NOVA SCOTIA COURT OF APPEAL
Citation: Robinson v. Morrell Estate, 2009 NSCA 127

Date: 20091210
Docket: CA 305792
Registry: Halifax

Between:

Anne Robinson

Appellant

v.

Susan Elaine Ostrom, Executrix of the Estate of Ezra Morrell
Susan Elaine Ostrom, Walter Ostrom and Ingrid Ostrom

Respondents

Revised judgment: The text of the original judgment has been corrected according to the erratum dated March 2, 2010. The text of the erratum is appended to this document.

Judges: Saunders, Oland, Fichaud, JJ.A.

Appeal Heard: September 9, 2009, in Halifax, Nova Scotia

Final Submissions Received: November 16, 2009

Held: Appeal is dismissed with costs per reasons for judgment of Oland, J.A.; Saunders and Fichaud, JJ.A. concurring.

Counsel: Timothy Matthews, Q.C., for the appellant
David Grant, for the respondents

Reasons for judgment:

[1] In his will, the late Ezra Morrell left his wife, Ingrid Ostrom, the residue of his estate. A few years later the couple signed a separation agreement. They subsequently divorced. After Mr. Morrell's passing, the executrix of his estate applied for an interpretation of the will and separation agreement. In a decision released on October 7, 2008 and reported in 2008 NSSC 295, Justice Arthur W.D. Pickup held that the separation agreement did not revoke the will and, accordingly, Ms. Ostrom is entitled to the gift under Mr. Morrell's will.

[2] Mr. Morrell's mother, Anne Robinson, appeals the order dated December 9, 2008.

Background

[3] The material facts are not in dispute. Ezra Morrell and Ingrid Ostrom were married in 2001. In his Last Will and Testament dated October 6, 2002, Mr. Morrell appointed Ms. Ostrom's mother, Susan Ostrom, the sole Executrix and Trustee. After directing the payment of his debts, funeral and testamentary expenses, he left the residue to Ingrid Ostrom. The will also provided that should his wife predecease him, the residue was left to her parents, Walter Ostrom and Susan Ostrom, in equal shares.

[4] In September 2005, Mr. Morrell and Ms. Ostrom separated. On July 31, 2006, they signed a separation agreement. Ms. Ostrom was represented by legal counsel; Mr. Morrell waived independent legal advice. Among other things, the separation agreement addressed spousal support, their bank accounts, automobiles, registered retirement savings plans, pensions, and debts. It provided for the conveyance by Ms. Ostrom of her interest in the matrimonial home to Mr. Morrell for $40,000, and for the transfer of certain personal property by her to him for $2,500.

[5] The separation agreement also referred to a joint life insurance policy on their respective lives from The Canada Life Assurance Company in the face amount of $250,000 (the "Canada Life Policy"). The Canada Life Policy provided that the death benefit would be paid on the death of the first to die, and be payable to the surviving life insured. The separation agreement read in part:

> 14(b) Except as provided in this Agreement to the contrary, the Wife consents to the Husband designating whomsoever he wishes to be beneficiary of any life insurance policies on his life even though she may now be designated (by operation of law or previous action of the Husband) as an irrevocable beneficiary of such policies. In the absence of a new designation, proceeds of any insurance on his life now payable to her will on his death be payable to his estate, unless otherwise specifically provided herein. [emphasis added]

[6] The following provision of the separation agreement is critical to this appeal:

> Waiver of Estate Claims
>
> 20 The parties hereby forever renounce and waive any claim in the estate of the other and any right to share in the estate of the other, whether such claim or right arises under statute or otherwise, including the right to administer the estate of the other in the event of the death of that party.

[7] The document also read:

> Full and Final Settlement
>
> 25 The parties acknowledge that the within Agreement is made with full and final satisfaction of their respective rights and obligations of a division of matrimonial and non-matrimonial assets and any other remedy pursuant to the **Matrimonial Property Act** of Nova Scotia and for relief under the **Divorce Act** of Canada, the **Family Maintenance Act** of Nova Scotia, and the **Pension Benefits Act** of Nova Scotia, **Pension Benefits Division Act** of Canada or any similar legislation in any jurisdiction and any other remedies arising out of their marriage to each other.

