Date: 20011031
Docket: SH 01-169251

IN THE SUPREME COURT OF NOVA SCOTIA
[Cite as: Ferguson Estate v. MacLean, 2001 NSSC 154]

BETWEEN:

MABEL P. CHISHOLM and KATHLEEN SORENSEN, Executors and Trustees under the Last Will and Testament of KATHLEEN NOVELLA FERGUSON

APPLICANTS

- and -

HUGH MACLEAN, DIANE TOMLIK, DONNA THOMPSON, ROBERT CURLEY, PATRICIA MACLEAN, SARA THOMPSON, ADRIAN MACLEAN, FRANK MACLEAN, LYNN MACLEAN, MARY MURRAY, ANN LANGLOIS, GEORGINA MOORE, JANE MACGEE, ROSS MACLEAN AND MABEL CHISHOLM, being all of the heirs-at-law of Kathleen Novella Ferguson, and KATHLEEN SORENSEN, MARY PATTERSON, JOHN PATTERSON, STEPHEN PATTERSON, GREG PATTERSON and CATHERINE PATTERSON

RESPONDENTS

D E C I S I O N

HEARD: Before the Honourable Justice Suzanne M. Hood at Halifax, Nova Scotia on September 13, 2001

DECISION: September 14, 2001 (Orally)

WRITTEN RELEASE OF ORAL: October 31, 2001

COUNSEL: **Lorraine P. Lafferty for the applicants** *(not appearing by consent)*
W. Augustus Richardson for the respondents, **Kathleen Sorensen, Mary Patterson, John Patterson, Stephen Patterson, Greg Patterson and Catherine Patterson**
Timothy Matthews, Q.C. for the heirs-at-law of Kathleen Novella Ferguson

HOOD, J. (Orally):

[1] Mr. Richardson submits that clause 4 of the will of Kathleen Ferguson gives a power of appointment to Mabel Chisholm and Kathleen Sorensen. Mr. Matthews says that the will establishes a trust and that the direction in clause 4 is part of the trust established. He says however that the clause 4 trust fails. *Halsbury's Laws of England*, vol. 36 (2), 4th ed. reissue (London: Butterworths, 1999) at 133, para. 219 says the following with respect to powers of appointment:

> No technical or express words are necessary either in a deed or in a will to create a power, so long as the intention is sufficiently clear. The intention may be found in a recital or in an exception from a prohibition; or it may be implied, as where the existence of a power is necessary for carrying out some express provision ...

[2] Mr. Richardson says that, in this case, the intent to create a power of appointment can be implied from clause 4. He says that to carry out clause 4 a power of appointment is necessary. In *Re Hayes*, [1938] O.W.N. 417, [1938] 3 D.L.R. 757, the will gave a power of appointment to executors. The decision is a very short one but there is no reference to trustees who have fiduciary duties but only to executors who had the power to distribute the residue.

[3] In *Re Nicholls* (1987), 34 D.L.R. (4th) 321 (Ont. C.A.), the clause in question was as follows (p. 327):

> 10. I also give my said executors power and desire them to dispose of any balance of my estate or property which may be in the bank ... to the best of their judgment, where they may consider it will do the most good and deserving.

[4] The Ontario Court of Appeal reviewed the law with respect to testamentary powers of appointment and concluded that they can be upheld in certain circumstances. One of the cases to which Krever, J.A. referred was *Higginson et al v. Kerr et al* (1898), 30 O.R. 62. In that case, Ferguson, J. (as quoted at p. 328 of *Nicholls*) said with respect to clause 10, the clause in question:

> The tenth paragraph gives a power over the moneys or funds referred to in it, but leaves the object or objects wholly in the judgment and discretion of the executors, to whom the power is given. The objects are entirely undefined.

