SUPREME COURT OF NOVA SCOTIA
Citation: Sprott Estate (Re), 2011 NSSC 327

Date: 20110825
Docket: Hfx No. 343317
Registry: Halifax

An Ex-Parte Application by the
University of Melbourne,
Trustee of a certain trust under the Last Will and Testament of
Samuel Ernest Sprott, deceased,
for an Order seeking the variation of certain terms of the Will

Judge: The Honourable Chief Justice Joseph P. Kennedy

Heard: February 21, 2011 in Halifax, Nova Scotia

Counsel: Hugh Wright and Ryan Conrod for the Applicant

By the Court:

[1] By this application the University of Melbourne ("the University") seeks the variation of certain terms of a will.

Background:

[2] Samuel Ernest Sprott, late of Halifax, Nova Scotia, retired Professor English Language and Literature at Dalhousie University, died on May 20, 2009, having executed his Last Will and Testament ("the Will").

[3] Royal Trust Corporation of Canada ("the Executor") is one of two personal representatives named in the Will. The other, Dr. Douglas Barbour, is named the "Literary Executor" and in this role is responsible for the disposition of all books, papers and other related materials and records. The Executor is referred to as the sole Executor and Trustee of the Will and in this role is responsible for the disposition of the remainder of the estate.

[4] The Executor is aware of this application and takes no position.

[5] Dr. Sprott bequeathed an initial 50% of the residue of his estate to the University to be held in trust ("the Melbourne Trust"), a portion of the annual income therefrom to be paid as a fellowship to Australian scholars ("the Fellowship").

[6] The University was established in 1853 and is one of Australia's premier institutions of higher learning, with over 35,000 students. It acts as trustee to approximately 800 trusts.

[7] The Will also establishes a Life Fund in favour of Dr. Sprott's two sisters, Winifred Barro Sprott and Mary Florence Sprott. Winifred Barro Sprott is deceased. On the death of Mary Florence Sprott, the Melbourne Trust will be enlarged by the addition of the balance of the Life Fund.

[8] The relevant provisions of the Will read as follows:

> 11) I GIVE, DEVISE, AND BEQUEATH all the rest and residue of my estate, both real and personal of whatsoever kind and wheresoever situate, to my Trustee upon trust for the following uses and purposes:
>
> . . .

b) As soon as convenient, and if possible within One (1) year of my death, to divide the remainder of the rest and residue of my estate into Two (2) equal funds to be applied as follows:

(i) To hold one such fund in securities and other property authorized for the investment of the funds of my estate and to pay Seventy-five Per Cent (75%) of the annual income therefrom in each year in equal shares to my sisters WINIFRED BERYL SPROTT and MARY FLORENCE SPROTT throughout their lifetimes and after the death of one of them to pay Seventy-five Per Cent (75%) of the annual income to the survivor of them throughout her lifetime, and in each case to accumulate the remaining Twenty-five Per Cent (25%) of the income in the fund; after the death of the survivor of my sisters WINIFRED and MARY, to add the balance of this fund to the capital of the fellowship fund established pursuant to subparagraph 11 (b)(ii) of this my Will.

(ii) To pay the other fund to the University of Melbourne, Victoria, Australia, or if the University of Melbourne does not accept it to the National University of Australia, Canberra, F.C.T., Australia, to be held by it in trust and, while any of my sisters is alive, to pay at least Ninety-five Per Cent (95%) of the annual income therefrom as a fellowship to be awarded annually to an Australian citizen who is an outstanding scholar not less than Thirty-five (35) nor more than Forty-five (45) years of age at the time of the award for scholarly study outside of Australia intended to lead to a book relating to dramatic or non-dramatic English Literature of the sixteenth or seventeenth centuries; and to pay up to Five Per Cent (5%) of the annual income from this fund to defray actual expenses incurred by the institution in administering the fellowship; after the death of my last surviving sister and after this fund has been enlarged by the addition of the balance of the fund referred to in subparagraph 11 (b)(i), to continue to hold this fund and to pay Seventy Per Cent (70%) of the annual income therefrom as a fellowship with the conditions and purposes hereinbefore stipulated, and to pay Two Per Cent (2%) of that income to defray actual expenses incurred by the institution in administering the fellowship, and of the remaining Twenty-eight Per Cent (28%) to accumulate as part of the capital fund the maximum amount legally permitted in any year to add the difference, if any, between that maximum amount and Twenty-eight Per Cent 28%) of the income for that year to the annual fellowship award.

