SUPREME COURT OF NOVA SCOTIA
Citation: *Kinley Estate v. MacKeen*, 2023 NSSC 357

Date: 20231114
Docket: 511947
Registry: Halifax

In the matter of:

The Estate of Grace Elizabeth Kinley

Between:

Paula Howatt and Edward Kinley, Personal Representatives of the Estate of Grace Elizabeth Kinley

Applicants

v.

Shona Kinley MacKeen and Peter Kinley

Respondents

Judge:	The Honourable Justice Gail L. Gatchalian
Heard:	November 6, 2023, in Halifax, Nova Scotia
Counsel:	Paula Howatt and Edward Kinley, on their own behalf J. Walter Thompson, K.C. for the Respondent, Peter Kinley

By the Court:

Introduction

[1] Paula Howatt and Edward Kinley are the Personal Representatives of the Estate of their late mother, Mrs. Grace Elizabeth Kinley. Paula and Edward filed an application for a passing of accounts under s.71 of the *Probate Act*, S.N.S. 2000, c.3. Their siblings, Peter Kinley and Shona Kinley MacKeen, objected to the accounts.

[2] A three-day hearing took place before me in December of 2022. I issued a written decision on March 6, 2023: *Kinley Estate v. MacKeen*, 2023 NSSC 83. In the decision, I approved the accounting and the Proctor's Bill of Costs, but I denied the Personal Representatives' claim for a commission and for reimbursement for certain expenses, and I ordered the Personal Representatives to pay a substantial portion of the Proctor's fees and to pay the costs of Peter and Shona on a party and party basis. I issued an unreported costs decision on March 31, 2023. A formal order has not yet been taken out.

[3] A new issue has arisen. In May of 2023, the Proctor advised Peter that the Estate had sold 989 shares of High Liner Foods on October 10, 2019, even though

the shares were the subject of a specific bequest to Peter. Peter wants to reopen the hearing to determine his claim for damages resulting from the sale of the shares.

[4] The Personal Representatives object to the reopening of the hearing, saying that Peter was aware or ought to have been aware of the share sale since the filing of the accounting on October 28, 2021, and that Peter should have raised the issue at the December 2022 hearing.

[5] Moreover, the Personal Representatives say that the bequest of the High Liner Foods shares abated, at least in part, to pay the Estate's expenses. The Personal Representatives say that were two specific bequests in Mrs. Kinley's will: (1) the specific bequest of the High Liner Foods shares to Peter, and (2) a specific bequest of "all other shares, bank accounts and investments" to Mrs. Kinley's four children. The Personal Representatives say that the "specific gifts abate proportionately" to pay for the Estate expenses.

[6] Peter rejects that explanation, stating that there were more than enough funds to pay the Estate's expenses from the residue and the bequest of "all other shares, bank accounts and investments," which Peter characterizes as a demonstrative bequest.

[7] First, I must decide whether I should exercise my discretion to re-open the hearing. The critical question is whether a substantial injustice would occur if I declined to exercise my discretion to re-open.

[8] Second, if I decide to re-open the hearing, the central question is whether the bequest of "all other shares, bank accounts and investments" to the four children was a specific bequest or a demonstrative bequest. If it was a demonstrative bequest, the specific bequest of the High Liner Foods shares did not abate. This is because of the order of abatement: there was enough money in the residue and in the demonstrative bequest to pay the Estate expenses.

[9] Third, if I decide that the High Liner Foods shares should have been transferred to Peter and not sold, I must decide whether he is entitled to damages, and if so, whether those damages should be paid by the Estate or by the Personal Representatives personally.

Should I Reopen the Hearing?

[10] In *Griffin v. Corcoran*, 2001 NSCA 73, Cromwell J.A., as he then was, set out the legal principles relating to reopening a trial after a judge has made a decision and issued reasons but before the formal judgment has been issued: at paras.69-72.

[11] A trial judge has the discretion to reopen a case prior to the entry of the formal judgment: *ibid*. at para.60. In exercising this discretion, I must attempt to balance the requirements that parties bring forward their whole case and that there must be finality in litigation with the need to reach a result that is just in substance.

