

**SUPREME COURT OF NOVA SCOTIA**  
**Citation:** *Wilkinson v. Wilkinson*, 2019 NSSC 52

**Date:** 2019 02 11

**Docket:** Hfx Nos. 478686

478698

483598

**Registry:** Halifax

**Between:**

Debra Ann Wilkinson, as co-executor and co-beneficiary of the Estate of Earl Gray Wilkinson and as co-administrator and co-beneficiary of the Estate of Annette Wilkinson

Applicant

v.

Nancy Lynn Wilkinson, as co-executor and co-beneficiary of the Estate of Earl Gray Wilkinson, and as co-administrator and co-beneficiary of the Estate of Annette Wilkinson, and Belinda Lee Wilkinson, as co-executor and co-beneficiary of the Estate of Earl Gray Wilkinson, and as co-administrator and co-beneficiary of the Estate of Annette Wilkinson

Respondents

**And:**

**IN THE COURT OF PROBATE FOR NOVA SCOTIA**

In the Estate of Annette Wilkinson, Deceased (Probate File 64453)  
and  
In the Estate of Earl Gray Wilkinson, Deceased (Probate File 64454)

**Judge:** The Honourable Justice Joshua M. Arnold

**Heard:** January 16, 2019, in Halifax, Nova Scotia

**Counsel:** A. Lawrence Graham, Q.C. and Tracy Smith, for the Applicant  
Nancy Wilkinson, for the Self-represented Respondents  
Derek M. Land, Estate Proctor

## **By the Court:**

### **Overview**

[1] This matter concerns a request for the removal of one of three sisters as co-administrator and co-executor of her parents' estates. It also involves the transfer of interest in part of the real estate that was not specifically devised.

[2] There were several matters involving this estate before the courts, including *Derek M. Land v. Estate of Annette Wilkinson*; *Derek Land v. Estate of Earl Gray Wilkinson*; and *Debbra Ann Wilkinson*, as co-executor and co-beneficiary of the Estate of Earl Gray Wilkinson and as co-administrator and co-beneficiary of the Estate of Annette Wilkinson v. *Nancy Lynn Wilkinson*, as co-executor and co-beneficiary of the Estate of Earl Gray Wilkinson, and as co-administrator and co-beneficiary of the Estate of Annette Wilkinson, and *Belinda Lee Wilkinson*, as co-executor and co-beneficiary of the Estate of Earl Gray Wilkinson, and as co-administrator and co-beneficiary of the Estate of Annette Wilkinson. At a Motion for Directions on December 12, 2018, Smith J. scheduled all of these matters to be heard together in one hearing.

### **Facts**

[3] Affidavits of the applicant, *Debbra Wilkinson*, the respondent, *Nancy Wilkinson-MacDonald*, and *Derek Land*, Barrister and Solicitor, were filed on this application. All three of these people testified at the hearing. Additionally, the court heard the testimony of *Michelle Nicholson*, a representative of the Bank of Montreal.

[4] *Annette Wilkinson* died intestate on March 22, 2007. Her husband, *Earl Grey Wilkinson*, died testate on January 3, 2017.

[5] *Annette* and *Earl Wilkinson* owned two parcels of real estate. The first property is a cottage in *Portree*, *Inverness County*. There is an adjunct lot near the cottage property that was deeded to *Earl* directly. *Annette* possessed no interest in that lot. The second property is their residence at 26 *Crestfield Drive* in *Hammonds Plains*, *Nova Scotia*. Both properties were held as tenants in common.

[6] An attempt was made to transfer both parcels to *Earl* following *Annette's* death. That attempted transfer was improper, as the deeds purported to be from

Annette and Earl to Earl, but Annette was deceased at the time. All parties to this application agree that this attempted transfer was ineffective.

[7] Because Annette died intestate, her legal interest vested in a personal representative and beneficially in her spouse and children. Earl's intestate interest passed to his executors under his will. Earl's executors (and administrators) are his three daughters, Belinda, Debra and Nancy.

[8] Earl's will gives title to his three daughters. The will directs them to realize his estate. There is no gift of the interest directly to any of the children and no power granted to the executors to divide the interest *in specie*.

[9] The beneficial interest to the children remains with the three sisters. Debra claims that Nancy has refused to assist in transferring this interest. In addition to requesting an order removing Nancy as executor and administrator, Debra asks the court for an order transferring this interest.

[10] Nancy wants to take the residence as part of her share and pay the difference if its value exceeds the value of her share. Belinda and Debra agree with this plan, but the sisters cannot agree on the market value of the residence.

[11] Without consulting her two co-executors, Nancy arranged for two separate appraisals of the residence. Debra believes the appraisals are too low. Nancy says the appraisals are too high.

[12] Both Nancy and Debra want the cottage property. Again, they cannot agree on the value of the cottage. Nothing in Earl's will allows for selecting who obtains these properties among the heirs.

