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Docket: PR 20-01-16826
(Winnipeg Centre)
Indexed as: Estate of Tina Werner
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COURT OF KING'S BENCH OF MANITOBA
PROBATE DIVISION

IN THE MATTER OF THE ESTATE OF TINA WERNER

B E T W E E N:

| | | |
|--|---|-----------------------|
| |) | <u>Appearances</u> |
| |) | |
| KAREN BREED, |) | Graham Fuga |
| Administrator of the Estate of Tina Werner |) | For the administrator |
| |) | |
| |) | |
| -and- |) | |
| |) | |
| |) | |
| HUNTER WERNER, NICHOLAS GIROUARD, |) | All self-represented |
| TIMOTHY WERNER AND ROBERT KING (also |) | |
| known as ROBERT WERNER), the opposing |) | |
| beneficiaries |) | |
| |) | |
| |) | |
| |) | JUDGMENT DELIVERED: |
| |) | January 23, 2024 |

ASSOCIATE JUDGE GOLDENBERG

BACKGROUND

[1] Tina Werner passed away on January 2, 2020. In her will, she appointed her niece, Karen Breed, as her Trustee and Executrix. Ms. Breed applied for and

was granted probate on February 24, 2020. She is referred to in this decision as Ms. Breed or the “administrator”.

[2] Tina Werner has two surviving children: Robert King (also known as Robert Werner) and Timothy Werner. In addition, she has two surviving grandchildren: Nicholas Girouard and Hunter Werner, who are the children of Timothy Werner. Tina Werner’s surviving children and grandchildren are the beneficiaries under her will, each being entitled to an equal share of the residue of Tina Werner’s estate. Collectively, the four beneficiaries are referred to in this decision as the “beneficiaries”; individually, they are referred to by their first names.

[3] Ms. Breed has applied to court to pass the accounts of the estate of Tina Werner because those accounts were contested by the beneficiaries. Prior to the application to pass accounts, there was another court proceeding relating to the estate of Tina Werner.

[4] In June of 2020, Ms. Breed brought an application for an order evicting Robert and Nicholas from a mobile home that was said to be property of the estate of Tina Werner, to pay rent and post security for the occupation of that mobile home, and to deliver up all personal property of the estate of Tina Werner.

[5] The grounds for that application were that the primary estate asset was the mobile home located in Stonewall, Manitoba, which was at the time occupied by Robert and Nicholas who refused to vacate the mobile home. That application

appeared on the civil uncontested list with four appearances, the last of which was adjourned *sine die*. There is dispute amongst the parties as to how and whether that application was ultimately resolved. Nevertheless, there is no dispute that the administrator sold the mobile home and now includes the proceeds of that sale as part of the estate.

[6] The initial passing of accounts was initially returnable on December 30, 2022, and included three informal appearances before me, and a final contested hearing. Adjournments were granted initially so that the self-represented respondents could retain counsel; none of them did so. Other appearances included directions for further affidavit evidence to be filed by Robert, and to give Ms. Breed an opportunity to respond.

[7] The following affidavits consist of the bulk of the evidence considered by me:

- Affidavit of Karen Breed affirmed June 3, 2020 (from the earlier application)
- Affidavit of Robert King affirmed July 8, 2020 (from the earlier application)
- Affidavit of Karen Breed verifying application and accounts affirmed September 22, 2022
- Affidavit of Robert King affirmed March 8, 2023
- Affidavit of Karen Breed affirmed March 24, 2023
- Affidavit of Karen Breed affirmed May 18, 2023
- Affidavit of Robert King affirmed May 18, 2023

[8] At the contested hearing, Ms. Breed confirmed she had no additional evidence to rely upon. Robert provided some oral evidence in addition to his affidavits. Hunter, Nicholas and Timothy each provided some brief oral evidence.