[12] The reopening of a trial after the judge has given a decision is an extraordinary and rare step that must be undertaken with great caution: *ibid*. at para.62. I must consider both the risk of procedural injustice, including that flowing from a lack of diligence in relation to discovery and presentation of the evidence, and the risk of substantial injustice judged mainly by the significance of the evidence to the outcome of the case: *ibid.* at para.72. Procedural concerns such as diligence should generally give way to the demands of substantial justice where failure to do so is likely to result in an obvious injustice: *ibid*.

Fair Procedure

[13] The evidence that Peter seeks to rely on in the reopened hearing was introduced at the December 2022 hearing as part of the final accounting filed by the Personal Representatives on October 28, 2021. In Schedule “B” to the accounting, it is obvious that the Personal Representatives sold 989 shares of High

Liner Foods on October 10, 2019 for $10,478.87. At the time of the hearing, the accounting had been in Peter's hands for over a year.

[14] The accounting was of critical importance to Peter and Shona. Beginning in June of 2019, they repeatedly asked the Personal Representatives to file an accounting of their administration of the Estate. Peter and Shona pursued an application to the Registrar of Probate and an appeal to a Judge of the Probate Court in order to compel the Personal Representatives to file an accounting.

[15] Peter and Shona filed a Notice of Objection to Accounts on January 4, 2022, and a Supplemental Notice of Objection to Accounts on October 26, 2022.

[16] The hearing before me took place over the course of three days, on December 19, 20 and 21, 2022. Extensive evidence was adduced at that hearing: see paragraphs 12 to 15 of my March 6, 2023 decision.

[17] Peter acknowledges, though counsel, that it was an oversight on his part that he did not raise the sale of the High Liner Foods shares at the December 2022 hearing.

[18] In these circumstances, only evidence showing that a substantial injustice will occur would justify reopening in the face of Peter's lack of diligence.

Substantial Justice

[19] Peter says that a substantial injustice will result if I do not reopen the hearing because it was the clear intention of Mrs. Kinley in her will to leave the High Liner Foods shares to him.

[20] However, the risk of substantial injustice is judged mainly by the significance of the evidence to the outcome of the case.

[21] Peter has a viable argument that the High Liner Foods shares, being a specific bequest, did not abate because there were sufficient funds to pay the Estate's expenses from the residue and from the bequest of "all other shares, bank accounts and investments," which Peter argues is a demonstrative bequest.

[22] Had the issue of the sale of the High Liner Foods shares been raised at the December 2022 hearing, and had Peter been successful in his argument that he should be reimbursed for the value of the shares, I would not have approved the accounting as filed. If he is correct about the shares, he would be entitled to 100% of the value of the shares, which he calculates to be $16,886.88.

[23] As stated by Cromwell J.A. in *Griffin v. Corcoran* at para.68:

> While fair and orderly procedure is essential, so is reaching a correct result on the merits. Genuine mistakes, oversights or even poor judgment should rarely defeat a just

> cause. If key evidence has been overlooked or an untruth only lately detected, there are strong arguments of justice in favour of allowing the court to reopen its consideration of the matter. The more important the evidence would be to the outcome of the case, the stronger the argument in favour of its reception. To rephrase a familiar adage, justice must not only appear to be done; it must in fact be done.

[24] I conclude that I cannot reach a correct result on the merits of the application to pass accounts unless I hear Peter's complaint about the sale of the High Liner Foods shares. I accept that Peter's failure to raise this issue at the December 2022 hearing was a genuine mistake, oversight and/or poor judgment on his part. The issue of the High Liner Foods shares is significant to my approval of the accounting.

Conclusion re: Reopening Hearing

[25] Applying the principles as set out in *Griffin v. Corcoran*, I will exercise my discretion to reopen the hearing to hear Peter's claim regarding the High Liner Foods shares.

Specific or Demonstrative Bequest?

[26] The parties agree that the bequest of the High Liner Foods shares to Peter was a specific bequest:

NATIONAL SEA PRODUCTS LIMITED

> 13. To transfer and deliver to my son, **PETER JOHN KINLEY**, if he survives me, all of my shares in the capital stock of National Sea Products Limited (now known as Highliner Foods Incorporated), (which are consistent with the wishes of my husband) owned by me at the time of my death, provided that, if my son shall have predeceased me leaving children alive at the time of my death, the shares in the capital stock of the company herein referred to shall be divided among such of the children of my said son, **PETER JOHN KINLEY**, as shall be alive at the time of my death, equally share and share alike.

