IN THE COURT OF PROBATE FOR NOVA SCOTIA

Citation: Maskell Estate (Re), 2017 NSSC 305

Date: 20170921
Docket: AM. No. 445899
Registry: Amherst

IN THE ESTATE OF WARREN MASKELL, Deceased

IN THE MATTER OF: The Probate Act of Nova Scotia, 2000 Chapter 31, Section 1

and

IN THE MATTER OF: An Application by Kelli Lovett to interpret the Will of Thomas Warren Maskell, Deceased

and

BETWEEN:

KELLI LOVETT

APPLICANT

and

THE ESTATE OF THOMAS WARREN MASKELL

DEFENDANT

DECISION

Judge:	**The Honourable Justice Jeffrey R. Hunt**
Heard:	September 8, 2017, in Truro, Nova Scotia
Oral Decision:	September 21, 2017
Written Release:	November 27, 2017
Counsel:	Douglas Livingstone, Solicitor for Kelli Lovett Peter Lederman, Q.C., Solicitor for Thomas Maskell Estate Dianne Paquet, Solicitor for Joanne Baxter

By the Court (Orally):

Opening Remarks

[1] We are coming back on the record now in the Estate of Thomas Warren Maskell, Probate Court file No. 11282 (Amh. 445899). As we all know this was an Amherst matter which had the hearing proceed here in Truro in order to save costs. This was at the request of the parties.

Decision

[2] For decision is the application of Kelli Lovett seeking interpretation of one clause in the Last Will and Testament of her brother, Thomas Warren Maskell. The Will is dated December 19, 2012.

[3] By way of overview the issue to be decided is the intended meaning of sub clause 4 (iv)(f) which makes a certain bequest to six individuals, one of whom is the Applicant. That sub clause is found within the longer clause 4 of the Will. This clause is the "heart" of the document. I am going to set out here at the outset of these reasons the entirety of clause 4 (iv). I am doing this to provide some sense of how the clause is orientated in the context of the other gifts.

[4] Thomas Maskell directed his Executor as follows:

4(iv) TO DIVIDE, pay, transfer and deliver my estate as follows:

(a) Any truck of which I die possessed to David Ogilvie for his own use, and this will also include the insurance proceeds, if any, in relation to any truck in which I may be a passenger at the time of my death;

(b) Any automobile (car) of which I die possessed to Joanne Marie Baxter for her own use, and this will also include the insurance proceeds, if any, in relation to any automobile in which I may be a passenger at the time of my death;

(c) My cottage to my niece and nephew, Jillian Lovett and Ellis Lovett, as joint tenants;

(d) My Sage salmon rod and reel to my friend Terry Terris of Truro, N.S.;

(e) Any guns of which I die possessed to my friend Darroll Thurier, of Sackville, N.S.;

(f) Any cash, securities, investments or any other assets held by Scotia McLeod at the time of my death, to be divided equally between my mother, Carol Maskell, David Munroe, Jillian Lovett, Ellis Lovett, John Lovett and Kelli Lovett, or the survivor of them in equal shares;

(g) I give to Joanne Marie Baxter my residence property located at Wentworth, Cumberland County, Nova Scotia for her use, enjoyment and occupancy during her lifetime or so long as she desires to live there and I direct my executors to pay the insurance thereon in order to insure the property at its full replacement value from time to time. All other costs to operate, keep in good condition, repair, maintain the property, as well as all costs of heat, electricity, taxes and regular costs of maintaining such a residence shall be the responsibility of Joanne Marie Baxter. Should Joanne wish to terminate her residence in the property, or should she fail to assume her responsibility of making necessary payments in order to maintain the property (which decision shall be in the absolute discretion of my Trustee) then, in that event, I instruct my trustee to sell the residence and to transfer 30% of the net proceeds of sale to Joanne Marie Baxter for her own use absolutely. The remaining seventy percent of the net proceeds of sale I devise to Jillian Lovett and Ellis Lovett, or the survivor of them, in equal shares;

(h) To give and transfer all the rest and reside of my estate, of whatsoever nature or whatsoever kind (both real and personal) to Joanne Marie Baxter for her own use absolutely. However, if she shall have died before me or in common accident with me, then in that event, the rest and residue of my estate is to be divided equally between my mother Carol Maskell, David Munroe, Jillian Lovett, Ellis

> Lovett, John Lovett, Kelli Lovett, or the survivor of them, in equal shares.

[5] In its simplest terms the position urged by the Applicant is that the proper interpretation of clause 4(iv)(f) is that Mr. Maskell was intending to convey to her and the five others, all the deceased's cash, securities and investments whether held by Scotia MacLeod or otherwise.

