

SUPREME COURT OF NOVA SCOTIA
Citation: *Chisholm v. Chisholm*, 2022 NSSC 270

Date: 20220128
Docket: Syd. No. 504312
Registry: Sydney

Between:

Daren Chisholm

Applicant

v.

Nancy (Chisholm) Donovan, Estate of Thomas Chisholm, Sr.

Respondent

LIBRARY HEADING

Judge: The Honourable Justice Patrick J. Murray

Heard: June 22, June 23, September 14 and September 20, 2021 in Sydney, Nova Scotia;

Written Decision: January 28, 2022

Subject: Probate; Estate Law, Removal Of Executrix

Facts: [1] Daren Chisholm made an Application seeking an order replacing Nancy (Chisholm) Donovan, as Executrix of the Will of Thomas Chisholm, with himself, Daren Chisholm, being named as the replacement Executor for the Estate.

[2] The Respondent contests the Application and argues the central point is that she was given the job of Executrix but was unable to perform her duties because of this Application.

Issue: [3] Should Nancy (Chisholm) Donovan be removed as Executrix of the Estate?

Result: [4] The Court found the Application of Daren Chisholm was premature and without merit. Mr. Chisholm has failed to satisfy the Court that the Executrix should be removed as her father's representative.

[5] Pursuant to s. 61 of the *Probate Act*, the court found on the whole of the evidence,

- (a) That Nancy Chisholm Donovan has not breached any Court Order;
- (b) That Nancy Chisholm Donovan is not wasting or neglecting to administer or settle the Estate;
- (c) That Nancy Chisholm Donovan is not insolvent;
- (d) That Nancy Chisholm Donovan is not mentally incompetent;

[6] The Court was not satisfied that the removal of the Personal Representative would be in the best interests of those persons interested in the Estate.

[7] The Application of Mr. Chisholm was dismissed

Caselaw: *Willisko v. Pottie Estate*, 2014 NSSC 389; and *Critchely v. Critchely*, 2006 NSSC 219.

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Sydney, Nova Scotia;

Submissions: September 20, 2021

Written Decision: January 28, 2022

Counsel: Daren Chisholm, Self represented
Hugh McLeod for Nancy (Chisholm) Donovan

By the Court:

Introduction

[1] This is a matter involving the Estate of Thomas Chisholm, Sr., of Florence, Cape Breton. Mr. Chisholm passed away on November 24, 2020.

[2] The late Thomas Chisholm had a home located at 100 Church Street, Florence, where he and his late wife, Margaret Cecilia Chisholm, raised their five children. He had another piece of land in Christmas Island, at the time of his death.

[3] In his Will Mr. Chisholm named the Respondent, Nancy Chisholm Donovan, as his Executrix and Trustee. He left his Estate “in trust” for her to divide equally among his five children.

[4] His children are: Nancy Chisholm Donovan of Florence; Daren Chisholm of Sydney Mines; William (Billy) Chisholm of Florence; David Blair Chisholm of Calgary, Alberta; and Thomas Chisholm, Jr., of Sydney Mines.

[5] Unfortunately, difficulties have arisen within the family over the appointment of the Respondent as personal representative of her father’s estate.

[6] Following the Grant of Probate being issued to Nancy Chisholm Donovan, her brother, Daren Chisholm, filed this Application to have her replaced. This is my decision with respect to that Application.

[7] The Applicant argues a major issue is the rent that is payable to the Estate by Nancy Chisholm Donovan, her partner, Billy Joe Pardy, and her brother, Bill Chisholm.

[8] The Applicant maintains that the bills of the Estate are not being taken care of and that his sister cannot be trusted to properly manage the Estate.

[9] The Respondent’s position is that she had not been able to act as a functioning Executrix due to the actions of the Applicant, and this Application has been an impediment with the Scotiabank, that has always kept her father’s account. She was able to make arrangements with the bank to have the bills paid pending the outcome of this Application to have her removed as Executrix.

[10] She submits the allegations made with respect to her have made it practically impossible for her to carry out her duties, as she normally would have. She maintains that this Application is without merit and should be dismissed.

[11] The Respondent testified she lived with her parents and looked after both of them in their later years.

