

Date: 20221118
Docket: PR 02-01-59758; CI 21-01-32421
(Winnipeg Centre)
Indexed as: Peters v. Watral et al.; Watral v. Peters et al.;
and Peters v. Peters-Watral
Cited as: 2022 MBKB 217

COURT OF KING'S BENCH OF MANITOBA

IN THE ESTATE OF: HEINRICH PETERS also known as HENRY PETERS,
Deceased

APPLICATIONS UNDER: *The Law of Property Act*, C.C.S.M. c. L90, s. 17
The Trustee Act, C.C.S.M. c. T160, ss. 25 & 84
The Court of King's Bench Rules, Rule 14.05(2)(c)(i)

(File No. PR 02-01-59758)

B E T W E E N:

)	<u>Appearances:</u>
BETWEEN:)	
)	<u>Kenneth G. Mandzuik,</u>
CONNIE HELEN PETERS)	for Connie Helen Peters
)	
)	applicant,
)	
- and -)	<u>Ian B. Scarth,</u>
)	for Wally Watral
WALLY WATRAL,)	
as Executor of the Estate of Heinrich Peters)	
and BRENDA MARIE PETERS-WATRAL)	
)	<u>Loren D. Brault,</u>
)	respondents.) for Brenda Marie Peters-Watral

AND BETWEEN:)
)
 WALLY WATRAL as the Executor of the)
 ESTATE OF HEINRICH PETERS also known as)
 HENRY PETERS,)
)
 applicant,)
)
 - and -)
)
 CONNIE HELEN PETERS and BRENDA MARIE)
 PETERS-WATRAL,)
)
 respondents.)

(File No. CI 21-01-32421)
B E T W E E N:

CONNIE HELEN PETERS,)
)
 applicant,)
)
 - and -)
)
 BRENDA MARIE PETERS-WATRAL,)
)
 respondent.)

JUDGMENT DELIVERED:
 November 18, 2022

HARRIS J.

BACKGROUND

[1] Heinrich Peters (“Henry”) died on March 9, 2002. He was survived by his spouse Helen and his two children, Connie Helen Peters (“Connie”) and Brenda Marie Peters-Watral (“Brenda”). Brenda’s spouse, Wally Miroslaw Watral (“Wally”), is the executor of Henry’s estate. (As all counsel have referred to the testator, his spouse and the parties by their first names, I will do likewise in these reasons.)

[2] Henry's will provided that the executor was to "invest the residue of [the] estate in a trust fund for the sole and exclusive benefit of Helen during her lifetime", and that "Upon the death of Helen, [the] Executor shall divide the remaining assets of [the] estate between [Connie and Brenda]".

[3] Helen passed away on March 4, 2019. To date, the residue has not been divided because of a dispute regarding the disposition of the land, which is comprised of three adjacent parcels, approximately 40, 28 and 12 acres respectively, totalling 80 acres, near the airport in Winkler, Manitoba ("the land"). The land is the primary asset remaining in the estate.

[4] Despite Henry's direction to divide the estate between Connie and Brenda, Wally has failed and refused to do so, having focussed his efforts on a plan to consolidate the parcels and subdivide the consolidation into two 40-acre parcels.

[5] Connie asserts that Wally has breached his fiduciary duty to the estate and to her as a beneficiary in that he has acted in concert with Brenda to achieve her desired outcome with respect to the distribution of the land. Wally says that he has acted with an even hand throughout in trying to fulfill the testator's wishes.

[6] There are three applications before me, two of which are with respect to Henry's estate:

King's Bench File No. PR 02-01-59758

(a) As applicant, Connie seeks:

- (i) an order pursuant to s. 9(1) and (2) of *The Trustee Act*, C.C.S.M c. T160 ("the *Act*") removing Wally as executor of

the estate on the basis that he has breached his fiduciary duty to the estate and to Connie as beneficiary;

(ii) an order that Wally not be entitled to executor's fees as a result of the breach of his fiduciary duty; and

(iii) an order directing the sale of the land on a reference to a Master of this court;

(b) Wally contests Connie's application and in his own application, seeks the advice and direction of the court with respect to the sale of the land and approval of the estate accounts, and his executor fees.

King's Bench File No. CI 21-01-32421

[7] This is an application by Connie for partition and sale of land that is jointly owned by her and Brenda in Reinfeld, Manitoba on a reference to a Master of the court. The parties advised me at the hearing that they have reached an agreement that the land be sold on a reference to a Master however, Brenda asks that she be given a right of first refusal. Connie opposes this as she wishes to have an opportunity to acquire the land. Accordingly, there will be an order that the land be sold on a reference to the Master and that the Master shall set the terms for sale. Neither party will have a right of first refusal. Costs of and incidental to the sale will be paid from the proceeds of sale before distribution to Brenda and Connie.

