SUPREME COURT OF NOVA SCOTIA
Citation: *Brooks Estate v. Brooks Estate*, 2013 NSSC 319

Date: 20131021
Docket: Hfx. 411047
Registry: Halifax

Between:

Frederick Brooks, Co-Executor and Co-Trustee of the Estate of Marcel Brooks and Co-Trustee of Life Insurance Trust

Applicant

and

Brendon Ewing and Brenda Brooks, Co-Executors and co-Trustees of the Estate of Marcel Brooks and Co-Trustees of Life Insurance Trust

First Respondents

and

Kahlyn McIntyre, child beneficiary, by her Litigation Guardian, Devonna McIntyre and Justin Huntington, beneficiary

Second Respondents

Judge: The Honourable Justice C. Richard Coughlan

Heard: May 1, 2013, in Halifax, Nova Scotia

Last Written Submission: July 11, 2013.

Decision: October 21, 2013.

Counsel: Bruce W. Evans, counsel for the Applicant

Matthew J.D. Moir, counsel for Brendon Ewing

By the Court:

[1] Marcel Frederick Brooks died March 20, 2011 at age 41. He was survived by two children Justin Huntington, born October 20, 1993 and Kahlyn McIntyre born, December 19, 1997. Marcel Brooks had life insurance policies with Manufacturer's Life Insurance Company (Manulife) and Sun Life Insurance Company (Sun Life). Proceeds paid upon Marcel Brooks's death were Manulife $70,147.00 and Sun Life $100,300.76.

[2] Although Marcel Brooks made a will it was not admitted to probate. In his will Marcel Brooks named his parents, Frederick Brooks and Brenda Brooks and a friend, Brendon Ewing to be his Executors and Trustees. The will executed March 3, 2011 provided:

> LIFE INSURANCE
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> 2. I DECLARE that the proceeds of any and all life insurance policies which are paid and payable upon my death shall be paid and payable to my trustee to be held in a separate trust in the same manner and on the same terms as I have provided for the residue of my estate by my Will. This declaration shall be a declaration within the meaning of the *Insurance Act*, R.S., c. 231.
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> EXECUTOR AND TRUSTEE:
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> 4. I APPOINT my friend, BRENDON EWING, my father, FREDERICK CHARLES BOOKS, and my mother, BRENDA LEE BROOKS, to be co-executors and co-trustees of my Will. I refer to my executor and trustee, whether original or substituted, as my trustee.
>
> My trustee shall be entitled to administer my estate in any jurisdiction where I hold property and shall not be required to post a bond for the performance of their duties. This provision shall constitute a waiver of any requirement for bonding in any jurisdiction where such a requirement to bond may be waived.

[3] On January 4, 2012, Frederick Brooks, Brenda Brooks and Brendon Ewing met with Mr. George Ash, the solicitor who drafted Marcel Brooks's will and agreed the proceeds of the Manulife Policy be paid to Brenda Brooks and the proceeds of both Manulife and Sun Life policies would be held in trust for the

benefit of Marcel's children. The same day, Brenda Brooks signed the application for the proceeds of the Manulife Policy.

[4] Frederick Brooks, Brenda Brooks and Brendon Ewing also signed documentation to open a trust account with the Royal Bank of Canada.

[5] On January 24, 2012 Frederick Brooks and Brenda Brooks opened a high interest savings account at the Tacoma Drive Branch of the Royal Bank of Canada into which was deposited the proceeds of the Manulife Policy. The account was in the names of Brenda Lee Brooks and Frederick Brooks.

[6] On February 17, 2012 another account was opened at the same branch of the Royal Bank to hold the proceeds of the Sun Life insurance policy. All three of Brendon Ewing, Frederick Brooks and Brenda Brooks had to sign cheques on that account.

[7] On April 13, 2012 Brenda Brooks withdrew $50,000.00 from the high interest savings account which held the proceeds of the Manulife policy purchasing a bank draft payable to B.A.E. Developments Ltd., a company of which Brendon Ewing is President, Secretary and Recognized Agent. The bank draft was deposited in the account of B.A.E. Developments Ltd. at the East Coast Credit Union Ltd., Margaree, Nova Scotia on April 13, 2012. The $50,000.00 was used to operate the account of B.A.E. Developments Limited between April 13, 2012 and July 16, 2012. The balance of the account prior to the deposit of the $50,000.00 on April 13, 2012 was $6,415.86 and the closing balance on July 16, 2012 was $1,237.95. There were no other deposits into the account between April 13, 2012 and July 17, 2012.