The Application

[12] The Applicant has applied to the judge of the Probate Court, seeking an order replacing Nancy (Chisholm) Donovan, as Executrix of the Will of Thomas Chisholm, with himself, Daren Chisholm, being named as the replacement Executor for the Estate.

[13] In addition, the Applicant in his brief filed September 20, 2021 stated this Court has to decide if Nancy Chisholm Donovan can be trusted to administer the Estate of Thomas Chisholm.

The Notice of Contest (See *Probate Act*)

[14] In her initial response to the Court, the Executrix, Nancy Chisholm Donovan, stated, through her legal counsel, the central point is that she was given the job of Executrix, “but has been unable to carry out her duties, because of the current application presented by Mr. Chisholm”.

[15] In addition, the Respondent, Nancy Chisholm Donovan, stated in her brief filed September 20, 2021:

The position of Nancy Chisholm Donovan stated to this court at other times is that the Applicant, Darren Chisholm must prove some reason Nancy Chisholm Donovan is not competent or capable of exercising sound and fair judgment in relation to the affairs of the estate. The point is she was never really given an opportunity to exercise administration with respect to the estate, except to take bills to the Bank of Nova Scotia and have them paid. She wasn't even permitted to open an estate account.

[16] The Affidavits filed in Support of the Application:

- Affidavit of Alton MacKinnon filed May 17, 2021.
- Affidavit of Alton MacKinnon filed June 18, 2021.
- Affidavit of William O'Neil filed February 26, 2021.
- Affidavit of Blair Chisholm filed February 26, 2021.
- Affidavit of Ms. Scott filed June 22, 2021.
- Affidavit of Daren Chisholm filed February 16, 2021.
- Affidavit of Daren Chisholm filed February 26, 2021.
- Affidavit of Daren Chisholm filed May 17, 2021.
- Affidavit of Daren Chisholm filed June 2, 2021.

[17] The Affidavits filed in Response to the Application:

- Affidavit of Bill Chisholm filed March 18, 2021.
- Affidavit of Bill Chisholm filed May 25, 2021.
- Affidavit of Nancy Chisholm Donovan filed March 18, 2021.
- Affidavit of Nancy Chisholm Donovan filed May 25, 2021.
- Affidavit of Nancy Chisholm Donovan filed June 8, 2021.
- Affidavit of Nancy Chisholm Donovan filed June 16, 2021.

The Evidence

[18] At the center of this application, is the Applicant's claim that rent payable to the Estate is "unaccounted for" and there are bills to the Estate that are unpaid, resulting in "arrears". According to Daren Chisholm, these are facts that clearly demonstrate that the Estate is being neglected and mishandled by Nancy Chisholm Donovan. Mr. Chisholm, in his affidavit evidence states his sister has proven in the past that she is not capable of exercising her role as Executrix.

Affidavit Evidence – Daren Chisholm

[19] In his evidence the Applicant directs his attention to several issues; the Respondent's background; places she previously resided (i.e. Park Road); the Executrix paying her own bills out of rent monies owing to the Estate; generally to her character as an unsuitable person for her role as the Estate representative.

[20] The Applicant in his evidence gave specific examples of things that illustrate to him that Nancy Chisholm Donovan cannot be trusted. He referred to a "black book" in which their father kept track of who owed him money, from time to time. This book has been kept from him, he testified, and has not been produced. Mr. O'Neil also gave evidence of its existence.

[21] Specifically, Mr. Chisholm says, the accounts for oil and power were paid by his father through his line of credit at the bank, and this continued after his father died, to the benefit of the Executrix, her partner, Billy Joe Pardy, and his brother, Billy Chisholm, who, he said, were all living in the basement, when his father passed away. No rent deposits have been made, he says, despite him being able to make a deposit to the bank account of his father, as shown in Exhibit 21. (Exhibits 7, 8; affidavits of Applicant filed February 26, 2021 and May 17, 2021)

(a) February 16, 2021 Affidavit – Exhibit 6

[22] In his affidavit filed February 16, 2021 the Applicant states Nancy Chisholm Donovan, “let the insurance lapse” (paragraph 7) and that “persons were running up utility bills” (paragraph 8). In addition, he stated, there was an \$1,100.00 water bill (paragraph 9) and the oil bill was not paid (paragraph 10).