[8] Connie advises that the accounting that she requested in this application has now been resolved by the parties and it is unnecessary for me to deal with this issue. Each party will bear her own costs of this application.

[9] I will now turn to the matters to be determined.

THE FACTS

[10] The dispute between the parties started soon after Helen's passing and revolves around Wally's approach to the disposition of the land. On January 7, 2020, Wally advised Connie by e-mail that he was "continuing to gather information about the best way to divide the 80 acres", and attached a letter from the City of Winkler regarding the planning process to develop the city's "fringe land area", which includes the subject land. According to Connie, Wally had told her a number of times that he was looking to consolidate and subdivide the property.

[11] On February 7, 2020, Ken Mandzuik ("Mr. Mandzuik"), counsel for Connie, sent a letter to Wally's lawyer, Jaret Hoepfner ("Mr. Hoepfner"), reminding him of Wally's obligation to sell the land and that Wally could not transfer the land *in specie* without the consent of both beneficiaries. Mr. Mandzuik also observed in his letter that selling the land a year from Helen's death would be reasonable, but that Connie would consider other options.

[12] The response from Wally was a 20-page proposal regarding the division of the residual assets of Henry's estate. While it was referred to as a "proposal", it was an analysis of the consolidation and subdivision of the three parcels for future development possibilities. The proposal set out options as to how the land, after

consolidation, could be subdivided as between Connie and Brenda and concluded that the best option for fulfilling Henry's testamentary wishes was to consolidate and subdivide the land, with Brenda and Connie each receiving a 40-acre parcel.

[13] The proposal dismissed the immediate sale of the land as an option and noted that Connie's wishes as articulated in Mr. Mandzuik's letter should be respected "insofar as they are not infringing upon Brenda's wishes". In the proposal, Wally said that he "would not put forward a proposal that meant Brenda's wishes were infringing upon Connie's". The proposal was clear that Wally would not sell the land over Brenda's desire to inherit the land and retain ownership of her portion of the 80-acre parcel. "She does not believe that immediate sale will yield an acceptable land value per acre. Brenda will not consent to a liquidation of the entire 80 acres". (emphasis added)

[14] The proposal concluded that "consequently, an application for consolidation and sale of the two 40-acre parcels ... will be submitted to the City of Winkler for approval." Connie is to advise the executor regarding which option for sale of her portion of the property she would prefer: sale of her parcel by the executor or retain title and have her spouse, Sean, manage the sale.

[15] Nothing in the proposal indicated that consideration was given to Connie's expressed desire to sell the land "as is" in accordance with the executor's obligation.

[16] Moreover, no thought was given as to how the costs of the consolidation and subdivision were to be paid, given that the estate lacked the funds to do so.

Brenda's assertion that Connie would not be expected to pay one-half the costs of the consolidation and subdivision is not borne out by the evidence.

[17] On February 18, 2020, Mr. Mandzuik wrote to Mr. Hoepfner acknowledging his review of the proposal. He provided legal authority supporting Connie's view that the executor has a duty to sell the land even if Brenda objects, but noting that Connie was willing to have discussions.

[18] On February 25, 2020, Brenda sent Connie a letter by which she attempted to distance herself from Wally's decision as set out in the proposal. In so doing, Brenda confirmed that Wally's decision was aligned with the outcome that she wanted.

[19] Despite some discussions in 2020 and early 2021, no progress was made and on March 25, 2021, Mr. Mandzuik advised that the 80 acres needed to be listed for sale immediately, failing which, Connie would seek remedies in court.

[20] On March 30, 2021, Brenda advised Mr. Hoepfner that she would not oppose the sale. Later, Brenda made an offer to purchase Connie's interest in the land for \$800,000 representing one-half of the value determined pursuant to an appraisal done in March 2019. This was firmly rejected by Connie through counsel.

[21] On or about May 18, 2020, Sean told Wally that they (Connie and Sean) wanted to "test the market" and list the properties for sale. Wally told him that Brenda was opposed to listing the properties for sale. Wally told Sean that they (Sean and Connie) could test the market, but that they would have to pay for it. He noted that, "Brenda did not want to use her inheritance to test the market".

[22] On August 4, 2021, Mr. Mandzuik demanded that Wally transfer title into the names of both beneficiaries, failing which an application would be made to the court to compel the transfer.

[23] Connie filed her application on September 2, 2021 and Wally filed his on March 29, 2022.

ANALYSIS

[24] Connie maintains that Wally has been in breach of his fiduciary duty to her and the estate throughout the effort to consolidate the titles and subdivide the land. As there was no unanimity by the beneficiaries regarding a consolidation and subdivision, Connie says that it was incumbent upon Wally to do what the will directed him to do, and that was to sell the land and transfer the proceeds equally to the beneficiaries. Wally refused to do so because Brenda had different plans for the land.

