

CANADA / JUDGMENT

Byrn v. Mackin et al.

2000 BCSC 1501

COURT

Supreme Court of British Columbia

DECIDED

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2000 BCSC 1501

Citation: Byrn v. Mackin et al. Date:

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2000 BCSC 1501 Docket:

A972374

Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

JESSLYN ELLIS BYRN
A.K.A. JACKIE MACKIN BYRN
PLAINTIFF

AND:

HENRY JOSEPH MACKIN, EXECUTOR OF THE WILL OF
W.J. MACKIN, ROBERT WILSON MACKIN,
JANE PATRICIA MACKIN, ROBERT WILSON MACKIN JR.,
JESSICA KATHLEEN MACKIN and JONATHON PATRICK MACKIN
DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE THACKRAY

Counsel for the Plaintiff: A.K. MacKinnon, W.R. Storey

and R.V. Burns

Henry Joseph Mackin: Appearing in person

Robert Wilson Mackin, Jr.: Appearing in person

Public Guardian and Trustee of British Columbia:

G.A. Fulton

Date and Place of Hearing: October 4, 2000

Vancouver, BC

- [1] This is an application by the plaintiff for an order that the sum of \$75,000 be paid out of money held in trust. She requires the money to retain counsel on three separate actions. The application is made pursuant to the Trust and Settlement Variation Act, R.S.B.C. 1996, c. 463 as amended, and pursuant to the inherent jurisdiction of the Court.
- [2] The trust fund for Ms. Byrn contains approximately \$285,000. This is held pursuant to the provisions of the last will and testament of Ms. Byrn's father. The interest thereon, approximating \$1,400 a month, is paid monthly to Ms. Byrn.
- [3] The form of order sought is contingent upon the plaintiff creating a life insurance policy on her life in the amount of \$75,000 payable to the trust, or, in the event the plaintiff succeeds in the action[s], payable as to one-half of the face value to the beneficiaries of the trust had it existed. The insurance policy is to be purchased from Clarica Life Insurance Company for a fixed premium of \$1,387.50 a year.

LITIGATION HISTORY OF THE PLAINTIFF APART FROM THE ACTIONS FOR WHICH RETAINERS ARE SOUGHT

- [4] In 1994 there were many actions outstanding and there was a high level of Court activity by way of motions. In order to avoid the necessity of informing different judges of the background of the plaintiff's litigation, which had a common thread in each action, I seized myself of all of Ms. Byrn's actions. They were as follows:
- [5] A 1983 action out of the Chilliwack Registry of this Court No. 5904/04327/83. Ms. Byrn claimed against Gordon Stavert Byrn for divorce and custody of children of the marriage. Custody was given to Mr. Byrn. Action No. A830354 is a Vancouver action that seemed to duplicate the Chilliwack action.
- [6] In another 1983 action, being No. 281/83, Ms. Byrn brought action against Gordon Stavert Byrn, James Stavert Byrn and Gulf Group over ownership of Gulf shares. On April 9, 1996, Ms. Byrn wrote to me alleging that this Court "lacks the power ... to restrain or restrict my corporate entity ... in any manner whatsoever." I believe that she was making reference to a company called Jackie Byrn's Cooking School Ltd. which she suggested was the owner of the shares.
- [7] Action No. 917/86 out of the Vancouver Registry of this Court is a bankruptcy action in which the bankrupt was Ms. Byrn. Mr. Justice R. Edwards annulled Ms. Byrn's bankruptcy on October 12, 1995, some ten years after Ms. Byrn went into bankruptcy.