[6] The position of the Respondent is that the clause was intended to convey only assets held by Scotia MacLeod whether it was in the form of cash, securities, or investments, or other assets but nothing further. In other words – anything and everything held by Scotia MacLeod.

Summary of the Evidence

[7] I intend at this point to undertake a brief overview of the evidence. It is not my intention here to restate or summarize every single point of evidence or submission. I will summarize central elements and core items of relevance. I have, however, reviewed, weighed and considered all of the evidence in coming to my conclusions - even if I do not refer to every individual item here.

[8] You should note, however, that not every item proffered in evidence is of equal value. For example, the law says that I must not consider inadmissible hearsay evidence. That means that I cannot consider facts advanced in evidence

from people who were not called as witnesses or made available for cross-examination unless a rule of law allows it.

[9] The law also states that I must not consider opinion evidence from people who are not qualified as experts - except on a limited range of issues on which lay persons are permitted to offer opinion evidence.

[10] Finally, the law says that I am not to consider facts that are not relevant to the issues that I must decide. I have followed these rules of evidence in reaching my conclusions in this matter. As well, as this is a matter involving the interpretation of a Will, special considerations apply to the use of evidence outside of the Will itself. This will be discussed in more detail later in these reasons.

[11] While there were a number of affidavits filed in the matter they were relatively short and concise. A number of affidavits were received without a request for cross-examination. These include on behalf of the Applicant, the Affidavits of Greg Johnson and Darrell Thurier. The affidavit evidence of these two individuals is limited and largely directed to asserting that as friends of the deceased they had heard him say in the past that his niece and nephew, Jillian and Ellis Lovett, would be:

> "well taken care of for life…" and would "…receive his investments…"

These are references from the Affidavit of Darrell Thurier.

And that:

> "…he was dealing with an investment portfolio of about $500,000.00 and expressed great pride in doing so…"

And further:

> "…he said his niece and nephew would be well looked after, after he died…"

These are references from the Affidavit of Greg Johnson.

[12] Before moving on from these affidavits I would only note that it is challenging for a Court to employ recollections such as these. They are inherently difficult to do a great deal with. They come without dates or details. There is no indication, for instance, whether the discussions took place before or after the death of Mr. Maskell's first wife or before or after he re-partnered with Joanne Baxter.

[13] They are by nature general and non-specific. A reference to "being well cared for" will have different meanings to different individuals in different contexts. It is also worth noting that the clause with which we are dealing relates to a gift to six individuals, not just the niece and nephew. This is obviously inconsistent with the recollections of Thurier and Johnson.

[14] We must also keep in mind that it is permissible for a testator's intentions to change or at least the emphasis to change from time to time. This is neither unheard of, unprecedented or even rare.

[15] Another group of affidavits were filed by the Applicant and these witnesses were the subject of some limited cross-examination. I want to say just a word about the family relationships between the various parties and witnesses in this matter which may help orient us to the evidence.

Relationships Between Witnesses

[16] Kelli Lovett, the Applicant, is the sister of the deceased, Thomas Maskell. Joanne Baxter was the partner of Thomas Maskell at his death. The witnesses Jillian Lovett and Ellis Lovett are the children of Kelli Lovett and, accordingly, the niece and nephew of Thomas Maskell who was childless.

[17] Carol Maskell is the mother of the deceased and Kelli Lovett. She is the grandmother of Jillian and Ellis. John Lovett also testified. He is the spouse of Kelli Lovett.

Jillian Lovett and Ellis Lovett

[18] Jillian Lovett and Ellis Lovett, as I stated, were the niece and nephew of Thomas Maskell. Each of them filed affidavits and were cross-examined. They each identified and adopted their affidavits, as filed. The affidavits speak to a close relationship with their Uncle Thomas. Jillian, for instance, in her affidavit identifies a conversation with him in which he, Mr. Maskell, spoke of looking after her financially. He had given her $2,000.00 previously for university by selling, she believes, some gold stock. She quotes him as saying that she and her brother would be "well off" under his Will if anything should happen to him.

[19] Ellis Lovett's affidavit was short and concise at five paragraphs. He, too, identified a close relationship with his Uncle. He comments on the expectations he had based upon conversations that he relates as having taken place with his Uncle. Specifically, in paragraph 4 he writes of his understanding that he would be "rich some day" based upon the provision made for him by his Uncle. There was also a reference to Thomas Maskell telling him that he had him "covered".

[20] Cross-examinations of both Jillian and Ellis were limited. They acknowledged that their detailed knowledge of the full financial situation of Thomas Maskell was limited. They agreed there may have been debts and other

obligations of which they were unaware. They acknowledged that they are now joint owners in the house resided in by their grandmother, joint with their grandmother and each other. This was a wish expressed by Thomas Maskell apparently in his Will (see Will paragraph 4(iv) (c). To give this desire legal effect, however, Carol Maskell, the grandmother, had to join them as joint tenants. As well, they are to share, they acknowledged, 70 percent interest in the proceeds of the Hunter Road residence of Thomas Maskell with 30 percent going to Joanne Conrad. (See Will paragraph 4(iv)(g).

