SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *Casavechia v. Casavechia Estate*, 2015 NSSC 119

Date: 2015-04-15
Docket: *Halifax* No. SFHMPAY-085963
Registry: Halifax

Between:

Glenna Casavechia

Applicant

v.

The Bank of Nova Scotia as Executor and Trustee of the Estate of Louis William Casavechia

Respondent

Judge:	The Honourable Justice Moira Legere Sers
Heard:	March 2, 2015, in Halifax, Nova Scotia
Written Release:	April 15, 2015
Counsel:	Lisanne Jacklin, Counsel for the Applicant
	Wayne Francis, Counsel for the Respondent
	Tanya Butler, Counsel for Gary Casavechia and for Shannon Noseworthy

By the Court:

Background

[1] The parties were married on December 15th, 1973 having lived together prior to the marriage for five years. This was the testator's second marriage.

[2] As of Mr. Casavechia's death the couple had been living together for 44 years.

[3] The facts support a conclusion that this union can be fairly described as a long term traditional marriage.

[4] This couple were not separated nor is there evidence to suggest that separation was in contemplation of either party prior to the death of Mr. Casavechia on September 1st, 2012.

Children

[5] Each of the testator and Mrs. Casavechia brought two children into the marriage.

[6] Mrs. Casavechia' s children Sheldon Casavechia and Nicole York were adopted by the testator.

[7] Shannon Noteworthy and Gary Casavechia are the testator's biological children.

[8] The testator's biological children have been granted intervener status by order dated September 26th, 2004.

[9] Both have also filed Testator Family Maintenance applications regarding this estate.

[10] The Testator Family Maintenance applications are being held in abeyance pending the outcome of this proceeding.

The Matrimonial Property Application takes precedence

[11] Where there are twin applications regarding an estate, the application under the *Matrimonial Property Act* proceeds first.

[12] As per *Driscoll v. Driscoll* Estate, 1988 Carswell NS 349, 12 A.C.W.S. (3d) 397, 225 A.P.R. 1, 88 N.S.R. (2d) 1:

> When twin applications are made, both under the *Matrimonial Property Act* and the *Testator's Family Maintenance Act*, it is the former that a court should consider first before an enquiry is made into whether or not an order for adequate maintenance and support should be granted under section 2 of the *Testator's Family*.

[13] In *Fraser v. Fraser Estate* [1981] N.S.J. No. 556 50 N.S.R. (2d) 55 Morrison J., noted that the division of property act application is the first that should be heard:

> … the legislation in the other provinces to which I have referred indicates the approach which those legislatures elected to take in transferring property under the *Matrimonial Property Act* as against the provisions of a will. I find this approach to be consistent with the provisions of Section 12(4) of the *Nova Scotia Act* and in my opinion is the most appropriate procedure to follow in this application. Consequently, it seems to me that the division of property under the *Matrimonial Property Act* should take place before the effect of the provisions of the will is applied and then the division of property determines what the testator has left to dispose of. If the widow is awarded one-half the matrimonial assets then the testator has only one-half the assets to dispose of by will.
>
> There may well be circumstances in which an equal division of the matrimonial assets would be unfair or unconscionable (as argued by the defendant) within the provisions of Section 13 of the *Matrimonial Property Act*, (supra), in relation to the effect of a last will and testament but such circumstances do not exist here.

Relief

[14] **The Applicant** seeks the following:

1. An equal division of their matrimonial property inclusive of debts. She wants to retain her half of the land. She does not want to sell her share.
2. She proposes she retain the residential property located at 379 Caldwell Road Cole Harbour inclusive of the house, outbuildings and three acres of land (the House Property) as described in paragraph 3(c) of the will.

   She wishes the Court to define her half as the '**upper portion'**. This is the road frontage portion. The Applicant selects a division in kind

suggesting the Young report supports a conclusion that the acreage is equal in value.

She seeks to have 12.16 acres deeded to her with the remaining 14.84 acres 'lower portion' to the estate.

3. For consideration, she will grant a right of way to the lower portion.
4. A deed indicating she is tenant in common with the estate.
5. An order directing the trustee to commission a survey at the expense of the estate to determine whether her proposed division can be accomplished.

[15] **The Interveners** argue that the division contemplated by the Applicant results in an unfair and unequal division 'in kind' rather than an equal division.

[16] They seek an unequal division relying on the fact that the Applicant, as surviving spouse, will receive advantageous tax consideration on the transfer. They wish to share in that tax advantage.

[17] The interveners object to the trustee undertaking the survey requested by the Applicant at the expense of the estate. They wish the Applicant to bear the costs of obtaining a survey or *whatever evidence is required to determine a fair division of the property in kind*.

[18] **The Trustee** argues it is premature to order a division of property. Valuation and the manner of effecting an equal division are as yet unknown.

[19] There is no evidence to suggest that the Trustee or the Interveners contest the Applicant's entitlement to an equal division of the remaining assets of the estate. Their argument rests solely with the real property held in the name of the testator. Nor do they contest at this point the right of the Applicant to remain in the matrimonial home and property.

[20] As this claim is being pursued by way of the *Matrimonial Property Act* I must first look to *the Act*.

[21] Section 12 of *the Act* states:

> **Application for division of matrimonial assets**
>
> 12 (1) Where
>
> (d) **one of the spouses has died,**

> Either spouse is entitled to apply to the court to have the matrimonial assets divided in equal shares, notwithstanding the ownership of these assets, or the court may order such a division.
>
> **Limitation period for surviving spouse**
>
> **(2)** An application for the division of matrimonial assets shall be made by a surviving spouse *within six months* after probate or administration of the estate of the deceased spouse is granted by a court of probate and not thereafter.
>
> **The application was made in a timely fashion.**
>
> (3) N/A
>
> **Right of surviving spouse as additional right**
>
> (4) *Any right* that the surviving spouse has to ownership or division of property under this *Act is in addition to the rights that* the surviving spouse has as a result of the death of the other spouse, whether these rights *arise* on intestacy or *by will.* R.S., c. 275, s. 12.

