SUPREME COURT OF NOVA SCOTIA
Citation: *Smith-Spurrell v. Smith*, 2023 NSSC 196

Date: 20230614
Docket: No. 517554
Probate: 12074
Registry: Amherst

In the matter of:

The Estate of Darrell Winston Smith, deceased

Between:

Angela Joanne Smith-Spurrell

Applicant

v.

Darren Wade Smith

Respondent

Judge: The Honourable Justice Timothy Gabriel

Heard: May 3, 2023, in Amherst, Nova Scotia

Counsel: Parker Byrne, for the Applicant
Alan Freckelton, for the Respondent

By the Court:

[1] Darrell Winston Smith died on June 26, 2021. The Applicant and Respondent are his children. In their father's Last Will and Testament ("the Will"), they were named co-executors of his estate. The instrument also appointed a third executor, Henry Harold Burris ("Mr. Burris"), a cousin of the Applicant and Respondent.

[2] The Grant of Probate was issued by the court on November 23, 2021. Nothing very productive has occurred since. On August 31, 2022, the Applicant filed her Notice of Application with this court. In it, she sets out the relief sought:

1. An Order removing the Respondent as executor of the estate;
2. An Order requiring the Respondent to relinquish $3660 from the safety deposit box of Darrell Smith in his possession;
3. An Order requiring the Respondent to pay the outstanding balance on the CIBC visa credit card of Darrell Smith;
4. Costs payable by the Respondent personally to the Applicant;
5. Costs payable by the Estate to the Applicant; and
6. Such further relief as this Honourable Court deems just.

[3] The Applicant filed an Affidavit accompanying her Notice, which was sworn on August 16, 2022. It alleges communication issues, the Respondent's removal of items from the deceased's home, his obstruction of efforts to sell the home of the deceased, that he has used their father's credit card to cover costs incurred by his trucking business, that he has removed a safety deposit box owned by the deceased and retained the $3,660 in cash located therein. It also alleges that the Estate's lawyer had withdrawn from representing the Estate because of the Respondent's conduct.

[4] In his Notice of Objection filed on October 18, 2022, the Respondent denies that he has either impeded the administration of the Estate, or that he has removed anything from the Estate, with the exception of what had been given to him in the Will, or what had been agreed to by the other co-executors. He further states that he has not taken cash from the property or the safety deposit box and expresses his view that all three co-executors can work together to successfully administer the Estate.

[5] Mr. Burris did not file anything in relation to this Application, nor did he testify or participate in any way.

[6] In the Respondent's Affidavit, sworn October 18, 2022, he admits some of the allegations contained in the Applicant's materials. Some others he either denies or attempts to explain.

[7] Two additional Affidavits have been filed by the Applicant in this matter. One was sworn on February 9, 2023. A rebuttal Affidavit was sworn on April 5, 2023.

[8] The Respondent, in addition to his Affidavit of October 18, 2022, has filed one dated March 22, 2023.

[9] At the outset of the hearing, the Applicant withdrew her claims for relief respecting the safety deposit box, the contents thereof, and the repayment of charges incurred on the late Mr. Smith's VISA.

[10] This leaves only the issue of Mr. Smith's removal as co-executor to be determined.

Should Darren Wade Smith be removed as co-executor of the estate?

[11] It is necessary at the outset to make some comment on the relationship between the parties. Although siblings, it appears to be common ground that they have never really gotten along.

[12] The Applicant states that her brother has always treated her in an abusive, threatening manner, and that he is prone to violent outbursts, both towards her, and, during their lifetimes, their parents.

[13] The Respondent has referred to his sister using rather unflattering epithets. He has described her, among other things, as “spoiled”, “controlling”, and, by way of paraphrase, feels that she is attempting to micromanage him and “tell him what he has to do” in so far as his duties vis-à-vis the Estate are concerned. Even while testifying, when one would expect the Respondent to be on his best behaviour, his hostility toward the Applicant was palpable.

[14] One incident, in particular, demonstrates the depth of this hostility. It occurred just before their father’s funeral service.

[15] The late Mr. Smith had, in the past, made preserves (jams and jellies) in his spare time. He often gave some away to neighbours and friends. The Applicant thought it would be a nice thing to take the jams and jellies that were still in his home and bring them to Arbor Memorial, to whom his funeral arrangements had been

entrusted. The idea was to distribute them among visitors coming to the funeral home to pay their respects to her father.

[16] On July 7, 2021 she wrote to Mischa Zeltner at Arbor Memorial in the following terms:

> "Our dad had bottles of jams, pickles etc. made in preparation for the summer season... We are not sure what to do with it and wondered if we could bring it to give to people who attend?"

[17] She added, in a follow-up email, that:

> "they are sealed and would be for people to take home".

