

SUPREME COURT OF NOVA SCOTIA
Citation: Fraser Estate (Re), 2009 NSSC 296

Date: 20091008
Docket: Pic No. 299458
Registry: Pictou

In the Matter of:

The Estate of Anna A. Fraser, Deceased

AND

In the Matter of:

An Application by Susan MacDonald and George Fraser to Adjudicate their claims
against the Estate of Anna A. Fraser

Applicants

AND

In the Matter of:

John Haywood Fraser

Respondent

Judge:

The Honourable Justice Kevin Coady

Heard:

September 8 and 11, 2009, in Pictou, Nova Scotia

Decision:

October 8, 2009

Counsel:

David Wallace, QC & Joyce Diamond, for the applicants
M. Anne Levangie & Elizabeth A. Newton, for the
respondent

By the Court:

[1] Anna A. Fraser died at New Glasgow on April 19, 2008 at the age of 90 years. She was predeceased by her husband in 1980. The Frasers raised five (5) children, namely, John, Patricia, Nancy, Susan and George. They are all alive and, with the exception of George, living in Pictou County. George Fraser resides in Arizona but summers in Pictou County.

[2] The evidence establishes that Anna Fraser was a strong and determined woman. She raised her children to be independent, educated and successful. She was devoted to her children equally. She was a woman of her word. I am satisfied that she was frugal in the sense that she could “stretch a dollar” and enjoyed getting a bargain. This conclusion does not suggest that she was cheap or self-centered. I am satisfied that she appreciated and enjoyed the nicer things in life which were provided to her by her family.

[3] I am satisfied that by 2002 Anna Frasers physical health was deteriorating to the point where she could not live independently. She was a robust woman and the condition of her knees impeded her mobility. She found it difficult to climb stairs. In 2000 she agreed to the renovation of her home which allowed her to live on the

ground floor. I am satisfied that initially she resisted this expenditure but, in time, came to appreciate the comfort afforded by the renovation.

[4] I am satisfied that until the time of her death, Anna Fraser was fully competent, not suffering from dementia and, as described, “sharp as a tack.”

[5] Anna Fraser made her Will on July 19, 2001 and executed a Codicil on December 10, 2002. The Will was admitted to Probate on May 12, 2008 and her daughter Susan was appointed Executrix and Trustee. Neither the Applicants nor the Respondents question Ms. Fraser’s testamentary capacity at the time the Will or the Codicil was executed. The estate inventory was valued at \$365,000 comprising \$288,500 in real property and \$77,000 in personal property.

[6] Anna Fraser’s Will left the family cottage to her daughter Susan and her son George, the Applicants herein. While this cottage has been valued at \$108,000, I am satisfied that it is worth at least three (3) times this value. It is also noteworthy that Anna Fraser would bequeath it to George who has a cottage in the area. This gift represented a windfall to her two (2) most prosperous children and contributed

to family conflict. In any case these factors are not relevant to my analysis given that this specific bequest is not being challenged. I mention it only for context.

[7] In addition to the cottage, there were small cash bequests and bequests of personal property to each of the five (5) children, the grandchildren and to a church. The residue was to be equally divided between her five (5) children.

[8] The evidence clearly establishes that in 2002 Anna Fraser was faced with the decision of remaining in her home or moving to an assisted living facility. It was her preference to stay in the home she had occupied for fifty (50) years. However, the family recognized that in order to stay she would require round the clock care. It was decided that a caregiver would be retained to assist the family in caring for their mother. Interviews were conducted by Susan and, after some difficulty, Donna Austin was hired. Initially Ms. Austin did not stay overnight. In time she became a full time caregiver living in the home with Anna Fraser. This arrangement continued until Ms. Fraser's death. I accept that Ms. Austin and Ms. Fraser became very close and that the family felt likewise.