- [8] In 1986 in Action No. C866052, Mr. Henry Joseph Mackin, Ms. Byrn's father, asked for an order restraining Ms. Byrn from harassing him. Davies J. ordered Ms. Byrn to vacate certain premises, that I believe was the family home, and enjoined her from molesting her father.
- [9] Within the same action Ms. Byrn, on January 30, 1994, brought a motion to have her goods returned. Braidwood J. dismissed the motion. On February 2, 1996, Ms. Byrn filed a notice of discontinuance. At a later date she came before me making allegations as to the whereabouts of the goods. I informed Ms. Byrn that she had no action outstanding. I ordered her to obtain leave of this Court before again pursuing this matter.
- [10] On January 4, 1988, Ms. Byrn brought Action No. A880002 against Mr. Gordon Stavert Byrn. It was an action to set aside a separation agreement dated January 6, 1986 and to set aside an order of Huddart L.J.S.C. of February 18, 1986. The writ had been renewed on July 16, 1991 but a notice of discontinuance was filed on May 27, 1992.
- [11] However, in 1996 Ms. Byrn raised this action before me as though, as I recall, it was still outstanding. On March 27, 1996, I informed Ms. Byrn that "this file is concluded in the Court. It is all over."
- [12] On that same date I denied Ms. Byrn leave to appeal a Small Claims Court Action No. 90-7479.
- [13] On August 13, 1990, Mr. Mackin Sr., Ms. Byrn's father, issued a writ out of this Court, No. 904614. It asked that Ms. Byrn be restrained from entering the family premises at 2782 Southwest Marine Drive. On August 9, 1991, Mr. Justice Melnick issued a restraining order. Subsequently, Spencer J, Esson C.J. and myself became involved. On October 4, 1994, I dismissed Ms. Byrn's counterclaim and removed the case from the trial list.
- [14] On December 31, 1991, Ms. Byrn issued a writ in Action No. C918628 naming Gordon Stavert Byrn as the defendant. It would seem that the relief claimed duplicated that in Action A880002. The case came before me on March 27, 1996, at which time I said as follows:
- ... there is no proof of service. This writ has expired. It expired on the 31st of December, 1992. That file is concluded then in this Court. If there is an application to renew the writ, which Ms. Byrn says she is doing, then the application is dismissed. There are no grounds upon which to renew this writ after four years. That action is finished in this Court.
- [15] On June 2, 1992, Ms. Byrn commenced Action No. A922180 against Henry Joseph Mackin as executor of the will of Wilson Joseph Mackin. The claim was for an order varying the will of Mr. Mackin Sr. The action was discontinued on September 16, 1992. Nevertheless, for reasons that I do not recall, the matter surfaced on March 27, 1996, at which time I informed Ms. Byrn as follows:

... I do not have that evidence [compelling evidence that Ms. Byrn was not "really aware of what she was signing"] and I am not setting aside the Notice of Discontinuance. The application is dismissed and this action has been discontinued and is not, therefore, an active file in this Court.

[16] In Action No. A942603, in which the Mackin brothers and their families are plaintiffs and Ms. Byrn is the defendant, I made an order on October 4, 1994, that Ms. Byrn could not, without leave, "institute any legal proceedings in either the Supreme Court or the Provincial Court."

[17] In 1996 Ms. Byrn commenced an "intended action" in the Vancouver Registry of this Court No. C961705. The leave application revealed that it was a claim for return of antique furniture. The intended defendant was Mr. Henry J. Mackin. On March 27, 1996, I informed Ms. Byrn as follows:

... you have been unsuccessful. There is nothing in front of me. If you are not prepared to tell me about the limitation, how you get around it, what furniture there is, the material simply does not support an application to commence a new action so that matter is dismissed. There is no leave given. Leave is denied to start a new action.

LITIGATION HISTORY OF THE PLAINTIFF IN THE ACTIONS FOR WHICH RETAINERS ARE SOUGHT

Jesslyn Ellis Byrn v. Henry J. Mackin and others, A972374

[18] In this action Mr. MacKinnon is prepared to represent Ms. Byrn upon a retainer being obtained in the amount of \$35,000.

[19] The action was commenced on September 11, 1997. It concerns the estate of W.J. Mackin, the father of the plaintiff and of the Mackin defendants. He died on November 9, 1991. Henry Mackin was named executor. The will left the estate to the four children, but Ms. Byrn's share was to be held in trust with the interest thereon to be paid to her. The plaintiff contends that her father lacked capacity to execute the will or, alternatively, that one or more of the defendants unduly influenced him to make the will and it does not express his true intentions.

[20] The plaintiff's contention that Mr. Mackin lacked capacity rests, at least to some extent, on the condition of her father's house upon his death and that he had not cashed many dividend cheques. He left a significant estate and it is said by the defendants that the uncashed cheques were insignificant relative to the gross value of the estate.

