Date: 19971010 Docket: CA 135442

NOVA SCOTIA COURT OF APPEAL
Cite as: Morash v. Morash Estate, 1997 NSCA 124

Freeman, Pugsley and Flinn, JJ.A.

**BETWEEN:**

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| **Douglas Percy Morash, David Morash, and Ronald Morash**, all of Glen Margaret, in the Halifax Regional Municipality, Province of Nova Scotia. | |
| Appellants | Richard A. Bureau for the Appellant |
| - and - | Kent L. Noseworthy for the Respondent |
| **The Estate of Edith Maude Morash,** late of Glen Margaret, in the Halifax Regional Municipality, Province of Nova Scotia. | |
| Respondent | Appeal Heard: September 26, 1997 |
| | Judgment Delivered: October 10, 1997 |

**THE COURT:** Both the appeal and the cross appeal are dismissed without costs, provided, however, that the respondent's solicitor and client costs on the appeal and cross appeal shall be paid from the estate as per reasons for judgment of Freeman, J.A.; Pugsley and Flinn, JJ.A., concurring.

**FREEMAN, J.A.**

This is an appeal from proof in solemn form of the second will of Edith Maude Morash, made in 1990 after she had suffered a stroke. She suffered a second stroke in 1993 and died in 1994.

Edith Maude Morash and Douglas Percy Morash were married in 1936 and had seven children, all of whom are still living. In 1977 they made wills, leaving everything to one another and naming one another executors. On the death of the survivor everything was to be divided equally between two of the children or the survivor of them: Lynn MacLellan, who was named executrix, and Ronald Morash, who was to be executor if Lynn MacLellan predeceased him.

Their estates consisted mainly of an 80-acre property at Glen Margaret in the Regional Municipality of Halifax acquired by Mrs. Morash from her father in 1941. The Morashes converted a rough cabin into their modern family residence and utilized the woodlands. The property also included Burnt Island, a four-or five acre island about 500 feet off shore in St. Margaret's Bay. The property was in the joint ownership of Mr. and Mrs. Morash from 1969 to 1977 when it was conveyed back into Mrs. Morash's name alone.

The mainland property was initially in one block but the woodlands became cut off from the house property by the conveyance of building lots to two of the children. Ronald Morash built a causeway from the shore to Burnt Island at his own expense.

On May 6, 1989, Mrs. Morash suffered a massive stroke from which the trial judge considered that she had made a "remarkable recovery". On January 23, 1990, she executed a second will, leaving her husband a life interest in the home and devising the residue of her estate to Lynn MacLellan. Ronald Morash was excluded. The next day she executed a deed conveying Burnt Island jointly to Lynn MacLellan and her son Douglas Morash Jr. Therefore, Burnt Island is not governed by the will.

There is evidence that Ronald Morash, who was to share the estate with Lynn MacLellan to the exclusion of the other children on the death of the surviving parent under the 1977 wills, had requested that his mother convey part or all of Burnt Island to him alone. Apparently Mrs. Morash was upset by this and made a number of requests during 1989 to be taken to a lawyer. Lynn MacLellan testified that Ronald Morash met with herself and Douglas Morash on January 8, 1990, demanding compensation for building the causeway if his mother gave the island to them. When Ms. MacLellan related that conversation to their mother she became concerned and insisted on seeing a lawyer. The lawyer she had seen previously had acted for other family members and did not wish to become involved in a controversy, so Mrs. MacLellan took her mother to Bruce Rawding, who had represented her when she bought her home five years earlier.

Following Mrs. Morash's death on December 6, 1994, Lynn MacLellan had the 1990 will admitted to probate in common form. At the request of her father, Douglas Morash Sr., she applied for proof in solemn form. The will was opposed by the senior Mr. Morash and some of the

children, including Ronald Morash and his wife Marlene. Lynn MacLellan, Douglas Morash Jr. and other children supported it.

The will was upheld by the late Associate Chief Justice Palmeter who considered the following issues and found for the proponents of the will on each of them:

1. Whether the will was properly attested and executed under the **Wills Act**, R.S.N.S. 1989, c. 505.

2. Whether the testatrix had testamentary capacity.

3. Whether there were suspicious circumstances surrounding the preparation and execution of the will.

4. Whether there was undue influence.

Palmeter A.C.J. thanked counsel for "very extensive briefs, and you have set out very clearly what the law is in relation to applications of this nature. I am very familiar with what I must consider in proving a will in proper form. I have done quite a number of them." The presumption that the trial judge knew the law and applied it has not been rebutted.

The grounds of appeal do not assert errors of law but rather allege errors of fact related to Associate Chief Justice Palmeter's assessment of the evidence in determining that Mrs. Morash had testamentary capacity to make a will, in his finding that there was no undue influence, in the identification of a key witness and in assessing inconsistent evidence in reaching his

conclusions as to credibility.

On the first issue he found the proponents of the will had discharged the burden of proof and established due execution.