[21] There is no question that to his niece and nephew Thomas Maskell was a loving and generous uncle who had made generous gestures to them in the past. He clearly intended to see them treated well in his Will. The Respondents, of course, would submit that they have been well treated.

Kelli Lovett

[22] Kelli Lovett filed an affidavit as Applicant. This was Exhibit #1. She testifies to her understanding of clause 4(iv)(f). She says that the Executor, Mr. Ogilvie (at least up until September 4, 2015) had never suggested to her anything but that he accepted or agreed with the view she took as to the proper operation of the clause.

[23] Ms. Lovett testifies that on September 4, 2015 Mr. Ogilvie advised her that he no longer shared her view as to the proper interpretation of the clause. Ms. Lovett understood that Mr. Ogilvie was going to seek the Court interpretation of the clause. Eventually she lost confidence that he actually intended to take this step. Accordingly, she says that she moved for the interpretation herself.

[24] The affidavit also references the power of attorney given by the Estate to Ms. Lovett for the purpose of searching for the location, history and valuation of any and all investments held by Thomas Maskell.

[25] Kelli Lovett was the subject of some cross-examination. She was questioned about the voluntary payment made by Joanne Baxter following Thomas Maskell's death which paid off the mortgage of the residence occupied by her and Thomas Maskell's mother, Carol Maskell. This was a payment of approximately $120,000.00. It was acknowledged that this was a "voluntary" payment by Joanne Baxter out of insurance proceeds paid to her as beneficiary after Mr. Maskell's death. It also appears clear this was the wish and intention of Thomas Maskell. Thomas Maskell wanted to see his mother mortgage free. As noted, this was a significant payment at approximately $120,000.00.

[26] Under questioning the Applicant exhibited an unwillingness to acknowledge this action. It was only grudgingly acknowledged. To be clear it was a legally voluntary payment made by Joanne Baxter that did not benefit her financially. Indeed, it used up a substantial asset. On interpretation of the general reluctance, I saw to acknowledge this gesture may be that it reveals a sense of entitlement that underpins the approach to the litigation as a whole. The other and more generous interpretation is that the inescapably adversarial nature of litigation does colour the view of parties who are participating in it. It may have coloured the Applicant's view of the actions and intentions of Joanne Baxter. I have adopted the more generous interpretation.

Carol Maskell

[27] Carol Maskell gave evidence as a witness for the Applicant. She identified and adopted her two affidavits filed in the matter. Mrs. Maskell as the mother of Thomas Maskell obviously has suffered a great loss as has everyone. It was clear from Mrs. Maskell that this, of course, had a deep affect on her. Mrs. Maskell's affidavit of June 15, 2016 contains background on her understanding of three Wills of Thomas Maskell. Later when I come to discuss the affidavit of Mr. MacNeill, I will set out in more detail the history of the Wills.

[28] In the earliest Will that was known to exist she was the named Executor. In the final Will David Ogilvie was the Executor. Mrs. Maskell indicates that it was at her own suggestion that this change occurred. In any event, David Ogilvie was the named Executor of the final Will. Mrs. Maskell addresses in her affidavits her recollection of various conversations with Thomas Maskell that reflect Joanne Baxter in a negative light. These are largely said to have occurred in or about 2013 through 2014. In any event, the Will of December, 2012 was never changed. The couple remained together until his death.

[29] Also notable in the affidavit of Carol Maskell of April 12, 2017 is her recollection: (paragraph 9)

> That at the same time Tommy told me that he was moving a small portion of his Scotia McLeod assets to a Scotia I-Trade account for the purposes of hands on trading

This recollection, if accurate, would suggest that Thomas Maskell did not use the terms Scotia McLeod and I-Trade interchangeably or as shorthand one for the other. This recollection would suggest they were distinct items in his mind.

[30] Mrs. Maskell's affidavit of June 15, 2016 makes reference to her recollections of Thomas Maskell saying in his lifetime that on his death the family would be rich. The quote is as follows: (paragraph 5)

> That he told me that because he had no children, his niece, Jillian Lovett and his nephew, Ellis Lovett would be financially well looked after in his Will. And I heard him say to them several times "when I die you guys will be rich". He made these statements whenever the topics of tuition, car payments, etc., came up.

Similarly, in paragraph 15:

> That throughout 2013 and 2014 Tommy continued to tell me about the growth of his investments and that he was finally in the financial position to begin his search for his dream yacht to live on and sail down south for six months each year.

