

SUPREME COURT OF NOVA SCOTIA
Citation: *Watt Estate v. Watt*, 2024 NSSC 87

Date: 20240322
Docket: 529721
Registry: Sydney

Between:

Estate of Douglas Alden Watt

Plaintiff

and

Bethany Rebekah Watt

Defendant

DECISION

Corrected Decision: The text of the original decision has been corrected according to the attached erratum dated March 28, 2024.

Judge: The Honourable Justice Jamie Campbell

Heard: March 15, 2024, in Sydney, Nova Scotia

Counsel: Brian Awad K.C., for the Plaintiff
Nathan Sutherland, for the Defendant

By the Court:

[1] Douglas Watt died on January 15, 2021. His daughter Bethany Watt is the only beneficiary under his will. The will named MD Private Trust Company as Executor. MDPTC was granted probate on March 11, 2021. There has been no suggestion by Ms. Watt that MDPTC mishandled trust or estate assets, and she does not object to the accounts. She also agrees that MDPTC is entitled to the fees set out in the fee agreement between her father and MDPTC. Bethany Watt does have an issue however with the actions of the solicitor who provided estate-planning legal services to her father. In June 2023, through her lawyer, she expressed an intention to start a legal action against that solicitor.

[2] MDPTC retained legal counsel to provide advice regarding the potential that it could face liability as a result of a third party claim made by the solicitor. If Ms. Watt starts an action against the lawyer, the lawyer could allege that any damages or losses were the result of fault or negligence on the part of MDPTC. Ms. Watt does not object to MDPTC getting legal advice on that issue. What she does object to is the inclusion in the draft Order on Passing Accounts of a paragraph that purports to limit her ability to make a claim against a third party, such as the solicitor. The paragraph reads,

The foregoing discharge of the Applicant precludes Betheny (sic) R. Watt from making any claim or demand against any person or entity (hereinafter “Third Party Claim”) relating to this estate unless the Third Party Claim explicitly excludes that portion of the liability alleged in the Third Party Claim that a court might attribute to the Applicant.

[3] Ms. Watt was, and remains, unwilling to consent to a draft order containing that provision.

[4] In November 2023, Ms. Watt brought an application under the *Probate Act*, S.N.S. 2000, c. 31, s. 69, seeking an order requiring MDPTC to pass its accounts. MDPTC filed a Notice of Objection to Application indicting that MDPTC was not opposed to proceeding with the formal passing of accounts but objecting to relief related to fees charged by MDPTC. That issue of fees was resolved in January 2023, with the deposit on money into the estate account.

[5] On February 26, 2024, MDPTC applying for the passing of accounts. The matter was heard on March 15, 2024.

Issues

[6] There are two issues. The first issue is whether paragraph 6 should be included in the order. The second issue is the payment of costs for the November 2023 application and for the application to pass accounts.

Form of Order

[7] MDPTC wants an order that will provide it with a final discharge. It wants to conclude its mandate with respect to the management of the estate, including the distribution and receipt of the assets of the estate. The sole beneficiary of the estate, Bethany Watt, has no dispute with the actions of MDPTC in performing its duties. But MDPTC does not want to face the prospect of being drawn into the law suit that Ms. Watt may bring against the solicitor.

[8] Section 71 of the *Probate Act* sets out the powers of the court on the passing of accounts.

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.

[9] The court may then adjudicate a claim made by a beneficiary against the personal representative and may make an order requiring the personal representative to pay an amount to the estate. In this case there is no claim by “any person interested in the taking of the accounts”, of misconduct, neglect or default on the part of MDPTC. There is a potential, at some time, that the solicitor, upon being sued by Bethany Watt, will seek to involve MDPTC in that matter. But the court cannot inquire into or adjudicate on that not yet made claim by a person who is not a person interested in the taking of the accounts.

[10] The court’s powers on passing the accounts are set out in s. 72.

72(1) On passing of accounts the court may

- (a) order that
 - (i) the accounts of the personal representative are passed and bills of costs are taxed pursuant to Section 91,
 - (ii) the personal representative is discharged,
 - (iii) any security be released,
 - (iv) the estate remaining undistributed after the passing of accounts be distributed among the persons entitled; and
 - (b) make any other order it thinks necessary to settle the estate.
- (2) Where there is a contest as to how the remaining assets are to be distributed, the court shall hear evidence and determine who are the persons entitled to participate

[11] That section provides for the passing of accounts, the discharge of the personal representative and the distribution of the estate. It does not deal with limiting the liability of the estate or the personal representative with respect to third parties who were not involved in the passing of the accounts.

[12] The passing of accounts is the approval by the court of the accounts.

75 A passing of accounts, or where there is an appeal from the passing of accounts the passing of accounts by the highest authority to which an appeal is taken or the confirmation by that authority of the passing of accounts, is conclusive evidence of the approval by the court of the accounts, except in respect of undisclosed acts, dishonest or unlawful conduct or breach of trust by a person while holding the office of personal representative, and is final and binding upon each person who was notified, or present, or represented and upon everyone claiming under such person.