[25] I reject Wally's contention that he was objective in his dealings as executor and that he considered the interests of both beneficiaries in his actions. In my opinion, the weight of the evidence demonstrates that Connie's complaints are justified. At all times, Wally pursued the outcome preferred by Brenda. He refused to sell the land within a reasonable amount of time as he was compelled to do. There was no agreement between the beneficiaries to delay the sale of the land. He pursued Brenda's desired outcome at the expense of his duty as an executor.

[26] In ***Bereskin Estate, Re***, 2014 MBCA 15, the court identified the legal principles governing the conduct and removal of a trustee of an estate as follows (at para 13):

(i) “[a]n estate trustee is a fiduciary and he or she holds title to and control of property for the exclusive benefit of the beneficiaries of the trust. The duty is often described as one of utmost good faith or uberrima fides” (excerpt from Jennifer J. Jenkins & The Late H. Mark Scott, **Compensation and Duties of Estate Trustees, Guardians and Attorneys**, Looseleaf (Canada Law Book, A division of Thomson Reuters Canada Limited, 2006), p. 12-2);

(ii) a court will not lightly remove an executor chosen by a testator. The onus is on the party seeking removal to show that it is a clear necessity and that the welfare of the beneficiaries requires it. See ***Stern Estate, Re*** (2010), 2010 MBQB 68 (CanLII), 250 Man.R. (2d) 293; 2010 MBQB 68, at para. 15;

(iii) an executor may be removed where the executor is in a conflict of interest, where the executor fails to put the interests of the trust and the beneficiaries first in his thinking, and ahead of any other interest, or where the attitude and conduct of the executor is “purely obstructive”. See ***Stern***, at para. 13; ***Beatrice Watson-Acheson Foundation et al. v. Polk et al.***, [2006] O.T.C. 542; [2006] O.J. No. 2518 (Sup. Ct.) (QL), at para. 53; ***Somerset Estate, Re***, 1951 CanLII 476 (BC SC), [1928] 2 W.W.R. (2d) 697 (Man. C.A.), pp. 698-9.

[emphasis added]

[27] In ***Melna v. Hall***, 2000 (CanLII) 20739 (MB QB), 143 Man. R. (2d) 98 (“***Melna***”), MacInnes, J. (as he then was) said (at para 18):

It is fundamental that a trustee act reasonably and with an even hand in carrying out the wishes of the testatrix. The trustee is not to second guess or override the express wishes of the testatrix, nor substitute his judgment for hers, nor place himself in a position of adversity with any of the beneficiaries of the estate. One whose ability to be neutral is questionable should not become a trustee and/or should recuse from being trustee should an inability to remain neutral arise.

[28] In my opinion, Wally was clearly in a conflict of interest and he consistently acted in accordance with his wife’s interests which did not align with the testator’s

instructions as articulated in the will, nor to his duty to both beneficiaries and the estate. Wally has consistently taken a position adversarial to Connie by refusing to consider Connie's interest in selling the land because it did not accord with Brenda's wishes. In his 20-page proposal, Wally specifically noted that Brenda would not consent to a sale of the land and he gave Connie two options as to how to handle her 40 acres which would result from the consolidation and subdivision desired by Brenda. Wally refused to spend estate money on testing the market as proposed by Connie because Brenda would not consent. In a demonstration of his failure to appreciate how his conduct was not even-handed, Wally now seeks compensation for the work that he did with respect to the consolidation and subdivision plan for which he did not seek Connie's consent. Wally pursued Brenda's preferred outcome for the development of the land at the expense of the estate, half of which belonged to Connie.

[29] Wally's alignment with Brenda and his disregard for his role as a neutral figure is further underscored by his participation in the surreptitious recording by Wally and Brenda of two phone conversations and a meeting involving Sean, Brenda and Wally regarding these issues.

[30] Wally attempts to justify his conduct by saying that he was just trying to fulfill Henry's wishes which he discerned from conversations he had with Henry. However, his obligation was to fulfil the wishes and direction of Henry as set out in the will, which was to sell the land and divide the proceeds between the

beneficiaries in a timely way. He could act otherwise only with the consent of all beneficiaries (***Herron Estate v. Herron***, 2000 ABQB 417 (CanLII) at para 11):

...it is clear that the purpose of construing a will is to give effect to the intention of the testator as expressed in the wording of the will. Such intention must be determined from reading the whole will. Effect is given to the testator's intention as ascertained from the express language used in the will.

