SUPREME COURT OF NOVA SCOTIA
Citation: *Walcott v. Walcott*, 2017 NSSC 327

Date: 20170926
Docket: File No. 460559
Registry: Sydney

Between:

Rita Walcott and Gerald Walcott

Appellants

v.

Georgina Walcott and Joseph Walcott

Respondents

Judge:	The Honourable Justice Patrick J. Murray
Heard:	May 31, 2017, in Sydney, Nova Scotia
Written Submissions:	June 14, 2017
Written Decision:	September 26, 2017
Counsel:	Frank Gillis, QC, for the Appellants, Rita Walcott and Gerald Walcott Doug MacKinlay, for the Respondents, Georgina Walcott and Joseph Walcott

By the Court:

Introduction

[1] This is an Appeal from a decision from the Registrar of Probate appointing Georgina Walcott as Administrator of the Estate of her mother, Lynora Christine Walcott.

[2] Ms. Walcott died on July 10, 2016 and at the time of her death resided in Glace Bay, Nova Scotia. She was survived by her five (5) children: 1) Charlotte; 2) Rita; 3) Georgina; 4) Gerald; and 5) Joseph. A will had been prepared but it was unsigned.

[3] Among the five heirs of the deceased, all resided in Nova Scotia with the exception of Charlotte, who resides in Calgary, Alberta.

[4] The Registrar's decision appealed from was made on January 9, 2017. Central to the Appeal is the Registrar's finding in the Order that reads as follows:

> It is further Ordered that pursuant to s. 32(2) of the *Probate Act*, Georgina Walcott has been appointed and may apply for a grant of administration of the estate of Lynora Christine Walcott.

[5] Section 32 (2) of the *Probate Act* reads as follows:

> 32 (2) Where there is no person entitled to a grant of administration, the court may grant administration to any person the court thinks fit.

[6] The Appellant relies on three (3) grounds of Appeal, all which allege errors of law. Those grounds will be addressed in more detail herein.

[7] The Respondents submit that the appeal should be dismissed. They say Georgina was the only remaining child residing in Nova Scotia and was willing and able to act. Pursuant to s. 32(1) there was no one in priority or equally entitled to act.

Background

[8] This is an appeal from an order of the Register of Probate that involves several siblings following the death of their mother,

[9] The Registrar granted an order pursuant to s 32(2) of the *Probate Act* (1) of Nova Scotia allowing:

> (i) the application of **Joseph Walcott** for an order dispensing with the requirement **for Rita Walcott** and **Gerald Walcott** to renounce their rights to apply for probate of their mother's estate and;

(ii) allowing the corresponding application of **Rita Walcott** and **Gerald Walcott** for an order dispensing with the requirement for **Joseph Walcott** to renounce their right to apply for probate of their mother's estate.

[10] The only remaining sibling in this province is Georgina Walcott.

[11] The Registrar also ordered, *inter alia*, that (3) Georgina Walcott "has been appointed and may apply for a grant of administration of the estate…" pursuant to s 32(2) of the *Probate Act*.[1]

[12] Georgina Walcott had apparently not applied for a grant of administration as of the date of the Registrar's decision on January 9, 2017. The Registrar noted that she had "made several visits to the Probate Court seeking direction and information regarding probate of her mother's estate. It was also noted in the decision that she attended at Scotiabank and the Registry of Deeds in order to gather information."[2]

[13] A fifth sibling Charlotte Walcott, who lives in Alberta, is a potential recipient of a grant of probate or administration. In priority she would be "behind" the four siblings in Nova Scotia, and the Public Trustee of Nova Scotia pursuant to the hierarchy under s. 32(1)(d).

The Appeal

[14] Rita Walcott and Gerald Walcott have appealed the Registrar's order, on the following grounds:

> 1. Error at law, exceeding jurisdiction, in appointing Georgina Walcott, pursuant to Section 32(2) of the *Probate Act*.
>
> 2. Error at law in using "directions and information" that came from outside the documents in evidence before the Registrar…
>
> 3. Error at law in granting relief and appointing of a party where there was no application before the Registrar…[3]

[15] Section 93 of the *Probate Act* provides, *inter alia*:

> Powers of court on appeal
>
> 93 (1) Any party aggrieved by an order or decision of the registrar, other than a grant, may in the prescribed manner, appeal from the order or decision of the registrar to the judge. [Emphasis added.]

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[1] Order of the Registrar, 9 January 2017..
[2] Reasons of the Registrar, 9 January 2017.
[3] Notice of Appeal, filed 20 January 2017.

