

IN THE COURT OF PROBATE FOR NOVA SCOTIA
IN THE ESTATE OF NANETTE ELIZABETH KEATING, DECEASED

Citation: *Keating v. Keating*, 2024 NSSC 207

Date: 20240712

Docket: 531160

Probate Court File: 66770

Registry: Halifax

Between:

Gary Keating

Applicant

v.

Rachel Keating

Respondent

**DECISION ON APPLICATION TO REMOVE CO-PERSONAL
REPRESENTATIVE**

Judge: The Honourable Justice Scott C. Norton

Heard: July 11, 2024, in Halifax, Nova Scotia

Decision: July 12, 2024

Counsel: Allison J. Bigg, for the Applicant
Rachel Keating, self-represented Respondent

By the Court:

Introduction

[1] Gary Keating is the co-personal representative of the Estate of Nanette Elizabeth Keating. He applies for an order removing his sister, Rachel Keating, as co-personal representative of the Estate because, generally, she has failed to fulfill her duties as co-personal representative.

[2] More specifically, Gary alleges that Rachel should be removed because she has failed to comply with an order of the Registrar of Probate dated August 31, 2023 and, alternatively, because it is in the best interest of the beneficiaries.

[3] The issue to be decided by me is whether the facts of this case justify an order removing Rachel Keating as co-personal representative.

Background

[4] Nanette Keating passed away on January 6, 2020. She executed a Will on December 15, 2010 naming Gary and Rachel as co-personal representatives. Nanette was pre-deceased by her husband George. Her Estate was to be divided equally among her surviving five children. Her son, Clark, has since passed away on June 2, 2021. His estate cannot be closed until Nanette's Estate is settled.

[5] A Grant of Probate appointing Gary and Rachel as co-personal representatives was granted on September 23, 2020.

[6] Gary alleges the following specific reasons that Rachel should be removed:

- (a) Rachel is neglecting to use the Estate's bank account that was set up by the parties in March 2020 to account for Estate-related transactions (the "Estate Account"). Rather, she is intermingling the Estate's assets with accounts that Gary does not have access to.
- (b) Over \$23,000.00 in the Estate's assets are misallocated or missing. Rachel has admitted to transferring \$15,000.00 of the

Estate's assets to herself, but the remaining \$8,000.00 remains unaccounted for.

- (c) Rachel, without the knowledge or consent of all the Beneficiaries, disbursed an additional \$15,000.00 to herself, Dennis, Jocelyn, and Lorraine, totalling an unauthorized disbursement of \$60,000.00 of the Estate's assets. Rachel admitted that she was able to do this because she was a joint holder for the investment account from which the funds were withdrawn.
- (d) Rachel provided an accounting of the Estate to Gary, but it was inadequate as she failed to provide all relevant bank statements and account for the missing funds from the Estate.
- (e) Rachel has breached the Order of the Registrar dated August 31, 2023 ("Order") by failing to provide a full and complete disclosure of how she is managing the Estate.
- (f) Rachel's lack of adequate disclosure also prevents Gary from moving forward with an application to pass the accounts.

[7] Rachel contests the application. She asserts that she has done her best to manage the Estate in keeping with the wishes of their mother. Rachel is not now and has not been represented by legal counsel throughout her management of the Estate.

Analysis

[8] The *Probate Act* gives the Court the authority to remove Rachel as a co-personal representative for non-compliance (s. 61(1)(a)), and provides that if Rachel is removed, she is required to provide an accounting of the Estate up to the time of her removal (s. 61(6)).

[9] The personal representative is expected to have the accounts of an Estate passed within 18 months of the date of the grant. If the Court determines that Rachel failed to comply with the Order to pass the accounts, s. 53(3) of the *Probate Court Practice, Procedure and Forms Regulations* ("Probate Regulations") gives the court

the authority to order that Rachel pay the costs of an independent accounting of the administration of the Estate.

[10] The purpose of these provisions is that the court must be able to understand the transactions in and out of the estate and what they were for. It is unacceptable conduct when a personal representative neglects to administer or settle the estate: *Skanes v. Skanes Estate*, 2022 NSSC 381.

1. *Did Rachel fail to comply with the Registrar's Order?*

[11] The Order required Rachel to provide all bank statements in her possession relating to the Estate. She did not do so. The materials filed and Rachel's testimony establish:

- Rachel admits in her affidavit that she has not used the Estate Account at RBC that she and Gary opened in March 2020. Instead she has used her own account and intermingled the Estate's assets with other accounts. She has not disclosed statements to these other accounts. At the hearing she acknowledged that she did not appreciate the distinction between Estate monies being managed through the joint account and her (now) sole ownership of the former joint account.
- Rachel has not provided statements for two of the four accounts that Nanette held with RBC when she died, and has not provided the statements for the mutual fund investment account for the period January to September 2020.
- Rachel disclosed only the top half of the first page of the October to December 2020 investment account statement that shows that Rachel removed the remaining funds from the investment account on an indeterminable date because the bottom half of the page is missing. Rachel has not provided any bank statements to show where the funds were deposited. Rachel could not explain why only the top half of the pages were produced.

- Rachel has not provided the tax-free savings account statements for January to September 2020, all of 2021 and all of 2022, April to June 2023, and January 2024 to date. Rachel stated that if the court ordered them produced she would obtain them.
- Rachel disclosed only the first page for the October to December 2019, October to December 2020, and October to December 2023 statements, and the first two pages of the January to March 2023 statement. Rachel stated that if the court ordered them produced she would obtain them.

