IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Drescher v. Drescher Estate, 2007 NSSC 352

Date: 20071121
Docket: SH. No. 278018
Registry: Halifax

Between:

Gisela Drescher, by her attorney Alex Winkler

-and-

Plaintiff

Herb Shannon and John Hencher, as Executors of the Last Will and Testament of Erhard Drescher, deceased

Defendants

Decision

Judge: The Honourable Justice Robert W. Wright

Heard: November 21, 2007 in Halifax, Nova Scotia

Oral Decision: November 21, 2007

Written Decision: December 14, 2007

Counsel: For the Plaintiff - Timothy Matthews, Q.C.
For Gay Drescher - Roberta Clarke, Q.C.
For the Defendants - Loretta Manning
For the Alzheimer Society of Nova Scotia - Jeanne Desveaux

Wright J. (Orally)

[1] This is an application on behalf of the plaintiff Gisela Drescher, by her attorney Alex Winkler, for an order approving the variation or termination of a trust pursuant to the rule in *Saunders v. Vautier* or, in the alternative, for such an order pursuant to the **Variation of Trusts Act** R.S.N.S. 1989, c. 486.

[2] I will begin with a brief outline of the material facts underlying this application. Gisela Drescher and Erhard Drescher, now deceased, were married in 1954. They had only one daughter, Gay Drescher, who is an interested party in this matter, although not formally joined. Their marriage ended in divorce in 1984, following which Gisela Drescher moved her residence to Ontario. In the years that followed, they nonetheless maintained a close relationship with each other.

[3] In 2003, the plaintiff was diagnosed with Alzheimer's disease which led to her placement

in a nursing home in Ontario by her daughter. At that time, her daughter held a continuing Power of Attorney on behalf of her mother over her personal affairs.

[4] Prior to her Alzheimer diagnosis, the plaintiff also executed a second continuing Power of Attorney in favour of her lawyer, Mr. Alex Winkler, Q.C. respecting her financial affairs, details of which will follow.

[5] After she was placed in the Ontario nursing home in early 2003, Erhard Drescher sought to have his former wife placed in a long term care facility in Dartmouth, Nova Scotia. Their daughter initially agreed to this and indeed obtained approval for such a move from the Nova Scotia Department of Health. For reasons outlined in her affidavit, Gay Drescher later changed her mind over the proposed move of her mother to Nova Scotia. That unfortunately marked the beginning of the deterioration of her relationship with her father. That relationship continued to sour over the fall months of 2003 over what her father perceived as his daughter's attempts to cut off his lines of communications and contact with the plaintiff.

[6] This upset led to her father's changing his Will. Up to that point, he had intended to leave his entire estate to his daughter (and appoint her sole executrix) under a Will executed in 2000. On November 27, 2003, however, Erhard Drescher (hereinafter referred to as "the testator") executed a new Will, eliminating his daughter as a beneficiary altogether. Instead, the testator created a new trust under his Will which, of course, is the subject of this application.

[7] Essentially, the testator created a discretionary trust in favour of the plaintiff for her lifetime, with a remainder gift of the residue to the Alzheimer Society of Nova Scotia. He also appointed two friends, Herb Shannon and John Hencher to be his executors and who are so named as defendants in this action.

[8] On February 23, 2006 the testator passed way, leaving an estate valued at approximately $750,000. Prior to his death, the testator was not paying or contributing to the plaintiff's nursing home expenses in Ontario. She had a sufficient level of income herself to cover those expenses.

[9] Having been cut out of the Will, Gay Drescher commenced an action in this court under the **Testator's Family Maintenance Act** ("TFMA") in August of 2006 which is ongoing.

[10] As it happened, Mr. Winkler passed away in June of 2007. In the result, Gay Drescher has now become her mother's successor attorney in respect of her financial matters as well as those personal, and has given instructions to counsel to proceed with this application.

[11] Prior to his death, Mr. Winkler corresponded with the proctor for the estate, as holder of the enduring Power of Attorney on behalf of the plaintiff, requesting that the executors of the estate exercise their discretionary power to pay the plaintiff's monthly costs of nursing home care. The executors were non-committal in their reply, wanting first to have full disclosure of the plaintiff's financial situation so as to be able to assess her financial need for such assistance.

[12] With that response, Mr. Winkler entered into discussions with legal counsel for Gay Drescher and the Alzheimer Society of Nova Scotia respectively and negotiated an agreement with them for the winding up of the estate and the settlement of the TFMA claim.