[16] There is no doubt as to the construction of the emphasized language. The *Probate Act*, RSNS 1900, c 158, included similar language, at s 155: "Any party aggrieved by any order, decree, or decision of the registrar other than a grant of probate . . . may appeal therefrom to the Judge sitting in the Court of Probate." In ***Re Wilson Estate*** (1914), 19 DLR 698, 1914 CarswellNS 99 (NS Co Ct), Patterson J construed this to mean that it was "perfectly clear that no appeal lies against an order or decree granting letters of probate…"[4] The same reasoning was applied in ***Re Creighton Estate*** (1987), 80 NSR (2d) 233, 1987 CarswellNS 90 (Prob Ct).[5]

[17] Accordingly, if the Registrar's order constitutes a grant, no appeal is possible. The first thing to determine therefore is whether the decision appealed from is a grant.

[18] Subsection 2(d) of the *Probate Act* defines a "grant" in the following terms:

> (d) "grant" means a grant of probate or administration of the estate of a deceased person made pursuant to this Act, whether granted for general, special or limited purposes and includes administration with the will annexed and an extra-provincial grant and, for the purpose of Sections 85, 86 and 87, includes a grant of probate or administration of the estate of a deceased person made pursuant to either of the former Acts, whether granted for general, special or limited purposes and includes administration with the will annexed and a re-sealing of probate or administration and ancillary probate or ancillary administration… ***(emphasis added)***

[19] The Registrar cited s 32(2) as authority for the purported "appointment" of Georgina Walcott. Once again, that subsection provides:

> (2) Where there is no person entitled to a grant of administration, the court may grant administration to any person the court thinks fit.

[20] On the basis of the facts before me, prior to the Registrar's order, all of the siblings resident in Nova Scotia would have been "entitled" to a grant of administration pursuant to s. 32(1)(b), being "persons who reside in the Province and who are entitled to share in the distribution of the estate by reason of the *Intestate Succession Act* or by reason of being adult residuary beneficiaries…" Subsection 32(1) therefore authorizes an appointment in the event of intestacy.

[21] Under s. 32(2), which applies where there is "no person entitled to a grant of administration" the Appellants submits there *were* clearly persons entitled to a grant – at the very

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[4] *Wilson Estate* at para 1.

[5] This reasoning was endorsed in respect of s 161(1) of the *Probate Act*, RSNS 1967, c 238, in *Re Creighton Estate*, at para 17, based on the following statutory language: "[a]ny party aggrieved by any order, decree, or decision of the registrar, other than a grant of probate or letters of administration, may appeal therefrom to the judge sitting in the court of probate."

least, Georgina Walcott and Charlotte Walcott. It appears it was not a mere oversight in the order alone, since the Registrar also referred to s. 32(2) in her decision that attached the order.

[22] Arguably the appropriate provision was actually s. 32(3):

> (3) Where more than one person is entitled to administration, the court may grant administration to one or more of such persons.

[23] A more basic question arises from the language used by the Registrar. The order states that "pursuant to Section 32(2) of the *Probate Act*, Georgina Walcott has been appointed *and may apply* for a grant of administration" (emphasis added).

[24] Arguably this is akin to a declaration that, of the siblings, Georgina Walcott is the one entitled to *apply* for a grant. However, the reference to s. 32(2) would suggest that this *is* a grant.

[25] The Registrar's reasons further state "pursuant to Section 32(2) of the *Probate Act* I am hereby appointing Georgina Walcott to act solely *in making application* for a grant of administration of the estate…" (emphasis added).

[26] In the Registrar's language she appears to be identifying Georgina Walcott as the sibling who was qualified to seek a grant; hence the words "may apply for a grant of administration" (in the order) and "I am hereby appointing Georgina Walcott to act solely in making application for a grant of administration…" (in the reasons). On this construction, the decision would *not* be a grant, and it is therefore subject to appeal under s. 93(1) of the *Act*.

Standard of review

[27] The parties agree that pure questions of law call for an appellate standard of correctness. The Respondents, however, appear to take the position that the law on appellate standards of review is derived from the Supreme Court of Canada's modern caselaw on standards of review on judicial review, as embodied in ***Dunsmuir v New Brunswick***, 2008 SCC 9. As the majority stated in the first paragraph of the decision:

> This appeal calls on the Court to consider, once again, the question of the approach to be taken in judicial review of decisions of administrative tribunals. The recent history of judicial review in Canada has been marked by ebbs and flows of deference, confounding tests and new words for old problems, but no solutions that provide real guidance for litigants, counsel, administrative decision makers or judicial review judges. The time has arrived for a reassessment of the question. [Emphasis added.]

