NOVA SCOTIA COURT OF APPEAL
Citation: *Whitford v. Baird*, 2015 NSCA 98

Date: 20151103
Docket: CA 430325
Registry: Halifax

Between:

Grace Helen Whitford

Appellant

v.

Edward Baird and Barbara Elizabeth D'Eon

Respondents

Judges:	Fichaud, Farrar and Bryson, JJ.A.
Appeal Heard:	September 21, 2015, in Halifax, Nova Scotia
Held:	Appeal dismissed with costs, per reasons for judgment of Bryson, J.A.; Fichaud and Farrar, JJ.A.
Counsel:	Keith MacKay, for the appellant Jill Graham-Scanlan, for the respondent

Reasons for judgment:

Introduction

[1] This is one of those unfortunate cases in which a family is divided over a will.

[2] In November 2011 Helen Baird executed a new will appointing her son, Edward Baird, as executor of her estate. Mr. Baird displaced his sisters, Grace Whitford and Margaret Anderson who had been the executors under Mrs. Baird's 2006 will. Helen Baird died in May 2013. Ms. Whitford and Ms. Anderson sought proof in solemn form. The fourth Baird sibling, Barbara D'Eon, sided with her brother Edward.

[3] The Honourable Justice Cindy Bourgeois heard the proof in solemn form application and found Mrs. Baird was competent when she signed her will. She admitted the 2011 will to probate (2014 NSSC 266). Grace Whitford appeals, arguing that the application judge erred in law because she failed to apply the principles of insane delusion to the evidence before her.

[4] She asks this court to perform the analysis which she says the application judge failed to do and revoke the grant of probate to Edward Baird. Ms. Whitford does not claim that the judge overlooked the law; simply that she failed to apply it to the evidence. She acknowledges that the judge cited the law relating to insane delusion in her decision but then made no use of it.

Facts

[5] Ms. Whitford and Ms. Anderson described a happy and settled routine in which Mrs. Baird summered at her home in Caribou Island, Pictou County and wintered with Ms. Whitford and her husband in Porter's Lake, Halifax County. This carried on for almost 17 years following the death of Helen Baird's husband in 1993. Ms. Whitford and Ms. Anderson helped with medical appointments and were Mrs. Baird's attorneys under a Power of Attorney drawn by Mrs. Baird's long time solicitor, Anne MacDonald, in 2006. They also assisted with banking.

[6] In August 2011 things changed. There was a confrontation among the siblings. Edward Baird and Barbara D'Eon were critical of Ms. Anderson and Ms. Whitford and accused them of taking money from their mother. Mrs. Baird went

to live with Barbara D'Eon. Ms. D'Eon took her mother to Ms. MacDonald to change her executor to Edward Baird. Ms. MacDonald had some reservations about these instructions. She was concerned that they came from Ms. D'Eon rather than Mrs. Baird. She didn't draft anything.

[7] Some weeks later, Ms. D'Eon took her mother to another lawyer, Mr. Ian MacLean, Q.C. While he thought Mrs. Baird was competent, Mr. MacLean wanted a doctor's assessment. He did not get it.

[8] Mrs. Baird was finally taken to solicitor Daniel MacIsaac. He took instructions, drafted a new will, and attended upon Mrs. Baird for its execution on November 25, 2011. Although she did change some property dispositions, the judge described them as "minor".

[9] For their part, Ms. Whitford and Ms. Anderson recounted unsettling changes in their mother's behaviour in the winter of 2010-2011. She was more reclusive, less cooperative, and hostile towards visitors. Ms. Anderson said her mother was sullen towards her after visits with Ms. D'Eon.

[10] In her factum, Ms. Whitford characterizes what happened in this way:

> ...as increasing care needs disrupted her traditional living pattern, she [Mrs. Baird] abruptly and irrationally became mistrustful of them [Ms. Whitford and Ms. Anderson] amid an atmosphere of hostility cultivated by Ms. D'Eon and her brother, Edward Baird.

