PROBATE COURT OF NOVA SCOTIA
Citation: *Beck Estate (Re)*, 2015 NSSC 239

Date: 20150818
Docket: Bwt No. 431260
Probate Number: 15040
Registry: Bridgewater

In the Estate of Vera May Beck

Decision

Judge:	The Honourable Justice Gerald R. P. Moir
Heard:	May 14, 2015, in Bridgewater, Nova Scotia
Final Written Submissions:	July 22, 2015
Counsel:	David C. Melnick, for the proctor Rosalie Beck Osmond, on her own

Moir J.:

[1] *Introduction*. I have been asked to provide my interpretation of a will under which named beneficiaries died before the testator. Also, the personal representative is not confident about the correct interpretation of a phrase that refers to brothers and sisters when some of the testator's brothers and sisters died before she made the will.

[2] *Vera May Beck's Background*. Vera May Milbury was born in 1905. She had eleven brothers and sisters. They grew up in Newburne, Lunenburg County.

[3] Ms. Milbury and her next younger sister, Erna Viola, married brothers, and both took the surname Beck. The younger Ms. Beck had one child, Rosalie. Ms. Vera Beck had none. The two families lived together in Lunenburg for over twenty years. When they bought separate houses, they were still neighbours on the same street in Lunenburg.

[4] Rosalie Beck lived with her parents, her uncle, and aunt all her childhood. Ms. Vera Beck had many second and third-generation relatives, but none who grew up in her house. Rosalie Beck's mother, Ms. Vera Beck's sister, died in 1959, shortly after the two families bought separate but neighbouring homes.

Rosalie Beck was only seventeen. Ms. Rosalie Beck Osmond's affidavit shows that her aunt had a maternal relationship with her and stood as a grandmother to the Osmond children.

[5] Three sisters and one brother lived into this century with Ms. Beck, who as I said was born in 1905. They were Hazel Joudrey (1910), Lizzie Milbury (1915), Inez Young (1916), and John Milbury (1918). By 2000, Ms. Beck had outlived Erna and all her older siblings, as well as her husband and his brother. That year Ms. Beck made a will.

[6] *Ms. Beck's Will*. The first, second, and third paragraphs deal, in usual ways, with revocation of previous wills, payment of debts, and appointment of Messrs. Burpee Meisner and Olin Spidle as executors and trustees. The fourth paragraph makes a specific bequest and the fifth conveys the rest of Ms. Beck's property to her trustees.

[7] The fifth paragraph also contains specific bequests followed by a division of the residue. These are in clauses 5(b), (c), and (d). Clause 5(b) gives $1,000 to one of Ms. Beck's sisters-in-law "on the condition that she survives me". Clause 5(c) deals with household furniture and personal effects.

[8] Clause 5(d) distributes the residue by percentages in ten subclauses. Subclause 5(d)(10) reads:

> I give, devise and bequeath all the rest and residue of my estate in the following proportions: …
>
> [10] to my brother and three sisters to be divided equally Twenty Per Cent [20%]. Should any of these people predecease me, their share is to be distributed as set out in [c] above.

[9] Thus, subclause 5(d)(10) incorporates the scheme of distribution in clause 5(c). It reads:

> My Executors and Trustees are to distribute the household furniture and personal effects of my home among my brother, three sisters and niece, ROSALIE OSMOND, equally. Any contents and household effects that are not distributed are to be sold [not by auction] and the monies divided equally between the above-named people. Should my brother, John Eldridge V. Milbury, predecease me, his share is to be distributed to his wife, Kathleen. Should my sister, Lizzie Spidle, predecease me, her share is to be distributed to her husband, Olin Oscar Spidle. Should my sisters, Inez and Hazel, and my niece, Rosalie Osmond, predecease me, their share is to be distributed among my surviving brother, sisters, sister-in-law or brother-in-law.

[10] *Individually Designated Gift or Class Gift*. The second question is best answered first. Do the words "my brother and three sisters" mean all Ms. Beck's siblings or just the four alive at the time she made her will?

[11] The proctor referred me to several authorities on the fundamental approach a judge must take to interpretation of a will, including the authorities adopted by the

Court of Appeal in *Re Murray Estate*, 2001 NSCA 25. The problem presented on behalf of the estate is of a kind frequently encountered and for which a specific approach has been formulated, one that must remain faithful just the same to the fundamentals of wills construction.

[12] Professor Feeney says:

> The problem is to determine whether the testator was group-minded or individual-minded; whether the property was given to be shared by all persons falling within the general or generic description and who are alive at the testator's death (and usually meaning to include those born thereafter); or whether it was given to be shared only by individuals answering the general description at the time the testator made his will, so as to exclude anyone not then alive.

Thomas G. Feeney, *The Canadian Law of Wills*, vol. 2 "Construction", 3ed (Toronto and Vancouver: Butterworths, 1987) at p. 154. He goes on to say at the same page "if the testator has named the individuals in the group, or has mentioned their number, then *prima facia* the gift is not a class gift …".

