COURT OF PROBATE FOR NOVA SCOTIA
Citation: *Deagle v. Deagle Estate*, 2019 NSSC 70

In the Estate of Mary Catherine Deagle, Deceased

Date: 2019-02-25
Probate No.: 58689
Docket: Hfx No.: 452357
Registry: Halifax

Between:

Steven Deagle

Applicant

v.

The Estate of Mary Catherine Deagle

Respondent

D E C I S I O N

Judge:	The Honourable Justice Glen G. McDougall
Heard:	July 13, 2018, in Halifax, Nova Scotia
Written Decision:	February 25, 2019
Counsel:	Andrea Pierce for Richard Norman, on behalf of Steven Deagle George M. Clarke, on behalf of previous Proctor Keith Lehwald, on behalf of the Proctor John Deagle, self-represented

By the Court (McDougall, J.):

[1] Mary Catherine Deagle passed away on December 20, 2014. She was survived by her three children: John ("Jack") Deagle, Steven Deagle and Lynn Graham. Her husband, John Charles Deagle, had predeceased her.

[2] The late Mary Catherine Deagle's Last Will and Testament left everything to her husband who was also named to be her personal representative in the event he survived her.

[3] In the event her husband failed to survive her, two other individuals were named to act as co-executors and trustees of her Estate. She further directed that all of her property, both real and personal, including any policies of insurance on her life, should go to her named trustees to be held in trust for any children born to or adopted by her and her husband until they each attained the age of nineteen years at which time an equal share of the residue of the Estate would be paid to him or her. When she died in 2014, Mary Catherine Deagle's three surviving children were all well beyond the age of nineteen years.

[4] One of the alternate trustees named in the Will of Mary Catherine Deagle – Shirley Dawson – renounced her right to apply to be appointed as co-executor and trustee.

[5] The other named co-executor and trustee – Norma Shannon – was, according to her medical doctor, incapable of acting as a co-executor of a Will due to her medical condition.

[6] On July 3, 2015 a Grant of Administration with Will Annexed was issued to John "Jack" Deagle. Jack Deagle is the eldest of the deceased's three surviving children.

[7] George M. Clarke of the firm Boyne Clarke, LLP was appointed Proctor. In this role, Mr. Clarke provided legal advice to the Estate's personal representative, Jack Deagle.

[8] Once the Grant of Administration with Will Annexed was issued and the required advertising was done, an Estate Inventory was then filed and the work required to administer the Estate and to carry out the deceased's wishes to underway.

[9] Unfortunately, the work of administering the Estate eventually bogged down. The remaining two beneficiaries became frustrated with their brother's lackadaisical approach to settling the Estate particularly when it came to the disposition of the residence formerly occupied by their mother. The home had also been the home of the personal representative for many years prior to his mother's death. Not only did he continue to occupy the residence after his mother died, he also used other Estate assets to maintain the property and to pay for utilities and property taxes. There was little incentive for him to prepare the property for eventual sale.

[10] In an effort to address the festering problem, the other two beneficiaries – Steven Deagle and Lynn Graham – brought a motion seeking to have Jack Deagle removed as administrator of the Estate which would then clear the way for one or both of them to apply to take on the role.

[11] When the matter first came before me on September 15, 2016, I decided to, in effect, case manage the file. Mr. Clarke, the Proctor of the Estate at that time, satisfied me that the administrator had made considerable progress in fulfilling his responsibilities as the personal representative. A Clearance Certificate had yet to be obtained from Canada Revenue Agency ("CRA") and a decision regarding the disposition of the Estate's principal asset - the former residence of the deceased located at 30 Guildwood Crescent, Halifax, Nova Scotia –remained outstanding.

[12] The motion was set over to November 18, 2016 to give the personal representative the opportunity to show that he was sincere in his commitment to close the Estate. The Motion had to be adjourned several more times, first to December 15, 2016 then to February 23, 2017 and finally to May 2, 2017. During that time the Proctor – Mr. Clarke – obtained the necessary Clearance Certificate from CRA but the issue regarding the disposition of the deceased's residence persisted. The main stumbling block was the Estate administrator. Despite the many opportunities given to him by the Court to either buy out the interest of his two siblings or to list the property for sale, he did little, if anything, to move the matter forward. Indeed, it appeared that he was not only intent on frustrating the wishes of the other two beneficiaries, he was prepared to also ignore the directives of the Court.