[21] The defendant executors deny that they exerted any influence over their father in the making of his will. They assert that he was a "sharp" businessman and that he had good reason for limiting the plaintiff's share in the way that he did. It is not disputed that he was having significant differences with the plaintiff before his death and that he had obtained an injunction against her harassing him.

[22] There have been innumerable applications in this action but it has never been set for trial. On October 21, 1999, I ordered that Ms. Byrn had "to be represented in this action." I said that "the Court, the system, cannot handle you, Ms. Byrn, without counsel." Counsel for Ms. Byrn point to this order as the reason why this application is necessary.

Hamish Buchanan McIntosh v. Jesslyn Ellis Byrn, A871647

- [23] Mr. Storey is the potential counsel in this action. He seeks a retainer of \$25,000. This action concerns custody of and access to Sarah Mary McIntosh, daughter of the plaintiff and Mr. McIntosh. Sarah was born on November 12, 1984. On June 24, 1987, Mr. Justice Taylor granted interim custody to Mr. McIntosh. On July 2, 1987, Chief Justice McEachern granted interim custody to Mr. McIntosh until the trial of the action.
- [24] The trial was held before Madam Justice Allan in April, 1989. On June 29, 1989, Allan J. ordered that sole custody and guardianship was granted to Mr. McIntosh. Ms. Byrn was denied access to Sarah with leave to vary this order "if she can first establish to the satisfaction of this Court that she has successfully completed a course of psychiatric treatment of her delusional disorder."
- [25] On May 6, 1991, Ms. Byrn obtained an ex parte order from McKinnon J. that restrained Mr. McIntosh from communicating with Ms. Byrn and from removing Sarah from the jurisdiction. Mr. Justice Parrett set aside that order "in its entirety" on May 17, 1991.
- [26] On July 10, 1991, Chief Justice Esson issued a memorandum because Ms. Byrn had requested that a hearing be held in August with respect to access. He said that he had reviewed the matter and he referred to many of the previous orders. He adopted the order of Allan J. that only upon completion of a course of psychiatric treatment could Ms. Byrn bring on an application for access.
- [27] On June 15, 1992, Mr. D. Marzban informed the Registry that he had been retained to seek an order varying Madam Justice Allan's order. The Chief Justice responded that Ms. Byrn would have to provide at least prima facie evidence of successful psychiatric treatment before she could bring a variance application.
- [28] Upon consideration of further material supplied by Mr. Marzban, the Chief Justice, on July 10, 1992, lifted the restrictions that he had placed upon Ms. Byrn bringing an application. On November 22, 1994, the Chief Justice issued a memorandum in which he noted that the authorization that he had given "was not acted upon within a reasonable time and Mr. Marzban is apparently not now acting."
- [29] The Chief Justice issued a memorandum on January 3, 1995, in which he said that "no proper basis exists for permitting Ms. Byrn to proceed with an application for variation. Accordingly, the request to pursue such an application is refused." Ms. Byrn sent a handwritten submission to Chief Justice Esson and on December 4, 1995, the Chief Justice said that there was "no fact or circumstance which would justify holding a hearing. That request is therefore refused."
- [30] On January 4, 1996, Mr. F. Messenger corresponded with Ms. Byrn and, at the direction of the Chief Justice, reminded Ms. Byrn of the ruling of the Chief Justice.

