SUPREME COURT OF NOVA SCOTIA
Citation: *Rumsey v. Rumsey (Estate)*, 2020 NSSC 404

Date: 20200909
Docket: *Syd* No. 497896
Registry: Sydney

Between:

Sara Michelle Rumsey MacLean

Appellant

v.

Estate of Marguerite Rumsey

Respondent

Judge: The Honourable Justice Robin Gogan

Heard: July 8, 2020, in Sydney, Nova Scotia

Counsel: Sara Michelle Rumsey-MacLean, Personal Representative, Appellant, in person
Steve Andrea, Estate Proctor
Michael Tobin, for the Clayton Reashore, Personal Representative

By the Court:

Introduction

[1] This matter is an appeal from a decision of the Register of Probate dated March 5, 2020. That decision resulted in two Orders; an Order Passing Accounts, and a further Order respecting the transfer of undistributed funds to the Public Trustee. Sara Rumsey-MacLean appeals.

Background

[2] Margaret Rumsey died on August 6, 2010. She did not leave a will. She was predeceased by her husband and survived by her children; Sara, James, Natalie, and Jamie. Jamie did not participate in this proceeding. He could not be located. Hence the eventual Order in favour of the Public Trustee. The Estate was modest, consisting mainly of Margaret Rumsey's former home and some insurance proceeds.

[3] On October 13, 2016, Sara Rumsey-MacLean and Clayton Reashore were together granted Administration of the Estate. There were problems between them and disputes arose resulting in competing applications for removal. In that context,

I had occasion to preside over a number of hearings and granted two Orders on consent, enabling the proceeding to move toward a final distribution.

[4] For the interim matters, Sara Rumsey-MacLean was represented by counsel. Unfortunately, Sara and her lawyer parted ways before the matter concluded and she was left to navigate the final stage of the proceeding on her own. From my observation, this was difficult for her and for the other parties involved. Sara's self-representation increased the complexity of the proceeding and the court time required to dispose of the issues that arose. In my view however, Sara's conduct was diligent and well intentioned and could not be construed as misconduct in the conventional sense. She was a self-represented litigant accessing a court system that she found challenging to navigate.

[5] Sara filed a Notice of Objection to Accounts, provided a written submission, and attended the hearing before the Registrar of Probate on March 5, 2020. She disagreed with the Orders granted by the Registrar and appealed. Her Notice of Appeal raised numerous issues, some of which related more broadly to the proceeding or to her former lawyer's conduct of the case. In support of her appeal, Sara filed a lengthy document expanding on the issues raised in her Notice. Much of the information contained in that document is beyond the scope of this appeal.

Issues

[6] What are the appropriate terms of the Order for the Passing of Accounts and what is the appropriate distribution of the Estate of Margarite Rumsey?

Position of the Parties

The Appellant

[7] Sara Rumsey-MacLean raised numerous issues on appeal. Many of these same issues were raised before the Registrar and during previous court appearances. Many are beyond the scope of this appeal. She is of the view that the decision of the Registrar was unfair to her and did not address the issues she wished to have determined at the hearing. These included the conduct of the Co-Administrator Clayton Reashore, the conduct of her former counsel and other lawyers involved in the proceeding, the approval of counsel and Proctor's fees, and the issue of Manulife Insurance proceeds.

The Respondents

[8] The Respondents advanced a concerted position. Broadly speaking, they took the position that the Registrar's decision on the passing of accounts was in accord with her jurisdiction and the evidence. The Estate Proctor provided a

concise written submission on the various issues raised by Sara Rumsey-MacLean. All ask that the decision of the Register on the accounts remain undisturbed.

[9] On the issue of the distribution, the Respondents submit that a fair outcome would be an equal distribution of proceeds amongst the children of Margaret Rumsey. This is not what was ordered by the Registrar of Probate.

Analysis

[10] This is an appeal brought pursuant to s. 93(1) of *The Probate Act*, S.N.S 2000, c. 31 as amended which provides:

> **Powers of court on appeal**
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> 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.
>
> (2) On an appeal taken pursuant to subsection (1),
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> (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;
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> (c) costs of the appeal are in the discretion of the court.

