SUPREME COURT OF NOVA SCOTIA
Citation: *Galbraith v. Smith*, 2024 NSSC 40

Date: 20240212
Docket: 524445
Registry: Halifax

Between:

Elizabeth Galbraith

Applicant

v.

Murray Smith

Respondent

DECISION

Judge: The Honourable Justice Scott C. Norton

Heard: January 16, 17 and 18, 2024, in Halifax, Nova Scotia

Decision: February 12, 2024

Counsel: Sarah Douglas, Rebecca Hiltz LeBlanc, K.C., and Tarah Sawler, Articled Clerk for the Applicant
David Coles, K.C. and Nadine Nasrallah, Articled Clerk for the Respondent

By the Court:

Introduction

[1] Many adult Nova Scotians are called upon to manage the affairs of their aging parents when they are no longer able to do so for themselves, due to deterioration of physical or mental health. Often this is done by one or more of the adult children being given a power of attorney. A power of attorney is a legal document by which a person (the "donor") authorizes another to act on their behalf (the "attorney") in relation to matters of property and finances.

[2] The powers given to the attorney are not unfettered. The attorney is in a fiduciary relationship with the donor and must act in good faith and in the best interests of the donor. To this end, there are both common law and statutory obligations that the attorney must adhere to. The attorney is responsible to account for the decisions made during any period of incapacity of the donor. An attorney may be found liable for breach of their duty and may be ordered to reimburse the donor.

[3] In this Application, Elizabeth Galbraith ("Liz") claims that her brother, Murray Smith ("Murray"), breached his duty to properly manage and to account for the property and finances of their late mother, Patricia Smith ("Trisha"), while she was alive, pursuant to the Power of Attorney ("POA") executed by Trisha on March 9, 2017. In the Notice of Application in Court filed, Liz seeks two forms of relief:

> (a) An order requiring the Respondent to provide a full accounting to the Court arising from the exercise of his authority as attorney under the POA, for the Court's review; and
>
> (b) Upon such review, an order requiring that the Respondent reimburse Mrs. Smith's Estate for any expenses or losses caused by him in breach of his obligations as attorney.

[4] Kimberly Smith ("Kim Smith") is the brother of Liz and Murray and is the Executor of Trisha's Estate. Neither Kim Smith nor the Estate are parties to this proceeding. Kim Smith and his wife, Heather Smith ("Heather"), both provided affidavit evidence in support of the application by Liz. The balance of the evidence consists of affidavits filed by Liz, Heather, Murray, and Murray's son, Graeme Smith. Each affiant was cross-examined.

Background

[5] The evidence before the court establishes the following history of events. Trisha's husband, Ken, died in 1999. Trisha continued to reside in the family home at 30 Hazelholme Drive, in Halifax, Nova Scotia (the "House").

[6] Murray was a member of the RCMP. In 2011 he moved back to Nova Scotia. In 2015 Murray filed a proposal in Bankruptcy. He was absolutely discharged on September 15, 2019.

[7] On March 9, 2017, Trisha executed the POA naming Murray, then living in Falmouth, NS, as her attorney. The POA, generally, gave Murray authority to handle banking, investments, prosecute and defend legal proceedings, deal with real property, sign tax returns, deal with life insurance, and generally manage any expenses, including nursing home expenses. The POA named Murray as her guardian under the *Hospitals Act* and gave him power to give consent or directions with regard to medical treatment as her delegate under the *Personal Directives Act*. In the event that Murray was unwilling or unable to act, Kim Smith was named as alternate. The POA became effective upon Trisha's disability or incapacity.

