

**CITATION:** Denny v. Denny, 2022 ONSC 3267  
**COURT FILE NO.:** CV-19-38145-00ES  
**DATE:** 2022/05/31

**SUPERIOR COURT OF JUSTICE – ONTARIO**

**In the Estate of Helen Irene Denny also known as Irene Denny and  
In the Estate of Peter Leslie Denny**

**RE:** Steve Denny, Plaintiff

**AND**

Michael Denny, Defendant

**BEFORE:** Madam Justice Robyn M. Ryan Bell

**COUNSEL:** Jason Dutrizac, for the Plaintiff

Miriam Vale Peters, for the Defendant

Suzanne Sviergula, for Roger Trudel

**HEARD:** March 31, 2022

**ENDORSEMENT**

**Overview**

[1] Helen Irene Denny and Peter Leslie Denny were married for over 54 years and resided at their matrimonial home on Stoneboat Crescent, in Ottawa. Helen and Peter had two sons: Steve and Michael.<sup>1</sup>

[2] Helen died on December 21, 2018. Peter died on December 24, 2018.

[3] In January 2019, Steve filed notices of objection to the issuing of a certificate of appointment of estate trustee to Michael in both estates.

[4] By consent order dated March 23, 2020, the files relating to the two estates were consolidated. Steve was required to serve his statement of claim by March 31, 2020, with the defence to follow by May 4, 2020.

[5] The exchange of pleadings contemplated by the consent order did not occur. Steve and Michael did, however, proceed to a mediation in May 2020. The mediation was unsuccessful.

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<sup>1</sup> For clarity, I have used first names throughout this endorsement.

[6] In June 2021, Steve served a notice of action on Michael. Steve served his statement of claim in July 2021.

[7] In January 2022, Steve filed a further notice of objection to Michael's appointment as estate trustee in Helen's estate.

[8] Steve now moves for an order amending or varying the March 23, 2020 consent order, including the timetable for proceeding with the litigation, and an order appointing Dale Denny (Steve's former wife) as the estate trustee during litigation. Steve seeks orders that the estate trustee during litigation be empowered to sell the Stoneboat property, collect occupancy rent, and investigate the mortgage on the property.

[9] By way of cross-motion, Michael moves for an order removing Steve's 2019 and 2022 notices of objection in Helen's estate, and an order that he be reimbursed from the estates for various expenses.

[10] At the hearing on March 31, 2022, on consent of the parties and Mr. Trudel, I made orders amending the March 23, 2020 consent order and extending the time for the service and filing of pleadings, providing for the production of financial and medical records, and providing for the production of solicitor-client records and the examination of Mr. Trudel as a non-party. Mr. Trudel took no further part in the motion and cross-motion.

[11] The following issues remain to be determined:

- (i) Should the notices of objection be removed?
- (ii) Should an estate trustee during litigation be appointed and, if so, who should be appointed?
- (iii) If an estate trustee during litigation is appointed, should the estate trustee during litigation be empowered to list the Stoneboat property for sale, collect occupancy rent, and/or investigate the mortgage?
- (iv) Should Michael be reimbursed for alleged expenses incurred on behalf of the estates?

### **Background Facts**

[12] Helen and Peter each executed a will on August 9, 1999. In the 1999 wills, each appointed the other as estate executor and trustee and each named the other as the beneficiary of their respective estates.

[13] On July 11, 2018 and then again on July 12, 2018, Helen signed new wills that had been prepared by Mr. Trudel. On December 12, 2018, Mr. Trudel again met with Helen at which time Helen executed her most recent will. Steve maintains that Helen lacked testamentary capacity to give instructions for and to execute the December 2018 will, that the December 2018 will is invalid

because of undue influence or duress exercised by Michael, and that there are suspicious circumstances in the execution and nature of the December 2018 will.

[14] In Helen's December 2018 will, Michael is named as the estate trustee; Dale is named as an alternate. The will contains a provision requiring that all just debts be paid. In Peter's will, Steve and Michael are named as the estate trustees if Helen was unable to act. Peter's will also contains a provision requiring that all just debts be paid.

