

2005 CarswellAlta 2334,

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Barrett Estate, Re

In the Matter of the Estate of Dwight Wesley Barrett

Alberta Court of Queen's Bench

Rawlins, J.

Heard: June 6, 2005

Judgment: June 6, 2005

Docket: Calgary ES01-089933

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Counsel: H. McQueen, Q.C., for Applicant

A. Silenzi, for John Barrett, Darrell Barrett

Ms D, **Castle**, for Bernard Barrett

Subject: Estates and Trusts; Civil Practice and Procedure

Estates and trusts --- Estates — Passing of accounts — Practice and procedure — Appeals — General principles.

Cases considered by *Rawlins J.*:

Barrett Estate, Re (2003), 4 E.T.R. (3d) 163, 350 A.R. 123, [2005] 2 W.W.R. 262, 2003 CarswellAlta 1787, 2003 ABQB 986, 32 Alta. L.R. (4th) 223 (Alta. Q.B.) — referred to

***Rawlins J.*:**

1

THE COURT CLERK: Order in Chambers, all rise.

THE COURT: Good morning, all, or afternoon.

MR. MCQUEEN: Good afternoon, My Lady.

THE COURT: All right, this is your application to pass the accounts?

MR. MCQUEEN: It is, My Lady.

THE COURT: And I note that you have filed your material on June the 1st, and earlier on May 24th, it looks like. Does that sound about right?

MR. MCQUEEN: Yes.

THE COURT: Okay. I have had an opportunity to review the information. Did you want to — and then I will just hear whatever you have to say then, Mr. McQueen, in addition to what you have already filed.

MR. MCQUEEN: I thought, My Lady, it might be useful to, by way of preamble, give you a — remind you, I guess, of the ongoings in this matter.

THE COURT: That would be appreciated.

MR. MCQUEEN: Dwight Wesley Barrett died on March the 11th, 1999, and Mr. Wood was appointed administrator ad litem, by order of Your Ladyship —

MR. SILENZI: Dave, do you want to wait until Ms. Castle comes? She's out talking to her client at the moment.

MR. MCQUEEN: My Lady, Mr. Barrett apparently retained counsel for this and another matter over the weekend, and his counsel has arrived, and she's talked to us very briefly. She's now in the corridor talking with Mr. Barrett.

THE COURT: Perhaps I could ask the clerk to go out and advise her that I am here.

MR. MCQUEEN: That would be —

THE COURT: Ms. Castle, are you here representing —

MS. CASTLE: Bernard Barrett.

THE COURT: All right.

MS. CASTLE: And I've had some brief discussions with my friend, and he hasn't heard the conclusions of my brief discussions outside of the courtroom door, so I'll just apprise him of that.

THE COURT: Would you like me to leave first and then —

MS. CASTLE: Not at all, My Lady.

THE COURT: Okay.

MS. CASTLE: We have no difficulty with the passing of the accounts today. The difficulty that my client has, and I told him this isn't the appropriate forum or time to make those representations, they would be made at the point of distribution.

2 I've asked Mr. McQueen if he could provide me with a proposed schedule of distribution, of which he says he's got three different schedules depending on the — the value that the home in Okotoks would sell for, and at

which point in time I've advised my client, Mr. Barrett, who is present in the courtroom, that we would make argument with respect to how it should be disbursed, because of the payment of legal fees.

3 Mr. Barrett has the position — or takes the position that the reason that the estate is at the value it is, is because of the legal fees that have been paid to the counsel representing his brother, which has in effect dissipated the estate. But like I indicated to him, this would not be the forum. And perhaps my friends will make argument upon the distribution of the estate that that argument cannot be made at this late date either, because one is precluded from making it.

4 But those are in summary, my client's position.

THE COURT: Well just so you know, I think you are new on this file, would that be fair to say, Ms. Castle?

MS. CASTLE: Oh, I'm —

THE COURT: Okay. My —

MS. CASTLE: — just kind of.