Determining Legislative intent

[22] In Nova Scotia (unlike section 6 of the Ontario *Family Law Act* R.S.O. 1990,c.F.3,s6; s.37 of the North West Territories and Nunavut *Family Law Acts*, S.N.W.T. 1997,c18,;) the surviving spouse need not elect to take either under the *Matrimonial Property Act* or the will. She has a right to receive under both.

[23] Closer to home in Part 6 s.6 of the PEI *Family Property Act* 1995,c.12 entitlement to an equal division arises when a divorce is granted, a marriage is nullified or the parties are living separate and apart.

[24] In Alberta, separation appears to be a pre-condition to an application under the Alberta *Matrimonial Property Act*, RSA 2000,cM-8. Their Statutory scheme suggests that other applications such as for Dependant's Relief should be joined. The court is directed to consider the circumstances of the will.

[25] In the Manitoba *Family Property Act*, CCSM,c.F25 the surviving spouse may as in Nova Scotia take under both.

[26] However, where a surviving spouse takes a share of the estate under the *Intestate Succession Act* the equal division of property is reduced by the entitlement under the *Family Property Act*. (s.38 ,43)

[27] In the Yukon *Family Property and Support Act*, RSY 2002,c.83, s.6 states as its purpose preservation of entitlement to equal division of family assets on marriage breakdown.

[28] S.15(1) indicates that the provisions of the part apply if the court is satisfied that a marriage breakdown occurred.

[29] The parties in this proceeding have not raised any argument that questions the legitimacy of this statutory position in relation to the situation before me where the spouses were living as husband and wife at the time of the testator's death.

[30] Troubling and not specifically mentioned in the various statutes is whether preservation of the rights of a spouse on the death of a spouse was intended by the Legislature to include a situation where the spouses are not separated prior to the death of one of the spouses.

[31] Clearly if a separated spouse intends to take under the *Matrimonial Property Act* their rights are first in line and are preferred over any testamentary bequest. Their rights under the *Matrimonial Property Act* can effectively nullify the testator's intentions and bequests if necessary to satisfy a surviving spouse's entitlement.

[32] If spouses are not separated, was it intended by the Legislature in protecting the rights of surviving spouses that through a combination of applications a spouse could effectively nullify or modify a testator's written wishes.

[33] Also troubling is whether the protections afforded by the various Matrimonial Property Acts was meant to permit a spouse not in contemplation of separation to take under both the *Matrimonial Property Act* and under the will to the extent the wishes of the testator could be avoided entirely.

[34] Were the sections relating to preservation of a spouses right to pursue a division of property action intended to protect the right of separated spouses (as a personal right) or were they intended to include an application by a spouse in a marriage where the spouses were not in contemplation of separation or divorce.

[35] If the latter then under both the *Matrimonial Property Act* and the *Probate Act* the court must be alert to the rights of both the surviving spouse and the deceased as represented by the executor.

[36] In *Levy v. Levy Estate*, {1981} NSJ No.555 at paragraph 52, 50 NSR 14, Hallett J. opined about the potential consequences of an application for division

under the *Matrimonial Property Act* might have on the testator's intentions as expressed in the will.

> "The legislature has now extended the court's right to interfere beyond just the need for maintenance in such a way as to drastically interfere with a testator's intention as to the disposition of his property following his death as evidenced by his will. In my opinion a court will be very reluctant to order an equal division of matrimonial assets if a testator has made adequate provision in his will for his surviving spouse. However, the fact that a testator has made adequate provision for his surviving spouse is not a factor the court can consider on an application for equal decision as it is not a factor mentioned in Section 13 of the *Act* that justifies the court in making other an as equal division. However, I venture to say that it may be a factor judges will consider but not give expression to on the written page (para60)."

[37] At this stage neither the executor nor the interveners contest Mrs. Casavechia's right to pursue an application under the *Matrimonial Property Act* to seek a division of property.

[38] In this circumstance as noted in *Levy v Levy* the testator prima facie has made adequate provision for his surviving spouse.

[39] The contest for an unequal division comes from the interveners and not the trustee as representative of the estate of the deceased spouse.

[40] As it relates to the interveners action, the question remains whether the right to call for an unequal division under the *Matrimonial Property Act* is a personal right of the surviving spouse and the deceased through his represented.

[41] How does this right give rise to the Interveners to seek an unequal division of property under *the Act* (not argued and unanswered)?

The Last Will and Testament

[42] The testators will was signed October 2nd, 1996. Mr. Casavechia died September 1st, 2012. Probate was granted on November 2nd, 2012.

[43] In his last will and testament Mr. Casavechia defines his children as follows;

> "6. The terms "my child" "my children" and child of mine" include Sheldon Casavechia and Nicole York both of whom I have adopted."

Joint Property

[44] Mrs. Casavechia is named as the sole beneficiary by right of survivorship of any real property deposits or investments in their joint names.

The land in dispute

[45] 379 Caldwell Road, Cole Harbour, the land in dispute, is not in the joint names of the couple.

[46] The value of the estate is in the described property.

[47] The property in dispute is described as 28 acres of mostly undeveloped land with frontage to Morris Lake in the suburban area of Cole Harbour, Dartmouth, Nova Scotia. It includes a matrimonial home, garage and barn described as PID 00403386.

[48] There are 66 feet of street frontage close in proximity to the residential property described in the will (matrimonial home, outbuildings and three acres).

[49] The lower portion of the land has lake front access.