[18] Ms. Zeltner responded, also by email:

> "that certainly would be a nice gesture in your dad's memory."
>
> (*Applicant's Affidavit sworn April 5, 2023, Exhibit "E")*

[19] All of the above was copied to the Respondent, who raised no objection at the time. In fact, the Respondent was present during the visitation at the Funeral Home and observed the preserves being given away to visitors. Again, he said nothing.

[20] Afterward, he contacted the police to report the preserves as having been stolen, evidently seeking to have charges laid against the Applicant. His pretext was that, in the Will, he had been left the contents of the basement of the deceased's home, and the preserves had been in the basement. He was unable to arouse any interest on the part of the RCMP to pursue the matter.

[21] There have been other problems. For example, on July 23, 2021, the Applicant (who lives in Alberta but was in Nova Scotia for her father's funeral and to attend to some estate duties personally) had scheduled an executors' meeting with her brother. She asked her husband, Glenn Spurrell, to attend with her as she did not feel comfortable meeting with the Respondent alone. The meeting lasted for approximately an hour, at which time the Respondent began yelling that Glenn needed to leave.

[22] On April 22, 2022, the Applicant sought some information with respect to certain assets. The Respondent made a number of responses, including:

> "And I will tell you the land at the shour [sic] was NEVER PART OF ANEY [sic] PARTNERSHIP BETWEEN DAD AND I. Who ever gave you aney [sic]

> information of my and dad's dealings is in very big trouble and they will need to deal with me and not you. GET THIS THROUGH YOUR HEAD."
>
> (Capitalization in original)

[23] And the same day:

> "All of the information you [sic] were given to you [sic] was against conflict of interest … you have no right to ANEY [sic] DEALING BETWEEN DAD AND I … As far as cleaning out the house NO I WILL NOT AGREE TO YOU DOING ANEY [sic] OF IT TILL THERE IS A MEETING OF THE EXETERS [sic – "executors"?] In JUNE WHEN HENRY AND I MAY BE FREE. There is a large list of bills you have … I will be calling lawyers and accountant on Monday to deal with the t4 that sounds [sic] have been given out months ago, and there will be changes [sic – "charges"?] being layer [sic – "laid"?] over things. Your [sic] people has [sic] a lot answer to and have to start dealing me on my business not a spoiled sister that doesn't know shit about dad's business with me so back the FUCK DOWN."
>
> (Capitalization in Original)
>
> (*Applicant's Affidavit, August 16, 2022, paras. 51-54 and Exhibit "R")*

[24] In addition to this, the Respondent has acknowledged that he was unavailable during April – August, 2022 to discharge duties as co-executor (Respondent's Affidavit, October 18, 2022, para. 57 and Respondent's Affidavit, March 22, 2023, para. 41).

[25] On another occasion, in late December 2022, a break and enter occurred at the deceased's former home and a number of items, including the key for a Kubota tractor, went missing. Fearing that the culprit would return for the tractor, the Applicant and Mr. Burris discussed consigning the tractor and associated implements at a local dealership called Fort Equipment.

[26] The Applicant proceeded to make the necessary arrangements with Fort Equipment personnel and gave Mr. Burris's number to the establishment so that arrangements for pickup could be made.

[27] On January 24, 2023 she was contacted by Fort Equipment to say that the tractor had been sold and the customer was seeking to change it into their name. The following day, she was contacted by the principal dealer at the establishment to discuss a phone call he had received from the Respondent. The Applicant was advised that the Respondent was refusing permission to complete the sale on the basis that she, the Applicant, had no permission to unilaterally sell it.

[28] The siblings exchanged emails the next day. She said:

> Darren,
>
> I am not sure of your purpose in excluding Henry [Burris] in your email. It was he who contacted you and acquired your agreement to have the tractor and implements picked up by, and moved to, Fort equipment for the purpose of consignment sale. The details of their consignment process and anticipated valuations have been known for 1 1/2 years and have been repeatedly communicated during that time.
>
> You have had ample opportunity to ask questions but, instead, you have waited for the items to be sold (and sold at more than four times the value you attempted to assign them) to object, seemingly just for the sake of objecting.

[29] He said:

> I still whont [sic] what I whont [sic]. Your words mean nothing. I whont [sic] It is straight from Fort equipment not you. I argued [sic-"agreed"?] to send it and get contract from Fort equipment not to sell anything till we all had it from Fort equipment. That is what I agreed to nothing more.
>
> If you will not do what I have asked then ALL FUCTURE [sic-"future"?] correspondence will be through my lawyer and I will contact Fort equipment and tell them you do not have authority to sell anything on your own that is what you have done at this point.
>
> (Emphasis in original)
>
> (*Applicant's Affidavit, August 16, 2022, paras. 51-54 and Exhibit "R")*

[30] This is simply a sample of the parties' interactions. While neither party adverts to any problems in dealing with Mr. Burris, they themselves simply cannot communicate.