THE COURT: — all right. Well my understanding is we started somewhere around \$900,000 or a million dollars at the outset, and since I was involved in this for a long time, there is no doubt in my mind that it is down to where it is, as a result of the legal fees and all the haranguings that were going on.

But to suggest that there is some sort of fault with respect to the legal fees, I have a little problem with that, because I do not know what they are now, but they were down about — they were about a half a million the last time I heard, and they were —

MS. CASTLE: There's about 300 left.

THE COURT: — relatively understandable with the case.

So if you are saying at this point you are not going to be objecting to the order that is going today, and that you think there is going to be some further argument on distribution, I guess they will give you — I guess you will be giving some notice to the beneficiaries of your proposed distribution at that time, that is going to happen?

MR. MCQUEEN: We — we will, My Lady. We have one matter to resolve before we can talk about a distribution, and that is the value of the house —

THE COURT: Mm-hm.

MR. MCQUEEN: — in Okotoks, and that is currently being appraised. And depending on that value, if it — if it achieves a value of anything less than about \$300,000 and we think it's probably more like \$200,000, Mr. Bernard Barrett would not receive anything from the estate.

THE COURT: Okay.

MR. MCQUEEN: And I'll — I'll explain that, if I might, in my — in my presentation.

THE COURT: All right. So which you are going to do now?

MR. MCQUEEN: I am going to do now. I'm just somewhat troubled by the — I think the apparent need to come back to you, to talk about distribution. I'd rather talk about it now, and then if there's any objection to the proposed distribution we can — we can talk about that.

MS. CASTLE: The only thing, that if we were going to do that, is I would just need a bit more information from my friends, so that I can give legal advice to my client. I have been able to give legal advice to my client, that his legal remedies are exhausted, with respect to this estate and his grandfather's estate, both by the findings made by Justice Coutu and by yourself. There are written reasons there.

I have — I have had a very brief exposure to reviewing this file, and I would just — my friend may be right, because I — I have certainly put that condition on that perhaps the time has long ran to make any argument with respect to the payment of the legal fees, because I understand that they have been taxed, and I also understand that they've been paid out, pursuant to Mr. Wood, who is the Court appointed administrator that was by Court order by yourself.

THE COURT: Mm-hm.

MS. CASTLE: So whether or not we have any legal remedy, My Lady, to make any argument at this late date on the distribution or not, is something that I would have to review based on the information, then I can — once I've had the opportunity to review —

THE COURT: All right —

MS. CASTLE: — review the whole file.

THE COURT: — just so I understand the process though. We are passing the accounts, and I am assuming at this point that you are in a position to distribute, and that is why you are having these passing of accounts?

MR. MCQUEEN: That's exactly correct.

MS. CASTLE: Exactly right.

THE COURT: Okay. So, I guess my question, I do not really foresee another opportunity, Ms. Castle, for him to argue on the issues. Is this previously paid legal fees?

MS. CASTLE: Yes, My Lady.

THE COURT: I think perhaps this is perhaps the wrong forum, that would have had to have gone by way of appeal. I do not think I can revisit those issues, particularly if they have been ordered to be taxed, and they have been paid. So —

MS. CASTLE: That's —

THE COURT: — but you know what, maybe the best thing to do is, I know you are in an awkward position.

MS. CASTLE: I would just ask for a brief adjournment. I know that people have travelled far, they would

like the matter resolved, because I understand exactly what you're saying, but I need to review that with my client, and give him that advice. I briefly said to him, I believe that our — our argument, you may not be able to make that argument, because it should have been made at the taxation, or at the time that the money was going to be disbursed, not after the fact. I've already advised my client of that. But I — I simply want to make sure what I'm saying is correct.

THE COURT: All right, so are you asking for a brief adjournment of today's application?

MS. CASTLE: Well, if we — if we want to go into — and I think my friend is quite correct, and once the accounts are passed, then they're into disbursing the assets, and —

THE COURT: That is it. That is the —

MS. CASTLE: — normally —

THE COURT: — Court approval to distribute.

