**IN THE PROBATE COURT OF NOVA SCOTIA**

**Citation:** Moore Estate (Re), 2008 NSSC 200

**Date:** 20080618
**Docket:** SH 296343
**Estate No:** 55363
**Registry:** Halifax

**Between:**

Catherine Brown

Applicant

and

Christine Christian

Respondent

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| **Judge:** | The Honourable Justice Glen G. McDougall |
| **Heard:** | June 11, 2008, in Halifax, Nova Scotia |
| **Written Decision:** | June 26, 2008 |
| **Counsel:** | Timothy C. Matthews, Q.C., on behalf of the applicant<br>Christine Christian, on her own behalf |

**By the Court**:

[1] The Executrix of the Estate of the Late Dorothea R. Moore brings this application for directions.

[2] The matter first came before the Registrar of Probate as part of the Passing of Accounts. The Registrar declined to hear it and suggested that it should be brought before a Judge of the Probate Court.

[3] A pre-hearing memorandum was filed by the Estate's proctor along with two affidavits of the Personal Representative of the Estate.

[4] The affidavit bearing the heading "Possible Debt Owing to the Estate" contains the following at paragraph 1:

> 1. All the specific bequests have been paid except for the following gift:
>
> Christine Christian - $5,000.00 clause 4(b)
>
> I have not paid this bequest because there is uncertainty whether a certain Promissory Note dated December 18, 1995, in the amount of $15,000.00 has been repaid by Mrs. Christian to the late Mrs. Moore. Attached hereto and marked Exhibit "A" is the original Promissory Note and the envelope in which it was enclosed, which I found in Mrs. Moore's safe deposit box after her death. I have no personal knowledge of the loan and have been unable to determine from Mrs. Moore's records whether it has been paid. My solicitor Timothy C. Matthews has requested Mrs. Christian to prove that the Note had been repaid in full. She has advised my solicitor that the loan was fully repaid, but she has no bank records or other documentation which can confirm it.

[5] The promissory note referred to was jointly signed by Christine L. Christian and J. Mark Gulliver on December 18, 1995. Ms. Christian and Mr. Gulliver promised to re-pay the sum of $15,000.00 which had been loaned to them by Dorothea R. Moore. The total amount borrowed was to be repaid by way of annual instalments of $3,000.00 on the 1st day of October, commencing on October 1, 1996.

[6] As indicated in the Executrix's affidavit she had no personal knowledge of the loan nor was she able to determine if it had been re-paid either in whole or in part.

[7] Ms. Christian, by way of an e-mail message sent to the Proctor of the Estate, stated that the loan had been repaid in full. By her recollection this was done within approximately two years from the date the money was borrowed. Unfortunately the co-borrower is not available to testify nor was Ms. Christian able to provide any receipts, cancelled cheques or any other bank records to corroborate her position.

[8] Counsel for the Estate referred the Court to section 45 of the *Nova Scotia Evidence Act*, R.S.N.S., 1989, c. 154 (as amended) which states:

> 45 On the trial of any action, matter or proceeding in any court, the parties thereto, and the persons in whose behalf any such action, matter or proceeding is brought or instituted, or opposed, or defended, and the husbands and wives of such

> parties and persons, shall, except as hereinafter provided, be competent and compellable to give evidence, according to the practice of the court, on behalf of either or any of the parties to the action, matter or proceeding, provided that in any action or proceeding in any court, by or against the heirs, executors, administrators or assigns of a deceased person, an opposite or interested party to the action shall not obtain a verdict, judgment, award or decision therein on his own testimony, or that of his wife, or of both of them, with respect to any dealing, transaction or agreement with the deceased, or with respect to any act, statement, acknowledgement or admission of the deceased, unless such testimony is corroborated by other material evidence. [Emphasis added]

[9] The Personal Representative of the Estate has personal duties imposed under the *Probate Act*, S.N.S., 2000, c. 31 (as amended). In addition, the *Probate Act* provides certain directives and guidance which the Personal Representative must adhere to.

[10] For instance, section 79 of the *Probate Act* requires that:

> 76 (1) The share of each person interested in the estate is subject to the payment of any debt due by that person to the deceased.
>
> (2) Where the share of a person in the personal property is not sufficient for payment of the debt, the debt or the balance of the debt after deducting the value of that person's share in the personal property of the deceased shall be deducted from that person's share in the real property of the deceased and shall be taken into account when making a division of the real property or the proceeds thereof and the charge for the debt has priority over all judgments, mortgages, conveyances of and other charges and encumbrances upon the share, whether created by or against that person before or after the death of the deceased.
>
> (3) The court may try and determine the validity and amount of the debt and direct such proceedings to be taken as are necessary to enable it to ascertain the amount of the debt upon the evidence brought before it and may make all orders necessary or proper to carry into effect and enforce this Section.

[11] If, indeed, it could be established that Ms. Christian still owed money under the promissory note, the Personal Representative, in order to properly fulfil her duties, would be obliged to deduct any such outstanding sum from the amount of any monetary bequest contained in the Will.

[12] In her Last Will and Testament, Dorothea R. Moore left the sum of $5,000.00 to her niece, Christine Christian. The Will was signed by the Testatrix on the 7th day of May, 2001. A Codicil was later executed by her on the 19th day of November, 2001. The Codicil contained certain amendments but it did not alter the bequest to Ms. Christian. It, in effect, confirmed the remainder of the Will which included this bequest.

