SUPREME COURT OF NOVA SCOTIA

Citation: *Leslie Estate v. Gough*, 2021 NSSC 63

Date: 20210219
Docket: *Halifax*, No. 500450
Registry: Halifax

Between:

Megan Elizabeth Leslie, in her capacity as
Executor of the Estate of Allan Charles Leslie

Applicant

v.

Shannon Gough

Respondent

Decision on Application

Judge:	The Honourable Justice Joshua Arnold
Heard:	January 4, 2021, in Halifax, Nova Scotia
Counsel:	Benjamin Corkum, for Megan Leslie Jessica Lyle, for Shannon Gough

By the Court:

Introduction

[1] Allan Leslie passed away on May 14, 2018. Under the terms of his will executed on December 8, 2015, his daughter, Megan Elizabeth Leslie, was named as the executor and residuary beneficiary of his estate. The residue of the estate includes the property at 263 Hillside Drive in Boutiliers Point, Nova Scotia, where Allan Leslie resided at the time of his death. Megan Leslie wishes to take possession of the property and sell it.

[2] Shannon Gough, Allan Leslie's former common law spouse, lived with him at 263 Hillside Drive and has remained in the home since his death. She says an agreement between herself, Allan Leslie and Megan Leslie, executed at the same time as Allan Leslie's 2014 will, entitles her to remain in the home until she dies, reaches the age of 70, or informs Megan Leslie that she no longer wishes to live there, whichever comes first. Shannon Gough says the agreement is a contract, not a testamentary disposition, and that it remains binding on the parties notwithstanding Allan Leslie's execution of a new will in December 2015.

[3] Megan Leslie acknowledges that she signed the agreement, but says the agreement, on its own or by reference to the 2014 will, is a testamentary instrument that was revoked when her father executed a new will in 2015. She brings this application pursuant to s. 64 of the *Probate Court Practice, Procedure and Forms Regulations*, N.S. Reg. 119/2001, seeking a determination as to the nature of the agreement and its effect, if any, on the estate.

[4] For the reasons that follow, I agree with Ms. Leslie.

The parties

[5] During the hearing, the parties referred to one another, and to Allan Leslie, by first name only. Several relevant documents also refer to them in this manner. For the sake of clarity, I will adopt the same approach going forward. In so doing, I mean no disrespect to the parties.

The evidence

[6] The evidence consisted of affidavits from Megan, Shannon, and Catherine Watson Coles, the lawyer who worked with Allan to draft the 2014 will and the agreement. There was no evidence presented at this hearing from the lawyer who drafted the 2015 will.

[7] Several key facts are undisputed. At the time of his death, Allan had been in a common law relationship with Shannon for eight or nine years. The couple lived together at 263 Hillside Drive. Allan executed a will on July 23, 2014. The will designated Shannon as the beneficiary of all of Allan's registered plans:

> **DESIGNATION OF REGISTERED PLANS**
>
> 3. **I DECLARE** that the proceeds of any and all refunds of premiums or contributions payable out of any registered retirement savings plan, registered pension plan, or out of any superannuation or pension fund or plan, payable after my death shall be paid and payable to **SHANNON YVETTE GOUGH**, for her own use absolutely. …

[8] Allan named Megan, his adult daughter, as the executor and residuary beneficiary of the estate. On the same day that he executed his will, Allan entered into an agreement with Megan and Shannon with respect to the real property at 263 Hillside Drive and his RRSP. Clause I(iv) of the agreement states:

> It is the intention of Allan, Shannon and Megan to contract into certain matters around the gifts being given under Allan's Will bearing even date herewith (the "Will").