[9] While all five (5) children generally supported retaining Ms. Austin, they were not all in a position to contribute financially. Susan and George had ample resources. Nancy and Patricia did not. John had the resources but chose not to participate until his mother had expended her own resources. The terms of Ms. Austin's retainer changed over the years as her commitment to Anna Fraser's care expanded. The monthly care costs were paid by George, Susan and Anna Fraser. The monthly contribution of each varied from time to time.

[10] I am satisfied that since 2002 all decisions respecting the care and support of Anna Fraser were made by George and Susan. The rift in the family precluded any meaningful consultation with John, Nancy and Patricia. While these three (3) siblings continued their personal relationship with their mother, they were not included in the financial decisions made between 2002 and 2008. I am satisfied that Anna Fraser was aware of these expenditures but I am not persuaded she was aware of the quantum.

[11] In 2002 Anna Fraser was living on the ground floor of her home and the upstairs was unoccupied. Susan and George, in consultation with their mother, decided that the house was not suitable for a live in a care provider. It was their

view that the upstairs required renovations and improvements so that a caregiver would have a comfortable and private accommodation. They also decided that providing such a premises would attract a quality candidate. In time Donna Austin was selected and moved into the upstairs of Anna Fraser's house. George and Susan contributed to ongoing expenditures until their mother's death in 2008. George Fraser contributed \$53,300 to caregiver expenses and \$30,792.50 in other expenditures for a total of \$84,092.50. Susan contributed \$55,900 to caregiver expenses and \$8,000.93 in other expenditures for a total of \$63,900.93. These other expenditures involved a wide variety of goods and services. The list included appliances, furnishings, painting, automobile expenses and property maintenance. It also included clothing, footwear, drapes and repairs to clothing and personal effects. A deck was built in 2007 at a cost of \$5,600.

[12] It is well established that Anna Fraser did not have the liquid resources to pay for these expenditures. Susan and George agreed to cover these costs. I am satisfied that their mother was aware of these expenditures and understood that many items were expensive. I am also satisfied that Susan and George did not discuss financial details with their mother, or for that matter, any other member of their family. I am not persuaded that Anna Fraser appreciated just how much was

being spent by Susan and George. I accept Susan and George's evidence that their mother indicated her intention to repay Susan and George from her estate. I am also satisfied that she encouraged them to save their receipts for that purpose. It is clear to me that receipts were kept for every expenditure no matter how small.

[13] Anna Fraser executed a Codicil to her Will on December 10, 2002. The material direction is as follows:

That all of my children who have provided for preparing and renovating my house for my home care, and/or have contributed financially to my continuing home care, shall be reimbursed in full from my estate after payment of my just debts, funeral and testamentary expenses before any other bequests are paid, and the funds are to be disbursed to those children in full or on a pro-rated basis if there is not sufficient funds to reimburse them;

[14] I am satisfied that at the time of the Codicil Donna Austin had been retained and the improvements to the home had started.

[15] On July 9, 2008 Susan, as Executrix, contacted all residual beneficiaries advising that she and George had combined claims against the estate in the approximate amount of \$148,000. It was her hope that all residual beneficiaries would approve these claims and she could then close the estate. The estate was

compromised of \$77,000 in personal property, the home valued at \$192,000 and two (2) lots of land valued at \$8,500. I expect it was apparent to all that if these claims were paid as presented, there would be little, if anything left to the residual beneficiaries.

[16] On December 8, 2008, John filed a Notice of Objection objecting to all of the items included in George and Susan's claims. He alleged that these expenditures were not proper claims under the Codicil or there were no receipts in proof of many items. Nancy and Patricia chose to remain on the sidelines. In the months that followed the parties exchanged documentation which resulted in some objections being removed and some claims being amended. At the time of trial the total amended claim of George was \$85,512.32 of which \$33,386.25 was objected to by John. The total amended claim of Susan was \$67,804.61 of which \$15,688.18 was objected to by John.

[17] On November 12, 2008, John filed a Notice of Claim against the estate in the amount of \$3,443.00. This amount represented the purchase of a hospital bed (\$1,333.00) and "a contribution to my mothers personal care worker" (\$2,100.00).

