SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: McIntyre v. McNeil Estate, 2010 NSSC 135

Date: 20100401
Docket: 55987
Registry: Sydney

Between:

Edna P. McIntyre, Gerald McNeil and Kenneth (Roy) McNeil

Plaintiffs

v.

The Estate of James F. McNeil, deceased and Wade Wadman, Executor and Trustee of the Last Will and Testament of James F. McNeil

Defendants

Judge:	The Honourable Justice Theresa Forgeron
Heard:	September 29 and 30, 2008, March 11, 12 and 26, December 7 and 8, 2009, and April 1, 2010, in Sydney, Nova Scotia
Oral Decision:	April 1, 2010
Written Decision:	April 20, 2010
Counsel:	Duncan H. MacEachern, counsel for the Plaintiffs Darlene MacRury, counsel for the Defendant Estate Marlene Wadman, on her own behalf

By the Court:

I Introduction

[1] James F. McNeil died on August 25, 2007. In his 2005 will, Mr. McNeil named his youngest child, Marlene Wadman, as the sole beneficiary. His other four surviving children were excluded. Three of those children, Edna McIntyre, Gerald McNeil, and Roy McNeil commenced an action under the *Testators' Family Maintenance Act* seeking relief. The Estate and Marlene Wadman dispute their claim.

[2] The matter proceeded to trial on the following dates: September 29 and 30, 2008, March 11, 12, and 26, and December 7 and 8, 2009. The following witnesses testified at the hearing: Roy McNeil, Gerald McNeil, Edna McIntyre, Bradley MacNeil, Marlene Wadman, Mary Lynn Sparrow, Wade Wadman, and Brad Smith. Following the trial, post trial submissions were received on December 23, 2009, and on January 7,and 13, 2010. The oral decision was rendered on April 1, 2010.

II Issues

[3] The following two issues will be determined by this court:

a) Have any of the Plaintiffs established entitlement to relief under the provisions of the *Testators' Family Maintenance Act*?

b) If yes, what is the appropriate relief?

III Analysis

[4] **Have any of the Plaintiffs established entitlement to relief under the provisions of the *Testators' Family Maintenance Act*?**

[5] ***Freedom of Testamentary Disposition and Burden of Proof***

[6] At common law, a testator has the right to dispose of his/her property in any way he/she so choses. Courts must, therefore, be cautious about rewriting the will of a testator: **Walker v. Walker Estate** (1998), 168 N.S.R. (2d) 231 (S.C.) per

Goodfellow J. Although the *Testators' Family Maintenance Act* places a limit on the right of testamentary disposition, interference is to be avoided except when a clear case has been made out by the claimant: **Currie v. Currie Estate** (1995), 166 N.B.R. (2d) 144 (C.A.) as per Bastarache, J.A., as he then was.

[7] To justify interference, the applicants must prove that the testator failed to provide proper maintenance and support, which is described as both a need for maintenance, relative to the size of the estate, and a moral claim, which may be of varying strength: **Garrett v. Zwicker** (1976), 15 N.S.R. (2d) 118 (C.A.), MacKeigan C.J.N.S. at para. 41.

[8] The applicant bears the burden of proof. In **C. (R.) v. McDougall** 2008 S.C.C. 53, Rothstein J. confirmed that there is only one standard of proof in civil cases - proof on a balance of probabilities. In every civil case, a judge must take into account the seriousness of the allegations or consequences, and the inherent improbabilities. In all cases, the court must scrutinize the evidence when deciding whether it is more likely than not that an alleged event occurred. The evidence must always be clear, convincing, and cogent to satisfy the balance of probabilities' test. Testimony must not be considered in isolation, but rather examined based upon its totality.

[9] Further, Rothstein J. held that the court must assess the impact of inconsistencies in relation to questions of credibility and reliability which relate to core issues. It is not necessary for a judge to deal with every inconsistency in the decision, but rather a judge must address, in a general way, the arguments advanced by each party: **C. (R.) v. McDougall, *supra***, paras. 40, 45 - 49.

