CITATION: Hockley v. Moy, 2013 ONSC 6195
COURT FILE NO.: CV-10-401117
DATE: 20131003

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: James Hockley, Plaintiff

– AND –

Joanne Moy and Helen Agar, Estate Trustees of the Estate of Dorothy Madeline McKillop, Defendants

BEFORE: E.M. Morgan J.

COUNSEL: *Benjamin Salsberg*, for the Plaintiff

David Lobl and John Zerucelli, for the Defendants

HEARD: October 1, 2013

ENDORSEMENT

[1] Given my view that there is a need to move this action along as quickly as possible to trial, I will not recite all of the background facts leading up to this motion. It is enough simply to note that in the underlying action the Plaintiff claims dependent's support and a declaration that he is entitled to Dorothy McKillop's entire Estate pursuant to a constructive or resulting trust.

[2] In this motion the Plaintiff seeks an order for interim support. In turn, the Trustees seek directions with respect to the possibility of selling a farm property that belonged to the deceased and in which the Plaintiff has continued to reside.

[3] Turning first to the question of the sale of the farm property, this property was not left to the Plaintiff in the deceased's will. However, as he had been residing there for years, Conway J. ordered on July 2, 2010 that he have the use of the property, along with a cottage property also owned by the deceased (and not bequeathed to the Plaintiff), on an interim basis.

[4] The Trustees raise questions as to whether the Plaintiff truly lives at the farm. They allege that on his annual tax returns he has been identifying a house that he owns (and in which he apparently used to live before moving in with the deceased) as his principal residence. The Plaintiff responds that whatever he fills out on his tax return is irrelevant here, and states that the fact is that he has lived at the farm for many years and his own house is in a state of disrepair and does not even have running water.

[5] In my view, nothing has substantially changed since the Order of Conway J. Neither the Plaintiff's tax filings nor his living situation appear to be different now than they were when Conway J. issued her Order three years ago. What has changed is that the action has proceeded rather slowly and the Trustees are getting impatient. There are other beneficiaries of the Estate whose interests are of equal concern to the Trustees. In the interim, the Plaintiff has use of the farm and the cottage rent free, and the Trustees are anxious to bring this claim to a resolution one way or the other.

[6] As for the Plaintiff's claim for interim support, his expenses can be divided into two categories: those related to upkeep and repair of the farm and cottage, and those related to his general living expenses.

[7] Given that he has been awarded use of the farm and cottage on an interim basis by Order of this court since July 2010, the upkeep and repair of these properties has fallen to him. However, the properties do not belong to him; he has claimed ownership by constructive or resulting trust, but that claim has not been adjudicated and until a court decides otherwise the properties belong to the Estate. It is therefore in everyone's interest that they be kept in a good state of repair. Accordingly, to the extent that the claim for interim support is based on reasonable property-related expenses, I am inclined to grant it.

[8] According to the Plaintiff's materials filed in this motion, the Estate should reimburse the Plaintiff for the cost of a riding lawnmower and emergency furnace repairs that he has incurred at the farm in the total amount of $4,480.44. The lawnmower, of course, will thereafter belong to the Estate.

[9] In addition, the Estate should provide the Plaintiff with funds to effect repairs in accordance with estimates he has received from Bloomfield Plumbing Ltd re replacement of a hot water tank ($621.50), Clearlite Electrical, Excavating and Haulage re replacement of a hydro pole at the farm ($1,695.00), Gorilla Gutters re work on the soffit and fascia at the farm ($418.10), Bert's General Contracting re roofing work at the cottage ($7,345.00), Dave's Tire re a tractor wheel ($395.50), and Rona re repair of the front steps at the farm ($280.30). These funds amount to a total of $10,755.40. Once they are paid by the Estate they must be spent by the Plaintiff in the way set out here.

[10] In terms of the Plaintiff's claim for general living expenses, there is a legal and evidentiary impediment to any interim support award. Section 58(1) of the *Succession Law Reform Act* ("SLRA") provides:

> Where a deceased, whether testate or intestate, has not made adequate provision for the proper support of his dependents or any of them, the court, on application, may order that such provision as it considers adequate be made out of the estate of the deceased for the proper support of the dependents or any of them.

[11] Section 64 of the SLRA reinforces this by setting out the circumstances in which a party may move for interim support:

> Where an application is made under this Part and the applicant is in need of and entitled to support but any or all of the matters referred to in section 62 or 63 have not been ascertained by the court, the court may make such interim order under section 63 as it considers appropriate.

[12] In order to evaluate a claim for interim support, the court must look to all the circumstances of the claimant and the estate. Most importantly, in order to be successful the claimant must demonstrate that the deceased "has not made adequate provision for the proper support of his dependents". *Modopoulos v. Breen Estate*, 1996 CarswellOnt 2863, at para 21 (Ont Gen Div).

