<u>**SUPREME COURT OF NOVA SCOTIA**</u>
Probate Court of Nova Scotia
In The Estate of Michael James Terrence Mulrooney, Deceased
Citation: *Mulrooney Estate (Re)*, 2016 NSSC 352

Date: 20161229
Docket: Hfx No. 446123
Probate No.: 61952
Registry: Halifax

Between:

Rita Brousseau

Applicant

v.

Elizabeth Brown, executrix of the
Estate of Michael James Terrence Mulrooney

Respondent

D E C I S I O N

Judge:	The Honourable Justice Glen G. McDougall
Heard:	**Wednesday May 11, 2016 at 9:30 a.m.**
Counsel:	Michael Maddalena and Patrick O'Neil, for the Applicant Craig Berryman and Niall Burke, for the Respondent Richard Niedermayer and Sara Nickleson (watching brief)

By the Court (McDougall, J.):

[1] Ms. Rita Brousseau (formerly Rita Mulrooney) is one of several residual beneficiaries named in the Last Will and Testament of Michael James Terrence Mulrooney, now deceased.

[2] Ms. Brousseau has applied for an order pursuant to Regulation 64 of the Probate Court Practice, Procedure and Forms Regulations, N.S. Reg. 119/2001 (as amended), made under s. 106 of the *Probate Act*, S.N.S. 2000, c. 31 (as amended) (the "*Act*"). Specifically, Ms. Brousseau seeks an order directing Elizabeth Browne, the Executrix of the Estate of Michael James Terrence Mulrooney, to:

> 1. Include the proceeds of a Registered Retirement Income Fund ("RRIF"), owned by the Testator at the time of his death, as part of the Estate inventory; and,
> 2. Declare that the proceeds of the RRIF form part of the rest and residue of the Estate to be distributed in accordance with the terms of the Will.

[3] The application was initially brought before the Registrar of Probate, pursuant to s. 97(3) of the *Act*. The Registrar, relying on the authority given to her under s. 99(1) of the *Act*, transferred it to a Judge of Probate. Section 99(2) states that:

> (2) Where an application is transferred to a judge pursuant to subsection (1), the judge may hear, determine and dispose of the application.

[4] It should also be noted that s. 102 of the *Act* and Regulation 3 of the Probate Court Practice, Procedure and Forms Regulations allow for the application of the Nova Scotia Civil Procedure Rules where no provision is made in the *Act* with respect to practice or evidence or where any practice or procedure respecting probate is not provided for by the Regulations or the *Act*.

[5] I am satisfied that all the jurisdictional requirements, including notice to all persons interested in the Estate, have been satisfied and that the matter is properly before me for determination.

<u>FACTS THAT PERTAIN TO THIS APPLICATION:</u>

[6] At the time of his death on December 7, 2014, the Testator – Michael James Terrence Mulrooney (the “Testator” or “Mr. Mulrooney”) – had an RRIF, bearing Account No. 599364759, held by the Royal Bank of Canada, at 5161 George Street, Halifax, Nova Scotia. The Testator named his niece, Elizabeth Brown [sic], the beneficiary of the RRIF. The Beneficiary Designation form was executed by Mr. Mulrooney on July 15, 2013.

[7] The wording of the designation includes, among other things, the following:

> I revoke all prior Plan beneficiary designations made in respect of the above identified plan, including any such designation made in my will.
>
> I designate the person(s) named above as the beneficiary(ies) of my Plan…. …. If none of the persons named above survive me, I direct that the proceeds of my Plan be paid to my estate on my death.

[8] Approximately three to four months before designating his niece to be the beneficiary of his RRIF, Mr. Mulrooney contacted his lawyer, David S. Johnson, Q.C., to begin the process of preparing his Last Will and Testament. Based on instructions from the Testator, Mr. Johnson prepared a draft Will and provided it to his client. The actual date it was provided to Mr. Mulrooney is not certain. But, based on notes of a telephone conversation Mr. Johnson had with his client, they discussed the draft on November 22, 2013. A handwritten message of a telephone call to Mr. Johnson’s assistant from Mr. Mulrooney bears the same date. And, if one looks to the draft document itself, the signature page shows a date of “November _, 2013.”

[9] Mr. Johnson’s affidavit filed on March 3, 2016 indicates that he was contacted by Mr. Mulrooney sometime in 2014 and after receiving further instructions some changes were made. The amended Last Will and Testament of Mr. Mulrooney was signed and duly executed by him, in the presence of Mr. Johnson and Mr. Johnson’s assistant, but not until August 6, 2014.

