NOVA SCOTIA COURT OF APPEAL
Citation: *Smithers v. Mitchell Estate,* 2004 NSCA 149

Date: 20041210
Docket: CA 212254
Registry: Halifax

Between:

Nancy Smithers, Heather Leet, Richard Mitchell, Greg Mitchell, Jason Quigley, Brandon Quigley and Laurie Harrietha

Appellants

v.

Thomas E. Pekar, Executor of the Estate of Jane Mitchell, deceased

Respondent

- and -

Alfred Smithers and Keith B. MacRae, Executors of the Estate of John Donald Mitchell, deceased

Respondents

Judges:	Saunders, Chipman and Fichaud, JJ.A.
Appeal Heard:	December 1, 2004, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Chipman, J.A.; Saunders and Fichaud, JJ.A. concurring.
Counsel:	David G. Coles and Nicole Godbout, for the appellants Roberta Clarke, Q.C., for the respondent, Thomas E. Pekar respondents, respondents, Alfred Smithers and Keith B. MacRae not appearing

Reasons for judgment:

[1] This is an appeal from a decision of Edwards, J. in Chambers interpreting the provisions of a will. The testator, J.D. Mitchell, made a will on January 6th, 1994, handwritten on a preprinted form. Mr. Mitchell died in December, 1999, and the will was admitted to probate on February 1st, 2000.

[2] The provisions of the will of which interpretation was sought by the respondent, Thomas E. Pekar, Executor and sole residuary beneficiary of and under the will of Jane Mitchell, deceased, read:

> I devise and bequeath the Real and Personal Estate of which I may die possessed, in the manner following, that is to say: -
>
> 1. My following assets are to be sold and proceeds divided among my children, Jane, Nancy, Heather, Richard, Greg:-
>
> (a) Bank Accounts
>
> (b) Cash, stocks, bonds and the contents of my trading account and R.R.I.F. at Midland Walwyn, together with any and all the investments which I may have, including Bermuda assets [...]
>
> 2. Before division of Item 1, I give the following [cash bequests] ...
>
> 9. My personal effects, guns, books, paintings, pictures, watches, medals, furniture etc., are to be given in accordance with List C attached. (Underlining in original)

[3] List "C" attached to the will indicated several items of personal property to go to Jane Mitchell as well as first choice among another list of items to be allocated by choice.

[4] The testator's daughter, Jane Mitchell, died November 8th, 1999, shortly before the testator, leaving children surviving her. The issue was whether, having predeceased the testator, her estate was entitled to the share of the testator's assets so left to her by clauses 1 and 9 or whether they fell to be divided among the surviving children of J.D. Mitchell, or alternatively, to be disposed of by the residuary provision of the will which read:

> All of the residue of my estate not hereinbefore disposed of I devise and bequeath unto my grand children and is to be divided equally among them.

[5] Also referred to in the submissions before Edwards, J. was clause 11 of the will:

> 11. All of the inheritances which I leave to my children and grandchildren and Maureen Banyard belong solely and absolutely to them and is not to form part of matrimonial assets. [underlining in original]

[6] The appellants, Nancy Smithers, Heather Leet, Richard Mitchell and Greg Mitchell are the surviving children of the testator. The appellants, Jason Quigley, Brandon Quigley and Laurie Harrietha are children of Jane Mitchell and grandchildren of the testator. The respondents Alfred Smithers and Keith MacRae, Executors of and under the will of J.D. Mitchell did not appear on the argument before us.

[7] Edwards, J., after reviewing the terms of the will and the authorities, addressed the submissions before him and concluded that the gifts to Jane Mitchell did not lapse on her death, but by operation of s. 31 of the **Wills Act**, R.S.N.S. 1989, c. 505, passed to her estate as if her death had happened immediately after that of the testator.

[8] Section 31 of the **Wills Act** provides:

> 31 Where any person, being a child or other issue of the testator to whom any real or personal property is devised or bequeathed for any estate or interest not determinable at or before the death of such person, dies in the lifetime of the testator leaving issue and any such issue of such person are living at the time of the death of the testator, such devise or bequest does not lapse, but takes effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention appears by the will.

[9] Edwards, J. was of the opinion that no contrary intention appeared by the will of the testator and that as Jane Mitchell had left issue living at the time of the testator's death, the devises or bequests did not lapse, but took this effect as if Jane Mitchell's death occurred immediately after that of the testator. The result was that the gifts to Jane Mitchell in clauses 1 and 9 of the will fell to be disposed of according to the terms of her will of which the respondent, Dr. Pekar, was executor and sole residuary beneficiary.