[8] In early 2017 Murray separated from his then partner, Kim McGill, and moved from Falmouth to a house across the street from the House so he could assist his mother with care and provide support for her healthcare needs. On May 31, 2017, Murray accompanied Trisha to a geriatric memory assessment at the QEII Health Sciences Centre. A report signed June 15, 2017, authored by Dr. Daniel Wong, Resident, and Dr. Kate Koller, FRCPC, Dept. of Medicine (Geriatrics), noted a history of frontal lobe stroke in 2015. The report notes a two year history of chronic progressive decline in cognition as well as some behavioural changes. It also noted a urinary tract infection with associated delirium two years prior to the assessment that may have exacerbated her condition. The report diagnoses Trisha with vascular dementia of moderate severity. During this time, Trisha's driver's license was taken from her as a result of several road incidents. I pause to note that there was no objection to the medical evidence (in the form of medical records and reports) submitted to the Court as exhibits to Murray's affidavit.

[9] Murray engaged the support services of Northwood Care to assist with Trisha's day to day care.

[10] While living across the street from the House, Murray began to move belongings into the basement of the House as he needed additional storage space.

[11] In January, 2019 Trisha was admitted to the hospital for urosepsis and remained in hospital until discharged on February 5, 2019. On discharge the hospital detailed the need for her to receive increased care if she was to remain at home.

[12] Murray had by then reunited with Kim McGill and, while Trisha was in hospital, the two of them moved to the basement of the House in order for Murray to provide permanent care for his mother. To make space, he moved some of his mother's belongings out of the house. Liz understood that in exchange for Murray's care of their mother, he would live at the House rent-free. At that time Liz was relieved and thankful that Murray and Kim McGill offered to live at the House to help care for her mother.

[13] On January 26, 2019, Murray informed Liz by text message that, to prepare for their mother's return from hospital, she and Kim Smith should take what stored items they wanted from the House basement, workshop and shed. Shortly after moving in, Murray removed the stored items to a paid storage locker. Liz suggested that the items should remain in the house and be stored in a spare bedroom or the garage. However, Liz thought that although this was not ideal, it was a small cost (for the storage locker) as compared to the cost for 24-hour care.

[14] In or about September 2019, Murray asked Liz and Kim Smith to sort and remove the contents of the storage locker due to the cost of maintaining its rental. It took Liz and Kim Smith two years to clear out the locker. Liz attests in her affidavit that when she visited the House she began to notice that some items no longer seemed to be at the House and were also not at the storage locker. Murray says that he did not sell, donate or throw out any of his mother's assets except for a rototiller and some clothes that were given to Goodwill. Murray did not take any of the items from the storage locker. When she did attend the locker, Liz noted that there were many items that showed damage that she believed had been in good shape when they were in the House. By the end of November 2021 the storage locker was emptied.

[15] According to Murray, sometime in 2019 significant amounts of water were found in the basement of the House after periods of rain. Kim Smith attests that Murray informed him in February 2019 of his intent to renovate the basement and that the work was necessary because he and Kim McGill "deserved to be comfortable".

[16] Murray undertook renovations to the basement to mitigate the presence of mold that was in the walls. To facilitate the replacement of the aged drainage system, Murray says that trees had to be removed, a collapsing concrete retaining wall

needed to be replaced, and the installation of surface mounted four inch plastic pipes were necessary to facilitate movement of the water from the rear down spout to the front yard. It was necessary to re-level the yard. Renovations were necessary to the back deck of the House including the exterior stairs as the deck was rotting and blocking egress from the basement room occupied by Murray. As a result of the necessary repairs to the yard and deck, the heat pump and propane tank had to be moved and re-installed.

[17] At the request of those contracted to do the work, Murray paid them in cash and as such he does not have invoices or receipts for much of the work completed. Prior to undertaking the work Murray did not obtain an appraisal of the property, despite Kim Smith telling him to do so when Kim Smith first became aware of the renovation work in the basement bathroom. Murray did not obtain any permits for the work.

[18] Liz attests that the basement was fully remodelled, the basement bathroom was expanded and renovated and the laundry appliances were relocated to the upstairs sunroom. The exterior work included removal of several trees, re-sodding the front yard, levelling the back yard, replacing the back deck and refinishing the back yard with paving stones. Murray told her the paving stones were to eventually accommodate an above-ground pool and a hot tub that would be purchased by he and Kim McGill.

[19] According to Murray, he transferred all funds from Trisha's investment account to her chequing account in early 2021 to assist with the payment for the renovations.

