IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Finlayson Estate (Re), 2008 NSSC 58

Date: 20080228
Docket: Probate No. 14525
Registry: Truro

In The Matter of:	Margaret Finlayson, Deceased
	- and -
In the Matter of:	The Application of Alex D. Finlayson, Executor, and Elaine Brooks, Respondent, with respect to certain Royal Bank of Canada share certificates/securities
	- and -
In the Matter of:	The Application of Elaine Brooks for the Removal of Alex D. Finlayson as the Executor of the Estate of Margaret Finlayson, Deceased
Judge:	The Honourable Justice Arthur J. LeBlanc
Heard:	December 19, 2006, in Truro, Nova Scotia
Final Written Submissions:	May 4 and 15, 2007
Oral Decision:	April 27, 2007
Written Decision and Decision on Costs:	February 28, 2008
Counsel:	William L. Ryan, Q.C., for the Applicant Melinda J. MacLean, Q.C., for the Respondent

By the Court:

[1] The applicant, Elaine Brooks seeks an order removing the executor, Alexander Finlayson, pursuant to s.61(1)(b)(v) of the Probate Act. The executor is the husband of the testator, Margaret Finlayson, and was designated as the sole executor in her will in December 2000. The applicant, a niece of the testator, is the alternate executor. Mrs. Finlayson died on April 15, 2004. Probate was granted on July 8, 2005. I gave an oral decision stating my disposition of this matter on April 27, 2007.

Background

[2] At the time of her death, Mrs. Finlayson was a registered owner of certain Royal Bank of Canada shares. These shares were held in joint tenancy with the applicant. In September 2005, the executor applied to the Probate Court for a hearing to show cause why the testator's interest in those securities should not be treated as an asset of the estate or, in the alternative, subject to certain trusts. Mr. Finlayson indicated in his affidavit that the Royal Bank shares, with a value in excess of $500,000.00, were registered in Ms. Brooks' name in order to avoid probate, that the estate had demanded the return of the shares and that Mrs. Brooks

had refused. Mr. Finlayson was discovery in connection with this application in March 2006.

[3] The applicant argues that the evidence given by the executor on discovery in March 2006, "raises grave concerns about his mental competency to continue to act as executor" and suggests that Mr. Finlayson "has passed over control of all his affairs, including the executorship" to John Conrod, a third party. This, it is submitted, is an express contradiction of Mrs. Finlayson's will. The applicant submits that the discovery transcript reveals that Mr. Finlayson "is clearly not capable of supervising the activities of Mr. Conrod and ... has no idea of the investments and activities of Mr. Conrod." The discovery testimony allegedly indicates that Mr. Finlayson lacks the mental faculties required to administer the estate. As a result, the terms of the will are allegedly not being met, and the interests of beneficiaries are being prejudiced.

[4] Ms. Brooks claims that she is interested in the estate because she is designated as alternate executor. In her affidavit, dated October 23, 2006, she identifies several other "persons interested in the estate" pursuant to s. 63(1) of the Probate Court Practice, Procedure and Forms Regulations. Aside from Mr.

Finlayson, she refers to Noel Brooks, Estelle Brooks, Lois MacDonald, Lorna MacDonald, John Conrod, St. Peter's United Church Cemetery and Grand River United Church Cemetery. The will designates Mr. Finlayson as the sole beneficiary. Ms. Brooks and the other "persons interested" were only entitled under the will in the event that Mr. Finlayson predeceased his wife.

[5] The executor resists the application, claiming that he is competent to administer the estate.

The Discovery Transcript

[6] In the discovery examination, Mr. Finlayson had no difficulty recalling his wife, as well as her father's name. He stated that he did not know much about the bank shares, which his wife took care of. He said she had inherited bank shares from her father, but he did not know how many. She also bought bank shares after the war, but he did not know how many. He said the shares were placed in a bank safety deposit box at Royal Bank at the Mic Mac Mall in Dartmouth, but could not say how long they remained there. He could not recall the name of the bank. He said he never saw the keys to the safety deposit box. He said the shares were

moved to a safety-deposit box at a bank in Truro when they moved there. He believed that his wife had started cashing in the shares. He remembered her and Elaine Brooks (or her mother Estelle Brooks) carrying envelopes that he believed had share certificates in them. He did not remember the shares being lost at one point.