[50] 3(c) Ms. Casavechia was granted the right to hold the "residence property" in her husband's name at 379 Caldwell Road as a home during her lifetime or for such shorter time as she desires or the trustee in his absolute discretion considers appropriate (my emphasis)

[51] She was responsible for all expenses of maintaining the property whether of an income or capital nature.

[52] Should Mrs. Casavechia need funds to complete this task the trustee, in his absolute discretion was entitled to sell such a portion of the property as was necessary for the purpose of paying the expenses as described.

[53] If a sale was necessary, the trustee was to reserve from this sale, sufficient funds to guarantee the bequests for his grandchildren Josh and Jason Downey (a total sum of $40,000 - see Pg. 2 of 8 Last Will & Testament clause (d)(vi)).

[54] The trustee had the sole discretion upon Mrs. Casavechia's death or if he considered it no longer appropriate to retain the property, to sell the property.

[55] Should the trustee determine the property needed or ought to be sold he was to subdivide the property to permit the house, outbuildings and three acres of land (the house property) to be retained by Mrs. Casavechia.

[56] Upon approval of the subdivision and on her application, the trustee was to convey the house property to Mrs. Casavechia for her own use absolutely.

[57] The trustee's discretion relating to the use and occupation of the property and in all other matters relating to the provisions of this paragraph was to be final and binding on all concerned.

Proceeds of Sale

[58] The testator set out specific bequests totalling $132,000.

[59] None of these bequests are challenged herein.

Residual

[60] (d)(vii) The balance of his estate was to go to Mrs. Casavechia absolutely. This included personal chattels and automobiles.

Codicil

[61] A handwritten codicil dated Sunday, November 14th, 2010, was added to the will by decision dated April 2nd, 2014.

[62] In this codicil the testator acknowledged his promise to give to his only daughter Shannon, a lake front building lot (as described in the codicil) on the Caldwell Road property.

[63] The gift of the lot is net of all expenses and taxes and is to be conveyed when his lake front property is sold and will be in accordance with the other lake front lots.

[64] The trustee was granted the right to make the final determination as to the location and dimensions of the lot devised by the codicil or to seek the Court's assistance regarding the codicil if necessary.

[65] The Applicant has appealed this decision.

[66] The matter was heard by the Court of Appeal on February 9th, 2015.

[67] As of the date of the hearing a decision from the Court of Appeal was unavailable.

Disagreement

[68] Both the trustee and the interveners argue that the combination of the Young proposal on the acreage split and the Applicant's proposal as to how to subdivide the property leave her with the upper portion of the property. This, they argue, would result in an unequal division in favour of the Applicant.

[69] The interveners do not agree to share the costs of the survey to assist in the subdivision suggested.

[70] They demand the Applicant pay for the survey to determine a fair division of the Property should she continue to suggest a "division in kind as she proposes."

[71] All parties acknowledge the fact that the Applicant cannot fund this herself outright.

[72] The interveners are not adverse to the trustee issuing a loan to the estate secured against the property to fund the survey.

[73] They intend to contest the accounts should the estate absorb this cost.

[74] Although there is merit to their wish to contest a survey limited to achieving the Applicant's proposal as to a possible subdivision; their position is not entirely reasonable.

[75] In the usual matrimonial property application where both spouses are living at the date of the division, each or either party *may* be called upon to contribute to evaluations or assessment made necessary to achieve an appropriate division.

[76] The cost *may* be apportioned between the competing parties or deducted along with other ordinary disbursements before arriving at a net equity.

[77] The will in this case contemplates a subdivision to effect section 3(c) of the will at the estate's expense.

[78] The trustee will in all likelihood have to employ a professional(s) to reach a closer and more reliable value of the property which may include some research into the prospect of development options, before it concludes whether the best

option is to seek to sell the entire parcel or the remaining parcel after the residential property is subdivided or some other alternative.

[79] These seem like legitimate expenses.

[80] However, the trustee is not bound to pay the costs of a survey to determine if the proposal suggested by the Applicant is feasible particularly if it yields an unequal division and a corresponding diminishment in value of the remaining lot.

[81] The Applicant might, therefore, be called upon to pay the difference between what was contemplated and what she wishes to advance.

[82] The interveners must bear in mind that, aside from the Applicant's interest, she is the residual beneficiary and some of the costs will inevitably be coming out of her share of the estate.

[83] Preventing the trustee from making reasonable expenditures as he sees fit may result in costs assessed against the offending party.

Real Property Valuation

[84] In effecting a division of property pursuant to the *Matrimonial Property Act* when one party seeks to maintain the property one has to know, with a reasonable degree of certainty, the value of the land sought to be divided or apportioned to one of the parties either though appraisal, sale or other method.

[85] In this case there are competing interests.

[86] Given the Applicant's wishes to stay on her portion of the property, the effect of that wish may reflect on the feasibility of subdivision or partition as an alternative to an order for sale of the entire property.

The Issue

[87] What is the value of the land in total and per acre? How can the trustee achieve an equal division of the real property? How is this value discovered?

Expert Evidence

[88] There are two professional appraisals. All counsel agreed on their expert qualifications.

Young Report

[89] Mr. Paul Young, an accredited appraiser with the Canadian Institute Appraisal (AACIP. APP) determined the market value of $2,670,000 as of April 9th, 2014.

[90] He identified the house and 12.16 acres as one half and the bulk land of 14.84 acres as the other half.

[91] He concluded that each half of the estate would be worth $1,335,000.

[92] He recommended that the *optional subdivision plan should be determined by a qualified surveyor giving equal consideration to the lake frontage.*

[93] Mr. Young was not aware of the most recent attempts to sell the property. He advises had he known, he would normally have investigated this information.

[94] The Applicant takes the Young report one step further, asking that she keep the upper portion of the land and asking for a for a buffer zone between her and the adjoining property. Those additional requests are wishes and not necessarily entitlements.

Evidence of previous offers

[95] Using the Young report to support her demands, the Applicant produced evidence of previous negotiations as to price per acre prior to the testator's death.

