IN THE SUPREME COURT OF NOVA SCOTIA
Citation: *Wilson Estate (Re)*, 2008 NSSC 418

Date: 20081208
Docket: S.N. No. 304863
Registry: Sydney

Between:

In The Matter Of: *The Powers of Attorney Act*, being Chapter 352, R.S.N.S. 1989, as amended

-and-

In The Matter Of: An Application of Caroline Pitcher for a Substitution for a Joint Attorney of the person and Estate of Jessie Florence Wilson

Judge: Justice M. Heather Robertson

Heard: December 8, 2008, in Sydney, Nova Scotia

Decision: December 8, 2008 (Orally)

Written Release: April 8, 2009

Counsel: Patrick J. Murray, Q.C., for the applicant

Robertson, J.: (Orally)

[1] The Court received the application of Caroline Pitcher, for a Substitution for a Joint Attorney of the person and Estate of Jessie Florence Wilson her mother.

[2] She had been appointed a "joint attorney" with her brother Harold Wilson, who died in January 2008. She asks the Court to appoint her brother's wife, Colleen Wilson as her joint attorney pursuant to the *Powers of Attorney Act.*

[3] The Court will allow the substitution because quite clearly, it is in the best interests of Jessie Wilson, for her daughter Caroline and her daughter-in-law Colleen Wilson to act for her.

[4] The substitution of an attorney "for cause" under s. 5(e) to "grant such relief" as the Court considers appropriate" can be in my view be invoked because of the death of the joint attorney Harold Wilson.

[5] However, the legislation in this province should be amended, to specifically prevent the failure of the Power of Attorney in the event of the death of one of the attorneys.

[6] Counsel for the applicant, very ably researched this issue of the court's authority to make such a substitution.

[7] The operative words in the Power of Attorney signed by Jessie Wilson and duly witnessed and executed on April 17, 2006, states as follows:

> Know all by these presents that I, Jessie Wilson, of Cape Breton, in the Province of Nova Scotia, appoint Harold Wilson and Caroline Pitcher my joint attorneys to act for me and in my name in relation to my estate, real and personal, and their absolute discretion and as fully and effectually as I personally could.

[8] The operative words in the above-mentioned appointment are "my joint attorneys to act for me and in my name."

[9] As the wording of the Power of Attorney did not specify a joint tenancy or right of survivorship, a question arose as to whether Caroline could act alone on

the death of her brother, Harold. The common law suggests that a power of attorney terminates upon the death of the attorney.

[10] Section 5(1) and 5(3) of the *Powers of Attorney Act* allow for the substitution of an attorney and these provisions are set out below:

> 5 (1) Where a donor of an enduring power of attorney becomes legally incapacitated, a judge of the Trial Division of the Supreme Court may for cause, on application,
>
> a) require the attorney to have accounts passed for any transaction involving the exercise of the power during the incapacity of the donor;
>
> (b) require the attorney to attend to show cause for the attorneys failure to do anything that the attorney is required to do as attorney or any order made pursuant to this Act;
>
> (c) substitute another person for the attorney;
>
> (d) allow or disallow all or any part of the remuneration claimed by the attorney;
>
> (e) grant such relief as the judge considers appropriate;
>
> (f) make such provision respecting costs as the judge considers appropriate.
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> 5(3) An attorney may apply to a judge of the Trial Division of the Supreme Court for an order substituting another person as attorney in the same manner as a person interested in the estate of the donor, upon giving notice of the application to the Public Trustee at least ten days before the application is heard.

[11] There is no specific case dealing with the operation of these sections. It would appear that s. 5(1) exists to allow an attorney be removed "for cause". However, it does allow the court under s-s. (c) to "substitute another person for the attorney" and under s-s. (e) grant such relief as the judge considers appropriate". Further s. 5(3) allows an attorney to apply for an "Order substituting another person as attorney in the same manner as a person interested in the estate of the donor", upon give notice of the application to the Public Trustee.