[11] The application judge was confronted by two dramatically different pictures of Mrs. Baird's last years and had to choose between them. The judge acknowledged that there were "suspicious circumstances" displacing the usual presumption of competency that attends a duly executed will, but she was satisfied that Mr. Baird had discharged that burden.

[12] In deciding that Mrs. Baird was competent and aware of the contents of her will, the judge relied upon the evidence of solicitor Daniel MacIsaac who took instructions from her and witnessed the will. She also accepted the evidence of Barbara D'Eon, Edward Baird and his wife Sandra Baird, rejecting that offered by Ms. Whitford and Ms. Anderson, who insisted their mother was not competent. She found Ms. D'Eon to be "a credible witness" and accepted her testimony about Mrs. Baird's capacity in the period of July 2011 to May 2013. She concluded that Mrs. Baird was competent to give instructions and execute her November 2011 will.

Insane Delusion

[13] Ms. Whitford and Ms. Anderson maintain that their mother entertained "insane delusions" about them which affected her last will. Such delusions are referred to in the classic testamentary capacity test set out in *Banks v. Goodfellow*, (1870) L.R. 5 Q.B. 549 at p. 565 which concludes:

> ...that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.

[14] The burden of establishing capacity which rests with the propounder of a will includes dispelling any proved delusions. Justice Estey summarized the necessary inquiry in *O'Neil v. The Royal Trust Co.,* [1946] S.C.R. 622 at p. 632:

> […] That while the burden of proof always rests upon the party supporting the will, and that the existence of proved hallucinations and delusions often presents a "difficult and delicate investigation", it remains a question of fact to be determined as in civil cases by a balance of probabilities. ***In the determination of this fact the contents of the will and all the surrounding circumstances must be considered*** by the jury or the Court called upon to arrive at a decision. If satisfied that at the relevant time the testator was not impelled or directed by hallucinations or delusions and was in possession of testamentary capacity, the will is valid. *Boughton v. Knight*; *Smee v. Smee*; Halsbury, 2nd Ed., Vol. 2, p. 38.
>
> [Emphasis added]

[15] The application judge referred to *Re Fawson Estate*, 2012 NSSC 55 with respect to the test for testamentary capacity and in particular quoted from paragraphs 208 and 209 regarding insane delusions:

> [208] The authors then consider the effect of delusions on testamentary capacity saying in the following paragraph:
>
> **3-03** A delusion in the mind of a testator deprives him of testamentary capacity if the delusion influences, or is capable of influencing, the provisions of his will. But a delusion does not have this effect if it cannot have had any influence upon him in making his will.
>
> ***A testator suffers from a delusion if he holds a belief on any subject which no rational person could hold***, and which cannot be permanently eradicated from his mind by reasoning with him.
>
> [...]

> In practice it may be difficult to distinguish between grave misjudgment and delusion, particularly in relation to a testator's assessment of the character of a possible beneficiary under his will. ...
>
> A will is not invalid merely because in making it the testator is moved by capricious, frivolous, mean or even bad motives. If he has testamentary capacity he 'may disinherit...his children, and leave his property to strangers to gratify his spite, or to charities to gratify his pride.

[209] In *Royal Trust Corporation of Canada v. Saunders*, 2006 CanLII 19424 (Ont. S.C.), Blishen, J. said at para. 62:

> [62] In order to affect testamentary capacity, a delusion must:
>
> 1. be one of 'insanity'; and
>
> 2. be in relation to the testator's property or expected beneficiaries.
>
> [Emphasis added]

[16] The evidence of insane delusion primarily comes from the notes of solicitor Ian MacLean with whom Mrs. Helen Baird met on August 25, 2011. His notes, explained by him in his testimony, suggest that he was told that:

- Ms. Anderson and Ms. Whitford tried to prevent Mrs. Baird from attending the meeting with Mr. MacLean that day.
- Ms. Anderson and Ms. Whitford were then alleging that Mrs. Baird was incompetent.
- Ms. Anderson and Ms. Whitford had interfered with her relationship with her family doctor.
- Ms. Anderson had taken money from Mrs. Baird and Ms. Whitford had not done anything except support Ms. Anderson.