The second issue figured in the evidence of each of the eighteen witnesses who testified. These included four family members on each side, whose evidence was treated with suspicion because of interest, and ten "objective witnesses", including two doctors and a speech therapist. The medical expert for the opponents of the will had not examined Mrs. Morash after June of 1989 and Palmeter A.C.J. discounted his evidence. He concluded:

> ...concerning testamentary capacity, considering all of the evidence, I accept the evidence of witnesses for the proponents of the will and find on the balance of probabilities that, at the time of making the will, the deceased had the requisite testamentary capacity, that is, she was of sound and disposing mind and memory. This determination is a matter of fact, not law, and I so find, and I accept the precedents submitted by the proponents of the will in support of this finding.

The characterization of determining testamentary capacity as a matter of fact, not law, is clearly correct: see **Re Fergusson's Will** (1981), 43 N.S.R. (2d) (N.S.S.C., A.D.)

Palmeter A.C.J. found there were suspicious circumstances surrounding the preparation and signing of the will, but the proponents of the will had discharged the onus of rebutting them.

He expressed concerns about the procedure carried out by Bruce Rawding, the solicitor who prepared the will, to satisfy himself as to testamentary capacity. The trial judge did not consider that he followed the practice "a prudent solicitor should have followed." However he accepted that there were extenuating circumstances. Mr. Rawding had left the area in the meantime and was not available to testify. Any deficiencies in his procedure for satisfying himself as to testamentary capacity were remedied by the evidence, which supported the finding of the trial judge that Mrs. Morash had sufficient capacity to make a new will in January of 1990.

The choice of lawyer, who had done previous work for Ms. MacLellan, also came under his scrutiny. He accepted Ms. MacLellan's evidence as to why she was in the room when instructions were given. He also accepted her evidence that there were two meetings with the lawyer, once for instructions and once for execution. His conclusion was that:

> I find that the proponents of the will have satisfied the suspicious circumstances on a balance of probabilities proportionate to the circumstances alleged.

As to undue influence, Palmeter A.C.J. held:

> I find there is no evidence before me to establish undue influence or coercion. Suspicion is not enough--suspicion is not enough, and I accept the cases submitted by the proponents of the will in support of this matter.
>
> Accordingly, I find that the will has been duly proved in solemn form and I admit the will to probate.

The error of identification related only to a minor confusion as to the correct first name of a witness in the oral decision which was corrected in the written version. The conclusions as to credibility are consistent with the written record; the trial judge had the further benefit of watching and hearing the witnesses as they testified.

After a careful review of the evidence in light of the submissions of counsel it is apparent that Palmeter, A.C.J., clearly grasped the legal principles including the burdens of proof involved in each of the elements he had to consider, and he did not fall into error in applying them. Neither did he fall into manifest error in his assessment of the facts.

The deference which a court of appeal owes to a trial judge has been expressed so clearly and frequently as to need little restatement. The respondent has appropriately cited **Stein Estate et al. v. The Ship "Kathy K." et al.** (1975), 6 N.R. 359 (S.C.C.); **Toneguzzo-Norvell et al. v. Savein and Burnaby Hospital** (1994), 162 N.R. 161 (S.C.C.); **Davis v. Bathtub King (Halifax) Ltd.** (1991), 104 N.S.R. (2d) 98 (N.S.S.C., A.D.); **Travellers Indemnity Co. v. Kehoe** (1985), 66 N.S.R. (2d) 434 (N.S.S.C., A.D.) and **MacNeil v. Gillis** (1995), 138 N.S.R. (2d), 1 (N.S.C.A.) and the following passage from the judgment of Wilson, J., writing for the Supreme Court of Canada in **Goodman Estate v. Geffen** (1991), 127 N.R. 241 (S.C.C.) at p. 280-281:

> It is by now well established that findings of fact made at trial based on the credibility of witnesses are not to be reversed on appeal unless it is established that the trial judge made some palpable and overriding error which affected his assessment of the facts: see **Lensen v. Lensen**, [1987] 2 S.C.R. 672; 79 N.R. 334; 64 Sask. R. 6, at . 683, and the cases cited therein. Even where a finding of fact is not contingent upon credibility, this court has maintained a non-interventionist approach to the review of the trial court

findings. . .

> And even in those cases where a finding of fact is neither inextricably linked to the credibility of the testifying witness nor based on a misapprehension of the evidence, the rule remains the appellate review should be limited to those instances where a manifest error has been made...
>
> I would dismiss the appeal on the merits.

There is a cross appeal as to costs, which the trial judge awarded to the opponents of the will as well as to the executrix and proponents on a solicitor and client basis to be paid from the estate. He noted that the application and request for proof in solemn form was not frivolous, for suspicious circumstances were established. In wills matters the general practice appears to be for executors to be awarded solicitor and client costs to be paid from the estate in any event, for executors may have no personal interest in the outcome and no other source of reimbursement for their legal expenses. When the matter in contention is not frivolous, unsuccessful opposing parties usually have their costs paid from the estate as well, usually on a party and party basis, but occasionally, depending on the practice of the individual judge, on a solicitor and client basis. Costs are discretionary with the trial judge and I am not satisfied that there is a basis for interfering with the cost award in the present matter. Both the appeal and the cross appeal are dismissed without costs, provided, however, that the respondent's solicitor and client costs on the appeal and cross appeal shall be paid from the estate.

Freeman, J.A.

Concurred in:

Pugsley, J.A.

Flinn, J.A.