[31] The Respondent objects to his receipt of "to do" lists from the Applicant. Yet, as she reasonably points out, she lives in Alberta, is attempting to take steps to discharge her duties, and he objects every time she tries to do something on her own. When she tries to tell the Respondent what she is going to do, or to tell him what needs to be done, or asks if he would do it, he accuses her of micromanaging or "ordering him around."

[32] This is a significant concern because the Estate is also bereft of a Proctor. The Applicant testified that the lawyer quit due to the Respondent's conduct. That individual did not testify, however, the Respondent admitted on cross-examination that he did go to the Proctor/lawyer and accuse him of favouring the Applicant's

interests rather than his own. It was shortly after this that the lawyer decided to end his involvement with the Estate.

[33] It will soon be two years since their father passed away. The house in which he resided is still vacant. The parties have clashed over such things as who is to shovel the property in the wintertime, who is to cut the grass in the summer, and what to do to obtain insurance on the home, since it has been vacant for so long. The house is not yet even listed for sale.

[34] The Respondent, in his Affidavits, makes various accusations against the Applicant, and offers explanations for some of the things she alleges. Much of what he complains of is her propensity to do things without asking his permission first and/or "telling him what to do." And yet, during his testimony, he indicated that he often would not bother reading or responding to her emails, since they only made him mad.

[35] The practice appears to have been to attempt to use Mr. Burris as a go-between, and to filter communications through him. It is crystal clear from the Respondent's Affidavits (although predictably, he has a different take on some of the events that have occurred, or why they have occurred) that he is not able to work with his sister. And, to repeat, having listened to him testify, I find that he is implacably hostile towards her.

The Law

[36] Section 61 of the *Probate Act*, SNS 2000, c.5 ("the Act") provides 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 estate 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

[37] Obviously, the criteria set forth in section 61 of the Act are not exhaustive. Moreover, they do not supplant the common-law grounds set out in *Letterstedt v. Broers* (1884), 9 App. Cas. 371, which the Applicant cites to the following effect:

> ...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.

[38] The overarching consideration appears to be the welfare of the beneficiaries. This has been referenced and adopted in many cases in this jurisdiction. (See for example, *Willisko v. Pottie Estate*, [2014] NSSC 389; *Critchely v. Critchely*, 2006 NSSC 219; *Re Winter Estate*, [2001] NSJ No 416, aff'd [2002] NSJ No 66; *Re MacCulloch Estate* (1991), 102 NSR (2d) 147 (NS SC)).

[39] In *Dirnberger Estate*, 2016 BC SC 439, the Court relied on *Letterstedt* in the course of removing the deceased's son as executor. He had treated his sister with excessive distain, had been consistently and unaccountably hostile to her, and wrote angry emails to her and to her lawyer which were very critical of them. The court held that he had demonstrated a failure to retain, and keep retained, professional

advisors required by the estate, including the estate's lawyer. The court concluded that he had demonstrated an inability to perform his duties as executor of the estate.

[40] Another British Columbia case, one that is referenced by both parties is *Wilson v. Heathcote*, 2009 BCSC 554. It dealt with allegations on the part of Wilson that he and his co-executor Heathcote were stalemated over issues relating to their duties and with respect to the administration of the estate.

[41] It was claimed that these issues had led to a deterioration of their relationship to the point where they were no longer able to function effectively in the discharge of their duties. Allegations were made that Heathcote was steadfast in his refusal to meet with Wilson in the presence of the estate lawyer, that he was impeding the sale of assets by the estate (which all conceded needed to be sold) and that he was refusing to follow legal advice received on behalf of the estate and/or actually circumventing that advice. This included advice given with respect to the proper manner of handling estate funds.

[42] In his decision, Cohen, J. noted at paragraph 76 that:

> In my view, the parties' arguments clearly disclose three things:
>
> 1. That the relationship of the trustees has deteriorated into a finger pointing exercise over how to handle the administration of the Estate;
>
> 2. While strictly speaking there is not a formal deadlock on the issues that have become contentious between the trustees, nevertheless <u>for all intents and purposes their disagreement is tantamount to deadlock between them on how to handle the administration of the Estate</u>;
>
> 3. That in view of the dysfunctional relationship between the trustees <u>it is necessary for the Court to intervene and ensure that the administration of the Estate can move forward in the welfare of the beneficiaries</u>.
>
> (Emphasis added)

[43] Then, later in his decision, he pointed out (at paragraph 78) that:

> <u>I am mindful that both trustees have contributed to the disagreement between them on the issues in dispute</u>. However, I think that the evidence points to the fact that Heathcote's manner and conduct at times has been the major contributor to the breakdown in the relationship between the trustees. I set out below what I consider to be some examples of Heathcote's behaviour towards Wilson which I think make it impossible for Heathcote to continue in his role as a trustee of the Estate.
>
> (Emphasis added)

