

IN THE NOVA SCOTIA COURT OF PROBATE
CITATION: *Kelly Estate (Re)*, 2019 NSPB 1

ESTATE OF SHEILA KELLY - #59199

DECISION

Before: Registrar Cora Jacquemin

Date: January 23rd, 2019

Counsel:

Jennifer Keliher : on behalf of Carrie Dauphinee, personal representative of the estate of Sheila Kelly

Patrick Eagan – on behalf of the respondent, Cheryl Dauphinee

[1] This application was brought before the Court by Carrie Dauphinee who is the personal representative named in the will of her mother, Ms. Sheila Kelly. Carrie Dauphinee is seeking to gain possession of the urn containing the ashes of her mother. The urn and ashes are presently in the possession of Cheryl Dauphinee.

[2] Ms. Kelly's will at paragraph 5, it states:

"It is my last wish that my body not be laid out and I request that my body be cremated. I also wish that my ashes remain together and not spread. I give my Executrix the powers to decide what will happen with the said ashes."

The will has never been contested, nor has direction been sought for its interpretation.

[3] The fact that the ashes and urn were taken from the memorial service by Cheryl to her home is not in dispute. There they remained for several years before being taken to the nursing home in Windsor for a period of time. This *'relocation'* of the urn and ashes was ostensibly agreed upon by both Cheryl and Carrie.

[4] In her brief filed on January 8th, 2019 Ms. Keliher, writes:

"A final disposition must involve a greater degree of permanency and certainty' and 'as personal representative, the applicant {Carrie} is the appropriate person to make decisions about her late mothers ashes'.

[5] Of this, there can be no question: Disposition of the deceased is one of the most fundamental tasks an executor/rix can undertake on behalf of the deceased. The will is paramount in this instruction: Carrie has the power to decide what will happen.

[6] In her application for a grant of Probate signed by on July 12th, 2011, Carrie Dauphinee swore an oath to perform the tasks of a personal representative. To date, the oath has not been fulfilled as the estate remains open past the 18 months indicated in the legislation.

[7] It seems odd, therefore, that an executorial obligation is being put forth on the ashes now – 13.5 years after Ms. Kelly's passing and 8 years after probate was granted when other responsibilities of the personal representative of the estate remain incomplete.

[8] There has been no evidence put before me to suggest that there have been multiple attempts over the 13.5 years by the Executrix to regain custody and control of the ashes. There is no evidence to suggest that Carrie wanted something more permanent done with the ashes while she was living with Cheryl after their mother had passed away, or while the ashes and urn were in the nursing home in Windsor for 'luck'. Or even after Cheryl retrieved the ashes and urn from the nursing home and took them back to her home in 2017.

[9] In her testimony, Carrie stated:

"She {referring to her mother Sheila Kelly} was going to the shelf like she requested" and that she {Carrie} "never thought about possession".

[10] While I cannot take into account the wishes of the deceased that haven't been incorporated into a last will and testament or codicil – and it should be made clear that I have not been asked to do this by either the applicant or the respondent – I can and will take into account the facts before me: Cheryl has had the ashes and urn in her custody either directly, or indirectly: in her home and/or business since the funeral.

[11] In a paper prepared by Whaley Estate Litigation of Ontario it states:

The control over a loved ones' ashes came before the British Columbia Supreme Court in Re Popp Estate (2001 BCSC 183), which was decided under the now repealed, Cemetery and Funeral Services Act ("CFSA"), but which is similar in effect to the CIFSA. In Popp Estate, the deceased wife was

cremated and the executor husband buried the ashes with the remains of his father in the grave plot that was designed for his parents. The husband planned to remove his wife's ashes when his father passed away. Approximately five years later, the deceased's sister applied to have the ashes disinterred and moved to a columbarium. Numerous family members of the deceased expressed their opinion that the deceased wished to have her ashes placed in a columbarium and feared being buried under ground.

The Court considered whether the request for a disinterment involved family hostility or a capricious change of mind. The Court relied on a plain meaning of "capricious" and decided that the husband's plan to remove his wife's remains from the grave site with no plan on what to do with them was irregular and unpredictable. The Court decided to intervene and order the remains to be disinterred and placed in a columbarium thus ensuring a final resting place.

The Court held that the sister was entitled to certainty regarding the deceased's remains and that the husband has acted capriciously by not declaring his intention. The court stated that he was 'entitled to control of the disposition of the remains provided that he did not act capriciously'.

Capricious: given to sudden and unaccountable changes of mood or behavior.

[12] Nothing has been put forth to suggest that a permanent interment has been arranged, much less discussed, or that one will be taking place. None of the daughters of Ms. Kelly seem to be seeking a formal closure that can sometimes be provided by an interment.

[13] A vague suggestion has been put forth today of purchasing a plot for mother and daughters so that they can be interred together. In this way, Ms. Kelly wouldn't be alone.

[14] This suggestion has, according to Carrie, never been circulated amongst her siblings and she admits that a consensus would be unlikely. Therefore, I will not take it into consideration for this decision.

[15] By virtue of allowing the urn and ashes to remain in the custody of her sister, Cheryl, either in Cheryl's home or their business since the day of the memorial service, and with nothing before me to suggest that custody of the ashes and urn by Cheryl has ever been challenged by the Executrix in the 13.5 years since Sheila Kelly's passing or 8 years since probate was granted, I find that Carrie has done just that – determined their disposition and final resting place – with Cheryl.

[16] A change of Carrie's decision now of the ashes and urn that has stood since the day of Ms. Kelly's memorial at this point seems capricious at best or malicious at worst and I am not prepared to order their transfer.

[17] The application is dismissed.

CNMJ