[31] This case is not about determining what may or may not be out there in the spectrum of assets. I have heard, the parties in fact argued at various points, as to what the searches to-date have found and not found. I can only say that is going to be added to the list of things that this case will not settle. Thomas Maskell had means, quite reasonable means in fact. Whether they stretched to the extent that would be hoped for is another question.

[32] Mrs. Maskell was cross-examined on a number of issues including her view of the relationship between her son and Joanne Baxter. She identified her view that the couple had issues from time to time. She was shown copies of e-mail exchanges from a trip the couple took together to the Gaspe, Quebec in August, 2014. Mr. Maskell sadly passed away only a few months later in December, 2014. The suggestion put to her was that Thomas Maskell and Joanne Baxter certainly appeared to be a couple at that time. She also had put to her e-mails where she thanked Joanne Baxter for paying off the mortgage on her residence.

John Lovett

[33] John Lovett was called in the Applicant's case. He identified and adopted his brief affidavit. In his appropriately brief cross-examination he was asked to confirm that his children (Mr. Maskell's niece and nephew) had received various legacies, items and transfers from the Estate. He agreed readily that this was the case. It was acknowledged that the residence occupied by Carol Maskell is now in the joint property names of Carol Maskell and his children Jillian and Ellis. It was also acknowledged, of course, that funds from the sale of the Hunter Road home are being held in trust for them pending the outcome of the closing of the estate.

Alan MacNeill

[34] Turning to the evidence of the responding parties. The Respondent Estate presented the affidavit of the solicitor who, based upon instructions from the Testator, drafted the Will in question. This is the affidavit of Alan MacNeill. By any measure it is easy to understand why the evidence of the drawing solicitor may be highly relevant. Mr. MacNeill is an experienced solicitor having been in practice since December, 1980. He drafted three Wills for Mr. Maskell. The first prior to the death of his first wife, Karen Maskell. Karen Maskell sadly succumbed to cancer in December, 2010. Following her passing revisions were

called for and a new Will was signed in January, 2011. Subsequently Mr. Maskell re-partnered with Joanne Baxter and the third and final Will was executed on December 19, 2012. It is this Will which is the subject of the present Application.

[35] The evidence of Mr. MacNeill was that he began to receive some direction in the intended redraft of the final Will from Mr. Maskell as early as August, 2012. The discussions occurred at Mr. MacNeill's office. He heard from Mr. Maskell in its skeletal outline the shape of the changes intended. They were directed in general to making provision for his new partner. Mr. MacNeill states that the taking of formal instructions for the Will occurred on September 10, 2012. Once again, this occurred at his law office.

[36] Mr. MacNeill testifies to the instructions and discussions with respect to the Scotia McLeod issue in these terms: (paragraph 10)

> During our meeting, Thomas instructed me that any asset held in Scotia McLeod was to be gifted to his sister and the others listed in clause 4(f) of the present Will. I explained that an investment consultant such as Scotia McLeod might temporarily hold cash assets during a time when investments had been cashed down and were to be re-invested and that I intended to include that possibility in the gifting clause concerning Scotia McLeod. I advised him that the sentence would provide that *any* cash, securities, and investments held by Scotia McLeod would pass to the named beneficiaries in order that all assets held by Scotia McLeod, no matter what the nature of the asset at the time of death, would go as gifted. I told him that my reason for doing so was to make it clear that in the interim cash holdings held by Scotia McLeod would pass under this clause. I recall stressing the point with Thomas, and he readily agreeing that only assets held by Scotia McLeod would pass under that clause. Thomas made it very clear that, apart from the gifts already enumerated in the Will, the only other gift to

> pass to his sister and her family was what was held by Scotia McLeod. The wording of the sentence was designed to broaden the type of asset of Scotia McLeod but not to broaden the asset base beyond Scotia McLeod. I specifically recall Thomas reiterating the point that, as long as it was a Scotia McLeod asset, it would go to his sister and family as directed.

[37] Mr. MacNeill went on to say that his understanding of the instructions was that the clause was to pass Scotia McLeod held assets only and 4(iv)(f) was not intended to capture any other assets. He testified further by affidavit with respect to consideration that was given to what Joanne Baxter would have upon his death: (paragraph 12)

> In furtherance of the above, I also state that my notes of our meeting indicate that, in assessing the assets which Joanne Baxter would have upon his death, Thomas Maskell planned that Joanne Baxter would have the RRSP of approximately $50,000.00, a life interest in the home, 30% of the net sale proceeds of the home, his insurance proceeds, as well as her own home on Young Street. This RRSP would fall to Joanne pursuant to the residuary clause of the Will. This observation, made at the time of taking instructions, also leads me to conclude that it was Thomas' clear intention that other assets which were not held by Scotia McLeod (and, specifically the RRSP at Scotiabank) would devolve to Joanne Baxter pursuant to the residue gift.

