CITATION: Iannarelli Estate v Abbruzzese, 2023 ONSC 7262
COURT FILE NO.: CV-23-00707387-00ES
DATE: 20231228

ONTARIO

SUPERIOR COURT OF JUSTICE

ESTATES LIST

IN THE MATTER OF THE PROPERTY AND THE ESTATE OF ASSUNTA MARIA IANNARELLI

APPLICATION TO PASS ACCOUNTS

BETWEEN:	)	
Bernadette Tucci Applicant/Estate Trustee	)	*Romeo D'Ambrosio* for the Applicant/Estate Trustee
– and –	)	
Angela Abbruzzese Objector	)	*Genevieve Madill* for the Objector
	)	**HEARD:** December 7, 2023

C. GILMORE, J.

Introduction

[1] The Applicant and Estate Trustee, Bernadette Tucci ("Bernadette"), and the Objector, Angela Abbruzzese ("Angela"), are the only children of the deceased, Assunta Maria Iannarelli. Ms. Iannarelli passed away on March 5, 2018. It is conceded that Bernadette and Angela have always had a strained relationship.

[2] Ms. Iannarelli was a first-generation Italian immigrant. She could not read or write in English and never worked outside the home.

[3] The main assets of the Estate are a home located at 20 McLeod Street in Toronto and some cash. Ms. Iannarelli and her husband purchased the McLeod home in 1961. Her husband died in 2005.

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[4] Angela commenced an application against her sister in August 2016 in which she sought (1) to be appointed as guardian of property and personal care for her mother and (2) an accounting of her mother's assets from Bernadette. She also challenged powers of attorney and a Will dated April 25, 2016, as well as the transfer of the McLeod property to Bernadette and her mother jointly also dated April 25, 2016. All of the April 2016 documents were prepared by the deceased's solicitor, Mr. Anthony Vumbaca.

[5] In the course of those proceedings, s. 3 counsel, Ms. Natalia Angelini ("Ms. Angelini") was appointed on behalf of Ms. Iannarelli. Section 3 counsel is appointed under the *Substitute Decisions Act*, 1992, S.O. 1992, c. 30 to persons who do not have legal representation and whose capacity is in issue.

[6] The 2016 will gifts the McLeod property to Bernadette and divides the residue of the Estate equally between the daughters. The Will specifies that the McLeod property is gifted to Bernadette in "recognition of her ongoing support and assistance to [Ms. Iannarelli] during [her] lifetime."

[7] After their mother's death, the 2016 Application was continued but narrowed by deleting the guardianship and POA claims. The trial in relation to the validity of the Will and property transfer is scheduled to be heard in January 2024.

[8] The within passing of accounts was ordered by Justice Dietrich to take place prior to trial. The accounts in question relate to the period when Bernadette was acting as her mother's attorney for property between January 1, 2015 to the date of death on March 5, 2018. The issues to be determined are the standard to which Bernadette should be held regarding the accounting and whether the accounts should be passed.

[9] Bernadette is seeking a payment from the Estate in the amount of $100,006.20, being Schedule A expenses of $89,102.07 plus compensation of $10,904.13.

[10] Angela objects to the accounts as presented and requests an order that Bernadette repay the Estate the sum of $107,790.01. She concedes that Bernadette is entitled to be reimbursed Schedule A expenses totalling $25,593.47, leaving the net amount to be repaid by Bernadette of $82,196.70. Angela denies that Bernadette is entitled to any compensation.

[11] For the reasons set out below, I find that Bernadette was only acting as a fiduciary at the point when she signed the bank POA on March 4, 2016 ("the accounting start date"). It was at that point that her mother assigned certain banking responsibilities to her daughter out of necessity. Bernadette is not required to account for any period prior to that date as there is clear evidence that her mother was managing her own financial affairs before then. The only issue with respect to any period prior to the accounting start date is whether Bernadette has provided proper receipts to substantiate her claim for reimbursement or repayment from the Estate.

[12] Further, as set out below, Bernadette's record keeping was not at the level it should have been, given that she had been put on notice in August 2016 that she would be required to

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account. As such, some adjustments have been made to reflect entries which are too vague or unsupported to be recognized by this court.

[13] Finally, Bernadette is entitled to a modest amount of compensation given the fact that she preformed extensive caregiving duties for her mother. The caregiving would otherwise have been paid for by her mother and significantly depleted her assets.

[14] During the course of the hearing, the parties made various concessions and adjustments to their original positions on the financial matters. At my request, counsel submitted an Excel spreadsheet setting out their revised position on each item. I have used this spreadsheet as the basis for the totals claimed in each category of expense.

Background Facts and the Will Challenge

[15] Bernadette moved in with her parents in September 2005. Mr. Iannarelli died on December 21, 2005. Bernadette remained in the home to care for her mother for another 12 years until her mother's death.

