<u>SUPREME COURT OF NOVA SCOTIA</u>

Citation: *Karen Elizabeth Pay (Re)*, 2022 NSSC 366

Date: 20220926
Docket: Hfx No. 508659
Registry: Halifax

In the matter of the Bankruptcy of
Karen Elizabeth Pay

DECISION

Judge:	The Honourable Justice John P. Bodurtha
Heard:	In Halifax, Nova Scotia
Oral Decision:	September 26, 2022
Written Decision:	December 14, 2022
Counsel:	Tim Hill, K.C., Counsel for the Trustee Karen Pay, Self-Represented Bankrupt (not appearing)

By the Court (Orally):

Introduction

[1] This is an appeal made by MNP Limited (the "Trustee"), pursuant to section 192(4) of the *Bankruptcy and Insolvency Act* (hereinafter the "*BIA*"), where a person dissatisfied with an order or decision of a registrar may appeal to a judge. The Trustee appeals from the decision of the Registrar in the estate of Karen Elizabeth Pay (the "Bankrupt") rendered August 16, 2021. For the reasons that follow, the appeal is allowed.

Standard of Review

[2] The standard of review, where a judge assesses an appeal from the decision of the Registrar was discussed in *Re Nelson*, [2006] O.J. No. 2812, at para. 2:

> The standard of review on appeal from a decision of the Registrar was articulated by Lane J. In *Golden Mile Bowl Inc., Re,* [2005] O.J. No. 3722, 14 C.B.R. (5th) 187 (Ont. S.C.J.) at para. 13 and adopted in *Impact Tool & Mould Inc. (Trustee of) v. Impact Tool & Mould (Windsor) Inc, (Receiver of)* (2006), 79 O.R. (3d) 241 (Ont. C.A.) at para. 48. A decision should not be interfered with on appeal unless it is demonstrated that the Registrar erred in principle or in law, or failed to take into account a proper factor or took into account an improper factor which led to a wrong conclusion.

[3] The Ontario Court of Appeal addressed the standard in *Re Sally Creek Environs Corp.*, 2010 ONCA 312, at paras. 67-69:

> 67 As this is the second level of appeal, two standards of review must be addressed. The first is the standard governing the commercial court judge's review of the registrar's decision. The second is the standard applicable to this court's review of the Superior Court decision.
>
> 68 The parties agreed before this court that the applicable standard that governs the commercial court judge's review of the registrar's decision is that set out by the Supreme Court in the case of *Housen v. Nikolaisen,* [2002] 2 S.C.R. 235 (S.C.C.). All findings of fact by the registrar are deserving of deference unless he made a "palpable and overriding error". Questions of law and matters of principle are reviewed on the standard of correctness. The standard on mixed questions of fact and law lies along a spectrum. At one end, the palpable and overriding error standard applies to questions that primarily involve fact-finding

> or the making of factual inferences. At the other, where there is an error in characterizing or considering the proper legal standard to be applied, the standard is correctness.
>
> 69 It is worth noting that in *L. (H.) v. Canada (Attorney General)*, [2005] 1 S.C.R. 401 (S.C.C.), at para. 56, the Supreme Court has made clear that the term "palpable and overriding", though "elegant and expressive" was not intended to displace the earlier formulations of "unreasonableness", "clearly wrong", or "unsupported by the evidence".

Facts

[4] On or about June 18, 2021, the Trustee filed a Notice of Motion seeking a Conditional Order of Discharge of Bankrupt and Order Directing Payment to the Trustee of Part of the Salary, Wages, Remuneration or Any Other Monies Receivable by the Bankrupt pursuant to section 68 of the *BIA*.

[5] The Motion was heard before the Registrar on July 23, 2021.

[6] Karen Pay's common-law spouse, Ralph Eric Taylor ("Taylor"), filed a consumer proposal on April 7, 2017 and passed away on June 30, 2019 before completing the terms of the consumer proposal. Taylor's consumer proposal was subsequently deemed annulled. As this was a consumer proposal, there was no deemed assignment and the rights of creditors were revived in the amount of their claims less any dividends received.

[7] Taylor owned an unencumbered mobile home on a rented lot valued at $57,000 (the "Mobile Home").

[8] Taylor had made an assignment in bankruptcy in 2007 with a different trustee. The Mobile Home was secured at that time and the prior trustee disclaimed its interest in the Mobile Home.

[9] Karen Pay is the sole beneficiary and the executrix of Taylor's estate. Taylor's estate has creditors.