[23] In this affidavit Mr. Chisholm asserts that the Estate is not being protected and that he does not trust Nancy Chisholm Donovan, and “neither do Billy or Tom”. This would have been after the voice mail message left by Billy on January 27, 2021, which was played back on the record in open Court. In short, his affidavit refers to Nancy Chisholm Donovan as not being financially responsible or honest. (Paragraphs 3.1, 8, 9, 13)

(b) February 26, 2021 Affidavit – Exhibit 7

[24] In his affidavit filed February 26, 2021 Mr. Chisholm gives evidence of “chronic neglect and abuse”, thereby giving opinion evidence. Opinion evidence is generally speaking, not admissible.

[25] The Applicant gives further evidence about his father’s care, his mother’s estate, and Nancy Chisholm Donovan’s untrustworthiness. He refers to “suspicious activity” being pointed out to him by Chad Green of Scotiabank. This is hearsay evidence, which is presumptively inadmissible. On a number of occasions he refers to things that happened on October 20, 2020, before his father died.

[26] With respect to the issues before the Court, the Applicant provides the status of the steps taken “to this date”. It is not disputed that he was directed to pay the insurance, in an Interim Order dated October 22, 2020. In this affidavit the Applicant testifies that Nancy Chisholm Donovan did not keep the insurance up. (Paragraph 22)

(c) May 17, 2021 Affidavit – Exhibit 8

[27] In his affidavit filed May 17, 2021 Daren Chisholm addresses the rent issue, in addition to responding to the evidence contained in Ms. Chisholm Donovan’s affidavit of March 18, 2021. In this regard, the Applicant stated:

17. In Nancy Chisholm Donovan’s affidavit of March 18, 2021 paragraph 35 Nancy acknowledges she misappropriated rent money from the estate. She states: We did not pay rent after our father died, but we maintained the house such as paying the oil bill and electricity. Nancy Chisholm Donovan lied about paying the electricity. It was being paid directly from our father’s bank account. The oil was being paid through the Scotia Bank account of our father;
Exhibit (5)

[28] I am not going to refer to each allegation in the affidavit (Exhibit 8), but in paragraph 28 the Applicant stated the Estate’s representative is “not protecting the interests of the beneficiaries” by not requiring rents to be paid and “putting her own interests ahead of the beneficiaries interests”.

Affidavit Evidence – Nancy Chisholm Donovan

(a) March 18, 2021 Affidavit – Exhibit 17

[29] This affidavit shows that Nancy Chisholm Donovan acted with haste following the Order issued by Justice Gogan on January 21, 2021, which Order was initiated when Daren Chisholm wrote to the Court on December 6, 2020 indicating the Estate was “in jeopardy”.

[30] Although Nancy Chisholm Donovan had not yet been appointed, Daren Chisholm stated in his letter, “I understand Nancy is not fulfilling her duties as Executrix and is not serving the Estate”. This was less than two (2) weeks after their father died.

[31] Nancy Chisholm Donovan lived with her father and had been looking after him for a number of years, while working herself. Her brother, Bill, also lived at 100 Church St.

[32] In the letter Daren Chisholm sought to be named as personal representative of his father’s estate.

[33] In this affidavit of Nancy Chisholm Donovan states her brother, Billy, supports her in her position as Executrix.

[34] With respect to rents, Nancy Chisholm Donovan says she paid rent of \$400.00 a month, every month to her father for the last 20 years. She was always invited back, she said, and she and her father had a good relationship.

[35] With respect to the payment of rent upon the death of her father, she stated:

35. With respect to paragraphs eighteen to twenty two, we did not pay rent after my father died but we maintain the house, such as paying the oil bill and electricity. I am prepared to pay back rent that I failed to pay and put it in the estate account and do my best to collect the same from Billy Chisholm and Joe Pardy. Any money Joe gave me I used to help pay the oil bill.

[36] With respect to the duties to be carried out by an Executrix, and in particular, her role, Nancy Chisholm Donovan stated at paragraph 10:

10. I take very seriously my obligations and Executrix and want to continue with my job as Executrix. I have obtained the services of a Lawyer who will guide me on my duties such as paying the debts of the estate and any collections of rent from myself or the other tenants. If there are arrears to get immediate payment or to have rents adjusted after the properties are sold and division made to the heirs an accounting for any rent adjustment will be made.

