IN THE PROBATE COURT OF NOVA SCOTIA
Citation: Finlayson Estate (Re), 2008 NSSC 120

Date: 20080314
Docket: 14525(286459)
Registry: Truro

IN THE MATTER OF: The Estate 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

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DECISION

Judge: The Honourable Justice J. E. Scanlan

Heard: March 13 & 14, 2008, in Truro, Nova Scotia

Written Decision: April 22, 2008

Counsel: Mr. Harry Munro, Q.C., Solicitor for the Applicant, The Estate of Margaret Finlayson

Mr. William L. Ryan, Q.C., Solicitor for the Respondent, Margaret Elaine Brooks

By the Court:

[1] This is a dispute involving 9888 shares of Royal Bank of Canada common stock. The Estate of Margaret Finlayson claims the shares were held by the Respondent, Elaine Brooks, in trust for the late Margaret Finlayson. The legal issue is whether the shares were held in trust after there was a gratuitous transfer of the shares in question from the late Margaret Finlayson to Elaine Brooks in 1990.

BACKGROUND

[2] The Respondent was the great niece of Margaret Finlayson who died on April 15, 2004. The deceased had been married to the Applicant, Alex Finlayson, for approximately 60 years. They had no children. On February 8, 1990 the deceased transferred the share certificates to the names of both the deceased and the Respondent, Elaine Brooks, with the registration being marked on the account as joint tenants with the right of survivorship. The shares in question had been in the deceased's, Margaret Finlayson's family, first acquired by her father, Robert MacDonald, in the 1940's or 1950's. They were subsequently conveyed to

Margaret Finlayson's mother. Upon Mrs. Finlayson's mother's death the shares were conveyed to Margaret Finlayson.

[3] I am satisfied it is of substantial importance that the shares in question were transferred to the Respondent, Elaine Brooks, in 1990 but she did not become aware of the fact she was named as a joint tenant with the right of survivorship in 1990. Elaine Brooks did know the shares were in joint names prior to 1994. In 1994 the original share certificates from 1990 were lost or misplaced. At this time the deceased and the Applicant, Alex Finlayson, were living in Truro. The Respondent, Elaine Brooks, was informed by her mother that the deceased had lost the share certificates. Ms. Brooks was then asked to assist the Finlaysons in obtaining replacement share certificates.

[4] I am satisfied the fact the share certificates were placed in joint tenancy with the right of survivorship in 1990 without the Respondent, Elaine Brooks, being advised of the change in the ownership of the share certificates bespeaks of something other than a scheme whereby the deceased, Margaret Finlayson, was establishing a system to assist her in the management of this specific asset. How

could Elaine Brooks be assisting in the management of something she did not even know existed?

[5] It is also important to note that Mrs. Finlayson made it clear during her marriage to Alex Finlayson that the share certificates in question came to her as a result of the efforts of her parents. Margaret Finlayson did not ever cash any of the share certificates during her lifetime. She did use the dividend income as a source of spending money for herself. This gave her some independence which both Mr. Finlayson and Ms. Brooks spoke of. The number of shares increased through at least two share splits.

[6] As noted in paragraph 66 of **Pecore** in **Pecore v. Pecore**, 2007 SCC 17:

> The fact that a transferor controlled and used the funds during his or her life is not necessarily inconsistent with an intention at the time of the transfer that the transferee would acquire the balance of the account on the transferor's death through the gift of the right of survivorship.

In this case it was only the dividend income that was used by Margaret Finlayson and the share capital remained intact. The use of the income is reflective of the ownership interest that Margaret Finlayson had in the account. The fact she did

not at any time access the capital is reflective of the fact that it was the capital account she intended to transfer to Elaine Brooks upon her death.

[7] Alex Finlayson testified he did not recall Margaret Finlayson saying she did not want the shares going to his family. That evidence appears to contradict what Mr. Finlayson told his counsel in October 2002. At that time Mr. Finlayson told his counsel that it was important to Margaret Finlayson that his family, that is the Finlayson family in Cape Breton would not become the beneficiaries of the share certificates.