[7] Elsewhere in his discovery examination, Mr. Finlayson said he did not know what an affidavit was, did not know if he had signed a document in the proceedings and appeared to be unaware that he was involved in a court proceeding. He said he was "very confused most ... 95 percent of the time ...". When asked about Ms. Brooks and the Royal Bank shares, he said there was an incident "when we started ... going to Brookfield to cash them and it came we didn't own them anymore." By "we" he said he meant himself and his wife. At that point, he said, he "lost track of the whole system" and "turned my troubles over to John Conrod," whom he described as "a friend of mine ... he's my banker and everything else. Banker and buyer and everything." He said he was told that he should get a lawyer. At that point, Mr. Conrod "came in and took over."

[8] Mr. Finlayson had no clear idea of what an executor was. When asked whether he knew who was responsible for looking after his wife's estate, he said "No ... I turned ... all of that over to John Conrod because I'm not capable ... of doing that, and I have an efficient law lady ... that is the best ... I can do, and what else can I do?" He said he believed Mr. Conrod was "quite capable of taking care of my little business." Asked what he had done in relation to the estate, Mr. Finlayson said "I don't think I have ... I haven't done anything ..." As to obtaining the grant of probate, he said, "I had nothing to do with it, not that I know of."

[9] Mr. Finlayson was apparently unaware that the Royal Bank shares were registered jointly in the names of his wife and Ms. Brooks. He did not know how many shares were registered at the time of his wife's death. He did not understand what a trust was. He said he had understood that the shares were in the name of his wife and her mother, and agreed that his name was never on the shares. He knew that his and his wife's wills had been prepared by Blair MacKinnon. He knew Estelle Brooks, but could not say whether she was related to his wife.

Other Evidence

[10] The estate has submitted an affidavit by Sharon Lynds, the owner and operator of Meadowland Villa Senior Care in Bible Hill. She states that Mrs. Finlayson was a resident of the facility from the spring of 2000 until her death in April 2004. Mr. Finlayson has been a resident since the fall of 2001. Based on her regular contact with him, she took the view that he "has had hearing and sight difficulties consistent with his age in the past few years," including the need for hearing aids and cataract operations. Apart from these matters, she states, his health status, "both physical and mental, to my observation, has remained good." She said he maintained an active daily routine, reads the newspaper, watches television news, and takes an interest in world news, technical advances and the business affairs of the facility. She stated that he was "sharp as a tack" in conversations with her on a one-on-one basis, but "has difficulty hearing in larger spaces and when groups of people are talking." She said he "has always talked about 'the Royal Bank shares' or 'certificates' and the subject continues to trouble him. He has told me many times that there is a court case on regarding 'the shares'."

[11] Ms. Lynds concluded that Mr. Finlayson was almost 100 years of age and apart from hearing and sight deterioration, and "a general slowing down, all of which in my experience is age appropriate, I believe that Mr. Finlayson, considering his age, continues to enjoy fairly remarkable physical and mental capacities."

[12] The estate has also submitted an affidavit by John Conrod. Mr. Conrod stated that he has known Mr. and Mrs. Finlayson for 25 to 30 years, having lived near them until they moved to Bible Hill in the 1990s. He looked after their winter snow removal. He said he maintained contact with them after they moved to live in a mini-home on the property of Mrs. Finlayson's niece, Estelle Brooks, and her husband, Noel Brooks. He stated that in 2002 Mr. Finlayson told him "that there was conflict between him and Elaine Brooks, daughter of Estelle and Noel Brooks, concerning Margaret's Royal Bank shares." He said Mr. Finlayson asked him "to assist him with his personal affairs as needed as he had no family on mainland Nova Scotia, other than Margaret, whose health was failing. Alex Finlayson had no operator's license and was dependant upon others for transportation for banking, any medical/health appointments and the like." He stated that Mr. Finlayson later informed him that he had made himself and Mr. Finlayson's

lawyer, Blair MacKinnon, his attorneys under a Power of Attorney, which had never become active, as Mr. Finlayson "continues to manage and supervise his personal, financial and legal affairs providing direction to me as necessary." As to Mr. Finlayson's health, Mr. Conrod stated that he "has experienced sight and hearing problems in recent years, he seldom requires the attention of a doctor other than for his annual checkup. I believe he takes blood pressure medication. Otherwise, he remains astute to his affairs and in particular, the court case regarding Margaret Finlayson's Royal Bank shares which he often discusses."

