C.A. No. 130657

NOVA SCOTIA COURT OF APPEAL

Cite as: Hollis v. Theriault, 1997 NSCA 26
Clarke, C.J.N.S.; Jones and Flinn, JJ.A.

BETWEEN:

AUBREY HOLLIS Appellant - and - GORDON THERIAULT and ALMA LAKE (Re: Estate of Richard Theriault) Respondents	)	Timothy C. Matthews for the Appellant David L. Parsons, Q.C. and Gerard MacKenize for the Respondents Appeal Heard: January 17, 1997 Judgment Delivered: January 17, 1997

THE COURT: Appeal allowed per oral reasons for judgment of Flinn, J.A.; Clarke, C.J.N.S. and Jones, J.A. concurring.

FLINN, J.A.:

The executor of the Last Will and Testament of the late Richard Theriault made application to a judge of the Supreme Court of Nova Scotia, in his capacity as a judge of the Court of Probate, for proof, in solemn form, of a copy of the Will of Mr. Theriault dated May 10th, 1978. The copy of the Will was in the possession of the testator at the time of his death. The original Will had been kept in the office of the testator's lawyer in Oshawa, Ontario; and was destroyed, accidentally, in a fire which occurred in the law office premises in 1983.

The trial judge refused to admit the Will to probate. He decided, that the Will had been revoked, on the basis of affidavit evidence from members of the testator's family, as to the testator's intention that the destruction of the Will, in the fire, revoked the Will.

The executor appeals that decision.

Section 19 of the **Wills Act**, R.S.N.S. 1989, c. 505 sets out the conditions which must be met before a Will, or any part thereof, is revoked:

> "19 No will or any part thereof is revoked otherwise than by
>
> (a) marriage as hereinbefore provided:
>
> (b) another will executed in manner by this Act required;
>
> (c) some writing declaring an intention to revoke the same and executed in the manner in which a will is by this Act required to be executed; or
>
> (d) the burning, tearing or otherwise destroying the same by the testator, or by some person in the testator's presence and by the testator's direction, with the intention of revoking the same."

Clause (a) has no application here. Clause (d) has no application

because the Will was not destroyed by the testator, or by some person in his presence and by his direction. The testator could have executed a new Will, as contemplated by Clause (b), or he could have signed a written declaration of intention to revoke his Will as contemplated by Clause (c). The testator did neither of those things.

If the testator had destroyed the Will himself, or if it had been destroyed by someone else in his presence, and at his direction, evidence would be admissible to determine the intention of the testator at the time of destruction. That is not the case here, and the affidavit evidence, from members of the testator's family, as to the testator's ratification of the destruction, is not relevant.

None of the conditions for revocation, set out in s. 19 of the **Wills Act**, have been met. The testator's Will, therefore, has not been revoked (see **Re: Krushel** (1991), 1 O.R. (3rd) 552 (Ont. Ct, Gen. Div.) and cases cited therein).

The appeal is allowed. On the basis of the uncontradicted affidavit evidence of Richard H. Donald, as to the execution of the original Will of the testator, the copy of the original Will shall be admitted to probate.

The appellant shall have his costs, both here and in the Court below, taxed on a solicitor and client basis and paid out of the estate. The respondents shall have their costs, both here and in the Court below, on a party and party basis and paid out of the estate, which costs are hereby fixed at $3,000 plus taxable disbursements.

Flinn, J.A.

Concurred in:

Clarke, C.J.N.S.

Jones, J.A.

C.A. No. 130657

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AUBREY HOLLIS

Appellant

- and -

GORDON THERIAULT and ALMA LAKE (Re: Estate of Richard Theriault)

Respondents

REASONS FOR JUDGMENT BY:

FLINN, J.A.
(Orally)