[16] Bernadette submits that she was never compensated for her caregiving, was unable to work due to the demands of caregiving and incurred personal expenses during the course of her caregiving. Bernadette has not claimed compensation for any caregiving services she provided to her mother.

[17] In 2007, Ms. Iannarelli executed powers of attorney naming her daughters jointly as her attorneys for property and personal care. In March and April 2016, Ms. Iannarelli executed new powers of attorney naming Bernadette as her sole attorney for property and personal care.

[18] Mr. Vumbaca's notes indicate that Ms. Iannarelli changed her Will and POAs because Bernadette did everything for her, and she had very little assistance from or contact with Angela. Angela's position is that she never refused to care for her mother but was intentionally isolated from her by Bernadette, who prevented her from visiting or even phoning her mother. Angela's evidence is supported by that of her son Joseph Abbruzzese, one of the few family members that Bernadette allowed to visit her mother.

[19] In 2015, Ms. Iannarelli had the first of two hip surgeries. The aftercare following those surgeries required Bernadette to provide even more caregiving as her mother lacked mobility. The second hip surgery took place on May 28, 2016.

[20] Notes from Ms. Angelini's file indicate that Ms. Iannarelli told her in December 2016 that she had not seen Angela for six years, that Angela did not care about her and that she was a liar. In contrast, Ms. Iannarelli described Bernadette as a "good girl" who returned home to care for her parents.

[21] On March 4, 2016, two bank employees from CIBC, Ms. Pompea Bifolchi and Ms. Liliana Prete came to Ms. Iannarelli's home to assist with the execution of a CIBC continuing power of attorney in favour of Bernadette.

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[22] Ms. Prete deposed that she had never met Bernadette or Ms. Iannarelli before the March meeting. It was Ms. Iannarelli who suggested opening a joint account with Bernadette. Ms. Prete discouraged Ms. Iannarelli from doing this and instead suggested a bank POA. Ms. Iannarelli understood the reasons for this suggestion and accepted her recommendation. She noted that Bernadette did not "coach" her mother and that the reason for the bank POA was to allow Bernadette to pay bills on her mother's behalf because of mobility issues. Ms. Prete had no concerns about Ms. Iannarelli's ability to give instructions for or sign the bank POA.

[23] Ms. Prete deposed that sometime after the bank POA was signed, Angela came into the bank and showed her the joint POAs signed in favour of her and Bernadette. Ms. Prete contacted Ms. Iannarelli, who understood the situation and confirmed her instructions that she wished to have a bank POA in favour of Bernadette. Ms. Iannarelli told Ms. Prete that if Angela had any issues with that, she could talk to her mother directly.

[24] Ms. Bifolchi deposed that she had known Ms. Iannarelli as a regular banking customer who often asked for her because she spoke Italian. Prior to the March 2016 meeting, Ms. Iannarelli always attended at the bank personally to pay her bills and make withdrawals. Ms. Bifolchi was aware that the March 4, 2016 meeting was set up because of Ms. Iannarelli's hip surgery and her associated mobility issues.

[25] Ms. Bifolchi's evidence was that while Bernadette was present at the meeting, Ms. Iannarelli gave all the instructions and understood why a bank POA was suggested rather than a joint account. She noted that Ms. Iannarelli was the same strong-willed woman she had always known, and she insisted that Bernadette be given the authority to assist her with her banking needs without any influence from Bernadette.

[26] On March 31, 2016, Ms. Iannarelli met with Mr. Vumbaca to discuss her estate planning. Mr. Vumbaca's evidence was that Ms. Iannarelli met with him alone and provided clear instructions to him in Italian. She gave him specific instructions that the only asset to be divided between her daughters was her CIBC bank account which contained approximately $80,000 at that time.

[27] Ms. Iannarelli began to experience memory issues as early as 2005. In 2014, Ms. Iannarelli underwent an assessment at Humber River Hospital in which it was noted that she had poor insight into her declining cognition and memory.

[28] After a fall in 2015, Ms. Iannarelli had hip surgery. Upon her discharge from rehab in October 2015, she was diagnosed as suffering from dementia. In November 2015, her family doctor noted that she had been going downhill since her discharge from hospital in October 2015.

[29] Angela went to visit her mother in the hospital after her first hip surgery in September 2015. A nurse's note indicates that Bernadette was displeased that Angela was visiting their mother and wanted her banned from visiting. Angela continued to visit based on the 2007 power of attorney which named both sisters jointly as POAs for personal care and property.

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A nurse's note dated October 5, 2015 indicates that Bernadette told the nurse she intended to get a new POA for personal care for her mother which did not include her sister.

[30] A capacity assessment was conducted on June 30, 2017 by Dr. Bruto, who concluded that Ms. Iannarelli did not have the capacity to appoint a POA, manage her property or personal care or make a Will. He opined that on a balance of probabilities, Ms. Iannerelli did not have the capacity to make a new Will in April 2016.