[38] It should be noted that the "notice" referred to in the affidavit were not attached to the affidavit. It might have been useful to have those attached. Recourse to the primary source is never a bad thing. However, we do have a senior solicitor's summary upon review of his own notes, so prima facie that is compelling although perhaps not fully useful to the extent of the original material. Mr. MacNeill was not cross-examined on his affidavit.

Joanne Baxter

[39] Joanne Baxter filed two Affidavits in this matter. She met and began a relationship with Thomas Maskell sometime after the death of his wife, Karen. At the time she worked at the Nova Institute for Women. Thomas Maskell had been a Canada Post mail carrier for his working life. At the time he met Joanne Baxter his income was from CPP disability benefit and disability paid by virtue of his multi-year employment with Canada Post.

[40] Joanne Baxter subsequently retired from Nova Institute and began drawing a retirement pension. The parties would have commenced their dating relationship in or about March, 2011 and moved in together over a year later in or about June, 2012. The resided together in the Hunter Road residence of Mr. Maskell.

[41] The relationship, in common with many relationships, was not without some periods of challenge and re-evaluation. The challenge of a blended family, in that Joanne Baxter had two sons from her prior marriage, was one of the dynamics here. The couple by all accounts did persevere. Steps were taken by the couple around designation of beneficiary status and dependant designations, including:

1. Thomas Maskell and Joanne Baxter designating each other as beneficiaries on insurance and pensions;

2. Thomas Maskell designated Joanne Baxter's son as a dependant to his CPP benefit and on certain medical/dental coverage.
3. He notified Canada Post of Ms. Baxter's son being his dependant.

[42] Tragically Thomas Maskell suffered a fatal heart attack on December 19, 2014. Immediately following the death, relations between Joanne Baxter and the Maskell/Lovett families appeared to be cordial or at least there was no immediate break down.

[43] Joanne Baxter and Carol Baxter wrote the obituary together. Ms. Baxter took the lead in covering the costs of the funeral. These were later paid back to her by the Estate. There was a later memorial service paid for by Ms. Baxter and not reimbursed by the Estate. This second service caused apparent hurt and bad feelings as the Maskell/Lovett families felt intentionally excluded from the planning and/or execution of that service.

[44] Ms. Baxter's affidavit canvasses various financial matters that is meant to highlight the financial integration between her and Thomas Maskell. They filed income tax as a "married/common-law" couple in 2012, although they had not yet resided together for 12 months. This resulted in the need for refilings. They filed again as married/common-law for income tax status in 2013. There were, as well, the changes in beneficiaries and insurance designations referred to earlier.

[45] Ms. Baxter's affidavits detail her recollections of the discussions around the December 19, 2012 Will. In summary, her recollection is that the instructions and intentions was to bequeath any Scotia McLeod held assets to the six named beneficiaries under clause 4(iv)(f) and nothing outside that asset base. The other substantial portion of the affidavit deals with the other financial events which took place after the passing of Mr. Maskell. These include her receipt of the aforementioned insurance proceeds which she indicates Thomas Maskell wanted used to pay out the approximately $120,000.00 mortgage on the residence lived in by his mother, Carol. This property had, up to the point of his passing, been held in joint tenancy.

[46] By virtue of his passing Carol Maskell became the sole legal owner. In apparent further compliance with Thomas Maskell's wishes that his interests would be transferred to his niece and nephew after death, Carol Maskell acted to transfer ownership from her name alone to her own name as well as the names of Jillian Lovett and Ellis Lovett in joint tenancy. As a legal matter Carol Maskell did not have to do that. It is clear to me that it was done as another step in honouring the wishes of Thomas Maskell. But to be clear, that joint tenancy did not come about because of the operation of the Will.

The Hunter Road Residence

[47] The Will, as we have read previously, made provision with respect to Mr. Maskell's Hunter Road residence. A life interest was given to Joanne Baxter. It had conditions attached which required her to maintain certain financial costs for the home. The Will then divided up any eventual proceeds either at the end of the life tenancy or its surrender or failure. The life interest was surrendered by Ms. Baxter in May, 2015. The house was sold and the proceeds are, according to the evidence I heard, being held pending further action within the Estate. The eventual balance of proceeds will be distributed as follows:

- 35% Jillian Lovett
- 35% Ellis Lovett
- 30% Joanne Baxter

[48] As a final issue to touch on, the affidavit of Ms. Baxter references what she says are discussions she had with Mr. Maskell about the issue of growing strain in the relationship between Kelli Lovett and Thomas Maskell. She extrapolates this to the way in which the December, 2012 Will was written.