DECISION

[9] For the reasons that follow, I am approving the accounts of the administrator, as follows:

- The assets of the estate that came into the hands of the administrator of the estate amounted to \$51,842.23;
- The monies received by the estate (other than from the realization of assets or investments made by the personal representatives) amounts to \$42,711.02, all of which is applicable to income and none of which is applicable to capital;
- That the administrator properly paid out and disbursed in due course of the administration of the estate (otherwise than as distributions to beneficiaries or for the purpose of investing monies of the estate) the sum of \$32,510.59, all of which is applicable to income and none of which is applicable to capital.

[10] In addition to approving those accounts, I also allow or approve as follows:

- Allow Pitblado LLP, lawyers for the administrator, \$18,839 as fees and \$610.02 as disbursements, amounting to a total of \$21,723.13 including applicable taxes in relation to the administrator's application to pass her

accounts for the period of March 24, 2022, to May 25, 2023, three-quarters of which shall be paid from the estate, and one-quarter of which shall be paid by the estate from Robert's share of the estate.

- Allow the administrator's additional request for fees in the amount of \$6,795 as fair and reasonable compensation for the care, pains, trouble and time expended in administering and settling the affairs of the estate and the administrator's request for mileage in the amount of \$77 for the period of February 4, 2020, to May 25, 2023.
- Approve the administrator's fees previously paid out of the estate in the amount of \$3,000 as fair and reasonable compensation for the care, pains, trouble and time expended in administering and settling the affairs of the estate from February 4, 2020 to August 31, 2022.
- Approve the legal fees of Pitblado LLP, the lawyers for the administrator, previously paid out of the estate in the amounts of \$1,731.52, inclusive of taxes and disbursements, and \$627.20, inclusive of taxes and disbursements.
- Approve the legal fees of George Derwin Law Office the previous lawyers for the administrator, previously paid out of the estate, in the amount of \$4,199.50 inclusive of taxes and disbursements.
- Approve the payment and transfer of \$7,000 to Timothy Werner as advances on his share of the estate to which he is entitled.

[11] After deducting the further amounts of compensation and mileage expenses for the administrator (\$6,872), three-quarters of the fees and disbursements for the lawyers for the administrator for the passing of accounts (\$16,292.34), and the payment and transfer of \$7,000 to Timothy, I find that the value of the assets of the estate remaining on hand is \$31,878.32, all in the form of cash.

[12] In addition, I find that Nicholas has received benefits from the estate totalling \$185.21 and Robert has received benefits from the estate totalling \$6,106.21. Accordingly, I find that Robert and Nicholas's share in the estate ought to be reduced by the amounts of the benefits received by them. In addition, Robert's share in the estate ought to be reduced by a further \$5,430.78 to cover one-quarter of the legal fees for the passing of accounts. Given that the total of the benefits received by Robert and his share of the legal costs exceed his interest in the estate by \$244.56 the estate is unable to pay the other three beneficiaries their share of the estate in full. Accordingly, I direct that the remaining \$31,878.32 ought to be distributed as follows:

- to Hunter: \$11,210.92
- to Nicholas: \$11,025.70
- to Timothy: \$4,210.92
- to Robert: \$0
- to payment for Robert's share of the legal fees for the passing of accounts: \$5,430.78

[13] I find that Robert owes the estate \$244.54. Should the estate recover that money, it can be distributed equally among the remaining beneficiaries.

REASONS FOR DECISION

Matters Contested by The Beneficiaries

[14] The beneficiaries each opposed the passing of accounts to some extent. Robert strongly opposed on a number of grounds; the other three beneficiaries raised some less serious concerns.