[8] On June 19, 2007, Ezra Morrell and Ingrid Ostrom divorced. Their separation agreement was incorporated by reference into the corollary relief judgment.

[9] On January 21, 2008 Mr. Morrell died in an automobile accident. He was 31 years of age. He had neither revoked nor changed his will, nor had he revoked or changed the beneficiary designation in the Canada Life Policy. At the date of Mr. Morrell's death, divorce did not revoke the bequest of a beneficial interest in property to a testator's former spouse. Since then, s. 19A of the *Wills Act*, R.S.N.S. 1989, c. 505, as amended, has been enacted.

[10] Susan Ostrom, the executrix named in Mr. Morrell's will, obtained a grant of probate on February 4, 2008. That same month, Ingrid Ostrom signed a renunciation of all her rights under the Canada Life Policy. The death benefit was paid to the estate of the late Mr. Morrell. According to the inventory of estate assets filed in the Probate Court, the total value of that estate, including the $250,000 life insurance death benefit, is less than $275,000.

[11] The executrix applied for the interpretation of the will and separation agreement to determine whether clause 20 of the separation agreement dissentitled Ingrid Ostrom to the bequest of the residue of Ezra Morrell's estate and, if so, whether Susan Ostrom and Walter Ostrom are the residual beneficiaries of the estate or an intestacy resulted.

The Chambers Judge's Decision

[12] The chambers judge referred to ss. 22 and 23 of the *Wills Act*:

> Effect of conveyance or other act
>
> 22 No conveyance or other act made or done subsequently to the execution of a will of any real or personal property therein comprised, except an act by which such will is revoked as in this Act mentioned, prevents the operation of the will with respect to such estate or interest in such real or personal property as the testator has power to dispose of by will at the time of the testator's death.
>
> Time of which will speaks
>
> 23 Every will shall be construed, with reference to the real and personal property comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will.

In determining whether s. 20 of the separation agreement was effective to release and waive any right to inherit under the will, he principally relied on two decisions, namely, *Billing v. Rideout* (1993), 109 Nfld. & P.E.I.R. 271; 1993 CarswellNfld 71 (Nfld. S.C.T.D.) and *Eccleston Estate v. Eccleston* (1999), 221 N.B.R. (2d) 295; 1999 CarswellNB 534 (N.B.Q.B.). The latter considered, among other cases,

Billing, *supra* and *Pearson v. Pearson* (1980), 3 Man. R. (2d) 404, 7 E.T.R. 12 (Man. C.A.).

[13] The chambers judge held:

> [15] . . . I am satisfied that while Ms. Ostrom may have waived any claim against the estate of her late husband and the right to share in it, it is not clear from the wording of s. 20 that she waived her right to claim under the will if her husband chose not to alter his will so as to eliminate her as a beneficiary. There is no reference to a will in the separation agreement.
>
> [16] Section 20 of the separation agreement does not, in my view, affect the right of Ms. Ostrom to be the sole beneficiary under the will.
>
> . . .
>
> [22] Counsel for Ms. Robinson . . . agreed that the will was valid. In the absence of any challenge to the will, there would need to be compelling reasons to override the testator's intentions. The language of the separation agreement, which did not purport to revoke the party's wills, and did not use the word "will" in the section dealing with estate claims, does not permit this conclusion. It would have been possible for the separation agreement to include a clear waiver of the right of the parties to inherit under each other's wills, if this was their intention. I am not satisfied that any intention can be found in the language of the separation agreement.
>
> [23] As the majority said in *Pearson, supra*, "[h]ad the deceased made a new will after the settlement with his wife, conferring benefits upon his wife, no one would question that she would be entitled to receive the benefits conferred by that new will. The failure to revoke the previous will amounts to the same thing. It is a constant affirmation of his choice to confer a benefit ...." .
>
> [24] The above cases . . . make it clear that a testator's intentions, as expressed in a valid will, should not be lightly interfered with. A spouse's right to claim against the estate or to share in the estate appears to be distinct from the testator's right to confer a benefit voluntarily. The separation agreement did not revoke the will, nor does it appear to have affected either party's ability to dispose of their estate as they saw fit. Therefore, the gift to Ms. Ostrom will stand.

