SUPREME COURT OF NOVA SCOTIA
Citation: MacRae Estate (Re), 2010 NSSC 157

Date: 20100423
Docket: PtH 301816
Registry: Port Hawkesbury

In the Estate of Mary Sarah MacRae

Judge:	The Honourable Justice Frank Edwards
Heard:	March 30 & 31, 2010, in Port Hawkesbury, Nova Scotia
Counsel:	Donald MacDonald and Catherine MacDonald, for the Claimant M. Ann Levangie for Respondent Heirs Cory Binderup, Proctor of the Estate of Mary Sarah MacRae

By the Court:

[1] This is a claim against the estate of the late Mary Sarah MacRae ("Sadie"), who died, intestate, on December 13, 2003. It is brought by Theresa MacRae, the widow and personal representative of Sadie's son Vincent MacRae ("Vinnie"), who died on September 8, 2002. Sadie had seven other children, one of whom, Angus MacRae ("Angus"), was appointed administrator of her estate on November 26, 2004. In his application for administration, Angus included, as part of the estate, lands at St. Rose, Inverness County consisting of 200 acres. That is the property that is the subject of this claim.

[2] ***Factual Overview:*** The St. Rose property had been owned by Sadie's husband Dan Joe MacRae ("Dan Joe"), who acquired the property from family members in the 1930's and lived there with Sadie after their marriage.

[3] Dan Joe was a miner, and the property, in addition to being the location of the family home, was also a farm and provided food and supplementary income for the MacRaes and their eight children.

[4] Dan Joe became ill with cancer in the early 1970's. At the time, the persons living at the farm in the family home were Dan Joe, Sadie and Angus, then a teenager.

[5] In 1973, Dan Joe contacted his son Vinnie, who had started work at a Chrysler plant in Windsor, Ontario and asked him to return to Cape Breton to assist with the farm. Vinnie was 23 at the time and engaged to his future wife, Theresa.

[6] Vinnie contacted his other siblings and determined that none wished to return to the farm. In 1974, Vinnie moved back to St. Rose to live with his parents. In that year, he also married Theresa.

[7] Dan Joe died intestate in September 1975. Sadie was appointed administrator and in that capacity conveyed the property to herself, being the sole Grantor in a deed which recited that the property was valued at $6,400.00.

[8] Over the next 27 years, Vinnie and Theresa lived in the family home with Sadie and raised four children there.

[9] Vinnie continued to work the property as a farm, and it provided produce, meat, poultry and wood for the family. He also took a job as assessor for the Municipality to provide needed income. The farm, though time consuming, was not a financially profitable operation.

[10] Vinnie made substantial improvements to the farm and he and his wife maintained the home. They paid, with some occasional assistance from Sadie, for all of the expenses of the property: taxes, heating, electricity, maintenance and food.

[11] To the extent that other siblings contributed to the farm operation or maintenance, such contribution was gratuitous. There was some evidence that at least one of the siblings received meat or produce in return for their occasional labour.

[12] For most of the 30 years after Dan Joe's death, Sadie lived with Vinnie and Theresa in the family home at St. Rose. For a seven-year period in the early 1980's, she spent a large part of each year with a daughter in the Halifax area to

assist her with her young family. After that period, Sadie returned to St. Rose and lived there until she moved to a nursing home shortly before her death.

[13] In 1995 Vinnie contacted a solicitor, Carmel Lavigne, to deal with the property. Ms. Lavigne consulted with him and with Sadie.

[14] On August 29, 1995, Sadie executed a deed prepared by Ms. Lavigne conveying the property into the joint names of herself and Vinnie. At the time she was 76 years of age, her son was 48. On December 12, 1995, Sadie and Vinnie put a $33,000.00 mortgage on the property. The mortgage was used for household improvement, a new garage and also to retire some of Vinnie's personal debts. I am satisfied that the mortgage was primarily for Vinnie's benefit.

[15] In November, 1997, Sadie was diagnosed with dementia. In the fall of 1998, Vinnie had a heart attack.

[16] In or about 1998, Evans Coal Mines Company leased a portion of the property. In or about the fall of 1999, the first payment from the company arrived by cheque payable to Vinnie. Sadie, suffering from dementia, had by then entered

the nursing home. Vinnie and Theresa, understanding that the were no *de facto* owners, applied the monies to their children's education. The total amount paid was $73,424.00.

[17] Vinnie died of heart disease on September 8, 2002. By operation of law, title to the St. Rose property vested in Sadie. She had been admitted to a nursing home in 1999 and died intestate on December 13, 2003.

