

IN THE PROBATE COURT OF NOVA SCOTIA

Citation: MacQuarrie Estate (Re), 2008 NSSC 108

Date: 20080416

Docket: Probate No. 4495

Registry: Port Hawkesbury

IN THE MATTER OF: the Estate of Daniel Angus MacQuarrie,
late of Hays River, in the County of
Inverness and Province of Nova Scotia

Judge: The Honourable Justice C. Richard Coughlan

Heard: December 7, 2007 (in Chambers), Port Hawkesbury,
Nova Scotia

**Amended Affidavit
of Service Received:** February 8, 2008

Written Decision: April 16, 2008

Counsel: Joseph A. MacDonell, for the Applicant/Respondent,
Estate of Daniel Angus MacQuarrie
Martin MacQuarrie, Respondent/Claimant, Self-
represented (did not appear)

Coughlan, J.:

- [1] Martin MacQuarrie filed a claim against the Estate of Daniel Angus MacQuarrie, deceased, in which he seeks *inter alia*, a declaration he is the owner of certain real property through a constructive trust, or, in the alternative, he owns the real property pursuant to the equitable doctrines of unjust enrichment and/or *quantum meruit*, or, in the alternative, a declaration he is entitled to receive compensation from the Estate on the basis of unjust enrichment and/or *quantum meruit*.
- [2] The Estate applies for an order dismissing Mr. MacQuarrie's claim, taking the position the Probate Court does not have jurisdiction to deal with the claim.
- [3] Daniel Angus MacQuarrie died November 11, 1976. He made a Last Will and Testament dated July 10, 1973.
- [4] Mr. MacQuarrie's will is on a printed form and provides as follows:

This is the last Will and Testament of me, Daniel Angus MacQuarrie (Retired) Hays River, Inverness Co. Nova Scotia, hereby revoking all Wills, Testaments or Codicils by me at any time heretofore made.

I devise and bequeath all my Estate, real and personal, to my executors and trustees hereinafter named in trust for the purposes following:-

Firstly, to pay my just debts, funeral and Testamentary expenses, and thereafter in trust to dispose of and pay over or convey the same to the person or persons or corporations hereinafter named as follows:-

I give, devise and bequeath all my Real and Personal Estate which I may die possessed to my son Daniel Frances MacQuarrie Hays River, Inverness Co. N.S.

All the rest and residue of my Estate I devise and bequeath to ... as above.

I nominated, constitute and appoint Daniel Frances MacQuarrie Hays River, Inverness Co. N.S. and Dennis MacQuarrie, Hays River, Inverness Co. N.S. as executors and trustees of this my last Will, with full power and authority to sell and dispose of all my Estate where necessary, and execute any and all Documents requisite to carry out this my Will, and should one or more of my said Executors or Trustees wish to retire I authorize them to appoint a successor instead thereof.

In Witness whereof, I subscribed these presents as printed and written this tenth day of July A.D. 1973.

Signed, published and declared by the said Testator as his last Will and Testament in the presence of us both present at the same time, who in his presence and in the presence of each other have hereunto set and subscribed our names as witness.

Daniel Angus X MacQuarrie
his
mark

Witness Donald Cornelius MacLeod

Address Church Street, Inverness N.S.

Witness Mrs. Allan MacDougall

Address Hays River, Inverness Co. N.S.

- [5] Daniel Francis MacQuarrie died testate on June 1, 1987. Dennis MacQuarrie died on April 29, 1978. Probate of the Last Will and Testament of Daniel Francis MacQuarrie was granted to Albert Hubbard by the Probate Court in Massachusetts, United States of America on September 11, 1987.
- [6] A Grant of Probate with Will Annexed was issued to Albert Hubbard, of Millbury, Massachusetts by the Registrar of Probate for the County of Inverness on June 8, 2005.
- [7] Martin MacQuarrie, a son of Daniel Angus MacQuarrie, filed a claim pursuant to s. 63 of the *Probate Act*, S.N.S. 2000, c. 31 dated December 1, 2005 against the Estate of Daniel Angus MacQuarrie.
- [8] Section 44 of the *Probate Act*, S.N.S. 2000, c. 31 provides:

Application of provisions

44 (1) Nothing in Sections 45 to 56 affects the interest of a spouse in a matrimonial home under the *Matrimonial Property Act*.

(2) Sections 45 to 55 do not apply with respect to

(a) real property that devolves under a will that was executed;
or

(b) real property that devolves in an intestacy where the intestate dies,

before those Sections come into force.

(3) Sections 50 to 64 of Chapter 359 of the Revised Statues, 1989, the *Probate Act*, apply with respect to

(a) real property that devolves under a will that was executed;
and

(b) real property that devolves in an intestacy where the intestate dies,

before Sections 45 to 55 come into force. 2000, c. 31, s. 44; 2001, c. 5, s. 13.

[9] Sections 45 to 55 of the *Probate Act*, S.N.S. 2000, c. 31 came into force October 1, 2001. The *Probate Act*, R.S.N.S. 1989, c. 359 applies to the devolution of the real property of Daniel Angus MacQuarrie.

[10] Martin MacQuarrie's claim appears to be based on events occurring subsequent to the death of Daniel Angus MacQuarrie. The claim raises various possible issues, including when and in whom the real property vested.

[11] Sections 7, 8 and 73 of the *Probate Act*, S.N.S. 2000, c. 31 deal with the jurisdiction and powers of the court:

Jurisdiction of courts

7 (1) Each court has jurisdiction throughout the Province and all grants, licences, orders and process of every court have effect and may be enforced throughout the Province.

(2) A court has and may exercise all the powers and jurisdiction exercised by the courts of probate in existence immediately before February 1, 1901, and by the judges of probate. 2000, c. 31, s. 7.

Powers of courts

8 (1) Each court may

- (a) issue grants;
- (b) revoke or cancel grants;
- (c) effect and carry out the judicial administration of the estates of deceased persons through their personal representatives, and hear and determine all questions, matters and things in relation thereto necessary for such administration;
- (d) order any person who has been named as an executor of a will to appear and probate or renounce executorship of the will;
- (e) order any person who witnessed a will to prove the will;
- (f) order a person to comply with this Act;
- (g) appoint guardians and take the accounts of guardians under the *Guardianship Act*.

(2) Nothing in this Act deprives the Supreme Court of jurisdiction in the matters referred to in subsection (1), 2000, c. 31, s. 8.

....

Same powers as Supreme Court

73 On passing the accounts of the personal representative and the distribution of the estate or in any matter relating thereto, a court has the same powers as the Supreme Court. 2000, c. 31, s.73.

- [12] The claim of Martin MacQuarrie is not a claim properly brought pursuant to s. 63 of the *Probate Act*, S.N.S. 2000, c. 31. It does not effect or carry out the judicial administration of the Estate of Daniel Angus MacQuarrie. It is a claim to certain real property which may involve persons other than the Estate. The claim does not come within the jurisdiction of the Probate Court; rather, it is within the jurisdiction of the Supreme Court.
- [13] I allow the application subject to Martin MacQuarrie's right to bring his claim in the Supreme Court.
- [14] Although Martin MacQuarrie was served with notice of this application, he did not attend at the hearing of the application. The dismissal of Martin MacQuarrie's claim is stayed for a period of sixty (60) days after he receives notice of this decision, so as to allow him time to commence action in the Supreme Court.
- [15] If they are unable to agree, I will hear the parties on the issue of costs.

Coughlan, J.