[27] Absent instructions to the contrary in a will, the payment of debts and expenses are to be paid as follows: first, out of the residuary personalty; second, out of the residuary (not specifically devised) real property; third, out of general bequests; fourth, out of demonstrative bequests; fifth, out of specific bequests; and finally, out of specific devises of real property: see *The Estate of Harold B. Legge*, 2001 NSSC 156 at para.21.

[28] The order of abatement is dealt with in **The Canadian Law of Wills**, (3rd ed., 1987) (vol. 1) by Thomas G. Feeney at p. 251:

> When the estate is solvent, the creditors must be paid in full, but if there are insufficient assets to pay all beneficiaries, it is the duty of the personal representative to decide on the contesting claims between the beneficiaries *inter se*. The rules for the application of the available assets are well fixed. He must, under the rules, decide first as to the order in which resort is to be had to the various assets of the estate to pay debts and other liabilities and, second, decide what parts of the estate are charged with the payment of pecuniary legacies and in what order. The order of abatement depends on the nature of the legacy or devise. A general legacy is a gift out of the residuary estate after the payment of debts and specific legacies. The most usual kind of a general legacy is a pecuniary legacy. A specific legacy is one which the testator has separated from his residuary estate in favour of a particular legatee and since the testator has shown that he intends that the legatee shall take the specific thing unconditionally, while it may have to be sold to pay debts, it will not abate to meet debts until the

> residuary estate and general legacies have been exhausted. There is a third kind of legacy known as a demonstrative legacy - rather halfway between a specific legacy and a general one - which is a pecuniary legacy that makes reference to a particular fund out of which it is to be paid.
>
> In the payment of debts the residuary estate must first be exhausted and residuary personalty and realty are liable rateably for the debts. After the residuary estate has been exhausted, general legacies abate *pro rata*, then demonstrative and specific legacies rateably after that, and finally devises. Devises abate last because of the general rule that personalty is primarily liable for the payment of debts.
>
> See *Legge Estate*, *supra* at para.22

[29] In this case, the Estate expenses as per Schedule D to the accounting totalled $377,707.07.

[30] The expenses were to be first paid out from the residuary personalty. In this case, Mrs. Kinley's designation of her RRIF for the benefit of her late husband lapsed through his death. The RRIF of $185,798.25 then fell to the Estate is residue. The Estate also had income of $74,858.76. There was therefore an amount of $260,657.01 available to the Estate as residue to apply to the estate expenses. The shortfall after applying the residue was $117,050.06.

[31] The Estate held no real property.

[32] The gift of all other shares, bank accounts and investments was, in my view, a demonstrative bequest. It is provided for in para.14 of Mrs. Kinley's will as follows:

> **All OTHER SHARES, BANK ACCOUNTS AND INVESTMENTS**
>
> 14. Should my husband, predecease me, I direct my Trustees to divide all my remaining shares into as many equal parts as will be necessary to give effect to the following provisions:
>
> I direct my Trustees to divide all of my shares in the Royal Bank of Canada, Canadian Imperial Bank of Commerce, Bank of Montreal, Bell Alliant, Manulife, Sun Life, and any other remaining shares, bank accounts, short and long term investments of any kind, into as many equal parts as will be necessary to give the effect to the following provisions:
>
> (i) to transfer four of such equal parts to my daughter, **PAULA KINLEY HOWATT**, if she survives me, …
>
> (ii) to transfer three of such equal parts to my daughter, **SHONA KINLEY MACKEEN**, if she survives me, …
>
> (iii) to transfer two of such equal parts to my son, **JAMES EDWARD KINLEY**, if he survives me, …
>
> (iv) to transfer one of such equal parts to my son, **PETER JOHN**, if he survives me, …
>
> The above shares, accounts and investments in this paragraph have been divided as provided herein so as to equalize as best as possible the distribution of real and personal property between my four children, as that is my wish.