- [31] In early 1996, I attended upon an application by Ms. Byrn for access to Sarah's school records and for telephone access. This came before me again on April 29, 1996, at which time Mr. W. Stilling appeared as a "Family Advocate." A transcript is available of that hearing. Ms. Byrn objected to the Court hearing from Mr. Stilling. I allowed Mr. Stilling to appear and noted that it was appropriate that someone represent the interests of Sarah. Mr. McIntosh was not in attendance nor represented. The hearing had, apparently, been designated as *ex parte*.
- [32] The matter was adjourned to May 17 with directions that Mr. McIntosh be served with a notice of the hearing.
- [33] The hearing on May 17, 1996, was attended by Mr. McIntosh, Mr. Stilling and Ms. Byrn. Ms. Byrn and I agreed that the hearing was designed to determine the "form of hearing" that would be held to determine the applications of Ms. Byrn. However, Mr. McIntosh wanted to apply to strike out an order of March 12, 1996, in which I had granted leave to Ms. Byrn to come before the Court to determine if a hearing was justified and, if so, its form. His contention was that Madam Justice Allan and Chief Justice Esson had "laid out very strict terms under which Ms. Byrn can apply for access, any kind of access." In particular, he stressed the requirement from Allan J. that Ms. Byrn was not to have access to the Court on the issue of access until she had successfully completed a course of psychiatric treatment. This order had been adopted by the Chief Justice when he reviewed the order of Madam Justice Allan.
- [34] During the course of the hearing it surfaced that Ms. Byrn was seeking not only access but joint guardianship. After hearing from Mr. Stilling I suggested to Ms. Byrn that there was weight to the contention that "there should be a determination as to whether or not you can bring an access motion in face of certain directions from the Chief Justice and the order of Madam Justice Allan."
- [35] Ms. Byrn took the position that Mr. Justice Parrett had accepted the proposition that she had never suffered from a mental illness. After reviewing his reasons I informed Ms. Byrn that I could not find any support for her submission. She then reverted to Mr. Justice Coultas and said that he could not determine whether there was a mental illness. Ms. Byrn concluded that she was "a woman of unsteady temperament, but what woman isn't?" I reviewed the reasons of Mr. Justice Coultas and pointed out to Ms. Byrn that he had refused to vary the custodial status. On the issue of access he said that "there is no basis for varying the access because the child is happy."
- [36] Nevertheless, I confirmed that I was allowing Ms. Byrn to bring an application for leave to have a hearing into access. I said that I was "prepared to hear the matter to see whether those documents, those rulings, directions I have referred to have been fulfilled, or if they are required to be fulfilled." I added that it seemed "to me that I am giving you a fresh opportunity in spite of those orders."

[37] Ms. Byrn continued to argue that she never had a mental illness and suggested that I go behind the order of Madam Justice Allan. I refused to do that and pressed Ms. Byrn as to what material she was going to rely upon. She referred, as she often did, to a report from Dr. Penfold dated in 1990. After more submissions from Ms. Byrn I said as follows:

Ms. Byrn, you have convinced me, contrary to my earlier thinking, that you have no foundation for the motion which you have brought for guardianship or access. The record is here. Based on what you have told me, I am satisfied now, and I have read the letters you have produced, that you have no evidence to put before me that you have fulfilled the requirements of the order of Madam Justice Allan or of any of the directions of the Chief Justice, and as [did] the Chief Justice I am dismissing this application.

[38] When Chief Justice Williams was appointed Ms. Byrn wrote to him and asked for his intervention. He declined.

[39] I decided to give Ms. Byrn another opportunity to have a full hearing into her claim for access to Sarah. The reasons of the Court of Appeal on June 5, 1998, reveal that on April 29, 1998, I gave Ms. Byrn leave to apply for a variation of the access order. I further ordered that Ms. Byrn was restrained from attending at or telephoning the residence of Mr. McIntosh. This was the basis of the appeal. The appeal was dismissed.

[40] Various dates were set and adjourned for hearing the potential application to vary the access order. A letter from Ms. Byrn said that on April 20, 1998, I ordered that she had to be represented by counsel. She said that she had retained Mr. K. Bowman. Mr. Bowman appeared before me and we discussed having a psychiatric examination of Ms. Byrn by a mutually agreed to psychiatrist. I recall that we agreed upon Dr. Maelor Vallance. Subsequently I issued a memorandum rejecting the proposal that a section 15 report be ordered. I said that I would not do so before Dr. Vallance completed his report.

[41] I received an affidavit of Ms. Byrn's sworn March 29, 1999, in which she deposed that Mr. Bowman was her "former" lawyer in that he lacked experience in "feminist law." In a letter forming an attachment she said that there was "no need for a hearing in the Supreme Court" in that "Maureen Maloney" had said that a thorough review of the case was in order.

[42] In a letter dated February 24, 1999, Dr. Vallance said that he would "not be completing a psychiatric assessment for Keith Bowman or for anyone else." He did not make clear what had happened but the indications are that Ms. Byrn had taken some objection to the presence of a doctor who was a resident physician in training.

