terms of the will. If the beneficiaries, including Mr. Gillis, cannot come to mutually-agreeable terms as to its disposition between the three of them, it must be sold and the proceeds split three ways.

[46] I see no basis on which the Estate should receive its full solicitor-client costs. The conduct of Mr. Gillis was not the type of behaviour which would attract a solicitor-client award of costs under Tariff 'C' of the *Civil Procedure Rules*. A hearing of half a day or less would normally result in costs in the range of \$750 to \$1,000. The Tariff also provides that a judge may apply a factor of two, three or four if the application is determinative of the entire matter at issue in the proceeding. The factors to consider are the complexity, the importance of the issues and the effort involved in preparing for and conducting the application. The sole issue in this proceeding was the issue of the removal of the personal representative and that has been resolved. I decline to order a multiplier in the circumstances.

[47] I award the Estate costs of \$750 to be paid by Mr. Gillis.

Smith, J.