[18] Sadie's remaining children have refused to recognize that Theresa and her children have any claim to the St. Rose property other than under the ***Intestate Succession Act***, pursuant to which Vinnie's four children would share 1/8th interest in the estate of their grandmother.

[19] The parties have filed affidavits in support of their respective positions. In addition to the affidavit appended to the claim, Theresa MacRae provided a further affidavit addressing the history of how she and Vinnie came to live at St. Rose with Sadie. Her son Bradley's affidavit recounts in some detail the work that his father and the family did on the property, the improvements made and the scale and

intensity of their farming operations. He further recounts that Sadie told him that it was her intention that his father would have the property.

[20] Bradley also appends to his affidavit a copy of a letter he received from Ms. Lavigne, the solicitor, in 2005 addressing the circumstances surrounding the execution of the 1995 deed in which she wrote:

> "It was also my general impression that the belief of the parties were that Vincent MacRae would outlive his mother and that the property would eventually be that of your parents.
>
> ...
>
> It was my understanding from my interactions with Vincent MacRae and Sarah MacRae that the property would become that of your parents. It was your parents who were looking after Sarah MacRae before she was moved to the home for the elderly and disabled. In my personal opinion, it was my impression from my meetings with Sarah MacRae that she wanted your parents to have the property."

[21] The remaining affidavits filed by the Claimant are from persons without an interest in the estate:

[22] ***Carmel Lavigne:*** Ms. Lavigne reviews her role in the preparation and execution of the deed. Included is an averment that Mrs. MacRae wished, in executing the deed, to avoid probate.

[23] ***Nadine Boutilier:*** A student who met with Sadie in 1994-1995 to learn from her about the lives of rural women, and found her to be bright and alert.

[24] ***Norman MacLellan, Donald MacLennan and Douglas Beaton:*** These gentlemen, all long-time residents of the area and neighbours of Sadie, Vinnie and his family, attest to the significant amount of work and resources required of Vinnie and his family to maintain the farm and house as well as the care provided for Sadie. They substantially corroborate Bradley MacRae's account of the work done on the farm.

[25] ***Mary MacKinnon:*** Mrs. MacKinnon lives on an adjoining farm, has known the MacRaes all her life and was a good friend to Sadie. She also confirms the work and effort put into the farm by Vinnie and his family and the support provided to Sadie. She says in part that "...Sadie often spoke to me about how proud she was of the way Vinnie had developed the farm."

[26] ***Donald MacDonald:*** Mr. MacDonald is a former spouse of Shirley MacRae, one of Sadie's daughters. He provides evidence of conversations with Sadie in which she made it clear that Vinnie was to have the property in St. Rose.

[27] ***James Sullivan:*** A gentleman who acquired property next to the MacRae farm, provides evidence that he sought information about the property from Sadie. When Mr. Sullivan advised Sadie that he was surprised to have found that land registration records did not show her son as owner, Sadie's reply was that it was in fact Vinnie's.

[28] ***Undue Influence:*** The Claimant's application is premised upon the validity of the August 16, 1995 deed whereby her husband became joint tenant with his mother. Arguably, the Claimant still has a case even if the deed was invalid. But a valid deed is very strong evidence of Sadie's intention to ensure that Vinnie eventually owned the farm.

[29] There is no doubt that by 1995 a dominant relationship between Vinnie and his mother would have existed. Vinnie was the dominant party. By that time,

Sadie was in her mid-seventies and Vinnie acted as the *de facto* owner of the farm. Solicitor Lavigne herself noted that it was her impression that Sadie looked to Vinnie for advice. Or, as Sadie told James Sullivan in 1990, "... my name is still on the deed, but (the farm) is really Vinnie's now." Other examples exist. Suffice to say that the potential for undue influence existed and therefore, in law, the presumption of undue influence is triggered. As such, the burden shifts to the Claimant to rebut that presumption.

[30] The best rebuttal evidence would be to show that Sadie had independent legal advice. (For a summary of the law relating to undue influence, see ***Dempsey v. Dempsey*** 2010 NSSC 96.) Sadie did not have independent legal advice. Ms. Lavigne was retained by Vinnie and did not confer privately with Sadie. There is no acknowledgment signed by Sadie that she understood the consequences of signing the deed. Nor are there notes made at the time by Solicitor Lavigne that Sadie acknowledged her understanding. Ms. Lavigne acknowledged that she knew and trusted Vinnie. I took it from that comment that that was why she as a lawyer did not take the steps necessary to rule out undue influence.