[13] Ms. Beck did both. She mentioned the number of beneficiaries using the singular for her surviving brother and the number "three" for her sisters. In the clause incorporated by 5(d)(10), she names her brother as "John Eldridge V. Milbury", and her three sisters, "Lizzie Spidle" and "Inez and Hazel".

[14] The will as a whole, understood in the context of the evidence about Ms. Beck, seems to confirm that Ms. Beck was "individual-minded", to use Professor Feeney's word. The immediate text makes this perfectly clear. In addition to numbers and names, she treats the four individually on the subject of dying before her, to which we shall return. And, the specific gift outside the residue is to one of her sisters only. It is Ms. Beck's singular brother named John and her three sisters named Lizzie, Inez, and Hazel that she has in mind, not her sibling group.

[15] *After the Will*. Ms. Beck lived for more than thirteen years after she made her will. In the meantime, four of the people mentioned in clause 5(c) of the will died. Lizzie Spidle died in 2004, but her husband, Olin, is still alive. Hazel Joudrey died in 2011. Ms. Beck's sister-in-law, Kathleen Milbury, died in 2011 and her husband, Ms. Beck's brother John, died the next year. It is the deaths of the Milburys that cause the personal representatives concern.

[16] The proctor wrote to the court:

> We need an authoritative interpretation as to whether the gift to John lapses and, if it does, should it go to
>
> - Inez and Olin, as Hazel's gift does; in other words, does it stay within the bounds of para [10], or
> - all of the recipients named in part [d], including Rosalie, her children, and the charities mentioned, or
> - all heirs at law as though there were an intestacy

[17] *Gift that Lapses and Effects of Lapsing*. The proctor referred to authorities on the presumption against intestacy, and the estate otherwise took a neutral stance. Ms. Beck Osmond provided useful evidence on the factual background, and she contended that John Milbury's share should go to Olin Spidle and Inez Young. She also suggested that the expense of the determination should be borne by the portion of the estate at issue.

[18] The general rule at common law is "where a beneficiary or legatee predeceases the testator, the gift will lapse and fall into the residue of the estate (or, if the gift is of residue, go on an intestacy) in the absence of a contrary intention expressed in the will": *Smithers v. Mitchell Estate*, 2004 NSCA 149, para. 15. Section 31 of the *Wills Act* modifies the lapsing of a gift to "a child or other issue of the testator", but Ms. Beck had no children of her own.

[19] The anti-lapse provisions in s. 30 and 31 of our *Wills Act* have their origins in the English *Wills Act, 1837*. All other Canadian jurisdictions have expanded the equivalents of s. 31 to cover close relatives. As Professor Feeney says at p. 351 of 3ed., v. 2 "In N.S. the rule does not operate to prevent the lapse of a gift to a brother or sister." See also, Justice McDougall's decision in *Saunders Estate (Re)*, 2005 NSSC 216 at para. 9.

[20] So, the gift to John Milbury lapsed, and the contingent gift to Kathleen Milbury lapsed, unless there is a contrary intention expressed in the will. The exercise in wills interpretation posed by this question is governed by the general approach described in the authorities to which the proctor referred, especially *Re Murray Estate* and *Re O'Brien* (1978), 25 N.S.R. (2d) 262 (N.S.S.C., A.D.) and the Ontario authorities they adopted.

[21] That general approach is also canvassed by Justice Davison in *Re Carter Estate* (1991), 109 N.S.R. (2d) 384 (N.S.S.C., T.D.) affirmed at (1993), 120 N.S.R. (2d) 259 (C.A.) and Justice Edwards in *Mitchell Estate*, 2003 NSSC 223 affirmed at 2004 NSCA 149.

[22] Justice David Chipman summarized the general approach this way at para. 19 of *Mitchell*:

> The first duty of the court is to ascertain the intention of the testator from the language used in the will. Regard must be had, not only to the whole of any clause in question, but to the will as a whole, which forms the context of the clause. Effect must be given, if at all possible, to all parts of the will. A fair and literal meaning should be given to the actual language of the will, the ordinary and grammatical sense of the words to be assigned unless the context otherwise dictates. The context may well include "surrounding circumstances". Only after the language employed by the testator has been approached in this fashion need resort be had to case law and legal rules to see if any modification is required.

However, at para. 24 he also expressed a caution where, as here and as in *Mitchell*, the question is one of express intention contrary to lapsing. He adopted this passage from Professor Feeney's text at p. 13.10:

> It is a relatively easy matter of drafting to expressly provide for a contrary intent. Thus the courts ought not to find the contrary intent by conjecture or stretched inference, particularly in cases where the wills are prepared by trained persons and there is not a clear expression of contrary intent. What constitutes a contrary intent is, however, inevitably a question of inference.

[23] The text of clause 5(c) does not provide for John Milbury's share of the 5(d)(10) gift to go to the other beneficiaries under either 5(d)(10) or 5(c). Subclause 5(d)(10) provides for a gift "to be divided equally". Nothing in the anti-lapse provisions in 5(c) suggests a contingent gift of John Milbury's share, except to Kathleen Milbury. The absence of further anti-lapsing provisions is at home with the context and the surrounding circumstances.