[31] Ms. Deka Islow was Ms. Iannarelli's personal support worker between January 2015 and October 2017 and provided daily care to her. She deposed that Bernadette prepared her mother's food and clothes and provided instructions to Ms. Islow. She never saw any tension or difficulties between Bernadette and her mother and did not know that Ms. Iannarelli had another daughter as she never spoke of Angela. She notes that Bernadette took good care of her mother, and her mother was happy. Ms. Islow further deposed that she had considerable experience in dealing with elderly people and did not notice any signs that Ms. Iannarelli was incapable.

[32] Angela makes many allegations about her sister's management of her mother's finances. One of these allegations is that in the 12 weeks that followed Bernadette being named the attorney for property for her mother's CIBC accounts, she withdrew almost all of the money in those accounts.

[33] She also claims that in 1995, her mother gave Bernadette and her then husband Carlo $125,000 to buy a house. Bernadette now rents out that house and lives in the McLeod property. Bernadette's evidence was that both daughters received gifts of $100,000 from their mother during her lifetime.

[34] Angela does not accept the requests for expense reimbursement made by Bernadette, nor does she accept the amounts for which Bernadette seeks repayment from the Estate. She is critical of her sister's record keeping and alleges that Bernadette depleted all her mother's savings with little or no benefit to their mother.

[35] Given Angela's view that Bernadette did not use their mother's money solely for their mother's benefit, she is not entitled to compensation.

[36] Bernadette's position is that she often used her own money to pay for her mother's expenses and she should be reimbursed for that. Further, once she had exhausted her own resources, her mother's account was used to pay for both of their expenses. At times, her mother gave gifts of money to Bernadette and the grandchildren. Bernadette submits her accounting is not perfect, but it is accurate enough and she should be paid all of the amounts sought including compensation.

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The Issues

Issue #1 – What is the Standard for a Passing of Accounts

[37] Rules 74.16-74.18 of the *Rules of Civil Procedure* set out the procedure on a passing of accounts. Those rules apply to persons acting under a power of attorney. Those persons are obliged to keep proper books and records and be ready to account if requested.

[38] As well, the conduct of an attorney is governed by the provisions of the *Substitute Decisions Act, 1992,* S.O. 1992, c. 30 ("the *SDA"*), which sets out that such attorneys are fiduciaries whose duties must be exercised diligently with good faith, honesty and integrity.

[39] The regulations of the *SDA* require attorneys for property to keep a list of assets, a list of all money received, and a list of all money spent. A proper accounting must be kept as a pre-condition for receiving compensation.

[40] In *Zimmerman v. McMichael Estate*, 2010 ONSC 2947, 103 O.R. (3d) 25, the court dealt with a passing of accounts relating to an attorney for property. After reviewing numerous transactions and evidence, Justice Strathy found that the attorney for property was grossly indifferent to his duty to account, deliberately obstructed the objectors, made unauthorized payments and loans to himself, pre-took compensations, mingled trust property with his personal property, pre-took compensation of almost $450,000 without keeping proper records, and acted in a conflict of interest.

[41] In the end, Mr. Zimmerman was ordered to repay the compensation and other sums totalling over $400,000 plus interest.

[42] In *Zimmerman,* Justice Strathy held that a trustee [attorney for property] must keep proper accounts and be ready to provide an accounting whenever required: at para. 31. The court further held that Mr. Zimmerman's conduct fell below the required standards of a trustee and that he had breached some of the basic obligations of a trustee.

[43] In *Laird v. Mulholland* (1998), 21 E.T.R. (2d) 204 (Ont. Gen. Div.), the court dealt with a case in which an individual who was acting as fiduciary but who was not a named attorney was unable to recall the purpose of most of the withdrawals from the incapable person's account. The court held that a trustee who is a layperson is not required to keep perfect records with respect to every disbursement or expense. Ordinary prudence and diligence was all that was required: at paras. 24-27. It should be noted that in that case, the donor had full capacity. The fiduciary simply assisted her with her financial affairs. The court held that given the attorney's overall honest and diligent conduct towards the donor, it would be inconsistent to find that the withdrawals were used for the fiduciary's personal benefit.

[44] In *Lanthier v. Cousineau Dufresne Estate*, [2002] O.T.C. 671 (S.C.), the court dealt with a passing of accounts in relation to a daughter who held a power of attorney for her mother. The mother's incapacity was not in issue in that case.

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[45] The court held that the attorney did not keep proper accounts particularly as they related to cash withdrawals and cheques written to the attorney herself. The court also found that many of the expenses appeared unreasonable for a woman who was seriously ill and confined to a wheelchair.

[46] The court fixed an amount for incidentals of $400 per month over and above the mother's monthly room and board and disallowed all other amounts of unreceipted cash disbursements. The attorney was ordered to pay the difference of $36,208.56 back to the Estate.