[20] In August 2021, Murray, Liz and Kim Smith met at the office of Trisha's lawyer, Gary Armsworthy. Liz attests that the reason for the meeting was to discuss their mother's assets, including the House, and Murray's management of those assets. At that meeting Murray offered to buy the house so that he could invest in it for the benefit of his children. Liz and Kim Smith declined the offer. Both Liz and Kim Smith attest that they asked Murray at this meeting to provide an accounting of his activities as attorney for their mother. Liz says Murray agreed to provide an accounting.

[21] On November 15, 2021, Liz and Kim Smith met with Murray in their mother's presence to discuss their mother's affairs. Liz and Kim Smith attest that they again requested an accounting of Murray's handling, as attorney, of their mother's accounts.

[22] As to both the August and November meetings, Murray attests that his siblings "queried whether it would be possible to complete an accounting, but no explicit request was ever made until after my mother's passing".

[23] In her reply affidavit, Liz attests that at Murray's discovery examination, which she attended, Murray acknowledged that Liz or Kim Smith may have requested an accounting at the November 2021 meeting.

[24] In August 2022, Murray moved Trisha into a long-term care facility. Murray continued to live in the House. Kim Smith suggested that he begin paying rent because he was no longer providing full-time care. Murray agreed but nothing further was done to formalize payment.

[25] In September 2022, Murray arranged for a tenant for one of the bedrooms. A lease was signed. Murray has held the rent payments in a separate account pending the outcome of this legal proceeding.

[26] On December 20, 2022, through legal counsel, Liz requested a full accounting from Murray. Murray did nothing in response.

[27] On January 24, 2023 Trisha died. Kim Smith was appointed Executor of the Estate through the Court of Probate. The next day Liz found her mother's closet empty of all clothes and shoes. In December 2022, Murray had a man-door added to the garage. When Kim Smith objected, Murray paid $2,000 for the benefit of the Estate (Trisha had since died) and said he would pay the balance when invoiced. No further payment has been received. Murray testified in court that the contractor never asked for any additional payment.

[28] In mid-February 2023, Murray made $10,000 of his mother's money available to Kim Smith as Executor. Kim Smith does not know where the money came from.

[29] On May 19, 2023 Murray retired from the RCMP.

[30] On May 23, 2023 a family meeting was held. Present were Liz, her husband Barry, Kim Smith, his wife Heather, their son Marshall, and Murray and his son Graeme. Liz recorded the meeting. She says she made Murray aware she was taping it. She used an app to have the transcript prepared and edited the transcript to remove references that the app picked up from a tv playing in the background. She denies adding anything to the transcript that was not recorded.

[31] At the meeting Murray acknowledges that he did not know what his legal obligations were as attorney.

[32] On June 30, 2023, Murray vacated the house at the direction of the Executor. The House has since been sold for $540,000.

Position of the Parties

[33] The Applicant says that she is an "interested person" as defined by the *Powers of Attorney Act*, and as such has standing to make this application. When the application was filed she sought an accounting from Murray. In oral submissions at the Hearing, she stated that, through the affidavits of Murray and Graeme and the undertakings provided during the proceeding, Murray has provided the Court with the extent of the accounting that he is able or willing to provide. Accordingly, she no longer seeks an order for accounting. She continues to seek a declaration that Murray breached his obligations as attorney; and an order that Murray repay Trisha's Estate for the transactions for which he cannot account nor explain, and the purchases and expenses paid by Trisha that solely benefitted Murray.

[34] Murray says that he has now provided a detailed accounting of all of Trisha's financial accounts, liabilities and expenditures with explanations and summaries where needed for context. He says any accusations that he breached his obligations are unfounded and that the assertions made by Liz that his actions were for his own benefit mischaracterize the years of care and responsibility he undertook on behalf of Trisha for her benefit. As POA, he had the authority to make decisions with regard to the upkeep and maintenance of the House without the approval or input of his siblings. The renovations materially improved the value of the House thus benefitting the Estate. He was acting in good faith and trying to ensure the best interests of Trisha. Murray asserts that in all the circumstances, the evidence does not establish misconduct or neglect on his part.

