SUPREME COURT OF YUKON

Citation: *In the Matter of the Estate of Donald Ross Miller, Deceased,* 2012 YKSC 66

Date: 20120801
Docket S.C. No.: 08-P0027
Registry: Whitehorse

IN THE MATTER OF THE ESTATE

OF

DONALD ROSS MILLER, DECEASED

Before: Mr. Justice J.Z. Vertes

Appearances:

Barbara Hare	Administrator Appearing on her own behalf
Anne-Marie Miller	Beneficiary Appearing on her own behalf
Bev Miller	Beneficiary Appearing on her own behalf

REASONS FOR JUDGMENT
DELIVERED FROM THE BENCH

[1] VERTES J. (Oral): This is a summary proceeding regarding the passing of accounts and distribution of assets of the Estate of the late Donald Ross Miller. The parties appearing are the three adult daughters of the late Mr. Miller, each of them an equal beneficiary of the Estate.

[2] Mr. Miller died intestate on May 5, 2008. The assets of the Estate consisted of a house located in Whitehorse, a bank account, and miscellaneous personal property including some vehicles, equipment and furnishings. An application for Letters of

Administration of the Estate was filed by Barbara Hare, the eldest of the three daughters. A caveat objecting to the application was filed by another daughter, Anne-Marie Miller. On July 17, 2008, by order of Justice Gower of this Court, the caveat was struck out and Ms. Hare was appointed administrator of the Estate.

[3] Nothing further was done in court until an application filed on January 5, 2012 by Anne-Marie Miller for an order directing an accounting of the administration of the Estate. On January 19, 2012 Justice Veale of this Court ordered that:

a) Ms. Hare file an accounting;

b) The bank account be frozen;

c) The house be listed for sale;

d) Any sale be approved by the Court; and

e) All proceeds of the sale be paid into Court.

[4] Subsequently, an affidavit was filed by Ms. Hare containing various bank documents and other financial information. It is acknowledged by all parties that the information is incomplete and, in some cases, confusing in terms of providing a full accounting of the financial administration of the Estate.

[5] On February 14, 2012 the dispute was ordered to go to trial and a Case Management Conference was conducted by Justice Veale on April 24. As a result of that, Justice Veale gave directions for the disposition of certain vehicles. He also directed a trial of the application for an accounting. That is what this proceeding has as its objective.

[6] There is, for reasons unknown to me, a great deal of animosity displayed by the parties toward each other. There are disputes over factual issues. Matters are made more difficult by the fact that each party is self-represented, whether by choice or necessity is neither clear nor relevant. But as a result, the proceeding before me was a relatively informal affair with evidence given under oath, replete with hearsay, speculation and opinion.

[7] At one point during the proceeding I broached with the parties the prospect of this hearing being premature. The house has not been sold, the dispositions ordered on April 24 have not, apparently, taken place, the banking and other financial records are incomplete, and there are disagreements of a material nature relating to how certain things have been handled. I thought it may be more prudent to await the sale of the house and the production of a more thorough statement of receipts and expenses. The parties, however, wanted to proceed with the hearing. Thus we did so even though, as I said at the hearing, all that can result from this are further directions, directions which I hope will assist the parties in eventually resolving matters and settling this Estate.

[8] I think it would be helpful to restate some fundamental principles relating to the administration of estates. Generally speaking, an administrator has four obligations:

1. To make a complete and true inventory of the estate of the deceased;
2. To administer the estate including the payment of all debts and the realization of all assets;
3. To make an accounting of the administration when required to do so; and
4. To pay the residue of the estate to the persons entitled to it.

[9] An administrator must act responsibly and diligently, being sure to avoid putting their personal interest in conflict with the interests of all of the beneficiaries. It is the duty of all estate administrators to keep proper books of account and to be ready to account for the estate property which they are bound to administer. Section 55 of the Yukon *Trustee Act*, R.S.Y. 2002, c. 223, directs that, unless their accounts are approved and consented to by all beneficiaries, an administrator must pass their accounts and if their accounts are incomplete or inaccurate, they may be required to attend before the Court to show cause why the accounts have not been passed.

[10] I will not go through the evidence in detail. Much of it was merely repetition of the statements contained in the different affidavits already filed by the parties. I will cover the main contentious items and give directions.