[13] The cottage property can only be accessed by passing over a neighbour's property. Therefore, it would be of little value to a third party. Earl had deeded the cottage to Debra and her husband, however, they subsequently deeded it back to Earl in 2016.

### **Removal of Nancy as Co-Executor**

[14] Debra requests Nancy be removed as co-executor and be replaced by Derek Land, a lawyer with Blackburn Law. Mr. Land is currently acting as Proctor of the estate.

[15] Section 61(1) of the *Probate Act*, S.N.S. 2000, c. 31, states:

61 (1) On the application of any person, the court may remove a personal representative where the court is satisfied that removal of the personal representative would be in the best interests of those persons interested in the estate and, without limiting the generality of the foregoing, if the court is satisfied that

- (a) the personal representative has not complied with an order of the court;
- (b) the personal representative
  - (i) is neglecting to administer or settle the estate,
  - (ii) is wasting the estate,
  - (iii) has failed to comply with an order to pay into a chartered bank any money of the estate remaining in the hands of the personal representative,
  - (iv) is insolvent,
  - (v) is mentally incompetent,
  - (vi) has, within five years of the application, been convicted of theft, criminal breach of trust, destroying documents of title, fraudulent concealment, theft related to improper use of a credit card, possession of property obtained by crime, obtaining anything by false pretences or fraud under the Criminal Code (Canada), or
  - (vii) cannot be found or has left the Province without any apparent intention of returning.

[16] Debbra says that Nancy has failed to administer or settle the estate as defined by s. 61(1)(b)(i), and that she is wasting the estate as defined by s. 61(1)(b)(i). In *Re Loughead Estate*, 2013 NSSC 236, Duncan J. considered the removal of a personal representative in accordance with s. 61(1) of the *Probate Act.*, He stated:

[15] *Letterstedt v. Broers* (1884) 9 App Case 377, cited with approval in *Re: Winter Estate* 2001 NSSC 121 (CanLII), affirmed (2002) 2002 NSCA 23 (CanLII), 202 N.S.R. (2d) 5 ( NSCA), directs the court to ask the following questions in relation to an assessment of the Personal Representative's conduct:

1. Does the conduct endanger the trust property?
2. Does the conduct show a want of honesty?
3. Does the conduct show incapacity to execute the duties?
4. Does the conduct show a want of reasonable fidelity?

#### Conflict of Interest

[16] The personal representative has a fiduciary duty of a trustee in relation to his or her conduct and 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 amount to a ground for removal.

[17] *Stadelmire v. Hoffman* (1986) 25 ETR 174, at paragraph 13 states:

One duty of an executor is to bring in the Estate for distribution among the beneficiaries. If it is perceived on good grounds, that that important duty is compromised by personal conflict of interest because the executor will be asked to sue himself to recover what may be a large part of the Estate property, he must be passed over.

[18] Ultimately the question that the court must answer is: "what is in the best interest of the beneficiary?"

[17] He went on to explain:

[22] It is understood that a high degree of fidelity is owed by the personal representative to the Estate. Personal conflict of interest is a grave concern.

[23] Decisions that are made for the benefit of non-beneficiaries that cause the deferral of the distribution of the Estate to the beneficiaries gives rise to such concern. Where those decisions benefit the personal representative, his family or his personal business interests, the question arises as to who will scrutinize these transactions on behalf of the beneficiary. If they are questionable, it is not reasonable to expect that the personal representative is going to act against his own personal interest. It is not sufficient, in my opinion, to simply say that these are matters that can be dealt with on the passing of accounts.

[24] In this case, there are three clear instances of acting in potential conflict between Mr. Loughhead's personal interest and that as the personal representative of the Estate.

[18] Similarly, in *Willisko v. Murphy*, 2014 NSSC 389, Gogan J. considered the removal of a personal representative in accordance with s. 61(1)(b) of the *Probate Act* and stated:

[35] Section 61 of the *Probate Act* provides authority to remove a personal representative that is, *inter alia*, neglecting to administer the estate of a deceased person. On such an application, the burden is on the applicant to establish that the relief sought should be granted.

[36] As noted by Duncan J. in *Lougheed Estate (Re)*, 2013 NSSC 236 (CanLII), at para. 40, "Removal of a personal representative should not be done lightly or without good reason based on evidence." In *Widdifield on Executors and Trustees* (6th ed.) (Carswell, 2013), the author states at p. 15-12:

A court will be reluctant to interfere with a testator's exercise of testamentary freedom, and will therefore be generally reluctant to interfere

with a testator's choice of estate trustee. Such interference must not only be justified, but must amount to a clear case of necessity (*Weil, Re*, 1961 CanLII 157 (ON CA), [1961] O.R. 888 at 889 (Ont. C.A.)) and should occur only "on the clearest evidence that there is no other course to follow" (*Crawford v. Jardine*, [1977] O.J. No. 5041(Ont. Ct.(Gen. Div.) at para 18)).