[28] Throughout the Respondents' brief, the words "appeal" or "appellate" are substituted for "judicial review" in attempting to apply the ***Dunsmuir*** framework to a *Probate Act* appeal. They are not the same thing. While neither party has provided relevant law under s. 93, the Respondents' ***Dunsmuir***-based argument in particular, lacks merit, as applied to this appeal.

[29] More to the point, there is direct authority on the proper approach to an appeal under s. 93(1). It is a trial *de novo*. This was the conclusion of Gruchy J in ***Re Faye Estate***, 2002 NSSC 242, subsequently restated by Moir J in ***Cooper v. Moncel Estate***, 2012 NSSC 195.[6] This is further apparent from s. 93(2), which provides, *inter alia*:

> (2) On an appeal taken pursuant to subsection (1),
>
> (a) the judge may hear such appeal and, where the judge thinks fit, any of the parties thereto may adduce the same evidence as that given before the registrar and, so that the judge may hear the same evidence and any further or other evidence, any further or other evidence and the judge may confirm, vary or set aside the order or decision appealed from, and may make any decree, order or decision which the registrar should have made;
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> (b) the judge may rescind, set aside, vary or affirm the order or decision appealed from or make any decision or order the registrar could have made…

[30] As Moir, J put it in ***Cooper***, on a *de novo* appeal, "the issue under appeal is decided afresh. The hearing of the appeal is more like first instance determination than appellate review."[7]

[31] The parties have argued without reference to the *Act* or to the decisions on this point. The appellants have relied on general caselaw on appellate standards of review. If this is an appeal of a grant, it would be excluded from the right of appeal created by s. 93(1).

[32] A right of appeal must have a statutory basis, as La Forest, J noted (for the majority), in ***Kourtessis v Minister of National Revenue***, [1993] 2 SCR 53, 1993 CarswellBC 1213:

> 17 Appeals are solely creatures of statute; see *R. v. Meltzer*, [1989] 1 S.C.R. 1764, 96 N.R. 391, 49 C.C.C. (3d) 453, at page 1773 (N.R. 401, C.C.C. 460-61). There is no inherent jurisdiction in any appeal court. Nowadays, however, this basic proposition tends at times to be forgotten. Appeals to appellate courts and to the Supreme Court of Canada have become so established and routine that there is a widespread expectation that there must be some way to appeal the decision of a Court of first instance. But it remains true that there is no right of appeal on any matter unless provided for by the relevant legislature.

[33] Accordingly, there is no free-standing right of appeal, as the parties here appear to maintain. Neither brief focusses on s. 93 of the *Probate Act*, the only potential source of

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[6] *Re Faye Estate*, 2002 NSSC 242, 2002 CarswellNS 456, at para 4, affirmed at 2003 NSCA 97; *Cooper v Moncel Estate*, 2012 NSSC 195, 2012 CarswellNS 341, at paras 4-6.
[7] *Cooper* at para 6.

jurisdiction for an appeal in this case.[8] If, as I have found, the Registrar's order was not an effective grant, then the proper approach on appeal is as described in ***Faye Estate*** and ***Cooper****, a trial de novo*.

Decision

[34] On the question of whether this is a grant of administration, I find that it is not. The language in the decision, in "appointing" Georgina Walcott, is not effective to clearly contain a grant.

[35] In my respectful view the language in the decision and the order amounts to an invitation by the Registrar for her, to "apply" for a grant of administration, but it is not a grant. The order states that Georgina "may" apply. An actual grant could not be made until an application was made.

[36] The Registrar's decision therefore in my view is appealable.

[37] Secondly, it is clear that all three grounds of appeal allege errors of law. The standard of review for errors of law is correctness.

[38] Thirdly, I am aware that the language of the *Act* in s. 93 and the caselaw referred to identifies the standard of review on this appeal as a trial-de-novo. Neither party has presented the appeal in that fashion. There is no transcript of the hearing before the Registrar. The Appeal Book does contain all of the affidavits filed, but I have no transcribed record of the evidence at the hearing before the Registrar, including the cross-examination.

[39] Fourthly, I am cognizant that the *Probate Act* and the *Regulations* allow for considerable discretion upon the Registrar. Section 67(b), enable the Registrar to "dispose of the issues" before her and s. 67(k) enables her to "make any order the Registrar considers appropriate in the circumstances."

[40] In addition section 32(1) of the *Act* states that administration of an estate shall be granted to one or more of the persons, "according to the following priorities" but also states "unless the court thinks it proper to appoint some other person'.

[41] Section 32(3) is arguably the appropriate provision in this case which reads:

> (3) Where more than one person is entitled to administration , the court may grant administration to one or more of such persons.