[11] The nature of appeals of this kind has been considered in a number of cases. In ***Atlantic Jewish Foundation v. Leventhal Estate***, 2018 NSSC 147, Campbell, J. provided an analysis:

> Hearing *De Novo* or Appeal
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> 3 The statutory basis for the appeal is found in s. 93 of the *Probate Act* SNS 2000, c. 31. A party who is "aggrieved" by an order or decision of the Registrar of Probate may appeal from that decision to a judge. On the appeal, "where the judge thinks fit", the parties may adduce the same evidence that was before the registrar and "any further evidence". The judge may confirm, vary, or set aside the order or decision appealed from and "make any decree, order or decision which the registrar should have made". The judge may rescind, set aside, vary or affirm the order or decision appealed from, or make any decision that the registrar "could have made".
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> 4 If the appeal were in the form of an appeal from the decision of an administrative decision maker to whose findings deference is accorded, that appeal would be based on the record before the decision maker. Instead the legislation specially provides that the judge may rehear the evidence that was before the registrar, and may hear more evidence. The section allows the judge to make any decision that the registrar "should" or "could" have made. That is not the typical language of deferential judicial review.
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> 5 … In *Moncel Estate* Justice Moir dealt with an appeal from the registrar's decision dealing with the amount of the executors commission. He followed *Faye Estate* in concluding that the appeal was by way of a *de novo* hearing. He noted that subsection 93(20 provides that where the judge thinks fit, the parties may adduce the same evidence that was before the registrar and further other evidence. The appeal is not a review. The matter is "decided afresh" and the haring is more like a "first instance determination than appellate review."
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> 6 The wording of the section is as Justice Moir interpreted it. The judge may decide the case without hearing any further evidence. The judge may hear the same evidence that was before the registrar. And the judge may hear more evidence. That is a matter for the exercise of judicial discretion. The judge can then make any decision that the registrar could or should have made. Justice Moir's statement that it is "more like a first instance determination than an appellate review" acknowledges the nuances. A judge may decide that no further or other evidence should be heard. It makes sense that there should be some deference accorded to the findings of facts and assessments of the credibility of

> witnesses made by the Registrar of Probate when the judge has not heard the evidence on the appeal. The process is still more like a first instance determination than a search for error.
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> (See also ***McInnes Cooper v. Moncel Estate***, 2012 NSSC 195)

[12] As in the cited authorities, the present appeal is likewise nuanced. The evidence on the appeal was the evidence before the Registrar. This evidence was largely, if not exclusively, documentary evidence. There were both written and oral submissions made on appeal, much of which repeated the written submissions made to the Registrar. Although this appeal is *de novo* in nature, there was nothing fresh to consider on appeal. There were no credibility assessments made by the Registrar. There was no new evidence on appeal. There was nothing novel or unique. Rather, the subject matter of the appeal, passing accounts and distribution, is the bread and butter activity of the Registrar. In my view, some deference is appropriate.

[13] The appeal court in these matters has the authority to make any order that the Registrar could have made. The matter on appeal was an Application to Pass Accounts. The authority of the Registrar on such applications is found in ss. 71 to 73 which provides:

Powers of court

71 On passing the accounts of the personal representative, the court may

(a) enter into and make full inquiry and accounting of and concerning the whole property that the deceased was possessed of or entitled to, and the administration and disbursement thereof, including the calling in of creditors and adjudicating on their claims, and for that purpose take evidence and decide all disputed matters arising in the accounting; and

(b) inquire into and adjudicate on a complaint or claim by a person interested in the taking of the accounts of misconduct, neglect or default on the part of the personal representative and, on proof of the claim, make any order the court considers necessary, including an order that the personal representative pay such sum as it considers proper and just to the estate, but any order made under this subsection is subject to appeal.

Further powers of court

72 (1) On passing of accounts the court may

(a) order that

(i) the accounts of the personal representative are passed and bills of costs are taxed pursuant to Section 91,

(ii) the personal representative is discharged,

(iii) any security be released,

(iv) the estate remaining undistributed after the passing of accounts be distributed among the persons entitled; and

(b) make any other order it thinks necessary to settle the estate.

(2) Where there is a contest as to how the remaining assets are to be distributed, the court shall hear evidence and determine who are the persons entitled to participate in the surplus of assets and the shares that they are respectively entitled to receive.

Same powers as Supreme Court

73 On passing the accounts of the personal representative and the distribution of the estate or in any matter relating thereto, a court has the same powers as the Supreme Court.

[14] More generally relevant to this appeal are s. 81 (dealing with the share of a missing person), ss. 90 to 98 (dealing with taxations, costs and fees) and regulations 55 to 67. All of these sections have some bearing on the powers of the Registrar and the appeal court. The authority conferred is broad.

Determination

[15] On December 10, 2019, an application was filed in this proceeding seeking various forms of relief including taxation of accounts, passing of accounts and distribution of the Estate. The Estate Proctor prepared a draft account setting out the required information and filed supporting documentation. The material filed documented a modest estate that had become complex for various reasons. As a result, the administration of the Estate became protracted and expensive.