Law

[13] The Probate Act states, at s.61:

> 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 limiting the generality of the foregoing, if the court is satisfied that
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> (b) the personal representative
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> (I) is neglecting to administer or settle the estate,
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> (v) is mentally incompetent ...
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> (3) Where the court removes or discharges a personal representative, it shall appoint a new personal representative in the place of the personal representative that was removed or discharged.

[14] While the Act does not define a "person interested in an estate", the Probate Court Practice, Procedure and Forms Regulations describes a "person interested in the estate" for the purposes of Part III of the Regulations, which is titled "Accounting, Settlement and Distribution." The Regulations provide, a s.52:

> 52(1) Subject to subsection (2), a person interested in an estate is, for the purposes of this Part, any
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> (a) residuary beneficiary;
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> (b) unpaid non-residuary beneficiary;
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> (c) person entitled to share in the distribution of the estate on an intestacy;
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> (d) life tenant;
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> (e) trustee, guardian, court-appointed guardian or attorney appointed under the Power of Attorney Act for a person under a disability;
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> (f) trustee, guardian, court-appointed guardian or attorney appointed under the Powers of Attorney Act for a missing person or unascertained person;
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> (g) the Public Trustee, where the Public Trustee Act applies;

> (h) unpaid claimant or creditor who has filed a claim in accordance with Section 48;
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> (I) unreleased security.
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> (2) A person who has signed a release in Form 36 is not, for the purposes of this Part, a person interested in an estate.

[15] Lacking a definition in the statute, and reverting to the definition in the Regulations, leads to the conclusion that the only "person interested in the estate" is Mr. Finlayson. He is the sole residuary beneficiary. Under this definition, Ms. Brooks does not qualify as a "person interested in the estate". However, the application to remove an executor can be made by "any person."

[16] Widdifield on Executors and Trustees, 6th edn., sets out several circumstances in which trustees have been removed, including incapacity through illness, age or inclination and lace of appreciation of duties (pp. 15/11-15/12). In Re Galbraith, [1951] 2 All E.R. 470 (Prob. Div.), the Court removed two executors on the basis that they were unable to perform their duties on account of advanced age and physical and mental infirmity. Karminski, J., said:

> The application is a novel one in that there appears to be no reported case in which both executors have been removed in this way, but in the present case there is the clearest evidence that both the surviving executors are of advanced age and suffering from such a degree of physical and mental infirmity as makes a

> continuance of their duties impossible. For reasons due to conditions in the Argentine, the estate has not yet been wound up, and I have to consider the object of the court in looking after the estate, in looking after the proper representation, and not least, in looking after the interest of the parties beneficially interested ...

[17] A similar result occurred in Re Derrick, [1936] O.W.N. 223 (Ont. S.C.-H.C.J.), where the Court concluded that the estate required continual care and attention by a capable executor or trustee. The executor did not live in Toronto, where he was required to travel to carry out estate business, and certain legacies were not being paid. Kelly, J. concluded that "[t]he executor has not appreciated, and does not appreciate, the responsibility of his position as executor, or the necessity of due and prompt fulfilment of the duties thereof" (paragraph 11). In addition, the Court stated, at paragraph 12,

> [h]is mode of administration of the estate and his incapacity for his position, as evidenced by what is above mentioned and by other matters set out in the material filed, endangered or prejudiced the interests of those who have claims against the estate, particularly those whose claims have priority over the residuary devisee, by the payments to whom these prior claims have already been delayed.

[18] The respondent refers to Letterstedt v. Broers (1884), 9 App. Cas. 371, where the Privy Council stated:

> [I]n cases of positive misconduct Courts of Equity have no difficulty in interposing to remove trustees who have abused their trust; it is not indeed every

> mistake or neglect of duty, or inaccuracy of conduct of trustees, which will induce Courts of Equity to adopt such a course. But the acts or omissions must be such as to endanger the trust property, or to show a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity.
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> [I]f satisfied that the continuance of the trustee would prevent the trusts being properly executed, the trustee might be removed. It must always be borne in mind that trustees exist for the benefit of those whom the creator of the trust has given the trust estate.
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> In exercising so delicate a jurisdiction as that of removing trustees, their Lordships do not venture to lay down any general rule beyond the very broad principle above enunciated, that their main guide must be the welfare of the beneficiaries. Probably it is not possible to lay down any more definite rule in a matter so essentially dependent on details often of great nicety. But they proceed to look carefully into the circumstances of the case.

