2000 Date:[20010122]
Docket: [SN. No. 1138997]

IN THE SUPREME COURT OF NOVA SCOTIA
[Cite as: MacGregor Estate (Re), 2001 NSSC 9]

IN THE MATTER OF:

THE ESTATE OF ROBERT G. MacGREGOR

- and -

AN APPLICATION TO INTERPRET PARAGRAPH 5(A) OF THE LAST WILL AND TESTAMENT OF ROBERT G. MacGREGOR

DECISION

HEARD:	Before the Honourable Justice A. David MacAdam, at Sydney, Nova Scotia, on January 11, 2001
DECISION:	January 11, 2001
WRITTEN RELEASE OF DECISION:	January 22, 2001
COUNSEL:	Brian F. Bailey, counsel for the Estate of Robert G. MacGregor Ralph W. Ripley, counsel for Robert M. MacGregor and Joyce Williston

<u>MacADAM, J.</u>:

[1] Robert Gardner MacGregor, (herein the "testator"), died on May 7, 1971, having executed a last will and testament, (herein his "will") prepared with the assistance of legal counsel and dated November 6, 1970. In paragraph (5)(a) of his will, the testator provided a life interest to his spouse, of what he described as his summer property, with the proviso that the life interest could be terminated if the spouse advised the executors' she no longer wished to make use of the summer property. The will then directed the executors:

> ...to convey the larger of the two cottages and the land on which it is situated and being part of my summer property to my two daughters Shirley Joyce Williston and Wilma Jean Meyers to their joint and absolute use and to convey the smaller of the two cottages and the land on which it is situated and being part of my summer property to my two sons Robert Melbourne MacGregor and Gordon Ross MacGregor to their joint and absolute use, and that if either one of the two cottages on my summer property should be destroyed or otherwise cease to exist at any time following my death and before the death of my wife, the party to which the cottage was to be conveyed shall be paid the insurance on the full value of the cottage, and that the remaining portion of my summer property shall be conveyed in equal shares between the two aforementioned parties so that each of the two parties can have full utilization of their cottage and a good and sufficient access to the shore of East Bay;

[2] At issue is whether the devises to the daughters of the larger cottage, and to the sons, of the smaller cottage, were as joint tenants or as tenants in common. On this application counsel have agreed there is no evidence, other than the will itself, to assist in the determination of the intention of the testator and after consultation with the lawyer who assisted in the preparation of the will, there is nothing he can add as to the late Mr. MacGregor's intention in respect to the conveyance of the two cottages. Also in agreement, is that pursuant to ***Section 5(1)*** of the ***Real Property Act***, R.S., c. 261, which provides:

> *5(1)* Every estate granted or devised to two or more persons in their own right shall be a tenancy in common, unless expressly declared to be in joint tenancy but every estate vested in trustees or executors as such shall be held by them in joint tenancy.

the onus is on the party suggesting a joint tenancy to establish the testator, in respect to the devise, "*expressly declared (it) to be in joint tenancy*".

[3] Also undisputed is that in the presence circumstance the appropriate approach in deciding whether the conveyances were by way of *"joint tenancy"* or *"tenants in common"*, is to apply the principles outlined by Hallett, J., as he then was, in ***Cook v. Nova Scotia*** (1982) 53 N.S.R. (2d) 87, at p. 104:

> In interpreting this will you must look at the will as a whole. You cannot simply look at the first part of the will and say she made an absolute devise to Robert Cook and stop there. One must look at the whole will. If this is done, it is apparent that the testatrix did not intend to make an absolute devise to her husband.