[96] There is evidence of three potential interested buyers. The offers and expressions of interests occurred between April 23rd, 2010 to shortly before the testator's death in 2012.

[97] The evidence of conditional offers produced different valuations:

1) 18acres for 1 million ($55,000 per acre)
2) 17acres fir 1.190 million ($70,000 per acre)
3) 28acres 2.520 million ($90,000 per acre
4) 18 acres 1.350 million ($75,000 per acres)
5) 18 acres for 1.710 million ($95,000 per acre)
5) 20 acres for 1.8 million ($90,000 per acre)
6) 20 acres for 1.5 million ($75,000 per acre)
7) 17.4 acres for 1.8 million ($103,448 per acre)
8) 15.4 acres for 1.6 million ($103,896 per acre)

[98] Each appeared to relate to the lower section. Conditions differed and included the existence or not of a right of way, road access, costs of and ability to obtain developments permits, surveys, inclusion or not of a serviced lake front lot, inclusive of the island or not, etc.

[99] The evidence supports a conclusion that during the early discussions surrounding the testator's expression of intent Mrs. Casavechia was unhappy with her husband's decision to sell the designated number of acres. She sought legal advice to secure her interest and stop the agreement.

[100] On July 29th, 2010 the developer was served with notice by the testator that the land was matrimonial. The offer was withdrawn.

[101] The second last offer was about to be finalized when the testator became ill. When he recovered, the testator was convinced by his wife to reduce the acreage to 15.4 for $1.6 million not inclusive of the island. They also asked for Lake Frontage.

[102] By the time the counter offer was put forward, the buyers withdrew their offer.

[103] The agent made it clear to the testator and the Applicant that the delays and changes in acreage for sale had a (negative) effect on getting an agreement.

[104] The evidence allows me to conclude that preceding his death the testator was interested and anxious to sell portions of the land.

[105] Traditionally, Mr. Casavechia purchased and sold land without Mrs. Casavechia' s involvement. Legal title was always in the testator's sole name.

[106] The testator was intent on selling larger portions of the property than Mrs. Casavechia was prepared to allow.

[107] Mrs. Casavechia confirmed with her husband and potential purchasers that the property was matrimonial and her consent was required before sale.

[108] Mrs. Casavechia was not always present throughout the negotiations as in the most recent pre-death discussions when it was a clear the testator was interested in selling.

[109] The unsuccessful process of attempting to arrive at a sale was frustrating for Mr. Casavechia and at times frustrated by Mrs. Casavechia.

[110] This evidence is helpful because it gives the Court some insight into the difficulty the testator encountered arriving at a firm offer of purchase and sale between Mr. Casavechia and the potential purchasers /developers during his lifetime,

[111] The Applicant and her husband were not always of one mind.

[112] The evidence of these agreements however, does not allow me to conclude what valuation to put to the acreage on the lower half of the property.

The Piccott Report

[113] On behalf of the estate the Trustee retained Mr. Piccott to review the Young appraisal.

[114] Mr. Piccott is also an accredited appraiser (AACIP. APP).

[115] He agreed with the Young report as it relates to the value attached to the house, one acre and the two outbuildings of $240,000. (See residual property paragraph (c) pg. 2) (Note Will reflects 3 acres Valuation 1).

[116] It is within contemplation of the will that the trustee may need to effect a subdivision to sell portions of the land to assist the Applicant with maintaining the property.

[117] Mr. Piccott proposed that the land has a uniform value per acre **if** considered as a vacant parcel of 28 acres. He concluded however that not all acres would have the same value if divided between upper and lower.

[118] He further noted that the division between upper and lower *may* be the best alternative.

[119] He suggests splitting the upper portion and lower portion with the buildings intact may result in a lower value for the lower portion (Lake Front).

[120] Further, after the Applicant has taken her proposed portion, the manner of division may hamper the development of the remaining portion for a number of reasons including more costly development costs.

[121] To subdivide the land a development agreement is required. To obtain a development agreement there needs to be sufficient road frontage. The easement from the road (the portion adjacent to the residential property) is insufficient. A new roadway over the existing easement would be required.

[122] In July 2014, correspondence received from the development intern planner for the HRM suggested that to qualify for a development agreement there would have to have sufficient public road frontage within the lands zoned a CDD.

[123] The proposed lot does not have public road frontage. Therefore tehy did not recommend applying for a planning application for a development agreement

[124] Mr. Piccott's review and report acknowledge he did not have personal knowledge of the land or access to it. Nor did he undertake the extensive assessment work followed by Mr. Young.

[125] He did not inspect either of the comparison sale property or the land which is the subject matter of this hearing.

[126] He met with two known local experienced developers.

[127] His enquiries left him with a number of unanswered questions.

[128] Mr. Piccott was concerned about the unexplained discrepancy in sale value for the two adjacent land sales used in the direct comparison approach. These two lots are the only lots in close proximity with the subject property. He was unable to satisfy himself regarding the large differences in sale price.

[129] There was general agreement that the third comparison property, a distance from the subject property, was not a helpful comparison.

[130] Mr. Piccott obtained a topographical map from Geometrics Centre in Amherst. This disclosed to him the difference in elevation between portions of the property which may impede development agreements for the portion of the property with more severe decline; thus affecting the value of per acreage.

[131] The upper portion which Mrs. Casavechia wants to receive is the flatter portion with road access. It *may be* more valuable than the lower portion.

[132] After his review of the topographical map and his discussion with the developers, one of whom was familiar with the subject property, Mr. Piccott raised a reasonable concern with the conclusion in the Young report that the topography is "generally level with a moderate decline to Morris Lake"

[133] Mr. Piccott describes the rate of decline relating to 49% of the total land area as best determined moderate and the remainder a severe decline potentially affecting development.