[47] In that case, the attorney sought compensation of $14,264. The objector argued that no compensation should be awarded due to the failure of the attorney to keep proper records and account for the disallowed cash withdrawals. The court in its discretion discounted the compensation to $8,585 on the grounds that the attorney cared for her mother appropriately for four and a half years and paid all of the bills as required.

[48] The duty to account while a donor of a POA is *sui juris.*is different than the standard imposed for a donor who is not capable. In *Craig Estate v. Craig Estate (Trustee of),* 2007 CarswellOnt 395 (S.C.), the attorney for property did not begin to act in a fiduciary capacity for her mother. She argued that prior to 2002, she assisted her mother with her financial affairs, but her mother had full capacity and instructed her daughter with respect to her financial affairs.

[49] The court, referring to Laird, held that given the mother's capacity, her daughter only had a limited requirement to account and that in that case the mother was capable of managing her affairs but simply preferred that her daughter do it for her: at para. 74. Of interest is that the attorney's sister objected to the amounts of weekly cash taken out by the attorney for her mother's needs. The sister submitted that the amounts taken out far exceeded what her mother needed. The court noted at paragraph 86 that the objecting sister had little contact with her mother and therefore had limited knowledge of her mother's personal spending habits: at para. 86.

[50] In *Craig Estate* the court found that the attorney did not breach her duty owed as a fiduciary to her mother and that she discharged her duties honestly and reasonably. The accounts were ordered to be passed as submitted.

[51] In Toller James Montague Cranston (Estate of), 2021 ONSC 1347, 65 E.T.R. (4th) 84, the deceased's sister brought an application to pass accounts as estate trustee of her brother's estate. Her two other brothers filed various objections.

[52] In determining whether the Estate Trustee had met the required standard, the court noted that the brothers' objections did not relate to the accuracy of the accounting presented but, rather, that a receipt was not provided for each and every expense. Citing Lanthier, Zimmerman and Laird, the court held that while having a receipt for all expenses was the recommended approach, a receipt was not required for each expense in order for the required standard to be met where the accounts presented were otherwise accurate. A standard of perfection is not required: at paras. 57 and 61.

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[53] In determining the standard to be met by Bernadette in this case based on the principles enunciated in the abovementioned cases, the following propositions emerge:

a. A layperson acting as a fiduciary is not required to provide receipts and/or an exact explanation for each expense. A standard of perfection is not required.

b. The standard of accounting for a fiduciary acting for a donor who is *sui juris* is that of ordinary prudence and diligence where the fiduciary has discharged his or her duties honestly and reasonably. The higher standard set out in the *SDA* for guardians of property or attorneys acting for persons who are incapable should not be applied in this case.

c. The court may exercise its discretion to reduce accounts or compensation to reflect the facts or reality of individual circumstances.

[54] Given all of the above considerations, I find that Bernadette was in a situation similar to the one in *Craig Estate.* That is, her mother, as supported by the evidence of the CIBC bank employees, requested that a bank POA be done in favour of Bernadette so that Bernadette could assist her. It was her mother's preference, not a necessity, just as in *Craig Estate.*

[55] I further find that Bernadette's obligations as a fiduciary did not commence until March 4, 2016 when she was given the bank POA. The requirement to keep more accurate accounts only arose after the August 2016 Application was issued and Bernadette was put on notice of the request to account.

The Positions of the Parties on the Accounts

A. The Applicant

[56] Bernadette's position is that she was not acting under mother's POA for Property at any time. Her mother was competent to handle her own affairs until the date of death. The bank POA was prepared only because of her mother's physical limitations after her hip surgery.

[57] The evidence of Ms. Angelini, Mr. Vumbaca, the PSW and the bank employees was consistent that Ms. Iannarelli was alert, engaged and provided competent instructions. Further, in October 2017, her s. 3 counsel wrote to opposing counsel indicating that she did not agree with Dr. Bruto's assessment and intended to contest the proposed guardianship.

[58] As well, there was evidence from her geriatrician, Dr. Marotta. In 2001, he noted that although Ms. Iannarelli came to him with a concern about her short-term memory, she scored well on the mental status evaluation. She came on her own for the appointment and was noted to show up on the right day and at the right time.

[59] In 2002, Dr. Marotta noted that Ms. Iannarelli's cognitive abilities remained stable.

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[60] In 2005, Dr. Marotta noted mild memory changes but did not need further investigation. His opinion was that she was very affected by certain stressors in her life, including the death of her grandson in a car accident.

[61] Bernadette's position is that her mother was sui juris at all relevant times and that she was entirely reasonable in that belief. While her mother had more physical limitations over time, she was still fully able to make decisions about her care and finances.