[9] Clause II provides, in part:

> **NOW THIS AGREEMENT WITNESSETH** that in consideration of the promises hereinafter expressed and other good and valuable consideration, the receipt and sufficiency whereof is hereby acknowledged, all of Allan, Shannon and Megan desiring to contract into certain matters around the gifts being given under the Will, hereby undertake and agree that:
>
> (i) This agreement shall be deemed to be effective on execution by all of Allan, Shannon and Megan.
>
> (ii) All of Allan, Shannon and Megan agree to be bound by the provisions herein.
>
> …

[10] Clause III deals with the real property at 263 Hillside Drive:

> After Allan's death, and in consideration of Allan's gift of the residue of his Estate to Megan, Megan agrees to hold Allan's real property municipally known as 263 Hillside Drive, Boutiliers Point, Nova Scotia (PID: 00469627) (the "**Residence**") as a home for Shannon until the first to happen of:
>
> (i) The date of the death of Shannon; or
>
> (ii) The date when Shannon advises Megan that she does not wish the Residence held for her; or
>
> (iii) The date when Shannon attains the age of seventy (70) years.
>
> The first to happen of such events shall be known as the "**Disposition Date**".
>
> Until the Disposition Date, the taxes, insurance, repairs, and any other charges or amounts necessary for the general upkeep of the Residence shall be paid by Shannon.
>
> On or before the Disposition Date, Shannon shall vacate the property.

[11] Clause IV addresses the RRSP:

> After Allan's death, and in consideration of Allan's gift of his RRSP to Shannon, Shannon hereby agrees:
>
> (i) To permit Megan to manage the investment of Allan's Registered Retirement Savings Plan (the "**RRSP**") and to take no more of the income or capital thereof per year than the minimum required by law until her death;
>
> (ii) That her entitlement to withdraw from the RRSP will not commence until she attains the age of seventy (70) years; and
>
> (iii) To gift the amount remaining in the RRSP to Megan upon her death.

[12] The agreement also contains a severability clause:

> **VI. SEVERABILITY**
>
> The validity or unenforceability of any provision of this Agreement will not affect the validity or enforceability of any other provision, and any invalid provision will be severable.

[13] The affidavit of Catherine Watson Coles, the lawyer who drafted the 2014 will and the agreement, contains a document entitled "Estate and Trust Services Will and Estate Planning Workbook". Page 10 of the workbook, which has the word "Will" in the top left hand corner, asks the question, "Describe for us how you would like to see your Estate passed on to your family members." The handwritten response states:

- All non res assets to Megan Leslie
- House to Megan Leslie, right for Shannon Gough to reside till 70 years or earlier if she chooses to move out, all costs paid by Shannon
- RRSP + RRIF to Shannon with residue to Megan on death

[14] The affidavit also attaches Catherine Watson Coles' handwritten notes dated July 16, 2014. The notes contain the words "house + physical property", with an arrow to "Megan", along with the following:

> Want an agmt btn Megan + Shannon that M owns house but S can live there til age 70 then house to daughter.
> S responsible for all costs – tax/insurance/utilities/normal maintenance
>
> Megan is ben on RRSP rt now
> Shannon is Can Post – pension etc – A is ben. + survivor on her pension – A took out annuity w GS to provide her some income.
>
> S will have M be administrator of RRIF –
> $600K→ S has no investment knowledge + not interest →
> - When S turns 70 + asked to vacate the house, RRIF would kick in.
> - M would give S the payout (min CRA amt)
> - S has 2 kids – S will inherit from mother →
> - mother's house worth $1mil – S will get $300k
> - S agrees that A's RRSP kept separate –
> - her mom's $ goes to her kids & the RRIF would go to Megan

[15] The handwritten notes also state:

> - house – M discretion to kick out beforehand?
> - + RRSP? payable?
> - NO – don't give Megan discretion to kick her out early <u>or</u> let her stay longer <u>or</u> pay more from RRIF → let them agree unanimously if they want to make any changes from this

[16] The parties agree that in late November 2015, Allan and Shannon had a falling-out. Megan said in her affidavit that Shannon moved out of Allan's home "due to their relationship breaking up." Shannon admitted that she and Allan had a "particularly significant argument" about Allan's assets, but she denied ever moving out. Shannon stated that at the outset of their relationship, Allan presented himself to her as a man of limited means on a limited income. For this reason, the couple shared all expenses equally. When Shannon and Allan executed their wills

together in July 2014, she learned that he had far more assets than she did. This information began to irritate her. Shannon stated that after their argument in November 2015, she and Allan agreed that there were certain aspects of their relationship that they needed to work on. In early December 2015, Allan asked her to go to couples counselling with him. Shannon said she agreed, but that Allan had committed to a number of trips and she was concerned that he could not commit time to counselling until early 2016. They agreed to continue working on their relationship and to start counseling in early 2016, which they did.