He went on to conclude that there was a power of appointment given to executors. He said with respect to the question of whether the executors held the residue in trust:

> ... I do not see that the fact that the executors are in the first clause of the will, the one by which they are appointed, called 'executors and trustees', nor the fact that they are by the twelfth paragraph empowered to hold property in trust for any of the friends of the testator, as they, the executors, might think proper, or both together, shew, or go to shew, that the residue mentioned in the ninth and tenth paragraphs is held by the executors in trust, or that there is any trust connected with the power given by these paragraphs.

[5] Mr. Richardson submits that in this case the court should conclude that the property referred to in clause 4 of the will is not held in trust.

[6] In *Higginson*, Ferguson, J. referred to a clause of the will empowering the executors and trustees to hold some property in trust. He also referred to the fact that the clause that appointed them appointed them as executors and trustees. He concluded however that there was nothing to show that the residue was held in trust.

[7] However, in this case, clause 3 of the will clearly provides that all of Kathleen Ferguson's property was to be held in trust. It says:

> 3. I GIVE, DEVISE AND BEQUEATH all my property of every nature and kind and wheresoever situate, including any property over which I may have a general power of appointment, to my said Trustees upon the following trusts ...

[8] In my view, it is clear that all of the property was subject to a trust. This is reinforced by the reference in clause 4 to trustees. It is also reinforced by the provision in clause 4 that, before the trustees could distribute to themselves, they could seek independent advice. If, as it was in the *Hayes* case, this clause created a power of appointment, they would have been free to distribute to themselves and the second paragraph of clause 4 would have been unnecessary. That paragraph is the one dealing with hiring of someone to give them independent advice.

[9] I therefore conclude that clause 4 does not create a power of appointment. Since it is a trust provision, the trust fails because of uncertainty of its objects.

[10] Mr. Richardson's alternate argument is that the memorandum which was signed by Kathleen Ferguson creates a secret trust.

[11] Kathleen Sorensen swore an affidavit and testified about the circumstances under which the memorandum was prepared. She testified that it was she to

whom Kathleen Ferguson dictated this memorandum. She is one of the trustees under the will. She also testified that she felt morally bound to carry out the directions in the memorandum.

[12] Mabel Chisholm as well swore an affidavit and she testified that she knew nothing of the memorandum before Kathleen Ferguson's death. She knew only that she was to be an executor of her will. In fact, she is appointed as executor and trustee under the will.

[13] In these circumstances, was a secret trust created?

[14] Both counsel agree that there are two conditions for the creation of a secret trust: firstly, communication of the terms of the trust to the trustee and, secondly, the trustee agreeing to be bound.

[15] In *Boyes v. Carritt*, (1883) 26 Ch. D. 531, Kay, J. referred to two situations involving trusts. At pp. 535-36 of the decision he said:

> If it had been expressed on the face of the will that the Defendant was a trustee, but the trusts were not thereby declared, it is quite clear that no trust afterwards declared by a paper not executed as a will could be binding... In such a case the legatee would be trustee for the next of kin. There is another well-known class of cases where no trust appears on the face of the will, but the testator has been induced to make the will, or, having made it, has been induced not to revoke it by a promise on the part of the devisee or legatee to deal with the property, or some part of it in a specified manner. In these cases, the Court has compelled discovery and performance of a promise, treating it as a trust binding the conscience of the donee, on the ground that otherwise a fraud would be committed, because it is to be presumed that if it had not been for such a promise the testator would not have made or would have revoked the gift.

[16] In that case, all the testator's property was left absolutely to the solicitor personally. He said that, in spite of that absolute gift to him, he held the property in trust. Because the secret trust failed in that case, he held as trustee for the next of kin.

[17] In *Re Stead*, [1900] 1 Ch. 237, the residue of the estate was by will given to the plaintiff and defendant absolutely. The plaintiff then said that, although there was an absolute gift to her, she held her share in trust for a nephew of the testator and certain charities. In that case, it was held that the absolute gift to her was held by her on a secret trust.