The Registrar's Decision

[10] The decision was made on August 16, 2021, at Halifax, Nova Scotia.

[11] The Trustee requested the Court issue an Order requiring the Bankrupt to pay the residual value of the Mobile Home after Taylor's creditors were satisfied.

[12] The Registrar disagreed with that approach to the Mobile Home. Among other items, he ordered:

(a) the Trustee to record a claim against the Mobile Home at the Personal Property Security Registry (PPSR);

(b) Ms. Pay, being the executrix of the estate to Mr. Taylor to surrender the Mobile Home to the Trustee; and

(c) If the Mobile Home was surrendered to the Trustee, the Trustee to satisfy the obligations of Mr. Taylor's estate.

Analysis

[13] The Registrar seems to have found that Taylor was "either an undischarged bankrupt or that the dwelling was not acquired by him after his discharge". Taylor was discharged from the prior bankruptcy in 2017, before making his consumer proposal. In addition, the trustee in the prior bankruptcy had disclaimed any interest in the Mobile Home.

[14] The Last Will and Testament of Taylor appoints the Bankrupt as executor and trustee. There are alternate executors and trustees, should the Bankrupt be unwilling or unable to act. Taylor's assets are given over to his executor and trustee to pay first debts, income taxes and funeral expenses. It is only then that the Bankrupt becomes entitled to the residue.

[15] Section 67(1)(a) of the *BIA* reads:

> The property of a bankrupt divisible among his creditors shall not comprise
>
> (a) property held by the bankrupt in trust for any other person.

[16] All the property of Taylor is held by the Bankrupt in her capacity as trustee and she has no entitlement to the residue unless and until Taylor's creditors, his income taxes and his funeral expenses are paid.

[17] The Registrar's powers upon an application for discharge of a bankrupt are set out in section 172(2) of the *BIA* as follows:

> The court shall, on proof of any of the facts referred to in section 173, which proof may be given orally under oath, by affidavit or otherwise,
>
> (a) refuse the discharge of a bankrupt;

(b) suspend the discharge for such period as the court thinks proper; or

(c) require the bankrupt, as a condition of his discharge, to perform such acts, pay such moneys, consent to such judgments or comply with such other terms as the court may direct.

Removal of the Trustee

[18] In my opinion, the Mobile Home has not vested in the Trustee and remains part of the probate estate of Taylor. In the case at bar, the Registrar ordered, in essence, that the Trustee take over as executor of the Taylor estate. *Wilson v. Stackhouse*, [1926] 1 D.L.R. 584, addresses the established law regarding property vesting in a trustee in bankruptcy, at paras. 7 and 8:

> 7 The only property which vests in a trustee in bankruptcy is that which belongs to a debtor at the date of the presentation of a petition and that which may be acquired or devolved upon him before his discharge, and it is that property which a trustee is, by *The Bankruptcy Act*, entitled to administer for the express purpose of paying the debtor's creditors and the cost of the administration of the estate.
>
> 8 But sec. 25 does not preclude the beneficial interest of a debtor in trust property which he or any other person is trustee from passing to his trustee in bankruptcy and becoming divisible among his creditors. See *Governors of St. Thomas Hospital v. Richardson,* [1910] 1 K.B. 271, 79 L.J.K.B. 488, 101 L.T. 771, 17 Mans. 129. Moulton, L.J., at pp. 278-9 said:
>
>> The meaning of the provision [section 44, the corresponding section in the English Act] is that property held by the bankrupt does not go to form part of his divisible estate, if and so far as he holds it in trust for another person. But as far as the bankrupt has a beneficial interest in property it passes to his trustee to form part of his divisible estate, and this none the less [*sic*, nonetheless] because the balance of the property is held by the bankrupt in trust for others. The trustee in bankruptcy will take the same position in respect of the property as the bankrupt; he will hold it on the same trusts and be entitled to the same beneficial interest , and no more. To give the trustee in bankruptcy this interest is not necessary that he should formally become trustee of the property in question.

[19] The Bankrupt held as trustee until such time as Taylor's creditors, his income taxes and his funeral expenses were paid, and there was no evidence such had occurred. Thus, none of Taylor's property was beneficially owned by the Bankrupt, and thus had not vested in the Trustee.