[13] The essential terms of the agreement provided for the distribution of the estate under three

categories. First, 40% of the estate was to be allocated to a new trust for the plaintiff under which she was to receive a guaranteed fixed monthly payment of $3,000 for her lifetime, with any residue existing at the time of her death to go to the Alzheimer Society. Secondly, 40% of the estate was to be paid to Gay Drescher in settlement of her TFMA claim. Thirdly, 20% of the estate was to be allocated to the Alzheimer Society outright. The agreement further provided for its implementation either by acceptance of the proposal by the executors of the estate or, failing that, by obtaining court approval.

[14] The defendant executors have not accepted or consented to this agreement. They have no financial or personal interest in the estate but they object to the agreement because it does not reflect the wishes and the intention of the testator, which was to deny his daughter any benefit under the estate. That position left the proponents of the agreement with having to make this application for court approval.

[15] As earlier referenced, the application is brought on two bases, namely, under the rule in *Saunders v. Vautier* or, alternatively, pursuant to the **Variation of Trusts Act**.

[16] I will first deal with the rule in *Saunders v. Vautier*, the modern version of which was recently articulated by the Supreme Court of Canada in *Buschau v. Rogers Communications Inc.* 2006 SCC 28 (CanLII), [2006] 1 S.C.R. 973 as follows (at para 21):

The common law rule in *Saunders v. Vautier* can be concisely stated as allowing beneficiaries of a trust to depart from the settlor's original intentions provided that they are of full legal capacity and are together entitled to all the rights of beneficial ownership in the trust property. More formally, the rule is stated as follows in *Underhill and Hayton Law Relating to Trusts and Trustees* (14th ed. 1987), at p. 628:

> If there is only one beneficiary, or if there are several (whether entitled concurrently or successively) and they are all of one mind, and he or they are not under any disability, the specific performance of the trust may be arrested, and the trust modified or extinguished by him or them without reference to the wishes of the settlor or the trustees.

[17] The defendants say that the present case falls outside the scope of the rule in *Saunders v. Vautier* because (a) the plaintiff is not mentally competent and (b) the rule does not contemplate a situation where a person who is not a beneficiary receives a benefit. To that, the proponents of the application say that all of the beneficiaries under the estate (here consisting of the plaintiff and the Alzheimer Society) can agree on how and when they want to enjoy the trust property and that their recognition of a claim by a non-beneficiary (here Gay Drescher who has a statutory cause of action under the TFMA) does not detract from that principle.

[18] What is in contention, the proponents acknowledge, is whether the plaintiff, being an incompetent person, is permitted to provide consent to a variation or termination of the trust through her appointee under a continuing Power of Attorney. Put another way, does the attorney (here Mr. Winkler) have the power to enter into the settlement agreement on behalf of the plaintiff by virtue of a continuing and unrestricted Power of Attorney, in the belief that such an agreement is in the plaintiff's best interests.

[19] Neither counsel for the proponents of this application have been able to find a case authority which directly answers this question. They acknowledge that for this court to now so hold would represent an extension of the rule in *Saunders v. Vautier* in that the classic statement of the rule includes the caveat that the beneficiary is not under any disability. Counsel therefore framed their arguments on logic and principle, posing the question of why, as a matter of public policy, an incompetent beneficiary, properly represented by an attorney of her choice, should be prevented from so exercising this power to terminate the trust.

[20] The argument continues that the justification for the restriction in the rule is to protect the interests of the incompetent beneficiary who might otherwise enter into a compromise or termination of the trust contrary to her best interests. However, if the attorney concludes that the termination of the trust is preferable to its continuation because it is in the best interests of the person who appointed him to do so, should not the individual's autonomy be respected by honouring her selection of the attorney and the attorney's decision? It is argued that the duly appointed attorney should be able to so act to protect those interests.

[21] In making this argument, counsel emphasize the broad scope of the power conferred under clause 1 of the Power of Attorney in favour of Mr. Winkler. He is thereby authorized "to do, on my behalf, any and all acts which I could do if capable, subject to any conditions and restrictions contained herein". Under clause 5, Conditions and Restrictions are listed as "None".

[22] Counsel also point out that the exercise of such powers is consistent with the legislative provisions in the **Powers of Attorney Act** (Ontario) and the **Substitute Decisions Act** (Ontario) being in the nature of a continuing Power of Attorney which may be exercised during any subsequent legal incapacity of the appointor.

[23] Counsel for the proponents of the application also make reference to other analogous case examples where courts have recognized the power of an attorney to create a trust, albeit in different fact situations.