Having determined that the separation agreement did not revoke the will nor affect either party's ability to dispose of their estate as they saw fit, the judge did not

decide the second issue before him which pertained to the distribution of Mr. Morrell's estate if Ingrid Ostrom was not entitled to the gift of the residue.

[14] Anne Robinson, the mother of the late Mr. Morrell, appeals. She would have an interest in his estate as an heir-at-law if none of Ingrid Ostrom, Walter Ostrom and Susan Ostrom are entitled to take under the will and an intestacy should result.

Issues

[15] The grounds of appeal as set out in the notice of appeal and the appellant's factum read:

> The learned Trial Judge erred in law:
>
> 1. By failing to answer the question . . . concerning the interpretation of the Separation Agreement, and failing to give any meaning to the express words used:
>
> > 20. The parties hereby forever renounce and waive any claim in the estate of the other and any right to share in the estate of the other, whether such claim or right arises under statute or otherwise, including the right to administer the estate of the other in the event of the death of that party.
>
> 2. By failing to consider whether Ingrid Ostrom had immediately renounced her right to share in the deceased's estate under the Will by signing the Separation Agreement or whether she had contractually bound herself to renounce any inheritance after the death of Ezra Morrell.
>
> 3. By purporting to answer a different question – namely, whether the Will was revoked by the Separation Agreement;
>
> 4. By failing to answer the question [(II) above] concerning the interpretation of the Will in these specific circumstances.

[16] On questioning by the court at the very outset of the hearing of the appeal, counsel for the appellant withdrew his arguments based on immediate renunciation by Ms. Ostrom when she signed the separation agreement. He candidly acknowledged that this ground could not succeed. Later in my decision, I will address the jurisprudence in this regard.

[17] The appellant then collapsed the remaining grounds of appeal into a single ground: whether Ingrid Ostrom had contractually bound herself to renounce any inheritance after the death of Ezra Morrell. If this court should find that she had, then the appellant asked this court to decide whether Walter Ostrom and Susan Ostrom would take pursuant to the will or the estate would be divided as an intestacy.

[18] No legal authorities were provided by either party either in support of, or contrary to, the proposition that before a testator's death, a person can contractually obligate himself or herself to renounce a testamentary gift. The court asked for post-hearing submissions, which both parties provided.

Standard of Review

[19] Both issues raised on this appeal pertain to the interpretation of legal documents, namely the separation agreement and the will. It is undisputed that these are questions of law for which the standard of review is correctness.

Analysis

[20] The issue before the chambers judge concerned the effect of s. 20 of the separation agreement, if any, on Ingrid Ostrom's entitlement pursuant to Mr. Morrell's will. For convenience, I reproduce the relevant portion below:

> 20. The parties hereby forever renounce and waive any claim in the estate of the other and any right to share in the estate of the other, whether such claim or right arises under statue or otherwise . . .

[21] In his decision, the judge relied on *Billing, supra* and on *Eccleston, supra*. With respect, his reliance on these decisions to determine that the gift to Ingrid Ostrom in Mr. Morrell's will should stand was misplaced. Both cases are distinguishable.

[22] In *Billing*, *supra*, the separation agreement provided that the husband and wife released each other from all claims that he or she may have had or afterwards may acquire "in the estate of the other <u>upon the other dying intestate</u> . . .". The clause in question was confined to a release of rights of inheritance only on intestacy. It did not address the right of inheritance under a will.

[23] In *Eccleston, supra* the domestic contract the parties executed prior to their divorce provided that each released and discharged "all rights that he or she has or may hereafter acquire under the laws of any jurisdiction in the estate of the other." That language expressly limited the releases to any statutory rights. It is not broad enough to include rights that might be acquired by will or contract. Like *Billing, supra*, *Eccleston, supra* did not deal with testamentary instruments. As a result, these cases do not support the determination the judge reached.

[24] As indicated earlier, the appellant has resiled from any argument that Ingrid Ostrom's execution of the separation agreement, and s. 20 of that document, amounted to an immediate renunciation or one which springs into effect on the death of the testator or otherwise. Rather, she argues that by signing the separation agreement, Ms. Ostrom had covenanted for valuable consideration to renounce any inheritance after the death of Mr. Morrell.

