COURT FILE NO.: Brockville 05-0631

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
BRENDA MACDOUGALL	)	Ormond Murphy, for Ms. MacDougall
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	)	
	)	
Applicant	)	
	)	
- and -	)	
	)	
	)	
TRUST COMPANY OF BANK OF MONTREAL ("BMO TRUST COMPANY")Estate Trustee with a will of the Estate of Oscar Earl MacDougall, GORDON MACDOUGALL and DAWN MACDOUGALL	)	Kurt Pearson, for the Respondents, Gordon MacDougall and Dawn MacDougall; No One for BMO Trust Company
	)	
	)	
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	)	
Respondents	)	
	)	
	)	
	)	**HEARD:** May 27, 28, 29, 30, 2008 and June 2, 2008
	)	

RAY J.

Introduction

[1] This is the trial of an issue as a result of an application by the widow, Ms MacDougall, for an Order under the *Succession Law Reform Act*, R.S.O. 1990, c. S.26 (the "*SLRA*") for support from the Estate on the ground that the deceased failed to make adequate provision for her. An additional claim by her to a U.S. dollar bank account in the deceased's name was abandoned.

[2] All parties consent to the non participation of the Estate Trustee, BMO Trust, in this proceeding, although it will be bound by the outcome.

Position of the Parties

[3] Ms. MacDougall's position is that the Estate left to her by her deceased husband is inadequate to meet her needs as determined by the standard of living to which she was accustomed, her wish to continue to live in the matrimonial home unencumbered, and the length of the marriage. She contends that her budget of $57,000.00 per annum, net of taxes, properly reflects the standard of living she enjoyed prior to the deceased's death, and that a present day value of $692,000.00 is necessary to top up her financial resources in order to fund a lifestyle to which she says she is entitled. Counsel candidly admits that such a lump sum order against the Estate would effectively eliminate any distribution to the Respondents, the deceased's two children. Ms. MacDougall's position is that the deceased's intentions regarding his Estate are not relevant, and that only the considerations set out in s. 62 of the *SLRA* are to be considered by the Court in a determination of the test.

[4] It was also her position that, given she had not worked for the last 16 years of the 20 year marriage, she should not be expected to seek employment – and that the onus fell to the Respondents to demonstrate what, if any, employment income she could generate.

[5] The Respondents' position is that adequate provision was made for Ms. MacDougall by their father, the deceased, in providing her with over $1,000,000 from which she can maintain the standard of living their father reasonably anticipated, and that she could and should generate employment income to assist in her expenses. The Respondents contend that her proposed budget of $57,000.00 net of taxes is unreasonable and that annual expenses of $45,000.00 after tax is more appropriate to meet her needs, which they contend can be met from her financial resources.

History of the Parties

[6] The late Oscar Earl MacDougall died December 7, 2004 at the age of 74. He was survived by his wife Brenda MacDougall, then aged 52, his two children Gordon and Dawn, then aged 46 and 50, and seven grandchildren, and great-grandchildren. The deceased had been a successful businessman whose first wife died in July 1978 with whom he had the two children: Gordon and Dawn.

[7] Ms. MacDougall met the deceased in the year following his wife's death. She was 27 years old, single, and employed as an insurance broker in Brockville. The deceased was 49 years old, had a very successful business and enjoyed an affluent lifestyle.

[8] They married in 1984. Ms. MacDougall was 32, and the deceased was 54. During their courtship, they travelled frequently and enjoyed a very active social life.

[9] After marriage, they lived in a small two-bedroom house, and then, in 1988, moved into a larger waterfront property with a pool. They lived there until October 2000 when the deceased decided to sell. They moved to the current house on Lily Bay Drive, Brockville. It is a 140-year-old stone four-bedroom, two-bathroom house with a pool. Its current value is approximately $425,000.00. The previous house sold in 2001 for $342,500.00.

[10] Being on the waterfront, the deceased had a succession of cabin cruisers: an 18 foot cuddy, then a 24 foot, and finally, a pontoon boat and a jet ski. In the early years, the deceased always had late model vehicles; at one time, a Lincoln Continental and then a Lexus. By 2000, they had a Toyota Highlander SUV and a Jeep Liberty. They were not replaced with new vehicles.