[15] As a result of Steve's notices of objection, there is no estate trustee for either of the estates. No one has administered the estates in the interim. Taxes remain outstanding. There is evidence that since the date of Helen's death, Michael has paid the utilities and fire insurance for the Stoneboat property. The municipal taxes on the Stoneboat property are in arrears. Michael's evidence is that he cannot afford to pay the municipal taxes on the property because he has paid other expenses on behalf of the estates, for which he is seeking reimbursement.

[16] Helen's December 2018 will permits Michael to live at the Stoneboat property for a two-year period provided that he assumed responsibility for certain expenses. Helen's will also provides Michael with an option to purchase the Stoneboat property. On April 17, 2020, Michael notified Steve of his intention to exercise the option to purchase the Stoneboat property.

### **The Notices of Objection**

[17] A notice of objection may be filed at any time before a certificate of appointment of estate trustee has been issued: r. 75.03(1) of the *Rules of Civil Procedure*.<sup>2</sup> Rule 75.03(2) provides that a notice of objection expires three years after it is filed and may be withdrawn by the person who filed it at any time before a hearing for directions or may be removed by order of the court.

[18] Michael submits that Steve's 2019 notice of objection in Helen's estate should be removed because of the passage of time. Michael alleges that Steve has "lost the benefit of" the notice of objection given his lack of cooperation in the payment of taxes and administration of the estate. Michael maintains that the 2022 notice of objection is essentially invalid as there is no provision in the *Rules* that provides for a "renewal" of a previous notice of objection.

[19] I decline to make an order removing the 2019 notice of objection. Steve's objection is, effectively, a challenge to Helen's December 2018 will, based on allegations of a lack of testamentary capacity and undue influence. The threshold to maintain an objection is low<sup>3</sup>, the court's processes were engaged on the motion for directions resulting in the March 23, 2020 consent order, and the litigation is proceeding. The 2022 notice of objection will be removed on the basis that it is duplicative.

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<sup>2</sup> R.R.O. 1990, Reg. 194.

<sup>3</sup> *Martin v. Martin*, 2018 ONSC 1840.

### **Appointment of Estate Trustee During Litigation**

[20] As the 2019 notice of objection will remain and the litigation is proceeding, the parties agree that an estate trustee during litigation should be appointed. Steve proposes that Dale should be appointed. Michael objects to Dale, and has proposed that Gail Nicholls, a retired lawyer, be appointed.

[21] The statutory authority for the appointment of an estate trustee during litigation is found in s. 28 of the *Estates Act*.<sup>4</sup> Rule 75.06(3)(f) authorizes the court to appoint an estate trustee during litigation.

[22] I agree with the observations of Myers J. in *Mayer v. Rubin*<sup>5</sup> regarding the appointment of an estate trustee during litigation:

It is in the interests of all beneficiaries that the assets of the estate be immunized from the tactics employed by litigating parties. The court must protect the level playing field. Neither side should be able to use their control over the estate to benefit themselves or to prejudice the other. It is a simple inference that a trustee who is in an adversarial position towards a co-trustee or a beneficiary should not normally be left in charge of trust property. Simple prudence calls for the temporary replacement of a trustee who is in an adversarial position with a co-trustee or a beneficiary. It is not an insult to anyone's integrity to understand that conflicts of interest are insidious. Conflicts of interest play havoc with peoples' judgment of their own capacity to maintain neutrality and a fiduciary stance.

[23] Generally, a party unconnected with the litigation is the most appropriate person to be appointed estate trustee during litigation: *Re Bazos*.<sup>6</sup>

[24] It cannot be said that Dale is a neutral party. She is Steve's ex-wife and her daughter is a beneficiary under Helen's will. Dale was a close confidant of Helen and was named as an alternate trustee in Helen's December 2018 will. Although Dale is a certified management accountant, she does not have experience in administering estates. While Dale is prepared to waive any entitlement to compensation if appointed as estate trustee during litigation, the same cannot be said of any lawyers or other professionals she would need to retain to assist in administering the estates.

[25] By contrast, Ms. Nicholls is a retired lawyer whose practice focused on specialized estate areas. Ms. Nicholls has considerable experience in acting as estate trustee and charges \$450 per hour for her professional expertise. There is no question that she is a neutral party, removed from the litigation.

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<sup>4</sup> R.S.O. 1990, c. E.21.

<sup>5</sup> 2017 ONSC 3498, at para. 36.

