IN THE SUPREME COURT OF NOVA SCOTIA
Citation: *Singleton (Re)*, 2004 NSSC 259

Date: 20041213
Docket: S.K. 234814
Registry: Kentville

IN THE MATTER OF:

the application of Mary Ann Singleton and Thomas Leroy Singleton for an Order granting permission to mortgage real property owned in part by their infant children, Thomas Ellis St Clair Singleton and Samantha Mary Singleton.

Judge: The Honourable Justice Gregory M. Warner

Heard: November 17, 2004

Counsel: Harold G. S. Adams, Q.C., for the applicants

By the Court:

INTRODUCTION

[1] Thomas and Mary Singleton have applied under Civil Procedure Rule 47 for authorization from the Court to mortgage the interests of their two minor children in their home. The home was deeded on July 16th,2004, by Mary Singleton's mother, Edith Johnson, to Mary Singleton and her three children (Edith Johnson's grandchildren) Cassandra (age 19), Thomas Jr. (age 17) and Samantha (age 15); the applicant Thomas Singleton (husband of Mary and father of the children) was not a grantee.

[2] Rule 47 authorizes the court to make an order for the sale, mortgage, lease or other disposable property (a) where it appears necessary for the maintenance, support or education of the children, or (b) where, by reason of exposure to waste and dilapidation, the interests of the children will be substantially promoted or (c) for "any other reasonable cause".

[3] The proposed mortgage amount is $47,930.00. There is no evidence as to the value of the property.

[4] The purpose of the proposed mortgage is to pay off the following debts:

(a) CIBC loan number one in the amount of $25,000.00,

(b) CIBC loan number two in the amount of $2,700.00,

(c) Trans Canada Credit loan in the amount of $2,500.00,

(d) CIBC Visa in the amount of $850.00, and

(e) eight miscellaneous power and phone bills.

The balance is proposed to be spent to replace or repair the family vehicle (a 1992 Blazer) and to purchase a refrigerator and winter clothing. The reasons set forth in Thomas Singleton's affidavit is that, as a result of taking a fifteen week stress leave

in April 2004 (from his long term employment as a stock preparation controller earning over $1,000.00 per week) he received only $350.00 a week in employment insurance and fell behind in his living expenses (thereby incurring the Trans Canada debt to survive).

[5] Thomas Singleton Jr., age 16, has signed a consent pursuant to Rule 47.02. He has not received independent legal advice in respect of that consent.

[6] The first CIBC loan ($25,000.00) originated many years ago for the purchase of a family vehicle and in part to renovate the house, which had been rented for eight years by applicants before being gifted in July, 2004. The second CIBC loan was taken out to buy a vehicle to assist Thomas Singleton Jr. to get to a summer job. These loans were incurred before the gift of the home. The Trans Canada Credit loan was incurred during the applicant's stress leave.

THE LAW

[7] I could find no reported decisions under Rule 47.01 to 47.03.

[8] In **Re Coolen** (1970), 2 N.S.R.(2d) 626, Jones, J. (as he then was) dismissed an application under a former rule (which appeared from the decision to be identical to Rule 47) to sell an infant's interest in real property, acquired on an intestacy by the infant and his widowed mother. From the sale of the property, the widow proposed to pay off expenses she had incurred in respect of the property, to pay out her dower interest and to invest the rest for her son.

[9] The court made the following points:

(a) the paramount consideration must be the welfare of the child;

(b) older cases show that sales are allowed when it was necessary or proper for the infant's benefit;

(c) the two issues were whether it was in the child's interest to sell the property, and secondly, if so, to what extent the widow was entitled to benefit ;

(d) the weight of the evidence in that case indicated that the sale would primarily benefit the widow, and

(e) there is no authority permitting the court to direct repayment of the widow's expenses, although he left it open, with a full accounting of all incomes received from the property, to make some further possible accounting.

[10] In **Re Estate of Lawlor** (1869-72) 8 N.S.R. 153, a decision cited in **Re Coolen,** the Chief Justice of Nova Scotia found that the origin of what is now our

Rule 47 comes from American legislation and not English law and requires the applicant to show that the interests of the child would be substantially promoted. In that case, the court approved the sale of an island for a very high price because the income received from the island was very small and the income that would be received from the investment of the children's proceeds would be four or five times greater.