[8] There is a dispute between Frederick Brooks and Brandon Ewing concerning the payment to B.A.E. Developments Ltd. Frederick Brooks says approximately February 17, 2012 Brendon Ewing stated he could secure a higher rate of return than offered by the Royal Bank by investing the life insurance proceeds in his own business. At that time Mr. Ewing said, "Let's keep it quiet about this money." Frederick Brooks did not say he agreed or disagreed with putting the money in Mr. Ewing's business. Mr. Brooks testified he let Mr. Ewing go on - Mr. Ewing did all the talking. Subsequently, Brenda Brooks told him Mr. Ewing was coming to their

home to have some papers signed and Mr. Brooks told Ms. Brooks he was not putting any of the money in Mr. Ewing's business.

[9] In his affidavit deposed to April 16, 2013 Brendon Ewing stated:

> "9. I had a (sic) several discussions with Mr. and Mrs. Brooks (the applicant and second respondent) concerning making this investment into my real estate developments. These discussions all took place at their residence between February and March 2012. The bank account paid less than 1% interest. The African Baptist Church Association was offering GICS, but they only paid around 3% per annum. I advised that, if some of the money were invested into my real estate development, the rate of return would be between 6% and 8% annually.
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> 10. We never discussed any further terms of the arrangement. We never discussed, for example, what if any interest the trust would have in the real estate developments. I certainly intended that the trust would have some interest in the real estate developments into which funds were invested in order to secure the trust's investment, but this was not discussed between us. Nor was any exact rate of return on the investment discussed. The only terms we discussed were that the trust would receive between 6% and 8% interest on its investments.
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> 11. I never said "Let's keep it quiet about this money," as Mr. Brooks states at paragraph 36 of his affidavit. I did say that the properties which my company owns, their values and the charges against them were my personal business, and I asked that they keep that information confidential. I never suggested the proposed investment from the trust be kept confidential.
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> 12. I never had any impression from Mr. Brooks that he objected to our making an investment of this kind. Mr Brooks is Marcel's father, who Marcel saw fit to make a co-trustee of these funds. I respected Marcel's decision.
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> 13. I do not know what Mr. Brooks means at paragraph 38 of his affidavit, concerning documents which I had to take to him to sign. I cannot think of what I would have had for him to sign after the bank account was set up. I met with Mrs. Brooks at the bank in order to have a bank draft prepared for $50,000.00 to be made out to my company, B.A.E. Developments Limited. (The statement attached as Exhibit "G" to Mr. Brooks's affidavit says this was a "cash withdrawal" but the bank issued a draft, not actual legal tender.)
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> 14. I do not know what if any discussions took place between Mr. and Mrs. Brooks concerning this transaction. I assumed that Mrs. Brooks at least discussed it with

> Mr Brooks. I had no reason to believe that Mr. Brooks did not know about the transaction. Based on the discussions I had with him, I understood he had agreed to it. ..."

[10] Mr. Ewing testified he did not know whether B.A.E. Developments Ltd. has ever made a profit.

[11] Prior to his career in real estate development, Brendon Ewing was employed by RBC (Royal Bank) for approximately 15 years. He was involved in personal banking and then was mortgage sales manager responsible for a mortgage sales staff of 23 in the Halifax region. Mr. Ewing knew the Bank required documentation when lending money.

[12] I accept the evidence of Frederick Brooks over that of Brendon Ewing. Mr. Ewing, who had worked with a chartered bank for approximately 15 years and was a mortgage sales manager responsible for a sale staff of 23, testified he did not know whether B.A.E. Developments Ltd. ever made a profit. That is unbelievable.

[13] Frederick Brooks did not authorize the transfer of the trust funds to B.A.E. Developments Ltd. Approximately July 27, 2012 Frederick Brooks telephoned the Royal Bank to make two payments of $200.00 each from his personal account. The next day Mr. Brooks saw the payments had not come out of his account. Upon making inquiries with the bank he was informed the payments had been taken from the high interest savings account into which the proceeds of the Manulife insurance policy had been deposited, the account had a balance of $19,973.83 and $50,000.00 had been withdrawn on April 13, 2012. He was shocked. Questioning his wife on July 28, 2012 she told him she had withdrawn the $50,000.00 and given it to Mr. Ewing to invest in his business.

[14] The evidence is clear $50,000.00 was paid from the "Manulife" account to B.A.E. Developments Ltd. by the bank draft of April 13, 2012. In his affidavit of April 16, 2013 Brendon Ewing exhibited a Statement of Disbursement of Funds of the Marcel Brooks Estate Trust monies by B.A.E. Developments Ltd. In the same affidavit, Mr. Ewing stated he advised the money invested in his real estate development would result in a rate of return of between 6% and 8% per annually.

