

PROVINCE OF NOVA SCOTIA

COUNTY OF LUNENBURG

IN THE COURT OF PROBATE

Cite as: MacKay Estate (Re), 2012 NSPB 1

IN THE MATTER OF the Estate of Marion Phyllis MacKay

-and -

IN THE MATTER OF a claim filed against the estate by Richard MacKay

Counsel: Franceen Romney, Solicitor representing the Estate

Michael Power, Solicitor for the Claimant

DECISION

This is a claim of Richard MacKay against the estate of Marion Phyllis MacKay for \$46,800.00. The nature of the claim is for maintenance, labour, housekeeping and care-giving services rendered to the deceased prior to her death at her request. The Claimant states he provided on average five (5) hours per week for fifty-two (52) weeks for the past twelve (12) years. At a rate of fifteen dollars (\$15.00) per hour he would be entitled to \$46,800.00.

Richard MacKay is a nephew of the deceased, and her late husband, Laurie MacKay. He resided next door to Marion and Laurie MacKay during his youth. Richard would often stay with his grandparents who resided with Marion and Laurie. Richard testified that he was treated as a child of Marion and Laurie as they did not have children of their own.

In his testimony Richard explained he helped his grandparents, Laurie and Marion around the property. Richard testified he had been told by Laurie and Marion that the home would be his.

At some point he moved away from his parent's home and worked in other areas of the province and country for a number of years returning to Lunenburg County in 1983. Richard advised the Court that when he was living away, he kept in touch with Laurie and Marion and he would often visit them.

Richard testified that since 1983, he would stop by to give Laurie a helping hand as Laurie was getting old. Richard also testified that Laurie and Marion expected him to give them a helping hand. He helped by shoveling the snow, as

Laurie was not able to use the snow blower after he reached a certain age, which he continued to do after Laurie's death. Once Laurie passed away he mowed the lawn, maintained the lawn mower, cleaned around the property by picking up debris, stacking wood and carrying wood to the wood box outside of the house, providing meals, some light housekeeping duties, and talking on the telephone daily. Marion was lonely and had asked him to call her every evening. He had a garden and provided Marion with fresh produce from his garden. On one occasion after Laurie's death he painted the house. He saw there was a problem with squirrels and mice and he set traps to catch the squirrels and mice. During the winter months he ensured that there was sufficient wood in the wood box for Marion's use. He cleaned the stovepipe and chimney for winter's use. Marion did not like to drive in the winter so he would chauffeur her to do her shopping, doctor appointments and different errands. Marion did most of her own housekeeping but in later years did have a housekeeper come in once a week. In later years when he dropped by there would be dirt on the floor and he would sweep, sometimes wash the floor, and defrost the fridge. She was self-sufficient in preparing her own meals until the last four to five years and then he provided meals to her. He also provided her with homemade pies, cookies and cake. He did not keep record of the hours he worked or specific work he did for Marion MacKay.

Richard testified that Marion had also told him he would receive the property so he did all these things with that expectation. His father passed away in 1986 and Laurie and Marion were hateful to his mother and the only reason he continued to help was the reason that he was getting the house. In his own words "I had no reason to go out of my way to be nice to them not just to do it for nothing". He also advised the court that he was never paid for all his assistance throughout the years and he had no reason to help Marion and Laurie other than to receive the property. He advised the court, in his own words, "that he wasn't bending over backwards to help them out without receiving something".

Once Marion had passed away he waited to hear something about receiving the property under the Will. When no one was in touch with him he went to the house when Mary Ann Eisner and others were at the house and asked her if the Will had been read. He told Mary Ann that he had been promised the property for years. He was very upset once he was advised that he was not to receive the property.

Don Saxton advised the Court that he was acquainted with Marion MacKay as he visited Laurie and Marion's property with Richard. He confirmed that Richard did work for Marion after Laurie's death. Laurie told Richard, in Don Saxton's presence, twenty to twenty-five ago, that when he (Laurie) was finished with the place it would be Richard's. He was never in Marion's presence when she stated this. Marion requested Richard to do various things to help her out around the place, ie

snow shoveling, lawn mowing, wood for her stove, cleaning the stove and chimneys, shopping, running errands and other everyday chores. He helped out with the inside and outside painting, yard work and any other things to help her out during the years. In later years Marion was not able to do her shopping so Richard, and sometimes Don, would do the shopping. Also, in later years Richard would take meals to Marion. Mr. Saxton said he only saw Mary Ann Eisner at Marion's two times and Michael Conrad only once. Don Saxton advises that he and Richard would shovel the whole driveway. In the last few years Larry MacKay would plow the driveway for Marion and Richard and Don would shovel the pathways. He never heard Marion state that Richard would be paid for the work that he did.