[11] First, I will address the listing of the house. When the order for sale was made, Mr. Don MacDonald of Coldwell Banker was identified and approved as the listing agent. The house was originally listed at $319,000. In April the listing price was reduced to $309,000. Now, Mr. MacDonald has recommended reducing it further to $299,000. The administrator is in agreement but the two beneficiaries oppose any reduction. They feel, although without any evidence to support it, that the house would be more saleable or marketable if it were vacant. Ms. Hare and one of her daughters currently live in it.

[12] In my opinion, the advice of the realtor should be followed. He is the professional in this regard. I therefore direct that the Listing Agreement be renewed for a period of no less than three months at a listing price of $299,000. All of the provisions of the order of January 19, 2012 continue to apply.

[13] With respect to whether the house should be vacant or occupied, I make no direction in that respect. I point out, however, that by occupying the property there is a potential conflict as between Ms. Hare's personal interest and her duty to the Estate as administrator. A reasonable occupation rent must be set, something I will discuss shortly. But to the point, Ms. Hare must cooperate with the efforts to sell by maintaining the property in a clean and presentable manner. She should therefore seek and follow the advice of the realtor so as to improve and maximize the marketability of the property.

[14] Next, I want to address the question of occupation rent and maintenance of the property. The evidence was that, upon Mr. Miller's death in May of 2008, Ms. Hare stayed in the house until October 31, 2008, so as to preserve the property and look after Mr. Miller's animals and personal effects. I think this was a reasonable step to take. The Estate benefitted from this. Equally, however, Ms. Hare benefitted from occupying the house. For that reason, I think Ms. Hare should be charged a nominal occupation rent for that period. I therefore direct that for that five-month period a rent of $400 per month be set and accounted for as a personal charge to Ms. Hare and as a receipt to the Estate. With respect to maintenance costs, the utility expenses (heat, electricity, water) should be divided in half as between Ms. Hare personally and the Estate. Insurance and property taxes for that period should be allocated 100 percent to the Estate. Telephone, cable, and Internet charges (if any) should be allocated one hundred percent to Ms. Hare.

[15] From November 1, 2008, until December, 2010, Ms. Hare's daughter lived in the house along with her boyfriend who lived there until March of 2009. Ms. Hare says that

the purpose of her doing so was to have her take care of the house. Having someone in the house was a reasonable thing to do, but Ms. Hare's daughter and her boyfriend benefitted from their use and occupation of the house. Ms. Hare testified that her daughter paid rent of $600 per month. She used this money to pay utility and other expenses.

[16] In the absence of direct evidence as to market conditions in that period I am prepared to accept the $600 rent figure. So, for the period of November, 2008, to December, 2010, the Estate is to be credited with rental income of $600 per month. I am not prepared, however, to accept that the people occupying the house should not have paid for utilities. Granted, some utility charges would be levied even if the house were empty, but the bulk of the utility expenses would have been due to the occupier's use. Therefore, the utility expenses for that period should be allocated as 90 percent to the tenants and 10 percent to the Estate. The Estate should bear one hundred percent of the insurance and property taxes for this period, but the tenants must bear one hundred percent of the costs for telephone, cable and Internet.

[17] Ms. Hare testified that after her daughter moved out in December, 2010, a fellow by the name of Dustin continued to live there until June of 2011. He did not pay any rent. Ms. Hare thought that security of the house was more important than generating revenue. I agree that security was important, but she had another option. She could have taken steps to sell the house. Why the delay in doing so is unexplained, other than claims of non-cooperation by the other beneficiaries.

[18] If this Dustin, and maybe others, were going to have the benefit of living in the

house, then they should have been charged rent. Ms. Hare has an obligation to protect the financial interests of the Estate. I therefore direct that a monthly rent of $600 be credited for this period to the Estate. Since no rent was collected, the amount is to be charged against Ms. Hare's share of the Estate. The ongoing expenses are to be allocated as before: 10 percent of utility charges to the Estate and 90 percent to the tenant; one hundred percent of insurance and taxes to the Estate; and one hundred percent of telephone, cable and Internet charges to the tenant.

[19] Ms. Hare went on to testify that from June until September, 2011, she stayed in the house periodically just to check on it. I think that was reasonable and no rent should be charged for this period and one hundred percent of all expenses relating to the house for this period should be allocated to the Estate.

