NOVA SCOTIA COURT OF APPEAL

Citation: *Campbell v. MacRae Estate*, 2011 NSCA 57

Date: 20110610
Docket: CA 334142
Registry: Halifax

Between:

Barbara Helen Campbell, Margaret Isabelle Sutherland, Lauchina Margaret Campbell, Shirley Marie MacRae, Angus Alphonus MacRae, William Daniel MacRae, and John Francis MacRae, Beneficiaries of the Estate of Mary Sarah MacRae

Appellants

and

Theresa MacRae, Personal Representative of the Estate of Vincent MacRae

Respondent

and

Cory Binderup, Proctor of the Estate of Mary Sarah MacRae

Respondent

Judges: MacDonald, C.J.N.S.; Oland and Bryson, JJ.A.

Appeal Heard: May 16, 2011, in Halifax, Nova Scotia

Held: Appeal dismissed with $5,000 costs to the respondent, Theresa MacRae, together with reasonable disbursements to be taxed, per reasons for judgment of MacDonald, C.J.N.S.; Oland and Bryson, JJ.A. concurring.

Counsel: M. Ann Levangie and Sandra McCulloch (Articled Clerk), for the appellants

Donald Macdonald and Catherine MacNeil Macdonald, for the respondent Theresa MacRae

Cory Binderup, Proctor of the Estate of Mary Sarah MacRae, respondent not present

Reasons for judgment:

OVERVIEW

[1] A series of tragic events left the ownership of a family farm in rural Cape Breton up in the air. Justice Frank C. Edwards of the Supreme Court of Nova Scotia was asked to resolve this dilemma. This he did. See: **Re: MacRae Estate** [2010] N.S.J. No. 230; 2010 NSSC 157. His decision is now appealed to this court. For reasons which follow, I would dismiss the appeal. In essence, the judge's decision was based on sound legal reasoning and unassailable findings of fact.

BACKGROUND

[2] In 1937, Dan Joe MacRae, then in his late 20's, was deeded the family farm in St. Rose, Inverness County. His widowed mother and three brothers all signed over their interest. From then on, Dan Joe and his wife Sadie ran the farm and in the process raised their eight children. Off the farm, Dan Joe also worked as a miner.

[3] Then in 1973 came the first tragic event. Dan Joe, then only in his mid 60's, was diagnosed with terminal cancer. By then, the children had grown. Only their youngest child, Angus, then a teenager, remained at home. Difficult questions emerged. What would become of the farm? What would Sadie do as a widow in her mid fifties? Although active and independent, could she manage the farm on her own? Angus was obviously too young. Besides, he was still in school. Would any of the adult children be in a position to return?

[4] Up stepped their son, Alexander Vincent ("Vinnie") MacRae. When his parents asked, he agreed to return to Cape Breton with his fiancée, Theresa (now) MacRae. He would give up his job at the Chrysler plant in Windsor, Ontario. Theresa and he would marry and live on the farm with Dan Joe, Sadie and young Angus.

[5] Dan Joe was dead within two years. A few years after that Angus, having completed school, left home. Vinnie and Theresa stayed and raised a family of their own. Thus the farm was preserved but perhaps more importantly, Sadie could enjoy her remaining years there.

[6] For over 27 years, Vinnie and Theresa operated the farm and raised their family. Off the farm, Vinnie worked at the local assessment office.

[7] Along the way, in 1995, Sadie signed the property over to herself and Vinnie as joint tenants. This was followed six months later by a $33,000 mortgage.

[8] Shortly thereafter, the second tragic circumstance began to emerge. Sadie developed dementia and by 1999 had to be placed in a nursing home.

[9] The third tragedy soon followed. On September 8, 2002, Vinnie died of a heart condition. He was only 55. His tragic passing left so many unanswered questions, one of them central to this appeal. Specifically, what were Sadie's true intentions when she signed the 1995 joint tenancy deed?

[10] In fact, this question has resulted in a fourth tragedy - the division of a once close-knit family. Specifically, Theresa and her children were pitted against Vinnie's brothers and sisters. Not surprising, both sides offered diametrically opposite perspectives.

