

SUPREME OF NOVA SCOTIA

Citation: *Skanes v Skanes Estate*, 2022 NSSC 381

Date: 20230118

Docket: *KEN*. No. 507807

Probate Court No. 13193

Registry: Kentville

Between:

Mark Randall Skanes

Applicant

v.

Paul Gordon Skanes, Personal Representative of the Estate of Mildred Jean Skanes

Respondent

Judge: The Honourable Justice Gail L. Gatchalian

Heard: April 11, 2022 and July 15, 2022, in Kentville, Nova Scotia

Oral Decision: July 15, 2022

Counsel: Jonathan Hooper, for Mark Skanes, Applicant
Paul Gordon Skanes, Personal Representative of the Estate

By the Court:

Introduction

[1] This is an Application under the *Probate Act*, S.N.S. 2000, c.31, s.1, by Mark Skanes for the removal of his brother, Paul Gordon Skanes, as the personal representative of the Estate of their mother, Mildred Jean Skanes.

[2] Ms. Skanes died on July 23, 2015. A Grant of Probate was issued to Paul Skanes on March 15, 2016. Six years later, Paul has not settled the Estate.

[3] Any person may apply under s.61(1) of the *Probate Act* to remove a personal representative, and the court may remove the personal representative when satisfied that removal would be in the best interests of the beneficiaries and, without limiting the generality of the foregoing, if the court is satisfied that the personal representative has not complied with an order of the court or that the personal representative is neglecting to administer or settle the estate or is wasting the estate (s.61(1)(a) and (b) of the *Act*).

[4] Mark is a residual beneficiary of the will. He complains that:

1. Paul distributed money that belonged to the Estate before the Grant of Probate was issued.

2. Paul transferred Estate money into Paul's business, Mini Donut Express, and distributed Estate money through a bill payment system, Telpay, used by the business, Mini Donut Express.
3. Paul has failed to adequately account for his administration of the Estate, despite numerous requests from Mark beginning in 2017.
4. The Estate owes taxes to Canada Revenue Agency, which froze the Estate bank accounts in February, 2020.
5. Very little has been done to administer the Estate in six years.

[5] Mark asks that Paul be replaced by Robert MacDougall, the alternate executor named by Ms. Skanes in her will. Mr. MacDougall is one of Mildred Skanes' grandsons.

[6] Paul's response is as follows:

1. He did distribute money from Ms. Skanes' bank accounts before the Grant of Probate was issued, but this was done with the knowledge and consent of all of the beneficiaries. Ms. Skanes' bank accounts were in her name only, but she had given him her bank account access numbers and passwords, which he used to access the accounts.

2. He did transfer \$180,000 in Estate money into Mini Donut Express, before the Grant of Probate, and then distributed Estate money through Telpay, the bill payment provider, because of his ability to use Telpay to transfer large sums of money in single transactions. He provided the court with a copy of a bank statement for his Mini Donut Express Inc. account that shows a deposit of \$180,000 on August 24, 2015 and a withdrawal of \$180,000 on August 25, 2015.
3. All but \$73,272.93 in Estate funds have been distributed. He has invested this remaining amount for beneficiaries who are under the age of 25, pursuant to the wishes of Ms. Skanes.
4. He has not filed a final accounting of the Estate, but he wishes the Court to order him to file a final accounting. He has a journal or ledger that he kept with all of the disbursements and expenses backed up with receipts. He wants an opportunity to present affidavit evidence from the adult beneficiaries that they agreed to receive Estate funds before the Grant of Probate.
5. Although he has not filed any tax returns for the Estate for 2016 to 2021, inclusive, the Estate taxes are paid, and he is waiting for a Clearance Certificate, which he acknowledged that he first requested

in 2021, six years after the date of death. Revenue Canada requires the 2016 tax return to be filed because there was income earned in that year.

[7] Mark and Paul filed affidavit evidence. The hearing took place on April 11, 2022. Mark was represented by counsel. Paul represented himself. Paul cross-examined Mark. Mark's legal counsel cross-examined Paul. After closing arguments, I decided to make an interim order that Paul file with the Court a detailed accounting of his administration of the Estate, for the following reasons:

1. Paul did not file sufficient information or documents for me to determine the Application to remove him as the personal representative.
2. If I were to remove him as the personal representative, he would have to account for the administration of the Estate up to the time of his removal anyway: s.53(2) of the *Probate Court Practice, Procedure and Forms Regulations*, NS Reg 119/2001.
3. It has been seven years since Mildred Skanes' death and six years since the Grant of Probate was issued, and I was concerned about further delay in the administration of the Estate.