[11] The deceased managed his own business and financial affairs with no assistance or discussion with Ms. MacDougall. She was very unaware of his financial affairs. For example, in 1989, he told Ms. MacDougall he had sold his liquid waste disposal business for $5,000,000.00, after the fact. She was unaware what, if any, net proceeds he pocketed.

[12] In December 1988, she resigned at the urging of the deceased from the insurance firm with which she worked because he wanted to spend his winters in Florida and wanted her to be with him.

[13] For the next ten years, they spent five months of each year in Florida. In 1990, the deceased bought a condominium for their use, after renting it for three years, on the beach near Fort Myers. While in Florida each winter, golf was the deceased's main pursuit while Ms. MacDougall was involved to a lesser extent. They also drove to various places in Florida and socialized a lot with friends. They dined out often – four times a week. They took two vacations: one to Las Vegas and the other to New Orleans.

[14] The balance of each year was spent in Brockville during which time the deceased worked at the executive par 3 golf course that he built – Sunnidell Golf Course. Ms. MacDougall would occasionally work with him.

[15] The deceased has been universally described as a high energy, extremely sociable entrepreneur who would get a lot done in a day. That would appear to have been at the root of his business success.

[16] In 1998, at age 68, the deceased was diagnosed with kidney disease, which shortly afterwards required regular dialysis. Because of the cost of dialysis in Florida, the condominium was sold and, except for vacations, they spent their winters in Brockville, and of course, continued spending their summers in Brockville as well. Vacations after they sold the condominium included driving trips to Arizona for a month in January 1999, and Daytona for two months in January-February 2000. There were no more winters in Florida.

[17] In fact there were no further vacations up to the time of his death, almost five years later. While the deceased kept busy with his golf course and his work with his charities, he sold their boat. Their activity level lessened somewhat, and they led a more sedate lifestyle.

[18] Nine regular dialysis sessions – 12 hours per week – began in July 2000. However, the deceased continued to maintain his high energy level of work and golf.

[19] In October 2004, he experienced a stricture of the oesophagus and surgery was planned. Then by the end of November, he had lost 30 pounds, apparently because of his inability to swallow.

[20] Two weeks later on December 7, 2004, at the age of 74, he died from cancer of the liver. The development of liver cancer was sudden and not anticipated. It had been thought that with the dialysis he would have lived to a normal age, and would have maintained his level of activity, i.e., limited travelling and limited entertaining.

[21] The deceased had become quite ill on December 6, 2004, and was admitted to the Brockville General Hospital in the early afternoon. His wife, Brenda, the two children Gordon and Dawn, and an aunt arrived. The family learned of the advanced liver cancer, that no surgery was being planned, and that he did not have long to live.

[22] The family returned to the hospital the next day, December 7, 2004, along with various grandchildren who could be there.

[23] In the early afternoon of December 7, 2004, Ms. MacDougall telephoned the deceased's personal solicitor, John MacIntosh, to say that the deceased wished to see him. Mr. MacIntosh, a Brockville solicitor, and the deceased's personal solicitor for over 40 years, arrived around 3:15 p.m. at the deceased's bedside. Ms. MacDougall and the deceased were present. The deceased was sleeping but was awakened by Ms. MacDougall.

[24] Ms. MacDougall led the discussion and told Mr. MacIntosh that "Earl mentioned he wanted to make changes to his will."

[25] Mr. MacIntosh's notes, made at the time and signed by him and Ms. MacDougall, were explained by him as follows:

1) a personal bank account (for paying bills) and a Bank of Montreal U.S. dollar account containing about $15,000.00 to go to Brenda;

2) Jody Hall (sic) $25,000.00

3) Nancy (Ker) to remain manager and to get $25,000.00

[26] It was his opinion that the two bequests to Jodie Carr (mis-noted as Hall) and Nancy Ker, employees of the golf course, were valid, but the bank accounts were not since Ms. MacDougall could not witness her own bequest.

[27] Mr. MacIntosh was told by Ms. MacDougall that the deceased had another week to live. It was his intention to dictate the instructions into a codicil and return the following day.