[20] At para. 21 of the Trustee's appeal brief, the appellant argues that the Registrar lacked the power to make the order, as the property of the estate of the late Taylor was held by Karen Pay in her capacity as executrix and trustee. In *Ex Parte Butler*, 1749, 1 Atk 214, the Lord Chancellor wrote:

> Suppose a tradesman is under a will made executor and residuary legatee, and before his bankruptcy collects in enough of the testator's effects to pay debts and particular legacies and the remainder of the assets stood out in mortgages: The assignees would not in law be intitled [*sic*, entitled] to get it in, because the bankrupt has it *in auter droit* as executor, and yet if he refused, I should certainly be of opinion the assignees under the commission, notwithstanding the legal interest is not vested in them, might by the aid of this court get in this part of the assets in the name of the executor, and would direct accordingly.
>
> [Emphasis added]

[21] *Butler* is used as the authority for the same proposition in *Williams & Mortimer On Executors Administrators and Probate* (London, UK: Stevens & Sons, 1970) at page 459:

> Where a bankrupt is an executor and residuary legatee, and has paid the debts and particular legacies out of part of the assets, if he refuses to collect the rest, notwithstanding the trustee in bankruptcy has not the legal interest vested in him, the court will assist him to get in the remainder in the name of the executor.

[22] Notably, no mention is made that the assistance will be made by a court of equity, but that may only be due to the fact that the common law courts of equity were fused in the UK in the 19th century. The authors also refer to section 38 of the *Bankruptcy Act*, *1914* (UK), 4 & 5 Geo V, c. 59 for that proposition as well. The only part of that section that appears to support that proposition is subsection 1 which exempts "Property held by the bankrupt on trust for any other person" from being divisible among the bankrupt's creditors. This subsection mirrors s. 67(1)(a) of the *BIA*.

Estate Property Sold on Application by Trustee in Bankruptcy

[23] In *Milverton Stock Yards Ltd. v. Thomas*, [2005] O.J. No. 602 (Ont. S.C.J.) is a case in which a creditor, acting in lieu of the trustee in bankruptcy, successfully applied to force the executor and bankrupt, Mr. I, to sell estate property, the proceeds of which would, if not for his bankruptcy, be distributed to the Mr. I as a beneficiary of the estate. This case is relevant to the extent that the beneficiary of the estate argued that he could not be forced to sell the property, as

he was holding it in trust for himself and the other beneficiary. However, it is distinguishable on the facts before me. The beneficiary in that case, apart from holding the estate property in trust, was granted a life estate in the property. Under the will, upon deciding that he no longer wished to use the property, the life interest would be terminated and he was to sell the property and distribute the proceeds between himself and the other beneficiary. On these facts, the Court found that the beneficiary's life estate was property within the meaning of section 2(1) of the *BIA*, and that his right to cause the property to be sold was exercisable by the creditor under s. 67(1)(d) of the *BIA* which reads that the property of bankrupt divisible among his creditors shall comprise:

> (d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

Removal of an Executor/Trustee (and Beneficiary under the Will) by the Trustee in Bankruptcy

[24] In *Gechman (Trustee of) v. Gechman Estate*, 2017 BCSC 416, Mr. Gechman was the executor of and sole beneficiary under his late sister's will. Mr. Gechman, however, was bankrupt and, any interest he had in the estate vested in his trustee in bankruptcy. Nonetheless, Mr. Gechman wished to remain the executor of the estate. Mr. Gechman's trustee in bankruptcy applied to have Mr. Gechman passed over as executor of the estate. Notably, this case was not dealt with under the Court's jurisdiction in bankruptcy. The Court stated at paras. 22-26:

> 22 Section 7 of the *Estate Administration Act*, R.S.B.C. 1996, c. 122 was in force at the date of death of Sara Gechman. It provides:
>
> > Discretionary power in appointment of administrator
> >
> > 7(1) This section applies if
> >
> > (a) a person dies intestate,
> >
> > (b) a person leaves a will, but without having appointed an executor willing and competent to take probate, or
> >
> > (c) the executor at the time of the death of the person resides out of British Columbia
> >
> > and it appears to the court to be necessary or convenient by reason of the insolvency of the estate of the deceased or of other special

> circumstances to appoint some person to be the administrator of the estate of the deceased, or part of it, other than the person who, but for this section, would have been entitled to a grant of administration.
>
> …