[15] The biggest concern raised by Robert relates to the mobile home which he says is not an estate asset, rather that it was gifted to the four beneficiaries prior to Tina Werner's death. I am not satisfied on the evidence that the trailer was gifted to the beneficiaries. Robert included in his affidavit evidence, a letter purportedly signed by his mother on December 24, 2018, giving the mobile home to the four beneficiaries and stating that she wanted Robert and Nicholas to be able to live in the mobile home rent free for a period of one year after her death. Robert's evidence on that point was not corroborated by the other beneficiaries, and is contradicted by Ms. Breed's evidence about that asset. I accept the evidence presented by her on that issue, including that all of the utility bills, the property insurance and the trailer court lease for the mobile home were in Tina Werner's name prior to her death. Further evidence regarding the mobile home is set out later in my analysis regarding monies owing to the estate. Robert has not made any claim against the estate in respect to the

mobile home and I find he has not established that the asset does not form part of the estate.

[16] I find that Ms. Breed properly treated the mobile home as an estate asset and that all steps taken by her to sell the trailer were reasonable and necessary. While concerns were raised by Robert and Nicholas that the mobile home was sold for less than it was worth, I am not satisfied that any of the steps taken by Ms. Breed to sell the property were unreasonable.

[17] Robert took issue with some of the disbursements incurred by Ms. Breed, and in particular the funeral expenses. He was critical of her choice of venue for the funeral and expenses incurred. None of his criticisms have any merit. I find that Ms. Breed acted reasonably in making the arrangements particularly given that none of the beneficiaries were assisting her in that regard.

[18] Robert also took the position that it was wrong for the estate to have made rental payments totalling about \$7,000 for the trailer lot rental fees. However, I find that Ms. Breed's actions regarding the payment of the trailer lot rental fees until such time as she was able to cause Robert and Nicholas to vacate the trailer and then to sell it, were reasonable and appropriate.

[19] In addition, Robert alleges that \$10,000 seems to have been drawn from the accounts and that no accounting has been made to the beneficiaries. On the contrary, Ms. Breed has properly accounted to the beneficiaries including with respect to all monies disbursed from the estate. There is no evidence of any

monies not properly accounted for and I approve all disbursements accounted for by Ms. Breed.

[20] All of the beneficiaries expressed concern with the amount of compensation sought by Ms. Breed. However, I find that the compensation she seeks, totalling \$9,872 is entirely reasonable for the extraordinary care, pains, trouble and time that she expended in administering the estate.

Monies Owing to the Estate or Benefits already received by Beneficiaries

[21] Ms. Breed takes the position that Robert owes the estate money given his occupation of the mobile home for a considerable period of time following Tina Werner's death and for other expenses she says the estate unnecessarily incurred because of Robert.

[22] The mobile home was on property leased from the Stonewall Haven Trailer Court. The monthly rent was \$465. The mobile home had been on that site since 1984. In or around 2017 or 2018, Tina Werner became unable to safely stay in the mobile home and was eventually moved to a personal care home. Tina Werner became mentally incompetent in approximately 2019, and the Public Guardian and Trustee of Manitoba (the "PGT") became the committee of her estate in or around May 2019. The PGT continued to make the monthly rental payment on behalf of Tina Werner presumably because her son, Robert, and her grandson, Nicholas, were residing at the mobile home.

[23] The PGT paid the lot fees on behalf of Tina Werner and her estate until the month of March 2020, then they released the account to Ms. Breed as administrator in April 2020. Ms. Breed, as administrator of the estate, began paying the monthly rent of \$465 to Stonewall Haven Trailer Court as of April 2020.

[24] As referenced earlier, Ms. Breed took steps to sell the trailer given that the estate was small and would be depleted by those monthly payments. She was concerned that the monthly payments being made by the estate were accruing to the benefit of two of the beneficiaries only, that is, to Robert and Nicholas.

[25] In January 2020, Ms. Breed, in speaking with Nicholas, learned that Nicholas was paying rent of \$500 per month to Robert. Those \$500 rent payments by Nicholas to Robert were never turned over to the estate.