[28] The deceased died late in the evening of December 7 with his two children, Dawn and Gordon, plus some grandchildren present.

Testamentary and Other Dispositions

[29] The deceased's principal advisers included Kathryn Boone, a lawyer then with the Bank of Montreal, his own personal solicitor, John MacIntosh, and his accountant.

[30] Ms. Boone, currently employed with Empire Life, has her LL.M. in Estate Planning and Taxation. She has several years experience in giving advice in estate planning issues.

[31] Ms. Boone met with the deceased twice while she was with the Bank of Montreal, and also had telephone discussions with him. She had no meetings or discussions with Ms. MacDougall. Ms. Boone's discussions with the deceased centered on the Estate plan objectives which included the golf course, tax issues in the Estate, probate savings, division amongst members of the deceased's family (which I take to have included Ms. MacDougall), the *SLRA*, and election provisions in the *Family Law Act*.

[32] The first meeting between the deceased and Ms. Boone took place June 27, 2002, and was confirmed in her letter of July 22, 2002 as to his intentions regarding Ms. MacDougall and

his children. The letter confirmed his plans with her and their discussions including "whether your plans for the gifts to Ms. MacDougall are appropriate."

[33] Ms. Boone's letter of August 8, 2002 being draft instructions to the deceased's personal solicitor for the drafting of a Will was reviewed with the deceased. Ms. Boone made changes to the draft letter to reflect the meeting. One of the changes involved leaving the entire RRIF of $450,000.00 to Ms. MacDougall, instead of splitting it with his children. This was in addition to the house by way of joint tenancy (valued by him then at $400,000), life insurance of $65,000.00, plus house contents, boat and cars.

[34] The deceased's instructions assumed the golf course was worth $1,000,000.00 which overstated it quite considerably. Appraisals by the Estate Trustee have since valued it at $452,000. But Ms. MacDougall was not intended to share in the golf course so that the miscalculation did not affect her share. Importantly, it did provide that her percentage of the total value she in fact received is considerably greater than the deceased anticipated at the time.

[35] The deceased left two Wills: a primary Will dated September 30, 2003 and a secondary Will dated September 30, 2003.

[36] The primary Will excluded a numbered company which owned Sunnidell Golf Club, and made the following gifts:

> 1) to Ms. MacDougall, the contents of the matrimonial home plus any boat and automobile owned at the time, subject to each of Gordon and Dawn to choose two paintings and two carvings from the house contents;
>
> 2) to pay to each of the grandchildren and great-grandchildren the sum of $50,000.00.
>
> 3) the residue to be divided between Gordon and Dawn.
>
> 4) confirmed that Ms. MacDougall is the beneficiary of his RRIF and life insurance policies; and that the matrimonial home was for Ms. MacDougall as surviving joint tenant.

[37] The secondary Will dealt with a numbered company which owned Sunnidell Golf Course, and provided that the shares were to be sold and the proceeds divided equally between Gordon and Dawn.

[38] The Estate Statement of Accounts valued the Estate, as of March 31, 2008, at $753,127.44.

[39] Ms. MacDougall's receipts both within the Estate and outside the Estate totalled $713,854.54 at the time of the deceased's death, plus the matrimonial home which was valued at $400,000.00 prior to his death, for a total of $1,113,854.54.

[40] The total value of the Estate, including the Sunnidell Golf Course (owned by the numbered company) is approximately $1.7 million. However, the Sunnidell Golf Course is facing litigation; the value of that contingent liability is approximately $100,000.00 reducing the total Estate to approximately $1.6 million.

Analysis: The s. 58(1) *SLRA* Test

[41] Ms. MacDougall's claim is under s. 58(1) of the *SLRA* as follows:

> Where a deceased, whether testate or intestate, has not made adequate provision for the proper support of his dependants or any of them, the court, on application, may order that such provision as it considers adequate be made out of the estate of the deceased for the proper support of the dependants or any of them.

[42] Ms. MacDougall was a dependant at the time of the deceased's death for the purpose of the *SLRA.*

[43] The threshold for the operation of the *SLRA,* however, is a determination as to whether the deceased "made adequate provision for the proper support of" Ms. MacDougall. The time of the hearing is the relevant valuation date.

