Probate District K(H)
Probate Court File No. 7058

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: MacDonald Estate (Re), 2008 NSSC 253

Date: 20080903
Docket: 296438
Registry: Kentville

In the Court of Probate for Nova Scotia
In the Estate of James Hector MacDonald, Deceased

Application pursuant to Section 68
of the Probate Court Practice, Procedure and Forms Regulations

Judge:	The Honourable Justice Gregory M. Warner
Heard:	July 17, 2008 at Kentville, Nova Scotia
Counsel:	Joseph Cuffari, Solicitor for the Applicant Gloria MacDonald, not present

BY THE COURT:

[1.] A personal representative seeks interpretation of, and directions respecting, a life interest devised by a testator to his wife in his last will.

A. The Will

[2.] James Hector MacDonald's will dated May 1, 2003, appointed his wife Gloria MacDonald as the personal representative and trustee of his will. Her named replacement was his stepson Darrel Leroy Humber, who goes by the name Darrel MacDonald. The will prepared by legal counsel contains some standard procedural clauses. Paragraph 9(a) contains specific bequests and 9(b) a residue clause. In 9(a), the testator bequeathed sentimental items of little monetary value (for example, tie clips and cuff links) to each of his three children and twelve grandchildren from his first marriage, his three stepchildren from his second marriage and his six siblings.

[3.] Paragraph 9(a)(xx) and 9(b) read:

> "9. I give all my estate to the following individuals in the following manner:
>
> a. Concerning specific gifts, I give as follows:
>
> . . .
>
> xx. To my wife, **Gloria MacDonald**, I devise a life estate interest in my home situate in Noel, Nova Scotia. I give the remainder interest in said home to **Darrel Humber**, my stepson.
>
> b. I give absolutely **the rest of all** my estate to my spouse, **Gloria Maxine MacDonald**, for her own use absolutely. If she should predecease me or die within 30 days following my death, I give the rest of my estate to my stepson, **Darrel Leroy Humber**, of Halifax."

B. Background

[4.] The testator died June 19, 2004. Despite requests, Ms. MacDonald did not file, or seek probate of, the will.

[5.] On June 5, 2005, Darrel (Humber) MacDonald, applied for an Order requiring her to produce the will for probate or announce her executorship. In the supporting affidavit, Mr. MacDonald swore that Ms. MacDonald had vacated the homestead, the taxes had gone into arrears and he had paid them to prevent the tax sale, the home was no longer insured and Ms. MacDonald had failed to respond to his lawyer's letter advising her of her obligations and that, if she did not act, he would apply to remove her as personal representative.

[6.] The application was heard by the Registrar of Probate on July 5, 2007. Ms. MacDonald was personally served but did not appear. The Registrar dispensed with her renunciation and ordered that Mr. MacDonald was permitted to apply for probate.

[7.] Mr. MacDonald caused the will to be filed, applied for probate and was granted probate on August 22, 2007.

[8.] The application specified that the estimated value of the estate was $45,000.00 ($40,000.00 for the home and $5,000.00 for personal property).

[9.] On May 28, 2008, Mr. MacDonald applied "for direction with respect to the life interest granted pursuant to the terms of the deceased will to Gloria MacDonald of the home situate in Noel, Nova Scotia as a result of her having vacated the property".

[10.] In support, Mr. MacDonald's affidavit repeats that Ms. MacDonald had vacated the residence in early 2007, had not properly maintained the property which was in disrepair, had not paid property taxes (necessitating him paying taxes to prevent a tax sale), nor maintained the property insurance. He stated that his counsel (Mr. Cuffari) had inquired of beneficiaries who advised they had not received the specific bequests. He attached an e-mail from Ms. MacDonald to Mr. Cuffari sent December 13, 2007.

[11.] Pursuant to section 99 of the *Probate Act*, the Registrar of Probate transferred the application for hearing to a Judge of the Probate Court. It was set down for hearing at Windsor on July 16, 2008, and, because of Mr. MacDonald's physical disability, moved to Kentville for hearing on July 17, 2008.