[13] If a person who has received notice of the passing of accounts has a complaint about the management of the estate that complaint must be brought to the court's attention at the passing of accounts. The order discharges the Executor and precludes a claim being made afterward.

[14] The order passing accounts is not a full and final release of the personal representative from all claims that anyone may bring. Section 75 provides that it is conclusive evidence of the court's approval of the accounts. It does not insulate the personal representative from claims based on undisclosed acts, dishonest or unlawful conduct or breach of trust. None of those things are claimed here by Bethany Watt, but the legislation does not provide that the passing of accounts

gives absolute protection to the personal representative from all liabilities that may arise.

[15] The parties have not been able to locate any authorities in Nova Scotia on the interpretation of s. 75, or the scope of an order passing accounts. In *Simone v. Cheifetz*, 2005 CanLII 25094, the Ontario Court of Appeal made comments that may offer some guidance. The case was not analogous to this one because in it there were allegations that the Executor and trustee, Stephen Cheifetz, had acted in his own interests. When Mr. Cheifetz made the application to pass his accounts the two beneficiaries brought an application for the repayment of over \$900,000 paid to him and his holding company by the estate. The Court of Appeal held that the passing of accounts did not amount to a dismissal of the claim by the beneficiaries. The Court noted that while there was statutory authority for awarding damages for misconduct, neglect or default by a trustee on passing of accounts, “it is rare for the court to permit the parties to litigate a substantial claim for damages for breach of a trustee’s fiduciary duties through the medium of an audit” (para. 7). The Ontario Court of Appeal observed that in an action for damages for breach of trust the court will be concerned the issues of a different nature than those involved in passing of accounts. Passing of accounts concerns itself with the amount properly paid to the personal representative, while an action for damages is concerned with whether the estate is entitled to any payment from the representative as compensation.

[16] Once again, there is no claim of breach of trust or any other inappropriate actions on the part of MDPTC. *Simone v. Cheifetz* does serve to point out that the passing of accounts has a limited purpose related to the accounting before the court. That is consistent with s. 75 of the *Probate Act*.

[17] Paragraph 6 of the draft order sought by MDPTC would be a court order preventing Bethany Watt from making any claim against the solicitor unless she “explicitly excludes that portion of the liability alleged” in the claim against the solicitor “that a court might attribute” to MDPTC. That order would go beyond what the passing of accounts is intended to do. The passing of accounts is conclusive proof that the court has approved the accounts as filed and adjudicated any claims or complaints brought forward under s. 71. It does not limit the right of a beneficiary to take an action against a third party and cannot limit the scope of a claim that a third party might make.

Costs

[18] Bethany Watt is the sole beneficiary of her father's estate. Any money paid out of the estate, as costs to her, ultimately would be paid by her.

[19] Ms. Watt argues that MDPTC should not be entitled to have its legal fees paid out of the estate and that MDPTC should pay her costs. She does not dispute that the legal fees incurred in obtaining advice were a reasonable charge against the estate, but that the legal fees in the litigation, both hers and those of MDPTC, should not come out of the estate. She says that MDPTC caused the litigation and should pay the cost of it.

[20] In *Prevost Estate v. Prevost Estate*, 2013 NSCA 20, the Court of Appeal held that where a trustee engaged in unnecessary proceedings and the other parties have been put to needless expense, the trustee should be ordered to pay their own costs and not be indemnified from the estate. The conduct of the Executor in *Prevost* was nothing at all like what MDPTC did in this case. In *Prevost* the Executor obtained the court's interpretation of the disputed clauses of the will. "Not content with that outcome, the Executor appealed essentially repeating the narrow linguistic arguments unsuccessfully made before the Chambers judge. The respondents have been put to needless expense." (para. 18.)

[21] In this case, MDPTC was made aware of Ms. Watt's intent to sue the lawyer. It's actions in seeking legal advice about the implications of that were not unreasonable. Ms. Watt does not dispute that. MDPTC engaged in discussions with Ms. Watt's counsel about a form of order that in their view was required to protect them against being drawn into litigation that she would commence. The position taken by MDPTC that the order should include paragraph 6 was, in my opinion, not correct. But both parties agree that there is no Nova Scotia caselaw on point. The position taken by MDPTC was not unreasonable so that it should be required to bear its own costs or pay costs itself to Ms. Watt. A personal representative is required to act reasonably or face the consequences of their actions. They are not penalized for making mistakes within the zone of reasonable conduct.

Campbell, J.

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Defendant

ERRATUM

Judge: The Honourable Justice Jamie Campbell

Heard: March 15, 2024, in Sydney, Nova Scotia

Counsel: Brian Awad K.C., for the Plaintiff
Nathan Sutherland, for the Defendant

- Erratum:**
1. The sentence contained in para. 1 of the decision released on March 22, 2024 has been deleted. It read as follows:
“Bethany Watt does have an issue however with the actions of the solicitor who was retained to provide legal services for the estate, including the winding up of two companies owned by Douglas Watt.”
 2. The above sentence is replaced with the following:
“Bethany Watt does have an issue however with the actions of the solicitor who provided estate-planning legal services to her father.”