[44] A dependent applying for relief bears the burden of satisfying the court that reasonable provision was not made by the testator. (See *Re Shaw Estate*, [1942] S.C.R. 513.)

[45] Section 58 of the *SLRA* requires a determination of whether adequate provision has been made for proper support, and s. 62(1) sets out the principles a court is required to consider in order to determine the amount, if any, of support. A plain reading of ss. 58 and 62 suggests that s. 62 does not become relevant unless and until the test in s. 58 is determined.

[46] However, the test is a two-step approach described by Misener J. in *Kipp v Buck Estate*, [1993] O.J. No. 790,

> There are, as I understand it, two steps to a proceeding such as this, and although the identical language defines each step, the considerations are somewhat different. Sec. 58 compels a finding that Mr. Buck has not made "adequate provision for" Ms. Kipp's "proper support" as a condition to any order being made. If that condition is satisfied, then the Court is entitled to order "such provision as it considers adequate for the proper support" of Ms. Kipp, and in making that determination the Court is required, by the terms of Sec. 62, to consider "all the circumstances including" the specific factors (some 18 in number) listed therein. Obviously, in dealing with the first step, it is necessary to consider all of the circumstances as well. And therefore to consider the specific factors set forth in Sec. 62. Nevertheless, in the first step these circumstances should be considered from the deceased's point of view as well as in the light of the circumstances of the dependent at the time of the hearing of the application, and the Court should not declare the first step satisfied simply because, assuming jurisdiction, it would have made greater provision than the deceased did.

[47] While utilizing the same s. 62 principles, the first step involves a consideration of all the circumstances "from the deceased's point of view" as well as the dependent's circumstances at the time of the hearing. This is the threshold that must be reached before the court can exercise its unfettered discretion. (See *Swire v. Swire*, [1986] O.J. No. 2023 at paras. 84 and 85, aff'd 10 R.F.L. (3rd) 399, 24 O.A.C. 147 (Ont. C.A.).)

[48] In every case, the Court is required "to place itself in the position of the testator and consider what he ought to have done in all the circumstances of the case, treating the testator for that purpose as a wise and just, rather than a fond and foolish husband…." *Cummings v. Cummings Estate*, 2004 CANLII 9339 (Ont. C.A.), quoting with approval Lord Romer in *Bosch v. Perpetual Trustee Company*, [1938] A.C. 463 (P.C.) at pp. 478-479.

[49] The purpose of the *SLRA* is not to enable Ms. MacDougall to acquire an estate but is to ensure the adequacy of her support. The test for 'adequate provision' is whether it is sufficient to enable Ms MacDougall to live neither luxuriously nor miserably, but decent and according to her station in life. (See *Re Duranceau,* [1952] 3 D.L.R. 714 at paras. 36 and 37 (Ont. C.A.).)

[50] McLachlin C.J. in *Tataryn v. Tataryn,* [1994] 2 S.C.R. 807 (S.C.C.) considered that two interests were protected by the legislative equivalent to the *SLRA*; firstly, adequate, just and equitable provision for dependents; secondly, testamentary autonomy, which must give way to the first. Paragraph 33 reads:

> In the absence of other evidence, a will should be seen as reflecting the means chosen by the testator to meet his legitimate concerns and provide for an ordered administration and distribution of his estate in the best interests of the persons and institutions closest to him. It is the exercise by the testator of his freedom to dispose of his property and is to be interfered with not lightly but only so far as the statute requires.

[51] From the deceased's point of view, the evidence demonstrates that he considered the needs of Ms. MacDougall, had the assistance at the time of several professionals, told her she would be a millionaire and in fact, left her over $1,000,000.00 in assets. This represented a very significant proportion of his assets. It is reasonable to infer that he believed he had adequately provided for Ms. MacDougall, even if Ms. MacDougall believes he did not.

[52] Ms. MacDougall says she was told by the deceased she would never have to work again. There was no evidence that she had any physical or mental characteristics that made her unemployable. He did not tell her never to work again.

