NOVA SCOTIA COURT OF APPEAL
Citation: *Comeau v. Gregoire*, 2007 NSCA 73

Date: 20070614
Docket: CA 263772
Registry: Halifax

Between:

Frank J. Comeau

Appellant

v.

Rachel Gregoire and Jeanne Akerley

Respondents

Judges:	Roscoe, Bateman and Oland, JJ.A.
Appeal Heard:	May 31, 2007, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Oland, J.A.; Roscoe and Bateman, JJ.A. concurring.
Counsel:	Appellant on his own behalf Respondents on their own behalf

Reasons for judgment:

[1] At issue in this appeal is the ownership of monies in a joint bank account in the names of the late Elizabeth Scott and Jeanne Akerley. At Mrs. Scott's passing, over $50,000 was held on deposit in that account. The appellant, Frank Comeau, and the respondents, Ms. Akerley and Rachel Gregoire, are children of the deceased. Ms. Gregoire serves as adminstratrix of the estate of her late mother. All parties were self-represented on the appeal.

[2] This is the second appeal before this court which pertained to the estate of the late Mrs. Scott. In *Scott Estate (Re)*, 2005 NSCA 135, the court allowed an appeal by Mr. Comeau from an order passing the final account of the adminstratrix, set aside that order, and remitted the matter to the probate court to determine the ownership of two joint bank accounts, one of which is the subject of this appeal. The funds in the other joint account were subsequently turned over to the estate.

[3] The late Mrs. Scott's situation and her family were summarized by Justice Roscoe in that earlier decision as follows:

> [2] Elizabeth Scott, a 90 year old widow, died without a will on June 15, 2002. Mrs. Scott was living on her own in a house she rented in Saulnierville, Digby County. She was survived by ten children, ranging in ages from 53 to 74. Four of the children lived in Nova Scotia: Helen Comeau and Rose Comeau Jeddry of Meteghan, Claire Comeau of Saulnierville, and Wayne Comeau of Kentville. Two lived in New Brunswick: Mr. Comeau (the appellant) and Jeanne Ackerly [sic]. The respondent, Ms. Gregoire lived in Ontario, Yvonne Comeau in Montreal and Louise Scribner and Jacqueline Donahue lived in Massachusetts.

[4] In remitting the matter of the ownership of the joint bank accounts to the probate court for determination, she stated:

> [21] I would however agree with the appellant that the issue of the joint bank accounts was not properly handled by the Probate Court and that a further investigation into their ownership is required. Citing several cases as examples, James MacKenzie in **Feeney's Canadian Law of Wills**, 4th edition, looseleaf, Butterworth's, states at §1.72:
>
> > The mere deposit of money in a bank in the joint names of the depositor and alleged donee with the power of either of them to

> withdraw funds is insufficient, by itself, to constitute a gift. In the absence of convincing evidence of the intention to make a gift, there will be a resulting trust in favour of the estate of the funds to which the survivor holds only the legal title.
>
> [22] Each case is very fact specific, but it is incorrect in law to find, as was done here, that if there is a joint account, it is automatically a gift to the survivor. In many cases where a bank account was held jointly by a parent and a child, after the death of the parent the funds were determined by the court to belong to the estate. See for example, **Edwards Estate v. Bradley**, [1957] S.C.R. 599; **Legg v. Nicholson**, 2002 NSSC 217; **McIntosh Estate v. Kenny**, [1989] N.B.J. No. 920 (Q.L.) (Q.B.); **Purchase v. Pike Estate**, [1991] N.J. No. 199 (Q.L.) (S.C.T.D.).
>
> [23] In order to make the determination as to whether there is a gift to the survivor or a resulting trust in favour of the estate, it is necessary for the court to have evidence to show, at the very least, the date the accounts were opened, what documents were signed at that time, who received the bank statements, who deposited funds, who withdrew funds and wrote cheques and for what purposes, and the balance as of the date of death.

[5] Justice Allan P. Boudreau, sitting as a probate court judge, heard two days of testimony regarding the ownership of the monies in the joint account in the names of the late Mrs. Scott and Ms. Akerley. The witnesses who gave evidence and were cross-examined were:

(a) the respondent, Rachel Gregoire;
(b) Mrs. Scott's daughter, Yvonne Davis;
(c) Mrs. Scott's daughter Rose Comeau-Jeddry;
(d) the respondent, Mrs. Akerley; and,
(e) Odette Deveau, personal financial services representative with the Royal Bank of Canada (the "Bank").

The probate court judge determined that the monies in the joint account belonged to Ms. Akerley. His oral unreported decision (*Scott Estate (Re)* (September 13, 2006) Digby Case No. 3135 (Court of Probate)) was delivered on September 13, 2006, the second day of the hearing and his order issued on November 27, 2006.

[6] Mr. Comeau appeals, arguing that the probate court judge erred:

(a) by making a determination when the evidence was not sufficient for him to do so, and based only on speculation and hearsay rather than as required in law; and
(b) by not ruling on allegations of breach of trust and conflict of interest against the administratrix of the estate.

[7] The appellant challenges the judge's findings of fact based on the credibility of witnesses. The standard of review applicable for all factual conclusions made by the trial judge is palpable and overriding error. The same standard applies to questions of mixed law and fact, unless a question of law is readily extricable when the standard will be that of correctness. See *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, [2002] S.C.J. No. 31.

[8] Before commencing my analysis, it is helpful to observe that the probate court judge did not find that any of the witnesses lacked credibility. The evidence was such that he did not have contradictory testimony before him. He stated:

> I should say that I accept the testimonies of all the witnesses; Mr. Comeau and all of the Estate witnesses, as testifying honestly and straightforwardly as best they recall the events and I believe everyone was trying to be as truthful as they could as to what took place.