[13] I should point out that the Proctor was in no way responsible for this situation. Mr. Clarke did whatever he could to advise and encourage his client to perform the duties of a personal representative/administrator. The Court

appreciates his efforts on behalf of the Estate as well as the assistance he provided to the Court during this time period.

[14] At the hearing before me on May 2, 2017, I granted an Order (issued May 15, 2017) that ordered the removal of Jack Deagle as administrator (unless he earlier signed the necessary forms renouncing his right to continue to administer the Estate) without discharging him from any responsibility for what he did while serving in that capacity. He was also ordered to give up vacant possession of the residence on or before May 31, 2017, failing which, the Sheriff would remove him and any personal belongings of his still located on the property at that time.

[15] The Order also provided for the sale of the property to Steven Deagle for a purchase price of $120,000.00. This offer had earlier been rejected by Jack Deagle who, after deciding for whatever reason that the offer was not acceptable, made his own offer to purchase the property for $90,000.00. It escapes me how an offer 25% lower than one made by one of the other Estate beneficiaries could possibly be seriously entertained. What it does show is the former administrator's disregard for his role as the personal representative. He was more interested in looking after himself than his two fellow beneficiaries. It also demonstrates his rather cavalier attitude towards Court orders. Despite being given several extensions to vacate the residence and removed with his personal belongings, the Sheriff's deputies had to physically remove him from the premises. Movers were hired to remove numerous and sundry personal effects that had been left behind. The cost for Sheriff's fees and the removal of these items as well as clean-up expenses will be re-visited later in this decision.

COSTS

[16] The authority to award costs in Estate matters is found in the *Probate Act*, S.N.S. 2000, c. 31. Section 92 of the *Act* provides:

> **Costs in contested matters**
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> 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.
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> …..

> (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.

[17] *The Probate Act* also incorporates the *Civil Procedure Rules* within its ambit. At Section 102, the *Act* reads:

> **Application of Civil Procedure Rules**
>
> 102 Where no provision is made in this Act or in the Probate Rules with respect to practice or evidence and in so far as this Act or the Probate Rules do not extend, the *Civil Procedure Rules* apply.

[18] The general discretion to award costs is succinctly captured in Rule 77.02(1) which provides:

> **General discretion (party and party costs)**
>
> **77.02 (1)** A presiding judge may, at any time, make any order about costs as the judge is satisfied will do justice between the parties.

[19] In *Wittenberg v. Wittenburg Estate*, 2015 NSCA 79, Bryson J.A. provided a very useful review of the evolution of costs in estate matters beginning at para. 91 *et sequentes*. In particular, paras. 96 to 100 of the decision seem to capture the approach the Courts now take to determining what costs should be awarded and who bears the burden of paying and to whom:

> [96] The increasing primacy of the usual rule finds expression in a recent decision of the Ontario Court of Appeal. In *McDougald Estate v. Gooderham*, [2005] O.J. No. 2432 (Ont. C.A.), Gillese, J.A. speaking for the court, described the contemporary approach:
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> > [80] However, the traditional approach has been – in my view, correctly – displaced. The modern approach to fixing costs in estate litigation is to carefully scrutinize the litigation and, unless the court finds that one or more of the public policy considerations set out above applies, to follow the costs rules that apply in civil litigation. Four cases usefully illustrate this modern approach.
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> > [...]
> >
> > [85] The modern approach to awarding costs, at first instance, in estate litigation recognises the important role that courts play in ensuring that only valid wills executed by competent testators are propounded. It also recognises the need to restrict unwarranted litigation and protect estates from being depleted by litigation. Gone are the days when the costs of all