[10] The appellants appeal to this Court contending that Edwards, J. erred in concluding that the will did not show a contrary intention as contemplated by s. 31 of the **Act**, that he erred by failing to find that the relevant provisions of the will were ambiguous so as to give rise to consideration of evidence of the surrounding circumstances involved in the creation of the will, and that he erred in failing to find that the application of s. 31 of the **Act** had the effect of benefiting the issue of the late Jane Mitchell.

Standard of Review:

[11] Here we are called upon to review the conclusions of the Chambers judge as to the proper interpretation of the will. There is no dispute about the facts here. Findings to be reviewed can be characterized as questions of law and inferences drawn from the facts.

[12] In **Campbell-MacIsaac v. Deveau** (2004), 222 N.S.R. (2d) 315, Saunders, J.A. of this Court said at para. 31:

> [31] The issues raised in this appeal entail a review of the trial judge's findings and conclusions. The standard of review will depend on how those findings and conclusions ought to be characterized: whether as a question of fact, or an inference drawn from facts, or a question of law, or mixed law and fact, or an assessment of damages.

[13] And at para. 38:

> [38] The standard of review applicable to inferences drawn from fact is no less and no different than the standard applied to the trial judge's findings of fact. Again, such inferences are immutable unless shown to be the result of palpable and overriding error. If there is no such error in establishing the facts upon which the trial judge relies to draw an inference, then it is only when palpable and overriding error can be shown in the inference drawing process itself that an appellate court is entitled to intervene. This was made clear by the Court in **Housen**, supra, at ¶ 21, et seq: ...

[14] And at para. 40:

> [40] On questions of law the trial judge must be right. The standard of review is one of correctness. ...

Issue 1- Section 31 of the Act - Contrary Intention:

[15] Edwards, J. first referred to the general rule at common law that where a beneficiary or legatee predeceases the testator, the gift will lapse and fall into the residue of the estate (or, if the gift is of residue, go on an intestacy) in the absence of a contrary intention expressed in the will. In the case of a gift falling within the provisions of s. 31 of the **Act**, it is unnecessary to consider whether the testator expressed a contrary intention to save the gift. Rather, as s. 31 itself is made subject to a provision as to contrary intention, the sole question before Edwards, J. was whether the testator expressed an intention that if Jane Mitchell should predecease him leaving issue alive at his death, the gift should lapse or pass in some other fashion.

[16] Edwards, J. referred to case law and to the text, Feeney's *Canadian Law of Wills*. He referred to passages in Feeney supporting the proposition that a class gift expresses a contrary intention sufficient to displace the general rule that a gift lapses where the beneficiary or legatee predeceases the testator, with the result that the deceased person's share will go to increase the shares of the other members of the class who survive the testator. He also referred to passages in Feeney supporting the proposition that such a class gift also amounts to an expression of contrary intention sufficient to displace the effect of a provision such as s. 31 of the **Act**, and further that, generally speaking, a gift to a group of persons whose number is not mentioned or whose members are not named is to be regarded as a class gift, while a gift to a group whose number is given or whose members are named is to be regarded as a gift *personae designatae*. He concluded:

> [25] ***Analysis:*** I am satisfied that J.D. intended to make a separate bequest to each individual child. He intended to make the gift ***personae designatae*** rather than a class gift. I am sure that this interpretation is in accord with a fair and literal meaning of the actual language of the will. J.D.'s Will does identify the class (i.e. "children") but he also identifies the members of that class by naming each of his five children. By doing so, he effectively stated that he was leaving his assets to "my child Jane, my child Nancy, my child Heather, my child Richard, and my child Greg. Obviously, the latter method would have been a more cumbersome and unnatural method of conveying the same thought. By constructing the clause in the manner he did, J.D. was simply leaving no doubt as to which Jane, Nancy, Heather, Richard or Greg he was referring to.

> [26] A bequest to the named children is in contrast to the gift in the residue clause to "my grandchildren." The latter is a typical class gift as the grandchildren are not named. Only the survivors of that class, or those added (if any) between the making of the Will and J.D.'s death, will inherit.
> [27] I am unable to discern a "contrary intention" in J.D.'s Will. Counsel have urged me to find that Clause 11 does describe a contrary intention. In that clause, J.D. underlined the words "***solely*** and ***absolutely***". As I noted earlier, Clause 11 reads as follows: "11. All of the inheritances which I leave to my children and grandchildren and Maureen Banyard belong solely and absolutely to them and is not to form part of matrimonial assets."
> [28] The underlining of the two words ***solely*** and ***absolutely*** and the direction that such inheritances "is not to form part of matrimonial assets", it is argued, shows that he does not want his property passing outside his bloodline (except to his companion Maureen Banyard). I would have to venture into "conjecture or stretched inference" to accept such an argument. It was common ground among counsel that J.D. was familiar with divorce and its consequences regarding matrimonial property. I heard evidence that at least two of his children had been divorced. I am satisfied that Clause 11 was J.D.'s attempt to avoid such consequences. I do not believe that J.D. considered the possibility of a child predeceasing him when he wrote Clause 11. Indeed, J.D. did not have such an event in mind when he wrote any part of the Will. Jane's death was a shock. Six weeks later, J.D. was dead. In those circumstances, I am not surprised that J.D. did not take immediate steps to redraft his Will.
> [29] If Jane had survived J.D., she would have inherited her share of his estate "solely and absolutely". Accordingly, she could have bequeathed her inheritance to her husband, the Applicant, and no one could have taken issue with that. Because of the operation of Section 31, that is exactly the situation which pertains today. Jane's estate is entitled to her share just as if she had died "immediately after" her father.