[35] During oral submissions, counsel for Murray objected to the submissions by counsel for Liz on the basis that she did not question Murray about issues she raised regarding the evidence, and in particular the accounting spreadsheet prepared by Graeme. Without requesting permission, a few days after the hearing, counsel for Murray sent to the court two cases and a cover letter stating that the cases supported the argument he had made that the failure to question Murray about the accounting issues was improper. The cases provided: *Clark v. O'Brien*, 1995 NSCA 232 and *O'Brien v. Shantz*, [1998] O.J. No. 4072, both speak to the "rule in *Browne v. Dunn"*. That "rule" imposes a duty on an opposing party to give a witness an opportunity to

explain contradictory evidence "which the cross-examiner intends to use later to impeach the witness' testimony or credibility" or impugn the witness' prior testimony (*Clark*, at para. 21).

[36] Respectfully, that is not what counsel for Liz did in the case before me. The spreadsheet "accounting" was evidence submitted by Murray and entered for the truth of its contents. In cross-examination, Murray stated that he "did not waste his time" in reviewing the completed spreadsheet. The submissions on behalf of Liz focused on the unexplained and unsubstantiated transactions disclosed by the spreadsheet and the fact that the Respondent had not explained and did not produce the documentation to back up each transaction. That was Murray's burden as will be more fully explained below.

[37] I will add that, as a matter of good practice and in compliance with the *Rules*, counsel who have not sought permission from, or been asked by, a hearing judge to submit additional authority should not presume to do so without first asking the judge for permission.

The Law

Powers of Attorney Act

[38] The Nova Scotia *Powers of Attorney Act*, RSNS, c. 352 (the "Act"), governs the duties of an attorney for property and financial affairs. The Act sets out the obligations an attorney owes to a donor.

[39] Attorneys are bound by a duty of loyalty to the donor. Pursuant to s.5(1) of the Act, attorneys must act according to the donor's instruction, in the donor's best interests, and in good faith (at s-ss.(a)-(c)). Attorneys must refrain from acting for their own benefit, and attorneys must avoid conflicts of interest and avoid making secret profits (at s-ss. (d)-(f)). Attorneys must not unreasonably interfere with the donor's contact with family, nor dispose of assets the attorney knows are subject to the donor's estate plan; and attorneys are required to "exercise the judgment and care that a reasonably prudent person in comparable circumstances would exercise" (at s.5(2)-(4)).

[40] Section 6 of the Act states that an attorney may be found liable for breach of duty. It further states that "Where the Court is satisfied that an attorney who has committed a breach of duty has acted honestly and reasonably, it may relieve the attorney from all or part of the liability".

[41] Section 11 provides that an attorney may not make a gift from the donor's estate except as expressly provided for in the power of attorney or directed by the donor.

[42] Attorneys must account. Section 12 of the Act requires attorneys to preserve and keep records of their transactions and the donor's assets and liabilities. Section 13 of the Act speaks to the obligation to account:

> **Accounting**
>
> 13 (1) For the purpose of this Section, an accounting includes
>
> > (a) a statement of the assets and liabilities of the donor under the attorney's control at the beginning of the accounting period, with values if they are known or can be reasonably estimated by the attorney;
> >
> > (b) details of any transactions involving the donor's estate, including copies of any records of those transactions, as well as bank account statements and any other statement of the value of an asset or liability that the attorney may have received; and
> >
> > (c) a closing summary of the estate's current assets and liabilities under the attorney's control, with values if they are known or can be reasonably estimated by the attorney.
>
> (2) A donor may require an attorney to account to the donor on demand for all transactions undertaken on the donor's behalf.
>
> (3) Subject to any direction in the power of attorney, an attorney who has begun to act shall, during any incapacity of the donor in an area of authority covered by the power of attorney, account to a monitor named by the donor in the power of attorney upon demand by the monitor made at reasonable intervals.
>
> (4) The content of an accounting to a monitor is the same as that for an accounting to a donor.
>
> (5) A donor may exclude any person or class of persons from receiving an accounting.
>
> (6) Subject to any direction in the power of attorney, where
>
> > (a) the power of attorney does not name a monitor;
> >
> > (b) the named monitor is the attorney's spouse, registered domestic partner or common-law partner; or
> >
> > (c) the named monitor is unavailable or incapable of requesting an accounting,

