

SUPREME COURT OF NOVA SCOTIA

Citation: *Krauch v. Degen Estate*, 2021 NSSC 108

Date: 20210326

Docket: Hfx No. 500270 (H-64333)

Registry: Halifax

Between:

Maureen Krauch

Applicant

v.

Estate of William Degen

Respondent

<p>DECISION</p>

Judge: The Honourable Justice Jamie Campbell

Heard: March 24, 2021, in Halifax, Nova Scotia

Counsel: Mark Holden, for the Applicant
Jeanne Desveaux, for the Respondent

By the Court:

[1] Whatever one's beliefs might be surrounding death, it is likely safe to say that very few people would want their surviving children to be arguing in court about the placement of their ashes almost 5 years after their death. But there are strange things done in the name of "respect".

Summary

[2] William Edward Degen died on July 30, 2016. His son and executor, Terry Degen, has filed the accounts and wants to close his father's estate. The process at this stage is about the passing of those accounts. It is not about the validity of the will. One of the late Mr. Degen's six surviving children, Maureen Krauch, has contested the closing of the estate. She says that her brother had her mother's ashes moved so that when her father's ashes were interred, they were not with his mother's ashes, as their father had wanted. That was the real issue. She also says that she has not received any funds from her father's estate while her siblings have each got about \$10,000.

[3] A person's ashes are not a part of their estate. A will does not provide legally binding conditions as to the disposition of the testator's ashes. The executor has common law obligations with respect to the body of the deceased person. Those are to dispose of the human remains of the testator in a dignified and respectful way. That was done by cremation. What happens to the ashes after that is not an issue that relates to the estate of the deceased. The dispute should not stand in the way of closing the estate.

[4] Ms. Krauch has said she had "many concerns" about the accounts. In her evidence she did not say what those "concerns" were. She said that the executor provided her with inconsistent information, verbally and in writing. The evidence from the executor indicates that the accounts were consistent with money coming into the estate and expenses being paid from the estate. Ms. Krauch's alternative claim for relief under the *Testators Family Maintenance Act* would have to have been made about three years ago.

[5] The accounts are passed.

Background

[6] William Edward Degen was married to Helen Valentine Degen for 62 years. They had 7 children. In 1983 the couple bought a burial niche at Jesus Christ the Redeemer, Dartmouth Memorial Gardens. On May 24, 2011 Helen Degen died. She did not have a will. She was cremated and her ashes were placed in the burial niche.

[7] A few months after his wife's death William Edward Degen signed a will dated November 9, 2011. The validity of that will has not been contested. In the will Mr. Degen appointed his son Terry Degen as his executor and provided for the distribution of the rest and residue of his estate among his surviving six children "in such proportions, shares, or amounts as my Trustee in his sole absolute discretion chooses". The will gave the executor broad discretion to distribute the estate amongst his siblings. It provided that the executor may choose, in his absolute discretion, to give nothing to one or more of his siblings provided that at least one of William Edward Degen's children was given the residue of the estate. The will expressed Mr. Degen's wish that he be cremated and that his ashes be placed in the columbarium with those of his late wife at Jesus Christ Redeemer, Dartmouth Memorial Gardens.

[8] William Edward Degen bought a cremation bench on March 21, 2014. That was also at Dartmouth Memorial Gardens. The cremation bench is separate from the burial niche. It could accommodate 5 urns and is located about 25 feet from the burial niche that contained the ashes of Helen Valentine Degen. In September 2014 Mr. Degen moved into the Camp Hill Veterans Memorial Unit at the QEII Health Sciences Centre. He died on July 30, 2016.

[9] The affidavit of Kelly Ileen Miller, Mr. Degen's daughter, describes the interment. Ms. Miller says that it was a memorable occasion. Terry Degen supplied roses for each of the grandchildren. He provided miniature bottles of Crown Royal whiskey and included one for their father to be placed in the burial niche with his ashes. The cremation bench into which Helen Degen's ashes were placed had a cribbage board design incorporated in it and a crib board and a deck of cards were placed with her ashes.