> parties are so routinely ordered payable out of the estate that people perceive there is nothing to be lost in pursuing estate litigation.
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> [97] This trend appears in some Nova Scotia cases: *Harnum v. Moser*, 2007 NSSC 351; *Van Kippersluis v. Van Kippersluis Estate*, 2011 NSSC 399.
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> [98] The policy reasons for the old rule are weaker now. By contrast, litigation is more expensive than ever. A rule that accommodates a losing party with costs is an inducement to litigation. Although the public interest component remains in probate litigation, the liberality of contemporary disclosure and the court's policy of encouraging settlement, (*Ameron v. Sable*, 2013 SCC 37), favours the usual rule that the victor should be indemnified by the vanquished.
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> [99] To the extent that there was a traditional practice of paying costs of all parties out of the estate, those days are over. Provided that a personal representative is discharging her duties and is acting reasonably, she can be expected to be indemnified from the estate. Not so with an adverse party, who may obtain party-party costs if successful, but may have to bear her own costs or even have to pay them, if unsuccessful. If the court proceeding can be ascribed to conduct of the deceased or residuary beneficiaries, a losing party may still recover costs from the estate, although usually on a party-party basis (*Casavechia, supra*; *Townsend v. Doherty*, 1993 O.J. No. 713, per Borins J. as he then was; *Gamble v. McCormick*, 2002 O.J. No. 2694 (S.C.J.); *Holzel v. Mjeda*, 2000 ABQB 549; *Oldfield v. Oldfield Estate*, 1994 O.J. No. 2529).
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> [100] Awarding costs against or out of an estate means that the expense usually is borne by the residuary beneficiaries. It is appropriate to ask whether that is a proper burden for them to bear. Where the personal representative is discharging her duties and there is no other unsuccessful party to share at least some of the burden, there is nothing that can be done to mitigate this indirect charge on the generosity of the testatrix, at the expense of the residuary beneficiaries. But where, as here, there is an unsuccessful party who is the cause of the litigation, it is proper that the unsuccessful party bear much of the burden. Moreover, in this case, there was very little lay evidence, and no expert evidence, sustaining Mr. Wittenberg's allegations. Finally, those allegations were not confined to incapacity, but also cast the aspersion of undue influence.

[20] Shortly before the *Wittenburg* decision was released, the Nova Scotia Court of Appeal in *Casavechia v. Noseworthy*, [2015] N.S.J. No. 238 (2015 NSCA 56), also dealt with the issue of costs in an estate matter. At paras. 69 and 70, Oland J.A. wrote:

> [69] The decision in *Jollimore Estate v. Nova Scotia (Public Archives)*, 2012 NSSC 8 issued after Rule 77 came into effect. After referring to that Rule and, among other authorities, this Court's decisions in *Morash and Fair Estate v. Fair Estate* (1971), 2 N.S.R. (2d) 556 (N.S.S.C.A.D.), Coughlan J. stated at ¶ 18:

> It has long been the law in Nova Scotia that in the case of executors and trustees their costs are paid out of the estate on a solicitor and client basis.
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> This Court's 2013 decision in *Prevost Estate* at ¶ 17 also indicates that generally, the personal representative of an estate will receive its costs from the estate on a solicitor and client basis.
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> [70] In summary, there is a long line of jurisprudence in this Province that has held that the costs of the executor or personal representative of an estate involved in litigation pertaining to the estate is entitled to costs from the estate on a solicitor and client basis if it has acted reasonably.
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> [Emphasis added]

[21] In his brief filed on behalf of his clients, Steven Deagle and Lynn Graham, Mr. Norman referred to a decision of Coughlan J. in *Jollimore Estate (Trustee of) v. Nova Scotia (Public Archives)*, 2012 NSSC 8, where at para 22 he wrote:

> [22] Mr. Ian M. Hull in an article, "Costs In Estate Litigation" (1998),18 E.T.R. (2d) 218, set out factors which are favourable or unfavourable to an award of costs from an estate as follows:
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> "Some considerations favourable to an award of costs out of the estate are:
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> · where the litigation arises out of the acts or fault of the deceased;
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> · where the order sought is for the protection of the trustee, such as an interpretation problem or where other directions or advice of the court are sought;
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> · where there are reasonable grounds for the litigation such as proof in solemn form;
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> · where suspicious circumstances are demonstrated;
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> · where the court's scrutiny or supervision is warranted.
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> Some considerations unfavourable to an award of costs out of the estate are:
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> · proceedings unwarranted or unjustified;
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> · intransigence of a party to a proceeding arising out of extra-legal considerations such as bad feelings between the parties;
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> · actions by a party designed to delay or prohibit the trustee's administration of the estate without proper reasons for such action;
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> · unnecessary proceedings, where for example, a subsequent will is not located by the executor or executrix as a result of an incomplete search therefor.

> However, the question that must be foremost in counsel's mind is how to convince the court that the questions raised warrant investigation and inquiry of the circumstances, are sufficient to require proceedings to be taken."

[22] One of the considerations unfavourable to an award of costs out of the Estate includes:

- Intransigence of a party to a proceeding arising out of extra-legal considerations such as bad feelings between the parties;

[23] This was the situation that forced Steven Deagle and Lynn Graham to rely on the Court to resolve the impasse that had developed after their mother's passing. The administrator/personal representative – Jack Deagle – failed to live up to his obligations to properly administer the Estate despite repeated requests from his two siblings to move things along. He simply refused to do so. And, despite being granted additional time by the Court, he stubbornly hung on to his desire to remain in the residence while having the Estate pay for maintaining it. This intolerable situation got to the point where it could no longer be countenanced.

[24] The Court gave Jack Deagle a choice. He could resign as the administrator of the Estate or be removed and replaced by someone else. As previously stated he eventually renounced the right to continue to administer the Estate. He did not, however, vacate the premises as ordered. He and his personal belongings had to be gathered up and removed. The expense associated with cleaning up and removing the items remaining in and about the property was dealt with by the Registrar at the hearing of the Passing of Accounts. Approximately $3,000.00 was ordered deducted from Jack Deagle's share of the residue of the Estate. I see no reason to interfere with her decision.

[25] The Registrar further ordered that approximately $15,000.00 should also be deducted from Jack Deagle’s share of the residue to reimburse the Estate for expenses that should have been paid personally by Jack Deagle during the time he occupied the residence beyond the one-year period allowed in s-s. 53(2) of the *Probate Act*. As with the Registrar’s decision to order the clean-up expenses to come out of Jack Deagle’s share of the residue of the Estate, I see no reason to interfere with the Registrar’s decision.

[26] Before deciding on what commission should be awarded to Jack Deagle for the work he did to administer the Estate prior to his removal and the commission to

be paid to the new administrator – Steven Deagle – the Registrar instructed counsel to get a ruling from this Court on:

(1) legal fees and disbursements incurred by Jack Deagle while he was administrator;

(2) legal fees and disbursements incurred by Steven Deagle and Lynn Graham in their efforts to have Jack Deagle removed as administrator; and,

(3) payment of Sheriff's fees.

[27] Once I make my decision, the matter will be referred back to the Registrar of Probate so she can deal with commissions and all other closing-related matters.

Sheriff's Fees

[28] I will deal first with the fees charged by the Sheriff to remove Jack Deagle from the property located at 30 Guildwood Crescent, Halifax and to arrange to have his personal belongings removed. They total $380.57. He should be held personally responsible for payment of this expense. His refusal to follow the Court's order resulted in this needless expense to be incurred. The Estate should not have to pay for his intransigence.

Legal Fees and Disbursements incurred by Jack Deagle while still Administrator

[29] The Proctor for the Estate throughout the period while Jack Deagle was the administrator was Mr. George M. Clarke of Boyne Clarke LLP.

[30] Mr. Clarke filed a pre-bill on May 4, 2018 showing total unbilled time valued at $9,605.00. With HST added, the total adds up to $11,045.75. Disbursements plus HST adds a further $294.80 to the unbilled amount for a grand total of $11,340.55.