[37] At page 15-12.1:

To override a testator's choice of an executor is a sensitive exercise not to be lightly undertaken. Presumably, the testator has appointed those in whom he has confidence to give effect to his wishes and a court should interfere only where it is clear that the confidence was misplaced: *Surminsky (Litigation Guardian of) v. Ulmer Estate*, 2000 SKQB 209 (CanLII), 2000 SKQB 209 (Sask. Q.B.)

Clear necessity is determined on the balance of probabilities: *St. Joseph's Health Center v. Dzwiekowski*, [2007] O.J. No 4641 (Ont. S.C.J.) at para 37.

[38] Interference with a testator's wishes is a delicate exercise. In the present case, it is not contested that Allister Pottie intended for Murphy to act as his personal representative. It is not disputed that Allister Pottie trusted Murphy to carry out his wishes. She was a logical choice given her involvement in his life prior to his death.

[39] The question now before the Court is whether she must be removed for failure to administer the Estate in the manner required by law. In answering this question, I am mindful that the Applicant must establish, on balance, that the removal is clearly necessary.

[19] The burden is on the applicant, Debbra Wilkinson, to show on a balance of probabilities that her sister, Nancy Wilkinson MacDonald, should be removed as personal representative in accordance with s. 61(1)(b).

[20] Nancy filed an affidavit on this application. She was cross-examined at the hearing. Through cross-examination it became apparent that Nancy still mourns for her deceased parents. She was visibly upset during aspects of her testimony when her parents' death was discussed. Nancy does not want to see any of her parents' possessions sold to anyone outside of the immediate family and finds the thought of anyone outside of the family coming into possession of the residence, the cottage, or even Earl's car offensive. She is both suspicious and resentful of certain of her family members' interest in the estate. Nancy feels entitled to the properties.

[21] There is clearly animosity between Debbra and Nancy. However, as Freeman J.A. states in *Winter Estate, Re*, 2002 NSCA 23:

[22] Justice Hood turned further to Lord Blackburn's judgment in *Letterstedt v. Broers*, citing from his judgment at p. 387 for the principle that the main guide of the courts must be the welfare of the beneficiaries, and that the circumstances of each case must be carefully considered. She referred to page 389 in noting that hostility between the executor and beneficiaries is not sufficient grounds for removal in the absence of further seriously aggravating circumstances, or where there is conflict between the executor's personal interests and those of the beneficiaries.

[22] Earl's will states at clause 3(b):

3. I GIVE, DEVISE AND BEQUEATH all of my property, both real and personal, of every nature and kind and wheresoever situate to my Trustee on the following trusts:

...

(b). To subject to the provisions appearing herein in this my Last Will and Testament, sell, call in and convert into cash all of my Estate not consisting of cast at the time of my decease, in such manner and upon such terms as my Trustee may in her absolute discretion decide with power and discretion to postpone such conversion of my Estate for such length of time as she may think fit;

[23] In her affidavit, Nancy comments:

26. Debbra and Belinda made efforts very shortly after my father's death to commence the probate process. I said to Debbra and Belinda that our father's Will states that we are to allow the right amount of time before starting the process. Debbra and Belinda said nothing to me so I talked to a lawyer for some advice.

[24] Nancy felt that her sisters were in too much of a hurry to resolve the estate issues. As Gogan J. noted in *Willisko v. Murphy*:

[44] The personal representative must act diligently and must not delay the settlement of an estate. *Halsbury's Laws of Canada* at HWE-266, contains the following direction:

The executor must not unreasonably delay in getting in the assets and settling the affairs of the estate...There is no hard and fast rule as to what constitutes undue or unreasonable delay, but it is the practice to speak of the executor's or administrator's year...Therefore, all investments that are not proper to retain should be realized within 1 year of the testator's death...Normally, too, other residuary property should be liquidated and distribution made within the year.

[25] Nancy did not want to create an inventory of her parents' possessions on the same timeline as her sisters, as she felt they were in too much of a hurry. In an undated letter to Belinda sent in January 2017, she states:

If you read your will carefully it says we have to allow the right amount of time for this and one month is not considered the right amount of time. The will also states that we have to be considerate of each other.

[26] Nancy chose not to cross-examine Debbra on either of her affidavits. In her affidavit of December 20, 2018, Debbra states:

13. Difficulties with my sister Nancy as a Joint Executor began the day of our father's death on January 3, 2017, when Nancy told me that she did not wish to take any actions with respect to our father's estate, including making an application for a grant of probate, until a year had passed. Nancy maintained this position for several months afterward.

14. After agreeing with Nancy that we would leave all important documents pertaining to our father's estate on his dining room table, so that all three of myself, Nancy, and Belinda, could have access to them, Nancy kept our father's will at her home (which is immediately next door to our father's home) and required me to arrange ahead of time if I wanted to see it or use it to obtain notarial copies for purposes of the estate. Despite this, several times I would arrive at Nancy's home, having pre-arranged with Nancy to access the will, only to find Nancy not there.

