IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Morrell Estate v. Robinson, 2008 NSSC 295

Date: 20080923
Docket: SH 298735
Registry: Halifax

Between:

Susan Elaine Ostrom, executrix of the Estate of Ezra Morrell

Plaintiff

and

Ann Robinson, Walter Ostrom, Susan Elaine Ostrom and Ingrid Ostrom

Defendants

Judge:	The Honourable Justice Arthur W.D. Pickup
Heard:	September 23, 2008, in Halifax, Nova Scotia
Oral decision:	September 23, 2008
Written release of oral decision:	October 7, 2008
Counsel:	David Grant for the Plaintiff Timothy C. Matthews, Q.C. for the Defendant, Ann Robinson

By the Court: Orally

[1] This is an application by Susan Elaine Ostrom, the executrix of the estate of the late Ezra Morrell. Mr. Morrell married Ingrid Ostrom on June 16, 2001 and they divorced on June 19, 2007. He executed a last will and testament on December 6, 2002 and left the residue of his estate to Ingrid Ostrom.

[2] The parties executed a separation agreement in July 2007 which provided in para. 20:

> 20. The parties hereby forever renounce and waive any claim in the estate of the other and any right to share in the estate of the other, whether such claim or right arises under statute or otherwise, including the right to administer the estate of the other in the event of the death of that party.

[3] The issue to be determined is whether Ingrid Ostrom, by virtue of s. 20 of the separation agreement, has waived and released her right to inherit under the will.

[4] The applicant refers to ss. 22 and 23 of the *Wills Act*:

> Effect of conveyance or other act
>
> 22 No conveyance or other act made or done subsequently to the execution of a will of any real or personal property therein comprised, except an act by which such will is revoked as in this Act mentioned, prevents the operation of the will with respect to such estate or interest in such real or personal property as the testator has power to dispose of by will at the time of the testator's death.
>
> Time of which will speaks
>
> 23 Every will shall be construed, with reference to the real and personal property comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will.

[5] The applicant's position is that the bequest of the residue to Ingrid Ostrom is not affected by s. 20 of the separation agreement and s. 22 of the *Wills Act* renders that section ineffective to deal with the bequest in the will, unless the will has been revoked.

[6] Further, under s. 23 of the *Wills Act*, the applicant argues that the will speaks as of the date of death and that the bequest would take effect after the date of the separation agreement and would not, in any way, be interfered with by that agreement.

[7] The applicant submits that there is a procedure set out in the *Wills Act* to revoke or change the provisions of the will and that this does not include a separation agreement.

[8] Mr. Matthews represents Ann Robinson, mother of the late Mr. Morrell, who would be heir at law if he died intestate.

[9] Ms. Robinson's counsel, while acknowledging that s. 20 of the separation agreement does not revoke the will, argues that Ingrid Ostrom has waived and released her right to inherit under the will.

[10] Ms. Robinson's counsel submits that paras. 25 and 26 of the separation agreement indicate that the separation agreement is intended to be "a full and final settlement" between the parties and to effect a division of all their assets "to their mutual satisfaction". As a result, s. 20 effectively waives and releases Ingrid Ostrom's right to inherit under the will. To find otherwise, Ms. Robinson's counsel submits, would have the effect of defeating the intent that the separation agreement be a full and final settlement.

[11] Are the words in s. 20 of the separation agreement effective to release and waive any right to inherit under the will?

[12] In *Billing v. Rideout* (1993),(109 Nfld & P.E.I.R. 271; 1993 CarswellNfld 71 (Nfld. S.C.T.D.), the spouses had agreed in a separation agreement to release each other from "all claims and rights that he or she may have had or afterwards may acquire":

> (a) in the estate of the other upon the other dying intestate, whether by way of statutory allowance or right under the laws of any jurisdiction;

> (b) upon the death of the other, under the laws of any jurisdiction and in particular *The Succession Law Reform Act*, R.S.O. 1980, chapter 488 and amendments thereto in force from time to time in the Province of Ontario; and
>
> (c) to act as executor or administrator of the other's will or estate.

[13] The testator's estranged wife sought to be declared the sole beneficiary of the estate in accordance with his will. Roberts J. described the issue as whether the separation agreement "revoked or altered the Will ... or otherwise effected the right of the applicant to be the sole beneficiary thereunder" (para. 3). The revocation provisions of the Newfoundland *Wills Act* (ss. 10 - 11) were similar in wording and effect to ss. 18 - 19 of the Nova Scotia *Wills Act.* Roberts J. said:

> 5. The requirements for revocation provided for in s. 11 of the Wills Act are quite specific and generally speaking, along with the execution provisions of the Wills Act, have been interpreted strictly. In particular, the intention to revoke a will or any provision of it must be clear from the writing. Putting aside whether the execution of the separation agreement of September 18, 1990 met the requirements of s. 11, paragraph 12.1 does not contain such a clear intention. Paragraph 12.1(a) is confined to release of rights on intestacy. Paragraph 12.1(b) is a release of statutory rights. Neither provision extinguishes contractual right or rights as a beneficiary under a will. The situation here is not unlike that in *Goldfield, Shore and Canada Trust Company v. Koslovsky* (1975), 22 R.F.L. 133 (Man. Q.B.), where Morse J. at p. 138 stated:
>
> > I do not read the agreement as depriving Barbara Goldfield of the right to take the benefits given to her under the will. The agreement does not seek to restrict either party from disposing of his or her estate by will, nor, in my opinion, does it have such effect.
>
> After reviewing the statutes referred to in the separation agreement release, Morse J. concluded:
>
> > Barbara Goldman is not claiming under any such statutes but under the terms of the will.
>
> The same statement can be made here. Jean Billing is not claiming under the *Succession Law Reform Act* of Ontario or any other statute but under the terms of her ex-husband's Will. Morse J. added at p. 139:
>
> > ... the wording of para. 7 is in the present tense and does not, in my opinion, preclude Barbara Goldfield from taking the benefits conferred on

> her by the will. She had no right or claim to be named as a beneficiary of her former husband's estate, but she did not by the agreement waive her right to claim if her husband chose not to alter his will so as to eliminate her as a beneficiary. [Emphasis added].

