C. A. No. 02981

NOVA SCOTIA COURT OF APPEAL

Jones, Freeman and Roscoe, JJ.A.

Cite as: Cole v. Cole Estate, 1994 NSCA 123

BETWEEN:	
WILLIAM (Bill) COLE and JOSEPH COLE Appellants	Elizabeth Cusack Walsh for the Appellants
- and -	
THE ESTATE OF JOHN ROBERT COLE Respondent	Michael J.. Whalley, Q.C. for the Respondent
	Appeal Heard: May 17, 1994
	Judgment Delivered: May 30, 1994

THE COURT: The appeal is dismissed as per reasons for judgment of Roscoe, J.A.; Jones and Freeman, JJ.A., concurring.

ROSCOE, J.A.:

This is an appeal of a decision of Ryan, J. sitting in his capacity of a Judge of the Probate Court whereby he granted proof in solemn form and admitted to probate

a reconstructed will of the late John Robert Cole.

Mr. John Robert Cole, known as Bob or Uncle Bob to most of his relatives, died on April 28, 1991 at the age of 77 in New Waterford. He had never married and he left surviving him his siblings, Anna J. MacLean, Bill Cole, Joseph Cole and Emma Ryan. He was predeceased by his sister Elisa. Anna, a widow, has seven children, Phyllis MacLellan, Marilyn Tomoczek, Lawrence, Bobby, Raymond, Leo and Janice MacLean. At the time of his death, Bob Cole had assets worth more than $370,000.

The reconstructed will admitted to probate by Justice Ryan is as follows:

> "1. I John Robert Cole do solemnly swear that this is my Last Will and Testament.
>
> 2. I hereby bequeath $1000.00 dollars One thousand dollars_____xx to All Saints Anglican Church in New Waterford.
>
> 3. I hereby name as sole beneficiary my sister Mrs. Anna J. MacLean bequeathing to her all my worldly goods including all monies in bank accounts, all stocks and bonds, and all contents of my safety deposit box number___ and all other investments.
>
> 4. As Executor to my Last Will and Testament I appoint Rev Tom G. Mitchell."

The proponent of the will, Anna MacLean alleged that this will was executed by the deceased in January, 1970 when he was a patient in hospital and that the will was still in existence at the time of his death. Her daughters, Phyllis MacLellan and Janice MacLean, both testified that they saw and read the will the day after their uncle's funeral, but the will was taken by Bill Cole who said the will was no good because it was too old and it has not been seen since. They testified that the will was witnessed by Reverend Tom Mitchell and another person whose signature they could not decipher but later determined by them to be that of Ralph Dieltgens. Bill Cole testified that no will of his brother's was found and denied the allegations of his nieces. He swore that the will found by them and taken by him was his grandfather's, although

he did not produce that will at the trial either. Reverend Mitchell, age 70 at the time of trial, suffered from a failing memory and was not able to recall assisting in the preparation of the will or witnessing it. He had prepared the will of Eliza Cole, the mother of Robert Cole, in 1968 and that will had been properly witnessed by Reverend Mitchell and Anna MacLean. Mr. Dieltgens predeceased Robert Cole but his daughter testified that she visited her father in hospital in 1970, and that at that time he advised her that he had witnessed the will of his roommate, Bob Cole. A letter from Dr. J.A. Roach, filed as an exhibit, confirmed that Robert Cole and Ralph Dieltgens were patients in the same room at the same time in January, 1970. Anna MacLean testified that her brother Robert told her when he was in the hospital in 1970 that he had Reverend Mitchell prepare a will for him, and asked her to pay the minister $10.00 for his services.

Those opposing the application to admit the will, Bill, Emma and Joseph introduced evidence which would, if accepted, tend to show that the deceased had destroyed the will he made in the hospital and had not prepared another. Two independent witnesses testified that Bob Cole told them he did not have a will. Emma Ryan testified that Bob told her he had destroyed his hospital will.

The learned trial judge, in his decision referred to and applied the presumption of law as developed by the common law in such cases as **Sugden v. Lord St. Leonard**, [1876] 1 P.D. 154, where Chief Justice Cockburn of the Appeal Court said at page 217:

> "Now, where a will is shown to have been in the custody of a testator, and is not found at his death, the well-known presumption arises that the will has been destroyed by the testator for the purpose of revoking it, but of course that presumption may be rebutted by the facts."