4. Paul's evidence is that he has all the documents to support the administration of the Estate.

[8] My April 11, 2022 Order required Paul to file, by June 10, 2022, a detailed accounting of the administration of the Estate by way of Affidavit for the period from the date of Mildred Skanes' death on July 23, 2015 until the date of the Order, and to file all necessary Estate tax returns needed to obtain a Clearance Certificate within 90 calendar days of the Order. I explained that the Court would have to understand, line by line, what went in and what went out of the Estate and why.

[9] At the time I gave my Interim Order, I encouraged Paul to retain an accountant or bookkeeper to assist him in filing the detailed accounting with the court. The hearing was adjourned to July 15, 2022.

[10] Paul did not comply with the Order.

[11] On July 14, 2022, the day before the continuation of the hearing, Paul faxed the Court a number of documents:

- A fax cover sheet listing attached documents.
- A summary of the amounts in Ms. Skanes' accounts as of June 30, 2015.

- A three-page “disbursement journal” showing expenses paid and disbursements to beneficiaries, the nature of the expense and recipient of the disbursement, with dates.
- Copies of various receipts that support some of items on the disbursement journal.
- Four statements showing the conversion to cash of two CIBC GIC accounts, a CIBC Tax Free Account and a CIBC RESP Account, belonging to Ms. Skanes, from 2015 and 2016.
- A 2016 Tax Return for the Estate of Mildred Skanes signed by Paul on May 1, 2022.

[12] Paul did not file, as required by my Order, an Affidavit or copies of:

- Any bank account statements for the Estate, Mildred Skanes, Paul Skanes, Mini Donut Express Inc., or the TD Canada Trust account.
- Any Telpay Statements.

- Any tax records, apart from a March 16, 2021 letter from Revenue Canada and a copy of a T1 General 2016 return for the Estate signed by Paul on May 25, 2022.
- Signed and dated acknowledgments from each beneficiary of the Estate stating what they received and when.

Failure to Comply with Order of the Court

[13] Paul has failed to comply with the requirements of my Order that he file a detailed accounting of his administration of the Estate, including a copy of the supporting documents, by way of affidavit. He missed the June 10, 2022 deadline, and has still not filed all of the required documents.

[14] During today's hearing, I gave the parties an opportunity to make further oral submissions. In his oral submissions today, Mr. Skanes acknowledged that:

- He has the bank account statements of the Estate but did not provide them to the Court.
- He did not try to obtain the bank account statements of Mildred Skanes.
- He has relevant Telpay statements, but did not provide them to the court.

[15] Paul's failure to comply with my Order justifies his removal as the personal representative of the Estate of Mildred Skanes.

Neglecting to Administer or Settle the Estate

[16] Paul has neglected to administer or settle the Estate. In the circumstances of this case, it is unacceptable that he has not settled the Estate seven years after his mother's death, and six years after the Grant of Probate. It is not a complicated Estate.

[17] During his cross-examination, Paul asserted that there were two reasons for the delay in settling the Estate: (a) issues between him and Mark regarding finances and (b) "I dragged my butt." Paul's failure to settle the Estate seven years after Ms. Skanes' death and six years after the Grant of Probate is not justified and warrants his removal as the personal representative of the Estate of Mildred Skanes.

Conflict of Interest

[18] Paul, as the personal representative of the Estate, has a fiduciary duty of a trustee in relation to the management of the Estate. Where there is evidence of a conflict of interest between the personal interests of the personal representative and

those of the beneficiaries, it may warrant removal: see *Re: Loughhead Estate*, 2013 NSSC 236 at para.16.

[19] The Will deals with the residue of the estate as follows:

- 25% of the residue is to be divided in equal shares among the grandchildren of Mildred Skanes, and
- 75% of the residue is to be divided in equal shares among her children, Robin, Paul and Mark Skanes.

[20] The Will provides that, if any beneficiary is less than 25 years old at the time of Mildred Skanes' death, their share of the estate must be invested:

... [I]f any Beneficiary herein is less than twenty-five (25) years of age at the time of my death, **INDIRECT** that his or her share of my estate shall be held and kept invested by my Trustee and the income and capital or so much thereof as my Trustee in his absolute discretion consider advisable shall be paid to or applied for the benefit of such beneficiary until such time as he or she attains the age of twenty-five (25) years, at which time the balance of the funds in the trust shall be paid to him or her for his or her own use absolutely. Any income not so paid or applied in any year is to be added to the capital and dealt with as part thereof.

[21] Paul made inconsistent and concerning representations regarding the funds owed to the six grandchildren of Mildred Skanes who are under the age of 25.