15. Despite maintaining in January of 2017 that she did not wish for any actions to be taken regarding our father's estate for a year, Nancy immediately began unilaterally contacting and/or cancelling services without keeping myself or Belinda fully informed.

[27] Because Debbra was not cross-examined on her affidavit, and I see no reason to doubt its accuracy, I take this evidence at face value: see e.g., *Gresham v. Rohaly*, 2011 ONSC 7652, [2011] O.J. No. 6467, at paras. 78-79, and *Zarrandi v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 1036, [2015] F.C.J. No. 1103, at para. 17.

[28] Nancy's duty as a co-executor is to create an inventory in a timely fashion. Yet, it became clear during the hearing that Nancy does not want to settle the estate and does not want various of her parents' possessions sold. She states in her affidavit:

30. The following are items that I have in my possession:

- 2 lamps
- 1 table

- 1 cookie jar
- 3 cross stitchings (nor framed)
- 2 ornaments (old men)
- 1 courier set of drawers

I don't wish any of my parent's life long purchases to be sold. Debbra and Belinda have taken things out of 26 Crestfield Drive, and I don't believe everything they have taken they still have. Debbra and Belinda are supposed to arrange to meet with me to go through Earl and Annette's life long possessions. I am still waiting for that to be done.

[29] During cross-examination Nancy confirmed this sentiment and stated:

N. Wilkinson: And the snow blower's still in Dad's garage. Yes, exactly where he left it. And I have no intentions of sell any of my father's things, ever.

...

N. Wilkinson: The things I have written down, no I intend to, ah, no don't intend to keep them. I will give them back when she puts back everything that that they've taken and I told the both of them that. When Debbra and Belinda return everything they've taken I will return those things.

Ms. Smith: And then will those things be sold?

N. Wilkinson: No.

Ms. Smith: You wouldn't authorize the sale of personal items?

N. Wilkinson: Does that include everything they have to return that they've taken? If that includes all of that stuff, I don't want to sell anything of my mother and my father's life. And they don't have to return anything other than the things I have listed. Debbra has Mom's wedding band, so I would like Belinda to have, there's two other wedding rings, I would like Belinda to have one and I would like to have one.

[30] Nancy took Earl's original will and withheld it for a time from Debbra and Belinda, even though they are co-adminstrators/co-executors. Nancy wanted to control who did, and did not, see the will.

[31] Nancy's house is located immediately adjacent to the residential property. She hired a landscaper to do work at both her own home and the residential property. Nancy wants to purchase the residential property and has already moved some of her personal effects there, even though she has not yet purchased it. She stated in cross-examination:

Ms. Smith: With respect to the homestead property, it's been incurring insurance and utility costs?

N. Wilkinson: That's right, yes.

Ms. Smith: It's been unoccupied?

N. Wilkinson: I live 11 steps from it.

Ms. Smith: You've already moved some of your personal belongings like clothing and bedding into the house?

N. Wilkinson: I did that after the courts quite a while ago granted administration of the estate, so I was just waiting for them, Debbra and Belinda, to sign the deed, and so I just started moving some of my things over so that say if I was lucky and my house got sold right away I wouldn't have too much more work to do getting into Mom and Dad's house, that's all.

[32] Nancy used funds from the estate to pay for the landscaping at the residential property without the knowledge or permission of the co-executors. During cross-examination, she was referred to Mr. Land's affidavit. The following exchanges occurred:

Ms. Smith: Well, I will open the page, so the first reference that I'd like to go to are invoices for landscaping work and they are attached to Exhibit E of Mr. Land's affidavit which contains a statement and the backup for the statement and there's a number of invoices and receipts...

...

Ms. Smith: On this page of Mr. Land's affidavit and the following page there are two invoices from Eden Park Landscaping. Both of these invoices are addressed to yourself.

N. Wilkinson: Yes.

Ms. Smith: The first one is for 26 Crestwood Drive. The second one is for 3 Kenwood Drive, which I understand is your property, correct?

N. Wilkinson: I am Kenwood Avenue.

...

N. Wilkinson: He's got it Kenwood Drive, but he's wrong.

Ms. Smith: Okay. They are referencing your property, correct?

N. Wilkinson: Ah, no. The, no, he had missed Ross MacLean, he just made those mistakes with the addresses because he used to do Dad's house and (inaudible) access started the summer before Dad died. I never called him to correct why he said 1-26 Crest, Dad's Crestfield, not even Crestwood, so they were just typing mistakes that he made, so I never called to straighten them out.

Ms. Smith: Um okay, I understand that the estate's only charge, for the second invoice, the estate's only charging for the gardening and transplanting and edging. If you look at the two invoices there are two invoices from Eden Park Landscaping. One for 26 Crestwood Drive, one for 3 Kenwood...

