C.A. No. 100897

NOVA SCOTIA COURT OF APPEAL

Chipman, Roscoe and Pugsley, JJ.A.

IN THE MATTER OF THE ESTATE OF MILDRED LOUISE COLLICUTT

Cite as: Collicutt Estate v. Haughn, 1994 NSCA 175

BETWEEN:	)	
	)	
HAZEL KNICKLE, EXECUTRIX OF AND UNDER THE LAST WILL AND TESTAMENT OF MILDRED COLLICUTT	)	Walton W. Cook, Q.C. and Timothy Reid for the Appellant
Appellant	)	
- and -	)	
	)	
PETER J. HAUGHN AND NANCY HAUGHN	)	Patrick A. Burke for the Respondent
	)	
Respondents	)	
	)	
	)	
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	)	
	)	Appeal Heard: October 4, 1994
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	)	
	)	Judgment Delivered: October 4, 1994

THE COURT: The appeal is dismissed with costs as per oral reasons for judgment of Chipman, J.A.; Roscoe and Pugsley, JJ.A., concurring.

The reasons for judgment of the Court were delivered orally by

CHIPMAN, J.A.:

This is an appeal from a decision of Carver, J. in Supreme Court whereby on an application to have the will of Mildred Collicutt proved in solemn form, he revoked

probate thereof.

Mildred Collicutt was born on January 25, 1903. In 1982, a solicitor practicing in Lunenburg prepared a will for her after examining her competency in the course of taking instructions for it. The instructions specified bequests to a number of persons and organizations, with the residue going to two charities. In 1985, the solicitor prepared a new will for Ms. Collicutt. The only change was in deleting one of the executors, increasing and reducing certain bequests and changing one of the residuary beneficiaries to a different charity. The bequest to Hazel Knickle, one of the beneficiaries was reduced from $10,000 to $5,000.

Hazel Knickle was a friend of Ms. Collicutt. In the latter part of 1987, Ms. Collicutt was admitted to hospital suffering from depression and dehydration. In January of 1988 she went to the Mahone Bay Nursing Home. In that same month, Walton Cook, Q.C. and his secretary visited Ms. Collicutt to take instructions giving Hazel Knickle the power of attorney to sell her home and manage her affairs. They returned on another occasion to have the power of attorney executed. The house was sold in June of 1988 and Hazel Knickle deposited the proceeds to the credit of Ms. Collicutt at the bank.

As a result of conversation between Hazel Knickle and Mildred Collicutt, the former contacted Mr. Cook respecting the drafting of a new will. Mr. Cook attended at the nursing home on September 9, 1988. While instructions were taken, both Mr. Cook and Hazel Knickle were present in the same room with Ms. Collicutt. Mr. Cook, who testified, stated that he was there for two or three minutes. Mrs. Knickle thought they were there for ten or 15 minutes. The trial judge found that the taking of the instructions "extended over a short period of time". Mr. Cook remembered little except from notes on the file which are not his handwriting but that of his secretary. Mr. Cook made no notes respecting Ms. Collicutt's competency, nor appeared to have made any inquiries regarding it, her assets or prior wills. It was not his practice when taking

instructions for a will to consult with the nursing home or the doctor unless it came to his attention that the person was not competent.

Mr. Cook prepared the will in this office and gave it to Mrs. Knickle who took it to the nursing home on October 9, 1988. Mrs. Knickle said she had the following conversation with Ms. Collicutt, "Mildred, I brought your will." She said, "Good, I want to sign it."

The will was then executed by Ms. Collicutt in the presence of two nursing home attendants as witnesses. Only one of these testified at the trial. There is no evidence that Ms. Collicutt read the will before signing it. The will was then taken to Mr. Cook's office and later placed in a safety deposit box. Ms. Collicutt died on March 18, 1992 and her will dated October 9, 1988 was admitted to probate on April 2, 1992. The appraised value of the estate amounted to $242,376.99. By this will, Hazel Knickle was appointed sole executrix and given all the property of the deceased. It was duly admitted to probate following which an application was brought on behalf of Peter and Nancy Haughn to have such will proved in solemn form.

Evidence was heard by Carver, J. over three days. There were contradictions as to the extent of Ms. Collicutt's testamentary capacity, but the preponderance of the evidence established highly suspicious circumstances surrounding the execution of the will at issue and a lack of appreciation on the part of the deceased as to the nature and extent of her assets and of other matters. The trial judge made an extensive review of the evidence and the relevant principles of law governing applications to test testamentary capacity. He found a number of suspicious circumstances surrounding the acts of Hazel Knickle concerning the will, of which he enumerated ten. After making a further analysis of the evidence, he expressed concern about the lack of instructions taken by Mr. Cook in the preparation of a will for an 85 year old lady at a nursing home. He referred to authorities setting out the duty of a

lawyer in taking instructions for a will and concluded that Mr. Cook fell short of the standard. He further noted that Mr. Cook did not attend the execution of the will but gave it to the sole beneficiary to cause it to be executed by this elderly lady.

It was agreed at the trial that both Mr. Cook and Mr. Macdonald, partner of counsel for the respondents could testify without requiring counsel to withdraw.

The trial judge stated that there was a burden imposed upon the proponent of a will once it has been attacked. That burden is to satisfy the court on a balance of probabilities that the testatrix was mentally competent to give instructions. In his opinion, the proponent did not do so. Moreover, he was not satisfied based on the listed suspicions that Ms. Collicutt knew and approved of the contents of the will signed by her. Accordingly, the trial judge ordered that probate of the subject will be revoked.

We have reviewed the record and heard the submissions of counsel for the parties. In our opinion, the trial judge made no error in the fact finding process or in the application of the relevant law. We dismiss the appeal with costs to the respondent to be paid from the estate on a solicitor/client basis. The appellant will receive no costs. We do not disturb the disposition of costs made by the trial judge.

J.A.

Concurred in:

Roscoe, J.A.

Pugsley, J.A.