Susan and George approve of the bed expenditure but oppose the personal care claim.

[18] There is no suggestion that the amounts sought by George and Susan do not represent expenditures made for the benefit of Anna Fraser. John suggests that some of the items were gifts that were never intended to be repaid. There is no suggestion of fraudulent activity.

[19] John advances the argument that George and Susan have failed to verify many of the expenditures, or that the verification provided is inadequate. I do not accept these submissions. John argues that section 45 of the **Evidence Act** R.S.N.S. 1989, c.154 requires corroboration. I take the view that the testimony of Susan and George is the primary evidence in support of their claims and that the documents provided amount to corroboration. The Supreme Court of Canada in *O'Connell Estate*, [1980] N.S.J. No. 128 addresses “other material evidence” at paragraph 25:

There are many reported cases dealing with the phrase “other material evidence” for it occurs in the statutes of most, if not all, other provinces of Canada. The leading case is perhaps *Thompson v. Coulter* ((1903) 34 S.C.R. 261, 3 O.W.R. 82) in which Killam, J. said,

‘In my opinion this enactment, demands corroborative evidence of a material character supporting the case to be proved by ... the ‘opposite ... party’ in order to entitle him to a verdict ... A mere scintilla is not sufficient. At the same time, the corroborating evidence need not be sufficient in itself to establish the case. ... the corroboration may be afforded by circumstances.’

Adverting to the last sentence in this quotation, Taschereau, C.J.C. had said in a previous case on appeal from Nova Scotia (*McDonald v. McDonald* (1903) 33 S.C.R. 145):

‘Circumstantial evidence and fair inferences of fact arising from other facts proved that render it improbable that the fact sworn to be not true and reasonably tend to give certainty to the contention which it supports and are consistent with the truth of the fact deposed to, are, in law, corroborative evidence.’

(See also *Re MacDonald* ((1924) 56 N.S.R. 451 (C.A.) to the same effect). However, the corroboration must be of some fact necessary for success (*Elgin v. Stubbs* [1928] 2 D.L.R. 8 38, 62 O.L.R. 128) and evidence which is consistent with two views is not corroborative of either (Killam, J. in *Thompson v. Coulter* (supra)).

[20] The documentation provided may not be as complete as John would like.

However, it is a long way from amounting to a “mere scintilla” of evidence. This point is not critical given that John is not alleging fraud and I have concluded that the expenditures were made. The critical issue is whether they are caught by Anna Fraser’s Codicil. I also find that the documentation provided displaces any presumption that any expenditures were gifts.

[21] John also argues that several items in George and Susan's claim ended up in their possession, or the possession of their designee. He submits that billing the estate for items they received from the estate amounts to "double dipping." He argued that paragraph 8 of the Will supports the conclusion that if Anna Fraser left or gave them to George or Susan, they were gifts and therefore not recoverable under the Codicil. Paragraph 8 states:

I direct that any gift which was given to me by a member of my family (son or daughters) be returned to that member if I have possession of that gift at the time of death.

[22] I find this to be a tenuous argument. It was incumbent on the Executrix Susan to distribute all of Anna Fraser's possessions. It cannot be assumed that every item in the possession of a beneficiary was a gift to Anna Fraser by that beneficiary. I can understand why John is raising this argument given the way the distribution was conducted. However that is a different issue and is not probative to the issues before the Court.

[23] John further argues that \$6,345.06 of George and Susan's claim were made outside of the six (6) month limitation period to make a claim against the Estate.

He argues that section 63 of the **Probate Act** applies:

63(1) Before the payment of debts and expenses or distribution of an estate, the personal representative shall, by advertisement in the Royal Gazette for six months in such manner and at such times as is prescribed, call on all persons who have any demand upon the estate to file a claim within that six month period.

[24] I see this as a procedural direction that allows an estate finalized within a reasonable period of time. It is not an absolute bar to claims made after the six (6) months. Section 82(3) of the **Probate Act** supports this premise:

The Section does not prejudice the right of any creditor or claimant to follow the proceeds of the trust estate or assets, as the case may be, or any part of them, into hands of the person or persons who may have received them. 2000, c.31, s.82.