N. Wilkinson: Yes

Ms. Smith: And they shown mowing and trimming on the same day. October 2, October 11, October 18.

N. Wilkinson: Yes, I see that.

Ms. Smith: So the second invoice is for your property, correct?

N. Wilkinson: Well, I can't say because I don't have the cheques. I can't imagine me, because I've been honest with all the money these times. You're right.

...

Ms. Smith: The October 12 entry, the word "Dad's", you added that in...

N. Wilkinson: That's me.

Ms. Smith: Correct?

N. Wilkinson: Yep. Yes.

Ms. Smith: And is the gardening, transplanting, edging, weeding, is this on plants that line between you and your father's property?

N. Wilkinson: No. That's next to Dad's house on the... if looking at my dad's house, on the right end there was, there's a lot of the shingles that are rotting on that end, so I had that area cleaned out so that whenever I get to own the house those shingles would all have to be replaced and there's a large, I don't know what you call it, something metal in the shingles and the shingles are rotting around it, so I had that area cleaned out again because I thought the house was going to be mine soon, and just getting it ready to have the shingles replaced.

Ms. Smith: So this gardening, weeding, this is not necessary to avoid deterioration of your father's property?

N. Wilkinson: Sure it is, because it was all right next to the house.

Ms. Smith: You didn't contact your sisters to discuss whether this work was necessary?

N. Wilkinson: They don't talk to me at all.

Ms. Smith: That wasn't my question, my question was you didn't...

N. Wilkinson: No.

Ms. Smith: You didn't contact them?

N. Wilkinson: No.

Ms. Smith: You never advised them that this work was being done?

N. Wilkinson: No.

Ms. Smith: You never advised them that the work was going to be charged against the estate?

N. Wilkinson: No.

Ms. Smith: And you do understand, at this time when you're having this work done, you're understanding is that you will eventually have the house, your father's house?

N. Wilkinson: Not have it, pay for it.

Ms. Smith: Pay for it. It will eventually come to you.

N. Wilkinson: I would eventually buy it and I was just keeping the house up as I kept had been keeping the cottage up since before Dad died as well.

[33] Nancy used funds from the estate, again without the knowledge or consent of her co-executors, to have cracks in the ceiling of the residence repaired and repainted. On cross-examination she said that because of cracks in the ceiling she was initially concerned about the possibility that the roof was leaking. She had a professional examine the problem and was advised that there was no leak. However, she then had the cracks repaired and the ceiling re-painted and then unilaterally charged those repairs to the estate. The estate money was used to better the residence that Nancy intended to purchase without the consent of her co-executors.

[34] In the undated letter to Belinda of January 2017, Nancy says she is buying the cottage:

The car is worth at least \$30,000. The cottage will have to be safety inspected, surveyed and it is assessed at \$33,000. Once the building has been inspected the assessed value may go down. I am buying it. I have no problems with Debra buying the car.

[35] Nancy did not want Mr. Land, as Proctor, to advise Debra that the cottage was landlocked with no legal access, as she felt this would lower the value of the cottage and spark an interest in Debra to purchase that property. As stated in Nancy's affidavit, Mr. Land did not comply with Nancy's wishes and instead advised Debra of the situation:

9. I wish to purchase, or to acquire as a portion of my entitlements from the estates, the cottage. I feel that it would have been my father's wish that the cottage be retained within the family, and I do not believe that Debra would honour that wish.

10. Debbra Wilkinson initially said she was willing to allow me to buy the cottage, but changed her mind when Derek Land advised us that we did not have a deeded or prescriptive right to use the road leading up to the cabin. I told Mr. Land that he was opening the door for Debbra to want to buy the cottage now. Debbra had been aware that our parents did not have legal access to the road; she told me so when I first said to her that I wanted to buy the cottage. Mr. Land needed to speak to my brothers-in-law, Jerry and Andy McDonald (“Jerry and Andy”) to get legal access to the road. I am advised by Derek Land and I believe that Debbra did not consent to allow Mr. Land to speak with them. I believe Debbra spoke to Jerry and Andy and I believe they have my deceased husband’s gun.

[36] Nancy agreed on cross-examination that she does not want Debbra to purchase the cottage because she is afraid Debbra will sell it:

Ms. Smith: With respect to the cottage property, you state at paragraph 9 of your affidavit that you do not believe Debbra would honour the wish of keeping the cottage in the family. That’s an assumption.

N. Wilkinson: All based on the fact that right after Dad died she told me she could get \$60,000 or \$70,000 for it. So that’s the only reason I said that because she was going to sell it when Dad died, so...

Ms. Smith: You have no knowledge of her intention?

N. Wilkinson: No. Well, she told me she was going to sell it for that price. She told me she could get \$60,000, was \$60,000 or \$70,000, I don’t remember the amount, she was just talking days after Dad died, so...

Ms. Smith: She was discussing the value of the cottage.