[10] In reaching my decision, I have considered the totality of the evidence. I have thoroughly reviewed the viva voce and documentary evidence, in conjunction with the submissions of counsel, and the applicable legislation and case law.

[11] ***Evidence of the Testator's Reasons***

[12] The court has limited direct knowledge as to why the late Mr. McNeil excluded the Plaintiffs from his will. In the body of the will it is stated:

> I GIVE, DEVISE AND BEQUEATH to my surviving children, other than my daughter Marlene Wadman, the sum of one dollar

> ($1.00) each, to be theirs absolutely. I do not feel that any of my children, save and except for my daughter Marlene Wadman, should benefit from my estate as I have no relationship with them at this time.

[13] The late Mr. McNeil did not provide a statutory declaration or other written memorandum outlining the details for his reason. The late Mr. McNeil did not follow the practice suggested by Roscoe J., as she then was, in **Kuhn v. Kuhn Estate** (1992), 112 N.S.R. (2d) 38 (T.D.) at para 45.

[14] ***Meaning of Dependant***

[15] Section 3(1) of the *Act* provides the court with the jurisdiction to vary the terms of a testamentary disposition when there has not been adequate provision made for a dependent. Section 3(1) states as follows:

> 3(1) Where a testator dies without having made adequate provision in his will for the proper maintenance and support of a dependant, a judge, on application by or on behalf of the dependant, has power, in his discretion and taking into consideration all relevant circumstances of the case, to order that whatever provision the judge deems adequate be made out of the estate of the testator for the proper maintenance and support of the dependant.

[16] Section 2(b) of the *Act* defines “dependant” as follows:

> 2(b) "dependant" means the widow or widower or the child of a testator;

[17] Section 2(a) defines “child” as follows:

> 2(a) "child" includes a child
>
> > (i) lawfully adopted by the testator,
> > (ii) of the testator not born at the date of the death of the testator,
> > (iii) of which the testator is the natural parent

[18] ***Emphasis on Moral Aspect of Claim***

[19] In **Garrett v. Zwicker**, ***supra***, MacKeigan C.J.N.S. confirmed that a dependant was not required to show actual need in order to qualify for consideration under the *Act*. " Need" in the context of the legislation is relative to the size of the estate and the strength of other claims. MacKeigan C.J.N.S. states at para. 40:

> 40 The dependant claimant need not, however, show need in the sense of actual want in order to qualify for consideration under the Act, and need not show actual dependancy upon the testator. The need is relative, relative to the extent of the estate and the strength of other claims. I agree, as did Dickson J.A. in Barr v. Barr, supra, at p. 411, with Gresson P. of the New Zealand Court of Appeal in Re Harrison; Thomson v. Harrison, [1962] N.Z.L.R. 6 at 13:
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> > It is rather unfortunate that there has crept into the cases over the years a disposition sometimes to consider first the 'need' of the applicant and then to turn to a consideration of the extent of the estate and other claims there might be upon the testator. These considerations do not admit of separate consideration; they are inter-related. The 'need' of an applicant, or rather his or her needs — the plural form is I think preferable — cannot be considered in vacuo. What has to be assessed are the merits of the claim having regard to the applicant's circumstances as at the date of the death of the testator; relations between the testator and the applicant in the past; and the extent of his estate and the strength of other claims.

[20] In **Garrett v. Zwicker**, ***supra***, MacKeigan, C.J.N.S. also confirmed that all dependents do not have moral claims of equal strength. Priority is assigned to spouses, infant children, and disabled, adult children. He likewise noted that the dominant theme, throughout the case law, is the emphasis placed on the moral aspect of the claim, as opposed to the economic aspects, at paras. 46 and 47:

> 46 After quoting the foregoing, Dickson J.A. in Barr v. Barr, at p. 410, pointed out that "the dominant theme running through the cases ... is one of ethics, even more than economics" and "that heavy emphasis is placed upon the moral aspects of the problem". He went on at [p. 410]:

> The Court was never intended to rewrite the will of a testator and in discharging its difficult task of correcting a breach of morality on a testator's part the Court must not, except in plain and definite cases, restrain a man's right to dispose of his estate as he pleases.
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> 47 The task before this court is to determine whether the testator failed to make "adequate provision in his will for the proper maintenance and support" of his adult daughter, the respondent Mrs. Garrett, so as to warrant interference by the court. The question to be asked is moral, not economic. In ignoring the respondent in his will, was the testator in all the circumstances guilty of a "breach of morality", or a "manifest breach of moral duty"?