[11] In **Re Steen's Estate** (1894-99) 1 NB Eq. Rep. 261, the Court held that it had no power to authorize sale or mortgage of the interests of two children in a property which produced barely enough income to pay the mortgage but not the guardian's claim. The sale of part of the land and the mortgage of the rest would only pay the outstanding debts. At page 263, the Court said:

> This application was made in the interests of the guardian and trustees rather than that of the infants. I cannot see how the infants would be benefited in the slightest degree by the proposed arrangement. The money cannot be wanted for the infants' support, because it is not proposed to expend a dollar of it in that way. **It is true that it is proposed to spend a portion of it in paying Mr. Campbell, the guardian . . . and this represents the past support and maintenance of these infants**.

[12] In **Re Hibbard** (1891) 14 P.R. 177 (Ontario), the Court declined to authorize a mortgage on lands of an infant and said at page 179:

> the present application is to raise money out of the land to enable the father of the infant to go to California for the benefit of his health. It is suggested that this expenditure may save the parent's life; but however persuasive may be the domestic and humane reasons involved, these cannot bestow jurisdiction upon the Court.

[13] In **Wicks v. Duffett** (1983) 34 R.F.L. (2d) 247(Nfld SC), a father died in a car accident leaving a widow and son. The widow wanted to purchase a new home and for that purpose to borrow from her son's settlement. The loan was to be secured by a mortgage on the new home and on the widow's existing home and to be repaid out of the proceeds of the sale of the old home. The court declined to grant an order, saying at page 248:

> In matters of this nature the interests of the child is the first and paramount consideration. There is no direct beneficial benefit to the child in loaning his money to his mother in this manner. There may be an indirect benefit to the child in that the dwelling at Mount Pearl will become his home but there is no direct financial benefit in the investment. I should also observe that **it is contrary to the policy of the Registrar of the Supreme Court to loan a child's money to his or her parent .** . . in my view this would set an unfortunate precedent and establish a practice that would be very unwise.[emphasis added]

[14] The role of the Court in reviewing applications such as this are not dissimilar to the exercise of the *parens patriae* jurisdiction of courts. This role was reviewed in detail by the Supreme Court of Canada in **Re Eve** (1986) 2 S.C.R. 388, where the Court said in part at paragraphs 73 and 74:

> The *parens patriae* jurisdiction is, as I have said, founded on necessity, namely the need to act for the protection of those who cannot care for themselves. The Courts have frequently stated that it is to be exercised in the "best interest" of the protected person, or again, for his or her "benefit" or "welfare".
>
> . . . the categories under which the jurisdiction can be exercised are never closed. . . the jurisdiction is of a very broad nature, and that it can be invoked in such matters as . . . protection of property.

At paragraph 77:

> Through the scope or sphere of operation of the *parens patriae* jurisdiction may be unlimited, it by no means follows that the discretion to exercise it is unlimited. It must be exercised in accordance with its underlying principle. Simply put, the discretion is to do what is necessary for the protection of the person for whose benefit it is exercised; . . . **The discretion is to be exercised for the benefit of that person, not for that of others. It is a discretion, too, that must at all times be exercised with great caution**, a caution that must be redoubled as the seriousness of the matter increases. [emphasis added]

[15] This principle has been applied in several circumstances across the country. One example is the decision of Lutz, J., in **B.J.S. v. F.T.S. (**1990) 111 A.R. 330, to refuse to approve an infant settlement that involved a claim by a child against his stepfather for sexual assault.

[16] In **Halsbury's Laws of England**, Fourth Edition (London, 1979, Butterworths) Volume 24, the following principles are set out:

1. At paragraph 446 - At common law, an infant's interest in real estate cannot be alienated either by his parents, or guardian, or by the court, even when it is for the infant's benefit.
2. At paragraph 458 - Express trusts or powers for providing maintenance or education for , or otherwise benefiting, an infant that are created by a settlement can be exercised in respect of his or her property, even if it might benefit the father
3. At paragraph 469 - Where an express power is inadequate or does not exist, **the Courts will not relieve a parent of his duty to maintain his infant children by directing maintenance out of their property, unless the**

parent is not in a position to maintain them. At footnote 5, the writer cites **Re Stables** (1852) 21 L. Ch 620, for the proposition that a direct benefit will not be given to the father out of an infant's property.

4. At paragraph 470 - On an application for access to the capital or income from an infant's property to be used for the infant's maintenance, education or benefit, the power may only be used for the purpose of applying the capital and income for the infant's maintenance and education and **does not authorize a conveyance merely because it is for that infant's benefit.**

5. At paragraph 474 - The advancement from the infant's trust must not be merely to put money in the infant's pocket but must be for a definite purpose that is to his advantage.