> 23 Sections 30 and 31 of the *Trustee Act*, R.S.B.C. 1996, c. 464 are to similar effect. The court also has inherent jurisdiction to pass over an executor.
>
> 24 The parties are agreed that *Conroy v. Stokes*, [1952] 4 D.L.R. 124 (B.C. C.A) is the leading case with respect to passing over or removing an executor. At 127, Bird J.A. stated that the court may pass over or remove an executor where there is:
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> a. endangerment of trust property;
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> b. want of honesty;
>
> c. want of proper capacity to execute duties; or
>
> d. want of reasonable fidelity.
>
> 25 Courts are hesitant to interfere with the testator's right to nominate his or her executor. However, if good reason is shown for believing that the interests of the persons entitled under the will are in danger, the courts will interfere with the discretion of the testator to name an executor and pass over that named executor. The primary guide for the court is the welfare of the beneficiaries (*Blitz Estate, Re*, 2000 BCSC 1596 (B.C. S.C.) at paras. 20-23).
>
> 26 I am satisfied that Mr. Gechman must be passed over in this case. I am satisfied that he has already endangered trust property of the estate of Sara Gechman; he has demonstrated want of honesty; he lacks the proper capacity to exercise his duties and he lacks reasonable fidelity. Any one of these would be sufficient to remove Mr. Gechman.

[25] The order requiring that the Bankrupt surrender the Mobile Home to the Trustee ignores the obligations imposed upon her by the Will, and pursuant to the *Probate Act*.

[26] The Registrar erred by proceeding based upon a finding of fact which was manifestly wrong and contrary to the evidence before him. I find that the Registrar committed an overriding error in finding that the Trustee held an interest in the Mobile Home.

Overlap in Jurisdiction

[27] If there was, and is, an issue regarding the Bankrupt administering Taylor's probate estate, the remedy lies with the Probate Court which is where the jurisdiction lies. Sections 8(1) and (2) of the *Probate Act* read as follows:

> 8(1) Each court may
>
> (a) issue grants;
>
> (b) revoke or cancel grants;
>
> (c) effect and carry out the judicial administration of the estates of deceased persons through their personal representatives, and hear and determine all questions, matters and things in relation thereto necessary for such administration;
>
> (d) order any person who has been named as an executor of a will to appear and probate or renounce executorship of the will;
>
> (e) order any person who witnessed a will to prove the will;
>
> (f) order a person to comply with this Act;
>
> (g) appoint guardians and take the accounts of guardians under the *Guardianship Act*.
>
> 8(2) Nothing in this Act deprives the Supreme Court of jurisdiction in the matters referred to in subsection (1).

[28] The Bankruptcy Court, and particularly the Registrar thereof, lacks jurisdiction to interfere with the probate process.

[29] It is unclear, on the facts before the Registrar, as to whether there was a grant of administration in favor of the Bankrupt where section 34 of the *Probate Act* would apply. Section 34 reads:

> 34 After the issue of a grant, no person other than the personal representative to whom it is issued may act in the estate comprised in or affected by the grant until the grant has been recalled or revoked or the personal representative discharged.

[30] The *Probate Act* has a remedy for situations such as this:

> 61(1) On the application of any person, the court may remove a personal representative where the court is satisfied that removal of the personal representative would be in the best interests of those persons interested in the

estate and, without limiting the generality of the foregoing, if the court is satisfied that

...

(b) the personal representative

…

(iv) is insolvent,

…

[31] In this case, the remedy was not to circumvent the jurisdiction of the Probate Court and, in essence, appoint the Trustee as administrator of the deceased's estate.

[32] In *Consumer Proposal of Cindy Lou Dickinson (Administrator of) v. Hong Estate*, 2008 NBQB 170, Ms. Dickinson and her brother were the beneficiaries of their late mother's estate. They decided to make improvements to a house forming part of the estate in order to sell it at a higher price. Ms. Dickinson partially funded these improvements with her credit card and this amount was to be reimbursed to her prior to the proceeds from the sale being distributed to her and her brother. Subsequently, Ms. Dickinson made a consumer proposal under the *BIA*. The Administrator of her consumer proposal asked the solicitor working for the estate to write a cheque for the amount Ms. Dickinson owed to the credit card company, and to make the cheque payable to the credit card company directly. The solicitor complied. However, the Administrator then informed the solicitor that the cheque should have been made payable to the Administrator instead and offered to return the original cheque for amendment. The solicitor refused to amend the cheque. The Administrator made a motion to the Registrar in Bankruptcy to order the solicitor to make the amendment. In finding that the motion was deficient on procedural grounds, the Registrar wrote:

31 […] For the Registrar to make an order binding a solicitor in a Probate Court matter that is not otherwise before the Court of Queen's Bench in Bankruptcy and Insolvency requires a clear reference to permit the Respondent to adequately defend. A mandatory order such as that solicited is not an insignificant imposition on the lawyer. His concerns about tangential legal consequences for his clients are neither frivolous nor unfounded.