[11] For Theresa (on Vinnie's behalf), this deed represented Sadie's attempt to convey the property to her loyal son in recognition of his decision to come home and to operate the farm. In other words, he, and no other sibling, fulfilled his parents' wish to see the farm preserved and to see Sadie remain there for the rest of her days. Furthermore, having Sadie remain on the deed as a joint tenant was Vinnie's idea. He simply wanted her to have the comfort of knowing that while she lived, the property would remain partly in her name. In other words, it was assumed that Sadie would die first leaving Vinnie the sole owner. With Vinnie dying first, it should therefore be presumed that Sadie's legal interest in the property from 1995 was actually held in trust for Vinnie. Theresa sought a declaration accordingly.

[12] Then, we have the perspective of Vinnie's brothers and sisters who had enjoyed a warm relationship with their mother. They insist that their mother at no time intended to exclude them from ownership. Instead, the deed represented Vinnie's undue influence over his vulnerable mother. It was no more than an accommodation to Vinnie so he could secure a mortgage. Furthermore, even absent undue influence, the deed spoke for itself. In other words, with Vinnie dying first, under a joint tenancy arrangement, Sadie would legally remain the sole owner. Thus upon her death without a will, her eight children would share the

property with Vinnie's share divided among his four children. In fact, the siblings insist that Vinnie's return to the farm was no sacrifice at all. Instead, it was something that he had always wanted to do. Thus, he simply seized an opportunity. In fact, he lived there "rent free" and reaped the farm's produce. Thus, their mother being able to stay there was little more than a happy coincidence. They insisted that the farm belonged to their mother's estate and, in fact, they sought the return of profits secured by Vinnie when a portion of the land was leased to extract coal.

[13] As noted, the judge was asked to resolve this dilemma. He sided with Theresa. He rejected the assertion that Sadie signed the deed under Vinnie's undue influence. Instead, the deed represented Sadie's intention to convey the property to Vinnie without reservation. In other words, it was indeed assumed that Sadie would die first, thereby fulfilling this intention. Vinnie's untimely death did not change this original intention. The property since 1995 (the date of the deed) was therefore held in trust for Vinnie. This meant that (a) the farm would go to Vinnie's heirs as opposed to Sadie's estate; and (b) Sadie's estate had no entitlement to the coal lease profits, they having been earned after the 1995 trust declaration.

[14] The siblings now appeal to this court.

ISSUES AND CORRESPONDING STANDARD OF REVIEW

[15] In advancing their appeal, Vinnie's siblings do not question the judge's legal conclusions. Nor should they. As I will detail later, the judge properly articulated the law surrounding undue influence and trusts.

[16] Instead, the appellants attack the judge's factual conclusions asserting that many of them are completely unreasonable and unsupported by the weight of the evidence. Of course, this is a difficult task for the appellants considering the deference we pay to trial judges when it comes to their factual findings. After all, they see and hear the witnesses first hand. We do not. Thus, we will not interfere unless the appellants can demonstrate "palpable and overriding" error. See: **Housen v. Nickolaisen**, [2002] 2 S.C.R. 235.

[17] What then is meant by "palpable and overriding error"? Saunders, J.A. of this court in **McPhee v. Gwynne-Timothy**, 2005 NSCA 80 (QL), succinctly explained:

> ¶32 An error is said to be palpable if it is clear or obvious. An error is overriding if, in the context of the whole case, it is so serious as to be

> determinative when assessing the balance of probabilities with respect to that particular factual issue. Thus, invoking the "palpable and overriding error" standard recognizes that a high degree of deference is paid on appeal to findings of fact at trial. See, for example, *Housen, supra*, at para. 1-5 and *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at paras. 78 and 80. Not every misapprehension of the evidence or every error of fact by the trial judge will justify appellate intervention. The error must not only be plainly seen, but "overriding and determinative."

[18] Furthermore, inferences drawn from the facts are also subject to deference on the “palpable and overriding” standard. See **Housen**, *supra*, at paras. 18 to 25. This is important in this case because, of course, the two main witnesses, Sadie and Vinnie, are deceased. Thus, the judge was forced to infer their true intentions when the 1995 deed was signed. I now turn to the merits of the appeal.

ANALYSIS

[19] In advancing their case, the appellants have launched a three-prong attack on this judgement. They first challenge the judge’s finding that Vinnie exercised no undue influence when his mother signed this deed. Secondly, they take issue with the resulting trust favouring Vinnie. Finally, they challenge the denial of reimbursement for the coal lease. I will now consider each challenge in order.