[20] Since September, 2011, however, Ms. Hare has been living in the house with her younger daughter. Ms. Hare says that she is willing to pay rent and suggests $850 per month would be a fair price. Ms. Bev Miller testified that she was told that the rent should more appropriately be in the range of up to $1,200 per month. Again, in the absence of direct and professional evidence on this point, I will set what I consider to be a reasonable figure taking into account that the Estate benefits from having someone looking after the house while Ms. Hare and her daughter benefit from being able to occupy the residence. Therefore, I will set the occupation rent at $1,000 per month to be credited to the Estate from September 1, 2011, for so long as Ms. Hare continues to occupy it. The monthly expenses are to be allocated as I described previously: 10 percent of utility costs to the Estate and 90 percent to Ms. Hare; one hundred percent of insurance and taxes to the Estate; and one hundred percent of telephone, cable and

Internet charges to Ms. Hare. The amounts payable by Ms. Hare, if not actually paid by her, are to be a charge against her interest in the Estate. In addition, all late charges on payments made to date for maintenance expenses are to be allocated to Ms. Hare.

[21] Turning next to the vehicles and other items listed in Justice Veale's order of April 24, 2012, the directions in that order must still be complied with to the extent that the parties can do so. If they cannot be complied with then steps should be taken to dispose of those items for the best price possible, and the amounts credited to the Estate. Further, I direct that Ms. Hare move expeditiously to arrange the sale of all other vehicles and equipment owned by the late Mr. Miller for the best price possible. The sale should include all household furnishings. All proceeds of sales are to be credited to the Estate. The administrator shall itemize each asset sold and the amount realized.

[22] If there are any items that any of the beneficiaries claim as their personal asset, then that beneficiary must itemize it in writing and, subject to the agreement of the other beneficiaries, those items may be removed. If a beneficiary wishes to keep any item that used to belong to the late Mr. Miller and is slated for sale, then a fair market value for that item will be set jointly by the administrator and the beneficiary in question and allocated to that beneficiary's share in the Estate.

[23] Finally, I direct that the administrator prepare a further and better accounting of the assets and expenses of the Estate, identifying as specifically as possible each item and amount. In order to do that she is to make further inquiries of the Royal Bank so as to obtain complete records and copies of bank statements. She is also directed to

answer the specific questions raised in Bev Miller's affidavit of February 13, 2012, and Anne-Marie Miller's affidavit of July 12, 2012. Those answers should be in affidavit form.

[24] Now, I recognize that Ms. Hare may not have the necessary expertise to do all this, in particular, to make the appropriate allocations as I directed in these reasons. I think it only reasonable and responsible for Ms. Hare to obtain professional accounting assistance, and it will be ultimately to the benefit of all three beneficiaries to do this properly. Therefore, if Ms. Hare chooses to do so, and I certainly recommend that she do so, she may retain the services of an accountant or similarly knowledgeable professional to prepare the necessary reconciliations and allocations set out in these reasons. She is to obtain an estimate of the fees to be charged for this service and, provided that those fees do not exceed $5,000, she may pay those fees from the funds held in the Estate bank account at the Royal Bank of Canada. To that extent only, the order of January 19, 2012, freezing the bank account is amended. If the fees exceed that amount, she is to seek further direction from a judge of this Court.

[25] I direct that the further and better accounting be prepared and filed within three months of today's date with copies provided to all beneficiaries. Unless all beneficiaries agree with and consent to the new accounting, then the parties are directed to obtain a date from the Clerk of the Court in order to bring this matter back before any judge of this Court who may make such further directions or issue such other orders as he or she thinks appropriate.

[26] As a final point, I want to address the question of Ms. Hare's entitlement to compensation for her services as administrator. Generally, an administrator is not

deprived of compensation, even if they are neglectful or less than capable, provided that their defaults are not dishonest. In this case, Ms. Hare has expressly waived any claim for compensation. I therefore make no order in that regard. She is, of course, still entitled to be reimbursed for any Estate expenses she has paid, as are the beneficiaries so entitled if they did, in fact, pay any Estate expenses.

[27] I want to emphasize in closing the benefits of cooperation and compromise. This Estate is not large and continuing litigation will only serve to diminish it. However, if litigation does continue, I strongly urge all parties to obtain legal advice.

VERTES J.