[17] I am satisfied that Edwards, J. applied the correct law.

[18] The principles governing interpretation of wills have been stated and restated many times.

[19] The first duty of the court is to ascertain the intention of the testator from the language used in the will. Regard must be had, not only to the whole of any clause in question, but to the will as a whole, which forms the context of the clause. Effect must be given, if at all possible, to all parts of the will. A fair and literal meaning should be given to the actual language of the will, the ordinary and grammatical sense of the words to be assigned unless the context otherwise dictates. The context may well include "surrounding circumstances". Only after the language employed by the testator has been approached in this fashion need resort be had to case law and legal rules to see if any modification is required. These principles were referred to with references to relevant authorities by Davison, J. in **Carter Estate Re:** (1991), 109 N.S.R. (2d) 394 (T.D.). The role of "surrounding circumstances" in this exercise was discussed by this Court in **Re: Murray Estate** (2001), 191 N.S.R. (2d) 63, at paras. 20 - 25.

[20] Edwards, J. formed his opinion as to whether or not the testator intended to make a class gift or a gift to each of his children on a review of the language chosen by the testator (para. 25). He had regard, not only to the provisions in question, but to the will as a whole, giving consideration to the residue clause as well as clause 11, which was urged upon him as evidencing a contrary intention sufficient to displace the effect of s. 31 of the **Act**. He referred to evidence relating to surrounding circumstances as an aid in interpreting the will (para. 28).

[21] I do not agree with the appellants' submission that the testator's use of the word "among" before the words "my children" shows an intention to make a class gift in the face of his subsequent naming of each of his children. There are no words here denoting a requirement of survivorship. All of the cases relied on by the appellants are clearly distinguishable. Edwards, J. has, in my opinion, drawn the correct inference. Clearly, J.D. Mitchell had in mind his children as five individuals. For example, there are no words indicating that the gifts go only to survivors. See **Re: Snyder** (1960), O.R. 107 (Ont. H. C. J.).

[22] The appellants relied on the residuary clause of the will in support of the argument that the testator intended a class gift. The mere fact that there is a residuary clause is not sufficient to indicate a contrary intention within the meaning of s. 31 of the **Act**. The residuary clause provides for what happens in the event of

having to deal with any part of the testator's estate not otherwise disposed of. It does not shed any light on the circumstances giving rise to the lapse of any gift. Moreover, the testator's use of the words "my grand children" without naming them is in contrast to the language of the clause in question, as the Chambers judge pointed out in para. 26 of his decision.

[23] I would, therefore, also reject the appellants' submission that Edwards, J. erred in failing to find that the will evidenced a contrary intention in that J.D. Mitchell intended largely to benefit only blood relatives in his will. No such intention appears, as Edwards, J. has demonstrated. Moreover, such an intention is not necessarily helpful respecting the gift to Jane Mitchell as there is no evidence that in 1994 J.D. Mitchell was aware that she had executed a will in 1991 leaving virtually all of her property to her husband rather than to blood relatives of J.D. Mitchell.

[24] As Feeney, supra states at p. 13.10:

> It is a relatively easy matter of drafting to expressly provide for a contrary intent. Thus the courts ought not to find the contrary intent by conjecture or stretched inference, particularly in cases where the wills are prepared by trained persons and there is not a clear expression of contrary intent. What constitutes a contrary intent is, however, inevitably a question of inference.
>
> (Emphasis added)

[25] I am satisfied that in reaching his conclusions, the inferences drawn by Edwards, J. in the paragraphs which I have quoted were not shown to be erroneous. There was no palpable and overriding error, or indeed any error, in the inference drawing process.

[26] I would, therefore, reject the appellants submissions on the first issue.

Issue 2 - Ambiguity Giving Rise to Consideration of Evidence of Surrounding Circumstances.