[49] I earlier made reference to the limited use that I can make of assertions such as these. Those same considerations apply to these comments. I cannot and do not make much of recollections such as these unsupported as they are by other evidence. But I can say this, I do not need to resort to those types of considerations to dispose of the issues before the Court.

[50] I briefly make mention of a side issue. I will do it at this point because the issue of the properties came up during the questioning of both Kelli Lovett and Ms. Baxter. In her evidence, Kelli Lovett indicated that she wasn't sure what the reference in the Will to the "cottage" property meant. She speculated that it could have referred to another property in Wallace. I think it is notable that Kelli Lovett, in fairness to her, had indicated she didn't know. No other party seemed to be confused or have that doubt. It was referred repeatedly to other witnesses as the cottage, we're talking about the property occupied by Carol Maskell. It is notable that the Wallace property was not purchased until early 2014. The Will was written and signed in December, 2012. So there should be no suggestion that there is confusion as to what the reference to the cottage was meant to be. The reference was to the property owned with his mother. I do not think this need confuse anyone as the Wallace property was not purchased at the time the Will was written.

[51] Additionally, according to what appears to be the only evidence I have in the matter, which is found in paragraph 32 of the affidavit of Joanne Baxter, the property always appears to have been (I do not have any other evidence and this was not cross-examined on) always solely in the name of Joanne Baxter. I take that from paragraph 32 of the July 25, 2016 affidavit.

[52] I have also reviewed, in detail, the affidavit of David Ogilvie of January 19, 2016. There was no request to cross-examination on this affidavit. No affiant for any responding party was cross-examined.

Legal Principles – Interpretation of Will

[53] At this point I want to turn to a consideration of the state of the law on how a Court must approach a question of interpretation and construction such as the one before the Court. An often cited summary in this jurisdiction is found in Justice Davison's ruling in ***Re Carter Estate*** (1991), 109 N.S.R. (2d) 384 (NSTD). This has often been referred to as a "roadmap" for the interpretation exercise.

> 16. The principles used in interpretation of wills or considered by the Appeal Division of this Court in ***Re O'Brien*** (1978), 25 N.S.R. (2d) 262 at 266 where Cooper, J. A. approved of the rules enunciated by Kelly, J. of the Ontario High Court in ***Re Kirk*** (1956), 2 D.L.R. (2d) 527 at 528 as follows:
>
> In my opinion, the first duty of the Court in construing a will is to ascertain the intention of the testator from the language used in the will. The proper procedure is to form an opinion, apart from the cases, and then determine whether the cases require a modification of that opinion; the Court should not

begin by considering how far the will resembles others on which decisions have been given: ***Re Blantern, Lowe v. Cooke***, [1891] W.N.54.

There are certain rules of construction to which a Judge ought to adhere:

1. To read the Will without paying any attention to legal rules;
2. To have regard not only to the whole of the clause which is in question, but to the will as a whole, which forms the context to the clause;
3. To give effect, if possible, to all parts of the will and so to construe the will that every word shall have effect, if some meaning can be given to it and if some meaning is not contrary to some intention plainly expressed in other parts of the will;
4. When the Judge thus determines the intention of the testator he should inquire whether there is any rule of law which prevents effect being given to it.

17. I approve of the approach of Mr. Justice Krever in ***Re Crawley*** (1976), 68 D.L.R. (3d) 193 which is not inconsistent with the previous authority to which I referred. Krever J. stated at 195:

As to the particular language used by the testator, the following propositions are, in my view, so well established that they need no citation of authority to support them:

1. A fair and literal meaning should be given to the actual language of the will;
2. An opinion as to the meaning should be formed first without regard to the cases, which would afterwards be looked at to see if modification of the opinion is required;
3. The ordinary and grammatical sense of the words should be assigned;
4. The words should be given the meaning that was intended by the testator, in view of the context and the surrounding circumstances;
5. A natural and ordinary meaning should be given in preference to a secondary meaning.

[54] This is the roadmap that I intend to follow in this decision. We will touch on various aspects of that test as we move forward.

[55] I am also mindful of the remarks of Justice Jill Hamilton in the case of ***Price Estate v. Mann***, 2001 NSSC 16 where at para. 4 she stated:

> A court of construction such as this is to determine the testator's intention from the words in the testamentary document and not from other indicia of dispositive intent.

[56] Justice Goodfellow in ***Re Peters Estate***, 2007 NSSC 103 expanded on this point by commenting, at para. 13 as follows:

> …only when such intention cannot be arrived at with reasonable certainty by giving the natural and ordinary meaning to the words which he has used is resort to be had to the rules of construction which have been developed by the Courts in the interpretation of other wills.