[31] In this case, Henry's express direction was to divide the remaining assets of the estate between Connie and Brenda after Helen's death. While an executor has the discretion to postpone the sale for such periods of time that the executor thinks is in the interests of the *estate*, absent consent of all beneficiaries, he cannot refuse to convert the land into cash. (***Re Gunn Estate***, 2010 PESC 30 at para 32)

[32] Where there is no agreement among the beneficiaries, a beneficiary has the right to insist that the executor administer the estate in the normal course (***Re Harris***, 1915 (CanLII) 619 (ON SC) at p 384 ("***Re Harris***")):

...where the parties beneficially concerned are not of one mind, then the parties who so desire are entitled to insist upon the normal course of administration being pursued to the end. There can be no divergence from the donor's will or from the statutory testament which would injuriously affect the right of any one *cestui que trust*. That *cestui que trust* may compel a strict and literal adherence to the prescribed line of duty.

[33] In ***Re Bucovetsky***, 1942 (CanLII) 350 (ON SC), [1943] 1 D.L.R. 208 (Ont. High Ct.) *in obiter*, the court, referring to ***Re Harris***, acknowledged (at p 211):

...that it would appear to be incontrovertible that failing a specific direction in the will, and failing the unanimity of all beneficiary who might be entitled to share in the distribution, the executors would not be entitled to distribute *in specie* but only after conversion.

[34] The Supreme Court of Canada confirmed this principle in ***Cowper-Smith v. Morgan***, 2017 SCC 61, [2017] 2 S.C.R. 754 ("***Cowper-Smith***") (at para 40):

Where a will allows for executorial discretion, an *in specie* distribution of real property may be effected by an executor with the consent of all beneficiaries: see *Re Harris* (1915), 1915 CanLII 619 (ON SC), 22 D.L.R. 381 (Ont. S.C.), at p. 386; *Gunn Estate, Re*, 2010 PECA 13, 200 Nfld. & P.E.I.R. 197, at paras. 42 and 49. A beneficiary's objection to such a distribution should not be vexatious or manifestly unreasonable: *Re Harris*, at p. 386. In this case, Max clearly desires an *in specie* distribution of the property, Nathan has indicated that he has an agreement with Max regarding the property, and Gloria, *qua* beneficiary, has not raised a compelling objection to an *in specie* distribution of the property. Gloria's objection to an *in specie* distribution is grounded in her desire to escape her equitable obligation and to spite her brother; this is manifestly unreasonable.

[35] Further, even where the executor has a discretion on how to manage the estate assets, if the executor is in breach of his fiduciary duty, the court may interfere with the executor's exercise of discretion. (***Cowper-Smith*** at para 41)

[36] It is clear that Wally has acted in breach of his duty to the estate and Connie as beneficiary and he must be removed. I do so pursuant to s. 9(2) of the **Act** and the court's inherent jurisdiction. No alternatives were presented for my consideration. If the beneficiaries are unable to agree on a replacement trustee, they may arrange for an appearance before me to address this issue.

[37] Wally asks the court for advice and direction with respect to the administration of the estate, in particular, the disposition of the land. Having regard to my conclusion that the land be sold in accordance with the terms of the will as requested by Connie, Wally's application is dismissed, with costs.

[38] Connie takes no issue with Wally's financial administration of the estate and is satisfied with Wally's accounts as presented. Brenda has not taken issue with these accounts. Therefore, it will not be necessary to pass the estate accounts.

[39] With respect to Wally's compensation, Connie does not take issue with Wally's management of the estate up until Helen's death on March 4, 2019. After that date, Connie says that Wally was acting in concert with Brenda in order to achieve Brenda's desired outcome. It is clear that Wally's conduct from at least February 2020 delayed the resolution of estate matters and increased costs. It is less clear the extent to which his actions previous to February 2020 affected the resolution and costs. Accordingly, it is appropriate to direct the question as to the amount of compensation to which Wally is entitled after March 4, 2019 to the Master.

[40] Wally seeks to have his legal fees related to these proceedings paid by the estate. However, as Wally's disregard for his duty to the estate and Connie led to these proceedings, he will have to bear those costs on his own. For the same reason, Wally will pay Connie's costs on a party and party basis, but at a level of two times the normal tariff. (see *Melna*) Brenda will bear her own legal costs. There is no reason why the estate should bear the costs of this litigation, as it was caused by Wally's breach of his fiduciary duty to keep an even hand as between the beneficiaries.

[41] Counsel agreed that should I direct that the land be sold upon a reference to a Master, for tax purposes it should first be transferred from the estate into the

names of Connie and Brenda as tenants-in-common. Accordingly, I direct that the land be so transferred and that the Master shall set the terms for sale. Neither party shall have a right of first refusal. Costs of and incidental to the sale will be paid from the proceeds of sale before distribution to the beneficiaries.

_____ J.