[24] Ms. Beck, her three sisters, and her brothers were elderly when the will was made in 2000. Ms. Beck was ninety-four. The rest were in their eighties.

[25] Ms. Beck Osmond points out that gifts to individuals in her aunt's will are only to people in her aunt's generation, except Ms. Beck Osmond and her children receive almost half the residue. No mention is made about surviving Ms. Beck in

the residual gifts to Ms. Beck Osmond or her children. Otherwise, some provision is always made for the possibility individual beneficiaries will die first.

[26] Clause 5(b) leaves money to a sister-in-law "on the condition that she survives me". This is not an anti-lapse provision. It is for a specific bequest and it makes the bequest conditional. On failure of the condition, the gift goes to residue. The point is that Ms. Beck was willing to provide for the earlier death of the widow of one of her brothers.

[27] The distribution of personal property in clause 5(c) contains various anti-lapse provisions. These include the possibility that Ms. Beck Osmond will die before her aunt. However, in the gifts under 5(c), Ms. Beck Osmond is among her living aunts and uncle, all in their eighties. The gifts of residue to Ms. Beck Osmond and her children provide a striking contrast in that Ms. Beck did not (refused to?) provide for any of them dying before her.

[28] Thirdly, subclause 5(d)(10) contemplates the earlier deaths of any of the three sisters or brother, older people whose earlier deaths a woman in her nineties might contemplate without incredulity, pain, or embarrassment.

[29] We see that the advanced age of the sibling beneficiaries was on Ms. Beck's mind. She lived a good long time after she made the will, well into her hundreds.

Who would die when among herself and her remaining siblings is a subject much reflected in the will. Ms. Beck's circumstances and the words of her will as a whole show that she was deliberate about the provisions for survival. We cannot assume that dead ends in clause 5(c) are oversights.

[30] The scheme for distribution in clause 5(c) is governed generally by "among my brother, three sisters and niece, Rosalie Osmond, equally." After a provision about liquidation, comes three provisions about predeceasing Ms. Beck. These must be what subclause 5(d)(10) is referring to.

[31] The first provides for Ms. Beck outliving her brother, "his share is to be distributed to his wife, Kathleen". No provision is made for the earlier death of both her brother and his wife. For example, the Beck will does not say their share goes to their estates. Recall Ms. Beck Osmond's point about avoiding express gifts to most members of the next generations.

[32] Second, the clause provides for Ms. Beck outliving her married sister, "her share is to be distributed to her husband". Same comments as about the first provision.

[33] The third provision is more curious:

> Should my sisters, Inez and Hazel, and my niece, Rosalie Osmond, predecease me, their share is to be distributed among my surviving brother, sisters, sister-in-law or brother-in-law.

The text could apply on the death of any one of the three or require the deaths of all three. The conjunctions in the subject phrase and the plural verb suggest all three, as does the absence of Ms. Beck Osmond in the predicate. The plural "sisters" in the predicate phrase suggests any one.

[34] The third clause about dying before Ms. Beck is only a partial response to lapsing no matter which interpretation prevails. No provision is made for Ms. Osmond surviving her aunt, after the deaths of the uncle, and the three elderly aunts. No provision is made if there is no "surviving brother, sisters, sister-in-law or brother-in-law".

[35] The will shows a testator who benefits first her daughter-like niece and the niece's children, second her brother and sisters living at the time of the will, third her church, and then some charities and a sister-in-law. I see through this will a very elderly woman who may not care to formulate her wishes for every contingency of death among her and her individual beneficiaries. Dead ends in her gifts should not be regarded as failures.

[36] The significant gifts of parts of the residual to Ms. Beck Osmond and her children without any provision about predeceasing their aunt and great aunt, context supplied by the absence of any reference to other members of the next generations, the partial nature of the anti-lapsing provisions in clause 5(c), and the circumstances of Ms. Beck when she made her will convince me that she made deliberate choices to limit her anti-lapsing provisions.

[37] The dead end of the gift to John Milbury likely was deliberate. Therefore, the will does not show an intention contrary to lapsing when both John Milbury and Kathleen Milbury die before Vera May Beck.

[38] The Milbury share of the gift in subclause 5(d)(10) of the Vera May Beck will goes as if Ms. Beck had died intestate.

[39] *Expense of this Determination*. The executors discovered a problem in the gift provisions of the will. Their obligations to the estate as a whole compelled them to get what the proctor called "an authoritative interpretation". The executors are entitled to indemnity for the expense. Respectfully, the persons to whom the gift at issue falls should not bear the expense on their own.

[40] *Conclusion*. The court cannot make a choice in substitution for a choice Ms. Beck chose not to make. The court can only interpret and apply her will. To go further would be to show disrespect for Ms. Beck's will.

[41] I will grant a declaration that subclause 5(d)(10) refers to the brothers and sisters of Vera May Beck alive when she made her will, as individuals and not a class. I will also declare that the gift to John Milbury in 5(d)(10) lapsed and the subject of the gift goes as if Ms. Beck had died intestate.

[42] The expenses of obtaining this declaration are to be paid by the estate in the ordinary course.

Moir J.