

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: McGean Estate (Re), 2008 NSSC 145

Date: 20080512

Docket: Probate No: 20,357

Registry: Sydney

In the Court of Probate for Nova Scotia

In the Estate of David McGean, Deceased

Judge: The Honourable Justice Frank Edwards

Heard: March 31 and April 25, 2008, in Sydney, Nova Scotia

Counsel: Andrea Rizzato, for the applicants
Elizabeth Cusack, Q.C., for the respondent

By the Court:

[1] This is an Application for an Order removing Joan McGean as one of the Personal representatives of the Estate of David Raphael McGean.

[2] **Introduction:** David Raphael McGean died intestate on May 3, 2007 in North Sydney, Nova Scotia. The Applicant, Theresa McGean, and the Respondent applied for a Grant of Administration by application, dated May 4, 2007. By Grant of Administration, issued by the Court of Probate for Nova Scotia, the Applicant Theresa McGean, and the Respondent were appointed Co-Administratrices of the Estate of David Raphael McGean.

[3] The intestate, was employed by Marine Atlantic Inc. for approximately thirty-one (31) years. During that period he contributed to a pension plan, which was valued following his death in June, 2007 by Marine Atlantic Inc. at two hundred eighty-three thousand two hundred thirty-seven dollars (\$283,237.00).

[4] Marine Atlantic Inc. determined that the Respondent is a spouse within the meaning of the Pension Plan for Employees of Marine Atlantic Inc. and the *Pension Benefits Standards Act* R.S.C. 1985, c.32 (2nd Supp.), and therefore,

began paying survivor benefits to her. As a result of the survivor benefits being paid to the Respondent, the Estate received no monies from Marine Atlantic Inc.

The Applicants contend that the pension should have been paid to the Estate, rather than the survivor benefits to the Respondent. It is the Applicant's position that the Respondent was not a spouse, within the meaning of the legislation and plan, and is therefore not entitled to the survivor benefits. As such, the Applicants believe that the Estate should commence an action in the Supreme Court of Nova Scotia against Marine Atlantic Inc. and the Respondent for payment into the Estate of the pension plan entitlement earned by the Intestate, and for reimbursement by the Respondent of the amounts already paid to her.

[5] The Applicants further contend that the Respondent is in a position of direct conflict. The continuing payment of the survivor benefits is an immediate benefit to her, which would be lessened if it were to be paid to the Estate and divided amongst all of the heirs. Unless the Respondent agreed that the pension funds should be paid into the Estate and divided amongst the heirs, the Respondent, as Administratrix of the Estate, would be required to bring action against herself, in her personal capacity.

[6] Based on the foregoing, the Applicants believe that the Respondent should be removed as Administratrix of the Estate. Then the Estate could pursue a claim for payment of the Marine Atlantic pension into the Estate.

[7] **Facts:** The Intestate resided at North Sydney, Nova Scotia, at the time of his death. The Intestate had two children, the Applicants, and was separated from his wife, the Respondent. The Respondent is not the biological mother of the Applicants. The Intestate and the Respondent had been separated from one another for approximately twelve (12) years at the time of his death. The Intestate had no common law spouse.

[8] The Intestate was employed by Marine Atlantic Inc. from January 1975 until he retired in October 2006. The Intestate was collecting the pension from Marine Atlantic Inc. at the time of his death. Marine Atlantic Inc. has indicated that the total lump sum value of the pension, as of May 31, 2007 was, as was noted above, two hundred eighty-three thousand two hundred thirty seven dollars (\$283,237.00).

[9] As noted, the Intestate died on May 3, 2007. The Administratrices were unable to locate a Will of the Intestate and therefore filed for a Grant of

Administration. The Applicant, David McGean, did not apply for the Grant, as he is a resident in Kellowna, British Columbia.

[10] As also noted, Marine Atlantic Inc. has commenced payment of the pension survivor benefit to the Respondent. Marine Atlantic Inc. has refused to make any payment to the Estate.

[11] **Legislation: The New Act:** The Applicants rely upon the *Probate Act*, S.N.S. 2000, c. 31. Section 61 provides in part:

“61(1) On the application of any person, the court may remove a personal representative ***where the court is satisfied that removal of the personal representative would be in the best interests of those persons interested*** in the estate and, without limited the generality of the foregoing, if the court is satisfied that

(a) the personal representative has not complied with an order of the court;

(b) the personal representative

(i) is neglecting to administer or settle the estate,
(ii) is wasting the estate” (Emphasis added)

[12] The Application must fail. It is clear that the removal of Joan McGean as personal representative is not in the “best interests of those persons interested in

the estate”. It would only be so if the intended lawsuit with Marine Atlantic were feasible. It is not.

[13] Section 7.1.1(a) of the Pension Plan reads:

“7.1.1 Except as provided under Section 7.1.2 and Section 7.1.3, on the death of the pensioner, ***survivor benefits shall be paid***

- (a) equal to sixty-six and two-thirds percent of the member’s pension ***to the person who was his spouse at the time of retirement***, during the spouse’s lifetime and to the spouse’s estate as a lump sum on the basis of the commuted value of the payments for the remainder of a five-year period from the date of the member’s retirement if his surviving spouse dies within that period.”
(Emphasis added)

[14] “Spouse” is defined in Section 1.32 which reads:

“***Spouse means*** a person of the opposite or same sex who is cohabiting with the member in a conjugal relationship at the relevant time, having so cohabited with the member for at least one year or, if there is no such person, ***a person who is married to the member*** or who is party to a void marriage with the member, except that prior to July 1, 1999. ... Prior to December 31, 1986, spouse meant a person whom the member was married prior to his date of termination and at least one year prior to his death or retirement.” (Emphasis added)

[15] Joan McGean and the Intestate never divorced. They separated in December 1996. A Consent Order dated December 10, 1996 obliged the intestate to make

payments in lieu of spousal support. He continued to make such payments until two months before his death.

[16] On July 18, 2002, the Intestate signed an affidavit of status on a deed which reads:

“That I am the spouse of Joan McGean and have no other spouse or, with respect to the within property, any former domestic partner with the rights contemplated by Section 55 of the Vital Statistics Act, or any former spouse with rights under the Matrimonial Property Act.”

[17] Theresa McLean says that, prior to his death, the Testator had made arrangements with Marine Atlantic Inc. to designate himself as single. There is no documentary support for this assertion. Even if there were, the Intestate took no steps to change the Respondent’s status in law, that is, he never divorced the Respondent.

[18] There is no question but that Joan McGean was the spouse of the Intestate at the time of his death. As such, she is entitled to be paid survivor benefits pursuant to the plan. Those are the terms that bound the intestate. They now bind his Estate. There is no reason to remove Joan McGean as personal representative of the Estate because there is no feasible action for the Estate to pursue.

[19] I am therefore dismissing the application. Jean McGean failed to respond to the notice on the original scheduled date for hearing. She therefore necessitated a second date. The Applicants needlessly incurred costs on the original date because of Joan McGean's failure to respond. Joan McGean is entitled to costs for the second day but these are offset by the expense she caused the Applicants on the first date. The parties therefore will each bear their respective costs.

Order accordingly.

J.