[10] At the end of the family service the funeral director was instructed to place Helen Degen's ashes in the cremation bench. That meant that William Edward Degen's ashes remained in the burial niche while Helen Degen's ashes were removed and placed in the cremation bench. Terry Degen says that the decision to move his mother's ashes from the niche to the bench was not a decision that he

made lightly. The affidavit of Kelly Ruth Anne MacKenzie, one of the six surviving children, says that Helen Degen “wanted no part of my father, whether dead or alive, and she expressed it to me on many occasions”. It is enough to say that the view of the couple’s children who remained in Nova Scotia was that their parents’ marriage was troubled.

[11] Ms. Krauch says that her mother had never indicated to her a wish to have her ashes interred separately from those of her husband. William Edward Degen’s ashes were placed in the spot designated in his will, the burial niche at Jesus Christ the Redeemer, Dartmouth Memorial Gardens. They were not moved from that spot. Ms. Krauch’s concern is that those ashes are not placed with the ashes of her mother, Mr. Degen’s wife, Helen Degen. She wants the ashes of her mother put back in the niche where they had been for about 5 years before her father’s death.

[12] Later in his father’s life Terry Degen helped him to look after his finances. The elder Mr. Degen was interested in avoiding the payment of taxes on his estate. He had two life insurance policies naming Terry Degen as his beneficiary and Terry Degen held joint bank accounts with him. There was no evidence of impropriety. On Mr. Degen’s death the money from the joint accounts and the life insurance proceeds went directly to Terry Degen. That money was not part of William Edward Degen’s estate. But Terry Degen’s position was that the money should be shared with his siblings. They were provided with about \$10,000 each from the money that was not part of the estate. Ms. Krauch and Mr. Degen became involved in the dispute about the location of their parents’ ashes and while Mr. Degen was prepared to share the proceeds with her, as he had with the other siblings, he was not willing to do so if the condition was that the ashes of their parents be kept together. This was money that was not part of the estate.

[13] After William Edward Degen’s death a Grant of Probate was issued to Terry Degen on September 17, 2017. The estate was advertised in the *Royal Gazette* for six months starting on November 1, 2017.

[14] An application to pass the accounts without a hearing was set scheduled for September 30, 2020. On September 2, 2020, a Notice of Objection was received by the Probate Court from Ms. Krauch. That notice set out her objections. She said that she had not been consulted about the disinterment of her mother, Helen Degen. She said that she disputed the accuracy of the final accounts of her father’s assets.

The Accounts

[15] This was not a large estate. The accounts should not be complicated. There was about \$70,000 in insurance proceeds and in a joint account but once again, that money was not part of the estate.

[16] On February 28, 2017 Terry Degen wrote to Ms. Krauch's solicitor in British Columbia, Paul Scrambler Q.C. He explained that the family home had been sold in January 2014 and at that time William Edward Degen asked his son to distribute \$5,000 to each of his surviving children and \$5,000 to the children of his deceased daughter.

[17] At that time the estate consisted of a rebate from Eastlink of \$86.16, a credit on a Bank of Montreal credit card of \$39.01, a rebate from Capital Health District for August 2016 rent of \$940, a CPP benefit of \$2,500, a refund from Revenue Canada in an amount to be determined, and the value of the contents of Mr. Degen's room at Camp Hill Hospital.

[18] The Inventory filed January 22, 2018 shows a total value of the estate at \$21,724.62. Of that amount, \$21,224.62 was in a chequing account.

[19] The Inventory filed on March 21, 2019 shows a chequing account with a balance of \$14,738.49. That was made up of the \$2,500 CPP benefit, \$71,13.32 in disability tax credits for 2014, 2015 and 2016, \$5,000 as a supplementary death benefit, \$39.01 for the credit card rebate, and \$86.16 for the Eastlink credit. Personal effects were valued at \$500.