[134] He identified as problematic the contour of the property in part of the larger parcel that might influence development options.

[135] He determined that he did not have sufficient information to determine the price per acre nor could he give a value to the entire 28 acres without additional research.

[136] He concluded there were many significant factors that could affect the value of the lower portion of the property (water side).

[137] These factors include the need for a right of way, an enhanced road access to prevent land locking the lower portion, the requirement for a buffer zone on the lake front which *may* affect valuation, the fact that a large development would require a larger pumping station, the impact on the elevation and decline on the valuation of portions of the subject property.

[138] The conclusion he reached was that the best option given the complications relating to subdivision, would be that the entire 28 acres should be exposed to the market and sold as one property.

[139] Should the Applicant succeed in her current application, her proposal as to how that is to be effected might well result in an unequal division reducing further the value of the lower portion.

[140] Even though the testator granted the Applicant the largest share of his estate, the estate and the other beneficiaries are entitled to their bequests.

[141] The trustee must effect a division that permits him to address the estate requirements and other bequests before the residual is transferred to the Applicant.

[142] The Court must address a division that addresses the Applicant's entitlement to a division of matrimonial property and the right of the estate to a division that is fair.

[143] There is insufficient evidence before me to determine whether the Applicant's proposal will obstruct successful development and thus affect value.

The trustee's concerns

[144] The trustee is concerned about the manner of subdivision, the effect of the proposed subdivision on the development potential, price per acreage specific to

any differences as a result of grade or lot location and the eventual sale price and tax implications.

[145] The trustee is seeking to effect an equal dollar division to retain for all beneficiaries, including the interveners and the residual beneficiary, that which is rightfully theirs.

[146] Neither the trustee nor the interveners are seeking, as their first option, to force the sale of the residential potion of property containing the matrimonial home outbuildings and acreage gifted to Mrs. Casavechia.

Options include and are not limited to:

1. Subdivide the matrimonial home and a small allotment of surrounding land for Mrs. Casavechia, sell the remainder and divide the funds.
2. Subdivide two equally valued portions of the property one for Mrs. Casavechia and one for the estate.
3. Subdivide a complete lot development and subdivide a few estate sized lots with water view.
4. List the entire property, first effect an equal division in accordance with the *Act* and subsequently divide the remaining net equity in accordance with the testator's wishes. A developer may well prefer this option.

[147] There may well be other options that would permit the Trustee to give full effect to the terms of the will.

[148] Currently not enough information exists to determine the most beneficial achievable option under the *Act* and subsequently pursuant to Probate.

Survey Costs

[149] Mr. Young and Mr. Piccott, both qualified experts, suggested a survey be completed to confirm if subdivision was possible.

[150] They both confirmed this was beyond their expertise.

[151] The parameters of this survey and who bears the cost of completion is one of the principle issues.

[152] The survey requested by the Applicant may not be the most efficient use of the estate funds and may not produce a viable option for subdivision that is fair and equitable.

[153] The costs to effect the transfer of title of the residence property (matrimonial home and two outbuildings with the acreage) is a cost the testator allowed for his estate to absorb.

[154] Should the Applicant elect to effect this subdivision due to need or other reason it is reasonable to conclude that the costs of that should come from the estate.

[155] The cost of a larger survey, as requested by Mrs. Casavechia, could result in a significant expense beyond that that was authorized by the estate.

[156] It could produce a result that causes the trustee to reject the subdivision proposed or a result that is an unequal dollar value of the property.

[157] All of the offers or expressions of interest required the potential buyers to absorb the costs of survey, development applications and permits.

[158] In the discussions between the potential buyers and sellers that obligation was not the subject of counter offers or challenges.

[159] Were he alive today it would be fair to conclude that the testator would have insisted that the buyers absorb the cost of the larger survey required for development purposes.

[160] Thus, this larger survey is an expense in ordinary circumstances the estate would not necessarily need to bear.

The unknown factors

[161] Since the Applicant chooses to take under the *Act* and this must be accomplished first, the court has to have sufficient information as to how to effect an equal division in light of her wish to remain on the property.

[162] Once the land is subdivided to provide Mrs. Casavechia her portion under 3(c) of the will (the home the two outbuildings and three acres) the question remains whether the remainder of the property can be subdivided in such a manner to equalize the shares without adversely affecting the value of both divisions.

[163] In answering this question one may need to know whether every acre will be equal in value; whether the decline that exists (moderate or severe) will hamper development and thus affect market price and whether the manner of subdivision will decrease marketability?

[164] Neither expert could provide answers to these questions.

[165] The Young appraisal contains some standard assumptions which if incorrect will affect the value of this property.

[166] Currently municipal sewer and water services are available. There is some suggestion they are not of sufficient capacity to allow for residential development which is the highest and best use of the land according to the Young report.

Developers Opinions

[167] The developers were not present for cross-examination.

[168] The evidence indicates that developers may well provide the optimum price should the land be sold.

[169] Given I did not hear their evidence and it was not subject to cross-examination, I cannot draw any firm conclusion on their opinions as expressed to the appraiser.

[170] However, as a result of Mr. Piccott's discussions with them, in addition to his views regarding the effect of the decline on portions of the property, the assessor has raised reasonable concerns about the value per acre and the value of the entire property including its development potential after the residential lands are exempted.

[171] An equal division cannot be effected until these questions are answered.

Conclusion

[172] There is insufficient evidence to permit the Court to effect an equal division of the subject property or to determine that all acreage is equal or that this property can be subdivided in a fashion to effect the Applicant's wish or the estate's entitlement.

[173] If Mrs. Casavechia takes an equal division under *the Act* (which is what she is seeking) then she asks to receive an equal share of the property.