[21] In **Kuhn v. Kuhn Estate, *supra***, Roscoe J., as she then was, discussed the moral and economic approach at paras. 29 and 30:

> 29 In Mitchell v. Mitchell Estate (1970), 3 N.S.R. (2d) 455 (T.D.), Bissett J. quotes the following passage from Allen v. Manchester, [1922] N.Z.L.R. 218:
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> > The Act is designed to enforce the moral obligation of a testator to use his testamentary powers for the purpose of making proper and adequate provision after his death for the support of his wife and children, having regard to his means, to the means and deserts of the several claimants, and to the relative urgency of the various moral claims upon his bounty. The provision which the court may properly make in default of testamentary provision is that which a just and wise father would have thought it his moral duty to make in the interests of his widow and children had he been fully aware of all the relevant circumstances.
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> 30 Although the approach of the courts has been one of determining whether or not there was a moral duty not to disentitle a child and not an overly economic approach to the question, the relative means and needs of the children must be one of the relevant considerations. ...

[22] ***Factors to be Balanced and Weighed***

[23] Section 5 of the *Act* outlines the factors which are to be considered when determining whether the court should exercise its discretionary authority. A discretionary power is one which must be exercised according to rules of reason and justice, and not according to private opinion. It must be exercised within a rational framework: **Walker v. Walker Estate**, ***supra***, paras. 58-61.

[24] Section 5(1) of the *Act* states as follows:

> 5 (1) Upon the hearing of an application made by or on behalf of a dependant under subsection (1) of Section 3, the judge shall inquire into and consider all matters that should be fairly taken into account in deciding upon the application including, without limiting the generality of the foregoing,
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> > (a) whether the character or conduct of the dependant is such as should disentitle the dependant to the benefit of an order under this Act;
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> > (b) whether the dependant is likely to become possessed of or entitled to any other provision for his maintenance and support;
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> > (c) the relations of the dependant and the testator at the time of his death;
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> > (d) the financial circumstances of the dependant;
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> > (e) the claims which any other dependant has upon the estate;
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> > (f) any provision which the testator while living has made for the dependant and for any other dependant;
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> > (g) any services rendered by the dependant to the testator;
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> > (h) any sum of money or any property provided by the dependant for the testator for the purpose of providing a home or assisting in any business or occupation or for maintenance or medical or hospital expenses.

[25] *Character and Conduct, and Relations between the Testator and Claimants*

[26] Because factors (a) and (c) are interwoven, they will be presented jointly.

[27] The Plaintiffs state that there is nothing in their character or conduct which should disentitle them from benefiting under the *Act*. They indicate that they did not engage in blameworthy conduct. The Plaintiffs further state that they did have an ongoing relationship with their father. Any strain in their relationship was caused by their father, who at times, acted in a blameworthy fashion towards each of them.

[28] The Plaintiffs testified that their father was abusive to them and to their mother; their father was angry with them because they tried to protect their mother. Each Plaintiff indicated, however, that despite the nature of their relationship, they each continued to attempt contact with their father.

[29] The Estate and Ms. Wadman argue against such claims. They argue that the late Mr. McNeil was a kind and loving man who was not abusive to his wife or children. Further, they argue that the Plaintiffs engaged in conduct which caused the alienation and their poor relationship with their father. Examples of this blameworthy conduct include the following:

a) That Roy McNeil commenced legal action against his father in 1989;

b) That following the dispute, Roy McNeil left the home and had virtually no positive contact with his father after that time;

c) That the Plaintiffs disregarded their father's wishes at the time of their mother's death, and were thus responsible for the further relationship problems which developed;

d) That the Plaintiffs weren't involved in the care of their father once he became ill;

e) That the Plaintiffs did not visit their father while he was hospitalized, nor did they provide him comfort or guidance at the hospital, or when he was home.