The trial judge recognized that credibility of the witnesses in the case before him was of vital importance to deciding the issues of fact. In his lengthy decision

he reviewed the evidence of each witness in detail adding numerous excerpts from the transcript. He concluded as follows:

> "I am satisfied that the Reverend Thomas Mitchell even at the time he testified, was capable of assisting in the drafting of a Will. There is no question his memory was failing but his responses to questions were such that I am of the opinion he was still competent. There is no question in my mind about his ability to draft and execute a simple Will twenty years or so earlier. I am satisfied he did draft a Will for Robert Cole and that it was properly executed when the deceased was a patient in the New Waterford General Hospital. The evidence is in my mind overwhelming and that this Will existed at the time of the death of Robert Cole.
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> Mrs. Anna Jane MacLean testified she saw the Will and paid the Reverend Mr. Mitchell $10.00 as instructed by her brother. The evidence of Mrs. MacLellan and Janice MacLean is most credible. Mrs. MacLellan said she found the Will and read it twice and that Bill Cole read it out loud. Janice MacLean also was positive about seeing Bill with the Will and him reading it at the table. She said after asking Bill to see the Will she actually had it in her hands and read it. The actions of the parties to contact Reverend Mr. Mitchell in England strongly supports their claim that the Will was found and that Bill had it. Three calls were made within a few days and from the evidence of Mr. Mitchell and Linda Dieltgens and the records of Dr. Roach, I can only conclude that Mrs. MacLellan and Janice MacLean saw the Will and that Mr. Mitchell was a witness. Efforts made by Mr. MacLellan, Raymond MacLean and others to recover the Will such as visits to Bill in the hospital and contacting Sergeant Dwyer of the New Waterford Police must at least have meant they were satisfied that the Will existed.
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> Brenda White was a competent and truthful witness. She said the deceased was an intelligent person who personally attended to his personal affairs. She also said when she spoke of the necessity that he have a Will that he said there was someone he did not want to have anything. It is inconceivable that the deceased would destroy a Will without making another. The evidence satisfied me that he provided for his brother Bill because it was his mother's wish. It is clear that he had not spoken to his brother Joseph for 30 years. There is no question that the proponent of the Will Anna Jane MacLean who was the oldest of the family in a sense, took her mother's place upon her death. Bill Cole as quoted earlier said she and Bob were like two peas in a pod. It is impossible to accept the argument that Robert Cole destroyed his Will knowing they would fight over it and

> that Bill and Joseph and Emma Ryan would share equally with Mrs. MacLean.
>
> I have carefully reviewed the evidence and the demeanor of the witnesses in judging their credibility and am satisfied that the presumption that the Testator Robert Cole destroyed his Will has been rebutted. I find it did exist and was last in the possession of William Cole. The evidence of Mrs. MacLellan and Janice MacLean has convinced me of its existence. In addition the evidence of others I have referred to support this conclusion.
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> I am satisfied that all reasonable doubts regarding execution, attestation and the contents of the Will and that it existed at the time of the Testator's death, have been removed."

The appellants have raised the following grounds of appeal:

> "1. What is the effect of the failure of the Learned Trial Judge to render a decision within a timely fashion? What is the appropriate remedy in this case?
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> 2. Was the decision perverse and unreasonable and unsupported by the overwhelming weight of the evidence (grounds 2, 3, 4, 5, 7, 8) or in other words based on palpable errors?
>
> 3. Was there a failure to prove due execution of the alleged will?
>
> 4. Was there a failure to prove the contents of the alleged will?"

The first ground of appeal relates to the fact that eighteen months passed from the filing of the post trial briefs to the release of the written decision. The record does not reveal any reason for such an inordinate delay other than the fact that the trial judge obviously had a transcript of the evidence prepared before rendering his decision. There is no indication of when the transcript was completed. The appellants submit that as a result of the timing of the decision, this court should not accept his findings of credibility or fact which they say are "distorted by delay".

The Supreme Court of Canada has on numerous occasions discussed the scope of appellate review, not only in relation to its own powers, but also in relation

to first appellate courts. In **Fletcher et al v. Manitoba Public Insurance Company**, [1990] 3 S.C.R. 191, Madam Justice Wilson referred to statements set forth in a number of cases including **Stein v. The Ship "Kathy K"**, [1976] 2 S.C.R. 802 and **Lewis v. Todd**, [1980] 2 S.C.R. 694 and concluded at page 204:

> " These authorities, in my view, make crystal clear the test for determining when it is appropriate for an appellate court to depart from a trial judge's findings of fact: appellate courts should only interfere where the trial judge has made a 'palpable and overriding error which affected his assessment of the facts.'... As this Court and the House of Lords have repeatedly emphasized, it is the trial judge who is in the best position to assess the credibility of the testimony. An appellate court should not depart from the trial judge's conclusions concerning the evidence 'merely on the result of their own comparisons and criticisms of witnesses'."