[9] The approximate value of the residue to be distributed is $1.8 million, divided evenly between the Life Fund and the Melbourne Trust. The University has received partial funds of $637,116.50 to establish the Melbourne Trust.

[10] The University has reviewed the terms of the Will and has accepted the Melbourne Trust, but prefers to make three amendments to its terms.

[11] These three amendments and the reasons the University gives for each are as follows:

(a) that the Fellowship be open for award annually rather than be awarded on a strictly annual basis. The Will stipulates that the Fellowship is to be awarded to an "outstanding" candidate. This proposed change is directed at years for which there are no outstanding candidates. In such instances the University, at its discretion, would apply the amount of the award to the capital fund or to an award in the next year;

(b) that the University be permitted to award the Fellowship to an outstanding scholar under the age of 45 years, as opposed to being required to award the Fellowship to scholars between the ages of 35 and

45 only. The purpose of this amendment is to broaden the pool of potential recipients so that the Fellowship may be awarded to outstanding scholars as often as possible; and finally

(c) the University is requesting an alteration to the calculation of the annual administrative commission. The Will provides for a deduction of a commission of 2% of the annual uncapped income as set out in the Will, once the University receives the remaining 50% of the residual estate. This is a different method than the University's current procedure for similar funds, but does not, says the University, necessarily result in a higher or lower commission in any given year. For reasons of administrative efficiency, the University is seeking to make the Will consistent with its current practice in calculating and receiving commission. The University requests firstly that income should be capped at 5.5% per year (or such other percentage as the University determines from time to time for University charitable trusts generally), with the excess added to the capital amount. Of the capped income amount, it should then be allowed to deduct the lesser of the amount it deducts for similar funds (currently 2.5%) and 5% of the annual income. The change would ease the administrative burden on the University as

> trustee and is, it submits, consistent with the purposes of the Melbourne Trust. The University says it operates hundreds of trusts and it would avoid unnecessary administrative complexity and cost if the administrative fees for the Melbourne Trust were equal to the fees applied to the University's other trusts. The desired change would result in an administrative commission that may be higher or lower in any given year.

[12] The University submits that the proposed changes to the terms of the Melbourne Trust will better achieve its purposes.

[13] It therefore seeks an amendment to the Will to effect these three changes in provision 11(b)(ii) of the Will.

THE LAW

Inherent Jurisdiction

[14] The University submits that this Court has an inherent jurisdiction to approve a variation in the administrative terms or machinery of charitable trusts. It cites *Re*

Killam Estate (1999), 38 E.T.R. (2d) 50 as authority for this proposition. I wrote that decision.

[15] In *Re Killam Estate,* the deceased had established trusts for the benefit of institutions including several universities. Under the terms of the will, only the income derived from the trust property was to be distributed and the trusts were to continue in perpetuity. However, economic and other factors led to a request by the trustees and beneficiaries to encroach on the capital gains of the fund to supplement the income. Consequently, the trustees and beneficiaries brought an application for implementation of a new administrative scheme on the basis that the Court had an inherent jurisdiction broad enough to allow the variation, although the result would be contrary to the explicit directions of the deceased. It was submitted that the new scheme would be in accord with the spirit of the gift and would ultimately better accomplish the deceased's purposes.