[15] Frederick Brooks applies for an order as follows:

1. declaring that the life insurance proceeds, of $70,147.00 paid by Manulife Financial and the $100,300.76 paid by Sun Life Financial, upon the death of Marcel Brooks are subject to an express separate trust for the benefit of the children of Marcel Brooks, namely, Justin Frederick Huntington and Kahlyn Victoria McIntyre;

2. alternatively, declaring that the said life insurance proceeds, are subject to a resulting trust, for the estate of Marcel Brooks and the testamentary trust in the Last Will and Testament of Marcel Brooks dated March 3, 2011 (the "Will"), for the benefit of the children of Marcel Brooks, namely, Justin Frederick Huntington and Kahlyn Victoria McIntyre;

3. removing Brendon Ewing and Brenda Brooks as Co-Executors and Co-Trustees of the Will and as Trustees of the separate life insurance trust, pursuant to Section 31(1) of the **Trustee Act,** R.S.N.S. 1989, c. 479 and/or common law principles;

4. ordering equitable and other relief including:

   (a) an "accounting" of the $50,000.00 trust funds misappropriated by Brendon Ewing;

   (b) the "following" of the $50,000 trust funds into the hands of the Brendon Ewing and other entities;

   (c) the "tracing" of the $50,000 trust funds transformed into other property; and

   (d) the recovery, of the trust funds and other property into which any portion of the trust funds have been transformed;

5. ordering Brendon Ewing and other entities, who have received trust funds or property into which trust funds have been transformed, to pay and/or deliver, to the Applicant, in trust for the benefit of Justin Frederick Huntington and Kahlyn Victoria McIntyre:

   (a) $50,000 plus

   (b) prejudgment interest to date of payment; and/or

(c) profits and gains earned or accrued by Brendon Ewing and/or any business entities with which he is associated, from use of the trust funds; and/or

(d) property into which the trust funds were transformed;

6. ordering Brendon Ewing to pay to the life insurance trust or alternatively, to the testamentary trust, the solicitor and client costs of the Applicant of this application and of all subsequent legal steps by the Applicant to obtain relief on behalf of the trust beneficiaries.

7. directing the Applicant to pay from the life insurance trust or alternatively, from the testamentary trust, the solicitor and client costs of the Applicant in making this application and of all subsequent legal steps by the Applicant to obtain relief on behalf of the trust beneficiaries.

8. ordering that the Applicant and any third parties affected by this order, may by motion or application seek such further relief or direction from this Honourable Court as appears appropriate from time to time.

[16] Brenda Brooks who was present at the hearing did not file a Notice of Contest or take part in the proceeding. Brendon Ewing filed a Notice of Contest but agreed the application be allowed in part by an order as follows:

1. that the funds paid by Manulife Financial and Sun Life Financial be declared to be the trust property of an express or implied trust;

2. that Brendon Ewing be removed as a trustee of the said trust;

3. that Brendon Ewing provide an accounting of $50,000.00 paid out of the trust property on April 13, 2012;

4. that said $50,000.00 be followed and traced;

5. the Brendon Ewing and any individuals, companies or other business organizations related to him be ordered to pay, convey or assign to the remaining and replacement trustees:

a. $50,000.00;

b. prejudgment interest;

c. profits and gains earned or accrued; and/or

d. property into which the trust funds were transformed;

in accordance with the law once the accounting has been made and the trustees elect whether to accept or refute the impugned transaction; and .....

[17] Mr. Ewing seeks an order that he otherwise be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed such breach pursuant to section 64 of the *Trustee Act* R.S.N.S. 1989, C. 479.

[18] Justin Huntington and Devonna McIntyre, Litigation Guardian of Kahlyn McIntyre were served with Notice of the application but neither took part in the proceeding.

[19] Considering the evidence before me I declare the proceeds of the life insurance policies namely, Manufacturer's Life Insurance Company, group policy #60074957 of $70,147.00 and Sun Life Insurance Company of $100,300.76 paid upon the death of Marcel Brooks are subject to a trust for the benefit of the children of Marcel Brooks namely, Justin Frederick Huntington and Kahlyn Victoria McIntyre.

[20] Mr. Brooks applies pursuant to section 31(1) of the *Trustee Act, supra* and the common law for the removal of Brendon Ewing and Brenda Brooks as Trustees of the life insurance trust. Section 31(1) provides:

> 31(1) The Court or a judge may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult or impracticable so to do without the assistance of the Court, make an order for the appointment of a new trustee or new trustees, either in substitution for or in addition to any existing trustee or trustees or although there is no existing trustee, or although no trustee was appointed in a will containing provisions rendering a trustee necessary to carry them into effect.