Courts obviously do recognize that situations will arise where an ambiguity may be made out. Direction has been provided on how to proceed in such a situation. Nova Scotia Courts have referred to and applied the concept of "armchair evidence". See for example the decision of Justice Moir in ***Skerrett v. Bigalow Estate,*** 2001 NSSC 116. Justice Moir expressed it this way:

> The Court puts itself in the position of the testator at the point he or she made his or her will, and from that vantage point, reads the will and construes it, in light of all the surrounding facts and circumstances.

The law on this subject is reasonably well developed and I would summarize it as follows:

1. It is evidence which establishes a context for the testator's words. Evidence of the testator's intentions may include hearsay reports of the testator's words admissible under exceptions or the principle analysis;
2. Where the testamentary instrument is clear and unambiguous no evidence beyond the document is necessary to determine the proper construction;
3. Where the testamentary instrument is unclear as to intent or construction, armchair evidence is receivable. Cases have concluded that where there is a legitimate dispute as to ambiguity, armchair evidence ought to be received where it is likely to assist in resolving the ambiguity;
4. Where a testamentary instrument is ambiguous extrinsic evidence of intent is receivable. In this context ambiguity does not simply mean competing possible interpretations. The competing interpretations must be plausible;
5. Where there is reason to believe that the testator made a mistake and the mistake was one of fact not law, evidence may be received. Where the alleged mistake is established the offending portions of the instrument are struck and the balance of the document is then construed.

I note parenthetically that mistake has not been advanced in the case before me. I include the reference above simply for completeness.

[57] There are policy reasons for being cautious about the use that may be made of outside evidence of intention. These are touched on in the case of ***Decore v. Decore*** 2009 ABQB 440 as follows:

1. There is a danger that a flood of spurious claims backed by hearsay will clog the courts and bring chaos to the orderly administration of estates.

2. There is a danger that the written document will be supplanted by an oral or verbal direction.

[58] In ***Rondel v. Robinson Estate***, 2011 ONCA 49. the Court made the following comment at para. 37:

> Third party evidence of a testator's intentions gives rise to both reliability and credibility issues. Credibility is a concern because would-be beneficiaries can, without fear of contradiction by the deceased, exaggerate their relationship and fabricate the promises of requests. Reliability is a concern because testators are not obliged to write their wills to accord with the sincere or mendacious assurances they may have given to those close to them. Until they die, testators may freely revoke or vary the directions they have given for the distribution of their estates. The evidence of third parties, who cannot directly discern the mind of a testator, is logically incapable of directly proving the testator's intent.

However, ***Décore v. Décore*** and other cases does recognize that while courts must be cautious as to these issues they will not be a bar to the receipt of probative armchair evidence. The Nova Scotia Court of Appeal in ***Provost Estate v. Provost Estate*** 2013 NSCA 20, a decision of the Court of Appeal put it this way:

> Much has been written about the principles governing the interpretation of wills. Often there is a debate about how far the Court may stray beyond the language used by the testator in her will. But there is unanimity on the beginning (***Mitchell Estate v. Mitchell Estate, 2004 NSCA 149)***:
>
> > The first duty of the Court is to ascertain the intention of the testator from the language used in the will. Regard must be had, not only to the whole of any clause in question, but to the Will as a whole, which forms the context of the clause. Effect must be given, if at all possible, to all parts of the will. A fair and literal meaning should be given to the actual language of the will, the ordinary and grammatical sense of the words to be assigned unless the context otherwise dictates. The context may well include

> "surrounding circumstances". Only after the language employed by the testator has been approached in this fashion need resort be had to case law and legal rules to see if any modification is required. These principles were referred to with references to relevant authorities by Davison J. in ***Carter Estate: Re:*** (1991), 109 N.S.R. (2d) 384 (T.D.). The role of "surrounding circumstances" in this exercise was discussed by this Court in ***Re: Murray Estate*** (2001), 191 N.S.R. (2d) 63, at paras. 20-25.

And the Court of Appeal continues:

> One might have thought that ascertaining intention is a question of fact. But Courts have long held that ascertaining the intention of a deceased as expressed in her will is a question of law. The Supreme Court has described it this way:
>
> > …in construing a will, deed, contract, prospectus or other commercial document the legal effect to be given to the language employed, is a question of law and in the construction of such a document…
>
> Sometimes it is necessary for the Courts to consider "surrounding circumstances" and to make findings of fact or mixed fact and law. When this occurs, the Court of Appeal can only interfere if the trial judge makes a palpable and overriding error.
>
> The Courts interpretative task is to try and ascertain the intention of the testator from the language used - not to import and impose an intention from other cases, dictionary meanings, evidentiary presumptions, maxims of construction or other principles external to the Will and the language of the testator, unless the testator's intention cannot be settled without recourse to the principles. The language of the will itself must be examined contextually. Justice Ritchie expressed it well in ***Alberta Giftwares*** as follows:
>
> > It is an error of law to attribute a fixed meaning to a word of variable connotation by selecting one of the alternative dictionary definitions without regard to the context of the paragraph or sentence in which the word is used.