[174] Given the Applicant is adverse to selling the entire property the value has to be determined with greater precision, bearing in mind the differences of opinion in both appraisers' reports, the effect the differences in grade (moderate severe) may have on development and the value of the land as a whole as opposed to the value once a subdivision if proposed has been effected to obtain equal dollar value as opposed to equal land value.

[175] To cause the estate to take on an expense that a potential buyer may ordinarily be required to pay depletes the estate assets.

[176] All parties confirm they are not able to indicate the cost of the survey that would be required by a potential buyer to arrive at decision as to the best use of the property.

[177] Neither can the parties advise the Court that a survey is all that is required.

[178] That is a function assigned to the testator's trustee.

[179] In the offers to purchase the developers themselves were not certain whether they could convince the authorities regarding the necessity of an easement or road access.

[180] If the proposal advanced by Mrs. Casavechia under the *Matrimonial Property Act*, in fact, favoured her with the more valuable property with road access that would in effect be an unequal division of the subject property.

[181] If her proposal diminished the value of the lake shore property that might be an instant where the trustee would be required to make a decision opting for sale of the total land mass as suggested on page two, paragraph two.

[182] It is in the interests of all parties to divide the property fairly and equally. No party can, at this stage, speak to what that division should be.

[183] The offers do not help in establishing a value as the number of acres was always in issue and the proposed sale related to the lower section.

Conveying a Deed to Mrs. Casavechia as Tennant in Common

[184] In the interim Mrs. Casavechia asks for an order granting her a half interest in the property by way of a deed as tenants in common.

[185] The Court has the ability to accomplish this through section 15 of *The Matrimonial Property Act.*

Powers of court upon division

15 On an application for the division of matrimonial assets, the court may order

(a) that the title to any specified property granted by the court to a spouse be transferred to or held in trust for that spouse for such period, or absolutely, as the court may decide;

(b) the partition or sale of any property;

(c) that payment be made out of the proceeds of a sale ordered under clause (b) to one or both spouses, and the amount thereof;

(d) that any property forming part of the share of either or both spouses be transferred to or held in trust for a child to whom a spouse must provide support;

(e) that either or both spouses give such security, including a charge on property, that the court orders, for the performance of any order made under this Section;

(f) that one spouse pay to the other spouse such amount as is set out in the order for the purpose of providing for the division of the property,

and make such other orders and directions as are ancillary thereto. R.S., c. 275, s. 15.

[186] Neither the interveners nor the trustee debate Mrs. Casavechia's entitlement under the *Matrimonial Property Act*.

[187] There is no evidence of any unreasonable delay nor any prejudice to Mrs. Casavechia or threat to her entitlement.

[188] If a deed conveying a one half interest in the land were to be given to Mrs. Casavechia as a tenant in common resolution of this issue would be no further ahead. At this stage it would complicate the matter, add another layer and route of possible recovery through a different statute.

[189] Whether under the *Matrimonial Property Act*, the *Probate Act* or the *Partition Act* the court first needs to know the value and whether the land can be divided without prejudice to the parties and if so in the most advantageous manner.

Sale of land

28 (1) Where

(a) the land, or any part thereof, cannot be divided without prejudice to the parties entitled; or

the Court or a judge may order that such land shall be sold after such notice and in such manner as the Court or judge directs, and that the net proceeds of such sale shall be divided among the parties entitled.

> (2) Such order may be made instead of an order appointing commissioners for the division of the land, or may be made at any time subsequent to such an order.

[190] Premature judicial intervention into the affairs of spouses under the *Matrimonial Property Act* and in the affairs of a testator ought to be avoided or cautiously exercised if unnecessary to effect all parties' entitlement.

[191] Given the historical difficulties between the testator and Mrs. Casavechia as it relates to the sale of the property it is my conclusion that if I were to transfer to Mrs. Casavechia her half as tenant in common without knowing what her half was this will likely result in further litigation.

[192] Conveying by deed to Mrs. Casavechia a half interest (which she already has) simply transfers the authority from all parties to the division under both the *Act* and the estate provisions to favour Mrs. Casavechia, increasing her power to intervene at the expense of those entitled to the other half, including the estate, the other beneficiaries and the interveners should they pursue their applications under the *Testators Family Maintenance Act*.

[193] It would delay the resolution of the estate if there were not agreement.

[194] This is a family divided. The beneficiaries are at odds with how the estate should be divided.

[195] While the Court is required to first focus on a division pursuant to *the Act*, I cannot ignore the rights of others in the subject property or effect a change in the decision making powers that exist favouring one party over the other until, failing agreement between the parties, further evidence allows the Court to effect an equitable and just division.

The validity of the codicil

[196] Absent a final decision from the Court on the codicil, conveying legal title of half the property might give to Mrs. Casavechia an interest in land that might otherwise be excluded from the division.

[197] The trustee has all the powers it needs to obtain answers to the question in the most expeditious manner, incurring the most reasonable costs.

[198] That the interveners suggest they will contest the costs ought not to interfere or stop the trustee from doing the proper research to determine how, in the most cost efficient manner, the sub division ought to take place, if at all.

[199] The trustee is in the best position to determine what is needed to arrive at a conclusion as to value.

[200] Without further evidence to sway the court in accordance with the burden of proof, I therefore decline to transfer title at this time.

Unequal Division

[201] The interveners echo the trustee's concerns that the Applicant's proposal will result in an unequal division.

[202] They also ask for an unequal division to account for the unequal tax treatment as between the two shares.

[203] Mrs. Casavechia will have the benefit of a spousal rollover on any share of the property that vests in her within 36 months of the date of the testator's death.

[204] She will also have a principal residence exemption for the half hectare on which the home and outbuildings are situate.

[205] The interveners rely on section 13 (b) and (m) of the *Matrimonial Property Act* set out below.

[206] In assessing this claim section 13 ought to be considered in context of the legislative scheme.