[25] Section 56 of the **Trustee Act** establishes that the six (6) months in section 63 of the **Probate Act** does not establish a firm limitation period:

56 Where an executor or administrator has given such or the like notices as, in the opinion of the court in which such executor or administrator is sought to be charged, would be sufficient in the Supreme Court in an administration action, or in a court of probate, for creditors and others to send in to the executor or administrator their claims against the estate of the testator or intestate, such executor or administrator shall, at the expiration of the time named in the said notices, or the last of the said notices for sending in such claims, be at liberty to

distribute the assets of the testator or intestate, or any part thereof, amongst the persons entitled thereto, having regard to the claims of which such executor or administrator has then notice, and shall not be liable for the assets or any part thereof so distributed to any person of whose claim such executor or administrator did not have notice at the time of distribution of the said assets or a part thereof, as the case may be, but nothing in this Section contained shall prejudice the right of any creditor or claimant to follow the assets or any part thereof into the hands of the person or persons who have received the same respectively.

[26] I am not persuaded to rule out any claim of the basis of a limitation period.

[27] There is no challenge to the testamentary capacity of Anna Fraser and no suggestion she acted under duress when she executed the Codicil. The terms of the Will have not been challenged. The only question, from the perspective of the Court, is whether certain expenditures are authorized by the Codicil.

[28] The evidence satisfies me that while Anna Fraser may not have been fully aware of the financial details of all expenditures, she was fully aware that they were being made for her benefit and pursuant to her Codicil. She was by nature frugal and yet did not question any expenditures or their associated costs. She formalized her intentions in the Codicil.

[29] While the Court might question her choices, they must be honoured. It would be inappropriate and patronizing to usurp her authority. Anna Fraser was a

strong woman fully capable of deciding her affairs. The evidence indicates that throughout her life she kept a keen eye on her finances. There is no suggestion she changed in the years 2002-2008.

[30] I am satisfied that Susan and George will not financially benefit from their claims. I am satisfied that their claims represent actual and accurate expenditures. While it would be inviting to suggest that they were inappropriately extending their authority to frustrate John, Patricia and Nancy, the evidence does not permit me to so conclude. I am satisfied that Anna Fraser instructed George and Susan to save their receipts. While George and Susan's collecting of receipts could be described as zealous, I am only interested in their appropriateness.

[31] The intentions of Anna Fraser must be found in her Will and Codicil. In the Codicil she used the words "preparing and renovating my house for my home care and/or have contributed financially to my continuing home care." The use of the phrase "and/or" indicates that she turned her mind to both. It is also noteworthy that the Codicil authorized repayment of expenditures made by "all of my children." I take the view that this phrase must be given an expansive interpretation.

[32] The Codicil goes on to state “shall be reimbursed in full from my estate after payment of my just debts, funeral and testamentary expenses.” This indicates an intention to fully reimburse those who contributed to her home and care. The Codicil does not place any conditions or limitations on those payments.

[33] Anna Fraser’s Codicil also directs that these reimbursements shall be paid “before any other bequests are made.” This clause indicates that she turned her mind to the effect of this prioritization on the whole of her estate. It was clearly her intention to repay George and Susan before any other family member received anything financial.

[34] The Codicil also states that “the funds are to be disbursed to those children in full or on a pro-rated basis if there is not sufficient funds to reimburse them.” This language satisfies me that Anna Fraser recognized that the reimbursements to George and Susan could exhaust her estate’s resources. It also tells me that she recognized that George and Susan might not get reimbursed totally if she lived long enough. I am satisfied that Anna Fraser accepted that other family members

would not receive under her Will if her home care expenses exceeded the value of her estate.