[25] That a person may renounce or disclaim a gift is well established. Abbott, C.J., in *Townson v. Tickell*, (1819), 3 B. & Ald. 31, 106 E.R. 575 stated at pp. 576-577:

> The law certainly is not so absurd as to force a man to take an estate against his will. Prima facie, every estate, whether given by will or otherwise, is supposed to be beneficial to the party to whom it is given. Of that, however, he is the best judge, and if it turn[s] out that the party to whom the gift is made does not consider it beneficial, the law will certainly, by some mode or other, allow him to renounce or refuse the gift. ... a man "cannot have an estate put into him in spite of his teeth". [quoting Ventris, J., in *Thomson v. Leach*, 2 Ventris 198.]

[26] However, until the death of the testator, a person has nothing more than an expectancy and one cannot disclaim or renounce an interest in something to which he or she has no legal interest. In response to the court's questions and the jurisprudence, the appellant readily and correctly withdrew her argument that, when she signed the separation agreement, Ms. Ostrom had immediately renounced any interest in the testamentary gift.

[27] See, for example, *Wolfson Estate v. Wolfson* (2005), 22 E.T.R. (3d) 255 (Ont. S.C.J.). There a daughter made a voluntary disclaimer prior to her mother's death. In refusing her application to set aside the disclaimer, McMahon J. stated at p. 261:

> The Applicant cannot disclaim or renounce an interest in something she has no legal interest in. The Applicant's interest under the Deceased's will did not crystallize until the date of the Deceased's death … Up until that date, the Applicant had nothing more than a *spes successionis* or an expectancy.

[28] A strong statement of this principle is found in *Re Smith*, [2001] 3 All E.R. 552 (Ch.). Years before his mother's passing, a son signed a disclaimer of all benefit in his favour arising upon her death. In determining whether the disclaimer in advance of the testator's death was effective as a disclaimer, the deputy judge of the High Court stated:

> [9] … In the normal disclaimer case the disclaimer operates in relation to some actual transaction that has taken place or which a person has taken steps to try to bring about. In the context of wills, the will has been drawn, and the testator has died. In the context of an inter vivos gift, the donor has taken steps in order to divest himself of the property in favour of the donee. At that point there is a real interest which the donee can accept or disclaim, and on which an avoidance can operate.
>
> [10] Now contrast a case such as the present. At the date of the disclaimer the intended donee has no interest whatsoever. He or she has a mere expectancy. Any existing wills might or might not be revoked or varied; any existing intestacy might or might not persist until the death of the deceased. There are no proprietary rights, or other rights to control the destination of the estate in any way. What, then, is there to be disclaimed, or (as a matter of analysis) avoided? In my view the answer is nothing. A disclaimer bites on something that can be disclaimed; on a transaction which can in some way be said to be an attempt to make a gift. The testamentary intentions of a living person do not fall within that category. Until the death there is simply nothing that can be disclaimed and any attempt to disclaim is invalid and ineffective.

[29] An income tax case, *Biderman v. Canada*, [2000] F.C.J. No. 194, 2000 D.T.C. 6149 (C.A.) is also illustrative. There a husband signed two disclaimers of any inheritance under his wife's will, one prior to and the other almost three years after his wife's death. Letourneau, J.A., writing for the court, determined that the first disclaimer was legally ineffective:

> 12 In the present instance, the first and informal disclaimer made in 1991 by Mr. Biderman is, I believe, legally ineffective and of no avail to him. Not unlike the civil law in Quebec, the common law requires that a disclaimer in order to be effective be made after the death of the legator, that is to say when the legatee is

> entitled to inherit. While the *Civil Code of Quebec* has a specific provision expressly prohibiting a disclaimer with respect to a succession not yet opened, the nature of a disclaimer at common law and its retroactive effect to the date of death of the deceased lead to the same result. In *Bence v. Gilpin*, cited in *Re McFaden* and in *McLean & Kerr v. Hrab*, Kelly C.B. wrote:
>
> > A disclaimer to be worth anything must be an act whereby one entitled to an estate immediately and before dealing with it renounces it whereby in effect he says: "I will not be the owner of this property".