MS. CASTLE: — normally we don't come back to Court and get an order to distribute, unless of course we want to set that over as part of the passing of the accounts that can set the matter back to make any argument on the distribution. But that is not the normal course, I understand that, My Lady.

THE COURT: Well, the concern I have is that we have the accounts have been submitted. They have been reviewed by an accountant and found that they are in accordance with generally accepted accounting principles. And I appreciate that you have said my client has no problem with the passing of accounts, but by saying that, and that is fair, because it is pretty hard to argue with the numbers that are left, and here it is, it is all set out.

And it is in many cases, just a presentation to the Court, and unless there is some problem with the accounting or mismanagement, and this has been under the scrutiny of the Court for its entire life, I do not see that as being a problem. It seems to me what they are asking for, is they could have done this by the way, the normal course would have been to get the beneficiaries consent and they would not even have to make this application. So we did not get that, I do not know whether your client was one of the ones that did or who did not consent, but at the end of the day, is we are back in front of the Court, basically giving an at a boy to the people who done it, which could have been done in the normal course. And if you have got a problem with the administration, I think the time is long past. That is my problem.

MS. CASTLE: Well the only problem when I reviewed the documents, My Lady, is normally attached to this application when you bring it forward, they attach the statement of —

THE COURT: Distribution.

MS. CASTLE: — distribution, and it's not been attached to this, which put me somewhat at a — in a — in a position not to address that, because —

THE COURT: Well actually passing of accounts does not necessarily have that, because the distribution is generally not in dispute, it is basically by the terms of the will. And what you are —

MS. CASTLE: But —

THE COURT: — saying is, if we had the house in Okotoks sold, I think that is the only issue that has to do with the distribution, the will determines the distribution, does it not?

MS. CASTLE: Well, just when I look at — reading the document, it says once the Court approves the financial statements. So I'm looking at number nine of the —

THE COURT: Yes, that is where I am.

MS. CASTLE: — of the affidavit. The personal representative undertakes to distribute the estate property as set out in the schedule of distribution. There was no schedule attached, My Lady. So when I'm looking at it to give my client advice, I wasn't able to advise, and — and I know that Mr. McQueen does have a draft.

THE COURT: Is not the schedule of distribution the one that is referred to on the application?

MR. MCQUEEN: It is.

THE COURT: Not —

MS. CASTLE: On the probate application?

THE COURT: Yes.

MS. CASTLE: Yes.

MR. MCQUEEN: Maybe — maybe I can break the log jam, I would undertake, My Lady, to provide my learned friend with the information that I think she's lacking.

MS. CASTLE: Yes.

MR. MCQUEEN: And that is scenarios about distribution, depending on the value of the house, and also taking into account the hodge podge —

MS. CASTLE: Yes.

MR. MCQUEEN: — decision of Justice Coutu, which I will refer to in my presentation.

MS. CASTLE: Yes.

MR. MCQUEEN: Which also has a bearing on this. And if I —

THE COURT: Okay.

MR. MCQUEEN: — provide that information, and my learned friend has difficulty with it, in terms of the distribution, perhaps she could make application back to the Court as to our proposed distribution.

THE COURT: Okay.

MS. CASTLE: That would be a fair way of dealing with this, simply because I am lacking that information, My Lady.

THE COURT: Okay.

MS. CASTLE: And not because it hasn't been already provided to my client, perhaps it has been, but I haven't been privy to it. Thank you, My Lady.

THE COURT: All right, thank you. Then why do you not proceed then, Mr. McQueen?

MR. MCQUEEN: I was going through a brief history of this — this matter for Your — Your Ladyship. Dwight Wesley Barrett died March 11th, 1999. Mr. Wood was appointed administrator ad litem December 7th, '99. His authority as administrator was expanded by your — your order, My Lady, to include full power and authority to administer the estate to its conclusion. And that order of yours was dated May 16th, 2000.