(b) May 25, 2021 Affidavit – Exhibit 18

[37] In this affidavit, Nancy Chisholm Donovan attempts to respond to the Applicant’s allegations contained in his affidavit of May 14, 2021.

[38] Firstly, with respect to the payment of bills she states at paragraph 3 as follows:

3. That its already explained, the Bank of Nova Scotia has refused to open an estate account as shown in exhibits 5, 6 and 7 of my Affidavit of March 18, 2021 but the Bank of Nova Scotia has agreed to pay all estate bills, such as funeral, property tax, housing expenses, heat and electricity once submitted with invoices. Attached as Exhibit 1 are the bills and expenses paid by the Bank of Nova Scotia after I submitted invoices. Attached as Exhibit 2 is a list of expenses such as power and cable, which I had changed into my own name.

[39] Secondly, Nancy Chisholm Donovan addresses the allegation concerning the non-payment of rent at paragraph 4:

4. After my mother Margaret Chisholm's death I never paid rent to my father. I looked after him, cooked his meals, made his bed, washed his clothes and cleaned up for him wherever he would let. He did not want me to touch his papers on the table, which contained financial information and bills.

[40] Thirdly, with respect to her brother, Bill Chisholm, and financial payments by him, Nancy Chisholm Donovan states at paragraph 9:

9. With respect to Bill Chisholm's contribution after my father died, he did give me money to help out with expenses, such as bills to pay for oil, cable and power.

Analysis and Decision

[41] In reviewing the affidavits submitted by the Applicant, it becomes clear that this dispute is about rents not being collected and bills not being paid by the Executrix.

[42] Significant portions of the affidavit evidence of Mr. Chisholm deal with matters that are irrelevant or not directly related to the issue before the Court. Examples are the paragraphs pertaining to Ms. Chisholm Donovan's personal circumstances, such as her past addition, or what payments were made or not made before their father died, or his medical condition before he died.

[43] I have seen little or no evidence that these are relevant to whether Nancy Chisholm Donovan should be removed as her father's personal representative, something he clearly contemplated when he made his Last Will and Testament.

[44] What is relevant to the issue at hand, is Nancy Chisholm Donovan not being able to open an Estate bank account, which is often the starting point for any representative charged with the serious task of administering an estate, and using it to properly account to the beneficiaries how that was done. An Estate bank account is a necessity to completing the Executor's account, as is required by the *Probate Act* in sections 69 and 70 included in Appendix "A".

[45] There are several sections of the *Act* that are relevant and instructive in the case before me. For example, s. 69(1) requires that the representative present "an accounting of the

administration of the estate within 18 months form the date of the grant or such longer period as the Court ... may allow”.

[46] In this case the Grant of Probate was issued on February 11, 2021, which would require the representative, Ms. Chisholm Donovan, to file her account on or before August 2022, without any allowance for additional time being added.

[47] This alone may be sufficient reason to dismiss this application, absent clear, cogent and convincing evidence that Ms. Chisholm Donovan is acting in bad faith, is squandering the Estate assets, or failing to pay the Estate bills.

[48] The onus on an Applicant to remove a personal representative named by a testator in her or his Will, is a significant one. In *Willisko v. Pottie Estate*, 2014 NSSC 389, Gogan, J. described the burden upon the Applicant in the following terms:

[46] *Critchely v. Critchely*, 2006 NSSC 219, provides an overview of the jurisprudence on the removal of a personal representative. In that case, Warner J. summarized at paras 38-40:

In *Re MacCulloch Estate* (1991) 102 N.S.R. (2d) 147 (NS Prov. Ct), Haliburton J., noted that the statutory authority for removal of a trustee is very narrow but that the cases appear to give broader authority. He concluded that it appeared that an executor whose administration is motivated by an unlawful or criminal intent will be removed and furthermore, if it is established that the executor is, for some reason, not competent or capable of the exercise of sound and fair judgement in relation to the affairs of the estate, or has exhibited bad faith in relation to decisions made in the course of his administration, then he/she will be removed.

In *Re Winter Estate*, [2001] N.S.J. No. 416, 2001 CarswellNS 379 (NSSC), Hood J. , expanded on Justice Haliburton’s decision with a thorough review of the principles for the removal of trustees. Her decision was upheld by the Nova Scotia Court of Appeal in *Re Winter Estate*, [2002] N.S.J. No. 66, 2002 CarswellNS 66.