[53] It is reasonable to infer from his comments to Ms. MacDougall that she would be able to manage her affairs after his death without being required to rely upon employment income. She is 56 years of age, in excellent health, articulate and well-spoken. While she may have a distaste for working, I have no doubt that she could obtain part-time or even fulltime employment, if she wished.

[54] The evidence is that the deceased worked hard, and was active all his life. His two children, who are approximately the same age as Ms. MacDougall, work fulltime, and in earlier years worked with their father.

Application of the s. 58 Test

[55] Having regard to the first part of the test alone, a consideration of both of the facts listed in s.62(1), I am not satisfied that Ms. MacDougall has met the onus of demonstrating that the deceased failed to make adequate provision for her support.

[56] Ms. MacDougall currently lives in the matrimonial home and has assets she values at $536,190.77, plus a life insurance policy in the amount of $34,000.00 that she will receive in 2020. She receives a survivor's pension in the amount of $472.10 per month.

[57] At age 60, she will be entitled to the Canadian Pension Plan (CPP). At age 65, she will receive Old Age Security Pension (OAS) of $502.31 ($6,028.00 per annum) and CPP of approximately $3,060.00 per year.

[58] Ms. MacDougall has been a "pack-a-day" smoker for over 30 years and, according to the life table for smokers, her life expectancy is 17.36 years. According to Mr. Gupta, an actuary called by the Respondents, the average life expectancy of all smokers, including those who smoked one cigarette during the previous twelve months, is 76.39 years of age. Applying that average, Ms. MacDougall's statistical life expectancy is therefore 20.39 years.

[59] A very experienced financial planner, called by the Respondents, estimated that her current assets invested conservatively would generate $45,000.00 per annum net of tax, and indexed for inflation for a period of 21 years, providing she sold her current home and moved into a lesser valued house ($103,250.00 lower value). He estimated that if she were to remain in the current home, the shortfall of $103,250.00 would be reduced to $58,000.00 if she obtained employment at $10,000.00 per annum for the next four years. If she were to work to age 65 at $10,000.00 per annum, there would be no shortfall at all. I was impressed with his evidence.

[60] None of his calculations included a reverse mortgage which he indicated would be worthwhile if her income requirements extended beyond age 76. Without a reverse mortgage, she would own the matrimonial home at the end of her statistical life unencumbered - an asset currently valued at $425,000.

[61] Mr. Martel, an actuary called by Ms. MacDougall, estimated that $585,475.00 would be required to purchase an annuity which would give Ms. MacDougall $57,458.00 per annum after taxes.

[62] His calculations assumed no reduced mortality for “smoking” on the ground that that factor is not taken into account for pension valuation by actuaries. I do not accept his evidence on that point, and prefer the evidence of Mr. Gupta. His assumptions included the following:

1) RRIF at $337,881.00;
2) RRSP at $14,633.00;
3) investments totalling $163,458.00;
4) a life insurance policy of $34,000.00 payable in 2020; and,
5) Ms. MacDougall would remain in the home owned by her, unencumbered.

[63] Ms. MacDougall estimates her current after tax “annual budget” to be $57,458.00. The Respondents’ position is that this is exorbitant, and that $45,000.00 annually is sufficient for her to maintain her lifestyle.

[64] Ms. MacDougall’s budget total of $57,548.00 is not a reasonable reflection of her accustomed standard of living.

[65] Mr. Pearson, on behalf of the Respondents, argued that the asset change between the date of death to May 21, 2008 (being the generally agreed upon valuation date) represented the expenses of Ms. MacDougall over that period of time, so as to show that her expenses were approximately $34,000.00 per annum.

[66] I do not accept that approach. That change in asset position, in the absence of a great deal of additional information is purely speculative, and does not lead one to conclude that those are Ms. MacDougall’s expenses. In and of itself, the calculation fails to take into account fluctuations in the value of assets.

[67] On the other hand, I was not impressed with Ms. MacDougall's evidence concerning her lifestyle and her expenses. Her budget, introduced as an exhibit, was on a spreadsheet with no explanatory or back up information. Some of the items were guesses; others were constituted as a wish list. Even under questioning from her own counsel, she bordered on being antagonistic and resentful at having to explain her lifestyle and budget.