[12] Other provinces have provisions in their *Powers of Attorney Act* legislation which appear to be drafted so as to prevent and avoid the power of attorney failing in the event of death of one of the attorneys.

[13] The *Act* in P.E.I. at ss. 10(1)(2) would appear similar to the Nova Scotia *Act.* It allows an interested person to apply for substitution of an attorney if the court considers it appropriate. However, at s. 10(2) it states that the substitution has the same effect as a substitution under the *Trustees Act*. In that regard the provision is more specific than the Nova Scotia *Act.*

[14] Some provinces allow the first named attorney in the document to make decisions where there is a disagreement. With respect to these other provisions the following was respectfully submitted.

1. In Ontario the *Substitute Decisions Act,* S.O. 1992, c.30, specifically provides that one attorney can continue on in the event of the death of a joint attorney.

2. In Saskatchewan under the *Powers of Attorney Act* 2002, c.p. 20.3, the *Act* deems that two attorneys must act jointly unless stated otherwise, but in s. 7(4)(a)(ii) one attorney can continue to act if one attorney dies.

3. Similarly, in Manitoba the *Act* at s. 18(1) states that where there are two attorneys and one dies the surviving can make decisions.

4. Alberta's *Act* deals specifically with enduring powers of attorney and provides that if one attorney dies the other can continue to make decisions only if they have joint and several authority.

5. Newfoundland also allows an interested person to apply for substitution "where it appears to him or her to be in the best interest of the donor or the donor's estate."

6. Section 9 of the *Enduring Power of Attorney Act* in Newfoundland states as follows:

> 9. (1) Where a donor of an enduring power of attorney becomes legally incapacitated, a person having an interest in the estate of the donor, or another

> person permitted by the court, may apply to the court for an order substituting another person for the attorney named in the enduring power of attorney.
>
> (2) The registrar of the court may apply to the court for an order substituting another person for the attorney named in the enduring power of attorney where it appears to him or her to be in the best interests of the donor or the donor's estate.
>
> (3) The attorney may apply to the court for an order substituting another person as attorney on giving notice to all persons having an interest in the estate of the donor.

[15] This is relevant to this application because the power of attorney document which Jessie Wilson signed stated in the last paragraph:

> In accordance with the *Powers of Attorney Act* of Nova Scotia "in Newfoundland the *Enduring Powers of Attorney Act,* in New Brunswick the *Property Act,* in Quebec the Civil Code."

[16] Although Nova Scotia was specifically mentioned, it also incorporated by reference the other *Acts.* In the Newfoundland case of *Re: Hammond* 1999, 173 Newfoundland and P.E.I. reports, at 240, a nephew of a mentally disabled person applied for an order appointing a guardian of his uncle's estate. The application was opposed by the donee of a power of attorney from the uncle. The application was dismissed and the power of attorney held to be valid having been duly executed pursuant to the *Enduring Powers of Attorney Act* of Newfoundland.

[17] The court in *R. v. Hammond*, *supra,* referred to the text of Gerald R. Robertson entitled Mental Disability and the Law in Canada, 2nd Edition, 1994, at p. 185, which states:

> An enduring power of attorney terminates:
>
> (1) on being revoked by a mentally capable principal;
>
> (2) on the death of the principal;
>
> (3) on the death, mental incapacity or resignation of the attorney (unless there are joint or alternate attorneys);

[18] This passage from Gerald Robertson has been cited in two cases: *Potasky v. Potasky*, 2002, MBQB 146, and *Glenn v. Brennan,* 2006, 144 ACWS, 3rd 976.

[19] In *Potasky, supra,* Mrs. Potasky executed an enduring power of attorney in favour of her son who died. His wife had been carrying out the duties under the power of attorney. The daughter-in-law applied for an order appointing her as attorney in the place of her husband. The Public Trustee opposed the substitution. The court held that a power of attorney must be strictly construed and there is no substitution in the drafted power of attorney. The common law principle that the death of an attorney terminated the agency relationship applied.