These decisions and *Macdonnell, Sheard and Hull on Probate Practice*, 4th ed. (Carswell, 1996) at page 163, note that the principles that guide courts in removing trustees are set out in *Letterstedt v. Broers* (1884), 9 App. Cas. 371 (P.C.), which reads in part:

...in cases of positive misconduct, the Courts of Equity have no difficulty in 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 to endanger the trust property or to shew a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity.

And at page 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...

[49] There is little question that hostility exists here between the Executrix, the Applicant and certain family members. She has the support of Billy. However, hostility alone is not sufficient grounds for removal form performing her duties. A conflict of interest between the personal

representative and the beneficiaries can be a ground for removal, as stated in *Willisko*, referring to the decision of Duncan, J., in *Lougheed Estate (Re)*, 2013 NSSC 236, at paragraph 48:

[48] A conflict of interest between the personal interests of the personal representative and the beneficiaries is a ground for removal. In *Lougheed 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 held inconsistent with the duty to act in the beneficiaries best interest and the duty of utmost good faith owed by a fiduciary to a beneficiary. In so finding, Duncan J. reasoned at para. 16:

The personal representative has a fiduciary duty of trustee in relation to his or her conduct and management of the Estate. Where there is evidence of a conflict of interest between the personal representative and those of the beneficiaries, it may amount to a ground for removal.

[50] The Applicant has argued the circumstances here place the Executrix in a conflict of interest, alleging she is acting in her own interests and not that of the beneficiaries.

[51] The Court is not satisfied the Applicant has established on a balance of probabilities that his sister, Nancy Chisholm Donovan, is acting in her own self interest or is in conflict.

[52] Mr. Chisholm has established that there were no receipts issued by the Estate for rents received and that no bank deposit for rent was made by Nancy Chisholm Donovan. She testified that rents were paid and the monies received were used to pay the bills of the Estate through the Scotiabank, in Sydney Mines, N.S.

[53] In addition to his affidavit evidence, Mr. Chisholm relies on Exhibits 21-23 to show he has established that Nancy Chisholm Donovan “does not pay her bills and cannot be trusted to manage the Estate”.

[54] Having reviewed these Exhibits together with all of the evidence, the Court is not satisfied that Nancy Chisholm Donovan cannot be trusted or is incapable of carrying out her duties as Executrix. That is a “far reach” to be taken from them.

[55] These exhibits on their face do not stand for the proposition asserted by the Applicant with respect to the Executrix neglecting the Estate or its assets. For example, it appears that in Exhibit 22, the January 25, 2021 statement that the Eastlink bill was taken out of her name in December 2020, as she stated. Exhibit 23 shows there were arrears in May, but by August/September, were “caught up” after making substantial payments.

[56] The evidence is clear that the Estate may have a claim for occupational rent payable by Billy Joe Pardy and Billy Chisholm in the amount of \$550.00 per month. This Court will leave it to the Executrix and her legal representative (Proctor) to determine whether the Estate has such a claim, which would be based on equitable principles. There were no written leases. It appears there was an oral agreement with Mr. Pardy that he was to pay rent that included heat and lights.

[57] Nancy Chisholm Donovan has promised to collect the rents due. She will need to assess whether she owes rent in her capacity as an occupant of the residence at 100 Church Street, at least since her father passed away. It is her duty to account for monies owed to the Estate.

[58] With respect to bills owing and what bills must be paid, an important one will be the Income Tax return of the late Mr. Chisholm, his personal return (2020) and the Estate return (2021), as applicable. It is likely she will need advice in the completion of this task.

[59] Nancy Chisholm Donovan spent the past year (2021) responding to the Application before the Court, numerous affidavits, briefs and hearings have been filed.

[60] In addition to the rent issue, the Applicant's submissions pertain to Nancy Chisholm Donovan's inability to handle finances, stating that bills such as the electrical, taxes and insurance have been left in arrears, and have not been paid by her since her father's death. She responds, stating she is not independently wealthy and it is her intention to appraise the assets for sale and distribute the assets once all bills have been paid.