N. Wilkinson: No she wasn’t. She told me what she could get for it, and she told me she could sell the house in 3 months, we didn’t need a realtor. That’s exactly what she said to me.

[37] When Nancy found out about the cottage being given to Debbra and her husband she was hurt and then determined it was wrong because she, not Debbra, had been looking after Earl. She stated on cross-examination:

Ms. Smith: When you first found out that your father had previously deeded the cottage to Debbra and David, when you first found that out, you were mad?

N. Wilkinson: I was hurt, not mad, hurt because my sister talking about, not discussing things with my telling my sisters, she, Debbra and David owned the cottage and she, know what she told Dad, Dad was to tell me that he deeded the cottage to Debbra and David. And even when I found out Debbra and David owned it, figured they owned the whole thing, long weekend was coming up so I called Debbra and I asked her if her and Forrest were going to Margaree for Thanksgiving weekend. Again, this is when she thought she owned the whole thing and in my

mind I knew she only had owned half because of the lawyer Dad had come out. So I was going to go to Margaree and I asked Debbra if her and Forrest were going to go, and her answer to me was odd, she was saying to me, you know Nancy were going and this has been planned for a while. I thought well that's great I'll get to see you. So then she made two calls to me over a period of time after and she said to me, Nancy, she told her in-laws were coming from Ontario or somewhere, and they were all going to Margaree, so basically in the end she didn't want me to go. I went and she didn't show up. She didn't want me to be there.

Ms. Smith: So my question to you was that when you found out that your father had previously...

N. Wilkinson: No, I wasn't mad.

Ms. Smith: You were hurt?

N. Wilkinson: Yes.

Ms. Smith: And were you hurt, well, you were hurt because you understood that your father was going to divide up everything equally?

N. Wilkinson: No, I was hurt because of the fact that Dad, I was the only one who looked after him, my mother's sick, I looked after my father and he gave that to Debbra and David without telling Belinda, without telling me. Debbra took it without telling me and without telling Belinda. So no, that's why I was hurt.

Ms. Smith: In your mind it wasn't fair?

N. Wilkinson: It was wrong is what it was.

Ms. Smith: You understood at that time your father owned the cottage? You understood, in your mind he owned it completely?

N. Wilkinson: Yeah.

Ms. Smith: Yeah. And so he could make the decision who he deeds it to?

N. Wilkinson: Well, yes, that's right.

Ms. Smith: And you were hurt that he decided it would go to another sibling of yours?

N. Wilkinson: Without telling his other two daughters, yes.

Ms. Smith: Because...

N. Wilkinson: A year, I figured it out myself a year later.

Ms. Smith: Because you felt that it was supposed to be divided equally?

N. Wilkinson: That's, no, I just assumed it would be left to the three girls and obviously when I was going to go down that weekend and Debbra and Forrest didn't go and all her in-laws because I was there, so then I knew, I wasn't going to be involved in that cottage because she figured she owned it.

Ms. Smith: You understand that Debbra and David did deed the cottage back to your father?

N. Wilkinson: Yeah. I was told, I don't know if this is true, I was told Dad had to pay her \$10,000, that I don't know is true, I just said I don't know if it's true.

Ms. Smith: Did you receive \$10,000 from your father?

N. Wilkinson: Yes, Belinda made him do that. I don't know why. Yeah. She gave, he gave Belinda \$10,000 because Belinda was there, and me yes. I gave him the check back because he paid me DVA money. I gave him the cheque back and he said no Nancy you keep that, he said and you pay off your vehicle. Yep. And Belinda looked at me said, I made Dad do that Nancy.

Ms. Smith: To your knowledge, Debbra and David did deed the property back?

N. Wilkinson: To my knowledge, yes.

[38] Debbra and her husband returned the cottage to Earl in 2016.

[39] Debbra also wants to purchase the cottage and says in her affidavit:

7. With respect to paragraph 9 of Nancy's Affidavit, I confirm that I also would like to purchase, or acquire as a portion of my inheritance, the cottage. I confirm I intend to keep the cottage within our family and that I do not intend to sell the cottage. My intention is to eventually pass the cottage down to my son, Forrest Gray Dawe.

8. The statements made in paragraph 10 of Nancy's Affidavit are inaccurate. I have always known there was no legal right of way from the road to the cottage. The lack of legal right of way does not impact the fact that I would like to purchase the cottage or acquire it as a portion of my inheritance.

[40] Nancy knew that Debbra's son, Forrest Gray Dawe, wanted to purchase Earl's 2003 Lincoln Town Car. In the letter to Belinda, Nancy said the car was worth at least \$30,000. On cross-examination Nancy agreed that she had no idea of the actual value of the car. She said that Forrest wanted to take the car the day her father died and this offended her. Nancy says in her affidavit:

25. The day my father passed away, Debbra stated that she was going to take my father's 2003 Lincoln Town Car. I would not let her because I felt it was too soon, and that she did not have the legal authority to do so.