[62] Bernadette did not plan for her mother to pass away and fully expected that her mother would be involved in the defence of the 2016 Application. As such, she concedes that her record keeping was not perfect because she did not view herself as acting as a fiduciary and was not expecting to have to account.

[63] Bernadette deposed that her own financial resources were exhausted in or around January 2015. She agrees that her mother paid for many of her expenses after that point, but she had been assisting with her mother's expenses prior to January 2015. In any event, she is not seeking any compensation by way of caregiving expenses even though she was her mother's full-time caregiver throughout the relevant period.

[64] Bernadette requests that she be reimbursed for expenses of $89,102.07 plus compensation of $10,904.13 for a total of $100,006.20.

B. The Objector

[65] Angela submits that Bernadette has a duty to account and has been well aware of that duty since the August 2016 Application was served on her. In addition to that Application, there was also her appointment as POA on the CIBC accounts on March 4, 2016 and as POA on April 25, 2016.

[66] While the Objector concedes that the court is not tasked with making a finding as to whether Ms. Iannarelli was capable during the relevant time, there is concerning evidence about her cognitive decline after her fall on September 10, 2015.

[67] Bernadette has not provided satisfactory receipts for the expenses and reimbursements she claims. She undertook to use her best efforts to produce receipts for the Schedule A expenses at her discovery on October 22, 2019 but has failed to provide those receipts. Further, there are many cash withdrawals which are not accompanied by adequate or any explanations.

[68] Angela notes that after her sister became the POA on her mother's CIBC accounts, the account was depleted from approximately $80,000 to just over $3,000 in a period of four months.

[69] Bernadette had failed to provide proper receipts. Some of the receipts provided are undated, partial, contradictory, relate to dates outside of the specified time, or illegible.

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[70] Angela requests that the court draw an adverse inference with respect to Bernadette's inferior record keeping and failure to keep proper accounts and vouchers such that she has not met the required standard. The accounts should not be passed, Bernadette should be required to return the sum of $82,196.70 to the Estate and no compensation should be paid.

The Accounts

Schedule A Expenses Claimed

[71] Schedule A expenses are those for which a trustee or attorney requests reimbursement where such expenses are properly incurred for the benefit of the Estate or the donor/incapable person. The onus is on the trustee or attorney to establish that the expenses were properly incurred.

[72] While there is evidence that while Ms. Iannarelli's health began to decline in 2015 and particularly after her fall and hip replacements, there is significant evidence that Ms. Iannarelli was still very much in control of her financial affairs. I rely on the evidence of the CIBC banking employees who were clear that Ms. Iannarelli knew why a bank POA was recommended to her rather than a joint account with Bernadette. Their evidence was also clear that the reason for the bank POA was to permit Bernadette to assist her mother with her banking due to her mother's mobility issues.

[73] I find that it was only after the bank POA was signed on March 4, 2016 that Ms. Iannarelli gave over certain financial responsibilities to Bernadette. Prior to that, and supported by the bank employee's evidence, Ms. Iannarelli was doing her own banking and in control of her financial affairs. Despite the accounting period formally commencing on January 1, 2015, I find that Bernadette's fiduciary responsibilities first arose on or about March 4, 2016 and fully crystallized upon being served with the August 2016 Application.

[74] Bernadette deposed that between October 2015 and January 2016, her personal resources were depleted and that she used her mother's resources for her personal benefit. She claims that prior to October 2015, she spent all her money for her mother's care and support and that once her resources were gone, her mother invited her to use her funds for ongoing expenses and as a form of reimbursement. I note that Bernadette was not completely devoid of resources as she has readily admitted that was renting out her own home while residing in her mother's home.

[75] The court is simply asked to accept that this was the case based on Bernadette's affidavit evidence from October 2018. Bernadette does not provide any of her personal banking or credit card statements to confirm that her personal resources had been exhausted.

[76] Bernadette claims a multitude of Schedule A expenses including items such as curtains, appliances, home upgrades, painting, a mattress and outdoor maintenance. The receipts are inadequate, many are outside of the accounting period, not in Bernadette's name or are noted as having been paid in cash. Ms. Iannarelli had her own resources and if Bernadette did make certain contributions to household expenses, it would not have been unexpected

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given that neither she nor any of her children or grandchildren who were living with Ms. Iannarelli at various times were paying rent.

[77] As such, I do not find that any of the Schedule A Expenses were properly documented or incurred by Bernadette for the benefit of Ms. Iannarelli with the exceptions set out below. Rather, the expenses were either paid for by Ms. Iannarelli from her own resources for her ongoing home and maintenance expenses or they were paid by Bernadette but cannot be adequately proven to have been paid by her.