[61] It is not disputed that Mr. Chisholm paid the house insurance on 100 Church Street. Nancy Chisholm Donovan has provided an affidavit that the Applicant will be reimbursed for such payment.

[62] The evidence shows that Nancy Chisholm Donovan paid the property taxes with respect to the real properties in Florence and Christmas Island.

[63] The Court acknowledges there is a level of inconsistency in the evidence as to which bills were outstanding at the time of death, which bills have been paid, by whom. The duty to account is a primary duty of an executor or executrix.

[64] Two subsequent affidavits were filed by Nancy Chisholm Donovan on June 8, 2021 (Exhibit 19) and June 16, 2021 (Exhibit 20).

[65] In paragraph 5 of Exhibit 19, Nancy Chisholm Donovan apologized to the Court for her earlier stating she paid \$400.00 in rent to her father. She clarified her earlier statement by stating she had not paid rent since her mother passed away. Paragraph 5 reads:

5. I apologize to the court for the inaccuracies stating that I paid \$400.00 a month rent to my father. After my mother died I paid no rent. Joe Parly paid \$550.00 a month and Billy Chisholm helped out but paid no rent.

[66] In this affidavit Nancy Chisholm Donovan states that the electrical/power bill was taken out of her father's name and placed in her name, as she and others were "using the power". This was also the case, she said, with respect to the cable TV bill.

[67] With respect to the payment of the bills owing by the Estate, water, property taxes, and funeral bill, she stated, these were taken to the Scotiabank for payment, as shown in the receipt in Exhibit 1 to her May 25, 2021 affidavit which receipt is dated March 10, 2021.

[68] Daren Chisholm, in his affidavit evidence and oral testimony, alleged that Nancy Chisholm Donovan fabricated her evidence about the bills that were alleged to be paid, and cannot be trusted.

Daren Chisholm In Re-Direct : I quite clearly pointed out to you that my sister was in arrears, she had disconnection notices and everything else that she don't pay her bills. I was basically called a liar by Hugh. I proved it to you that she does not pay her bills on time, that there was disconnected notice and she hooked it up in December and this all happened in March and they're asking me to rely, you're asking me why I don't want my sister to be there, my sister can't be trusted. My sister don't pay her bills.

[69] The Court has reviewed and considered the Affidavit of Nancy Chisholm Donovan filed June 16, 2021. In that affidavit Nancy Chisholm Donovan gives additional evidence relating to the bills paid by the Scotiabank, as listed in her previous affidavit. In addition, she confirmed that an Estate Inventory has been completed and sets out her plan to administer the Estate, by having the property appraised to determine the fair market value, as well as the furniture. The concluding paragraph reads:

6. I of course will pay all bills and not disburse funds until the time limits set out in the *Probate Act* are kept and adhered to.

[70] Nancy Chisholm Donovan was cross-examined at length by the Applicant, for over 3.5 hours. For the most part, I found that her evidence was credible. She was basically unshaken during her evidence.

[71] Nancy Chisholm Donovan admitted there were some shortcomings, but explained her reasons. Much had to do with responding to what, she said, were personal attacks upon her, that were without merit. She also testified this application to have her removed made it difficult.

[72] The Court has reviewed and considered all of the affidavits filed as referred to in paragraphs 16 and 17 herein. This includes the Applicant's affidavit of June 2, 2021, in which he referred to persons "living off the Estate".

[73] With respect to other aspects of the evidence, I do not find that anything turns on the voice mail left for Daren Chisholm by his brother, Bill. Nor do I find the evidence of the "black book" compelling. The Executrix has an obligation to collect the records for the Estate and determine their relevancy in carrying out her duties.

[74] The authorization signed by Nancy Chisholm Donovan on December 22, 2020 is evidence of her attempt to properly administer the Estate. I find, despite her attempts, she was unable to "get out of the gate" properly.

Conclusion

[75] On the whole of the evidence, I find that the Application of Daren Chisholm is premature and without merit at this time. Mr. Chisholm has failed to satisfy me that Nancy Chisholm

Donovan should be removed as Executrix of the Estate of Thomas Chisholm. I find that the Executrix, Nancy Chisholm Donovan was a credible witness.