> the attorney shall, during any incapacity of the donor in an area of authority covered by the power of attorney, account to the immediate family members of the donor who request an accounting, no more than once each calendar year.
>
> …
>
> [Emphasis added]

[43] Where, as here, a donor does not name a monitor, and the donor lacks capacity, attorneys must provide a full accounting to their immediate family members, upon request, no more than once each calendar year.

[44] Section 18 gives the court authority to consider an application by an attorney or an "interested person" which is defined in s.1A(g) to include "an adult child of the donor". Liz is an interested person. The Court has authority pursuant to s.18 to make any order it considers appropriate.

Common Law

[45] At common law, an attorney must exercise the duty of care of a reasonable person in similar circumstances. *Isnor Estate (Re),* [2001] N.S.J. No. 659, is a leading Nova Scotia authority with respect to the standard of care owed by an attorney to the donor. As summarized in *Isnor,* at para. 57:

> 57 A donor and donee in a power of attorney relationship have an agency relationship which imposes a fiduciary relationship on the agent and a legal duty to act for the benefit of the principal (*Bacon Estate v. Gallagher* (1993), 121 N.S.R. (2d) 181 (N.S.S.C.) at para. 55). An agent's duty to her principal is to act for the benefit of the principal, and when in a gratuitous agency,
>
> > It is said that the agent must exercise the care that a reasonable man would exercise in respect of his own affairs…

[46] As G.H.L. Fridman describes in the *Law of Agency* (6th ed) (Toronto: Butterworths, 1990), in exercising such care, an attorney is obligated to keep the donor's property and money separate from his own, keep proper accounts, and be ready to produce them on demand (p. 156).

[47] In *Withenshaw v. Withenshaw*, 2020 NSSC 208, the trial judge held the attorney's accounting to be tardy and deficient. The judge was frustrated by the attorney's delays and opposition to provide a full accounting. The trial judge found she had not accounted for all assets she dealt with during the mother's incapacity.

[48] On appeal, the Nova Scotia Court of Appeal found that the trial judge had erred in the calculation of money for which the attorney was responsible to account. The Court of Appeal recognized that the burden to account lies on the attorney to "…identify those assets over which she exercised power, what she did with those assets, and what balance remained…Any failure of adequate explanation is a breach of her duty and typically requires reimbursement for the missing assets…". 2023 NSCA 59, at para. 38.

Analysis

Duty to Account

[49] Section 12 of the Act requires an attorney to preserve and keep records regarding the donor's assets and liabilities and the attorney's transactions, including "all records of any transaction undertaken under the appointment as attorney, including but not limited to receipts, cancelled cheques, invoices, bank statements, copies of title, conveyances and any relevant correspondence".

[50] Murray did not do this. He acknowledges not obtaining invoices from contractors retained to do renovation work on the House. He acknowledges not keeping receipts for retail purchases that were paid for from the donor's funds. He acknowledges not obtaining or not retaining banking records of an account with any of the banks from the outset of his exercise of the POA until January 2019 and, in respect of a chequing account at the TD bank, not at all. I find that Murray breached his duty under s.12.

[51] On August 3, 2021, Liz requested an accounting from Murray of his activities as attorney. She and Kim Smith repeated this request at a meeting at the House on November 15, 2021. Murray chose not to respond to either of these requests. On December 20, 2022, through a letter from legal counsel, Murray was again requested to provide an accounting going back to the date the POA was executed. In January 2023, Murray responded to this request by sending a collection of bank statements relating to two Scotiabank accounts for a date range from January 2019 to December 2022. Shortly before the commencement of this proceeding, on June 6, 2023, Murray sent to Liz's counsel by email records relating to a TD Aeroplan Visa credit card account for the date range February 2015 to May 2023.