[8] After the conveyance of the shares to Elaine Brooks in 1990 and even after Elaine Brooks became aware of the existence of the share certificates in 1994, Margaret Finlayson continued to receive the dividend income earned on the shares. Mrs. Finlayson was able to deposit those monies into a bank account she had set up while she lived in Halifax County. This was done without Elaine Brooks having to endorse the dividend cheques or even being aware of the joint registration of the shares. After Margaret Finlayson moved to Truro in or about 1994 she began having difficulties depositing the dividend cheques because of the fact Elaine Brooks name was also on the dividend cheques. It was a point of some

consternation for Margaret Finlayson that she would have to wait until Elaine Brooks attended in Truro to sign the dividend cheques before she could deposit them. Margaret Finlayson also claimed all of the dividend income on her income tax returns up until the date of her death.

[9] I would note that Margaret Finlayson was an individual who exhibited an extraordinary personality throughout her lifetime and throughout her marriage. She was, and remained, fiercely independent and secretive about the shares. Mr. Finlayson was never aware throughout the marriage as to how many shares Margaret Finlayson actually held.

[10] At some point, shortly before Margaret Finlayson died, Mr. Finlayson was concerned about whether there would be an equal division of the assets in the marriage so as to enable both of the, then aging, partners in the marriage to maintain themselves through the rest of their lifetime. Mr. Finlayson assumed that the Royal Bank shares at that time would be worth approximately $100,000.00 or $150,000.00. In an attempt to equalize the assets the parties would have available to them to support themselves Mr. Finlayson removed some monies from a joint bank account. This is reflective of Mr. Finlayson also recognizing that Margaret

Finlayson considered the shares to be assets belonging to her. By that time Mr. Finlayson also was aware of the fact that the shares were in the joint names of Elaine Brooks and Margaret Finlayson. The act of him withdrawing money from the joint account recognized the fact that he did not anticipate monies from the share capital coming back to him.

[11] One thing is clear, Alex Finlayson had almost no involvement in the share certificates over the entire course of the marriage to the deceased. The one time he did discuss the shares was when the share certificates were lost, in 1994. At that time he provided a cheque in the approximate amount of $5,200.00 to cover the cost of a bond which was required to facilitate the replacement of the lost share certificates. It is not clear from the evidence as to whether this money actually came out of a joint account, Mr. Finlayson's account, or Margaret Finlayson's account. Certainly both of the parties had sufficient assets to afford the $5,200.00 cost of the bond.

[12] At the time of Margaret Finlayson's death in 2004, she had a will which named her husband, the Applicant, Alex Finlayson, as the residuary beneficiary of her estate. If the Royal Bank shares were held pursuant to the terms of a resulting

trust the shares would form part of the residue of the estate. If there was an intended right of survivorship so that Elaine Brooks became the owner of the shares upon the death of Margaret Finlayson the shares would not form part of the residue of the estate. The approximate value of these shares at the time of Mrs. Finlayson's death would have slightly exceeded $600,000.00.

Discussion of Legal Principles

[13] It is clear that if there is a right of survivorship and not a resulting trust the shares in question would pass to the joint holder, Elaine Brooks. The only name on the share certificates prior to 1990 was that of the deceased, Margaret Finlayson. She had inherited these share certificates from her father. As the sole owner of the shares in 1990 the deceased was entitled to create a joint tenancy with a right of survivorship by adding Elaine Brooks name as a joint owner with a right of survivorship.

[14] The evidence of Estelle Brooks, mother of the Respondent, Elaine Brooks, and even the evidence of Alex Finlayson's counsel, corroborates the fact that Margaret Finlayson clearly intended that the shares would remain in the

MacDonald family. This would not have been accomplished under the terms of the will of the late Margaret Finlayson. It could only have been accomplished pursuant to the right of survivorship as indicated in the share certificates. This is evidence that contradicts any suggestion that Margaret Finlayson intended that the shares be held in trust.