[16] I concluded that the Nova Scotia Supreme Court had the inherent jurisdiction to alter the administration or the "machinery" of the trusts in the way that was requested and emphasized that the new scheme was reasonable, prudent and in accordance with the purposes of the trusts. I stated at paras. 78-82:

> [78] I am satisfied that I do have the inherent jurisdiction to alter the administration, "the machinery" of these charitable trusts, and that it is so extensive as to allow the specific changes that "the agreement" accomplishes.
>
> [79] I conclude that the use of this Court's inherent jurisdiction to allow the distribution of both income and capital growth is a progression that comes rationally and naturally from the use of jurisdiction by the English and Commonwealth Courts.
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> [80] Having concluded that both the method of investment and the distribution level sought to be maintained by the applicants are reasonable and prudent, I conclude that this Court should use its inherent jurisdiction to approve and enable "the agreement" to be accomplished.
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> [81] Although the result will be contrary to the expressed, unequivocal direction of Mrs. Killam to distribute "income only", I am influenced by the cases cited, such as: *re J. W. Laing Trust,* [1984] 1 Ch. 143, *re Dominion Students' Hall Trust*, [1947] 1 Ch. 183 and *re Lysaght, decd. Hill and Another v. The Royal College of Surgeons and Others*, [1966] 1 Ch. 191 in which the courts have varied trusts and thereby contradicted the original intentions of the makers when they determined that the alterations were in the best interests of the beneficiaries and for the better administration of the trust.
>
> [82] I am convinced that the variations accomplished by "the agreement" are in accord with the "spirit of the gift".

[17] In *Re J.W. Laing Trust*, [1984] 1 Ch. 143, the will required distribution of trust funds within ten years of the death of the Testator. The Executors applied to distribute the capital over an indefinite period, rather than within the ten years. The Court held that it had jurisdiction to regulate the administrative machinery of a trust when it is

expedient in the interests of the beneficiaries. In *Re Laing*, Mr. Justice Peter Gibson made the point that distributing the capital within a certain period was not the purpose of the trust.

[18] The Court concluded that it had the power to amend the machinery by which a trust was administered, provided that the purpose of the trust continued to be served. Justice Gibson stated at p. 155:

> . . . I have no hesitation in reaching the conclusion that the court should, in the exercise of its inherent jurisdiction, approve a scheme under which the trustees for the time being of the charity will be discharged from the obligation to distribute the capital within 10 years of the death of the settlor.

[19] In *Lysaght v. Royal College of Surgeons*, [1966] 1 Ch. 191, the Testatrix established a trust in her will out of which an endowment fund was to be paid to the Royal College of Surgeons. The Testatrix, though, directed that any student to receive money under the trust could not be Jewish or of the Roman Catholic faith. The College informed the executors that it would accept the bequest according to the terms in the will only if this clause was omitted.

[20] Buckley J. reviewed the clause in order to determine the Testatrix's true intention. He stated at p. 204:

> . . . In my judgment, upon the proper construction of clause 11 of the testatrix's will the essentials of her intention expressed in that clause were (a) to found medical studentships which (b) should be administered by the governing body of the college (c) for the purposes set out in paragraph (E) of clause 11. These parts of the clause state her objective, and in them, in my judgment, the heart of her intention is to be found. The remaining provisions of clause 11 may not unfairly be said to deal with the machinery of the trust. . . .

[21] Buckley J. found that where it was the intention of the Testatrix that the College act as the trustee for the endowment fund, insistence on maintaining paragraph 11(d) would override the paramount intention of the Testatrix. The Court ordered the deletion of the words "and not of the Jewish or Roman Catholic faith" in clause 11(d) so as to make this bequest acceptable to the Council of the College and to facilitate the administration of the trust.

[22] *Re Dominion Students' Hall Trust v. Attorney General*, [1947] 1 Ch. 183 involved a company that ran a hostel for male students. Originally, the benefit of the charity was restricted solely to "dominion students of European origin". The company asked for the approval of a scheme by which the charity could be administered so as to benefit students of all racial origin and brought a petition asking for the confirmation of a special resolution to change its memorandum of association in relation to its object by removing the words "of European origin".

[23] In deciding to approve the new administrative scheme, the Court considered the intention of the charity, to promote "community of citizenship, culture and tradition among all members of the British Commonwealth of Nations". The Court found that times had changed since the charity first came into being, and concluded that failing to approve the proposed scheme, and maintaining the original provisions would effectively defeat the charity's main object. The Court also found that the original beneficiaries would receive a greater benefit from the charity if the proposed administrative changes were approved. The Court authorized the scheme.

