NOVA SCOTIA COURT OF APPEAL
Citation: *Crittenden v. MacLean*, 2003 NSCA 121

Date: 20031114
Docket: CA 192997
Registry: Halifax

Between:

Frederick Walter Crittenden

Appellant

v.

Ian H. MacLean

Respondent

and

Evelyn Laurena Turner

Third Party

Judges:	Saunders, Chipman and Hamilton, JJ.A.
Appeal Heard:	November 12, 2003, in Halifax, Nova Scotia
Held:	**Appeal dismissed per reasons for judgment of Chipman, J.A.; Saunders and Hamilton, JJ.A. concurring**
Counsel:	Michael W. Stokoe, Q.C., for the appellant respondent not appearing Hector J. MacIsaac, for the third party

Reasons for judgment:

[1] Having read the record and the written submissions of counsel and having heard counsel for the appellant on the argument of this appeal, the panel considered the matter and indicated in open court that the appeal was dismissed with reasons to follow. These are the reasons.

[2] This is an appeal from a decision of Scanlan, J. in Chambers dismissing an application by the appellant for a declaration that a deed executed by the grantor, since deceased, in favour of himself and the appellant as joint tenants was valid.

[3] The property described in the deed is located in Welsford, Pictou County and was owned at all material times by John Forward MacNeil. The appellant was a long time friend of Mr. MacNeil.

[4] On July 24, 2002, Mr. MacNeil attended at the law office of the respondent, a barrister, for the purpose of having a deed, which would add the appellant as a joint tenant of the property, prepared. The respondent had some concerns but undertook to prepare the deed. Mr. MacNeil then returned alone on August 7, 2002, to the respondent's office. At that time the respondent discussed with Mr. MacNeil the effects of the proposed conveyance. The respondent learned that Mr. MacNeil had three biological children - a son who was adopted at a young age and two daughters, one of whom was the third party in the application before Scanlan, J.. Mr. MacNeil signed the deed but instructed the respondent not to do anything with it until he heard further from him. Notes prepared by the respondent at the time summarized his recollection of the conversation:

> I met alone with John - he says he came in alone.
>
> I asked him to consider carefully if he wants to put Crittenden's name on Deed - Says he has an adopted son - Sudbury, Ontario - never saw since five years old. Two daughters - Glace Bay, Fredericton. Very little contact with them - says that he and Crittenden are very good friends and have been for years.
>
> Says he wants to sign the Deed. I explained effect. He will sign but says don't do anything with it until he is "ready". I asked him what means - i.e. don't record or give to anyone he says. I questioned why not - her ([sp?] refused to say.
>
> I questioned when do I release and he only said he would tell me when ready.

> I am to wait to hear from him.

[5] The respondent retained possession of the signed deed.

[6] Mr. MacNeil died on September 7, 2002. The respondent, under the impression that the new deed was not valid as he had received no further instructions from Mr. MacNeil, proceeded with the estate on that footing. The appellant brought this application before Scanlan, J. on November 5, 2002.

[7] A number of issues were raised but Scanlan, J. concluded that the case turned on the issue of the intention of Mr. MacNeil regarding the delivery of the deed. Scanlan, J. concluded that the evidence supported the inference that the deed had not been delivered and the deed was therefore not valid. In reaching this conclusion Scanlan, J. relied largely on the respondent's affidavit to which were attached his notes from the two meetings with Mr. MacNeil. The affidavit was not challenged either by cross-examination or contradictory evidence. Scanlan, J. concluded that Mr. MacNeil did not intend the deed to become effective at the time it was signed. Scanlan, J. was of the view that the intention of the grantor of the deed is essential in determining if delivery was effected, and that very strong evidence was required to set aside a deed which was valid on its face. He concluded, however, that such strong evidence existed, as there was never any intention on Mr. MacNeil's part to deliver the deed. He said:

> [15] I refer to **Edwards v. Poirier**, (1949), 1 D.L.R. 846. The court noted that very strong evidence is required in order to justify a court in setting aside a deed which is valid on its face on the ground of non-delivery. This is such a case. I am satisfied that there is indeed very strong evidence which would justify the court in setting aside this deed. The instructions to Mr. MacNeil not to record the deed or to release it to anyone is compelling evidence that the grantor did not intend to deliver the deed at the time of its execution...
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> [17] ... I am satisfied that the evidence in this case clearly indicates that when Mr. John Forward MacNeil signed the deed he did not want to lose the right to rethink his decision ...
>
> [19] ... I would suspect many clients indeed sign documents with instructions to their own lawyer not to release only to find out later that they want to revisit the issue. Those clients would be very surprised to find that, in spite of their

> instructions, they could not undo the effect of signing. ... Delivery is a question of fact and intention to be determined in each and every case.

[8] The appellant's application was dismissed by Scanlan, J.

[9] The appellant's notice of appeal raises a number of grounds but the only issue in our opinion is whether Scanlan, J. was correct in his conclusion respecting the non delivery of the deed.

[10] The respondent takes no position on this appeal. The third party's position is that Scanlan, J. was correct in his reasoning and conclusion.

[11] The law on delivery of deeds is discussed by C.W. MacIntosh in *Nova Scotia Real Property Manual*, looseleaf, Markham, ON: Butterworths, 1988 at s. 5.5A:

> Physical delivery of the deed to the grantee is not necessary to constitute effective delivery. Delivery of a deed is a matter of intention.
>
> What is essential to delivery of the document as a deed is that "the party whose deed the document is expressed to be, having first sealed it, must by words or conduct expressly or impliedly acknowledge his intention to be immediately and unconditionally bound by the expressions contained therein."
>
> The intention is to be determined from words, conduct and the surrounding circumstances.
>
> The Supreme Court of Canada has held that execution of the deed in the presence of an attesting witness is sufficient evidence from which to infer a delivery. "The law [in Nova Scotia] appears to be that in the face of the oath of the subscribing witness, delivery is proved" unless there is persuasive evidence of a contrary intention. The retention of the possession of the deed by the grantor (even until his death) after its signing and sealing does not negative delivery even if the grantee is not aware that the deed has been executed. Very strong evidence is required to set aside, on the ground of non-delivery, a deed which is valid on its face.

[12] In **Ross v. Lynds Estate** (1977), 28 N.S.R. (2d) 260 (S.C.T.D.) Hallett, J. (as he then was) said:

> [18] One would have thought that delivery of a deed would mean physical delivery but, as indicated earlier in this decision, the Courts over a long period of time have held that physical delivery of a deed to the grantee is not necessary to constitute effective delivery. No doubt the development of the law in this direction was as a result of the Courts attempting to fulfil what they perceive to be the intention of the grantor ...
>
> [19] The cases cited clearly show that there does not have to be a physical handing over of a deed to the grantee or to some other person to take it out of the control of the grantor to effect delivery.

[13] We are satisfied that Scanlan, J. applied the correct principles of law, and that in relying on the evidence of the respondent as to the instructions received from Mr. MacNeil he made no error in concluding that such evidence was sufficient to rebut any inference that might otherwise arise that the deed became effective.

[14] The appeal is, therefore, dismissed with costs payable by the appellant to the third party. These are fixed at $750.00 inclusive of disbursements.

Chipman, J.A.

Concurred in:

Saunders, J.A.

Hamilton, J.A.