[42] In keeping with the standard of review of correctness, such broad discretion must still be properly (judicially) exercised. I have said that the Respondents' submission as to the standard

[8] The respondents' brief references s 93 at p 7, in an attempt to wedge it into the *Dunsmuir* analysis as a privative clause.

of review of reasonableness is essentially academic. This is an appeal, not an application for judicial review.

[43] With this in mind, I turn to the three grounds of Appeal, set out in the Notice of Appeal.

Ground # 1 – No other person entitled to administration

[44] The Appellants have spent a good deal of time in their factum discussing s. 32(2) and have provided authorities on its proper interpretation. The Appellants submit:

> If the existence of a party entitled to a share of distribution arising living outside the province is not sufficient to prevent the exercise of the Registrar's discretion in Section 32(2), then what other purpose could be set forth for Section 32(1). Could not the same logic be said to apply to the Office of the Public Trustee, or indeed a widow and the children of the deceased.

[45] The Respondents state in their factum:

> The Registrar of Probate found the competing applicants (Rita and Gerald, and Joe) to be not suitable for reasons cited in paragraph of her January 9, 2017 correspondence to counsel (Tab 2 of the Appeal Book).Having eliminated all three persons who actually applied, it was appropriate to consider the fourth remaining person eligible in category one.(s. 32(1)): Georgina.

[46] It is difficult to take issue with the logic of appointing the remaining Nova Scotia heir, under the hierarchy in s. 32(1). From a practical standpoint such an exercise of discretion may be considered expedient to resolve the issue and allow the parties to get on with the affairs of the estate.

[47] I think it must be said that allowing the situation to continue without compromising the procedural rights the interested persons is also an important consideration, in assessing the discretion exercised by the Registrar.

[48] In the Appellants' factum reference is made to the case of ***Municipal Contracting v. Nova Scotia (Attorney General)***, 2003 NSCA 10, in paragraphs 47 and 48, as to the proper approach in interpreting a statute. Paragraph 48 reads:

> 48. In **Statutory Interpretation** (1997), Irwin Law Publications for Professionals by Ruth Sullivan, she states at p. 50:
>
> > An interpretation that takes into account the full context of legislation, its purpose and its possible consequences, along with any relevant interpretive aids, is superior to one that looks to a limited context and ignores, or purports to ignore, all other considerations.

[49] The Respondents argue the Registrar, having found no person (among the Applicants) entitled to a grant of administration, turned to the hierarchy of "potential" Applicants.

[50] The Respondents submit the Registrar was within her powers to appoint Georgina because, among other reasons, she only becomes eligible on the filing of the mandatory form of application, as stated in s. 33(2) of the Regulations. Therefore, it was not wrong for the Registrar to rely on s. 32(2), which requires there is "no person entitled".

[51] There are additional provisions in the *Act* and *Regulations* that assist in interpreting the intent of s. 32(2).

[52] It is apparent that the order made may well have been authorized under section 33(3). The Registrar did not base her decision on that Section nor on section 32(1) of the *Act*. It was clearly based on section 32(2).

[53] Under s. 34(3) of the regulations, a person entitled "in priority or equally" to be named as a personal representative under s. 32 of the *Act*, who is unable or unwilling to apply for a grant shall renounce their rights. Before the Registrar's decision, Georgina had not sought to be appointed. Perhaps she would have but she had not at that point.

[54] Under s. 34(4) if *a person with a prior or equal right has not renounced or there is a contest over the right to administer the estate,* an applicant *shall* make an Application under s. 64 of the regulations.

[55] Thus, if there had been no appointment of Georgina by the Registrar, an application to contest her appointment could have been made under s. 64(1) as a "contentious matter". This procedure is confirmed in section 33(2) of the regulations.

[56] In this case there was a contest over the right to administer and therefore an applicant could have applied for a grant under s. 64 by submitting an application in the form described in s. 33. Practically speaking this could be persons still entitled under section 32(1) to be appointed, including presumably the Public Trustee and Charlotte.

[57] There is no question there was no person having a prior or equal right to Georgina, but that would not have precluded other persons from making the application to contest her right to administer the estate.

[58] A "person who is served with an application" is entitled to file a notice of objection in From 47. The application (under s. 64) is required to be served on "a person interested in the estate", under s. 52(1). This would include persons entitled to share in the distribution of the estate on intestacy, (s. 52(i)) so it would include Georgina and the other siblings.

[59] Of course three of them could no longer be appointed because right to renounce were dispensed with. They would however, not be precluded from filing a notice of objection.