[13] In *Perkovic v Marion Estate*, 2008 CarswellOnt 5931, at para 9 (SCJ), Brown J. opined that, "If, after such assessment [of the evidence on the motion], the motions court concludes that the record contains credible evidence from which one could rationally conclude that the applicant could establish his claim for support, then an order for interim support may issue." The Trustees submit, understandably, that this requires some evidence in support of the proposition that the deceased made inadequate provision for the Plaintiff.

[14] At this stage the Plaintiff is not required to provide the court with definitive proof of the inadequacy of the provisions made for him in the will. Indeed, the case law itself contains a debate as to whether he must show a "good, arguable case", *Sturgess v Shaw*, [2002] OJ No 3759, at para 9 (SCJ), or a "*prima facie* case", *Burke v Poste*, [1996] OJ No 2725 (Ont Gen Div), or a "triable issue", *Kraus v Valentini Estate*, [1993] OJ No 3276, at para 4 (Ont Gen Div). What is clear, however, is that *some* evidence must be put forward to address this issue. Here, the Plaintiff has failed to put forward any such evidence at all.

[15] The Plaintiff was bequeathed a cash payment of $150,000 in the deceased's will. He is in his 70's and apparently not in the best of health. Will $150,000 be enough to see him comfortably to the end of his days? In cross-examination the Plaintiff was specifically asked what he would spend his $150,000 on were he to have it today. He refused to answer the question on the grounds that it is "hypothetical", arguing that he has not yet received the cash.

[16] I pause here to note that the Trustees have, for good reason, refrained from making any distributions out of the Estate. The Plaintiff has not just claimed a portion of the Estate for his own support. He has made a large claim to the entire Estate. No distributions can be made to any of the beneficiaries as the entire corpus of the Estate has been put in issue by the Plaintiff. Accordingly, since they cannot distribute to the other beneficiaries the Trustees have determined that they cannot prefer the Plaintiff by making a distribution to him on an interim basis. The sheer extent of the Plaintiff's claim has, in effect, frozen the Estate.

[17] The Plaintiff argues that the Trustees' position is circular: he cannot advance his claim without showing the inadequacy of the cash gift, and he cannot receive the cash gift because of the magnitude of his claim. I have some sympathy with the dilemma that this puts him in; nevertheless, the SLRA and cases thereunder are clear that the Plaintiff must somehow satisfy the court that the provision made for him in the will is inadequate. By refusing to answer any

questions as to how the bequest of $150,000 will affect his lifestyle, he has left the record blank in a crucial respect. Since there will be no way to claw back any interim support paid out if it ultimately is determined that the provision made for him in the will was adequate, the Plaintiff has not satisfied the burden that the SLRA places upon him.

[18] It appears from the Plaintiff's evidence that his financial state is somewhat precarious and that he leads a rather meager life. He does, however, have a comfortable property in which to live. As indicated above, he has had, and will continue on an interim basis to have, a farm and a cottage entirely free of charge. Unless circumstances change prior to trial, the Order of Conway J. will remain in place and the Plaintiff can continue to enjoy these properties until trial.

[19] The farm and the cottage must not be sold pending trial, and must be reasonably maintained at the expense of the Estate. To this end, the Estate shall pay the Plaintiff $15,235.84, as detailed in paragraphs 8 and 9 above.

[20] The Plaintiff's claim for interim support is otherwise dismissed.

[21] Given that the Plaintiff is understandably in need of money and the Trustees are understandably anxious to make distributions, this action must proceed to trial expeditiously. There is a mediation and pre-trial to be done prior to trial. The mediator should be a person of appropriate experience, but need not be a high-priced practitioner. Counsel for the Plaintiff has suggested a retired Superior Court judge, which sounds like a reasonable suggestion. I leave it to both counsel to coordinate these arrangements and to proceed efficiently. I trust that counsel will also cooperate in taking whatever steps are required to have the matter pre-tried by the court.

[22] As for the trial, the Estates Office has indicated that there is a slot available the last week of February 2014. Both sets of counsel have indicated that they are available during that week, and that the matter will require a 3 to 4 day trial. This action is therefore to be tried over a period of 4 days, commencing February 24, 2014.

[23] Counsel for the Trustees has indicated that the other beneficiaries have not yet been put on notice of the Plaintiff's claim. That surprises me given the passage of more than three years. The beneficiaries must be put on notice. This can be done by regular mail.

[24] Counsel for the Trustees has also advised that in very recent days one of the Trustees has been injured in a car accident and her state of health is uncertain. There are two Trustees, and I would expect the other Trustee to take over many of the duties in the short term. I urge both of them to decide as quickly as possible whether there is to be a replacement Trustee. Under the circumstances, I am confident that no one involved with this Estate will object to a change and that from the court's point of view any such change can be done without delay.

[25] Counsel for the Trustees indicated at the hearing that the costs of this motion should be borne by the Estate. That seems reasonable to me. Counsel for both parties may make written submissions as to costs. I would ask that they be sent directly to me, and that they be made within two weeks of the date of this endorsement.

Morgan J.

Date: October 3, 2013