[68] A review of the budget as presented suggests that $5,000.00 is a reserve for a new car, which she budgets at $40,000.00. For home expenses, excluding utilities, she shows $13,130.00. Leisure expenses, including tobacco and alcohol, totalled $13,394.00. It includes $5,000 for a European vacation; they had never travelled to Europe. I find these amounts to be overstated or unreasonable.

[69] Ms. MacDougall's expense claim is driven largely by what she claims is the lifestyle established prior to the deceased's death, presumes that she will continue to live in the same house and that she will not obtain employment.

[70] The evidence shows that there were two distinct lifestyle periods. Prior to 1998, the deceased and Ms. MacDougall wintered in Florida, travelled, played a good deal of golf, did a lot of socializing, and generally lived well. Mr. Cotie, a retired elementary school principal in his early 70s, friend and former neighbour, described their lifestyle as lavish. The Respondents, Gordon and Dawn, disagreed with that characterization, but agreed their father had lived well.

[71] After 1998, the lifestyle changed. There were no more vacations or wintering in Florida. Except for a couple of holiday periods in the United States, they stayed close to home. The socializing was seriously curtailed. The lifestyle became restrained. With this reduced lifestyle, there was less need for a boat or multiple vehicles. In fact, Ms. MacDougall complained that she wanted to travel more and had even tried to interest the deceased in a cruise, but to no avail.

[72] From 1989 until 1999, the deceased gave Ms. MacDougall a monthly allowance for household and her personal expenses in the amount of $1,500 per month. In 1999, this allowance was reduced to $1,200 and continued until his death.

[73] According to her evidence, her lifestyle now is pretty much the way it was from 1998 up to the deceased's death. She is unhappy and wants to live a lifestyle as it was prior to 1998. She complained that her friends do not invite her out. She attributes this to her lack of resources. She objected to having to spend the winter in Brockville after 1998. Except for golf, her evidence disclosed no hobbies or interests outside of travelling and socializing with friends. It is reasonable to infer that the socializing that she aspires to, and which is missing, is not because of her lack of resources, but is because the deceased was a social person with a great number of friends who enjoyed his company.

[74] Prior to her marriage to the deceased, Ms. MacDougall worked as a licensed insurance broker. After marriage, she said that the deceased told her she would never have to work again. In fact, except for closing out the cash at the golf course a few times and working as a receptionist for an insurance company for two days, she has not worked. She said that during the deceased's lifetime, she kept the house and catered to his needs, although contributed very little if anything to its maintenance, according to her budget, and certainly nothing to any of his businesses.

[75] She made it clear in her evidence that she had no intention of looking for employment.

[76] In assessing the circumstances of Ms. MacDougall, it is reasonable to impute a modest income of $12,000.00 per year from employment.

[77] Ms. MacDougall is fifty-six years old and, apparently, in excellent health. She has no dependents. She and the deceased had no children.

[78] Prior to his death, the deceased told Ms. MacDougall that she would be a millionaire. The evidence suggests that that was so, although Ms. MacDougall intimated in her evidence that a million dollars was not that much.

[79] The deceased gave careful consideration to the disposition of his Estate and to the needs of Ms. MacDougall.

[80] Having considered all of the factors in s. 61 of the *SLRA*, I am unable to conclude that the deceased failed to make adequate provision for Ms MacDougall. Her claim is dismissed.

[81] If the parties are unable to agree on costs, I will consider written submissions of not more than seven pages within 30 days, with a right of reply, if any, within a further 10 days.

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Justice Timothy Ray

DATE RELEASED: July 23, 3008

COURT FILE NO.: 05-0631
DATE HEARD: May 27, 28, 29, 30, 2008 and June 2, 2008

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

BRENDA MACDOUGALL

Applicant

- and –

TRUST COMPANY OF BANK OF MONTREAL ("BMO TRUST COMPANY")Estate Trustee with a will of the Estate of Oscar Earl MacDougall, GORDON MACDOUGALL and DAWN MACDOUGALL

Respondents

REASONS

RAY J.

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