> WHEREAS it is desirable to encourage and strengthen the role of the family in society;
>
> **AND WHEREAS for that purpose it is necessary to recognize the contribution made to a marriage by each spouse;**
>
> AND WHEREAS in support of such recognition it is necessary to provide in law for the orderly and equitable settlement of the affairs of the spouses upon the termination of a marriage relationship;
>
> AND WHEREAS it is necessary to provide for mutual obligations in family relationships including the responsibility of parents for their children;
>
> AND WHEREAS it is desirable to recognize that childcare, household management and financial support are the joint responsibilities of the spouses and that there is a joint contribution by the spouses, financial and otherwise, that entitles each spouse equally to the matrimonial assets:
>
> 12 (1) Where
>
> (d) one of the spouses has died,

> either spouse is entitled to apply to the court to have the matrimonial assets divided in equal shares, notwithstanding the ownership of these assets, and the court may order such a division.
>
> **Factors considered on division**
>
> **13 Upon an application pursuant to Section 12**, the court may make a division of matrimonial assets that is not equal or may make a division of property that is not a matrimonial asset, where the court is satisfied that the division of matrimonial assets in equal shares would be unfair or unconscionable taking into account the following factors:
>
> (a) the unreasonable impoverishment by either spouse of the matrimonial assets;
>
> (b) **the amount of the debts and liabilities of each spouse and the circumstances in which they were incurred;**
>
> (c) a marriage contract or separation agreement between the spouses;
>
> (d) the length of time that the spouses have cohabited with each other during their marriage;
>
> (e) the date and manner of acquisition of the assets;
>
> (f) the effect of the assumption by one spouse of any housekeeping, child care or other domestic responsibilities for the family on the ability of the other spouse to acquire, manage, maintain, operate or improve a business asset;
>
> (g) the contribution by one spouse to the education or career potential of the other spouse;
>
> (h) the needs of a child who has not attained the age of majority;
>
> (i) the contribution made by each spouse to the marriage and to the welfare of the family, including any contribution made as a homemaker or parent;
>
> (j) whether the value of the assets substantially appreciated during the marriage;
>
> (k) the proceeds of an insurance policy, or an award of damages in tort, intended to represent compensation for physical injuries or the cost of future maintenance of the injured spouse;
>
> (l) the value to either spouse of any pension or other benefit which, by reason of the termination of the marriage relationship, that party will lose the chance of acquiring;
>
> (m) **all taxation consequences of the division of matrimonial assets. R.S., c. 275, s. 13; revision corrected.**

[207] In this case the surviving spouse has applied for an equal division.

[208] Section 13 of *the Act* suggests that the decision to consider an unequal division arises out of a spouses' application (presumably the estate of the testator would have the same right) and exists as between spouses.

[209] The benefit they wish shared arises from her status as spouse.

[210] I have no authority supporting the proposition that, as between the surviving spouse and the beneficiaries, there is any right to share tax benefits that arise as a result of a marital relationship or that the tax benefit ought to be sharable with children of the deceased.

[211] Under the will the Interveners rights arise as beneficiaries and as the testator's children, their rights, if any arise, under the *Testator's Family Maintenance Act*.

[212] What, if any, entitlement they would have to be supported by their father's estate as dependent children must be established as fact supported by the law.

> **1** This *Act* may be cited as the *Testators' Family Maintenance Act*. R.S., c. 465, s. 1.
>
> **Interpretation**
>
> **2** In this *Act*,
>
> (a) "child" includes a child
>
> (i) lawfully adopted by the testator,
>
> (ii) of the testator not born at the date of the death of the testator,
>
> (iii) of which the testator is the natural parent;
>
> (b) "Dependant" means the widow or widower or the child of a testator;
>
> (c) "Executor" includes an administrator with the will annexed;
>
> (d) "judge" means a judge of the Trial Division of the Supreme Court or a local judge thereof acting within the district for which the local judge is appointed a judge of the county court;
>
> (e) "Testator" means a person who has died leaving a will. R.S., c. 465, s. 2.

Order for adequate maintenance and support

> **3 (1)** Where a testator dies without having made adequate provision in his will for the proper maintenance and support of a dependant, a judge, on application by or on behalf of the dependant, has power, in his discretion and taking into consideration all relevant circumstances of the case, to order that whatever provision the judge deems adequate be made out of the estate of the testator for the proper maintenance and support of the dependant.

[213] I have no evidence that the interveners were intended to be able to advance an application for an unequal division; absent a finding that they are classified as

dependants; between the surviving spouse and their entitlement as beneficiaries under the will.

[214] Indeed there is some authority in other provinces that the right under the matrimonial property Act is a personal right and while it may be pursued against the estate or by the estate against the surviving spouse what authority exists that sugest a beneficiary can advance that application for unequal division?

[215] If an argument arises as to unequal division, ought it to come from either Mrs. Casavechia or the trustee on behalf of the estate?

[216] In addition, the potential for a spousal rollover referred to in the interveners brief does not eliminate the tax, it defers it until the surviving spouse disposes of the property or the property is deemed to have been disposed of at which time the gain will be taxed.

[217] The argument advanced seems to suggest the interveners and other beneficiaries ought to share the benefit of deferral leaving Mrs. Casavechia, her estate or her future beneficiaries responsible for the tax, if and when it is disposed or deemed to be disposed of with no corresponding responsibility on them to share the tax with her or her estate.

[218] The principal residence exemption arises out of her status as spouse.

[219] Should the interveners wish to advance this argument they might consider providing factual support and authority to justify an unequal division that flows from the spirit and intention of the *Matrimonial Property Act* before I would consider ordering a spouse to share with a family member, or other beneficiary, a tax benefit indirectly by way of an unequal division under the *Matrimonial Property Act*.

Conclusion

[220] Ruling on the application for a division of matrimonial property is premature given the unanswered questions. The value of the greatest asset is undetermined.