Undue Influence

[20] At the outset, let me repeat that the judge was well aware of the law surrounding undue influence. In fact, he properly noted that, given Vinnie’s perceived dominant relationship over his mother, it would be up to his estate to rebut a presumption of undue influence on Vinnie’s part:

> ¶28 Undue Influence: The Claimant's application is premised upon the validity of the August 16, 1995 deed whereby her husband became joint tenant with his mother. Arguably, the Claimant still has a case even if the deed was invalid. But a valid deed is very strong evidence of Sadie's intention to ensure that Vinnie eventually owned the farm.
>
> ¶29 There is no doubt that by 1995 a dominant relationship between Vinnie and his mother would have existed. Vinnie was the dominant party. By that time, Sadie was in her mid-seventies and Vinnie acted as the de facto owner of the farm. Solicitor Lavigne herself noted that it was her impression that Sadie looked to Vinnie for advice. Or, as Sadie told James Sullivan in 1990, "... my name is

> still on the deed, but (the farm) is really Vinnie's now." Other examples exist. Suffice to say that the potential for undue influence existed and therefore, in law, the presumption of undue influence is triggered. As such, the burden shifts to the Claimant to rebut that presumption.

[21] Furthermore, the judge was also well aware that Vinnie arranged for the lawyer to prepare the deed and that Sadie, therefore, had no independent legal advice:

> ¶30 The best rebuttal evidence would be to show that Sadie had independent legal advice. (For a summary of the law relating to undue influence, see **Dempsey v. Dempsey** 2010 NSSC 96.) Sadie did not have independent legal advice. Ms. Lavigne was retained by Vinnie and did not confer privately with Sadie. There is no acknowledgment signed by Sadie that she understood the consequences of signing the deed. Nor are there notes made at the time by Solicitor Lavigne that Sadie acknowledged her understanding. Ms. Lavigne acknowledged that she knew and trusted Vinnie. I took it from that comment that that was why she as a lawyer did not take the steps necessary to rule out undue influence.

[22] Sadie's lack of independent counsel was, therefore, a legitimate source of concern but, in the end, not fatal to Vinnie's interest. Instead, the judge concluded that the presumption of undue influence was rebutted. In doing so, he relied on the independent evidence of one James Sullivan, a neighbour, and on the evidence of Sadie's former son-in-law:

> ¶31 Despite the lack of independent legal advice, I am satisfied that the Claimant has rebutted the presumption of undue influence. Sadie's signing of the deed was entirely consistent with statements she made regarding Vinnie's ownership of the property. I have already referred to what she said to James Sullivan. [i.e., the farm is really Vinnie's now.] In the same vein, she told her then son-in-law Donald MacDonald "... how she hoped the rest of her sons and daughters would understand why Vincent should have the property." (Affidavit paragraph 12)

[23] The appellants take particular issue with the judge's reliance on Mr. Sullivan's evidence. They say that Sadie's confirmation of Vinnie's ownership to him was simply a passing comment. In my view, that does not make Mr. Sullivan's evidence less reliable or less important. In fact, passing comments may often be viewed as more candid and, therefore, more reliable.

[24] The appellants also challenged Sadie's competence at the time the deed was signed. Yet, the judge carefully considered this issue:

¶33 I am satisfied that all of the MacRae siblings knew and understood that their mother's intention was that the farm would belong to Vinnie. They all became aware of the 1995 deed in 1997. It is significant that at that time, no one challenged the deed or their mother's ability to sign it.

¶34 In her affidavit dated March 4, 2009, Lauchina Campbell at paragraph 10 says: "... I was surprised this (the deed signing) happened because Sadie was in no shape mentally to be doing anything like that." I am satisfied that Lauchina is mistaken in her recollection of what the situation had been approximately 14 years earlier.

¶35 Lauchina's evidence is at odds with that of other siblings. Shirley MacRae, for example, testified that when she learned of the deed she "... didn't get upset over it." Margaret Sutherland said that her mother was (apparently referring to 1995) "forgetful at times". Yet Margaret never challenged Vinnie about her mother's ability to sign the deed.

. . .

¶37 Similarly, Angus MacRae testified that, shortly before Vinnie's death, he intended to ask Vinnie for a piece of land. Angus never did ask because of Vinnie's health. Again, this is an example of acknowledgment within the family that ownership of the farm had been transferred as their mother had always intended.