[17] On December 8, 2015, however, without Shannon's knowledge, Allan executed a new will. Unlike the 2014 will, the 2015 will does not name Shannon as a beneficiary of the estate. As under the previous will, Megan is named as the executor and residuary beneficiary. The new will includes a clause revoking all prior wills and testamentary dispositions:

> 1. **I HEREBY REVOKE** all former Wills and other Testamentary Dispositions made by me at any time heretofore and declare this only to be and contain my Last Will and Testament.

[18] The 2015 will does not mention the terms of the agreement. Shannon said she did not learn that Allan had executed another will until after his death. She does not know why he changed it or why he didn't advise her that he had. She surmised, however, that because "it didn't really have any bearing on me, he likely didn't think I needed to know."

[19] According to Shannon, in July 2017, Allan told her that he was naming her as the beneficiary of his RRIF in consideration of the fact that he would receive a pension from Canada Post Corporation on her death. Shannon had worked for Canada Post from August 1986 until her retirement on June 28, 2017.

[20] On April 25, 2018, Allan executed a codicil to amend the 2015 will. The codicil provides, among other things:

> **5(a). SPECIFIC GIFTS**
>
> **I HEREBY DIRECT** my Trustee to give to my common law partner, **SHANNON YVETTE GOUGH**, of Boutilier's Point, Nova Scotia, my registered retirement income fund account with Empire Life, contract #: 401169545, which has her named as the sole beneficiary, and should pass to her automatically upon my death.
>
> **5(b). RESIDUE**

> **I HEREBY DIRECT** my Trustee that when all the rest, residue and remainder of my estate has been converted to cash, or to some other transferable form, then to transfer, pay out, and deliver that entire residue to my daughter, **MEGAN ELIZABETH LESLIE**, for her own use absolutely.

[21] Shannon was aware of the codicil. The day before it was executed, Allan emailed her and Megan a copy of the codicil in draft form. Unaware of the 2015 will, however, Shannon assumed that the codicil was related to the 2014 will.

[22] On May 14, 2018, Allan passed away. Since then, Shannon has remained in the home at 263 Hillside Drive. Megan believes she is entitled to possession of the home. Megan stated that she planned to have the agent for the estate arrange an appraisal of the house for tax purposes, arrange for necessary repairs, and sell the property to convert it to cash. She said Shannon has not been cooperative with an appraisal, and she cannot sell the home while Shannon is living in it. Megan also stated that Shannon has not paid for all of the taxes, insurance, repairs, or other amounts necessary for the general upkeep of the home.

[23] Shannon believes that Allan intended for the agreement to remain in effect notwithstanding his execution of a new will, and that she is entitled to remain in the house until the "Disposition Date". In her affidavit, Shannon described her relationship with Allan as loving and committed, both before and after November 2015. She said they attended weekly couples counselling from January 2016 until late 2017, after which they continued to attend several times per year, as needed, to keep their relationship healthy.

[24] Shannon said Allan was concerned about looking after both her and Megan. She stated that Allan intended to provide her with a home, and pointed out at para. 60 of her affidavit that he had provided a home for Megan when he agreed to pay off her condominium mortgage:

> In 2014 when we were putting together our Wills, Allan itemized our financial assets and expenses. He included taking over Megan's mortgage at $194,000. Attached as **Exhibit C** is a copy of the handwritten note by Allan. Allan told me that Allan, Megan and Megan's husband Matthew James Smart ("**Matt**") entered into a separate agreement regarding Megan and Matt's condominium wherein Allan assumed responsibility for the mortgage on the condominium ("**the Secondary Agreement**"), also on or about July 23, 2014, though I was not present in the room when this agreement was signed. Allan was concerned about looking after me, and he was also concerned about looking after Megan. Although this Secondary Agreement is not directly related to what has transpired

> between Megan and me, it is relevant insofar as it demonstrated that Allan intended to provide me with a home even after he was gone.