P209777/Caveat 2744 Re the estate of Jesslyn Patricia Mackin

[43] Mr. Burns is seeking a retainer of \$15,000 to proceed with this action in which Ms. Byrn asks to be appointed administrator of her mother's estate. Her mother, Jesslyn Patricia Mackin, died on November 27, 1981. She left surviving her husband and her four children.

- [44] Ms. Byrn contends that her mother died leaving a signed will that was lost, stolen or destroyed. She claims that she was named executrix in the will and that the will was "torn apart" by her father. On August 2, 1994, Holmes J. ordered that a copy of Mrs. Mackin's wills held by Farris & Co. be produced to the Court.
- [45] Mr. Geoffrey Lewis of Farris & Co. filed an affidavit annexing three wills. One, typed on legal length paper, was unsigned. A second, in similar form, and dated November 17, 1981, is also unsigned. The third will is handwritten and dated August 4, 1980. It is signed and witnessed. Mr. Lewis deposed that his firm's file suggests that it was not executed in accordance with s. 4 of the Wills Act.
- [46] Ms. Byrn wants to force her brother Henry to prove the November 17, 1981, will. Its validity would make Ms. Byrn executrix of the will. The will leaves specific items to named people and the residue to be divided equally between her children.
- [47] On October 4, 1994, I ordered that no documents were to be filed or any proceedings taken by Ms. Byrn except through a solicitor. Nevertheless, on July 23, 1996, Ms. Byrn appeared on her own behalf. I understood that the hearing was to determine the form of the proceeding. I said that I was prepared to allow Ms. Byrn to appear unrepresented to set aside my order that Ms. Byrn was to be represented by counsel. Ms. Byrn then referred to "Chief Justice Esson's mysterious demotion." I agreed to allow Ms. Byrn to file material that I would consider and make a determination as to the form of hearing.
- [48] On March 27, 1996, a hearing was held before me in which a wide range of actions and issues were canvassed. I refer to several of those in these reasons.
- [49] In a letter dated July 29, 1996, Ms. Byrn informed me that she wanted to make an application to have Brown Benson removed "from handling the business of the Mackin Family estates ... rather than an application to vary your order of October 4, 1994."
- [50] Shortly after August 9, 1996, I received a draft notice of motion from Ms. Byrn. It was to set aside my order of October 4, 1994. On August 16, 1996, I sent a memorandum to the interested parties in which I reviewed the history of this matter.
- [51] A series of letters from Ms. Byrn was then directed to the Court. She referred to the "wills" of her mother and suggested that the Public Trustee be appointed administrator. Correspondence continued to arrive from Ms. Byrn but there have not been any substantive matters until the present application.

SUBMISSIONS AND EVIDENCE IN THE PRESENT APPLICATION

- [52] The Trust and Settlement Variation Act provides that if property is held in trust under a will, this Court may approve an arrangement varying a trust. However, the Court "must not approve an arrangement" unless "it appears to be for the benefit" of persons who may have an interest in the trust. In the case at bar such persons would be the yet unborn. Ms. Byrn deposed that she believes "that there is a benefit to all of the residual beneficiaries of the trust" because of the insurance proposal.
- [53] Mr. MacKinnon referred to *Re Irving* (1975), 66 D.L.R. (3d) 387 (Ont. H.C.). The test set out therein is threefold in determining if the arrangement is such that it should be approved. First, does it keep alive the intention of the testator? Second, is there a benefit for all persons that might become entitled under the will? Third, is the benefit such that a prudent adult motivated by intelligent self-interest and sustained consideration of the expectancies and risks would be likely to accept?
- [54] The executors submitted that the first test cannot be met in that Mr. Mackin Sr. wanted Ms. Byrn to be protected from financial hardship. Ms. Byrn is impecunious and, according to her, unable to retain counsel without access to her trust funds. She deposed that her "only income is what I receive from the trust."
- [55] Should the trust fund be reduced by \$75,000 the monthly payment to Ms. Byrn will be reduced by approximately 25%. Mr. MacKinnon, on behalf of Ms. Byrn, said that Ms. Byrn is prepared to live on less than she now receives. The executors take no comfort from this but rather say that it adds to their opinion that if the trust is depleted Ms. Byrn will end up "back on the welfare rolls."
- [56] On the second test Mr. MacKinnon submitted that there was a benefit and even if it was only a remote benefit it fulfilled the requirement of the Act. Mr. Fulton countered that pursuant to *Re Assie Estate* (1985), 45 Sask. R. 124 (Sask. Q.B.) and as applied in *Public Trustee for Saskatchewan on behalf of Ronald Packet* (1986), 23 E.T.R. 111 (Sask. C.A.), the class of persons being protected "must gain something more than the existing trust gives them. Some general benefit or good to those most concerned is not sufficient."
- [57] Mr. MacKinnon referred to *Farrington v. Rogers (Nanson)* (1980), 19 B.C.L.R. 373 (S.C.) wherein it is stated that the word "benefit" in the Act is to be liberally interpreted. However, the Court also said that the class of persons, unborn in that case as well, had interests that were remote but that the class could not be ignored. The variation was refused.
- [58] Mr. Fulton contended that the alleged benefit is an illusion at best and that there is no potential benefit to the unborn. Further, on the third test, no prudent interested adult would agree to the diminution of the trust fund that is proposed and which might well continue should the first incursion occur. This is a reference to the thought that once the retainers are exhausted there will be applications for further funds to continue the legal services.