[52] Section 13(1) of the Act defines what is to be included in an accounting:

> (a) a statement of the assets and liabilities of the donor under the attorney's control at the beginning of the accounting period, with values if they are known or can be reasonably estimated by the attorney;
>
> (b) details of any transactions involving the donor's estate, including copies of any records of those transactions, as well as bank account statements and any other statement of the value of an asset or liability that the attorney may have received; and
>
> (c) a closing summary of the estate's current assets and liabilities under the attorney's control, with values if they are known or can be reasonably estimated by the attorney.

[53] The plain and ordinary meaning of s.13(1)(a) requires the attorney to create a statement of assets and liabilities under the attorney's control at the "beginning of the accounting period". I interpret this to be the date upon which the attorney begins to exercise their power as attorney. This is consistent with the fact that the attorney is liable to account to the donor "on demand" (s.13(2)). If the value of an asset is not obvious (such as a bank account balance) the attorney may reasonably estimate the value. Here, Murray acknowledges he began exercising his power as attorney almost immediately after the POA was executed on March 9, 2017. However, he made no attempt to create a statement of assets and liabilities at that time. He was not compliant with the requirements of the Act.

[54] Section 13(1)(b) requires the attorney to maintain details of any transactions involving the donor's estate, including copies of records of those transactions. Here, Murray did not maintain any banking records prior to January 2019 as discussed, *supra*. Prior to undertaking renovations on the property he did not obtain an appraisal. He did not have a plan for the work. He asked for no invoices from contractors and paid many of them in cash without obtaining receipts. He made cash withdrawals and electronically transferred funds from the donor's accounts without keeping any corresponding record of what the cash withdrawal or transfer was for. In preparation for the hearing of this proceeding he asked his son, Graeme, to create a spreadsheet from the bank accounts and attempted to reconstruct the purpose of the withdrawals from memory, using averaging of expenses, or assumption. This is not compliant with the requirements of the Act.

[55] Further, with regard to contents of the House, Murray disposed of items that he considered were damaged by mold or infested by rodents. Some items were transferred to a storage unit off property. Some were disposed as garbage or burned. No inventory or list of items or categories of items was kept. This is not compliant with the requirements of the Act.

[56] Section 13(1)(c) requires that the attorney provide a closing summary of the estate's current assets and liabilities under the attorney's control. This should have been done as of the date of Trisha's death on January 24, 2023, when the POA ceased to operate. No closing balance was prepared. This is not compliant with the Act.

[57] Section 5(3) of the Act states that "An attorney is required to exercise the judgment and care that a reasonably prudent person in comparable circumstances would exercise".

[58] The duty to account is not met by simply producing banking records. Such records do not tell the reader what was done with the money withdrawn. As the Court of Appeal in *Withenshaw*, *supra,* recognized, the burden to account lies on the attorney to "…identify those assets over which she exercised power, what she did with those assets, and what balance remained…Any failure of adequate explanation is a breach of her duty and typically requires reimbursement for the missing assets…". [Emphasis added]

[59] Pursuant to s.13(6)(c), once Trisha became incapacitated, any immediate family member could request an accounting. The Applicant says that Trisha no longer had capacity as of the spring of 2017. In cross-examination, Murray agreed that Trisha was unable to handle her own affairs following the execution of the POA in 2017. The medical records make it clear that Trisha no longer had capacity by February 2020. No matter what date the incapacity began, Liz and Kim Smith had the legal right to request the accounting in August and November of 2021. There is no prescribed form for such a request. I find that the evidence clearly establishes that they requested an accounting from Murray on both August 31, 2021 and November 15, 2021. The accounting was required to commence from the date that the attorney began to exercise authority – in this case March of 2017.