Larry MacKay, brother of Richard MacKay, advised the court he purchased a piece of property from Laurie and Marion in order to build a house in 1980. There was a small pie shaped piece of property that Larry wanted to purchase from Laurie and Marion and when he approached them about purchasing the small piece of property they advised "that they were not selling anymore land as whatever was left was Richard's". He approached Marion, after Laurie died, and Marion said no that the property was being left to Richard. It was always an understanding that Richard would be left the property when Laurie and Marion were deceased. Larry said that Richard was always there helping Marion. He observed Richard shoveling snow until Larry purchased a tractor then he plowed the main driveway and Richard shoveled the paths to the barn and house. Larry was paid \$10.00 every time he plowed the driveway.

Michael Conrad, was a nephew of the deceased and her late husband, Laurie MacKay. His mother was Marion's sister. He testified that he owns a cottage on Indian Lake which is a few miles from Marion's home. He would be in Union Square four to five months of the year and while staying at the cottage he would drop in daily to see Marion to see if there was anything that she wanted him to do. He never saw Richard, Don Saxton or Larry MacKay at the property. He never heard Marion or Laurie say they were leaving the property to Richard MacKay. He was told by his sister, Mary Ann, that an "Eric" was mowing the lawn. Michael said that Marion was self-sufficient and was able to do the work herself until she fell. He knew that "Larry" was plowing the snow and was paid for doing this service as Marion gave him an envelope to give to "Larry". He never talked to Marion about who was doing work around her property although in conversation Marion told Michael that she brought the wood to the wood box.

Mary Ann Eisner, was a niece of the deceased and her late husband, Laurie MacKay. Mary Ann's mother was a sister of Marion. Mary Ann testified that she moved to Indian Lake in June 2007, and prior to that lived at Chester Basin. Until moving to Indian Lake permanently she was there most weekends. In 1986 she was employed by Walton W. Cook in Lunenburg. Laurie and Marion requested her

to ask Mr. Cook to attend at their home to take instructions for a Will. Once the Will was prepared Marion & Laurie were contacted and they requested her to take the Wills to her parent's home in Western Shore where they executed the Wills. Their Wills left the entire estate to each other and if they had predeceased then to Mary Ann Eisner and Michael Conrad. Again, in June 1990, Laurie and Marion requested her to ask Mr. Cook to attend at their home to take instructions for a deed putting the property in both of their names as joint tenants. Again she took the Deed to her parent's home in Western Shore and the Deed was executed there.

Mary Ann advised the court that Marion's brother-in-law, Eric Dorey, mowed the lawn with the ride on lawn mower and Larry MacKay plowed the driveway in the winter. Marion would get a cord of wood and would look after the wood herself, piling it a little at a time over the summer. Marion told her that Eric Dorey did not want to be paid for his service of mowing the lawn. Up to March or April 2009 Marion was able to look after herself and was self sufficient and did not need help.

Mary Ann advised the court there was a period of time after Laurie's death that it was felt that Marion should not be at the home by herself as she seemed to be becoming depressed. Mary Ann's mother and Mary Ann asked Marion if she would like to stay at Mary Ann's mother's home in Western Shore. Marion stayed for a few weeks during which time Marion was feeling very anxious and she took Marion to the hospital. Marion was diagnosed with having panic attacks. She then made an appointment for Marion to see Marion's doctor who prescribed medication. Marion wanted to return home and Richard came to pick her up and take her back to her own home.

Mary Ann advised the court that in March or April of 2009, Marion became short of breath and was having difficulty moving around. Mary Ann took her to the hospital and Marion was diagnosed with degenerative heart failure and COPD. She was put on oxygen but she was able to move around the house and would still be able to go out to get the mail and prepare her own meals. She did not use wood after going on oxygen. After getting diagnosed, she took Marion for groceries and to run errands every Saturday or Sunday. She advised the court that Marion would always ask how much she owed her for taking her on outings.