[30] I find that the Plaintiffs have met the burden upon them. They have proven there is nothing in their character or conduct which should disentitle them from the benefit of the *Act*. I further find that each of the Plaintiffs attempted to have contact with their father, including after the death of their mother, and that the frequency, or lack thereof, was due to factors outside of the control of the Plaintiffs for the most part. I draw this conclusion from the following findings which I have made:

> a) The Testator was an abusive father to the three Plaintiffs. The late Mr. McNeil frequently hit and kicked the boys, and ill treated all three Plaintiffs without cause. His conduct far exceeded that which could be classified as appropriate parental discipline. This treatment became worse when the late Mr. McNeil was intoxicated. Likewise, the late Mr. McNeil was abusive to his wife when the Plaintiffs were young. The Plaintiffs were not in any way responsible for the maltreatment they suffered while in the care of their father.
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> b) Although the Plaintiffs held little respect for their father, they still loved him because he was their parent.
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> c) The conduct of the late Mr. McNeil was one of the main reasons why Gerald McNeil left the family homestead. I accept the evidence of Gerald McNeil in his description of the events involving his father. I accept that the late Mr. McNeil kept business revenue from Gerald McNeil, without permission. Gerald McNeil was frustrated by his father's actions, but realized there was little that he could do. He, therefore, moved to Massachusetts to begin a life there.
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> d) The late Mr. McNeil also disrupted the business of Roy McNeil by harassing him and his customers. Mr. McNeil's behaviour became so erratic that Roy McNeil had no choice but to commence legal proceedings against his father. An injunction was granted to prevent Mr. McNeil from interfering further. Roy McNeil did not want to involve the courts. Correspondence dated January 20, 1989, from Roy McNeil's lawyer to the late Mr. McNeil, clearly states that Roy McNeil did not want to quarrel or fight with his father. Although Roy McNeil commenced legal action against his father, such does not constitute conduct or character within the context of s. 5(1)(a) of the *Act* because the legal action was precipitated by the unlawful

conduct of the late Mr. McNeil. I accept the evidence of Roy McNeil in relation to this finding.

e) Edna McIntyre and Roy McNeil tried to maintain a relationship with their father after their mother died, but were rebuffed for the most part. Roy McNeil spoke with his father by telephone from time to time. I find that the late Mr. McNeil was bitter and angry with Edna and Roy over matters which he, and not they, caused.

f) Gerald McNeil had an ongoing relationship with his father. They spoke regularly on the telephone, and had visits when Gerald McNeil returned to Cape Breton for vacations. Gerald McNeil provided his father with gifts and cards for birthdays and major holidays.

g) The Plaintiffs' actions in relation to the handling of their mother's death and funeral were appropriate. I accept the evidence of Edna McIntyre, Gerald McNeil and Roy McNeil in respect of their descriptions of what occurred at the time of their mother's death.

h) The Plaintiffs did not attend the funeral of their father because Marlene Wadman did not advise the Plaintiffs of the death particulars in a timely fashion. I am unable to draw a negative inference in such circumstances.

[31] In making these findings, I have made credibility determinations. I reject the evidence of Brad Smith when it contradicts the evidence of the Plaintiffs. Brad Smith is not credible. I also find that much of Marlene and Wade Wadman's evidence to be coloured by bitterness and anger, and by Ms. Wadman's lack of personal knowledge of some of the events about which she testified. I find that although Roy McNeil was prone to exaggerations, his evidence was, for the most part, reliable and credible, as was the evidence of Gerald McNeil and Edna McIntyre. The evidence of the other witnesses was neutral to my credibility determinations.

[32] *Plaintiff's Entitlement to Other Maintenance or Support*

[33] The Plaintiffs argue that there is little likelihood that they will become entitled to any significant future maintenance or support. The Estate and Marlene Wadman argue that each of the Plaintiffs are married, and therefore will become

entitled to maintenance and support from their spouses, in the event their spouses predecease them.

[34] I find, on a balance of probabilities, that there is little likelihood that any of the Plaintiffs will inherit any significant assets from their spouses in the event their spouses predecease them. None of the spouses have significant properties and any amount which may be received in the future will be limited at best.