[12.] The probate file contains the following communications from Ms. MacDonald:

a. a 10 page letter from Ms. MacDonald to Mr. Cuffari dated May 27, 2007, in response to his letter of April 18, 2007, in which Ms. MacDonald stated she moved out of the property because of fear, intimidation and a financial inability based on her small pension income ($250.00 per month in total) to maintain herself on the property; complained about mistreatment by her children; and advised that she had boxes for Mr. MacDonald that he had not picked up since late 2006;

b. a 8 page facsimile to Mr. Cuffari dated July 3, 2007, setting out various particulars of the will and estate since the testators' death, expenses owed by the estate to her and contact information respecting beneficiaries;

c. a short e-mail dated December 13, 2007, to Mr. Cuffari stating that he could arrange to get the key for the house and other items from her; and,

d. a lengthy e-mail to the Court sent July 13, 2008, in response to the Notice of this application, in which she outlines the history of her dealings with the estate, the bequeathed items and the home, including the threats that led her to vacate the

home. She stated her limited income ($250.00 per month), along with her fear of Mr. MacDonald, prevented her from attending Court.

C. The Law

[13.] The applicant's brief identifies the issue as whether the widow's life interest still exists or whether, as a result of abandonment in early 2007, her interest ceased. The effective question, as framed by the applicant, is whether the life tenant disclaimed her life interest so as to accelerate the residuary interest.

[14.] In support, counsel cites ***Roberts* v. *Roberts Estate*** (1993) 121 N.S.R. (2d) 58 and ***Skerrett* v. *Bigelow Estate*** 2001 NSSC 116.

[15.] In ***Roberts*** *supra*, MacDonald J. cited **Re Hodge** [1943] 1 Ch. 300, for the proposition that where a person with an interest dies, or their interest ceases "for any other cause" which cause may include a disclaimer, there is no reason to postpone the residuary interest and acceleration takes place. All of this is determined by the intent of the testator.

[16.] In ***Skerrett*** *supra*, Moir J. accepted the proposition that a disclaimer of a life interest is a premature determination of the life interest in the same way that forfeiture of a life interest prematurely determines the interest. In both cases, unless a contrary intention appears, the remainder interest vests in the same way as it would have vested upon the contemplated determination - death of the beneficiary of the life interest. He noted that the application of the doctrine of acceleration is largely dependent upon the intention of the testator.

[17.] The applicant argues that the intent of the testator was that the home was to remain for Ms. MacDonald's use so long as she used it, then vest in Mr. MacDonald. Since Ms. MacDonald has ceased to live in the home, maintain the property, or pay property taxes - thereby risking a tax sale, she has disclaimed her interest.

D. Analysis

[18.] The key to the application is whether the life tenant has disclaimed her life interest, or whether that life interest has in some other manner been terminated or forfeited.

Disclaimer

[19.] In both ***Roberts*** *supra* and ***Skerrett*** *supra*, the life tenants explicitly renounced their life interest (in the latter case, conditional upon a certain result). Ms. MacDonald has not expressed an overt intent to renounce or disclaim her life interest in the property; on the contrary, in all her communications she has written otherwise.

[20.] In **Anger & Honsberger: Law of Real Property,** Third Edition (Canada Law Book, looseleaf to May 2008), edited by and partly written by Anne Warner LaForest, Ms. LaForest writes in Chapter 9, Section 50.30(a)(v):

"[Disclaimer] arises where land is conveyed or devised to a person who refuses it. When a person disclaims a vested estate, the estate passes to the person next entitled and thus a disclaimer will destroy any contingent remainders dependent upon the disclaimed gift."

[21.] In Chapter 25, Section 70.20, G. Thomas Johnson writes:

"The general rule is that, no person is forced to accept an interest assured to them by deed without consent, for the law will not force an interest upon someone against their will unless the person is under some legal or equitable obligation to accept it. If a person disclaims, the deed becomes void *ab initio* . . . Not only a grantee by deed, but a devisee by will may disclaim an estate devised to them and, after the disclaimer, has no interest in the estate.

"A disclaimer may be by deed, but it is not essential to the validity of a disclaimer of a grant of land that it be by deed or by record."

[22.] This Court concludes that a disclaimer is a deliberate renunciation of an interest. Such is not consistent with the facts in this case.

Lesser than Life Interest

[23.] The applicant goes on to submit that the intent of the testator may not have been to give, in effect, a life interest; that is, an interest for the life of Ms. MacDonald, but rather to give some lesser interest.