[20] Ms. Krauch says that she cannot understand how her siblings each got \$10,000 from the estate in that case. And how did the value go from \$21,724.62 to \$14,738.49? The explanation is that Mr. Degen provided money to his siblings that was not part of the estate. He gave them the insurance proceeds and money from the joint account that was, on his father's death owned by Terry Degen, personally. Mr. Degen put some of that money into the estate account. It should not have been. The Inventory, which is really an Amended Inventory, filed on March 21, 2019 is an accurate statement of the funds that were in the estate itself. Ms. Krauch did not provide any evidence to indicate that the accounts were anything other than accurate and nothing to substantiate her claim that she should receive the same \$10,000 amount as her siblings.

[21] The will provides the executor with remarkably broad discretion. The late Mr. Degen's property was to be distributed to his surviving children in such shares

as determined by his executor in his sole and absolute discretion. The will was not contested.

[22] Ms. Kauch's alternative financial claim is based on an assertion that the court should exercise discretion under the *Testator's Family Maintenance Act* to award her an appropriate amount from the estate. The Grant of Probate was issued on September 29, 2017. Ms. Krauch was represented by legal counsel at that time. Any claim under the *Testator's Family Maintenance Act* had to be made within six months of that Grant of Probate. This claim was not put forward until it appeared in the solicitor's brief filed on February 18, 2021. It is out of time.

Funeral and Burial Arrangements

[23] The case was far less about accounts than it was about ashes.

[24] Wills deal with the disposition of a person's estate. A person's body is not part of their estate. Whether a person is cremated or buried, whether a service of remembrance is held, the form and location of the burial or the manner in which ashes are either kept or disposed of, are all matters over which an executor has control. The testator may express a wish, but it is just that.

[25] Terry Degen as executor of the will of William Edward Degen was under an obligation to dispose of the body of his late father in a dignified manner. By having Mr. Degen's body cremated by a funeral director, he did that. His obligations at common law were fulfilled. The *Probate Act* does not regulate the interment of ashes or deal with who, if anyone, has the right to possess the ashes of the deceased person. It deals with estates. It allows for the payment of the costs of a funeral from an estate. Disputes about how a person's ashes are to be kept are not disputes that involve the passing of the accounts of the estate. Ms. Krauch's concerns about the internment of her parents' ashes are not grounds for the court to refuse to pass the accounts. That is particularly true when the concern is with respect to the placement of her mother's ashes, raised in the context of the passing of the accounts of her father's estate.

The Legal Status of Ashes

[26] When a body is buried, as is required in some religious traditions, there is a sense of finality. A burial plot is sometimes referred to as a last resting place. And there is reason for that. Human bodies are not generally subjected to being disinterred and moved elsewhere. Once the burial is done, except for gravesite

maintenance and grave markers, there is limited scope for dispute. Cremation is different.

[27] Ashes are not a human body. There are laws and regulations that govern many aspects of the treatment of the body of a dead human being. Some of those rules are based on health concerns and some have their basis in the concern for basic human dignity. Ashes are not the same. A person's ashes may be divided among family members, placed in urns, moved from place to place, kept on a mantle, buried, scattered or used to create a "diamond".

[28] As noted by Justice Richard (as he then was) in *Mason v. Mason* 2018 NBCA 20, disputes about the final resting place of a deceased person are "exceedingly rare". Justice Richard in that case dealt with a claim brought by a surviving spouse who had applied to the Court of Queen's Bench for an order to allow her to disinter the remains of her late husband to relocate them to another cemetery. The deceased was buried next to his father, in the family plot owned by his mother. His wife came to believe that her husband had not had a good relationship with his father and wanted to disinter the body so that he could be buried somewhere else. The cemetery refused to allow for the disinterment without the consent of the mother, who was the owner of the plot. She refused that consent.

[29] The application judge noted that in New Brunswick there was no legislative regime governing the disposition of a deceased person's remains. At common law there is no property in a dead body. The executors, administrators or next of kin have the right to custody and possession of the body until it has been properly buried or otherwise disposed of. That right of custody or possession is limited to carrying out the actions for which it was granted, namely ensuring that the body is properly dispositioned.