[35] *Financial Circumstances of the Dependents*

[36] The Plaintiffs argue that they have limited resources. The Estate and Ms. Wadman argue otherwise.

[37] I find that Edna McIntyre's means are limited. She earns approximately $7,000 per annum from C.P.P. and old age security benefits. She and her husband own a home on Grand Lake Road, Sydney, with an assessed value of $41,600. They have basic furniture and own a vehicle which is fully encumbered by a loan. They have savings of approximately $1,500.

[38] Roy McNeil's means are also limited. He and his wife reside in real property owned by his wife's daughter. Roy McNeil's property includes household furnishings, a 1998 vehicle and approximately $2,000 in savings. He has no debt. Roy McNeil is a trucker who earns approximately $29,000 per annum.

[39] Gerald McNeil's means are somewhat better than those of the other Plaintiffs, but he is not wealthy. Gerald McNeil resides with his wife in Massachusetts. They own a home with an assessed value of $332,600 less a mortgage of approximately $66,300. They have household furnishings and two motor vehicles - a 2007 Dodge and a 1997 Ford. Savings are owned jointly and are valued at approximately $12,000. Non-secured debt equals approximately $40,000. Mr. McNeil is a trucker employed by his own company. The company has no value because the only significant asset, the truck, is old, with excessive mileage. Both Gerald McNeil and his wife receive social security benefits.

[40] *Claims of Other Dependants Upon the Estate*

[41] The only other claim against the estate is that of the sole beneficiary, Marlene Wadman.

[42] The Plaintiffs argue that Marlene Wadman is financially secure. They further suggest that Marlene Wadman's contribution to her father, while living, was limited. The Defendant Estate and Marlene Wadman argue that her contribution is not relevant to the issues before the court.

[43] I agree. Ms. Wadman does not have to prove contribution. Ms. Wadman does not have an application before the court. The financial circumstances of Ms. Wadman are, however, relevant as noted in s. 5(1)(e) of the *Act*. Ms. Wadman's financial circumstances are significantly better than the financial circumstances of Edna McIntyre and Roy McNeil, and are relatively similar to those of Gerald McNeil given Ms. Wadman's family circumstances.

[44] *Provisions which the Testator Made for the Dependants While Living*

[45] The Plaintiffs state that their father did not make any provisions for them while living. The Estate and Ms. Wadman argue that the late Mr. McNeil allowed Gerald McNeil and Roy McNeil to establish a business on real property owned by the Testator, which resulted in significant financial gain to each of them.

[46] I disagree with the Estate and Ms. Wadman. The Testator did not provide gifts to any of the Plaintiffs. Although Roy McNeil and Gerald McNeil did operate businesses on the real property owned by the Testator, this did not produce a financial benefit to either. Roy McNeil paid rent to his father, and also endured significant interference with his business. Gerald McNeil, although not paying rent, ultimately had to leave the property because his father was collecting and retaining some of his profits, without permission.

[47] *Services Rendered by the Dependants to the Testator*

[48] The Plaintiffs argue that each made significant contributions to the Testator, both directly, and indirectly on behalf of their mother when she was sick. The Estate and Marlene Wadman reject this evidence. They state that the services rendered by Gerald McNeil and Roy McNeil occurred while they operated their own businesses. The services rendered, therefore, were not on behalf of the Testator. Further, they argue that any services provided when the Plaintiffs were

young, were grossly over exaggerated and represented services that children would have performed at the time.