[78] The exception to the Schedule A expenses would be certain amounts paid after Ms. Iannarelli's hip surgery. Clearly, Ms. Iannarelli required more care at that point including the cost of a PSW, grooming, clothing, incontinency supplies etc. Using a similar solution to the *Lanthier* case, I find that Bernadette incurred the cost of $500 per month by way of incidentals for her mother's care from the commencement of the accounting period in January 2015 to January 2016, when Bernadette's evidence was that her resources were depleted. Thereafter, all expenses must have been paid from Ms. Iannarelli's own resources as Bernadette deposed she had none. This would mean that Bernadette should receive a credit of $6,500 (or $500 x 13 months).

[79] Bernadette claims $25,035.47 in legal fees for s. 3 counsel. This includes a costs order of $9,000. Bernadette sought to have the s. 3 counsel fees borne equally by her and her sister. Angela did not agree. Ms. Angelini's firm (Hull & Hull) brought an enforcement motion to which Bernadette was obliged to respond. The result of that motion was that Bernadette was ordered to pay the s. 3 counsel fees personally without prejudice to claiming the fees from the Estate. Angela agrees that the fees for s. 3 counsel should be reimbursed to Bernadette.

[80] The real issue is who should bear the costs of the enforcement motion of $9,000. I have reviewed the order of Justice McEwen dated July 17, 2018. There is no provision in paragraph two which permits Bernadette to argue that the costs should be paid from the Estate. As such, this amount is owed by Bernadette personally and may not be reimbursed.

Summary of Schedule A Expenses Owed

[81] Therefore, the total Schedule A expenses to which Bernadette is entitled are the legal fees for s. 3 counsel ($16,035.47), funeral expenses ($9,454) and the personal care amount of $6,500 for a total of $31,989.47.

Amounts Which the Objector Claims Should be Repaid to the Estate

[82] Angela objects to certain withdrawals from her mother's accounts. These are broken down into two categories, identified withdrawals of $68,22.51 and unidentified withdrawals, with no vouchers, totalling $39,567.66.

[83] As per my findings made above, any withdrawals made prior to March 4, 2016 must be assumed to have been made by Ms. Iannarelli personally or on her direct instruction to Bernadette. Whether she used those amounts for her own expenses or gave the money to

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Bernadette is immaterial. Those amounts need not be repaid to the Estate by Bernadette and include items 86, 87, 88, 89, 90 and 305, being the sum of $5,620.

[84] As for the balance of identified expenses after March 4, 2016, these are small amounts which appear to relate to ongoing expenses for groceries and household expenses. No vouchers are provided with the account entries, but the bank statements show that the purchases were made at places such as grocery and drug stores, which would be consistent with ongoing household expense payments. These amounts need not be repaid to the Estate.

[85] The only concerning item in the identified withdrawals is the cheque for $10,000 on March 23, 2016. Bernadette cannot recall what this amount was used for. This was withdrawn shortly after the banking POA was signed and is not consistent with other expenditures made by or for her mother as set out in the accounting. With no further evidence of the use of this amount being for the benefit of Ms. Iannarelli, I find that Bernadette must repay it to the Estate. Her fiduciary obligations were clear at that point and simply not remembering the use of such a large amount does not meet the required standard for a fiduciary.

[86] With respect to the unidentified withdrawals, I do not take issue with the amounts which are variously explained as gifts for Ms. Iannarelli's granddaughters or the experimental arthritis treatment. While there are no vouchers for these amounts, the explanation seems reasonable given that at least one of her granddaughters was living with her and there were events such as birthdays and baptisms to which Ms. Iannarelli would have wanted to make a contribution. In any event, the amounts are not large.

[87] What is concerning to the court is the cheque for $10,000 on March 9, 2016 and the $50,000 "gift" on May 9, 2016. With respect to the $10,000 cheque, Bernadette explained this as a transfer from savings to chequing for which $5,000 was used to defray expenses for her granddaughter's accident in the U.S. including legal fees. Bernadette's evidence was that her mother gifted her those funds for that purpose.

[88] However, Bernadette gave evidence at her examination that in fact the $5,000 was used to retain a lawyer to respond to a legal proceeding commenced by the Children's Aid Society in relation to her granddaughter. Bernadette sought to remove the granddaughter from care and proposed that the granddaughter live with her.

[89] If Bernadette's daughter was involved in legal proceedings in the U.S. or if there was a child protection proceeding, there must have been legal bills, correspondence or other documents related to the incident. Bernadette has produced minimal documentation in that regard. However, I accept that Ms. Iannarelli was generous with her grandchildren and may well have provided Bernadette with some financial support for this matter. However, without proper vouchers for the $5,000, the inconsistent evidence on what the money was used for, and no proof with respect to the legal requirements for a gift, the amount must be reduced.

[90] Therefore, with respect to the $10,000 transfer from savings to chequing on March 9, 2016, I accept that the transfer to chequing was to deal with ongoing household and care expenses as dealt with elsewhere in these reasons. I also find that the $5,000 was used for legal

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expenses for the granddaughter in some capacity, however, for the reasons given above, the amount must be reduced to $2,500.