In *Re Governors of Dalhousie College and University and City of Dartmouth et al.* (1978), 25 N.S.R. (2d) 262; 36 A.P.R. 262; 85 D.L.R. (3d) 532, Cooper, J.A., writing for the court, dealt with the approach a court should take to the interpretation of a will. He stated at p. 534:

> Authorities which set out the rules which should be followed in interpreting a will are referred to in the decision of the trial judge. I add to, or supplement, them by reference to *Re Kirk* (1956), 2 D.L.R. (2d) 527, [1956] O.W.N. 418 (Ont. H.C.), where Kelly, J., said at p. 528:
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> > In my opinion, the first duty of the court in construing a will is to ascertain the intention of the testator from the language used in the will. The proper procedure is to form an opinion, apart from the cases, and then determine whether the cases require a modification of that opinion; the court should not begin by considering how far the will resembles others on which decisions have been given: *Re Blantern, Lowe v. Cooke*, [1891] W.N. 54.
> >
> > There are certain rules of construction to which a judge ought to adhere, *viz:* (1) to read the will without paying any attention to legal rules; *per* Lord Davey in *Comiskey v. Bowring-Hanbury*, [1905] A.C. 84 at p. 89; (2) to have regard not only to the whole of the clause which is in in *[sic]* question, but to the will as a whole, which forms the context of the clause; *per* Lord Birkenhead, L.C. in *Lucas-Tooth v. Lucas-Tooth*, [1921] 1 A.C. 594 at p. 601; (3) to give effect, if possible, to all parts of the will and so to construe the will that every word shall have effect, if some meaning can be given to it and if such meaning is not contrary to some intention plainly expressed in other parts of the will: see *34 Hals.,* 2nd ed., s. 252, pp. 197 *et seq*; (4) when the judge thus determines the intention of the testator he should inquire whether there is any rule of law which prevents effect being given to it: *Hodgson v. Ambrose* (1780), 1 Doug. K.B. 337 at p. 342, 99 E.R. 216.
>
> The principles enunciated by Kelly, J., were quoted with approval by this court in *Re Mitchell* (1970), 12 D.L.R. (3d) 66 at pp. 74-5, 1 N.S.R. (2d) 922 at p. 935, and I approach the interpretation of the late Mr. O'Brien's will with these principles in mind.

[4] Having regard to these principles, counsel for the estate notes the use of the word *"joint"* is not conclusive, referring to the decision of Justice Oyen of the Ontario High Court of Justice in ***Re White*** (1987), 38 D.L.R. (4th) 631, and in particular at p. 633:

> I am satisfied that when the parties to the deed used the word "jointly" they intended to have its ordinary meaning rather than a technical meaning. In *Kidston (Inspector of Taxes) v. MacDonald et al.,* [1974] 1 All E.R. 849 (Ch.D.), Foster J. held at p. 858, that the word "jointly" in that case "should be given its ordinary meaning, namely, concurrently or in common". He went on to hold that the word "jointly" was broad enough to encompass property held as tenants in common. In my view the word "jointly", as used by the parties in the deed of settlement, is broad enough to encompass property held by them as tenants in common as well as joint tenants.

[5] Both counsel have referred to the decision of Glube, C.J.T.D., as she then was, in ***Sellon v. Huston Estate*** (1991), 107 N.S.R. (2d) 6, where the court determined a devise of real property to the testatrix's nephew and niece *"jointly"* created a tenancy in common rather than a joint tenancy. Chief Justice Glube determined the testator's intention by looking at the whole will and was apparently persuaded it was highly unlikely the testatrix used the word *"jointly"* in any technical legal sense by reason of the will having been prepared " . . . *on a stationery store form without any evidence that a lawyer was involved* . . . ". She found there was no express declaration of a joint tenancy and applied the presumption in favor of tenancy in common created under the ***Real Property Act***. The use of the word *"jointly"* was not sufficient to create the express declaration required under the statutory provision.

[6] On the other hand, counsel refer to the decision of Justice Hall in ***Rafuse v. Borne*** (1996), 157 N.S.R. (2d) 118. One of the issues before Justice Hall was whether a provision in a will devising real property to the testator's cousins *"to be owned by them jointly"* constituted a joint tenancy or a tenancy in common. Justice Hall, after referring to ***s. (5)*** of the ***Real Property Act*** and the decision of Chief Justice Glube in ***Sellon v. Huston Estate, supra***, reviewed a number of authorities, including two Chief Justice Glube had concluded had been wrongly decided. Justice Hall referred to the decisions in ***Re Campbell*** (1912), 4 O.W.N. 221(Ont. H.C.), and ***Re Quebec*** (1929), 37 O.W.N. 271, where the use of the word *"jointly"* in devises resulted in the court finding the conveyances were by way of joint tenancy, rather than as tenants in common. Justice Hall then referred to two Ontario decisions where devises containing the word *"jointly"* were held not to create joint tenancies. In ***Re Dupont***, [1966] 2 O.R. 419 (Ont. H.C.) and in ***Re White, supra***, the court held there was no joint tenancy created. In ***Re Dupont, supra***, where the will was written in French, the court, at p. 422, held:

> Even in English the word "jointly" would not be understood by anyone other than the person having training in the common law as meaning or implying survivorship. It is unlikely that even a person highly educated in the English language but having no specialized knowledge of law would, if asked the meaning of 'jointly', think of survivorship.

[7] Justice Hall then noted that in ***Re White, supra***, the court held that the word *"jointly"* was intended *"to have its ordinary meaning rather than a technical meaning"* and interpreted the decision to be based on the court's finding as to the intention of the parties in creating the document of conveyance.

[8] Justice Hall referred to the decision of the Court of Appeals of New York in ***Overheiser v. Lackey*** (1913), 100 N.E. 738, where the testatrix devised to named daughters *'jointly"* a particular lot and later, in the same paragraph, gave the rest, remainder and residue, to her daughters and son *"to be divided equally"*. The majority held that the word *"jointly"* was not used in its technical sense and therefore did not negate the presumption that there was a tenancy in common. Justice Hall, however, found the dissenting judgment of Gray, J., to be more persuasive, at p. 126, commenting:

> The learned judge asks why the testator used the word "jointly" in one devise and not in the other if she did not intend the right of survivorship to attach to the former.

[9] In relating to the case before him, Justice Hall, at p. 127, continued:

> In the present case it will be seen that the testator Joseph R. Allen devised the property in question to his cousins Amy and Emma Allen "to be owned by them jointly", whereas he devised the residue of his estate "to be divided equally among" his two sisters and his two cousins "share and share alike."
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> It seems to me that it defies common sense to suggest that the testator did not intend that the beneficiaries would take title in different capacities under the two provisions of the will. Under the latter, as a result of the words used, "be divided equally among" and "share and share alike", it seems clear that there was no intention that the beneficiaries should take as joint tenants, but rather as tenants in common. That being the case why did the testator use the limiting or conditional word "jointly" in conjunction with the devise of the property in question? The answer, to my mind, can only be that he intended the cousins to take the property other than as tenants in common. In these circumstances there were only two possibilities - that they take as tenants in common or as joint tenants. Since the testator did not intend that they take as tenants in common, then he must have intended that they take as joint tenants.
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> This case, however, is distinguishable from *Sellon v. Huston (supra)* in that the will of the late Joseph R. Allen was typewritten and in proper legal form. One of the attesting witnesses was A.L. Davidson, a prominent lawyer practicing in Middleton at the time the will was executed. In addition to the will containing the usual provisions formulated as a lawyer experienced in drafting wills would do, it also contains appropriate precatory words with respect to the holding by the residual beneficiaries, of shares of stock in a company that the testator had an interest in. In my view, it is not too great a leap in faith to conclude that the will was drawn by Mr. Davidson. Thus it may be presumed that the word "jointly" was being used in its technical legal sense, as suggested by the decisions referred to above, to mean "as joint tenants".

[10] Justice Hall, after indicating from his experience as a practicing lawyer, that lay people when requesting a property to be conveyed into their names as *"joint tenants"*, generally refer to property being conveyed *"jointly"* or by *"joint deed"* and also, that when two or more persons wanted a bank account to go to the survivor they would ask for the account to be *"a joint account"*, then, at p. 128, continued:

> In order to convey property to two or more persons as tenants in common it is only necessary to say "I convey to A and B" without more as a result of the presumption created by s. 5 of the **Real Property Act**. In order to convey as joint tenants it is necessary to add qualifying words to express the intention to do so. By the addition of a qualifying word such as "jointly" it seems to me that even persons "entirely ignorant of the law and unskilled in the precise use of language" would understand that the grantees would not take the property as tenants in common but in an alternative capacity, viz., joint tenants.