5 The estate assets were turned over to the administrator by Mr. Sussex (phonetic), who you may recall represented a former wanna be executrix, if I could use that term, Arleen Dexter-Barrett. And that turnover of assets occurred in June of 2000, and that is why the accounts begin in June of 2000.

6 As we are all painfully aware, there have been very numerous and very Court challenges launched by both Arleen Dexter-Barrett and Bernard Barrett over the intervening years, in attempting to prove their respective entitlement to the estate, all of — all of those applications and those Court proceedings proved unsuccessful.

7 The February 7th, 1992 will of Dwight Wesley Barrett, the one that we're dealing with today, was proved in solemn form before Madam Justice Coutu in December 2003. And in that proceeding, she directed that certain lists of advancements that had been made to the three sons prior to their father's death, were to be incorporated by reference in the will and taken into hodge podge in the administration — sorry, the administrator's distribution of the residue of the estate among the sons. And that material is some of the material that I will be providing to my — my learned friend.

8 Bernard Barrett unsuccessfully appealed that decision. The administrator's distribution estimates are such that Bernard would not receive any portion of the residue at this time, because of advancements made to him by his parents, which advancements substantially exceeded those made to his brothers.

9 That's a brief history, My Lady. My application — oh, I can tell you before I make my application, that service of all documentation was made on all three beneficiaries, personal service. Both Darrell and John Barrett have approved the accounts and — and indicated there will be no objections forthcoming from them in this application. Bernard has his own representative and you've heard from her.

10 My order then is that the accounts of the personal representative of the estate of Dwight Wesley Barrett, my application rather, covering the period from June 26th, 2000 to April 26th, 2005, be approved, and passed.

11 Secondly, that distribution of the assets of the estate as set out in the financial statements, that's distributions to this point in time, for the period June 26th to April 26th, 2005, is hereby approved, and that after meeting all expenses of the estate, the personal representative shall distribute the balance of the estate assets in accordance with the December 5th, 2003 judgment of the Honourable Madam Justice Coutu [2003 CarswellAlta 1787 (Alta. Q.B.)]. In other words, in accordance with the terms of the will and the lists that were attached to the will in the — in the hodge podge decision of Madam Justice Coutu.

12 The administrator is also seeking compensation in the total amount of \$25,000, for his slightly in excess of five years work, of which he has pre-taken \$16,727.40, and therefore a balance of \$8,272.60 would be owing if

compensation is approved. So my application is that that compensation amount be approved.

13 And lastly, and perhaps most importantly from my perspective and Mr. Wood's perspective, I am requesting in this order, that upon completion of distribution of the estate of Dwight Wesley Barrett, in compliance with your order, the personal representative, Mr. Wood, be released and discharged fully and finally, from his duties as personal representative as Court appointed administrator and trustee of the estate of Dwight Wesley Barrett, for all legal purposes whatsoever.

14 That is my application, My — oh, lastly that the costs of this application be paid by the estate of Dwight Wesley Barrett. That is my application, My Lady.

THE COURT: Any comments on that, Ms. Castle?

MS. CASTLE: Well it seems that the distribution has probably been already decided by Madam Justice Coutu?

THE COURT: Well certainly she has certainly indicated what has to be taken into account in making a distribution.

MS. CASTLE: Right. And so it's just once I have the opportunity to review this information, then we'll be in a position to advise my friend. So, that's all —

THE COURT: All right, so —

MS. CASTLE: — I have nothing — it's the same issue.

THE COURT: All right. But with respect to the balance of the issue, the propriety of the accounts and the other relief, you still want to say something about the distribution, you may have some comments about that?

MS. CASTLE: I may, but my friend has given me a remedy in which to address them if I need be, by bringing it back to the Court to address it. And if not, then this will be the end of the matter.

THE COURT: Okay. So am going to grant the order in the form in which you asked, and I look at the \$5,000 a year, it is like a little less than 425 a month, which is just an incredibly small amount. That would be like about an hour of your time, Mr. Wood, I think I am pretty sure you spent more than an hour per month on this?