The test respecting a trial judge's findings of credibility was stated by Macdonald, J.A. in **Travelers Indemnity Co. v. Kehoe** (1985), 66 N.S.R. (2d) 434, where he said, at 437:

> "This and other appellate courts have said time after time that the credibility of witnesses is a matter peculiarly within the province of the trial judge. He has the distinct advantage, denied appeal court judges, of seeing and hearing the witnesses; of observing their demeanor and conduct, hearing their nuances of speech and subtlety of expression and generally is presented with those intangibles that so often must be weighed in determining whether or not a witness is truthful. These are the matters that are not capable of reflection in the written record and it is because of such factors that save strong and cogent reasons appellate tribunals are not justified in reversing a finding of credibility made by a trial judge. Particularly is that so where, as here, the case was heard by an experienced trial judge."

In light of the allegation of distortion through excessive delay, the members of the panel have each reviewed the transcript thoroughly and we have satisfied ourselves that there is absolutely no basis whatsoever to suspect the findings of credibility of the trial judge. When the whole of the evidence is considered, the

conclusions reached by the trial judge are not only amply supported by the evidence, they are in our view the only reasonable conclusions.

Once the trial judge made the determination that he believed the evidence of Phyllis MacLellan and Janice MacLean that they saw and read the will of Robert Cole after his death, the presumption of revocation by the testator did not apply to this case. The will was found to be in existence after the testator's death, so it was neither "last in the possession of the testator" nor was it "not found at his death", to use the words of **Sugden v. Lord St. Leonards, supra**. Once this finding of fact was made, the other well- known presumption in the law of wills comes into effect, that is the presumption of due execution embodied in the maxim *omnia praesumuntur rite esse acta* which is explained in the following passage from **Harris v. Knight** (1890), 15 P.D. 170 at page 179:

> ". . . The maxim, 'Omnia praesumuntur rite esse acta,' is an expression, in a short form, of a reasonable probability, and of the propriety in point of law of acting on such probability. The maxim expresses an inference which may reasonably be drawn when an intention to do some formal act is established; when the evidence is consistent with that intention having been carried into effect in a proper way; but when the actual observance of all due formalities can only be inferred as a matter of probability. The maxim is not wanted where such observance is proved, nor has it any place where such observance is disproved. The maxim only comes into operation where there is no proof one way or the other; but where it is more probable that what was intended to be done was done as it ought to have been done to render it valid; rather than that it was done in some other manner which would defeat the intention proved to exist, and would render what is proved to have been done of no effect."

The presumption of due execution was applied in **McQueen v. McQueen** (1923), 56 N.S.R. 401 (N.S.S.C. en banc) in a case where several witnesses testified as to seeing the will after the death of the testator, but it was lost before being proved.

In **Re Laxer**, [1963] 1 O.R. 343 the Ontario Court of Appeal upheld the trial judge's decision to rely on the presumption of due execution in a case where the two witnesses to a codicil swore that the paper signed by them was blank at the time they signed it. Once it is established that a will survived the testator, the burden to prove its proper execution in accordance with the formalities of the **Wills Act** is not a strenuous one, as a result of the assistance of the presumption. It is not necessary that the will be shown to have an attestation clause before the maxim applies.

In this case the preponderance of the evidence regarding the will of Robert Cole supported the finding that it was properly executed. Both Phyllis MacLellan and Janice MacLean testified that the will contained the signature of their uncle and two other signatures. Ms. Dieltgens testified that her father spoke of witnessing Mr. Cole's will. Reverend Mitchell knew of the requirement for two witnesses although he did not seem to recognize that they each had to see each other sign, but given the fact that Mr. Dieltgens was occupying the bed next to Mr. Cole at the relevant time, it is reasonable to infer that he was present both when Mr. Cole signed and when Reverend Mitchell signed. As well, the evidence of Phyllis and Janice as to the contents of the will, accepted by the trial judge, was sufficient under the circumstances.

The order of the trial judge should be confirmed and the appeal should be dismissed. The respondent is entitled to costs and disbursements on a solicitor- client basis to be paid from the estate. The respondent has agreed that Joseph Cole should have party and party costs, plus reasonable disbursements paid by the estate. I would fix those costs at $2000.00 and order that the disbursements be taxed. William Cole shall have no costs.

J.A.

Concurred in:

Jones, J.A.

Freeman, J.A.