[30] In the case under appeal then, when she signed the separation agreement, Ms. Ostrom could not and did not immediately renounce any interest in the estate of the late Mr. Morrell pursuant to his will. At that time, there was nothing more than an expectancy. In the words of *Re Smith*, *supra*, there was nothing on which a renunciation could "bite".

[31] Now that Mr. Morrell has died, Ms. Ostrom could renounce or refuse her interest as residuary beneficiary under his will. However, she does not wish to do so. On the contrary – she seeks to take the benefits for herself pursuant to that will.

[32] The appellant argues that she cannot do so, and that Ms. Ostrom is contractually bound to renounce. She submits in her factum:

> 33. Clause 20 binds both parties to renounce benefits from the other's estate. It is a contract supported by consideration and it does not violate public policy. Although unusual, it is not unprecedented for a beneficiary to renounce some or all benefits conferred upon him or her by will. Particularly for tax planning purposes, disclaimers of interest are effective and well recognized. The legal effect of the refusal to accept the gift is not to revoke the will, but rather to cause the gift to fail. Ingrid Ostrom has covenanted in clause 20 to waive and renounce her right to share in Ezra Morrell's estate.

[33] In support of her argument that, before a testator's death, a person can obligate herself to renounce a gift under the will, the appellant relies on *Re Smith*, *supra*, *Biderman*, *supra*, and *Wolfson Estate*, *supra*. She also refers to several American cases which I will address later in my decision. In essence, the appellant's submission is that there is case law in support of her proposition and that the separation agreement was for consideration.

[34] The case law upon which the appellant relies is a passage from *Re Smith, supra* which immediately follows that quoted in [28] above, which established that a disclaimer of a future interest has no legal effect. The extract upon which the appellant bases her submissions reads:

> [11] There is a principle in relation to disclaimers that they can only be effective if they are 'made with knowledge of the interest alleged to be disclaimed, and with an intention to disclaim it' (see *Naas v Westminster Bank Ltd* [1940] 1 All ER 485 at 504, [1940] AC 366 at 396, per Lord Russell of Killowen). While I do not rely on the first half of that statement as my principal reason for saying that disclaimers in advance of the death are not operative, it might be said to be a supporting factor. For firmer support I prefer the analogy of gifts of expectancies or future property. They are invalid in law, and can at most take effect as a contract to convey the property when it falls in, which equity will enforce if consideration is provided (see *Re Ellenborough, Towry Law v Burne* [1903] 1 Ch 697). . . . Since no consideration was provided by Frank (or by anyone else), there is no question of his being able to treat the disclaimer as an agreement and enforce it accordingly. In any event, it is hard to treat it as an agreement when it is on its face a unilateral document without any inter partes or bilateral element.
>
> [Emphasis added]

[35] Since the disclaimer in *Re Smith, supra* was voluntary, the judge did not need to decide whether one given for consideration had any binding effect and did not do so. In any event, the wording he used is hardly definitive, but rather was limited or confined by the qualifier “can at most take effect”. The passage amounts only to an indication that, in deciding a different fact situation, the judge mused about the possibility of a pre-death contractual obligation to disclaim a gift under a will. *Re Smith, supra* cannot be relied upon as establishing that principle.

[36] The situation is the same for the authority cited within that decision for that premise, namely *Re Ellenborough, supra*. There Miss Towry Law had voluntarily assigned to trustees all her future interest in the estate of her brother, Lord Ellenborough. On his death, intestate, she was the heiress of his estate. She sought to retain it and applied to court for a declaration that she was not bound by her assignment. At p. 700, Buckley, J. stated:

> The deed was purely voluntary. The question is whether a volunteer can enforce a contract made by deed to dispose of an expectancy. It cannot be and is not disputed that if the deed had been for value the trustees could have enforced it. If value be given, it is immaterial what is the form of assurance by which the

> disposition is made, or whether the subject of the disposition is capable of being thereby disposed of or not. An assignment for value binds the conscience of the assignor. A Court of Equity as against him will compel him to do that which ex hypothesi he has not yet effectually done. Future property, possibilities, and expectancies are all assignable in equity for value: *Tailby v. Official Receiver*. But when the assurance is not for value, a Court of Equity will not assist a volunteer.