¶38 No one ever confronted Vinnie with a declaration that his mother did not understand the consequences of the deed nor that she intended otherwise. The situation is in marked contrast to that in **Dempsey** (noted earlier) where the siblings did confront their brother as soon as they learned of the impugned transaction. (Also in **Dempsey**, there was evidence of prior Wills which contradicted the purported intent of the deed.)

¶39 On the competence issue, the evidence is that Sadie was not diagnosed with dementia until November 1997, that is, over two years after she had signed the deed. Yet, in June 1997, Shirley MacRae had no hesitation in borrowing $300.00 from her mother. Shirley testified that Sadie was fully aware of the loan being made. Sadie told Shirley that "she was happy to do it for her."

¶40 Similarly, Angus MacRae has no difficulty relying upon a 1996 conversation with his mother where she stated that the farm "... was there for everybody." Angus overstates what his mother meant. Sadie did not mean that everybody would be equal owners of the farm. Sadie was undoubtedly conveying her belief that the close family relations that then existed would continue.

> Accordingly (and this as well reflected Sadie's perception of how Vinnie felt), all the siblings and their families would always be welcome to visit.
>
> ¶41 It is clear from the evidence of Solicitor Lavigne that, on August 16, 1995, the expectation of both Vinnie and Sadie was that Sadie would die first. In that case Vinnie would, as the surviving joint tenant, have become the sole owner of the farm. If that had happened, I very much doubt that any of the siblings would have challenged Vinnie's ownership. When Vinnie died first, the siblings realized they had what they thought was a solid legal entitlement to a share of the farm. Given their obvious emotional attachment to the property, there was no way they were going to surrender that entitlement.
>
> ¶42 In short, I am satisfied that on August 16, 1995, Sadie knew exactly what she was doing when she signed the deed. Further, I am satisfied that she signed the deed of her own free will with no undue influence from Vinnie. I am confident that Sadie fully appreciated that by signing the deed she would fulfill her long held intention of making Vinnie the eventual owner of the farm.

[25] The judge also dismissed the appellants' suggestion that the mortgage was the prime motivating factor:

> ¶36 Some of the siblings suggested that they understood that the deed was merely a financing mechanism, that is, it enabled Vinnie to get a mortgage. I do not accept such evidence. Actions speak louder than words. In 2002, just before he died, Vinnie offered Margaret Sutherland a piece of land. While she declined the offer, Margaret did not dispute Vinnie's authority to make it. In other words, Vinnie was acting like the owner and Margaret took no issue with that.

[26] In short, after carefully considering the appellants' concerns, the judge made a solid finding of fact that Vinnie did not exercise undue influence over his mother. I see no error in this regard and I would, therefore, dismiss this aspect of the appeal.

Resulting Trust

[27] Turning to the trust issue, the judge again correctly stated the law:

> ¶47 In **Veinot Estate v. Veinot**, [1998] N.S.J. No. 67, 1998 CanLII 1957, the Court held that the brothers had established their claim on the basis of a resulting trust:
>
> > I conclude as well that a resulting trust exists and has been established in their favour. **Rathwell** (1978), 83 D.L.R. (3d) 289 (S.C.C.). Reginald and

> Carmon Veinot contributed to the acquisition, development, extension, and improvement of the farm operations and the evidence establishes a clear, common intention with their father that amounted to a joint venture between them and their father in the farm operation. The existence of such a strong common intention brings the factual situation well within the prerequisites of a resulting trust, and the same division I arrive at based on constructive trust would prevail had it been necessary to rely upon the doctrine of resulting trust.
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> ¶48 In **Rathwell**, the Supreme Court had described a resulting trust as being firmly grounded in the settlor's intent, with that intent being inferred or presumed '... as a matter of law from the circumstances of the case ... The law presumes that the holder of legal title was not intended to take beneficially.'
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> ¶49 The **Veinot** decision was upheld on appeal, [1998] N.S.J. No. 421, and leave to appeal to the Supreme Court of Canada, [1998] S.C.C.A. No. 633, was refused.

