

SUPREME COURT OF NOVA SCOTIA

Citation: *Chisholm v. Estate of Chisholm*, 2024 NSSC 148

Date: 20240417

Docket: 504312

Registry: Sydney

Between:

Daren Chisholm

Applicant

v.

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

Respondent

Judge: The Honourable Justice Patrick J. Murray

Oral Decision: April 17, 2024

Counsel: Daren Chisholm, Self represented
Nancy (Chisholm) Donovan, Self represented
Duncan MacEachern, Proctor

By the Court:

Introduction

[1] This is an application by Daren Chisholm for the removal of Nancy (Chisholm) Donovan as the personal representative of the Estate of their father, Thomas Joseph Donovan, who passed away on November 24, 2020.

[2] Mr. Chisholm left a Will appointing the Respondent, Nancy (Chisholm) Donovan as his Executrix, and he left his entire Estate “in trust” for his Executrix to divide it equally among his five children, namely, Nancy (Chisholm) Donovan, William (Billy) Chisholm, David Blair Chisholm, Thomas Chisholm, Jr. and Daren Chisholm, the Applicant.

[3] The Applicant alleges that the Executrix, Nancy (Chisholm) Donovan has mishandled the Estate and failed to account for its assets and liabilities.

[4] Mr. Chisholm has filed two affidavits in which he stated there have been no receipts produced for rent or the expenses that are related to the rents paid.

[5] Further, Mr. Chisholm argues she has refused to properly complete her duty by refusing to deposit the rents in the Estate bank account.

[6] The Applicant states that this is the case despite being advised by the Proctor for the Estate, in writing, that she must account for this income to the Estate in the form of rent which is paid on a monthly basis.

[7] In his affidavit evidence, the Applicant says the beneficiaries have not been informed as to the status of the personal belongings in the home at 100 Church Street, Florence, NS, and that the alleged neglect has placed the Estate in jeopardy, as the Estate expenses could have been avoided if the property was listed and sold.

[8] Mr. Chisholm stated there are essentially three bills the Estate must discharge monthly; utilities, taxes and upkeep. No information, he says, has been provided in relation to any care and upkeep of the family home.

[9] Daren Chisholm was cross-examined at the hearing on his affidavits. He maintained his position throughout his testimony.

[10] That said, the Applicant was argumentative, defensive, and often failed to grasp the difference between giving evidence and making submissions in support of his position on the application. However he is not a lawyer, and generally had a grasp on the issues concerning the Estate.

[11] Ms. Chisholm (Donovan) did not file an affidavit but filed a detailed notice of objection to the application to have her removed.

[12] In her objection Ms. Chisholm (Donovan) provides an explanation regarding the failure to deposit rents and her proposal for ultimate distribution:

12. As personal representative of the estate it would be my intention upon the sale of the properties to prepare a proposed distribution of estate assets and sale proceeds for which would be subject to approval by this Honourable Court in regard to deductions to be made from the entitlement of Daren Chisholm, myself and my brother William Chisholm in regard to legal costs and outstanding rental contributions.

13. In respect to both deposits and withdrawals for which I have been unable to provide sufficient information to the Court I will continue to endeavour to review these matters to provide suitable explanation and failing which I would rely upon the Court to provide direction in the manner in which these discrepancies should be offset from either my entitlement in regard to the estate or as otherwise may be directed by this Court.

[13] In cross-examination the personal representative continued to maintain that in the final settlement each beneficiary will receive their legal entitlement.

[14] In assessing her evidence the Court must consider why it is that the personal representative's proposed distribution is necessary. At this point that is something that must come after all of the assets and liabilities are accounted for, and there is a solid basis on which the Court may order a distribution.

[15] In her Notice of Objection, Nancy (Chisholm) Donovan provided (at Tab 7) an updated list of deposits and withdrawals that she had not previously explained.

[16] At the hearing she was asked about a \$3,000. withdrawal on July 14, 2022, as well as a cheque from the Proctor of \$788.83 on May 13, 2022. In relation to the withdrawal she stated, "I don't know" and with respect the second amount, her response was, "It would have to be for taxes or water, but I don't know what it was for".

[17] It appears in Tab 7 there was a deposit on May 19, 2022 of \$2,903.49 which Nancy (Chisholm) Donovan indicated was for income tax, but this item has a question mark, which I infer means she is unsure.

[18] This does not engender confidence in the ability of the Executrix to complete closure of the Estate in a timely fashion. It is imperative that all beneficiaries receive a more accurate accounting with a clear explanation for the amount of rent collected that is more than just that the rent “went to bills”.

[19] I am not suggesting Nancy (Chisholm) Donovan did anything dishonest or deliberate, but the evidence does suggest that she is not up to the task of providing the beneficiaries with a clear financial picture of the Estate.

[20] She is prepared to compensate the Estate from her share, and she says Mr. Daren Chisholm must do the same, in respect of the cost award against him.

[21] This uncertainty can lead only to the prospect that potentially large sums of money will need to be deducted from the respective shares of those who paid rent, that was not deposited to the Estate accounts. In particular, this would be the Executrix herself and her brother William. There is also the rent paid by Mr. Pardy that must be calculated.

[22] In short, the plan of Ms. Chisholm (Donovan) is to leave it all to be determined at the time of distribution.