[10] The Will appointed the Testator’s niece, Elizabeth (Betty) Browne, to be his Executrix and Trustee. It also included the following paragraph:

4. **I DIRECT THAT** all of the **REST AND RESIDUE** of my Estate both real and personal, of whatsoever nature and kind, and wheresoever situate, including the proceeds of any Registered Retirement Savings Plans and/or Registered Retirement Income Plans, Securities or Stocks, or any other Pension Plans that I may own or have an interest, and also over which I may have any power of appointment or disposal at the time of my death, **be given to my Trustee upon the following trusts:**

   a) **TO PAY** out of and charge to the capital of my general Estate my just debts, funeral and testamentary expenses, and all estate taxes, succession duties and the like that may be payable with respect to my estate;

   b) **I DIRECT MY TRUSTEE** to distribute the **ITEMS CONTAINED IN THE LIST** which **MAY** be attached hereto according to the terms of that list. [sic]

   c) **I DIRECT MY TRUSTEE** to gift the sum Twenty Thousand Dollars ($20,000.00) to **ST. AGNES PARISH (*St. Agnes Church*)**, 6903 Mumford Road, Halifax, Nova Scotia B3L 2H4. [sic]

   d) **I DIRECT THAT ALL OF THE REST AND RESIDUE** of my estate both real and personal, of whatsoever nature and kind, and wheresoever situate, including the proceeds of any Registered Retirement Savings Plans and/or registered Retirement Income Plans, Securities or Stocks, or any other Pension Plans that I may own or have an interest, and also over which I may have any power of appointment or disposal at the time of my death and any of the rest and residue of my Estate not consisting of cash **BE CONVERTED TO CASH** and the proceeds added to any remaining cash on hand with the resulting balance to be **EQUALLY DIVIDED** among **following;** [sic]

      i) my brother, **FRANCIS PATRICK MULROONEY**, now or formerly of Halifax, NS, for his own use and benefit absolutely (life interest);

      ii) my sister, **RITA MULROONEY**, now or formerly of Halifax, NS, for her own use and benefit absolutely;

      iii) my sister, **MARGARET THERSA [sic] MULROONEY**, now or formerly of Halifax, NS, for her own use and benefit absolutely (life interest);

WHEREAS Francis Patrick Mulrooney and Margaret Theresa Mulrooney are not competent at the time of the writing of this will, **I**

> **DIRECT** my Trustee to hold any share, interest or legacy of the Trust Estate to which a [sic] they may be entitled and to invest and reinvest the capital and interest therefrom, and to use so much of the income and capital thereof as my Trustees in their absolute discretion deem advisable for the benefit of **Francis Patrick Mulrooney and Margaret Theresa Mulrooney** during their lifetime.
>
> **I FURTHER DIRECT THAT** on the respective death of either **Francis Patrick Mulrooney and Margaret Theresa Mulrooney**, any remaining amounts of their share of my estate being held in trust shall fall to the rest and residue of my Estate and the proceeds shall be **DIVIDED IN EQUAL SHARES** among the following **OR TO THE SURVIVORS OF THEM;** [sic]
>
> i) my niece, **ELIZABETH (BETTY) BROWNE**, now or formerly of Halifax, NS, for her own use and benefit absolutely;
>
> ii) my niece **PATSY CONROD**, now or formerly of Halifax, NS, for her own use and benefit absolutely;
>
> iii) my niece **PEGGY BROUSSEAU**, now or formerly of Halifax, NS, for her own use and benefit absolutely;
>
> iv) my niece **DONNA BROUSSEAU**, now or formerly of Halifax, NS for her own use and benefit absolutely;
>
> v) my nephew **MICHAEL FALVEY**, now or formerly of Halifax, NS, for his own use and benefit absolutely;
>
> vi) my nephew Dan's widow, **MARGARET JONES FALVEY**, now or formerly of Halifax, NS, for her own use and benefit absolutely.

[11] The execution of the Will occurred a little more than twelve and one-half months after Mr. Mulrooney designated his niece as the beneficiary of the RRIF. The Will made no specific mention of this particular investment nor did it confirm the prior beneficiary designation. This, then, leads to the question of what affect, if any, does paragraph four of the Will have on the earlier designation under the Plan.

ISSUE 1:

[12] The first issue can be stated as follows:

1. Does the wording of the Will, particularly paragraph four, affect the manner in which the named beneficiary is to distribute the proceeds of the RRIF?

[13] The named or designated beneficiary of the RRIF and the personal representative under the Will are one and the same. How the proceeds of the RRIF are distributed will depend on whether the designated beneficiary / trustee receives the funds personally or in her capacity as a trustee.

[14] Counsel for the applicant relies on the provisions of the *Beneficiaries Designation Act*, R.S.N.S. 1989, c. 36 (as amended) (the "*BDA*"). According to the definition of "savings plan" in s. 9(1)(b), of the *BDA*, retirement savings plans fall within the ambit of the *BDA*.