[91] With respect to the $50,000 gift, the evidence is contradictory, convoluted and is entirely rejected for the reasons set out below.

[92] First, Bernadette argues that no objection was made to this amount, and it cannot now be raised due to limitation period issues. Angela submits that she made a specific objection to the depletion of her mother's bank account and that Bernadette was cross-examined on the issue of the $50,000 gift. I agree with Angela. The issue clearly forms part of the objection with respect to the overall depletion of Ms. Iannarelli's accounts after March 4, 2016 and Bernadette was specifically cross-examined on the alleged gift on October 22, 2019.

[93] In that cross-examination, Bernadette deposed that her mother lent Bernadette's friend Joseph Nazzicone the sum of $50,000 for the closing of his condo. After his condo sold about a year later, Mr. Nazzicone brought Ms. Iannarelli a cheque to repay the loan inclusive of interest. According to Bernadette, there are documents memorializing the loan between Ms. Iannarelli and Mr. Nazzicone but she has never produced them.

[94] Bernadette's evidence was that her mother would not accept the repayment cheque from Mr. Nazzicone but insisted that he keep the money and use it to spend on her grandchildren, as Mr. Nazzicone does not have grandchildren of his own. According to Bernadette, her mother further stated that she wanted to ensure that her sister did not receive the money as her mother said that Angela only cared about money and not her.

[95] In contrast, in her affidavit sworn October 2, 2018, at paragraph 155, Bernadette deposed that the money was loaned through Mr. Vumbaca's office (no mention of Mr. Nazzicone was made) and when the loan was repaid, her mother gifted the amount with interest to Bernadette to reimburse her for the money she had spent for her mother's support and care.

[96] The convoluted and simply unbelievable account given by Bernadette about the $50,000 withdrawal gives this court pause. $50,000 represented a significant amount of Ms. Iannarelli's liquid assets at that point. I find that she must have been aware of that fact, given that she was still involved in her financial affairs.

[97] The question then remains as to why Ms. Iannarelli would have lent and then given Mr. Nazzicone this money? He was not a relative and no longer in a relationship with Bernadette. He was at best a family friend and Bernadette's tenant. Mr. Nazzicone's affidavit sworn March 2, 2023 makes no mention of this generous gift from Ms. Iannarelli.

[98] Bernadette's further evidence was that it was given to him on the understanding he would spend it on Ms. Iannarelli's grandchildren is also not believable.

[99] As I am not tasked with making any determination concerning Ms. Iannarelli's capacity, the court must assume that Ms. Iannarelli well understood her personal situation in May 2016. That is, she had mobility issues, she required the care of both a PSW and Bernadette and that her total liquid assets as of the date she signed the bank POA as just over $100,000.

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I find that although Ms. Iannarelli *could* have made such a gift at the time, the onus is on Bernadette to adequately explain and document it.

[100] Further, the legal elements of a gift are missing. For example, given that Ms. Iannarelli was capable, why did she not write a cheque for $50,000 to Bernadette herself? If a gift was indeed intended, why is there is no evidence to corroborate its delivery to Bernadette from any other source?

[101] In *Robertson (Attorney for) v. Hayton* [O.J. No. 4538] the court dealt with whether certain amounts transferred by a daughter from her parents' joint accounts were gifts. Her parents were both incapable at the relevant time. The daughter was named, along with the son, as joint POA for property for her parents. Her brother brought an Application to have her removed as POA and for repayment of the alleged gifts. The court found that there was no gift because 1) the fact that the funds were transferred from a joint account was insufficient to find a gift, 2) there was no corroboration for the pursuant to section 14 of the *Evidence Act*, R.S.O. 1990, c.E23, the parents lacked capacity to make a gift, and 4) the daughter had failed to meet the onus required for an *inter vivos* gift.

[102] As para 30, the court set out the elements of a gift that are required to prove an *inter vivos* gift being; 1) an intention to donate, 2) an acceptance of the gift and 3) a sufficient act of delivery.

[103] Given the requirements set out in *Roberston*, I find that a gift has not been proven in the case of the $50,000 cheque in that:

a. Ms. Iannarelli was vulnerable;

b. There is no evidence that Ms. Iannarelli intended such a gift;

c. Bernadette had a fiduciary duty to her mother which, although the duty was not at the level it would have been had her mother been incapable, required Bernadette to document and explain large transactions;

d. The amount represented a substantial portion of Ms. Iannarelli's liquid assets;

e. There was no reason why Ms. Iannarelli could not have written the cheque to Bernadette given she was capable. As such, the gift lacks a sufficient act of delivery; and

f. There is no other evidence (other than that of Bernadette, and that evidence has been rejected) to corroborate that a gift was intended.