Since credibility was not contentious, the judge focussed on assessing the evidence available to the court and applying the appropriate legal principles in order to determine the ownership of the funds in the joint account.

[9] The evidence of Yvonne Davis, Rose Comeau-Jeddry and Ms. Gregoire established that the late Mrs. Scott relied heavily upon and regularly spent the winters with Ms. Akerley in New Brunswick, and that each year Ms. Akerley visited her mother in Nova Scotia for extended periods. Mrs. Davis described her mother's relationship with Ms. Akerley as follows:

> They were very close. And I think it often happens, . . . that older people choose the one person in the family whom they confide in and whom they feel confident with. And this was the case with Jeanne. I am absolute [sic] sure about that.

She testified that none of the children was closer to Mrs. Scott than Ms. Akerley.

[10] According to Ms. Akerley, the account was opened around 1989 and a bank employee explained the right of survivorship to her and her mother. The signature card signed by the late Mrs. Scott and Ms. Akerley at that time was not produced before the probate court. Ms. Deaveau, of the Bank, testified that many attempts had been made to find it, all unsuccessful. She was able to present the form of personal deposit account agreement which would have governed, which provided that the survivor would be able to withdraw the funds from a joint account. It was undisputed that all the deposits, which consisted of interest earned on the account, (except one, which will be described below) and all withdrawals, were made by the deceased, and that the annual statement of interest income, which showed both names was sent to the late Mrs. Scott who filed it with her income tax return.

[11] Ms. Deveau, who closed out the account on Mrs. Scott's passing, testified that she "was 100 percent sure that the account was a joint account." When she closed it, she had had the signature card for the account and, according to Ms. Deveau, she would not have done so if it had not been joint with rights of survivorship.

[12] The probate court judge stated that he had "no doubt, after hearing that evidence [of Odette Deveau], that it was a joint account with the right of survivorship." He also found "on the strong balance of probabilities," that the late Mrs. Scott intended to make an *inter vivos* gift to Ms. Akerley. This finding was based on evidence that in 1993, Mrs. Scott withdrew $80,000 from the joint account and placed it in an investment certificate in the sole name of Ms. Akerley, rather than her own name or in their joint names. The interest was to be paid to the joint account and, on maturity, Ms. Akerley was entitled to the funds. The judge accepted that Ms. Akerley put those monies back into the joint account because she wanted her mother to have the benefit of those monies, if needed, as well as the interest from those monies.

[13] Finally, the probate court judge stated that even if his finding of an *inter vivos* gift was wrong, then "certainly the evidence of Ms. Ackerley [sic] and the other witnesses and the documentary evidence rebuts any presumption of resulting trust" in favour of the late Mrs. Scott or her estate. He noted that witnesses, other than Ms. Akerley, testified that it was her mother's intention that Ms. Akerley be the beneficiary of that account, and pointed out that if the account was only for the convenience of the deceased, it could have been set up with one of her other

children who lived closer to her and in Nova Scotia, rather than Ms. Akerley who resides in New Brunswick.

[14] The appellant argues that the evidence before the probate court judge was not that as required by this court and thus, is contrary to law. In this regard, he relies on the comments in ¶ 23 of our earlier decision, which he interprets as stipulating that, unless all the evidence described therein is put forward, the ownership of a joint account cannot be determined. He points out that the signature card signed when the account was opened was not presented to the probate court judge, and that neither Ms. Deveau nor Ms. Akerley produced signed documents showing that Ms. Akerley was entitled to the amount remaining in the account on Mrs. Scott's passing.

[15] The comments by this court in its earlier decision at ¶ 23 upon which the appellant bases his central argument do not establish the types nor the extent of the evidence that must be tendered in every case where the ownership of a joint account is in dispute. As Justice Roscoe indicated in ¶ 22 of that decision, every case is very fact specific. There will be instances, as here, where witnesses may not be available or able to testify as to every aspect of an account or its history, and where, for acceptable reasons, not all the documents are available. After all, financial institutions generate a multitude of records, may not keep them indefinitely, and through inadvertence or otherwise may lose records or place them beyond retrieval.

[16] The hearing in probate court was neither lengthy nor complex. The probate court judge heard all the witnesses under direct and cross-examination, and asked probing questions of the witnesses and counsel. At the conclusion of the hearing, based on the evidence before him, the judge had to decide the question of ownership. Having reviewed his decision, the written arguments provided by the parties and their oral submissions, I cannot say that the judge misapprehended the evidence, lacked an evidentiary basis for his findings, relied upon incorrect legal principles, or failed to apply or misapplied the law. His decision which dealt with joint bank accounts and the presumption of resulting trusts follows the principles set out in *Pecore v. Pecore*, [2007] S.C.J. No. 17 and *Madsen Estate v. Saylor*, [2007] S.C.J. No 18, both of which were decided after its release. In summary, I see no grounds for appellate intervention in his decision regarding ownership of the joint account.

[17] As to the probate court judge's failure to rule on the appellant's allegations during the hearing of breach of trust and conflict of interest against the adminstratrix, this was not before the probate court. The matter had been remitted by this court for determination only of the ownership of the joint account. By not addressing this matter, the probate court judge did not err.

[18] I would dismiss the appeal, and order the appellant to pay costs of $500 to Ms. Gregoire. The estate has not yet paid the costs of $500 to each of the parties as ordered by the probate court judge. If she wishes, the administratrix may apply the $500 the appellant was to receive there against the costs he is here ordered to pay Ms. Gregoire.

Oland, J.A.

Concurred in:

Roscoe, J.A.

Bateman, J.A.