[14] In the result, Roberts J. held that the separation agreement did not have the effect of revoking the will, nor did she waive her right to claim if her husband chose not to alter his will so as to eliminate her as a beneficiary, and the applicant was therefore entitled to the benefits conferred by the will.

[15] Similarly, I am satisfied that while Ms. Ostrom may have waived any claim against the estate of her late husband and the right to share in it, it is not clear from the wording of s. 20 that she waived her right to claim under the will if her husband chose not to alter his will so as to eliminate her as a beneficiary. There is no reference to a will in the separation agreement.

[16] Section 20 of the separation agreement does not, in my view, affect the right of Ms. Ostrom to be the sole beneficiary under the will.

[17] I am satisfied that this result is supported by *Eccleston Estate v. Eccleston* (1999), 221 N.B.R. (2d) 295; 1999 CarswellNB 534 (N.B.Q.B.). In *Eccleston*, the executors sought a declaration that a bequest to the testator's ex-wife was void as a result of a separation agreement in which the parties agreed to release and discharge

> ... all rights that he or she has or may hereafter acquire under the laws of any jurisdiction in the Estate of the other. In particular, each releases all rights: (1) to share in the Estate of the other upon the other dying intestate; (2) to act as Executor or Administrator of the Estate of the other; and (3) undertakes to provide by separate Wills for the administration of the Estates of the Parties hereto.

[18] The testator died without making a new will.

[19] The court reviewed the relevant case law, including the *Billing and Goldfield* decisions, as well as *Pearson v. Pearson* (1980), 3Man. R. (2d) 404 (Man. C.A.) and *Re Kindl* (1982), 140 D.L.R. (3d) 92 (Ont. H.C.). The court concluded at para. 19:

> The deceased did not revoke the 1987 will by any of the methods described in the *Wills Act*. The domestic contract (quite apart from the fact it was not "made in accordance with the provisions of this Act"), did not refer to the 1987 or any will. I conclude the domestic contract did not extinguish the benefits conferred on Louise Eccleston by that will.

[20] In *Re Kindl, supra*, the court said:

> 18 In minutes of settlement dated 26th May 1982, the parties released each other from any claims they might have ".. for support, property or any other matter of any nature or kind whatsoever..." the effect of such releases by spouses has been dealt with in several cases. In *Goldfied, Shore and Can. Trust Co. v. Koslovsky* ... [t]he written agreement did not invalidate the bequests for the following reasons [at pp. 138-39]:
>
> > ... in the absence of clear language to the contrary, the wording of the agreement does not preclude the husband from continuing to benefit his wife under the terms of his will or the wife from claiming the benefit of such voluntary act on the part of her husband.
> >
> > ... she did not by the agreement waive her right to claim if her husband chose not to alter his will so as to eliminate her as a beneficiary.
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> 19 In *Dimma v. Algoma Steel Corp . Ltd.* (1979), 4 E.T.R. 186, 98 D.L.R. (3d) 160 (Ont. H.C.) the spouses released each other in a separation agreement from claims arising "under the laws of any jurisdiction". The court held that this did not go so far as to extinguish the wife's rights under a will or under a contract providing for spousal pension benefits. Likewise, in *Pearson* ... the wife's release of any claims against her husband's estate arising under various statutes did not preclude her from accepting a benefit voluntarily conferred upon her by her husband's will, which had been written 30 years before the release was given. The fact that the husband did not change his will was considered by the court to be an affirmation of his intention to benefit his wife, despite their domestic difficulties.

[21] The court in *Eccleston* noted the absence of legislation in New Brunswick creating a presumption of revocation of a will upon dissolution of a marriage. Such legislation was proclaimed in force in Nova Scotia on August 19, 2008 in the form of an amendment to the *Wills Act.*

[22] Counsel for Ms. Robinson did not advance a clear legal rationale for finding that the words in this particular agreement should be given the effect he claimed. He agreed that the will was valid. In the absence of any challenge to the will, there would need to be compelling reasons to override the testator's intentions. The language of the separation agreement, which did not purport to revoke the party's wills, and did not use the word "will" in the section dealing with estate claims, does not permit this conclusion. It would have been possible for the separation agreement to include a clear waiver of the right of the parties to inherit under each other's wills, if this was their intention. I am not satisfied that any intention can be found in the language of the separation agreement.

[23] As the majority said in *Pearson, supra*, "[h]ad the deceased made a new will after the settlement with his wife, conferring benefits upon his wife, no one would question that she would be entitled to receive the benefits conferred by that new will. The failure to revoke the previous will amounts to the same thing. It is a constant affirmation of his choice to confer a benefit ...." .

[24] The above cases which were submitted by Ms. Robinson's counsel make it clear that a testator's intentions, as expressed in a valid will, should not be lightly interfered with. A spouse's right to claim against the estate or to share in the estate appears to be distinct from the testator's right to confer a benefit voluntarily. The separation agreement did not revoke the will, nor does it appear to have affected either party's ability to dispose of their estate as they saw fit. Therefore, the gift to Ms. Ostrom will stand.

[25] I am satisfied that the separation agreement did not revoke the will, nor did it affect either party's ability to dispose of their estate as they saw fit. Both ss. 22 and 23 of the *Wills Act* are consistent with this interpretation.

Pickup, J.