Mary Ann testified that in October 2009, Eric Dorey called her at work to advise that Marion had fallen and he thought that she had broken her leg. She called an ambulance and met Marion at the hospital in Bridgewater. Marion was transferred to a Halifax hospital to have an operation on her broken hip. On October 11, 2009, she visited Marion in the hospital and Marion was very concerned that she had bills that needed to be paid. She advised Marion that she did not have access to her bank accounts and would not be able to pay the bills for her. A Power of Attorney was prepared and taken to Marion in the hospital for her

signature. Marion was concerned that she would not make it through the operation and when questioned about if her affairs were in order Marion replied that everything was done the way she wanted. Upon leaving the Halifax hospital she was transferred to the Patterson Unit in Lunenburg and then released to her home.

Mary Ann advised the Court that Marion used a walker for a short period of time and then used a cane to assist with her walking. She arranged for home care which started in December, 2009 for one morning a week. She also arranged for a lifeline to be installed. She was the contact person for all Marion's personal care.

Mary Ann advised the Court that there were a few neighbors in the area that brought sweets and things to Marion. She said that Richard may have brought a plate of food on occasion as she also did.

Mary Ann advised the court that in 2010 she noticed Marion's health starting to deteriorate around October, Marion didn't want to leave the property and wasn't eating. She received a call from Richard saying that he had been in to see Marion and that Marion didn't look that great and she said she would stop in on her way home. Richard called after lunch and said that Marion was not well. Marion wanted to talk to her and she then left work to go to Marion's home. Richard stayed with Marion until she arrived and after a discussion with Marion it was decided that she would take her to the hospital where she later died.

Mary Ann advised that during a two year period she would stop every morning and deliver the paper to Marion. She had calls from Canada Post advising that they would not deliver the mail until the mailbox was shoveled. She shoveled the mailbox. She also received calls from Home Care and they advised that they would require the walkway shoveled before they could do their visit. She would shovel the walkways when they required shoveling.

Mary Ann testified that there was a note found on a bed upstairs addressed to herself setting out certain instructions and advising her to pay Marion's bills.

Mary Ann advised that she never saw Richard do any work around the property. She knew that Richard visited Marion on Sunday's and that he called every evening, but Marion would not always answer the phone.

Mary Ann testified that she never heard any discussion that Richard was to receive the home property as it was always her understanding that the property would go to herself and Michael. Marion was a private person and did not discuss her private affairs with many people.

Mr. Power, solicitor for Richard MacKay, advises that Richard performed labor and services for Marion from the time of the death of her husband, Laurie. Richard was under the assumption that in the performance of this contract that he would

receive something for his assistance. Because of Richard MacKay, Don Saxton & Larry MacKay's assistance Marion MacKay was able to remain in her home until the time of her death and did not have to be placed in a nursing home. By Mary Ann Eisner and Michael Conrad's testimony they never saw Richard do any of the services that he said he performed but because someone didn't see you do it doesn't mean it didn't get done.

Ms. Romney, solicitor for Mary Ann Eisner, advises that Section 66(1) of Probate Act gives the Court four choices to either allow the claim, disallow the claim, direct an investigation of any or all the claims or to require further particulars, information or evidence relating to any or all of the claims.

Section 52(1) of the Probate Regulations – Part III – Accounting, Settlement and Distribution indicates who is a person interested in an estate. The list is set out as follows:

- (a) Residuary beneficiary;*
- (b) unpaid non-residuary beneficiary;*
- (c) person entitled to share in the distribution of the estate on an intestacy;*
- (d) life tenant;*
- (e) Trustee, guardian, court-appointed guardian or attorney appointed under the Powers of Attorney Act for a person under a disability*
- (f) Trustee, guardian, court-appointed guardian or attorney appointed under the Powers of Attorney Act for a missing person or unascertained person;*
- (g) The Public Trustee, where the Public Trustee Act applies;*
- (h) Unpaid claimant or creditor who has filed a claim in accordance with Section 48*
- (i) Unreleased security;*
- (j) Personal representative.*

Richard MacKay is claiming that he is an unpaid claimant or creditor who has filed a claim in accordance with Section 48. Ms Romney suggests that none of the above describe Richard MacKay.

