NOVA SCOTIA COURT OF APPEAL
Citation: ***Keddy v. Keddy (Estate of)***, 2003 NSCA 55

Date: 20030521
Docket: CA 186973
Registry: Halifax

Between:

Keith M. Keddy

Appellant

v.

The Estate of Gladys Gertrude Keddy

Respondent

Judge(s):	Bateman, Saunders and Hamilton, JJ.A.
Appeal Heard:	May 21, 2003, in Halifax, Nova Scotia
Written Judgment:	May 23, 2003
Held:	**Appeal dismissed without costs per oral reasons for judgment of Bateman, J.A.; Saunders and Hamilton, JJ.A. concurring.**
Counsel:	Peter Nathanson, for the appellant Robert C. Stewart, Q.C., for the respondent

Reasons for judgment:

[1] This is an appeal from an order of Justice Donald Hall of the Supreme Court sitting as a judge in the Court of Probate granting a Petition for Proof in Solemn Form of the Last Will and Testament of the late Gladys Gertrude Keddy.

[2] The testatrix died on October 31, 1999 at the age of 82 years. At the application for proof in solemn form, the appellant, Keith M. Keddy, one of the testatrix's seven children, challenged a change to the testatrix's will which altered a provision granting him an option to purchase the family farm.

[3] The appellant acknowledges that the judge enunciated the appropriate test for determining the testatrix's testamentary capacity. The appellant says, however, that there was insufficient evidence to support the judge's conclusion that the testatrix was of sound mind at the time of altering her will.

[4] The finding of mental capacity in such circumstances is one of fact. In **Re Fergusson's Will** (1981), 43 N.S.R. (2d) 89 (C.A.) Cooper, J.A., for the Court, said at pp. 97-98:

> It think it advisable at this point to make it clear that the question of testamentary capacity or not is one not of law but of fact - see *Perera v. Perera*, [1901] A.C. 354 at p. 355, Privy Council. I, therefore, must approach the issue in this appeal having in mind the constraints placed upon an appeal court in dealing with findings of fact made by the trial judge. Mr. Justice Ritchie in delivering the judgment of the Supreme Court of Canada in *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, 4 N.R. 381, said at p. 808 S.C.R.:
>
> > These authorities are not to be taken as meaning that the findings of fact made at trial are immutable, but rather that they are not to be reversed unless it can be established that the learned trial judge made some palpable and overriding error which affected his assessment of the facts. While the Court of Appeal is seized with the duty of re-examining the evidence in order to be satisfied that no such error occurred, it is not, in my view, a part of its function to substitute its assessment of the balance of probability for the findings of the judge who presided at the trial.

[5] There was evidence from which the judge could conclude that the testatrix, at the time of altering her will, was of sound mind. In his thorough decision the

judge reviewed the evidence of capacity in detail, understood and applied the correct legal principles, and concluded, with reasons, as he was entitled to do, that he preferred that of the lay witnesses to the testimony of the medical experts. Paraphrasing Schroeder, J.A. in **Re Davis** (1963), 40 D.L.R. (2d) 801 (Ont. C.A.), whether a person has testamentary capacity, absent evidence based on pathological findings, "may be answered by laymen of good sense as well as by doctors". (See also **Re Morrison Estate** (1982), 52 N.S.R. (2d) 640 (A.D.)). We are not persuaded that the judge's assessment of the evidence reveals palpable or overriding error. Nor do we see any error in the way in which Justice Hall dealt with the evidence contained in a diary kept by the testatrix's daughter Donna Shunamon or his conclusion that no adverse inference ought to be drawn against the executors on account of the manner in which it was edited. In essence, the appellant seeks a re-trial. That is not the function of this Court on such an appeal.

[6] Accordingly, notwithstanding the able submissions of Mr. Nathanson on behalf of the appellant, we would dismiss the appeal with costs to the Estate in the amount of $4800.00 inclusive of disbursements which is forty percent of the party and party costs agreed to by the parties following trial.

Bateman, J.A.

Concurred in:
Saunders, J.A.
Hamilton, J.A.