[15] Subsection (3) of s. 9 states that:

> (3) Sections 5, 6, 7 and 8 apply mutatis mutandis to a designation under a savings plan.

Section 5 of the *BDA* states:

> 5 A participant may alter or revoke a designation made under a plan, but, subject to Section 8, any such alteration or revocation may be made only in the manner set forth in the plan.

Section 6 of the *BDA* further provides that:

> 6 Where a designation is contained in a will, the designation, notwithstanding Section 23 of the Wills Act, has effect from the time of its execution.

Sections 7 and 8 of the *BDA* have no bearing on the issue that is before the Court.

[16] Counsel for the applicant has also advanced cases from several other Canadian jurisdictions in support of his client's position. In ***Waugh Estate v. Waugh***, [1990] J.J. No. 10, Wright, J. of the Manitoba Court of Queen's Bench ruled that the following clause in the Last Will and Testament of Dr. Waugh was effective in changing the designated beneficiary from the Estate to his surviving wife. The particular clause in the Will reads as follows:

> I DECLARE that the proceeds of any REGISTERED RETIREMENT SAVINGS PLANS, or other PENSION BENEFITS owned by me at the time of my death

> shall be payable to my said wife if she survives me as if my said wife were the designated beneficiary thereof.

[17] This case as well as the other cases advanced by counsel in support of his client's position are distinguishable from the case before me.

[18] Paragraph 4 of the Mulrooney Will does not specifically refer to the RRIF held by the Royal Bank of Canada. It does, however, refer in general terms to "… any Registered Retirement Savings Plans and/or Registered Retirement Income Plans, …."

[19] I prefer the approach taken by the British Columbia Supreme Court in ***Bottcher Estate, (Re)***,1990 CarswellBC 162; 22 ACWS (3d) 117 (BCSC) in which Anderson, J. held that a general revocation clause in a Will does not revoke a prior beneficiary designation unless the language indicates a clear intention to do so. Paragraph 27 of Justice Ander's decision reads as follows?

> 27 Applying that ratio to the matter in issue here, I think it can fairly be said that, even as the Law and Equity Act presently stands, without specifying an exact method of revocation, something more than the language of a general revocation clause in a will is necessary to revoke a designation validly made other than by will. Or, put another way, the general revocation clause in a will does not revoke a prior beneficiary designation validly made outside a will unless the language of such a clause evidences a clear intention to do so. I find that the general revocation clause in Mrs. Bottcher's will fails to revoke the designation of John Bottcher as beneficiary of her R.R.S.P. and that he is entitled to the proceeds of the R.R.S.P. presently held by the Administrator.

[20] I am supported in my decision by the affidavit evidence of both Mr. Johnson and Ms. Browne. Although the latter's evidence can be criticized for being rather self-serving, I do not think the same can be necessarily said of the former's. And, despite the challenge advanced by counsel for the applicant as to the admissibility of Mr. Johnson's evidence, I believe it can be considered to determine whether the more recent Will revokes the designation of beneficiary in the Plan.

[21] Even if I am wrong in accepting this evidence, I remain satisfied that the beneficiary designated by Mr. Mulrooney on July 15, 2013 is the proper recipient of the funds.

ISSUE 2:

> 2. If the Will does not revoke Ms. Browne as the beneficiary of the RRIF, whether, pursuant to the presumption of resulting trust, the proceeds of the RRIF pass to the Testator's Estate?

[22] I am further satisfied that payment of the proceeds from the RRIF were intended to be for Elizabeth "Betty" Browne's personal use and enjoyment and any suggestion that a resulting trust has been created is rebutted. I rely on the affidavits of Ms. Browne and Mr. Johnson in arriving at this decision.

[23] After first designating his niece as beneficiary of the RRIF and during the nearly sixteen months it took for him to finalize his testamentary wishes, Mr. Mulrooney had ample time to either return to the bank to revoke or change the Beneficiary Designation or to state his intentions in respect to the distribution of the RRIF proceeds. Indeed, Mr. Johnson's evidence helps to establish that Mr. Mulrooney was fully aware of what would happen to these funds and desired it.

CONCLUSION:

[24] The proceeds of the Royal Bank of Canada Registered Retirement Income Fund, Account No. 599364759, which was owned by Michael James Terrence Mulrooney at the time of his death on December 7, 2014 and which has already been paid to Elizabeth Browne but which has been held by her pending the results of this application rightfully belong to her and, as such, can be used as she deems appropriate without regard to any other duties and obligations she has as Executrix and Trustee of her deceased uncle's Estate.

[25] The issue pertaining to income tax liability resulting from the payout of the RRIF has been withdrawn.

[26] Given the nature of this application, I feel it is appropriate to order that the Estate be responsible for all costs and disbursements, to be first taxed and approved by the Court and payable on a solicitor and client basis.

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McDougall, J.