Application of Principles

[59] That is what we must take as the state on the law on these issues. So turning to the "road map" the case law directs that before resorting to the outside evidence I must examine the clause itself. The questioned clause in this matter comes within a list of specific bequests of items set out sequentially. It leads up to the cottage and to the home and then has a general residue clause following. Clause 4(iv)(6) has the placement of a clause meant to be giving something specific rather than being a "catch all" for all cash, all investments, all securities, etc. It has the appearance on first look of being a gift of something specific. However, I have opted to be cautious about the application of this particular tool of application. The maker of a Will could opt to make a sweeping bequest, more in the nature of a residue clause, within a list of other more specific bequests. Taken on its own this would not be satisfactory as a tool of interpretation.

[60] With respect to the wording of the clause itself – if the interpretation urged by the Applicant is correct then one would wonder why the words "held by Scotia McLeod" would ever appear there at all. The prior words "any cash, securities, investments" would, one would think, normally capture a Scotia McLeod account. How could they not? This would render the reference to Scotia McLeod redundant or surplus. The rules of construction discussed earlier caution against

interpretations which result in such a construction. On the other hand, if the interpretation urged by the Estate is correct then arguably all of the words make sense. None are redundant or surplus.

[61] The argument is also advanced by the Estate that if the Applicant is correct then effectively the residue clause would be meaningless and redundant. If Mr. Maskell's intention had been as suggested by the Applicant than those six individuals would in effect have been the residual beneficiaries. This is, when taken with the other points, a relevant argument.

[62] In general, the interpretation posed by the Estate makes more sense within the context of the document and is the more logical interpretation and construction of the document on a plain reading approach.

[63] However, in this case we do have outside evidence including evidence from the parties and the solicitor who drew the document.

[64] In the alternative, I would turn to those outside sources. We do not always have in these situations the evidence of the drawing solicitor. His evidence was compelling and I have concluded it was of a different character than the evidence of friends, family and potential beneficiaries. I apply that comment to the evidence of all including Ms. Baxter as well as the Lovett side. It is hard to separate one's

self from the hurt and the cut and thrust of the family dispute like arose in this matter. This can colour recollections, emphasis and understanding.

[65] There was also the shock in this case of persons who expected there to be greater assets. Whether this was a reasonable expectation and where the expectation came from have already been touched upon. Keep in mind that presumably Mr. Maskell did not anticipate dying in the sudden and unexpected way he did at the very young age that he did. Presumably he anticipated many more years of wealth accumulation which he would have taken pleasure in passing on. Events intervened and he never had the opportunity to do that. I accept that the evidence of family members on each side of the dispute obviously favours themselves. It was to a certain extent self-serving from both sides but I must say, especially from the Lovett side. However, I do not have to make recourse to that evidence to make the decision here.

[66] Much of the evidence from Applicant witnesses was directed to how Thomas Maskell was determined to be generous with his family and notably his niece and nephew. By any measure this was accomplished by Mr. Maskell and this is as he wanted it.

[67] The outside evidence of the family, however, cannot displace the clear evidence of intention and drafting intention advanced by the Respondent Estate. Specifically, the uncontradicted evidence of the solicitor. I accept his evidence in its entirety. The evidence of the family witnesses, as I would call them, becomes more difficult to apply when it moves from the subject of Thomas Maskell's general intention to favour his niece and nephew to the specific subject of specific investments. However, in any event, whether those discussions happened or not it does not displace the fact that Thomas Maskell's intentions in December, 2012, at the point of making the Will were and are clear. That is the critical point in time.

[68] The "armchair" or outside evidence that I find to be probative here, and have referenced, only serves to strengthen my conclusion. Accordingly, it is the Court's ruling that Clause 4(iv)(f) in the Will of December 19, 2012 was intended to convey to the six named beneficiaries in equal shares any asset of any description held by Scotia McLeod for Mr. Maskell at the time of his death.

[69] This judgment, as I have said before, does not presume what is, or is not, held by Scotia McLeod. There was reference earlier to the Applicant having expressed a view that further asset searching must be done. I make no comment about that. That is a different issue and it is for the future. Those issues are not before me.

[70] The only remaining issues today may be the drafting of the Order and costs.

[Discussion of Order and costs omitted. Costs reserved.]

Justice Jeffrey R. Hunt