Again, as in *Re Smith, supra* this discussion of a disclaimer or renunciation with latent effect enforceable in equity was not applicable on the facts of the case which dealt with a voluntary assignment, and so was not followed. The appellant herself describes this passage as "comments" made by the judge. In addition, *Re Ellenborough, supra* dealt not with a disclaimer or renunciation, but with an assignment. Further, the case it referred to, *Tailby v. Official Receiver*, (1888), 13 App. Cas. 523 (House of Lords) is a commercial law case on the assignment of book debts, and factually bears no similarity to the case under appeal.

[37] As shown earlier in this decision, *Biderman, supra* and *Wolfson Estate, supra* stand for the principle that a voluntary disclaimer of a future interest has no legal effect. In the result, the appellant has not provided any Canadian and English authority in which a renunciation or disclaimer executed before the death of the testator, whether without consideration or for consideration, has been found to be legally effective.

[38] Although not raised by either party, there is a Canadian case where a person was found to be contractually required to refuse a testamentary gift. However, the context was very different from that in this appeal. The case is *Assh v. Canada (Attorney General)*, 2006 FCA 358, 274 D.L.R. (4th) 633. A lawyer with Veterans Affairs Canada was left a bequest of $5,000 by a pensioner whom he had assisted. There was no question of any impropriety on his part and he reported it immediately. Pursuant to the *Conflict of Interest Code* which was incorporated into his employment contract, he was instructed to decline. The majority of the Federal Court of Appeal rejected *Assh*'s argument that this gift fell within an exception. At ¶ 88, they noted that their decision was contrary to the testamentary intentions of the testator and the principles of testamentary freedom.

[39] The facts in *Assh*, *supra* involve public employees, employment law, conflicts of interest, and a contractual obligation to refuse gifts generally, not just those under a will or inheritances due to intestacy. That context is far removed

from the issue on which this appeal turns which pertains to refusal or renunciation of a benefit under a will in the future.

[40] In support of her position, the appellant refers to case law from the United States, namely *Re Cook's Will* (1926), 244 N.Y. 63, 154 N.E. 823 (Court of appeals of New York), *Re Ginsburg Estate* (1988), 142 Misc. 2d 192, 536 N.Y.S. 2d 649 (Surrogate's Court, New York), and *Estate of Carmen Prime*, (2000), 184 Misc. 2d 796, 710 N.Y.S. 2d 810 (Surrogate Court, New York). These American decisions are not binding upon me. Furthermore, they are distinguishable and I do not find their analysis persuasive.

[41] *Re Cook's Will*, *supra* concerned the validity of a will. The agreement was not a renunciation of a gift thereunder, but one not to contest, or join with others in contesting, the will. In *Ginsberg Estate, supra* a separation agreement included a provision where the wife renounced all interest under any will executed by the husband prior to the execution of the agreement itself. When the husband died, his will predated the separation agreement and left her a considerable portion of his estate. The Surrogate Court judge found that despite the lack of precedent, a separation agreement may constitute a "renunciation" under the New York statute, Estates Powers and Trusts Law 2-1.11(b)(2). The wording in the separation agreement under appeal is different and we have no similar legislation. In *Estate of Carmen Prime*, a father and a son drafted a bill of sale regarding business assets for consideration of one dollar. Among other things, the son agreed to renounce "any share in any future estate" of the father. Years afterwards, the father made two wills which left the son a bequest or a residuary interest. The Surrogate Court judge observed that the facts and wording were different from *Re Cook's Will, supra* and stated that it appeared that by naming him in his wills, the father unilaterally waived the son's earlier renunciation. Accordingly, the son had standing to contest a third will. Here, we have no will executed after the separation agreement.