[27] The appellants make no case that the relevant provisions of the will are ambiguous. Indeed, they submit that the will is, on its face, clear but say in the alternative that if the court is of the opinion that it is not, then certain direct

evidence of the testator's intention to the effect that his estate was to remain with his blood relatives and Maureen Banyard should be entertained. I see nothing in the provisions at issue that is ambiguous and would not give consideration to direct declarations alleged to have been made by J.D. Mitchell concerning his testamentary intention. As I have already pointed out, there is no evidence that he had knowledge that Jane Mitchell had or would, by her will, leave the bulk of her estate to her husband rather than to her children, J.D. Mitchell's grandchildren.

[28] Nor, in my view, is it necessary to resort to an examination of the "surrounding circumstances". Evidence of "surrounding circumstances" is to be distinguished from direct evidence of testamentary intent. In **Haidl v. Sacher** (1979), 106 D.L.R. (3d) 360, Bayda, J.A. (as he then was) of the Saskatchewan Court of Appeal, said at p. 363:

> ... "surrounding circumstances" as used in these reasons refers only to indirect extrinsic evidence. It has no reference whatever to direct extrinsic evidence. It has no reference whatever to direct extrinsic evidence of intent, the admission of which is governed by a different set of conditions. The former consists of such circumstances as the character and occupation of the testator; the amount, extent and condition of his property; the number, identity, and general relationship to the testator of the immediate family and other relatives; the persons who comprised his circle of friends, and any other natural objects of his bounty

[29] I have already referred to the use of "surrounding circumstances" in the interpretation of wills. I agree with Edwards, J. in his view of their value here when he said:

> [30] ***Conclusion:*** J.D.'s intention is apparent from the Will itself. There is no need to resort to the rules of construction and assess the words of the Will in light of the surrounding circumstances. I would note that, even if I had done so, the result would be the same. Jane's estate is entitled to Jane's share under J.D.'s Will.

[30] Referring, nevertheless, to the "surrounding circumstances" on which the appellants rely, the evidence was that J.D. Mitchell was a quiet, reflective, frugal and proud man of strong opinions and fiercely loyal to his family - characteristics not uncommon among successful people. The appellants relied, both at the hearing

and before us, on evidence that the testator was neither close to, nor particularly liked, Dr. Thomas Pekar, Jane Mitchell's husband. The evidence was somewhat conflicting, but many of the circumstances relied on by the appellants were not shown to relate to the state of mind of J.D. Mitchell when he made his will on January 6th, 1994. Such evidence as there is is insufficient to displace the intention of the testator as appears from the will itself. Further, as I have pointed out, there is no evidence that he had knowledge, at the time of making the will, respecting Jane Mitchell's will. Had he not liked Dr. Pekar or wished to ensure that Dr. Pekar did not participate in his testamentary bounty he could easily, in the nearly eight years that Jane Mitchell was married to him, have taken steps to attain that end.

[31] I would dismiss this ground of appeal.

Issue 3 - Interpretation of s. 31 of the Act:

[32] The provisions of s. 31 of the **Act** are very clear. They do not say that in the event of the prior death of a child leaving issue that the gift devolves to such issue. Rather, they provide for the fictional survival of the deceased legatee until immediately after the death of the testator. The result, in this case, of the operation of s. 31 is that the gifts pass, not to Jane Mitchell's issue, but to her estate. This is so even though she left issue alive at the testator's death - the very requirement for the provision to come into play.

[33] An interesting commentary on the effect of this section is noted by David Howlett in his text, *Estate Matters in Atlantic Canada*, (1999 Carswell) where he compares, at pp. 50 - 51, s. 31 of the **Act** with similar provisions in the other Atlantic provinces. While the anti-lapse provisions of the New Brunswick and Newfoundland legislation extend to cases of a deceased sibling of the testator, those of Nova Scotia and Prince Edward Island preserve a gift only to a child or other issue of the testator. The author refers to the Prince Edward Island provision as the "purest", because the gift to the deceased child goes only to the issue per stirpes of the deceased testator. The anti-lapse provision in s. 31 of the **Act** is what the author describes as "least pure." The gift takes effect merely as if the death of the beneficiary occurred immediately after the testator but the intestacy rules are not invoked. Thus for example if a deceased beneficiary had a will leaving everything to a charity:

> The gift in the original testator's Will would be preserved (because the beneficiary died leaving issue) but the charity – not the issue – would receive the gift!

[34] At p. 13.10, Feeney refers to anti-lapse legislation in Ontario, England and Saskatchewan.

[35] I am of the opinion that Edwards, J. applied the correct interpretation of s. 31 of the **Act** and would dismiss this ground of appeal.

[36] I would, therefore, dismiss the appeal with costs in the amount of $1000.00 plus disbursements.

Chipman, J.A.

Concurred in:

Saunders, J.A.

Fichaud, J.A.