[11] Justice Hall distinguished the decision of Chief Justice Glube in ***Sellon v. Huston Estates, supra***, on the basis of presuming that since the will in question had been witnessed by a

well-known lawyer, it had been prepared by the same lawyer, and, as such, he concluded the word *"jointly"* was being used in its technical sense, that is, to mean *"as joint tenants"*.

[12] In submitting that the appropriate approach in interpreting the intention of the late Mr. MacGregor, is to apply a technical meaning to the use of the word *"joint"*, counsel for the devisees maintaining the conveyance was by way *"joint tenancy"*, comments that subsequent provisions in the will, in respect to the distribution of the *"residuary trust funds"*, refer to these conveyances as being *"per stirpes"*. Counsel notes the will was prepared by a practicing lawyer and citing the decision of JusticeRobertson in ***Fuller v. Anderson*** (1891), 20 O.R. 424, suggests the words should be construed in their technical sense. At p. 426, Justice Robertson quoted Sir Richard Arden M. R., in ***Thelluson v. Woodford***, 4 Ves. Jr., at p. 329:

> If words of art are used, they are to be construed according to the technical sense, unless upon the whole will, it is plain that the testator did not so intend:...

[13] Counsel also refers to the decision of the Supreme Court of Canada in ***Ernst v. Zwicker*** (1897), 27 S.C.R. 594, where at p. 601, Justice Gwynne stated:

> The will appears to have been drawn by a person having a slight but by no means an accurate knowledge of the technical language of wills or of the proper use of such language or of the construction put thereon by the courts. In construing wills this is a matter to be taken into consideration by courts when endeavoring to construe an ambiguously expressed will so as best to promote what can be gathered from the will to have been the intention of the testator.

[14] In the context of the present circumstance, it is agreed the will was drafted by a lawyer and this, as noted by Justice Gwynne, in ***Ernst v. Zwicker, supra***, is a consideration to be taken into account in interpreting the intention of the testator. There is also the circumstance that in respect to the *"residuary trust fund"*, the testator provided that the share of any predeceased child should be held in trust for the children of any such child as contrasted with the devise in respect to the summer cottages. There is a clear distinction in the wording incorporated in the will in devising the summer cottages as contrasted with the wording used in devising the *"residuary trust fund"* among the children, including the children of any predeceased child, suggesting an understanding, and therefore an intention, by the testator, to convey in different capacities.

[15] Although the provision in paragraph ***(5)(a),*** relating to a circumstance where one of the cottages is destroyed before the termination of the life tenancy, is far from clear, it is not inconsistent with an intention by the testator to have conveyed the larger cottage to his daughters', as joint tenants, and the smaller cottage to his sons' as joint tenants.

[16] Having regard to the death of Wilma Jean Meyers in December 1997, and by virtue of the right of survivorship associated with property held in joint tenancy, the larger cottage is to be

conveyed to Shirley Joyce Williston for her own use absolutely.

[17] In the devise of the two cottages the phrase used in the will is *"to their joint and absolute use"*. During oral argument, counsel attached no significance to the conjunctive use of the phrase *"absolute use"* in the context of whether or not the conveyances were either in joint tenancy or as tenants in common. Apart from negating the temporal tenancy created by a *"life tenancy"* nothing is suggested by the use of this phrase as to whether the conveyance is by way of *"joint tenancy"* or *"tenancy in common"*.

[18] In the pre-hearing written submission, counsel for the estate raised as an additional issue whether the devise *"effected a subdivision of the lands"*. However, as noted by counsel on behalf of the children supporting the *"joint tenancy"*, to the extent the devise of the two cottages represented a subdivision of the original lands, ***Part IX*** of the ***Municipal Government Act***, S.N.S., 1998, c. 18, as amended, in ***s. 268 (2)(j)*** permits such a subdivision:

> (2) Subdivision approval is not required for a subdivision
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> . . .
>
> (j) resulting from a devise of land by will executed on or before January 1, 2000.

[19] The payment of costs of this application from the estate was agreed by counsel during the course of oral submission and is not in issue.

[20] Judgment accordingly.

J.