During his oral argument on April 11, 2022, Paul stated that \$78,000 was owed to the grandchildren under the age of 25 and that that money had been invested in a “trust fund” earning 3.75% interest. During his oral submissions today, Paul stated

that \$74,603.34 plus interest remains to be distributed to the grandchildren who are under the age of 25. When I asked where this money has been invested, Paul said that he invested it in his company, Mini Donut Express, as “capital”. He said that he believed that this was in compliance with sections 5(d) and (e) of the Will, which read as follows:

(d) Should my Trustee be required to make any investments for my estate, my Trustee is authorized to make any investments which would be made by a prudent individual investing his/her own funds and shall not be limited to investments authorized by law for Trustees. My Trustee shall not be liable for any loss that may happen to my estate in connection with any such investments made by my Trustee in good faith.

e) I authorize my Trustee to make any payments for any person under the age of majority to a parent or guardian or person standing loco parentis to such person whose receipt shall be a sufficient discharge to my said Trustee.

[22] If Paul is to be believed, he has used \$74,603.34 in money owed to the grandchildren under 25 to benefit his business. This is a clear conflict of interest and justifies his removal as the personal representative of the Estate. See *Loughead Estate, supra* at paras.22-24.

Pre-Taking of Commission

[23] During his cross-examination, Paul acknowledged that he paid himself “Executor Fees” from the bank account held in the name of Mildred Skanes only in 2015, before the Grant of Probate, and before settlement of the Estate. Paul said he paid himself \$20,319.05, in 2015, which he said was approximately 5% of Estate

funds. Then, in response to questions from me, Paul said that he put the amount of \$20,319.05 in his disbursement journal, but then said, “Would they be considered Executor’s fees at the time? There wasn’t a fixed transaction that said here these are your Executor’s fees. There was just equal amounts of money disbursed. And all the money has been disbursed today.”

[24] In the disbursement journal he provided to the Court yesterday, Paul notes that he paid himself Executor Fees of \$13,000 on October 8, 2015. There is no corresponding bank statement to back up this amount.

[25] Paul’s decision to pay himself a commission before settling the Estate is problematic, for many reasons:

1. It is unclear how much he paid himself, and he has provided insufficient information for the Court to determine how much he paid himself.
2. He paid himself before the Estate was settled. Section 76 of the *Act* says that “on the settlement of an estate, the personal representative may be allowed ... a commission not exceeding five percent.” In his disbursement journal, he asserts that he made several disbursements to beneficiaries in 2021, six years after he paid himself. The Estate is not yet settled.

3. He may not, in the end, be entitled to fees in the amount that he took.

Section 62 of the *Regulations* sets out what is to be considered.

[26] Paul's decision to pre-take a commission, and his inability or unwillingness to provide the documents necessary to determine how much of a commission he took, when the Estate is not yet settled, justifies his removal as personal representative.

Best Interests of the Beneficiaries

[27] For all of the above reasons, it is not in the best interests of the beneficiaries that Paul Skanes continue as the personal representative of the Estate of Mildred Skanes.

Conclusion

[28] I allow the Application of Mark Skanes and I order the removal of Paul Skanes as the personal representative of the Estate of Mildred Skanes effective immediately and I appoint in his place Robert MacDougall as the personal representative of Mildred Skanes' Estate, effective immediately.

[29] Under s. 61(6) of the *Act*, a personal representative who is removed or discharged shall make an accounting of the administration of the estate up to the

time of the removal or discharge. My April 11, 2022 order already required Paul Skanes to make an accounting of the administration of the Estate up to the time of the Order. He is further required to make an accounting for the administration of the Estate to today, the time of his removal.

[30] Paul Skanes must deliver the original copy of the Grant of Probate to the Registrar within one week.

Costs

[31] Mark Skanes, as the successful party, is entitled to costs as a result of the removal of Paul Skanes as personal representative of the Estate. Subsection 92(1) of the *Act* provides that, in a contested matter, the court may order costs to be paid by the party against whom the decision is given or out of the estate, and if such party is a personal representative, order that the costs be paid by the personal representative personally or out of the estate of the deceased. It is my determination that, in the circumstances of this case, those costs are to be paid by Paul Skanes personally, and not from the Estate: see the discussion of costs in estate litigation in *Keddy v. Keddy Estate*, 2016 NSSC 194 at paras.16-42. Paul Skanes failed to carry out the duties of personal representative under the *Act*: see s.92(3) of the *Act*.

[32] The starting point for the assessment of the amount of costs is Tariff A, which provides a basic scale of costs depending on the amount involved, and an additional \$2000 for each day of trial. This matter took two days of hearing. The issue between the parties was a non-monetary one. However, the issue was an important one, not only to Mark Skanes but to the other beneficiaries. I am satisfied that a lump sum amount of \$10,000 in costs does justice between the parties. This amount includes \$2000 for each day of hearing, and another lump sum of \$6000. Paul Skanes is ordered to pay Mark Skanes \$10,000 in costs, inclusive of disbursements, forthwith. Paul Skanes is to bear his own costs of this proceeding without indemnification by the Estate.

Gatchalian, J.