[60] The point is, in this circumstances there was no opportunity for a person to contest the application of Georgina, because she had been earlier appointed to "to act solely". This was subject only to her making the application under section 33(2) which is in Form 9.

[61] In this regard, paragraph 3 of Georgina's Form 9 application stated:

> I, Georgina Walcott, was appointed to administer the Estate of Lynora Christina Walcott by order of the Probate Court dated January 9th, 2017 and am therefore entitled to make this application. All required renunciations were dispensed with by order of the Probate Court.

[62] It could be argued that Charlotte did not have a right to contest because she was not "entitled in priority or equally". Form 9 has the instruction in paragraph 3 to "Attach Form 13 renunciation from each person having a prior or equal right". This supports the Respondents' argument that under the scheme of the *Act* there was no other person "entitled" in section 33(2).

[63] The contrary argument is that s. 33(2) does not say "where there is no other person having a prior or equal right", it says "where there is no other person".

[64] I conclude with respect to the first ground of appeal, that the Registrar stepped beyond what she was asked to do, in purporting to appoint Georgina Walcott in the order of January 9, 2017.

[65] The authority for such an appointment under s. 32(2) is at the very least unclear. However well intended, it could be seen as "pre-judging" the application.

[66] I am satisfied that it is the role of the Registrar to make decisions on the applications before her, and thereafter allow the process to continue. Interested persons can then decide their next steps if they wish to contest the matter by filing an application.

[67] Otherwise, those persons are denied the opportunity to contest, intervene or make applications of their own. An example of such an application would be Charlotte applying for an order to dispense with the requirement of Georgina to renounce, under s. 35(5).

[68] For all of the foregoing reasons, I am satisfied the Registrar's decision constituted an error in law, and not a proper use of her discretion. I will allow the appeal on this ground.

Ground #2 Error of Natural Justice

[69] In the Registrar's decision, she stated in the third paragraph:

> I note that Georgina Walcott made several visits to the Probate Court seeking direction and information regarding probate of her mother's estate. It was also noted in evidence that she attended at Scotiabank and the Registry of Deeds in order to gather information.

[70] The Registrar obviously believed this was relevant information in reaching her decision to appoint Georgina. It was among her reasons in effect. It is difficult to say what bearing it had on her decision but it had some bearing on it. Without more it is difficult to say.

[71] Under s. 31(1) the administration of an estate shall be granted to one or more of the persons listed, "if they are competent and suitable".

[72] The powers conveyed to the Registrar under s. 67 are numerous, and once again procedure is interwoven with these powers.

[73] S. 67(c) of the regulations states that the Registrar may "direct a hearing of the issues arising out of the application .." and s. 67(a) states the Registrar may "receive the evidence by affidavit or orally".

[74] It is those affidavits and oral evidence given at that hearing that provides the opportunity for the parties to properly litigate the matter.

[75] Having concluded that Ground #1 of the Appeal has merit, it is unnecessary to decide Ground #2.

[76] I will however state that had it been necessary I would likely have found there was merit to this second ground of appeal.

Ground #3 – Appointing a Party without an Application

[77] Having decided to allow the appeal on ground 1, and having addressed ground 2, I decline to address the third ground of appeal as it is not necessary.

[78] I respectfully allow the appeal and remit the matter back before another Registrar in accordance with the following Disposition.

Disposition of the Appeal

[79] This appeal was fundamentally about the appointment of Georgina Walcott and the Appellants' submission that it was made without ascertaining the position of the other heirs.

[80] I am remitting that issue back to the Registrar for reconsideration and if necessary a rehearing under the contentious matters section of the Regulations.

[81] The Registrars decision dispensing with the renunciations of Rita, Gerald and Joseph Walcott, will stand.

[82] I have considered whether to remit the matter back before the same Registrar as the ground allege errors of law and do not allege bias, prejudice, or impartiality on her part.

[83] On the whole, I have concluded it is in the best interest of the Estate to have the matter heard by a different Registrar. I will add however, that if that process becomes cumbersome, the parties through counsel, may seek direction from this Court, under its inherent jurisdiction.

[84] Until such a hearing takes place and a further decision is forthcoming the status quo will be maintained, in terms of the assets, including the joint bank account at the Bank of Nova Scotia. If expenditures are required, approval may be sought from the Registrar when one is scheduled to re-hear the matter.

[85] I therefore confirm that the Grant of Administration is revoked. This decision in no way reflects on Georgina Walcott's competency or suitability as an Administrator and is based only on the process involved in her appointment. As part of this disposition she will be required to provide an accounting for the term of her appointment.

[86] Order accordingly.

Murray, J.