[42] In addition to case law, the appellant argues by analogy. Her supplementary factum read in part:

> 18. By analogy, consider the terms of the Morrell-Ostrom separation agreement dealing with the beneficiary designation under the life insurance policy. Each spouse agreed that the other could unilaterally change the beneficiary designation, but if he or she did not do so prior to death, the parties agreed that (notwithstanding the spousal designation) the death benefit would be

> paid to the estate of the deceased. Ingrid Ostrom signed a release to implement this agreement. But, properly analyzed, is not a beneficiary designation merely an "expectancy"? It is not a property right. It can amount to nothing, if (i) the policy lapses; or (ii) the designation is revoked; or (iii) the beneficiary predeceases the life insured. But, such a promise, given for valuable consideration, is enforceable.
>
> 19. By further analogy, consider the standard terms in all separation agreements, releasing statutory claims on death: *Intestate Succession Act, Testator's Family Maintenance Act*, *Matrimonial Property Act*. Are such claims not merely "expectancies"? They are not property rights. They are contingent and may vanish if (i) the parties are divorced at the time of the death of one of them; or (ii) the potential claimant has predeceased the other spouse; or (iii) in the case of a potential intestacy, the other spouse executes a valid will; or (iv) the other spouse dies without assets. Yet such promises, given for valuable consideration, are enforceable as releases.

In order to rely on these analogies, I would have to accept or decide that a beneficiary designation under a life insurance policy or certain statutory claims constitute mere expectations which nevertheless are enforceable if given for valuable consideration. It is not necessary nor would it be appropriate for me to do so. That is not the question on this appeal.

[43] Finally, while acknowledging that voluntary disclaimers in advance of death are void, the appellant argues that a contractual renunciation supported by consideration should be upheld:

> 21. Clause 20. of the Separation Agreement is fully supported by consideration. Therefore, in equity, it can be construed <u>either</u> as an immediate renunciation [which attaches to the estate of the deceased ex-spouse at death], <u>or</u> as a contractual promise to renounce after the death of the ex-spouse. In either case, it is binding on the survivor ex-spouse. Otherwise, the result would be unconscionable and would allow the survivor ex-spouse to breach the contract.
>
> [Emphasis in the original]

However, the appellant has failed to produce any legal authority that a contractual promise to renounce, given for consideration before the death of a former spouse, binds a person to renounce a testamentary gift after his death.

[44] The remedy the appellant seeks is specific performance of the alleged renunciation in clause 20 of the separation agreement. That agreement is, of course, a contract. The parties to the contract were Ezra Morrell and Ingrid Ostrom, and its clause 2 states that its terms are binding on their heirs, administrators, executors, successors and assigns. The appellant was not a party to the separation agreement, nor is she one of the persons named under clause 2. Even if it had been determined that Ingrid Ostrom was contractually bound to refuse the testamentary gift, there does not appear to be any privity of contract between the appellant and Ingrid Ostrom which would allow the appellant to enforce clause 20 of the separation agreement. It is the executrix who is permitted, but not mandated, to enforce a separation agreement (*Matrimonial Property Act*, R.S.N.S. 1989, c. 275, s. 28).

[45] While the chambers judge's reasoning which led to his determination that Ingrid Ostrom was entitled to take under Ezra Morrell's will was flawed, in these circumstances I am not persuaded that the result was incorrect in law. It is not necessary for me to decide the alternative disposition of the estate of the late Mr. Morrell pursuant to his will.

Disposition

[46] I would dismiss the appeal. The appellant shall pay the estate of Ezra Morrell costs of $2,000 inclusive of disbursements. The executrix shall have her costs paid out of the estate on a solicitor-client basis.

Oland, J.A.

Concurred in:

Saunders, J.A.

Fichaud, J.A.

Docket: CA 305792
Registry: Halifax

Between:

Anne Robinson

Appellant

v.

Susan Elaine Ostrom, Executrix of the Estate of Ezra Morrell
Susan Elaine Ostrom, Walter Ostrom and Ingrid Ostrom

Respondents

Revised judgment: The text of the original judgment has been corrected according to this erratum dated **March 2, 2010.**

Judges: Saunders, Oland, Fichaud, JJ.A.

Appeal Heard: September 9, 2009, in Halifax, Nova Scotia

Final Submissions Received: November 16, 2009

Held: Appeal is dismissed with costs per reasons for judgment of Oland, J.A.; Saunders and Fichaud, JJ.A. concurring.

Counsel: Timothy Matthews, Q.C., for the appellant
David Grant, for the respondents

Erratum:

[47] Replace the last sentence in ¶ 9 with the following: "Since then, s. 19A of the *Wills Act*, R.S.N.S. 1989, c. 505, as amended, has been enacted.