[15] In this case there is no issue as regards the credibility of Elaine Brooks, Estelle Brooks or even Mr. Finlayson himself. Their evidence is consistent as regards Margaret Finlayson's desire to have the shares remain within the MacDonald family. In the circumstances of this case this could only be accomplished by having the shares transferred by way of a right of survivorship to Elaine Brooks. At the time the shares were first transferred into a joint tenancy, the deceased was clearly capable of managing her own financial affairs, even to the exclusion of Alex Finlayson. The Respondent, Elaine Brooks, was very close to both the Applicant and the late Margaret Finlayson. As noted earlier they had no children of their marriage and Elaine Brooks was treated like a daughter. She in fact considered both Alex and Margaret Finlayson to be her second parents. This relationship blossomed especially when Elaine Brooks attended Dalhousie University to receive her formal nursing education. Elaine Brooks graduated with

a Bachelor of Nursing in 1978, a Master of Education in 1981 and a Master in Nursing in 1993.

[16] As Alex and Margaret grew older, Elaine Brooks was the person they both looked to when health problems became a concern. In one instance, for example, Alex contacted Elaine Brooks when Margaret Finlayson became ill. Elaine Brooks arranged for an ambulance to take Margaret to the Dartmouth General Hospital.

[17] The Finlayson's also enjoyed spending time with Elaine Brooks and her daughter. In many ways, they were both second parents for the Respondent, Elaine Brooks, and like second grandparents for her daughter, Caitlin.

[18] Elaine Brooks moved with her now estranged husband away from Nova Scotia to Toronto in 1991. She returned to Nova Scotia in 1994 after her marriage failed. Elaine Brooks continued to maintain a close, almost a parent/daughter, relationship with Margaret Finlayson. During the period immediately after her return from Toronto both Margaret and Alex Finlayson assisted her a great deal in re-establishing in Nova Scotia. I am satisfied that it was this close relationship that resulted in Margaret Finlayson deciding in 1990 that it

was Elaine Brooks whom she wished to have as the beneficiary of the shares that were to be passed down through the MacDonald family.

[19] Elaine Brooks referred to the fact that early in the 1980's Margaret Finlayson mailed a letter to her enclosing a key for a safety deposit box. Margaret Finlayson instructed her that should anything happen to Mrs. Finlayson, Ms. Brooks was to go to the safety deposit box at a bank branch and remove the contents which were to be hers. Ms. Brooks suggested the shares would have perhaps been in the safety deposit box at that time. I indicated at trial, and I repeat, there is no evidence as to what the contents of the safety deposit box were so it has little bearing on the outcome of this case.

[20] I am satisfied that when the shares were placed in the joint names of the Respondent, Elaine Brooks, and Margaret Finlayson in 1990, the intent of Mrs. Finlayson was to create a joint tenancy with a right of survivorship so that if anything happened to Mrs. Finlayson, Elaine Brooks would become the sole owner of the shares. This intention was reaffirmed in 1994 when the new share certificates were obtained after the original had been lost. In 1994 Margaret Finlayson was still capable of managing her financial affairs. She did not,

according to the evidence of Alex Finlayson, at that time disclose the extent of her holdings in Royal Bank shares but again the replacement share certificates named both Margaret Finlayson and Elaine Brooks. Because the Court is satisfied that at the time of the transfer in joint names, the intention was to create a right of survivorship, even though the conveyance was without consideration, the Court cannot ignore what is the clear intention of the owner. In this case we have an individual who was fully aware of her circumstances and had the ability to understand the consequences of what she did.

[21] In **Pecore** at p. 104, the Court noted:

> ... I have difficulty seeing any continuing justification for ignoring the presumptive, albeit rebuttable, relevance of unambiguous language in banking documents in determining intention. I think it would come as a surprise to most Canadian parents to learn that in the creation of joint bank accounts with rights of survivorship, there is little evidentiary value in the clear language of what they have voluntarily signed.