- [59] Mr. Fulton said that a variation should achieve resolution of family problems and decrease litigation. Usually, he asserted, there is consent from all parties to such an application. He noted that there are no case precedents for using a trust fund to finance litigation. He submitted that to continue the existing litigation can only increase family tensions and trouble and, if anything, promote even more litigation.
- [60] Mr. Fulton noted that the onus is on the applicant and asserted that it has not been met. He said that no benefit has been shown and that the "prudent adult test" has not been satisfied.
- [61] Mr. Henry Mackin filed an outline of his reasons for opposing the incursion into the trust fund. He said that his father set up the trust to provide an income for Ms. Byrn for life "as at the time my father executed his will Jackie was an undischarged bankrupt and had not been employed since Oct. 1986."
- [62] Mr. Henry Mackin made reference to passages in the reasons of Allan J. with respect to Ms. Byrn's delusional disorder and the difficulty in treating this condition. He noted the reference to the symptom that accompanies it of "litigious activity" and he said that "nothing has changed since those findings." He concluded his submission as follows:

I feel that if any attempt to take money from this trust succeeds it will only serve to put the entire amount at risk for the benefit of her lawyers and her creditors.

- [63] Mr. Mackin filed an affidavit giving details of the family life, the events surrounding the execution of his father's will and the probate of the estate. He denied that there was any "undue influence" or any influence at all. Ms. Jane Patricia Mackin deposed similarly.
- [64] Mr. Michael V. Barnard is a solicitor. He prepared Mr. Mackin Sr.'s will. He deposed that Mr. Mackin was the only person he spoke to with respect to the will. Mr. Barnard has a recollection that Mr. Mackin wanted a trust for Ms. Byrn because "he felt that Ms. Byrn had been financially irresponsible in the past and could not be expected to handle her share of the estate responsibly in the future."
- [65] As to capacity, Mr. Barnard has an "independent recollection" that completely satisfies him "that he was of full capacity."
- [66] Mr. Robert Mackin asked, rhetorically, "what is best for Jackie?" He answered that it was not to deplete her monthly income and return her to the welfare rolls. He said that he and his brother were trying to protect their father's wishes. He stated that "if the Court opens the trust it will all go." He submitted that the insurance plan is a "hairbrained scheme".
- [67] Mr. Mackin referred to nine affidavits attesting to Mr. Mackin Sr.'s competency. Then he concluded as follows:

Jackie's mental illness is not going away but if the court opens the trust it is going away and Jackie ends up on welfare.

- [68] He concluded by saying that "litigation is my sister's full time occupation."