[33] Although the bequest in paragraph 14 of Mrs. Kinley will does include specific named shares, it is not a gift of a specific thing to a beneficiary. None of the four beneficiaries is entitled to shares in a specific company. Rather, the

Personal Representatives are directed, in paragraph 14 of the will, to divide the shares, bank accounts and investments into ten equal shares. One way to achieve this would be to liquidate all of the shares and investments and divide the cash into ten equal shares, which is what the Personal Representatives did in this case. The bequest in paragraph 14 is a pecuniary legacy that makes reference to particular funds out of which is to be paid. It is a demonstrative bequest.

[34] Very soon after Mrs. Kinley's death, in November, 2017, Paula and Edward had the Estate sell $9513.56 of the stock portfolio. They used these funds, together with the money in Mrs. Kinley's bank account, to pay immediate estate expenses. Then, in April 2018, Paula and Edward had the Estate sell a further $120,409.77 in the portfolio. These amounts, together with the residue, were more than sufficient to pay all of the Estate's debts and expenses.

[35] The specific gift of the High Liner Foods shares to Peter therefore did not abate. The Personal Representatives should not have sold these shares.

What, if Anything, is Peter Entitled To?

[36] Peter alleges that the Personal Representatives committed a breach of trust when they sold the shares. Peter claims that he should be paid $16,886.88, representing the value of the Highliner shares as of the date the parties discovered

the issue (May 30, 2023) ($14.80 x 989 shares), the dividends that the Estate earned before they were sold ($949.20) and the dividends the Estate would have earned after they were sold ($1300.48). Peter says that the tax benefit derived from the capital loss on the sale of the shares cancels out the pet tax paid on the dividend income. The facts on which Peter's calculations are based are set out in a request for admission, which the Personal Representatives did not answer. Pursuant to Civil Procedure Rule 20.05, the Personal Representatives are taken to have made the admissions. Peter says that the damages should be paid by the Personal Representatives personally.

[37] The Personal Representatives say that they should, together, be responsible to pay 60% of the amount claimed by Peter. Presumably, the Personal Representatives take the position that Peter should be responsible to pay 10% of the amount, and Shona 30% of the amount, based on their respective entitlements under paragraph 14 of the will.

[38] The Estate received $10,132.13 when the Personal Representatives sold the High Liner shares in October of 2019. The Estate earned $949.20 in dividends before the sale. Peter should receive, at least, the value of the shares at the time of sale, along with the dividends earned by the Estate to the date of sale, for a total of $11,081.33.

[39] In his affidavit, Peter did not say that he would have kept the shares, had the Personal Representatives transferred the shares to him instead of selling them. He has therefore not established that he is entitled to damages representing the current value of the shares and the dividends he would have earned had he had the shares and kept them.

[40] The Estate agreed to a hold back of $20,000 pending resolution of this issue. Peter takes the position that, as he is entitled to 10% of the residue, and Shona is entitled to 30%, the Personal Representatives should pay damages personally. I do not accept this rationale. The Estate received an extra $11,081.33 as a result of the dividends and sale of the High Liner shares. Had the shares not been sold, this amount would not have formed part of the residue.

[41] Peter also says that this is an instance of neglect on the part of the Personal Representatives within the meaning of s.71(b) of the *Act*, justifying an order that they pay damages personally. I am not satisfied that the sale of the shares was anything more than an oversight on the part of the Personal Representatives. I am not convinced that I should order them to pay damages personally.

[42] Peter is entitled to $11,081.33, to be paid out of the Estate.

Draft Order

[43] When attempting to agree on the form of order following my March 6, 2023 decision, the Personal Representatives wanted language releasing them, whereas Shona and Peter wanted language simply discharging the Personal Representatives. Subsection 72(1)(a)(ii) permits the Court, on a passing of accounts, to order that the Personal Representative be discharged. The form of Order should include that the Personal Representatives are discharged. It will not include a form of release.

Conclusion

[44] Peter is entitled to $11,081.33, to be paid out of the Estate, as reimbursement for the sale of the High Liner Foods shares.

[45] If the parties cannot agree on the issue of costs of this proceeding, I will receive written submissions from them within two weeks.

Gatchalian, J.