<sup>6</sup> [1964] 2 O.R. 236 (C.A.).

[26] I am persuaded that Ms. Nicholls should be appointed as estate trustee during litigation based on her experience and the fact that she is unconnected with the litigation.

### **Scope of Authority of the Estate Trustee During Litigation**

[27] The parties generally agree on the scope of the authority to be granted to the estate trustee during litigation. In particular, as estate trustee during litigation, Ms. Nicholls is authorized and directed to: pay the just debts, funeral and testamentary expenses for Peter's estate and Helen's estate, including any income taxes which are or may become due and owing from time to time; take the full account of the assets and liabilities of the estates as of the date of death; report to the parties monthly, or as reasonably requested; and, if requested by either party, to pass her accounts within one year.

[28] The parties do not agree on whether the estate trustee during litigation should be empowered to (i) sell the Stoneboat property; (ii) collect occupancy rent; and (iii) investigate the mortgage on the Stoneboat property. For the following reasons, I am not prepared to extend the scope of authority of the estate trustee during litigation to include these matters.

[29] First, Helen's December 2018 will provided Michael with a specific right to purchase the Stoneboat property. Michael has triggered his option to purchase and intends to proceed if the challenge to the will is dismissed. His right to purchase the property would be irreparably harmed if the property were ordered to be sold in the interim, while the will challenge is pending. On the other hand, based on the evidence in the record, it is not necessary for the Stoneboat property to be sold to satisfy the existing debts of the estates.

[30] Second, Michael's obligation to pay occupancy rent depends on the validity of Helen's December 2018 will. Under that will, Michael was permitted to live at the Stoneboat property rent-free for two years provided he assumed responsibility for certain expenses. Michael has paid some of those expenses. His uncontroverted evidence is that he would have paid all of the expenses but for the fact that he paid other expenses of the estates. In my view, whether Michael should pay occupancy rent is a matter that should be determined based on the outcome of the will challenge.

[31] Third, regarding the mortgage, in my view, the estate trustee during litigation is not required to investigate how the mortgage funds were used during Helen's lifetime. I agree with Michael that this matter is irrelevant to the interim administration of the estates.

### **Reimbursement of Michael for Expenses**

[32] The wills permit payment for just debts. The evidentiary record discloses that as of January 27, 2022, Michael has incurred expenses on behalf of Helen and/or the estates in the total amount of \$30,695.59. Steve previously agreed that Michael should be reimbursed for certain expenses in the amount of \$8,786.29; however, Michael has not been reimbursed for any of the expenses incurred.

[33] The remaining expenses all relate to the Stoneboat property: mortgage payments, house insurance, plumbing work, work to repair the garage door, furnace inspection and replacement of air filter, and an air washer. Michael has provided receipts for all of these payments. Steve asserts that it is "highly unlikely that Michael made these payments from his own personal savings, if he

has any at all.” Steve submits that reimbursement of these expenses at this stage, absent complete disclosure of the source of the funds for payment, is premature.

[34] I disagree with Steve’s submission. Helen’s will (as well as Peter’s will) provides for the payment of just debts. The disputed expenses are just expenses of Helen’s estate. Steve could have cross-examined Michael on his affidavit if he wished to test his theory that the estate, and not Michael, was the source of the funds. No cross-examination was conducted. On the uncontroverted evidence, these expenses were incurred by Michael on behalf of Helen and/or the estates and he is entitled to reimbursement in the amount of \$30,695.59, subject to any future accounting.

**Conclusion**

[35] Accordingly, I make the following orders:

1. The 2022 notice of objection shall be removed;
2. Ms. Nicholls is appointed estate trustee during litigation of Peter’s estate and Helen’s estate;
3. As estate trustee during litigation, Ms. Nicholls is empowered to reimburse Michael for expenses incurred in the total amount of \$30,695.59.

[36] In the event the parties are unable to agree on costs of the motion and cross-motion, they may make written submissions limited to a maximum of three pages. Both parties shall deliver their submissions by June 21, 2022. If no submissions are received by this date, the parties will be deemed to have settled the issue of costs as between themselves.

*Ryan Bell J.*

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Madam Justice Robyn M. Ryan Bell

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**ENDORSEMENT**

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Justice Ryan Bell

**Released:** May 31, 2022