[76] There is a process in the *Probate Act* for beneficiaries to challenge the account of the Executor/Executrix at the closing of the Estate. These provisions are attached in Appendix “A”

[77] Pursuant to s. 61 of the *Probate Act*, I find on the whole of the evidence,

- (e) That Nancy Chisholm Donovan has not beached any Court Order;
- (f) That Nancy Chisholm Donovan is not wasting or neglecting to administer or settle the Estate;
- (g) That Nancy Chisholm Donovan is not insolvent;
- (h) That Nancy Chisholm Donovan is not mentally incompetent;

[78] The Court is not satisfied that the removal of the Personal Representation would be in the best interests of those persons interested in the Estate. (*Lebo Estate, Re*, 1998 CarswellSask 86)

[79] Respectfully, the Application of Mr. Chisholm is dismissed.

[80] In view of the present status, I direct that the Executrix shall be allowed an additional time period to complete her duties as required under the *Act* and Regulations. This period shall be 10 months. I further reserve the right to provide further directions.

[81] My decision on costs is reserved.

Murray, J.

Appendix “A”

Probate Act

Section 61, 62, 69, 70 and 71 of the *Probate Acts* reads 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) the personal representative has not complied with an order of the court;
- (b) the personal representative
 - (i) is neglecting to administer or settle the estate,
 - (ii) is wasting the estate,
 - (iii) has failed to comply with an order to pay into a chartered bank any money of the state remaining in the hands of the personal representative,
 - (iv) is insolvent,
 - (v) is mentally incompetent,
 - (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) cannot be found or has left the Province without any apparent intention of returning.

(2) The court may discharge a personal representative who desires to be discharged.

(3) Where the court removes or discharges a personal representative, it shall appoint a new personal representative in the place of the personal representative that was removed or discharged.

(4) Where a new personal representative is appointed pursuant to subsection (3), the new personal representative has all the powers and shall perform all the duties of the personal representative who was removed or discharged.

(5) Notwithstanding the removal or discharge of a personal representative, each surety for the personal representative continues to be liable for any act or omission of the personal representative up to the time of the removal or discharge and for any asset of the estate that has come into the personal representative’s hands.

(6) A personal representative who is removed or discharged shall make an accounting of the administration of the estate up to the time of the removal

Effect of discharge

62 The personal representative applying for discharge shall execute any assurance or deed or do anything required for vesting the estate or part of it in a person appointed pursuant to subsection 61(3) in the place of that personal representative, whether the vesting is in the person alone or jointly with a personal representative continuing to act under a former appointment.

...

Duty to give accounting

69 (1) A personal representative shall give the court an accounting of the administration of the estate within eighteen months from the date of the grant or such longer period as the court, on the application of the personal representative, may allow.

(2) Notwithstanding subsection (1), the court shall, upon the application of a person interested in the estate, including a creditor whose claim has not been paid or a surety on a bond given as security to the court, order the personal representative to give an accounting no later than such date as the court orders and the personal representative is personally liable for the costs of the application and of the accounting.

(3) Notwithstanding subsection (1), an accounting is not required where

- (a) the deceased died testate;
- (b) all the unpaid beneficiaries are adult and competent; and
- (c) all the unpaid beneficiaries and any surety agree, in writing, in the prescribed manner and form, that an accounting is not required.

Duties of personal representative

70 (1) The personal representative shall give the accounting in the prescribed form and manner.

(2) Every personal representative, at the expiration of twelve months from the date of the grant, or such longer period as the court, on the application of the personal representative, may allow, shall pay all such legal and just claims as have been exhibited, so far as the estate of the deceased in the hands of the personal representative will enable the personal representative, and shall make such distribution of the estate as is directed by the will of the deceased or by the statutes in that behalf.

Powers of court

71 On passing the accounts of the personal representative, the court may

(a) enter into and make full inquiry and accounting of and concerning the whole property that the deceased was possessed of or entitled to, and the administration and disbursement thereof, including the calling in of creditors and adjudicating on their claims, and for that purpose take evidence and decide all disputed matters arising in the accounting; and

(b) inquire into and adjudicate on a complaint or claim by a person interested in the taking of the accounts of misconduct, neglect or default on the part of the personal representative and, on proof of the claim, make any order the court considers necessary, including an order that the personal representative pay such sum as it considers proper and just to the estate, but any order made under this subsection is subject to appeal.