[21] The section allows the court to appoint a new trustee either in substitution for or in addition to any existing trustee or if there is no existing trustee when it is expedient to do so. The court also has inherent jurisdiction to remove a trustee. In *Waters' Law of Trusts in Canada*, 4th edition, the author states at page 895:

> "Private trusts, that is, *inter vivos* and testamentary trusts, seldom include an express power to remove a trustee. For long the courts have been prepared under their inherent jurisdiction to remove a trustee as part of the process of administering the trust, and settlors are normally content to rely upon an appeal to the court should the need of removal arise." . . .

and at page 897:

> "If persons having an express or statutory power to appoint new trustees purport to replace a trustee on the grounds that he refuses to act, is unfit to act, or in incapable of acting, and the trustee disputes that he falls into the category alleged, the court can be asked to determine what constitutes unfitness or incapability. The court will have to make a similar decision if it is asked to remove a trustee, whether or not it is also asked to make a new appointment. The question therefore arises as to what circumstances justify this removal.
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> Canadian courts have consistently followed the general guidelines set out by Lord Blackburn in *Letterstedt v. Broers* where he said that the courts' "main guide must be the welfare of the beneficiaries." If it is clear that the continuance of the trustee would be detrimental to the execution of the trust and on request he refuses to retire without any reasonable ground for his refusal, the court might then consider it proper to remove him He went on to quote from Story that "the acts or omissions must be such as to endanger the trust property, or to show a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity." In *Conroy v. Stokes*, this quotation and Lord Blackburn's specific adoption of it, were specifically noted." . . .

[22] The payment made by Brenda Brooks to Mr. Ewing which was deposited in the B.A.E. Developments Ltd. account was improper. Loans by a trust to a Trustee are prohibited. In dealing with an application to approve a loan to an Executor, Freedman, J. as he then was, stated in *Re Lerner Estate* [1952] 4 D.L.R. 605 (Man. Q.B.):

> "12 That a trustee is barred from purchasing any part of the trust estate is well known. Does the disability extend to the obtaining by a trustee of a loan from the estate?

13 Underhill on Law of Trusts and Trustees, 10th ed., at p. 374 says:

A trustee must not use or deal with trust property for his own private advantage.

14 Keeton's Law of Trusts, 5th ed., p. 310, is to the same effect, namely:

15 "A trustee may not profit from his trust."

16 In *McLennan v. Newton*, [1927] 3 W.W.R. 684, 37 Man. R. 201, Fullerton, J.A. quotes with approval, at p. 686, the following propositions of law as laid down in *Aberdeen Ry. v. Blackie Bros*. (1854) 1 Macq HL 461, 2 Eq R 1281:

> '(1) It is a rule of universal application that no trustee shall be allowed to enter into engagements in which he has, or can have, a personal interest, conflicting, or which may possibly conflict, with the interests of those whom he is bound by fiduciary duty to protect.
>
> '(2) So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness, or unfairness, of the transaction; for it is enough that the parties interested object.
>
> '(3) It may be that the terms on which a trustee has attempted to deal with the trust estate, are as good as could have been obtained from any other quarter. They may even be better. But so inflexible is the rule that no inquiry into that matter is permitted.
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> '(4) It makes no difference whether the contract relates to real estate or personalty, or mercantile transactions; the disability arising, not from the subject-matter of the contract, but from the fiduciary character of the contracting party.'

17 I am of the opinion, on the basis of the authorities cited, that Edith Lerner, being an executrix and trustee of the will, is barred from obtaining a loan out of the corpus of the trust estate. Under the circumstances, therefore, the proposed transaction is not an appropriate one for the exercise by the court of its powers under sec. 54 of The Trustee Act.

The investment of money in B.A.E. Developments Ltd. was a breach of the Trustee’s duty not to use trust property for his own private advantage.

[23] The facts existing here clearly show Brendon Ewing and Brenda Brooks were not acting in the interests of the beneficiaries of the trust and therefore Brendon Ewing and Brenda Brooks are removed as Trustees of the above mentioned trust of the proceeds of the insurance policies. Mr. Frederick Brooks remains the sole trustee of the trust funds. Having been named by Marcel Brooks and considering how he has conducted himself as Trustee, Mr. Frederick Brooks is not required to post a bond.