[24.] **Principles of Property Law,** Third Edition, by Bruce Ziff (Carswell: 2000) writes that a life interest may be created under a will or conveyance by carving a limited freehold interest out of the larger fee simple. At Page 162, he writes:

"Unlike the fee simple, no special terminology is needed for the creation of a life estate at common law. . . . This means that there is no strict code of construction for the life estate. Occasionally, a question of interpretation arises concerning whether a life estate has been give away, or whether some lesser right has been conferred, such as a mere permission (or licence) to use the land. Gifts reserving a "privilege" to live on the land, allowing "free use", permitting the donee to "use" the property, with a gift over "[w]hen she no longer needs" the premises, or the conferring of a right to occupy a dwelling house rent-free, have been found to confer a life estate."

[25.] In **Anger & Honsberger** Chapter 6 Section 20.10(b) Ms. LaForest writes:

"In cases of wills the Courts have always been more ready to try to ascertain the testator's intention than in cases of deeds. . . . In the absence of words of limitation, however, the devisee would take a life estate and a life estate would also be created by express words to that effect."

[26.] There is nothing in the will, prepared by legal counsel on behalf of the testator, to suggest

that the simple words used in Paragraph 9(a) were intended to convey any lesser interest than an estate for the life of Ms. MacDonald.

Forfeiture

[27.] A third argument of the applicant is that the life tenant may be deemed to have forfeited (Counsel includes this within disclaimer) the life interest by failing to fulfill her obligations. In particular he complained that the life tenant has failed to maintain the property, pay insurance and pay property taxes.

[28.] The rights, powers and obligations of a life tenant are discussed in **Principles of Property Law**, *supra*, Chapter 5, and **Anger & Honsberger**, *supra*, Chapter 6.

[29.] In **Anger & Honsberger**, Ms. LaForest writes that it is the inherent right of a life tenant to receive the rents and profits of the lands during the life estate. This creates an entitlement to actual possession and management. The life tenant is not obligated to remain on the property. She writes that a life tenant must pay all annual taxes imposed on the land, but that this liability is limited to an amount equal to the annual value of the land. The life tenant is in the position of a trust, *vis a vis* the remainder man. The life tenant is not bound to insure.

[30.] It appears that the remedy where a life tenant fails in her duty to pay encumbrances is for the remainder man to apply for a receiver to be appointed to appropriate rents for the purpose of paying encumbrances.

[31.] Ms. LaForest states that a life tenant is not bound to repair unless the instrument creating the estate requires it.

[32.] Both Ms. LaForest and Mr. Ziff describe the four categories of waste which serve to limit the extent to which a life tenant may alter the physical complexity of the real property. The categories are:

a. ameliorating waste, which constitute acts that enhance the value of land;

b. voluntary waste, which constitute the commission of acts that diminish the value of land;

c. permissive waste, which constitutes damage resulting from the failure to preserve or repair property (acts of omission or neglect); and,

d. equitable waste, which consists of the wanton, malicious and severe destruction of property.

[33.] The only category relevant to the complaints of the applicant is “permissive waste”.

[34.] Mr. Ziff writes:

> " Responsibility for permissive waste is not automatically imposed on a life tenant. The instrument under which the estate is created must contain such a requirement and unless this is done the life tenant assumes no obligation to repair buildings on the property." (Page 166)

35. From this I conclude that Ms. MacDonald is not responsible for failing to maintain the property.

E. <u>Conclusion</u>

36. I conclude that: - Ms. MacDonald has not disclaimed her life interest;

- the life interest is as expressly stated an interest for the rest of her life and does not require her, but only entitles her, to possession and management;

- Mr. MacDonald may be able to apply for appointment of a receiver to appropriate rents to pay property taxes; and,

- Ms. MacDonald is not responsible for any permissive waste; such waste does not entitle forfeiture of the life interest.

F. <u>Remedies</u>

[37.] The applicant does not apply under Section 50 of the *Probate Act* for the sale of land to pay debts. If he did, there may be more debts than simply the property taxes that the Court would have to recognize.

[38.] The request for a declaration that Ms. MacDonald has disclaimed, or forfeited, her life interest, or that the interest she has in the property is less than a life interest, is dismissed.

[39.] As obiter, the Court notes that the *Partition Act* contains various remedies for uncooperative parties who hold interests in the same real property. It may be that the *Partition Act* may provide a method, separate from the probate processes, to resolve the impasse between Mr. MacDonald and Ms. MacDonald with respect to their common interest in the homestead property.

J.