[31] In the cover letter accompanying the pre-bill, Mr. Clarke indicated that his firm will not be seeing reimbursement for "LD2" time billed. These time entries and the corresponding dollar values were crossed out but not deducted from the total unbilled time referred to above.

[32] The total dollar value attributed to "LD2" adds up to $854.00. When HST is applied ($128.10) the amount remaining in unbilled time together with HST amounts to $10,063.65. When combined with disbursements the total for unbilled time + HST adds up to $10,358.45. This covers the period from January 6, 2016 up to March 15, 2018. It does not cover the final appearance before me in Chambers on July 13, 2018 when costs were argued. By then a new Proctor had been appointed and Jack Deagle was, in effect, representing himself. Throughout this period approximately one-half of the charges can be linked to the application to have Jack Deagle replaced as administrator. The time entries describe the work done by Mr. Clarke and others in his firm to salvage what had been done by the administrator to move the Estate closer to the point where the real estate could be sold and the closing accounts then presented to the Registrar for her review. I commend Mr. Clarke for his efforts to try to keep this thing on the rails. However, when dealing with the administrator there was only so much Mr. Clarke could do. The delays and added costs incurred in administering this Estate are directly attributable to Jack Deagle's stubborn refusal to acknowledge that he could not simply continue to occupy the residence and expect the Estate to cover the expenses associated with its upkeep. His intransigence falls squarely in the list of "considerations unfavourable to an award of costs out of the estate" set out in Hall's article, "*Costs in Estate Litigation*" which was referred to by Coughlan J. in *Jollimore Estate*, *supra*.

[33] I take no issue with Mr. Clarke's bill which I tax and approve in the total amount of $10,358.45. I do, however, find it unacceptable to have the entire amount paid out of the Estate account. This would, in effect, force the other two residuary beneficiaries to bear legal expenses arising from their brother's failure to properly carry out his role as administrator. For that he should be held personally responsible.

[34] I, therefore, direct that 50% of the first Proctor's outstanding account should be paid by the Estate and the remaining 50% ($5,179.22) shall be paid out of Jack Deagle's share of whatever is left for distribution to the Estate's three beneficiaries. These payments are in priority to what I order be paid to counsel for Steven Deagle and Lynn Graham.

Legal Fees and Disbursements incurred by Steven Deagle and Lynn Graham in their efforts to have Jack Deagle removed as administrator

[35] Steven Deagle and Lynn Graham incurred significant legal expenses to have their brother removed as administrator. For the period between March 27, 2015 and June 15, 2018, they were billed a total of $19,513.02, including HST and disbursements. If Jack Deagle had done what he undertook to do when he applied to become administrator, a lot of this unnecessary legal expense could have been avoided. But, as indicated previously in my decision, Jack Deagle thanks mainly to the efforts of Mr. Clarke, did manage to make some progress in moving the matter forward. He managed to obtain a Clearance Certificate from Canada Revenue Agency and to prepare Closing Accounts for review by the Registrar. If not for his unwillingness to recognize that he did not have the financial resources to buy out his siblings' share of their mother's home and his refusal to vacate the premises so it could be sold, the Estate could have been settled much sooner and with considerably less expense.

[36] In an effort to credit Jack Deagle for making some attempt to ready the Estate for closing, while not losing sight of the fact that his obstinacy in refusing to accept the inevitable cost Steven Deagle and Lynn Graham a considerable sum in legal fees and disbursements, I tax and approve Cox & Palmer's account in the total amount of $19,513.02. I order that 25% of this amount should be paid by the Estate. The remaining 75% ($14,634.76) shall be paid from Jack Deagle's share of whatever is left for distribution after closing. This will likely eat up much of what he would have otherwise received from his late mother's Estate. If there should be any shortfall, it will remain Jack Deagle's personal responsibility to pay. Unfortunately he has no one other than himself to blame for that.

[37] I ask counsel to prepare the Order reflecting this decision. Nothing in this decision affects what the Registrar of Probate has already decided. Once the Order is issued the matter can then be sent back to the Registrar to determine what commission, if any, should be paid to each of the two administrators.

McDougall , J.