[17] Jeffery Wilson in **Wilson on Children and The Law** (Looseleaf December 2002, Butterworths) writes at paragraph 5.34:

> . . .Where substantial moneys or assets are concerned, a parent may wisely request that she be appointed guardian by order of court, and so long as she acts in accordance with her statutory and fiduciary duties she will thereby minimize the risk of a subsequent allegation of impropriety and any accompanying liability.

I take this quote to mean that when a parent acts as a guardian in respect of his children's property, that he is acting in a fiduciary capacity. In my view, this is an important analogy.

[18] The fundamental concepts regarding fiduciary duties are set out by D.W.M. Waters in **Law of Trusts in Canada** Second Edition (Carswell: 1984, Toronto); the following statements are relevant to that role:

> It is a fundamental principle of every developed legal system that one who undertakes a task on behalf of another must act exclusively for the benefit of the other, putting his own interests completely aside. (Page 710)

> To whom does the rule apply? ,. . . Equity first conceived of the rule in relation to trustees, and it was from this starting point that it spread to cover the activities of any person who is involved with or to whom a task is confided. (Page 712)

> The general principle was established in the seventeenth century that a trustee may not purchase any part of the trust property . . . however honest the circumstances. (Page 718)

> **Loans by the trust to the trustee are also prohibited**, and in this situation at least one Canadian court has not been prepared to waive that prohibition , whatever the circumstances, when asked in advance for that consent. (Page 727.)

(The Candian case cited is **Re Lerner** [1952] 4 DLR 605.)

[19] At page 741, Waters writes that the Supreme Court of Canada in **Canadian Aero Service Ltd. v. O'Malley** (1974) S.C.R. 592, held that

> . . .it is irrelevant to the application of the rule whether the beneficiary of the fiduciary relationship suffered any loss, or whether the fiduciary is honest in what he has done. The essential element was whether the fiduciary had acquired any property or business advantage belonging to the company, or for which the company had been negotiating. On the one hand, there was the equitable principle setting out the general standards of loyalty, good faith and avoidance of a conflict of duty and self-interest, and on the other a set of factual circumstances which taken together would reveal whether or not the fiduciary had breached those general standards.

ANALYSIS

[20] The court is satisfied that the disposal of property by either conveyance or mortgage is authorized where it is necessary for the maintenance, support or education of a child. The only interest to be considered is the interest of the child. There is, in a review of the history of Court's exercise of this authority, some ambiguity as to whether the exercise of the power might result in a benefit to another person such as a parent. However, it is clear that (a) the primary benefit must be to the child even if there is an incidental benefit to a parent and (b) caution must be exercised to avoid conflict between the interest of the parent (fiduciary) and of the child (beneficiary).

DECISION

[21] Most of the debts sought to be consolidated into the mortgage in the case at bar pre-existed the conveyance this past summer by the grandmother to her daughter and grandchildren of the home. The remainder of the proposed mortgage advance is to replace an existing family vehicle. The primary beneficiary of the consolidation will not be the two underage children. The Court accepts that the father had decreased income for a period of fifteen weeks (totalling approximately

$10,000.00 in lost pretax income) and that this has caused some strain on the family finances.

[22] Looking at it from the family point of view, there may be some temporary benefit to relieve the pressure on the household finances by authorizing all or at least part of the mortgage. However, Rule 47 requires the Court to consider the interests of the children and not the interests of the family.

[23] This Court recognizes that the survival of families is a significant objective of our society, and that this objective can best be achieved when all members of the family enjoy the benefits of the financial contributions made by the main bread winner(s) and contribute to the family's economic survival when it is under stress; however, Rule 47 places a different onus and obligation on the Court.

[24] The affidavits filed do not make it clear how the applicant's reduced income for fifteen weeks should necessitate the proposed mortgage . If the mortgage of the children's interest is not approved ,it is not clear there will be insufficient resources to provide the family with their basic maintenance. Assuming a worst case

scenario, that is, that Mr. Singleton becomes insolvent, the risk to the children's interest in the home is still lesser than if the mortgage is approved.

[25] The bottom line is that the primary beneficiary of the mortgage must be the children and not the parents. In the case at bar, it appears that the primary beneficiary would be the parents and not the children; furthermore, the intended use of the mortgage proceeds does not fulfill a direct specific need of the children.

[26] Under Rule 47.03(1)(a) the applicant must establish that the mortgage is necessary for the maintenance, support or education of the children and has not done so. No relief has been claimed under Rule 47.03(1)(b). It is unclear what "any other reasonable cause" means under Rule 47.03(1)(c); applying the principles set out in other cases and texts to the facts in this case, I exclude the application of this subsection.

[27] The application is dismissed.

Warner, J.