[24] The culmination of this argument is framed by counsel for the plaintiff in his brief as follows:

It is respectfully submitted that the rule in Saunders v. Vautier ought to be enlarged and expanded to apply in cases such as this present application, where the incompetent beneficiary is represented by a duly appointed independent attorney (that is, an attorney free from conflict of interest) with full powers to act in her best interests, on one or other of these bases:

Either: [Wide formulation] The beneficiary under any disability, if represented by an independent attorney with full powers under a continuing (enduring) power of attorney, ought to have the same rights to modify or extinguish the trust as a beneficiary not under any disability.

Or: [Narrow formulation] The independent attorney with full powers under a continuing (enduring) power of attorney ought to have the power (on behalf of the beneficiary under disability) to modify or extinguish the trust, with the approval of the Court.

[25] Although this argument has some logical appeal, the fact remains that the courts have long exercised a supervisory role over the financial affairs of incompetent persons. From guardianship and sale of property applications to the approval of settlements for the disabled, the courts have always played a steadfast role in safeguarding their interests, even though there is no reason to suspect that the guardian may not be acting in the best interests of the person under disability or not adhering to their fiduciary duty. Because of that overriding concern, and the traditional role of the courts in safeguarding such interests, even if I were to accede to this argument, I would go no further than to consider the narrow formulation presented by Mr. Matthews which would still require the approval of the court.

[26] It seems to me that if the court approval process is to be invoked, as I find it ought to be, that process should be framed by the **Variation of Trusts Act** whose very purpose is enable a trust to be varied or terminated in situations where some or all of the beneficiaries are incompetent, whether by age or reduced mental capacity. I therefore prefer to decide this application on the basis of the legislative framework found in the **Variation of Trusts Act**.

[27] The relevant excerpts from the Act are set out in sections 2 and 3 as follows:

> Variation or revocation of trust
>
> 2 Where property, real or personal, is held on trusts arising before or after the coming into force of this Act under any will, settlement or other disposition, the Supreme Court may, if it thinks fit, by order approve on behalf of
>
> (a) any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who, by reason of infancy or other incapacity, is incapable of assenting;...
>
> any arrangement, by whomsoever proposed and whether or not there is any other person beneficially interested who is capable of assenting thereto, varying or revoking all or any of the trusts or enlarging the powers of the trustees or managing or administering any of the property, subject to the trusts. R.S., c. 486, s. 2.
>
> Condition for approval
>
> 3 The Court shall not approve an arrangement on behalf of any person coming within clause (a), (b) or (c) of Section 2, unless the carrying out thereof appears to be for the benefit of that person. R.S., c. 486, s. 3.

[28] Counsel have referred me to the leading Ontario case in *Re Irving* (1975) 66 D.L.R. (3d) 387 where Pennell J., in considering similar legislation, wrote (at p. 394):

> The Court is concerned whether the arrangement as a whole, in all the circumstances, is such that it is proper to approve it. By way of a brief prefatory summation then, and further to the powers conferred under s. 1 of the Variation of Trusts Act, approval is to be measured, inter alia, by reference to these considerations: First, does it keep alive the basic intention of the testator? Second, is there a benefit to be obtained on behalf of infants and of all persons who are or may become interested under the trusts of the will? And, third, is the benefit to be obtained on behalf of those for whom the Court is acting such that a prudent adult motivated by intelligent self-interest and sustained consideration of the expectancies and risks and the proposal made, would be likely to accept?

[29] The first consideration of keeping alive the basic intention of the testator has been questioned in subsequent case authorities. Prominent amongst these is the appellate decision from British Columbia in *Russ v. British Columbia (Public Trustee)*, (1994) 3 E.T.R. (2d) 170. In that case, Finch, J.A., after referring to the principles set out in *Re Irving*, stated (at p. 183):

> The language of s.1, which authorizes the Court to vary or revoke any trust, is inconsistent with the suggestion that the settlor's intention is a consideration at all, much less a consideration of first importance. The Act says nothing concerning the settlor's intention, or of any obligation upon the Court to weigh that intention along with other factors in deciding whether to approve a proposed variation.
>
> In my respectful view, the Court need not consider whether the basic intention of the settlor is preserved. The Court is not charged under the Act with protecting the interests of the settlor. If the proposition put forward by the appellant were correct, the Court would not be able to approve any arrangement that was not such as to keep alive the basic intention of the settlor, in spite of great benefits that might be created for infants and unborn persons.
>
> Many variations to a trust are at odds with the intention of the settlor. If, as argued by the appellant, the wishes of the settlor may not be thwarted, notwithstanding benefits to the infants and unborn, then the powers afforded by the Act would be meaningless.