[35] It is not my intention to comment on every objected expenditure. I will comment on the most contested items. I am not prepared to question any of the caregiver expenses. Donna Austin provided Anna Fraser with care, companionship and friendship. They became very close. The provision of full time care allowed Anna Fraser to stay in her home and to maintain an element of independence. This is why people save during their lifetime. The evidence clearly establishes that Anna Fraser lived a happy and contented life up to the time of her death.

[36] In relation to the many objected non-caregiver expenditures, it is not my intention to address each one. I have paid close attention to the documents in Exhibit #one and the parties have submitted extensive briefs.

[37] John objects to the following four (4) items contending that they are not caught by the Codicil:

·Winsby's (Boots & Shoes) \$ 850.00

·Wacky Wheatley's (Television)	\$2,772.21
·Pottery Barn	\$ 902.88
·Fur Coat Remodel	\$ 912.00

[38] I am satisfied that these items are caught by the Codicil. While Anna Fraser's mobility decreased as she aged, she still required boots and shoes. It is quite likely she might not have spent so much on footwear in her earlier years. Nonetheless, it would be inappropriate to suggest she did not want greater comfort in her final years.

[39] The television replaced a very old set. It was an acceptable purchase given her failing vision and her interest in watching television. The drapes were necessary to cover the access to the new deck and to provide privacy. Anna Fraser was very proud of her fur coat but she could not wear it due to her deteriorating posture. This renovation allowed her to wear the coat the few times she was out in her community. It should not be forgotten that the money spent on these items belonged to Anna Fraser. I have no difficulty concluding that these items are caught by the Codicil phrase "my continuing home care."

[40] There is a series of expenditures made to improve the upstairs for the caregiver and I am satisfied that these items are entirely appropriate. The provision of these improvements attracted a quality caregiver to a very demanding occupation. Donna Austin provided a great deal of support and comfort that would not have been possible if she was not on site. These costs are directly related to Anna Fraser's home care. The same goes for any repairs or improvements in Anna Fraser's unit.

[41] There was much debate about the expenditures for car repairs and landscaping expenses. The evidence establishes that Donna Austin used the vehicle to transport Anna Fraser to appointments. The maintenance of that vehicle contributed to her mobility and independence. It is well established that Anna Fraser was not able to care for her property. She very much appreciated having an attractive home and property. The fact that she did not pay for professional lawn care during her life does not detract from the necessity of such care in her later years. I see these expenses as an extension of her basic home care. I am satisfied that she derived a great deal of pride and satisfaction from her property during her final years.

[42] The deck installation was controversial in this hearing. While John suggests that this expenditure was extremely out of character for his mother, the evidence establishes that she did use it from time to time. Clearly Anna Fraser observed its construction and she did not object. This expense is caught by the Codicil words “renovating my house for my home care.”

[43] There are several “Arizona” expenses in dispute. They include housing in Arizona, an extra night in hospital and legal fees required to address a health insurance issue. The evidence establishes that Anna Fraser enjoyed visiting George and his family in Arizona. I am satisfied that these expenses are caught by the words “my continuing home care.” They were not costs directly associated with her home in Pictou but she required these expenditures while she was on vacation. It would be easy to question why George would not cover these occasional costs as gifts in return for his mothers life long contributions to his considerable success. However Anna Fraser was a strong and independent woman and I expect that she was not prone to accepting a free ride.

[44] I approve all of the expenditures advanced by Susan and George. I feel compelled to honour the clearly stated directions of Anna Fraser. While I could

question some of the smaller items, I cannot rule that they fall outside the Codicil.

I do not feel that I should tinker with the stated directions of Anna Fraser.

[45] If Anna Fraser were here today to see the impact of her Will and Codicil on her children, she might wish to handle her estate differently. I am certain she would have wanted to avoid the strife that now exists. This observation does not change her choices in 2001 and 2002.

[46] In relation to John's claim, I approve the hospital bed account in the amount of \$1,333.00. The \$2,100.00 for home care is also approved as I find that the facts surrounding this expenditure amount to a mistake brought about by the conflict between George, Susan and John.

[47] In conclusion all accounts are approved and the estate can now be finalized.

J.