[41] Nancy spent \$3500, again without the knowledge or consent of her co-executors, to have the Lincoln towed and repaired. She wants the estate to pay this cost. She says she does not want to own the car, but does not want it sold to anyone else and stated on cross-examination:

Ms. Smith: And you want that repair cost to come from the estate?

N. Wilkinson: Yes. Because I was told to do it.

Ms. Smith: Now notwithstanding that you want the repair cost to come from the estate, you're unwilling to have the car sold? You're not agreeable to selling the car?

N. Wilkinson: I not only because of the fact that they're unagreeable about me just signing the deeds to letting me purchase the house and the cottage. That's why. I haven't been disagreeable about anything until they started. So now I'm just responding, that's all. That's all.

...

Ms. Smith: In your affidavit you indicate when I'm gone, Forrest (inaudible) can have the car. For now it is where it belongs.

N. Wilkinson: Yes.

Ms. Smith: You feel that you have a duty to ensure estate assets aren't getting sold or distributed?

N. Wilkinson: How can you say I don't want things distributed? They've already taken what they wanted. And the car, I just, the car is just, I'm afraid if she takes the car she'll sell it because she, I'm just afraid that the car will be sold to someone outside of her I mean. And she's got no where to keep the car and Dad has two driveways. So if, I don't want to own the car, I just don't want it sold. And so when we're all gone if Forrest still wants the car he can have it.

[42] Nancy withdrew \$23,000 from her father's bank account after his death without the knowledge or consent of her co-executors. This money has since been re-paid to the account.

[43] In *Willisko v. Murphy*, Gogan J. reviewed the law regarding the removal of a personal representative and stated:

[46] *Critchely v. Critchely*, 2006 NSSC 219 (CanLII), provides an overview of the jurisprudence on the removal of a personal representative. In that case, Warner J. summarized at paras 38-40:

In *Re MacCulloch Estate* (1991) 102 N.S.R. (2d) 147 (NS Prov. Ct), Haliburton J., noted that the statutory authority for removal of a trustee is very narrow but that the cases appear to give broader authority. He concluded that it appeared that an executor whose administration is motivated by an unlawful or criminal intent will be removed and furthermore, if it is established that the executor is, for some reason, not competent or capable of the exercise of sound and fair judgement in relation

to the affairs of the estate, or has exhibited bad faith in relation to decisions made in the course of his administration, then he/she will be removed.

In *Re Winter Estate*, [2001] N.S.J. No. 416, 2001 CarswellNS 379 (NSSC), Hood J. , expanded on Justice Haliburton's decision with a thorough review of the principles for the removal of trustees. Her decision was upheld by the Nova Scotia Court of Appeal in *Re Winter Estate*, [2002] N.S.J. No. 66, 2002 CarswellNS 66.

These decisions and *Macdonnell, Sheard and Hull on Probate Practice*, 4th ed. (Carswell, 1996) at page 163, note that the principles that guide courts in removing trustees are set out in *Letterstedt v. Broers* (1884), 9 App. Cas. 371 (P.C.), which reads in part:

...in cases of positive misconduct, the Courts of Equity have no difficulty in interposing to remove trustees who have abused their trust; it is not indeed every mistake or neglect of duty or inaccuracy of conduct of trustees, which will induce Courts of Equity to adopt such a course. But the acts or omissions must be such to endanger the trust property or to shew a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity.

And at page 387:

In exercising so delicate a jurisdiction as that of removing trustees, their Lordships do not venture to lay down any general rule beyond the very broad principle above enunciated, that their main guide must be the welfare of the beneficiaries...

...

[48] A conflict of interest between the personal interests of the personal representative and the beneficiaries is a ground for removal. In *Loughead Estate (Re)*, *supra*, the personal representative was removed based upon evidence that he was advancing loans to himself from the estate and taking pre-commission for his administration. These acts were held inconsistent with the duty to act in the beneficiaries best interest and the duty of utmost good faith owed by a fiduciary to a beneficiary. In so finding, Duncan J. reasoned at para. 16:

The personal representative has a fiduciary duty of trustee in relation to his or her conduct and management of the Estate. Where there is evidence of a conflict of interest between the personal representative and those of the beneficiaries, it may amount to a ground for removal.

[49] In summary then, the preceding authorities establish that a court must not remove a personal representative unless the actions of the personal representative establish a conflict of interest, are consistent with the statutory grounds set out in s. 61 of the *Probate Act*, or are consistent with the common law grounds established in *Letterstedt v. Broers*.

[44] The facts clearly support a finding on a balance of probabilities that Nancy: 1) is in a conflict of interest regarding her interest in the residence and unilaterally spending estate money to improve the residence; 2) should not have removed money from the estate accounts unilaterally; 3) has violated s. 61(1) (b)(i) of the *Probate Act* in that she has neglected to properly administer or settle the estate; 4) has violated s. 61(1) (b)(ii) of the *Probate Act* in that she is wasting the estate; and 5) has taken various other actions that place her personal interests over those of the estate, her co-executors and co-beneficiaries and therefore has other conflicts of interest.