[221] More information is necessary that would assist the Court in creating a fair and equable division

[222] The Court accepts the position advanced by the trustee that there is work remaining to be completed before an equal division can take place.

[223] The Court recognizes the authority of the trustee to effect the necessary reports to carry out the terms of the will recognizing the right of the Applicant under the *Matrimonial Property Act* must be determined first, before the balance of the estate is divided in accordance with the testator's wishes.

[224] There is no evidence the Applicant is being denied funds to address expenses to meet her obligations.

[225] I suspect the Applicant does not want to seek expenses from the estate because that may trigger a possible subdivision and sale of the property to pay the expenses. The Applicant has made it clear she does not want to sell her portion of the property.

[226] To seek compensation may restrict her by operation of the will to a portion less desirous than that which she wishes under the *Act*.

[227] The trustee has the power to effect sale to meet those expenses and has advised her by letter to seek redress should she need to be compensated for expenses associated with the maintenance of the lands and property.

[228] If there was such evidence and the trustee refused to assist as directed by the Will that would merit Court intervention.

[229] There is no evidence before me that she is being denied other personal assets.

[230] The Applicant wants a buffer. This may not necessarily flow from an equal division or the operation of the will depending on the best use of the remaining portion.

[231] The trustee and beneficiaries need to know the value of the property having regard to the questions raised by Mr. Piccott.

[232] The trustee requires more information to divide the property, whether under the *Matrimonial Property Act* or the *Probate Act*.

[233] Reasonable questions have been raised regarding the steepness of the slope and the effect of subdivision on effecting an equal division as proposed by the Applicant.

[234] Those questions require expert advice in order to maximize the assets of the estate.

[235] While a survey may be necessary it may not be the most helpful at this stage and the parameters must be defined.

[236] The trustee has the power to order such survey as is necessary to effect the testator's wishes.

[237] Section 7(j) allows the trustee to borrow against the estate to effect a loan.

[238] I see no valid reason at this stage, without more, to usurp the role of the trustee as granted by the testator.

[239] The trustee has the power and the responsibility to undertake these enquiries to effect the estate management, not simply to satisfy any one beneficiary.

[240] Therefore, I decline without further evidence to rule on what would constitute an equal division.

[241] Mrs. Casavechia has suggested in her brief that she may be open to receiving the residence property as set out in paragraph 2(c) of the will.

[242] In that case a survey would be required to effect that division and that was contemplated by the testator.

[243] When the trustee has in his possession sufficient information to make the decision regarding the property as it relates to his duties to the estate he may well decide that the greatest value will be in selling the remainder and leaving the potential buyer with the costs of any more extensive survey or development responsibilities.

[244] That is within the discretion of the trustee.

[245] The alternative proposal to deed the property to the Applicant as tenants in common with the estate is denied as is the request to order the trustee to conduct a survey at the estates expense to determine whether a subdivision, as proposed by the Applicant, is feasible.

[246] The position advanced by the interveners to require the Applicant to absorb the costs of a survey to effect an equal division of property is denied.

[247] The interveners' request for relief by way of an unequal division of property is denied at this stage for the reasons addressed in the body of the decision subject to the right of the parties to argue it at a later hearing.

[248] Thus, far legal fees, (aside from executor fees), arising out of litigation and the expert report are in excess of $60,700. It does include a contested hearing relating to the codicil and $13,410.81 for the Piccott report.

[249] The estimated executor's fees at this stage are $138,000.

[250] Suffice it to say the testator could not have intended this litigation to deplete the assets of his estate.

[251] The *estimated value* of the lake lot provided by codicil is $90,000. The interveners are entitled under the will to $15,000 each.

[252] The Applicant is the residual beneficiary.

[253] Clearly, the testator wanted the Applicant to remain on the property as long as she wished or was able to reside there. No party at this stage is seeking to have the Applicant vacate the property or contesting her right to a division of the other assets.

[254] To date, she has paid $11,826.94 according to her February 2015 affidavit. The Applicant does not have the cash resources to meet these expenses.

[255] The Applicant does not want to sell her portion of the land.

[256] She has also indicated she is interested in an **equal division.**

[257] Given that there is sufficient value in the estate if properly managed without further litigation, to effect an equal division and the specific bequests of the testator including that made in the codicil, it is highly unlikely in a long term marriage of 44 years the Applicant will get any less than an equal division of the property, plus that which she is entitled to under the will.

[258] If a subdivision can be effected, as Mr. Piccott and Mr. Young suggest, between the upper half and the lower half giving the Applicant the more valuable portion clearly she may have to either accommodate by granting sufficient right of way to avoid hindering development, compensate the estate by equalizing the subdivision to achieve an equitable result or agreeing to subdivide the residential land out and selling the remainder to be divided in accordance first with *the Act* and secondly in accordance with the Will.

[259] The interveners may then decide what, if anything, they can achieve under the *Testators Maintenance Act*.

[260] If the property had to be sold a deed was to be made to her ensuring she had at least the residential property.

[261] Once the $132,000 in other bequests were effected she was to receive the remainder subject to an interpretation as to 3(h) as to what distributable means.

[262] Should the parties fail to agree I highly recommend the parties seek less litigious manner of resolving this through (judicial) settlement conference or binding resolution to avoid further escalating costs and depleting the assets of the estate in addition to further expanding the gulf between the Applicant and the family.

[263] Prolonged delays will unduly prejudice the Applicant.

[264] I reserve the right for the parties to return once there is sufficient evidence to provide more reliable valuation to satisfy the parties as to viable possibilities or to provide the Court

[265] I will adjourn to allow the parties to collect more reliable information and set this down for review to ensure the division goes forward in a timely fashion. The review date will be assigned by scheduling.

[266] Costs may be argued on completion of the application.

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Moira C. Legere Sers, J.