

Probate District: H

Probate Court File No. 56863

IN THE COURT OF PROBATE

Cite as: Deveau Estate (Re), 2012 NSPB 3

IN THE MATTER OF: The Estate of BARBARA GAIL DEVEAU, deceased

DECISION

Decision: September 18, 2012

Counsel: George P. Ash for Estate of Barbara Gail Deveau
Don Urquhart for Jody Deveau-Ward

Background:

On August 29, 2012 a hearing was held before me as Registrar regarding the passing of the accounts of Laurena Gail Barber, as Personal Representative of the Estate of Barbara Gail Deveau.

Barbara Gail Deveau made a Will on February 14, 1978 appointing her husband as executor and leaving her assets to him and in the event that he predeceased her then to her children, Laurena Gail Barber, Earl Kelly Deveau and Jody Deveau-Ward.

On July 6, 1996 she then prepared a Codicil to her Last Will and Testament appointing her daughter, Laurena Gail Selinger ("Laurena") Barber as the Executrix.

Barbara Gail Deveau was ill for quite some time before her death and was hospitalized on various occasions. During this time Jody Deveau-Ward ("Jody") would travel to visit her mother and do her cleaning and run errands while at her mother's apartment and during her hospitalization.

During the period of Barbara Gail Deveau's illness Laurena moved with her family to Ontario. She had very little communication with her mother as she testified that she felt her mother was not looking after herself properly in that she would not give up smoking which ultimately had an impact on her health.

From evidence given by Earl Kelly Deveau ("Kelly") he had very little contact with his mother nor his sister, Jody and could not offer too much evidence with respect to the relationship between his mother and Jody or the relationship between his sister, Laurena and Jody other than since his mother's death Laurena and Jody had become estranged.

Barbara Gail Deveau died on July 14, 2008. She was predeceased by her husband leaving surviving three (3) children, Laurena, Kelly and Jody. The application for a grant of probate was filed with the Probate Court in Halifax and a Grant of Probate issued on August 26, 2008. The application included real property valued at \$111,300.00 and personal property at \$4,000.00. An Inventory was filed on October 31, 2008 and the only change was an increase in the value of the personal to \$4,090.00.

On April 11, 2012, an Application for accounting by person interested in an estate was made requesting an order requiring the Personal Representative to apply to the Probate Court to have the court pass the accounts of the estate and give an accounting of the estate and an order for costs of the application. The application was made by Jody and in her affidavit she states that the real property had been sold and that she had received a partial distribution prior to December 2010. Attached to Jody's Affidavit was a letter from Laurena dated March 11, 2011 which requests that Jody return the jewelry items she took from their mother's condo or provide her with an appraisal of the items. Jody's lawyer, Peter Robertson's reply letter of March 14, 2011 advises that the rings were a gift from their mother. The letter advises that this could be confirmed by Marilyn Vaughan & Betty Sprague. It continues to say "our client notes that the jewelry which was still in your mother's possession at the time of her death, does not appear to be represented in the Inventory of the estate". Mr. Ash, Proctor for the estate, wrote Mr. Robertson on May 2, 2012 and requested that the rings be returned to the estate.

On May 16, 2012 a revised Inventory was filed which increased the value of the personal property to \$11,590.00. The administration of the estate proceeded as usual in that Notices were served, the estate was advertised in the Royal Gazette, the Inventory had been filed and the real property sold and the personal effects distributed. It appears that the bulk of the estate had been distributed all prior to December 2010. There had been no activity in the estate file until December 2010 when Jody made inquiries to the Probate Court on the status of the estate.

The Court was then advised that an accounting would be provided and the application was removed from the docket. An Application to pass the accounts with a hearing was filed with the court on July 11, 2012 setting a date of August 29, 2012 for the closing.

Issues:

1. A Notice of Objection was filed by Kelly objecting to the lawyer's fees for Jody being paid from the estate. He proceeded to say that he was satisfied with the administration of the estate by Laurena.

2. A Notice of Objection was filed by Jody objecting to the following:

Object to the accounts of the personal representative on the following grounds:

1. Inclusion of Inter vivos gift of rings to Jodi-Deveau Ward in the estate Assets and distributions
2. The Personal Representative's personal expenses totaling \$11,164.20 include unreasonable and excessive travel expenses of approximately \$5,192.33 and are objected...
3. Personal Representative's delay in closing the estate...