[45] I conclude that Nancy Wilkinson should be removed as co-executor of Earl's estate. The parties agree that if Nancy is removed as co-executor, Derek Land would be an appropriate replacement. Mr. Land has agreed to convert his position from Proctor of the estate to co-executor along with Belinda and Debbra. During the hearing Mr. Land requested if he was appointed a co-executor that he continue to receive the hourly billing rate he was receiving as Proctor, instead of the usual percentage afforded to executors. I agree that Mr. Land's appointment as co-executor is appropriate. I also agree that he should continue to be paid the hourly rate he received as Proctor in his new role as co-executor.

### **Transfer of Interest in Annette Wilkinson Estate**

[46] Annette died intestate. Earl died testate. There is no way to sell only a part of either the residence or the cottage. Section 50 of the *Probate Act* states:

50 (1) Subject to any will, a personal representative may sell the real property for the purpose not only of paying debts but also for distributing the estate among the persons beneficially entitled thereto, whether there are or are not debts and it is not necessary that the persons beneficially entitled to the real property concur in such sale, except where the sale is made for the purpose of distribution only.

(2) Subject to this Act and any will, no sale of real property for the purpose of distribution only is valid with respect to any person beneficially interested, unless that person concurs in the sale.

(3) Except where otherwise provided in any will, where in the case of a sale for the purpose of distribution

- (a) a mentally incompetent person or an infant is beneficially interested;
  - (b) an adult beneficiary does not concur in the sale;
  - (c) there is, under a will, a contingent interest or interests not yet vested;
- or

(d) there is a person who may be a beneficiary who has not yet been ascertained,

the Supreme Court, upon being satisfied that it is just and appropriate to do so, may approve the sale and the sale so approved is valid with respect to the contingent interest and any interest not yet vested and is binding upon the incompetent person or infant, non-concurring person and beneficiary not yet ascertained.

(4) Notwithstanding subsections (1), (2) and (3), the non-concurrence of any person who is of the age of majority and entitled to share in immediate distribution does not invalidate the sale of real property if persons entitled to receive in the aggregate at least seventy-five per cent of the net proceeds concur in the sale and the sale is made in accordance with the concurrence and the personal representative is not answerable or chargeable to or by the non-concurring person for selling the real property at an undervalue if the sale has first been approved by the court.

(5) Where a person of the age of majority accepts a share of the purchase money knowing it to be such, that person is deemed to have concurred in the sale.

[47] Therefore, a sale of specifically devised property requires an order of the court in the absence of consent. The court has the authority to order a sale without the consent of a beneficiary if it is “just and appropriate”: s. 50(3)(b).

[48] Section 50 of the *Probate Act* also applies to intestacies. The co-administrators have the legal title to real estate, however, the beneficial interest is held by the heirs. Since a sale of the properties would be for the purpose of distributing the estate, consent of the parties is required.

[49] Neither property is capable of subdivision. No third party would be interested in purchasing a partial interest in the residential property or the cottage. Transferring title to Earl’s estate is the only viable option.

[50] An appraisal of the residential property shall be obtained. Nancy will then be given the first opportunity to purchase the residential home. If she has not purchased the residential property for a price acceptable to the co-executors within two (2) months of receipt of the appraisal, it shall be listed for sale to the public in accordance with the *Partition Act* procedure.

[51] An appraisal of the cottage shall be obtained. Once the appraisal is received, within two (2) months of receipt of that appraisal, if interested, Nancy and Debbra shall provide sealed bids to Mr. Land for purchase of the cottage and the highest offer shall be accepted.

[52] The parties shall return before me for approval of the sales.

### **Tax Free Savings Account**

[53] Debra argued that, despite being named as the sole beneficiary of Earl's tax free savings account, Nancy was not entitled to those funds. She argued that the principles in *Pecore v. Pecore*, 2007 SCC 17, applied to TFSAs and that the money was held by Nancy as a resulting trust.

[54] Michelle Nicholson from the Bank of Montreal testified at the hearing and provided the court with the Non-Financial Account Amendment Form for the tax free savings account signed by Earl on January 30, 2013. The form reveals that Earl had named Nancy as the sole beneficiary of his tax free savings account. This date was separate and apart from any other financial event in Earl's life. There was no evidence that there may have been any other reason or intention on the part of Earl for so naming Nancy as the sole beneficiary.

[55] Debra withdrew this aspect of her claim against Nancy and now agrees that the funds properly belong to Nancy. I therefore decline to comment whether the principles in *Pecore* apply to TFSAs.

### **Conclusion**

[56] Accordingly, Nancy is removed as co-executor, to be replaced by Mr. Land. The properties shall be disposed of as described in this decision.

Arnold, J.