[28] Then having properly stated the law, the judge found that since 1995 the property was indeed held in trust for Vinnie. He did not mince words:

> ¶46 If ever there was a case which merited the finding of an implied or resulting trust, this is it. I am sure that it never occurred to Sadie that her son Vinnie would predecease her. If events had unfolded as Sadie had anticipated, Vinnie would have become sole owner of the farm.

[29] In reaching this conclusion the judge accepted that Vinnie’s coming home was a sacrifice and not one of mutual benefit as the siblings assert. The conveyance was therefore a recognition of that sacrifice:

> ¶43 ... As noted, Vinnie gave up a good job with Chrysler in Windsor, Ontario in 1973. He did so at the request of his parents after his father was diagnosed with cancer. He lived and worked on the farm from 1973 until his death in 2002. Vinnie made substantial improvements to the farm. I heard evidence that some of those improvements were paid for by government grants. If so, I am satisfied that that in no way diminishes Vinnie's contribution in time and effort. Indeed, I commend his initiative in securing any grants that became available.
>
> ¶44 As I indicated earlier, there is no doubt that Sadie intended that Vinnie should be the eventual owner of the farm. Sadie hugely benefited by Vinnie's return from Ontario and subsequent efforts on the farm. Vinnie's return enabled Sadie to continue to live in her own home and to continue to enjoy the farm and her family as she had before her husband's death.

> ¶45 I have not the slightest doubt that Sadie was extremely grateful that Vinnie returned home and worked the farm. As I have said, Sadie signed the August 15, 1995 deed specifically to ensure that Vinnie's ownership was secure. No doubt she appreciated that he needed his name on the deed to get a mortgage. But her primary motivation was to make Vinnie the owner of the farm.

[30] Again, these are unassailable findings of facts.

The Coal Lease

[31] Finally, because of this finding that the property was held in trust for Vinnie since 1995, the judge found him to be entitled to the nearly $75,000 in coal lease payments made between 1998 and 2000:

> ¶52 (a) Vinnie's Receipt of $68,300.00 ($73,424.00-$5,124.00 payable to Sadie's estate) under the Evans Coal mine lease. These payments occurred between November 18, 1998 and June 30, 2000. That is, the money was received by Vinnie after he became joint owner of the farm and while Sadie was still alive. Ordinarily, Sadie (and thus her estate) would be entitled to one half of those monies. I find that that is not the case here.
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> ¶53 By the time the Evans money was paid, Sadie had been diagnosed with dementia. But there is no evidence that Sadie had ever sought a share of any other monetary benefits from the farm, meagre though they might have been. There was some evidence that from time to time pulp would be cut and sold. Or livestock or equipment would be sold. My understanding is that any money realized was re-invested in the farm. That re-investment would solely benefit Vinnie.
>
> ¶54 I am satisfied that, had she been competent in 1998-2000, Sadie would not have sought a share of the Evans money. By that time (and well before) Sadie regarded Vinnie as the property owner entitled to any benefits that flowed from such ownership. The cheque for $5,124.00 payable to Sadie's estate should be payable to Vinnie's estate. If the cheque has already been cashed, the $5,124.00 is to be transferred to Vinnie's estate.

[32] Given the finding that the resulting trust was formed in 1995, this conclusion is logical and not one that I would interfere with.

CONCLUSION

[33] In summary, having reviewed the record and having had the benefit of counsels' submissions, I take no issue with any of the judge's factual conclusions, including his inferences. In essence, the judge was presented with two opposing

theories as to Sadie's intentions in what was essentially a *winner take all* proposition. He was forced to select one side over the other. Therefore, while this result is no doubt very disappointing for the appellants, it is not the product of judicial error. In short, this appeal is a valiant but vain attempt to retry the case; something that we are not entitled to do.

[34] Before concluding, let me simply offer this final observation. The judge in this case was left with a difficult choice which would inevitably leave one part of the family very disappointed. Sadie and Vinnie could, unfortunately, no longer speak for themselves. The judge, therefore, had to speak for them. Having heard all the evidence, the judge discerned Sadie's true intentions. In Sadie and Vinnie's memory, I trust that the entire family can now respect those intentions and move on from this unfortunate dispute.

[35] I would therefore dismiss the appeal with $5,000 costs to the respondent, Theresa MacRae, together with reasonable disbursements to be taxed.

MacDonald, C.J.N.S.

Concurred in:

Oland, J.A.

Bryson, J.A.