[104] Therefore, based on all of the above, Bernadette has failed to meet the required standard of accounting for a fiduciary for the following transactions:

a. The $10,000 unexplained cheque on March 23, 2016.

b. $2,500 of the $5,000 allegedly used for her granddaughter's legal proceedings.

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c. The $50,000 alleged gift dated May 9, 2016.

[105] Bernadette is therefore required to repay to the Estate the sum of $62,500 being transactions for which she failed to meet her onus to properly account while acting as a fiduciary.

A. Compensation

[106] Bernadette claims tariff compensation totalling $10,904.13. Angela does not dispute that this is the correct amount. However, her position is that her sister is not entitled to compensation as she was living rent free in their mother's home and her accounting failed to meet the proper standard. Further, her mother was paying for all of the utilities and groceries.

[107] In the often-cited case of Toronto General Trusts Corp v. Central Ontario Railway, [1905] O.J. No. 536 (Ont. H.C.), the court set out the factors to be considered with respect to Trustee compensation as follows:

(a) the size of the trust;

(b) the care and responsibility arising therefrom;

I the time occupied in performing the duties;

(d) the skill and ability shown; anI(e) the success resulting from the administration.

[108] As mentioned in *Zimmerman,* it is a condition precedent to receiving compensation that proper accounts are kept and presented. Without such an accounting, it is difficult for the court to ascertain whether the trustee has met the proper standard and is deserving of compensation.

[109] This is a case in which Bernadette's deficient accounting must have an effect on the compensation claimed. In *Lanthier,* the court found that the accounting did not meet the required standard but that the attorney had appropriately cared for her mother for four and a half years. The compensation was reduced by approximately half.

[110] In this case, there is no question that Bernadette was caring for her mother full-time during the accounting period. Her services should not go unrecognized, but an appropriate reduction should be made to account for the lack of proper documentation and explanation for certain large expenses, in particular the $50,000 alleged gift and the findings of this court that Bernadette did not meet the required standard of accounting with respect to certain expenses.

[111] I therefore find that, in accordance with the principles set out in *Toronto General Trusts Corp.*, Bernadette lacked the required care and responsibility with respect to her duties as a fiduciary after March 4, 2016. Given the caregiving she provided to her mother, her compensation should not be reduced to $0 but some reduction is in order. I therefore order that Bernadette should be paid compensation of $6,000.

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Orders and Costs

[112] Given all of the above, I order that the accounts are not passed in their current form. Bernadette shall receive reimbursement for Schedule A expenses in the amount of $31,989.47 plus compensation of $6,000 for a total of $37,989.47. Bernadette is required to pay back to the Estate the sum of $62,500, leaving a net owing to the Estate by Bernadette of $24,510.53. Bernadette shall not be required to repay this amount until the Will Challenge trial has been completed in January 2024 and the trial decision for that matter is available.

[113] Bernadette seeks costs of $30,463. She argues that a portion of those costs should be paid by the Estate as she was required to provide an extensive accounting.

[114] Angela seeks costs of $11,841.27 on a full indemnity scale, or $7,815.08 on a partial indemnity scale. She submits that her costs were increased due to the initial absence of an affidavit verifying the accounts, the difficulty pursuing vouchers, the subsequent amendments to the accounts and Bernadette's overall deficient accounting. She does not disagree that a blended costs award is reasonable and that some portion of the actual accounting costs should be borne by the Estate.

[115] Mr. D'Ambrosio served an offer to settle on September 19, 2023. In that offer, Bernadette agreed to accept the sum of $36,000 from the Estate by way of settlement for compensation, legal fees paid to s. 3 counsel, funeral and cemetery costs and the expenses listed in the accounts. No offer to settle was served by Angela's counsel.

[116] Bernadette's offer is $60,510 different from the result. While Angela served no offer to settle, her position is $57,686 different from the result ($82,196 - $24,510). In the end, neither party has come close to the amounts they sought in this application.

[117] In my view, the parties' respective lack of success should result in their having to bear their own costs. The exception to this would be the cost of the accounting which I assess at $10,000. This portion of Bernadette's costs shall be paid by the Estate. Bernadette and Angela shall otherwise be personally responsible for their costs.

[118] Counsel for Bernadette shall prepare a draft approved order for my review and signature. The order may be sent to me directly once approved.

C. Gilmore, J.

Released: December 28, 2023

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COURT FILE NO.: CV-23-00707387-00ES
DATE: 20231228

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ONTARIO

SUPERIOR COURT OF JUSTICE

ESTATES LIST

IN THE MATTER OF THE PROPERTY AND THE ESTATE OF ASSUNTA MARIA IANNARELLI

BETWEEN:

Bernadette Tucci

Applicant/Estate Trustee

– and –

Angela Abbruzzese

Objector

APPLICATION TO PASS ACCOUNTS

C. Gilmore, J.

Released: December 28, 2023