[25] Shannon said she was never advised that the validity of the agreement depended on the 2014 will remaining valid, nor is there anything in the 2015 will or the 2018 codicil that confirms the agreement is revoked.

[26] According to Shannon, since Allan's death, Megan has made it clear that she wants Shannon out of the property. Shannon denied that she has failed to pay for all of the taxes, insurance, repairs or other charges necessary for the general upkeep of the home. She said she considers herself to have paid for all of the expenses she was reasonably required to pay under the agreement.

The issue

[27] The issue before the court is whether the agreement is a testamentary disposition which was revoked upon the execution of the 2015 will, or a contract that remains valid and binding on the parties.

[28] The parties state that if I find the agreement is not a testamentary disposition, the secondary issue of its effect on the estate will be determined before a different judge at a hearing scheduled for May 25, 2021.

Law and analysis

[29] Section 2(f) of the *Wills Act*, R.S.N.S. 1989, c. 505, defines a "will" as including "a codicil and an appointment by will or by writing in the nature of a will in exercise of a power, and also a disposition by will and testament or devise of the custody and tuition of any child, and any other testamentary disposition." If the agreement is a "testamentary disposition" – whether or not it complies with the formalities for the valid execution of a will under s. 6 of the Act – it was revoked when Allan executed the 2015 will.

[30] When will a legal instrument be deemed a testamentary disposition? In *MacInnes v. MacInnes*, [1935] S.C.R. 200, the Supreme Court of Canada considered whether the document designating the testator's wife as beneficiary of his share of an employee profit sharing fund was a testamentary instrument. The employer contributed to the fund and each participating employee contributed five percent of his wages and certain bonuses. The employee was entitled to withdraw from the plan at any time. If he withdrew before 10 years, he received what he

personally had put in, together with five percent interest. If he withdrew after ten years, he received a share of the full fund. If an employee died, his interest was a share in the full fund regardless of whether he had or had not been with the company for 10 years. The testator accepted membership in the plan and designated his wife as his beneficiary.

[31] To determine whether the document was testamentary in nature, Hughes J., writing for the majority, relied on the following statement from *Cock v. Cooke*, (1866) L.R. 1 Pro. & Div. 241:

> It is undoubted law that whatever may be the form of a duly executed instrument, if the person executing it intends that it shall not take effect until after his death, and it is dependent upon his death for its vigour and effect, it is testamentary. (p. 209)

[32] Justice Hughes also cited *Robertson v. Smith and Lawrence*, (1870) L.R. 2 Pro. & Div. 43, for the principle that an instrument will be testamentary "if it was the intention of the maker that the gifts made by it should be dependent on his death" (p. 209).

[33] The Supreme Court held that because the beneficiary designation was revocable, and it did not transfer any immediate right or interest to the beneficiary, the instrument was testamentary in nature:

> It has already been pointed out that the intention of the Plan in the case at bar was to furnish to each participating employee who remained until retirement on account of age, a contribution to future maintenance; to each employee who served an extended term of years, but not until retirement on account of age, a substantial accumulated sum; and to each employee who died, assistance in providing for his family or dependents. An employee with less than ten years of service could withdraw for himself approximately the amount deposited with interest. An employee after ten years of service could withdraw for himself approximately the balance at his credit. Any participating employee could revoke the benefits or change the beneficiaries or divert the money to his estate by instrument in writing or by will. The "Employee's Acceptance" did not, in the words of Lord Mersey, supra, create any charge or trust in favour of the nominee against the nominator. Until death the beneficial interest in the amount which the participating employee could withdraw was in the employee. If he died while a participating employee, his beneficiary had a right to his share of the Fund. The right of the beneficiary was dependent upon the death of the participating employee for its vigour and effect.