MR. WOOD: Well, Mr. McQueen has been very efficient.

THE COURT: Well that is okay, we paid him in the legal aspect. So, I will grant the application in the form in which you have asked, and I will not make any reference in that to any further relief or conversations you may have with Ms. Castle on the distribution.

Did you want to go further into what those three are? Or do you want to deal with that after she has had a chance to look at it?

MR. MCQUEEN: I'd be happy to deal that directly with Ms. Castle.

THE COURT: At a later time?

MR. MCQUEEN: Yeah.

THE COURT: Okay. Do you have an order prepared then?

MR. MCQUEEN: I do.

THE COURT: The only thing I might say is I guess the problem, you have got costs in connection with this application should be paid by the estate, but do you not want to say in connection with this application and distribution; because you are not finished today?

MR. MCQUEEN: Right.

THE COURT: Right, So I am just going to put an and distribution.

MR. MCQUEEN: Thank you.

THE COURT: And I take it that all the tax returns and all of that have been all done?

MR. MCQUEEN: They have.

THE COURT: Okay.

MR. MCQUEEN: Just on that point, it occurs to me there'll be one final tax return. The house which was the principal residence, lost that designation at such time as Arleen was evicted, and it became a revenue property some time after that. So it loses its principal residence designation and becomes a revenue property.

THE COURT: But only from the difference between its ACB when she left and the time you sell it —

MR. MCQUEEN: Right.

THE COURT: — so —

MR. MCQUEEN: Right.

THE COURT: — there might be a bit of a capital gain there. But I am —

MR. MCQUEEN: Right.

THE COURT: — assuming that by saying distribution, covers right up until the time when you close your file, the very last legal bill, whatever.

MR. MCQUEEN: It will.

THE COURT: Okay, so...

MR. MCQUEEN: Yeah.

THE COURT: — that is why I am putting in distribution, until you finish that —

MR. MCQUEEN: Thank you.

THE COURT: — whatever that has to be done. If it means that you have to hang onto it for a little bit longer, whatever you expend until that is done, so we have to hold some money back for that last tax return I guess?

MR. MCQUEEN: Right.

THE COURT: Right. Okay.

MR. BARRETT: Madam Justice Rawlins, can I ask Mr. McQueen a question please?

THE COURT: Sure.

15 (DISCUSSION OFF THE RECORD)

THE COURT: Are we all set then?

MR. MCQUEEN: I'm fine, thank you.

THE COURT: Okay, fine. I will return this order to you then. Madam clerk, if you would not mind. Thank you very much, thank you, Ms. Castle.

MR. MCQUEEN: Thank you, My Lady.

THE COURT: Thanks, everyone.

MR. WOOD: Not finished, My Lady.

THE COURT: Thank you.

MR. WOOD: Oh, not finished.

THE COURT: Oh, you would like to say something, Mr. Wood?

MR. WOOD: I just wanted to apologize to the court for not having solved this thing, I tried my best, I took the — a lot of time.

THE COURT: Well, you know, you were —

MR. WOOD: But it didn't work.

THE COURT: Well, you know what, sometimes that is why we are open for business all the time, because sometimes you know, it just does not work out. You cannot always settle everything. We are finding out that, you know, JDRs work a lot of the time, but not all of the time. I think I heard a judge at lunchtime today saying he has the first motor vehicle accident that he has had probably in three or four years that is actually running as a three week trial.

MR. WOOD: Ouch.

THE COURT: You know, so we just, you know, every now and then you have just got to run a few just to keep everybody on top of their game. Okay. Now you are on top of your game, Mr. Wood, you never know. See all your great mediation skills, and I am sure they are honed at a high level right now. But we know you are out there, so we will not hesitate to call you again.

MR. WOOD: Well thank you, My Lady.

THE COURT: Thanks, everyone.

THE COURT CLERK: Order in Chambers.

END OF DOCUMENT