32 It may be that a section 96 judge of the Court of Queen's Bench who has an ex officio competence in all divisions as well as inherent jurisdiction, could

> grant the remedy sought but I have not been persuaded by the arguments presented that the Registrar would have the power to do so.

[33] In *McWhan, Re,* 2010 ABQB 106, a Master in the Alberta Court of Queen's Bench transferred the matter that was before them to a Justice of the Court, as the matter involved an overlap of jurisdiction between bankruptcy and matrimony. As that is the issue in the case before me with respect to the jurisdiction in bankruptcy and probate, the case suggests that the Registrar does not have the power to make the order it did. In this case, the McWhans' (who were in matrimonial proceedings) house was foreclosed. After the mortgage was satisfied from the proceeds of sale, there remained a surplus. This surplus was paid into court and then by consent order into the trust account of Mr. McWhan's lawyer. This surplus was to be distributed on agreement between Mr. McWhan, Mrs. McWhan and Mrs. McWhan's trustee in bankruptcy or on a court order. As no agreement was come to, the trustee in bankruptcy applied for a determination of its entitlement to the surplus. The Master held, at para. 6:

> Mr. McWhan's counsel counters that the division of the sales proceeds falls under the purview of the matrimonial proceedings underway between Mr. McWhan and Mrs. McWhan. There is an overlap between the partition and sale provisions of the *Law of Property Act* and the *Matrimonial Property Act*, see *Silva v. Silva*, 1990 CarswellOnt 319, 75 D.L.R. (4th) 415 (Ont. C.A.), cited in *Veselic-Titheridge v. Titheridge*, 2007 CarswellAlta 932, 2007 ABQB 456, 427 A.R. 384 (Alta Q.B.). As a result of this overlapping jurisdiction, the question of disposition of the surplus proceedings should similarly be determined by a Justice of the Court of Queen's Bench, who has concurrent jurisdiction in bankruptcy and matrimonial proceedings.
>
> [Emphasis added]

[34] I find that the Registrar was incorrect at law in assuming jurisdiction to order the trustee to, in effect, administer the estate of Taylor (who is not a bankrupt).

Registering an Interest

[35] With respect to registering an interest under the *Personal Property Security Act* ("*PPSA*"), if the trustee has any interest, it is that of owner of the mobile home pursuant to the vesting provisions of section 67 of the *BIA;* it is not as a creditor. Thus, registration under the *PPSA* is not appropriate, given the application of the statute:

> 4(1) Subject to Section 5, this Act applies to
>
> (a) every transaction that in substance creates a security interest, without regard to its form and without regard to the person who has title to the collateral; and
>
> (b) without limiting the generality of the clause (a), a chattel mortgage, conditional sale, fixed charge, floating charge, pledge, trust indenture, trust receipt, assignment, consignment, lease, trust or transfer of chattel paper where it secures payment or performance of an obligation,
>
> including, for greater certainty, a security interest in relation to personal property located in Nova Scotia lands as defined in the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation (Nova Scotia) Act* other than a security interest to which Sections 104 to 120 of that Act apply.
>
> 4(2) Subject to Sections 5 and 56, this Act applies to
>
> (a) a commercial consignment;
>
> (b) a lease for a term of more than one year;
>
> (c) a transfer of an account or chattel paper; and
>
> (d) a sale of goods without a change of possession,
>
> that does not secure payment or performance of an obligation.

[36] I find that there is no jurisdiction to order the Trustee to register a claim under the PPSA where such is not provided for in the statute. If the Mobile Home is vested in the Trustee, the Trustee should take possession.

[37] I find the Registrar was incorrect at law in ordering the Trustee to register an interest in the Mobile Home in the PPSR because the Trustee had no registrable interest under the PPSA.

Conclusion

[38] I find that the Registrar committed an overriding error in finding that the Trustee held an interest in the Mobile Home and I find that the Registrar was incorrect at law in assuming jurisdiction to order the Trustee to, in effect, administer the estate of Taylor who was not a bankrupt.

[39] Lastly, I find the Registrar was incorrect at law in ordering the Trustee to register an interest in the Mobile Home in the PPSR because the Trustee had no registrable interest under the PPSA.

[40] The appeal is allowed and the relief sought by the Trustee is granted. The order of the Registrar is set aside and the Bankrupt is ordered to pay to the Trustee the value of any monies or personal property devolving upon her after the completion of the administration of Mr. Taylor's estate.

[41] The order shall be prepared by Mr. Hill, counsel for the Trustee.

Bodurtha, J.