[26] Robert and Nicholas did not vacate the mobile home despite repeated requests by Ms. Breed, and so, in June of 2020, she engaged Derwin Law Offices to obtain an eviction order so that she could have Robert and Nicholas evicted from the home so she could then sell the mobile home. In an attempt to limit the legal fees, Ms. Breed offered to allow Robert to sell the mobile home, instead of her selling it. However, Robert did not list the mobile home for sale. Ms. Breed then determined it was in the best interests of Tina Werner's estate and the other beneficiaries that she stop paying the monthly lot rental payments for the mobile home, as this would be one way she could get Robert and Nicholas

evicted from the mobile home so that she could sell it. She proceeded to contact the Stonewall Haven Trailer Court and inform them that she would pay the monthly lot rental payments until August 30, 2020, which was an additional four months after she requested that Robert and Nicholas move out of the home by April 30, 2020.

[27] In November 2020, Ms. Breed received a notice of termination from the trailer court for non-payment of rent. She then proceeded to obtain an appraisal of the mobile home which valued the mobile home at \$50,000 to \$55,000, with an expected sale price of \$50,000.

[28] In March of 2021, Ms. Breed received an order of possession granted by the Residential Tenancies Commission which had been applied for by the Stonewall Haven Trailer Court. The eviction was performed by the sheriff's office on April 22, 2021. Ms. Breed then listed the mobile home for sale through the realtor and it was sold on May 5, 2021, for \$49,900.

[29] Ms. Breed took steps to obtain assets from Robert, which she was of the view belonged to the estate. These included a 2007 Ford Escape, several withdrawals and purchases from Tina Werner's credit union account totalling over \$53,000, and Tina Werner's furnishings and household effects from the mobile home worth an estimated \$1,500. It was Ms. Breed's belief that Robert took each of these items illegally from Tina Werner prior to her death, and that it was her responsibility to try and obtain the items, or their value, from Robert for the beneficiaries of Tina's estate. She directed her legal counsel to send a

demand letter to Robert on April 29, 2022. Robert did not reply to the demand letter. Ms. Breed determined that it was not worth pursuing Robert for the items that he took from Tina Werner because the legal costs associated with pursuing Robert would be substantial, the estate was very modest and could not support the legal fees associated with pursuing Robert, and because even if judgment was awarded in favour of Tina's estate, that Robert does not have the funds required to pay the estate for the value of the items he took from the estate. Nevertheless, the amounts demanded from Robert for those items do not form part of the accounting or impact the distribution that Ms. Breed intends to make to the beneficiaries.

[30] Timothy received advances from the estate totalling \$7,000. He acknowledges that the advance should be deducted from his share of the estate.

[31] Ms. Breed's position is that Nicholas received the benefit of half of the Town of Stonewall water and sewer bills being paid by Tina's estate, for a total benefit of \$185.21. Nicholas does not dispute receiving that benefit and agrees that his share of the estate should be reduced by the amount of that benefit.

[32] Ms. Breed's position is that Robert received the benefit of half of the Town of Stonewall water and sewer bills being paid by Tina's estate for a total benefit of \$185.21. Furthermore, as Robert refused to leave the mobile home after he was asked to do so, the estate had to spend money on lot fees, eviction proceedings, a locksmith and cleaners. Ms. Breed says that it is unfair for the other beneficiaries to have those expenses come out of their share of the estate.

She says that the benefits Robert has received from the estate, and the expenses the estate has had to pay relating solely to Robert, total \$20,263.17.

[33] I find that Robert received half of the benefit of the water and sewer bills paid by the estate in the amount of \$185.21 and that his share in the estate ought to be reduced by that amount.

[34] I find that Robert received the benefit of the rent paid by the estate for the mobile home in the amount of \$5,921, calculated as follows: \$465 x 12 months for April 2020 to March 2021 and \$341 for April 1, 2021, to April 22, 2021, the date the order of possession was enforced by the Sheriffs.

[35] I find that the rent was a benefit solely received by Robert as he remained in the mobile home that entire time without paying any rent; whereas, Nicholas was paying rent of \$500 to Robert. I make no findings on whether the rent paid by Nicholas or any other occupation rent should be accounted for as that matter is not before me.