[34] These principles have been applied in Nova Scotia. In *Turner Estate v. Bezanson*, [1995] N.S.J. No. 321 (C.A.), leave to appeal denied, [1995] S.C.C.A. No. 438, Pugsley J.A., for the court, noted that the trial judge's conclusion that the instrument in question, a beneficiary designation signed by the testator, was a testamentary gift consistent with the Supreme Court of Canada's decision in *MacInnes*.

[35] In summary, a testamentary disposition is one which "disposes of the testator's property, takes effect only upon the testator's death and neither before nor after, is revocable until the testator's death, and is made *animo testandi*" (Albert H. Oosterhoff et al., *Oosterhoff on Wills*, 8th ed. (Toronto: Thomson Reuters Canada, 2016) at p. 107). As noted in *Halsbury's Laws of Canada - Wills and Estates* (2020 Reissue) at para. 2:

> The most definitive point for the classification of a testamentary document is whether it depends upon the death of the donor to take effect. …
>
> [I]f, at the time of its execution, the document is legally effective to pass some immediate interest in the property, no matter how slight, the transaction will not be classified as testamentary. …

[36] Shannon argues that the agreement is not a testamentary disposition because, unlike a will, it was executed by three separate parties. As a result, it could not be revoked by Allan alone. She further submits that the agreement, unlike the 2015 will, does not "dispose" of any property. The property was disposed of in the will, not the agreement.

[37] Neither party provided any authorities considering the nature or effect of a multi-party agreement, executed at the same time as a will, which purports to deal with gifts given under that will. In my view, however, this case can be decided on basic contracts and wills principles.

[38] The parties agree that the 2014 will and the agreement were part of Allan's estate planning process. They were both executed on July 23, 2014, and one references the other. The agreement, like the 2014 will, clearly depends on Allan's death to take effect – the most definitive characteristic of a testamentary instrument.

[39] Even though the agreement has no effect until Allan's death, Shannon says it is not a testamentary instrument because it could not be revoked by Allan, and it did not dispose of any property. These arguments presume, however, that the

agreement can be considered separately from the 2014 will. In my view, the agreement was intended to be an extension of the 2014 will, and the documents must be considered together. I say that for the following reasons.

[40] The agreement states that the parties intend "to contract into certain matters around the gifts being given under Allan's Will bearing even date". These gifts serve as the consideration for the promises made by Shannon and Megan under the agreement. If the 2014 will were subsequently revoked, the subject matter of the agreement (and the consideration from Allan) would cease to exist.

[41] Under the 2014 will, Shannon was to receive the amounts in the RRSP "for her own use absolutely", while Megan was to receive the residue of the estate, including title to the property at 263 Hillside Drive. Under the agreement, however, in consideration for Allan giving them these gifts under the 2014 will, Shannon and Megan agreed to certain conditions on the gifts that would benefit one another. Shannon agreed to allow Megan to manage the RRSP, to withdraw only the minimum amount required by law each year, and, on Shannon's death, to gift the amount remaining in the RRSP to Megan. Megan, for her part, agreed to allow Shannon to live in the property at 263 Hillside Drive until the Disposition Date.

[42] So why didn't Allan simply make the conditions part of the 2014 will? Conditions of the nature set out in the agreement, if included in a will, are at risk of being struck on the basis that they are repugnant. In Albert H. Oosterhoff et al., *Oosterhoff on Wills*, 8th ed. (Toronto: Thomson Reuters Canada, 2016), the authors write at p. 735:

> It is not possible at law to give property to a person while withholding from or denying to that person an essential attribute of property. Conditions attempting to do this are ignored on the basis that they are repugnant. Gifts which offend the rule in *Saunders v. Vautier* fall into this category. If A is vested in interest in respect of property and there is no prior interest which must conclude before A may vest in possession, it is not possible to delay vesting in possession against A's wishes. Doing so would be repugnant to the form of property presently held by A. Likewise, since the right to alienate property is an essential feature of property, restraints on alienation … can be struck on the basis of repugnancy. …[T]he same point applies to attempts to dictate how property given to A should be dealt with on A's death. Provided the form of property given to A does not terminate on A's death (as would be the case if a life estate *pur sa vie* was given to A), the entitlement to determine how that property should be distributed on A's

> death is within the bundle of rights that define the property held by A and is thus exclusive to A.