[18] In those cases, the gifts were absolute gifts impressed with a secret trust. Helper, J. said in *Jankowski v. Pelek Estate* (1995), 131 D.L.R. (4th) 717 (Man. C.A.) at p. 742:

> It arises where a testatrix gives property to a person apparently beneficially, but has communicated to that person during his lifetime certain trusts on which the property is to be held. The trust arises outside the will. Any trust obligation which the legatee has undertaken is hidden from view, revealed only by extrinsic evidence. In such circumstances, where the testator has communicated the intention that the legacy should be held in trust for others, where the objects of the trust are known to the legatee, and where the legatee agrees to act as trustee or acquiesces in that arrangement, the trust will be enforced and extrinsic evidence is admissible to prove the essential facts.

[19] In only a few cases has a secret trust been found where the gift was not an absolute gift but a fiduciary one. *Blackwell and Blackwell*, [1929] A.C. 318 (H.L.) is one. In *Blackwell v. Blackwell*, a codicil was added to a will which created a trust as follows (quoting from p. 326):

> ... to invest the same as they in their uncontrolled discretion shall think fit and to apply the income and interest arising therefrom yearly and every year for the purposes indicated by me to them with full power at any time to pay over the capital sum of eight thousand pounds to such person or persons indicted by me as they think fit, and to pay the balance of four thousand pounds to my trustees as part of my residuary estate, and upon the same trusts as are declared in my will and previous codicils.

[20] A memorandum was then executed outside the will which gave instructions about the disposition of the twelve thousand pounds. Thereafter, all five trustees agreed during the testator's lifetime to carry out the trust established in the will, the details of which were set out in the memorandum. The House of Lords upheld the trust.

[21] Several of the facts in *Blackwell* differ from those in this case. In my view, those distinctions are important to the decision of the House of Lords. Firstly, the trust was for a specific sum not the entire residue of the estate. Secondly, the codicil itself referred to "purposes indicated by me to them." Thirdly, the memorandum setting out the terms of the trust was executed at the same time as the codicil. It says "memorandum of verbal instructions given to me at execution of codicil" and it was prepared by the lawyer who prepared the codicil. Fourthly, all five trustees agreed, before Mr. Blackwell's death, to carry out the trust. Fifthly, the trust did not benefit the trustees or persons related to them.

[22] In my view, these differences are critical to the result in *Blackwell*. In this case, the entire residue was alleged to have been held in a secret trust and the will itself did not refer to any list but only to the sole discretion of the trustees. The list was prepared eight months after the will and was prepared

by one of the trustees who was to benefit by it along with her mother and siblings. Finally and very importantly, one of the trustees not only did not consent to carrying out its directions during Kathleen Ferguson's lifetime but had no knowledge of the list nor that she was to be a trustee. She knew only that she was to be an executor.

[23] I have already referred to the distinction between this case and that of *Re Stead, supra*, where the gifts in the latter were absolute gifts. For that reason, I conclude that it was possible in *Re Stead* for one person to have fiduciary obligations as a trustee when the other did not. That circumstance does not apply here where both were trustees. As in *Blackwell*, all trustees would have had to agree to be bound to carry out the trust.

[24] The usual rule is that a secret trust arises only when an absolute gift is given and a secret trust imposed upon that absolute gift. *Blackwell*, in my view, creates a limited exception in the peculiar circumstances of that case to which I have referred above.

[25] It is clear that Marven Block was worried about clause 4 in Kathleen Ferguson's will. It is also clear that Kathleen Sorensen had concerns. It appears likely on the evidence that Kathleen Ferguson intended to see Marven Block to deal further with the list. She did not return the will to Kathleen Sorensen to lock away in the file cabinet again; she tried to make an appointment with Marven Block; and she had the will and the list in her purse at the time of her death. It appears that it was her intent to dispose of her property in the way set out in the list. Because of the wording of the will and the fact that it was not changed, she did not carry out her intent before her untimely death.

[26] I therefore conclude that clause 4 of the will attempts to create a trust and fails to do so. No secret trust was created in the circumstances of this case. The court cannot write the will that Kathleen Ferguson did not. Accordingly, there is an intestacy with respect to the residue of the estate of Kathleen Ferguson.

Hood, J.