[36] I am not prepared, in the circumstances, to order that the legal fees paid by the estate in connection with the court application, that was ultimately not resolved in court, be paid entirely by Robert; rather, I approve it as an estate disbursement to be shared by all beneficiaries.

[37] Other expenses such as a safety deposit box drilling, eviction costs charged by the property owner and cleaning of the mobile home, I am also not prepared to find should be paid only from Robert's share of the estate, but approve them as estate disbursements.

[38] Ms. Breed also asks that Robert pay for an unpaid VISA bill in the amount of \$398.61 which she says were for items he purchased on this mother's credit card, along with the various other items Ms. Breed says were improperly taken from the estate. I make no findings on this possible claim of the estate against Robert. It was not pursued by the administrator for reasons explained by her relating to the other items she says Robert removed from the estate. Accordingly, I find that the expense for the unpaid VISA bill is to be shared by all beneficiaries.

Legal Fees for the Passing of Accounts

[39] The legal fees for the passing of accounts are high for an estate of this size. They total \$21,723.13 inclusive of disbursements and taxes. However, the fees are reasonable given the protracted nature of the proceedings including three informal appearances, considerable sworn affidavit evidence, and a contested hearing.

[40] I find that Robert should pay for one-quarter of the legal fees for the passing of accounts by himself and that three-quarters should be paid by the estate. The net result of that will be that Robert will pay for just under half of the legal fees for the passing of accounts.

[41] While the other beneficiaries had some concerns, those could reasonably have been addressed at an appearance on an informal passing of accounts. In my view, Hunter, Nicholas and Timothy wanted an opportunity to be heard but were not aggressive or adversarial in their approach on the passing of accounts.

Robert, on the other hand, was overly aggressive and was adversarial in his dealings with Ms. Breed, and caused the proceedings to be unnecessarily protracted. Significantly, there was little to no merit to his opposition.

[42] Accordingly, I direct that \$5,430.78 of the legal fees for the passing of accounts come from Robert's share of the estate.

[43] Based on the amount that has been advanced to Timothy by Tina Werner's estate, the benefits that Nicholas and Robert have received from the estate, and the expense Robert caused to Tina's estate, each beneficiary is entitled to the following¹:

- a) Hunter is entitled to \$11,292.43
- b) Nicholas is entitled to \$11,107.22; (\$11,292.43 - \$185.21)
- c) Timothy is entitled to \$4,292.43 (\$11,292.43 - \$7,000)
- d) Robert owes \$244.56 (\$11,292.43-\$185.21-\$5,921-\$5,430.78)

[44] As Robert owes the estate \$244.56, the other beneficiaries' entitlement must be reduced by the amount that he owes the estate. Accordingly, each of Timothy's, Nicholas' and Hunter's entitlement must be reduced by \$81.52, resulting in the following amounts owing to each beneficiary:

- a) Hunter is entitled to \$11,210.92
- b) Nicholas is entitled to \$11,025.70
- c) Timonthy is entitled to \$4,210.92

¹ In order to calculate the share entitled to by each beneficiary, I have taken the \$31,878.32 found to be remaining and added back in the \$7,000 already advanced to Timothy as well as the benefits received by Nicolas and Robert. That amount totals \$45,169.51, meaning each beneficiary should have been entitled to \$11,292.43

d) Robert is entitled to nothing

[45] Ms. Breed expressed concern that Robert may initiate some type of litigation against the estate and asked the court to consider a holdback of \$20,000 for two years, in case she is required to pay legal fees to defend herself in her role as executor of the estate. At the hearing, her counsel indicated that Ms. Breed would not pursue maintaining a holdback on the estate, acknowledging that some other means such as seeking security for costs would be appropriate in the event that Robert takes any action against the estate or against Ms. Breed personally.

[46] For all of the reasons set out above, the accounts of the administrator are passed. Counsel can submit a Report and Order for my signature in accordance with these reasons.

J. L. Goldenberg
Associate Judge