[24] *Re Killam Estate* has been considered by an Ontario case, *Re Stillman Estate* (2003), 5 ETR (3d) 260. *Re Stillman Estate* involved an issue similar to the one raised in *Re Killam Estate*. The issue addressed by the Court was whether to allow encroachment on the capital of an endowment fund in contravention of the specific terms of the trust. The terms of the trust did not include a power to encroach on capital and, as a result, the trust had been unable to meet its quota. The Applicants requested the approval of an administrative scheme that would allow for a total return investment policy.

[25] The Ontario Superior Court found that such a variation went beyond the merely mechanical or administrative terms and that to approve such a departure from the Testator's intention under the administrative scheme-making power of the Court would require "a leap of some magnitude". However, that Court recognized the value of this proposed scheme in that it would permit the trustee to increase the overall return on the trust investments and allow the trustee to better realize on the intentions of the Testatrix. Recognizing the benefits of this proposed scheme, the Court opted to apply the cy-près doctrine in order to approve the proposed scheme.

[26] Although the courts in *Re Killam Estate* and *Re Stillman Estate* applied a different approach, each case had the same end result. In both cases, the Court approved a scheme in order to alter the terms of the trust to allow for the better administration of the trust.

[27] Having found in *Re Killam Estate* a broad inherent jurisdiction to amend the administrative terms of a charitable trust, I am prepared to consider the use of that power therein.

[28] This is not a situation in which the cy-près doctrine is applicable. The Trust can function, albeit less well, if the terms remain unaltered. What is sought in the present circumstances is a variation of the administrative terms so that it can be implemented in a better way to advance the intentions of the Testator.

[29] I find the University's proposed amendments fall within this Court's jurisdiction to alter the administrative terms of charitable trusts.

[30] I conclude that, if an administrative change would better accomplish the charitable purpose of the late Dr. Sprott, the Court can authorize a change in the mechanism by which the purpose is accomplished.

[31] In *Re Killam Estate*, the Court recognized its inherent jurisdiction to alter the administrative terms of a charitable trust where the amendments were reasonable, prudent and in accordance with the purpose of the gift and for the ultimate benefit of the beneficiaries. The University submits that each of the proposed amendments meets these conditions.

[32] It says that each of the proposed amendments goes to the administration of the Trust and does not interfere with the purpose.

[33] Clause 11(b)(ii) confirms that Dr. Sprott's intention in drafting this provision was to provide "outstanding scholars" with the opportunity to study outside of Australia. "Outstanding" would seem to be central to Dr. Sprott's intent. It is possible that scholars of this calibre interested in pursuing this area of study will be uncommon. This would seem especially so when the age restriction is considered.

THE VARIATIONS SOUGHT

(a) <u>The Award should be open for awarding annually</u>

[34] The University's first request is that the Fellowship be open for award annually as opposed to being required to award this Fellowship every year. Should an "outstanding" candidate not be available, it would be problematic if the University is required to award a Fellowship. Altering the terms to give the University permission to not award a Fellowship in a year when there are no suitable candidates addresses Dr. Sprott's intent that the award be given to outstanding scholars.

[35] The Will as it presently reads risks diminishing the significance of the Fellowship and compromising the quality of scholarship.

[36] It is probable that Dr. Sprott would be distressed should his directions as to the awarding of the Fellowships result in a level of scholarship that was less than he clearly anticipated.

[37] I am convinced that this amendment would support the obvious intent central to the creation of the Fellowship and I direct that the Will be amended as suggested.

(b) <u>The Age requirements of the Award should be broadened to under 45 years of age</u>

[38] The University requests that it be allowed to award the Fellowship to an outstanding scholar under the age of 45 as opposed to being restricted to award the Fellowship to scholars between the ages of 35 and 45 only. Confining eligible candidates to this narrow age range will limit the pool of possible recipients which could cause a reduction in the quality of the recipients.

