IN THE COURT OF PROBATE FOR NOVA SCOTIA
Citation: *Shellnutt Estate v. Shellnutt*, 2015 NSSC 305

Date: 20151022
Docket: *Halifax*, No. 440084
Registry: Halifax

Between:

Wayne Shellnutt Executor of the Estate of Ernest George Shellnutt

Applicant

and

Wayne Shellnutt in his personal capacity, James Leslie Shellnutt , and Brenda Haight (Children of the testator living as of the date of his death)

and

Michael Shellnutt, Dr. Gregory Shellnutt, Jeffery Dixon, Krista Kelly, Jennifer Mason, Khristopher Shellnutt, Jonathan Shellnutt, Laura Shellnutt, Brian Garrison (Children of deceased children of the testator)

Respondents

Judge:	The Honourable Justice Michael J. Wood
Heard:	September 29, 2015, in Halifax, Nova Scotia
Written Decision:	October 27, 2015
Counsel:	David A. Grant, for the Applicant Brian F. Bailey, for the Respondent – James Shellnutt

By the Court (Orally):

[1] Ernest George Shellnutt executed his last will and testament on March 18, 2005. It was admitted to Probate on May 14, 2015. The disposition of the residue of Mr. Shellnutt's estate is found in Clause 9 of the will which reads as follows:

> **I GIVE, DEVISE AND BEQUEATH** all the rest and residue of my Estate, both real and personal, of every nature and kind and wheresoever situate, including any property over which I may have a general power of appointment in equal shares to my children per capita.

[2] Mr. Shellnutt had seven children, four of whom predeceased him. Each of the deceased children left children of their own, who would be Mr. Shellnutt's grandchildren.

[3] The Executor has brought this application for directions with respect to the proper interpretation of Clause 9 of the will and, in particular, whether the residue is to be distributed to the three surviving children of Mr. Shellnutt or shared with the children of his deceased children.

[4] Section 31 of the *Wills Act* states as follows:

> Where any person, being a child or other issue of the testator to whom any real or personal property is devised or bequeathed for any estate or interest not determinable at or before the death of such person, dies in the lifetime of the testator leaving issue and any such issue of such person are living at the time of the death of the testator, such devise or bequest does not lapse, but takes effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention appears by the will. *R.S., c. 505, s.31.*

[5] The practical effect of this legislation is that surviving children of a child who predeceased the testator will take their parents' share "unless a contrary intention appears by the will".

[6] Where a will refers to a group of beneficiaries by description but not name (for example "my children" or "my grandchildren") this is considered to be a class

gift and only those members of the class alive at the date of death are entitled to benefit (see paras. 16-17 *Smithers v. Mitchell Estate* 2004 NSCA 149).

[7] In this case the question arises as to whether the addition of the words "per capita" in Clause 9 of the will changes what would otherwise be a class gift to a specific bequest to which s.31 of the *Wills Act* would apply. In my view it does not.

[8] If Mr. Shellnutt had listed his children by name in Clause 9, s. 31 of the *Wills Act* would apply and children of deceased children would be entitled to their parents' share, provided a contrary intention was not indicated by the language of the will. In oral argument counsel for the Executor suggested that the use of "per capita" might be equivalent to listing the children by name. I do not think that is the proper interpretation. The phrase "per capita" is also found in Clause 4(e) of the will which reads:

> (e) to each grandchild the sum of **Two Thousand Dollars ($2,000.00)** per capita.

[9] It is obvious that the use of the words "per capita" is not a substitute for "each" since both of those terms are used in Clause 4(e). It is not an alternative to listing the grandchildren by name. I believe the use of that phrase in this will is intended to address whether a child's or grandchild's share in the estate will go to their heirs if they predecease Mr. Shellnutt. It does not change what would otherwise be considered a class gift.

[10] Since I have determined that Clause 9 of the will creates a class gift, s.31 of the *Wills Act* does not apply and the residue is to be distributed amongst those of Mr. Shellnutt's children alive at the date of his death. If I am wrong and s.31 of the *Wills Act* applies a question remains as to whether the phrase "per capita" shows a contrary intention within the meaning of s.31 of the *Wills Act*. That was the conclusion in *British Columbia (Official Administrator) v. Joseph*, [1999] B.C.J. No. 2340. In that case the will left the residue of the estate to the named children of the deceased "in equal shares per capita for their sole use and benefit absolutely". The judge was satisfied that this language constituted a contrary intention under the British Columbia Wills legislation for the following reasons:

> 9. The key words in Stella West's will are "in equal shares per capita for their sole use and benefit absolutely". In my view these words are capable of only

> one meaning. Stella West intended the residue of her estate to go to her two children, with the right of survivorship to be enjoyed by each of the other should he or she predecease her.
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> 10. I reach this conclusion because per capita means "equal sharing by the heads or polls", according to the number of individuals, without reference to their issue or the right of such issue to take the share of an estate which their immediate ancestor would have taken, if living. It is the opposite of *per stirpes*, which means "by the roots or stalks" and expressly refers to dividing the share of an estate of a deceased ancestor amongst the successors of the deceased ancestor.
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> 11. In addition, Stella West used the words "for their sole use and benefit absolutely". These words may be redundant but they serve to reinforce her intention that her children should share her estate and not their successors.

[11] A similar conclusion was reached by the Saskatchewan Queen's Bench in *Re: Beckett Estate*, [1992] S.J. No. 521. In that case all of the residual beneficiaries predeceased the testator and the court held that the Saskatchewan equivalent to s.31 of the *Wills Act* did not apply because of the contrary intention evidenced by the words "per capita".

[12] I am satisfied that even if s.31 of the *Wills Act* applies Mr. Shellnutt has demonstrated a contrary intention by his use of the phrase "per capita". By using this language he intended to limit the residual bequest to those of his children alive at the date of his death.

[13] I will receive written submissions from the parties on costs.

Wood, J.