[60] The evidence establishes that the efforts of the attorney to account are insufficient. Murray displayed an arrogant and cavalier attitude towards his responsibilities as attorney to account. He did not take advice from any lawyer or other professional as to his responsibilities. He did not read the Act. These are things that a reasonably prudent person being named as attorney would do. When confronted by his siblings about providing an accounting he responded that he had done what he was obligated to and resented their questioning.

[61] I find that Murray breached his duties to preserve and keep records and to provide the accounting lawfully requested by Liz and Kim Smith in August and November, 2021. In breaching his duties, he failed to meet the standard of care set

out in s.5(3) of the Act. As a result, the Applicant is entitled to an order for an accounting.

[62] However, at the hearing the Applicant acknowledged that with the passage of time and the evidence of Murray that he has produced all the records that he is able or willing to produce, the Applicant accepts that the information received is as good as can be had and is therefore prepared to waive their right to any further accounting. The Applicant maintains that Murray should be ordered to reimburse Trisha's Estate for the amounts the Applicant says are unaccounted for. I will address that issue next.

Claim for Reimbursement

[63] The Applicant submits that the Respondent attorney is liable for any transactions that he cannot explain and for those that were personal purchases and not for the benefit of the donor. This includes the issue of whether the renovation of the property was for the benefit of the donor or for the benefit of the attorney.

[64] According to Kim Smith, sometime in 2016, prior to the POA being executed, he had occasion to visit Trisha's bank with her. At that time he became aware that Trisha had approximately $90,000 in cash and an additional $90,000 in registered assets (one RRSP and one RIF). This evidence was not challenged by Murray. As noted above, Murray made no inventory of assets at the outset of his acting under the POA. There is no evidence of any significant expenditures, gifts or donations of money by Trisha in the period between 2016 and the beginning of the accounting period in 2017. As her annual income was sufficient to cover her annual expenses as discussed below, it is reasonable to infer that the beginning inventory of these assets was $180,000.

[65] Murray attests that he transferred all funds from the investment account to the chequing account in or around 2021 to assist with payments for renovations.

[66] This $180,000 no longer existed at the time of Trisha's death. Although Murray made no closing inventory of assets, the bank records as at the end of December 2022, one month before her death show a combined chequing and savings account balance of $8,220.88. In mid-February 2023, after Trisha's death, Murray paid to Kim Smith (as Executor) the sum of $10,000, although the source of the funds was not identified. In the absence of any evidence from Murray as to the source of this payment, I infer that this payment came from the bank account balance.

Accordingly, Murray is required to account for the difference of approximately $170,000.

[67] As stated, Trisha's annual income, as shown by her tax return in 2020, was $70,000 per year between 2016 and 2020. Based on the spreadsheet accounting evidence submitted to the Court by Murray, this income was sufficient to cover her average annual expenses, including expenses for home care for Trisha and cleaning the House after the POA came into effect in 2017. The monthly income was also sufficient to cover charges to the credit card that was used by Murray for purchases for both himself and Trisha (accounting for the reimbursement payments he made personally to the credit card). Trisha was placed in a long-term care facility on August 1, 2022. Even with this increased expense, the monthly deficit was only $364.47. So the $170,000 was not materially reduced by the average monthly expenses as presented by Murray in the accounting spreadsheet.

The Renovations

[68] According to the "accounting" presented in the spreadsheet prepared by Graeme on Murray's instruction, $89,048.30 was spent on renovations to the House, paid by cash withdrawal or e-transfer from Trisha's bank accounts. As discussed, *supra*, no invoices or receipts were obtained for the majority of these payments. Thus we have only Murray's testimony as to what these transfers were for. The accounting also represents that he made personal financial contributions to the renovations of $10,857.85. These payments did not reduce the amount paid from the donor's funds.

[69] In the absence of cross-examination on the specifics of these transfers or any evidence putting them in question, I am prepared to accept Murray's evidence that he paid $89,000 for renovations to the House. The next issue to address is whether those renovations were for the benefit of the donor.