- [69] Mr. Robert Mackin said that Ms. Byrn suffers from a bipolar mental disorder and that he is similarly afflicted. He is on medication that he takes every four hours and without which he becomes delusional. He said that failure to comply with the medication schedule would render him incapable of instructing counsel. The suggestion was that Ms. Byrn is not on appropriate medication and that it is unrealistic to think that she can properly instruct counsel.
- [70] Mr. Mackin filed an affidavit with evidence in conformity with his submissions.
- [71] Ms. Jane Patricia Mackin is a sister of the plaintiff. She filed an affidavit deposing that "there is absolutely no merit to my sister's allegation that our father lacked capacity." She gave an opinion that permitting the use of trust funds for the "pursuit of further litigation is completely contrary to everything my father wanted."
- [72] Ms. Renata Hejka is a solicitor and acted for Mr. Mackin Sr. in the matter of the injunction against Ms. Byrn. From September 1990 to August 1991 she had "a number of conferences with Mr. Mackin." She "never had occasion to question his mental or legal competence."
- [73] Mr. Eric Brown, a retired lawyer, deposed that he referred Mr. Mackin Sr. to Mr. Barnard to have his will drawn. Mr. Brown had known Mr. Mackin for the twenty years preceding the death of Mr. Mackin. He considered him a "close friend". He had been confided in by Mr. Mackin regarding Ms. Byrn so Mr. Brown referred him to Ms. Hejka. Mr. Brown had "absolutely no concerns regarding his competency".
- [74] Mr. McIntosh filed an affidavit relevant to Ms. Byrn's action for custody and access to Sarah. He noted that on April 6, 1999, I dismissed Ms. Byrn's application for access. He said that at that time Ms. Byrn had been given almost one year to prepare the application.
- [75] He said that the appeal cannot be heard before April of next year by which time Sarah will be 16 years of age. He is of the opinion that Sarah has "no desire for any contact with her mother."

CONCLUSIONS

- [76] In my opinion counsel for Ms. Byrn should have attempted to satisfy the Court that Ms. Byrn has at least *prima facie* cases in the actions in which they wish to be retained. I understand the conundrum that they face, i.e. that an investigation as to the strength of the actions would be an expensive undertaking. However, the significance of depleting the trust fund is such that the Court should have some indication that to do so would have at least some potential benefit to Ms. Byrn.
- [77] The case for setting aside Mr. Mackin Sr.'s will was commenced in 1997 and has gone nowhere. On the issue of capacity the evidence of Mr. Barnard would be most difficult to overcome. He has a clear and distinct recollection of the mental competence of Mr. Mackin. There is also the sworn evidence of Henry Mackin, Jane Mackin and Robert Mackin. While it can be alleged that they are not objective witnesses, I have at this stage no evidence upon

which to doubt their credibility. There is the evidence of Ms. Renata Hejka and Mr. Eric Brown. These lawyers acted for Mr. Mackin in the relevant period of time. They all attest to his mental competence.

- [78] The action on Mr. Mackin Sr.'s will has not been shown to have any chance of success. All of the evidence that has come before the Court over the years, and in particular on this application, is supportive of the mental competency of Mr. Mackin. There is no evidence of improper influence having been exerted on Mr. Mackin.
- [79] Mr. MacKinnon submitted that the action regarding Ms. Byrn's claim on her father's will is complex and not suited to an unrepresented plaintiff. That is a responsible submission. However, I cannot approve incursion into the trust fund on this narrow basis. I suggested to Mr. Robert Mackin and to Mr. Henry Mackin that I would have to consider vacating my order that Ms. Byrn be represented by counsel if I refuse this application. Their reaction to this was "so be it". Mr. Robert Mackin said that if he had to come here every day to defend motions brought by Ms. Byrn this would be the price he has to pay for her being unrepresented.
- [80] The case for custody of and access to Sarah has, in my opinion, no possibility of success on the issue of custody. Sarah is now 15 years of age and she will be 16 in November. She has effectively been in the custody of her father all of her life. It will be a considerable time yet, possibly even years, before any trial and appeals as to custody could be completed. Sarah will probably have gained her majority before that could come to pass.
- [81] Mr. Storey, in a letter to Mr. MacKinnon, defined the case as a "very complex and difficult custody and access dispute which has been ongoing for approximately thirteen years." I agree with that and it is in keeping with my conclusion as to the time that would be consumed in pursuing this further through the courts.
- [82] Apart from that matter, there is little possibility that the Court, in view of the circumstances of Ms. Byrn, would change custody from the safe and secure setting in which Sarah has grown up to an unstable environment with Ms. Byrn.
- [83] I am mindful that an appeal of my order dismissing an application for access is underway. Regardless of the outcome of that appeal, any access application faces an uphill battle. The evidence referred to by Mr. Storey suggesting that Sarah wants to associate with her mother is a telephone call that she made to Ms. Byrn's telephone number. Ms. Byrn became aware of the call because her telephone displayed the telephone number of the incoming call. Mr. Storey defined the call as a "reaching out" by Sarah. It might have been or it might have been for any other number of reasons. It is slim evidence of the wishes of Sarah.