[49] I find that the three Plaintiffs performed many services on behalf of the late Mr. McNeil during his lifetime. I make the following findings in respect of this conclusion:

> a) When Gerald and Roy McNeil were in elementary school, they spent long hours manually taking apart vehicles for salvage. Machines were not used at this time. They were required to junk automobiles and separate the various metals and parts for salvage. They were not paid for their work. This work continued for approximately eight years before Gerald and Roy McNeil opened their own businesses.
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> b) After Roy McNeil and Gerald McNeil established their own businesses on the family property, the late Mr. McNeil retained revenue from Gerald McNeil's customers, without Gerald's consent. The late Mr. McNeil also interfered in the operations of his sons' businesses, thereby causing income loss.
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> c) Roy McNeil and Gerald McNeil both left the family home because of the ongoing interference and controlling conduct of the Testator. They left buildings which were constructed by Roy McNeil and Gerald McNeil. One of the buildings was of better quality than the other out buildings. Their father did not reimburse them for the buildings. I accept the evidence of Gerald McNeil and Roy McNeil in this regard.
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> d) Edna McIntyre, prior to her marriage, spent significant time performing household work on behalf of the late James McNeil and the family. I find that the quantity and quality of work, which Edna McIntyre completed, far exceeded that which would be expected of a child growing up in a household at that time. I further find that Edna McIntyre continued after she returned to the area to provide housekeeping and meal preparation services on behalf of the Testator and her mother from time to time. These services continued until her mother's death, and were in addition to the meal and housekeeping services being provided by third party professionals.

[50] **Summary of the First Issue**

[51] I find that the Plaintiffs have met the burden upon them. They have established, on a balance of probabilities, that their father, the late James McNeil, died without having made adequate provision in his will for their proper maintenance and support, taking into account all relevant circumstances. The Plaintiffs have established that their father failed to meet his legal and moral obligations. I find that the Plaintiffs have a need for maintenance relative to the size of their father's estate; they have a strong moral claim. This claim can be met, while recognizing the fact that the late Mr. McNeil showed a preference to benefit Marlene Wadman, over and above his other children.

[52] **What is the appropriate relief?**

[53] Section 3(1) of the *Act* provides the court with the jurisdiction to order the relief which it deems adequate for the proper maintenance and support of the dependents.

[54] The conditions and restrictions of an order, which a judge may make, are set out in s. 6 of the *Act* which states:

> Conditions and restrictions of order
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> 6 (1) The judge, in making an order for proper maintenance and support of a dependant, may impose conditions and restrictions.
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> Order charging estate
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> (2) The judge may make an order charging the whole or any portion of the estate, in any proportion and manner that to the judge seems proper, with payment of an allowance sufficient to provide proper maintenance and support, and the judge may order that the provision for proper maintenance and support be made out of the whole or any portion of the estate and out of income or corpus or both, and may be by way of
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> (a) an amount payable annually or otherwise;
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> (b) a lump sum to be paid or held in trust;

> (c) the transfer or assignment of particular property either absolutely, in trust, for life or for a term of years to or for the benefit of the dependant; or
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> (d) any combination of the foregoing methods.
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> Directions for transfer of property of estate
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> (3) Where a transfer or assignment of property is ordered, the judge may give all necessary and proper directions for the execution of the transfer or assignment either by the executor or other person the judge directs. R.S., c. 465, s. 6.

[55] I have reviewed the legislation, case law, the evidence, and the submissions of the parties. I award each of the Plaintiffs 12 % of the net value of the estate, after the payment of all legitimate debt and fees. I am unable to assign a specific dollar amount because I have no credible evidence as to the true value of the estate. I do not accept that the salvage licence is valued at $1.00 as noted by the Executor. I do not accept that the value of the real property is that which is stated on the municipal assessment.

[56] In the event the parties are unable to agree as to a proper valuation of the licence and real property, or to a mechanism by which the Plaintiffs are to receive their portion of the estate, then either party can contact the scheduler to obtain a date for a docket appearance. The docket will be used to determine the time required to hear the matter and any procedural issues outstanding.

IV Conclusion

[57] The Plaintiffs have proven entitlement to the provisions of the *Testators' Family Maintenance Act*. After balancing all of the relevant factors, each Plaintiff is assigned 12% of the net worth of the estate. The court retains jurisdiction to determine valuation issues and the mechanism to ensure compliance, absent agreement.

[58] If the parties wish to be heard on the issue of costs, written submissions are to be provided to the court by April 13, 2010, and responses delivered by April 19, 2010.

Dated at Sydney, Nova Scotia, this 20th day of April, 2010.

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The Honourable Justice Theresa Forgeron