[70] Murray says that he and Kim McGill moved into the House to assist with Trisha's daily care. Upon moving into the basement area in early 2019, he discovered evidence of water leaks on several occasions following periods of rain. This led to repair and renovation of the basement bathroom and expanded to the rest of the basement area. Murray presented some evidence of mold in the walls when the Gyproc was removed. Kim Smith testified that he agreed that it would be reasonable for Murray not to have to live with water leaks or mold. Murray says that to remediate the drainage problem, trees had to be removed from the yard, a collapsing

concrete retaining wall needed to be replaced, and the installation of surface-mount four inch plastic pipes was necessary to facilitate the movement of water from the rear down spout to the front yard. Murray provided photos of this work being done. Murray says that renovations were also necessary for the back deck of the House, including exterior stairs, as the deck was rotting and blocking egress to the basement room he was living in. In order to repair the back deck, the heat pump and propane tank had to be moved and re-installed.

[71] Murray provided e-transfer records of payments to one contractor totalling $14,950. He also produced receipts for materials he purchased from Home Depot, Kent, Shaw Group, and some other various receipts. As stated, there are no invoices or receipts for the majority of the renovation expenses.

[72] It is acknowledged that Murray did not obtain an estimate of the value of the House before the renovations were made. There is no question that pursuant to the POA and subject to accounting, Murray had the authority to direct the renovations that he decided were in the interests of the donor. Certainly there is no argument that taking steps to stop water leaking into the basement, the remediation of mold, and the replacement of a rotting deck is not reasonable.

[73] Liz argues that Murray extended the renovations to add value to the property with the plan of purchasing it when Trisha was no longer living there, and thus a great portion of the renovations were not for the benefit of the donor. There are a number of difficulties with this argument. First, Liz points to the fact that Murray and Kim McGill had patio stones placed with the intent to add an above ground pool and hot tub (that Murray and Kim McGill would pay for). Liz presented no evidence as to the cost of the patio stones. Liz presented no evidence that the renovations that Murray undertook were unreasonable or went beyond what was necessary to address the water leaks, mold, and rotting deck. Second, any increase in value to the House would ultimately benefit the donor and, after her death, all three children who were to receive equal shares of the Estate. There was no guarantee that Murray would be the successful purchaser, and as it turns out he was not.

[74] The only evidence of value of the House is from a copy of the Property Valuation Services website that shows the sale price of $540,000 on August 31, 2023, and the assessed value at that time of $437,200.

[75] On the meagre evidence before me, I am unable to find that the amount paid by Murray for the renovations was unreasonable, or a breach of his duty as attorney.

[76] The accounting spreadsheet attached to the Graeme affidavit displays a page titled “Credit Card Offsets (Large Transactions)”. On this page Murray shows transactions wherein he reimbursed the donor’s TD credit card from his own funds for a new stove at the House, a utility trailer, sundry specific charges and “repayments for general use”. As these amounts paid by Murray are already included in the account balances for the credit card and the donor’s chequing account, they do not reduce the amount unaccounted for in the closing balances as at December 31, 2022.

[77] In summary, I find that Murray has accounted for $90,000 of the $170,000 opening balance of financial assets referred to above as having been spent by him on the renovations. That leaves $80,000 that has been spent from the opening balance that is unaccounted for.

[78] This is a harsh lesson to Murray and any other person who undertakes the role of attorney. They are a fiduciary. They must account for the money received, spent, and the amount left. The requirement to keep records is as much to protect the attorney as to protect the donor.

[79] I order Murray Smith to make restitution to the Estate of Patricia Smith by paying to the Executor of the Estate the sum of $80,000. In addition, Murray Smith is ordered to pay to the Executor the entire balance of the rent received from the tenant and held pending the outcome of this proceeding.

[80] There was much focus in the affidavits about the storage and disposal of some of Trisha’s belongings and the whereabouts of certain jewellery. Murray kept no records of his dealings with those items. However, there is no evidence of their value and accordingly I am unable to make any order for reimbursement with regard to those items.

[81] In the event the parties are unable to agree on costs, I will accept submissions in writing to be filed within three weeks of the date of this decision.

[82] Order accordingly.

Norton, J.