[31] Despite the lack of independent legal advice, I am satisfied that the Claimant has rebutted the presumption of undue influence. Sadie's signing of the deed was entirely consistent with statements she made regarding Vinnie's ownership of the property. I have already referred to what she said to James Sullivan. In the same vein, she told her then son-in-law Donald MacDonald "...how she hoped the rest of her sons and daughters would understand why Vincent should have the property." (Affidavit paragraph 12)

[32] The Claimant also sought to introduce affidavit evidence dated January 30, 2009 and a Statutory Declaration dated April 11, 2008 from one Dorothy Oliver. Ms. Oliver is 82 years old. She was a good friend of Sadie's and had conversations with Sadie regarding ownership of the property. Regrettably, Ms. Oliver was diagnosed with dementia on November 13, 2009. A consultation report (same date) indicates that Ms. Oliver had memory issues "over the past three or four years." I therefore give no weight to Ms. Oliver's affidavit or statutory declaration.

[33] I am satisfied that all of the MacRae siblings knew and understood that their mother's intention was that the farm would belong to Vinnie. They all became

aware of the 1995 deed in 1997. It is significant that at that time, no one challenged the deed or their mother's ability to sign it.

[34] In her affidavit dated March 4, 2009, Lauchina Campbell at paragraph 10 says: "... I was surprised this (the deed signing) happened because Sadie was in no shape mentally to be doing anything like that." I am satisfied that Lauchina is mistaken in her recollection of what the situation had been approximately 14 years earlier.

[35] Lauchina's evidence is at odds with that of other siblings. Shirley MacRae, for example, testified that when she learned of the deed she "... didn't get upset over it." Margaret Sutherland said that her mother was (apparently referring to 1995) "forgetful at times". Yet Margaret never challenged Vinnie about her mother's ability to sign the deed.

[36] Some of the siblings suggested that they understood that the deed was merely a financing mechanism, that is, it enabled Vinnie to get a mortgage. I do not accept such evidence. Actions speak louder than words. In 2002, just before he died, Vinnie offered Margaret Sutherland a piece of land. While she declined

the offer, Margaret did not dispute Vinnie's authority to make it. In other words, Vinnie was acting like the owner and Margaret took no issue with that.

[37] Similarly, Angus MacRae testified that, shortly before Vinnie's death, he intended to ask Vinnie for a piece of land. Angus never did ask because of Vinnie's health. Again, this is an example of acknowledgment within the family that ownership of the farm had been transferred as their mother had always intended.

[38] No one ever confronted Vinnie with a declaration that his mother did not understand the consequences of the deed nor that she intended otherwise. The situation is in marked contrast to that in ***Dempsey*** (noted earlier) where the siblings did confront their brother as soon as they learned of the impugned transaction. (Also in ***Dempsey***, there was evidence of prior Wills which contradicted the purported intent of the deed.)

[39] On the competence issue, the evidence is that Sadie was not diagnosed with dementia until November 1997, that is, over two years after she had signed the deed. Yet, in June 1997, Shirley MacRae had no hesitation in borrowing $300.00

from her mother. Shirley testified that Sadie was fully aware of the loan being made. Sadie told Shirley that "she was happy to do it for her."

[40] Similarly, Angus MacRae has no difficulty relying upon a 1996 conversation with his mother where she stated that the farm "... was there for everybody." Angus overstates what his mother meant. Sadie did not mean that everybody would be equal owners of the farm. Sadie was undoubtedly conveying her belief that the close family relations that then existed would continue. Accordingly (and this as well reflected Sadie's perception of how Vinnie felt), all the siblings and their families would always be welcome to visit.

[41] It is clear from the evidence of Solicitor Lavigne that, on August 16, 1995, the expectation of both Vinnie and Sadie was that Sadie would die first. In that case Vinnie would, as the surviving joint tenant, have become the sole owner of the farm. If that had happened, I very much doubt that any of the siblings would have challenged Vinnie's ownership. When Vinnie died first, the siblings realized they had what they thought was a solid legal entitlement to a share of the farm. Given their obvious emotional attachment to the property, there was no way they were going to surrender that entitlement.

[42] In short, I am satisfied that on August 16, 1995, Sadie knew exactly what she was doing when she signed the deed. Further, I am satisfied that she signed the deed of her own free will with no undue influence from Vinnie. I am confident that Sadie fully appreciated that by signing the deed she would fulfill her long held intention of making Vinnie the eventual owner of the farm.

[43] ***Resulting Trust:*** As noted, Vinnie gave up a good job with Chrysler in Windsor, Ontario in 1973. He did so at the request of his parents after his father was diagnosed with cancer. He lived and worked on the farm from 1973 until his death in 2002. Vinnie made substantial improvements to the farm. I heard evidence that some of those improvements were paid for by government grants. If so, I am satisfied that that in no way diminishes Vinnie's contribution in time and effort. Indeed, I commend his initiative in securing any grants that became available.