[39] I will make the amendment as suggested, again to protect the level of scholarship under the Fellowships that Dr. Sprott anticipated.

[40] This amendment will increase the pool of talented individuals eligible for the Fellowship and predictably reduce the number of years in which the University will be unable to award the Fellowship based on a lack of eligible "outstanding" recipients.

(c) The Commission for the administration of the Melbourne Trust should be calculated the same way as for similar University funds

[41] The University requests that once it receives the remaining 50% of the residue of the estate from the Life Fund, it be permitted to take the lesser of the amount it deducts for similar funds, currently 2.5% of the annual income of the Melbourne Trust, with income in any given year capped at 5.5% or such other percentage as the University from time to time determines for charitable trusts generally. This is as opposed to the 2% of the annual uncapped income as set out in the Will.

[42] The University is the trustee to approximately 800 charitable trusts. The *Melbourne University Act 2009* entitles the University to commonly invest these trust funds and proportionately apply the income. The Melbourne Trust would be invested

commonly with these other funds. This, it says, will allow for more efficient administration of the Melbourne Trust.

[43] Generally, a court has the authority to award an amount of compensation to a trustee that is fair and reasonable. However, if a rate of remuneration has been set in the trust instrument, then the Court does not have jurisdiction to increase this amount for a trust that has already been established. Section 62 of the Nova Scotia *Trustees Act* states:

> Remuneration of trustee or guardian
>
> 62 (1) Trustees or guardians shall be entitled to such fair and reasonable remuneration for their care, pains and trouble, and their time expended in and about the estate, and in such proportions where there is more than one trustee, as is determined by the Court or judge, or by any local judge of the Court or referee to whom the matter is referred.
>
> (2) A judge may, on application to him for the purpose, settle the amount and apportionment of such remuneration, although the estate is not before the Court in any action or proceeding.
>
> (3) Nothing in this Section shall apply to any case in which the rate of remuneration is fixed by the instrument creating the trust. R.S., c. 479, s. 62.

[44] The University emphasizes that s. 62 of the *Trustee Act* is not a prohibition. Ss. 61(1) and ss. 61(2) are rendered inapplicable where, as here, the rate of remuneration is fixed in the Will. However, s. 61 does not prohibit the present application nor

purport to oust the broad inherent jurisdiction of the Court, as set out in *Re Killam Estate*.

[45] The University says this is not a request for an increase in the amount of commission, but a variation in the manner of its calculation. It demonstrated that in some years there may be an increase. However, in other years it is possible that the University would receive less as a result of the proposed change.

[46] The University says its request to change the manner of the calculation of the commission in order to administer the Melbourne Trust is an appropriate reasonable change to "machinery" of this Trust. It is requesting a manner of compensation calculation that is comparable to the amount it receives to administer similar funds. It says the purpose of the request is to reduce administration complexity and therefore cost, not to increase commission.

[47] There are obviously practical advantages to be accomplished by this proposed amendment. If allowed, the Trust would be easier for the University to manage and its interest in accomplishing this change is understandable.

[48] However, unlike the other amendments sought, I do not find that this proposed change can be justified by reference to the "spirit of the Trust".

[49] The argument that has persuaded this Court to make the first two amendments sought is not applicable to this third requested change.

[50] It is my view that the use of the Court of its inherent jurisdiction to alter the terms of the Will should be restricted to changes that address the "spirit of the Trust" and not be employed to address administrative efficiency.

[51] I will not be making the third amendment sought by this application.

[52] The Will will be amended to accomplish the first two changes sought by this application - there will be no requirement that the Fellowship be awarded annually and there will no longer be a minimum age for candidates.

[53] I am satisfied that the two amendments that this Court is making will allow the University to maximize the benefit that the Trust can provide to "outstanding scholars" and will not interfere with the charitable purposes of the Trust.

[54] I believe that Dr. Sprott would have agreed with these reasonable amendments and would have been pleased that the University shared his interest in the facilitation of outstanding scholarship.

Kennedy, C.J.S.C.