- [84] It must also be kept in mind that the issues of custody and access are going to concentrate on the benefit of such to Sarah. From my years of involvement with Ms. Byrn in this litigation I do not have any evidence of such a benefit. The custody and access case has been decided several times, always contrary to the position of Ms. Byrn. There is nothing of which I am aware that has a likelihood of changing that form of outcome.
- [85] The case for appointing an administrator of Mrs. Mackin's estate was not approached at all as to substance. I pointed out to Mr. Burns that there was no evidence that Mrs. Mackin even had an estate beyond her joint tenancy in the matrimonial home, and that interest reverted to Mr. Mackin. He agreed, but of course is in the unenviable position mentioned earlier of having to decide whether to investigate without compensation.
- [86] I am sympathetic to that conundrum, but the fact is that in the nineteen years since the death of Mrs. Mackin there has been no information gathered as to whether this action is anything but academic. Ms. Byrn has had several lawyers over those years.
- [87] The Court must be realistic. In being such it cannot but conclude that to pursue an action to appoint an administrator for an estate distributed nineteen years ago, when it cannot be said that there was anything in the estate, has little chance of success.
- [88] Failing to convince the Court that any of the actions has any prospect of success drives a mighty nail into the application. However, there is more. Mr. Henry Mackin and his brother Robert say that they are dedicated to carrying out the wishes of their father. That is to keep the trust intact, to pay to the plaintiff the interest and thereby keep her off the welfare rolls on which she was and would again be but for the interest from the trust fund. That submission, supported by their affidavit evidence, carries significant weight.
- [89] The will of Mr. Mackin was drawn by a solicitor for a man about whom no evidence of mental incompetence has been advanced. Mr. Mackin had expressed concern regarding the financial abilities of his daughter, who was then in serious financial difficulties. His sons were aware of his concerns and of his desire to protect Ms. Byrn from her own inadequacies. They made a commitment to uphold his wishes and they have consistently done so since his death.
- [90] I cannot be definitive as to whether the insurance scheme represents a potential benefit to unborn beneficiaries. It would not be appropriate to make such a determination in that it is unnecessary in the case at bar. However, I can go so far as to say that if there is any benefit beyond the "illusory" it is so minimal as to be insignificant.
- [91] I agree with Mr. Fulton that anything that encourages more or continued litigation in the Mackin family should be discouraged. Funding lawyers to continue with actions that have little if any prospect of success cannot be said to fulfill the tests set forth in Irving. It was not the intention of Mr. Mackin Sr. to fund litigation or to jeopardize his daughter's security. No "prudent adult motivated by intelligent self-interest ... would be likely to accept" this proposal.

- [92] The proposal would, in my opinion, lead to diminution of the trust fund well beyond the initial incursion of \$75,000. I say that from the vantage of years of observing the mental processes of Ms. Byrn. She is on a mission that will not abate. It is of no comfort to her brothers, nor to the Court, that she is "prepared to live on less." This was not the wish of her father nor is it in the public's best interests.
- [93] The application is dismissed.
- [94] I appreciate that I have expressed views with respect to ongoing litigation. I have found it necessary to do so in order to properly explain the ruling that I have made. Those opinions are not in any way binding upon other judges of this Court who might be involved in the three outstanding actions. There may be evidence before them that was not before the Court on this application or which has even surfaced to date.
- [95] Because of the lengths to which I have gone I am of the opinion, no doubt shared by Ms. Byrn, that I should no longer be involved with her litigation. That is my decision with the exception of any motion that she might bring to vacate my order of October 4, 1994.

"A.D. Thackray, J."

The Honourable Mr. Justice A.D. Thackray

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