Object to the amount of commission claimed by the personal representative on the following grounds:

1. The personal representative has paid to herself \$4,750.00 as executor's commission without an order of the court
2. The personal representative is claiming a commission of \$4,750.00 in addition to excessive and unreasonable travel and out of pocket expenses totaling approximately \$1,192.33
3. The personal representative's delay in closing the estate and providing accounts resulted in unnecessary expenses to the estate, including additional legal fees.

Object to the solicitor's bill of costs on following grounds:

1. The primary asset of the estate was the real property located at 70 Collins Grove, Dartmouth which was sold on October 31, 2008 only three and one half months after Laurena Barber's date of death on July 14, 2008.
2. The personal representative did not proceed to apply to close the estate or provide formal accounts until July 2012, despite repeated requests from Jodi Deveau-Ward and her counsel and after a formal application was made to the Probate Court pursuant to section 69(2) of the Probate Act;
3. The personal representative's delay in closing the estate and providing accounts resulted in unnecessary expenses to the estate and to Jodi

Deveau-Ward personally, including additional legal fees that Jodi Deveau-Ward would not have incurred had the personal representative adhered to the deadlines in the probate act.

4. The personal representative should be personally liable for the additional legal fees incurred by the estate and Jodi Deveau-Ward due to the personal representative's unreasonable delay in closing the estate.

Have another objection

1. Jodi-Deveau-Ward claims the costs of her application for an Order requiring the Personal representative to apply to close the estate, filed on April 5, 2012 from the personal representative.

I have read the Affidavit of Jody and heard her oral testimony whereby it appears that after Laurena moved to Ontario, Jody was the child that lived the closest to her mother and was able to assist her mother by doing cleaning and running errands for her. Jody testified that her mother was ill for quite some time before her death and was hospitalized on various occasions.

The oral testimony of Kelly does not hold much weight with me as he worked away from home and readily admitted that he did not visit or telephone his mother nor had he spoke to his sister, Jody but a few times over the past number of years. He advised the court that his best friend's mother called him and told him that his mother was in hospital and that he should come home. He did state that he, his wife and his sister, Laurena, cleaned their mother's apartment and that it was in a deplorable state in that they cleaned and then had to hire professional cleaners in order to ready the condo for sale. His sister, Jody, did not help with any of the cleaning or readying of the condo but was there for the distribution of the personal effects.

Laurena testified that she did not have too much contact with her mother once she moved to Ontario and further explained that she did not agree with her mother's choices with her health.

It was apparent from the testimony of Jody and Laurena that they had been close at one time but since the death of their mother their relationship has become strained to the point where they no longer speak to each other.

Decision:

Black's Law Dictionary's definition of "Inter Vivos" is *between the living; from one living person to another. Where property passes by conveyance, the transaction is said to be inter vivos, to distinguish it from a case of succession or devise. So an ordinary gift from one person to another is called a "gift inter vivos" to distinguish it from a donation made in contemplation of death".*

Jody, through written testimony and oral testimony, advised that her mother, while in the hospital, told her to take the rings but she did not take the rings until after her mother's death.

By evidence of Jody and correspondence from her lawyer, Peter Robertson, placed in the Probate Court's file the deceased told Jody that she should take her jewelry and jewelry box. After her mother's death she took only four rings and left the rest of the jewelry and jewelry box. Jody testified that there were only three rings now as one had been stolen from her jewelry box. I am of the opinion that the three rings are assets of the estate and should be returned to the Personal Representative.

Unfortunately, one of the rings was stolen from Jody's jewelry box. This ring, if not lost, would be an asset of the estate. No evidence has been given to indicate a value was placed on this ring. Since this ring was in the possession of Jody and has since been lost or stolen, this ring should be given a nominal value and that value be deducted from Jody's share of the estate.

I order that the one ring should go to Laurena, one to Kelly and one to Jody. In order to determine who gets which ring I order that the rings be numbered 1 - 3, the numbers written on paper and be placed in a hat and a number drawn by each party and subsequently the number drawn will be the ring they shall receive.