Mr. MacLean was not certain about the source of the latter two comments, but was clear that the first two came from Mrs. Baird.

[17] Ms. Whitford says that this evidence amounts to "insane delusion" which was not explained away by Mr. Baird or Ms. D'Eon and should result in the rejection of the will drawn up and signed three months later.

[18] Ms. Whitford and Ms. Anderson emphatically deny the first, third and fourth of these allegations. They must concede the second because it was indeed their view at the time that their mother was incompetent. It would not have been delusional for Mrs. Baird to believe that, since it was true.

[19] An insane delusion is a belief that no rational person would entertain, (*Fawson*). Are these irrational beliefs? And did Mrs. Baird really entertain all of them? Did they influence the will she signed three months later? Does the change of executor suggest that Mrs. Baird was not of sound mind?

[20] It is reasonable to look at the will itself to see whether the alleged "insane delusions" had any meaningful impact. The principal change was that of the executor, i.e., the person who would administer the estate. If Mrs. Baird entertained irrational and wrong-headed views about two of her daughters, the change to her will was minimal. She did not disinherit them. She simply took them out of a position of control. This desire to remove them from control is consistent with her desire to move her residence in 2011 and extricate herself from what the respondents would describe as the overbearing control of these daughters.

[21] In *Skinner v. Farquharson* (1902), 32 S.C.R. 58, the Supreme Court upheld a will challenged on the basis that the testator was deluded that his wife and son were involved in an incestuous relationship. His initial will had provided generously for his wife and gave his son the residue. His second will, made while he was allegedly under this delusion, left the wife a smaller but still substantial share and divided the residue equally between his son and daughter. The Court found it significant that the terms of the will remained highly favourable to the wife and son. The Court was impressed that the testator had made generous provision for his family and took this as an indication that he was not labouring under "an insane delusion". So it is here.

[22] The evidence of alleged delusion in this case is uncertain and does not immediately precede the change of executor. Even so, the test for insane delusion links any change to a sound state of mind which would not have made that change. As in *Skinner*, it is hard to see that Mrs. Baird's minimal alteration of who would administer her estate can only be explained by an insane delusion.

[23] While it is true the application judge did not expressly address the evidence of delusion, she did not err in doing so. There is simply too tenuous a connection between Mr. MacLean's notes and the will drawn and witnessed by Mr. MacIsaac three months later in which the only substantive change is that of executor. The

judge was well aware of the law of insane delusion because she quoted it when she referred to *Fawson*. Moreover, the appellant addressed delusion in his pre and post hearing submissions to the court. One can only conclude that the judge did not consider Mr. MacLean's notes sufficient evidence of delusion in light of the provisions of the will and the evidence of Mr. MacIsaac three months later that Mrs. Baird was fully competent and knew and approved of the contents of her will when she signed it.

[24] I would dismiss the appeal.

Costs

[25] Ms. Whitford seeks costs in any event of the cause on a party-party basis. The Respondents seek costs against Ms. Whitford on a solicitor-client basis. The usual rule is that the loser should bear costs (*Wittenberg v. Wittenberg Estate*, 2015 NSCA 79, ¶ 90-110). Ms. Whitford has appealed and lost. It is appropriate that she should bear the costs of doing so. There is no basis for awarding solicitor-client costs. Nothing in Ms. Whitford's conduct would warrant such an exceptional award.

[26] I would award costs to the Respondents of $2,500.00, inclusive of disbursements.

Bryson, J.A.

Concurred in:

Fichaud, J.A.

Farrar, J.A.