Richard MacKay advanced a claim, the drafting of the claim is crucial. This claim was drafted as Richard being an unpaid creditor. An unpaid creditor is someone who has provided a service for a fee ie. Irving oil - who provided a service and didn't get paid. There was never any discussion that he would be paid for his

services. His claim is he was promised the house but he didn't get the house. There was never any recognition that he was ever going to be paid. There was no contract that Richard would receive the property. Richard did the work for no reason other than to receive the house. There is independent evidence in that there are two wills and a deed showing that he was not getting the house. Richard didn't claim for the house or the equity. He is saying I am creditor because I didn't get paid and in same breath he said she never said she would pay him.

Ms. Romney further submits that Richard has provided no details on when he was at the property doing work. He wishes to be paid the going rate of wage that he received from Nauss Bros. He has nothing to base his claims on.

Ms Romney indicated to the court "How is Richard an interested person if he is not a creditor or an unpaid claimant. He should have sued on breach or sued on equity or sued for property, he did not do that".

Ms Romney submits that Richard MacKay and Don Saxton, in their testimony, made it appear that Marion MacKay was a needy person and that Richard was called upon quite often to run errands and/or do chores for her.

Ms. Romney submits that Mary Ann Eisner and Michael Conrad, in their testimony, made it appear as if Marion MacKay was a strong lady, capable of doing all her chores and running her own errands.

Ms Romney submits that Richard MacKay, in his testimony, said he mowed the lawns, shoveled the driveway and walkways to the house, woodshed and barn. Mary Ann Eisner, in her testimony, said that when she moved to Union Square in 2007 that she did the shoveling and up until that time that Marion did her own work. Mary Ann Eisner further went on to say that Eric Dorey mowed the lawn and Larry MacKay plowed the driveway. Larry MacKay also testified that he plowed the driveway and was paid for this service. It appeared from testimony that Marion MacKay paid individuals for the work that was performed for her but for some reason when it came to Richard MacKay it was never offered.

What I don't understand is that Marion MacKay never mentioned to Mary Ann Eisner and Michael Conrad that Richard MacKay was doing work for her around the property.

Richard MacKay said in his testimony that if he had known that he wasn't getting the property he wouldn't have done what he did. Whatever happened to helping out family, friends or neighbors out of the goodness of our hearts? Do we expect to get paid for everything we do?

Richard MacKay also stated that he called Marion MacKay every evening and talked for one-half hour. Mary Ann testified that Marion, at times, wouldn't answer the phone as she knew it was Richard calling.

Richard MacKay says he mowed the lawn for twelve years but Eric Dorey mowed the "flat areas" with the ride on lawn mower until 2010 and Richard mowed the hills and banks. Richard also stated that he piled the wood in the wood shed and brought wood to the house. Mary Ann testified that Marion received about one cord of wood a year, one cord of wood not being very much wood for a year's burning. Also since 2009 Marion was not able to burn wood as she was on oxygen.

Richard is also claiming talking on the telephone for one half hour per day as part of his time and wants to be paid for this. This totals three and one half hours a week. I do not agree that this should be part of his claim.

Running errands, doing grocery shopping, bringing in meals, etc. there is much controversy in who did these things once Mary Ann moved to the area in 2007.

Richard is saying that it was understood for many years that he was to receive the property once Laurie and Marion MacKay died. It is quite evident that Laurie and Marion had different ideas in that their wills were made in 1986 leaving their estates to each other and then to Mary Ann Eisner and Michael Conrad.

There was never any agreement between Marion MacKay and Richard MacKay for payment, in fact Richard MacKay stated that he did not expect to be paid as he thought he would receive the property.

I am left with the question if Richard MacKay should be compensated for the services he provided to Marion MacKay over the last twelve years. I had difficulty with the credibility of Richard MacKay's testimony. I do not believe that Richard MacKay is a creditor or an unpaid claimant. The claim filed by Richard MacKay is rejected in its entirety.

Dated at Bridgewater, NS, this 15th day of February, A.D., 2012.

Registrar of Probate