[13] Neither the Will nor the Codicil nor any notes made by the individuals retained to draft these instruments made any mention of the promissory note evidencing the $15,000.00 loan made to Ms. Christian and Mr. Gulliver in 1995. Certainly the clause in the Will bequeathing the $5,000.00 to Ms. Christian did not make the gift contingent on the repayment of the amount previously loaned to her.

[14] Counsel for the Estate readily acknowledges that any legal action against Ms. Christian for repayment of any monies outstanding under the promissory note would be statute barred under the *Limitation of Actions Act*, R.S.N.S., 1989, c. 258. Furthermore, the Estate has no intention of commencing an action to collect any amount that might still be outstanding. If such an action was started, any defence based on a time limitation could be disallowed under section 3 of the *Limitation of Actions Act* should the plaintiff make such application and provided the action itself has not been commenced more than four years after the time limitation has expired. But since the Estate has decided not to pursue a claim (should there even be one) this need not be considered.

[15] It is the Estate that must first prove the amount of the debt that remains outstanding. The existence of the promissory note in and of itself is not sufficient to satisfy the burden. Ms. Christian does not have the burden of proving that she has repaid the loan. As such, the corroboration contemplated by section 45 of the *Evidence Act* is not required.

[16] Although corroboration of Ms. Christian's evidence is not necessary in this case, I will nonetheless refer to the case of **Re: Harvey** (2006) N.S.C. 118; 23 E.T.R. (3d) 226; 772 A.P.R. 109; 243 N.S.R. (3d) 109. This is a decision of Justice Warner of this Court. At paragraphs 15 to 18 justice Warner had this to say:

15 In *O'Connell, Re*, 1980 CarswellNS 243 (N.S. Prob. Ct.), upheld on appeal [1981 CarswellNS 90 (N.S.C.A.)], McLellan, J., reviewed the law in the context of claims against an estate by a common law wife for quantum meruit and unjust enrichment. He adopted the words of Killam, J., in *Thompson v. Coulter*, (1903), 34 S.C.R. 261 at paragraph 5:

> ... A mere scintilla is not sufficient. At the same time the corroborating evidence need not be sufficient in itself to establish the case.

and Tashereau, C.J.C., in *McDonald v. McDonald*, (1903), 33 S.C.R. at paragraph 8:

> Circumstantial evidence and fair inferences of fact arising from other facts proved, that render it improbable that the fact sworn to be not true and reasonably tend to given certainty to the contention which it supports and are consistent with the truth of the fact deposed to, are, in law, corroborative evidence.

16 In *Burns Estate v. Mellon*, supra, the Court held at paragraph 29:

> The corroboration required by s. 13 must be evidence independent of the evidence of Ms. Mellon, which shows that her evidence on a material issue is true. The corroborating evidence can be either direct or circumstantial. It can consist of a single piece of evidence or several pieces considered cumulatively.

17 In that case the trial judge found independent evidence corroborative of a gift in three pieces of circumstantial evidence; the circumstances consisted of inferences, drawn by the court from the absence of evidence, that tended to support the claimant's evidence. The Court relied upon the thorough analysis and "propositions" put forth in *Paquette v. Chubb* (1988), 29 O.A.C. 243 (Ont. C.A.), which decision in turn relied heavily upon *Smallman v. Moore*, [1948] S.C.R. 295 (S.C.C.).

18 *Smallman* was cited by Glube, J., (as she then was) in *Colborne v. Llewellyn Estate* (1982), 57 N.S.R. (2d) 31 (N.S.T.D.), as establishing that corroboration of a material point need not be by a second witness, but may be afforded by circumstances and that not every fact necessary to establish a cause of action need be corroborated by other evidence.

[17] If one looks, one can find there is corroborating evidence to support Ms. Christian’s contention that she repaid the loan in full. The promissory note itself

provided for annual instalments of $3,000.00 over five consecutive years commencing on October 1, 1996. If the repayment schedule was followed the loan would have been paid off no later than October 1, 2000. This pre-dates the will and codicil which were executed in 2001.

[18] In addition, the Will does not make the $5,000.00 bequest contingent on repayment of the loan. Nor is there any mention of the loan or any amount that might still have been owed in the file notes of the individuals who took instructions for the Will and the Codicil.

[19] As well, the Personal Representative could not find anything among the deceased Testatrix's personal effects to suggest that payment had not been received or that efforts to collect had occurred or, at least, been contemplated.

[20] It is possible to make inferences from this circumstantial evidence which, when considered cumulatively, would tend to corroborate Ms. Christian's evidence. If the burden had been on her to prove, on the balance of probabilities, that the loan had been repaid in full this would help meet the requirements of section 45 of the *Evidence Act*. However, as I stated earlier, the burden is not on Ms. Christian to prove that the loan has been repaid but rather on the Estate to prove that it has not received full payment.

[21] The Personal Representative should therefore fulfil her obligations by carrying out the instructions contained in the Will. The bequest of $5,000.00 is to be paid to Ms. Christian as her aunt originally intended.

[22] By seeking directions from the Court, the Personal Representative has demonstrated good judgment. If she had not done so, she might have deprived the residual beneficiaries of the entire amount that they would otherwise have been entitled to; she is to be commended for so doing.

[23] The costs of this application shall be paid by the Estate.

McDougall, J.