With respect to the second objection of Jody with respect to the Personal Representative's personal expenses:

1. The first expense – Mar 26/08 to Memorial Gardens – grave marker engraving - allowed;
2. The next eight expenses from June 21, 2008 to July 11, 2008 which include flight, gas for a rental car, airport parking, rental car and food which total \$1,660.53. These expenses occurred prior to the death of Barbara Gail Deveau and I do not have any jurisdiction with these - not allowed;
3. The expense - July 14/08 – Air Canada – Flight change fee (no receipt) - \$182.69 – not allowed;
4. The expense – July 14/08 – Air Canada – Flight from Toronto to Halifax July 15 – 338.80 - allowed;
5. The expense – July 14/08 – Laurena Barber – lost wages - \$1,000.00 – not allowed
6. The next two expenses on July 15/08 and July 16/08 for food and cemetery flowers – allowed;
7. The next four expenses on July 18/08 for gas, car rental, airport parking and hotel totaling \$517.16 – not allowed;
8. The expenses – July 30/08 – service Nova Scotia – Transfer fee for car - \$185.49 – allowed;
9. With respect to the remainder of the expenses, they are allowed.

It is my usual practice, when a Personal Representative lives a distance from the Probate Court to allow two trips, one to open the estate and the second to close the estate. Laurena has not submitted her costs to attend the closing of the estate but I will allow her \$1,000.00 for her travel and stay in order to close the estate.

A total of \$2,360.38 should be reimbursed to the estate by the Personal Representative.

With respect to the third objection, it is noted that the estate was opened, grant was issued, notices served, Inventory filed, real property was sold

within a reasonable period of time. The Personal Representative admitted that she was not aware nor had been made aware that the estate was to be closed within eighteen months as prescribed by law. She testified that she did not continue to close the estate as she was waiting for her sister to return the four rings that had been taken from her mother's apartment. There seems to have been a stall in the proceedings here until Jody made application to the court to have the Personal Representative file an accounting and close the estate. The issue of the rings became the major issue in order for the estate to be closed as neither side seemed to be willing to come to a settlement.

The fourth objection concerns the commission claimed by the personal representative. The final account shows a disbursement on Schedule "D" on Nov 20/08 – Laurie Barber – Executor Fees - \$5,750.00. The awarding of an Executor's commission is solely at the discretion of the Registrar of Probate at the time of closing. In this case the Personal Representative did take commission approximately three and one half years early without the approval of the Court.

When determining commission I apply Section 62(3) of the Probate Regulations and in determining the percentage I take into consideration the value of the estate, if there were investments, if the Personal Representative invested money, if they sold or divided the personal property, sold or transferred the real property, banking and the amount of time it took to complete the administration of the estate. In this estate there was real property which was sold, a bank account and household goods, personal effects which consisted of a vehicle, furniture and jewelry. There was a delay of three years, in which, it appears, the Personal Representative did not make any attempts to close the estate. I award the commission at 4.5% based on the value in the final account of \$136,561.68 which totals \$6,145.28 less the \$5,750.00 leaving \$395.28 owing to the Personal Representative.

The fifth objection is with respect to the Proctor's Bill of Costs for the estate. On November 25, 2008 Boyne Clark submitted an invoice for \$2,804.44 which has been paid. On June 9, 2009 Boyne Clark submitted an invoice for \$366.75 which has also been paid. I allow the Proctor's accounts that have already been paid from the estate and the remaining invoices of Boyne Clark are to be paid by the estate. The sixth objection was Jody Deveau-Ward

claiming the costs of her application for an Order requiring the Personal Representative to apply to close the estate. I am of the opinion that there has been fault by Laurena and Jody in not trying to rectify this matter without going to court.

Unfortunately, we have sisters, who at one time, were quite close and now over the death of their mother and the matter of four rings have become estranged. Hopefully, at some time in the future they will be able to overcome all of this and become friends again.

I refer to the article "Costs and Estate Litigation" 18 E.T.R. (2d) 218, Ian Hull sets forth some considerations favourable to an award of costs out of an estate:

- where the litigation arises out of the acts or fault of the deceased;
- where the order sought is for the protection of the trustee, such as an interpretation problem or where other directions or advice of the court are sought;
- where there are reasonable grounds for the litigation such as proof in solemn form;
- where suspicious circumstances are demonstrated;
- where the court's scrutiny or supervision is warranted.

I do not believe that the litigation arose as a result of any act or fault of the deceased nor for the protection of the trustee, nor for litigation, nor suspicious circumstances nor where the court's scrutiny is warranted. This matter should have been resolved without seeking the intervention of the Court.

Jody Deveau-Ward will be responsible for the payment of the legal account of her counsel and the estate will be responsible for the payment of Mr. Ash's account.

Once the proctor for the estates has amended the final accounts, he can forward same to my attention and I will finalize the estate.