[20] It should be noted that there are two distinct differences between *Potasky* and the case of Jessie Wilson's Power of Attorney. First, in Jessie Wilson's case there is still an attorney alive who is ready, willing and able to act, her daughter, Caroline.

[21] Secondly, s. 13 of the Manitoba *Act*, which applied in *Potasky, supra,* specifically stated in s. 13(d) that:

> The authority of an attorney under an enduring power of attorney terminates if the attorney becomes bankrupt or mentally incompetent or dies."

[22] The *Powers of Attorney Act* of Nova Scotia does not contain such a provision, but instead appears to allow for a substitution.

[23] In *Potasky, supra,* the court further stated:

> I agree with counsel for the applicant that s.13(d) is not about the termination of the power of attorney; rather it deals with the termination of the authority of an individual to exercise a power, not the termination of the power.

[24] Following the logic in *Potasky, supra,* the applicant submits that if the "power" is intended to continue then the daughter, Caroline Pitcher, would continue to have the authority to act. The court in *Potasky* went on to discuss the Manitoba Law Reforms Commission report and Recommendations. It made reference to Recommendation 27 which stated:

> The death of an attorney will terminate the attorneyship but not necessarily terminate the enduring power of attorney.

[25] In Jessie Wilson's case she specifically stated in the concluding paragraph of the document she signed:

> I declare that this Power of Attorney may be exercised during any subsequent legal incapacity or mental infirmity on my part. It shall not be terminated or invalidated by reason only of legal incapacity.

[26] The applicant submits and I agree that it is likely that Jessie Wilson did not contemplate her son predeceasing her. The affidavits filed in support of this application provide a history of the relationship between Jessie Wilson and her daughter, Caroline, as well as her son. One can readily see the closeness of that relationship and the degree of care which has been exercised by Caroline Pitcher and her late brother. It has been described by her sister-in-law, Colleen, as "exemplary."

[27] The applicant submits that Jessie Wilson's declaration that the document not be "terminated or invalidated by reason of legal incapacity" shows an intention not to burden her estate by having her daughter apply for a Guardianship Order under the *Incompetent Persons Act.* Such an application would be the result of the power of attorney terminating and would serve no purpose as the only likely person to be appointed under a guardianship order would be her daughter, Caroline, who is the surviving joint attorney. I agree with this submission.

[28] In the *Potasky* case, the court qualified the common law rule to some extent when it stated:

> There is no reference in the Act that has the effect, directly or even indirectly, of changing the common law principle that the death of a sole attorney terminates an enduring power of attorney.

[29] By implication, this would seem to suggest that the common law principle applies when there is a sole attorney and not when there are "joint attorneys."

[30] Finally, there is the Nova Scotia case of *Re: Isnor Estate* 2001 CanLII 25721 (N.S.S.C.) in which Justice Arthur LeBlanc discussed both the relationship between the *Powers of Attorney Act* and the *Incompetent Persons Act* to determine if a guardianship application would vacate a power of attorney. The court held that

the *Powers of Attorney Act* must prevail over the *Incompetent Persons Act* because the legislators specifically drafted the *Powers of Attorney Act* in such a way than an attorney could be removed if necessary and the *Act* allowed an individual to make selections for his or her future care and comfort pursuant to their own wishes. The court stated this should not be ignored. LeBlanc, J. found there was no evidence that the attorney was discharging her duties improperly and upheld the power of attorney as it expressed the donor's wishes. He therefore dismissed the guardianship application.

[31] Accordingly, I have interpreted s. 5(1)(c) of the *Act* "the court may substitute another person for the attorney only" for cause, to further mean that the death of an attorney is "cause" for which the court can grant relief under s. 5(e) "grant such relief as the court considers appropriate".

[32] Clearly, a simple amendment to the legislation allowing substitution upon the death of an attorney would cure the problem.

Justice M. Heather Robertson