[30] The application judge determined that they had jurisdiction to decide whether the remains of a deceased person should be disinterred. The New Brunswick legislation governing cemeteries provided that no person can reopen a grave in a cemetery without consent from the Medical Health Officer or an order from the Court of Queen's Bench. Such an order should be made only with clear compelling and cogent reasons. In that case the remains were properly interred in a way that was generally acceptable to the deceased person's next of kin. There were insufficient reasons to disrupt the sense of finality inherent in the funeral process.

[31] Justice Richard at the Court of Appeal did not disagree with the approach taken by the application judge. Once the body was buried the wife, as executor, did

not maintain a continuing right over it. The case did not deal with the estate of the deceased person. It dealt with the burial and disinterment of a human body. This case deals with ashes. They are different. And that difference is significant.

[32] The common law requires that the executor deal with the body of the deceased in a way that is dignified and respectful. Having the body properly cremated complies with that requirement. The executor then has custody of the ashes of the deceased person. They are not part of the estate. But the executor must decide what to do with them. A buried human body cannot easily be disinterred and taken elsewhere. Ashes need not be interred at all and can be divided into parts and taken almost anywhere.

[33] Family members can be involved in disputes about who should get the ashes, how much of them they should get, how the ashes should be respectfully kept, whether the ashes kept by any other family member can be scattered in a way that the other members disapprove of, and those disputes could carry on for decades. The scope within which people might indulge their litigious natures is potentially unlimited. There may be very different and strongly held opinions as to what is “respectful” with regard to either maintaining or disposing of ashes.

[34] There is no property in a human body or in human remains. There are obligations imposed on executors but there are no property rights or rights of ownership with respect to the human body or human remains. The executor is required to dispose of the body in a way that is dignified and respectful. Those legal principles, when taken together, inform the role of the executor in dealing with the ashes of a person who has been cremated. Those ashes come into the custody of the executor and the obligation to arrange for respectful and dignified disposition of the body continues. There is no requirement that they be treated in the same way as a human body. But the executor’s obligations are fulfilled when arrangements have been made for the appropriate disposition of the ashes. That may involve simply scattering them, having them buried or otherwise interred, or provided to family members, all at the discretion of the executor. An executor is not bound by a testator’s wishes to have ashes scattered in a particular place or places or retained or interred in a particular way. An executor should not be responsible for what family members or others do with the ashes that have been entrusted to them. And estates should not be required to respond to claims by family members for a share of the ashes or for a say in the final disposition of the ashes. That kind of litigation would be unseemly, wasteful and the very opposite of dignified.

[35] Terry Degen arranged for the disposition of his father's ashes. They were placed in a niche bought for that purpose. Though he was not bound to comply with his father's wishes about his ashes, as expressed in his will, Mr. Degen tried to accommodate those wishes. He fulfilled his obligations as an executor and as a son. The ashes of Helen Degen are not part of the Estate of William Edward Degen. The removal of those ashes from the burial niche and their placement in a cremation bench was not done by Terry Degen in his capacity as executor of the estate of his father. It is not an action that would have any bearing on the passing of accounts in the Estate of William Edward Degen. And in any event, there was no legal impediment to the moving of ashes, by the funeral director, from a niche to a cremation bench.

[36] The accounts are passed and Ms. Krauch's contest of the accounts is dismissed.

Costs

[37] The awarding of costs in this case is not intended to punish Ms. Krauch for contesting the passing of the accounts. But this was a wasteful exercise. The estate should not be required to bear the cost of it.

[38] Ms. Krauch's attempt to impose her will on her siblings has been costly. It has required the estate to hire legal counsel and expend money in legal fees. That did not have to happen.

[39] Ms. Krauch's claims about the accounting are based on misunderstanding and suspicion without evidentiary foundation.

[40] Costs are awarded to the Degen Estate in the amount of \$2,000.

Campbell, J.