[16] The application was served on the required parties. Sara Rumsey-MacLean provided a written submission and appeared before the Registrar on the date set for the application. There was also a written submission filed by Natalie Rumsey who did not otherwise appear. The matter was contested and a hearing was held before the Registrar on March 5, 2020. The hearing was not recorded and there were no

written reasons. The Registrar granted an Order Passing Accounts and a further Order for Distribution to the Public Trustee.

[17] The documentary evidence before the Registrar and reviewed on appeal is not controversial. It reveals that the Estate was largely dormant until the mortgage on Margaret Rumsey's former home fell into default and the mortgage company moved to realize its security in late 2014. At this point, the administration of the Estate required urgent attention and various counsel became involved. Within a year, the urgent matters had been resolved and by the fall of 2016, Clayton Reashore and Sara Rumsey-MacLean were granted administration of the Estate.

[18] Unfortunately, things did not go smoothly. The administration became complicated by disputes between Mr. Reashore and Ms. Rumsey-MacLean. These disputes resulted in competing applications to remove personal representatives. After much delay and several court appearances, these disputes were managed and the Estate finally moved toward liquidation and final distribution in late 2019.

[19] Given the dynamics of this Estate, and the impact of the disputes between the personal representatives, I see no basis to disturb the Registrar's decision to disallow any commission otherwise payable to Clayton Reashore or Sara Rumsey-

MacLean. Certainly, there was no new evidence offered or submission advanced that this resolution was inappropriate in the circumstances.

[20] Closely related to the difficulties between the personal representatives was the involvement of legal counsel and increased legal fees. There is no surprise that there were a multitude of legal accounts taxed and approved by the Registrar. I have reviewed these accounts on appeal and likewise find them reasonable in the circumstances.

[21] Accounting for the absence of any commission payable, and the payment of legal accounts, I agree with the Registrar's finding that the balance available for distribution is $17,039.50. It is at this point that I part company with the Registrar.

[22] In her decision, the Registrar ordered that Sara Rumsey-MacLean "reimburse the estate in the amount of $5,000 for legal fees: $4,259.88 from her portion of the estate and $740.12 from her personally". Given the size of the Estate, and the proceeds for distribution, this is a very significant sanction.

[23] There is no explanation provided as to why Sara Rumsey-MacLean should be singled out for such a sanction. There is no documentary evidence on appeal that supports this outcome. If it were based upon delay or increased complexity of the Estate administration flowing from the animosity between representatives, then

such a sanction should also been imposed on Clayton Reashore. Both representatives were denied a commission and that finding was not challenged on appeal.

[24] One would think the reason for such a significant sanction would be obvious from the evidence. But it is not. No explanation or justification was provided by any party on appeal. To the contrary, the Estate Proctor acknowledged that outcome was a surprise. Before the Registrar, no party took the position that Sara should be excluded from distribution. And as he candidly submitted, "there was enough blame to go around".

[25] On the hearing of the appeal, Ms. Rumsey-MacLeod was certainly insistent in her submissions. The issues she raised had been raised before with the Registrar and also raised in other court appearances. But she was prepared and polite. In my view, her tendency to focus on certain issues and raise them repeatedly reflected her lack of understanding of the law and process. This required accommodation, not sanction.

[26] Before leaving this aspect of the appeal, I would point to one example. Ms. Rumsey-MacLean repeatedly raised the issue of Manulife Insurance proceeds. She believed that there were life insurance proceeds paid to the Estate that should have

been payable to her directly. She said that the documentation disclosed by Manulife supported her position. At one point, when represented by counsel, she conceded that the disclosure did not support her position. After she and her lawyer parted ways, she revisited the issue. The Estate Proctor sought clarification from Manulife on the point multiple times. The inability to resolve this issue to Ms. Rumsey-MacLean's satisfaction was no doubt frustrating to the other parties and resulted in increased legal costs. In my view however, it was a relatively small point in the general landscape of issues. Her position, as insistent as it was, did not support a $5,000.00 penalty, in addition to the disallowance of any commission.

[27] On the evidence, I see no principled basis to deprive Sara Rumsey-MacLean of an equal distribution of her mother's estate or otherwise impose a $5,000.00 sanction. The respondents offered consent to vary this part of the Registrar's decision. I think this is a fair concession given the evidence on appeal.

Conclusion

[28] I affirm the decision of the Registrar in all respects except distribution. The balance available for distribution in the amount of $17,039.50 shall be distributed equally between Sara Rumsey-MacLeod, Natalie Rumsey, James Rumsey and Jamie Rumsey.

[29] The appeal is therefore allowed in part and the Order of the Registrar Passing Accounts dated March 5, 2020 varied accordingly.

[30] In the circumstances, all parties shall bear their own costs.

Gogan, J.