[22] In this case we are not dealing with a parent/child relationship but instead that of a grandniece and grandaunt. As noted earlier, Margaret Finlayson in many ways treated the Respondent, Elaine Brooks, as a daughter and had a relationship that was very much akin to a mother/daughter relationship. I am satisfied that

Margaret Finlayson was aware of the language in the banking documents, in this case the share certificates. In 1990 she first created the joint tenancy and in 1994 confirmed the joint ownership of the share certificates. I am satisfied this is evidence which should not be ignored.

[23] As noted in **Pecore** the presumption of advancement arises in a situation where the transferor is a parent and the transferee is a child. That is not the situation in the present case even though, as I have indicated, Margaret Finlayson treated Elaine Brooks as her daughter in many ways. The burden in this case, absent the presumption of advancement, falls to the Respondent, Elaine Brooks. As noted at para. 24 of **Pecore** the presumption of a resulting trust is a rebuttable presumption of law and the general rule applies to gratuitous transfers. When a transfer is challenged, as it is in this case, the presumption allocates the legal burden of proof to the beneficiary of the transfer and the onus is placed on the transferee to demonstrate that a gift was intended. As noted at para. 42 of **Pecore** the standard of proof to rebut a presumption of resulting trust is on the balance of probabilities.

[24] Counsel for Alex Finlayson suggests that in this case there's evidence the intent of Margaret Finlayson was to make an imperfect gift which would only become effective upon her death. I am not satisfied that is the situation in this case. I am satisfied that Margaret Finlayson's use of the dividend income and the fact she declared it on her income tax makes it clear that she did intend to have the use and control of the dividend income as earned from the share certificates. I again refer to the fact, however, that the evidence is clear that at no time during her life did Margaret Finlayson ever access any of the share capital in the Royal Bank shares as bequeathed to her from her father, through her mother. I am satisfied it was her intent to make an inter vivos gift effective the date of the transfer into joint names. That was completed in 1990 and was reconfirmed in 1994 when the replacement share certificates were obtained.

[25] This case is very much like **Reid, Re** (1921) 64 D.L.R. 598 (Ont. C.A.). In the **Reid, Re** case the Ontario Court of Appeal found that a gift of joint interest was a "complete and perfect inter vivos gift" from the moment the joint bank account was opened even though the transferor in that case retained exclusive control over the account during his lifetime. In such cases the legal right to take the account, or in this case the shares, based on survivorship occurs on the opening

of the account or, in this case, the transfer of the shares into joint tenancy. It cannot, therefore, be the subject of a testamentary disposition. In this case Margaret Finlayson or Elaine Brooks, were in a position to utilize the capital. That does not negate the joint ownership and the consequential right of survival. I am satisfied the shares, when placed in a joint tenancy in this case were in fact an inter vivos gift of a joint interest.

[26] The fact that Margaret Finlayson clearly wanted the shares to remain in the MacDonald family through Elaine Brooks and the fact that she made it clear to both Alex Finlayson and others that she did not wish his family to inherit the money speaks to her intention to create a joint tenancy with a right of survivorship at the time that the shares were transferred into joint names in 1990. The conveyance was effective as of that date and the right of survivorship existed as of that moment in time. The evidence is sufficient to rebut any presumption of trust.

[27] The ownership and the right of survivorship does not appear to have been an issue as between Elaine Brooks and Alex Finlayson until approximately 2003. At that time it appears Mr. Finlayson made up his mind that somehow Elaine Brooks was spending money obtained from the share certificates for her own use. At that

time he suggested she was buying cars, houses and trips, using the money from the share certificates. By that time it would appear as though Margaret Finlayson, although still alive, had limited ability to manage her own affairs. Although it's of little relevance to the case, I am satisfied in 2003 Elaine Brooks was not using any proceeds from the share certificates for her own use. The share certificates remained intact until after the demise of Margaret Finlayson.

Conclusion

[28] I am satisfied that at the time the share certificates were placed in joint tenancy in 1990 that it was the intention of Margaret Finlayson there would be a gift to Elaine Brooks of the share certificates. It was the intention of Margaret Finlayson that Elaine Brooks would be the sole owner of the shares should she survive Margaret Finlayson.

J.

04/17/08