[24] In *Waters' Law of Trusts In Canada*, supra, a trustee's duty to account is set out at page 1273:

> "A trustee is always liable to account to his beneficiary, without any allegation of wrongdoing or breach of trust. The accounting mechanism is the means by which the beneficiary can learn what has been done with the trust property: how it is invested, what revenues it is producing, and so one.(sic) Moreover, when a breach of trust has occurred, the beneficiary's personal remedies against the trustee are traditionally implemented through the mechanism of accounting. This is important in understanding some of the differences between personal liabilities for breach of trust, and liabilities that may arise in tort or breach of contact." ...
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> "The core of the accounting process is simply a factual inquiry into what has been done with the trust property. The trustee must lay out all receipts and all disbursement of trust property, which will not only reveal what property is now held on trust, but will allow the determination of what income has been received, whether dispositive powers were properly used, and so on. Traditionally, if the accounting process revealed an improper transaction, the beneficiary had the choice between adopting that transaction or rejecting it." ...

[25] In his affidavit of April 16, 2013 Brandon Ewing exhibited a Statement of Disbursements of Funds of the Marcel Brooks Estate Trust monies by B.A.E. Developments Ltd. That exhibit is not a proper accounting as required by a Trustee. For example, in addition to cheques written on the account it appears there were pre-authorized payments, direct payments and other transfer of funds from BA.E. Developments Ltd.'s account into which the $50,000.00 was deposited. An accounting would provide various receipts and other evidence of the use of the funds.

[26] An accounting of the $50,000.00 deposited into the account of B.A.E. Developments Ltd. is to be provided by November 29, 2013.

[27] Once the accounting is completed the trustee may within 30 days of the receipt of the above mentioned accounting elect in writing, (a) to have transferred to him the Trustee's interest in real or personal property into which a portion of the trust funds have been transferred or, (b) have judgment against Brandon Ewing for the sum of $50,000.00 together with interest on the $50,000.00 at 7% per annum from April 13, 2012 to the date of judgment.

[28] Although B.A.E. Developments Ltd. received the $50,000.00 which was improperly used it was not a party to this application. I cannot make any order effecting its real or personal property. The applicant may consider taking action against B.A.E. Developments Ltd. including applying for an injunction preventing it from conveying, encumbrancing or disposing of its real and personal property.

[29] Mr. Ewing submits he should be excused for his breach of trust pursuant to section 64 of the *Trustee Act*, *supra,* as he acted honestly and reasonably and ought to be excused for the breach. Section 64 of the *Trustee Act, supra*, provides:

> 64. "If it appears to the Court that a trustee is or may be personally liable for any breach of trust whether the transaction alleged to be a breach of trust occurred, before, on or after the twenty-seventh day of March, 1902, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust, and for omitting to obtain the directions of the Court in the matter in which he committed such breach, then the Court may relieve the trustee either wholly or partly from personal liability for the same."

[30] In giving the Court's judgment in *Scott Estate, Re* (2005), 237 N.S.R. (2d) 390 (C.A.) Roscoe, J.A. in describing section 64 stated at paragraph 20:

> "The effect of s. 64 of the **Trustee Act** is that personal representatives of estates are only liable to do their best, and if they honestly do their best in the circumstances, they are not liable for errors in judgment. See: **Davies v. Nelson**, [1928] 1 D.L.R. 254 (Ont. C.A.); **Shields Estate, Re** [1994] P.E.I.J. No. 116; 126 Nfld. & P.E.I.R. 266; 393 A.P.R. 266 (P.E.I.T.D.), 61 **Slemko v. Dye**, [1989] B.C.J. No. 342 (S.C.). ..."

[31] I accept Frederick Brooks' evidence he was not aware of the $50,000.00 withdrawal until July 28, 2012. Consequently, I find the deposit of the $50,000.00 in the account of B.A.E. Developments Ltd. was made without the knowledge and

consent of Frederick Brooks. I also accept Frederick Brooks' evidence that when discussing a possible investment in his business Mr. Ewing did say about the investment, "Let's keep it quiet about this money."

[32] In reviewing the account of B.A.E. Developments Ltd. for the period April 13, 2012 to July 17, 2012, Mr. Ewing was using the $50,000.00 from the trust funds to operate his business. This was no investment. Mr. Ewing was using the funds for his own benefit. He was not acting honestly and reasonably and there is no reason his breach of trust should be excused. Mr. Ewing with his long history in the financial industry was taking advantage of less financially sophisticated individuals. Mr. Ewing was only helping himself. Section 64 of the *Trustee Act*, *supra* has no application in this case.

[33] I will hear further submissions from the parties concerning costs after the accounting has been provided and the election made by the applicant.

Coughlan, J.