[44] As I indicated earlier, there is no doubt that Sadie intended that Vinnie should be the eventual owner of the farm. Sadie hugely benefited by Vinnie's return from Ontario and subsequent efforts on the farm. Vinnie's return enabled

Sadie to continue to live in her own home and to continue to enjoy the farm and her family as she had before her husband's death.

[45] I have not the slightest doubt that Sadie was extremely grateful that Vinnie returned home and worked the farm. As I have said, Sadie signed the August 15, 1995 deed specifically to ensure that Vinnie's ownership was secure. No doubt she appreciated that he needed his name on the deed to get a mortgage. But her primary motivation was to make Vinnie the owner of the farm.

[46] If ever there was a case which merited the finding of an implied or resulting trust, this is it. I am sure that it never occurred to Sadie that her son Vinnie would predecease her. If events had unfolded as Sadie had anticipated, Vinnie would have become sole owner of the farm.

[47] In ***Veinot Estate v. Veinot*** 1998 CanLII 1957, the Court held that the brothers had established their claim on the basis of a resulting trust:

> I conclude as well that a resulting trust exists and has been established in their favour. ***Rathwell*** (1978), 83 DLR 3rd, 289 (SCC). Reginald and Carmon Veinot contributed to the acquisition, development, extension, and improvement of the farm operations and the evidence establishes a clear, common intention with their father that amounted to a joint venture

> between them and their father in the farm operation. The existence of such a strong common intention brings the factual situation well within the prerequisites of a resulting trust, and the same division I arrive at based on constructive trust would prevail had it been necessary to rely upon the doctrine of resulting trust.

[48] In ***Rathwell***, the Supreme Court had described a resulting trust as being firmly grounded in the settlor's intent, with that intent being inferred or presumed '... as a matter of law from the circumstances of the case ... The law presumes that the holder of legal title was not intended to take beneficially.'

[49] The ***Veinot*** decision was upheld on appeal, and leave to appeal to the Supreme Court of Canada was refused.

[50] As I am satisfied a resulting trust exists in favor of Vinnie's estate, I need not deal with constructive trusts. Had it been necessary to do so, I would have no difficulty in finding that Sadie's estate is unjustly enriched by the acquisition of the farm while Vinnie's estate is correspondingly deprived.

[51] A couple of incidental issues:

[52] ***(a) Vinnie's Receipt of $68,300.00*** ($73,424.00 - $5,124.00 payable to Sadie's estate) under the Evans Coal mine lease. These payments occurred between November 18, 1998 and June 30, 2000. That is, the money was received by Vinnie after he became joint owner of the farm and while Sadie was still alive. Ordinarily, Sadie (and thus her estate) would be entitled to one half of those monies. I find that that is not the case here.

[53] By the time the Evans money was paid, Sadie had been diagnosed with dementia. But there is no evidence that Sadie had ever sought a share of any other monetary benefits from the farm, meagre though they might have been. There was some evidence that from time to time pulp would be cut and sold. Or livestock or equipment would be sold. My understanding is that any money realized was re-invested in the farm. That re-investment would solely benefit Vinnie.

[54] I am satisfied that, had she been competent in 1998 - 2000, Sadie would not have sought a share of the Evans money. By that time (and well before) Sadie regarded Vinnie as the property owner entitled to any benefits that flowed from such ownership. The cheque for $5,124.00 payable to Sadie's estate should be

payable to Vinnie's estate. If the cheque has already been cashed, the $5,124.00 is to be transferred to Vinnie's estate.

[55] ***(b) Potential tax consequences resulting from the 1995 deed:*** the Proctor of Sadie's estate raised this issue. In his view Sadie's gift of the farm to Vinnie may be a "deemed disposition" as far as the Canada Revenue Agency is concerned. Had his mother predeceased him, I am confident that Vinnie would have accepted responsibility for any such tax consequences. Vinnie might have felt morally obliged to do so. The tax however would have been assessed to Sadie.

[56] Whether or not Vinnie's estate now has a legal obligation to pay any tax is another question. I have not been briefed on the relevant tax law. Counsel should ascertain the position of the CRA. If Counsel then cannot agree on the disposition of this issue, then an application to this Court (not necessarily to me) should be made to resolve the question. (Counsel should first satisfy themselves that the jurisdiction to make such an application with this Court and not with the Tax Court.)

[57] ***Conclusion:*** I am directing that the personal representative of Sadie's estate quit claim its interest in the farm to Vinnie's estate.

[58] Counsel for the Claimant should submit a brief on costs within 14 days of receipt of this direction. Opposing Counsel and the Proctor (if he wishes) shall reply seven days later.

Order accordingly.

J.