[23] What is key to the decision on this application is what is in the interests of all beneficiaries including Daren Chisholm?

[24] Nancy (Chisholm) Donovan has submitted that the litigious nature of the Applicant has added to the delay and difficulty in regard to finalizing the Estate.

[25] The Estate clearly recognized the pressing need to dispose of the real properties. An appraisal was obtained by Black and Sons dated August 11, 2023. The Executrix has submitted (and accepted) an offer on this property.

[26] It was the Applicant who filed a motion for directions on June 22, 2023, which resulted in the Court’s letter providing further directions on October 5, 2023.

[27] I can accept, as I did previously, that the high level of contention and animosity that exists here, can thwart even good faith efforts to be diligent.

[28] That, however, does not divert or lessen the duty upon the Executrix, with the passage of time, to employ better practices and if not to seek help. Ms. Chisholm (Donovan) was advised by the Proctor, Duncan MacEachern, in writing of what was required of her. In the brief filed by the Estate, he concedes that the accounting could have been more accurate.

[29] Under the law, the onus lies upon the Applicant to establish that the relief sought, should be granted. It has been described as a delicate exercise.

[30] Guidance for the decision is set out in the statutory grounds set out in s. 61 of the *Probate Act*, and in the grounds established at common law. In particular, the case of *Letterstedt v. Broers*, (1884) 9 App Case 377, is instructive.

[31] Under s. 61, on application of any person, a court may remove a personal representative where it is satisfied that it would be in the best interests of the persons interested in the Estate, and without limiting the generality of that, the Court is satisfied the personal representative is “neglecting to administer or settle the estate, or is wasting the estate”, among other grounds.

[32] The exercise of discretion to remove an Executor is not to be undertaken lightly, the overriding duty of the Court is to ensure that the administration of the Estate will be properly executed, the ultimate concern of the Court must be for the welfare of the beneficiaries. (*CEO Estate and Trusts*, May 2021; *Whitworth Estate*, (2016) CarswellSask 779 (Sask Q.B.))

Decision

[33] I am mindful that the wishes of the late Thomas Chisholm in his Will should be respected and that his choice of representative should only be altered in the clearest of cases.

[34] Many of the things complained of in this application are those same concerns that were the subject of the initial application in 2021.

[35] The fact is that several years later those problems persist and while I find the high level of contention has made the administration of the Estate more difficult, it does not account for all of the issues and, in particular, the financial issues.

[36] It is not every mistake, neglect of duty, or inaccuracy of conduct that will induce a Court of Equity to step in. As stated by Warner J. referring to the leading text of MacDonald Sheard and Hull on *Probate Practice*:

The acts or omissions must be such as to endanger the trust property or show a want of honesty or a want of proper capacity to execute the duties...

[37] In this case, as in all cases, the main guide is the welfare of the beneficiaries.

[38] I would repeat that I make no finding of anything deliberate or untoward in Nancy (Chisholm) Donovan's actions or omission. I found earlier that she is a credible person and I do not question her honesty or integrity. The fact remains however, that she has not been up to the task. She has not provided a level of accounting that one would expect, this includes a clear record of deposits made and expenses paid by the Estate. She says she has receipts, but not in all cases.

[39] Respectfully, I would add that after this length of time, the beneficiaries have come to expect more. Simply stating that a Court approved disposition is the viable option, does not replace the need for vigilant handling of the Estate's affairs.

[40] In the result, the Application for the removal of the personal representative is granted.

[41] There are some additional matters that we need to deal with today.

[42] I have decided to give Mr. Daren Chisholm an opportunity to administer the estate. This was a difficult aspect of my decision given the history and strained relationships within the family. This is an important and difficult role to take on.

[43] It will require Mr. Daren Chisholm to look out for the welfare of all beneficiaries including Nancy (Chisholm) Donovan, William, Thomas and Blair. He and his siblings must attempt to put differences aside and cooperate with the Proctor, Mr. MacEachern, who is very knowledgeable in these matters.

[44] In my view, the most important thing for Daren Chisholm will be to keep an open mind and not attempt to impose his will at every turn but to make sound and reasonable decisions. He will need to inform himself and become educated as to his duties. Cooperation will be required from the beneficiaries.

[45] Nancy (Chisholm) Donovan, will need to gather and deliver, in tact, the documentation she possesses in relation to her former position as the estates

personal representative. For example, signatory on the Estate bank account will likely be required as well as other authority or consents needed to complete proper administration.

[46] As well, care must be taken to avoid, what I will say respectfully, chaos and disruption in relation to the payment of rent, and Daren Chisholm's access to the family home, which is the Estate's chief asset.

[47] He must respect this is still his family home and currently that of his siblings. They must respect that he has a job to do.

[48] In respect of the listing price and current offers, the Court has been asked to allow the Estate to reduce the purchase price to \$132,000. It does so based on the information obtained from the realtor as to the number of viewings and showings with the resulted number of offers, there are two existing offers.

[49] The Court is prepared to accept that the listing price would be reduced to \$132,000. I will allow the new personal representative, Mr. Daren Chisholm, to respond to these offers under the guidance of the Proctor, Mr. MacEachern. For the Court to step beyond that would not be appropriate, that is a role that the personal representative has in this matter.

[50] Mr. MacEachern shall prepare an order for the Court to issue.

[51] At this time any decision on costs is reserved.

Murray, J.