[19] In Re J.J., [2003] N.S.J. No. 384, 2003 NSSF 42 (S.C.), on a six-month review of an Adult Protection Act order, the Court refused to appoint a guardian ad litem where there was a working relationship between a solicitor and the adult for whom a guardian was sought. A psychiatrist gave the opinion that the person was competent to retain and instruct counsel on specific issues, which the Court held was sufficient to permit the individual to continue without a guardian.

Discussion

[20] In the course of the proceeding, the Court was informed that Ms. Brooks would not be a suitable executor. It was suggested that the Public Trustee should act as executor, but the Public Trustee has declined to do so.

[21] There was no medical evidence submitted in support of the applicant's claim that Mr. Finlayson is not competent to administer the estate. The applicant relies entirely upon Mr. Finlayson's answers given in discovery. Mr. Finlayson was 99 years of age at the time of the hearing. He has difficulties with eyesight and hearing, and clearly had difficulty comprehending and responding coherently to the questions he was asked on discovery. He made it clear that he relies heavily on Mr. Conrod in dealing with his affairs. He said his wife was very secretive and possessive with respect to the bank shares, and he therefore, did not have a full understanding of how they were dealt with.

[22] The respondent argues that there is no basis upon which to remove the present executor. There is no reason to believe that the testator's instructions will not be carried out. It is significant that Mr. Finlayson is the only beneficiary of the

will. The alternative beneficiaries are not entitled to any benefit under the will, given that Mr. Finlayson survived his wife.

[23] I am satisfied that the removal of an executor requires a two-part test. First, it must be established that the executor is unable to perform his duty to administer the estate on account of age, infirmity or illness. Second, it must be shown that a primary beneficiary's interest in the estate is at risk. In the present case, the first branch of the test is met. I am satisfied from a review of the discovery evidence that Mr. Finlayson does not have a clear understanding of his duties. While he claims he can instruct counsel, it is clear that he is relying heavily upon Mr. Conrod, as well as counsel. I infer that counsel prepared the affidavit submitted in support of the show-cause application. This is evident from his answers on discovery. He appeared to have some recollection of certain events, but a weak grasp of other events.

[24] I emphasize that these conclusions about Mr. Finlayson's grasp of his affairs have no significance beyond this application; there was no medical evidence submitted relating to his mental state, and there was contrary evidence submitted

on behalf of the estate in the affidavits of Ms. Lynds and Mr. Conrod. These comments are limited to Mr. Finlayson's duty as executor.

[25] On the equally important second test, however, I am satisfied that Mr. Finlayson himself is the only person whose interest is at risk if he fails to properly administer the estate. He is the only beneficiary of the will. As was the case in Re J.J., it is my view that, although Mr. Finlayson has difficulties with vision and hearing and lacks a clear understanding of the proceeding or his position as executor, I believe, based on all the evidence, that he has sufficient presence of mind to instruct counsel in the circumstances.

[26] This broader context of this proceeding is to require Ms. Brooks to show cause why the Royal Bank shares held in her and the testator's names as joint tenants should not be treated as assets of the estate and included in the will. Whether the executor will be in a position to testify on this issue will depend on his apparent competence. I am not deciding that issue today.

[27] The application to remove Mr. Finlayson as executor is dismissed.

[28] Counsel on behalf of Ms. Brooks submits that costs should be in the cause. However, in this instance it is appropriate that I fix costs. Counsel on behalf of the estate claim that the estate has incurred disbursements as follows:

Office Administration	$ 60.00
Brief Binding	22.89
Courier	11.01
Research	60.42
Travel	90.00
Total	$244.32
HST 14%	

I am awarding the sum of $1,000 plus HST of 14 percent in costs and $244.32. Plus HST of 14 percent for disbursements payable in any event in the cause.

J.