[44] And finally, at paragraph 87:

> In all of the circumstances, I am satisfied that the continuation of Heathcote as a trustee would prevent the trusts from being properly executed. I find that the continued administration of the trust with due regard to the interests of the beneficiaries has by virtue of the breakdown in the relationship between the trustees become impossible. Moreover, I am satisfied that it is highly improbable that the nature of the issues in dispute between the trustees could be resolved by one or more applications under s. 86 of the ***Trustee Act***. In the result, I find that Wilson has established on the whole of the evidence that the Court should exercise its inherent jurisdiction and order the removal of Heathcote as a trustee.
>
> (Emphasis added)

[45] The Respondent argues, in part:

> 23. In *Re Dirnberger Estate* [2016] BCSC 439 the Supreme Court of British Columbia ordered the removal of an executor because he was unable to perform his duties as an executor, including retaining a lawyer for the estate. In the instant case, the previous lawyer for the estate, Mr. McNairn, resigned because of conflicts between the applicant and respondent generally, and not solely because of the conduct of the respondent. As noted above, the Applicant always treated Mr. McNairn as *her* lawyer in any event. The executor in *Dirnberger* was also removed because of one-sided hostility to his sister – in this case, the relationship between the executors is admittedly difficult, but is far from one-sided. This is also an issue when considering *Wilson v Heathcote*, a case in which again the court could allocate responsibility for the breakdown in relations between the executors largely to the respondent. In this case, the Applicant in her own affidavits admits to a long-term difficult relationship with the Respondent, and the reasons for this difficulty cannot be blamed solely on the Respondent.
>
> 24. The Applicant's own evidence demonstrates that she regards herself as *the* executor of the estate, with the authority to delegate tasks to the Respondent and Mr. Burris more or less at will. This is the reason why the Respondent's responses to her lengthy e-mails and "to-do" lists have been sporadic. The Applicant also seems to have a condescending and belittling attitude towards the Respondent because his ability to communicate in writing does not reach Shakespearian quality, which is something hardly likely to engender trust and co-operation between the parties.
>
> (*Respondent's brief filed April 26, 2023)*

[46] With respect, it would be a very rare situation where an inter-sibling dysfunction is entirely one-sided. However, when considering the affidavits, supporting materials and (particularly) the examples of communication between the parties with which the court has been provided, it would appear that the Applicant is

able, for the most part, to put aside differences that she has with her brother and to attempt to discharge her duties for the benefit of the Estate.

[47] For example, the Court heard evidence with respect to attempts to deal with the deceased's RESP, one that he had maintained for the benefit of the Respondent's daughters. The two options provided by a professional advisor were to either change the subscriber from the deceased to someone else so that the education plan may continue, or to wind up the RESP and distribute the funds to the Estate.

[48] I am not sure that the Applicant was being completely objective when she took the position that the Respondent was financially irresponsible. That was the reason that she gave (when she testified) as to why she would not agree to a change of the RESP into the name of the Respondent.

[49] However, and with that said, the Applicant actually brought one of the Respondent's daughters to the bank in an effort to straighten this up, so that she could receive the benefit of the fund and continue with her education. Thus, despite her feelings, she did attempt to move matters along in a manner consistent with her father's wishes. I cannot be as sanguine with respect to the prospects of the Respondent ever becoming able to function similarly.

[50] The level of hostility and contrariness that has been demonstrated by the Respondent toward the Applicant has had a deleterious effect on the Estate and is actively frustrating the intentions of their late father, and the distribution of his assets in the manner which he had intended.

[51] Clearly, as a result of this antipathy, the Respondent is unable to discharge the duties required of an executor and trustee of his father's estate. The beneficiaries, which include the Respondent's own children, are being done a significant disservice by the manner in which he has conducted himself.

Conclusion

[52] The Application is granted: the Respondent is removed as co-executor of his father's estate.

[53] As a consequence, s. 61 of the Act provides:

> (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 or discharge. 2000, c.31, s.61
>
> (Emphasis added)

[54] Inasmuch as the statute requires me to appoint another executor in the Respondent's place, I note that I have received no submissions on who that individual should be. It would be my expectation that the parties can at least agree on that particular point. That person should file an affidavit agreeing to undertake the duties required in the administration of the Estate, in concert with the Applicant and Mr. Burris.

[55] If the parties are unable to agree as to the substitution, I will receive written submissions within 30 days. I will also require that Darren Wade Smith comply with his obligations under s.61(6) within that time period, file the necessary documentation with the Court, and provide copies to the Applicant and Mr. Burris.

[56] If the parties are unable to agree on costs, I will receive written submissions, also within 30 days.

Gabriel, J.