[30] In the leading text by D.W.M. Waters on **Law of Trusts in Canada** (Third Edition), the author comments on the dilution of this requirement as well. He writes (at p. 1292):

> As we shall see, the scope of the "arrangements", varying or revoking trusts, to which the courts have power to give their consent, is for almost all practical purposes without limit. The essential basis of the court's consent is the benefit of the beneficiaries on behalf of whom the court gives its consent. Only as a matter of practice, not as a requirement of the legislation, is the intention of the settlor or testator taken into account.

[31] Waters adds the comment (at p. 1330) that the view of the British Columbia Court of Appeal in *Russ* is gaining ground in other Canadian appellate courts, footnoting other decisions from Ontario and Manitoba.

[32] Waters adds the further comment that it is generally safe to say that the courts have wanted to know what purpose the settlor had in mind. That will always be so. In my view, the consideration of keeping alive the testator's intention will always be taken into account, but it is not a conclusive consideration which will necessarily dictate the final outcome. There are a number of situations that regularly come before the courts where the courts will order or sanction a departure from the testator's stated or apparent intentions, e.g., classic *Saunders Vautier* situations, TFMA situations, matrimonial property situations and certain variation of trusts situations.

[33] According to Waters on **Law of Trusts in Canada** (at p.1078), in order to be approved by the court, the proposed arrangement must satisfy two criteria:
(1) It must be to the benefit of the beneficiary on behalf of whom the court has been requested to consent, and
(2) The court must be satisfied that overall, the arrangement is one which is fit to approve.

[34] These criteria so framed generally align with the second and third considerations articulated in *Re Irving*.

[35] The case law clearly establishes that the requirement of a "benefit" to the beneficiary is to be liberally construed. The benefit to the beneficiary arising from the proposal may be financial, social or moral, or an enhancement of family well-being.

[36] As matters presently stand, the plaintiff has been using and continues to use her own money to pay her living expenses for nursing home care which she is able to cover from her level of income. With the discretionary trust created under the Will of the testator, she may or may not receive any contribution to those living expenses, depending on how the executors exercise their discretion and the extent to which that discretion will be exercised on the basis of financial need.

[37] On the other hand, if the plaintiff were to incur catastrophic medical expenses, although presently unforeseeable, theoretically she could stand to receive the entirety of the trust (subject to the TFMA claim).

[38] Risks and probabilities have to be weighed. The decision reached by Mr. Winkler here, as evidenced by the proposed arrangement, is that it is more prudent to have the certainty of a guaranteed fixed monthly income of $3,000 over her lifetime, from her share under the agreement, than to wrestle with the uncertainty of receiving little or no benefits at all and perhaps having to litigate over it, given the lines of communication between the parties thus far. That proposed level of guaranteed income is considered to be adequate support to cover the plaintiff's living expenses without having to exhaust her own resources.

[39] The other financial consideration at play here, as earlier mentioned, is the included settlement of the daughter's TFMA claim. The merits of that claim are not to be decided on this

application, but given the size of the estate and the family member situation, it is safe to say that such a claim is not frivolous and it is in everyone's interest, including the plaintiff's, that that lawsuit be resolved now. That will add greater certainty to the financial benefits to be received and eliminate the high costs and delay that will inevitably follow. Delay breeds added costs, and the bite of solicitor-client costs for three parties out of the estate funds (the likely costs result) would be substantial.

[40] There are also non-financial benefits to be realized from this arrangement as well. The situation before the court has the potential to become an acrimonious one over an indefinite period of time. The implementation of the agreement would also enhance family harmony in setting concrete rules for the payment of the estate funds and resolving the TFMA litigation. The estate could be wound up quickly and the beneficiaries will receive their funds much sooner than they otherwise would.

[41] As Mr. Matthews' points out, there is no intention underlying the proposed agreement to diminish the financial benefits to be received by the plaintiff. Rather, the intention or objective is to secure a fixed level of income sufficient to support her maintenance and care, and to provide any other amenities that might improve the quality of her life. That she will benefit from the agreement being implemented is a sound conclusion, on any risk/benefit analysis.

[42] These same considerations support the conclusion that the benefit to be obtained by the plaintiff is such that a prudent adult, motivated by intelligent self-interest and sustained consideration of the expectancies and risks, would be likely to accept the proposal made.

[43] Overall, I am satisfied that the arrangement embodied in the subject agreement is one that is fit for the court to approve.

[44] In conclusion, I am satisfied that the court should exercise its discretion in favour of the applicants under the **Variation of Trusts Act** by approving the subject agreement and ordering its implementation forthwith.