[12] The Order also required Rachel to work with Gary to file an application to pass the accounts as required by s. 69 of the *Probate Act* and s. 53 of the *Probate Regulations*. The evidence shows that Rachel did not comply with the requests from counsel for Gary to produce all the documents required for an accounting. Rachel stated that she thought she had provided everything asked for. I find she did not. As Rachel did not use the Estate Account, without those documents the court is not able to understand the transactions Rachel made in and out of the Estate and what they were for (*Skanes*).

[13] Rachel claims that she has provided an accounting to the best of her knowledge. This is not sufficient. Opening an Estate Account, conducting all business of the Estate through that account and providing a closing inventory is not a complex matter in an estate of this nature. She says that Gary should have arranged to meet with her to discuss these issues rather than bringing an application to the court.

[14] Rachel also relies on the fact that since she was a joint holder of the two personal deposit accounts with Nanette, these funds do not form part of the Estate's assets. Although Rachel was a joint holder on the accounts, she has failed to rebut the presumption of a resulting trust.

[15] *Patterson Estate (Re)*, 2017 NSSC 221 (“Patterson Estate”) addresses the issue of joint bank accounts held with a deceased person. Justice Wright cited the Supreme Court of Canada’s decision in *Pecore v. Pecore*, 2007 SCC 17, at para. 20:

A resulting trust arises when title to property is in one party's name, but that party, because he or she is a fiduciary or gave no value for the property, is under and obligation to return it to the original title owner.

[16] The onus is on the joint holder of the bank account with the deceased to prove, on a balance of probabilities, that the testator intended to gift them the right of survivorship. Rachel has failed to provide any evidence that Nanette intended to gift her the funds from the two deposit accounts. As such, Rachel has not provided evidence to rebut the presumption of a resulting trust. Therefore, the assets from the two deposit accounts, and any other joint accounts Rachel held with Nanette, should be treated as part of the Estate.

[17] The duty to account is a primary duty of a personal representative. One of the responsibilities tied to this duty is opening an estate bank account. In *Chisholm v. Chisholm*, 2022 NSSC 271, Justice Murray describes this responsibility as follows:

[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".

[18] It has been well-established that Rachel is not using the Estate Account to administer the Estate. Consequently, Rachel's concealment and intermingling of the Estate's assets has overcomplicated her ability to properly account for the Estate to Gary and the Beneficiaries. By not using the Estate Account, Rachel is not only breaching her duty to account but is preventing Gary from fulfilling his duty to account.

[19] In *Chisholm v. Estate of Chisholm*, 2024 NSSC 148 ("Chisholm Estate"), concerning the same estate, Justice Murray removed the personal representative as it was found that she was unable to handle the affairs associated with the Estate:

[38] ... 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.

[20] Similarly, Rachel's treatment of the Estate's assets and her candid responses to questions from me during the hearing demonstrates she is not up to the task of managing the Estate to the level that is expected of a personal representative. Regardless of her best intentions, she has prolonged the settling of the Estate through her continued refusal to disclose the Estate's assets and financial records, even when mandated by an Order of the Registrar of Probate to do so.

[21] I find on the totality of the circumstances that is in the best interests of those persons interested in the Estate that I order Rachel removed as co-personal representative of the Estate. I order that Gary Keating shall continue as sole personal representative.

[22] I further order Rachel to produce, within 60 days of the date of my order, copies of all of the documents that have been requested to date by Gary including statements from any bank account that was used for the management of the Estate from January 2020 to date, including the four accounts identified by RBC:

- (a) Personal Deposit Account #05563-5061817 ("Deposit Account 1");
- (b) Personal Deposit Account #05563-5061833 ("Deposit Account 2");
- (c) Mutual Funds Investment Account #408666444 ("MFIA"); and
- (d) Tax-Free Savings Account #42383936 ("TFSA").

[23] I order that Rachel provide to Gary, within 60 days of my order, a complete accounting for the administration of the Estate (providing an opening inventory of all assets, identifying the amount and source of funds for of all payments made by her on behalf of the Estate, a list of any pending debts not yet paid, a list of any payments to beneficiaries to date and providing a closing inventory of all assets) from January 6, 2020 to date.

[24] I order that Rachel cease any activity with respect to the administration of the Estate and that she shall not make any withdrawal of any Estate funds from any account pending Gary having an opportunity to conduct a review and accounting.

[25] I order Gary to provide an accounting to the Registrar within 120 days of my order.

[26] I decline to order that a professional accountant be hired at Rachel's expense to conduct an accounting. The evidence before me does not support such an order at this time. However, if upon receipt of the statements and accounting from Rachel, Gary considers that a professional accountant is required to be retained, he may make a further application with supporting evidence to the court for that authority and a determination of whether it should be paid for by Rachel or the Estate.

[27] On the evidence before me I cannot find that there are any funds missing from the Estate, nor attribute any responsibility for any shortfall to Rachel. It will be Gary's responsibility to determine from RBC why the discrepancy between their statement of account balances as of December 31, 2019 and the statement of account balances as of January 6, 2020 exists.

[28] Upon completion of the accounting, if there is any amount that the Estate contends that should be repaid by Rachel, it can be addressed with Rachel and if necessary, be the subject of a separate proceeding on behalf of the Estate.

[29] The Registrar reserved the issue of costs for Gary's application to compel Rachel to provide a full accounting. I leave that issue to the Registrar to determine.

[30] As to the costs of the application before me, based on Tariff C, I award party and party costs to Gary in the amount of \$750 to be paid forthwith and in any event of the cause by Rachel personally and not by the Estate.

[31] Order accordingly.

Norton, J.