[43] In *Blackburn and Cox v. McCallum*, (1903), 33 S.C.R. 65, Mills J., for the Supreme Court of Canada, stated the principle this way at pp. 92-93:

> Where property is given absolutely a condition cannot be annexed to the gift inconsistent with its absolute character, and where a devise in fee is made upon condition that the estate shall be shorn of some of its necessary incidents … or that the proprietor shall not have the power to alien, either generally, or for a time limited, such conditions are void, because they are repugnant to the character of the estate.

See also *Doherty v. Doherty*, [1936] 2 D.L.R. 180 (N.S.S.C. [In Banco]); *Re Malcolm*, [1947] 4 D.L.R. 756 (Ont. H.C.); and *Re Collier*, (1966), 60 D.L.R. (2d) 70 (Nfld. S.C.).

[44] The most convincing inference is that by executing the agreement, Allan was attempting to do indirectly what he could not do directly through the 2014 will itself: create binding and enforceable obligations on Shannon and Megan to accept conditions on the absolute interests he gave them under the will. When read together, the 2014 will and the agreement dictate how Allan intended to dispose of the property at 263 Hillside Drive and his RRSP on his death. Shannon was to have the right to live in the property until the Disposition Date – an interest akin to a lesser form of life estate – after which the property would pass entirely to Megan. Upon reaching 70 years of age, Shannon would be entitled to withdraw an amount from the RRSP each year, and, on her death, she would gift the RRSP to Megan. If these conditions had formed part of Allan's will, they would likely have been invalid.

[45] Having found that the agreement depends on Allan's death to take effect, and that, when considered together with the 2014 will, it disposes of Allan's property, it remains to consider whether the agreement was revocable – the final criteria for a testamentary instrument. As noted earlier, the gifts given under the 2014 will are the subject matter of the agreement, as well as the consideration from Allan. There is nothing in the agreement preventing Allan from changing his will at any time. Upon revocation of the 2014 will, the subject matter of the agreement (and Allan's consideration) ceased to exist. As a result, although there were three parties to the agreement, Allan was free to revoke the agreement, by revoking the 2014 will, at any time before his death. And he did.

[46] I find that the agreement was a testamentary instrument (of dubious enforceability) that was revoked when Allan executed the 2015 will. I further find that it was Allan's intention to revoke the agreement. Any argument that Allan intended for the agreement to remain in effect is undermined by the fact that, upon executing the new will, Allan removed Sharon as beneficiary of his RRSP. As a result, there was no longer any consideration from Allan to Shannon, or from Shannon to any other party under the agreement.

[47] Before concluding, I will address the suggestion by Shannon's counsel that I should draw a negative inference from Megan's failure to request a copy of Allan's file from the lawyer who drafted the 2015 will. While ideally all relevant evidence would have been before the court, I cannot speculate about evidence that has not been placed before me. If I could speculate, I would surmise that the file contents regarding the 2015 will were unlikely to have changed the outcome of this application.

Conclusion

[48] The agreement executed by the parties on July 23, 2014, is a testamentary disposition which was revoked upon Allan Leslie's execution of a new will on December 8, 2015. None of the obligations contained in the agreement are binding on the estate.

[49] Megan Leslie requests the following order:

1. A declaration that the agreement is a testamentary instrument, and not a common law contract;
2. A declaration that the agreement has been revoked by the valid execution of the 2015 will;
3. A declaration that the agreement is invalid for its failure to comply with the *Wills Act*;
4. A cancellation of the May 25, 2021 hearing.

[50] I would ask applicant's counsel to draft an order including items 1, 2, and 4. It was not necessary, in light of my other conclusions, to consider the agreement's compliance with the formalities of execution under the *Wills Act*.

[51] If the parties are unable to agree on costs, I will accept written submissions within 30 days of the release of this decision.

Arnold, J.